

## in this issue:

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New Jersey Supreme Court holds that pregnant employees are not entitled to preferential leave treatment under the New Jersey Law Against Discrimination.

## East Coast Edition

*A Littler Mendelson East Coast-specific Newsletter*

### NJ Supreme Court Clarifies Leave Rights of Pregnant Employees Under New Jersey's Law Against Discrimination

*By Michael T. Grosso*

In *Gerety v. Atlantic City Hilton Casino Resort*, 2005 N.J. LEXIS 931 (July 25, 2005), the Supreme Court of New Jersey held that pregnant employees are not entitled to preferential leave treatment under the New Jersey Law Against Discrimination (LAD).

The court's decision in *Gerety* establishes that an employer does not violate LAD as long as it treats pregnant employees no differently than non-pregnant employees who require medical leave. In addition, an employer may terminate an employee who exceeds the time allowed under an employer-provided medical leave policy, even if he/she is medically unable to return to work, so long as the employer consistently applies the policy with no exceptions.

#### Factual Background

Atlantic City Hilton Casino Resort ("Hilton") provides its employees with up to 26 weeks of unpaid family and medical leave during a 12 month period, which is more than twice the amount of leave required under New Jersey and federal law. After exhausting 12 weeks of leave under the federal Family Medical Leave Act (FMLA), employees may apply for an additional 14 weeks of medical leave pursuant to Hilton's medical leave policy. The medical leave policy is gender neutral and contains a strict "no exceptions" provision, whereby an employee who takes more than 26 weeks of leave during a 12 month period is terminated from employment. Terminated employees are eligible for rehire, but do not retain seniority.

Christina Gerety ("Gerety") was pregnant with twins while employed at Hilton. Due to pregnancy-related medical complications, Gerety began medical leave early in her pregnancy, with the first 12 weeks of leave applied against her federal FMLA leave entitlement. At the end of 12 weeks, Gerety requested additional leave, which Hilton granted, providing Gerety with 14 additional weeks of leave under its medical leave policy. Near the end of her pregnancy, while still on medical leave, one of her expectant twins developed a health problem and Gerety requested additional medical leave for the duration of her pregnancy. Hilton notified Gerety that its policy did not allow employees to exceed 26 weeks of medical leave in a 12 month period and terminated Gerety's employment when she was unable to return to work.

Gerety filed suit alleging that Hilton's medical leave policy violated LAD's prohibition against pregnancy discrimination, under disparate treatment and disparate impact theories.

#### The Court's Analysis

The Supreme Court agreed with the lower court's dismissal of the disparate treatment claim, finding that Gerety presented no evidence that she was treated differently than other non-pregnant employees who had been terminated for not returning to work at the conclusion of 26 weeks, even though they were medically unable to do so.

With respect to her disparate impact claim, Gerety argued that Hilton's medical leave

policy, although facially neutral, adversely affected a sub-classification of females, namely, “pregnant women,” because only women can become pregnant and experience high-risk pregnancies requiring additional leave. The Supreme Court rejected that argument, holding that an employer does not unlawfully discriminate simply by adopting and adhering to a leave policy that provides employees with a medical leave that does not cover the entire period an employee is medically unable to work.

Instead, the court, focused on how male and female employees equally “benefited from the generous leave that Hilton permitted for its eligible employees.” According to the court, a medical leave policy does not run afoul of LAD where it even-handedly provides male and female employees with extended leave and contains a strict prohibition against extending the maximum limit. The court also noted that there may be policy arguments in favor of mandating additional medical leave for pregnancy-related issues, but it refrained, in the absence of legislative action, from carving out a more refined gender classification. The court also noted that neither Congress nor the state legislature had passed legislation requiring employers to provide nine-months of pregnancy leave for high risk pregnancies.

## Significance of *Gerety*

*Gerety* provides a useful framework to assist companies in designing and/or reviewing a current medical leave policy. To minimize exposure to pregnancy discrimination claims, we recommend that medical leave policies providing more leave than is required under federal or state law grant pregnant employees the same medical leave benefits as all other employees. Further, employers should apply medical leave benefits even-handedly to male and female employees alike, and adhere to a policy of not extending medical leaves for any reason, without exceptions.

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