No. 31425 – General Motors Corporation v. Hubert J. Smith and The West Virginia Human Rights Commission

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**SUPREME COURT OF APPEALS**
**OF WEST VIRGINIA**

Starcher, J., concurring:

Neither the Labor Management Relations Act ("LMRA"), nor the Employee Retirement Income Security Act ("ERISA"), were designed by Congress to pre-empt state laws that proscribe conduct or establish civil rights which operate independently of a collective bargaining agreement or employee benefit plan. Employee rights under state law – like those under our Human Rights Act – exist independently of any job-related agreement or plan, are nonnegotiable, and cannot be waived by the parties. As the majority opinion makes clear, if a state-law-based claim can be resolved without interpreting a collective bargaining agreement or an employee benefit plan, then the state-law-based claim is independent of any federal question and is not pre-empted by federal law.

The crux of this case is that appellant Hubert J. Smith alleges that he was – because of his disability and because of his race – denied reinstatement to his job and to his seniority with the appellee, General Motors Corporation ("GM"), through actions that plainly violated the Human Rights Act. The application of the Human Rights Act to Mr. Smith's allegations does nothing to alter or interpret the GM collective bargaining agreement, nor does the application of the Act in this case alter the mechanics of the GM disability retirement plan. In sum, the conclusion by the Human Rights Commission that GM engaged

in discrimination did nothing to alter or interpret any agreement or plan; it is therefore plain that Mr. Smith's claims are not preempted by any federal law.

Other courts have similarly concluded that discrimination claims under state law are not preempted by the LMRA or ERISA, so long as the application of the state law does not require an interpretation of, or alteration to, a collective bargaining agreement or benefit plan. As one court stated, "[i]n race, sex, and age cases, interpretation of the collective bargaining contract is unnecessary . . . . The right to be free of race, sex, or age discrimination is independent of any ancillary rights contained in a collective bargaining agreement." *Betty v. Brooks & Perkins*, 521 N.W.2d 518, 524 (Mich. 1994). Likewise, another court allowing an employee to pursue a state law disability claim found that "ERISA does not preempt state law claims when the claims 'affec[t] only [an employee's] employer/employee relationship with [an employer] and *not* her administrator/beneficiary relationship with the company.'" *Rokohl v. Texaco, Inc.*, 77 F.3d 126, 129 (5th Cir. 1996) (citations omitted). This is because "an employer may not use its ERISA plan as a 'gimmick' to trigger preemption and therefore avoid litigation in state court." *Id.* at 130.

Mr. Smith established a clear-cut case of discrimination under our Human Rights Act. Mr. Smith sought to return to work at GM pursuant to GM's policies and the collective bargaining agreement. Instead of treating him fairly, GM met Mr. Smith's request to return to work with three years of Kafkaesque responses designed solely to prevent Mr. Smith's return to work. Mr. Smith demonstrated before the Human Rights Commission that

his case was much like that of other disabled employees at the GM facility, and that discrimination against disabled employees was very pervasive.[1]

In sum, the record firmly establishes that General Motors Corporation discriminated against Hubert Smith in violation of our Human Rights Act – and did so regardless of any terms in any collective bargaining agreement or benefit plan. I therefore concur with the majority opinion.

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[1]As one court noted, in affirming a jury verdict against GM and in favor of a disabled employee named Robert Fox, there was substantial evidence of a pervasive environment hostile to disabled workers at the Martinsburg GM plant:

> For example, at safety meetings, held each week, Okal referred to the disabled workers as "handicapped people" and "hospital people." Okal and Dame also frequently called Fox and other disabled workers "handicapped MFs" and "911 hospital people." Fox also testified that Okal instructed the other employees not to talk to the disabled employees. Perhaps because of this, Fox's co-workers ostracized the disabled employees and refused to bring needed materials to the light-duty table where they worked. Fox also testified that Okal refused to permit disabled employees to work overtime.

*Fox v. General Motors Corp.*, 247 F.3d 169, 174 (4th Cir. 2001).