IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

September Term, 2006

No. 00997

CATAPULT TECHNOLOGY, LTD.

Appellant,

vs.

PAUL WOLF, *et. al.*

Appellees.

Appeal from the Circuit Court
For Montgomery County, Maryland

(Judge Joseph A. Dugan, Jr.)
(Judge Nelson W. Rupp, Jr.)

BRIEF OF APPELLEES

Marc J. Smith
Smith, Lease & Goldstein, LLC
11 North Washington Street
Suite 520
Rockville, Maryland 20850
(301) 838-8950

Counsel for Appellees

Dated: January 12, 2007

STATEMENT OF CASE

The Appellees in this case, fourteen former employees of Appellant Catapult Technology, Ltd. ("Catapult"), initiated this case under Maryland's Wage Payment and Collection Law to recover damages arising out of Catapult's decision to withhold their earned and accrued "universal leave" (a combination of vacation and sick leave) at the conclusion of their employment. It is undisputed that all of the Appellees had earned and accrued leave balances at the time of their resignation. Similarly, it is undisputed that Catapult intentionally withheld compensation for Appellees' earned and accrued leave balances pursuant to a policy in Catapult's Employee Handbook that called for forfeiture of earned and accrued leave if employees do not provide two weeks advance notice of resignation.

On March 8, 2006, the trial court granted partial summary judgment in Appellees' favor as to the issue of liability, finding that the forfeiture policy contained in Catapult's Employee Handbook violated Maryland's Wage Payment and Collection Law. The trial court entered judgment in Appellees' favor in the amount of $68,883.54, representing full compensation for the outstanding leave balances.

On April 24-25, 2006, a jury trial was held to address the issue of whether Appellees were eligible to recover enhanced damages under § 3-507.1 of the Wage Payment and Collection Law. After Appellees rested their case, the trial court denied Catapult's motion for judgment. The jury subsequently returned a verdict in Appellees favor finding that Catapult's actions in withholding compensation for Appellees' earned and accrued universal leave were not undertaken in good faith and awarded enhanced

damages. Following trial, the trial court denied Catapult's Motion for Judgment Notwithstanding the Verdict and this appeal followed.

STATEMENT OF QUESTIONS PRESENTED

1. Whether Catapult's policy requiring forfeiture of earned and accrued universal leave violates Maryland's public policy and the provisions of the Wage Payment and Collection Law, and is invalid under Medex v. McCabe, 372 Md. 28 (2002).

2. Whether sufficient evidence was introduced at trial to support the jury's verdict that Catapult's actions in withholding compensation for Appellees' earned and accrued universal leave were not undertaken in good faith.

STATEMENT OF FACTS

I. Introduction

Appellant Catapult Technology, Ltd. ("Catapult") is a government contractor that primarily provides information technology and related services to the federal government. (E 27-28). In approximately August 2001, Catapult was awarded a contract to provide IT related services to the U.S. Department of Transportation. (Apx. 9). This contract, known as the "VANITS" contract, consisted of an initial award period of one year with four optional one-year renewal periods. (E 47).

As is customary for government contractors, at the time it was awarded the VANITS contract, Catapult hired some of the incumbent employees of the outgoing contractor that had been working under the VANITS contract. (E 29; Apx. 7-8, 10). Hiring incumbent employees is a customary practice in the contracting industry because the government likes to retain the expertise of these employees and it is an efficient way for the incoming contractor to staff the contract with experienced employees. (Apx. 8). In fact, the federal government has adopted a regulation known as the "Continuity of Services" provision that requires the outgoing contractor to allow its staff to remain on the job with the successor contractor in order to assist the successor contractor in maintaining continuity and consistency of services. (E 55).

Some of the Appellees in this case were part of the incumbent staff of the predecessor contractor and were hired by Catapult when it was awarded the VANITS contract in 2001. (Apx. 10, 44). All of the remaining Appellees were hired by Catapult and assigned to work on the VANITS contract. (Apx. 9).

II. Universal Leave

During the trial of this case, Catapult's only witness testified that "universal leave" was one of the "fringe benefits" Catapult provided to its employees at the time Appellees were hired. (Apx. 10-11). Universal Leave is paid leave that can be used by Catapult's employees for either vacation or sick leave. (E 88, Apx. 52). The Appellees in this case were provided with offer letters at the inception of their employment with Catapult. (E 127-128; Apx. 12-13, 54-55). The fringe benefits described in the offer letters include entitlement to eighteen days of paid universal leave for each year of employment. (E 127-28; Apx. 13, 54-55). Specifically, the offer letters provide, in relevant part:

> Additionally, you will be entitled to 18 days of paid universal leave for each year of employment in accordance with our usual policies. ***Leave is earned on a pay period basis at the rate of 6 hours per pay period***.

(E 127-28; Apx. 54-55)(emphasis added). The offer letters do not condition payout of earned and accrued universal leave on an employee's provision of advance notice of termination. (Apx. 13).

Like the offer letters issued to Appellees, Catapult's Employee Handbook also provides that full-time employees "earn" and "accrue" universal leave at the rate of six hours per pay period. (E 88). According to the Employee Handbook, full-time employees who work less than forty hours per week only accrue universal leave at the rate of four hours per pay period. (E 89). Similarly, employees in a leave-without-pay status beyond three days do not accrue universal leave during that leave period. (E 89).

The Employee Handbook further provides that in the event an employee terminates their employment without providing at least two (2) weeks notice in writing, that employee "forfeits any rights to any universal leave that may have been accrued while employed" by Catapult.[1] In addition, in the event an employee terminates employment with a negative leave balance (i.e. they have used more universal leave than they have earned), the negative balance is deducted from their final paycheck. (E 34, 88).

