New Jersey Law Journal

FEBRUARY 28, 2000

LAD Plaintiff Challenges Order To Undergo Mental Examination

By Mary P. Gallagher

APPELLATE WATCH

Plaintiffs seeking emotional distress damages under New Jersey's Law Against Discrimination have not been required to submit to psychiatric examination, but a state appeal court panel is about to consider whether one should.

A lawyer for Tropicana Products argued to an Appellate Division panel on Thursday that, in some circumstances, mental examinations are necessary to enable an effective defense, even where the plaintiff does not claim any mental disorder, has not consulted any mental health expert and does not plan to present expert psychiatric or psychological testimony.

The judges, sitting in Morristown, were hearing an interlocutory appeal in *Kluczyk v. Tropicana Products Inc.*, A-1405-99T5, which stemmed from an Oct. 22, 1999, Hudson County judge's order that compelled Tadeusz Kluczyk to under-

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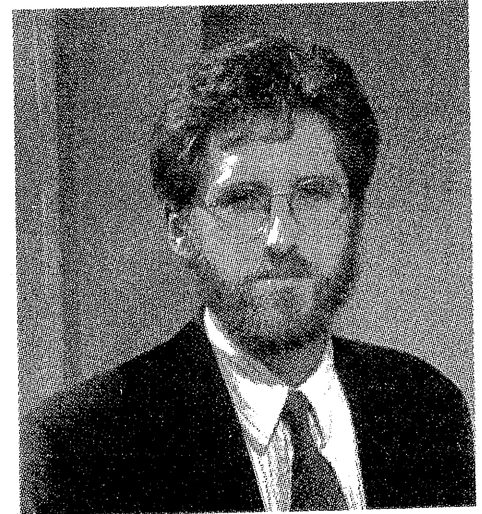

DON'T GO THERE: Andrew Dwyer argues that the unrestricted scope of the examination authorized by a trial judge — allowing inquiry into his client's sexual history, practices and attitudes — is an invasion of privacy.

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go an exam under Rule 4:19, "Physical and Mental Examination of Persons."

In his original complaint, filed in December 1998, Kluczyk alleged that fellow workers at a Tropicana warehouse in Jersey City caused him physical injury and emotional distress by a continuous campaign of sexual harassment which management did nothing to remedy, despite repeated complaints. He claimed he was subjected to explicit sexual overtures, obscene and suggestive comments, and sexually explicit gestures, including pantomimes of anal sex and being called a "faggot." Kluczyk amended his complaint in October 1999 to add a claim that Tropicana terminated him in retaliation for bringing the action.

The complaint contains a separate emotional distress count, but Kluczyk's attorney, Andrew Dwyer of Newark's Dwyer & Ellis, stated in response to a pointed question from Presiding Judge Edwin Stein that he was willing to dismiss that claim to spare his client the psychiatric examination.

Dwyer had, in fact, offered to do so in the trial court, but Superior Court Judge Joseph Ryan ruled that even without the separate tort claim, the plaintiff's claim for emotional distress damages under the LAD was sufficient to place his mental condition in controversy.

Appellate Division Judge Howard Kestin was quick to stress the difference between a tort claim for infliction of emotional distress and what he termed "mental anguish" damages asserted in LAD and other tort claims.

The panel sent both parties into the hall in the middle of their arguments to see if the defendant would waive the examination in exchange for dismissal of the emotional distress claim. However, the two sides failed to agree to a quid pro quo and resumed their arguments on returning to the courtroom.

Defendants' attorney James Flynn, an associate with Newark's Epstein Becker & Green, argued that, even in the absence of a separate emotional distress claim, the examination was necessary because the plaintiff alleged "severe" emotional distress injuries, including anxiety, stress, depression and loss of sleep, which would still be present as part of the harassment claim.

Flynn, an associate at Newark's Epstein Becker & Green, expressed concern that withdrawal of the emotional distress claim "in form" but not "in substance" would leave his clients exposed to substantial damages based on the same essential harm. If Kluczyk tried to prove extensive emotional harm at trial, Judge Edwin Stern commented that the defendants could ask for a continuance in order

Judge Kestin stressed the "special" and "ultraremedial" nature of LAD cases and repeatedly asked Flynn how he could distinguish LAD claims, which are "tortish," from other tort claims, in which a psychiatric examination is typically not required. Kestin invoked the example of an auto accident case alleging loss of consortium and disturbed sleep patterns.

Flynn agreed that it was probably not necessary to psychologically examine a plaintiff on a consortium claim. However, he contended, an auto accident usually involves a more concrete physical injury than the chest pains alleged by Kluczyk, which were themselves allegedly caused by emotional distress. Flynn opined that an auto accident defendant might be entitled to a mental examination in some cases. He also drew an analogy between examining a plaintiff's mind and examining the back of

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a plaintiff who alleges physical injury "to see how the injury causes the symptoms."

Asked Stern: "What about one-count LAD cases?" Flynn agreed he had never seen a psychiatric exam in such a case but insisted that one was necessary here or Tropicana would be "hamstrung" in its ability to contest not only damages but causation as well.

Both Stern and Kestin inquired where Flynn found the "good cause" that was necessary under R. 4:19. When Flynn responded that good cause could be found in the plaintiff's allegations, Stern instructed that defendants must locate it in "specific allegations as developed in discovery."

Judge Dorothea Wefing wanted to know if the defendants had questioned Kluczyk in his deposition about "mental anguish" damages. Flynn acknowledged that he had only lightly explored the area because he anticipated a psychiatric exam

Flynn also indicated that the defendants might want to depose Kluczyk again after he was examined by Dr. Harvey Hammer, the psychiatrist who would conduct the exam. This was despite the fact, pointed out by Dwyer, that the plaintiff's deposition has been concluded and that Dwyer had not been blocking questions during the five days that it lasted. Dwyer hinted darkly that the exam's real purpose was to question the plaintiff's sexual history, not ask about emotional damages.

Stern then asked Flynn what his clients wanted to accomplish. Flynn replied that the defendants sought "to explore alternative proofs for the psychological harm alleged."

Flynn explained how a psychological exam might reveal that plaintiff's loss of sleep was a pre-existing condition.

But "why does a psychiatrist have to ask the question," Wefing queried, when Flynn himself could ask the plaintiff about his sleep patterns under oath in a deposition?

A psychiatrist, replied Flynn, would have the "background and experience necessary to ask follow-up questions."

When Kestin ventured that Hammer's general testimony as an expert concerning "the causes of these conditions" would suffice, Flynn said that the defendants' expert witness fees would be wasted once his adversary undermined Hammer's testimony by pointing out to the jury that the expert had never personally examined Kluczyk.

When Stern raised the possibility that the defendants might try to probe Kluczyk's credibility or "sensitivity," Flynn responded that he was principally concerned with damages but "might also uncover evidence that plaintiff had problems dealing with reality."

Dwyer also argued that the unrestricted scope of the examination authorized by Judge Ryan's order would invade Kluczyk's privacy by allowing inquiry into his client's sexual history, practices and attitudes. According to Dwyer, potential areas of inquiry identified by the defendants include whether the plaintiff masturbates and his attitude toward cunnilingus. Dwyer said his allegations about the scope of the exam are based on a document provided by Hammer, and emphasized that the defendants have never disavowed that they would pursue such areas of inquiry.

Stern suggested that bifurcation might be in order so that litigation of damages need not be addressed until there was a determination of liability under the LAD. Although Flynn called this "an excellent suggestion in an appropriate case," he observed that the result would actually be "trifurcation" because of the already separate punitive damages phase.

This only rendered the idea of bifurcation even more appropriate to Stern, however, because, he said: "we're already splitting the process."

Stern discounted Flynn's worry about separate juries, commenting that death penalty jurors are told at the start of the trial that there are two phases and "that they might go home for a few weeks" in between.

If the panel were to hold that no examination was required predicated on plaintiff's dismissal of the emotional distress claim, Stern asked if the plaintiff could reinstate the claim if the defendants were later able to establish good cause and compel the psychiatric examination.

Flynn deflected the question, asserting that "if plaintiff can make out an emotional distress claim, he should stand behind it and be examined" but if there was "no basis for the claim, he should withdraw it anyway."

Stern reminded Flynn that the plaintiff had offered to withdraw the claim but Judge Ryan's reaction had been that the defendants would get their examination regardless. Stern hypothesized that an absolute, rather than a conditional withdrawal of the claim by plaintiffs, might have met with a different response from the trial court.

Kestin had characterized the appeal as a clash between the plaintiff's right to privacy and the defendants' right to discover information that would enable it to meet the plaintiff's case. However, Flynn argued that "the price of plaintiff's right of privacy was that he must give up his emotional distress claim."

Trial courts were far better equipped, in any event, Flynn said, to weigh the interest in privacy against plaintiff's claims. Dwyer retorted that, as held by the Appellate Division in *Connolly v. Burger King Corp.*, 306 N.J. Super. 344 (1997), appellate judges "normally give deference to trial courts but not when they are mistaken in their understanding of applicable law."

In closing, Dwyer urged the panel to issue a written opinion to provide guidance to trial courts on "this truly important question." The panel appeared to agree with Dwyer's estimation of the issue's significance.

The National Employment Lawyers Association had sought to submit a brief and participate in the oral argument in support of the appeal but the Appellate Division denied the group's motion to appear as amicus curiae. ■