In The

Court of Appeals of Maryland

No. 9

September Term, 2010

JULIA M. TAYLOR,

Petitioner,

v.

GIANT OF MARYLAND LLC,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF *AMICI CURIAE* MARYLAND EMPLOYMENT LAWYERS ASSOCIATION and METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

DEBORAH THOMPSON EISENBERG
UNIVERSITY OF MARYLAND SCHOOL OF LAW
Room 333
500 West Baltimore Street
Baltimore, MD 21202
(410) 706-5995
deisenberg@law.umaryland.edu

JULIE GLASS MARTIN-KORB
7836 Rydal Terrace
Rockville, MD 20855-2058
(301) 775-6688
topattorney@hotmail.com

ALAN R. KABAT
BERNABEI & WACHTEL, PLLC
1775 T Street, NW
Washington, DC 20009-7124
(202) 745-1942 (ext. 242)
Kabat@BernabeiPLLC.com

Attorneys for Amici Curiae Maryland Employment Lawyers Association and Metropolitan Washington Employment Lawyers Association

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259 228519

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STATEMENT OF INTEREST

Amici Curiae, the Maryland Employment Lawyers Association (MELA) and the Metropolitan Washington Employment Lawyers Association (MWELA) are sister local affiliates of the National Employment Lawyers Association, a national organization of attorneys, primarily plaintiffs' counsel, who specialize in employment law. The joint membership of MELA/MWELA comprises over 300 members who represent and protect the interests of employees under state and federal law. The purpose of MELA/MWELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA and/or MWELA have frequently participated as amicus curiae in cases of interest to their members, including the following recent cases: *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, *rehearing en banc den.,* 467 F.3d 378 (4th Cir. 2006); *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (2007); *Manor Country Club v. Flaa*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 384 Md. 68 (2004); and *Friolo v. Frankel*, 373 Md. 501 (2003).

Members of MELA and MWELA have represented numerous clients seeking to enforce federal, state and local laws prohibiting discrimination and retaliation in employment. As longtime advocates in employment and labor law, MELA/MWELA appreciate this opportunity to offer the Court their wide-ranging expertise and their unique perspective on the issues presented in this appeal. MELA/MWELA have a significant interest in this case to ensure that Maryland courts construe state and local anti-discrimination laws broadly and on their own terms, rather than merely replicating federal law, in order to fulfill the broader remedial purposes that were intended by the Maryland state and county legislative bodies. Because the outcome of this case will have a direct impact upon the ability of MELA/MWELA members and their clients to protect employees' interests under Maryland state and local anti-discrimination laws, MELA/MWELA have a specific interest in the fair resolution of the issues presented in this appeal.

STATEMENT OF THE CASE

Amici adopt the Petitioner's Statement of the Case.

QUESTIONS PRESENTED

(1) Has the lower court created a new standard for comparator evidence and "adverse employment action"?

(2) Did Petitioner present legally sufficient evidence that she was subjected to retaliatory treatment by Respondent?

(3) Does the lower court's opinion announce an application of preemption law which is contrary to existing law?

STATEMENT OF FACTS

Amici adopt the Petitioner's Statement of Facts.

ARGUMENT

I. Overview

Maryland's state and county anti-discrimination codes must be interpreted based on their own terms, without blind adoption of federal Title VII case law. As this Court cautioned in *Haas v. Lockheed Martin Corp.*: ". . . relying on federal decisional law construing Title VII as a surrogate for analysis of the meaning of the terms used in the Maryland enactments . . . **should not be a substitute for the pre-eminent plain meaning inquiry of the statutory language under examination**." 396 Md. 469, 492, 914 A.2d 735, 749 (2007) (citations omitted) (emphasis added).

In this case, however, the Court of Special Appeals construed the anti-discrimination and anti-retaliation provisions of the Prince George's County Human Relations Code ("PGHRC") without examining or applying one word of the ordinance, except in a footnote on a side issue.[1] Instead, the lower court adopted wholesale inapt and irrelevant terms and concepts drawn from federal Title VII case law, despite *Haas* and the county legislature's statement of intent that: "It is intended that the prohibitions

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[1] The Court of Special Appeals assumed, without deciding, that the PGHRC provides a private cause of action for retaliation. *Giant of Maryland LLC v. Taylor*, 188 Md. App. 1, 7 n.1, 39 n.18, 981 A.2d 1, 4 n.1, 23 n.18 (2009). Respondent Giant of Maryland LLC ("Giant") repeatedly and incorrectly represented to the courts below that "[t]here's no anti-retaliation provision in the Prince George's County code," (E. 1963), and that "the County Code does not prohibit retaliation or recognize a cause of action for alleged retaliation." (Reply Br. of Appellant at 10 (citing Br. of Appellant at 19-20).) Contrary to Respondent's representations, the PGHRC ***explicitly prohibits retaliation***:

> No person shall retaliate, or cause or coerce, or attempt to cause or coerce, any other person to retaliate against any person because such person has lawfully opposed any act or failure to act that is a violation of this Act or has, in good faith, filed a complaint, testified, participated, or assisted in any way in any proceeding under this Act.

PGHRC § 2-209. This provision, in conjunction with former Md. Code, Art. 49B § 42 (now Md. Code, State Gov't § 20-1202), provides a private cause of action for retaliation. *Cf. Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 294, 841 A.2d 845, 854-55 (2004). Retaliation is discussed further *infra*.

in this Division [Division 12. Human Relations Commission] are substantially similar, but not necessarily identical, to prohibitions in federal and State law." PGHRC § 2-185(c).

Among other legal errors, the Court of Special Appeals stated that, in order to establish an employment discrimination claim under the PGHRC, the plaintiff must show a "but for" causal connection between the employee's protected status and the employer's discriminatory act. *Giant of Maryland LLC v. Taylor*, 188 Md. App. 1, 25, 981 A.2d 1, 15 (2009). As this Court stated in *Molesworth v. Brandon*, "[t]o construe the words 'because of' as a colloquial shorthand for 'but-for causation,' . . . is to misunderstand them." 341 Md. 621, 645 & n.8, 672 A.2d 608, 620 & n.8 (1996) (quoting with approval *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)). Although this error may not be covered by the issues accepted on writ of certiorari, Amici respectfully suggest that this Court cannot leave such plain error uncorrected.

If Maryland courts wish to look to federal Title VII case law as an aid in construing state and local anti-discrimination laws, three important principles must be considered. First, federal Title VII case law is not binding on Maryland courts construing state and local anti-discrimination laws. *Haas*, 396 Md. at 482 & n.10, 914 A.2d at 742 & n.10. Second, Title VII case law developed by the federal circuit courts in the absence of binding Supreme Court precedent is not at all uniform. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60-61 (2006) (noting great disparity among federal circuit courts as to concept of "adverse employment action"); *cf. Haas*, 396 Md. at 486 n.12, 914 A.2d at 745 n.12 (noting that since Supreme Court precedent is binding on federal circuits, "cataloguing federal circuits that follow the [Supreme Court's] rule . . . is of no moment here"). Third, the vital remedial nature of state and local anti-discrimination laws cannot be overemphasized. As this Court has held: "The Maryland act is remedial and should receive a liberal construction so as to give to it the most beneficial operation. . . . [R]emedial statutes are to be liberally construed to suppress the evil and advance the remedy." *Haas*, 396 Md. at 494-95, 914 A.2d at 750-51 (internal citations and quotations omitted).

Bearing these principles in mind, Amici recommend that when Maryland courts look to federal Title VII case law as an aid in construing state and local anti-discrimination laws, the least generous Title VII case law should be considered the least persuasive authority since its application is most likely to undermine the remedial purpose of the state and local laws. *See, e.g., Haas*, 396 Md. at 494-95, 914 A.2d at 750-51 (rejecting Title VII "*Ricks/Chardon*" statute of limitations rule as inconsistent with remedial purpose of state anti-discrimination law. In the instant case, the Court of Special Appeals failed to adhere to these *Haas* principles and fell into the trap of blindly applying federal case law – and in many instances the *most* restrictive federal circuit court interpretations.

The Court of Special Appeals also erred in holding that Taylor's discrimination and retaliation claims are preempted by Section 301 of the Labor Management Relations Act. Taylor asserted independent state and local rights to be free from discrimination and retaliation that did not arise from or substantially depend upon any provision in the collective-bargaining agreement. Whether Giant had a right, or did not have a right, under the labor contract to order employees to submit to a medical examination simply had nothing to do with whether Giant discriminated against Taylor by treating her less favorably than similarly-situated white men, or whether Giant retaliated against her for filing a discrimination charge.

II. The Court of Special Appeals Erred in Imposing an Overly Restrictive "Adverse Employment Action" Standard Under the PGHRC.

A. The PGHRC Is Broader In Scope than Title VII.

Taylor brought her gender discrimination claim pursuant exclusively to former Maryland Code, Article 49B § 42 (now Md. Code Ann., State Gov't § 20-1202) and the PGHRC. *Giant of Maryland LLC*, 188 Md. App. at 19, 981 at 11. She prevailed on this claim at trial. The Court of Special Appeals reversed, however, on the grounds that Taylor did not prove that she suffered an "adverse employment action." The court failed

to construe the expansive language and remedial purpose of the PGHRC, and merely imported a federal standard of discriminatory action as "one that affects the 'terms, conditions or benefits of employment.'" *Id.* at 34, 981 A.2d at 20 (quoting *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001)).

The provisions of the PGHRC prohibiting discrimination in employment are worded differently and more broadly than the federal statute. First, the PGHRC defines "discrimination" to mean "acting, or failing to act, or unduly delaying any action regarding any person because of [protected status] in such a way that such person is adversely affected in the area[] of . . employment [.]" PGHRC § 2-186(a)(3). This definition does not limit employment discrimination to employer conduct that results in an adverse effect on the "terms, conditions, or benefits" of employment. It does not specify any particular level of adversity that must be reached to constitute prohibited employment discrimination. And it does not require that the employer's conduct have an adverse economic impact on the employee.

The PGHRC then prohibits employment discrimination as follows: "No employer in the County shall discharge or refuse to hire any person, or act against any person with respect to compensation or other terms and conditions of employment, or limit, segregate, classify, or assign employees because of discrimination." PGHRC § 2-222. Again, this language is different from the federal statute, and captures a broader variety of employer conduct. In particular, the PGHRC adds the term "assign" to the list of potentially discriminatory conduct. It also differentiates "compensation" from "other terms and conditions of employment," making it clear that a discriminatory act need not implicate any sort of financial consequence in order to be prohibited.

In contrast to the PGHRC, the federal statute is significantly narrower. Section 703(a) of Title VII of the Civil Rights Act of 1964 prohibiting employment discrimination provides that:

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The federal statute thus focuses on particular employment practices. The terms "refuse to hire," "discharge," "compensation, terms, conditions, or privileges of employment," "deprive . . . of employment opportunities," and "adversely affect his status as an employee" explicitly limit the substantive provision's scope to actions that affect employment or alter workplace conditions. The statute does not define discrimination outside the context of employment, since that is covered by other federal anti-discrimination statutes.

Construing the federal statute, some federal courts have developed a narrow concept of "adverse employment action" for discrimination (as well as retaliation) claims. The Third, Fourth, and Sixth Circuits, for example, have required that, in order to be actionable under Title VII, an employer's discriminatory conduct must rise to the level of an "adverse employment action," holding that the challenged action must "resul[t] in an adverse effect on the 'terms, conditions, or benefits' of employment."[2] Some federal

[2] *Von Gunten*, 243 F.3d at 863 n.1, 866 (abrogated as to retaliation by *Burlington Northern*, 548 U.S. at 60, 66); *see White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004) (en banc) (same); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (same). The Fifth and the Eighth Circuits adopted an even more restrictive approach. They employ an "ultimate employment decision[]" standard, which limits actionable discriminatory conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating." *See Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 707 (5th Cir. 1997) (abrogated as to retaliation by *Burlington Northern*, 548 U.S. at 60, 66); *see also Manning v. Metropolitan Life Ins. Co.,* 127 F.3d 686, 692 (8th Cir. 1997) (same).

courts have also required that an "adverse employment action" must implicate some detrimental financial consequence.[3]

B. Ordering an Employee to Submit to a Medical Examination as a Condition of Employment Was Actionable Conduct.

In the case at bar, the discriminatory conduct at issue was the employer's ordering the employee to submit to a so-called "Independent Medical Examination" (IME).[4] The Court of Special Appeals held that requiring Taylor to submit to an IME could not constitute an "adverse employment action" as a matter of law. *Giant of Maryland LLC*, 188 Md. App. at 35-35, 981 A.2d at 20. The court erred in several respects.

First, the intermediate court adopted the restrictive Title VII "adverse employment action" standard for actionable discrimination without considering the more expansive language of the PGHRC. As shown above, the PGHRC prohibits "acting . . . because

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[3] *See White*, 364 F.3d at 797-98 & n.3, 802-03; *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 651 (4th Cir. 2002); *Kerns v. Capital Graphics, Inc.,* 178 F.3d 1011, 1016 (8th Cir. 1999). *But see Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 (10th Cir. 1998) ("Such actions are not simply limited to monetary losses in the form of wages or benefits."); *de la Cruz v. New York City Human Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996) ("[W]e have held that the protections provided by Title VII are not limited to 'instances of discrimination in pecuniary emoluments.'"); *Collins v. Illinois*, 830 F.2d 692, 702-03 (7th Cir. 1987) (collecting cases: "Title VII does not limit adverse job action to strictly monetary considerations. One does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture.").

[4] The term "Independent Medical Examination" (IME) is misleading and a misnomer, since that term is invariably used by employer's counsel to refer to a physician who is hired solely by the employer, to conduct medical examinations at the employer's behest, and whose ability to be hired for future examinations may depend, in part, upon generating favorable results for the employer. A more accurate term would be "Defense Medical Examination" (DME). *See Phillips v. Pris-MM, LLC*, 2009 WL 3022117, at *3 (Del. Super. Ct. Sept. 21, 2009) ("Although in theory, I.M.E. is to be scientific rather than adversarial, experience suggests that it is often the latter. The party being examined may have to respond to limitless questions by a trained representative of the opposing side without check. In most instances, the plaintiff has never met the physician. A physician selected by the defendant to examine plaintiff is not necessarily a disinterested, impartial medical expert, indifferent to the conflicting interests of the parties.") (internal citations and quotations omitted).

of [protected status] in such a way that such person is adversely affected in the area[] of . . . employment." PGHRC § 2-186(a)(3). It does not specify any particular threshold of adversity that must be crossed, nor does it require that the action must result in economic adversity. Requiring that female employees must submit to examination by a strange doctor, picked and paid by the employer, to verify that their medical conditions would not impair their fitness for duty, while male employees could have their fitness for duty verified by their own regular private doctors at their own comfort and convenience, falls within the PGHRC's broad definition of employment discrimination. Imposing the IME requirement on females only constitutes "limit[ing], segregat[ing], classify[ing], or assign[ing]" because of sex. *See* PGHRC § 2-222. Requiring females to jump through higher hoops to establish their fitness for duty (and so keep their jobs) certainly constitutes an adverse effect "in the area of" employment. *See* PGHRC § 2-186(a)(3).

Second, the decision below erred in suggesting that a court can determine *a priori* whether a particular act would or would not constitute employment discrimination: "The case law is clear that imposition of discipline that does not materially affect the terms, conditions, or benefits of employment is not an adverse employment action for purposes of a discrimination claim." *Giant of Maryland LLC*, 188 Md. App. at 34, 981 A.2d at 20 (citing *Thompson*, 312 F.3d at 651; and *Kersting v. Wal-Mart Stores, Inc.,* 250 F.3d 1109, 1115 (7th Cir. 2001)). Assuming *arguendo* this is true under Title VII (which Amici do not concede), Amici respectfully suggest that an employer's conduct must always be evaluated on the facts and circumstances of the case before the court. *See Kersting*, 250 F.3d at 1115 ("Because 'adverse actions can come in many shapes and sizes,' we must consider the particular facts of this case to determine whether [the employee] has suffered a materially adverse employment action.") (citations omitted).[5]

[5] *See also White*, 364 F.3d at 799 ("As we recognized in [a prior decision], however, it is impossible to list every possible employment action that falls into the definition of adverse employment action and a court must consider 'indices that might be unique to a particular situation.'"); *Sanchez*, 164 F.3d at 532 ("The Tenth Circuit liberally defines the phrase 'adverse employment action.' . . . [W]e take a 'case-by-case approach,' examining the unique factors relevant to the situation at hand.") (citations

The ultimate determination of whether an employer's conduct constitutes an "adverse employment action" is a question of fact for the jury. *See MacGregor v. Mallinckodt*, 373 F.3d 923, 928 (8th Cir. 2004) ("Whether there has been an adverse [employment] action is an issue of fact for a jury to determine.").[6] Where an employer imposes a specious requirement upon an employee in order to set up the employee for failure and termination, that is "acting . . . in such a way that such person is adversely affected in the area[] of . . employment." It was for the jury to decide whether Giant had a legitimate non-discriminatory reason for ordering Taylor to submit to an IME – i.e., was it really for "safety" reasons? – or whether requiring Taylor to submit to an IME was merely a pretext – i.e., a way to "set up" her termination for failing the examination conducted by the employer's hired doctor. The jury could certainly apply its own life experience and common sense to conclude that, whether or not anyone ever said it out loud, passing the IME was, in reality, a necessary condition of Taylor's continued employment.[7]

C. A "Materially Adverse" Standard Should Be Used for Maryland State and Local Anti-Discrimination Laws.

The proper definition of actionable conduct under Maryland anti-discrimination laws is a crucial question that affects nearly every discrimination case. This case presents an opportunity for this Court to set forth a standard to determine how "adversely

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omitted); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse.'").

[6] *See also Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 310 F.3d 43, 52 (2d Cir. 2002) ("The jury was entitled to conclude . . . that the transfer had a sufficiently material negative impact on the terms and conditions of [the employee's] employment with the NYPD to constitute an adverse employment action."); *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997) (jury could determine whether job transfer that resulted in salary increase was adverse employment action).

[7] Indeed, the jury instructions in this case on "Adverse Employment Action for Discrimination Claim" actually set forth the "ultimate employment decision" standard, yet Taylor still prevailed. (E. 1997); *see* (Br. of Appellee at Apx. 35 (Jury Instructions)).

affected" the employee must be in order for the employer's conduct to constitute prohibited discrimination. Amici respectfully propose that the "materially adverse action" standard articulated in *Burlington Northern* for retaliation claims best fits the remedial purposes of the PGHRC.

In enacting the PGHRC, the county government sought "to foster and encourage the growth and development of the County in such a manner that all persons shall have an equal opportunity to pursue their lives free of discrimination imposed because of race [or] sex . . . Discriminatory practices based upon the foregoing criteria are declared to be contrary to the public policy of the County." PGHRC § 2-185(a), (b).

A "materially adverse action" is an employer action that would have been materially adverse to a reasonable person in the employee's circumstances. *Burlington Northern*, 548 U.S. at 57, 68. As described by the Supreme Court, the standard should be defined "in general terms because the significance of any given act . . . will often depend upon the particular circumstances. Context matters." *Id.* at 69. As the Court explained, adversity is a relative concept that depends on the unique circumstances of a particular employee:

> "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Id. (citations omitted). Given the varying impact that an employer's actions will have on certain employees, the Court explained that "a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an 'act that would be immaterial in some situations is material in others.'" *Id.* (citations omitted).

Although the *Burlington Northern* standard was adopted for Title VII retaliation cases, it captures a broader range of employer conduct – just as the PGHRC does – than does the "adverse employment action" standard for Title VII discrimination cases. In addition, the *Burlington Northern* standard properly focuses on the facts and circumstances of the particular discriminatory conduct at issue, rather than deciding *a priori* what conduct can or can never be discrimination. *See also Burlington Northern*, 548 U.S. at 71 (explaining that deciding whether an action "is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances") (quotations omitted).

For the foregoing reasons, Amici support Petitioner's request that this Court reject the overly restrictive "adverse employment action" standard set forth in the decision below. Allowing the decision below to stand uncorrected will not only affect discrimination claims brought pursuant to the PGHRC, but also the Howard County Human Rights Code, which contains almost identical anti-discrimination provisions. *See* Howard County Human Rights Code §§ 12.208(I)(a) (defining "Discrimination/discriminatory"), 12.208(II)(a) (setting forth "Unlawful acts of employers"). In addition, although the Montgomery County Human Rights Code and the state anti-discrimination statute more closely track Title VII's language, *see* Mont. Co. Code § 27-19(a); Md. Code Ann., State Gov't § 20-606(a), they too should be construed more generously than Title VII in order to achieve their remedial purpose.[8] *See Haas*,

[8] In particular, the Montgomery County Human Rights Code, like the PGHRC, states that: "The prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law." Mont. Co. Code § 27-1(b). The ordinance also states that: "Montgomery County's policy is to foster equal opportunity for all without regard to race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, or genetic status and ***strictly in accord with their individual merits as human beings***." *Id.* § 27-1(c) (emphasis supplied). These provisions call especial attention to the broad remedial purpose of the Montgomery County Human Rights Code.

396 Md. at 495, 914 A.2d at 750 (construing former Article 49B and holding that, for claims brought pursuant to state statute and local anti-discrimination ordinances, restrictive Title VII statute of limitations rule does not apply). Amici therefore respectfully suggest that this Court adopt the "materially adverse action" standard for the state and local anti-discrimination laws.

III. The Court of Special Appeals Erred in Holding that Comparators Must Be Virtually Identical in All Respects.

A. The Supreme Court has Repeatedly Recognized that the "Similarly Situated" Standard Must Not Be Unduly Narrow.

To help prove her gender discrimination claim under former Maryland Code, Article 49B § 42 (now Md. Code Ann., State Gov't § 20-1202) and the PGHRC, Taylor relied in part upon "comparator" evidence. *Giant of Maryland LLC*, 188 Md. App. at 35-37, 981 A.2d at 21-22. She prevailed on this claim at trial. The Court of Special Appeals reversed, holding as a matter of law that Taylor's proffered comparators were not "similarly situated" to her because they did not need IMEs to establish their fitness for duty. *Id.* at 37, 981 A.2d at 22.

Amici respectfully submit that the most fundamental error committed by the Court of Special Appeals was confusing the question of "Who was similarly situated?" with "What was the discriminatory act?". The employees who were "similarly situated" to Taylor were employees who had medical conditions that could potentially impact their fitness for duty. The discriminatory act was requiring that female truck drivers who had medical conditions that could impact upon their fitness for duty must submit to IMEs to establish their fitness for duty, but not "similarly situated" males. Contrary to the intermediate court's unclear analysis, the issue was not that the male comparators did not ***need*** IMEs, and so were not "similarly situated" to females. Rather, the male comparators – unlike the female truck drivers – were not ***required*** to get IMEs because their own doctors were permitted to certify their fitness for duty. This disparate treatment was the discriminatory act about which Taylor complained. *Id.* at 37-38, 981 A.2d at 22.

Because this is primarily a factual issue, however, Amici anticipate that Petitioner will be better situated to address this error in her own brief.

More pertinent to Amici's interests, the Court of Special Appeals defined "similarly situated" employees without reference to Maryland law as employees who "had to have dealt with the same supervisor, been subject to the same standards, and engaged in conduct that would not distinguish [the employer's] treatment of them from [the employer's] treatment of [the plaintiff]." *Giant of Maryland LLC*, 188 Md. App. at 37, 981 A.2d at 22 (citing *Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1233 (10th Cir. 2009);[9] *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-18 (7th Cir. 2000); and *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998)). In short, the intermediate court held that comparator employees must be virtually identical to the plaintiff in every detail, regardless of whether any particular detail bore any logical relevance to the discrimination claim. Once again, the intermediate court adopted an overly restrictive standard from Title VII case law without considering whether such a standard was appropriate for state and local anti-discrimination law.

At the heart of any discrimination claim is the contention that one has been treated differently because of a protected characteristic. Accordingly, comparative evidence, i.e., evidence that similarly situated persons outside the employee's protected group received more favorable treatment, is often a significant part of the evidence advanced by the employee. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Especially relevant to [a showing of pretext] would be evidence that white employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired.").

The Supreme Court has repeatedly recognized that the standard for whether a comparator is "similarly situated" must be broad enough to permit meaningful comparisons that may (or may not) evidence discriminatory motives, rather than applying a restricted standard that inevitably results in each person ending up in a class by herself.

[9] The *Strickland* citation is actually from the dissent rather than the majority opinion, as will be discussed further *infra*.

For example, in *McDonald v. Santa Fe Trail Transportation Co.*, a disparate discipline case, the Court noted: "Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against (the employer) of [c]omparable seriousness . . . were nevertheless retained . . .' is adequate . . . ." 427 U.S. 273, 283 n.11 (1976) (quoting *McDonnell Douglas*, 411 U.S. at 804).

Along the same lines, in *Miller-El v. Dretke*, a case involving alleged racial discrimination during jury selection, the Court emphasized the probative force of "side-by-side comparisons of some black venire panelists who were struck and white ones who were not." 545 U.S. 231, 241 (2005). The Court observed that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination . . . ." *Id.*[10] The majority rejected the dissent's proposed standard which would require that "'[s]imilarly situated' does not mean matching any one of several reasons the prosecution gave for striking a potential juror – it means matching *all* of them." *Id.* at 247 n.6. (emphasis in original). Instead, as the Supreme Court stated: "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." *Id.* Indeed, such a rule "would leave [the constitutional protections against race discrimination in jury selection] inoperable; potential jurors are not products of a set of cookie cutters." *Id.*

Most recently, in *Sprint/United Management Co. v. Mendelsohn*, the Supreme Court held that evidence of discriminatory conduct suffered by other employees could be admissible to show individual discrimination against the plaintiff, regardless of whether they had the same supervisor. 552 U.S. 379, 388 (2009). The Court rejected the employer's argument and the trial court's apparent ruling that such evidence was *per se*

[10] It is important to note that the Supreme Court cited its earlier decision in *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000), an employment discrimination case, in support of this proposition, illustrating that its discussion of probative comparator evidence was intended to extend broadly across the field of civil rights law, including employment discrimination claims. *See Miller-El*, 545 U.S. at 241.

inadmissible because employees with different supervisors were not "similarly situated" to the plaintiff. *Id.* at 382.

To be sure, courts must be alert to ensure that a proffered comparison is reasonable. However, they need equally to ensure that the utility of this type of proof is not destroyed by reliance on immaterial differences — or differences going only to weight — to exclude the evidence altogether. The "purpose" of anti-discrimination law is "not served by an overly narrow application of the similarly situated standard." *Jackson v. FedEx Corporate Servs., Inc.*, 518 F.3d 388, 396 (6th Cir. 2008). Such a restrictive approach may effectively remove the employee "from the protective reach of the antidiscrimination laws." *Id*. at 397.

B. The Standard Applied by Federal Courts Is Not as Restrictive as the Intermediate Court's Holding.

The cases that the intermediate court cited to support its holding do not stand for the strict standard that it imposed. The intermediate court stated that similarly situated comparators "***had to*** have dealt with the same supervisor, been subject to the same standards, and engaged in conduct that would not distinguish [the employer's] treatment of them from [the employer's] treatment of [the plaintiff]." *Giant of Maryland LLC*, 188 Md. App. at 37, 981 A.2d at 22 (citing *inter alia* the Seventh Circuit's *Radue*, 219 F.3d at 617-18) (emphasis added). The Seventh Circuit in particular, however, has rejected as "too rigid and inflexible" the notion that "similarly situated comparators *must* have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. In other words, they must be essentially identical to the plaintiff, . . . " *Humphries v. CBOCS West, Inc.,* 474 F.3d 387, 404 (7th Cir. 2007) (emphasis in original), *aff'd*, 553 U.S. 442 (2008). As stated by the Seventh Circuit, the similarly situated standard "***should not be applied mechanically or inflexibly."*** *Id.* (emphasis added). In fact, the Seventh Circuit has emphasized that the similarly situated inquiry is a flexible one that considers "all relevant factors, the number of which depends on the context of the case." *Id.* at 405 (citing *Radue*, 219 F.3d at 617). "As to the relevant factors, an employee need not show complete identity in comparing

himself to the better treated employee, but he must show substantial similarity." *Id.* (citing *Radue*, 219 F.3d at 618).