According to Catapult, the justification for its forfeiture policy is twofold. First, the policy is meant to prevent billable employees from terminating their employment without notice, which results in the loss of income to Catapult. (Apx. 25). Second, the notice requirement helps ensure that Catapult is not understaffed on a contract and potentially unable to perform the duties it has been engaged by the federal government to perform. (Apx. 25).

III. Catapult's VANITS Contract is Terminated

In late August 2004, Catapult received notice that the Department of Transportation was terminating the VANITS contract effective September 30, 2004 and replacing Catapult with another federal contractor, Bowhead Information Technology Solutions ("Bowhead"). (E 34-35, 38; Apx. 17). On August 25, 2004, Catapult notified its employees regarding the Department of Transportation's decision to terminate their

[1] During trial, Catapult's only witness, Kyle Mulhall, acknowledged that Sections 7.1 and 10.2 of the Employee Handbook were inconsistent and that the handbook was ambiguous as it related to the issue of whether the forfeiture of earned and accrued universal leave was mandatory in the event an employee failed to provide two weeks notice of termination. (Apx. 15-16).

VANITS contract. (E 35-36, 111). The loss of the VANITS contract was a significant setback for Catapult as it accounted for 14-17% of its revenue. (Apx. 21).

On August 26, 2004, Mr. Steven Fisher, one of the Appellees in this case, sent an email to his manager asking to be "released from any and all commitments to and agreements with Catapult Technology," effective at the expiration of Catapult's VANITS contract. (E 37, 110). On August 27, 2004, Rodger Blevins, Catapult's Vice President and the individual who was responsible for overseeing the VANITS contract, sent the following response:

> Since Catapult is in the process of negotiating terms and conditions to continue providing technical support services to the DOT OCIO [Office of Chief Information Officer], it is premature to discuss releasing anyone from their Catapult Employment Agreement, specifically the non-compete clause.

(E 36, 110).

The non-competition clause referred to by Mr. Blevins is set forth in the Employment Agreement that each of the Appellees was required to sign at the inception of their employment. (E 129-133; Apx. 13-14). Despite Catapult's obligation to allow its employees to transition to successor contractors in accordance with the Continuity of Services regulation described above, the non-competition provision set forth its Employment Agreement purports to prohibit employees from accepting a position with a successor contractor. (E 129-133).

In view of Mr. Fischer's email, Catapult was on notice in August 2004 that the employees working under the VANITS contract wanted to transition to Bowhead following the expiration of Catapult's contract on September 30, 2004. (E 38). Indeed,

Mr. Kyle Mulhall, the only witness who testified on behalf of Catapult at trial, testified that he was aware of this fact.

> Q: Well, you knew, for quite some time didn't you, that they had an intention to leave the company and go to work for Bowhead, didn't you?
>
> A: Well, no I did not specifically know they were (unintelligible).
>
> Q: You had some indication that they desired to leave the company and go to work for Bowhead, didn't you?
>
> A: I certainly was aware that was something the employees would have liked, to have gone to work for Bowhead.
>
> Q: And you knew that at least two weeks prior to their resignation, correct?
>
> A: I was aware for two weeks prior to the end of our contract that some of the employees were interested in working for a successor contractor.

(Apx. 23).

IV. The August 31, 2004 "All-Hands" Meeting

On August 31, 2004, Catapult convened an "all-hands" meeting for all of its staff working at the Department of Transportation. (Apx. 28-29). At this meeting, Mr. Blevins told Catapult's employees that the company was appealing the loss of the contract to the Small Business Administration and that the company was "highly confident" it would win. (Apx. 29, 35). Yet, during trial, Mr. Mulhall indicated that Bowhead's contract was a "sole source contract" (i.e. it was awarded without competition), could not be challenged on its merits and was very difficult to appeal. (Apx. 18-20).

During the August 31, 2004 meeting, Mr. Blevins also assured the employees that Catapult was trying to find positions for everyone who would be affected in the event the appeal was unsuccessful and the contract terminated on September 30, 2004 as scheduled. (Apx. 29). During this meeting, Mr. Blevins also explicitly threatened employees with legal action if they accepted employment with Bowhead. (Apx. 34). During trial, Mr. Mulhall also admitted that he made it known to employees that Catapult had the option to pursue legal action to enforce the non-competition provisions in the event they accepted employment with Bowhead. (E 43). During trial, Mr. Mulhall testified that at the same time he was advising employees of Catapult's right to pursue legal action, he also "reminded" them of their obligation to provide two weeks notice of resignation. (E 43).

During this meeting, notwithstanding the threats of legal action, when some of the employees again requested to be released from their Employment Agreement, Mr. Blevins indicated that if Catapult did not ultimately retain the contract and could not otherwise place the employees in other positions, they would be released from their Employment Agreements. (Apx. 30).

V. Subsequent Events

In view of the threats of legal action and the uncertain status of the VANITS contract (at least according to Catapult), Appellees remained on the job and did not immediately provide notice of their resignation to join Bowhead. (Apx. 33-34, 48). Following the August 31, 2004 meeting, employees sought out concrete information regarding the appeal and their employment prospects if the appeal was not successful.

(Apx. 31-32, 46, 48-49). According Paul Wolf and Peter Matsuki, both of whom are Appellees in this case, Catapult refused to provide any concrete information regarding specific job opportunities that existed at the company outside of the VANITS contract. (Apx. 101, 10 v2). These witnesses also testified that Catapult was providing "sparse," "conflicting" and "misleading" information regarding the status of its appeal. (Apx. 31-32, 48-49).

