New Jersey Commissioner of Education

Final Decision

Willingboro Education Association, on behalf of member, Michelle N. Reddick,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

Synopsis

This matter involves a challenge by petitioner to the outcome of an Affirmative Action complaint which she filed with the respondent Board in 2018. Petitioner, who is African American, alleged that she was subjected to a hostile work environment based on her race. Petitioner's allegations stem, *inter alia*, from a series of interactions between herself and another employee, who petitioner claimed repeatedly called her a "monkey". The Board assigned an attorney to investigate petitioner's complaint, which was ultimately found to be unsubstantiated. The Board filed a motion to dismiss in lieu of an answer to petitioner's appeal, and the contested matter was transmitted to the Office of Administrative Law (OAL).

The ALJ found, *inter alia,* that: petitioner's appeal presents sufficient facts to support a viable claim, relief from which could lie in the petitioner's favor; further, the Board's decision on the Affirmative Action complaint failed to provide factual findings or legal conclusions, aside from the ultimate conclusion that petitioner's allegations were not substantiated. Accordingly, the ALJ denied the Board's motion to dismiss and remanded the matter to the Board for issuance of a new decision on petitioner's Affirmative Action complaint, with instruction that the Board address the reasoning behind its conclusion that petitioner's hostile workplace claims could not be substantiated.

Upon a comprehensive review of this matter, the Commissioner noted that, pursuant to *N.J.S.A.* 18A:6-9, her jurisdiction is limited to controversies and disputes that arise under New Jersey school laws. Further, petitioner's allegations about a hostile work environment arise out of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.,* which does not involve New Jersey school law. As petitioner's challenge of her Affirmative Action complaint stems from the substance of the investigation and findings, a determination of such issues is outside of the Commissioner's expertise and beyond her jurisdiction. Accordingly, the Initial Decision of the OAL was rejected and the petition was dismissed for lack of jurisdiction. In dismissing the appeal, the Commissioner noted that while she lacks jurisdiction in this matter, the petitioner may pursue her hostile work environment claim at the New Jersey Division on Civil Rights.

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OAL Dkt. No. EDU 14369-19
Agency Dkt. No. 234-9/19

New Jersey Commissioner of Education

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Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file a reply.

In this matter, petitioner challenges the outcome of an Affirmative Action complaint she filed with the Board in 2018. Petitioner, who is African American, alleged that she was subjected to a hostile work environment based on her race when another employee called her a "monkey." Petitioner also alleges that the employee indicated that she would call her a "monkey" from now on, sent an email saying nothing else but "MONKEY!!!!," and that on two other occasions the employee verbally harassed her by speaking aggressively. The investigating attorney found that petitioner's complaint was unsubstantiated, and both the Superintendent

and the Board affirmed the findings. Petitioner appealed the Board's decision to the Commissioner, and the Board filed a motion to dismiss in lieu of an answer.

The Administrative Law Judge (ALJ) denied the Board's motion to dismiss because the petition presents sufficient facts to support a viable claim and such relief could lie in petitioner's favor. The ALJ also found that the Board's decision on the Affirmative Action complaint failed to provide factual findings or legal conclusions, aside from the ultimate conclusion that petitioner's allegations were not substantiated. Accordingly, the ALJ remanded the matter to the Board for issuance of a new decision on petitioner's complaint, with instruction that the Board address the reasoning behind its conclusion that petitioner's hostile workplace claims could not be substantiated.

In her exceptions, petitioner disagrees with the portion of the Initial Decision that remands the matter to the Board. Petitioner argues that since the Board's decision did not include any factual findings or legal conclusions, it is arbitrary, capricious and unreasonable. Accordingly, petitioner contends that a remand is not the appropriate remedy, and the decision should be overturned.

