STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 4100-08
DCR DOCKET NO. P211WE-02944

Daniel Jacobson and the Director of the New Jersey Division on Civil Rights, Complainants, v. Jackson School District, Respondent.	Administrative Action **FINAL DECISION**

APPEARANCES:

Daniel Jacobson, *pro se*

Stephani C. Schwartz, Esq., and Andrew Li, Esq., (*Schwartz, Simon, Edelstein and Celso, LLC*, attorneys) for the respondent.

BY THE DIRECTOR:

This is a school bullying case. On May 26, 2006, Daniel Jacobson filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that while a student in the Jackson School District, he was subjected to severe or pervasive harassment because of his national origin and perceived sexual orientation, and that the District failed to take actions reasonably calculated to end the hostile school environment, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent filed an answer denying the allegations of unlawful conduct. The DCR investigated the allegations and, on April 23, 2007, issued a finding of probable cause.[1] The DCR's attempts to resolve the matter through conciliation were unsuccessful.

[1] The complaint was amended to add the DCR Director as a complainant. However, for purposes of this determination, "Complainant" will refer to Daniel Jacobson.

On May 8, 2008, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. While the case was pending, Respondent filed a motion to enforce a purported settlement made with Complainant. The administrative law judge (ALJ) denied the motion and, following interlocutory review, the Director concurred and returned the case to OAL for a hearing. ALJ John R. Futey presided over twenty-two days of testimony, argument, document review, and heard from twenty-one lay and expert witnesses. After weighing the evidence, ALJ Futey issued a 171-page initial decision on February 27, 2013, in which he recommended that the complaint be dismissed in its entirety with prejudice. (ID 163)[2] In so doing, the ALJ ruled, among other things:

> I **FIND** that the relatively few incidents which Jacobson encountered over a four year span, with the freshman and senior years' incidents having been interrupted by two virtually blemish-free school years, as well as having occurred in a very large school with approximately 2600 to 2700 students, and which nonetheless resulted in the disciplines and remedial actions having been enacted and imposed against the established and identified perpetrators proved that the overall efforts by Jackson on behalf of Jacobson were highly effective since no greater escalating issues emerged there from. In the process those direct and responsive efforts also served to prevent any potential, suggested or individually perceived systemic problem from building to unmanageable proportions. (ID 153)

For the sake of economy, the Director will forego restating each of the Complainants' allegations, Respondent's responses, all the witness testimony, the ALJ's analysis of each issue, and Complainant's voluminous exceptions.[3] The following is an overview the ALJ's findings and analysis.

Complainant, who is of Honduran heritage, attended Jackson Memorial High School from September 2002 to June 2006. He testified about harassment he received during his freshman year--not all of which he reported to school officials--including three or four harassing phone calls on New Year's Eve from his friend, G.S., and two other boys (T:Jacobson, D., 2/6/12, 19:22 - 25

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[2] For the remainder of this document, the abbreviation "ID" will refer to ALJ Futey's initial decision. "CE" will refer to Complainant's exceptions dated March 17, 2013, and "RE" will refer to Respondent's reply dated April 1, 2013.

[3] Complainant's most recent attorney withdrew after sixteen days of hearing. Thus, Complainant is now proceeding *pro se*.

& 209:15 - 216:10) (ID 4), a student identified as J.P. grabbing Complainant's chest in the cafeteria and yelling,"Second base!" (ID 7), an incident in which Complainant was assaulted by another student, Robert Havens (ID 4), and an incident in which an unidentified student threatened him in the hallway for "what [Complainant] did to Havens and to G.S. and his friends." (ID 15.) The testimony at the hearing focused on how the school addressed those four incidents.

In particular, when Complainant reported the New Year's Eve incident three weeks later, Vice Principal John Schollenberger interviewed Complainant and G.S. Vice Principal Lynn Coddington also met with Complainant and his parents, and presided over a mediation with Complainant and G.S. to discuss the phone calls. As a result, "[t]here were no further incidents between [Complainant] and G.S." and Complainant told Dr. Coddington that he was satisfied with the outcome. (Joint Stipulations of Facts ¶¶ 21 - 24) (T:Jacobson, D., 2/7/12, 191:9).[4] The school suspended J.P. for two days for the "second base" incident and Complainant was again "satisfied with the school's response" to that incident. (Joint Stipulations of Facts ¶¶ 39 - 42). The school suspended Havens for ten days for the assault and reported the matter to the police, who arrested Havens and charged him with assault. (Joint Stipulations of Facts ¶¶ 29 - 31) (stipulating that "[t]here were no further incidents between Jacobson and Havens"). To address the threat from the unidentified student, Vice Principal Schollenberger produced yearbooks for Complainant and his two friends to look through to see if they could identify the student. (Joint Stipulations of Facts ¶ 35) (T:Jacobson, D., 2/6/12, 104:19 - 105:23). Complainant and his friends could not identify the speaker from the yearbook, so the Vice-Principal devised a different plan. For the "next couple of days," Schollenberger and Complainant stood in the hallway in the same area where the incident

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[4] Linda Jewell, who was the principal at the time, also became involved in the matter when Complainant's father called to complain about Coddington and Schollenberger. She testified that she had multiple conversations with Complainant's father, reviewed her subordinates' response to the incident, and discussed the matter with the superintendent who had also received calls from the Complainant's father. (T:Jewell. 9/11/12. 114:8 - 141:9). She claimed that her "investigation spanned almost 10 calendar days." (P31)

occurred at the same time in the morning to see if Complainant could spot the student in the hallway. (Id. at 106:12 - 110:7) (Joint Stipulations of Facts ¶¶ 36 & 37). Each such "stakeout" session lasted "[t]en, fifteen minutes." (T:Jacobson, D., 2/6/12, 108:7 & 109:93). Complainant was never able to spot the student nor could he identify him by name. (Joint Stipulations of Facts ¶37). Vice Principal Schollenberger testified that he also alerted all the security officers to the incident and directed them to be vigilant. (ID 101) (T:Schollenberger. 8/7/12. 128:25 - 129:3). At different points during the second half of his freshman year, Complainant told his guidance counselor and Vice Principal Schollenberger that he was no longer being harassed at the school. (Joint Stipulations of Facts ¶¶17 & 19).

