COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
PETER JOYCE,

Complainants

v. DOCKET NO. 11-BEM-00505

CSX TRANSPORTATION,

Respondent

Appearances: Caitlin A. Sheehan, Esq. Commission Counsel for Complainant
Matthew L. Mitchell, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 7, 2011, the Complainant, Peter Joyce, Jr. filed a complaint with this Commission charging Respondent CSX Transportation with discrimination in employment on the basis of disability in violation of M.G.L. c. 151B, § 4(16) and the ADA. Complainant claims that he was denied a reasonable accommodation in the use of a computer device that he had difficulty mastering because of he suffers from Attention Deficit Disorder and other cognitive limitations and that he was disciplined and removed from service for an infraction which he claims was related to his disability. He asserts that the unwarranted discipline caused him great anxiety and distress resulting in his being placed on an occupational disability

retirement. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts to conciliate the matter were unsuccessful. The case was certified for hearing and the hearing was held before me on September 27 and 28, 2016. The parties submitted post-hearing briefs on March 31, 2017. A digital recording was made of the proceedings, but Respondent subsequently submitted a transcript of the recording completed by a certified court reporter which the parties have cited to in their briefs. The transcript will be deemed the official record of the proceeding for purposes of this decision and any subsequent appeals. Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Peter Joyce, is a sixty-six year old man who suffers from a number of cognitive disabilities, including ADD/ADHD and depression. Complainant was diagnosed with these disabilities by a medical evaluation in 2001 at age 50 after a life-time of struggling with learning, comprehension, distraction, inability to pay attention and needing information repeated. He testified about his difficulties as a student caused by his cognitive disabilities. (Tr. Day 1, pp. 34, 35, Ex. 3) Complainant's 2001 medical evaluation stated that he has a "combination of depression and depressive symptoms with attention deficit disorder and executive functioning problems." His cognitive impairments affect his ability to think, process information, problem solve and understand and complete tasks. As a result, Complainant has slowed processing which impacts his performance and has particular difficulty with certain computer related tasks. (Tr. Day 1 pp. 34-41, Ex. 3).

2. Complainant had a career in the railroad industry spanning some thirty-two years from 1978 until 2010. He commenced his rail service as a union or "craft" employee of Conrail and thereafter worked for various railroad operators including the Providence & Worcester Railroad, Amtrak and Respondent, CSX Transportation. (Tr. Day 1, pp. 21- 27) Complainant has worked in variety of positions, including brakeman, trackman, flagman, switch tender, utility man and conductor.

3. In 1999, CSX Transportation took over Conrail. Complainant began working for CSX in 2001. (Tr. Day 1, pp. 21-25) The terms and conditions of Complainant's employment at Respondent were governed by a collective bargaining agreement, pursuant to which he was afforded "bumping rights" as a senior employee to replace a less senior employee in a particular position for which he was qualified. (Tr. Day 1, pp. 43-45) Between 2001 and 2004, Complainant was employed in various "functional" positions at CSX and was assigned to railroad lines in Massachusetts. In these positions Complainant was responsible for tasks related to the maintenance, safety, or functions of particular track and train components. According to Complainant he worked for Respondent primarily as a brakeman or in a utility position. (Tr. Day 1, pp. 27-30) Complainant testified that during this time his cognitive limitations did not interfere with his job duties as a brakeman and he did not need an accommodation. Therefore, he felt there was no need to inform anyone at CSX about his diagnosis and he did not seek any accommodation for his disabilities. (Tr. Day 1, p. 31; Day 2, pp. 8-11)

4. In 2004, the brakeman position that Complainant had held since 2001 was abolished. As a result, in October of 2004, Complainant exercised his bumping rights to opt for a conductor position in Reidville, MA. (Tr. Day 1, pp. 29-30) Complainant's duties as a conductor included: supervising train crews; selecting the needed train cars, securing them, and testing the brakes;

ensuring accurate movement and placement of train cars; ensuring compliance with train operation safety regulations; delivering freight to its destination; and conducting administrative tasks related to the delivery of train cars to customers. (Tr. Day 1, pp. 46-49; Tr. Day 2, pp. 13-16) Included in these administrative tasks was: recording work time and overtime of train crews on a CSX computer system and using a portable computer console (referred to as an Onboard Work Order Device or OBWOD) to track train car movements and deliveries of freight to customers. The OBWOD is a hand-held computer that allows a conductor to record the delivery of freight for business reporting purposes. (Tr. Day 2, pp. 13-16) As the conductor, Complainant had to retrieve the Onboard device from its docking station to enter data about train car movements and deliveries as the train moves from station to station and to finalize data at the end of the work shift. (Tr. Day 1, pp. 30-31)

5. The various other positions Complainant had held at CSX did not require him to use the Onboard device. Complainant had a great deal of difficulty learning and mastering the computer system because of his cognitive impairments. Complainant advised the Trainmaster at Readville, Art Scott, that he had never used the Onboard device before and did not know how to use it, and was told by Scott to "just do the best you can." (Tr. Day 1, pp 31-32; Day 2, p. 16) Complainant was not provided with any training or classes on how to use the device. He testified that he might get assistance from another conductor, but usually just had to stumble along or, if he had time, he might call the customer service help desk in Jacksonville, Florida for assistance. He would do this from the yard office at the end of his shift for assistance. He stated that he could end up waiting in a queue and be on hold for a considerable amount of time waiting for the customer service center to take his call. (Tr. Day 1, pp. 32-33) He could not call the help desk while on board the train because cell phone use was prohibited. (Tr. Day 1, p. 49)

