



Department of Budget and Management  
Office of the Statewide Equal Employment  
Opportunity Coordinator  
**EEO Connection**

June 2013

Issue I

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**Coordinator's Message**

**EQUALITY**

Employment laws in our country forbids employers from discriminating against employees (and applicants) on the basis of various protected categories, such as race, religion, gender, disability, and other categories. It is our responsibility to obey these laws and by doing so we are promoting equality. Equality in the workplace means ensuring that all individuals are treated with respect, are allowed to enjoy the same benefits and privileges, and have the same chance to pursue opportunities and develop skills-despite our differences.

In this newsletter's ADA Corner, learn what the EEOC has to say about employees that have PTSD. Also, learn the rules that new managers and supervisors should

know to help avoid ADA problems. In the EEO Case Review section, read about the EEOC case, Clecker v. Secretary of Defense, to learn whether Clecker's job offer was unfairly withdrawn after he did not pass a medical evaluation. Other interesting reads include a major egg supplier to pay \$650,000 to settle a sexual harassment lawsuit and the University of Maryland Faculty Physicians, Inc. to pay \$92,500 to settle a disability discrimination case.

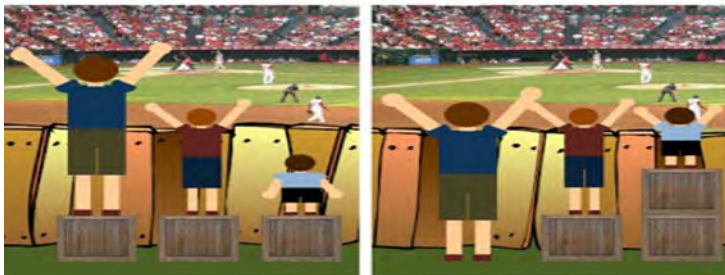
Read about Maryland's new law "Reasonable Accommodations for Disabilities due to Pregnancy Act" that will be effective October 1, 2013. This newsletter also spotlights employers' rights regarding English-only rules and a company's violation of GINA. Looking for fun and exciting things to do this summer? Check out the Diversity Corner for a list of

festivals happening in and around Baltimore.

Enjoy!

Glynis Watford  
Statewide EEO Coordinator

**EQUALITY**



*"We should all know that diversity makes for rich tapestry, and we must understand that all threads of the tapestry are equal in value no matter what their color."*

Maya Angelou

## NOTEWORTHY RULING

### Egg Giant National Food to Pay \$650,000 to Settle Sexual Harassment Lawsuit

National Food Corporation, a major supplier of eggs to the Pacific Northwest and Midwestern United States and East Asia with headquarters in Everett, Washington, will pay \$650,000 to five workers and provide other relief to settle a sexual harassment lawsuit filed by the U.S.E.E.O.C.

The EEOC's suit charged that a supervisor at National Food's egg farm in Lind, WA, repeatedly demanded sexual favors from a female laborer, who worked alone in a hen-

house, in order to keep her job. Taking advantage of her isolated workplace, the supervisor would physically grab the barn worker and demand sex from her on a weekly basis, from 2003 to 2010. The EEOC also alleged that when her co-workers raised complaints about sexual harassment to company management, they were fired or forced out of their jobs.

"For almost seven years, I tried to just survive these de-

mands from my boss, because I needed to support my mother and daughter," said the worker. "I hope my case will help other workers to speak out against sexual harassment. It's important to know that you have a right to say no to sexual demands even from a supervisor, and that the law protects you when you protest harassment." Under the consent decree resolving this lawsuit, National Food has also agreed to issue EEO policies in English and Spanish to employees throughout Eastern Washington and South

Dakota; institute changes to ensure that its complaint procedures are accessible, and train its management and to hold supervisors accountable for any discrimination, harassment or retaliation under their watch. In addition, National Foods will report harassment complaints to the EEOC for four years, and will not rehire the alleged harasser in any capacity. "All workers have the right to a workplace free of harassment," said EEOC San Francisco Regional Attorney William R. Tamayo, whose office has jurisdiction over Washington State.

