COMMONWEALTH OF MASSACHUETTS
COMMISSION AGAINST DISCRIMINATION

Massachusetts Commission Against
Discrimination and Stephanie Joseph,
Complainants

v. Docket: 17-BEM-02109

Massachusetts Department of
Children and Families,
Respondent

Appearances:

For the Complainants:
Chetan Tiwari, Esq.
Patrick Banfield, Esq.

For the Respondent:
Jeremy Bayless, Esq.

DECISION OF THE HEARING COMMISSIONER

Stephanie Joseph filed a complaint with the Massachusetts Commission Against Discrimination ("Commission") on August 30, 2017 against her former employer, the Massachusetts Department of Children and Families ("DCF"), alleging that it: (1) discriminated against her on the basis of her disability by failing to provide her with reasonable accommodation; (2) retaliated against her; and (3) constructively discharged her in violation of M.G.L. c. 151B.[1] The complaint was certified to public hearing, and on May 19, 2021, I

[1]Although M.G.L. c. 151B uses the terms "handicap" and "handicapped", the preferred terms "disability" and "disabled" are used in this decision.

commenced a public hearing by video conferencing due to the COVID-19 pandemic. The hearing lasted five days. The parties filed post-hearing briefs.[2] Unless stated otherwise, where testimony is cited, I found such testimony credible and reliable, and where an exhibit is cited, I found such document reliable to the extent cited. Evidence not cited within this decision was considered and does not alter my findings of fact or conclusions of law.

I. FINDINGS OF FACT

1. Stephanie Joseph ("Ms. Joseph") graduated from Salem State University with a bachelor's degree in social work and completed a one year advanced standing clinical social work program at Boston University. Prior to joining DCF, Ms. Joseph worked at Arbour Counseling as a mental health associate. (Tr. Vol. V, p. 18, 21-22)
2. On July 11, 2016, Ms. Joseph began her employment with DCF at its Dimock Street Office as a Social Worker I. Her annual salary at DCF was $ 51,000. Like other full-time social workers at DCF, she worked 37.5 hours a week. (Tr. Vol. V, p. 17-20, 135, 153, 161)
3. At all times material, social workers at DCF were unionized employees with their job duties governed by a collective bargaining agreement ("CBA"). (Tr. Vol. V, p. 12-13, 153, 161; Tr. Vol. III, p. 124-128; Ex. HH)
4. The CBA stated the maximum caseload allowed for a social worker was 15 cases. (Tr. Vol. IV, p. 94-96; Ex. HH)

[2]DCF's post hearing submission briefly addresses racial discrimination. This decision does not address racial or color discrimination because at the public hearing, during a sidebar, the attorneys for the parties agreed that the issues raised in this case did not relate to racial or color discrimination.

5. Ian Pineda ("Mr. Pineda") was Ms. Joseph's direct supervisor from the time of her hire at DCF until January 23, 2017. (Tr. Vol. V, p. 37, 56; Tr. Vol. III, p. 43)
6. Annette Nazziwa ("Ms. Nazziwa") was Ms. Joseph's direct supervisor from June 19, 2017 until her last day of employment at DCF. (Tr. Vol. V, p. 71-73; Tr. Vol. III, p. 118)
7. Sarah Albino ("Ms. Albino") was Ms. Joseph's Area Program Manager during the period Ms. Joseph was employed at DCF. (Tr. Vol. V, p. 90; Tr. Vol. III, p. 30-31)
8. Gertrude Condon ("Ms. Condon") was the Area Director overseeing the operations of the Dimock Street Office during the period that Ms. Joseph was employed at DCF. (Tr. Vol. III, p. 100; Ex. KK)
9. Diane Chang ("Ms. Chang") was the DCF Diversity Officer /ADA Disability Coordinator ("ADA Coordinator") during Ms. Joseph's employment at DCF. Ms. Chang was the decision maker regarding granting or denying a request for a reasonable accommodation. (Tr. Vol. I, p. 125-128)
10. At all material times, Linda Spears was the DCF Commissioner. (Tr. Vol. 1, p. 178; Tr. Vol. II, p. 110)
11. At all material times, Ms. Joseph was a good employee, and had good clinical skills. Neither Mr. Pineda nor Ms. Condon had concerns about the quality of her work. (Tr. Vol. III, p. 19-20, 116; Tr. Vol. IV, p. 25, 137)
12. In December 2014, Ms. Joseph learned that she had a brain tumor. The tumor impacted the function of her pituitary gland causing her body to produce excessive cortisol – the body's fight-or-flight hormone. She was diagnosed with Cushing's disease and experienced a number of medical complications including hypertension,

diabetes, and excessive weight gain which led to knee and joint problems affecting her ability to walk. Ms. Joseph's medical condition required surgery to remove the tumor. After the tumor was removed on January 24, 2017, Ms. Joseph developed adrenal insufficiency and could not produce sufficient cortisol. Her symptoms from adrenal insufficiency included nausea, weakness, fatigue, lightheadedness, body pain, weight loss, and passing out. Adrenal insufficiency can be life threatening. Ms. Joseph required medication to address the loss of cortisol. She suffered from adrenal insufficiency for approximately eleven months after her January 24, 2017 surgery. (Tr. Vol. I, p. 49-57; Tr. Vol. V, p. 33-36; Ex. UU)

13. Soon after Ms. Joseph began working at DCF, she told Mr. Pineda and Ms. Condon of her medical condition and the need for surgery. (Tr. Vol. III, p. 23-26; Tr. Vol. V, p. 41-43; Ex. BB)
14. Following her surgery on January 24, 2017, Ms. Joseph took an approved unpaid medical leave pursuant to the Family and Medical Leave Act ("FMLA"). (Tr. Vol. I, p. 16; Tr. Vol. V, p. 42, 48-49, 56, 124, 176)
15. Ms. Joseph was initially scheduled to return to work at DCF in March 2017. However, her doctor determined that Ms. Joseph was not medically cleared to return to work at that time. Ms. Joseph made a request to extend her medical leave to April 2017, which DCF approved. (Tr. Vol. IV, p. 25)

April 28, 2017 Request for Accommodation

16. By April 27, 2017, Ms. Joseph's treating physician, Dr. Leslie Subhi Eldeiry ("Dr. Eldeiry") had cleared her to return to work with certain restrictions. On April 27, 2017, Ms. Chang forwarded the request for accommodation paperwork to Ms. Joseph. (Tr. Vol. I, p. 61-64)
17. On April 28, 2017, Ms. Joseph faxed Ms. Chang a completed request for reasonable accommodation form and a completed medical inquiry form filled out by Dr. Eldeiry. Dr. Eldeiry recommended that Ms. Joseph return to work with the following restrictions: a) limit weekly work hours to 20; b) limit caseload to 10 cases; c) no driving duty; and d) two 15-minute breaks daily to take medication and rest. ("April 28, 2017 Request") (Ex. A)
18. On May 3, 2017, Ms. Chang forwarded by email the April 28, 2017 Request to Ms. Condon. (Ex. J)
19. On May 5, 2017, Ms. Chang emailed Ms. Condon and stated that the April 28, 2017 Request should be denied as "[Ms. Joseph] cannot do the essential functions of the job." Ms. Condon replied by email on May 6, 2017 as follows: "I really don't think [Ms. Joseph] should come back, as she won't be able to do the work. Even though she says she can have 10 cases ... I doubt she will be able to take public transportation and, I can't have staff driving her to home visits ... it just won't work." (Tr. Vol. III, p. 133-143; Ex. J)
20. After communicating with Ms. Condon regarding the April 28, 2017 Request, Ms. Chang denied the request on the ground that driving was an essential function of Ms. Joseph's position at DCF as a Social Worker I. (Tr. Vol. II, pg. 168)

21. On May 8, 2017, Ms. Chang spoke with Ms. Joseph on the telephone and explained that DCF was denying her April 28, 2017 Request. (Tr. Vol. II, p. 148-153)
22. After speaking to Ms. Chang on May 8, 2017, Ms. Joseph extended her medical leave. (Tr. Vol. IV, p. 52 – 56, 156-163)
23. Prior to denying the April 28, 2017 Request, Ms. Chang failed to engage in conversation with Ms. Joseph or her doctor regarding any alternative to Ms. Joseph's ability to drive herself or her clients. (Tr. Vol. V, p. 54-56, 158-167)
24. Both the DCF Social Worker I and II job descriptions stated that a social worker must be able to "[t]ransport clients who are in the Commonwealth's custody to school, appointments, etc. to maintain the daily needs of the client; schedule and transport, as needed, the client to supervised visits with the family to ensure family contact and to observe the commitment of the parent and interactions among the family." The DCF Social Worker Form 30, which describes job duties, states "[t]he classification may require possession of a current and valid Motor Vehicle Driver's License...." (Ex. F; Ex. G)
25. During 2016-2017, Ms. Chang allowed driving restrictions for social workers as a reasonable accommodation from anywhere from one week to one month, and in at least one case – for the entire duration of a pregnancy. (Tr. Vol. I, p. 174-175, 183-186; Ex. K)

June 13, 2017 Request for Accommodation

26. On June 13, 2017, Ms. Joseph emailed Ms. Chang attaching a reasonable accommodation request form and a letter from Dr. Eldeiry which recommended that Ms. Joseph could return to work under the following limitations: a) two 15-minute breaks for medication and rest, b) limit weekly hours to 20 (4 hours per day); and c) limit caseload to 10 cases. Dr. Eldeiry removed the no-driving restriction. ("June 13, 2017 Request") Dr. Eldeiry requested that these accommodations last until at least July 24, 2017 when she was scheduled to reevaluate Ms. Joseph. Dr. Eldeiry requested flexibility regarding Ms. Joseph's work schedule because Ms. Joseph's disease and recovery were unpredictable, and some flexibility would allow Ms. Joseph the ability to modify her schedule if she was not feeling well. (Tr. Vol. I, p. 73-74; Ex. C)
27. Ms. Chang and Ms. Condon discussed the June 13, 2017 Request. (Tr. Vol. II, p. 17-21; Ex. L)
28. DCF drafted a temporary modified duties agreement for Ms. Joseph that included a maximum caseload of 10 cases and listed hours as 9:00 A.M. – 1:30 P.M. with two 15 minutes breaks and noted that Ms. Joseph was able to drive. (Ex. M; Ex. N)
29. On June 19, 2017, Ms. Joseph returned to work at DCF after her medical leave, met with Ms. Condon, and they signed the temporary modified duties agreement. (Tr. Vol. p. 80-81)
30. During the June 19, 2017 meeting, Ms. Condon inquired about Ms. Joseph's health. Ms. Joseph told Ms. Condon that she was still experiencing headaches and dizziness. Ms. Condon then told Ms. Joseph that she would not be assigned cases that required

driving; would work as a secondary worker on assigned cases supporting the primary worker; and would be limited to 5 cases. Ms. Condon decided Ms. Joseph should not drive children because she believed that may not be safe based on Ms. Joseph telling her during the meeting that Ms. Joseph had headaches and dizziness. (Tr. Vol. IV, p. 45-53)

Request for Workspace Relocation and Furniture Change

31. On Ms. Joseph's first day back in the office on June 19, 2017, she learned that she had been reassigned to a new unit, under a new supervisor, Ms. Nazziwa. With the reassignment, Ms. Joseph was moved to an office space on a different floor. Her desk was now located directly under an air conditioning vent blowing out cold air, and the temperature was "frigid." Her desk was torn open in the front. The arm handles of her desk chair were torn, and it was broken. (Tr. Vol. V, p. 75-77)
32. Due to being seated directly under the air conditioner vent, Ms. Joseph was extremely cold and experienced headaches and general discomfort. (Tr. Vol. V, p. 77- 79, 82)
33. Ms. Joseph was worried that her tumor would return because she believed that her health concerns were triggered by the vent, extremely cold temperature, and broken desk and chair. (Tr. Vol. V, p. 97)
34. On July 6, 2017, Ms. Joseph called out sick because of a nosebleed and went to the emergency room. It was her third day calling out sick since her June 19, 2017 return to work. (Tr. Vol. I, p. 93-94; Tr. Vol. II, p. 44-45; Tr. Vol. V, p. 96-97; Ex. O)
35. On an almost daily basis from June 19, 2017 to July 9, 2017, Ms. Joseph complained to Ms. Nazziwa, Ms. Condon and/or Ms. Albino about her working conditions. Ms.

Joseph requested that DCF change her furniture and move her workspace or lower the temperature. Ms. Joseph did not fill out the request for accommodation paperwork for these requests nor did her supervisors relay her requests to Ms. Chang as a request for a reasonable accommodation. Ms. Joseph mentioned to Ms. Condon in their "check-ins" that Ms. Joseph was having headaches from the vent. As of July 9, 2017, DCF had not moved Ms. Joseph's workspace or changed her furniture despite her inquiries. As of that date, Ms. Joseph "would ask for the progress or what was the status of my desk being moved. And I wasn't hearing, like, any type of feedback…. And there wasn't – I wasn't presented with, like, another option or something else to accommodate me in the meantime. Nothing like that was presented to me." (Tr. Vol. V, p. 90-91, 99-100; Ex. RR)

36. On July 10, 2017, Ms. Joseph emailed Ms. Chang regarding her working conditions, referenced her health concerns, and requested assistance. Ms. Joseph copied Dr. Eldeiry on that email and wrote that she still "suffers from headaches and dizziness" and was "trying not to encounter any triggers." (Tr. Vol. V, p. 94-95; Ex. P)
37. On July 11, 2017, Ms. Joseph emailed Ms. Nazziwa, Ms. Albino and copied Ms. Chang - who she referred to in the email as her "special accommodations coordinator" - asking for a different desk and that DCF move her workspace to another location. In that email, Ms. Joseph wrote "not only am I shivering but feeling the onset of symptoms I am supposed to prevent." Ms. Joseph noted that the desk she was using was causing her to get scratched and explained she is "susceptible to injury" and "cannot afford to have any type of injury especially coming back from a major surgery." (Tr. Vol. II, p. 66-68; Ex. Q)

38. In an email exchange between Ms. Condon and Ms. Chang on July 11, 2017, Ms. Condon expressed her frustration regarding Ms. Joseph having "gone over my head" to Ms. Chang and called Ms. Joseph's behavior "unacceptable". Ms. Chang replied by agreeing with Ms. Condon's assessment and concluded that Ms. Joseph is "taking advantage of the ADA accommodations and asking for everything she can." Ms. Condon replied that Ms. Joseph is "stepping way over boundaries and I am not happy with this at all." Ms. Condon also wrote "I know you don't see it as 'going over my head', but most staff do." (Tr. Vol. IV, p. 65-77; Ex. R)
39. On July 12, 2017, DCF gave Ms. Joseph a different desk and moved her office space so she was no longer directly under an air conditioning vent. (Tr. Vol. IV, pg. 77; Tr. Vol. V, p. 169-171)

July 24, 2017 Request for Accommodation

40. On July 24, 2017, Dr. Eldeiry evaluated Ms. Joseph and issued to DCF a letter seeking the following revised requested accommodation. Dr. Eldeiry increased Ms. Joseph's maximum weekly work hours from 20 to 30 hours with no more than six hours daily and with flexibility in the daily hours. There were no driving restrictions. Dr. Eldeiry retained the restrictions of a caseload limit of 10 cases and two 15-minute breaks for medication and rest and added a 30 minute lunch break. ("July 24, 2017 Request") (Tr. Vol. I, p. 81-86; Tr. Vol. IV, p. 104; Ex. E)
41. On July 24, 2017, Ms. Chang received the July 24, 2017 Request. Ms. Chang then apparently spoke on the phone with Ms. Condon regarding the July 24, 2017 Request. (Tr. Vol. II, p. 103-104; Tr. Vol. IV, p. 79; Ex. T)

