

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and KEVIN O'LEARY,
Complainants

Docket No. 15-BEM-01246

v.

BROCKTON FIRE DEPARTMENT
and
DEPUTY CHIEF BRIAN NARDELLI,
Respondents

Appearances: Edward J. O'Brien, Esq. for Complainant O'Leary
Megan Bridges, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 8, 2015, Complainant Kevin O'Leary filed a charge of disability discrimination against the Brockton Fire Department and Deputy Chief Brian Nardelli. Complainant alleges that he was not provided with a reasonable accommodation and was subjected to a hostile work environment after giving the Fire Department a copy of a neuropsychological evaluation diagnosing him with a learning disability. Complainant does not make a claim for lost wages.

A probable cause finding was issued and the matter was certified for a public hearing.

A public hearing was held on September 5, 7, 8, and 11, 2017. The following witnesses testified at the hearing: Complainant, Richard Francis, Scott Albanese, Paul Linscott, and Thomas Goodale.

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 and conclusions:

II. FINDINGS OF FACT

1. Complainant Kevin O'Leary is a resident of Brockton, MA. He received honorable discharges from both the United States Marine Corps and the Marine Reserves and is a certified medical technician (CMT). While serving in the Marine Reserves in 1998, Complainant suffered a lumbar-sacral strain causing a 10% impairment for which he received a disabled veteran's preference in regard to civil service employment. Exhibit Y at 62, 293. Complainant's lumbar-sacral impairment is not at issue in this case.
2. Prior to the events at issue, Complainant earned a bachelor's degree in criminal justice, a master's degree in criminal justice, and an associate of science degree in nursing. Transcript, Day 1 at 53; Day 2 at 38. Complainant also completed a master's thesis in criminal justice with the help of a paid mentor. Transcript, Day 2 at 58.
3. Prior to the events at issue, Complainant worked for several ambulance services as a certified EMT and paramedic. Transcript, Day 1 at 41-43. He also worked as a security officer for Curry College and Massachusetts General Hospital (MGH) from 2003 to 2015. Transcript, Day 1 at 36; Day 2 at 3-5.
4. Between 2008 and 2010, Complainant received inpatient care at Arbour-Fuller Hospital in Attleboro, MA for substance abuse, depression, and suicidal ideation. Around that time he began to attend Alcoholics Anonymous. Transcript, Day 2 at 73. He testified that he had "good sobriety" from July 2010 to February or April 2014.

5. In 2011, Complainant was bypassed for appointment to a vacancy on the Brockton Fire Department by Brockton Fire Chief Richard Francis. Chief Francis served on the Brockton Fire Department from 1978 to 2015 and was Fire Chief from 2010 to 2015. Transcript, Day 2 at 167. Chief Francis bypassed Complainant in 2011 for: a) omitting to mention a failed drug test administered by the Quincy Police Department which resulted in his non-appointment as a Quincy Police Officer in 2003 and his dismissal from the Massachusetts Bay Transportation Authority Police Training Academy in 2005; b) having a history of alcohol abuse, including OUIs and a 2008 hospitalization for alcohol-induced depression; and c) having a poor driving history. Exhibit Y at 23, 90, 133, 136, 294-295. Complainant appealed his 2011 bypass as a Brockton firefighter to the Massachusetts Civil Service Commission which upheld the bypass.
6. In 2013, Complainant was interviewed for another round of vacancies at the Brockton Fire Department. He was selected on this occasion by Chief Francis. According to Chief Francis, he decided to hire Complainant based on Complainant's membership in Alcoholics Anonymous for three years and his sobriety during the three-year period.
7. Following his appointment as a Brockton firefighter, Complainant was assigned to the Department's Training Division to attend a three-month drill school beginning on or around January 2, 2014. Exhibit S. Drill school is taught by instructors from both the Massachusetts Fire Academy and the Brockton Fire Department. Instructors provide academic training and conduct drills and simulations. Recruits perform both pumping and ladder operations. They are required to achieve competence in both as measured by written exams and practical (live fire) exercises in order to be able to fill in for each other. Transcript, Day 1 at 103; Day 3 at 45, 47-49; Day 9 at 40. According to Captain

Linscott, pumping skills are critical because pumping operations get water to a fire.

Transcript, Day 4 at 37.

8. Drill school recruits are given academic tests once a week. Complainant testified that his academic average on the tests was "mid-range" which he defined as C+ or B.

Transcript, Day 1 at 99. Chief Francis testified that Complainant's performance was the lowest in the class but no documents were submitted to verify Chief Francis's claim. Transcript, Day 1 at 99, 123.

9. Respondent Brian Nardelli was at all relevant times a Brockton Deputy Fire Chief. He was in charge of training new recruits until March or April 2014 when Deputy Scott Albanese replaced him as Training Director. Transcript, Day 2 at 171-172; Day 3 at 96. Respondent Nardelli attended, but did not testify, in this proceeding.

10. The Training Director monitors the progress of firefighter recruits. *Id.* at 170. At the start of drill school, Chief Francis and Deputy Nardelli instructed recruits to report learning disabilities for which they needed accommodations.¹ Transcript, Day 2 at 120; Exhibit Y at 234. Complainant asserts that he informed Deputy Nardelli of his learning disability a day or two later. Transcript, Day 1 at 103-106; Day 2 at 120. I do not credit this assertion. Instead, I credit that Deputy Nardelli and Complainant had a discussion on day eight of drill school about why Complainant was having difficulties and only then did Complainant acknowledge that he had a documented learning disability. Transcript, Day 3 at 57; Exhibit S. Complainant delayed in reporting his

¹ The Rules and Regulations for the Recruit Training Program state that: "All Recruits are encouraged to inform the Training Division of any learning disabilities that may impede the recruits learning ability, on the first day of classes. Reasonable accommodations may be made if the approved documentation of that disability is brought forth." Exhibit W.

disability out of concern that it would not be “accepted” but thereafter revealed it after having more difficulty than he anticipated. Transcript, Day 1 at 104.

