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Recent Developments: Owens-Illinois v. Zenobia: Maryland Restructures the Law of Punitive Damages in Non-Intentional Tort Cases

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that regardless of benign intent, Johnson's policy of treating male and female employees differently was facially discriminatory. To bolster its conclusion, the Court cited the Pregnancy Discrimination Act of 1978, which provides that sex-based discrimination "includes discrimination 'because of or on the basis of pregnancy, childbirth, or related medical conditions.'" *Id.* at 1203 (quoting 42 U.S.C. § 2000e(k)).

Finding Johnson's policy discriminatory, the Court proceeded to determine whether the policy could be excused as a BFOQ. After examining the statutory basis of the BFOQ standard, the Court emphasized that the defense, particularly for safety exceptions, "reaches only special situations." *Id.* at 1204-05. Such special situations recognized by the Court included permitting a prison to hire only male guards in areas of maximum security prisons housing males, and attempting to ensure airline safety by approving age restrictions for airline flight engineers.

To qualify as a BFOQ, however, the "job qualification must relate to the 'essence,' or to the 'central mission of the employer's business.'" *Id.* at 1205 (citations omitted). Relating the Johnson facts to the BFOQ standards, the Court concluded that the standard was not met because a genuine concern for future generations cannot be recast as an "essential aspect of batterymaking." *Id.* at 1206.

The Court also engaged in legislative history analysis of the Pregnancy Discrimination Act, which has its own BFOQ criterion. The Act provides that, unless pregnant employees differ in their ability to perform, they must be treated the same as any other employee. Further, the Act's legislative history revealed Congress's decision to reserve to women the right to work while pregnant, or while capable of so becoming. Because the record indicated that pregnant women are as efficient as other employees in the manufacture of batteries, the Court concluded that the standard for upholding a BFOQ had

not been met. Having failed to establish either a business necessity defense or a BFOQ, the Court held that Johnson's policy constituted forbidden sex discrimination. *Id.* at 1207.

The Court briefly addressed the issue of tort liability. Because "Title VII bans sex-specific fetal-protection policies," the Court felt the risk of liability of an employer who follows OSHA guidelines, informs women as to the risk, and is not otherwise negligent to be "remote at best." *Id.* at 1208.

Justice White, joined by Justice Kennedy and Chief Justice Rehnquist, concurred with a portion of the majority's rationale, as well as with the judgment. The concurrence disagreed, however, "that the BFOQ defense is so narrow that it could never justify a sex-specific fetal protection policy." *Id.* at 1210. White indicated that one justification for a BFOQ would be the avoidance of substantial tort liability. As pertaining to the facts, White felt that it was not clear that Title VII would preempt state tort liability. He further stated that even if employees were precluded from making claims for injury, their children still might be able to do so because "the general rule is that parents cannot waive causes of action on behalf of their children." *Id.* at 1211.

In holding that an employer may not discriminate against a woman on the basis of her pregnancy or capability to become pregnant, the Supreme Court has furthered the beneficent goal of eradicating sex-based discrimination. Bound only by moral and ethical regulation, however, expectant parents will be forced to engage in a most difficult balancing test, positing pecuniary interests against the interest in insuring a healthy child.

- Howard Cohen

***Owens-Illinois v. Zenobia*: MARYLAND RESTRUCTURES THE LAW OF PUNITIVE DAMAGES IN NON-INTENTIONAL TORT CASES.**

In *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992), the Court of Appeals of Maryland pronounced sweeping changes respecting awards of punitive damages in non-intentional tort actions. In the first of three revolutionary changes to Maryland law, the court abolished the longstanding "arising out of contract" test for punitive damages in tort actions where the parties enjoy a contractual relationship. Second, the court reformulated the standard for determining whether punitive damages may be awarded by rejecting the established "implied malice" standard and adopting the exacting "actual malice" standard of conduct in its place. Third, the court announced that in all tort cases, plaintiffs must meet the heightened burden of proof of "clear and convincing" evidence when seeking punitive damages.

As a result of exposure to asbestos, plaintiffs William L. Zenobia ("Zenobia") and Louis L. Dickerson ("Dickerson") developed pleural and parenchymal asbestosis. Zenobia alleged that he had been exposed to asbestos while employed at various locations over a twenty-five month period from 1948 to 1968. Dickerson claimed exposure to asbestos during his employment with the Bethlehem Steel Corporation at Sparrows Point from 1953 until 1963.

Both plaintiffs filed claims in the Circuit Court for Baltimore City seeking damages for their asbestos related injuries and the complaints were consolidated for purposes of trial and appeal. At trial, the plaintiffs abandoned all theories of liability except for strict liability under Section 402 of the Restatement (Second) of Torts. The defendants included six companies that had either manufactured or supplied and installed products containing asbestos.

The jury awarded Zenobia com-

pensatory damages in the amount of \$1,200,000 against all four defendants named in his suit and punitive damages were assessed against manufacturer Owens-Illinois, Incorporated ("Owens-Illinois") in the amount of \$235,000 and against supplier and installer Porter Hayden Company ("Porter Hayden") for \$2,500. The jury awarded Dickerson compensatory damages of \$1,300,000 against all five defendants named in his suit. He also was awarded punitive damages against Owens-Illinois in the amount of \$235,000, against Porter Hayden in the amount of \$2,500 and against Celotex Corporation ("Celotex") in the amount of \$372,000.

All defendants, except Celotex, appealed the awards to the Court of Special Appeals of Maryland. The court affirmed all aspects of the awards for compensatory damages. It also affirmed the awards of punitive damages against Owens-Illinois, but reversed the awards of punitive damages against Porter Hayden. Owens-Illinois challenged the award of punitive damages to the Court of Appeals of Maryland. The court granted certiorari and ordered the parties to address the issue of what the correct standard should be for an award of punitive damages in negligence and products liability in Maryland. *Owens-Illinois*, 601 A.2d at 647.

The court began its review of punitive damages by noting concern over the recent proliferation of punitive damages claims, awards, and amounts of awards in tort cases. *Id.* at 648 (citing 2 James D. Ghiardi and John J. Kircher, *Punitive Damages Law and Practice* § 21.01, at 2 (1985)). "Accompanying this increase in punitive damages claims, awards and amounts of awards," the court opined, "[was] renewed criticism of the concept of punitive damages in a tort system designed primarily to compensate injured parties for harm." *Id.* The court asserted that such criticism was justified because "juries [were] provided with imprecise and uncertain characterizations of the type of conduct which [would] expose a

defendant to a potential award of punitive damages." *Id.* Moreover, the court noted that the trial court and the court of special appeals had required the plaintiffs to prove, by a preponderance of evidence, that the defendants had acted with "implied malice." *Id.* Although this standard was consistent with Maryland law, the plaintiffs were not required to show "actual malice," which historically had been a concomitant of punitive damages. Thus, the court concluded that it was necessary to re-evaluate the basic standard of wrongful conduct which would give rise to punitive damages awards in negligence actions generally, and product liability cases specifically. *Id.*

The court began its re-examination of punitive damages under Maryland law by overruling *H&R Block v. Testerman*, 338 A.2d 48 (Md. 1975) and *Wedeman v. City Chevrolet*, 366 A.2d 7 (Md. 1976), summarily abandoning the "arising out of contract" distinction, which had existed for the purpose of awarding punitive damages in tort actions involving a contractual relationship. *Owens-Illinois*, 601 A.2d at 649. "Under the *Testerman-Wedeman* rule . . . the basic standard for exposure to punitive damage liability would vary depending on whether the wrongful conduct took place before or after the formation of the contract." *Id.* The court emphasized that the historical purposes of punitive damages were punishment and deterrence, and accordingly punitive awards should be based exclusively upon the "heinous nature of the defendant's tortious conduct." *Id.* (citing *Schaefer v. Miller*, 587 A.2d 491, 503 (Md. 1991)). Because the *Testerman-Wedeman* rule focused on when a defendant acted, instead of how a defendant acted, the court found it inconsistent with the established purposes of punitive damages, and therefore, bad law. *Id.* at 650.

Next, the court re-examined the standard of conduct which governed an award of punitive damages. Until 1972, Maryland courts applied the "actual malice" standard of conduct. *Id.*

In *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721 (Md. 1972), however, the court of appeals allowed an award of punitive damages based upon "implied malice" for the first time in a non-intentional tort case. *Owens-Illinois*, 601 A.2d at 650 (citing *Smith*, 297 A.2d at 731). The court criticized the adoption of the implied malice standard as having "led to inconsistent results and frustration of the purposes of punitive damages . . ." *Id.* at 651 (citing *Schaefer*, 587 A.2d at 508). Moreover, the court noted that such awards were arbitrary and unpredictable and thus, could not serve their primary purpose of deterrence. Therefore, the court overruled *Smith* and its progeny and reinstated an "actual malice" standard for all non-intentional tort actions. *Id.* at 652. The court defined "actual malice" as conduct that "was characterized by evil motive, intent to injure, ill will, or fraud." *Id.* at 652-53 (citing *Davis v. Gordon*, 36 A.2d 699, 701 (Md. 1944)).

Next, the court recognized that "actual malice," as they had defined the term, did not readily lend itself to a typical products liability case because of the remote chance that a victim of a dangerous product could establish that a manufacturer or supplier specifically intended to harm a particular consumer. *Id.* at 653. Consequently, the court clarified the test for determining whether "actual malice" existed in a products liability case. In such cases a plaintiff must prove that a defendant had actual knowledge of the defect and deliberately disregarded the foreseeable harm to the consumer. *Id.*

Finally, the court reached the issue of which standard of proof should be required for an award of punitive damages. The court observed that "[t]he function of the standard of proof is to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Id.* at 655 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). The court noted that Maryland already required the clear and

convincing evidence standard in civil cases when “fraud, dishonesty, or criminal conduct [was] imputed . . .” *Id.* at 655-56 (citing *First Nat’l Bank v. U.S.F. & G. Co.*, 340 A.2d 275 (Md. 1975)). The court concluded that in order to further the purposes inherent in punitive damages and because of their penal nature the “[u]se of a clear and convincing standard of proof [would] help to insure that punitive damages [were] properly awarded.” *Id.* at 657.

In *Owens-Illinois v. Zenobia*, the court of appeals clearly attempted to “fix” Maryland law regarding jury awards of punitive damages. However, in adjusting the scales of justice, the court simply tilted the scales in the opposite direction. While the elimination of the “arising out of contract” distinction was appropriate in light of the arbitrariness of the rule, and the use of clear and convincing evidence standard was justified by the penal implication of punitive damages, the court tilted the scales in favor of the defendant when it adopted the “actual malice” standard of conduct. As a result, plaintiffs who clearly have been the victims of a grossly negligent defendant will find little redress in the Maryland courts.

- Laurie Ann Garey

***King v. St. Vincent’s Hospital*: MEMBERS OF THE ARMED FORCES RETAIN THE RIGHT TO CIVILIAN REEMPLOYMENT UNDER 38 U.S.C. § 2024(d) REGARDLESS OF THE DURATION OF ACTIVE DUTY.**

Justice Souter, writing for a unanimous court, authored *King v. St. Vincent’s Hosp.*, 112 S. Ct. 570 (1991), which resolved the conflict surrounding the interpretation of 38 U.S.C. section 2024(d) (1981 & Supp. 1992), which is known as the Veterans’ Reemployment Rights Act. The Court held that section 2024(d) does not implicitly limit the length of military service after which a member of the armed forces retains the right to civil-

ian reemployment.

William “Sky” King, a member of the Alabama National Guard, applied to become a Command Sergeant Major in the Active Guard/Reserve (“AGR”) program. A three year tour of duty was required by army regulations of the person holding that position. Upon learning of his appointment, King notified his employer, St. Vincent’s Hospital, of his acceptance, requested a three year leave of absence, and reported for duty as ordered. Several weeks later, St. Vincent’s notified him that his request was unreasonable and was therefore beyond the Act’s guarantee of reemployment. St. Vincent’s then brought an action for a declaratory judgment in the United States District Court for the District of Northern Alabama to settle the question of whether the applicable terms of the Act provide reemployment rights after tours of duty as long as King’s.

The district court held that service in the AGR program was protected under section 2024(d), but that a three year leave of absence was *per se* unreasonable. *King*, 112 S. Ct. at 572. The court’s reasoning paralleled the opinions of the third, fifth and eleventh circuits which had held that leave requests under section 2024(d) must meet a test of reasonableness. A panel of the eleventh circuit affirmed the district court’s decision. Due in part to the fact that the fourth circuit had declined to accept a reasonableness standard, the Supreme Court granted certiorari to resolve the conflict among the circuits.

The Supreme Court began its analysis by recognizing the importance of the wording of section 2024(d), which contains no express time limitations. The Court noted that the fourth circuit had found that the words appear to guarantee that leave and reemployment be “unequivocal and unqualified,” whereas the eleventh circuit had acknowledged that the subsection “does not address the ‘reasonableness’ of a reservist’s leave request”. *King*, 112 S. Ct. at 573 (quoting *Kolkhorst v. Tilghman*, 897 F.2d 1282, 1286 (4th

Cir. 1990), *cert. denied*, 112 S. Ct. 865 (1992)); *Gulf States Paper Corp. v. Ingraham*, 811 F.2d 1464, 1468 (11th Cir. 1987)). St. Vincent’s argued that “leave,” as used in subsection (d), applies to an “employee,” implying that the employment relationship continues during the employee’s absence and that this relationship is incompatible with a leave as long as King’s. St. Vincent’s further argued that a leave of this duration would create a burden on the hospital to temporarily fill King’s position for three years until he returned to resume his job.

The Court responded by first recognizing that there is a burden placed on employers by this section, however, the Court found that it was not “free to tinker with the statutory scheme.” *King*, 112 S. Ct. at 573. The Court further stated that it could not render the statute “susceptible to interpretive choice” no matter how great the burden. *Id.* In analyzing the statutory scheme, the Court noted that while “subsection (d) is utterly silent about any durational limit on the protection it provides, other subsections of section 2024, protecting other classes of full-time service personnel, expressly limit the periods of their protection.” *King*, 112 S. Ct. at 573-74. From this, the Court concluded that the simplicity of subsection (d) was deliberate and intended to provide its benefit without imposing conditions on the length of service. The Court also explained that it followed the “cardinal rule that a statute is to be read as a whole,” and “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries favor.” *Id.* at 574.

The Court next addressed St. Vincent’s misapplication of the principle that a statute is to be read as a whole. Although the hospital read the statutory scheme to show a hierarchy of reemployment rights, the Court held that the differences in treatment among the various sections of the Act do not necessarily amount to a hierarchy. *Id.* at 574. Instead, the Court stated that