STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. AND-23-310

HELEN CRABTREE,
Plaintiff-Appellant

v.

CENTRAL MAINE MEDICAL CENTER,
Defendant-Appellee

ON APPEAL FROM THE ANDROSCOGGIN COUNTY SUPERIOR COURT

BRIEF FOR APPELLANT

John P. Gause, Esq., Bar No. 8192
Attorney for Helen Crabtree
Eastern Maine Law, LLC, P.A.
23 Water Street, Suite 202
Bangor, ME 04401
(207) 947-5100
jgause@easternmainelaw.com

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INTRODUCTION

This appeal arises out of the Androscoggin County Superior Court's equitable remedies decision following a jury verdict finding that Appellee, Central Maine Medical Center (CMMC), engaged in unlawful employment discrimination under the Maine Human Rights Act, 5 M.R.S. §§ 4551-4634 (2014) (MHRA), against Appellant, Helen Crabtree, on the basis of religion. The presiding Superior Court Justice ordered CMMC to pay Helen back pay through May 2017 but erroneously denied additional back pay, front pay, and a tax offset.

STATEMENT OF FACTS

The following facts were admitted in evidence at trial.

CMMC is a wholly-owned subsidiary of Central Maine Healthcare (CMH). (App. 106 ¶ 11.) The Maine College of Health Professions (MCHP) is a wholly-owned subsidiary of CMMC. (App. 105 ¶ 3.) In August 2015 Helen Crabtree applied to a Certified Nursing Assistant (CNA) course at the MCHP and for a CNA trainee position with CMMC in connection with the "Earn While You Learn"

(EWYL) program. (App. 105 ¶ 4.) Applicants to the MHCP were selected by the MCHP. (App. 105 ¶ 5.) Applicants who were accepted to the MCHP could then apply for inclusion in the EWYL program. (App. 106 ¶ 6.) Decisions on who was selected for the EWYL program and employment were made by CMMC. (App. 106 ¶ 7.)

The EWYL program was created to recruit CNAs during times that CMMC was struggling to fill CNA positions. (App. 106 ¶ 8; Pl.'s Ex. 6, at 15, 21.) Upon acceptance to the EWYL program the participant's tuition and fees would be paid by CMH. (App. 106 ¶ 9.) Otherwise, the cost of the CNA course would have been approximately $3000 to $4000. (Pl.'s Ex. 6, at 18, 20.) CMH also compensated the trainee with an hourly rate ($10.20 per hour) as the trainee attended courses (up to 30 hours per week). (App. 106 ¶ 9; Jt. Ex. 8.) Once a CNA trainee completed the program and met the criteria to be included on the state CNA registry, the trainee would be required to work as a CNA with CMH for two years in either a part-time or full-time capacity. (App. 106, ¶ 10; Pl.'s Ex. 6, at 27.)

The selection criteria for admission to the EWYL program included first being accepted by the MCHP, which in turn required being 18 years of age or older, a high school diploma or GED, completed immunizations to work in a healthcare organization, and CPR certification. (Pl.'s Ex. 6, at 22; App. 85.) The applicant then needed to be accepted by CMMC as a CNA trainee, which required

that the applicant be 18 years of age or older, successful job interview(s), passing a background screening and drug test, and passing a preemployment physical. (Pl.'s Ex. 6, at 24-25.) To transition from a CNA trainee to a staff CNA the applicant needed to get a C or better in the CNA course and sit for and pass the state exam to be included on the CNA registry. (Pl.'s Ex. 6, at 35.)

The fall 2015 MCHP CNA course ran from September 15, 2015, through November 19, 2015. (App. 106 ¶ 12.) The course included three classroom/lab days on Tuesdays, Wednesdays, and Thursdays from September 15 to October 29, 2015, as well as three clinical days on Tuesdays, Wednesdays, and Thursdays from November 3-18, 2015. (App. 106 ¶ 13.)

CNAs at CMMC provided direct and indirect patient care under the direction of an RN or physician, and their duties included assisting patients with activities of daily living, providing for personal care, emotional support, and performing more complex skills under the direction of an RN. (App. 90.) Since 2015 part time and full time CNAs at CMMC received the following average hourly wages: 1/1/2015—$11.79, 1/1/2016—$11.75, 1/1/2017—$11.77, 1/1/2018—$12.60, 1/1/2019—$14.18, 1/1/2020—$15.82, 1/1/2021—$18.58, 1/1/2022—$18.58, 1/1/2023—$23.38. (App. 109 ¶ 32.)

Helen Crabtree grew up in Kenya and moved to the United States in 1992. (Tr. 16-17.) She graduated from high school and college in Kenya. (Tr. 16.) She

received a Bachelor of Arts from Manhattan College in business administration in June 1999, graduating on the dean's list. (Tr. 18, 22-23, 70.) She speaks six languages. (Tr. 20.) Her work experience prior to applying to CMMC included a Clinical Research Coordinator at Roger Williams Hospital Research Department, an Assistant Manager at Bayside Health Clinic, and the Director of the Poland Spring Health Institute. (App. 134-135; Tr. 22.)

Helen has always had an interest in working in healthcare. (Tr. 32-33, 59.) She is interested in working on the clinical side of healthcare, seeing patients, as opposed to the administrative side. (Tr. 60, 62.) In 2015 Helen learned about the EWYL program from the president of CMMC at a networking breakfast. (Tr. 59-60, 62-63.) She was aspiring to go to nursing school to become a registered nurse, and she thought the EWYL program would be a springboard to allow her to achieve her goal. (Tr. 60-64; App. 88.) In fact, it was common for CMMC CNAs to attend nursing school and become registered nurses while working as CNAs. (Tr. 275, 282, 377.) Helen did not have the money to pay for the CNA training program on her own. (Tr. 62, 232.)

In August 2015 Helen applied to the MCHP CNA training program for entry into the EWYL program, and she was accepted by the MCHP. (App. 106 ¶ 14; Tr. 62-63.) On August 19, 2015, she applied with CMMC for a part-time CNA trainee position in connection with the program. (App. 106 ¶ 15.) At the time of her

application Helen was over 18 years old, had graduated from high school, and had never been convicted of a crime. (Tr. 68.) Helen had been a good student in college, and she testified that she believes she would have passed the exam for entry onto the CNA registry. (Tr. 70-71.) She also testified that she believes she would have been able to perform all of the CNA duties listed in the job description, which is supported by her prior work experience providing personal care to others. (Tr. 31-32, 102-103; App. 90-94.) She testified that she believes she would have been able to perform all of the physical requirements for the CNA position. (Tr. 104; Jt. Ex. 7.)

Helen interviewed for the CNA trainee position in August 2015. (App. 106 ¶ 16.) The nurse manager who interviewed her thought she was "a good candidate" because "it appeared she really was interested in nursing and caring for people . . . I thought she was intelligent . . ." (Pl. Ex. 10, at 75.) Helen subsequently received a phone call from a CMMC human resources representative who initially offered her the position but rescinded it after discussing Helen's Sabbath scheduling conflict. (Tr. 111.) Helen is a Seventh Day Adventist, and her observance of the Sabbath conflicted with CMMC's weekend shift schedule. (App. 105 ¶ 2, 108 ¶ 30.) The HR rep emailed Helen on September 15, 2015, confirming that the offer was rescinded. (Tr. 113-114; Jt. Ex. 5.)

Helen's subsequent job search efforts are partially documented in logs she created at the Lewiston Career Center. (App. 110, 149-150; Tr. 118-119, 206-207.) Those show approximately 25 organizations where she sought employment from October 2015 through 2019. (App. 110, 149-150.) Her efforts were largely unsuccessful, however. Some of the places listed on the logs did not have job openings. (Tr. 207-208.) One of the listed positions was as a housekeeper with the Hilton Garden Inn in Auburn, but Helen did not accept the position because after shadowing a housekeeper for two days she determined that she could not do the job quickly enough. (Tr. 208-209.) She was offered a position as a TD Bank specialist, but she did not accept it partially because the schedule would have prevented her from completing a Japanese language class she was taking at Bates, and because she was told that it would be a year or two before she was transferred to a position that better aligned with her qualifications. (Tr. 209-210.) She applied for a sales position with Proctor & Gamble, but she did not accept that position because it required Saturday work. (Tr. 212-213.) On April 8, 2018, she signed up with a staffing agency, but it did not match her with any positions. (Tr. 214.) She explored CNA training with another organization, Clover Manor, but she could not afford to pay for it. (Tr. 230-232.)

In April 2017 Helen was hired by the Central/Western Maine Workforce Development Board as a part-time Administrative Assistant, working 20 hours per

week at $18/hour. (App. 115; Tr. 122-123, 196-197.) She was laid off from that position on October 31, 2017, for lack of funding. (App. 112; Tr. 123-124.)

After Workforce Development Helen continued with her job search and with her Japanese language classes at Bates College. (Tr. 124, 126.) She was learning Japanese because she had submitted an application to work for the Olympics in Japan. (Tr. 124, 211.) Helen continued looking for work, however, throughout that time. (Tr. 126.) Her job search included calling, emailing, word of mouth, using the Indeed.com website, and using the Lewiston Career Center computer to search for jobs. (Tr. 127.)

Helen's continued job search efforts after Workforce Development were largely unsuccessful. She did not have an operable vehicle because she could not afford gas or repairs for it after losing the Workforce Development job. (Tr. 125-126.) On November 27, 2017, she met with the proprietor of Forage Market to discuss working for them, but the available position was too far away for Helen to travel and she asked them to keep her posted of other open positions. (App. 152; Tr. 125.) She interviewed to work for another hotel but was not hired for the position. (Tr. 126-127.) In February 2018 she applied for a Public Safety Communications 9-1-1 Telecommunicator position with the Lewiston-Auburn 9-1-1 Emergency Communications System, but she was not hired for the position. (App. 151.) In January and February 2019 she expressed interest in an

administrative representative and an office assistant position she learned about through Indeed. (App. 167-169, 173-175; Tr. 129.) In May 2019 she applied for a Foreign Language Instructor position through Indeed. (App. 176-177; Tr. 129.) In March 2020 Helen applied for a position with the Australian Consulate General in New York but did not get the position. (App. 181; Tr. 129.) In early 2020 she expressed interest in working for a woman who provided elderly caregiver services, but the woman told her she was not hiring due to COVID-19. (App. 183; Tr. 129-130.) In January 2021 she applied for an administrative assistant position and an office manager position through Indeed. (App. 170-172; Tr. 129.) In May 2021 she took a part-time hostess job at Da Vinci's restaurant, earning $14/hour. (Tr. 133, 199-200, 203.) She was let go from that position within a month, however, because she had not memorized the menu quickly enough. (Tr. 201-202.)

Helen has also pursued education, including language classes, to better her employment chances. (Tr. 124, 209, 212, 225.) On April 12, 2021, she was accepted into a Master of Arts in Diplomacy and International Relations degree program that was scheduled to begin in the Fall 2021, but she deferred that because it would have required her to be outside of the country and she felt that she needed to be present because of this case. (App. 188; Tr. 135-136.) She took online Hebrew language immersion courses through Middlebury College from June 29, 2020, to August 7, 2020; June 28, 2021, to August 6, 2021; and July 4, 2022, to

August 12, 2022. (App. 184-187; Tr. 131-132, 223-224.) In 2022 Helen enrolled in a four-year hydrotherapy training program through the Wildwood Center for Health Evangelism. (App. 189-197; Tr. 14-16, 134.) She was still enrolled in that program at the time of trial. (Tr. 14-15, 134.) The costs of the program are being paid for by the church. (Tr. 229-230.)

Since 2019, while there have been stretches that Helen was not actively looking for work due to a lack of transportation, to care for herself, and time spent in foreign language courses that she took to improve her employment chances, she never removed herself from the workforce entirely or permanently gave up on looking for work. (App. 206-207; Tr. 132, 214-215, 218.) She was completely unavailable for working or searching for work, however, during her Hebrew classes. (Tr. 224.) The COVID-19 pandemic from March 2020 to the time of trial also interrupted Helen's job search at times because businesses were not open or were laying off employees. (Tr. 130.) She nevertheless continued her job search online during COVID. (Tr. 130-131.)

Helen filed a complaint against CMMC in the Androscoggin County Superior Court on January 18, 2019. (App. 1.) In it she alleged that CMMC intentionally discriminated against her in violation of the MHRA by failing or refusing to provide her with a reasonable accommodation for her religious practices and refusing to hire her because of her religious beliefs. (App. 25 ¶ 15.)

A four-day jury trial was held from May 8, 2023, to May 11, 2023. (App. 8-9.) On May 11, 2023, the jury returned a verdict in Helen's favor against CMMC on her single claim of unlawful employment discrimination under the MHRA. (App. 9; 27-29.) The jury was asked to decide liability and whether to award Helen compensatory damages and punitive damages. (App. 27-29.) The jury did not award compensatory damages beyond $1 in nominal damages. (App. 28.) While the reason for that decision is unclear, the most likely explanation appears to be that it did not find "intentional discrimination." *See* 5 M.R.S. § 4613(2)(B)(8) (allowing compensatory damages "in cases of intentional employment discrimination"). The jury did not award punitive damages because it did not find by clear and convincing evidence that CMMC acted with malice or reckless indifference. (App. 28-29.)

The court retained for itself the authority to award further relief pursuant to its equity jurisdiction, and it rendered its Decision and Judgment on equity remedies on July 27, 2023. (App. 12-19.) It ordered that CMMC pay Helen back pay until she started her Workforce Development job in May 2017, for a total back pay award of $24,558. (App. 16-17.) It declined to award additional back pay beyond Helen's layoff from that job in October 2017, however, because it found that CMMC had met its burden of proving that Helen failed to exercise reasonable diligence in finding other employment after October 2017 and that substantially

equivalent jobs to an entry level CNA position were available in the region. (App. 17.) The court found that a plaintiff's failure to mitigate was also relevant to an entitlement to front pay, and it declined to award front pay because of its earlier finding on Helen's failure to mitigate coupled with its finding that front pay would require speculation in light of Helen's limited work history. (App. 17-18.) The court also declined to award a tax offset both because it sensed that the tax liability on a back pay award of $24,558 would be modest if not negligible, and it felt that an award would be speculative without knowing what deductions and tax rate would be applicable. (App. 18-19.)

The court also declined to order reinstatement or issue a cease and desist order because it found that circumstances had changed and there was no indication that Helen would work for CMMC again. (App. 17, 19.)

Helen timely filed a notice of appeal on August 17, 2023. (App. 10.)

On August 29, 2023, the Superior Court amended its judgment to include interest of $4,644.21, and costs of $4,597.96. (App. 21.)

STATEMENT OF ISSUES FOR REVIEW

The following issues are raised for review:

A) Did the Superior Court abuse its discretion by declining to award back pay after October 2017.[1]

B) Did the Superior Court abuse its discretion by declining to award front pay or a tax offset.

ARGUMENT

A. The Superior Court Abused its Discretion By Declining to Award Back Pay After October 2017.

Review of a determination of the amount of a back-pay award is for abuse of discretion. *See Walsh v. Town of Millinocket*, 2011 ME 99, ¶ 34, 28 A.3d 610, 619. This Court has explained that "review for an abuse of discretion involves resolution of three questions: (1) are factual findings, if any, supported by the record according to the clear error standard; (2) did the court understand the law applicable to its exercise of discretion; and (3) given all the facts and applying the appropriate law, was the court's weighing of the applicable facts and choices within the bounds of reasonableness." *Marks v. Marks*, 2021 ME 55, ¶ 15, 262 A.3d 1135, 1139 (quotations and citations omitted).

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[1] CMMC has not cross-appealed either the original Decision and Judgment or the Amendment Judgment. Accordingly, the $29,203.21 judgment for back pay and interest through May 2017, together with costs of $4,597.96, are not at issue on appeal. *See* M.R. App. P. 2C(a)(1); *In re Melissa T.*, 2002 ME 31, ¶ 5, 791 A.2d 98, 99-100.

Here, the presiding Superior Court Justice abused his discretion by refusing to award Helen back pay after October 2017. In light of the evidence at trial, the court could not have reasonably concluded that CMMC met its burden of proving the mitigation defense in order to justify cutting off back pay.

Back pay is expressly authorized by the MHRA, 5 M.R.S. § 4613(2)(B)(2), and it should be awarded absent extraordinary circumstances. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) ("[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."). *Cf. Maine Human Rights Com'n v. City of Auburn*, 425 A.2d 990, 996 (Me. 1981) ("We approve the Superior Court's application of the federal rule in determining back pay under our Maine statute, modeled as it is on the federal antidiscrimination acts."). Back pay is calculated by subtracting the amount a victim of unlawful discrimination earned in other employment from the amount she would have earned if the discrimination had not occurred, until the date of judgment. *See LeBlond v. Sentinel Service*, 635 A.2d 943, 945 (Me. 1993); *Scarfo v. Cabletron Sys.*, 54 F.3d 931, 954 (1st Cir. 1995) (citing provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5(g)).

An employer may reduce a back-pay award if it establishes what is known as the mitigation defense. This Court has held that "back pay awarded as relief for unlawful employment discrimination is to be reduced by actual earnings on another job during the pertinent period, or by whatever amount the victim could with reasonable diligence have earned during that time." *Maine Human Rights Com'n for Use of Kellman v. Department of Corrections*, 474 A.2d 860, 869 (Me. 1984) (citations and quotations omitted). "The employer has the burden to prove that the employee could have mitigated her damages by finding other employment." *Walsh v. Town of Millinocket*, 2011 ME 99, ¶ 34, 28 A.3d 610, 618-619.

To establish the mitigation defense an employer must prove two elements if plaintiff has made some effort at reemployment: "(i) though substantially equivalent jobs were available in the relevant geographic area, (ii) the claimant failed to use reasonable diligence to secure suitable employment." *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 15 (1st Cir. 1999). It is a two-part test, meaning defendant must prove *both* that substantially equivalent jobs were available *and* that plaintiff failed to use reasonable diligence to find suitable employment. *See id.*

This makes sense. Without the requirement of substantially equivalent jobs a victim of discrimination would have to work in a job she did not want so that the employer who discriminated against her could pay less, despite the employer having put her in that position due to its unlawful discrimination. Such an outcome

would be at odds with the MHRA remedial purpose of making a victim of unlawful discrimination whole. *Cf. Rozanski v. A-P-A Transport, Inc.*, 512 A.2d 335, 342 (Me. 1986) ("the paramount objective of the remedy is to make whole the victim of unlawful employment discrimination"); *Albermarle Paper Co.*, 422 U.S. at 418-419 ("The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.") (quoting *Wicker v. Hoppock*, 73 U.S. 94, 99 (1867)).

1. Substantially Equivalent Jobs Were Not Available.

The Superior Court abused its discretion in finding that "substantially equivalent jobs" were available in the relevant geographic area. (App. 17.) A "substantially equivalent job" is not one in another line of work. *See Ford Motor Co. v. Equal Employment Opportunity Com'n*, 458 U.S. 219, 231 (1982); *Mullen v. New Balance Athletics, Inc.*, 2019 U.S. Dist. LEXIS 30967, at *19 (D. Me. Feb. 27, 2019). Rather, "[s]ubstantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title VII claimant has been discriminatorily terminated." *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003). *See also Booker v. Taylor Milk Co.*, 64 F.3d 860, 866 (3rd Cir. 1995) (same); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991) (same); *Rasimas v. Michigan Dept. of Mental Health*,

714 F.2d 614, 624 (6th Cir. 1983) (same); *Mullen v. New Balance Athletics, Inc.*, 2019 U.S. Dist. LEXIS 30967, at *19 ("The comparability of other jobs turns on numerous factors—e.g.[,] stature, amount of compensation, job responsibilities, and working conditions.") (quoting *Bennett v. Capitol BC Rests., LLC*, 54 F. Supp. 3d 139, 148 (D. Mass. 2014)).

Here, the court did not identify in its opinion any substantially equivalent jobs under the standard articulated in these cases. Rather, it found that a CNA is an "entry position," (App. 14), and found that there were other entry level positions available in the area. (App. 17-18.) The court's written decision reflects virtually no analysis, however, of the promotional opportunities, job responsibilities, working conditions, or status of other positions. It could not do so because there was a dearth of evidence on topic to discuss. There were scant details offered at trial about any other jobs. In sum, the available evidence came up far short of the required showing for "substantially equivalent jobs" to be found. *See id. See also Brianna Colo v. Ns Support*, 2023 U.S. Dist. LEXIS 105452, *55-56 (D. Idaho June 15, 2023) (defendant's failure to provide evidence of other position's promotional opportunities, compensation, or job responsibilities prevented court from finding that it was substantially equivalent); *Hughes v. Mayoral*, 721 F. Supp. 2d 947, 968 (D. Haw. 2010) (classified advertisements did not carry defendant's burden of showing advertised positions had virtually identical promotional

opportunities, compensation, job responsibilities, working conditions, and status as the position in question); *Holocheck v. Luzerne County Head Start, Inc.*, 2007 U.S. Dist. LEXIS 22339, *40 (M.D. Pa. March 28, 2007) (four-page computer printout purporting to list positions employing individuals with plaintiff's credentials was insufficient to establish defendant's burden).

With respect to other possible "Earn While You Learn" programs, the court correctly found that "[t]he details of those other programs were not specified at trial." (App. 16.) In fact, the only reference at trial to such programs at MaineGeneral, MidCoast Hospital, and the V.A. was the following exchange between Helen and CMMC's lawyer during cross examination:

> Q Miss Crabtree, you're aware that there are Earn While You Learn programs offered by other instituions [sp], correct?
>
> A I am aware.
>
> Q And you haven't applied for those either, have you?
>
> A We just talked about Clover and St. Mary's.
>
> Q There are programs currently being offered by Maine General, Midcoast Hospital, the VA. You haven't applied for any of those, correct?
>
> A How would I get there, Miss Rideout? How would I get to those places?
>
> Q Have you explored subsidized housing options that are closer to any of those institutions?

A I think it's -- it's a bit much for me at this time. It's quite a lot with what I'm dealing with.

(Tr. 252-253.)

The reference to Clover Manor was to an earlier exchange in which Helen explained that she did not pursue a CNA training program at Clover Manor because she would have had to pay and she could not afford it. (Tr. 230-232.)[2] The reference to a St. Mary's CNA training program was to the following earlier reading by CMMC's counsel of a portion of Helen's deposition testimony:

Q Miss Crabtree, I'm directing you to page 96 of your deposition, which is Defense Exhibit 3. Question, Did you ever explore receiving training as a CNA at another facility? Yes. And where? I believe St. Mary's and Clover Manor. Question, Did you receive training at St. Mary's or Clover Manor as a CNA? Answer, By that time St. Mary's responded I had already received -- taken up another employment. Clover Manor required that I would have had to pay for it and I was working with the CareerCenter at the time and they said they would not fund the cost of training. Do you see that?

A That the CareerCenter would not fund the training?

Q Correct.

A Yes.

(Tr. 231-232.)

[2] The cost of a CNA course would have been $3000 to $4000. (Pl.'s Ex. 6, at 18, 20.) By contrast, the EWYL program would have included free tuition and fees and she would have been paid her for her time. (App. 106 ¶ 9.) In any event, while she would not have been eligible to be hired as a CNA without the training, there was no evidence at trial of CNA openings outside of CMMC.

These passing references are far from sufficient to show that there were substantially equivalent CNA training programs to the CMMC EWYL program. Again, other than the reference to Clover Manor requiring payment as opposed to free tuition, no description of the programs was provided. (App. 16.)[3] It is therefore impossible to conclude that they provided "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status" to the CMMC EWYL program.

The other jobs the court discussed in its opinion were not even remotely equivalent. None was comparable to an EWYL CNA trainee or to a CNA. None provided tuition-free, paid training to become a CNA. None involved direct patient care. None required training and certification similar to a CNA. (App. 106, ¶ 10; Pl.'s Ex. 6, at 27.) While we know very little about them based on the record, a bank specialist, hotel housekeeper, and restaurant hostess are far different positions simply by name. The staffing agency did not match Helen with any positions. (Tr. 214.) The parties' stipulations about other jobs in the healthcare field do not describe them other than that they were "healthcare support positions." (App. 109 ¶

[3] The court appeared to nevertheless fault Helen for not being interested in exploring the possibility of programs within an hour commute, (App. 16), but Helen testified that she did not have an operable vehicle. (Tr. 125-126.)

34.) The stipulations also refer to 2016 job data instead of the timeframe the court was analyzing after October 2017. (App. 16.)[4]

2. Helen Did Not Remove Herself From the Work Force Altogether.

Some courts have held that an employer is relieved of its obligation to show that substantially equivalent jobs were available as a part of its failure to mitigate defense if the discrimination victim made no effort to secure suitable employment. *See Quint v. A.E. Staley Mfg. Co.*, 172 F.3d at 16. "This alternative burden requires proof that the terminated employee withdrew completely, a burden that is more onerous than establishing a plaintiff's job search was not reasonably diligent." *Phillips v. Starbucks Corp.*, 2023 U.S. Dist. LEXIS 143149, *19 (D.N.J. Aug. 16, 2023) (citations and quotations omitted).

Here, the Superior Court made the following finding: "Her work search after 2017 has been woefully inadequate, and she admittedly went long periods with no search at all. She in effect removed herself from the work force." (App. 16.) While it is unclear whether the court meant that Helen removed herself only during the referenced "long periods" or entirely, to the extent CMMC may argue that it meant that Helen had removed herself from the work force completely from 2017 to the time of judgment, such a finding by the court would have been clearly erroneous.

[4] Similarly, the open jobs listed in Defendant's Exhibit 5 such as Patient Services Representative were all from the 2015 and 2016 time period. (App. 200-205.)

Cf. Marks v. Marks, 2021 ME 55, ¶ 15, 262 A.3d 1135, 1139 (factual findings are subject to the clear error standard of review). The evidence at trial described above, (8-11), and the court's own findings, (App. 15-17),[5] conclusively establish that Helen did not completely remove herself from working or looking for work from October 2017 until the time of trial. CMMC was therefore not relieved of its obligation under the mitigation defense to show that substantially equivalent positions were available.

B. The Superior Court abused its discretion by declining to award front pay or a tax offset.

The Superior Court declined to award Helen front pay at least in part because it erroneously found that Helen had failed to mitigate her damages. (App. 17-18.) It also denied a tax offset at least in part because it found that the tax consequences resulting from the small award would be negligible. (App. 18-19.)[6] On remand, the court should thus redetermine both whether front pay should be awarded and whether a tax offset is appropriate in light of the correct standard on the mitigation defense.

[5] While the court may have found Helen's job search to be inadequate, it nevertheless found it to be "minimal," (App. 15), which is different from it being absent.

[6] With respect to the court's concern about speculation, (App. 18), Appellant's Post-Trial Damages Brief provided a detailed analysis of the tax offset request, (App. 36-39), and the court was asked to take judicial notice of the applicable tax rates. (App. 59.) With respect to the deductions that Helen may claim, in light of this appeal payment on the judgment will not take place until the 2024 tax year and information on Helen's anticipated 2024 deductions can be provided to the court after remand.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court vacate the Superior Court's decision to deny back pay after October 2017, front pay, and a tax offset, and remand those issues for redetermination in light of the correct legal standard on the mitigation defense.

Dated: January 12, 2024 /s/ John P. Gause

John P. Gause, Esq., Bar # 8192
Eastern Maine Law, LLC, P.A.
23 Water Street, Suite 202
Bangor, ME 04401
(207) 947-5100
jgause@easternmainelaw.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, John P. Gause, hereby certify that two copies of the Brief of Appellant Helen Crabtree are being served upon counsel at the addresses set forth below by email on January 12, 2024, and first-class mail, postage prepaid on January 12, 2024:

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau & Pachios, LLP
57 North Main Street
P.O. Box 1318
Concord, NH 03302-1318
Email: pcallaghan@preti.com

Harper A. Weissburg, Esq.
Preti Flaherty
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Email: HWeissburg@preti.com

Brooke K. Haley, Esq.
Preti Flaherty
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Email: BHaley@preti.com

Dated: January 12, 2024 /s/ John P. Gause

John P. Gause, Esq., Bar # 8192
Eastern Maine Law, LLC, P.A.
23 Water Street, Suite 202
Bangor, ME 04401
(207) 947-5100
jgause@easternmainelaw.com

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. And-23-310

Helen Crabtree,
Appellant

v.

Central Maine Medical Center,
Appellee.

CERTIFICATE OF SIGNATURE AND COMPLIANCE

I am filing the electronic copy of a brief with this certificate. I will file the paper copies as required by M.R. App. P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R. App. P. 7A(f), and conform to the form and formatting requirements of M.R. App. P. 7A(g).

Name of party for whom the brief is filed: Helen Crabtree
Attorney's name: John P. Gause
Attorney's Maine Bar No.: 8192
Attorney's email address: jgause@easternmainelaw.com
Attorney's street address: 23 Water Street, Suite 202
Attorney's business telephone number: (207) 947-5100
Date: January 12, 2024