COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DONNALYN SULLIVAN,
Complainants

v. DOCKET NO. 07-BEM-00453

MIDDLESEX SHERIFF'S OFFICE,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant, Donnalyn Sullivan, a 17- year employee of the Middlesex Sheriff's Office. Following an evidentiary hearing, the Hearing Officer concluded that Respondent violated M.G.L. c. 151B and awarded the Complainant damages for lost wages, lost benefits such as sick leave, vacation, and seniority, reinstatement to her position and damages for emotional distress.

The Hearing Officer found that Respondent denied Complainant a reasonable accommodation for her asthma-related disability. She also found that after Complainant engaged in protected activity by requesting a reasonable accommodation and filing a complaint with the Massachusetts Commission Against Discrimination ("the Commission"), Respondent engaged in acts of retaliation when it sent her home from the workplace and subsequently filed for involuntary disability retirement benefits on her behalf. We remand the decision with respect to the order of reinstatement, but otherwise affirm the decision in all respects.

STANDARD OF REVIEW

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

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF THE FACTS

Complainant worked for the Middlesex Sheriff's Office as a Correction Officer ("CO") at the Respondent's Billerica and Cambridge facilities from 1990 through January of 2007. In 1991, Complainant was diagnosed with asthma. During the years she worked at the Middlesex Sheriff's Office, she could perform all work-related activities when her asthma was under control, including outdoor work for up to a full day. Complainant's asthma gets worse when she has prolonged exposure to outdoor elements

in cold air. She was hospitalized in 1994, 1995 and 1996 due to difficulty in breathing. Following her hospitalization in 1996, Complainant returned to work at the Middlesex Sheriff's Office on a modified schedule for a four to six week basis. Since her hospitalization, Complainant has avoided serious incidents of asthma through the use of inhaler medication and avoidance of cold weather.

Complainant's assignments for the Middlesex Sheriff's Office included a transportation post which she successfully bid on from 2001 until March of 2005, when her firearms permit was indefinitely suspended. [1] Complainant was removed from her transportation assignment, and placed in the "utility pool' at the Billerica facility where she was assigned a variety of posts, including the front office, patrol and work release. The posts available for assignment of Correction Officers include outdoor, indoor and partially indoor positions. For example, a CO assigned to a transportation post is responsible for transporting inmates from the prison facilities to courts and other locations. Complainant described the transportation post as "primarily indoors" to the extent most time is spent in environmentally-controlled vans, courthouses and other buildings. Following the gun incident, Complainant repeatedly sought the return of her gun permit and anticipated return to her transportation assignment.

In October of 2006, her direct supervisor, then- Captain Hopkinson,[2] assigned Complainant to the outdoor post of Trap 1, a utility assignment at the Billerica facility

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[1] Complainant mistakenly left her gun belt and equipment in a public restroom on March 29, 2005. Complainant was sanctioned with a thirty day suspension, with five working days to serve, indefinite suspension of her firearms permit and eight hours of training of the proper handling of firearms. Joint Exhibit 36.

[2] Complainant was assigned to Trap 1 96% of the time during the period from October 10, 2006 through January 23, 2007. Captain Hopkinson testified that any one of the 77 to 80 Correction Officers could have filled the Trap 1 position and she was assigned there for the duration for "no specific reason" other than "She was doing a good job there...She did a good job anywhere we put her." Transcript VIII, p.85; Hearing Officer's Finding ¶33.

where officers verify the credentials of vehicle operators who seek to enter the secure area of the facility. Complainant's position required her to be outdoors most of the day, and although there was a wooden shack, it had no insulation and was inadequately heated so the temperature inside the shack was similar to the outdoors. During the fall of 2006, Complainant informed her direct supervisor that she would need an indoor post when the weather became cold because extreme cold aggravated her asthma.[3] Complainant spoke to the Captain numerous times, and each time he responded in a noncommittal fashion, telling her when the time came, he would look into it.

In December 2006, Complainant's asthma became severely aggravated due to prolonged exposure to the cold. Complainant again asked Captain Hopkinson if she could be reassigned indoors on days of "extreme" cold as an accommodation to her asthma, but her requests were not granted. Complainant testified that she did not request to be reassigned indoors indefinitely, but rather to be allowed to work inside sporadically. In January 2007, weather conditions caused Complainant's asthma to become more unstable and she experienced tightness of the chest and wheezing. Complainant was out of work using sick time during the second week of the month, and saw her physician. Upon her return to work, she submitted a note from her doctor to Respondent stating that her asthma had become unstable due to her assignment to an outdoor post during cold weather. Respondent persisted in refusing to grant or even discuss a reasonable accommodation and continued to assign her to the Trap. Thereafter, Complainant

[3] The Hearing Officer found that Captain Hopkinson was not credible when he denied that Complainant asked him to move her inside from the assignment at Trap I during cold weather or that he knew she had asthma prior to January of 2007 given Complainant's history of asthma-related absences and use of an inhaler at work. Hearing Officer's Finding, ¶46.

submitted a second doctor's note from her treating physician, Dr. Lawrence Kenney, dated January 23, 2007 stating that her asthma could be life threatening if uncontrolled.

On January 24, 2007, Complainant was initially assigned to an indoor post involving the escort of prisoners. After asking Complainant to rip up Dr. Kenney's note, Respondent ordered the unwilling Complainant to go home on sick leave. Complainant was later ordered to attend a fitness-for duty evaluation conducted by Dr. Boswell, which concluded in part:

> Ms. Sullivan is unable to work as a correctional officer outside during cold (i.e. less than 50 degrees) or damp conditions. Otherwise it is my opinion that she is capable of performing all job duties of a correctional officer as outlined in the job description provided to me.

The Respondent did not seek clarification from any physician or Complainant about whether Complainant could work outside for short intervals during cold weather. Nor did Respondent discuss these limitations with Complainant. Instead, based solely on the notes from Drs. Kenney and Boswell, Respondent determined that Complainant was incapable of working as a CO. Hearing Officer's Findings of Fact, ¶62.

On March 6, 2007, the Middlesex Sheriff's Office received the Complainant's charge alleging disability discrimination filed with the Commission. On March 15, 2007, Respondent filed an involuntary ordinary disability retirement application on Complainant's behalf. On December 20, 2007, the State Board of Retirement voted to approve the retirement application, which was then approved by the Public Employees Retirement Administration Commission ("PERAC") on January 25, 2008.

Following an eleven-day Public Hearing, the Hearing Officer awarded Complainant back pay, as well as $75,000 in damages for emotional distress. She ordered Respondent to reinstate Complainant to her former position provided that

Complainant "satisfies lawful and relevant eligibility criteria," and to restore her seniority and certain benefits. Respondent was also assessed a $10,000 civil penalty and ordered to conduct training of its supervisors and managers.

BASIS OF APPEAL

Respondent has appealed to the Full Commission, asserting that the Hearing Officer erred as a matter of law in concluding that Respondent is liable for discrimination and retaliation. Respondent also challenges the Hearing Officer's back pay awards, the award of emotional distress damages, the reinstatement order, the civil penalty, and the training provisions contained in the order.

Respondent asserts that the Hearing Officer failed to make findings regarding the essential functions of Complainant's position, and that such a finding is necessary to the determination of whether Complainant established a prima facie case of discrimination and Respondent's obligations to engage in the interactive process to provide a reasonable accommodation. They assert that the lack of findings regarding the essential functions of the CO position is "highly prejudicial," "arbitrary, capricious, and a reversible "error of law." Contrary to Respondent's position, our review reveals that the Hearing Officer devoted a substantial portion of her decision to examining the essential functions of the correction officer position. Consistent with the Job Description for a Correction Officer, the Hearing Officer found that the essential function of the position is the custodial care and custody of inmates. See, Hearing Officer's Finding of Fact, ¶4, Joint Exhibit 33.

She specifically found that numerous CO assignments at the Billerica facility were primarily, if not wholly, indoor positions, that there was no requirement that a CO be permanently assigned to a post where the majority of the day was spent outdoors, and that

Respondent has significant discretion to modify assignments, and does so for a variety of reasons including personality conflicts. See, Hearing Officer's Findings of Fact, ¶¶ 7, 8, 11, 32. Given these facts, the Hearing Officer properly concluded that working outside all day in a permanent position is not an essential function of a CO position. Respondent disagrees with the Hearing Officer's conclusion arguing that a CO's duties must be fully interchangeable, and each officer must be capable of doing every job at any time due to emergencies that arrive and unexpected absences. It argues that an officer must be able to work at any post at any given time and for any period of time. However, there is sufficient evidence in the record based on past and routine practice to support the Hearing Officer's finding that "the length of time that a CO remains in the same post is discretionary." This finding is based on testimony from Captain Richard Hopkinson and Deputy Kevin Slattery that they assigned officers, at their discretion, to the same assignments for periods ranging from three months to eight months. Shift commanders or schedulers at Respondent have the ability and discretion to assign officers wherever they so choose, including discretion to place an officer in an indoor post. Despite the fact that utility officers are trained to serve in all utility posts, they are, in practice, often assigned to the same post for extended periods of time. Indeed, during Complainant's two year tenure as a utility officer, she was assigned to several different posts, but there were many other posts to which she was not assigned. These assigned posts all fell under the umbrella of the Respondent's generic job descriptions for a CO.

Respondent argues that Complainant herself acknowledged that interchangeability was an essential function of the position. However, Complainant testified that officers were moved from one post to another "every day of the week," as evidence of how easily

Respondent could have accommodated her disability by assigning her to a primarily indoor post had it elected to do so. The Hearing Officer did not credit the testimony of Respondent's witnesses regarding the requirement that positions be fully interchangeable at all times. Determining credibility is ultimately the province of the Hearing Officer, who is in the position to observe the demeanor of the witnesses in the relevant context.

Respondent also contends that the Hearing Officer improperly substituted her judgment for that of medical professionals. Specifically, Respondent argues that at least five medical professionals found Complainant to be "totally or severely disabled" and thus unable to perform the essential functions of her job. One of the five doctors Respondent identifies is Dr. Lawrence Kenney, Complainant's treating physician and pulmonologist. Respondent insists that the Hearing Officer ignored and or downplayed Dr. Kenney's statement in his January 23, 2007 note that working outdoors could trigger a severe or life-threatening episode of asthma. While this statement appears in Dr. Kenney's January 23, 2007 note to Respondent, the Hearing Officer understood this note represented Complainant's last ditch effort to get Respondent to recognize her disability and the need to be accommodated. Where Complainant had repeatedly asked her superiors to be reassigned indoors on days of "extreme" cold as an accommodation to her asthma, and her requests had gone unheeded, she was concerned about her asthma becoming unstable. Dr. Kenney noted that if Complainant's asthma were uncontrolled, it could cause a life-threatening situation. While the words were extreme, in context, they were an attempt to gain the attention of Complainant's supervisors to spur a dialogue about how to accommodate her disability. It was not an ultimatum requiring her to stop working, but an attempt to obtain the accommodation she had requested to avoid a life-

threatening situation. At the time Dr. Kenney wrote this note, Complainant's asthma was aggravated and in danger of becoming of a condition that was "severe or life-threatening," only if Respondent continued to deny her an accommodation and required her to remain working outdoors in extreme weather. Respondent suggests that they reasonably interpreted this note to mean that Complainant's asthma could become uncontrolled unexpectedly at any time. This was not the case and the doctor made it clear that only prolonged exposure over time to extreme weather would render her condition uncontrollable. The evidence from Complainant and her physician suggested that Complainant's condition was not haphazard or unpredictable and that she understood how to control it. Dr. Kenney expressed confidence in Complainant's demonstrated ability to manage her asthma and for this reason urged Respondent to solicit her input about her medical needs.

Respondent also asserts that the Hearing Officer ignored the opinion of Dr. Boswell, who conducted a fitness-for-duty evaluation of Complainant, meeting with her one time and asking her several questions about her asthma, after Respondent sent her home from work. Dr. Boswell concluded that Complainant was unable to work as a Correction Officer outside during cold weather, but that she was otherwise capable of performing all of the job duties of a Correctional Officer. The Hearing Officer specifically recognized the opinion, but also recognized the fact that Respondent sought no clarification about whether Complainant could work outdoors for short intervals during cold weather. Hearing Officer's Finding of Fact, ¶62. Instead, Respondent relied merely upon Dr. Boswell's written statement and Dr. Kenney's note to determine that Complainant could no longer work and failed to engage in any dialogue concerning an

accommodation. In any event, Dr. Boswell's conclusory opinion was not inconsistent with Complainant's and Dr. Kenney's testimony that Complainant needed to avoid prolonged exposure to extreme temperatures, but could work outside intermittently if needed for short periods of time.

Finally, Respondent asserts the Hearing Officer ignored the findings of the physicians directed by the Public Employee Retirement Administration Commission ("PERAC") to examine Complainant and issue independent medical assessments about whether she was incapable of performing her duties, two of whom issued certificates finding that Complainant was disabled from her employment. However, only one of these two doctors concluded, without reservation, that Complainant was eligible for disability retirement. The other doctor (Dr. Morris) concluded that Complainant was unable to perform the essential duties of her job "if indeed her job requires her to be outside in the cold weather."[4] The third doctor, (Dr. Lebovits) determined that Complainant was physically capable of performing the essential duties of her job and did not support the Application for Disability Retirement. Dr. Lebovits concluded:

> Given that Ms. Sullivan is completely asymptomatic today, with no objective evidence for airways obstruction, and given that she is fully functional on a regular basis other than when she is exposed to cold air, it is my opinion that she is not disabled from performing her usual job duties, particularly since her job duty description does not make reference to environmental factors.

Joint Exhibit 7, p. 00057; Hearing Officer's Finding of Fact, ¶76.

The only information these doctors had about the essential functions of the Correction Officer job came exclusively from Respondent. The State Retirement Board

[4] Dr. Morris also concluded that Complainant should be awarded accidental (vs. ordinary) disability retirement benefits "given that her occupation and the duties she was required to perform aggravated her condition and her employer did not accommodate her condition in keeping her indoors during the cold weather." Joint Exhibit 7, p. 00064.

did not seek any information from Complainant about her job duties, and they did not consider the issue of or availability of a reasonable accommodation for Complainant's asthma such as assigning Complainant to an indoor post. Where the Hearing Officer determined that most Correction Officer assignments are totally or primarily indoors, the requirement of spending a majority of the day outside was not an essential function of the position, and where Complainant could perform the essential functions of the job with an accommodation, the fact that she declined to give significant weight to the facially conflicting opinions of two PERAC doctors was not an impermissible substitution of judgment or an abuse of discretion.

Respondent also argues that the Hearing Officer failed to consider evidence that Complainant was not credible, exhibited clear bias toward the Complainant, and rejected the testimony of most of Respondent's witnesses. The record does not support this contention. The record demonstrates that the Hearing Officer considered and in some instances credited Respondent's witnesses on disputed points of fact. In the final analysis the job of the fact finder is to assess the credibility of witnesses, weigh the evidence and draw reasonable inferences from the facts found. Ramsdell v. Western Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) The fact that the Hearing Officer believed Complainant over Respondent's witnesses is not evidence of bias, but a judgment call about what rings true given the totality of the evidence heard by the Hearing Officer. Respondent's displeasure with this assessment is not evidence that the Hearing Officer was biased. There is no evidence to suggest that the Hearing Officer did not properly consider and weigh the testimony before her.

Respondent next challenges the Hearing Officer's determination that Complainant was handicapped within the meaning of the law, arguing that the Hearing Officer's reliance upon the 2008 amendments to the Americans with Disabilities Act ("ADA") to support a broad definition of "disability," was misplaced and that changes to the ADA were not retroactive so cannot apply to events that occurred prior to their enactment. The Hearing Officer cited to these amendments for the proposition that "disability" is to be construed in a manner that favors broad coverage and disfavors extensive analysis as to whether animpairment substantially limits a major life activity. Respondent ignores the fact that even prior to the ADA amendments the Commission has consistently interpreted M.G.L. c. 151B to include a broad definition of disability. See Duso v. Roadway Express, 32 MDLR 131 (2010). Consistent with the Legislature's directive that the provisions of M.G.L. c. 151B shall "be construed liberally' to effectuate the remedial purposes of the statute, the Commission has traditionally interpreted the definition of handicap broadly to afford protections for those employees who suffer impairments that affect their ability to do their jobs but who are still capable of carrying out the essential functions of the job. M. G.L. c. 151B, § 9. Dahill v. Police Dep't of Boston, 434 Mass. 233, 240 (2001).

Moreover, the Hearing Officer relied chiefly upon M.G.L. c. 151B, §1(17) and the MCAD Guidelines on Employment Discrimination on the Basis of Handicap in citing the standards for establishing a disability. She found that Complainant's asthma was an impairment substantially limiting Ms. Sullivan's ability to breathe, exercise, and work outdoors in extreme conditions. Complainant also had a record of asthma going as far back as her diagnosis in 1991 and was clearly regarded as having an impairment by

Respondent, as evidenced by its involuntary application for disability retirement benefits. Respondent argues that an impairment of a major life activity must be more than an intermittent impairment that is symptomatic only "at times," but the disability must substantially limit a major life activity "as a whole." This assertion is inaccurate. Conditions that impair one intermittently or that are not always symptomatic are considered disabling, if the impairment would substantially limit a major life activity when active. See, Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 17 (1998) (recognizing that a temporary disability may constitute a handicap within the meaning of M.G.L. c.151B); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 637 (2004) (determination of whether a person is a "handicapped person" an individualized inquiry) The facts are that Complainant was diagnosed by her pulmonologist with persistent asthma, which causes chest tightness, wheezing, and difficulty breathing, and is restricted " from engaging in activities that are of central importance to her daily life such as breathing, working outdoors in certain weather conditions, and exercising." Hearing Officer Decision, p. 32. Although the condition could be ameliorated with appropriate medication and environmental conditions, there was sufficient evidence to find that Complainant's asthma affects several major life activities and is a disability within the meaning of the law.

Respondent next challenges the finding that Complainant was a qualified handicapped individual, arguing that she was unable to perform the "essential functions" of the job which allegedly required that all duties of utility COs be interchangeable in response to emergencies. This assertion was properly addressed by the Hearing Officer, particularly given the findings that the numerous utility CO positions are exclusively or

primarily indoor positions, and that Respondent routinely exercised its discretion to change assignments. Moreover, the Hearing Officer credited Complainant's testimony that she could respond to outside emergencies, even in extreme weather, so long as her exposure to extreme weather was not for prolonged periods of time. Complainant testified credibly that she could handle outside transportation duties and outdoor emergency situations if the need arose, but could not sustain prolonged exposure to the cold on a daily basis as a permanent assignment. Complainant's testimony was corroborated by Dr. Kenney, who testified that Complainant could spend up to several hours each day outdoors under any and all conditions as long as her asthma was controlled. The evidence showed that Complainant's asthma had been controlled and managed well since 1996. There was not one occasion cited during her work history since 1996 when Complainant was prevented from responding to an emergency due to her asthma while at work. It is only when Complainant has prolonged exposure to aggravating conditions – as occurred with her assignment to the Trap 1 post for months on end during cold weather – that her condition requires her to be indoors. Therefore, the finding that she was fully capable of performing all the functions of the Correction Officer position as long as she was not placed outdoors on a permanent basis was supported by the evidence. Under these circumstances, the Hearing Officer was correct in concluding that Complainant was a qualified handicapped person who could perform the essential functions of her job with a reasonable accommodation.

Respondent next contends that Complainant should be estopped from claiming that Respondent discriminated against her because she received disability benefits. Respondent cites Beal v. Board of Selectmen, 419 Mass. 535 (1993) and August v.

Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) for the proposition that an individual should be estopped from claiming that she is qualified under M.G.L. c. 151B after representing in another forum that she is disabled or unable to perform the job. These cases are distinguishable because the employers ordered or requested that the employees return to work and the employees indicated they were unable to work due to a disability. In contrast, here Complainant sought to continue working and was ordered to go home on involuntary sick leave and then placed on involuntary disability retirement. Complainant never indicated she was unable to perform her job, and could have continued working with a reasonable accommodation.

When Respondent refused to extend her a reasonable accommodation that would have allowed her to continue working, she had no practical choice but to accept disability benefits. See Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997) and D'Aprile v. Fleet Services Corp., 92 F.3d 1 (1st Cir. 1996). In Labonte, the employee sought a reasonable accommodation which was denied, and only then did he resort to collecting disability benefits. The Supreme Judicial Court held that estoppel was "inappropriate" where the employee's "evidence was that he was disabled to perform the job without reasonable accommodation, but quite able to perform the job given some reasonable accommodation." 424 Mass. at 820. Similarly, in D'Aprile, an employee sought disability benefits only after her employer repeatedly refused to grant her a reasonable accommodation despite the fact that the accommodation would have enabled her to perform the essential functions of her position. These cases support the Hearing Officer's conclusion that, "It is not axiomatic that an individual who seeks disability benefits is estopped from claiming disability discrimination."

The Hearing Officer also recognized Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999), a case Respondent cites in its appeal for the proposition that a plaintiff must "proffer a sufficient explanation" for the apparent discrepancy created when a plaintiff has sought disability benefits and also seeks relief from disability discrimination. The U.S. Supreme Court recognized, however, that there are situations in which a claim for disability benefits under the Social Security Disability Insurance (SSDI) program can "comfortably exist side by side" with an ADA claim. For example, where the application for disability benefits is reviewed in a forum that does not consider the possibility of a reasonable accommodation, the finding of disability should not preclude the employee from recovering for disability discrimination. In this case, Complainant proffered ample evidence to explain the discrepancy referred to in Cleveland. There was no evidence that the State Retirement Board ever fully considered this issue of whether Respondent could accommodate Complainant's disability. Instead, the Associate General Counsel of the State Retirement Board testified that he took the Respondent's Human Resource Director at his word about Complainant's work requirements and did not seek any information from Complainant. During the retirement application process, Respondent answered "unknown" to a question as to whether Complainant could perform the essential functions of her position with a reasonable accommodation and, incredibly, "no" to a question on the application as to whether Complainant ever requested a reasonable accommodation. Hearing Officer's Findings, ¶¶ 77, 78.

Complainant testified that once Respondent refused to extend her an accommodation and would not allow her to return to work, she was compelled to accept disability retirement benefits with associated health insurance benefits because she could

not have otherwise financially survived. If forced to choose between accepting such benefits and pursuing her discrimination claim, her pressing financial needs would have required her to forfeit her claim of discrimination. . Complainant presented ample evidence that the disability retirement application was involuntary – something that was submitted on her behalf by Respondent. She insisted she was capable of performing her job, and she vehemently protested when Respondent sent her home from work. We agree that where the involuntary disability retirement application was approved without full consideration of a reasonable accommodation to permit Complainant to work, it should not operate in favor of estoppel.

Respondent argues further that Complainant's failure to appeal the determinations of the Board of Retirement or Public Employee Retirement Administration Commission ("PERAC") demonstrates that she concurred with the finding that she was totally disabled and incapable of performing her job. The weight of the evidence demonstrates the opposite. Complainant strenuously objected to Respondent sending her home and she made it clear that she believed she was capable of performing the essential functions of her position. Complainant did request a hearing to contest the retirement application, but such request was denied by the Retirement Board for the reason that only applicants with 20 years of service or applicants over the age of 55 with at least 15 years of service are eligible for a hearing. Complainant did not believe she had a right to appeal the decision, but chose instead to challenge Respondent's action regarding the involuntary retirement through this complaint. We agree that she should not be precluded from doing so.

Respondent further argues that Complainant's answers on the Extended Illness Leave Bank ("EILB") application in 2007, indicated that she was no longer contesting

her disability retirement and support a finding that she considered herself to be totally disabled and incapable of performing her job. We do not concur. Complainant's responses reflected Respondent's insistence that she could not work if she had any type of "restriction" and its refusal to discuss or grant a reasonable accommodation. The Hearing Officer correctly determined that Complainant successfully reconciled these seemingly contradictory positions at hearing by claiming that while she was incapable of functioning as a CO without the accommodation she sought, she could function as a CO if accommodated. Her application for extended sick leave benefits and her doctor's report were premised on Respondent's unwillingness to grant an accommodation. There is substantial evidence in the record to support this conclusion.

Respondent next contends that Complainant's claim of discrimination is barred by issue preclusion, since PERAC and the State Board of Retirement determined that Complainant was disabled and unable to perform the essential duties of her position. Respondent argues that Complainant should therefore be barred from relitigating this issue before the Commission. Respondent raised this issue for the first time in its closing brief, which was filed in June 2012. The Hearing Officer did not address this issue in her decision and we conclude that they have waived the issue on appeal by not raising it earlier.

In any event, we are not persuaded by Respondent's issue preclusion argument. A party is precluded from re-litigating an issue when: 1) there was a final judgment on the merits in a prior adjudication; 2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; 3) the issue in the prior adjudication is identical to the issue in the current litigation and 4) the issue decided in

the prior adjudication was essential to the earlier judgment. Porio v. Dept. of Revenue, 80 Mass. App. Ct. 57, 61 (2011) (decision rendered in Civil Service appeal did not have preclusive effect on subsequent discrimination claim). The case before the Hearing Officer did not meet these requirements.[5] The issues in this discrimination case are not identical to the question whether Complainant was entitled to disability retirement benefits due to Respondent's refusal to allow any accommodation to permit her to work. The Hearing Officer decided the following issues: 1) whether Respondent discriminated against Complainant on the basis of handicap when it refused to provide or discuss any reasonable accommodation to allow her to perform the essential functions of her job and 2) whether Respondent retaliated against Complainant for opposing practices forbidden under M.G.L. c.151B and filing her complaint of discrimination. As demonstrated by the testimony and exhibits, the issue before the State Retirement Board and PERAC was only whether or not Complainant was entitled to disability retirement benefits in 2008 based upon the information provided by Respondent.

Issue preclusion is appropriate only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment..." Alba v. Raytheon Co., 441 Mass. 836, 841 (2004). In this matter, the issue as to whether Complainant was a qualified handicapped individual entitled to protection under M.G.L. c. 151B was not actually litigated and determined before either PERAC or the State Board of Retirement. Neither body held an adjudicatory hearing or made written findings regarding the reasoning or analysis that preceded the approval of

[5] Among other limitations to application of the doctrine here, the Massachusetts Commission Against Discrimination was not a party to any proceeding involving Complainant's retirement benefits. Further, while its interests are aligned with Complainant in the post-probable cause proceedings; the Commission is not in privity with the Complainant.

Complainant's involuntary disability retirement application. Cf. McLaughlin v. Lowell, 84 Mass. App. Ct. 45 (2013) (issue whether accidental disability retiree also qualified handicapped person fully litigated through PERAC's appeal of decision to Division of Administrative Appeals (DALA) and to the Contributory Retirement Appeal Board (CRAB), with specific findings made by CRAB as to whether use of inhalers at a fire scene strictly prohibited). Where there was no adjudicatory hearing, Complainant did not have "an adequate opportunity to litigate" the issue of her disability. Respondent states that "an essential question in the retirement process is whether the applicant would be able to perform the job with reasonable accommodation." However, there is no evidence that PERAC or the Board of Retirement considered the potential impact of a reasonable accommodation. Instead, as noted previously State Retirement Board Associate General Counsel Dennis Kirwan testified that he accepted Respondent's statement of the duties of CO without further inquiry, making it obvious that the Board did not fully consider the issue of reasonable accommodation. Attorney Kirwan had no specific memory whether or not Complainant had requested an accommodation or whether Respondent considered its ability to provide an accommodation, merely stating, "[T]hat would probably be something I would have asked them." Transcript Volume X, p. 64. His testimony indicated that he made certain assumptions about Respondent's inability to accommodate COs generally, but did not engage in a thorough informed deliberation of the issue.

Respondent next challenges generally the Hearing Officer's conclusion that Respondent discriminated against Complainant, arguing that it was not obligated to engage in an interactive process regarding a reasonable accommodation because Complainant was not a qualified handicapped individual. Respondent is correct the

obligation to engage in an interactive process depends on the employee being an otherwise qualified handicapped individual, see Massachusetts Commission Against Discrimination and Anthony Luster v. Massachusetts DOC, 34 MDLR 71 (2012). However, this argument was addressed by the Hearing Officer when she determined that the vast majority of CO assignments are indoors, that working outside in a permanent assignment is not an essential function of the job, and that Complainant was able to work outside intermittently for shorter periods of time. We concur that the Hearing Officer correctly determined that Complainant was in fact a qualified handicapped individual under the law, and that Respondent failed to engage in the interactive process to consider possible accommodations.

The evidence supports the Hearing Officer's conclusion that Respondent failed to engage in direct, open, and meaningful communication with Complainant to determine possible adjustments or accommodations that could enable her to remain working, but rather, summarily and repeatedly insisted that she remain in the Trap I post. Although Complainant repeatedly requested that she be assigned to an indoor post, Captain Hopkinson "ignored her, refused to dialogue, and stonewalled her efforts to fashion a reasonable accommodation." Respondent asserts that at least four different superior officers spoke to Complainant and heard her objections, but explained to her that restrictions on the ability to perform the essential and basic functions of the job made her ineligible to continue working. The Hearing Officer concluded that this was not due consideration of Complainant's accommodation requests but a unilateral rejection of them. We concur that this was not an interactive process.

Respondent also challenges the Hearing Officer's determination that it failed to provide Complainant with a reasonable accommodation, asserting that, "any accommodation that would have allowed Complainant to continue safely working as a CO would have been an undue hardship." Here again Respondent asserts that it requires every CO to be "fully interchangeable" and able to respond to emergencies so as to maximize public safety. Respondent argues that the Hearing Officer "essentially created a phantom position for the Complainant to fill – a position which has no basis in reality and would greatly compromise the operation and safety of the facility and its workforce." The Hearing Officer addressed this argument when she found that Complainant was able to respond to emergencies despite her asthma, and could work in colder temperatures, so long as her exposure was not "prolonged." There was ample credible testimony that the Respondent had complete discretion to assign Complainant to any position permitted by the collective bargaining agreement, could have assigned Complainant to one of the many exclusively or primarily indoor CO positions, and exercised such discretion routinely with other officers. Respondent acknowledged that it reassigned officers from one post to another to address conflicts or to accommodate an officer's preference regarding assignments. Assignment changes could occur for reasons such as coaching activities, marital problems and child care. As the Hearing Officer noted, "such an accommodation would not have set Complainant apart from numerous other correction officers occupying indoor bid or utility assignments on an indefinite basis."

Finally, Respondent's argument that granting Complainant an accommodation would compromise the safety of Respondent's facility is not supported by the evidence. As we have stated before, the Hearing Officer specifically found that Complainant

demonstrated she was capable of responding to emergencies as long as she was not assigned outdoors for prolonged periods of time during extreme cold weather. Throughout her seventeen year tenure with Respondent, the evidence demonstrated that Complainant never failed to respond to an emergency while at work, was fully capable of performing all duties in an emergency and was able to continue doing so.

In sum, the record demonstrates that Respondent failed to accommodate Complainant's disability as a result of its uncompromising policy of refusing to grant any accommodations to employees who are disabled or have medical restrictions. The Hearing Officer properly concluded that to compel Complainant to cease working and to apply for an involuntary disability retirement on her behalf, absent any consideration of potential accommodations, was a violation of M.G.L. c. 151B.

Respondent next challenges as error the Hearing Officer's finding that the evidence supported a claim of retaliation. First, Respondent argues that the Hearing Officer failed to make findings demonstrating a causal connection between the protected activity of requesting an accommodation and subsequently filing a complaint and the adverse employment actions she suffered, to wit: not being permitted to continue working and being involuntarily retired. We concur with the Hearing Officer's finding that the close proximity in time from the protected activity to the adverse employment actions was sufficient to support a causal connection. The Hearing Officer noted that Respondent sent Complainant home "[w]ithin one day" of receiving her physician's note documenting the dire need for an accommodation, and Respondent initiated the application for involuntary disability retirement "[l]ittle more than a week" after receipt of her complaint with this Commission. "Where adverse employment actions follow

closely on the heels of protected activity, a causal relationship may be inferred." Mole v. University of Mass., 442 Mass. 582, 592 (2004). Where, as here, the adverse actions occurred within one day and less than a week after the protected activity, we agree that such close temporal proximity supports an inference of a causal relationship.

RELIEF AWARDED

Respondent next contends that the Hearing Officer erred in ordering the reinstatement of Complainant conditioned upon Complainant satisfying lawful and relevant eligibility requirements. Specifically, Respondent argues that the Hearing Officer has no authority to order Respondent to reinstate Complainant because she was lawfully retired by the State Board of Retirement and PERAC. The Commission, however is authorized by section 5 of Chapter 151B to order affirmative relief, including reinstatement or upgrading of employees, with or without back pay, as, in the judgment of the commission will effectuate the purposes of the anti-discrimination laws. The Commission is given broad authority to fashion appropriate remedies to make victims whole for their damages and to further the purpose of eradicating discrimination. Deroche v. MCAD, 447 Mass. 1 (2006); College-Town, Div.of Interco, Inc. v. MCAD, 400 Mass. 156 (1987).

The Hearing Officer considered and evaluated the evidence submitted by Respondent concerning the involuntary retirement of Complainant. Cf. City of Boston v. MCAD, 39 Mass. App. Ct. 234 (1995) (error for Hearing Officer to ignore arbitration decision, but not error warranting reversal). The Hearing Officer's Order states that reinstatement is conditioned upon Complainant satisfying "lawful and relevant eligibility requirements." We conclude that the Hearing Officer acted within her discretion in

ordering this affirmative relief. Given the factual circumstances of this case, however, we are not convinced that the remedy of reinstatement when conditioned upon a third-party, such as the State Board of Retirement, to determine eligibility will necessarily make Complainant whole.[6] This is particularly the case where the Hearing Officer determined that Complainant was not entitled to front pay in part due to the "option offered... to return to employment at the Sheriff's Office." To the extent that option may be unavailable, because reinstatement is not entirely within Respondent's control and is conditioned upon eligibility requirements and or constraints dictated by the Commonwealth's retirement system, the Hearing Officer's order may not make Complainant whole. Nor will the remedy promote eradication of discrimination. Accordingly, we remand the decision to the Hearing Officer to reconsider the reinstatement order and denial of front pay damages.

Respondent also argues that the Hearing Officer lacked authority to order restitution of Complainant's lost seniority status for employment and superannuation retirement purposes from 2007 until such time as she may be reinstated. The Commission regularly orders that reinstatement be accompanied by the benefits an employee would have accrued absent the unlawful discrimination. Absent Respondent's discriminatory and retaliatory actions, Complainant would have remained employed and would have continued to accrue seniority. We conclude that the Hearing Officer was therefore justified in ordering that Complainant be reinstated with credit for lost seniority as this relief is necessary in order to make Complainant whole. Again, however, due to the conditional nature of the reinstatement award, we are compelled to remand this matter

[6]The Hearing Officer's Order does not address how the determination will be made that Complainant satisfies "lawful and relevant eligibility criteria."

to the Hearing Officer for reconsideration of the damage award. In the event that Complainant is not eligible for reinstatement, the Hearing Officer should consider what damages, if any, are appropriate to make the Complainant whole.

Respondent next challenges the award for emotional distress damages of $75,000 as not supported by substantial evidence. We find that the Hearing Officer's award is based upon ample compelling and convincing testimony that Complainant sustained significant harm as a result of Respondent's unlawful acts, including Complainant's testimony that the loss of her job, which she loved, "made her feel worthless." Complainant's sister testified that having to leave work was "devastating" to Complainant and that she became "depressed" and "overwhelmed" at not being permitted to continue working. Complainant's mother testified that Complainant was "destroyed," distraught," and "disillusioned" after she was involuntarily retired, that she "cried a lot and had so much trouble sleeping that she slept in her mother's bedroom on at least a dozen occasions." Complainant's mother also testified that Complainant would never be the person that she was before due to Respondent's actions. Respondent's assertion that Complainant's sister and mother were "biased" and consequently their testimony without merit is not convincing. Family members and friends are generally best able to observe and report on a claimant's distress and the Hearing Officer is in the best position to assess the credibility of such witnesses and accord the proper weight to their testimony. The allegation their testimony may be biased because they are related is insufficient to render the testimony not credible and does not support a diminution of the award. Respondent also argues that the fact that Complainant successfully handled "a heavy case load of graduate level classes" in 2007 after she left Respondents' employ, demonstrates that she

was not emotionally distraught or unable to function. The "graduate level classes" to which Respondent refers were related to a certificate in massage therapy and not post graduate work. The fact that Complainant sought to mitigate her damages because she felt compelled to prepare for a new career and attempt to move on with her life does not negate her significant emotional distress.

Respondent also contends that the Hearing Officer provided no reasoning to support her order that Complainant receive back pay for "sick, personal, and vacation benefits" that she exhausted. However, the Order is merely reimbursing Complainant for leave time that she was forced to use because Respondent refused to grant her an accommodation, leave time she would otherwise not have used. Respondent asserts that Complainant received these benefits when she used her accrued time, but misses the point that Complainant would not have been compelled to lose this time had she been granted the accommodations she sought and had continued to work. We find that the Hearing Officer's award of back pay damages was proper as it was relief intended to make Complainant whole and was not an abuse of discretion.

Finally, Respondent contends that the Hearing Officer abused her discretion in ordering that Respondent pay a civil penalty and submit to training. The Commission is expressly authorized by M.G.L. c.151B, § 5 to assess a civil penalty in any case in which a respondent has engaged in an unlawful practice. The Hearing Officer made specific findings to support the civil penalty, and we concur that a civil penalty was appropriate given Respondent's egregious conduct and intransigence in refusing to engage in an interactive dialogue with Complainant, refusing to consider a reasonable accommodation,

and engaging in retaliatory actions in response to her protected activities. We do not believe that the assessment of a civil penalty was an abuse of discretion.

With respect to the training provisions, the Hearing Officer has the discretion to fashion appropriate affirmative relief where a violation of law is found. We find the Hearing Officer's training order to be reasonable and justified by the facts and circumstances in this case given Respondent's unduly rigid standard for responding to accommodation requests as evidenced by its professed ideology of not allowing employees to work with any restrictions. This was evidenced by the fact that Respondent's HR director could not cite one single example of a workplace accommodation ever granted by Respondent. The Hearing Officer determined that training on the issue of reasonable accommodation was warranted, and she prescribed training with a view toward preventing similar infractions in the future. Such an order is entirely consistent with past Commission orders, and we see no reason to disturb this requirement.

In sum, we have carefully reviewed Respondent's Petition and its objections to the Hearing Officer's decision in this matter in accordance with the standard of review articulated herein, and conclude the decision is supported by substantial evidence and that there are no material errors of law. We therefore deny Respondent's appeal. We affirm the decision and Order of the Hearing Officer in its entirety, except with respect to the reinstatement order and consideration of front pay damages.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5.

The Commission exercises its discretion and expertise to determine what is a reasonable fee given such factors as the complexity of the litigation and the time and resources required to litigate a claim of discrimination in the administrative forum. In determining what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires the Commission to undertake a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable. Second, the Commission examines the resulting figure, known as the "lodestar", and may adjust it upward, downward, or not at all depending on various factors. Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992).

Complainant's counsel have filed a petition seeking attorney fees in the amount of $599,485.00 and costs in the amount of $11,027.18 (totaling $610,512.18), and a supplemental petition seeking fees in the amount of $41,172.50 and costs in the amount of $8.00. The total amount of fees, expenses and costs associated with Complainant's fee petition is $651,692.68. We expect that Complainant may file another petition seeking fees, expenses and costs associated with the remand of the reinstatement order. We also

anticipate that the Hearing Officer's decision on remand may inform the decision on the petitions for fees. Accordingly, the decision on the initial and supplemental petition for fees is deferred until further notice.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer except with respect to the reinstatement order and issue the following Order of the Full Commission:

(1) Respondent shall cease and desist from all acts of handicap discrimination and retaliation.

(2) Respondent shall pay a civil penalty in the amount of $10,000.00 for the knowing, willful, and egregious discriminatory actions adjudicated to have been committed.

(3) The matter shall be remanded to the Hearing Officer to determine whether Complainant can be reinstated to the position of Correction Officer if she chooses reinstatement and satisfies lawful and relevant eligibility criteria. If Complainant chooses and qualifies for reinstatement, she is entitled to lost seniority for job and superannuation retirement purposes retroactive to January of 2007. If Complainant is unable to satisfy lawful and relevant eligibility criteria, the Hearing Officer shall determine whether or not Complainant is entitled to front pay, and make an appropriate award.

(4) Respondent shall reimburse Complainant for back pay losses sustained in 2007 for (a) the sick, personal, and vacation benefits she was forced to exhaust in that year; (b) $14,173.78 in lost base pay for the months of September through December 7,

2007; (c) lost training and educational incentives in 2007 totaling $4,040.00; and (d) lost overtime opportunities equivalent to the amount of overtime she earned in 2006.

(5) Respondent shall reimburse Complainant for back pay damages in the form of out-of-pocket costs for health insurance between September of 2007 and March of 2008.

(6) Respondent shall reimburse Complainant for back pay damages in 2008 in the amount of $56,685.10 in base salary plus $4,040.00 in annual training and educational incentives, and lost overtime potential (based upon 2006 overtime income) less Complainant's actual 2008 income of $39,450.40.

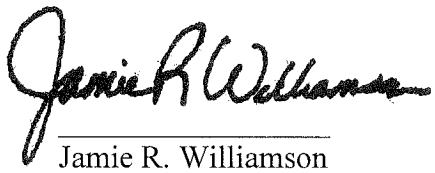
(7) Respondent shall determine the excess, if any, between what Complainant would have earned at the Sheriff's Office from 2009 to 2011 including base pay, training and educational incentives, and overtime potential (based upon 2006 overtime income) and what she actually received from her teaching and disability retirement income during those years, without regard to caps of $9,198.12 and $11,991.74 in 2009 and 2010, respectively, imposed by PERAC as a result of Complainant's earnings, exceeding by more than $5,000.00, what her base pay would have been at the Sheriff's Office. Complainant is entitled to back pay damages in the amount of such excess, if any.

(8) Respondent shall pay Complainant within sixty (60) days of this decision the sum of $75,000.00 in emotional distress damages.

Complainant shall receive all of the sums outlined above in items 4-8 plus interest at the statutory rate of 12% per annum from the date the Complaint was filed, until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(9) The training provisions articulated in the Hearing Officer's decision are incorporated by reference herein.

SO ORDERED[7] this 27th day of May , 2015.



Jamie R. Williamson
Chairwoman

Charlotte Golar Richie
Commissioner

[7] Commissioner Sunila Thomas –George was the Investigating Commission in this matter, so did not take part in the Full Commission deliberation pursuant to 804 C.M.R. 1.23.