EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Robert Hackett, Jr. 4536 Thurston Ln., # 7 Madison, WI 53711 Complainant vs. Russ Darrow 6525 Odana Rd. Madison, WI 53711 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 3356

On July 2, 1996, a public hearing on the merits of the above-captioned complaint was held before Hearing Examiner Clifford E. Blackwell III. The Complainant, Robert R. Hackett, appeared in person and by his attorney, Tracey Thomas, of the law firm of Brinks, Hofer, Gilson and Lione. The Respondent, Russ Darrow, appeared by Manager James Mercado, and by its attorney, M. Christine Cowles, of the law firm of Mohr and Anderson of Hartford, Wisconsin. Based upon the record in this matter, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACTS

1. The Complainant is a Black or African American male.
2. The Respondent is an automobile dealership with a place of business within the City of Madison. It is open to the public without exception.
3. On August 3, 1995, James Mercado was employed by the Respondent as its General Sales Manager at its dealership located at 6525 Odana Road. In this capacity, Mercado supervised the New and Used Car Managers and the Finance Managers as well as their staffs.
4. On August 3, 1995, Kevin Rude was employed by the Respondent as a salesman.
5. On August 3, 1995, the Complainant accompanied his friend, David Brown, to several car dealerships in the Madison area. Brown was interested in purchasing an automobile and sought the assistance of the Complainant because the Complainant had more experience in purchasing cars, having bought approximately ten (10) cars during the period of their friendship.
6. The Complainant and Brown arrived at the Respondent's dealership late in the morning and spent approximately fifteen (15) minutes looking at cars on the Respondent's lot. Brown was primarily interested in a used Honda Accord with a sticker price in the vicinity of $13,000 to $14,000. Prior to coming to the Respondent's lot, Brown and the Complainant had looked at cars at several other dealerships.
7. While looking at cars on the lot, Brown and the Complainant were joined by Kevin Rude, a salesman employed by the Respondent. The three of them took the Honda Accord for a test drive.

8. Subsequent to the test drive, Rude took Brown and the Complainant to his office located within the showroom building. After seating Brown and the Complainant in his office, Rude went to get an appraisal of Brown's car.
9. Brown was limited to a maximum purchase value of $10,000 by the terms of a pre-approved loan granted through his credit union. Brown still owed approximately $2,000 to $3,000 on his current car, the one which he wished to trade-in.
10. Rude told Brown and the Complainant that he could credit Brown with $1,500 as a trade in for his current car. Brown and the Complainant were somewhat annoyed with this figure because they had been told that Brown's car was worth up to $3,000 earlier in the day at a different dealership. Also, Brown owed more on the car than Rude was offering in trade. Because of the limitations of Brown's financial position, Brown and the Complainant asked Rude for Brown's keys back because it did not seem likely that Brown could afford the car that he had driven.
11. Rude left the office. He returned shortly thereafter not with the keys to Brown's car but with a different figure for the trade-in value of Brown's car. Brown and the Complainant pointed out that the price of the car was still in excess of the amount that Brown could afford to pay and once again asked for the keys to Brown's car.
12. Rude left again. Once again when he returned, he did not bring Brown's car keys but a lower offer for the car in which Brown had been interested. The new price was still in excess of the $10,000 loan amount for which Brown had been approved.
13. The pattern of this transaction repeated itself for perhaps two more cycles before Rude agreed that he could sell the Accord for the $10,000 that Brown could afford. Brown signed a form indicating his assent to the purchase. He did not yet have the bottom line price though because only a Finance or Business Manager could work out those figures.
14. When Rude returned with a completed purchase agreement, the sales figure was between $13,000 and $14,000, once again in excess of the $10,000 bottom line figure cited by Brown and the Complainant. The higher figure included items such as fees, taxes and pay-off of Brown's loan on his trade-in car. These items had not been previously discussed by the parties. Brown and the Complainant felt that Rude had tried to trick them at the last moment. Brown and the Complainant insisted on the return of Brown's car keys so that they might leave.
15. The transaction as negotiated between Rude and Brown appears to have been premised upon a misunderstanding of the parties. In short, Brown believed that his bottom line price was inclusive of all fees and costs, while Rude, perhaps willfully, was only negotiating the price of the car exclusive of the normal costs and fees.
16. Instead of getting the car keys, Rude went to speak to Mercado in an effort to see if the sale could be salvaged. Mercado returned to Rude's office to speak with Brown and the Complainant.
17. Mercado and the Complainant did not get along with each other from the beginning of this transaction. It is not clear on this record who initiated the conflict but eventually both persons engaged in impolite and unprofessional conduct.
18. Mercado wished to attempt to save the apparent sale that Rude had negotiated with Brown and the Complainant. In this effort, he wished to speak primarily with Brown because it was Brown who would need to sign the necessary papers. Brown informed Mercado that the Complainant was authorized to speak on his behalf.
19. When it became obvious to Brown and the Complainant that the deal was not going to go through as planned, they again asked for their keys so that they could leave.
20. Mercado directed Rude to retrieve Brown's keys while he continued to speak with Brown and the Complainant.
21. It appears that it was around this time that the problems between Mercado and the Complainant began to intensify. Mercado told the Complainant to shut up because he wished to speak with

Brown, the person actually buying the car. The Complainant objected to Mercado's aggressive attitude and Mercado replied with sarcasm that he would let his mother know about the attitude lesson he had received. The Complainant then asked Mercado if Mercado would like his glasses shoved in his face. At this point Mercado indicated that the Complainant and Brown had to leave or Mercado would call the police.

22. As Brown and the Complainant were leaving, Mercado indicated to Brown that if Brown was still interested in the car, Mercado would hold open the last offer.
23. Brown and the Complainant then left the premises.
24. In early to mid October, 1995, Jermaine Butler, a Black or African American male, sought to purchase an automobile from the Respondent. Butler dealt primarily with Joseph Mercado, the brother of Jim Mercado. Butler had significant credit problems. Joseph Mercado helped Butler to secure a line of credit through a lender often used by the Respondent in cases of customers with poor credit ratings. The line of credit arranged through the Respondent had limitations in addition to those usually accompanying a car loan.
25. When Butler and Joseph Mercado met to discuss the purchase of a car, Butler was dissatisfied with the available selection of cars that would meet the limitations of the loan. When Butler expressed his dissatisfaction, Joseph Mercado became angry and forcefully expressed his frustration to Butler. Eventually, Joseph Mercado told Butler to leave.
26. Butler returned to the Respondent's lot several days later with a White male work acquaintance, Anthony Guidici.
27. While Butler was looking at cars on the lot, Joseph Mercado came out of the showroom area and yelled at Butler indicating that Butler would never get a car from the Respondent or from anywhere else in Madison. This incident was observed by Guidici.
28. Guidici was not treated in the same manner as Butler. Guidici did not have a history of past dealings with the Respondent.

RECOMMENDED CONCLUSIONS OF LAW

29. The Complainant is a member of the protected group "race" and is entitled to the protection of the Equal Opportunity Ordinance MGO Sec. 3.23 (5)(a) (EOO).
30. The Respondent is a public place of accommodation or amusement within the meaning of the Equal Opportunities Ordinance MGO Sec. 3.23(2)(e) and is subject to the regulation of the Equal Opportunities Ordinance.
31. The Complainant was not denied in whole or in part access to the Respondent's public place of accommodation or amusement on the basis of his race.

RECOMMENDED ORDER

32. The Complaint is hereby dismissed.

MEMORANDUM DECISION

This complaint is a graphic illustration of the legacy of this country's poor race relations and the results of horrible customer service policies. The endpoint of these two paths was a regrettable and entirely avoidable confrontation between two grown men that appears to have narrowly escaped violence.

On August 3, 1995, Dave Brown asked his friend, the Complainant, to assist him in buying a new car. Brown wished the Complainant's help because Brown knew that the Complainant had purchased a

number of cars over the period of their friendship. Brown believed that this higher level of experience would benefit him.

Prior to beginning his search, Brown received approval from his credit union for a loan in the amount of $10,000. Brown also owned a car that could be traded in but he still owed approximately $3,000 on the loan for this car. Before Brown and the Complainant arrived at the Respondent's car lot, they had visited other automobile dealerships in order to test the market. At one of these dealerships, Brown's car was appraised to have a trade-in value of approximately $3,000.

When Brown and the Complainant arrived at the Respondent's lot, they spent several minutes looking at cars on the lot. Brown was interested in a used Honda Accord. The asking price for this car was between $13,000 and $14,000. After Brown and the Complainant had been looking at cars for approximately fifteen (15) minutes, they were joined by Kevin Rude, a salesman for the Respondent. Brown indicated the car in which he was interested and the three men went for a test drive of the Accord.

Once they returned to the lot, Rude asked if Brown was interested in the car. Brown explained his price range. Rude, Brown and the Complainant went to Rude's office in the showroom area. Rude estimated that Brown could have approximately a $1,500 trade-in on his existing vehicle. Brown and the Complainant felt that this trade-in value was too low based upon the estimate given them earlier in the day.

Brown and the Complainant asked Rude for the car keys since they did not believe that a deal for the Accord could be struck at Brown's price with Rude's proposed trade-in value. Rude left the office and returned not with the keys to Brown's car but a higher trade-in estimate. Rude asked Brown if he was still interested in the Accord given the higher trade-in value. Brown and the Complainant stated that they were interested in the Accord but only if the bottom line met Brown's pre-approved loan figure of $10,000. Rude, Brown and the Complainant continued to negotiate until Rude said that he could meet Brown's price.

Rude filled out an offer sheet for the Accord. When he gave the sheet to Brown and the Complainant, they observed that several of the form's provisions had not been filled in. Rude indicated that only the Business Manager could complete the form. Brown and the Complainant indicated, wisely in the mind of the Hearing Examiner, that Brown would not sign the form until the blanks had been completed. Rude took the form to someone to be completed.

When Rude returned to his office with the completed form, Brown and the Complainant objected because the additions made to the form brought the total price of the Accord to between $13,000 and $14,000. Since Brown and the Complainant believed that they had negotiated a price of approximately $10,000, they believed that Rude was attempting to trick them. They insisted upon the return of Brown's car keys so that they could leave. Once again, Rude left the office and returned without the keys. This time, Rude returned with his supervisor, Jim Mercado. Rude hoped that Mercado could salvage the deal that he believed that he had worked out with Brown and the Complainant.

Mercado attempted to discover the source of the problem and the obvious discontent of Brown and the Complainant. Mercado's attempts tended to exacerbate an already difficult situation. Mercado wished to speak with the person who would actually be buying the car. When the Complainant attempted to continue to speak for Brown, Mercado told the Complainant to "shut up" because he

wanted to speak to Brown. Both the Complainant and Brown told Mercado that the Complainant was authorized to speak for Brown.

Mercado explained the numbers on the purchase sheet to both Brown and the Complainant. Brown and the Complainant still believed that they were being victimized by the Respondent's salespersons. They told Mercado that they only wished the keys to Brown's car and they would leave. Mercado was surprised that they did not have the keys and sent Rude to retrieve them.

As Mercado, Brown and the Complainant left Rude's office, the Complainant told Mercado that Mercado's attitude was poor. Mercado took offense and replied sarcastically that he would tell his mother about the attitude adjustment lesson he had received. This further angered the Complainant.

The Complainant told Mercado that Mercado would not find things so funny if the Complainant smashed Mercado's glasses in Mercado's face. Mercado then ordered Brown and the Complainant to leave the premises or Mercado would call the police. Brown and the Complainant left. As Brown left, Mercado indicated to Brown that if Brown still wanted the car, the deal was good as offered until the end of the day.

In order to prevail on his claim, the above facts must demonstrate, by a preponderance of the evidence, four (4) things: 1) the Complainant is a member of a group protected by the ordinance; 2) the Respondent is a public place of accommodation or amusement within the meaning of the ordinance; 3) the Complainant was denied a service of the Respondent or was charged a price higher than that charged to those not of his protected group and; 4) the denial of service or the charging of a higher price was motivated at least in part by his membership in the protected group. The Respondent is willing to concede that the Complainant has established the first three (3) of these elements but contends that the final element has not been proven.

There is no question that as a Black African American, the Complainant is a member of the protected group "race" within the meaning of the ordinance. Equally, the Respondent is a public place of accommodation or amusement as that term is defined in the ordinance. Somewhat more of a question to the Hearing Examiner is whether the Complainant was denied a service of the Respondent. There is no question of a higher price being charged by the Respondent. Since the Respondent is apparently willing to concede that the Complainant may have been denied a service, the Hearing Examiner will not address this element.

The final element of the prima facie case is the most critical. If the Complainant's race did not motivate the Respondent's conduct, then no matter how outrageous the Complainant's treatment, a claim for discrimination cannot be proven. Only adverse actions that occur at least in part because of one's membership in a protected group are subject to the proscription of the ordinance.

No reasonable person can assert that the Complainant and Brown did not receive rude and reprehensible treatment at Mercado's hand. While the Complainant's threat to strike Mercado cannot be condoned, Mercado, to a great extent, invited the Complainant's reaction by his sarcasm and unprofessional attitude. However, there is nothing in this record to link the Complainant's treatment to his race.

The Complainant essentially makes two arguments to demonstrate that his race was a motivating factor in his treatment. First, he contends that because he is a Black African American that his treatment had to have been motivated by his race. Second, the Complainant asserts that there is a

pattern and practice of poor treatment by the Respondent of Black African Americans who drive a hard bargain.

With respect to the Complainant's position that his race must have been a factor simply because he was treated so badly, such a claim is supported by neither the record in this matter, nor the law in general. There was no testimony indicating that any racial epithets were used. The Complainant produced no testimony demonstrating that Whites or others not of his race were treated more favorably under similar circumstances. The Complainant testified himself that he did not know what had motivated Mercado's treatment of him. He also testified that he did not know how someone not of his race would have been treated under similar circumstances. Absent some additional evidentiary support, the fact that the Complainant is a Black, African American and was treated badly is insufficient to establish that he was treated badly because he is a Black African American. The second argument offered by the Complainant to demonstrate that his race played a motivating role in his treatment is that there is a pattern and practice of discrimination involving the Respondent, particularly where an African American has attempted to drive a hard bargain. While pattern and practice evidence may be useful in demonstrating an illegal motivation, the record in this matter is insufficient to establish such a pattern and practice.

The Complainant attempted to rely on four (4) incidents to establish a pattern and practice of discrimination. These include a complaint by Ms. Pat Mitchell, a complaint by Dave Brown, the complaint of the Complainant and a complaint of Jermaine Butler. At hearing, the Hearing Examiner excluded testimony relating to the complaint of Pat Mitchell. Mitchell's complaint was filed with the Wisconsin Department of Industry, Labor and Human Relations Equal Rights Division (ERD). In general, the complaint alleged improprieties on the part of Mercado in his dealings with Mitchell. After investigation, the ERD issued an Initial Determination of No Probable Cause to Believe that Discrimination had occurred. Mitchell did not appeal the ERD's determination. The Hearing Examiner concluded that Mitchell's complaint had been resolved against her and did not establish that the Respondent had done anything wrong. The Mitchell complaint could not be used to establish a pattern and practice of discrimination because no discrimination was found.

The Brown complaint and that of the Complainant arose out of the same incident and facts. It is hard to see how the Brown complaint could form part of a pattern or practice separate from the Complainant's own complaint. Additionally, Brown settled his complaint prior to the issuance of an Initial Determination. Without a finding of at least probable cause to believe that the Respondent discriminated against Brown, Brown's complaint, even if separate from the Complainant's, cannot be used to establish a pattern or practice of discrimination. To hold to the contrary would give credence to a theory of liability that could be best described as "Where there's smoke, there's fire." The Hearing Examiner knows of no support in the law for such a theory and the Complainant provides no support.

The final part of the Complainant's pattern or practice theory is the complaint of Jermaine Butler. Butler v. Russ Darrow, MEOC Case No. 3359 (Ex. Dec. 07/30/96). The Complainant contends that Butler's treatment at the Respondent's lot mirrors that afforded himself and thus demonstrates a pattern or practice of discrimination. The essential facts of the Butler case are that Butler, a Black African American visited the Respondent's lot in order to purchase a car. Butler had a poor credit history and had found financing difficult to obtain. Joseph Mercado, the younger brother of Jim Mercado, worked with Butler to obtain financing for the purchase of a car. Joseph Mercado was able to obtain financing through a company with which the Respondent worked on a regular basis. This company specializes in financing cars for those with a poor credit history. Because of Butler's credit problems, the financing available to him was limited and carried significant restrictions and limited the selection of cars for which he could qualify.

Joseph Mercado met with Butler and explained the limitations of the financing that he had been able to procure for Butler. Butler did not like the selection of cars available to him within the limitations of the financing. He believed that Joseph Mercado was jerking him around. Joseph Mercado became angry with Butler and told him to leave. Joseph Mercado felt that he had put forth an unusual amount of work on behalf of Butler and that Butler was now ungrateful.

Butler was upset with his treatment by Joseph Mercado. Butler wished to file a complaint of discrimination against the Respondent with the Commission. When Butler discussed his options with an intake worker for the Commission, he was advised that his claim of discrimination could be made stronger if he were to have a similarly situated White person also seek to buy a car at the Respondent's lot. Butler enlisted the aid of Anthony Guidici, a White coworker of Butler. Guidici and Butler both went to the Respondent's lot in early October of 1995. Separately they looked at cars. Guidici testified that after a few minutes, a person came out of the Respondent's showroom and began yelling at Butler. The individual doing the yelling was a White male later identified as Joseph Mercado. Joseph Mercado told Butler to leave and indicated that Butler would never be able to buy a car through the Respondent or anywhere else in Madison. Guidici was not treated in a similar manner.

The use of the Butler complaint to establish a pattern or practice of discrimination has a number of problems. First, in considering the Butler complaint and the present complaint, there are only two (2) incidents. Two data points hardly can be said to establish a pattern or practice of discriminatory conduct. Generally, several more incidents of discrimination would be necessary to establish a pattern or practice.

Second, the incidents complained of in the Butler complaint occurred approximately two (2) months after those complained of in the present complaint. Though it may appear somewhat technical, the Butler complaint cannot be used to establish a pattern or practice of discrimination since it occurred subsequent to the events giving rise to the present complaint. On the other hand, the present complaint might be used to help establish a pattern or practice for the Butler complaint. Generally speaking, in order to be determined to be part of a pattern or practice of discrimination, there must be incidents in the pattern occurring before the incident complained of in the present complaint. It is possible that one could argue that every pattern or practice must start somewhere but that does not help to establish the admissibility of any individual allegation of discrimination. This is particularly true, where as here, the Complainant is arguing that the Respondent acted in conformity with a pattern or practice of discrimination. Simply put, how can you establish that someone has acted in conformity with a pattern or practice that does not yet exist?

Third, though Butler received an Initial Determination of Probable Cause to believe that discrimination had occurred, his complaint was dismissed prior to hearing because Butler failed to appear at a scheduled Pre-Hearing Conference and failed to demonstrate good cause for his failure to appear at the conference. Though the Initial Determination is a necessary step on the road to a finding of discrimination, it does not represent a final determination that discrimination has occurred. Without a final determination of discrimination, the Complainant is back to the "Where there's smoke..." theory. This falls short of establishing a pattern or practice of discrimination and only establishes a pattern of dissatisfied customers.

The Complainant has failed to present a prima facie case of discrimination. Most notably the Complainant has not met his burden of establishing that the treatment he received was because of his race. Without proof of this crucial element the Complainant's complaint fails and must be dismissed.

Even if this record were to demonstrate a prima facie case, the Respondent has presented a legitimate, nondiscriminatory explanation of its actions as required by the McDonnell Douglas/Burdine paradigm setting forth the shifting burden of proof in discrimination cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). As noted in Burdine, the Respondent's burden is one of articulation rather than one of proof.

The Respondent has established that it prepared its offer sheet in accordance with its usual practice and there is no reason to believe that usual practice is of itself discriminatory. It has also established that the Complainant threatened to strike an employee, Jim Mercado. Even though the Complainant may have been baited into making the threat, the Respondent's order to leave in light of the threat was warranted. An employer has the right to assure the physical safety of its employees.

Despite the fact that the Respondent has presented a legitimate, nondiscriminatory reason for its action, the Complainant may still prevail if he demonstrates that either the reason proffered by the Respondent is not credible or the reason proffered by the Respondent is a pretext for another discriminatory reason. The Complainant fails to make either of these demonstrations.

There is nothing in this record to indicate that any of the witnesses is not credible. In fact, the factual basis of the complaint is essentially agreed upon by the parties. Each party interprets the legal consequences of these facts differently but that does not alter the underlying facts. Both parties agree about the lack of communication between Rude and Brown and the Complainant. Both parties agree that Jim Mercado and the Complainant did not get along together from the beginning of their interaction. Both parties agree with facts that demonstrate that Jim Mercado acted rudely and unprofessionally. Both parties agree that the Complainant threatened to hit Mercado. While each party may be guilty of slightly shading his testimony to favor his position, that does not amount to a lack of credibility.

There is nothing in the record to support a finding that the Respondent's proffered reasons for its action are a pretext for other discriminatory reasons. It makes little sense for the Respondent to deprive the Respondent and Brown from the opportunity to buy a car since that is the business in which the Respondent is engaged. Rude spent a significant amount of time and energy attempting to come to a mutually acceptable sales figure. It is not likely that he would have done this if there was an intent to discriminate against the Complainant. The fact that Brown and the Complainant drove a hard bargain is not significant on this record. The Complainant fails to point to any credible evidence in the record demonstrating pretext.

When the Hearing Examiner drafts his Recommended Decision in a case, he not only sets forth the facts, law and the application of the facts to the law, but attempts to provide guidance to both parties about how to avoid similar circumstances and outcomes in the future. Given the circumstances of this complaint, it is particularly difficult to find appropriate words of advice. The Respondent's employees acted entirely inappropriately in baiting the Complainant and in escalating the confrontation between themselves and the Complainant and Butler. If the Respondent wishes to improve its image with various minority communities, it must act responsibly to assure that all customers and potential customers are treated with respect and courtesy no matter the circumstances. The Hearing Examiner has no doubt that as an honorable man, the Complainant truly believes that his race was a motivating factor in his treatment. On this record, the Hearing Examiner believes that it is possible that the Complainant is correct. However, the mere possibility of the Complainant's race having been a factor is insufficient to represent proof of the allegation to the requisite degree. Had the Complainant been able to point to other customers not of his race who were treated more favorably under similar

circumstances, the Hearing Examiner may well have been persuaded to reach a contrary result. At least part of the Complainant's difficulties in proving his case stem from a lack of precision in setting forth his claim. Specifically, it is not clear exactly what service of the Respondent the Complainant sought. Is the Respondent complaining that his friend was unable to buy a car at the Respondent's lot? Is the Complainant asserting that he was ordered to leave the lot after he threatened to strike Mercado? Was the Complainant asserting that he was rudely treated in the negotiating process? Is the Complainant complaining of all or some part of these things? The Complainant does not make the basis of his complaint clear. Had he focused his efforts more precisely on one or more claims, perhaps some of the deficiencies of proof could have been eliminated.

For the foregoing reasons, the Hearing Examiner concludes that the complaint must be dismissed.

Signed and dated this 5th day of August, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner