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

Andrew Obriecht
1420 1/2 Sheridan Drive
Madison WI 53704

Complainant

vs.

Laserwords US, Inc.
4230 Argosy Court, Suite 100
Madison WI 53714

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S PETITION FOR COSTS AND FEES

CASE NO. 20152151

BACKGROUND

On August 12, 2015, the Complainant, Andrew Obriecht, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunity Division (EOD). In the complaint, Obriecht charged that the Respondent, Laserwords US, Inc., discriminated against him on the bases of his arrest record and conviction record. The Complainant alleged two instances of discrimination: one when an initial job offer from the Respondent was rescinded (failure to hire), and second, when he was later terminated. The Respondent denied having discriminated against the Complainant.

Subsequent to an investigation of the allegations in the complaint, a Division Investigator/Conciliator concluded that there was probable cause to believe that the Respondent had discriminated against the Complainant in its failure to hire and termination of the Complainant. Efforts to conciliate the complaint proved unsuccessful and the complaint was transferred to the Hearing Examiner for a hearing on the merits of the complaint.

A hearing on the merits of the complaint was held on September 7, 2016. On October 4, 2018, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner found that there was no discrimination with respect to the claim on termination, but that the initial failure to hire claim demonstrated discrimination. In that decision, the Hearing Examiner proposed an award of compensatory damages and provided a schedule for the filing of a petition for costs and fees including a reasonable attorney's fee by the Complainant. That schedule provided for a period for the Respondent to object to the Complainant's costs and fees.

On December 6, 2018, the Complainant filed his petition for costs and fees, including a reasonable attorney's fee, seeking $10,775.00 in attorney's fees and $501.92 in costs. On January 25, 2019, the Respondent submitted its objections to the Complainant's petition and a brief in support of its objections. The Respondent was provided additional time to respond to the

Complainant's petition as the Complainant failed to serve a copy of the petition on the Respondent, requiring an extension for the Respondent to reply.

DECISION

The Department of Civil Rights and the Equal Opportunity Commission has long held that a prevailing Complainant should be awarded the reasonable costs and fees associated with bringing and pursuing a successful claim of discrimination, including a reasonable attorney's fee. Nelson v. Weight Loss Clinics of America, Inc. et al., MEOC Case No. 20684 (Ex. Dec. 9/29/89), Harris v Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (on liability/damages: Comm. Dec. 2/14/90, 5/12/94, Ex. Dec. 6/28/89, 11/8/93; on attorney's fees: Comm. Dec. 2/27/95, Ex. Dec. 8/8/94), Sprague v. Rowe and Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. on attorney's fees 2/9/98), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. on liability 2/10/93, on attorney's fees 7/29/93 and 9/23/93), Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. on attorney's fees 6/1/01), Groholski v. Old Town Pub, MEOC Case No. 20072041 (Ex. Dec. on attorney's fees 5/10/10), Johnson and Goodwin v. Madison Taxi, MEOC Case Nos. 20093110 and 20093094 (Ex. Dec. on attorney's fees: 02/22/2013), Obriecht v. Midwest Infinity Group, MEOC Case No. 20162022 (Ex. Dec. on attorney's fees: 04/21/2017). The underlying theory for the making of such awards is the dictate to make the Complainant whole. In theory, a prevailing Complainant might win an award of damages and still come out at a loss if the costs of bringing a complaint, including attorney's fees, had to be shouldered by the Complainant.

In order to encourage the public to file complaints when an individual feels that his or her rights under the Equal Opportunities Ordinance have been violated, the Commission is directed to issue a "make whole" remedy. MGO 39.03(10)(b)(4). This remedy includes the costs and fees incurred in pursuit of the complaint. As an enactment intended to further the social good, the Ordinance relies on the filing of individual complaints of discrimination or retaliation. As these complaints can sometimes be over relatively minor monetary sums, but rest on important legal principles, the public must receive awards of their costs and fees in order to effectuate the social good embodied in the ordinance.

The method utilized in cases brought before the Department of Civil Rights essentially tracks that used by state and federal courts. In this approach, the Hearing Examiner will first establish a lodestar figure. The lodestar is calculated by taking a reasonable hourly rate for an attorney's services and then multiplying that rate by the number of the hours reasonably expended in pursuit of a successful claim. Once this lodestar is fixed, adjustments may be made, either up or down, for a variety of factors. See Sprague, supra, Gardner, supra, Groholski, supra.

The Complainant states that the usual and customary hourly rate for similar cases brought by his attorney is $250.00 per hour. He contends that the Hearing Examiner should use this hourly rate to determine the lodestar amount. Complainant's counsel and the law firm for which he worked, as part of the petition for costs and fees, has included a contemporaneously maintained list of work and charges for this matter. Complainant's counsel asserts that they reasonably expended 43.10 hours in their representation of the Complainant in this matter.

Proof of the elements of the lodestar amount rests on the Complainant. In the present matter, the Complainant presents an affidavit averring that the hourly rate for counsel in this

matter for similar cases is $250.00 per hour. While each attorney's hourly fee needs to be scrutinized for reasonableness, the Hearing Examiner has already determined that $250.00 per hour is a reasonable rate for Attorney Sulton and Attorney Butler (see Obriecht v. Midwest Infinity Group, supra) and the Respondent in this matter does not object to this hourly rate.

Having determined that the Hearing Examiner will use the hourly rate of $250.00 in calculating the lodestar, the Hearing Examiner now turns to the number of hours claimed by Complainant as being reasonably necessary for the preparation and hearing of this action. Complainant, as part of his petition, provides the contemporaneously maintained billing records for this matter. The Order of the Hearing Examiner provided that the Complainant could submit a petition for fees and costs, including a reasonable attorney's fee "relating to the claim for rescission of Respondent's offer of employment." Complainant claims that 43.10 hours were expended in the representation of the Complainant in pursuit of that claim.

The Complainant does not seek an enhancement to the proposed fee. The Respondent does assert that a reduction in the fee from the lodestar proposed by the Complainant is warranted.

The Respondent objects to the accounting of time as set forth in Complainant's Petition for Fees and Costs. The Respondent argues that the accounting of time expended in representation of the Complainant could not be related solely to the claim upon which the Complainant was successful, and that despite the Petition and accompanying Affidavit designating the hours billed as "related to Mr. Obriecht's claim for rescission of Respondent's offer of employment" appears to be an accounting of the time spent on the case in its entirety.

The Complainant in this case sought employment with the Respondent on October 1, 2014. At some time after that date, the Complainant was verbally offered employment by the Respondent, which was then rescinded, by letter from the Human Resource Director, on December 18, 2014. The Respondent then retracted the rescinded offer of employment, and on December 29, 2014, sent another letter offering the Complainant the original position for which he had applied, to begin on the same date as the original offer of employment. The Complainant began his employment with the Respondent on January 5, 2015 and he was terminated on June 8, 2015.

The Respondent objects to the accounting provided by the Complainant, contending that "the parties spent very little time on the rescission claim, before the hearing, during the hearing, or in post-hearing briefing", and further points out that the only evidence or testimony offered at hearing to support the Complainant's claim of discriminatory failure to hire was the Complainant's own, brief, testimony on the matter.

The Hearing Examiner finds that the accounting provided by the Complainant is insufficient to attempt a meaningful review of the work performed relating to the rescission claim only, and that the Complainant has not satisfied his burden in showing that the number of hours claimed in the Petition and Affidavit are reasonably expended in proof of the rescission claim. As such, it falls to the Hearing Examiner to determine how much time, and for what services, the Complainant should reasonably be compensated.

The purpose of an attorney's fee award is to provide an incentive for the private bar to assist in the enforcement of rights conferred and protected by the Equal Opportunities

Ordinance. The award of attorney's fees is neither meant to be punitive to the Respondent, nor a windfall for the Complainant. In the matter at hand, the Complainant succeeded on only a very small portion of his claims of discrimination. The Respondent suggests in their brief in opposition to the petition for attorney's fees and costs that the Complainant's fees should be reduced relative to the percentage of damages awarded when compared to what the Complainant had asked for as total damages in his post hearing brief. The Respondent calculates the rescission damages award amount to be 2% of the total damages award sought by the Complainant. While the analysis of what hours were expended on the rescission claim in Complainant's fee petition poses some difficulty, in exercising sound discretion, the Hearing Examiner finds this suggested approach not to be consistent with the purposes for making attorney's fee awards.

Relative to the Hearing Examiner's concern that not all of the hours listed in the Complainant's petition were related to the rescission claim, the Hearing Examiner points to the entry for hours billed in the amount of 8.0 hours on September 7, 2016 to prepare for and attend the hearing in this matter. To charge this amount of hours as having been spent on the claims related to the rescinded offer of employment only is presumptively unreasonable. The hearing in this matter took only one day. To claim that 8.0 hours of that day were spent preparing for and attending the hearing relating to the claim of rescission of the Respondent's offer of employment suggests to the Hearing Examiner that the accounting attached to the Petition for Fees and Affidavit in this case was perhaps not broken down to include only the time spent on the rescission claim.

As the Respondent points out in their brief in opposition to the Complainant's petition for fees and costs, the time spent arguing the merits of the claim of discriminatory rescission of employment, at hearing and in post hearing briefing, was minimal. During the one day hearing, the only witness that testified on the matter of the rescinded offer was the Complainant himself. Neither Complainant nor Respondent spent any significant time arguing the rescission claim, and in providing no testimony at hearing or proof to the contrary, the Respondent effectively conceded this claim. The Complainant is not entitled to an award for attorney's fees on the entirety of his case when, on the successful portion of his claim, only minimal time was spent, and the remaining portion of time was spent on claims that were unproductive and not necessary to the proof of the claim which was successful.

The Complainant also seeks $501.92 in costs associated with this case. While the Respondent does not object to specific elements of the costs, that should not be construed as conceding its argument regarding inappropriate fees. While it is likely not all of the claimed costs are related to the rescission claim, the Respondent has not provided any objection to the Complainant's cost accounting.

The Hearing Examiner believes an award for attorney's fees in the amount of $3,000.00 is appropriate in this case. The amount represents a lodestar calculated from $250.00 per hour for 12.0 hours of work. While 12.0 hours may seem like an arbitrary amount, the Hearing Examiner believes this is an award high enough that it would attract a talented attorney to take on a claim as uncomplicated as the rescission claim, but does not serve as an award or windfall to the Complainant for his otherwise unproductive claims. The Complainant petitions for just more than 7 hours of time having been spent on travel. This travel time would have been expended regardless of the Complainant's division of claims. As recognized in Gardner, supra, a party has the right to choose their representation, regardless of their geographical location,

and that a non-local attorney is still entitled to fees for reasonable travel time. It is not unreasonable to believe that no more than 5 hours was spent preparing for an argument on which virtually no time was spent during the hearing and post-hearing briefing. The Hearing Examiner believes a fee award of three times the Complainant's compensatory damages award serves to reasonably compensate and make whole the Complainant.

ORDER

For the foregoing reasons, the Hearing Examiner orders the Respondent to pay to the Complainant, the amount of $3,501.92. This represents an hourly rate of $250.00 per hour for 12.0 hours, and costs awarded in the amount of $501.92. Payment or arrangements for payment shall be made no later than 30 days from this order's becoming final.

Signed and dated this 18th day of February, 2019.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: William F Sulton
Kevin J Palmersheim

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CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
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Andrew Obriecht
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vs.

Laserwords US, Inc.
4230 Argosy Court Suite 100
Madison WI 53714

Respondent

HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CASE NO. 20152151

On September 7, 2016, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing in Room LL120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard. The Complainant, Andrew Obriecht, appeared in person and by his attorney, William F. Sulton. The Respondent, Laserwords US, Inc., appeared by its representative Kevin Davidson, and by its attorneys, Erin E. Rome and Kevin J. Palmersheim. Based upon the record of the proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. Andrew Obriecht is a person with an arrest record and conviction record.

2. Respondent, Laserwords US, Inc., doing business as SPi Global (SPi Global), is an employer located at 4230 Argosy Court, Suite 100, in the City of Madison, Dane County, Wisconsin, employing more than 15 employees, and is subject to the Equal Opportunities Ordinance.

3. Complainant applied for employment with SPi Global on October 1, 2014.

4. Following his October 1, 2014 application, Complainant interviewed with SPi Global, and a verbal offer of employment was made on October 24, 2014 with an anticipated start date of January 5, 2015.

5. On December 18, 2014, SPi Global rescinded its original offer of employment to Complainant stating only that SPi Global had determined it could not offer the Complainant employment at that time.

6. On December 29, 2014, SPi Global extended a written offer of employment to Complainant with an anticipated start date of January 5, 2015, and at a wage rate of $11.00 per hour plus commission.

7. Lori Romine was the Human Resources Manager for SPi Global for the duration of Complainant's employment.

8. Mark Belcher was the Site Director for SPi Global during the Complainant's employment.

9. Chris Rutter was the Senior Operations Manager for SPi Global during the Complainant's employment.

10. Andrew Trujillo was employed as the Vice President of Vendor Management for DISH Network during the Complainant's employment with SPi Global.

11. SPi Global is a third party service provider for DISH Network, who outsources to SPi Global for certain business operations.

12. SPi Global's Madison location was designed specifically to provide service for DISH Network, who is SPi Global Madison's only contract.

13. SPi Global Madison is connected to DISH Network's computer infrastructure including its servers and mainframe.

14. DISH Network monitors SPi Global employees' computer usage.

15. On his October 1, 2014 application, Complainant disclosed that he had been convicted of a felony.

16. On October 7, 2014, SPi Global performed a background check on the Complainant, which revealed the Complainant's conviction record and status as a registered sex offender.

17. At the time Complainant was hired, he was under the supervision of the Division of Community Corrections and was assigned a supervision agent or officer.

18. Complainant is a registered sex offender and, as such, is subject to the Wisconsin Department of Corrections Standard Sex Offender Rules of Supervision.

19. Complainant's first day of employment with SPi Global was January 5, 2015, as an Outbound Sales Agent, with a wage rate of $11.00 per hour plus commission.

20. On June 5, 2015, Chris Rutter and Mark Belcher received an email from Andrew Trujillo of DISH Network asking that they get an explanation from Complainant about flagged internet searches performed by the Complainant on June 4, 2015.

21. A list of the searches performed by the Complainant on June 4, 2015 shows a number of searches for sexually explicit or salacious material while logged in to the DISH Network server.

22. Complainant's employment with SPi Global was terminated on June 8, 2015 for violating SPi Global's Code of Discipline for improper use of equipment, specifically, searches for and viewing of unauthorized websites.

23. Complainant was notified of his termination via conference call with Chris Rutter and Lori Romine on June 8, 2015.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes Arrest Record and Conviction Record and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

2. The Respondent is an employer within the meaning of the City of Madison Equal Opportunities Ordinance 39.03 and is subject to its terms and conditions.

3. The Respondent did discriminate against the Complainant on the basis of his arrest record when it rescinded an offer of employment due to the Complainant's arrest record for 2nd Degree Attempted Sexual Assault in violation of the Equal Opportunities Ordinance.

4. The Respondent did discriminate against the Complainant on the basis of his conviction record when it rescinded an offer of employment due to the Complainant's conviction record for 2nd Degree Attempted Sexual Assault in violation of the Equal Opportunities Ordinance.

5. The Complainant suffered no economic loss as a result of the rescission of SPi Global's initial offer of employment, as the Complainant's anticipated start date was the same as the date the Complainant did, in fact, begin his employment.

6. The Complainant did suffer a compensable loss for humiliation, embarrassment and emotional distress due to the Respondent's rescission of their initial offer of employment.

7. The Respondent did not discriminate against the Complainant on the basis of his arrest record for 2nd Degree Attempted Sexual Assault when it terminated his employment for a legitimate, nondiscriminatory reason.

8. The Respondent did not discriminate against the Complainant on the basis of his conviction record for 2nd Degree Attempted Sexual Assault when it terminated his employment for a legitimate, nondiscriminatory reason.

ORDER

1. No later than 30 days from the date upon which this Order becomes final, the Respondent shall pay Complainant $1,000.00 as compensatory damages for the Respondent's rescission of its initial offer of employment in violation of MGO 39.03.

2. No later than 45 days from the date upon which this Order becomes final, the Complainant shall submit a petition along with supporting documentation of his costs and fees, including a reasonable attorney's fee relating to the claim for rescission of Respondent's offer of employment. The Respondent may object to the Complainant's petition within 15 days of receipt of the Complainant's petition.

MEMORANDUM DECISION

In his complaint, filed on August 12, 2015, MEOD Case No. 20152151, the Complainant alleges that the Respondent discriminated against him on the basis of his arrest record and

conviction record for 2nd Degree Attempted Sexual Assault when the Respondent rescinded an offer of employment and later terminated his employment in violation of MGO 39.03. The Initial Determination by the City of Madison Department of Civil Rights found that there was probable cause to believe that discrimination occurred in regard to employment (failure to hire/termination) because of the Complainant's conviction record.

Cases of discrimination can be proven by either the direct or indirect method. In the direct method, the parties present their cases and the Hearing Examiner examines the facts and, without reliance on inference, reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct. In a case presented by the indirect method, the parties present their facts and apply those facts, be they inferential or direct, to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

The Hearing Examiner finds that the proof in this matter is best analyzed using the indirect method. When analyzing a case using the indirect method, the Hearing Examiner first must determine for each allegation of discrimination if the Complainant has established a *prima facie* claim of discrimination. A complaint for discrimination on the basis of arrest record or conviction record must meet the *prima facie* standard; that is, the Complainant must establish that he is 1) a member of a protected class as defined by the Madison General Ordinance Sec. 39.03, 2) that he was qualified for the job that had been applied for, 3) that he suffered an adverse employment action, and 4) that the adverse action suffered was causally related to the Complainant's membership in the protected class. The Complainant must prove each element of the *prima facie* claim by a preponderance of the evidence, which can also be stated as, by the greater weight of the credible evidence.

Presuming the Complainant meets this burden of proof, the burden shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof.

If the Respondent carries its burden of production, the Complainant might still prevail if he can point to evidence in the record demonstrating that the Respondent's proffered explanation is either not credible, or represents a pretext for an otherwise discriminatory motive.

First, the Hearing Examiner will examine whether the Complainant has demonstrated that he has met the first element of the *prima facie* claim. The Complainant filed a complaint of discrimination in relation to employment (failure to hire/termination), based upon his arrest record or conviction record, against the Respondent on August 12, 2015. Complainant is a member of the protected classes, Arrest Record and Conviction Record, as defined in Madison General Ordinance Sec. 39.03(2) and thus meets the first element of the *prima facie* claim.

Next, the Hearing Examiner must examine whether the Complainant has established that he was qualified for the job that he had applied for. Complainant's job application with the Respondent detailed a background in both sales and retail capacities. At the time of his October 1, 2014 application, Complainant believed he was applying for a sales position. Complainant interviewed and was, in fact, hired as a Sales Agent. Respondent's extending an offer of employment to the Complainant suggests they thought him to be qualified as well, thus establishing the second element of a *prima facie* claim.

The Hearing Examiner now turns to whether or not the Complainant suffered an adverse employment action. The Complainant applied for employment with the Respondent on October 1, 2014, and at some time after that, was verbally offered a sales position with the Respondent. That employment offer was rescinded, by letter, by Lori Romine, Human Resources Director at SPi Global. On December 18, 2014, Ms. Romine sent a "Notice of Revocation of Offer of Employment" letter to the Complainant stating that, "SPi Global has determined it cannot offer you employment at this time." This failure to hire the Complainant qualifies as an adverse employment action, despite the fact that on December 29, 2014, Ms. Romine sent another letter to the Complainant, offering him a position as a full-time Sales Agent, with his employment beginning on January 5, 2015. This is the same anticipated start date as the original, verbal, offer of employment. Complainant accepted this offer and his employment commenced January 5, 2015.

During that time period between the initial offer rescission and the second job offer, Complainant reasonably believed that he would not be working for SPi Global. Complainant testified that the rescission of the offer of employment caused him emotional distress. The Complainant even reached out to Ms. Romine in HR for further clarification on why the job offer had been rescinded. His request for further clarification was rebuffed by Ms. Romine who told the Complainant that Wisconsin was an at-will employment state and would provide no further details.

In his post hearing brief, Complainant believes his emotional distress for the approximately 10-11 days between when the Complainant became aware of the rescission and the offer of rehire to be $1,000.00. The Hearing Examiner agrees with this amount. The testimony at hearing as to the emotional distress impact on the Complainant caused by the rescission of the initial job offer was sparse. In Chung v. Paisans, MEOD Case No. 21192, Ex. Dec. 2/10/93, the Hearing Examiner observed that "…discrimination has an emotional impact" and that given that "there was no testimony that [these] effects were long lasting or caused a serious disruption in the Complainant's life or relationships" that only a nominal award of damages was appropriate. So too is the case here. The Complainant did express that he suffered some emotional distress following the rescission of the job offer, but given the length of time between the rescission and the second offer to hire, and the lack of any substantial testimony about his emotional state, the Hearing Examiner finds that a nominal award in this case is appropriate.

Despite the rescission of the initial job offer, Complainant ultimately did begin employment with SPi Global on January 5, 2015. SPi Global's Madison office was specifically designed to perform call center services for DISH Network. DISH Network is SPi Global Madison's sole client. SPi Global's computer network is run through a DISH Network server and DISH Network operates under a "whitelist" internet system, meaning all but approved sites are blocked from employee access. Andrew Gokenbach, SPi Global's IT Technical Support Engineer, testified that despite the whitelist internet system, there is a "proxy loophole" that allows searches for otherwise blocked content to be performed on search engines not blocked by the whitelist (i.e., Google, Bing, etc.).

From the record, it appears the Complainant's employment was without incident until June 5, 2015. Complainant's personnel file, and testimony from Respondent's representatives, are devoid of any mention of disciplinary actions or performance issues on the part of the Complainant for his approximately six months of employment. However, on June 5, 2015, SPi Global was contacted by its client, DISH Network, after the DISH Network's internet security

system detected multiple instances of "flagged" internet use under the user name "andrew.obriecht" that had occurred while the Complainant was clocked in to work on June 4, 2015. The internet searches performed by the Complainant were deemed by DISH Network to be sexual or pornographic in nature, and DISH Network tasked Andrew Trujillo, their Vice President of Vendor Management, with reaching out to SPi Global for further explanation of the Complainant's internet usage as outlined in a spreadsheet search history that had been provided to Mr. Trujillo. Mr. Trujillo reached out to Chris Rutter, Senior Operations Manager for SPi Global, for further explanation. Mr. Rutter testified that he forwarded the information on the internet usage of the Complainant to Andrew Gockenbach for assessment of the content, and to Lori Romine and Mark Belcher to address the issue with the Complainant.

Mr. Rutter testified that in his contact with Mr. Trujillo, DISH Network expressed that they wanted the Complainant removed from the DISH Network program. Mr. Rutter also testified that any personnel decisions for SPi Global were made in-house and not by DISH Network, however, Mr. Rutter and Ms. Romine ultimately determined that the Complainant's actions warranted termination. On June 8, 2015, Mr. Rutter and Ms. Romine placed a conference call to the Complainant and notified him of his termination, effective immediately.

SPi Global provides its employees with a Code of Discipline as part of the orientation process. This document outlined various offenses, grouped them by severity, and outlined the appropriate corrective action and prescriptive period. There were various offenses listed under "Willful Disobedience against IT Security" regarding the viewing, storing or transmitting of data on company IT systems to view pornographic materials or to access unauthorized websites. These offenses ranged in severity from Moderate to Grave. According to the Code of Discipline, first offense corrective action for those instances categorized as Moderate was a first written warning. For those instances categorized as Serious, it was a final written warning and a five-working day suspension. For those instances categorized as Grave, a first offense resulted in dismissal. The Code of Discipline also allowed for management to impose a sanction one level higher or lower than that proscribed to the offense, depending on the aggravating or mitigating circumstances of the offense, and any of an employee's past performance or habitual offender related issues. According to SPi Global's Code of Discipline, "viewing or storing of pornographic materials using or associated to company resources" was an offense categorized as "serious", as was "use of company IT systems (storing, transmitting data or any electronic media) in any way which could offend, humiliate or embarrass any person on the basis of their sex, age, marital status, race, disability, religious beliefs, sexual preference or transgender status."

The fourth element of establishing a *prima facie* case of discrimination is to establish that the reason for the adverse employment action was causally related to a person's membership in a protected class. The Ordinance allows employers to deny employment if an applicant "has been within the past three (3) years placed on probation, paroled, released from incarceration, or paid a fine, for a felony, misdemeanor, or other offense, the circumstances of which substantially relate to the circumstances of the particular job or licensed activity" MGO 39.03(8)(a)(i)(3)(b). In this case, Complainant had applied for a Sales Agent position with the Respondent. The Complainant is protected under the Ordinance due to his conviction record. After the commencement of his employment, the Complainant met with Ms. Romine to set up his payroll direct deposit. The Complainant testified that during a conversation with Ms. Romine at that time, she apologized for rescinding the offer of employment, and indicated that she had rescinded the offer of employment due to his arrest record and conviction record 2nd Degree Attempted Sexual Assault. Neither SPi Global nor the Complainant subpoenaed Ms. Romine as a witness. Ms. Romine's employment with SPi Global ended in August 2015. The Respondent did not dispute that this conversation between the Complainant and Ms. Romine took place, and

the Hearing Examiner finds the Complainant's testimony on the matter to be credible. Respondent did not deny that this conversation occurred, nor did they offer any evidence to the contrary. The Hearing Examiner cannot infer any argument in favor of or against the Respondent because of the lack of Ms. Romine's presence or testimony at hearing. The Hearing Examiner may only consider that the Complainant's testimony as to the occurrence of this conversation was credible. It would seem clear then that the adverse employment action suffered by the Complainant when the Respondent rescinded its offer of employment, is directly related to the Complainant's membership in a protected class, thus providing the discriminatory motive for Respondent's failure to hire.

In the case of his ultimate termination, the Complainant continues to assert that this, too, was a result of his membership in a protected class. The Hearing Examiner finds it difficult to draw a causal connection here. While in the instance of the employment offer revocation, a representative of the Respondent directly admitted to the Complainant that she did not want to hire him because of his status as a registered sex offender, the Respondent evidently, and within 11 days, saw the error of its ways and did, in fact, hire the Complainant to start on the same date set forth in the original employment offer. The Complainant testified the he enjoyed working for SPi Global, and that not only did management not have any criticisms of his work, he was praised for his performance and attendance.

Kevin Davidson was the Human Resources Assistant for SPi Global at the time of Complainant's employment. Ms. Romine was Mr. Davidson's direct supervisor. Mr. Davidson testified that he was unaware that the initial job offer to the Complainant had been rescinded, and was unaware of the results of the Complainant's criminal background check until after the Complainant began his employment. Mr. Davidson also testified that he had not been involved in the decision to terminate the Complainant's employment. In fact, Mr. Davidson testified that he was unaware of any egregious or habitual wrongdoing on behalf of the Complainant until the subject incident.

It was not until June 4, 2015, when the Complainant purportedly spent two working hours searching for what he admittedly described as "sexual" search terms, that the Respondent decided to terminate his employment. Unauthorized or inappropriate use of SPi Global and DISH Network's internet system is a legitimate business reason for termination of employment.

The Complainant makes the argument that, in this case, the punishment did not fit the crime and, in making this argument, refers to SPi Global's Code of Discipline, which categorized the Complainant's misconduct as "serious" with the corrective action, as outlined in the policy, being a final written warning with a five-working day suspension. The Complainant argues that because of his lack of any prior egregious or habitual wrongdoing, or any record of disciplinary action at all, that the Respondent offers his inappropriate computer use as a pretextual reason to discriminate based on his conviction record. The Hearing Examiner does not make that same leap. SPi Global, through the actions of Ms. Romine, did discriminate on the basis of the Complainant's arrest record and conviction record when it rescinded its offer of employment to the Complainant, but attempted to cure this wrongdoing by ultimately hiring the Complainant. It was not until the Complainant's unauthorized computer use that SPi Global considered terminating the Complainant.

Mr. Rutter testified that in his conversation with Andrew Trujillo, he did feel some pressure to terminate the Complainant to keep SPi Global Madison's one-and-only client happy. There is nothing in the record to indicate that anyone at DISH Network would have been aware

of the Complainant's conviction record or status as a registered sex offender when they encouraged SPi Global to terminate the Complainant. While SPi Global was in charge of its own personnel decisions, given the nature of the misconduct and the request from their only client, it is reasonable that SPi Global would make the decision to terminate the Complainant, regardless of the remedies prescribed in the Company Code of Discipline.

The Complainant also argues that because he is the only employee to have been disciplined for his computer usage that this means that he was being treated differently than other employees. The Complainant testified that he was aware of other employees that had accessed various social media or news media websites for personal use, that had not been subject to the disciplinary policy, and that he was being singled out. Chris Rutter and Andrew Gockenbach both testified that the only time they were aware of DISH Network contacting SPi Global regarding an employee's computer usage was when they were contacted on June 5, 2015 regarding the Complainants flagged search history. The Complainant testified that other employees had looked up sexy or salacious web content from their workstations, however, the testimony at hearing suggests no other such search terms entered or web usage of other employees rose to the level of being flagged by DISH Network's servers. Andrew Gockenbach testified that he was in contact with DISH Network daily about IT concerns, and that he was not aware of any other report from DISH Network about any SPi Global employee's unauthorized computer use.

No evidence presented at hearing suggested DISH Network and its employees were aware of the events surrounding the Complainant's ultimate employment with SPi Global, the background check performed by SPi Global, or Ms. Romine's conversation with the Complainant following his hire. DISH Network was only aware that the Complainant had performed internet searches that were flagged by their system, and wanted this agent removed from their program. SPi Global, being solely responsible for disciplinary measures against their staff, took DISH Networks request under advisement and, ultimately, did terminate the Complainant. The Hearing Examiner finds no reason to believe that the Complainant's ultimate termination from SPi Global was as a result of any discriminatory intent, nor that the reason offered for the Complainant's termination was pretext.

For the foregoing reasons, the complaint of discrimination as to Complainant's termination is hereby dismissed.

Signed and dated this 4th day of October, 2018.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: William F. Sulton
Kevin J. Palmersheim