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When It Rains It Pours: Can Marital Problems Affect Your Job Status?

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Imagine going through a nasty divorce. Sounds bad enough, but imagine your employer then uses it against you as grounds to terminate your employment. That is exactly what Robert Smith alleges in a case before the New Jersey Supreme Court. Smith v. Millville Rescue Squad, No. A-1717-12T3, LEXIS 1548, (N.J. Super. Ct. App. Div. June 27, 2014). Smith claims that Millville Rescue Squad (MRS) violated the New Jersey Law Against Discrimination's (LAD) prohibition against marital status discrimination when MRS termenated him solely on the basis that he and his wife were going through a divorce.

Smith and his wife were both long-term MRS employees. Smith then had an affair with a subordinate. His wife discovered it and filed for a divorce. At some point, MRS became aware of the affair and the subsequent separation of Smith and his wife. Although MRS never reprimanded Smith because of the affair itself, Smith's complaint alleges that he was told he was being terminated "because he and his wife were going to go through an ugly divorce." Id. at *4. As discussed below, the issue of the anticipated behavior of parties going through a separation or divorce was a primary focus at oral argument before the New Jersey Supreme Court on Dec. 1, 2015.

Smith filed suit against MRS, claiming that he was terminated on the basis of his marital status and sex, in violation of LAD. The defendant filed a motion to dismiss, which the trial court granted. On appeal, the Appellate Division considered the scope of the "marital status" protection afforded under LAD, "in particular whether it protects persons from discrimination because they are in the process of being divorced." Id. at *1. The Appellate Division reversed in part and rejected the trial court's narrow view that the term "marital status" only

encompasses the two statuses of married or unmarried. The Appellate Division held that "marital status" as referenced in LAD protects individuals who are in the process of being divorced and interpreted the term to encompass every state from engaged (the stage preliminary to marriage) to separated (the stage preliminary to divorce). "The apparent purpose of the ban on marital status-based discrimination is to shield persons from an employer's interference in one of the most personal decisions an individual makes—whether to marry and to remain married." Id. at *18.

The LAD states: "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination ... [f]or an employer, because of the ... marital status ... of any individual ... to refuse to hire or employ or to bar or to discharge ... such individual ...." N.J.S.A. 10:5-12(a). Although the LAD is generally interpreted broadly, it does not define "marital status." Until the Appellate Division's decision in this case, New Jersey's courts have never expressly addressed whether the term encompasses status as a divorced person or a person going through a divorce action. In this case, the Supreme Court may be primed to make a determination as to the scope of "marital status." There are a number of other states that, like New Jersey, provide individual protection from discrimination on the basis of marital status. Of those states, however, only a handful have defined the term "marital status" in their antidiscrimination statutes. In these states, "marital status" is not limited in scope to a binary definition of being either married or unmarried.

During oral argument, the Supreme Court considered a few states that have specifically defined "marital status" in their statutes to embrace all stages before and after marriage, including divorce specifically. For instance, in Washington state, "'marital status' means the legal status of being married, single, separated, divorced, or widowed." Wash. Rev. Code. 49.60.040(17). Minnesota's statute goes even further in protecting applicants and employees, stating that "'marital status' means whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse." Minn. Stat. 363A.03, Subd. 24.

However, there are a number of other states, like New Jersey, that do not provide a definition of "marital status" and have had to interpret their antidiscrimination statutes' definition of the term in case law. Michigan's courts, for instance, have stated that the relevant inquiry is whether discrimination occurred based on if an individual is married, rather than to whom one is married. In other words, Michigan's law does not require an employer to ignore the person to whom the applicant or employee is married. Similarly, Connecticut has held that marital status discrimination did not occur where an employee was discharged because he was married to another employee who the employer intended to terminate as well. Pleau v. Centrix,343 App'x 685 (2d Cir. 2009). Likewise, a Florida case found that discrimination on the basis of marital status did not occur where an employee was terminated because the employer wanted to keep the employee's husband, a former employee himself who was accused of misconduct, off the premises. Nat'l Indus. v. Comm'n on Human Relations, 527 So. 2d 894 (Fla. Dist. Ct. App. 1988). Another Florida court held that there was no discrimination against a former correctional officer in violation of the Florida Civil Rights Act simply because she was married; rather, she was fired because she fraternized with an inmate and then married him. Burke-Fowler v. Orange Cty., Fla., 447 F.3d 1319 (11th Cir. 2006).

The distinctions these other states have made seem clear—marital status refers to whether one is single or married (or any stage in between), but the employer need not ignore the specific identity of one's spouse or the actions of the spouse or married couple. This varies significantly from Minnesota's statute, as noted above. This is also an important distinction for MRS's defense and any employer in a similar situation. MRS can argue that Smith was not fired because of his "ugly divorce," but because of his actions and the circumstances that led to the divorce—his wife was also an employee and the catalyst for the divorce was his relationship with a subordinate (although he was not reprimanded for the affair at the time).

At oral argument on Dec. 1, 2015, Justice Patterson pressed counsel on where the dividing line would be between an appropriate policy based on expectations of human behavior in the workplace, and an inappropriate action toward an employee that is rooted in expectations of events that have not yet happened. As oral argument progressed, the direction of the court focused on when an employer's interest in preserving a nondisruptive workplace could overcome an employee's interest in a nondiscriminatory workplace. The court queried whether MRS, or other employers, could have a rational argument for terminating an employee based on anticipated behavior where, as here, the employer engages in emergency medical transportation and rescue services. This was not a consideration of the Appellate Division, which held that MRS had violated LAD by terminating its employee on the basis of the employee's marital status and the anticipated disruption that could ensue. Specifically, the Appellate Division "reject[ed] the notion that plaintiff was terminated not because of an imminent divorce, but because of the impact the divorce was expected to have on his ability to perform in his job." Smith v. Millville at *20, citing Thomson v. Sanborn's Motor Express, 154 N.J. Super. 555 (App. Div. 1977).

The Supreme Court also explored whether a distinction exists between an employer's termination of an employee on the basis of anticipated behavior during a divorce and antinepotism policies, which seemingly also seek to stem anticipated behavior. To this issue, the Appellate Division found that"antinepotism policies do not run afoul of LAD's proscription against marital status-based discrimination. They are not targeted at persons based on marital status." Smith v. Millville at *21. This was a significant issue during oral argument, where the court posed a number of questions that sought to draw a bright-line distinction between the two issues. Counsel for plaintiff reiterated the disposition of the Appellate Division, because antinepotism policies are applied to all employees and are not specific to a certain class of individuals for whom certain stereotypes may exist, i.e., that divorcing or separating parties may engage in an "ugly" divorce. Plaintiff's counsel highlighted the finding made by the Appellate Division—that the LAD "does not bar an employer from taking employment action against a divorcing employee who actually demonstrates antagonism, incivility, or lack of professionalism," because that type of employment decision would be based on an employee's disruptive conduct and not on the employee's marital status. Counsel for the NJ-ACLU, which submitted an amicus brief in this matter, additionally reiterated this point during oral argument, noting that "antinepotism policies get at underlying relationships and are not talking about legal statuses, such as marriage." So long as anti-nepotism policies are universal and not specific to specific classes of individuals, the LAD's intent would not be offended. Thus, marital status can be affected in an across-the-board nepotism policy, but the question becomes whether an adverse employment action was

made on the basis of marital status or because of other underlying issues.

In the end, it remains to be seen whether the Supreme Court will go so far as to define "marital status" as clearly as Washington or Minnesota have done. The tenor of the court's questioning toward the end of the oral argument suggested that perhaps the issue of whether an employer's actions were legitimate is best left to a jury to decide. Irrespective of the court's ultimate decision, an employee's job performance should speak louder than his or her marital status.