

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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SCOTT MACINTOSH )  
)  
Plaintiff, )  
)  
v. ) Civil Action No. 03-1113 (EGS)  
)  
BUILDING OWNERS AND MANAGERS )  
ASSOCIATION INTERNATIONAL; HENRY )  
CHAMBERLAIN; and RON BURTON )  
)  
Defendants. )  

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BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS  
ASSOCIATION AS *AMICUS CURIAE* REGARDING INDIVIDUAL LIABILITY UNDER  
THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT

The Metropolitan Washington Employment Lawyers Association (“MWELA”)<sup>1</sup> files this brief to urge this Court to correct a misinterpretation of District of Columbia law over whether individuals may be held liable for discrimination and retaliation under the District of Columbia Human Rights Act, D.C. Code §2-1401.01 *et seq.* (2001) (“DCHRA”). This Court held that in DCHRA cases that “take their shape from Title VII,” there is no individual liability. *MacIntosh v. Building Owners and Managers Association International, et al.*, Mem. Op. at 9 (D.D.C. March 30, 2004 (EGS)). Importantly, however, in reaching that conclusion, this Court relied upon district court authority that has since been effectively overruled by the District of Columbia Court of Appeals. Therefore, MWELA respectfully urges this Court to correct its memorandum opinion.

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<sup>1</sup>MWELA is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys, predominantly plaintiffs’ counsel, who specialize in employment law. MWELA conducts continuing legal education programs for its members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the three jurisdictions in which its members primarily practice – the District of Columbia, Maryland and Virginia.

The District of Columbia Court of Appeals established that individuals may be held liable for discrimination and retaliation under the Human Rights Act. *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 887-88 (D.C. 1998). In reaching its decision in the instant matter, this Court considered *Wallace*, but this Court was persuaded by the reasoning in *Hunter v. Ark Restaurants Corporation*, 3 F. Supp. 2d 9 (D.D.C. 1998), which found that there was no such liability in spite of the pronouncement of the Court of Appeals. (Mem. Op. at 9 (*citing Hunter*, 3 F. Supp. 2d at 17).) Apparently, however, this Court was unaware that *Hunter* does not reflect the current state of the law, since the Court of Appeals later withdrew and re-wrote its *Wallace* decision to make clear that individuals may be held liable for discrimination under the DCHRA.

**A. The District of Columbia Court of Appeals effectively overruled Judge Harris' *Hunter v. Ark Restaurants* decision.**

As noted by this Court, Judge Harris determined in *Hunter* that the Court of Appeals in *Wallace* had relied nearly exclusively on an error in the published statute. (Mem. Op. at 9 (*citing Hunter*, 3 F. Supp. 2d at 17).) Indeed, in that decision issued just three months after *Wallace*, Judge Harris set forth in considerable detail the language in *Wallace* that led to his conviction that the Court of Appeals would not have found individual liability were it not for the error. *Hunter*, 3 F. Supp. 2d at 16-17 (*citing Wallace v. Skadden Arps, Slate, Meagher & Flom*, 1998 WL 12571 at \*13). The very language relied upon by Judge Harris from *Wallace*, however, was short-lived.

In apparent response to the *Hunter* decision, the District of Columbia Court of Appeals withdrew its January 15, 1998 decision and replaced it with its published July 30, 1998 opinion. *See Wallace*, 715 A.2d at n. \*. Notably, the Court of Appeals removed all of the language from its original decision that was quoted by Judge Harris in *Hunter* as proof of reliance on a publishing error. Compare *Hunter*, 3 F. Supp. 2d at 16-17, with *Wallace*, 715 A.2d at 887-88. In its place, the

Court of Appeals focused instead on several other aspects of the DC statute to find that individual supervisors are liable for discrimination under the DCHRA. *Id.* Since *Hunter* does not reflect the state of the law on individual liability under the DCHRA, therefore, this Court’s reliance on *Hunter* was erroneous.

**B. Individuals may be held liable under the DCHRA.**

In *Wallace*, the Court of Appeals for the District of Columbia carefully analyzed the plain language of the District of Columbia Human Rights Act to determine that, in addition to corporate entities, individuals are to be held liable for their discriminatory acts. *Wallace*, 715 A.2d at 887-88.

In particular, the Court noted:

“Employer” is defined as

Any person who, for compensation, employs an individual . . . ; *any person acting in the interests of such employer, directly or indirectly*; and any professional association.

