PROOF STANDARDS UNDER THE IOWA CIVIL RIGHTS ACT: A GROSS OVERSIGHT?

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In the wake of the Iowa Supreme Court's decision in *DeBoom v. Raining Rose, Inc.*[1], some practitioners have speculated that the Iowa Supreme Court broke tradition by rejecting the United States Supreme Court's holding in *Gross v. FBL Financial Services, Inc.*[2] with regard to the way age discrimination cases are analyzed. In fact, a close analysis of *DeBoom* and a review of the chronology of the case demonstrate that in *DeBoom*, the Iowa Supreme Court did not intend to address *Gross* and did not make any sweeping change in the way it analyzes discrimination claims. The eighth circuit court of appeals recently recognized as much in *Gross v. FBL Financial Services, Inc.*, 588 F.3d 614 (8th Cir. 2009) (on remand). This article discusses the likely development of age discrimination proof standards under the Iowa Civil Rights Act ("ICRA").

THE *GROSS* DECISION

In *Gross*, the United States Supreme Court held that the burden of persuasion never shifts to the party defending an age discrimination claim brought under the Age Discrimination in Employment Act ("ADEA"). *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2348 (2009). The *Gross* decision resolved a split among the federal courts of appeals and firmly established a proof standard consistent with the plain language of the ADEA.

THE *DEBOOM* DECISION

In *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1 (Iowa 2009), the Supreme Court of Iowa held in part that the causation standard applicable to Iowa's common law retaliatory discharge tort does not apply to a sex and pregnancy discrimination claim under the ICRA. The plaintiff in *DeBoom* alleged that she was terminated because of her sex and pregnancy. At trial, however, the district court used jury instructions that were derived in part from the elements of Iowa's common law retaliatory discharge tort and in part from the ICRA. *Id.* at 13.

Consistent with the ICRA, the instructions directed the jury that the plaintiff in a sex and pregnancy discrimination case must prove that her protected status "was a determining factor" in the employer's adverse employment decision. *DeBoom*, *Id* at 12. The district court also instructed the jury that "Plaintiff's pregnancy was a 'determining factor' if that factor *played a part* in the Defendant's later actions towards Plaintiff. However, Plaintiff's pregnancy need not have been the only reason for Defendant's actions." *Id.* at 13 (emphasis in original). This portion of the instructions was the same as the eighth circuit court of appeals model jury instruction for sex and pregnancy discrimination under Title VII. The Supreme Court of Iowa held that these instructions—taken from federal law prohibiting sex and pregnancy discrimination—were appropriate. *Id.* at 12-13. Although DeBoom suggested that it would be less confusing if trial courts use the term "motivating" factor rather than "determining" factor, the court held that substitution of the term "determining" for "motivating" was not error. *Id.* at 13-14

The district court, drawing from the elements of Iowa's retaliatory discharge tort, also instructed the jury that "[a] determining factor need not be the main reason behind the decision. It need only be the reason which *tips the scales decisively* one way or the other." *Id.* at 13 (emphasis in original). *DeBoom* held that this portion of the instructions misstated the plaintiff's burden of proof by imposing a "higher burden of proof than is required in discrimination cases." *Id.* Moreover, the court concluded that the retaliatory discharge portion of the instructions was inconsistent with the portion of the instructions based on the ICRA, so the jury was likely confused about what the plaintiff had to prove to prevail on her claim. *Id.* at 14. Based on this instructional error, the Supreme Court of Iowa reversed the judgment and ordered a new trial. *Id.*

In the wake of *DeBoom*, some members of the plaintiff's bar have argued that the Iowa Supreme Court rejected the U.S. Supreme Court's analysis in *Gross*. Indeed, at least one federal judge has taken that position. *Schott v. Care Initiatives*, 2009 WL 3297290, at *4 (N.D. Iowa Oct. 15, 2009). Shortly after *DeBoom* was decided, the Eighth Circuit Court of Appeals weighed in on the matter and concluded that *DeBoom* did not reject, or even consider, Gross. *See Gross v. FBL Financial Services, Inc.*, 588 F.3d at 618-20.

THE IOWA SUPREME COURT FOLLOWING FEDERAL LAW

The Iowa Supreme Court has repeatedly interpreted the ICRA in a manner consistent with companion federal anti-discrimination statutes, bringing uniformity and predictability to the employers and employees that must navigate the complementary regimes. A long line of Iowa Supreme Court opinions reflects that Court's consistent practice of adopting and drawing from the companion federal analytical frameworks when interpreting the ICRA. A sampling of those cases includes:

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1 772 N.W.2d 1 (Iowa 2009).
2 129 S.Ct. 2343 (2009).

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- ADEA analytical framework regarding voluntary early retirement incentive plans, *Weddum v. Davenport Cmty. Sch.* Dist., 750 N.W.2d 114 (Iowa 2008);
- the *Morgan*[3] statute of limitations analysis, *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733 (Iowa 2003);
- the *Faragher-Ellerth*[4] affirmative defense, *Farmland Foods*, 672 N.W.2d at 744;
- the *Reeves*[5] analytical framework, *Farmland Foods*, 672 N.W.2d at 741 n.3;
- the *St. Mary's v. Hicks*[6] analytical framework, *Board of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 256 (Iowa 1998);
- the *McKennon*[7] after-acquired evidence doctrine, *Walters v. U.S. Gypsum Co.*, 537 N.W.2d 708, 708-09 (Iowa 1995);
- the *Price Waterhouse*[8] mixed motive analytical framework, *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 893-94 (Iowa 1990);
- the *Burdine*[9] analytical framework, *Hamilton v. First Baptist Elderly Housing Found.*, 436 N.W.2d 336, 338-39 (Iowa 1989);
- the federal analytical framework and religious accommodation requirement, *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601-02 (Iowa 1983); and
- the *McDonnell Douglas v. Green*[10] analytical framework, *Linn Coop Oil Co. v. Quigley*, 305 N.W.2d 729, 733 (Iowa 1981).

DeBoom is no exception. In fact, *DeBoom* reiterates the Iowa Supreme Court's intention to follow, rather than deviate from, companion federal analytical frameworks when analyzing the ICRA. Rather than distinguishing the ICRA from federal law, in *DeBoom*, the Iowa Supreme Court adopted in part the eighth circuit's Title VII model jury instructions for discrimination "because of" sex and pregnancy. 772 N.W.2d at 11-14. Additionally, the Iowa Supreme Court interpreted the ICRA in a manner that followed the federal Pregnancy Discrimination Act's expansive definition of pregnancy.[11] *Id.* at 7-8.

When clear textual differences in statutory language exist, the Iowa Supreme Court has recognized distinctions between the ICRA and federal law.[12] That is likely the reason why, in *DeBoom*, the Supreme Court of Iowa did not adopt the Title VII standard for sex and pregnancy discrimination in its entirety. Title VII, in contrast to the ICRA, goes beyond a prohibition on discrimination "because of" sex or pregnancy. The federal Civil Rights Act of 1991 amended Title VII by adding a provision to impose liability on an employer when an employee "demonstrates" that an impermissible consideration "was a motivating factor for any employment practice, even though other factors also motivated the practice." Pub. L. No. 102-166, § 107 (now contained in 42 U.S.C. § 2000e-2(m)). Under that provision of Title VII, once a plaintiff establishes that a prohibited characteristic motivated an employer's decision, the employer is liable for engaging in a prohibited employment practice. Title VII does provide the employer with an opportunity to limit the damages a plaintiff may obtain under this avenue. Once liability is established, the burden of persuasion shifts to the employer to establish it would have made the same decision regardless of the prohibited characteristic. In *Desert Palace v. Costa*[13], the Supreme Court interpreted 42 U.S.C. § 2000e-2(m). To date, the Supreme Court of Iowa has declined to decide whether *Desert Palace* is applicable to the ICRA.[14] Given the patent differences between the Title VII provisions that *Desert Palace* interpreted and the ICRA, however, the Court does not need to address it.

Where the ICRA is similar to federal law, however, the Iowa Supreme Court has opted for uniformity and clarity. For this reason, it seems likely the Iowa Supreme Court will embrace the *Gross* decision. The ICRA—like the ADEA—imposes the burden of persuasion on the plaintiff at all times. *See Landals*, 454 N.W.2d at 893-94; *Trobaugh v. Hy-Vee Food Stores, Inc.*, 392 N.W.2d 154, 156-57 (Iowa 1986); *Peoples Mem. Hosp. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 87, 92-93 n.5 (Iowa 1982); *Linn Coop Oil Co.*, 305 N.W.2d at 733. In addition, the ICRA—like the ADEA—prohibits discrimination in employment "because of" an individual's age. Iowa Code § 216.6(1); 29 U.S.C. § 623(a)(1). Finally, the Iowa Supreme Court has consid-

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3 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

4 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

5 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

6 *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

7 *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995).

8 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

9 *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

10 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

11 *See* 42 U.S.C. § 2000e(k).

12 *See, e.g., Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) (in contrast to Title VII, supervisory employee may be held liable for unfair employment practices under the ICRA); *Hulme v. Barrett*, 449 N.W.2d 629, 631-32 (Iowa 1989) (in contrast to the ADEA, ICRA is "age-neutral" in that the class protected from age discrimination is not limited to individuals age 40 or older); *Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 384 (Iowa 1986) (in contrast to Title VII, punitive damages are not available under the ICRA).

13 539 U.S. 90 (2003).

14 *See Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005).

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ered the ADEA's analytical framework when interpreting the ICRA's prohibition on age discrimination. *See Weddum*, 750 N.W.2d at 118; *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 793 (Iowa 1999). Like the Iowa Supreme Court, federal courts recognize the symmetry between the ICRA and the ADEA.[15]

DeBoom presented the Iowa Supreme Court with an interpretive issue that the federal courts did not face in analyzing Gross's age discrimination claim. The Iowa Supreme Court interpreted *two* subsections of Iowa Code § 216.6 in *DeBoom*: Iowa Code § 216.6(1) and Iowa Code § 216.6(2). Iowa Code § 216.6(1)(a) provides that an employer may not take adverse action against a person because of sex or disability (including pregnancy). Iowa Code § 216.6(2) contains comprehensive provisions addressing pregnancy discrimination. One part of that subsection, at issue in *DeBoom*, provides: "[a] n employer shall not terminate the employment of a person disabled by pregnancy because of the employee's pregnancy."[16] There are no counterparts to these provisions in the ADEA.

Furthermore, age discrimination is inherently different than sex and pregnancy discrimination. In enacting the ADEA, for example, Congress recognized distinctions between the more pernicious types of discrimination protected by Title VII and the type of prejudices and biases that drive age discrimination; therefore, federal law provides a different level of protection for age discrimination. A report of the Secretary of Labor, prepared at Congress's request, noted that "there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits." *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005). Consequently, the ADEA was designed to prevent employers from discriminating against older workers based on groundless perceptions and assumptions. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). And, in the federal context, the statutory objectives of the ADEA were "to promote employment of older persons based on their ability rather than age; to prohibit the arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 589-90 (2004). As discussed above, the legislative history of the ICRA reflects comparable distinctions. Therefore, the ICRA treats age discrimination differently than sex and pregnancy discrimination.

Perhaps the best evidence that the *DeBoom* court did not reject *Gross* is the fact that the *DeBoom* opinion did not cite *Gross*. A review of the *DeBoom* briefing and oral argument makes clear that neither party asked the court to reject *Gross*. Indeed, this would have been impossible given the fact that the briefs in *DeBoom* were submitted nearly two years before *Gross* was decided. Oral argument in *DeBoom* preceded *Gross* by more than one year. Thus, it would have been impossible for the litigants in *DeBoom* to anticipate what the Supreme Court would do in *Gross*.

THE CLOSER ANALYSIS

Although both *Gross* and *DeBoom* addressed the propriety of jury instructions in discrimination cases, the cases presented entirely different issues. In *Gross*, the plaintiff characterized his age discrimination claim as a "mixed motive" claim. Relying on *Price Waterhouse*, *Gross* argued that once he established his age was a factor in the adverse employment decision, the burden of persuasion should shift to the employer to show the absence of causation. *DeBoom* did not present a mixed motive case; instead, she presented a classic pretext claim.

The Iowa Supreme Court has applied the *Price Waterhouse* burden-shifting framework as an alternative to the *McDonnell Douglas* pretext framework for ICRA claims that involve direct evidence of discrimination. *Landals*, 454 N.W.2d at 893-94; *Civil Serv. Comm'n v. Iowa Civil Rights Comm'n*, 522 N.W.2d 82, 90 (Iowa 1994). The Iowa Supreme Court applies *Price Waterhouse* to the ICRA and has held that Justice O'Connor's concurring opinion is controlling. *Landals*, 454 N.W.2d at 893-94; *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 520 n.3 (Iowa 2003). Therefore, under the ICRA, to receive a burden-shifting instruction, a "plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse*, 490 U.S. at 276. Direct evidence is evidence that relates directly to the challenged decision. *Id.* at 277 (employee must satisfy evidentiary threshold by showing "*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision") (emphasis added). *See also Casey's Gen. Stores, Inc.*, 661 N.W.2d at 520 n.3.

The *DeBoom* case neither addressed nor undermined the Iowa Supreme Court's precedent adopting the *Price Waterhouse* burden-shifting framework. When the Iowa Supreme Court intends to overrule its precedent, it clearly expresses its intention to do so.[17] The Iowa

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[15] *See, e.g., King v. U.S.*, 553 F.3d 1156, 1160 n.3 (8th Cir. 2009) ("Because the same analysis applies to age discrimination claims under the ADEA and the ICRA, we do not separately discuss King's claim under the ICRA"); *Christensen v. Titan Distrib., Inc.*, 481 F.3d 1085, 1095 n.4 (8th Cir. 2007) ("The same analysis applies for age discrimination claims brought under Iowa law"); *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 n.2 (8th Cir. 2000) ("The ICRA is interpreted to mirror federal law, including the ADEA"); *Montgomery v. John Deere & Co.*, 169 F.3d 556, 558 n.3 (8th Cir. 1999) ("The discrimination claims alleged under the Iowa Civil Rights Act are analyzed in the same manner as their federal law counterparts").

[16] Iowa Code § 216.6(2)(d).

[17] *See, e.g., Bontrager Auto Serv. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 495 (Iowa 2008); McElroy v. State, 703 N.W.2d 385, 395 (Iowa 2005); *Kiesau v. Bantz*, 686 N.W.2d 164, 173 (Iowa 2004); *State v. Liddell*, 672 N.W.2d 805, 811-12 (Iowa 2003); *State v. Robinson*, 618 N.W.2d 306, 312-13 (Iowa 2000); *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 304-05 (Iowa 2000).

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Supreme Court expressed no intent to overrule precedent in *DeBoom*. Instead, the Iowa Supreme Court approved the eighth circuit model jury instruction for a claim of discrimination "because of" sex and pregnancy under Title VII. *DeBoom*, 772 N.W.2d at 13. The parties in *DeBoom* did not raise the issue of burden-shifting. The Iowa Supreme Court did not address the issue of burden-shifting. Thus, the Iowa Supreme Court's interpretation of *Price Waterhouse*—using the direct evidence standard set forth in Justice O'Connor's concurring opinion—governs analysis of the mixed motive jury instructions that the district court used at trial.

CONCLUSION: LOOKING FORWARD

The eighth circuit dismissed the argument that *DeBoom* rejected *Gross*. Thus, in Iowa's federal courts, *Gross* dictates that pendent claims under Iowa Code Chapter 216 be analyzed using the *Price Waterhouse* analysis adopted by the Iowa Supreme Court in *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538-39 (Iowa 1996).

Indeed, given the thorough and well reasoned analysis of the eighth circuit in *Gross*, it is likely that Iowa trial courts will likewise apply the *Price Waterhouse* standard or the *Gross* standard in age claims brought under the Iowa Civil Rights Act. Although the matter won't be settled until the Iowa Supreme Court weighs in, it seems likely that the *Gross* decision may have a longer life under Iowa law than federal law. This is true because federal legislation has been proposed that would overturn Gross.

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