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April 23, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: SB 678 / HB 314

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency SB 678 and HB 314, identical bills which expand administrative and judicial remedies available in employment discrimination cases under Article 49B of the Maryland Code. While we approve the bill for signing, we note that an issue is raised as to the adequacy of a portion of legislation's title, i.e., that describing new provisions governing administrative monetary relief. Although an argument can be made that the title is constitutionally sufficient, we believe it would be advisable to revise the title in next year's curative bill. In addition, we also write to note an ambiguity with respect to the applicability of the legislation's monetary relief provisions to State agencies caused by the General Assembly's failure to amend §7 and §17A of Article 49B. This is another issue the Legislature may wish to address next session.

Background

Among other things, SB 678 / HB 314 authorize an administrative law judge in cases filed with the Human Relations Commission alleging employment discrimination to award back pay, provide injunctive or equitable relief and award compensatory damages

within certain limits.¹ In addition, the bills authorize the Commission and, under certain circumstances, a complainant to go to court to seek back pay, compensatory damages (within certain limitations), punitive damages, attorney's fees and expert witness fees. The legislation expressly bars the award of punitive damages if the respondent is "a government entity or political subdivision." However, the measure does not amend §7 of Article 49B, governing the application of the law to State agencies or §17A, which states that:

The State, its officers, and its units may not raise sovereign immunity as a defense against a salary award in an employment discrimination case under §16 of this article. (emphasis added)

Title

Article III, §29 of the Maryland Constitution requires that a bill's title provide an adequate description of the legislation's contents. While the title to SB 678 / HB 314 is detailed in many respects, it is less specific in its description of new administrative monetary relief. The purpose clause of the legislation's title after describing the authorization of a "civil action" refers to "expanding the relief available to certain acts of discrimination to include an award of certain compensatory damages, punitive damages, and attorney's fees and expert witness fees under certain circumstances." While it is possible to argue that the quoted language refers only to the judicial relief provisions of the bill, it can also be argued that the clause collapses all relief—both administrative and judicial—within the language. In addition, the short title of the bills, "Maryland Human Relations Commission-Hearings and Civil Actions-Relief" and the "generally relating" clause, "generally relating to hearings and relief under the Maryland Human Relations Commission Law," could be read to include administrative monetary relief. In any event, because of the importance of these provisions and to eliminate any doubt about their description in the title, we recommend that a revised (and more descriptive) title be included in next year's curative bill. Curative legislation might also make specific reference to the bills' elimination of a 36-month limit on back pay. See SB 678, p. 6, lines 22-23 and HB 314, p. 6, lines 16-17.²

¹In SB 678, p. 5, line 21 and in HB 314, p. 5, line 13, the legislation erroneously refers to "THE COURT", rather than an ALJ. In addition, both bills at p. 5 refer to "enjoining" a respondent—relief characteristic of a court, rather than an administrative agency.

²In *Gutwein v. Easton Publishing Co.*, 272 Md. 563, 575 No. 10 (1974), the Court of Appeals reserved the issue of whether the Separation of Powers doctrine would prevent an

Sovereign Immunity

Absent a waiver of sovereign immunity, the state and its agencies are immune from monetary liability. Although immunity can be waived “either directly or by necessary implication,” *Stern v. Board of Regents*, 380 Md. 691, 701 (2004), the Court of Appeals has said that “the dilution” of the doctrine of sovereign immunity shall not be accomplished by the judiciary. *Id.* at 700. The Court has also said that even where a statute specifically waives the doctrine, a suit may be maintained only where there are funds available for the satisfaction of the judgment or the agency has the power to raise funds to satisfy the judgment. *Id.* at 701.

This is not the first time these principles have clashed with amendments to Article 49B. Following the decision of the Court of Appeals in *Gutwein v. Easton Publishing Co.*, 272 Md. 563 (1974) denying the availability of back pay under Article 49B, the General Assembly in 1977 authorized such a remedy, Chapter 937, Laws of 1977. At the same session, the Legislature provided that in a case in which the State was a respondent “the rules, procedures, powers, rights, and remedies. . . applicable . . . shall be those which are applicable in a discrimination case in which a private person is the respondent.” Chapter 706, Laws of 1977.³ Nevertheless, the 1977 legislation prohibited the award of monetary relief in cases including State respondents.

In 1980, the General Assembly eliminated this exception. Chapter 624, Laws of 1980. However, after an exchange of communications among the Attorney General’s Office, the Commission’s Counsel, and the Governor’s Chief Legislative Officer, it was decided that additional legislation was needed to make a back pay award available to a complainant in a case involving a State agency. Chapter 262, Laws of 1982 attempted to address the issue by prohibiting the defense of sovereign immunity in employment discrimination cases before the Commission and by piggybacking on an existing statute requiring the Governor to include funds in the budget to satisfy merit system grievances. Thus, the 1982 legislation appeared to satisfy the prerequisites to an effective waiver of immunity.

In 1993, the new State Personnel & Pension Article moved this waiver into Article

executive agency from making monetary awards. No later case raises the issue. Thus, we approve the bill for constitutionality.

³The only remedy expressly mentioned in Article 49B §7—the present embodiment of Chapter 706-- is injunctive relief.

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49B as §17A and apparently (and erroneously) restricted the appropriation component to State employee grievance cases. See State Personnel & Pension Article §14-201 et seq. In any event §17A in its present form applies only to salary awards, and §7 mentions only injunctive relief. Most importantly, no provision establishes a mechanism to appropriate funds to satisfy judgments against state agencies with respect to the enhanced remedies authorized by SB 678 / HB 314.

The only evidence that a fully effective waiver of immunity was intended in this legislation is the reference in the bills to a prohibition of punitive damages where the respondent “is not a government entity or political subdivision”—a suggestion that State agencies were encompassed within the new enhanced remedies.⁴ In our view, under Court of Appeals decisions, this is not sufficient for a fully effective waiver. Rather, we believe the Legislature, just as it did in the early 1980's, should revisit this area and resolve the issue of the State's liability in employment discrimination cases.

We should point out that waiting to address this issue next session does not create a significant enforcement gap. Claims for damages for various types of discrimination under the 1866, 1871, 1964 and 1991 Federal Civil Rights Act can still be brought in State court against State officers or agencies.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/RAZ/mw

cc: Joseph Bryce
Secretary of State
Karl Aro

⁴The Fiscal and Policy Note for the legislation does not mention an increase in State agency expenditures as a result of the bills.