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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0686-13T1

MARYANNE GRANDE, R.N.,

Plaintiff-Appellant,

v.

SAINT CLARE'S HEALTH SYSTEM,

Defendant-Respondent.

Argued December 3, 2014 – Decided August 28, 2015

Before Judges Fuentes, Ashrafi and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1376-11.

Noel C. Crowley argued the cause for appellant (Crowley & Crowley, attorneys; Mr. Crowley, on the briefs).

Sean R. Gallagher (Polsinelli, PC) of the Colorado bar, admitted pro hac vice, argued the cause for respondent (McCarter & English, LLP and Mr. Gallagher and Gillian McKean Bidgood (Polsinelli, PC) of the Colorado bar, admitted pro hac vice, attorneys; Mr. Gallagher, Ms. Bidgood and Thomas F. Doherty, on the brief).

PER CURIAM

Plaintiff Maryanne Grande, R.N., filed a two count complaint against her former employer, defendant Saint Clare's Health System, alleging defendant terminated her from her

employment as a nurse because of her disability and for being perceived to have a disability, in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Plaintiff sought economic and compensatory damages.

After joinder of issue and engaging in discovery, defendant moved for summary judgment arguing plaintiff was terminated from her employment as a nurse because she was physically unable to perform the essential duties of her job. Plaintiff responded to defendant's motion claiming the undisputed facts show she was able to perform all of the essential duties of a nurse. Plaintiff also filed her own cross-motion for summary judgment, arguing defendant unlawfully terminated her from her position as a nurse because she was "perceived" to have a physical disability, in violation of N.J.S.A. 10:5-4.1 and N.J.A.C. 13:13-1.3(1).

The Law Division granted defendant's motion for summary judgment and dismissed plaintiff's complaint with prejudice. Applying the analytical paradigm established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the motion judge found plaintiff failed to establish a prima facie case for employment discrimination because she was unable to perform her duties as a nurse to meet defendant's legitimate expectations. The judge also found defendant had satisfied its burden to

provide a legitimate, non-discriminatory reason for plaintiff's discharge.

Plaintiff moved for reconsideration arguing the motion judge applied an incorrect legal standard in deciding to grant defendant's motion for summary judgment. Plaintiff argued the appropriate standard for determining the legal viability of her claims of employment discrimination under the LAD was established by our Supreme Court in Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363 (1988). Plaintiff argued the Court in Jansen construed N.J.S.A. 10:5-4.1 to prohibit discrimination against the handicapped unless the employer can prove, with a reasonable degree of certainty, that plaintiff, as the person perceived to be handicapped, poses a serious threat of injury to the health and safety of herself, fellow employees, or to her patients. Jansen, supra, 110 N.J. at 374.

In denying plaintiff's motion for reconsideration, the motion judge agreed that the Court's holding in Jansen articulated the legal standard applicable to this case. Despite this, the judge found, "unlike the paucity of the lower court record in Jansen, the record [in this case] is replete with evidence that the Defendant appropriately concluded that patients were in danger, and that accommodations were unpractical and unreasonable given the Plaintiff's job responsibilities and duties."

Plaintiff now appeals arguing the Law Division: (1) misapplied the Court's holding in Jansen; (2) allowed inadmissible hearsay evidence to influence its decision in defendant's favor; and (3) contravened the standards governing the adjudication of motions for summary judgment by making factual findings that were not supported by an undisputed factual record.

We review a trial court's decision granting or denying a motion for summary judgment using the same standard used by the trial judge. Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). We must determine, based on the competent evidential materials submitted by the parties, whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). A trial court is compelled to grant summary judgment only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

After reviewing the record and applying the relevant standards, we reverse. The record developed by the parties contains a number of key material facts in dispute that can only

be resolved by a jury. In granting summary judgment in defendant's favor, the motion court incorrectly resolved these materially disputed facts in favor of defendant and rejected or minimized the importance of evidence a rational jury could find to support plaintiff's case of unlawful discrimination due to her perceived physical disability. Based on the record before us, defendant did not indisputably establish, within a reasonable degree of certainty, that plaintiff cannot perform the core duties of her job as a nurse without posing a serious threat of injury to herself, or to the health and safety of her patients or fellow employees. Jansen, supra, 110 N.J. at 374. This case is thus not ripe for disposition in defendant's favor as a matter of law. Brill, supra, 142 N.J. at 540.