Upon review, the Commissioner notes that her jurisdiction is limited to controversies and disputes that arise under the school laws of this State. *N.J.S.A.* 18A:6-9. Petitioner's allegations about a hostile work environment arise out of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.,* which does not involve New Jersey school law. As petitioner's challenge of her Affirmative Action complaint stems from the substance of the investigation and findings, a determination of such issues is outside of the Commissioner's expertise and, therefore, beyond her jurisdiction. *See Sterling Education Association,*

individually and on behalf of its member Simone Colancecco v. Board of Education of the Sterling Regional School District, Camden County, Commissioner's Decision No. 108-19, decided April 23, 2019 (finding that the Commissioner lacked jurisdiction over an Affirmative Action complaint involving sexual harassment because it did not arise out of New Jersey school law). The Commissioner notes that the petitioner is not without recourse to pursue her hostile work environment claim at the New Jersey Division on Civil Rights.[1]

Accordingly, the Initial Decision of the OAL is rejected for the reasons stated herein. The petition of appeal is hereby dismissed due to lack of jurisdiction.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2022
Date of Mailing: January 12, 2022

[1] To the extent that the Board's Affirmative Action policy indicated that petitioner could appeal to the Commissioner in addition to the New Jersey Division on Civil Rights, the Commissioner notes that a Board policy cannot confer jurisdiction on the Commissioner, as the Commissioner only has jurisdiction over controversies and disputes that arise out of the school laws of the State. *N.J.S.A.* 18A:6-9.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14369-19
AGENCY DKT. NO. 234-9/19

WILLINGBORO EDUCATION ASSOCIATION ON BEHALF OF ITS MEMBER, MICHELLE N. REDDICK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
Respondent.

Matthew B. Wieliczko, Esq., for petitioner (Zeller & Wieliczko, LLP, attorneys)

Lester E. Taylor III, Esq., for respondent (Florio, Perrucci, Steinhardt & Cappelli, LLC, attorneys)

Record Closed: August 26, 2021 Decided: October 15, 2021

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Willingboro Education Association, acting on behalf of its member, Michelle N. Reddick, filed a Verified Petition with the Commissioner of Education on September 6,

2019, alleging that the Board of Education of the Township of Willingboro acted in an arbitrary and capricious manner when it denied Ms. Reddick's Affirmative Action Complaint. On October 4, 2019, the Board filed an answer to the Petition and a motion to dismiss the Petition. Petitioner responded on December 10, 2019, in opposition to the motion to dismiss. On January 3, 2020, the Board filed a response to the petitioner's reply. The contested case was transferred to the Office of Administrative Law on October 10, 2019, without the Commissioner having decided the motion to dismiss. The case was assigned to Honorable John S. Kennedy, ALJ. Judge Kennedy was appointed to the Superior Court before deciding the motion, and the case was transferred on July 28, 2021, to this judge, retired and serving on recall.

FACTUAL DISCUSSION

In her Petition of Appeal, Ms. Reddick states that she is an African-American woman employed by the Board of Education as a payroll administrator. Stacey Robinson is employed by the Board as its human resource director. Reddick and Robinson's departments work together regarding the District's payroll operations. Reddick states that on September 14, 2017, she spoke to Robinson and pointed out a salary correction for employee D.R. She asserts that during that meeting, Ms. Robinson spoke "in an aggressive tone" and insisted that Reddick was mistaken. When Reddick demonstrated to Robinson that it was Robinson who was mistaken, Robinson stated to Reddick, "You're such a monkey," a comment that Reddick says took her aback. Robinson then said, "I am going to call you monkey from now on." Reddick felt embarrassed and insulted by these comments and left Robinson's office. Then, that same day, Robinson "revived an older email thread," and in the text merely repeated the word "MONKEY!!!!" More specifically, an email dated July 13, 2017, from Robinson to Reddick and others was originally forwarded by Reddick to at least one other person. On September 14, 2017, Robinson wrote to Reddick as a part of that same email chain and the text of that message is nothing other than "MONKEY!!!!" It is not clear if this message, addressed to Reddick, also went to others addressed in the original email of July 13.

Ms. Reddick then points to two separate occasions when Robinson continued to subject her to a "retaliatory hostile work environment." The first occurred on or about

February, 28, 2018, when Robinson "verbally harassed" her when Reddick indicated that Robinson had failed to comply with standard procedures regarding payroll notices. "When confronted," Robinson "aggressively dismissed" Reddick, stating that Robinson was "not discussing this with her any further" and that Reddick "should speak to her peers." Robinson also stated that she would withhold any prior payroll notices for school year 2017–2018 from the payroll department, which Reddick claims would violate standard procedures for keeping accurate and current payroll notices.

The second incident occurred on August 23, 2018, when Robinson called Reddick "ignorant, just ignorant" when Reddick delivered reports to Robinson. Later that day, Robinson refused to speak to Reddick and slammed a door in her face.

The Verified Petition relates that after Ms. Reddick filed an Affirmative Action Complaint with the District's superintendent on September 4, 2018, the Board assigned an attorney "representing the District" to conduct an affirmative-action investigation. This assignment was necessitated by the fact that Ms. Robinson was the District's affirmative action officer After what are alleged to have been inappropriate delays in that investigative process that violated the time frames established for such an investigation in the District's own Resolution 1505, the District released a response on March 28, 2019, 211 days after the complaint was filed. The investigating attorney reported that following a "thorough investigation" involving interviews with "numerous witnesses" and the review and analysis of "all documentation provided by the Board and Reddick and her union representative," "we did not find that the complaint was substantiated." Subsequent appeals to the superintendent and then to the Board were denied. The superintendent wrote that he "concurred with the report and [did] not find that your complaint was substantiated." The Board met on June 26, 2019, and went into executive session for thirty-two minutes. No discussion concerning Reddick or her complaint occurred during the public session. On July 16, 2019, the Board's business administrator advised Reddick that "on June 26, 2019, the Board decided to sustain Dr. Ronald Taylor's findings concerning Michelle Reddick's hostile work environment complaint." The present appeal to the Commissioner followed the issuance of the Board's notification to Reddick of its denial of her appeal.

The Board filed an Answer to the Petition of Appeal. In that Answer, it denied many of Reddick's factual and legal claims. However, in addition, it filed its motion to dismiss, contending that the complaint failed to state a claim upon which relief could be granted, as petitioner "has not sufficiently plead allegations to support [its] claim." In explaining exactly how the complaint lacks such support, the Board states that the petitioner has "not only failed to adequately plead, or prove, any of the required elements of a hostile work environment claim," but has additionally "failed to establish that the Board's determination was arbitrary, capricious or unreasonable." According to the Board, the "legal basis relied upon by [petitioner] for filing this Petition is predicated on whether Robinson engaged in conduct unbecoming of a public employee, which is **not** at issue in Reddick's Affirmative Action Complaint, nor can it be an issue within the scope of this Petition." The Board notes that Reddick relies upon "three separate, unrelated events, each occurring approximately five months apart, to attempt to establish her hostile work environment claim." It argues that Reddick has failed to allege that the alleged events would not have occurred but for her status in a protected class and failed to allege any facts to establish that the "three, unrelated events were severe or pervasive enough to make a reasonable person in Reddick's position believe the conditions of her employment were altered and the work environment is hostile or abusive."

In its response to the Board's motion, the petitioner notes that while the Board has characterized its application as a motion to dismiss, it actually reads like a motion for summary decision, as provided for in N.J.A.C. 1:1-12.5.

Motion to Dismiss

A motion seeking the dismissal of a petition filed with the Commissioner of Education is permitted by the regulations governing pleadings in matters before the Department's Bureau of Controversies and Disputes. N.J.A.C. 6A:3-1.10 allows a motion to dismiss based upon the contention that even if the petitioner's factual allegations are accepted as true no cause of action will lie. In determining such motion, the standard is drawn from that applied in similar motions brought in the judicial branch under R. 4:6-2€, where the "inquiry is confined to a consideration of the legal sufficiency of the alleged

facts apparent on the face of the challenged claim." Rieder v. State, Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The court must "assume the facts as asserted by [petitioner] are true," and giving the petitioner the benefit of "all inferences that may be drawn in [petitioner's] favor," the court must decide whether the facts would support a basis for relief. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005) (citation omitted). If the factual allegations are "palpably insufficient to support a claim upon which relief can be granted," dismissal is warranted. Reider, 221 N.J. Super. at 552. However, if discovery might supply a basis for relief, dismissal at this stage is unwarranted.

In the petition, Ms. Reddick asserts that in September 2014, Ms. Robinson, in the course of aggressively responding to Ms. Reddick's correcting her about a payroll issue, referred to Reddick as a "monkey" and then within the same encounter repeated that term, stating that she would continue to refer to Reddick by the term, then almost immediately doing so in an email. Reddick then presents two instances of events occurring in February and August 2018 in which she claims Robinson exhibited harassing conduct toward her. According to Reddick, this conduct constituted discrimination against her and subjected her to a hostile work environment. It is immediately obvious that while the two events identified as occurring in 2018 may have involved what a person might well see as hostility, and either or both together might well cause an employee to be uncomfortable and disturbed by Robinson's attitude and conduct, on their face neither involves any statement, characterization, or other indicia of discriminatory conduct relating to Ms. Reddick's status as a member of a protected class. Thus, the claim that unlawful discrimination occurred and that a hostile work environment existed must of necessity be grounded upon the first alleged incident, the instance where Ms. Robinson is alleged, and for purposes of this motion must be found, to have referred to Ms. Reddick, an African-American woman, as a "monkey." In her briefs, Ms. Reddick has detailed some history of the use of this and related terminology as a derogatory and highly offensive reference to persons of Black African descent. It is not necessary to repeat this material here, and for the purposes of this motion at least, it can be readily accepted that a person of such heritage would likely find the use of the term as employed by Robinson offensive.

If the predicate for the claim of discrimination and the genesis of the hostility characterizing the workplace is this September 14, 2017, incident, then the two events in 2018 identified in the complaint can arguably be understood as not merely examples of commonplace workplace disagreements and obnoxious behavior, but instead as continued manifestations of Ms. Robinson's discriminatory hostility towards this member of a protected class, an invidious discrimination first disclosed by the "monkey" references.

In moving for dismissal, the respondent notes that alleged harassment can only be a violation of the Law Against Discrimination if the harassment in the workplace is based upon a protected characteristic and is sufficiently severe or pervasive. As the Board notes correctly, the LAD is not a "general civility" code and mere discourtesy or rudeness is not to be confused with harassment that is aimed at and motivated by a protected characteristic. Citing the test set forth by the New Jersey Supreme Court in Taylor v. Metzger, 152 N.J. 490, 498 (1998) (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603–04 (1993)), respondent contends that the complaint fails to plead the required elements of a hostile-workplace claim, and also fails to demonstrate that the Board's ultimate decision to deny the complaint was arbitrary and capricious. Thus, the appeal must fail at its inception, as the petitioner has neither set forth a claim that the Board could have legally granted nor, given the legal constraints on the Commissioner's authority to interfere with the Board's decision, demonstrated any legal basis for the Commissioner to overturn the Board's action. The limits on the Commissioner's authority will be discussed later in this decision.

Since the claim of discriminatory conduct that created the ongoing hostile-workplace environment must be founded on the "monkey" references, the Board argues that there is "no support or corroboration that Robinson's complained of comments and interactions with Reddick, e.g., calling Reddick a 'monkey,' [were] based upon Reddick's protected status." In the course of presenting this argument as a basis for demonstrating that the claim put forth by Reddick is so weak that even with the generous treatment of complaints used in determining motions to dismiss, the Board adds a fact that is not mentioned in the appeal filed with the Commissioner by Reddick or in her briefs, a fact that the Board contends must, given case law, be seen as significant in assessing the

viability of Reddick's claim. That fact is that Ms. Robinson, like Ms. Reddick, is an African-American woman.

LAD and Board Regulation 1550

The Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, prohibits discrimination "because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality." N.J.S.A. 10:5-3. A person claiming to have suffered conduct that violated the LAD bears the initial burden of establishing a prima facie case of a hostile work environment. Aguas v. State, 220 N.J. 494, 524 (2015).

The Willingboro Board of Education adopted Resolution 1550, which set forth a process for the investigation and resolution of complaints arising from claims of discriminatory conduct related to "employment and contract practices." Section A4 states that "[e]very reasonable effort will be made to expedite the process in the interest of a prompt resolution. Time limits may, however, be extended with the consent of all parties." If an informal attempt to resolve the complaint is unsuccessful after ten working days following the filing of the complaint, the District's affirmative action officer is directed to investigate and respond to the complaint "in writing no later than ten working days after receipt of the written complaint." Resolution 1550, Section C3. In the present matter, as Ms. Robinson was both the subject of the complaint and also the District's affirmative action officer, the investigation was assigned to an attorney employed by the Florio, Perucci law firm.

After the investigator responds to the complaint, the complainant may seek review of the investigator's determination from the District's superintendent. An informal hearing may be requested, and here such a meeting was held on May 2, 2019. The following day, May 3, 2019, Superintendent Taylor denied the complaint. The complainant may then appeal the superintendent's determination to the Board of Education, which is directed to render a decision no later than forty-five days after either the date when the appeal to the Board is filed or a hearing requested by the complainant is held, whichever

is later. Here petitioner claims that despite Reddick having requested a hearing before the Board, none occurred. The Board apparently discussed the complaint during an executive session held at its meeting on June 26, 2019, and Ms. Reddick was informed of the Board's decision on July 16, 2019.

In Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), the New Jersey Supreme Court established the test for determining whether acts of harassment in the workplace rose to the level of invidious discrimination in violation of the LAD. In Taylor, 152 N.J. 490, the Court stated this test in regard to a claim of invidious discrimination based upon the race of the complainant.

> When a black plaintiff alleges racial harassment under the LAD, she must demonstrate that the defendant's "conduct (1) would not have occurred but for the employee's [race]; and [the conduct] was (2) severe or pervasive enough to make a (3) reasonable [African American] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive."
>
> The Court in Lehmann specifically adopted the "severe or pervasive" test as part of its comprehensive standard. That test conforms to the standard for establishing workplace racial or gender harassment under federal Title VII law. In choosing its test, the Court clearly rejected an alternative regular-and-pervasive test that requires repetitive or recurrent acts to establish workplace harassment; that test would bar harassment-discrimination actions that were "based on a single, extremely severe incident." Consequently, under the chosen standard—severe or pervasive conduct—one incident of harassing conduct can create a hostile work environment.
>
> [Citations omitted.]

Given the test established in Taylor, the "monkey" remark directed by Robinson towards Reddick, if found to have been addressed to Reddick because of her status as a member of her race and if found to be severe or pervasive in nature, could reasonably be deemed conduct of a discriminatory nature. Its use towards her on September 14, whether viewed as one incident, or as more than one since it was first spoken that day and then repeated in a written communication, can by itself be sufficient to create a hostile work environment,

again if it is also found that a reasonable member of the protected class would believe it to have altered her conditions of work. Of course, Reddick additionally proposes that the other, later incidents described also establish that hostility and demonstrate that they are continued manifestations of Robinson's racially motivated discrimination.

The Board argues that since both Reddick and Robinson are African-American females, the claim of race discrimination is "severely weaken(d), if not eliminate(d)," citing, among other cases, Johnson v. State Department of Corrections, No. A-5021-09 (App. Div. October 28, 2011), https://njlaw.rutgers.edu/collections/courts/, where the plaintiff's LAD claim was that she was terminated from her position at least part due to her race. Johnson was an African-American, as was the Commissioner of the Department of Corrections who dismissed her, as was the person immediately hired to replace her. The Appellate Division noted that while New Jersey's courts had not yet addressed the significance of the circumstance of the fact that the person terminating the employment was of the same race as the terminated employee, some federal courts had recognized that the inference of unlawful racial discrimination "may be significantly diminished by the fact that the employer's decision-maker was a member of the same race as the plaintiff. . . . The undisputed circumstances that plaintiff's employment was terminated by an African-American man, and that she was replaced by an African-American woman, severely weaken if not entirely eviscerate her attempt to present a prima facie case of racial discrimination through the anecdotal circumstances alleged," circumstances which, according to a footnote, were disputed by the defendants.

The Board distinguishes several education tenure cases cited by the petitioner in support of the contention that the "monkey" remark was meant to be discriminatory and harassing towards Reddick, cases in which Caucasians used terms deemed derogatory toward African-Americans and were found to have engaged in misconduct. In re Tenure Hearing of Watson, Sch. Dist. of Franklin, Somerset Cty., 2014 N.J. Super. Unpub. LEXIS 1283 (teacher told class of predominantly African-American students that they were "stupid" and "acting like monkeys"); In re Tenure Hearing of Emri, Sch. Dist. of Evesham, Burlington Cty., 2002 N.J. AGEN LEXIS 565 (Caucasian teacher used "N word" and stated that some African-American girls reminded her of monkeys touching each other's hair). The Board, besides pointing out that Robinson was not a teacher and thus not held

to the high standards required of teachers, and that these teachers were alleged to have engaged in multiple actions of misconduct, claims that Reddick, in citing only one instance where the term "monkey" was used in reference to her, failed to establish "that the term was used toward Reddick because of her race."

