STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 10536-06
DCR DOCKET NO. EB06HE-52136-E

J. P. ,	)	
	)	
Complainant,	)	**ADMINISTRATIVE ACTION**
	)	
v.	)	**FINDINGS, DETERMINATION AND ORDER**
	)	
CLIFFSIDE PARK BOARD OF EDUCATION,	)	
	)	
Respondent.	)	
	)	

APPEARANCES:

Sheldon H. Pincus, Esq., for the complainant (Bucceri and Pincus, attorneys).

Lisa S. Grosskreutz, Esq., for the respondent (Parker McCay, P.A. attorneys).

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by J. P. (Complainant), alleging that Cliffside Park Board of Education (Respondent) unlawfully discriminated against him based on his disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On March 17, 2008, the Honorable Imre Karaszegi, Jr., Administrative Law Judge (ALJ), issued an initial decision[1] concluding that Respondent violated the LAD. After independently evaluating the evidence, the

[1]Hereinafter, "ID" shall refer to the initial decision of the ALJ; Ex. R- and Ex. C- shall refer to Respondent's and Complainant's exhibits, respectively, admitted into evidence at the hearing; RE shall refer to Respondent's exceptions to the initial decision; CR shall refer to Complainant's reply to Respondent's exceptions; CE shall refer to Complainant's exceptions to the initial decision; and "TR1-" through "TR5-" shall refer to transcripts of hearing dates August 6, 2007, August 27, 2007, August 28, 2007, September 26, 2007 and September 28, 2007, respectively.

parties' submissions and the ALJ's decision, the Director adopts the ALJ's recommended decision, as modified below.

PROCEDURAL HISTORY

On February 17, 2006, Complainant filed a verified complaint with the Division alleging that Respondent unlawfully discriminated against him based on his disabilities (anxiety and depression) in violation of the employment discrimination provisions of the LAD. Respondent filed an answer denying the allegations of unlawful discrimination, and the Division commenced an investigation. On October 16, 2006, prior to the completion of the Division's investigation, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing at Complainant's request pursuant to N.J.S.A. 10:5-13.

Prior to commencement of the hearing, the ALJ held several telephone conferences with counsel and considered written submissions regarding the issues to be addressed and the burden of proof. The ALJ concluded that the case would be heard as a reasonable accommodation case, and that Respondent would bear the burden of proof on the reasonable accommodation issues. ID2; TR2-14. On March 5, 2007, the ALJ signed a consent order limiting the use and disclosure of Complainant's confidential medical and psychological records.

The ALJ conducted a hearing on August 6, 27 and 28 and September 26 and 28, 2007; after receiving post-hearing submissions, the record closed on January 31, 2008. The ALJ issued an initial decision on March 17, 2008. The Director granted the parties an extension of time to file exceptions and replies, and the original deadline for filing the Director's final order was extended to July 31, 2008.

THE ALJ'S DECISION

The ALJ's Factual Findings

Based on the facts he identified as undisputed and his own determinations, the ALJ made the following findings of fact:

Complainant was a tenured high school mathematics teacher when he was suspended with pay on May 27, 2003; he was first hired by Respondent in September 1980, and he had never been disciplined prior to May 2003. His suspension, based on accusations made by two students and a teaching staff member, was to continue pending a superintendent's investigation and a psychiatric evaluation. ID2. In October 2003, Respondent formally suspended Complainant based on Dr. Gerald Meyerhoff's finding of medical disability; Complainant's disability at that time was depression and anxiety. ID7. No tenure charges or civil or criminal charges were filed against Complainant, and Respondent never reprimanded or imposed discipline or increment withholding against Complainant based on the accusations. ID2. By December 31, 2004, Complainant exhibited no symptoms of depression or anxiety and was able to return to work. ID7. By requests to Respondent dated July 7, 2005 and September 27, 2005, Complainant asked for reinstatement, with the second request suggesting transfer to a different school or a non-teaching position as alternatives. ID7. Between June 2005 and November 16, 2005, Respondent did not seek to meet with Complainant to discuss reinstatement. ID7. Respondent presented no evidence that it took affirmative steps to reasonably accommodate Complainant's disability. ID7.

The ALJ summarized some of the witness testimony at pages 2-4 of the initial decision. The following additional factual findings can be gleaned from the undisputed aspects of the ALJ's summary. On May 28, 2003, after learning of his suspension, Complainant visited his internist, Jeffrey Kocher, M.D. Dr. Kocher recommended that Complainant be evaluated by a psychiatrist, and Complainant was referred to psychiatrist Michael Milano, who began treating Complainant in June 2003. Dr. Milano saw Complainant once a week for approximately a year, and prescribed Paxil, Xanax and Valium. ID2-3. In May 2004, Dr. Milano concluded that Complainant had

improved, and that he could return to work if the serious charges against him were resolved. He again evaluated Complainant in December 2004, and at that time Dr. Milano felt that, based on the absence of symptoms, Complainant was able to return to work. ID3.

On September 16, 2003, Complainant was evaluated by Dr. Gerald Meyerhoff, a psychiatrist selected by Respondent. At that time, he diagnosed Complainant with an adjustment disorder with mixed anxiety and depressed mood. Dr. Meyerhoff evaluated Complainant again on April 5, 2005, at which time he observed that Complainant had changed considerably and was less emotional; Meyerhoff changed his diagnosis to delusional disorder, persecutory type. ID4. Dr. Meyerhoff's report advised Respondent that problems could persist in an environment with particular stressors, and that Complainant would need to be re-interviewed if Respondent desired to re-employ him. Ibid.

The ALJ's Analysis and Conclusions

The ALJ concluded that Complainant is a person with a disability as defined by the LAD, and that Complainant can perform his job. ID2,8. After reviewing the evidence presented and weighing the testimony of Dr. Milano and Dr. Meyerhoff, the ALJ concluded that Respondent failed to reasonably accommodate Complainant's disability, failed to engage in an interactive process with Complainant to explore reinstatement, transfer or other accommodations, and failed to demonstrate that reasonably accommodating Complainant's disability would impose an undue hardship on its operations. ID5, 8-9.

The ALJ noted that the testimony of Drs. Milano and Meyerhoff was "divergent," and credited Dr. Milano's testimony more than that of Dr. Meyerhoff. ID5. In reaching this conclusion, the ALJ relied on his observations of the demeanor of Milano and Meyerhoff, noted that Milano's testimony was clear and concise, and noted that, as Complainant's treating psychiatrist, Milano observed Complainant over the course of forty fifty-minute-long treatment sessions, while Meyerhoff examined Complainant on only two occasions. ID5. The ALJ noted that Dr. Meyerhoff admitted

that Complainant could function fine in a non-threatening environment, and that he failed to conclude with a reasonable degree of certainty that Complainant's disability, if still present, would pose a serious threat in an educational environment, and failed to explain why any residual disability would pose such a threat. ID5-6. The ALJ also noted that Dr. Meyerhoff failed to provide any objective or factual basis for his opinion that Complainant's "casualness and serenity" or his not being "repentant" indicated that Complainant would pose an imminent threat. ID6. The ALJ found Dr. Meyerhoff's final determination contradictory, in that he testified that Complainant could "unravel, at some point," but concluded that Respondent could re-interview Complainant for reinstatement. Ibid.

EXCEPTIONS AND REPLIES OF THE PARTIES

Respondent filed exceptions to the ALJ's initial decision on April 14, 2008. Complainant filed exceptions on April 15, 2008 and filed replies to Respondent's exceptions on April 25, 2008.

- Respondent takes exception to the ALJ's failure to consider or give appropriate weight to evidence that Respondent reasonably determined that the nature and extent of Complainant's disability precluded him from returning to work. RE2, 6. In response, Complainant argues that Respondent failed to consider reasonable accommodations before discharging Complainant, and failed to meet its obligation to engage in a good faith interactive process with Complainant to consider accommodations that could have permitted him to return to work or to otherwise avoid discharge. CR22-24, 30-36.
- Respondent takes exception to the ALJ's finding that by December 31, 2004, Complainant exhibited no signs of depression or anxiety and was able to return to work, citing hearing testimony of Drs. Meyerhoff and Milano, and Dr. Meyerhoff's April 5, 2005 re-evaluation of Complainant. RE2-4. In response, Complainant contends that the evidence demonstrates that Dr. Meyerhoff's opinion regarding Complainant's fitness to return to work was "subjectively unreasonable," and argues that Respondent had a duty to independently

assess the objective reasonableness of Dr. Meyerhoff's opinion. CR40-42. Complainant also contends that Dr. Meyerhoff's conclusions were flawed, in part because he assumed that the accusations that Complainant acted inappropriately were true, and contends that Dr. Meyerhoff had insufficient evidence or cause to credit those allegations. CR43. Complainant further contends that Dr. Meyerhoff erred in basing his opinion on the risk of a future onset of disability, rather than the risk of future harm or injury. CR46-47. In addition, Complainant argues that Dr. Meyerhoff's conclusions regarding Complainant's fitness to return to work were not supported by facts or data reasonably relied upon by experts in his field, and for that reason are inadmissible as a net opinion. CR47-51.

- Respondent takes exception to the ALJ's determination that Dr. Milano's testimony was more credible than the testimony of Dr. Meyerhoff. As evidence to impeach Dr. Milano's credibility, Respondent cites inconsistencies between Dr. Milano's trial testimony and his prior written evaluation of Complainant's fitness to return to work, and as well as testimony regarding Dr. Milano's professional history. RE4-5. In response, Complainant cites inconsistencies in Dr. Meyerhoff's testimony, as well as testimony of psychiatrist Peter Crain which disputes the validity of Meyerhoff's conclusions. CR42-44, 50-51.
- Respondent takes exception to the ALJ's failure to consider or give appropriate weight to the Respondent's discretion to evaluate teachers' fitness for duty pursuant to State education statutes, N.J.S.A. 18A:16-2, 16-4, and notes that Dr. Meyerhoff testified that he felt he had a professional duty to warn Respondent about potential violent behavior against staff and/or students by Complainant. RE5, 8. In response, Complainant challenges the validity of Dr. Meyerhoff's conclusion that Complainant posed a danger. CR46, 50-51. Complainant further argues that Respondent is now attempting to claim that Complainant's termination was based on alleged inappropriate conduct rather than medical evidence regarding his fitness to return to work, but such an assertion is merely a pretext for disability

discrimination. Complainant notes that he has consistently denied that he engaged in the alleged conduct which led to his suspension, and asserts that Respondent never completed an investigation or reached a determination regarding the accusations, and that there is insufficient evidence in the record to support the conclusion that the accusations were true. CR51-54.

- Respondent takes exception to the ALJ's award of backpay for a period in which Complainant had a duty to mitigate damages. RE5-6. In response, Complainant notes that Respondent bears the burden of proving failure to mitigate damages, argues that evidence that Complainant failed to search for a new job in 2005 is insufficient to meet Respondent's burden, and notes that Respondent has not challenged Complainant's expert's economic report regarding damages or presented evidence of comparable jobs that were available to Complainant. CR55-56. Complainant also argues that it was reasonable for Complainant to expect that, once he had given Respondent proof of his recovery, Respondent would engage in an interactive process to determine whether he could be reinstated with or without reasonable accommodation, and asserts that he immediately began looking for alternate work once it became clear that Respondent would not grant his request for reinstatement. CR56-57.
- Complainant takes exception to the ALJ's finding that Complainant first requested reinstatement on July 7, 2005, and asserts that he first requested reinstatement by letter dated February 9, 2005. CE2.
- Complainant takes exception to the ALJ's failure to award pre-judgment interest on the backpay award, and failure to compensate Complainant for the negative tax consequences of receiving his backpay in a lump sum . CE2-3.
- Complainant takes exception to the ALJ's failure to award emotional distress damages, and also argues that prejudgment interest should be awarded on such damages. CE3.

THE DIRECTOR'S DECISION

The Director's Factual Findings

Except as noted in the discussion below, the Director concludes that the ALJ's factual findings are supported by the record, and adopts them as his own. In the absence of evidence that the ALJ's factual findings were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence, the Director has no basis for rejecting the ALJ's credibility determinations or the factual findings based on those determinations. N.J.A.C. 1:1-18.6. Because he had the opportunity to hear the live testimony of witnesses and observe their demeanor, it is the ALJ who is best able to judge the credibility of those witnesses on particular issues. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988).

Based on the undisputed evidence in the record, the Director makes the following additional factual findings. Complainant was informed of the accusations against him on May 23, 2003, when he was summoned from a class he was teaching to attend a meeting in the principal's office.[2] Before entering the meeting, a representative of Complainant's union informed him of the accusations against him. At the meeting were Complainant, the union representative, several of

[2]In its exceptions, Respondent contends that the ALJ concluded that the accusations that led to Complainant's suspension are irrelevant to the issues to be addressed, and argues that the ALJ erred in that conclusion. RE6. The Director disagrees with Respondent's contention that the ALJ found the circumstances of Complainant's suspension irrelevant. The ALJ acknowledged the relevance of the accusations, noting that certain documents referring to the accusations were admitted into evidence, and that those documents speak for themselves. TR5- 163. However, the ALJ sustained objections to certain hearsay testimony, concluding that it would be outside the scope of a LAD disability discrimination complaint for him to conduct a mini-trial on the veracity of the accusations against Complainant. TR5,163-165. The Director agrees. It is undisputed that Respondent terminated Complainant based on Dr. Meyerhoff's psychiatric evaluation, and not based on discipline or censure - - Respondent took no disciplinary or tenure action against Complainant based on the accusations. The Director concludes that, pursuant to N.J.A.C. 1:1-15.1(c), the ALJ did not abuse his discretion in concluding that any probative value of Respondent's proffered hearsay testimony regarding the unresolved accusations against Complainant was outweighed by the potential confusion such testimony could present. TR5-164. Notwithstanding that conclusion, the Director finds it appropriate to include in the factual findings such general outline of the accusations as can be drawn from the undisputed evidence, while acknowledging that they remain unsubstantiated and that the issue to be addressed is whether Respondent's discharge of Complainant violated the disability discrimination provisions of the LAD.

Respondent's administrative staff, and two female students. Complainant's notes of that meeting state that one of the students was asked to recount the accusations, and she contended that while Complainant was supervising the room in which she was serving an in-school suspension, he made certain derogatory and lewd comments about Turks. Ex. R-14. At the meeting, Complainant denied all of the accusations of inappropriate statements or conduct, and gave his explanation of what occurred, stating that he and the student had a pleasant conversation in the suspension room two days earlier, and that she even offered to make him some baklava. Complainant's notes reflect that after the students left the May 23, 2003 meeting, the female math teacher was summoned to the meeting; she accused him of pushing her, and that he denied her accusations. Ibid. Complainant has consistently denied all of the accusations since that time. TR2-52. Although Complainant was suspended pending a superintendent's investigation and a psychiatric evaluation, Ex. R-2, ID2, there was no evidence that Respondent ever completed an investigation into the accusations or otherwise substantiated the accusations.

In September 2003, Respondent requested that Dr. Meyerhoff evaluate Complainant, and advised Meyerhoff that the evaluation request was prompted by Complainant's "inappropriate comments" to two high school students, and a female math teacher's report that Complainant "shoved" her on two occasions. Ex. C-5.

At its October 15, 2003 Board meeting, Respondent considered Dr. Meyerhoff's September 2003 evaluation report and issued a resolution suspending Complainant based on medical disability, to continue until he furnished proof of recovery, satisfactory to Respondent. Ex. C-14. That resolution provided that if the suspension continued for more than two years, Respondent would terminate Complainant's employment. Ibid. Despite prior requests to Respondent for a copy of Dr. Meyerhoff's report, Complainant never received the report until December 2003, after Respondent issued the resolution. TR2-67, Ex. C-11, C-19. Using his accrued sick leave, Respondent paid Complainant through the end of the academic year ending in June 2004. TR2-69.

Complainant initially requested reinstatement by letter from his attorney dated February 9, 2005, which enclosed a January 31, 2005 letter from Dr. Milano stating that his psychiatric symptoms had abated and he was fully able to resume teaching. Ex. C-23, C-22. Respondent did not render a decision on Complainant's request for reinstatement at its October 19, 2005 Board meeting. Ex. C-39. At its November 16, 2005 board meeting, after considering Dr. Meyerhoff's re-evaluation report, Respondent concluded that Complainant had not recovered from his medical disability and denied Complainant's request for reinstatement. Ex. C-40.

Legal Standards And Analysis

The LAD prohibits disability discrimination in employment, and prohibits an employer from terminating an employee based on disability, unless the employer demonstrates that the nature and extent of the employee's disability reasonably precludes job performance. N.J.S.A. 10:5-4.1; 10:5-12(a);10:5-29.1. It is undisputed that Complainant was a person with a disability as defined by the LAD. TR2-39. It also appears to be undisputed that Respondent terminated Complainant's employment based on its conclusion that his disability prevented him from performing his job. Ex. C-40. The issues to be addressed here are whether Respondent's decision to discharge Complainant was "reasonably arrived at" as required by N.J.S.A. 10:5-2.1, and whether Respondent met its obligations under the reasonable accommodation provisions of the LAD.[3]

. After review of the record, the Director concludes that Respondent did not reasonably arrive at its decision that Complainant's disability precluded performance of his job. At its November 16, 2005 Board meeting, Respondent concluded that Dr. Meyerhoff's April 5, 2005 re-evaluation report indicated that Complainant had not recovered from his disability, and on that basis Respondent denied Complainant's request for reinstatement. Ex. R-13. The record reflects that Respondent

[3]Although the ALJ concluded that this was a "reasonable accommodation case," this matter primarily turns on whether Respondent reasonably arrived at its decisions that Complainant's disability prevented him from performing his job, with or without reasonable accommodations.

requested the April 5, 2005 re-evaluation in response to a January 31, 2005 letter from Complainant's treating psychiatrist, Dr. Milano. Milano's letter stated that he had treated Complainant for roughly a year, that Complainant's prior symptoms of depression and anxiety had abated, he had no remaining psychiatric symptoms, and he was fully able to resume his teaching duties. Ex. C-22. That letter also noted that Complainant's initial symptoms of depression and anxiety "sprang directly" from the accusations against him and his suspension from teaching. Ibid.

To make a reasonable determination regarding whether Complainant's disability precluded job performance, Respondent had an obligation to consider Dr. Meyerhoff's re-evaluation report in light of the conflicting medical evidence and conclusion of Complainant's treating psychiatrist, and to determine whether Dr. Meyerhoff's re-evaluation report reached a valid and reliable conclusion based on facts and competent evidence. Despite Respondent's knowledge that Dr. Milano had treated Complainant for roughly a year, and had concluded that he was symptom-free and fit to return to work, there is no evidence in the record that Respondent made any attempt to get additional information to attempt to reconcile the conflicting medical conclusions.

In addition, to make a reasonable determination regarding whether, in 2005, Complainant continued to have a disability that precluded job performance, Respondent had an obligation to independently evaluate and resolve the internal inconsistencies in Dr. Meyerhoff's re-evaluation report. An employer may not rely on a deficient report to support its decision to discharge an employee, and might reasonably be expected to communicate with its expert about a report's meaning and how it relates to other relevant records. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 379-380 (1988). As noted by the ALJ, Meyerhoff's statement that "it is likely that [Complainant] would unravel at some point," was contradicted by his suggestion that, if Respondent "seriously wishes to reinstate him, it is not unreasonable that he be re-interviewed, as a 'returning' employee...." Ex. C-27; ID 6. The record is devoid of evidence that Respondent ever asked Dr. Meyerhoff for any clarification of his report or its conclusions before discharging Complainant.

Moreover, although Meyerhoff's re-evaluation report concluded that Complainant still had a disability, it did not reach a definitive conclusion as to whether Complainant was fit to resume teaching, or how the disability affected his ability to teach, and instead deferred to Respondent for the final assessment as to whether Complainant's disability precluded job performance.

Further, Respondent did not even follow Dr. Meyerhoff's direction. Despite his statement that Respondent should interview Complainant to get additional information, there is no evidence that Respondent ever sought to meet with, speak with, or get any additional information from Complainant or anyone on his behalf before deciding to discharge him.

Evidence presented at the hearing further demonstrates the inadequacy of the report Respondent relied upon. The ALJ noted that Dr. Meyerhoff failed to provide any objective or factual basis for his conclusions that any continuing limitations from Complainant's disability would pose a threat in an educational environment. ID5-6.[4] The ALJ's conclusion is supported by the hearing testimony of Dr. Peter Crain, who was qualified as an expert in psychiatry without objection. TR3-7. Based on his own evaluation of Complainant and his review of the other psychiatric reports, including Meyerhoff's re-evaluation report, Crain testified that Dr. Meyerhoff's conclusion that Complainant was "likely to unravel" was a prediction or hypothesis, and was based solely on the accusations against Complainant, rather than any substantiated evidence of dangerous behavior. TR3, 24-26.

This in turn is supported by Dr. Meyerhoff's own testimony that, in reaching his diagnosis and conclusions regarding Complainant, he presumed that the accusations against Complainant were true. TR5-108,111,157. The record, however, reflects no evidence that Respondent ever completed an investigation or otherwise reached a determination as to whether the accusations

[4]Although Respondent seems to imply that it denied Complainant's reinstatement request because it felt he would pose some sort of safety risk, Dr. Meyerhoff's re-evaluation report merely states he is "likely to unravel," and provides nothing to support this suggestion.

were substantiated, and Dr. Meyerhoff acknowledged that he never received any conclusions or determinations regarding the accusations from Respondent or any other source.[5] Dr. Meyerhoff's initial evaluation of Complainant noted that Complainant denied making any inappropriate comments about Turks and denied pushing the accusing teacher, and neither of Meyerhoff's reports gave any basis for discrediting Complainant's version of events. Ex. R-5, R-8. As noted by Dr. Crain, Complainant has consistently denied the accusations, and identifies his summary suspension without a proper investigation into the accusations as the cause of his emotional difficulties. TR3,25, 31-33. Dr. Meyerhoff based his conclusions in part on the fact that Complainant was not repentant. However, as noted by Dr. Crain, if the accusations were not true, there would be nothing for Complainant to be repentant about.

Moreover, the evidence from Dr. Crain challenges the basis on which Dr. Meyerhoff reached his conclusion that Complainant had developed a delusional disorder. Dr. Crain noted that Dr. Meyerhoff's report was contradictory, as it concluded that Complainant's mental status was normal and that he could separate reality from fantasy, but Meyerhoff diagnosed him with a delusional disorder, which is a psychosis. Dr. Crain explained that Dr. Meyerhoff's observation that Complainant was able to separate reality from fantasy would mean that he was not delusional or psychotic. TR3-19, 27-28. After examining Complainant, Dr. Crain found no evidence of delusions, and concluded that he had no mental disorder. Ex. C-41.

In its exceptions, Respondent argues that the ALJ failed to give sufficient weight to the discretion Respondent holds, under state education statutes, to evaluate teachers' fitness for duty. RE5, 6-7. In so doing, Respondent implies it had no obligation to make an individualized

[5] Although the two accusing students claimed that Complainant made the inappropriate remarks during an in-school suspension session, there is no evidence that Respondent ever questioned other students who were in the same suspension session. Nor is there any evidence that Respondent interviewed other potential witnesses or gave Complainant an opportunity to identify potential witnesses or to otherwise present evidence contradicting the accusations.

assessment of the impact of Complainant's disability on his ability to perform his job or otherwise consider reasonable accommodations. The Director disagrees.

N.J.S.A. 18A:16-4 gives boards of education the jurisdiction to determine whether an employee who has previously been deemed ineligible for service based on an examination indicating "mental abnormality or communicable disease,"[6] has provided sufficient "proof of recovery" to warrant his or her return to work. Such statutory jurisdiction does not deprive the employee of the right to reasonable accommodations under the LAD, or the right to engage in an interactive process with the board of education or school administration to evaluate the feasibility of potential reasonable accommodations that might enable the employee to return to work. Moreover, nothing in the education statutes absolves a board of education of the responsibility to act reasonably in evaluating medical or other evidence regarding recovery.

In its exceptions, Respondent emphasizes Dr. Meyerhoff's testimony that, based on his professional duty as a psychiatrist, he warned Respondent and Complainant's wife about the danger posed by Complainant's possession of firearms. RE7-8; TR5, 77-78. Initially, while acknowledging that the accusations against Complainant have not been substantiated, the Director notes that those accusations made no reference to weapons, threats to use weapons or threats of any sort. Moreover, review of the hearing transcripts and Dr. Meyerhoff's reports disclosed that Dr. Meyerhoff's only warnings were made in September 2003, when he first evaluated Complainant (and at a time when Complainant himself did not feel he was fit to return to work.) In his April 2005 re-evaluation session, Dr. Meyerhoff told Complainant that, in September 2003, he had been greatly concerned about his access to guns and had warned Complainant's wife of potential danger. Although Dr. Meyerhoff's re-evaluation report noted that Complainant "bristled" a little at hearing this, asserting that people unfamiliar with hunting and fishing are overly cautious about firearms,

[6] "Mental abnormality" is not defined in the statute.

the report made no renewed warnings about any danger in this respect. Neither his testimony nor his April 2005 re-evaluation report gave any indication that Dr. Meyerhoff felt any need or duty to warn anyone regarding potential violent behavior or any danger relating to Complainant's access to guns based on Complainant's condition at the time he sought reinstatement. The Director finds that the warnings made a year and a half before Complainant sought reinstatement provide no support for Respondent's assertion that it reasonably concluded that he was not fit to return to work.

Based on all of the above, the Director concludes that Respondent did not reasonably arrive at its conclusion that Complainant's disability precluded job performance when he sought reinstatement in 2005.

The related question is whether the evidence supports the conclusion that, when Complainant sought reinstatement, Respondent met its obligation under the LAD to consider reasonable accommodations before discharging him. Although the LAD does not explicitly address reasonable accommodation, New Jersey courts have uniformly held that the law requires employers to reasonably accommodate employees' disabilities. See, e.g., Potente v. County of Hudson, 187 N.J. 103, 110 (2006); Viscik v. Fowler Equipment Co., 173 N.J. 1, 11 (2002); Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 396 (App. Div. 2002). Employers are required to provide reasonable accommodations for employees' disabilities unless they can prove that the nature and extent of the employee's disability reasonably precludes job performance, or that needed accommodations would impose an undue hardship on the employers' operations. See N.J.S.A. 10:5-4.1, 10:5-29.1; N.J.A.C. 13:13-2.5. Reasonable accommodations are not limited to assistance that facilitates functioning in the employee's current job; based on the specific facts and circumstances, other types of accommodations may include time off, job restructuring or job reassignment. N.J.A.C. 13:13-2.5. The ALJ concluded that Respondent failed to meet its obligation to reasonably accommodate Complainant's disability, and specifically failed to engage in an interactive process with Complainant to explore the feasibility of providing reasonable

accommodations that could have permitted him to return to work. ID8-9. The Director agrees.

Before concluding that the employee's disability precludes continued employment, the LAD requires the employer to make an individualized assessment of the employee's ability to perform his or her job and to fully consider available accommodations. Jansen v. Food Circus Supermarkets, Inc.,110 N.J. 363, 379 (1988). This individualized assessment requires an interactive process in which the employer and the employee work together in good faith to evaluate the employee's abilities and limitations and the feasibility of possible accommodations. See, e.g., Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 385, 400 (App. Div. 2002). The interactive process is crucial, because each party normally holds relevant information that the other party does not have, and exchange of such information will ensure that the employer's assessment of potential accommodations is complete and, consequently, reasonable. See, e.g., Taylor v. Phoenixville School District, 184 F. 3d 296, 317 (3rd Cir. 1999).

The Appellate Division has articulated standards for evaluating a claim that an employer violated the reasonable accommodation requirements of the LAD by failing to engage in a good faith interactive process. Tynan v. Vicinage 13, supra at 400-401; Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412 (App. Div. 2001). To prevail in such a claim, an employee must show that "(1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith." Jones v. Aluminum Shapes, Inc., supra, 339 N.J. Super. at 423, citing Taylor v. Phoenixville School District, supra, 184 F. 3d at 319-320. Here, since it is undisputed that Respondent suspended Complainant from his teaching position based on its determination that he had a medical disability that rendered him unable to work, Ex. C-14, the Director concludes that Respondent knew of Complainant's disability.

The Director further concludes that Complainant's requests to return to work and requests

for transfer constituted the types of requests for assistance that triggered Respondent's reasonable accommodation obligations. Complainant first requested reinstatement by letter from his attorney dated February 9, 2005, which enclosed a January 31, 2005 letter from his treating psychiatrist concluding that Complainant was at the time fully able to resume teaching. Ex. C-22; Ex. C-23. Complainant reiterated his request for reinstatement by letter dated July 7, 2005, and by letter dated September 27, 2005, which also suggested alternatives -- transfer to one of the open math teacher positions in the middle school, or to a non-teaching position. Ex. C-36, C-37. The Director concludes that Complainant established the first two elements of a claim that his employer failed to engage in an interactive process.

Addressing the third element, after considering the evidence, the Director concludes that Respondent did not make a good faith effort to assist Complainant in seeking accommodation. An employer can show its good faith in a number of ways, including meeting with the employee, asking the employee what he or she specifically wants, or when it deems a requested accommodation too burdensome, showing some sign of having considered the employee's request and offering/discussing alternatives. Taylor , supra, 184 F. 3d at 317. Once the employer learns that the employee is asking for some form of assistance because of a disability, it is the employer who must initiate the process of determining the appropriate accommodation. Tynan, supra, at 400.

Here, review of the record discloses no evidence that Respondent ever met with or spoke with Complainant or anyone on his behalf to discuss his request to return to work. The record reflects that Respondent's communications with Complainant or anyone on his behalf in response to his requests for accommodation were limited to the following:

- A February 15, 2005 letter advising him to schedule an appointment with Dr. Meyerhoff for a re-evaluation, Ex. C-25;
- After several communications to confirm that Complainant authorized Respondent to release Dr. Meyerhoff's re-evaluation report to his attorney, a June 28, 2005 letter

forwarding Meyerhoff's April 5, 2005 report to Complainant's attorney, Ex. C-35;

- An October 3, 2005 letter from Respondent's attorney expressing his own disagreement with Complainant's assertion that Meyerhoff's report cleared Complainant to return to work, but stating that he would forward Meyerhoff's report and Complainant's September 27, 2005 reinstatement request to Respondent for consideration, noting that Respondent's next Board meeting was scheduled for October 19, 2005, Ex. C-38;
- A November 10, 2005 letter stating that Respondent did not render a decision on Complainant's request for reinstatement at its October 19, 2005 meeting, and that his reinstatement request would be on the agenda for the November 16, 2005 meeting, Ex. C-39; and
- A November 25, 2005 letter from Respondent's attorney to Complainant's attorney, stating that after considering Dr. Meyerhoff's re-evaluation report, Respondent concluded that Complainant had not recovered from his disability and denied Complainant's request for reinstatement. Ex. C-40.

The Director concludes that Respondent's actions were insufficient to demonstrate a good faith attempt to work with Complainant to determine whether he could return to work, with or without reasonable accommodations. As noted above, receipt of the conflicting conclusions from Dr. Meyerhoff and Dr. Milano would reasonably require some attempt to communicate with Complainant to address the conflicting evidence. A good faith interactive process would also require Respondent to consider and respond to Complainant's alternative suggestion of returning to work in a non-teaching position. Moreover, a good faith interactive process does not permit an employer to make complete "recovery" a condition of reinstatement, but requires the employer to evaluate any continuing limitations to determine whether reasonable accommodations are available that could permit the employee to return to work. Even Dr. Meyerhoff's re-evaluation report

contemplated that Respondent's school administration would meet with Complainant as part of its determination as to whether he was able to return to work. Ex.R-8, p.5. By denying Complainant's request for reinstatement or transfer and terminating his employment without any additional discussion with Complainant, Respondent failed to participate in the interactive process in good faith.

Addressing the fourth element, the Director concludes that, if Respondent had participated in the interactive process in good faith, it could have reasonably accommodated Complainant without undue hardship. Before addressing the question of whether Complainant was in fact medically fit to return to work, the Director first notes that there were math teacher vacancies at the time Complainant sought reinstatement. The September 27, 2005 letter from Complainant's attorney states that there were at that time openings for math teachers in Respondent's middle school, and there is no evidence in the record to contradict this. Ex. C-37. Moreover, there is no evidence in the record that Respondent at that time lacked the capacity to hire a qualified high school math teacher.

The more fundamental question regarding this fourth element of Complainant's claim is whether Complainant was fit to return to work, with or without reasonable accommodations. The ALJ found as fact that by December 31, 2004, Complainant exhibited no symptoms of depression or anxiety and was able to return to work. ID7. This is supported by expert testimony and evidence from Complainant's treating psychiatrist, Dr. Milano, who concluded that based on his treatment of Complainant for over a year and his December 31, 2004 re-evaluation, Complainant was able to fully resume teaching duties. Ex. C-22, TR4-32. This is corroborated by testimony and evidence from psychiatrist Peter Crain, who at the hearing was qualified as an expert in psychiatry without objection. TR3-7. Dr. Crain examined Complainant in January 2006, after reviewing the medical evidence from Drs. Meyerhoff and Milano, as well as documents relating to Complainant's prior work performance, and concluded that Complainant exhibited no deviation from normal mental

health that would affect his ability to resume teaching, and was fit to return to work. TR3-38, Ex. C-41. Additional support can be drawn from the undisputed evidence that Complainant resumed teaching in other New Jersey public school districts, first as a substitute, and subsequently as a contract teacher. TR5-14; Ex.C-52,55. The record is devoid of evidence that Complainant failed to function well in the teaching positions he obtained after Respondent discharged him.

At this point, it is appropriate to address Respondent's exception to the ALJ's crediting of Dr. Milano's testimony regarding Complainant's fitness to return to work. RE4-5. As noted above, after weighing their credibility, the ALJ credited the testimony of Dr. Milano over that of Dr. Meyerhoff. ID5-6. After review of the record, the Director finds insufficient evidence to reject the ALJ's credibility determination, as he had the opportunity to hear the live testimony of the witnesses, observe their demeanor, and based on those factors, to assess their credibility. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587-88 (1988). Both of these witnesses were qualified as experts without objection. TR4-8; TR5-62. As the finder of fact, the ALJ is charged with considering the testimony of each expert and any weaknesses exposed on cross examination, determining whether an expert's opinion is supported by the facts as they actually exist, and determining the weight, credibility and probative value to be accorded to the opinion of each expert. See, e.g., Higgins v. Owens-Corning Fiberglas Corp., 282 N.J. Super. 600, 614 (App. Div. 1995); Biro v. Prudential Insurance Co. of America, 110 N.J. Super. 391, 401 (App. Div.), rev'd on other grounds, 57 N.J. 204 (1970); Rosenberg v. Tavorath, 352 N.J. Super. 385, 399 (App. Div. 2002).

The ALJ noted that Dr. Meyerhoff met with Complainant only twice, while Dr. Milano evaluated Complainant over the course of forty psychotherapy sessions from June 2003 to May 2004, and evaluated him again in December 2004. ID5. He found Dr. Milano's testimony clear, but noted inconsistencies in Dr. Meyerhoff's testimony, and noted that Meyerhoff failed to provide any objective or factual basis for his conclusions that any continuing limitations from Complainant's disability would to pose a threat in an educational environment. ID5-6.

Although the ALJ described the testimony of Dr. Milano and Dr. Meyerhoff as "divergent," their testimony was parallel in some respects - - each initially diagnosed Complainant with an adjustment disorder, and upon re-evaluation, they each concluded that he had recovered from that condition. Ex. C-27, p.4; Ex. C-22. The divergence appears upon final re-evaluation, when Dr. Milano concluded that Complainant no longer exhibited any psychiatric abnormalities, but Dr. Meyerhoff concluded that Complainant had developed a delusional disorder, persecutory type. He noted that this "seemed to be mostly in remission," and explained that this meant "not discernible obviously." TR5-87, Ex. C-27.

The Director finds sufficient evidence in the record to support the ALJ's failure to fully credit Dr. Meyerhoff's testimony. As noted above, the ALJ found contradictions in Dr. Meyerhoff's statement that it was likely that Complainant "would unravel at some point," and his suggestion that Respondent interview Complainant to determine whether he should be reinstated. ID6. Ex.C-27, p.5. When asked to explain this at the hearing, Dr. Meyerhoff testified that "...prudently, to take him back, they would have needed, as I wrote, to presumably re-interview him ***and determine for themselves*** whether or not they could work with him...." TR5-147 (emphasis added). He explained he felt it was appropriate for Respondent to interview Complainant to "find out if they could understand the serenity and the comfort that he seemed to show in the face of his previous declarations of bitterness." He stated that based on Complainant's discomfort level or agitation during the interview, Respondent could determine whether he had the "remarkable tolerance level" that would satisfy them that he was fit to return to work. TR5-92.

Obviously, neither Dr. Meyerhoff's re-evaluation report or his testimony expressed strong confidence that Complainant was fit to return to work. However, he did not reach a definitive conclusion, and instead, his testimony and report defer to Respondent for the final assessment as to whether Complainant's disability precluded job performance. The inconsistency between his reservations about Complainant's fitness and his suggestion that Respondent interview him, thus

deferring the decision to Respondent, was one of the factors considered by the ALJ in weighing the probative value of his testimony. ID6. Review of Dr. Meyerhoff's hearing testimony failed to disclose any reconciliation of this inconsistency.

As discussed above, the ALJ noted that Dr. Meyerhoff failed to provide any objective or factual basis for his conclusions that any continuing limitations from Complainant's disability would pose a threat in an educational environment, and this was supported by Dr. Crain's testimony that Meyerhoff's conclusion was merely a hypothesis, and was based solely on the unsubstantiated accusations, rather than any substantiated evidence of dangerous behavior. ID5-6;TR3, 24-26. Further support for the ALJ's credibility determination comes from Dr. Crain's testimony pointing out the contradiction in Meyerhoff's conclusions - - diagnosing him with a psychosis, which would contradict his concurrent finding that Complainant's mental status was normal and that he could separate reality from fantasy. TR3-19, 27-28.

Respondent asserts in exceptions that Dr. Milano's testimony was inconsistent with his written report, contrasting Milano's testimony that he should not return to work while the charges against him were unresolved, with his January 31, 2005 letter stating that Complainant was fully able to resume his teaching duties. RE3-4. Review of the hearing transcripts reveals that the ALJ directly questioned Dr. Milano on this issue, asking him to reconcile his testimony that appeared to place a condition on his return to work - - having the accusations against Complainant resolved - - with his January 2005 conclusion that Complainant was ready to return to work even though Respondent had not resolved the accusations. TR4, 70-74. In response to the ALJ's questioning, Dr. Milano testified that he initially assumed that Respondent would want to address any unresolved accusations before reinstating Complainant, and that he expected that his medical determination that Complainant was fit to return to work would prompt Respondent to address those unresolved accusations. The ALJ then asked Dr. Milano to set aside any assumption that Respondent would want to resolve the accusations before reinstating Complainant, and to give his opinion as to

whether Complainant was fit to return to work. Dr. Milano testified that he still would have concluded that Complainant was at that time able to resume his duties as a math teacher. TR3-74.

Respondent's October 2003 resolution formally suspending Complainant noted that he was initially suspended in May 2003 "pending the outcome of an investigation and a psychiatric evaluation...." Ex. C-14. Thus, it was reasonable for Dr. Milano to expect that Respondent would complete an investigation and resolve the accusations as a corollary to the suspension and the psychiatric evaluation. It also appears reasonable for Dr. Milano to conclude that, after more than a year had lapsed and Respondent failed to make any determination on the accusations, it was appropriate to evaluate Complainant's fitness to return to work based on his medical condition, independent of any resolution of the accusations by Respondent. The ALJ noted that no charges regarding the accusations existed against Complainant at any time, ID8, and review of the record disclosed no evidence that Respondent ever completed an investigation or issued a determination regarding whether the accusations against Complainant were true. After review of the hearing testimony, the Director concludes that any facial inconsistencies in Dr. Milano's testimony and prior writings were reasonably resolved to permit the ALJ to find his testimony credible.

Respondent also argues that testimony regarding certain incidents in Dr. Milano's professional history impeach his credibility. Review of the hearing transcripts disclosed that Dr. Milano acknowledged that he was once sanctioned for failure to comply with laws and regulations governing methadone treatment to a patient, and that in 1993, he entered into a consent order to resolve charges brought by the Board of Medical Examiners relating to the submission of insurance forms. TR4, 60-70. Respondent also cites a malpractice or wrongful death action filed against Dr. Milano after a 15 year old patient shot and killed a neighbor, which he testified resulted in an "acquittal."

After review of the cited hearing testimony and relevant testimony on cross-examination, the Director finds insufficient evidence to conclude that the types of lapses indicated by the cited

incidents would impair Dr. Milano's ability to make the professional judgments required in his treatment or evaluation of Complainant. The testimony and evaluation report of psychiatrist Peter Crain corroborates Dr. Milano's conclusions. TR3-38; Ex C-41. After reviewing the record, the Director finds insufficient evidence to conclude that any negative incidents in Dr. Milano's professional career impaired his professional judgment or his ability to apply the standards accepted in his field to assess the facts and evidence gathered in treating and evaluating Complainant, and to conclude that he was fit to resume his teaching duties in December 2004.

After reviewing the testimony and evidence of Drs. Meyerhoff, Milano and Crain, the Director concludes that there is insufficient evidence to reject the ALJ's crediting of the testimony of Dr. Milano over Dr. Meyerhoff, or the ALJ's finding that, as of December 31, 2004, Complainant was fully able to resume his teaching duties. Given the undisputed evidence that Respondent had openings for math teachers, the Director concludes that, if Respondent had met its obligation to engage in an interactive process with Complainant, Respondent could have brought him back to work without undue hardship.

Based on all of the above, the Director concludes that, when Complainant requested reinstatement in 2005, Respondent failed to reasonably arrive at its conclusion that Complainant could not perform the duties of a math teacher, and failed to reasonably exercise its discretion in evaluating whether Complainant was fit to return to work with or without reasonable accommodations.

Remedies

A. Backpay

The Director adopts the ALJ's award of backpay in the amount of $155,698, but concludes that Complainant should be awarded pre-judgment interest on the backpay award.

Initially, the Director concludes that the amount of backpay awarded by the ALJ is supported by the record. Respondent takes exception to the ALJ's award of backpay for the period of January

2005 through November 2005, arguing that Complainant failed to mitigate damages during this period. Failure to mitigate damages is an affirmative defense, and the employer bears the burden of proving that the employee's mitigation efforts were not reasonable. Goodman v. London Metals Exchange, 86 N.J. 19, 40 (1981). The employer establishes a prima facie case of failure to mitigate by showing that employment opportunities comparable to the wrongfully lost position were available, and if the lowered sights doctrine is applicable, that there were other suitable jobs. Id. at 41. The burden then shifts to the employee to present evidence that there were no comparable jobs available, that he made reasonable and diligent efforts to find appropriate work, but was unsuccessful, or that the circumstances did not justify acceptance of a dissimilar job. Ibid.

Here, Respondent presented no evidence at the hearing of comparable teaching vacancies or other available jobs that would have been suitable for Complainant, nor has it even proffered such evidence in post-hearing submissions. In its exceptions, Respondent merely states that, since he worked as a substitute teacher beginning in January 2006, Complainant could have worked earlier, had he chosen to do so. This is not a prima facie showing of failure to mitigate damages. The record reflects that Complainant requested reinstatement with Respondent as soon as he received clearance from his treating physician, but despite two more requests for reinstatement, Respondent delayed responding to Complainant's request for roughly eight months after sending Complainant for a re-evaluation with Dr. Meyerhoff. In addition, the record reflects that Complainant began looking for work as soon as he learned that Respondent would not reinstate him. (Stipulation re: missing transcript testimony, p.1.[7]) After review of the record, the Director finds insufficient evidence to conclude that Complainant failed to meet his obligation to mitigate damages.

[7]Due to some recording or other malfunction, the transcript of Complainant's testimony was incomplete, and was supplemented by stipulated notes regarding the missing portions of his testimony. The relevant portion of the summary of Complainant's testimony states,"After November 2005 to present, sent out over 160 applications. Obtained employment in Leonia as a substitute teacher around January 2006."

Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who is able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). See also, Potente v. County of Hudson, 378 N.J. Super. 40, 49 (App. Div. 2005). Applying the interest rates set forth in New Jersey Court Rule 4:42-11, the Director awards Complainants prejudgment interest on the back pay award through June 23, 2008, in the amount of $21,168.05. Based on the 2008 interest rates, a per diem of $31.99 shall be applied until payment is received.

Complainant has taken exception to the ALJ's failure to increase the backpay award to compensate for the tax consequences of receiving a lump sum back pay award. CE3. This type of "tax leveling" in a LAD case was addressed as an issue of first impression in Ferrante v. Sciaretta, 365 N.J. Super. 601 (Law Div. 2003), but has not yet been addressed by the Appellate Courts. In Ferrante, the court reviewed out-of-state cases awarding similar remedies, and found the LAD's remedies sufficiently broad to encompass such additional compensation that, as demonstrated by a qualified expert, would be needed to make a discrimination victim whole. 356 N.J. Super. at 607-608. The Director agrees.

The LAD provides the Director with the power to order such affirmative relief as is needed to make a discrimination victim whole, including equitable relief and compensatory damages. N.J.S.A. 10:5-3; 10:5-17; Baker v. National State Bank, 353 N.J. Super. 145, 158 (App. Div. 2002). As the LAD is to be liberally construed to effectuate its remedial purposes, N.J.S.A. 10:5-3, the Director concludes that the Director's remedial powers include the award of such additional sums as are needed to ensure that a backpay award places a complainant in the same position he or she would have occupied but for the unlawful discrimination.

The report and testimony of Complainant's expert in vocational economics, Robert P. Wolf,

stated that, because Complainant will be receiving his 2006-2008 salary in a lump sum, it will be taxed at a higher rate than if he had received the same wages spread over the years they were earned (approximately 32½ % as compared with approximately 21½%). TR5-24; Ex.C-62 p.4. This testimony is undisputed, and as Respondent did not object to Wolf's qualification as an expert or take exception to Wolf's testimony or report, the Director finds no basis to reject his conclusion.

However, as Complainant notes in his exceptions, Wolf's calculations of the actual dollar amount of the additional tax burden were based on Complainant's receipt of both backpay and frontpay. Since Complainant is being reinstated in lieu of frontpay, Complainant's counsel used the expert's figures to recalculate the tax consequences of the lump sum backpay award alone. CE3. Although counsel's recalculation may appear logical, it is not competent evidence of the additional tax burden imposed by the backpay award. Accordingly, the Director will leave the record open for a brief period to permit Complainant to file and serve on Respondent a supplemental expert report addressing and calculating the tax consequences of Complainant's receipt of the $155,698 backpay award as a lump sum. Complainant shall file and serve the report within 20 days, and Respondent may file a response within ten days after receipt. The Director will then rule on the amount to be awarded for "tax leveling."

B. Reinstatement

The ALJ ordered Respondent to reinstate Complainant "... with the same tenure and privileges he possessed at the time of his termination." ID9. The Director agrees. Neither party has argued that frontpay should be awarded in lieu of reinstatement due to hostility or other factors, and Respondent has presented no argument or evidence that immediate reinstatement cannot be accomplished.

C. Compensatory Damages

1. Emotional Distress Damages.

Complainant takes exception to the ALJ's failure to award compensation for his emotional distress, and argues that prejudgment interest should be assessed on this award. CE3. The Director agrees that an award of emotional distress damages is appropriate in this case, but declines to award pre-judgment interest on that award.

A victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970), see also, Tarr v. Ciasulli, 181 N.J. 70, 82 (2004)("victim may recover all natural consequences of that wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and other intangible injuries.") Thus, pain and humiliation awards are not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318. Nor is expert testimony needed. See, e.g., Rendine v. Pantzer, 276 N.J. Super. 398, 440(App. Div. 1994), affirmed as modified, 141 N.J. 292 (1995).

Here, although Complainant testified about the physical and emotional reactions he experienced in response to his 2003 suspension, the record reflects no testimony from Complainant or anyone on his behalf about any emotional distress he suffered in response to the LAD violations, which occurred when Respondent failed to respond appropriately to his February 2005 request for

reinstatement.[8] In the absence of specific evidence of Complainant's symptoms or reactions, the Director considers the natural and proximate responses to Respondent's actions, and awards $1000 in emotional distress damages.

Complainant argues that pre-judgment interest should be awarded on the emotional distress damages. An award of pre-judgment interest is discretionary. See, e.g., Gallo v. Salesian Society, Inc., 290 N.J. Super. 616, 660-661 (App. Div. 1996). Damages for emotional distress do not consist of funds which were previously due to Complainant at any specified time. Moreover, one measure of the dollar amount of the emotional distress award is the length of time Complainant suffered, which may, based on the facts of the case, be an appropriate substitute for a separate award of interest on the damage award. After considering the evidence in the record, the Director declines to award pre-judgment interest on the emotional distress damages in this matter.

2. COBRA Reimbursement

The ALJ ordered Respondent to reimburse Complainant for $11,094.18 in payments he made for health insurance coverage under COBRA, after Respondent terminated his health benefits. The Director agrees that it is appropriate to reimburse Complainant for this expenditure, but finds that Complainant's expert included this amount in the backpay amount of $155,698. Ex. C-62, Table 1, Table 5. Accordingly, no additional amount will be awarded for COBRA payments.

D. Statutory Penalty

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates these statutes. N.J.S.A. 10:5-14.1a. The ALJ assessed a $10,000 penalty, which is the maximum penalty for a first violation of

[8] As noted above, the transcript of Complainant's testimony was incomplete, and was supplemented by stipulated notes regarding the missing portions of his testimony. None of those notes explicitly refer to testimony regarding emotional distress Complainant suffered after he requested reinstatement, and neither Complainant's exceptions nor his post-hearing brief refer to any such testimony.

the LAD. Ibid.

After a review of the record, the Director concludes that the maximum penalty of $10,000 is appropriate for Respondent's LAD violation. As punitive damages cannot be awarded in LAD actions filed administratively and can only be awarded in actions before the Superior Court, the $10,000 civil penalty is the only remedy available to serve an admonitory or deterrent purpose in this case.

E. Counsel Fees

A prevailing party in a LAD action may be awarded reasonable attorneys' fees. N.J.S.A. 10:5-27.1. It is a fee-shifting statute, subject to the holding of Rendine v. Pantzer, 141 N.J. 292 (1995). The Director concludes that it is appropriate to make an award of attorney fees in this case.

The Director will leave the record open for a total of 30 days to permit the parties to attempt to reach an amicable resolution of the issues relating to counsel fees, or if that is not possible, to submit briefs and/or certifications addressing the fee award. Complainant shall file with the Division and serve on Respondent any submissions within 20 days, and Respondent shall have 10 days to file and serve a reply.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the LAD, N.J.S.A. 10:5-1 to -49.

2. Respondent shall re-hire Complainant to his former position, with the same tenure rights, benefits and privileges he had at the time of his termination.

3. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to Complainant in the amount of $177,866.05 as compensation for his backpay with pre-judgment interest and compensatory damages;

4. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $10,000 as a statutory penalty.

5. The penalty and all payments to be made by Respondent under this order shall be forwarded to Robert Siconolfi, New Jersey Division on Civil Rights, P.O. Box 46001, Newark, New Jersey, 07102.

6. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

7. The record in this matter shall remain open for 30 days for the limited purpose of calculating amounts due for tax leveling and counsel fees. The parties shall attempt to amicably resolve the amount of counsel fees due, and if they are unsuccessful, Complainant shall file with the Division and serve on Respondent, within 20 days of this order, a certification of services and related certifications as to the reasonable hourly rate for counsel's work, and a brief if desired. Respondent shall have 10 days to file and serve a reply. Regarding tax leveling, any supplemental expert report Complainant may wish to submit shall be filed and served within 20 days, and Respondent may file a response within ten days after receipt. After receipt of the supplemental submissions, the Director will issue a supplemental order limited to addressing counsel fees and tax leveling.

DATE: June 23, 2008

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J. FRANK VESPA-PAPALEO, ESQ., Director
New Jersey Division on Civil Rights

OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW JERSEY