

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JAMILE HILLARD,

Complainant,

v.

MANHATTAN FORD LINCOLN MERCURY
MAZDA JAGUAR, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10114660

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on November 17, 2008, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: JAN 22 2009
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**MANHATTAN FORD LINCOLN MERCURY
MAZDA JAGUAR, INC.,**

Respondent.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 10114660

SUMMARY

Complainant, who is African American, alleged that he was harassed and underpaid because of his race. At hearing, he was unable to prove his claims and his case must be dismissed.

PROCEEDINGS IN THE CASE

On November 6, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. A Public hearing was held on August 20, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Robert F. Milman, Esq.

Permission to file post-hearing briefs was granted. The Respondent's attorney filed a timely submission.

FINDINGS OF FACT

1. Complainant is African American. He currently works for Respondent as a B-technician. He was hired in 2001 as a C-technician and promoted to a B-technician in April, 2005. (Tr. 32-33, 41)

2. As a C- or a B-technician, Complainant performs automotive repair services. The difference between a B- and a C-technician is that a B-technician has more expertise and greater diagnostic abilities. (Tr. 33, 35)

3. At all times during his employment with Respondent, Complainant's supervisor was, and is, Mikhail Kopilovich, service manager. Kopilovich hired Complainant and promoted him. (Tr. 194-95, 200)

4. Complainant alleged that in January, 2006, Kopilovich kicked him in the buttocks as he walked away from Kopilovich. This incident occurred after Complainant and Kopilovich had a disagreement about whether Complainant should provide roadside assistance to a stranded motorist. (Tr. 48) Kopilovich does not remember doing this. (Tr. 208)

5. Complainant also alleged that Kopilovich placed his hands around Complainant's neck and once used his forearm to move Complainant out of his way so that Kopilovich could look at a vehicle Complainant was repairing. (Tr. 63, 101-02)

6. Kopilovich admits to placing his hands on Complainant's shoulder or arm as a friendly gesture on several occasions. Usually this occurred when he was giving Complainant instructions or commenting on his work. Kopilovich is from Russia, where such gestures are common. Kopilovich routinely touches other employees in that manner and shakes their hands at the beginning of the day. (Tr. 206-08, 216)

7. Eventually, Complainant directed Kopilovich not to touch him. Complainant said the touching bothered him. Kopilovich apologized and has never touched Complainant since then. (Tr. 212-14)

8. Respondent has an anti-discrimination policy, which includes complaint procedures for employees who feel that they are being harassed. (Respondent's Exhibits 1, 3; Tr. 129) Complainant did not avail himself of this process prior to filing his complaint. (Tr. 54)

9. Respondent has a system by which technicians get paid for work that is covered under the manufacturer's warranty based upon the time limits allowed for various types of repairs. (Tr. 137-38) Complainant alleges that he was denied his proper wages because Respondent failed to credit him for the proper time allowances for the jobs he performed. (Tr. 140)

10. Prior to March 2007, none of the Jaguar technicians (*i.e.*, those technicians who worked on Jaguar vehicles), regardless of race, were shown their warranty times. Complainant, who was a Jaguar technician, questioned this practice. Thereafter, Respondent allowed Jaguar technicians to see their warranty times. (Tr. 70-71, 142-43)

11. Complainant alleges that prior to March, 2007, he was underpaid for his warranty times because of his race. He has no documents or statistics to support this allegation. (Tr. 147)

12. Tim Orland, dispatcher, was responsible for assigning the warranty allowances for Respondents. Orland assigned labor times based upon repair tickets prepared by the technicians.

He used this system for all technicians employed by Respondent. (Tr. 181-84) Orland receives a commission based upon the amount of chargeable warranty hours the technicians work.

Therefore, shortchanging the Complainant, or any technician, would have a negative impact on Orland's pay. Orland did not shortchange Complainant's wages. (Tr. 171-73)

OPINION AND DECISION

The Human Rights Law makes it unlawful to discriminate against anyone with respect to the terms, conditions or privileges of employment because of that person's race. Human Rights Law §296. Complainant alleges that he was harassed because of his race and treated differently than non-African American employees with respect to his pay.

In order to prevail on his claim of disparate treatment based upon the alleged pay discrepancies, Complainant must first make out a prima facie case. To make out a prima facie case of unlawful discrimination under the Human Rights Law a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 28-29 (1997).

Complainant has not made out a prima facie case of discrimination with respect to his allegations of pay discrepancies. He is unable to show that he suffered from some adverse employment action. No evidence was submitted to establish that Complainant was underpaid and all employees were paid in the same manner. When Complainant complained that he and the other Jaguar technicians were not being shown their warranty times, Respondent changed its

policy and began showing the Jaguar technicians their times. There is no evidence that Complainant's pay was shorted and the fact that Orland's commissions increased as Complainant's warranty pay increased suggests that he would not have shorted Complainant.

With Respect to his claim of racial harassment, Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination.

Father Belle Community Ctr. v. N.Y. State Division of Human Rights, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant has not made a showing of harassment. He complains that Kopilovich harassed him by touching him. The touching he complains of was unrelated to Complainant's race. Kopilovich touched everyone in a similar manner. When Complainant told Kopilovich not to touch him, Kopilovich stopped touching him. The other incidents Complainant complains of—the kicking incident, Kopilovich's hands around his neck and the forearm shove—were, if true, similarly unrelated to Complainant's race but, even if they could be considered racially motivated, they were too infrequent to be considered "harassment" under the law. *Id.* at 50.

Complainant has failed to establish a claim for either disparate pay or harassment. As a result, his case must be dismissed.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby ORDERED, that the case be, and the same hereby is, dismissed.

DATED: November 17, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano", with a long horizontal flourish extending to the right.

Thomas S. Protano
Administrative Law Judge