

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NOS. EG08WE-35545-E
EG08WE-37410-E (CONSOLIDATED)
OAL DOCKET NOS. CRT 10575-97
(On Remand CRT 12195-93 & CRT 8747-94)
DECIDED: August 12, 2002

KENNETH T. TUCKER,
Complainant,
v.
GLEN RIDGE BOARD OF
EDUCATION,
Respondent.

ADMINISTRATIVE ACTION

**FINDINGS, DETERMINATION
AND ORDER**

APPEARANCES:

Kenneth T. Tucker, pro se

Stephen A. Santola, Esq., for the respondent
(Lindabury, McCormick & Estabrook, attorneys)

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to two consolidated verified complaints that the complainant, Kenneth T. Tucker, (Complainant), filed with the Division on March 8, 1993 and February 7, 1994, respectively, in which he charges that the respondent, the Glen Ridge Board of Education (Respondent), subjected him to unlawful employment discrimination based on disability (bulging disc), race (Black) and reprisal for filing a complaint with the Division, in

violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On December 20, 2001, following a hearing on remand from the Division, the Honorable Elinor R. Reiner, Administrative Law Judge (ALJ), issued an initial decision dismissing the complaint. Having conducted an independent review of the record, including the pleadings, transcripts of the hearings, and the legal arguments and exhibits submitted by the parties, the Director finds good cause to adopt the ALJ's decision dismissing the consolidated complaints with certain modifications detailed herein.

II. PROCEDURAL HISTORY

This matter arose on March 8, 1993, when Complainant filed a verified complaint with the Division alleging that Respondent subjected him to differential treatment based on his race and disability and failed to reasonably accommodate his disability. On April 21, 1993, Respondent filed an answer to the verified complaint denying Complainant's allegations of unlawful discrimination. Prior to completing its investigation, the Division transmitted this first verified complaint to the Office of Administrative Law (OAL) on December 21, 1993, in response to Complainant's request for an administrative hearing pursuant to N.J.S.A. 10:5-13. Shortly thereafter, on February 7, 1994, Complainant filed a second verified complaint with the Division alleging that Respondent subjected him to further differential treatment, required him to return to work in contradiction to his doctor's orders, and terminated his employment based on race and reprisal.

On July 24, 1994, the Honorable Arnold Samuels, ALJ, held a pre-hearing conference in connection with Complainant's original complaint and issued an order consolidating the matter before him with the second complaint pending before the Division.

In accordance with this order, the Division transferred the second matter to the OAL on August 30, 1994.

Thereafter, ALJ Reiner (hereinafter, “the ALJ”) conducted a plenary hearing of the consolidated matters over seventeen days spanning July 1995 and January, February, July, August, and October 1996. On May 21, 1997, the ALJ issued an initial decision granting Respondent’s motion to dismiss the verified complaints at the close of Complainant’s case.¹ Specifically, the ALJ concluded that Complainant failed to prove that Respondent transferred him from the position of day custodian to the position of evening custodian because of his race, and found instead that Respondent transferred Complainant in reliance on a medical opinion that Complainant’s back injury precluded him from performing the duties of the day custodian position from which he was transferred (ID 5, 10). The ALJ further concluded that Complainant failed to establish a prima facie case of unlawful termination of employment based on race because he did not prove that he met his employer’s legitimate expectations for satisfactory job performance (ID 10).

The Director rejected the ALJ’s conclusion that Complainant failed to establish a prima facie case of unlawful race discrimination and remanded the matter to the OAL for further consideration of this issue. The Director further remanded the matter for resolution of additional charges that were raised in the verified complaint but not addressed in the initial decision, including allegations of unlawful disability discrimination and unlawful reprisal. The ALJ conducted an additional 23 days of hearing on remand and issued an

¹In this Order, “ID” shall refer to the initial decision dated May 21, 1997; “2ID” shall refer to the initial decision dated December 20, 2001; “RO” shall refer to the Director’s Order of Remand dated November 20, 1997; “T” shall refer to the transcript of hearing; “Exhibit” shall refer to the parties’ exhibits presented at hearing.

initial decision dismissing the complaints on December 20, 2001. Complainant filed his exceptions to the initial decision on February 15, 2002 and Respondent filed a reply to the exceptions on February 25, 2002.

The Director sought and was granted four extensions of time to file a final order in this matter, which moved the time for rendering his findings, determination and order to August 12, 2002.

III. THE ALJ'S FINDINGS AND DETERMINATIONS

A. The ALJ's Findings of Fact

1. The ALJ's Credibility Determinations

The ALJ's factual findings were significantly affected by her determination that Complainant's testimony was "erratic, inconsistent...unreliable" and "simply could not be believed." (2ID 3) In support of this conclusion the ALJ cited numerous misrepresentations and significant inconsistencies in Complainant's testimony and concluded that Complainant's testimony was "often fabricated" or "deliberately inaccurate" (2ID 4). By way of contrast, the ALJ found the testimony of Respondent's representatives "credible and consistent" and believed that they offered testimony in the interest of clarifying what happened during Complainant's employment (2ID 4). The ALJ additionally rejected the testimony of Leigh Steven Byron, a witness Complainant produced to demonstrate Superintendent Bossart's discriminatory bias. The ALJ determined that the witness' testimony did not have the ring of truth and was a "malicious, unwarranted attack" on Dr. Bossart's credibility (2ID at 6). Finally, the ALJ concluded that the minor inconsistencies in testimony raised by Complainant were "meaningless" and concluded

that it was not necessary to require witnesses to have total recall of all details of the events as a prerequisite for accepting their testimony as truthful and reliable (2ID 6).

Guided by these credibility determinations, the ALJ then made the following findings of fact:

2. Complainant's Day Shift Custodian Position

In July 1992, Respondent hired Complainant as a non-tenured day custodian for the school district's middle school (2ID 9). At the time Complainant was hired, Dr. Marcia Bossart was the superintendent of schools; Ms. Patricia Haberthur served as the business administrator and board secretary; and Dr. Nell Sanders was the middle school's principal (2ID 6-8). Respondent hired Complainant based largely on recommendations from Superintendent Bossart and Business Administrator Haberthur (2ID 9). In 1992, Respondent employed five custodians, including Complainant, for its middle school, and assigned two custodians to the day shift and three to the evening shift (2ID 9). During the period of Complainant's employment, all the day shift custodians that Respondent hired were non-Caucasian. Typical day shift tasks included shoveling snow, cutting grass, and setting up bleachers, risers, lunch tables and chairs, and accepting deliveries. The hours of the evening shift custodians overlapped with Complainant's hours on the day shift. Complainant began work at 9:00 a.m., while evening custodians reported to work at 2:30 p.m. (ID 9).

3. Complainant's Performance

The ALJ found that Complainant's performance problems in the day shift custodian position began shortly after his hiring date. Although Complainant's work

performance was satisfactory at first, during the first three months of his employment he failed to complete his tasks during his regular shift and would often, without permission, work beyond the hours of his shift to complete his work (2ID 18). This type of “after hours” work created problems for Respondent with respect to its obligations to record and provide compensation for overtime hours and additionally raised concerns about Respondent’s liability for injuries that could occur involving individuals on school property without authority (2ID 19).

The ALJ additionally found that Complainant’s attendance was erratic and unacceptable beginning late in 1992 and continuing through his employment (2ID 31). From July 1992 through November 3, 1993 Complainant had an excessive number of absences (49 sick days and 6.5 personal days) as compared to other employees of the school district. However, Respondent never disciplined Complainant for excused absences (2ID 32). The ALJ further found that, even when medically excused, the number and frequency of Complainant’s absences had a negative impact on the morale of the other members of the custodial staff and ultimately affected the functioning of the school (2ID 32). For example, day shift employees were frequently asked to work 2 hours late and evening custodians were often asked to report to work 2 hours early to compensate for Complainant’s absences ibid. Moreover, Respondent was often required to refuse deliveries when Complainant was absent because they could not be accepted with only one custodian on duty. In light of his absences and the fact that, when he was in attendance, Complainant failed to complete many of his assignments on time, Principal

Sanders reduced Complainant's duties and assigned them to other custodians (2ID 19).

The ALJ found that Complainant's predecessor on the day shift completed the assigned work in the time allotted while Complainant did not. The ALJ also found that Respondent's reduction of Complainant's duties had a negative effect on the morale of other custodians who were required to increase their workloads and hours (2ID 26-27). Complainant's performance continued to decline even after Respondent reduced his duties (2ID 20). Effective March 1993, Respondent transferred Complainant to the evening shift after evaluating his medical condition as detailed in the following section regarding his back injury.

The ALJ accepted Respondent's evidence regarding Complainant's performance on both shifts and found as fact that Complainant failed to follow directions and committed acts of insubordination (2ID 20-25, 27). For example, the ALJ concluded that Complainant ignored a directive to empty his wet mop bucket and rinse his mop at the end of each day; left old ceiling tiles in the service elevator instead of discarding them; spent an inordinate amount of time cleaning the field house instead of attending to his duties in the school; and refused to follow Principal Sanders' suggestions regarding his performance of assigned tasks. Moreover, the ALJ found that Complainant gave parents tours of the school without authorization; encouraged a student to gather student support for him in his opposition to the way the administration was treating him; and routinely wrote letters to the administration --which were often caustic-- challenging its decisions and refusing to accept the validity of any criticism of his work (2ID 20-23).

Despite these difficulties, shortly after transferring Complainant to the evening shift,

Respondent renewed Complainant's contract for the 1993-94 school year (2ID 19). School Superintendent Bossart recommended that the Board renew his contract because she wanted to give Complainant the opportunity to demonstrate that he could be perform successfully on the new shift (2ID 27). However, the ALJ found that Complainant's did not improve and he engaged in additional acts of poor performance and insubordination. Accordingly, Dr. Bossart served Complainant with a final written warning on July 9, 1993. The warning specifically outlined areas needing improvement and stated that if Complainant's performance did not improve, she would recommend to the Board that he be terminated (2ID 28).

Shortly thereafter, the Respondent began preparing for State monitoring inspections scheduled for Fall 1993. The New Jersey Department of Education monitors each school district once every seven years to ensure that they meet statutory standards. Business Administrator Haberthur worked closely with the principal, custodians and maintenance staff of each building to prepare for the impending inspections of the facilities (2ID 29). They prepared a checklist of work to be completed in each building and divided certain tasks among the custodians. The ALJ accepted Respondent's testimony and documentary evidence that, despite being assigned fewer duties than other custodians, Complainant failed to work cooperatively with the other custodial and maintenance employees and refused to complete certain tasks on his list, claiming them to be outside his scope of work (2ID 30). These "maintenance" tasks had been assigned to both Black and Caucasian custodians. Complainant was the only employee who did not complete his assigned tasks.

4. Complainant's Back Injury

Shortly after starting in the job on July 29, 1992, Complainant slipped and fell while mowing the school's lawn and injured his back (2ID 11). He did not report the injury to any supervisor. Several weeks later, in August 1992, Complainant aggravated this injury while performing other tasks at the school. Complainant then reported the injury for the first time, advising Paul Foy, head custodian (2ID 11-12). Foy gave Complainant an injury report to complete for both incidents, however he unintentionally selected the incorrect forms that were used to report a student injury (2ID 12). This error regarding the forms triggered a different administrative review of the injury report and caused a delay in Respondent's processing of Complainant's workers compensation claim. It was not until meeting with Complainant on January 13, 1993 that the administration learned of Complainant's injuries and properly filed a workers' compensation claim on his behalf.

Complainant testified that in February 17, 1993, Principal Sanders began assigning him duties that aggravated his back condition. The ALJ found that, notwithstanding this testimony, Complainant did not object to any assignment prior to undertaking it. Moreover, the ALJ also found that Complainant did not advise his supervisors or administrators that his back injury precluded him from performing the tasks he now contends aggravated his back. In addition, Principal Sanders told Complainant on more than one occasion to let her know if he could not do a job that was assigned to him. Respondent also encouraged custodians to assist each other and made hand trucks available for use in moving heavy objects (2ID 11,14).

The ALJ also determined that, when Respondent learned that Complainant was

unable to perform certain tasks, such as heavy lifting, it considered whether accommodations were available that would enable Complainant to remain on the day shift notwithstanding his disability. Finding none, Respondent then decided to reassign Complainant to the evening shift effective March 8, 1993 (2ID 14). The ALJ found that Respondent initiated the shift change because Complainant could not perform all of the physically demanding tasks of a day custodian. The ALJ also held that Respondent found it necessary to reassign Complainant to the evening shift because he could not serve as one of only two custodians on the day shift while medically restricted from performing much of the work that had to be performed on that shift (2ID 15). Furthermore, the ALJ accepted Respondent's testimony that since Complainant displayed an inability to function well with others and to follow directions, the evening shift was the preferable choice since custodians on that shift were able to work more independently of each other (2ID 16). The ALJ also noted that in order to reassign Complainant to accommodate his disability, Respondent moved the least senior evening shift custodian to the day shift over his objection in order to create a vacancy for Complainant (2ID 17). In making this shift change, Respondent transferred both Complainant and the evening custodian, who was Caucasian, over their objections. The ALJ additionally determined that Respondent utilized the same process to transfer of Complainant from the day shift to the evening shift as it used for schedule and shift changes of other employees. █

Since the job duties of the evening shift custodians primarily involved cleaning the facility, they performed considerably less physically strenuous work the day shift custodians who were required to set up bleachers, risers, tables and chairs as well as

shovel snow and mow lawns. Moreover, deliveries rarely came in the evening. The duties between the shifts also differed in the amount of flexibility allowed in time allotted for the completion of assignments (2ID 10). Day shift tasks were time-sensitive and critical to the proper functioning of the school while deadlines for many tasks performed in the evening could usually be postponed if necessary, such as when a staff member was absent (2ID 11). The ALJ also determined that the absence of an evening custodian had less impact on the functioning of the school based on the nature of the evening assignments and because there were three custodians assigned to the evening shift as compared to two on the day shift. Respondent's doctor reviewed the job descriptions and tasks of both the day and evening custodian positions, examined Complainant, and concluded that Complainant could not perform the duties of the day shift but could perform the evening shift duties. Accordingly, Respondent's doctor cleared Complainant to work only as an evening custodian.

Following his transfer to the evening shift, while involved in preparing the facility for State inspections, Complainant was absent from work and advised that his absences were caused by his inhalation of paint fumes. However, he did not provide a medical note regarding his injury and an exam by Respondent's physician did not reveal any injury or signs of the reported problem (2ID 31-31).

5. Complainant's Termination

On November 3, 1993, Superintendent Bossart recommended that Respondent vote to terminate Complainant's employment (2ID 33). Dr. Bossart based her recommendation on Complainant's job performance, insubordinate attitude, excessive

absences, inability to work well with others and failure to improve his performance after receiving a warning letter on July 9, 1993 and (2ID 33-3). The Board members voted to terminate Complainant (2ID 34). Following Complainant's termination, the Caucasian custodian who Respondent transferred to the day shift to make room for Complainant on the evening shift asked to return to the evening shift. Respondent granted this request and then hired Wally Muhammad, an African-American, to replace Complainant (2ID 36).

B. The ALJ's Conclusions of Law

1. Intentional Discrimination Based on Race and Disability

After applying the legal standards set forth in the Director's order of remand, the ALJ concluded that Complainant failed to establish by a preponderance of the evidence that Respondent subjected him to intentional discrimination in the terms and conditions of his employment or that Respondent terminated his employment because of his race or disability. First, the ALJ concluded that Complainant did not produce any direct evidence of unlawful discrimination, such as express statements by decision-makers that unequivocally revealed that their decisions regarding Complainant were motivated by his race or status as a person with a disability (2ID 38). Second, the ALJ determined that Complainant failed to establish a prima facie case of intentional race or disability discrimination with indirect or circumstantial evidence (2ID 38-39, 50-51).

a. Terms and Conditions of Employment

The ALJ did not find any credible support in the record for Complainant's allegation that Respondent subjected him to differential treatment in assignments, transfer or discipline as compared to other custodians based on unlawful considerations of his race

or disability. Instead, the ALJ concluded that Respondent assigned Complainant tasks and set deadlines and performance standards that were no less favorable or more rigorous than the treatment Respondent accorded to other custodians (2ID 16-17, 29-30, 35, 40, 51). Indeed, the ALJ concluded that Respondent did not hold Complainant to a higher standard of performance and instead reduced his responsibilities to enable him to complete tasks in a satisfactory and timely manner and excused certain conduct for which Respondent had terminated others (2ID 25-27). The ALJ additionally found that Respondent offered Complainant the opportunity for additional instruction and assistance and, thus militating against a finding that any performance deficiencies were the result of insufficient instructions or training (2ID 25, 40, 51). For these reasons the ALJ concluded that Respondent held Complainant to a less stringent standard of performance with respect to his work and insubordination (2ID 19, 25-27, 35).

In particular, with respect to transferring Complainant to the evening shift over his objections, the ALJ determined that Respondent utilized the same procedure for transferring Complainant to the evening shift that it used to transfer a Caucasian custodian to the day shift over that individual's objections. Similarly, the ALJ found no support for Complainant's claim that Respondent subjected him to differential treatment by failing to comply with certain administrative procedures set forth in N.J.S.A. 18A:27-4.1(a), which require that all transfers be made only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the Board. The ALJ ruled that Respondent did not utilize these procedures because they were not enacted at the time of Complainant's shift change (2ID 50). Based on the entire record, the ALJ concluded Respondent did not subject Complainant to differential treatment with

respect to the terms and conditions of his employment based on his race or disability.

b. Termination of Employment

With specific regard to the charge of unlawful termination, it is undisputed that Complainant was a member of two protected classes in that he is African-American and was a person with a disability at relevant times during his employment. However, the ALJ concluded, based on her detailed findings of fact, that Complainant did not establish proof of a prima facie case of unlawful termination because he did not establish that he performed his job duties in a manner that met Respondent's legitimate expectations. The ALJ also concluded that Complainant failed to show that following his termination the Board filled his position with someone outside of the protected class. For these reasons, the ALJ dismissed Complainant's charges of unlawful race and disability discrimination with respect to the terms and conditions of his employment and with respect to Respondent's termination of his employment.

2. Intentional Discrimination Based on Unlawful Reprisal

In the previously issued order of remand in this matter, the Director determined that Complainant established a prima facie case of unlawful reprisal under the LAD. The Director found that Complainant established that: 1) he engaged in a protected activity which was known by his employer by filing a verified complaint with the Division in March 1993; 2) Respondent thereafter took an adverse action against him by subjecting him to discipline and termination; and 3) the timing of Respondent's adverse actions and Complainant's protected activity raised a rebuttable presumption of a causal connection sufficient to establish prima facie evidence of retaliatory intent in this case. Jamison v.

Rockaway Township Bd. of Educ., 242 N.J. Super. 436, 445 (App. Div. 1990). On remand, the ALJ found that Respondent's evidence rebutted the presumption that Complainant's termination was in retaliation for filing a discrimination complaint. First, the ALJ found that Respondent offered credible testimony that it subjected Complainant to discipline and termination because of his poor performance and insubordination and not because of his protected activity. Second, the ALJ determined that Complainant's testimony and documentary evidence did not establish by a preponderance of the evidence that Respondent's articulated reasons for its adverse employment actions were pretexts for its unlawful retaliatory motives. Indeed, the ALJ noted that Respondent continued to treat Complainant favorably after he filed his initial complaint of discrimination in March 1993, allowing him to leave one hour early every day for a week to address childcare needs, renewing his contract of employment, and issuing a reprimand in July 1993 despite having grounds to suspend him without pay (2ID 43-44). In sum, the ALJ concluded that Complainant did not establish that Respondent acted with retaliatory intent.

3. Failure to Accommodate Complainant's Disability

The ALJ concluded that Respondent accorded Complainant every reasonable accommodation available with respect to his need for restricted duties and time off. The ALJ also concluded that Complainant's "poor performance and unacceptable conduct had nothing to do with his stated disability." (2ID at 51). Specifically, the ALJ concluded that Respondent held Complainant to a lower standard of performance and that Complainant's allegations that Respondent unlawfully assigned him tasks to aggravate his back condition were not supported by the record. Instead, the ALJ found that Respondent advised

Complainant that he should report any concerns he might have about his physical ability to perform any assigned task, but Complainant did not tell Respondent that the disputed tasks were a problem for him because of his disability at the time they were assigned. Further, the ALJ ruled that Respondent acted consistent with its policies when requiring Complainant to produce medical notes after certain absences.

The ALJ additionally concluded that Respondent lawfully and reasonably determined that Complainant could not perform the duties of the day custodian position due to his back injury (2ID 47-49). Specifically, the ALJ noted that, before transferring Complainant, Respondent fully considered whether any reasonable accommodations were available that would enable Complainant to perform his job duties on the day shift. The ALJ also determined that Respondent's decision was based on the medical opinion of a doctor who examined Complainant and considered the job duties of day and evening custodians (2ID 48). Moreover, the ALJ further explained that the decision was reasonable because the day custodian position involved more strenuous physical tasks than the evening position and because Complainant's extensive and erratic absences on the day shift interfered with the proper functioning of the school (2ID 47-48). In particular, the ALJ described Complainant's unpredictable and extensive absenteeism and outlined its impact on the operation of Respondent's middle school. For example, tasks such as setting up bleachers and tables or clearing walkways of snow were often time-sensitive due to the daily needs of the students, such that these and other tasks, such as accepting deliveries, could not be performed timely, effectively, or at all, without both day shift custodians present (2ID 50-51). The ALJ then observed that an employer may lawfully

determine that excessive absenteeism precludes an employee's satisfactory performance of his or her job, even if those absences are related to a disability (2ID 51, citations omitted). In addition, the ALJ noted that Respondent intended the transfer to the evening shift to be temporary, pending Complainant's ability to perform necessary tasks and maintain regular attendance, (2ID 14), and that Respondent offered Complainant an opportunity to discuss the transfer with the Board but he accepted the transfer when he was assured it was temporary (2ID 18, 49). For all these reasons, the ALJ concluded that Complainant failed to establish that Respondent transferred him to the evening shift and terminated his employment based on an unreasonable determination that his disability precluded his performance of his jobs or otherwise failed to accommodate his disability.

IV. THE PARTIES' EXCEPTIONS AND REPLIES

Complainant filed detailed exceptions challenging virtually all of the ALJ's factual findings as unsupported by the record and biased against him and taking particular exception to the ALJ's credibility determinations as unsupported by the record. In reply to Complainant's exceptions Respondent urges the Director to adopt the ALJ's findings because they are based on competent factual evidence and the ALJ's sound evaluation of the demeanor and credibility of the witnesses who testified at the hearing. Respondent additionally notes that much of Complainant's exceptions should be construed as additional testimony and therefore discounted as impermissible.

V. THE DIRECTORS FINDINGS AND DETERMINATIONS

A. The Director's Findings of Fact

In reviewing an ALJ's factual findings, the Director must give substantial weight to the credibility determinations of an ALJ, who has an opportunity to hear the testimony of

the witnesses and assess their credibility. Clowes v. Terminix Intern., Inc., 109 N.J. 575, 587 (1988). This is especially true in this instance, where the ALJ had the opportunity to consider the demeanor of the parties and their witnesses over 40 days of testimony.

Further, in order for an agency head to reach alternate factual findings based on testimony, a specific portion of the transcript relating to the specific disputed fact must be identified as a basis for rendering additional or alternate fact findings, which Complainant has failed to do here. Matter of Morrison, 216 N.J. Super. 143, 157-58 (App. Div. 1987); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Moreover, “the agency head 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. Finally, the rules governing practice and procedure before the OAL do not permit a party to submit new evidence in support of exceptions or replies to an initial decision. N.J.A.C. 1:1-18.4(c). Applying these standards, the Director has reviewed the testimony of the witnesses, paying particular attention to the testimony cited by Complainant in his exceptions as grounds for rejecting the ALJ’s credibility determinations and the factual findings based thereon. The Director is mindful that after observing the parties and their witnesses during nearly 40 days of hearing, the ALJ accepted as true the testimony of Respondent’s decision-makers that their actions and decisions regarding Complainant’s employment were based on non-discriminatory business reasons and consistent with the LAD. The ALJ’s factual findings are consistent with her credibility

determinations and supported by the evidence of record. Furthermore, the exceptions submitted by Complainant do not provide grounds for rejecting the ALJ's findings as "arbitrary, capricious or unreasonable" and do not demonstrate that these findings "are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10. For example, Complainant does not refer to portions of the transcript or documentary evidence of record that warrant rejection of the ALJ's finding that Complainant engaged in the conduct set forth at length in the initial decision. Similarly, the record supports the ALJ's determination that Respondent did not subject Complainant to less favorable treatment than other custodians based on his race, disability or protected activity. Moreover, in this instance, the Director is not persuaded that the ALJ erred in excluding certain evidence or that the additional evidence referred to by Complainant in his exceptions would alter the outcome of this case, given the ALJ's credibility determinations.

Therefore, based on all of the foregoing, the Director adopts the ALJ's findings of facts as set forth herein.

B. The Director's Conclusions of Law

1. Differential Treatment based on Race and Disability

a. Direct Evidence

The ALJ initially determined that the record did not reveal any direct evidence that Respondent acted with discriminatory intent. Direct evidence means evidence of conduct or statements of decision-makers that directly reflects their alleged discriminatory attitudes and is sufficient to establish unlawful intent. Jackson v. Georgia-Pacific Corp., 296 N.J. Super. 1, 19 (App. Div. 1996), cert. denied 149 N.J. 141 (1997). Direct evidence contemplates a case in which “the defendant condemns himself of invidious discrimination out of his own mouth.” Hook v. Ernst & Young, 28 F.3d 366, 374 n. 3 (3d Cir. 1994). Differential treatment, stray remarks of coworkers, and statistical evidence are not generally regarded as direct evidence of discrimination.² Ibid. In this instance, the Director adopts the ALJ's decision that Complainant did not produce direct evidence of discriminatory intent.

b. Indirect Evidence of Differential Treatment Based on Race or Disability

In the absence of direct evidence, a prima facie case of intentional discrimination in the terms and conditions of employment is generally established with proof that a similarly situated individual who is not a member of the protected class is treated more favorably than the complainant. Peper v. Princeton University Bd. of Trustees, 77 N.J. 55,

² In a direct evidence case, the McDonnell Douglas analysis is inapplicable. In such cases, instead of proving the case through circumstantial evidence, the complainant presents direct evidence that the employer acted with unlawful intent. Starceski v. Westinghouse Electric Corp., 54 F. 3d 1089, 1097 (3rd Cir. 1995).

84 (1978); see also, Baxter v. AT&T, 712 F.Supp. 1166, 1173 (D.N.J. 1989) (“Some evidence must be proffered from which [it can be inferred] that ... disparate treatment occurred because of illegal discrimination”).

In this instance, the ALJ determined that Respondent did not subject Complainant to differential treatment as compared to similarly-situated others with respect to standards of performance, discipline, or the nature of his assignments (2ID 40, 41). Witnesses on both sides testified that many of the activities Respondent assigned to Complainant, such as shoveling snow, changing tiles or using scaffolding were required of all custodians. Complainant could not establish through the documentary evidence or the testimony of witnesses, including Black co-workers, that he was treated any differently than Caucasian custodians.

Moreover, in order to transfer Complainant to the evening shift to accommodate his disability, Respondent subjected a Caucasian custodian who was not a person with a disability to involuntary transfer to the day shift (T 12/16/99 p. 29; T 4/17/2000 p.12). Both individuals were transferred through the same administrative process and there is no evidence that Respondent accorded the other custodian more favorable treatment than Complainant with respect to the transfer. Having reviewed the record the Director finds good cause to adopt the ALJ’s conclusion that the evidence does not establish that Respondent subjected Complainant to unlawful differential treatment in the terms and conditions of his employment based on his race or disability.

c. Indirect Evidence of Unlawful Discharge Based on Race or Disability

With respect to wrongful discharge, the Supreme Court of New Jersey has

established that a prima facie case of unlawful termination of employment is established under the LAD with proof that: (1) the complainant is a member of a protected class; (2) the complainant was performing his or her job at a level which met the employer's legitimate expectations; (3) the complainant's employment was terminated despite meeting these expectations; and (4) the employer thereafter sought some other person to perform the same work. Clowes, supra, 109 N.J. at 597. As noted in the Director's order of remand, it was undisputed that Complainant was a member of two protected classes in that he is an African-American and was person with a disability during his employment due to his back injury. Moreover, it is undisputed that Respondent terminated Complainant's employment and sought others to perform his job duties.

On remand, the ALJ concluded that Complainant failed to establish a prima facie case of unlawful termination. First, the ALJ concluded that although Complainant's work performance was acceptable at first, the quality and quantity of his work steadily declined. Complainant was reprimanded on several occasions due to incomplete or neglected work assignments. Complainant's own witnesses testified that they were tired of shouldering the responsibility of carrying out Complainant's assignments (T 7/18/95 p.19, lines 5-16). Based on the entire record, including examples of performance deficiencies and insubordination set forth on pages 20-25 of the initial decision, the ALJ concluded that Complainant failed to meet the legitimate expectations of Respondent and therefore did not establish a prima facie case of unlawful termination. Although the Director accepts the ALJ's underlying factual findings regarding the events described by Respondent, the Director is constrained to modify this legal holding for the following reasons.

The purpose of requiring an aggrieved party to establish the proofs necessary for a prima facie case is to "eliminate the most common nondiscriminatory reasons" for the conduct that the plaintiff claims is discriminatory. Texas Dep't. of Community Affairs v. Burdine, 248, 253 (1981) (citations omitted). With this purpose in mind, the United States Supreme Court and the New Jersey Supreme Court have explained that the burden of establishing a prima facie case of discrimination is "not onerous." Texas Dep't. of Community Affairs v. Burdine, *supra*, 450 U.S. at 253; Peper v. Princeton University Bd. of Trustees, *supra*, 77 N.J. at 81.

In this instance, the evidence relied on by the ALJ to conclude that Complainant failed to establish a prima facie case is clearly persuasive and determinative with respect to the ultimate question of the legitimacy of Respondent's decision to terminate Complainant's employment. However, for the preliminary purpose of establishing a threshold showing of acceptable performance the Director relies on the undisputed evidence that Complainant met the general qualifications for the position of custodian, performed satisfactorily for the first few months of his employment (2ID 44) and that Respondent renewed Complainant's annual contract of employment. For these reasons, the Director concludes that Complainant initially performed his job in a manner that minimally met his employer's expectations for the purpose of establishing a prima facie case of unlawful termination. Clearly, this modification is in no way meant to say that Respondent's reasons for terminating Complainant's employment were unlawful or unsubstantiated, or that Respondent did not have grounds for non-renewal of Complainant's contract for the 1993-94 school year, only that this record establishes that

Complainant performed at level that was sufficient for the limited purpose of establishing a prima facie case and requiring Respondent to articulate a reason for terminating his employment.

Furthermore, the Director additionally modifies the initial decision with respect to the ALJ's determination that the fact that Respondent hired an African-American to fill the vacancy created when Complainant was terminated precludes a finding of prima facie evidence of unlawful termination based on race. It is undisputed that Respondent sought another person to perform Complainant's work after his termination, and this satisfies the fourth prong of the prima facie test. See Clowes v. Terminix International, Inc., supra, 109 N.J. at 597 (citations omitted). It is well settled that the fact that one member of a protected group is not a victim of discrimination does not preclude others in the group from prevailing on a discrimination claim. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 111 (1990), citing Connecticut v. Teal, 457 U.S. 440, 455 (1982) and Catlett v. Missouri Highway & Transp. Common, 828 F.2d 1260, 1266 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988). Accordingly, although the fact that Respondent replaced Complainant with an African-American is probative that race was not a factor in its decision to dismiss Complainant, Respondent's subsequent hire of an African-American does not negate the fact that Respondent sought others to perform Complainant's job duties following his termination and does not preclude a finding that Complainant established a prima facie case of unlawful termination based on race and disability, requiring Respondent to articulate non-discriminatory reasons for its action. For all these reasons, the Director

modifies the initial decision and concludes that the record supports a prima facie case of unlawful termination based on race and disability.

In order to overcome the prima facie case of discriminatory termination, a respondent must articulate some legitimate, non-retaliatory reason for the action. Jamison, supra, 242 NJ Super at 446. If the respondent carries this burden of production, the complainant is then afforded the “opportunity to prove by a preponderance of the evidence that the respondent’s articulated reason was pretextual.” Goodman v. London Metals Exchange., Inc., 86 N.J. 19, 32 (1981).

In this instance, Respondent has clearly articulated non-discriminatory business reasons for terminating Complainant’s employment. There is an overwhelming amount of evidence throughout the record that Complainant did not adequately perform his duties as a custodian. Among other things, Complainant failed to properly put away equipment; remove trash; promptly sweep and vacuum his assigned areas; clean spills that caused a hazardous condition at the school; remove graffiti from school property; properly clean lavatories; and follow direct orders from the principal, Nell Sanders. Moreover, Complainant gave parents tours of the school without obtaining authorization or permission. Instead of improving his performance, Complainant responded to each suggestion or criticism from the administration regarding his work with lengthy correspondence that became increasingly insulting, disrespectful and caustic.

When responding to an employer’s articulated reasons a complainant must do more than posit simple accusations and speculations concerning the facts surrounding the employment discrimination; he or she must present sufficient evidence to allow the trier of

fact to find the articulated reasons were pretextual. Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864-65 (3d Cir. 1986). Since a complainant's proofs of pretextual intent are usually testimonial, the issue of pretext often turns on the credibility of the parties and the parties' witnesses, which is determined by the trier of fact. Jackson v. Univ. of Pittsburgh, 826 F.2d 230, 234 (3d Cir. 1987), cert. den. 484 U.S. 1020 (1988).

In this instance, the ALJ issued express and clear credibility determinations rejecting Complainant's testimony and accepting the accounts of events offered by Respondent's decision-makers. Given these determinations and the evidence proffered in the record as a whole, the Director finds good cause to adopt the the ALJ's conclusion that Respondent terminated Complainant's employment because of his performance and repeated acts of insubordination. The Director finds ample basis in the record to adopt the ALJ's finding that Complainant failed to establish that his race or disability was a motivating factor in Respondent's treatment of Complainant.

2. Unlawful Reprisal

As determined by the Director and explained in the remand order, the record supports a finding of a prima facie case of discriminatory reprisal (R 25-26). This conclusion was based on undisputed evidence that Complainant engaged in the protected activity of filing a complaint with the Division, that Respondent thereafter subjected him to adverse employment decisions and that the proximity in time of the events warranted further inquiry. On remand, Respondent articulated lawful reasons for its adverse employment actions following Complainant's protected activity. These reasons were not

shown to be pretextual and the record did not establish that Respondent took any action against Complainant in unlawful retaliation for his assertion of rights under the LAD. On the contrary, the ALJ noted that Respondent continued to treat Complainant favorably after he filed his initial complaint of discrimination in March 1993, including allowing him to leave one hour early every day for a week to address childcare needs, renewing his contract of employment, and issuing a warning despite having grounds to suspend him without pay. In consideration of this and other evidence discussed above in connection with the charges of unlawful race and disability discrimination, the Director finds good cause to adopt the ALJ's determination that the record does not support a finding of unlawful reprisal.

3. Failure to Accommodate Complainant's Disability

The LAD prohibits employers from denying employment opportunities to people with disabilities unless it can be clearly shown that the nature and extent of a person's disability reasonably precludes his or her performance of the particular employment. N.J.S.A. 10:5-4. -29.1. In the instant case, the Director ruled in his order of remand that Complainant established a prima facie case of unlawful discrimination with respect to the shift transfer since Respondent conceded that Complainant's disability was a determinative factor in this decision. Upon establishment of a prima facie case, the burden of proof shifts to the respondent to prove that it made reasonable decisions regarding whether the employee's disability precluded his or performance of essential job duties. Accordingly, the Director remanded the matter to the ALJ with instructions to render factual conclusions and legal findings regarding whether Respondent reasonably concluded that Complainant's disability

precluded his performance of the essential functions of the day custodian position even with accommodation or if Respondent failed to reasonably accommodate Complainant's disability in any other way, such as with respect to discipline or assignments (RO 37-41).

Complainant was excused from work for his bulging disc condition on several occasions by his physician, Dr. Murray, who advised that Complainant should avoid "lifting, shoveling or any straining" (Exhibit C- 89; see also C-23, C-88, C-90, and C-92). Further, Dr. Joseph Andolino, Respondent's workers compensation physician, issued a notice on March 4, 1993, that Complainant was "totally incapacitated" and should remain out of work until March 25, 1993 (Exhibit C-40 and C-62 (same document)). In light of these restrictions, Business Administrator Haberthur discussed the duties and responsibilities of each shift and Complainant's physical limitations with Dr. Andolino and other staff members, and then determined that it was necessary to transfer Complainant to the evening shift to enable him to perform his job duties as a custodian (T 9/26/2000 p.46 line 18 - p.48 line 7).

In reaching this decision, Respondent relied on Dr. Andolino's opinion that Complainant could not perform the duties of the day custodian but could perform the duties of a night shift custodian, (T 4/17/00 p.116), and on medical notes submitted by Complainant that indicated he could not perform "the full duties of a day-shift custodian." (ID at 10). The duties of the day shift differed from those of the evening shift. The day shift consisted of physically demanding tasks that required lifting and exertion, such as shoveling snow and unloading trucks, while the evening shift involved mostly cleaning duties like sweeping, mopping and wiping blackboards (Er 4; 2ID 10) Another difference

between the shifts was that students and employees were present during the day, so certain tasks had to be performed immediately due to health and safety concerns or in accordance with activities scheduled during school hours. Given the physicality and time-sensitive nature of the duties of the day shift, as well as the number of custodians available on the respective shifts, the Director concludes that Respondent reasonably decided that the change in shift was an appropriate accommodation to Complainant's limitations, and lawfully implemented the accommodation proposed by Business Administrator Haberthur and approved by Dr. Andolino.

The Director is mindful that Complainant communicated extensively with the principal and superintendent of schools regarding the details of his job duties and performance but did not suggest an alternate manner in which he could perform the essential functions of the day shift position within his medical restrictions. Moreover, although Complainant initially protested the shift change, he did not suggest any alternate accommodations other than the elimination of certain duties (Er 1). Furthermore, when Complainant was told that the transfer was temporary, he no longer opposed the action and stated that further discussion of the matter was not necessary (Ec 221; T 9/26/2000 p. 66 line 17- p.67 line 13). For all these reasons, the Director concludes that, faced with Complainant's inability to perform certain essential day shift tasks, Respondent conducted an individualized assessment of Complainant's abilities, limitations and job duties and reasonably decided that transferring Complainant to the evening shift would be an appropriate accommodation that would enable him to perform his essential job duties as

a custodian.

There is no other evidence that Respondent acted unlawfully with respect to Complainant's disability or otherwise failed to meet any obligations under the LAD with respect to accommodating Complainant's stated disability. The Director has adopted the ALJ's finding that Complainant's performance problems and much of his absenteeism were unrelated to his stated disability. Accordingly, the Director concludes that the circumstances did not trigger any obligation on Respondent's part to consider any additional accommodation of Complainant's performance problems or absences beyond those accorded throughout Complainant's employment. In sum, the Director finds no reason in the record to reject the ALJ's determination that Respondent acted reasonably with respect to the transfer and did not otherwise act to discriminate against Complainant on the basis of his disability in violation of the LAD.

V. ORDER

Based on all of the above, the Director finds good cause to adopt the ALJ's conclusion that Complainant failed to prove that Respondent subjected him to unlawful discrimination based on race, disability or reprisal in violation of the LAD. Therefore, the Director adopts the the ALJ's initial decision dismissing the consolidated complaints.

DATE

JFVP:SSG:VY:

/signed/
J. FRANK VESPA-PAPLEO
DIRECTOR