42. On July 25, 2017, Ms. Chang denied the July 24, 2017 Request. Ms. Chang determined that allowing the July 24, 2017 Request would impose an undue hardship on DCF because other workers would have to carry additional cases to enable Ms. Joseph to continue working a reduced caseload. (Tr. Vol. II, p. 105-111; Ex. U)
43. The CBA listed several methods of off-loading excess cases that an Area Director was required to use, including reassigning: (1) cases within a supervisory unit; (2) cases within an area office; (3) vacant positions within a region; (4) excess cases to another area office; and (5) staff to an office with excess cases. There is no evidence that Ms. Condon explored these options relative to the July 24, 2017 Request. (Tr. Vol. III, p. 120-124; Ex. HH)
44. During the period of Ms. Joseph's employment, DCF employed approximately 64-80 social workers in its Dimock Street Office, and the Dimock Street Office managed a fluctuating total of 700 – 900 cases. (Tr. Vol. III, p. 131-132; Tr. Vol. IV, p. 105-109)
45. The CBA stated that part-time social workers be assigned cases proportionate to the number of hours worked. DCF social workers had been accommodated with reduced hours and reduced caseloads. Ms. Condon acknowledged that "[i]f someone was on an accommodation, they would be part-time, if necessary, if that's what they needed." (Tr. Vol. III, p. 125-126; Tr. Vol. IV, p. 33-35; Ex. HH)
46. Ms. Condon was not able to say that the Dimock Street Office was overburdened by allowing Ms. Joseph to maintain a reduced caseload from June 19, 2017 until July 24, 2017. (Tr. Vol. IV, p. 54)
47. Ms. Chang testified that in considering a request for reasonable accommodation, having a reduced caseload was difficult to accommodate. (Tr. Vol. II, p. 153) Ms.

Chang did not investigate, analyze, or review the Dimock Street Office's operational needs when reviewing Ms. Joseph's July 24, 2017 Request. (Tr. Vol. III, p. 178-180)

48. Ms. Chang and Ms. Condon did not reach out to Ms. Joseph or Dr. Eldeiry before Ms. Chang denied the July 24, 2017 Request. (Tr. Vol. I, p. 80, 86, 104; Tr. Vol. III, p. 85; Tr. Vol. V, p. 107)

49. On July 26, 2017, Ms. Joseph met with Ms. Condon, Ms. Albino and Ms. Nazziwa during which the following occurred. Ms. Condon told Ms. Joseph that her request for vacation time from August 7-11, 2017 was denied (although Ms. Joseph was later allowed to take that period off as "comp time") Ms. Albino and Ms. Nazziwa admonished Ms. Joseph for making an early morning home visit on July 24, 2017 that was not within her approved work hours. Ms. Albino called Ms. Joseph a liability to the office. Ms. Joseph felt alone, unsupported, and distraught, and repeatedly asked Ms. Condon, Ms. Albino and Ms. Nazziwa what she had done wrong. Towards the end of the meeting, Ms. Condon informed Ms. Joseph that DCF was denying the July 24, 2017 Request and that Ms. Joseph would need to decide what to do regarding her employment at DCF. Ms. Joseph stated to Ms. Condon that she had not been notified of the denial and needed to talk to Ms. Chang. (Tr. Vol. V, p. 107-111; Tr. Vol. IV, p. 97-98)

50. The following email exchange occurred on July 26, 2017 between Ms. Joseph and Ms. Chang after the meeting discussed in the previous paragraph. (Tr. Vol. V, p. 111-113; Tr. Vol. II, p. 111-116; Ex. V)

    a. Ms. Joseph emailed Ms. Chang for "advice and insight" about the denial of her July 24, 2017 Request. Ms. Joseph's email expressed that she was "overwhelm[ed] to hear this news."

b. Ms. Chang responded that the July 24, 2017 Request "has been denied as an undue hardship on other workers and the operational needs of the office" and that the "denial is with the [DCF] Commissioner for her review and approval."
c. Ms. Joseph asked if the Commissioner review could go in her favor.
d. Ms. Chang wrote that it was "possible, which means that you would continue with the restrictions recommended by your doctor at least until your next appointment. If not, then you will need to return to full duty or apply for FMLA or other leave so that you can heal fully and return to work. You have the right to speak with your union representative…."
e. Ms. Joseph asked for the name of the union representative and stated that she was "just trying my best to wrap my mind around this news."

51. Subsequently on July 26, 2017, Ms. Joseph contacted the Commissioner's office seeking to speak to Commissioner Spears before the Commissioner reviewed Ms. Chang's determination of the July 24, 2017 Request. Ms. Joseph did not speak with the Commissioner. Ms. Joseph was referred back to Ms. Chang. Ms. Joseph also attempted to contact her union for assistance. The union did not respond. (Tr. Vol. V, p. 111-112, 115-116; Ex. I)

End of DCF Employment

52. By letter dated July 25, 2017, Ms. Chang denied the July 24, 2017 Request and stated that if Ms. Joseph "would like to discuss other ways in which [DCF] may be able to accommodate you so that you can continue to perform[] the essential functions of your assigned duties, please do not hesitate to contact me." The letter stated that if Ms. Joseph disagreed with the decision, she could contact the state agencies listed

therein. One of the persons that Ms. Chang listed to contact if Ms. Joseph disagreed with the decision was Sonia A. Bryan of the Executive Office of Health and Human Services ("EOHHS"). (Ex. U)

53. Ms. Chang attached to her July 25, 2017 letter a form entitled "Department of Children and Families Decision to Deny Reasonable Accommodation" signed by Ms. Chang and Commissioner Spears ("Denial Form"). The Denial Form has a section entitled "Final Decision to Deny" and states Ms. Joseph could appeal to EOHHS. (Ex. U)
54. Ms. Chang admitted that she made numerous mistakes when completing the Denial Form including using the wrong date of the request for accommodation and inputting the wrong information under Accommodation Requested. (Tr. Vol. II, p.108-110; Ex. U)
55. On August 2, 2017, Ms. Joseph met with Ms. Albino who again admonished Ms. Joseph for scheduling a family visit outside of Ms. Joseph's scheduled hours of work. During this meeting, Ms. Albino chided Ms. Joseph for doing too much work on the cases assigned to her as a secondary social worker. (Tr. Vol. p. 117-119)
56. During August 6-12, 2017, Ms. Joseph applied for jobs as a behavioral health specialist. (Tr. Vol. VI, p. 9-10)
57. On August 13, 2017, Ms. Joseph read Ms. Chang's July 25, 2017 letter and the Denial Form and understood that Ms. Chang had denied the July 24, 2017 Request but believed that the Commissioner was still reviewing Ms. Chang's decision. (Tr. Vol. V, p. 120-121)

58. On August 14, 2017, Ms. Joseph met with Ms. Condon who told Ms. Joseph that in light of the denial of the July 24, 2017 Request, Ms. Joseph needed to decide how to proceed with her DCF employment. Ms. Condon told Ms. Joseph that she needed to either return to work full time, go back on leave, or resign. Ms. Condon told Ms. Joseph that she needed to decide that day. After hearing Ms. Condon's choices and that a decision needed to be made that day, Ms. Joseph felt lost. She didn't feel safe or supported. She felt shocked and ostracized and believed that she was being pushed out of DCF. (Tr. Vol. IV, p. 97-101; Tr. Vol. V, p. 121-124, 126-127; Ex. KK)

59. Immediately after the August 14, 2017 meeting with Ms. Condon, Ms. Joseph emailed Ms. Chang seeking help and guidance regarding what Ms. Condon had imposed and asked Ms. Chang "who I should speak to directly or have a face-to-face meeting with?" Ms. Joseph wrote "[t]his is something I will need to sit with as this is not only a medical-based decision but a personal decision. However, I am supposed to meet with [Ms. Condon], again, this morning…." Ms. Chang never responded to that email. (Tr. Vol. V, p. 124-126; Tr. Vol. II, p. 119-132; Ex. X)

60. Ms. Chang admitted though that requiring a worker to make a same day decision as to whether to resign, go on a FMLA leave, or return back to work full time, was unreasonable. (Tr. Vol. II, p. 123-124)

> Q. Do you agree that forcing somebody to rush this decision, giving somebody an ultimatum is inappropriate?
> A. Yeah. It seems unreasonable.
> Q. Do you agree that this is an ultimatum?
> MR. BAYLESS: Objection.
> HEARING COMMISSIONER: Overruled. I'm going to allow it.
> A. I don't know if it's an ultimatum. She's given a choice to return to work, resign or go out on FMLA.
> Q. She needs to give that decision – she needs to give her decision to [Ms. Condon] that day; correct?

