

2011 WL 2645877 (MCAD)

Massachusetts Commission Against Discrimination

*1 MCAD AND CYNTHIA JOHNSON, COMPLAINANTS

v.

BG NEW ENGLAND POWER SERVICES, INC., RESPONDENT

Docket No. 06 BEM 00957

June 21, 2011

For Complainants: William Green, Esq., Commission Counsel

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 20, 2007, Cynthia Johnson (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that Respondent BG New England Power Services, Inc. (“Respondent”) failed to rehire her as a laborer at the Mystic Power Plant on or around December of 2005 as a result of age and gender discrimination in violation of M.G.L. c. 151B. sec. 4(1) and (1B). On January 20, 2009, the Commission issued a Finding of Probable Cause against the Respondent. The Commission certified the case for public hearing on July 23, 2010.

On or about August 18, 2010, Respondent's parent, EBG Holdings LLC, along with its subsidiaries including the Respondent, filed a petition for relief under Chapter 11 of the United States Bankruptcy Court in the Southern District of New York (Case No. 10-14419 and related cases). On August 24, 2010, Respondent's counsel notified Commission Counsel William Green of the filing and asserted that it operated as a stay of litigation against the Respondent. Commission Counsel Green replied in a letter dated September 8, 2010 that the stay provisions of [Section 362 of the Bankruptcy Code](#) do not apply to Commission proceedings. On October 19, 2010, Respondent's counsel wrote the Commission that the certification for public hearing should be withdrawn and the case dismissed. He did not, however, file a motion to dismiss in accordance with the Commission's adjudicatory rules. Following a pre-hearing conference at which Respondent's counsel argued that the Commission should not go forward with a public hearing, he informed the Commission on January 31, 2011 that Respondent would not appear at the public hearing in light of the pending bankruptcy proceedings.

A default hearing pursuant to [804 CMR sec. 1.21\(8\) \(b\)](#) was conducted on February 7, 2011, the date scheduled for the public hearing. Complainant proffered evidence in support of her age and gender discrimination claims as well as evidence of her damage claims. The record was held open after the hearing for the submission of additional records by Commission Counsel Green regarding successor ownership of Respondent's assets. On February 8, 2011, a written notice of the entry of default and of the consequences thereof was served on Respondent by the Commission Clerk.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the follow-

ing findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Cynthia Johnson was born on October 7, 1957. She has two sons, born in 1992 and 1997. Her older son was diagnosed with ADHD and her younger son was diagnosed with ADHD and Bipolar Disorder. Complainant is a single parent.

*2 2. Complainant was hired by Boston Edison in 1982 as a station cleaner at its Mystic Station plant (hereafter "Mystic Station"). Mystic Station is an electric-generating facility in Everett, Massachusetts. Boston Edison also owned and operated an electric-generating facility in South Boston ("New Boston").

3. Complainant became a Fossil Station Laborer ("laborer") at Mystic Station in the mid-1980s. She was one of the first women to hold a laborer position at Mystic Station and functioned in that capacity for twenty-two years. The job was a union position. Some of the duties Complainant performed as laborer included removing snow and ash, cleaning machinery, pumping oil, performing clean-ups after outages, draining river water and marine life from condenser tubes, and painting. The laborer job required specialized training and, at times, posed physical challenges. Some cleaning tasks required that Complainant wear a protective rubber suit and mask and climb down narrow manholes on ladders in order to clean debris from pipes. As a laborer, Complainant operated equipment such as bobcats, small backhoes, and steam cleaner degreasers.

4. During power outages Complainant had to work consecutive night and day shifts, for sixteen hours a day, seven days a week. Her normal work week was forty hours plus approximately ten hours of overtime per week.

5. While Complainant worked as a laborer at Mystic Station, she attended numerous safety and power equipment maintenance classes.

6. In May of 1998, Mystic Station and the New Boston facility were sold to Sithe Energies, Inc. Complainant became an employee of Sithe New England Power Services Inc.

7. Union employees at Mystic Station and at New Boston, regardless of the various changes in the power plants' ownership, retained their status as union members of the Utility Workers Union of America, AFL-CIO, Local 369. Collective bargaining agreements, covering such matters as accrued seniority, vacation benefits, health care benefits, and 401K plan contributions, were carried over as part of the sale of corporate assets from one corporate owner to another.