11. After informing Deputy Nardelli of his learning disability, Complainant submitted a neuropsychological evaluation drafted by Dr. Neal McGrath, Ph.D. Exhibit Y. Complainant obtained the evaluation in 2006 in order to address trouble he was having with undergraduate science courses such as chemistry. Transcript, Day 2 at 32-33. In or around 2006, Complainant was taking Ritalin, but he stopped taking the medication because of side effects. Transcript, Day 2 at 147. Dr. McGrath administered a battery of diagnostic tests which placed Complainant in the low-average range of nonverbal intellectual function and the low-average to average range for working memory span. Exhibit Y. According to Dr. McGrath, these scores are “significantly lower” than Complainant’s verbal scores. The neuropsychological evaluation also contains a self-reported inventory of traits and symptoms consistent with a diagnosis of Attention Deficit Disorder (inattentive type). Id. at 4-6. Dr. McGrath concluded that Complainant appeared to have a mild disability in regard to nonverbal learning, exacerbated by difficulties with inattention which impeded the synthesis of new information in areas such as math and science. Id. Dr. McGrath additionally stated that Complainant “struggles with anxiety and depression” and assessed Complainant in the moderate-to-severe range of depression with concentration difficulties. Id. at 3, 5. Dr. McGrath noted that the daily use of Ritalin or other medication for Attention Deficit Disorder would significantly improve Complainant’s attentional errors. Id. at 6. Dr. McGrath suggested that Complainant reconsider pursuing higher education in areas that are “not a natural strength for him” and recommended the following

accommodations: extended time on timed tests, a quiet environment for test-taking, an individual tutor, continued treatment for depression and inattentiveness, and developing the habit of re-checking work for attentional errors. Id. at pp. 6-7.

12. According to Complainant, Deputy Nardelli said, "Don't think this is going to make anything easier for you." Transcript, Day 1 at 108; Day 2 at 128. Complainant asserts that he did not receive a response from anybody in the Department in regard to his neuropsychological evaluation and that no one asked him how the Department could help him learn. Transcript, Day 1 at 108, 140, 180; Day 2 at 121-122, 125. I credit this assertion.
13. Chief Francis testified that after he was shown the neuropsychological report, he asked Complainant, "What else do you need? Is there something we're not providing you?" and received no response. Transcript, Day 3 at 23. I do not credit this assertion because: 1) Chief Francis testified elsewhere that he could not remember discussing reasonable accommodations with Complainant; 2) he deferred to Deputy Nardelli, who declined to testify, regarding the specifics of the reasonable accommodations provided to Complainant; and 3) he maintained that Complainant could have received extra assistance from instructors who stayed late approximately once per week to assist any recruits who needed help. Transcript, Day 3 at 23, 34, 36-37, 61. I find that Complainant did not receive any assistance during recruit school that differed from, or was more specialized than, the generic assistance made available to all members of the recruit class.
14. Complainant asserts that after he submitted his neuropsychological evaluation, he was treated differently. Transcript, Day 1 at 109. Complainant claims that Captain Foye

was always "at [him] for something" and began to address him in a sarcastic manner such as asking if he knew the difference between his right and left hands and asking him which hand he used to "jerk off" after a fire extinguisher drill in which Complainant used the wrong hand to operate a piece of equipment. Transcript, Day 1 at 110-112, 115. According to Complainant, the stress from the hostile treatment caused him to make mistakes and forget things. Transcript, Day 2 at 110, 116. I credit Complainant's testimony.

15. Complainant and four other recruits in his drill school class did not successfully pass Firefighter I and II exams on their first attempt. Transcript, Day 1 at 117. The exams are administered by the Massachusetts Fire Academy during drill school. Transcript, Day 1 at 115-116. The exams test an applicant's knowledge of drill school subjects. Complainant and the four other recruits who failed the tests were allowed to proceed to fire station assignments when drill school ended. Complainant re-took the exams approximately two months later after studying suggested materials and passed them on his second attempt in May 2014. Transcript, Day 1 at 117-118. Complainant's Exhibit 1. The other four recruits were sent back for re-training in lieu of termination. Transcript, Day 1 at 168; Day 2 at 160-161.

16. As a probationary firefighter, Complainant was assigned to three different "two-piece" fire stations in order to learn how to operate both ladder and engine trucks. Transcript, Day 4 at 24-25. Probationary firefighters rotate through three stations in order to learn how to handle a spectrum of matters such as helping citizens, extinguishing fires, handling overdoses, dealing with traffic accidents, and responding to medical calls. Transcript, Day 4 at 50-51, 55.

