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MERRILL V. FALL MOUNTAIN REGIONAL SCHOOL DISTRICT – SAU 60

**EA 0313 – 06
16D – 2006 - 01191**

ORDER ON APPLICABILITY OF GROSS V. FBL FINANCIAL SERVICES, INC. (Slip Op. No. 08-441, U.S. Supreme Court, Decided June 18, 2009) TO AGE DISCRIMINATION CASES UNDER NH RSA 354-A

1. This is an employment discrimination case dually filed under State law, NH RSA 354-A (“354-A”) and Federal law, 29 U.S.C. §623(a) the Age Discrimination in Employment Act (“ADEA”). The charge alleges that the Respondent District failed to promote Mr. Merrill based on his age. The District denies this.
2. Since the filing of this charge, the U.S. Supreme Court has decided *Gross v. FBL Financial Services, Inc.* (Slip. op. No. 08-441, June 18, 2009, [“Gross”]) an age discrimination case under the ADEA. In its 5 to 4 decision, the Court found that analyzing ADEA claims requires the charging party to show the employer took adverse job

action because of age and that age was the “reason” the employer decided to act. *Gross* at 8, (quotations omitted).

3. The *Gross* Court squarely rejects the *Price Waterhouse* and *Desert Palace* burden-shifting, mixed motive framework previously employed in Title VII cases, concluding that the absence of any reference to mixed motive when Title VII and the ADEA provisions were amended in 1991 were evidence of Congressional intent. See *Gross* at 6.
4. To be clear: *Gross* applies to Mr. Merrill’s federal ADEA claims in the instant case. The question now before the Commissioners’ panel in this case is whether *Gross* applies to Mr. Merrill’s state law claims under RSA 354-A:7, I and IV (Supp. 2009).
5. Both parties have submitted Memoranda of Law, Charging Party an errata letter, and Respondent a Reply Memorandum, all of which are part of the record in this case.
6. After consideration of the parties’ submissions and applicable law, the Commission concludes that *Gross* does not apply to claims under RSA 354-A.

7. New Hampshire has no separate statute for age discrimination protection in employment. RSA 354-A:7, I lists unlawful discriminatory employment practices. It states in relevant part:

It shall be an unlawful discriminatory practice: I. for an employer, because of age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

8. Therefore, the New Hampshire Legislature has chosen to group all protected classes under one provision; with one exception contained within 354-A there are no other provisions under New Hampshire Revised Statutes applicable to age as a distinct class.

The only exception within 354-A is in regard to age discrimination and retirement. New Hampshire RSA 354-A:7 (IV) provides:

It shall be an unlawful discriminatory practice . . . IV. For any employee to be required, as a condition of employment, to retire upon or before reaching a specified predetermined chronological age, or after completion of a specified number of years of service unless such employee was elected or appointed for a specified term or required to retire pursuant to Pt. II, Art. 78 of the constitution of New Hampshire. It shall not be unlawful for an employer to:

(a) Establish a normal retirement age, based on chronological age or length of service or both, which may be used to govern eligibility for and accrual of

pension or other retirement benefits; provided that such normal retirement age shall not be used to justify retirement of or failure to hire any individual; or

(b) Require any individual employee to retire on the basis of a finding that the employee can no longer meet such bona fide, reasonable standards of job performance as the employer may have established.

9. In contrast, the United States Congress chose to provide classifications for race, color, religion, sex and national origin in Title VII of the Civil Rights Act of 1964, as amended, but enacted a separate statute, the ADEA, to protect individuals based upon their age. See 42 U.S.C. §2000e.; 29 U.S.C. §621. In addition, although retirement provisions are also contained within the ADEA they take the form of exemptions, not specific protections for employees. See 29 U.S.C. § 623.

10. Under RSA 354-A, age is listed first in the series of unlawful employment practices (NH RSA 354-A 7). Further distinguishing 354-A from the ADEA, all ages of eligible workers are protected, not just those aged forty and older.

11. The rationale employed by the U.S. Supreme Court in *Gross* is that in drafting the language of the ADEA and its amendments, Congress made no allowance for a mixed motive provision that might lead to a burden-shifting process of proof: that an employer might have both a discriminatory *and* a legitimate business reason for taking adverse action

against an employee. Therefore, the Gross Court found there is no burden-shifting when analyzing the burden of proof as had been the practice in cases such as *Price Waterhouse* and *Desert Palace*. Simply put, what had been good for Title VII and ADEA cases is no longer good for ADEA cases, only Title VII cases.

12. When it amended Title VII of the Civil Rights Act in 1991, Congress allowed as follows:

“(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” (emphasis added).

42 U.S.C. 2000e-2 §107(m) (1991)

13. As noted earlier, RSA 354-A and its federal counterpart differ in that *all* protected classes under New Hampshire law are grouped and protected within one statute. Compare 42 U.S.C. §2000e and 29 U.S.C. § 621 *with* RSA 354-A. However, Congress decided to create a separate statute providing for protection from discrimination against a specific age group (40 and older), rather than providing such protection in Title VII. Id.

Thus, the Gross Court was concerned that to allow the “mixed motive” test to be used under the ADEA would run counter to Congressional intent. The same cannot be said for RSA 354-A. Because

the New Hampshire Legislature did not separate age from the other protected classes, it may be presumed that the legislature intended that each class be analyzed in the same manner.

14. Even if New Hampshire continues to follow and apply federal standards when applying state law that is similar to federal law, the New Hampshire Supreme Court would likely make the same distinction made by the United States Supreme Court. Specifically, the New Hampshire Supreme Court would distinguish RSA 354-A from the ADEA based upon the very specific nature of the ADEA in dealing with forty plus (40+) age discrimination, whereas RSA 354-A makes no distinction between any specific age and other protected classes. *Compare* 42 U.S.C. §2000e, 29 U.S.C. §621 and RSA 354-A.

15. No state supreme court or its equivalent has considered its own state's age discrimination law in light of *Gross*, and federal courts have applied pre-*Gross* standards when considering state anti-age discrimination claims that are pendant to ADEA claims. Since the *Gross* decision, various Federal courts have had opportunities to express opinions regarding state counterparts to the ADEA.¹ In most of those decisions, the courts have treated the state counterparts exactly the

¹ Neither party has explicitly provided any reasoning as to why the New Hampshire Supreme Court will look to any particular jurisdiction when considering an issue of first impression to this State. *See generally* Brief of Respondent and Brief of Complainant. The parties include statutes and U.S. District and Appellate Court citations from the following States in their briefs: Texas, Minnesota, Connecticut, Louisiana, Colorado, Pennsylvania, and Iowa. As a result, the following discussion considers only those jurisdictions provided by the parties.

same as *Gross*' treatment of the ADEA. In each of those opinions, however, the courts do not provide reasoning for treating the state versions the same as the ADEA, except for citing pre-*Gross* case law, which cited the states' determination that the two laws should be analyzed in the same manner. However, those decisions were made when "mixed motive" analysis was accepted as appropriate under the ADEA. The courts failed to consider state policy in following federal precedent with regard to their anti-age discrimination laws.²

16. The Federal courts that have ruled post-*Gross* have failed to consider underlying state policy. In Colorado, the U.S. District Court opted to treat an age discrimination claim under the Colorado Anti-Discrimination Act (hereinafter referred to as "CADA") in the same manner as the ADEA claim brought in the same suit. The court cited the Colorado State Supreme Court's previous decisions to follow the burden-shifting approach under *McDonnell-Douglas*, and apply it to CADA claims. *Fuller v. Seagate Technology*, 08-cv-00656-CMA-CBS, at *17 (D. Colo. Aug. 19, 2009) (Loislaw.com, U.S. Dist. Ct. case law). Colorado's decision to follow federal precedent dealt with burden-shifting requirements regarding the "mixed motive" analysis. *Bodaghi v. Dept. of Nat'l Resources*, 995 P.2d 288, 297-298 (Colo. 2000). At that time, "mixed motive" analysis using a burden-shifting framework was

² This paragraph is meant to be introductory only. Specific instances of such decisions are cited in Section "B."

considered appropriate under the ADEA. See *generally Id.* Colorado chose to follow the federal framework because it provided, "a clear and thorough analytical framework for evaluating claims of employment discrimination." *Id.* In *Gross*, the Supreme Court explicitly held that age had to be the *only* motivating factor in an employment decision for a plaintiff to prevail. *Gross* at *6. The *Gross* ADEA standard, therefore, arguably no longer provides a "thorough analytical framework." Thus, it remains unclear as to whether the Colorado state courts will apply the *Gross* standard to its own anti-age discrimination statute.

17. The U.S. District Court in Minnesota automatically applied the same analytical framework to Minnesota's age discrimination law as it does to the ADEA. *Jackson v. Lakewinds Natural Foods*, 08-398 (JNE/JJG) at *6, n.4 (D.Minn. July 28, 2009) (Loislaw.com, U.S. Dist. Ct. case law). However, in so holding, the court failed to account for Minnesota's State policy of providing greater protection than federal law as discussed in *Friend v. Gopher Co.*, A08-1810 (Minn. App. Aug. 25, 2009), (Loislaw.com Minn. Case law). In *Friend*, the court explained that under the Minnesota Human Rights Act (hereinafter referred to as "MHRA"), Minnesota's policy is to provide greater protection to employees by limiting the extent to which employers can avoid liability:

[A]llowing employers to limit or avoid liability based on a same-decision analysis would 'defeat the broad remedial purposes of the [MHRA] by

permitting employers, definitionally [sic] guilty of prohibited employment discrimination, to avoid all liability for the discrimination provided they can prove that other legitimate reasons may coincidentally exist that could have justified the discharge.

Id. at *11-12 (brackets in original). Therefore, the *Friend* Court found that forcing complainants to prove that the complainants' age was the "but-for" reason for a respondent's action would run counter to the quoted language above and employers could avoid liability by admitting that age was a factor, but then raising a legal reason for any action taken against the employee. Based on the *Gross* decision, it remains unclear as to whether Minnesota state courts will continue to apply this standard.

17. Although both parties have provided other case law and statutes that at first glance appear to apply the *Gross* standard to state law counterparts to the ADEA, the federal case law cited fails to account for underlying state policy. Each state made a determination that following federal precedent would be appropriate for one reason or another. However, based upon the nature of the Supreme Court's decision in *Gross*, which is arguably less protective of employees, compared with underlying previous state policy to provide greater protection for employees or at least provide a more thorough analysis, one cannot definitively conclude that each of the states discussed will follow the *Gross* standard. As a result, if the New Hampshire Supreme Court is to

look to the previously mentioned states for guidance, one cannot assume that the Court will avoid looking at the rationale for the states' determination to follow federal precedent in the past, and determine that those other states would now opt to apply the new federal standard, the *Gross* standard.

18. The Commission notes there is no New Hampshire Supreme Court case law directly on point regarding failure to promote based on age. However, the case cited to most when our Supreme Court looks for guidance as to novel questions of employment law is *Scarborough v. Arnold*, 117 N.H. 803 (1977). In the *Scarborough* case, on appeal from a Human Rights Commission decision, the charging party alleged she was not hired because of her sex.³ Her charge was dually filed with the EEOC under Title VII of the Civil Rights Act of 1964. *Scarborough*, 117 N.H. at 805-806.

19. In *Scarborough*, our New Hampshire Supreme Court looked at how federal courts analyzed adequate proof standards in failure to hire cases under Title VII. In particular, the New Hampshire Supreme Court focused on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) in

³ The charge was brought under an earlier version of RSA 354-A:7, I (RSA 354-A: 8, I (Supp. 1975)).

which the now familiar burden-shifting paradigm was set forth by the U.S. Supreme Court. ⁴

20. Essentially, for a failure to hire case under Title VII, the burden of proof is the following:

- a. The charging party must show s/he is a member of a protected class;
- b. S/he must show s/he applied for and was qualified for a job for which the employer was seeking applicants;
- c. In spite of his or her qualifications, s/he was rejected;
- d. After being rejected, the employer continued to look for applicants with charging party's qualifications;
- e. If the charging party meets that burden of proof, the burden shifts to the employer to offer a legitimate, non-discriminatory business reason for rejecting the charging party's application;
- f. The burden then shifts back to the charging party to show that the reason offered by the employer was a pretext, and the real reason for its failure to hire was discriminatory.

Scarborough at 807, 808.

21. The *Scarborough* Court found that the Commission had failed to make specific factual findings about the plaintiff's job qualifications in light of the *McDonnell Douglas* factors. The Court went on to state that where the employer was found to have discriminatory attitudes against women, the Commission failed to determine if the owner acted on his discriminatory attitudes toward the woman who applied for a job or gave

⁴ *Scarborough* was decided before Title VII was amended to allow for an employer's mixed motive. Nevertheless, federal courts had developed the *McDonnell Douglas* burden shifting test when construing Title VII cases. This test was ultimately codified in the 1991 amendments to Title VII referenced *infra*.

her fair consideration. *Id* at 808. (citations omitted.) The case was remanded back to the Commission to make findings consistent with the elements of proof outlined above.

Our Supreme Court continues to rely on the U.S. Supreme Court for guidance in deciding cases of first impression under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e. See *New Hampshire Department of Corrections v. Susan Asselin Butland* slip. op. No. 2000-803, May 7, 2002, at 3.

22. There is a single age discrimination in employment decision on record of the Commission: *Carl LaFond, New Hampshire Commission for Human Rights and Sanel Auto Parts, Inc.*, EA - 1419 - 388 - 57, decided November 15, 1977. In it, the employee charges that after taking medical leave for a back injury he presented a doctor's note to his employer pronouncing him fit for duty as a supervisor and manager. The employer did not reply to the medical clearance note, and did not bring the employee back to work. In fact there was no communication from the employer for some time. Eventually, the employer informed LaFond there was no position available for him and the employer wanted to "...place LaFond on retirement." The Commissioners unanimously decided that LaFond, who had reached age 61, "...an age (61) when he would be entitled to retirement benefits, all other reasons for his termination represented a subterfuge for terminating LaFond, if not

solely, than predominantly, because of his age; (*See, Hodgson v. Sugar Cane Growers*, U.S.D.C. Southern District Florida) and that therefore the Company is in violation of NHRS354-A:8, I, in that LaFond was denied terms, conditions or provisions of employment (rehire subsequent to temporary sick leave) because of his age.” *Id.* at p. 2.⁵

23. Unfortunately, the Commission made no factual findings in its decision of “all other reasons for his termination” which they found to represent a subterfuge. The evidence did strike the Commissioners unanimously as a violation of the age provision of unlawful employment practices under RSA 354-A when the employer terminated “...if not solely, than predominately, because of his age...” *Id.* This cursory, page and one quarter decision is void of extensive burden shifting analysis, or detailing each parties’ proffered evidence, but its value is in the “if not solely, than predominantly, because of his age” language. It supports the analysis that the legislature intended age to be protected along with all other protected categories in a manner modeled after Title VII, and to analyze evidence of discrimination as the courts do in such cases, a la mixed motive. *LaFond* has persuasive, if not precedent setting effect on the case before the Commission.

⁵ Citation format true to original decision.

CONCLUSION

The Commission has *LaFond* on the mixed motive analysis under 354-A.

The New Hampshire legislature has crafted the Law Against Discrimination in such a manner as to include age first, to have it apply to workers of any age, and to provide that no person shall be discriminated against on the basis of age through forced retirement. All of these provisions are set forth in one Civil Rights law, not a separate statute.

Taking the logic of the *Gross* decision, it would be improper to apply the holding in *Gross* to New Hampshire Commission for Human Rights cases involving age because RSA 354- A:7, I so clearly mirrors the Civil Rights Act of 1964 (Title VII) and our Supreme Court has relied on guidance from U.S. Supreme Court cases interpreting Title VII since the *Scarborough* case.

The Commission believes that when faced with this issue for the first time, our Supreme Court will look to the underlying reason why the Legislature kept age with sex, race, color, marital status, physical or mental disability, religious creed, or national origin...[or] sexual orientation, rather than mimicking the federal statutory framework. Therefore, our Supreme Court will likely continue to apply the Title VII analysis to RSA 354-A:7, I and IV no matter the holding in *Gross*, in order to construe 354-A liberally so as to give broad remedial effect to its

purposes: that being the elimination of discrimination which threatens the foundation of a free democratic state and the peace, order, health, safety and general welfare of the state and its inhabitants. *Scarborough*, 117 N.H. at 809; see also, RSA 354-A:1 Title and Purposes of Chapter (Supp. 2009).

For purposes of this case, based on the reasoning outlined above, the Commission rules that the *Gross* decision is not binding on it when considering the parties' evidence and arguments on RSA 354-A:7, I and/or IV.

So Ordered.

Date: 9/13/2010

Date: 9/8/2010

Date: 9/10/2010

Commissioner Cole, Chair

Commissioner Mirhashem

Commissioner Boynton

