

# Magna Carta— Still Paving the Long Road to Equality

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**W**hile it may not be widely known, Magna Carta is a key document that helped lay the groundwork for future legislation guaranteeing the rights of women. This was true despite only granting rights to a small percentage of elite women when it was signed in 1215. Over time, the seeds of progress planted by Magna Carta spread from Europe to America and led to the provision of greater legal protections for women.

By way of historical context, following the Norman conquest in 1066, land in England was considered to belong to the king.<sup>1</sup> In what became known as the feudal system, the barons who supported and fought for the king were handsomely rewarded with large parcels of land to govern, and became the “tenants-in-chief” of those lands.<sup>2</sup> In exchange for the continued support provided by the barons, the king was obliged to protect them, including their widows and children.<sup>3</sup> However, once the barons died, the king often failed to fulfill these unwritten promises. Instead, the king preyed upon the vulnerable remaining family members, who were typically women and children.

The vast majority of Englishwomen in the 13th century had no recognized legal rights. In 1215, an Englishwoman could be betrothed at age seven and married at 12.<sup>4</sup> Once married, any property to which an heiress might be entitled legally belonged to her husband, and her legal identity was unified with that of her husband.<sup>5</sup> Married women also had no right to bring a matter in court, since they were not considered to have separate legal identities.<sup>6</sup> There were, however, limited rights enjoyed by a very select group of women. Prior to 1215, it was recognized by barons that their widows had the right to choose whether to remarry. Moreover, in contrast to married women, widows were *femmes sole*, permitted to manage their

own affairs and argue their cases in court.<sup>7</sup>

However, the king had a significant interest in the disposal of estates and garnering financial and military support. Consistent with that power, the king was prone to disregard the few rights the noble women had, and would also dictate the marriage of heiresses and remarriage of widows.<sup>8</sup> Despite it being contrary to his agreed-upon promises to his barons, prior to Magna Carta, the king routinely forced widows to remarry whomever he pleased before their children became of age and inherited their deceased husbands’ estates, thereby depriving both the widows and the children of the estate.<sup>9</sup> The abuse of this right became so rampant that King John, and his predecessor King Richard I, not only interfered with the unions of wealthy widows, they also sold heiresses into marriage to the highest bidders, including men who were socially inferior, and without notice to the heir’s next-of-kin.<sup>10</sup> King John and King Richard I also sold the guardianship of noble heiresses in order to fund military operations and their expeditions to the Holy Land in the Third Crusade.<sup>11</sup>

Prior to Magna Carta, there had been ongoing tensions and escalating pressure on the monarchs by their barons, even before King John and King Richard, to respect the autonomy of noble widows and not force a union that might result in a stepfather disposing of the inheritance of his wife’s children from her first marriage. These conflicts, along with the heavy taxation of the barons and the English Church, led Archbishop of Canterbury Stephen Langton and the barons to threaten civil war if King John did not agree in writing to grant of certain liberties and restrict his many abuses. That agreement, in 1215, became Magna Carta.<sup>12</sup>

Significantly, the following chapters of Magna Carta provided some protections for women’s rights with respect to marriage and property:



6. Heirs shall be married without disparagement, yet so that before the marriage takes place the nearest in blood to that heir shall have notice.
7. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.
8. No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

In sum, after Magna Carta was signed, while widows still needed the king's permission to remarry, the king could no longer force widows to marry against their will. Widows no longer could be cast out of their homes, and were given their dowers and inheritances without difficulty. Additionally, an heiress's next-of-kin needed to be provided notice before she was married. While these rights may seem both odd and insignificant today, they were the seeds from which the founding fathers found inspiration to assert their own rightful liberties in the Declaration of Independence and the U.S. Constitution.<sup>13</sup> These seeds were the kernels from which women's rights began to flourish, including the 19th Amendment to the United States Constitution giving women the right to vote in 1920.<sup>14</sup>

Over the past century, New Jersey has distinguished itself as a state that has acted to protect and further women's

rights, especially in the workplace. However, just as there were limits to the scope of the law at the time of Magna Carta, the authors believe there are boundaries still to be broken today. While the inclination may be to exclaim, "You've come a long way baby!" from the limitations imposed on King John's female subjects, there still remains a division between men and women in the job force after 800 years. Some of the developments that emanate from the rights and liberties that began to be recognized in 1215 are described below.

### **Expansion of Gender Rights, Equal Protection, and Benefits Afforded to Women**

Over the years, New Jersey has consistently added to the protection of women in the workplace. Women cannot be discriminated against due to sex, marital status, and pregnancy through the broad protections described below.

#### ***New Jersey Law Against Discrimination—Sex, Marital Status and Pregnancy***

Unlike Magna Carta, where the focus of protection was on a small segment of women, the protections under the New Jersey Law Against Discrimination (NJ LAD) are not limited to the privileged classes. Since its inception in 1945, the NJ LAD has been the standard for workplace protections for race, national origin, creed, national origin or ancestry and other "protected categories."<sup>15</sup> However, discrimination on the basis of sex and marital status were not included until 1970.<sup>16</sup> The following 30 years brought several other amendments to the NJ LAD that impacted some women in terms of preventing discrimination on the basis of affectional or sexual orientation (1991),<sup>17</sup> disability (2003),<sup>18</sup> domestic partnership status (2003),<sup>19</sup> civil union status (2006)<sup>20</sup> and gender identity or expression (2007).<sup>21</sup> There

was also an amendment preventing discrimination on the basis of familial status (1992), however, this amendment does not squarely fall under the NJ LAD's section that is applicable to employment discrimination.<sup>22</sup> In addition to the above protections, the NJ LAD protects against retaliation for making complaints about discrimination.<sup>23</sup>

Until 2014, women who were discriminated against by their employers due to pregnancy, and/or were not reasonably accommodated for pregnancy-related conditions, encountered some legal obstacles. Because pregnancy was not identified as a protected characteristic under the law, aggrieved pregnant employees were required to characterize their claims in terms of sex or disability discrimination, which often proved challenging. After many years of fighting for the enactment of legislation protecting pregnant workers, the Pregnant Workers Fairness Act (PWFA) was signed into law as an amendment of the NJ LAD on Jan. 21, 2014.<sup>24</sup> Additionally, pregnant workers are entitled to accommodations such as "bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work."<sup>25</sup>

An unpublished 2014 Appellate Division case, *Smith v. Millville Rescue Squad*,<sup>26</sup> even though not citing it, nonetheless followed the essential principle of Magna Carta in focusing on the marital status of individuals and their rights. In *Smith*, the court expanded the definition of "marital status" to bar employers from making employment decisions based on the status of an employee as engaged, separated or divorcing. In reversing the trial court's dismissal of his claim, the Appellate Division focused on the broad remedial efforts of the NJ LAD and expanded the interpretation of marital status to include divorcing individuals.<sup>27</sup> As such,



employers cannot make employment decisions based on stereotypes of how an individual's marital status, in the expanded definition, might impact the workplace.

### ***New Jersey Constitution and New Jersey Civil Rights Act***

Women have rights in New Jersey directly under the New Jersey Constitution, as well as in private rights of action. New Jersey adopted its original constitution in 1884, in which it provided that, "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."<sup>28</sup> In 1947, New Jersey enacted its present constitution, in which it changed all "men" to all "persons."<sup>29</sup> The effect of changing this word has led courts to acknowledge that women enjoy constitutional protections in employment and to property equal to those of men.<sup>30</sup> In 2004, the New Jersey Civil Rights Act (NJ CRA) was enacted, which provided a private right of action to protect employees' New Jersey and United States constitutional rights where someone acted "under color of law," such as in the public-sector workplace.<sup>31</sup> However, under the NJ CRA, private employers were also affected, as the state attorney general could opt to file a suit against a private employer if it was believed that constitutional rights were being infringed.<sup>32</sup>

### ***Equal Pay Act and Additional Retaliation Protections for Pay Disparity Claims***

In addition to a private right of action under the NJ LAD, women can file claims under the New Jersey Equal Pay Act (NJ EPA).<sup>33</sup> Since 1952, the NJ EPA, like its federal counterpart, has prohibited employers from discriminating in the method or rate of wage payment

because of an employee's gender. The NJ EPA does allow for pay differentials on bases other than sex, but requires that equal compensation be paid if the nature of the work is the same.

In Aug. 2013, the anti-reprisal provision of the NJ LAD was amended to prohibit employers from retaliating against employees who share compensation and benefit information for purposes of investigating, contemplating or filing a discrimination claim under the NJ LAD.<sup>34</sup> The law protects from retaliation an employee who seeks to take action against any wage disparity. The amendment was introduced and enacted because of legislators' concerns that gender-based income disparities continue to exist and go undiscovered because of employees' reluctance to discuss compensation out of fear of retaliation.<sup>35</sup>

Effective Jan. 2014, a new posting requirement was implemented for New Jersey employers with 50 or more employees, entitled "Right to be Free of Gender Inequity or Bias in Pay, Compensation, Benefits or Other Terms and Conditions of Employment."<sup>36</sup> The posting references both federal and state protections regarding disparity in compensation and privileges of employment due to an individual's sex. It puts female workers on notice regarding which laws pay inequality violate, the remedies available under the laws and the timeframes within which claims must be filed.

### ***New Jersey Family Leave Act***

In 1989, New Jersey enacted the New Jersey Family Leave Act (NJ FLA)<sup>37</sup> to protect employees in need of time off, including time to care for a newborn or adopted child or to care for a family member with a serious health condition. The NJ FLA was adopted four years before the federal Family Medical Leave Act (FMLA). Under the NJ FLA, employees of a covered employer who have worked the requisite number of hours are entitled to take up to 12 weeks of

unpaid leave during a 24-month period for the care of a newborn. These requirements generally only apply to employers with 50 or more employees.

While the federal FMLA covers areas that are not addressed by the NJ FLA, women taking leave for their own pregnancy-related medical condition and/or pregnancy are entitled to more than 12 weeks leave due to the way the two laws interact. When women take off in part due to their own pregnancy-related disabilities and in part due to caring for and/or bonding with their newborns, they can sometime receive more than 12 weeks off with job protection because New Jersey's law does not cover the woman's own serious health condition and New Jersey regulations have made it explicit that it will not abridge any rights. For example, "if an eligible employee is on disability leave while pregnant for four weeks and is on disability leave following childbirth for an additional six weeks, those 10 weeks of disability leave count against the employee's FMLA entitlement only, and the employee retains the full 12-week entitlement under the [NJ FLA] for the care of the newly-born child."<sup>38</sup>

### ***Sexual Harassment Protections***

In 1992, the New Jersey Supreme Court decided the standards of liability for sexual harassment cases in New Jersey in *Lehmann v. Toys 'R' Us*.<sup>39</sup> To be actionable under *Lehmann*, sexual harassment does not have to be sexual in nature; rather, it need only be directed toward a person because of his or her sex. The Court found that liability could be imposed against employers for supervisory sexual harassment. In short, *Lehmann* recognized that employers will be liable for supervisory harassment "in most cases" where supervisors abuse the authority delegated to them by employers. However, as discussed below, the longstanding protections under *Lehmann* and its progeny are now being disturbed.



### *New Jersey Temporary Disability Benefits and New Jersey Family Leave Insurance*

In 1948, New Jersey became one of a limited number of states to provide temporary disability benefits to employees.<sup>40</sup> Temporary disability benefits can be used for many disabilities, including pregnancy, so women are not out of work without financial support.

