COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

THE MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MARIE LUNIE DALEXIS,[1]
Complainants

v. DOCKET NO. 10-BEM-01133

TUFTS MEDICAL CENTER and
JULIE MIGLIETTA,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant on her claim of discrimination on the basis of disability. Following an evidentiary hearing, the Hearing Officer found that Respondent Tufts Medical Center was liable for discrimination when it failed to provide Complainant with a reasonable accommodation and constructively discharged her from her employment. The Hearing Officer also dismissed Complainant's claims of race, color, and national origin discrimination and concluded that Respondent Julie Miglietta was not individually liable for discrimination.[2] Tufts Medical Center has appealed to the Full Commission.

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[1] Complainant died on August 21, 2016, while her appeal to the Full Commission was pending. Her claim continues to be prosecuted by the authorized personal representative of her estate, Jonel Dalexis.

[2] The Hearing Officer concluded that Miglietta lacked the requisite intent to discriminate required to find her individually liable for discrimination. Complainant does not appeal this determination, and we agree with the Hearing Officer that there is insufficient evidence from which to find Miglietta individually liable for discrimination.

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*.), 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(1)(h).

SUMMARY OF FACTS

In 2002, Complainant began working as a nurse for Respondent Tufts Medical Center a major medical institution in Boston. Tufts Medical Center had twenty-two inpatient units in which nurses worked and nurses operated on three shifts: (1) the day shift from 7:00 a.m. to 3:30 p.m.; (2) the evening shift from 3:00 p.m. to 11:30 p.m.; and (3) the night shift from either 7:00

p.m. or 11:00 p.m. to 7:30 a.m. Nurses at the hospital could work as "day/rotators," meaning that they worked a combination of day-evening or day-night shifts. Complainant's first assignment was on Pratt 8, an oncology unit where she began working the day-night rotator shift. In 2003, Complainant switched to working the day-evening shift. In 2005, Complainant transferred to Proger 5 North, a medical/surgical unit, where she continued to work the day-evening shift.

At the end of 2005, Complainant began experiencing health issues, as she began to feel tired, was coughing on and off, and suffered joint pain. In 2006, Complainant was diagnosed with rheumatoid arthritis. This condition caused her to suffer from interstitial lung disease, which made it difficult for her to breathe normally and caused her to choke and cough, suffer from pain and crackles in her lungs, shortness of breath, and an inability to run or climb stairs. Complainant continued to work the day-evening shift, but took some intermittent medical leaves to deal with her health issues. In February of 2007, Complainant's internist, Dr. Harold Greenspan, wrote a note to Tufts Medical Center stating that Complainant was unable to work past her normal day-evening shift hours due to her interstitial lung disease. After receiving this note, the Proger 5 North nurse-manager, Melissa Culkins-Bair, excused Complainant from working overtime to accommodate her medical condition.

From March 25, 2009 to April 5, 2009, Complainant took a medical leave, returned to work, and then took another medical leave beginning on May 25, 2009. Despite her intention to return to work on June 22, 2009, Complainant had emergency surgery on June 17, 2009, after being diagnosed with fluid around her heart. Complainant received short-term disability coverage while she recovered from surgery. While Complainant was out of work on medical

leave, the nurse-manager of Proger 5 North became Alyson Shea. Complainant only briefly worked under Shea's supervision.

The parties' Collective Bargaining Agreement allows for ninety days of protected medical leave during which Tufts Medical Center must hold open the position of the nurse on leave. Tufts Medical Center sometimes grants extensions of this period, but declined to grant Complainant an extension of protected medical leave after she had used her allotted ninety days.

By July 15, 2009, Tufts Medical Center determined that Complainant had reached the end of her protected leave and that it was time to consider recruiting someone to fill her position on Proger 5 North. Effective July 23, 2009, Complainant was transferred to Tufts Medical Center's "leave of absence cost center," meaning that she retained her health insurance but lost her job protection, and had to apply online for vacant positions at Tufts Medical Center once she was able to return to work.

During the summer of 2009, Tufts Medical Center began moving towards twelve-hour nursing shifts under a new "Care Delivery Model." This involved decreasing day-evening rotations in favor of day-night rotations. However, a nurse working a day-rotator job could still indicate a preference for working day-evening shifts and Tufts Medical Center would endeavor to accommodate the preference to the extent allowed by the nurse's seniority.

In a note dated September 8, 2009, Complainant's cardiologist, Dr. Marshall Katz, indicated that Complainant would be fit to return to work part-time on October 5, 2009, and full-time on October 19, 2009. The note did not specify any job restrictions. Complainant gave this note to Tufts Medical Center's Risk Manager Patti Andrews. Andrews told Complainant to start looking online for available positions and to call Tufts Medical Center's Nurse Recruiter Leona Martin who would help Complainant identify available job opportunities. Complainant told

Andrews that she would welcome a job that was a better fit for her health condition such as a case manager or a research nurse position, but that she was ready to go back to a staff or bedside nursing position, like her previous inpatient nursing position at Proger 5 North, if no better fit could be found.

On September 22, 2009, Complainant met with Nurse Recruiter Martin. Complainant asked Martin if she could return to her day-evening position on Proger 5 North, but Martin told Complainant that the position had been filled. Complainant applied for other inpatient nursing positions that were posted online, but she did not receive any interviews. Martin set up only one interview for Complainant, which ultimately was cancelled in advance because the job was "closed."

During Complainant's job search, three non-float, day-rotator jobs on Proger 5 North which had been posted in May of 2009 remained unfilled, yet Tufts Medical Center did not alert Complainant to these openings. A fourth non-float, day-rotator position on Proger 5 North was posted on October 23, 2009, and again Complainant was not told about this opening. In addition, two float pool, day-rotator jobs for medical/surgical units were posted in May and August and remained unfilled during Complainant's job search, and a third was posted on October 23, 2009. Complainant applied for the float pool, day-rotator position posted on October 23, 2009, but she did not receive an interview. These day-rotator positions could either be day-evening shift or day-night shift positions, and Complainant testified that if she had received an interview, she would have informed the relevant individual that she sought to work the day-evening shift. Respondent Julie Miglietta, an Employee Relations Specialist/Manager for Tufts Medical Center,

testified that Complainant did not get an interview for the float pool, day-rotator position because her overtime restriction made her ineligible for the position.[3]

On October 30, 2009, Tufts Medical Center's Risk Manager, Patti Andrews, emailed Miglietta to let her know that Complainant had "recently" been cleared to work on a full-time basis with no restrictions, but that Complainant preferred "to find an administrative nursing position so as to not further injure what she's been able to heal."

At the end of October, Nurse Recruiter Martin left her employment with Tufts Medical Center, and Miglietta informed Complainant she would take over Complainant's case, despite the fact that Miglietta was not involved in the hiring of nurses. Miglietta did not contact Shea to inquire about whether another nurse was still needed on Proger 5 North. When asked at the public hearing how she "assisted" Complainant's return to work, Miglietta testified that she "assumed" that if a position on Proger North 5 was posted then Complainant would have been "aware of it."

On November 6, 2009, Miglietta explained to Complainant that she was not considered for any of the positions that she had applied for because they were in units with specialties that differed from Complainant's background. Miglietta then told Complainant that a vacant night-shift position in Proger North 5 was "the only current option." She noted that Complainant's doctor had returned her to work with no restrictions. However, the record evidence in this matter showed that, contrary to Miglietta's statement to Complainant that a night-shift position was the only available option, there was no night-shift position advertised. <u>See</u> Joint Exhibit 68. Instead, there were several day-rotator positions on Proger 5 North advertised as vacant positions. Tufts Medical Center did not inform Complainant about these day-rotator positions on Proger 5 North.

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[3] However, at the time Complainant applied for the float pool day-rotator position the information Tufts Medical Center had from Dr. Katz was that she was able to return to work full-time with no restrictions on October 19, 2009. <u>See</u> Joint Exhibit 21.

In response to Miglietta's offer of the available night-shift job, Complainant said, "I love my floor [but] can't work nights" because doing so would exacerbate her rheumatoid arthritis. On November 8, 2009, Miglietta emailed Tufts Medical Center's Chief Nursing Officer Theresa Hudson-Jinks and told her that they could "probably" terminate Complainant for refusing the night-shift offer given that she had been cleared to return to work full-time without restrictions and refused the position offered to her.

In a note dated November 10, 2009, Dr. Robert Sands wrote that Complainant could not work the night-shift due to "medical issues." In a follow-up note dated November 11, 2009, Dr. Greenspan cleared Complainant to return to work full-time on November 16, 2009, on the day-shift. Dr. Greenspan explained that working nights affected Complainant's ability to sleep, and lack of sleep exacerbated Complainant's rheumatoid arthritis, which was under good control at that point. The note did not address working overtime or working the evening shift. Complainant testified that she was capable of working evening shifts as well as day shifts.

On November 23, 2009, Complainant reapplied for a float-pool, day-rotator position. While this position did not specify whether it was day-evening or day-night, Miglietta testified that it could be either. Miglietta emailed Chief Nursing Officer Hudson-Jinks about Complainant's application, stating, "It sounds like we should allow her to proceed through at least the interview process…. Just concerned this issue is going to bubble up with the MNA [the nurses' union]."

Miglietta testified that, after reading all of Complainant's doctors' notes, she knew that Complainant could work a day-evening rotation, but she was unclear as to whether Complainant could work an occasional night shift on an overtime basis as opposed to no nights at all. Miglietta asked Complainant whether she could work an occasional night shift. Complainant

directed Miglietta to speak to her doctor. Upon asking Dr. Greenspan whether Complainant could occasionally work overtime, including a possible double shift or night hours, Miglietta documented their conversation in this way: "no doubles – no nights – no doubles, even occasional not recommended/Up to her if she wants to try/Exacerbations occur when tired/OT not recommended/Permanent restrictions." Based upon this information, Miglietta decided that Complainant could not work in the float-pool because the ability to work overtime (i.e. past evening shift hours and into the night) was considered an essential function of the float-pool nursing job at Tufts Medical Center. Because of Complainant's work restrictions, Miglietta believed that a clinic position in a doctor's office would be a better position for Complainant than an inpatient hospital job. Complainant was thereafter encouraged to seek employment outside of Tufts Medical Center.

In December 2009, Complainant grieved her situation but was not successful. In April 2010, a Step 2 grievance hearing was held and conducted by Tufts Medical Center's Human Resource Vice President Paul Heffernan. At the hearing, Miglietta asked if Complainant's doctor would lift the overtime or night work restriction. When Complainant contacted Dr. Greenspan with this question, he stated that over-exhaustion could cause her disease to flare up and thus, he declined to lift the restrictions. Heffernan issued a decision in May 2010 stating that because Complainant was restricted from working any overtime or nights, her return to work in an inpatient capacity was "unlikely" and that she should be processed for separation as of June 5, 2010. Complainant has not performed any nursing duties at Tufts Medical Center since mid-2009.

Complainant testified that she felt "so bad" when she was not allowed to return to a nursing job at Tufts Medical Center. She testified that her husband's income alone was

insufficient to cover their household expenses and that he was forced to cash out his 401K in order to pay their mortgage. Complainant testified that her family had difficulty communicating about the financial burdens caused by losing her job. Complainant described herself as depressed and unable to leave her bed to do chores following the loss of her job at Tufts Medical Center. Complainant was prescribed an antidepressant from June 2010 to June 2011.

In July 2010, Complainant was offered a position with the Visiting Nurses Association (VNA) Hospice Care Inc. In this position, Complainant did not work nights and she worked very little overtime. She worked there until 2012. In addition to working at VNA Hospice Care, in 2011 Complainant worked as an adjunct faculty member at Roxbury Community College supervising nursing students one day a week. In the fall of 2013, Complainant obtained a full-time position at Roxbury Community College as an Assistant Professor.

BASIS OF THE APPEAL

Tufts Medical Center's appeal to the Full Commission asserts that the Hearing Officer erred by (1) crediting the testimony of Complainant; (2) determining that working overtime was not an essential function of an inpatient nursing job at Tufts Medical Center and that Tufts Medical Center failed to provide Complainant with a reasonable accommodation; (3) concluding that Tufts Medical Center failed to engage in the interactive process with Complainant; (4) determining that Tufts Medical Center regarded Complainant as a handicapped individual; and (5) concluding that Complainant was constructively discharged. Additionally, Tufts Medical Center opposes Complainant's Petition for Attorneys' Fees and Costs arguing that the amount sought is duplicative and excessive and that the hourly rates sought by the attorneys are well above what the Commission has awarded in similar cases.

Tufts Medical Center first argues that the Hearing Officer erred in crediting the testimony

of Complainant. Tufts Medical Center asserts that Complainant's testimony at the public hearing was inconsistent with her deposition testimony, her filings with the Commission, and other documentation, and thus cannot be credible. We disagree. The Full Commission defers to the Hearing Officer's credibility determinations and findings of fact, absent an error of law or abuse of discretion. School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007 at 1011. The Hearing Officer is in the best position to observe a witness's testimony and demeanor, and her credibility determinations generally should not be disturbed. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). This standard of review does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and testimony, as it is the Hearing Officer's responsibility to weigh the evidence and decide disputed issues of fact. We will not disturb the Hearing Officer's decision to credit the testimony of Complainant, where, as here, the Hearing Officer did not err or abuse her discretion.

Tufts Medical Center argues that the Hearing Officer erred in concluding that Tufts Medical Center was liable for discriminating against Complainant on the basis of handicap after it failed to provide her with a reasonable accommodation. Specifically, Tufts Medical Center argues that working overtime was an essential function of an inpatient nursing job, and it had no obligation to provide Complainant with a reasonable accommodation that foregoes an essential function of the job.[4] We disagree with Tuft Medical Center's assertions and conclude that the Hearing Officer correctly determined that working overtime was not an essential function of an inpatient nursing position at Tufts Medical Center.

[4] Tufts Medical Center does not argue that working nights is an essential function of the inpatient nursing position. Rather, it asserts that working overtime, which could require a nurse to work past the evening shift hours and into the night-shift hours, is an essential function.

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"; (2) that she needed a reasonable accommodation to perform her job; (3) that the employer was aware, or could have become aware of her handicap and the need for a reasonable accommodation; (4) the employer was aware, or through a reasonable investigation could have become aware, of a means to reasonably accommodate the handicap; and (5) the employer failed to provide her with a reasonable accommodation. See Alba v. Raytheon Co., 441 Mass. 836, 843 n. 9 (2004); Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 381 (1993); Hall v. Department of Mental Retardation, 27 MDLR 235 (2005). 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. 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. M.G.L. c. 151B, § 4(16); Dahill v. Police Dept. of Boston, 434 Mass. 233, 243 (2001).

A reasonable accommodation is defined as any adjustment or modification to a job that makes it possible for a handicapped individual to perform the essential functions of the position. Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648 (2014). An accommodation is not reasonable if it requires a fundamental alteration of a job or the waiver of an essential job function. See Godfrey v. Globe Newspaper Inc., 457 Mass. 113, 121 (2010); Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443, 454 (2002).

The determination of whether a function is an "essential function" of the job must be made on a case-by-case basis, as it involves fact-sensitive considerations. Gillen v. Fallon

Ambulance Service, Inc., 283 F.3d 11, 25 (1st Cir. 2002). To determine whether a job function is essential, courts look at factors including: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of the parties' collective bargaining agreement; (6) the work experience of past incumbents in the job; and (7) the current work experience of incumbents in similar jobs. See Cargill v. Harvard University, 60 Mass. App. Ct. 585, 596 (2004); Laurin v. Providence Hosp., 150 F.3d 52, 57 (1st Cir. 1998). While these factors provide guidance on what functions are essential functions of a job, the totality of factual information surrounding the job and its various functions should be considered. See Cargill, 60 Mass. App. Ct. at 596.

The Hearing Officer found that Complainant was handicapped based on her chronic conditions of interstitial lung disease and rheumatoid arthritis. Complainant had trouble breathing, experienced fatigue and pain in her joints, could not climb stairs, and could not run. These conditions substantially impaired Complainant's major life functions. See M.G.L. c. 151B, § 16; Cargill, 60 Mass. App. Ct. at 587. Additionally, Complainant's physical condition caused Tufts Medical Center to regard her as handicapped.[5]

Tufts Medical Center asserts that working overtime is an essential function of a nursing position and that because Complainant was unable to perform an essential function of the job, she was not a "qualified handicapped individual." Although the Hearing Officer did not make an

[5] Tufts Medical Center argues that the Hearing Officer's conclusion that Tufts Medical Center regarded Complainant as handicapped is not supported by substantial evidence in the record. We disagree. The Hearing Officer found that the lack of assistance Complainant received as she attempted to return to a nursing position at Tufts Medical Center following her transfer to the leave of absence cost center evidenced Tufts Medical Center's "perception that Complainant was incapable of performing the essential functions of an RN." This finding is supported by substantial evidence that even before Tufts Medical Center became aware that Complainant had any job restrictions, Tufts Medical Center did not alert her to job openings for positions for which she was qualified.

explicit finding that overtime work was not an essential function of the job, she implicitly determined in her analysis that overtime work was not an essential function. Contrary to Tufts Medical Center's assertions, the Hearing Officer correctly analyzed the issues of whether overtime was an essential function of an inpatient nursing position and whether Tufts Medical Center discriminated against Complainant by failing to provide her with a reasonable accommodation. The Hearing Officer thoroughly analyzed the relevant factors and engaged in the fact-based inquiry necessary to determine whether a function is an essential function of a job. See Cargill, 60 Mass. App. Ct. at 596.

In determining that working overtime was not an essential function, the Hearing Officer acknowledged that Tufts Medical Center relies on nurses to work overtime when nurses call out sick, a patient becomes critically ill, or if there is an emergency situation that requires nurses to stay and work overtime to ensure proper nursing care. The Hearing Officer found that the parties' Collective Bargaining Agreement did not mandate overtime; instead it merely permitted Tufts Medical Center to require "reasonable overtime." Complainant's job description did not include overtime work as a job requirement, instead the job description provided that nurses were "subjected to irregular hours." The Hearing Officer also found that while Tufts Medical Center asserted that overtime work was a universal practice, as 94.6% of all nurses were paid for working some amount of overtime in 2009, some nurses performed as little as three hours of overtime and about 5% of nurses performed no overtime at all. Further, the nurse, who filled Complainant's position at Proger 5 North after Complainant was transferred to the leave of absence cost center, worked an average of one overtime shift per month during the seven-month period following her hire. The Hearing Officer also found that although Complainant had performed overtime work in the past as an inpatient nurse, in 2008, she was provided with an

accommodation that exempted her from working any overtime.[6] The totality of these specific facts, all of which are supported by substantial evidence in the record, support the Hearing Officer's conclusion that overtime was not an essential function of an inpatient nursing job at Tufts Medical Center. Because Complainant was able to perform the essential functions of the job with the reasonable accommodation that she be excused from working nights and overtime, the Hearing Officer correctly determined that Complainant was a qualified handicapped individual.

The Hearing Officer further determined that the accommodation that Complainant be relieved from working nights and overtime was a reasonable accommodation, and it was not an undue hardship on Tufts Medical Center. The Hearing Officer based this determination on the following facts, all of which are supported by evidence in the record: (1) the large pool of inpatient nurses from which Tufts Medical Center could obtain individuals to work an overtime shift; (2) the fact that some inpatient nurses sought overtime and night-shift work in order to earn more money and to be relieved of work obligations during the day; (3) Tuft Medical Center's reliance on "per diems" and "floaters" to cover nursing absences; (4) the fact that 5% of inpatient nurses did not work any overtime in 2009; (5) the existence of day-evening rotating nursing schedules at Tufts Medical Center and Complainant's ability to work this shift; (6) Complainant's assurance that if an emergency were to occur requiring her to stay past her normal hours, she would never abandon a patient; and (7) Tufts Medical Center had previously provided Complainant with an accommodation exempting her from working any overtime past her normal day-evening shift hours. Given these specific factual findings, the Hearing Officer did not err in concluding that Tufts Medical Center failed to provide Complainant with a reasonable

[6] It is important to note that the Hearing Officer also credited Complainant's testimony that she would never leave a patient that needed her even if that required her to work past her normal shift hours. <u>See</u> Transcript I, 43-46.

accommodation.

Tufts Medical Center argues that the Hearing Officer erred in finding that it failed to engage in the interactive process with Complainant. We disagree. "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation . . . through a flexible, interactive process that involves both the employer and the qualified individual with a disability." Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002). This process is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could overcome the employee's limitations. See MBTA v. MCAD, 450 Mass. 327, 342 (2008).

The Hearing Officer determined that rather than engage in an interactive dialogue with Complainant, Tufts Medical Center refrained from interviewing Complainant for day-rotator inpatient nursing positions, which Complainant could have performed provided she was given a reasonable accommodation. Specifically, when Tufts Medical Center learned that Complainant would be able to return from her medical leave on an unrestricted full-time basis on October 19, 2009, Tufts Medical Center failed to assist Complainant return to work. The credible evidence in the record supports the Hearing Officer's determination that Tufts Medical Center knew that there were vacant inpatient nursing positions available that Complainant was qualified for, yet declined to bring these positions to Complainant's attention. Instead, Tufts Medical Center offered Complainant a night-shift only position and told her it was the only option available, despite evidence that this position was not publically posted online and that several day-rotator inpatient nursing positons on Proger 5 North remained available. The Hearing Officer made the reasonable inference that this was a direct tactic by Tufts Medical Center to avoid interactive

dialogue with Complainant.

