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OPENING THE DOORS TO THE LOCAL COURTHOUSE: MARYLAND'S NEW PRIVATE RIGHT OF ACTION FOR EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

For decades, Maryland's employment discrimination law[1] was an empty promise with no meaningful enforcement scheme. Maryland resided in the ranks of a handful of states that offered employees no private right of action in state court to enforce the prohibition against workplace discrimination. Instead, employees were limited to filing an administrative complaint with the Maryland Commission on Human Relations (MCHR). The MCHR could investigate and attempt to resolve the claim through conciliation. The potential recovery, however, was limited to three years of backpay, without the possibility of compensatory or punitive damages or attorneys' fees. This provided no relief to employees who experienced on-the-job harassment, for which the damages are typically emotional in nature. If the conciliation or mediation efforts at the administrative level failed, neither the MCHR nor the employee could file an action in state circuit court. Instead, employees were forced to pursue a case in federal court using only the federal law, Title VII of the Civil Rights Act of 1964.[2] Employees had no way to vindicate the remedial and deterrent purposes of Maryland's employment discrimination law, and employers did not take it seriously.

In 2007, after a fifteen-year struggle by employee advocates and the MCHR, the Maryland General Assembly passed a private right of action to allow employees to file suit in state circuit court to vindicate their right to be free from workplace discrimination.[3] The express purpose of the law was to open the doors to the local courthouse. The new private right of action ensures access to the

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1. Maryland's antidiscrimination code was formerly known as "Article 49B" and was found at MD. CODE ANN., art. 49B, § 16 (2003). The Maryland General Assembly has repealed Article 49B and recodified the statute without substantive changes. *See* H.B. 51, 2009 Leg., 426th Sess. (Md. 2009). H.B. 51 will add a new title to the State Government Article of the Annotated Code of Maryland, to be designated and known as "Title 20. Human Relations."

2. 42 U.S.C. § 2000e (2000).

3. H.B. 1034, 2006 Leg., 421st Sess. (Md. 2006).

circuit court for employment discrimination claims throughout all counties in Maryland.

During the hearings on the private right of action bill, known as the Civil Rights Preservation Act of 2006, the legislature heard compelling testimony about how people who experienced workplace discrimination in the far reaches of Maryland—in Western or Southern Maryland or on the Eastern Shore—had to travel six hours to find a lawyer in the Baltimore-Washington area to prosecute a Title VII claim in federal court. Given the logistical hurdles of pursuing a case so far from home, many individuals who lived outside of the Baltimore–Washington corridor simply did nothing to seek redress for workplace discrimination.

As of October 1, 2007, Maryland's anti-discrimination promise finally has "teeth" in the form of a private right of action in state court. In introducing the bill to committee, Delegate Sandy Rosenberg, the bill's sponsor, described the importance of providing discrimination victims their day in court before a jury of their peers:

> Our constituents who are discriminated against deserve their day in state court, and [this bill] would provide that remedy to them... Victims of employ[ment] discrimination would have access to a jury trial in state court. The right to a trial by one's peers is an essential safeguard of liberty because it ensures independence in the judicial process. In their pursuit of justice, victims of discrimination are, in many cases, among the weakest members of our society and are particularly in need of a jury of their own peers, which identifies with the average citizen.[4]

Part II of this essay provides a brief overview of the mechanics of the new private right of action. Part III describes how the new remedy provides choices and meaningful relief to people who experience workplace discrimination. Part IV reflects my comments at the Symposium *Having it Our Way: Women in Maryland's Workplace Circa 2027*. The essay concludes by encouraging employee advocates to use the promising opportunity of a new remedy with no developed case law in a thoughtful, responsible manner.

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4. *Civil Rights Preservation Act of 2006: Testimony on H.B. 1034 Before the Health and Government Operations Comm.*, 2006 Leg., 421st Sess. (Md. 2006) (testimony of Del. Samuel I. Rosenberg) (on file with author).

II. OVERVIEW OF THE NEW MARYLAND PRIVATE RIGHT OF ACTION

The remedies provided by the Maryland employment discrimination law mirror those provided under Title VII. Prior to filing an action in court, complainants must first file an administrative charge or complaint with the MCHR, the Equal Employment Opportunity Commission (EEOC), or a local human relations commission.[5] After the investigatory stage, the complainant has several options.

First, in those cases in which the MCHR finds that the employer engaged in unlawful conduct, and the employer refuses to remedy and eliminate the discrimination,[6] the MCHR may file an action in circuit court,[7] similar to the EEOC's power under Title VII. The potential of agency enforcement is critical in addressing systemic discrimination and providing representation for those who may not be able to retain private counsel. In addition to the right of the MCHR to file suit in the circuit court on the claimant's or the agency's behalf, Maryland law now provides a "small claims" avenue of relief.[8] If the administrative law judge (ALJ) finds that the employer engaged in a discriminatory act, the ALJ may issue a cease and desist order to enjoin the employer from engaging in future discriminatory acts;[9] order appropriate affirmative relief, including reinstatement or hiring of employees, with or without backpay;[10] award compensatory damages (with the same cap levels as in Title VII);[11] or order any other equitable relief the ALJ deems appropriate.[12]

Second, 180 days after filing a charge with the agency, the complainant may file suit in court, even if the MCHR has not yet issued a finding.[13] Employees seeking compensatory or punitive damages may demand a trial by jury.[14] The court may award compensatory damages,[15] back pay and interest on back pay,[16]

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5. MD. CODE ANN., STATE GOV'T, § 20-1013(a)(1) (West 2009).

6. *Id.* § 20-1007(b)(1)–(2).

7. *Id.* § 20-1007(a).

8. *See id.* § 20-1007(a)(1)–(2) (allowing complainants for whom the MCHR has made a finding of discrimination the option of trying their cases in front of the Maryland Office of Administrative Hearings).

9. *Id.* § 20-1009(a)(2).

10. *Id.* § 20-1009(b)(1)(ii).

11. *Id.* § 20-1009(b)(1)(iii), § 20-1009(b)(3); 42 U.S.C. § 1981 (West 2008).

12. *Id.* § 20-1009(b)(1)(iv)

13. *Id.* § 20-1013(a)(1)–(2).

14. *Id.* § 20-1013(f).

15. *Id.* § 20-1009(b)(1)(iii).

punitive damages,[17] and "[a]ny other equitable relief the complainant is entitled to recover under any other provision of law."[18] In addition, the court "may award the prevailing party reasonable attorney's fees, expert witness fees, and costs."[19] The same damages caps for compensatory and punitive damages that exist under Title VII apply under Maryland's law: $50,000 for employers who employ between 15 and 100 employees; $100,000 for employers who employ between 101 and 200 employees; $200,000 for employers who employ between 201 and 500 employees; and $300,000 for employers who employ 501 or more employees.[20]

III. IMPORTANCE OF MARYLAND'S NEW PRIVATE RIGHT OF ACTION

Even though the new Maryland private right of action is essentially a Title VII copycat, the new statute matters for several reasons. First, the protected classes under Maryland law are broader than those under Title VII. Second, employees now have meaningful choices about which remedies to pursue. Finally, a prime opportunity exists to build a body of case law that will benefit employees in a positive way.

A. Maryland Protects Broader Classes

Maryland's antidiscrimination law protects broader classes than Title VII. In addition to the categories protected under federal law—race, color, religion, sex, age, national origin, and disability[21]—Maryland law also prohibits discrimination on the basis of marital status, sexual orientation, genetic information, and "refusal to submit to a genetic test or make available the results of a genetic test."[22] A separate section also prohibits discrimination based on pregnancy.[23]

The definition of "disability" under Maryland law is both broader and narrower than the federal Americans with Disabilities Act

16. *Id.* § 20-1009(b)(2)(i).

17. *Id.* § 20-1013(e). Punitive damages may not be awarded against government entities or political subdivisions. *Id.* § 20-1013(e)(1).

18. *Id.* § 20-1009(b)(2)(ii).

19. *Id.* § 20-1015.

20. *Id.* § 20-1009(b)(3); 42 U.S.C. § 1981 (West 2008).

21. 42 U.S.C. § 2000e-2(a) (2000).

22. MD. CODE ANN., STATE GOV'T § 20-606 (West 2009).

23. *Id.* § 20-608.

(ADA). The ADA focuses on whether the disability affects a "major life activity."[24] Under Maryland law, "disability" means:

> [A]ny physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and 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 as, but not limited to, retardation or such other which may have necessitated remedial or special education and related services.[25]

Prior to the passage of the private right of action in Maryland, these broader rights to be free from discrimination based on disability, sexual orientation, marital status, and genetic information were unenforceable. Now, these protections have true meaning for Maryland workers.

B. Employees Have Meaningful Choices about Remedies

Second, the new remedy is important because employees now have meaningful choices about whether to pursue local, state, or federal remedies, and whether to file suit in federal or state court. Plaintiffs may file in federal court and assert both state and federal claims, or assert only the state law claim and proceed in state circuit court.[26] It is common wisdom among Maryland practitioners that federal courts are more likely to grant summary judgment and preclude plaintiffs from having their day in court.[27] In Maryland circuit court, plaintiffs are more likely to proceed to a jury trial. In addition, by

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24. 42 U.S.C. § 12102(2)(A) (1990).

25. MD. CODE ANN., STATE GOV'T § 20-601(b) (West 2009).

26. Plaintiffs may, of course, file Title VII claims in state court, but employers are likely to immediately remove the case to federal court if a federal claim is asserted.

27. According to federal judiciary statistics, only 4.6 percent of employment civil rights cases reach trial. *See* Federal Judicial Case Load Statistics, tbl.C-4, http://www.uscourts.gov/caseload2007/contents.html (last visted Mar. 4, 2009). U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TRAKEN, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2007, http://www.uscourts.gov/caseload2007/tables/C04Mar07.pdf (last visited Apr. 10, 2008).

ensuring access to the local courthouse, employees in the far reaches of the state, not just those who work close to a federal courthouse, may seek redress for discrimination.

The issue of forum selection raises many strategic questions from a practitioner's perspective. For example, several counties in Maryland—Prince George's, Montgomery, and Howard Counties—have local ordinances that protect broader classes of individuals. In addition to the classes protected by Maryland law, the county ordinances prohibit discrimination based on familial status,[28] family responsibilities,[29] occupation,[30] political opinion,[31] and personal appearance[32] not related to cleanliness or proscribed attire.[33] In addition, the local laws apply to nearly all employers. Unlike Title VII and Maryland law, which cover employers who employ more than fifteen employees,[34] the laws in Prince George's and Montgomery Counties apply to employers who employ one or more individuals, and Howard County's law applies to employers with at least five employees.[35]

Long before the new statewide remedy, the Maryland General Assembly passed authorizing legislation that permits claims under the local ordinances in Howard, Montgomery, and Prince George's Counties to be filed in circuit court. The local laws of Howard, Montgomery, and Prince George's Counties are attractive to plaintiffs because they do not cap compensatory and punitive damages. Under the local ordinances, the court may award "damages, injunctive relief, or other civil relief,"[36] as well as "reasonable attorney's fees, expert

28. *See, e.g.*, Howard County Code § 12.208(I)(a) (1977); Prince George's County Code § 2-186(a)(7.1) (1999).

29. *See, e.g.*, Montgomery County Code § 27-19(a) (1997).

30. *See, e.g.*, Howard County Code § 12.208(I)(a); Prince George's County Code § 2-186(a)(3).

31. *See, e.g.*, Howard County Code § 12.208(I)(a); Prince George's County Code § 2-186(a)(3).

32. *See, e.g.*, Howard County Code § 12.208(I)(a); Prince George's County Code § 2-186(a)(3).

33. *See, e.g.*, Prince George's County Code § 2-186(a)(14).

34. 42 U.S.C. § 2000e(b) (2000); MD. CODE ANN., STATE GOV'T § 20-601(d) (West 2009).

35. Prince George's County Code § 2-186(a)(5); Howard County Code § 12.208(I)(d).

36. MD. CODE ANN., STATE GOV'T § 20-1202(b) (West 2009).

witness fees, and costs."[37] The new statewide remedy clarifies that it does not affect or limit these broader local remedies.[38]

IV. THE NEED TO WRITE RESPONSIBLY ON MARYLAND'S "CLEAN SLATE"

In addition to providing plaintiffs with meaningful choices of remedies and local access to justice, the new Maryland private right of action remedy is significant on a broader level for us today, as we discuss a blueprint for future employment law for women in this state. It matters because Maryland has a "clean slate." We have a remedial law that holds tremendous potential, without any case law developed under it. We have a very unique opportunity and special responsibility to build that law in a positive, smart way for employees in the state. Employee advocates, civil rights groups, legal scholars, and law students who are interested in employment law all need to work in a coordinated and intelligent way to ensure the sound development of this new remedy.

How do we do that? First, we need to figure out how we want our new law to develop. We need to examine how Title VII law has developed in the federal courts, and determine where federal standards have eviscerated the remedial effect of the law. We need to study how other states have developed standards under their own anti-discrimination laws. We also need to work to develop a solid body of case law that fosters the remedial purposes of the statute in our appellate courts.

The Maryland Court of Appeals has shown that it is willing to forge its own path and not simply defer to deficient standards adopted by federal courts. A compelling example of the judicial independence of the Maryland Court of Appeals is the recent decision in *Haas v. Lockheed Martin Corporation*.[39] In this case, the court considered when the statute of limitations began for a discriminatory discharge claim filed pursuant to the Montgomery County anti-discrimination code.[40] Previously, the United States Supreme Court held that the statute of limitations for a discriminatory discharge claim under Title VII begins on the date the employee received notice of an impending

37. *Id.* § 20-1202(d).

38. *Id.* § 20-1002. Claimants who wish to proceed under one of the county laws must study these local remedial schemes carefully and ensure that they satisfy all filing deadlines and procedures.

39. 914 A.2d 735 (Md. 2007).

40. *Id.* at 737.

adverse action, not the actual date of the termination of employment.[41] In *Haas*, however, the Maryland Court of Appeals departed from federal precedent and held that the statute of limitations begins on the date of actual discharge.[42]

In *Haas*, the court emphasized that federal court opinions under Title VII or comparable federal civil rights statutes may be "relevant authorities," but "do not bind" Maryland courts.[43] The majority made this point in a particularly potent and eloquent way in a footnote.[44] After a long list of citations to cases in which the Maryland Court of Appeals diverged from Supreme Court pronouncements regarding "federal dopplegangers," the court emphatically concluded, "Put in a more homespun idiom, and paraphrasing a frequent motherly admonition, 'Just because [Georgia] ran off a cliff doesn't mean [Maryland] has to follow suit.'"[45]

As we put the writing on our new remedy, we must ensure that Maryland does not simply jump off the same cliff that federal courts have. We need to be ever vigilant that the judicial standards we work to develop truly effectuate the remedial purposes of the law.

The first step in the sound development of Maryland case law is to make sure that we are taking only the best test cases up to the appellate level. We must work with the plaintiffs' bar to encourage them not to file weak cases. The new remedy may tempt attorneys who do not have any background or experience with employment litigation to bring their first discrimination case. We need to reach out those attorneys, educate them about this area of the law, and provide litigation support where we can. We need to convince the plaintiffs' bar not to appeal weaker cases that may make bad law. We need to monitor the cases that make their way to the higher courts and provide strong amicus curiae support where we can. In addition, we can help practitioners with the first battleground they will face at trial: developing solid jury instructions. Employee advocates will face a real battle to convince trial judges not to simply adopt federal standards, but to draft instructions appropriately tailored to Maryland's law.

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41. Ricks v. Del. State College, 449 U.S. 250, 259 (1980); *see also* Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (per curiam) (discussing *Ricks* holding).

42. In an ironic twist, the only two women on the Maryland Court of Appeals dissented in *Haas*, stating they would follow the federal standard adopted by the Supreme Court in *Ricks* and *Chardon*. *Haas*, 914 A.2d at 754 (Battaglia & Raker, J.J., dissenting).

43. *Id.* at 742 (majority opinion).

44. *Id.* at 743 n.10.

45. *Id.* (alterations in original).

There is another danger that may inhibit the development of our new state remedy: mandatory arbitration clauses. The management bar has already sounded alarm bells to employers that the "the playing field for litigating employment discrimination cases in the State of Maryland" has been "drastically altered" with the availability of a private right of action.[46] Consequently, more employers will force employees to sign mandatory arbitration clauses or jury trial waivers as conditions of employment.[47] These documents are typically contracts of adhesion—boilerplate employment applications, employee handbooks, and other documents—that employees must sign, or else get fired. Most employees either do not understand or are not aware of the devastating effect these clauses may have on the vindication of their civil rights should they experience unlawful discrimination on the job. One scholar has described such mandatory arbitration clauses as modern-day "yellow dog contracts."[48]

Aside from the potential impact that mandatory arbitration clauses have on individual employees, however, mandatory arbitration of civil rights cases harms the public's interest on a more profound level. When an employee files a discrimination case in court, she is not simply seeking an individual remedy. She is a private attorney general, the legislature's "chosen instrument . . . to vindicate 'a policy that [the legislature] considered of the highest priority.'"[49] In addition to enforcing the law, she serves the broader remedial goal of educating the public about the continued existence and detrimental consequences of workplace discrimination. As the Supreme Court has stated,

> [t]he disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important,

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46. Carla Murphy, Neil Duke & Stacy Bekman Radz, *Maryland Employers Confronted with Additional Liability as a Result of the Newly Enacted Anti-Discrimination Measure*, MD. ST. B. ASS'N, LAB. & EMP. SEC. NEWSL. (MD. St. B. Ass'n, Baltimore, MD) Vol. XII, No. 4, Winter 2007/08, at 15 (on file with author).

47. *See id.* at 16 (urging employers to consider mandatory mediation and arbitration agreements and jury trial waivers as ways to limit exposure under state law).

48. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019 (1996) (arguing that "employers are using arbitration clauses as a new-found weapon to escape burdensome employment regulations").

49. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (quoting Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968)); *see also* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (stating that "[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA [Age Discrimination in Employment Act].").

> for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [the anti-discrimination law's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance."[50]

Mandatory arbitration undermines the public's interest in effectively exposing and deterring workplace discrimination. In effect, by simply killing the "private attorney generals," employers are undermining the important public policies of anti-discrimination statutes and permitting the evil of workplace discrimination to flourish undetected and undeterred.

Likewise, having discrimination cases decided in private arenas rather than by our state court judges and juries will deprive the courts of the opportunity to develop a body of case law interpreting the statute. Over ten years ago, the EEOC issued a policy statement[51] proclaiming that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in" civil rights laws preventing discrimination in employment.[52]

The EEOC has emphasized that the courts are charged with the ultimate responsibility for development and enforcement of the civil rights laws.[53] Mandatory arbitration undermines public enforcement of the laws and prevents the development of anti-discrimination jurisprudence through precedent.[54] The arbitral process is private in nature and allows for little, if any, public accountability.[55] The public plays no role in the arbitrator's selection.[56] There is no opportunity for review and correction of an arbitrator's erroneous application of the law because "[j]udicial review of arbitral decisions is limited to the narrowest of grounds."[57]

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50. *McKennon*, 513 U.S. at 358–59.

51. Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Notice No. 915.002, (July 10, 1997), *available at* http://www.eeoc.gov/policy/docs/mandarb.html (last modified Sept. 14, 2004).

52. *Id.* at 1.

53. *Id.* at 3–5.

54. *See id.* at 5.

55. *See id.* at 6.

56. *Id.* at 8.

57. *Id.* Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud, or misconduct. 9 U.S.C. § 10(a) (Supp. V 2000).

We should work together to support federal legislation that outlaws mandatory arbitration clauses imposed as a condition of employment.[58] While working for the passage of such legislation, practitioners should be cognizant of traditional contract defenses that challenge and strike down arbitration clauses that are so one-sided in favor of the employer that they are unconscionable.[59]

V. CONCLUSION

As we strategize about the future of the law for working women in Maryland circa 2027, the passage of Maryland's new private right of action teaches employee advocates some valuable lessons and poses a special challenge. The fact that it required fifteen years of advocacy to convince the Maryland legislature that employees need a meaningful state remedy to enforce a right already on the books teaches us that legislative and legal reforms will not happen quickly or easily. We must continue to envision and prioritize needed workplace reforms and develop innovative and multi-pronged approaches to accomplish those reforms. In addition to legislative advocacy and litigation, we must continue to educate employers and the public about the harms of discrimination and the benefits of treating workers with fairness, respect, and dignity. We must be creative, persistent, and patient.

The new private right of action presents an extraordinary opportunity to reeducate employers about the need to eliminate

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58. *See, e.g.*, Civil Rights Act of 2008, S. 2554 and H.R. 5129, 110th Cong. § 423 (2008) (banning mandatory arbitration of employment claims); Arbitration Fairness Act of 2007, S. 1782 and H.R. 3010, 110th Cong. (2007) (banning mandatory arbitration in consumer, employment, and franchise contracts).

59. The Federal Arbitration Act explicitly permits courts to refuse to enforce arbitration clauses "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). Courts have used contract principles to invalidate mandatory arbitration clauses in the employment context in a variety of ways. Courts will invalidate arbitration clauses if the plaintiff can show lack of contract formation. *See* Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415 (2006) (reviewing various court approaches to contract-formation challenges to the enforcement of employment arbitration agreements). Courts will not permit any waivers of rights provided in the statute (other than the jury trial right) and have invalidated limitations on damages awards, waivers of attorneys' fees, or cost-shifting provisions. *See, e.g.*, Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669, 674 (Cal. 2000); DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 470 (S.D.N.Y. 1997) (holding arbitration clause unenforceable as against public policy to the extent it prevented employee from recovering legal fees to which he was entitled under Title VII). With increasing frequency, courts are applying the doctrine of unconscionability to invalidate arbitration clauses. *See* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 761 (2004).

discrimination in the workplace and a powerful tool to enforce Maryland's anti-discrimination mandate. Employee advocates also have a tremendous responsibility to develop case law that effectuates the promise that all individuals may work in an environment free from discrimination and harassment.