

Client Alert

A report
for clients
and friends
of the firm July 2005

New Jersey Refuses To Force Employers To Provide Preferential Treatment for Pregnant Employees

Last week, the Supreme Court of New Jersey ruled in *Gerety v. Atlantic City Hilton Casino Resort*, No. A-33 (N.J. July 25, 2005), that an employer's gender-neutral medical leave of absence policy does not discriminate against women — even if it fails to carve out a preferential exception for women who develop complications during pregnancy which render them unable to report to work. Though sharply divided, the Court's 4-to-3 ruling held that a New Jersey employer's medical leave policy, which applies equally to men and women and regardless of whether the medical condition is pregnancy-based, does not discriminate against women. Edward Cerasia II, Mark A. Saloman, and Bryant Roman of Proskauer Rose's Newark office submitted a brief for the Employers Association of New Jersey as *amicus curiae*. Mark also argued on behalf of the Association.

Christina Gerety ("Gerety"), a former employee of the Atlantic City Hilton ("Hilton"), became pregnant with twins in 1997. She had planned to continue working, but encountered severe medical complications early in her pregnancy, which required periods of bed rest and hospitalization. Consistent with Hilton's written guidelines, it approved her application for a leave of absence. Hilton's leave policy allowed eligible employees, including Gerety, to take up to 26 weeks of leave during any 12-month period. This leave included 12 weeks of paid time off under the Family and Medical Leave Act of 1993, and the remaining 14 weeks available through Hilton's voluntarily implemented medical leave policy.

After she exhausted all of the six months of leave available to her, Gerety had not yet reached her delivery date and was unable to report to work. In accordance with its mandatory return-to-work requirement, Hilton terminated Gerety's employment.

Gerety filed suit in the Superior Court of New Jersey, alleging that Hilton's medical leave policy had a disparate discriminatory impact on women in violation of the New Jersey Law Against Discrimination ("NJLAD"). In ruling on Hilton's motion for summary judgment, the trial court held that Hilton's policy was discriminatory *per se* because only women could become pregnant and, therefore, only women could develop complications during pregnancy which would require more than 26 weeks of leave. The trial court then entered judgment *sua sponte* in favor of Gerety. New Jersey's Appellate Division denied Hilton's motion for leave to appeal but the Supreme Court granted the motion and heard the appeal.

In rejecting the trial court's analysis that Hilton's policy visited a "disparate impact" on women, the Supreme Court recognized that the NJLAD only requires that employers treat pregnant employees equal to — not better than — non-pregnant members of their workforce. *Id.* at 22. By way of example, the Court observed that the NJLAD mandates that a woman absent from work due to complications in pregnancy be treated the same as a woman absent due to ovarian cancer. *Id.* at 17. Such a genderless, otherwise neutral policy equally applied to male and female employees is, therefore, all that the NJLAD requires. *Id.* at 22. The Court reasoned that to carve out an exception from Hilton's six-month limit on leave time would, therefore, improperly create a preference only for women who experience complications in pregnancy.

Editors' Comment

The Supreme Court's ruling sends a clear message that the NJLAD is not violated when a New Jersey employer's policies and procedures treat pregnant employees the same as comparable non-pregnant employees in need of extended medical leave. Nonetheless, employers in New Jersey and elsewhere should be cautious when a pregnant employee with medical complications is in need of a leave of absence above and beyond the company's own policies. Although a facially neutral and evenly applied policy may not give rise to gender discrimination, federal and/or state disability or handicap laws may entitle such employees to reasonable accommodation under certain circumstances, which will require employers to engage in an interactive process with the employee.

Significantly, on June 30, 2005, the New Jersey State Senate passed legislation that would amend the NJLAD to include, among other things, a provision making it unlawful for an employer "to fail to provide reasonable accommodations for pregnancy or pregnancy-related conditions unless to do so would impose an undue hardship upon the employer." N.J. Senate Bill 2522, § 3:2. The language of that amendment, parroted nearly verbatim in *Gerety's* lengthy dissent, could very well require New Jersey employers to accommodate pregnant employees through an even longer leave of absence than Hilton granted to Gerety. As of the time of this Alert, that bill has not been signed into law.

A complete version of the Supreme Court's ruling can be found online at <http://www.judiciary.state.nj.us/opinions/supreme/a-33-04.pdf>.

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