**STATE OF MAINE**
**SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

**LAW DOCKET No. AND-23-310**

**HELEN CRABTREE,**

**Plaintiff-Appellant**

**v.**

**CENTRAL MAINE MEDICAL CENTER,**

**Defendant-Appellee**

**ON APPEAL**
**FROM THE ANDROSCOGGIN COUNTY SUPERIOR COURT**

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# BRIEF OF APPELLEE
# Central Maine Medical Center

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

# I. INTRODUCTION

Plaintiff-Appellant Helen Crabtree ("Appellant" or "Crabtree") challenges portions of the Androscoggin Superior Court's Decision and Judgment (i) limiting Appellant's back pay to the period of September 15, 2015 through May 19, 2017, based on its determination that Appellant removed herself from the workforce after October 31, 2017; (ii) declining to award tax-enhanced relief; and (iii) denying Appellant's request for six years of front pay.

For the reasons set forth herein, this Court must uphold the Superior Court's denial of back pay after October 2017, tax-enhanced relief, and front pay as an appropriate exercise of the Superior Court's discretion, supported by evidence presented at trial, including but not limited to, Crabtree's own admissions regarding her removal from the workforce, abysmal mitigation efforts, and lack of interest in substantially equivalent opportunities, as well as applicable legal precedent.

# II. STATEMENT OF FACTS

## A. Earn While You Learn Program

In August 2015, Crabtree applied to a Certified Nursing Assistant ("CNA") course through the Maine College of Health Professions ("MCHP"), a wholly owned subsidiary of Central Maine Medical Center ("CMMC"). Appendix "A" at 105, ¶¶3-4. Accepted applicants could then apply for a CNA trainee position in connection with CMMC's Earn While You Learn ("EWYL") program, which CMMC created

to recruit CNAs.[1] (A. 106, ¶¶6, 8.) The CNA trainee position did not require prior experience. (A. 86.)

Upon acceptance to the EWYL program, CMMC would pay a CNA trainee's course tuition and fees and $10.20 per hour for up to 30 hours per week for time spent in class and clinics.[2] (A. 106, ¶9, A. 86.) CNA trainees were assigned to work in a specific hospital unit for their course clinical hours. Trial Transcript ("Tr.") at 465:6-12; (A. 106, ¶15, A. 107, ¶17, A. 108, ¶24.) Upon completion of the nine-week CNA course and State licensing and registration requirements, CMMC required the CNA to work on the unit for two years. (A. 106, ¶¶10, 12.) During their two-year work commitment with CMMC, CNAs provided direct and indirect patient care and performed more complex clinical skills under the direction of a registered nurse[3] or physician. (A. 90-94.)

### B. Appellant's Failure To Mitigate

In the fall of 2015, there was 3.6% unemployment rate in Androscoggin County, 687 vacant healthcare support positions in Central and Western Maine, and CMMC alone had approximately 100 different available entry-level positions. (A. 109, ¶¶33-35, A. 200-205.) But Crabtree did not apply for any of the hundreds of

[1] The EWYL CNA training program and "CNA Trainee" position are the "employment opportunity" and "job description", respectively, underlying Crabtree's employment discrimination claim. (Blue Br. 14-23; A. 97.)
[2] CMMC compensated CNA trainees in the EWYL program at a lower rate ($10.20) than CNAs ($11.79). *Compare* (A. 106, ¶9) *with* (A. 109, ¶32.)
[3] Unlike CNAs, registered nurses ("RNs") must complete college-level courses and other state licensing requirements. (Tr. 265:2-16.)

available healthcare support positions. (Tr. 234:12-236:9.) Rather, on May 19, 2017, Crabtree left the healthcare industry altogether and accepted a higher-paying part-time job as an administrative assistant for the Central Western Maine Workforce Development Board ("Workforce Development")—her first paying job in over five years. (Tr. 196:15-197:2; A. 198.) Crabtree chose this position over other available CNA training programs at St. Mary's and Clover Manor.[4] (Tr. 231:3-232:24.)

