COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

THE MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
PETER JOYCE, JR.,
Complainants,

v. DOCKET NO. 11-BEM-00505

CSX TRANSPORTATION, INC.,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferri in favor of Complainant Peter Joyce, Jr. ("Mr. Joyce") on his claims of employment discrimination on the basis of disability, specifically Attention Deficit Disorder ("ADD") and Attention Deficient Hyperactivity Disorder ("ADHD") (together, "ADD/ADHD")[1]. Following an evidentiary hearing, the Hearing Officer determined that Mr. Joyce's employer, CSX Transportation, Inc. ("CSX") was liable for failing to provide Mr. Joyce with a reasonable accommodation to do computerized administrative work, and for removing him from his job pending a disciplinary hearing for alleged overtime abuse, after he took extra time to complete that work.

[1] Mr. Joyce's ADD/ADHD diagnosis included findings that he struggled with learning, comprehension, inability to pay attention, and executive reasoning, resulting in difficulty processing information, problem solving and completing tasks. His diagnosis also included depressive symptoms. As used herein, "ADD/ADHD" is shorthand for the full range of Mr. Joyce's cognitive disabilities as contained in the Hearing Officer's factual findings.

SUMMARY OF FACTS[2]

Mr. Joyce worked for the railroad for over 30 years under different employers, the last of which was CSX. Mr. Joyce held and lost a train conductor position at CSX twice, first in November of 2004 and then in June of 2010, under very similar circumstances. The main difference between the two job losses is that in 2004, Mr. Joyce was formally terminated from his job after being disciplined, but in 2010, Mr. Joyce went out on disability and ultimately retired prior to a disciplinary hearing or formal termination. Mr. Joyce's complaint of discrimination arises from the 2010 loss of his train conductor job, but certain facts concerning the 2004 termination are germane to the questions raised on appeal.

In 2004, Mr. Joyce was found guilty at a disciplinary hearing for misuse of overtime. In that incident, Mr. Joyce used over two hours of overtime[3] to complete computerized administrative tasks, and then signed out his engineer at the same time he signed himself out, although the engineer had stopped working earlier than Mr. Joyce. At the disciplinary hearing, Mr. Joyce disclosed to all who were present, including his supervisor at the time, Arthur Scott ("Scott") that he had ADD/ADHD which caused him difficulty in doing computerized work. The computerized work in question was in large part work performed on a portable device called the Onboard Work Order Device ("Onboard device"). Scott had been aware of Mr. Joyce's difficulties with the Onboard device prior to the disciplinary hearing, telling him "just do the best you can" when Mr. Joyce told him he was having trouble and asked for training.

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[2] The within summary of facts is merely a narrative for the convenience of the reader that is based on the Hearing Officer's factual findings, as supported by substantial evidence throughout the administrative record. As detailed infra, in the standard of review, the Hearing Officer has the exclusive authority to make factual findings.

[3] "Overtime" at CSX is any time after eight hours, although the standard workday is often twelve hours, which is the point at which railroad employees are required to stop working for the day. Thus, a standard workday often includes four hours of overtime.

Just several months after the 2004 termination, CSX re-hired Mr. Joyce,[4] requiring him to first speak to the District Terminal Superintendent, Robert McGovern ("McGovern") before starting work. Mr. Joyce testified, and the Hearing Officer believed, that in the initial conversation with McGovern, McGovern said to Mr. Joyce, "I didn't realize you had all these disabilities," and not to worry because he would "never have to use the Onboard work order device again." There was no evidence that Mr. Joyce personally informed McGovern about his ADD/ADHD prior to that conversation, and CSX presented evidence that it kept disciplinary hearing records confidential. However, at the time of Mr. Joyce's conversation with McGovern (and the time leading up to and through Mr. Joyce's 2004 disciplinary hearing), McGovern supervised Scott, who, as detailed above, had been present at the hearing when Mr. Joyce disclosed his ADD/ADHD.

After speaking with McGovern, Mr. Joyce did not return to the role of train conductor, but instead started working a number of jobs over a period of about five years, none of which required using the Onboard device. In that time, however, there was one day that Mr. Joyce filled in as a train conductor when a crew was in need and called him in on his day off. He testified, and the Hearing Officer believed, that shortly afterwards a "livid" McGovern reprimanded the crew for allowing Mr. Joyce to work as a train conductor and told them they were never again to call Mr. Joyce for any conductor work.

After the non-conductor jobs Mr. Joyce had been working were eliminated, he had the opportunity to select a train conductor job due to his seniority in the union. Neither McGovern nor another manager could veto his choice, so long as he took certain required steps. Before taking the job, Mr. Joyce spoke to the supervisor of the position, Christopher Pendleton

[4] Mr. Joyce was rehired in settlement of the appeal of his termination.

("Pendleton"), who was supervised by McGovern. In that conversation, Pendleton essentially discouraged Mr. Joyce from taking the train conductor position. Pendleton testified, and the Hearing Officer believed, that around the time of that conversation, McGovern had warned Pendleton that Mr. Joyce "needed the overtime." Pendleton also testified he knew about Mr. Joyce's 2004 discipline, and that his position with CSX involved talking to McGovern regularly, about once or twice a week.

Mr. Joyce started work as a train conductor under Pendleton in April of 2010. At that time, Scott had moved from management to a union position, and was Mr. Joyce's engineer (i.e., union coworker) rather than supervisor. Upon starting as a train conductor under Pendleton and working alongside Scott, Mr. Joyce immediately told Pendleton he had difficulty using the Onboard device and asked for training. Pendleton allowed Mr. Joyce to partially use the (old) paper system but put frequent pressure on him to use the Onboard device, without ever providing him any formal training. (Pendleton did attempt to briefly train Mr. Joyce himself, but he struggled with the device and did not help Mr. Joyce.) Mr. Joyce also asked McGovern for training on the device on one occasion when McGovern was filling in for Pendleton as Mr. Joyce's supervisor. McGovern also never provided training for Mr. Joyce.

The Hearing Officer credited Pendleton's testimony that he had concerns about Mr. Joyce's "efficiency" on the job during his brief time as Mr. Joyce's supervisor. Specifically, Pendleton testified that he suspected Mr. Joyce of trying to use unwarranted overtime on the job, concluding that Mr. Joyce was trying to get more time for the day when he forgot a tool, for example. Then, after just three months on the job, Pendleton indeed cited Mr. Joyce for alleged overtime abuse, which, as a matter of company procedure, resulted in Mr. Joyce's immediate removal from service pending a disciplinary hearing. The details of Mr. Joyce's alleged

infraction were that he stayed roughly two hours late for the primary purpose of finishing up his administrative tasks exclusively using the Onboard device, rather than the paper system. Mr. Joyce's typical work day did not allow for enough time for him to troubleshoot issues he had with completing tasks on the Onboard device, but on the day in question, Mr. Joyce finished his manual work early, giving him time to figure out how to do all of his work on the computer, rather than on paper. When he was finished, just as in the 2004 overtime incident, Mr. Joyce signed both himself and his engineer (Scott) out, although Scott had finished work a couple of hours earlier. In order to finish his work entirely on the computer, Mr. Joyce spent some time on hold with and talking to the technical support team over the phone, and he was proud to say that after getting that assistance, he managed to get all his work done electronically for the first time. Mr. Joyce thought that Pendleton would be pleased, but when Pendleton confronted him about the use of overtime, Mr. Joyce's explanations for how he used that time were unavailing. CSX did not present any evidence that overtime could not be used for such work, and, to the contrary, Pendleton testified that a conductor's administrative duties could take some time after the manual work for the day was done (which would be during the typically overtime portion of the work day). Pendleton had the authority and the discretion to determine whether Mr. Joyce's explanation was reasonable, and, even though Mr. Joyce accounted for his time and explained that the use was work-related, Pendleton nevertheless chose to cite him for overtime abuse.

Mr. Joyce was surprised by the disciplinary citation because he accurately accounted for his time and he felt certain that the use of overtime to complete his tasks on the Onboard device was permissible. Mr. Joyce was upset to find himself in similar circumstances to the 2004 incident and clinically depressed that he had effectively lost a career he had enjoyed for decades. After being removed from service he took short term disability leave and sought extensive

counseling to deal with his anxiety and depression. Ultimately, he was unable to attend a disciplinary hearing, and he went out on long-term disability (paid) leave in February 2011, retiring from the railroad as of February 2017.

