COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

WILLIAM ANDERSON, JR. and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Complainants

v. DOCKET NO. 08-SEM-00376

UNITED PARCEL SERVICE,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant, William Anderson, issued on March 18, 2010. Following a full evidentiary Public Hearing, during which seven witnesses testified, the Hearing Officer concluded that Respondent violated G.L. c. 151B and was liable for unlawful discrimination and constructive discharge. The Hearing Officer found that Respondent failed to accommodate Complainant's disability and that he was constructively discharged from his job when he was forced to commence an unpaid leave of absence. The Hearing Officer awarded Complainant back pay and front pay, as well as $125,000 in damages for emotional distress with interest thereon. On April 2, 2010, the Hearing Officer amended the decision to exclude pre-judgment interest on the front pay award.

Respondent appealed to the Full Commission, filing its Petition for Review on April 22, 2010. Respondent asserts that the Hearing Officer erred as a matter of law in concluding that Respondent was liable for discrimination and constructive discharge.

Respondent also challenges the Hearing Officer's awards of front pay, emotional distress damages, and the assessment of interest on the damage awards at the rate of twelve percent. We concur in part with Respondent's argument regarding the award of front pay as discussed below, but otherwise find no grounds to upset the remainder of the Hearing Officer's decision.

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "….such evidence as a reasonable mind might accept as adequate to support a finding…" School Comm. of Brockton v. MCAD, 423 Mass. 7, 11 (1996); Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A. We find that the Hearing Officer's findings were supported by such evidence, and defer to her detailed findings.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Comm. of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 M.D.L.R. 1007, 1011 (1982). The Full Commission must determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

I. THERE WAS NO ERROR IN THE HEARING OFFICER'S CONCLUSION THAT COMPLAINANT WAS A QUALIFIED HANDICAPPED PERSON.

Respondent, United Parcel Service ("UPS"), challenges the Hearing Officer's conclusion that it is liable for discrimination on the basis of disability. Specifically, UPS argues that the Hearing Officer erred as a matter of law in finding that Complainant, William Anderson ("Mr. Anderson"), was a "qualified handicapped person," because he allegedly could not perform the essential functions of a particular position with or without a reasonable accommodation. At the same time, UPS claims that the Hearing Officer erred in finding that Mr. Anderson's bipolar disorder substantially limited his ability to work, arguing that UPS did not have sufficient information to determine that he was disabled. UPS asserts that Mr. Anderson's limitation that he not regularly work more than a nine- hour day, five-days per week, meant he was still capable of working a 45 hour work week and therefore he was not substantially limited in his ability to work. UPS argues further that because Complainant was not precluded from performing a broad class of jobs, he should not be deemed disabled. For the reasons stated below we find that there was sufficient evidence to show that Mr. Anderson was a "qualified handicapped person" and that his bipolar condition substantially limited his ability to work.

UPS asserts that the Hearing Officer's decision must be reversed due to her incorrect finding that Complainant was a qualified handicapped person capable of performing the essential functions of the job. Central to UPS's appeal is the contention that the focus of any analysis as to whether one is a "qualified handicapped person" entitled to the protection of G.L. c. 151B, is solely upon whether the employee can

perform the duties of the position held by him at the time the accommodation is requested. It asserts that the Hearing Officer improperly considered whether Mr. Anderson could perform the duties of other vacant positions. UPS argues that because Complainant requested an accommodation in his position as pre-load manager on the night shift, and sought a transfer to a daytime supervisory, less stressful position, the Hearing Officer should have concluded that Mr. Anderson was not a "qualified handicapped person." This argument conflates the analysis as to whether a requested accommodation is unreasonable with the initial determination as to whether a person is a "qualified handicapped person" entitled to the protection of G.L. c. 151B. It also fails to recognize the individualized factual inquiry associated with determining whether an individual is such a person. See Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 637 (2004); Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443 (2002) (even where plaintiff received benefits based on assertion of total disability disputed issue of fact remained whether plaintiff able to perform the essential functions of the job). The Hearing Officer in this case had substantial evidence to support her conclusion that Mr. Anderson was a "qualified handicapped person."

Respondent's interpretation of "qualified handicapped person" and what constitutes a disability fails to recognize the broad presumption in favor of finding individuals disabled both under state and federal law. Consistent with the Legislature's directive that the provisions of G.L. c. 151B shall "be construed liberally' to effectuate the remedial purposes of the statute, the Commission has traditionally interpreted the definition of handicap broadly to afford protections for those employees who have suffered impairments that affect their ability to do their jobs but who are still capable of

carrying out the essential functions of the job. G.L. c. 151B, s. 9. See Dahill v. Police Dept't of Boston, 434 Mass. 233, 240 (2001). This liberal interpretation of G.L. c.151B is also consistent with Congress's intent in its amendments to the Americans with Disabilities Act (ADA) and regulations interpreting the ADA Amendments Act of 2008. See 29 CFR 1630.1 ("The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination occurred, not whether the individual meets the definition of disability.").

The Commission's interpretation of the handicap provisions of G.L. c. 151B has been consistent with this approach as have Massachusetts courts. See Dahill, supra. (defining disability more broadly and declining to adopt the holding in *Sutton v. United Airlines, Inc.* 527 U.S. 471 (1999) that if impairment is corrected or mitigated by measures such as medication or eye glasses, the employee may not be deemed disabled) The Supreme Judicial Court has emphasized that "[G.L.] c. 151B anticipates that determining whether a person is a 'handicapped person' will be an individualized inquiry…Per se rules are to be avoided. Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632 at 637 (2004). Whether an impairment substantially limits a major life function turns on factors including the nature and severity of the impairment, the duration of the impairment, and its permanent and long-term impact. See, School Committee of Norton v. MCAD, 63 Mass. App. Ct. 839, 844 (2005).

Mr. Anderson began working for UPS in 1986, and successfully held a variety of job assignments for the company at the request of management. In 2005, he was diagnosed with bipolar illness. He was hospitalized twice in 2005, and took a medical leave from UPS for approximately seven months in 2005, receiving short-term disability

benefits during his leave. Mr. Anderson received electroconvulsive therapy ("shock treatment") on several occasions, and was hospitalized several additional times between 2005 and 2007 for severe depression. Mr. Anderson sought to continue to work with these mental disabilities by obtaining an accommodation from UPS. As discussed further below, rather than engaging in any interactive dialogue, UPS incredibly determined that his bipolar illness was not a disability and conducted no further analysis of how Mr. Anderson could continue to work for UPS.

Following Mr. Anderson's authorized medical leave in 2005, from January 2006 to January 2007 he was assigned to Hartford, Connecticut as a pre-load manager and then as a hub manager. In January of 2007, Mr. Anderson was assigned to the night shift in Springfield, Massachusetts as the pre-load manager. The stress of Mr. Anderson's position as pre-load manager during the night shift exacerbated his bipolar condition. In April of 2007, Mr. Anderson requested that he be permitted to step down from his pre-load manager position, to a daytime supervisory position to manage his chronic bipolar illness.

Instead of engaging in an interactive dialogue to accommodate his disability, UPS provided him with "ADA paperwork" to be sent to a company review committee to determine whether he met the requirements for a recognized disability under the ADA. On May 8, 2007 UPS's company review committee provided a Request for Medical Information form to be completed by Mr. Anderson's physician. (Joint Exhibit 4.) On May 14, 2007, Mr. Anderson began a personal, unpaid leave of absence from his job as pre-load manager. Mr. Anderson's treating psychiatrist provided information concerning his medical condition on May 14, 17 and 18, 2007. (Joint Exhibits 5, 6 and 7) The

psychiatrist also informed UPS that the Complainant would be able to perform the essential job functions of Supervisors/Managers with the requested accommodations. Although the review committee recognized that Complainant had bipolar illness, it determined that because Mr. Anderson represented he was able to work a regular schedule at a less stressful position, during daytime rather than at night, he was not disabled within the meaning of the law. The review committee did not explore whether there was a job that Mr. Anderson could have performed with his medical restrictions. Nor did the review committee speak with Mr. Anderson. At public hearing, UPS acknowledged that there were daytime positions available which could have been performed on a nine-hour per day, five-day a week basis. However, because the review committee determined that Mr. Anderson was not disabled within the meaning of the ADA, UPS notified him that he was "not eligible for a reasonable accommodation under applicable law" and failed to engage in any constructive discussion which would permit him to work at UPS.

Respondent seeks to impose an overly restrictive definition of disability that focuses solely on Complainant's ability to work and fails to consider his diagnosis of bi-polar depression and anxiety disorder which caused him to seek a number of leaves from work in the past. Respondent also refuses to acknowledge the evidence before the Hearing Officer that the stress of his long hours and responsibilities as a pre-load manager working nights exacerbated his bipolar disorder causing his mental and emotional health to deteriorate and resulting in bouts of depression and insomnia that left him forgetful, withdrawn, tired and lethargic. The Hearing Officer noted that Complainant was hindered not only in his ability to work, as evidenced by his repeated

medical leaves, but also in other major life activities. She noted that Complainant's bipolar depression and anxiety disorder causes him to suffer panic attacks, fatigue, decreased energy, inability to concentrate, difficulty sleeping, and suicidal feelings. His illness has an adverse impact on his cognitive functions and on his interpersonal relationships. Given these circumstances, the Hearing Officer properly concluded that Complainant was disabled under the law.

Respondent claims that the Hearing Officer's decision is contrary to the Commission's decision in Luster v. MCAD, 34 M.D.L.R. 71 (2012) where we held that the employer was justified in denying the employee's request for an accommodation where the employee was not able to perform the essential functions of his job with the sought-after accommodation. In Luster, the employer presented evidence describing seven "essential functions" of the job, with five involving direct inmate contact. One of the accommodations sought by the employee was to be indefinitely excused from inmate contact; which would be required in five of the essential functions. We recognized that the evidence showed that inmate contact was required for inmate care and supervision – the primary duty of the employee. Accordingly, the employee was not a "qualified handicapped person" within the meaning of M.G.L. c. 151B because the required accommodation would not permit him to perform the essential functions of his position. In this case, however, the Hearing Officer had substantial evidence to conclude that Complainant did not seek an accommodation which would prevent him from meeting the essential job functions of his position. See e.g., Joint Exhibit 18 (UPS Description of Essential Job Functions for Operations Supervisor/Manager) and Joint Exhibit 20 (Letter to UPS of Kenneth Jaffee, M.D. March 27, 2008). As discussed further below,

Complainant provided evidence and testimony as to his ability to perform the essential functions of his job with reasonable accommodation.

Respondent also challenges the Hearing Officer's conclusion that Respondent had sufficient information to determine whether or not Complainant was handicapped. It argues that an employer cannot be held liable if it lacked information about Complainant's disability at the time it made the employment decision. Respondent states that the only information Complainant presented to the employer was regarding his work restrictions, and that this was not sufficient information from which to make a determination that Complainant was disabled.

In support of this argument, Respondent states that Complainant's physician failed to complete the Medical Information Questionnaire and Respondent was not provided with information regarding what, if any, of Complainant's major life activities, beyond working were affected by the bipolar illness. However, the evidence demonstrates that Respondent was well aware of Complainant's bipolar condition and knew that he received electro-shock therapy for his condition. UPS was also aware that Mr. Anderson felt that the bipolar condition was affecting him both at work and at home with his family. See, Respondent's Exhibit 1 (File Memorandum from Manager Don Richardson updated 5/16/07). The evid**e**nce also demonstrates that while Complainant's psychiatrist did not fill out the UPS medical questionnaire in the form requested, the psychiatrist wrote a letter to Complainant's supervisor, advising him that Complainant was in treatment for bipolar illness. He also sent a letter to the director of the Human Resources department detailing Complainant's symptoms of increased anxiety and depression exacerbated by his having to work 12-hour days and 60-hour weeks. In

addition, in August 2007 Complainant's physician provided both UPS and Aetna Insurance with medical documentation of his condition, faxed office notes to Respondent's Occupational Health Nurse, spoke to Aetna's Dr. Mendelsohn "at length" about Complainant's condition, notified Respondent of Complainant's diagnosis, provided a history of his hospitalizations, and provided a detailed description of his symptoms of crying spells, difficulty concentrating, poor sleep, low energy, irritability and panic attacks. Given this evidence, the Hearing Officer properly discounted Respondent's assertion that it did not have sufficient information to determine if Complainant was disabled. The evidence demonstrated that Respondent had been given ample information to conclude that Complainant's illness caused him to be impaired in a number of major life activities, including the ability think and concentrate normally, and that he was limited not only in his ability to work. We therefore reject Respondent's argument that it was without sufficient information to determine whether Complainant was disabled at the time he sought an accommodation.

II. THERE WAS NO ERROR IN THE HEARING OFFICER'S DETERMINATION THAT UPS FAILED TO ACCOMMODATE COMPLAINANT'S DISABILITY RESULTING IN HIS CONSTRUCTIVE DISCHARGE.

Once the employee meets his burden of producing evidence that an accommodation would allow him to perform the essential functions of the position, both the burden of production and persuasion shift to the employer to establish that the suggested accommodation would impose an undue hardship. Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 120 (2010). The Hearing Officer had sufficient evidence to support her conclusion that Complainant met his burden of production. Mr. Anderson produced evidence showing that a shift change and relinquishing excessively

stressful duties would permit him to perform the essential functions of particular job assignments he had already successfully held. Unlike the employee in Godfrey, the Hearing Officer properly found that Mr. Anderson did not seek the removal of an essential function of any of the available positions he sought.

The Hearing Officer acknowledged that the transfer of an employee from one position to another is generally not required as a reasonable accommodation. Respondent argues that it was under no legal obligation to transfer an employee or create a new position. However, the Hearing Officer determined that such an accommodation was reasonable given the size of the employer, the many available positions Complainant could perform and the fact that it routinely transferred employees in and out of different positions to meet it needs. The Hearing Officer specifically determined that Respondent's "frequent and routine transfers of managerial and supervisory employees at the discretion of the company makes a job transfer to a daytime position with less stress and fewer hours a reasonable accommodation." She found it was commonplace at Respondent's workplace to move employees around from job to job within the same general category of positions.

It was undisputed that Complainant had performed in a variety of positions over the course of his employment with Respondent and that these assignments ranged from lower-level to managerial positions. Complainant had *already* performed several of the jobs to which he requested a transfer in a satisfactory manner. Indeed, he was assigned to the position of night shift pre-load manager only in January 2007 at Respondent's behest, after performing competently at numerous other jobs. Complainant's request to be accommodated by transferring to a lower level position was not inconsistent with

Respondent's long-standing routine practice of moving employees. There was no representation that Complainant's was not qualified to do the jobs he identified or that transferring him would have had a discernable negative impact on its business.

Respondent asserts that the Hearing Officer's ruling runs contrary to the holding of Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443 (2002). In Russell, the court rejected the claim of an injured employee whose medical limitations were such that there was no available full-time position for her to perform. The employee sought to combine different parts or different jobs into a new job which she could perform, and the hospital refused. The court held that "[t] hospital was under no obligation to create a new position for the plaintiff." Russell at 454. In this case, Complainant was not asking Respondent to create a new position. He was requesting consideration for a transfer to open, available positions for which he was clearly qualified. [1] Such an accommodation falls within the Commission's Guidelines in Employment on the Basis of Handicap, which provide that "reassignment or transfer to a vacant position" is a reasonable accommodation. Respondent argues that footnote 5 of the Guidelines restrict the obligation to transfer to situations where the transfer is "within the same job category." In this case, the Hearing Officer specifically found that Complainant sought to be transferred to a position that was within the same job category as the one he had been performing, as the positions he identified fell within Respondent's own "generic job description for managerial/supervisory positions."

Respondent asserts that Hearing Officer's ruling contravenes the holding of Fiumara v. Harvard University, 526 F. Supp. 2d 150 (D. Mass. 2007). We find no error

[1] Indeed, it appears that UPS at one point considered placing Complainant in an open supervisory position with less responsibility to respond to his request for an accommodation. See, Complainant's Exhibits 6A and 6B. Regrettably, UPS abandoned this solution.

of law in the Hearing Officer's analysis of Fiumara. The accommodation sought in Fiumara for a different position was deemed unreasonable because the alternative position required different training and qualifications, which the plaintiff did not possess, and the plaintiff "was not an eligible bidder for the van job" under the applicable collective bargaining agreement. Id. at 157. In contrast in this case, the Hearing Officer determined that no such impediments existed where Complainant was clearly qualified for the positions he sought, and the jobs were in the same general category as the pre-load manager job. The Hearing Officer also properly relied on the case of Kane, et.al v. Suffolk County Sheriff's Dept., 20 M.D.L.R. 135 (1998) where injured corrections officers' reassignments to positions with minimal inmate contact and less stringent physical requirements were recognized as feasible accommodations. The Hearing Officer found that like the employees in Kane, the accommodation Complainant sought was more akin to different working conditions within the same job category rather than a transfer to a completely different job requiring different training and qualifications.

Respondent's claim that there was no evidence that there were any positions at UPS that Mr. Anderson could have performed given his restrictions is belied by the Hearing Officer's findings. Complainant identified specific positions, several of which he had held previously, that would have been appropriate. The Hearing Officer concluded that: "Because the evidence indicates that Complainant had the necessary qualifications and could have functioned successfully in a variety of daytime supervisory positions, he is entitled to consideration as a qualified handicapped person at the time he requested an accommodation." Given these unique circumstances and Respondent's

well-established practices regarding transfers, the Hearing Officer's determination that the sought-after transfer was reasonable is supported by the evidence.

Respondent rejects the conclusion that it had a duty to grant Complainant any accommodation and challenges the finding that Complainant could have performed adequately in the positions he identified, arguing that his medical restrictions rendered him unable to perform the essential functions of any open position. According to Respondent, the positions identified by Complainant as reasonable alternatives required more than 45 hours per week, three of them required night work, and all of the positions, save one, were in operations. It argues that to facilitate Complainant's request for a transfer to one of the available positions, it would have had to eliminate essential functions of the job, something that is not obligated to do under the law. This argument discounts Complainant's acknowledgment that he could work beyond nine hours if required to do so by unusual or extraordinary circumstances, and that he could work nights occasionally, so long as this was not his regular schedule. It also reflects Respondent's failure to engage in a flexible, interactive process involving Mr. Anderson.

The Hearing Officer recognized that Complainant's physician had reviewed the list of Essential Job Functions' for Supervisors/Managers provided by Respondent and, in his view, Complainant could perform these functions if he received the requested accommodations. See, Joint Exhibit 20 (Letter to UPS of Kenneth Jaffee, M.D. March 27, 2008). Complainant identified a number of other capacities he could work in, including any of the following non-managerial positions: on-road supervisor, health and safety supervisor, CHSP supervisor, Human Resources representative, employment supervisor (i.e., workforce planning supervisor), and training supervisor, any number of

which he had performed and where the stress level was significantly lower that in his night shift pre-load manager position.

UPS failed to respond or consider any of these suggestions, remaining inflexible and refusing even to engage in a dialogue with Complainant to determine if any of the identified positions would have been workable because it had previously determined that Mr. Anderson was not disabled with the meaning of the ADA. Since Respondent failed to consider whether Complainant could perform the essential functions of the identified positions, its assertion that any accommodation would have been utterly futile, even in the face of Complainant's ample flexibility as to his restrictions, is unconvincing. This is particularly so given the testimony of Respondent's Northeast Regional Occupational Health Manager, Valerie Ballowe, that she did not explore whether there was a job Complainant could have performed with his medical restrictions, and her admission that there were daytime positions that conformed to Complainant's schedule restrictions. Instead, her role was limited to determining whether or not disability status would be recognized. Only if such a status was recognized would the Respondent engage in an interactive dialogue concerning reasonable accommodations. The Respondent did not meet its obligation to engage in an interactive dialogue with Mr. Anderson. See, Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 649 (2004) (employer obligated to engage in interactive process upon employee's request for accommodation). The Hearing Officer properly determined that UPS failed to meet its burden to show that the Complainant's requests constituted an undue hardship.

Finally, Respondent appealed the Hearing Officer's conclusion that Complainant was constructively discharged. It asserts that Complainant did not allege or offer

evidence that he experienced a hostile work environment, or that he was abused or harassed by co-workers. While constructive discharge may result from a hostile work environment or abuse and harassment by co-workers, these elements are not prerequisites for a constructive discharge case. The standard for constructive discharge requires the employee to prove only that his working conditions were so intolerable that a reasonable person in his position would have felt compelled to resign. A constructive discharge occurs when the employer's conduct effectively forces an employee to resign. GTE Prods. Corp. v. Stewart, 421 Mass. 22, 33- 34 (1995). Here, the Hearing Officer found that Complainant's working conditions became intolerable, because Respondent refused to address in any meaningful way that his job of night shift pre-load manager was impossible for him to continue in because of his bipolar disorder and depression or to address his need for an accommodation. Although Complainant sought accommodation repeatedly both personally and through his physician and attorney, his entreaties were ignored and he remained unable to work the night-shift as a pre-load manager. When he remained unable to work, UPS officially terminated Mr. Anderson on July 28, 2008. Given these circumstances, the Hearing Officer's conclusion that Complainant "had no choice but to leave his job," and was compelled to do so, is sufficient proof of constructive discharge.

III. THE COMPLAINANT'S AWARD OF FRONT PAY DAMAGES IS REDUCED TO PRESENT VALUE, AWARD OF EMOTIONAL DISTRESS DAMAGES SUPPORTED BY SUBSTANTIAL EVIDENCE AND AWARD OF INTEREST ON COMPENSATORY DAMAGES IS APPROPRIATE.

Respondent appeals the Hearing Officer's award of front pay damages. Respondent asserts that the award of sixteen years of front pay was improperly speculative and constituted and a windfall for Complainant. The award of front pay was

based on findings that Complainant would have continued to work for Respondent but for the discrimination, and that given his age, years of service, his educational level and the fact that he had risen through the ranks at Respondent, it was highly unlikely that he would ever find comparable work at a similar level and rate of pay elsewhere. See Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91 (2009). The Hearing Officer found that Complainant was 49 years old when he left Respondent, had worked there for twenty-one years, and would have remained employed there until he retired at 65. Given these factors and Complainant's high school education, she concluded that he would likely never duplicate his position and salary at another employer. The Hearing Officer had sufficient evidence to support and develop her earning calculation. She recognized that the average pay for a daytime supervisory position at UPS would be less than the amount Mr. Anderson earned in his night time position as a pre-load manager. She properly reduced the lost earnings by the amount Mr. Anderson could earn if he continued at the position he obtained as assistant store manager of a hardware store. Given these circumstances we conclude that the Hearing Officer's award of front pay was warranted and proper.

Respondent also contends that the Hearing Officer erred in failing to attach a discount rate to the award of front pay, so as to determine the present value of a future income stream. While acknowledging that "front pay damages are based on the present discounted value of the income stream," the Hearing Officer noted that the parties presented no expert testimony on this issue. Absent evidence in the record to support a discounting, she based her award on the numbers before her. We hold, however, that the Hearing Officer should have applied a discount rate to the front pay award to reflect

present value. See, Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 104 (2009) (approving jury instructions on front pay award where award was properly discounted to present value); Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) (remanding case for consideration as to discount rate to reduce award for loss of future earnings to present value under Longshoremen's and Harbor Worker's Compensation Act). Since neither party provided testimony on the appropriate discount rate, we take notice of and apply the discount rate of 5.7% which was determined after the review of substantial testimony in another Commission proceeding. St. Marie v. ISO New England, Inc., 31 M.D.L.R. 123 (Aug. 14, 2009). The application of this discount rate reduces Complainant's front pay award to $306,355.33.[2]

Respondent also challenges the Hearing Officer's award of damages for emotional distress, as excessive and not supported by substantial evidence. We conclude that the award was based on substantial evidence presented by Complainant and corroborating witnesses and meets the standards articulated in Stonehill College v. MCAD, 441 Mass. 549 (2004). The Hearing Officer specifically credited Complainant's

[2] $PV=FV/(1+i)^n$. FV (future damages = 603,520) is the amount due over *n* years (number of years until retirement from date of public hearing (16.25) less number of years to Full Commission decision (4) = 12.25.) and *i* is the market interest rate (5.7%). Using the method outlined in Jones & Laughlin Steel Corp., at 537, n. 21 and the Hearing Officer's findings, the calculation is:

$PV=603,520/(1+.057)^{12,25}$

$PV=603,520/(1.057)^{12.25}$

$PV=603,520/1.97$

$PV=306,355.33$

testimony that he was devastated by Respondent's refusal to accommodate his disability, having devoted some 20+ years of service to the company and rising from entry level to management over the years with a strong record of achievement. She found that Complainant was exceedingly proud of his progress and tenure with the company and felt exceedingly hurt and disrespected by Respondent--in his words-- "kicked to the curb." The Hearing Officer credited additional testimony from Complainant's wife that he was devastated by Respondent's actions. His psychiatrist, Dr. Jaffe, testified that the refusal to accommodate Complainant and the loss of his job and his career at Respondent affected his bipolar condition in a "major way." We conclude that the evidence supports the award of $125,000 in damages for emotional distress to compensate Complainant for the significant emotional pain and suffering he experienced from the loss of his job and long-standing career at Respondent.

Finally, Respondent contends that the Hearing Officer erred in assessing interest on the damage awards at the rate of 12% per annum and that the rate is punitive. We concur that interest should not have been awarded on the front pay damages, but recognize that the Hearing Officer specifically amended the order to exclude pre-judgment interest on the front pay award. This amendment was appropriate because the purpose of interest is to "compensate a damaged party for the loss of use or the unlawful detention of money." Conway v. Electro Switch Corp., 402 Mass. 385, 390 (1988) "There is no justification for adding interest to damages which, by definition, are for losses to be incurred in the future." Id.; See also DeRoche v. MCAD, 447 Mass 1 (2006) (Complainant not entitled to pre-judgment interest on front pay award). As to the remaining damage awards, this argument is without merit. Interest is routinely assessed

at 12% per annum as a matter of course on Commission awards of back pay and emotional distress damages both to compensate Complainant for the loss of use of the money and to promote the eradication of discrimination. See, Id. at 15 (upholding award of interest at rate of 12%).

IV. THE U.S. DISTRICT COURT SUMMARY JUDGMENT DECISION ISSUED AFTER THE FULL PUBLIC HEARING AND HEARING OFFICER'S DECISION DOES NOT HAVE PRECLUSIVE EFFECT UPON THE COMMISSION.

Following the Hearing Officer's decision of March 16, 2010, a separate federal complaint was filed by Complainant claiming that UPS discriminated against Mr. Anderson under the ADA.[3] The MCAD was not a party to the subsequent federal court proceeding. The U.S. District Court of Massachusetts (J. Woodlock) issued a summary judgment decision in favor of Respondent primarily based on excerpts of the transcript from the public hearing and affidavits filed by UPS. (March 29, 2012). The affidavits in the U.S. District Court proceeding were not part of the Public Hearing at the Commission.[4] Instead, the Hearing Officer had the benefit of witnesses' live testimony presented by Respondent and Complainant and made her own credibility determinations. Affidavits which were submitted by UPS to counter evidence presented through direct and cross-examination at the Public Hearing do not form the basis of the Hearing Officer's decision. As described above, we defer to the Hearing Officer's detailed findings where we have determined that the findings are supported by substantial evidence. We also defer to her credibility determinations regarding the witnesses at the

[3] Complainant received a notice of right to sue from the Equal Employment Opportunity Commission relating to the ADA claim, leading to the filing of the federal complaint.

[4] We note that the U.S. District Court considered but struck an affidavit and other evidence filed by Complainant as not part of the summary judgment record. In contrast, at the end of the public hearing, the Hearing Officer provided Respondent with the opportunity to present additional evidence, which it declined. Transcript of Hearing, November 10, 2009 pp. 450 - 451.

Public Hearing. We do not consider affidavits filed in the U.S. District Court following the Public Hearing as part of the record for review by the Full Commission.

Respondent argues that the U.S. District Court decision issued subsequent to the Hearing Officer's decision "collateral (sic) estopps (sic) the Commission from finding that Mr. Anderson was qualified to be transferred." Respondent's Supplemental Memorandum in Support of its Petition for Review, April 5, 2012, page 2.

The subsequent federal court decision does not meet the requirements for issue preclusion to result in preclusive effect upon the Full Commission's decision.

> The doctrine of issue preclusion prevents relitigation of an issue determined in an earlier action when the same issue arises in a later action, based on a different claim, between the same parties or their privies, and the determination was essential to the decision in the earlier action." Salem v. Massachusetts Commn. Against Discrimination, 44 Mass.App.Ct. 627, 639, 693 N.E.2d 1026 (1998). Issue preclusion, as most recently articulated, provides that "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Alba v. Raytheon Co., 441 Mass. at 841, 809 N.E.2d 516, quoting from Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 372, 479 N.E.2d 1386 (1985). See Restatement (Second) of Judgments § 27 (1982)

Day v. Kerkorian**,** 61 Mass.App.Ct. 804, 808-809 (2004). The federal court action was a later action; the Hearing Officer's decision which we review as the Full Commission preceded the summary judgment motion and ruling. The MCAD, a party to this proceeding, was not a party to the federal court proceeding. Instead, only the Complainant and Respondent were parties to the later action. The federal court decision is not a final judgment, but instead is subject to an appeal at the U.S. First Circuit Court of Appeals. [5] Our task as the Full Commission is to review the decision of the Hearing

[5] In contrast, an argument can be made that issues determined by the Hearing Officer's decision under M.G.L. c.151B should have a preclusive affect upon the U.S. District Court determination. Cf., Brunson v. Wall, 405 Mass. 446 (1989) (unreviewed MCAD decision given preclusive effect to plaintiff's G.L. c.151B

Officer; not to review or accept the subsequent decision of the U.S. District Court. 804 C.M.R. 1.23.

In sum, we have carefully reviewed Respondent's Petition and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated therein and conclude that there are no material errors of fact or law, except with respect to the failure to discount the front pay award. The Hearing Officer's findings are supported by substantial evidence in the record. We therefore deny the appeal, except with respect to the front pay award.

V. COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS IS ALLOWED.

Having affirmed the Hearing Officer's decision in favor of Complainant we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5. The determination of what constitutes a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the litigation and of the time and resources required to litigate a claim of discrimination in the administrative forum. In reaching a determination of what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 M.D.L.R. 1097 (1992). This method requires the Commission to undertake a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then

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and civil rights claims). As the U.S. District Court recognized, "The MCAD is binding for purposes of 151B perhaps and perhaps only after a superior court has ratified it. I don't know enough about the res judicata, except to know that it doesn't bind me for purposes of the ADA." Transcript of U.S. District Court Motion Hearing, October 27, 2011, p. 29.

multiplies that number by an hourly rate considered to be reasonable. Second, the Commission examines the resulting figure, known as the "lodestar", and may adjust it upward or downward or determines that no adjustment is warranted depending on various factors, including the complexity of the matter.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding all hours expended by all personnel. The Commission carefully reviews the Complainant's submission and does not simply accept the proffered number of hours as "reasonable." See, e.g., Baird v. Bellotti, 616 F. Supp. 6 (D. Mass. 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Brown v. City of Salem, 14 M.D.L.R. 1365 (1992). Only those hours that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of $90,690.00 and costs in the amount of $8,273.16. The Petition is supported by detailed time records showing hours expended by individual time-keepers and counsel's affidavit. The Petition also includes a detailed description of the costs incurred to support the matter. Having reviewed the contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal work that is duplicative, excessive,

unproductive, or otherwise unnecessary to the prosecution of the claim. Nor does the Petition include the time required to prepare supplemental briefs to respond to various supplemental submissions by the Respondent in its appeal to the Full Commission. We further conclude that Complainant's attorneys' hourly rates are consistent with rates customarily charged by attorneys with comparable expertise in such cases and are within the range of rates charged by attorneys in the area with similar experience. We also find that the costs requested by Complainant are adequately documented and reasonable.

Respondent claims that the Commission "has repeatedly held" that time spent on preparing a Fee Petition is not recoverable. Respondent is incorrect. The Commission will award such fees provided the fees are reasonable. Abdur-Rashid v. Clair Toyota, 24 M.D.L.R. 39 (2002) (awarding attorneys' fees for fee petition, but reducing for unreasonable time spent preparing the petition); cf. DeRoche v. Town of Wakefield, et al., 29 M.D.L.R. 132 (2007) (awarding supplemental attorneys' fees for time spent defending Respondent's appeal but declining to award additional fees for supplemental fee petition). The Commission's position with respect to the award of attorney fees for preparing a fee petition is consistent with both its own jurisprudence and federal law. Lurd v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978) (recognizing inconsistent with Fees Act associated with 42 U.S.C. §1983 to refuse to compensate attorney for time reasonably spent establishing rightful claim to the fee). It is consistent with the Commission's purposes in awarding fees to award the reasonable fees associated with the fee petition.

We therefore award attorney fees totaling $90,690.00 and costs in the amount of $8,273.16 to Complainant.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer in part and issue the following Order of the Full Commission:

(1) Respondent shall pay Complainant back pay damages in the amount of $143,970 plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(2) Respondent shall pay Complainant front pay damages in the amount of $ 306,355.33.

(3) Respondent shall pay Complainant damages in the amount of $125,000 for emotional distress as set forth in the Hearing Officer's decision, with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(4) Respondent shall pay Complainant attorney fees in the amount of $90,690 and costs in the amount of $8,273.16 with interest thereon at the rate of 12% per annum from the date the fee petition was filed until such time as payment is made.

(5) The Training Provisions set forth in the Decision of the Hearing Officer shall be incorporated herein.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the

transcript of the proceedings. Such action must be filed within 30 days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within 30 days of receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED this 9th day of December, 2013.

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Julian T. Tynes
Chairman

_____
Sunila Thomas-George
Commissioner

_____
Jamie R. Williamson
Commissioner