Other than her early inquiries about St. Mary's and Clover Manor, Crabtree did not explore CNA training. (Tr. 230:19-233:6.) Nor did she investigate nursing courses at the community college. (Tr. 225:18-227:10.) Instead, Crabtree worked part-time for Workforce Development, until she was laid off on October 31, 2017, and simultaneously audited Japanese classes at Bates College ("Bates"). (Tr. 124:2-11, 196:8-197:2; A. 112.)

The unemployment rate in Androscoggin County at the time of her termination from Workforce Development was 3.2%. (A. 109, ¶35.) However, Crabtree did not apply for any other job for the rest of 2017. At best, Crabtree preliminarily inquired with Forage Market about job opportunities but did not apply

[4] Crabtree testified that she did not pursue St. Mary's CNA training program because she was working elsewhere and further testified that she did not pursue Clover Manor's training program due to cost. (Tr. 231:3-232:24.) However, Crabtree was willing to finance a $46,000 master's degree in diplomacy and international relations. (Tr. 227:12-229:5.)

for any available positions because Gray, Maine "was far and without transportation, [she] wouldn't have been able to make it."[5] (Tr. 125:1-14; A. 110, A. 150.)

Despite her unemployment, Crabtree remained committed to her Japanese courses at Bates through March 2020. (Tr. 130:13-131:19, 222:23-223:6.) Crabtree prioritized her Japanese class over employment opportunities and turned down a job offer as a bank specialist with TD Bank because it would have conflicted with her classes. (Tr. 209:7-210:16.)

In 2018, the unemployment rate in Androscoggin County was just 3.2%. (A. 109, ¶35.) Yet, the trial record contains *credible* evidence of only two job search attempts by Crabtree in 2018 and neither was in healthcare. (A. 151, A. 154; Tr. 214:4-16.)

Crabtree's job search logs are unreliable and undated. (A. 110, A. 149-150.) At trial, Crabtree conceded that some of the log entries were for employers without active job postings. (Tr. 207:2-208:8.) As the Superior Court observed:

> Most of the listings do not indicate a date, and many of the entries are for the same prospective employer. For example, there are 7 entries for Bates College, and several other businesses with two or more entries suggesting there may be double entries for the same search (i.e. Town

[5] Crabtree later testified that she, in fact, had reliable transportation in the fall of 2017. (Tr. 125:20-126:3.) Crabtree frequently cited "lack of transport" to justify removing herself from the workforce after her October 2017 layoff. *See, e.g.*, (Tr. 125:1-126:3, 214:21-215:6, 252:19-253:12; A. 206-207, ¶¶2-3.) However, lack of transport and/or distance did not stop her from pursuing other academic and professional opportunities in New York, Japan, South Africa, Washington, D.C., Switzerland, Germany, and Ethiopia. (Tr. 124:6-124:18, 129:14-22, 135:12-137:10). The Superior Court appropriately determined that Crabtree was not interested in CNA training positions "as despite her claims she wanted to work in the healthcare field, she testified she would not consider such programs due to travel." (A. 16.)

> of Gray, Proctor and Gamble, Hilton Garden). Many entries do not identify the position applied for, leaving the court doubting if it was a realistic search, (i.e., Harvard University, Middlebury College).

(A. 15.) Notably, several of the post-2017 job entries reference positions in Gray, Maine, despite Crabtree's testimony that she would not accept a job in Gray due to a lack of transportation after 2017. (A. 110, A. 149; Tr. 125:5-126:3.) None of the post-2017 entries indicate whether Crabtree actually applied for or inquired about the position. (A. 110, A. 149-150.) Moreover, the job logs do not contain any entries beyond January 1, 2019.[6] (A. 110, A. 149-150; Tr: 207:5-8.)

Crabtree entered 2019 unemployed despite another year of record-low unemployment in Androscoggin County. (A. 109, ¶35.) Crabtree admitted there were stretches of time in 2019 (and for years after) that she was not actively looking for work because she was "busy with foreign language classes." (Tr. 214:21-24, 218:25-219:4; A. 206, ¶2.) Those "stretches" of time covered the entire year (and the years following).

Crabtree did not provide evidence that she applied for any job in 2019. At best, Crabtree submitted applications through Indeed (a third-party online job-posting platform) for non-healthcare positions with two different companies, both of which informed her they were not accepting applications through Indeed, only

[6] The last dated entry is a January 1, 2019 reference to a position in Gray, Maine, which Crabtree had no intention of applying for, let alone accepting. (A. 149; Tr. 125:5-126:3.)

through their company websites.[7] (A. 176-178.) However, Crabtree presented no evidence that she applied for these positions through the respective company websites.

In 2020, Crabtree applied for only one job—a job with the Australian Consulate General based in New York or Washington, D.C.[8] (A. 181; Tr. 129:14-22.) That same year, she also made an "unsolicited" job inquiry at city hall, where they directed her to "receiving phone calls, distress phone calls coming in at the ambulance place." (Tr. 130:13-131:19.) However, there is no evidence Crabtree pursued such opportunity.

In the summer of 2020, Crabtree took an online Hebrew language immersion course through Middlebury College. (A. 187.) Crabtree testified, and further concedes in her Brief, that she was unavailable for work or to search for work while taking such course. (Blue Br. 11; Tr. 223:7-224:15.) She also testified that she paid Hebrew course costs, which she was not willing to do for a local CNA training program. (Tr. 224:11-225:14, 231:11-232:24.)

[7] Crabtree's 2019 mitigation efforts otherwise amounted to nothing more than passively clicking "confirm my interest" in response to emails from job recruiters on January 7 and February 5, 2019. (A. 167-169, A. 173-174, A. 206, ¶3.) Importantly, both emails were for jobs that Crabtree testified she would not have pursued because they were "either . . . in Augusta or Portland, [sic] Portland, Brunswick, quite distances that [she] couldn't make due to transportation." (Tr. 128:9-129:13.)

[8] Crabtree may have also applied for a job with the 2020 Census that same year but the timing is unconfirmed. (A. 206, ¶3.)

In January 2021, Crabtree conveniently submitted two job applications the same week she filed an affidavit with the Superior Court testifying to her most recent job search efforts. (A. 170, A. 172, A. 206-207.) Neither job was in healthcare. (A. 170, A. 172.) At some point prior to that, Crabtree also inquired with Linda's Home Care Planning and Staffing about available positions; although there were available positions, Crabtree did not pursue them. (A. 183, A. 206-207, ¶3.)

In April 2021, Crabtree was accepted into the School for International Training's "Fall 2021: Master of Arts in Diplomacy and International Relations program" based in Durban, South Africa. (A. 188; Tr. 135:12-136:1.) The program cost more than $46,000. (Tr. 227:12-228:10.)

In May 2021, Crabtree accepted her first and only job since her termination from Workforce Development nearly four years earlier. (Tr. 205:18-23.) Crabtree worked part-time as a hostess at DaVinci's restaurant for approximately a month before DaVinci's fired her for failing to memorize the menu. (Tr. 199:9-203:2.)

By June 28, 2021, Crabtree was back in the Hebrew language immersion course and unavailable for work or to search for work. (A. 186; Tr. 223:7-224:15.) Consequently, when DaVinci's offered Crabtree her job back, she declined because

"the number of classes that [she] was taking didn't give [her] that flexibility."[9] (Tr. 203:3-22.)

After her part-time hostess position in May/June of 2021, Crabtree made no job search attempts through the date of trial. (Tr. 205:24-206:10.) Instead, Crabtree continued taking Hebrew language immersion courses, and, in 2022, enrolled in a four-year online hydrotherapy and massage training program through Wildwood Center for Health Evangelism.[10] (A. 185; Tr. 14:25-16:2, 134:2-12.)

### C. Superior Court Findings

The Superior Court weighed the evidence before it and awarded Crabtree back pay in the amount of $24,558.00 for the limited period of September 15, 2015 through May 19, 2017, and determined that Crabtree removed herself from the workforce after October 31, 2017.[11] (A. 12-17.) The court further held that, even if Crabtree had not removed herself from the workforce, Crabtree failed to mitigate her damages, as there were substantially equivalent entry-level positions in the healthcare industry available, including the identically titled "Earn While You Learn" CNA training programs offered by three hospitals in her area. (A. 16.)

[9] Crabtree admitted later that she could have accommodated working part-time while taking her Hebrew course but did not. (Tr. 204:22-205:6.)
[10] Although she was only enrolled at Wildwood part-time up through the time of trial, she did not search for jobs in the intervening period. (Tr. 14:25-16:2.)
[11] On August 29, 2023, the Superior Court amended its judgment to include interest of $4,644.21 and costs of $4,597.96. (A. 21).

Based on the evidence, including Crabtree's failure to mitigate and her feeble work history, the court declined to award "any of the other remedies requested by Crabtree" including front pay and a tax offset, on the grounds that such requests were unsupported by the record and would require broad speculation.[12] (A. 17-18.)

## III. ISSUES PRESENTED

1. Did the Superior Court abuse its discretion by declining to award back pay after October 2017?

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

## IV. ARGUMENT

### A. Standard of Review.

The Law Court must uphold the Superior Court's discretionary back pay award absent "an abuse of discretion."[13] *Ginn v. Kelley Pontiac-Mazda, Inc.*, 2004 ME 1, ¶¶ 6-7, 841 A.2d 785 (internal quotation marks omitted) (quoting *Kopenga v. Davric Me. Corp.*, 1999 ME 65, ¶ 11, 727 A.2d 906); *Ford Motor Co. v. E. E. O. C.*, 458 U.S. 219, 226 (1982) (back pay is a discretionary remedy); *see also Webber v.*

[12] At trial, the parties agreed to present all evidence regarding back pay, front pay, and mitigation and to "reserve all arguments" regarding the same "until following the jury's verdict." (Tr. 501:21-502:18, 533:10-535:17.) Appellant and Appellee fully briefed these issues, and the Superior Court issued a decision and judgment accordingly. (A. 12-19, A. 30-59.)

[13] This Court reviews an award of back pay for clear error but reviews the amount of the award for abuse of discretion. *LeBlond v. Sentinel Serv.*, 635 A.2d 943, 945 (Me. 1993). Appellant does not challenge the award of back pay, just its amount.

*Int'l Paper Co.*, 307 F. Supp. 2d 119, 126 (D. Me. 2004) (trial court may award "back pay in an amount supported by competent evidence in the record.").

Similarly, the Superior Court's denial of front pay is subject to review for abuse of discretion. *See Walsh v. Town of Millinocket*, 2011 ME 99, ¶ 41, 28 A.3d 610 (reviewing front pay determination for abuse of discretion). This Court may not, however, "substitute [its] judgment as to the weight or credibility of the evidence for that of" the justice. *Id.* ¶ 31 (quoting *State v. Connor*, 2009 ME 91, ¶ 9, 977 A.2d 1003); *see also Carey v. Mt. Desert Island Hosp.*, 156 F.3d 31, 41 (1st Cir. 1998) ("The court's order demonstrates a thoughtful weighing of the credibility of the witnesses [and]. . . [s]uch weighing was fully within the court's discretion and is supported by the evidence.").[14]

While this Court must review the Superior Court's decision on back pay and front pay for abuse of discretion, there is no obvious standard of review for the court's denial of tax-enhanced back pay, likely because there is no precedent for such relief in this jurisdiction.[15] Should this Court consider persuasive authority from other jurisdictions, applying the abuse of discretion standard to the Superior Court's decision denying Crabtree any tax offset is appropriate. *See, e.g.*, *Bryant v.*

[14] *See generally Proctor v. Childs*, 2023 ME 6, ¶ 6, 288 A.3d 815 ("[T]he trial court is the sole arbiter of witness credibility, and it is therefore free to accept or reject portions of the parties' testimony based on its credibility determinations and to give their testimony the weight it deems appropriate.") (quoting *Sulikowski v. Sulikowski*, 2019 ME 143, ¶ 14, 216 A.3d 893) (internal quotation marks omitted).

[15] Appellant fails to cite controlling authority in support of her request for tax-enhanced back pay. *See, e.g.*, (Blue Br. 23; A. 36.)

*Aiken Reg'l Med. Centers Inc.*, 333 F.3d 536, 549 n.5 (4th Cir. 2003) (holding denial of tax-enhanced back pay was not an abuse of discretion); *Fogg v. Gonzales*, 492 F.3d 447, 456 (D.C. Cir. 2007) (holding tax-enhanced back pay award was an abuse of discretion).

### B. The Superior Court appropriately declined to award back pay after October 2017.

This Court must uphold the Superior Court's well-reasoned decision as to back pay. If a court in its discretion decides back pay is appropriate, the court *must* reduce the award "by [plaintiff's] actual earnings on another job during the pertinent period, or by whatever amount [plaintiff] could with reasonable diligence have earned during that time." *Walsh*, 2011 ME 99, ¶ 34, 28 A.3d 610 (quoting *Maine Human Rights Comm'n v. Dep't of Corrections*, 474 A.2d 860, 869 (Me. 1984)). Here, the Superior Court weighed the evidence before it and appropriately exercised its discretion to limit Crabtree's back pay award to $24,558.00 for the limited period of September 15, 2015 through May 19, 2017 based upon its findings that (i) Crabtree removed herself from the workforce after October 2017; and (ii) even if Crabtree had not removed herself from the workforce, she failed to mitigate her damages. (A. 16-17.)

1. Crabtree removed herself from the workforce after October 2017.

The Superior Court reasonably determined that, after getting laid off on October 31, 2017, Crabtree "removed herself from the work force" based on evidence that Crabtree prioritized foreign languages courses for years and "stopped 'serious searches' for employment." *Currier v. United Techs. Corp.*, 326 F. Supp. 2d 145, 158 (D. Me.), *aff'd*, 393 F.3d 246 (1st Cir. 2004) (upholding jury's limited back pay award because plaintiff "stopped 'serious searches' for employment" in March 2002, allowing the jury to reasonably conclude plaintiff withdrew from the labor market prior to trial in January 2004); *see, e.g.*, *Webber*, 307 F. Supp. 2d at 127 (declining to award back pay for the period plaintiff removed himself from the labor market prior to trial).

As the trial record reflects, and as set forth above, Crabtree's "commitment" to foreign language education was resolute, but her job search was not. (Tr. 209:7-25.) After getting laid off in October 2017, Crabtree audited Japanese classes for years, went long stretches without actively looking for work because she was "busy with [these] foreign language classes", and declined a job offer from TD Bank because it would have interfered with her Japanese class. (Tr. 209:7-25, 218:25-219:4; A. 206, ¶2.) Similarly, after switching from Japanese to Hebrew, Crabtree admits she "was completely unavailable for work or searching for work," (Blue Br.

11), and declined at least one employment offer because "the number of [Hebrew] classes that [she] was taking didn't give [her] that flexibility."[16] (Tr. 203:3-22.)

During her five and a half years of unrelated study, Crabtree applied to *zero* jobs in healthcare and rejected at least two different employment opportunities based on her subjective belief that they would conflict with her language courses.[17] (A. 206, ¶2; Tr. 203:3-22, 209:7-25.)

As a result, the Superior Court reasonably concluded that Crabtree removed herself from the job market. (A. 16.)