At the same time Catapult was threatening its employees with legal action, it was also attempting to negotiate directly with Bowhead to retain a portion of the VANITS contract or serve as a subcontractor and continue to perform some of the work. (Apx. 36, 45). By preventing its staff from giving notice and resigning to join Bowhead, Catapult was attempting to leverage its position with Bowhead; indeed, at a subsequent meeting, Mr. Blevins admitted that the employees were "pawns in a matter of contract law." (Apx. 35, 50). Ultimately, Catapult's negotiations with Bowhead were not successful. (Apx. 36-37).

VI. Catapult's Contract Expires on September 30, 2004

As with its negotiations with Bowhead to retain some of the work under the VANITS contract, Catapult's appeal of the loss of the VANITS contract was not successful. (E 42-43). Accordingly, on September 30, 2004, Catapult's contract with the Department of Transportation expired and Bowhead took over responsibility for the VANITS contract. (E 43, 47; Apx. 37). All of the Appellees in this case continued their employment with Catapult until the VANITS contract expired on September 30, 2004. (Apx. 21).

In view of the expiration of the VANITS contract, all of the twenty-four employees working under the VANITS contract were instructed to report to Catapult's headquarters on October 1, 2004 for job assignments. (Apx. 37-38). When the employees reported to headquarters as instructed, Catapult did not have positions available for all of the displaced employees. (Apx. 38-39). In fact, only six to eight positions were available. (Apx. 38-39, 47). During this meeting, Catapult was not able to identify any positions that were available for the remaining employees. (Apx. 38-39, 46, 51).

Immediately following the October 1, 2004 meeting at Catapult's headquarters, Appellees met with representatives of Bowhead to discuss employment opportunities. (Apx. 40, 51). According to the testimony at trial, Appellees were concerned about their employment future and that Bowhead might quickly fill the positions they had just vacated. (Apx. 40-41). Later in the day, each of the Appellees delivered resignation notices to Catapult and subsequently accepted employment with Bowhead. (E 112-125; Apx. 41-42). Catapult did not attempt to enforce the non-competition provision contained in Appellees' Employment Agreements. (E 44).

VII. Catapult Refuses to Compensate Appellees for Their Earned and Accrued Universal Leave

During trial, a chart prepared by Catapult reflecting Appellees' earned and accrued leave balances that existed at the time of their resignation was introduced. (E 56). This chart reflects that, at the time of their resignation, Appellees had earned and accrued universal leave balances in the following amounts:

Appellee	Leave Balance (hours)	Dollar Amount
Alan Aleshire	116	$2,409.23
Alex Bogdanovksy	122	$5,278.85
Steven Fischer	208	$8,320.00
Laurel Harrison	139	$4,865.00
Leroy Hill	118	$2,516.94
Cecil Kelly	140	$3,712.80
Benjamin Levin	175	$5,960.94
Annamarie Lloyd	92.5	$2,620.82
Kevin Maher	185	$9,250.00
Tahir Mahmooh	178	$5,116.07
Peter Matsuki	214	$11,090.55
Miguel Morales	49	$2,166.02
Biniam Tekle	93.5	$2,711.50
Paul Wolf	79.25	$2,864.81

(E 56). According to Mr. Mulhall, the chart accurately reflects both the number of hours of universal leave and the dollar value of that leave that existed at the time of resignation. (Apx. 22).

Notwithstanding the fact that no dispute existed with respect to the amount of universal leave Appellees had earned and accrued at the time of their resignation, Catapult intentionally failed to compensate Appellees for their leave balances. (Apx. 22-23). According to Mr. Mulhall, no compensation was provided because the Appellees failed to provide two weeks advance notice of their resignation. (Apx. 23).

ARGUMENT

I. Standard of Review

In granting a motion for summary judgment, "the trial court does not resolve factual disputes, but is instead limited to ruling as a matter of law." Sheets v. Brethren Mut. Ins. Co., 342 Md. 634, 638-39, 679 A.2d 540 (1996)(citing Heat & Power v. Air Products, 320 Md. 584, 591, 578 A.2d 1202 (1990)). The standard for appellate review of a trial court's grant or denial of a summary judgment motion is whether the trial court was legally correct. Id. The appellate court reviews the same material from the record and decides the same legal issues as the circuit court. Nationwide Mut. Ins. Co. v. Scherr, 101 Md. App. 690, 695, 647 A.2d 1297 (1994), cert. denied, Scherr v. Nationwide, 337 Md. 214, 652 A.2d 670 (1995). In making its analysis, the appellate court does not accord deference to the trial court's legal conclusions. Post v. Bregman, 112 Md. App. 738, 748, 686 A.2d 665 (1996), rev'd on other grounds, 349 Md. 142, 707 A.2d 806 (1998).

A motion for judgment notwithstanding the verdict "tests the legal sufficiency of the evidence and is reviewed under the same standard as a motion for judgment made during trial." Nationwide Mut. Fire Ins. Co. v. Tufts, 118 Md. App. 180, 190, 702 A.2d 422 (1997), cert. denied, 349 Md. 104, 707 A.2d 89 (1998). In reviewing a trial court's denial of a motion for judgment in a jury trial, the appellate court "must conduct the same analysis as the trial court, viewing all evidence in the light most favorable to the non-moving party." Id. at 189. Moreover, the appellate court "must assume the truth of all credible evidence and all inferences of fact reasonably deductible from the evidence...."

Id. at 190. "If there exists any legally competent evidence, however slight, from which the jury could have found as it did, [the appellate court] must affirm the trial court's denial of the motion." Id. at 191.