8. In 2002, Exelon Corporation purchased Sithe Boston Generating from Sithe Energies, Inc., acquired the Mystic Station and New Boston facilities, and changed the name of Sithe Boston Generating to Exelon Boston Generating. Various Sithe subsidiaries changed their Sithe designations to Exelon designations. For example, the entity which provided plant personnel for Mystic Station -- Sithe New England Power Services, Inc. -- became Exelon New England Power Services, Inc.

9. Complainant was laid off from her laborer's position at Mystic Station in February of 2004 by Exelon New England Power Services, Inc. Complainant was offered a layoff package but refused to take it because the terms of the layoff package required her to give up recall rights to her laborer's job at Mystic Station.

10. Following her layoff from Mystic Station, Complainant was recalled in mid-2004 to work as a laborer at New Boston.

*3 11. In 2005, Complainant was working at Exelon's New Boston facility in South Boston, when Exelon Corporation sold its interest in Exelon Boston Generating to EBG Holdings. Exelon Boston Generating was re-named Boston Generating and assumed control of Mystic Station. Various Exelon subsidiaries deleted their Exelon designations or changed them to BG designations. The Exelon Corporation retained ownership and management of the New Boston facility.

12. On or about November 1, 2005, Respondent BG New England Power Service, Inc. posted a laborer vacancy at Mystic Station. Complainant learned from friends that a job vacancy had been posted. The position was initially posted only for internal candidates but was subsequently posted for external candidates after no internal candidates applied.

13. Complainant, who was working at the soon-to-be de-activated New Boston facility, applied for the Mystic Station position in a letter dated November 14, 2005. Complainant's Exhibit 6. Complainant received an email acknowledging receipt of her application but was not offered an interview and was not hired.

14. BG New England Power Services, Inc. hired Timothy Moran for the position of Fossil Station Laborer at Mystic Station in December of 2005 at \$21.99 per hour. Moran was approximately thirty years old at the time of hire. Moran's prior job experience consisted of four years as a maintenance worker at a school, part-time work as a grocery clerk, and some experience as a warehouse employee unloading trucks and stocking inventory. Complainant's Exhibit 1.

15. Complainant testified that she was more qualified than Moran for the position of laborer because she had worked as a laborer at Mystic Station for almost twenty years and was familiar with the job duties. She testified that Moran had no experience working in the electrical power generating business.

16. On January 17, 2006, Respondent BG New England Power Services, Inc. posted another laborer vacancy at Mystic Station. On or about March 6, 2006, Respondent hired Steven Bailey. According to Complainant, Bailey was a longstanding BG employee, but in a different, non-laborer position at a Weymouth plant. Complainant testified that Bailey occupied the laborer's position for approximately a year and then left. According to Complainant, the second laborer's position is currently vacant.

17. On November 30, 2007, Complainant was laid off from employment at the New Boston facility. She received \$36,960.00 in severance pay. At the time of layoff, she earned approximately \$22.00 per hour for her forty-hour work week and \$33.00 per hour for an average of ten hours per week of overtime at a rate of time and one-half. In calendar year 2006, Complainant's last full year of employment as an electrical power plant laborer, she earned gross wages of \$72,340.00. Complainant's Exhibit 20.

18. In 2008, Complainant received unemployment compensation totaling \$31,200.00 and in 2009, she received \$7,650.00 in unemployment compensation.

*4 19. Following her layoff, Complainant looked, unsuccessfully, for work as a laborer in an electrical power plant. Complainant was forced to work in a variety of lowpaying, temporary jobs earning minimum wage. Complainant's total income after layoff has been less than \$10,000.00. In an effort to find another job, Complainant has used facilities offered by the Division of Employment Security in Cambridge and Everett, but has been unable to locate a position with income comparable to what she formerly earned.

20. Complainant testified that if rehired, she would have worked at Mystic Station until 2019, when she reached age sixty-two.

21. Complainant testified that she suffered great emotional harm in confronting the reality that Respondent did not value her as a job candidate despite her long work history at Mystic Station. Complainant was hurt, humiliated, and felt "betrayed" that Respondent awarded the laborer's job at Mystic Station to a young man with no experience in power generating plants when she had performed in the position for approximately twenty years. Complainant was anxious about providing housing and medical care for her children following her layoff in 2007 from New Boston. Her stress resulted in sleep loss, anxiety attacks, and trouble breathing. Complainant sought medical assistance from her primary care physician at MGH who suggested that she see a therapist. Complainant saw a psychiatric nurse therapist on approximately seven or eight occasions, was placed on Wellbutrin medication, and started performing Yoga to ease her anxiety.

22. On or about August 18, 2010, Respondent BG Power Service of New England, Inc., along with its parent and affiliates, filed for relief under Chapter 11 of the United States Bankruptcy Code in the United

States Bankruptcy Court for the Southern District of New York. Respondent's assets and those of its parent and affiliates were to be sold for the benefit of creditors.

23. Complainant filed a proof of claim with the bankruptcy claims administrator in the amount of \$285,000.

24. In February of 2011, Respondent's bankrupt entities were purchased by Constellation Energy Group, Inc. which became the successor-in-interest to, and has adopted the collective bargaining agreements of, the Mystic plants. Constellation has assumed the labor obligations of Respondent BG Power Service of New England, Inc., its predecessor.

25. On or around April 28, 2011, Exelon Corp. agreed to buy Constellation Energy Group, Inc. for 7.9 billion dollars. The transaction is pending approval of utility regulators and shareholders.

III. CONCLUSIONS OF LAW

Sex and Age Discrimination

In order to prevail on a charge of discrimination in employment based on race, color, national origin, sex, or ancestry under [M.G.L. c. 151B, s. 4\(1\)](#), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See [Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination](#), 431 Mass. 655 (2000). Where, as here, direct evidence is absent, Complainant may establish a prima facie case of employment discrimination by showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of her protected class(es). See [Lipchitz v. Raytheon Company](#), 434 Mass. 493 (2001); [Abramian v. President & Fellows of Harvard College](#), 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts).

*5 Complainant described her membership in two protected classes, gender and age, which related to her attempts to continue her career, at age forty-eight, as a female laborer in a male-dominated field. Complainant suffered an adverse employment action when she was unsuccessful in her attempt to become re-employed at Mystic Station. There is un rebutted evidence that she was treated differently from the successful male applicant for the 2005 laborer vacancy at Mystic Station insofar as her credentials for the position far exceeded his yet she was not selected. The un rebutted evidence also establishes that Complainant performed in an adequate manner as a Mystic Station laborer for nearly two decades prior to applying for rehire in 2005. No evidence was introduced at the public hearing which detracts from Complainant's testimony that she satisfactorily completed all tasks assigned to her, was extensively trained in the position, and had no record of discipline. Complainant's work record includes an average of ten hours overtime per week. Such overtime attests to her value as an employee, her reliability, and her work ethic.

The circumstances presented above raise reasonable inferences of sex and age discrimination with respect to the selection of Timothy Moran over Complainant. See [Knight v. Avon Products](#), 438 Mass. 413, 420 (2003); [Wheeler College v. MCAD](#), 371 Mass 130 (1976). In the normal course, the burden of articulating a legitimate, nondiscriminatory reason for its action would shift to Respondent, but in this matter, Respondent has chosen to default rather than present a defense. As a result, Respondent has failed to rebut Complainant's evidence. See [Kane v. College Central Network, Inc.](#) 32 MDLR 192 (2010) (Complainant entitled to prevail in face of Respondent's default at stage two). Accordingly, Complainant is deemed to have prevailed on the issue of liability. [FN1]

Impact of Bankruptcy Proceedings

Respondent asserted in pretrial communications that the filing of its voluntary petition for relief under Chapter

11 of Title II of the United States Bankruptcy Code operates as a stay of the commencement of this proceeding. It is the position of the Commission, however, that the stay provisions of section 362 of Chapter 11 do not apply to this case because the Commission's civil proceedings constitute an exercise of the state's police and regulatory powers that are exempt from the automatic stay provision of [section 362 \(b\)\(4\) of the Bankruptcy Code](#). See [In re Mohawk Greenfield Motel Corp.](#), 239 B.R.1 (Bkrcty. D. Mass. 1999) (holding that [section 362 \(b\)\(4\) of the Bankruptcy Code](#) excepts from the Code's automatic stay provisions the entry by the MCAD of monetary judgments under Chapter 151B). Were a stay to be imposed, the Commission's police powers as a legislatively-established agency would be nullified. The Commonwealth and its citizens, no less than the individuals who are parties to this suit, have an interest in preventing employment discrimination. Consequently, the Commission has jurisdiction to proceed with a resolution of this matter, notwithstanding Respondent's filing of a Suggestion of Bankruptcy with the Commission on August 24, 2010.

Lost Wages

*6 During her last full year of employment with Respondent in 2006, Complainant earned gross wages of \$72,340.00. She is entitled to three and one-half years of back pay (from layoff to public hearing) computed in accordance with that yearly amount, for an aggregate figure of \$253,190.00. This figure must be mitigated by severance payments, unemployment compensation, and income from other jobs. Complainant's mitigation amounts to \$85,810.00. Accordingly, Complainant is entitled to damages for lost wages in the amount of \$167,380.00. I decline to award front pay on the basis that its issuance is both unwarranted and impractical.

Affirmative Relief

Pursuant to [G.L.c.151B, sec. 5](#), the Commission has the authority to issue orders for affirmative relief, including the hiring and reinstatement of employees, with or without back pay. The findings of fact merit that Complainant be returned to her former position as Fossil Station Laborer at Mystic Station, whether such an order be deemed hiring or reinstatement. As with the issue of liability, relief is unaffected by the changing ownership of Mystic Station because successor owners of Mystic Station have adopted the collective bargaining agreements of their predecessors and have assumed their predecessors' contractual labor obligations. Accordingly, Respondent's current successor entity is ordered to offer Complainant the next Fossil Station Laborer position it seeks to fill at Mystic Station. Until such action takes place or for the next two years, the successor entity shall report to the Commission any Fossil Laborer Station position that it posts internally, externally or otherwise and anyone it places into such position.

Emotional Distress Damages

Complainant is entitled to an award of monetary damages for emotional distress based solely on her credible testimony as to the cause of the distress. See [Stonehill College v. MCAD](#), 441 Mass. 549 (2004); [College-Town](#), 400 Mass. at 169; [Buckley Nursing Home v. MCAD](#), 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See [Stonehill](#), 441 at 576. An award must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. *Id.*

Complainant testified that she was greatly depressed when the 2005 laborer's vacancy at Mystic Station was awarded to a young man with no experience in power generating plants. She was hurt and humiliated that she did not obtain the job since she had held the same position for approximately twenty years, was familiar with employees at Mystic Station, and had been extensively trained for the position. Complainant was fearful about losing her job at New Boston and anxious that she would not be able to care for her children after she was laid

off. Complainant's emotional distress continues to this day because she has not been able to obtain a comparable position, she has exhausted a substantial part of her retirement savings, and she realizes that her age and specialized job skills limit her future employment prospects. Complainant testified credibly that her job-related stress caused her sleep loss, anxiety attacks, and trouble breathing. Complainant has seen a therapist and has taken medication to cope with the stress of not being rehired at Mystic Station.

*7 As a result of the foregoing, I conclude that Complainant is entitled to \$75,000.00 in emotional distress damages.

IV. ORDER

This decision represents the final order of the Hearing Officer. Respondent and/or its successors are hereby ORDERED to:

(1). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$167,380.00 in lost wages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(2) Offer Complainant the next available Fossil Station Laborer position at Mystic Station. Respondent's successor entity shall report to the Commission any Fossil Station Laborer position that it posts internally, externally or otherwise and anyone it places into such position in the next two years or until Complainant is hired.

(3). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$75,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as payment of lost wage and emotional distress damages have been made. If Respondent fails to comply with the terms of this Order within the time periods allotted, Complainant should notify the Clerk of the Commission.

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.

So ordered this 21st day of June, 2011.

Betty E. Waxman, Esq., Hearing Officer

FN1. Liability is unaffected by the changing ownership of Mystic Station because EBG Holdings, through its subsidiaries, assumed control of Mystic Station prior to advertising for the laborer vacancy in November of 2005 and because EBG, as a successor-in-interest to Exelon, adopted the collective bargaining agreements of its predecessor and assumed the predecessor's contractual labor obligations.

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