STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 08567-2011N
DCR DOCKET NO. ER08WE-61920

C.B., Complainant, v. State-Operated School District of Paterson and Paula Santana, Respondents.	)	Administrative Action **FINDINGS, DETERMINATION AND ORDER**

APPEARANCES:

Sheldon H. Pincus, Esq. (*Bucceri & Pincus,* attorneys) for Complainant.

John D. McCarthy, Esq. (*Schenck Price Smith & King LLP,* attorneys) for Respondents.

Charles S. Cohen, Deputy Attorney General (John J. Hoffman, Acting Attorney General of New Jersey, attorney) monitoring this matter on behalf of the New Jersey Division on Civil Rights.

BY THE DIRECTOR:

On December 1, 2010, C.B. filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that her employer, the Paterson School District, and her supervisor, school principal Paula Santana, failed to provide her with reasonable accommodations for her disability, subjected her to a hostile work environment based on her disability, and retaliated against her for requesting accommodations, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondents filed an answer denying the allegations of unlawful conduct in their entirety. During the course of DCR's ensuing investigation, C.B. asked that the matter be transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.A.C. 13:4-11.1(c). On July 20, 2011, the DCR transmitted this case to OAL.

Administrative Law Judge (ALJ) Caridad F. Rigo held hearings on April 23, 24, 25, and May 11 and 14, 2012.[1] The record was closed on June 10, 2013, and ALJ Rigo filed her initial decision on December 6, 2013,[2] in which she recommended that the complaint be dismissed with prejudice. (ID163.) In particular, the ALJ found as follows.

The ALJ's Factual Findings

After summarizing each witness's testimony on pages 2 through 78 of the initial decision, the ALJ enumerated her factual findings on pages 79 through 101 of the initial decision, and made other factual findings in her analysis. The following is a summary of her factual findings:

Complainant's Work History at School No. 11. C.B. began teaching at another school in the District in 1998, and transferred to School No. 11 during the 1999-2000 school year. (ID79.) She was diagnosed with lupus in 2000. ID80. C.B. is capable of climbing stairs--e.g., the entrance to her home has four to five stairs--but has difficulty doing so. (ID80, citing Ex. C-3, 4.) C.B. is able to walk reasonable distances and does not need to be close to a bathroom at all times. (ID80.)

Complainant's First Accommodation Request. C.B. made her first request for an accommodation during the 2000-01 school year, while she was assigned to teach fifth grade on the second floor. Although C.B. testified that she submitted a medical note requesting an accommodation in September 2000, the ALJ found that she did not do so before October 23, 2000. (ID5, 81-82.) The ALJ found that Santana's testimony that she offered C.B. the opportunity to move to a first-floor class as an accommodation that year was not credible. (ID81-83.)

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[1] C.B. testified on her own behalf. Her witnesses were Michele Vancheri, a math teacher at School No. 11 for the past 15 years, ID43-45; Jacquelyn Norman, a life-skills teacher and reading remediation assistant at School No. 11 for the 2010-11 school year, ID46-47; Calvin Eugene Harvell, an art teacher and Paterson Education Association (union) representative; and school nurse Victoria Gonzalez.

Respondents' witnesses were Paula Santana, Principal of School No. 11, who has been employed in that position since 1989, ID47-69 ; Kathleen Kellet, a thirty-seven year employee of the district who was Interim Assistant Superintendent during the 2010-11 school year, with responsibility for School No. 11, ID69-73; and Luis Rojas, Director of Human Resources from 2006 to 2010 and Director of Labor Relations as of April 2010, ID73-78.

[2] For the remainder of this document, the abbreviation "ID" will refer to ALJ Rigo's initial decision. "Ex. R-" and "Ex. C-" shall, respectively, refer to Respondents' and C.B.'s exhibits admitted into evidence at the administrative hearings. "CE" shall refer to C.B.'s exceptions to the initial decision, and RE shall refer to Respondents' reply to exceptions.

Classroom Assistant for 2006-07. C.B. had a classroom assistant in 2006, who was laid off later that year as part of a district-wide reduction in force ("RIF"). (ID8-9, 83.)

Assignment to the Third Floor in 2009-10. At the end of the 2008-09 school year, Santana told C.B. that she would be assigned to teach 6th, 7th, and 8th grade social studies on the third floor for the upcoming school year. When C.B. replied that she could not work on the third floor because of the stairs, Santana offered to have other teachers escort students to and from C.B.'s classroom so that she would only need to use the stairs twice a day. (ID9, 83.)

In July 2009, Santana sent a letter to C.B. confirming that she would be assigned to work on the third floor in the coming school year. (Ex. C-12.) In August 2009, C.B. submitted a doctor's note stating that she would be in less pain if she worked on the first floor. (Ex. C-14.) After receiving that note and getting direction from the District's Central Office, Santana reassigned C.B. to Room 6 on the first floor. C.B. asked Santana to change her assignment to Room 4 so she could be closer to a restroom. Santana denied that request. C.B. began to assert that Santana disliked her and "promised to document their interactions." (ID84.) There is no doctor's note to support C.B.'s request that her classroom be located near a bathroom. (ID80.) Santana ultimately assigned C.B. to Room 1 on the first floor. C.B. "never traveled to the third floor during the 2009-2010 school year." (ID84.)

Escorting Students to Second Floor Spanish Class. In October 2009, Santana directed C.B. to begin escorting her students to and from their Spanish classes on the second floor. C.B. raised the issue with her union representative, Calvin Harvell, who then addressed the matter with the District's Central Office. C.B. never actually had to escort students to the second floor. (ID85.)

DEAR and Remediation Assistants.[3] C.B. did not receive a DEAR classroom assistant for three to four months during the 2009-10 school year due to a reduction in staff. (ID85.) The following school year, Santana did not initially assign a DEAR or remediation assistant to C.B. because she had the smallest class. (ID94.) Because of a RIF and resulting union challenges,

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[3] School No. 11 had a program called, "DEAR" (Drop Everything and Read), and a reading remediation program.

Santana had to adjust assistant assignments throughout that school year as various teachers were laid off and rehired, and some other teachers had no assistants during the 2010-11 school year. (ID94-95.) Due to the RIF, the assistant designated for C.B.'s class was assigned to teach some life skills classes, and needed several weeks to prepare lesson plans for those classes. (ID94.) Once the assistant completed those lesson plans, Santana directed her to resume assisting C.B. with DEAR and remediation. (Ibid.)

The Fire Drill. C.B.'s accommodations for the 2009-10 school year provided that during fire drills, C.B.'s class would use the main entrance, which has four steps. (Ex. C-17.) During a November 2009 fire drill, C.B. was temporarily assisting a teacher in another first floor classroom. Rather than remain with the children during the fire drill, C.B. walked in the opposite direction to use the shorter set of stairs at the main entrance. Santana yelled at C.B. in the hallway and told her to stay with the class she was assisting. (ID86.) C.B. refused. She told Santana that she was using the main entrance in accordance with her accommodation. After the fire drill, C.B. returned to her classroom and was so upset that the school nurse sent her home for the day. C.B.'s union representative filed a grievance on her behalf. The union contract prohibits public criticism of teachers but specifically exempts "direct orders made to staff by administration in emergency situations" such as fire drills. Santana bears ultimate responsibility "for the safety of all students in School No. 11." (ID87, citing Ex. C-22.) C.B. testified that if there had there been "an actual fire, she would have remained with the class she was assisting." (ID87.)

The Lunch Incident. During the 2009-10 school year, C.B. asked a security guard to bring her a lunch from the basement cafeteria. Students in the cafeteria overheard Santana ask the guard why she was in the cafeteria and then tell the guard not to retrieve lunch for C.B. because "that was not her job." (ID87.) C.B. could have called the cafeteria on the school phone and asked a cafeteria worker to bring lunch to her. (ID88.)

The Substitute Teacher. One day during the 2009-10 school year, C.B. was absent and requested a specific substitute teacher. That substitute was not assigned to her class. (ID88; C18) Santana was also absent that day. Santana did not deny the request "intentionally or as an act of

retaliation and probably did not personally deny this request at all." (ID88.)

The Third-Floor Bulletin Board. When assigning bulletin boards to teachers to decorate, Santana assigned a third floor bulletin board to C.B. (ID88.) Once C.B. brought the issue to her attention, Santana changed her assignment to a first floor bulletin board. Ibid.

The Performance Evaluation. For 2009-10, Santana gave C.B. a "fairly positive evaluation with little constructive criticism." C.B. noted in her response that Santana was "supportive." (ID88.)

Medical Leave for Carpal Tunnel. C.B. took medical leave at the end of the 2009-10 school year for carpal tunnel surgery, and in response to the Central Office's inquiry, C.B. confirmed that she intended to return for the 2010-11 school year. (ID89.) Santana was aware of both the nature of the surgery and her plan to return the next school year. (Ibid.)

Proposed Transfer to Another School. In a June 2010 memo, Santana notified C.B. that she was seeking her transfer to another school for the upcoming school year to accommodate her medical condition, because her accommodation in School 11 created logistical issues. (ID89.) C.B. complained about the transfer to the Central Office, but did not receive a response. (ID90.) C.B. wanted to remain at School 11 and teach first, second, or third grades, rather than teach older students anywhere. (Ibid.) Because Santana attempted to transfer three other teachers along with C.B., the ALJ found that the attempted transfer was not disciplinary in nature. Ibid. None of the transfers were carried out. (Ibid.)

Assignment to the Third Floor in 2010-11. For the 2010-11 school year, the District's Central Office assigned C.B. to teach social studies to sixth, seventh, and eighth-graders (i.e., whose classes were on higher floors). Santana re-assigned C.B. to teach first grade on the first floor, and C.B. taught there for several weeks until mid-September 2010. (ID90-91.)

Although C.B. was "very satisfied" with teaching first grade on the first floor, Harvell complained to Santana because the principal had not followed the Central Office's assignments for several teachers, including C.B. On September 14, 2010, Assistant Superintendent Kellet directed Santana to assign C.B. to teach social studies to sixth, seventh, and eighth-grade students, but assign her to a first floor classroom to accommodate her disability. (ID91-92.) On

September 15, 2010, Santana directed C.B. to submit another doctor's note even though Kellett had already verified that she was entitled to a medical accommodation. (ID92.) On September 16, 2010, C.B. submitted the note and Santana directed her to take it to the Central Office. Despite Kellett's instruction to assign C.B. to a first floor classroom, Santana told C.B. to proceed to the third floor. (ID92.) Santana did so out of frustration with Harvell's interference with her original assignments, including the assignment of C.B. to teach first grade on the first floor. (ID117.) Instead of going to the third floor as Santana had directed, C.B. called Harvell. (ID92.)

Although Harvell initially protested Santana's failure to follow the Central Office's teacher assignments, he now supported C.B.'s request to work on the first floor, and attempted to persuade Santana to reassign her to a first-floor classroom. (ID92.) Santana told Harvell that she could not change C.B.'s classroom until directed to do so by the Central Office. However, Santana had the authority to accommodate C.B.'s request for a first-floor classroom without Central Office approval. Santana reiterated her claim that she could not change C.B.'s classroom assignment. C.B. spoke with the assistant superintendent and affirmative action officer about her accommodation. (ID93.)

For the next two school days, C.B. was absent for an unrelated reason. When she returned to work on September 21, 2010, Santana assigned her to a first-floor classroom and gave her a memo outlining her accommodations for that year. (ID93.) On September 30, 2010, Santana publicly asked C.B. for additional copies of her doctor's notes. (ID95.) C.B. never actually set foot on the third floor during the 2010-11 school year. (ID94.)

The Pay Stub. C.B.'s pay was direct-deposited into her bank account. Her pay stub was the record of payment. (ID95.) In September 2010, C.B.'s classroom computer was not connected to the school network for a short period due to a classroom reassignment, so she did not receive an email directing teachers to pick up their pay stubs in Santana's office. Because unclaimed pay stubs were returned to the District's Central Office, C.B. had to retrieve her pay stub from the Central Office for that pay period. The ALJ did not find credible C.B.'s testimony that Santana knew that her computer was temporarily unconnected and used the opportunity to deprive her of the pay stub. (ID96.)

Santana's Directive to Remain in Her Classroom. C.B. testified that Santana yelled at her to stay in her classroom on October 28, 2010. The ALJ did not find this testimony credible because C.B.'s contemporaneous notes merely stated that Santana ordered her to stay in her classroom, and mentioned nothing about yelling. (ID96, citing Ex. C-18.)

The Health Lesson. In November 2010, C.B. asked the school nurse to teach a health lesson for her class. When Santana learned of the request, she told the nurse that she needed to ask permission before teaching a health lesson for any teacher. The ALJ found not credible C.B.'s testimony that Santana told the nurse that she could teach a health class for any other teacher except C.B. The ALJ found credible Santana's testimony that her instructions to the school nurse were not specific to C.B. and were based on Santana's need to ensure that students received the State-mandated amount of instruction in each subject. (ID97.)

In-Service Training. The District provided in-service trainings on March 18, April 15, and May 25, 2011, which were held either in the computer lab (on the second floor) or in the library or cafeteria (in the basement). (ID97.) C.B. could not attend those trainings because of her difficulty using stairs. Her accommodations for the 2010-11 school year did not include accommodations for attending trainings. (ID97-98.) Santana arranged to have two of the presenters provide the information to C.B. in her classroom when students were not present. (ID98-99.) Although C.B. testified that she never received the training, and that a presenter who came to her classroom did not know the training topic, the ALJ found this testimony to be not credible. (ID99.) The ALJ found credible the testimony of one of the training presenters, Michelle Vancheri, who described the information she presented to C.B. (ID100.)

Field Day. In June 2011, Santana told C.B. to escort her students to a local park for Field Day. C.B. refused and wrote a memo to Santana asserting that according to her medical accommodation, she could not walk to the park. (ID100.) C.B.'s 2010-11 medical note and accommodation memos do not address her inability to walk any distance. (ID100, citing Ex. C-33.) The ALJ found that C.B.'s assertion that she could not walk to the park was unsupported. She noted C.B.'s testimony that she walks the supermarket aisles and walked around the block to buy

lunch during the hearing. Ultimately, the ALJ found that C.B. was accommodated because she was not required to go to the park. (ID100, 113.)

Emotional Damages. C.B. was diagnosed with depression in November 2006 and took medication to treat that condition. (ID100-01.) The 2007 move of her grandchildren to Florida contributed to her depression. (ID101.) The ALJ found that objective evidence did not support C.B.'s suspicions that Santana was abusive and not proactively accommodating her, and that her colleagues resented her. (Ibid.)

The ALJ's Legal Analysis

The LAD states that a complaint must be filed with DCR within 180 days of the alleged act of discrimination. N.J.S.A. 10:5-18. In evaluating the timeliness of C.B.'s claims, the ALJ noted that allegations that occurred on or after June 4, 2010, fell within the 180-day period. However, the ALJ applied the continuing violation theory to conclude that the incidents beginning in June 2009 were part of a pattern of similar conduct and thus not time-barred. (ID102.) She concluded that C.B.'s allegations from the 2000-01 school year, which were separated from her later allegations by an eight-year gap, were too isolated in time to be part of a continuing pattern of discrimination, and were time-barred. (ID102-03.)

The ALJ noted that the LAD prohibits employment discrimination based on disability and that once an employer knows about the employee's disability, it "has the responsibility to determine how to accommodate the employee." (ID103.) The ALJ noted that to prove that an employer did not meet its legal obligations, an employee must show that (1) she has a disability and the employer knew about it; (2) she requested accommodation; (3) the employer did not make a good faith effort to assist her; and (4) the employer could have reasonably accommodated her. Ibid.

Here, the ALJ found that because C.B. has lupus, she qualified as an individual with a disability. (ID102.) Applying her factual findings and the above legal standards, the ALJ reviewed each incident to determine if Respondents met their obligations to provide reasonable accommodations. The ALJ concluded that after some lapses, misdirections, or requests for additional information, C.B. was fully accommodated without ever traveling off the first floor for the

following incidents: her first floor classroom assignment for the 2009-10 school year (ID105-106); escorting students to the second floor (ID106); the bulletin board incident (ID108); the attempted transfer to another school and then reassignment to the third floor in September 2010 (ID110); the fire drill incident (ID107); and the Field Day incident (ID113). With regard to the in-service training, the ALJ found that Respondents met their legal obligation by providing C.B. with individual training even though it was not the precise accommodation she wanted. (ID111-12.) The ALJ found that some of the alternative accommodations that C.B. suggested were not reasonable or were more expensive. (ID111.)

The ALJ concluded that Santana's attempt to transfer C.B. to a school with an elevator or a single floor was an attempt to reasonably accommodate C.B.'s need to avoid stairs, "while maintaining order and structure in School 11" by keeping the elementary grades on the same floor. (ID108) The ALJ concluded that although C.B. may have preferred different accommodations, the employer has a right to choose the most efficient accommodation that would reasonably accommodate the employee's disability. (ID108-109.)

The ALJ concluded that because C.B. had not provided medical documentation supporting a need for classroom assistants for the 2009-10 and 2010-11 school years, and because applicable policies required revisiting accommodation requests each year, Respondents' failure to provide DEAR and remediation assistants for some periods during those school years did not violate Respondents' reasonable accommodation obligations. (ID106, 110.)

Noting that C.B.'s accommodations did not address how she would get lunch, the ALJ concluded that Santana did not deny C.B. a reasonable accommodation by scolding a security guard who was getting lunch for her, and reminding the guard of her duties. (ID107.)

The ALJ concluded that Santana did not interfere with C.B.'s accommodations by directing her to remain in her classroom, rather than wait in the hallway for another teacher to arrive with her students. (ID110.) Similarly, the ALJ concluded that the substitute teacher, pay stub, and health lesson incidents did not interfere with her accommodations because they were unrelated to her disability. (ID108, 110-11.)

Addressing Respondents' conduct overall, the ALJ concluded that the District engaged in the interactive process in good faith and adequately accommodated C.B. for the 2009-10 and 2010-11 school years, and that although Santana "may not have diligently provided [C.B.] with accommodations, her actions cannot be said to amount to a failure to accommodate." (ID113.)

The ALJ also cited the legal standards for evaluating hostile work environment and retaliation claims under the LAD. (ID114-15, citing Shepherd v. Hunterdon Develop. Cntr., 174 N.J. 1, 24 (2002), Lehmann v. Toys R Us, 132 N.J. 587, 607 (1993), and Victor v. State, 203 N.J. 383, 409 (2010)). The ALJ simultaneously discussed the incidents under both theories. The ALJ found that most of the incidents could not support a hostile work environment claim because they were unrelated to C.B.'s disability. (ID116, 119.) The ALJ found that some of Santana's conduct could constitute harassment or retaliation. (ID117-18.) She found that Santana's order for C.B. to proceed to the third floor could constitute harassment, but she concluded that it could not be considered in a hostile work environment claim because Santana made the comment out of frustration with the union representative rather than any animosity toward C.B. Thus, the ALJ concluded that the conduct was not triggered by C.B.'s protected status. For the same reason, the ALJ concluded that it was not retaliatory because there was no causal connection between that action and C.B.'s enforcement of her right to disability accommodations. (ID117.)

The ALJ found that Santana's attempt to transfer C.B. to another school could be seen as either a good faith attempt to provide a reasonable accommodation or as retaliation or harassment. She found that the fact that such a transfer would have gone against C.B.'s preferences did not make it an adverse action. The ALJ concluded that it was not retaliation, and would not make a reasonable person believe that the work environment was hostile or abusive. (ID118.)

The ALJ cited three remaining incidents that could constitute retaliation or harassment based on disability, i.e., Santana's public request for copies of C.B.'s doctor's notes, the assignment to escort students to the second floor for Spanish class, and ordering C.B. to remain in her classroom rather than receive her students in the hallway. The ALJ found that "three relatively innocuous comments over the course of two school years cannot be considered either

severe or pervasive, and therefore do not constitute a hostile work environment." (ID119.) She also found that Santana's conduct was "not consistent enough to create a hostile work environment that effected [C.B.'s] day-to-day work experience." (ID115.)

Based on her findings that Respondents did not deny C.B. accommodations and did not subject her to a hostile work environment or retaliation, the ALJ dismissed the complaint. C.B. filed exceptions to the ALJ's decision on January 13, 2014. Respondents filed their replies to those exceptions on January 21, 2014.

The Director's Decision

After independently evaluating the record including the parties' and exceptions and replies, the Director finds that the ALJ's factual findings are supported by substantial credible evidence and, except as noted in the discussion below, adopts them as his own. The Director is mindful that because the ALJ had the opportunity to hear the 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 Int'l, Inc., 109 N.J. 575, 587-88 (1988), and that unless there is evidence that the ALJ's factual findings based on the credibility of lay witnesses were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence in the record, the Director has no basis for rejecting those credibility determinations or the ALJ's factual findings based on those determinations. N.J.A.C. 1:1-18.6.

a. Failure to Provide Reasonable Accommodations

In New Jersey, an employer is required to make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." N.J.A.C. 13:13-2.5(b). The determination as to whether an employer has failed to make reasonable accommodations is made on a case-by-case basis. Ibid.

When an employee with a disability requests an accommodation, the employer must initiate an informal interactive process to determine what accommodations are necessary and appropriate. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 311 (3d Cir. 1999). This process is crucial because

each party generally holds relevant information that the other party is not aware of, and exchanging such information will ensure that the employer's assessment of potential accommodations is both complete and reasonable. Id. at 317.

To prove a failure to accommodate claim, a plaintiff must show that: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Tynan v. Vicinage 13 Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002)(citing Jones v. Aluminum Shapes, 339 N.J. Super. at 400-01 (App. Div. 2001)).[4]

Although there is no dispute that C.B. has a disability and was entitled to reasonable accommodations, C.B. takes exception to some of the ALJ's factual findings about her background and physical abilities. (CE4-5.) C.B. asserts that there is no evidence in the record to support the ALJ's finding that she transferred to School 11 because of conflicts with a previous supervisor, and cites her Governor's Teacher Recognition award (Ex. C-48) as evidence of her prowess as a teacher. (CE5.) However, the ALJ made an explicit finding that C.B.'s testimony on this issue was not credible, and C.B. has cited no testimony to the contrary. (ID79.) That said, the Director finds that any conflicts with a previous supervisor do not reflect negatively on C.B.'s prowess as a teacher. C.B. takes exception to the fact that the ALJ made no findings regarding her testimony that she has a disabled parking placard and a reserved disabled parking space at the school. Because there was no evidence about the type of medical documentation that supported C.B.'s application for those parking privileges, it is not clear how this evidence is relevant to any disputed issue in the case. However, because C.B.'s testimony on this issue is uncontroverted, the Director

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[4] Respondent argues that in Victor, supra, the Supreme Court held that a plaintiff alleging a failure to accommodate must also prove that he or she suffered an adverse employment action. (RE at 6-7) However, the Victor Court expressly refrained from determining if an identifiable adverse employment consequence was an essential element of a failure to accommodate claim under the LAD. 203 N.J. at 422.

finds as fact that C.B. has a disabled parking placard and that Santana assisted her in getting a disabled parking spot at the school. (Tr. 4/24/12, 39:13 to 40:1)

C.B. takes exception to the ALJ's findings that she is capable of climbing stairs but has difficulty, and that she can walk reasonable distances. (ID80, CE4-5.) C.B. contends that those findings are irrelevant and prejudicial. She notes that the entrance to her home has only four or five steps, while there are two sets of eight stairs each between floors at the school. (ID80; CE5; Tr. 4/24/12, 28-30) C.B. argues that instead of making factual findings about her current limitations and abilities, the ALJ should have limited her findings and conclusions to whether Respondents properly engaged in an interactive process to provide her with reasonable accommodations. (CE5)

The Director clarifies that C.B.'s need to climb four or five stairs to enter and exit her home should not be considered evidence to contradict the documentation she presented to Respondents in support of her request for a first floor classroom. Nor should her ability to walk to a restaurant on a hearing date in 2012 or her ability to walk supermarket aisles be considered evidence to contradict her limitations on the job during the 2009-10 and 2010-11 school years. If Respondents had questions about the extent of her limitations, or if they perceived any inconsistencies between her limitations on the job and her limitations outside of work, the appropriate solution would have been to use the interactive process to seek clarification from C.B. or her doctors. That said, for the reasons discussed below, the Director concludes (without considering the information about C.B.'s activities outside of work) that the evidence does not show that Respondents denied C.B. reasonable disability accommodations or failed to engage in a good faith interactive process.

In reaching that conclusion, the Director relies primarily on the medical notes submitted by C.B. and the accommodation memos for the 2009-10 and 2010-11 school years. The ALJ found that C.B. first submitted medical notes to Santana to support her requests for accommodations on October 23, 2000. (ID82.) The medical notes related to the school years in question ask for two accommodations: working on the first floor/not using stairs (Ex. C-3/Sept. 29, 2000; Ex. C-4/Oct.

5, 2000; Ex. C-14/Aug. 12, 2009 and Ex. R-32/Sept. 15, 2010) and assigning her a classroom assistant (Ex. C-11/ Nov. 17 and 21, 2006 and Ex. R-4/ Feb. 17, 2009.)[5]

C.B. argues that the assignment to walk to a park for a Field Day event was a breakdown in the interactive process or a failure to accommodate. (CE4-5.) That incident occurred on June 6, 2011. (ID100.) The September 15, 2010 medical note C.B. submitted in support of her accommodations for that school year stated that she was "unable to be going up and down the stairs," and asked Respondent to arrange so that she would not need to use the stairs. (Ex. R-32.) None of the prior medical notes addressed walking any particular distances. Because there is no evidence that C.B. provided medical documentation to show a need to limit walking, Respondents did not deny C.B. an accommodation or somehow violate the interactive process when Santana assigned this task to C.B. And once C.B. objected, Respondent provided an appropriate accommodation by relieving her of the assignment.

C.B. points to the assignment to decorate a third-floor bulletin board. However, C.B. was re-assigned to a first floor bulletin board after she reminded Respondents about her difficulty climbing stairs. The incident did not deprive her of an accommodation or violate Respondents' obligation to engage in the interactive process.