The Hearing Officer found CSX liable under M.G.L. c. 151B, § 4(16) for failing to reasonably accommodate Mr. Joyce's ADD/ADHD and for removing him from service because of his disabilities. Specifically, she determined that McGovern knew about Mr. Joyce's disabilities, he had the intent to discriminate against Mr. Joyce when he discussed Mr. Joyce with Pendleton, and Pendleton's decision to cite Mr. Joyce for alleged overtime abuse (which made his removal from service automatic) was attributable to McGovern's intent to discriminate under the "cat's paw" theory of liability. She also determined that CSX was on sufficient notice of Mr. Joyce's disabilities and his need for a reasonable accommodation but failed its duty to reasonably accommodate. She ordered CSX to cease and desist from any acts of discrimination, to pay Mr. Joyce $224,070.39 in back pay and $100,000 in emotional distress damages, both subject to 12% interest per annum, and to provide training to certain Boston region personnel. CSX appealed to the Full Commission seeking reversal of the decision imposing liability, or, alternatively, total relief from the back-pay award, reversal or remittal of the emotional distress award, and relief from the imposition of 12% interest on both damage awards. Counsel for the MCAD prosecuted the claims against CSX and filed a petition requesting attorneys' fees and costs in the amount of $34,853.30, which CSX did not oppose.

For the reasons provided below, we affirm the Hearing Officer's decision with modification of the back-pay award and award the petition for attorneys' fees and costs according to the time recorded and hourly rate requested.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020)), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "....such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 1(6).

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

LEGAL DISCUSSION

On appeal, CSX challenges the sufficiency of the evidence with respect to the Hearing Officer's determinations of liability and the award of emotional distress damages. CSX also argues that the Hearing Officer made a legal error in awarding back pay, and that the pre-judgment interest award is unduly punitive.

I. Liability under M.G.L. c. 151B, § 4(16)

CSX argues that there is insufficient evidence to support several of the Hearing Officer's key factual findings underpinning the determination of liability, namely that: (1) McGovern harbored discriminatory animus against Mr. Joyce which caused Pendleton to cite Mr. Joyce for overtime abuse; (2) the decision to remove Mr. Joyce from service was "unduly harsh"; (3) Mr. Joyce was singled out for special discipline and treated differently with respect to similarly-situated employees; and (4) CSX never offered or allowed Mr. Joyce reasonable accommodations to do computerized administrative tasks such as allowing use of a paper system or more time to complete such tasks. The first three objections relate to the claim that CSX removed Mr. Joyce from service because of his disabilities (i.e., illegally subjected Mr. Joyce to an adverse action); the last objection relates to the claim that CSX failed to reasonably accommodate Mr. Joyce's disabilities. These objections are discussed in turn, but generally speaking each objection asks us to either disregard the Hearing Officer's credibility determinations or re-weigh the evidence on appeal, which we decline to do.

In order to prove disability discrimination under M.G.L. c. 151B, § 4(16) with respect to an adverse action, Mr. Joyce had to prove that he "(1) is handicapped within the meaning of the statute [M.G.L. c. 151B, §1(17), (19)]; (2) is a qualified handicapped person capable of performing the essential functions of his job either with or without a reasonable accommodation [M.G.L. c. 151B, § 1(16)]; and (3) was subject to an adverse employment action because of his handicap." McLaughlin v. City of Lowell, 84 Mass. App. Ct. 45, 64 (2013) (citations and quotations omitted). Once the prima facie case was made, CSX was required to show that it had legitimate reason for taking the adverse action. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 117 (2000). From there, Mr. Joyce had to prove the reason(s) were

pretextual and that CSX nevertheless acted with discriminatory animus. Lipchitz v. Raytheon Company, 434 Mass. 493, 501 (2001). The Hearing Officer found liability at the third stage of the process, i.e., she determined that Mr. Joyce made out his prima facie case, and although CSX provided a legitimate reason for the adverse action, Mr. Joyce proved that reason was pretextual. We agree that CSX offered a legitimate, non-discriminatory reason for removing Mr. Joyce from service and initiating disciplinary proceedings against him where the removal was for allegedly abusing overtime and theft was punishable at CSX by termination after just one event. CSX argues that Mr. Joyce did not prove his adverse action claim because there was insufficient evidence of pretext.[5]

