

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

-----  
MCAD and ASAF MAGEN,  
Complainants

Docket No. 16 BEM 03470

v.

AUTO MALL COLLECTION,  
Respondent

-----

Appearances: Yael Magen, Esq. for Complainant  
Travis T. Pregent, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 30, 2016, Asaf Magen (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that he was subjected to discrimination by Respondent on the basis of religious creed (Jewish) and national origin (Israeli) in violation of G.L. c. 151B, section 4(1).

The MCAD issued a probable cause finding and certified the case for public hearing. A public hearing was conducted on June 10 and 11, 2019 and on September 3, 2019. The parties introduced 12 joint exhibits into evidence. Joint Exhibits 1-12. Complainant introduced a chalk and Respondents introduced one additional exhibit. Respondent's Exhibit 1. The following individuals testified at the public hearing: Asaf Magen, Nader (John) Jamali Afoussi, Jon (“Jay”) Morgan, Lucas Machado, and Randy Cunha.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent that testimony and exhibits are not in accord with or are irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant Asaf Magen resides in Swampscott, MA. He was born in Israel and practices the Jewish faith. Prior to working for Respondent, Complainant worked for and/or had employment relationships with the following U.S. employers/entities: MassPirg (October 06-February 07), Boch Toyota (February 07-April 07), Jones West Ford (November 07-February 08), Fisher Scientific/Novartis (January 09-July 09), the Keshet Center (August 09-October 10), TomG, Inc. (October 10-September 13), North Shore Automall (two weeks), Auto Drive One (September 14-April 15), and the Boston Web Group. Joint Exhibit 2; Transcript I at 22-24, 48-59.
2. On October 28, 2016, Complainant commenced employment with Respondent as a salesperson of previously-owned cars. Transcript I at 65. He was hired a month earlier, but his position was held open by Respondent while he went to Israel for a month. Transcript I at 65-66; III at 9. During his interview, Complainant wore a beard. He told interviewer John Jamali that he was Jewish and from Israel. Transcript III at 8-9. Complainant testified that he was told during his interview that his national origin was "absolutely no problem." Transcript I at 93-94. According to Jamali, Complainant's Israeli/Jewish identity was an asset because the dealership has many Jewish clients. Transcript III at 50.

3. Respondent Auto Mall Collection is a business located at 218 Andover Street in Peabody, MA focused on the purchase and sale of used luxury European vehicles, chiefly Audis, Mercedes, and BMWs. Transcript II at 81, 101; Joint Exhibit 8.
- Respondent is a small/medium dealership with an overall inventory of 95 to 114 cars on its website and with sales of approximately 40 or 50 cars a month. Transcript I at 47; II 103-104; Joint Exhibit 8. The dealership has approximately 40 cars on its main lot, additional vehicles on another lot in Beverly, MA, and access to cars at other dealerships with which Respondent collaborates. Transcript I at 43-45. During the time that Complainant was employed by the dealership, it was managed by brothers Eddie Jamali (aka Ardeshir Jamali) and John Jamali (aka Nader Jamali Afoussi). The dealership is owned by the Jamalis' older brother and his wife, Tamir and Sherry Jamali. Transcript III a 77-81. John Jamali described himself and his brother as Muslim immigrants from Iran. Transcript III at 24. During the period at issue, the business had a finance manager, Randy Cunha, two salespeople besides Complainant ("Jay" Morgan and Joe Tumbiolo), and an employee who moved cars between lots (Lucas Machado). Transcript III at 6, 10.
4. In 2016, Respondent's sales staff typically received a weekly salary of \$450 and a flat fee of \$200 for each car sold rather than a commission that varied depending on the price of the cars sold. Transcript II at 106, 203, 228-229; III at 10; Joint Exhibit 3.<sup>1</sup>

---

<sup>1</sup> According to Complainant, an extra bonus or "spiff" would attach to the sale of cars over \$50,000 and/or vehicles that had been in Respondent's inventory for a long time. Transcript II at 108, 123, 129, 144. However, Complainant's testimony was credibly refuted by finance manager Randy Cunha who testified that there were no bonuses for the sale of specific vehicles. Transcript II at 203, 229.

5. During 2016, salespeople obtained customers through leads from "AutoRaptor CRM" (a car industry database), walk-ins, phone calls, and prior business dealings. Transcript III at 12; Joint Exhibit 6, p, 3; Joint Exhibit 10. According to Complainant, an Auto Raptor lead typically consists of a consumer looking up a car on various websites, expressing interest in it, and being referred to a dealership. Transcript II at 75-78, 102. Respondent's managers determine which leads from AutoRaptor to distribute to each salesperson. Transcript II at 76, 200-202. John Jamali testified that ninety percent of the dealership's customers come through the internet. Transcript III at 52.
6. Complainant testified that he received disproportionately more leads from "foreigners, minorities, immigrants, Latinos, and Arabs" than from "Americans or those with Jewish names." Complainant did not support this charge with credible evidence nor did he explain how or why his alleged pairing with Arab or Latino ethnic groups rather than "Americans or those with Jewish names" would benefit the dealership.
7. Complainant also testified that he received a disproportionate number of leads for low-end, non-luxury vehicles that were not typically sold by Respondent,<sup>2</sup> that people interested in non-luxury vehicles did not generally come to Auto Mall Collection, that he received fewer leads for high-end vehicles than other salespeople, that he sold fewer cars from non-luxury leads than he did from luxury leads, and that he sold fewer cars than other salespeople. Transcript I at 97-100; II at 89, 100, 103-104, 106-108, 130, 143-144, 218, 230; Joint Exhibit 8. Finance manager Randy Cunha acknowledged that

---

<sup>2</sup> According to Complainant, approximately half of his leads were "non-luxury leads" (i.e., vehicles under \$20,000) which comprised about 14 of the dealership's 111 car inventory. Joint Exhibit 8; Transcript III at 67-68.

it would be hard to make a living at Auto Mall Collection from leads for low-end cars because Respondent lacked a sufficient inventory of cars in that price range. John Jamali disputed this point on the basis that salespeople made commissions of \$200 for any car sold. Transcript III at 65-66. While Jamali's response ignores the reality that the dealership has relatively few low-end vehicles in its inventory, there is no evidence in the record that Complainant received leads that were different in quality or quantity from those given to other salespeople. Transcript II at 155; III at 51; Joint Exhibit 10.<sup>3</sup>

8. According to Complainant, he worked ten to twelve hour days and often worked seven days a week. Transcript I at 85-86, 117. Complainant testified that he would not get leads if he was not at the office and that if he took a day off, he would get fewer leads on the following day. Transcript I at 86, II at 94. I credit that Complainant would not get leads if he was not at the office, but I do not credit the assertion that he would get fewer leads on the following day after taking a day off. Transcript III at 56-61.
9. Complainant testified that discriminatory comments based on his national origin and/or religion were made to him "pretty much daily." Transcript I at 92. According to Complainant, Respondent's managers: 1) described him as "a Jew [who] doesn't believe in Christmas;" 2) called him a "Jew, kike;" 3) asked him if he was carrying a bomb; 4) said that instead of cutting his tie in recognition of selling two cars on one

---

<sup>3</sup> Complainant, four days prior to the commencement of the public hearing, filed an "emergency" motion to compel discovery seeking information about leads distributed to all salespeople during Complainant's employment, the identification of potential customers, the model, price, and mileage of the cars sought, the salesperson to whom the leads were distributed, a breakdown of leads on a daily basis, and the compensation given to all sales personnel at Auto Mall Collection in 2016 and 2017. This motion, which was not served during the parties' discovery period, was denied on the basis that it was untimely and in violation of the parties' prehearing order to finalize witness and exhibit lists thirty days prior to the public hearing.

day, he would be circumcised; and 5) responded to his requests for more and better leads by commenting, “stop being a Jew and then [you'll get] more leads.” Transcript I at 94-96, 100; II at 153. I do not credit that Respondent’s managers made these comments, however, I do credit that managers may have asked Complainant to groom his beard so that it was neat and did not contain food crumbs. Transcript III at 72.

10. Former Auto Mall Collection salesperson Jay Morgan worked for Respondent while Complainant was employed at the dealership. Morgan testified that John Jamali commented that Complainant had the appearance of an Israeli suicide bomber on a day when he returned from lunch wearing a backpack, that Jamali said he would cut off Complainant’s beard if Complainant didn't “do something” about its appearance, that Jamali hoped Complainant wouldn’t be offended by a Christmas tree in the office, and that Jews control the world and own this country. Transcript II at 9-15. I do not credit these statements nor did I find Morgan to be a credible witness. Morgan denied conferring with Complainant about this case but was forced to acknowledge doing so after his deposition testimony was presented. Transcript II at 50. Morgan received multiple written warnings for making derogatory comments about Spanish and black people while he was employed by Respondent. Transcript II at 231.
11. According to Complainant, manager John Jamali made him tie his beard in a “scrunci” at work and asked him every day to shave it off. Transcript I at 137-138. I do not credit this statement.
12. John Jamali testified that Complainant took long lunches, returned from lunch with red eyes and smelling of marijuana, and used headphones while working at his computer.

Transcript III at 13, 40. Finance manager Randy Cunha testified that Complainant's lunch breaks were "excessive." Transcript II at 206, 215. I credit their testimony.

13. John Jamali testified that despite Complainant's habit of taking long lunches, "I absolutely did not want to fire him, absolutely not. . . . I wanted to work with him and I do this with all of the employees." Transcript III at 16. I credit Jamali's testimony.
14. Complainant left Respondent's employ on December 28, 2016, after working at Auto Mall Collection for two months. Transcript I at 103. He earned \$5,566.00 during the time he was employed by Respondent. Transcript I at 119. Complainant acknowledged that he was not fired, but asserted that he had to leave because he was not earning enough to support himself and his family. Transcript I at 93, 120.
15. Complainant testified that he spoke to Jay Morgan in or around January 2018 and may have said, "I'm just busting their balls" in regard to suing Respondent for discrimination. Transcript II at 136-137. I credit that Complainant made this statement.
16. On December 22, 2018, Complainant communicated via Facebook with former Auto Mall Collection employee Lucas Machado who worked for Respondent during the time that Complainant was employed there. Transcript I at 136-137; Joint Exhibit 5. Complainant informed Machado that he was suing Respondent for discrimination, asked Machado if he wanted to testify, said he was working for a new dealership where he was earning more money, and asked Machado if he needed a job. Joint Exhibit 5. Machado replied, "Honestly, Asaf, I have no problem with them." Id. Several days later, Complainant again reached out to Machado over Facebook to say that his new dealership had "all sorts of positions that I believe will fit you." Id. Machado testified that he believed that Complainant was offering him a bribe. Transcript II at 168.

### III. CONCLUSIONS OF LAW

M.G.L. c. 151B, section 4, para.1 prohibits discrimination in employment based on religion and national origin among other protected classifications. Complainant maintains that Respondent violated these precepts by subjecting him to disparate treatment in the terms and conditions of employment and to harassment as a result of his Jewish religion and his Israeli national origin.

In order to prove a prima facie case of disparate treatment employment discrimination based on circumstantial evidence, Complainant must show that he: (1) is a member of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s). See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665-666 n.22 (2000). Such evidence permits an inference of unlawful discrimination subject to rebuttal by Respondent. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995).

Proven facts in the record establish that Complainant's national origin is Israeli and that he practices the Jewish faith. Complainant acknowledges that he was told during his interview that his national origin was "absolutely no problem." The record establishes that manager John Jamali believed that Complainant's Israeli/Jewish identity was an asset because the dealership had many Jewish clients. Notwithstanding the fact that Complainant



took long lunches, returned from lunch with red eyes and smelling of marijuana, and used headphones while working at his computer, he was regarded as a satisfactory car salesperson by Jamali who acknowledged that he had no intention of firing him.

As far as adverse action and disparate treatment are concerned, Complainant maintains that he received fewer leads for luxury cars than did Respondent's other salespeople and that his disparity accounts for his failure to earn a living wage at the dealership. Complainant characterizes himself as a talented salesperson who would have been a successful member of Respondent's sales force had he been treated in the same manner as other sales associates. Such an assertion, however, is not supported by the record.

Despite Complainant's charges of adverse action and disparate treatment, there is no credible evidence that he was singled out for poor treatment or denied sales opportunities given to other members of the sales staff. Complainant acknowledges that John Jamali commented during their initial interview that Complainant's national origin was "absolutely no problem." Jamali thereafter held open a sales position for Complainant during the latter's month-long trip to Israel. These are not the actions of a sales manager harboring discriminatory animus but, rather, one who viewed Complainant as a valuable addition to his sales staff in light of the dealership's many Jewish clients.

The crux of Complainant's disparate treatment claim is that he was given fewer leads for luxury cars than were given to Respondent's other salespeople. Notwithstanding this assertion, Complainant failed to produce any credible evidence that he received leads that were different in quality or quantity from those given to others. To be sure, Complainant made an eleventh hour "emergency" request to compel discovery about the leads distributed to all salespeople during the time he worked for Respondent, but he did so four days prior to the public hearing,

long after the close of discovery. Having failed to comply with prior discovery directives, the motion was denied as untimely.

In contrast to Complainant's portrayal of himself as a victim of discrimination, the record depicts an employee still in training who was frustrated by not making more sales. Complainant attributes his failure to Respondent's discriminatory actions, but it appears that his modest sales were due to other factors such as lacking a client base at the dealership, the small inventory of vehicles at the dealership, Complainant's excessive lunches, and other distractions which undermined Complainant's effectiveness. Based on the foregoing, I conclude that the proven facts do not support a prima facie case of disparate treatment discrimination based on religion and/or national origin.

Turning to allegations of harassment based on religion and/or national origin, 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 the conditions of employment and create an abusive working environment; and 4) the harassment was carried out by a supervisor or by a non-supervisor under circumstances in which the Respondent knew or should have known of the harassment and failed to take prompt remedial action. See College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987) (employer liable for discrimination committed by those on whom it confers authority and by non-supervisors where employer is notified and fails to take adequate remedial steps); Lattimore v. Polaroid Corp., 99 F.3<sup>rd</sup> 456, 463 (1<sup>st</sup> Cir. 1996).

According to Complainant, discriminatory comments based on his national origin and/or religion were made to him "pretty much daily." He charges that Respondent's managers

described him as a "Jew [who] doesn't believe in Christmas," called him a "Jew, kike," jokingly asked if he was carrying a bomb, and suggested circumcising him instead of cutting his tie in recognition of selling two cars on one day. Complainant testified that manager John Jamali responded to his request for more and better leads by saying, "stop being a Jew and then I'll give you more leads." Complainant asserts that Jamali made him tie his beard in a "scrunci" at work and asked him every day to shave it off. None of these charges ring true.

Manager John Jamali testified convincingly that neither he nor his brother Eddie Jamali made the anti-Semitic comments attributed to them. He denied having any objection to Complainant's beard as long as it was groomed. The fact that the Jamalis interviewed and hired Complainant with a beard supports this contention. Similarly, they credibly deny subjecting Complainant to a barrage of nasty comments about his ethnic identity. The Jamalis knew about Complainant's national origin and religion at the time they hired him and welcomed such attributes as a benefit to the business.


Complainant's charges of discrimination and harassment are also undermined by the fact that he sought favorable evidence from a witness in exchange for assisting the witness to get a job. Complainant told another witness that he was "just busting balls" in bringing this case. Complainant asserted without basis that other salespeople received bonuses for selling high priced cars and untruthfully claimed that he was denied leads on days after he was off from work. These matters all detract from the validity of Complainant's charges.

Finally, Complainant's checkered employment history contradicts his assertion that he would have achieved greater success at the dealership had he not been hampered by discriminatory animus. Complainant characterizes numerous prior instances of jumping

becomes quickly frustrated and abandons one job for another. I conclude that this quality, not discrimination, caused Complainant to become disenchanted with his prospects at Auto Mall Collection and to leave Respondent's employ. See Hedvat v. Herb Chambers Companies et al., \_\_\_MDLR \_\_\_ (2014) (concluding that Complainant's termination as sales manager for car company was based on unsatisfactory performance not discrimination based on the practice of Orthodox Judaism).

Based on the foregoing, the case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 22<sup>nd</sup> day of June, 2020

  
Betty E. Waxman, Esq.  
Hearing Officer