

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

Commission on Human Rights : CHRO No. 0630040  
and Opportunities, *ex rel.* :  
Kevin Rhodes, Complainant :

v. :

Mortgage Company of America, LLC, : March 15, 2007  
Respondent :

**MEMORANDUM OF DECISION**

**Procedural Background**

On July 26, 2005, Kevin Rhodes (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 ultimately terminated him because of his race and color in violation of General Statutes § 46a-60 (a) (1). (Ex. CHRO-1)<sup>1</sup>

On July 28, 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 August 30, 2006, the commission served upon the complainant and the respondent (specifically addressed to Michelle Thibeault, its office manager), via certified mail, a notice informing them that the commission had scheduled a

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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.

“mandatory mediation conference” 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 addressed to the respondent was returned to the commission as “undeliverable.” (Ex. CHRO-5)

On September 15, 2006, the commission served upon the complainant and the respondent (specifically addressed to Steven Bouchner, alleged to be its principal), via certified mail, a notice reminding them of the mandatory mediation conference on October 18, 2006. Attached to this notice was a copy of the August 30, 2006 notice. (Ex. CHRO-4) This notice was delivered to the respondent on September 18, 2006. (Ex. CHRO-5)

The respondent failed to appear at the mandatory mediation conference. On the following day, October 19, 2006, the commission sent a letter to Steven Bouchner via certified and regular mail indicating that the respondent’s failure to attend the conference constituted grounds for default. 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.” (Ex. CHRO-5)

Bouchner telephoned the investigator and stated that the respondent had been dissolved. Bouchner also indicated that his father, not he, was the owner of the respondent. Consequently, 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 conciliation conference. The notice contained the same emphatic warning of potential default for failure to appear at the conference. (Ex. CHRO-6) The respondent failed to appear at the mandatory mediation conference on November 15, 2006. (Ex. CHRO-7)

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 Bouchner via certified mail. (Ex. CHRO-7) On November 22, 2006, the executive director entered an order of default against the respondent pursuant to General Statutes §46a-83. (Ex. CHRO-8)

On or about November 27, 2006, the commission's 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-9) Upon motion by the commission, the matter was continued to February 7, 2007; all parties were duly notified. (Ex. CHRO-11)

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 12, 2007, when the commission filed its post-hearing brief.

### **Findings of Fact**

1. On or about October 1, 2004, the respondent hired the complainant, an African-American male, as a mortgage consultant. (Testimony of complainant, Transcript pp. 11-12; Ex. CHRO-1)<sup>2</sup>

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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.

2. When the complainant first began working for the respondent, he observed the respondent frequently mistreating an African American co-worker, ultimately causing that co-worker to resign. Thereafter, when the complainant was the respondent's only African American employee, he became the focus of the respondent's discriminatory treatment. For example, when he and a white co-worker were late returning from lunch, only he was chastised and only he was taken out of the "lead distribution rotation." Although all employees had office keys, the respondent took away only the complainant's keys.

The complainant was the only employee not allowed to work at a certain bridal show, and he consequently missed sales opportunities that were available to his white co-workers.

In May 2005, with permission from office manager Michelle Thibeault, the complainant extended one particular lunch period to take his son to the doctor. Later, Thibeault and Steven Bouchner "berated and demeaned" the complainant for taking unauthorized leave. The following week, the complainant missed time at work due his child's medical emergency. Although he left telephone messages for both Thibeault and Bouchner, informing them of his absence, Thibeault denied receiving any message and issued a written warning incorrectly accusing the complainant of missing workdays, taking extended lunch breaks, leaving early, and arriving late. Despite the complainant's pleas that Bouchner speak to Thibeault about her treatment of the complainant, and despite Bouchner's concession that Thibeault was, in all likelihood, "targeting" the complainant, Bouchner sided with Thibeault. On June 7, 2005, Thibeault terminated the complainant's employment.

3. All of the complainant's earnings were in the form of commissions on loans he closed. (Tr. 12)

4. During the period of the complainant's employment, his reported income was \$4718 in 2004 and \$21,059 in 2005, for a total of \$25,777. (Tr. 12-14; Exs. CHRO-12, CHRO-13)

5. At the time of the complainant's termination, the respondent owed him \$8020.40 for unpaid commissions. As of the hearing, the complainant had still not received this money. (Tr. 15-16; Exs. CHRO-1, CHRO-14)

6. During his subsequent period of unemployment, the complainant received \$5980 in unemployment compensation payments from the Connecticut Department of Labor. (Tr. 18; Ex. CHRO-15)

7. During his period of unemployment, the complainant applied to numerous entities for a job in the mortgage-lending field. (Tr. 16-17) In early February 2006,<sup>3</sup> he was hired by Fairfield Financial Mortgage Group (FFMG) in Fairfield, CT as a "senior mortgage consultant." (Tr. 17) The complainant earns more money at FFMG than he did with the respondent. (Id.)

### **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 in damages.

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,

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<sup>3</sup> Because the complainant bears the burden of proving his damages, and because he has not identified the precise starting date of his new position, I will assume, for the purposes of calculating his losses, that he began his employment on February 1, 2006.

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, as the aforementioned statute and regulation, by limiting the scope of the hearing solely to the determination of appropriate relief, assume the establishment of liability in accordance with the allegations in the complaint.

C. General Statutes § 46a-86 (b) authorizes the presiding referee, upon finding that a discriminatory practice occurred, to award back pay as a way to make the complainant whole. *Thames Talent Ltd. v. Commission on Human Rights & Opportunities*, 265 Conn. 127, 144-45 (2003). As a general rule, an award of back pay ends when the terminated 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 immediately began to earn more money with FFMG than he had with the respondent, he seeks no damages beyond the date of his hiring at FFMG. Thus, his period of potential recovery runs from June 8, 2005 through January 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 during his subsequent period of unemployment. 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 only thirty-six weeks and, according to his earning statements and W-2 forms, was paid \$25,777. Taking into account the complainant's reported earnings, and treating the unpaid commissions (\$8020.40) as if they had been paid, his total earnings were or should have been \$33,797.40 for the thirty-six weeks, or an average of \$938.82 per week. Based on this weekly figure, the complainant would have potentially earned \$31,919.88 during the following thirty-four weeks (6/8/05 – 1/31/06) had he remained employed by the respondent. No evidence appears on this record to suggest that his income would deviate meaningfully from this average.

Accordingly, the damages award shall include back pay in the amount of \$31,919.88 plus the \$8020.40 already owed, all offset by the \$5980 in unemployment compensation, for a total of \$33,960.28.

D. This tribunal, like state and federal courts, has the authority to award pre-judgment 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); *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, 10 Conn. L. Rptr. No. 19, 604 (Feb. 28, 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 pre-judgment interest calculation designed to make the complainant whole. *Silhouette Optical v. Commission*, supra. An appropriate rate of interest, as used in other decisions, is ten percent (10%). *Commission ex rel. Williams v. M.N.S.*, supra; see General Statutes § 37-3a. Moreover, case law supports awards of compounded interest; *Saulpaugh v. Monroe Community Hospital*, supra; and I will follow such precedent in this case.

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 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).

### **Order of Relief**

1. The respondent shall pay to the complainant the sum of \$33,960.28 representing back pay and unpaid earned commissions. This award of damages shall further include pre-judgment interest, compounded annually at the rate of ten percent to the date of this decision.
2. The respondent shall also pay post-judgment compound interest on the aforesaid 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.



3. The respondent shall cease and desist from the practice complained of as well as from any other acts of discrimination prohibited by state or federal law.
4. 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.
5. The respondent shall not engage in any retaliation against the complainant in violation of General Statutes § 46a-60 (a) (4).
6. Pursuant to General Statutes § 46a-86 (b), the respondent shall pay to the commission the sum of \$5980, which represents the amount of unemployment compensation received by the complainant. The commission shall transmit said amount to the appropriate state agency.
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 15<sup>th</sup> day of March 2007.

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David S. Knishkowy  
Human Rights Referee

## **PARTY LIST**

### Party

Kevin Rhodes  
50 Rock Ridge Circle  
Bridgeport, CT 06606

Commission on Human  
Rights and Opportunities  
21 Grand Street  
Hartford, CT 06106

Mortgage Company of America, LLC  
Attn: Steven Bouchner  
25 Brook Street  
Shelton, CT 06484  
-and-  
Attn: Steven Bouchner  
7 Clapboard Ridge Road  
Sandy Hook, CT 06482  
-and-  
Attn: Lawrence Bouchner  
874 Church Hill Road  
Fairfield, CT 06825

### Represented by

Kevin Rhodes (pro se)

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

(defaulted party)