

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
DISCRIMINATION AND  
OSCAR JOHNSON,  
Complainant

v.

DOCKET NO. 99-BEM-1149

EAST WEST MORTGAGE CO., INC.,  
Respondent

Appearances: Thomas F. Walsh, Esq. for the Complainant  
Lawrence A. Baler, Esq. for the Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On May 3, 1999, the Complainant, Oscar Johnson, filed a Complaint of race discrimination against the Respondent, East West Mortgage Co., Inc. alleging that he was subjected to a racially hostile work environment while employed at Respondent, subjected to different terms and conditions of employment as a retail sales mortgage consultant, and terminated from his employment on April 28, 1999, for reasons he believed were related to his race. Respondent denies all allegations of race discrimination and asserts that Complainant was treated in the same manner as all other mortgage originators and was terminated for poor performance and poor attendance.

The Investigating Commissioner found probable cause to credit the allegations of the Complaint and conciliation efforts were unsuccessful. The matter was certified for a public hearing on March 13, 2002 and a public hearing was held before the undersigned Hearing Officer on January 14 and 15, 2003. The parties filed post-hearing briefs on March 27, 2003. Having reviewed the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

## II. FINDINGS OF FACT

1. Complainant, Oscar Johnson, is an African American male who resides in Dorchester, MA. He began working for the Respondent, East-West Mortgage Company on February 1, 1999. Complainant sought out the position as a mortgage originator at Respondent when a friend told him of the possibility to make good money.
2. East West Mortgage, Inc. is a mortgage brokerage company whose business is setting up potential mortgage applicants with loans. Brian Sutcliffe is the Vice President of Sales for Respondent. Complainant interviewed with Sutcliffe and they discussed the duties of a loan originator. Sutcliffe informed Complainant that the job was “strictly commission” based, but that originators were paid a draw until such time as they began earning commissions.
3. Complainant began working on February 1, 1999 and was assigned to the Retail Consumer Division on the evening shift from 5 to 9 p.m. He met with Michelle Durette who was the night supervisor. The originator’s job was essentially to field telephone calls from potential mortgage applicants, to take loan application

information over the phone, and to meet with the clients to finalize a mortgage application. The originators sat at desks in an open office answering frequent telephone calls in a hectic atmosphere. Originators were not paid a commission unless a mortgage loan was sold to an applicant.

4. Complainant stated that about 10 mortgage originators worked with Durette on the evening shift and that he was the only minority. His job for the first few weeks was essentially to listen to the other phone originators and learn from them. He said it was difficult to ask questions of the other originators and when he did, they acted like he was bothering them. According to Complainant when he did answer phone inquiries and take down necessary information, Durette would conduct the follow-up meeting with potential applicants, which he did not attend. He testified Durette did not train him how to conduct these follow-up meetings. Complainant alleged that he was not properly trained for the job and not given the product information to relay to callers.
5. Respondent did not appear to have any standard organized procedures for the training of new originators. Madelaine McKay testified that she was the manager of the supervisors who were called team leaders. She stated that the supervision structure was loose. There were no training manuals or formal training materials. Each team was to look out for the new originators on their team. McKay was also an originator with sales responsibilities, as were the other supervisors, but she received some additional compensation in her loan commissions in return for helping other originators get started. From all appearances, new employees were basically thrown into the sales process on their own to either sink or swim .

6. During the four weeks in February 1999 that Complainant worked the evening shift he did not sell any mortgage loans. He did receive a draw for those weeks in the amounts of \$600 on February 15<sup>th</sup> for his first two weeks, and \$1100 every two weeks thereafter. By April he had received a total of \$4300 from Respondent but had sold only one loan. According to Complainant after a short time on the evening shift, he asked to transfer to days. Complainant was assigned to work days under Nick Kremidas and testified that Kremidas was his supervisor until his termination. Shortly after Complainant was transferred to work with Kremidas, Kremidas told him that he was starting up a Corporate Division and invited Complainant to work with him. Complainant accepted. On March 10, 1999 Complainant was transferred to the Corporate Division of Respondent.
7. Kremidas testified that he became the Director of the Corporate Sales Division for Respondent in 1999. He originated the Corporate Sales Division and wanted to hire his own sales people for the division, but because employee turnover on the residential sales side was enormous, he was obliged to take the employees from the residential side who were not successfully selling loans. According to Kremidas, Sutcliffe asked him to take Complainant over to the corporate side because Complainant did not have the product knowledge and was “not cutting it” as a loan originator on the retail side. According to Kremidas all employees assigned to Corporate were not meeting performance goals as originators. The Corporate Division never got off the ground and Kremidas was terminated from Respondent’s employ in September of 1999 ostensibly because the Corporate Sales

program was not successful. At the hearing Kremidas made it clear that he had not left Respondent on good terms.

8. Kremidas testified that he took an interest in Complainant and liked him. He thought Complainant was not getting proper training and thought Complainant had some talent. He claims he spent more time with Complainant than with others because he liked him and because he thought he needed it. Complainant testified that Kremidas called him “bro” and that he found this embarrassing and offensive. He stated the other guys in the office would laugh and snicker when Kremidas called him “bro,” and he told Kremidas he didn’t like it. He claimed that white employees started calling him “bro,” but when he told them he didn’t like it they stopped. Kremidas admitted that he called Complainant “bro” and said he called everyone “bro.” He said that Complainant also called him “bro” and never complained to him about this or said he was offended by it. According to Kremidas, he and Complainant had a social relationship, often went to lunch together and to buy computer equipment, which Complainant would load for him. Kremidas also said he lent Complainant money on occasion. He said he would have stopped calling Complainant “bro” if Complainant had told him he was offended by this.
9. Sutcliffe testified that Nick called everyone, including him, “bro.” He thought that Kremidas called people “bro” because he could not remember names. Sutcliffe did not believe that this was offensive, and stated “that was Nick.” McKay also testified that Kremidas called everyone, including her “bro.” She felt that because he called everyone “bro” that he was not singling out Complainant so she did not

believe this was a racial reference or offensive. Both Sutcliffe and McKay testified that Complainant never mentioned this to them nor did he complain that he felt offended or uncomfortable in the workplace.

10. Complainant testified that at some point during the time he worked for Kremidas, he arrived at work one day to find a picture of a monkey on his desk. He testified that when he asked who had put the picture on his desk, a co-worker who sat next to him on the left hand side told him that he witnessed a co-worker named "Frank" put the picture on Complainant's desk. Complainant testified that his heart was racing and he felt scared. He said that he spoke to "Frank" about the photo and "Frank" denied that he put it there. He testified that he didn't make a scene because he is not that kind of person, but he brought the incident to Nick's attention and showed him the photo and that Nick said he'd look into it but did nothing. Kremidas claimed to know nothing of this photograph, and stated that Complainant never showed him, nor complained about, any photo. He also claimed not to know the employee "Frank" that Complainant referred to. I believe Complainant's testimony that this incident occurred and that he was disturbed by it; however, I am not persuaded that Kremidas or anyone else in management was ever apprised of the incident.

11. Complainant was also upset because when he went over to the Corporate Sales Division, Kremidas assigned him the Roxbury/Dorchester territory. Complainant felt he was given minority neighborhoods in which to develop corporate leads because he is black and felt this was discriminatory. He claimed that he asked Kremidas for the Quincy/Braintree area also, but that Kremidas refused to assign

him this territory. According to Complainant when he questioned Kremidas about his assignment, Kremidas said it is because you live there and know that area best. Kremidas was completely forthright about this assignment and said he gave this territory to Complainant because he felt Complainant would do best in his “own backyard” where he had contacts, precisely because he is black. He stated “I’m Greek, I’d be thrilled to get a Greek territory.” Kremidas, however, denied that he refused to give Complainant Quincy and Braintree and stated they were included in the assignment. Complainant clearly did not believe that this territory was included in his assignment because he complained to Sutcliffe about it.

12. Complainant stated that once in corporate sales he had to develop his own leads because the company, which generally provided leads, did not have any for that area. Complainant’s job was to contact minority businesses in the area to determine if they would include Respondent’s mortgage information and application packet as part of their benefits package to employees. His commissions would be based on the number of employees who actually signed up for a mortgage loan. Complainant stated that he signed up Boston Medical Center which had 5000 employees. Kremidas stated that he gave Complainant this lead and that they worked on this account together. According to Kremidas, while Complainant made the initial call, Kremidas made the presentation and secured the account. Complainant testified that while working in Corporate he also signed up the Harvard Neighborhood Health Center and branched out on his own to the Quincy area where he signed up another company. He did not know if any loans were actually sold as a result of securing these accounts.

13. Complainant was terminated on April 28, 1999. He was terminated on the day that he was to meet with the Massachusetts Hospital Association, which represented 128 hospitals in Massachusetts. Complainant believed that if he could close this deal, he would get rich. He stated that Kremidas told him the meeting was cancelled. Instead he met with Kremidas and Sutcliffe that day and was terminated. Although Complainant at first said he was given no explanation of why he was being let go, he did admit they said something about the low number of loans. He believed he was terminated because Kremidas wanted to profit from the Mass. Hospital Association arrangement and not share the commissions. Kremidas attended the meeting with the Hospital Association and continued to negotiate with them, but never secured the account.
14. Kremidas agreed that Complainant was terminated on the day of the anticipated meeting with Mass Hospital Association. According to Kremidas, prior to April 28, 1999, Sutcliffe had asked him several times if Complainant should be terminated because he was not selling any loans. Kremidas claimed that in these discussions he asked for more time to train Complainant and get his performance level up. He remembered that Complainant had some problems with his car which he discussed with Sutcliffe and that he had been absent a number of days just prior to his termination. Sutcliffe also testified that Complainant came to discuss car problems with him and asked Respondent to pay for a car for him because he needed a reliable car to do his job. Sutcliffe stated after that discussion he never saw Complainant again and said he was a no-show for three days. There are no attendance records to support this assertion.

15. Sutcliffe testified that each originator's performance was reviewed monthly and that there was a very high turnover rate. He stated that he knew Complainant was in trouble because his level of loan sales was very low and he met with Kremidas a number of times to discuss this. (Ex. C-5). He also stated that he did not fire Complainant in April of 1999 and claimed to have no memory of a meeting with Kremidas at which they terminated Complainant. He could only recall a discussion with Kremidas about Complainant's performance problems, attendance issues, and his improper attire. He seemed to believe that Complainant had abandoned the job, though this view does not comport with Complainant's or Kremidas' version of events. Sutcliffe ultimately admitted that he could not remember the exact circumstances of Complainant's separation from the company. He had no memory of any complaints by Complainant about a hostile work environment.
16. In a memo to the Respondent's Payroll Department dated April 29, 1999, Kremidas wrote that Complainant was terminated on the previous day after having received two prior warnings on April 5<sup>th</sup> and 22<sup>nd</sup> for unacceptable sales performance and corporate appointments, poor attendance, lack of product knowledge, casual attire. (Exhibit C-8). There was some testimony that Complainant had been counseled for not dressing professionally.
17. Complainant applied for unemployment compensation and was originally denied but, after appealing, he received benefits. He was not sure how much unemployment compensation he received. He was out of work for 1 to 2 months before returning to his former company where he worked until he was laid off in

August of 2001 and remained unemployed up to the time of the hearing in January of 2003.

### III. CONCLUSIONS OF LAW

General Laws c. 151B s. 4 (1) prohibits discrimination in hiring, firing and in the terms and conditions of employment based upon race. It has also been interpreted to prohibit harassment based upon race that creates a hostile work environment. Beldo v. University of Massachusetts, 20 MDLR 105, 111 (1998); Richards v. Bull H. N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994). Complainant has alleged both a hostile work environment based upon his race and discrimination based on disparate treatment based upon his race.

In order to prove a claim of hostile work environment based upon racial harassment, Complainant must establish that (1) he is a member of a protected class; (2) he was the target of speech or conduct based on his membership in that class; (3) the speech or conduct was sufficiently severe or pervasive to alter his conditions of employment and create an abusive work environment; (4) the harassment was carried out by an employee with a supervisory relationship to Complainant, or Respondent knew or should have known of the harassment and failed to take prompt remedial action. Beldo, supra. at 111.

The Complainant in this case is African American. He claims that a hostile work environment was created by the fact that his supervisor Kremidas called him “bro” and that a picture of a monkey was left on his desk by a co-worker. I conclude that Kremidas’ use of the term “bro” to address Complainant, given the context of their relationship, was not a racially hostile or offensive act. There was testimony that Kremidas and Complainant had a good working relationship, that they frequently went to

lunch together and to purchase computer equipment. Complainant would load software for Kremidas and Kremidas occasionally lent Complainant money. There was also testimony that Kremidas called everyone “bro” regardless of their race or sex, and while Complainant being the only African American, clearly might have been more sensitive to being addressed in this manner, I don’t believe that he was offended by this. I believed both Kremidas and Sutcliffe’s testimony that Complainant never complained about this, and I also believed Kremidas when he stated that he would have ceased calling Complainant “bro” if Complainant had let him know it was offensive to him.

With respect to the claim that a picture of a monkey was left on Complainant’s desk, I do believe that this occurred. Complainant was led to believe when he asked a co-worker if he knew who had put the picture on his desk, that another co-worker named “Frank” had done it. I also believe that when this happened Complainant was shaken and upset. However, he testified he did not make a big deal about it, and I do not believe that Complainant brought this incident to the attention of Kremidas or Sutcliffe, as evidenced by their credible testimony that they knew nothing of the incident. Kremidas claimed to not even know who the alleged perpetrator named “Frank” was. Given that the turnover at Respondent was very high as testified to by both Sutcliffe and McKay, it is believable that Kremidas might not have known everyone who was employed by Respondent at a given time. Thus, I am unable to conclude that Respondent’s managers failed to take adequate remedial action, because I do not believe that they knew or should have known about this incident. I therefore find that Respondent is not liable for failing to remedy what Complainant alleges was a racially hostile work environment.

Complainant also alleges discrimination based on disparate treatment in the terms and conditions of his employment which he alleges were the (1) the failure to train him and make information, including leads, available to him, (2) Kremidas' assignment to him of territory in Roxbury and Dorchester and refusal to assign him to Braintree and Quincy, and (3) his ultimate termination just as he was about to consummate an important corporate deal, which Complainant believed had the potential to generate significant income from commissions.

In order to establish a prima facie claim of disparate treatment in employment based upon his race, Complainant must establish that (1) he is a member of a class protected by G.L. c. 151B; (2) that he was performing his duties at an acceptable level; (3) that he was terminated or suffered some adverse employment action; and (4) that the employer sought to fill the position with an individual whose qualifications are similar to Complainant's. Blare v. Huskey Injection Molding Systems, 419 Mass. 437, 441 (1995).

Complainant's allegation that he was inadequately trained, on its face, appears to be true. Notwithstanding, Respondent asserts that Complainant was essentially trained no differently than any other new employee. I conclude that Respondent had no formal training procedures or program for any of its new employees. There were no written training materials. It was apparent from the testimony of McKay that new loan originators were thrown into the telemarketing room to observe and learn from their co-workers and were provided with little to no guidance or assistance. There was no evidence that other originators received more extensive or detailed training than Complainant. The evidence suggests that originators were expected to succeed on their

own initiative and to learn as much as they could from observation and osmosis.

Respondent asserts this was the training method for everyone.

If Respondent articulates a legitimate, non-discriminatory reason for the treatment of Complainant that is supported by some credible evidence, Complainant must persuade the fact-finder that Respondent acted with discriminatory intent, motive, or state of mind. Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001). While it is apparent that training of new employees was a hapless and slipshod operation, the evidence does not support a conclusion that Complainant was the victim of inadequate or ineffective training because of his race. I also believe that once Complainant was assigned to corporate sales, Kremidas worked with him and did make efforts to assist him with leads.

Complainant also alleges that his assignment to corporate territory in Roxbury and Dorchester was disparate treatment based upon his race. While I find that Complainant's race was indeed a factor in Kremidas' decision to assign him this territory, I do not find that this was a determination adverse to Complainant, or that he was hindered or restricted in establishing corporate leads because of this assignment. Indeed, he claims to have secured several corporate accounts in this territory, including Boston Medical Center with over 5000 employees. I, therefore, conclude that this assignment did not constitute an adverse action with respect to Complainant's employment and thus he failed to articulate a prima facie case of discrimination with respect to this allegation.

Finally, Complainant alleges that his termination was for discriminatory reasons. However, he believed that Kremidas' goal was to secure the Mass Hospital Association account for himself to avoid sharing any resulting commissions with Complainant. Respondent asserted that Complainant was terminated in April of 1999 because he had

closed only one loan in a three-month period and that this was not consistent with Respondent's production goals. Complainant had received a substantial draw during this period of time that significantly exceeded the commission from the one loan that he closed. While there were also allegations about Complainant's poor attendance and his taking a number of days off immediately prior to his termination, his attendance was not documented. Complainant's lackluster production in terms of closing loans was, however, documented and it was substandard. Complainant, thus, failed to satisfy that element of the prima facie case that requires him to perform his job at an acceptable level.

However, even if I were to conclude that Complainant satisfied all the elements of a prima facie case with respect to his termination, Respondent articulated a legitimate non-discriminatory reason for the termination. It would then fall to Complainant to prove by a preponderance of the evidence that Respondent's reasons are a pretext for unlawful discrimination and that Respondent was motivated by discriminatory intent, motive, or state of mind. Lipchitz, supra. at 504. I conclude that Complainant did not prove by a preponderance of the evidence, that Respondent's reasons were motivated by discrimination. Even if I were to countenance Complainant's belief that Kremidas fired him in order to be the sole beneficiary of the potential new corporate account, this might suggest questionable business ethics motivated by greed, but not improper considerations of Complainant's race. The evidence suggests that Respondent's business was a ruthless, profit-driven operation, but it does not suggest that Complainant was singled out for poor treatment on account of his race. Thus, I conclude that Complainant's termination was not a violation of c. 151B.

IV. ORDER

For all the reasons stated above, I hereby order that the Complaint in this matter be dismissed. This Order is the final decision of the Hearing Officer.

Any party aggrieved by this Order may file a Notice of Appeal with the Full Commission within ten days of receipt of this order, and a Petition for Review within 30 days of receipt of this Order pursuant to 804 C.M.R. 1.23.

So Ordered this 19<sup>th</sup> day of November, 2003.

Eugenia M. Guastaferr  
Hearing Officer