



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Relating to the Definition of Marital Status within New Jersey's Law Against Discrimination (N.J.S. 10:5 *et seq.*)

April 09, 2018

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8.*

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **June 28, 2018.**

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Timothy J. Prol, Counsel
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: tjp@njlrc.org
Web site: <http://www.njlrc.org>

Executive Summary

In the case of *Smith v. Millville Rescue Squad*, the New Jersey Supreme Court examined the meaning of the phrase “marital status” in New Jersey’s Law Against Discrimination (LAD), N.J.S. 10:5 et seq., and determined that the phrase included those who are single or married and those who are in transition from one state to another.¹

The Commission authorized Staff to conduct further research and outreach in order to determine whether it would be appropriate to amend the LAD to incorporate the definition of “marital status” identified by the New Jersey Supreme Court in *Smith v. Millville Rescue Squad*.

Background

This Report addresses the definition of the term “marital status” in the LAD, as distinct from the definition of the term “marriage.” The New Jersey LAD prohibits discrimination based on, among other things, an individual’s marital status. The LAD provides in pertinent part:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the... marital status... of any individual ...to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment....²

The term “marital status” is not defined in the LAD. In addition to prohibiting discrimination on the basis of an individual’s marital status in the context of employment, the LAD contains separate statutory provisions which prohibit marital status discrimination in the context of labor organizations, employment agencies, businesses, real estate agents, lessees and lessors, and banking.³ These provisions impact a wide cross-section of the everyday life of a multitude of New Jersey residents.

Case Law

The New Jersey Supreme Court, in the case of *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016), examined the New Jersey Law Against Discrimination and determined that the

¹ *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016).

² N.J.S. 10:5-12a.

³ N.J.S. 10:5-12 b-o.

phrase “marital status” includes individuals who are single, married, divorced, widowed, or are in transition between those states of being.

In *Smith*, Plaintiff was a certified emergency medical technician and paramedic working with Defendant Millville Rescue Squad (MRS).⁴ At the time of his termination the Plaintiff served as the Director of Operations, and had been in that position since June 1998.⁵ His wife at the time was also employed by MRS along with her mother and two sisters.⁶ In 2005, Plaintiff began an extramarital affair with an MRS volunteer, who he directly supervised.⁷ In June 2005, Plaintiff’s wife learned of the Plaintiff’s affair and reported it to Plaintiff’s direct supervisor.⁸ Shortly thereafter, Plaintiff reported the affair to his supervisor as well.⁹ During their conversation, Plaintiff’s supervisor told Plaintiff that he could not promise that the affair would not affect his continuing employment with MRS.¹⁰

While the MRS volunteer left on June 2005, the affair continued, causing irreconcilable discord between Plaintiff and his wife.¹¹ Plaintiff moved out of the marital home on January 2006, and informed his supervisor at MRS that his marriage had collapsed.¹² According to the Plaintiff, his supervisor thanked Plaintiff for keeping him informed and asked he keep him updated on any developments regarding his marital status.¹³ Plaintiff and his supervisor met again, and according to Plaintiff, his supervisor informed him that he “did not think there was any chance of reconciliation between [the Plaintiff] and his wife and that the supervisor believed there would be an ‘ugly divorce’.”¹⁴ Plaintiff testified that the supervisor informed him that “if there had been even the slightest chance of reconciliation, [the supervisor] would not have to take the issue to the MRS Board of Directors.”¹⁵ According to Plaintiff, the supervisor also “indicated that he should not have met with [Plaintiff] and that he was only supposed to meet with [Plaintiff] the next day to terminate his employment,” and that, “if anyone learned that they had met, he would deny it.”¹⁶

Later, Plaintiff learned that the Board held a meeting on February 7, 2006, which the supervisor attended.¹⁷ The meeting minutes talked of restructuring which would hurt Plaintiff’s position, and that Plaintiff’s “work performance has been very poor for some time,” and “all

⁴ *Smith*, 225 N.J. 373 at 380.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 381.

¹⁶ *Id.*

¹⁷ *Id.*

efforts to remediate have failed.”¹⁸ Plaintiff testified that the MRS Employee Information Manual provided that Plaintiff was an “at will” employee who could resign or be terminated at any time with or without cause or notice.¹⁹

The Manual also include a sexual harassment policy, but Plaintiff testified that “he did not believe that having a relationship with a subordinate was a problem because two other supervisors at MRS had dated employees who they supervised.”²⁰ Plaintiff also testified that while phone records indicated he used his business phone to speak with the MRS volunteer after hours, which was prohibited, no one ever complained to him about it.²¹ In addition, he testified that during his formal employment he was never subject to formal discipline, and emphasized that he was promoted twice and received raises annually, even after the supervisor learned of the affair.²²

In March 2006, Plaintiff and his wife filed for divorce, which was finalized in September, 2006, and which Plaintiff testified was “amicable.”²³ Plaintiff then filed a complaint against MRS, the supervisor, and unnamed “John Does” who were involved in Plaintiff’s termination.²⁴ The complaint asserted wrongful discrimination on the basis of sex and marital status in violation of LAD, N.J.S. 10:5-1 to -42²⁵, and the State Constitution, and common law wrongful discharge.

After hearing oral argument the trial court dismissed the Plaintiff’s gender and marital status LAD claims. The Court explained that Plaintiff,

“was required to establish four elements to succeed on his LAD claim: 1) that Plaintiff is a member of a protected class; 2) that he was performing his job at a level that met his employer’s legitimate expectations prior to his termination; 3) that he was fired nevertheless; and 4) that he was replaced by someone not in the same protected class, that non-protected-class workers with comparable work records were retained, or that he was terminated under circumstances giving rise to an inference of discrimination.”²⁶

The court found that Plaintiff failed to satisfy factor two and factor four of the four elements required to succeed on a LAD claim.²⁷ The court also found that he failed to present

¹⁸ *Id.*

¹⁹ *Id.* at 382.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 383.

²⁴ *Id.*

²⁵ N.J.S. 10:5-1 et seq.

²⁶ *Smith*, 225 N.J. 373 at 384.

²⁷ *Id.*

evidence that he was fired because he was “single, married, separated, or divorced”, and instead found that he 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.²⁸ Plaintiff appealed.

The Appellate Division affirmed the dismissal of Plaintiff’s gender-discrimination claim but reversed the dismissal of Plaintiff’s marital-status-discrimination claim.²⁹ In reversing, they noted that this case raised the issue of the scope of the marital-status protection under LAD, and interpreted “marital status” to include “the states of being divorced, engaged to be married, separated, and involved in divorce proceedings.”³⁰ They also found the comment “that [the Plaintiff] was being terminated because he was going to go through an ‘ugly divorce’ constituted direct evidence of discrimination 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-divorced[.]”³¹ The Defendants appealed, and the Supreme Court of New Jersey granted the Defendants’ petition for certification.

The Supreme Court affirmed the Appellate Division’s determination, stating that “[b]ecause this case involves LAD, special rules of interpretation also apply,” and that “the LAD is a remedial legislation intended to ‘eradicate the cancer of discrimination’ in our society, and should therefore be liberally construed ‘in order to advance its beneficial purposes.’”³² The Court also emphasized that marital status was not defined in N.J.S. 10:5-5.

The Court explained that when LAD was initially enacted, it only protected individuals from discrimination based on “race, creed, color, national origin, or ancestry.”³³ Discrimination based on marital status did not appear in the LAD as a prohibited employment practice until 1970, part of a comprehensive amendment to the LAD.³⁴ The “inclusion of marital status in the LAD 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 the employment practices of some companies that conditioned hiring and continued employment for women in certain positions on being single.”³⁵

New Jersey is not the only state that bars discrimination based on marital status. Twenty-one states and the District of Columbia bar discrimination based on marital status.³⁶ Some states,

²⁸ *Id.*

²⁹ *Id.* at 385.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 390.

³³ *Id.* at 388.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 388-389.

like Hawaii and Nebraska, define “marital status” in a limited manner, meaning “the state of whether someone is married or single,” while other states like Colorado, define marital status in a more complex way.³⁷ Colorado defines marital status as “a relationship or a spousal status of an individual, including but not limited to being single, cohabitating, engaged, widowed, married, in a civil union, or legally separated, or a relationship or spousal status of an individual who has had or is in the process of having a marriage or civil union dissolved or declared invalid.”³⁸ The District of Columbia defines marital status as “the state of being married, in a domestic partnership, single, divorced, separated, or widowed and the usual conditions associated therewith, including pregnancy or parenthood.”³⁹

The Court considered the legislative intent in order to determine the “scope and limits of the protection of the protections afforded by the LAD”.⁴⁰ The Court concluded that “marital status should be interpreted to include those are single or married and those who are in transition from one to another”⁴¹ stating that no employee should fear that their marriage ceremony, a divorce, or the death of their spouse will lead to termination or disciplining at work, while at the same time ensuring that the interpretation doesn’t disrupt an “employer’s legitimate business judgment and policies regarding its workforce.”⁴²

Outreach

Staff conducted preliminary outreach to various individuals, including practicing attorneys and academic faculty in an effort to obtain comment regarding the issue of whether to codify the New Jersey Supreme Court’s definition of “marital status” in the New Jersey Statutes.

Professor Stacy Hawkins, Associate Professor at the Rutgers University School of Law, noted that the New Jersey Supreme Court reached a decision which was in line with the purpose behind the New Jersey Legislature's enactment of the LAD. She indicated that the definition of "marital status" as laid out by the Court is currently the law in New Jersey. Codification of that definition in the statute would not change that, but could result in more consistent interpretations of the term moving forward. Professor Hawkins also noted that incorporating the definition in the statute could make the law more accessible to *pro se* litigants, or individuals who might not have ready access to the case law.

Representatives of the Labor and Employment Law Section of the New Jersey State Bar Association (LAELS) indicated that the LAELS considers the *Smith* decision clear and

³⁷ *Id.* at 389.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 392.

⁴² *Id.*

recommended against codification at this time but indicated a willingness to contribute to any proposed statutory revision in the event the project moves forward.

Conclusion

While the outreach did not result in a universal consensus on the issue regarding the codification of the New Jersey Supreme Court’s definition of “marital status” in the LAD, proposed language is included in this report for the Commission’s review.

Appendix

The following definition of the term “marital status” is proposed for consideration to be added to N.J.S. 10:5-5:

vv. “Marital Status” means the state of being single, married, engaged, separated, divorced, or widowed, or being in transition from one state to another.