*Equal Employment Opportunity Commission (EEOC)*

### University of Maryland Faculty Physicians, Inc. Will Pay \$92,500 in Lawsuit

University of Maryland Faculty Physicians, Inc. will pay \$92,500 and furnish other relief to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

According to the EEOC's lawsuit, Doneen King, a medical practice representative whose duties included answering phone calls and scheduling appointments, was unable to work for two weeks while undergoing medical treatment for her disability, Crohn's disease, including two emergency room visits and hospitalization. The EEOC said that when King requested an additional day of unpaid leave as a reasonable accommodation, the medical practice instead terminated her.

The EEOC said that University of Maryland Faculty Physicians, Inc.'s lateness and attendance policy violated the Americans with Disabilities Act, as amended (ADA), because it did not provide for exceptions or modifications to the attendance policy as a reasonable accommodation for individuals with disabilities.

The EEOC filed suit in U.S. District Court for the District of Maryland, Baltimore Division, Civil Action No. 1:12-cv-02887-GLR, after first attempting to reach a pre-litigation settlement through its conciliation process.

"It's not only a good business practice to provide reasonable and inexpensive accommodations that allow employees with disabilities to

remain employed, it is required by federal law," said Spencer H. Lewis, Jr., district director of the EEOC's Philadelphia District Office.

In addition to the \$92,500 in monetary relief to King, the three-year consent decree resolving the lawsuit enjoins University of Maryland Faculty Physicians, Inc. from violating the ADA, including by not providing reasonable accommodations. It must revise its lateness and absenteeism policy to permit reasonable accommodations for employees with disabilities.

The medical practice is required to train all supervisory, managerial and human resources personnel on the ADA and post a no-

tice regarding the resolution of the lawsuit at its facilities.

*"We must become the change we want to see."*

*Mahatma Gandhi*

## SPOT LIGHT

### EEOC Files Class Genetic Information Discrimination Suit Against Corning Rehab

The Founders Pavilion, Inc., a Corning N.Y., nursing and rehabilitation center, violated federal law by asking for genetic information during the hiring process, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit it filed on May 16, 2013. The EEOC also alleged that Founders violated the Americans with Disabilities Act and Title VII of the Civil Rights Act.

According to the EEOC's suit, Founders conducted post-offer, pre-employment medical exams of applicants, which were repeated annually if the person was hired. As part of this exam, Founders requested family medical history, a form of prohibited genetic information.

Such alleged conduct violates the Genetic Information Nondiscrimination Act (GINA),

passed by Congress in 2008 and enforced by the EEOC. GINA prevents employers from demanding genetic information, including family medical history, and using that information in the hiring process. The EEOC filed suit (Case No. 6:13-cv-06250) in U.S. District Court for the Western District of New York in Rochester after first attempting to reach a pre-litigation settlement through its conciliation process. The Founders suit is the second ever GINA lawsuit filed by the EEOC, following a complaint and consent decree filed in Tulsa, OK.

The EEOC further charged that Founders fired one employee after it refused to accommodate her during her probationary period, in violation of the ADA. Further, the lawsuit also charged that Founders fired two women because of perceived dis-

abilities under the ADA and either refused to hire or fired three women because they were pregnant, in violation of the Title VII of the Civil Rights Act of 1964. "GINA applies whenever an employer conducts a medical exam, and employers must make sure that they or their agents do not violate the law," said Elizabeth Grossman, the regional attorney in the EEOC's New York District Office. "Congress's intent is clear: employers cannot obtain genetic information from applicants or employees."

One of the six national priorities identified by the EEOC's Strategic Enforcement Plan (SEP) is for the agency to address emerging and developing issues in equal employment

law, which includes genetic discrimination.

*Equal Employment Opportunity Commission (EEOC)*

*"If we cannot end our differences, at least we can help make the world safe for diversity."*

*John F. Kennedy*

### The Reasonable Accommodations for Disabilities Due to Pregnancy Act

Effective October 1, 2013, Maryland employers with 15 or more employees will be required to provide pregnant employees who are temporarily disabled with light duty assignments or similar accommodations, unless the accommodations would impose an undue hardship to the employer.