As for CSX's first objection to the sufficiency of the evidence, there are three components: whether McGovern knew about Mr. Joyce's disabilities, whether he harbored discriminatory animus against Mr. Joyce, and whether that animus caused the adverse actions in question. The Hearing Officer found all three components were established almost entirety by Mr. Joyce's testimony alone. Mr. Joyce testified, and the Hearing Officer believed, that McGovern essentially mocked Mr. Joyce about having "all these disabilities," which led her to the obvious conclusion that McGovern in fact knew about Mr. Joyce's disabilities. CSX argues

[5] The gravamen of CSX's appeal is that Mr. Joyce failed to prove pretext, but it does briefly attack the prima facie case by arguing that removing Mr. Joyce from service and initiating disciplinary proceedings against him do not qualify as adverse actions because "incomplete discipline cannot form the basis of an adverse action discrimination claim," citing Yenush v. Pioneer Grp., Inc., No. CIV.A.02-11379-DPW, 2004 WL 187385, at *4 (D. Mass. Jan. 22, 2004). Yenush is inapposite, however, because although the court expressed some doubt as to whether a written warning could constitute an adverse action, it ultimately assumed for the purposes of deciding summary judgment for defendant that a written warning sufficed to prove this element of the prima facie case. Moreover, the court recognized that divesting an employee of significant responsibilities constitutes an adverse action (citing Blackie v. State of Me., 75 F.3d 716, 725 (1st Cir.1996)), and Mr. Joyce, unlike the Yenush plaintiff, was divested of all responsibilities when he was removed from service. Whether an action is adverse (i.e., constitutes a material change to the terms and conditions of employment) and is therefore within the scope of Chapter 151B is determined on a case by case basis—even a change in shift can be materially adverse to one plaintiff but not another. Yee v. MA State Police, 481 Mass. 290, 296-297 (2019) (citing Blackie with approval). Removing Mr. Joyce from service as a train conductor while awaiting a disciplinary hearing was clearly a material change in the terms and conditions of his employment. In fact, the Hearing Officer found upon sufficient evidence, that given Mr. Joyce's previous termination after a disciplinary hearing on nearly identical conduct, the removal was tantamount to a termination.

that "there is no credible record evidence that McGovern was aware of Joyce's ADD or ADHD diagnosis", which ignores the Hearing Officer's credibility determination with respect this specific testimony from Mr. Joyce. In rebuttal to Mr. Joyce's testimony that McGovern knew about his disabilities, CSX offered some evidence that McGovern would not have had access to the disciplinary hearing record wherein Mr. Joyce clearly disclosed his disabilities to CSX in 2004, but it did not call McGovern as a witness to personally rebut Mr. Joyce's account. Furthermore, there was documentary evidence proving that Mr. Joyce's coworker (and former supervisor), Scott, knew about his disabilities because he was present at the 2004 disciplinary hearing when Mr. Joyce disclosed them. Scott worked under McGovern for years in different capacities, and Mr. Joyce testified to the culture at CSX as being a "fishbowl" where there was plenty of gossip, which the Hearing Officer found credible. (The Hearing Officer also believed Mr. Joyce's more specific assertion that his difficulties using the Onboard device were common knowledge to anyone who had worked with him.) Therefore, not only did Mr. Joyce testify that McGovern knew about his disabilities and spoke to him about them in a mocking tone, but other circumstantial evidence bolstered that testimony. We will not overturn the Hearing Officer's credibility determination with respect to Mr. Joyce's testimony about McGovern, especially where other record evidence supports, rather than contradicts, his testimony. We will also not re-weigh the evidence discussed above in order to conclude that CSX's evidence with respect to the confidentiality of hearing records outweighs Mr. Joyce's testimony. Last, there was sufficient evidence that McGovern not only knew about Mr. Joyce's disabilities but also harbored discriminatory animus against Mr. Joyce—it was reasonable for the Hearing Officer to infer animus based on McGovern's statements to Mr. Joyce about his disabilities and his hostility following Mr. Joyce's one-day stint as a train conductor prior to getting the job under Pendleton.

Having determined there was sufficient evidence of McGovern's knowledge of Mr. Joyce's disabilities and discriminatory animus against him, we address the ultimate question of whether there was sufficient evidence that McGovern's animus caused Mr. Joyce's supervisor, Pendleton, to take adverse action against him. CSX argues that there is no evidence in the record that McGovern influenced Pendleton to cite Mr. Joyce for overtime abuse. We disagree.

