

To: Commission
From: Beshoy Shokralla
Re: Definition of “marital status” in N.J.S. 10:5 (*Smith v. Millville Rescue Squad*)
Date: September 11, 2017

MEMORANDUM

Executive Summary

The Law Against Discrimination, found at N.J.S. 10:5 et seq. (“LAD”) in New Jersey prohibits “an employer from imposing conditions of employment that have no relationship to tasks assigned to and expected of an employee.”¹ It also prohibits employers from resorting to stereotypes to discipline, block from advancement, or terminate an employee due to life decisions, such as marital status. In *Smith v. Millville Rescue Squad*, the Supreme Court of New Jersey decided that “marital status”, when referred to in the LAD, means whether an employee or prospective employee is “single, married, or transitioning from one state to another.”²

In the case, the court decided that while the term “marital status” is not defined in the LAD, its inclusion in the statute and previous cases point to it meaning one’s status as either “single, married, or transitioning from one to another.”³ In doing so, they stressed that marital status as a term is not defined in the LAD, and that there was no legislative history to clarify the boundaries of the term, going on to list several examples of states with “marital status” in their anti-discrimination laws that also define what the term marital status means.

Background

The issue in this case is what is meant by the term “marital status” in N.J.S. 10:5-12, and whether it protects employees and prospective employees from being fired due to generalizations about divorce proceedings and marriage planning as well as about their marital status.

In *Smith*, plaintiff Robert Smith was a certified emergency medical technician and paramedic working with defendant Millville Rescue Squad.⁴ At the time of his termination Mr. Smith served as the Director of Operations, and had been in that position since June 1998.⁵ His wife at the time, Mary, was also employed by MRS along with her mother and two sisters.⁶ In 2005, Smith began an extramarital affair with an MRS volunteer, who was directly supervised by Smith.⁷ In June 2005, Mary learned of the plaintiff’s affair and reported it to Smith’s direct

¹ *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016).

² *Id.* at 392.

³ *Id.*

⁴ *Id.* at 380.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

supervisor and co-defendant, Redden.⁸ Shortly thereafter, Smith reported the affair to Redden as well.⁹ During their conversation, Redden told Smith that he could not promise that the affair would not affect his continuing employment with MRS.¹⁰

While the MRS volunteer left on June 2005, the affair continued, causing irreconcilable discord between Smith and Mary.¹¹ Smith moved out of the marital home on January 2006, and informed Redden that his marriage with Mary had collapsed.¹² According to the plaintiff, Redden thanked Smith for keeping him informed and asked he keep him updated on any developments regarding his marital status.¹³ Redden and Smith met again, and according to Smith, Redden informed him that he “did not think there was any chance of reconciliation between the plaintiff and Mary and that he believed there would be an ‘ugly divorce’.”¹⁴ Plaintiff testified that Redden informed him that “if there had been even the slightest chance of reconciliation, Redden would not have to take the issue to the MRS Board of Directors.”¹⁵ According to Smith, Redden also “indicated that he should not have met with plaintiff and that he was only supposed to meet with plaintiff the next day to terminate his employment,” and that, “if anyone learned that they had met, he would deny it.”¹⁶

Later, Smith learned that the Board held a meeting on February 7, 2006, which Redden attended.¹⁷ The meeting minutes of the meeting talked of restructuring which would hurt Smith’s position, and that Smith’s “work performance has been very poor for some time,” and “all efforts to remediate have failed.”¹⁸ Plaintiff testified that the MRS Employee Information Manual provided that plaintiff was an “at will” employee who could resign or be terminated at any time with or without cause or notice.¹⁹

The Manual also include a sexual harassment policy, but Smith testified that “he did not believe that having a relationship with a subordinate was a problem because two other supervisors at MRS had dated employees who they supervised.”²⁰ Smith also testified that while phone records indicated he used his business phone to speak with the MRS volunteer after hours, which was prohibited, no one ever complained to him about it.²¹ In addition, he testified that

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 381.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 382.

²⁰ *Id.*

²¹ *Id.*

during his formal employment he was never subject to formal discipline, and emphasized that he was promoted twice and received raises annually, even after Redden learned of the affair.²²

In March 2006, plaintiff and Mary filed for divorce, which was finalized that September, and which plaintiff testified was “amicable,” and not “messy,” and that he continues to have a good relationship with Mary.²³ Smith then filed a complaint against MRS, Redden, and unnamed “John Does” who were involved in plaintiff’s termination.²⁴

The complaint asserted wrongful discrimination on the basis of sex and marital status in violation of LAD, N.J.S. 10:5-1 to -4²⁵, and the State Constitution, and common law wrongful discharge.

