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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3175-09T4

SCOTT JONES,

Plaintiff-Respondent,

v.

SOUTH JERSEY INDUSTRIES, INC.,
d/b/a SOUTH JERSEY GAS COMPANY,

Defendant-Appellant.

Argued April 11, 2011 – Decided August 30, 2011

Before Judges Lisa, Sabatino and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-15354-06.

David F. Jasinski argued the cause for appellant (Jasinski, P.C., attorneys; Mr. Jasinski, of counsel and on the briefs; Jennifer C. Van Syckle and John C. Hegarty, on the briefs).

Kimberly D. Sutton argued the cause for respondent (Obermayer Rebmann Maxwell & Hippel LLP, attorneys; Ms. Sutton and Gregory D. Saputelli, on the brief).

PER CURIAM

Plaintiff Scott Jones filed suit against defendant South Jersey Industries, Inc. (SJI), doing business as South Jersey Gas Company, alleging wrongful termination from employment based

on perceived disability and age discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 5-49. The age discrimination claim was dismissed at the close of plaintiff's case; however, the disability claim resulted in a jury award of compensatory damages totaling $1,070,544 and punitive damages totaling $750,000. Plaintiff's attorneys were awarded counsel fees and costs of $660,081.37. We reverse and remand for a new trial.

THE EMPLOYMENT TERMINATION

The following facts were developed during depositions and the trial, and are necessary to an understanding of the significance of the alleged errors. Plaintiff began working at SJI as a retail marketing sales representative in May 1985. In 1993, he became a Marketing Support Specialist, Commercial/Industrial, and in 1996 was promoted to Major Accounts Manager (MAM). He remained in this position, handling large commercial sales in Cape May and Atlantic Counties, until his termination on March 21, 2005.

MAMs market and maintain gas service accounts for large industrial and commercial customers. Plaintiff in fact completed a certification as a Registered Commercial Gas Consultant. MAMs are also responsible for generating new customers from businesses using other types of fuel, or

"conversions." MAMs were expected to meet or exceed specified sales targets and were paid a base salary in addition to bi-monthly performance incentives.

In late 2001, Lawrence Lhulier became SJI's Director of Commercial, Major, and Residential Gas Sales. In January 2002, Victoria Molloy became SJI's Manager of Major Accounts and Commercial Sales, thus making her plaintiff's direct supervisor. Lhulier's compensation was tied in part to the sales achieved by the MAMs; Molloy's compensation was also contingent upon the sales performance of her group. Molloy, who reported directly to Lhulier, maintained routine contact with Human Resources (HR), copied HR on unfavorable employee reviews, and kept HR advised of performance issues.

South Jersey Gas Company is a subsidiary of SJI. Lhulier and Molloy were designated as "key management team members" in its gas sales management business segment. Lhulier ranked second behind the subsidiary's President and CEO. Molloy and two other sales division managers were third in rank in the corporate structure.

Commencing in early 2002, Molloy required MAMs in her group to submit their weekly call reports directly to her. She also increased the number of mandatory reports, requiring not only

weekly call reports, but also monthly sales and project status reports.

Plaintiff considered the additional documents to be unnecessarily duplicative and time-consuming, detracting from time available for sales activities. He also believed that the company's software, installed in 2001 and designed to compile customer information, occasionally malfunctioned, resulting in late completion of his reports.

Molloy testified that, in 2002, her first year acting as plaintiff's direct supervisor, approximately seventy-five percent of her time was consumed by plaintiff's transactions. In large part, this was attributable to the construction of a sizeable hospital in his sales region, and the expectation that Molloy would assist plaintiff in acquiring the hospital as a customer. Her concerns about his performance developed almost immediately, as a hospital representative complained to Molloy in March of that year that the hospital was reconsidering its decision to use gas because of dissatisfaction with plaintiff's handling of the account. Molloy found herself "doing all the work," including holding meetings with the hospital and directing lengthy negotiations while plaintiff merely assisted. Eventually, the account was secured and plaintiff received a commission.

During the course of the hospital negotiations, plaintiff failed to respond to several of Molloy's e-mails or to attend meetings. Because plaintiff denied receiving the e-mails, Molloy began to track messages sent to him. None of Molloy's other sales representatives had difficulty in receiving her e-mails.

Although Molloy rated plaintiff as competent on his 2002 annual appraisal, she noted that he lacked knowledge in certain key areas and had issues with timeliness, initiative, and follow-through, observing that she had to "constantly remind [him] what need[ed] to be done."

On January 9, 2003, Molloy met with plaintiff to discuss problems in his job performance. She focused particularly upon his lack of initiative and follow-through, and the need for him to work on his conversions. Although she assured plaintiff that she would do whatever was necessary to ensure his success, she expected him to actively manage his time and employ his sales skills, while following through on commitments.

On April 8, 2003, Molloy e-mailed plaintiff requesting his end-of-the-month reports for March. She explained that his tardiness could affect his end-of-the-year incentives and reminded him that she should not have to request reports he was expected to generate as a matter of course. Molloy told

plaintiff that henceforth she would not approve his expenses until all of his reports were received. She also noted he had not submitted a weekly call report since March 17.

On April 30, 2003, Molloy gave plaintiff both an oral and written warning regarding his performance, reiterating that she should not have to remind him of the need to follow through, and restating her concerns regarding his inattention to detail. She pointed out that she had invested seventy-five percent of her time on his accounts in 2002, and that she should not have to constantly "babysit him." Molloy described the email as a "verbal warning," and said "progressive discipline" would follow, including "reassignment or dismissal." At trial, plaintiff denied seeing this written warning, or receiving any verbal warning, claiming that Molloy only requested documentation on behalf of another MAM who was out on maternity leave.

