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# Recent Developments: Federated Department Stores v. Le: Employer Potentially Liable to Its Employee for Tortious Conduct of a Co-Employee

Steven B. Drucker

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and on the Maryland Declaration of Rights. *Colbert*, 593 A.2d at 228 (quoting *Buzbee v. Journal Newspaper*, 465 A.2d 426 (Md. 1983)). The court further stated that the function of the judicial process is influenced by public access. *Id.* The court observed that access to pretrial proceedings allows the public to "evaluate the work of trial judges, prosecutors and public defenders in the criminal justice system." *Id.*

The court, nevertheless, recognized that the right of access to pretrial proceedings is not absolute. *Id.* The court emphasized that there are limited circumstances where a defendant's right to a fair trial outweigh the constitutional presumption of openness. *Id.* The court reasoned that closure should be considered on a case-by-case basis and the public should be given an opportunity to question their exclusion. *Id.* The court further determined that a motion for closure should be docketed prior to the hearing to provide adequate notice to oppose the motion. *Id.* at 229. The court stated that in situations where advance notice is impracticable, any individuals in the courtroom should be given a reasonable opportunity to oppose the closure. *Id.*

In the present case, the trial court ruled on the closure motion before arguments in opposition were heard. *Id.* As a result, the court of appeals determined that notice and reasonable opportunity to oppose the closure were not provided, thus violating the public's and the media's constitutional rights. *Id.*

The court reasoned that the party seeking closure must persuade the court that their rights will be infringed upon by an open hearing, and that there are no reasonable alternatives to closure. *Id.* Additionally, the court emphasized that when a defendant asks for closure under the Sixth Amendment right to a fair trial, the specific findings by the court must be made on the record. *Id.* at 230. Under this fair trial argument, the trial court

should consider the extent of publicity the case has and will receive after a public hearing. *Id.* In addition, the trial court must specifically determine that closure is the only reasonable way to protect the defendant's right to a fair trial. *Id.* The court further added that if there are any alternatives to closure which will protect the defendant's rights, these alternatives must be employed prior to closure. *Id.*

The court next addressed an inherent problem at the hearing of a motion to close. The court considered the situation arising when the moving party informs the court of the reasons to close and the sensitive nature of the information sought to be protected has necessarily been revealed. To avoid this problem, the court reasoned that the trial court must receive sensitive evidence in private, but on the record. *Id.* Further, the court agreed that the sensitive portions of the record may be sealed but only as long as reasonably necessary. *Id.*

Because in the present case the trial court granted the motion to close before making the required specific findings, the court determined that the trial court's statement that Colbert could only be afforded a fair trial by closure was not supported by any facts. *Id.* Therefore, the trial court erred in closing the hearing and sealing all portions of the record. The court opined that the trial judge could have heard the sensitive evidence in private and sealed only that part protecting the public's right of access to the records. *Id.* When sealing records, the court explained that the closure must be narrowly tailored and that the interests protected must be articulated and supported by specific findings. *Id.*

In reaching its conclusion, the court of appeals balanced First Amendment rights of public access in criminal cases against the defendant's Sixth Amendment rights to a fair trial. As a result, the public will be excluded only when the defendant's right to a

fair trial cannot be protected. However, the burden on trial judges is now heavier both in giving the media an opportunity to be heard prior to closure and in specifically articulating the grounds for closure. Also on a broader scale, the opinion has reinforced the right of media access to criminal trials as guaranteed by the First and Fourteenth Amendments.

- Bruce D. Hechmer

***Federated Department Stores v. Le: EMPLOYER POTENTIALLY LIABLE TO ITS EMPLOYEE FOR TORTIOUS CONDUCT OF A CO-EMPLOYEE.***

In *Federated Department Stores v. Le*, 595 A.2d 1067 (Md. 1991), the Court of Appeals of Maryland held that the Maryland Workers' Compensation Act permits employees to sue employers under common law in cases where an employee deliberately injures a co-employee. In so holding, the court expanded the liability of Maryland employers for injuries to their employees.

Federated Department Stores, doing business as Bloomingdales, employed Thach Le as a salesperson. On the morning of April 11, 1983, he left his briefcase in an employee store-room. Upon his return to the store-room, he was asked to accompany a security guard to the security office. The Regional Director of Security, Suzanne Spahr, was there waiting for Le. Spahr accused Le of attempting to steal a calculator which was in his briefcase. Although he denied the allegation, Le claims that Spahr forced him to sign a prepared confession before she would allow him to leave the room. Federated terminated Le shortly thereafter. Le asserted that he later learned that Mrs. Spahr had framed him. Le sued Federated Department Stores for damages, charging Federated with false arrest, intentional infliction of emotional distress, and defamation.

Federated filed a motion for sum-

mary judgment claiming that the exclusivity provision of section 15 of the Workers' Compensation Act barred Le's action. Section 15 states in pertinent part that "an employer's liability for payment of workers' compensation provided for in this statute shall be the exclusive remedy." *Id.* at 1069. Federated additionally argued that although section 44 of the Maryland Workers' Compensation Act provides an exception to the exclusivity rule by permitting common law actions against employers for deliberate torts, it did not apply to Le. *Id.* Federated cited Maryland case law for the proposition that an employee could sue only if the potential tort-feasor was the employer's "alter ego" or acted with its express authorization. *Id.* at 1070 (citing *Continental Casualty Co. v. Mirabile*, 449 A.2d 1176 (Md. Ct. Spec. App. 1982)). Federated argued that because Spahr was not its "alter ego," nor acting with its express authority, Le's only redress was governed by the terms of the Act. Accepting this interpretation, the circuit court granted Federated's motion.

The court of special appeals reversed, stating that because Le's case involved non-physical injuries, it did not fall within the provision of the Workers Compensation Act. *Id.* The intermediate appellate court distinguished Le's case from earlier cases on the ground that the latter dealt with physical injuries while Le's injuries were non-physical, thereby allowing Le's action to proceed. *Id.* Federated appealed to the court of appeals which affirmed the intermediate court's decision on different grounds.

The court of appeals began its analysis by interpreting the appropriate sections of the Workers' Compensation Act. *Id.* at 1071. The court first reiterated the basic principal that section 44 operates as an exception to the exclusivity requirement of section 15 and provides that an employee shall have the "option to take benefits under article or sue where injury or death

results from the deliberate intention of employer." *Id.* (quoting Md. Ann. Code art. 101 § 44 (1985 & 1990 Supp.)). The court held that the prior decisions of the court of special appeals construed the section too narrowly by requiring that the tort-feasor be the employer's "alter ego" or act with its express authority. *Id.* at 1072.

The court of appeals declined to adopt the "alter ego" test and allowed Le to bring the common law suit. *Id.* In support of its broad application of section 44, the court cited decisions which support an employee's right to sue his employer for "some intentional torts based on the employer's vicarious liability for the conduct of a co-employee." *Id.* at 1073-74. The court, however, declined to define the parameters of the section 44 exception. *Id.*

The court in *Federated Department Stores v. Le* has significantly broadened the interpretation of section 44 causes of action and the exclusivity exception in the Maryland Workers' Compensation Act. In so doing, the court aligned Maryland with the majority of other jurisdictions which have similar exclusivity provisions and exceptions in their respective Workers' Compensation Acts. Maryland employers are now subject to increased liability for injuries to their employees. Potential plaintiffs may now seek a common law action against their employers for the deliberate actions of co-employees causing non-physical injury. In this respect, more employers may have to defend themselves against claims arising from situations over which they have little control. Moreover, the small business owner who, although able to exert some control over the situation, may not have the financial means to afford the increased litigation costs of actions now permitted.

- Steven B. Drucker

### **Alexander & Alexander v. Evander & Assoc., Inc.: COURT OF SPECIAL APPEALS VACATES STATE'S LARGEST PUNITIVE AWARD.**

Acting in accordance with a recent United States Supreme Court opinion, the Court of Special Appeals of Maryland recognized in *Alexander & Alexander v. Evander & Assoc., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), an opportunity to review Maryland's system of awarding punitive damages. In holding that the award in *Alexander* violated due process, the court vacated the award and remanded for retrial the issues of whether, and in what amount, punitive damages should have been rendered.

B. Dixon Evander & Associates, Inc. ("Evander"), an insurance broker, secured medical malpractice insurance for doctors at the University of Maryland Hospital with an insurer, Mutual Fire, whose underwriter was Shand, Morahan and Co. ("Shand"). Shand was a subsidiary of another broker, Alexander & Alexander ("A & A"). Evander and Shand had a contract whereby Evander was to be Shand's exclusive representative for professional malpractice coverage.

In order to obtain less expensive malpractice coverage, the hospital secured A & A as its new exclusive broker in 1985. This decision created a conflict with Shand's agreement to underwrite exclusively for A & A. Aware of the conflict, Shand officials refused to place any of the hospital's insurance needs with its carrier except through Evander. At trial, it was revealed that A & A officials had pressured Shand officials to accept hospital policies through A & A in spite of Shand's promise to Evander.

Evander claimed that A & A had tortiously interfered with his contract with Shand, thereby depriving him of commissions from that contract. Evander additionally alleged that A & A had conspired to harm his business reputation. Testimony at trial revealed that an A & A vice-president