Because the Law Division granted summary judgment in defendant's favor, we will describe the factual record in the light most favorable to plaintiff, "together with all legitimate inferences therefrom[.]" R. 4:46-2(c).

I

Plaintiff worked as a registered nurse for Saint Clare's Health System from 2000 to 2010. She was initially assigned to the "float pool." As plaintiff explained in her deposition, when she was in the "float pool" she reported to work in the morning "and they [gave] you what floor to work on." Her duties

included "direct patient care." She worked in this capacity from 2000 until the position was "eliminated" in 2003. From this point, she worked in the medical surgical unit known as "Urban 2." This unit had approximately thirty-eight to forty beds, and was dedicated to serving patients who had both medical and surgical needs. According to plaintiff, the number of nurses assigned to Urban 2 "was not the same every day." Depending on the availability of staff, "generally three to four nurses" worked in Urban 2 on a daily basis. Plaintiff worked in Urban 2 for approximately three years.

Plaintiff next worked in the emergency room at Dover General. When asked why she moved to the emergency room, she answered, "[f]or experience." She described her duties as an emergency room nurse as involving "more detailed assessment because the patients are coming from outside, patient care, the usual assessments, medications, IVs [intravenous], testing, blood work and speaking with the doctors, charting." When asked to compare her activities working in the emergency room to the activities in Urban 2, plaintiff explained she had "a longer stay" with patients in Urban 2 than those in the emergency room, "unless the patients in the emergency room were admitted." She also noted that emergency room patients "were more critical at the moment. They needed to be stabilized." She served as an

emergency room nurse until 2006 or 2007, for approximately one and a half years.

Her next assignment was at Unit "4A . . . a medical surgical unit [that] eventually turned into a stroke unit" in 2007 to 2008. This unit was located in Denville. Her duties in Unit 4A were initially "the same . . . patient care, assessments, medication administration, charting, [and] rounds." These duties also included "activities of daily living," which involved "washing, bathing, dressing, ambulating, prepping [patients] for tests, [and] physical therapy." It was expected that nurses assigned to 4A would assist patients walking, help pull patients up in bed, and reposition patients while in the bed.

When stroke patients were added to Unit 4A, the nurses assigned to assist them were "to get certified." This certification process consisted of taking "online courses" to acquire competencies specific to stroke patients. These "competencies" consisted of learning when to administer specific time-sensitive medications, recognizing the symptoms of a stroke, and learning how to perform tests to confirm the existence of certain medically significant events. Plaintiff testified that approximately fifty percent of the patients were recovering stroke patients. However, because of the intensity of care required by recovering stroke patients, Unit 4A only had

about twenty to twenty-four beds, approximately half the size of the other units. Thus, the nurse to patient ratio was about "five to one." When asked how long she worked in Unit 4A, plaintiff responded: "Until . . . I was let go on July 22nd, [2010]." Stated differently, plaintiff worked in Unit 4A for approximately three years.

Plaintiff had a total of three work-related injuries during the ten years she was employed by defendant. Her first work-related injury occurred on March 23, 2007. As reflected in defendant's records, plaintiff "was pulling a patient up in bed and . . . felt a crack in [her] shoulder, a crackling sensation in [her] shoulder and pain[.]" Assisted by another staff person, plaintiff was using "a pad" to pull the patient up in the bed. This is a typical procedure nurses use for this purpose.

The injury was to her left shoulder and required surgery to correct. She returned to work "on light duty" on June 18, 2007. According to defendant's employee records, plaintiff returned to work without restrictions on July 12, 2007. Plaintiff testified her physician told her "just be mindful of [your] shoulder when lifting anybody or anything." When asked to elaborate, plaintiff explained she understood these comments by her doctor to mean "just be cautious." Her fellow nurses were aware of plaintiff's concerns and "volunteered to a degree" to help on

occasion. On May 1, 2008, plaintiff "experienced pain" in her right shoulder while repositioning a patient in bed. An MRI revealed "no injury" to the right shoulder. She was advised by her doctor to "be careful," and returned to full duty within weeks.

Plaintiff had another work-related injury on November 20, 2008. She was working in Unit 4A at the time. Plaintiff injured her "left shoulder" while lifting the legs of a patient who weighed approximately 300 pounds. Although the "secretary of the floor" was in the room with plaintiff when the injury occurred, plaintiff was the only one lifting the patient's legs. Plaintiff had surgery to repair the injury to her left shoulder on January 22, 2009. Plaintiff testified her physician did not express any concerns to her about returning to work having had surgery to repair injuries in the left shoulder. She was cleared to return to active duty without restrictions.

The latest work-related injury occurred in 2010. Plaintiff gave the following description of how she was injured:

> The patient was in an isolation room, so I was gowned and gloved. He was going down for x-ray. The tech came up and got the patient with the stretcher, and getting the patient over to the stretcher, the patient said he could use the walker to stand. He used the walker to stand and he got over the stretcher. Upon returning back from the test, the, I don't know what they are called, the tech, runner, whatever, he is that brings the patient back, brought the

> patient back, and, again, we took the walker to the patient so he could transfer from the stretcher to the bed.
>
> And at that time while he was standing, the tech took the stretcher out of the room and the patient said, "I am falling," so I grabbed the patient so he wouldn't fall and I pulled him to the bed on top of me pretty much.

It is undisputed this incident coincided with a safety initiative defendant was implementing at the time to reduce the number of patient falls. It consisted of placing symbols outside the doors of rooms where patients who were recognized to have a higher risk of falling were located. Plaintiff estimated that forty percent of the patients in Unit 4A had this symbol on their room door.

Plaintiff injured the cervical area of her spine as a result of this incident, and had surgery on May 13, 2010 to address it. She was on leave under the Family Medical Leave Act from February to April 2010, and also received ten weeks of workers compensation benefits which ended on April 26, 2010. Plaintiff returned to work on light duty on June 14, 2010; this consisted of reviewing charts for compliance. She was physically unable to perform the tasks assigned to her on light duty for a full shift, and returned home after four hours. She was on personal leave from April 27, 2010 through July 20, 2010. On June 17, 2010, plaintiff's physician, Dr. Joel H. Spielman,

wrote a statement authorizing her to return to work for sedentary duty beginning on June 25, 2010. Plaintiff returned to work accordingly. Dr. Spielman also cleared plaintiff to return to work on full active duty as of July 9, 2010.

Genex Services, Inc., administers defendant's employee medical benefits plan on behalf of defendant's medical benefits carrier. On July 7, 2010, Lori Briglio, R.N., an employee of Genex Services, informed plaintiff her return-to-work date had been postponed pending the results of a "functional capacity evaluation test." Without prior notice, Briglio further informed plaintiff that she was required to take this test on July 12, 2010, at a facility operated by Kinematic Consultants, Inc. (KCI).[1]

As plaintiff described in her deposition, the testing consisted of various physical tasks requiring her to turn her head, lift certain objects of undisclosed weight, and move her body in specific ways. Plaintiff indicated that at the conclusion of the test the technician reassured her not to "lose any sleep over it" because that she had passed. On July 12, 2010, KCI issued a report on plaintiff's performance.

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[1] According to a certification submitted by Heather Jordan, employed as a Human Resource Business Partner for Saint Clare's Hospital, in support of defendant's summary judgment motion, KCI "is an independent company that is not affiliated in any way with Saint Clare's Health System or Saint Clare's Hospital."

In a letter dated July 19, 2010, Monica Lynch, the Director of KCI's Functional Capacity Evaluation Department, provided Briglio with an addendum to the report "to address the concerns that were forwarded to this office via your email message." The addendum addressed six specific items: (1) repetitive lifting of 50 lbs.; (2) if plaintiff lifted the 50 lbs. limit, but was unable to do so repetitively; (3) work effort; (4) job class category that plaintiff did meet; (5) part of the job description plaintiff cannot fulfill; and (6) accommodation for part of the job. Lynch concluded the letter-addendum to Briglio with the following caveat: "Please note that determination for final return to work abilities for this Examinee is deferred to her treating physician, in this case, Joel H. Spielman, M.D." (Emphasis added).

On July 21, 2010, Dr. Spielman issued plaintiff a "certificate" authorizing her to return to work on the following day with "restrictions per [the report], full time." Briglio advised defendant of Dr. Spielman's assessment that same day. Also that same day, Deborah Regan, defendant's Director of Nurses, informed plaintiff she should report directly to Regan's office upon her return to work the next day, not plaintiff's work station. When plaintiff reported to Regan's office as instructed, she found, in addition to Regan, Rui Matos, her immediate supervisor, and Heather Jordan, an executive in

defendant's human resources department. They informed plaintiff her employment had been terminated because the KCI report indicated she would require specific restrictions which defendant was unable to accommodate.

Following her termination, plaintiff met with Dr. Spielman, who on August 25, 2010 issued an amended "certificate" authorizing her to return to work with no restrictions "full time, full duty." (Emphasis added). After allegedly considering Dr. Spielman's August 25, 2015 certificate, defendant reaffirmed its July 21, 2010 position and refused to reverse its decision to terminate plaintiff.

The record includes defendant's Job Description for Registered Nurse for the Denville location. This document gives the following Job Summary for the position of Registered Nurse:

> Performs patient care utilizing the nursing process. Provides and maintains competence to care for patients ranging from neonatal through geriatric, depending on the clinical area and the population served.

The Job Description also included the following list of "essential" requirements for nursing in Acute Care, Medical-Surgical, and Emergency Services:

Functional List	Hand/Arm Tasks
	Pinch
Sitting	Grip
Standing	Fine manipulation
Walking	Keyboard
Twisting	

Climbing stairs
Balancing
Squatting
Sustained bending
Reaching Above Shoulder
Reaching Waist High
Reaching Below Belt

Lift and Carry Tasks

Floor-to-Waist 25 pounds
Waist-to-Chest 50 pounds
Chest-to-Overhead 10 pounds
Two-Hand Carry 20 pounds
One-Hand Carry 10 pounds
Pushing/Pulling 50 pounds

Exposures to Chemicals

MSDS Sheet
Chemo Therapeutic Meds

Protective Equipment

Shoes
Gloves
Glasses/ Eye Protection
Respirator: N95/Dust mask

Task

Light Touch
Vision
Hearing
Problem Solving
Speaking
Remembering
Work with Others
Color
Depth Perception
Reading
Work Independently

Both parties also interpret the results of the KCI report to support their divergent positions. Plaintiff claims the physical demands allegedly measured in the KCI report differ from the specific requirements listed in the job description and appear to be internally inconsistent. Specifically, the physical strength demands of plaintiff's position are considered "medium" by the Dictionary of Occupational Titles (DOT),[2] but

[2] Plaintiff claims the United States Department of Labor (USDOL) issues the DOT. However, the USDOL has replaced the DOT with the Occupational Information Network O*NET. See USDOL website, (continued)

"heavy" by defendant. Next, the essential job task (EJT) strength demands are different between the DOT and defendant:

EJT Strength Demand Job Category

	Category:	Occasional (1-33%)	Frequent (34-44%)	Continuous (67-100%)
Demands/**DOT**	Medium	50	20	10
Ability	Medium	50	20	10
Demands/**Employer**	Heavy	100	50	20
Ability	Medium	50	20	10

The recommended material handling in pounds is:

	To waist	To chest	Over shoulder
Occasional (0-33%) lift and work at	50	40	30
Frequent (33-66%) lift and work at	20	16	12
Constant (67-100%)	10	8	6

By contrast, the EJT material handling ability, "as per employer job description" is as follows in the report:

	Occasional (1-33%)		Frequent (34-66%)		Continuous (67-100%)	
	Demand	Examinee	Demand	Examinee	Demand	Examinee
Floor to waist	100	131	50	66	20	26

(continued)
http://www.dol.gov/dol/siteindex.htm#D, (last visited Aug. 16, 2015).

Waist to shoulder	80	92	40	46	16	18
Shoulder to overheard	60	54	30	27	12	11
Push	136	92	60	46	27	18
Push right	68	48	34	24	14	10
Push left	68	44	34	22	14	9
Pull	127	88	64	44	25	18
Carry	64	73	32	37	13	15

In its original evaluation report dated July 12, 2010, KCI stated its "impression": "FCE [functional capacity evaluation] may be compatible with mild residual functional issues, as per complaints and/or diagnosis. It is improbable that this will significantly affect job performance ability." The report indicated that under the return to work job demands of defendant, plaintiff would need to be on altered duty. Under the return to work job demands per the DOT, plaintiff could have returned to full duty along with some suggestions. The report added the following comment:

> The examinee demonstrates ability for Medium category work (occasional lift and work up to 50 lbs.) with the above noted job movement demand changes. She demonstrated ability for administrative/supervisory duties, verbal instruction to patients/care givers, assisting physicians with examinations, assisting with would care/dressing changes, dispensation of medications, pushing wheelchairs, assisting with moderate patient care, handling loads up to 50 lbs., etc. Due to Examinee's post-fusion status, it is recommended that she is allowed changes in activities during periods of prolonged or repetitive end range

> cervical positioning > 20-30 minutes (i.e. looking up/down, reaching away or above shoulder height, data entry). Due to her demonstrated strength, it is recommended that she seek appropriate assistance with heavier physical activities as patient transfers, guarding ambulatory patients or handling loads > 50 lbs.
>
> It is our understanding, as per Examinee, that she is currently working. If this job information is accurate, she demonstrated ability for any work up to Medium category with similar action requirements. The Examinee is encouraged to improve her movement abilities, endurance and overall strength with a self-maintained exercise program.

The report concluded with the following caveat:

> <u>The FCE is for information purposes only and is intended to be used as a guideline for back to work decision making by the attending physician, who has medical authority for the final decision on work status</u>.
>
> [(Emphasis added).]

As noted earlier, plaintiff's attending physician Dr. Spielman issued a "certificate" on July 21, 2010, authorizing plaintiff to return to work on the following day with "restrictions per [the KCI report], full time." On August 25, 2010, Dr. Spielman issued a final "certificate" clearing plaintiff to return to work "full time, full duty," and without restrictions.

Against this record, the motion judge held defendant was entitled to terminate plaintiff's employment because, due to her

physical limitations, the record showed she could not perform the core responsibilities of her job as a nurse without creating a substantial risk of serious injury to herself, her patients, or fellow employees.

II

Because the Law Division dismissed plaintiff's complaint as a matter of law, our review is de novo. Saccone v. Bd. of Trs. of the Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014). We review the denial of a motion for reconsideration mindful that such a decision is "within the sound discretion of the [c]ourt, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

The LAD prohibits an employer from dismissing a handicapped employee, or an individual perceived to be handicapped, unless the disability "reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1. Our Supreme Court's decision in Jansen set the standards applicable to deciding this appeal. As framed by Justice Pollock on behalf the Court, the central issue in Jansen was whether the defendant employer had a reasonable basis to conclude the employee's epilepsy "presented a materially enhanced risk of harm to him or other employees." Jansen, supra, 110 N.J. at 367.

The plaintiff in Jansen suffered from "a mild form of epilepsy known as psychomotor or temporal lobe epilepsy, a form that causes 'partial, complex seizures.'" Id. at 368. The plaintiff "began working as a meat cutter" for the defendant, the owners of a supermarket chain, four years before he was diagnosed with this form of epilepsy. Id. at 369. As a meat cutter, the plaintiff's work entailed the use of butcher knives and other cutting tools, including a band saw. Ibid. He controlled his epilepsy through medication and suffered six to ten seizures. Ibid. He worked for the defendant from 1974 to 1982 without incident. Ibid. Although aware of his diagnosis, the defendant did not take any adverse employment action against Jansen until an incident that occurred at work on July 17, 1982. Ibid. That day,

> the meat department manager, Dominick Iannuzzi, was instructing Jansen on cutting top round steaks. While Jansen was cutting steaks with a large steak knife, he suffered a seizure in which he stopped and stood staring, with the knife in his right hand. When Jansen did not respond to inquiries, Iannuzzi removed the knife from Jansen's hand. Jansen sat on the butcher's block, noticed another employee, and said, "this is it, it's all over," and walked out of the room. Found in the restroom, Jansen seemed dazed and did not remember the incident.
>
> [Ibid.]

Jansen provided the defendant with a note from his treating neurologist stating that his seizures were "under fair control

on medication," that he had "increased [his] medication so as to help prevent recurrence of such seizures in the future," and that he expected "to be able to achieve better seizure control for Mr. Jansen." Id. at 370. Meanwhile, meat department employees learned of the incident and complained to the store manager that they feared for their own safety and did not want to work with Jansen. Ibid. The defendant arranged for medical examinations by a neurosurgeon and a psychiatrist. Ibid. The defendant's experts found no psychopathology, but concluded that Jansen's continued employment would be "risky and dangerous." Ibid. One of the employer's experts performed a complete physical and neurological examination and concluded:

> Thusfar, he has not been really adequately controlled by medication, but even if such control is obtained, one can never state with certainty that such a patient may not have another attack in spite of adequate medication. For these reasons, I think that such patients, including Mr. Jansen, need to be protected, as well as other people, from the effects of such seizures, and I think, therefore, that any occupational activity in which the patient might injure himself or others, were he to have a seizure, should be avoided. Therefore, as I indicated in my initial report, I think that the occupation of butcher and meat cutter entailing as it does, access to knives and other dangerous instruments, is inappropriate and potentially hazardous in this instance.
>
> [Id. at 371.]

Based on these reports, the defendant/employer terminated Jansen's employment. Ibid. Jansen gave the defendant reports from his own physicians who assured the defendant that Jansen's epilepsy was under control and that his infrequent seizures indicated he did not pose a workplace hazard. Ibid. Unable to obtain relief from his employer, Jansen brought a claim against the defendant for unlawful termination of his employment based on being an epileptic, in violation of the LAD, N.J.S.A. 10:5.4-1. Id. at 372.

In upholding the plaintiff's claim, the Court noted that the defendant's medical experts' failure "to distinguish between the risk of a seizure and that of harm to others rendered their reports deficient." Id. at 379. The Court emphasized that the physician who examined the plaintiff on behalf of the employer did not make "an individualized assessment of the probability that Jansen's handicap would pose a risk of harm to Jansen or others." Ibid.

The Court provided the following guidelines for determining whether an employee's disability reasonably precludes job performance:

> [A]n employer may consider whether the handicapped person can do his or her work without posing a serious threat of injury to the health and safety of himself or herself or other employees. That decision requires the employer to conclude with a reasonable degree of certainty that the handicap will

> probably cause such an injury. The mere fact that the applicant is an epileptic will not suffice. Otherwise, unfounded fears or prejudice about epilepsy could bar epileptics from the work force.
>
> [Id. at 374 (emphasis added) (citation omitted).]

To terminate an employee based on "the safety defense" without committing unlawful discrimination, "the employer must reasonably conclude that the employee's handicap poses a materially enhanced risk of serious injury." Id. at 376. Probability, not mere possibility, is key. Ibid. The Court thus emphasized:

> An employer may not rely on a deficient report to support its decision to fire a handicapped worker. If, however, the employer relies on an adequate report, courts should not second-guess its decision. In arriving at its decision, the employer should review not only the report of its medical experts, but also relevant records such as the employee's work and medical histories. The employer thereby can independently reach an objectively reasonable decision about such matters as the probability that the employee will cause harm to himself or other employees. In an appropriate case, an employer might reasonably be expected to communicate with its expert about the meaning of the report.
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> [Id. at 379-80 (citations omitted).]

The Court reaffirmed the Jansen standard in Greenwood v. State Police Training Center, 127 N.J. 500, 511 (1992), noting that "the LAD prohibits an employer from dismissing a

handicapped employee because of a disability that does not 'reasonably preclude[] the performance of the particular employment.'" (quoting N.J.S.A. 10:5-4.1). "Under the LAD the critical inquiry is 'whether the handicapped person can do his or her work without posing a serious threat of injury to the health and safety of himself or herself or other employees.'" Greenwood, 127 N.J. at 511 (quoting Jansen, supra, 110 N.J. at 374).

Here, plaintiff produced competent evidence, in the form of her treating physician's certification, stating she had been medically cleared to return to work without restrictions. Defendant has not rebutted that medical opinion with the opinion of another physician. Instead, defendant relies on the results of a "functional capacity evaluation test" conducted by an alleged independent company retained by defendant's Department of Human Resources. KCI's report contains facially equivocal findings with respect to plaintiff's abilities to perform the core requirements of a nurse.

However, in determining whether this case is ripe for summary judgment, the most significant part of the two reports issued by KCI is Monica Lynch's disclaimer, as the Director of KCI's Functional Capacity Evaluation Department, that "determination for final return to work abilities for this Examinee is deferred to [plaintiff's] treating physician, in

this case, Joel H. Spielman, M.D." A rational jury can find this disclaimer creates a sufficient basis to find defendant terminated plaintiff's employment without information to reach the conclusion, with a reasonable degree of certainty, that plaintiff could not do her work as a nurse without posing a serious threat of injury to the health and safety of herself, her coworkers, or her patients.

Relying on Raspa v. Office of Sheriff of County of Gloucester, 191 N.J. 323 (2007), defendant argues we do not need to reach the issue of probability of future harm because plaintiff failed to establish a prima facie case that she can meet defendant's legitimate employment-related expectations. Defendant's reliance on Raspa is misplaced. The legal question in Raspa concerned the reasonableness of an accommodation requested by a Corrections Officer who suffered from Grave's disease, "a disabling disease that, in his doctor's words, required that the corrections officer 'be in an environment with minimum to no contact with prison inmates to insure minimum risk to the corrections officer.'" Raspa, supra, 191 N.J. at 327. In that context, the Court held, "an employee must possess the bona fide occupational qualifications for the job position that employee seeks to occupy in order to trigger an employer's obligation to reasonably accommodate the employee to the extent required by the LAD." Ibid. (emphasis added).

Here, by contrast, plaintiff has not requested an accommodation from defendant to permit her to perform the core duties of her job as a nurse. She has presented evidence, in the form of a certificate from her treating physician, that she is fully capable of discharging her duties and performing her job in the same manner and under the same conditions she accepted and abided by during her ten-year tenure as defendant's employee. Defendant has presented evidence, in the form of a performance evaluation report, which allegedly refutes plaintiff's claims. A rational jury is capable of discerning the probative value of this evidence and, guided by the relevant legal principles, reach an ultimate verdict on the matter.

Our dissenting colleague concludes an employer "can sensibly rely on plaintiff's actual work history," as it relates to work-related injuries, to terminate her employment without violating the LAD. This conclusion was expressly repudiated by the Supreme Court in Raspa:

> [The LAD] forbids 'any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment. To give meaning to that caveat requires the conclusion that, unless an employee's 'disability reasonably precludes the performance of the particular employment, discrimination in employment on

> the basis of a disability or handicap is prohibited. (Emphasis added).
>
> [Id. at 336 (citations omitted).]

The Law Division's order granting defendant's motion for summary judgment and dismissing plaintiff's complaint with prejudice is reversed and the matter is remanded for such further proceedings as may be warranted.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

ASHRAFI, J.A.D., dissenting.

Respectfully, I dissent. I would affirm the order granting summary judgment to defendant Saint Clare's Health System essentially for the reasons stated in the trial court's written decision of September 12, 2013, on plaintiff's motion for reconsideration. Applying the law established by the Supreme Court in Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363 (1998), and subsequently applied in Raspa v. Office of the Sheriff of the County of Gloucester, 191 N.J. 323 (2007), no rational jury could find that defendant-hospital violated the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

Before the hospital terminated plaintiff's employment as a nurse caring for stroke patients, she injured herself four times in a three-year period because her regular job duties were more strenuous than she could safely perform. Three times she seriously hurt a shoulder while lifting patients in their beds, and the fourth time she hurt her neck while trying to prevent a patient from falling. The job required frequent heavy lifting of patients. The hospital reasonably and lawfully determined that retaining plaintiff was not safe for her or for patients.

The court now holds that a jury might conclude plaintiff's termination amounts to discrimination based on an actual or perceived disability. The law should not place a hospital in a

position of sacrificing employee and patient safety in order to avoid potential liability for discrimination.

Contrary to the majority's conclusion, there is no genuine factual dispute in this case that requires a jury's assessment. Both parties filed for summary judgment because the facts are not disputed. Plaintiff does not deny her four serious injuries were caused by the usual lifting and fall-prevention duties of her job. The only dispute is a legal one — whether the hospital could impose the lifting and fall-prevention qualifications that it did for plaintiff's job, and whether it could terminate plaintiff when she did not satisfy those requirements. See Raspa, supra, 191 N.J. at 337 ("[T]he threshold question of law that must be addressed is whether the 'disability reasonably precludes the performance of the particular employment[,]' N.J.S.A. 10:5-4.1 (emphasis supplied) . . . ."). The trial court decided that legal issue correctly.

In Jansen, supra, 110 N.J. at 374, the Court stated:

> As we have previously written, "[u]nder both [N.J.S.A. 10:5-2.1[1] and N.J.S.A. 10:5-

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[1] N.J.S.A. 10:5-2.1 provides in relevant part:

> Nothing contained in this act . . . shall be construed . . . to prohibit the establishment and maintenance of bona fide occupational qualifications . . . nor to prevent the termination or change of the employment of any person who in the opinion of the employer, reasonably arrived at, is

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> 4.1[2]], an employer found to have reasonably arrived at an opinion that a job applicant cannot do the job, either because the applicant is unqualified or because of a given handicap, cannot be found liable for discrimination against that applicant." Andersen [v. Exxon Co., U.S.A.], 89 N.J. [483,] 497 [(1982)]; accord Panettieri v. C.V. Hill Refrigeration, 159 N.J. Super. 472, 473, 487 (App. Div. 1978). The two provisions leave the employer with the right to fire or not to hire employees who are unable to perform the job, "whether because they are generally unqualified or because they have a handicap that in fact impedes job performance." Andersen, supra, 89 N.J. at 496.

The Court added:

> In deciding whether the nature and extent of an employee's handicap reasonably precludes job performance, an employer may consider whether the handicapped person can do his or her work without posing a serious threat of injury to the health and safety of himself or herself or other employees. Panettieri, supra, 159 N.J. Super. at 491-92. That

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(continued)

> unable to perform adequately the duties of employment . . . .

[2] N.J.S.A. 10:5-4.1 provides in relevant part:

> All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment.

> decision requires the employer to conclude with a reasonable degree of certainty that the handicap will probably cause such an injury.
>
> [Id. at 374.]

Similar to the kinds of proofs described in Jansen, id. at 379, the hospital in this case presented objective evidence that plaintiff could not safely perform the "heavy" lifting duties of the job. The testing of plaintiff's physical abilities conducted by Kinematic Consultants, Inc., demonstrated that plaintiff was only capable of performing "medium," not "heavy," lifting work. Plaintiff did not present conflicting evidence that she was capable of safely performing repetitive "heavy" lifting as required by the job qualifications the hospital had established in 2008.

Furthermore, at the time the hospital made its decision to terminate plaintiff, her treating physician had stated she could return to work, but only with lifting restrictions. The doctor modified his recommendation and removed the reference to restrictions, but only after the hospital had already terminated plaintiff's employment. Cf. Raspa, supra, 191 N.J. at 330 (the plaintiff's treating doctor modified his opinion of the restrictions required for the plaintiff's performance of his job duties only after the employer made a decision to terminate the plaintiff, but the modification was not sufficient to establish

discrimination). Here, plaintiff presented no evidence in the summary judgment motion supporting the reasons for her doctor's changed conclusion and no evidence that the doctor predicted she would be safe against further injury if she had to do heavy lifting.

Most important for purposes of an analysis under Jansen, plaintiff had an established history of injuring herself when doing the regular heavy lifting and fall-prevention duties of a nurse caring for stroke patients. The hospital was not merely predicting future injury because plaintiff suffered from a medical condition. It could sensibly rely on plaintiff's actual work history when it placed safety interests above plaintiff's continued employment.

In Jansen, supra, 110 N.J. at 368-69, the plaintiff's epilepsy had not caused any injury, and the employer decided without sufficient concrete evidence that the risk of future epileptic seizures would be dangerous to others. Id. at 377-80. In this case, the hospital "reasonably arrived" at the determination that there was a "probability," not just a "possibility," of future injury to plaintiff if she continued to perform the heavy lifting and fall-prevention duties of her job. See id. at 376.

The consulting firm that tested plaintiff recommended she "seek appropriate assistance with heavier physical activities

such as patient transfers, guarding ambulatory patients or handling loads [greater than] 50 [pounds]." That recommendation and the lifting restrictions plaintiff's doctor placed on her return to work were not practical solutions to plaintiff's inability to perform all the essential duties of her job. Plaintiff was required at times to attend to a patient alone, such as at the time of the fourth incident when she injured her neck because a patient fell on her. Also, even with assistance in performing her lifting duties on some of the other occasions when she was injured, plaintiff could not safely perform the required patient care duties of the job without getting injured. The LAD does not require that an employer provide constant additional assistance to an employee who cannot physically perform the regular and necessary duties of the job, or alternatively, to transfer permanently those job duties to others. See Raspa, supra, 191 N.J. at 340-41. In fact, plaintiff does not allege that the hospital failed to provide reasonable accommodation for her disability.

The Supreme Court in Jansen, supra, 110 N.J. at 379, stated "courts should not second-guess" the decision of an employer to discharge an employee based on "an adequate report" and "the employee's work and medical histories." It continued: "The employer thereby can independently reach an objectively reasonable decision about such matters as the probability that

the employee will cause harm to himself or other employees." Ibid. Here, this court would allow a jury to second-guess the employer's decision about the safety needs of its employees and patients despite the established history of plaintiff's injuries caused by her job duties.

Finally, because the LAD prohibits both the discriminatory discharge of an employee and the discriminatory refusal to hire a prospective employee, N.J.S.A. 10:5-12(a), the court's decision today means that an employer such as defendant could theoretically face liability for declining to hire an applicant for a similar nursing position even if it knew with certainty that the applicant would injure herself on the job four times in three years. That cannot be and is not the law. A history of four serious injuries in three years may not be actual knowledge of future injuries that plaintiff will suffer, but it is as good a predictor as there might be.

I would affirm the summary judgment dismissing plaintiff's claim of disability discrimination.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION