

Recent Developments in NJ Employment Law

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Over the past several months, there have been some significant developments in New Jersey employment law and in the Law Against Discrimination (LAD) in particular. This article will briefly highlight four of those developments, which include a conditional veto of pay equity legislation and three New Jersey Supreme Court decisions.

Statute of Limitations for LAD Claims

This article would not be complete without at least a mention of the New Jersey Supreme Court's June 16 decision in *Rodriguez v. Raymours Furniture Co.*, No. 074603, 2016 WL 3263896 (N.J. June 15, 2016), which addressed whether employers could contractually shorten the two-year statute of limitations applicable to the LAD. The case garnered significant attention at its various stages. It began with the trial court granting summary judgment in favor of Raymours on its argument that the disability discrimination claim brought by the plaintiff was barred by a six-month statute of limitations in his employment application, which the Appellate Division affirmed. The chatter continued when the Supreme Court agreed to consider the case.

It likely came as no great surprise to practitioners when the Supreme Court reversed and held that the shortening of the limitations period for a private action is contrary to public policy. Its rationale was straightforward: the two-year limitations period had become "woven ... into the fabric of the LAD" by more than two decades of legislative silence, and the "interplay between the LAD's administrative remedy[.]" which carries a six-month statute of limitations, and the aggrieved party's "right to file in Superior Court," which carries the two-year statute of limitations, is part of the LAD's very essence. In the court's view, an aggrieved individual's incentive for seeking the LAD's administrative remedy, which is pursued by the DCR on behalf of the larger aggrieved public, comes from its relative efficiency and economy, and from the fact that the pursuit may be terminated if it takes too long to bear fruit, in favor of the pursuit of one's own private interests in court. The court found that shortening the two-year statute of limitations for private actions would leave aggrieved parties without any incentive to test the waters with the administrative remedy. In addition to preserving that remedy's "accessib[ility] and

vibrant[ce][,]" the court also sought to avoid an increase in prematurely filed court complaints and the loss of claims discovered or acted on too late.

It was certainly interesting to think about the impact that a shortened limitations period would have had on New Jersey businesses and their employees. With the fanfare now behind us, these cases will proceed just as they always have.

Pay Equity

On March 14, the New Jersey Legislature passed a bill that, if enacted, would have amended the LAD to advance the goal of achieving pay equity within the state. Less than two months later, on May 2, Governor Christie conditionally vetoed the bill.

Among other things, the governor took issue with portions of the bill that would have allowed plaintiffs to pursue *unlimited* back pay as damages for pay discrimination and that would have effectively barred employers from entering into agreements like the one at issue in *Raymours*. The latter issue is obviously no longer a concern. The governor also took exception to portions of the bill that would have prohibited retaliation against employees who have disclosed information about the compensation of other employees, because the provision made no distinction between employees who have broad access to that information by virtue of their jobs (such as HR professionals), those who have obtained and shared it without consent, and those who have obtained consent beforehand. The governor also requested that the legislature remove a provision that would require state contractors to provide the state with detailed information on the compensation and demographics of their workers.

The bill's most significant proposal sets forth a new framework for analyzing claims of gender-based pay discrimination under the LAD, by prohibiting disparate pay for "substantially similar work" performed at *any* of an employer's operations and facilities, unless the employer could successfully assert an affirmative defense also created by the bill. Although the governor was amenable to the inclusion of the new provision in general, his conditional veto proposed some significant changes. For example, he requested that the prohibition on disparate pay apply only to "substantially *equal* work[,]" and that the comparison of wages not be extended to all facilities and operations.

The legislature has yet to accept or override the governor's proposed changes, but may do so any time during the current legislative session, which concludes in January 2018.

Marital Status Discrimination

On June 21, in *Smith v. Millville Rescue Squad*, No. 074685, 2016 WL 3389950 (N.J. June 21, 2016), the Supreme Court considered the scope of marital status protection under the LAD. The plaintiff was terminated from his position as the Millville Rescue Squad's (MRS) director of operations following an affair with an MRS volunteer. It was not the affair itself that caused his termination, however. It was concern on the part of MRS leadership that he would be involved in an "ugly divorce" from his wife, who was also an MRS employee.

The plaintiff filed suit, alleging, among other things, that the MRS had terminated him on the basis of his marital status in violation of the LAD. The trial court dismissed the claim, finding "that plaintiff 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." *Id.* at *4. The Appellate Division reversed, "interpret[ing] 'marital status' to include the states of being divorced, engaged to be married, separated, and involved in divorce proceedings[.]" and finding 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-divorcing[.]'" *Id.*

The Supreme Court granted certification and found that marital status "should be interpreted to include those who are single or married and those who are in transition from one state to another." *Id.* at *9. Throughout its opinion, the court made statements indicating that the LAD's marital status protection extends from those who have never married or are merely considering marriage to those who are confronting the death of a spouse or have recently been widowed. The opinion suggests that: (1) scrutiny of allegations regarding discrimination of a divorcing employee will be greater "if the estranged spouse or the spouse's friends and family are employed by the same employer"; and (2) it might be unlawful to discriminate against a person on the basis of "a life decision, *such as* deciding to marry or divorce." *Id.* at *1, 9. According to the court, "even 'novel arguments' advanced by victims of workplace discrimination require [the court's] utmost care and attention in order that [it] may be steadfast in [its] efforts to effectuate the Legislature's goal of workplace equality[.]" *Id.* at *7-8.

The court's holding is limited in one important respect—an employer is not prevented from disciplining or terminating an employee whose work performance is, in fact, affected by his or her marital status. "For example, the LAD does not prohibit an employer from firing an employee who is engaged in a dispute—marital or otherwise—that has become so contentious that it interferes with his or other employees' ability to carry out their work." *Id.* at *13. Stay tuned for the impact of the court's decision.

Admissions by a "Party"

Nearly every New Jersey employment case includes allegations that someone, whether individually named as a party or not, said or did something that should impose liability on the employer. The question of which employees may be considered a "party" for evidentiary purposes is often debated but rarely the subject of published opinions, until now. In *Griffin v. City of East Orange*, 2016 WL 3408464 (N.J. June 22, 2016), the Supreme Court looked at the admissibility of a hearsay statement attributed to the mayor of East Orange in a case brought against the City of East Orange. The plaintiffs alleged that they had been sexually harassed while employed by the city. They sought to introduce the testimony of another city employee who had made detrimental statements regarding the plaintiffs and positive statements regarding the alleged harasser to an independent investigator, but who later stated during a deposition that she had been instructed to do so by the mayor.

Although the mayor was not a party to the litigation, the court held that his statements would nevertheless be admissible under N.J.R.E. 803(b)(4), as statements made by a party-opponent. According to the court, such statements are admissible "if [the party] was an agent of the [employer] at the relevant time, and if his [or her] statements concern a matter within the scope of his [or her] agency or employment." *Id.* at *8. The court found that the mayor was the city's agent when he allegedly spoke with the witness, and, based on evidence presented, that he was "the senior official in the city's organizational structure[.]" had "the authority to discipline a department manager ... in the event he sexually harassed another employee[.]" and "was [the witness in question]'s supervisor." *Id.* As a result, his alleged statements were attributable to the city under N.J.R.E. 803(b)(4).

While the court's discussion of the mayor's statements may not be groundbreaking, it provides a clear, authoritative, and useful expression of the applicable legal analysis when a party seeks to admit into evidence the statements of an entity's employee.