In March and April 2004, plaintiff exceeded his sales goal by sixty-nine percent and his conversion goal by twenty percent. In May and June, plaintiff again exceeded his goals, by eighty-two percent for sales, and 190 percent generating leads for conversions. In August, Molloy pointed out that the actual connected load, or flow of gas being consumed by plaintiff's customers, did not match the number plaintiff claimed. That

error was never corrected, and plaintiff had the same discrepancy each month thereafter.

On September 13, 2004, Molloy informed plaintiff that his sales results for July and August were unsatisfactory, under the fifty percent threshold, and he was therefore not entitled to any incentive pay for that time. In September and October 2004, plaintiff's performance improved: he achieved 191 percent of his sales goals, and seventy percent of his conversion goals.

On October 27, 2004, Molloy provided plaintiff with a mid-year performance assessment, with a copy to Lhulier. Overall, she reported he was an "[a]verage performer that display[ed] a desire and willingness to succeed," but needed to improve his organizational and time management skills and hold himself more accountable. She also noted that he needed to improve his connected load targets, having achieved only five percent of them, and improve his timeliness and his critical thinking.

The following day, Molloy forwarded an e-mail to plaintiff advising that his failure to supply a weekly call report in two months was in "blatant disregard for the [office] reporting procedures" and that these delays would "no longer be tolerated." The following day, plaintiff testified, he provided her with three reports, although Molloy denied receiving them.

On November 18, 2004, Molloy met with plaintiff and reprimanded him for, among other things, falling behind with his weekly call reports. Plaintiff claimed that, until this meeting, he had never been told that he was perceived as a poor performer as a result of his late submission of reports. Molloy told plaintiff that she was frustrated by "his performance, time management, follow-up," and inclusion of improper information in reports.

Plaintiff responded that he did not feel like himself and had problems at home that were interfering with his job. He had trouble focusing and thinking clearly, and lacked energy, feeling like he was continuously "in a fog."

That same date, Molloy gave plaintiff a summary intended to act as a written warning, reflecting that he had submitted only twenty-four of forty-five weekly reports, and had not updated his key account or other reports since August 2004. Plaintiff told Molloy that the software was not working properly, but assured her that he would improve. He disputed many of her other complaints, however, claiming that he had personal issues and had recently told his wife that things had to change at home, particularly with child care, or that otherwise his job

was at risk.[1] Nonetheless, he promised Molloy that he would address these issues and stressed that his lack of performance was not intended to be disrespectful. Molloy reiterated that unless plaintiff's performance improved, she would have to recommend either a transfer or dismissal.

Following the November 18 meeting, Lhulier contacted the HR department in an attempt to devise a performance improvement plan for plaintiff. The Director of HR, Sharon Pennington, assigned oversight of the situation to William Oxenford, the Employee Labor Relations Manager.

On November 30, 2004, Molloy noted plaintiff never received a commitment from a potential major customer, Snows-Doxsee, whose service order he commenced handling in September. Although no contracts with the customer were executed in that time period, plaintiff claimed them on his sales report.

On December 2, 2004, Molloy told plaintiff to revise certain reports which contained errors and discrepancies before

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[1] Patricia Perry-Jones, plaintiff's wife, testified that he began to experience personality changes in mid-2004. She noticed that he had "trouble sleeping at night" and often stayed up late working. He also "spent less time engaging [with] the kids [in] their activities, and he had periods where he would zone out." "[H]e would have this vacant stare that he wasn't there." Perry-Jones stated that plaintiff also stopped socializing and rowing, and would sometimes just stay in bed on the weekends. His moods varied between "sullen and disengaged" and "irritable and nasty."

he left the following day on a family vacation. Those corrections were never made.

On December 7, Lhulier requested that Molloy provide him with any documentation she had on plaintiff. Plaintiff's performance had not improved by the end of that month. In fact, his poor sales results caused the overall team performance to be an unacceptable forty-one percent. On December 29, 2004, Oxenford memorialized a proposal with respect to plaintiff, which involved providing him with a "60-day Get Well Plan" during his year-end evaluation.

Also on that date, plaintiff signed the written summary of the November 18, 2004 meeting, although at trial he only recalled that the meeting related to late call reports and no other issues. Molloy warned plaintiff that improvement had to be shown within one month and continue for twelve months, otherwise, "progressive discipline [would] be imposed with a recommendation for dismissal."

In a separate memo, Molloy noted that plaintiff's performance had worsened in key areas since his mid-year review in September. She complained that she had to have this same conversation with him every four to six months, which always resulted in a temporary improvement, but effectuated no long-term changes.

On January 3, 2005, Molloy discovered that plaintiff had requested vacation time for December 31, 2004, in contravention of an email sent on October 27 advising that last-minute holiday vacation requests would not be approved. Lhulier testified that Molloy perceived this as plaintiff challenging her authority and that the incident, effectively, was the last straw. The incident was minor, but plaintiff believed it caused Molloy to descend into a tirade.

In fact, plaintiff's recollection was that when confronted he apologized, told Molloy that he thought he was suffering from a loss of concentration, and said that he needed help. Intending to see a psychologist his wife had found for him, plaintiff begged her for ninety days, promising that he would get better. He claimed that Molloy said she would discuss this request with Lhulier and get back to him.

In any event, Molloy discussed plaintiff's situation with Lhulier, who contacted Thomas Worrell, the head of SJI's Employee Assistance Program (EAP). Worrell, a guidance counselor, not a psychologist, operated the EAP as an outside contractor.

Lhulier then called plaintiff, telling him that he was worried as he did not sound like himself. Plaintiff claimed that at this point he assumed Lhulier and others understood he

was not entirely well, but admitted at trial that Lhulier said only that he did not sound like himself. Initially, even plaintiff did not consider depression as the explanation of his problems, suspecting instead that he might be developing early-onset senility, as had his mother.

According to plaintiff, Lhulier directed that he utilize the EAP rather than a private psychologist. In contrast, Lhulier explained that he lacked the authority to directly refer an employee to the EAP, but could reach out to HR on the employee's behalf. Oxenford further clarified that no employee was ever required to utilize the EAP; it was never a condition of employment. Neither Oxenford nor Lhulier considered the referral to be mandatory, although Worrell testified he believed that it was.

Pennington approved the referral, testifying that she was told plaintiff said he was "depressed at one point in time, or words to that effect." Pennington also testified that once an employee was referred to the EAP, SJI only wanted to know if progress was being made generally, as more detailed information would have been viewed as a violation of an individual's right of privacy. Plaintiff later claimed that he believed Lhulier and Oxenford were fully aware of his "fragile mental state."

Plaintiff, who assumed Worrell was trained to treat mental health problems, based in part on flyers in the building urging troubled employees to contact EAP for assistance, attended his first appointment on January 10. He expressed concerns about his frame of mind and job performance. Worrell administered diagnostic tests which suggested the presence of mild depression and anxiety. To the contrary, plaintiff testified that Worrell diagnosed him as depressed. He further stated he would not have gone to Worrell had he not believed Worrell could treat him for depression.

On the witness stand, Worrell denied diagnosing plaintiff as clinically or seriously depressed. Had that been his diagnosis, he would have referred plaintiff to a qualified therapist. Worrell stated that the cognitive behavioral therapy he offered employees was merely designed to assist them in improving work performance, and was not intended to address mental health needs.

Plaintiff signed a release authorizing Worrell to communicate with SJI regarding his contacts with EAP. Worrell testified, however, that the release only authorized informing SJI that plaintiff was participating; plaintiff testified that he signed it so that Worrell could share all relevant information with SJI. When deposed, Molloy stated that she

believed plaintiff had been referred to the EAP because "he was suicidal."

On January 13, 2005, plaintiff met with Oxenford, Lhulier, and Molloy, who presented him with a "Get Well Plan" designed to address his timeliness, focus, and disregard for management requests. When, during the meeting, Lhulier expressed frustration and told plaintiff they were trying to wake him up, plaintiff promised to improve, albeit attributing his job issues to personal difficulties. He was warned that if he did not improve, he would be terminated.

Plaintiff's reporting requirements were increased to mandatory weekly schedules, including four sales calls daily, preparation of rate recommendations for load management for two major consumers, and the obligation to provide management with information within twenty-four hours of any request. Plaintiff and Molloy disagreed after the fact as to the extent and substance of the reports he was required to provide. Plaintiff explained that he did not know how to prepare load management reports, ordinarily created by engineers, whereas Molloy insisted that plaintiff was not told to prepare load management reports but, rather, rate recommendations for load management, which should have been within his field of competence.

Furthermore, she claimed plaintiff never told her he did not know how to prepare these reports.

During the January 2005 meeting, plaintiff kept his head down, nodded but did not seem to be fully present, and failed to respond to offers of help. As Oxenford explained it, he did not appear engaged. At the end of the meeting, Oxenford heard plaintiff say words to the effect that he would kill himself, or that his wife would kill him. Lhulier heard plaintiff say something to the effect of "[o]h, I could just kill myself," or "[m]aybe I should kill myself," but was unsure whether it was said seriously or was merely an offhanded comment. Pennington recalled being told that plaintiff had made some comment about killing himself if he lost his job, but did not know if he meant something along the lines that his wife would kill him if he lost his job. When deposed, plaintiff did not recall using the word "suicide."

Oxenford sent a follow-up e-mail to Lhulier and Molloy, informing them that he had called Worrell to let him know about the final warning given to plaintiff. During that phone call, he recalled mentioning that plaintiff had used the word suicide with regard to his employment. He never followed up with Worrell, however, and never heard from him about plaintiff.

On the stand, Worrell denied ever being informed about any of SJI's concerns regarding plaintiff's mental condition. He added that had he been told, he would have checked in with plaintiff and perhaps called his wife as well. Worrell also said he would have been informed if plaintiff's job performance had not improved. He denied any contact from anyone at SJI about plaintiff's performance, any plans for improvement, or his compliance with SJI expectations.

Worrell discussed the January meeting with plaintiff the following day. Plaintiff said that he had no problems with his co-workers or superiors, and that he knew he had to make changes.

On January 21, 2005, eight days after the meeting, Molloy presented plaintiff with a "Last and Final Warning" memo, which Pennington had approved. It reiterated the requirements of the Get Well Plan. Plaintiff claimed that it incorrectly asserted he had failed to meet certain requirements, although during the meeting he had not disputed any of the observations about his job performance. The memo enumerated the six areas of deficiency identified and discussed at the meeting, and warned that plaintiff would be terminated if he did not improve. Plaintiff signed this final warning.

Ten days later, on January 31, 2005, Molloy issued plaintiff's 2004 evaluation, prepared on December 22, 2004, which classified him as unsatisfactory. Plaintiff did not agree with these negative assessments, and testified he had never been told of anything along these lines in his prior twenty years at the company.

A comparison of end-of-year connected sales showed that plaintiff met only seventeen percent of his goal, only five percent over the first six months. Other MAMs and commercial representatives met significantly higher percentages of their goals. Over the next couple of months, plaintiff's performance and Molloy's assessment appeared equivocal. Ultimately, on March 21, 2005, plaintiff was terminated. When Molloy was later promoted and transferred, she shredded many documents prior to moving to her new office, inadvertently destroying or discarding the field sales file which documented her observations of the MAMs.

It is clear that a confused picture emerged during the course of the trial as to whether other MAMs were expected to meet the same requirements as plaintiff, or the extent to which management understood plaintiff's condition, if at all. Pennington, for example, who approved plaintiff's termination, outright asserted that no one at SJI knew plaintiff was

depressed. Yet, she also claimed that she called Worrell to inform him of the termination because she was concerned about plaintiff's emotional state. Despite the fact that his wife stated plaintiff was "devastated" after the firing, plaintiff obtained a new job approximately one month later. Two weeks after termination, plaintiff spoke on the phone with a psychologist, James D. Herbert, Ph.D., and reported feeling disconnected. Dr. Herbert suggested a possible diagnosis of depression and scheduled an intake for April 7, 2005. At the intake, plaintiff told Dr. Herbert that his feelings of being in a fog had worsened in the last year and a half, and he discussed his job performance problems as well as mood swings. Dr. Herbert saw plaintiff again on April 13, after which plaintiff failed to follow through with the assessment process and did not initiate treatment.

Plaintiff testified that he began taking medication in late 2005. He met with Richard A. Kader, D.O., and was diagnosed with depression on November 2, 2006. Plaintiff was still taking medication at the time of trial in 2009.

EXPERT TESTIMONY

Plaintiff's mental health expert witness was David J. York, Ph.D., a clinical psychologist. He testified plaintiff had been depressed at the time his job performance deteriorated and he

was terminated. Dr. York viewed extensive documents and records, including plaintiff's deposition, but never met with plaintiff. Based on this review, he opined that plaintiff "was suffering from a major depressive episode" as of November 2004.

During his testimony, Dr. York said that: Molloy and Lhulier were aware that plaintiff felt he was in a fog; that plaintiff asked Molloy for ninety days, which might have been a request for an accommodation of his disability; that Molloy believed plaintiff was reaching out for help; that Oxenford was aware that plaintiff mentioned suicide at the January 14 meeting and was not responsive to the statement; that Lhulier and others in the workplace had noticed a change in plaintiff over a six-month period; that Oxenford reported the "suicide comments" to Worrell; and that Worrell's evaluation was inadequate and he should have referred plaintiff to a licensed professional. Dr. York also said Worrell improperly concluded plaintiff was depressed because of his poor performance in the workplace, rather than considering that the depression may have been causing the poor performance. Dr. York stated that Molloy mistakenly attributed plaintiff's depressed behavior to plaintiff's fear of losing his job, essentially telling the jury that plaintiff's supervisors vacillated between concern about

him and a failure to recognize the import of his actions and statements.

In fact, Dr. York contended that either Molloy, or Oxenford, or both, lied about the events leading to the termination, based on discrepancies he believed existed in the documents he reviewed. Dr. York considered it inconsequential that SJI had not been informed of testing outcomes by Worrell, or that plaintiff did not learn that he was suffering from depression until approximately a year and a half after his termination.

JURY INSTRUCTIONS

Although the trial judge indicated he would conduct a jury charge conference, we have not been directed to one, nor have we been able to locate one in the trial transcripts. Over SJI's objection, the court instructed the jury as to reasonable accommodation for a disability, and included questions regarding reasonable accommodation on the verdict sheet. SJI objected because plaintiff had not alleged a failure to accommodate in the complaint, and SJI's defense was that plaintiff was terminated because of poor job performance. As we will discuss later in greater detail, even the trial judge agreed when he denied SJI's application for a new trial that the issue should therefore not have been presented to the jury.

In significant respects, the instruction given to the jury did not track the model jury charges. For example, instead of the standard instruction regarding expert testimony, the court referred to the expert's testimony at the end of the charge regarding credibility. He told the jury:

> I'm not making an evaluation as to its credibility. So anything I may have said you need to ignore with the exception of these charges obviously. Any rulings I may have made, if you think I was favoring one party or the other, it looks like one is winning over the other, no, no. You decide who wins based upon the credible evidence. I decide what evidence you get to hear, and those were the battles or the arguments, if you will, that you saw that we were dealing with, not whether you assess credibility to the evidence. Now how do you assess credibility? Well, credibility in its basic form — and remember, you've heard a lot of . . . fancy legal terms in this case. You're going to hear some more in this jury charge, but when we ask you as jurors to come in and sit and hear a case, we also have an expression, don't leave your common sense at the courthouse door. Bring it into this courtroom. Bring it into that jury deliberation room, and when you're deciding credibility, remember it's basic believability. Why do you believe the evidence, how do you believe the evidence, and to what extent do you believe it. If you want to look at it from some legal maxims, you can consider this. False in one, false in all. That means if you don't believe somebody during one part of their testimony, you can discount all of it. Kind of the old expression your grandmother used to tell you, once a liar always a liar. Well, if you want to discount somebody's testimony in total because you think they

lied to you in one part, you're free to do that. Another way to look at credibility is to take apart that testimony. In other words, some [] parts of it may sound very believable, may sound very understandable. Other parts may not. You can sift through it and choose that portion you believe. You may consider when evaluating the credibility of a witness what was their interest in the case; in other words, what do they gain from all this. You may consider were they inconsistent, did they say something on direct examination and something else during cross that's inconsistent. What type of memory do they have. Were they able to give you the facts in a cogent, believable way. All of this goes into assessment of credibility, and again, that's credibility that's applied to the evidence in this case. Keep in mind we've had experts presented by the plaintiff. Now one was the economist, and the other was the doctor, and if you notice at the beginning of the testimony, the plaintiff would go through the qualifications of the expert: "where'd you go to school, how long have you been doing this, have you ever published anything." All those go into an assessment of credibility. Just because I deem them to be an expert doesn't mean that you, as the jury, assign any greater credibility to their testimony than you would a lay witness or party or anybody else that testified in this case, but you can assign it another layer of assessment of credibility; and that is, what is their experience, how long have they been doing what they're doing, what type of schooling do they have, what type of articles have they published. That goes into whether you believe the witness as an expert in this case, and of course, you may also consider . . . the same rules of credibility; in other words, what's their interest in the case, did they have a good memory, were they inconsistent, did they say something on direct and something on cross,

> and does that difference make a difference to you as the decider of facts. All that goes into assessing . . . the credibility of the expert, and you may also consider whether that expert was paid and how much they were paid. Now obviously that goes to one of the points of credibility, what's the interest in the case, what do they have to gain by testifying the way they're testifying. However, I will tell you in advance that it is normal and customary for experts to be paid a fee. Why? They're performing a service. I mean if you hire a plumber to come over and fix your sink, he's an expert. You're paying him some money to come over and perform that service. It's the same thing the plaintiff was doing. They were hiring an expert to perform a service for them. Nevertheless, it may be considered as an issue of credibility in this case.

The above was the full extent of the jury charge regarding the expert's testimony. No limiting instruction was given, either at the time Dr. York testified or in the closing charges, regarding Dr. York's references in his testimony to hearsay, his discussion of the credibility of other witnesses, or characterization of plaintiff's request to his employers for ninety days to improve his performance as being a request for reasonable accommodation.

SJI submitted a proposed jury charge as to reasonable accommodation under protest. It objected throughout the trial to any testimony in that regard, since reasonable accommodation was not pled and it asserted as its principal defense that the

employee in this case "was terminated for legitimate, nondiscriminatory reasons." See Viscik v. Fowler, 173 N.J. 1, 20 (2002).

During deliberations, the jurors asked a number of questions regarding reasonable accommodation. Ultimately, the jury determined plaintiff was terminated for a discriminatory reason and awarded the damages previously described, but never reached the questions on the verdict sheet regarding reasonable accommodation.

I.

In evaluating cases brought under the LAD, New Jersey "courts have adopted the burden-shifting framework articulated in" McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Viscik, supra, 173 N.J. at 13-14. In the context of an alleged discriminatory discharge, the first portion of the McDonnell Douglas framework requires a plaintiff to establish a prima facie case by "prov[ing] '[1] that he was in the protected . . . group, [2] that he was performing his job at a level that met his employer's legitimate expectations, [3] that he nevertheless was fired, and [4] that [the employer] sought someone to perform the same work after he left.'" Clowes v. Terminix Int'l Inc., 109 N.J. 575, 597 (1988) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir.

1979)). Should the plaintiff succeed in meeting these criteria, discrimination is presumed. Viscik, supra, 173 N.J. at 14.

At that point, the burden shifts to the employer "to articulate a legitimate, non-discriminatory reason for the adverse employment action." Ibid. If the employer is successful in doing so, "the burden shifts back to the plaintiff to show that the . . . proffered reason was merely a pretext for discrimination." Ibid. The employee must then demonstrate not only that the reason for the action was false, but also "that the employer was motivated by discriminatory intent." Ibid. In other words, the plaintiff must provide evidence "that either casts sufficient doubt upon the employer's proffered legitimate reason so that a factfinder could reasonably conclude it was fabricated, or that allows the factfinder to infer that discrimination was more likely than not the motivating or determinative cause of the termination decision." Svarnas v. AT&T Commc'ns, 326 N.J. Super. 59, 82 (App. Div. 1999). "Thus, under the McDonnell Douglas framework, a plaintiff retains the ultimate burden of persuasion at all times; only the burden of production shifts." Viscik, supra, 173 N.J. at 14.

II.

SJI asserts that Dr. York's testimony regarding reasonable accommodation prejudiced the outcome, that the court erred in

charging reasonable accommodation, and that these errors alone constitute a basis for judgment notwithstanding the verdict or a new trial. We agree.

Reasonable accommodation is relevant where:

> a plaintiff affirmatively pleads failure to reasonably accommodate as a separate cause of action. . . . The second is the case in which an employer, rather than defending on the grounds that the employee was terminated for legitimate, nondiscriminatory reasons, proffers the employee's inability to perform the job as a defense.
>
> [Viscik, supra, 173 N.J. at 19-20.]

In this case, however, plaintiff did not plead reasonable accommodation. SJI's entire defense to this LAD complaint was that plaintiff was terminated for legitimate, nondiscriminatory reasons, not because any alleged disability rendered him unable to perform his job. Thus, reasonable accommodation was not an issue and should not have been mentioned by Dr. York nor explained to the jury as a possible basis for recovery. Although the trial court agreed with SJI on this score in its written decision denying SJI's motion for a new trial, it nonetheless took no curative action as a result.

Plaintiff contends that Victor v. State, 203 N.J. 383 (2010), stands for the proposition that reasonable accommodation is always an issue in LAD disability cases because it is incorporated into the second prong of the McDonnell Douglas test

for a prima facie case, where a plaintiff has demonstrated the ability to perform the job's essential functions.

This argument is misplaced, however, as Victor addresses the question of "whether an adverse employment consequence is an essential element of a plaintiff's claim that his employer discriminated against him by failing to accommodate his disability." Id. at 388. In other words, the court considered whether a "freestanding" reasonable accommodation claim could exist without an adverse employment action. Id. at 389. But in this case, an adverse action occurred and, furthermore, plaintiff never alleged in his complaint that he requested accommodation.

The Victor Court's language that a "plaintiff [must] demonstrate that he or she is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without a reasonable accommodation" does not make reasonable accommodation a built-in basis for relief in every LAD case. Id. at 410.

When SJI reiterated its objection to the instruction to the jury about reasonable accommodation, the trial judge responded:

> I certainly don't claim to be the expert in this area of the law. It's sometimes confusing. I think I put together charges which [are] kind of an amalgam of both the defense's request and plaintiff's request and tried to stay within the law. I don't

> know how to respond other than to say that was done, and if I didn't do it correctly, three people with better parking spots than me will tell me.

During deliberations, the jury sent out several written questions related to reasonable accommodation, including whether: (1) management or HR ever suggested or recommended medical disability leave or a leave of absence; (2) if management was aware of plaintiff's depressed mood and why, if it played a part in the decision to terminate, he was not offered temporary disability; (3) whether management discussed the option of allowing plaintiff "time to receive treatment from a mental health professional"; (4) whether plaintiff ever requested time off to resolve his problems or management granted plaintiff's request for ninety days; and (5) if plaintiff had requested sick leave or leave with pay in order to receive treatment, it would have been approved.

The jury did not reach these issues. But the questions it asked indicated that lengthy discussions about reasonable accommodation occurred during deliberations.

"It is axiomatic that clear and correct jury charges are essential to a fair trial, and the failure to provide them may constitute plain error." Das v. Thani, 171 N.J. 518, 527 (2002). "Jury charges 'must outline the function of the jury, set forth the issues, correctly state the applicable law in

understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them. . . .'" Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (quoting Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591-92 (1966)).

In general, "an appellate court will not disturb a jury's verdict based on a trial court's instructional error 'where the charge, considered as a whole, adequately conveys the law and is unlikely to confuse or mislead the jury, even though part of the charge, standing alone, might be incorrect.'" Wade v. Kessler Inst., 172 N.J. 327, 341 (2002) (quoting Fischer v. Canario, 143 N.J. 235, 254 (1996)). "[W]hen evaluating the adequacy of a jury's interrogatories or verdict sheet," the same standard is applied. Ibid.

We do not doubt that the jury believed, based on Dr. York's statements and the jury instruction on the subject of reasonable accommodation, that the issue was a subject it should consider. This jury instruction could well have misled or confused the jury with respect to their deliberations about the claims which were properly pled. See Dynasty, Inc. v. Princeton Ins. Co., 165 N.J. 1, 13-14 (2000) (instructions lacking basis in evidence are misleading and constitute reversible error).

In accordance with Rule 4:49-1(a), new trial motions should be granted where, giving "due regard to the opportunity of the jury to pass upon" witness credibility, there clearly and convincingly was "a miscarriage of justice under the law." A trial court's legal conclusions are subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The jury's apparent confusion, resulting from an instruction the trial judge later acknowledged he should not have given, poisoned the charge as a whole and requires reversal. On this basis alone, we believe SJI is entitled to a new trial and disagree with the trial judge that no curative action was necessary. Given that the jury focused on an issue highly prejudicial to SJI during deliberations, about which it should not have heard one word, a miscarriage of justice may well have occurred.

III.

SJI also contends its motion for a new trial should have been granted in light of several erroneous evidentiary rulings, jury instructions which were erroneous separate and apart from reasonable accommodation, and cumulative error. Again, we are constrained to agree.

a.

Reversal on the basis of the erroneous admission of evidence is warranted only where the trial court's decision: (1) is "so wide of the mark as to result in a manifest denial of justice," Bitsko v. Main Pharmacy, Inc., 289 N.J. Super. 267, 284 (App. Div. 1996); or (2) demonstrates "a clear abuse of [] discretion resulting in an injustice." Ripa v. Owens-Corning Fiberglas Corp., 282 N.J. Super. 373, 389 (App. Div.), certif. denied, 142 N.J. 518 (1995). In other words, even where an error has occurred, reversal is necessary "only when an unjust result occurred." Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 92 (App. Div. 1991).

In accordance with N.J.R.E. 403, a trial court may exclude relevant evidence where "its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." Thus, even highly prejudicial evidence may be admitted if it is deemed overwhelmingly probative. Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 496 (1999). "Determinations pursuant to N.J.R.E. 403 should not be overturned on appeal 'unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of

justice resulted.'" Id. at 492 (quoting State v. Carter, 91 N.J. 86, 106 (1982)).

SJI contends that a portion of plaintiff's wife's testimony was not probative, was highly prejudicial and unfounded, and had an inflammatory effect. During her direct testimony, SJI objected to counsel asking whether she knew that plaintiff had "threatened suicide at a meeting . . . [and] had used the word suicide?" The court instructed counsel to avoid leading questions, but permitted him to next ask plaintiff's wife if she had ever been contacted regarding plaintiff's condition at the meeting or the fact that Worrell was evaluating him to determine if he was suicidal; essentially, continuing the line of questioning assuming facts not in evidence about which no ruling issued in response to SJI's objection. Plaintiff's wife said that she was not contacted, although she wished she had been. Counsel then asked why. She responded:

> Because it's unconscionable that if somebody in your employment says that they're going to threaten their - if they threaten their life in your presence, one, you tell their wife. You know, you tell their significant other. You know, Mr. Lhulier has, has known [plaintiff] for 20 years and . . . he was [plaintiff's] mentor, and the fact that he was dedicated, loved South Jersey Gas, never took a sick day, and for 20 years he was a good employee. When they - when he threatened his life in your presence you call crisis intervention at the hospital. You call Mr. Worrell. You call his wife.

> And, and if I had known that he threatened his life he would have been [at] ACMC Crisis Intervention that day, and I just think it's despicable and I - and honestly, I'm looking you in the eye. I'll never forgive you, Mr. Lhulier.

When defense counsel objected that the response was "unnecessary, unwarranted. It wasn't responsive to anything. It was just a speech . . .," plaintiff's wife insisted that it was her "story" and true, to which defense counsel reiterated that it was nonetheless unresponsive. The court overruled the objection, and issued no curative instruction.

SJI subsequently moved for a mistrial, which was denied. As the court saw it, although unhappy with plaintiff's wife's speech, "outbursts happen during trials. It's an emotional time. Trials aren't perfect." The court went on to explain that mistrials should be granted only when something so "egregious happens" that a jury is inflamed, rather than simply "incense[d]" or "tweak[ed]." Therefore, since it intended to instruct the jury to act without bias, prejudice, or sympathy, it felt that would be sufficient to correct any passion aroused by the speech.

On this point, however, the instruction purporting to advise the jury that it should reach its decision in an impartial and unbiased manner was not so clear:

> Your role is to determine fact[s]. Nobody can tell you what to do in that area. That's entirely your decision. If you get to the issue of damages, I will instruct you as follows: number one, you should determine not only that portion of the case but all [of] this portion of the case without using bias or prejudice; in other words, we want you to be — and I'm going to date myself a little bit by saying this. Do you remember Star Trek, the original one with Mr. Spock? Mr. Spock could look at things totally logical. He was not influenced by passion. He certainly wasn't influenced by prejudice, and that's . . . how you need to look at a case. You need to look at a case for the facts as you see them. You need to look at the case for the law. You apply the facts to the law, and that's how you come up with a decision. You don't allow sympathy to enter into your decision. Keep in mind there are actually — yes?

The error in the admission of this testimony was two-fold. It was obviously inflammatory. But it also assumed as fact multiple hearsay which was very much in controversy; namely, that plaintiff mentioned killing himself as he left the January meeting and that his statement was serious. Plaintiff's wife presented the statement as hard fact, indeed, as a betrayal by Lhulier, a long-time friend and mentor. She characterized Lhulier's failure to take action as unforgivable — yet plaintiff did not even engage in treatment for depression until approximately a year and one-half after his termination.

A lay witness may, in accordance with N.J.R.E. 602, testify as to his or her personal knowledge. Phillips v. Gelpke, 190 N.J. 580, 589 (2007). Additionally, "N.J.R.E. 701 permits lay witness testimony regarding common knowledge based on observable perceptions[.]" In re Trust Created By Agreement Dated December 20, 1961, 194 N.J. 276, 283 (2008). Personal knowledge, however, cannot be based on hearsay. Neno v. Clinton, 167 N.J. 573, 585-86 (2001). Additionally, the credibility of a witness is solely the province of the jury, and one witness may not comment on the veracity of another. State v. Vandeweaghe, 351 N.J. Super. 467, 481-82 (App. Div. 2002), aff'd, 177 N.J. 229 (2003). Plaintiff's wife's direct attack on Lhulier was certainly intended to affect the jury's assessment of not only his good faith, but his credibility. At a minimum, the court should have sustained the objection and issued a "firm, clear" curative instruction "without delay." State v. Vallejo, 198 N.J. 122, 134 (2009). Our Supreme Court has "consistently stressed the importance of immediacy and specificity" in giving such instructions to "alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial." Id. at 135. The admission of this testimony was an abuse of discretion, an error compounded by the absence of a curative instruction.

b.

Additionally, the trial court allowed plaintiff to read Oxenford and Molloy's deposition testimony to the jury in contravention of Rule 4:16-1(b). That rule states that a deposition may be read to the jury when, at the time it was taken, the individual "was an officer, director, or managing or authorized agent, or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a . . . corporation . . . ."

Certainly, a trial court is afforded significant discretion when determining whether an individual meets those requirements. See Bonnet v. Stewart, 68 N.J. 287, 299 (1975). No such exercise of discretion was warranted here, however, as neither Molloy nor Oxenford were employed by SJI when they were deposed. Unquestionably the rule was violated.

To some degree the mistake was mitigated as to Molloy, whom defendant called as a witness, but that was not the case as to Oxenford. Defendant initially indicated it would also call him as a witness, but did not do so. Because it did not do so, Oxenford's deposition testimony was read to the jury without any challenge or opportunity for examination. The admission of this testimony was also error.

c.

An expert's opinion, although it may rely upon hearsay, is not to be used as "'a vehicle for the wholesale [introduction] of otherwise inadmissible evidence.'" Vandeweaghe, supra, 351 N.J. Super. at 481 (quoting State v. Farthing, 331 N.J. Super. 58, 79 (App. Div.), certif. denied, 165 N.J. 530 (2007)). In Vandeweaghe, a State psychiatric expert included in his testimony a series of anecdotes related to him by defendant's acquaintances, detailing his prior crimes and antisocial behavior. Id. at 479-80. We reasoned that the testimony was far more prejudicial than probative and therefore should not have been presented to the jury. Id. at 481-82.

In this case, Dr. York commented upon the conduct and statements of Oxenford, Molloy, and Lhulier during and after the January 14, 2005 meeting. He stated that plaintiff told Molloy of something which "most reasonable people would be concerned about," implying Molloy's response was unreasonable. He opined that either Molloy or Oxenford or both lied when describing the meeting. These hearsay statements had nothing to do with the opinion he was called upon to convey to the jury. He could not possibly have relied upon those hearsay statements or his characterizations of Oxenford, Molloy, and Lhulier in diagnosing plaintiff's condition as a "major depressive episode." It is

difficult to imagine any justification for the admission of these statements.

Likewise, the court did not give the jury the model jury charge regarding expert testimony. That instruction reads:

> You have heard testimony from a witness(es) who was (were) called as experts. Generally, witnesses can testify only about the facts and are not permitted to give opinions. However, an exception to this rule exists in the case of an expert witness. An expert witness may give an opinion on a matter in which the witness has (some special knowledge, education, skill, experience or training). An expert witness may be able to assist you in understanding the evidence in this case or in performing your duties as a fact finder. But I want to emphasize to you that the determination of the facts in this case rests solely with you as jurors.
>
> In this case, [list experts] were called as experts and testified about certain opinions.
>
> In examining each expert's opinion(s), you may consider the person's reasons for testifying, if any. You may also consider the qualifications of the individual(s) and the believability of the expert, including all the considerations that generally apply when you are deciding whether or not to believe a witness' testimony.
>
> The weight of the expert's opinion depends on the facts on which the expert bases his/her opinion. You as jurors must also decide whether the facts relied upon by the expert actually exist.
>
> Finally, you are not bound by the testimony of an expert. You may give it

> whatever weight you deem is appropriate. You may accept or reject all or part of an expert's opinion(s).
>
> [Model Jury Charge (Civil) 1.13, "Expert Testimony" (Apr. 1995).]

SJI contends this omission constituted plain error. Rule 2:10-2. We reiterate that as applied to jury charges, the question is whether the instructions, viewed as a whole, explained the law in clear and understandable language. We ask whether the charges were misleading or confusing, or whether they were clearly capable of producing an unjust result which prejudiced substantial rights. Mogull v. CB Commerc. Real Estate Grp., 162 N.J. 449, 466 (2000). In these circumstances, omission of the expert instruction was plain error.

The jury was told to consider only the credibility of the experts. They were not told that they could simultaneously find the expert both credible and mistaken, or credible but nonetheless not worthy of belief, in whole or in part, for any other reason. Since in addition to opining that plaintiff suffered from depression during the relevant time, plaintiff's expert also commented upon the credibility, good faith, and reasonableness of his employers, the omission of this instruction is indeed plain error. Once having found Dr. York credible, the jury would not have known that it did not need to accept his criticisms of SJI management, his narrative of events

leading to the termination, or that it could otherwise accept only a portion of his testimony.

Charges which closely track the model jury charges rarely constitute plain error. Id. at 466. In this case, none of the instructions appear to have closely tracked the model jury charges. They did not offer the jury the necessary clear guidelines for its deliberations, or clear and understandable legal definitions and rules of law.

d.

As a result, we agree that the trial errors, including erroneous evidentiary hearings and jury instructions, cumulatively require reversal. Trial errors that would not mandate reversal when viewed individually may require it when viewed in the aggregate. Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 51-53 (2009). In fact, New Jersey courts "have recognized that the cumulative effect of small errors may be so great as to work prejudice, and [] have not hesitated to afford the party suffering that prejudice relief where it has been warranted." Id. at 53.

The test for cumulative error "is informed by the dictates of Rule 4:49-1(a), which provides that [a] motion [for a new trial] is governed by the miscarriage of justice standard and evaluated in accordance with a heavy burden, that the appearance

of injustice be clear and convincing." Id. at 52. Relevant to the inquiry as to whether cumulative error warrants a new trial is consideration of whether: (1) the errors pervaded the trial; (2) the jury was inflamed by prejudicial evidence; (3) the parties were treated disparately; and (4) the record viewed in its entirety, from jury selection to damages, "engenders the distinct impression that defendants were not accorded justice." Id. at 55-56.

The improper admission of plaintiff's wife's statement regarding plaintiff's comments at the January meeting, the improper deposition reading, Dr. York's improper comments on the credibility and reactions of Molloy and Oxenford, and the improper omission of the expert testimony instruction, constitute a series of mistakes that "cannot be explained away as harmless . . . . They represent real and repeated errors that accumulated so as to . . . deprive defendants of a fair trial." Id. at 56-57.

Accordingly, we reverse and remand for a new trial.