

CLIENT ALERT

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New Jersey Supreme Court Upholds Leave Policy That Treats Pregnancy The Same As Other Temporary Disabilities

This Firm recently obtained a significant victory before the New Jersey Supreme Court in *Gerety v. Atlantic City Hilton*, by convincing a majority of the Court that an employer does not discriminate against pregnant women by treating pregnancy the same as other temporary disabilities under the terms of its disability leave policy. In ruling in our client's favor, the Court reversed the finding of the trial court that the leave policy was inherently discriminatory by not recognizing that only women can become pregnant, and that women with high risk pregnancies must be allowed time off from work for up to nine months. The Supreme Court specifically rejected the theory argued by the plaintiff that the New Jersey Law Against Discrimination ("LAD") should be read to require *preferential*, rather than equal, treatment for pregnant employees.

Factual Background

Plaintiff Christina Gerety was a long-term employee of the Atlantic City Hilton. In September 1997, Gerety became pregnant with twins. Because her doctor ordered her to remain out of work beginning in October 1997 due to medical complications related to the pregnancy, Gerety requested and was given time off from work under the Hilton's leave policies. The first 12 weeks of time off from work was counted as family leave under the Federal Family and Medical Leave Act ("FMLA"). Once that family leave was exhausted, Gerety's request for additional leave was granted under the Company's disability leave policy, which allowed up to six months of leave for every employee regardless of the nature of the disability. That policy also provided, without exception, that employees unable to return to work after six months would be terminated. Because of

medical conditions related to her pregnancy, Gerety was unable to return to work in April 1998, when her eligibility for disability leave under the policy was exhausted. Gerety's request for additional time off as personal leave was then rejected by the Hilton because, under the Hilton's policy, personal time may not be used to extend disability leave. Accordingly, Gerety's employment was terminated at that time because she was unable to return to work after exhausting her entitlement to disability leave. Gerety gave birth approximately two weeks later. She thereafter filed suit claiming that her discharge was the result of gender discrimination under the LAD.

The Trial Court Ruling

The Hilton filed a motion for summary judgment based on its contention that Gerety had been discharged pursuant to the terms of its facially neutral disability leave policy, and that she had been treated the same as any other employee, regardless of gender, who was unable to return to work at the end of the six month disability leave period. In denying the Hilton's motion, the trial court recognized that there was no evidence that Gerety had been treated differently than any male employee who was unable to return to work after six months of disability leave, as the record showed that males and females alike had been discharged when they were unable to return to work after exhausting the leave time provided for under the policy. The trial court nevertheless concluded that the leave policy was inherently discriminatory against women by failing to recognize that only women can become pregnant, and that some pregnant women may need to be out of work for more than six months due to medical complications related to the pregnancy. The trial court concluded that the leave policy was discriminatory on its face because it did not provide for additional leave for high risk pregnancies, such as Gerety's, and ruled that

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it would charge the jury at trial that the policy, as applied to Gerety, was unlawful.

The Supreme Court

This Firm was brought in after the Hilton had lost its motion for summary judgment. After the trial court denied our motion for reconsideration, and the Appellate Division denied our motion for leave to appeal, we were successful in convincing the Supreme Court to grant the extraordinary relief of leave to appeal in light of the importance of the issue to employers throughout the State who have historically tailored their leave policies to meet the long standing legal requirement that pregnancy had to be treated *the same* as every other disability.

In its 4-3 decision, the majority reversed the holding of the trial court and found that the Hilton's leave policy was not discriminatory. In reaching that conclusion, the majority focused on the fact that the Hilton's leave policy was facially neutral in terms of providing leave to employees regardless of gender, and that the Hilton had applied the policy equally in its treatment of men and women regardless of the underlying medical reason for the need to be away from work. The majority therefore found that the policy was not unlawful because it was consistent with the LAD's requirement of equal treatment. In further support of its opinion, the majority observed that the New Jersey Legislature has not required that pregnant employees be given preferential treatment in terms of the amount of time off from work due to pregnancy, or that women be guaranteed up to nine months of leave in case of high risk pregnancies, in enacting laws specifically addressed to the issue, including the New Jersey Family Leave Act ("NJFLA"). The majority further observed that the federal Pregnancy Discrimination Act ("PDA") mandated *equal*, not preferential, treatment for pregnant

women. Ultimately, the majority concluded that the LAD is not violated so long as an employer treats its pregnant employees no differently than other employees who apply for and receive extended leave for medical reasons, and that any requirement for preferential treatment would have to be enacted by the legislature, not the courts.

Conclusion

The *Gerety* decision was of critical importance in reversing the trial court's finding that neutral leave policies are inherently discriminatory against women, and that such leave policies would be found to be unlawful unless they provide for preferential treatment for pregnant employees. The Supreme Court restored the state of the law which requires only that employers treat pregnancy the same as other temporary disabilities, and properly recognized that any change in the law would have to come from the legislature. Accordingly, employers need not amend their leave policies at this time to guarantee leave to pregnant employees for up to nine months, but should be aware that the *Gerety* opinion has created a fair amount of controversy because of the result – that the pregnant Gerety was discharged only two weeks prior to giving birth, at which time she would have become eligible for additional time off under the New Jersey Family Leave Act to care for her newborn babies. Because of that result, the Supreme Court's decision has spawned calls for legislation to protect the jobs of pregnant employees for the duration of their pregnancy. We will keep you informed of legislative developments in response to the *Gerety* opinion.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

Hurricane Katrina Leave-Donation Programs

In a move reminiscent of a guidance issued following the September 11, 2001 terrorist attacks, the Treasury Department and Internal Revenue Service recently announced special tax relief to encourage leave-based donation programs to aid victims of Hurricane Katrina's devastation.

Under Notice 2005-68, employees may, instead of donating cash to the relief effort, forego vacation, sick or personal leave in exchange for their employers making cash payments to qualified tax-exempt organizations providing relief to the victims of the Hurricane Katrina's extraordinary destruction, so long as those cash donations are made prior to January 1, 2007.

Employees will not have to include the donated leave in their income for tax purposes, however, they may not claim a charitable contribution deduction for the value of the foregone leave excluded from their compensation and wages. Employers, on the other hand, will be allowed to deduct the amount of the cash payments they make.

Additional information for setting up such a program may be obtained from Sheldon A. Iskow of the Office of Associate Chief Counsel (Income Tax and Accounting) at 202-622-4920.

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