Under the "cat's paw" theory of liability, an employer can be liable for intentional discrimination based on the conduct of its agent, usually a supervisor, who harbors discriminatory animus and influences an adverse employment decision, even if the agent does not make the ultimate employment decision. See Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011). As a result, an employer can still be liable even if a neutral decision maker exercises independent judgment, as this does not prevent the animus of the biased individual from tainting the adverse employment action. Id. at 419. As long as the discriminating employee's influence is a proximate cause of the ultimate adverse employment action, the employer's liability will be established. Id.

The Hearing Officer concluded that CSX was liable for unlawful discrimination based on McGovern's animus under the cat's paw theory of liability "*even if* a reasonable fact-finder could not ascribe an unlawful motive directly to Pendleton" (emphasis added).[6] After a thorough

[6] The Hearing Officer thus presented the cat's paw theory as an alternative theory upon which CSX's liability could be based, necessarily indicating the companion conclusion that liability could also stem from Pendleton's discriminatory animus. While the Hearing Officer did not make an explicit finding with respect to Pendleton's discriminatory animus, she did conclude that it was more likely than not that Pendleton knew about Mr. Joyce's disabilities at least through conversation with McGovern. While she found Pendleton "largely credible", she clearly did not believe Pendleton when he denied knowing about Mr. Joyce's disabilities, either through conversation with McGovern or otherwise, and she refused to credit his testimony that Mr. Joyce never personally told him about his disabilities. In conjunction with presenting the cat's paw theory as an alternative theory of liability, these findings implicate a finding of discriminatory animus on the part of Pendleton. Last, there is no contradiction in explicitly finding Pendleton knew about Mr. Joyce's disabilities but not explicitly finding that he harbored discriminatory animus because although knowledge (or suspicion) about an employee's real or perceived disabilities is a precursor to harboring discriminatory animus, it is not in and of itself equivalent to as much.

review of the record, we find that the circumstances surrounding Mr. Joyce's removal as a whole amounted to substantial evidence that McGovern's animus was the proximate cause of Pendleton's decision to cite Mr. Joyce for alleged abuse of overtime. CSX argues that there was insufficient evidence for essentially one of two of those circumstances, i.e., the Hearing Officer's factual findings that Mr. Joyce's suspension was "unduly harsh," and, relatedly, that Mr. Joyce was singled out for special discipline. It argues that the removal was neither unduly harsh nor special where removal was standard policy pending discipline for major offenses, and where it presented evidence that Mr. Joyce was treated no differently than similarly situated employees. The record does support the conclusion that removal from service pending discipline for overtime abuse is standard policy at CSX, and thus in that simplistic sense Mr. Joyce's removal was not "unduly harsh." However, the record also shows that supervisors were given discretion and latitude to investigate the circumstances of time reporting before making the decision to cite an employee for overtime abuse. Mr. Joyce's alleged abuse of overtime was twofold because he signed out himself and his coworker, Scott, two hours after they had finished their manual labor for the day. His explanation for himself was that he used the time to finish his computerized administrative work (with remote assistance from the Onboard device help desk), and as for Scott, that it was standard practice for the conductor to sign out the engineer whenever the conductor was finished for the day. Mr. Joyce's struggles with the Onboard device were well known to Pendleton, and there was evidence, credited by the Hearing Officer, that it was common practice for the conductor and engineer to sign out in tandem.[7] In that more

[7] The Hearing Officer credited Mr. Joyce's testimony that the tandem sign out for conductors and engineers was customary, and that he had never seen it done any other way. Pendleton also testified that the tandem sign out was customary even when one of the two employees had stopped working before the other (although a two-hour discrepancy is longer than what he testified to as normal). Moreover, Mr. Joyce was re-hired by CSX after engaging in identical conduct with respect to signing himself and his engineer out, begging the question of the seriousness of the offense.

complicated landscape, Mr. Joyce's removal could reasonably appear unduly harsh. Moreover, there was no evidence that the other employees CSX refers to on appeal were suspended for taking extra time to complete computerized administrative tasks. To the contrary, Pendleton testified with respect to other employees' overtime violations that were attempts to get paid without working. Mr. Joyce staying on his shift to finish the work he struggled with due to his disabilities is entirely different than an employee clocking out hours after they actually stopped doing any work at all. That being the case, the circumstances of Mr. Joyce's removal from service for alleged overtime abuse can be inferred to be unique, or special.

The Hearing Officer found that Pendleton's imposition of a relatively harsh decision to remove Mr. Joyce from service could be explained by McGovern's animus because McGovern tainted Pendleton's view of Mr. Joyce from the start, painting him as an overtime cheat before Mr. Joyce even started his job, so much so that Pendleton discouraged him from taking the job in the first place and then immediately suspected that Mr. Joyce's slower pace meant he was looking for overtime. Based on Mr. Joyce's credited testimony, McGovern was on notice for years that Mr. Joyce struggled with the Onboard device because of his disabilities, yet he did not secure training for Mr. Joyce even when Mr. Joyce directly asked him for training. Mr. Joyce's credited testimony also showed that McGovern did not want Mr. Joyce to be a train conductor but could not stop him from taking the job under Pendleton (due to union rules), but then Mr. Joyce only managed to keep his job for a few months due to Pendleton's immediate suspicion, imparted to him from McGovern, that Mr. Joyce was an overtime cheat. Under these circumstances, it was reasonable for the Hearing Officer to conclude that McGovern ultimately succeeded in preventing Mr. Joyce from working as a train conductor, and his influence was in fact a proximate cause of Pendleton's decision to remove Mr. Joyce from service.

As for the failure to reasonably accommodate, Mr. Joyce had to prove that: (1) he is handicapped within the meaning of M.G.L. c. 151B, § 4 (16); (2) he was qualified and able to perform the essential functions of the job with a reasonable accommodation of his handicap; (3) he requested a reasonable accommodation and (4) he was prevented from performing his job because his employer failed to reasonably accommodate the limitations associated with his handicap. Linda Johansson v. Department of Corrections, 32 MDLR 95, 97 (2010) (citing Handicap Discrimination Guidelines of the Massachusetts Commission Against Discrimination ("MCAD Handicap Discrimination Guidelines"), § VII (B) (1998) and Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998)). When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job or the employer has reason to know that an accommodation may be needed, the employer should engage in an interactive process to determine an appropriate accommodation. Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 644 (2004). The interactive process requires the employer to engage in a direct, open, and meaningful communication with the employee, which is designed to identify the employee's precise limitations. See MBTA v. MCAD, 450 Mass. 327, 342 (2008). Here, CSX failed to engage in any meaningful discussion with Mr. Joyce about his difficulty in using the Onboard device or how to assist him in successfully using the device.

CSX's primarily objection to the evidence in support of the failure to reasonably accommodate claim is that it actually did provide Mr. Joyce with reasonable accommodations to do computerized administrative tasks such as allowing use of a paper system and offering additional training.[8] This objection is unavailing because the record clearly shows that despite

[8] CSX also argues in the context of the failure to reasonably accommodate claim that Mr. Joyce was unqualified to do his job because he violated overtime rules by signing Scott out late, conduct that, it argues, has nothing to do with Mr. Joyce's disabilities. The Hearing Officer believed Mr. Joyce when he testified that he knew no other way to sign himself and Scott out other than to do it at the same time, which could be explained by his disability-related

Mr. Joyce's repeated requests for training, he never received anything other than cursory, flawed instruction from Pendleton himself, as opposed to meaningful training from more expert instructors on the Onboard device. Moreover, while Mr. Joyce was somewhat allowed to continue using paper records, the Hearing Officer credited his testimony (which was in line with Pendleton's testimony) that Pendleton put significant pressure on him to exclusively use the Onboard device during the entirety of Mr. Joyce's brief tenure on the job. Furthermore, CSX never engaged Mr. Joyce in any interactive dialogue with respect to his need for a reasonable accommodation, through McGovern, Pendleton, or anyone else, despite being on notice from Mr. Joyce as of 2004 that his ADD/ADHD caused him difficulty in learning tasks required by computers, specifically the Onboard device. To the contrary, when Mr. Joyce actually requested training on the Onboard device directly from McGovern[9], who knew about Mr. Joyce's disabilities and struggles with the device, McGovern failed to provide the training or engage in further discussion. For all of these reasons, the Hearing Officer did not err in concluding that CSX discriminated against Mr. Joyce on the basis of disability for failing to provide him with a reasonable accommodation.

II. Damages

difficulties with computerized tasks. An employer cannot escape liability by arguing that an employee is unqualified (per the definition in M.G.L. c. 151B, § 1(16)) because they failed in a job duty that the employer should have but failed to accommodate. However, even if this aspect of Mr. Joyce's infraction was totally unrelated to his disabilities, and Mr. Joyce only did it as a matter of custom (for which there was also factual support), the central issue is whether the discipline attached was motivated by discriminatory animus. While "a handicapped employee who engages in conduct significantly inimical to the interests of his employer and in violation of the employer's rules is not .... a 'qualified handicapped person' within the meaning of [Massachusetts General Laws chapter] 151B," Garrity v. United Airlines, Inc., 421 Mass. 55, 63 (1995), an employee may engage in significant misconduct and nevertheless prove themselves to be victims of unlawful discrimination with respect to their employer's response to such conduct (see, e.g., Abramian, 432 Mass. at 114–15) (jury could have found that employer's termination of employee who fell asleep on the job and engaged in assaultive behavior with coworker was discriminatory, in part because the coworker was promoted and not terminated).

[9] McGovern filled in as Mr. Joyce's direct supervisor for a short time.

CSX argues that the Hearing Officer made a legal error by awarding Mr. Joyce back pay because such damages were prohibited once Mr. Joyce voluntarily left his job to go on long-term disability leave in 2011. Relatedly, it argues that back pay is precluded once Mr. Joyce was disabled and unable to work on the railroad. With respect to emotional distress damages, CSX argues that there was insufficient evidence of the type and severity of harm necessary to justify damages in the amount of $100,000. CSX also argues that the 12% interest per annum awarded on both the back pay and emotional distress awards is unduly punitive.

The Hearing Officer has broad discretion to fashion remedies to effectuate the goals of M.G.L. c. 151B. Conway v. Electro Switch Corp., 402 Mass. 385, 387 (1988). An award of back pay is not required upon a finding of discrimination, though such an award may be granted if it is deemed appropriate under the circumstances. See Everett Industries, Inc. v. MCAD, 49 Mass. App. Ct. 1116 (2000) (Rule 1:28). While back pay is generally unavailable if an employee voluntarily leaves their job (see, e.g., MCAD and Marie Lunie Dalexis v. Tufts Medical Center and Julie Miglietta, 37 MDLR 170, 178-179 (2015)), back pay may be awarded if the employee was unable to work due to a disability caused by the employer. See Blockel v. J.C. Penney Co., Inc., 337 F.3d 17, 27 (1st Cir. 2003) (when an employee's total disability is caused by an employer's failure to reasonably accommodate, the employee is entitled to the pay they would have received but for that failure).

Contrary to CSX's arguments on appeal, Mr. Joyce's separation from CSX was not voluntary, and he was not legally prohibited from receiving back pay when he went out on long term disability leave that was the direct result of CSX's actions against him. As previously discussed, (supra, footnote 2), we find there was sufficient evidence for the Hearing Officer's conclusion that Mr. Joyce's removal from service was tantamount to a termination. The Hearing

Officer also credited Mr. Joyce's testimony that his mental health significantly deteriorated due to being removed from service as a railroad employee, and that but for the removal from service, he would have remained working at CSX until he turned age sixty-five. Where CSX effectively terminated Mr. Joyce and caused his inability to continue with full-time work on the railroad, awarding back pay was not in error. We do, however, find error with respect to the calculation of damages which omitted $1,300.81 in back pay owed. The amended back pay award therefore amounts to $225,371.20.[10]

Next, emotional distress damages may be awarded at the Hearing Officer's discretion where the distress suffered is a direct and probable consequence of respondent's discriminatory acts. Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The award must be supported by substantial evidence and the record must be clear with respect to the factual basis of such damages as well as the causal connection between the unlawful act and the emotional distress. Stonehill College v. MCAD, et al., 441 Mass. 549, 576 (2004); MCAD and Tara Leary v. James F. Braden & Joan G. Braden, 26 MDLR 234, 240-241 (2004). The Hearing Officer credited Mr. Joyce's testimony that after he was removed from service, he suffered from severe depression, anxiety, and panic attacks for which he immediately sought treatment and was prescribed medication. There was documentary evidence that Mr. Joyce sought and attended an outpatient counseling and treatment program and attended individual psychotherapy sessions with a psychologist for nine months following his removal from service to address his anxiety and depression. The Hearing Officer found that although Mr. Joyce suffered from pre-existing

[10] The Hearing Officer correctly cited substantial evidence in support of the back-pay award and appropriately concluded that Mr. Joyce was entitled to the difference between his last full year of salary and his other sources of income for each year from 2010 to 2015. However, the correct calculations for back pay owed each of those years is as follows: **2010** - $41,165.78; **2011** - $39,196.34; **2012** - $36,170.27; **2013** - $34,903.40; **2014** - $37,761.91; **2015** - $36,173.50.

mental health conditions prior to his removal from service, CSX's actions "significantly exacerbated" his depression and anxiety. Thus the decision below contains a factual basis for the damages and a causal connection between CSX's unlawful actions and Mr. Joyce's emotional distress. We will not disturb the Hearing Officer's award of $100,000 in emotional distress damages where it is supported by substantial evidence in the record.

Finally, CSX argues that the Hearing Officer's award of pre-judgment and post-judgment interest is unduly punitive. Interest is routinely assessed at 12% per annum as a matter of course on Commission awards of back pay and emotional distress damages, both to compensate the complainant for the loss of use of the money and to promote the eradication of discrimination. See DeRoche v. MCAD, 447 Mass. 1, 15 (2006). Thus, we will not disturb the Hearing Officer's award of 12% interest per annum on the award of back pay damages and emotional distress damages.

III. Request for Attorneys' Fees and Costs[11]

Commission Counsel filed a Petition for Attorneys' Fees and Costs with supporting affidavits. No opposition to the Petition was filed. The Petition seeks attorneys' fees for 87.1 hours of compensable time at an hourly rate of $400.00. The Petition is supported by detailed contemporaneous time records noting the amount of time spent on specific tasks and an affidavit of counsel.

M.G.L. c. 151B allows prevailing complainants to recover attorneys' fees for the claims on which the complainant prevailed. The Commonwealth is entitled to reasonable attorney's fees and costs expended on behalf of a prevailing Complainant pursuant to G.L. c.151B, §3(15).

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

The determination of whether a fee sought is reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097, 1098 (1992). By this method, the Commission first calculates the number of hours reasonably expended to litigate the claim and multiplies that number by a reasonable hourly rate. After applying the hourly rate to the hours expended, the Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including the complexity of the matter. Id.

Only those hours that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Id. at 1099. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Brown v. City of Salem, 14 MDLR 1365, 1375 (1992).

Having reviewed the contemporaneous time records that support the Petition for attorneys' fees, we conclude that the amount of time spent on the preparation and litigation of this claim was reasonable. We find no evidence that the hours spent were duplicative, unproductive, excessive or otherwise unnecessary to the prosecution of the case. We also conclude that the rate charged by Commission Counsel is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases. We therefore

award attorneys' fees in the amount of $34,840.00.[12]

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order.

1. CSX shall immediately cease and desist from all acts of discrimination based upon disability.
2. CSX shall conduct, within one hundred and twenty (120) days of the receipt of this decision, a training of its human resources personnel, managers, or other employees in the Boston region who are authorized to negotiate and provide reasonable accommodations for disabled employees. The training shall be conducted by instructors who have graduated from one or more "train the trainer" MCAD training courses. Following the training session, CSX shall report to the Commission the date and names of persons who attended the training.
3. CSX shall pay to Mr. Joyce the sum of $225,371.20 in damages for lost wages with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
4. CSX shall pay to Mr. Joyce the sum of $100,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

[12] The actual amount requested was $34,853.30. The fees awarded here represent the correct calculation using 87.1 hours compensable at $400 per hour.

5. CSX shall pay the Commonwealth attorneys' fees in the amount of $34,840, with interest thereon at the rate of 12% per annum from the date the petition for attorneys' fees and costs was filed, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This Order represents the final action of the Commission for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A. Any party aggrieved by this Order may challenge it by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Failure to provide a copy of the transcript may preclude the aggrieved party from alleging that the Commission's decision is not supported by substantial evidence, or is arbitrary or capricious, or is an abuse of discretion. Such action must be filed within thirty (30) days of service of this Order and must be filed in accordance with M.G.L. c. 151B, § 6, M.G.L. c. 30A, and Superior Court Standing Order 1-96. Failure to file a complaint in court within thirty (30) days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A.

SO ORDERED[13] this 8th day of October, 2020

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

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