COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and GUY DOBLE,
Complainants

v. DOCKET NO. 05-BEM-01948

ENGINEERED MATERIALS SOLUTIONS,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us on appeal from a decision of Hearing Officer Judith E. Kaplan in favor of Complainant Guy Doble ("Doble"). Following an evidentiary hearing, the Hearing Officer concluded that Respondent Engineered Materials Solutions ("EMS") was liable for discrimination on the basis of handicap in violation of M.G.L. c. 151B, § 4(16). Specifically, the Hearing Officer found that Doble, a person with a disability, was constructively discharged after thirty years of employment at EMS or its predecessor company, when he was compelled to resign on the day that EMS announced a reorganization and reduction in work-force and unilaterally reassigned him to a position he could not physically perform. The Hearing Officer determined that EMS failed to engage Doble in an interactive process to determine whether a reasonable accommodation was available that would have allowed him to perform the newly

assigned job or to continue to work for EMS in some other capacity, with or without a reasonable accommodation. The Hearing Officer awarded Doble back pay damages in the amount of $5,812.00 and damages for emotional distress in the amount of $50,000.00. Respondent has appealed the decision to the Full Commission.

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.

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). The Full Commission's role is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

EMS has appealed the decision on the grounds that the Hearing Officer's findings were not supported by substantial evidence and contrary to the law. Specifically, EMS asserts that the Hearing Officer erred in concluding that (1) Doble was a "qualified" person with a disability, (2)

EMS knew of his disability and breached its duty of participating in an interactive process with him regarding a reasonable accommodation and (3) that EMS' reassignment of Doble to a job he could not perform because of his disability amounted to constructive discharge. EMS also claims that the Hearing Officer's decision obliges it to create a new position for Doble as a reasonable accommodation, an action not required by state law, and challenges her award of $50,000.00 in emotional distress damages as excessive and unsupported by the evidence.

We have carefully reviewed EMS's grounds for appeal and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. We find no material errors of fact or law with respect to the Hearing Officer's findings of fact and conclusions of law. Moreover, we defer to the Hearing Officer's findings which are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

We begin first with EMS's challenge to the Hearing Officer's finding that it was on notice of Doble's disability and failed to engage him in an interactive dialogue to determine whether a reasonable accommodation could be made. We conclude that substantial record evidence supports the Hearing Officer's finding that EMS was indeed made aware of Doble's physical impairment (knee and back arthritis and pain) immediately after its reorganization and reduction in work-force on April 9, 2005, and that its duty to engage Doble in an interactive conversation was repeatedly triggered as Doble expressed to his supervisor and human resources personnel that as a result of his medical condition, he was unable to perform the newly-assigned job. Based on findings of fact by the Hearing Officer which are substantially supported by the evidence, we also conclude that EMS had notice (knew or should have known) of Doble's physical impairments (back and knee arthritis) before it reassigned him to a new position

following the elimination of his job and had an obligation to re-assign him to a job he could perform with or without a reasonable accommodation or if unsure of the extent of his impairment and limitation, engage him in an interactive conversation about the jobs he was qualified for. [1]

The Hearing Officer found the following relevant facts. Doble worked for EMS or its predecessor, Texas Instruments, for almost thirty-five years. He began in 1971 working on the bonding line as a helper to the bonding mill operations, a position which required him to lift 100 to 150 pounds and to perform strenuous work on his knees. He began to suffer from arthritis in his back and knees and underwent arthroscopic surgery in both knees in the mid-1990s. In 1999, he underwent a second surgery, an osteotomy, which relieved some of the pain in his knees. Doble testified that when he returned to work in 2000, his supervisor (from approximately 1998 to 2002), John Devlin, reassigned him to a less strenuous position as a roll change operator. The Hearing Officer concluded that Devlin made this assignment to accommodate complainant's physical impairments and found that following the second surgery up until the reorganization, Doble treated with a chiropractor in an effort to reduce his knee and back pain, which varied depending on his job assignment and shift length. [2]

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[1] In light of our decision, we do not need to address EMS's claim that the Hearing Officer erred in finding that Doble was a "qualified" person with a disability. EMS's argument is based on the assumption that the disability inquiry begins and ends with an analysis of the job Doble was *re-assigned* to and (according to EMS) could not perform with or without a reasonable accommodation, instead of his prior, eliminated job as a result of EMS's reorganization, which is our focus. If we were to focus on the re-assigned job only, any pre-existing rights or obligations that an employee or employer, respectively, had under M.G.L. c. 151B, § 4(16), could be extinguished , merely by reassigning a disabled employee who has been accommodated to any job that's impossible for him to do, and then claiming accommodation is not feasible . This we refuse to do.

[2] EMS witnesses testified that they had no record of Doble's impairments. EMS' lack of knowledge, whether due to insufficient or inadequate transferal of relevant personnel information from its predecessor, Texas Instruments, or any other reason(s), is a problem of its own making. EMS' ignorance of Doble's prior surgeries, medical leave and subsequent accommodation

As a roll change operator, Doble initially worked eight-hour shifts (until 2004) and testified that at the end of the day, his knees were sore. In 2004, however, because of an increase in business, Doble's shift was increased to twelve-hours on alternating days with the result that he experienced "throbbing" leg pain. In February, 2005, Kirke Calley, Doble's supervisor, once again returned him to an eight-hour shift, which lessened his pain. Doble testified that when he learned of the reduction in hours he told Calley that "his knees and back thanked him".[3]

At the beginning of the work day on April 19, 2005, Calley informed Doble that his position was eliminated and unilaterally re-assigned him, as part of EMS's reorganization and reduction in work-force, to the position of bonding mill helper assisting the lead person to set up the bonding mill machine on 12-hours shifts, the job Doble held prior to his return from knee surgery in 2000, but for a shorter (8-hour) shift. Doble had no prior notice of the reassignment or re-organization. The Hearing Officer found that Doble reminded Calley, who had become his supervisor in 2002, that his previous supervisor had taken him off the bonding mill helper job because of his arthritis and pain. She also found that during this conversation Doble was upset about the more strenuous physical demands of the job and his physical inability to do the work for longer hours.[4] Doble reported to the new work-site that day as instructed by Calley and attempted to perform the job. As before, the bond line helper job required that he work on his knees. Doble testified that when he got down on his knees to slide the brushes, he could "barely"

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cannot fairly be allowed to stand in the way of his rights under Chapter 151B. Holding otherwise would undermine the protections afforded to disabled workers by discouraging a successor employer from obtaining relevant information about the acquired work force and allow it to plead ignorance in the face of a claim of discrimination.

[3] The Hearing Officer concluded that the return to an eight-hour work day was not for the purpose of providing Doble with a reasonable accommodation but for other unrelated reasons.

[4] The Hearing Officer rejected Calley's testimony that Doble was upset with the reassignment because he didn't want to work long hours or on weekends.

get up to a standing position and realized he couldn't perform the re-assigned job.

The Hearing Officer found that prior to April 19, 2005, the day EMS announced its reorganization and Doble was re-assigned to the bonding mill helper position, he had engaged in informal conversations about his physical limitations with Barbara Lewis, a nurse who provided on-site services for EMS, including assisting employees whose conditions require light duty or restrictions.[5] Specifically, the Hearing Officer credited Doble's testimony that he "often" complained about his pain to Lewis and told her that he suffered from arthritis;[6] and that Lewis had gone so far as to suggest to him that he get a note from his surgeon recommending light duty work.[7] Lewis testified that while she had known Doble since 2001 and treated him for a "work-related injury," she had never had a conversation with him about his pain or arthritis. The Hearing Officer rejected this testimony but credited her claim that she had never received a formal request and medical documentation for an accommodation from Doble.[8]

The Hearing Officer also found that Doble discussed his pain and arthritis in casual

[5] Lewis testified that she's known complainant since 2001, when he came into her office for treatment of a work-related injury. The Hearing Officer found that Lewis worked in 1999 under a contract between Texas Instruments and Sturdy Memorial Hospital in Attleboro and since 2000, under a contract between EMS and the Hospital, to provide services on site at EMS for 32 hours a week. Her duties included among other things processing workers' compensation, short-term disability claims, and assisting employees whose conditions require light duty or restrictions. She testified that she did not share any of the information she obtained about employees with EMS.

[6] Doble testified that he visited Lewis weekly so that his blood pressure could be checked.

[7] Doble, who was working the roll change job, testified that he told Lewis that he did not want light duty work.

[8] This is consistent with Doble's testimony that he did not seek any accommodation while performing the roll change operator job that was eliminated on April 19, 2005.

conversations with his supervisor, Calley.[9] Doble testified, for example, that he "frequently" complained to Calley about his knees after climbing the stairs to see him in his office. Calley was involved in EMS's reorganization and reduction in force efforts and made recommendations to EMS's management on which jobs to eliminate, who to lay-off and who to retain and reassign to other jobs. He further testified that Doble was never considered for layoff and that EMS wanted to keep him on.

Pre-Reorganization Notice of Doble's Disability. We conclude that the Hearing Officer's findings of fact, which are supported by substantial evidence, support a conclusion that EMS knew or should have known that Doble had a disability prior to the date of its reorganization and that it had an obligation to re-assign him to a position he was qualified for and could perform.[10]

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[9] Calley testified that he did not recall discussing Doble's arthritis with him.

[10] It is reasonable in our view, and consistent with the anti-discrimination mandate of Chapter 151B and our obligation to liberally construe the statute in a way that furthers this mandate, to require an employer who re-assigns an employee with a disability as part of a reorganization to re-assign the employee to a position (s)he is qualified for and can perform, with or without a reasonable accommodation. In these circumstances, the employer's re-assignment obligation is analogous to that of the employer who elects the job re-assignment option as way to reasonably accommodate an employee who can no longer perform his or her existing job under the Americans with Disabilities Act ("ADA"). **W**hen the re-assignment option is chosen, the employer is required "to offer a reassignment to another vacant job which that person would be qualified to perform with or without a reasonable accommodation." Smith v. Midland Brake, Inc., 180 F.3d 1154, 1177 (10th Cir. 1999). See EEOC v. Humiston Keeling, Inc., 227 F.3d 1024, 1027 (7th Cir. 2000) (noting that "[t]he [ADA] reassignment provision makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance"). Here, as under the ADA, "[i]t would not be reasonable to require an employer to reassign an employee to a position for which he or she is not otherwise qualified with or without reasonable accommodation." Smith, 180 F.3d at 1178. While Chapter 151B has not been interpreted to require re-assignment as a reasonable accommodation when an employee is no longer able to perform the job (s)he holds, we see no reason why the rationale and logic of the Federal approach should not apply when an employer chooses to re-assign an employee after eliminating the position the employee was adequately performing. This conclusion does not require EMS to create a new job for Doble. Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443 (2002) .

If EMS had any question about the parameters of Doble's limitations it had a duty to engage him in an interactive dialogue before reassigning him to a new position. In reaching this conclusion, we rely on the Hearing Officer's findings of fact, which are supported by substantial evidence in the record, regarding Doble's conversations with Lewis and Calley about his pain and arthritis, his two knee surgeries, and reasonable accommodation upon return from the second surgery in 2000 to a less strenuous position, and his ongoing treatment for pain. It is well-settled law that the role of the Full Commission is not to second-guess a Hearing Officer's credibility determination, where (s)he is in the unique position to hear the testimony of the witnesses and to observe their demeanor, and we will not do so here today. See School Committee of Chicopee, 361 Mass. 352; Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011. The Hearing Officer's decision to credit Doble's testimony over Lewis and Calley's regarding the content of conversations that occurred in the preceding years, are the Hearing Officer's decisions to make. Id. Moreover, the failure of EMS to reflect Doble's medical status in its records does not negate the underlying facts, as found by the Hearing Officer.

The Hearing Officer correctly noted in her decision that even though EMS violated no law when it eliminated Doble's position, this "does not mean that its duty to accommodate remaining employees who are disabled ends." Indeed, as we have just noted, when an employer decides to re-assign an employee who it knew or should have known had physical limitations, it must endeavor to assign that employee to a job that (s)he is capable of performing with or without a reasonable accommodation. If EMS was unsure about the scope of Doble's physical impairment and concomitant limitations, it could have sought medical documentation from his health-care provider for clarification, see Handicap Discrimination Guidelines of the Massachusetts Commission Against Discrimination, § VII (A) (1998) ("MCAD Guidelines"), or

entered into an interactive dialogue with him about these issues. Id., Mazeikus v. Northwest Airlines, 22 MDLR 63, 69 (2000).

We further hold that EMS was responsible for initiating an interactive dialogue with Doble because only it knew that the job Doble was performing was about to be eliminated and that he would need to be re-assigned to another position. Ordinarily, the interactive process is initiated when an employee gives notice to an employer of his or her disability and resulting limitation with respect to an essential function of his or her current job. See MCAD Guidelines § VII (A). Here, Doble had no reason to believe that he was about to be assigned to another job, much less one that five years earlier he had been relieved of as accommodation of his disability. The information that provoked a need for an interactive dialogue was peculiarly within EMS' knowledge and triggered its duty to begin the interactive process.

We conclude that EMS's failure to re-assign Doble to a position he was qualified for and could perform with or without a reasonable accommodation or initiate at an interactive dialogue to this end, under these circumstances, where EMS had notice of Doble's physical condition and related limitations before its re-organization and elimination of his position, violated Chapter 151B § 4(16).[11]

Post-Reorganization Notice of Doble's Disability. EMS had opportunities to correct its error immediately following Doble's re-assignment. The Hearing Officer found that after

[11] This conclusion is not intended to give an employer license to simply terminate rather than re-assign disabled employees when engaged in workforce down-sizing and reorganization. A company must establish and apply fair and objective criteria when making lay-off decisions. Here, EMS's witnesses testified that it considered employee skills, flexibility, attitude and performance in its decision to lay-off 42 out of 500 employees, and weighed seniority favorably. Kerrin Servais, EMS's Human Resources Director at the time of the Hearing testified, and the Hearing Officer found, that EMS did not consider Doble for lay-off "because of his experience and good work record and a desire not to lose him" and recognized of his seniority. She also found that Doble "consistently" received positive performance appraisals.

attempting the newly-assigned job on April 19, 2005, Doble sought out Calley and told him he couldn't physically work as a bond line helper, had been relieved of that strenuous job following his return from surgery in 2000, and asked for a different assignment. In response, Calley told him that no other jobs were available and referred him to the Human Resources Department and that day, Doble met with Lisa Doherty, a Human Resources Generalist. Doble testified and the Hearing Officer found that Doble told Doherty that he couldn't do the newly re-assigned job because the arthritis in his knees and back affected his ability to work in a position that required kneeling twelve-hours a day. He further informed her that he could work any other eight-hour job, including operating a fork lift, and that he could perform the roll change operator job for unlimited hours. Doherty, like Calley earlier in the day, informed Doble that there were no other jobs to offer him and as a result, Doble tendered his resignation from EMS.[12] Doherty testified that she asked Doble to take more time to think about his resignation decision but that when he declined to do so, printed a termination notice and had him sign on the spot, an act that was the next day characterized as irreversible by her supervisor.

The Hearing Officer concluded (and we agree) that this conversation between Doble and Doherty on April 19, 2004, was more than sufficient notice to EMS of Doble's disability (arthritic knees and back) to trigger EMS's obligation to engage him in an interactive process in order to determine if there was any feasible accommodation that would allow him to perform his new job, or if any other jobs were available that met his needs.[13] An employee does not need to

[12] The Hearing Officer rejected Doherty's testimony that Doble never mentioned his physical disabilities during this meeting and told her that he was resigning because he did not want to work twelve-hour days or on Sundays. We will not disturb the Hearing Officer's credibility determinations with respect to the content of this conversation.

[13] Given the circumstances of this case, namely a company reorganization that resulted in the elimination of some (including Doble's) jobs and the termination of some employees and re-

use the talismanic words "disability" or "reasonable accommodation" in order for an employer's duty to engage in an interactive process to arise; it is sufficient that information is conveyed indicating that the employee has an impairment that is interfering with the performance of essential job functions. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disability Act; EEOC Notice Number 915.002, 10/27/02.

The next day (April 20, 2005) Doble and his wife spoke with Kerrin Servais, EMS's Human Resources Director and Doherty's supervisor, and also told her told her that Doble's medical condition prevented him from working twelve hours-a-day as a bonding mill helper. Servais was also informed that medical documentation would be forthcoming later that day from Doble's medical care providers. Servais testified that she told Doble's wife that there was nothing more she could do because Doble's termination had already been "processed" and he had "voluntarily" signed the paperwork. Nonetheless, Servais testified that she asked Doble whether he would like to return to work in the mill helper position (the newly assigned position Doble could not perform) to which, not surprisingly, Doble responded "no" on account of his physical condition. Servais then told Doble that there were no other positions available for him,[14] and added that EMS had no record of his having a medical problem with his knees.[15] That

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assignment of others, it would have been appropriate for EMS to consider as an accommodation re-assignment of Doble to a job he was qualified to perform with or without a reasonable accommodation.

[14] At this point Doble requested a severance package, which had been offered to all laid off employees, which he was denied as ineligible because he was not laid off.

[15] EMS's absence of records pertaining to Doble's medical condition is irrelevant. An employer's duty to engage in an interactive conversation about the feasibility of a reasonable accommodation is triggered when the employee discloses his physical impairment. Doble's disclosures to Calley, Doherty and Servais, independently and taken together, were sufficient to

day, Doble's doctor and chiropractor sent faxes stating that he suffered from severe osteoarthritis in his knees and back and chronic back pain, resulting in limitations on the kind of job he could perform, and that he had been under treatment for the pain since April 10, 2000.[16] With medical documentation in hand, EMS still refused to engage Doble in an interactive conversation on April 20, 2005, this time not for lack of documentation, but because Doble's submission of voluntarily signed paperwork had already been processed by EMS and his separation from employment final. We agree with the Hearing Officer's rejection of the alleged finality of Doble's resignation and her conclusion that EMS's claim is belied by the fact that Servais twice asked Doble whether he wanted his re-assigned job back, on April 20 and 21, 2005. We find that Doble's resignation was not irreversible and that EMS should have discussed with him the feasibility of a reasonable accommodation of his re-assigned position or whether another job was available.[17]

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trigger EMS's obligations. Moreover, if EMS had any doubt about whether Doble's medical condition rose to the level of a disability within the meaning of the law, it was of course entitled to request medical documentation from him, but could not simply conclude that the absence of prior records in its possession was sufficient to obviate its duty. See Handicap Discrimination Guidelines of the Massachusetts Commission Against Discrimination, § VII (A) (1998) ("[w]hen the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation").

[16] Doble's doctor sent a fax stating that Doble had severe osteoarthritis in his knees and back and that he is "no longer able to perform job duties that require strenuous physical effort and long hours" and Doble's chiropractor faxed a note stating that Doble had been under his care since April 10, 2000 for chronic back pain and that the hours and physical demands of the new position "would have been detrimental to his back condition." We note that this subsequent conduct of obtaining medical documentation is consistent with Doble's testimony that he told Doherty the day before that he could not perform the newly assigned job because of arthritis in his knees and back.

[17] Because EMS failed to engage Doble in an interactive conversation to determine if he could perform his re-assigned job with an accommodation, it is incorrect to claim as EMS has here, that Doble was "unqualified" for the bond line helper job. This is especially in light of testimony

We recognize of course that an employer is under no obligation to provide a reasonable accommodation if it can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on its business operations. G.L. c. 151B, § 4(16). See MBTA v. MCAD, 450 Mass. 327, 342 (2008) ("[t]here is no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business"). Here, however, the testimony of EMS's witnesses that Doble could indeed have been reasonably accommodated leads us to conclude that EMS could have re-assigned Doble to a job that met the needs of his physical limitations. Notably, EMS's nurse, Lewis, testified that had Doble provided medical documentation of his physical limitations prior to his "resignation" (see discussion within) from employment, she could "absolutely" have worked with him, his physician, and Human Resources to determine his limitations and accommodate his needs.[18] She further testified that EMS was a "unique company" in that it had never denied a request for accommodation from an employee. Similarly, Karen Servais, EMS's Human Resources Director testified that EMS *never* denied an accommodation to an employee who was disabled. Moreover, the Hearing Officer found that Doble had worked "just about every job" in his thirty-five year career working for the metal bonding and cladding company, under EMS or its predecessor, Texas Instruments, including as a forklift operator, and had operated nearly every machine for the company, rendering him qualified for a range of EMS positions. In short, EMS presented no evidence that it would

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from EMS's own witnesses (to be discussed) about accommodations that were granted to employees in that position.

[18] Lewis testified, for example, that she helped "many" employees in the bonding mill helper position who had lifting or hours of work restrictions by assigning helpers or "even chang[ing] jobs to accommodate medical conditions".

suffer undue hardship in providing Doble with a reasonable accommodation and its argument otherwise is mere speculation.

Based on our conclusions, it should be clear that we have rejected EMS's argument that our analysis should begin and end with the post-reorganization bonding mill helper job he was assigned to and could not perform. EMS has argued that because Doble could not perform this job on account of his disability, he failed to prove an essential element of his discrimination claim, namely, that he was a qualified handicapped individual under Chapter 151B, thus dooming his cause of action.[19] We have already determined, however, that EMS had a duty to engage Doble in an interactive conversation before assigning him to a new position based on his long-standing medical condition which EMS knew or should have known about. Moreover, where EMS's eliminated Doble's position and assigned him to a different one, it was required to reassign him to a position for which he was otherwise qualified with or without reasonable accommodation or engage him in an interactive process.

EMS argues that the Hearing Officer erred in determining that Doble was constructively discharged from his job. The Commission has long recognized constructive discharge in situations where an employee justifiably has no other recourse but to resign his employment. McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1240-42 (1992); Brodeur v. Harney's Superstore, 5 MDLR 1335 (1983). In this case, the facts support Doble's assertion that he had no choice but to resign. His job had been eliminated and he was unilaterally re-assigned to a longer shift and a different position as a bonding line helper that he could not perform because of

[19] Because EMS did not engage Doble in an interactive dialogue, we do not know whether he could have performed the new job with an accommodation. However, as already noted, EMS employees with medical conditions had received various accommodations in the position Doble was re-assigned to.

his disability. Moreover, Doble had previously been reassigned from the bonding line helper position in 2000 as an accommodation of his physical impairments following his return from surgery. When Doble brought his disability and resulting limitations to EMS's attention, he was repeatedly told (by his supervisor Calley, human resources specialist Doherty, and human resources director Servais) that there were no other jobs or recourse available to him. Where EMS failed to engage Doble in an interactive discussion about his disability, or the possibility of reasonable accommodation, we agree with the Hearing Officer's conclusion that Doble was left with no other alternative but to resign. Doherty's suggestion to Doble that he "take more time" before resigning does not alter our conclusion because it did not change the underlying situation and simply was not an attempt to explore possible accommodations with him. In fact, the next day Servais repeated to Doble what Doherty had told him already, namely, that there were no positions available other than the one he had been assigned to, which he could not perform, and offered no dialogue on a possible accommodation. We affirm 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 that is required by law. We also repeat what we have said earlier that when an employer eliminates a disabled employee's job it is required to re-assign the employee to one that he can perform, with or without a reasonable accommodation.[20]

[20] EMS has also argued that Doble was uninterested in discussing possible accommodation and only interested in obtaining a severance package. The evidence does not support this -- the parties discussed severance only after Doble had been told no other jobs was available and resigned. Having failed to re-assign him to a job he could perform or fulfill its duty to explore and discuss alternatives for reasonable accommodation prior to Doble's resignation, EMS cannot in hindsight now assert that Doble only wanted severance pay. (This is not to say that had the parties reached a determination that no accommodation was feasible, Complainant might very well have sought, or been entitled to a lay-off, making him eligible for severance pay, as were all other employees who were laid off).

Having affirmed the Hearing Officer's conclusion that EMS's violated Chapter 151B, we now turn to the issue of emotional distress damages. EMS challenges the Hearing Officer's award to Complainant of $50,000.00 for emotional distress damages. The Supreme Judicial Court has articulated standards for the Commission to consider in rendering damage awards for emotional distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004). These include the nature, character, severity and length of the harm suffered. Id. at 576. Such awards should be "fair and reasonable and proportionate to the distress suffered." In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id.

In this case, the Hearing Officer credited the testimony of Doble, his wife, and his brother-in-law that subsequent to his constructive discharge, Doble experienced a great deal of anxiety, became very depressed, cried frequently, and began to drink more. Doble testified that he was extremely hurt that no one from EMS talked to him about staying with the company or about the possibility of finding another position after thirty-three years of service as a good and loyal employee. He opined about the abrupt nature of his separation and the confusion that ensued. Doble's wife testified that her husband was the type of person who kept his feelings to himself; however, on the day he was forced to resign, she came home to find her husband sitting outside, very upset and that he broke down into tears. Furthermore, she testified that thereafter, he would cry when she went to work, and/or be extremely depressed and quiet, and that he was under a "great deal of stress" as a result of the job loss. She further opined that he was "desolate, refused to talk, and did not want to go out in public or socialize."

The Hearing Officer found that Doble continued to remain upset and depressed about his treatment and separation from EMS two years after the fact, when he began therapy following the death of his son, and continued to raise and discuss the events surrounding the loss of his job with his counselor, expressing bitterness, devastation, depression, and loss of esteem at being treated so badly by his employer despite his thirty-plus years of loyal employment. In making the award of emotional distress damages, the Hearing Officer took into consideration the other stressors that came into Doble's life some two years after his termination including distress caused by his son's death and from a pre-existing condition (PTSD), and discussed and considered their contribution to his emotional state. We find that she fairly apportioned causation in reaching her determination that EMS's actions did cause and contribute significantly to Doble's distress both before and the tragic event of his son's death. We find that the Hearing Officer's award of damages is consistent with the standards set forth in Stonehill and that the award is fair, reasonable, and commensurate with the emotional pain that Doble suffered as a direct result of EMS's failure to consider and discuss potential reasonable accommodations to Doble's disability, resulting in his constructive discharge.

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision in its entirety.

COMPLAINANT'S PETITION FOR ATTORNEY'S FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, we conclude that Complainant is entitled to an award of reasonable attorney's fees and costs. See M.G.L. c. 151B, §5. The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. In determining what constitutes a

reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate which 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.

The Commission carefully reviews the Complainant's petition for fees and does not merely accept the number of hours submitted as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). 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. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir.); Miles v. Samson, 675 F. 2d 5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that the Commission determines were expended reasonably will be compensated. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and the tasks involved.

Complainant's counsel has filed a petition seeking attorneys' fees and costs in the amount of $33,097.31. The request is supported by contemporaneous time records denoting the number of hours expended in this matter. Respondent did not oppose Complainant's petition. Complainant's petition seeks compensation for 198.4 hours of work performed at a rate of $150.00 per hour for a total of $31,880.00. We find the hourly rate of $150.00 to be reasonable and the records to be sufficiently detailed as to tasks performed. We further find that the amounts

of time billed for the tasks performed are reasonable and not unnecessary, excessive, or duplicative. Accordingly, we award Complainant $31,880.00 in attorney's fees. Complainant's counsel also seeks reimbursement for costs in the amount of $1,217.31. We find these costs are reasonable and will award costs in the amount sought.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and her Order of damages for back pay in the amount of $5,812.00; and for emotional distress in the amount of $50,000.00 with interest to be paid on both awards at the rate of 12% per annum from the date the Complainant was filed until payment is made, and further Order that:

(1) Respondent pay to Complainant $31,880.00 for attorneys fees with interest thereon at the rate of 12% per annum from the date the petition for fees was filed until such time as payment is made.

(2) Respondent pay to Complainant the sum of $1, 217.31 for costs with interest thereon at the rate of 12% per annum from the date the petition was filed until payment is made.

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 receipt 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. Failure to file a petition in court within thirty (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 14th day of March , 2013

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Julian Tynes
Chair

Sunila Thomas George
Commissioner

Jaime Williamson
Commissioner