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Law Against Discrimination Interpreted to Include Protection of Divorced Individuals

By Robert T. Szyba and Samuel Sverdlov

States that ban marital-status-based discrimination have long been struggling to define the scope of "marital status" under their anti-discrimination laws. While some states have narrowed the term to include only married and unmarried individuals,[1] others have given the expression broad interpretation to include a very liberal reading, awarding protection to those individuals who are married, unmarried, divorced, separated, remarried, and are the surviving spouse.[2] Faced with an undefined statutory term,[3] and an "unilluminating" legislative history, the New Jersey Appellate Division leaned towards the latter approach in its recent *Smith v. Millville Rescue Squad* decision.

Facts

The plaintiff had worked for Millville Rescue Squad ("MRS") for 17 years, starting as a volunteer, and rising to the level of director of operations before his termination, at which point he supervised more than 100 employees. One of the employees under the plaintiff's supervision was his ex-wife, to whom he was married beginning from her time as a volunteer, until she became a field supervisor. The plaintiff and his ex-wife separated after 8 years of marriage due to an affair that the plaintiff had with another subordinate employee.

Management became aware of the separation and affair soon after its discovery by the ex-wife. When the plaintiff met with the executive director, John Redden, to discuss the circumstances, Redden neither directed the plaintiff to discontinue the relationship nor took any personnel action. Redden merely told the plaintiff "that the one thing he can't do is promise this won't affect my job… All depends on how it shakes down."

After 8 months of separation, the plaintiff moved out of the marital home, and notified Redden that chances for reconciliation were bleak. A month later, Redden met with the plaintiff and told him that due to the improbability of reconciliation and his feeling that this was going to be an "ugly divorce" he had to take the matter to the board of directors—who promptly terminated the plaintiff. When the plaintiff asked Redden what would be the cause of termination, Redden responded with four reasons, only two of which the plaintiff could remember—"restructuring" and "poor job performance." After sifting through the parties' testimony at trial, the court dismissed the plaintiff's claims of marital status and sex discrimination.

The Appellate Division's Decision

Guided by "the underlying purpose of anti-discrimination laws to discourage the use of categories in employment decisions which ignore the individual characteristics of particular applicants," the Appellate Division rejected the trial court's narrow

interpretation of "marital status," and expanded the LAD's protection to those who are divorced. The court further explained that this coverage includes the "stages preliminary to marriage" and the "stages preliminary to marital dissolution."

Further, the Appellate Division held that the trial court's four-prong test, similar to the *McDonnell Douglas* analysis, did not apply here because this was not a case involving circumstantial evidence of discrimination. Rather, the plaintiff here had direct evidence of discrimination, and thus he only had to show "hostility toward members of the employee's class" and "a direct causal connection between that hostility and the challenged employment decision." Therefore, the plaintiff's testimony that "Redden told him he would be terminated because he and his wife were going to go through an ugly divorce" was sufficient to establish a *prima facie* case for marital status discrimination.[4]

Outlook for Employers

Although at this point it is not clear whether the Supreme Court of New Jersey will weigh in on this issue, until it does employers should consider this expansive reading of the LAD in contexts that may have a connection to any "stage" of marital status. Likewise, employers with employees in multiple states should be mindful that such coverage may differ from state-to-state.

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[1] States whose legislatures have narrow the definition of "marital status" to the status of being married or unmarried include Hawaii and Nebraska.

[2] States whose legislatures have defined "marital status" broadly include Illinois, Minnesota, and Washington.

[3] States that also have marital-status-based discrimination legislation, however, do not define the term include California, Connecticut, Florida, Michigan, and Alaska.

[4] The court affirmed the trial court's dismissal of the plaintiff's sex discrimination claim.