

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 636
Judiciary

(Delegate Smith, *et al.*)

Maryland Tort Claims Act - Certain Claim Requirement - Exception

This bill creates an exception to the notice of claim requirement under the Maryland Tort Claims Act (MTCA) for a complaint that alleges a grievance due to an alleged discriminatory act that is filed with the Maryland Commission on Civil Rights (MCCR) in accordance with § 20-1004 of the State Government Article.

The bill applies prospectively to causes of action arising on or after the bill's October 1, 2016 effective date.

Fiscal Summary

State Effect: Potential significant impact on State Insurance Trust Fund (SITF) expenditures, depending on the monetary value of affected claims, as discussed below. Revenues are not affected.

Local Effect: The bill does not materially impact local finances.

Small Business Effect: None.

Analysis

Current Law:

Discriminatory Complaints Filed with MCCR: MCCR is the State agency charged with the enforcement of laws prohibiting discrimination in employment, housing, public accommodations, and State contracting. MCCR works to ensure equal opportunity to all

citizens of Maryland by engaging in the investigation, mediation, and litigation of discrimination complaints in administrative and State court proceedings.

Any person claiming to be aggrieved by an alleged discriminatory act may file a complaint with MCCR. The complaint must be filed within six months after the date on which the alleged discriminatory act occurred. A complaint filed with a federal or local human relations commission within that same time period is considered in compliance with this requirement.

The complaint must (1) be in writing; (2) state the name and address of the person or State or local unit alleged to have committed the discriminatory act and the particulars of the alleged discriminatory act; (3) contain any other information required by MCCR; and (4) be signed by the complainant under oath.

Following receipt and consideration of a complaint, MCCR investigates the claim, and if there is a finding of probable cause to believe that a discriminatory act has been or is being committed, MCCR staff must immediately attempt to eliminate the discrimination through conference, conciliation, or persuasion. If an agreement cannot be reached through that process, the statute prescribes procedures for further pursuing the matter through an administrative hearing or, in the case of unlawful employment practice, a civil action.

Maryland Tort Claims Act: In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under MTCA, the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by “State personnel” performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially “...waives sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort.” *Lee v. Cline*, 384 Md. 245, 262 (2004).

However, MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident. (Chapter 132 of 2015 increased the liability limit under MTCA from \$200,000 to \$400,000 for causes of action arising on or after October 1, 2015.)

In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State’s color of authority or sovereign immunity and may be held personally liable.

MTCA also contains specific notice and procedural requirements. A claimant is prohibited from instituting an action under MTCA unless (1) the claimant submits a written claim to the State Treasurer or the Treasurer’s designee within one year after the injury to person or

property that is the basis of the claim; (2) the State Treasurer/designee denies the claim finally; and (3) the action is filed within three years after the cause of action arises.

The claim must (1) contain a concise statement of facts that sets forth the nature of the claim, including the date and place of the alleged tort; (2) demand specific damages; (3) state the name and address of each party; (4) state the name, address, and telephone number of counsel for the claimant, if any; and (5) be signed by the claimant, or the legal representative or counsel for the claimant.

However, pursuant to Chapter 132 of 2015, a court, upon motion of a claimant who failed to submit a written claim to the State Treasurer or the Treasurer's designee within the one-year time period under MTCA, and for good cause shown, may entertain the claimant's action unless the State can affirmatively show that its defense has been prejudiced by the claimant's failure to submit the claim.

The purpose of the notice provision is "...to give the State early notice of claims against it. That early notice, in turn, affords the State the opportunity to investigate the claims while the facts are fresh and memories vivid, and, where appropriate, settle them at the earliest time." *Haupt v. State*, 340 Md. 462, 470 (1995).

Background: MCCR received 864 complaints in fiscal 2015 – 693 employment, 109 housing, and 62 public accommodations complaints. MCCR advises that complaints are not always related to an act of discrimination and that an investigation by MCCR does not always prove an allegation of discrimination in a complaint to be a fact. According to MCCR's *2015 Annual Report*, 515 of the commission's 932 case closures during fiscal 2015 resulted in findings of no probable cause.

State Expenditures: Special fund expenditures increase, perhaps significantly, depending on the monetary value of SITF payments for claims affected by the bill.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. The Treasurer's Insurance Division handles approximately 5,000 MTCA claims each year. SITF paid the following amounts in tort claims under MTCA: \$5.8 million in fiscal 2014, \$7.3 million in fiscal 2015, \$8.5 million in fiscal 2016 (estimated), and \$9.0 million in fiscal 2017 (projected). The Governor's proposed fiscal 2017 budget includes a \$10.5 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF.

For illustrative purposes only, as previously noted, of the 864 complaints MCCR received in fiscal 2015, 693 involved allegations of employment discrimination. MCCR complaints involve public and private employers. Assuming that MCCR complaint levels remain constant, employment discrimination is the most likely type of MCCR complaint to result

in an MTCA claim, and 10% of the employment discrimination claims filed with MCR allege discrimination by the State; approximately 69 MCCR claims are affected by the bill's provisions each year.

According to the Treasurer's Office, one-third of the estimated 5,000 claims received each year are denied on the basis of untimely notice. Applying this factor to the estimated 69 claims affected by the bill each year results in 23 MTCA claims per year being allowed to proceed under the bill that would be denied for untimely notice under existing statute. This illustration does not account for the fact that approximately 50% of MCCR complaints result in findings of no probable cause. This illustration also does not account for (1) MCCR complaints that (though eligible) do not currently result in MTCA filings; (2) claims that are currently filed in compliance with MTCA and MCCR; and (3) claims that do not meet the notice requirements under MTCA but proceed for good cause shown.

It is unclear what type of notice the Treasurer's Office is to receive when a person files a complaint with MCCR. Statute does not address whether MCCR is required to notify the Treasurer's Office when a State agency is named as a defendant in an MCCR complaint. Also, it is unknown at this time whether State agencies alert the Treasurer's Office when they are notified that they have been named in complaints filed with MCCR or if the Treasurer's Office is notified when MCCR complaints progress to a civil action. Furthermore, since the bill exempts specified MCCR claims from the notice of claim requirement under MTCA, it appears that so long as the applicable MTCA claims are filed within three years under the general statute of limitations for civil actions, they may be considered under MTCA.

The Treasurer's Office has historically advised that removing the notice requirement impedes the ability of the office and its actuaries to accurately calculate potential claims and liabilities to maintain adequate SITF reserves. While the bill appears to apply to a small number of MTCA claims each year, should the bill result in the Treasurer's Office receiving a claim three years after the alleged act of discrimination and should this delay in notice result in the Treasurer's Office being unable to thoroughly investigate a claim, then there is a possibility that claims affected by the bill generate higher SITF payments within the current liability limit of \$400,000. The magnitude of this effect depends on the actual number of claims and payments made under the bill and cannot be reliably estimated at this time.

Depending on the monetary value of claims affected by the bill, the bill may result in higher premium assessments against relevant State agencies, but that is likely to occur only if the bill results in significantly higher SITF payments. Agencies pay premiums to SITF that are comprised of an assessment for each employee covered and SITF payments for torts committed by the agency's employees. The portion of the assessment attributable to losses is allocated over five years. The Treasurer is charged with setting premiums "so as to

produce funds that approximate the payments from the fund.” (See Md. State Fin. & Proc. Code Ann. § 9-106(b).) The actuary assesses SITF’s reserves and each agency’s loss experience for the various risk categories, which include tort claims and constitutional claims. An agency’s loss history, consisting of settlements and judgments incurred since the last budget cycle, comprises part of the agency’s annual premium. That amount is electronically transferred to SITF from the appropriations in an agency’s budget.

Additional Information

Prior Introductions: None.

Cross File: SB 935 (Senator Manno) - Judicial Proceedings.

Information Source(s): Maryland Commission on Civil Rights, Maryland State Treasurer’s Office, Judiciary (Administrative Office of the Courts), Department of Legislative Services

Fiscal Note History: First Reader - February 16, 2016
md/kdm

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