

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

Bradley Goldsworthy
E13440 County Highway DL
Merrimac, WI 53561

Complainant

vs.

SPi CRM, Inc. n/k/a Inspiro
200 West Hanley Avenue, Suite 13
Coeur d'Alene, ID 83815

Respondent

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

CASE NO. 20182155

On February 18, 2020, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing in Room 202 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard in Madison, Wisconsin. The hearing continued February 19, 2020, in Room 206 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard in Madison, Wisconsin. The Complainant, Bradley Goldsworthy, appeared in person and by his attorney Richard Rice. The Respondent, SPi CRM, Inc. n/k/a Inspiro, appeared by its representative Kristina Glascock, and by its attorney Erin Rome. 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. Complainant, Bradley Goldsworthy, is a male whose date of birth is June 1, 1970.
2. Complainant was employed with SPi CRM, Inc. n/k/a Inspiro as a Trainer from May 28, 2013 through November 28, 2017.
3. Complainant was one of only three employees working in the Madison office of SPi CRM, Inc. n/k/a Inspiro when he began his employment.
4. Complainant's job duties as outlined in the Respondent's Competency Profile for Complainant's position included, in part, instructing new hires, continuing education programs, and program-specific training.
5. Complainant's employment with SPi CRM, Inc. n/k/a Inspiro was terminated on November 28, 2017.
6. Complainant's age at the time of his termination was 47 years old.

7. Complainant learned of his termination in a meeting with Kari Knox Krueger, Human Resources Manager, and Neal Stake, Senior Operations Manager.
8. Complainant's pay rate at the time of his termination was \$21.92 per hour. Complainant worked 2,080 hours per year for an annual income of \$45,593.60 and a weekly income of \$876.80.
9. Complainant received a letter at the November 28, 2017 meeting with Kari Knox Krueger and Neal Stake, signed by Kari Knox Krueger stating Complainant's employment was being terminated "at-will" and "without notice and without reason."
10. Respondent, SPi CRM, Inc. n/k/a Inspiro, is a customer relationship management service that operates a call center located in Madison, Wisconsin, and employs 15 or more employees. Respondent's Madison call center opened in the spring of 2013.
11. Respondent's, SPi CRM, Inc. n/k/a Inspiro, business is headquartered in the Philippines.
12. Respondent, SPi CRM, Inc. n/k/a Inspiro, operates to provide business process outsourcing services for DISH Network.
13. In November 2017, Kari Knox Krueger was a Human Resources Manager for SPi CRM, Inc. n/k/a Inspiro.
14. In November 2017, Neal Stake was a Senior Operations Manager with SPi CRM, Inc. n/k/a Inspiro.
15. Kristina Glascock is a Human Resources Assistant Manager with SPi CRM, Inc. n/k/a Inspiro.
16. Kristina Glascock began her employment with SPi CRM, Inc. n/k/a Inspiro in 2016 as a Human Resources Assistant. She was promoted to Human Resources Business Partner in 2018 and to Human Resources Assistant Manager in 2019.
17. In 2018, Rami Rosima was the Vice President of Human Resources for SPi CRM, Inc. n/k/a Inspiro.
18. Rami Rosima was located in the Manila, Philippines office of SPi CRM, Inc. n/k/a Inspiro.
19. Rowena "Weng" Hernaez Castro had been employed by SPi CRM, Inc. n/k/a Inspiro for approximately 15 years at the time of hearing and had been Vice President of Operations in November 2017.
20. Rowena "Weng" Hernaez Castro was located in the Manila, Philippines office of SPi CRM, Inc. n/k/a Inspiro.
21. Rowena "Weng" Hernaez Castro described the Complainant as a good trainer, a leader at the Madison site, and a trusted member of the team.
22. At any point in time, SPi CRM, Inc. n/k/a Inspiro would employ approximately 120 to 160 employees at the Madison office.

23. Beginning in 2015, SPi CRM, Inc. n/k/a Inspiro employed two to four individuals to staff the Talent Acquisition Department. This department was responsible for soliciting job applications, posting positions, screening applications or resumes, interviewing and hiring desirable candidates.
24. The training classes taught by the Complainant typically consisted of ten to twelve students training to be sales agents.
25. Sales agents were SPi CRM, Inc. n/k/a Inspiro's only revenue-generating position.
26. Lynn Olson was a sales agent in Complainant's training class at the end of October 2017.
27. Lynn Olson had been deemed unfit for hire by Talent Acquisition but had been hired anyway.
28. Lynn Olson's entire employment, lasting two or three weeks with the Respondent, was spent training in the Complainant's class.
29. On November 9, 2017, Complainant reported to Kristina Glascock that one of his trainees, Lynn Olson, had "a meltdown" during Academy Bay (ABAY) training and walked out of a training class.
30. Complainant reported to Kristina Glascock that he would be happy to have Lynn Olson back if she chose to return to SPi CRM, Inc. n/k/a Inspiro.
31. Kristina Glascock contacted Lynn Olson about the November 2017 incident at the request of the Complainant.
32. Kristina Glascock documented her contact with the Complainant and Lynn Olson regarding this incident in an email to Kari Knox Krueger and Neal Stake.
33. On November 14, 2017, Complainant was issued a Notice to Explain prepared by Vidal Condicion (Site Learning Manager) and delivered to the Complainant by Kari Knox Krueger.
34. The November 14, 2017 Notice to Explain contained a seven-day preventative suspension.
35. The November 14, 2017 Notice to Explain cited "Gross or habitual negligence in the performance of assigned duties," which is designated as a "grave" offense under the SPi Global Code of Discipline.
36. The corrective action for a first "grave" offense is dismissal.
37. Complainant responded to the Notice to Explain by email to Kari Knox Krueger, Vidal Condicion, and Gary Villena on November 20, 2017. In this response, the Complainant included a November 8, 2017 email from Vidal Condicion asking about the training class that included Lynn Olson and a response from the Complainant explaining some of the challenges facing Talent Acquisition.

38. Complainant had received a prior Notice to Explain in November 2016, which resulted in an exoneration of all allegations due to lack of evidence.
39. Respondent maintained Performance Evaluations of the Complainant, which indicated the Complainant was a "solid performer," with one such evaluation indicating Complainant was an "excellent performer."
40. After Complainant's termination, his position was filled by Kasey Olson (female), who was 23 years old at the time of her hire and earned a salary of \$42,500.00 annually.
41. SPi CRM, Inc. n/k/a Inspiro used an internal Talent Acquisition department to screen and interview potential new employees.
42. Respondent's training program for newly hired sales agents lasted four weeks. It included two weeks of classroom instruction and two weeks of ABAY, where agents would assist customers in a supervised setting.
43. The curriculum and materials for Respondent's four-week sales agent training program were produced by DISH Network.
44. Being present and available to trainees was a key part of the Trainer position, with new sales agent training cohorts needing to be highly supervised.
45. In November 2017, only two employees held the Trainer position in the Respondent's Madison call center, the Complainant and Drew Johnson.
46. In November 2017, the Respondent wanted to employ two more trainers, for a total of four trainers, at the Madison call center.
47. The Complainant recommended Kasey Olson for a trainer position.
48. Complainant trained approximately 400 people in the 4-1/2 years he was a trainer with SPi CRM, Inc. n/k/a Inspiro.
49. Complainant, along with Brent Smith and DISH Network, developed a CAT (Continued Associate Training) program to help develop underperforming employees' skills.
50. The training class that Lynn Olson was a part of consisted of ten to twelve trainees who were in the third week of their training when Lynn Olson walked out of class.
51. Brent Smith was employed by SPi CRM, Inc. n/k/a Inspiro in 2014 as a Trainer and was promoted to Operations Manager in 2017.
52. Brent Smith was in the training room with Lynn Olson when she had her "meltdown" and walked off the job.
53. Brent Smith reported to Kari Knox Krueger his belief that Lynn Olson had abandoned her job.

54. Brent Smith's employment with SPi CRM, Inc. n/k/a Inspiro terminated in March 2018.
55. Between September 2017 and September 2018, 109 employees of SPi CRM, Inc. n/k/a Inspiro had been terminated. Of those, the average age of the terminated employees was 29 years old, and 14% of the terminations were employees age 40 and older.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class Age 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 age in violation of the Equal Opportunities Ordinance by terminating the Complainant's employment.

ORDER

1. The Respondent is ordered to cease and desist from discriminating against the Complainant.
2. The Respondent is ordered not to retaliate against the Complainant for his bringing of this complaint.
3. The Respondent is ordered to offer the Complainant the next available position as a Trainer at the rate of pay he would have received had he not been terminated.
4. The parties shall confer no later than 30 days from this Order's becoming final, to establish an amount of damages owed to the Complainant as a result of the Respondent's discrimination against the Complainant on the basis of his age. Damages shall, at a minimum, include back pay, pre-judgment interest, non-economic damages, and the Complainant's reasonable costs and fees in pursuit of this complaint, including a reasonable attorney's fee.
5. Should the parties be unable to agree upon an amount of damages, they shall inform the Hearing Examiner of such inability. The Hearing Examiner will hold further proceedings and make an award of damages that will make the Complainant whole.
6. Once damages have been fixed, the Complainant shall submit a petition for his reasonable costs and fees, including a reasonable attorney's fee not later than 15 days from the Hearing Examiner's decision on damages becoming final.

MEMORANDUM DECISION

The Complainant alleges that the Respondent discriminated against him on the basis of his age (date of birth 6/01/1970) when the Respondent terminated his employment as a Trainer. The Complainant began his employment as a Trainer with the Respondent, SPi CRM, Inc. n/k/a Inspiro ("Inspiro") on May 28, 2013. Inspiro operates a call center providing business process

outsourcing for DISH Network, selling products and services, and providing customer support. At the time of his hire, the Complainant was one of only three employees in the Madison office of Inspiro, and the call center at this location was not yet operational.

The Complainant was 43 years old at the time of his hire, and his job responsibilities included implementing and conducting training programs for new employees. The Complainant remained in this role until the time of his termination on November 28, 2017.

The Training Department for Inspiro conducted the training for all new sales agent hires. This training program lasted for four weeks and included two weeks of classroom training and two weeks of Academy Bay or ABAY, where trainees were immersed in closely monitored hands-on training. Inspiro's training program followed a tight timeline and provided in-depth material, requiring the trainers to keep their training classes on track and engaged. The Complainant trained hundreds of people in the 4-1/2 years he was a trainer with Inspiro.

Aside from new associate trainings, the Training Department also conducted Continued Associate Training (CAT). CAT was implemented as a strategy to increase overall sales agents' retention rates by identifying and coaching underperforming agents. Inspiro's CAT was developed, implemented, and executed with the assistance of the Complainant.

Corporate Vice President of HR Operations, Rowena ("Weng") Hernaez Castro, testified in mid-2017, the Madison site made changes to its leadership team. However, she did not testify to what these changes were. She indicated that in July 2017, the Complainant emailed her. She claimed that the Complainant's emails reported dissatisfaction with associates' behavior at the Madison site and made comments regarding the overall site response to the changes in leadership. Hernaez Castro testified that the Complainant also gave feedback on some of the standard operating procedures in Madison. However, she did not specify on what procedures the Complainant commented.

Hernaez Castro testified she discussed these concerns with the Complainant in-person during her visit to Madison's Inspiro location in September 2017. In response, Hernaez Castro claimed she had discussions via email with J.P. Meris, who had operational oversight of the Madison location. Hernaez Castro also testified that she told the Complainant via email that the Madison site is "important to Inspiro" and that the Complainant was "very important in the leadership transition." Hernaez Castro said she further discussed these issues with the Complainant via phone to "appease him and... listen to his concerns."

One such behavioral issue with the Madison site that alarmed the Complainant took place in September 2017. According to the Complainant's testimony, there was a violation of Inspiro's Code of Conduct by another Trainer. Brent C. Smith, initially hired as the second Trainer at the Madison location and later promoted to Operations Manager, asserted that Inspiro Trainer Michael Muldoon (age 32) arrived at his shift displaying behavior that indicated to Smith that Muldoon was under the influence of alcohol and marijuana. Aside from this apparent intoxication, Smith testified that Muldoon also abandoned his shift. The Complainant corroborated Muldoon's alleged intoxication and shift abandonment in his testimony. Human Resources Assistant Kristina Glascock testified Muldoon was terminated for "job abandonment," an offense categorized as "grave" in the Respondent's Code of Conduct. With Muldoon's termination, the Respondent's Madison location was operating with two Trainers: Drew Johnson and the Complainant.

September 2017, the Respondent was actively hiring both new sales agents and new trainers. The Respondent had authorized its Madison location to employ an additional 100 sales agents to bring the site's agent count to 200. Knowing the Respondent was looking to fill "at least two Trainer positions" to support the new training demands, the Complainant testified that he informed upper management that he felt Inspiro employee, Kasey Olson, 24, would be a "good Trainer," however, the Complainant claimed he was informed Kasey Olson did not meet the prerequisites for a Trainer position.

Throughout October 2017, Madison Inspiro acquired many new hires in their effort to reach 200 sales agents. On November 8, 2017, Vidal Condicion (Site Learning Manager—Sales) emailed the Complainant with concerns about the Complainant's current training class. According to an email provided by the Complainant, Condicion said, "Just between you and me, what have you observed with these employees? Almost every week, we are getting fall-outs." The Complainant testified his response was, "This class is one of the most unusual classes I've had in a long time. My gut feeling is that the pressure to increase head-count is resulting in a less selective process...some of them probably should not have been hired in the first place."

More issues with this training class arose on November 9, 2017. The class was on week three of their four-week training program; training was being conducted in the ABAY. Smith testified that the Complainant located Smith to request Smith temporarily supervise the Complainant's trainees while the Complainant used the restroom; the Complainant's testimony corroborated this. During Smith's supervision of the Complainant's class, Smith claimed he observed one trainee, Lynn Olson, exhibiting "inappropriate behavior while on the phone with a DISH Network potential customer; Lynn Olson became frustrated with her inability to use the order entry system." Observing Lynn Olson's difficulties, Smith said he attempted to assist Lynn Olson, who responded with, "This is ridiculous. I can't fucking do this." Smith said Lynn Olson took off her headset, threw it down, and left the room. Smith claimed that it led him to believe Lynn Olson abandoned her job.

Later, on November 9, 2017, Kristina Glascock (Human Resources Assistant), called Lynn Olson—whom the Complainant testified was previously deemed unfit for hire by Talent Acquisition but who had been hired anyway due to her acquaintance with a Team Lead—to follow up on the circumstances of her departure from the ABAY. According to the Complainant and Glascock, Glascock made this call at the request of the Complainant. On this call, Glascock said Lynn Olson told Glascock she was frustrated because the Complainant was "unhelpful and unprofessional in terms of training." Lynn Olson testified that the Complainant had an attitude toward helping her and said he was nowhere to be found during her training hours.

In response to Lynn Olson's allegations, on November 14, 2017, the Respondent provided the Complainant a "Notice to Explain," informing him of Lynn Olson's assertions and advising him that if an investigation found Lynn Olson's claims had merit, his purported actions constituted "gross and habitual negligence under Section C.1.3 of the Code of Discipline." Under the framework of the Code of Discipline at Inspiro, this violation would warrant the Complainant's dismissal.

The Complainant responded to the Notice to Explain by email to Condicion, Kari Knox Krueger (Human Resources Director), and Gary Villena (Account Manager—Learning) on November 20, 2017. In his response, the Complainant included the November 8, 2017 email thread with Condicion regarding the quality and fall-out of his November class.

During the investigation into the Notice to Explain, Hernaez Castro testified the Madison site informed her several other reports from Goldsworthy's trainees mirrored Lynn Olson's claims that the Complainant left trainees unattended for extended periods. Hernaez Castro said she had received no specific information about any complaints from trainees aside from Lynn Olson's, and maintained the Complainant's termination was a recommendation from Knox Krueger.

On November 28, 2017, in a meeting with Knox Krueger, and Neal Stake, Senior Operations Manager, the Complainant was informed he was being terminated "at-will" and "without notice and without reason." The Complainant claims Knox Krueger expressly indicated his termination had nothing to do with the Notice to Explain from November 14, 2017.

Hernaez Castro indicated the termination letter provided to the Complainant by Knox Krueger asserting the Complainant was fired by Inspiro "without reason" was a false claim. She claimed that when Inspiro's corporate team agreed to terminate the Complainant per Knox Krueger's recommendation, corporate decided to classify his termination as "at-will." Hernaez Castro claimed corporate only termed his termination as at-will in an effort to assist the Complainant, claiming the Respondent's hope was that the Complainant may find his efforts to obtain new employment easier. Hernaez Castro claimed that the Complainant was terminated because the investigation into the Notice to Explain revealed "gross and habitual negligence" by Mr. Goldsworthy "in the performance of his assigned duties, which is classified as a grave offense under Inspiro's Code of Discipline."

Eventually, after the Complainant's termination, the Respondent filled the vacant Trainer position with the Complainant's previous recommendation of Kasey Olson. Records show that Kasey Olson's starting rate of pay was \$42,500.00, roughly \$3,000 less than the Complainant's annual income at the date of his termination. Kasey Olson was also 23 years old at the time of her promotion to Trainer, 24 years younger than the 47-year-old Complainant.

When evaluating the Madison site's termination records, Glascock affirmed during her testimony that between 2017 and 2018, there were two other individuals over the age of 40 who were terminated, neither of which had a comparable job title to that of the Complainant. She also testified that the Complainant's most recent performance review score of 3.9 would qualify the Complainant as a "solid performer." The Complainant never scored below "solid performer," and had a performance review that indicated he was an "excellent performer."

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 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 must first determine if the Complainant has established a *prima facie* claim for each allegation of discrimination. The Complainant claims he was discriminated against on the basis of his age when

the Respondent terminated his employment. To show a *prima facie* indirect case of discrimination, the Complainant must establish that 1) he belonged to a protected class; 2) he was performing his job satisfactorily; 3) he experienced an adverse employment action, and 4) he was either replaced by someone, not within the protected class or the employer treated a similarly-situated employee, not in the protected class more favorably. Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853, 863 (7th Cir. 1997); Puetz Motor Sales, Inc. v. LIRC, 126 Wis. 2d 168, 173, 376 N.W.2d 372 (Ct. App. 1985).

Presuming the Complainant meets this burden of proof, the burden then 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 determine whether the Complainant has demonstrated that he has met the first element of the *prima facie* claim. The Complainant filed a complaint alleging age discrimination. The Complainant's date of birth is June 1, 1970, and he was 47 years old on the date of his termination; thus, the Complainant meets the first element of the *prima facie* claim, that he is a member of the protected class "age".

Next, the Hearing Examiner must examine the second element: whether the Complainant has established that he was adequately performing in his position with the Respondent.

The Complainant reapplied for his position and gave extensive testimony on his positive contributions to the company. It is evident that he feels as though he was adequately performing in his position with the Respondent. The Respondent argues that the evidence does not support the assertion that the Complainant was satisfactorily performing his job duties when he was terminated, absolving them of allegations the Complainant was terminated on the basis of his age.

Both the Complainant and Respondent point to the Complainant's Performance Evaluations as evidence of whether the Complainant was performing satisfactorily. The performance evaluations indicate during the Complainant's four-year tenure with the Respondent, the Complainant maintained standings as a "solid performer," with one evaluation indicating he was an "excellent performer." This evaluation record was corroborated by the Complainant, Smith, and Glascock during their testimonies. The Respondent did indicate that the Complainant had some challenges meeting reporting requirements, however, these challenges did not affect the Complainant's performance evaluations significantly enough to drop his performance below "solid."

Testimony offered by Trainer and Inspiro Operations Manager Brent Smith indicates the Complainant was "at or near to the top of the Trainers in the entire enterprise." Vice President of Operations Rowena "Weng" Hernaez Castro described her impression of the Complainant as "a good trainer, a leader at the Madison site and a trusted member of the team."

It is evident that as a "leader at the Madison site," the Complainant certainly felt the strains of his site's efforts to employ an additional 100 sales agents to bring the site's agent count to 200 and did share the challenges associated with this increase with his superiors. The Complainant

offered testimony on a November 8, 2017 email thread exchanged with Condicion, in which Condicion relayed his concern about the Complainant's training class, saying, "Just between you and me, what have you observed with these employees?" The Complainant told Condicion, "This class is one of the most unusual classes I've had in a long time. My gut feeling is that the pressure to increase head-count is resulting in a less selective process...some of them probably should not have been hired in the first place."

The Complainant assisted in the development of CAT to help develop the skills of underperforming employees and was the longest-tenured Trainer on the Madison site's staff. It can be expected that the Complainant's feedback in this exchange would be particularly valuable.

Testimony from Smith indicated that within 24 hours of the Complainant and Condicion's November 8, 2017 emails, an issue with this "unusual class" arose. Smith asserted he supervised the Complainant's class in the ABAY, while the Complainant used the restroom. Smith testified that during his time with the class, trainee Lynn Olson—who had been deemed unfit for hire by Talent Acquisition but had been hired anyway due to her acquaintance with a Team Lead—got upset when she was unable to complete a task. Smith testified that Lynn Olson took a call with a potential customer, spoke using profanities, took off her headset, threw it down, and left the room, which led Smith to believe Lynn Olson had abandoned her job.

At the request of the Complainant, on November 9, 2017, Kristina Glascock contacted Lynn Olson to ask about the incident in the ABAY. The Complainant informed Glascock that he would be happy to have Lynn Olson back if she chose to return. After speaking with Lynn Olson, who claimed the Complainant was often "nowhere to be found," Glascock reported the incident to Knox Krueger and Stake via email. This incident triggered the November 14, 2017 Notice to Explain, which cited possible "gross or habitual negligence in the performance of assigned duties" and resulted in the Complainant serving a seven-day preventative suspension.

Shortly after the expiration of his seven-day preventative suspension, the Complainant was called to the November 28, 2017 termination meeting with Stake and Knox Krueger, who told the Complainant that he was being terminated "at-will" and "without explanation." The Complainant testified that he inquired whether the termination had anything to do with the November 14, 2017 Notice to Explain. In his testimony, the Complainant states that he was explicitly told his termination had nothing to do with this Notice to Explain.

The Respondent's failure to provide an explanation for its decision to terminate the Complainant at the time of termination gives rise to the inference that the Respondent's true reason was an impermissible one.

Hernaez Castro testified the Complainant's termination was coded as "at-will" so that it would be easier for the Complainant to find another job. She testified the true reason for his termination was due to his "gross offense." This, coupled with her testimony revealing undisclosed email correspondences concerning the Complainant found nowhere in the record, leaves the Hearing Examiner the quandary of determining whether the Respondent's claim of the Complainant's apparent "gross offense" is also deceitful. The willingness of the Respondent to mischaracterize the termination damages the Respondent's credibility and casts doubt on the Respondent's presentation of a legitimate, nondiscriminatory explanation for its decision to terminate the Complainant.

Furthermore, the primary substantiation of the Respondent's claims that the Complainant was terminated due to "gross or habitual negligence in the performance of assigned duties" seems to hinge largely on the testimony of Lynn Olson, as the Respondent offered no other verifiable, first-hand evidence to the record to support the Complainant's alleged poor performance. It is not likely a reasonable person would be convinced by Lynn Olson's first-hand testimony alone to substantiate claims that the Complainant was habitually "missing" for long periods and negligent with performing his assigned duties. Lynn Olson abandoned her shift after her inability to perform a task, effectively quitting without notice. She only complained about the Complainant after the fact—when Glascock called her. Lynn Olson seemingly attempted to justify her actions by passing the blame of her poor performance onto her Trainer, the Complainant. It is notable that Lynn Olson was originally hired for a less complex position, selling another product, "Sling-TV."

The Respondent claims the investigation to the November 14, 2017 Notice to Explain did, in fact, conclude the Complainant had been grossly or habitually negligent. However, the Respondent failed to provide any documentation to corroborate there was any investigation conducted. Glascock and Knock Krueger's testimony gives inference that there was no such investigation, as they each were unable to provide any details into the particulars of the Respondent's alleged investigation. This failure to produce may also be seen as evidence of an intent to conceal the true reason for terminating the Complainant.

As the Complainant trained a significant portion of the call center employees—hundreds of employees over his tenure with the company—one would expect a pattern of trainee complaints or disciplinary action indicating the Complainant had a history of poor performance. While Hernaez Castro did claim she "heard" there were possibly other claims mirroring Lynn Olson's, she maintained she never saw any formal documentation to substantiate these claims; no documentation of these claims has ever been produced by the Respondent.

The only actual disciplinary action the Respondent offered was a Notice to Explain from November 2016, which resulted in the Complainant's exoneration of all allegations. Testimony from both the Complainant and Glascock confirm the Complainant was never found in violation of the Respondent's Code of Conduct during his four years employed by the Respondent.

The evidence in the record shows that Complainant was adequately performing in his position. The Complainant has met the second element of the *prima facie* claim.

The Hearing Examiner now turns to whether or not the Complainant suffered an adverse employment action. It is clear from the record that Complainant's employment with the Respondent was terminated, establishing the third element of the Complainant's *prima facie* claim.

Finally, the Hearing Examiner approaches the issue of whether there was a causal link between the Complainant's membership in a protected class and the Respondent's termination of the Complainant's employment, by determining if the Complainant was either replaced by someone not within the protected class, and/or the employer treated a similarly situated employee not in the protected class more favorably.

Shortly after his recommendation that 23-year-old Kasey Olson be moved into a Trainer position, a recommendation that was rejected by the Respondent, the Complainant was terminated. Closely following the Complainant's termination, Kasey Olson was promoted to the

vacant Trainer position. The Complainant fulfills both of the elements or possible circumstances to indicate discrimination did occur.

In Cronk v. Reynolds Transfer and Storage, MEOC Case No. 20022063 (Comm. Dec. 3/5/2007; Ex. Dec. 8/29/2006; Comm. Dec. 2/28/2005; Ex. Dec. 9/13/2004); Reynolds Transfer & Storage, Inc. v. City of Madison Department of Civil Rights, Equal Opportunities Commission, 2000 CV 1100 (Dane Cty. Cir. Ct. 10/19/2007), Judge Bartell wrote, "A significant age disparity is highly probative of discriminatory animus and can be used to state a *prima facie* case under the McDonnell Douglas methodology. See Robin v. Espo Engineering Corp., 200 F.3d 1081, 1090 (7th Cir. 2000) ("Accordingly, we require that Robin present the following... Espo hired someone else who was substantially younger or other such evidence that indicates that it is more likely than not that his age or disability was the reason for the discharge."); Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1178-79 (7th Cir. 1997) ("To stave off summary judgment, Coco had to show that he was performing up to the employer's legitimate expectations and that he was replaced by a much younger person." (citations omitted)).

The 24-year difference between the Complainant's age and Kasey Olson's is, in fact, probative of a discriminatory animus. Further, the 15-year difference in age between the Complainant and the rehired Muldoon, who had previously abandoned his position under circumstances that constituted a "grave offense" under the Respondent's Code of Discipline, further supports this assertion.

The fact that Kasey Olson had been originally recommended for promotion to a Trainer position is undercut by the Respondent's own determination that she was not qualified for the position. For the Respondent to turn around and place Kasey Olson in the exact position for which she was previously rejected casts doubt on the Respondent's actions.

In her testimony, Glascock indicated that 14% of Respondent's terminated employees in 2017 were 40 years of age or older. The Hearing Examiner takes note of this fact, but as the referenced terminated employees did not perform duties or have responsibilities that were substantially similar to those of the Trainer position, this fact is not particularly persuasive. Regardless, the employment status of these other terminated employees does not absolve the Respondent's choice to terminate the Complainant and replace him with someone approximately half his age.

The Complainant has shown, by the greater weight of the credible evidence, that age, at least in some major part, motivated his termination. This finding shifts the burden to the Respondent to offer a legitimate, nondiscriminatory explanation for the Complainant's termination.

The Respondent indicates that the Complainant was terminated as a result of inquiries made after Glascock's discussion with Lynn Olson. These inquiries led to the conclusion that the Complainant was habitually and grossly negligent, a grave offense in the Respondent's disciplinary scheme.

This proffered explanation meets the Respondent's burden to set forth a legitimate, nondiscriminatory explanation for its actions. This burden is merely one of production and not one of proof.

Having met its burden of production of a legitimate, nondiscriminatory reason for the Complainant's termination, the burden shifts to the Complainant to demonstrate that the

Respondent's proffered explanation is either not credible or represents a pretext for an otherwise discriminatory explanation. The proffered nondiscriminatory explanation—that he was terminated solely because he was habitually and grossly negligent—is not credible.

The Respondent's attempts to characterize the Complainant's work as inadequate is directly supported only by the first-hand testimony of Lynn Olson, an employee who had been deemed unfit for hire by Talent Acquisition; her claims of the Complainant's poor performance came only after she had abandoned her shift. Olson's testimony in general lacked credibility. She was surly when questioned and seemed not to take seriously her oath. Her testimony was vague as to time and circumstances. The Hearing Examiner gives her testimony no weight at all.

Hernaez Castro further undercut the Respondent's credibility when she testified the Complainant's "at-will" termination code was not reflective of the reasoning behind the Complainant's termination, instead testifying after an investigation into the November 14, 2017 Notice to Explain the Complainant was fired for negligence. Neither Hernaez Castro, nor the Madison site HR team in 2017, Knox Krueger and Glascock produced any documentation to support such an investigation ever took place. Further, Knox Krueger, Hernaez Castro, and Glascock all failed to offer testimony regarding the alleged investigation in any detail whatsoever. It is evident the Complainant was replaced by Kasey Olson, who is 24 years younger than the Complainant. Also concerning is the fact that Muldoon, 15 years younger than the Complainant and previously terminated for a "grave" offense, was rehired, while the 47-year-old Complainant was terminated "at will".

The fact that the Respondent has given two different reasons for the Complainant's termination, simply an "at will" termination and a termination for cause, further cast doubt on the Respondent's credibility.

In addition to Olson's lack of credibility on the stand, Knox Krueger and Glascock's testimony was delivered in a manner that causes the Hearing Examiner to question the credibility of their testimony. Glascock was visibly under stress on the stand and needed several breaks to compose herself. While this may have been due to nervousness about the act of testifying, the Hearing Examiner believes that her reticence was, in part, due to a lack of confidence in her testimony.

As with Olson, Knox Krueger's testimony was delivered with an attitude of having been put upon to testify. She had difficulty remembering dates, names and other key facts that would have lent credibility to her testimony.

The Hearing Examiner does not suggest that the Complainant was a perfect employee or that he flawlessly executed his duties. The record does demonstrate that the Complainant was a solid performer and for the most part was an important and successful employee of the Respondent.

In totality, these events and circumstances call into question the legitimacy of the reason the Respondent offered to justify terminating the Complainant. The record in this matter leads to the conclusion that the greater weight of the credible evidence demonstrates, at least in part, the Respondent was motivated to terminate the Complainant on the basis of his age.

At this point, the Hearing Examiner would usually analyze the record and propose a make whole award, however, this matter was tried under a bifurcation of liability and damages. Having

found that the Respondent is liable for the Complainant's wrongful termination, the Hearing Examiner will give the parties an opportunity to reach an agreement as to damages. If, after a reasonable period of time, an agreement cannot be reached, the Hearing Examiner will schedule further proceedings on the issue of damages.

Signed and dated this 19th day of January, 2022.

EQUAL OPPORTUNITIES COMMISSION

A handwritten signature in black ink, appearing to read "Clifford E. Blackwell, III", written over a rectangular stamp area.

Clifford E. Blackwell, III
Hearing Examiner

Cc: Attorney Richard Rice
Attorney Erin Rome