

**STATE OF CONNECTICUT  
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES  
OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights	:	CHRO No. 0630076
and Opportunities, <i>ex rel.</i>	:	
David Mejias, Complainant	:	
v.	:	
Mortgage Company of America, LLC,	:	March 22, 2007
Respondent	:	

**MEMORANDUM OF DECISION**

**Procedural Background**

On or about August 20, 2005, David Mejias (the complainant) filed with the commission on human rights and opportunities (the commission) an affidavit of illegal discriminatory practice (the complaint), alleging that Mortgage Company of America, LLC (the respondent) discriminated against him in the terms and conditions of his employment and constructively discharged him because of his race and national origin in violation of General Statutes § 46a-60 (a) (1). (Ex. CHRO-1)<sup>1</sup>

On September 7, 2005, the commission served upon the respondent, via certified mail, notice that the complaint had been filed. A copy of the complaint was attached thereto. (Ex. CHRO-2)

On September 25, 2006, the commission served upon the complainant and the respondent (specifically addressed to Steven Boucher, alleged to be its principal), via certified mail, a notice informing them of a “mandatory mediation

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<sup>1</sup> The exhibits offered by the commission on the complainant’s behalf are marked with the prefix “CHRO” followed by a number.

conference” scheduled for October 18, 2006. The notice included the following paragraph:

Please take notice of the fact that pursuant to Section 46a-83 of the Connecticut General Statutes (formerly Public Act 94-238), the Commission has the authority to DISMISS THE COMPLAINT IF THE COMPLAINANT, AFTER NOTICE AND WITHOUT GOOD CAUSE, FAILS TO ATTEND THE CONFERENCE AND TO DEFAULT A RESPONDENT WHO, AFTER NOTICE AND WITHOUT GOOD CAUSE, FAILS TO ATTEND THE CONFERENCE.

(Emphasis in original.) (Ex. CHRO-3) The certified letter was delivered on September 29, 2006. (Ex. CHRO-4) The respondent did not appear at the conference. (Ex. CHRO-5)

On or about October 19, 2006, the commission sent a letter to Steven Bouchner regarding the respondent’s failure to attend the conference. The commission requested that Bouchner immediately contact the commission investigator and emphasized that “[f]ailure to do so will result in the Commission proceeding with default.” Consequently, Bouchner telephoned the investigator and stated that his father, not he, was the owner of the respondent and that, in any event, the respondent had been dissolved. (Ex. CHRO-5.)

On October 24, 2006, the commission served a new notice upon the complainant and the respondent (with two separate notices for the respondent, one addressed to Steven Bouchner and one to his father, Lawrence Bouchner) via certified mail, providing a new date—November 15, 2006—for the mandatory mediation conference. The notice contained the same emphatic warning of potential default for failure to appear at the conference. (Ex. CHRO-5) The respondent failed to appear at the mandatory mediation conference on November 15, 2006. (Ex. CHRO-6)

On November 16, 2006, the commission’s regional manager filed with the commission’s executive director a request for a default order against the respondent. The manager served copies of the request upon the complainant and upon both Steven and Lawrence Boucher via certified mail. (Ex. CHRO-6)

On November 22, 2006, the executive director entered an order of default against the respondent pursuant to General Statutes § 46a-83. (Ex. CHRO-7)

On or about November 27, 2006, the office of public hearings served notice upon the complainant and the respondent via certified mail, informing them that a hearing in damages was scheduled for January 17, 2007. (Ex. CHRO-8) Upon motion by the commission, the matter was continued to February 7, 2007; all parties were duly notified. (Exs. CHRO-9, CHRO-10)

I conducted a hearing in damages on February 7, 2007. The complainant appeared pro se and the commission appeared through its counsel, Margaret Nurse-Goodison. The respondent did not appear at the hearing and did not submit any documents in response to any of the orders or notices described above. The record closed on March 19, 2007, when the commission filed its post-hearing memorandum.

### **Findings of Fact**

1. The complainant is a Hispanic male of Puerto Rican descent. At the beginning of March 2005, the respondent hired him as a senior loan officer. (Testimony of complainant, Transcript, p. 10; Ex. CHRO-1) <sup>2</sup>
2. When the complainant began working, he observed—and was “shocked” and “floored” by—the respondent’s mistreatment and harassment of its only two minority employees, one who was eventually terminated,<sup>3</sup> the other who was forced to resign. The respondent, particularly Steven Bouchner, began to treat the complainant in the same fashion.

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<sup>2</sup> The complainant was the sole witness in this case. All subsequent references to his testimony simply comprise the abbreviation “Tr.” and the page number.

<sup>3</sup> See Memorandum of Decision in *Commission on Human Rights & Opportunities ex rel. Rhodes v. Mortgage Company of America*, CHRO No. 0630040 (March 15, 2007).

For example, the respondent never provided training for the complainant, yet Bouchner became impatient when the complainant asked questions about unfamiliar tasks or concepts. At times, his impatience escalated into what the complainant described as “tantrums,” with belittling tirades directed at the complainant or other employees. Bouchner often made disparaging remarks about Hispanics (e.g., “that’s the problem with you stupid fucking Hispanics,” and “you people, you guys got no clue”) and other minorities. (Tr. 12, 15-16; Ex. CHRO-1)

The respondent limited the complainant’s “leads” to Spanish-speaking customers. Consequently, he handled far fewer customers and earned less money than his non-Hispanic colleagues who received leads on a rotating basis. (Tr. 16-17; Ex. CHRO-1)

When the complainant finally spoke to the office manager, Michelle Thibeault, about his treatment, she told him there was nothing that could be done and that he should either accept the situation or leave. (Tr. 16) Tensions between the complainant and Bouchner increased to the point that the two avoided each other whenever possible. (Tr. 20) On June 30, 2005, feeling overwhelmed by the intolerable work conditions, the complainant left his employment with the respondent. (Tr. 18, 20)

3. All of the complainant’s earnings with the respondent were in the form of commissions on loans he closed. (Tr. 20-21)

4. During the complainant’s employment with the respondent, his reported income (earned commissions) was \$12,225. (Tr. 21, 34; Exs. CHRO-11, CHRO-14)

5. At the time the complainant ceased working for the respondent, the respondent owed him \$2883.65 for unpaid commissions. As of the public hearing, the complainant still had not received that money. (Tr. 28-29; Ex. CHRO-13)

6. On or about July 5, 2005, the complainant was hired as a loan officer for American Home Mortgage Corporation (AMH). (Tr. 22-23) For the remainder of 2005 and through January 2006, the complainant earned \$3990 in commissions at AMH. (Ex. CHRO-12) (Tr. 24-26) Although the complainant liked working at AMH, the employer, unlike the respondent, did not provide leads for its loan officers, thus accounting for his limited earnings. (Tr. 25-26) The complainant left AMH voluntarily and amicably at the end of January 2006. (Tr. 38)

7. In the second week of February 2006, the complainant began working as a loan officer for the Fairfield Financial Mortgage Group (FFMG). (Tr. 27) During the remainder of calendar year 2006 (approximately 46 weeks), the complainant earned \$25,001.33 working for FFG. (Tr. 28; Ex. CHRO-15)

8. Although, as of the date of this hearing, the complainant had earned no commissions in 2007, he had already developed numerous leads and had closings scheduled, and he anticipated that he would earn \$75,000 - \$100,000 by the end of the calendar year. (Tr. 39-40)

### **Discussion and Conclusions**

A. All jurisdictional prerequisites have been satisfied and the commission has taken all of the proper procedural steps to bring this complaint to a public hearing.

B. As required by law, following the entry of default for failure to attend a mandatory mediation conference and the provision of due notice, I conducted a hearing in damages to determine the relief necessary to eliminate the discriminatory practices and to make the complainant whole. General Statutes § 46a-83 (i); Regs., Conn. State Agencies § 46a-54-78a (b) (5); *State of Connecticut v. Commission on Human Rights & Opportunities*, 211 Conn. 464, 478 (1989); *Commission on Human Rights & Opportunities ex rel. Gilmore v. City of Waterbury*, CHRO No. 9620571 (August 11, 2000). I need not address the

issue of the respondent's liability. The aforementioned statute and regulation, by limiting the scope of the hearing solely to the determination of appropriate relief, assume the establishment of liability for discrimination and constructive discharge in accordance with the uncontroverted complaint allegations and evidentiary record.

C. General Statutes § 46a-86 (b) authorizes the presiding referee, upon a finding that a discriminatory practice occurred, to award back pay. *Thames Talent Ltd. v. Commission on Human Rights & Opportunities*, 265 Conn. 127, 144-45 (2003). As a general rule, an award of back pay begins when the employee is terminated and ends when the employee obtains a comparable or higher-paying position. See, e.g., *N.L.R.B. v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2nd Cir. 1990); *Harkless v. Sweeney Independent School District*, 466 F.Sup. 457, 469 (S.D. Tex.), aff'd, 608 F.2d 594 (5<sup>th</sup> Cir. 1979); *Commission on Human Rights & Opportunities ex rel. Carter v. C.N. Flagg Power, Inc.* (CHRO No. 8840227), 2000 WL 35457584.

Because the complainant confidently explained that he expected to earn more than \$75,000 in calendar year 2007—far more, per week, than he had with the respondent—I will award no damages for 2007, whether back pay for the first three months, or prospective “front pay” for the remainder of the year. Thus, the complainant's period of potential recovery runs from the day after his termination, July 1 2005, through December 31, 2006.

Lost commissions are treated as lost wages for the purpose of calculating back pay awards. See, e.g., *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889 (3<sup>rd</sup> Cir. 1984); *Rivera v. Baccarat, Inc.*, 34 F.Sup.2d 879, 874 (S.D.N.Y. 1999). Unlike fixed wages, commissions logically fluctuate in both frequency and amount, and thus future earnings are not susceptible to precise calculation. Nonetheless, a complainant is entitled to back pay even if lost wages cannot be computed with exactitude. *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 156 (3<sup>rd</sup> Cir. 1999) (court may estimate what claimant's earnings would have been, and uncertainties are resolved against the discriminating employer); *Gallo v.*

*John Powell Chevrolet*, 779 F.Sup. 804, 812 (M.D. Pa. 1991), aff'd, 981 F.2d 1246 (3<sup>rd</sup> Cir. 1992).

In the present case, the complainant's income was predicated entirely upon commissions. I will rely upon his income during his employment with the respondent to make a pro rata estimate of what he otherwise would have earned had he remained employed by the respondent. See *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488 (9<sup>th</sup> Cir. 1986) (no error occurred when jury relied on former employee's last year of commission salary to estimate his lost earnings during the time in which he was allegedly unable to find employment); *Goss v. Exxon Office Systems*, supra, 747 F.2d 889 (estimated commissions based on past performance found to be fair and reasonable).

The complainant worked for the respondent from early March until June 30, 2005, approximately seventeen weeks. According to his earning statements and W-2 form for 2005, he was paid \$12,225. Taking into account the complainant's reported earnings and treating the unpaid commissions (\$2883.65) as if they had been paid, his total earnings were or should have been \$15,108.65 for the seventeen weeks, or an average of \$888.74 per week. Based on this figure, the complainant would have potentially earned \$69,321.72 during the following seventy-eight weeks (7/1/05 – 12/31/06) had he remained employed by the respondent. No other factors appear on this record to suggest that his income would deviate meaningfully from this average.

The complainant's back pay damages must be offset by any money earned during that seventy-eight week period. *Rivera v. Baccarat*, supra, 34 F.Sup.2d 874-75; *Commission on Human Rights & Opportunities v. General Dynamics Corp.*, 1995 WL 264014, \*13 (Conn. Super.). While employed by AMH from July 5, 2005 until January 31, 2006, the complainant earned \$3990; thereafter, he earned \$25,001.33 working for FFMG for the remainder of 2006. Accordingly, his damages award shall include back pay in the amount of \$69,321.72, plus the \$2883.65 owed for unpaid commissions, all offset by \$28,991.33 (i.e., \$3990 plus \$25,001.33), for a total award of \$43,214.04.

D. Courts—and this tribunal—have the authority to award prejudgment interest as an appropriate means of fully restoring the complainant to the economic position he would have been in but for his discharge. *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 145 (2<sup>nd</sup> Cir. 1993), cert. denied, 510 U.S. 1164 (1994); *Commission on Human Rights & Opportunities ex rel. Williams v. M.N.S. Corporation*, CHRO No. 0010124 (March 1, 2001). This tribunal also has the discretion to choose a prejudgment interest calculation designed to make the complainant whole. *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, 10 Conn. L. Rptr. No. 19, 604 (Feb. 28, 1994). An appropriate rate of interest, as used in other decisions, is ten percent. *Commission ex rel. Williams v. M.N.S.*, supra; see General Statutes § 37-3a. Case law supports awards of compounded interest. *Saulpaugh v. Monroe Community Hospital*, supra.

E. Post-judgment interest compensates the successful litigant when that litigant does not have the use of his money between the order of payment and the actual payment by the losing party. As with pre-judgment interest, the employee should not have to bear further loss while the employer avails itself of the use of the money prior to payment, and the imposition of post-judgment interest is often an impetus for faster payment. *Thames Talent v. Commission*, supra, 265 Conn. 144. Other commission decisions have also applied post-judgment interest at the rate of ten percent, and I will follow suit here. See, e.g., *Commission on Human Rights & Opportunities ex rel. DeBarros v. The Hartford Roofing Co.*, CHRO No. 0430162 (May 10, 2005); *Commission on Human Rights & Opportunities ex rel. Hansen v. W.E.T. National Relocation Services*, CHRO No. 0020220 (November 14, 2001).

### **Final decision and order of relief**

1. The respondent shall pay to the complainant the sum of \$43,214.04, representing back pay and unpaid commissions offset by his interim earnings.



2. The respondent shall pay pre-judgment interest on the aforesaid sum, compounded annually at the rate of ten percent to the date of this decision.
3. The respondent shall also pay post-judgment compound interest on the total award of damages. Said interest shall accrue on the unpaid balance from the date of this decision at the rate of ten percent per year.
4. The respondent shall cease and desist from the practices complained of, as well as from any other acts of discrimination prohibited by state or federal law.
5. Should prospective employers seek references concerning the complainant, the respondent shall provide only the dates of the complainant's employment, the last position he held, and his rate of pay. In the event additional information is requested in connection with any inquiry regarding the complainant, the respondent shall obtain written authorization from the complainant before providing such information, unless the respondent is required by law to provide such information.
6. The respondent shall not engage in any retaliation against the complainant in violation of General Statutes § 46a-60 (a) (4).
7. The respondent shall post in prominent and accessible locations, visible to all employees and applicants for employment, such notices regarding statutory discrimination provisions as the commission deems appropriate.

So ordered this \_\_\_\_ day of March 2007.

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David S. Knishkowy  
Human Rights Referee

## **PARTY LIST**

### Party

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### Represented by

David Mejias (pro se)

Margaret Nurse-Goodison, Esquire  
Commission on Human Rights  
and Opportunities

(defaulted party)