

Employment Law Alert

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Employer's Even-Handed Adherence to Gender-Neutral Medical Leave Policy did not Violate the New Jersey Law Against Discrimination ("LAD")

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We have prepared this Alert to advise you of a recent decision by the New Jersey Supreme Court that affects all employers. In *Gerety v. Atlantic City Hilton Casino, et.al.* (A-33-04), a female employee exceeded her maximum twenty-six weeks of leave because of a difficult pregnancy and was terminated pursuant to the defendant Atlantic City Hilton Casino's ("Hilton") medical leave policy. The New Jersey Supreme Court considered whether Hilton's medical leave policy violated the LAD because the policy did not provide more than twenty-six weeks leave to the pregnant employee. The Supreme Court answered this question in the negative and held that because Hilton's leave policy was applied in a non-discriminatory fashion to all of its employees without exception, application of the policy to the plaintiff did not violate the LAD. The Court concluded that the LAD does not require an employer to deviate for pregnant employees from the even-handed application of its gender-neutral medical leave policy, which, in *Gerety*, already provided more leave than any relevant federal or state statute requires. This means that as long as an employer's medical leave policy applies equally to men and women, and otherwise complies with applicable law, employers need not provide

preferential leave treatment for pregnant employees for the employer to avoid a claim of "disparate impact" gender discrimination under the LAD.

Background

Both the New Jersey Family Leave Act "NJFLA" and the federal Family and Medical Leave Act "FMLA" require that a qualifying employer provide its eligible employees with up to twelve weeks of unpaid, job-protected leave for certain family and medical reasons. The FMLA allows twelve weeks during a consecutive twelve month period, while the NJFLA allows twelve weeks per each twenty-four month period. Family reasons include care for the employee's child after birth or placement for adoption or foster care or to care for the employee's spouse, son, daughter, parent or parent-in-law who has a serious health condition. Medical reasons include a serious health condition of the employee that makes the employee unable to perform his or her job (FMLA only).

Hilton's medical leave policy at issue in *Gerety* provides more than the law requires of employers. Hilton's policy authorizes two types of leave: that available pursuant to the FMLA and the NJFLA, as well as that provided by the terms of its own medical leave policy. Hilton's policy, though not mandated

by law and offered to its employees on its own initiative, allowed for twenty-six weeks of leave (including FMLA and NJFLA leave) for any medical reason, including pregnancy. The policy further provides that any employee unable to return to work after twenty-six weeks is deemed to have resigned. Although those employees may reapply for employment, if rehired they lose seniority and other carryover benefits that were available had the twenty-six weeks not been exceeded. Hilton's leave policy is facially neutral in that it treats men and women alike in respect of the number of days they are allotted for medical disability. Further, in the implementation of its leave policy, Hilton maintains a strict, no-exceptions standard: under no circumstances will requests for medical leaves of absence in excess of twenty-six weeks be granted and if the employee takes more than the maximum twenty-six weeks of leave, that employee is terminated from employment, but is eligible for rehire.

The New Jersey Supreme Court's Decision:

In *Gerety*, the employee exceeded her maximum twenty-six weeks leave because of a difficult pregnancy and was terminated pursuant to Hilton's policy. The plaintiff was employed by Hilton from 1989 until she was discharged on April 2, 1998. Plaintiff discovered that she was pregnant in September 1997. In October 1997, the plaintiff sought disability leave because of pregnancy-related medical concerns, continuing through December 1, 1997. Plaintiff later extended her leave request through February 1, 1998. Hilton approved both periods of leave, designating her leave through December 16, 1997 as FMLA leave

and her leave thereafter as a leave under Hilton's extension policy. Plaintiff's pregnancy-related medical problems continued, resulting in her absence from work for more than the twenty-six weeks allowed under Hilton's family leave policy. Because Hilton strictly enforced its medical leave policy, it terminated plaintiff's employment on April 2, 1998 when she failed to return to work, although she did not return based on her doctor's instructions. After plaintiff gave birth to twins on April 15, 1998, she would have become eligible for family leave under the NJFLA, had the gap not occurred between Hilton's twenty-six week leave period and her twins' birth. Plaintiff filed a complaint alleging, among other things, gender discrimination in violation of the LAD.

