IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2002
No. 102

EDWARDS SYSTEMS TECHNOLOGY, et al.,

Petitioners

v.

CYNTHIA CORBIN,

Respondent

On Appeal from the Circuit Court for Prince George's County, Maryland
(James J. Lombardi, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

BRIEF OF AMICI CURIAE BALTIMORE COUNTY, HOWARD COUNTY, MONTGOMERY COUNTY, AND PRINCE GEORGE'S COUNTY, MARYLAND

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QUESTION PRESENTED

Does the creation of a private right of action for violations of local employment discrimination laws in Howard County, Montgomery County and Prince George's County conflict with constitutional principles and local government authority?[1]

ARGUMENT

Perhaps atoning for its errant past, forty years ago, the State of Maryland acted to abrogate discrimination in housing, employment, and public accommodations and continues to maintain laws that prohibit discrimination and provide remedies to those who are its victims. To supplement these State laws and to bring to bear local resources in support of these policies, many local governments have enacted human relations laws to protect their citizens through an administrative process. A little more than a decade ago, this Court recognized the authority of charter counties to enact laws prohibiting discrimination, but determined that only the State itself could create a private cause of action in court based on those local laws. The General Assembly reacted quickly to this decision by enacting a law authorizing a private individual to file suit in court based on a violation of local laws that prohibit discrimination. The Legislature's action promotes the public policy goals of ending discrimination by providing complete remedies to those who suffer discrimination whether under State or local law.

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[1]Baltimore County has a similar remedy available under Md. Ann. Code art. 49B, §43 (1998).

Consistent with constitutional principles and local government authority, the General Assembly created a private right of action for violations of local employment discrimination laws in Baltimore County, Howard County, Montgomery County, and Prince George's County.

A charter county has broad powers that often operate concurrently with the State's powers.

Upon electing a charter form of government, a county obtains a certain measure of independence from the State legislature by being authorized to exercise, within well-defined limits, legislative powers formerly reserved to the General Assembly. Md. Const. art. XI-A. The "Home Rule Amendment" was ratified by the voters of this State in November 1915, and evidenced an intent to secure to Maryland citizens "the fullest measure of local self-government" regarding local affairs. *State v. Stewart*, 152 Md. 419, 422, 137 A. 39, 41 (1927). In addition, the Home Rule Amendment mandates that the General Assembly expressly enumerate and delegate those powers exercisable by counties that elect a charter form of government. Md. Const. art. XI-A § 2. The legislature followed this directive by enacting the Express Powers Act, which endowed charter counties with a wide array of legislative powers over local affairs. Md. Ann. Code art. 25A (1998).

In 1948, Montgomery County became the first county in Maryland to adopt a charter form of government. *McCarthy v. Board of Education*, 280 Md. 634, 638, 374 A.2d 1135, 1137 (1977). Several years later, Baltimore County adopted a charter form of government in 1956. *Connor v. Board of Supervisors of Elections*, 212 Md. 379, 381, 129 A.2d 396, 397 (1957). The following decade, Howard County voters approved a charter in 1968. *Turf*

Valley Associates v. Howard County, 262 Md. 632, 634, 278 A.2d 574, 575 (1971). And shortly thereafter, Prince George's County became a charter county. *Northhampton Corp. v. Prince George's County*, 21 Md. App. 625, 630, 321 A.2d 204, 207 (1974).

Among the enumerated express powers is the general authority "to pass all ordinances, resolutions or bylaws. . . as may be deemed expedient in maintaining the peace, good government, health and welfare of the county." Md. Ann. Code art. 25A, § 5(S). This "general welfare clause" is viewed as the broadest authority for local legislation, because it grants charter counties the power to legislate on matters not specifically enumerated elsewhere. *See Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161, 252 A.2d 242, 247 (1969). In doing so, the clause fulfills the purpose of home rule by enabling the General Assembly to share its legislative power concurrently with charter counties. *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 418, 312 A.2d 225, 234 (1973).[2]

The exercise of the power granted by art. 25A, § 5(S) has included the enactment of a local fair housing law prohibiting racial and religious discrimination in the sale or rental of housing, as well as comprehensive legislation governing landlord-tenant relationships. *Greenhalgh*, 253 Md. at 162, 252 A.2d at 247; *Investors Funding Corp.*, 270 Md. at 415, 312 A.2d at 232. This Court also has held that the general welfare clause permits local

[2]This Court has long recognized the concurrent authority of the State and counties to legislate for the general welfare. *See City of Baltimore v. Sitnick*, 254 Md. 303, 255 A.2d 376 (1969).

legislation regarding employment discrimination. *Montrose Christian School Corp. v. Walsh*, 363 Md. 565, 770 A.2d 111 (2001).

