



**SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY**

**Joseph E. Kane
Boulevard
Judge of the Superior Court**

**1201 Bacharach
Atlantic City, NJ 08401
(609) 345-6700 x3263**

MEMORANDUM OF DECISION

CASE: Richard McGhee, Michael Standi and Julian Trader v. Pathmark Stores, Inc., The Great Atlantic & Pacific Tea Company, Inc., et als

and

Shawn Johnson v. Pathmark Stores, Inc., The Great Atlantic & Pacific Tea Company, Inc., et als

DOCKET NO.: ATL-L-2459-08

DATE: August 23, 2010

MOTION: Defendant's Motion for Reconsideration

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Richard McGhee, Michael Standi, and Julian Trader instituted a Complaint alleging violations of the New Jersey Law Against Discrimination Act, along with other claims.

Defendants Pathmark and Servis bring forth this motion for reconsideration, arguing that this Court should vacate its May 19, 2010 Order. Moving Defendants argue that the Court overlooked the fact that Plaintiffs have alleged continuing and severe emotional distress from April 2007 to present. Defendants Pathmark and Servis

present four arguments in support of their motion. First, Defendants Pathmark and Servis argue that this Court should apply federal law to this case because there are very little New Jersey cases dealing with a Plaintiff's mental condition under New Jersey Law Against Discrimination Act (hereinafter "NJLAD"). Defendants Pathmark and Servis argue that many Federal Courts have held that a plaintiff puts his or her mental condition in controversy when the plaintiff pleads emotional distress as part of his or her employment discrimination claim. Defendants Pathmark and Servis allege that even though Federal Courts have been more conservative before requiring an employment discrimination plaintiff to undergo mental examination, said Courts would find that moving Defendants have established more than adequate grounds to require Plaintiffs to undergo IMEs in this litigation under Federal Rules of Civil Procedure 35. Defendants Pathmark and Servis allege that Plaintiffs have insists that their emotional distress was and is severe and continuing from April 2007 to present, and that Plaintiffs pled that they are entitled to monetary damages for the whole period. Defendants Pathmark and Servis argue that the forgoing makes their request reasonable, thus argues that the Court erred in barring their reasonable request.

Second, Defendants Pathmark and Servis argue that pursuant to R. 4:19, they are entitled to conduct a mental examination of the Plaintiffs. Defendants Pathmark and Servis allege that Plaintiffs put their mental condition in controversy when they sought damages for severe and continuing emotional distress, and relied on expert testimony to bolster those claims. Third, Defendants Pathmark and Servis argue that Plaintiff's relatively low burden of proof to establish emotional distress damages is irrelevant to a dispute of whether moving Defendants are entitled to take mental examinations of Plaintiff. Defendants Pathmark and Servis argue that the low threshold is irrelevant as to the scope and type of discovery available to Defendants to dispute and defend against Plaintiff's claims for monetary damages. Defendants Pathmark and Servis allege that Plaintiff is offering expert testimony in support of their claims. Defendants Pathmark and Servis also argue that the low threshold set forth in *Rendine v. Panzter*, 141 N.J. 292 (1995) and *Tarr v. Ciasulli*, 181 N.J. 70 (2004), supports the need for moving Defendants to be able to vigorously challenge allegations of pain and suffering through all available means, including a R. 4:19 mental examination. Defendants allege that (1) Plaintiffs have minimal prior documented medical histories from health care providers from which moving Defendants could determine a base line of their

mental health prior to April 2007, and of which moving Defendants can establish whether there are any mental, physical or social factors unrelated to Defendants which have been a contributing factor to the alleged pain and suffering. Defendants also allege that all four of the Plaintiffs have criminal backgrounds, with one Plaintiff facing domestic abuse charges, and two of the Plaintiffs having undergone Court Ordered anger management.

Defendants Pathmark and Servis argue that Plaintiff's alleged pain and suffering could have been caused by other underlying mental issues or other stressors besides moving Defendants' alleged conducts. Defendants argue that the Court's decision puts them in a precarious position of defending a potentially significant claim for monetary damages without expert testimonies. Fourth, and in the alternative, Defendants Pathmark and Servis argue that even if Plaintiff's deposition testimony and pleadings are insufficient to permit a mental examination, that their decision to offer an expert testimony to bolster their claim for emotional distress damages, should permit Defendants an opportunity to offer their own rebuttal expert testimony. Defendants Pathmark and Servis argue that this Court overlooked Plaintiff's reliance on expert witness testimony to bolster their credibility. Defendants Pathmark and Servis allege that Plaintiff's expert, Dr. Stewart, has issued a report opining on the physical and mental distress suffered by Plaintiffs, and that Dr. Stewart is prepared to testify what a reasonable African American would experience as a result of race discrimination. Defendants Pathmark and Servis also allege that Dr. Stewart intends to compare their emotional distress to that of a reasonable individual. Defendants Pathmark and Servis argue that this type of testimony would undoubtedly lead the jury to believe that it is an expert verification of the truthfulness and accuracy of Plaintiffs' own description of their pain and suffering, as well as its causation by moving Defendants. Defendants Pathmark and Servis argue that the Court should vacate its Order dated May 19, 2010, thus allow moving Defendants to present a rebuttal expert.

In their opposition, Plaintiffs argue that moving Defendants did not meet their burden for reconsideration, and that an examination of Plaintiff's emotional state is intrusive and unnecessary. Plaintiffs argue that moving Defendants failed to meet the threshold burden for a motion for reconsideration. Plaintiffs argue that there is no showing that the Court's ruling was arbitrary and capricious. Plaintiffs allege that moving Defendant's argument is centered on a new point, which argues that the Court's decision has a patently unfair effect since Plaintiff is allowed

the benefit of an expert testimony while Defendants are denied same. Plaintiffs argue that this Court's Protective Order did not place a restriction on Defendant's discovery or expert proofs. Plaintiff alleges that moving Defendants are still free to resort to other, less intrusive discovery such as obtaining extensive deposition testimony and employment records. Plaintiffs allege that the fact that Plaintiffs did not regularly see any healthcare providers does not unfairly limit moving Defendants' discovery, but rather substantiates that no psychiatric condition, diagnosis or treatment is in controversy in this LAD racial harassment case. Plaintiffs argue that moving Defendants did not raise or meet any of the requirements of *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995). Plaintiffs also argue that moving Defendants cannot place Plaintiffs' mental condition in controversy by asserting that such condition is an underlying theory of defense to Plaintiff's claim. Plaintiffs argue that the intrusion of the psychiatric examination and MMPI could reveal aspects of Plaintiff's personality that would be used in an unfair way to the defense. Plaintiffs argue that this potentially intimate knowledge about a plaintiff becomes available to the adversary only when it would be probative of the plaintiff's mental condition in controversy. Plaintiffs allege that moving Defendants have already secured non examining psychiatric reports as to each Plaintiff, and that the report details Plaintiff's deposition testimony, work records, and purported compile of their medical, social, psychiatric and drug/alcohol histories. Plaintiffs argue that the expert report intends to include hearsay and inadmissible evidence to the jury for impeachment. Plaintiffs argue that moving Defendants have not presented any new evidence or good cause evidence to support an order for a physical and mental examination of Plaintiffs.

In their reply brief, Defendants Pathmark and Servis reiterates their previous arguments, then argues that they are not required to prove that the Court's decision was arbitrary or irrational because there was no written opinion. Defendants Pathmark and Servis also argue that Plaintiff's reliance on *Little by Little v. McIntyre*, 289 N.J.Super. 75 (App. Div. 1996) fails as said case is distinguishable from this case. Defendants Pathmark and Servis allege that *Little by Little* involved mental examination of the plaintiff's mother, who was not a party to the case, while these Plaintiffs have proffered expert opinion in support of their claim for pain and suffering.

LEGAL DISCUSSION AND ANALYSIS

Pursuant to N.J.R.C., 4:49-2, a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred". This State's Appellate Division opined that "reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice". *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (App. Div. 1990). The Court opined that "a litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court". *Id.* The Court also opined that "reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence". *Id.* The Court opined that repetitive bites at the apple is not allowed as the core will swiftly sour. *Id.* The Court held that "a litigant may seek reconsideration when it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence". *Id.*

The Appellate Division held that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter". *Shanley & Fisher, P.C. v. Sisselman*, 215 N.J. Super. 200, 215 – 16 (App. Div. 1987). The Court opined that "the liberal procedures for discovery in preparation for trial are essential to any modern judicial system in which the search for the truth in aid of justice is paramount and in which concealment and surprise are not to be tolerated". *Id.*

Pursuant to N.J.S.A. 10:5-12(a), *Unlawful Employment Practices, Discrimination*, “it shall be unlawful employment practice, or, as the case may be, an unlawful discrimination for an employer to termination an employee because of sex...”. Pursuant to N.J.S.A.10:5-3, *Findings, declarations*,

“The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.”

In *Tarr v. Ciasulli*, 181 N.J. 70 (2004), this State’s Supreme Court affirmed the lower court’s decision to allow a Plaintiff to recover for emotional distress without expert report. The Court opined that “a cause of action asserting discrimination is willful rather than negligent”. *Id.* at 80. The Court further opined that “the purpose of NJLAD is to eradication of the cancer of discrimination, and that NJLAD expressly reflects the public policy considerations of protection of the civil rights of individual aggrieved employees and protection of the public’s strong interest in a discrimination-free workplace”. *Id.* The Court opined that “underlying the NJLAD’s expansive language advocating the elimination of discrimination is also the directive that we compensate victims for economic and noneconomic injuries attributable to an employer’s discriminatory conduct”. *Id.* at 80–81. The Court also opined that “the Legislature intended victims of discrimination to obtain redress for mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments” *Id.* at 81. Furthermore, the Court opined that “Emotional distress actually suffered in that manner by the victim of proscribed discrimination is compensable without corroborative proof, permanency of response, or other physical or psychological symptoms rendering the emotional distress severe or substantial”. *Id.*

Prior to addressing the merits of this question, the Court must address the choice of law to be used. This Court notes that Plaintiffs reside in New Jersey, and that the cause of action arose in New Jersey. This Court notes that Plaintiffs' claim is based on the violations of the New Jersey Law Against Discrimination. This Court notes that this State has been creating laws, and amending said laws in an effort to eradicate discrimination for as long as the State has been in existence. Thus, there is no reason to apply Federal law to this state created protection, based on the State Constitution. Accordingly, this Court will apply New Jersey law to the issues related to violations of the New Jersey Law Against Discrimination laws.

Before the Court is Defendants Pathmark and Servis' attempt to obtain the mental impressions of Plaintiffs. Defendants Pathmark and Servis seek a reconsideration of this Court's Order granting a protective order to Plaintiffs. Defendants Pathmark and Servis argue that it would be unfair to allow Plaintiffs to use an expert report in support of their claim, while Defendants are not allowed to obtain an expert report. Defendants Pathmark and Servis argue that this Court should apply Federal rules to this case. Defendants Pathmark and Servis also argue that they need a mental examination of the Plaintiffs because (1) Plaintiffs put their mental state in controversy, and (2) they need a mental examination of the Plaintiffs in order to defend the claim. Defendants Pathmark and Servis argue that Plaintiffs put their mental state in controversy when they plead emotional distress as part of their employment discrimination claim. Defendants Pathmark and Servis allege that they need a mental examination of the Plaintiffs because Plaintiffs do not have an extensive or consistent medical background. Defendants Pathmark and Servis allege that they may be other mental, physical or social factors unrelated to Defendants which have been a contributing factor to the alleged pain and suffering. Defendants also allege that all four of the Plaintiffs have criminal backgrounds, with one Plaintiff facing domestic abuse charges, and two of the Plaintiffs having undergone Court Ordered anger management. Defendants Pathmark and Servis argue that Plaintiff's alleged pain and suffering could have been caused by other underlying mental issues or other stressors besides moving Defendants' alleged conducts. Defendants argue that the Court's decision puts them in a precarious position of defending a potentially significant claim for monetary damages without expert testimonies. Plaintiffs argue that this type of mental examination is intrusive and unnecessary.

Though this Court appreciates moving Defendants' need to be fully prepared for trial, this Court cannot override the provisions of the NJLAD to satisfy that need. This case is based on violations of the NJLAD. Emotional Distress is a recognized byproduct of discrimination. Thus, this Court finds no reason why Plaintiffs' current criminal history is relevant to whether Plaintiffs suffered pain and suffering as a result of an alleged discrimination. This Court finds that the fact that a Plaintiff is currently facing domestic abuse charges, while two have undergone Court Ordered anger management, does not create a defense for the Defendant. Nor does it give an alternate explanation for the pain and suffering alleged under NJLAD. To allow such evidence into a NJLAD case will confuse the jury, causing them to judge the alleged victims, here, Plaintiffs, for their moral turpitude, rather than judge the evidence as to whether Plaintiffs suffered racial discrimination. Therefore, this Court finds that Plaintiffs did not put their mental state in question when they plead pain and suffering as a result of discrimination. Thus, as previously Ordered, moving Defendants are disallowed from performing an evaluation of the Plaintiffs by using MMPI. If Defendants feels disadvantaged by the fact that Plaintiffs have obtained an expert psychological witness to testify that a typical African Americans will suffer pain and suffering as a result of allegedly seeing a noose allegedly hanging in the break room, then moving Defendants are welcomed to obtain their own expert contradicting said expert's conclusion. This Motion for reconsideration is denied.

CONCLUSION

For the aforementioned reasons, moving Defendant's Motion for Reconsideration is Denied.

A Form of Order is attached.

Court Prepared

RICHARD MCGHEE, MICHAEL
STANDI AND JULIAN TRADER,
Plaintiffs,

v.

PATHMARK STORES, INC., THE
GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC., ET ALS,
Defendants,

and

SHAWN JOHNSON,
Plaintiffs,

v.

PATHMARK STORES, INC., THE
GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC., ET ALS,
Defendants.

SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY
LAW DIVISION

DOCKET NO. ATL-L-2459-08

ORDER

**RECEIVED and
FILED**

AUG 23, 2010

**ATLANTIC COUNTY
LAW DIVISION**

THIS MATTER having been opened to the Court by Aisha M. Barbour, Attorney for Defendants, Pathmark Stores, Inc. and Joseph Servis; and the Court having reviewed the moving papers; and the Court having reviewed all the opposing papers; and for good cause shown:

IT IS, on this 23rd day of AUGUST 2010, HEREBY ORDERED AND ADJUDGED that moving Defendant's Motion For Reconsideration is DENIED, for reasons set forth in the Memorandum of Decision.

IT IS FURTHER ORDERED that a copy of this order shall be served on all parties within seven (7) days of the date of this order.



JOSEPH E. KANE, J.S.C.

(X) Opposed () Unopposed