

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION and)
CHERYL M. POORE)
Complainant)
v.) Docket No. 98-BEM-1091
TOWN OF HARWICH HIGH SCHOOL,)
VINCENT P. BRESNAHAN and)
GLENN A. ROSE)
Respondents)

Appearances:

Howard Friedman, Esq., and Myong J. Joun, Esq., for
Complainant
Douglas I. Louison, Esq., for Respondents Town of Harwich
High School, Vincent P. Bresnahan and Glenn A. Rose

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 9, 1998, Complainant Cheryl M. Poore filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged that the Town of Harwich High School, Principal Vincent P. Bresnahan and Athletic Director Glenn A. Rose discriminated against Complainant based on her gender in violation of Massachusetts General Laws, Chapter 151B, §4, paragraph 1, when they did not select her on February 10, 1998

and March 10, 1999 for the varsity softball coach's position at Harwich High School.¹

Attempts to conciliate this matter were unsuccessful. On October 25, 2001, Investigating Commissioner Dorca I. Gomez certified this case for a public hearing.

I held a public hearing in this case on December 9-11, 2002. On February 14, 2003, Complainant filed her proposed findings of fact and rulings of law with the Commission. Respondents filed their proposed findings of fact and rulings of law on February 17, 2003.²

On March 19, 2003, Complainant filed a motion to strike Respondents' statement of proposed facts in their post-hearing memorandum, proposed order and affidavit of compliance. On March 21, 2003, Respondents filed an opposition to Complainant's motion to strike their statement of proposed facts and a motion to extend the time within which to file their opposition.³

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions,

¹The parties agreed to address Complainant's 1999 non-selection as part of the instant complaint.

²On February 14, 2003, Respondents filed their proposed findings of fact and conclusions of law with the Commission but inadvertently addressed them to former Commissioner Charles Walker, Jr.

³As of the date of this decision, I hereby grant Respondents' motion to extend the time period within which to file their opposition to Complainant's motion to strike Respondents' statement of proposed findings of fact and conclusions of law. I also deny Complainant's motion to strike Respondents' proposed findings of fact and conclusions of law.

they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other proposed findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

II. Findings of Fact

1. Complainant Cheryl Poore is a female who has worked as a health and physical education teacher in the Harwich public schools since 1971. (Complainant's Exhibit No. 4). Complainant has worked as a physical education teacher at the Harwich Middle School since 1989.

2. In 1970, Complainant graduated magna cum laude from Anderson University in Indiana with a bachelor's of science degree in health and physical education and a minor in education. Complainant's undergraduate courses included anatomy, physiology, exercise physiology, applied kinesiology and body mechanics. (Complainant's Exhibit No. 4).

3. The Town of Harwich High School (hereafter: Harwich High School) is a public school located in Barnstable County, Massachusetts. It has approximately 435 enrolled students. (Joint Stipulation No. 1). At all times relevant to this complaint, The Town of Harwich was an employer within the definition of Massachusetts General Laws Chapter 151B.

4. During the time period relevant to this complaint, Dr. Joseph Gilbert was the superintendent of the Harwich public schools and Respondent Vincent Bresnahan was the principal at Harwich High School. Bresnahan served as the principal at Harwich High School for 19 years and retired two and one-half years ago. In 1998-1999, Bresnahan was the appointing authority for all teachers and coaches at Harwich High School subject to Superintendent Gilbert's approval. General Laws, Chapter 71, §59B.

5. During the period relevant to this complaint, Respondent Glenn A. Rose was the athletic director at Harwich High School. Rose taught in the Harwich school system for 32 years and was the athletic director at Harwich High School from 1994-2002. During this period, Rose also coached the varsity boys' basketball team.

6. After Dr. Gilbert became the superintendent of the Harwich public schools, Harwich High School hired all sports coaches on one-year contracts and required all incumbent coaches to reapply each year. Beginning in 1996, all coaching positions were posted even if an incumbent coach had satisfactorily coached a sports team during the prior year. (Joint Stipulation No. 3).

7. During the period relevant to the instant complaint, Paul R. Mangelinkx was the assistant principal at Harwich High School. Mangelinkx held his position for seven years until he became the principal at Chatham High School in 2000.

8. Fredrick J. Thacher, Jr., has worked as a physical education teacher in the Harwich public school system for 21 years, including 10 years at the Harwich Middle School where he "team"

taught with Complainant. Thacher has a bachelor's of science degree in physical and health education and a masters' degree from Bridgewater State College in school administration. Thacher has coached three sports at Harwich High School: varsity boys' soccer, varsity girls' basketball and varsity baseball.

9. Mary (McGrath) Dowling earned a bachelor's of science degree in physical education and health from Bridgewater State College in 1962. Dowling has taught in the Harwich school system since 1974, including 25 years at the Harwich High School. During this period, Dowling "team taught" with Rose at Harwich High School.

10. Dowling has been friends with Complainant since 1974. Dowling worked as an assistant field hockey coach under Complainant for seven years. Dowling coached the boys' track team at Harwich High School for 15 years.

11. In May 1998, Dowling lived with Complainant. During the 1999 school year, Dowling rented a room from Complainant until she moved to Stow, Vermont.

12. Angelina Raneo Chilaka began working as a full-time health teacher at Harwich High School in the fall of 1987. Chilaka has a bachelor's degree in health and physical education from Northeastern University. In 1972, Chilaka earned a master's degree from Columbia University in health and physical education.

13. In the spring of 1994, Bresnahan hired Chilaka to coach the Harwich High School varsity and junior varsity softball teams.

Chilaka held her coaching position through 1997.⁴ (Joint Stipulation No. 2). Chilaka had never held a varsity softball coaching position before Bresnahan hired her in 1994. Chilaka's prior coaching experience was as a junior varsity softball coach in the Harwich school system.

14. There were "difficulties" in the varsity softball program when Chilaka assumed the head coach's position that continued during her tenure as head coach. These problems included an insufficient number of athletes for the varsity and junior varsity teams, a lack of "quality" athletes for the varsity team and its ongoing losing record.

15. During her tenure as varsity softball coach, Chilaka asked Complainant and Thacher to help her to develop middle school softball pitchers who could successfully compete at the high school level. Complainant also assisted Chilaka by taking over softball practices for one week during Chilaka's first or second year as the varsity softball coach.

16. Chilaka testified that her evaluations as the varsity softball coach were "very good" and Rose did not discuss any coaching problems with her prior to 1997.

17. On or about September 26, 1997, Rose met with Chilaka and asked her not reapply for the varsity softball coach's position for the 1998 season because of her poor performance. Chilaka believed Rose did not want her to reapply because the varsity softball team did not have an overall winning record and he felt

⁴Complainant testified that she applied for the varsity softball coaching vacancy in 1994. Complainant also testified that she withdrew her application in support of Chilaka's candidacy at the request of Mr. Ebbet, then Harwich High School's athletic director. I credit Complainant's testimony.

that she had not adequately developed the junior varsity and varsity softball programs. (Complainant's Exhibit No. 25). Chilaka testified that Rose cited the low number of players on the varsity softball team and a lack of interest among team members as two reasons he did not want Chilaka to reapply. I credit Chilaka's testimony.

18. Rose testified that he asked Chilaka not to reapply for the varsity softball coach's position for several reasons: the attitude and overall appearance of the team, a low number of players, a poor winning record and a total disarray in the program. Rose felt that it was not a "positive" program and did not believe that Chilaka was qualified to coach varsity softball. Despite her inadequate performance as varsity softball coach, Rose suggested to Chilaka that she apply to coach the junior varsity softball team for the 1998 season.

19. In September 1997, Dowling learned that Rose had asked Chilaka to step down as the varsity softball coach. Dowling spoke to Rose who told her that he might take the job. Dowling told Rose that it might be a conflict of interest for him to fire Chilaka and take the position. Rose testified that he considered applying for the varsity softball coaching position but decided against it.

20. On October 3, 1997, Chilaka wrote a letter to Dr. Gilbert in which she confirmed that Rose had asked her to "step down" as the varsity softball coach. Chilaka also informed Dr. Gilbert of her interest in coaching the junior varsity softball team. (Complainant's Exhibit 24).

21. Bresnahan testified that he had no role in Rose's decision to ask Chilaka not to reapply for the varsity softball coach position. Bresnahan felt that Chilaka was a very "nurturing" coach but that the softball program was "demoralized." Bresnahan testified that he wanted a coach who was interested in the players and "winning."

22. On January 20, 1998, Chilaka wrote Dr. Gilbert and requested a written statement regarding the reasons why Respondent Rose asked her to step down as the varsity softball coach. In her letter, Chilaka requested a positive recommendation from Rose and reaffirmed her interest in coaching the junior varsity softball team. (Complainant's Exhibit No. 25). Chilaka testified that she wrote Dr. Gilbert because she did not know of other Harwich High School coaches who were asked to step down from their coaching positions for any reason and she was worried about her reputation and future employment as a coach.

23. Approximately one week after Rose told Chilaka not to reapply for the varsity softball coaching position, Chilaka suggested to Complainant that she apply. Chilaka thought Complainant would have the "best shot" at rebuilding the team because she believed Complainant attracted the best girl athletes in field hockey (a fall sports) but they were not trying out for the varsity softball team (a spring sport). Chilaka also believed Complainant would be the best candidate because she had a highly successful record of coaching varsity softball and field hockey at Harwich High School. Bresnahan testified that Complainant's field hockey teams traditionally included the most gifted female athletes in Harwich High School.

Complainant's Coaching Background and Qualifications

24. Based on her extensive coaching background and credentials, Complainant was qualified for the varsity softball coach position at Harwich High School. (Joint Stipulation No. 6).

25. Since 1973, Complainant has conducted coaching workshops at the Massachusetts Convention for Health and Physical Education and has spoken at the Division of Girls and Women's Sports. Complainant also conducted pitching workshops for the Harwich Middle School and its coaches. In the mid-1970's, Complainant conducted softball workshops for the women's league in Barnstable. From 1972 to 1986, Complainant also conducted softball and coaching leadership clinics in "lassie" league programs and the Women's Softball League. While coaching varsity softball at Harwich High School, Complainant served on coaching panels for the Division of Girls' and Women's Sports. Complainant also served on the softball association for high school coaches that ranked softball teams from the late 1970's until 1984. (Complainant's Exhibit No. 3).

26. Complainant was the varsity softball coach at Harwich High School from 1972 through 1984. During this period, the varsity softball team had a record of 240 wins and 10 losses. It won 12 league championships and one District II state softball championship. The team did not finish lower than second place in its league, had a 50-game winning streak and qualified each year for the state softball tournament. Complainant also coached several Boston Globe all-scholastic softball players and one Boston Globe all-scholastic softball player of the year.