17. Complainant's first assignment, beginning on March 24, 2014, was at Station 1 where he reported to Captain Shawn Kerr. Exhibit D. While at Station 1, Complainant worked on both a ladder truck and an engine. Transcript, Day 1 at 140, 173. When Complainant worked on the ladder truck, he typically responded to medical calls or climbed ladders to inspect roofs. Transcript, Day 1 at 140-141. When he worked on a squad truck/engine, he performed pumping operations. Id. at 144. Complainant remained at Station 1 until June 1, 2014. Id. at 145. He performed pumping drills on several occasions under the direction of Lt. Mclean. Id. at 170. Complainant testified that Lt. Mclean's efforts to assist him were genuine; however, Complainant also asserted that he was purposely misled when told to initiate action at a medical call rather than wait for a more senior officer to do so. Transcript, Day 1 at 126, 170-171.

18. Complainant testified that during his tenure at Station 1 he felt unwelcome and was ostracized. Transcript, Day 1 at 125. He claims that he was subjected to more pranks than other firefighters and that the pranks were mean-spirited rather than humorous. Transcript, Day 1 at 137. Complainant described having buckets of water dumped on him "pretty much constant[ly]." Transcript, Day 1 at 127. According to Complainant, buckets were set up to fall on him from the second-floor windows of the fire house, from the top and inside of the ladder truck, and from the opening of the fire pole. Transcript, Day 1 at 128-129. Complainant testified that on one occasion when he baked a cake and served a piece to a fellow firefighter, Deputy Nardelli said, "What did you do that for? He's the reason why you're running around here soaking wet all the time." Transcript, Day 1 at 130. Complainant asserts that on one occasion when he returned to the fire house in the middle of the night from a call, he found a 210 pound

dummy strapped in his bed. Transcript, Day 1 at 130-131. He described other incidents in which “dead lobsters” were placed in his coat pockets, his bed was propped up on soda cans, the tires of his car were placed on wooden blocks, and he was sprayed with chemical spray from a fire extinguisher. Id. at 132-135, 155. Complainant states that he was given the “cold shoulder” every day and that no one would talk to him. Id. at 138. He claims that the pranks he was subjected to were humiliating and that they made it difficult for him to concentrate at work. Id. at 136. Complainant testified that the treatment depressed him and made him feel like no one liked him. Id. He stated that he did not report his treatment because he thought complaining would make things worse. Id. at 139. According to Complainant, Captain Kerr was aware of the situation because on one occasion, water that was intended for Complainant hit Captain Kerr. Id. at 138. I credit these assertions.

19. According to the credible testimony of Chief Francis and Captain Goodale, everybody is a victim of fire house pranks at some point. Transcript, Day 3 at 41; Day 4 at 96. Captain Linscott claimed that firefighters generally prank individuals they like and ignore individuals they don’t like. Transcript, Day 4 at 31. I do not credit this testimony, nor do I credit the statement of Chief Francis that if an individual doesn’t want to be subjected to pranks, he/she can inform a company officer and the pranking will stop. Transcript, Day 3 at 42, 73-74. I find that Complainant was subjected to more and meaner pranks than those visited upon others.

20. At the conclusion of Complainant’s first rotation, Captain Kerr drafted a report describing Complainant as respectful and punctual but unable to grasp tasks despite daily and individualized training in the basic fundamentals of ladder and squad

company operations. Exhibits F & N. Captain Kerr stated that Complainant exhibited a lack of attention to detail and an inability to accomplish tasks despite training.

21. According to Captain Kerr, Deputy Nardelli and Chief Francis, Complainant was studying for his nursing certification exam rather than familiarizing himself with fire equipment during his free time at the station. Transcript, Day 3 at 10-11. Deputy Nardelli and Chief Francis told Complainant not to bring nursing materials to the station and to use his free time to become familiar with fire tools, hose fittings, and fire trucks. Transcript, Day 1 at 155. Complainant claims that he only studied nursing material after passing his Firefighter I and II exams and only did so while others watched TV or read magazines. Transcript Day 1 at 154. He likewise maintains that while he continued to work an occasional overnight shift as a security officer at MGH during his probationary period, he only did so on weekends when the shifts did not conflict with his responsibilities as a probationary firefighter. Transcript, Day 2 at 2-7.
22. On June 1, 2014, Complainant started his second assignment at Station 2 on Engine 2 and Ladder 2, reporting to Captain Paul Linscott. Transcript, Day 4 at 49; Exhibit F, p. 2. Captain Linscott provided Complainant with numerous practical drills because Complainant said that he learned through repetition. Transcript, Day 3 at 107-109; Day 4 at 29. According to Complainant, the amount of drilling increased to the point that he felt the drills physically and mentally wore him out. Transcript, Day 1 at 176. Complainant acknowledged that the amount of pranking he was subjected to decreased about "fifty notches" at Station 2 but stated that the constant drilling became part of the hazing. Transcript, Day 1 at 169-171. He stated that other crew members didn't want to participate in his drills. Id. at 179. He asserted that drilling on different equipment

confused him and that the drills lacked a methodical process. Id. at 173, 175-178.

Complainant acknowledged that the emotional intensity of the drills was intended to mimic the stress of a real fire but claimed that the intensity of the Station 2 drills was “nerve-wracking.” Id. at 178.

23. Captain Linscott claims that he did not know about Complainant’s learning disability.

Transcript, Day 4 at 29. He described Complainant as slow, nervous, and mistake-prone. Transcript Day 4 at 11-24. He described various errors committed by Complainant almost daily such as reversing discharge and intake lines, “charging” attack lines under pressure (i.e., sending water into hoses under pressure) which causes the line to flip around, and failing to put trucks into pump mode. Transcript, Day 4 at 12-24, 32-36.

24. According to Captain Linscott, Complainant appeared to be arrogant and “borderline” insubordinate. Transcript, Day 4 at 6, 11-12. Captain Linscott testified that on one occasion when Complainant answered a question from a police officer about a domestic violence victim and was later instructed that he was not qualified to answer the question, he responded that he “thought it was a personal conversation.” Id. at 7. Captain Linscott said that on another occasion when he attempted to show Complainant how to fight a brush fire in the woods using “pump cans,” Complainant said he didn’t think the technique worked “that well,” used body language that showed he lacked interest in the operation, complained to a police officer about having to practice the technique, and took a shower when he returned to the fire house while the rest of the men were getting the hose and truck ready for the next response. Id. at 9-11.

Complainant admits that he may have rolled his eyes and that he took a five-minute

shower upon returning to quarters, but denies saying that the cans were “a waste of time,” states that no one ever told him he couldn’t take a quick shower, and notes that he spent three hours servicing the truck and stowing equipment after showering. *Id.* at 151-153.

25. Deputy Albanese, who took over from Deputy Nardelli as Training Director in March 2014, claims that he was not aware that Complainant had a learning disability.

Transcript, Day 3 at 137. Deputy Albanese described Complainant as respectful, polite, and never insubordinate but as lacking attention to detail and not self-motivated. *Id.* Exhibit F. Deputy Albanese’s written reviews of Complainant’s first two rotations assert that Complainant studied for his nursing certification instead of learning his job as a firefighter and maintains that fellow firefighters were upset that their efforts to assist Complainant were not appreciated. Exhibits F & N. Deputy Albanese wrote that during a pump drill in April 2014, Complainant twice failed to properly unroll a hose despite being corrected the first time; that during an attack pump drill in June 2014, Complainant failed to put Engine 2 “in pump” and was “painfully slow” in getting a water supply despite practicing this operation numerous times; that during a pump drill the following week, Complainant did not know which line to charge in order to feed Engine 11, forgot to put the truck “in pump” and delayed getting water to Engine 11; and that in July 2014, Complainant confused discharge and intake openings and on multiple occasions when attempting to connect a portable hydrant, did so backwards. Exhibit F.

26. Captain Linscott testified that although he tried to “calm down” Complainant after unsuccessful drills and arranged for Complainant to work with non-ranked firefighters

who were less intimidating than ranked officers, he rejected Complainant's suggestion that he write out the steps required in firefighting operations in order to demonstrate that he knew what he was supposed to do. According to Captain Linscott, Complainant needed to perform the steps, not describe them in writing. Transcript, Day 1 at 149; Day 2 at 134-135; Day 4 at 17.

27. Complainant was more comfortable performing the EMS portion of his job than pumping operations due to his medical training. He participated in resuscitating numerous people, set up and used a defibrillator, and revived a victim of a drug overdose by placing an oral pharyngeal airway into her throat and administering Narcan. Transcript, Day 1 at 141-142. However, Deputy Albanese, Captain Linscott, and Captain Goodale maintained that Complainant displayed a tendency to "over-perform," i.e., to diagnose patients rather than to provide emergency treatment. Transcript, Day 3 at 149; Day 4 at 65, 71; Exhibits F & I.

28. On June 20, 2014, during his assignment at Station 2, Complainant was late for work because he left his car (with his uniform inside) at a bar on the previous night. Exhibits E & F. Because Complainant drank alcohol the prior evening, he got a ride home and the next morning had to retrieve his car from the bar before going to work. Transcript, Day 1 at 159-160; Day 2 at 88-89. Complainant testified that he was, at most, five-to-ten minutes late and was able to participate in the first run of the truck. Id. at 161. Complainant states that he truthfully related to supervisors what happened after returning from the run. Id. at 162-163. According to Complainant, Deputy Nardelli said, "the Chief stuck his neck out for you. ... If it were up to me, I would have fired you." and then told him to "Get the F... out of here." Id. at 165-166. Captain Linscott,

who was in the room, confirmed that Deputy Nardelli was “not pleased” and yelled at Complainant. Transcript, Day 4 at 66-68. Chief Francis told Complainant that he shouldn’t be drinking while pursuing a career as a firefighter and told Complainant to go back to Alcoholics Anonymous. Transcript, Day 3 at 14. Complainant admits that, on occasion, he drank alcohol during his time as a probationary firefighter but claims that it did not impact his work aside from the day he was late. Transcript, Day 2 at 79, 85.

29. Captain Linscott rated Complainant as adequate on ladder operations and medical calls. Transcript, Day 4 at 59. However, at the end of Complainant’s second rotation, Captain Linscott concluded that Complainant could still not adequately perform the most basic pump drills and that his weaknesses posed a danger to those working alongside of him. Transcript, Day 4 at 59-66, 70; Exhibit I. According to Captain Linscott, being able to pump is “absolutely” an essential function of the job. *Id.* and Day 4 at 37. Captain Linscott testified that when ladder trucks need repairs, they are replaced by engines, requiring ladder personnel to know how to operate engines. Transcript, Day 4 at 39. For this reason, and to cover vacationing firefighters, all individuals at “two-piece” stations are cross-trained and must know how to perform pumping operations.
30. Complainant’s third assignment began on August 4, 2014. Exhibit J. He was assigned to Station 4, Engine 4 under the supervision of Captain Goodale. In a 2015 letter to a fellow firefighter, Complainant stated that Captain Goodale was “[t]he only person I worked for that may have actually tried to help me.” Exhibit X. Complainant testified that under Captain Goodale, he started to feel more comfortable performing pumping

operations because Captain Goodale's approach to training was slower and less intense.

Transcript, Day 1 at 181.

31. Captain Goodale testified that he was not aware that Complainant had a disability while he was at Station 4. Transcript, Day 4 at 87. Captain Goodale's reports describe Complainant as "very likeable and easy to get along with" who "fits in well with my crew" and "does a very good job on medical calls" but is "not a self-starter," is "stand-offish," lacks an aptitude for the mechanical aspects of the job, and had a "very big weakness" in pumping operations. Transcript, Day 4 at 134; Exhibits J & K. When asked if Complainant was respectful, Captain Goodale replied "very much so." Transcript, Day 4 at 114. Captain Goodale reported that Complainant was unable to calculate engine pressures, nozzle pressures, or friction losses and opined that Complainant's performance was "worrisome to say the least." Exhibits J & K. Captain Goodale's final report states that Complainant was unable to "dress" a hydrant, could not "charge a booster line," had very poor math skills, had no aptitude for using tools, lacked physical stamina, and on one occasion failed to wear breathing apparatus at a fire. Id. According to Captain Goodale, Complainant was a danger to fellow crew members. Id. Captain Goodale testified at the public hearing that Complainant's problem area was pumping which he described as a "paramount" job duty. Transcript, Day 4 at 79-80, 88. He stated that Complainant failed to compensate for his difficulty in computing engine pressures by memorizing pre-determined pressures. Transcript, Day 4 at 83, 106-107. Captain Goodale states that he tried to find new approaches to teaching Complainant pumping operations and calculating engine pressures, but couldn't get through to Complainant. Transcript, Day 4 at 82. Captain Goodale

testified that Complainant was a “really nice guy” but was unable to perform the job of firefighter. Id. at 80, 85. According to Captain Goodale, Complainant was drilled on pump operations “over and over” and “at every possible opportunity” in an unsuccessful effort to improve his performance. Exhibits K & L.

32. During Complainant’s third assignment, then-Training Director Albanese, observed him during a pump drill on August 15, 2014. Deputy Albanese reported that Complainant was unable to operate a portable deck gun in order to obtain a water supply despite the operation having been covered “multiple times” in drill school. Exhibit M. According to Deputy Albanese, Complainant did not know the pressure required for the operation despite receiving a hydraulics card in drill school which he was expected to study and learn. Id.

33. Based on his own observations and the reports of other supervisors, Deputy Albanese wrote to Chief Francis on August 21, 2014 that Complainant did not demonstrate sufficient effort, did not pay sufficient attention to details, could not perform basic operations despite training, and was either unable or unwilling to successfully perform the job of firefighter. Exhibit F. At the public hearing, Deputy Albanese acknowledged that Complainant was respectful and polite but stated that he could not think on his feet, “wasn’t grasping it,” and failed to master the basic operations taught in drill school. Transcript, Day 3 at 110, 119; Exhibit F, p.2. Deputy Albanese disputed that training could have been made less stressful on the basis that stress is a necessary part of the job.

34. After learning of Deputy Albanese’s evaluation, Chief Francis wrote to Complainant on September 4, 2014 stating that he would be terminated or would have his probationary

period extended if he failed to gain proficiency in the following areas: performing standard pumping drills, identifying and using tools, and driving/operating apparatus.

Exhibit Y, p. 231.

35. Complainant testified that he felt bullied, intimidated, and demeaned by Chief Francis's letter of September 4, 2014. He claimed that Deputy Nardelli was "laughing in my face" when he delivered it. Transcript, Day 1 at 181-182.
36. After Complainant completed his third rotation, he was assigned back to Station 2 under Captain Linscott. Transcript, Day 4 at 25.
37. Deputy Albanese arranged for a "large-scale" drill to be held on November 24, 2014 involving timed scenarios, multiple trucks, and numerous people to test Complainant's progress. Exhibit Y, p. 282; Transcript, Day 1 at 182-186; Day 3 at 125. Deputy Albanese described the drill as consisting of basic evolutions which probationary firefighters are expected to perform. Transcript, Day 3 at 125. According to Deputy Albanese, Complainant became "discombobulated" during the first three evolutions. Id. at 126. Deputy Albanese claims that Complainant failed to supply water because he used the wrong radio channel, failed to properly calculate pumping pressures, failed to properly uncoil hose lines which caused the lines to strike the truck, parked his engine in the wrong location, dumped a hose line on the ground, failed to assist fellow firefighters, failed to close a valve, failed to wear proper gear which caused his equipment to fall to the ground, failed to supply tank water while attempting to charge a line, and needed prompting to shut off drains. Exhibit Y, p. 282-285. Deputy Albanese stopped the drill because Complainant became "overwhelmed" by his mistakes. Id. Chief Francis, who was present for the drill, concurred that Complainant was incapable

of obtaining water in a timely fashion during the pump drill. Transcript Day 3 at 27-28. According to Complainant, he gave a “good effort” but became distracted and intimidated. Transcript, Day 1 at 184-186.

38. On December 4, 2014, Chief Francis received a letter from Deputies Nardelli and Albanese and Captains Kerr, Goodale, and Linscott stating that Complainant had shown little or no progress since leaving drill school despite performing numerous drills on firefighting equipment. Exhibit P. The signatories stated that Complainant posed a risk to himself and to others and should not continue to be employed as a firefighter. *Id.* Deputy Albanese testified that he drafted the letter because he felt that Complainant was going to hurt himself, other firefighters, or members of the public. Transcript, Day 3 at 131. According to Deputy Albanese, terminating an employee is “virtually non-existent” due to the effort expended during training. *Id.* at 132-133.

39. On December 18, 2014, Chief Francis wrote to Brockton Mayor Bill Carpenter recommending that Complainant be terminated prior to the conclusion of his probationary period based on his failure to attain proficiency in fire operations and procedures. Exhibit Q. Chief Francis testified that he did not extend Complainant’s probationary period because he did not believe that Complainant’s skills would have improved if given more time. Transcript, Day 3 at 25.

40. On December 30, 2014, Complainant arrived at work and received a termination letter stating that he was terminated effective December 29, 2014 – the last day of his probationary period. Exhibit A. The letter cites Complainant’s inability to perform required tasks such as pumping operations, his inability to follow instructions, his

failure to report to calls properly equipped, and his alleged communication to a supervising officer that pump can training was a waste of time. Id.

41. Complainant describes experience on the Brockton Fire Department as a “devastating thing” which destroyed his life and reputation. Transcript, Day 1 at 191, 195. He testified that he felt betrayed, embarrassed, and a different person than he was before. Id. at 192, 195. Complainant testified that his experience hindered him from getting his sobriety under control. Id. He testified that after being terminated, he found it difficult to get out of bed for three months, he became very angry, he lost friends, and he had issues with his short-term memory. Transcript, Day 2 at 142-145. According to Complainant, he was forced to stop seeing a mental health counselor that he had been seeing since 2007 because he lost his health insurance. Id. at 145-146, 158.
42. After his termination from the Brockton Fire Department, Complainant worked per diem shifts as security officer for MGH until a full time position as a security officer became available in May 2015. Transcript, Day 2 at 10-16. He worked there full-time until resigning in August 2015 in order to study for the National Council Licensure Exam (NCLEX) for registered nurses which he had previously taken and failed on two occasions. Transcript, Day 1 at 45. Complainant passed the exam in April 2016 and thereafter began to work as a RN at various facilities. He continues to be employed as a RN.
43. In May 2017, Complainant saw Dr. McGrath for a follow-up evaluation to address the applicability of Dr. McGrath’s 2006 report to Complainant’s experience as a probationary firefighter. Complainant’s Exhibit 8. Dr. McGrath opined that Complainant’s 2006 diagnosis of a learning disability would have been a “limiting

condition” in regard to a firefighting job. *Id.* In his 2017 report, Dr. McGrath gives his clinical opinion that workplace harassment or hazing, such as having buckets of water dumped on an individual repeatedly, being sprayed with a fire extinguisher, and having one’s car vandalized would have, more likely than not, made it more difficult for an individual with Complainant’s clinical diagnosis to learn departmental procedures during his probationary period. Complainant’s Exhibit 8.

III. CONCLUSIONS OF LAW

A. Failure to Accommodate

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities, has a record of an impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1(17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) (“MCAD Handicap Guidelines”) at p. 2. According to 2008 amendments to the Americans with Disabilities Act (“ADA”), the term “disability” (i.e., handicap) is to be construed in a manner that favors broad coverage and disfavors extensive analysis. See ADA Amendments Act of 2008, Public Law # 110-325, section 2 (b) (5), amending Americans with Disabilities Act of 1990, 42 U.S.C sec. 12101 et seq.

Complainant is entitled to the benefit of doubt on the issue of handicap status based on his neuropsychological evaluations and his past struggles with learning and depression. A 2006 report drafted by Dr. Neal McGrath, PhD concludes that Complainant has a disability in regard to nonverbal learning which impedes the synthesis of new information in areas

such as science, that he possesses an inventory of traits and symptoms associated with Attention Deficit Disorder, and that he has moderate to severe depression with concentration difficulties. According to Dr. McGrath, Complainant's learning difficulties would have hampered his mastery of firefighting skills. Dr. McGrath's findings were updated in a May 2017 report which deemed the 2006 diagnosis to be relevant to Complainant's experience as a probationary firefighter.

Apart from the expert opinion of Dr. McGrath, Complainant's documented past struggles with math and science, his low-average diagnostic scores involving non-verbal functions, and the impact of depression on his acquisition of information paint a picture of an individual who has labored to acquire competency in nonverbal skills. While ultimately succeeding in a number of academic pursuits, Complainant did so after failing and re-taking numerous courses and exams, paying a mentor to assist him in completing a master's thesis, and receiving inpatient care for substance abuse, depression, and suicidal ideation. These factors depict an individual whose ability to grasp new information is compromised by neurological deficits, ADD, depression, and the ability to handle stress. Compare Wright v. Compusa, Inc., 352 F.3d 472 (1st Cir. 2003) (no handicap where lack of evidence that ADD rendered plaintiff generally unable to perform a usual activity or unable to handle stress).

In order to state a case of handicap discrimination based on a failure to accommodate, Complainant bears the initial burden of producing some evidence to prove that he was a qualified handicapped person capable of performing the essential functions of his job who requested a reasonable accommodation. See Russell v. Cooley Dickinson Hospital Inc.,

437 Mass. 443 (2002); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63 (2000).

A reasonable accommodation is defined as “any adjustment or modification to a job that makes it possible for a handicapped individual to perform the essential functions of the position” Employment Discrimination on the Basis of Handicap, Chapter 151B – 20 MDLR Appendix (1998), section II(C) (“MCAD Handicap Guidelines”); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648, n.19 (2004). An accommodation is not reasonable if it would impose an undue hardship on the operation of a business, such as requiring significant difficulty or expense when considered in light of the financial resources of an employer. See Mazeikus, 22 MDLR at 68.

Complainant did not make an explicit request for a reasonable accommodation, but, arguably, his submission of a neuropsychological report on around day eight of drill school amounted to a *de facto* request for an accommodation. The report documents his learning disability and provides suggestions for dealing with it. The evaluation was submitted in response to questions about why Complainant was having difficulties mastering training material. It discloses information about Complainant’s past academic struggles, provides a diagnosis of Complainant as learning disabled, and presents suggestions for overcoming difficulties.

The parties disagree about how Brockton Fire officials responded to the neuropsychological report. Complainant asserts that they did nothing whereas Chief Francis claims that the Fire Department made extra resources available to assist Complainant during drill school. I credit Complainant in this regard but nonetheless recognize that even if the Fire Department failed to accommodate Complainant’s learning

disability during drill school, he still succeeded in passing the classroom program. It was not until Complainant was assigned to on-the-job training at three different "two-piece" fire stations that he encountered insurmountable difficulties. Notably, at this stage of his training there is no evidence that Complainant requested any accommodations to alleviate the difficulties he faced. See Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632. 649, n. 21 (2004) (employer not required to accommodate a need that it does not know exists).

In any event, the duty to engage in an interactive process will not always pertain to situations such as the present one where a dialogue would likely have been futile. See MBTA v. MCAD, 450 Mass. 327, 342 (2008) (interactive process not required where employer can demonstrate that all conceivable accommodations would impose undue hardship); Gracia v. Northeastern University, 31 MDLR 1 (2008). Complainant argues that his difficulties grasping the essential functions of firefighting might have been ameliorated had he been given non-punitive drills presented in a systemic and non-threatening manner, but the evidence does not support such a claim. There are sound, job-related reasons why the drills were implemented to mimic the stress of real life fires. As far as the repetitiveness of the drills is concerned, Complainant now argues that the constant drilling was objectionable but during his probationary period he stated that he learned best through repetition.

The entire command staff concurred that Complainant's performance at the station houses posed a risk to himself and others. They evaluated Complainant as lacking basic firefighting skills such as the ability to calculate engine pressures, nozzle pressures, and friction losses; the ability to dress a hydrant, and the ability to charge a booster line. They

agreed that Complainant was deficient in the “paramount” area of pumping.² Based on the foregoing, the evidence fails to support Complainant’s position that implementation of an interactive process exploring reasonable accommodations for Complainant would have led to his success. See Jones v. Walgreen Co., 679 F.3d 9 (1st Cir. 2012) (duty to accommodate does not arise unless employee can perform essential functions of job with an accommodation); Gracia, 31 MDLR at 6 (employer not required to participate in fruitless dialogue).

That an interactive process would have been futile is underscored by the fact that Complainant contributed to his difficulties at work. He failed to take medication for ADD despite professional advice that he do so daily, failed to memorize categories of pump pressures by rote which would have reduced his need for making mathematical calculations, failed to familiarize himself with firefighting equipment during his free time at the fire house, and began to drink again after maintaining sobriety for three years. Rather than attend to firefighting matters during his free time at the station, Complainant studied for nursing exams. These factors foreclose the possibility that Complainant might have achieved proficiency as a firefighter had an interactive process been implemented. Given the established deficiencies in Complainant’s skill set after a year of training and the life and death consequences of firefighting, I conclude that Complainant was not a qualified

² In his post hearing brief, Complainant suggests that he could have been accommodated by being relieved of pumping responsibilities but such an accommodation is not reasonable because it requires the waiver of an essential job function. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998) (a qualified handicapped individual must be capable of performing essential functions of job with or without reasonable accommodation); Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995) (same); Cox v. New England Telephone & Telegraph Co., 414 Mass 374(1993) (reasonable accommodation doesn’t waive performance of essential job functions). The factual record in this case provides ample support for the proposition that pumping operations lie at the heart of firefighting and that pumping skills are an essential function of the job.

handicapped individual capable of performing the essential functions of the job with a reasonable accommodation. Accordingly Complainant failed to establish that Respondents violated G.L.c.151B by failing to accommodate his learning disability.

Disability Harassment

General Law c. 151B affords employees the right to work in an environment free of discriminatory intimidation that creates a hostile work environment and interferes with one's ability to do her job. See Helmuth v Harvard Vanguard Medical Associates, Inc., 27 MDLR 177, 184 *citing* College-Town v. Div. of Interco, Inc. v. MCAD, 400 Mass.156 (2001); Scionti v. Eurest Dining Services, 23 MDLR 234, 239 (2001). The protections of the statute with respect to a sexually-hostile work environment have been extended to situations where harassment occurs to members of other protected classes. See Helmuth 27 MDLR at 184 *citing* Beldo v. Univ. of Mass. Boston 20 MDLR 105 (1998); Richards v. Bull H.N. Information Systems, Inc. 16 MDLR 1639 (1994).

In order to establish a claim of discriminatory harassment, Complainant must show that that the conduct alleged was sufficiently severe and pervasive to interfere with a reasonable person's work performance and that the hostile work environment was linked to his protected class. See Helmuth, 27 MDLR at 184 *citing* Muzzy v. Cahillane Motors, Inc. 434 Mass. 409 (2001); Cuddy v. Stop & Shop Supermarket Co. 434 Mass. 521 (2001). A hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization [that] poses a formidable barrier to the full participation of an individual in the workplace." See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987).

Complainant testified credibly that during his tenure at Station 1 he was subjected to more pranks than other firefighters, that the pranks were mean-spirited rather than humorous, and that he was ostracized rather than included in the collegial life of the station house. Complainant described being constantly assaulted with water, including buckets of water that were set up to fall on him from second-floor fire house windows, from the top and inside of the ladder truck, and from the opening of the fire pole. On one occasion when he returned to the fire house in the middle of the night from a call, he found a 210 pound dummy strapped in his bed; on other occasions he had "dead lobsters" placed in his coat pockets, his bed propped up on soda cans, and the tires of his car placed on wooden blocks. Complainant was sprayed with chemical spray from a fire extinguisher as well as being drenched continuously with buckets of water. He testified in a believable fashion that he was given the "cold shoulder" every day and that no one would talk to him. He offered poignant testimony that the humiliating pranks to which he was subjected depressed him, made it difficult for him to concentrate at work, made him feel like no one liked him, and caused him to make mistakes and forget things.

There can be no dispute that Respondent's supervisors were aware of the treatment visited upon Complainant. On one occasion when he baked a cake and served a piece to a fellow firefighter, Deputy Nardelli said, "What did you do that for? He's the reason why you're running around here soaking wet all the time." On another occasion, a bucket of water that was intended for Complainant hit Captain Kerr.

Likewise, the evidence supports a conclusion that there was a causal connection between Complainant's disability and his harassment. Unremitting harassment followed on the heels of Complainant's communication to Deputy Nardelli of his learning issues and

depression. Although several supervisors maintained that they were not aware of Complainant's disability, I do not credit their claims in this regard. In any event, the communication of Complainant's disability to Deputy Nardelli serves as constructive notice to the Department. See Cooper v. Raytheon Co., 38 MDLR 28 (2016) (recognizing constructive notice of need for an accommodation where employee provided a power point presentation to various supervisors of cognitive deficiencies and need to learn in new way).

The treatment that Complainant received at Station 1 was not the type of good-natured pranking visited upon other firefighters. It was more egregious, both in character and amount. Combined with Complainant's ostracism, the harassment established a material alteration of Complainant's work environment and compounded his learning difficulties. Based on the foregoing, I conclude that Complainant was subject to a hostile work environment based on his disability in violation of G.L. c. 151B.

C. Individual Liability

Respondent Brockton Fire Department is liable for damages based on the above determination that it tolerated the existence of a hostile work environment at Station 1. See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass 156, 165 (1987) (employer vicariously-liable for discriminatory conduct). As well, Complainant seeks to hold retired Deputy Brian Nardelli individually liable for the same violations of G.L.c.151B.

As Training Director through March of 2014, Deputy Nardelli exercised authority over the terms and conditions of Complainant's employment. However, he did not do so individually but in concert with Chief Francis and others on the Fire Department command staff. As far as harassment is concerned, it appears that other supervisors and officers were more responsible for the toxic atmosphere at Station 1 than was Deputy Nardelli.

Accordingly, I decline to hold Deputy Nardelli individually liable. See Woodason v. Town of Norton School Committee, 25 MDLR 62, 64 (2003) (Full Commission) (individual liability where person who has authority to act on behalf of employer demonstrates intent to discriminate by acting in deliberate disregard of Complainant's rights).

IV. Remedy

Upon a finding of unlawful discrimination, the Commission is authorized to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, 441 Mass. at 576. Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See id. at 576; Buckley Nursing Home, 20 Mass. App. Ct. at 182-183. Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 Mass. at 576.

Complainant testified that during his tenure at Station 1 he felt unwelcome and was ostracized. Het states that he was given the "cold shoulder" every day and that no one would talk to him. He claims that the pranks he was subjected to were humiliating and that

they made it difficult for him to concentrate at work. Complainant testified that the treatment depressed him and made him feel like no one liked him.

Not all of the emotional distress described by Complainant can be attributed to his experience at Station 1, however. Complainant was also profoundly affected by being terminated. Complainant testified that after being dismissed as a firefighter, he found it difficult to get out of bed for three months, he became very angry, he lost friends, and he had issues with his short-term memory. He was forced to stop seeing a mental health counselor that he had been seeing since 2007 because he lost his health insurance. The emotional impact of termination, while profound, is not compensable because Complainant failed to prevail on his claim of failure to accommodate. For this reason, I decline to apportion all of the emotional distress which Complainant experienced at the Brockton Fire Department to his harassment at Station 1. See DeRoach v MCAD, 447 Mass. 1, 8 (2006) (emotional distress must be causally-connected to finding of discrimination).

Based on the foregoing, I conclude that Complainant is entitled to \$40,000.00 in emotional distress damages.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondents are subject to the following orders:

- (1) As injunctive relief, the Respondent Brockton Fire Department is directed to cease and desist from engaging in acts of disability harassment.

- (2) The Respondent Brockton Fire Department is liable to pay Complainant the sum of \$ 40,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (3) The Respondent Brockton Fire Department shall conduct, within one hundred twenty (120) days of the receipt of this decision, a training of its supervisory staff. Such training shall focus on all facets of disability discrimination. The chosen trainer shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the 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. To do so, a party must file a Notice of Appeal 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.

So ordered this 11th day of April, 2018.

A handwritten signature in dark ink, appearing to read "Betty E. Waxman", with a long, horizontal, sweeping flourish extending to the right.

Betty E. Waxman, Esq.,
Hearing Officer