Dual state and local government regulatory schemes have long been permissible in Maryland under what has been dubbed the "concurrent power theory." This theory was first applied by this Court in 1909[3] and "has been recognized with some frequency." *Sitnick*, 254 Md. at 312, 255 A.2d at 380. It "allows local legislation in certain fields where the State Legislature has acted if the local governments otherwise have authority to enact legislation on the subject." *County Council for Montgomery County v. Montgomery Association,* 274 Md. 52, 57, 333 A.2d 596, 599 (1975). The legislative authority of the State and its political subdivisions, therefore, is not necessarily mutually exclusive.

This Court has specifically recognized the authority of charter counties to enact laws prohibiting employment discrimination:

> [Although a]busive employment practices constitute a statewide problem which has been addressed by the General Assembly in Article 49B of the Maryland Code . . . . the field has not been preempted by the State, and . . . home rule counties have concurrent authority to provide administrative remedies not in conflict with state law.

McCrory v. Fowler, 319 Md. 12, 20, 570 A.2d 834, 838 (1990); *see also*, *National Asphalt Pavement Association v. Prince George's County*, 292 Md. 75, 79-81, 437 A.2d 651, 653-654 (1981). In fact, the sole limitation identified in *McCrory* involved the creation of a private cause of action in court. Recognizing that only the General Assembly and this Court

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[3]The landmark case for this proposition is *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909).

had the ability to create new causes of action in the court system, only that discrete provision was severed from the local law. *McCrory*, 319 Md. at 24, 570 A.2d at 840.

Subsequent cases have shown no inclination to retreat from this holding. The decision to remand the case for completion of the administrative proceedings in *Montgomery County v. Broadcast Equities, Inc.*, 360 Md. 438, 758 A.2d 995 (2000), reflects continued adherence to the ability of a charter county to maintain its own discrimination law. And in *Montrose Christian School Corp. v. Walsh*, *supra*, while noting that the parties had not challenged the validity of the State law creating a private cause of action, this Court did not stray from its holding in *McCrory* recognizing the authority of a charter county to enact discrimination laws in general. 363 Md. at 596-597, 770 A.2d at 129-130. Even in the recent decision in *H.P. Laboratory, Inc. v. Blackburn*, 372 Md. 160, 812 A.2d 305 (2002), this Court did not undermine its holding in *McCrory*, but relied on the same reasoning to conclude that Harford County could not create a private right of action in court.

The General Assembly intended to create a private right of action for employment discrimination based on local law.

The legislative history of Md. Ann. Code art. 49B, § 42, reflects a clear intent to remedy the defect identified by this Court in *McCrory v. Fowler, supra*. This Court issued its decision in *McCrory* in March 1990, and by the next legislative session, the first proposal was submitted. HB 246. (Apx. 12-13, 17-23) The original proposal extended the private right of action to all charter counties, and one amendment to the bill limited its application to Baltimore City, Montgomery County, Howard County, Baltimore County, and Prince

George's County, while yet another amendment eliminated Baltimore County from its scope. (Apx. 17-22) Even then, the testimony clarified that both the result of *McCrory* and the federal requirements for substantial equivalence mandated the provision. (Apx. 26-27, 32-34) In addition, an Assistant Attorney General reviewed the legislation and concluded that it did not violate the Maryland Constitution. (Apx. 12-13)

In 1992, the bill submitted by the Montgomery County Delegation passed, allowing "a person subjected to a discriminatory act prohibited by the Montgomery County Code to bring a civil action in the Circuit Court for Montgomery County for damages, injunctive relief, or other civil relief." Bill Analysis for HB 722. (Apx. 38, 41) The bill analysis and floor report referred to the inability of charter counties to establish this right under the Express Powers Act and the already recognized ability of the County to enact discrimination laws at the local level concurrently with the State's authority to prohibit discrimination. (Apx. 38-40) In support of the bill, the Montgomery County House and Senate Delegations noted the legislation's response to *McCrory* and identified an additional objective of the amendment—to allow "the Human Relations Commission to maintain substantial equivalency with HUD [Housing and Urban Development], which is necessary in order not to jeopardize the county's case processing contract with HUD." (Apx. 41) The Attorney General adopted the prior analysis in reviewing the bill (Apx. 14-15), and the General Assembly passed the bill into law with the stated purpose of providing a civil action for damages for a violation of the Montgomery County Code. 1992 Md. Laws ch. 555.

The same reasons appear in the materials supporting the subsequent amendment to include Howard County and Prince George's County in 1993.[4] HB 330. (Apx. 46-49) The counties noted the impact of this Court's decision in *McCrory* on local proceedings, along with the need to comply with the requirements of the worksharing agreements each county maintained with HUD. Without the private cause of action, the counties could not show substantial equivalency with the HUD program, which placed significant federal funding in jeopardy. The analysis supplied by the Attorney General was adopted again when Howard County and Prince George's County were added to the section. HB 330. (Apx. 16) And the Legislature again stated the purpose of the amendment as authorizing a civil action for damages for a violation of each county's code. 1993 Md. Laws ch. 152.

[4]In 1997, Baltimore County requested and obtained its own provision to allow a civil cause of action based upon violations of the County's employment discrimination law. *See* Md. Ann. Code art. 49B, § 43. As with the other counties, the law identified its purpose as allowing a civil action for damages for a violation of the Baltimore County Code. 1997 Md. Laws ch. 348.

The State law need not extend to all counties.

The United States Supreme Court has made clear that the counties within the State may have different laws without violating equal protection under the United States Constitution:

> There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option. It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each. *Territorial uniformity is not a constitutional requisite.*

Salsburg v. Maryland, 346 U.S. 545, 552 (1954) (emphasis added; citation omitted). As a result, the Court upheld the State law that prohibited courts from admitting evidence procured by an illegal search and seizure in misdemeanor trials in most counties, but expressly authorizing the same type of evidence to be admitted in prosecutions in Anne Arundel County and certain other counties for gambling misdemeanors. Similarly, the Court upheld Maryland's Sunday closing laws that permitted certain retailers in Anne Arundel County to sell goods on Sunday, even though retailers in other counties could not. *McGowan v. Maryland,* 366 U.S. 420 (1961).

Against this back drop, Maryland has a long tradition of enacting State laws that affect fewer than all counties or that specifically exempt identified counties, and this Court has upheld the vast majority of these laws, despite the fact that they single out specific counties or localities. For example, this Court upheld the constitutionality of a law that prohibited a person from possessing, selling or buying certain game and animals in

Baltimore City and specified other counties during closed season, even though the prohibition did not apply in other counties. *Stevens v. State,* 89 Md. 669, 674, 43 A. 929, 931 (1899). And in *State v. Shapiro,* 131 Md. 168, 101 A. 703 (1917), this Court upheld a law that charged a much greater fee to persons who wished to be licensed as junk dealers in Baltimore City than to persons who wished to be licensed as junk dealers in other counties.

The trend has continued through recent years as well. In *Matter of Trader v. Stokes,* 272 Md. 364, 383, 325 A.2d 398, 408 (1974), this Court upheld the constitutionality of a statutory scheme that treated a juvenile accused of an offense in Montgomery County differently than a juvenile accused of an offense in all other counties, allowing the former to appeal immediately, while everyone else had to wait until a final verdict was issued. When Carroll County challenged the constitutionality of the Maryland Vehicle Emissions Inspection Program (VEIP), which included Carroll County, while excluding other rural counties, this Court again upheld the program, despite the variation. *Department of Transportation v. Armacost*, 299 Md. 392, 474 A.2d 191 (1984). And a challenge to a mining act that regulated surface mine dewatering in only four counties met with a similar fate, with this Court reiterating that "[a] statute . . . is not invalid merely because it affects counties unequally." *Maryland Aggregates Association v. State,* 337 Md. 658, 672 n.9, 655 A.2d 886, 893 n.9 (1995) (quoting *Armacost*, 299 Md. at 408-09, 474 A.2d at 199).

In the present case, the General Assembly's decision to create a cause of action as a means of enforcing local anti-discrimination laws in four counties does not in and of itself

offend the Equal Protection Clause, but merely continues the legislative tradition of Maryland. Long ago, this Court recognized the inherent authority of the General Assembly to pass legislation that treated political subdivisions differently. *Sweeten v. State*, 122 Md. 634, 640, 90 A. 180, 183 (1914). Indeed, laws that empower some counties and not others fill virtually every nook and cranny of the Maryland Code. From the State's earliest days, political subdivisions served to allow the General Assembly to treat the local problems of the various geographic areas of the State differently, one from the other. Consistent with this history, the state law at issue in this case does not treat persons within a given county unequally, but merely creates a cause of action for the particular counties identified based on the existing local law in each county. The state law simply provides an additional remedy for the citizens of those counties. The General Assembly has no obligation to create a cause of action for all charter counties simply because it chose to do so for some counties.

As this Court acknowledged in *Armacost*, "Underinclusiveness does not create an equal protection violation under the rational basis test." 299 Md. at 409, 474 A.2d at 199. Rather, a contrary requirement would greatly constrain the Legislature, and "the need for equal protection 'does not shackle the legislature.'" *Matter of Trader*, 272 Md. at 392, 325 A.2d at 413 (quoting *Allied American Co. v. Commissioner*, 219 Md. 607, 623, 150 A.2d 421, 431 (1959)). The General Assembly followed the dictates of the constitution and this Court when it amended art. 49B to permit a private cause of action in several charter counties that already had discrimination laws in place.

CONCLUSION

The Court of Special Appeals held that the amendment to State law enables a private individual to pursue a cause of action in court based on prohibitions against employment discrimination contained in certain local laws. This conclusion finds support in the authority of charter counties, the legislative history leading to the amendment of State law, and the prior decisions of this Court. Inasmuch as the General Assembly has corrected the problem identified by this Court in *McCrory v. Fowler, supra*, this Court should affirm the decision of the Court of Special Appeals in this case.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX