

Foreword

Margaret E. Johnson

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HAVING IT OUR WAY: WOMEN IN MARYLAND'S WORKPLACE CIRCA 2027

FOREWORD

MARGARET E. JOHNSON*

On November 14, 2007, the University of Baltimore School of Law, the University of Maryland School of Law and the Women's Law Center of Maryland co-sponsored a symposium entitled "Having it Our Way: Women in Maryland's Workplace Circa 2027." The insightful collection of papers in this volume of the University of Maryland Law Journal of Race, Religion, Gender and Class represents the work of employment law scholars, public policy specialists, and activists who presented on the current state of Maryland employment law and discussed Maryland's future.

This distinguished group of experts and scholars present several themes: the hope of new state laws and how best to effectuate their intent; the work necessary to change Maryland's outdated employment law protections for women employees; the ongoing gender pay disparity, lack of protection for family responsibility discrimination, and paucity of leave rights available for women workers; the importance of coalition building among employee and employer groups in creating and passing new laws; and the need to be creative and think beyond federal laws or existing frameworks in modeling Maryland's new employment law landscape.

Professor Deborah Eisenberg's paper¹ begins the collection of symposium papers by underscoring the possibility and responsibility of Maryland's employment discrimination laws. As lucidly discussed by Professor Eisenberg, as of October 1, 2007, Maryland has enacted

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* Assistant Professor of Law and Co-Director, Center on Applied Feminism, University of Baltimore School of Law. I would like to thank Dean Phillip J. Closius for his generous support of this symposium. As chair of the symposium planning committee, I would be remiss in failing to recognize the important work of the Women's Law Center of Maryland in the area of employment law. It was during an advisory board meeting of the Center's employment law hotline that the idea for this symposium was born. Tracy Brown, Executive Director of the Women's Law Center, and Jill Wrigley, Director of the Employment Law Hotline, were instrumental in ensuring that this program occurred and no doubt will be integrally involved in ensuring that the concrete agenda embodied in this symposium comes to fruition as well.

1. Deborah Thompson Eisenberg, *Opening the Doors to the Local Courthouse: Maryland's New Private Right of Action for Employment Discrimination*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 7 (2009).

new legislation bringing it into accord with the vast majority of other states that provide a private right of action for employment discrimination cases.² The new legislation provides private citizens with the opportunity to bring independent court claims of discrimination against their employers without relying on the Maryland Commission on Human Relations.³ In addition, under the new law, the employee can seek a jury trial and is able to access a broader range of remedies than previously allowed under the state administrative scheme.⁴ Maryland also provides protection against discrimination to more classes of people⁵ than federal law.⁶ Overall, the private right of action is a great step forward for Maryland employees. As Professor Eisenberg underscores, however, we have a responsibility to establish favorable case law that will bring to fruition the intent of Maryland's newly established private right of action and ensure state protection from employment discrimination.⁷ Therefore, as we look down the road twenty years, Professor Eisenberg's piece stresses the importance of thoughtful litigation in developing the new law around this right.

Professor Michael Hayes' paper comprehensively and thoughtfully constructs another theme of this conference: that Maryland lags behind in the rights that it gives employees.⁸ While the Maryland legislature has addressed the issue of a private right of action for employment, as Professor Eisenberg's article discusses, the legislature has not been similarly responsive to the issues of paid and unpaid leave. In that area, Maryland has only a small patchwork of limited protections.⁹ As a result, Professor Hayes persuasively illustrates Maryland has much work to do in reforming its leave laws. Professor Hayes analyzes the different possible categories of leave in Maryland as well as the possible leave rights offered by other states. Based on this array of possibilities, Professor Hayes suggests how best

2. See *id.* at 7–8 (H.B. 1034, 2006 Leg., 421st Sess. (Md. 2006)).

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

4. *Id.* § 20-1013(d)-(f).

5. *Id.* § 20-606(a)(1)(i) (listing race, color, religion, sex, age, national origin, marital status, sexual orientation, genetic information and disability).

6. 42 U.S.C. 2000e-2(a) (listing race, color, religion, sex and national origin).

7. Eisenberg, *supra* note 1, at 13–17.

8. Michael J. Hayes, *Employment Leave Issues*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 19 (2009).

9. See *id.* (stating that Maryland law provides family and medical leave for public employees, a day of rest to certain retail and wholesale employees, and forbids termination due to certain court participation).

to achieve leave rights and protection for Maryland's workers by 2027. Professor Hayes weighs the advantages of two distinct approaches to begin filling in Maryland's law landscape. In the end, Professor Hayes articulates a strategy that would begin with a narrow agenda and then would gain momentum toward pushing an expansive agenda of broad-based leave laws.¹⁰ Building off of the successful coalition work documented by Professor Eisenberg regarding Maryland's new private right of action, Professor Hayes also suggests that such coalitions could be built to pass new legislation regarding employment leave.

Cynthia Calvert's paper¹¹ provides an important overview of the national legal landscape that currently exists to protect against family responsibility discrimination. Family responsibility discrimination (FRD) occurs "when an employee suffers discrimination at work based on unexamined biases about how employees with family care-giving responsibilities will or should act."¹² The Equal Employment Opportunity Commission (EEOC) recognizes FRD as a form of illegal gender-based discrimination.¹³ As Calvert explains, most FRD claims are brought by fitting them into federal and state employment laws that do not directly address FRD.¹⁴ Only Alaska and the District of Columbia expressly forbid family responsibility discrimination by statute, so Maryland is not lagging behind the majority of other states in this area.¹⁵ To the contrary, as Calvert has noted, several Maryland county codes directly protect against family responsibility discrimination.¹⁶ Therefore, there is a real opportunity for Maryland to be a trailblazer by creating state legislation to outlaw and provide a remedy for FRD in employment.¹⁷ Calvert proposes that efforts to provide protection against FRD discrimination might be possible on the state level by 2027 based on

10. *Id.* at 29–31.

11. Cynthia Thomas Calvert, *The New Sex Discrimination: Family Responsibilities*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 33 (2009).

12. Joan C. Williams and Cynthia Thomas Calvert, *Family Responsibilities Discrimination: What Plaintiffs' Attorneys, Management Attorneys and Employees Need to Know*, 91 Women Lawyers J. 24 (Winter 2006).

13. EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, Notice no. 915.002, May 23, 2007, available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

14. Calvert, *supra* note 11 at, 35–41.

15. *Id.* at n.98.

16. *Id.* at 43 (citing to the codes of Howard County, Montgomery County and Prince George's County).

17. *Id.* at 43–44. In fact, Maryland law actually prohibits family status discrimination in housing. *Id.*

the grassroots coalition building that accompanied the passage of House Bill 1034, Maryland's private right of action legislation.¹⁸ Calvert indicates that both employers and employees would benefit from such legislation,¹⁹ making a coalition of employee and employer groups possible.

Dr. Vicki Lovell's paper highlights another theme of this conference—that there is still a need for protection against and a remedy for discrimination on the basis of sex.²⁰ Specifically, Dr. Lovell's paper analyzes her *Report to the Maryland Pay Commission* to show that in Maryland, there is still a gap between male and female wages.²¹ Dr. Lovell then analyzes the possible reasons for the ongoing intransigent discrimination in pay. She posits, based on her research, that women continue to trail men in pay due to continuing occupational segregation and intentional discrimination in pay.²² In order to create a remedy for women in Maryland that at least targets the latter, Dr. Lovell highlights two pending pieces of federal legislation as helpful tools: the Fair Pay Act and the Paycheck Fairness Act.²³ In light of the recent U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber, Co.*,²⁴ Dr. Lovell again reinforces the notion that as we move forward to protect workers from gender-based discrimination, we need to create meaningful rights and remedies separate from federal laws. Dr. Lovell also suggests the importance of non-legal solutions, most importantly, significant cultural change, in order to better the lot of women workers in Maryland.²⁵

18. *Id.* at 42 (citing H.B. 1034, 2006 Leg., 421st Sess. (Md. 2006)).

19. *Id.* at 44.

20. Vicky Lovell, *Evaluating Policy Solutions to Sex-Based Pay Discrimination: Women Workers, Lawmakers, and Cultural Change*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45 (2009).

21. *Id.* at 49–51 (citing Vicky Lovell & Olga V. Sorokina, *Report to the Maryland Equal Pay Commission*, July 19, 2006, available at http://www.iwpr.org/pdf/MD_payequity_report.pdf).

22. *Id.* at 51–53.

23. *Id.* at 58–59. Please note that after the articles for this symposium issue were completed, the Lilly Ledbetter Fair Pay Act of 2009 was enacted on January 29, 2009. PL 111-2, January 29, 2009, 123 Stat 5.

24. 550 U.S. 618, 127 S. Ct. 2162, 2174 (2007) (holding that every new paycheck that might reflect an employer's discrimination by failing to provide a pay raise on the basis of the employee's gender does not give rise to a new charging period for the purposes of filing a claim with the EEOC—the employee's action is time barred.).

25. *Id.* at 59–61.

Professor Marley Weiss concludes the symposium by providing provocative commentary on the preceding papers.²⁶ Professor Weiss begins by identifying obstacles to women's equality, including such issues as occupational segregation, wage discrimination, devaluation of women's work, pregnancy discrimination, family responsibility discrimination, sexual harassment, unemployment insurance, employee benefit plan design, ERISA and the restrictions on the ability to organize labor and bargain collectively.²⁷ Recognizing the enormity of these obstacles, Professor Weiss offers some solutions in different areas. For instance, to more effectively eradicate employment discrimination, Professor Weiss suggests some of the following legislative initiatives: subjecting smaller employers to anti-discrimination laws, removing damage caps, limiting restrictions on class certifications and redefining employees to include independent contractors.²⁸ In addition, she proposes a strategy for working to change Maryland's employment law landscape for the better by 2027.

Differing from Professor Hayes, Professor Weiss suggests a legislative strategy to improve the lives of women workers that addresses some of the more pernicious systemic barriers to women's equality in the workplace. For instance, she suggests the following reforms: providing paid leave under the Family and Medical Leave Act; a flat ceiling on working hours and a prohibition on mandatory overtime; social provision of child and parental care; and equality and nondiscrimination between full-time and part-time workers.²⁹ In sum, Professor Weiss suggests that by attacking these gender-neutral obstacles to women's equality in the workplace, a successful coalition of women, unions and non-governmental organizations can unite to create significant change in the Maryland employment law landscape by 2027.

The discussions in the symposium papers above provide a concrete agenda as we move forward in improving the employment law landscape for Maryland's women workers. During the next twenty years, many will be hard at work in bringing the blueprint outlined in this symposium to life.

26. Marley S. Weiss, *Commentary: Women's Employment Rights in the Maryland Workplace of 2007 and 2027*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 63 (2009).

27. *Id.* at 63–74.

28. *Id.* at 76–81.

29. *Id.* at 86–91.

