

plea deal, failure to raise a statute of limitations defense, failure to call eyewitnesses to testify, failure to investigate mitigating evidence, and prohibiting a defendant from testifying have been deemed ineffective assistance in some cases. In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court clarified that to prove ineffective counsel, the claimant must show deficient attorney performance that directly affected the outcome of the case. When assessing deficient performance, the court must consider whether the counsel's actions were reasonable, compared with "prevailing professional norms" (*Strickland*, p 688).

In Mr. Delgado's case, the court relied on *Keats v. State*, 115 P.3d 1110 (Wyo. 2005). In *Keats*, the court held counsel provided ineffective assistance because Mr. Keats expressed interest in pursuing an NGMI defense, which was not explored, despite the defendant's being symptomatic at the time of the offense and having a history of mental illness. The *Delgado* court distinguished Mr. Delgado's case from *Keats*, as he opposed the NGMI defense. The court previously held defendant preferences can restrict viable actions counsel can take. Indeed, an NGMI defense cannot be imposed on a competent defendant.

Regarding the district court's denial of Mr. Delgado's motion to withdraw his no contest plea, the court considered if Mr. Delgado presented a "fair and just reason" to permit withdrawal. As part of this consideration, the court considered whether Mr. Delgado received "close assistance of counsel" when withdrawing his plea. Here, the court clarified "close assistance" and "ineffective assistance" are distinct concepts. It posits "constitutionally ineffective" counsel is not required to fail the "close assistance" factor under *Frame*. To meet *Frame's* "close assistance" factor, counsel need merely be "adequate and available." The court provides some guidance as to what constitutes a violation of this concept (e.g., refusing to meet with the defendant, ignoring the defendant's requests, being generally unavailable, having a contentious relationship with the defendant, failing to communicate with the defendant). These concepts are important for forensic mental health evaluators to be familiar with because they can be relevant in assessments of trial and other criminal competencies. In particular, understanding the legal framework for lawyers' "close assistance" and "ineffective assistance" is useful to

understand what courts expect in the attorney-client relationship.

Admission of Witness Testimony

Dhruv Gupta, MD, MS
Fellow in Forensic Psychiatry

John Northrop, MD, PhD
Associate Director, Forensic Psychiatry Fellowship
Clinical Associate Professor of Psychiatry

Department of Psychiatry
Perelman School of Medicine
University of Pennsylvania
Philadelphia, Pennsylvania

Court Did Not Abuse Its Discretion in Admitting Testimony of a Witness Who Testified Only as a Treatment Provider

DOI:10.29158/JAAPL.230038-23

Key words: ADA; ADEA; expert testimony; judgment as a matter of law

In *Gruttemeyer v. Transit Authority*, 31 F.4th 638 (8th Cir. 2022), John Gruttemeyer brought an action against his former employer, the Transit Authority of the City of Omaha (Metro), alleging disability discrimination under the Americans with Disabilities Act (42 U.S.C. § 12112 (2008)), retaliation in violation of the Age Discrimination in Employment Act (29 U.S.C. § 623 (d) (2015)), and violations of state law. The trial court denied Metro's motion for judgment as a matter of law or a new trial, and Metro appealed. Metro argued that Mr. Gruttemeyer did not disclose his witness as an expert. The Eighth Circuit ruled that the lower court did not abuse its discretion in admitting the witness's testimony because she testified as a treatment provider.

Facts of the Case

John Gruttemeyer was employed by the Omaha Fire Department for 23 years. He took a leave of medical absence for one year because of stress and depression, and he later retired with a disability pension in 2010. In 2011, he began working for the Transit Authority of the City of Omaha (Metro) as a full-time bus operator, and then in 2015 as a bus fueler and washer. He was a member of the Transportation Workers Union of America (the Union) for the duration of his employment with Metro, and he served as its vice president from November 2015 until March 2016.

On July 6, 2016, Metro fired Mr. Gruttemeyer. Mr. Gruttemeyer then filed a suit in the federal district court, alleging that Metro terminated his employment on two counts: his disability (bipolar disorder, anxiety, and depression) and in retaliation for helping a co-worker's age discrimination claim against Metro. Mr. Gruttemeyer brought a federal disability discrimination claim under the ADA and the ADEA. He also brought claims for retaliation and disability discrimination under Nebraska state law.

The district court denied Metro's motion for a summary judgment and the case proceeded to trial. The jury returned a verdict in Mr. Gruttemeyer's favor for both disability discrimination and retaliation. He was awarded damages of \$114,450.94 in lost wages and benefits and \$25,000 in other damages for the ADA claim, but no additional damages for the ADEA claim. Metro appealed two evidentiary rulings and the district court's denial of its motion for judgment as a matter of law or a new trial for the ADA and ADEA claims.

Ruling and Reasoning

The Eighth Circuit first reviewed the district court's decisions to admit witness testimony from Mr. Gruttemeyer's therapist, Francene Buda Dardon. Mr. Gruttemeyer proffered that she would testify on the treatment, observation, and diagnosis of his disability. Metro sought to exclude or limit Ms. Buda Dardon's testimony on grounds that her position as a Licensed Mental Health Practitioner (LMHP) did not allow her to diagnose major mental illness. Under Nebraska law, only a Licensed Independent Mental Health Professional (LIMHP) is qualified to diagnose independently major mental illness. But, when Metro took Ms. Buda Dardon's trial deposition, they discovered that she was in fact an LIMHP and therefore qualified to diagnose major mental illness and testify about it. The district court denied Metro's motion to exclude or limit Ms. Buda Dardon's testimony.

At trial, Metro had objected to Mr. Gruttemeyer's presenting Ms. Buda Dardon's testimony. Metro argued that her testimony was expert testimony, yet she was not disclosed as such. Additionally, Metro argued that it was a prejudicial and unfair surprise to learn Ms. Buda Dardon was an LIMHP at her deposition. The district court overruled the objection on the grounds that Ms. Buda Dardon was not testifying as an expert witness and that Metro had not shown prejudice justifying exclusion of her testimony. The Eighth Circuit said that Ms. Buda Dardon was not offered to testify

about causation or topics outside of treatment and, as such, the district court did not abuse its discretion to admit her testimony without expert witness disclosure.

For Metro's second objection, the court noted that Mr. Gruttemeyer incorrectly disclosed Ms. Buda Dardon's professional qualifications and that Metro first learned that she was an LIMHP at the deposition. Mr. Gruttemeyer provided information that was accurate per his knowledge, and the court noted that Metro made no effort to verify her qualifications before her deposition. On learning Ms. Buda Dardon's qualifications, Metro did not request a continuance, but instead proceeded with the deposition. The court found no abuse of discretion in the district court's decision to admit the testimony.

Metro also appealed the district court's denial of its motion for a judgment as a matter of law for a new trial on both the ADA and ADEA claims. On the ADA claim, the court noted that the jury heard conflicting testimony and found Mr. Gruttemeyer's evidence more compelling and thus affirmed the district court's decision. Mr. Gruttemeyer's ADEA claim was on the basis of his advocacy for a co-worker, Jim Miller. As per the evidence provided, the court noted that the jury could have inferred that Mr. Gruttemeyer's statements about Mr. Miller at the pretermination hearing were a contributing factor to his termination. Again, the court affirmed the district court's decision.

Discussion

Metro first objected to the testimony of Ms. Buda Dardon on grounds that her qualifications did not permit her to serve as an expert witness under Nebraska law. Subsequently, on finding out that Ms. Buda Dardon was indeed qualified, Metro objected to her testimony, arguing that it was a prejudicial unfair surprise that they only learned during the trial that she is an expert witness.

The federal requirements for serving as an expert witness are relatively minimal. As per the Federal Rule of Evidence 702, expert witnesses must have "knowledge, skill, experience, training, or education" that can "help the trier of fact to understand the evidence or to determine a fact in issue." Additional legal requirements, as is the case under Nebraska law with regard to testimony by a LMHP versus a LIMHP, vary depending on the jurisdiction. It should also be noted that the evidentiary standards regarding the admissibility of an expert witness are more stringent than that for a nonexpert witness

(such as a treating health care provider). Thus, if treating clinicians provide expert testimony, they are held to higher standards of admissibility.

The practical question becomes how litigants verify the qualifications of an expert witness and whether they meet the standards set forth by a jurisdiction. In this case, Mr. Gruttemeyer provided information about Ms. Buda Dardon's qualifications that he thought was accurate. Additionally, Metro's objection to the district court admitting Ms. Buda Dardon's testimony without expert disclosure is inapplicable as she testified as a treating practitioner only, and not about the causation or topics outside of Mr. Gruttemeyer's disability. To avoid similar mishaps, opposing parties should play an active role in verifying the qualifications of expert witnesses.

Mentioned in the case opinion was that Metro had also sought to exclude evidence of Mr. Gruttemeyer's diagnosis of major depressive disorder because he had only identified bipolar disorder as a disability in his complaint. The district court denied Metro's request on the grounds that Metro was aware through discovery of Mr. Gruttemeyer's other diagnoses. Metro argued that *EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438 (7th Cir. 2008) was persuasive authority. In *Lee's Log Cabin*, the Seventh Circuit affirmed a district court's decision that AIDS and HIV were not synonymous, "given the symptomatic variances." In contrast, in *Gruttemeyer*, the court ruled that Mr. Gruttemeyer's diagnoses (major depressive disorder, anxiety, and bipolar disorder) are interrelated, and their inclusion was unlikely to change fundamentally the factual basis of the case.

From this case, several questions may arise for the psychiatric expert, such as when diagnoses are mutually exclusive and what criteria are used to make these determinations clinically and in law. Research on the biological and psychosocial underpinnings of psychopathology overwhelmingly suggest difficulty in discrete conditions. There is substantial evidence that many of the same genes underlie seemingly distinct disorders. Additionally, a mental health condition often predisposes an individual to other mental health conditions, regardless of how distinct the symptoms may be. Much the way the court noted that Mr. Gruttemeyer's varied diagnoses are interrelated, mental health conditions are often not separated by hard dividing lines.

Should the expert witness need to draw distinctions among mental disorders, presently the best available resource would be the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition

(DSM-5), which provides both a categorical and dimensional approach to diagnosis and classification. The dimensional approach provides more latitude to assess disorders on the basis of severity and range of symptoms, allowing for an integrative approach to diagnosis and classification. On the other hand, a severe manifestation of a disorder may be sufficiently different in "symptomatic variances" from a mild manifestation that a distinction may be drawn on a dimensional basis when answering a particular legal question.

To prevail on the ADA employment claim, claimants must establish that the defendant knew of their disability, or record of disability, and it was a motivating (i.e., discriminatory) factor in the employee's termination. In *Gruttemeyer*, part of the evidence presented in support of this was the fact that Metro, a bus driver, and the Union president spread rumors about Mr. Gruttemeyer's mental health, calling him, "nuts," "crazy," and "unstable." There was evidence that this was known to Metro's executive director. These types of comments reflect stigma against individuals with mental illness and can be used as evidence in court of discrimination.

Judicial Discretion, Competency, and Due Process Rights in Juvenile Arraignments

Danielle Barcak, MD
Fellow in Forensic Psychiatry

Clarence Watson, JD, MD
Director, Forensic Psychiatry Fellowship
Clinical Associate Professor of Psychiatry

Department of Psychiatry
Perelman School of Medicine
University of Pennsylvania
Philadelphia, Pennsylvania

Constitutional Due Process Protections Were Satisfied Despite Court's Denial of Juvenile's Motion to Continue Arraignment for Competency Evaluation and Subsequent Petition for Arraignment Expungement

DOI:10.29158/JAAPL.230038L1-23

Key words: arraignment; due process; competency evaluation; expungement

In *Commonwealth v. Carson C.*, 187 N.E.3d 361 (Mass. 2022), Carson C. (referred to solely as "the