27. From 1972 through 1984, Complainant was named Cape Times Coach of the Year in softball eight times and the Cape Codder softball coach of the year numerous times. Complainant was also named the Boston Globe All-Scholastic softball coach of the year in 1978. (Complainant's Exhibit Nos. 3 and 4).

28. Complainant resigned from her position as the varsity softball coach in 1984 so that she could take graduate courses that were offered during the spring semester at Springfield College, Bridgewater State College and Leslie College. After 1984, Complainant completed 80 hours of graduate courses in sports medicine, sports and counseling psychology and public school administration. (Complainant's Exhibit No. 4).

29. Complainant has coached the varsity field hockey team at Harwich High School since 1971. (Complainant's Exhibit No. 4). From 1971 to 1998, Complainant's coaching record for the field hockey team was 395 wins, 46 losses and 16 ties. During this period, Complainant's field hockey teams won 18 league championships and 3 South Regional championships. Complainant coached 18 Boston Globe All-Scholastic field hockey players, 8 Players of the Year and one District II Player of the Year. More than 34 of her field hockey athletes have received college scholarships to play field hockey. In field hockey, Complainant was named Cape Times coach of the year, Boston Globe coach of the Year, Oracle coach of the year and the Cape Codder coach of the year many times. (Complainant's Exhibit No. 4).

30. In 1995, the Massachusetts Association of Health, Physical Education, Recreation and Dance named Complainant its Middle School physical education teacher of the year. In 1996, Complainant was named National Association of Sport and Physical

Education (NASPE) teacher of the year. Complainant was inducted into the Northeast Converse Hall of Fame for her coaching record and advocacy for girls' sports. (Complainant's Exhibit No. 4).

31. On January 29, 1998, Bresnahan and Rose completed a coach's evaluation report for Complainant's activities as the varsity field hockey coach. They gave Complainant the highest rating of "commendable" on all performance elements in the categories of coaching responsibilities, communications and relationships with parents, students, coaching staff, officials, the athletic director and school administration. They also assigned Complainant a "commendable" rating for 15 of 18 performance elements that constituted the "professionalism" category. (Complainant's Exhibit No. 12).

32. Rose testified that a degree in physical education was helpful in coaching, although not required. As athletic director, Rose testified that he expected or preferred physical education teachers to coach at least one sport. Bresnahan also testified that training as a physical education teacher would be helpful in coaching. Since Complainant was a physical education teacher at the Harwich Middle School, Rose testified that Complainant was also in a position to attract good players to the high school softball team.

33. When Chilaka needed help with the softball team, she asked Complainant to teach softball skills at the Harwich Middle School. In 1996, Complainant worked with several softball pitchers at 6:30 a.m. on her own time and without pay. One of these students, Sarah Broderick, later pitched for the varsity softball team. Chilaka testified that Broderick's pitching was crucial to the varsity team's success in the spring of 1998.

34. Rose testified that he did not know that Complainant had assisted Chilaka while she was varsity softball coach or that Complainant regularly worked with several softball players at Harwich Middle School prior to classes to improve their skills.

35. Rose testified that Complainant knew how to coach softball and had been highly successful during her prior tenure as the varsity softball coach at Harwich High School. Rose acknowledged that Complainant had an excellent reputation as a softball coach and that she had received honors in coaching varsity softball. Rose also testified that Complainant was very successful as the field hockey coach at Harwich High School.

36. Dowling described Complainant's coaching philosophy as one in which she drilled on basic skills, developed each player as a "whole person" and worked on each player's self-esteem.

37. While working at the Harwich Middle School with Complainant for 10 years, Thacher discussed coaching problems and strategies with her, observed her practice preparation and frequently watched her games. Thacher testified that Complainant is an excellent varsity coach who is well prepared, very organized and works hard on the psychological, physical and mental aspects of preparing an athlete for competition. I credit Thacher's testimony.

38. Complainant subscribes to many professional journals in the field of coaching, including the Journal of Health, Physical Education, Recreation, Dance and Sport, the Coaching Magazine, the Softball Coaching Magazine, the United States Field Hockey Magazine, the ESPN Magazine and Sports Illustrated for Women.

In 1997, Complainant subscribed to a softball coaching magazine as part of her preparation for the 1998 coaching position.

Hiring Process for 1998 Girls Varsity Softball Coaching Position

39. In 1997, Harwich High School was a member of the Cape and Islands (C&I) athletic league. While a member of the C&I league, Harwich High School teams occasionally played Saturday games. Since several teams were leaving the C&I league, Rose and Bresnahan began to explore opportunities to join at least three other off-the-Cape athletic leagues. Bresnahan testified that the off-the-Cape leagues under consideration indicated that Harwich High School would have to be "creative" and should expect to play some Saturday games because of travel time.

40. On September 26, 1997, Harwich High School posted the varsity and junior varsity softball coaching positions for the 1997-1998 school year along with all other winter and spring coaching positions. Candidates who were currently employed in the Harwich public schools as coaches were only required to send a letter of application to Dr. Gilbert. (Complainant's Exhibit 1). The deadline for applications was October 3, 1997. (Joint Stipulation No. 4).

41. On September 30, 1997, Complainant submitted her letter of application for the varsity softball coach position. (Complainant's Exhibit No. 2.) Complainant was the only candidate to apply for the varsity softball coach position by the October 3, 1997 deadline. (Joint Stipulation No. 5).

42. Rose testified that the incumbent tennis and junior varsity baseball coaches informed him that they did not see the posting

regarding vacant coaching positions until after the deadline. At the request of Bresnahan and Rose, Dr. Gilbert re-posted all high school coaching positions for the 1997-1998 year on October 20, 1997, including the varsity softball coach's position. The revised deadline for applications was October 29, 1997. (Complainant's Exhibit No. 5 and Joint Stipulation No. 7).

43. Bresnahan testified that he did not know that Complainant was the only candidate who had applied for the varsity softball coaching position when he requested the re-posting in 1997. I credit Bresnahan's testimony.

44. Complainant testified that, in her experience, it was unusual for Harwich High School to re-post a coaching position especially if there was a qualified internal applicant like herself.

45. After the re-posting, two males applied for the varsity softball coaching position: Anthony J. Cantanzaro and Howard M. Pavlofsky. Cantanzaro's letter of application was dated on October 27, 1997 and Pavlofsky's application was dated on November 28, 1997. (Complainant's Exhibit Nos. 6 and 28).

46. In 1997-1998, there was no formal job description or written qualifications for the varsity softball coach's position. In February 1998, Rose identified four key qualification standards for the varsity softball coach position: experience, knowledge of the sport and communication with athletes and the school administration.

47. Bresnahan testified that he used an interview committee to select teachers for approximately 35 vacancies over a 17-year

period. Bresnahan testified that he used a committee to select the Harwich High School ice hockey coach in 1995 and 1996, due to special circumstances involving the incumbent coach's legal problems.

48. Bresnahan testified that he also used an interview committee whenever an internal candidate applied for a coaching position for which an incumbent coach had re-applied. Bresnahan also testified that he did not accept applications from external candidates when an incumbent coach reapplied. Bresnahan did not recall any instance prior to 1996 in which an incumbent coach was "challenged" by an internal candidate. A committee was not used for a coaching position at Harwich High School other than the ice hockey coach position until the 1998 varsity softball coach's position at issue in this complaint.

49. At Bresnahan's request, Rose established an interview committee for the 1998 varsity softball coaching position. The interview committee consisted of Bresnahan and Rose and three parents whose daughters played varsity softball: Susan D. Peterson, Kim L. Gonzales and Paula Sdoucos.⁵ Gonzales' and Peterson's daughters played on the varsity softball team coached by Chilaka and on the soccer team coached by Catanzaro. The committee interviewed both male candidates and Complainant. (Joint Stipulation No. 8).

50. Mangelinkx also briefly served on the committee and interviewed one (unspecified) candidate. Mangelinkx did not participate in the committee's discussion and votes on the candidates.

⁵Sdoucos did not testify at the public hearing.

51. Bresnahan testified that the interview committee was advisory and its responsibility was to recommend a candidate to him. Bresnahan also testified that he "paid attention to the [committee's] vote" and that it would have been "folly" for him to totally ignore the parents' vote.

52. Bresnahan and Rose testified that the goal of the 1998 interviews was to select the most qualified candidate "according to the interview." Bresnahan testified that they were looking for a person who could rebuild the varsity softball team.

53. During a meeting prior to conducting interviews, the committee members prepared a list of interview questions that Bresnahan reduced to writing and distributed to the committee. The interview questions addressed the candidate's reasons for applying for the position, coaching philosophy and goals, team rules, motivation techniques and approaches to resolving conflicts with parents (over playing time) and with the athletic director. The written list of interview questions did not include any questions regarding a candidate's position on regularly playing Saturday softball games. (Complainant's Exhibit No. 9).

54. Bresnahan informed the committee that they could ask follow-up questions. Gonzales testified that the committee members also asked questions of the candidates regarding how they would handle an emergency and their position on playing Saturday games.

55. On January 30, 1998, Bresnahan mailed a copy of Harwich High School's athletic coach appraisal form (blank) to the committee members. (Complainant's Exhibit No. 8).

56. The committee interviewed Complainant and Pavlofsky on February 4, 1998. Complainant's interview was scheduled while she was planning for her field hockey team's banquet.

57. On the morning of the interview, Rose told Complainant that she needed to bring in her resume. The scheduled time of Complainant's interview was 2:15 p.m. (Complainant's Exhibit No. 8). Complainant arrived at her interview 15-20 minutes early but her interview did not begin until 2:30 p.m. Complainant testified that she was nervous that her interview might not finish in time for her meeting with the field hockey parents about the team banquet.

58. Gonzales testified that Complainant had a great attitude, was positive and very confident about her coaching abilities during her interview. Prior to her interview, Gonzales knew about Complainant's coaching credentials, her "great" reputation at the school for training in softball and her "record at the school for being a great coach." Gonzales testified that Complainant's reputation was that she was "highly qualified, a good coach" for softball. Gonzales felt that Complainant and Catanzaro were qualified to be the softball coach although Complainant had greater varsity softball coaching experience.

59. Complainant testified that she told the committee that she loved coaching as a profession because it required a lot of work and preparation and that she loved the mental challenge of building a softball team. Complainant believed that the

students benefited greatly by being on a team that helped them to develop life skills. Complainant testified that she told the committee that she believed in hard work with a balance of fun and time off for rest and relaxation. Complainant also told the committee that she emphasized discipline and that her team captains had input into team rules and the consequences for violating team rules. I credit Complainant's testimony.

60. Complainant described her coaching style to the interview committee as holistic and focused on nutrition, individual relaxation and visualization techniques. Complainant emphasized team building activities, assigned each player to a "buddy, held team dinners and developed a "family" atmosphere. Under her coaching style, Complainant challenged her players to reach their individual potential, including the "gifted" players. I credit Complainant's testimony.

61. The interview committee did not ask Complainant any questions about softball or her expertise in coaching softball.

62. Rose and Bresnahan did not recall any questions during the 1998 interview about each candidate's educational background or knowledge of softball. Bresnahan testified that he assumed that the candidates were knowledgeable about softball. Both Complainant and Gonzales testified that Complainant asked the committee why there were no questions regarding her softball expertise. Gonzales testified that there was no reason to ask Complainant about her coaching credentials because the committee already knew that she was highly qualified for the position based on her "great" coaching record.

63. Rose and Bresnahan did not give Complainant's 1997 field hockey coach appraisal to the interview committee nor did they share her appraisal ratings.

64. On February 9, 1998, the committee interviewed Catanzaro.

65. When Catanzaro applied for the varsity softball coach's position in 1998, he was an industrial arts teacher. Respondents presented no evidence that Catanzaro had any training or background in health and physical education.

66. Catanzaro had never coached a varsity softball team prior to the position at issue in this complaint. (Complainant's Exhibit Nos. 6 and 7). Catanzaro coached softball at Lakeview Elementary School in 1977-1981 and junior varsity softball at Barnstable High School in 1986-1988. (Complainant's Exhibit No. 7). Rose testified that Barnstable High School had approximately 2200 students while Harwich High School had approximately 400 students.

67. Catanzaro coached the varsity girls' soccer team at Harwich High School from 1993 to 1998. (Complainant's Exhibit No. 7). Rose acknowledged that Catanzaro's soccer team did not have a winning record and had not qualified for state tournaments because it failed to win at least one-half of its games.

Saturday Games

68. Bresnahan received the varsity softball schedule for the 1998 South Shore season before the committee conducted its interviews. There was one Sunday game and no Saturday games scheduled for the 1998 season. (Complainant's Exhibit No. 11

and Joint Stipulation No. 12). There were no regularly scheduled Saturday games during the next four seasons in the South Shore league.

69. Bresnahan testified that he raised the issue of playing Saturday softball games with the committee members before they conducted their interviews. Rose testified that he told the candidates, during their interviews, that no Saturday games were scheduled for the 1998 season.

70. Gonzales and Peterson testified that Bresnahan or Rose told them that the issue of Saturday games was important. Gonzales thought that there would be Saturday games that year while Peterson testified that she knew there were no regularly scheduled Saturday games that year. Both parents testified that Rose and Bresnahan indicated that there was a real possibility of playing Saturday games in the immediate future.

71. Gonzales felt that the candidates' position about playing Saturday games was an important factor in her decision because she understood that Harwich High School was unsure about what league it would be in the future. Gonzales also believed that it was likely that the varsity softball coach would have to be flexible about regularly playing Saturday games in the 1999 softball season, although there was none on the 1998 schedule. Peterson testified that she understood that there was a possibility that the varsity softball team might play in a new league that had regularly scheduled Saturday games.

72. Complainant received the schedule for the 1998 varsity softball season before her interview and reminded the committee

during her interview that there were no Saturday games on the schedule.

73. Complainant testified that she told the interview committee that she did not believe in playing regularly scheduled Saturday games because she felt her players worked enough during the week. Complainant testified that she has never practiced on Saturday or Sunday even if she had a game on Monday. Complainant testified that she told the committee that, in her experience, regularly scheduled Saturday games had a detrimental effect on her players. Complainant believed that the student-athletes needed time on the weekends for family, work, study and physical and mental rest. Complainant also testified that she told the committee that she was not opposed to occasionally playing Saturday games. I credit the Complainant's testimony.

74. Complainant testified that she met with other coaches throughout the state and advocated before the Massachusetts Interscholastic Athletic Association (MIAA) against a policy of playing regularly scheduled Saturday games. Complainant testified that she never stated during her interview that she would refuse to play Saturday games and told the committee that she had played Saturday games in the past. Complainant also testified that she was not inflexible and very much wanted to coach softball again. I credit Complainant's testimony.

75. Complainant's field hockey team played seven Saturday games during the 1997 season.

76. Rose testified that Complainant stated in her interview that she would play a few Saturday games. Rose and Bresnahan

testified that they also knew Complainant had occasionally coached Saturday games in field hockey.

77. Bresnahan testified that Complainant initially stated her intention not to play Saturday games because she felt they were not good for the student-players. Bresnahan also testified that, during her interview, Complainant retreated from her refusal and stated that she would play one or two Saturday games. Bresnahan testified that Complainant also stated that she would challenge a Saturday playing mandate at "every possible level." I do not credit Bresnahan's testimony regarding Complainant's alleged refusal to play regularly scheduled Saturday games.

78. Gonzales testified that Complainant stated her refusal or unwillingness to coach on Saturday. I do not credit Gonzales' testimony.

79. Bresnahan knew that Catanzaro coached Saturday games in girls' soccer. Rose testified that Catanzaro stated, during his interview, that he would abide by Rose's decision regarding the playing of regularly scheduled Saturday games.

Winning

80. Complainant and Catanzaro both noted in their application letters that they hoped to build a more "competitive" varsity softball team for the 1998 season. (Joint Stipulation No. 11 and Complainant's Exhibit Nos. 2 and 6). In her application letter, Complainant listed her record of championships as a softball coach. (Complainant's Exhibit No. 2). Pavlofsky listed his 1997 win-loss record on his application letter for the 1998

varsity softball coach position. (Complainant's Exhibit No. 28).

81. Rose testified that he expected candidates for coaching positions to have a goal of achieving a winning season. Rose also testified that if coaches are building skills, it is expected that their teams will win more games.

82. Gonzales testified that she expected coaches are expected to encourage winning. She also testified that winning was not as important as teaching the skills of the game, working together and enjoying team camaraderie. Gonzales testified that winning games was not her primary consideration in the selection process as long as the players enjoyed great camaraderie. Gonzales also believed that it was more important for the varsity softball coach to teach fundamental skills to the girls and how to work together.

83. Peterson testified that Complainant's very impressive win-loss record in softball was a positive consideration. Peterson did not recall Complainant saying anything specific about wins during her interview.

84. Bresnahan testified that "it is better to win than lose" and "losing is not fun" although he was not concerned that the softball team was not winning. Bresnahan also testified that the girls on the varsity softball team were demoralized by the lack of wins.

85. Complainant also testified that there was no discussion about "winning" during her interview. I credit Complainant's testimony.

86. Thacher testified that "winning" is a priority in a "healthy" varsity high school athletic program. In 1997-1999, Thacher listed his teams' championship or winning records on his applications for coaching positions at Harwich High School. (Complainant's Exhibit No. 26).

1998 Selection

87. By secret ballot, the interview committee unanimously recommended Catanzaro for the varsity softball coaching position for the spring 1998 season. Rose testified that he voted for Catanzaro because of the "way he talked about the kids, the program itself and the overall development." Rose denied that committee members, including Bresnahan, discussed Complainant's gender or that it was a factor in their selection decision.

88. Gonzales and Peterson testified that they voted for Catanzaro because of his willingness to play Saturday games and their belief that Complainant would refuse to play Saturday games. Gonzales testified that the gender of the candidates was not a factor in her decision to vote for Catanzaro. Gonzales also testified that she might have selected Complainant if there was no potential for playing Saturday softball games.

89. Peterson felt that Catanzaro was extremely sincere, outgoing, had a positive nature and was confident about working on skills and changing the team to get "some wins." She felt that Catanzaro was more positive, upbeat and balanced during his interview than Complainant. Peterson was impressed by Complainant's coaching credentials and record and knew that she was a strong advocate for girls' sports at Harwich High School.

Peterson also testified that Complainant was a highly qualified softball coach.

90. Peterson testified that she had reservations about Complainant based on her response to playing Saturday games and her demeanor during the interview in which a lot of her responses were about "winning." Peterson did not recall Complainant's specific responses about "winning" aside from her resume that showed her win-loss record. Peterson felt that Complainant was very strong regarding her feelings in her response to playing Saturday games. She also felt that Complainant "rushed" through her interview.

91. Peterson testified that she did not know that Complainant's field hockey teams played tournament and make-up games on Saturday. She also did not recall that Complainant stated, during her interview, that she would play a few Saturday games but was opposed to a regular schedule of Saturday games.

92. Gonzales and Peterson denied that Rose or Bresnahan pressured or influenced them in any manner to vote for Catanzaro. They also denied that Complainant's gender was a factor or consideration in their decision to vote for Catanzaro.

93. Rose did not feel that the issue of Saturday games was important. He testified that Complainant's view about playing Saturday games was not an important factor in his decision to vote for Catanzaro.

94. Complainant testified that Peterson stated that she and the parents were not in favor of playing Saturday games. Complainant also testified that Sdoucos stated that there was no

problem since there were no Saturday games scheduled for the upcoming season.

95. Gonzales and Peterson both testified that they might have voted for Complainant had they been told that Saturday games were not scheduled during the spring 1998 season and that the varsity softball coach's position would be filled for only one year.

96. Bresnahan testified that Complainant was confident in her ability to coach but that her demeanor during the interview was "standoffish" and that she acted as if the softball coach's position was hers "to get." Bresnahan also testified that Catanzaro was very relaxed with parents and demonstrated flexibility based on his answers.

97. Gonzales testified that Complainant's attitude during her interview was great and that she was positive and confident in her abilities. Gonzales also testified that Complainant's demeanor was appropriate, calm and informative. Peterson testified that, before Catanzaro's interview, she was very positive about Complainant's interview. Peterson also testified that Complainant conducted herself very well and was highly qualified for the position.

98. Bresnahan felt that Complainant "miss[ed] her audience" by focusing on wins and losses; specifically, that the softball players would become winners if they went along with her program. Bresnahan felt that the appropriate "audience" was players who have been on a team without very many wins and that Complainant made a mistake by discussing how she worked with

student athletes to get college scholarships because "these were not necessarily kids going on with athletic scholarships."

99. Bresnahan testified that he preferred Catanzaro's coaching style. He felt that Catanzaro's answers reflected more flexibility by focusing on players' attitudes and morale. Bresnahan felt that Catanzaro's approach focused on what he could do for the players --was more "humanistic" while Complainant had a "well-oiled machine-like thinking." Bresnahan recognized that the prior coach, Chilaka, had a humanistic style but she had to be replaced because the softball team was "demoralized" by its lack of success.

100. Respondents cited an "incident" in 1997 during which Complainant allegedly confronted two field hockey officials after a game and was ordered off the field. Bresnahan testified that he investigated the incident and responded to allegations that Complainant engaged in unsportsmanlike behavior and an angry outburst at officials during the game.

101. Thacher testified that he witnessed the interaction and characterized it as a discussion between Complainant and the officials and not as an "incident." Thacher testified that he is more vocal than Complainant with referees during games and that he has never been accused of misconduct or poor sportsmanship. I credit Thacher's testimony.

102. Respondents did not introduce any evidence that Complainant had ever been disciplined for misconduct as a coach.

103. On or about February 10, 1998, Dr. Gilbert hired Catanzaro as the varsity softball coach for the spring 1998 season based on Bresnahan's recommendation. (Joint Stipulation No. 9).

104. On February 10, 1998, Bresnahan and Rose informed Complainant, by letter, that she was not selected for the varsity softball coaching position for the spring 1998 season. (Complainant's Exhibit No. 10).

105. The varsity softball team's record for the 1998 season was 9 wins and 9 losses. In 1998, Catanzaro was selected as the Cape Cod Times' softball coach of the Year.

106. The same committee interviewed Chilaka for the junior varsity softball coach's position immediately after Complainant's interview. In response to a question from Bresnahan or Rose, Chilaka testified that she told the committee that she did not favor playing regularly scheduled Saturday games because she believed Saturdays should be committed to family time or for emergency games. Dr. Gilbert hired Chilaka for the junior varsity softball coach's position for the 1998 season. I credit Chilaka's testimony.

107. When Chikala learned that Catanzaro was selected for the girls' varsity softball coaching position, she was surprised that Complainant did not get the job based on her past coaching record and the lack of female coaches in the school system.

108. Complainant would have earned a salary of \$3,938.00 had she been hired as coach of the varsity softball team for the spring 1998 season. (Joint Stipulation No. 10 and Complainant's Exhibit No. 14).

109. The Harwich Public Schools' professional staff hiring policy prohibits discrimination because of gender. The policy also states that the hiring process should "attempt to attract, secure, and retain the highest qualified personnel for all professional positions." (Complainant's Exhibit No. 13).

110. In the fall of 1997, the Town of Harwich employed women in 6 of 25 (24%) coaching positions in its sports programs. During the same period, the Town of Harwich employed women in 115 of 165 (70%) teaching and staff positions. (Complainant's Exhibit No. 22).

Emotional Distress Related to 1998 Non-selection

111. On or about February 10, 1998, Bresnahan and Rose met Complainant at the Harwich Middle School and told her that they had selected Catanzaro for the 1998 varsity softball coaching position and that the decision was an unanimous one. Bresnahan testified that they told Complainant, in person, because she was an internal candidate.

112. Complainant testified that she was "totally stunned," was in shock and "kind of slumped down" in her seat. Complainant was "dumbfounded" because she thought the interview had gone well. Bresnahan testified that Complainant appeared "shocked" and became upset.

113. Bresnahan and Rose told Complainant that Catanzaro performed better in his interview because he did not emphasize "winning." This statement upset Complainant because she did not discuss "winning" during her interview although she included her

win-loss record on her resume. Complainant was confused and felt that Bresnahan and Rose were penalizing her accomplishments because they were attained in girls' sports programs.

114. After Bresnahan and Rose left, Complainant testified that she felt extremely embarrassed and humiliated. Ms. Chase, the assistant principal at Harwich High School, and Mrs. Wyasack, an English teacher, asked Complainant what happened. Complainant testified that she told them and then broke down. I credit Complainant's testimony.

115. When Complainant returned to the middle school gymnasium, she told Thacher what happened and began to cry uncontrollably. Thacher testified that Complainant was very upset and distraught. Thacher told Complainant to go home and that he would cover her classes. I credit's Complainant's testimony.

116. Complainant testified that she then left the Harwich Middle School, drove around for a little while and tried to calm down. Complainant also testified that she was still in shock and was humiliated and embarrassed because of her non-selection.

117. Complainant then spoke with Chilaka and Dowling for approximately 35-40 minutes at Harwich High School where she broke down again.

118. Dowling testified that she saw Complainant crying and that she was unable to talk at first. Dowling testified that Complainant then told her that she did not get the varsity softball coaching position. Dowling testified that Complainant was "devastated, like someone had poked her in her stomach." Dowling initially thought that someone had died in Complainant's

family. Ms. Dowling testified that she was flabbergasted and tried to encourage Complainant. I credit Dowling's testimony.

119. After Complainant left Harwich High School, she tried to calm down. Complainant went to a beach for a while, went home, took a bath and fell asleep for a half hour. Complainant then called her aunt in Kansas and her parents. Complainant testified that she had an overwhelming feeling of shame and that she was unable to sleep because she experienced heart arrhythmia.

120. Complainant testified that she was worried about damage to her reputation. Thacher and Dowling testified that there was a general expectation that Complainant would be selected for the 1998 varsity softball coach's position. Complainant was worried that individuals within the Harwich community might wonder what she had done to make the Town of Harwich reject her for the varsity softball coach's position.

121. Complainant testified that she was sad and overwhelmed for the remainder of the 1997-1998 school year. Complainant also testified that her energy level remained low and she continued to experience sadness and uncontrollable crying. Complainant testified that she was depressed, felt flat and was unable to feel any other emotions with intensity. She also testified that she worked as hard as she had in prior years but that she lost her energy, motivation and her natural excitement for coaching. I credit Complainant's testimony.

122. Complainant testified that she began to have self-doubt and reservations about her coaching and was more nervous about her coaching performance in field hockey. Dowling testified

that Complainant became more cautious and began to doubt her own coaching abilities.

123. In or about 1994, Complainant had been diagnosed with symptoms of heart arrhythmia. In 1995, Dr. Pennfield, an emergency room physician, prescribed Xanax, an anti-anxiety medication, for Complainant after she visited a hospital emergency room. After 1994, Complainant experienced arrhythmias one or two times in a four- or five-minute period, whenever she became nervous.

124. Dr. Sbarra, a cardiologist, told Complainant that stress exacerbated her heart arrhythmia and again prescribed Xanax to reduce her stress. In 1997, Complainant took a leave of absence so that her cardiologist could experiment with different drugs to slow her heartbeat but the drugs made her lethargic.

125. Prior to February 10, 1998, Complainant participated in the following activities to prevent her arrhythmias by reducing her stress level: yoga, acupuncture and massage therapy. Complainant enrolled in an eight-week program with Dr. Jon Kabat-Zinn wherein she learned how to use yoga, breathing techniques and meditation to reduce the frequency of her arrhythmia. At her doctor's recommendation, Complainant also saw an acupuncturist once a month and had massage therapy once every two months.

126. After February 10, 1998, Complainant went to her acupuncturist twice a week for about three months. Complainant reduced her schedule to once a week for a while and did not return to her prior schedule of once every two weeks until shortly before the hearing in this complaint.

127. After February 10, 1998, Complainant had massage therapy once every two weeks for approximately one year, which she paid for out of her own funds. Complainant testified that she now has massage therapy once every three weeks.

128. After February 10, 1998, Complainant began to suffer from bigiminy, a severe kind of arrhythmia marked by one anomaly every two heart beats. Complainant's condition gave her difficulty breathing, made her cough and made her feel tired. After Complainant's 1998 non-selection, Dr. Sbarra prescribed Xanax at a very low dose to be taken four times a day for 6-7 months, after which Complainant took it twice a day for an additional six months. Complainant's current prescription provides that she can take Xanax as needed.

129. Complainant testified that the severity of her arrhythmia prevented her from driving to a family reunion in Florida in February 1998.

130. After February 10, 1998, Thacher testified that Complainant was "stressed out," suffered from migraines and went to see her doctors frequently. Thacher also testified that he saw Complainant break down two or three times when she talked to him about the case but cannot recall when these conversations took place.

131. Thacher testified that Complainant "definitely paid a price" as she appeared stressed and unhappy. He also testified that Complainant had frequent migraines that sometimes made her black out. Thacher saw tension in Complainant's face and observed her "break down" two or three times regarding her 1998

non-selection. Thacher did not recall Complainant having migraines before February 1998. I credit Thacher's testimony.

132. Between February 1998 and May 1998, Dowling talked to Complainant a few times about her non-selection for the varsity softball coach's position. Dowling described Complainant as "extremely sad" during this period and that she began to lose some of her confidence and "spunk" for coaching. Dowling observed that Complainant began to lose weight and looked like her eyes were sunken all the time. In May or June 1998, Dowling saw Complainant fall to her knees because of her heart arrhythmia. I credit Dowling's testimony.

Hiring Process for the 1999 Coaching Position

133. Complainant and Catanzaro timely applied for the Harwich High School varsity softball coach's position for the spring 1999 season. (Joint Stipulation No. 13).

134. In addition to her letter of application, Complainant submitted an updated resume along with a speech entitled "Thanks, Coach," written by senior members of the 1998 field hockey team. (Complainant's Exhibit Nos. 15 and 16). Complainant submitted the speech to show, in part, her close relationship with her field hockey players. Respondent Bresnahan denied being at the 1998 field hockey banquet where the "Thanks Coach" speech was read.

135. Bresnahan asked Mangelinkx to handle the 1999 interview process because of the pending Commission complaint regarding the 1998 position and the fact that Mangelinkx had not been involved in the interview committee's decision-making process

regarding the 1998 selection. Respondent Bresnahan testified that he asked Mangelinkx to give him the name of the candidate recommended by the committee. Mangelinkx was responsible for setting up the interview process and conducting the interviews for the 1999 varsity softball coach position.

136. On March 2, 1999, Mangelinkx established an interview committee that consisted of himself and parents of students who were on the varsity softball team: Mary Lee Kelsey, Deborah Toner, Karen Simmons and Mr. and Mrs. James Coyle whose granddaughter played on the team.⁶ (Complainant's Exhibit No. 18).

137. Kelsey's daughter graduated from Harwich High School in 2000 and played field hockey under Complainant in 1999 and 2000. On August 25, 2002, Kelsey retired from the Massachusetts Department of Mental Health (DMH) where she worked for 10 years as the Director of Residential Services for Cape Cod and the Islands. During her employment at the DMH, Kelsey testified that she had "lots of experience" interviewing and hiring DMH line staff and psychiatrists.

138. Kelsey understood that Mangelinkx was the chairperson of the committee.

139. Rose did not serve on or have any role on the 1999 committee. Bresnahan did not participate in the 1999 interviews.

⁶Kelsey was the only parent member of the 1999 interview committee who testified in this case.

140. The committee met immediately prior to conducting the interviews of Complainant and Catanzaro. Mangelinkx gave the resumes for Complainant and Mangelinkx to the committee. He also distributed interview questions for review and editing by committee members as appropriate. The interview questions related to coaching philosophy, skills development activities, motivation strategies, proposals to ensure that the students maintain "good" grades, the role of captains, their positions on playing Saturday softball games and their most rewarding experience as a softball coach. (Complainant's Exhibit No. 17).

141. Mangelinkx did not recall telling the committee members that their votes would bind the school district. Mangelinkx also testified that he did not tell the committee members that he would not be voting as the putative chairperson. Mangelinkx also testified that he always intended or expected to vote on the coaching candidates.

142. Kelsey testified that Mangelinkx asked her to serve on the committee. Kelsey also testified that the committee was not given any instructions on what qualities or skills they were looking for in a coach—other than they were looking for a varsity softball coach.

143. Prior to Complainant's interview, Mangelinkx felt that Complainant had a reputation for being a committed and successful coach. Mangelinkx also felt that Complainant had a number of confrontations with officials, other coaches and school officials over issues such as playing or field conditions. Prior to Catanzaro's interview, Mangelinkx testified that he had a reputation for being an emotional coach

who was dedicated to the girl athletes who played softball and soccer.

144. Mangelinkx believed Catanzaro had a reputation for being a successful girls soccer coach and had one successful year as the varsity softball coach. Mangelinkx defined success in terms beyond simply wins and losses, e.g., uniting a team and developing a positive attitude.

145. During the interview, Kelsey learned that Complainant had coached for 26 or 27 years, she used to be the varsity softball coach with a very good win-lose record and that she was the current field hockey coach at Harwich High School. Kelsey testified that Complainant was a little nervous but that her demeanor, dress, and preparation showed that she took the interview process "very seriously." Kelsey also testified that Complainant was prepared, provided relevant information about her qualifications and acted like a "real professional." Kelsey testified that she was impressed with the "Thanks Coach" letter because it showed how much the field hockey athletes appreciated Complainant as a coach. (Complainant's Exhibit No. 16). Kelsey testified that the committee did not receive any materials from Catanzaro. I credit Kelsey's testimony.

146. Kelsey recalled a discussion about "winning" during Complainant's interview. She testified that Complainant made it clear that she was "out for her girls to win" but she also tried to support and teach them.

147. During the interview, Kelsey learned that Catanzaro did not have a lot of experience coaching softball and had not coached a varsity softball team prior to being hired in 1998.

Kelsey testified that Catanzaro did not provide any materials, was not well prepared, did not take the interview process or committee members "real seriously" and was very relaxed and laid back. Kelsey testified that Catanzaro stated that his goal for the team was to win at least 50% of its games and she felt that the proper goal should be 100%. I credit Kelsey's testimony.

148. Kelsey testified that Coyle believed Complainant was the better candidate. Kelsey also testified that Coyle told her that he had heard or seen Catanzaro criticize or yell at girls while on the field and that it was "humiliating" for the players.

149. Kelsey testified that Kelsey testified that Complainant knew the rules better than the officials and she heard that Complainant took a rulebook with her to games. Kelsey testified that Complainant sometimes convinced officials to change a ruling in her team's favor. I credit Kelsey's testimony.

150. The five parents voted by secret ballot. Kelsey testified that she voted for Complainant because she felt Complainant was the best-qualified candidate based on her resume, interview and the fact that she took her coaching seriously. The result was 3-2 in favor of hiring Complainant. Mangelinkx then voted for Catanzaro, making a 3-3 tie.

151. Mangelinkx testified that he voted for Catanzaro because of his success or record in 1998 as the varsity softball coach and his status as an incumbent. Mangelinkx did not recall any instance in which an incumbent coach was not rehired for a coach's position. Mangelinkx also testified that there was "some" presumption that incumbent coaches should continue in

their positions but that there was no "hard and fast" rule. Mangelinkx testified that "there wasn't any reason not to rehire" Catanzaro.

152. Mangelinkx did not recall any "glaring negatives" regarding Complainant's qualifications based on her interview.

153. Rose testified that Respondent Harwich's practice was to rehire incumbents who reapplied for coaching positions unless there was a reason not to rehire.

154. Kelsey testified that she was not told that there was a presumption or practice within Harwich High School to rehire an incumbent coach. Kelsey also testified that she did not discuss her vote with Bresnahan and Rose prior to making it.

155. Kelsey testified that she did not know Mangelinkx had a vote and that an odd number of voters made more sense to avoid a tie. Kelsey testified that this was when she first learned that the interview committee's role was merely to make a recommendation. Kelsey also testified that she was not told that there was a general expectation by the Harwich High School administration that Catanzaro would remain in the position as the incumbent.

156. After the committee's actions, Mangelinkx called Bresnahan and recommended that he hire Catanzaro. (Complainant's Exhibit No. 18). Mangelinkx testified that he did not give Bresnahan the results of the committee's vote because Respondent Bresnahan merely asked for the name of the recommended candidate without any details of the interview process. Bresnahan testified he knew that Complainant and Catanzaro were the only two candidates

for the 1999 position. On the same day, Bresnahan recommended to Superintendent Gilbert that Catanzaro be appointed to coach varsity softball for the spring 1999 season. (Complainant's Exhibit No. 20).

157. By letter, dated March 2, 1999, Bresnahan informed Complainant that she was not selected for the varsity softball coach position for spring 1999. (Complainant's Exhibit No. 19).

158. Respondent Harwich rehired Catanzaro as the varsity softball coach for the spring 1999 season. (Joint Stipulation No. 14).

Emotional Distress Related to 1999 Non-selection

159. Complainant testified that she was again shocked when she was not selected in 1999. Complainant testified that she experienced the same feelings of embarrassment, loss and sadness as when she was not selected for the 1998 varsity softball coach position. I credit Complainant's testimony.

160. Dowling testified that Complainant felt that her 1999 non-selection rekindled emotions of disbelief and heartache and that Complainant again felt like she was "kicked in the gut."

161. After her 1999 non-selection, Complainant testified that she began crying again, became more depressed and that her energy and motivation was "sliding down." Complainant received treatment for depression from Dr. Tokars, a psychologist who worked at the Harvard School of Medicine. Complainant testified that she had weekly sessions with Dr. Tokars for most of the summer in 1999. Complainant terminated her visits when she went

to Indiana to attend to her ill father and was not motivated to resume therapy after she returned from Indiana.

162. After March 2, 1999, Complainant began to feel that she no longer wanted to teach in the Harwich School system because she believed that it did not value her work. Complainant discussed her plans with a life transition coach and unsuccessfully applied for field hockey and softball coaching positions at several colleges including Union College, Memphis State University and Fitchburg State College. Complainant also consulted with a financial planner at the Massachusetts Teachers' Association Retirement Board financial planner who told her that leaving before her retirement benefits vested would be "financial suicide."

163. Dowling testified that coaching was Complainant's passion but she "was losing her spunk" and questioned whether she had been good as a coach. Dowling testified that, after the spring of 1999, she observed that Complainant lost weight, her eyes looked sunken and her heart arrhythmias worsened. Ms. Dowling also testified that, while they were walking in May or June of 1999, Complainant fell to her knees from a sudden episode of heart arrhythmia. I credit Dowling's testimony.

164. Complainant would have earned a salary of \$4,046.00 had she been hired as coach of the varsity softball team for the spring 1999 season. (Joint Stipulation No. 15 and Complainant's Exhibit No. 21).

165. Complainant used 9 sick days in FY1998, 12 sick days in FY1999 and 9.5 days in FY2000. (Respondent's Exhibit No. 1).

Varsity Softball Coaching Vacancy in 2000-2002

166. Complainant was the only applicant for the varsity softball coach's position in the spring 2000 season. (Joint Stipulation No. 16).

167. Complainant was hired as the varsity softball coach at Harwich High School for the spring 2000 season. (Joint Stipulation No. 17).

168. When Complainant was hired for the spring 2000 softball season, she felt that she was "in the spotlight," and that her performance would be scrutinized. Complainant believed that "people" would think she was hired because of her pending lawsuit.

169. Dowling testified that Complainant had mixed feelings about returning to coach softball as she doubted herself at first. As the season progressed, Dowling testified that Complainant seemed thrilled to be back in coaching and started "picking up the way she used to be."

170. Thacher testified that Complainant started her softball preparation immediately after being told unofficially that she would be hired and before receiving formal notification. Thacher testified that Complainant was eager to start and began her research by going to softball pitching clinics and buying coaching books. Thacher testified that Complainant had already planned the first couple of weeks of practice before being officially informed that she was hired.

171. Respondent Harwich High School hired Complainant as the varsity softball coach for the 2001 and 2002 seasons.

III. CONCLUSIONS OF LAW

Massachusetts General Laws, Chapter 151B, §4, paragraph 1, prohibits discrimination in employment including a refusal to hire individuals because of their gender. Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000). In the absence of direct evidence of unlawful discrimination based on gender, as in this case⁷, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976). See also Weber v. Community Teamwork, Inc., 434 Mass. 761 (2001); Lipchitz v. Raytheon Company, 434 Mass. 493 (2001) (G.L. c. 151B sets out four elements: membership in a protected class, harm, discriminatory animus and causation); Abramian v. President & Fellows of Harvard College, 432 Mass. 104 (2000); Yeskevic v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001).

To establish a prima facie case of gender discrimination based on Respondents' failure to hire her as the varsity softball coach at Harwich High School in 1998 and 1999, Complainant must show by credible evidence that: (1) she is a member of a protected class based her gender; (2) in 1998 and

⁷ Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000) (direct evidence is evidence that "if believed, results in an inescapable, or least highly probable, inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U. S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

1999, she applied and was qualified for the varsity softball coach's positions at issue in this complaint; (3) despite her coaching qualifications and experience, Complainant was not selected for these coaching positions; (4) Respondents filled the varsity softball coach's position in 1998 and 1999 by hiring a male candidate with similar or lesser qualifications. Wynn & Wynn, 431 Mass. at 886 n.22 (2000); Massachusetts Commission Against Discrimination & Bingham v. Lynn Sand & Stone Co., supra.; Massachusetts Commission Against Discrimination & Malone v. City of Boston Public Facilities Department, 26 MDLR 31 (2004).

I find that Complainant has established a prima facie case of gender discrimination based on Respondents' failure to hire her in 1998 and 1999 for the varsity softball coach's position at Harwich High School in favor of a male candidate. Complainant is a member of a protected class because of her gender, female. Complainant has also shown by credible evidence that she applied for and was qualified for the varsity softball coach's position at Harwich High School for the 1998 and 1999 seasons. (Complainant's Exhibit No. 2 and Joint Stipulation No. 13). Despite Complainant's coaching qualifications and experience,⁸ Respondents selected a male candidate, Anthony Cantanzaro, for the varsity softball coach's position in 1998 and 1999. (Complainant's Exhibit Nos. 9, 10 and 19; Joint Stipulation No. 13).

Complainant also alleged that there were two irregularities in the 1998 and 1999 interview and selection process that show a discriminatory animus based on her gender. The irregularities

⁸The parties stipulated that Complainant was qualified for the varsity softball coach's positions at issue in this complaint. (Joint Stipulation No. 6).

include: (1) Dr. Gilbert's reposting of the 1998 softball coaching vacancy after Respondents received Complainant's letter of interest and taking of additional applications, including Catanzaro's, after the initial application deadline; (2) Respondents use of an advisory interview committee to fill the varsity softball coach's position in 1998 and 1999 that was allegedly contrary to established practice within the Harwich school system. Buckley Nursing Home v. Massachusetts Commission Against Discrimination, supra. (evidence that an employer did not follow its standard practices may support a conclusion that a candidate was not hired because of discrimination).

While the hearing record supports Complainant's allegation that there were potential irregularities in the 1998 and 1999 interview and selection process, Complainant failed to establish that these irregularities were motivated by Respondents' discriminatory animus based on her gender. See Tavares-Merritt & Massachusetts Commission Against Discrimination v. Massachusetts Department of Corrections, 25 MDLR 390 (2003); DeBiase v. Massachusetts Transportation Authority, 22 MDLR 271 (2000). There is no evidence that Bresnahan or Dr. Gilbert knew that Complainant was the only candidate for the varsity softball coach's position when Dr. Gilbert reposted the 1998 vacancy on October 20, 1997. In addition, Dr. Gilbert reposted all coaching positions for the 1997-1998 school year, not merely the varsity softball coach's position. Complainant also failed to produce any evidence to establish that Respondents treated Complainant differently than other similarly situated male coaching candidates in 1998 and 1999, based on her gender, when they used an interview committee for the selections at issue in this complaint. Based on my review of the hearing record, I find that Bresnahan's use of an interview committee in 1998 and

1999 was consistent with his policy when there were internal and incumbent coaching candidates as in this complaint⁹. Finally, there is no evidence in the record that members of the 1998 or 1999 interview committees, other than Bresnahan or Rose, knew about these alleged irregularities or that they influenced the committee members' decision-making in any manner.

Once Complainant establishes a prima facie case of gender discrimination, the burden of production shifts to Respondents to articulate and produce credible evidence of a legitimate non-discriminatory reason(s) for their failure to select Complainant for the 1998 and 1999 varsity softball coach's position. See Weber, 434 Mass. at 768-769; Abramian, 432 Mass. at 116-118. If Respondents meet their burden of production, Complainant must then show by a preponderance of evidence that Respondents' proffered reason(s) is not, in fact, the real reason(s) for her non-selection for the 1998 and 1999 varsity softball coach's position but is a pretext for unlawful discrimination based on her gender. Abramian, 432 Mass. at 107; Mole v. University of Massachusetts, 58 Mass. App. Ct. 29 (2003). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [the Respondents] for making the adverse employment decision is false." Lipchitz, 434 Mass. at 504. Complainant retains the ultimate burden of proving by a preponderance of the evidence that Respondents were motivated by a discriminatory intent, motive or state of mind based on her gender. Abramian, 432 Mass. at 117; Thomas and Massachusetts Commission Against Discrimination v. King's Arthur Motel and Lounge, Inc., 24 MDLR 66 (2002).

⁹Complainant did not produce any evidence that there were other coaching vacancies involving internal and incumbent candidates for which Bresnahan failed to use an interview committee.

A. 1998 Non-Selection

Respondents contend that Complainant was not the best-qualified candidate for the varsity softball coach's position in 1998. They assert that Catanzaro was equally or better qualified than Complainant based, in part, on his overall coaching philosophy, his responses to interview questions about the possibility of playing Saturday softball games and his approach to "winning." For the following reasons, I conclude that Respondents' reasons for not selecting Complainant in 1998 are false and are not supported by credible evidence in the hearing record. Lipchitz, supra.

Complainant has shown by credible objective evidence that she had plainly superior coaching qualifications, background and experience than Catanzaro in 1998. When Complainant interviewed in 1998, she already had an exemplary 27 year record of coaching varsity sports at Harwich High School, including 13 years as the varsity softball coach with an outstanding record of league championships (12) and wins (240 wins and 10 losses). While Complainant's initial tenure as the varsity softball coach at Harwich High School ended in 1984, she continued her outstanding coaching record as the varsity field hockey coach where she accumulated an equally impressive record (395 wins and 46 losses and 18 league championships) using her well-honed coaching philosophy, skills and techniques. (Complainant's Exhibit Nos. 3 and 4). Respondents do not contend and there is no evidence in the record that Complainant's coaching skills, techniques and philosophy acquired and developed during her 27-year tenure as Harwich High School's varsity field hockey coach would not be equally as effective and transferable to her duties as the varsity softball coach beginning in 1998.

In addition to her outstanding win-loss record, Complainant established that she had superior coaching abilities and skills prior to 1998. Less than one week before her 1998 interview, Rose and Bresnahan gave Complainant the highest rating, "commendable," on her field hockey coaching appraisal rating for 1997 in all elements related to her coaching responsibilities, communication (including with parents) and relationships with parents, students, coaching staff, officials, athletic director and school administration. Rose and Bresnahan also gave Complainant a "commendable" rating on 15 of the 18 elements related to "professionalism."¹⁰ (Complainant's Exhibit No. 12).

Despite Complainant's favorable 1997 appraisal ratings, Rose and Bresnahan did not give them to the other committee members for their consideration regarding Complainant's most recent varsity coaching abilities, her communication skills and her ability to work effectively with students, parents and the school administration. There is also no evidence that Bresnahan or Rose or any committee member contacted Thacher or Dowling for references about Complainant's coaching skills, including her communication and motivation abilities. Based on their testimony, I am confident that their references would have been extremely favorable to Complainant on all aspects of her softball coaching skills and abilities.

Conversely, Catanzaro had no experience coaching varsity softball prior to his interview on February 9, 1998. Catanzaro's only experience as a softball coach before February

¹⁰Complainant received a "meets expectation" rating on non-coaching elements related to record keeping, maintenance of a supply inventory (including uniforms) and equipment cleaning and storage.

1998 was at an elementary school (four years ending in 1981) and as the junior varsity coach at Barnstable High School (two years ending in 1988). (Complainant's Exhibit No. 7). I also find that the weight, if any, that can be reasonably attributed to Catanzaro's junior varsity softball coaching experience is minimal, at best, given Rose's conclusion, in Chilaka's case, that coaching a varsity team compared to junior varsity team required a higher level of skills and experience.¹¹ In addition, Catanzaro's record as the coach of Harwich High School's girls varsity soccer team was unimpressive and obviously less successful than Complainant's field hockey or softball records. Prior to 1998, Catanzaro had an overall soccer coaching record more comparable to Chilaka's softball record in that he did not have a winning record for his varsity soccer team and did not once qualify for the state soccer tournament.

In addition to her excellent varsity coaching record, Complainant's qualifications included a bachelor's of art degree in physical education and 27 years of experience as a health and physical education teacher in the Harwich school system. Complainant completed 80 hours of graduate courses in sports medicine, sports and counseling psychology and public school administration. Complainant also conducted many softball workshops and leadership clinics from 1972 to 1986. (Complainant's Exhibits No. 3 and 4). While a degree in physical education was not required for the varsity softball coach's position, Rose and Bresnahan acknowledged that it was generally an asset in coaching. Finally, Respondents did not dispute that Complainant, as a physical education teacher at the Harwich Middle School, was familiar with and could attract

¹¹While Respondents believed Ms. Chilaka lacked the skills and experience to successfully coach the varsity softball team in 1998, they hired her to coach the junior varsity softball team in 1998.

"good" middle school players to the Harwich High School softball team.

Respondents relied solely on Catanzaro's resume to establish his minimum credentials and qualifications for a varsity softball coach's position. However, they offered no evidence that Catanzaro, an industrial arts teacher, studied physical education, took formal courses in sports medicine, sports psychology and public school administration or conducted coaching clinics and workshops of any type. (Complainant's Exhibit No. 7). They also did not offer any documentation regarding Catanzaro's coaching appraisal ratings for 1997 or any other period.

Based on any objective measurements, I find that Complainant's coaching qualifications, credentials, experience and performance at the varsity level were clearly superior to Catanzaro's in 1998. In addition, the undisputed evidence in the record clearly established that Complainant was an outstanding candidate for the 1998 position based on Respondent Rose's selection criteria for the varsity softball coach's vacancy: softball experience, knowledge of softball, communication with athletes and communication with the school administration.

Respondents contend that Catanzaro was a superior candidate because he was more flexible than Complainant based on his willingness to play regularly scheduled Saturday softball games, if needed. They contend that Catanzaro demonstrated a more positive attitude during his interview because he focused on team building rather than on "winning," unlike Complainant. Respondents also contend that Complainant did not interview

"well" for the following reasons: Complainant was "standoffish," she demonstrated a lack of flexibility regarding the playing of regularly scheduled Saturday softball games, she relied too heavily on her "winning" record and she did not communicate well. As discussed below, I find that Respondents' reasons for selecting Catanzaro are inconsistent and suspect, not credible and are not supported by evidence.

First, I find that Respondents' testimony regarding Complainant's interview responses on playing regularly scheduled Saturday games is inconsistent and contradictory for several reasons: (1) while Respondents now contend that Complainant's position on Saturday games was an important selection criteria, Bresnahan's written pre-interview list of questions for the 1998 vacancy, unlike the 1999 vacancy, did not include any questions regarding a candidate's position on playing regularly scheduled Saturday games; (2) Rose testified that Complainant's position about playing Saturday games was not an important factor in his decision to vote for Catanzaro. Conversely, Gonzales and Peterson testified that Rose or Bresnahan told them that the issue of playing Saturday games was important and that there was a real possibility of playing regularly scheduled Saturday games in the "immediate future;" (3) Gonzales also testified that the candidates' position on playing Saturday games was important to her because of the uncertainty about the athletic league that the high school would join after the 1998 season; (4) the committee members and Complainant knew that the varsity softball schedule for 1998 included one Sunday game but not any Saturday games. (Complainant's Exhibit No. 11 and Joint Stipulation No. 12); (5) Based on the totality of the evidence in the record, I find that Bresnahan and Rose misled the interview committee including Gonzales and Peterson who testified that they might

have voted for Complainant had they known that there were no Saturday games on the 1998 softball schedule and the varsity softball coach's contract was limited to one year; (6) the same interview committee, including Respondents, recommended Chilaka for the 1998 junior varsity softball coach's position even though her position on playing regularly scheduled Saturday games was substantially similar, if not identical, to Complainant's.¹²

I also do not credit Respondents' testimony that Complainant refused, during her interview, to play regularly scheduled Saturday softball games. I find that Respondents' testimony is false and grossly mischaracterizes Complainant's reasoned opinion, based on 27 years of coaching experience, that playing regularly scheduled Saturday games was detrimental to her players' physical and emotional well-being. To the contrary, I credit Complainant's testimony that she told the committee she was amenable to playing a few Saturday games but was philosophically opposed to playing regularly scheduled Saturday games because of their physical and emotional impact on her players. While Complainant told the committee about her willingness to advocate against regularly scheduled Saturday games, including lobbying the MIAA, I do not find any evidence in the record to support Respondents' contention that Complainant's potential advocacy was tantamount to an inflexible refusal to play regularly Saturday games. To the contrary, I am persuaded by the totality of the evidence that Complainant told the committee that she was not opposed to occasionally playing Saturday games. Complainant's credible testimony is also consistent with her coaching experience in 1997, known to Rose

¹²I note that the only other candidate for the junior varsity softball's coach's position was also a female.

and Bresnahan, when her field hockey team played seven Saturday games.

I am persuaded that Respondents' reliance on Complainant's alleged inflexibility about playing Saturday games is suspect and unreasonable because they knew, prior to Complainant's interview, that no Saturday games were scheduled on the 1998 softball schedule; in fact, no Saturday softball games were scheduled for the next five seasons. Rose and Bresnahan also knew that they could raise the scheduling issue, if needed, in subsequent years because Superintendent Gilbert's policy required them to fill the softball coach's position on a year-by-year basis. I conclude that their characterization is merely a thinly disguised after-the-fact justification offered in an attempt to rebut Peterson's and Gonzales' testimony that they might have voted for Complainant had they known that Saturday softball games were not scheduled for the 1998 season and that the softball coach's position was a one-year appointment.

I summarily reject Respondents' assertion that Complainant had an inappropriate attitude during her interview, was "standoffish," exhibited poor communication skills and focused too heavily on "winning." Contrary to Respondents' contention, Gonzales testified that Complainant's interview was "great" and that she was confident throughout it. Gonzales also testified that Complainant had an appropriate demeanor and was calm and positive during her interview. In addition, Peterson testified that Complainant conducted herself "well" during her interview and was highly qualified for the position. I find no evidence in the record to support Respondents' contention that Complainant exhibited a poor or inappropriate attitude during her 1998 interview.

To support their contention that Complainant had poor communication skills, Respondents cited one incident in 1997 when Complainant allegedly confronted two field hockey officials about a ruling and was ordered off the field. Respondents' testimony is not credible and is inconsistent with their 1997 coaching appraisal-issued shortly before her interview-in which they gave Complainant the highest rating possible on maintaining "effective and respectful relationship with parents, coaching staff and officials." (Complainant's Exhibit No. 12). I also credited Thacher's testimony that he saw Complainant's interaction with the officials and characterized it as a "discussion," not an "incident."

I do not find credible Bresnahan's testimony that Complainant hurt her candidacy because she focused too much on her win-loss record during her interview and demonstrated "well-oiled machine like thinking" rather than Catanzaro's alleged "humanistic" approach. Bresnahan's criticism is also contrary to Rose's testimony that he expected coaching candidates to have a goal of "winning" and that varsity teams will win more games if their coaches build skills.¹³ In addition, there is no dispute that Respondent Rose asked Chilaka not to reapply for the varsity coach's position based, in large part, on her poor winning record and his perception that there was a "total disarray" in the softball program. I am persuaded that Bresnahan's criticism of Complainant's alleged discussion of her winning record and overall organizational skills was specious

¹³I note that Dowling and Thacher testified that a key to Complainant's success as a coach is her commitment to building the individual skills of her players.

and was an attempt to minimize at least two key qualifications that made Complainant a superior candidate to Catanzaro.

B. 1999 Non-Selection

Respondents contend that they selected Catanzaro for the 1999 softball coach's position based on Harwich High School's practice of "rehiring" incumbent coaches unless there was an identified reason not to rehire them. Pursuant to the purported practice, Mangelinkx testified that he recommended Catanzaro to Bresnahan because of his coaching record in 1998 and his opinion that "there was no reason not to rehire" him. Mangelinkx also testified that he did not recall an instance in which Harwich High School did not hire an incumbent coach who reapplied for his or her coach's position.

I conclude that Respondents' reasons for selecting Catanzaro in 1999 are not believable and are not supported by credible evidence. I credit Kelsey's testimony that Mangelinkx did not tell her prior to the 1999 interviews that Harwich High School had a policy or practice of rehiring incumbent coaches who were challenged by internal candidates and that there was a "general expectation" that incumbent coaches would continue in their positions absent a clear reason not to rehire them. Respondents' reliance on this alleged practice is also suspect since the evidence showed that Mangelinkx did not disclose the alleged "incumbent" rule during the interview process except as part of his justification for voting for Catanzaro after the committee voted to recommend Complainant for the position. In addition, Respondents did not produce credible evidence to establish that committee members other than Mangelinkx knew

about the alleged incumbent policy or practice and considered it as part of their decision-making.

Based on the totality of evidence in the record, Respondents have not persuaded me that there was, in fact, a practice in Harwich High School to hire coaching incumbents in cases similar to Complainant's 1999 non-selection. First, Respondents did not produce any evidence or documentation to support its assertion that there was a written or informal Harwich High School "practice" to rehire incumbent coaches who were challenged by internal candidates. Second, Bresnahan testified that he did not accept applications from external candidates when incumbent coaches reapplied for their positions. Bresnahan also testified that he established an interview committee whenever there was a qualified internal candidate who challenged an incumbent coach.¹⁴ However, Respondents produced no evidence that Bresnahan used an interview committee for a coaching position prior to the 1998 varsity softball coaching vacancy except in the special circumstances related to an incumbent ice hockey coach. While I can reasonably infer from Respondent Bresnahan's testimony that he applied an incumbent "rule" to positions involving external candidates and an incumbent coach, Respondents produced no evidence that Bresnahan or Mangelinkx relied on a policy or practice, prior to Complainant's 1999 non-selection, to rehire an incumbent coach for a position that had internal coaching candidates.

I also find that Respondents' alleged use of an "incumbent" rule to rehire Cantanzaro directly contravenes Harwich High School's employment policy that directed staff to hire the

¹⁴I also infer that Bresnahan's incumbent policy to exclude external candidates did not apply in the 1998 selection process because Chilaka, as the putative incumbent, did not reapply.

"highest qualified personnel" for all professional positions. (Complainant's Exhibit No. 13).¹⁵ The alleged incumbent "presumption" is also contrary to the underlying purpose of Dr. Gilbert's posting policy: to ensure that Respondents had an opportunity to select the best qualified candidates for all coaching positions, including those held by incumbent coaches who performed satisfactorily in the previous athletic year. Respondent Bresnahan offered no reason for convening an interview committee for the 1999 varsity softball coach's vacancy and requiring Complainant to submit to the interview process if Respondents were constrained by an internal Harwich High School policy or practice to automatically rehire Catanzaro because he was the incumbent coach with a satisfactory record¹⁶.

I also find that Mangelinkx's decision to recommend Catanzaro based on a previously unused incumbency rule was egregious in this case because the committee members voted (3-2)¹⁷ to recommend Complainant for the coach's position, notwithstanding Cantanzaro's coaching record in 1998 and his interview. Kelsey, who voted for Complainant, testified credibly and persuasively that Complainant was prepared during her interview, acted like a "professional" and gave the committee useful information about her qualifications including her "Thanks Coach letter" from her 1998 field hockey players.

¹⁵Rose and Bresnahan acknowledged the underlying intent of Harwich's employment policy as they testified that the goal of the 1998 interview was to select the most qualified candidate based on the interviews.

¹⁶I note also that Complainant would have benefited from the so-called "incumbency" rule in 1999 had Respondents not unlawfully discriminated against her in connection with the 1998 softball coaching vacancy.

¹⁷Mangelinkx's vote for Catanzaro is highly suspect because he voted after the other committee members voted for Complainant. Respondents also failed to produce any evidence to show that the committee discussed the voting procedures and the circumstances in which Mangelinkx would vote as the committee chairperson.

Kelsey also testified that Catanzaro was not well prepared, did not take the interview seriously, did not provide any materials and stated that his goal was to win 50% of the team's softball games rather than the 100% goal Kelsey believed was more appropriate. Accordingly, I conclude that Respondents' purported use of an incumbency rule was merely a sham to avoid selecting Complainant who remained the superior candidate to Catanzaro in 1999 based on her interview and coaching credentials.

Based on the above findings and analysis, I conclude that the reasons advanced by Respondents for not selecting Complainant in 1998 and 1999 are false, inherently suspect and are not supported by credible evidence. I also conclude that Respondents' proffered reasons are not the real reasons for Complainant's non-selections but are a pretext for unlawful gender discrimination to avoid hiring Complainant who was a plainly superior candidate to Catanzaro in 1998 and 1999 based on her interview and coaching record. In addition, I find that Complainant has established, by credible evidence, that Respondents acted with a discriminatory intent, motive or state of mind based on her gender.¹⁸ Accordingly, I conclude that Respondents discriminated against Complainant based on her gender when they did not select her in 1998 and 1999 for the varsity softball coach's position at Harwich High School. Lipchitz, supra.

¹⁸Complainant also introduced statistical evidence to show women held 6 of 25 (24%) coaching positions compared to 115 of 165 (70%) teaching and staff positions at the Harwich High School in 1997. (Complainant's Exhibit No. 22). In the absence of additional data showing the available pool of qualified candidates (by gender) for the coaching positions at Harwich High School since 1996, I am not persuaded, as asserted by Complainant, that the statistical evidence admitted into the record supports an inference that Respondents' reasons for not selecting Complainant in 1998 and 1999 were a pretext for gender discrimination.

C. Individual Liability

In her complaint, Complainant named Vincent Bresnahan and Glenn Rose as individual respondents. The Commission has long recognized and imposed individual liability for unlawful discrimination under G.L. Chapter 151B. See e.g., Massachusetts Commission Against Discrimination & Rodriguez v. Nationwide Warehouse & Storage, LLC, et. al., 25 MDLR 233 (2003)(two supervisors were individually and jointly liable for the unlawful sexual harassment that was sufficiently severe and pervasive to alter the terms and conditions of the complainant's work environment); Deeter v. Bravo's Pizzeria and Restaurant, 23 MDLR 167, 170 (2001) (individual respondent was jointly and severally liable with employer where he supervised complainant's work, owned part of the business and engaged in particularly odious and loathsome unwelcome verbal or physical conduct).

Pursuant to G.L. c. 151B, §4(4A), it is unlawful for "any person to coerce, intimidate, threaten, or interfere with another person in the exercise of enjoyment of any right guaranteed or protected by this chapter. . ." Among the rights protected by G.L. c. 151B is equal treatment in the terms and conditions of employment regardless of gender. Massachusetts Commission Against Discrimination & Rodriguez v. Nationwide Warehouse & Storage, LLC, et. al., supra. The Commission has held that individuals may be liable under G.L. c. 151B, §4(4A) if they "interfere with a Complainant's right to be free from discrimination in the workplace." Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003)(Full Commission decision). To prove interference with a protected right, Complainant must show that Bresnahan and Rose had the authority or duty to act on behalf of the employer; their actions or failure to act

implicated rights under Chapter 151B; there is evidence articulated by Complainant that Bresnahan's and Rose's actions were in deliberate disregard of Complainant's rights allowing an inference to be drawn that there was an intent to discriminate or interfere with Complainant's exercise of rights. Woodason, supra. at 64-65; Massachusetts Commission Against Discrimination & Girouard v. Bekiro Corporation d/b/a/ Burger King of Bunker Hill et. al., 26 MDLR 24 (2004).

The evidence establishes the requisite discriminatory intent required to hold Bresnahan and Rose individually liable for unlawful gender discrimination in this case. There is no dispute that Bresnahan was the primary decision-maker regarding Complainant's non-selections in 1998 and 1999. Although Bresnahan established an advisory committee for both coaching vacancies, he was the statutorily designated appointing authority for all teachers and coaches at Harwich High School, subject to the Superintendent's approval. In addition, Bresnahan established and/or approved the interview processes and procedures used for both selections. While Rose was not the hiring authority, he served along with Bresnahan on the 1998 interview committee, developed the selection criteria, conducted interviews, participated in the committee's deliberations and joined in the recommendation to Superintendent Gilbert to select Catanzaro. Girouard, supra.

Accordingly, I conclude that Bresnahan and Rose are individually and jointly liable with the Town of Harwich because they interfered with Complainant's rights under Chapter 151B when they did not recommend and/or select her for the 1998 varsity softball coach's position based on her gender. I also conclude that Bresnahan is individually and jointly liable with

the Town of Harwich because he interfered with Complainant's rights under Chapter 151B when he did not recommend or select her for the 1999 varsity softball coach's position based on her gender. I conclude further that Rose is not individually liable for Complainant's 1999 non-selection because Complainant presented no evidence that he had a role in or participated in the non-selection decision. Woodason, supra.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to impose a remedy that will make Complainant whole and eliminate the discriminatory practice. The Commission's award may include damages for lost wages, lost benefits and for emotional distress Complainant suffered as a direct and probable result of Respondents' unlawful discrimination. G.L. c. 151B, §5. See Stonehill College v. Massachusetts Commission Against Discrimination, 441 Mass. 549 (2004), modifying, in part, Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997), quoting Buckley Nursing Home, Inc. v. Massachusetts Commission Against Discrimination, 20 Mass. App. Ct. 172, 182 (1985) (reaffirms the Commission's authority to award emotional distress damages proportionate to the distress suffered); Bournewood v. Massachusetts Commission Against Discrimination, 371 Mass. 303, 315-16 (1976). Complainant must prove her damages by more than speculation or surmise. College-Town, Division of Interco, Inc., supra.

Lost Wages

Massachusetts General laws, Chapter 151B, §5, authorizes the Commission to award lost wages after a finding of unlawful discrimination. Based on the evidence adduced at the public hearing, I find that Complainant is entitled to lost wages in the amount of \$7,984.00 calculated as follows: \$3,938.00 for the 1998 softball season and \$4,046.00 for the 1999 softball season. (Joint Stipulation Nos. 10 and 15).

Emotional Distress Damages

An award of monetary damages is appropriate to compensate Complainant for the emotional distress she suffered as a victim of Respondents' discrimination. See e.g., Baldelli v. Town of Southboro Police Dept., 17 MDLR 1541 (1995). A finding of discrimination or retaliation, by itself, does not permit an inference of or a presumption of emotional distress as a normal adjunct of such discrimination. Stonehill College, supra. While an award of emotional distress damages can be sustained even in the absence of physical injury or psychiatric consultation, it must be based on substantial evidence. Stonehill College, supra.; Franklin Publishing v. Massachusetts Commission Against Discrimination, 25 Mass. App. Ct. 947 (1988).

Permissible factors to measure emotional distress damages include but are not limited to: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; (4) whether the complainant has attempted to mitigate the harm, e.g., by counseling or taking medication. Stonehill

College, supra.; Baldelli v. Town of Southboro Police Dept., 18 MDLR 167, 169 (1996). In addition, Complainant must show a sufficient casual connection between Respondents' unlawful acts and her emotional distress. Emotional distress that arises from circumstances other than Respondents' unlawful actions or from a pre-existing condition is not compensable. Stonehill College, supra.

Complainant also seeks damages for emotional distress, embarrassment and humiliation she suffered as a result of Respondents' unlawful actions. I found Complainant to be a compelling witness regarding her emotional distress damages. Complainant provided compelling and credible testimony that she sustained substantial harm after her 1998 and 1999 non-selections. I believe Complainant was upset, shocked, embarrassed and humiliated by her 1998 non-selection after she had compiled an outstanding 27-year coaching record at Harwich High School. I also believe Complainant's credible testimony that she continued to experience sadness and uncontrollable crying throughout the remainder of the school year in 1998. Complainant also credibly testified that she was depressed, flat and lost her energy, motivation and excitement for coaching. She also felt overwhelmed, experienced a loss of self-esteem and self-doubt about her coaching abilities in field hockey and worried about her coaching reputation.

I am persuaded that Complainant sustained substantial emotional and physical harm as shown by her loss of weight, frequent migraine headaches and the exacerbation of her heart arrhythmia that resulted in changes in her treatment: higher levels of medication, including Xanax, and increases in her schedule of activities related to her yoga, acupuncture and

massage therapy. Complainant's detailed testimony regarding her substantial emotional and physical harm during 1998 is corroborated by the credible and unrebutted testimony of Ms. Dowling and Mr. Thacher.

Complainant's testimony about her emotional distress after her 1999 non-selection was equally credible and compelling. I believe that Complainant experienced feelings of embarrassment, loss, sadness and incidents of crying similar to those she had after her 1998 non-selection. Complainant also experienced an additional incident of arrhythmia and became more depressed culminating in weekly psychological counseling sessions during the summer of 1999. In addition to questioning her coaching abilities, Complainant also began to raise questions about her value as an educator in the Harwich school system and made unsuccessful inquiries regarding external employment opportunities. Ms. Dowling's testimony again corroborated the substantial nature and ongoing impact of Complainant's emotional distress after her 1999 non-selection.

While there may have been other stressors in Complainant's life that contributed to her emotional state during the relevant period, i.e., her father's illness, I conclude that Complainant is entitled to damages for the substantial emotional distress and physical harm she suffered as a direct and probable result of Respondents' unlawful gender discrimination in 1998 and 1999. Robinson v. Haffner's Service Stations, Inc., 23 MDLR 283 (2001); Sverck v. American Health Care, et. al., 22 MDLR 50 (2000). Given the nature, character and severity of the harm Complainant suffered, I

conclude that she is entitled to an award of damages for emotional distress in the amount of \$100,000.00.

Massachusetts General Laws, Chapter 151B, §5 states, in part, "If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice." Having found that Respondents have engaged in a discriminatory practice based on unlawful gender discrimination when they failed to select Complainant for the varsity softball coach's position in 1998 and 1999, I conclude that a civil penalty in the amount of \$10,000.00 is warranted.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following order:

1. Respondents shall immediately cease and desist from engaging in unlawful discrimination because of an individual's gender in violation of G.L. c. 151B.
2. As described above, Respondents shall pay Complainant the sum of \$7,984.00 in lost wages calculated as follows: \$3,938.00 for the 1998 softball season and \$4,046.00 for the 1999 softball season. Respondents shall also pay \$100,000.00 in emotional distress damages. Respondents shall pay these

sums to Complainant within 60 days of its receipt of this decision.¹⁹

3. Respondents shall pay the sum of \$10,000 to the Commonwealth of Massachusetts as a civil penalty within 60 days of its receipt of this decision. Respondents shall forward their civil penalty payment to the Clerk of the Commission.

4. The parties shall immediately notify the Clerk of the Commission when Respondents Harwich High School, Bresnahan and/or Rose make the required payments. Complainant shall also notify the Commission if Respondents fail to comply with the terms of this Order within the time period allotted.

Training Provisions

5. Within 60 days of the Commission's final decision, Respondent Harwich High School shall schedule all employees, including its supervisors and managers, to attend comprehensive training that addresses gender discrimination. The training shall include, but not be limited to, definitions of discrimination in the workplace, a supervisor's role in recognizing and preventing gender discrimination and liability under G.L. c. 151B for unlawful discrimination. This training

¹⁹Because the Town of Harwich is a municipal entity, no interest accrues on the damages award. See City of Boston v. Massachusetts Commission Against Discrimination, 39 Mass. App. Ct. 234, 245 (1995)(in the absence of express statutory authorization, interest does not lie against the Commonwealth's instrumentalities and there is no express statutory authorization for interest on awards); City of Salem v. Massachusetts Commission Against Discrimination, 44 Mass. App. Ct. 627, 646 (1998); Woodason v. Town of Norton School Committee et. al., 25 MDLR 62 (2003)(Full Commission Decision). While the Commission disagrees with the holding in City of Boston, *supra.*, it will follow it until it is overturned by a Supreme Judicial or Appeals Court decision. Massachusetts Commission Against Discrimination & Voltaire v. Massachusetts Division of Employment and Training, ___ MDLR ___ (2004)(Full Commission decision).

must be at least 4 hours in length and must be completed within 90 days of the date of this decision.

6. Respondent Harwich High School shall submit the training agenda to the Commission's Director of Training for approval at least 30 days prior to the proposed training session(s). The agenda shall provide that no more than 25 employees shall attend each training session held.

7. At least three weeks prior to the training date(s), Respondent Harwich High School shall inform the Commission's Director of Training, in writing, of the proposed training dates and locations so that the Commission has the option of sending a representative to attend and observe one or more of the training sessions as it is conducted.

8. Respondent Harwich High School shall select a trainer who has completed the Commission's certified discrimination or harassment prevention training courses, or shall submit another proposed trainer's resume to the Commission's Director of Training for approval at least 30 days prior to the initial training session. Respondent Harwich High School shall give a copy of this decision to the approved trainer as background information.

9. Within 30 days after each training session, Respondent Harwich High School must submit documentation to the Commission's Director of Training of its compliance with this order. The documentation must be signed by the trainer and identify the training agenda, participants who completed the training session, the date and time of each training session, and a list of all employees as of the training date(s).

10. Once a year for three years after completion of the initial training session(s), Respondent Harwich High School shall repeat the initial training session for all employees hired and employed since the date of the previous training session. Respondent Harwich High School shall also conduct a refresher course (at least two hours in duration) once each calendar year for all other employees, including managers and supervisors, for a total of three years.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this order and a Petition of Review with the Full Commission within thirty (30) days of receipt of this Order.

SO ORDERED this 12th day of November 2004.

KENNETH B. GROOMS
Hearing Officer