

## Appeals Panel Overturns Ordered Psychiatric Exam of LAD Plaintiff

By Mary P. Gallagher

A state appeals court on Tuesday vacated an order requiring a psychiatric examination of a plaintiff who seeks emotional distress damages under the Law Against Discrimination.

But the Appellate Division judges, in *Kluczyk v. Tropicana Products Inc.*, A-1405-99T5, said that the application for an examination, if renewed later in the case, would be "reconsidered in light of plaintiff's specific claims of mental anguish or psychological harm."

On interlocutory appeal, the judges reversed an Oct. 22 ruling by Hudson County Superior Court Judge Joseph Ryan, who had invoked Rule 4:19 to order the mental examination. The rule permits a court, once good cause has been shown, to order such an exam of a plaintiff asserting a claim for personal injuries or of a party whose mental or physical condition is in controversy.

The plaintiff's lawyer, Andrew Dwyer of Newark's Dwyer & Ellis, says the Appellate Division ruling "rejects the idea that you get a mental examination because an LAD claimant seeks emotional distress damages." The court, he adds, required a

more specific showing to obtain an examination, one that "defendants never attempted to make."

To Tropicana's attorney, James Flynn, an associate with Epstein, Becker & Green in Newark's decision "suggests that you get to look at a plaintiff's claims and take discovery on that basis rather than on an artificial legal label." Flynn sees the ruling as a victory for him in the sense that there was "no presumption against the examination" and "no statement that I have any special hurdle to jump over" in a LAD case.

Tadeusz Kluczyk alleges in his sexual harassment and retaliation suit that his co-workers at a Tropicana warehouse in Jersey City made sexual gestures and comments implying, among other things, that he was gay. He further claims that when he complained, his superiors did nothing and that they fired him after he filed suit.

Kluczyk originally included in his complaint a separate claim for infliction of emotional distress. Dwyer took the position in the Law Division that he would drop the emotional distress claim in order to forgo the examination. But Ryan ruled that Kluczyk's claim for emotional distress damages under the LAD was sufficient to

place his mental condition in controversy and ordered the examination.

During the Feb. 24 argument before Appellate Division Judges Edwin Stern, Howard Kestin and Dorothea Wefing, Dwyer reiterated his willingness to dismiss the claim and the court apparently took the word for the deed. The appeals court's March 14 opinion refers to the fact that "[b]efore us plaintiff has withdrawn [the emotional distress count] of the complaint."

The opinion doesn't say there was a quid pro quo, but Dwyer says that months ago he provided defense counsel Flynn with an executed stipulation for dismissal of the emotional distress claim with prejudice and told Flynn that it could be filed if Flynn withdrew the request for the examination or if the examination was blocked. After the decision on the interlocutory appeal, Flynn notified Dwyer that he would file the stipulation.

But Dwyer, who at the close of his oral argument had requested a written opinion that could provide instruction to trial courts, concedes that the unpublished opinion would not be of much assistance to judges in other cases. He calls the two-and-a-half-page decision "light in analysis," though it cites *Lehmann v. Toys 'R Us*, 132 N.J. 587 (1993), and *Rendine v. Pantzer*, 141 N.J. 292 (1995), which "talk about the breadth and liberal purpose of the LAD."

Flynn, who represents Tropicana and various Tropicana employees also named

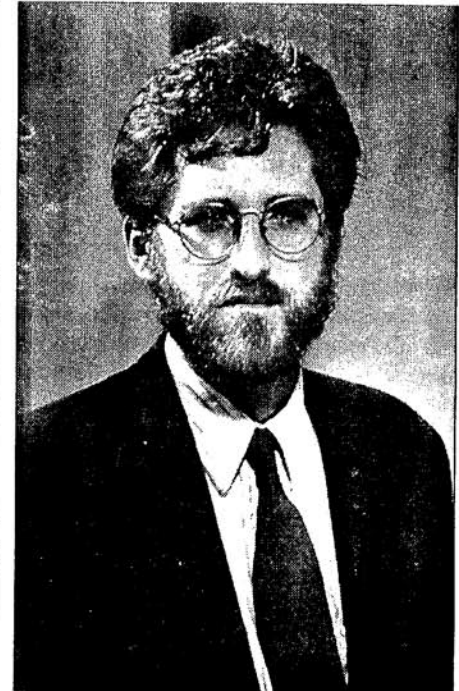


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**NO MENTAL EXAM NECESSARY:** Andrew Dwyer, above, says the appeals court decision rejects the idea that an LAD claimant seeking emotional distress damages must always undergo a psychiatric examination.

as defendants, characterizes the decision as not of "too great consequence" and as a "loss only in the immediate sense" that he does not get to examine the plaintiff based on the current state of discovery, but might get to do so later. ■