IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND
Civil Division

DONNA JACKSON,	
Plaintiff,	
v.	**Case No. 337495-V**
	Judge: Eric Johnson
EDGEWOOD MANAGEMENT CORP.,	
Defendant.	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO AMEND JUDGMENT

Plaintiff Donna Jackson, by and through counsel, opposes the motion to amend judgment filed by Defendant Edgewood Management Corp.

INTRODUCTION

The Maryland Code is the sole authority for Plaintiff's cause of action; the cause of action she sued under. The Maryland Code provides the relevant remedies. Defendant wrongly assumes that Plaintiff sued under the Montgomery County Code (MCC). Plaintiff could do no such thing. The Court in *McCrory Corp. v. Fowler*, 319 Md. 12, 20, 570 A.2d 834, 838 (1990), ruled unconstitutional the private cause of action in the circuit courts under the Montgomery County Code for employment discrimination; thereafter it was a nullity. The General Assembly responded by passing legislation that created its own, new cause of action looking to county codes as starting points for liability provisions but providing its own damages provision; and Maryland's courts have consistently referred to the Maryland Code for the cause of action sued under in the case *sub judice*.

As held by the Court of Special Appeals, Plaintiff is entitled to common law damages. The Court of Special Appeals held in *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 638, 881 A.2d 1212, 1233 (2005), that the applicable damages provision in the Maryland Code "is to be interpreted by application of Maryland common law." That this is the case is also supported by canons of statutory interpretation. Maryland common law looks to any past and future damages such as front and back pay as well as other compensatory damages. Plaintiff's position is bolstered by the text of the MCC which never speaks of applicable remedies in the circuit courts; it refers only to its own "case review board." As Defendant admits in its first heading, the MCC only provides "administrative remedies;" those remedies are administered by the case review board, not courts. And there is no provision in the Maryland Code or the MCC giving courts authority to look at the administrative remedies in the MCC as any kind of baseline. There is no preemption issue because Plaintiff sued under the state statute which merely looking to the MCC for liability provisions.

Moreover, Defendant's comparison of the MCC to §§ 20-1009 and -1013 are inapposite because § 20-1202 has its own provision for damages. Importantly, Plaintiff does not argue that she is entitled to §20-1009 damages; she is entitled to § 20-1202 damages which are common law damages.

Finally, it is improper for this Court to revise the judgment for unemployment benefits for three reasons. First, the MCC is inapplicable. Second, unemployment benefits are a collateral source and not appropriate for offsetting a judgment. Third, there was no evidence admitted at trial as to the amount of any benefits that Ms. Jackson has received.

I. The Maryland Code is the Sole Authority for Plaintiff's Cause of Action and It Provides the Corresponding Remedies.

The Court of Special Appeals has been clear that Maryland Code Ann., State Gov't, § 20-1202 [recodified version of Md. Code Ann. Art. 49B, § 42; hereinafter Art. 49B, § 42],[1] is a "new cause of action" that "is in the circuit courts for 'damages, injunctive relief, or other civil relief.'" *Shabazz*, 163 Md. App. at 638, 881 A.2d at 1233.

A. Plaintiff's Cause of Action is Under the Maryland Code and So It Is Unnecessary to Comprehensively Review the Home Rule Amendment

Plaintiff has consistently pursued a cause of action under Md. Code Ann., State Gov't, § 20-1202 (hereinafter § 20-1202).[2] In interpreting this statute, the Court of Special Appeals has been clear that the Maryland Code provided a "new cause action" that "is in the circuit courts for 'damages, injunctive relief, or other civil relief.'" *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 638, 881 A.2d 1212, 1233 (2005).

In *Shabazz*, Maryland's Court of Special Appeals put forth the framework for reviewing awards of damages under § 20-1202. First, the court reviewed Art. 49B, § 42 [recodified as § 20-1202], "a new cause of action in the circuit courts for *violation* of the local anti-discrimination laws of Montgomery County." *Id.* at 626 (citing *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 292, 841 A.2d 845 (2004) (emphasis added). The court in *Shabazz* then looked to

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[1] "In 2009, § 42 was recodified, without substantive changes, as subsections (a) and (b) of § 20-1202 of the State Government Article, entitled 'Howard, Montgomery, and Prince George's Counties.' Those subsections currently provide:

> (a) Scope of section.-This section applies only in Howard County, Montgomery County, and Prince George's County.
>
> (b) Civil action authorized.-In accordance with this section, a person that is subjected to a discriminatory act prohibited by the county code may bring and maintain a civil action against the person that committed the alleged discriminatory act for damages, injunctive relief, or other civil relief.

Washington Suburban Sanitary Comm'n v. Phillips, 413 Md. 606, 612, 994 A.2d 411, 415 (2010)

[2] *See, e.g.*, Plaintiff's Complaint filed with this Court ¶¶ 48 & 52

the Prince George's County Code (PGCC) for the sole purpose of determining what the PGCC declared to be "discriminatory practices." *Id.* at 627.

The court interpreted the plain language of the Maryland Code as creating a cause of action based on the liability provisions of "three local anti-employment discrimination laws" and that "there was nothing to preclude [the employee] from going forward with her economic claim of lost earnings before the jury." *Id.* at 631. Importantly, the court noted that the Maryland Code provision "does not carve out backpay and disallow recovery of lost earnings from recovery as damages." *Id.* In essence, § 20-1202 contains a general damages provision that does not carve out any restrictions on recovery beyond the common law on damages.

In sum, the framework for employment discrimination cases under § 20-1202 is simply to look to at the liability provisions in the county codes of the named counties—Montgomery, Prince George's and Howard—to determine whether there is liability under their provisions. Then the courts apply the common law of damages. This is not the approach advocated by Defendant. Defendant contends that an exegesis of the Home Rule Amendment and the statutory histories of the relevant Maryland Code provision and the MCC are required. Plaintiff will therefore argue the deficiencies in that approach as well as the holes in Defendant's arguments—first of which is that Defendant relies on a statutory interpretation that was ruled unconstitutional over 20 years ago.

B. Home Rule Counties and Unconstitutionality of Employment Discrimination Causes of Action in Same

Defendant argues that the MCC has a private cause of action that can be sued upon in the circuit courts. Two conditions must obtain for this argument to have any foundation: 1) it must be expressly granted by public general law by the General Assembly, and 2) it must be nonlocal. Neither condition is met. First, there is no public general law by the General Assembly *expressly*

granting Montgomery County the power to create a private cause of action for employment discrimination. Second, the Court of Appeals' opinion in *McCrory* that the private cause of action provided for under the MCC was unconstitutional because it was nonlocal has been left undisturbed by subsequent legislation; if the MCC does state a cause of action, it is nonlocal and unconstitutional and Plaintiff could not have sued on it.

1. The General Assembly has not expressly granted Montgomery County the power to create a private cause of action for violations of its employment discrimination laws.

The Home Rule Amendment to the Maryland Constitution, Md. Const., Art. XI-A, § 2, states, "The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article." Montgomery County formed such a charter. As required by the Home Rule Amendment, we must then look at what express powers are granted to home rule counties. Defendant maintains that Md. Code Ann., Art. 25A, §5, grants the necessary authority under the following provision:

> The following enumerated express powers are granted to and conferred upon any county or counties which hereafter form a charter under the provisions of Article XI-A of the Constitution, that is to say:
>
> ***
>
> (A) (4) To provide for the enforcement of local employment discrimination laws or public accommodations discrimination laws by fines or penalties that do not exceed $5,000 for any offense.

Nothing in this statute expressly grants Montgomery County the power to create a cause of action in the circuit courts. Defendant's conclusory statement without any authority to support it therefore must fail.

Because Defendant can find no support in the statute, it tries to salvage its argument by claiming that Montgomery County has the power to change common law and create a cause of

action for employment discrimination in the circuit courts. There is nothing in the language quoted from *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 312 A.2d 225 (1973), that inheres the county with the ability to create a cause of action in the circuit courts of the State of Maryland. Importantly, the Court of Appeals limited any such power "to alter, revise, or amend the English common law *within the express powers granted.*" *Id.* at 418. Thus, Montgomery County can only change the common law based on express grants of power which Defendant has only conclusorily asserted. Further, as discussed *infra*, to the extent such a cause of action could be inferred from the Court's language, it was explicitly overruled by the Court of Appeals' decision in *McCrory*.

2. The Court of Appeals held in *McCrory* that home rule county causes of action for employment discrimination violations are nonlocal and, therefore, unconstitutional; subsequent legislation has not disturbed the Court's holding.

Importantly, the Court of Appeals decided the approach advocated by the Defendant over 20 years ago in its decision in *McCrory*. There, the Court of Appeals held that the cause of action for a victim of employment to sue in the circuit courts provided under the MCC was unconstitutional because it was a nonlocal law.

In *McCrory*, the Court held that the cause of action purportedly created by the MCC was unconstitutional because it went beyond purely local concerns. *McCrory*, 319 Md. at 20, 570 A.2d at 838.[3] "A contrary holding would open the door for counties to enact a variety of laws in areas which have heretofore been viewed as the exclusive province of the General Assembly and the Court of Appeals." *Id.* at 21. As explained in *Edwards*, the Court of Appeals similarly

[3] Significantly, MCC § 27-20, the relevant provision for the *McCrory* decision, was repealed in 2001. The MCC Editor's Notes at §27-20, state, "Former Section 27-20, relating to rights of complainant; civil action by county attorney, derived from 1968 L.M.C., Ex. Sess., ch.19, § 1; 1972 L.M.C., ch. 23, § 6; 1977 L.M.C., ch. 30, §§ 7, 11, was repealed by 2001 L.M.C., ch. 9, §1."

invalidated an ordinance in Howard County shortly after the decision in *McCrory*. *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 292, 841 A.2d 845, 853 (2004) (referring to *Sweeney v. Hartz Mountain Corp.*, 319 Md. 440, 573 A.2d 32 (1990)).

The General Assembly responded by enacting Art. 49B, § 42 [recodified as Md. Code Ann., State Gov't, § 20-1202], which itself created a cause of action for violations of the county code of Montgomery County; it later added Howard and Prince George's Counties. *Id*; *see also* 1992 Md. Laws Chap. 555. Later, the General Assembly also created a cause of action for violations of the ordinances of Baltimore County at Art. 49B, §43 [recodified as Md. Code Ann., State Gov't, § 20-1203]. *See* 1997 Md. Laws Chap. 348. The Maryland Code provision only created a cause of action for the enumerated counties.

For example, in 2002, the Court of Appeals relied on its *McCrory* decision to dispose of a count that plaintiff attempted to bring under the Harford County Code. *H.P. White Laboratory, Inc. v. Blackburn*, 372 Md. 160, 812 A.2d 305 (2002). Harford County is a home rule county but it was not enumerated in the Maryland Code where the General Assembly created a new cause of action for employment discrimination violations of specific county codes.

In 2002, the Maryland Attorney General's Office, in an opinion related to a local human relations commissions' authority to issue subpoenas, opined that:

> [W]hile a charter county has concurrent authority with the State to prohibit employment discrimination, *see, e.g., National Asphalt Pavement Ass'n v. Prince George's County*, 292 Md. 75, 437 A.2d 651 (1981), **a county may not create a private cause of action to remedy such discrimination**. *McCrory Corp. v. Fowler*, 319 Md. 12, 570 A.2d 834 (1990). While questions remain on the remedies a charter county may create by ordinance to redress illegal discrimination, there is no doubt that, as a general proposition, the police power enables charter counties to enact local antidiscrimination ordinances, to establish local human relations commissions, and to provide for the administrative adjudication of complaints and the imposition of sanctions.

87 *Opinions of the Attorney General* 55, 57-58 (2002) (internal footnotes omitted) (emphasis

added); *see also State v. Crescent Cities Jaycees Foundation, Inc.*, 330 Md. 460, 470 (1993) (noting that "[C]ourts are not bound by an Attorney General's Opinion; however, "when the meaning of legislative language is not entirely clear, such legal interpretation should be given great consideration in determining the legislative intention;" and that the legislature is presumed to acquiesce in the Attorney General's Opinion absent statutory change) (citations omitted). That is, a charter county can *prohibit* discrimination and provide for administrative remedies, but it cannot create a private cause of action.

In 2003, the Montgomery County Attorney's Office in a memorandum discussing the scope of *McCrory*, agreed that while the General Assembly may create causes of action looking to county codes for liability provisions, it cannot authorize counties to enact non-local laws. *See* Office of the County Attorney, Memorandum, "*Fosler*, *McCrory*, and the Validity of the Remedies Available for Violations of Montgomery County's Consumer Affairs Law, at 30 (October 14, 2003).

The judicial and executive branches from bottom to top are in agreement that post-*McCrory*, a county provision that may be construed to grant a cause of action for employment discrimination violations of a county code is unconstitutional as a nonlocal law. The General Assembly did not, as Defendant argues, "expressly overturn *McCrory*" in 1992. House Bill 722 in 1992, as discussed *infra*, created a *new* cause of action; it did not resurrect the previous cause of action.

C. Maryland Code Ann., State Government, § 20-1202 Clearly Provide a Cause of Action Which Looks to the MCC for Liability Only and Contains Its Own Damages Provisions

The plain language of § 20-1202 instructs that a cause of action is available at Md. Code Ann., State Gov't, § 20-1202, the General Assembly explicitly created a cause of action for violations of the MCC: "In accordance *with this section*, a person that is subjected to a discriminatory act prohibited by the county code may bring and maintain a civil action against the person that committed the alleged discriminatory act for damages, injunctive relief, or other civil relief." Md. Code Ann., State Gov't, § 20-1202(b) (emphasis added). The statute itself gives further support to a cause of action created under §20-1202 rather than county ordinances. Specifically, under Maryland Code Ann., State Gov't, § 20-1202(c)(2)(i)(1), the statute states, "an action *under subsection (b) of this section* alleging discrimination in employment. . . ." The General Assembly, knowing of the decision in *McCrory*, could have written "an action under the county code . . ." but it did not. The General Assembly decided that it would create its own private cause of action to avoid any constitutional difficulties. Other courts have recognized the General Assembly's creation of a cause of action: "a specific state statute that created a private right of action for discrimination in violation of a county code." *Youssef v. Anvil Int'l*, 595 F. Supp. 2d 547, 558 (E.D. Pa. 2009). This Court must give weight to the "normal, plain meaning of the language of the statute." *Phillips*, 413 Md. at 619 (citing *Lockshin v. Semsker*, 412 Md. 257, 987 A.2d 18 (2010)). And it is clear from the language of the statute that courts must look at the relevant county ordinance for liability provisions only. Md. Code Ann., State Gov't, § 20-1202(b) ("subjected to a discriminatory act prohibited by the county code"). The Maryland Code then provides its own remedies as "damages, injunctive relief, or other civil relief." *Id.*

1. The Courts of the State Of Maryland Have Consistently Referred To § 20-1202 as the Statute under Which A Plaintiff Sues.

Plaintiff argues—consistent with the higher courts of the State of Maryland—that the cause of action sued on in this case is provided by Md. Code Ann., State Gov't, § 20-1202(b). Defendant argues that the cause of action comes from MCC § 27-9. Defendant's sole argument for this position is that the General Assembly overruled the decision in *McCrory* in such a way that authorized MCC to create a cause of action. This position is pointedly contradicted by the very authorities upon which Defendant relies.

Defendant's explanation of the law seems to go like this: the MCC provided for a cause of action pre-*McCrory*, the Court of Appeals invalidated the provision, then the General Assembly resurrected the pre-*McCrory* cause of action.

The problem with this position is that ignores the great weight of the cases after the General Assembly enacted Art. 49B, § 42 [recodified as § 20-1202]. These cases describe the law quite differently with the following result: the MCC provided for a cause of action pre-*McCrory*, the Court of Appeals invalidated the provision, then the General Assembly *created a new cause of action* separate and apart from the unconstitutional cause of action.

For example, the *Edwards* Court explicitly stated that the cause of action for employment discrimination in Montgomery, Howard, and Prince George's Counties "has been created by Art. 49B, § 42, of the Maryland Code [recodified at § 20-1202];" not the individual county ordinances. *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 294, 841 A.2d 845, 855 (2004).

The Court of Appeals has consistently adhered to this position in its subsequent opinions. For example, in *Washington Suburban Sanitary Comm'n v. Phillips*, it said, "Section 42(a) [recodified at § 20-1202] creates a civil, private cause of action for persons subjected to acts of discrimination prohibited by the County Codes of Montgomery, Prince George's, and Howard

Counties only." 413 Md. 606, 621, 994 A.2d 411, 420 (2010). The Court continued by recognizing that Art. 49B, § 42 [recodified as § 20-1202], provided the cause of action. *Id.* at 634 ("for purposes of causes of action brought pursuant to § 42(a)"). The Court also stated that these suits are "brought pursuant to § 42(a) for violations of the anti-discrimination ordinances contained within the Montgomery and Prince George's County Codes." *Id.* at 636. And in its holding, the Court again recognized that county discrimination suits were brought pursuant to the Maryland Code. *Id.* at 637 ("the General Assembly's clearly stated intent to subject county governments to suits under § 42(a)"). Additionally, the Court looked to the Maryland Code for guidance in determining the policy in construing the statute in *Phillips* rather than any county ordinance (which it surely could have done). *Id.* at 635-36. All this points to a cause of action created under the Maryland Code.

The Court of Special Appeals similarly construed the Maryland Code provision as a new cause of action, not the resurrection of the old MCC provision. "We return to section 42 of article 49B [recodified as § 20-1202], which is the statute creating the cause of action sued upon in this case." *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 636, 881 A.2d 1212, 1232 (2005). The court also described the underlying cause of action as "a judicial civil action under section 42 for violation of a county's local anti-discrimination law." *Shabazz*, 163 Md. App. at 627. Again, the court stated, "[t]he cause of action that is created in section 42 . . ." *Id.* at 631.

These opinions demonstrate a common thread running through this state's jurisprudence interpreting § 20-1202: The cause of action is the State of Maryland's, not Montgomery County's. The MCC provides liability provisions only. The Maryland Code has its own damages provision.

D. Both the Text of the Statute and This State's High Courts Make Clear that Common Law Damages Are Applicable Under § 20-1202

1. *Shabazz v. Bob Evans Farms, Inc.*

The Court of Special Appeals could not have been clearer when it declared that "The new cause of action [recodified at § 20-1202] thus created is in the circuit courts for 'damages, injunctive relief, or other civil relief.'" *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 638, 881 A.2d 1212, 1233 (2005). In *Shabazz*, the court considered, in part, the applicability of punitive damages under the equivalent of § 20-1202. As to punitive damages, the court said that the Maryland Code provision "does not make any specific reference to punitive damages." *Id.* Similarly, §20-1202 does not make any specific reference to past and future damages, that is economic damages, including backpay and frontpay; nor does it specifically mention compensatory damages. Therefore, the court in *Shabazz* noted, "[u]nless the General Assembly has stated otherwise, which it has not, the meaning of section 42, a state enactment, is to be interpreted by application of Maryland law. That includes the Maryland common law of damages." *Id.* This analysis holds true. The General Assembly has not changed the statute (other than recodification) since the Court of Special Appeals' decision in *Shabazz*. Therefore, § 20-1202 "is to be interpreted by application of Maryland law . . . include[ing] the Maryalnd common law of damages." *Id.*

In fact, buttressing this argument is the Court of Appeals' decision in *McCrory* where the Court interpreted language almost mirroring the statute sued under here:

McCrory, 319 Md. at 15 construing MCC § 27-20(a)	Md. Code Ann, State Gov't § 20-1202(b)
Section 27-20(a) creates the cause of action at issue in this case: "Any person who has been subjected to any act of discrimination prohibited under this division shall be deemed to have been denied a civil right and shall be entitled *to sue for damages, injunction or other civil relief*, including reasonable attorney's fees..."	"In accordance with this section, a person that is subjected to a discriminatory act prohibited by the county code may bring and *maintain a civil action* against the person that committed the alleged discriminatory act *for damages, injunctive relief, or other civil relief*."

Although the cause of action was found to be unconstitutional because it was not a local law as discussed *supra*, the Court did interpret the meaning of "for damages, injunction or other civil relief." There, the court stated that this language "institute[d] a judicial action in the courts of the State for, *inter alia*, **unlimited money damages**." *McCrory*, 319 Md. at 19 (emphasis added). Again, the Court interpreted the provision as "creat[ing] a new private judicial cause of action for **unlimited money damages and injunctive relief** as a remedy for employment discrimination." *Id.* at 24 (emphasis added).

The General Assembly is presumed to know of the Court's interpretation when it later enacted Art. 49B, § 42 [recodified at § 20-1202]. The General Assembly adopted an almost exact replication of the damages provision of former MCC § 27-20(a). Therefore, the interpretation given by the *McCrory* Court is applicable and "damages" in § 20-1202, which was adopted by the General Assembly, means "unlimited money damages."

Finally, Defendant points to no ambiguity in § 20-1202 in need of interpretation. *Lockshin v. Semsker*, 415 Md. 257, 273, 987 A.2d 18, 27 (2010) ("If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative

intent ends ordinarily and we apply the statute as written, without resort to other rules of construction."). To the extent Defendant may claim that any of the language is ambiguous, it has been interpreted in *Shabazz* and *McCrory* and this Court need only apply those interpretations. Plaintiff is entitled to "damages, injunctive relief, or other civil relief." Md. Code Ann., State Gov't, § 20-1202(b).

2. Although not considered in the *Shabazz* decision, an additional ground for determining that common law damages are applied to § 20-2012 is a comparison with the Baltimore provision

Defendant's position is further weakened when viewed in light of the very next section of the Maryland Code at Md. Code Ann., State Gov't, § 20-2013. Section 20-2013 is a provision similar to § 20-2012 except that it applies to Baltimore County. The table below shows these two sections side by side. Section 20-1203 was enacted after § 20-1202 and specifically limits the relief available to a plaintiff suing under its authority.

Md. Code Ann., State Gov't, §20-1202 Howard, Montgomery, and Prince George's Counties	Md. Code Ann., State Gov't, § 20-1203 Baltimore County
Scope of section (a) This section applies only in Howard County, Montgomery County, and Prince George's County. **Civil action authorized** (b) In accordance with this section, a person that is subjected to a discriminatory act prohibited by the county code may bring and maintain a civil action against the person that committed the alleged discriminatory act *for damages, injunctive relief, or other civil relief.* *** **Fees and costs** (d) In a civil action *under this section*, the court may award the prevailing party reasonable attorney's fees, expert witness fees, and costs.	**Scope of section** (a) This section applies only in Baltimore County. **Civil action authorized** (b) In accordance with this section, a person that is employed by an employer with fewer than 15 employees and that is subjected to a discriminatory act prohibited by the county code may bring and maintain a civil action against the employer that committed the alleged discriminatory act for relief as provided under subsection (d) of this section. *** **Relief; attorney's fees** (d)(1) In a civil action *under this section*, the court may award the prevailing party: (i) injunctive relief; (ii) compensatory damages, including back pay; or (iii) both injunctive relief and compensatory damages. (2) A prevailing party may not be awarded punitive damages under this section. (3) The court may award the prevailing party reasonable

	attorney's fees.

Clearly, the General Assembly was aware that both §§ 20-2012 and -2013 contained damages provisions specific to each and did not incorporate the damages provisions of the relevant county codes, though it presumably could have.[4] Indeed, nowhere in these statutes does the language refer to the damages provisions of the county codes. Of course, the General Assembly could have done so. It was capable of doing so. It had done something similar in § 20-1013 where the General Assembly explicitly limits the remedies for violations of the State's employment discrimination law to those outlined in § 20-1009 ("the court may provide the remedies specified in § 20-1009(b) of this subtitle."). But no such limitation appears in § 20-1202. The General Assembly is presumed to have been aware of these provisions and its failure to include them in § 20-2012 evidences a conscious decision to use another avenue for remedies. In brief, the General Assembly could have included language in § 20-1202 stating, "If the court finds that an unlawful employment practice occurred, the court may provide the remedies specified under the Montgomery County Code." The General Assembly did not do so. It is not the court's province to enact such legislation on behalf of the General Assembly especially when it is clear from the statute that the intent was to provide its own damages provision.

3. Common law damages

As held in *Shabazz*, common law damages are applicable in this case. In *Hanna v. Emergency Medicine Associates, P.A.*, the Court of Special Appeals noted that employment discrimination claims are "analogous to one for wrongful discharge." 77 Md. App. 595, 610 n.3, 551 A.2d 492 (1989). The applicable standard for wrongful discharge damages is the salary of

[4] The Maryland Code often points to the law of particular jurisdictions. In fact, § 20-1201 of the same title instructs, "In this subtitle, 'prevailing party' has the meaning as judicially determined under 42 U.S.C. § 1988."

the employee for the applicable period "for the remainder of the period of employment," less mitigation. *Atholwood Development Co. v. Houston*, 179 Md. 441, 445, 19 A.2d 706 (1941).

There was considerable evidence provided by Plaintiff and Drs. Edelman and Bussey on Plaintiff's damages. Dr. Bussey opined as to the work-life expectancy of Plaintiff and Dr. Edelman reduced the salary and benefits for those years to present value. The common law of Maryland supported the jury's award for economic damages.

E. The Terms of the MCC Do Not Provide for a Cause of Action in the Circuit Courts and Its Administrative Remedies Only Apply to the Case Review Board

As argued *supra*, Plaintiff has sued under § 20-1202, not MCC § 27-9; and MCC § 27-9 lends further support to this position. First, MCC § 27-9 is not a cause of action, and it has not been interpreted as such. In fact, Defendant has not pointed to a single case where any court has determined that a plaintiff was bringing a cause of action under MCC § 279. That is because MCC § 27-9 simply directs complainants to look to the Maryland Code rather than its own provisions for relief. To wit, "Any person subjected to an act of discrimination or intimidation under this article may pursue a civil action *under Maryland law*." MCC § 27-9 (emphasis added). The language of the ordinance is precatory and advises complainants to look to **Maryland law**; not the ordinances of Montgomery. This is because Montgomery County, as argued *supra,* cannot create a cause of action for employment discrimination in the circuit courts because it would be a nonlocal law.

The Court's decision in *Holiday Universal, Inc.* is instructive. "[J]ust as the Express Powers Act could not constitutionally authorize Montgomery County to enact a non-local law, the Consumer Protection Act could not constitutionally authorize to enact a consumer protection ordinance which is not a local law;" or in this case, an employment discrimination ordinance "which create[s] a private circuit court cause of action." *Holiday Universal, Inc. v. Montgomery*

County, 377 Md. 305, 318-19, 833 A.2d 518 (2003) (citing *McCrory*, 319 Md. 12). A private cause of action under the MCC for employment discrimination would still be a nonlocal law, nothing about its character has been changed. What has changed in the law is that the Maryland Code now instructs complainants to use the liability provisions from the MCC. The cause of action is strictly under the Maryland Code.

Second, MCC § 27-8, the damages provision of the MCC Defendant argues is applicable here, only provides authority to "the case review board." Simply, this court is not a case review board. Defendant points to no MCC provision giving courts authority to apply MCC § 27-8. There is not a single case where a court has invoked the damage provisions reserved for the Montgomery County case review board. Such a dearth of cases is logical given that county commissions are ordinarily only granted limited remedial powers such as limited damages to aggrieved parties. *McCrory*, 319 Md. at 22. And Defendant's argument that this Court should analogize such a case to the provisions of § 20-1009 and § 20-1013 actually cuts in Plaintiff's favor.

Section 20-1013 directs courts to § 20-1009 for the applicable remedies for causes of action under § 20-1013. Md. Code Ann., State Gov't, § 20-1013(d) ("the court may provide the remedies specified in § 20-1009(b) of this subtitle"). Importantly, § 20-1202 has no such limitation. The General Assembly could have used similar language pointing the courts to § 20-1009 or any other provision it saw fit. There is nothing "absurd" or "illogical" about the General Assembly choosing to provide different remedies for violations of certain counties. In fact, the reverse is true and the General Assembly has—as evidenced by § 20-1202 and § 20-1203—has its own reasons for providing different remedies for different causes of action.

The extremity of Defendant's position is apparent when it argues that Plaintiff is

"preclude[d] [from] any remedies under Maryland state law." It is not immediately apparent where those remedies would come from when even MCC § 27-9 looks to *Maryland law* for remedies beyond the administrative procedures the MCC is limited in providing. Plaintiff's remedies are in the plain terms of § 20-1202.

F. There Is No Preemption Issue Where Plaintiff Sued Under the Maryland Code

As discussed *infra*, Defendant's argument regarding preemption is unnecessary where Plaintiff sued under the Maryland Code Ann., State Gov't, § 20-1202, which looks to the MCC for liability provisions only, and this State's extensive case law invalidating private causes of action for employment discrimination brought under county ordinances. Plaintiff's cause of action and remedy are provided in § 20-1202, not the MCC.

II. This Court Should Not Revise the Judgment Downward Based on Any Receipt of Unemployment Benefits

It is improper for this Court to revise the judgment for unemployment benefits for three reasons. First, the MCC is inapplicable. Second, unemployment benefits are a collateral source and not appropriate for offsetting a judgment. Third, there was no testimony or documentation admitted into evidence in this matter as to when benefits commenced and/or will end, and there is no evidence as to the amounts that might have been paid and/or will be paid. The Court cannot simply speculate as to the value of these amounts in order to diminish a jury verdict.

A. The MCC Language Upon Which Defendant Relies Is Inapplicable

Defendant's argument is based on a false premise; that is, that the MCC provides the cause of action sued on. The MCC cannot provide such a cause of action for the reasons discussed *supra*. Therefore, this Court cannot apply the damages provisions of the MCC regarding offsets based on unemployment insurance.

B. Unemployment Benefits Are a Collateral Source

The Supreme Court of the United States has described unemployment benefits from state unemployment compensation funds as "payments to the employees ... not made to discharge any liability or obligation of [employers], but to carry out a policy of social betterment for the benefit of the entire state." *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 365 (1951) (citations omitted).

This State's courts agree. In *Norfolk Southern Ry. Corp. v. Henry Tiller*, the Court of Special appeals favorably cited *Mahon* for the proposition that evidence of an employee's unemployment benefits was inadmissible as a collateral source. 179 Md. App. 318, 345, 944 A.2d 1272 (2008) (citing *Mahon v. Reading Co.*, 367 F.2d 25, 30 (3d Cir. 1966)). And *Mahon* relied on Pennsylvania law where "[i]t is clear that Pennsylvania does allow double recovery where the collateral source is unemployment insurance." *Feeley v. United States*, 337 F.2d 924, 931 (3d Cir. 1964) (citing Lobalzo v. Varoli, 409 Pa. 15, 185 A.2d 557 (1962); Rice v. Shenk, 293 Pa. 524, 143 A. 231 (1928) (dictum); Labick v. Vicker, 200 Pa.Super. 111, 186 A.2d 874 (1962)).

Courts addressing the issue have held that unemployment benefits are a collateral source payment and should not be deducted from a backpay award and that unemployment compensation serves as assistance in seeking and obtaining new employment rather than as a remedy. *See Abron v. Black & Decker Mfg. Co.* , 439 F. Supp. 1095, 1115 (D. Md. 1977); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83-84 (3d Cir. 1983); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983); *Brown v. AJ Gerrard Mfg. Co.*, 715 F.2d 1549, 1550 (II th Cir. 1983). The Court should preclude Edgewood from proffering any evidence regarding Ms. Jackson's receipt of any unemployment benefits as an offset to her lost wages in this matter as they are estopped from doing so.

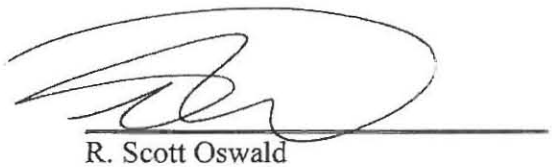
C. There Is No Evidence In The Record To Support What Defendant Wants The Court To Do

There was no testimony or documentation admitted into evidence in this matter as to when benefits commenced and/or will end, and there is no evidence as to the amounts that might have been paid and/or will be paid. The Court cannot simply speculate as to the value of these amounts in order to diminish a jury verdict.

CONCLUSION

WHEREFORE, and for all the foregoing reasons, Plaintiff respectfully requests that the Court deny the Defendant's motion to amend judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2011, the foregoing Plaintiff's Opposition to Defendant's Motion to Amend Judgment was served via email and United States Mail, First Class Postage prepaid, upon the following:

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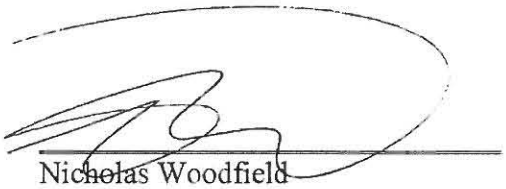

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