In 2008, New Jersey again became a trailblazer as one of the few states that provides paid leave to working mothers to enable them to bond with a newborn or newly adopted child, or to care for a seriously ill family member under New Jersey family temporary disability benefits, also known as New Jersey family leave insurance.<sup>41</sup> Using pregnancy and childbirth as an example, a pregnant worker would be entitled to temporary disability benefits for her own medical condition, generally up to four weeks before delivery and six or eight weeks after. She would then be entitled to up to six weeks of benefits under the Family Leave Insurance Program to bond with her child. This program provides coverage to employees of all private and governmental employers, and is not limited to employers with 50 or more employees.

### *New Jersey SAFE Act*

Another area where recent strides have been made for women in the workplace involves protections for victims of domestic violence. In 2013, the NJ SAFE Act was passed, which is a law that affords domestic violence victims, and their caregivers, leave from work.<sup>42</sup> Those affected would be entitled to up to 20 days of unpaid leave to obtain medical attention and psychological counseling, join a victim services group, and seek legal help and/or relocation services during the 12-month period following a documented offense. The caregiver benefit allows for the same amount of leave to someone caring for a parent, spouse, child, civil union or domestic partner who was the victim of

domestic violence. Coverage requires the employee provide written notice to the employer. However, the employer is prohibited from asking questions that invade the employee's privacy.

### *New Jersey Governmental Agencies and Academic Groups*

Governmental agencies have been put in place to safeguard the rights that exist and to continue advocating for women's rights and opportunities. Since 1974, the New Jersey Division on Women has been dedicated to developing women's rights in multiple areas, including employment and wages, through program development, research and public discussion. Such actions have led to the further advancement of women's rights. The New Jersey Advisory Commission on the Status of Women was also created in 1974 to advocate for all women and address critical issues to the Division of Children and Families. In 1993, Rutgers University School of Management and Labor Relations founded the Center for Women and Work. The center is a research and program leader on issues addressing the advancement of females in the workplace. Another entity geared toward compiling studies on the impact of gender at work is the New Jersey Council on Gender Parity in Labor and Education, founded in 1999.

### **Gender Inequities, Discrimination and Equal Pay Disparities**

The protections granted to women in New Jersey, as described above, paint only half the picture. Despite these advances, the authors believe there is still much to be done to reach true gender parity in the workplace, and that at a very basic level women are still being denied a "seat at the table." For example, within New Jersey's 111 largest publicly held companies, only four have female CEOs, roughly a third have no female board members, and only 14 per-

cent of the total board seats belong to women.<sup>43</sup> To put that into perspective, women occupy only 139 of the 1,007 board seats available at those corporations.<sup>44</sup> While New Jersey's female representation is slightly higher than the national average, the glass ceiling still seems firmly intact.

Despite clear advancements and legal protections, statistics also show women in New Jersey and throughout the United States are still not receiving equal pay for equal work. In 2013, according to the U.S. Department of Labor Bureau of Statistics, women's median earnings, at the national level, were 82.1 percent of men's earnings.<sup>45</sup> In New Jersey, the gender gap was greater than at the national level, as women only earned 79.5 percent of men's earnings in 2013.<sup>46</sup> Likewise, in 2012, the U.S. Department of Labor Bureau of Statistics cited that, nationally, women's median earnings were 80.9 percent of their male counterparts.<sup>47</sup> However, in New Jersey the median earnings for women were 79.4 percent of that of men's earnings.<sup>48</sup> Therefore, from 2012 to 2013 the New Jersey gender pay gap improved, but only to a negligible degree. The picture is worse for older women, as history shows that women's income lessens as they age and take on familial responsibilities, whereas men's income increases during that same time.<sup>49</sup>

While the above disparities show that gender discrimination remains alive and well in the Garden State, proving discrimination becomes more difficult and muddled when familial responsibilities come into play given that familial responsibility discrimination does not fit neatly within the confines of any of the legally available protected characteristics. Therefore, crafting a gender claim out of familial responsibilities discrimination can be tricky even though statistics show these responsibilities are often shouldered by women.

Studies show that while pay and promotion disparities are obvious forms of



workplace discrimination, other workplace disparities have been cited. For example, women who speak up in meetings may be shot down, interrupted, and/or penalized for speaking up.<sup>50</sup> Additionally, women are often expected to perform duties traditionally considered “women’s work,” such as getting coffee, taking notes, and mentoring and helping colleagues—actions that invariably not only consume valuable time but may cause women to miss other opportunities for development and career advancement. Surprisingly, when women assist or mentor their colleagues, they are generally rated lower than men who provide the same assistance.<sup>51</sup>

### **Recent Sexual Harassment Limitations**

As recently as early 2015, the New Jersey Supreme Court eliminated some significant protections afforded under *Lehmann* in the decision in *Aguas v. State of New Jersey*.<sup>52</sup> In *Aguas*, the Court endorsed what is commonly referred to as the *Farragher/Ellerth*<sup>53</sup> defense, which enables employers to avoid liability for supervisory harassment if they have effective anti-harassment policies and remedial measures that were not followed by the victim of harassment.<sup>54</sup>

The authors believe the New Jersey Supreme Court’s decision in *Aguas* does not take into consideration the psychology of individuals and workplaces. For example, countless claims of sexual harassment may go unreported each year because victims are too embarrassed or distressed to complain. Also, victims may fear they will be retaliated against if they complain or otherwise feel that they cannot take advantage of remedial and preventative policies that require them to report wrongdoing to the wrongdoer.

### **Financial Constraints in Taking Family and Disability Leave**

Today, the United States is the only industrialized nation without paid

maternity leave. And while New Jersey’s family leave insurance provides for six weeks’ of benefits, it is administered through the Temporary Disability Benefits Law, thereby limiting the compensation paid to two-thirds of an employee’s weekly pay, or a maximum of \$604 per week. Additionally, the law does not provide job protection.<sup>55</sup>

### **Family Leave and Breastfeeding Lack of Protections**

While the FMLA and NJ FLA provide up to 12 weeks of job protection, leave designated as FMLA and NJ FLA is unpaid. Moreover, only those employed in workplaces with 50 or more employees, who worked for 12 consecutive months prior to the leave and worked a minimum number of hours during those 12 months, qualify for leave. Therefore, many women who work for smaller employers and/or have not been working a full year for their employers, continue to be vulnerable and may be terminated when they take maternity leave.

In 2010, the federal Fair Labor Standards Act was amended to add a requirement that employers with 50 or more employees must provide unpaid breaks for breastfeeding unless doing so constitutes an undue hardship.<sup>56</sup> As such, women are generally entitled to a reasonable time to express breast milk for up to one year after the child’s birth, in a location other than a bathroom that is shielded from view and intrusion by coworkers. However, even with the enactment of the PWFA, New Jersey has no such requirement, and small employers are not required to provide breaks for expressing breast milk.

### **Conclusion**

While Magna Carta was a document of its time, its core principles have formed part of the thread that has run through the various incarnations of the New Jersey Constitution. That constitu-

tion has been significant in more contemporary developments of women’s rights. It remains remarkable that 800 years ago there was some recognition of a woman’s right to not be forced to marry against her will. If not the first official recognition of that right, Magna Carta nonetheless provided a small first step from which today’s legal terrain has developed.

Plainly, the road to equality for women has improved significantly in the 800 years since Magna Carta. From narrow rights for noble women regarding marriage and property to an expanse of protections for all women in the workplace, the growth that has occurred since 1215 is obvious. As the great charter of the liberties, Magna Carta was designed to promise protections. New Jersey has followed in these historical footsteps, and has changed the face of women’s rights in the workplace. However, as with all stages of progress, the authors believe there remains room for improvement and further growth to ensure women receive true equality. ♀

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