

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

DANIEL STEPHAN,
Complainant

v.

Docket No. 98 BEM 0982

SPS NEW ENGLAND, INC.,
Respondent

Hearing Officer's Supplemental Findings Pursuant To Remand Order

On March 31, 1998, Complainant filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") against his former employer, SPS New England, Inc. ("Respondent") alleging that his termination constituted age and handicap discrimination. On August 23, 2004, the Hearing Officer issued a decision concluding that Respondent had engaged in handicap discrimination but not age discrimination. The Hearing Officer awarded back pay and emotional distress damages. The award of back pay damages was mitigated by the amount of unemployment compensation Complainant received from February 10, 1998 to April 20, 1998, as elicited by Respondent at Public Hearing. The award was not mitigated by Complainant's subsequent employment income because Respondent failed to elicit, as is its burden, evidence of Complainant's post-termination earnings. See J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989); Buckley Nursing Home, Inc. v. MCAD, 20 Mass App. Ct 172 (1985).

The Hearing Officer's decision was affirmed, in all significant respects, on appeal to the Full Commission. The Full Commission, in its decision of September 19, 2005, denied a motion by Respondent for leave to introduce additional evidence of interim

earnings between Complainant's termination by Respondent and the date of public hearing because Respondent did not demonstrate good reason for its failure to do so at public hearing.

On October 18, 2005, Respondent filed a Complaint and Petition for Judicial Review in Superior Court. Respondent alleged, inter alia, that the MCAD's decision improperly denied Respondent's request for leave to present additional evidence regarding Complainant's post-SPS earnings. Respondent asked the Superior Court to issue an order remanding the case to the MCAD for the purpose of taking evidence of Complainant's post-SPS earnings and reconsidering the award of back pay damages in light of evidence of mitigation earnings.

By Order dated May 2, 2006, Superior Court Justice Elizabeth Fahey remanded the above-captioned matter for the purpose of taking evidence of Complainant's earnings between February 10, 1998, the date of Complainant's termination by Respondent and February 11, 2003, the date of public hearing. The Court originally based its remand on Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549 (2004). On June 22, 2006, Justice Fahey reconsidered her decision, issued a subsequent memorandum concluding that Stonehill College did not recognize any unfairness in retroactively depriving a party of its right to a jury trial, but reaffirmed the remand to avoid "a substantial, undeserved windfall."

Complainant appealed the Trial Court's order remanding the case to the MCAD. The MCAD originally joined in the appeal but subsequently filed a letter with the Appeals Court taking the position that the appeal was interlocutory. On July 24, 2007, the Appeals Court issued a rescript dismissing Complainant's appeal as interlocutory.

On remand, the Hearing Officer held a pre-hearing conference at which the parties agreed to submit deposition testimony as evidence of post-SPS employment earnings. Although Complainant opposes the remand for the purpose of taking additional evidence, he does not dispute the amount of post-SPS employment earnings presented at deposition. Accordingly, the following evidence is adopted as evidence of Complainant's post-SPS income for the period between February 10, 1998 and February 11, 2003.

1. After being terminated from Respondent, Complainant collected unemployment compensation from the Commonwealth of Massachusetts in the amount of \$378.00 per week during the period February 10, 1998 and April 20, 1998, for a total of **\$3,780.00**.
2. Complainant worked for Conproco Corp from April 20, 1998 to August of 1999. He was paid \$60,000.00 annually. In February of 1999, he received a commission of between \$1,500.00 and \$2,000.00. In total, Complainant received **\$79,961.80** in earnings from Conproco based on a weekly salary of \$1,153.85 for 68 weeks and a \$1,500.00 bonus for 1998-1999.
3. Complainant left Conproco Corp in August of 1999. There was a five to eight week period during which he was unemployed. During that time he collected \$301.00 a week in unemployment benefits from the State of New Hampshire. Complainant received a total of **\$2,408.00** in unemployment compensation for the period between 8/16/99 to 10/12/99.

4. Complainant worked for NER Construction Management from October of 1999 to the date of public hearing at a salary of \$60,000.00 per year or \$1,153.85 per week. Complainant's income from NER Construction Management is computed on the basis of 174 weeks of employment. In total, Complainant received **\$200,769.90** from NER Construction Management up to the date of public hearing.
5. Based on the foregoing evidence, the total amount that Complainant earned between February 11, 1998 and February 11, 2003 was **\$286,919.70**.
6. The difference between what Complainant would have earned had he continued to work for Respondent (\$375,000.00) and what he actually earned in other jobs (\$286,919.70) is **\$88,080.00**.

In conformity with the Trial Court's remand and order to accept additional evidence, I have considered evidence of Complainant's post-SPS earnings and conclude that between February 11, 1998 and February 11, 2003, Complainant sustained an actual loss of **\$88,080.00** in income resulting from Respondent's discriminatory actions. Had Respondent proffered evidence concerning the amount of mitigation at public hearing, the original public hearing decision would have identified this amount as the back pay owed to Complainant. Respondent, however, failed to provide relevant evidence of mitigation at public hearing. In subsequent filings before the Full Commission and the Trial Court, Respondent failed to provide good reason for its failure to do so. See 804 CMR 1.23(1) (g). Respondent's "inadvertence" does not constitute "good reason" as required by regulation. See, e.g., J.C. Hillary's v MCAD, 27 Mass. App. Ct. 204, 208

(1989) (“counsel’s unpreparedness and inexperience did not constitute good reason for reopening the hearings”); Cochran v. Department of Correction, 17 MDLR 1364 (1995). Accordingly, I decline to reconsider and modify the Full Commission’s award of back pay in the amount of **\$371,220.00**. The state of the law on which party bears the burden of mitigation of damages is clear, as the requirement of “good reason” for allowing additional evidence. Respondent, in this matter, did not meet either burden, and I am compelled to follow established precedent in this matter.

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 of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

Betty E. Waxman, Hearing Officer
April 29, 2008