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New Jersey Supreme Court Upholds Employer's Gender Neutral Medical Leave Policy as Nondiscriminatory Against Terminated Pregnant Employee

On July 25, 2005, the New Jersey Supreme Court ruled in *Gerety v. Atlantic City Hilton Casino Resort* (A-33-04), that an employer's generous policy allowing for twenty-six weeks of medical leave for any illness does not violate the Law Against Discrimination ("LAD") prohibiting gender discrimination as to plaintiff employee, who could not return to work after twenty-six weeks due to medical problems related to her pregnancy. The court found that as long as an employer's medical leave policy is gender neutral and applied in a nondiscriminatory manner, the New Jersey LAD is not violated when applied to a woman who has chronic problems related to a high-risk pregnancy.

In *Gerety*, plaintiff was employed by the Atlantic City Hilton Casino Resort for several years. Plaintiff became pregnant with twins in September 1997. On October 2 and 3, 1997, an illness associated with her pregnancy forced her absence from work. Plaintiff requested leave from October until December 1, 1997. Plaintiff later extended her leave through February 1, 1998. When the end of that leave approached, *bona fide* medical concerns required that plaintiff be out of work for medical reasons for the duration of her pregnancy.

Hilton's employee policy authorizes two types of leave: 1) leave available pursuant to the Family Medical Leave Act ("FMLA") and the New Jersey Family Leave Act ("NJFLA") and 2) leave provided by the terms of Hilton's own medical leave policy. The pertinent part of Hilton's Medical Leave Policy states:

> Hilton's Medical Leave is in addition to leave provided by the FMLA and may be granted up to a maximum of twenty-six weeks, including any leave taken under the FMLA…. Under no circumstances will requests for medical leaves of absence which in the aggregate total in excess of twenty-six (26) weeks in a twelve (12) month cycle based on the date when employee first takes a leave (inclusive of FMLA) be granted…

In the execution of the policy, Hilton maintains a no exceptions rule. If an employee takes more than the maximum twenty-six weeks of leave within a consecutive twelve month period, that employee is terminated but would be eligible for rehire. If rehired, however, the employee would not have the seniority accrued during service prior to the termination.

Plaintiff's leave was classified as FMLA for the first twelve weeks of her pregnancy-related disability, until December 26, 1997. Once plaintiff exhausted all FMLA leave, Hilton automatically approved additional leave under its own policy. Under Hilton's policy, plaintiff was entitled to a total of twenty-six weeks medical leave, which she exhausted on April 1, 1998, and there was no other category of leave available to her after that date. Citing its policy, Hilton informed plaintiff that as of April 1, 1998, she reached the "maximum allowable" amount of medical leave and her employment would be terminated if she did not return to work after that date. Her employment was terminated April 2, 1998 because she failed to return to work. Plaintiff delivered her twins five weeks early on April 14, 1998. Thirteen days, including weekends, elapsed between the exhaustion of plaintiff's medical leave allowable under Hilton's policy and the date when she would have been entitled to begin to take leave under the NJFLA to care for her newborn children.

Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the New Jersey Division of Civil Rights ("DCR") alleging gender discrimination. The EEOC concluded that Hilton did not commit any violation of law. Plaintiff then filed a civil complaint in Superior Court naming Hilton and two of its employees as defendants. The complaint alleged gender discrimination in violation of the LAD, wrongful termination in violation of public policy, and intentional infliction of emotional distress. The complaint also alleged claims on behalf of plaintiff's husband, who was also employed by Hilton.

On Hilton's motion for summary judgment, the Superior Court dismissed all but plaintiff's LAD claims, finding Hilton's leave policy to be discriminatory. Hilton's motion for reconsideration was denied, as well as its motion for leave to appeal and for a stay with the Appellate Division. The New Jersey Supreme Court granted Hilton's motion for leave to appeal *nunc pro tunc.*

After a lengthy review of the genesis and application of the LAD, the court focused on a disparate impact analysis as there was no evidence that plaintiff was treated differently from any nonpregnant employees. As an initial matter, the court noted that Hilton's policy was gender neutral and that was all that the LAD required. Plaintiff, however, argued that the policy had a disparate impact on women, specifically pregnant women, because only women can become pregnant and suffer high-risk pregnancies that would require extended absences from work for a definite period (i.e., nine months). Plaintiff urged the court to provide additional protection to this "sub-sub-class" in the form of extended medical leave.

The court found that while companies may not discriminate against pregnant women, evenhanded adherence to a leave policy that provides male and female employees with identical lengthy periods of medical leave are not discriminatory, even if the policy may not cover the entire period that an employee may need to be out of work. The court rejected the notion of preferential treatment of pregnant women, stating that similarly there are diseases that are unique to men that may require lengthy leave, testicular cancer in particular. Moreover, the court found it could not endorse the notion that a pregnant woman would be entitled to additional leave while a woman suffering ovarian cancer would not be entitled to such leave. The court focused on the fact that Hilton's policy was applied to men and woman equally, no matter the cause of the medical condition necessitating use of the medical leave policy. The court also noted that Hilton had consistently applied its no exceptions rule to the policy.

The court also observed that while the human gestation period is indisputable, neither Congress nor the state legislature has provided for additional leave for high-risk pregnancies. In fact, in enacting the Pregnancy Discrimination Act ("PDA"), Congress focused on the theme of equal, not preferential, treatment of pregnant women. While policy arguments could be made for the expansion of leave for pregnant women, it was not for the court to legislate such leave under the mantle of the LAD. To do so, the court cautioned, would be to legislate a new minimum medical leave requirement and it was not for the court to legislate its personal preferences regarding leave for pregnant employees.

If an employer treats its pregnant employees no differently than comparable nonpregnant employees in need of extended medical leave, then there is no LAD violation. Thus, an employer's failure to provide enhanced leave allotments for its pregnant employees, who may require more time off than the employer's policy permits, does not constitute gender discrimination prohibited by the LAD. The LAD simply does not require that an employer deviate from evenhanded application of a medical leave policy for pregnant women and, therefore, the employer's adherence to such a policy does not constitute gender discrimination.

The *Gerety* decision highlights the importance of an employer having a well-developed and defined medical leave policy, particularly if an employer chooses to permit more leave than required by federal or state law. The policy should clearly state what amount of leave is available, whether it runs concurrently with federal or state mandated leave, and the procedure for handling leave that exceeds the amount permitted. Moreover, an employer must ensure that adherence to the leave policy is strictly enforced so that preferential treatment of any employee is avoided. A no exceptions policy, such as the one Hilton maintained and followed, is prudent. Without such safeguards, an employer could be vulnerable to liability for failure to evenhandedly apply its policies. This would be particularly true if exceptions to any stated policy are permitted. It should also be noted that the court intimated that a decision to favor pregnant women in this context was for the legislature, not the courts. Therefore, it may follow that this issue could be raised in that arena.

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Please feel free to contact **James P. Flynn** or **Lauren D. Daloisio** in the firm's **Newark** office at 973/642-1900 if you have any questions or comments. Mr. Flynn's e-mail address is jflynn@ebglaw.com and Ms. Daloisio's is ldaloisio@ebglaw.com. Kristi Terranova, a summer associate in the Labor and Employment Department, assisted in the preparation of this Alert.