A. Yes. That's what she states.
Q. Is that an ultimatum?
A. I guess you could say it is.
Q. That's not appropriate, is it?
A. I don't think it's reasonable to make a same-day decision.

61. Subsequently, on August 14, 2017, Ms. Joseph emailed Ms. Condon letting her know that she was distraught and was going home for the day to think about her decision. (Ex. Z)

62. As of August 14, 2017, Ms. Joseph believed that she could not go back on FMLA leave because it was unpaid, and she needed to help financially support her family; she could not go against her doctor's orders and return to work full-time; and her only option was to resign. At this point, she had lost hope. (Tr. Vol. V, p. 130-135)

63. On August 15, 2017, Ms. Joseph sent an email to Ms. Condon, copying Ms. Nazziwa, Ms. Albino, Ms. Bryan and Ms. Chang tendering her resignation in response to the three, time-pressured choices imposed by Ms. Condon that included the following language. "Since you asked me for a final decision … I became very overwhelmed and felt unsupported. I felt I needed to be away from the office due to a lack of consideration and insufficient time to think through my options thoroughly." (Ex. PP)

64. On August 15, 2017, Ms. Joseph contacted Ms. Bryan.[3] (Ex. I)

Wages and Distress

65. Ms. Joseph did not earn wages between August 16, 2017 and November 12, 2018. From November 13, 2018 through June 30, 2019, she worked as a guidance counselor and earned $58,000 through a contract with the Brookline Public Schools in which

[3]The record does not support any inference whether such contact with Ms. Bryan on August 15, 2017 was before or after Ms. Joseph submitted her resignation letter on August 15, 2017.

she was replacing a guidance counselor who was on maternity leave. From July 1, 2019 through August 30, 2020, Ms. Joseph received no wages. Ms. Joseph started working at the Boston Public Schools as a Social Worker in September 2020 making $64,000. (Tr. Vol. V, p. 135-142)

66. Between May and October 2018, Ms. Joseph applied for several social worker positions and positions similar to the social worker position that she had held at DCF. Ms. Joseph collected some unemployment benefits. (Ex. SS; Tr. Vol. VI, p. 9-10)

67. Ms. Joseph's mother credibly testified that: (a) when Ms. Joseph talked about DCF, she was often sad and complaining, cried a lot, and was very emotional at times; (b) Ms. Joseph seemed withdrawn and disappointed in herself and appeared overwhelmed at times; and (c) it took Ms. Joseph four years to get back to a place of happiness. (Tr. Vol. IV, p. 165-170)

68. During the July 26, 2017 meeting, Ms. Joseph was distraught. Ms. Joseph's July 26, 2017 email to Ms. Chang after that meeting reflected that she was overwhelmed. When presented with the three, time-pressured choices by Ms. Condon on August 14, 2017, Ms. Joseph was shocked and felt ostracized. Ms. Joseph's August 14, 2017 email to Ms. Condon reflected that she was distraught. Ms. Joseph's resignation letter of August 15, 2017 evidenced that she was overwhelmed and felt entirely unsupported. Ms. Joseph had lost hope and had that feeling for a long time. Ms. Joseph was sad after she left DCF. She felt shaky and nervous during job interviews. As a result of her DCF experience, Ms. Joseph keeps her employers at a distance because she fears not being heard. She lost the trust she initially had at DCF. (Tr. Vol. V, p. 107-113, 121-126, 141-145; Ex. V, X and Z)

II. LEGAL ANALYSIS

A. Disability Discrimination: Failure to Provide Reasonable Accommodations

"A 'reasonable accommodation' is any adjustment or modification 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) Employers violate M.G.L. c. 151B, § 4(16) if they fail to provide a qualified disabled person capable of performing the essential functions of the position with a reasonable accommodation, unless the employer can demonstrate that the accommodation would impose an undue hardship to its business.

Regarding a claim of failure to provide a reasonable accommodation, Ms. Joseph must prove that she was a qualified disabled person capable of performing the essential functions of her job with reasonable accommodation, requested such accommodation, DCF refused to provide it; and, as a result, she suffered harm. Alba v. Raytheon Co., 441 Mass. 836, 843 n. 9 (2004); Smith v. Bell Atl., 63 Mass. App. Ct. 702, 711 (2005), review denied, 444 Mass. 1108 (2005) If Ms. Joseph satisfies her burden, then DCF has the burden of demonstrating that the accommodation would impose an undue hardship to its business. M.G.L. c. 151B, § 4(16)

At all material times Ms. Joseph was disabled. (See Finding of Fact 12) DCF properly concedes "that following [Ms. Joseph's] January 2017 surgery, and at the time of each of her 2017 complaints of discrimination, she was a disabled person within the meaning of the statute." (DCF post-hearing brief at p. 14)

April 28, 2017 Request for Accommodation

As to the April 28, 2017 Request, there is no dispute that Ms. Joseph made a request for a reasonable accommodation; DCF denied it; the denial harmed Ms. Joseph because she was unable to return to work in accordance with her doctor's instructions; and DCF has not raised a defense of undue hardship. The sole disputed issue regarding the April 28, 2017 Request is whether Ms. Joseph was a qualified disabled person. DCF claims Ms. Joseph was not, because she was unable to drive, and driving was an essential function of a DCF social worker position.

Based on the following, I determine that driving was not an essential function of Ms. Joseph's social worker position at DCF. First, neither the job description for Social Worker I nor Social Worker II states that a social worker must be able to drive herself or others to perform her duties. The job descriptions require that a social worker transport herself and clients but does not indicate that the transportation must be accomplished by the social worker doing the driving. Second, in Ms. Condon's May 5, 2017 email to Ms. Chang relative to the April 28, 2017 Request, Ms. Condon wrote "I doubt [Ms. Joseph] will be able to take public transportation and, I can't have staff driving her to home visits." This is an admission by DCF that a social worker can perform her transportation duties without driving – such as travel via public transportation. Third, during 2016-2017, Ms. Chang, as the ADA Coordinator, had allowed accommodations for social workers who sought not to drive due to a disability -- for a period ranging from one week to one month, and in at least one case – for the entire duration of a pregnancy. Fourth, after Ms. Joseph returned to work in June 2017, Ms. Condon unilaterally restricted Ms. Joseph from driving even though Ms. Joseph's doctor had cleared her to drive. I infer from this that Ms. Condon did not view driving as an essential job function of a social worker. Fifth, the Social Worker Form 30 which describes the job duties states: "[t]he classification may require

possession of a current and valid Motor Vehicle Driver's License…." The use of the permissive word "may" rebuffs the contention that ability to drive was an essential job function of a social worker.

For these reasons, as to the April 28, 2017 Request, I find that Ms. Joseph has demonstrated that she was a qualified disabled person who could perform the essential functions of her job with accommodation. Because this was the only issue in dispute relative to the April 28, 2017 Request, I determine that DCF's denial of this request violated M.G.L. c. 151B, § 4(16).

June 13, 2017 Request for Accommodation

Ms. Joseph's claim that DCF failed to provide a reasonable accommodation in response to the June 13, 2017 Request is dismissed. DCF granted that request by limiting Ms. Joseph's caseload, providing the two requested breaks, and limiting Ms. Joseph's hours. I recognize that Ms. Joseph's doctor recommended that her work schedule should have some flexibility and that DCF established a fixed schedule. However, I do not find this significant enough under the circumstances of this case to characterize DCF's action as a denial of a request for reasonable accommodation.

Request Regarding Workspace and Furniture

I also dismiss the claim that DCF failed to provide a reasonable accommodation relative to Ms. Joseph's workspace. On an almost daily basis from June 19, 2017 to July 9, 2017, Ms. Joseph made requests to her supervisors for a workspace relocation and for different furniture. Ms. Joseph did not fill out the request for accommodation paperwork for these requests. Her supervisors did not relay her requests to Ms. Chang as a request for an accommodation. Ms.