C.B. also takes exception to the ALJ's finding that her accommodations did not include in-service training (ID97), and argues that because Respondents did not hold the 2010-11 group training on the first floor, she was deprived of an effective accommodation for that training. (CE8, 21.) Although in-service trainings were not addressed in the accommodations memo for that year (Ex. C-33), the doctor's note that supported her accommodations for that year asked Respondent to "make arrangements at work so that she does not have to use the stairs." (Ex. R-32.) For that reason, the Director clarifies that the accommodations C.B. had requested that year would include

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[5] A medical note submitted the following school year asks that C.B. be excused from walking long distances and up and down stairs. (Ex. R-50.) About a week after C.B. submitted the note, Santana wrote a memo acknowledging that C.B. needed to avoid walking a distance. (Ex. R- 51.) There is no evidence that any of the medical notes that C.B. provided prior to the field day incident or her request to be assigned a classroom close to a restroom addressed any limitations for walking on flat surfaces as opposed to stairs. Moreover, there is no evidence that C.B. was ever forced to walk a greater distance than she was able.

providing accommodations for any training that was not held on the first floor. However, Respondents accommodated her. They arranged for the presenters to meet with C.B. individually to relay the information presented in the group training. (ID99-100; Ex. R-45.) Their decision to provide an alternate accommodation instead of holding the group training on the first floor did not deprive C.B. of a reasonable accommodation. The employer has the right to choose which effective accommodation method to implement. Victor, supra, 203 N.J. at 424.

Regarding the lunch incident, C.B. notes that although Santana testified at the hearing that C.B. could have ordered lunch by phone, there is no evidence that Santana made that suggestion at the time of the incident. (CE6.) The Director clarifies that Santana did not offer C.B. any alternatives when she learned that C.B. had asked a security guard to get lunch for her from the basement cafeteria in December 2009. There is no evidence that C.B. ever asked for an accommodation to enable her to purchase food from the cafeteria, either before or after the incident. Santana's memo listing C.B.'s accommodations for the 2009-10 school year mentioned nothing about lunch. The memo listing C.B.'s accommodations for the 2010-11 school year designated a place for C.B. to eat lunch on the first floor but did not address getting food from the basement cafeteria. (Ex. C-17, Ex. C-33.) Santana's comments to the security guard did not amount to denying C.B. an accommodation. And although Santana's failure to suggest alternatives to C.B. might be seen as a lapse in the interactive process, the absence of any further requests for this type of accommodation indicates that going forward, C.B. did not treat it as an issue that needed to be addressed through the accommodation process. In sum, Santana's conduct did not constitute a failure to accommodate, or a failure to engage in the interactive process.

C.B. contends that Respondents violated the LAD by requiring medical notes each year, and that the ALJ erred in concluding that the medical note submitted in 2000 (Ex. C-3), was not sufficient to support permanent disability accommodations. (CE9-10.) That note states that C.B.'s lupus and related arthralgias of the knees, hips, and hands, are chronic and permanent. (Ex. C-3.) It also says, "The use of stairs 5 to 6 times a day are causing increased pain" and recommends that

C.B. be moved to a first floor classroom. Ibid. The record reflects that when Respondent received this note, C.B. was assigned to the second floor for the 2000-01 school year.[6] For the following school year and every year until the 2009-10 school year, she was assigned to the first floor. (Tr. 5/11/12, 114:22 to 115:4, 95:13-22.)

The District's written policy states that medical accommodations are done on a yearly basis. (Ex. R-52) Human Resources Director Luis Rojas testified that if an employee has a permanent disability that requires a permanent accommodation, such as an employee who lost a leg, the accommodation would continue throughout his or her tenure. But if an employee has a "temporary" disability, the accommodation process would be revisited each year. (Tr. 4/25/12, 90:19 to 92:14.) Rojas testified that the reason for the annual renewal is to adjust accommodations when employees' conditions improve or worsen. (Tr. 4/25/12, 92:22 to 93:3.) Although Santana marked the September 29, 2000 note "received" on February 15, 2001, Rojas did not start working for Respondent until 2006, and he testified that he did not see that document until the hearing. (Tr. 4/25/12, 110:6-7.) He indicated that C.B. never told him that she had previously submitted a medical note designating her disability permanent. (Tr. 4/25/12, 113:5-10.) He testified that if he had received a medical note indicating that C.B.'s disability was permanent, he would have requested additional information from C.B. and referred it to Respondents' attorneys for advice in making a permanency determination. (Tr. 2/24/12, 115:9-24; 127:18-25.) In this context, the fact that Respondents required C.B. to submit medical notes each year did not constitute a failure to engage in a the interactive process in good faith.

The record supports the ALJ's conclusion that each time C.B. raised any accommodation issue, Respondents addressed it. Some issues, such as walking to a park, were not addressed in C.B.'s medical notes but Respondents nonetheless accommodated her without seeking additional medical documentation. Although engaging in the interactive process meant some

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[6] There are factual disputes regarding whether Respondent accommodated C.B. for the remainder of the 2000-01 school year. However, the Director concurs with the ALJ that any LAD allegations from 2000 or 2001 are time-barred. N.J.S.A. 10:5-18.

uncertainty and brief delays, the record reflects that C.B. was ultimately accommodated and was not required to work on upper floors while the accommodations were being worked out. Although perhaps more consistent and cooperative procedures would have avoided the brief interruptions and uncertainty, the fits and starts of the interactive process do not rise to the level of bad faith.

b. Hostile Work Environment

To state a prima facie case of hostile work environment under the LAD, a plaintiff must show that (1) the complained of conduct would not have occurred but for the his or her disability; and that it was (2) severe or pervasive enough (3) to make a reasonable employee with a disability believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. Lehmann, supra, 132 N.J. at 603. Applying those standards, the ALJ determined that Respondents did not create a hostile work environment for C.B. (ID115, 119 & 122.) With the clarifications discussed below, the Director reaches the same conclusion. In so doing, the Director is mindful that a plaintiff can prevail on a hostile work environment claim without proving that the defendant was intentionally trying to harass her. 132 N.J. at 604-05. The Lehmann Court wrote:

> A plaintiff need not show that the employer intentionally discriminated or harassed her, or intended to create a hostile work environment. The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional . . . it is at the effects of discrimination that the LAD is aimed.

Ibid. (emphasis in original). The requirement that the conduct would not have occurred "but for her disability" means merely that the employee's disability is what renders it offensive or harassing.

Here, C.B. takes exception to the ALJ's conclusion that most of the incidents she cites were "unrelated to her disability" and "seemingly innocuous." (CE23, ID116.) In light of the medical notes recommending that C.B. work on the first floor, the Director concludes that some of those incidents were related to C.B.'s disability and some were not innocuous. The record does not support the notion that the assignment to the third floor in 2009-10 and 2010-11 (CE 23) and directives to decorate a third-floor bulletin board (CE 23, 29) and escort her students to the second floor for Spanish class (CE 28) were intentionally designed to harass C.B. Still, the incidents were sufficiently related to C.B.'s known accommodation needs and related to her disability.

The ALJ acknowledged that ordering C.B. to report to a third floor classroom could be construed as harassment (ID117), but concluded that Santana did not do so "but for" C.B.'s protected status. Rather, the ALJ found that Santana was frustrated with the union representative. (ID117.) However, it is the effect of the conduct, rather than the actor's motivation that renders it harassing. Lehmann, supra, at 605. And this conduct was not innocuous because Santana knew that C.B. had previously submitted medical documentation stating that she needed to work on the first floor, and had represented that she still needed that accommodation. In this context, Santana's conduct was disability-based harassment.

The ALJ found that Santana's public scolding of C.B. for abandoning the first grade class she was assisting so that she could use a different exit, was unrelated to C.B.'s disability. (ID119.) C.B. asserted that she told Santana that she was following her accommodation for fire drills. (Ex. C-18) Because Santana knew that C.B. was attempting to use the exit designated as her accommodation for fire drills (Ex. C-29), this was related to C.B.'s disability. However, the ALJ found that C.B.'s accommodation for fire drills did not clearly address the situation that day--when C.B. was assisting another class in a different classroom--and that Santana interpreted the accommodation differently than C.B. (ID107.) The ALJ found that C.B. used the exit designated in her accommodation, and that Santana had the authority to publically criticize teachers in emergent situations, including fire drills. (ID119.) In this context, even if the scolding is deemed related to C.B.'s disability, it was not harassment in violation of the LAD.

C.B. characterizes the denial of classroom assistants for the DEAR and remediation programs for some periods in 2009-10 and 2010-11 as harassment. The ALJ found that this incident was unrelated to C.B.'s disability. (ID116.) The Director agrees. A 2006 medical note recommended that C.B. have a teaching assistant because there were 27 students in her class that year. (Ex C-11.) A February 2009 note from the same doctor (received by Respondent during the 2008-09 school year) again recommended that C.B. have a teacher's assistant. (Ex. R-4.) C.B.'s accommodation memos for the 2009-10 and 2010-11 school years did not include classroom

assistants, and no medical notes recommended assistants for those years. The ALJ found that C.B. was not assigned assistants for some periods in those years because of RIFs, understaffing, and because she had fewer students than other teachers. (ID85, 94 & 116.) In this context, although C.B.'s doctor recommended that she have an assistant in earlier years, there is no basis to set aside the ALJ's findings that denying C.B. a classroom assistant was unrelated to her disability.

C.B. cites Santana's attempt to transfer her to a school with an elevator or a single floor as harassment. (CE29-30.) Santana's letter notifying C.B. of the transfer stated that it was being proposed as a disability accommodation (Ex. C-25), and the ALJ found that the transfer request would have satisfied both C.B.'s need to avoid stairs during the workday, and Respondent's need to maintain "order and structure" in the school. (ID108.) Notably, the ALJ found that the transfer request was actually an attempt to reasonably accommodate C.B. Ibid. Thus, although the proposed transfer would not have occurred "but for" C.B.'s disability, it cannot be construed as harassment simply because the employer did not choose the employee's preferred method of accommodation. Victor, supra, 203 N.J. at 424.

Related to the transfer, C.B. objects to the ALJ's finding that she preferred to remain at School No. 11 and to teach the lower grades rather than teach upper grade students at any school. (CE7, ID89-90 and 108-109.) To the extent that the ALJ's finding might be interpreted to imply that C.B. was not asking for accommodations in good faith, the Director rejects that implication. C.B.'s teaching preferences do not show bad faith. C.B.'s preferences might be relevant if the evidence demonstrated that Respondents intentionally chose the alternative that would not align with her preferences, without some operational benefit to Respondents. Here, however, the District presented a reasonable basis for assigning C.B. to teach social studies, because of her certification and because she is bilingual. (Tr. 5/11/14, 132:11-16, 6, Ex. R-11.) And the District gave a reasonable basis for wanting to keep the upperclass students from traveling to and from the first floor. (ID 89, 108.) Because an employer has the right to choose among effective

accommodations, C.B.'s preference to teach younger students, without more, does not render the proposed transfer harassing.

The ALJ concluded that the attempted transfer was not harassment based in part on evidence that Santana also proposed to transfer three other teachers, and the lack of evidence that the other transfers were disciplinary. (ID90.) As the ALJ noted, none of the transfers were effectuated. Ibid. Based on these findings as well as the findings that Respondent had legitimate non-discriminatory reasons to avoid scheduling social studies classes on the first floor, the Director concludes that the proposed transfer was not harassment.

C.B. also asserts that to harass her, Santana denied her request for a specific substitute teacher for a December 10, 2009 absence. (CE6-7, Ex. C-18.) There is no basis to set aside the ALJ's finding that this incident was unrelated to C.B.'s disability. (ID116.) C.B. also cites the diversion of her paystub to Central Office on one occasion, and the directive for the school nurse to not teach C.B.'s class. (CE30-31.) The Director finds no basis to reject the ALJ's conclusion that those incidents were unrelated to C.B.'s disability. (ID96-97.)

As noted above, the ALJ characterized some of the incidents cited by C.B. as "seemingly innocuous." (ID116) To the extent that they impacted C.B.'s disability accommodations, they were not innocuous. Although the ALJ characterized some of these assignments (which were all withdrawn before C.B. had to actually travel to the third floor) as part of the interactive process (ID117-18), Santana's manner could have been more cooperative and conciliatory. However, after considering the timing, frequency, and substance of the incidents that were related to C.B.'s disability, the Director finds that C.B. has not shown that any disability-based harassment was sufficiently severe or pervasive to constitute a hostile work environment.

c. Retaliation

To establish a prima facie case of retaliation under the LAD, a plaintiff must show that she engaged, reasonably and in good faith, in activity protected by the LAD; that the employer subjected her to an adverse employment action after learning of the protected activity; and that

there was a causal connection between the two. Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007).

As noted above, the employer's intent is not relevant for hostile work environment claims. Lehmann, supra, 132 N.J. at 604-05. Retaliation claims are a different animal altogether. Intent is the essence of any retaliation claim. Thus, the plaintiff must establish a causal connection between the protected activity and the resulting adverse employment action.[7] And a plaintiff in a retaliation case must show that a reasonable employee would have found the adverse conduct "materially adverse," which is defined as conduct that "well might have dissuaded a reasonable worker" from engaging in the protected activity. Roa v. Roa, 200 N.J. 555, 574-575 (2010) (citing Burlington N. & Santa Fe Ry. Co. v White, 548 U.S. 53, 68 (2006)).

Here, the Director concurs with the ALJ's finding that C.B. did not establish that there was a causal connection between her accommodation requests (and/or complaints about problems with those requests) and the conduct that she characterized as "retaliation." For instance, C.B. asserts that the intermittent denial of DEAR and remediation assistants in the 2009-10 and 2010-11 school years was retaliatory. (CE29-30) But the ALJ found that for the first year, C.B. did not get an assistant because of a reduction in staff (ID85), and in the following year, it was because there was understaffing due to a RIF, and C.B. had the fewest students. The ALJ also found as fact that in 2009-10, other teachers had no assistants throughout the year. (ID94-95.) Based on those findings and the Director's independent review of the record, there is no basis to conclude that Respondents' decision to leave her without DEAR or remediation assistants for some periods during those years was motivated by an intention to punish or harass her.

Regarding the substitute teacher incident (CE29), C.B. asserts that although Santana was also absent that day, she "gave instruction for this specific substitute to be assigned to a different

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[7] The U.S. Supreme Court recently adopted a "but for" causation standard, and rejected the more liberal "motivating factor" standard in Title VII retaliation cases. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. __ (2013), cited in Rodriguez v. Auto Zone, 2014 U.S. Dist. LEXIS 4593 (D.N.J. Jan. 14, 2014).

class." (Ex. C-18) Santana testified that she does not recall the request, but if she had any input into the assignment that day, she would have made the decision based on where a particular substitute was needed. (Tr. 5/14/14, 49:22-25) She gave class size as an example of the type of factor she might consider. (Tr. 5/14/14, 49:24 to 50:3) The ALJ relied on this testimony to find that Santana did not deny C.B.'s request intentionally or as an act of retaliation, and probably did not personally deny C.B.'s request. (ID88.)

C.B. now contends that Santana's explanation that the substitute was needed elsewhere is not credible "because that would have left [C.B.]'s class unattended." (CE6-7.) However, Santana testified that if she felt it would be better to assign a particular substitute to a different class, she would "put someone else in there." (Tr. 5/14/14, 50:2-3) The Director's independent review of the record found no basis to reject the ALJ's credibility findings on this issue or her conclusions that there was no causal connection between the incident and C.B.'s protected activity.

Similarly, as to the paystub incident (CE30), the ALJ rejected as not credible C.B.'s contention that Santana knew that C.B.'s computer was not connected and intentionally sent her paystub to the main office. (ID95-96) For that reason, there is no basis to find a causal connection between this incident and C.B.'s protected activity. The ALJ also found not credible C.B.'s testimony that Santana told the school nurse that she could teach a health class for anyone else, but not for C.B. (ID97.) The ALJ found as fact that Santana merely directed the nurse to ask for Santana's permission before teaching a class for anyone. Ibid. Thus, there is no basis to find a causal connection between the denial of a nurse-taught health class and C.B.'s protected activity.

Regarding the fire drill, although the ALJ found that Santana "yelled" at C.B. to stay with her class, the ALJ also found that Santana had the authority to publically criticize teachers in emergent situations like fire drills. (ID86-87, 106-07.) In part because C.B.'s accommodation did not clearly address the procedures to be followed when C.B. was assisting a class in another classroom, the ALJ concluded that Santana acted out of concern for the safety of the first-grade class. (ID107, 119.) Based on those findings, there is no basis to conclude that Santana acted with retaliatory

intent in yelling at C.B. in the presence of students, or in subsequently sending a memo to C.B. and others addressing fire drill procedures. (Ex. R-16.)

As to Santana's attempt to transfer C.B. to a school with an elevator or a single floor, there was a causal connection between C.B.'s enforcement of her right to disability accommodations and Santana's proposal to transfer her. The ALJ characterized this as part of the interactive process, and found that there were operational benefits to transferring her. (ID108) Although the ALJ found that Santana also proposed to transfer other teachers, and none of the transfers were approved, this might be a situation in which the specific impact on one employee takes it out of the realm of "innocuous." And the risk of an unwanted transfer might in some cases dissuade employees from asserting their rights to disability accommodations. That said, in this context, where the proposed transfer would meet C.B.'s accommodation needs and make it simpler for the district to accommodate her, the analysis must recognize that an employer is not required to provide the precise accommodation that the employee seeks, but can offer alternatives that effectively accommodate her disabilities. 203 N.J. at 424.

The remaining incidents that C.B. characterizes as retaliation involve Santana's instruction or expectation that C.B. use stairs during the workday. Those could be seen as related to C.B.'s enforcement of her right to disability accommodations, i.e., Santana's instructions to C.B. related to her reassignment to the third floor a few weeks after the start of the 2010-11 school year; Santana's direction for C.B. to escort her students to the second floor for Spanish class (CE28); the lunch and bulletin board incidents (CE29); and telling C.B. to stay inside her classroom rather than wait in the hallway for another teacher to arrive with C.B.'s students. (CE 32.) Assigning C.B. to a third-floor bulletin board could be seen as a negligent error, without retaliatory intent. In the remaining incidents, Santana had some measure of awareness that her instructions would either chastise C.B. for seeking accommodations or make her workday more difficult, given her need to avoid using stairs. The ALJ characterized some of these incidents as part of the interactive process. For purposes of a retaliation analysis, the Director's independent review of the record

finds no basis to disturb the ALJ's finding that C.B. failed to show that those incidents were motivated by a retaliatory animus.

C.B.'s theory of retaliation falls short for another reason. Retaliation claims require a showing of an "adverse employment action." Proofs necessary to demonstrate an adverse employment action include "actions that affect wages [or] benefits, or result in direct economic harm . . . So too, noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment would suffice." Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008), aff'd in part, mod'd in part, 203 N.J. 383 (2010). The "significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." Burlington N., supra, 548 U.S. at 69. But "emotional factors alone cannot constitute adverse employment action." Shepherd, supra, 336 N.J. Super. at 420. In other words, the employer's action "must rise above something that makes an employee unhappy, resentful or otherwise cause[s] an incidental workplace dissatisfaction." 401 N.J. Super. at 616. "[T]rivial harms," "petty slights, minor annoyances, and simple lack of good manners" are insufficient. Roa, supra, at 575 (citing Burlington N., supra, 548 U.S. at 68).

For example, conduct that has been found to amount to "adverse employment actions" include firings, demotions, cancellation of an employee's health insurance, Roa, supra, 200 N.J. at 575, a thirty-seven-day suspension without pay, and reassignment to more arduous and less desirable duties, Burlington N., supra, 548 U.S. at 70-74. On the other end of the spectrum, "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." Canale v. State, 2013 N.J. Super. Unpub. LEXIS 1801 (Jul. 19, 2013, App. Div.) (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)). "A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." Ibid. "[U]nfavorable evaluation[s], unaccompanied by a demotion or similar action or a job reassignment with no corresponding reduction in wages or status is insufficient." 401 N.J. Super. at 615 (quoting El-Sioufi v. St. Peter's

Univ. Hosp., 382 N.J. Super. 145, 170 (App. Div. 2005)).

The above is by no means an exhaustive list of actionable adverse employment actions but merely sets forth some guidelines when evaluating retaliation claims. Here, the Director is satisfied that the incidents complained of by C.B. fall outside the parameters of adverse employment actions. She was not denied a promotion. She did not receive a loss of remuneration of benefits or suffer a significant, non-temporary adverse change in employment status or the terms and conditions of employment. She was not disciplined. Although there was talk of transferring her to another school or having her work on another floor, those things never came to fruition. The fact that her class did not get the substitute teacher of her choice and that she had to follow protocol in retrieving her unclaimed paystub is insufficient to support a claim of retaliation. We will refrain from going through the complete list of C.B.'s grievances yet again, but simply note that the record does not support a finding the C.B. suffered an adverse employment action. And although retaliatory harassment can create the "constellation of circumstances" that constitute adverse action, Burlington N., supra, 548 U.S. at 69, in this case the conduct did not rise to that level.

d. Interference

LAD's probation against employment discrimination addresses only the conduct of "employers." N.J.S.A. 10:5-12(a). In situations where an employee is claiming workplace discrimination by someone other than the employer (e.g., a co-worker, customer, or client), practitioners typically cite the LAD's interference section, which states that it is unlawful for "any person to . . . interfere with any person in the exercise of enjoyment of . . . any right granted or protected by this act." N.J.S.A. 10:5-12(d) (emphasis added).

C.B. now argues that Respondents illegally interfered with her existing accommodations and her attempts to adapt those existing accommodations to new situations. She did not plead "interference" as a claim in her verified complaint. Rather, she alleged that Santana "aided and abetted" the employer's conduct in violation of N.J.S.A. 10:5-12(e). For that reason, Santana's conduct has been examined under a hostile work environment analysis. Finding no New Jersey

case law on point, C.B. cites Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001). (CE15) In that case, however, the plaintiff alleged that the employer's conduct created a hostile work environment and, therefore, the court applied the hostile work environment standards rather than analyzing it as an interference claim. It would be unnecessary to re-analyze the allegations of offensive conduct in this case under "interference" if the hostile work environment standard is used.

Even if we were to follow C.B.'s suggestion to look at how courts address similar interference claims in federal discrimination statutes, she would not prevail. For instance, in Brown v. City of Tucson, 336 F. 3d 1181 (9th Cir. 2003), the court addressed the standards for evaluating an interference claim under the Americans with Disability Act (ADA). The plaintiff, a police detective, had an accommodation that excused her from being on-call during the night shift. Her supervisor repeatedly asked her why she could not work the night shift, asked her to stop taking her medication so that she could work at night, threatened her with demotion or forced retirement if she did not work the night shift, and tried to obtain confidential information about the nature of her disability. The court noted that as compared to the ADA's retaliation provision, the interference provision "protects a broader class of persons against less clearly defined wrongs." Id. at 1192-93. The court noted that there must be a balance between ensuring that there is no chilling effect on employee complaints, and ensuring that an employee who asserts rights under the ADA is not completely insulated from an employer's legitimate employment actions.

Because the plaintiff in Brown had been threatened with demotion or forced retirement if she did not forego her disability accommodation, and the court found that she had suffered direct harm as a result of those threats, the court concluded that the conduct violated the ADA interference provision. Id. at 1193. Addressing the standard in general, the court noted that conclusory allegations are not enough, and a plaintiff must demonstrate that he or she has suffered a "distinct and palpable injury." Ibid. Giving up her ADA rights would be such an injury, or the employee could show that she suffered a palpable injury by refusing to give up her rights, or she could show that she was injured by the threat itself. Ibid. The court reiterated that the interference

provision does not bar all employer conduct that has an impact on the employee's rights to disability accommodations.

In response to the employer's argument that too broad a definition of actionable interference would thwart the interactive process, the court noted that there was no basis for any such concern in that case, as the employee's accommodations were already in place when the alleged interference occurred. And the court questioned how any interactive process could legitimately include threatening an employee with adverse consequences if she did not give up her disability accommodations. Ibid.

In this case, C.B. has not demonstrated that Santana's actions actually deprived her of an accommodation, or that any actions that hindered or delayed her accommodations caused her palpable harm. Nor has she shown that she suffered palpable harm as a result of Santana's sometimes abrasive manner in addressing her accommodations. Although C.B. contended that Santana's conduct triggered or aggravated her previously diagnosed depression, in light of the ALJ's findings that C.B. was diagnosed in 2006 and that her grandchildren's move to Florida in 2007 contributed to her depression, there is insufficient evidence to show that her depression diagnosis constitutes palpable harm. (ID101, 121.)[8]

e. Emotional Distress Damages

A victim of unlawful discrimination under the LAD is entitled to recover damages for mental anguish and emotional distress proximately related to unlawful discrimination.[9] See Battaglia v. United Parcel Service, Inc., 214 N.J. 518, 552 (2013). Here, the ALJ found that C.B. was not a

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[8] C.B. asks that her LAD interference claim be analyzed like an interference claim under the Family and Medical Leave Act (FMLA). (CE 13-14) However, to prevail on an FMLA interference claim, an employee must show an "impairment of their rights and resulting prejudice," Antone v. Nobel Learning Cmtys., Inc., 2012 U.S. Dist. LEXIS 6922 (D.N.J. Jan. 19, 2012) (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 90 (2002)), which is not present in this case.

[9] Respondents, applying the tort standard for intentional infliction of emotional distress, argue that expert testimony is required for a complainant to recover emotional distress damages. RE 23-24. However, where an employee prevails on a LAD claim, emotional distress damages may be awarded based on a less stringent standard of proof, and based on lay testimony alone. See Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 552-53 (2013).

victim of unlawful discrimination or retaliation, and for that reason is not entitled to any damage award from Respondents. The Director agrees.

CONCLUSION AND ORDER

After a thorough and independent review of the record, the Director adopts the ALJ's decision to dismiss the complaint.

DATE: 4-21-14

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS