

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Deputy Director
Re: “Protected Class” within the Law of Discrimination, N.J.S. 10:5-1 et seq.
Date: November 08, 2019

MEMORANDUM

Executive Summary

To protect and ensure the economic prosperity and the general welfare of the inhabitants of the State of New Jersey, the Legislature enacted the Law Against Discrimination (“LAD” or the “Act”).¹ In an attempt to eradicate discrimination, the Act vested a “protected” party with the ability to seek compensatory and punitive damages against those who chose to employ the anathema of discrimination against them.²

All persons protected by the LAD would colloquially become known as “protected classes.”³ Although the term “protected class” is used in common parlance, the Commission’s inquiry regarding whether this term is actually defined in the LAD served as the basis for in-depth research regarding that question. The answer to the Commission’s question about whether the LAD defines the term “protected class,” is “yes” and “no.”

Background

In the case of *Smith v. Millville Rescue Squad*, the New Jersey Supreme Court examined the meaning of the phrase “marital status” in New Jersey’s Law Against Discrimination (LAD), N.J.S. 10:5 et seq., and determined that the phrase included those who are single or married and those who are in transition from one state to another.⁴

The Commission authorized Staff to conduct further research and outreach to determine whether it would be appropriate to amend the LAD to incorporate the definition of “marital status” identified by the New Jersey Supreme Court in *Smith v. Millville Rescue Squad*.⁵

¹ N.J.S. 10:5-1 et seq.

² *Id.*

³ See *Spence-Parker v. Delaware River & Bay Auth.*, 656 F.Supp.2d 488, 505 (D.N.J. Aug. 21, 2009) (a plaintiff claiming to have been wrongly discriminated against in violation of the NJLAD must identify the protected class that forms the basis of her discrimination claim i.e. race, gender, age or a different protected class or face dismissal of the claim).

⁴ *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016).

⁵ NEW JERSEY LAW REVISION COMMISSION (2018) ‘Definition of Marital Status’. *Minutes of NJLRC meeting 19 April 2018*, Newark, New Jersey.

In response to its outreach, Staff was advised that the Commission’s proposed definition of “marital status” is the appropriate way in which to define the term.⁶ Stakeholders cautioned, however, that the codification of this term could inadvertently adversely impact the broad protections currently afforded by the LAD to members of a “protected class” and those transitioning within or between “protected classes.”⁷

In direct response to the concerns expressed by stakeholders, the Commission proposed modifications to the “general construction” statutory section⁸ of the LAD to ensure that the comprehensive protections were not compromised.⁹

During the September 19, 2019 meeting of the NJLRC, Commissioner Bunn inquired whether the term “protected class” was defined in the LAD.¹⁰ In response, Staff indicated that a supplemental Memorandum on this topic would be submitted to the Commission.¹¹ Staff’s research on this topic follows.

Analysis

Since 1945, the New Jersey Legislature has found and declared that, “...practices of discrimination against any of its inhabitants... are matters of concern to the government of the state, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State...”¹² New Jersey’s Law Against Discrimination (LAD) set forth in Title 10, Chapter 5, of the New Jersey statutes, was enacted in an attempt to combat discrimination when directed against individuals who belong to a particular group.¹³

The Legislature vested a “protected” party with the ability to seek compensatory and punitive damages against those who discriminate against them.¹⁴ Groups protected by the LAD would colloquially become known as “protected classes.”¹⁵

⁶ See generally letter from Rachel Wainer Apters, Director, New Jersey Division on Civil Rights to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (June 27, 2019) (on file with the NJLRC).

⁷ *Id.*

⁸ N.J.S. 10:5-2.1.

⁹ See also, NEW JERSEY LAW REV. COMM’N, REVISED TENTATIVE REPORT RELATING TO THE DEFINITION OF MARITAL STATUS WITHIN NEW JERSEY’S LAW AGAINST DISCRIMINATION (N.J.S. 10:5-5 *et seq.*), at 10-12, (Sept. 19, 2019).

¹⁰ NEW JERSEY LAW REVISION COMMISSION (2019) ‘Definition of Marital Status’. *Minutes of NJLRC meeting 19 September 2019*, Newark, New Jersey.

¹¹ *Id.*

¹² N.J.S. 10:5-3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Spence-Parker v. Delaware River & Bay Auth.*, 656 F.Supp.2d 488, 505 (D.N.J. Aug. 21, 2009) (a plaintiff claiming to have been wrongly discriminated against in violation of the NJLAD must identify the “protected class” that forms the basis of her discrimination claim i.e. race, gender, age or a different protected class or face dismissal of

Although the term “protected class” is commonly used in legal circles, the term “protected class” appears in a total of three statutes.¹⁶ The term is, however, defined only once in the all of Title 10.¹⁷

The definition of this term resides within the Law Against Discrimination.¹⁸ N.J.S. 10:5-12(t) defines “member of a protected class” as “...an employee who has one or more characteristics, including race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces...”¹⁹ The language that immediately precedes this definition, “[f]or purposes of this subsection...”, is indicia that the definition is limited exclusively to the statute that defines it.²⁰ To confirm who could claim membership to a “protected class” would necessitate an examination of each statute in Title 10.

Of the 84 statutes contained in Title 10²¹, 32 statutes reference 25 separate characteristics “protected” under New Jersey’s Civil Rights Statutes (“CRS”).²² To track the use of each statutory reference and protected characteristic, Staff prepared a chart.²³ The “Y” axis of this chart sequentially lists each statute in which a “protected” characteristic appears.²⁴ By contract, the “X” axis sets forth each protected characteristic referenced within the corresponding statute.²⁵

A review of the data confirmed several phenomena about the Civil Rights Statutes. First, no single statute contains a recitation of all 25 characteristics that are protected under the CRS. Next, the characteristics that grant an individual membership to a protected class pursuant to one statute, may not necessarily provide the same individual with protected status under a different statute. Finally, although the Legislative findings and declarations make it clear that, “[t]he Legislature intends that such damages be available to all persons protected by this act...”²⁶ ascertaining whether you are protected under the Act can be a difficult and time-consuming endeavor for lawyers and laypersons alike.

the claim) and *State v. Probation Ass’n of N.J.*, 2015 WL 4067402 *3 (App. Div. Jul. 5, 2015) (discussing whether the plaintiff was a member of a protected class under the Law Against Discrimination N.J.S. 10:5-1 to -49)

¹⁶ N.J.S. 10:5-12, N.J.S. 10:5-12.12 and N.J.S. 34:6B-20.

¹⁷ N.J.S. 10:5-12.

¹⁸ Title 10 comprises the Civil Rights Statutes. Chapter 5, of the Civil Rights Statutes is entitled the Law Against Discrimination.

¹⁹ *Id.*

²⁰ *Id.* See also N.J.S. 10:5-12.12 which uses the term “protected class as defined in subsection t. of” N.J.S. 10:5-12.

²¹ N.J.S. 10:1-1 through N.J.S. 10:6-2.

²² See Figure 1.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ N.J.S. 10:5-3.

Conclusion

If it is the pleasure of the Commission, Staff will engage in further research and outreach to determine whether the creation of a comprehensive definition is achievable and beneficial.