Joseph contends that DCF failed to timely recognize that she was making a request for an accommodation. For "an employee's actions to constitute a request for accommodation, they must make the employer aware that the employee is entitled to and needs accommodation." Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 632, 649, n. 21 (2004) I find that through July 9, 2017, it was reasonable for her supervisors to perceive Ms. Joseph's requests regarding her working conditions as office logistics – temperature and furniture issues – not as a request for an accommodation. There are no magic words or documents required to make a request for accommodation. However, it is pertinent that Ms. Joseph did not fill out the request for accommodation paperwork pertaining to these requests as she and her doctor had done so previously.

The sea-change event occurred on July 10, 2017 when Ms. Joseph emailed Ms. Chang requesting assistance and referenced her health concerns, copied her doctor on the email, and stated that she still "suffers from headaches and dizziness" and was "trying not to encounter any triggers." At that point, DCF knew or reasonably should have known that Ms. Joseph was requesting an accommodation. Two days later, DCF moved Ms. Joseph's office space and provided her with a different desk. Because DCF granted the request within two days of when it should have known that Ms. Joseph was requesting an accommodation, I conclude that DCF did not deny this request for an accommodation.

July 24, 2017 Request for Accommodation

As to the July 24, 2017 Request, there is no dispute that Ms. Joseph made a request for accommodation that was denied by DCF. Further, the denial harmed Ms. Joseph as it precluded her from returning to work under the conditions her doctor believed were medically necessary. As to this request, the two disputed issues are whether Ms. Joseph was a qualified disabled person and whether granting this request would have caused an undue hardship for DCF.

DCF argues that Ms. Joseph was not a qualified disabled person because of safety concerns. DCF claims that Ms. Joseph "continued to experience headaches and dizziness through late July 2017, when she made her [July 24, 2017] request for accommodation. As such, Director Condon continued to believe that it was not safe for [Ms. Joseph] to transport children, rendering her unable to safely perform an essential function of her job as a Social Worker I." (DCF post-hearing brief at p. 18) DCF's argument has a fatal flaw. It erroneously assumes that the ability of Ms. Joseph to drive herself and clients is an essential function of Ms. Joseph's position as a social worker. As demonstrated above, it is not. There is no other challenge to Ms. Joseph's ability to perform her work as of July 24, 2017. At all material times, Ms. Joseph was a good employee, and had good clinical skills. Neither Mr. Pineda nor Ms. Condon had concerns about the quality of her work. Thus, Ms. Joseph has proven that she was a qualified disabled person for purpose of the July 24, 2017 Request.

I next address DCF's defense of undue hardship relative to the July 24, 2017 Request. Based on the following, I find that DCF has failed to prove that granting the July 24, 2017 Request would have created an undue hardship to its business.[4] In the July 24, 2017 Request,

[4]In determining whether an accommodation would impose such an undue hardship, "factors to be considered include: -- (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; (2) the type of the employer's operation, including the

Ms. Joseph was requesting that her caseload not exceed ten cases - only five cases below the maximum caseload permitted by the CBA for a social worker. Five cases are minute when compared to the fluctuating total of 700-900 cases that the Dimock Street Office managed during Ms. Joseph's employment. Even if Ms. Joseph's caseload was limited to five cases, as Ms. Condon had unilaterally done in June 2017, requiring DCF to off-load ten cases (15 cases allowed by CBA less 5 cases), the reasoning and outcome is still the same. Distributing ten cases in an office that managed 700-900 cases at material times does not approach undue burden status. Significantly, Ms. Condon admitted that she was not able to say that the Dimock Street Office was overburdened by allowing Ms. Joseph to maintain a reduced caseload from June 19, 2017 until July 24, 2017 - a period when Ms. Joseph was assigned only five cases. Further, the CBA listed several methods an area director was required to use to offload an excess of cases, but there is no evidence that Ms. Condon explored these operational avenues - let alone evidence that those avenues would not have satisfactorily addressed the excess. Also, and instructively, DCF has accommodated other social workers with reduced hours and reduced caseloads but has submitted no evidence why such accommodation of other social workers did not create an undue burden while accommodating Ms. Joseph would have created an undue burden. Finally, Ms. Chang's testimony that in considering a request for an accommodation, having a reduced caseload was difficult to accommodate merits little weight, because she failed to perform an individualized assessment of Ms. Joseph's request. Ms. Chang failed to investigate or analyze the Dimock Street Office's operational needs when reviewing the July 24, 2017 Request. Her lack of individualized consideration of the request is driven home by the mistake-laden Denial Form that

composition and structure of the employer's workforce; and (3) the nature and cost of the accommodation needed." M.G.L. c. 151B, § 4(16)

she created. DCF has woefully failed to establish that allowing the July 24, 2017 Request would have caused an undue hardship.

In sum, DCF's failure to allow the July 24, 2017 Request is a violation of M.G.L. c. 151B, § 4(16). There is an independent ground upon which DCF violated this statutory provision relative to the July 24, 2017 Request. DCF never participated in an interactive dialogue as to the request. Instead, the day after receiving the request, Ms. Chang denied it. Ms. Joseph and Dr. Eldeiry credibly testified that neither Ms. Chang nor Ms. Condon reached out to them before the denial. The refusal of an employer to participate in the interactive process itself "is a violation of our discrimination laws." Ocean Spray Cranberries, Inc., 441 Mass. at 644; Sch. Comm. of Norton v. Massachusetts Comm'n Against Discrimination, 63 Mass. App. Ct. 839, 848 (2005), review denied, 445 Mass. 1103 (2005) ("'The refusal of an employer to participate in [the interactive] process ... is a violation of our discrimination laws.' *Ocean Spray Cranberries*")

B. Retaliation

M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discriminate against a person because she has opposed any practices forbidden under M.G.L. c. 151B. To prevail on a retaliation claim, Ms. Joseph must prove that: (a) she reasonably and in good faith believed that DCF was engaged in wrongful discrimination under M.G.L. c. 151B; (b) she acted reasonably in response to that belief through reasonable action meant to protest or oppose such discrimination (protected conduct); (c) DCF took adverse action against her; and (d) the adverse action was in response to the protected conduct (forbidden motive). Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405–06 (2016)

a. Reasonable and Good Faith Belief of Unlawful Discrimination

Ms. Joseph was not asked at the hearing whether she believed her request to change her workspace and desk was a request for an accommodation. There is, however, ample evidence upon which to infer, which I do, that Ms. Joseph believed that such request was a request for an accommodation. In fact, Ms. Joseph was worried that her tumor would return because she believed that her health concerns were triggered by the vent, extremely cold temperature, and broken desk and chair. On July 6, 2017, Ms. Joseph called out sick because of a nosebleed and went to the emergency room. It was her third day calling out sick since her recent June 19, 2017 return to work. Ms. Joseph mentioned to Ms. Condon in their "check-ins" that Ms. Joseph was having headaches from the vent. Ms. Joseph's email to Ms. Chang on July 10, 2017 referenced her health concerns, notably copied Dr. Eldeiry on the email and stated she still "suffers from headaches and dizziness" and was "trying not to encounter any triggers." Ms. Joseph's email to her supervisors on July 11, 2017 – on which she copied Ms. Chang and referred to her as Ms. Joseph's "special accommodations coordinator" - asking for a different desk and workspace similarly was health related. In that email, Ms. Joseph wrote "not only am I shivering but feeling the onset of symptoms I am supposed to prevent"; the desk was causing her to get scratched; and "I cannot afford to have any type of injury especially coming back from a major surgery." This evidence substantially outweighs Ms. Joseph's failure to use the reasonable accommodation paperwork warranting the inference that I have drawn that Ms. Joseph believed that her request commencing on June 19, 2017 relative to the workspace and desk was a request for an accommodation.

Next, there is ample evidence to infer, which I do, that as of July 10, 2017, Ms. Joseph reasonably and in good faith believed that DCF was failing to provide her with a reasonable

accommodation.[5] Despite complaining on an almost daily basis from June 19, 2017 to July 9, 2017 to Ms. Nazziwa, Ms. Condon and/or Ms. Albino about her working conditions, as of July 9, 2017, DCF had not moved her workspace and had not changed her desk. As Ms. Joseph credibly testified, "I would ask for the progress or what was the status of my desk being moved. And I wasn't hearing, like, any type of feedback…. And there wasn't – I wasn't presented with, like, another option or something else to accommodate me in the meantime. Nothing like that was presented to me." Based on this evidence, I determine that Ms. Joseph reasonably and in good faith believed that DCF was failing to provide her with a reasonable accommodation.

b. Reasonable Response to Belief of Unlawful Discrimination

Ms. Joseph acted reasonably in response to her belief that DCF was failing to provide her with a reasonable accommodation through a reasonable act meant to protest or oppose such discrimination – seeking assistance directly from ADA Coordinator Chang (who Ms. Joseph referred to as her special accommodations coordinator) on July 10, 2017 and July 11, 2017. Requesting the accommodation was protected conduct. Sullivan and Massachusetts Commission Against Discrimination v. Middlesex Sheriffs Office, 37 MDLR 101, 107 (2015); Halstead and Massachusetts Commission Against Discrimination v. Leidos, Inc. and Kerrigan, 41 MDLR 38, 46 (2019)

[5]As addressed earlier, DCF did not fail to provide a reasonable accommodation relative to the workspace. But a claim of retaliation may succeed even if an underlying claim of failure to provide a reasonable accommodation fails, provided that the employee reasonably and in good faith believed that the employer was wrongfully failing to provide a reasonable accommodation. See e.g., Town of Brookline v. Alston, 487 Mass. 278, 294, n. 16 (2021)

c. Adverse Action

DCF took adverse action against Ms. Joseph through the creation of a hostile work environment based on her disability. Although unlawful retaliation typically involves "discrete and identifiable adverse employment decision[s]", the adverse retaliatory action "may also consist of a continuing pattern of behavior that is, by its insidious nature, linked to the very acts that make up a claim of hostile work environment." Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 616–17 (2005) (citing Noviello v. Boston, 398 F.3d 76, 89–91 (1st Cir. 2005) for the principle that creation and perpetuation of a hostile work environment can comprise retaliatory adverse employment action under Title VII and G.L. c. 151B); Scott v. Encore Images, Inc., 80 Mass. App. Ct. 661, 669 (2011)

Unlawful disability harassment exists when (1) a disabled individual (2) is the target of speech or conduct based on her disability; (3) the speech or conduct was sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive work environment; and (4) the harassment was carried out by a person in a supervisory capacity, or that the employer knew or should have known of the harassment and failed to take prompt remedial action. See Savage and Massachusetts Commission Against Discrimination v. Massachusetts Rehabilitation Commission, 38 MDLR 105, 115 (2016); Gilbert and Massachusetts Commission Against Discrimination v. Epic Enterprises Inc. et. al., 35 MDLR 117, 119, n. 5 (2013); Williams v. Karl Storz Endovision, Inc., 24 MDLR 91, 106 (2002); College-Town, Div. of Interco, Inc. v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 163 (1987)[6]

[6]The Massachusetts Supreme Judicial Court has not specifically confirmed that Massachusetts recognizes a claim for a hostile work environment based on disability under c. 151B, § 4(16), Chadwick v. Duxbury Pub. Sch., 97 Mass. App. Ct. 1106 (2020) (1:28 Decision) ("Whether a hostile work environment claim based on disability is available in this Commonwealth is unclear. See Barton v. Clancy, 632 F.3d 9, 20 n.7 (1st Cir. 2011) ('The SJC has not specifically confirmed that Massachusetts recognizes a claim for a hostile work environment based on handicap under c. 151B, § 4[16]'"). However, the Commission recognizes such a claim, Savage, 38 MDLR at 115; Gilbert, 35

The first and fourth elements of unlawful disability harassment are met. It is undisputed that Ms. Joseph was disabled, and that the speech or conduct directed against her was carried out by supervisors.

The second element of unlawful disability harassment is met. The denial of the July 24, 2017 Request, the content of the July 26, 2017 and August 2, 2017 meetings, and the August 14, 2017 time-pressured ultimatum all related to Ms. Joseph's actual or denied requested accommodations for her disability.

The third element of unlawful disability harassment is also met. The third element contains an objective and subjective standard. "The objective standard for determining unwelcome conduct must be evaluated from the perspective of a reasonable person. The reasonable person inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker's performance, and what psychological harm, if any, resulted." Savage, 38 MDLR at 115 There is ample evidence that a reasonable person's work performance would have been interfered with by the conduct incurred by Ms. Joseph. Within two days of DCF's receipt of the July 24, 2017 Request, the employee is called into a meeting by her supervisors and admonished for an early morning client visit, denied a request to use (previously requested) vacation time, called a liability to the office, and told that DCF was denying her recent accommodation request. A week thereafter, on August 2, 2017, the employee is chided by a supervisor for doing *too much* work on cases and again criticized for the early

MDLR at 119, n. 5, as there is no reasoned basis for treating disabled status different from other protected statuses in the context of a hostile work environment claim, whether as a standalone claim, or as part of a retaliation claim.

morning visit. Within a few weeks thereafter, DCF imposed an ultimatum upon the employee to decide that very day whether she would go back on unpaid medical leave, come back to work full-time (against her doctor's recommendation) or resign. Taken in combination, this conduct was severe and pervasive enough (although only one is needed) to alter the employment conditions of a reasonable person under the circumstances.

"The subjective standard measures whether the individual claiming hostile work environment harassment personally experienced the behavior as unwelcome." Savage, 38 MDLR at 115 Ms. Joseph has proven that she found the conduct unwelcome. During the July 26, 2017 meeting, she was distraught. Her July 26, 2017 email to Ms. Chang after that meeting reflected that she was overwhelmed by the denial of the July 24, 2017 Request. When presented with the three-choice, time-pressured ultimatum by Ms. Condon on August 14, 2017, Ms. Joseph was shocked and felt ostracized. Ms. Joseph's August 14, 2017 email to Ms. Condon that she was going home that day reflected she was also distraught by the ultimatum.

In sum, a disability based hostile work environment has been proven and serves as the adverse action for a retaliatory claim.

d. Forbidden Motive

Ms. Joseph may prove the final element of a retaliation claim (forbidden motive) using a burden-shifting paradigm similar to the one set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). At the *prima facie* stage, Ms. Joseph must show that: she engaged in protected conduct; DCF was aware of that; she suffered adverse action; and there was a causal connection between the protected conduct and the adverse action. If the *prima facie* is established, DCF must articulate a legitimate, non-retaliatory reason for the adverse action with credible

supporting evidence. If DCF does, Ms. Joseph must prove pretext which would allow one to infer retaliatory motivation. See Verdrager, 474 Mass. at 406

Ms. Joseph has established a *prima facie* case of retaliation. First, as demonstrated, she engaged in protected conduct on July 10, 2017 when she made a request for accommodation to the ADA Coordinator. Second, Ms. Chang and Ms. Condon were aware of such conduct. Third, as demonstrated, Ms. Joseph suffered from an adverse action in the form of a disability based hostile work environment. Fourth, the adverse action (being subjected to a hostile work environment from July 25, 2017 to August 14, 2017) was sufficiently close in time to the protected conduct (July 10, 2017) to allow for the inference, which I draw, that it was in response to the protected conduct. Compare Mole v. University of Massachusetts, 442 Mass. 582, 592-593 (2004)

With Ms. Joseph establishing a *prima facie* case of retaliation, DCF must articulate a legitimate, non-retaliatory reason for the hostile work environment (adverse action) with credible supporting evidence. Ms. Chang's July 25, 2017 denial letter articulates a reason - undue hardship - for the denial of the July 24, 2017 Request. Recognizing DCF only has a burden of production, I determine that it has barely met its burden of production.

Based on the following reasons, Ms. Joseph has demonstrated pretext/retaliatory animus. The reason for the denial of the July 24, 2017 Request is patently pretextual. Within one day of receiving the July 24, 2017 Request, Ms. Chang denies it on the ground of undue hardship without any investigation into the operational needs of the Dimock Street Office and without a single conversation with Ms. Joseph or her doctor. The claim of undue hardship is preposterous for the reasons previously detailed with no need to restate.

Further, the July 25, 2017 denial letter for the July 24, 2017 Request expressed that the request was denied because it would create an undue hardship for DCF. No mention of safety concerns is contained in the denial letter. Yet, during the public hearing and in its post-hearing brief, DCF includes safety concerns as a reason for the denial. The addition of a new reason for a challenged employment action, made after-the fact, is evidence of pretext. Parra v. Four Seasons Hotel, 605 F. Supp. 2d 314, 329 (D. Mass. 2009) ("To establish pretext under Title VII in the absence of direct evidence, a plaintiff can offer many different forms of circumstantial evidence. [Citations omitted] Such evidence can include, but is not limited to: … evidence that the employer's reason was developed after the adverse employment action was taken"); Neshewat v. Titan Corp., 2005 WL 8175869, at *5 (D. Mass. Nov. 21, 2005) (pretext can be established in several ways including inconsistent or after-the-fact statements made by the employer as to the justifications for the employment action)

Retaliatory animus is seen within one day of the July 10, 2017 protected conduct. In the email exchange between Ms. Condon and Ms. Chang on July 11, 2017, Ms. Condon expressed her frustration regarding Ms. Joseph having "gone over my head" and called the behavior "unacceptable." Ms. Chang states Ms. Joseph is "taking advantage of the ADA accommodations and asking for everything she can." Ms. Condon's feelings about Ms. Joseph are further on display in her email that day saying that Ms. Joseph "is a worker and stepping way over boundaries and I am not happy with this at all" and when she remarks "I know you [Ms. Chang] don't see it as 'going over my head', but most staff do."[7]

[7]Compare these statements by Ms. Chang and Ms. Condon to the comparatively benign statements found pertinent in DaPrato v. Massachusetts Water Res. Auth., 482 Mass. 375, 377 (2019). In that case, the jury found the Massachusetts Water Res. Auth. ("MWRA") liable for a retaliatory termination in violation of the FMLA, the Americans with Disabilities Act and M.G. L. c. 151B, § 4(16). In affirming an award of punitive damages, the Court identified among the circumstances upon which the jury reasonably could have found that the employer was recklessly indifferent to the employee's rights the following - "Additionally, the jury could have found that the MWRA demonstrated hostility in the internal e-mail messages responding to DaPrato's request for FMLA leave [in

Retaliatory animus is found in the manner by which Ms. Condon presented Ms. Joseph with her employment choices on August 14, 2017. Even Ms. Chang admitted that requiring a worker to make a same day decision as to whether they were going to resign, go on a FMLA leave, or return back to work full time, was unreasonable.

In sum, Ms. Joseph has proven that DCF retaliated against her in violation of M.G.L. c. 151B, § 4(4).

C. CONSTRUCTIVE DISCHARGE

A "[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, `I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." GTE Products Corp. v. Stewart, 421 Mass. 22, 33- 34 (1995) (quoted case omitted). The standard for constructive discharge is whether the working conditions were so intolerable that a reasonable person under the circumstances would have felt compelled to resign. To be intolerable, conditions must be unusually aggravated. Pertinent inquiries also include whether all possibilities to continue working have been exhausted, leaving resignation as the only alternative and whether the threat of physical or psychic harm is so great as to preclude remaining at work. Daly v.

which the Human Resources director forwarded DaPrato's e-mail message to a Human Resource manager with the message 'is he serious' to which the manager responded 'OMG'] and the manner in which it conducted its investigatory interview of DaPrato." The Court noted that the jury could have, but did not, find the "OMG" statement was "simply understandable frustration … with an employee who made one request immediately after another without appreciating or acknowledging the assistance he had already received."

Codman & Shurtleff, Inc., 32 MDLR 18, 27 (2010); Citron and Massachusetts Commission Against Discrimination v. G-2 Systems, et. al., 31 MDLR 49, 56 (2009)

On July 24, 2017, Ms. Joseph requested an accommodation that included reduced hours and a reduced caseload for health reasons. Ms. Joseph's request was to work ten more hours than she was currently working. Ms. Joseph was cleared to work up to 30 hours, only 7.5 hours less than full-time. The very next day, DCF denied the request without contacting Ms. Joseph or her doctor. The reason proffered for denial – creating an undue burden to other social workers - was ludicrous. The language in the denial paperwork regarding the potential of future discussions of accommodation sounded hollow in light of: (a) the utter lack of interactive dialogue that preceded the denial letter; (b) the incredulous proffered reason for the denial; and (c) the email of the ADA Coordinator evidencing that return from leave would require the employee to "heal fully."[8] Nevertheless, any sliver of hope regarding future discussion, is obliterated when on August 14, 2017, Ms. Condon imposes a same day, three-choice ultimatum that even the ADA Coordinator admitted was unreasonable. One choice – going back on unpaid leave would result in Ms. Joseph not getting paid. In light of Ms. Chang's July 26, 2017 email referencing "heal fully and return to work", a reasonable person would easily conclude that the unpaid period could be prolonged until Ms. Joseph was without symptoms. The second choice – returning full time without restrictions – would result in Ms. Joseph facing health risks in contravention of her doctor's instructions. And finally, the last choice was to resign.[9]

[8]An employer should avoid rigid policies such as requiring an employee on leave to be fully recovered or 100% healed before they can return to work as such inflexible policies run afoul of M.G.L c. 151B, §4(16). Compare Gracia and Massachusetts Commission Against Discrimination v. Northeastern University, 31 MDLR 1, 6 (2009)

[9]DCF contends "Complainant rejected the idea of returning to FMLA leave out of hand and began applying to new jobs by the week of August 6, 2017, over a week before her August 14 conversation with Director Condon. Thus, the evidence demonstrates that, rather than being constructively discharged Complainant chose to end her

Ms. Joseph explored numerous avenues in her desire to continue working at DCF. After the brutal meeting with her superiors on July 26, 2017, during which Ms. Joseph is notified for the first time that her July 24, 2017 Request is being denied, Ms. Joseph embarks on a series of steps in furtherance of continuing to work at DCF. Immediately after the July 26, 2017 meeting, Ms. Joseph emailed Ms. Chang for "advice and insight." As a result of her email exchange with Ms. Chang on July 26 2017, Mr. Joseph learns that the "denial is with the [DCF] Commissioner for her review and approval." Ms. Joseph then contacts the Commissioner's office that same day seeking to speak to Commissioner Spears before the Commissioner reviewed Ms. Chang's determination of the July 24, 2017 Request. But Ms. Joseph was not given the opportunity to speak with the Commissioner. Ms. Joseph was referred back to Ms. Chang. Ms. Joseph attempts to contact her union for assistance. The union did not respond. Even after receiving the August 14, 2017 three-choice ultimatum, Ms. Joseph plows forward. On August 15, 2017, she contacts Ms. Bryan at EOHHS, but there is no evidence that Ms. Bryan assisted her. Ms. Joseph is desperate to find anyone to support her accommodation request. But, the time-pressured ultimatum deprives Ms. Joseph of the opportunity to wait to see if the Commissioner, ADA Coordinator, Ms. Bryan or the union would ultimately assist. Ms. Joseph must make a decision. To avoid harm to her health by returning full time, against the doctor's instructions, and to avoid going on unpaid leave for an apparent prolonged period, Ms. Joseph reasonably concludes that she has no choice but to give up and resign.

employment…." (DCF post-hearing brief at p. 23). However, the universe of circumstances pertinent to constructive discharge analysis was not complete by August 12, 2017. The same day, three-choice ultimatum by Ms. Condon was still to occur as was the post-ultimatum non-responsiveness of ADA Coordinator Chang. Thus, Ms. Joseph applying for positions during August 6-12, 2017 warrants little weight relative to the constructive discharge analysis.

In sum, the working conditions that Ms. Joseph faced as of August 15, 2017 were so intolerable given their unusually aggravated nature, that a reasonable person would have felt compelled to resign. Further the resignation occurred after an exhaustion of other alternatives leaving resignation as the only and final alternative. Ms. Joseph has proven that DCF constructively discharged her on August 15, 2017.

III. REMEDIES

A. Lost Wages

General Laws c. 151B, § 5 empowers the Commission to award back pay (lost wages). DeRoche v. Massachusetts Commission Against Discrimination, 447 Mass. 1, 13 (2006)

Fifty one thousand dollars per year is the starting point for all lost wages calculations as the evidence was insufficient to support Ms. Joseph's argument that she would have received as of right an annual increase in salary if she had remained at DCF as a social worker. Fifty one thousand dollars equates to $26.15 per work hour.[10]

I first calculate the lost wages incurred by Ms. Joseph because DCF unlawfully denied the April 28, 2017 Request on May 8, 2017. By its action, DCF delayed Ms. Joseph's return to work from May 9, 2017 to June 19, 2017 which was 29 workdays. Because at that time, Ms. Joseph was medically cleared for 20 hours per work week (essentially 4 hours per workday) that violation deprived Ms. Joseph of 116 work hours at $ 26.15 per work hour which equates to lost wages of $3,033.

[10]This is calculated as follows: $51,000 divided by 52 weeks in a year is $980.77 per week; divided by 5 workdays per week (which includes paid holidays) is $196.15 per workday; divided by 7.5 hours per workday equals $26.15 per work hour.

I next calculate the lost wages Ms. Joseph incurred because DCF unlawfully constructively discharged her on August 15, 2017 at a time when she was medically cleared to work 30 hours per work (essentially six hours per workday). As a result of the unlawful constructive discharge, Ms. Joseph was (a) unemployed from August 16, 2017 to November 12, 2018 which deprived her of working 323 workdays or 1938 work hours which equates to lost wages of $ 50,679 and was (b) unemployed from July 1, 2019 through August 30, 2020 which deprived her of working 305 workdays or 1830 work hours which equates to additional lost wages of $47,855.[11] In sum, the wages lost by Ms. Joseph because of DCF's violations of M.G.L. c. 151B is **$101,567**.

Three final points regarding lost wages follow. First, although Ms. Joseph argues in her post hearing brief that she suffered the loss of benefits that she had with DCF, the evidence was insufficient to enable one to quantify the value of such benefits. I, therefore, decline to award any damages as to employer benefits. Second, there is no evidence of Ms. Joseph seeking employment after August 15, 2017 other than during May 2018 to October 2018. However, DCF has the burden of demonstrating a lack of mitigation of damages and failed to sustain its burden. Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Ct. 172, 185 (1985), review denied, 395 Mass. 1103 (1985)[12] Third, Ms. Joseph collected some

[11]Ms. Joseph was employed from November 13, 2018 to June 30, 2019 with the Brookline Public Schools, but I do not find that position constitutes an intervening event that would terminate DCF's responsibility for lost wages because such position was inherently temporary – a contract position replacing a person on maternity leave.

[12]DCF did not offer evidence that "(a) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment, (b) the improperly discharged employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the former employee would obtain one of those comparable jobs." Buckley Nursing Home, Inc., 20 Mass. App. Ct. at 185 (quoting Black v. School Comm. of Malden, 369 Mass. 657, 661–662 (1976))

unemployment benefits, but in my discretion, I decline to deduct unemployment benefits. Sch. Comm. of Norton, 63 Mass. App. Ct. at 849

B. Emotional Distress Damages

Ms. Joseph failed to establish that she suffered emotional distress because of the denial of her April 28, 2017 Request. In contrast, Ms. Joseph has proven that DCF's retaliatory conduct against Ms. Joseph and its unlawful denial of the July 24, 2017 Request directly caused Ms. Joseph to suffer emotional distress. DCF's conduct caused Ms. Joseph to be distraught, overwhelmed, shocked, and to feel ostracized and entirely unsupported while working at DCF. DCF's acts made Ms. Joseph lose hope and that had lasting impact after her DCF employment ended. As a result of her DCF experience, Ms. Joseph felt shaky and nervous during job interviews and kept her employers at a distance because she had lost the trust she initially had at DCF. Ms. Joseph's mother credibly testified that when Ms. Joseph talked about DCF, she was often sad, cried a lot, was very emotional at times, and that it took Ms. Joseph four years to get back to a place of happiness. I conclude that it is fair, reasonable and appropriate[13] to award Ms. Joseph emotional distress in the amount of **$ 35,000**.

[13]See Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 576 (2004)

C. Training and Policy Requirements

DCF's retaliatory response to Ms. Joseph's request for accommodation regarding her workspace evidences a dire need for DCF to participate in training as does DCF's failure to engage in the interactive dialogue and preposterous claim of undue hardship relative to the July 24, 2017 Request. DCF's actions are especially troubling because as a state agency, DCF should be setting a proper example for addressing and responding to an accommodation request. Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 623–24 (2005) ("deliberate violations of G.L. c. 151B, by 'those charged with the public duty to enforce the law equally,' present a heightened degree of reprehensibility, Dalrymple v. Winthrop, 50 Mass. App. Ct. 611, 621(2000)") To address this need, I order the following:

1. DCF shall provide the Commission's Director of Training within 60 days of receipt of this decision with a copy of its current policy regarding requests for accommodation or a statement that such a policy does not exist.

    a. The Commission shall review the policy and provide DCF with its comments, and DCF shall revise its policy, as applicable.
    b. In the event a policy does not exist, DCF shall create a policy regarding requests for accommodation and shall provide a copy of such policy to the Commission's Director of Training within 120 days of receipt of this decision. The Commission shall review the policy and provide DCF with its comments, and DCF shall revise its policy, as applicable.

2. DCF shall participate in trainings conducted by the Commission's Training Unit on disability discrimination (including but not limited to training in requests for accommodation, engaging in an interactive dialogue, and transition of employees on leave back to work). There shall be five such trainings. The first training shall occur within one year of receipt of this decision. A similar training shall be conducted for

the next four years with each training conducted approximately one year after the previous.

3. DCF shall also participate in trainings conducted by the Commission's Training Unit on hostile work environment and retaliation. There shall be five such trainings. The first training shall occur within one year of receipt of this decision. A similar training shall be conducted for the next four years with each training conducted approximately one year after the previous.

4. The following DCF personnel are required to attend all trainings: Commissioner, ADA Coordinators, Diversity Officers, employees performing a human resource function, legal counsel who participate in employee accommodation requests, and Area Directors.

5. For purposes of enforcement, the Commission shall retain jurisdiction over this section.

D. Civil Penalty

Massachusetts General Law, c.151B §5 states, in part, that the Commission may assess a civil penalty against a Respondent. Having found that DCF is liable in this case for its failure to provide a reasonable accommodation on two occasions and for retaliating against Ms. Joseph, I find a civil penalty in the amount of **$10,000** is warranted.

IV. ORDER

For the reasons detailed above, and pursuant to the authority granted to me under M.G.L. c. 151B, §5, I order the following.

1. DCF shall cease and desist from engaging in unlawful discriminatory practices as defined in M.G.L. c.151B, §4.

2. DCF is liable to pay Ms. Joseph lost wages in the amount of **$101,567**- plus interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid or until this order is reduced to a court judgment and post judgment interest begins to accrue.

3. DCF is liable to pay Ms. Joseph the amount of **$ 35,000** in damages for emotional distress - plus interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid or until this order is reduced to a court judgment and post judgment interest begins to accrue.

4. DCF shall comply with the above training and policy requirements.

5. DCF shall pay a civil penalty of **$10,000** to the Commonwealth of Massachusetts.

6. Any petition for attorney's fees and costs shall be submitted to the Clerk of the Commission within fifteen (15) days of receipt of this decision. Pursuant to 804 CMR 1.12 (19) (2020), "[s]uch petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. [DCF] may file a written opposition within 15 days of receipt of said petition."

V. NOTICE OF APPEAL

This decision represents the final order of the Hearing Commissioner. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal with the Clerk of the Commission within 10 days of receipt of this decision and submit a Petition for Review within 30 days of receipt of this decision. 804 CMR 1.23 (2020)

So ordered this 5th day of May, 2023

Sunila Thomas George
Hearing Commissioner