II. The Trial Court Correctly Ruled that Catapult's Withholding of Compensation for Appellees' Earned and Accrued Universal Leave Violates the Provisions of Maryland's Wage Payment and Collection Law

The central issue in this case is whether Catapult's actions in withholding compensation for Appellees' earned and accrued universal leave at the conclusion of their employment constitutes a violation of Maryland's Wage Payment and Collection Law ("WPCL"), Md. Code Ann. § 3-501, *et. seq.* of the Labor and Employment Article. In its ruling granting partial summary judgment in favor of the Appellees on the issue of Catapult's liability, the trial court concluded that the universal leave at issue in this case constitutes a "fringe benefit" that was earned during the employment relationship and is therefore properly considered a "wage" within the meaning of the WPCL. (Apx. 4). The trial court further ruled that under Medex v. McCabe, 372 Md. 28 (2002), the forfeiture provision contained in Catapult's universal leave policy violated Maryland's public policy and was therefore invalid as a matter of law. (Apx. 2, 3).

As set forth below, the trial court's ruling is consistent with well established Maryland law and should not be disturbed.

A. Universal Leave Constitutes a "Wage" Under the WPCL

Section 3-505 of the WPCL requires employers, upon termination of an employee's employment, to pay that employee "all wages due for work that the employee performed before the date of termination of employment, on or before the day on which the employee would have been paid if the employment had not been terminated." Whether the universal leave at issue in this case is governed by the terms of the WPCL therefore necessarily requires a preliminary finding that such leave constitutes a "wage" under § 3-501(c). In this regard, the statutory definition of wage set forth in the WPCL "is very broad." Medex, 372 Md. at 301. Specifically, § 3-501(c) provides as follows:

> (1) "Wage" means all compensation that is due to an employee for employment.
>
> (2) "Wage" includes:
>
> (i) a bonus;
>
> (ii) a commission;
>
> (iii) a fringe benefit; or
>
> (iv) any other remuneration promised for service.

Md. Code Ann. § 3-501(c). As noted by this Court in Stevenson v. Branch Banking and Trust Corporation, 159 Md. App. 620 (2004), this list is not exhaustive and merely sets forth "examples of different types of wages." Id. at 642.

According to Maryland's Court of Appeals, the wages which an employee is due and which must be paid upon the termination of the employment relationship "consist of all compensation, and any other remuneration, that the employee was promised in exchange for his work." Whiting-Turner v. Fitzpatrick, 366 Md. 295, 303 (2001). As

noted by the Court in Medex, "it is the exchange of remuneration for the employee's work that is crucial to the determination that compensation constitutes a wage." 372 Md. at 36, citing Whiting-Turner, 366 Md. at 303. See also Stevenson, 159 Md. App. at 641.

As noted by the trial court, the "common, ordinary everyday understanding" of a fringe benefit encompasses earned leave. (Apx. 4). Indeed, during trial, Catapult's general counsel specifically admitted that universal leave was one of the fringe benefits Catapult provided to employees. (Apx. 10-11). The trial court's conclusion that the universal leave at issue in this case constitutes a wage because it is a fringe benefit and therefore falls within the purview of the WPCL is not only inherently logical, it is also entirely consistent with Maryland law. Indeed, this Court has recognized that vacation pay constitutes a wage under the WPCL. See e.g. Stevenson, 159 Md. App. at 657, n. 13 ("we recognize that the [WPCL] does provide [plaintiff] a remedy to recover other unpaid wages that she earned before she was fired, such as any vacation pay or deferred compensation accumulated during her employment."); Magee v. Dansources Technical Services, Inc., 137 Md. App. 527 (2001)(trial court improperly granted summary judgment to employer with respect to employee's claim for vacation pay under the WPCL where fact issue existed regarding whether employee had unused vacation remaining).[2]

[2] As set forth below, the portion of the Magee decision relating to the effect of the employer's vacation policy on the employee's entitlement to compensation for unused vacation leave was based on common law -- an approach that was utilized by the courts in Maryland until the Medex decision was subsequently issued in 2002. However, Magee clearly recognized that vacation pay constitutes a "wage" under the WPCL.

Significantly, Catapult does not contest this issue in its brief. Indeed, during the trial of this case, Catapult's general counsel explicitly admitted that universal leave fell within the scope of the WPCL.

> Q: Okay. Did you have an understanding that the Act [WPCL] applied to fringe benefits such as universal leave?
>
> A: Yes, I did.

(E. 33).

To the extent there is any doubt about this issue, applying the test set forth Whiting-Turner and Medex, it is abundantly clear that the universal leave provided to the Appellees was intended as remuneration for work and accordingly constitutes a wage under the WPCL. In this regard, the offer letters provided to Appellees provide for entitlement to eighteen days of paid universal leave for each year of employment. (E 127-28; Apx. 13, 54-55). According to the offer letters, universal leave is "earned" on a pay period basis at the rate of six hours per pay period. (Id.). Similarly, Catapult's Employee Handbook also provides that employees "earn" and "accrue" universal leave each pay period. (E 32). Importantly, according to the Employee Handbook, an employee's rate of accrual will diminish if he or she works less than forty hours per week and will stop entirely during any period in which an employee is in a leave without pay status for more than three days. (E 33). Finally, at the conclusion of the employment relationship, employees are required to repay any advanced, unearned universal leave through a payroll deduction. (E 34, 88). According to Catapult's general counsel,

employees are responsible for repaying unearned universal even if they are terminated by Catapult without two weeks advance notice. (E 34).