Rather than provide a "magic formula" to determine similarity, the Seventh Circuit instructs that "courts should apply a 'common-sense' factual inquiry – essentially, are there enough common features between the individuals to allow a meaningful comparison?" *Id.* (citations omitted). The purpose of the requirement "is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination." *Id.* The court emphasized:

> It is important not to lose sight of the common-sense aspect of this inquiry. ***It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees – distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions***. . . . In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation . . . .

Id. at 404-05 (citations omitted) (emphasis added).

Similarly, the Sixth Circuit's *Ercegovich* decision does not stand for the extreme proposition stated by the Court of Special Appeals. *Giant of Maryland LLC*, 188 Md. App. at 37, 981 A.2d at 22 (citing *inter alia Ercegovich*, 154 F.3d at 352). Rather, as the Sixth Circuit explained, the comparators need not be "identically situated to the plaintiff in every single aspect of their employment." *Ercegovich*, 154 F.3d at 353. If comparators had to be identically situated, then a "unique" plaintiff could never prove discrimination (absent direct evidence), so that "an employer would be free to discriminate against those employees occupying 'unique' positions. . . ." *Id.* Instead, the Sixth Circuit explained, "we simply require that the plaintiff demonstrate that he or she is similarly-situated to the non-protected employee in all *relevant* respects. A contrary approach would undermine the remedial purpose of the anti-discrimination statutes." *Id.* (emphasis in original).

Finally, the Court of Special Appeal's reliance upon the dissenting opinion (noted *supra*) in the Tenth Circuit's *Strickland* case to define "similarly situated employees" is misguided. *Giant of Maryland LLC*, 188 Md. App. at 37, 981 A.2d at 22 (citing *inter alia Strickland*, 555 F.3d at 1233). The dissent had quoted another Tenth Circuit decision, *Aramburu v. Boeing Co.*, for the proposition that: "Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline." *Strickland*, 555 F.3d at 1233 (dissent) (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997)). The Tenth Circuit subsequently limited its "same supervisor" rule in *Aramburu* to discriminatory discipline cases. *See Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1120 n.11 (10th Cir. 2007) (noting limitation of *Aramburu* by *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1227-28 (10th Cir. 2006)). As aptly noted by the Tenth Circuit in *Mendelsohn*, applying the "same supervisor" rule in contexts other than discriminatory discipline cases "would, in many circumstances, make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence." *Mendelsohn*, 466 F.3d at 1228. As was the Sixth Circuit in *Ercegovich*, the Tenth Circuit in *Mendelsohn* was concerned that requiring "similarly situated" employees to have the same supervisor could unfairly put the plaintiff in a class by herself: *"*Applying *Aramburu* to cases of discrimination based on an alleged company-wide discriminatory RIF would create an unwarranted disparity between those cases where the plaintiff is fortunate enough to have other RIF'd employees in the protected class working for her supervisor, and those cases where the plaintiff is not so fortunate." *Id*. The Tenth Circuit stated: "We do not think such disparity should exist." *Id*.

The high bar for comparator evidence adopted by the Court of Special Appeals effectively and improperly requires that a person claiming discrimination cannot win unless she can find an absolutely identically situated person outside of her class who was treated differently. It is highly improbable that the majority of Maryland employees would ever be able to identify such an "identical twin" in their workplace. That is why other courts have properly looked at comparators who are similar, but not identical, to the

plaintiff. As the Supreme Court stated in *Miller-El*, an overly restrictive standard will render the state and local anti-discrimination laws "inoperable." *See* 545 U.S. at 247 n.6. Amici therefore support Petitioner's request that this Court reject the standard for comparator evidence set forth in the decision below, and urge the Court to adopt the broader standards set forth in *Miller-El* and *Humphries*.

IV. The Court of Special Appeals Erred in Requiring the Employee to Provide Direct Evidence of "Knowledge of Protected Activity."

A. The Jury May Infer Knowledge from Circumstantial Evidence.

Taylor alleged that Giant discharged her from employment on February 28, 2003 in retaliation for having filed a discrimination charge on February 3, 2003. *Giant of Maryland LLC*, 188 Md. App. at 39, 981 A.2d at 23. She prevailed on this claim at trial. The Court of Special Appeals reversed, holding that Taylor had failed to produce any evidence that the *individual* decision-maker(s) involved in her termination had actual knowledge that she had filed the charge. *Id.*

Knowledge is typically a question to be resolved by the trier of fact. Proof that an individual had actual knowledge of a particular fact is notoriously difficult to obtain. Absent a confession or a "smoking gun" document, this knowledge must nearly always be proven by circumstantial evidence. Denials of knowledge are not dispositive, but merely additional evidence to be considered by the jury in assessing the veracity of the witnesses. These concepts are well-established in Maryland law. *See, e.g., Attorney Grievance Comn'n of Maryland v. Glenn*, 341 Md. 448, 485, 671 A.2d 463, 481 (1996) ("Proving a state of mind – here, knowledge – poses difficulties in the absence of an outright admission. However . . . an inculpatory statement is not an indispensable ingredient of proof of knowledge, and . . . circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded.") (internal citations and quotations omitted); *Dawkins v. State*, 313 Md. 638, 651, 547 A.2d 1041, 1047 (1988) ("[K]nowledge may be proven by circumstantial

evidence and by inferences drawn therefrom."); *Clarke v. State*, 9 Md. App. 570, 573, 266 A.2d 359, 361 (1970) (explaining that proof of knowledge that the goods an accused possesses were stolen "may be proved, as any other fact, by evidence establishing that the accused [had] 'actual or direct knowledge' . . . or by circumstantial evidence which permits a rational inference that the accused, although he denies it," knew the goods were stolen.).

As Judge Bell observed in *Owens-Corning Fiberglas Corporation v. Garrett,* "[w]hether the defendant had the requisite knowledge and acted in bad faith are questions of fact to be determined by the trier of fact, in this case, the jury." 343 Md. 500, 553, 682 A.2d 1143, 1169 (1996) (Bell, J., concurring in part and dissenting in relevant part). "Such matters . . . most assuredly, are not matters to be resolved by an appellate court." *Id*. Knowledge is not a question of law, and need not be shown by direct evidence. *Id.* As Judge Bell explained:

> Because a party's state of mind is peculiarly within the power of that party to disclose, or not, as he or she chooses, the other party cannot prove that party's knowledge or bad faith except by circumstantial evidence. Certainly, the party whose actions are under scrutiny cannot, and should not, be permitted, by requiring that the proof be by direct evidence, to determine the outcome of the inquiry.

Id.

Amici respectfully submit that there is no need to carve out a special, restrictive evidentiary rule to show "knowledge" in employment law retaliation cases. Nevertheless, that is precisely what the Court of Special Appeals improperly did in this case. The intermediate court adopted the most restrictive Title VII case law; essentially required the employee to prove by direct evidence that the individual decision-maker had actual knowledge of her protected activity; and then treated denial of knowledge by individuals within the corporation as dispositive. Once again, the court failed to consider the expansive language of the PGHRC and its critical remedial purpose.

B. The PGHRC Does Not Permit an "Empty Head, Pure Heart" Defense.

The opinion below stated, without reference to the PGHRC and without reservation: "Clearly, one person cannot retaliate against another for certain conduct of the other if the person does not know about the other's conduct." *Giant of Maryland LLC*, 188 Md. App. at 40, 981 A.2d at 24. That statement, however, conflicts with the PGHRC's anti-retaliation provision:

> No person shall retaliate, or cause or coerce, or attempt to cause or coerce, any other person to retaliate against any person because such person has lawfully opposed any act or failure to act that is a violation of this Act or has, in good faith, filed a complaint, testified, participated, or assisted in any way in any proceeding under this Act.

PGHRC § 2-209. Per the plain terms of the PGHRC, a person without knowledge of an employee's protected activity can indeed retaliate when "cause[d] or [coerced]" to do so by a person with knowledge. Thus the PGHRC explicitly negates the "empty head – pure heart" defense; an employer that knows of the employee's protected activity cannot escape liability for retaliation merely by having an "innocent" supervisor perform the termination. *Cf. Worldwide Network Servs., LLC v. DynCorp Int'l, LLC*, 2010 WL 489477, at *7 (4th Cir. Feb. 12, 2010) (stating that Fourth Circuit precedent "does not enable [the employer] to self-select the decisionmaker whose motives are the purest"); *Reeves v. Safeway Stores, Inc.,* 121 Cal. App. 4th 95, 116, 16 Cal. Rptr. 3d 717, 733 (2004) (collecting cases: "We have no doubt that California law will follow the overwhelming weight of federal authority and hold employers responsible where discriminatory or retaliatory actions by supervisory personnel bring about adverse employment actions through the instrumentality or conduit of other corporate actors who may be entirely innocent of discriminatory or retaliatory animus.").

The opinion below also inaccurately pronounced: "It is well settled that for an employee to prove a causal connection between an adverse employment action and protected conduct, she must show that the relevant actors involved in the adverse employment action had knowledge that she had engaged in the protected conduct." *Giant*

of Maryland LLC, 188 Md. App. at 39-40, 981 A.2d at 23 (citing *Gorum v. Sessoms*, 561 F.3d 179, 188 (3d Cir. 2009); and *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 883 (5th Cir. 2003)). As before, this overstates the uniformity of federal law. The Second, Ninth, and Eleventh Circuits, for example, do not require the employee to prove separately that the employer had knowledge of her protected activity; rather, the employer's knowledge can be inferred from temporal proximity between the employee's protected activity and the employer's retaliatory act, and temporal proximity alone can satisfy the employee's ultimate burden of proof of a causal connection. *Cifra v. General Electric Co*., 252 F.3d 205, 217 (2d Cir. 2001); *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1119 (11th Cir. 2001); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000).

Furthermore, to the extent that the employee does need to show the employer's knowledge of her protected activity, the Second Circuit has stated: "Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity." *Kessler v. Westchester County Dep't of Soc. Servs.,* 461 F.3d 199, 210 (2d Cir. 2006) (quoting *Gordon v. New York City Bd. of Educ.,* 232 F.3d 111, 116 (2d Cir. 2000)). The knowledge element is satisfied when the employee has "complained directly" to another employee "whose job it was to investigate and resolve such complaints." *Patane v. Clark*, 508 F.3d 106, 115 (2d Cir. 2007) (per curiam); *see also Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1178 (2d Cir. 1996) (employee's complaints of gender discrimination to corporate officer imputed knowledge to corporation as a whole). "A jury . . . can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge." *Gordon*, 232 F.3d at 117; *see also Alston v. New York City Transit Auth.*, 14 F. Supp. 2d 308, 311 (S.D.N.Y. 1998) ("[A]n individual NYCTA employee's ignorance of plaintiff's

complaints cannot serve to obfuscate the NYCTA's general corporate knowledge of such actions.").

C. The Circumstantial Evidence Before the Jury Supported a Finding of Knowledge.

In this case, the jury concluded that there was a causal connection between Taylor's protected activity and her termination. At least three pieces of evidence supported the jury's conclusion:

First, Ted Garrett, senior manager in Giant's Fair Employment Office, whose responsibilities included "internal investigations of harassment/discrimination in the workplace, . . . deal[ing] with external agencies, any federal, state or local agencies where there's charges of discrimination and harassment brought against the company, [and] perform[ing] litigation support through attorneys with outside counsel" (E.1400), received Taylor's charge of discrimination on February 7, 2003. *Giant of Maryland LLC*, 188 Md. App. at 15, 981 A.2d at 9. This was sufficient to establish the corporate entity's knowledge of Taylor's protected activity. *See Patane*, 508 F.3d at 115; *Reed*, 95 F.3d at 1178.

Second, Garrett actively participated in Taylor's grievance meetings, including one which directly involved Eric Weiss, Vice President of Labor Relations for Giant. *Giant of Maryland LLC*, 188 Md. App. at 10, 981 A.2d at 6. Weiss thereafter was actively involved in the events leading up to Taylor's termination, including working with Josie Smith, Giant's Human Resources Manager for Distribution. *Id.* at 13, 981 A.2d at 8. Smith fired Taylor. *Id.* at 16, 981 A.2d at 10. Pursuant to PGHRC § 2-209, a jury could infer from the chain of events and relationships that there was general corporate knowledge of Taylor's protected activity, or even that Smith acted explicitly or implicitly upon the orders of superiors who had the requisite knowledge. *See Patane*, 508 F.3d at 115; *Gordon*, 232 F.3d at 117; *Reed*, 232 F.3d at 1175. Smith and Weiss's denial of knowledge, *see* 188 Md. App. at 15-16, 981 A.2d at 9-11, was not dispositive. *Gordon*, 232 F.3d at 117; *Alston*, 14 F. Supp. 2d at 311. Rather, their denials were

merely one factor to be considered by the jury in assessing the veracity of the employer's witnesses.

Third, Giant received Taylor's charge of discrimination on February 7, 2003, and discharged her only three weeks later on February 28, 2003. *Giant of Maryland LLC*, 188 Md. App. at 15-16, 981 A.2d at 9-11. This temporal proximity alone could satisfy Taylor's ultimate burden of proof of a causal connection between filing her charge of discrimination and her termination. *See, e.g., Cifra*, 252 F.3d at 217 (20-day lapse between protected activity and termination was sufficient to prove causal connection). In any event, taking the temporal proximity in combination with the evidence of general corporate knowledge of Taylor's protected activity, a jury certainly could conclude that the employer had the requisite knowledge to be liable for retaliation under the expansive terms of PGHRC § 2-209. *See Kessler*, 461 F.3d at 209-10.

In sum, where, as here, the jury heard ample evidence of general corporate knowledge and temporal proximity, and then found that the causal element of retaliation was proven by a preponderance of the evidence, the jury could reasonably infer that the decision-maker had sufficient actual or constructive knowledge of the employee's protected activity to retaliate.

Amici therefore support Petitioner's request that this Court reject the intermediate court's requirement that the employee must present direct evidence of actual knowledge of her protected activity by the individual decision-maker(s) in order to prove retaliation. This requirement would effectively force the employee to produce a confession or "smoking gun" document in every case, would improperly allow employers to escape liability by cherry-picking an ostensibly neutral decision-maker in order to insulate the biased supervisor from the discriminatory or retaliatory act. Circumstantial evidence, including general corporate knowledge and/or temporal proximity should suffice to establish the link between the employee's protected activity and the employer's retaliatory act. Amici respectfully suggest that this Court adopt the broad standards set forth in *Gordon* and its progeny in construing the state and local anti-retaliation laws.

V. Section 301 of the Labor Management Relations Act Does Not Preempt Taylor's Discrimination and Retaliation Claims.

The Court of Special Appeals – ignoring controlling precedent from this Court and the U.S. Supreme Court – engaged in an incorrect analysis of preemption law under Section 301 of the Labor Management Relations Act, codified at 29 U.S.C. § 185(a). In this case, Taylor filed claims based upon her non-negotiable right to be free from discrimination and retaliation under state and county law. It is well-established that § 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law . . . ." *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994). As described below, courts have consistently held that discrimination and retaliation claims similar to the claims asserted here are not preempted by § 301.

The Court of Special Appeals instead created a new § 301 preemption standard — one that is unsupported by federal law. This new standard somehow distinguishes between contract "interpretation" and "application" and focuses, entirely in hindsight, upon the employee's factual "presentation" at trial rather than the required *legal* elements of the plaintiff's discrimination and retaliation claims.

A. The Decision Below Contradicts the Purposes of § 301 Preemption Law.

Section 301 provides, in pertinent part, that: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185(a) (2009).

On its face, § 301 confers permissive federal court jurisdiction for claims alleging violations of CBAs.[11] The Supreme Court has interpreted § 301 "as a congressional

[11] Contrary to representations by Giant's counsel in its briefing below, § 301 does not confer *exclusive* federal court jurisdiction. (*See* Giant Reply Br., at 2.) State and federal courts have concurrent jurisdiction over § 301 contract claims, but state courts must apply federal common law when interpreting labor contract provisions. *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 506-07 (1962); *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 403 (1988).

mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (holding state courts must apply federal law in § 301 cases). Thus, suits alleging a violation of a labor contract must be filed under § 301, and state courts considering suits that allege a violation of a labor contract provision must apply federal common law, rather than state law contract principles. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95 (1962).

The purpose of § 301 preemption is not to displace state workplace or civil rights laws, but to promote uniform interpretation of federal labor standards. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 (1988). As the Supreme Court has emphasized, § 301 preemption "'should not be lightly inferred'" because "the establishment of labor standards falls within the traditional police power of the State.'" *Id.* at 412 (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)). In fact, Congress "has never exercised authority to occupy the entire field in the area of labor legislation." *Lueck*, 471 U.S. at 208. "Section 301 preemption merely ensures that federal law will be the basis for interpreting CBAs, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Lingle*, 486 U.S. at 409.

Most relevant to the dispute here, the Supreme Court has "underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Livadas*, 512 U.S. at 123. And, "§ 301 does not disable state courts from interpreting the terms of collective-bargaining agreements in resolving non-pre-empted claims." *Id.* at 124 n.17.

It is well-established that "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'" *Lueck*, 471 U.S. at 209 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

Here, Congress has expressed no intention to preempt state and local discrimination and retaliation codes with § 301 of the Labor Management Relations Act. In fact, Congress affirmatively endorsed state antidiscrimination remedies in a later federal statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(c) and 2000e-7. *Lingle*, 486 U.S. at 412. As noted by federal courts, "[i]t should be self-evident that if Congress did not preempt state civil rights actions by operation of federal civil rights law it could not have meant to do so through federal labor law." *Tisdale v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Can., Local 704*, 25 F.3d 1308, 1312 (6th Cir. 1994).

In this case, Ms. Taylor asserted rights under state and local law that the collective-bargaining agreement did not, and could not, waive. These non-negotiable rights to be free from discrimination and retaliation arose from independent state and local regulations, not from the CBA. The resolution of these claims was not controlled by any provision of the labor contract. Section 301 preemption therefore does not apply.

B. Section 301 Preemption Analysis Examines the Required Legal Elements of Plaintiff's Claims, Not the Factual Proof at Trial.

To reach its decision, the Court of Special Appeals improperly focused on the plaintiff's factual "prosecution" and "presentation" of evidence at trial, rather than the required legal elements of her claims.[12] The court erred both in the preemption analysis that it applied, and its *post hoc* transformation of plaintiff's discrimination and retaliation claims into some type of unarticulated common-law breach of contract claim.

To evaluate whether § 301 preempts a state claim, the Supreme Court has "stressed that it is the *legal* character of a claim, as 'independent' of rights under the collective-bargaining agreement, . . . that decides whether a state cause of action may go forward." *Livadas*, 512 U.S. at 123-24 (emphasis added). The Court has explained that "Section 301 governs claims founded directly on rights created by collective-bargaining

[12] *See Giant of Maryland LLC*, 188 Md. App. at 28, 981 A.2d at 16 (focusing on "Taylor's theory of prosecution" and "presentation of her case" at trial rather than the required legal elements of the discrimination and retaliation claims.)

agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (citations omitted).

In other words, Section 301 preemption applies only where resolution of the plaintiff's legal claims is *contingent* on the terms of a CBA. For example, the Supreme Court held that a union employee's assertion of bad-faith handling of an insurance claim under state tort law was preempted because the right involved the employer's failure to make payments under the negotiated disability plan in the CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 216 (1985). In *Lueck*, the right asserted by the employee derived from and was rooted in the collective bargaining agreement itself, and the employee could have pled an identical claim as a contract claim under § 301. *Id.* at 220.

Here, in contrast, Ms. Taylor asserted a statutory right to be free from discrimination and retaliation. These rights do not arise from – and are completely independent from – the CBA. Indeed, unlike the contract in *Lueck,* the provision on which the intermediate court focused – Article 22.7 – does not confer *any* right to be free from discrimination and retaliation. (*See* E. 2482.) Thus, Ms. Taylor's legal claims are not rooted in, and do not arise from, the collective-bargaining agreement.[13]

[13] In its briefing below, the defendant cited unique discrimination cases in which Section 301 preemption was found because the plaintiffs sought remedies (such as promotions) or asserted a claim that was controlled by provisions in CBAs. These cases are distinguishable from Ms. Taylor's discrimination and retaliation claims here, which arose solely from county and state anti-discrimination law – independent of the CBA – and the remedy for which did not depend on any CBA provision. *See, e.g., Audette v. Int'l Union*, 195 F.3d 1107 (9th Cir. 1999) (finding rights asserted arose from CBA where plaintiffs alleged their Union and employers discriminated against them by denying them their right to a certain labor classification); *Davis v. Johnson Controls*, 21 F.3d 866, 868 (8th Cir. 1994) (finding rights asserted arose from CBA where state disability discrimination law required the court to consider "the authority to make the accommodation under the terms of any bona fide agreement" and thus required analysis of the CBA to determine whether accommodation was reasonable); *Reece v. Houston Lighting & Power Co.*, 79 F.3d 485, 486-87 (5th Cir. 1996) (finding rights asserted arose from CBA where plaintiffs sought promotions, training, and seniority, the terms of which were controlled by the CBA).

The key question for § 301 preemption analysis is whether resolution of the legal claims asserted by Ms. Taylor – here, discrimination and retaliation – *required* interpretation of the CBA. *Lingle,* 486 U.S. at 405-06. For example, in *Lingle*, the Court held that the tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301. The Court explained that "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes." *Id.* at 409-10.

Where – as here – the employee's claims are based on non-negotiable state rights, and the employee need not rely on the CBA to state a *prima facie* case, the claims are not preempted as a matter of law. *See Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 449 (4th Cir. 2004) (finding no preemption when discrimination claim only required plaintiff to prove discriminatory motive, not breach of CBA); *Smolarek v. Fleming*, 879 F.2d 1326, 1333 (6th Cir. 1989) (same).

Claims that turn on *factual* questions about the employer's motivation and intent also are not preempted by § 301. For example, in *Harless v. CSX Hotels, Inc.*, an employee brought state-law discrimination and retaliation claims against his former employer after he was terminated. 389 F.3d at 446. The employer responded by asserting that it terminated the employee for violating attendance provisions of the CBA. *Id.* The employer then argued that the state-law claim was preempted because the trier of fact would have to interpret the CBA to determine whether the employer had the right to fire the plaintiff. *Id.* at 447. The Fourth Circuit, however, held that the employer's defense did not preempt the state-law claim. *Id.* at 449. The court stated that "the Supreme Court and this Court have recognized that § 301 does not preempt a claim alleging discriminatory discharge when, as here, the claim turns on the employer's motivation for firing the plaintiff, a question of fact that does not depend on an interpretation of the CBA." *Id.* (citing *Lingle*, 486 U.S. at 407 and *Owen v. Carpenters' Dist. Council,* 161 F.3d 767, 775 (4th Cir. 1998)). Other federal circuits have likewise

held that claims of discrimination and retaliation – governed by the factual question of whether the employer had a discriminatory intent – are not preempted by § 301. For example, in *Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392 (4th Cir. 1994), the Fourth Circuit held that § 301 did not preempt a disability discrimination claim under Maryland's former Article 49B[14] because the nonnegotiable right to be free from discrimination and the right to reasonable accommodation existed independent of the CBAs.[15] *Id.* at 1400-01.

In this case, Ms. Taylor's discrimination claim is based squarely on her non-negotiable right to be free from discrimination under state law. *Giant of Maryland LLC*, 188 Md. App. at 6, 15, 981 A.2d at 4, 9. To succeed in her discrimination and retaliation claims, Ms. Taylor did not need to prove the meaning of any provision in the CBA. Rather, Ms. Taylor only needed to show that Giant's motivation for requiring her to submit to an independent medical examination was discriminatory.

In addition to concocting an improper preemption standard, the court was wrong in its representation of Ms. Taylor's claims. Ms. Taylor's legal claims – as evidenced in her complaint and as presented throughout trial – were that Giant discriminated against her by treating her less favorably than white male drivers with medical conditions, and that Giant discharged her after she filed her Charge of Discrimination. The plaintiff's

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[14]Article 49B is now codified at Md. Code, State Gov't 20-101, *et seq.* (2009).

[15] *See also Trevino v. Ramos*, 197 F.3d 777 (5th Cir. 1999) (holding employee's claim of retaliatory discharge under Texas Workers' Compensation Act not preempted because primary issue was factual question of employer's motivation); *Owen v. Carpenter's Dist. Council*, 161 F.3d 767, 775 (4th Cir. 1998) (finding § 301 did not preempt plaintiff's sex discrimination claim because the claim involved "purely factual questions concerning her conduct and the motivation of [the employer] in reaching his decision to discharge [her]); *Price v. Goals Coal Co.*, 1998 U.S. App. LEXIS 18769 (4th Cir. 1998) (finding § 301 did not preempt plaintiff's state age discrimination claim); *Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993) (finding that § 301 did not preempt a state tort claim of intentional infliction of emotional distress); *Eldridge v. Felec Servs., Inc.*, 920 F.2d 1434, 1339-40 (9th Cir. 1990) (holding retaliation and contract claims not preempted because primary issue of employer's motivation could be determined without reference to the CBA).

Second Amended Complaint – which sets forth the legal basis of the suit – alleges discrimination and retaliation, **not** a contract claim based on the CBA. (E. 31-72.) At trial, the opening statement by plaintiff's counsel did not mention the CBA, and explained plaintiff's theory of the case: Giant forced her to be examined by the company's "hand-picked" doctor for her medical condition, but did not force white male drivers to do the same. (E. 456-57; 473-77.) The jury instructions did not require the jury to interpret the meaning of any provision in the CBA. (Br. of Appellee, Apx. at Attachment 2.) The verdict sheet did not refer to collective-bargaining agreement and did not require jury to interpret the CBA. (E. 2131-32.) Rather, the jury was asked whether Giant discriminated against Ms. Taylor on the basis of race or gender, and whether Giant retaliated against her after she filed her charge of discrimination. (*Id.*) Thus, the jury's verdict in favor of Taylor on her discrimination and retaliation claims did not require interpretation of the CBA.

Indeed, Article 22.7 of the CBA was first raised at trial by Giant's counsel in her opening statement *as a defense*. (E. 486.) Giant had relied on Article 22.7 when it ordered Ms. Taylor to submit to a medical examination. (E. 1199-1201; 2349). Ms. Taylor was entitled to introduce factual proof about the collective-bargaining agreement at trial to show that Giant was using Article 22.7 as a pretext for discrimination. Ms. Taylor was not asserting any *rights* under Article 22.7 – her employer was. The legal rights asserted by Ms. Taylor arose solely from statutory anti-discrimination law, wholly independent from the CBA.

Ultimately, however, the terms of the CBA were irrelevant and unnecessary to the *prima facie* showing and resolution of her discrimination and retaliation claims. Whether Giant had a right, or did not have a right, under the CBA to order employees to submit to a medical examination does not resolve the issue of whether Giant discriminated against Ms. Taylor by treating her less favorably than similarly-situated white male employees, or whether Giant retaliated against her for filing a discrimination charge. Section 301 preemption does not apply when the issue of whether or not the CBA was violated would not be determinative of the plaintiff's state law claims. *See Finch v. Holladay-Tyler*

Printing, Inc., 322 Md. 197, 205, 586 A.2d 1275, 1279 (1991) (holding that Section 301 does not apply to state wrongful discharge claim "when there is no need to construe the CBA or when the issue of whether or not the CBA was violated is irrelevant to the abusive discharge action").

This Court's decision in *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992) – a decision not cited by the court below – also provides guidance here. In *Batson*, the court held that § 301 preemption did not apply to plaintiff's claims that his Union defamed him in leaflets and speeches during the course of a heated labor dispute. *Id.* at 692, 602 A.2d at 1195. On appeal, the Union argued that § 301 preempted the plaintiff's claims because the plaintiff had to reference the Union's Constitution and By-laws in state court proceedings to prove the truth or falsity of the supposed defamatory statements. *Id.* at 718, 602 A.2d at 1208. This court rejected the Union's contention on two grounds. *Id.* First, the Court held that the plaintiff's amended complaint, which eliminated the accusation of "illegal contract ratification" as a basis for defamation, took the plaintiff's claims outside the ambit of § 301 preemption. *Id.* Second, the Court reasoned that even assuming that it was necessary for the state trial court to consult the Union's Constitution and By-laws, the plaintiff's claims were not substantially dependent upon the analysis of the terms of those documents. *Id.* at 718-19, 602 A.2d at 1208.

As in *Batson*, the jury below was never asked to determine the validity of a collective bargaining agreement. Just as Giant referred to the CBA to assert its right to order an IME (E. 1199-1201; 2349), the Union in *Batson* referred to its Constitution and By-laws to justify its allegedly defamatory statements. In both cases, "the role of any labor contract in th[e] dispute was, at most, tangential." *Id.* at 720, 602 A.2d at 1209. Just like Taylor's claims of discrimination and retaliation, Batson's claims of libel, slander, and intentional infliction of emotional distress were rights that existed under Maryland law, independent of any labor contract provision. *Id.* at 721, 602 A.2d at 1210. As in *Batson*, therefore, Taylor's claims were not "inextricably intertwined with consideration of the terms of the labor contract." *Id.* (citing *Lueck*, 471 U.S. at 213).

C. Section 301 Preemption Does Not Apply When the Employer's Defensive Use of the CBA May Be a Pretext for Discrimination or Retaliation.

The Court of Special Appeals seemed to conclude, erroneously, that Ms. Taylor's references to the CBA in her factual presentation at trial somehow stated to a breach of contract claim that required the state court to interpret provisions of the CBA. The court failed to recognize that a plaintiff may refer to the CBA to rebut the employer's defense, *Caterpillar*, 482 U.S. at 398, or to prove the elements of non-preempted state law claims. *Livadas*, 512 U.S. at 124 n.17 ("§ 301 does not disable state courts from interpreting the terms of collective-bargaining agreements in resolving non-pre-empted claims.")

Section 301 does not preempt a state-law claim when the employer merely relies upon a CBA as an affirmative defense. In *Caterpillar*, several employees of a tractor company were demoted from management positions to unionized positions. 482 U.S. at 390. The employees brought state-law claims against their employer alleging a breach of individualized employment contracts. *Id.* In response, the employer asserted that the CBA extinguished all previous employment contract claims. *Id.* The employer further argued that its defense, based on the CBA, mandated § 301 preemption and gave rise to federal question jurisdiction. *Id.* The Court flatly rejected these arguments. Recognizing that such a defense might require the state court to interpret the CBA, *id.* at 398, the Court held that a defendant could not transform state-law claims into a federal lawsuit "merely by injecting a federal question" into a state-law claim. *Id.* at 398-99.

As the Supreme Court has stated: "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Lueck*, 471 U.S. at 211. The CBA need not be completely irrelevant to the dispute, and the parties may refer to a CBA as part of their factual proof at trial to establish their credibility. *Wells v. General Motors Corp.*, 881 F.2d 166, 175 (5th Cir. 1989) (holding state-law contract and fraudulent inducement claims were not preempted by § 301). But, where the employee's "state law claims are founded upon contractual rights or common-law rights independent of those which the [CBA] creates, a defense that relies upon the provisions of a [CBA]

does not invoke federal preemption unless that agreement contains provisions that govern, or reasonably might be construed as governing, the circumstances at hand." *Id.* at 174. *See also Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192, 197 (7th Cir. 1989) (holding § 301 did not preempt retaliation claim, even though defendants asserted in defense that discharge rested on ground of physical incapacity based in collective bargaining agreement, because plaintiff's claims *could* be evaluated without interpreting agreement).[16]

Likewise, in *Finch v. Holladay-Tyler Printing, Inc.*, this Court held that § 301 did not preempt a state-law claim when the employer relied on the CBA as an affirmative defense. 322 Md. 197, 207, 586 A.2d 1275, 1280 (1991). There, a plaintiff claimed wrongful discharge under Maryland law prohibiting an employer from discharging an employee "solely" in retaliation for filing a workers' compensation claim. *Id.* at 198-200, 586 A.2d at 1276-77. The employer argued that it did not terminate the plaintiff "solely" in retaliation for his workers' compensation claim because it terminated him in

[16] Other federal courts have also consistently held that the existence of a potential defense based on the CBA does not trigger § 301 preemption. *See, e.g., DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) (finding that the fact that a provision of the CBA provides a potential defense to the plaintiff's state law claim will not trigger § 301 preemption); *Nelson v. Central Ill. Light Co.,* 878 F.2d 198, 203 (7th Cir. 1989) (holding employee's state law claim that he had been wrongfully discharged for exercising rights under Illinois Workers' Compensation Act was not preempted by federal labor law, even though CBA expressly addressed workers' compensation matters, and though employer could possibly assert defense arising under CBA); *Dalton v. Jefferson Smurfit Corp.*, 979 F. Supp. 1187, 1200 (S.D. Ohio 1997) (holding employee's retaliation claim under Ohio law existed independently from CBA, and was not preempted by § 301, despite employer's argument that it would rely on provisions of agreement when proffering legitimate, nondiscriminatory reason for its discipline of the employee); *Graef v. Chemical Leaman Tank Lines*, 860 F. Supp. 1170, 1174 (E.D. Tex. 1994) (finding employer's potential reliance on CBA as a defense to justify its actions against employee did not transform state claim that employer retaliated against employee for filing workers' compensation claim into claim that is preempted by § 301).

accordance with CBA procedure.[17] *Id.* at 200, 586 A.2d at 1277. Based on its CBA defense, the employer asserted that the employee should have exhausted his arbitration remedies and that the claim should be preempted. *Id.* at 202, 586 A.2d at 1278.

In response to the employer's defense, the court stated that "[w]hile it is possible, indeed probable, that Employer comported with the terms of the CBA, it does not necessarily follow that the discharge was not abusive." *Id.* at 206, 586 A.2d at 1280. The court reasoned that even if the employer had followed CBA discharge procedures and had not breached the CBA, the plaintiff could still recover under his wrongful discharge claim if "the layoff procedures, although permissible under the CBA, were utilized solely as a pretext" to discharge plaintiff for filing his workers' compensation claim. *Id.* at 207, 586 A.2d at 1280.

In sum, Giant's reliance on a labor contract provision as a defense, and Ms. Taylor's efforts to rebut that defense, does not result in § 301 preemption because interpretation of the CBA is not *required* to resolve her discrimination and retaliation claims. Plaintiff was entitled to present factual evidence regarding the collective-bargaining agreement to challenge the employer's credibility and intent. But, as in *Finch*, whether Giant complied with the CBA or not was a tangential issue that was not ultimately dispositive of her discrimination and retaliation claims. Whether Giant had a right, or did not have a right, under the CBA to order employees to submit to a medical examination simply has nothing to do with whether Giant discriminated against Ms. Taylor by treating her less favorably than similarly-situated white male employees, or whether Giant retaliated against her for filing a discrimination charge. This case is not about Giant's "right" to order an IME per the CBA; it is about Ms. Taylor's statutory right to be free from discrimination and retaliation. Analogously, an employer has a

[17] The court noted that the employer erroneously assumed that "regardless of whether the layoff was structured for the sole purpose of retaliating against Finch, it is vindicated if it was properly executed under the CBA. It ignores the possibility that, in the circumstances at bar, the outcome of any grievance process may not govern the issues in his abusive discharge claim." *Id.* at 202, 586 A.2d at 1278.

"right," for example, to discipline employees for misconduct – whether or not there is a CBA – but an employer may not discipline female employees more harshly than male employees for the comparable misconduct, because *that* is discrimination. An employer has a "right" to fire an employee for refusing to obey the employer's lawful direction – whether or not a CBA exists – but an employer may not fire an employee for filing a charge of discrimination, because *that* is retaliation.

For these reasons, Amici respectfully urge the court to hold that § 301 preemption does not apply here, and should not apply to other Maryland employees who bring discrimination and retaliation claims under state and local statutes, where resolution of those claims do not require interpretation of a CBA.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, as well as the reasons set forth in the Brief of Petitioner Taylor, Amici respectfully suggest that this Honorable Court vacate or reverse the decision of the Court of Special Appeals.

Respectfully submitted,

Julie Glass Martin-Korb
Julie Glass Martin-Korb, Esq.
7836 Rydal Terrace
Rockville, Maryland 20855-2058
(301) 775-6688
topattorney@hotmail.com

Deborah Thompson Eisenberg
Deborah Thompson Eisenberg, Esq.
University of Maryland School of Law
Room 333
500 West Baltimore Street
Baltimore, Maryland 21202
(410) 706-5995
deisenberg@law.umaryland.edu

Alan R. Kabat
Alan R. Kabat, Esq.
Bernabei & Wachtel, PLLC
1775 T Street, N.W.
Washington, D.C. 20009-7124
(202) 745-1942 (ext. 242)
Kabat@BernabeiPLLC.com

Attorneys for MELA/MWELA
Amici Curiae

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APPENDIX

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The following pertinent statutes and ordinances were referred to in the Brief of Amici Curiae, and the text has been provided below:

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Md. Ann. Code of 1957 Art. 49B § 42. Civil suits for discriminatory acts

(a) In Montgomery County, Prince George's County, and Howard County, in accordance with this subtitle, a person who is subjected to an act of discrimination prohibited by the county code may bring and maintain a civil action against the person who committed the alleged discriminatory act for damages, injunctive relief, or other civil relief.

(b) (1) An action under subsection (a) of this section shall be commenced in the circuit court for the county in which the alleged discrimination took place not later than 2 years after the occurrence of the alleged discriminatory act.

(2) Subject to the provisions of paragraph (1) of this subsection, an action under subsection (a) of this section alleging employment or public accommodation discrimination may not be commenced sooner than 45 days after the aggrieved person files a complaint with the county agency responsible for handling violations of the county discrimination laws.

(3) Subject to the provisions of paragraph (1) of this subsection, an action under subsection (a) of this section alleging real estate discrimination may be commenced at any time.

(c) In a civil action under this section, the court, in its discretion, may allow the prevailing party reasonable attorney's fees, expert witness fees, and costs.

DIVISION 12. HUMAN RELATIONS COMMISSION.

Sec. 2-185. Human Relations Commission; purpose.

(a) It shall be a function of the County government to foster and encourage the growth and development of the County in such a manner that all persons shall have an equal opportunity to pursue their lives free of discrimination imposed because of race, religion, color, sex, national origin, age, occupation, marital status, political opinion, personal appearance, sexual orientation, physical or mental handicap, or familial status. Discriminatory practices based upon the foregoing criteria are declared to be contrary to the public policy of the County.

(b) The County government shall direct its efforts and resources toward eliminating discriminatory practices within the County in the areas of housing, employment, law enforcement, education, public accommodations, commercial real estate, and any other facets of the lives of its citizens where such practices may be found to exist.

(c) It is intended that the prohibitions in this Division are substantially similar, but not necessarily identical, to prohibitions in federal and State law. The intent is to assure that a complaint filed under this Division may proceed more promptly than possible under either federal or State law. It is not County policy, however, to create a duplicative or cumulative process to those existing under similar or identical federal or State laws. Once a complaint is fully adjudicated under a similar or identical federal or State law, the complaint should not be reprocessed under this Division if the effect is duplicative or cumulative.
(CB-1-1972; CB-48-1976; CB-30-1990; CB-23-1991)

Sec. 2-186. Definitions.

(a) As used in this Division:

(1) **Act** shall mean the law established hereunder, and any subsequent legislative act or executive order which lawfully assigns a responsibility to the Commission to eliminate discrimination or the denial of civil rights.

(2) **Commission** shall mean the Human Relations Commission.

(3) **Discrimination** shall mean acting, or failing to act, or unduly delaying any action regarding any person because of race, religion, color, sex, national origin, age (except as required by State or federal law), occupation, familial status, marital status, political opinion, personal appearance, sexual orientation, or physical or mental handicap, in such a way that such person is adversely affected in the areas of housing and residential real estate, employment, law enforcement, education, financial lending, public accommodations, or commercial real estate.

(4) **Dwelling** shall mean any building or structure, or portion thereof which is designed, intended, or arranged for use or occupancy as a home, residence, or sleeping place of one (1) or more individuals.

(5) **Employer** shall mean any person engaged in commerce, industry, agriculture, or a lawful profession, who for compensation has hired or contracted for the services of one (1) or more employees, for a total of forty (40) or more hours in the current or preceding calendar year, and an agent of such person. Employer does include the County of Prince George's to the extent provided in this Division.

(6) **Employment agency** shall mean any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person, but shall not include any agency of the Federal or State governments.

(7) **Executive Director** shall mean a person appointed by the County Executive to supervise the staff and advise and assist the Human Relations Commission in its functions, and who shall serve at the pleasure of the County Executive

(7.1) **Familial status** shall mean one or more individuals (who have not attained the age of 18 years) being domiciled with a parent or another person having legal custody of such individual or individuals; or the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall be extended to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(8) **Housing** shall mean any dwelling for the use of one (1) or more individuals, groups or families, any mobile home site, and any land offered for sale or lease for the construction of such dwelling, building, structure, or mobile home site.

(9) **Informal hearing** shall mean any inquiry, forum, investigation, or meeting at which compulsory processes are not invoked and a record is not prepared for the purpose of providing the basis of the Commission's compulsory processes. Informal hearings are not required to be open to public or press.

(10) **Labor organization** shall mean a person or organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(11) **Lending Institution** shall mean any bank, insurance company, savings and loan association, or any other person or organization regularly engaged in the business of lending money or guaranteeing loans within the County.

(12) **Occupation** shall mean the principal lawful activity of one's life. Persons to be protected include but are not limited to students, welfare recipients, retired persons, physically or mentally handicapped persons as defined in this Division, and any persons irrespective of income, who are denied the equal protection of the laws.

(13) **Person** shall include one (1) or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, agents, or receivers.

(14) **Personal appearance** shall mean the outward appearance of any person irrespective of sex with regard to hair style, beards, or manner of dress. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire when uniformly applied for admittance to a public accommodation or a class of employees for a customary or reasonable business.

(14.1) **Physical or mental handicap** shall mean an impairment which substantially limits one or more of such person's major life activities, or a record of having such an impairment, or being regarded as having such an impairment, which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impediment, or physical

reliance on a seeing eye dog, wheelchair, or other remedial appliance or device; and any mental impairment or deficiency such as, but not limited to, retardation or such other condition which may have necessitated remedial or special education and related services; but such term does not include current, illegal use of, or addiction to, a controlled dangerous substance as defined by Maryland law.

(14.2) **Place of public accommodation** shall include, but not be limited to, any wholesale or retail store, inn, hotel, motel, or other establishment which provides lodging to transient persons; or any restaurant, cafeteria, lunch room, lunch counter, soda fountain, or other facility at which food or alcoholic beverages are sold for consumption on the premises; or any gasoline station, motion picture house, theatre, concert hall, sports arena, stadium, or place of exhibition or entertainment.

(15) **Political opinion** shall mean the opinions of persons relating to government, or the conduct of government; or related to political parties authorized to participate in primary elections in the State.

(15.1) **Sexual Orientation** shall mean the preference or practice of an individual as to male or female homosexuality, heterosexuality, or bisexuality, or being regarded or identified as having such a preference.

(16) **Solicit** shall mean to request, invite, or induce, for monetary gain, by the following means:

(A) Going in or upon the property of the person to be solicited, except when invited by such person;

(B) Contacting the person to be solicited by telephone, telegraph, or messenger service, except when requested by such person;

(C) Distributing handbills, circulars, or other advertising matter on private property or private vehicles, except as requested by owners of such property or vehicles.

Solicitation does not include advertising in bona fide newspapers, magazines, radio, television, or telephone directories.

(17) **Wrongful practice** shall mean an act for which the Commission shall have the power to issue Cease and Desist Orders and enforce through the Court. It shall not constitute a misdemeanor or a prohibited act as defined by Section 1-123 of this Code.

(CB-1-1972; CB-48-1976; CB-129-1976; CB-30-1990; CB-23-1991; CB-48-1992)

Sec. 2-209. Commission process and witnesses; protection.

No person shall retaliate, or cause or coerce, or attempt to cause or coerce, any other person to retaliate against any person because such person has lawfully opposed any act or failure to act that is a violation of this Act or has, in good faith, filed a complaint, testified, participated, or assisted in any way in any proceeding under this Act.

(CB-1-1972)

Sec. 2-222. Discrimination in employment prohibited.

No employer in the County shall discharge or refuse to hire any person, or act against any person with respect to compensation or other terms and conditions of employment, or limit, segregate, classify, or assign employees because of discrimination.

(CB-1-1972)

CERTIFICATE OF SERVICE

Court of Appeals
No. 9, September Term 2010
----------)
JULIA M. TAYLOR,
Petitioner,
v.
GIANT OF MARYLAND LLC,
Respondent.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Julie Glass Martin-Korb, Attorneys for *Amici Curiae*, to print this document. I am an employee of Counsel Press.

On the **23rd Day of March, 2010**, I served the within **Brief for *Amici Curiae*** upon:

Jo Ann Myles, Esq.
Law Office of Jo Ann P. Myles
9701 Apollo Drive
Suite 331
Largo, MD 20774

Cynthia E. Young, Esq.
1200 West Street
Annapolis, MD 21401

Attorneys for Petitioner

Connie Bertram, Esq.
Cooley Godward Kronish
777 6th Street, NW
Suite 1100
Washington, DC 20001

Attorneys for Respondent

via Express Mail, by causing 2 true copies of each, enclosed in a properly addressed wrapper, to be deposited in an official depository of the U.S. Postal Service.

Unless otherwise noted, 20 copies have been sent to the Court on the same date as above via Hand Delivery.

March 23, 2010