Case No. 22-1394

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CLARE E. MUNDELL,
Plaintiff – Appellee

v.

ACADIA HOSPITAL CORPORATION,
Defendant – Appellant,

EASTERN MAINE HEALTHCARE SYSTEMS,
Defendant

Appeal from the United States District Court for the District of Maine

AMICUS BRIEF OF MAINE STATE CHAMBER OF COMMERCE – IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Maine State Chamber of Commerce makes the following disclosures regarding its corporate status. Maine State Chamber of Commerce is a non-profit corporation. It has no parent corporation and, as a non-profit public benefit corporation, it has no shareholders.

TABLE OF AUTHORITIES

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STATEMENT OF IDENTITY OF AMICUS CURIAE[1]

The Maine State Chamber of Commerce is the State's largest business advocate representing over 5,000 member-employers across the State in adjudicatory hearings and before the legislature, state regulatory agencies, and other tribunals. The Chamber seeks to ensure that its members, large and small, can compete successfully in the local, regional, national, and world marketplaces. The Chamber operates on a state-wide basis, representing employers in every industry sector and from each of Maine's sixteen counties.

The Chamber has a direct interest in this case to preserve and promote business competition in the State of Maine and to provide employers sufficient flexibility to attract qualified candidates to their businesses in an unusually competitive market. An interpretation of Maine's Equal Pay Law, 26 M.R.S. § 628, that imposes strict liability on employers for liquidated damages consisting of treble damages and attorneys' fees in any instance where two employees of the opposite sex are paid differently under circumstances not attributable to seniority systems, merit increase systems, or shift differentials, will undoubtedly stifle Maine employers' ability to actively and effectively recruit qualified candidates to the

[1]Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no person or entity, other than amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

Maine workforce. The effects of such an interpretation will be detrimental to the workforce in Maine's rural counties that already struggle with significant labor shortages.

ARGUMENT

I. THE DISTRICT COURT'S INTERPRETATION OF THE MEPL WILL STIFLE ECONOMIC DEVELOPMENT IN MAINE AND HAVE UNINTENDED CONSEQUENCES FOR MAINE EMPLOYERS.

The District Court's interpretation of the Maine Equal Pay Law ("MEPL") as set forth in *Mundell v. Acadia Hospital*, No. 1:21-CV-00004-LEW, 2022 WL 375832 (D. Me. Feb. 8, 2022), will undoubtedly stifle economic development in Maine during already trying market circumstances. The MEPL states in relevant part:

> An employer may not discriminate between employees in the same establishment on the basis of sex by paying wages to an employee in an occupation in this State at a rate less than the rate at which the employer pays any employee of the opposite sex for comparable work on jobs that have comparable requirements relating to skill, effort and responsibility. Differentials that are paid pursuant to established seniority systems or merit increase systems or differences in shift or time of the day worked that do not discriminate on the basis of sex are not within this prohibition.

26 M.R.S. § 628. The Maine Supreme Judicial Court sitting as the Law Court has never had the opportunity to address the issue of whether discriminatory intent is a necessary element of a sex-based equal pay claim under Maine law or considered

the policy implications of imposing strict liability on Maine employers. Accordingly, the issue remains unsettled in the State of Maine.

While the District Court relies heavily on comparisons between the MEPL and other statutory frameworks such as the Federal equivalent (29 U.S.C. § 206(d) "FEPA") and the Massachusetts equivalent (M.G.L. c. 149, § 105A "MEPA") in determining that the MEPL contains no requirement of showing discriminatory intent, neither of these statutory frameworks are sufficiently similar to the MEPL to warrant comparison.

First, there are substantial differences between the MEPL and the federal counterpart FEPA. Notably, the MEPL regulates "comparable work" while FEPA regulates "equal work" between employees of opposite sexes. *See* 29 U.S.C. § 206(d)(1). Further, the FEPA contains a catchall enumerated exception for pay differentials between employees of opposite sexes when an employer can demonstrate the differential was based on "any other factor other than sex[.]" 29 U.S.C. § 206(d)(1). Notably, this catchall provision is missing in the MEPL framework.

It is well settled that the Maine Law Court will only consider construction of a federal counterpart "when the federal and state laws are substantially identical." *Scamman v. Shaw's Supermarkets, Inc.*, 2017 ME 41, ¶ 26, 157 A.3d 223; *see also Me. Human Rights Comm'n v. Kennebec Water Power Co.*, 468 A.2d 307, 310 (Me.

1983) (stating "[W]here the provisions of the Maine statute differ substantively from their federal counterparts . . . deference to construction of the federal version is unwarranted."). While both the MEPL and FEPA govern equal pay, given the significant substantive differences between the language of the MEPL and the FEPA, it is unlikely that the Law Court would look to precedent interpreting the federal counterpart. Indeed, other states that maintain equal pay frameworks with similar differences from FEPA—such as the Supreme Judicial Court of Massachusetts, have expressly refused to give deference to FEPA in interpreting the state equal pay statute. *See Jancey v. Sch. Comm. of Everett*, 421 Mass. 482, 658 N.E.2d 162, 166-67 (1995) (indicating that MEPA and FEPA differ "significantly" and Massachusetts does not "follow slavishly the Federal approach.").

Second, while there are some similarities between the MEPL and Massachusetts' equal pay statute—MEPA, the Massachusetts framework is markedly different than the MEPL. While Maine has three narrow enumerated defenses, MEPA contains six defenses including:

> (i) a system that rewards seniority with the employer; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job.

M.G.L. c. 149, § 105A. Indeed, a strict liability interpretation of the MEPA would still permit a Massachusetts employer to consider market factors such as geography, education, training, and travel requirements in setting wages for employees and in attracting qualified employees to the Commonwealth. A similar interpretation of the MEPL, however, will be detrimental to Maine employers by drastically restricting Maine employers' ability to compete in the labor market. Such an interpretation will have a chilling effect on economic growth in Maine. Given the disparities between the MEPL and MEPA, and the policy implications such an interpretation would have in a rural state like Maine, it is highly unlikely the Maine Law Court would instinctively rely on Massachusetts precedent to impose strict liability on Maine employers when the Legislature never intended to do so.

A review of the plain text of the MEPL, as well as regulations supporting the statute, does not support the District Court's conclusion that the three enumerated defenses in the statute are the *only* permissible bases for avoiding liability. *See* Appellant's Add. 11-12. The plain language of the MEPL expressly requires a showing of discrimination on the basis of sex. The standard in Maine for interpreting statutory provisions is well established. Indeed,

> In interpreting these provisions, we first look to the plain language of the provisions to determine their meaning . . . . If the language is unambiguous, we interpret the provisions according to their unambiguous meaning unless the result is illogical or absurd . . . . If the plain language of a statute is ambiguous—that is, susceptible of different meanings—we will then go on to consider the statute's

> meaning in light of its legislative history and other indicia of legislative intent.

MaineToday Media, Inc. v. State, 2013 ME 100, ¶ 6, 82 A.3d 104 (citations omitted) (quotation marks omitted). In applying these principles, the Law Court gives "due weight to design, structure, and purpose as well as to aggregate language." *Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 22, 107 A.3d 621). The Law Court has consistently and expressly rejected statutory interpretations that render some language "mere surplusage." *State v. Dubois Livestock, Inc.,* 2017 ME 223, ¶ 6, 174 A.3d 308, 311.[2]

In the case at bar, the District Court's interpretation of the MEPL disregards the words "discriminate . . . on the basis of sex" as stated in the statute, rendering those words mere surplusage. This has the net effect of holding employers strictly liable for sex-based discrimination in *any* instance where a lower paid employee happens to be the opposite sex of a higher paid employee, and the pay differential is not the result of seniority systems, merit increase systems, or shift differentials—regardless of the employer's intent. This will have a significant impact on Maine employers as there are many legitimate, non-discriminatory business reasons justifying differentials in pay among various employees. Indeed, courts across the

[2] A federal court exercising supplemental jurisdiction over a state law claim, such as the case here, must apply state substantive law. *Barton v. Clancy*, 632 F.3d 9, 17 (1st Cir. 2011).

country have specifically examined these types of business or market forces justifications for pay differentials among employees and have found those justifications to be non-discriminatory.[3]

While the MEPL does not have a "catchall" affirmative defense like its federal counterpart, it does have express language that requires a showing of discrimination on the basis of sex. *See* 26 M.R.S. § 628. Penalizing Maine employers for competing in the market to attract qualified candidates to their respective businesses, on a *per se* basis, will have catastrophic economic results not intended by the Legislature.

[3] *See e.g Merrilat v. Metal Spinners*, 470 F.3d 685, 697-98 (7th Cir. 2006) (granting summary judgment where employer argued that pay differential was based on male employee's education, experience and "the market forces at the time of his hire"); *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001) (affirming grant of summary judgment to employer who defended based on "job market demands"); *Smallwood v. Jefferson Cnty.*, No. 95-5686, 1996 WL 490353, at *4 (6th Cir. Aug. 27, 1996) (finding no EPA violation where employer argued salary differential was needed to meet market conditions and hire a well-qualified candidate); *Brune v. BASF Corp.,* 41 F. Supp. 2d 768, 778 (S.D. Ohio 1999), partially rev'd and aff'g, No. 99-3194, at *1, *5 (6th Cir. 2000) (granting summary judgment where male employee "was hired away from a competitor and received a starting salary at the market rate," which was higher than plaintiff's salary); *Engelmann v. Nat'l Broad. Co.*, No. 94 CIV. 5616 (MBM), 1996 WL 76107, at *10 (S.D.N.Y. Feb. 22, 1996) (finding that payment of higher salary to match an incoming employee's previous earnings is a valid defense); *Bartges v. Univ. of N.C. at Charlotte,* 908 F. Supp. 1312, 1328 (W.D.N.C. 1995) (finding no violation where women coaches were willing to work for lower salaries).

A. The Maine Legislature never intended the MEPL to be interpreted as a strict liability statute.

A review of Title 26, in its entirety, reflects that in circumstances when the Maine Legislature intended provisions within the Title to be strict liability, the Legislature specifically stated so. *See e.g.*, 26 M.R.S. § 781. In the MEPL, however, there is no such language or consideration of strict liability. Had the Legislature intended the MEPL to be a strict liability statute, it would have expressly included such a designation on the face of the statute. The Legislature intentionally chose not to do so.

While the MEPL reflects three enumerated defenses in the statute as permissible bases for avoiding liability, namely—merit increase systems, seniority systems, and shift differentials, Title 26 does not define those terms or provide guidance to employers as to what factors are appropriate. The absence of defined terms is further evidence that the Legislature did not intend the MEPL to be interpreted as a strict liability framework. Rather, for guidance the terms are defined in the Bureau of Labor Standards, the regulations applied to interpret the MEPL. In accordance with the Standards, a "merit increase system" is defined as "an established, bona fide, uniform, and objective system which rewards an employee with promotion, pay increases, or other advantages on the basis of competence." *See* 12-170 C.M.R. ch. 12, § I (I). Similarly, "seniority system" is defined as "a system that gives preference to workers based on years of service. For example, a worker

with more years of service may be paid more for performing a particular job than an employee with fewer years of service in that same job." *Id.* § I (K).

Both of these enumerated defenses permit employers to adjust pay for employees only *after* an employee has been hired. Under the District Court's strict liability interpretation of the MEPL, employers will be unable to consider a new hire's degree of experience, training, education, or skill in a particular area in setting wages. Rather, the *only* permissible consideration when setting wages will be the existing salary of other employees performing comparable work—regardless of the changes in the market. Given Maine's aging population and extraordinary difficulty attracting qualified candidates to the workforce, the Legislature never intended to disrupt market competition in hiring and never intended the MEPL to impose strict liability.

This is further evidenced by a review of the Bureau of Labor Standards at section IV. An employer is entitled to a "presumption of compliance" when undertaking a self-evaluation and demonstrating an affirmative showing "that progress is being made towards removing or preventing wage differentials based on gender." *See* 12-170 C.M.R. ch. 12, § IV. The District Court's interpretation of the MEPL would prohibit any presumption of compliance, would hold employers strictly liable for discrimination regardless of intent, and would render the Bureau of Labor standards effectively meaningless.

This inconsistency in interpretation of the statutory language, coupled with the negative impact on Maine employers, warrants remand in this case. Employers in Maine will be negatively impacted if they are prohibited from competing in the market for qualified candidates due to the looming threat of strict liability resulting from any pay disparities between employees, regardless of the employer's intent.

B. Employers in Maine will be negatively impacted if they are prohibited from adapting to market conditions to attract qualified employees.

Under the District Court's interpretation of the MEPL, Maine employers will be unable to consider market conditions in making hiring decisions. Employers will be unable to offer sign-on bonuses, to cover moving expenses, or to offer increased salary or other employment incentives necessary to entice new qualified employees to their businesses. Doing so would create a potential pay disparity among existing employees that would undoubtedly trigger the strict liability which the District Court's interpretation of the MEPL would impose.

The District Court's interpretation of the MEPL will be especially harmful in Maine. Unlike Massachusetts, Maine is one of the most rural states in the country with more than 60% of its population living in rural areas. *Census: Maine most Rural State*, Mainebiz (March 27, 2012), https://www.mainebiz.biz/article/census-maine-most-rural-state. There are significant disparities in the workforce and in access to crucial and necessary services throughout Maine's most rural counties. *Id.*

Strict liability under the MEPL will only add additional burden to employers making efforts to attract and maintain a qualified workforce in those counties.

Employers will further be unable to consider pay differentials for other important factors such as geographic placement. This means employers with offices in both Portland, Maine and Machias, Maine, must maintain equal compensation for employees living in drastically different local economies. Moreover, employers would be prohibited from offering incentive based pay to attract employees to their rural businesses. This means hospitals in Fort Kent, Maine and Dover Foxcroft, Maine cannot offer incentives to medical professionals to relocate to those facilities, unless they expend the resources to pay all existing employees performing comparable work the same incentive. If employers are not permitted the flexibility to attract employees to the Maine workforce, there is great risk that residents in Maine's most rural counties will face obstacles to receiving important and even life-saving services resulting from employers' efforts to countervail the risk of *per se* discrimination and liquidated treble damages.

C. *The Impact of the COVID-19 pandemic exacerbates the impact of the District Court's strict liability interpretation of the MEPL.*

The COVID-19 pandemic sparked a dual crisis consisting of a public health emergency coupled with severe economic disruption.[4] In the two years following

[4] Research Brief, Maine Dep't of Labor, The Maine Labor Force—Aging and Slowly Growing May 2013), https://www.maine.gov/labor/cwri/publications/pdf/Maine

the height of the pandemic, Maine employers continue to face obvious challenges. "The convergence of rising employer needs for staff at a time when fewer people were in the labor force caused the job opening rate to surge to more than seven percent . . . in 2022 openings remain high."[5] This uniquely competitive environment has driven Maine's strongest wage gains in decades due to hazard pay, increased overtime pay, cost of living salary adjustments, and bonuses for employees.[6] The market has drastically shifted and Maine employers simply cannot not hire qualified candidates for the same wages offered pre-pandemic.

These problems are compounded within the healthcare industry in Maine. Indeed, in the past two years, the healthcare sector accounted for 12% of total job losses across the State.[7] Today there are a record number of job openings within Maine's hospitals and medical facilities including long-term care facilities. Maine based medical care institutions have had an exceedingly difficult time recruiting

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LaborForceAgingAndGrowingSlowly.pdf.; See also *Two Years In: Maine's Labor Market Recovery from the Coronavirus Pandemic*, Maine Dep't of Labor, https://www.maine.gov/labor/cwri/blogs/Pandemic_Recovery.pdf.

[5] *See Two Years In: Maine's Labor Market Recovery from the Coronavirus Pandemic*, Maine Dep't of Labor, https://www.maine.gov/labor/cwri/blogs/Pandemic_Recovery.pdf.

[6] *See Two Years In: Maine's Labor Market Recovery from the Coronavirus Pandemic*, Maine Dep't of Labor, https://www.maine.gov/labor/cwri/blogs/Pandemic_Recovery.pdf.

[7] *Governor Mills Announces New Maine Jobs & Recovery Plan* Initiatives to Strengthen Maine's Health Care Workforce in Face of COVID-19 Pandemic (October 25, 2021), https://www.maine.gov/governor/mills/news/governor-mills-announces-new-maine-jobs-recovery-plan-initiatives-strengthen-maines-health.

professionals to Maine.[8] States continue to compete for physicians and nurses. Many are being lured away from the state by higher paying traveling positions.[9]

Employers in Maine's most rural counties have struggled more than ever to fill open positions resulting in early or unexpected closures due to lack of staff, reduction of hours, reduction of services, and even permanent closures. *Id*. The labor shortages will impede Maine residents in those rural areas from receiving crucial services. It is therefore imperative that Maine employers have the flexibility to offer proper incentives to qualified employees to ensure access to these services without facing repercussions for sex-based discrimination, where no such discriminatory intent exists.

In addition, employers are now faced with demands for higher than anticipated wages and compensation/benefit packages, sign-on or recruitments bonuses, limited work or call hours, limited travel, and in many instances—remote

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[8] *See* Christian Wade, *Maine has the third largest nursing shortage at long-term care facilities in the nation,* The Center Square (April 12, 2022), https://www.thecentersquare.com/maine/report-maine-has-third-largest-nursing-shortage-at-long-term-care-facilities/article_70dc6a02-ba75-11ec-85fb-f7a4aeab1594.html; *see also* Emily Bader, *Maine, with one of the Highest Cancer Rates in the Country, is Struggling to attract Oncologists,* Sun Journal (June 12, 2022) https://www.pressherald.com/2022/06/12/maine-with-one-of-the-highest-cancer-rates-in-the-country-is-struggling-to-attract-oncologists/.

[9] *See* Dustin Wlodkowski, *Maine Hospital Cuts Back Services Because of Staffing Shortages* (October 12, 2021), https://www.necn.com/news/local/maine-hospital-cuts-back-services-because-of-staffing-shortages/2572252/.

work.[10] Under the District Court's interpretation of the MEPL, Maine employers cannot compete in the present market given the significant risk of paying a new hire employee wages different than those wages of a previously retained employee of the opposite sex, despite the drastic change in market conditions and the shortage of labor. Due to the change in market value of employees, Maine employers' hands are effectively tied due to the District Court's strict liability interpretation of the MEPL. The risk of hiring new candidates at market rates will exceed the benefit to the business.

Employers in Maine must be afforded the flexibility to adapt to the changing market to attract qualified employees—regardless of sex—to their companies in Maine and throughout Maine's more rural counties. The District Court's interpretation of the MEPL prohibits this market competition and has the negative effect of chilling marked-driven wage growth. This is not the result the Maine Legislature intended when it enacted the MEPL and accordingly, is not the construction that the Maine Law Court would give to the statute.

[10] *See e.g.*, Nicole Ogrysko, *Maine businesses raise wages to retain workers, but still struggle to find new ones*, (February 8, 2022), Maine Public, https://www.mainepublic.org/business-and-economy/2022-02-08/maine-businesses-raise-wages-to-retain-workers-but-still-struggle-to-find-new-ones.

II. THE DISTRICT COURT ERRED IN ITS ASSESSMENT OF TREBLE DAMAGES FOR A *PER SE* VIOLATION OF THE MEPL.

The District Court's interpretation of the MEPL as a strict liability statute, coupled with its determination that employers are liable for treble damages for unpaid wages and attorney's fees in the event of a violation of the statute, is inconsistent with the Legislature's intent in enacting the MEPL and unsupported by Maine Law. Indeed, the Maine Law Court has never assessed liquidated treble damages for an employer's violation of the MEPL.

The purpose of the MEPL is for members of both sexes to be paid equally for comparable work. The Legislature never intended for employers to lose the ability to compete in the labor market or for employees to receive a windfall in the event of an employer's inadvertent *per se* violation of the MEPL. Under the District Court's interpretation an employee's recovery for purported sex-based discrimination would exceed an employee's recovery under other employment discrimination statutes that require a showing of discriminatory intent. This interpretation is inconsistent with the purpose of the MEPL and implements substantial damages for even an employer's inadvertent violation of the MEPL.

CONCLUSION

The District Court's interpretation of the MEPL and the assignment of liquidated damages for an unintentional violation will have a chilling effect on Maine employers and will result in a further labor shortage in Maine. Based on the foregoing, the Maine State Chamber of Commerce requests that the decision of the District Court be vacated and remanded for further proceedings including interpretation of the MEPL by the Maine Law Court.

Dated at Bangor, Maine, this 29th day of August, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because this brief contains 4,136 words, excluding the parts of the brief exempted by Fed R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point type font.

/s/ Janna L. Gau
Janna L. Gau, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2022, I electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit via the CM/ECF System the foregoing Amicus Brief. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

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