In this case, it is patently clear that universal leave formed part of the inducement for Appellees to accept employment with Catapult. Under Catapult's own policies, Appellees earned and accrued universal leave on a pay period basis (which accrual was subject to adjustment based upon the number of hours worked) and that such leave was available for use during the year. Employees are also obligated to reimburse Catapult for unearned universal leave advanced during their employment, even if terminated without notice. Clearly, universal leave was provided to each of the Appellees in this case as "remuneration for the employee's work" and therefore constitutes a "wage" under the WPCL.

B. The Forfeiture Provision Contained in Catapult's Universal Leave Policy is Contrary to Maryland Public Policy and is Invalid

Despite the fact that universal leave constitutes a wage under the WPCL, Catapult insists that the right to receive compensation for earned and accrued universal leave at the conclusion of the employment relationship is controlled by the employer's personnel policies. According to Catapult, their policy calling for the forfeiture of earned and accrued leave for failing to provide two weeks notice of resignation is in accordance with Maryland law. In support of this proposition, Catapult relies on a trio of cases: Rhoads v. FDIC, 956 F. Supp. 1239, 1259 (D. Md. 1997), rev'd. on other grounds, 257 F.3d 373 (4th Cir. 2001); Magee v. DanSources Tech. Servs., Inc., 137 Md. App. 527 (2001); and Dahl v. Brunswick Corp., 277 Md. 471 (1976). Catapult also cites guidance provided by

Maryland's Division of Labor and Industry on its website and information contained in a "fiscal and policy note" prepared in response to a proposed House Bill.

In Medex v. McCabe, 372 Md. 28 (2002), Maryland's Court of Appeals squarely rejected the common law contract approach followed in Rhoads, Magee and Dahl. In Medex, Maryland's Court of Appeals held that employees have an absolute right to receive earned wages and that any attempt to limit this right by contractual language is contrary to Maryland's public policy and is invalid.

In Medex, a former employee sued his former employer to recover incentive fees he was allegedly owed. The employee, a sales representative, had closed a number of sales during the employer's fiscal year ending January 31, 2000, but resigned before the fees were paid on March 31, 2000. The employer refused to pay the incentive fees, relying on a contractual provision that conditioned eligibility for the fees upon being employed at the time of payment. The employee filed suit, claiming violation of the WPCL. The trial court found the WPCL inapplicable and the employee appealed. This Court reversed the decision of the trial court, ruling that the employee had earned the incentive fees as wages under the WPCL and that the conditions the employer had placed on the payment of these wages were invalid as a matter of law. McCabe v. Medex, 141 Md. App. 558, 564-65 (2001).

The Court of Appeals granted certiorari to consider the issue whether the incentive fees that formed part of the employee's promised compensation for work performed must be paid despite an express term in the employment contract to the contrary. Initially, like the universal leave at issue in this case, the Court found that the incentive fees at issue

"were compensation for work performed, and, thus, wages under the [WPCL]." Medex, 372 Md. at 37. Having determined that the incentive fees at issue were wages under the WPCL, the Court then considered the validity of the provision in the employment contract conditioning eligibility for the fees on employment at the time of payment. In this regard, the Court noted that "[u]nder common law contract principles, such an employment contract provision would have been sufficient to deny the employee the incentive fees." Id., citing Maryland Credit Fin. Corp. v. Haggerty, 216 Md. 83, 89-90 (1958)(enforcing language of an employment contract that an employee had to remain in the employer's service until year's end to receive bonus). Nonetheless, after determining the intent of the Legislature in effectuating the WPCL, the Court of Appeals agreed with this Court that the provision at issue was not enforceable.

In construing an employer's obligation to pay wages under § 3-505 of the WPCL, the Court noted:

> [W]hat is due an employee who terminates employment with an employer are wages for work performed before termination, or all compensation due to the employee as a result of employment including any remuneration, other than salary, that is promised in exchange for the employee's work.

Medex, 372 Md. at 39. According to the Court, "the Act's mandate is clear, and complies with the public policy that was the origin of the Act." Id. In this regard, the Court noted that the principal purpose of the WPCL is "to provide a vehicle for employees to collect, and an incentive for employers to pay, back wages." Id., citing Battaglia v. Clinincal Perfusionists, 338 Md. 352, 364 (1995).

In its decision, the Medex Court relied in part on Burdette v. Broadview Dairy Co., 123 Wash. 158, 212 P. 181 (1923), one of earliest cases to consider a wage payment statute and a case involving facts very similar to the case at bar. In Burdette, the employment contract required that an employee give two weeks notice of resignation, or else the payment of earned wages would be delayed for thirty days after departure. In holding that this provision was void as against public policy, the Burdette court stated that "the natural right of the employer and the employee to contract between themselves must yield to what the legislature has established as the law." Id. at 182-83.

In adopting the rationale set forth in Burdette, the Court in Medex noted that "an employee's right to compensation vests when the employee does everything required to earn the wage," and ruled that the contract provision at issue providing for forfeiture of earned wages violated Maryland's clear mandate of public policy set forth in the WPCL. Medex at 42. As noted by the court, "[c]ontractual language between the parties cannot be used to eliminate the requirement and public policy that employees have a right to be compensated for their efforts." Id. at 39.

In its brief, Catapult urges this Court to adopt an unduly restrictive and unreasonably narrow interpretation of the holding in Medex. According to Catapult, the prohibitions set forth in Medex apply only in the situation where an employer's policy would "necessarily" result in the forfeiture of compensation. Because its own forfeiture policy "does not necessarily prevent" employees from receiving payment for their accrued leave (if employees provide the requisite notice), Catapult argues that the policy does not conflict with the WPCL and passes muster under Medex.

