

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

DAVID F. STEPHENS,

Complainant,

v.

E-Z LOAN AUTO SALES,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10108035

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on July 8, 2008, by Matthew A. Menes, Adjudication Counsel, after a hearing held before Rosalie Wohlstatter, 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 Alternative Proposed Order, and all Objections received have been reviewed.

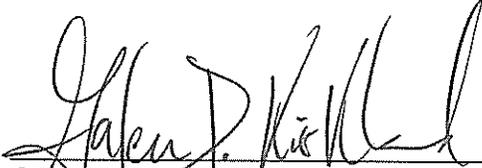
PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has 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: **MAR 13 2009**
Bronx, New York



GADEN D. KIRKLAND
COMMISSIONER

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**ALTERNATIVE
PROPOSED ORDER**

Case No. **10108035**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his age. Because the evidence does not support the allegation, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 14, 2005, 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 David Bowden, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on October 31, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Toni Ann Hollifield, Esq. Respondent was represented by Robert A. Doren, Esq.

ALJ Bowden subsequently left the Division and the case was reassigned to ALJ Rosalie Wohlstatter to write the recommended findings of fact, opinion and decision, and order.

Permission to file post-hearing briefs was granted. Both the Respondent and the Division filed timely post-hearing briefs.

On July 8, 2008, ALJ Wohlstatter issued a recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order"). Objections to the Recommended Order by Respondent's attorney were received by the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Respondent hired Complainant to be a salesperson and loan officer in February 2002. Complainant was 46 years old at the time. (ALJ's Exhibit 1; Tr. 22, 37)

2. Pat Sarcinelli, part-owner of Respondent, Larry Budzynski, a manager and Irwin Schreiber, CFO and part-owner were involved in hiring Complainant. (Tr. 22-23, 80-82)

3. Complainant's job was to show cars to potential customers and to provide financing (either in-house or external) if the customer wished to buy a car. (Tr. 23)

4. Complainant also performed a number of other tasks: making bank deposits, receiving payments, having keys made, obtaining registrations and plates from the Department of Motor Vehicles, and clearing away snow. (Tr. 23-24)

5. Complainant was paid a weekly salary of \$500 plus commissions. (Tr. 24)

6. In October 2004, due to an overall drop in sales, Respondent decided to cut costs. Complainant was laid off, along with two other individuals -- Jamie Halfelner, a Title Clerk and Clayton Drum, a Detailer. Both Halfelner and Drum were in their 20's at the time of the layoffs.

7. Budzynski (in his 50's) instituted these layoffs in consultation with Schreiber (in his 70's) and Cynthia Wexler, Business Manager (in her 50's). (Respondent's Exhibit 3; Tr. 36-38, 40-42, 58, 60-63)

8. Complainant was chosen to be laid off because he received a higher salary than other Respondent employees, he performed less work and was less versatile than other Respondent employees, he exhibited little initiative and he was the least valuable employee to the company. (Respondent's Exhibit 3; Tr. 37-38, 60-62, 82-87)

OPINION AND DECISION

Human Rights Law § 296.1(a), makes it an unlawful discriminatory practice for an employer "because of the . . . age . . . of any individual . . . to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Where a complainant fails to show that an adverse employment action occurred under circumstances giving rise to an inference of discrimination, that complaint must be dismissed. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003).

Here, Complainant has failed to show that the termination of his employment was related to his age. Instead, the credible evidence shows that Respondent's sole reason for terminating Complainant's employment was its desire to cut costs. Complainant was chosen, along with two younger individuals, because of his higher salary and his minimal value to the company. Cost-cutting needs are legitimate business reasons for laying off workers. *See Hogan v. General Elec. Co.*, 109 F.Supp.2d 99 (N.D.N.Y 2000).

Additionally, Complainant was hired by the same individuals who made the decision to lay him off, namely Budzynski and Schreiber, only two years prior to his layoff. "In cases where

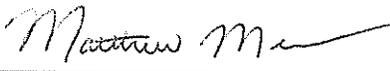
the hirer and firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.” *Grady v. Affiliated Central, Inc.*, 130 F.3d 553, 560 (2d Cir. 1997). The fact that the actors involved in the employment decisions are also members of Complainant’s protected class only enhances the inference. *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (2d Cir. 1996). Here, the three individuals who were responsible for the decision to terminate Complainant’s employment were all older than Complainant.

Ultimately, the burden of persuasion of the issue of unlawful discrimination always remains with the Complainant. *See Stephenson v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 811 N.Y.S.2d 633 (2006). Complainant has failed to meet this burden.

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 complaint be, and the same hereby is, dismissed.

DATED: January 21, 2009
Bronx, New York



Matthew Menes
Adjudication Counsel