COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
BONNIE IBEH,

Complainants

v. DOCKET NO. 17-BEM-00999

LAHEY HOSPITAL AND MEDICAL
CENTER,

Respondent

Appearances: George C. Malonis, Esq. for Complainant
Elise Busny, Esq. and Monica Cafaro, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 21, 2017, Complainant Bonnie Ibeh filed a charge of discrimination against her former employer, Respondent, Lahey Hospital and Medical Center, based on her age, disability and race. Complainant alleged that Respondent terminated her employment as a coder of medical procedures after it refused to extend her medical leave of absence for neuropathy and back pain, and refused to accommodate her disability by allowing her to work remotely from home full time due to the limitations arising from her impairments. The Investigating Commissioner found probable cause to credit the allegations of disability

discrimination only and conciliation was unsuccessful. A public hearing was held before me on January 14, 15, and 16, 2020, and the parties filed post-hearing briefs on February 28, 2020. Having reviewed the record and the post-hearing submissions, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Bonnie Ibeh, is a 64 year old woman who worked for Respondent, Lahey Hospital and Medical Center for nineteen years from April 7, 1997, until her termination on August 29, 2016. (Ex. 75 ¶1; Tr. I, 45, 53-55) Complainant has a high school education and worked in various administrative positions at health care facilities prior to working for Respondent. (Tr. I, 49-53) She resides in Tewksbury, MA with two adult children. (Tr. I, 48)

2. Complainant initially worked as a receptionist and appointment coordinator for Respondent until she became a professional coder in the coding department in 2000. (Ex. 75 ¶ 2) She is a Certified Professional Coder and a Gastroenterology (G.I.) Coder. (Tr. I, 57) Complainant coded gastroenterology procedures from 2004 until 2016. (Tr. I, 57-58) The G.I. Department at Respondent is a high volume department and Complainant was expected to complete coding of all fully-documented procedures from the previous day. (Tr. II, 377, 380) Complainant was the lead coder in the G.I. department, and was viewed as a highly proficient coder and experienced professional with a good work history. (Tr. II, 451, 576) Complainant's last review completed in March of 2016, acknowledged that she was the lead coder in the G.I. department, was a mentor and trainer of other coders, and had thorough understanding of Lahey coding. (Ex.64)

3. In 2016, Respondent's coding department had three divisions—medicine, surgical, and diagnostic, employing approximately 55 coders. (Tr. II, 567) The coding department is the driver of revenue for Respondent. (Tr. II, 377-380; 462-463) A coder translates the documentation of a healthcare provider's treatment of Respondent's patients, whether medical, surgical or diagnostic, into numeric codes and alphanumeric codes, to generate bills for service. (Tr. I, 72-73; Tr. II, 365) The work entails reading the provider's notes in a medical record to determine the correct code to use for both a diagnosis and a procedure which need to match. (Tr. II, 365-366) Professional coding requires sustained concentration and attention to detail in order to ensure that the procedure performed by a physician is appropriately billed. (Tr. I, 161, 72-73; Tr. II, 373) The job entails knowing and utilizing the correct diagnostic and procedural codes to ensure that the proper parties receive the correct bills for the right patient and procedure. (Tr. II, 521) Respondent's data entry system has built-in edits based on coding or payor guidelines which detect certain coding errors. Detection of such coding error triggers the record being returned to the coder to correct. Mistakes based on user or system errors are not detected by the system. (Tr. II, 372-373)

4. In 2003, Complainant was diagnosed with breast cancer and underwent chemotherapy, radiation, and a lumpectomy and was out of work for a period of time. (Tr. Vol. p. 60, 98-99; Ex. 61) As a result of her treatment, complainant developed neuropathy, which causes numbness and tingling in her hands and feet, makes it difficult to grip things, and places her at greater risk for falls. Complainant continues to takes medication related to these health issues, but prior to 2016, she did not miss work because of them. (Tr. I, 100) Complainant also suffered from hypertension, depression and anxiety before 2016, but her ability to work was not impacted by these conditions. (Tr. I, 102)

5. Pursuant to Respondent's Remote Coding Program Policy, effective in 2015, virtually all of its coders work remotely, at least four days a week. (Tr. I, 201; Ex.12) The remote coding program was implemented in 2013 to alleviate problems with limited space at Respondent. Respondent also contracts with a small number of coders who work out of state. (Tr. II, 502) The remote coding policy characterizes working remotely as a privilege and a reward for demonstrated professionalism, but not as a guaranteed benefit or entitlement. The opportunity to telecommute is at the discretion of management and may be terminated at any time by Respondent with or without cause. Working remotely is subject to compliance with certain requirements and procedures, including, maintaining confidentiality of records and having a designated working location and office space reasonably free from normal household and other activity. Pursuant to the policy, remote coders are expected to work from their designated space with secure internet access and are not permitted to code from other locations. (Tr. II, 525-526) Complainant designated her home in Tewksbury as her remote worksite. (Ex. 75 ¶7; Tr. I, 191, 195, 196) Respondent cannot identify the physical location from which a remote coder logs in. (Tr. Vol. II, 378-379)

6. Complainant began working remotely in 2013. In 2015, she completed two months of on-site training on the new EPIC software system. Thereafter, Complainant trained other Lahey coders on the EPIC system, including another G.I. coder who was responsible for G.I. procedures at Respondent's Peabody location and for G.I. visits in Peabody and Burlington. (Tr. I, 189, 62-63, 95; Tr. II, 383) Complainant worked 40 hours per week, typically working a split shift that consisted of a morning shift from 9:00 a.m. to 1:00 p.m. and an evening shift from 9:00 p.m. to 1:00 a.m. Until April 2016, she worked on-site at Respondent one day a week, typically Tuesdays. (Tr. I, 60, 66; Ex. 75 ¶ 10)

7. In January of 2016, Olaf Faeskorn was appointed the new Director of Coding at Lahey and was tasked with managing the three major coding groups (surgical, diagnostic and medical) and completing the integration of the EPIC billing and data management system into a unified coding operation. (Tr. II, 518) In addition to his new role as Director, Faeskorn continued to perform his duties as manager of the diagnostic division of the coding department. Faeskorn was admittedly under a great deal of pressure because he had a new boss and was charged with properly managing the work of a new area and unifying various groups who had been operating under interim managers with inconsistent procedures. He was concerned about maintaining revenue flow while coordinating the work procedures of the coding department. (Tr. II, 519-520)

8. In early 2016, Obiageli Egbunike was promoted to Associate Director of Professional Coding and Education and continued with her previous duties managing the medicine division. She reported to Faeskorn. (Tr. II, 364) Egbunike testified that she typically worked 13-hour days on-site at Lahey from 6:15 a.m. to 7:00 p.m. or later to avoid a difficult commute. (Tr. II, 506) Prior to 2016, Egbunike had some interaction with Complainant in a supervisory capacity and in 2013 she signed off on Complainant's 2012 performance appraisal. (Tr. II, 474-477)

9. Respondent is required to comply with HIPAA and to investigate HIPAA violations because it is ultimately responsible for protecting the confidentiality of patients' medical information. It is required to determine if the origin of a HIPAA violation is due to a flaw in the process or an employee's failure to comprehend their obligations, and to ensure that the violation does not recur. (Tr. III, 670) Employees are trained on HIPAA requirements and policy on an annual basis and have a legal and ethical obligation to prevent access to and disclosure of

confidential patient information. (Tr. III, 699-671; Tr. I, 194) Violation of confidentiality policies could result in disciplinary action, including immediate termination. (Ex. 2 @00477) The Confidentiality Statement signed by coders states that all patient data is considered confidential information, but the Remote Coding Program Policy has no prescribed procedure for addressing instances of HIPAA violations. (Tr. II, 507, 524)

10. On February 5, 2016, Complainant received an email from a hospital Reimbursement Analyst, inquiring about a record she had coded which contained a charge for a breast implant supply where the medical service provided was a colonoscopy. (Tr. I, 165-166; Ex. 6 @ 000693) Complainant did not respond to this email and the Analyst followed up with another email on February 19, 2016, and copied Respondent's Manager of Revenue and Finance. (Ex. 6, @00693) Complainant did not respond to the February 19th email. On March 1, 2016, Faeskorn signed Complainant's performance evaluation which was completed by her former supervisor who left Respondent's employ in late February 2016. Faeskorn had no direct knowledge of, or input into, that performance review. (Tr. I, 90; II, 519, 529, 531; Ex. 64 @00209-00212) At the time, Faeskorn was unaware of the recent coding error, and he testified that Complainant's failure to respond to inquiries about the error was not appropriate. (Tr. II, 532-533) Faeskorn also stated that as the new Director of the coding department, he had some concerns upon learning that Complainant was working non-core hours, and stated her working late at night made supervision more difficult. When he became Director, Faeskorn communicated to remote coders his expectation that they work core hours. (Tr. II, 653-655)

11. On March 4, 2016, the Manager of Revenue Finance forwarded the February emails Complainant had not answered to Faeskorn and Egbunike. Faeskorn was asked to look into the error. (Ex. 6; Tr. II, 384-386) Complainant responded to the email that day accepting

the suggestion that it was due to a typing error. (Tr. I, 168-169) She testified that she discussed the error with Egbunike, admitted that she may have mistakenly entered the charge for a breast implant, and suggested that the mistake was a "typo." (Ex. 6 @ 00817; Tr. I, 103-104, 170) Complainant pledged to be more careful and was not reprimanded for the error, which was not a HIPAA violation. (Tr. I, 104; Tr. II, 401-403) She testified that certain errors were fairly common in the EPIC system at that time because everyone was still adjusting to the new program, and that doctors and nurses continued to complain about problems with the system. (Tr. I, 329-330) Egbunike determined from her discussion with Complainant that the error was a system user error as opposed to a coding error, that is, entry of an improper code due to misunderstanding the documentation in the medical record. (Tr. II, 395-398, 402)

12. On or about March 25, 2016, Complainant told Egbunike that she wanted to go to Florida to care for her sister who was ill and work remotely from there. Complainant testified that Lahey managers had authorized her working remotely from Florida four times in 2014 and 2015. (Tr. I, 68, 198) Egbunike, and Faeskorn testified that they had no knowledge of whether Complainant had worked remotely from Florida in the past. (Tr. II, 404, 652-653) Egbunike advised Complainant that she would have to clear her request with Faeskorn because he was the new director and testified she did not approve the request. (Tr. Vol. II, 403-404) Complainant did not communicate her request to Faeskorn, but instead emailed her team leader and Egbunike with the request to work remotely from Florida from April 12 to April 27, 2016. (Tr. I, 198-199) She did not receive a response to this email. (Ex. 75 ¶ 14; Ex. 7; Tr. I, 199) Faeskorn acknowledged that he received and did not reply to the email. He testified that he informed Complainant verbally that he did not approve her working remotely from Florida, although he could not recall the date of this communication. He stated that this would be a violation of

Respondent's remote coding policy. (Tr. II, 538; Ex. 11) Complainant acknowledged that she got no written response to her email, but claimed she thought Egbunike had verbally approved her working remotely from Florida. (Tr. I 107-108,199) It's possible there was a miscommunication, but I credit Egbunike's testimony that she advised Complainant she could not approve the request.

13. Complainant traveled to Florida on April 12, 2016, where she planned to work remotely while caring for her sister through April 27. She took her Lahey-issued laptop with the expectation of logging into her sister's wi-fi to perform work remotely. (Tr. I, 199-200) Coincidentally, on the morning of April 12, 2016, Faeskorn and Egbunike received an email from Respondent's Manager of Revenue Cycle Training, stating that a user named "Ibeh" had overwritten the guarantor field in a patient record with a code that resulted in the guarantor[1] getting a bill for a procedure performed on another patient, which was a HIPAA violation. (Ex. 9; Tr. I, 183; Tr. II, 407) The error appeared to be an issue with how the professional billing coder was entering the charges. (Ex. 9) The email also advised that there had been some reports to customer service by guarantors stating that they were improperly linked to bills for patients they were not responsible for.

14. Egbunike testified that this error appeared to have resulted from Complainant failing to navigate to the proper field when entering coding information which resulted in her improperly entering a code that is related to the medical procedure or diagnosis into the guarantor field. This action altered the guarantor field which is auto-populated with the proper guarantor and resulted in a different guarantor appearing in the field. (Tr. II, 410-411, 415-418, 424; Ex. 73) The EPIC system could not detect this type of error, which is not a coding error but

[1] The guarantor is the entity responsible for payment of a bill and may be an insurance company or an individual.

a system user error. (Tr. II, 417, 418) Egbunike researched the possible codes Complainant used to code G.I. procedures to determine which of these codes might match guarantor accounts, and then further researched how many times Complainant mistakenly over-road guarantor codes in the guarantor field. (Tr. II, 421-422; Ex. 71) Her audit of approximately 100,000 records revealed that Complainant had made errors that resulted in seven patients receiving other patients bills, fully identifying the patients and the GI procedures performed. (Tr. II, 426-427; Tr. II, 610; Ex. 9) These invoices were dated between June 23, 2015, and March 29, 2016, a nine-month period. (Ex. 8; Tr. II. 428) Egbunike was concerned because these were serious HIPAA violations occurring over an extended period of time. She testified the errors were surprising given Complainant's longevity and significant experience as a coder. (Tr. II, 428) Upon discovery of the apparent cause of the errors, Faeskorn agreed to modify the EPIC system to gray out the guarantor field to prevent similar errors from recurring in the future. (Ex. 11; Tr. II, 550-551)

15. On April 12, 2016, Lahey's Director of Internal Audit confirmed to Faeskorn that the recently discovered billing error was a privacy violation that needed to be logged. He advised Faeskorn that he was alerting Lahey's Privacy Officer so that she could work with him on the next steps. (Ex. 9) Faeskorn testified that this issue was elevated within Lahey shortly after it was uncovered because it was important. (Tr. II, 542) Lahey's Privacy Officer inquired of Faeskorn if "the coder has been reeducated to the correct process and follow-up to the correct process and [if] follow-up [was] documented." (Ex. 7; Tr. II, 543)

16. Faeskorn and Egbunike testified that this type of error was highly unusual and one they had never seen before. It was not due to a coding error which occurs when a coder uses the wrong code for a procedure or diagnosis, mismatches the procedure and diagnosis, or does not

use the appropriate modifier required by an insurance company. (Tr. II, 418-419, 612) Egbunike discussed the mistakes with Faeskorn and she testified that Complainant needed to be on-site for Egbunike to observe the process of her work flow to determine how the errors had occurred and to develop a training to prevent recurrence. (Tr. II, 429, 431-432) According to Egbunike, it would not have been sufficient to admonish Complainant to work more attentively to avoid making the errors, and she needed to observe Complainant's workflow. (Tr. II, 368, 493,498, 612) As the only EPIC certified trainer in the professional coding department, Egbunike basically trains coders by observing their work. She does not train coders remotely and according to Respondent, its technology does not support remote training. (Tr. II, 368, 430-431) Faeskorn testified that he asked Egbunike to look into alternative methods to train Complainant remotely but stated this would be "highly unusual." (Tr. II, 615)

17. Faeskorn emailed Complainant on April 12, 2016, asking for her schedule. (Ex. 10) Complainant responded that she had just arrived in Florida and would work that evening and a "split" schedule the next day. (Id.) Faeskorn informed Complainant about the errors they had uncovered in accounts she had coded, some of which resulted in bills being sent to the wrong party, which was a HIPAA violation. He advised Complainant that he did not want her to do any work until she was able to come to the workplace to discuss the issue in person. He asked when she could come in and to provide him with her work schedule going forward. (Ex. 75, ¶17; Ex. 10; Tr. I, 112-113) Faeskorn was concerned that Complainant intended to work in Florida because it was a violation of the remote coding policy and because he did not know her schedule. (Tr. Vol. II 603) On April 13, 2016, Faeskorn sent an email to all coders to remind them of the Remote Coding Program requirements, including that remote work is to occur in designated

workspaces with Lahey issued equipment. (Ex. 75; ¶18; Ex. 12) The email also reinforced that remote coders were expected to adhere to an agreed upon work schedule. (Id.)

18. Prior to April 12, 2016, Complainant had been working on-site one day a week. As of that date, she had not alerted Faeskorn to any medical or physical limitations that would affect her ability to come in to work on-site. (Tr. II, 545-546) She had not identified any disabling conditions that would require FMLA or any other accommodation, including full-time remote work. (Tr. I, 186, 200, 204) While Complainant was in Florida, she injured her back while trying to assist her sister. (Tr. I, 113-114, 205; Complaint)

19. On April 13, 2016, Faeskorn emailed Egbunike and Patrick DeVivo, a Human Resources Business partner[2] for the coding department, to update them regarding the next step to deal with the discovered errors. Faeskorn informed them that Complainant was in Florida "despite me telling her previously that she can't be remote from Florida." (Ex. 11; Tr. II, 647) Faeskorn testified that Complainant's coding errors were the "ultimate nightmare scenario" for him as Director, and for the coding department. (Tr. II, 549) He testified that Respondent could be investigated, fined or audited as a result of Complainant's HIPAA violations. (Tr. II, 555) In April, Faeskorn and DeVivo had discussions regarding training for Complainant. Lahey had required on-site training with Egbunike for other remote coders who made errors and DeVivo thought this was reasonable for Complainant given the HIPAA violations. (Ex. 60 @000815; Ex. 5 @000602; Tr. III, 676)

20. Complainant returned from Florida on April 27, 2016. Faeskorn authorized Complainant to work remotely on that day, but she did not. Complainant intended to come to the workplace on April 28, 2016, to meet with Faeskorn and Egbunike, but she did not. Early

[2] DeVivo's duties included advising managers on disciplinary matters. (Tr. III, 664-665) In this role, he was included in communications regarding Complainant's coding errors.

that morning, she emailed Faeskorn that she was unable to attend the meeting that day and asked if they could meet the next time she was on-site. (Ex. 75 ¶¶20, 21, 22; Tr. I, 206-307, Ex. 15) Complainant testified that she was unable to return to the work-site on April 28th because she was not well, but she did not inform Faeskorn of this or that she would not be working that day. (Tr. I, 208)

21. While Complainant was in Florida, Faeskorn asked Egbunike to draft a final written warning addressing Complainant's errors. He emailed Complainant on April 28, 2016, telling her she could not work remotely until they had a conversation about the serious errors she had made and that she would be receiving a final written warning after they met in person on-site. (Exs. 13 &15) Egbunike understood that the warning would not be finalized until after they had an opportunity to meet with Complainant and discuss the mistakes and how to proceed with training. (Tr. II, 433-434) Faeskorn testified he intended to discuss a final draft of the warning with Human Resources. (Tr. II, 558) According to DeVivo, it would have been premature to give Complainant such a warning at their next meeting. He noted that Complainant did not ultimately receive a warning because she never returned to work. (Tr. III, 675) Faeskorn's notice of the impending warning to Complainant came prior to her notifying Respondent of any medical condition impacting her ability to work on-site, and prior to her request for leave under the FMLA. (Ex. 13)

22. After informing Faeskorn that she could not meet on April 28th, but that she intended to work from home to address a backlog of work, Complainant later informed her supervisor that she would not be working that day and would take paid time off (PTO) for the day. (Tr. I, 208- 209, 210; Exs.16 &17) She did not identify any medical issue that prevented her from working that day. (Tr. I, 209-210; Tr. II, 438-439, 564) Her supervisor determined

Complainant did not have any PTO available as of April 28, 2016. (Ex. 75 ¶ 27; Ex. 75 ¶28; Ex. 17) That same day, Faeskorn emailed Egbunike that he was considering revoking Complainant's remote working privileges and requiring her to work core hours on-site. (Ex. 17) Egbunike told him she anticipated this action and concurred that if a coder was placed on warning, remote privileges should be revoked. (Id.)

23. On April 29, 2016, Complainant consulted with her neurologist and her primary care physician for back pain and neuropathy and requested that her PCP fill out an FMLA form. (Tr. I, 117-118) On April 29, 2016, her neurologist reported that her neuropathy was unchanged but she reported a new problem of increasing lower back pain since December of 2015, with occasional weakness in the legs and worsening pain. Her neurologist also noted that she was severely depressed. (Ex. 75 ¶ 30; Ex. 37 SSDI 000146-47: Tr. Vol. I, 216) Complainant's PCP noted that she was out of work from 4/27 to 4/29 due to "stress and depression" in addition to her neuropathy pain, adding that she was suffering from a "moderate episode of recurrent major depressive disorder," and advising her to consult a psychiatrist. (Ex. 75 ¶ 29; Ex. 37, SSDI 000080, 000083) Her doctor's notes did not report her recent injury incurred while attempting to move her sister in Florida.[3] Complainant testified that she was very upset about the threat of a final written warning from Faeskorn. (Tr. I, 115-116)

24. On May 4, 2016, Complainant emailed Faeskorn, Egbunike, and another that she would be on a continuous leave of absence from April 30 through May 14, 2016, "due to medical condition. FMLA." (Ex. 18) This was the first time anyone at Respondent learned that Complainant was claiming a medical condition prevented her from working, and Respondent had

[3] The medical documentation referenced is part of Complainant's application for SSDI benefits. It is unclear what documentation Respondent received in April or May of 2016 supporting her request for FMLA.

already determined that Complainant needed to come on-site to be retrained due to concerns about HIPAA violations. (Tr. I, 218, 438, 563; Tr. III, 676-677)

25. On May 13, 2016, Complainant sent Faeskorn an email informing him that she would return to work on May 16th and requested a time to meet with him that day. (Ex. 19) Complainant met that day with Faeskorn, Egbunike and Respondent's then Director of Human Resources to discuss the HIPAA violations and retraining. (Tr. I, 10-22; Tr. II, 439; Ex. 75 ¶ 33) At the meeting, Egbunike demonstrated to Complainant on a laptop how the errors were made, including showing Complainant how, when she logged into the EPIC coding system, she had failed to tab to the correct field to enter CPT codes. She explained that Complainant had entered CPT codes in the guarantor account field and in the charge line, and showed her several examples. Complainant acknowledged the mistakes and admitted that she had neglected to tab across to the proper field before entering a code. (Tr. II, 439, 566) Faeskorn acknowledged that the working theory about the cause of the errors was the coder working too fast or not paying attention. (Tr. II, 610) Faeskorn and Egbunike told Complainant that she would need to be on-site for training, but did not offer a timeline for the training. (Tr. I, 225, 441) According to Respondent, the meeting ended with an understanding that Complainant would come on-site the next business day and Egbunike would observe her coding process and set up the training with her. (Tr. II, 441, 566) Complainant later disputed that she had made the errors and rejected the need for training because, she believed, even if made, the errors were simply due to lack of focus and tabbing too quickly, not improper coding. (Tr. I, 120-124) Complainant asked that any training be accomplished remotely, but Egbunike insisted she had to observe Complainant working before she could devise a training. (Tr. II, 582) Respondent rejected the suggestion that Egbunike travel to Complainant's home because Egbunike had responsibilities training other

coders in addition to managing the coding department. (Tr. II, 442-443) Faeskorn testified he also had concerns about remote training that involved privacy and safety issues and was uncomfortable with supervisors entering employees' homes. (Tr. II, 582-583)

26. Following the May 16, 2016, meeting, some confusion ensued about Complainant's clearance to return to work. (Ex. 75 ¶ 34) A few hours after the meeting, Complainant informed Faeskorn that she was cleared by Employee Health to return to work, but she would need to leave early to attend physical therapy appointments. Faeskorn approved this request and expected Complainant to return to work on-site on May 17, 2016. (Ex. 20, 000656, 000657; Tr. II, 567) He asked Complainant to confirm in writing that she could return to work on-site on May 17th and asked that she confirm all information about her schedule in writing. Complainant responded that she could not return to work on-site and that her doctor had instructed her to work remotely 5 days a week due to her medical condition. She also stated that she did not report to work that day because she was awaiting a training schedule from Egbunike. (Ex. 75 ¶ 35) This communication was the first time that Complainant requested to work remotely full time. (Tr. II, 569)

27. Faeskorn emailed Complainant on May 18, 2016, that she should remain out of work if she was not cleared to return to work on-site. He also advised her that she would require clearance from Employee Health to return to work. Complainant remained on FMLA leave and saw her neurologist again on May 20, 2016. He filled out a form indicating that Complainant reported she could not work. (Ex. 75 ¶ 37) On May 22, 2016, Complainant emailed Faeskorn and Egbunike disputing that she made errors and rejecting the need to be retrained, blaming the errors on the EPIC system. Nonetheless, she agreed to accept training if it could be done remotely. She indicated that the situation was very stressful for her. (Ex.75¶ 38; Ex. 20) Neither

of them responded to this email because Complainant was out on FMLA leave. (Tr. II, 570; Tr. III, 680)

28. Complainant had visits with her PCP, her oncologist, and her neurologist in May and June of 2016. Her PCP noted that she was "non-compliant with regular follow-up." Her neurologist noted on June 25, 2016, that Complainant had not had physical therapy for a while, was suffering from a lot of stress and could not work. (Ex. 75 ¶ 41) Her oncologist noted multiple stressors in her life and that she reported being regularly fatigued and depressed. He also wrote that Complainant described generalized aches and pains which were chronic and noted she was "severely depressed." (Ex. 75 ¶ 40)

29. Complainant was granted FMLA leave through July 12, 2016. (See Ex. 21) She had applied and was approved for short-term disability benefits in April 2016 and received a total of $10,382.40 for the period from April 27, 2016 to July 2016. (Ex. 65) During this time, Respondent's Human Resources and Benefits and Leave teams spoke on several occasions to discuss Complainant's leave status. Joanne Dawson was a Leave of Absence Specialist whose job was to facilitate employees filing for leaves under the ADA.[4] (Tr. III, 731- 732) On June 17, 2016, Dawson, DeVivo, and the HR director met and confirmed that Complainant had available FMLA through July 12, 2016, if she requested a further extension. They determined Complainant had to file an additional request for any further extension and, if she sought leave beyond the expiration of her FMLA, Respondent would consider it as a request for a reasonable accommodation under the ADA. (Tr. III, 740)

[4] Dawson was responsible for ensuring that Respondent received complete information from employees seeking leave, and she was the designated note taker in the meetings between Respondent's HR and Benefits teams. (Tr. III, 732, 735, 769; Ex. 14)

30. On June 29, 2016, Dawson sent a letter to Complainant advising her that her FMLA was approved through July 1, 2016, but that she needed to request additional leave from July 1-12 when her FMLA would expire. She also advised Complainant that if she sought leave beyond July 12, 2016, Respondent would consider providing a reasonable accommodation, including additional time off, if it was medically necessary and did not pose an undue hardship for Respondent. The notice advised that any request for an accommodation required Complainant to provide additional information from her health care provider by July 6th in compliance with the enclosed ADA questionnaire, and that failure to provide such information would result in her employment being terminated on July 13, 2016.

31. Complainant testified that she was not able to return to work on-site at that time as she was still in a lot of pain which made it difficult to sleep and concentrate, and she remained at risk for falls. (Tr. I, 238-239) On June 30, 2016, her neurologist wrote to Respondent that Complainant could return to remote work on July 5th and work eight 8 hours per day, with a break every 4 hours. (Ex. 75 ¶ 43; Ex. 22) Respondent's HR and Benefits teams decided to await the return of the ADA questionnaire from Complainant's physician before responding about the terms of her return to work. (Ex. 23)

32. Complainant appeared unannounced at Respondent's Employee Health facility on July 5, 2016, seeking clearance to return to work remotely five days a week, even though Respondent had not approved her return to work remotely. (Tr. I, 132, 243-244; Ex.14) Complainant fell down when leaving Employee Health on that day. (Tr. I , 133) On July 6, 2016, Respondent notified Complainant that extension of her FMLA beyond July 1st was denied because the requested medical documentation had not been received. She was advised that her doctor's June 30th letter did not provide adequate information to enable Respondent to assess her

request for an accommodation, and that she had until July 13th to provide the necessary information or otherwise face termination. (Ex. 24)

33. On July 8, 2016, Complainant saw her PCP who noted that she was on FMLA leave due to neuropathy and multiple joint pain. He stated, "she has been seeing her neurologist outside Lahey who recommended she works from home," but she reported that her employer was refusing to allow her to work from home and wanted her to be in the office. (Ex. 37, SSDI 000099) On July 11, 2016, Complainant sought additional time to provide the requested medical documentation because her neurologist was on vacation, and Respondent granted her request. (Ex. 56) Respondent's VP of HR forwarded Complainant's request to DeVivo and updated him on Complainant's status and the requirement that she come on-site for training before being allowed to return to remote work because of the errors made prior to her leave. (Ex. 72, LAHEY 000835)

34. On July 12, 2016, Complainant's FMLA expired. (Tr. I, 254) Complainant saw her neurologist on that day, who noted she was the "same re: pain," that physical therapy was pending and that "patient says she cannot work." (Ex. 37, SSDI 000140-141) On that same day, Complainant's neurologist sent his responses to the ADA questionnaire in which he again requested full-time remote work and answered that it was "unknown" whether Complainant was likely to recover sufficiently to perform all the tasks and duties listed in her job description, without accommodation. He stated Complainant could attend mandatory meetings at the workplace. (Ex. 25, Tr. I, 252-256) Respondent's Leave Specialist, Dawson, was concerned about the doctor's response because there was no end date to the restrictions and the accommodation requested was for full time remote work, a request Respondent had rejected at the end of June. (Tr. III, 747-748, 749) Egbunike testified that Respondent never explored

whether the physician-authorized option that allowed Complainant to be on-site for "mandatory meetings" would be a way to facilitate expedited on-site training. (Tr. II, 500) Faeskorn and Egbunike also did not explore the possibility of remote training. (Tr. II, 499-501; 613-616) I find that Complainant could have come to the work-site for meetings and that training, or the very least an assessment of the problem, could have been facilitated during these times.

35. Upon completion of her FMLA leave on July 12, 2016, Complainant did not return to work. Respondent did not terminate her employment at that time and asserted that it wanted Complainant to come back to work on-site. (Tr. I, 255-257) On July 13th, DeVivo, Dawson, and other members from the Benefits and Leave Teams met to discuss Complainant's status since her FMLA had expired. (Ex. 14; Tr. III, 690) Faeskorn told DeVivo that the coding department could not accommodate full-time remote work because it needed to review her workflow process to assess the need for on-site training to address her mistakes. (Ex. 26; Tr. II, 573-574) Faeskorn testified that in addition to the errors, he was concerned about the randomness of Complainant's work schedule, and the location of her work, and how these factors might have impacted her "workflow and the safety of the work environment at that point." (Tr. II, 617) DeVivo explained that because Respondent could not accommodate Complainant's request to work from home, they explored extending her leave. (Tr. III, 690)

36. Faeskorn and Egbunike never attempted to devise an on-site training program for Complainant, nor did they establish a time-line for doing the training. There was no discussion with Complainant about what the training would consist of, how it would be conducted, or how long it might take to complete. (Tr. II, 499-501; Tr. II, 614) They testified this was because there was no there was no opportunity to observe Complainant's workflow and assess the errors. Egbunike testified that the employees she had re-trained on-site were those who lacked a

fundamental understanding of the coding and documenting process, which was not Complainant's problem. (Tr. II, 465-466) The testimony suggests that Complainant's supervisors had no inkling of how to devise a training, or if there was even a training protocol available, given the nature of Complainant's errors which were not coding errors. They had already determined that her errors were more than likely related to lack of focus or working too quickly. Alternative methods to address errors related to carelessness were not explored with Complainant. When asked if Complainant, who was a very experienced coder, could have been directed with a warning to focus more carefully on her work and proceed more slowly to prevent future errors, Egbunike had no credible answer, other than to re-state that Complainant needed to work on-site so her "workflow" could be observed to determine how the errors had led to HIPAA violations. (Tr. II, 429, 452, 495-497) This assertion contradicted Egbunike's testimony that she had already determined, and Complainant had concurred, with how and why the mistakes had occurred, and that it was system user error related to a lack of focus or working too fast.

37. Between July 14 and 28, 2016, Dawson exchanged voice mail messages with Complainant. Dawson sought Complainant's permission to speak with her doctor directly. Complainant refused to allow Dawson to speak with any physician, claiming this would be a HIPAA violation. (Ex.14; Tr. III, 752) Both Dawson and DeVivo testified that it was atypical for an employee on medical leave to refuse Lahey permission to speak to their physician. (Tr. III, 701, 752-753)

38. From July 25 to August 4, 2016, Respondent sent Complainant a series of letters advising her that Lahey could not accommodate her request to work remotely and inviting her to request an extended leave of absence, which Lahey would consider. (Exs. 28, 30, 32, 34)

DeVivo testified that Respondent never considered placing Complainant on a performance improvement plan and never considered any alternative to requiring her to work full time on-site, including guidelines that might allow her to work from home. (Tr. III, 705-706) He stated this was because Complainant's errors were not understood or resolved due to her disavowal of the errors and rejection of the need for training. DeVivo stressed that Complainant's supervisors refused to discuss the issues by phone or by email and needed to meet with her in person, but such a meeting was not possible because Complainant was not at work. He also testified that since Respondent was granting her extended leave, getting into that conversation "didn't make sense." (Tr. III, 684, 706) DeVivo also acknowledged that Complainant's falls were a consideration mitigating against her coming to work on-site or possibly working at all. (Tr. III, 701)

39. Respondent continued to request medical information to support Complainant's request for a further leave and the expected duration of the leave, including the date when she could return to work on-site five days per week. (Exs. 28, 30, 32, 34) On July 19, 2016, Dawson wrote to Complainant that Respondent was considering extending her leave, but needed clarification on how much time she would need to recuperate and requested permission to speak to her physician. (Ex. 27; Ex. 75 ¶ 53; Ex. 37, SSDI 000103) On July 20, 2016, Complainant saw her PCP who noted that she had fallen four days earlier. On July 22, 2016, DeVivo and Dawson spoke with Complainant by phone requesting further documentation from her physician and the anticipated length of any leave. (Tr. III, 693) Dawson again informed Complainant that Respondent could not accommodate full-time remote work because the performance issues had not been resolved, but was considering extending her further leave if she could provide an end

date from her physician. (Tr. III, 753) Respondent then summarized this phone conversation in a follow-up email to Complainant, asking if she could return to work by July 29, 2016. (Ex. 28)

40. On July 22, 2016, Complainant's physician responded that Complainant was advised to be out on an extended leave for at least "4-6 months." (Ex. 29) The duration of the leave was indefinite with no specified end date. On July 29, 2016, Dawson spoke to Complainant asking if she would sign a release permitting Dawson to contact her physician directly to clarify if she could still work at home, but Complainant refused to sign a release. Complainant responded that her doctor continued to advise that she could work from home, but since Lahey persisted in denying that request, her physician had relayed his best estimate of a timeline for Complainant's return to work on-site. (Ex. 14) Complainant testified that she was continuing to suffer from falls at that time. (Tr. I, 275)

41. On August 4, 2016, Dawson wrote to Complainant to confirm receipt of her physician's note and to inform her that Respondent could not approve a request to work remotely for 4-6 months. Respondent sought additional information to support a continuous leave of absence (as an alternative to the remote work request) and gave Complainant an additional week, until August 11th to provide the information or face termination. (Ex. 30) On August 12, 2016, Complainant's physician wrote to Lahey reiterating the information in his July 27th letter that Complainant was advised to be out on an extended leave for 4-6 months. (Ex. 29)

42. On August 22, 2016, Respondent wrote to Complainant that it was unable to offer a 4-6 month remote work accommodation, and could not grant a discretionary personal leave of absence without a clear return to work date. It notified Complainant that her employment would be terminated on August 25, 2016. (Ex.32) Complainant was invited to explore employment opportunities at Lahey when she was medically able to return to work. (Id.)

43. Complainant called DeVivo upon receipt of the letter to inform him that her physician had misinterpreted Lahey's letter and indicated that she could provide a specific return to work date. (Tr. I, 275; Tr. III, 697, 764, 765-766; Ex. 70) On August 25, 2016, Complainant's physician wrote to Lahey that Complainant was undergoing physical therapy three times per week, would be treated for the next 3-4 months, and could return to work on December 12, 2016. (Ex. 33) On August 29, 2016, Lahey responded to Complainant acknowledging receipt of her doctor's note and stated that Lahey could not accommodate a continuous leave through December 12th because it would create an undue hardship. The letter advised Complainant that her employment was terminated as of August 29, 2016, and reiterated that she was welcome to explore employment opportunities with Lahey when she was medically cleared to work. (Ex. 34) Complainant did not apply for any jobs at Lahey after her termination. (Tr. III, 727)

44. Respondent asserts that the coding department could not accommodate Complainant's request for a continuous leave of absence until December 12, 2016, because it would have been unable to fill a much needed position for too long. According to Respondent, Complainant's absence was causing a great deal of stress in the coding department and had already required reshuffling of employees and arranging for substitutes. (Tr. II, 575; Tr. III, 698-699) While Complainant was on FMLA leave, the other G.I. coding employee coded all procedures for Respondent's Burlington and Peabody facilities, and was asked to work overtime every day, which she often did. Other coders in the department coded all the patient visits. (Tr. II, 447, 449-450, 577) Egbunike testified that she asked other coding department employees to give an additional two hours a day, as well as weekends, to code G.I. visits, because "gastro is a high-volume department" and the charges could easily become backed up if they sat for over two days. Egbunike testified that employees complained to her about all the extra work and that she

also assisted with coding G.I. procedures. (Tr. II, 447-448, 450-451) The department also contracted with a company MedKoder for experienced coders and paid them a contractually agreed upon hourly rate. (Tr. II, 447, 577, 578-579; Ex. 35) DeVivo testified that Lahey was undergoing financial difficulty and there was a lot of pressure on the coding department to increase revenue. He stated that gastroenterology was a specialized area that needed particular attention and there was insufficient coverage in Complainant's absence resulting in a lot of overtime. (Tr. III, 698-699) Faeskorn estimated that it cost approximately $50,000 to cover Complainant's work through December, 2016. (Ex. 35)

45. After Complainant's termination, Respondent sought a coder with the specialized skill to code G.I. procedures. Lahey suggests that because such coders were in high demand, it took longer than anticipated to fill the position. (Tr. II, 453, 581) Respondent did not hire a coder until February of 2017. Respondent states that given the passage of time and some re-organization of the coding department, the position was not an exact one to one replacement for Complainant's position. (Tr. II, 637-638)

46. In August of 2016, Complainant initiated a claim for long term disability benefits through MetLife. (Ex. 57) Her application for long term disability benefits was denied on October 16, 2016, on the grounds that the information on file did not support "disability" as defined by the plan. (Ex. 58) She filed an appeal of this determination which was denied on August 8, 2017. (Ex. 58) Complainant attended a therapy session on October 19, 2016. The notes from that session report that Complainant was currently unable to work due to her health and that she was occasionally forgetful and lost track of her thoughts. The notes of that visit also report that she was experiencing stress due to family problems. (Ex. 37, SSDI 000033 & 000050) In October Complainant ceased physical therapy and on October 25, 2016 her

neurologist noted that she was unchanged regarding her low back and leg pain. (Ex. 75 ¶ 61& 65) Complainant testified that physical therapy "was very painful." (Tr. II, 307) The medical evidence in the record demonstrates that there were significant stressors in Complainant's life related to her family and her physical and mental health, including ongoing depression, some of which pre-dated her termination and was affecting her memory. The recurrent falls she sustained in the spring and summer of 2016 also contributed to her anxiety and depression. (Tr. II, 326; Ex. 37, SSDI 000042-43) In December of 2016, Complainant's neurologist noted that her low back pain and leg pain were unchanged. (New England Neurological note: Tr. II, 310-311)

47. On October 27, 2016, Complainant applied for Social Security Disability insurance (SSDI) benefits, attesting that she became unable to work because of her disabling condition on April 12, 2016, and was still disabled. (Ex. 75 ¶ 66) She stated that her attorney advised her to use the date she ceased working at Respondent as the date of the onset of her disability. (Tr. I, 155) Respondent argues that this assertion was untruthful because, as of that date, Complainant was in Florida fully expecting to work and, prior to that time, she had not alerted Respondent to any medical issues that affected her ability to work, nor had she requested any accommodations. (Tr. I, 289) In her application for SSDI benefits Complainant identified August 2016 as the date her employment ended. (Ex. 37, SSDI, 000212-213) Her application states that she was unable to work because of constant pain and neuropathy related to her cancer treatment and due to major depression. (Ex. 37, SSDI 000020, 26)

48. Complainant testified that she loved her job at Respondent and despite her preexisting neuropathy from cancer treatment, she remained a productive employee, in large part due to the remote coding option, which allowed her to continue to be a high producer. Prior to April 2016, she had not missed any work due to anxiety and depression and had sought minimal

treatment for those conditions. (Tr. I, 101-103) Complainant never requested an accommodation for depression or anxiety while working at Respondent. (Ex. 75 ¶ 71) The only accommodation she sought was for full time remote work because of neuropathy and back pain in the spring and summer of 2016. (Ex. 75 ¶ 78; Ex. 20) Complainant testified that the notice of an impending final written warning, Respondent's repeated refusals to allow her to work remotely, and the threats of termination, greatly increased her stress and anxiety, took an emotional and physical toll on her, and exacerbated her depression.

49. Complainant was devastated by her termination and repeatedly attempted in vain to salvage her employment. (Tr. I, 149-150) She testified that she felt like Respondent just swept the rug out from under her. (Tr. I, 151) She was the primary breadwinner in her household and concerned about her family's financial future. (Tr. I, 154) Credible testimony from Complainant and family members detailed how the termination dramatically affected her family and her health. Prior to her termination, she was a positive, outgoing, person who loved to cook, shop and entertain family. She was the matriarch of the family. The testimony was that her personality and role in the family changed after Complainant lost her job and that she stopped eating, cooking, cleaning and neglected her personal hygiene. (Tr. I, 151-152) Her sister and niece testified that after her termination, they helped her bathe, eat, shop, clean and brought her to her medical appointments. (Tr. I, 156-157; Tr. II, 334-337; Tr. II, 348-351) Her niece noted that Complainant was so adversely impacted by her termination that she was in no frame of mind to look for work. (Tr. I, 158) Complainant indicated in responses to interrogatories that she has not sought any employment with Respondent or any other employer since her termination "due to [her] ongoing disability, anxiety and depression." (Ex. 46) She testified that since leaving Lahey, she has applied for one job. (Tr. II, 313-314)

50. In the fall of 2017, Complainant reported to a therapist that she was suffering from depression and stress related to multiple family problems, including the death of her sister. (South Bay notes, 9/27, 10/11, 10/25, 2017) In November of 2017 she relayed to her therapist that in addition to her family stressors, she had financial stress and was concerned about memory loss and if she would be able to remember enough to work again. She also stated that fighting to keep her job with Respondent had been a big part of her stress, after having been employed there for nineteen years. (South Bay note 11/30/17) Complainant reported that in 2018, she continued to be "in a ton of pain." (South Bay 1/19/18 note) In December of 2018, a psychologist who saw Complainant reported that her ability to "sustain attention, concentrate and exert mental control is in the borderline range." He diagnosed Complainant with persistent depressive disorder that "seems to be more historical than situational," and he saw no indication of post-traumatic stress disorder. (Ex. 66; Tr. II, 321-322) In June of 2019, Complainant's counselor at Arbor Health reported that Complainant continued to experience episodic fatigue, crying, inability to sleep, and hopelessness, noting ongoing post-traumatic stress and depression impacted by her termination. Arbor Health therapy notes for the balance of 2019 discuss Complainant's employment matter and its impact on her mental state. In August of 2019, Complainant reported to her therapist, that "she decided she is not able to work full-time." (Ex. 40, 8/8/19 note)

51. At the time of her termination Complainant was earning $74,800 per year and she received fringe benefits valued at $22,757. (Tr. I, 46; Ex. 35) She received a total of $10,382.40 in short term disability benefits for the period from April 27, 2016 to July 2016. Complainant received unemployment insurance benefits from October 29, 2016, through April 2, 2017, totaling $17,380. (Tr. I, 151, Ex.75 ¶ 72) On March 3, 2017, Complainant's SSDI benefits were

approved retroactive to April, 12, 2016. (Ex. 37, SSDI 000196-210) Complainant remained totally disabled from working at the time of the hearing, and continues to receive SSDI benefits. (Ex. 75 ¶ 83) As of the date of the hearing, she had received $61,163.75 in SSDI benefits. The total amount she has received from SSDI and short term disability insurance is $88,926.15. Her current annual SSDI benefits are approximately $18,000 annually. Complainant has suffered severe financial consequences including struggling to maintain her household and falling in arrears on the mortgage payments. (Ex. 35; Tr. I, 47-48, 150)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, §4(16) prohibits discrimination in employment based on disability. In order to establish a claim of disability discrimination under G.L. c. 151B § 4(16), Complainant must demonstrate that she suffered from a condition that impaired a major life function or was perceived as disabled, that she was capable of performing the essential functions of the job with a reasonable accommodation, and that she suffered an adverse job action because of her disability, or was refused a reasonable accommodation. Godfrey v. Globe Newspaper Co., 457 Mass. 113, 120 (2010) see also City of New Bedford v. Massachusetts Comm'n Against Discrimination, 440 Mass. 461-462 (2003).

Complainant alleges that Respondent discriminated against her because of her disability, in violation of G.L. c. 151B, § 4(16) when it denied her a reasonable accommodation, i.e., permission to work remotely, after she experienced debilitating back pain and neuropathy. To establish a claim of disability discrimination based on a failure to provide a reasonable accommodation, Complainant must demonstrate that (1) she is a qualified handicapped person, (2) she needed a reasonable accommodation to perform her job, (3) Respondent was aware of her

handicap and the need for a reasonable accommodation, (4) Respondent was aware or could have become aware of a means to reasonably accommodate her handicap, and (5) Respondent refused to provide Complainant a reasonable accommodation. Hall v. Department of Mental Retardation, 27 MDLR 235 (2005); MCAD Guidelines, Employment Discrimination on the Basis of Handicap, s. IX (A) (3) (1998).

A handicapped person is one who has an impairment which substantially limits one or more major life activities, a record of having such impairment, or is regarded as having such an impairment. G. L. c. 151B, s. 1(17). As regards the threshold question of disability, G.L. c. 151B is to be construed broadly to cover a wide range of people with mental and physical impairments. See Dahill v. Police Dept. of Boston, 434 Mass. 233, 240-241 (2001) Likewise, the regulations interpreting the ADA specifically provide that "the term 'substantially limits' shall be construed broadly in favor of expansive coverage…[and] is not meant to be a demanding standard." 29 C.F.R. § 1630.2 (j)(1)(i).

Prior to April of 2016, Complainant suffered from neuropathy caused by cancer treatment and from depression. Until that time, neither of these conditions was so severe as to interfere with her ability to perform the essential functions of her job, working as a coder remotely four days a week and on-site one day a week. In April of 2016, Complainant injured her back while tending to her ill sister in Florida. That injury exacerbated her preexisting neuropathy and caused debilitating back pain and weakness in her legs impacting her mobility and rendering her more vulnerable to frequent falls. Evidence of complainant's medical conditions was well documented in the physician's notes provided to Respondent to support her requests for FMLA leave and later for an extended leave of absence. The worsening of her condition resulted in her neurologist recommending that she work remotely full time as of May 16, 2016. The evidence

supports a conclusion that Complainant was disabled within the meaning of the statute by the end of April of 2016.

Once Complainant establishes that she is disabled within the meaning of the law, she must also demonstrate that she is a "qualified handicapped person." 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 … with reasonable accommodation to h[er] handicap." G. L. c. 151B, s. 1(16) Complainant was, by all accounts, a prolific coder with many years of experience, a specialized certification in G.I. coding, and a good work history. Respondent asserts that Complainant was not a qualified handicapped person because she could not perform essential functions of the job, which according to its managers, mandated her being able to work on-site to participate in retraining to address errors she had made. Respondent argues that on-site work was necessary to facilitate observation of Complainant's workflow as the sole method of ascertaining how and why she made certain errors, some of which resulted in HIPAA violations, over the course of the previous nine months.

Determination of what is an essential job function requires an "individualized inquiry," informed by the particular facts of each case, and while the employer's judgment is a factor to be considered, it is not necessarily controlling. Smith v. Bell Atlantic, 63, Mass. App. Ct. 702, 712 (2005) *citing* Cox v. New England Tel. & Tel Co., 414 Mass 375 (1993) Complainant argues that she was a qualified handicapped individual because from May 2016, she continuously remained able to work remotely full time with a split schedule performing all the essential functions of the job. As early as May 2016 again in July 5, 2016, Complainant and her physician indicated that she was able to perform coding for Respondent remotely working eight hours a day with breaks after four hours. As of July 2016, she was also permitted to attend on-site

meetings at Lahey as needed. Complainant insisted throughout that she could do the job from her home, working a split schedule with necessary breaks. The evidence supports a conclusion that on-site work was not an essential function of the job and that Complainant was an otherwise qualified handicapped individual despite the purported need for training and contradictory assertions in her SSDI application, both of which are discussed below.

Respondent also asserts that Complainant is not a qualified handicapped individual because of her assertion in her application for SSDI benefits that she was totally disabled and could not perform any work as of April 12, 2016. Since Complainant applied for benefits months after her termination, Respondent was unaware of this assertion at the time she sought an accommodation. Respondent also conveniently ignores that Complainant and her physician asserted respectively in May and July of 2016 that she was not disabled from performing the essential functions of her job if granted the requested accommodation and permitted to work remotely five days a week. Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997) (plaintiff not estopped from pursuing a discrimination claim because he sought disability benefits after being terminated where evidence creates a disputed issues of fact whether disabled person could perform essential functions of the job with an accommodation) Once Respondent insisted Complainant work on-site, she had no alternative but to request a leave, because her medical condition did not allow her to travel to and work on-site.

There is no dispute that, prior to May 4, 2016, Respondent was not aware that Complainant was suffering from medical disabilities that affected her ability to work or that required a medical leave. Faeskorn's decision in April of 2016 prohibiting Complainant from working remotely in Florida, and later at her home, was temporary, pending discussion of the recently discovered errors, and was not related to her disability. Faeskorn was upset to learn of

the errors at the same time he leaned that Complainant intended to work remotely from Florida. He also indicated at the hearing that he had some concerns about Complainant's work schedule because she did not work core hours.[5] Respondent asserted that the discovery of Complainant's additional errors, merited a serious response, and Faeskorn contemplated a final written warning, training and possible revocation of her remote working privileges. As Complainant's disability had just recently manifested due to her injury in Florida, she had not yet seen her physician or sought an accommodation from Respondent. While Complainant's actions prior to announcing her disability may have caused Respondent justifiable concern, they do not rise to the level of "egregious misconduct." See Mammone v. President and Fellows of Harvard College, 446 Mass. 657, 666-667, 680 (2006) (egregious workplace misconduct precluded plaintiff from availing the protections accorded a "qualified handicapped individual.") This particularly true of her errors which were inadvertent. Moreover, the nature and extent of the employee's misconduct is an issue for the fact finder to determine. Id. at 680.

Respondent asserts that the discovery of Complainant's errors and its threatened disciplinary actions, are what prompted her to request an accommodation for medical conditions, and that she made this request only after being notified that an adverse employment action was imminent. Respondent suggests that, under these circumstances, Complainant's request for an accommodation is suspect, not entirely legitimate, and unreasonable as a matter of law.[6] While this rather cynical assumption might be true in some circumstances, I do not believe that Complainant fabricated her impairments or sought an accommodation merely to avert or

[5] There was no evidence to suggest that a written warning could have addressed the issues unrelated to her errors.

[6] "When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late'" Trahan v. Wayfair Me., LLC, 2020 U.S. App. LEXIS 12748 *23 *24 (1st Cir. April 21, 2020) However, for reasons stated below, this principal does not apply to the circumstances of this case.

postpone discipline. Given Complainant's longstanding career with Respondent, her extreme distress upon receiving notice of an imminent final written warning is understandable. That measure was harsh, unexpected, and likely unwarranted given Respondent's progressive discipline policy and her good work record. No doubt, the resulting anxiety she suffered contributed to her deteriorating medical condition, and made returning to work on-site less feasible. However, I do not accept the proposition that she sought an accommodation to forestall discipline.

Once Respondent received notice that Complainant was disabled from working on-site and seeking an accommodation, without which she would be unable to continue working, it had an obligation to consider whether the accommodation she sought was feasible and reasonable given all the circumstances. Respondent argues that Complainant's request for an accommodation sought to excuse her past misconduct and was unreasonable as a matter of law. Trahan v. Wayfair Me., LLC, 2020 U.S. App. LEXIS 12748 (1st Cir. April 21, 2020) It argues that "the ADA does not oblige an employer to accommodate an employee's disability retroactively," as the ADA does not require an accommodation as "forgiveness" or a "second chance," for bad behavior. Id. at *23 *24. The principles articulated in Trahan are inapposite to Complainant's circumstances as the facts of that case are entirely distinguishable from the matter at hand.

First, it is undisputed that Respondent did not terminate Complainant's employment for her errors or any other conduct issue, but because she could not return to work on-site. The two errors resulting in HIPAA violations that purportedly justified her return to work on site, were inadvertent. There is no comparing Complainant's inadvertent system user errors to the intentional abusive conduct aimed at co-worker in Trahan. Respondent insisted that the primary

reason for requiring Complainant to work on-site was correction of her errors. In contrast to Trahan, Complainant's errors were not "fireable misconduct," or even bad behavior, for which she sought forgiveness or a "second chance" by way of an accommodation.[7] The fact that Respondent's managers had come to understand the nature of the errors, despite its assertion to the contrary, supports the conclusion that they were unintentional tabbing or typing mistakes. This fact seriously calls into question the reasonableness of Respondent's uncompromising limitation on Complainant's working remotely, which was so harsh as to ultimately prohibit her from working at all and left her with no option but to seek medical leave. Revocation of her remote working privileges amounted to denial of a reasonable accommodation that would have permitted her to continue working. It is significant, that Complainant was not seeking to excuse past misconduct or to circumvent punishment for misconduct by requesting full time remote work as an accommodation; she was seeking a solution, including alternative off-site training that would allow her to retain her position of some twenty years while she recovered from a physical ailment. The inquiry into reasonableness must include an objective review of Complainant's full work and medical history. Mammone v. President & Fellows of Harvard College, 446 Mass. 657 (2006) Given Complainant's nigh on twenty-year tenure at Lahey, her many years of proficiency in coding, her high level of productivity and her acknowledged value to the coding department, her request to modify her job to work remotely full-time was reasonable.

[7] Trahan was employed for one month prior to her termination, in contrast to Complainant's nineteen year employment history with Respondent as a highly productive and valued employee. Complainant sought an accommodation long before a decision to terminate her employment. Finally, in Trahan, the requested accommodation to work from home was held not reasonable as the employer lacked the technological capabilities to support a work-from-home arrangement. At Respondent most if not all of the coders worked remotely and there was no shortage of technology to allow remote work.

Employers are required by law to provide reasonable accommodation to disabled employees, if feasible, to permit them to carry out the job and continue working. A "reasonable accommodation" is any adjustment to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions, and benefits of employment. MCAD Guidelines, Employment Discrimination on the Basis of Handicap, § II (C) (2002), *citing* M.G.L. c. 151B §4(16). Requests for accommodation do not need to be stated in a formulaic manner or even using the words "reasonable accommodation." Anderson v. United Parcel Service, 35 MDLR 45, 50-51, (2010); Duso v. Roadway Express, 32 MDLR 131 (2010) In this case, Complainant's request to work remotely full time was a request to modify her work schedule, but not her duties, to allow her to recuperate from severe back pain and weakness in her legs which hampered her mobility and caused frequent falls. Respondent's denial of this request was predicated upon the notion that only on-site work would address correction of the mistakes that had led to two HIPAA violations. For the reasons stated below, this assertion is not credible.

To begin with, Complainant's argument that training was unnecessary because the errors she made were not coding errors was persuasive. She insisted the relatively small number of system user errors, made over many months were properly attributed to lack of focus or working too quickly. The fact that Complainant was a prolific coder who worked very quickly and was one of the top producers in the coding department supports the assertion that seven errors in the coding of 100,000 medical records over of period of nine months was not significant. She notes further that only two of the purported seven errors resulted in HIPAA violations, which occurred periodically with coders at Lahey and were not uncommon. Aside from the query from

Respondent's security officer about the measures taken to correct the process, there was no significant repercussion from the errors. Moreover, Respondent took a significant step to prevent this error from recurring by modifying the EPIC billing system to prohibit typing in the field where Complainant made errors, thereby eliminating the possibility of her accidentally billing the incorrect guarantor. Given these factors, Complainant contests the assertion that Egbunike had to directly observe her work, and argues that the solution was simply working more attentively.

Secondly, Respondent's insistence on unspecified "training" was, in essence, a reference to identifying and assessing the cause of Complainant's errors, something that, as discussed above, had already occurred. Egbunike had, in fact, analyzed the HIPAA violation errors and reached a logical conclusion about the likely cause, which she discussed and even demonstrated to Complainant using the EPIC system. Complainant concurred with the assessment that she had been typing too quickly and neglecting to tab to the correct field. They essentially agreed that working more attentively to prevent inadvertent tabbing or incorrect typing in the wrong field would prevent recurrence of the errors. In light of this, further assessment and training was not required, because the analysis had occurred and Complainant agreed on how to address the matter. The evidence suggests that "training" was a pretext that did not justify denial of a reasonable accommodation to Complainant, given her ability to continue performing the essential functions of the job working at home.

It is well established that work from home can be a reasonable accommodation. Smith v. Bell Atlantic, 63 Mass. App. Ct. 702 (2005). This is particularly true where a job lends itself to remote work, as coding does. Complainant's right to a reasonable accommodation involves considerations of the essential functions of a coder's job. The evidence is clear that coding does

not require an employee to work on-site and the job can be accomplished entirely remotely. In fact Respondent employed some out-of- state coders who worked remotely at all times. The essential function of a coder's job is entering data from medical records regarding visits or procedures to generate a bill to the patient or guarantor. The job requires a fundamental understanding of the coding process, a computer and high-speed internet access. Neither Complainant nor her treating physician anticipated any need to alter her job duties in the transition to exclusively remote work. There was no evidence presented to demonstrate that the job duties associated with coding remotely for five days differed from coding remotely for four days and working on-site for one. Complainant's initial proposed accommodation of exclusively remote work, as opposed to 80% remote and 20% onsite, did not eliminate any essential duty of her position that would have rendered her request unreasonable. In fact, Respondent acknowledged that the primary impediment to Complainant continuing to work remotely was need to "train" for errors she committed and her inability to come on-site for retraining. As such, the so-called "training" was the primary impediment to Complainant's continued employment. Respondent never considered less harsh alternative measures such as periodic monitoring or random reviews of Complainant's work or an alternative method of training remotely. It insisted that in-person monitoring and on-site training was the only option.[8] As stated earlier, this assertion was not entirely credible.

The evidence supports a reasonable inference that Egbunike and Faeskorn had no idea how "training" would address the type of system user errors Complainant made. They confirmed that the available training protocols would not have been useful since they did not address mistakes attributed to carelessness, excessive speed, or lack of focus. Egbunike testified

[8] Respondent asserted this was also required because Complainant disavowed her errors and the need for training, but given her overtures to Respondent regarding alternative methods of training, I do not accept this assertion.

that, unlike with Complainant, all of her on-site training was of coders whose errors reflected inability to understand the coding process. She admitted that even if observation of Complainant's "workflow process," had revealed carelessness as the cause of the errors, there was no training method or protocol to address this. Given this fact, Egbunike could not credibly respond to why a warning to Complainant to work more carefully would not have sufficed to achieve the stated objective of training, which was preventing future errors. Despite Complainant's requests for clarification of the scope and duration of any training, Respondent made no effort to devise a training protocol or a timetable, insisting that no training could be developed absent in-person observation of Complainant's work-flow process. Respondent's failure to contemplate or consider that availability of alternatives to on-site work supports a conclusion that reasonable accommodations were not sufficiently explored.

The Commission and the courts have repeatedly stressed the importance of an inter-active dialogue in granting accommodations to disabled employees, a process that involves both parties. Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 644 (2004); 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."); 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). Both the employer and the employee must approach the accommodation process in good faith and with flexibility. See, Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002). The interactive process includes engaging in an open

and constructive dialogue and requires a good faith effort to explore options that are feasible. See Massachusetts Bay Transportation Authority v. Massachusetts Comm'n Against Discrimination, 450 Mass. 327, (2008) (discussing reasonable accommodation in the context of religious discrimination)

The facts suggest that Respondent failed to engage Complainant in a meaningful inter-active process to determine if feasible accommodations existed that would allow her to continue to work from home. It is reasonable to conclude that, had Respondent done so, it could have fashioned a less draconian approach to on-site work and training as a reasonable accommodation to her disability. Complainant asserts that full-time remote work was feasible and that Respondent's failure to engage in a process that would have allowed it, left her with no other option but to accept Respondent's suggestion that she take an extended medical leave in July of 2016. Respondent's refusal to extend the leave and insisting that she return to work on-site, resulted in termination of Complainant's employment.

The interactive 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." Id. at 342. Complainant informed Respondent in May of 2016, that she was cleared to return to full-time remote work, and was able to perform all other functions of her job. The only adjustment she sought was one more day of work from home. It was only when Faeskorn rejected full-time remote work that Complainant and her physician concluded the only viable option was to request further leave, which would not have been necessary had she been allowed to work at home. For many reasons, not the least of which was financial, a leave was not optimal for Complainant. She communicated to Faeskorn and Egbunike how stressful it was for her not to be able to work, but they did not respond.

Respondent admitted that Complainant's supervisors did not reply to her requests to return to remote work because she was on leave. Thereafter, discussions with Complainant were largely facilitated by individuals working on the Benefits and Leave and Human Resources teams and did not include Complainant having direct communication with her supervisors, the individuals best suited to develop a plan for re-integrating Complainant.

As of July, 12, 2016, Complainant's doctor allowed Complainant to work remotely eight hours a day for four hours at a time with a break in between, and approved her to attend mandatory on-site meetings. Complainant argues that Respondent never explored the option of assessing her work and conducting training at these on-site meetings. Respondent's intransigent adherence to unspecified "training" and on-site work as the only alternative constitutes a failure to engage in a flexible interactive process that could have facilitated Complainant's continued employment.

Respondent asserts that it engaged in an interactive process with Complainant by offering her an extended leave of absence in lieu of firing her, when she could not work on-site. A medical leave of absence may constitute a reasonable accommodation. Russell v. Cooley Dickenson Hospital, Inc. et al. 437 Mass. 443, 455, (2002); MCAD Handicap Guidelines 2 II. (C)(9) Definitions-Reasonable Accommodation, X. (B) Absenteeism/Leaves of Absence for Handicapped Persons (1998). Respondent relied on the July responses from Complainant's physician to its ADA questionnaire, stating he was uncertain if or when Complainant would recover sufficiently to perform her job without an accommodation or restriction. Respondent asserts the only accommodation available in light of that response, was to grant Complainant an ADA leave. While granting a leave of absence was better than offering no accommodation at all, the adequacy of the extension is questionable given Respondent's refusal to allow remote work,

despite the medical opinion that Complainant was able to do so.[9] Respondent ignored the fact that Complainant could have worked remotely as an accommodation. As a condition of extending Complainant's leave, Respondent required a specific return to work date. Additionally it threatened Complainant with termination several times after July 12, 2016, if she could not provide a specific end date for her leave. When she provided an end-date of December 12, 2016, Respondent denied the request and terminated her employment.

Once Respondent denied Complainant's request for an accommodation it had the burden to show that granting the requested accommodation would impose an undue hardship. Godfrey v. Globe Newspaper, Co., Inc., 457 Mass. 113, 120 (2010) Lahey asserts that it was justified in terminating Complainant's employment due to operational and financial hardship and the inability to post the position so long as Complainant remained in it. However, Respondent was unable to fill Complainant's position until February of 2017, some months after the end date of her requested leave.

Respondent asserted that Complainant's absence placed was a strain on its operations requiring other employees to have to work overtime. I cannot conclude that this constituted undue hardship, given the availability of contract coders, which Respondent often relied on. Respondent asserted that hiring additional contract coders while Complainant was absent would be too costly. However, the estimate of the cost to Lahey was not exorbitant given an organization of its size and resources and that it was not paying Complainant's salary while she

[9] Respondent relies heavily on Complainant's statements in her subsequent application for SSDI benefits which contradict her assertion that she was able to work remotely from May 2016 onward. As stated earlier, Complainant's receipt of disability benefits retro-actively to April 2012, does not preclude her claim of handicap discrimination where she alleges with medical support that she would have been able to work with a reasonable accommodation that was denied. Moreover, Complainant never claimed to be totally disabled during the time when she requested her accommodation and her application for disability benefits came only after her request for an accommodation was denied and she was terminated. See Labonte, supra. at 818-819 *citing* D'Aprile v. Fleer Servs.Corp. 92 F.3d 1 1st Cir. (1996)

was on leave. Given Complainant's GI specialization, her proficiency with coding and her productivity, much of the stress on internal operations could have been averted, had she been allowed to work remotely. In light of these facts, I conclude Respondent has not met its burden of proving undue hardship.

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, supra. at 455-456. Complainant's request for leave was not open-ended. Her physician recommended she continue in physical therapy and return to work within five months. I conclude that it was reasonable to grant Complainant an additional five month leave, particularly where the choice she faced was to work on-site or not at all. I conclude that the refusal to extend Complainant's leave and terminating her employment constituted a failure to extend a reasonable accommodation to her disability and were a violation of G.L. c. 151B s. 4(16).[10]

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. See G.L. c. 151B §5. In addition to damages for lost wages and benefits, if warranted, the Commission is also authorized to award damages for emotional distress resulting from Respondent's unlawful conduct. Stonehill College v. MCAD, 441 Mass 549 (2004). Awards for emotional distress

[10] Whether Complainant would have been able to return to work in mid-December 2016, given the deterioration of her condition, is another matter related to damages addressed in the remedy section below.

"should be fair and reasonable, and proportionate to the distress suffered." Id. at 576. Some of the factors to be considered are: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm..." Id. The Complainant "must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress." Id.

After completing a 12 week FMLA leave, Complainant sought an extended leave of absence from July 12, 2016 until December 12, 2016 because her medical condition had not improved and Respondent would not allow her to work remotely. She claimed continuously from May 2016 onward that she could work full time from home and sought remote work as a reasonable accommodation. Respondent asserts that Complainant is not eligible to recoup any damages for lost wages because she asserted on her application for SSDI benefits that she was unable to work at all as of April 2016 and received disability benefits retro-active to that date. Since I have credited Complainant's and her physician's assertions that she could have worked remotely as a reasonable accommodation during that time, I do not accept Respondent's view on eligibility for back pay. However, for the reasons stated below, I conclude that Complainant is entitled to back pay damages limited to the period of time for which she sought leave, but not thereafter.

Complainant's medical records indicate that her condition did not improve significantly and essentially remained unchanged for many months after her August 2016 termination. There is ample evidence to suggest that Complainant's physical and mental health continued to deteriorate and that certain pre-existing conditions, possibly related to her cancer treatment, neuropathy and depression, became more pronounced after her termination. While Complainant

attributes the decline in her mental and physical health to the negative effects of losing her job, some of her medical problems had begun to manifest prior to the loss of employment, and the evidence suggests they were due to a number of factors. As early as April of 2016, her physician recommended she consult a psychiatrist for issues related to depression. It is also difficult to ascertain with any degree of certainty the extent to which Complainant's pre-existing conditions exacerbated her decline and contributed to her inability to work in any capacity over time. There is evidence that Complainant was generally not compliant with her physician's directives regarding physical therapy and regularly taking her medications. Complainant's reports to her medical and mental health providers after her termination indicated that she was experiencing myriad family problems causing her great stress and affecting her health.

In October of 2016, Complainant's doctor noted that she had stopped attending physical therapy, her condition remained unchanged, and she was unable to work. She applied for Social Security Disability Benefits in October of 2016. As of November 2016, Complainant reported that she had difficulty with completing tasks, concentrating, comprehension, following instructions and memory loss. In December of 2016, her neurologist noted that Complainant's low back pain and leg pain were unchanged. Given the fact that Complainant's condition had not improved by December of 2016, and that her health had continued to decline, I conclude that it is highly unlikely she would have returned to work on-site or remotely at that time. The medical records indicate that her condition did not improve in subsequent years. In November of 2017, Complainant told her therapist that she was concerned about memory loss and whether she could remember enough to work again. Complainant did not seek any gainful employment at any time after her termination from Respondent, despite the fact that the market for experienced coders was strong.

In light of these factors, I conclude that Complainant is entitled to damages for back pay from May of 2016 when she informed Respondent that she was disabled and sought to work remotely full time as an accommodation, until December of 2016, the anticipated end date of her requested ADA leave. Complainant's annual salary at the time of her termination was $74,800 or $6,233.33 per month. Her salary for the eight month period from May until December of 2016 would have been $49,866.64. During that time she received long some short term disability benefits and she received SSDI benefits retroactive to April 12, 2016, but I decline to deduct those benefits from her back pay losses based on the collateral source rule. This rule is grounded in the theory that the party who caused the injury is responsible for the damages and any resulting windfall arising from the receipt of certain benefits should inure to the benefit of the injured party rather than the wrongdoer. Jones v. Wayland, 374 Mass. 249, 262 (1978); School Committee of Norton v. Massachusetts Comm'n Against Discrimination, 63 Mass. App. Ct. 839, 849 (2005) (it is within the discretion of the hearing officer to decline to offset any unemployment benefits received by the complainant); See also, Schillace v. Enos Home Oxygen Therapy, Inc., 17 MDLR 59 (2017) (Full Comm'n adopts application of collateral source rule absent countervailing circumstances that would render its application unjust) Complainant ceased working entirely after her termination and has not sought work since, including remote coding work, despite her professional qualifications, which remain in high demand in the industry. Given these factors, I conclude that Complainant is entitled to an award of back pay in the amount of $49,866.64.

Complainant is also entitled to damages for emotional distress for Respondent' failure to grant her the reasonable accommodation of working from home, and terminating her employment, in lieu of granting her leave to December 2016. I credit Complainant's testimony

that the struggle to keep her job and the loss of her employment contributed to the deterioration of her mental and physical health and significantly exacerbated her depression and anxiety. Complainant was a valued employee with close to a twenty-year tenure of employment with Respondent. Prior to April 2016, Complainant had not missed any work due to anxiety and depression and sought minimal treatment for those conditions. After her termination her emotional and mental health deteriorated significantly. Complainant testified about how productive she was working remotely and how upsetting it was to have her remote working privileges revoked for errors that she believed had been largely rectified. She felt Respondent's insistence that she complete on-site training was nonsensical and ill-conceived.

Complainant was the primary breadwinner in her family and loved her job. She testified credibly that the long struggle to keep her job in the face of Respondent's repeated refusal to permit remote work and its threats of termination, greatly increased her stress and anxiety. Credible testimony from Complainant and family members detailed the effects of the termination on her health and mental well-being. There was credible and moving testimony that, prior to her termination, Complainant was a positive, outgoing, person who loved to cook, shop and entertain family. She was the matriarch of the family, but that role, and her personality, changed after she lost her job. She lost her appetite, stopped cooking and cleaning and neglected her personal hygiene. Complainant's sister and niece testified that after her termination, they helped her bathe, eat, shop, clean and brought her to her medical appointments. She no longer wanted to entertain or leave the house. Her niece testified that Complainant was in no frame of mind to look for work in the initial months after her termination, given her mental state. It stands to reason that Complainant suffered emotional distress from the struggles related to retaining her employment of some 20 years and from ultimately losing that employment.

However, there were other sources of emotional distress in Complainant's life. Emotional distress which arises from circumstances unrelated to Respondent's actions or from pre-existing conditions are not compensable. Stonehill College v. MCAD, 441 Mass. at 576; DeRoche v. Mass. Comm'n Against Discrimination, 447 Mass. 1, 8 (2006) Complainant's medical records indicate that both before and after her termination, she reported significant other stressors affecting her emotional wellbeing, including a number of very problematic issues with her family and distress about the continued deterioration of her physical and mental health, which was likely attributable, in part, to her own non-compliance with medical directives. The persistent back pain and recurrent falls she sustained in the spring and summer of 2016 also contributed to her anxiety and depression. In December of 2018, a psychologist who saw Complainant reported that her ability to "sustain attention, concentrate and exert mental control is in the borderline range." He diagnosed Complainant with persistent depressive disorder that "seems to be more historical than situational." In rendering an award, I must consider other causes of emotional distress in Complainant's life that are not directly attributable to Complainant's employment or Respondent's actions. Being mindful of this obligation, I conclude that Complainant is entitled to damages for emotional distress resulting from employment discrimination in the amount of $150,000.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law, Respondent is hereby Ordered:

1) To cease and desist from any acts of discrimination based upon disability and failure to accommodate disabled employees.

2) To pay to Complainant, Bonnie Ibeh, the sum of $49,866.64 in damages for lost wages 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) To pay to Complainant, Bonnie Ibeh, the sum of $150,000 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.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 15th day of June, 2020.

Eugenia M. Guastaferri
Hearing Officer