Catapult's analysis clearly misses the mark. The portion of the Medex opinion on which Catapult relies merely addresses the employer's argument that that the wages at issue in that case never came due (i.e. they were not earned) without continuous employment. In rejecting this argument, the Court noted that even if the employee had remained employed until the payment date of March 31, 2000, he still would be deprived of the incentive fees that he earned after the close of the fiscal year on January 31, 2000 because payment for these fees would not occur until a date subsequent to his departure. Accordingly, in harmony with its earlier determination that contractual language "cannot be used to eliminate the requirement and public policy that employees have a right to be compensated for their efforts," the Court noted that "[a] contract that necessitates the deprivation of some portion of the fees worked for by the employee contravenes the purpose of the Act." Medex 372 Md. at 39, 41.

Contrary to Catapult's tortured analysis, the overarching principle set forth in Medex is that employees have an absolute right to receive earned wages and that any attempt to limit this right by contractual language is contrary to Maryland's public policy and is invalid. In this case, it is an undisputed fact that each of the Appellees earned and accrued universal leave in exchange for their work and had varying amounts of unused leave at the time of their departure. Despite the fact that Appellees' universal leave was fully earned, Catapult intentionally withheld compensation for this leave based upon its personnel policy that calls for forfeiture when employees fail to provide two weeks advance notice of resignation. Given that Catapult's policy resulted in a forfeiture of earned compensation in this case, the mere fact that the policy *allows* for compensation if

notice is provided, is completely irrelevant. Under the principles set forth in Medex, it is clear that Catapult's forfeiture policy conflicts with the public policy expressed in the WPCL and is therefore invalid. Accordingly, Appellees are entitled to be paid in full for all earned and accrued universal leave that existed at the time of their departure.

In its final argument, notwithstanding the Court of Appeal's holding in Medex, Catapult suggests that it is actually Maryland's "public policy" that employer's personnel policies govern the issue of whether earned leave is payable upon termination. In other words, Catapult would have this Court rule that it is a public policy in Maryland that employers have the freedom to deprive employees of compensation for leave that is provided as remuneration in exchange for an employee's work. In support of this theory, Catapult relies on information provided by Maryland's Division of Labor and Industry on its website and a report prepared in response to a proposed House Bill.

With respect to the information provided by Maryland's Division of Labor and Industry on its website, it is clear that its "guidance" that earned leave may be forfeited is not binding on this Court and, more importantly, if adopted, would represent a dramatic departure from the holding in Medex.[3] Likewise, the "fiscal and policy note" cited by Catapult is of dubious value as it was not part of the record below, relates to proposed,

[3] While the Division of Labor and Industry apparently believes, contrary to the holding in Medex, that forfeiture of earned leave is permissible, it is noteworthy that elsewhere on its website, it defines a "fringe benefit" as including "accrued or accumulated compensation such as vacation ("annual") leave, sick leave or other promised benefit." http://www.dllr.state.md.us/labor/wagepay/wpwhatiswage.htm. Given that "fringe benefits" constitute "wages" under the WPCL, it is clear that the Division of Labor and Industry's views are internally contradictory cannot be reconciled with the requirements set forth in the WPCL.

rather than actual, legislation and deals with a separate section of the Maryland Code -- 3-801, *et. seq.* To the extent this report has any value whatsoever, it should be noted that Catapult's summary of the significance of this report contains a serious omission. In this regard, while the report does reflect a view that in Maryland the payment of vacation leave upon termination depends on the employer's policies, this language is tempered by the very next sentence:

> In the Wage Payment and Collection Law (WPCL), wage means all compensation due an employee and includes any fringe benefit promised in exchange for services. ***Accrued vacation leave, which accumulates as an employee provides services, is then sometimes viewed as recoverable under the WPCL.***

HB 701 (2206); Fiscal and Policy Note on HB 701. (emphasis added). This report does not suggest that it is Maryland's "public policy" that employer's personnel policies govern leave. Rather, consistent with Medex, it reflects the fact that where, as here, an employer withholds compensation for earned leave, that compensation may be recoverable under the WPCL.

The public policy reflected in the WPCL and reinforced by Medex, categorically prohibits an employer from withholding any remuneration, including universal leave, promised to an employee in exchange for work. Catapult's actions clearly contravene the WPCL and, as such, the trial court's grant of summary judgment in Appellees' favor should be affirmed.

III. The Evidence Presented at Trial was Sufficient to Support the Jury's Determination That Catapult Did Not Act in Good Faith When it Withheld Compensation for the Universal Leave at Issue in This Case

In view of the fact that the trial court determined, as a matter of law, that Catapult's forfeiture provision violated the provisions of the WPCL and that Appellees were entitled to recover the full value of their accrued universal leave balances, the only issue that remained for trial was whether the Appellees were entitled to recover additional damages (up to two times the amount awarded by the trial court) under Section 3-507.1 of the WPCL. In this regard, Section 3-507.1 provides, in relevant part, as follows:

> (b) *Award and costs.* If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

Md. Code Ann. § 3-507.1(b).

Under Section 3-507.1(b), entitlement to additional damages turns on the question whether Catapult withheld the universal leave at issue as a result of a "bona fide dispute." The existence of a bona fide dispute and entitlement to additional damages under the WPCL is a question of fact left for resolution by the jury. Admiral Mortgage v. Cooper, 357 Md. 533, 550 (2000); Medex, 372 Md. at 44; Baltimore Harbor Charters, Ltd. v. Ayd, 365 Md. 366, 396 (2000). According to Maryland law, a bona fide dispute exists only if the party making or resisting the claim has a good faith basis for doing so. Admiral Mortgage, 357 Md. at 543; Medex, 372 Md. at 43.

After hearing the evidence presented by the parties, the jury determined that Catapult did not act in good faith when it withheld compensation for Appellees' earned and accrued universal leave and awarded additional damages accordingly. As it should have, the trial court denied Catapult's motion for judgment and motion for judgment notwithstanding the verdict. As set forth below, there is ample evidence to support the jury's determination.

A. Reliance Upon a Personnel Policy That Violates Maryland Law Does Not Constitute Good Faith.

During the trial of this case, evidence was presented that the trial court had previously made a determination that Catapult's forfeiture policy violated Maryland law and that the Medex case served as the basis for the court's decision. (Apx. 24, 26-27). This point was also included in the instructions provided to the jury at the conclusion of the case (which were agreed upon by the parties and are not part of this appeal). (Apx. 53). From this evidence alone, the jury clearly could have concluded that Catapult was not acting in good faith when it withheld Appellees' universal leave on the basis of a personnel policy that, on its face, violated Maryland law.

During trial, Catapult presented testimony from its general counsel, Kyle Mulhall, who was the only witness to testify on Catapult's behalf. According to Mr. Mulhall, he reviewed the WPCL and relevant cases (including Medex) and determined that Catapult's forfeiture policy was valid. (E 31-32). The jury had ample reason to question this testimony, particularly given the fact that Mr. Mulhall conceded that the provisions of the WPCL applied to fringe benefits such as universal leave. (E 33). Of course, as they were

instructed at the conclusion of the trial, it is entirely possible that the jury did not find Mr. Mulhall's testimony concerning his due diligence to be credible and it was well within their province to disregard it entirely. It is also within the realm of reason that the jury could have questioned why Mr. Mulhall felt compelled to spend so much time researching the validity of Catapult's forfeiture policy and could have reasonably concluded that he had serious reservations about its enforceability. The jury could have also interpreted Mr. Mulhall's testimony for what it was -- the testimony of a high ranking official of a company that stood to profit by withholding the compensation at issue -- and weighed it accordingly.

In the end, Mr. Mulhall's testimony obviously did not resonate with the jury and Catapult declined to present any other witnesses to support its defense. Based upon the fact that Catapult's forfeiture policy so clearly violated Maryland law, as determined by the trial court, the jury clearly had sufficient evidence to conclude that Catapult was not acting in good faith when it withheld the universal leave at issue in this case.

B. The Record Is Replete with Other Evidence that Catapult was Not Acting in Good Faith

In addition to the fact that Catapult's forfeiture policy so clearly violated Maryland law, there was a substantial amount of other evidence introduced at trial from which the jury could have reasonably reached its conclusion that Catapult was not acting in good faith when it withheld Appellees' earned and accrued universal leave. As a preliminary matter, there was evidence presented at trial that raised a genuine issue as to whether the two week notice requirement was actually mandatory in order to retain the

right to receive compensation for earned and accrued universal leave. In this regard, during trial, Mr. Mulhall acknowledged that Sections 7.1 (covering universal leave) and 10.2 (covering resignation) of the Employee Handbook were inconsistent and that the handbook was ambiguous as it related to the issue of whether the forfeiture of earned and accrued universal leave was mandatory in the event an employee failed to provide two weeks notice of resignation.

> Q: Would you agree that there's some ambiguity between this provision [Paragraph 10.2] and Paragraph 7.1 in that this provision says "may forfeit" and Paragraph 7.1 does not?
>
> A: That is correct. This does say "may."
>
> Q. Okay. So, you see some ambiguity in terms of the policies, don't you?
>
> A: I can see why you think there's some ambiguity there. It's reasonable to see there's some ambiguity.

(Apx. 15-16). In view of this evidence, a jury could reasonably conclude that Catapult was not acting in good faith when it made the decision to withhold compensation for Appellees' universal leave based upon their failure to adhere to an admittedly ambiguous policy.

Further, the evidence presented at trial showed that Appellees had significant amounts of earned and accrued universal leave at the time of their resignation and that the cumulative value of their leave was $68,883.54. (E 56). In its brief, Catapult appears to take the position that it is guilty of nothing more than enforcing its own personnel policies and that Appellees voluntarily relinquished their right to receive compensation for their accrued universal leave by neglecting to provide the requisite notice. The

evidence presented at trial, however, suggests otherwise. In fact, the evidence establishes that Catapult engaged in active efforts to thwart Appellees from providing two weeks notice of their resignation in an effort to prevent Bowhead from hiring them and to further their own financial interests.

As established at trial, immediately after the announcement of the loss of the VANITS contract (and more than one month prior to the expiration of the VANITS contract on September 30, 2004), one of the Appellees in this case requested in writing to be "released from any and all commitments to and agreements with Catapult Technology," effective at the expiration of Catapult's contract. (E 37, 110). Mr. Mulhall received a copy of this request and testified at trial that he was fully aware that employees working under the VANITS contract wanted to transition to the successor contractor, Bowhead, following the expiration of Catapult's contract on September 30, 2004. (Apx. 23). In this regard, Mr. Mulhall testified that he became aware of this fact at least two weeks prior to the employees' date of resignation. (Id.). However, instead of complying with its obligation to allow employees to transition to the successor contractor in accordance with the Continuity of Services regulation introduced at trial (E 55), Catapult signaled its refusal to allow its staff to transition to Bowhead at the conclusion of Catapult's contract on September 30, 2004. (E 36, 110).

The evidence presented at trial also established that at an all-hands meeting held on August 31, 2004, employees were threatened with legal action to enforce the non-competition provisions contained in their employment agreements if they accepted employment with Bowhead. (E 83; Apx. 34). At the same time, according to his

testimony at trial, Mr. Mulhall disingenuously "reminded" employees of their obligation to provide two weeks notice of termination. (E 43). In view of the Continuity Services regulation, it is reasonable to infer that Catapult, in fact, had no intention of attempting to enforce the non-competition agreement and was simply threatening the employees to prevent Bowhead from hiring them. Indeed, during trial, Mr. Mulhall admitted that when the employees did join Bowhead at the expiration of Catapult's contract, Catapult made no effort whatsoever to enforce the non-competition agreements. (E 44).

According to the evidence presented at trial, at the same time it was threatening legal action, Catapult was also representing to its employees that the company was appealing the loss of the VANITS contract and that it was "highly confident" it would prevail. (Apx. 29, 35). Yet, during trial, Mr. Mulhall admitted that the nature of Bowhead's contract made it difficult to successfully appeal. (Apx. 18-20). Further, following the August 31, 2004 meeting, according to its employees who testified at trial, Catapult provided "sparse," "conflicting" and "misleading" information regarding the status of the appeal. (Apx. 31-32, 48-49). Ultimately, of course, Catapult's appeal was not successful. (E 42-43). As with Catapult's threats of legal action, the jury could have reasonably concluded from this evidence that Catapult knew it had no reasonable possibility of retaining the VANITS contract through its appeal, but provided Appellees with misinformation to confuse them about the status of the contract and to discourage them from providing notice of resignation to join Bowhead at the conclusion of the contract.

The evidence at trial further showed that Catapult assured its employees that it was making a concerted effort to find alternative positions for those employees who might be displaced by the potential loss of the VANITS contract. (Apx. 29). However, the evidence presented at trial revealed that following the August 31, 2004 meeting, Catapult refused to provide concrete information to its employees regarding specific job opportunities that existed within the company outside of the VANITS contract. (Apx. 31, 46). According to the undisputed evidence presented at trial, when the VANITS contract expired on September 30, 2004, only six to eight positions were available for the twenty-four employees who were displaced by the loss of the VANITS contract. (Apx. 38-39). At established at trial, Catapult was not able to identify any positions that were available for the remaining employees. (Apx. 38-39, 46, 51).

Finally, it is undisputed that each of the Appellees remained employed by Catapult through the expiration of the VANITS contract on September 30, 2004. (Apx. 21). This fact is significant, as with the expiration of the VANITS contract and no viable alternative billable work to offer Appellees, the rationale proffered by Catapult for the two week notice policy was no longer valid. Accordingly, there was no justifiable reason to withhold Appellees earned and accrued universal leave. Further, it is also significant that Mr. Blevins promised to release the Appellees from the obligations set forth in their employment agreements (including, presumably, the two week notice requirement and non-compete) in the event the appeal was unsuccessful and alternative employment could not be secured, but did not honor his agreement. (Apx. 30).

Based on the totality of evidence presented at trial, the jury could have inferred that Catapult acted in bad faith by preventing Appellees from giving two weeks notice through misinformation and threats of legal action in an attempt to leverage its position with Bowhead and retain some of the work with DOT following the expiration of the VANTIS contract on September 30, 2004. Indeed, according to the testimony at trial, Mr. Blevins indicated that Appellees were "pawns in a matter of contract law." (Apx. 35, 50). From this evidence, a reasonable jury could also have concluded that Catapult was not acting in good faith, and simply used the two week notice period as a pretext for withholding Appellees' earned and accrued Universal Leave in order to mitigate its losses following the expiration of the VANITS contract.

CONCLUSION

For the reasons set forth above, Appellees respectfully submit that the trial court's grant of partial summary judgment and the jury's verdict in Appellees' favor should be affirmed.

Respectfully submitted,

SMITH, LEASE & GOLDSTEIN, LLC

By: _____

Marc J. Smith
11 North Washington Street
Suite 520
Rockville, Maryland 20850
Phone: (301) 838-8950

Attorneys for Appellees

STATUTES

1. Md. Code Ann. § 3-501, Labor and Employment Article

Definitions.

(a) *In general.* In this subtitle the following words have the meanings indicated.

(b) *Employer.* "Employer" includes any person who employs an individual in the State or a successor of the person.

(c) *Wage.* (1) "Wage means al compensation that is due to an employee for employment.

(3) "Wage" includes:

(i) a bonus;

(ii) a commission;

(iii) a fringe benefit; or

(iv) any other remuneration promised for service.

2. Md. Code Ann. § 3-505, Labor and Employment Article

Payment on termination of employment.

Each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.

3. Md. Code Ann. § 3-507.1, Labor and Employment Article

Action to recover unpaid wages.

(a) *In general.* Notwithstanding any remedy available under § 3-507 of this subtitle, if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.

(b) *Award and costs.* If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the

employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

CERTIFICATION UNDER MARYLAND RULE 8-112

In accordance with Maryland Rule 8-112, the undersigned counsel of record for Appellees hereby certifies that this brief was prepared using Times New Roman, 13-point font.

By:_____
Marc J. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of January 2007, 2 copies of the foregoing Brief of Appellees were mailed via U.S. Mail, postage prepaid, to the following person(s):

Charles H. Carpenter
Pepper Hamilton LLP
600 14th Street, N.W.
Washington, D.C. 20005-2004

Marc J. Smith

APPENDIX

The Record Extract filed by Appellants only contains select pages of the summary judgment hearing transcript and trial transcript cited by Appellant in its brief. In addition, the Record Extract does not contain a correct copy of trial exhibit No. 9. As a result, Appellees have reproduced herein the pages to the transcript cited in their brief that are not contained within the Record Extract and a copy of Exhibit 9.

CONTENTS