At issue before the Court was Hilton's denial of the plaintiff's request that her leave be extended beyond the limits of Hilton's policy so as to accommodate the entirety of her pregnancy. Our courts have recognized two theories of relief when analyzing discrimination claims under the LAD - disparate treatment and disparate impact. The record showed that plaintiff was treated no differently than other non-pregnant Hilton employees whose leave had expired and who were terminated for not returning to work notwithstanding a valid medical inability to do so (disparate treatment). Thus, the New Jersey Supreme Court analyzed the *Gerety* case under a "disparate impact" theory of relief. Disparate impact involves employment practices that are facially neutral in their treatment of different groups, but that, in fact, fall more harshly on one group than another and cannot be justified by

business necessity. A disparate impact claim does not require the plaintiff to demonstrate proof of the employer's discriminatory motive. Rather, a plaintiff must show that a facially neutral policy resulted in a significantly disproportionate or adverse impact on members of the affected class, here, pregnant women.

The plaintiff argued that Hilton's policy visited a disparate impact on women because only women can become pregnant and only pregnant women can experience high-risk pregnancies that require extended absences from work (up to nine months). She asserted that the LAD requires preferential treatment to pregnant women in the form of an exception from the twenty-six week limit on the amount of medical leave that Hilton provides for its employees because that is the only way that Hilton could avoid negatively affecting women by operation of its gender-neutral policy.

The Court found that while it is true that in their employment actions employers may not discriminate against a female employee because she is pregnant, that does not mean that an employer discriminates simply by adopting and adhering to a leave policy that even-handedly provides male and female employees alike with lengthy periods of medical leave that, nonetheless, may not cover completely the entire period of time that an employee's health needs may require. In so holding, while underscoring the theme of *equal*, but not *preferential* treatment, the Court reasoned that whatever the cause of the medical condition,

Hilton's policy impacts men and women equally and specifically prohibits any exceptions to the maximum limit, a prohibition to which Hilton had adhered without exception. On its own initiative, Hilton chose to extend another ninety-eight days of medical leave to its employees, more than doubling the leave period required by law. The Court further noted that neither state nor federal law requires an employer to provide greater than twelve weeks of medical leave within a twelve month period for pregnancy-related or other medical needs.

The Impact of *Gerety v. Atlantic City Hilton Casino*

What does this mean to you as an employer? This ruling means that if an employer treats its pregnant employees no differently than comparable non-pregnant employees in need of extended medical leave, then the LAD is not violated. It is therefore critical that, as an employer, you are prudent in creating and drafting policies and practices and in evaluating existing policies to be certain that the policies are gender-neutral and are applied evenhandedly to both men and women without exception. If this is the case, 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, will not constitute gender discrimination prohibited by the LAD.

The law in the area of workplace discrimination continues to evolve. If you have any further questions about the issue discussed in this Alert, or whether any of your policies should be examined as a result of this decision, or any other employment practices or compliance issues, please do not hesitate to call David M. Wissert, a Member of the firm and member of the Employment Law Practice Group or Kristen L. Laracca, a member of the Employment Law Practice Group, at (973) 597-2500.

You may also wish to obtain a copy of our newly published book, "A Practical Guide to Federal and New Jersey Employment Law: The Employer's Resource," Executive Editor, Martha L. Lester, Esq. This Guidebook, published in connection with the New Jersey Business and Industry Association, is the resource for New Jersey employers seeking to comply with federal and New Jersey laws, regulations and procedures in the employment-related area. It provides management with information concerning existing laws, emerging trends, most frequently asked questions and practical tips on managing the workforce and workplace.