

One Minute Memo®



Somebody Call a Doctor!.... As a Treating Physician or Expert?

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Seyfarth Synopsis: *The New Jersey Supreme Court has recently held that a treating physician, who has not been designated as an expert witness, is permitted to testify as to whether a plaintiff's medical condition qualifies as a disability under the Law Against Discrimination.*

Courts have long struggled to define the scope of a treating physician's testimony when that physician has neither been designated as an expert witness nor produced an expert report. In [Delvecchio v. Township of Bridgewater](#), the New Jersey Supreme Court considered this very issue, and specifically, "whether a plaintiff employee may rely on the testimony of [her] treating physician, who has not been designated as an expert witness, to demonstrate a disability in her discrimination claim under the Law Against Discrimination ["LAD"]."

The plaintiff, a former police dispatcher, alleged that she suffered from Irritable Bowel Syndrome ("IBS"), and that her condition worsened when she was assigned the midnight shift rather than the day shift. After repeatedly declining assignments to the midnight shift, plaintiff accepted a lower-paying job as a records clerk, but was terminated shortly thereafter for excessive absenteeism.

Plaintiff later filed suit against the Township of Bridgewater, the Township of Bridgewater Police Department, and several individuals, alleging a violation of the LAD. She contended that her IBS constituted a disability under the LAD, and that defendants failed to provide a reasonable accommodation for that disability by asking her to work on the midnight shift. Plaintiff intended to present the testimony of her treating physician, who had diagnosed her with IBS and had written several notes to the township regarding her condition and work schedule, as well as that of her treating psychiatrist as respects non-economic damages.

In response to interrogatories, the plaintiff identified her physicians as individuals with "knowledge, information or evidence of the incident(s)," and listed both physicians as treating physicians. She also stated that "she had not retained [expert] witnesses at this time," but identified several "treating professionals [who] have expertise and are expected to testify." Notably, during discovery, the defendants neither asked for the treating physicians' report, nor deposed the physicians.

Lower Court Decisions

The trial court barred both doctors' testimony because they were not designated as experts and did not submit expert reports. The trial court admitted the treating physicians' notes, but only as evidence of a request for reasonable accommodation, as opposed to evidence of an underlying disease or illness. Moreover, Plaintiff was specifically barred from introducing the physicians' testimony about how her IBS was affected by her work schedule. After trial, the jury found that the plaintiff failed to establish that she had a disability.

Plaintiff appealed the trial court's decision and the Appellate Division reversed on the grounds that the court should not have limited the testimony of plaintiff's treating physician who diagnosed her with IBS. Defendants then appealed to the Supreme Court of New Jersey.

Supreme Court Decision

The Supreme Court affirmed the Appellate Division, holding that "a trial court [is authorized] to admit the testimony of a treating physician regarding the diagnosis and treatment of a patient." Hence, "plaintiff provided the information requested in defendants' interrogatories regarding her proposed treating physician testimony, and the trial court should have permitted her to present the vital testimony of those witnesses pursuant to N.J.R.E. 701." Further, "[i]n light of the pivotal role of the IBS issue in the jury's verdict, the trial court's decision to limit the testimony of the treating gastroenterologist constituted a reversible error."

The Supreme Court recognized that "a LAD disability claim, in which the plaintiff's disability is not readily apparent, must be supported by 'expert medical evidence,' also characterized as 'objective medical testimony.'" However, according to the court, the "expert medical evidence" or "objective medical testimony" does not need to be given by a designated expert pursuant to N.J.R.E. 702. Rather, "a jury [can be] guided by the testimony of witnesses qualified to assist it in understanding the disease or condition at issue in a given case," such as that of a treating physician. Further, "courts have long permitted treating physicians to offer medical testimony regarding the diagnosis and treatment of their patients pursuant to N.J.R.E. 701." Under this rule a trial court is authorized "to admit the 'testimony in the form of opinions or inferences' of a lay witness, if that testimony (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue."

The court cited *Stigliano v. Connaught Laboratories*, a 1995 New Jersey Supreme Court decision where the court noted that "the treating doctors to treat their patients must determine the cause of a disease, whether that determination is characterized as fact or opinion." Thus, "as fact witnesses, the treating doctors may testify about their diagnosis and treatment of [the] disorder, including their determination of that disorder's cause." The "testimony about the likely and unlikely causes of ... [the] disorder is factual information, albeit in the form of an opinion." An adverse party may request a treating physician's report by interrogatory, and a party seeking to present treating physician testimony at trial must disclose the substance of the witness's anticipated testimony, and the basis for that testimony, if requested to do so in discovery. However, "[u]nless the treating physician is retained and designated as an expert witness, his or her testimony is limited to issues relevant to the diagnosis and treatment of the individual patient."

In this case, "the court recognized that the question of disability is a medical determination that jury should be assisted by the testimony of qualified witnesses in that determination." So, "[i]f the question of a plaintiff's disability can be effectively addressed by testimony limited to the plaintiff's diagnosis and treatment, a treating physician may provide ... 'expert medical evidence' and 'objective medical testimony,'" on the condition that "the proponent of the testimony provides notice and responds to discovery requests in accordance with the court rules, and the testimony satisfies N.J.R.E. 701 and other applicable rules of evidence."

The court similarly determined that the trial court “erred when it restricted the testimony of plaintiff’s ... psychiatrist.” The psychiatrist was “properly designated by plaintiff as one of her treating physicians, and plaintiff gave defendants a description of the psychiatrist’s expected testimony.” Furthermore, the “opinions that [the] plaintiff sought to elicit from [the psychiatrist] were properly confined to plaintiff’s symptoms, diagnosis and care.”

Interestingly, the Supreme Court asked its Civil Practice Committee to consider whether the Court Rules should be amended to clarify the scope of a treating physicians report. The court suggested “permitting the service of a summary of the treating physician’s report.” The court similarly determined that the trial court “erred when it restricted the testimony of plaintiff’s ... psychiatrist.” The psychiatrist was “properly designated by plaintiff as one of her treating physicians, and plaintiff gave defendants a description of the psychiatrist’s expected testimony.” Furthermore, the “opinions that [the] plaintiff sought to elicit from [the psychiatrist] were properly confined to plaintiff’s symptoms, diagnosis and care.”

This case provides valuable guidance for employers litigating in New Jersey state courts, especially in defending claims of disability and/or emotional distress. Although here, the court allowed a treating physician to testify with regard to damages up until the date of the trial, in *Battaglia v. United Parcel Service Inc.*, the New Jersey Supreme Court held that in order for employees to recover for future emotional distress damages, expert proof of permanency is required. (For more information on *Battaglia*, see our article [here](#).)

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