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# RCBA NewsBrief

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## THE U.S. SUPREME COURT DECISION IN GROSS v. FBF FINANCIAL SERVICES CONSTRAINS PLAINTIFFS' ABILITY TO PROVE AGE DISCRIMINATION CASES BY ELIMINATING MIXED MOTIVE TEST

*Each month the Employment Committee of the Rockland County Bar Association will endeavor to bring matters of interest to the general bar in an article in the newsletter. This month's article is written by the Committee Chairman, Gary S. Graifman, Esq., of Kantrowitz Goldhamer & Graifman, P.C.*

The United States Supreme Court's decision this past June, 2009, in *Gross v FBF Financial Services, Inc.*, put a substantial crimp in the plaintiffs' bar with regard to Age Discrimination cases. In *Gross*, the Supreme Court, in a 5-4 opinion, held that a plaintiff bringing a claim under the Age Discrimination in Employment Act ("ADEA") for disparate-treatment must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The Court, with Judge Thomas writing the majority opinion, further held that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Previous to the *Gross* decision, Courts applied the "mixed motive" test with regard to age discrimination. Under a mixed motive test, the jury could find for the plaintiff if the claimed illegal discrimination was a motivating factor for the employment practice, "even though other factors also motivated the practice." *Id.* at 2350, fn 3. Many employment decisions hinge on multiple factors and, under that test, the plaintiff only need demonstrate that one of those motivating factors was discrimination. The mixed motive test is explicitly authorized under Title VII for discrimination cases, under which race or sex discrimination cases arise. Title VII was amended to allow claims where an improper consideration was a "motivating factor" for the adverse action. *Id.* at 2345; See 42 U.S.C. Sec. 2000e-2(m) and 2000e-5(g)(2) (B). However, the ADEA was not similarly amended when those provisions were added to Title VII, even though Congress amended the ADEA contemporaneously in several other ways. From that, the Court concluded that "the ADEA does not provide that a plaintiff may establish [age] discrimination by showing that age was simply a motivating factor." *Id.*

Ironically, the issue raised and decided in the *Gross* majority opinion was not the question on which the Court granted certiorari. The initial appeal was actually on the question of what level of evidence does the plaintiff need to show to qualify for a "mixed motive" instruction in a non-Title VII case ("The parties have asked us to decide whether a plaintiff must 'present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.'"). However, the Court first took a step back and asked whether the mixed motive instruction is *ever* warranted in an age discrimination case and, as noted above, found that it is not.

The *Gross* opinion, from the vantage of the employment law plaintiffs' bar is another constricting decision by the current Court and follows on the heels of the Court's decision in *Ledbetter v. Goodyear Tires and Rubber, 550 US 618, 127 SCT 2162, 167 L.Ed.2d 982 (2009)*. After *Ledbetter*, Congress acted swiftly to correct the results of that decision. It remains to be seen whether the *Gross* decision will provoke amendment of the ADEA, which will place Title VII's mixed motives claims on equal footing in Age Discrimination claims.

<sup>1</sup> 129 S.Ct. 2343, 174 L.Ed.2d 199 (2009).

<sup>2</sup> Justices Stevens, Souter, Ginsberg and Breyer dissented, with both Justices Stevens and Breyer writing dissenting opinions.

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CLE Registration

*We welcome your articles.*

**\*\*All articles submitted will be reviewed by the Executive Committee for approval\*\***

**Writing Tip of the Month***by Susan Cooper, Esq.*

Keep it clear and simple.

Lawyers writing motions and briefs often forget that judges and their law clerks are people. People don't like to struggle through complicated sentences loaded with lawyer jargon to figure out what's being said. Neither do judges or their law clerks.

Briefs and motions are prose, not a contract. They tell a story and try to convince the court that the story fits nicely into favorable legal principles. If the story and legal principles are clearly and simply stated, they will be more convincing than long, complicated sentences with legalese.

So drop the run-on sentences and the "hereinafters" and "[a posteriors](#)".

Want an example?

Take a look at the opinions of New York's Chief Judge Cardozo, one of our greatest jurists, whose short, simple and vivid sentences are still an excellent model today. Here is Judge Cardozo's description of the complicated facts in the well-known case of *Palsgraf v. Long Island Railroad Co.*, 284 N.Y. 339 (1928):

**CARDOZO, C. J.**

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

*Susan Cooper, Esq., has provided legal research and writing services to the Rockland Bar for over 25 years. She can be reached at [SusanCooperEsq@gmail.com](mailto:SusanCooperEsq@gmail.com).*

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-- Paul Savad, Esq.

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Level: Transitional/Non-Transitional

Cost: \$75.00 in advance; \$85 at the door; \$95 non-members  
\$40 paralegals and studentsPlace: **Good Samaritan Hospital Auditorium, Suffern**

Credits: 3 (2.5 Professional Practice; .5 Ethics)

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**Thursday, January 28, 2010****CLE: Free Speech and the Internet****Time: 6:00 p.m.– 9:00 p.m. (Registration @ 5:30 p.m.)****Dinner**

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Cost: \$75.00 in advance; \$85 at the door; \$95 non-members  
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**COMMERCIAL LITIGATION ISSUES OF INTEREST**

*Submitted by Paul Savad, Esq., Chair, Commercial and Corporate Law Committee;  
Joseph Churgin, Esq., and Susan Cooper, Esq., of SAVAD CHURGIN, Attorneys at Law*

Your client lives in the condominium apartment he owns in an upscale residential building. A heavy smoker owns the adjacent unit, causing secondhand smoke to regularly enter your client's unit. Although there is a condominium rule prohibiting smoking in certain common areas, there is no rule prohibiting smoking within the individual units. Nonetheless, your client asks you to sue the neighbor to stop the disturbing odor.

Will your complaint for nuisance survive a motion to dismiss?

*The answer is yes.*

*Ewen v. Maccherone*, 12/28/09 N.Y.L.J. 26 (col.1) (Civ. Ct. NY Co.), is apparently the first reported case involving a residential condominium owner suing a fellow unit owner for nuisance and negligence due to secondhand smoke.

The Ewens, owners of their residential condominium apartment at 200 Chambers Street in Manhattan, sued the owner of the adjacent condominium for nuisance, alleging that secondhand smoke from the Maccherone unit invaded the Ewen's unit, making their child sick and forcing the family to vacate their apartment repeatedly.

Maccherone moved to dismiss the complaint for failure to state a cause of action, arguing that the condominium rules prohibit smoking in only two areas, the playroom and the health club. He argued that smoking was, therefore, permitted in the individual units. The Ewens countered that there is also a condominium rule prohibiting unit owners from making "disturbing or objectionable noises, odors or activities...".

The Court began its analysis by noting that on a motion to dismiss, courts are constrained to afford the most liberal construction to the complaint as possible, accepting all allegations as true and affording the plaintiffs the benefit of every possible favorable inference, citing *Zumpamo v. Quinn*, 6 N.Y.3d 666, 668 (2006).

Turning to the elements of a cause of action for private nuisance, the Court quoted *Donnelly v. Nicotra*, 55 A.D.3d 868, 868-9 (2d Dep't 2008), requiring: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act".

Although the Court could find no other reported case involving a residential condominium owner suing the neighboring unit owner for secondhand smoke, the Court found a few secondhand smoke cases involving tenants, including *Herbert Paul, CPA, PC v. 370 Lex L.L.C.*, 7 Misc.3d 747 (Sup. Ct. N.Y. Co. 2005), where a commercial tenant brought a nuisance action against the adjoining tenant complaining of secondhand smoke; *Zipper v. Harold Court Condominiums*, 39 A.D.3d 325 (1<sup>st</sup> Dept., 2007), holding that odors emanating from a tenant's premises may constitute a nuisance warranting eviction; and *Poyck v. Bryant*, 13 Misc.3d 699 (Civ. Ct. N.Y. Co. 2006), holding that secondhand smoke may give rise to a claim of breach of the implied warranty of habitability based on a constructive eviction.

The Court held that a claim for nuisance had been properly pleaded.

As to the claim of negligence, the Court found that the condominium rules created a duty of condominium owners not to engage in activity that would interfere with the "rights, comforts or conveniences" of the other unit owners and occupants. The complaint alleged that violation of this duty resulted in the Ewens being forced to vacate their unit repeatedly and caused their daughter to be ill. Accepting these allegations as true, the complaint properly states a claim for negligence.

*The lesson?*

Interference with a person's right to the use and enjoyment of real property can constitute an actionable nuisance where the interference is substantial in nature, intentional in origin, unreasonable in character, and caused by another's conduct. Second-hand smoke and other odors emanating from a neighbor's premises can constitute an actionable nuisance.

## PERSONAL INJURY LITIGATION

This month I would like to share and opine on a recent Court of Appeals decision. Plaintiff's verdict following trial was then affirmed 3-2 by the Appellate Division, Second Department, and plaintiffs complaint dismissed by the high Court.

Plaintiff, Zelinda Dinardo, a special education teacher in the New York City public school system, filed suit as a result of injuries suffered when she attempted to assist a student who was being assaulted by another student. For several months prior to the incident, the assailant student was verbally and physically aggressive. On several occasions Dinardo complained to her supervisors about safety concerns in her classroom. Her supervisor and the school principal told her that "things were being worked on, things were happening" and to "hang in there because something was being done" to have the student removed.

In finding "no rational process by which a jury could have found liability" the Court determined that the assurances by the school were not sufficient to create justifiable reliance by the teacher. In so holding, the Court stated "the injured party's reliance is as critical . . . as is the municipality's voluntary affirmative undertaking of a duty to act . . . Indeed, at the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and had thereby induced [her] either to relax [her] own vigilance or to forego other available avenues of protection"

The statements by her superiors were "vaguely worded", as there was no indication as to when or if "something" would be done regarding the assailant. Therefore, the plaintiff could not have been lulled into a "false sense of security or otherwise generate justifiable reliance". Plaintiff knew, said the Court, that the administrative process was ongoing and could take up to 60 days.

Query, would the holding have been different if the incident occurred on the 59<sup>th</sup>, 60<sup>th</sup> or 61<sup>st</sup> day?

Chief Judge Jonathan Lippman, in a concurring opinion, disagreed with the majority's conclusion "that a rational jury could not have found that a special relationship existed between plaintiff and defendant Board."

Judge Littman highlighted the disciplinary history of the assailant, including bringing a knife to school; frequently punching, kicking, and throwing items at classmates; and threatening to kill plaintiff, another teacher, and fellow classmates on numerous other occasions. Plaintiff repeatedly expressed concerns for the safety of her class. It was to these complaints that she was "told to 'hang in there'" because 'something was being done' and 'things were happening.'"

The Chief Judge found the jury verdict not to be unreasonable. "Indeed, the evidence, properly viewed, practically compels the conclusion that the assurances made to plaintiff induced her to 'relax [her] own vigilance or . . . forego other available avenues of protection' (citations omitted) . . ." establishing a special relationship."

Judge Lippman "reluctantly" concurred with the majority's reasoning that a discretionary governmental action may never form the basis for tort liability. In an extremely reasoned and insightful explanation he opined that "(t)he touchstone of the special duty rule is that the government, by its undertaking to the specific plaintiff, has gone above and beyond the general duty" owed to the public and "created a unique relationship with that plaintiff, upon which he or she is entitled to rely."

The holding "allows public officials to unjustifiably hide behind the shield of discretionary immunity when their actions have induced a plaintiff to change his or her behavior in the face of a known threat." He acutely points out almost any governmental function may be characterized as discretionary. The end result is that governmental agencies are too broadly insulated from tort liability.

<sup>1</sup>Dinardo v. City of New York, 2009 NY Slip Op 08853, Decided December 1, 2009.

<sup>2</sup>Cuffy v. New York, 69 NY2d 255, 261 (1987).

I applaud the Chief Judge on his opinion and defer to the readers to form their own opinion.

Jeffrey M. Adams...[jeff@jeffadamsesq.com](mailto:jeff@jeffadamsesq.com)

The above statements contained in this article are those of the author and the Rockland County Bar Association takes no position with respect to same. Comments and/or rebuttal from members of this Association are welcome.

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