Only after Complainant declined Tuft Medical Center's offer of the night-shift only nursing position did Tufts Medical Center learn that Complainant had work restrictions. On November 10, 2009, Complainant submitted a medical note that stated she could not work nights due to "medical issues." Complainant then submitted another medical note on November 11, 2009, which listed Complainant's medical diagnoses and cleared Complainant to return to work full-time on the day-shift, explaining that working nights affects her ability to sleep and causes her to have flare-ups of her rheumatoid arthritis. After reading these notes, Tufts Medical Center's Employee Relations Specialist and Manager, Julie Miglietta, understood that Complainant could work the day-evening shift but was unclear about whether Complainant could work an occasional night-shift on an overtime basis. Complainant told Miglietta to speak with her doctor. Miglietta spoke with Dr. Greenspan on December 10, 2009, and asked if Complainant could occasionally work overtime, including a possible double shift or night hours. Miglietta documented her discussion with Dr. Greenspan as follows: "no doubles—no nights—no doubles, even occasional not recommended. Up to her if she wants to try. Exacerbations occur when tired. OT not recommended. Permanent restrictions." See Joint Exhibit 47.

After her conversation with Dr. Greenspan, Miglietta did not follow up with Complainant and ask her if she was willing to try working an occasional night shift or overtime. Instead, Miglietta determined that a clinic position at a doctor's office would be better fit for Complainant than a position at Tufts Medical Center. Complainant was thereafter encouraged to seek employment outside of Tufts Medical Center. The Hearing Officer determined that instead of continuing to have open dialogue with Complainant to determine whether, despite her doctor's recommendation, she wanted to try to work an occasional night shift or overtime, Tufts Medical

Center unilaterally determined that Complainant could not perform the essential functions of an inpatient nurse and would be better served seeking employment elsewhere. The Hearing Officer did not err in determining that Tufts Medical Center failed to engage in the interactive process with Complainant.

Tufts Medical Center argues that the Hearing Officer erred in concluding that Complainant was constructively discharged. Specifically, Tufts Medical Center argues that Complainant was never compelled to resign and she only did so after she engaged in the interactive process with Tufts Medical Center and turned down Tufts Medical Center's offer to work a night-shift only nursing position. We disagree with Tufts Medical Center's assertions.

A constructive discharge occurs when "...the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will." GTE Prod. Corp. v. Stewart, 421 Mass. 22, 34 (1995) (citations omitted). The Commission has long recognized constructive discharge in situations where an employee justifiably has no other recourse but to resign his employment. Doble v. Engineered Materials Solutions, 35 MDLR 36 (2013) (affirming the Hearing Officer's conclusion that an employer may cause the constructive discharge of an employee by failing to engage the employee in the interactive process to determine the feasibility of a reasonable accommodation), Anderson v. United Parcel Service, 32 MDLR 45 (2010) (determining that Complainant was constructively discharged where his employer refused to engage in an interactive dialogue with Complainant and failed to provide him with a reasonable accommodation, ultimately leaving him unable to return to work).

The Hearing Officer determined that Complainant was constructively discharged from her employment with Tufts Medical Center as of October 19, 2009, when Complainant was medically cleared to return to work full-time but was not offered a position that she could fill,

despite the existence of several open positions for which Complainant was qualified. Complainant applied for several vacant positions, but never received an interview or job offer. Tufts Medical Center offered Complainant a night-shift only nursing position and told her it was the only option available, despite the availability of several day-rotator positions that Complainant was qualified for. Tufts Medical Center failed to engage Complainant in the interactive process and instead unilaterally determined that Complainant could not perform the job functions of an inpatient nurse based on her disability. Because Tufts Medical Center failed to engage in the interactive process with Complainant and failed to assist her in finding a position for which she could return to, despite her ability to return with a reasonable accommodation, Complainant was effectively terminated by Tufts Medical Center's denial of Complainant's possibility of returning to work. The Hearing Officer did not err in determining that Tufts Medical Center was liable for constructive discharge.

PETITION FOR ATTORNEYS' FEES and COSTS

Complainant filed Petitions for Attorneys' Fees and Costs on October 28 and 29, 2015, to which Respondent Tufts Medical Center has filed an Opposition. Complainant also filed Supplemental Petitions for Attorneys' Fees. Complainant's Petitions seek attorneys' fees in the amount of $355,170.24. Specifically, Attorney LeBrun requests attorneys' fees in the amount of $208,850.24 and Attorney Fine requests attorneys' fees in the amount of $146,320.00. Complainant also seeks costs in the amount of $5,954.38, with Attorney LeBrun requesting $5,744.63 in costs and Attorney Fine requesting $209.75 in costs. The total amount of fees sought represents a total of 887.95 hours of compensable time at an hourly rate of $400.00. We have reviewed the affidavits submitted by Attorneys LeBrun and Fine and determine that that the hourly rate of $400 per hour, requested by both attorneys, is consistent with rates customarily

charged by attorneys with comparable experience and expertise in such cases. The Petitions are supported by detailed contemporaneous time records[7] noting the amount of time spent on specific tasks and affidavits of counsel.

M.G.L. c. 151B allows prevailing complainants to recover attorneys' fees for the claims on which the 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 a reasonable 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 the complexity of the matter. Baker v. Winchester School Committee, 14 MDLR 1097(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 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 prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Brown v. City of Salem, 14 MDLR 1365 (1992).

[7] Tufts Medical Center argues that the time records submitted by Attorneys LeBrun and Fine are not contemporaneous time records. We disagree. The affidavits submitted by Attorneys LeBrun and Fine in support of the Petitions aver that the time records and costs are based upon contemporaneous records and, with respect to Attorney LeBrun, contain an itemization of hours and services which were "tracked although [she] represented Complainant on a contingency fee basis."

Tufts Medical Center filed an Opposition to the fee petitions arguing that the amount sought must be reduced because (1) Complainant was not successful on her claims of race, color, and national origin discrimination and her claim of individual liability against Julie Miglietta; (2) the fees requested are excessive and duplicative; (3) Attorneys LeBrun and Fine seek fees for the performance of administrative tasks; (4) counsels' time entries are insufficiently detailed; and (5) Attorneys LeBrun and Fine inappropriately block-billed their time. Having reviewed Tufts Medical Center's Opposition and the time records, we determine that the attorneys' fees requested must be reduced.

Where different claims are involved, and the petitioner has prevailed on some claims but not others, the Commission may exercise its discretion to reduce the overall fees requested by some amount reasonably associated with the pursuit of Complainant's unsuccessful claims. See Marathas v. Holiday Inn, 22 MDLR 391 (2000). In making such a determination, we may examine the "degree of interconnectedness" between the claims. Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000). We conclude that a 10% reduction in Complainant's requested fees is appropriate here. There was significant interconnectedness between the claims against both Respondents. Complainant did not pursue her claims of race, color, and national origin discrimination at the public hearing through the presentation of additional witnesses or briefing. Therefore, we reduce the attorneys' fees requested for Attorney LeBrun's time by $20,885.02 and the attorneys' fees requested for Attorney Fine's time by $14,632.

Tufts Medical Center argues that the fees requested by Attorneys LeBrun and Fine are excessive and duplicative. Specifically, Tufts Medical Center challenges counsels' time spent conferencing with each other, attending the public hearing, reviewing deposition transcripts,

preparing witnesses for deposition, and drafting the pre-hearing memorandum. We agree with Tufts Medical Center that the hours requested by Attorneys LeBrun and Fine for conferencing with each other must be reduced. Specifically, Complainant's lead counsel, Attorney LeBrun, seeks compensation for 49.52 hours of time spent conferencing with co-counsel, Attorney Fine. Attorney Fine requests 75.9 hours for conferences, emails, and phone calls with Attorney LeBrun. In total, both attorneys seek compensation for 125.42 hours of time spent conferencing, emailing, calling, and leaving voice mails for each other. We conclude that this is excessive and accordingly discount each attorney's requested hours for conferencing by one-third. Thus, we deduct 16.5 hours for Attorney LeBrun and 25.3 hours for Attorney Fine for such time. Therefore, we discount the attorneys' fees requested by Attorney LeBrun by $6,600 and the attorneys' fees requested by Attorney Fine by $10,120.

A review of counsels' billing for attending the public hearing reveals that Attorneys LeBrun and Fine worked closely on and consulted with each other in the preparation and the prosecution of this matter. While the Commission has reduced fees in cases in some instances where multiple attorneys have billed for the same work, we decline to do so in this case. See MCAD & Lulu Sun v. University of Massachusetts, Dartmouth, 36 MDLR 85 (2014) (allowing two attorneys to bill for work at public hearing where both had active roles and the commission found joint work on documents, preparation, and participation in public hearing reasonable). Attorneys LeBrun and Fine both attended and took active roles at the public hearing. We have determined that in this case, it was reasonable for two attorneys to prepare for and participate in the public hearing.

Addressing Tufts Medical Center's argument that Complainant seeks recovery of fees for administrative tasks, we agree and further reduce the fees requested. Although Attorneys

LeBrun and Fine indicated in their affidavits that they discounted their time spent on administrative tasks from their requested attorneys' fees, further reduction is necessary. Specifically, Attorney LeBrun requests fees for administrative tasks such as numbering, copying, assembling, and redacting. We discount Attorney LeBrun's requested fees by $1,800 for 4.5 hours spent performing these administrative tasks. Attorney Fine requested attorneys' fees for traveling to and from the office of Attorney LeBrun for a total of 2.2 hours. We discount Attorney Fine's request for fees by $880 for his requested time spent traveling to and from co-counsel's office.

We also agree with Tufts Medical Center that Complainant's requested fees should be reduced to reflect the fact that some of counsels' time records are insufficiently detailed to allow for adequate review. Although Attorneys LeBrun and Fine itemized their time entries, the description of some of their entries lacked sufficient detail to permit the Commission to determine whether the services rendered were necessary and if the amount of time expended was reasonable. See MCAD and Lulu Sun v. University of Massachusetts, Dartmouth, 36 MDLR 85 (2014) ("Entries that simply reflect an email or telephone call with opposing counsel absent an explanation of the nature or subject matter of the task may be deemed insufficient and may be refused."). The descriptions of professional services which Attorneys LeBrun and Fine billed for included: "Telephone conference with Attorney LeBrun," "emailed co-counsel," "phone call from client," "conference with client," and "letter to client." These generic descriptions accounted for 16.98 hours billed by Attorney LeBrun and 9.7 hours billed by Attorney Fine. Therefore, we discount the attorneys' fees requested by Attorney LeBrun by $6,792 and the attorneys' fees requested by Attorney Fine by $3,880.

With respect to Tuft Medical Center's concern about block-billing, we find that because most of the items listed by counsel are clearly described and generally are of short-duration, the use of "block-billing," while disfavored, does not compel a reduction in the fee award. See Haddad v. Wal-Mart Stores Inc., 455 Mass. 1024, 1027 (2010) (providing that where several tasks are grouped under one single time entry, it is appropriate to divide the hours billed by the number of tasks listed to arrive at an average time for each task).

Accordingly, we conclude that an award of $289,581.22 for attorneys' fees, specifically $172,773.22 for Attorney LeBrun's time and $116,808 for Attorney Fine's time, is appropriate given these circumstances. We find that counsels' requests for reimbursement of costs is reasonable and will award Complainant a total of $5,954.38 for the listed expenses.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. Respondent's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is confirmed in its entirety.

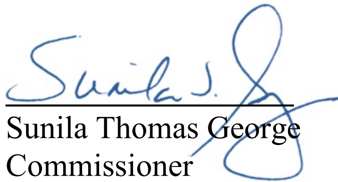
1. Respondent shall cease and desist from all acts of disability discrimination.
2. Respondent shall pay to Complainant a total of $85,793.45 in back pay damages with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Respondent shall pay to Complainant the sum of $45,000.00 in emotional distress damages 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 to Complainant attorneys' fees in the amount of $289,581.22 and costs in the amount of $5,954.38, with interest thereon at the rate of 12% per annum. With respect to the accrual of interest on attorneys' fees, the interest shall begin to accrue on $227,321.26 of the total amount as of October 29, 2015; and the interest shall begin to accrue on the remaining award of $62,259.96 as of August 8, 2016. Interest shall begin to accrue on costs as of October 29, 2015. Interest on these awards shall accrue until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

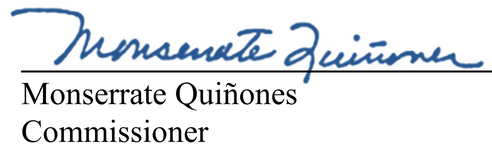
This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action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

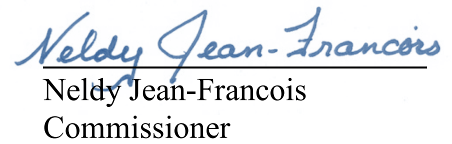
SO ORDERED this 18th day of December, 2019.



Sunila Thomas George
Commissioner



Monserrate Quiñones
Commissioner



Neldy Jean-Francois
Commissioner