2. Even if Crabtree had not removed herself from the workforce after October 2017, she failed to mitigate.

Assuming *arguendo*, that Crabtree had not removed herself from the workforce after October 2017, which she did, she wholly failed to mitigate thereafter. In its well-reasoned decision, the Superior Court held: "CMMC has proven substantially equivalent jobs to an entry level CNA position were available in the region, but that Crabtree failed to use reasonable diligence to secure suitable employment, be it as a CNA or other similar entry position." (A. 17); *see Mullen v. New Balance Athletics, Inc.*, No. 1:17-CV-194-NT, 2019 WL 958370, at *8 (D. Me. Feb. 27, 2019) (quoting *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 16 (1st Cir. 1999)).

[16] Crabtree later admitted that she could have accommodated taking her Hebrew course and working at DaVinci's part-time but did not. (Tr. 204:22-205:6.)
[17] Crabtree inquired about, but did not apply to, available healthcare-related position(s) with Linda's Home Care Planning and Staffing. (A. 183, A. 206-207, ¶3; Tr. 130:2-12.)

### *a. Substantially equivalent job opportunities existed.*

Without basis in law, Appellant asks this Court to review the Superior Court's determinations regarding Crabtree's below-diligent efforts to seek suitable employment through the inapplicable lens of the Fifth Circuit's "virtually identical" standard. *See also* (A. 40) (applying "virtually identical" standard in Post-Trial Damages Brief); (Blue Br. 17) (same).[18] The recent *Mullen* U.S. District Court for the District of Maine decision provides helpful discussion on factors to consider in evaluating what employment qualifies as substantially equivalent,[19] including "stature, amount of compensation, job responsibilities, and working conditions." *Mullen*, 2019 WL 958370, at *8 (quoting *Bennett v. Capitol BC Rests., LLC*, 54 F. Supp. 3d 139, 148 (D. Mass. 2014); *see* (A. 239) (citing the same). Applying this standard to the evidence, the Superior Court reasonably concluded that the CMMC CNA trainee position was entry-level, "within the realm of healthcare," did "not require extensive training," paid minimum wage, and was part of a "program

[18] Although Appellant argues the Superior Court "did not identify in its opinion any substantially equivalent jobs under the standard articulated in [Fifth Circuit] cases", (Blue Br. 18), the Superior Court was not obligated to adhere to non-controlling Fifth Circuit case law and/or standards in its assessment of back pay in this jurisdiction.

[19] This Court has not previously applied the heightened federal "substantially equivalent" standard to evaluate back pay relief under the Maine Human Rights Act, let alone any "virtually equivalent" standard. *See, e.g.*, *Walsh*, 2011 ME 99, ¶ 35, (affirming reduction of back pay award based on evidence that claimant did not apply for "similar" positions in the area and "unduly limited the scope of her search"); *LeBlond*, 635 A.2d at 945 (describing employer's burden as proving "the employee could have mitigated her damages by finding other employment"); *Maine Hum. Rts. Comm'n for Use of Kellman v. Dep't of Corr.*, 474 A.2d 860, 869 (Me. 1984) (requiring employer to prove claimant's actual earnings or the amount claimant could have earned with reasonable diligence from "another job" within commuting distance of her home during the pertinent period).

designed to train applicants to become CNA's with the benefit of being paid while attending the school." (A. 14.)

First, the Superior Court determined, based upon stipulated facts about the favorable healthcare job market in the region, that substantially equivalent job opportunities existed. (A. 16-17); *see Mullen*, 2019 WL 958370, at *9 (finding "a reasonable jury could conclude from the Defendant's [Maine Department of Labor] employment statistics [of the Central/Western region of Maine in which Plaintiff resided] that substantially equivalent jobs were available in Plaintiff's geographic area").

Second, based upon testimony and documentary evidence, the Superior Court further found that there were substantially equivalent Earn While You Learn CNA programs at other hospitals within an hour commute of Lewiston. (A. 16.):

> Crabtree's testimony on cross-examination:
>
> Q Are you aware that there are local organization*s* that have CNA Earn While You Learn programs available right now?
> A Yes.
> Q And you haven't applied for any of *those*, correct?
> A No, I haven't.
>
> Tr. 232:25-233:6 (emphasis added).
>
> Crabtree's testimony on re-direct examination:
>
> Q And you were also asked the question about being aware of a current Earn While You Learn program. With what organization is that?
> A With CMME [sic].
> Q And why haven't you applied for that?

A I didn't want to put myself in the same situation after what I experienced with them.

Tr. 252:6-14.

Crabtree's testimony on re-cross-examination:

Q Miss Crabtree, you're aware that there are Earn While You Learn programs offered by *other* instituions [sic], 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. 252:19-253:12 (emphasis added).

The Superior Court reasonably deduced that the "CNA Earn While You Learn" programs offered by Maine General, Midcoast Hospital, and the VA were, like CMMC's EWYL CNA program, programs where individuals could earn at least minimum wage while learning to become a CNA in a hospital setting.[20] (Tr. 232:25-233, 252:19-253:12; A. 85-86.)

[20] Although Appellant alleges "there was no evidence at trial of CNA openings outside of CMMC", (Blue Br. 20 n.2), the only position at issue in this litigation is that of "CNA Trainee." (A. 97.)

Thus, based on the record, the Superior Court reasonably concluded that "substantially equivalent jobs to an entry level CNA position were available in the region." (A. 17.)

***b. Crabtree failed to use reasonable efforts to secure suitable employment after October 2017.***

The Superior Court also reasonably held that, despite the availability of substantially equivalent positions, Crabtree failed to use reasonable efforts to secure suitable employment. (A. 17.)

*Walsh v. Town of Millinocket*, wherein this Court affirmed the Superior Court's decision to limit claimant's back pay based on evidence that claimant failed to apply for the "similar recreation-related positions in the Bangor area that were advertised in the Bangor Daily News" is instructive. 2011 ME 99, ¶ 35, 28 A.3d 610. In *Walsh*, the claimant was previously employed as "Town Recreation Director" for the Town of Millinocket and, following her termination, failed to look for and/or apply to at least three advertised openings for municipal recreation administrators in the area. *Id.* The Superior Court held, and this Court later affirmed, that it was reasonable to expect claimant to pursue employment opportunities within a "commute or move of approximately one hour." *Id.* However, the claimant "unduly limited the scope of her search which impaired her ability to apply for reasonable employment opportunities"; as such, the Superior Court reasonably determined that the claimant failed to mitigate her damages. *Id.*

Like the Town of Millinocket, here, CMMC established at trial that similar EWYL programs were available within reasonable distance of Crabtree and Crabtree would not consider them. (Tr. 253:1-12.) Not only did Crabtree fail to take reasonable steps to become aware of and/or pursue CNA training through another institution after October 2017, Crabtree testified at trial that she would not have applied for such programs even if she had known about them. (Tr. 253:1-12, 230:19-233:6); *see also* (A. 16) ("[W]hat was clear was Crabtree had no interest in other programs, as despite her claims she wanted to work in the healthcare field, she testified she would not consider such programs due to travel"). Indeed, in the five and a half years between getting laid off and trial, Crabtree merely inquired about, but did not apply to, only *one* healthcare-related position. (A. 206-207, ¶3; Tr. 129:23-130:12.)

To be clear, Crabtree's educational pursuits during this period do not qualify as mitigation. *See Paluh v. HSBC Bank USA*, 409 F. Supp. 2d 178, 204–05 (W.D.N.Y. 2006) (plaintiffs who opt to attend school instead of searching for and returning to work generally do not fulfill their mitigation obligation).[21] A claimant must be "available and willing to accept *substantially equivalent* employment."

[21] *Cf. Killian v. Yorozu Auto. Tennessee, Inc*., 454 F.3d 549, 557 (6th Cir. 2006) (holding claimant who was unemployed for eight months and could not find comparable positions mitigated by starting school to embark on a new career).

*Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985) (internal citation and quotation marks omitted) (emphasis added).

As such, the Superior Court reasonably concluded that CMMC proved by a preponderance of the evidence that Crabtree's level of mitigation after October 2017 was so far below diligent that she effectively withdrew from the workforce, even though "substantially equivalent jobs to an entry level CNA position were available in the region" and limited her back pay accordingly. (A. 16-17.)

For the foregoing reasons, this Court should uphold the Superior Court's well-reasoned determination as to back pay.

### C. The Superior Court did not abuse its discretion by declining to award front pay or a tax offset.

Appellant's brief argument requesting that this Court overturn the Superior Court's discretion to deny front pay and tax-enhanced back pay falls flat. (Blue Br. 23.)

First, the Superior Court correctly declined to award front pay based on its well-reasoned findings that: (i) Crabtree failed to mitigate her damages; and (ii) Crabtree's inconsistent and "modest" work history would make such an award highly speculative.[22] (A. 17-18); *Walsh*, 2011 ME 99, ¶ 42, 28 A.3d 610 (holding

[22] In addition, Appellant failed to meet her burden before the Superior Court to prove what amount of front pay, if any, is appropriate. *See Webber*, 307 F. Supp. 2d at 129. More specifically, Appellant left unaddressed at trial the length of time it would take Crabtree, using reasonable effort, to secure comparable employment, Crabtree's ability to work, as well as her work and life expectancy. *See Franchina v. City of*

no abuse of discretion by declining to award front pay where plaintiff failed to mitigate her damages); *Currier*, 326 F. Supp. at 158 ("Under federal law, since future damages are usually speculative, courts, in exercising their discretion, should consider all of the circumstances of the case."); *see also Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 381 (1st Cir. 2004) ("The analytical issues as to back pay and front pay are similar.").

Second, the Superior Court reasonably declined to award tax enhanced back pay. Not only is there no precedent in this jurisdiction for increasing a plaintiff's back pay award to offset tax liability, as Appellant acknowledges by her reliance on unavailing authority, Crabtree failed to present evidence at trial from which the court could award tax-enhanced back pay without speculation, including, but not limited to the applicable deductions and tax rate.[23] (A. 18.)

Accordingly, this Court should uphold the Superior Court's denial of front pay and tax-enhanced back pay.

## V. CONCLUSION

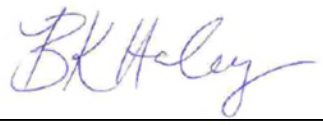
For the foregoing reasons, Appellee respectfully requests that this Court uphold the Superior Court's denial of backpay after October 2017, tax-enhanced

*Providence*, 881 F.3d 32, 57 (1st Cir. 2018). Appellant's post-trial attempts to introduce evidence of her "normal retirement age" based on her date of birth are unavailing. (A. 35.)

[23] Appellant acknowledged her omission when she presented the tax rate information for the first time in her post-trial damages brief and asked the Superior Court to take judicial notice of it, despite the parties' agreement to present all evidence regarding equitable relief at trial. (A. 36-39, A. 59; Tr. 501:21-502:18, 533:10-535:17.) Even if this Court were to vacate and remand the amount of the back pay award, the fact remains that Appellant failed to introduce the requisite evidence at trial for the tax offset requested.

relief, and front pay, as a reasonable exercise of discretion based upon credible evidence in the record and controlling legal authority, award CMMC its reasonable attorney's fees and costs for this appeal, and such other and further relief as justice may require.

Dated at Portland, Maine this 14th day of February, 2024.



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## CERTIFICATE OF SERVICE

I, Brooke K. Haley, Attorney for Appellee in the above matter, hereby certify that I have forwarded on this same date by mailing with postage prepaid two (2) copies to the attorney for Appellant addressed as follows:

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## CERTIFICATE OF SIGNATURE AND COMPLIANCE

We are filing the electronic copy of a brief with this certificate. We will file the paper copies as required by M. R. App. P. 7A(i). We certify that we 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).

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