

One Minute Memo®



NJ Supreme Court Finds For Employees In Two Recent Cases

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Seyfarth Synopsis: In two recent cases, the New Jersey Supreme Court unanimously expanded state law to protect individuals going through a divorce from discrimination, and remanded another case to the trial court with instructions to allow hearsay testimony that a witness was pressured to lie during a sexual harassment investigation.

Smith v. Millville Rescue Squad

In *Smith v. Millville Rescue Squad*, decided on June 21, 2016, the New Jersey Supreme Court reiterated the broad, remedial purpose of New Jersey's Law Against Discrimination ("LAD"), and effectively expanded its protections from not only discrimination based on "marital status" (i.e., single or married), but also to those who are separated, in the process of divorcing, or divorced.

The Facts

The plaintiff was a 17-year employee of the Millville Rescue Squad ("MRS"), where he worked with his wife during the latter 8 years of his employment. Plaintiff and his wife separated following an affair he had with a subordinate employee. Management became aware of the separation and affair, and informed plaintiff that it could not promise him that his job would not be affected. After 8 months of separation, plaintiff met with his supervisor again, and told him that chances of reconciliation with this wife were slim. His supervisor commented that he expected an "ugly divorce" and, absent any chance of reconciliation, he would have to bring the issue to the MRS Board. Shortly thereafter, the MRS Board voted to terminate plaintiff's employment, noting "operational restructuring," "very poor" performance, and plaintiff's supervisor's belief that there were no options other than termination of plaintiff's employment. When plaintiff asked why he was being fired, he was told it was due to, among other reasons, job "restructuring" and "poor job performance." After sifting through the parties' testimony at trial, the court dismissed plaintiff's claims of marital status and sex discrimination.

The Appellate Division reversed the dismissal of plaintiff's marital-status discrimination claim, as previously reported [here](#). The panel interpreted "marital status" to include the states of being separated and involved in divorce proceedings. The panel determined that plaintiff presented evidence that he was terminated based on negative stereotypes that defendants held about divorcing employees, and that plaintiff had established a *prima facie* case of discrimination.

The Supreme Court's Decision

The question for the Supreme Court was whether the LAD's prohibition against discrimination based on "marital status" extends to a person who has separated from their spouse and is in the process of obtaining a divorce. The LAD itself, however, was silent on the issue.

In analyzing the issue, the Court looked beyond the text of the statute and noted that the 1970 amendment adding "marital status" as a protected category "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 employment practices of some companies that conditioned hiring and continued employment for women in certain positions on being single." The Court also made note that at least 20 other states bar discrimination based on marital status, and that Colorado, Illinois, Minnesota, Washington, Wisconsin, and the District of Columbia have all defined the term beyond the simple distinction between a person being single or married. The Court further examined the "special rule" that applies to the LAD, calling for liberal construction "in order to advance beneficial purposes" on account of the LAD being "remedial legislation intended to 'eradicate the cancer of discrimination' in our society." Even "novel arguments" "require our utmost care and attention in order that we may be steadfast in our efforts to effectuate the Legislature's goal of workplace equality."

With this backdrop, the Court found the broader interpretation to be consistent the goals of the LAD and expanded the definition of "marital status" to include individuals who are "single, married, or transitioning from one state to another." The Court added that this interpretation is designed to prohibit employers from "resorting to stereotypes" relating to a worker's life decisions when that employer is considering taking an adverse employment action.

Griffin v. City of East Orange

In *Griffin v. City of East Orange*, decided on June 22, 2016, the New Jersey Supreme Court held a witness's testimony that her boss allegedly instructed her to lie to an outside investigator of a sexual harassment investigation was both relevant, and admissible under a hearsay exception.

The Facts

Several employees made internal complaints of hostile work environment, sexual harassment, and retaliation against another employee. The City retained an outside investigator to determine whether the alleged wrongdoer violated City policies or the law. The investigator took a statement from one of the employees, who did not have knowledge of the incident but was familiar with the parties, and who vouched for the alleged wrongdoer, saying the accused was a "phenomenal" and "cautious" director who "always acted professionally." At least in part based on this employee's statement, the investigator concluded that no wrongdoing had occurred.

During discovery in the lawsuit that followed, however, the employee testified at her deposition that the City's mayor spoke with her before her interview with the investigator, and directed her to make negative comments about one of the other complaining employees, and to praise the supervisor who was being accused. Per those instructions, she testified, and she provided misleading information. At trial, the City's counsel successfully argued that testimony regarding the mayor's influence on the employee's statement should be excluded as hearsay, which the Appellate Division affirmed.

Analyzing the trial court's decision, the Supreme Court reversed the Appellate Division, finding that the evidentiary ruling was effectively "so wide off the mark that a manifest denial of justice resulted." The Court ruled that these statements were relevant and admissible under the hearsay exception for a statement by a party opponent. First, the Court found

the testimony to be relevant to the independent nature of the investigation, corroborated plaintiffs' harassment claims, weakened the City's defense to those claims, and invigorated plaintiffs' claims for punitive damages. The mayor's alleged statement to the employee concerned his responsibilities as a senior official of the City and thus were an exception to hearsay as a statement by a party opponent. Finally, the Court found these statements were not prejudicial because the City would have the opportunity to cross-examine the employee regarding her testimony and thereby convince the jury the statements were false, eliminating any prejudice toward the City.

Takeaways

In *Millville*, the New Jersey Supreme Court has issued this reminder to employers that the broad remedial purposes of the LAD are the guidepost by which "novel arguments" will be considered. New Jersey employers make decisions relating to their workers on a daily basis, and the Court made clear that stereotypes and other reasons that do not specifically relate to the performance of a worker's job duties may fall under the prohibitions of the LAD. Given the prevailing divorce rate, employers will likely see a trend in "separation" discrimination claims based on workers' personal relationships. Employers that anticipate taking any employment action, including those pursuant to otherwise lawful workplace policies, would likely benefit from counseling management and human resources to navigate any employment-related decisions relating to employees who may be experiencing a change in their marital status.

In *Griffin*, the Supreme Court clarified that under the New Jersey Rules of Evidence, witnesses may be allowed to testify about comments made by upper management, as the members of upper management (*i.e.*, senior executives in the case of corporate entities) effectively speak for the employer. Even where the comments might otherwise be considered hearsay, they nevertheless might be admissible as a statement by a party opponent. Thus, the Court found it could be presented to a jury to undermine an anti-harassment policy and other steps designed to prevent and respond to allegations of workplace harassment, as well as to otherwise undercut the employer's other anti-discrimination and anti-harassment efforts.

Taken together, these unanimous decisions signal a pro-employee interpretation of the LAD on both substantive and procedural issues that were brought before the Court. We will continue to report key decisions with significant implications for New Jersey employers.

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