

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 December 2005

Case No.: 2005-SOX-00093

In the Matter of

WILLIAM J. McCLOSKEY
Complainant

v.

AMERIQUEST MORTGAGE COMPANY
Respondent

**DECISION AND ORDER GRANTING
DEFAULT JUDGMENT**

This matter arises under § 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("the Act"). The regulations promulgated under the Act are contained in 29 C.F.R. Part 1980.

Mr. McCloskey ("Complainant") filed this claim against Ameriquest Mortgage Company ("Respondent"), alleging that his employment was wrongfully terminated in violation of the Act. The Occupational Safety and Health Administration dismissed the complaint on July 14, 2005. Complainant requested a formal hearing on July 29, and the matter was referred to me on August 2, 2005. On August 5, I issued a Notice of Hearing, notifying the parties that the hearing in this matter would commence on September 27, 2005, in Philadelphia, Pennsylvania.

Respondent did not appear at the scheduled hearing. On September 28, 2005, I issued an Order, directing Respondent to show cause why default judgment should not be entered. Respondent failed to respond to the Show-Cause Order. Because Complainant has established a *prima facie* case of discrimination, default judgment is entered against Respondent.

At the hearing, I instructed Complainant to submit evidence of his damages within thirty days. Upon Complainant's request for an extension of time, I ordered that the record would close on November 30, 2005. Complainant's filings indicate that he seeks "back pay with interest, front pay, lost fringe benefits and compensatory damages for impairment of reputation, emotional pain and suffering, mental anguish, embarrassment and humiliation." Respondent has not objected or otherwise responded to the relief Complainant seeks.

The remedies provision of the Act, 18 U.S.C. § 1514A(c), provides that an employee who prevails in a whistleblower action under the Act is "entitled to all relief necessary to make the employee whole." § 1514A(c)(1). This shall include reinstatement to his prior position, back

pay with interest and “any special damages sustained as a result of the discrimination.” § 1514A(c)(2).

The pay stubs submitted by Complainant show that he earned \$5,220.35 in the eight week period of 2005 in which he was in the employ of Respondent. Thus, Complainant was making an average of \$653 per week. Complainant alleges that he should have been earning more money but was discriminated against in a manner which limited the amount of commission he was able to earn while working for Respondent. However, Complainant was not able to produce sufficient evidence of the amount of money he would have been earning if not for this alleged discrimination, and further, Complainant demonstrated through his subsequent employment that he often expects to earn more commission than he actually does. I will not speculate as to how much could have been earned at Ameriquest and in addition, note that the rate of \$653 per week includes commission, as Complainant’s base salary was \$25,000 per year, which alone yields a weekly wage of only \$481 per week.

Because Respondent terminated Complainant on March 1, 2005, he is entitled to back wages in the amount of \$26,120,¹ less the wages he earned from other employers between March 1 and the date of this Order. I find that he has earned \$17,650.69,² and is thus entitled to an award of \$8,469.31.

As to front pay, Complainant bases his claim on the assumption that he would have become a branch manager had he not been adversely treated while working for Respondent and had his employment not been terminated. In addition, Complainant contends that branch managers are guaranteed a monthly salary of \$17,000 and can also earn bonuses. However, Complainant can submit no solid evidence to support these contentions. In addition, I note that Complainant had worked for Respondent for less than five months and had limited experience in the mortgage profession. To award front pay based on a monthly salary of \$17,000 would thus be highly speculative, if not unreasonable.

In addition, Complainant admits that after his initial one month of employment with his current employer, Northeast Auto Outlet, he will earn commission equivalent to 25% of the price of any used car and 30% of the price of any new car he sells and that the average salesman earns between \$35,000 and \$60,000 during the first year of employment. Complainant thus can expect

¹ This figure represents Complainant’s weekly salary while working for Ameriquest (\$653) times 40 weeks (representing the number of weeks between Complainant’s discharge and the date of this Order).

² Complainant admittedly earned \$15,934.72 while working for Windsor Financial Mortgage between March and September of 2005. Complainant earned an additional \$1,115.97 while working for Wilmington Finance from September 19, 2005 until October 17, 2005, at which time he began working for U.S. Loans. He trained at U.S. Loans for two days before deciding not to accept the position and generated no income during this training period. On November 21, 2005, Complainant began working for Northeast Auto Outlet. Currently, he is being paid a base salary of \$300 per week, and thus has earned \$600 from this employer.

to surpass the \$33,956 dollars per year he presumably would have made while working for Respondent in his first year of employment with Northeast Auto Outlet.

The only near certainty is that for the next two weeks, while Complainant is still in the one-month training period, he will earn a base salary of \$300, compared to the \$653 he would have earned if still working for Respondent. Thus, Complainant is entitled to front pay in the amount of \$353 per week for a total of \$706.

Finally, Complainant's filings mention that he seeks compensation for lost fringe benefits and compensatory damages for impairment of reputation, emotional pain and suffering, mental anguish, embarrassment and humiliation. Complainant has failed to prove any such damages.

ORDER

- (1) Respondent shall pay Complainant \$8,469.31 in back pay plus interest.
- (2) Respondent shall pay Complainant \$706 in front pay.

A

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).