

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

Lee Syverud
212 Jackson St
Madison WI 53704

Complainant

vs.

Journey Mental Health Center
625 W Washington Ave
Madison WI 53703

Respondent

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

CASE NO. 20142170

EEOC CASE NO. 26B201500005

On December 15, 2015, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing in Room 108 of the Madison City County Building, 210 Martin Luther King, Jr. Boulevard. The Complainant, Lee Syverud, appeared in person and by her attorneys, Fox & Fox, S.C., by Richard F. Rice. The Respondent, Journey Mental Health Center, appeared by its representatives, Brad Schlough and Melissa Turk, by its attorneys Michael, Best & Friedrich, LLP, by Amy O. Bruchs. 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. Lee Syverud is a female resident of the City of Madison, with her date of birth being June 19, 1948.
2. Respondent, Journey Mental Health Center, is a non-profit organization providing mental health, substance abuse, and advocacy services with its principal place of business being located at 625 West Washington Avenue in the City of Madison, Dane County, Wisconsin and employs 15 or more employees.
3. Complainant was employed with Journey Mental Health Center from January 17, 1978 through January 24, 2014.
4. Complainant's job classification with Journey Mental Health Center at the time of her termination was Emergency Services Unit ("ESU") Program Support Specialist III, .9 FTE (90% Full Time Equivalent).
5. On December 27, 2013, Complainant was notified that her position was being eliminated and that her last scheduled work day would be January 24, 2014.

6. Complainant had not received any written performance evaluation or disciplinary actions prior to December 27, 2013.
7. Complainant received a copy of the Respondent's written Layoff Policy with her termination notice.
8. Complainant's age at the time of her termination was 65-1/2 years old (DOB June 19, 1948).
9. Following her termination, Complainant received job postings from Journey Mental Health Center for one year pursuant to their layoff policy.
10. Complainant did not apply for re-employment with Journey Mental Health Center following her termination on January 24, 2014, despite the fact that three positions posted were for the same classification as that of the Complainant.
11. Complainant applied for 123 positions subsequent to her termination with Journey Mental Health, but was not offered any of those positions.
12. Complainant began receiving social security benefits in August 2014.
13. In 2013, Respondent was attempting to reduce a \$100,000.00 budget deficit in the Crisis or Emergency Services Unit ("ESU") for the 2014 operating year.
14. In January 2014, the ESU was staffed, in addition to the Complainant, by Patricia Lunde ("Lunde"), classified as a .6 FTE (60% Full Time Equivalent) Program Support Specialist III, and Rebecca Nilles ("Nilles"), classified as a .6 FTE (60% Full Time Equivalent) Program Support Specialist III.
15. At the time of Complainant's termination, she earned an hourly wage of \$23.95 per hour.
16. Of the three (3) Program Support Specialist III employees in the ESU, 100% of the Complainant's .9 FTE salary, 100% of Ms. Lunde's .6 FTE salary, and approximately 50% of Ms. Nilles' .6 FTE salary (or .2 - .3 FTE) were attributable to the ESU budget.
17. Ms. Nilles was 54 years old at the time of Complainant's termination.
18. Ms. Nilles performed payroll and commitment tracking as part of her regular job duties with the Respondent.
19. Ms. Lunde was 58 years old at the time of Complainant's termination.
20. Ms. Lunde performed payroll and suicide tracking for Dane County as part of her regular job duties with the Respondent.
21. The Complainant did not perform payroll, suicide tracking or commitment tracking as part of her regular duties with the Respondent, but would assist with these duties on an as needed basis.
22. Andrea Bailey was the ESU manager at the time of Complainant's termination.

23. Ms. Bailey was involved in budget making decisions and was present at the meeting in which the Complainant received her termination notice.
24. Brad Schlough was the Clinical Director of Community Programs with responsibility over the ESU at the time of Complainant's termination.
25. Mr. Schlough was involved in budget making decisions and was present at the meeting in which the Complainant received her termination notice.
26. The Respondent determined that the salary savings from the termination of the Complainant outweighed the salary savings that could be accomplished by the termination of either or both of the other Program Support Specialist III positions in the ESU.
27. Though the Complainant had some experience performing the duties of Ms. Lunde and Ms. Nilles, the Respondent determined that for purposes of an efficient transfer of responsibilities, it would be better to retain Ms. Lunde and Ms. Nilles, and train them to perform any additional duties performed by the Complainant, than to attempt to retrain the Complainant with respect to Ms. Lunde and Ms. Nilles' duties.

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 not discriminate against the Complainant on the basis of her age in violation of the Equal Opportunities Ordinance by terminating her employment.

ORDER

It is ordered that the complaint be hereby dismissed. The parties are to bear their own costs and expenses.

MEMORANDUM DECISION

In her complaint, filed on October 14, 2014, MEOD Case No. 20142170, the Complainant alleges that the Respondent discriminated against her on the basis of her age (DOB June 19, 1948) when her employment with the Respondent was terminated in violation of MGO 39.03. The Initial Determination by the City of Madison Department of Civil Rights found that there was probable cause to believe that discrimination occurred in regard to the terms and conditions of employment (layoff and seniority) because of the Complainant's age (65).

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 first must determine, for each allegation of discrimination, if the Complainant has established a *prima facie* claim of discrimination. A complaint for discrimination on the basis of age must meet the *prima facie* standard; that is, the Complainant must establish that she is 1) a member of the protected class as defined by the Madison General Ordinance Sec. 39.03, 2) that she was performing her job satisfactorily, 3) that she suffered an adverse employment action and 4) that there is a causal connection between the Complainant's protected class and the adverse action suffered. This could be shown by providing evidence that she was either replaced by someone not within the protected class or that the employer treated a similarly situated employee not in the protected class more favorably. The Complainant must prove each element of the *prima facie* claim by a preponderance of the evidence, which can also be stated as, by the greater weight of the credible evidence.

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

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

First, the Hearing Examiner will examine whether the Complainant has demonstrated that she has met the first element of the *prima facie* claim. The Complainant filed a complaint of discrimination (age) in relation to the terms and conditions of employment (layoff and seniority) against the Respondent on October 14, 2014. Complainant is a member of the protected class Age as defined in Madison General Ordinance Sec. 39.03 with her date of birth being June 19, 1948, and thus meets the first element of the *prima facie* claim.

Next, the Hearing Examiner must examine whether the Complainant has established that she was performing her job satisfactorily. Indeed, Complainant had been employed with the Respondent for thirty-six (36) years at the time of her termination. The Complainant testified at hearing that, prior to notice of her termination, she had not recently had a performance evaluation and that she did not regularly receive performance evaluations. The Respondent offered no evidence of any performance issues by the Complainant or disciplinary actions taken against the Complainant. The longevity of the Complainant's employment and lack of any performance issues demonstrated by the Respondent suggest by preponderance of the evidence that the Complainant has met the second element of establishing a *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 Respondent was terminated by notice on December 27, 2013, and by effect on January 24, 2014, establishing the third element of Complainant's *prima facie* claim.

Finally, the Hearing Examiner approaches the issue of whether or not there was a causal link between the Complainant's membership in a protected class and her termination. One way of establishing this link is to examine whether the Complainant was either replaced by someone not within the protected class, or to show that the employer treated a similarly situated employee not in the protected class more favorably.

The Complainant attempts to demonstrate this causal connection by claiming that the Respondent violated the terms of the Employee Handbook when deciding to terminate her employment, specifically referencing the policy for identifying a position for layoff. According to the copy of the Layoff Policy terms in the Employee Handbook, provided to the Complainant with a copy of her termination letter, the Respondent's policy was to consider positions for layoff by identifying "...classification, [by] seniority (after all things considered), and the individual having the least seniority would be laid off.". The Complainant reasonably believed herself to be the most senior of the three Program Support Specialists III working in the ESU at the time of her termination, due to the longevity of her employment, and the number of hours she worked each week. The other two Program Support Specialists III employed during that time were employed as .6 FTE employees, whereas the Complainant was employed as a .9 FTE employee and would assume, or assist with, the duties of her coworkers when they were off of work or out ill. The Complainant reasonably believed that she was able to perform each of the duties assigned to all three Program Support Specialists III, and that she was terminated on the basis of her age, due to the fact that the two Program Support Specialists III not terminated, Patricia Lunde ("Lunde") and Rebecca Nilles ("Nilles"), were approximately 7 and 12 years younger, respectively, than the Complainant. During her testimony, the Complainant could not state Lunde or Nilles' specific ages, though an age difference of even 7 years could reasonably be considered remote enough to create the potential for discrimination.

The Respondent's arguments cast doubt on whether the Complainant's proof is sufficient to demonstrate the fourth element in her *prima facie* claim of discrimination; that the Complainant's termination was due to her age, and that she was either replaced by someone not within the protected class or that a similarly situated employee not in the protected class was treated more favorably. The evidence in the record shows that the Complainant's position was not filled after her termination, but rather was absorbed by two similarly situated and tenured employees of the Respondent.

The Respondent argues that in 2013 Journey Mental Health Center was facing a \$100,000.00 budget deficit for the year 2014 in the ESU, and that the decision to let the Complainant go was one of financial necessity, as well as for ease of transition of job responsibilities from one employee to the next. Ms. Bailey and Mr. Schlough, as supervisors of the Complainant, and persons being involved in the budget cut discussions, were not aware of the Complainant's age, or that she was older than the other two Program Support Specialists III (Lunde and Nilles) working in the ESU at the time of the layoffs.

The Complainant, Ms. Lunde and Ms. Nilles, had many of the same job duties, however Ms. Lunde and Ms. Nilles both performed payroll for their respective departments. Ms. Lunde was responsible for tracking suicides in Dane County, while Ms. Nilles was responsible for tracking commitments. While the Complainant had filled in in some of these capacities in the past, these were not a part of her general job requirements, and it was believed by the Respondent that Lunde and Nilles would have an easier time absorbing the job duties of the Complainant as opposed to the Complainant having to be further trained to perform the additional duties of Lunde and Nilles.

The Respondent also argues that the deficit reduction impact to the Respondent by terminating the employment of Lunde or Nilles, or both, would not have the same impact on deficit reduction as the termination of the Complainant. The evidence presented at hearing showed that the 100% of Lunde's .6 FTE salary, and approximately 50% of Nilles'.6 FTE salary, while near or equal in time allotted to the ESU's budget as the Complainant's .9 FTE salary, would not have had the same impact on the ESU budget deficit if they were both terminated, as neither employee was compensated at the same rate as the Complainant.

The Respondent also provided the Complainant, pursuant to its layoff policy, job postings for positions available with the Respondent for one year following the Complainant's termination. During that time, three Program Support Specialist III positions became available. The Complainant admitted to receiving these postings, and applying for none of them. The Complainant did apply for 123 jobs outside of the Respondent's organization through August 2014 when she began receiving social security benefits, then did not apply for any employment again until December 2014. The Complainant did not receive any job offers from the outside positions for which she applied. The Complainant's vacated position with the Respondent went unfilled when they reposted the position, and her job duties were absorbed by Lunde and Nilles.

The Respondent's burden to provide a legitimate, non-discriminatory reason for the Complainant's termination is one of production, and not proof. The testimony credibly supports the Respondent's argument that the reasons for the Complainant's termination were purely for financial, budgetary reasons, and for ease of transfer of workflow given the differing skill sets and budget impacting wage rates of the Program Support Specialists III that staffed the ESU.

At this point, the burden shifts back to the Complainant to show that the Respondent's proffered reason is a pretext for discrimination. "Plaintiffs may show that an employer's proffered reasons for an adverse employment action are pretext for discrimination if the reasons (1) have no basis in fact; (2) did not actually motivate the action; or (3) were insufficient to warrant the action." Demyanovich v. Cadon Plating & Coatings, LLC, 747 F.3d 419, 431 (6th Cir. 2014) (quoting Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 285 (6th Cir. 2012)). The Hearing Examiner finds no evidence in the record to show that the explanation offered by the Respondent lacks credibility, or that the reason for the Complainant's termination was pretextual. While the Hearing Examiner may sympathize with the difficulty in leaving a career before one is entirely ready to do so, the evidence does not support a finding of discrimination.

For the foregoing reasons, this complaint is hereby dismissed.

Signed and dated this 23rd day of August, 2018.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Richard F Rice