6. When Complainant opted into the conductor position, he did not tell anyone at CSX that he had a disability, nor did he request any accommodation to his disability with respect to using the Onboard device. (Tr. Day 2.pp. 16-17; Tr. Day 2, pp. 8-11) He stated that he was "not a real fast-paced worker" but was "careful and safety conscious" and that he had always done "his job methodically, safely, without incident." He stated that his symptoms first began to affect his work when he took the conductor position because of all the additional administrative responsibilities. Given his difficulties using the Onboard computer, Complainant was, however, permitted to record the necessary data manually on a paper back-up system. (Tr. Day 1, p.33, 43)

7. In November of 2004, Complainant was cited for a violation of a CSX safety policy that applies to all personnel who operate trains. (Tr. Day 2, pp. 119-123) Complainant was suspended for allegedly taking too much time to sign off his shift and was charged with being untruthful by recording overtime for himself and a member of his train crew for hours they did not perform assigned tasks. Respondent considered this a major offence under its policy. The infraction was related to time spent by Complainant trying to resolve a payroll issue where CSX had denied him extra pay for some special functions, and for time he spent calling the customer service help-desk to seek assistance entering the data into the Onboard device to complete his shift and enter his hours. (Tr. Day 1, pp. 52-55) This resulted in his putting in for two hours and 50 minutes of overtime. (Tr. Day 1 p. 57; Ex. 5) Complainant testified that he was unaware of the fact that he could not use company time to straighten out a payroll issue and that he was "completely surprised " when he was told this was not permissible. He had observed other engineers and conductors put in for time to complete this type of administrative task for 26 years and believed the practice was accepted. I credit Complainant's testimony that others had done

this and that it was either an accepted practice or was overlooked by Respondent. I do not believe that Complainant intentionally sought to de-fraud CSX by seeking overtime to which he was not entitled. Upon being informed by the Trainmaster that the overtime was not permitted, Complainant corrected his time sheet and was not paid for that time. He was, however, still disciplined for an infraction. (Tr. Day 1, pp. 54-56)

8. Complainant was afforded a hearing at which he admitted to the violation but stated that it was unintentional. At that hearing Complainant disclosed to CSX the diagnosis of his cognitive disabilities and the impact on his ability to do his work, including using the Onboard device. He provided CSX with copies of his neuropsychological report and two doctor's letters. (Tr. Day 1, 56-63, Ex. 5) Complainant testified about his disabilities in response to a question from his attorney and stated that they inhibited his ability to work with the computer and that he needed additional time to complete certain tasks. (Tr. Day 1. p. 61) The transcript of the hearing was maintained by CSX as part of Complainant's personnel file. (Tr. Day 2, p. 149)[1] The Hearing Officer concluded that Complainant had engaged in a major offence, and as a result of the alleged infraction, CSX terminated Complainant's employment. Complainant appealed the decision through his union and sought reinstatement and back wages. (Tr. Day 1, pp. 63-64) Complainant testified that he was devastated by the termination and sought counseling and medication to help him deal with the emotional impact of losing his job. (Id.) I credit his testimony.

9. After his termination, Complainant accepted a job in Florida with another railroad, where he worked briefly as a conductor in 2005. (Tr. Day 1 pp. 65-66) Complainant stated that

[1] Respondent maintains that because the hearing testimony was treated as confidential by the hearing officer, disclosure of Complainant's disability was not generally disseminated to CSX management. I find this argument to be specious. It was clear that at least one manager, McGovern, knew about Complainant's disabilities and Complainant testified that his Trainmaster at the time, Art Scott was aware of this disabilities. In addition, anyone who participated in the hearing would have become aware of such.

working in Florida was a hardship for him and his family, but he needed a job and medical insurance for his family, and to build up credits for his railroad retirement. (Tr. Day 1, p. 67-68) During this time, the chairman of Complainant's local union informed Complainant that he could negotiate his return to CSX as a resolution of the appeal of his dismissal. In or about June of 2005, Complainant was rehired by CSX on a "leniency basis" which meant that he was permitted to return to work without loss of seniority, provided he waive his appeal and claim for back wages. (Tr. Day 1, pp. 67-68; Ex. 1 at CSX00723)

10. Complainant was hired back into the position of "switchman" at the Framingham terminal, which is a yard job, working under the supervision of the conductor. Prior to returning to work, Complainant had to meet with Bob McGovern, the District Terminal Superintendent, who oversaw all the various terminals in the area. They met in July, 2005. McGovern supervised the Trainmasters in the area, including Art Scott in Reidville and Chris Pendleton in Middleboro. Complainant testified that one of the first things McGovern said to him was that he "didn't realize Complainant had all these disabilities." McGovern then told Complainant that he did not have to worry about using the Onboard work order device again because McGovern was placing him in a switchman position which did not require its use. (Tr. Day 1, p. 70)

11. From July of 2005 until January of 2009 Complainant was very comfortable in his switchman position, worked well with the engineers and enjoyed his job. He was not required to use the Onboard computer device and had very few administrative tasks. He needed no accommodation and had no performance problems. (Tr. Day 1, pp. 70-71) In July of 2009 CSX abolished the switchman position. As a result Complainant transferred to a medium sized facility in Allston MA where he worked a "utility job" assigned to work with the yard switcher on freight coming in to the terminal at night. He worked from afternoons until the early morning

hours. While on that job Complainant heard about a flagman position that might be opening when a colleague retired which would be a day job paid at conductor rates. According to Complainant, the yard flagman job was similar to a conductor position but with different duties and no requirement to use the Onboard device. (Tr. Day 1. Pp. 74-75)

12. Complainant testified that in order to get the flagman position he had to go through Bob McGovern and that McGovern was intent upon his not working as a conductor. (Tr. Day 1, pp. 75-76) Complainant discussed an occurrence in 2007 where a crew of a local freight train out of Framingham called him in to work as a conductor on a Sunday on an emergency basis. Complainant agreed to come in as a favor because the crew had no conductor. He was familiar with, and able to complete, the physical work and to do the necessary paper work entries but was unable to use the Onboard device. He told the yardmaster he did not know how to use it and the yardmaster made the necessary entries using Complainant's paperwork. Complainant heard the next day that McGovern was livid that he had worked as a conductor, reprimanded the crew callers for calling Complainant in to work as a conductor and instructed them that they were never to call Complainant for any conductor work. (Tr. Day 1, pp. 76-77) I credit Complainant's testimony that this occurred and that McGovern was intent on his not working as a conductor. Complainant testified that McGovern was reluctant to allow him to take the flagman position but ultimately approved the reassignment after consulting with the Union local chairman. Complainant thereafter held three different yard flag positions from March of 2009 to April 2010 and had no problems or performance issues. (Tr. Day 1, pp. 77-78)

13. In 2010 the yard flagman position Complainant had held was abolished. (Tr. Day 1, p. 79.) The only remaining non-conductor job was a utility position out of Worcester, a distance of some 63 miles from Complainant's home. For these reasons, Complainant bid on an open

conductor position in CSX "Cranberry Division" in Middleboro MA. The Trainmaster who would supervise Complainant was Christopher Pendleton. Complainant testified that he would need to use the Onboard device as part of his new freight conductor position but believed he could do the conductor position with accommodations to his disabilities. Complainant advised Pendleton that he wanted the job. He had to re-qualify for the position by riding the job for three days with no pay with a pilot conductor to familiarize himself with the territory. He qualified for the position and began working the job in April of 2010, from 7:30 a.m. to 7:30 p.m., a schedule that he testified was set by McGovern and Pendleton. (Tr. Day 1, pp. 78-83)

14. Complainant advised Pendleton on the first day that he had no training and limited experience using the Onboard device and needed more training. He stumbled with its use and was allowed to make his entries on paper and to fax his paperwork to the Customer Service Center. (Tr. Day 1, p. 85) Pendleton was aware of the fact that Complainant was entering information by hand on paper notes and that he tried to wean Complainant off the notes. (Tr. Day 2, p. 186) Complainant testified that within the next week, when Pendleton questioned his failure to use the device, he informed Pendleton that he suffered from ADD/ADHD and needed additional time to perform administrative duties. Pendleton told Complainant that he would get him more training on the device or send him to a class, but this did not happen. (Tr. Day 1, p. 86) Pendleton urged Complainant to use the Onboard device but Complainant told him he did not have sufficient time absent more training. (Tr. Day 1, pp. 88) He re-iterated to Pendleton that his disabilities, which were well documented in the 2004 investigation, coupled with his limited experience with the device, made it difficult for him to use. (Tr. Day 1, p. 90)

15. Complainant testified that Pendleton was very critical of him and told Complainant he would show him how to use the device, but it was apparent to Complainant that Pendleton

knew less about the device than he did. (Tr. Day 1, p. 89) Pendleton denied that Complainant informed him of his disabilities stating that he had a son with ADD/ADHD, was sensitive to the issue and would have sought assistance for Complainant. (Tr. Day 2, pp. 184, 189, 193-194) Although Pendleton denied having knowledge of Complainant's disabilities, he testified that Complainant told him he had not used the device in a long time, needed additional training on the device, and repeatedly informed Pendleton that he needed more time to complete administrative tasks. (Tr. Day 2, pp 185, 187,193) Complainant insisted that he spoke to Pendleton about his problems with mental filtering, slowed process and executive functioning, all of which impacted the time it took for him to learn new processes and apply them. (Tr. Day 1, p. 91, Tr. Day 2, pp. 41-43, 46) Despite Pendleton's denial, Complainant did not waiver from his assertion that he informed Pendleton of his disabilities. I found both Complainant and Pendleton to be largely credible witnesses. Even if I were to credit Pendleton's testimony that Complainant did not tell Pendleton directly about his disabilities, a reasonable inference can be drawn that McGovern likely mentioned the issue to Pendleton. McGovern and Pendleton spoke frequently and Pendleton admitted that when Complainant bid on the position, he asked questions about Complainant and McGovern did not speak well of him. (Tr. Day 2, pp. 242-243)

16. Complainant also perceived that Pendleton tried to discourage him from taking the job as conductor in Middleboro and told him the job was being diminished by hours and days. (Tr. Day 2, p. 45) I credit Complainant's testimony the McGovern knew about his disabilities after the 2004 disciplinary hearing and had commented on the subject to Complainant immediately upon Complainant's return to work at CSX in 2005. (Tr. Day 1, p. 70; Tr. Day 2, p. 30) McGovern told Complainant not to worry because he would not have to use the Onboard device again. McGovern did not testify at the hearing and Complainant's credible testimony

about McGovern's knowledge of his disabilities is unrebutted. Complainant testified from his more than 30 years of experience that the railroad is "one big fishbowl of gossip" and I credit this testimony. (Tr. Day 2, p. 34) Pendleton admitted knowing about Complainant's prior discipline for allegedly abusing overtime and that McGovern warned him that Complaint would be seeking a lot of overtime. Pendleton asserted that there was no mention of Complainant's disabilities in connection with these subjects. (Tr. Day 2, pp. 243-244) McGovern knew at that time that Complainant suffered from disabilities, that he had experienced problems with the Onboard device, had not received training in how to use the device, and had not had to use it for years. He also was aware of the fact that Complainant would need to use the device again in the conductor position he was assuming. I find Respondent's assertion that Complainant's disabilities and his difficulty with the computer related administrative tasks was not discussed at this time to be somewhat incredulous, and I draw the reasonable inference that McGovern likely discussed the issue with Pendleton.

17. Complainant testified that for reasons largely beyond his control, including the deplorable conditions of the tracks, which necessitated the trains running slowly, it sometimes took close to the entire 12 hour shift to complete all the "activity functions" which comprised the physical labor of the job. This required him to perform his administrative tasks in little more than one-half hour or after the end of the shift in the yard office. Complainant stated that the engineer, Art Scott frequently signed them out at 7:30 p.m. even though Complainant was still completing his administrative tasks. (Tr. Day 2, p. 54) His having to perform much of the administrative work at the end of the shift was largely the result of his difficulties with use of the Onboard device while on the train. (Tr. Day 1, p. 87-90; Day 2, pp. 48-51) Complainant testified that Pendleton continued to pressure him about using the Onboard device and that in

April and May Complainant continued to ask him for training, but never received training. (Tr. Day 1, pp. 92-95; Day 2, pp. 51-53) Complainant also repeated his request for training to his Union representative Brian Lawlor and to McGovern during one week when McGovern was in charge of Middleboro. (Tr. Day 2, 61-62) Complainant was unaware of any special forms that were required to ask for an accommodation, and no one ever asked him to put his request in writing or to provide medical documentation of his difficulties. (Tr. Day 1, p. 91-92) Respondent's Director of Employee Relations, Linda Mundy testified that CSX permitted its employees to raise the need for an accommodation directly with their managers. (Tr. Day 2, p. 136)

18. According to Pendleton, from the time Complainant started in the Spring of 2010, he exhibited performance problems related to the timeliness of his work, including completion of administrative tasks and use of the Onboard device. Pendleton claimed that he had repeated conversations with Complainant concerning his job performance and that the problems came to a head in June of 2010. (Tr. Day 2, pp. 189-194) On June 10, 2010, Pendleton "annulled" or cancelled a job assigned to Complainant for lack of business, which resulted in loss of a day's pay for Complainant. (Tr. Day 2, pp. 195-196, 198) At approximately 3:25 p.m. on June 11th, Pendleton drove through the train yard and observed that Complainant and Scott's work on the train was complete. Although Pendleton observed Complainant's vehicle in the yard on June 11th he did not enter the office or speak to Complainant that evening in an attempt to determine what tasks Complainant was engaged in. (Tr. Day 1, p. 129; Day 2, 200, 230-232)

19. On the following Monday, June 14, 2010, Pendleton discovered what he believed to be several inaccuracies on the electronic time sheets submitted by Complainant for himself and engineer Art Scott. Complainant had submitted a time record on June 11th indicating a

completion time of 5:40 p.m., which included approximately 2 hours of overtime. It appeared to Pendleton that Complainant had falsified his and Scott's electronic time sheet to reflect additional overtime not worked. Pendleton believed that Complainant padded his hours to compensate for the work hours annulled the previous day. Pendleton questioned Scott about the time sheet and Scott was unaware that Complainant had submitted overtime for him. Scott expressed anger at Complainant, brought up the 2004 overtime incident, and stated he thought Complainant might deliberately be trying to set him up.[2] (Tr. Day 2, pp. 198-205)

20. Complainant testified that on June 11, 2010, he and engineer Art Scott had returned to the train terminal earlier than usual. The locomotive stopped at around 3:50 p.m. and they returned to the terminal office at about 4:05 p.m. to complete their administrative tasks. Complainant had sufficient time to contact the CSX help desk for assistance in using the Onboard device to complete his daily report.[3] He testified that he waited on hold in a telephone queue for approximately 15 minutes and then was assisted by the help desk for approximately one-half hour. (Tr. Day 1, pp. 111-114; Ex. 12, 13) Complainant also completed other tasks, including calling the dispatcher, filling out his time slip, responding to a customer inquiry, and assisting a passerby who stopped in to inquire about employment. (Tr. Day 1, pp. 114-117; Ex. 13) He indicated that he was able to sign off from his shift at approximately 5:40 p.m. His time sheet included two hours of overtime which is paid at a rate of time and a half.[4] Complainant testified that he signed Scott off at the same time, even though Scott had left earlier, as this was customary. Complainant was unaware of any way in which he could have signed Scott out

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[2] Scott was the Trainmaster in Reidville in 2004 when Complainant was accused of violating overtime policy and according to Complainant, Scott also was well aware of his disabilities.

[3] Complainant testified that he rarely had sufficient time to call the help desk upon returning to the office trailer because it was often too close to the end of his twelve hour shift, and was often put on hold by the help-desk due to high caller volume.

[4] Time beyond 8 hours is considered overtime and is paid at a rate of time and a half. Each 12 hour shift regularly included 4 hours of overtime.

earlier. I credit his testimony that he had never seen it done any other way during his many years at CSX. (Tr. Day 1, pp. 115-117, Ex. 13) Complainant was very pleased at having successfully completed his administrative tasks using the Onboard device with 100% accuracy for the first time with the help desk assistance, particularly since Pendleton had been pressing him to utilize the device. Complainant testified that he did not believe he had done anything wrong when he signed off his shift and that he had accurately reported his time for that day. (Tr. Day 1, pp. 118-120)

21. On June 14, 2010, Pendleton accused Complainant of taking too long to sign out on June 11th. Complainant explained the tasks he had completed during that time. Pendleton told Complainant it should not have taken that long and cited Complainant for a violation of CSX overtime policy. According to Respondent, CSX considers this a major offense.[5] As a result of the citation, on June 15th Complainant was taken out of service. He learned this from the crew caller. CSX suspended his employment and scheduled an evidentiary hearing for June 23, 2010, to determine if Complainant had failed to complete his work order and register off in a timely manner in violation of CSX policy, and whether discipline was required. (Tr. Day 1, pp. 131-134; Ex. 15 at JOY00069) The hearing was rescheduled twice, first to July 7th and then to August 10th at the request of the union local chairman and assistant chairman. Complainant was not permitted to work during this time. (Tr. Day 1, pp. 135-138: Ex. 15 at JOY00071,00073)

22. Complainant testified that he became severely depressed about being charged with a violation of CSX overtime rules and being taken out of service. Complainant believed that he was being punished by Respondent for taking too much time to complete administrative tasks, but that this was a result of Respondent's failure to provide him with the necessary training he

[5] According to Respondent, Scott was not charged with a similar violation because he admitted to not working the hours and was not responsible for entering the inaccurate information.

had repeatedly requested as an accommodation to his cognitive limitations. He said it was "like déjà vu, all over again," and that his punishment was a repeat of the 2004 incident. He notified CSX that he was medically unable to participate in the hearing and unable to perform the job functions of a CSX conductor. Due to Complainant's inability to attend the hearing, it was adjourned indefinitely and has never been held. (Tr. Day 1, 138-140; Day 2, pp. 85-88; Ex. 15)

23. Complainant sought treatment for depression initially from his primary care physician and was prescribed additional medication. He subsequently sought outpatient treatment and counseling programs. (Tr. Day 1, pp. 138-140; 157-160) Complainant applied for short-term disability benefits and his psychologist provided documentation that the was disabled from doing his job from June 11, 2010 to September 18, 2010, due to depression, anxiety and other factors. As a result, Complainant received disability leave benefits from June 22, 2010 until January 21, 2011. (Tr. Day 1, p. 150; Ex. 24; See also Exs. 19-21) In addition, Complainant sought, and was granted in February 2011, an occupational disability annuity form the Railroad Retirement Board. (Tr. Day 1, pp. 142-143;150-151) This monetary disability annuity benefit (approximately $47,000 per year) replaces certain wages that Complainant would have received had he continued regular employment at CSX. By allowing Complainant to remain on extended leave, CSX has allowed him to maintain his eligibility for full Railroad Retirement Benefits. Complainant was eligible for full retirement benefits as of February 2017 when he turned 66. (Tr. Day 2, pp. 3, 4; 123-130) Complainant testified that had he remained an active employee of CSX, he would have elected to retire at age 65. (Tr. Day 1, p. 166) During his last full year of employment with CSX he earned $89, 852.13. From 2010 to 2015 Complainant's income from all sources is as follows:

2010- $54,753.44
2011- $48,868.35

2012- $50,655.79
2013- $53,681.86
2014- $54,948.73
2015- $52, 090.22

(Exs. 27-32) There is no documentation in the record as to Complainant's income in 2016. According to Respondent, had Complainant chosen to appear for his disciplinary hearing at any time between 2010 and 2016, and been exonerated of the charges against him, Respondent would have reinstated him to service with full back pay, provided that he was qualified to return to work. (Tr. Day 2, pp. 129-130)

24. Complainant testified that he loved working for the railroad and was devastated by being taken out of service at 60 years of age and felt that he was "singled out." After working full time 12 hour days for 32 years, he had a very difficult time adjusting to life without work. (Tr. Day 1, pp.152, 164-166; Ex. 3 at JOY 118-119) He testified that he suffered significant emotional distress as a result of Respondent's refusal to consider how his disabilities impacted performance of administrative functions and Respondent's failure to accommodate his disabilities. (Tr. Day 1, pp. 152-153) From July through late August of 2010, Complainant attended Arbour Partial Hospitalization Program, an outpatient program for the treatment of depression and anxiety. He attended five groups daily, was evaluated weekly by a clinical nurse specialist, met with a case worker weekly, and successfully completed the Program. (Tr. Day1, pp. 157-160; Ex. 3 at JOY 00098-99) Complainant was re-admitted to the Program on November 9, 2010 for treatment of severe depression, anxiety, and panic attacks. He testified that it was helpful to discuss his feelings about what had happened at work with others in a group setting. (Tr. Day 1, p. 158) Complainant reported at the time that his problems were related to his work situation, which included a "constant" fear of losing his benefits and his disability retirement. He also reported feeling worried about his finances, and the health of a family

member. (Tr. Day1, pp. 161-164; Ex. 3 at JOY 00100-107) Complainant also attended 24 psychotherapy sessions with Vincent Panetta, Ph.D. between June 2010 and February 2011 to address his anxiety and depression. He scheduled neuropsychological testing, and between the two Partial Hospitalization Programs, saw his primary care physician for additional medication. (Tr. Day 1, pp. 155-157; Day 2, 96; Ex. 3 at JOY 00139-140). Complainant testified that he improved some after his occupational disability annuity was approved. (Tr. Day 2, pp. 103-104) After his retirement, he was able to take some part-time jobs unrelated to the railroad that did not require accommodation of his disabilities. (Tr. Day 2, pp. 104-106)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(16) makes it unlawful for an employer to discriminate against a qualified handicapped individual who is able to perform the essential functions of a job with or without a reasonable accommodation. It is unlawful for an employer to dismiss an individual from employment or otherwise discriminate against such individual because of a disability if the person is qualified to perform the essential functions of the job. In order to establish a claim of termination from employment on account of his disability, Complainant must demonstrate that he (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by his employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on his disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, (1998).

The law also requires employers to provide reasonable accommodation to otherwise qualified disabled individuals who can perform the essential functions of the job unless they can demonstrate that the accommodation sought would impose an undue hardship on the employer's business. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008) (discussing reasonable accommodation in the context of religion) In order to prevail on a claim of failure to provide a reasonable accommodation, Complainant must demonstrate that: (1) he is a "handicapped person," (2) that he is a qualified handicapped person," (3) that he needed a reasonable accommodation to perform his job; and (4) that the employer was aware of his handicap and the need for a reasonable accommodation; (5) that his employer was aware or could have become aware of a means to reasonably accommodate Complainant's handicap; and (6) the employer failed to provide him with a reasonable accommodation. Hall v. Department of Mental Retardation, 27 MDLR 235 (2005); MCAD Handicap Guidelines, p. 33, 20 MDLR (1998).

A. Complainant's Disability

Complainant has established that he is disabled based upon his medical diagnosis and long history of treatment for ADD/ADHD, and other cognitive impairments including depression. As a result, he has particular difficulty with computerized tasks and other administrative functions and sometimes needs additional time to learn and complete certain mental tasks. Complainant worked for in the railroad industry for various employers for over thirty years and performed a number of jobs capably. Prior to 2010, Complainant had never required or sought an accommodation to his disabilities.

Complainant became an employee of CSX in 1999 and his employment was governed by a collective bargaining agreement. He was disciplined for the first time in 2004 for taking too

long to perform some administrative tasks and allegedly abusing overtime. Complainant raised the issue of his disabilities at a disciplinary hearing and presented medical documentation of same as a defense to the charge, asserting that his cognitive impairments caused him to require additional time to perform certain administrative tasks. He was nonetheless removed from service but was re-instated in 2005 in settlement of his appeal of the discharge.

Complainant worked without incident and without need for any accommodation from 2005 to 2010. Over that period of time he worked in a number of different positions that were ultimately eliminated. With few viable options remaining to him, in 2010, Complainant bid on a conductor position in Middleboro MA, which was the open position closest to his home.

B. Failure to Accommodate

In 2010 Complainant was otherwise qualified to perform the job of conductor. He testified that the physical labor aspects of the job which involved moving freight on trains, were tasks that he had done in the past, knew how to perform, and could perform without any accommodation. However, the job of conductor also required Complainant to perform administrative tasks using the Onboard device which was used to track train car movements and delivery of freight to customers. Complainant had experienced difficulty using this device in 2004. Bob McGovern, the District Terminal Superintendent, knew of Complainant's past difficulties with the device and was aware of Complainant's disabilities. Armed with this knowledge, at the time Complainant bid on the job, McGovern did not address the issue of Complainant's need for additional assistance with the Onboard device and the administrative duties related thereto. The testimony of Complainant and Pendleton suggests that rather than seeking to assist Complainant, McGovern expressed a lack of support for Complainant assuming the conductor position in Middleboro. McGovern warned Pendleton that Complainant would be

seeking a lot of overtime, implying that he was a malingerer and a poor employee. I conclude that having been left with this negative impression of Complainant, Pendleton likely formed an adverse opinion about Complainant prior to his starting the job. Notwithstanding, Complainant had rights to bid on the job due to his seniority, and Respondent could not deny him the position.

Pendleton testified that in the relatively short period of time Complainant worked for him, he had some concerns about Complainant's efficiency on the job. Complainant admitted that he was not the fastest worker, but stated that he was always safety conscious, thorough, and did a good job. He had no record of discipline related to his ability to perform the physical labor and manual activity tasks required of the position.

At the commencement of his employment in Middleboro, Complainant advised Pendleton that he had not used the Onboard device for many years, had difficulty with the device, and would need training. There is a dispute regarding whether or not Complainant advised Pendleton of his disabilities, with Complainant insisting that he did so, and Pendleton denying any such notice. It is significant, however, that McGovern was on notice that Complainant's disabilities had caused him difficulties with this part of the job in the past. During Complainant's short time on the job, Pendleton urged him to use the Onboard device and Complainant repeatedly asked Pendleton for more training on the device. Complainant re-iterated his need for training to McGovern during a period of time when McGovern filled in for Pendleton at the Middleboro job site. In this context, Complainant's repeated requests for training to both Pendleton and McGovern can clearly be construed as a request for an accommodation.

Respondent's assertion that it had no knowledge of Complainant's disabilities and that he made no request for an accommodation is not credible. McGovern knew that Complainant had

in the past, and continued to have difficulty with the Onboard device. According to Complainant, this was pretty much common knowledge to anyone who had worked with him, including Art Scott, who had worked with him as the Trainmaster in 2004 and was the engineer on his shift in 2010. I credit Complainant's testimony that the railroad was "one big fish bowl of gossip." Due to his difficulties with the Onboard device, Complainant was allowed to use handwritten paper notes as a back-up system. Respondent also was on notice of the fact that Complainant needed additional time to report the information in his notes and complete tasks related to the Onboard device. Moreover, it is undisputed that he sought additional training on use of the device. Respondent's assertion that it had no awareness that Complainant's requests were related to a disability or that they evidenced the need for an accommodation, is simply not credible.

Complainant's requests for accommodation were fairly straightforward; either allow him to continue using a paper system, grant him more time to complete administrative tasks, or provide him with adequate training. 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) It is the employee's initial request that triggers the obligation to participate in this process. Id. The interactive process requires the employer to engage in a direct, open, and meaningful communication with the employee, which is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could overcome the employee's limitations. See MBTA v. MCAD, 450 Mass. 327, 342, (2008); Daly v. Codman & Shurtleff, Inc. , 32 MDLR 18, 26 (2010) No one

at Respondent engaged Complainant in a meaningful discussion about his difficulty in learning the computer system or how to assist him in successfully performing computer-related job functions. I conclude that Respondent had an obligation to discuss and explore ways in which to provide Complainant with assistance in using the Onboard device, so as to enable him to successfully complete his administrative tasks, and to provide him with an accommodation to his disability. Respondent did not meet its obligations in this regard.

C. Complainant's Discipline

With respect to the Complainant's separation from employment with Respondent, he has satisfied the elements of a prima facie case by showing that he is disabled within the meaning of the law, that he likely could have performed the tasks required by use of the Onboard device with the accommodations of additional training or more time with the help desk to assist him with mastering the system. He was disciplined and removed from service under circumstances that give rise to the inference of disability discrimination.

Respondent may rebut the presumption of discrimination created by the employee's prima facie case by demonstrating that it had a legitimate non-discriminatory reason for its action. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, (2000) According to Respondent, Complainant was justifiably removed from service for abusing overtime, submitting a time record for overtime his engineer did not work, and for taking too long to perform certain job functions, including use of the Onboard device. Respondent asserts that Complainant was removed from service pending a disciplinary hearing but that his employment was never terminated. Instead, Complainant was placed on a disability leave due to his assertion that his worsening disabilities precluding him from attending the hearing.

Respondent has satisfied its burden at stage two of the analysis to articulate a legitimate non-discriminatory reason for its adverse action.

If Respondent articulates a non-discriminatory reason, Complainant must prove by a preponderance of the evidence that its reason is a pretext and that Respondents "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493,501 (2001); See, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence that permits an inference that discriminatory motives were at play. Lipchitz, supra. at 501.

Complainant asserts that Respondent's action was a pretext for disability discrimination. There is certainly credible evidence that Complainant struggled to perform certain administrative functions related to the Onboard device and that much of his difficulty was related to his disabilities. Therefore, while Respondent's reason appears to be legitimate on its face, I conclude that it was a pretext for discrimination. Respondent's reason begs the question of its failure to recognize or acknowledge the extent to which Complainant's disabilities caused his struggles and Respondent's failure to accommodate those disabilities. I also draw the inference that misuse of overtime was a convenient excuse to seek termination of Complainant rather than to train him in use of the Onboard device, since neither McGovern nor Pendleton wanted him in the position from the outset.

Complainant had been on the job for less than three months with no training in use of the Onboard device, when he submitted a time sheet reporting some two hours of overtime. Pendleton deemed the overtime to be excessive and unnecessary since the shift had ended early and believed Complainant had padded his time. Complainant told Pendleton that his overtime was justified by the successful completion of administrative tasks using the Onboard device,

something Complainant had accomplished for the first time with the assistance of the help desk because he finally had some extra time after the train was secured. Complainant testified that he was proud to have successfully utilized the Onboard device, as Pendleton had been urging him to do. Pendleton did not accept Complainant's explanation and rather than acknowledging Complainant's successful completion of reporting with the Onboard device, he imposed the severe punishment of removing Complainant from service pending a hearing on the alleged infractions. Given Complainant's short tenure on the job, his repeated requests for training that went unheeded, and his plausible explanation for the use of overtime, I conclude that Pendleton acted in an unduly harsh and punitive fashion. I find the immediacy and severity of the punishment to be evidence of Respondent's intent to terminate Complainant's employment for reasons related to his disability, i.e. that he was too slow to complete the administrative tasks. Given the fact that Complainant's employment had been terminated once before, a seemingly harsh punishment for a similar infraction, [6] the outcome would likely have been the same in 2010 had he submitted to a disciplinary hearing.

Even if a reasonable fact-finder could not ascribe an unlawful motive directly to Pendleton, the evidence suggests that Pendleton's views of Complainant were likely tainted by and mirrored McGovern's bias. McGovern's views about Complainant demonstrate bias based on Complainant's past assertion of his disabilities. Complainant insinuated that McGovern mocked him for asserting he could not perform computer related administrative tasks due to his cognitive limitations, and was determined that Complainant would never work as a conductor again. The evidence supports a conclusion that McGovern unjustifiably viewed Complainant as a malingerer and did not give credence to Complainant's assertion that his disabilities rendered

[6] The fact that Complainant was re-instated after his first termination as part of a negotiated settlement is evidence that the punishment was unduly harsh, and that there was a likelihood that he could prevail in the appeal of his dismissal.

him less able to perform certain job functions as quickly as others might. McGovern expressed his negative opinions about Complainant to Pendleton and clearly tainted Pendleton's view of Complainant from the outset before the two had even met. In the end, McGovern's communication of adverse information about Complainant to Pendleton likely influenced Pendleton's harsh and precipitous decision to remove Complainant from service. It is reasonable to draw the inference that Pendleton did not exercise his independent judgment in determining that Complainant was a slacker, was untruthful about his overtime, and should be removed from service. I conclude that Pendleton relied on his supervisor's biased view of Complainant, a view that likely tainted his decisions.

Under the "cat's paw" theory of discrimination, an employee may seek to hold an employer liable for intentional discrimination based on the conduct of an individual, usually a supervisor, who harbors discriminatory animus and influences an adverse employment decision, even if the supervisor does not make the decision. Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011) ("cat's paw" theory of liability addressed in a case interpreting USSERA). Thus an employer may be liable for the discriminatory animus of a supervisor who did not participate in an adverse employment decision if the supervisor's animus is a proximate cause of the adverse employment action. Under the Staub analysis, the actions of the ultimate or actual decision maker are irrelevant. As a result, even if a neutral decision maker exercises independent judgment this does not prevent the animus of the biased individual from tainting the adverse employment decision. Under this analysis, the employer remains liable merely because one of its agents acted with unlawful motives which ultimately caused an adverse employment decision. If the discriminating employee's influence has "some direct relation" to the ultimate action taken, liability will be established. *Id.* at 1192.

In this case, I conclude that the individual bearing discriminatory animus was Pendleton's supervisor McGovern, who more likely than not, influenced the Pendleton's decision to scrutinize Complainant's overtime request and remove Complainant from service. Indeed, McGovern had essentially warned Pendleton that Complainant would seek a lot of overtime. Liability can attach if a neutral decision maker when deciding to terminate an employee relies on information that is inaccurate or misleading or incomplete because of another employee's discriminatory animus. Cariglia v. Hertz Equip. Rental Corp., 363 F. 3d 77, 85 (1st Cir. 2004) I conclude that McGovern's bias influenced the ultimate decision in this case and resulted in Complainant being removed from service. Given the circumstances, and Complainant's history with Respondent, I conclude that his removal from service was tantamount to a termination. Moreover, Complainant's testimony that he suffered severe anxiety and depression as a result of this harsh discipline and was incapable of attending the disciplinary hearing was credible. He was justified in his view that the outcome of the hearing was pre-ordained. It is reasonable to conclude that Complainant was effectively terminated for all intents and purposes, and that Respondent is liable for the unlawful separation.

IV. REMEDY

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

Respondent asserts that Complainant is not eligible for back pay damages because after his separation he was fully disabled and not able to work. This assertion ignores the medically

documented evidence of the significant deterioration in Complainant's mental health that occurred after he was precipitously removed from service, and Complainant's credible testimony that his removal from service was the cause of his increased distress. Alternatively Respondent argues that Complainant could have chosen to submit to a disciplinary hearing, and if vindicated, would have been returned to active service with full back pay. It also takes the position that since Complainant never attended a disciplinary hearing, his employment was not terminated. This assertion relies on the dubious assumption that Complainant would have been vindicated of the charges. I conclude that given Complainant's history with Respondent, particularly the outcome of his previous disciplinary hearing for a similar infraction, it is highly likely that he would not have prevailed at the 2010 disciplinary hearing and would have been terminated. Therefore it is reasonable to draw the inference that even if Complainant had been medically able to submit to the hearing, he would have been terminated by CSX. More importantly, the reason for Complainant's inability to attend the hearing and return to work was the onset of severe depression, anxiety, and related emotional trauma caused by Respondent's charges against him, which characterized him as dishonest and essentially stealing time from the company. When viewed in light of Respondent's failure to provide him with the necessary accommodations to perform the administrative functions of his position, such a charge was indeed unduly harsh and demeaning to an employee who had devoted his life to the railroad.

Given these facts, it is reasonable to conclude that but for his removal from service, Complainant would have remained working at Respondent until he turned age sixty-five in February of 2016. I therefore conclude that Complainant is entitled to back pay for the years 2010 to 2015 for the difference between the wages he would have received had he remained working and the income he received from his disability annuity benefit and other sources of

income. Complainant's lost income for these six years is based on his salary for his last full year of employment which was $89,852.131 minus his other sources of income for those years. His lost income is as follows: for 2010- $35,099.69; for 2011- $40,983.78; for 2012- $39,196.34; for 2013- $36,170.27; for 2014- $34,903.40; for 2015- $37,761.91. The total amount of lost wages to which Complainant is entitled is $224,070.39.

Complainant is also entitled to damages for the significant emotional distress he suffered as a direct result of Respondent's unlawful actions. The evidence suggests that Complainant's mental health deteriorated significantly upon his removal from service. He was treated for severe depression and anxiety which were exacerbated greatly by Respondent's refusal to accommodate his disabilities and what he viewed as his unjustified removal from service. Complainant was devastated by this turn of events. He loved working for the railroad and felt a commitment to the industry throughout his long-serving career. He stated working for the railroad was what he wanted to do from the time he finished college. He was particularly offended at having been portrayed in a negative manner by Respondent and felt his reputation was tarnished. Complainant testified that he had a very difficult time adjusting to life without work after putting in 12 hours shifts for many years. In addition, he was very worried about his financial situation.

After being removed from service, Complainant sought immediate treatment from his primary care physician and was prescribed additional medication for depression. He subsequently sought and attended an outpatient hospitalization counseling and treatment program, submitting to at least two courses of intensive treatment over a period of time. Complainant also attended twenty-four individual psychotherapy sessions with a PhD psychologist over a period of nine months from June of 2010 to February of 2011 to address his

anxiety and depression. He was determined eligible for short-term disability benefits and a subsequent disability annuity from the railroad based on documentation from his mental health providers. Based on his testimony and the medical documentation, I conclude that Complainant suffered from severe depression, anxiety and panic attacks after being removed from service. I found his testimony to be compelling and sincere. While Complainant suffered from pre-existing mental health conditions that were related to his cognitive disabilities, prior to 2010, his depression and anxiety did not interfere with his ability to work and function. I conclude that his depression and anxiety were significantly exacerbated by and directly related to Respondent's actions, and that he is entitled to an award of $100,000 in damages for emotional distress he suffered.

I. ORDER

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

1) To cease and desist from any acts of discrimination based upon disability.
2) To pay to Complainant, Peter Joyce, the sum of $224,070.39 in damages for lost wages with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
3) To pay to Complainant, Peter Joyce, the sum of $100,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

4) To conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's human resources personnel, managers or other employees in the Boston region who are authorized to negotiate and provide reasonable accommodations for disabled employees. Following the training session, Respondent shall report to the Commission the date and names of persons who attended the training.

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

So Ordered this 31st day of May, 2017.

Eugenia M. Guastaferri
Hearing Officer