While the Board relies on cases such as Johnson, the law clearly recognizes that in matters of discriminatory conduct that violate such federal laws as 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, the fact that the alleged discriminator is of the same race, color, ethnic group or sex as the alleged victim of the discriminatory conduct does not necessarily erase the invidious nature of such conduct. In Castaneda v. Partida, 430 U.S. 482, 499 (1977), the Supreme Court recognized that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), the Court held that same-sex sexual harassment was actionable under Title VII. New Jersey's LAD is a more expansive law than the federal provisions and there is no doubt that merely because the person alleged to have acted in a discriminatory manner against another person of the same color, race, or other protected class due to the recipient's memberships in such group does not automatically foreclose a determination that actionable discrimination occurred.

It is also possible that the identification of Robinson as Black might be meant to suggest that while discriminatory conduct by a Black person against another Black person can be actionable under the LAD, nevertheless, the fact that Robinson was also Black might suggest it to be less likely that the reference to Reddick was in fact meant to be discriminatory Perhaps Robinson did not mean it to be, and possibly she did not understand that it might be perceived by another Black person as a demeaning reference made due to Reddick's being of Black African descent. However, the case law recognizes that the question is not what the alleged perpetrator intended but what the reasonable person, here the reasonable Black person, referred to as, here, a "monkey," might perceive the reference to mean, that is, to understand it as demeaning her because she is Black and of African descent. In Ross v. Douglas County, 234 F.3d 391 (8th Cir. 2000),

the complainant in the Title VII action was a Black man employed in a correctional facility. His supervisor, Johnson, was also Black. The Court noted,

> The only reason that Johnson used such racial epithets was because of Ross' race. We are well aware that Title VII should not turn into "a general civility code," see Oncale, 523 U.S. at 80, but Johnson's epithets go beyond mere incivility: the only reason Ross was called a "nigger" was because he was black—that Johnson was also black does not alter this.

In Taylor, 152 N.J. 490, a public official referred to an African-American employee as a "jungle bunny." The Court recognized that this term had an "unambiguously demeaning racial message that a rational factfinder could conclude was sufficiently severe to contribute materially to the creation of a hostile work environment. The term defendant used, 'jungle bunny,' is patently a racist slur, and is ugly, stark and raw in its opprobrious connotation." Taylor, 152 N.J. at 502–03. It is clear enough that reference to an African-American as a "monkey" is likewise a patently racist remark. Indeed, as counsel for the complainant has documented in its brief, there have been several articles published that have examined the use of this term and its historical use as a slur against Africans and those of Black African descent. The fact that a Black supervisor would direct it against a subordinate during a confrontation over work-related issues does not lessen the derogatory connotations of the term.

Thus, while the fact that both Reddick and Robinson are Black may well be a highly relevant factor in ultimately analyzing the merits of Reddick's claim that she was the victim of discriminatory conduct that altered the conditions of her employment, this factor is not a sufficient basis for concluding that in her complaint, Reddick did not present a sufficient claim for which relief might lie. A fact finder could legally conclude that Robinson, despite being an African-American, did specifically address Reddick as a "monkey," indeed more than once, due specifically to Reddick's membership in that protected class. The test on a motion to dismiss is not one that involves weighing the sufficiency of the proofs, but is instead whether, given the stated facts, assumed to be true and with all inferences in the petitioner's favor, relief could lie under the law. Here, relief could lie for Reddick, despite Robinson's similar racial category.

The remaining three tests are whether the conduct was (2) severe or pervasive enough so that (3) a reasonable person of the same protected class would believe that (4) the conditions of employment were altered and the working environment became hostile or abusive." Taylor, 152 N.J. at 498. As Taylor concluded, one use of a patently racist term could be sufficiently severe to persuade a reasonable member of a protected class that such a hostile work environment existed. Here, on one day, according to Reddick, Robinson first verbally used the "monkey" term directly in reference to Reddick, telling her to her face that Reddick was "such a monkey" and that "from now on" she would refer to Reddick as a "monkey." The statement of intention to continue to use the term in direct reference to Reddick certainly could persuade a reasonable member of a protected class that the demeaning and discriminatory conduct was likely to continue and that a hostile work environment had been created for her. Then, Robinson used the term in an email. As such, she seemed to be carrying out her threat to continue to refer to Reddick with this slur. Given these facts, even without the two later incidents cited by Reddick, a fact finder could find that the incident on September 14, 2017, was severe or pervasive enough that a reasonable member of a protected class could conclude that she faced a hostile work environment. If the fact finder also deemed the later incidents as continuing evidence of such hostility, that would simply confirm the impact of the events of September 14. Thus, given the allegations presented by Reddick and applying the Taylor test, the facts presented are sufficient to present a claim for which relief could lie.

I **CONCLUDE** that the complaint and the petition present sufficient facts such that, under the applicable law, relief could lie in favor of Ms. Reddick. Thus, as to the motion to dismiss, it is without merit and is **DENIED.**

The Commissioner's Ability to Decide This Appeal

The conclusion reached by the Board's investigator, the superintendent and, ultimately, the Board, whose decision is of course the decision that is here under review, was that the complaint was not substantiated. As noted previously, the Commissioner's review of a Board's decision concerning matters that are within the scope of a Board's plenary authority is a limited one, confined to whether that decision was arbitrary,

capricious or unreasonable. The Board's decision in regard to its quasi-judicial activity in determining a complaint alleging discriminatory conduct, which is entitled to a ""presumption of correctness," Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294–96 (App. Div. 1960). Indeed, if the facts of the case leave "room for two opinions" and the decision is "exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached," the Commissioner will not interfere. Worthington v. Fauver, 88 N.J. 183, 204–05 (1982). Thus, the burden on the petitioner to overturn the Board's conclusion is significant.

The problem that is presented by this request for the Commissioner to exercise that limited authority of review is that it is difficult to properly assess a determination of the Board that is presented in such a baldly conclusory manner. When an appellate court considers an appeal of an agency final decision, it too has limits placed on its authority to overturn the agency's decision. While the appellate body is not bound by the agency's interpretation of the applicable law, when it considers the agency's factual findings and the factual conclusions reached from them and how the agency has applied a proper understanding of the law to those factual findings, the appellate court is not free to substitute its judgment and it defers to the agency's decision so long as the record demonstrates that the agency acted in a reasonable manner based on the facts established before it. In this case, this judge, and then the Commissioner, hopefully aided by this initial decision, must make that same determination. Yet, how the conclusion of the Willingboro Board was arrived at is, frankly, a mystery, for nowhere in the investigating attorney's letter of March 28, 2019 (Exhibit J to the Petition), the superintendent's letter of May 3, 2019 (Exhibit M), or the Board's letter of July 16, 2019 (Exhibit P) is there one word regarding any of the factual findings or the legal conclusions reached at any level of the investigation or during the review of that investigation by the Board, except for the ultimate conclusion, presented without any reference to what supported that conclusion. Attorney Rose's letter merely states that she, or her firm, "undertook a thorough investigation, interviewing numerous witnesses and reviewing and analyzing all documentation provided by the Board and by your client and her union representative," and they "did not find that the complaint was substantiated." The letter offers no clue as

to who was interviewed, what they said, exactly what documents were reviewed, or what the analysis of the information gathered was and what findings and conclusions that "analysis" led to. [1] Superintendent Taylor simply states that he "concur[s] with the report and [does] not find that your complaint was substantiated." If he is referring to Rose's letter as the "report," what exactly did Taylor concur in, what factual findings, what analysis? Finally, the Board's letter reveals only that the "Board decided to sustain Dr. Taylor's findings." What those findings were, beyond the conclusion that the complaint was not substantiated, is left to the imagination of those receiving, or those reviewing, that decision. Did the Board conclude that Reddick made up the facts? Did the Board find that being called a "monkey" was not a derogatory, discriminatory reference? Did the Board believe that the events occurred, but were not severe or pervasive enough to warrant a finding that they created a hostile work environment? Did the Board think that a Black person could not be found to have discriminated against a Black person? The point of these questions is simply to point out that there is no way to know whether the Board's decision was the result of a reasoned analysis of the events and law and a reasonable conclusion from the facts, even if that decision might be disagreed with by others, or was instead an unreasonable, arbitrary or capricious decision based upon mistakes about the law or unreasonable factual conclusions unsupported by a reasoned analysis of the facts as revealed by the investigation, whatever that inquiry may have consisted of. And while it is possible that the Board received additional information about the investigation during its closed executive session on June 26, 2019, there is no way to determine what that information was and whether the Board's conclusion that the allegation was unsubstantiated was supported by that "secret" information. An appellate court faced with such a completely conclusory and unexplained agency final decision would not engage in speculation as to what findings and/or legal conclusions the agency head made in reaching the decision. Instead, in almost every case, the appellate court would remand the matter to the agency with instructions to detail its findings and conclusions so that a proper review might occur if the matter were again appealed to the court. In this case, while it recognized that the Board's determination is

[1] When she met with the superintendent for the informal hearing, Reddick was asked who else should be spoken to and she only identified a "Ms. Brown at the front desk." It is not clear if Reddick had any idea who had been interviewed by the investigator, the minutes of the hearing provide no hint of any such information being offered, and as noted, the letter from the investigating attorney does not mention any names of any of the "numerous witnesses."

entitled to a "presumption of correctness," given the absolutely unsatisfactory manner in which the Board chose to tell its employee that her complaint was "unsubstantiated," I see no way in which it is appropriate to ask this judge or the Commissioner to exercise review authority on this decision. There is simply no way to tell if it was, or was not, arbitrary or unreasonable. Therefore, I **CONCLUDE** that the matter should be returned to the Board for it to issue a new decision, including therein findings of fact and conclusions of law such that the Commissioner and any reviewing court will be able to do more than merely rubber stamp the wholly conclusory decision of July 16, 2019.

It is understood that a case can be made that the Board's conclusion is correct, or at least reasonably so, albeit without at present it having stated any supporting explanation. It is possible that it could find that while certain events did occur, given the tests applicable, the facts do not support that the actions of Ms. Robinson were either directed at a characteristic of a protected group, were not severe or pervasive in nature and/or would not provide a member of the protected class with a reasonable apprehension that her work environment had become hostile or abusive. As, depending upon the explanation offered, such a determination may be supportable, a reversal of the decision in favor of Ms. Reddick's complaint is not presently appropriate. But if I or the Commissioner were to presume that any of these determinations were made, singly or in tandem, by the Board upon review of whatever information it actually had following the as of now undetailed investigation, we would be stepping into the shoes of the Board and essentially doing their job for them, creating a rationale for finding the complaint unsubstantiated that the Board itself has failed to provide. Therefore, I decline to provide them their rationale, and return the matter to them to set forth the factual and legal basis for whatever conclusion they reach. Of course, following the issuance of such a decision, the petitioner may, should it choose, request that the Commissioner review the amended determination.

ORDER

It is **ORDERED** that this matter be returned to the Willingboro Board of Education for the issuance of a determination of Ms. Reddick's Affirmative Action Complaint with findings of fact and conclusions of law. It is not intended that the Board must provide a

"judicial-like" opinion, but it must at the very least provide basic findings and conclusions that permit an understanding of the rationale for its conclusion, whatever that may be.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 15, 2021
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: Oct 15, 2021

Date Mailed to Parties: Oct 15, 2021

mph

LIST OF EXHIBITS:

For petitioner:

Exhibit A	Regulation 1550/Policy Affirmative Action
Exhibit B	Email chain July 13, 2017-September 14, 2017
Exhibit C	Letter from Michelle Reddick to Dr. Taylor
Exhibit D	Emails October 28 and 29, 2018
Exhibit E	Emails November 12, 2018-January 4, 2019
Exhibit F	Emails November 26, 2018-January 4, 2019
Exhibit G	Memorandum, Reddick to Taylor, dated January 14, 2019
Exhibit H	Emails, January 13, 2019-February 13, 2019
Exhibit I	Letter dated March 22, 2019
Exhibit J	Letter dated March 28, 2019
Exhibit K	Letter dated April 10, 2019
Exhibit L	Memo regarding informal hearing, May 2, 2019
Exhibit M	Letter dated May 3, 2019
Exhibit N	Letter dated June 3, 2019
Exhibit O	Minutes of Willingboro Board of Education Meeting, June 26, 2019
Exhibit P	Letter dated July 16, 2019