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## Maryland Court Holds Employers Must Pay Terminated Employees For Accrued Leave

The Maryland Court of Special Appeals, in a recent unpublished decision, held that employers must pay terminated employees for accrued but unused leave, even where a company policy specifically provides otherwise. This represents a significant departure from the prior understanding in Maryland that an employer was not required to pay for earned but unused leave time if the employer had expressly notified its employees of a policy under which unused leave time would have been forfeited.

### Background:

In *Catapult Technology, Ltd. v. Wolfe*, No. 997, September Term, 2006 (Md. Ct. Spec. App. Aug. 20, 2007), the employer had a policy that denied payment of accrued but unused universal leave (paid time off leave) to employees who resigned without providing at least two weeks written notice. The employer lost a government contract and was not immediately able to find new positions for the affected employees. Fourteen of the employees then resigned and accepted employment with the successor contractor. When the employer declined to pay these employees for their accrued but unused universal leave, they sued under the Maryland Wage Payment and Collection Law ("WPCL"), which requires employers to pay departing employees for all wages owed for work performed prior to termination and defines "wages" to include "fringe benefits" and "any other remuneration promised for service."

Previously, in *Rhoads v. Federal Deposit Ins. Corp.*, 956 F. Supp. 1239 (D. Md. 1997), the federal District Court for Maryland held that a terminated employee could not recover accrued unused vacation pay because the employee manual clearly stated that employees terminated for cause (as she was) forfeited such pay. The court held the earned vacation was not compensation due for employment within the meaning of the WPCL. 956 F. Supp. at 1259-60. In *Magee v. Dansources Technical Services, Inc.*, 137 Md. App. 527, 769 A.2d 231 (2001), the Maryland Court of Appeals held that it was a fact (jury) question whether the employer had a policy of not paying unused vacation upon termination, which seemed consistent with the view that such a policy was lawful under the WPCL. 137 Md. App. at 574. Also consistent with these deci-

Resurgens Plaza  
945 East Paces Ferry Road  
Suite 2700  
Atlanta, Georgia 30326-1380  
404.923.9000

150 North Michigan Avenue  
35th Floor  
Chicago, Illinois 60601-7553  
312.499.1400

Lincoln Plaza  
500 N. Akard Street  
Suite 2700  
Dallas, Texas 75201-3306  
214.397.4300

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1000 Louisiana  
Suite 5400  
Houston, Texas 77002-5013  
713.750.3100

1875 Century Park East  
Suite 500  
Los Angeles, California 90067-2506  
310.556.8861

Wachovia Financial Center  
200 South Biscayne Boulevard  
Suite 4300  
Miami, Florida 33131  
305.982.1520

Two Gateway Center  
12th Floor  
Newark, New Jersey 07102-5003  
973.642.1900

250 Park Avenue  
New York, New York 10177-1211  
212.351.4500

One California Street  
26th Floor  
San Francisco, California 94111-5427  
415.398.3500

One Landmark Square  
Suite 1800  
Stamford, Connecticut 06901-2681  
203.348.3737

1227 25th Street, N.W.  
Suite 700  
Washington, DC 20037-1175  
202.861.0900

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sions, the Maryland Division of Labor and Industry had long posted advice on its web site stating that if an employer specifically informs employees that unused vacation leave is forfeited on termination, then the employee would not be able to claim it, but that in the absence of such a policy the employee should receive the cash value of unused earned vacation.

## **The Decision:**

The *Catapult* court held that an employer cannot deny an employee compensation for leave earned by working for the required period. In so doing it relied on the decision of the Maryland Court of Appeals in *Medex v. McCabe*, 372 Md. 28 (2002), which held that an employee's right to compensation vests when the employee does everything required to earn the wages and rejected an employer's attempt to condition payment of a commission on being employed at the time of actual payment. Thus, the *Catapult* court held the vacation pay was given "in remuneration" for the employee's work and consequently constituted a wage under the WPCL. The court did find, however, that there was insufficient evidence that the dispute between the parties was not bona fide (in part due to testimony that the employer had relied on the prior decisions and web site advice). Therefore, it reversed a jury finding that had awarded treble damages pursuant to a WPCL provision that allows treble damages in the absence of a bona fide dispute as to whether the employee is owed the amount at issue.

## **Significance:**

Although the *Catapult* decision is unpublished and therefore not binding on other courts, there is no other Maryland appellate court decision addressing this issue. Therefore, it is likely to be cited by employees and followed by trial court judges. Significantly, the Maryland Division of Labor and Industry has changed its web site advice to follow *Catapult* and has begun using it in enforcement proceedings. The existence of this decision and the Division of Labor and Industry web site will make it difficult in the future to assert the "bona fide dispute" exception to the award of treble damages on this issue. Employees may also use the court's decision to argue that "use it or lose it" policies, which require use of earned vacation leave by a given date, are unlawful because they constitute a forfeiture of wages. There are, however, strong arguments to the contrary so long as the employer has not prevented the employee from being able to use vacation leave.

Furthermore, as noted, the *Catapult* decision involved a universal leave policy, also known as "paid time off" ("PTO"), which combines vacation, sick, and other types of leave into one category. It did not address a policy that distinguishes between vacation and sick leave. Typically sick leave has been treated differently from other types of paid leave because it usually is available only for illnesses and is considered protection of pay for lost work time due to sickness, rather than part of an employee's earned wages. It is possible, however, that a court following *Catapult* could find otherwise.

Accordingly, Maryland employers should promptly review their leave policies and practices and consider changes to comply with *Catapult* while at the same time reducing to the extent possible their obligation to pay departing employees for unused leave. This may include restructuring when leave is considered earned and changing from a PTO policy to a policy that treats vacation and sick leave differently.

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Should you have any questions or wish to discuss other aspects of the Maryland Wage Payment and Collection Law, or any other labor or employment questions, please call Frank C. Morris at (202) 861-1870 or ([fmorris@ebglaw.com](mailto:fmorris@ebglaw.com)); or Brian Steinbach at (202) 861-1870 or ([bsteinbach@ebglaw.com](mailto:bsteinbach@ebglaw.com)); both in the firm's Washington, D.C. office.



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