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### ***Panel of the Court of Special Appeals of Maryland Declares Accrued But Unused Vacation Must Be Paid Out At Termination of Employment and the Maryland Division of Labor and Industry Now Agrees***

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On August 20, 2007, a panel of the Court of Special Appeals ruled that employees must be paid for accrued but unused vacation pay at the time of termination of employment. *Catapult Tech. Ltd v. Wolfe* (Md. Ct. Spec. App. 2007). This opinion, which contradicted two earlier cases interpreting the Maryland wage payment statute (one of which had been reversed on other grounds), was entirely unexpected to many employment law practitioners in Maryland. The decision also was contrary to the long-standing interpretation of the Maryland wage payment statute by the Maryland Division of Labor and Industry, which had a statement on its web site essentially stating that an employee was not entitled to be paid for accrued but unused vacation if the employee was advised in advance that such leave would not be compensable upon termination.

Whether by coincidence of timing or otherwise, that interpretation apparently was eliminated by the DLI from its web site at around the time of the *Catapult Tech.* hearing, and the DLI web site had no statement taking a position either way as to whether accrued vacation leave was compensable at the time of termination. Then in a one-two punch, a three judge panel of the Court of Special Appeals in *Catapult* rejected the commonly held belief that a company did not have to pay for accrued but unused vacation, and the Maryland Division of Labor and Industry altered its website to require such payment. The DLI's web site now provides the following question and answer to address the issue:

Q: Wages and Compensation - Unused Vacation at Termination - Is It Payable?

A: When an employee has earned or accrued his or her leave in exchange for work, an employee

has a right to be compensated for unused leave upon the termination of his or her employment regardless of the employer's policy or language in the employee handbook.

[www.dllr.state.md.us/labor/wagepay/wpunusedvacpay.html](http://www.dllr.state.md.us/labor/wagepay/wpunusedvacpay.html)

If these two authorities prevail, accrued vacation time is an earned "wage" under Maryland Wage Payment and Collection Law ("MWPCCL") for services performed. Thus, just as earned wages cannot be forfeited, accrued vacation time can not be forfeited at the time of termination. Moreover, to the extent that accrued vacation is considered a "wage" under the MWPCCL, an employer who fails to pay for accrued but unused vacation can be held liable for treble damages and recovery of attorney's fees unless there is a *bona fide* dispute over whether the money was owed (a position which becomes more difficult to establish in light of the DLI web site and the *Catapult* decision, which was not appealed). See Md. Code Ann., Lab. & Emp. § 3-507.1.

### **The Catapult Technology Case**

The defendant employer, Catapult Technology, Ltd., was a government contractor that provided business and technology services to the federal government. The plaintiffs were fourteen former employees of Catapult who had worked on a contract to provide network services to the United States Department of Transportation (the "DOT") for three years. Unfortunately for Catapult, the DOT decided not to renew its contract with Catapult and the department instead awarded the new contract to Bowhead Information Technology Solutions ("Bowhead"). Catapult informed its employees that it intended to appeal the DOT decision and that it was confident that it would prevail on its appeal. The company also reminded the employees that the employee handbook required any employee who quit to provide two weeks' notice and that the employees remained subject to the non-compete provisions in their employment contracts.

The day after the contract expired, the displaced employees reported for work only to find that there were not enough jobs available for all of the employees. They were, however, advised by the company that it was working to identify positions for them within the company and that they should return to work on Monday. Instead, the employees met with Bowhead and were offered positions with that company. The employees gave their resignations to Catapult to be effective immediately, and they accepted employment with Bowhead. In response, Catapult refused to pay the employees for any accrued vacation time because Catapult had a policy, detailed in its employment manual, which stated that employees would lose any accrued vacation and sick leave ("universal leave") if they failed to give two weeks' notice in writing of their resignation.

The employees filed suit in the Circuit Court of Montgomery County for payment of their accrued but unused leave, and the trial court sided with the employees, granting their motion for partial summary judgment and holding that Catapult had violated the MWPCCL. The case went forward as a jury trial on the issue of whether the parties had a *bona fide* dispute regarding Catapult's entitlement to withhold the employees' accrued leave. If no *bona fide* dispute existed, then the employees were entitled to treble damages under § 3-507.1. The jury ruled in favor of the employees and awarded treble damages. Catapult appealed the Circuit Court's ruling and raised two issues on appeal: (1) whether the Circuit Court erred in ruling that Catapult's leave policy violated the MWPCCL; and (2) whether there was sufficient evidence to substantiate a jury verdict that no *bona fide* dispute existed between the parties in connection with Catapult's refusal to pay for accrued but unused leave.

On appeal, the Court of Special Appeals concurred with the Circuit Court on the issue of whether Catapult's leave policy violated Maryland law. The Court declared that universal leave is a "wage" under the MWPCCL and must be paid upon termination of the employee's relationship. Specifically, the Court stated universal leave is given "'in remuneration' for the employee's work and therefore constitutes a wage under the WPCCL." *Id.* at 12.

In reaching this conclusion, the *Catapult* Court found that the case was analogous to *Medex v. McCabe*, 372 Md. 28 (2002), which addressed an employer's obligation to make incentive payments to employees after their termination. In *Medex*, the employer had a policy in its employee handbook in which it promised to provide certain incentive payments if employees met their targets and if the participant was still "an employee at the end of the incentive plan (generally the fiscal year) and [was] employed at the time of actual payment." After the plaintiff quit his position, Medex refused to make the incentive payment when it otherwise would have become due on the grounds that the employee had resigned and therefore was ineligible under the written terms of the incentive plan. The Court of Appeals ruled that the incentive payments were commissions and thus "wages" under the MWPCCL. In reaching that conclusion, the court stated that "[i]n accordance with the policy underlying the Maryland Act, an employee's right to compensation vests when the employee does everything required to earn wages. . . . A contract that necessitates the deprivation of some portion of the fees worked for by the employee contravenes the purpose of the Act." *Id.* at 41.

The Court in *Catapult* reasoned that the logic of the *Medex* case also would apply to compel the payout of accrued but unused vacation upon termination. Reasoning that an employee's right to vacation is earned as a consequence of an employee providing services to an employer, the Court concluded that such leave - if not taken as leave by the

employee - must be compensated at the time of termination of employment. The Court also ruled that Catapult's forfeiture provision, in its universal leave policy, was contrary to Maryland law, invalid and against public policy. However, the Court also reversed the award of treble damages against the employer and held that, under these particular circumstances, there was a *bona fide* dispute between the parties and that the employees therefore were not entitled to treble damages.

### **The Issues Are Not Entirely Resolved**

The *Catapult* case is an unreported decision by a three judge panel of the Court of Special Appeals. Thus, technically, the decision is not final, binding precedent and another court could disagree. At the same time, lower courts often follow the decisions of the Court of Special Appeals until they are reversed by the Court of Appeals. The risk created by employers ignoring this decision is compounded by the amendment of the Division of Labor and Industry's web site advising employers that they should pay employees for accrued but unused leave.

In addition, the logic of the *Catapult* opinion could put at risk any "use it or lose it" vacation policy. Many employers limit the amount of vacation that an employee may carry over to another year, specifically advising employees that they will lose any vacation they do not use in a given year. Under the *Catapult* reasoning, those employees arguably should be required to use any accrued leave before the end of the year or be paid for vacation time that they cannot use and cannot carry over to the next year.

Finally, the *Catapult* Court alluded to the possibility that sick leave might be treated differently from other kinds of leave, but did not directly resolve that issue since the employer in that case had a "universal leave" policy which provided leave that could be used as either sick or vacation leave. There is good reason to conclude that accrued sick leave - provided for the sole purpose of providing compensation in the event of illness or disability - would not be paid upon termination since the event necessary to give rise to the leave (illness or disability) never occurred. That conclusion, however; is not certain.

Employment attorneys can only hope that the Court of Appeals soon agrees to hear a case in which it can decide whether the Court of Special Appeals correctly interpreted Maryland wage and hour law in the *Catapult* opinion, as well as to address the other issues that are raised by that case.

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