D.C. Code §1-2502(10) (1992) [D.C. Code §2-1401.02(10) (2001)] [court’s emphasis]. The Act also makes it an unlawful discriminatory practice for any person to “aid, abet, invite, compel, or coerce the doing of any of the acts forbidden under the provisions of this chapter or to attempt to do so.” D.C. Code. §1-2526 [D.C. Code §2-1402.62 (2001)].

The partner defendants contend that the plaintiff was employed for compensation by Skadden Arps, and not by the individual partners, and that therefore none of the partners is the plaintiff’s employer. This argument has some force with respect to the first part of the statutory definition of “employer,” but it cannot be reconciled with the phrase which we have italicized in that definition. According to the italicized words their normal everyday meaning, *see James Parreco & Son v. District of Columbia Rental Hous. Comm’n*, 567 A.2d 43, 45-46 (D.C. 1989), we conclude that the partners fall within the ambit of the statute.

*Wallace*, 715 A.2d at 887-88.

On two important bases, therefore, the Court of Appeals left no doubt that individuals are liable under the DCHRA. First, the definition of employer includes “any person acting in the

interests of such employer.” *Id.*, citing D.C. Code §1-2502(10) (1992) (now §2-1401.02(10)). Second, the Court found the distinction set forth in the Act between entities and individuals all the more obvious, given the “aiding and abetting” clause of the Human Rights Act. *Id.* (citing D.C. Code §1-2526 (now § 2-1402.62)). “The presence in the Human Rights Act of the proscription against aiding and abetting refutes the partner-defendants’ contention that the Act ‘imposes liability only on the employing entity.’” *Id.*

Dispensing with the language from its withdrawn opinion that formed the basis for *Hunter*, the Court of Appeals concluded that case law under Title VII cannot answer the question of individual liability under the DCHRA:

We note [] that Title VII differs from the Human Rights Act in several critical respects. First, Title VII’s definition of ‘employer,’ 42 U.S.C. §2000e(b), does not contain the phrase “any person acting in the interest of such employer, directly or indirectly.” Second, there is no provision in Title VII proscribing “Aiding or abetting.” The language of the Human Rights Act on which we have relied in support of our conclusion that the partner defendants are amenable to suit thus finds no analogue in the federal statute.

*Id.* at 889.<sup>2</sup>

Aside from the erroneous *Hunter* decision, each other court to consider the question of individual liability under the DCHRA has answered in the affirmative. *Martini v. Federal Nat. Morg. Ass’n*, 977 F. Supp 464, 479 (D.D.C. 1997)(Kessler, J.) (Under the DCHRA, “individual supervisors can be held liable for their acts of discrimination.”) , *vacated on other grounds*, 178 F.3d 1336 (D.C. Cir, 1999), *cert. dismissed*, 528 U.S. 1147 (2000); *Russ v. Van Scoyoc*, 59 F. Supp. 2d 20, 24-25 (D.D.C. 1999)(Lamberth, J.). *See also Blake v. Professional Travel Corporation*, 768

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<sup>2</sup>The Court also noted other important distinctions, including the broad remedial purpose of the DCHRA, as well as the applicability of the law to entities with as few as one employee. *Id.*

A.2d 568, 575 n. 8 (D.C. 2001); *Gardner v. Benefits Communications Corporation*, 175 F.3d 155, 161 (D.C. Cir. 1999). Individual liability under the DCHRA, therefore, is the law of the District of Columbia, regardless of the type of employment discrimination claim that is brought.<sup>3</sup>

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For the foregoing reasons *amicus curiae* Metropolitan Washington Employment Lawyers Association respectfully urges this Court to correct its decision in this case to reflect an appropriate reading of the District of Columbia Human Rights Act.

Respectfully submitted,

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<sup>3</sup>This Court is bound to follow the decisions of the District of Columbia Court of Appeals regarding interpretation of District of Columbia law. See *Steorts v. American Airlines, Inc.*, 647 F.2d 194, 196-97 (D.C.Cir.1981); *United States v. Gower*, 503 F.2d 189, 191 (D.C.Cir.1974). See also *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of April, 2004, I served by First Class mail, postage pre-paid, a copy of the forgoing Brief for Metropolitan Washington Employment Lawyers Association as *Amicus Curiae* Regarding Individual Liability under the District of Columbia Human Rights Act to the following:

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