SUPREME COURT OF NEW JERSEY
DOCKET NO. 64,176

ROSE NINI Appellant-Respondent, vs. MERCER COUNTY COMMUNITY COLLEGE, ROBERT ROSE, in his individual and official capacities, Vanessa Wilson, in her individual and official capacities, BOARD OF TRUSTEES OF MERCER COUNTY COMMUNITY COLLEGE, and its Personnel Committee Trustees, in their official capacities. Respondent-Petitioners.	:	On Petition for Certification from the Superior Court of New Jersey, Appellate Division Civil Action Sat Below: Hon. Mary Catherine Cuff, P.J.A.D. Hon. Clarkson S. Fisher Jr., J.A.D. Hon. Christine L. Miniman, J.A.D.

BRIEF AND APPENDIX ON BEHALF OF AMICUS CURIAE NEW JERSEY DIVISION ON CIVIL RIGHTS

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
R.J. HUGHES JUSTICE COMPLEX
P.O. BOX 112
TRENTON, NEW JERSEY 08625
(973) 648-3762
ATTORNEY FOR AMICUS CURIAE
NEW JERSEY DIVISION ON CIVIL RIGHTS
AnneMarie.Kelly@dol.lps.state.nj.us

ANDREA M. SILKOWITZ
ASSISTANT ATTORNEY GENERAL
Of Counsel

ANNE MARIE KELLY
SENIOR DEPUTY ATTORNEY GENERAL
On the Brief

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES CITED

PAGE

STATUTES CITED

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

This appeal addresses whether a nonrenewal of an employment contract for a person over seventy years of age is the equivalent of a termination and, therefore, does not fall under the statutory exception in the New Jersey Law Against Discrimination ("LAD"), which provides that the LAD does not bar an employer from hiring or promoting any person over seventy years of age. N.J.S.A. 10:5-12a. Rose Nini had been employed by Petitioner, Mercer County Community College ("MCCC") continuously for over twenty-five years through a series of contracts. MCCC argues that its action in not offering an extension of Respondent's then-current contract is not a termination but a refusal to accept for employment a person over the age of seventy to which the protections of the LAD do not reach.

Amicus curiae New Jersey Division on Civil Rights (Division) is the agency charged with the responsibility of enforcing the LAD. The Division believes that MCCC puts forth a misplaced and overly broad interpretation of the over-seventy statutory exception which, if adopted, would severely hamper this State's ability "to eradicate the cancer of discrimination." Jackson v. Concord Co., 54 N.J. 113,124 (1969).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Rose Nini had been employed by defendant MCCC for twenty-five years and was seventy-three years old when her employment ceased. Nini v. Mercer County Community College, 406 N.J. Super. 547, 550 (App. Div. 2009). Plaintiff commenced her employment at MCCC in 1979 as an executive assistant to the president of the college. Prior to this time, she was a member of the Board of Trustees of MCCC (Board). In 1982, she became Dean of the Division of Corporate and Community Programs, a position she held until her final contract expired on June 30, 2005. Id. at 550.

As a non-faculty employee, Nini was employed through a series of contracts. In accordance with an agreement between the Board and the MCCC Professional Staff Federation, terms of appointment for contract employees -- such as length of the contract period or amount of notice prior to nonrenewal -- correspond with the number of years the employee has worked for MCCC. Id. at 551. On June 23, 2004, Robert Rose, the President of MCCC, sent Nini a letter informing her that she was not recommended for reappointment as Dean and that her current contract would expire June 30, 2005. Nini was surprised by the decision because she had never received poor evaluations and believed that a nonrenewal was generally confined to poor performance. Id. at 552. After the notice of nonrenewal,

---

[1] The Statement of Facts and Procedural History have been combined since they are inextricably connected.

Rose met with her and provided three performance-related reasons for the decision: (1) her tendency to micro manage caused discontent among her staff; (2) her inconsistent and unclear financial reporting had a negative effect on the budgeting process and other financial aspects of the college as a whole; and (3) he believed that she was untrustworthy. Id.

In an August 2004 meeting, Rose made it very clear that he thought Nini had no right to be working at her age and suggested she take early retirement. She also claimed that at meetings Rose held with department heads, several people discussed age and incompetence and being "dead wood" and made jokes about getting rid of the oldest employees. Additionally, she was told that MCCC Human Relations Director Vanessa Williams said "the college had to get rid of old-timers and bring in new blood." Id. at 552.

On September 24, 2004 Nini sent a letter to the chairman of the Board and two other Board members requesting the Board's review of the events surrounding her nonrenewal. She stated that her "strong 25-year record" and Rose's comments led her to believe that her sudden nonrenewal was a result of her age and pointed out that she took on more responsibilities despite her age and was successful in reaching her goals. Id. at 553. Nini's contract expired on June 30, 2005 and was not renewed. Id. at 554.

On September 7, 2005 Nini filed a complaint in the Superior Court of New Jersey, Law Division alleging age-based discrimination

and retaliation against Rose, MCCC, the Board and Wilson. Upon defendants' motion for summary judgment, the court held that N.J.S.A. 10:5-12a permitted an employer to decline to renew an employment contract of any employee seventy years of age or older. In August 2007, Wilson was voluntarily dismissed from the case. Id. at 554.

Nini appealed, arguing that a nonrenewal of an employment contract represents a termination or discharge rather than a refusal to accept for employment and that N.J.S.A. 10:5-12a was preempted by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §621(a). The Appellate Division reversed the order of the trial court finding that the over-seventy exception of N.J.S.A. 10:5-12a should be interpreted to equate a contract nonrenewal with a termination and to bar an age-based nonrenewal. Id. at 558. Due to its interpretation of the exception to the LAD, the Court declined to consider the federal preemption issue. This court then granted MCCC's Petition for certification on the issue of the Court's interpretation of the over-seventy exception of N.J.S.A. 10:5-12a. Nini did not cross-petition this Court on the federal preemption issue.

ARGUMENT

THE OVER-SEVENTY EXCEPTION OF N.J.S.A. 10:5-12a SHOULD NOT BE INTERPRETED TO EQUATE A CONTRACT NONRENEWAL WITH A FAILURE TO HIRE OR TO PERMIT AN AGE-BASED NONRENEWAL.

Although the LAD does enable employers to refuse to hire candidates over the age of seventy, it also recognizes that for existing employees age cannot be a determining factor in termination decisions. The work of one who has a history with an employer can be assessed by more accurate measures than age. Chronological age is not a reliable indicator of how the aging process has affected an individual's physical and mental condition. Research in industrial gerontology has consistently demonstrated that there is more variation in the ability of workers in the same age group than between different age groups of workers. In relation to output, absenteeism, accident rates, and ability to be trained for new skills, age is widely recognized as an unsatisfactory predictor of job performance. "Mandatory Retirement and the Constitution; Challenging the Factual Basis Underlying Legislative Classifications." 10 Fla. St. U.L. Rev. 1, 7-8 (1982).

In legislative hearings before the passage of the Age Discrimination in Employment Act, 29 U.S.C.A. §§621-34 (ADEA), Senator Jacob K. Javits of New York stated:

> Age discrimination in employment is a tragedy, not only from the standpoint of our older workers themselves, but also from the standpoint of the nation as a whole. For it

> represents a great waste of one of our most precious resources - in this case the talent and experience accumulated by our older workers over many years. We must also remember, too, that youth itself has a stake in guarding against discrimination in employment, for nothing but time stands between the "younger worker" and the "older worker."
>
> [Age Discrimination in Employment, 1967; Hearings on §.830 and §.788 before the Subcomm. On Labor of the Senate Comm. On Labor and Public Welfare, 90th Cong., 1st Sess. 23 (1967)].[2]

The ADEA's stated purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C.A. §621(b).

Since enacting the first state anti-discrimination statute, New Jersey has been in the forefront of protecting the civil rights of its citizens. This Court has long recognized the clear public policy of this State to abolish discrimination in the workplace. Fuchilla v. Layman, 109 N.J. 319, 334 (1988). Indeed, the goal is "nothing less than the eradication of the cancer of discrimination." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993), citing Fuchilla, supra, 109 N.J. at 334.

In 1985, again leading the country in protecting the rights of New Jersey citizens, the LAD was amended to include all employees,

---

[2] The 1985 amendments to the ADEA limits its protections to individuals over forty years of age, 29 U.S.C.A. §631(a)

regardless of age, to be protected from involuntary retirement. Thus N.J.S.A. 10:5-12 provides in relevant part:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer, because of the ...age...of any individual...to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment;...provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70. (Emphasis added).

This amendment is consistent with the legislative findings that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic state", N.J.S.A. 10:5-3, and that such is a civil right. N.J.S.A. 10:5-4.

Petitioners have urged that under a strict construction of the over-seventy amendment, a failure to renew Nini's contract is not a termination but a failure to hire and in that context not protected under the LAD. (Pb 13).[3] However, this Court has ruled that "no functional difference exists between the failure to

---

[3] Pb refers to petitioner's brief.

reappoint at the end of a fixed term and the dismissal of an at-will employee." Battaglia v. Union County Welfare Board, 88 N.J. 48, 62-63, cert. denied, 456 U.S. 965, 102 S. Ct. 2045 (1982). As the Appellate Division noted in Rubin v. Chilton Memorial Hospital, 359 N.J. Super. 105 (App. Div. 2003), "[T]o distinguish between a refusal to enter into a contract and the termination of a contract where the motivation is illegal discrimination would mock the beneficial goals of the LAD." Id. at 110."

Most compelling is that the over-seventy amendment does not distinguish between contract and non-contract employees but only carves out exceptions for certain situations, namely refusing to accept one for employment or making promotional decisions. Exceptions in a legislative enactment are to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law. Service Armament Co. v. Hyland, 70 N.J. 550, 558-59 (1976), citing to Wright v. Vogt, 7 N.J. 1, 6 (1951). Emphasizing these considerations, the United States Supreme Court has held that where the purpose of legislation is remedial and humanitarian, any exemption must be narrowly construed, giving due regard to the plain meaning of the language and the legislative intent. "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." Phillips v. Walling, 324 U.S. 490, 493, 65 S.Ct. 807

(1945).

The legislative history of the over-seventy amendment clearly demonstrates that it was to prohibit mandatory retirement of the majority of employees and not deny its protections to contract employees.[4] A news release issued by Governor Kean at the time the legislation was enacted on March 11, 1985, stated that "[M]andatory retirement provisions are shortsighted, discriminatory and can cost the public and private sections many talented individuals." The release further stated that "[A] person's productivity does not suddenly come to a halt upon reaching a birthday. Yet, mandatory retirement systems are based on the false premise that the calendar should dictate a person's work value." Finally, Governor Kean stated that "[W]e have benefitted – and will continue to benefit – from the productivity of New Jersey's senior workers and elimination of the mandatory retirement will assure that continued productivity." (ACa1).[5]

This Court has been scrupulous in its insistence that the LAD be applied to the full extent of its facial coverage. Peper v.

---

[4] The State's position is that the legislative intent underlying the LAD's over-70 exception is to protect existing workers from losing their jobs when they turn 70, whether they are employees or contractors. This is not to be construed, however, more broadly than the context presented here. In other situations, such as fringe benefits, for example, distinctions based on the nature of employment serve different purposes, and the State's position in this case should not be construed as binding beyond the narrowly drawn issue at hand.

[5] ACa refers to this appendix to this brief.

Princeton University, 77 N.J. 55, 68 (1978). This Court also found that "a broad construction of the statute is entirely consistent with the underlying purpose of anti-discrimination laws 'to discourage the use of categories in employment decisions which ignore the individual characteristics of particular applicants.'" Bergen Commercial Bank v. Sisler, 157 N.J. 188, 216 (1999) (citation omitted). Given the legislative mandate that the protections of the LAD be "liberally construed," N.J.S.A. 10:5-3, it is quite clear that any employee, whether hired under contract or not, must be entitled to the full protection of the LAD. If this Court were to rule otherwise, then there would be nothing to stop employers from placing all their employees under contract and thus precluding them from the age protection of the LAD, a result that would be contrary to the clear public policy of this State to abolish discrimination in the workplace. Fuchilla, supra. 109 N.J. at 334.

It is disingenuous for MCCC to characterize the termination of Nini's contract as simply a failure to employ in the context of the amendment. Clearly, to continuously renew her contract for twenty-five years and decide not to renew it only after she reaches the age of seventy, is not only invidious age discrimination but "mocks the beneficial goals of the LAD." Rubin, supra 359 N.J. Super. at 110. Since the LAD is remedial legislation which should be liberally construed to advance its beneficial purposes, the over-seventy exception must be limited to a refusal to hire new employees and not

apply to a refusal to renew the contracts of long-term employees.

CONCLUSION

For the foregoing reasons, amicus curiae New Jersey Division on Civil Rights respectfully requests that this Court ensure that a victim of unlawful age discrimination in this State is protected under the LAD and hold that employees under contract are not subject to the over-seventy statutory exception in N.J.S.A. 10:5-12a.

Respectfully submitted,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Attorney for *Amicus Curiae*
New Jersey Division on Civil Rights

Dated: 10/28/09

By Anne Marie Kelly
Anne Marie Kelly, SDAG

OFFICE OF THE GOVERNOR
NEWS RELEASE

CN-00
Contact: CARL GOLDEN
609-292-8956

TRENTON, N.J. 08625
Release: MON., MARCH 11, 198

Governor Thomas H. Kean today signed legislation to prohibit mandatory retirement based on age in both public and private employment.

The legislation, A-1042, sponsored by Assemblyman David Schwartz, D-Middlesex, was conditionally vetoed by the Governor on January 28. The Legislature concurred in the Governor's recommendations in February.

"Mandatory retirement provisions are shortsighted, discriminatory and can cost the public and private sectors many talented individuals," Kean said. "A person's productivity does not suddenly come to a halt upon reaching a birthday. Yet, mandatory retirement systems are based on the false premise that the calendar should dictate a person's work value."

Kean noted that he recently issued a proclamation designating this week as "Hire the Older Worker Week."

"We have benefited --- and will continue to benefit --- from the productivity of New Jersey's senior workers and elimination of the mandatory retirement barrier will assure that continued productivity," Kean said.

The bill, effective in October, exempts from its provisions Supreme Court justices, Tax and Superior Court judges, State Police officers and State, county and municipal police and firemen. Tenured college and university faculty members are also exempt at the option of the particular institution.

# # # #

Matter printed in italics *thus* is new matter.