

## MEMORANDUM

TO: Hiring Attorney

FROM: Lisa Solomon

DATE May 23, 2005

RE: L\_\_\_\_\_ v. S\_\_\_\_\_ USA

### QUESTION PRESENTED

Analyze the merits of potential age discrimination claims under Maryland and federal law light of the retirement provision of R\_\_\_\_\_ L\_\_\_\_\_’s employment contract.

### FACTS

In December 1999, R\_\_\_\_\_ L\_\_\_\_\_ and D\_\_\_\_\_ M\_\_\_\_\_, a director of S\_\_\_\_\_ & S\_\_\_\_\_, executed a brief letter agreement. This letter agreement provided that L\_\_\_\_\_ would become Vice President and General Manager of S\_\_\_\_\_ USA, Inc. (“S\_\_\_\_\_ USA”) “by the end of January 2000.” The only substantive term of the letter agreement addressed the amount of L\_\_\_\_\_’s salary.

On August 13, 2001, L\_\_\_\_\_ and S\_\_\_\_\_ USA entered into a much more detailed employment agreement (the “Employment Contract”). The Employment Contract provides that L\_\_\_\_\_ will work as President of S\_\_\_\_\_ USA for a term beginning on February 14, 2000 and ending “on the Executive’s retirement at the age of 65 which will be on August 13, 2005, unless sooner terminated as provided herein.” The Employment Contract further states that, “[i]f agreed by both parties at least 6 months prior to the

retirement[,] an employment after August 13, 2005 may be possible.” Under the Employment Contract, S\_\_\_\_ may terminate L\_\_\_\_\_ at any time for “cause” (as defined in the Employment Contract) or, on six months’ written notice, without “cause.”

The Employment Contract contains provisions addressing L\_\_\_\_\_’s salary during the term of his employment and the benefits and perquisites to which he is entitled.

The benefits clause does not contain any reference to pension benefits.

S\_\_\_\_ USA, which is a wholly-owned subsidiary of S\_\_\_\_ & S\_\_\_\_ with approximately 12 employees in Maryland, has already indicated that it does not intend to extend the contract term past August 13, 2005.

## DISCUSSION

### **I. L\_\_\_\_\_ MAY HAVE A VIABLE WRONGFUL DISCHARGE CLAIM AGAINST S\_\_\_\_ USA UNDER MARYLAND COMMON LAW**

The Maryland Fair Employment Practices Act (“FEPA”), provides: “It is hereby declared to be the policy of the State of Maryland . . . to assure all persons equal opportunity in receiving employment . . . regardless of . . . age . . . , and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.” Md. Code, Art. 49B, §14. FEPA defines an employer as “a person engaged in an industry or business who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .” Md. Code, Art. 49B, §15(b). For purposes of analysis, it is assumed that S\_\_\_\_ USA has accurately calculated the number of its

employees, and that the employees of S\_\_\_\_ USA and S\_\_\_\_ & S\_\_\_\_ cannot be aggregated for purposes of applying FEPA. Therefore, FEPA is not, by its terms, applicable to S\_\_\_\_ USA.

However, Maryland recognizes a common law claim for wrongful discharge of an at-will employee. Molesworth v. Brandon, 672 A.2d 608, 612 (Md. 1996). An at-will employee can be fired for any non-discriminatory reason, or for no reason at all. E.g., Wholey v. Sears Roebuck, 803 A.2d 482, 488 (Md. App. 2002). Here, although L\_\_\_\_'s Employment Contract was for a fixed term and required cause for S\_\_\_\_'s termination of L\_\_\_\_'s employment if the termination was accomplished without notice, it also allowed S\_\_\_\_ USA to terminate L\_\_\_\_ without cause upon six months' written notice. Thus, aside from the six month notice requirement, L\_\_\_\_ is arguably in the same position as an at-will employee, since he is subject to termination without cause.

In order to prevail on a wrongful discharge claim, an at-will employee must show that the motivation for his discharge contravenes a clear mandate of public policy. Molesworth v. Brandon, 672 A.2d at 612. In Molesworth, the Court of Appeals held that FEPA expresses a clear mandate a public policy against employment discrimination and therefore provides a sufficient basis for a common law wrongful discharge claim against an employer with fewer than 15 employees. Id. at 614-15. The court reasoned that, while the legislative intent of FEPA was to exempt small employers from its administrative requirements, the General Assembly did not intend to exempt small

employers from the public policy underlying the Act. Id. at 614. Although Molesworth involved a sex discrimination claim, nothing in the decision or in subsequent case law indicates that Molesworth's holding would not apply equally to age discrimination claims.

The question then becomes whether the “retirement” provision in the Employment Contract constitutes a waiver of any age discrimination claims. Under Maryland law, a contractual provision that violates public policy is invalid to the extent of the conflict between the public policy and the contractual provision. State Farm Mut. Auto. Ins. Co. v. Nationwide Mut. Auto. Ins. Co., 516 A.2d 586, 591 (Md. 1986); see also Medex v. McCabe, 811 A.2d 297 (Md. 2002) (invalidating provision in employment agreement conditioning payment of earned incentives on future employment as violative of public policy embodied in Maryland wage payment laws).

There are no Maryland cases addressing the issue of whether an individual employee can prospectively waive discrimination claims in an employment contract, and there are only a few cases from other jurisdictions addressing the issue.<sup>1</sup> In Moses v. Burleigh County, 438 N.W.2d 186 (N.D. 1989), the plaintiff, a black female deputy sheriff, alleged that the County deprived her of peace officer training because of her gender and race. The sheriff claimed that he hired Moses solely for detention work, and

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<sup>1</sup>Since cases involving collective bargaining agreements also implicate labor law, they are not included in this analysis.

when he hired Moses he expected to transfer her to a new women's detention section of the jail. Id. at 187. The trial court concluded that any unequal treatment Moses received was due to the terms of her employment contract. Id. at 187.

On appeal, the North Dakota Supreme Court squarely addressed the question of whether discrimination prohibited by the state's Human Rights Act could be justified by a prior contract. The court concluded that a contract cannot excuse later discrimination, explaining that

[t]he enactment of the Human Rights Act identified important public interests in eradicating discrimination and designated remedies for violation of an individual's right to be free of discrimination. An accepted principle of interpretation attaches a paramount purpose to such a declaration of public policy. See Restatement (Second) [of] Contracts, §178 (1981) [additional citations omitted]. When an important public policy would be frustrated by a promise, the policy outweighs enforcement of the promise.

To permit a contractual term to vary the intent of a law against discrimination in commercial and contractual matters would make the law ineffective. If an employer could require waiver of an anti-discrimination law as a condition of employment, it could become a widespread practice, increasing discrimination rather than doing away with it. It would be nearly impossible to enforce anti-discrimination laws in employment. Intrinsicly, a law against discrimination outlaws contradictory contracts.

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. . . [T]here can be no contract for unlawful discriminatory treatment.

Id. at 189-90. Other courts have also held that there can be no prospective waiver of employment discrimination claims. See Adams v. Philip Morris, Inc., 67 F.3d 580 (6<sup>th</sup> Cir. 1996) (release was ineffective to waive employee's prospective ADEA and Title VII claims arising from his re-application for employment with defendant); Thompson v. Moran, 1996 WL 616675 (6th Cir. Oct. 24, 1996) (*per curiam*) (agreement, under which (1) employer agreed to consider employee fully disabled and to pay him disability benefits and (2) employee agreed to retire on a date certain, did not insulate employer from liability for disability discrimination claim under ADA and Michigan Handicappers Civil Rights Act based on employer's subsequent refusal to re-employ employee when he became only partially disabled); Harrington v. Aetna-Bearing Co., 921 F.2d 717, 720 (7<sup>th</sup> Cir.), cert. denied, 500 U.S. 906, 111 S. Ct. 1685, 114 L. Ed. 2d 80 (1991) (stating, in *dicta*, that "if an employer had a practice of giving term employment contracts to its executives and renewing the contracts only for the young executives, it would be guilty of age discrimination. Therefore if Aetna had refused to extend Harrington's contract beyond the age of 70 because it thought people over 70 are unreliable, it might well be guilty of age discrimination. If it had fired Harrington when and because he reached 70, or forced him to retire then, the conclusion would be the same."); Gustafson, Inc. v. Bunch, 1999 WL 766020 (N.D. Tex. Sept. 12, 1999), aff'd, 244 F.3d 134 (5<sup>th</sup> Cir. 2000) (general release that purported to release employer from all known and unknown claims, including ADA and ADEA claims, that employee had or might have in the

future, was unenforceable and did not preclude employee from bringing ADA and ADEA claims based on conduct that had not occurred at the time release was entered into). But see Creamer v. AIM Telephones, Inc., 159 B.R. 440 (E.D. Pa. 1993) (stating, in *dicta*, that plaintiff's waiver of his statutory right under ADA to work until age 70 constituted consideration for employment agreement).

The Moses court's citation of §178 of the Restatement (Second) of Contracts is significant because Maryland courts "frequently cite to treatises for persuasive authority on contract issues." Pyles v. Goller, 674 A.2d 35 (Md. App. 1996) (citing two cases in which Maryland courts have relied on the Restatement (Second) of Contracts). Three sections of the Restatement (Second) of Contracts are potentially applicable here.

Section 178 states: "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." As discussed above, in Molesworth, the Court of Appeals held that Maryland's explicit public policy against employment discrimination was strong enough to support a common law wrongful discharge claim against a small employer not covered by FEPA. Therefore, it seems likely that a Maryland court would also determine that the same policy against employment discrimination is sufficiently strong to outweigh the interest in enforcing the "retirement" provision of the Employment Contract.

Because it is in L\_\_\_\_\_’s interest to invalidate only the “retirement” provision, while leaving the remainder of the Employment Contract in effect, we must look to two other Restatement (Second) provisions. Section 183 provides: “If the parties’ performances can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents and one pair is not offensive to public policy, that portion of the agreement is enforceable by a party who did not engage in serious misconduct.” Section 184 states, in relevant part that, “[i]f less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.” Section 184 seems particularly applicable to the “retirement” provision. L\_\_\_\_\_ can reasonably argue that the only essential parts of the “agreed exchange” in the Employment Contract are those portions that require him to work for S\_\_\_\_ USA in return for the compensation provided for in the agreement, since a contract with those terms would be enforceable even absent the “retirement” provision.

**II. THE LIMITED FORUM SELECTION CLAUSE IN THE EMPLOYMENT AGREEMENT SHOULD NOT PROHIBIT L\_\_\_\_\_ FROM SUING S\_\_\_\_ USA IN MARYLAND STATE COURT**

The Employment Agreement provides that L\_\_\_\_\_

irrevocably (i) consents to the jurisdiction and venue of the Federal district court located in the State of Maryland in

connection with any action, suit or other proceeding arising out of or relating to this agreement or any act take or omitted hereunder [and], (ii) waives and agrees not to assert in any such action, suit or other proceeding that he is not personally subject to the jurisdiction of such courts, that the action, suit or other proceeding is brought in an inconvenient forum or that venue of the action, suit or other proceeding is improper . . . .

On its face, this clause does not prohibit L\_\_\_\_\_ from suing S\_\_\_\_\_ USA in Maryland state court. The clause is not a broad provision requiring all disputes arising out of or relating to the Employment Contract to be determined by a Maryland federal court; rather, it only prohibits L\_\_\_\_\_ from opposing, on the grounds of personal jurisdiction or forum *non conveniens*, any attempt by S\_\_\_\_\_ USA to have such a dispute heard in a Maryland federal court.

Moreover, if S\_\_\_\_\_ USA desired to remove a state court action filed by L\_\_\_\_\_ to federal court, it would still have to show a basis for federal subject matter jurisdiction. Since S\_\_\_\_\_ USA is a Delaware company with its principal place of business in Maryland, and L\_\_\_\_\_ is (presumably) a Maryland citizen, there is no basis for diversity jurisdiction. See 28 U.S.C. §1441(e)(1) (authorizing removal based on diversity jurisdiction); 28 U.S.C. §1332(c)(1) (corporation is a citizen of state where it is incorporated and stated where it has its principal place of business); Burns v. Friedli, 241 F. Supp. 2d 519 (D. Md. 2003) (Delaware corporation with principal place of business in Maryland is a Maryland citizen for diversity and removal purposes). Furthermore, if the complaint does not contain any federal claims (*e.g.*, an ADEA claim),

there will be no federal question jurisdiction.<sup>2</sup> Therefore, the choice of forum provision in the Employment Contract does not prohibit L\_\_\_\_\_ from suing S\_\_\_\_ USA in Maryland state court.

### CONCLUSION

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<sup>2</sup>Because the desire to litigate this case in Maryland state court counsels against filing an EEOC charge (which could provide the jurisdictional basis for an ADEA claim in federal court, once L\_\_\_\_\_ has exhausted his administrative remedies), I have not analyzed all of the issues applicable to a potential ADEA claim. However, it should be noted that the ADEA allows an employer to require a “bona fide executive,” to retire at age 65, but only if the employee “is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$44,000.” 29 U.S.C. §631(c)(1). L\_\_\_\_\_’s Employment Contract does not provide for any such benefits. Therefore, L\_\_\_\_\_ would presumptively be covered by ADEA’s general prohibition on mandatory retirement based on age. 29 U.S.C. §623(a)(1).

However, the ADEA applies only to employers with 20 or more employees on each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 U.S.C. §630(b). Since S\_\_\_\_ USA currently has approximately 12 employees, it would not be subject to ADEA unless it and S\_\_\_\_ & S\_\_\_\_ are considered to be a “single employer” for purposes of the ADEA.

Finally, before he can bring an ADEA claim, L\_\_\_\_\_ must exhaust his administrative remedies by filing an EEOC charge alleging age discrimination. 29 U.S.C. §626(d). Any such charge must be filed within 300 days of the discriminatory act. 29 U.S.C. §626(d)(2). This raises the question of whether the discriminatory act is S\_\_\_\_ USA’s inclusion of the retirement provision in the Employment Contract, or whether it is S\_\_\_\_ USA’s written notice to L\_\_\_\_\_ that it does not intend to employ him after age 65. If the discriminatory act is S\_\_\_\_ USA’s inclusion of the retirement provision in the Employment Contract, then L\_\_\_\_\_ would be time-barred from filing an EEOC charge, because more than 300 days have passed since the execution of the Employment Contract on August 13, 2001.

Although L\_\_\_\_\_ has a potentially viable common law wrongful discharge claim, in light of the dearth of Maryland law squarely addressing the issue of the enforceability of the “retirement” provision in the Employment Contract, and the relatively few cases from around the country on this issue, if L\_\_\_\_\_ decides to pursue such a claim, S\_\_\_\_\_ USA would most likely move to dismiss. If, based on the analysis set forth above, the court denies such a motion, S\_\_\_\_\_ USA might be amenable to reaching an early settlement. However, such a result is far from certain, and S\_\_\_\_\_ USA’s reaction to a decision allowing the case to go forward ultimately depends on numerous other factors outside the scope of this memorandum.