After hearing oral argument the trial court dismissed the plaintiff’s gender and marital status LAD claims. The Court explained that Smith

was required to establish four elements to succeed on his LAD claim: 1) that plaintiff is a member of a protected class; 2) that he was performing his job at a level that met his employer's legitimate expectations prior to his termination; 3) that he was fired nevertheless; and 4) that he was replaced by someone not in the same protected class, that non-protected-class workers with comparable work records were retained, or that he was terminated under circumstances giving rise to an inference of discrimination.²⁶

The court found that he failed to satisfy factor two and factor four of the four elements required to succeed on a LAD claim.²⁷ The court also found that he failed to present evidence that he was fired because he was “single, married, separated, or divorced”, and instead found that he presented proof that he was terminated because management was concerned about “the likelihood of an ugly or messy divorce”, which the court held did not give rise to a marital-status-discrimination claim.²⁸ Smith appealed.

The Appellate Division affirmed the dismissal of plaintiff’s gender-discrimination claim but reversed the dismissal of plaintiff’s marital-status-discrimination claim.²⁹ In reversing they noted that this case raised the issue of the scope of the marital-status protection under LAD, and interpreted “marital status” to include “the states of being divorced, engaged to be married, separated, and involved in divorce proceedings.”³⁰ They also found the comment “that the

²² *Id.*

²³ *Id.* at 383.

²⁴ *Id.*

²⁵ N.J.S. 10:5-1 et seq.

²⁶ *Id.* at 384.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 385.

³⁰ *Id.*

plaintiff was being terminated because he was going to go through an ‘ugly divorce’ constituted direct evidence of discrimination that plaintiff had established a prima facie case of discrimination based on a change in the status of his relationship “from married to soon-to-be-divorced[.]”³¹ The defendants appealed, and the Supreme Court of New Jersey granted the defendant’s petition for certification.

The Supreme Court affirmed the Appellate Division’s determination, stating that “[b]ecause this case involves LAD, special rules of interpretation also apply,” and that “the LAD is a remedial legislation intended to ‘eradicate the cancer of discrimination’ in our society, and should therefore be liberally construed ‘in order to advance its beneficial purposes’.”³² The Court also emphasized that marital status was not defined in N.J.S. 10:5-5.

The Court explained that when LAD was initially enacted, it only protected individuals from discrimination based on “race, creed, color, national origin, or ancestry.”³³ Discrimination based on marital status did not appear in the LAD as a prohibited employment practice until 1970, part of a comprehensive amendment to the LAD.³⁴ The “inclusion of marital status in the LAD coincided with the attention that discrimination against women based on their marital status was receiving, including the commencement of legal proceedings in various courts challenging the employment practices of some companies that conditioned hiring and continued employment for women in certain positions on being single.”³⁵

New Jersey is not the only state that bars discrimination based on marital status. According to an article referred to by the court, *Marital Status Discrimination: A Proposal for Title VII Protection*, by Nicole Buonocore Porter for the Wayne Law Review in 2000, 21 states and the District of Columbia bar discrimination based on marital status.³⁶ Some states, like Hawaii and Nebraska, define “marital status” in a limited manner, meaning “the state of whether someone is married or single,” while other states like Colorado, define marital status in a more complex way.³⁷ Colorado defines marital status as “a relationship or a spousal status of an individual, including but not limited to being single, cohabitating, engaged, widowed, married, in a civil union, or legally separated, or a relationship or spousal status of an individual who has had or is in the process of having a marriage or civil union dissolved or declared invalid.”³⁸ The District of Columbia defines marital status as “the state of being married, in a domestic

³¹ *Id.*

³² *Id.* at 390.

³³ *Id.* at 388.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 388-389.

³⁷ *Id.* at 389.

³⁸ *Id.*

partnership, single, divorced, separated, or windowed and the usual conditions associated therewith, including pregnancy or parenthood.”³⁹

The Court considered the legislative intent in order to determine the “scope and limits of the protection of the protections afforded by the LAD”.⁴⁰ The Court concluded that “marital status should be interpreted to include those are single or married and those who are in transition from one to another”⁴¹ stating that no employee should fear that their marriage ceremony, a divorce, or the death of their spouse will lead to termination or disciplining at work, while at the same time ensuring that the interpretation doesn’t disrupt an “employer’s legitimate business judgment and policies regarding its workforce.”⁴²

Conclusion

While the LAD in New Jersey includes marital status as a protected class when it comes to employment, the statute fails to define what the Legislature meant by marital status, leaving the courts to have to interpret what exactly the scope of “marital status” is in New Jersey. Staff seeks authorization to engage in further research and outreach in order to determine whether the statute should be modified pursuant to the result in *Smith*.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 392.

⁴² *Id.*