Complainant contends that during the his sophomore and junior years, he heard disparaging remarks about gays and Latinos "[p]retty much on a daily basis" while walking through the school. (T: Jacobson, D., 2/6/12, 126:11). He testified that he did not report the incidents to school officials because he suspected that such complaints would not be adequately addressed and he felt it "best . . . to stay under the radar." (Id. at 126:20 to 127:4).

The parties stipulated to three incidents that occurred during his senior year. In January 2006, Complainant's friend, J.P., heard one of Jacobson's former friends, A.E.B., call him a "fucking queer." (Joint Stipulations of Facts ¶ 47). In Spring 2006, Complainant heard two students walking in front of him say the words, "fucking faggot." He could not identify the students and was "unsure whether the students were directing their comment at him." (Joint Stipulations of Facts ¶¶ 54-56). Complainant alleged that J.P. also told him in May 2006, that she overheard unidentified "students in the hallway . . . calling [Complainant] a 'faggot' and that they wanted to 'kill him.'" (Joint Stipulations of Facts ¶58). Complainant testified about a fourth incident at the start of the school year in which some female students in his gym/health class made derogatory remarks to him based

on his sexual orientation. (T:Jacobson, D, 2/6/12, 141:12).[5]

The school responded to the three senior year incidents of which it had notice. In particular, school officials responded to the A.E.B. incident by interviewing the students, taking their statements, notifying the Jackson police officer who was stationed in the school (CE 11) and mandating that A.E.B. and his friends undergo sensitivity counseling from the guidance department. (ID 30, 92-94.) The parties stipulated that "[n]o further incidents occurred between [Complainant] and A.E.B. or A.E.B.'s friends after the January 2006 incident." (Joint Stipulations of Facts ¶53) (T:Jacobson, D, 2/6/12, 165:3). The school did not take action with regard to Complainant's allegation that he heard two unidentified students walking in front of him say, "fucking faggot," but there was no persuasive evidence that Complainant ever reported that incident to school authorities. The ALJ noted that Complainant decided not to report the "kill him" incident to a vice principal because "he did not see, or know the names of" the students who allegedly made the threat. (ID 147). Still, after Complainant mentioned the matter to his English teacher, she conveyed the information orally and via a written report to Dr. Coddington who, in turn, spoke with Complainant and J.P. about the matter. (T:Coddington, 8/6/12, 70:11 - 73:16). Dr. Coddington took statements from Complainant and J.P., and alerted the Principal and security personnel. She testified as follows:

> A: . . . I said, "Do you feel comfortable coming back into the high school? Do you feel safe? And he said, "Oh, absolutely I - - I do feel safe," and he appeared calm and left my office. Then [Principal Anthony Gaita] and I of course followed up and we - - we were in the hallway for a good two weeks, ten days in school days observing

[5] After the close of evidence, Complainant stated that there were additional incidents. (Complainant's Closing Argument, p. 84) ("At no time did the Plaintiff claim that he had listed every harassing, intimidating, biased or discriminatory comment made directly to him or in his presence during his years at Jackson Memorial High School. Testifying to every comment would have required hours, if not days, more of direct testimony by Plaintiff."). Similarly, in Complainant's closing argument, he described a "fifth senior year incident" in which an unidentified male student yelled, "Faggot!" Complainant alleged that the incident was witnessed by a student assistance counselor (SAC) who "proceeded to then ignore the situation." (Id. at 99) That allegation was not raised at trial; he did not call the SAC to testify or produce anyone else who verified witnessing the alleged incident.

what was going on in the hallway. We also asked para monitors and security, made them aware and they were looking for any abnormal kinds of behavior from people and especially directed at Daniel.

Q: When you said you stood in the hallway, Dr. Coddington, do you recall approximately where the location was in the hallway that you stood?

A: In the middle of wing A is where I stood and Mr. Gada [sic] stood at another section and, you know, during the week we would move around, go to a different area, but primarily in the area of his home room which is where the incident supposedly took place, wing A.

(T:Coddington, 8/6/12, 72:20 - 73:13) (See also T:Gaita. 1/5/12. 215:9 -217:5) (testifying about patrolling the hallway for ten days in May 2006 on behalf of Complainant). Coddington explained that in addition to teachers, administrative staff, and police personnel stationed in the school, there were ten to twelve "paraprofessionals" who monitored the hallways and cafeteria. (T:Coddington, 8/30/12, 254:10 - 256:19). In response to Complainant's allegation regarding his gym/health class, Respondent granted Complainant's request to move into a different class. (T:Jacobson, 2/6/12, 155:1-8).

Under New Jersey law, "[w]hen a student is subjected to severe or pervasive bullying on the school bus, in the classroom, or at the playground, and a school district fails to adequately respond to that misconduct, that student has a right to redress." L.W., et al. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 412 (2007). The Supreme Court wrote:

> [A] school district may be found liable under the LAD for student-on-student sexual orientation harassment that creates a hostile educational environment when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment. . . . Because we do not create a strict liability standard, a district is not compelled to purge its schools of all peer harassment to avoid liability. Rather, we require school districts to implement preventive and remedial measures to curb severe or pervasive discriminatory treatment.

189 N.J. at 407.

In L.W., the Court likened school bullying cases to hostile work environment cases but noted that students are not always held to the same standard as co-workers:

> Schools are unlike the adult workplace . . . [C]hildren may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender specific conduct that is upsetting to the students subjected to it.

Id. at 408 (quoting Davis v. Monroe County Bd. of Educ., 525 U.S. 629, 651-52 (1999)). In determining whether conduct is sufficiently severe or pervasive to trigger the LAD, courts "look to all circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance . . ." Shepherd v. Hunterdon Devel. Ctr., 174 N.J. 1, 19-20 (2001). The Supreme Court wrote:

> We do not suggest, however, that isolated schoolyard insults or classroom taunts are actionable. Rather, in the educational context, to state a claim under the LAD, an aggrieved student must allege discriminatory conduct that would not have occurred "but for" the student's protected characteristic, that a reasonable student of the same age, maturity level, and protected characteristic would consider sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment, and that the school district failed to reasonably address such conduct.

L.W., supra, 189 N.J. at 402-03. Even in the adult workplace, derogatory name-calling based on a protected characteristic such as sexual orientation or race does not automatically violate the LAD. See, e.g., Heitzman v. Monmouth County, 321 N.J. Super. 133, 148 (App. Div. 1999) (concluding that anti-Semitic comments did not constitute severe or pervasive conduct because they were casual, sporadic, and did not involve any physical threat).

If a plaintiff can meet its burden of demonstrating a severe or pervasive hostile educational environment, the plaintiff must then demonstrate by the preponderance of the evidence that the school district failed to adequately respond by implementing effective preventive and remedial measures. The evaluation of the school's response must be made in light of the totality of the circumstances. L.W., supra, 189 N.J. at 408 & 409 ("Illustratively, a reasonable response to name calling among grade schoolers may be inadequate to address violence among teenagers.") Relevant factors include, but are not limited to, the students' ages, developmental and maturity

levels, school culture and atmosphere, rareness or frequency of the conduct, duration of the harassment, extent and severity of the conduct, whether violence was involved, history of harassment within the school district and between the students, swiftness of the school's response and the effectiveness of the school's response. Id. at 409.

In L.W., the Court wrote that the NJ Department of Education promulgated a Model Policy and Guidance for Prohibiting Harassment, Intimidation and Bullying on School Property, School-Sponsored Functions and on School Buses (Model Policy) and "any assessment of the reasonableness of the District's actual response may be informed by what the DOE currently advises school districts to do in such circumstances." 189 N.J. 411.

In this case, the ALJ found that Complainant failed to establish that the harassment was sufficiently severe or pervasive. In doing so, the ALJ limited his consideration to the incidents occurring in Complainant's freshman and senior years. Complainant testified that additional harassment occurred throughout his years of high school that he believed created a culture of hostility. However, at the heart of the ALJ's determination to limit the number of incidents to be considered was the ALJ's finding that Complainant and his parents were not as credible as Respondent's witnesses. In rejecting Complainant's argument that the additional incidents occurred and created a culture of harassment at the school, the ALJ found it significant that although the incidents allegedly occurred in public areas such as classrooms and crowded hallways on a near-daily basis, Complainant did not produce a single person who verified witnessing the harassment take place. See, e.g., (ID 158) ("No one, except for [Complainant] spoke about the existence or reality of the negative culture.") In short, the ALJ found that there was insufficient credible evidence from which to conclude that the majority of the incidents occurred, i.e., those where the only source of the information was Complainant's uncorroborated testimony. The ALJ wrote:

> Curiously, in all of the matters which [Complainant] illustrated at the hearing, he presented testimony from absolutely no one who could corroborate the actual confrontations, apart from the documented summaries of statements and interviews which were generated regarding a number of those incidents by the school authorities and/the police. Thus, and despite the fact that he admitted at hearing that he did have some friends at school, none of them were called by him to appear on his behalf in this matter, this also being of some curious note since he still lives in the same town, having returned there after completing college. This failing not only served to detract from the credibility of his allegations herein and compromised the weight and credibility which this tribunal could attach to his allegations, but it also significantly defeated his claims, and those similar assertions by [Complainant's expert] Dr. Rodriguez Rust, regarding the purported negative climate or culture which existed in Jackson at the time. Dr. Rodriguez Rust could only speculate regarding that educational climate.

(ID 158). The ALJ noted that other than the four incidents from freshman year, and slurs from his former friend, A.E.B., and girls in his gym/health class during his senior year, Complainant testified generally that unidentified students directed anti-gay and racist slurs toward him at unspecified times on unspecified dates and unspecified places within earshot of unspecified witnesses. The ALJ found that those allegations were vague and insufficient to meet Complainant's burden of proof. A witness's ability or inability to provide sufficient descriptive details when recounting an event is one of many standard factors in making credibility assessments. See generally In re Seaman, 133 N.J. 67, 87 (1993). The ALJ did not conclude that a vague allegation of anti-gay slurs is not actionable. Rather, he found, among other things, that in this case, the lack of any corroborating witnesses (despite the fact that the remarks were reportedly made constantly in crowded, public areas) and the lack of descriptive details made Complainant's allegations less credible.

Rather than call eye-witnesses such as students, Complainant presented testimony from his parents. However, the ALJ found that his parents' testimony was "not thoroughly credible and not worthy of significant belief." (ID 160). The ALJ found it telling that, among other things, the father "vacillated" regarding significant matters and was a times "at complete variance" with his wife on factual matters. (ID 160-61.) Likewise, the ALJ found that the mother "had no real evidence to corroborate the occurrence of the various incidents since [her husband] virtually exclusively

handled most of them" and because most of her allegations were "based upon hearsay generated from either her son or her husband." (ID 161.) The ALJ noted, for instance, that the mother testified that Complainant received a death threat during his senior year but failed to mention that relevant and provocative detail at any time during her prior deposition. (ID 36.)[6]

Based on his credibility assessments of Complainant and his parents, and in the absence of any other corroborating evidence, the ALJ found that Complainant did not meet his burden of producing credible proof that any harassment occurred during the two intervening years. He wrote:

> Jacobson never successfully demonstrated or proved the existence of those purported sophomore or junior year incidents by way of any corroborating witness testimony either. It is noteworthy in that regard, that Jacobson, who conceded in his rebuttal statement that he did actually have friends at Jackson, never produced any other witnesses to any of the events or purported events whatsoever at this hearing. At most, he presented the testimony of his parents to suggest that all of those unreported, unidentified incidents were actually true. This falls very short of convincing me that there were any such incidents under the circumstances during those two intervening grade years of his high school education.

(ID 141.) In sum, he concluded that Complainant's allegations of near-daily harassment based on his national origin and sexual orientation were "vague and totally unsupported." (Ibid.)

By contrast, the ALJ found all of Jackson's witnesses to be "highly credible." (ID 159.) For instance, he wrote:

> Jackson presented a whole host of witnesses all of whom I found to be highly credible and their testimonies worthy of belief, particularly, as indicated hereinabove, Schollenberger, as well as Superintendent Gialanella, Dr. Coddington, Mr. Gaita, Ms. Schwaber, Ms. Rogers, and Principal Jewell, the last of whom was incredibly well versed and educated in the management of diversity-based issues from her vast experiences in growing up in and eventually educating and administering in the Freehold area educational settings, both in the Boro and Township before her arrival at Jackson. Equally importantly, although Ms. Schwaber was called as a witness in Jacobson's case in chief, she presented cogent, credible testimony which totally supported Jackson's handling of the various

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[6] Although Complainant called other witnesses on direct, none testified witnessing the alleged conduct. He called his former English teacher who recalled Complainant telling her during his senior year that his friend overhead students saying that they wanted to kill him. Complainant now accuses that teacher of providing "false" and "absurd testimony" and being "clearly willing to say anything to protect the school." (CE 28.)

> incidents of which she was a part. And teacher Michele (nee Moore) McCann was more of a witness on behalf of the district than she was for Jacobson.

(Ibid.) Ultimately, the ALJ concluded that the "minimal number of incidents over a four year time span" were "offensive, unsavory, unsettling and completely unacceptable in a school setting," but did not rise to "severe or pervasive discriminatory mistreatment." (ID 150.)

In the course of evaluating the ALJ's findings and conclusions, the Director carefully considered the Complainant's exceptions and Respondent's responses thereto. In conducting that review, the Director is guided by the New Jersey Administrative Procedure Act, which requires an agency head reviewing an ALJ's credibility findings relating to a lay witness may not reject or modify any findings of fact as to issues of credibility of lay witness testimony "unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c).

Discussion of some points raised in Complainant's exceptions is warranted. For instance, Complainant argues that the fact that he could not identify the two persons in the hallway who said, "faggot" during his senior year should not lessen the severity of the harassment. (CE 55) He writes:

> The Judge takes the position that being unable to identify the offending students somehow diminishes or discredits the Plaintiff's claims. One has to wonder if the Plaintiff had been beaten up and unable to identify his attackers, would it diminish his claims in the opinion of Judge Futey?

(Ibid.) Complainant is correct that the fact that a plaintiff cannot identify a harasser does not make the harassment less egregious. However, a lack of sufficient detail from which to verify or corroborate an allegation may be considered in the totality of circumstances where the fact-finder is trying to determine whether the incident actually occurred. Complainant argues that the ALJ "ignore[d] the fact" that the incident was witnessed by a security officer. (Ibid.) It may be that a security officer heard the remark, but there is nothing in the evidentiary record other than

Complainant's testimony to support that assertion. Complainant did not, for instance, call the security officer or other students as witnesses at the hearing. This leads to a similar related issue. A fact-finder is not compelled to accept every allegation asserted by a party in a pleading or testimony. Likewise, assertions made during closing argument are not evidence. R. 1:7-1.

Complainant takes exception to the ALJ's remark that because Complainant "had tremendous academic success . . . positive interactions and relationships with his teachers, was active in his community and never attempted or requested to leave Jackson High School," it suggests that he was not bullied. (ID 150.) Complainant argues that he was neither as successful nor as active as portrayed. (CE 83-84) (noting, for instance, that he was rejected by the National Honor Society). The Director also takes issue with the ALJ's assertion, but for a different reason. Courts have noted that because harassment is judged on an objective standard, the subjective effect on a particular plaintiff should play no role in determining whether the alleged harassing conduct violates the LAD. Cowher v. Carson & Roberts, 425 N.J. Super. 285, 300 (App. Div. 2012) (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 612 (1993) ("An objective reasonableness standard better focuses the court's attention on the nature and legality of the conduct rather than on the reaction of the individual plaintiff, which is more relevant to damages."). Stated differently, the mere fact that a particular student is resilient in the face of bullying, does not mean that the bullying cannot rise to the level of actionable harassment.

Complainant takes exception to the ALJ's observation that it was "disturbing to observe consistent allegations from both the school administrators and the Jackson Police officers who testified regarding [the father's] repeated, overt and abrupt" intimidation tactics such as "bluntly discredit[ing] them to their faces," stating that he was a State investigator "who knew much more than they did," and that the Attorney General would be personally investigating their actions. (ID 161) (noting that the father's actions "ironically bordered on bullying, harassing and threatening various people"). For instance, Principal Jewell testified that in 2003, she had "several telephone

calls with [the father] and there were a couple of face to face" meetings in response to the New Year's eve incident. (T:Jewell. 9/11/12. 116:13). Jewell testified:

> What was difficult was there was always a - - when we had our face to face, he would sit across from me, he would reach into his briefcase, he would take out his yellow legal sized pad, and he would start writing, and he would preface it by saying, "Do you know what I do? I investigate incompetent people like you. I'm an investigator for DYFS. I have friends in high places, and I am not satisfied with - -," and then launch into what he wasn't satisfied with.

(T:Jewell. 9/11/12. 116:19 - 117:2). Complainant argues that even if the ALJ disliked his father's methods based on his alleged abusiveness toward school and police officials, it should not diminish his father's credibility. (CE 30). Complainant's general point is well-taken. However, the ALJ appeared to be commenting not so much that the father was knowingly supplying false testimony, but that the evidence of the father's extreme advocacy suggested that he might not be an objective witness. Here again, such considerations are not uncommon in reaching credibility determinations. For instance, a senior judge for the Federal District Court of Colorado voiced a similar concern about relying on a parent's uncorroborated testimony:

> Bias and prejudice also tend to be ironclad criteria for evaluating credibility. I expect a mother to be highly motivated to protect and support her child. I recognize such an interest can shade her testimony, but that alone will not make it incredible . . . In such circumstances, I look for corroboration. There may be no requirement for it, but the burden of persuasion will rarely be met without it.

[Hon. John L. Kane, "Judging Credibility," Litigation Mag., (ABA Spring 2007)]. The ALJ appeared to be also juxtaposing the father's "attempt to use his position in the manner in which he did," with what he viewed as the school and police personnel's professionalism. (ID 162) ("[T]here is no evidence that any of them compromised or adjusted their stewardship over Jacobson in reaction to and/or despite those parental verbal attacks and innuendoes.").

Complainant takes exception to what he characterizes as the ALJ's "blame the victim" mentality. (See e.g., CE 2, 46, 55, 58, 71, 90). He refers to passages such as the following discussion regarding the telephone calls Complainant received from G.S. and two others on New Year's Eve during his freshman year:

> The role which Jacobson played in a number of the incidents which involved gender bias was quite problematic and unsettling for it appears that he may have been the initial instigator of harassment or intimidation himself, starting with his almost 100 phone calls to G.S. before G.S. and others responded to him in their crass and highly inappropriate phone calls to him on New Years Eve 2002. While youthful indiscretions and missteps can be given some measure of leniency as emerging emotions test the waters around them and in the effort to define relationships and expectations, there nonetheless comes a point when enough is enough, as here where Jacobson went well beyond reasonable means and persisted in pursuing and calling G.S. an inordinate number of unsolicited times, which ultimately resulted in complaints being filed by the parent of G.S. against Jacobson. Although Jacobson's instigating actions should not serve to provide an excuse for the despicable and moronic infantile comments by G.S. and his cohorts, it nonetheless demonstrates that, at least from the standpoint of G.S., he had a real motivation to lash back at Jacobson under the circumstances, since Jacobson had overly oppressed him with an absurd number of phone calls over a relatively short period of time.

(ID 144-45.)

Elsewhere, the ALJ wrote that the name-calling in the incident with A.E.B. and two females in January 2006 was not altogether one-sided:

> [Complainant] . . . admitted that he called them names in response, such as "gringo" (meaning a white person) and he may have also said "Pendejo" (which he admitted and explained on further questioning could mean something like "pubic hair" or, depending upon what country, like someone who was stupid). He admitted that it was an insult and a derogatory term, after questioning from this tribunal. Although he said he never directly told those girls that they were "sluts", he admitted that he may have said that they were sluts to his own friends.

(ID 18). The ALJ noted that a vice principal testified that one of the females, D.R., claimed that Complainant called her a "bitch," "white trash," and "nasty slut" (ID 92-94) and that the other female, N.G., alleged that Complainant told her to "shut the fuck up" and called her a "fat bitch." (ID 93) (noting that the vice principal testified that Complainant "also picked on a couple of girls, T.E. and C.L. and he had called them 'sluts' because he said they were pregnant.") (T:Coddington 8/6/12, 38:12 - 40:9). The ALJ wrote that while A.E.B. and the other students "admitted their individual wrongdoings in the incident," Complainant did not. The ALJ observed:

> As a result, any possible effort to instill in all of the active participants a sense of awareness, sensitivity, ownership of one's actions and responsibility was thwarted by [Complainant] himself. It also casts doubt regarding [Complainant]'s own

> understanding of and sensitivity to bias and intimidation because his own use of inappropriate words was as bad as those around him . . .

(ID 143.) The ALJ characterized the A.E.B. incident as a "war of words between the opposing sides [that] ultimately resolved itself and the parties walked away from that incident, which was, like every other reported incident over a four year period, not repeated." (ID 146.)

The ALJ wrote that Complainant may have "triggered" A.E.B.'s outburst by "publically announc[ing] to other students that he wanted to kiss A.E.B., this once again demonstrating how [Complainant] had exhibited his own type of insensitivity to the preferences of A.E.B., which resulted in a virtual harassment against A.E.B. and which [Complainant] also improvidently shared with other students." (ID 146.) The ALJ wrote that Complainant "turned his attention to A.E.B. by seeking to pursue him even though A.E.B. had attempted to sever relationships with him because of [Complainant]'s repeated advances on him." (Ibid.)[7]

Still elsewhere, the ALJ noted that the assault by Havens during freshman year occurred because Havens took "umbrance with the fact that [Complainant] had chosen not to stand, as he was entitled to do, during the presentation of the National Anthem and the Pledge of Allegiance in homeroom and that [Complainant] was also talking during the exercise." (ID 115.) However, the ALJ added, "This is not meant to suggest that he is to blame for the event since Havens was totally and completely out of line his response." (ID 157-58.)

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[7] The ALJ may have based that observation on the testimony of the police officer who interviewed Complainant's friend, identified only as "J," during his investigation of the A.E.B. incident. The officer testified (reading from his investigate report) as follows:

> I asked J. why she thought A.[E.B.] and Daniel are no longer friends. J. stated that when A. and Daniel would talk on the telephone she will listen to their conversation while on another line, three way. J. stated that Daniel would try to convince A. that he A. is bisexual. J. stated that he Daniel would ask A. to meet somewhere see if he was bisexual. J. also stated that she believed their friendship ended due to Daniel asking A. about his sexual preference on numerous occasions making him uncomfortable with the situation.

(T:Menafra. C., 9/12/12, 125:11-21).

It appears from the record that the ALJ is attempting to view the conduct of all parties in context and suggesting that in some instances, a complainant's level of instigation and/or active participation in the conduct at issue is relevant to determining whether a hostile school environment existed. (See, e.g., ID 157) ("Apart from the despicable Havens assault, [Complainant] appeared to give back on the same level in which he got those verbal abuses.") Perhaps the ALJ was considering Complainant's conduct as part of the ALJ's evaluation of the "constellation of surrounding circumstances, expectation, and relationships." L.W., supra, 189 N.J. at 408. But regardless of whether the ALJ ascribed the conduct at issue to what he viewed as the Complainant's own inappropriate actions, the Director has not done so in his independent review of the record. The Director has found nothing in the record to persuade him that any of the conduct from freshman and senior years was somehow justified by Complainant's actions.

Complainant takes exception to the ALJ's mention of the size of the high school. He argues:

> When discussing the incidents against the Plaintiff Judge Futey feels it necessary to note: "...having occurred in a very large school with approximately 2600 to 2700 students,..." (Initial decision Page 153) Judge Futey seems unaware that under the LAD the size of an institution is irrelevant and provides no defense. As noted previously in this document, in the final decision in L.W. the Director of DCR wrote; "Nor have our courts granted a more lenient standard to large employers or large school districts because they can point to a greater number of individuals in their charge or employ who escaped harassment." (L.W. Final decision & Order Page 13)

(CE 86) (ellipses in original) (boldface omitted). The point in L.W. was that a school cannot argue that it has no liability to the plaintiff simply because the majority of its other students are not bullied. In other words, there is no "we can't help everyone because we have too many kids to watch" affirmative defense. But here, the ALJ was not justifying Respondent's inaction. He was not excusing Respondent. He was praising Respondent for what he viewed as reasonably prompt investigation that succeeded in identifying the perpetrators and taking remedial action in challenging circumstances. He wrote that despite Jackson Memorial High School being a "very

large school with approximately 2600 to 2700 students, [the reported incidents] nonetheless resulted in the disciplines and remedial actions have been enacted and imposed against the established and identified perpetrators." (ID at 153.)

Complainant takes exception to what he views as the ALJ's misunderstanding or disregard for the legal principles set forth in L.W. The instant case and L.W. differ in significant aspects. In L.W., the Court found that for years, L.W. was subjected to sexual molestation, physical assaults, and a daily barrage of verbal attacks, culminating in his withdrawal from school after a car full of students jumped out and attacked him off school grounds and poured dirt over him as he lay battered. 189 N.J. at 392-96. The central issue in that case was what legal obligation, if any, did the school district owe to the student. Here, Respondent was not disavowing any legal obligation. The ALJ found that the conduct was not severe or pervasive and that Respondent took appropriate action to any matters of which it had notice. Thus, the same legal principles govern, but the underlying circumstances are different. In this case, the court found that there were only a handful of incidents over the course of four years, and that most was name-calling.

The difference in the severity and number of incidents leads to another issue. The ALJ remarked that L.W. is distinguishable by the sheer number of incidents. In particular, The ALJ wrote:

> By significant contrast and after carefully assessing the sum total of incidents and the spacing and timing of those incidents over a total of four years while enrolled at Jackson, I **FIND** that the facts do not demonstrate that [Complainant] did prove or establish severe or pervasive harassment that created a hostile school environment, as set forth under L.W. . . . [I]n L.W., Judge Saunders found twenty-four incidents in a four-month period should put a school on notice that its response is inadequate, in the matter before me respondent Jackson did not have such chronic and pervasive incidents to indicate that its policies were not working. Instead, the minimal number of incidents, time span between them, along with the specific circumstances for each one supports the respondent's position that it believed the incidents were being reasonably and timely handled and that it was effectively deterring a hostile environment from developing.

(ID 139.) The Director does not believe that the ALJ was suggesting that twenty-four incidents in a four-month period is the minimum standard for findings of harassment or bullying. But in an

abundance of caution, the Director reiterates that matters are evaluated on a case by case basis and turn on the specific circumstances of each case. And the Director reiterates that bias-based harassment or bullying will be actionable if it is either severe or pervasive, and in some instances a single incident will be severe enough to establish a violation of the LAD. See e.g., Taylor v. Metzger, 152 N.J. 490, 506-07 (1998).

Complainant takes exception to what he views as the ALJ's rejection of the DCR's finding of probable cause. For instance, Complainant argues that "[i]n rejecting [his expert]'s opinion that the Plaintiff was a victim, Judge Futey is also rejecting the probable cause decision that was issued after DCR investigated the Plaintiff's allegations." (CE 45.) Elsewhere he writes, "With this dismissal regarding a hostile environment related to national origin, Judge Futey is again rejecting the DCR probable cause decision that was issued after DCR investigated the Plaintiff's allegations." (CE 66.) Because a finding of probable cause is only a preliminary determination, neither an ALJ nor the DCR Director is bound by it in making a final determination after a hearing on the merits. At the conclusion of a DCR investigation, the agency is required to determine whether probable cause exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. Probable cause under the LAD means a "reasonable ground for suspicion supported by facts and circumstances in themselves strong enough to warrant a cautious person to believe" that the LAD was violated and that matter should proceed to hearing. Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a preliminary determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799; Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). It is not uncommon for an ALJ to determine, after presiding over a hearing, that despite an initial reasonable suspicion to

believe that the LAD may have been violated, the cause of action was ultimately not supported by the weight of the evidence.

Complainant takes exception to what he views as the ALJ's failure to acknowledge his national origin in the initial decision. Complainant writes:

> Glaringly absent from Judge Futey's summary of the case and the testimony is the fact that the Plaintiff was born in Honduras and adopted by his parents in the United States. The Plaintiff is Hispanic. It is difficult to understand how an experienced fact finder in a case dealing with discrimination based in part on national origin could omit the fact that the Plaintiff is Hispanic . . . Judge Futey never notes that Plaintiff is Hispanic when he makes this finding.

(CE 1) (boldface and underline omitted). Although Complainant apparently would have preferred more mention of the fact that he is Hispanic, it is incorrect to suggest that the ALJ missed or ignored this fact. The ALJ noted in his summary of Complainant's testimony that he was "born in Honduras and is, therefore, of Latino heritage." (ID 12.) Problematic, however, is the ALJ's observation that "even to the extent that the derisive use of terms such as 'spic' or 'dirty Mexican' were or may have been occasionally used in the shouting matches and/or in the heat of such exchanges," there did not appear to be any "real connection with a bias against Jacobson due to national origin." (ID 144). It is hard to imagine a scenario in which a Latino student is called a "spic" or "dirty Mexican," and it has no "real connection" to the student's national origin, race, or ethnicity. However, even if Complainant could prove by the preponderance of the evidence that he was called "spic" or "dirty Mexican" on occasion, it would not automatically constitute severe or pervasive harassment. See L.W., supra, 189 N.J. at 408.

Complainant argues that the ALJ's findings may stem from a discriminatory animus. (CE 54) (noting "it is impossible to ignore the possibility that the Court has allowed its own personal issues regarding gay rights to intrude on its obligation to provide impartial fact finding."). Elsewhere, Complainant writes, "One can only hope that the Plaintiff's national origin and sexual orientation have not been a factor in Judge Futey taking a decidedly different position than he has in other cases." (CE 93). He also writes that portions of the ALJ's initial decision evince a "subtle

bias against support services for gay teens." (CE 34) (boldface omitted). Still elsewhere he characterizes portions of the ALJ's opinion as echoing the "homophobic" opinion of Respondent's expert. (CE 58). Complainant's assertions ignore the settled rule that to prevail, the party with the burden of proof must prove its case. Allegations of bias-based wrongdoing--no matter how passionately felt and genuinely held--still need to be demonstrated by the preponderance of the evidence. Bare assertions, without more, are simply bare assertions. The Director finds that the record does not support the conclusion that the ALJ was motivated by an anti-gay bias.

As set forth above, an agency head reviewing an ALJ's credibility findings relating to a lay witness may not reject or modify any findings of fact as to issues of credibility of lay witness testimony "unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c); S.D. v. Division of Med. Assist. and Health Services, 349 N.J. Super. 480, 485 (App. Div. 2002). That rule recognizes that it was the ALJ, and not the agency head, who heard the live testimony first-hand, and who was in a position to judge the witnesses' credibility. Clowes v. Terminix Int'l, 109 N.J. 575, 538 (1988).

Such is true here. The Director did not hear the testimony and finds nothing in the record from which to conclude that the ALJ's credibility assessments are somehow arbitrary, capricious, unreasonable, or not supported by sufficient, competent, and credible evidence. The Director therefore adopts the ALJ's finding that Complainant and his parents' testimony of constant harassment was not credible. Once that testimony is discredited, what remains is a record that is relatively lengthy but establishes "relatively few incidents which Jacobson encountered over a four year span, with the freshman and senior years' incidents having been interrupted by two virtually blemish-free school years." (ID 153). After a careful review of the record and the parties' post-hearing arguments, the Director adopts the ALJ's finding that Complainant did not meet his burden of proving that the four incidents from his freshman year and four incidents from his senior year

(three of which were reported) were sufficiently severe or pervasive to create a hostile school environment. It is true that Complainant was assaulted by Havens during his freshman year. But it is also true that Havens' conduct was swiftly addressed and there is no evidence that Complainant was subjected to any further physical violence from Havens or any other students for the remainder of his high school career. The remaining seven incidents can be fairly characterized as isolated short-lived incidents that were immediately addressed and, in some instances, "mere offensive utterance[s]." Shepherd, infra, 174 N.J. at 20. Indeed, two of those incidents involved boys whom Complainant considered to be his friends or former friends at the time (i.e., G.S. and A.E.B.) and the circumstances surrounding those incidents did not appear to have the sort of intimidation and imbalance of power that typically characterize bullying. In affirming the ALJ's finding that the record did not establish a sufficiently severe or pervasive hostile school environment, the Director is guided in part by the understanding that "a school cannot be expected to shelter students from all instances of peer harassment," L.W., 189 N.J. at 406, and the Supreme Court's recognition that "students often engage in insults, banter, teasing, shoving, pushing, and gender specific conduct that is upsetting to the students subjected to it." Id. at 408.

Moreover, the record contains sufficient credible competent evidence from which to conclude that the School District's response to the incidents during freshman year amounted to actions reasonably calculated to end the harassment. cf. (ID 140) ("Unlike the 'counsel first' approach in L.W., here J.P. was immediately suspended from school, which further reflects [Respondent]'s individual assessment of events on a one-on-one basis and not an automatic pro forma approach to all incidents."). The school's responses to the other two incidents--i.e., suspending Havens for ten days and having him arrested, and trying to help Complainant identify the unknown student who allegedly threatened him--would appear from any objective standpoint to be reasonably calculated to end the mistreatment. The evidence indicated that Complainant had no further incidents with any of those students. Similarly, the Director is satisfied that the District's

response to the senior year incidents was reasonably calculated to end the harassment. In response to the A.E.B. incident, Respondent investigated the matter, counseled A.E.B. and his friends, and notified the police. Complainant stipulated that there were no further incidents involving A.E.B. and his friends. When Complainant told a teacher that a friend overheard the "kill him" remark, the teacher notified senior school officials who personally stood guard for two weeks in the hallways, and alerted security team members, and attempted to investigate the allegation but could not reach any conclusions under the circumstances. School officials granted his request to be moved out of his gym/health class away from the girls who allegedly made derogatory remarks to him. (T:Jacobson, D, 2/6/12. 155:1 - 8).

