NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3155-09T4

KIM ANN WHALEN,

Plaintiff-Appellant/
Cross-Respondent,

v.

NEW JERSEY MANUFACTURERS
INSURANCE COMPANY,

Defendant-Respondent/
Cross-Appellant.

Argued December 13, 2011 - Decided August 6, 2012

Before Judges Carchman, Fisher and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2785-05.

Kathleen P. Ramalho argued the cause for appellant/cross-respondent (Breuninger & Fellman, attorneys; Susan B. Fellman and Patricia Breuninger, of counsel; Ms. Fellman, Ms. Breuninger and Ms. Ramalho, on the brief).

Peter M. Avery argued the cause for respondent/cross-appellant (Buchanan Ingersoll & Rooney, P.C., attorneys; Rosemary J. Bruno, of counsel; Ms. Bruno and Mr. Avery, on the brief).

PER CURIAM

Plaintiff Kim Whalen, a project coordinator formerly employed by defendant New Jersey Manufacturers Insurance Company, appeals from an adverse jury verdict in a trial on her claims for disability discrimination and unlawful termination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. In this appeal, plaintiff claims that the trial judge erred in charging the jury as to defendant's failures to engage in an interactive process and reasonably accommodate her, as required by the LAD. Despite the extended discussion between counsel and the court regarding the content of the charge at a pre-charge conference, at the conclusion of the jury instructions, plaintiff indicated that she had no exceptions or objections to the charge. She now claims plain error. We reject that argument and affirm.[1]

I.

These are the facts adduced at trial. In February 2004, plaintiff commenced working for defendant as a project coordinator in its information technology (IT) department at an annual salary of $75,000. Her direct supervisor was Jan Foldes, a project management skill group leader. Foldes reported to

[1] Because we affirm on the merits of plaintiff's appeal, it is unnecessary to consider defendant's argument that the court erred in denying its motion for summary judgment.

Lorene Hartigan, an assistant secretary. As of September 2004, Hartigan reported to Mike Carey, the head of IT department.

Carol Ann Doran, who was "in charge of the . . . recruiting and hiring of staff," offered plaintiff a position with defendant. Plaintiff took handwritten notes of her telephone conversation with Doran, and she indicated that the offered full-time position required forty hours per week.

Defendant was reorganized in October 2004, such that the project coordinators were assigned to specific business areas. Plaintiff was assigned to workers' compensation underwriting, which she understood to be "one of the more lucrative lines of business for the company."

The IT department provided the electronic support for defendant's day-to-day business operations, which consisted primarily of writing workers' compensation and personal automobile insurance policies. According to both Foldes and Hartigan, the department was "critical." In Hartigan's deposition,[2] and at trial, she indicated that all of defendant's IT positions in 2004 were full-time.

Plaintiff's job description was as follows:

---

[2] Unless otherwise indicated, any reference to deposition testimony refers to those portions of the depositions that were read into the record during the course of the trial.

> Responsible for managing one or more projects within the constraints of scope, quality, time and cost, and to deliver specified requirements. Responsible for overall project implementation, execution, delivery and customer satisfaction. Responsible for the design, planning, implementation and closure processes which includes development of the scope of work and the management of time, cost, risk, communications, human resources, contracts, and quality within [i]nternal and external projects. Leads and manages the Project Team, with the authority and responsibility to run the project on a day-to-day basis. Must ensure that the business is well[-] defined and understood by the Project Team . . . . Responsible for ensuring the project schedule, scope and cost [are] adhered to and reported to Stakeholders.

Foldes and Hartigan also stated that plaintiff's position was full-time, requiring forty hours per week. Hartigan explained that the job required full-time hours because "[a] lot of interaction is required." Foldes similarly explained that a project coordinator's key responsibility was to "facilitate . . . collaborations." Even plaintiff acknowledged that she knew of no other project coordinators who worked part-time or from home.

According to plaintiff, her "high[-]level responsibilities" included "planning a project, scoping it out, executing that project, controlling the project, and then closing the project out after it was completed." Specifically, plaintiff broke "each task [of a project] into smaller tasks for each team member" and prepared project plans. She managed the work but

did not have supervisory authority over the members of her team, which "could" include a programmer, a developer, a database administrator and a business analyst.

Regarding the volume of work, plaintiff was assigned approximately ten projects at any given time, of which she was the sole coordinator. Each project could take "anywhere from a week" to "four to six months" to complete. Depending on business needs, plaintiff was assigned new projects "a few times [each] month." Plaintiff further testified that none of her assigned projects required immediate completion, but some "took priority because [of] . . . a State deadline . . . or some [other] kind of deadline involved."

Plaintiff, who was diagnosed with Lyme's Disease in 1995, experienced symptoms in May 2004, including "palpitations, headaches, muscle weakness, fatigue, [and] numbness." Her symptoms were much worse then as compared to January 2003, when she first saw her treating physician, Dr. Emilia Eiras. At trial, Eiras' deposition testimony was presented, and she was qualified as both an expert in the field of internal medicine and as plaintiff's treating physician. Eiras indicated that plaintiff suffered from "chronic Lyme['s] [D]isease and the consequences of it."

Because of plaintiff's symptoms in May 2004, Eiras ordered plaintiff not to work from May 18 to June 2, 2004, and thereafter ordered plaintiff to "decrease her work load to [four] days [per week] . . . until [August 2, 2004]." Plaintiff indicated that Eiras "thought it would be best for [her] to be out of work in order to get [] rest and recuperate[,] . . . [to] lessen the symptoms."

Erin Hannigan, defendant's leave coordinator in August 2004, observed that it was defendant's practice to send disability paperwork to any employee absent from work for six or more consecutive days. As long as the employee's alleged disability was supported by sufficient medical documentation, defendant routinely granted short-term disability (STD) leave in accordance with its policy.

Marcia Federico, the then-employee leave coordinator, advised plaintiff that she qualified for STD leave and was required "to update [her] disability file to substantiate [her] disability income continuation." Eiras and plaintiff completed a "Short-Term Disability Certification Form," dated May 27, 2004, which prohibited plaintiff from "work[ing] in any capacity" until June 7, 2004. Thereafter, she was permitted to "[r]eturn to work . . . on [a] limited work schedule [of] [four days per week] for at least two months." Effective June 9,

2004, plaintiff's compensation was "changed to 60% of [her] salary for each day of disability."

Plaintiff returned to work on June 7, and as a result of Eiras' recommendation, was not to work on Wednesdays until early August. Eiras subsequently sent defendant an updated STD certification form, dated July 28, 2004, which extended plaintiff's four-day workweek from June 7 to December 5, 2004. Defendant permitted plaintiff to continue working on a reduced work week of four days per week.

According to plaintiff, while she had a four-day workweek: no other project coordinators assisted her; her workload did not decrease; she had no projects requiring immediate completion; she was not late in completing projects; she ensured prior to each scheduled day off that she got "everything done in advance of being out"; and "everyone [on her team] was up to speed . . . [and] knew what they were doing."

Foldes noted that while plaintiff worked a four-day work schedule, Foldes "never [gave plaintiff] a verbal or written warning," she did not communicate to plaintiff that her performance was deficient, plaintiff's team members did not complain to her that plaintiff's absence adversely affected the team, and plaintiff's absence did not affect the assignment of projects. Likewise, plaintiff was not apprised that she was

performing poorly while at defendant. However, in September 2004, Foldes noted that plaintiff was not actively managing her work but did not discipline her for it.

Elizabeth Hutchinson Nealy, a resource manager, assigned plaintiff a decreased workload while she was on the reduced work schedule. Nealy documented, in an event report, that plaintiff failed to attend a meeting on August 26, 2004. The report, dated August 27, 2004, was sent to Foldes, "just to inform" her, since Nealy was not plaintiff's supervisor.

In an August 31, 2004 letter, Hannigan informed plaintiff that her STD benefits would end on November 15, 2004, and enclosed long-term disability (LTD) paperwork for completion. Plaintiff and Eiras completed the paperwork in October 2004, wherein Eiras stated that plaintiff might be able to work more in six months' time.

On October 20, 2004, plaintiff spoke with Bill Lash of MetLife, defendant's LTD insurance provider. Lash informed plaintiff that she was disqualified from receiving LTD benefits because she "didn't meet [the] salary threshold." On October 21, 2004, plaintiff met with Hannigan to discuss her concerns about being verbally denied those benefits.

By e-mail dated October 28, 2004, plaintiff asked Hannigan for clarification as to whether: she would continue accruing

paid time off; her salary would be reviewed after completion of her first year of employment; she would be "classified" as being on unpaid leave because she did not qualify for LTD benefits; and in taking one day off per week, she would have used approximately seven weeks of her STD leave as of November 15, 2004. Plaintiff also requested an in-person meeting. Hannigan responded that day, stating she would get back to plaintiff with answers and available meeting times.

Although Hannigan responded to most of plaintiff's questions, a meeting scheduled for November 4, 2004 never took place. Plaintiff e-mailed Hannigan additional questions on November 4, asking whether a provision in defendant's disability income program handbook stating that "[i]ndividuals who cease to qualify for benefits and do not return to work will no longer be eligible for employment with NJM" applied to her. She also inquired whether she could obtain a hard copy of defendant's STD and LTD benefits policies. Hannigan verbally informed plaintiff at noon on November 4, that the provision applied to her, and she could request a hard copy of the policies she had found posted on the Internet.

Shortly after her conversation with Hannigan on November 4, plaintiff e-mailed Hannigan again, advising her that she would "like to have options prior to [November 12]" and was "rather

concerned and [felt] very stressed[] since [their] previous phone conversation led [her] to believe that [her] employment status [was] in limbo as of [November 15, 2004]." She asked when there would be "answers" for her because she felt "extremely uncomfortable waiting until the last minute to receive the information." Plaintiff indicated that what she meant by "options" was "[h]ow [defendant was] going to bridge the gap" between the expiration of her STD leave on November 15 and her scheduled full-duty return to work date of December 5. Hannigan claimed that she did not have authority to discuss options with plaintiff when her STD benefits were scheduled to end on November 15.

Hannigan responded to plaintiff's e-mail the same day, advising that she had scheduled a meeting for November 10 with plaintiff; Hannigan; Patricia Hartpence, an assistant secretary in human resources; and Edward Daley, vice president of human resources, to review plaintiff's file. The scheduled meeting with Hannigan, Daley, and Hartpence did not occur because plaintiff was in a training class on November 10.

Also in Hannigan's November 4 e-mail, plaintiff was reminded that defendant had scheduled an independent medical examination (IME) for her on November 11. Plaintiff thought it was strange that an IME was scheduled "so late in the process"

but did not question Hannigan about it. Hannigan indicated that the IME was requested "towards the end of [plaintiff's STD leave,] as she had not been released to full[-]duty status yet, and [defendant] wanted to get a better understanding of how long th[e] partial disability schedule would last."

Eiras permitted plaintiff to return to full-duty status on November 9 without examining her. Plaintiff indicated that Eiras "felt that the stress from the fear of losing [her] job was causing [her] more anxiety and stress" and was adversely affecting her health. The IME scheduled for November 11 was cancelled because plaintiff had returned to full-duty status. In an e-mail dated December 1, 2004, from Hannigan to Daley, she wrote that the IME had been cancelled "for fear that the physician would come back and say she should be out of work." Hannigan later clarified what she meant by that statement: "when [plaintiff's] doctor released her to return to work full-duty on November 9[], the reason for the IME was no longer necessary, and there was no need to create . . . conflict" between plaintiff's "treating physician and an independent medical exam[ination] physician."

On November 22, plaintiff had a relapse of her Lyme's Disease symptoms. Eiras' note dated November 24, 2004, stated that plaintiff was "having a flare of her Lyme's Disease with

[General Anxiety Order]" and was required to "decrease her work schedule to [four days per week] until [January] 2005." The STD certification form, dated December 1, 2004, stated that plaintiff was required to decrease her work schedule until March 1, 2005.

Plaintiff returned to work on November 30. On that day, an IME was scheduled for December 8. Also on that day, Hannigan notified plaintiff via e-mail that her STD benefits were due to expire "around" December 22, 2004. Hannigan indicated that this date reflected a miscalculation she made to plaintiff's benefit.

On December 1, 2004, plaintiff met with Peter Espeut, a senior employee relations specialist in defendant's Human Resources Department (HR) who reported to Daley. According to plaintiff, she asked Espeut "about the IME process and . . . if he could give [her] any information about that [] as well as what [her] options were going to be after the [STD leave] expired." At the time, plaintiff thought that potential options could be for defendant not to pay her for her scheduled day off, "working in a different department, [or] working in the same department but in a different position." In plaintiff's deposition, she claimed she suggested alternatives to Espeut such as "working from home, transferring jobs within the department as well as transferring jobs within the company."

At trial, plaintiff denied that she ever suggested to Espeut that she wanted her schedule permanently reduced to four days per week. However, in plaintiff's deposition, she conceded that she may have suggested a permanent time reduction in her schedule. According to plaintiff, Espeut told her that he needed to speak with Hartpence and Daley "in order to get [her] answers."

At trial, Espeut did not recall the specifics of the December 1 meeting with plaintiff but stated that his handwritten notes from the meeting included plaintiff's statements. Those notes indicated that plaintiff "want[ed] to change schedule from [forty] to [thirty-two hours] permanently" and "want[ed] options." The notes also stated that plaintiff felt she was receiving "[n]o explanation" regarding the scheduled IME. Espeut understood plaintiff's request to be for "[a] permanent accommodation to work [thirty-two] hours per week." Espeut did not seek any further clarification from plaintiff regarding whether she sought some other accommodation. According to Espeut, plaintiff did not ask for a part-time position in a different business area.

Espeut understood that plaintiff was seeking an accommodation, and he acknowledged it was either his or Daley's job to discuss accommodations with plaintiff. At no time did

Espeut discuss with plaintiff what her options would be when her STD leave expired.

On December 1, 2004, Hannigan wrote an e-mail to Daley, updating him that plaintiff's STD leave was due to expire the week of December 20 and requesting a meeting with him "[a]t the end of [plaintiff's] disability . . . [to] review her employment options."

On December 3, plaintiff met with Hannigan and Christine Dyer, a nurse in HR. Hannigan asked plaintiff to clarify whether her doctor meant for her to return to full-duty work on January 1, 2005 or March 1, 2005. Hannigan also explained the purpose of the IME.

Also during the December 3 meeting, Hannigan explained to plaintiff that HR would review her file and discuss options with her after the IME, scheduled for December 8, occurred and her STD leave expired. At plaintiff's deposition, she recalled informing Hannigan and Dyer that she "was looking forward to getting back to working five days a week."

Tracy Trinian, a business analyst scope group leader who supervised business analysts, noted that the first time she heard complaints about plaintiff was on December 2, 2004. Trinian subsequently reported business analyst Dan Reece's complaint about plaintiff in an employee event report dated

December 8, 2004. Reece complained to Trinian that he felt he was performing the duties of a project coordinator when, in fact, that was not his job.

Meanwhile, on December 2, 2004, Espeut contacted Hartigan and Foldes and asked them to investigate whether plaintiff could fulfill her job responsibilities in a thirty-two hour workweek. Neither Foldes nor Hartigan recalled being asked by anyone at defendant whether plaintiff could temporarily remain on her reduced work schedule until she was able to resume full-duty status.

In response to Espeut's request, Foldes created two employee event/incident reports, dated December 7, 2004, wherein she documented some of plaintiff's performance deficiencies, and a third report, dated December 8. The December 8 report concluded that, "[s]hould the [thirty-two hour workweek] be approved[,] it will require a reduced workload for [plaintiff,] and not being in the office[,] she will not be able to effectively manage the work assigned." Foldes concluded that plaintiff's job required forty hours of work per week, based upon an examination of both the responsibilities of the position itself and plaintiff's performance.

Likewise, Hartigan agreed that plaintiff's job required forty hours of work per week. Hartigan spoke to Espeut about

IT's need to hire consultants due to the amount of work in that department and stated that "[plaintiff's] not being there [full-time] caused[, in part, defendant] not to have enough staff to cover the job." Hartigan told Espeut that the IT department was considering hiring a consultant to cover the job responsibilities otherwise unfulfilled on one day per week when plaintiff did not work.

After speaking with Foldes and Hartigan, Espeut gave Daley an oral summary of both the workweek requirement for plaintiff's position as well as plaintiff's work deficiencies. In addition, Daley spoke with Hartigan and Carey, who both told him that there were no part-time positions in IT and that "[plaintiff's] position was a highly technical, skilled position [that required] . . . five days a week in the office."

Daley concluded that plaintiff could not "perform the essential duties of her job, which was working five days a week . . . in the office . . . with her team." He made the decision to terminate plaintiff's employment. At the time he made the decision, Daley did not know the specific duties plaintiff was tasked to complete, but he "knew she had to be present on the job," and he "had a general acknowledgement [sic] of what a business coordinator or business manager would do." In his deposition, Daley explained that he understood the duties

plaintiff was not completing due to her reduced work schedule as "[t]he duties that she was assigned to do for [forty] hours a week" were left unfulfilled due to her reduced work schedule. Daley also knew that plaintiff was expected to return to full-duty status on March 1, 2005.

Daley knew that plaintiff wanted to know her "options" when her STD leave was due to expire. In his deposition, he indicated that he believed Hannigan had discussed potential accommodations with plaintiff, but Hannigan claimed that she did not have that authority.

Daley asserted that even if accommodations were not discussed with plaintiff, there were none available at the time. Specifically, defendant did not "allow . . . as a normal practice" for an employee to use his or her personal time one day per week because "[t]he business units can't commit to just give an exact time every week for a length of period of time." Unpaid time off was "a last resort[] when [an employee] . . . exhausted all of [his or her personal time off] . . . [in] an emergency situation for one or two days, [for instance,] if [the employee had] a loss in the family," such that this type of leave would not have been applicable to plaintiff's situation. Working from home was "not . . . an option" in this case because plaintiff's position "was a highly technical position within

IT," and the department did not allow project coordinators to work from home.

Daley indicated in his deposition that some of defendant's departments offered their employees thirty-hour-per-week positions "on a limited basis . . . for a one[-]year period." That would not have been an option for plaintiff, however, because the IT department "needed full-time employment."

Daley also noted that defendant offered part-time positions, but these positions were "usually in the clerical level," and there were "none" available in IT. It would not have been "a [human resources] best practice" to place plaintiff in an entry level position. Although that option was not discussed with plaintiff, "it wouldn't have changed [Daley's] decision [to] terminat[e] her [employment]."

Daley was asked during depositions whether he considered allowing plaintiff to have a reduced work schedule until March 2005, and he responded "no." When asked at trial whether he had spoken with Hartigan and Carey about a temporary reduced work schedule, he stated "[n]o. I knew that they couldn't [offer that to plaintiff]." Daley observed that even if he had considered such an accommodation for plaintiff, it "couldn't be done," because the IT department "needed her to work 40 hours a

week, so the decision was made that that would not be a reasonable accommodation."

According to plaintiff, Espeut called her on the morning of December 8 and told her her employment was being terminated for "substandard performance." Espeut had spoken with Foldes and Hartigan earlier that day about the termination decision and had noted that either Foldes or Hartigan had said to him that the decision was "based on assumptions[,] no[t] facts"; plaintiff was not given an "opportunity to defend" herself; and she was going to be "blindsided."

Plaintiff was scheduled for an IME on December 8. Defendant cancelled the IME that morning.

In a letter to plaintiff, dated December 9, 2004, defendant memorialized that plaintiff's employment was terminated for substandard performance. Espeut explained that "substandard performance"

> was the best explanation [he] had . . . . [I]n retrospect, the [December 9] letter could have been written better . . . . Attendance being a primary facet of the job, not being [t]here hurts the job, hurts the productivity and that was [his] reason for putting performance down. In retrospect, it could have been worded differently.

Daley similarly indicated that the termination decision was "based on [his] decision that attendance is a part of performance[,] and [plaintiff] could not perform the essential

duties of her job." Daley thought Espeut communicated that as the reason for plaintiff's termination. Had Daley known that Espeut did not do so, he would have communicated with plaintiff himself.

Eiras wrote plaintiff a note dated January 17, 2005, stating she had been able to return to work full-duty status since January 5, 2005. Eiras explained that plaintiff's symptoms had improved, and she "assumed" this was because "[plaintiff] . . . had extra time to rest." At her deposition, Eiras indicated that she had never recommended that plaintiff permanently work a four-day-per-week schedule. According to Eiras, all of the return-to-work dates provided to defendant were estimations.

Following the presentation of evidence, the parties engaged in an extensive discussion regarding the jury charge. After the jury charge, the judge presented the jury with a series of questions. As to the first question -- "Has the plaintiff Whelan proved that she had a disability as defined in the LAD?" -- the jury answered in the affirmative. The jury then proceeded to the second question, with the instruction that if the jurors answered the question in the negative, they were to cease their deliberations. In response to the inquiry as to "[h]as the plaintiff Whelan proved that she could perform the

essential functions of her job at NJM with or without an accommodation, taking into account what is an essential function, what is a reasonable accommodation and the interactive process?" the jury answered in the negative, and judgment was entered in favor of defendant. This appeal followed.

II.

As we previously noted, on appeal, plaintiff challenges the jury instructions and asserts that the judge erred in failing to separately charge her disparate-treatment and failure-to-accommodate claims. Specifically, plaintiff argues that the judge failed to instruct the jury about the impact of the interactive process on the failure-to-accommodate theory of liability.

In addressing these contentions, we first set forth basic principles regarding jury charges in LAD cases. "A jury charge in a[n] LAD matter requires that the jury be given an explanation of the applicable legal principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008) (internal quotation marks and citations omitted), aff'd in part and modified in part, 203 N.J. 383 (2010). Generally speaking, we “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 Fisher v. Canario, 143 N.J. 235, 254 (1996)). "If the jury charge is incorrect, it 'constitutes reversible error only if the jury could have come to a different result had it been correctly instructed.'" Victor, supra, 401 N.J. Super. at 617 (quoting Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002)).

Plaintiff contends the trial court committed reversible error by not separately instructing the jury on her disparate treatment and failure-to-accommodate disability discrimination claims. Plaintiff alleges the court (1) erroneously instructed the jurors that they were only required to consider whether plaintiff could have performed the essential functions of the job with an accommodation if they first found she was performing the essential functions of her job at the time of termination, and (2) failed to instruct that an alternative way for plaintiff to satisfy the second element of her prima facie failure-to-accommodate claim was to prove that defendant failed to engage in the interactive process and that plaintiff could have been reasonably accommodated but for defendant's lack of good faith,

which was evidenced by the failure to engage in an interactive process.

Plaintiff requested during the charge conference that the court separately charge on her disparate-treatment and failure-to-accommodate disability discrimination claims. The court decided to describe the two theories in a single charge, finding that "[t]he elements [of the two claims] are identical[,] and the jury is going to have to find all the same factors [in] establishing the [disparate treatment] claim . . . [as] they would have to find on a failure[-]to[-]accommodate claim."

The jury charge was provided to the jury both orally and in written form, for use during their deliberations. The court instructed that plaintiff claimed she was terminated "because of her disability." The jury was further instructed that

> [t]here are three basic things plaintiff must prove to establish her claim of disability discrimination. However, there are very important sub-parts to these elements[,] and it is important that you understand all of them.
>
> To prove that NJM discriminated against her on the basis of her disability, plaintiff must prove that:
>
> 1. She had a disability[,] as defined in the NJLAD;
>
> 2. She could perform the essential functions of her job at NJM with or without an accom[m]odation; and

3. NJM terminated her employment solely because of her disability.

Regarding the second element, the jury was told, "unless plaintiff proves that her disability did not prevent her from still being able to do the essential functions of her job, then NJM did not violate the NJLAD by taking action. Your considerations on this issue involve some complex standards under the law, which . . . will now [be] explain[ed]." The court further explained:

> In this case, NJM says plaintiff could not perform the essential functions of her job as a full[-]time project coordinator because she was unable or unwilling to work full[-] time, five days a week. Plaintiff says that working full[-]time was not an essential function of the project coordinator position for which she was hired.

The court went on to define the term "essential function of the job," concluding in that portion of the charge that

> [a]n employer does not violate the LAD by taking employment actions against a disabled employee if the nature and extent of the employee's disability reasonably precludes [sic] the performance of the particular employment. In other words, if the employee's disability prevents her from doing the particular job, the employer does not violate the law by taking action against the employee because of that limitation. An employer may terminate the employment of a disabled person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment.

Next, the jury was instructed on the interactive process:

> [A] subset of the essential[-]function factor is the interactive process. You may also consider . . . whether NJM engaged in . . . the ["]interactive process["] with plaintiff in attempting to accommodate her disability. To prove that NJM failed in its obligations under the "interactive process," plaintiff must prove all of the following:
>
> 1. NJM knew about plaintiff's disability;
>
> 2. Plaintiff requested accommodations for her disability;
>
> 3. NJM did not make a good[-]faith effort to assist plaintiff in seeking accommodations; and
>
> 4. Plaintiff could have been reasonably accommodated but for NJM's lack of good faith.
>
> If the plaintiff proves all of those things, she may succeed on her claim, but she does not succeed automatically. Plaintiff cannot succeed on her claim simply by proving NJM failed to engage in the interactive process. To find for plaintiff, you must also find that plaintiff has proved there was an actual accommodation NJM could have made at the time that would have enabled her to do her job. If plaintiff does not prove that, then any problem with the interactive process is immaterial.
>
> The goal of the interactive process is to find a reasonable accommodation that will allow the employee to function successfully in her job or a reasonable accommodation as I have previously explained. The interactive process is important because each party holds information the other does

> not have or cannot easily obtain. . . . Thus, good faith is essential. Both the employer and employee share the duty to participate in the interactive process in good faith. However, the law requires the employer to initiate the interactive process.

Finally, the court instructed the jury on reasonable accommodation. At the conclusion of the charge, plaintiff raised no objections or exceptions.[3]

III.

The LAD prohibits employment discrimination based on an employee's disability. N.J.S.A. 10:5-4.1 to -29.1. The burden of proving discrimination "remains with the employee at all times." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450 (2005).

There are two categories of disability discrimination: disparate treatment and the failure to reasonably accommodate an employee's known disability. Tynan v. Vicinage 13 of the Superior Court of N.J., 351 N.J. Super. 385, 397 (App. Div. 2002). "The gravamen of a disparate[-]treatment claim is that

---

[3] We have noted that plaintiff did not object or present exceptions to the charge. We recognize that the judge and the parties engaged in an extended charge conference, during which disagreements were voiced as to the merits of the judge's charge. Nevertheless, the appropriate practice is to object after the charge. R. 1:7-2. Failure to do so deprives the trial judge of the opportunity to correct any claimed error. Bradford v. Kupper Assocs., 283 N.J. Super. 556, 573-74 (App. Div. 1995), certif. denied, 144 N.J. 586 (1996).

employees who are not disabled are treated more favorably than a disabled employee. In other words, the employee with the disability has been discriminated against by reason of such disparate treatment." Seiden v. Marina Assocs., 315 N.J. Super. 451, 459 (Law Div. 1998). To establish a disparate-treatment claim on the basis of a disability, 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.

"The McDonnell Douglas test is not designed for rigid application. The precise elements of a [prima facie] case must be tailored to the particular circumstances." Id. at 14 (internal citation omitted).

> If the claim is based upon discriminatory discharge, . . . plaintiff must demonstrate: (1) that plaintiff is in a protected class; (2) that plaintiff was otherwise qualified and performing the essential functions of the job; (3) that plaintiff['s employment] was terminated; and (4) that the employer thereafter sought similarly qualified individuals for that job.
>
> [Victor, supra, 203 N.J. at 409 (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596-97 (1988)).]

Once a prima facie case is established, "the burden of going forward shifts to the employer to articulate a legitimate, non[]discriminatory reason for the adverse employment action.

After the employer does so, the burden shifts back to the [employee] to show that the employer's proffered reason was merely a pretext for discrimination." Viscik, supra, 173 N.J. at 14 (internal citation omitted). "Thus, under the McDonnell Douglas framework, a[n] [employee] retains the ultimate burden of persuasion at all times; only the burden of production shifts." Ibid.

Although the LAD does not specifically address reasonable accommodations, the regulations promulgated to implement the LAD require the employer to "make a reasonable accommodation to the limitations of an employee . . . with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business." N.J.A.C. 13:13-2.5(b). The regulations require employers to consider the possibility of reasonable accommodation before demoting or otherwise taking an adverse action against a disabled employee. N.J.A.C. 13:13-2.5(b)2.

To succeed in her failure-to-accommodate claim, plaintiff was required to establish that she: "(1) had a[n] LAD [disability]; (2) was qualified to perform the essential functions of the job, with or without accommodation; and (3)

suffered an adverse employment action[4] because of the [disability]." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 91 (App. Div. 2001) (citing Seiden, supra, 315 N.J. Super. at 465-66). If "the employer denies an employee an opportunity to continue with employment because the employee suffers from a disability that could reasonably be accommodated, but is not, regardless of how other employees are treated, that in itself is an unlawful employment practice and a violation of the LAD," and analysis under the McDonnell Douglas burden-shifting methodology is unnecessary. Seiden, supra, 315 N.J. Super. at 461. See also Victor, supra, 203 N.J. at 421-22.

Victor instructs that proof of "the second prong of the prima facie [reasonable accommodation] case would entail proof of either the failure to accommodate or the failure to engage in the interactive process[.]" Id. at 411-12. One way for an employee to establish the second prong is by proving that he or she was able to perform the essential functions of the position and that his or her employer did not reasonably accommodate him

[4] In Victor, supra, 203 N.J. at 421-22, the Court recognized that a plaintiff could bring a failure-to-accommodate claim where there was no adverse employment action apart from the failure to accommodate. Here, there is no dispute that plaintiff's employment was terminated and that she therefore suffered an adverse employment action.

or her to facilitate performance of the essential functions. See ibid.

Another way for an employee to establish the second prong of a prima facie failure-to-accommodate claim is by establishing that the employer failed to engage in the interactive process concerning appropriate accommodations. Ibid.

> To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good[-]faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.
>
> [Tynan, supra, 351 N.J. Super. at 400-01.]

See also N.J.A.C. 13:13-2.5(b)2 (requiring an employer to "consider the possibility of reasonable accommodation before firing . . . a person with a disability on the grounds that his or her disability precludes job performance").

However, an employer is not required to accommodate a disability if "it can reasonably be determined that an . . . employee, as a result of the individual's disability, cannot perform the essential function of the job even with reasonable accommodation." Potente v. Cnty. of Hudson, 187 N.J. 103, 110-11 (2006) (quoting N.J.A.C. 13:13-2.8(a)). "An employer's duty

to accommodate extends only so far as necessary to allow 'a disabled employee to perform the essential functions of his job. It does not require acquiescence to the employee's every demand.'" Tynan, supra, 351 N.J. Super. at 397 (quoting Vande Zande v. State of Wis. Dep't of Admin., 851 F. Supp. 353, 362 (W.D. Wis. 1994), aff'd, 44 F.3d 538 (7th Cir. 1995)).

First, plaintiff contends the court improperly blended the two theories of liability plaintiff advanced (i.e., disparate-treatment and failure-to-accommodate).

New Jersey has a model jury charge for a disparate treatment discrimination claim under the LAD, Model Jury Charges (Civil), § 2.21, "The New Jersey Law Against Discrimination" (2003), but no model charge for a failure-to-accommodate claim. In fact, the introductory note of Section 2.21 of the Model Jury Charges (Civil) states, "[i]t was not designed for [disability] discrimination cases alleging failure to provide reasonable accommodations."

We have previously recommended that the committee on civil jury charges develop a failure-to-accommodate charge. Victor, supra, 401 N.J. Super. at 617. We renew that recommendation. The addition of such a charge would be consistent with federal practice, as the Third Circuit's model charge for employment claims under the Americans with Disabilities Act (ADA), 42

U.S.C.A. §§ 12101-12213,[5] instructs separately on disparate-treatment disability discrimination and failure-to-accommodate claims. Model Third Circuit Jury Instructions, §§ 9.1.2 and 9.1.3, "Disparate Treatment-Pretext" and "Reasonable Accommodation" (2011).

A failure-to-accommodate claim differs from a disparate treatment disability discrimination claim in two respects: the former includes the defining element that an employee may have a claim even if he or she cannot meet the objective standards of the job, so long as he or she could meet them with a reasonable accommodation, and it eliminates both the fourth prong of a disability discrimination claim and the McDonnell Douglas burden-shifting methodology because the failure to accommodate subjects the employer to liability, dispensing the need to assess inferences of pretext. See Seiden, supra, 315 N.J. Super. at 465; see also LaResca v. Am. Tel. & Tel., 161 F. Supp. 2d 323, 329 (D.N.J. 2001). While the failure-to-accommodate and disparate-treatment claims are different, and the better practice is that they be separately charged, see Viscik, supra, 173 N.J. at 20 (finding reversible error where court instructed that employer had duty to reasonably accommodate employee

[5] Substantive standards under the ADA guide New Jersey courts in disability discrimination claims under the LAD. Victor, supra, 401 N.J. Super. at 612-13.

because a failure-to-accommodate claim was not pleaded, and charge "mixed two theories, pretext and reasonable accommodation, that are completely and purposefully distinct from one another"), we decline to conclude that the failure here to separate the charges was plain error. Although the charge did not differentiate between the two theories of recovery, it did include a distinct reference to an interactive process, see 29 C.F.R. § 1630.2(o)(3), in describing the jurors' consideration of plaintiff's ability to perform the essential functions of her position.

An employer is required to initiate a good faith interactive process regarding accommodations before reasonably determining whether an employee's disability reasonably precludes performance of his or her essential job functions. Tynan, supra, 351 N.J. Super. at 400. See also Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 772 (3d Cir. 2004), cert. denied, 544 U.S. 961, 125 S. Ct. 1725, 161 L. Ed. 2d 602 (2005). For example, an employer's good faith attempt may be shown by "meet[ing] with the employee[,]. . . request[ing] information about the condition and what limitations the employee has, ask[ing] the employee what he or she specifically wants . . . and offer[ing] and discuss[ing] available alternatives when the request is too burdensome." Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d. Cir. 1999).

Participation in the interactive process "is the obligation of both parties," and the "employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals." Ibid.

Critically, however, an employer's failure to engage in an interactive process is not sufficient in itself to meet the employee's prima facie burden of disability discrimination. See Donahue v. Consol. Rail Corp., 224 F.3d 226, 234-35 (3d Cir. 2000); Victor, supra, 401 N.J. Super. at 614. A "plaintiff in a disability discrimination case who claims that the defendant engaged in discrimination by failing to make a reasonable accommodation cannot recover without showing that a reasonable accommodation was possible." Williams, supra, 380 F.3d at 772 (citations and internal quotation marks omitted). See also Tynan, supra, 351 N.J. Super. at 400-01 ("To show that an employer failed to participate in the interactive process[,] a disabled employee must demonstrate: . . . (4) [that he or she] could have been reasonably accommodated but for the employer's lack of good faith."). During his or her employment, the employee is not required to state what specific accommodation he or she seeks. Id. at 399-40. Nevertheless, after the complaint

is filed, the employee is required, as part of his or her prima facie burden, to provide examples of what the employer could have done to accommodate his or her specific needs. Donahue, supra, 224 F.3d at 234. Where the plaintiff fails to show that a reasonable accommodation existed, the employer's lack of investigation is inconsequential. Id. at 233; Kleiber v. Honda of Am. Mfg., Inc., 420 F. Supp. 2d 809, 829-30 (S.D. Ohio 2006) (citing authority from various jurisdictions for the proposition that the burden remains with the employee to demonstrate that he or she would have been able to perform an available job with accommodations), aff'd, 485 F.3d 862 (6th Cir. 2007).

In addition, if an employee requests a transfer to another position, he or she has to demonstrate: "(1) that there was a vacant, funded position; (2) that the position was at or below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with reasonable accommodation." Donahue, supra, 224 F.3d at 230.

Here, plaintiff testified at her deposition that she suggested alternatives to Espeut, such as "working from home, transferring jobs within the department[,] as well as transferring jobs within the company." She also may have suggested a permanent reduction in her work schedule.

Nevertheless, in light of the fact that the company concluded that all IT positions required full-time presence in the office, plaintiff failed to show that there were reasonable accommodations available or that her proposed accommodations were reasonable. Additionally, part-time positions in the company were "usually in the clerical level," and plaintiff was over qualified for an entry-level position.

Even if defendant's engagement in the interactive process was insufficient because HR representatives did not specifically ask plaintiff what other "options" she wanted besides a permanently reduced work schedule, plaintiff's failure-to-accommodate claim fails because she did not establish either that reasonable accommodations existed or that her proposed accommodations were reasonable.

The jury had more than sufficient facts to assess the issue of the interactive process as well as the ultimate issue, whether plaintiff could perform the essential functions of her position. The jury heard both the evidence and the parties' arguments regarding the essential functions of plaintiff's job. Although we have commented that the better practice would have been to separate the theories, on the record before us, we cannot say that the charge, as given, was erroneous or of such a nature as to cause an unjust result. R. 2:10-2.

Plaintiff also urges that the court erred when it failed to instruct the jury regarding defendant's burden of proof as to its defense concerning plaintiff's ability to perform the essential functions of her position. The difficulty with this argument is that any error was, in essence, invited by plaintiff.

Defendant's proposed charge included language about its burden to establish the defense of plaintiff's inability to perform "her particular job." Plaintiff objected, arguing that addressing the essential functions of the job towards the end of the charge would be confusing. The court agreed and inserted the essential functions language in the prima facie charge. Plaintiff did not object to that placement. Plaintiff thereafter submitted other proposed language, but nothing as to defendant's burden.

"The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996). "Some measure of reliance by the court is necessary for the invited-error doctrine to come into play." State v. Jenkins, 178 N.J. 347, 359 (2004).

Here, plaintiff invited the error about which she now complains. The court responded to her objection, after which plaintiff did not include the essential functions language in her proposed charge, suggesting that she did not think it necessary. Language consistent with N.J.A.C. 13:13-2.8(a)[6] as well as N.J.A.C. 13:13-2.8(a)(3)[7] should have been included in the jury charge; however, although not as stated in defendant's proposed charge, plaintiff invited the error and is precluded from relief on this basis on appeal.

While the charge as to defendant's burden should have been included, there is no plain error. The jury determined plaintiff could not perform the essential functions of the job. Therefore, the question of defendant's reasonable accommodation is irrelevant to the outcome of the case.

Plaintiff next contends that the reasonable accommodation instruction was flawed because it contained language that was "highly favorable" to defendant's case and lacked language that

---

[6] "[I]t shall be lawful to take any action otherwise prohibited under this section where it can reasonably be determined that an . . . employee, as a result of the individual's disability, cannot perform the essential functions of the job even with reasonable accommodation."

[7] "The burden of proof is upon the employer . . . to demonstrate in each case that the exception relied upon is based upon an objective standard supported by factual evidence."

"would have provided the jury with a balanced understanding of what was required of an employer" regarding reasonable accommodation.

Plaintiff now objects to this language in the charge.

> [T]here are certain things that the courts have decided that employers are not obligated to provide as accommodations because they are not reasonable. For example, an employer is not necessarily required to give an employee whose job is full-duty an indefinite light[-]duty assignment, nor is an employer necessarily required to make a temporary light-duty assignment into a permanent one.

The language was taken verbatim from defendant's proposed charge, and plaintiff objected to this language at the charge conference on the grounds that it weighed in favor of defendant. The court overruled plaintiff counsel's objection, stating that it thought the charge "makes sense structured this way because the first sentence indicates that those things are accommodations. So the next sentence says it's not necessarily required to be an accommodation. I mean, it says the same thing."

The Third Circuit's model instructions for a reasonable accommodation claim under the ADA first provide examples of a reasonable accommodation and then provide examples of what an employer is not required to do. Model Third Circuit Jury Instructions, supra, at § 9.1.3. Like the Third Circuit's model

charge, the charge here first provided examples of reasonable accommodations ("a part-time work schedule or a leave of absence for a period of time, or a job reassignment, or acquiring equipment that allows a disabled person to do her job") and then instructed that employers are not required to provide certain other accommodations. Inclusion of the language in the charge on the grounds that it was "highly favorable to [] defendant's case" did not constitute error, especially since the Third Circuit model jury instructions contain a similar format, and language favorable to plaintiff preceded language favorable to defendant.

The jury instruction language did not misstate the law. The portion of the charge stating, "an employer is not necessarily required to give an employee whose job is full-duty an indefinite light[-]duty assignment" is consistent with the Court's observation in Raspa v. Sheriff of the County of Gloucester, 191 N.J. 323, 340 (2007), "that the LAD does not require that an employer create an indefinite light[-]duty position for a permanently disabled employee if the employee's disability, absent a reasonable accommodation, renders him otherwise unqualified for a full-time, full-duty position." We recognize that Raspa applies to permanently disabled employees, whereas here, while plaintiff was employed, Eiras estimated that

plaintiff could return to full-duty status, albeit with conflicting dates as to when that could occur.

Additionally, the second portion of the charge, stating that "an employer is [not] necessarily required to make a temporary light-duty assignment into a permanent one," is consistent with New Jersey case law. Muller v. Exxon Research & Eng'g Co., 345 N.J. Super. 595, 608 (App. Div. 2001), certif. denied, 172 N.J. 355 (2002). There was no error here.

Plaintiff also contends the court committed error by rejecting the following sentence which plaintiff requested to have added after the sentence about what employers are not obligated to provide as a reasonable accommodation: "An employer must simply make all reasonable accommodations to an employee returning from disability leave and allow an employee time to recover from his injuries." Plaintiff claims inclusion of this sentence "would have provided the jury with a balanced understanding of what was required of an employer" regarding reasonable accommodation.

Over plaintiff counsel's objection, the court rejected plaintiff's proposed language at the charge conference, noting the entire paragraph was "balanced," and "the bottom line is, and [it will be] emphasize[d] to the jury, [the inquiry is] fact[-]specific."

Plaintiff's proposed sentence is a correct statement of the law, as it is verbatim from Muller, supra, 345 N.J. Super. at 608. Nevertheless, plaintiff's proposed language would have generated the same flaw about which she now complains and would have unfairly tipped the scale in favor of plaintiff. The paragraph was balanced already because it stated examples of reasonable accommodations and examples of what an employer was not required to provide. Moreover, the language, as charged to the jury, included a portion of plaintiff's proposed sentence, stating that "[t]he employer must simply allow the employee a reasonable accommodation." There was no error here.

Next, plaintiff contends the court erred by instructing the jury:

> Keep in mind that in reaching your determination of whether the defendant engaged in intentional discrimination, you are instructed that the defendant's actions and business practices need not be fair, wise, reasonable, moral or even right so long as plaintiff's disability was not the sole factor for the termination.

Plaintiff argues that the charge incorrectly instructed on the subjective standard applicable to a disparate-treatment discrimination claim where a non discriminatory reason for the termination is proffered, but here, such an instruction was inapplicable, because defendant "effectively conceded that the disability was a factor in the decision to terminate."

When the language was discussed at the charge conference, plaintiff's counsel stated that this language was contained in her proposed jury instructions, which were based upon the language in Model Jury Charges (Civil), supra, at § 2.21. Plaintiff's counsel stated that she had no problem with the court instructing on the language contained in her proposed charge, and so the court included the language in the charge. Plaintiff is barred by the invited-error doctrine from arguing on appeal that the language prejudiced her, since the court clearly relied on plaintiff's proposed language and acquiescence to its inclusion in the final charge. See Brett, supra, 144 N.J. at 503.

Plaintiff also contends the court erred in instructing that she could prove "her claim" by "showing that a failure to reasonably accommodate was discriminatory" because the charge erroneously implied that she was "required to provide evidence of evil motive and/or mendacity." Plaintiff objected to inclusion of the instruction at the charge conference, but her objection was overruled.

There is no merit to this claim. The court instructed that plaintiff could "prove her claim in either of those ways -- by showing the defendant acted under a pretext or by showing that a failure to reasonably accommodate was discriminatory."

Plaintiff was required to prove, as part of her failure-to-accommodate claim, that her employment was terminated because of her disability. See Bosshard, supra, 345 N.J. Super. at 91. The language the judge used in the charge conveys that principle.

Plaintiff also contends that the court improperly instructed the jury that "discrimination [could] be inferred" if plaintiff proved that "defendant failed to reasonably accommodate her." Plaintiff claims that the court should have instead instructed that discrimination "is" inferred. Plaintiff did not object below, and so our review is for plain error. R. 1:7-2; R. 2:10-2.

The charge could have been clearer and would have been accurate if the word "is" were inserted. However, when this portion of the charge is read as a whole, it instructs that plaintiff may prove "her claim" in two ways, either "by showing the defendant acted under a pretext or by showing that a failure to reasonably accommodate was discriminatory." The charge implied that plaintiff could succeed on her reasonable accommodation claim by proving that defendant failed to reasonably accommodate her. We find no basis for our intervention as to this issue.

Finally, we need not reach plaintiff's contention regarding the third element of her prima facie disability discrimination claim. The jury did not reach that issue in their deliberations.

We reach the same conclusion concerning the cross-appeal, as our affirming the judgment in favor of defendant renders that appeal moot.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION