

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

THERESA SENNA,
Complainant

v.

DOCKET NO. 89-NEM-0146

NEW ENGLAND POWER CO.,
Respondent.

DECISION OF THE FULL COMMISSION ON REMAND

This matter comes before us on remand from the Worcester Superior Court following a decision from that court ordering the Commission to determine “whether the issue of front pay was fully litigated, and, if not, whether it requires a re-opening of the evidentiary record, and whether its decision requiring reinstatement should be modified.” New England Power Co. v. MCAD, Worcester Sup. Ct. No. 95-2226 (Fecteau, J., November 19, 2002). On November 24, 1993, Hearing Officer Eugenia Guastaferrri issued a decision after public hearing in this matter in favor of Complainant. As part of the remedy, the Hearing Officer ordered that “Respondent reinstate Complainant to the first available position of Assistant Auxiliary Operator.” On December 12, 1996, the superior court vacated her decision. On November 8, 1999, the Appeals Court reversed the superior court and ordered the Commission’s decision reinstated. However, in the interim, Respondent sold the facility that was the subject of the reinstatement order. Complainant subsequently sought enforcement of the reinstatement order in superior court, which prompted the court order by which this matter has been remanded.

Upon full review of the record in this matter, we conclude that the issue of front pay was fully litigated and the Hearing Officer did not commit error when she declined to award front pay to Complainant. Furthermore, we conclude that the subsequent closure of Respondent’s facility, which rendered Complainant’s reinstatement an impossibility, does not warrant the ordering of front pay in its place.

1. Front Pay

The Commission is vested with broad discretion to order remedies that make a victim of discrimination whole and effectuate the purposes of M.G.L. c.151B. Stonehill College v. MCAD, 441 Mass. 549, 567 (2004). However, the Commission and the courts have long held that given the speculative nature of front pay, such an award will be made only in very limited instances, such as where the discriminatory act occurs near an individual's retirement date or where comparable positions would be difficult to find. Williams v. New Bedford Free Public Library, 24 MDLR 171, 173 (2002); Kealy v. City of Lowell, Dept. of Public Schools, 21 MDLR 19, 24 (1999); Madden v. Town of Falmouth Harbormaster Waterway Dept., 15 MDLR 1949, 1967-68 (1993).

In this case, Complainant offered evidence on the record of her employment history from her termination in September 1989 up to the date of the public hearing in April 1993. This evidence revealed that Complainant secured comparable employment in March 1991 at Strathmore Paper, a position which she continued to hold at the commencement of the public hearing more than two years later. As such, the Hearing Officer declined to order front pay as part of the remedy. This was not error. See German v. Building Technology Engineers, Inc., 25 MDLR 414, 423 (2003); Handrahan v. Red Roof Inns, 43 Mass. App. Ct. 13, 24 (1997).

2. Front Pay in Lieu of Reinstatement

The Hearing Officer ordered reinstatement to a position at Respondent (First Class Fireman) that would have been a promotion from the position from which she was terminated. Complainant sought such a remedy and offered evidence that she had obtained the necessary licensure to qualify for such a position. The Hearing Officer concluded that such a remedy would be consistent with the Commission's broad authority to make Complainant whole. However, the Hearing Officer's order was not predicated on a finding that the Complainant continued to suffer from reduced earning capacity or had not achieved a comparable position as a

result of her termination. To the contrary, Complainant held the position of Second Class Fireman at Strathmore Paper at the time of the hearing, had received a raise, and there was nothing to indicate that she could not advance at that employer. The order of reinstatement was based entirely upon different evidence and the Hearing Officer exercised her discretion to award reinstatement, while declining to award front pay. As such, the Hearing Officer did not order reinstatement as a proxy for lost front pay. Thus, the fact that reinstatement subsequently became impossible due to the sale of Respondent's facility does not support the imposition of front pay damages in its place.

Therefore, we affirm the Hearing Officer's decision in its entirety and decline the superior court's invitation to award front pay, re-open the record, or modify the Hearing Officer's decision regarding reinstatement.

SO ORDERED this 18th day of October, 2004.

Dorca I. Gomez
Chairwoman

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner