COMMONWEATLH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and CECILIA CARTA,
Complainants

v. DOCKET NO. 11-BEM-02841

WINGATE HEALTHCARE, INC.,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferri in favor of Complainant Cecilia Carta. Complainant was terminated from her position as a Clinical Liaison after suffering a work-related injury. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for discrimination on the basis of handicap in violation of M.G.L. c.151B, § 4(16). Respondent appealed to the Full Commission. For the reasons provided below, we affirm the Hearing Officer's decision.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et seq*.(2020), 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…." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 1(6).

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 Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Fact-finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(10) (2020).

BASIS OF THE APPEAL

Respondent has appealed the decision arguing that the Hearing Officer erred by (1) failing to address whether Complainant was capable of performing the physical requirements of the position, even with an accommodation; (2) failing to apply Massachusetts Commission Against Discrimination (MCAD) precedent providing that an employer may consider risk of future injury to an employee in defending a decision to terminate an employee; (3) finding that Complainant established a prima facie case because the decision finds that the Respondent did not make a real effort to fill the Complainant's vacant position, and (4) misapplying binding authority and misconstruing medical evidence regarding the Complainant's prognosis for returning to work full time when assessing whether working full time was an essential function. After careful review we find no material errors with respect to the Hearing Officer's findings of

fact and conclusions of law. We properly defer to the Hearing Officer's findings that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. This standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support a contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984).

To establish a prima facie case of handicap discrimination based on the failure to provide a reasonable accommodation, Complainant must demonstrate that (1) she is a "qualified handicapped person" capable of performing the essential functions of her job with a reasonable accommodation (2) that employer was aware of the need for an accommodation or that it was requested (3) that the employer refused and (4) the employee suffered harm as a result of the refusal. See Alba v. Raytheon Co., 441 Mass. 836, 843 n. 9 (2004); Hall v. Department of Mental Retardation, 27 MDLR 235, 242 (2005). Once Complainant establishes a prima facie case, the burden shifts to Respondent to prove that the reasonable accommodation sought would be an undue hardship on the employer's business. Id.; Dahill v. Police Dept. of Boston, 434 Mass. 233, 243 (2001). Both the employer and the employee must approach the accommodation process in good faith. See, Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002).

Respondent claims that the Hearing Officer erred by finding Complainant was a "qualified handicapped person" within the meaning of G.L. c. 151B, §4. It argues that physical restrictions set out in May 10, 2011 orthopedists' reports indicated Complainant was restricted from lifting, pushing, or carrying more than 5-10 pounds, and therefore, Complainant could not fulfill the essential duties of her position. Respondent asserts that the 5- 10 pound restriction was not identified until May 10, 2011. Prior to that time, Complainant had been on FMLA leave which began following a work related accident on August 30, 2010 and pulmonary embolism on

September 10, 2010. She then returned to work on December 6, 2010 on a part-time schedule to accommodate her physical disabilities, permitting her to obtain outpatient physical therapy. Although Complainant worked on a part-time basis until her termination, Respondent argues that Complainant was not a qualified handicapped individual because full-time work was an essential function of the position.

Respondent's Vice President of Risk Management terminated Complainant on May 12, 2011, informing Complainant that the position needed to be full-time, and because Complainant could not return full-time, her employment was terminated. Complainant requested an additional three weeks of part-time employment to complete physical therapy following which she would return to work full-time. The request was denied. Complainant's supervisor, who managed the Clinical Liaisons and ensured that work goals were met during Complainant's part-time employment, testified that if she had the authority, she would have provided Complainant with additional time for recovery. A "qualified handicapped person" is a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of the job with a reasonable accommodation. M.G.L. c. 151B, § 1(16). Pursuant to M.G.L. c. 152, § 75(B)(1), an individual who sustains a workplace injury, receives workers' compensation benefits, and is capable of performing the essential functions of the job with a reasonable accommodation is presumed to be a "qualified handicapped person" under M.G.L. c. 151B. Under this expanded definition of "qualified handicapped person," a person receiving workers' compensation need not show that he is "handicapped," but still must demonstrate an ability to perform the essential functions of the job. Canfield v. Con-Way Freight, Inc., 578 F.Supp.2d 235, 240 (2008); see Gilman v. C& S Wholesale Grocers, Inc., 170 F. Supp. 2d 77, 84 (D. Mass 2001) (recognizing that individuals suffering work-related injuries

shall be "deemed" handicapped persons under chapter 151B) . Hall v. Laidlaw Transit, Inc., 26 MDLR 216 (2004) ("An employee injured at work is entitled to reasonable accommodation to enable him to return to work, and is protected from discrimination based on the injury during the time he is affected by it.")

Essential functions are "those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job." Kogut v. The Coca-Cola Company, 34 MDLR 43, aff'd 37 MDLR 180 (2012). The Hearing Officer found that Complainant met this burden as the evidence demonstrated Complainant was completing the essential functions of the position, albeit on a part time basis prior to her termination. Tompson v. Department of Mental Health, 76 Mass. App. Ct. 586, 594 (2010) ("Actual work…is the best evidence of ability to work."). This finding was supported by sufficient evidence, including the testimony of Complainant's supervisor. Similarly, the Independent Medical Evaluation ("IME") conducted by the worker's compensation insurer on May 24, 2011, recognized that Complainant "was performing her usual job duties on a part-time basis up until 1 week ago." Public Hearing Exhibit 3, CAR000654.

Respondent argues that Complainant was not able to perform the essential functions of the job because the job description stated that the position required her to be able to "lift weights up to fifty pounds" and to push patients on wheelchairs or on stretchers." We recognize that a job description for Admissions Coordinator (Clinical Liaison) submitted at the Public Hearing states that the Admissions Coordinator "**May** need to lift weights of up to fifty pounds." Public Hearing Exhibit 31. Similarly, it states that the Admission Coordinator "**May** be required to push patients in wheelchairs or on stretchers." (emphasis added). However, no evidence was presented at the hearing that lifting fifty pounds or pushing patients were actual tasks Clinical Liaisons were

required to complete during the course of their job duties. See Patel v. Everett Industries, 18 MDLR 182, 183 (1996); aff'd, unpublished opinion 49 Mass. App. Ct. 1116 (2000) ("The formal description is important evidence on the question of what functions are "essential" to a particular position but is not dispositive of the issue.") See also Labonte v. Hutchins & Wheeler, 424 Mass. 813, 822 (1997) (recognizing that employer's job description is not sole factor determining whether function is essential, and that other factors including work experience of past and current incumbents should be evaluated). With respect to the Hearing Officer's finding that Complainant's duties included accessing medical records binders that weighed more than 5-10 pounds; the Hearing Officer also found that Complainant testified that much of this information was accessible by computer. There was sufficient evidence to support the Hearing Officer's determination that Complainant was capable of performing the essential functions of her job with reasonable accommodations at the time Respondent terminated her employment.

Furthermore, Respondent had an obligation to engage in the interactive process to discuss possible reasonable accommodations with Complainant before it unilaterally decided to terminate her based on her disability if they believed that she was unable to complete the essential functions of the position. Hall v. Department of Mental Retardation, 27 MDLR 235 (2005). The Commission has repeatedly recognized that modifying an employee's work schedule may be an appropriate reasonable accommodation depending upon the circumstances. Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000). The SJC has also found that although an employer is not required to extend an employee's leave indefinitely as an accommodation, "[a] request for a limited extension, setting a more definite time for the employee's return to work, may, however, constitute a reasonable accommodation, under the ADA as well as G. L. c. 151B, § 4 (16), based on the circumstances." Russell v. Cooley Dickerson Hospital Inc., 437 Mass. 443, 455-456 (2002). If Respondent did not believe that

Complainant's request for a three week extension of her modified schedule so that she could finish physical therapy was a reasonable accommodation, they had an obligation to engage in an interactive dialog with Complainant to assess if an alternative reasonable accommodation was available. The Hearing Officer determined that Complainant's request for an accommodation was reasonable and that "[a]t the very least, Respondent should have considered Complainant's request for a brief reprieve and advised her that if she did not return to full duty by a date certain, she would face termination." The Hearing Officer is responsible for making credibility determinations and weighing conflicting evidence. We will not disturb the Hearing Officer's findings where, as here, they are supported by sufficient evidence.

Respondent also argues that it was reasonable to prevent Complainant from working in order to avoid further injury because her shoulder condition appeared to be worsening. Respondent bases this assertion on Complainant's doctor's notes dated September 8, 2010 prescribing no physical limitations, November 29, 2010 prescribing general restrictions on lifting, pushing and pulling, and May 10, 2011 adding weight restrictions of 5-10 pounds, noting that more restrictions appeared to be imposed over time. An employer may defend a termination decision if there is "an unacceptably significant risk of serious injury" to the employee or others. Gannon v. City of Boston, 476 Mass. 786, 798-800 (2017). Respondent has the burden of producing specific evidence showing that Complainant would pose an "unacceptably significant risk of serious injury" to herself or to others by proffering evidence that it has made an "individualized factual inquiry" based on substantial information about Complainant's individual work and medical history. Id. Once Respondent has met this burden, the burden rests with the employee to prove that she can safely perform the essential functions of the job. Id. In determining whether Respondent has met its burden, factors to be considered are "the potential

severity of the feared injury" and "the probability that the employee in that position would cause such injury." Id. An employer "may not meet its burden based upon pure speculation as to the likely risk of injury. Nor is it sufficient to show simply an increased risk of injury. The employer must offer evidence showing an increased risk of serious injury that is so significant that it cannot reasonably be deemed acceptable by an employer." Id. at 800 (citations omitted).

The Hearing Officer recognized that the Respondent's Vice President of Risk Management's (Cosby's) determinations regarding Complainant's future capacity were purely speculative at the time of termination as Cosby "substituted her conclusions about Complainant's future capacity and determined that termination was appropriate based on Complainant's current medical limitations." There was no evidence that Cosby inquired into the danger continued work might cause to Complainant's injury immediately prior to the abrupt termination decision. Nor was evidence presented of an individualized factual inquiry based upon Complainant's work history. The Hearing Officer determined that where the prognosis for recovery was unknown at the time of her termination it would have been reasonable for Complainant to be permitted to complete her planned physical therapy over the course of the next month, in order to obtain a more definitive prognosis. We determine that Respondent was unable to show that at the time of the termination, there was an unacceptably significant risk of serious injury for continuation of Complainant's part-time schedule with a lifting restriction.

Respondent also argues that because the Hearing Officer found that Respondent did not fill Complainant's position until over a year later, Complainant failed to establish a prima facie case of discriminatory termination that the position she had occupied remained open and the employer sought to fill it. This argument does not recognize that the Hearing Officer's liability determination was largely based upon Respondent's failure to delay its premature termination

decision and its failure to establish an undue burden associated with continued part-time restricted work. The Hearing Officer recognized that Respondent did not provide evidence of revenue losses nor of undue burdens resulting from accommodating Complainant's disability. Nor does Respondent recognize the Hearing Officer's findings that the Vice President of Risk Management, who made the decision to terminate Complainant, testified that Respondent terminated Complainant because there was an immediate financial need to fill Complainant's position on a full time basis. The Hearing Officer found that Respondent did not fill the full-time Clinical Liaison position until July of 2012, more than a year after Complainant's termination, despite having candidates for the position in August of 2011 and January of 2012, leading her to conclude that the declared "financial reasons" were a pretext for discrimination based upon disability.

Respondent further argues that the Hearing Officer erred as a matter of law by determining that Respondent's immediate and abrupt termination of Complainant's part-time employment violated G.L. c.151B, because a full-time schedule was an essential function of Complainant's position. Respondent argues that the accommodation it had previously afforded Complainant was not a reasonable accommodation because it required Respondent to reallocate responsibilities to other employees; it altered the structure of the Clinical Liaison department; there were no part-time jobs available; and it was open-ended and indefinite. This argument fails to recognize the Hearing Officer's findings that Complainant was never told by Respondent that her part-time status was a "courtesy" or her employment would be in jeopardy if she did not return to full-time status by a date certain. Complainant was not advised of this requirement until May 11, 2011, one day prior to her abrupt termination. At that time, Complainant had worked a part-time schedule for 23 weeks with lifting restrictions, from December 6, 2010 until

May 11, 2011. Nor does Respondent's argument recognize the Hearing Officer's determination that the part-time schedule was a reasonable accommodation for Complainant's disability.

A reasonable accommodation is "a modification or adjustment to the work environment, enabling a qualified handicapped person to perform the essential functions of that position." MCAD Guidelines: Employment Discrimination on the Basis of Handicap, at VII, B (1998). Essential functions are "those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job." Kogut v. The Coca-Cola Company, 34 MDLR 43, aff'd 37 MDLR 180 (2012) citing MCAD, Guidelines: Employment Discrimination on the Basis of Handicap Chapter 151B §II.B (1998). The Hearing Officer concluded that "Respondent's assertion that working full-time was an essential function of Complainant's job is dubious since it allowed Complainant to work part-time for 23 weeks and did not fill the position for a year and a half after Complainant's termination." The Hearing Officer determined that Complainant's part-time schedule for the 23 weeks prior to her termination was an accommodation that allowed Complainant to continue performing the essential functions of her position while she underwent treatment.[1] The Hearing Officer recognized that Complainant had performed the essential functions of her job within the framework of her part-time schedule for 23 weeks and that her supervisor willingly helped to ensure that all referrals were handled, something her supervisor continued to do for over a year after Complainant's termination. The Hearing Officer determined that Complainant's request on May 11, 2011 was not open-ended and indefinite because Complainant requested a three weeks extension of her part-time accommodation, at which point Complainant would obtain a more definitive prognosis and the

[1] The Hearing Officer held that Respondent's characterization of Complainant's part-time schedule during the 23 weeks prior to her termination as a "courtesy" to Complainant was "clearly a matter of semantics; " this was an accommodation.

possibility of returning to work fulltime.[2]

Respondent failed in its obligation to engage in the interactive process when it unilaterally determined that Complainant would not be able to complete the essential functions of the position without investigating possible accommodations and engaging in an interactive process. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 217, aff'd, 26 MDLR 2016 (2004)("an employer is required to engage in an open and ***ongoing*** dialogue or "interactive process" with a qualified handicapped individual about providing a reasonable accommodation.")(emphasis added); See Sabella v. Boston Public Schools, 27 MDLR 90, aff'd, 28 MDLR 93 (2005) (unilateral refusal to consider requested accommodation of job-sharing, revocation of an accommodation, and unwillingness to investigate possible reasonable accommodations is contrary to Respondent's lawful obligation to engage in an interactive dialogue with Complainant). Notably, the Hearing Officer reasoned that if there was no prognosis for Complainant's improvement and no anticipated date of return to full-time after the additional three weeks, then Respondent's obligation to continue providing an accommodation likely would have ceased. We disagree with Respondent's assertions, as there is substantial evidence in the record that supports the Hearing Officer's determination.

Respondent avers that the emotional distress damages award should be reduced because the damages are based entirely on the testimony of Complainant and her sister. Respondent argues that Complainant would have encountered the same financial uncertainty regardless of whether she had been terminated because her orthopedist found her unable to work three weeks after her termination. Respondent also argues that the Hearing Officer should have offset the

[2] Although an open-ended or indefinite leave extension is generally not considered a reasonable accommodation, see Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 455 (2002), Complainant was not requesting an indefinite leave extension. Here, Complainant informed Respondent that she needed to complete three more weeks of physical therapy, at which time she would have a more definitive prognosis. Complainant's "request for a limited extension, setting a more definite time for the employee's return to work" may have been a reasonable accommodation had it been considered by Respondent. See id.

award by the enjoyable aspects of not having to work, including new social opportunities, increased travel, service on her condo board, and entertaining visitors, and because the Complainant did not seek medical or psychological attention or require any medication for her distress that lasted a few months.

Awards for emotional distress must rest on substantial evidence of the emotional suffering that occurred and be causally-connected to the unlawful act of discrimination. DeRoche v. MCAD, 447 Mass 1, 7 (2006); Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Factors to consider in awarding emotional distress damages include "the nature and character of the alleged harm, the severity of the harm, the length of time the complainant has suffered and reasonably expects to suffer, and whether the complainant has attempted to mitigate the harm." DeRoche, at 7. An award of damages may be based on a complainant's own credible testimony. Stonehill College, at 576. The Hearing Officer awarded Complainant $25,000.00 in damages for emotional distress, basing her decision on the credible testimony of Complainant and her sister. Complainant testified that she was shocked, devastated, and blind-sided by her termination. Both Complainant and her sister testified that Complainant suffered emotional harm as a result of her abrupt and premature termination. Complainant also testified that after her termination she felt unwelcome at Mt. Auburn Hospital where she had many friends. She testified that she felt listless, depressed, and insecure about her financial future. These findings are supported by the record. The Hearing Officer recognized that Respondent was not liable for the emotional distress Complainant surely suffered, and about which her sister testified, from her injuries themselves, her long recovery period, and the overall deterioration of her health, and considered this factor in her award. Therefore, we decline to modify the award.

ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Attorney's Fees and Costs on June 28, 2016, with affidavits and invoices. [3] The petition is supported by detailed contemporaneous time records noting the amount of time spent on specific tasks and affidavits of counsel. Complainant seeks to recover fees in the amount of $27,852.50 for 157.40 hours of work performed by Attorney Adam LaFrance, $18,520.00 for 55.60 hours of work performed by Attorney J. Mark Dickison, and $2,976.00 for 30.60 hours of work performed by law clerks for a total of $49,348.50.[4] Respondent opposes the Petition, arguing that Complainant's fee request should be reduced by 65% or more. For the reasons stated below, Complainant's Petition for Attorney's Fees and Costs is granted, with modifications.

M.G.L. c. 151B allows prevailing complainants to recover reasonable attorneys' fees for the claims on which Complainant prevailed. The determination of whether a fee sought is reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by an hourly rate it deems reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including complexity of the matter. Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

[3] Since the Petition for Attorneys' Fees and Costs was filed pursuant to 804 CMR 1.00 (1999) et. seq., the Full Commission determined the award.

[4] While the Petition for Fees requests $48,867.50 in Legal Fees, the sum of the individual attorneys' fees requested equals $49,348.50. Accordingly, we base our determination upon the actual sum of the fees requested.

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 will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Id. at 1099. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992).

The contemporaneous time records and affidavits filed in support of this request have been carefully reviewed. Attorney LaFrance seeks reimbursement at the hourly rate of $175 in 2014 and 2015, and $200 in 2016. Attorney Dickison seeks reimbursement at the hourly rate of $260 in 2011 when the case began, then $290 in 2013-2014, $350 in 2015, and $375 in 2016. Counsels' affidavits do not list an hourly rate for law clerks, but dividing the total amount billed for the work law clerks performed ($2,976.00) by the total number of hours listed for their work (30.60) yields an hourly rate of $97.25. These rates are fully consistent with the rates customarily charged by attorneys with comparable experience and expertise in such cases and are well within the range of rates charged by attorneys practicing employment law and law clerks within the area.

We address Respondent's arguments in opposition to the fee petition. First, Respondent contends that Counsel's itemized invoice includes 4.0 hours of time billed by "JPM" for "John McNulty" on September 15, 2011 that should be stricken for insufficient information because neither the fee petition nor the supporting affidavits identify who John McNulty is, his role in the litigation, his qualifications, or his hourly rate. This entry is the fifth entry on Counsel's time sheets and it represents time spent drafting the complaint. Although no information was

provided regarding McNulty's role in the litigation or his qualifications, the 4.0 hours billed for him were charged at the law clerk rate.[5] Since the entry for these 4.0 hours billed on 9/15/11 by "JPM" is sufficiently related to the prosecution of this case (*i.e.*, the complaint commenced administrative action at the Commission), is adequately detailed, and is not duplicative we decline to strike this entry.

Second, Respondent avers that the law clerks' hours should be stricken from the fee award entirely because they have not been sufficiently identified or in the alternative the fee award should be reduced for being unreasonable, unnecessary or duplicative. We decline to strike or reduce the fees attributable to law clerks as we find that the entries are sufficiently related to the prosecution of this case, are adequately detailed, and are not duplicative.

Respondent further asserts that entries on 2/26/14, 3/28/14, 4/7/14, 4/10/14, 4/14/14 and 4/22/14 for which a law clerk billed a total of 2.1 hours for various phone calls with the MCAD investigator following up on the status of the investigation are excessive. We disagree. These entries are well-documented and do not appear excessive at that phase of the investigation.

Respondent cites entries on 3/20/14, 3/21/14, 3/26/14, 4/7/14, and 4/10/14 in which a law clerk (LC) billed a total of 4.9 hours related to drafting a Superior Court complaint and preparing papers to withdraw the MCAD complaint, neither of which occurred. Since this work was not required to prosecute the case before the Commission, it is appropriate to strike these 4.9 hours. Respondent also notes duplicate entries on 9/15/14 and 9/16/14 for 2.5 hours of LC time. We deduct 1.0 hour for time charged on 9/15/17 and 1.5 hours charged on 9/16/17 as they appear to be duplicate entries on both dates. Respondent argues an entry by LC on 6/14/13 for 0.5 hours

[5] Although the petition and supporting affidavits do not explicitly indicate that the 4.0 hours attributed to McNulty were assessed at the law clerk rate. Page 8 of the invoice of legal fees lists 26.6 hours attributable to law clerks, and 4.0 hours attributed to McNulty. However the Petition lists the total hours for work done by law clerks as 30.6, which includes McNulty's 4.0 hours.

should be stricken since it involves PACER, an electronic database of Federal court filings, which likely relates to a different case and was billed in error. We deduct this 0.5 hours because the entry does not adequately explain its relationship to this case. Therefore, we reduce the award for hours billed by law clerks by 7.9 hours at $97.25/hour for a total reduction of $768.28.

Third, Respondent argues that several items billed by Attorney LaFrance should be stricken as unreasonable or unnecessary:

- 2.0 hours on 2/13/15 for reviewing deposition transcripts when depositions were not taken until 6/24/15;
- 4.0 hours on 5/14/15 to prepare for and attend a pre-hearing conference in which he did not participate and for which his attendance was unnecessary;
- 16.6 hours on 11/3/15 and 11/4/15 for attending the hearing in which he did not participate;
- 68.3 hours on 10/30/15 and 1/14/15 to prepare, research, and draft the post-hearing brief for which Attorney Dickison also billed 9.4 hours, for a total of 77.7 hours.

We decline to reimburse for the 2.0 hours on 2/13/15 for reviewing deposition transcripts since the billing records reflect that depositions were not taken until 6/24/15 and it is unclear how much time was spent on this task relative to other items in this entry. This amounts to a deduction of $350. We decline to reimburse the full 4.0 hours on 5/14/15 to prepare for and attend the pre-hearing conference since it is duplicative for two attorneys to attend a pre-hearing conference, but will allow 2 hours for preparation at a rate of $175 per hour, resulting in an additional deduction of $350. We will allow part of the fee for 16.6 hours for Attorney La France to attend the hearing on 11/3/15 and 11/4/15, but reduce it by half to 8.3 hours since

Attorney LaFrance was 2nd chair and did not participate, while acknowledging that he performed much of the preparation for the litigation. These reductions amount to a deduction of $2,152.50.

We reduce by 30% the fee for 72.7 hours spent between 11/1//15 - 1/14/16 to prepare, research, and draft the post-hearing brief, which includes 63.3 hours by Attorney LaFrance and 9.4 hours by Attorney Dickison, because these items represent excessive billing for the work performed. The 30% reduction results in 15.8 hours being deducted from Attorney LaFrance's hours billed in 2015 and 3.51 billed in 2016 and a deduction of 1.14 hours for Attorney Dickison's hours billed in 2015 and 1.68 billed in 2016. Therefore, we deduct 15.48 hours for Attorney LaFrance at a rate of $175/hour, and 3.51 hours at a rate of $200/hour, amounting to a deduction of $3,411. We deduct 1.14 hours for Attorney Dickison's work, at a 2015 rate of $350/hour, and deduct 1.68 hours at a rate of $375 for a deduction of $1,029. These deductions total $4,440.

Respondent argues that Complainant's fee petition should be reduced further to reflect the fact that Complainant failed to recover any lost wages, representing a significant failure in her prosecution of this case and because Complainant only prevailed on her disability discrimination claim, which was only one of three causes of action in this matter, as this matter also included claims of age discrimination and retaliation.

A complainant may request attorney's fees for claims in which they prevailed. When a complainant does not prevail on all claims, the "Commission may exercise its discretion to reduce the overall fees requested by some amount that may reasonably be said to have been expended in pursuit of Complainant's unsuccessful claims. In making such a determination, we examine the 'degree of interconnectedness' between the two claims." Blue v. Aramark Corp., 27 MDLR 73 (2005). Respondent cites three cases in support of its position that the fees should be

reduced because Complainant did not succeed on her claim for lost wages: Joubert v. United Parcel Service, 25 MDLR 11 (2003); Roughneen v. Bennington Floors, Inc., 38 MDLR 48 (2016); Hammond v. Carol O'Leary Residential Cleaning Specialists, 38 MDLR 94 (2016). In Joubert and Roughneen, the Commission found that the Complainants' attorney fees should be reduced because they did not prevail on a substantial claim in the case and thus were not entitled to lost wages. Joubert v. United Parcel Service, 25 MDLR 11 (2003) (complainant failed to prove his claim for discriminatory termination, the more labor-intensive of the two claims, and was not entitled to lost wages); Roughneen v. Bennington Floors, Inc., 38 MDLR 48 (2016) (complainant was not entitled to lost wages because she did not prevail on her claim of retaliatory termination, a "substantial claim"). In Hammond, an overall 25% reduction of fees was taken in part for the complainant's failure to succeed on her claim for back wages after a certain date. In all of these cases the complainants failed to prove that they were entitled to lost wages. These cases are distinguishable from Complainant's since she prevailed on her disability discrimination claim and established that she was entitled to lost wages. Here, however, the Complainant was not awarded lost wages because the Hearing Officer found that Complainant was fully compensated for her lost wages by her workers' compensation payments and her recovery in a third-party law suit, both of which included substantial amounts for lost wages. Therefore, we decline to reduce Complainant's fee petition because she did not recover lost wages.

We also decline to reduce Complainant's fee petition because Complainant only prevailed on her disability discrimination claim and not age and retaliation, as we determine that the claims were closely interconnected. In her Decision, the Hearing Officer concluded: "Although Complainant's age may have also been a contributing factor in this decision, there is

no evidence pointing to her age as a primary motivating factor in her termination and *the issue was not addressed in any significant way by either party*." (emphasis added). While the Commission may reduce attorneys' fees to reflect unsuccessful claims, Counsel's contemporaneous time records and their prosecution of this case do not reflect that time was expended with particularity on the age or retaliation claims.

We conclude that the tasks performed are adequately documented and that the amount of time spent on preparation and litigation of this claim is within reason, with the few stated exceptions and modifications. We therefore approve a total fee award in the amount of $41,987.73.

COSTS

Complainant seeks costs in the amount of $1,973.36 for deposition transcripts, copying, mailing and other costs. With the exception of the charge for meals of $77.44, we find that this request is reasonable and hereby award costs to Complainant in the amount of $1,895.92.

ORDER

For the reasons set forth above, we hereby affirm the Decision of the Hearing Officer in its entirety and issue the following order:

1. Respondent shall cease and desist from any acts of discrimination based upon disability.
2. Respondent shall pay Complainant, Cecilia Carta, the sum of $25,000.00 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
3. Respondent shall pay Complainant, Cecilia Carta, the sum of $43,883.65 in attorney's

fees and costs with interest thereon at the rate of 12% per annum from the date the Petition for Attorneys' Fees and Costs was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

4. Respondent shall conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's human resources director, managers, supervisors or other employees who have authority to negotiate reasonable accommodations for employees or to terminate employees with disabilities. Respondent shall utilize a trainer certified by the Massachusetts Commission Against Discrimination. Following the training session, Respondent shall report to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any of the above described employees who fail to attend the original training, including those new personnel hired or promoted within two years after the date of the initial training session.

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 contest the Commission's decision by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of service of this decision and must be filed in accordance with M.G.L. c.30A, c.151B, § 6, and the 1996 Standing Order on Judicial Review of Agency Actions,

Superior Court Standing Order 96-1. Failure to file a petition in court within thirty (30) days of service 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[6] this 8th day of June, 2020,

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[6] Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR 1.23(6) (2020).