On May 16, 2013, Governor Martin O'Malley signed legislation that amends the Maryland Fair Employment Practices Act ("FEPA") and expands Maryland employers' obligations to accommodate pregnant employees. The Reasonable Accommodations for Disabilities Due to Pregnancy Act requires employers to provide certain reasonable accommodations to pregnant employees who provide notice of a temporary disability, as long as it

does not pose an undue hardship to do so. Employers must "explore" with the employee all possible means of providing a reasonable accommodation, including: (1) changing the employee's job duties, (2) changing the employee's work hours, (3) relocating the employee's work area, (4) providing mechanical or electrical aids, (5) transferring the employee to a less strenuous or hazardous position, or (6) providing leave. If an employee requests a transfer to a less strenuous job during the pregnancy, an employer must grant the request if: (1) it would do so for any other temporarily disabled employee; or (2) the woman's health care provider so advises, and the employer can do so without creating a new job or displacing employees.

Employers may require

pregnant employees seeking an accommodation to submit a medical certification that includes the date the reasonable accommodation became medically advisable, the probable duration of the accommodation, and an explanatory statement as to the medical advisability of the accommodation.

The impetus to amend the Maryland Fair Employment Practices Act (FEPA) to include additional accommodations for pregnant employees was a recent decision issued by the 4th U.S. Circuit Court of Appeals. In *Young v. UPS*, the 4th Circuit held that employers are not required under the ADA or PDA to provide pregnant employees with light duty assignments so long as the employer puts them on an equal footing with non-pregnant employees.

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Joseph P. Harkins and Steven E. Kaplan© Littler Mendelson

## SPOT LIGHT

# Workplace Language Rules Should be Narrowly Tailored

The federal Equal Employment Opportunity Commission (EEOC) announced in September, 2012 that Delano Regional Medical Center (DRMC), an acute care hospital in California's San Joaquin Valley, agreed to pay \$975,000 to settle a class action national origin discrimination lawsuit brought on behalf of a class of approximately 70 Filipino-American hospital workers.

The employees alleged that the hospital's English-only rule was discriminatory, and enforced only against Filipino employees. They also alleged that they were subjected to humiliating treatment by hospital management and co-workers, and that their repeated complaints about the ill-treatment were ignored.

The EEOC and the Asian Pacific-American Legal Center filed suit in 2010, challenging the English-only policy and other practices at the hospital, claiming that the conduct violated Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex or national origin.

According to the lawsuit, the hospital's CEO called a meeting in 2006, which only the Filipino employees were required to attend, and threatened the workers with penalties unless they followed a strict English-only policy. The policy required employees to speak English at all times unless on break or when speaking to a patient who had other language needs.

### New Approved Policy

In settling the case, the hospital agreed to hire an EEO monitor to conduct anti-harassment and anti-discrimination training, and to adopt a new language policy. The new policy, which the EEOC approved, is set forth below:

"Each patient has the right to be fully informed of his or her total health status, including his or her medical condition, in a language that he or she understands. Patient Care Team members will speak to the patient in English or in the language that the patient or patient's representative understands or a translator will be provided."

"Employees have the right to communicate with each other in a language of their choice when not engaged in direct communication with, or while providing care, or services, to a patient. When providing care, employees should not engage in a conversation of a social nature with each other that does not relate to the care of the patient."

"This policy is not applicable when an employee is on break or off duty and does not apply in break rooms, cafeteria or other areas where staff take personal breaks. Non-supervisory employees and volunteers are not to attempt to enforce the policy and must comply with DRMC's policy against harassment and discrimination.

### B. Part of a Trend

Recently, there has been an increase of national origin discrimination claims in general, and claims based on English-only policies in particular. The Delano case is part of a trend of such cases filed against employers, including health care facilities.

For example, in 2009, the EEOC filed suit on behalf of 53 current and former Hispanic employees of Royalwood Care Center, an assisted living facility, in Torrance, California. The employees were prohibited from speaking Spanish to Spanish-speaking residents of the center, and even punished for speaking in Spanish on the facility's parking lot. By Contrast, Filipino employees were allowed to speak their native languages without reprimand. That suit settled for \$450,000.

### C. The EEOC Position

While language is not a protected characteristic under Title VII, the EEOC takes the position that the primary language of an individual is often "an essential national origin characteristic." Accordingly, the agency has held that it will presume that a policy that imposes a blanket prohibition on employees speaking foreign languages violates Title VII.

The EEOC does, however, recognize that English-only rules may be permissible under limited circumstances where the rule is justified by a legitimate "business necessity" such as

in the following circumstances:

1. For communications with customers, coworkers, or supervisors who only speak English.
2. In emergencies or other situations in which workers must speak a common language to promote safety.
3. For cooperative work assignments in which the English-only rule is needed to promote efficiency.
4. To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with co-workers or customers.

### D. Opposite Outcomes

The courts have also upheld English-only policies that are applied to limited situations in health care facilities. For example, in *Pacheco v. New York Presbyterian Hospital*, a New York federal court dismissed a Hispanic employee's challenge to his supervisor's rule that he should not speak Spanish while in hearing range of patients. The employee was not otherwise prohibited from speaking Spanish and, in fact, was asked to speak Spanish to Spanish speaking patients. There was also no other evidence of discriminatory conduct by the hospital.

The court in *Pacheco* cited two circumstances that supported a finding of business necessity. First, several patients had complained to management that they felt employees were ridiculing them when speaking in Spanish nearby.

## SPOT LIGHT— cont'd

Second, it was easier for managers, who did not speak Spanish, to supervise and evaluate an employee if he or she spoke English around them and to them.

In a similar case, *Montes v. Vail Clinic, Inc.*, the federal appeals court for the Tenth Circuit, which hears appeals from several western states, dismissed a Title VII suit brought by a Mexican-born housekeeper at a hospital. The employee complained that she was asked by her direct supervisor to speak only English when cleaning the operating rooms, but that she was allowed to speak Spanish outside the operating room or on her breaks.

The court in *Montes* recognized that English-only rules can, in certain circumstances, create a hostile atmosphere for Hispanics in their workplace and

thus violate Title VII because such rules “may be used as a covert basis for national origin discrimination.” Nevertheless, the court found that the policy was not discriminatory because it only applied to the operating rooms where “clear and precise communication between the cleaning staff and the medical staff was essential,” and there was no other evidence of discrimination.

### E. Conclusion

Employers can avoid potential discrimination claims by narrowly tailoring workplace language requirements to specific situations. Such policies should be rooted in legitimate business reasons, such as safety, clear communications and the need of patients to understand conversations taking place in their presence. English-only policies that prohibit any

use of other languages in the workplace, policies which are enforced only against one ethnic or national origin group, or are based on the claimed discomfort of other employees, will not usually pass muster.

Of course, in addition to having a well drafted rule, it is also critically important to ensure that supervisors and human resource officials are sensitive to discrimination law principles. Overbroad or invalid English-only rules are usually just a symptom of other workplace problems. Indeed, most situations in which employers have been found liable for Title VII violations, or have settled lawsuits, involve workplaces where the complaining employees have been subjected to discriminatory conduct in addition to the English-only policy.

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*“We are a nation of communities...a brilliant diversity spread like stars, like a thousand points of light in a broad sky.”*

George W. Bush

## ADA CORNER

### PTSD and the Americans with Disabilities Act

The ADA does not contain a list of medical conditions that constitute disabilities. Instead, the ADA has a general definition of disability that each person must meet on a case by case basis (EEOC Regulations . . . , 2011). A person has a disability if he/she has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having an impairment (EEOC Regulations . . . , 2011).

However, according to the Equal Employment Opportunity Commission (EEOC), the individualized assessment of virtually all people with PTSD will result in a determination of disability under the ADA; given its inherent nature, PTSD will almost always be found to substantially limit the major life

activity of brain function (EEOC Regulations . . . , 2011).

#### **Are employees with PTSD required to disclose their disability to their employers?**

No. Employees need only disclose their disability if/when they need an accommodation to perform the essential functions of the job. Applicants never have to disclose a disability on a job application, or in the job interview, unless they need an accommodation to assist them in the application or interview process (EEOC, 1992).

#### **Can an employer ask an employee with PTSD to submit to a medical examination?**

Yes, if the need for the medical examination is job-related and consistent with business necessi-

ty. Typically, employers will ask an employee with PTSD to submit to a medical examination (also called a fitness-for-duty exam) after the employee had an incident on the job that would lead the employer to believe that this employee is unable to perform the job, or to determine if the employee can safely return to work, and if any accommodations will be needed on the job (EEOC, 1992).

Special note: Pre-job offer medical examinations or inquiries are illegal under the ADA. People with PTSD (or any disability) do not have to submit to a medical exam or answer any medical questions until after they are conditionally offered a job (EEOC, 1992).

#### **How and when does a person with PTSD ask for an accommodation?**

An employee with PTSD can ask for an accommodation at any time when he/she needs an accommodation to perform the essential functions of the job. The employee can make a request verbally or in writing and is responsible for providing documentation of a disability (EEOC, 1992).

For more information about this topic visit: <http://askjan.org/media/ptsd.html>

## ADA CORNER—cont'd

### ADA Issues Related to New Supervisors and Managers

When new supervisors or managers start working, they often make changes that affect the employees they supervise. Whether these changes are good or bad, some employees are not shy about letting the new person know that they prefer the old supervisor or manager's methods. In some cases, a power struggle can ensue and the new supervisor/manager may make a statement such as "I don't care how the old supervisor did things. I'm your supervisor now and you'll do things my way." Typically everyone eventually settles down and the employees get used to the new way of doing things, but what happens when one of the employees has a disability and needs an accommodation? Here are a few examples of what can happen:

**Example:** A new supervisor decides that employees in her unit will no longer be allowed to work at home. One employee has a disability and needs to continue working at home as an accommodation. The old supervisor knew about the employee's disability, but no formal records were ever made because the employee's needs were met under the work-at-home policy available to all employees. The employee assumes the new supervisor knows about his disability, so merely states "I need to continue working at home." The new supervisor denies the request and states "no one is going to work at home, get used to it or find a new job."

**Example:** The supervisor of a long-term employee with a progressive disability had been helping the employee by performing part of his essential job functions. This had been going on for several years without HR knowing about it. When the supervisor retired, a new supervisor discovered that the employee had not been doing his job and told him he would immediately need to do so or he would be fired.

**Example:** A new manager decides to review all accommodations made by the previous manager. He notifies all employees that their accommodations are being suspended until the review has been completed and he asks them all to bring in new medical documentation. In the meantime, he offers leave to any employee who is unable to work without accommodations.

In all of these examples, there are potential ADA violations that might have been avoided. The following general rules may help avoid ADA problems when new supervisors and managers make changes:

1. Keep track of accommodations, both formal and informal, and tell new supervisors and managers about existing accommodations when necessary.

2. Educate new supervisors and managers about the ADA, especially how to recognize an accommodation request.

3. Require new supervisors and managers to notify you and employees in advance of making changes and remind employees that they can ask for accommodations if needed.

4. Do not remove existing accommodations before considering new accommodations to take their place. When reviewing accommodations, remember ADA rules about medical inquiries and only ask for medical information that you need and do not already have.

5. Keep the lines of communication open and consider having one person be responsible for overseeing accommodations in your workplace. Make sure to periodically remind employees who that person is.

6. Use available resources. If you need accommodation ideas, call JAN!

*Linda Carter Batiste, J.D., Principal Consultant*

# EEO CASE REVIEW

## Clecker v. Secretary of Defense—EEOC Appeal No. 0120091162 (2013)

### Issue:

Did the Agency properly find that the Complainant was not subjected to discrimination based on his disabilities (depression, anxiety, and PTSD) when the Agency withdrew its tentative job offer after the Complainant did not pass a medical evaluation?

### Facts:

The Complainant worked as a GS-5 Transportation Assistant in Alabama. He applied for a GS-7 Motor Vehicle Operator position in September 2006. The agency offered the Complainant the position pending successful completion of a medical examination, drug test, and security clearance.

On October 20, 2006, the Agency rescinded the job offer because the Complainant did not successfully complete his medical examination. To support its decision, the Agency relied on the statements of its physician, Dr. T, who conducted an examination based solely on the Complainant's medical records. Dr. T determined that the Complainant was not medically qualified for the position because he did not "possess emotional and mental stability."

The Complainant filed a complaint in November 2006, and the Agency issued a FAD finding no discrimination. The Agency found that the Complainant established that he was a person with a disability because he had a record of a mental impairment, including a PTSD diagnosis. The Agency also found that the Complainant was

regarded as having a disability based on Dr. T's assessment that he was not medically qualified for the position. However, the Agency determined that the Complainant failed to establish a prima facie case of disability discrimination because he failed to show that he was qualified for the position. Specifically, the Agency found that the Complainant was medically disqualified from operating a motor vehicle and could not perform the essential functions of the position he desired with or without reasonable accommodation. Dr. T's evaluation indicated that the Complainant lacked emotional stability, which effectively eliminated him from being able to operate a government vehicle. The Agency's legitimate, non-discriminatory reason for its decision was Dr. T's claim that a PTSD diagnosis alone allowed the Agency to exclude the Complainant from the position.

### Decision:

**Holding:** The Commission reversed the Agency's final decision and found that the Agency's decision to rescind the Complainant's job offer was based on his disabilities. The Commission ordered the Agency to provide the Complainant with relief including offering him the Motor Vehicle Operator position retroactive to October 20, 2006 and back pay with interest and benefits the Complainant would have received had the Agency not rescinded his job offer.

### Analysis:

The Commission found that the Agency conceded in its FAD that the Complainant was disabled or regarded as such. The Commission also found that the Complainant was a qualified individual with a disability, disagreeing with the Agency's argument that the Complainant was not qualified because he did not pass his medical examination. The Agency admitted that it denied the Complainant employment because of his perceived inability to safely perform the functions of the position, so the Commission found that the Agency was essentially stating that the Complainant could not be hired because he posed a direct threat to himself or others but was otherwise qualified.

The Commission found that the Agency did not meet its burden of showing significant risk of substantial harm to the health or safety of the Complainant or others that could not be eliminated or reduced to an acceptable level by reasonable accommodation.

The record demonstrated that the Agency was motivated by concern based upon fear of a future risk of injury, but the Commission found nothing in the record that indicated that the Agency evaluated the duration, severity, likelihood, or imminence of any risk in hiring Complainant before deciding to rescind his offer. The Commission found it "particularly troubling" that Dr. T believed that a diagnosis of PTSD excluded all

individuals from "sensitive job positions" without a further individualized assessment. Dr. T's bright-line rule regarding PTSD diagnoses and lack of further assessment demonstrated Dr. T was motivated by stereotypes of individuals with PTSD.

Federal Employment Law Group

*"We may all have different religions, different languages, different colored skin, but we all belong to one human race. We all share the same basic values."*

*Kofi Atta Annan*

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## DIVERSITY CORNER

*“What we have to do...is to find a way to celebrate our diversities and debate our differences without fracturing our communities”*

*Hillary Clinton*

### Why is diversity important?

Educating managers and staff on how to work effectively in a diverse environment helps ...prevent discrimination and promote inclusiveness. There is evidence that managing a diverse work force can contribute to increased staff retention and productivity. It can enhance the organization's responsiveness to an increasingly diverse world of customers, improve relations with the surrounding community, increase the organization's ability to cope with change, and expand the creativity of the organization. In addition to contributing to these business goals, diversity can contribute to goals...such as increased accessibility and accountability to all residents of the state.

Actions that promote diversity for staff are those that lead to a work environment that maximizes the potential of all employees while acknowledging their unique contributions and differences.

*University of California, Berkeley,  
HR Dept.*

Here are some cultural events that are taking place in June-August 2013. Websites are included so that you may learn more about them.

### June Events

#### **LatinoFest**

Patterson Park, Linwood and Eastern avenues  
410-783-5404  
[www.latinofest.org](http://www.latinofest.org)

#### **Polish Festival**

Patterson Park, Linwood and Eastern avenues  
410-879-6336

### July Events

#### **African American Festival**

Oriole Park at Camden Yards  
410-235-4427  
[www.africanamericanfestival.net](http://www.africanamericanfestival.net)

#### **Caribbean Carnival Festival**

Druid Hill Park  
410-230-2969  
[www.bcacarnival.net](http://www.bcacarnival.net)

#### **Salsapolkalooza**

At The Patterson, 3134 Eastern Avenue in Fell's Point  
410-276-1651  
[www.creativealliance.org](http://www.creativealliance.org)

### August Events

#### **PowWow Native American Festival**

Patterson Park, Linwood and Eastern avenues  
410-675-3535  
[www.baic.org](http://www.baic.org)

#### **Saint Gabriel Festival**

Saint Leo the Great Roman Catholic Church  
Corner of Exeter and Stiles streets  
[littlitalymd.com](http://littlitalymd.com)

#### **Stone Soul Picnic**

Druid Hill Park  
410-332-8200