The record shows that the school's corrective actions were not limited to its responses to the seven incidents of which it had notice. Before the hearing, the parties stipulated that apart from its responses to Complainant's particular incidents (i.e., meeting with G.S., suspending J.P. and Havens, etc.), Respondent undertook the following initiatives:

> The District had a policy (number 2225), prohibiting harassment and violence entitled "Prohibiting Harassment and Violence", which was adopted June 22, 1999 and revised January 23, 2001.
>
> In August 2004, the District adopted policy 5512.01 entitled Harassment, Intimidation and Bullying.
>
> On or about December 6, 2004, the District sent to each student's home a copy of District Policy 5512.01, entitled Harassment Intimidation and Bullying.
>
> During Jacobson's freshman, sophomore, junior and senior years, the District disseminated a student handbook to students which contains a code of student conduct and addresses certain policies, including sexual harassment and affirmative action. The 2005-2006 Student Handbook contains a paragraph which is a part of the District's Harassment, Intimidation and Bullying Policy.
>
> In October 2003, Michael Fowlin presented an assembly entitled "You Don't Know Me Until You Know Me" to selected eleventh grade classes and students participating in the "Senior Smart Start" program. This assembly is a one-person show regarding diversity and tolerance.
>
> In December 2005, Michael Fowlin again presented the assembly "You Don't Know Me Until You Know Me".

> On January 18, 2006, Detective David D'Amico from the Monmouth County Prosecutor's Office presented a program on "Bias, Prejudice and Hate Crimes" to selected health classes.
>
> In February 2006, an optional evening program entitled "Bullying: Impact on Youth" was offered to parents, guardians and students to discuss the effects of bullying and how it can be prevented. The program was part of the Jackson Township Police Department's SAFE Program.
>
> Issues of relationships and getting along with others were part of the District's health curriculum.
>
> The District offered an elective course entitled Man's Inhumanity to Mankind which focused on issues of bias, hate and genocide.
>
> On October 19, 2004, Assistant Principal Thomas Tarver voluntarily attended a workshop at Rutgers University entitled "Confronting Hatred in Our Schools and Community.

[Joint Stipulations of Facts ¶¶ 71 - 82]

Based on his review of the hundreds of pages of documentary evidence, lay and expert witness testimony--which he set forth at length in his initial decision--and his comparison of the Respondent's policies to the Model Policy, the ALJ found that Respondent maintained an "effective anti-bullying policy that was enforced in this matter through sufficient investigations and appropriate discipline as needed." (ID 148) The ALJ found, among other things, that Respondent "made timely professional efforts to periodically review and update its policies and procedures to reflect any suggested or recommended changes in those areas," (Ibid.) conducted "appropriate HIB training, education and orientation to its faculty and staff on an annual basis, including at the beginning and end of each school year, weekly administrative meetings, and monthly faculty and/or department meetings," (ID 149) and "reached out to the students on other levels as well. In particular, the hygiene/health classes were specifically geared to and included components of HIB, as well as other timely, critical and topical community concerns." (ID 150) The ALJ concluded that Respondent was "not only reasonable in its responses to the individual incidents involving Jacobson but . . . its responses were also effective at preventing a severe or pervasive harassment

or bullying problem from developing. . . . [and] repeatedly respond appropriately and timely to the incidents regarding Jacobson." (ID 154)

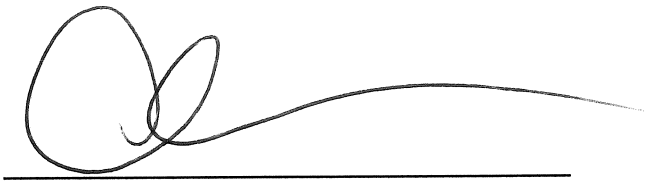
Complainant vigorously disputes those findings. Indeed, the majority of his exceptions are devoted to challenging the credibility of Respondent's witnesses regarding their testimony as to the adequacy of the school's responses. In addition to credibility challenges, Complainant takes exception to the ALJ's decision to place more weight on the testimony of Respondent's expert (William Foley, ED) than his expert (Paula Rodriguez Rust, PhD). The ALJ found that Foley, who was a former superintendent of the Westfield School District, was "better able to capture that sense of school reality or climate based upon his extensive and direct hands-on long-term experience as an educator and administrator in a comparable sophisticated high school environment." (ID 142) He noted that Rust, on the other hand, lacked "hands-on knowledge and timely experience in an educational setting," which "diminished her effectiveness in thoroughly analyzing" school administration issues." (ID 141) Here again, the Director finds nothing arbitrary or improper in the ALJ's judgement that of the two experts who testified before him, one was more persuasive than the other. The basis of his conclusion--i.e., that Foley had more relevant experience and, therefore, more relevant insight--is not unreasonable given their very different backgrounds. Although Respondent might have implemented a more rigorous systemic approach to respond to the several incidents occurring during Complainant's freshman year, on this record the Director cannot say that a more rigorous approach was required, or that the failure to implement a more rigorous systemic approach led to a worsening culture or climate at the school.

The Director has not found sufficient credible evidence from which to reject the ALJ's conclusion that the Respondent's responses to the incidents from freshman and senior year were reasonable under the circumstances. But ultimately, it is unnecessary to reach the issue because based in part on the ALJ's credibility assessments, the Director adopts the ALJ's recommended

finding that Complainant did not meet his burden of proving that the alleged conduct was severe or pervasive.

CONCLUSION

After carefully reviewing the record, initial decision, and parties' exceptions, the Director has found no basis from which to conclude that the ALJ's factual findings were somehow arbitrary, capricious, or unreasonable, or unsupported by competent and credible evidence in the record. Nor has the Director identified any material flaw in the ALJ's legal conclusions. Accordingly, the Director adopts the ALJ's initial decision dismissing the verified complaint in its entirety with prejudice.



DATE: 11-27-13

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS