

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

Cindy L Plummer
Post Office Box 122
McFarland WI 53558

Complainant

vs.

Cuna Mutual Group
5910 Mineral Point Rd
Madison WI 53701

Respondent

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

CASE NOS. 20092108 and 20102067

EEOC CASE NO. 26B200900051 and
26B201000034

On January 9, 10, 11, 12, 17, 18 and 19, 2012, Clifford E. Blackwell, III, the Hearing Examiner for the Madison Equal Opportunities Commission, held a public hearing on the merits of the complaint in the above captioned matters which were consolidated for hearing. The Complainant, Cindy L. Plummer, appeared in person and by her attorneys Fox and Fox S.C. by Michael Fox and Mary Kennelly. The Respondent appeared by its corporate representative, Emily Gnam, and by its attorneys Melli Law, S.C. by Thomas R. Crone. Based upon the record of those proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Cindy Plummer, is a female over the age of 40 (DOB 07/25/59). At all times relevant to this complaint, she was a resident of the city of McFarland, WI.
2. The Respondent, CUNA Mutual Insurance Group, is a Wisconsin corporation with more than 3,500 employees worldwide, including over 200 in its Madison office. Its principal place of business is 5910 Mineral Point Rd., Madison, WI 53705.
3. On July 1, 1981, Respondent hired Gary Hertel (DOB 12/25/1947). At the time of Complainant's termination, Mr. Hertel was HR Business Process & Management Leader.
4. On April 1, 1987, Respondent hired Gary Bidwell (DOB 6/21/1960). At the time of Complainant's termination, Mr. Bidwell was a Project Management Consultant.
5. On December 11, 2000, Respondent hired Marc Janes (DOB 2/20/1963). At the time of Complainant's termination, Mr. Janes had just been moved into the role of Human Resources Service Center Director from the role of Process Quality Consultant.

6. Sometime during January 2005, Respondent hired Scott Mayer (DOB 5/10/1950). At the time of Complainant's termination, Mr. Mayer was Vice President of Total Rewards.
7. On March 21, 2005, Respondent hired Jane Fahey (DOB 1/20/67) as its Employee Resource Center (ERC) Manager. At the time of Complainant's termination, Ms. Fahey was her supervisor and reported to Scott Mayer.
8. On June 20, 2005, Respondent hired Complainant as its Employee Resource Center Customer Service Manager. She was hired by and reported to Jane Fahey.
9. On December 4, 2006, Respondent hired Jennifer Schmeiser (DOB 3/21/1975) as its Payroll Benefits Manager.
10. On April 28, 2008, Respondent hired Amanda (Mandy) Eisch (DOB 6/21/1977) as its HRIS/Payroll Manager.
11. In July 2008, Ms. Schmeiser was promoted from Payroll Benefits Manager to Project Manager.
12. On November 11, 2008, Respondent, via Jason Pistulka (DOB 6/13/1970), posted an opening for a Human Resources Manager on Respondent's Authoria internal job posting system. This position was also posted externally.
13. On November 18, 2008, Ms. Schmeiser applied internally for the Human Resource Manager position.
14. On November 21, 2008, Complainant met with Mr. Pistulka to discuss the Human Resources Manager position.
15. At some point during that meeting, Mr. Pistulka mentioned in a general way that he enjoyed working with young college graduates.
16. At the end of that meeting, Complainant informed Mr. Pistulka that she was not yet sure she would apply for the open position.
17. During his employment with Respondent, Mr. Pistulka had a history of hiring younger, recently out of college individuals. He testified at hearing that the average age of candidates he had hired during that time was 30. As of November 2008, Ms. Schmeiser was 33, while Complainant was 49.
18. After the meeting, Complainant sent Mr. Pistulka an email thanking him for meeting with her and stating she looked forward to their next conversation. The email did not say anything about her intentions to apply.
19. On November 25, 2008, Complainant uploaded her resume and cover letter to begin her application for the Human Resources Manager position. However, she still had not informed Mr. Pistulka or her supervisor that she had decided to apply.

20. On November 26, 2008, the job posting for Human Resources Manager closed. At this time, Jennifer Schmeiser was the only internal applicant whose application was marked by the system as viewable.
21. Mr. Pistulka checked with the Respondent's recruiting office and was told that Ms. Schmeiser's application was the only one for the Human Resources Manager position. Later that same day, he offered Ms. Schmeiser the position.
22. On November 28, 2008, Complainant's application was "created" by the system.
23. The delay between Complainant's November 25 upload date and her application's "created" date was the result of the same glitch that caused Ms. Schmeiser's application to be "created" two days after she had uploaded it.
24. Until the system marked Complainant's application as "created," there was no way for Mr. Pistulka to view it.
25. Under normal circumstances, the Authoria system marks a candidate's application as "created" on the same date as they upload their resume and cover letter.
26. It was Mr. Pistulka's practice not to check the Authoria system for applicants other than those who had confirmed their interest to him or those that the system indicated had applied.
27. As of November 26, 2008, Mr. Pistulka did not know Complainant had applied for the Human Resource Manager position. The only internal applicant he knew of was Ms. Schmeiser.
28. Although Ms. Schmeiser had been in her previous position for less than one year, her supervisor, Gary Hertel, waived the one year wait requirement between changing jobs. Thus, Ms. Schmeiser was able to accept the position as Human Resources Manager.
29. Beginning in September 2008, Scott Mayer initiated a project to create a group referred to as the HR Service Center. Its purpose would be to process routine, transactional work then being handled by HR generalists. The project team in charge of creating this group was led by Jane Fahey and included Complainant, Jennifer Schmeiser, and four other employees.
30. Complainant's role on the team was ERC Liaison. As ERC Customer Service Manager, she was the interface for transactional work coming from HR generalists. Thus, it was anticipated she would be the interface for the HR Service Center and help acclimate the new HR Service Manager.
31. On or about April 2, 2009, the position of Human Resource Service Manager (HRSM) was finalized.
32. On or about April 2, 2009, Respondent's Human Resources Leadership Team (HRLT) identified four potential candidates for the HRSM position: Allison Osting, Laura Schroeder-Trudell, Nadia Lazaro and Jaime Benton. All four were female.
33. Between April 2 and April 20, the HRLT contacted all four candidates. At least two, Ms. Osting and Ms. Schroeder-Trudell, expressed interest and received formal interviews.

34. On April 22, 2009, Respondent's CEO and President Jeff Post issued a company-wide memo stating the need to cut costs by \$50 million in 2009 and a further \$20 million in 2010.

35. Pursuant to this memo, Scott Mayer's superior Kerry Piercy met with her direct reports, including Mr. Mayer, and asked each of them to come up with cost and headcount reductions.

36. Mr. Mayer then met with his direct reports as a group and asked each of them to come up with names of people in their groups who were candidates for a reduction in force. Mr. Mayer's direct reports were Brenda Page (DOB 5/17/55), Teri Edman (late 50s), Jane Fahey (DOB 1/20/67), Gary Hertel (DOB 12/15/47) and Connie Kielty (late 40s to 50).

37. After this meeting, with the input of his direct reports, Mr. Mayer came up with and eventually finalized a plan to cut costs in his department. This plan included reducing headcount by several means—by layoffs, by combining positions, and by either not filling open positions altogether or, when necessary, filling them in a cost-neutral manner.

38. Jane Fahey proposed eliminating two customer service positions in the ERC and leaving one open position vacant. Mr. Mayer said he was fine with that. Ms. Fahey also asked about filling the HR Service Manager position, and Mr. Mayer said yes, that the position was important enough to fill.

39. On April 23, 2009, Jennifer Schmeiser sent out an email to HR staff announcing they were filling the newly created HRSM position and anyone interested should contact her. A copy of the job description was attached.

40. Two employees, Diana Clark (age unknown) and Linda Rasmussen (DOB 8/30/1949) expressed interest in response to that email.

41. Ms. Fahey did not consider Ms. Rasmussen qualified based on her experience compared to the qualifications for the position. The HRLT also did not consider Ms. Clark, although the record does not mention why.

42. As of April 29, 2009, therefore, all six current and former candidates for the HRSM position were women.

43. By April 28, 2009, Scott Mayer had decided against adopting Ms. Fahey's suggestions with respect to cost-cutting measures. Instead, he had begun developing a plan that, even in its early stages, included laying off the Complainant and Ms. Fahey. His initial plan involved, among other things, replacing the Complainant and another female employee with Gary Bidwell and replacing Ms. Fahey with Gary Hertel. He also initially planned to lay off Marc Janes entirely. Mayer had told his direct reports not to discuss the potential layoffs with anyone and to keep the matter confidential. Despite this stated need for secrecy, Mayer himself told Hertel and Eisch of his plans to lay off Fahey and the Complainant and the combining of their positions. Mayer again asked Hertel and Eisch not to tell others of Mayer's plans. These secret discussions appear to have occurred early in May of 2009.

44. After he had decided to lay off Ms. Fahey, Mr. Mayer stopped discussing cost-cutting measures with her. However, he continued to hold discussions with her about filling the HR Service Manager position.

45. Mr. Mayer did not inform either Ms. Fahey or Complainant that he planned to lay them off.

46. On April 29, 2009, Ms. Fahey contacted Mr. Mayer and informed him that Ms. Lazaro and Ms. Benton were not interested, but that she had interviewed Ms. Osting and Ms. Schroeder-Trudell and felt that they should offer the position to Ms. Osting.

47. Sometime between April 29 and May 19, 2009, Ms. Osting turned down the offer.

48. On May 19, 2009, the position was offered to Ms. Schroeder-Trudell, who accepted it.

49. Sometime between May 19 and 26, 2009, Ms. Schroeder-Trudell received an outside offer of employment and accepted it instead.

50. Mr. Mayer's (DOB 5/10/50) final headcount and cost reduction plan, as of May 22, 2009, included: laying off Ms. Fahey (DOB 1/20/67) and merging her position with Mr. Hertel's (DOB 12/25/47); laying off the Complainant (DOB 7/25/59) and merging her position with that of Mandy Eisch (DOB 6/21/77); laying off five employees without combining their positions with anyone else's, including Marc Janes (DOB 2/20/63) and Gary Bidwell (DOB 6/21/60); transferring one employee to another group within Respondent; and assigning one employee the Benefits Manager role.

51. Between March and May 2009, Complainant and Ms. Fahey had several conversations about the HRSM position in relation to Complainant's own job. Complainant at one point asked Ms. Fahey if she should be concerned about her own job, because the new position was so similar.

52. The job description for the HR Service Manager position was based on the job description for Complainant's position. The new position was the same pay grade as Complainant's position. The requirements for both positions were nearly identical, except that the HRSM position asked specifically for strong conceptual and problem-solving skills (in addition to analytical), for experience in executing large-scale projects, and noted the desirability of a Professional Human Resources or Senior Professional Human Resources designation or the ability to obtain one within two years.

53. At some point, Complainant indicated that if her job was going to be taken over or eliminated, that she wanted to apply for the HR Service Manager job. Ms. Fahey assured her that the two jobs were intended to be similar because they would work closely together, and not to worry about her current job.

54. Sometime in May 2009, Ms. Fahey recounted this information to Mr. Mayer. During this conversation, Ms. Fahey stated specifically that Complainant had asked Ms. Fahey about applying for the HRSM position because of her concerns about her, Complainant's, own job. Ms. Fahey asked Mr. Mayer whether or not she had correctly reassured Complainant that Complainant's job was safe. Mr. Mayer replied that she had. As noted above, however, Mr. Mayer had already begun planning to eliminate both Complainant's and Ms. Fahey's positions.

55. On May 26, 2009, Ms. Fahey and Mr. Mayer met to discuss candidates for the HRSM position given Ms. Schroeder-Trudell's departure. They listed the two candidates already

identified by the HR Leadership Team who had not yet been interviewed, and several other people who had either expressed interest or who they felt should be considered.

56. At this point, Mr. Mayer told Ms. Fahey to put Marc Janes's name down, because he said Mr. Janes was the best candidate.

57. At that same meeting, Ms. Fahey mentioned several other names, and pointed out that Complainant had also expressed interest. Mr. Mayer said to put Complainant's name down, but that they weren't hiring her.

58. Apart from Mr. Janes, all of the candidates identified at this meeting—Jaime Benson, Nadia Lazaro, Becky Falk, Nancy Blindauer, Jess Mathias, Diana Clark, Linda Rasmussen, Annette (last name unknown) and Complainant—were women.

59. On May 27, 2009, Connie Kielty sent an email to all HR staff announcing Ms. Schroeder-Trudell's departure and stating that Mr. Mayer and Ms. Fahey would be working on filling the HR Service Center Manager position.

60. On May 27, 2009, in response to Ms. Kielty's email, Marc Janes first expressed interest in the HRSM position. He did not submit a resume or application, however.

61. On June 2, 2009, Mr. Mayer again met with Ms. Fahey to discuss Mr. Janes's qualifications for the HRSM position.

62. Ms. Fahey was familiar with Mr. Janes's skill set, because he had been one of her subordinates for two or three years and she had worked closely with him on several projects. Based on this knowledge, she warned Mr. Mayer that Mr. Janes did not have the skill set to be in a customer service facing position, but agreed that he might manage in the short term because of the process work the position still required.

63. Mr. Mayer responded that they needed to fill the position and that they needed Mr. Janes's project management skills in that position in the short term.

64. There was no discussion of Mr. Janes's salary in spite of Mr. Mayer's then-ongoing attempt to cut costs in his department. Mr. Janes's salary in 2008 had been around \$85,000. Complainant's 2008 salary was approximately \$70,000.

65. Ms. Fahey was also familiar with Complainant's skill set, because she had hired Complainant and had been Complainant's direct supervisor throughout Complainant's employment. Based on her observations of Complainant and her knowledge of Complainant's background, Ms. Fahey felt that Complainant was fully qualified for the HR Service Manager position.

66. On June 2, 2009, Marc Janes was hired into the HRSM position. He did not interview with Ms. Schmeiser as Ms. Osting and Ms. Schroeder-Trudell had done.

67. On June 4, 2009, Mr. Mayer informed Complainant she was being laid off, effective July 3, 2009. Her last scheduled day of work was to be June 19, 2009.

68. At that same termination meeting, Mr. Mayer told Complainant that her job was being combined with that of Mandy Eisch.

69. When Complainant asked why she had not been considered for the HR Service Manager position, Mr. Mayer stated that she had been on a list of qualified individuals but had not made the cut.

70. Mr. Janes did not meet the minimum educational or background requirements for the HRSM position; he had a bachelor's in engineering and less than five years' total experience in Human Resources. Complainant met both the educational and background requirements; her bachelor's was in management with an emphasis on human resources, she was working on her master's in human resources, and she had well over five years' progressively responsible experience in Human Resources.

71. Both Mr. Janes and Complainant had proven project management skills, analytical and problem solving abilities and experience with improving processes.

72. When Complainant asked why she had not been considered for the combined ERC Customer Service/Payroll Manager position, Mr. Mayer said that he had wanted to offer the position to the "newest manager" and had not considered Complainant.

73. The "newest manager" was apparently a reference to Mandy Eisch. Ms. Eisch was retained in the combined position, for which the only potential candidates were herself and Complainant.

74. The combined position was never posted, and Complainant was never given a chance to apply.

75. As of June 4, 2009, Ms. Eisch had had some customer service experience in previous positions, but felt that customer service was "a step back" for her.

76. Ms. Eisch had articulated this sentiment when she filled in for Complainant for six weeks in June 2008. Ms. Fahey, who supervised both Ms. Eisch and Complainant, was primarily neutral in her comments about Ms. Eisch's performance during this time.

77. By contrast, Complainant had performed payroll management duties in addition to her customer service duties between October 2005 and December 2006, and Ms. Fahey praised Complainant's strong relationships with staff and the responsibility she had taken for managing the group during that time period.

78. Also on June 4, 2009, Mr. Mayer told Ms. Fahey she was being laid off. Gary Hertel then took over her job as ERC Manager. However, Mr. Hertel's skills, like Mr. Janes', were more project-oriented than customer service oriented, while Ms. Fahey's job was hands-on and required technical experience with payroll, benefits and HR administration.

79. Also on June 4, 2009, Mr. Mayer told Mr. Bidwell he was being laid off. However, before his layoff took effect, Mr. Mayer referred him to a job opening Respondent had available in another area.

80. All three male employees, Hertel (\$115,000/yr.), Janes (approx. \$85,000/yr.) and Bidwell (\$91,325/yr.), were earning more than Complainant (\$68,700/yr.). Mr. Hertel, who replaced Ms. Fahey (\$95,000/yr.), was also earning more than Ms. Fahey.

81. Mr. Mayer did not refer Ms. Fahey or Complainant to any of Respondent's other job openings, even after he had done so for Bidwell and had pushed for Janes's hire into the HRSM position.

82. On July 15, 2009, Complainant filed her initial complaint, alleging age and sex discrimination related to failure to promote her to HR Manager in November 2008, failure to consider her for HR Service Manager in June 2009, and failure to consider her for the combined ERC Customer Service/Payroll Manager position in June 2009.

83. Sometime between July 22 and 30, 2009, Respondent received a copy of the complaint.

84. On August 4, 2009, after less than two full months as HR Service Manager, Marc Janes announced he was leaving Respondent's employ for a new job. His explanation to coworker Mandy Eisch was that the ERC was too "needy" and he couldn't take working with them anymore.

85. On August 6, 2009, Respondent posted the HR Service Manager position on its Authoria system. The application deadline was August 19, 2009. Three current employees submitted applications for the HRSM position before the deadline, two males and one female; however, none of them were considered qualified and none were offered the job.

86. After the application deadline had passed, Brenda Page (DOB 5/17/55) took over the job's responsibilities in addition to her work as Director of Labor Relations. Because Respondent was still facing possible budget cuts, and because the position would involve working closely with Respondent's Human Resources staff, the job was limited to internal applicants only. This was consistent both with the way it had been handled from April to June, 2009, and with Mr. Mayer's attempt to fill the position on a cost-neutral basis.

87. Because the HRSM position was posted internally only, none of the 64 employees Respondent laid off in June or July 2009 were able to apply for it in August 2009. Complainant is the only one of those 64 who filed a complaint.

88. By limiting the HRSM position to internal applicants only, Respondent did not treat Complainant any differently than any of the other 63 employees it laid off in June or July 2009.

89. Further, after the HRSM position was taken down without being filled in August 2009, Brenda Page (DOB 5/17/55) took over the responsibilities then associated with that job, in addition to her own work as Director of Labor Relations.

90. Because Complainant had not asked to be kept informed of internal job postings, Respondent had no way of knowing she would be interested in the HR Service Manager position in August 2009.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes, age, sex, and an individual who exercised a right protected by the Ordinance, and is subject to the provisions of the Equal Opportunities Ordinance.
2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to its provisions.
3. The Respondent did not discriminate against the Complainant on the basis of age when it hired Jennifer Schmeiser into the position of Human Resources Manager in November of 2008. Schmeiser's hire did not violate the Equal Opportunities Ordinance.
4. The Respondent did discriminate against the Complainant on the basis of her sex when it did not consider her for the position of Human Resource Service Manager and laid her off as of July 3, 2009 in violation of the Equal Opportunities Ordinance.
5. The Respondent did discriminate against the Complainant on the basis of age when it did not consider her for the combined position of ERC Customer Service Manager/Payroll Manager that was given to Mandy Eisch, a much younger coworker, in violation of the Equal Opportunities Ordinance.
6. The Respondent did not retaliate against the Complainant for her exercise of a right protected by the Ordinance by limiting applications for the vacant Human Resources Service Manager position to internal candidates subsequent to August 4, 2009.

ORDER

It is hereby ordered that once this order becomes final, there will be further proceedings to set a remedy to make the Complainant whole for the violations of the Ordinance. Those claims for which the Hearing Examiner has found no discrimination or retaliation are dismissed. Once a make-whole remedy has been set, the Complainant may submit a petition for the costs and fees including a reasonable attorney's fee.

MEMORANDUM DECISION

The record in this matter is extensive and the parties, not surprisingly, take very different views of the quantity and quality of the proof. Both parties agree that this complaint should be addressed utilizing the burden shifting approach set forth in the McDonnell Douglas/Burdine paradigm. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Use of this approach is especially appropriate where there is a lack of direct evidence of discrimination and proof relies on the inferences to be gleaned from the exhibits and the testimony of the parties.

The complaint sets forth four general claims of discrimination and retaliation. While initially set forth in terms of specific protected classes, in her reply brief, the Complainant asserts that the claims should be examined through the lense of "intersectional discrimination." Under this theory of discrimination, the finder of fact must look at how two or more protected classes might interact to explain what happened in a given circumstance. While it is true that the Commission has applied this approach when it appeared appropriate (see e.g., Dickson v.

Woodman's, MEOC Case No. 21919 (Ex. Dec. 10/23/1995)), the Respondent has not had an opportunity to address this particular aspect of the Complainant's argument. It does however, appear to be a legitimate response to the Respondent's claim that the Complainant has "cherry picked" her claims to fit the particular circumstances of her various allegations.

The parties address the Complainant's claims in roughly chronological order. In this approach, the first claim is that of the Complainant's charge that she was discriminated against on the basis of her age when the position of HR Manager was given to Jennifer Schmeiser on November 26, 2008.

The HR Manager position is a generalist position within the Human Resources structure of the Respondent. During the fall of 2008, Jason Pistulka, a Director of Human Resources, was recruiting for someone to fill such a position in his department. In this effort, Tina Wallace from the Recruiting Office of the Human Resources Department was assigned to assist Pistulka with this hire.

When a position is to be offered by the Respondent, it utilizes a computerized system for receiving applications and associated documents known as the Authoria system. It is operated by an outside vendor, but has support and liaison functions internal to the Respondent. The individual holding this support position at the time was Ms. Christa Walter-Doering.

When operating correctly, an employee uploads his or her application and related documents to the Authoria system and the system will "create" a file, presumably as soon as the application is completed and uploaded to the system. From the testimony in this matter, it appears that in November of 2008, the Authoria system was not performing as described and there could be a lag time between the date and time an application was uploaded to the time when the file was "created" by the system. According to Walter-Doering, one's application could not be accessed nor could any changes be made to the application until the file was successfully created. Even then, Walter-Doering testified that the only date that could be entered or changed was the date of hire.

The record indicates that Ms. Schmeiser, who was 33 years old at the time of her application, uploaded her application for Pistulka's HR Manager position on or about November 18, 2008. Unfortunately, the record does not indicate when Ms. Schmeiser's application file was created on the Authoria system, but, at a minimum, it was prior to the closing date for the position for which she was applying.

The record establishes that the Complainant uploaded an application for the same position late in the day on November 25, 2008 prior to the position's closing on November 26, 2008 just after midnight. At the time of her application, the Complainant was 49 years old. It does not appear that the Authoria system "created" an application file for the Complainant until November 28, 2008, after the closing date for the position.

Pistulka offered the position to Schmeiser on November 26, 2008 after checking with the recruiting official, presumably Wallace, to see if there were any other applicants. Pistulka did not check the Authoria system himself at that time.

It is these facts along with other corroborating information that the Complainant asserts establishes her claim of discrimination on the basis of age.

The Complainant contends that Pistulka has a history of preferring to hire younger candidates, i.e., those recently graduated from college and generally in their 20s or 30s. To this end, the Complainant produced records and testimony demonstrating that Pistulka's previous four hires all fell within that age range.

Additionally, the Complainant recounted a conversation with Wallace in which Wallace is alleged to have stated that the position was intended for Ms. Schmeiser all along and that is why the Complainant was not further contacted about the position.

The Complainant states that Pistulka knew or should reasonably have known of her interest in the position as she had an interview with Pistulka shortly before the date on which applications were due. She ended that interview indicating that Pistulka would be hearing from her again or that she looked forward to their next meeting and confirmed that information in an email to Pistulka. The Complainant did not definitely indicate that she would be applying for the position nor did the Complainant notify her supervisor that she was going to apply for the HR Manager position.

On November 26, 2008, Pistulka asked someone in recruiting if there were any additional applications for the HR Manager position. Once he was told that there were none, Pistulka offered Schmeiser the position, which she accepted.

The Complainant argues that Pistulka's history of hiring younger candidates recently out of college, the Complainant's expression of interest in the position during her meeting/interview with Pistulka, Pistulka's failure to look to see if there were additional applicants in the Authoria system, and Pistulka's and the Respondent's varying descriptions of what happened to the Complainant's application, along with the difference in ages between Schmeiser and the Complainant, all mesh to demonstrate that the Complainant was the victim of age discrimination when the Respondent hired Schmeiser for the HR Manager position on November 26, 2008.

The Complainant asserts that during her interview/meeting with Pistulka, Pistulka appeared to be trying to discourage the Complainant's interest in the position. The Complainant contends that Pistulka tended to minimize the aspect of the position relating to qualifications the Complainant possessed or was in the process of obtaining. As further evidence of Pistulka's efforts to dissuade the Complainant from applying, Pistulka spent much of the interview not talking about the position, but rather, his interest in adopting a child.

The Complainant additionally argues that the Respondent's varying explanations for why the Complainant was not considered for the position, which vary from the Complainant did not timely submit an application, to that the Complainant's application was delayed due to a "glitch" in the Authoria system.

The Respondent contends that there is no proof the Pistulka has a preference for hiring younger, recent college graduates and that the evidence presented by the Complainant falls short of demonstrating that contention. The Respondent does not specifically address the content and nature of the Complainant's interview/meeting with Pistulka. The Respondent does not acknowledge that its position with the respect to the Complainant's application has changed over time. It rests its defense on its understanding that Pistulka did not have access to the Complainant's application at the time he made his decision to hire Schmeiser and that he had no knowledge that the Complainant was actually going to apply for the position.

The *prima facie* case for this claim roughly put is that the Complainant is a member of the protected class “age,” that she was qualified for the HR Manager position for which she applied and that there is reason to believe that her age played a part in the Respondent’s decision to hire a younger candidate. There is, of course, the additional element of an adverse action or decision that affected the Complainant. As is typical, the most difficult of these elements is the final one that of a causal link between the Complainant’s age and the hiring of Schmeiser.

The differences in the Complainant’s age and that of Schmeiser, though not substantial is enough to find that the Complainant is a member of the protected class age. The Complainant was over 40 years of age and Schmeiser was under 40. The 16 years that separated them is enough to create a class that separates the Complainant and Schmeiser.

There does not appear to be any contention that the Complainant was not qualified for the HR Manager position. The record indicates that if the Complainant had not met the qualifications for the position, the Authoria system would not have permitted her application to be filed. Additionally, the Respondent does not seriously argue that the Complainant was not qualified for the position. It may believe that Schmeiser was the superior candidate, but Respondent does not appear to argue that the Complainant was not qualified for the HR Manager position.

Though over the course of this complaint, the Respondent has taken differing positions with respect to whether the Complainant had timely filed her application for the HR Manager position, at hearing, it appears the Respondent is willing to concede that the Complainant’s application was filed on November 25, 2008, shortly before the closing of the position’s application period.

The Complainant asserts that the causal link between the Complainant’s age and Pistulka’s decision to hire a younger candidate is demonstrated by several facts. First, Pistulka’s history of hiring young, recent college graduates, the fact that the position was “intended” for Schmeiser as stated by Wallace, statements of recruiters for the Respondent that the Respondent wanted to create a younger more energetic workforce as indicated by Linda Rasmussen, Pistulka’s lackluster interview/meeting with the Complainant, all serve to link the Complainant’s age as some part of the cause for Pistulka’s decision not to offer the position to the Complainant.

The Respondent attacks the sufficiency of the evidence relating to Pistulka’s possible preference for hiring younger, recent college graduates. Specifically, the Respondent contends that one can draw no conclusion about such a history without knowing of the qualifications and ages of other candidates for the positions in question here. Other than to question the accuracy of the Complainant’s recollection as to when Wallace told the Complainant that the position was intended for Schmeiser, the Respondent does not specifically deny that such a statement was made. With respect to the Complainant’s meeting with Pistulka, the Respondent argues that the meeting was held at the request of the Complainant to find out more about the position and that the Complainant did not indicate that she would definitely be applying for the position. The Respondent argues that it cannot be held responsible for a recruiter’s statement of the Respondent’s direction and even if it could, the statement testified to by Rasmussen was so old as to not be relevant.

The Hearing Examiner finds that the conflicts in the parties' positions can be resolved in different ways depending upon the contention. The bottom line for the Hearing Examiner is whether the facts once the disputes are resolved represent proof of the elements of the *prima facie* claim.

First with respect to the notion that Pistulka's past hires demonstrate or corroborate a preference for hiring younger employees, the Hearing Examiner agrees with the Respondent that without more explanation of the circumstances of those hires, this does not constitute proof. However, the anecdotal evidence, even without strict statistical verification is sufficient to create an inference of such a preference. The record demonstrates that Pistulka's immediate prior four hires fall within the range of Schmeiser's age. The Respondent's attack on the sufficiency of proof does not disturb the inference that the Hearing Examiner believes can be fairly drawn that Pistulka had a preference for hiring employees in an age range substantially younger than that of the Complainant.

The evidence of Wallace's statement whether the timing was accurately reported in the Complainant's deposition or at a date after the hire seems immaterial to the Hearing Examiner. At best Wallace's statement indicates that Pistulka had a particular interest in Schmeiser as a candidate, but fails to indicate why he had such an interest. One possible conclusion is that Pistulka saw Schmeiser as the type of younger employee that he seemed to prefer. Another possible reason for Pistulka's interest is Schmeiser's particular job skills and qualifications or even a friendship that would not interfere with the operation of the enterprise. The Hearing Examiner does not find Wallace's statement to be particularly helpful to meeting the Complainant's burden to establish a causal link between the Complainant's protected class and Pistulka's decision to hire Schmeiser.

The testimony of Rasmussen is somewhat more supportive of the Complainant's positions. Rasmussen stated that her belief in the truth of the recruiter's statement was sufficiently strong that it affected her willingness to apply for some open positions. While the recruiter's statement does not clearly tie the Respondent to such a "get young" movement, it does not strike the Hearing Examiner as the type of statement that a recruiter would make up out of whole cloth. Had the recruiter stated that the Respondent was seeking a more studied and stable workforce indicating a possible preference for perhaps older applicants, I think the Respondent would be willing to embrace such a statement. However, the Hearing Examiner agrees that Rasmussen's testimony indicating that the statement had been made at a somewhat remote date from the circumstances here limits the strength of any inference of causation to be drawn here.

The Hearing Examiner does not find Pistulka's conduct of the meeting with the Complainant to be so indicative of a desire to discourage the Complainant from applying for the HR Manager position. The meeting/interview was held at the behest of the Complainant at a time prior to her submission of an application. In fact, the Complainant, by the end of the meeting, was not sure herself if she would apply for the position. Pistulka had no incentive to treat the meeting as an interview of a job candidate given the Complainant's own unsettled mind. The Hearing Examiner does not find that the Complainant's indication that she looked forward to another meeting soon put Pistulka on notice that the Complainant was going to apply or wished a second meeting or interview. That is one inference one could draw, but an equally likely one is that the Complainant would see Pistulka around the offices or at meetings.

The Hearing Examiner concludes given the record as a whole and the inferences to be drawn from that record that the Complainant has made out a *prima facie* case of discrimination on the basis of age. The inferences to be drawn from Pistulka's recent history of hires, the Complainant's statement that Pistulka told her that he likes to hire younger, recent college graduates, Schmeiser's age, and Rasmussen's testimony about the Respondent seeking a younger more energetic workforce, all combine to convince the Hearing Examiner that it is more likely than not that the Respondent discriminated against the Complainant on the basis of her age when it hired Schmeiser. Some of the evidence is admittedly not strong, but when taken with the rest, the Hearing Examiner finds that the Complainant has made out a *prima facie* claim of age discrimination.

The Complainant's showing shifts the burden to the Respondent to produce a legitimate, nondiscriminatory explanation for its decision. The Respondent's explanation for why it did not further consider the Complainant's application is that at the time of decision, Pistulka did not know and had no reasonable way of knowing of the Complainant's application. Not knowing that the Complainant had submitted an application the evening before, Pistulka made a decision on the basis of the information available to him, i.e., that Schmeiser was the only candidate and that she was qualified for the position. The Hearing Examiner accepts this as a legitimate, nondiscriminatory explanation for the Respondent's action. If Pistulka did not know of any other candidates and after checking with his recruiter reasonably believed that there was no one else to be considered, his action in offering the position to Schmeiser is reasonable. The record shows that at best the Complainant expressed confusion about whether she would apply for the position. She did not inform anyone else that she was or had applied for the position including her own supervisor. Informing one's supervisor of a job application was recommended conduct, but was not required. Given these facts, the Hearing Examiner finds that the Respondent has met its burden of production, shifting the burden back to the Complainant.

The Complainant contends that the Respondent's proffered explanation is not credible given the shifting explanations offered by the Respondent at various times during the life of this complaint. The Complainant also argues that Schmeiser did not meet the minimum qualifications for the position in that she had not been in her current position for at least one year which appears to be required on the Respondent's application/posting.

The parties engage in a debate about the appropriate standard and type of proof is necessary to demonstrate a lack of credibility or pretext. The Respondent points to Johnson v. Webcrafters, MEOC Case No. 20042097 (Comm. Dec. 08/25/2006, Ex. Dec. 03/30/2006) as a decision of the Commission applying the principle that a showing of pretext must be tied to some additional evidence of discrimination. The Complainant points out that in that decision, the Hearing Examiner relied on Court of Appeals precedent that had been supplanted by the Supreme Court's decision in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000).

Reeves settled the dispute in the Circuit Courts of Appeals over the proper method and proof necessary for establishing pretext. Accordingly, the Hearing Examiner will, consistent with Reeves, consider both any additional evidence supplied by the Complainant as well as that evidence introduced to establish her *prima facie* case, along with evidence of a lie or false statement by the Respondent concerning its proffered explanation.

It is clear to the Hearing Examiner that over time, the Respondent's explanation for why it did not consider the Complainant's application has changed. Starting with the position that the

Complainant did not timely apply for the position as evidenced by the created date on the Complainant's application file, November 28, 2008, and ending with a claim that the Complainant timely applied but her application was lost in cyberspace for an inexplicable reason, there is no doubt that the Respondent's explanation has shifted. Between these two extremes, the Respondent contended that the Complainant had applied as an external candidate, not an internal one, and thus her application came in after the closing date.

It is difficult to know whether these shifting positions reflect a continuing refinement of the Respondent's information about its application system, or an intentional effort to confuse the finders of fact in this process, or to try various explanations to see which one might be accepted. There is no doubt that the Respondent's explanation has changed over time.

The Hearing Examiner cannot determine the degree of mendacity, if any, with which these alterations to the explanation were made. However, the Hearing Examiner is persuaded that the fact that the Complainant's application was not "created until November 28, 2008 despite her having completed her part of the process on November 25, 2008" was due to an inexplicable glitch in the Authoria system. Accepting this conclusion, the Hearing Examiner finds that Pistulka or his representative in the recruiting office were legitimately unaware that the Complainant had submitted a timely application for the HR Manager position. In reaching this conclusion, the Hearing Examiner finds that the Complainant never made it clear to Pistulka or anyone else that she intended to apply for the HR Manager position until after the fact.

The testimony of Walter-Doering to the existence of such a computer glitch is credible and, in the Hearing Examiner's mind corroborated by the Authoria documents themselves. The only part of Walter-Doering's testimony that the Hearing Examiner is unwilling to credit is that Schmeiser's application was subject to the same glitch that affected the Complainant's application. There is no testimony or documentary evidence in the record to support this testimony.

Had the Complainant produced some technical evidence of how the Authoria system might be jiggered to ignore the Complainant's application for three days, the Hearing Examiner would be more concerned by the Respondent's varying explanations. However, ultimately, the Hearing examiner accepts the Respondent's explanation, no matter how late in the process it came, that Pistulka did not consider the Complainant's application because he did not know it existed and he reasonably relied on his recruiter for verification that there were no applications to consider other than Schmeiser's.

The Complainant's argument is that Schmeiser was not a qualified candidate because she had not been in her current position for at least a year as the process is more traditionally handled. While the job posting/application notes this as a requirement, both Pistulka and Gary Hertel testified that the requirement could be waived by the current supervisor, which Hertel did in this case. The Complainant fails to explain how or why Schmeiser's application was processed if this issue would have "killed the deal." While Pistulka and Hertel's testimony in other respects may be subject to question, the Hearing Examiner can accept their statements on this point given the Authoria systems continued processing of Schmeiser's application.

The Hearing Examiner concludes that though the Complainant established a *prima facie* case, her inference of discrimination was overcome by the Respondent's explanation. The Complainant failed to demonstrate that the Respondent's final explanation was not credible or represented a pretext for discrimination. The Hearing Examiner will turn to the next issue, the

hiring of Marc Janes for the Human Resources Service Manager position and the Complainant's exclusion from consideration for that position.

The next claim stems from the creation and filling of a new position, that of Human Resource Service Center Manager. A taskforce of Human Resource individuals began the work to define and create this new managerial position in September 2008. The position and the concept of the Human Resource Service Center were the idea of Scott Mayer, Vice President of Total Rewards. Total Rewards encompassed several units including the Employee Resource Center (ERC) in which the Complainant was employed. Complainant and her immediate supervisor, Jane Fahey, ERC Manager, both held positions on this taskforce. In the most general of ways, this position was intended to reduce the workload of the Human Resources generalists by relieving them of a portion of their workload consisting of more repetitive tasks.

On or about April 2, 2009, the taskforce finalized a position description for the Human Resources Service Center Manager. This position description was generally based on the Complainant's position description for her position as ERC Customer Service Manager. When the Complainant read the final position description for the Human Resource Service Center Manager, she became concerned that her position might be in jeopardy because of the similarities in the two positions.

The Complainant asked Fahey if she (the Complainant) should apply for the Human Resource Service Center Manager position because of her concern for the possible duplication of services. Fahey indicated to the Complainant that her ERC Customer Service Manager position was safe and that the two positions were intended to work together. Fahey approached her supervisor, Scott Mayer, to confirm that the information she'd provided the Complainant was correct. Mayer said that it was and that the Complainant's position was not in jeopardy.

The position of Human Resource Service Center Manager position's title was changed to Human Resource Service Manager (HRSM). This position was not to be posted but rather, the taskforce met and identified four potential candidates for the position: Allison Osting, Laura Schroeder-Trudell, Nadia Lazaro and Jaime Benton. Once contacted, Lazaro and Benton withdrew their names from consideration. In late April, 2009, Schmeiser, as the Human Resources Manager/Generalist working on this recruitment, interviewed Osting and Schroeder-Trudell. Osting was offered the position, but declined it. The position was then offered to Schroeder-Trudell who accepted the position.

A week after accepting the HRSM position, Schroeder-Trudell informed her supervisors that she had accepted a position with a different company and would be leaving her employment with the Respondent. This left the Respondent without any obvious candidates for the HRSM position.

On May 26, 2009, before there was an announcement of Schroeder-Trudell's departure, Fahey and Mayer met to discuss how to fill the HRSM position. Mayer suggested that Marc Janes, then a Project Consultant working in another unit of the Total Rewards office, would be a good candidate. Fahey suggested several other names including that of the Complainant. Mayer, according to Fahey, indicated that Fahey could put the Complainant's name on the list, but that she wouldn't be hired. Mayer asked Fahey what she thought about Janes as a candidate. Fahey told Mayer that she would have to think about that.

On June 2, 2009, Fahey and Mayer once again met and Fahey indicated that she did not think that Janes was qualified for the HRSM position and identified what she saw as Janes's deficiencies and again indicated that she thought the Complainant met all of the qualifications. Mayer ignored Fahey's recommendations and offered the HRSM position to Janes on June 2, 2009. Janes accepted the position on the same day.

While the process of filling the HRSM position was ongoing, the Respondent announced that there was a financial crisis and directed managers to reduce their budgets and the number of employees working in their units. This reduction in employees refers to reducing the head count. Mayer asked his five direct reports including Fahey and Hertel to propose staff reductions, but not to share the information with their employees, especially potentially affected individuals. Over the period April and May 2009, Mayer accepted the recommendations of his reports and made at least two proposals for eliminating staff and reducing his budget.

Hertel's recommendation indicated that both of his employees, Gary Bidwell's and Marc Janes's positions, could be eliminated. Fahey indicated that two of the Customer Service Representatives employed in the ERC could be cut. After several efforts at developing a plan, Mayer ultimately decided to terminate, among others, Fahey and the Complainant. In Mayer's solution, Hertel took over Fahey's position. The Complainant's position was merged with the Payroll Manager position that was then held by Amanda (Mandy) Eisch. Janes assumed the HRSM position and Bidwell, Hertel's other employee, found a contractor position elsewhere in the company.

On June 4, 2009, Fahey and the Complainant were told that they would be laid off as of July 3, 2009. While meeting with Mayer about her layoff, the Complainant asked Mayer why she was not considered for the HRSM position. He indicated that her name was on the list, but that she did not "make the cut." The Complainant also asked Mayer why she was not hired for the newly merged Payroll/ERC Customer Service Manager position. Mayer only indicated that he'd spoken with the youngest manager and offered no explanation for not appointing the Complainant.

The essence of Complainant's claim is that though all members of the Project Center were males, they were retained while the Complainant, a female, and her supervisor, Fahey, were laid off. In particular, the Complainant asserts that Marc Janes, an individual with fewer credentials for the HRSM position, was given that position despite the Complainant's superior experience and credentials.

The Respondent contends that the Respondent's decision to move Janes to the HRSM position and to not offer the position to the Complainant was not the product of discrimination on the basis of sex, but rather represented the Respondent's evaluation of which individual was best qualified to get the Human Resource Service Center up and running. The Respondent viewed that operation as very important. The Respondent further argues that it was important in the period of downsizing and cost containment that the hire for the HRSM position be as cost-effective as possible.

The analysis of this claim focuses on the question of whether there is a causal link between the Complainant's gender and the adverse action of not being selected for the position of HRSM and ultimately being laid off. The first two elements of the *prima facie* claim are not really in dispute. The position was given to a male and the Complainant did not get hired and was eventually laid off. The question of whether the Complainant was qualified for the position is

subsumed in the analysis of causality. The facts are hotly disputed by the parties, but play an important part of this analysis.

The Complainant's argument starts with the fact that the HRSM position description was developed, in large part, from the Complainant's own position as ERC Customer Service Manager. The position was to be customer-oriented and was intended to work closely with the ERC Customer Service Manager. The Complainant was part of the working group that developed the position description for the HRSM. The position was so similar to that of the ERC Customer Service Manager held by the Complainant that she approached Fahey to see if she should apply for the position because it appeared to her that her current position might be in jeopardy. Fahey sought to assure the Complainant that her position was safe and confirmed that fact with Mayer, Fahey's supervisor. This conversation appears to have predated the Respondent's announcement of cost-cutting measures, but serves to demonstrate that Mayer was aware of the Complainant's interest in the HRSM position if her position was to be eliminated.

The HRSM position was to be a cost-neutral hire in that the position was only to be filled internally. The working group decided not to post the position but developed a list of four individuals who might successfully fill the position. Mayer was part of the group who made this decision. The group, after evaluation of the pool of candidates suggested four individuals, Osting, Schroeder-Trudell, Lazaro and Benton, all women. This was in April of 2009 at about the time the Respondent's cost-cutting program was announced. Lazaro and Benton quickly took their names out of consideration for the position, leaving Osting and Schroeder-Trudell.

Schmeiser, who had participated in the development of the HRSM position and the group selecting possible candidates, interviewed Osting and Schroeder-Trudell. Based on the information available to Fahey and Mayer, the position was offered to Osting, who declined the offer. The position was then offered to Schroeder-Trudell who accepted the position. A week after accepting the offer, Schroeder-Trudell announced that she'd accepted a position with another company and would be leaving the Respondent.

The Respondent argues that the fact that this first slate of candidates were all women demonstrates a lack of discriminatory animus on the part of Mayer, who the Respondent contends, enthusiastically endorsed the slate of candidates. The Complainant rejoins that treatment of some individuals in a protected class favorably does not necessarily show a lack of disparate treatment in an individual's circumstances. The Complainant also contends that there is no evidence in the record indicating that Mayer "enthusiastically endorsed" the list of candidates. The Complainant asserts that Mayer was but one member of the group that made the initial recommendations and that the record does not indicate that Mayer was particularly enthusiastic or not.

The Respondent also argues that the fact that the duties of the HRSM were eventually filled by Brenda Page after the departure of Janes demonstrates a lack of discrimination with respect to the filling of this position. The Complainant points out that Page's entry into the picture occurred well after the filing of this complaint and that alone casts doubt on the probity of the conclusion that Page's assumption of duties shows a lack of discrimination with respect to the Complainant.

The Hearing Examiner finds that the fact that the initial slate of candidates were all women does not mean that the Complainant was not separately subjected to discrimination on

the basis of sex. Conditions in the company had changed from the initial lists development to the point of the decision filling the HRSM position and it is those conditions that are more relevant to the outcome of this claim. Additionally, the cases cited in the Complainant's briefs make it clear that the courts are not swayed by favorable treatment to a class of individuals when there is disparate treatment to an individual in that class. The Ordinance cannot be read in a contrary manner.

The Hearing Examiner is not persuaded that Page's assumption of the HRSM duties demonstrates anything other than the Respondent needed the position filled. It had advertised the position internally after Janes's departure and got no acceptable candidates. While the Respondent could have cast a wider net by opening the position to external candidates, there was still pressure to keep filling that position expense-neutral. Additionally, the fact that Page's offer to assume the duties during a slow spot in her workload does nothing to suggest that her gender played any role in Mayer's selection or acquiescence in having Page perform the duties of the HRSM. Mayer had previously announced the importance of the position and to allow it to languish without someone in the position would make no sense. Additionally, Page's assumption of duties came after the filing of the complaint in this matter and could be seen as a ploy to demonstrate a lack of discriminatory motive. The Hearing Examiner does not believe this is the case given the open position.

The Respondent argues that the Complainant failed to show initiative after Schroeder-Trudell's decision to leave the position became known, while Janes came forward and did seek out the position. These circumstances are additionally confused by the state of the Total Rewards program in May of 2009 concerning the reductions in force and cost-control efforts that were underway.

In early May, Mayer asked his direct reports, including Fahey and Hertel, to propose reduction in their staffs. Hertel indicated that both of his direct reports, Bidwell and Janes, could be laid off. Fahey proposed to reduce two Customer Service Representative positions. It is interesting to note that Mayer had five direct reports, four of them female and one male. Though not conclusive, it tends to show that Mayer might not make decisions on the basis of the applicant's gender.

Mayer's proposals went through some evolution, but in the end, Mayer was prepared to propose that Janes and the Complainant be laid off.

One troubling aspect of the record in this matter is that Mayer told his direct reports to hold their recommendations and keep the information about pending reductions in confidence. Despite this desire for confidentiality, Mayer on at least two occasions himself violated the confidentiality by sharing his plans with Hertel and Eisch. The information shared with both of these individuals gave them an advantage and demonstrated Mayer's favoritism his willingness to go outside the parameters of conduct to which he would have had others hold to. What is troubling is that it creates unanswered questions about the knowledge of Janes, the Complainant and other employees about their impending employment options.

Schroeder-Trudell's departure from the Respondent was announced by email on May 27, 2009. In the days leading up to this announcement, Fahey questioned Mayer about whether the HRSM position would still be filled with the cost-cutting measures being examined. Mayer indicated that he viewed the position as being very important and that he wanted it filled.

The Respondent contends that Janes had no special knowledge of his impending job loss, but was able to discern that Project Management positions such as his were likely to be targets of the reduction. When Janes heard of Schroeder-Trudell's impending departure, he took the initiative to seek out Fahey to inquire about the still vacant HRSM position. When Janes approached Fahey, the Respondent asserts that Fahey and Janes discussed the HRSM position at length and Fahey, finding Janes highly qualified for the HRSM position, sent him to talk to Mayer. Janes did speak to Mayer and Mayer felt he was an excellent candidate for the HRSM position. The Respondent argues that Janes's project management experience would be particularly important in starting the operation of the Human Resource Service Center.

Mayer offered the position of HRSM to Janes on June 2, 2009 and Janes accepted the position immediately. During this time, the Complainant did not similarly come forward to express her interest in the position despite evidence that she'd heard from another manager that the Complainant's and Fahey's positions were to be laid off.

The Complainant contends that Mayer had already determined that he wished to hire Janes for the HRSM position prior to Janes coming forward on May 27, 2009. Fahey testified that in her effort to get the HRSM position filled, she met with Mayer on May 26, 2009 to discuss possible candidates for the HRSM position. She had compiled a list of all of the individuals who had either been initially considered by the working group or those who expressed interest in the position after an email had been sent indicating that anyone who was interested should make their interest known. At this point, the Complainant had not expressed interest, based upon Fahey and Mayer's assurance that her position was "safe".

At the May 26, 2009 meeting, Mayer proposed Janes as a candidate and asked for Fahey's opinion. Mayer felt Janes was well qualified for the position. Fahey testified that she told Mayer that she would have to think about it. She further stated that the next day she told Mayer that she did not believe that Janes was qualified for the position but that the Complainant was highly qualified. Fahey had brought up the Complainant's name during the May 26, 2009 meeting. Fahey testified that Mayer said that Fahey could put the Complainant on the list but that he wasn't going to hire her.

At hearing, Mayer testified that he did not recall the May 26, 2009 meeting but that he couldn't deny that it had happened. In support of Fahey's version of events, Fahey produced a page of notes that she kept of the meeting.

The Respondent argues that the evidence supporting the existence of the meeting is not strong enough to conclude that the meeting ever occurred or that it occurred in the way suggested by the Complainant. Specifically, the Respondent doubts the accuracy of the listed names on the notes produced by the Complainant. The Respondent highlights the name of Jennifer Schmeiser as being a person who was not likely to consider or to be considered for the HRSM position. It does not seem incredible that Schmeiser's name might appear on this list given the potential reductions in force throughout the Human Resources Department.

The Respondent correctly notes that Fahey's testimony is at odds with that of Mayer and Janes about when Janes's name first came up in discussion of how to fill the HRSM position. The Hearing Examiner sees no reason to doubt the version of events set forth by Fahey. At the time of hearing, Fahey was not employed by the Respondent. While it might be argued that she could have born some animus towards the Respondent for her layoff, there was nothing in the record to suggest this was the case. The Respondent did not produce any evidence or

testimony other than to attack the notes presented by Fahey to demonstrate that Fahey's testimony was not credible.

The Hearing Examiner finds that Mayer's violation of his own dictate not to share the information about impending layoffs with others casts doubt on Mayer's testimony. Clearly, if Mayer was willing to show "favorites" in sharing of such knowledge, he would be willing to shade his testimony in deposition or at hearing. It also suggests that Mayer either directly or indirectly may have shared information about the pending layoffs with Janes. The fact that Mayer says he does not recall, but doesn't deny the meeting, given the record as a whole, Mayer's explanation is the type of answer that one who does not wish to lie on the stand, but does want to obfuscate the effect of earlier testimony might give.

The Respondent asserts that Janes was more highly qualified for the position of HRSM because it was early days for the Human Resource Service Center and Janes experience setting up processes and lines of authority would be particularly useful. The Respondent further argues that the Complainant lacked these qualities and knowledge and was therefore not so well qualified as Janes. During his cross examination, Janes took loud and great exception to the Complainant's questioning of his qualifications. The Hearing Examiner does not conclude that by itself, Janes's conduct on the stand means his testimony should be given no weight, but it does create in the mind of the Hearing Examiner some doubt about the weight Janes's own self-serving testimony should be given. Though as with Fahey, Janes was no longer employed by the Respondent at the time of hearing, he did apparently feel compelled to justify his selection for the position of HRSM and his testimony reflects that narrow focus on his personal self-interest.

The Complainant rebuts the Respondent's position on qualifications by pointing out that most of the process and project work had already been completed by the time of the HRSM hire and was not needed given the customer focus of the position. Janes, though he'd worked in Human Resources on various projects, did not have any particular customer service experience in his background and his supervisory credentials were questionable.

Given the record as a whole, the Hearing Examiner finds that on or before May 26, 2009, Mayer had already determined that he intended to offer the position of HRSM to Janes, a male, and that he was not going to consider the Complainant, a female, for that position. The hearing Examiner is particularly influenced by the fact that Hertel, an older male, replaced Fahey, a younger female, when Mayer merged the Project Management function with the ERC Management function and laid off Fahey. Hertel was paid substantially more than Fahey and his project management duties were negligible at the time. Though Hertel had recommended the layoff of both Bidwell and Janes, they both remained with the Respondent when the dust of the announced layoffs settled. Janes was less qualified for a position that had its focus on the provision of customer service and his particular skills in the area of project development and management were not needed. The Complainant's skill set was more in line with the needs of the HRSM position since the position description essentially started from the Complainant's own ERC Customer Service Manager description and was intended to complement the work being performed by the Complainant as the ERC Customer Service Manager.

The fact that three male employees retained their employment replacing two female employees given the need to not only reduce head count but to affect cost savings, in the mind of the Hearing Examiner, is telling. Had Mayer been following the dictates of the cost-cutting

measures, it would have been more logical to reduce the older more highly paid males and retaining the lower-paid females. The Respondent contends that in such a reduction, it is not just the head count and financial savings that are important, but retaining the ability to operate the core elements of the business must be preserved. The Hearing Examiner accepts the importance of this concept, but does not find that the hire of Janes over the Complainant accomplished that end. Janes skills were not needed and he lacked experience and knowledge of the core function of the Human Resource Service Center, that of customer service. That core function was in the wheelhouse of the Complainant.

The whole process for filling the HRSM position seems to the Hearing Examiner to have been an exercise in avoiding the usual hiring processes. The Respondent had a system for posting available positions and accepting internal candidates and if no acceptable internal candidates were available, then seeking external ones. Even with the initial slate of candidates, there was no application process. The candidates were hand selected by a group that included Mayer. Though all the candidates at that time were women, it was prior to the announcement of reductions and cost-cutting to come. When Mayer put forth Janes's name as a highly qualified candidate on May 26, 2009, he was following the process that threw the usual process out the window. That type of discretion can lead to decisions made for reasons other than strictly the qualification of the respective candidates.

The Respondent contends that Mayer favored Janes, in large part, because of his project management skills and because he'd shown the initiative to come forward and seek the position. However, the record does not support a finding that Janes's project skills were particularly needed at the time of the hire, and based upon Fahey's testimony demonstrates that Mayer wanted to hire Janes even before Janes supposedly showed interest in the position on May 27, 2009. For the Hearing Examiner, this is the clearest indication that Mayer favored Janes, the male candidate, in part, because of his gender. When given the opportunity to consider Janes's qualifications along with those of the Complainant on May 26, 2009, Mayer indicated that he would not hire the Complainant though her name could be listed. Why list her name if he'd already decided not to consider/hire her? One answer is that Mayer wanted to make it appear that he had considered the Complainant when he'd already made up his mind to hire Janes.

While the Respondent's contention that Janes did not know of the availability of the HRSM position until May 27, 2009 has some support in the record, the Hearing Examiner believes that there is also support in the record sufficient to reach the conclusion that Janes had knowledge prior to May 27, 2009. It is uncontroverted that Mayer informed Hertel and Eisch of the impending layoffs and his plans well prior to May 27, 2009, it does not represent a great leap to believe that Mayer also informed Janes of the same either directly or through Hertel. Even if Mayer did not make such a direct contact of Janes, it is clear that rumors of the pending cuts and layoffs were circulating through the office. The Complainant testified that she'd heard about the potential layoff of herself and Fahey from Tina Monroe, one of Mayer's other reports on or about May 25, 2009. Given this testimony, it is doubtful that Janes didn't have some prior knowledge of the situation prior to the public announcement of Schroeder-Trudell's departure.

The Hearing Examiner finds that there is sufficient evidence in the record for the Complainant to have made out a *prima facie* claim of discrimination on the basis of sex. The Respondent's explanation that Janes was selected over the Complainant because of his project management qualifications and his demonstration of initiative represents a legitimate, nondiscriminatory explanation for the hire of Janes over the Complainant. However, the

Complainant adequately rebuts the Respondent's proffered explanation by demonstrating that Janes qualifications were not so great as the Complainant's in the core mission of the Human Resource Service Center and that Janes's best qualifications in the area of project management were not really needed by the time of his hire. The issue of Janes's initiative and the lack of initiative on the part of the Complainant is rebutted by Fahey's testimony on the May 26, 2009 meeting and her prior discussions with Mayer about whether the Complainant's position was safe or not. From Fahey's testimony, Mayer had already decided that he would hire Janes and would not consider the Complainant even though he knew that she would have been interested in the position if it was known that her position of ERC Customer Service Manager was going to be eliminated or merged out from under her.

While it might have been naive on the part of the Complainant to rely on Fahey's earlier assurances concerning the safety of her position given the rumors swirling through the office, it does not overcome the evidence that she had better qualifications for the position than did Janes. Retaining the Complainant and laying off Janes would have been consistent with the Respondent's efforts to reduce head count and to reduce costs. Janes made more than the Complainant and retaining him in a position for which he was not as well qualified for as the Complainant was contrary to the stated goals of the cost reductions.

The Hearing Examiner finds that the Complainant has demonstrated by the greater weight of the credible evidence that the Respondent discriminated against her on the basis of her sex when it failed or refused to consider her for the position of HRSM in May and June of 2009, and then laid her off effective July 3, 2009. Damages related to this claim will be assessed after further proceedings.

The Complainant's third claim concerns Mayer's decision to lay off the Complainant, but to merge her ERC Customer Service Manager position with the Payroll Manager position held by Amanda "Mandy" Eisch and to retain Eisch. At the time of these decisions, the Complainant was 50 years of age while Eisch was 32 years of age. The Complainant's claim is that because she was an older woman, Mayer made his decision to retain the younger female. In this way, the Complainant's argument combines the Complainant's age and sex into what has been described as an intersectional claim of discrimination.

The Respondent asserts that Eisch was retained because she was capable of performing the duties of the ERC Customer Service Manager and had superior credentials to those of the Complainant for the more important role of Payroll Manager. The Respondent also contends that the record demonstrates that the Respondent retained older employees while laying off younger ones, making it unlikely that the decision to retain Eisch while laying off the Complainant was because of the Complainant's age or some combination of age and sex. As part of its position, the Respondent argues that the Complainant was not really adequately performing her duties as ERC Customer Service Manager and that Eisch's first tasks were to undo some of the work of the Complainant.

The first two elements of a *prima facie* claim remain proven. The Complainant was 18 years older than Eisch and the Complainant's duties were given to Eisch and Eisch was retained. The Complainant's failure to be appointed or, frankly, even considered for the combined position which, in part, led to her lay off certainly represents an adverse action. That the Complainant was qualified for the position as merged is supported by the fact that she performed these two function from October, 2005 until November, 2006 while the Payroll Manager position was vacant.

Those facts, in themselves are sufficient to create an inference that the Complainant was the victim of age discrimination in this situation. However, where those general facts are combined with Mayer's actions in April and May of 2009, the connection between the Complainant's age and that of Eisch become more compelling. Fahey testified that in April, 2009 as Mayer was beginning his consideration of how to meet the Respondent's cost-cutting measures, Mayer asked Fahey if Eisch could perform the duties of ERC Customer Service Manager. Fahey told Mayer that Eisch did not have the experience, temperament or interest to successfully perform the Customer Service function of a merged ERC Customer Service Center and Payroll Center. Fahey relayed to Mayer that after Eisch had performed the Complainant's managerial duties for a six-week period, Eisch told Fahey that she never wanted to do that again and she did not like that experience. Despite Fahey's failure to endorse Eisch, Mayer then went to Eisch in May and informed Eisch that she would be given the combined responsibilities and that Fahey and the Complainant were to be laid off. Mayer told Eisch to hold this information confidential even though Mayer had apparently been unable to keep his maneuvering to himself. The Hearing Examiner finds that Mayer's decision to share this information with the younger candidate that he apparently hand-picked is very disturbing and casts great doubt on Mayer's integrity and credibility.

The Respondent presents no explanation for Mayer's conduct in not posting the combined ERC Customer Service Manager/Payroll Manager or why Eisch did not have to interview or apply for the position. Additionally, the Respondent does not explain Mayer's conduct in breaching his own requirement of confidentiality in sharing personal information with Eisch approximately a month before providing the same information to the affected individuals.

The Respondent asserts that Eisch was more qualified than the Complainant for the Payroll Manager position which has been described as the more important of the two functions. While Eisch appears to have been well qualified for that portion of the job, Fahey's testimony indicated that Fahey believed that the Complainant was well qualified to handle the Payroll Manager position and had much better qualifications for the Customer Service Manager portion of the position.

The Respondent's primary attack on the Complainant's credentials for the Payroll Manager position is that while acting as both ERC Customer Service Manager and Payroll Manager in 2005 and 2006, the Complainant was essentially back-stopped by Linda Gant who had held the position for many years. Because Gant had retired, the Respondent would not have had a truly experienced financial person to rely on for help in the combined role.

There is nothing in the record to indicate that this actually played any part in Mayer's decision, even if it were true. The record lacks any information upon which the Hearing Examiner could find that the Complainant's successful management of the Payroll Manager and ERC Customer Service Manager positions was due to the presence of Gant.

It is true that the record does demonstrate that Eisch possessed more experience and better credentials in the realm of payroll management than the Complainant. The same is true, however, with respect to the performance of customer service duties for the Complainant. Both individuals had their strengths and their not-so-strong points. It does not, however, appear credible to the Hearing Examiner to say that Eisch was a clearly better candidate for the combined ERC Customer Service Manager/Payroll Manager position.

The Respondent contends that Eisch's age could not have played any role in Mayer's decision to coronate her instead of the Complainant because it retained older individuals such as Hertel while laying off Fahey, a younger manager. As we've already seen, the Hearing Examiner has found that the retention of higher-expense males such as Hertel and Janes, demonstrated discrimination on the basis of sex. When combining an attitude that permitted discrimination on the basis of sex, it is not a large stretch to find that Mayer wanted to relieve the Respondent of older females in the guise of reducing costs and maintaining services. However, the cost-saving motive was debunked in the claim of sex discrimination and it holds no more water here.

The Respondent's implications that the Complainant was not well-liked or competent in her role of ERC Customer Service Manager is not supported in the record. The testimony of Rasmussen that she didn't think the Complainant's supervision was competent and that the Complainant was "flighty" is not supported by anything other than the witness's personal feelings. She does not provide examples or support for her opinion. In fact, Hertel seemed to counteract Rasmussen's testimony by indicating that any friction or differences in opinion in the ERC were due to rocky relations between Fahey and Eisch, not the Complainant. Similarly, Eisch's testimony that she need to correct problems created by the Complainant's management is self-serving and was given without any corroborating detail.

It seems clear to the Hearing Examiner that there was some special relationship between Eisch and Mayer and equally, a not very good relationship between Mayer and the Complainant. If these relationships were caused by some personal feelings between or among the parties, it is not presented on this record. Did Mayer view the Complainant's employment as problematic for reasons of competency? If so, it is not reflected in the record to any degree that the Hearing Examiner can find. At the bottom line, the Hearing Examiner concludes that the relative differences in the Complainant's age and that of Eisch played some motivating role in Mayer's decision not to consider the Complainant for the combined ERC Customer Service Manager/Payroll Manager position. Finding such, the Hearing Examiner finds that the Respondent discriminated against the Complainant on the basis of her age when it did not consider her for the combined position in violation of the Equal Opportunities Ordinance. Damages will be addressed in a further proceeding.

The Complainant's final claim is that the Respondent retaliated against her for the filing of her initial complaint by failing and refusing to open the vacant HRSM position to external candidates after the departure of Janes. The Complainant contends that Mayer knew or reasonably should have known of the filing of the complaint and the Complainant's suitability and interest in the position when he decided not to open the HRSM position to external candidates even when there were no acceptable internal candidates.

The Respondent contends that Mayer's decision not to open the applications for the HRSM position to external candidates represented adherence to the decision to keep the HRSM hire cost-neutral and did not represent retaliation against the Complainant for her exercise of a right protected by the Ordinance. The Respondent also argues that the record does not support a finding that Mayer knew of the filing of the complaint at the time he made the decision to limit access to the application process for the HRSM position after Janes's departure.

The Complainant's argument rests almost entirely on the premise that Mayer must have known of the complaint and that the decision not to open the HRSM application process to external candidates came so closely in time to Mayer's knowledge of the complaint that it

demonstrates an intent to retaliate. While temporal proximity between events may be one factor in judging whether one event flows from another, one must be cautious of the logical fallacy of *post hoc ergo propter hoc*. This fallacy indicates that one need to demonstrate more than merely that one event followed another to demonstrate a causal relationship between the two events.

The Hearing Examiner does not find sufficient evidence in the record to conclude that the decision to not post the HRSM position for external candidates is causally linked with the filing of the complaint in this matter.

The Respondent's explanation that it was still in the midst of the cost reduction efforts begun in April of 2009 and that it was important not to add to the office head count or to add salary from an external applicant is credible. The fact that eventually, the Respondent was able to fill the position or to have its duties absorbed by Page supports the importance to the Respondent of keeping the hire internal to itself.

The Complainant argues that it is incredible to believe that the Respondent kept the position open for six months given the importance the position was given at the time of its creation. This ignores that many of the duties were initially absorbed by Page when she had additional capacity and then those duties were permanently given to Page.

While Mayer likely knew of the filing of the complaint and that the Complainant might remain interested in the position, the decision to maintain the internal hire to avoid an additional cost for the position outweighs any inference created by the temporal proximity.

One gap in the record is the precise status of the Complainant as an individual in layoff status. It is not clear whether the Complainant retained certain rehire rights or rights to access the Respondent application process as an internal candidate. Given the testimony, it would appear that the Complainant's status was really that of a terminated employee than one who was merely laid off and waiting for possible recall. Since the Complainant attempts to apply for the HRSM position after Janes's departure were all as an external candidate, the Authoria system would not accept them. Similarly, had any other laid off employee attempted such an application, the system would have prevented his or her application.

It must be noted that subsequent to being informed of her layoff on June 4, 2009, the record indicates that the Complainant did not apply for any other positions with the Respondent. It is not clear in the record whether that was because there were no positions for which the Complainant was qualified or whether it was because she was dispirited and was no longer interested in working for the Respondent.

Given this record as a whole, the Hearing Examiner concludes that the Complainant has failed to rebut the Respondent's legitimate, nondiscriminatory explanation that the HRSM position was limited to internal candidates for budgetary reasons and not for reasons of retaliation against the Complainant for her exercise of a right protected by the Ordinance. This claim is dismissed.

The record and arguments of the parties in this matter are extensive. To the extent that the Hearing Examiner has not addressed each and every argument of either party reflects a determination on the part of the Hearing Examiner that such an argument does not compel or defeat the Hearing Examiner's conclusions set forth above. A failure to address specific claims

of the parties should not be seen as a failure to consider their points, but rather that they are not persuasive or relevant to the ultimate decision.

The parties agreed to bifurcate hearing of these matters along liability and damages lines. Once the order in this matter becomes final, the parties, if possible, should endeavor to come to an agreement as to damages, costs and fees. If such an agreement is not possible, then further proceedings will be scheduled.

Signed and dated this 11th day of October, 2017.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Michael R Fox
Thomas R Crone