

New Jersey Appellate Court “Renews” Recommendation that Model Jury Charge For Failure-to-Accommodate Cases Is Needed

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In *Whalen v. New Jersey Manufacturers Insurance Company*, Docket No. A-3155-09T4 (N.J. App. Div. August 6, 2012), the Appellate Division, in an unpublished *per curiam* decision ([click here to read](#)), found no reversible error in a jury charge that did not differentiate between the two distinct theories of disparate treatment and failure to accommodate. The plaintiff, a former project coordinator in NJM's information technology department, claimed the trial judge had failed to separately charge her disparate treatment and failure-to-accommodate claims. Plaintiff had Lyme's disease, and flare ups with her disease required her to go on short-term disability, reducing her schedule from full-time (five days a week/40 hours) to less than full-time (four days a week/32 hours). Plaintiff did not qualify for long-term disability, and there was a dispute as to whether Plaintiff had requested to work on a permanent basis on a reduced work schedule of four days per week or whether working full-time was an essential function of her job. Based on an examination of both the responsibilities of the position itself and the plaintiff's performance, NJM concluded that the plaintiff's job required 40 hours of work per week, that she could not perform the essential functions of her job working less than 40 hours per week, and thus terminated her for this reason.

Ms. Whalen sued NJM for disability discrimination and unlawful termination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The case went to trial. At the close of all the evidence, the parties “engaged in an extensive discussion regarding the jury charge.” Although the plaintiff did not voice any objections after the charge was given (per Rule 1:7-2), she claimed plain error on appeal after the jury returned a defense verdict, contending the trial judge had failed to instruct the jury about the impact of the interactive process on the failure to accommodate theory of liability.

The jury was instructed on the three elements of a disability discrimination claim under LAD, the definition of the term “essential function of the job,” the four elements to consider in determining whether NJM had engaged in the interactive process, and the meaning of a “reasonable accommodation.” The panel concluded that although “the better practice” would have been to charge separately the disparate treatment and failure-to-accommodate claims, the jury had more than sufficient facts to assess the issue of the interactive process as well as the ultimate issue – whether the plaintiff could perform the essential functions of her job. Nevertheless, the panel “renewed” its recommendation that the Committee on Civil Jury Charges develop a separate failure-

to-accommodate charge, stating that “[t]he addition of such a charge would be consistent with federal practice” (citing the Third Circuit’s model charge Section 9.1.2 and 9.1.3 for disparate treatment and failure-to-accommodate claims under the ADA).

Take away: until New Jersey’s Committee on Civil Jury Charges develops a separate failure-to-accommodate jury instruction, when faced with crafting jury charges in failure-to-accommodate disability discrimination cases, practioners should be guided by the courts’ direction and holdings in *Whalen v. NJM (attached)*; *Victor v. State*, 401 N.J. Super. 516 (App. Div. 2008), *aff’d in part and modified in part*, 203 N.J. 383 (2010); *Tynan v. Vicinage 13 of the Superior Court of N.J.*, 351 N.J. Super. 385 (App. Div. 2002); and *Viscik v. Fowler Equip. Co.*, 173 N.J. 1 (2002).

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