ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE DIRECTOR, ex rel. LARRY D. FLAKES, Complainant, v. ALASKA SALES AND SERVICE, INC., Respondent.	ASCHR No. C-02-337 OAH No. 07-0190 HRC

RECEIVED
HUMAN RIGHTS COMMISSION
NOV 13 2009
VIA: ____ TIME: ____ BY: ____

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners have reviewed and considered the hearing record and the Recommended Decision dated June 15, 2009, of the Administrative Law Judge in this matter. The Recommended Decision is ADOPTED by the Commission EXCEPT AS SO MODIFIED regarding issues of damages.

The Recommended Decision is modified as follows:

(1) In order to determine the damages incurred by Mr. Flakes as a result of the Respondent's failure to promote him to the position of team leader, the Administrative Law Judge properly concluded that it was necessary to determine what salary Flakes would have earned as a team leader. The method chosen by the Administrative Law Judge to arrive at that figure was to use the average salary of the three team leaders who testified at the hearing. In its Objections, the Respondent asserts that the salaries of the two other team leaders who were promoted into the team leader

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

position should have been included. The Commission agrees that the more reasonable estimate of what Mr. Flakes would have earned as a team leader would be to calculate the average salary earned by all five team leaders. *See* 6 AAC 30.480(b) (Commission can order monetary relief that will "reasonably" compensate the complainant).

(2) The two team leaders not included in the Administrative Law Judge's calculation of the average earnings of team leaders were Michael McShane and Robbie Dixon. A reasonable estimate can be made regarding these team leaders' earnings because documentary evidence regarding their earnings was introduced at the hearing.

(3) The Respondent asserts that McShane's average annualized salary as team leader was approximately $60,000. Respondent's Objection to Recommended Decision at 21, citing Hearing Ex. 6 at 31. McShane left his position as a team leader on November 30, 2002 to accept a position at another dealership. Hearing Ex. 6 at 12. McShane's personnel file was entered into evidence. It contains a payroll document that identified the gross wages McShane had earned by the time he left employment. A review of that document supports Respondent's estimate that McShane's annualized earnings as team leader were approximately $60,000. Hearing Ex. 6 at 31. That sum will be used for purposes of determining the average earnings of the team leaders.

(4) Regarding Robbie Dixon, the Respondent asserts that this team leader's salary was "less than $65,000." Respondent's Objection to Recommended Decision at 21, citing Hearing Ex. 4 at 59, 83. A review of several documents entered into evidence reveals that Dixon identified his annual salary as a team leader during the

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

years of 2001 and 2004 as $65,000. Hearing Ex. 4 at 47; 49; 59. However, a W-2 statement that was entered into evidence for one of those years revealed that Dixon's earnings for the year 2003 for social security and Medicare purposes was $62,163. Based on this record, it is reasonable to determine Dixon's average earnings as a team leader by taking his estimate of his earnings for three years and to use the W-2 statement of earnings for social security and Medicare purposes for 2003 and to arrive at an average. Based on a calculation of three years earning $65,000 per year as a team leader and one year earning $62,163 as a team leader, the average salary that results for Dixon is $64,291.

(5) According to the Administrative Law Judge, the average salaries of team leaders who testified were as follows: Roger Davis, $60,000; John Isaacson, $75,000; Lewis Mosby, $90,000. Each of these individuals testified at the hearing that those sums were their "income," "salary" or what they "made" once they were promoted to the team leader position. Those sums are reasonable as they are based on the witnesses' recollection of their earnings. As set forth above, the average salary of the two remaining team leaders based on documentary evidence was as follows: Michael McShane, $60,000; Robbie Dixon, $64,291. The average salaries of the five team leaders were thus: $60,000; $75,000; $90,000; $60,000; and $64,291. The resulting average wage of the five leaders was $69,858. This figure will be used as the sum that Flakes would have earned if he had been promoted to the team leader position.

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

(6) The Administrative Law Judge properly concluded that in order to determine the damages Flakes suffered as a result of being denied promotion to the team leader position, it was necessary to determine what he had earned as a sales representative before the promotion decision was made in 2002. The Administrative Law Judge determined that amount by using the wages Mr. Flakes had earned during the year 2001, which was the last full year prior to the promotion decision. The Respondent argued that a more accurate determination of Flakes' wages would be to use either Flakes' year 2000 earnings or to average the wages for the years 2000 and 2001. The Commission has concluded that the most accurate estimate would be to average Flakes' wages in 2000 and 2001. This was considered the more accurate estimate because it involves a longer work period – two years as opposed to one year – to determine Flakes' average earnings. This was also considered to be a better estimate because Flakes was working in a sales position in which wages typically vary year to year, unlike a civil service or union contract position in which sales are set by a specific wage schedule.

(7) The Administrative Law Judge determined that Flakes' wages in 2001 were $41,692, citing Exh. 15 at 32-44 (Flakes' tax records). The Respondent argues that this understates Flakes' actual total compensation which was $46,120.48, citing Ex. 15 at 42. The difference between these two figures is that $41,692 represents the taxable wages reported on Flakes' W-2 statement for federal income tax purposes while $46,120 represents Flakes' wages for purposes of social security and Medicare

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

according to the W-2 statement. The Commission agrees with the Respondent that the wages earned for social security and Medicare purposes more reasonably reflects the total compensation earned by Flakes. This is because the social security and Medicare calculation of employee compensation includes certain employee compensation such as deferred income which is excluded from the sum calculated for purposes of federal income taxation. Thus, Flakes' wages for 2001 will be considered $46,120. Flakes' wages based on compensation for social security and Medicare purposes for 2000 was $55,476. Ex. 15 at 29. The average of $46,120 and $55,476 is $50,798. This sum will be used as Flakes' average earnings as a sales representative before he was denied promotion to team leader.

(8) The Administrative Law Judge properly determined that Flakes' actual damages for back pay should run from April 1, 2002 (when the promotion decisions were announced and Flakes was discriminatorily denied promotion) through August 31, 2007, which is the date that the Executive Director requested that the back pay period end.

(9) The Administrative Law Judge reasonably determined that Flakes' actual damages for the back pay period are based on subtracting the average team leader's earnings from Flakes' earnings as a sales representative. However, the Administrative Law Judge properly concluded that for the year 2002 the full annual figure should not be used because Flakes would only have worked as a team leader from April 1, 2002 through December 2002 or 75% of the year. The Administrative Law

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

Judge also appropriately determined that for the year 2007, because back pay damages will only run through August 31 of that year, the back pay sum would be the equivalent of 66.6% of a full year's earnings.

(10) Based on the average team leader's earnings of $69,858 and Flakes' average earnings as a sales representative of $50,798 as set forth above, a full year's lost earnings would be $19,060. A chart of the total damages is as follows:

2002	$14,295
2003	$19,060
2004	$19,060
2005	$19,060
2006	$19,060
2007	$12,694
Total	**$103,229**

(11) The Commission agrees with the Administrative Law Judge for the reasons stated in the recommended decision that prejudgment interest should be set at the rate of 3.5% per annum (based on an application of AS 09.30.070(a)), and that it should run from the date of written notice of Flakes' claim (October 3, 2002) through August 31, 2007. The Commission has adopted the same interest calculation methodology as the Administrative Law Judge for the reasons stated in the Recommended Decision but the calculation must be made based on a different principal sum for back wages. The interest calculation appears as follows:

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

	Quarter	Principal	Interest Rate	Accrual Yrs	Interest due
2002	Qtr 4 Oct-Dec	5245.38	0.035	6.5	1193.32
2003	Qtr 1 Jan-Mar	5245.38	0.035	6.25	1147.43
	Qtr 2 Apr-Jun	5245.38	0.035	6	1101.53
	Qtr 3 Jul-Sep	5245.38	0.035	5.75	1055.63
	Qtr 4 Oct-Dec	5245.38	0.035	5.5	1009.74
2004	Qtr 1 Jan-Mar	5245.38	0.035	5.25	963.84
	Qtr 2 Apr-Jun	5245.38	0.035	5	917.94
	Qtr 3 Jul-Sep	5245.38	0.035	4.75	872.04
	Qtr 4 Oct-Dec	5245.38	0.035	4.5	826.15
2005	Qtr 1 Jan-Mar	5245.38	0.035	4.25	780.25
	Qtr 2 Apr-Jun	5245.38	0.035	4	734.35
	Qtr 3 Jul-Sep	5245.38	0.035	3.75	688.46
	Qtr 4 Oct-Dec	5245.38	0.035	3.5	642.56
2006	Qtr 1 Jan-Mar	5245.38	0.035	3.25	596.66
	Qtr 2 Apr-Jun	5245.38	0.035	3	550.76
	Qtr 3 Jul-Sep	5245.38	0.035	2.75	504.87
	Qtr 4 Oct-Dec	5245.38	0.035	2.5	458.97
2007	Qtr 1 Jan-Mar	5245.38	0.035	2.25	413.07
	Qtr 2 Apr-Jun	5245.38	0.035	2	367.18
	Qtr 3 Jul-Aug 31	5245.38	0.035	1.75	321.28
					15146.03

(12) The Commission accordingly directs that Larry Flakes be made whole by award of back pay damages of $103,229 plus pre judgment interest of $15,146.03 calculated quarterly from October 3, 2002 through August 31, 2007 at the rate of 3.5%, for a total award of $118,375.03.

(13) The Commission directs that post judgment interest at the rate of 3.5% should run from the date of this order until the full amount is paid. It is noted that Alaska courts have held that post judgment interest is appropriate because it is necessary to compensate the successful party for lost use of money. *Ogard v. Ogard,* 808 P.2d 815, 817-18 (Alaska 1991); *Morris v. Morris,* 724 P.2d 527, 529 (Alaska 1986). The Respondent agreed that post judgment interest at rate of 3.5%

should be awarded if the Commission awarded any damages in this matter. (Respondent's Reply to the Complainant's Limited Objections at p. 5).

Judicial review is available to the parties pursuant to AS 18.80.135 and AS 44.62.560-.570. An appeal must be filed with the superior court within 30 days from the date this Final Order is mailed or otherwise distributed to the parties.

DATED: November 13, 2009

Randall H. Eledge, Commissioner

DATED: November 13, 2009

Lester C. Lunceford, Commissioner

DATED: November 13, 2009

Grace E. Merkes, Commissioner

This is to certify that on the 13th day of November 2009, a copy of the foregoing was mailed or delivered to:

Complainant Attorney:
Stephen Koteff, Human Rights Advocate (hand-delivery)
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501

Respondent or Respondent's Representative:
Peter Partnow
Lane Powell, LLC
301 Northern Lights Boulevard, #301
Anchorage, AK 99503

Kay L. Howard, Administrative Law Judge
Office of Administrative Hearings
State of Alaska
Department of Administration
550 W. 7th Avenue, Suite 1600
Anchorage, AK 99501

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON APPOINTMENT BY THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

Paula M. Haley el rel. Larry D. Flakes, Complainant, v. Alaska Sales and Service, Inc. Respondent.	)	OAH No. 07-0190-HRC ASCHR No. C-02-337

RECEIVED
HUMAN RIGHTS COMMISSION
JUN 17 2009
VIA: ____ TIME: ____ BY: ____

RECOMMENDED DECISION

I. INTRODUCTION

On September 30, 2002, Larry Flakes filed a complaint of racial discrimination with the Alaska State Commission for Human Rights ("Commission"). He claims that Alaska Sales and Service ("Alaska Sales"), an Anchorage-based car dealership, violated the Alaska Human Rights Law by discriminating against him on the basis of his race, African American, when in 2002 it refused to promote him to the position of team leader in the automobile sales department.[1]

The Commission staff investigated Flakes' complaint over the course of four years, and on December 21, 2006, determined that substantial evidence supported his allegations that Alaska Sales discriminated against him on the basis of his race by not promoting him to the position of team leader.[2] The staff found that substantial evidence did not support two other allegations he brought – constructive discharge and denial of monetary benefit because of his race.[3]

On February 28, 2007, the Executive Director certified that attempts to eliminate the alleged discrimination by conference, conciliation, or persuasion failed, and that a hearing was required to determine the merits of the case.[4] Pursuant to AS 18.80.120, a hearing

---

1 Exh. D.
2 Exh. V.
3 *Id.*
4 *See* Certification of Conciliation Failure, filed with the case referral received on April 9, 2007.

was held before the undersigned on September 22–29, 2008.[5] The Executive Director was represented by Human Rights Attorney Caitlin Shortell; Peter C. Partnow represented Alaska Sales and Service. Complainant's exhibits 1-6, 11, 13, 14-15, 17; and Respondent's exhibits A, B, C, D, H, J, U, V, BB and CC were admitted into evidence.

Based on the record in its entirety and after careful consideration, I recommend the Commission find that Flakes established a *prima facie* case of discrimination under AS 18.80.220(a)(1), and even though Alaska Sales produced admissible evidence that its hiring decision was motivated by a facially legitimate, nondiscriminatory reason, Flakes proved that Alaska Sales' stated reason for not promoting him was a pretext for racial discrimination.

Accordingly, I recommend that the Commission award Flakes "make whole" relief consisting of back pay damages equal to $180,429, the difference between the average team leader salary and Flakes' salary as a sales representative, projected from April 1, 2002, through August 31, 2007, plus simple interest at the rate of 3.50% per year.

II. FACTS

A. Undisputed Facts

1. *Alaska Sales and Service*

Alaska Sales and Service is an automobile dealership that has operated in Alaska for over 60 years. It sells new and used vehicles, provides parts and accessories, operates a full service repair center, leases vehicles, and under a separate corporation offers in-house financing. It has several facilities around the state and employs more than 300 people.[6] Alaska Sales' CEO, Diana Pfeiffer, is the only woman car dealer in Alaska. Ms. Pfeiffer started as an accounting clerk in 1969, then over the ensuing years worked her way up to bookkeeper and assistant general manager. In 1995, she became the General Manager and eight years later became the President/Dealer for Alaska Sales and Service.

Alaska Sales has an equal employment opportunity policy that is set out in writing and distributed to all new employees. The 1999 version of the employee handbook contains information about the company's equal employment policy as well as information for employees regarding work schedules, compensation and benefits, leave and the company's standards of

---

[5] The hearing in this matter was originally calendared to begin on December 10, 2007. However, the hearing date was vacated on October 17, 2007, and delayed for eleven months due to the resignation of the Commission's attorney. The hearing began on September 22, 2008.

conduct for employees.[7] All new hires are required to attend a new employee orientation; a worker having a problem with any aspect of his or her employment is directed to take complaints to a supervisor or further up the chain of command if necessary.[8]

Prior to the time frame of 2001-2002, the approximately 30 sales representatives working at the Anchorage location of Alaska Sales were organized in four teams of associates reporting directly to the four sales managers, Charles Trimpey, Lane Gunther, Steve Ginnett and Mark Gross. In late 2001 or early 2002, the management of Alaska Sales decided to change the organizational structure of the sales staff so that the sales representatives would each report to one of five "team leaders" or "closers," mid-level supervisors who would each report to the sales managers. The conversion was designed to change both the organizational structure and the compensation package for the commissioned sales staff.

Alaska Sales' upper management and the four sales managers met in advance of the change to discuss how the team leaders would be chosen and how the new organizational structure would work. Alaska Sales did not post a written announcement of the team leader positions or solicit applications, but merely announced that team leaders would be chosen from among the sales staff. Privately, however, individual sales managers were soliciting specific sales representatives for the position. Lane Gunther asked John Isaacson if he was interested in being a team leader; Isaacson answered in the affirmative.[9] Also, Mark Gross actively recruited sales representatives for the team leader position. He told Roger Davis that Davis should "apply" for team leader because of the skills he had learned at a former dealership.[10] Gross also brought in Michael McShane from another dealership specifically to be a team leader.[11]

Sometime in late March 2002, the sales managers collectively decided on the sales representatives they wanted as team leaders. They recommended to General Sales Manager James D. McMullian, Jr., that these five individuals be promoted: Tommy Lee, John Isaacson, Robbie Dixon, Roger Davis and Michael McShane. McMullian did not interview the individuals who had been chosen as team leaders, nor did he consult their personnel files to verify whether

---

6 Exh. B at 2-4.
7 Exh. B.
8 Exh. B at 7.
9 Testimony of John Isaacson.
10 Davis did express an interest in the position, but this was the usual practice for him – he had previously informed his superiors he was interested in management on numerous occasions. Testimony of Roger Davis.
11 McShane was hired directly into the position of team leader from another dealership on March 29, 2002. *See* Exh. 6 at 59.

they were qualified for the position. McMullian signed off on all the sales managers' picks and confirmed them as the new team leaders at Alaska Sales.

On April 1, 2002, Alaska Sales announced that the above five individuals had been chosen for the team leader positions. Larry Flakes was not chosen, nor was his good friend, Lewis Mosby, also an African American sales representative at Alaska Sales. For reasons that will be discussed below, Flakes came to believe that he had not been selected because he is African American. He subsequently left his employment at Alaska Sales on April 1, 2002, and did not return.

The Alaska Sales upper management and sales managers had been working on a draft job description for the team leader position, but it was not finalized until April 3, 2002. Each new team leader signed the document, making it more of a job contract than a job description posted for the benefit of individuals wanting to apply for a specific employment opportunity.

2. *Larry Flakes*

Larry Flakes was 44 years old in 2002. He was born in the Mississippi Delta region in 1958 and was raised there during the time of segregation in the South. At the age of 20, he went into the U.S. Army and served for four years. Flakes came to Alaska in 1979. Following his separation from the military in August 1983, Flakes began his career in automobile sales at Stepp Brothers, an Anchorage car dealership.[12] Two years later he moved to Anchorage Nissan, where he was a sales representative and Assistant Manager/Closer from August 1985 through August 1986.[13]

Flakes began working at Alaska Sales on February 1, 1988, and was employed there intermittently for nearly 11 years, until April 1, 2002.[14] During his tenure at the dealership, Flakes worked in the general sales department and also in the commercial section, commonly referred to as the "Fleet Department," where sales representatives had more autonomy to work their own deals. During each of his three absences from Alaska Sales, Flakes was employed at another car dealership. Significantly, during one of his breaks in service, Flakes was the Sales Manager at Easy Street Auto from September 1994 through January 1996.[15] When the team

---

12 Exh. 1 at 217.

13 *Id.*

14 Flakes worked at Alaska Sales during four distinct time frames: February 1, 1998 – September 30, 1993 (a period of 5 years, 7 months); March 16, 1994 – September 21, 1994 (6 months); March 4, 1997 – June 26, 2001 (4 years, 3 months); and September 28, 2001 – April 1, 2002 (7 months). Exh. 1 at 9.

15 Exh. 1 at 103.

leaders were chosen at Alaska Sales on April 1, 2002, Flakes had been selling cars for about 18 years, including over two years that he spent as a Sales Manager or Assistant Manager/Closer at two other dealerships.

Flakes received numerous accolades for his performance at Alaska Sales. In particular, he was named the "sales representative of the month" on no fewer than 12 occasions: February, August and October of 1990; February, July and October of 1991; January, April and August of 1992; February of 1993; and February and August of 2000.[16] In addition to being awarded the plaques, Flakes received letters from customers on February 14, 1998 and July 11, 2000, complimenting him on the quality and professionalism of his work with them.[17]

During the 11-plus years he was an employee at Alaska Sales, Flakes was absent from work for vacations, minor injuries and medical appointments, to be sure, but most of his absences were due to illness.[18] Flakes received four warnings during his employment at Alaska Sales. The first was on March 19, 1991, for calling in absent because of "personal reasons" for three consecutive days.[19] In addition, he received three warnings for taking excessive time off for illness or recuperation concurrent with weekends or holidays,[20] and he received an unexcused absence for personal reasons on January 26, 2000.[21]

After he left Alaska Sales in April 2002, Flakes continued to work in vehicle sales at several locations over the next few years.[22] His earnings were as follows:

Year	Employers	Earnings
1998	Alaska Sales	$40,620[23]
1999	Alaska Sales	$37,595[24]
2000	Alaska Sales	$47,661[25]
2001	Alaska Sales	$41,692[26]
2002	Alaska Sales, Tony Chevrolet	$45,714[27]
2003	Universal Motors, Tony Chevrolet	$32,460[28]

16 Mr. Flakes brought his 12 plaques to the hearing and the front of each one was copied. The copies were admitted as Exhibit 17.

17 Exh. 1 at 56, 86.

18 Flakes was absent due to illness for 52 total days. *See* Exh. 1 at 148-196, 41-86, and 218-220 (these last three pages were added to the end of Exhibit 1 during the hearing).

19 *Id.* at 181.

20 *Id.* at 49, 53, 59.

21 *Id.* at 54.

22 Exh. A.

23 Exh. 15 at 0009-0015.

24 *Id.* at 0016-0022.

25 *Id.* at 0023-0031.

26 *Id.* at 0032-0044.

27 *Id.* at 0045-0047.

2004	Tony Chevrolet, Universal Motors, Fleet Liquidators	$32,984[29]
2005	Fleet Liquidators, Lyberger's, Continental Motors	$22,102[30]
2006	Lyberger's, Phil Haw's (DBA Park & Sell)	$30,667[31]
2007	A&M RV Center, Phil Haw's, Morrison Auto Group	$38,669[32]

3. Team Leaders

In April 2002, all of the sales representatives who were promoted to team leader had less experience selling cars than Larry Flakes. Robbie Dixon had been selling cars for about 14 months; he had no experience in automobile sales before he was hired in February 2001.[33] Tommy Lee was in real estate before he was hired at Alaska Sales in August 1999, so he had 2½ years of experience in car sales as of April 2002.[34] Michael McShane had just over two years experience in car sales prior to his promotion.[35] Roger Davis had 4½ years of experience in car sales, but he had been employed at Alaska Sales for only four months when he became a team leader.[36] John Isaacson had been a longtime retail salesman prior to starting at Alaska Sales in January 1997, so he acquired all five years of his vehicle sales experience at the dealership before becoming a team leader.[37]

As of April 2002, the five new team leaders also had notations in their personnel files for absences, tardiness, and other disciplinary matters prior to their promotions. Lee had the most marks on his record. He had at least 12 warnings for being late to work and missing required meetings. He was written up for being absent from a meeting on September 27, 1999.[38] Lee also received warnings on October 21, 1999, when he was late to training and a shift meeting,[39] and again on November 27, 1999, when he did not show up for work and did not call to notify a supervisor.[40] Less than one month later, Lee was suspended for one day on December 17, 1999,

---

28 *Id.* at 0048-0058.
29 *Id.* at 0059-0061.
30 *Id.* at 0062-0066.
31 Exh. A at 2-3.
32 Testimony of Larry Flakes. Flakes' year-to-date earnings with A&M RV Center totaled $24,164 as of July 10, 2007. Exh. A at 3.
33 Exh. 4 at 181.
34 Exh. 5 at 113.
35 Exh. 6 at 15, 30.
36 Exh. 3 at 25, 133.
37 Exh. 1 at 48, 50.
38 Exh. 5 at 10.
39 *Id.* at 9. The write up slip said he had already been counseled verbally about this problem several times.
40 *Id.* at 25.

when he was late to a mandatory sales meeting after being warned previously.[41] Lee took a six-day leave of absence in January 2000 to attend to family matters, yet his conduct did not improve. On January 20, 2000, he received a warning for violation of company policies when he failed to ensure that vehicles were ready for delivery when promised.[42] On May 21, 2000, he was again warned because he "couldn't give a direct answer to confirm money down and answer certain closing questions ...."[43] Lee quit over that incident, although someone apparently intervened, as the word "void" was handwritten on the report indicating that he had voluntarily terminated his employment at Alaska Sales.[44] Lee was absent without explanation on September 26, 2000, and got an additional write up for being late on September 30, 2000.[45] Finally, Lee received a written warning for failing to come to training on time on February 26, 2001, and three other written warnings for lateness in 2001.[46]

Isaacson also had records of leave and absences for sickness in his file. In the most serious disciplinary matter, Isaacson had a written warning in his file for sexually harassing a female customer on January 30, 1999.[47] He also had three absences for sickness on February 3, 10th, and 28, of 2002, just one month prior to his promotion to team leader.[48]

Robbie Dixon's most critical issues prior to his promotion involved driving offenses. In 1999 he was charged with reckless driving, but it was discharged pursuant to a suspended imposition of sentence.[49] In 2000, he received four traffic citations.[50] A background check revealed these violations to Alaska Sales prior to his being hired in February 2001.[51]

Roger Davis was hired only six months before being promoted to team leader, so his personnel file shows just one absence, for foul weather, on March 17, 2002.[52] Similarly, Michael McShane's attendance record prior to his promotion is not known; he was hired directly into the

---

41 *Id.* at 2.
42 *Id.* at 8.
43 *Id.* at 7.
44 *Id.* at 102.
45 *Id.* at 23.
46 *Id.* at 19-20, 22.
47 Exh. 2 at 5-6.
48 *Id.* at 23.
49 Exh. 4 at 41, 43.
50 *Id.* at 45.
51 *Id.* at 37-45.
52 Exh. 3 at 14.

position of team leader from another dealership on March 29, 2002.[53] His former employers did report that he sometimes had sloppy paperwork and needed "direction."[54] McShane left Alaska Sales and the team leader position to work at another dealership on November 30, 2002.[55]

The new team leaders experienced an increase in income after being promoted in April 2002.[56] For example, Roger Davis earned $2,000 to $2,500 gross per month while selling cars,[57] but as a team leader, his earnings increased to an average gross amount of $5,000 per month, or, $60,000 per year.[58] Likewise, John Isaacson, who had two separate stints as a team leader, saw his earnings increase from $60,000 as a sales representative to $75,000 and $84,000 after his promotion.[59] Lewis Mosby was promoted to team leader in December 2002 after he closed his charter business and returned to Alaska Sales full-time. His income increased to $90,000 as a team leader. The initial team leader earnings of these individuals – $60,000, $75,000, and $90,000 – average $75,000 annually.

B. Evidentiary Ruling

At the heart of this case is a dispute about a statement allegedly made by Mark Gross, one of Alaska Sales' four sales managers, to Lewis Mosby and subsequently to Larry Flakes, on April 1, 2002. At the hearing, the Executive Director offered the testimony of both Mosby and Flakes that Gross told both of them they were not promoted to the position of team leader because of their race.

Alaska Sales claims that Gross's alleged statement to Mosby and Flakes is hearsay and is therefore inadmissible. In response, the Executive Director maintains that Gross's statement is admissible because it is an admission of a party opponent, either under Evidence Rule 801(d)(2)(A), or Evidence Rule 801(d)(2)(D).

Typically, in administrative hearings, the rules of evidence used in state court do not apply, "except as a guide."[60] However, in hearings conducted for the Commission, its regulation,

---

53 Exh. 6 at 59. Lewis Mosby testified that he spoke with McShane's supervisor at the other dealership, who reported McShane was on the verge of being fired for not selling enough cars. Alaska Sales did not object to this testimony.

54 *Id.* at 26, 28.

55 *Id.* at 12, 33.

56 Tommy Lee apparently resigned after two months as a team leader because he could make more money as a sales representative due to his large customer base. Exh. 5 at 89.

57 Testimony of Roger Davis.

58 *Id.*

59 Testimony of John Isaacson.

60 2 AAC 64.290(b).

6 AAC 30.460(a), requires that the administrative law judge "shall admit and give probative effect to evidence that is admissible in the superior court." Thus, the court rules must be evaluated to determine whether Gross's alleged statement "shall" be admitted.

Evidence Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Unless it falls within one of several exceptions found in the Evidence Rules, hearsay is generally inadmissible in court.[61]

Evidence Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Gross's statement to Mosby and Flakes falls squarely within this definition. The statement, offered by the Executive Director against Alaska Sales, the respondent in this action, was made by Mark Gross, one of the four sales managers at the dealership. Gross was one of the four individuals who was directly involved in the selection of the sales representatives for the five positions of team leader and further, Gross was answering a question posed to him by both Mosby and Flakes concerning why each of them had not been chosen to be team leaders. Thus, any statement Gross made on this matter was within the scope of, and during, his employment relationship with Alaska Sales. Accordingly, Mark Gross's alleged statement to Mosby and Flakes is not hearsay; it is an admission of a party opponent and it must be admitted.

In addition, Commission regulation 6 AAC 30.460(a) provides that the administrative law judge is to admit "other evidence" – meaning evidence not admissible in the Superior Court, such as hearsay – if it is "evidence on which reasonable persons are accustomed to rely in the conduct of their serious affairs." I find that a statement of a sales manager about the reason for a hiring decision in which he was directly involved is the type of information "on which reasonable persons are accustomed to rely in the conduct of their serious affairs."

C. Findings of Fact

1. *The events surrounding April 1, 2002*

On April 1, 2002, the sales managers announced who had been chosen for the team leader positions: Tommy Lee, John Isaacson, Robbie Dixon, Roger Davis and Michael McShane. Neither Larry Flakes nor Lewis Mosby was chosen.

---

[61] Evidence Rule 802.

Mosby testified that he would have been interested in the position because it potentially involved more money, so after the announcement was made he said he initiated a private conversation with Gross on the sidewalk outside the dealership.[62] Mosby asked the sales manager why he, Mosby, had not been chosen for the team leader position. Gross replied that it was because Mosby is black.[63] Mosby was upset by Gross's explanation, so he immediately went across the street to where Flakes was working and told him what Gross had said about the team leader position.

Flakes testified that he was shocked and surprised by what Mosby told him, so he went to speak with the sales manager himself. When Flakes found Gross, he asked the sales manager the same question Mosby asked him – why wasn't I chosen for the team leader position? According to Flakes, Gross said it was because of the color of his skin.[64] Flakes was stunned by Gross's explanation; it immediately brought back his youth in the segregated South. Flakes said he had always thought of Alaska Sales as his family – after all, he had worked there for 11 years – and he was deeply hurt at the thought that he was being judged because he is black.[65] No one else was present for this exchange between Flakes and Gross. Flakes could think of nothing else to do, so he packed his personal belongings and left the dealership without speaking to anyone.[66]

Meanwhile, Mosby said he went to the office area to speak with General Sales Manager McMullian about what had transpired with Mark Gross.[67] Mosby wanted McMullian to know what one of his sales managers had said and what McMullian would do about it. Mosby had the expectation that the general sales manager would investigate or re-do the team leader selections.

McMullian testified that he heard Mosby in the hallway outside his office speaking loudly about not being promoted because of his race.[68] McMullian said he took Mosby into his office and said something akin to "we don't talk like that around here."[69] Mosby told McMullian what was said to him and Flakes, but inexplicably refused to tell McMullian who made the statement.[70] McMullian asked Mosby where Flakes was and Mosby responded that Flakes had

---

62 Testimony of Lewis Mosby.
63 *Id.*
64 Testimony of Larry Flakes.
65 *Id.*
66 *Id.*
67 Testimony of Lewis Mosby.
68 *Id.*
69 Testimony of James McMullian.
70 Testimony of Lewis Mosby and James McMullian.

taken his things and left Alaska Sales.[71] According to McMullian, McMullian assured Mosby that race was not the reason he hadn't been picked – it was because he operated his charter business in the summer and therefore was a part-time employee.[72] McMullian testified that he told Mosby if he came back to Alaska Sales full-time after running his charter business that summer and worked hard, he would be considered for a team leader position when one came open.[73]

Other than trying to get Mosby to tell him who made the alleged discriminatory statement, no one at Alaska Sales followed up regarding the events of April 1, 2002. McMullian did not investigate Mosby's claims after their conversation in his office.[74] The Human Relations department sent Flakes an exit questionnaire on April 30, 2002, but it was not returned.[75] Flakes denied getting it. At some point McMullian asked Paul Ramage, the company's Human Resource Manager, if he should give Flakes a call. Ramage responded that if Flakes wasn't willing to step forward and tell them "who it was" or to make a statement, then no, McMullian was not to contact Flakes because after all, it was his fourth time leaving the dealership.[76]

Ramage also did not initiate an investigation in response to the events of April 1, 2002. Later he conducted an inquiry into why Flakes left his job at Alaska Sales, but it was done after Flakes filed his complaint and specifically to prepare for a meeting between Alaska Sales and the Executive Director in late 2002.[77] Ramage testified he did not have notes about the investigation, but if he had made them they would be in the "complaint file." When asked what steps he took in furtherance of the inquiry Ramage replied that he would have spoken with everyone involved in the hiring process and with others as necessary, asking them whether they heard Gross's conversation with either Mosby or Flakes. He did not remember speaking to Gross or whether the sales manager was still working at Alaska Sales at the time he conducted the investigation. Ramage closed the investigation after concluding Mosby's allegation about Gross could not be corroborated.

---

71 *Id.*

72 *Id.*

73 *Id.* Mosby did return to Alaska Sales full time in the fall of 2002 and was promoted to team leader in December 2002. Testimony of Lewis Mosby.

74 Testimony of James McMullian.

75 Exh. 1 at 63.

76 Testimony of James McMullian.

77 Testimony of Paul Ramage.

2. Mark Gross was not a credible witness

Mosby and Flakes both testified that Gross told each of them that they were not chosen for the position of team leader because of their race. Gross denied making the statement, either to Mosby and Flakes,[78] both in his February 6, 2006, interview with the staff investigator,[79] and in his videotaped hearing testimony. Gross insisted he had always been a proponent of racial minorities and he would have had no reason to make such a statement to Mosby or Flakes, especially since Alaska Sales is an equal opportunity employer and does not discriminate on the basis of race.

Gross was not a credible witness. His answers to questions were given in short and curt statements and appeared rehearsed. All the while, he was chewing gum and attempting to look comfortable, although his demeanor came across as forced and strained rather than relaxed. Moreover, Gross's videotaped deposition contained inconsistencies. For example, Gross stated in response to the question "[d]o you remember why, if there was any reason, you didn't recommend complainant for a closer position?" Gross replied, "I barely knew him. I had nothing to judge it on."[80] Inexplicably, Gross then responded affirmatively to this question, based on a statement taken from his 2006 interview with a staff investigator:

> Then you go on to say that Mr. Flakes *was a very talented and capable sales rep.* He had a good position in fleet sales with very little second guessing by management. And do you remember that Mr. Flakes was always well-dressed. Is there anything you'd like to add to that today, or is that still your testimony?[81]

To which Gross replied, "[t]hat's about it."[82]

Secondly, Gross stated, in reference to the team leader positions, that [General Sales Manager McMullian] "wanted to promote from within, which is according to Sales and Service policy." Gross then reiterated that the hiring process "was wide open. I mean, you could choose from – any salesperson that worked for Alaska Sales and Service could have been promoted to that position."[83] Yet in direct contradiction to this testimony, Gross himself recruited future team

---

78 Mark Gross is alleged to have said virtually the same thing to Lewis Mosby and soon thereafter to Larry Flakes. For purposes of this analysis his remarks are being referred to collectively as a "statement" even though they were allegedly made twice.

79 Exh. J.

80 Exh. 13 at 14 (emphasis added).

81 *Id.* at 17.

82 *Id. See also* Exh. J at 2.

83 *Id.* at 20-21.

leader Michael McShane from another dealership in late March 2002, the same time the team leaders were being chosen by the sales managers.[84]

In contrast to Mark Gross, both Mosby and Flakes were credible witnesses. Their demeanor was quiet and sincere and their attitude was respectful as they answered both counsels' and the administrative law judge's questions with direct eye contact. Mosby's credibility was further bolstered by the fact that he is currently employed as a sales manager at Alaska Sales and has enjoyed financial success there since 2002, yet he acknowledged he believes he was promoted to the position of team leader in December 2002 specifically because of Flakes' complaint to the Commission. I find Mosby and Flakes' accounts of the conversations with Mark Gross to be credible.

III. DISCUSSION

A. Legal Framework

Alaska Human Rights law makes it "unlawful for . . . an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin . . . ."[85] In considering the application of the statute, Alaska courts have looked to the relevant federal decisions interpreting Title VII of the Civil Rights Act.[86] Even though Alaska courts take the lead from federal decisions, the Alaska Human Rights Law "is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination."[87]

The parties agree that the appropriate analysis is the *McDonnell Douglas* test, in which the courts apply a three-part burden shifting analysis in cases where there is no direct evidence of

---

[84] McShane, who previously worked at Nye Frontier Toyota, was hired on March 29, 2002, for the position of Closer-Floor Manager. His immediate supervisor was to be Mark Gross, who was also listed as McShane's primary contact on his Personnel Data Sheet. Exh. 6 at 34, 49, 50, 59. It was Lewis Mosby, however, who revealed in his testimony that McShane was going to be fired at his former dealership for inadequate performance.

[85] AS 18.80.220(a)(1). The version of AS 18.80.220(a)(1) that applies to this case is the version in effect prior to being amended in 2006. *See* § 14, ch. 63 SLA 2006. The quoted language has not changed from the previous version.

[86] *See Alaska State Commission for Human Rights v. Yellow Cab,* 611 P.2d 487, 490 & n.5 (Alaska 1980); *see also Thomas v. Anchorage Telephone Utility,* 741 P.2d 618, 622 (Alaska 1987).

[87] *Wondzell v. Alaska Wood Products, Inc.,* 601 P.2d 584, 585 (Alaska 1979).

discriminatory intent on the part of the employer.[88] The Executive Director has the burden of proving each element of the case by a preponderance of the evidence.[89]

Under *McDonnell Douglas,* the complaining party must first establish a *prima facie* case of discrimination. If the complainant is alleging discrimination because of race, religion, national origin, or a similar protected status, the complainant meets this burden by showing that (1) the complainant is a member of a protected class; (2) the complainant applied for and was qualified for a job for which the employer was seeking applications; (3) the complainant was rejected despite his or her qualifications and (4) the employer either left the position open while seeking more applicants with the same qualifications, or hired an individual not within the same protected class as the complainant.[90]

If it is established, a *prima facie* case "raises an inference of discrimination" because it is presumed that, in the absence of explanation, a potential employee's rejection under these circumstances is "more likely than not based on the consideration of impermissible factors."[91] A *prima facie* showing therefore "creates a presumption that the employer unlawfully discriminated against the employee."[92]

Once a *prima facie* case of discrimination is established, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. To satisfy its burden, the employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[93] An employer may not compose fictitious, post-hoc justifications for an employment action. Rather, the reason(s) must have existed at the time the employment decision was made.[94]

If the employer meets its burden of production, the burden shifts back to the complainant to show that discriminatory reasons were a more likely motive for the employer's action than the explanation offered by the employer. This is ordinarily done by showing the employers' reason

---

88 *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Alaska adopted the *McDonnell Douglas* test in *Brown v. Wood,* 575 P.2d 760, 770 (Alaska 1978).

89 AS 18 80.120(d); 6 AAC 30.440(a).

90 *Raad v. ASCHR,* 86 P.3d 899, 904-5 (Alaska 2004).

91 *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978).

92 *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981).

93 *Raad v. ASCHR,* 86 P.3d at 905.

94 *Id.*

or reasons to be a pretext for discrimination.[95] There are a number of ways to prove pretext, either by direct or circumstantial evidence.[96] If there is no direct evidence, the complainant may establish pretext by showing internal "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action" such that they are unworthy of credence,[97] or by showing "clearly superior" qualifications for the position.[98]

B. Analysis

1. Flakes Established a Prima Facie Case of Discrimination

In this case, Flakes met his burden of proving a *prima facie* case of racial discrimination:

a) Flakes is African American and, by virtue of his race, has shown that he is a member of a protected class under AS 18.80.220.

b) Flakes was qualified for the position of team leader at Alaska Sales. It is not necessary for Flakes to prove that he was more qualified than the other sales representatives who were chosen as team leaders. He must merely establish that he was objectively qualified for the position.[99] Examples of objective criteria include education and years of work experience.[100]

At a minimum, Flakes was objectively qualified for the position of team leader in 2002. He had worked as an automobile sales representative for 18 years, 11 of them at the Alaska Sales dealership. Also, Flakes was an Assistant Manager/Closer at Anchorage Nissan from August 1985 through August 1986, and the Sales Manager at Easy Street Auto from September 1994 through January 1996. He even had some discretion to close his own deals in the Fleet Department of Alaska Sales, a responsibility not granted to many sales representatives.

The second prong of the *McDonnell* test requires that in addition to being qualified for the position that the complainant also must have applied for it.[101] This aspect of the prong does not apply here because, as Alaska Sales admits, applications were not solicited during the

---

95 *Id.*

96 *Id.*

97 *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2002); *see also Raad v. FNSBS,* 323 F.3d 1185, 1194 (9th Cir. 2003).

98 *See, e.g., Raad v. ASCHR,* 86 P.3d at 906.

99 *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1344-45 (9th Circuit 1981) (objective job qualifications should be treated at step one and subjective criteria are best addressed at the later stages of the process).

100 *Id.* How the complainant actually measures up against any other job applicant is an issue for the pretext section of the analysis.

101 *See Raad v. ASCHR,* 86 P.3d at 905.

process of choosing team leaders. The team leaders were simply chosen from the ranks of the sales representatives by the sales managers and affirmed by the General Manager. Therefore, under the facts of this case, Flakes did not have to formally apply for the position.[102]

c) In spite of being objectively qualified to be a team leader, Flakes was not chosen for the position.

d) Alaska Sales promoted five sales representatives to the position of team leader who are not members of Flakes' protected class: Tommy Lee, John Isaacson, Roger Davis, Robbie Dixon and Michael McShane. Isaacson, Dixon and McShane are Caucasian; Lee and Davis are of Asian descent.

Alaska Sales argues that even though it did not promote any African American sales representatives, its decision not to promote Flakes was not racial discrimination because two of the new team leaders, Lee and Davis, were themselves Asians and thus members of a racial minority group. This assertion ignores the fourth element of the *McDonnell Douglas* test. In order to meet his *prima facie* burden, the complainant must show merely that the employer hired an individual not within the same protected class as the complainant.[103] Lee and Davis are not African American, so none of the team leaders promoted by Alaska Sales in April 2002 were members of Flakes' protected class.[104]

Flakes has satisfied each of the four elements of proof necessary to establish a *prima facie* case of racial discrimination. The burden now shifts to Alaska Sales to articulate a legitimate, nondiscriminatory reason for its failure to promote him from sales representative to the position of team leader.

2. Alaska Sales Had a Facially Legitimate Reason for its Hiring Decision

Alaska Sales claims it is an equal opportunity employer strongly committed to fair treatment of women and minorities and that in selecting individuals for the newly created closer positions in 2002, Alaska Sales failed to promote Flakes because of chronic absenteeism, not because of any consideration related to his race.

---

[102] *See Furnco Construction Corp. v. Waters*, 438 U.S. at 577 ("[t]he method suggested in McDonnell Douglas for pursuing [a discrimination] inquiry, however, was never intended to be rigid, mechanized, or ritualistic.").

[103] *Raad v. ASCHR,* 86 P.3d at 904-5.

[104] *See Villaflores v. ASCHR,* 170 P.3d 663 (Alaska 2007) (Asian complainant over the age of forty did not establish the fourth element of his *prima facie* case because the person who was hired was in complainant's protected class – Asian and over forty).

Alaska Sales asserts that Flakes had a significant attendance problem for which he had been warned and counseled. The dealership maintains this was a legitimate concern because of the requirement for the team leaders to be reliable, to serve as an example to others and to be available to assist the members of the sales team. Alaska Sales claims that Flakes' lack of dependability in attendance was well known among the sales managers choosing the team leaders and the fact of his absences is not in dispute.

3. Alaska Sales' Reason for Not Hiring Flakes Was a Pretext for Discrimination

Alaska Sales has articulated a facially legitimate reason for not promoting Larry Flakes to the position of team leader. It now falls to the Executive Director, on behalf of the complainant, to establish that Alaska Sales' stated reason for not hiring him – absenteeism – was a pretext for racial discrimination. Pretext can be proven either by direct or circumstantial evidence, both of which are present in this case.[105]

a) Direct evidence of racial discrimination

The record in this case contains direct evidence of racial discrimination. The most damaging, and really the central dispute between the parties, is the statement that Mark Gross made to Lewis Mosby and Larry Flakes on April 1, 2002, that they were not promoted to the position of team leader because of their race. This comment, made separately to each sales representative, was admitted over Alaska Sales' objection as an admission of a party opponent under Evidence Rule 801(d)(2)(D).

Gross insisted that he did not make any such statement to either Mosby or Flakes, but he was found not to be credible because of his demeanor, attitude and the internal inconsistencies in his testimony. There was other testimony that Gross was a loud-mouth and he might have just been trying to stir things up a bit by making the statement to Mosby and Flakes. Gross even admitted that it was his "loud mouth" that got him fired from Alaska Sales. But Gross's statement should be taken at face value. He was a central figure in the team leader hiring and if anyone could speak with authority as to why Flakes was not chosen, it would be the sales manager. His racially charged comment to Mosby and Flakes is direct evidence that Flakes was not promoted because he is African American. This motivation constitutes impermissible racial discrimination.

---

105 *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 256.

b) Circumstantial evidence of racial discrimination

In addition to the direct evidence established by Gross's statement, there is circumstantial evidence of racial discrimination in the facts of this case. Alaska Sales' proffered reasons for not promoting Flakes are inconsistent and contradictory.[106]

First, James McMullian, the General Sales Manager in 2002, testified that he worked on the draft of the team leader job description and that attendance was a necessary qualification for the team leader job. However, Tommy Lee, one of the team leaders who was promoted in 2002, had a worse attendance record than Flakes. In fact, McMullian was shocked to see the number of warnings in Lee's file. Similarly, 2002 sales manager Charles Trimpey – one of the four who selected the team leaders – was stumped when asked to explain why Flakes was rejected because of absences when in fact Tommy Lee had more warnings than Flakes. That diminishes the importance that McMullian and the other Alaska Sales witnesses can attribute to attendance and punctuality for management personnel, especially since most of Lee's warnings were for missing or being late for required sales meetings. The claim that absences were a concern for Alaska Sales also conflicts with the text of the team leader job description, which is silent on the issue of attendance as a qualification for the job. Moreover, the team leader job description was not even posted until after the five team leaders were chosen and confirmed by McMullian. Thus, the minimum job qualifications were unknown to even the sales representatives until after the team leaders were chosen. All of this leads to the inference that attendance was not the real reason Flakes was not promoted to team leader. Since Alaska Sales offered no other facially legitimate reason, Flakes' attendance became a pretext for the company's refusal to promote Flakes.

Second, Alaska Sales points out that Flakes walked off the job three times before his final term of employment at the dealership, suggesting his leaving on April 1, 2002 was a typical move for him. But McMullian admitted that car salespeople move around quite often and it is an acknowledged reality in the automobile dealership world. If Flakes returned to Alaska Sales so many times, it was because it always welcomed Flakes back. Human Resource Manager Paul Ramage opined that Flakes was always hired back after leaving "because the company wanted him to work for us." This undermines Alaska Sales' suggestion that Flakes was not hired because he was a less than desirable employee due to his absences.

---

[106] *See Danville v. Regional Lab Corp.*, 292 F.3d at 1250.

Third, Alaska Sales claims Flakes never indicated by word or deed that he wanted to go into management or mid-level management, so the sales managers did not know he was interested in the team leader position. The team leaders were simply chosen from the ranks of the sales representatives by the four sales managers and affirmed by the General Manager. The question whether Flakes formally applied for the position is irrelevant.[107]

Finally, although the attention of the parties in this case has been focused on whether Mark Gross actually told Mosby and Flakes that they were not promoted because of their race, and the ramifications of that statement, one piece of evidence has been neglected. After Gross told Flakes he had not been promoted because he is African American and the stunned sales representative silently left the company, no one from Alaska Sales made any attempt to contact Flakes directly and find out what had caused him to leave. Both the General Sales Manager and the Human Resource Manager had to have put the clues together when Mosby told McMullian about the race comment. Even not knowing who made the statement, it must have been obvious to them that Flakes left Alaska Sales because of this incident. Likewise, Ramage's investigation later in the year was conducted to prepare for the December 2002 meeting with the Executive Director, not to get to the bottom of what happened on April 1, 2002, and Ramage seems to have spoken to neither Flakes nor Gross. The lack of seriousness associated with this investigation suggests disinterest in learning the truth.

C. Damages

1. Principal

Alaska Human Rights law provides that "if the commission finds that a person against whom a complaint was filed has engaged in the discriminatory conduct alleged in the complaint, . . . [i]n a case involving discrimination in . . . employment, the commission may order any appropriate relief, including but not limited to, the hiring, reinstatement or upgrading of an employee with or without back pay . . . ."[108] A Commission regulation interpreting this statute further provides that it may order "any legal or equitable relief . . . which reasonably compensates the complainant . . . ."[109]

---

[107] *See Furnco Construction Corp. v. Waters*, 438 U.S. at 577 ("[t]he method suggested in McDonnell Douglas for pursuing [a discrimination] inquiry, however, was never intended to be rigid, mechanized, or ritualistic.").

[108] AS 18.80.130(a)(1) (amended 2006).

[109] 6 AAC 30.480(b) (prior to 2007 amendment). The earlier version of this regulation is quoted because it is the interpretation of the pre-2006 statute that is relevant to this case. The quoted language has not changed significantly, however.

The Executive Director is requesting back pay in an amount equal to the difference between what Flakes would have received as team leader and his income as a sales representative, calculated from April 1, 2002, the date he resigned, through the third quarter of 2007, the original date for the hearing in this matter. Alaska Sales opposes the award of any damages to Flakes.

When considering an award of back pay, "the basic purpose of Title VII relief is to 'make whole' victims of unlawful employment discrimination."[110] Such "make whole" relief is calculated from the date of discrimination to the date the victim's damage calculation ends. A complainant has the duty to mitigate damages by seeking and accepting alternative employment.[111] These efforts must be reasonable, in light of the plaintiff's individual characteristics and the job market.[112] The respondent ordinarily has the burden of proving the complainant "lacked diligence in mitigating damages by showing that there were substantially equivalent positions available and that the plaintiff did not diligently pursue those positions.[113]

Alaska Sales presented no evidence that either substantially equivalent jobs were available or that Flakes did not diligently pursue such positions. Instead, the only evidence presented on the issue came from Flakes, who introduced evidence that after leaving Alaska Sales he sought and obtained employment at other car dealerships.[114]

A respondent in a discrimination case may be able to toll continuing accrual of back pay damages by unconditionally offering the claimant the job he or she sought, thereby minimizing damages.[115] Alaska Sales claims that any damages it may incur, although it denies liability, should be cut off as of December 5, 2002, when it made an unconditional offer of reemployment to Flakes during mediation. Contrary to Alaska Sales' contention, there is no admissible evidence that supports Respondent's claim that it made an unconditional offer of reemployment to Flakes.[116]

---

110 *Darnell v. City of Jasper,* 730 F.2d 653, 655 (11th Cir. 1984).

111 *Pyramid Printing v. Com'n for Human Rights,* 153 P.3d 994, 998-999 (Alaska 2007).

112 *Madden v. Chattanooga City Wide Service Dept.*, 549 F.3d 666, 680 (6th Cir. 2008) citing *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 557 (6th Cir. 2006).

113 *Id.*

114 Exh. A.

115 *Madden,* 549 F.3d at 679.

116 All evidence arising out of the parties' mediation was excluded in a pre-hearing order dated June 27, 2008. For an expanded discussion of the order and how it relates to the mitigation issue, please refer to Administrative Law Judge's Ruling on Objections to Recommended Decision at 4.

There is adequate evidence in this case to establish what Flakes would have earned had he been promoted. The way to calculate Flakes' damages is by first averaging the incomes of the three team leaders who testified, John Isaacson, Roger Davis and Lewis Mosby. Next, Flakes' income as a sales representative should be deducted as an offset from the three team leaders' average earnings. Flakes' earnings from 2001 should be used as the offset figure because 2001 was the last full year he worked at Alaska Sales and there is no way to predict what he would have made in subsequent years. The difference between the average team leader earnings and Flakes' income as a sales representative represents the increase in pay Flakes most likely would have earned as a team leader had he been promoted. Multiplying that figure times the number of years in the back pay period will show his total amount of damages.

Flakes earned $41,692 in 2001.[117] The three team leaders referenced above earned an average of $75,000 annually. Subtracting Flakes' 2001 earnings from the average team leader figure results in a difference of $33,308. This amount represents Flakes' actual damages for each year from April 1, 2002, through August 31, 2007, the end of the back pay period,[118] and he is entitled to damages in the total amount. The full annual figure should not be used for 2002, however, because Flakes would have worked as a team leader only from April 1, 2002 through December 2002, the equivalent of 75% of the year, or $24,981. Likewise for 2007, the damages should run only through August 31st of that year, the equivalent of 66.6% of the year, or $22,216. Thus, a chart of the total damages is as follows:

2002	$24,981
2003	$33,308
2004	$33,308
2005	$33,308
2006	$33,308
2007	$22,216
Total	**$180,429**

2. Prejudgment Interest

At the time the complaint was filed in this case, the commission had general statutory authority to order interest on awards under the statute's authorization to order "any appropriate

[117] Exh. 15 at 0032-0044.

relief."[119] The commission had further addressed interest in a regulation, 6 AAC 30.480(b), which at that time provided for an interest rate of 10.5 percent per annum.[120] The Alaska Supreme Court reviewed this version of the regulation in *Pyramid Printing Co. v. ASCHR*,[121] holding that in the economic climate prevailing in 2003 (a low-interest environment similar to today's), the 10.5 percent rate was punitive and could not be imposed. The court remanded to the commission to choose "any reasonable rate," but suggested that a rate calculation using the 12th Federal Reserve District discount rate plus an appropriate surcharge (that is, a calculation in keeping with AS 09.30.070(a)) would be reasonable.[122] In late 2004, in a regulatory amendment that may not be strictly applicable to this case since it post-dates the complaint, the commission changed 6 AAC 30.480 to provide for interest at three percentage points above the 12th Federal Reserve District discount rate as found in AS 09.30.070(a).[123] In a statute that was expressly made inapplicable to complaints filed before September 13, 2006, the legislature, in effect, approved the commission's choice of the AS 09.30.070(a) method.[124]

To the extent that it has discretion to choose a rate methodology, the commission should choose the one it has selected as a matter of policy in its recent regulatory change, that is, the one set out in AS 09.30.070(a). That provision states that "the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered . . . ." The discount rate in effect on January 2, 2009 was 0.5 percent making the applicable interest rate 3.5 percent for damages awarded in this case.[125]

The starting date for interest calculated under AS 09.30.070(a) is ordinarily the date on which the defendant or respondent "received written notification that an injury has occurred and that a claim may be brought."[126] In this case, Commission staff sent Flakes' complaint and a

---

[118] The Executive Director has requested that the back pay period end as of August 31, 2007. The hearing in this matter was originally calendared for late 2007 so the August 31, 2007 date is apparently related to the prior attorney advocate's resignation.

[119] AS 18.80.130(a)(1) (pre-2006 version).

[120] Alaska Admin. Code, Reg. 91.

[121] 153 P.3d 994, 1001-1002 (Alaska 2007).

[122] *Id.* at n.31.

[123] *See id.* at n.21; Alaska Admin. Code, Reg. 172.

[124] §§ 6-8 and 14, ch. 63 SLA 2006, amending AS 18.80.130.

[125] *See http://www.state.ak.us/courts/forms/adm-505.pdf.*

[126] AS 09.30.070(b). Note that the 2006 amendments to AS 18.80.130 made the whole of AS 09.30.070, including this provision, applicable to ASCHR orders. This should remove any doubt as to whether state policy is to apply interest from the date of written notice or from some earlier date.

cover letter dated October 3, 2002, to Alaska Sales informing the dealership that Flakes was seeking redress through the Commission.[127] Owner and dealer Diana Pfeiffer testified she had no knowledge of Flakes' action prior to receiving that letter and a copy of the complaint. Interest should therefore be assessed as of October 3, 2002,[128] and calculated to the date of judgment.[129]

The Executive Director proposes calculating interest on a quarterly basis,[130] so that the 3.5% interest rate would be applied to Flakes' damages that come due at the end of each quarter and the accrual period for each quarter's damages would gradually diminish until June 30, 2009, "the end of the quarter presumably closest to the Commission's final order.[131] Using this approach, the Executive Director estimated the total interest due as of June 30, 2009, at $27,883.[132] Alaska Sales contested this approach but did not present an alternative means of calculating interest.[133]

The Executive Director's method of calculating prejudgment interest should be adopted, with two minor mathematical corrections made necessary by the application of a start date of October 3, 2002 (the date of written notice), rather than April 1, 2002.[134] The interest calculation for each quarter is reached by multiplying the principal amount of damages for that quarter[135] times the interest rate of 3.5%, then multiplying the result times the number of years until June 30, 2009. Using a chart for simplicity's sake, the interest calculation appears as follows:

Year	Quarter	Principal	Interest Rate	Accrual (yrs)	Interest Due
2002	Q2 Apr-Jun	$8,327	.035	6.5	$1,894
	Q3 Jul-Sept	$8,327	.035	6.5	$1,894

127 Exh. C.

128 Interest calculated in accordance with AS 09.30.070 is simple, not compound, interest. *See Alyeska Pipeline Serv. Co. v. Anderson,* 669 P.2d 956, 956 (Alaska 1983).

129 *Liimatta v. Vest,* 45 P.3d 310, 321 (Alaska 2002).

130 *See Darnell v. City of Jasper, Ala.*, 730 F.2d 653, 656-657 (11th Cir. 1984). The Executive Director indicated that the Commission has adopted and used this method in at least two prior decisions, *Tiernan v. Pyramid Printing,* ASCHR No. C-99-079 at 29 (October 1, 2003), *aff'd Pyramid Printing v. Com'n for Human Rights,* 153 P.3d 994 (Alaska 2007); and *Smith v. Bergman Hotel,* ASCHR No. C-95-376 (September 1, 2000).

131 *See* Limited Objections Regarding Damages at 8.

132 *Id.* at 9. *See also* Introduction and n.5, *supra.*

133 In essence, respondent objects to having prejudgment interest "assessed during periods when this matter was delayed due to no fault of Respondent." Reply to ASCHR's Limited Objections re Damages at 6. The length of time it has taken to litigate Flakes' complaint is indeed troubling, but Alaska Sales fails to acknowledge that it could have reduced its exposure to damages and prejudgment interest significantly by making an unconditional offer of reemployment to Flakes several years ago, as discussed in Section C.1, *supra.*

134 Because the start date is October 3, 2002, the accrual period for the second and third quarters of 2002 is 6.5 years, the same as for the fourth quarter of 2002.

135 Annual damages of $33,308 ÷ 4 quarters per year = $8,327 per quarter.

	Q4 Oct-Dec	$8,327	.035	6.5	$1,894
2003	Q1 Jan-Mar	$8,327	.035	6.25	$1,822
	Q2 Apr-Jun	$8,327	.035	6.0	$1,749
	Q3 Jul-Sept	$8,327	.035	5.75	$1,676
	Q4 Oct-Dec	$8,327	.035	5.5	$1,603
2004	Q1 Jan-Mar	$8,327	.035	5.25	$1,530
	Q2 Apr-Jun	$8,327	.035	5.0	$1,457
	Q3 Jul-Sept	$8,327	.035	4.75	$1,384
	Q4 Oct-Dec	$8,327	.035	4.5	$1,312
2005	Q1 Jan-Mar	$8,327	.035	4.25	$1,239
	Q2 Apr-Jun	$8,327	.035	4.0	$1,166
	Q3 Jul-Sept	$8,327	.035	3.75	$1,093
	Q4 Oct-Dec	$8,327	.035	3.5	$1,020
2006	Q1 Jan-Mar	$8,327	.035	3.25	$947
	Q2 Apr-Jun	$8,327	.035	3.0	$874
	Q3 Jul-Sept	$8,327	.035	2.75	$801
	Q4 Oct-Dec	$8,327	.035	2.5	$729
2007	Q1 Jan-Mar	$8,327	.035	2.25	$656
	Q2 Apr-Jun	$8,327	.035	2.0	$583
	Q3 Jul-Sept	$8,327	.035	1.75	$341
				Total	**$27,664**

Applying these concepts, the principal amount of damages is $180,429 and the prejudgment interest on those damages equals $27,664, as shown above. Accordingly, the amount owing as of June 30, 2009 is $208,093.

IV. CONCLUSION

The Executive Director proved by a preponderance of the evidence that Alaska Sales and Service engaged in racial discrimination in its failure to promote Larry Flakes from sales representative to team leader on April 1, 2002.

Accordingly, I recommend that the Alaska State Commission for Human Rights award Larry Flakes "make whole" relief consisting of back pay damages equal to the difference between the average team leader salary and Flakes' salary as a sales representative, projected from April 1, 2002, through August 31, 2007, or $180,429 plus simple interest of $27,664, calculated quarterly from October 3, 2002 through August 31, 2007, at the rate of 3.50% per annum, for a total award of $208,093.

DATED this 15th day of June, 2009.

By: Kay L. Howard
Kay L. Howard
Administrative Law Judge

Certificate of Service: The undersigned certifies that on the 16th day of June, 2009, a true and correct copy of this document was faxed to the following: Peter C. Partnow, for the Respondent; and Caitlin Shortell, for ASCHR.

By: _____
Kim DeMoss/ Linda Schwass