

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

BOARD OF HIGHER EDUCATION/
SALEM STATE UNIVERSITY

and

ASSOCIATION OF PROFESSIONAL
ADMINISTRATORS/MTA/NEA

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Case Number: SUP-16-5246

Date Issued: September 6, 2018

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Paul J. Hodnett, Esq.

Representing the Board of Higher Education

Mark A. Hickernell, Esq.

Representing the Association of Professional
Administrators

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this matter is whether the Board of Higher Education (Employer),
2 acting through Salem State University (University), discriminated against former
3 bargaining unit member Angelique Torres Kim (Kim) in violation of Section 10(a)(3) and,
4 derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law)
5 by discharging Kim for engaging in concerted, protected activity. Based on the record,
6 and for the reasons explained below, I find that the Employer did not violate the Law,
7 and I dismiss the Complaint.

8

STATEMENT OF THE CASE

On May 23, 2016, the Association of Professional Administrators (APA or Union) filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the Employer had violated Section 10(a)(3) and Section 10(a)(1) of the Law. On July 19, 2016, a DLR Investigator conducted an in-person investigation of these allegations.¹ On August 11, 2016, the Investigator issued a Complaint of Prohibited Practice alleging that the Employer had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. On November 4, 2016, the Employer filed an Answer to the Complaint of Prohibited Practice.

On August 4, 2017, and August 9, 2017, I conducted a hearing during which the parties received a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On January 12, 2018, the parties filed post-hearing briefs.

STIPULATIONS OF FACT

1. The Employer is a public employer within the meaning of Section 1 of the Law.
2. The APA is an employee organization within the meaning of Section 1 of the Law.
3. The APA is the exclusive bargaining representative for all regular full-time and regular part-time employees holding bargaining unit positions as set forth in Appendix A to the parties' Collective Bargaining Agreement (CBA).
4. At all relevant times, Angelique Torres Kim (Kim) was Associate Director of Employer Relations in the Employer's Career Services Department and a member of the bargaining unit described in Stipulation 3.

FINDINGS OF FACT

General Background

¹ At the in-person investigation, the Union withdrew its independent 10(a)(1) allegation.

1 Throughout the events at issue in this matter, Lauren Hubacheck (Hubacheck)
2 was a member of the APA bargaining unit and the University's Director of Career
3 Services. The Career Services Office (Career Services) operates in two functional
4 areas that are supposed to work hand in hand as one team: Career Development and
5 Employer Relations. Career Development provides students with job related skills, and
6 Employer Relations develops relationships with employers looking to recruit students
7 from the University. At all relevant times, Janet Neely (Neely) was a member of the
8 APA bargaining unit and Associate Director of Career Development. Neely, who
9 reported directly to Hubacheck, supervised two Assistant Directors of Career
10 Development, and also supervised other student staff. Additionally, Ruthann Reed
11 (Reed), a member of a different bargaining unit, worked in Career Services as the Office
12 Manager, and also reported directly to Hubacheck.²

13 On January 6, 2014, Angelique Torres Kim (Kim) began working in Career
14 Services as Associate Director of Employer Relations. Hubacheck hired Kim, and Kim
15 reported directly to Hubacheck. Kim's primary job duties included developing strategies
16 with employers to recruit University students, and facilitating recruitment activities on
17 campus. Kim supervised Josue Flores (Flores), an Administrative Assistant II, and
18 several student staff. As a public employee, Kim received training in the State's conflict
19 of interest law upon hire, and she also acknowledged reading a summary of the state's
20 conflict of interest law on January 30, 2015, and December 14, 2015. Kim completed
21 additional conflict of interest law training on January 30, 2016. On her 2014 Review and
22 Evaluation of Performance and Skills (2014 Evaluation), Kim received an Overall

² Neither Neely nor Reed testified at the hearing.

1 Performance Rating of Above Standard.³ In the written component of the 2014
2 Evaluation, Hubacheck described Kim as “an incredible addition to the Career Services
3 Team,” and “an asset to the Career Services and the University.”

4 August 28, 2015 Training Session: Conflict of Interest Issue Arises

5 On August 28, 2015, Kim gave a thirty to forty-five minute PowerPoint
6 presentation to her colleagues in Career Services about LinkedIn, a social media
7 website that facilitates networking and job seeking opportunities for its members. Kim
8 had possessed a free, or standard, LinkedIn account since approximately 2005, but in
9 the spring of 2015 the University began paying for Kim to maintain an upgraded,
10 premium LinkedIn account. The premium account afforded Kim greater access to
11 potential employers than did the free account that Kim had previously possessed.

12 Hubacheck attended this presentation, but Neely was out of the office and did not
13 attend. During this presentation, Kim displayed an image of her LinkedIn profile to her
14 co-workers. This image referenced, in Kim’s current employment history, a company
15 named LRC Advisors. Kim did not mention LRC Advisors during this presentation, and
16 Hubacheck had no prior knowledge of LRC Advisors.

17 After the presentation, Hubacheck visited the website for LRC Advisors and
18 discovered that it was Kim’s current, private business related to employer recruitment
19 and individual career development.⁴ Hubacheck believed that Kim’s private business
20 might present a conflict of interest, and she also had concerns about two blog posts on

³ The ratings are, respectively: Unsatisfactory, Needs Improvement, Competent, Above Standard, and Commendable.

⁴ “LRC” stands for: Lead Generation, Relationship Fostering, and Communication.

1 the LRC Advisors website that she believed Kim had written in Kim's capacity as
2 Associate Director of Employer Relations. Accordingly, Hubacheck reached out to
3 Human Resources for guidance, and Human Resources forwarded the issue to John D.
4 Keenan (Keenan), then the University's General Counsel and Vice President for
5 Administration.

6 In or around early September 2015, during a conversation in Hubacheck's office,
7 Hubacheck informed Kim that Hubacheck believed that Kim's private business may
8 present a conflict of interest, and that Hubacheck was seeking guidance from Human
9 Resources. At that time, Hubacheck gave to Kim a copy of Appendix L to the parties'
10 collective bargaining agreement (CBA), which contains the parties' contractual Code of
11 Responsibility governing conflicts of interest. During this conversation, Hubacheck also
12 informed Kim that a staff member had independently raised this conflict of interest issue
13 with Hubacheck about Kim.⁵ Kim disagreed with Hubacheck that LRC Advisors
14 presented a conflict of interest.⁶

15 Cease and Desist Letter

⁵ On direct examination, Kim testified that during this conversation Hubacheck informed her that "someone externally" raised this issue with Hubacheck. On cross-examination, however, Kim testified that she "did not recall" Hubacheck stating during this meeting that other staff members had mentioned Kim's private business to Hubacheck. Hubacheck testified that Neely raised the issue with Hubacheck based upon what staff reported to Neely. Hubacheck identified those staff as Joe Santa Cruz (Santa Cruz), an Assistant Director of Career Development, and Reed. Hubacheck did not speak to either Santa Cruz or Reed about this issue.

⁶ Although Kim denied that any conflict existed, she acknowledged on cross-examination that she had listed LRC Advisors on her Premium LinkedIn account when she stated that her co-workers "might have seen it on my LinkedIn profile." Also, the record contains no evidence that Kim ever denied that her private website contained blog posts that she had written in her capacity as a University employee.

1 By letter to Kim dated September 15, 2015, Keenan wrote:

2 As part of my role as General Counsel to the university, I am responsible for
3 reviewing potential violations of the State Ethics law as it applies to state
4 employees. The law (Mass. Gen. L. c. 268A) regulates what state employees
5 can do both on the job and after hours or "on the side."
6

7 First and foremost, a state employee cannot use state resources to engage in a
8 private business enterprise. This would include using university technology (i[e.
9 computers) or engaging in private business during regular working hours. It is
10 my understanding that you have listed your private career service business, LRC
11 Advisors, on your Salem State University LinkedIn account. It is also my
12 understanding that you have used at least one blog post written in your capacity
13 as an SSU employee on your business website. This blurring of lines between
14 your public employment and private ("after hours") employment is precisely the
15 conduct the State Ethics law prohibits.
16

17 The appearance of a conflict of interest will often be created when a public
18 employee's personal interests or relationships overlap with her public obligations.
19 State employees are prohibited from using or attempting to use their official
20 position to secure for themselves unwarranted privileges of substantial value that
21 are not similarly available to similarly situated individuals. In your role as
22 Associate Director, while participating on behalf of SSU, you cannot engage in
23 any activity or conduct (receive or solicit referrals for example) for your private
24 business. Nor should you use information or relationships gained through your
25 SSU employment to further in any way your private business.
26

27 To be clear, the State Ethics Law does not prohibit state employees from having
28 an "after hours" job or business unless inherently incompatible. Your private
29 business, however, should not benefit from your public employment.
30

31 To that end, please cease and desist from any such conduct that violates the
32 State Ethics law. Going forward, should you have a question about activity
33 that may violate the law, you can seek advice (prior to engaging in the activity)
34 from this office or contact the State Ethics Commission's Legal Division for a
35 confidential advisory opinion.
36

37 After receiving this letter, Kim scheduled a meeting with Keenan to discuss the

38 conflict of interest issue, and on September 23, 2015, Kim met with Keenan. By email

39 to Hubacheck dated September 23, 2015, Keenan wrote:

40 Just wanted to let you know that I had a very positive and productive meeting
41 today with Angelique. I told her that I did appreciate her coming in to discuss my
42 letter and to get an understanding of the potential issues raised by her outside

1 employment. I am comfortable that she does understand the need to keep
2 separate her day job here at SSU with what she does on her own time.
3

4 She mentioned that another employee had referenced this issue publicly in the
5 office. The employee who brought this to your attention should certainly know
6 this matter has been appropriately addressed, but it should not be a topic of
7 public discussion amongst her colleagues.
8

9 I'm hopeful that this should put this matter to rest.⁷
10

11 St. Jean's Credit Union

⁷ Kim testified that during this meeting Keenan, who did not testify at the hearing, told her that the Cease and Desist Letter "was nothing to worry about," that he "agreed it was indeed my account," and that she understood the meeting to have resolved the conflict of interest issue. She also testified that he thanked her for not bringing the Union to the meeting. On cross-examination, Kim answered affirmatively to the question, "And you testified today that he told you after listening to you that everything was okay?" The Union argues that I must credit Kim's testimony because Keenan did not testify at the hearing.

I do not credit Kim's hearsay testimony about this meeting with Keenan. Kim's testimony amounts to Keenan completely vindicating her position, but the same-day email that Keenan sent to Hubacheck about this meeting demonstrates that the outcome was more equivocal than Kim represents. The email reiterates "the need to keep separate her day job" and states that Keenan is "hopeful" that this "should" put the matter to rest. He did not, however, say that no conflict existed; he did not tell Hubacheck that the whole issue was nothing to worry about; and he did not tell Hubacheck that Kim owned the LinkedIn account. Moreover, Keenan, then the University's General Counsel, never subsequently retracted or modified the Cease and Desist Letter, which identifies specific, alleged conduct, i.e. listing LRC Advisors on the LinkedIn profile and posting University blog content. Additionally, I draw no conclusions from the University not calling Keenan to testify because although he was consulted prior to the Employer issuing the Discharge Letter, he was not a direct decision-maker, and his testimony was therefore not necessary to the University's defense.

I also do not credit Kim's testimony that Keenan thanked her for not bringing the Union to the meeting. In a case in which Kim extensively documented what she perceived to be inappropriate remarks, this allegation appears nowhere in the evidentiary record before her testimony at the hearing, over twenty-two months after the alleged statement. Not only did she not record it, but she also did not report it to the Union.

1 St. Jean's Credit Union (St. Jean's) operates on the North Shore of
2 Massachusetts and, for at least the past five years, has been both a donor to the
3 University and a recruiter of its graduates. By email dated September 21, 2015, Debora
4 Lee Surface (Surface), a University alumna and the Marketing Manager of St. Jean's,
5 agreed to participate at the University's Majors/Minors Fair on October 13, 2015. By
6 email to Kim dated October 14, 2015, Surface expressed her pleasure in participating in
7 this Majors/Minors Fair, and asked Kim if they could meet to discuss further building the
8 partnership between St. Jean's and the University.

9 By email to Surface dated October 15, 2015, Kim proposed that they meet at
10 2:00 pm on October 20, 2015, and Kim asked Surface if Surface would like Kim to come
11 to Surface's office. Still on October 15, 2015, Surface responded: "2pm works great.
12 Whatever is easiest, I am at our Highland Ave office. If you want to meet me at our
13 Seaport Branch or I can come to campus if that is easier, just let me know!" Still on
14 October 15, 2015, Kim responded that she would be on the road and would come to
15 Surface.

16 On October 20, 2015, Kim went to the Seaport location and did not show up at
17 the Highland Avenue office where Surface had indicated that Surface was working. By
18 email to Kim later that day, Surface wrote:

19 I wanted to follow up with my voicemail. I just spoke to Heidi at our Seaport
20 location. I know you had mentioned you would come by here I believe there was
21 a misunderstanding on our meeting location. I am at our Highland Ave office as I
22 mentioned below. When you said you would come to me I was under the
23 impression you were coming to my office. We have two locations in Salem, the
24 Seaport Branch across the street from the Sullivan building and our Salem
25 Branch & Operations Center on Highland Avenue where my office is located.

26
27 I apologize for the confusion.
28

1 Still on October 20, 2015, Kim responded to Surface: "Yes, you are correct. I
2 think there was a misunderstanding in meeting location. I would love to reschedule and
3 this time I can make sure I travel to the Highland location. I am free next Tuesday at
4 2:30 or Friday the 30th in the afternoon." They agreed to meet on Tuesday, October 27,
5 2015, at 2:30 pm at Surface's office, and subsequently did meet.

6 By email to Kim dated October 27, 2015, Dottie Nestle (Nestle), St. Jean's
7 Human Resources Manager, wrote: "It was great meeting with you today. I look forward
8 to working with you and the students of Salem State University in the future. Please
9 sign me up for access to the database and send information regarding the Career Fair
10 in March."⁸ Still on October 27, 2015, Kim forwarded Nestle's email to Flores and asked
11 him to "follow up" with Nestle.

12 October 28 Associate Director Meeting

13 Shortly after Kim joined Career Services in 2014, Hubacheck began conducting
14 regularly scheduled, weekly Associate Director Meetings with Neely and Kim. The
15 meetings initially occurred on Tuesdays, but then moved to Wednesdays. During these
16 meetings, which usually lasted approximately one hour, they discussed operational
17 issues within Career Services, and also general occurrences at the University.

18 During an October 28, 2015 Associate Director Meeting, Neely informed Kim that
19 Neely had given feedback to Flores about a "GoPro" course that Kim coordinated and

⁸ The Career Fair occurs in the first week of March, and is an opportunity for students seeking internships and/or employment to connect with over 130 companies that attend the event.

1 managed. Kim told Neely not to speak to Flores, but instead to speak to Kim.⁹
2 Hubacheck then told both of them that they were one team, and that there needed to be
3 communication regarding the employers involved in the "GoPro" course. Hubacheck,
4 the Director of Career Services, did not consider it improper for Neely to speak to Flores
5 about the GoPro course.

6 This incident increased tension in the office between Kim and Neely.¹⁰ After this
7 meeting, but before the next Associate Director Meeting, Hubacheck separately told
8 both Kim and Neely to have a professional conversation and manage any conflict that
9 existed between them.

10 November 4, 2015 Associate Director Meeting

11 On the morning of November 4, 2015, Kim and Neely attended an Associate
12 Director meeting with Hubacheck. At the outset of the meeting, Hubacheck asked Kim
13 and Neely if they had spoken to each other about their communication issue, and they
14 both indicated that they had not. Hubacheck told them that they were one office and
15 one team; that they would move forward as one team; and that communication needed
16 to flow through the entire office. Kim then raised the issue of trust within the office, and
17 Neely said to Kim words to the effect that the office could not trust Kim because Kim

⁹ Kim testified that she "respectfully requested" that Neely "share that information with me directly versus going to my direct report, so I can manage my group and function effectively."

¹⁰ Hubacheck also testified about another incident, on an unidentified date, in which Neely asked Kim "for assistance with a faculty member on a specific utilization of the database system" and Kim responded "that she would not assist the faculty member."

1 had a conflict of interest.¹¹ Hubacheck said that they were not going to discuss the
2 conflict of interest, and that they were going to move on to the items on the agenda.
3 After speaking with Neely about the first agenda item, Hubacheck sought feedback from
4 Kim, but Kim said that she was too distracted to continue the meeting. The meeting
5 then ended.

6 After the meeting, Hubacheck spoke privately with Kim. Hubacheck told Kim that
7 if they were going to discuss trust within the office, then the conflict of interest issue
8 would come up because there was some mistrust within the office.

9 Later that day, Kim entered Hubacheck's office and submitted a letter of
10 resignation to Hubacheck. Hubacheck contacted Human Resources, and was advised
11 to send Kim to Human Resources, which Hubacheck did. After speaking with Human
12 Resources, Kim returned to Career Services and asked Hubacheck to rescind her
13 resignation. Hubacheck allowed Kim to rescind her resignation. Hubacheck indicated
14 that Kim's "actions" and "behavior" concerned Hubacheck, and then asked Kim to go for
15 coffee later that afternoon to discuss the ongoing issues that Kim was experiencing.

16 They went for coffee later that afternoon and during their conversation Kim
17 requested mediation with Neely to improve relations in Career Services. Hubacheck
18 told Kim that she would look into the possibility of mediation. During this conversation,
19 Kim also told Hubacheck that Kim had been keeping a log (Bullying Log) of co-worker

¹¹Kim testified that Neely stated: "You have a personal business and that's a conflict of interest and people are talking about it."

1 incidents within the office.¹² Hubacheck was concerned that Kim had not previously
2 brought this to Hubacheck's attention.¹³

3 Kim Proposes Mediation Conditions

4 Sometime the following week, Kim gave to Hubacheck a letter, dated November
5 9, 2015, with the heading "Proposed Mediation Conditions." Kim wrote:¹⁴

6 I would like to propose the following conditions while undergoing mediation with
7 Ms. Neely. The end goal for me is to continue serving the institution and our
8 student population while feeling safe, secure, and satisfied in my work
9 environment through a separation between Janet Neely and myself throughout
10 this process.

11
12 - Weekly meetings between Lauren Hubacheck, Janet Neely, and myself will
13 be put on hold. Meetings between Lauren and Janet and Lauren and myself
14 will continue and will focus on work-related priorities.

15
16 - Janet Neely will work with the employer relations associate with regards to
17 any career development infrastructure needs in CSO¹⁵ only and with other
18 members of the employer relations team within the office and with an open
19 door policy. Janet will copy me on email communications addressed to
20 members of my team for me to be able to continue to lead the employer
21 relations function and support my employees. Furthermore, Janet Neely will
22 refrain from discussing employer relations matters with my employees:

23
24 - Another member of the career development team will be designated as the
25 representative on the career fair team for this academic year.

26
27 - All communication between Janet Neely and myself should be through email
28 with a copy to Lauren Hubacheck.

¹²Kim testified that she began keeping the Bullying Log on September 3, 2015.

¹³Hubacheck testified: "I did not find that to be unprofessional. What I found concerning was the log of incidents that happened between Ms. Kim and other people that wasn't brought to my attention until that point."

¹⁴ Kim testified that her purpose in proposing mediation conditions was so that she could feel "safe and secure and comfortable working with Ms. Neely to resolve the personnel matter."

¹⁵ CSO refers to on-line software that Career Services used to post jobs for students.

- 1
2 - Janet Neely is not to discuss the proceedings with anyone on the Salem State
3 campus and shall keep the information confidential.
4

5 I have enjoyed the opportunity for professional and personal growth that has
6 been provided to me. I will continue to be the utmost professional and look
7 forward to a healthy and mutually beneficial process.
8

9 Hubacheck told Kim that these proposed mediation conditions were not feasible.¹⁶

10 Additionally, Hubacheck specifically told Kim that the Associate Director Meetings would
11 not be on hold.

12 November 13, 2015 Meeting with Mark Quigley

13 On November 13, 2015, Kim met with Mark Quigley (Quigley), the University's
14 interim Assistant Vice President of Human Resources, in Quigley's office.¹⁷ At this
15 meeting, Kim submitted to Quigley a letter regarding workplace bullying (Bullying
16 Letter), the Bullying Log, and the mediation conditions she had provided to
17 Hubacheck.¹⁸ Kim spoke to Quigley about feeling safe and secure in her work
18 environment, and gossip that was occurring within Career Services. Quigley considered

¹⁶ Hubacheck testified, "Because the idea that two individuals that lead distinct areas in the office would not meet or communicate other than via email would not allow for the team to fully function and to meet our goals."

¹⁷ Quigley became interim Assistant Vice President of Human Resources in October 2015, and he permanently took over this position in April 2016. Prior to becoming Assistant Vice President of Human Resources, Quigley was Director of Labor Relations at the University.

¹⁸ Quigley did not remember ever seeing the Bullying Letter, and he further testified that the University does not have a "per se workplace bullying policy." Hubacheck testified that she had no knowledge of Kim ever filing a workplace bullying complaint at any point during Kim's employment.

1 Kim's issues to be interpersonal.¹⁹ They decided that the next step would be to meet
2 with Hubacheck and a representative of the Union.

3 Bullying Letter

4 By letter to Quigley dated November 13, 2015, Kim wrote, under the heading
5 "Healthy Workplace Bill: Workplace Bullying Claim and Request for Separation:"

6 This is a workplace bullying claim and request for separation as it relates to the
7 Healthy Workplace Bill in Massachusetts.
8

9 Given the documented instances of attempted workplace bullying led by Janet
10 Neely (see spreadsheet attached), I would like to request the following conditions
11 while undergoing a proposed mediation with Ms. Neely (see letter addressed to
12 Lauren Hubacheck). The end goal for me is to continue serving the institution
13 and our student population while feeling safe, secure, and satisfied in my work
14 environment through a separation between Janet Neely and myself and my work
15 throughout this process.
16

17 Furthermore, given that there have been other members of the career services
18 team that have participated in bullying behavior, I would like to request, if
19 possible, that I continue my work in employer relations under a different
20 reporting structure and that the employer relations function and its employees be
21 physically removed from the office. I would like to prevent any future retaliation.
22

23 I would also state for the record that I stated my right to feel safe and secure in
24 my work environment to Lauren Hubacheck on 9/22/15 at 12 pm at [sic] to John
25 Keenan on 9/23/15 at 9 am. I did not feel safe and secure, which resulted in my
26 feeling forced to quit and close resignation [sic] on 11/4/15. I have submitted a
27 letter to Lauren Hubacheck on 11/9/15 stating my need to feel safe and secure in
28 my work environment.
29

30 I will continue to be the utmost professional and look forward to a healthy and
31 mutually beneficial process. I believe and enjoy the work that I have
32 accomplished [sic], and there is still more to be done. Furthermore, I enjoy
33 working with the members of my team. I look forward to continuing the

¹⁹ Quigley testified that Kim used a lot of "buzz words, about feeling safe and secure in the workplace and bullying in the workplace but didn't provide concrete examples to me from an HR perspective, but we talked through issues that were happening in the department." Quigley gave an example: "She mentioned one incident with Ms. Neely that she drummed her fingers on the front desk I believe she said it was, I can't remember exactly, but I believe that was the case and there was another case where she felt that Ms. Neely was hovering over her."

opportunities for professional and personal growth that have been provided to me by Salem State University.

Bullying Log

The attached spreadsheet was the Bullying Log that Kim compiled to document instances of alleged bullying that Kim claimed to have experienced in Career Services between February 2015 and November 2015. The Bullying Log contains the following eleven allegations by Date/Time, Person, Comment, Action and Bullying Behavior:²⁰

- 1) Date/Time: Tuesday, February 24th, 2015. Person: Janet Neely. Comment: Janet Neely demonstrated inappropriate behavior and was not civil regarding feedback to me which I addressed with her the next day where she preceded [sic] to make comments on how I dressed and that she felt that I was condescending. Action: reported to Lauren. Bullying Behavior: Abusive conduct/insults
- 2) Date/Time: Thursday, September 3rd, 11am. Person: Lauren Hubacheck. Comment: "This would be a lot easier if you weren't good at your job" when confronting me regarding conflict of interest. Action: Logged as inappropriate behavior, not reported. Bullying Behavior: Intimidation/Threat
- 3) Date/Time: Thursday, September 17th, after staff meeting. Person: Janet Neely. Comment: We can invite Knack for a demo, we can share best practices, and then charge them for it. Action: Reported to Lauren Hubacheck on Tuesday, September 22nd at 12 pm and John Keenan on Wednesday, September 23rd, at 9 am. Bullying Behavior: Intimidation.²¹
- 4) Date/Time: Tuesday, September 22nd, 9 am. Person: Lauren Hubacheck. Comment: I would rather go to your wedding than to the Meet the Firms Night event. Action: Reported to Lauren Hubacheck on Tuesday, September 22nd at 12pm and John Keenan on Wednesday, September 23, at 9 am. Bullying Behavior: Intimidation
- 5) Date/Time: Tuesday, September 22nd, 12 pm. Person: Lauren Hubacheck. Comment: "What did you expect? You posted your private business on your LinkedIn profile." When I requested that people in the office stop making inappropriate comments regarding the conflict of interest case and

²⁰ I have altered the formatting for ease of reference, but retain Kim's language.

²¹ "Knack" was career placement software for students that the University considered purchasing. Kim testified that she reported this alleged incident to Keenan.

1 approached her concerning her inappropriate behavior. Action: Logged as
2 inappropriate behavior, not reported. Bullying Behavior: Intimidation.

- 3
4 6) Date/Time: Thursday, September 24th. Person: Ruthann Reed. Comment: I
5 can teach everyone how to do a cartwheel, but I won't charge them for it.
6 Action: Logged as inappropriate behavior. Bullying Behavior: Intimidation.

- 7
8 7) Date/Time: Thursday, October 8th, staff meeting. Person: Lauren Hubacheck.
9 Comment: Did not let me lead employer relations discussion during staff
10 meeting by jumping in and asking for feedback on an event I led which I was
11 planning on asking; excluded me out of the internship road map development
12 projected when as a part of the leadership team I am also a part of the project
13 given my employer relations focus area. Action: Logged as inappropriate
14 behavior. Bullying Behavior: Omission.

- 15
16 8) Date/Time: Wednesday, October 28th, Associate Director meeting. Person:
17 Janet Neely. Comment: "I am angry." Stated when I approached Janet that in
18 order for me to support my team and lead my function that she would have to
19 report feedback directly to me, especially if the program was run by me,
20 rather than my employee. Action: observed by Lauren Hubacheck. Bullying
21 Behavior: Intimidation.

- 22
23 9) Date/Time: Wednesday, November 4th, Associate Director meeting. Person:
24 Janet Neely. Comment: Janet mentioned that people are talking about my
25 personal/private affairs and that this would be a lot easier if I was not good at
26 my job. Action: reported to Lauren that afternoon as inappropriate. Bullying
27 Behavior: Intimidation/Threat.

- 28
29 10) Date/Time: Wednesday, November 4th, 3pm. Person: Lauren Hubacheck.
30 Comment: Lauren stated that she has had to protect me in the office, that I
31 would get attacked if the conflict of interest concern was addressed publicly,
32 that this is the same as what happened with the Lisa Morency case, and that
33 the attempts at humiliation and intimidation are justified because I posted my
34 private business on my LinkedIn profile. Action: Logged as inappropriate
35 behavior, not reported. Bullying Behavior: Threat.

- 36
37 11) Date/Time: Friday, November 6th, 3pm. Person: Ruthann Reed and Lauren
38 Hubacheck. Comment: both standing outside of my office. Action: Logged as
39 inappropriate behavior, not reported. Bullying Behavior: Intimidation.

40
41 Kim Refuses to Attend November 18, 2015 Associate Director Meeting

42 The day prior to a November 18, 2015 Associate Director Meeting, Hubacheck
43 sent an invitation to Kim regarding the meeting, and Kim declined the request.

1 Hubacheck responded that Kim's attendance was expected. Kim then requested that
2 the meeting not occur until Kim could obtain Union representation, and Hubacheck did
3 not respond to this request.²² On November 18, 2015, Kim did not attend the meeting
4 and left the office during the meeting.²³ Hubacheck reported Kim's refusal to attend the
5 meeting to Quigley and James Stoll (Stoll), Hubacheck's direct supervisor and the
6 Assistant Vice President and Dean of Students.

7 Kim Meets with the Union's Chapter President, Michael Pelletier

8 Michael Pelletier (Pelletier) has worked at the University since 2008. At all times
9 during the events at issue in this matter, Pelletier worked as a Student Services
10 Representative and was the APA's Chapter President. At some point after the
11 November 18, 2015 Associate Director Meeting, Kim met with Pelletier regarding her
12 ongoing issues within Career Services. They met for coffee to discuss her situation,
13 and Pelletier offered to reach out to Human Resources. Pelletier contacted Human
14 Resources and scheduled a meeting with Hubacheck and Quigley.

15 November 30, 2015 Meeting

16 On November 30, 2015, Pelletier and Kim met with Hubacheck and Quigley in
17 Quigley's office for approximately an hour.²⁴ They agreed that going forward minutes
18 would be taken during the Associate Director Meetings, and Hubacheck volunteered to

²² Kim testified that she sought Union assistance for this meeting because she "did not feel safe."

²³ Kim testified that she did not attend the meeting because she "did not feel safe and secure and comfortable meeting with Janet Neely at the time."

²⁴ Pelletier testified that around this time period Hubacheck reached out to him to inquire whether she needed Union representation related to the issues within Career Services.

1 begin taking the minutes. They also agreed that moving forward there would be no
2 more communication, by anyone, regarding the conflict of interest issue.²⁵

3 Kim Refuses December 7, 2015 Meeting Request with Hubacheck

4 On or around December 7, 2015, Hubacheck requested a same-day meeting
5 with Kim after a staff meeting. Kim asked Hubacheck what the meeting was about, and
6 Hubacheck told her that it was to follow-up on some items that had been discussed in
7 the staff meeting, and to discuss the Career Fair. Kim initially accepted the request, but
8 then declined the request and asked for Pelletier to be present during the meeting.

²⁵ Here, Kim's testimony significantly deviates from that of Pelletier, Hubacheck and Quigley. Kim testified that they agreed on "three outcomes of action items." According to Kim, in addition to taking minutes of the Associate Director Meetings, they agreed that Hubacheck would "reach out" to Keenan "to get talking points in terms of what to share to Ms. Neely regarding the conflict of interest and that it was no longer an issue but just verbiage behind that so that there would be no more gossip about the issue moving forward." Kim further testified that they also agreed that "the team would undergo training related to emotional intelligence."

No one else present at this meeting, including Pelletier, testified to such an understanding regarding outcome two and three, and I therefore do not credit Kim's testimony regarding these alleged outcomes. To the contrary, Hubacheck testified that she told Neely before the November 30, 2015 meeting not to further discuss the conflict of interest issue. At the end of the meeting, Hubacheck understood, "That there would be no more communication about the conflict of interest" with Keenan or with the Career Services staff. According to Hubacheck, "We would no longer have a discussion about this issue."

Similarly, Quigley testified that Kim originally "wanted some sort of communication back to Ms. Hubacheck's team about it, that it was a non-issue, it was over." According to Quigley, after some discussion they agreed "that we would not have further communications. Ms. Hubacheck had already spoken to Ms. Neely about it and said it was not to be discussed further, so that matter, as far as I was concerned, was put to bed." Neither Pelletier nor Hubacheck nor Quigley testified to any discussion or agreement related to emotional intelligence training.

1 Hubacheck did not respond to Kim's request for representation, and Kim did not attend
2 the meeting.²⁶

3 Kim Attempts to Separate Employer Relations from Career Services

4 In or around December 2015, Kim attempted to separate Employer Relations
5 from Career Services without informing Hubacheck that Kim was so doing. After
6 unsuccessfully attempting to set up a meeting with the President of the University, Kim
7 met with Stoll and then Scott James (James), the Vice President of Enrollment,
8 Management and Student Life, to propose her idea.²⁷ Both Stoll and James rejected
9 Kim's proposal to separate Employer Relations from Career Services. On December
10 21, 2015, Stoll informed Hubacheck that Kim had proposed separating Employer
11 Relations from Career Services.²⁸

²⁶ Kim testified that Hubacheck told Kim only "that she had made an observation that she wanted to bring to my attention." According to Kim, Kim exchanged emails with Pelletier in which she told him that she felt she was going to be reprimanded. Pelletier then told her she could request Union representation, and that he would accompany Kim to the meeting. Kim did not attend the meeting because she did not know what it was about, and because Hubacheck did not respond to her request for Union representation.

I do not here credit Kim's testimony. Pelletier not only did not verify this exchange, but he testified that after the November 30, 2015 meeting he next heard from Kim over her evaluation, discussed infra. On the other hand, Hubacheck's testimony that after a staff meeting she told Kim she wanted to follow-up with Kim about the staff meeting, and give Kim feedback about the upcoming Career Fair, is entirely plausible.

²⁷ Kim testified that she initially reached out to the President of the University "to set up a meeting to discuss the personnel matter and the issue [involving] me feeling safe and secure in the work environment."

²⁸ Kim testified that she did not discuss this proposal with Quigley. I do not credit Kim's testimony on this point. The Bullying Letter Kim gave to Quigley at their November 13, 2015 meeting requests that Kim "continue my work in employer relations under a different reporting structure and that the employer relations function and its employees be physically removed from the office." Moreover, Quigley testified that he discussed

1 Request for Coaching

2 In or around late January or early February 2016, Hubacheck learned from
3 James that Kim had requested “coaching” to mediate between Kim and Hubacheck.
4 Hubacheck did not oppose this idea, and James offered to serve as “coach” between
5 Hubacheck and Kim. Kim, however, rejected James’ offer to serve as coach because
6 he did not have experience coaching.

7 February 2016 Evaluation for 2015 Calendar Year

8 Kim’s 2015 Review and Evaluation of Performance and Skills (2015 Evaluation)
9 covered the period from January 1, 2015 through December 31, 2015. The evaluation
10 process begins with the employee submitting a self-evaluation to the supervisor, which
11 Kim did. After receiving the self-evaluation, the supervisor then prepares the
12 employee’s evaluation.

13 The 2015 Evaluation contains Sections I and II. Section I contains Part A,
14 Evaluation of Position Responsibilities and Performance for Period of Review, and Part
15 B, Evaluation of Professional Skills. Of the five categories that comprise Section I, Part
16 A, Hubacheck evaluated Kim as Above Standard in two categories and Competent in
17 three categories. In Section I, Part B, Hubacheck evaluated Kim as Needs
18 Improvement in the categories of Leadership, Management, Problem Solving, and
19 Teamwork; and Hubacheck evaluated Kim as Above Standard or Competent in the
20 subcategories of the final Part B category of Skills Specific to Position. In Section II,

this proposal with Kim at their initial meeting, told her it was not feasible, and he directed Kim to speak with Hubacheck about it: “I think I had referenced her back to Ms. Hubacheck for discussion again because that was within her department solely; it wasn’t something for me to decide on.” Kim did not speak to Hubacheck.

1 Evaluation of General Skills, Hubacheck evaluated Kim as Competent in the categories
2 of Job Knowledge and Responsiveness; and Needs Improvement in the categories of
3 Communication and Interpersonal Skills.²⁹

4 For the written component of the 2015 Evaluation, dated February 11, 2016,
5 Hubacheck wrote:

6 Angelique is a hard working individual who has taken the foundation of Employer
7 Relations started prior to her arrival and moved it forward increasing employer
8 engagement meetings by 13% during this evaluation period. She has facilitated
9 the growth of employers at Career Services signature events and hosted
10 employer academy sessions that reached 197 registrants.

11
12 Angelique is competent in many aspects of her position that relate to her
13 individual work including developing a pipeline of employers for future
14 recruitment of Salem State University students and alumni. The areas in which
15 Angelique was challenged in the last review cycle have multiplied this year
16 resulting in conversations regarding Angelique's ability to see the career services
17 office as one team impacting the transformational experience Salem State
18 University provides its student[s] and that the function of employer relations is
19 part of the larger office mission, vision and strategy.

20
21 As a part of Angelique[']s evaluation she is rated needs improvement in each of
22 the professional skills.

23
24 Leadership:

25
26 Angelique refers to developing her leadership skills and management style
27 through the professional development of reading current text that addresses such
28 topics. As a part of the APA evaluation Leadership is a professional skill detailed
29 in providing sound judgment. The behavior in which Angelique has engaged in
30 over the last six months of the evaluation period challenges her previous
31 leadership performance. Angelique had made choices to resign effective
32 immediately and rescind the resignation after a short period of time within the
33 same day. Angelique has also chosen to decline pre-arranged office

²⁹ Kim self-evaluated as Above Standard in all categories of Section I, Part A. In Section I, Part B, Kim rated herself as Above Standard in Management, Problem Solving, and Skills Specific to Position; and Kim rated herself as Competent in Leadership and Teamwork. In Section II, Kim rated herself as Above Standard in Job Knowledge, Communication, and Responsiveness; and Kim rated herself as Competent in Interpersonal Skills.

1 management meetings in lieu of promoting her personal agenda and opened a
2 business utilizing materials and technology that was paid for by the university.

3
4 Management:

5
6 The management portion of the APA evaluation details seeking and receiving
7 feedback in a constructive manner and applies to enhance performance. This is
8 an area of growth for Angelique. In conversations in which constructive feedback
9 is being provided, Angelique chooses to deflect and assume ill intent from her
10 peers and supervisor. Angelique has chosen to avoid environments in which
11 constructive criticism could be given by making a request that union
12 representation be present and denying operational meetings. These
13 conversations are not disciplinary in nature and therefore representation of the
14 union representative has been denied. In doing so Angelique has jeopardized
15 the level of trust and mutual respect in the office.

16
17 Problem Solving:

18
19 Career Services prides itself on being a solutions focused office. In the past
20 Angelique has rated above average in this area. In the past year there have
21 been new initiatives that have been developed in the office resulting in the need
22 for creative solutions. Angelique over the past year has added little to assist in
23 identifying solutions seeking that a detailed process be in place before engaging
24 in solutions. During conversation relating to Angelique's work she is often
25 seeking solutions from myself or the greater career services team in the form of a
26 discussions as a part of the weekly staff meeting. Budget, employer engagement
27 opportunities and teamwork are the most common areas in which Angelique
28 seeks problem solving support.

29
30 Teamwork:

31
32 The Career Services team is one functioning unit with one mission and vision.
33 As the director I have emphasized the nature of the work that each area of the
34 office is responsible for must work hand in hand for student success.
35 Angelique[s] inability to see that challenges the perception and image of the
36 career services office. Angelique promotes the employer relations function of the
37 office and has developed a proposal without my knowledge to separate the
38 employer relations function from career services to its own standalone unit.
39 These actions challenge Angelique's ability to work as a team and her integrity.

40
41 General Skills:

42
43 Communication:

44
45 Angelique needs improvement in the areas of listening, interacting with staff and
46 students as well as keeping appropriate people informed on status and key

1 issues. Angelique has exhibited the behavior of collecting instances in which she
2 is concerned about and bringing them to my attention months after the instance
3 has occurred expecting remediation.

4
5 Interpersonal Skills:

6
7 As stated in the area of management Angelique assumes ill intent from her
8 colleagues and often neglects to understand the work of others specifically
9 around when she is seeking support and collaboration from her peers. Her
10 actions as stated above have resulted in a lack of trust with her colleagues.

11
12 A Plan of Professional Development:

13
14 In observing and addressing the dramatic change from one year's evaluation to
15 the next it is of great concern that Angelique does not have the best interest of
16 the career services office or the ability to promote a strong image increasing the
17 positive perception of the office. While her individual work is above standard the
18 professional and general skills Angelique possesses need improvement.

19
20 I would recommend that Angelique and I review the APA evaluation monthly
21 creating small goals that are achievable in each of her challenge areas.
22 Angelique would also benefit from ongoing training around working as a member
23 of a team and developing her emotional intelligence skills. Angelique should
24 seek out training, opportunities and solutions in these areas with continuous
25 communication between the both of us.

26
27 In the area of trust, integrity, and mutual respect these are all items that could be
28 regained with actions over a period of time.

29
30 On February 25, 2016, Hubacheck and Kim reviewed the 2015 Evaluation
31 together, and Kim signed it.³⁰ Kim received an Overall Performance Rating of
32 Competent.³¹ When signing the 2015 Evaluation, Kim wrote next to her signature, "I

³⁰ At some point prior to signing the 2015 Evaluation, Kim reached out to Pelletier for guidance. Pelletier advised Kim that she could submit a rebuttal statement, and told her that the Union would look into whether the Employer had committed a "violation."

³¹ Hubacheck testified regarding this evaluation: "Because of the actions and what occurred, there were a number of barriers that slipped below competent in her 2015 evaluation."

1 Angelique Kim, do not agree with this performance evaluation and will be providing a
2 rebuttal statement.”³²

3 St. Jean's Waitlisted for Career Fair

4 By email to Kim on February 3, 2016, Nestle informed Kim that Nestle had been
5 unable to register St. Jean's for the March 3, 2016 Career Fair due to the event being at
6 capacity.³³ Nestle indicated that she had asked Flores if the University would make an
7 exception for St. Jean's due to its status as a sponsor for University events, and she
8 asked Kim if St. Jean's had been accepted into the Career Fair.³⁴ On February 3, 2016,
9 Kim responded to Nestle that St. Jean's was on the waitlist for the Career Fair.

10 On or about February 25, 2016, Hubacheck received a phone call from Mike
11 Randall (Randall), a University employee in Institutional Advancement, and Randall

³² Article IV, Section F(2)(d) of the parties' CBA provides that the "administrator may submit a written response to the evaluation," and Article IV, Section G provides that, "Prior to an evaluation becoming a part of an administrator's permanent personnel record, he or she must be given an opportunity to review and respond to any recommendations or comments that are recorded on the evaluation form."

³³ Due to space availability, the University limits attendance to approximately 136 employers. The University notifies potential employers about the Career Fair through email correspondence from a database system, and the employer must timely respond in order to register without being waitlisted. In this instance, Kim had instructed Flores on October 27, 2015, to follow up with Nestle about registering in the database, and Flores neglected to follow up with Nestle. Consequently, St. Jean's did not timely receive notice that it could register. By the time St. Jean's attempted to register, the event was at capacity.

³⁴ On February 3, 2016, Nestle had received from Kim an email addressed to "Career Fair Participants."

1 informed Hubacheck that an issue existed with St. Jean's and that she needed to reach
2 out to the institution.³⁵

3 By email at 11:28 AM on February 25, 2016, Hubacheck sought from both Kim
4 and Flores the "documentation that was sent to St. Jean's Credit Union that confirms
5 that they are registered and can attend the fair." At 11:37 AM, Kim responded that she
6 had just forwarded to Hubacheck the "approval packet," and added: "If you are speaking
7 with St. Jean's, we have still to receive payment and we are in need of the following
8 information for their profile. Also, Kathleen is not attending, and we would need
9 updated attendee information."

10 At 3:02 PM, still on February 25, 2016, Hubacheck replied to Kim and Flores that
11 Hubacheck "spoke with Debra Lee Surface and Dottie Nestle from St. Jean's Credit
12 Union. I have adjusted the registration to reflect the two of them as attendees at the fair
13 and removed Kathleen's name. The information below was also filled in. I have also
14 sent them the approval packet."³⁶

15 During the conversation with Surface, Surface expressed concern to Hubacheck
16 about St. Jean's being waitlisted for the Career Fair. Surface also told Hubacheck that
17 Kim had missed a meeting the prior October, arrived late to the make-up meeting, and
18 had been unaware of a recent donation St. Jean's had made to the University.³⁷

³⁵ The record does not establish at what time Hubacheck received the call from Randall, and whether she received the call before or after she reviewed the 2015 Evaluation with Kim.

³⁶ Hubacheck testified that she spoke to Surface on February 26, 2016, but the emails establish that the conversation occurred before 3:02 PM on February 25.

³⁷ On cross-examination, Hubacheck, who knows Surface, testified that during their phone conversation Surface was "upset" about Surface's interaction with Kim. Surface

1 At some point after speaking with Surface, Hubacheck contacted Human
2 Resources for guidance on the issues Surface raised about Kim during their
3 conversation. Hubacheck was instructed that she should have an investigatory
4 conversation with Kim about Kim's interaction with Saint Jean's.

5 At 9:43 PM on February 25, 2016, Hubacheck wrote to Kim: "Do you have notes
6 from your meeting with St. Jean's Credit Union? If so can you please forward them to
7 me." On February 29, 2016, Kim responded to Hubacheck: "When I met with Debra,
8 the new HR contact had just started and was with Enzymatics previously. I shared an
9 overview of the different engagement activities that St. Jean's can engage with us for
10 recruitment purposes and they expressed an interest in getting involved with anything
11 that we may need help with."

12 Kim's Rebuttal to February 2016 Evaluation

13 On or about February 29, 2016, Kim submitted to Hubacheck a Rebuttal
14 Statement (Rebuttal Statement) that contained Kim's four-page written response and
15 numerous letters of reference that Kim solicited from various individuals, including
16 Flores, a graduate assistant that Kim supervised during the Spring 2015 semester,
17 other employees of Career Services, and University faculty and administrators.³⁸ Kim
18 wrote:

19 I am a hard working individual who has taken the foundation of Employer
20 Relations started prior to my arrival and moved it forward increasing employer
21 engagement meetings by 13% during this evaluation period. I have facilitated

had contacted Randall about this, and Randall contacted Hubacheck. Hubacheck believes the "wait list prompted a call."

³⁸ The letters of reference are dated between February 25, 2016, and March 1, 2016, indicating that Kim submitted some of the references after she submitted the Rebuttal Statement.

1 the growth of employers at career services signature events and hosted
2 employer academy sessions that reached 197 registrants.

3
4 I am competent in all aspects of my position that relate to my individual work
5 including developing a pipeline of employers for future recruitment of Salem
6 State University students and alumni. I do view career services as one team
7 impacting the transformational experience Salem State University provides its
8 student[s] and that the function of employer relations is part of the larger office
9 mission, vision and strategy.

10
11 It has been recommended that I need improvement in the following professional
12 skills: leadership, management, problem solving and teamwork. It has also been
13 recommended that I need improvement in the following general skills:
14 communication and interpersonal. I do not agree with this evaluation and will be
15 sharing examples in support of my competence in each of those areas.

16
17 Leadership:

18
19 On November 4, 2015, I informed the director of career services that I wanted to
20 resign effective immediately and rescinded the resignation after a short period of
21 time within the same day. I felt that I was being forced to quit due to the inaction
22 from the director of career services. On September 22, 2015, at 12 pm, I
23 requested that gossip related to my personal business and whether or not it was
24 a conflict of interest needed to stop within the office. As a result of the level of
25 gossip in the office not being addressed, an inappropriate comment was made by
26 a peer that my business was a conflict of interest and that people were talking
27 about it the morning of November 4th. This was also after an altercation with this
28 same individual the week prior on October 28th, 2015, at 10 am where I made a
29 professional and rational request related to the management of my employee
30 and my peer responded with anger by stating that she was angry and slammed
31 her surface.

32
33 On November 4th, 2015 and upon my arrival to human resources, I was
34 encouraged to think about my actions, and if there was a
35 leadership/management issue that needed to be addressed that I had a
36 responsibility to report it and take action. Given this encouragement, I rescinded
37 my resignation to maintain a high ethical standard and support university mission
38 and policies as listed in the APA evaluation professional skill of leadership to
39 address a leadership/management issue.

40
41 I chose to decline a pre-arranged office management meeting scheduled for
42 Wednesday, November 18th, 2015 because I was being forced to engage in a
43 conversation with a peer in which I had two previous altercations. I needed to
44 feel safe and secure before doing so and did not feel comfortable meeting with
45 this individual without a prior conversation and a level of mediation. This was
46 communicated to both human resources and the director of career services

1 through email communication on Tuesday, November 17th, 2015. Contrary to the
2 previous claim, I did not decline pre-arranged office management meetings in
3 lieu of promoting my personal agenda and opening a business utilizing materials
4 and technology that was paid for by the university.
5

6 With regards to me opening a business utilizing materials and technology that
7 was paid for by the university, that is a state issue, and not a departmental issue.
8 This state issue was addressed and closed on September 23rd, 2015 at 9 am as
9 a result of my meeting with John Keenan, the General Counsel for the university.
10 Thus, this issue should not be a part of the claims in this performance evaluation.
11

12 Management:

13
14 The Management portion of the APA evaluation details seeking and receiving
15 feedback in a constructive manner and applies to enhance performance. There
16 have been occasions where I seek and receive feedback in a constructive
17 manner related to projects that I am working on during our weekly Associate
18 Director meetings.
19

20 It is my right to request union representation if I feel a situation is not being
21 handled properly and when I have concerns regarding a fair and equitable
22 process. On November 4, 2015, at 4 pm, the director of career services
23 communicated to me that she was not equipped to handle conversations. Given
24 that declaration, I made the decision to request union representation.
25

26 As a part of this evaluation, I have attached feedback from those that I manage
27 directly in support of my management professional skills.

28 Problem Solving:

29
30 When it comes to identifying solutions, it has been communicated to me by the
31 director of career services that the career services office is a team, and it is also
32 my understanding that if I need support then I should be able [to] rely on my
33 supervisor and on the team that I am a part of for that support. When new
34 initiatives are developed in the office and there is a need for creative solutions, it
35 is my understanding that it is a team effort. Initiatives that involve the career
36 services team as whole should be facilitated by the director of the office. I do
37 identify solutions and engage in those solutions as far as I can from an employer
38 relations perspective, but I realize that the career development function also has
39 to be tied into the conversation, a tie that should be facilitated by the director of
40 the office.
41

42 An example of my problem solving ability can be demonstrated through my work
43 in directing and managing the career fair. In order to make the annual career fair
44 a team effort and more inclusive and transparent, I developed and facilitated a
45 focus area and lead model using an Asana project tool where team members

1 could share progress on work and a level of accountability and ownership was
2 created for the event across the team.

3
4 Teamwork:

5
6 The Career Services team is one team with one mission and vision. I understand
7 this. There is a claim that I have the inability to see that and that this challenges
8 the perception and image of the career services office. As a part of this
9 statement, I have attached feedback from community members which contradicts
10 this claim. There are also examples of instances where I have promoted the
11 career services office as a whole and facilitated connections for the career
12 development function within the office. For example, I facilitated a conversation
13 between communication students and faculty with our office which resulted in
14 both employer and career development engagements for the office. I have also
15 facilitated connections between diversity student groups and career development
16 as well as the international office.

17
18 General Skills: Communication

19
20 The evaluation claims that I need improvement in the areas of listening,
21 interacting with staff and students as well as keeping appropriate people
22 informed on status and key issues. As a part of this statement, I have attached
23 feedback from peers and students that contradict the claim that I need
24 improvement in interacting with staff and students.

25
26 It has also been claimed that I have exhibited the behavior of collecting instances
27 in which I am [sic] concerned about and bringing them to the attention months after
28 the instance has occurred expecting remediation. As stated earlier, on
29 September 22nd, 2015, I requested that gossip related to my personal business
30 and whether or not it was a conflict of interest needed to stop within the office as
31 soon as possible after I observed inappropriate comments being made during
32 staff meetings by a peer. I was expecting a level of remediation at this time.

33
34 Interpersonal Skills:

35
36 There is the claim that I assume ill intent from my colleagues and that I often
37 neglect to understand the work of others specifically around when I am seeking
38 support and collaboration from my peers and that actions have resulted in a lack
39 of trust with my colleagues. This statement is inaccurate. I do not assume ill
40 intent and I do understand the work of others. As a part of this statement, I have
41 attached comments from peers. I have also had conversations with peers that
42 have indicated that they work well with me, with no indication that there are trust
43 concerns. I have also had occasions during this evaluation period where I have
44 successfully collaborated with peers on projects including social media
45 scheduling, developing a presentation for the leadership conference, and
46 developing a canvas course.

1
2 With Regards to a Proposal for a Plan of Professional Development:
3

4 I enjoy my work and working with my team and those that I have built
5 relationships with over the course of the last couple of years. I have been
6 grateful for the opportunity to serve the institution and for growth in my
7 profession. I am a visionary leader that believes in the greater purpose of career
8 services. As a part of the leadership team of career services, I view it as an
9 opportunity to serve students by both providing a holistic approach to prepare
10 them for a life-long career journey after college and serving employers by
11 enhancing their talent pipeline and making mutually beneficial connections. That
12 being said, I am results-driven and run a team based on the values of
13 accountability, integrity, trust, and mutual respect. I foster these values, by
14 holding both team and individual 1:1 meetings focused on open communication,
15 generating ideas, and 360 degree feedback. I trust others to do the work they
16 are responsible for to the best of their ability in alignment with this greater
17 purpose and provide support when needed.
18

19 I have experience in holding people accountable and having difficult
20 conversations, taking disciplinary action with an employee involving HR and
21 union reps, evaluating job descriptions and reclassifying job descriptions to meet
22 the demands of the strategic plan, function, and ultimately career services as a
23 whole. As a manager, I have a responsibility to look out for the best interest of
24 individuals on my team and the office as a whole to keep the greater purpose of
25 our service moving forward.
26

27 There is currently a proposal for a plan for professional development for me. I
28 had expressed concerns regarding trust and emotional intelligence during a
29 meeting with human resources, the director of career services and the APA
30 Union on November 30th, 2015 that would have benefited the entire staff of
31 career services. I had requested training for the staff in these areas. It was also
32 discussed that the director of career services should have a conversation with
33 John Keenan and that the message that there is nothing in the law that states
34 that I cannot have my own personal business as long as university resources are
35 not utilized be communicated to a peer that was engaging in gossip. As of a
36 meeting with the director of career services on December 10, 2015, no action
37 has been taken with regards to staff training on trust and emotional intelligence
38 or having the conversation with John Keenan or my peer.
39

40 The director of career services has requested from me what coaching areas I
41 seek related to my professional development, but I will not move forward until the
42 director is open to having a conversation regarding her role and the roles of
43 others in the office in this unresolved conflict and coaching for others on the
44 team. The leadership of the division has also offered to provide counseling
45 between the director of career services and myself. However, I would like to
46 request that a neutral party be a part of the conversation. I am currently not

1 receiving support from my leadership as a valued member of the career services
2 team and the institution. I do not agree with this evaluation, and will not be
3 moving forward with a plan for professional development that is not fair and
4 equitable.

5
6 Hubacheck did not discuss this Rebuttal Statement with Kim.

7 March 2016 Meeting

8 In March, at some point after the Career Fair, Kim received a calendar invite from
9 Hubacheck to attend a meeting related to an issue with St. Jean's.³⁹ The
10 communication notified Kim that the meeting could lead to discipline and that Kim had
11 the right to request Union representation for the meeting. Kim contacted Pelletier, and
12 Kim and Pelletier subsequently attended a meeting with Hubacheck and Carla Tharp
13 (Tharp), the University's Dean of Students and an Assistant Vice President. The
14 meeting occurred in a conference room near the Dean's Office and lasted for
15 approximately thirty minutes.

16 To prepare for this meeting, Kim solicited a letter of recommendation from an
17 employee of Target (Target Letter), a private employer, which the employee supplied on
18 March 16, 2016. Kim brought the Target Letter to the meeting, and she also brought
19 copies of her emails related to St. Jean's. Kim also reviewed the National Association
20 of Colleges and Employers Ethical Guidelines (NACE Guidelines), which provide a
21 framework for career service professionals to conduct business at work with employer
22 partners. At the meeting, Kim gave Hubacheck a copy of the Target Letter and copies

³⁹ In its post-hearing brief, the University asserts that the meeting occurred on March 17, 2016, but the record does not establish the date of this meeting other than that it occurred after March 16, 2016.

1 of the emails. Kim also discussed the NACE Guidelines in terms of St. Jean's receiving
2 preferential treatment.⁴⁰

3 At the outset of the meeting, Hubacheck questioned Kim regarding Kim's
4 October 2015 meeting with Surface, and Kim told Hubacheck that that meeting had
5 gone well.⁴¹ Hubacheck then told Kim that Hubacheck had received feedback from St.
6 Jean's regarding that meeting, including that Kim showed up for the meeting at the
7 wrong location and that she was late for a make-up meeting. Kim responded with
8 words to the effect that she did not think Surface had been upset at the October
9 meeting.⁴²

⁴⁰ On direct examination, Kim testified that to prepare for this meeting she "pulled" the NACE Guidelines because she thought that St. Jean's "wanted sort of special treatment because of their involvement" with the University. On cross-examination, however, when asked if she reviewed the NACE Guidelines because she thought St. Jean's would seek special treatment, Kim answered, "It wasn't a request for special treatment. I knew their status was going to come up, so I read the guidelines."

Hubacheck testified that Kim "addressed the NACE guidelines in terms of preferential treatment of employers," which Hubacheck understood to insinuate that St. Jean's was receiving preferential treatment. Pelletier testified that "there were some disputes over how the client was advanced on the wait list. I think Angelique had some reservations of that directive being in conflict with ethics guidelines." I credit Hubacheck's testimony, which Pelletier's testimony supports.

⁴¹ Pelletier testified that he believed that the University was trying "to determine the timing of events" that led to St. Jean's being waitlisted for the Career Fair.

⁴² Kim testified regarding the October meeting that "there was a confusion in terms of where the meeting was taking place." Kim thought Kim was meeting Surface "at the location right next to the University," but Surface was at another location and Kim "actually waited." After the mix-up, Surface "apologized for the confusion," and Kim said, "no worries." Pelletier testified that, "Angelique and I discussed it. We felt the initial complaint was she tried to meet this person at one location. The employee miscommunicated the location."

I do not credit the Union's testimony that Surface "miscommunicated the location." Surface clearly communicated in her October 15, 2015 email to Kim that

1 Kim then changed the subject and told Hubacheck, "That I felt this meeting had
2 nothing to do with Saint Jean's Credit Union and everything had to do with the issues
3 that we've been trying to resolve since August of last year."⁴³ Kim then mentioned her
4 concern that the meeting would lead to discipline, and Hubacheck told her "not
5 necessarily."

6 During the meeting, they also discussed the wait-listing of St. Jean's for the
7 Career Fair. Hubacheck told Kim that St. Jean's was dissatisfied with not being able to
8 register in a timely manner for the Career Fair. Kim did not respond, and Hubacheck
9 did not say that it was Kim's fault that St. Jean's was waitlisted.⁴⁴ The meeting then
10 ended.

11 April 6 Meeting

12 On April 6, 2016, Kim received a calendar invite from Quigley to attend a same-
13 day meeting in Quigley's office. Kim contacted Pelletier about the meeting, and
14 Pelletier advised Kim to attend the meeting, but to request Union representation if the
15 subject of the meeting differed from what they had discussed during the March meeting.
16 Hubacheck and Siobhain Feeney (Feeney), a Human Resources employee, were also

Surface was at the Highland Avenue location. Accordingly, to extent that any responsibility for this "confusion" exists, it resides with Kim and not with Surface.

⁴³ On cross-examination, counsel for the Employer asked Kim, "So that you don't believe that the inquiry into the Saint Jean's incident in March of 2016 was a legitimate inquiry. You think everything related back to August of '15?" Kim answered, "Unresolved personnel issues, yes."

⁴⁴ Kim testified that the responsibility for registration for the Career Fair belonged to "the Employer Relations associate at the time." According to Kim, the mistake belonged solely to Flores: "It was not my responsibility and I did not make a mistake in their ability to register."

1 present at the meeting. At the meeting, Quigley informed Kim that the University was
2 separating Kim from employment, and Quigley presented Kim with a Separation
3 Agreement and General Release of Claims (Separation Agreement).⁴⁵

4 Kim then requested Union representation, and Quigley paused the meeting for
5 approximately twenty to thirty minutes to allow Kim to contact Pelletier, but she was
6 unable to reach him. Kim then returned to Quigley's office and turned in her University
7 property before being escorted out of the office. Kim took the Separation Agreement
8 with her, but she later informed Quigley that she was not going to sign it.

9 Kim's Termination

10 By letter dated April 21, 2016 (Discharge Letter), the University, acting through
11 Hubacheck, discharged Kim effective April 6, 2016, the day of her separation from
12 employment.⁴⁶ Quigley and Hubacheck drafted the Discharge Letter.⁴⁷ It states:

13 Please be advised that your employment with Salem State University is being
14 terminated effective April 6, 2016. The past eight (8) months have been
15 challenging given your unprofessional behavior which includes but is not limited
16 to an abrupt resignation which you subsequently rescinded, engaging in
17 insubordinate behavior which includes refusing to attend pre-arranged office

⁴⁵ Quigley testified that after a number of conversations with Hubacheck in which they "looked at the history of what had been happening with Ms. Kim in her employment for the past eight months," he began to draft the separation letter. Quigley, Hubacheck and Feeney, who did not testify at the hearing, made the decision to separate Kim from the University. James, Tharp and Keenan were "in the loop" on the decision. Additionally, Quigley testified on cross-examination that "it was probably a few days but not much longer than that" from the time that they decided to separate Kim to when they presented her with the Separation Agreement on April 6.

⁴⁶ Pursuant to Article VIII, Section B(1) of the parties' CBA, "Any administrator who has been employed as a member of the bargaining unit at a University for fewer than four (4) consecutive years may be disciplined or terminated at any time and for any reason" subject only to certain limitations that are not here relevant.

⁴⁷ James, Tharp and Keenan were again consulted prior to issuing the letter.

1 management meetings and lastly utilizing materials and technology that were
2 paid for by the university for personal gain by engaging in a private business
3 enterprise.
4

5 In August 2015 the university became aware that you had established LRC
6 Advisors and that you had listed this on your LinkedIn profile which is paid for by
7 the university. In addition, you wrote a blog in your capacity as a university
8 employee and included your private business website. This matter was brought
9 to the attention of the university's General Counsel who met with you to discuss
10 this matter. The General Counsel followed this up with a letter to you dated
11 September 15, 2015 outlining the State Ethics Law & Conflict of Interest and told
12 you to cease and desist from conduct that violates the State Ethics Law. From
13 this date forward your conduct as an employee of the university spiraled
14 downward.
15

16 In addition, there were many instances where I tried to provide you with
17 constructive feedback, however this was met with you assuming ill intent from me
18 and your peers. Your actions resulted in a lack of trust with your colleagues.
19 You even informed and provided to me that you were keeping a log of your
20 peer's behavior at work. Your continued inability to see the mission and vision of
21 the Career Services team as one functioning unit has been extremely challenging
22 and completely undermined my authority as Director of Career Services.
23

24 For example, without my knowledge you developed a proposal to separate the
25 employer relations function from Career Services so you would be a standalone
26 unit reporting to the President. Despite the feedback from the Assistant Vice
27 President of Human Resources, the Dean of Students, and the Vice President for
28 Enrollment Management to propose your model, all told you that they did not
29 agree with this and that it was not tenable. Despite being told this from the
30 Assistant Vice President of Human Resources, the Dean of Students and the
31 Vice President for Enrollment Management you then attempted to arrange a
32 meeting with the President to advocate your plan. This was totally
33 unprofessional and unacceptable.
34

35 This type of behavior indicated that you did not have the best interests of the
36 Career Services Office in mind which made it difficult to promote the positive
37 perception of the office. Your behavior at times bordered on insubordination.
38 For example, on November 17, 2015 you declined an invite to an Associate
39 Director meeting stating that as a part of your "conditions" to attend were that a
40 union representative attend with you. This request was denied as the meeting
41 was not disciplinary in nature, rather it was a prescheduled departmental meeting
42 that occurred regularly and you were expected to attend. You subsequently
43 failed to attend the meeting. This is simply unacceptable behavior in the
44 workplace.
45

1 When I presented you with your 2015 APA Annual Evaluation I noted that you
2 were in fact a hard working individual who has taken the foundation of Employer
3 Relations and moved it forward increasing employer engagement meetings by
4 13% during the evaluation period. At the same time I provided feedback on
5 areas of improvement (as I do for every employee) including your challenge at
6 times seeing the Career Service office as one team impacting the
7 transformational experience the university provides its students and that the
8 function of employer relations is part of the larger office mission, vision and
9 strategy. I also provided a plan for professional development noting that your
10 individual work is above standard but an area that needs improvement is your
11 professional and general skills. In response to this, you provided a four (4) page
12 inflammatory rebuttal in which you took no ownership of your actions and were
13 again insubordinate. I requested the coaching areas you were seeking in
14 regards to your professional development and you responded, *"...I will not move
15 forward until the director is open to having a conversation regarding her role and
16 the roles of others in the office in this unresolved conflict and coaching for others
17 on the team (Emphasis in original)."*

18
19 Lastly, I was made aware by one of the university's donors that you failed to
20 attend a scheduled meeting and then subsequently arrived fifteen (15) minutes
21 late to the rescheduled meeting. When I asked to meet with [you] on this matter
22 you solicited a recommendation from another employer that the university
23 engages with. This type of behavior is another example of your lack of judgment
24 and failure to take ownership of a shortcoming. Given the totality of your
25 behaviors described above the university has made the decision to terminate
26 your employment effective April 6, 2016.

27
28 Pursuant to the collective bargaining agreement between the Board of Higher
29 Education and the Association of Professional Administrators enclosed please
30 find a check in the equivalent of one (1) month's salary from April 6, 2016.

31 OPINION

32
33 The issue is whether the University discharged Kim in violation of Section
34 10(a)(3), and, derivatively, Section 10(a)(1) of the Law. To establish a violation of
35 Section 10(a)(3) of the Law, a charging party must first establish a prima facie case of
36 retaliation or discrimination by demonstrating that: 1) the employee was engaged in
37 activity protected under Section 2 of the Law; 2) the employer was aware of this activity;
38 3) the employer took adverse action against the employee; and 4) the employer's
39 conduct was motivated by a desire to penalize or discourage the protected activity.

1 Town of Carver, 35 MLC 29, 47, MUP-03-3894 (June 30, 2008); Lawrence School
2 Committee, 33 MLC 90, 96-97, MUP-02-3631 (December 13, 2006). To support a claim
3 of unlawful motivation, the last element of a prima facie case, a charging party may
4 proffer direct or indirect evidence of discrimination or retaliation. Town of Brookfield,
5 28 MLC 320, 327-328, MUP-2538 (May 1, 2002), *aff'd sub nom.*, Town of Brookfield v.
6 Labor Relations Commission, 443 Mass. 315 (2005). A charging party may proceed on
7 either basis, or both, depending on the nature of the evidence. *Id.* at 328 (citing Wynn &
8 Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 667
9 n. 23 (2000)).

10 Direct evidence is evidence that, if believed, results in an inescapable, or at least
11 a highly probable inference that a forbidden bias was present in the workplace. Wynn &
12 Wynn, P.C., 431 Mass. at 667 (citing Johansen v. NCR Comten. Inc., 30 Mass. App. Ct.
13 294, 300 (1991)). Stray remarks in the workplace, statements by people without the
14 power to make employment decisions, and statements made by decision makers
15 unrelated to the decisional process itself do not satisfy the charging party's threshold
16 burden. Town of Brookfield, 28 MLC at 328, (citing Wynn & Wynn, P.C., 431 Mass. at
17 667). Under the direct evidence analysis, the employee must first prove by a
18 preponderance of the evidence that a proscribed factor played a motivating part in the
19 challenged employment decision. The burden of persuasion then shifts to the
20 employer, who may avoid a finding of liability only by proving that it would have made
21 the same decision even without the illegitimate motive. *Id.* at 327 (citing Wynn & Wynn,
22 P.C., 431 Mass. at 669-670).

1 Absent direct evidence, unlawful motivation may be established through
2 circumstantial evidence and reasonable inferences drawn from that evidence.
3 Lawrence School Committee, 33 MLC at 97. Several factors may suggest unlawful
4 motivation, including the timing of the alleged discriminatory act in relation to the
5 protected activity, triviality of reasons given by the employer, disparate treatment, an
6 employer's deviation from past practices, or expressions of animus or hostility toward a
7 union or the protected activity. Town of Carver, 35 MLC at 48 (citing Melrose School
8 Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006)). Under an indirect, or
9 circumstantial, evidence case, the CERB applies the tri-partite analysis articulated in
10 Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981).
11 Under this analysis, once the charging party establishes a prima facie case, the
12 employer may rebut it by producing evidence that a legitimate reason motivated the
13 adverse action. If the employer produces one or more legitimate reasons, the charging
14 party must establish that but for the protected activity, the employer would not have
15 taken the adverse action. Id. at 565-566; Suffolk County Sheriff's Department, 27 MLC
16 155, 159, MUP-1498 (June 4, 2001).

17 Activity Protected under Section 2 of the Law

18 The parties agree that Kim engaged in activity protected under Section 2 of the
19 Law. They disagree, however, regarding which of Kim's activities fall within the
20 protection of Section 2. The Union argues that Kim's protected activity includes:
21 keeping the Bullying Log; attempting to obtain Union representation in both disciplinary
22 meetings and in her attempt to resolve her workplace dispute; and submitting the
23 Rebuttal Statement, in both exercising a contractual right and in exercising that right

1 through the mutual aid and protection of her colleagues. On the other hand, the
2 University argues that Section 2 protects Kim's requests for Union representation on
3 November 30, 2015, March 17, 2016, and April 6, 2016. The University argues that
4 Section 2 of the Law does not protect Kim's request for Union representation at
5 operational meetings on November 18, 2015, and December 7, 2015.

6 Section 2 of the Law gives employees the right to engage in lawful, concerted
7 activities for the purpose of collective bargaining or other mutual aid or protection, free
8 from interference, restraint, or coercion. An employee's activity is protected if it focuses
9 on generally applicable terms and conditions of employment that impact the collective
10 bargaining unit as a whole. City of Newton, 32 MLC 37, 47, MUP-2849 (June 29, 2005)
11 (citing City of Boston, 8 MLC 1872, 1875, MUP-3994 (February 25, 1982)). An
12 employee's activity is concerted if the employee is acting with other employees, or on
13 the authority of other employees, rather than acting out of self-interest. Town of
14 Southborough, 21 MLC 1242, 1249, MUP-8521 (August 29, 1994). Additionally, an
15 individual employee's exercise of rights grounded in the collective bargaining agreement
16 constitutes concerted, protected activity. City of Newton, 32 MLC at 48; Commonwealth
17 of Massachusetts, 24 MLC 116, 118, SUP-4050 (June 10, 1998) (citing NLRB v. City
18 Disposal, 465 U.S. 822 (1984)).

19 Bullying Log

20 The Union argues that the Bullying Log qualifies as concerted, protected activity
21 because Kim kept the log in preparation for either a grievance or other workplace
22 complaint, or to defend herself against any repercussions that might result from Neely's
23 continued accusations of wrongdoing. The evidence in the record, however, does not

1 support the Union's position. Kim began drafting the Bullying Log on or around
2 September 3, 2015, and she told Hubacheck about it on November 4, 2015. Kim
3 presented the Bullying Log to Quigley on November 13, 2015. Kim did not seek the
4 assistance of the Union until after November 18, 2015, and there is no evidence in the
5 record that she ever presented the Bullying Log to anyone other than a representative
6 of management.⁴⁸ The Bullying Log does not relate to any grievance, and the Union
7 has not identified any contractual right that Kim was exercising when she presented it to
8 the Employer, but not the Union. Importantly, Kim created this Bullying Log to
9 document what she perceived to be abuses that she sustained from her colleagues,
10 including other members of the bargaining unit. Accordingly, Kim was not acting in
11 concert with other employees, or on the authority of other employees. Rather, she was
12 acting completely out of self-interest. I therefore find that Kim's keeping of the Bullying
13 Log was not concerted, protected activity under Section 2 of the Law. See Town of
14 Southborough 21 MLC at 1249; see also, Massachusetts Port Authority, 35 MLC 61, 63,
15 UP-06-2686, (June 18, 2008).

16 Requests for Union Representation

17 An employee who requests union representation for a meeting with an employer
18 is engaged in activity protected under Section 2 of the Law, even if no right to union
19 representation has attached. Commonwealth of Massachusetts, 26 MLC 139, 142,

⁴⁸ Although Hubacheck is a member of the bargaining unit, the meeting on November 4, 2015, resulted from Kim having submitted and then rescinded her resignation to Hubacheck on the same day, and there is no evidence that they were meeting other than in Hubacheck's capacity as Kim's supervisor and an Employer representative.

1 SUP-4301 (March 9, 2000). Accordingly, all of Kim's requests for Union representation
2 fall within the protection of Section 2 of the Law.⁴⁹

3 Rebuttal Statement

4 Article IV, Section F(2)(d) of the parties' CBA provides that an administrator "may
5 submit a written response to the evaluation." Additionally, Article IV, Section G provides
6 that, "Prior to an evaluation becoming a part of an administrator's permanent personnel
7 record, he or she must be given an opportunity to review and respond to any
8 recommendations or comments that are recorded on the evaluation form." Because
9 Kim was exercising a contractual right when she submitted her Rebuttal Statement,
10 Section 2 of the Law protects this activity. City of Newton, 32 MLC at 48.

11 Employer Knowledge and Adverse Action

12 The parties do not dispute these elements of the prima facie case. The
13 University was aware of all of Kim's Section 2 activity, and the University took adverse
14 action against Kim when it discharged her on April 21, 2016, effective April 6, 2016.

15 Unlawful Motivation

16 The Union argues that both direct and indirect evidence support a finding of
17 unlawful motivation. The University argues that the case should be considered under
18 an indirect evidence analysis. Because the Union argues that both direct and indirect
19 evidence support its position, I address both standards.

⁴⁹ As discussed *infra*, this means that an employer may not retaliate against an employee for requesting union representation at a meeting for which the employee has no right to union representation. It does not mean, however, that an employer may not discipline an employee for unprotected conduct, such as insubordination, related to the meeting at which no right to union representation has attached. See Id.; see also, Commonwealth of Massachusetts, 22 MLC 1741, 1747-1750, SUP-4105 (May 16, 1996).

1 Direct Evidence

2 The Union argues that the 2015 Evaluation and the Discharge Letter contain
3 direct evidence that Kim's concerted, protected activity motivated the Employer's
4 decision to discharge Kim. To support this position, the Union identifies references in
5 the 2015 Evaluation and the Discharge Letter to Kim's keeping of the Bullying Log and
6 Kim's attempts to obtain Union representation; and the reference in the Discharge Letter
7 to Kim's Rebuttal Statement.

8 I have not found Kim's keeping of the Bullying Log to be concerted, protected
9 activity within the meaning of Section 2 of the Law. Accordingly, the references to the
10 Bullying Log are not direct evidence of unlawful motivation.

11 The 2015 Evaluation once referenced Kim's request for Union representation. It
12 states, under Management:

13 The management portion of the APA evaluation details seeking and receiving
14 feedback in a constructive manner and applies to enhance performance. This is
15 an area of growth for Angelique. In conversations in which constructive feedback
16 is being provided, Angelique chooses to deflect and assume ill intent from her
17 peers and supervisor. Angelique has chosen to avoid environments in which
18 constructive criticism could be given by making a request that union
19 representation be present and denying operational meetings. These
20 conversations are not disciplinary in nature and therefore representation of the
21 union representative has been denied. In doing so Angelique has jeopardized
22 the level of trust and mutual respect in the office.

23
24 This reference expresses neither hostility nor animus toward concerted, protected
25 activity. The context establishes that Hubacheck is concerned with Kim's ability to
26 receive criticism, and not Kim's request for Union representation. This section of the
27 evaluation "details seeking and receiving feedback in a constructive manner." Kim
28 "chooses to deflect and assume ill intent from her peers and supervisor" when they
29 provide her with constructive feedback. The next sentence, which contains the

1 reference to Kim's request for Union representation, continues along this line of thought
2 and merely states facts that the record supports: Kim used a request for Union
3 representation to avoid attending operational meetings in which the Employer could give
4 Kim constructive criticism. The penultimate sentence in the paragraph explains that the
5 Employer denied the requests because Kim had no right to Union representation at
6 these non-disciplinary meetings. The final sentence offers the conclusion that in "doing
7 so," i.e. deflecting and assuming ill intent and avoiding "environments in which
8 constructive criticism could be given," Kim "jeopardized the level of trust and mutual
9 respect in the office."

10 Kim's unwillingness to receive constructive criticism and her refusal to attend the
11 operational meetings are inextricably entangled with her request for Union
12 representation, and the Employer therefore could not fully discuss what it perceived to
13 be her need to improve in this area of management without mentioning those requests
14 for Union representation. In light of this entanglement, I do not read this reference to
15 the requests for Union representation as resulting in the inescapable, or highly
16 probable, inference that a forbidden bias was present in the workplace. Rather, I read
17 this section of the 2015 Evaluation as legitimately addressing unprofessional conduct
18 unrelated to concerted, protected activity. Accordingly, I find that the reference in the
19 2015 Evaluation to Kim requesting Union representation is not direct evidence of
20 unlawful motivation.

21 Similarly, albeit in a form that differed from the 2015 Evaluation, the Discharge
22 Letter once referenced Kim's requests for Union representation. It states:

23 Your behavior at times bordered on insubordination. For example, on November
24 17, 2015 you declined an invite to an Associate Director meeting stating that as

1 part of your "conditions" to attend were that a union representative attend with
2 you. This request was denied as the meeting was not disciplinary in nature,
3 rather it was a prescheduled departmental meeting that occurred regularly and
4 you were expected to attend. You subsequently failed to attend the meeting.
5 This is simply unacceptable behavior in the workplace.
6

7 Again, this reference expresses neither hostility nor animus toward concerted,
8 protected activity, and merely states facts that the record supports: Kim refused to
9 attend an operational meeting without Union representation; the Employer denied Kim's
10 request because the meeting was not disciplinary in nature; and the Employer expected
11 Kim to attend. The "unacceptable behavior in the workplace" that the Employer is, in
12 part, discharging Kim for is the refusal to attend a non-disciplinary meeting without
13 Union representation, which Section 2 does not protect, and not the request for Union
14 representation, which Section 2 does protect. See Commonwealth of Massachusetts,
15 22 MLC at 1749-1750 (Refusal to attend a non-disciplinary meeting without union
16 representation is not conduct protected under the Law). Accordingly, the reference in
17 the Discharge Letter to Kim's request for Union representation is not direct evidence of
18 unlawful motivation.

19 Regarding the Rebuttal Statement, the Discharge Letter states:

20 When I presented you with your 2015 APA Annual Evaluation I noted that you
21 were in fact a hard working individual who has taken the foundation of Employer
22 Relations and moved it forward increasing employer engagement meetings by
23 13% during the evaluation period. At the same time I provided feedback on
24 areas of improvement (as I do for every employee) including your challenge at
25 times seeing the Career Service office as one team impacting the
26 transformational experience the university provides its students and that the
27 function of employer relations is part of the larger office mission, vision and
28 strategy. I also provided a plan for professional development noting that your
29 individual work is above standard but an area that needs improvement is your
30 professional and general skills. In response to this, you provided a four (4) page
31 inflammatory rebuttal in which you took no ownership of your actions and were
32 again insubordinate. I requested the coaching areas you were seeking in
33 regards to your professional development and you responded, "...I will not move

1 *forward until the director is open to having a conversation regarding her role and*
2 *the roles of others in the office in this unresolved conflict and coaching for others*
3 *on the team (Emphasis in original)."*
4

5 As noted, the parties' CBA gives Kim the right to respond in writing to her
6 evaluation, and Kim's exercise of that right was therefore concerted, protected activity
7 within the meaning of Section 2 of the Law. The fact that speech takes place within the
8 context of protected activities, however, does not preclude an inquiry into the nature of
9 the statements made. Instead, a balance must be struck in each case between the
10 rights of employees to engage in concerted activities and the rights of employers not to
11 be subjected to egregious, insubordinate or profane remarks which disrupt the
12 employer's business or demean workers or supervisors. Plymouth Police Brotherhood
13 v. Labor Relations Commission, 417 Mass. 436, 438 (1994) (citing Harwich School
14 Committee, 2 MLC 1095, MUP-720 (August 26, 1975)); City of Boston, 6 MLC 1096,
15 1097, MUP-2878 (May 23, 1979). Articulated differently, an employee may not act with
16 impunity even though she is engaged in protected activity. Her rights must be balanced
17 against the employer's right to maintain order in the business by punishing acts of
18 insubordination. Plymouth Police Brotherhood, 417 Mass. at 441 (citing Crown Central
19 Petroleum Corp. v. NLRB, 430 F.2d 724, 729 (5th Cir. 1970)).

20 The University specifically identified its reason for deeming Kim's Rebuttal
21 Statement insubordinate: Hubacheck requested the coaching areas that Kim sought in
22 regard to professional development and Kim responded that she "will not move forward
23 until the director is open to having a conversation regarding her role and the roles of
24 other in the office in this unresolved conflict and coaching for others on the team." I
25 agree with the Employer that Kim's response was insubordinate, and conclude that

1 although Section 2 protects the act of submitting the Rebuttal Statement, it does not
2 protect Kim's statement that the Employer cites in the Discharge Letter.

3 Kim's refusal to "move forward" extends beyond her contractual right to respond
4 to an evaluation and enters into the realm of unprotected conduct because she does
5 more than disagree with the 2015 Evaluation; she expressly states her intent to defy her
6 superior until such time as Hubacheck accedes to Kim's unilateral demands. In addition
7 to exhibiting unprofessional behavior, Kim attempts to invert the organizational
8 hierarchy within Career Services by dictating the action that her superior must take.
9 Such conduct serves no legitimate purpose within the workplace, and effectively
10 subverts the Employer's ability to use the evaluation process as a tool for corrective
11 action. For these reasons, I conclude that the balance favors the Employer's right to
12 prevent the insubordinate disruption of its workplace over Kim's right to respond to the
13 2015 Evaluation in the manner that she did. Accordingly, I find that the Law does not
14 protect Kim's statement that the Employer cites in the Discharge Letter, and I therefore
15 conclude that the reference in the Discharge Letter to Kim's Rebuttal Statement is not
16 direct evidence of unlawful motivation.

17 For the foregoing reasons, I find that the 2015 Evaluation and the Discharge
18 Letter do not contain direct evidence of unlawful motivation. Consequently, the Union
19 has not established a prima facie case of retaliation under the direct evidence standard.
20 I next address the Union's arguments that the record contains indirect evidence of
21 unlawful motivation.

22 Indirect Evidence

1 Several factors may suggest unlawful motivation, including the timing of the
2 alleged discriminatory act in relation to the protected activity, triviality of reasons given
3 by the employer, disparate treatment, an employer's deviation from past practices, or
4 expressions of animus or hostility toward a union or protected activity. Town of Carver,
5 35 MLC at 48. Timing alone is insufficient to establish unlawful employer motivation.
6 City of Holyoke, 35 MLC 153, 157, MUP-05-4503 (January 9, 2009).

7 The Employer discharged Kim effective April 6, 2016, approximately three weeks
8 after she engaged in the concerted, protected activity of attending the March meeting
9 with Union representation, and slightly more than five weeks after she submitted the
10 Rebuttal Statement. Thus, the discharge did occur within the proximity of Kim's
11 concerted, protected activity. Additionally, the April 21, 2016 Discharge Letter cites
12 conduct that reaches back eight months to August 2015, and, as the Union argues,
13 includes conduct for which Kim did not receive any discipline at the time that the
14 conduct occurred. I therefore find that the Union has established a prima facie case
15 under the indirect evidence standard.

16 Under this analysis, the Employer may rebut the prima facie case by producing
17 evidence that a legitimate reason motivated the discharge. The University argues that it
18 discharged Kim for escalating poor performance and judgment over a period of a time.
19 According to the University, Kim's discharge resulted from eight months of Kim's
20 challenging behavior in which she engaged in unprofessional, insubordinate and
21 unacceptable behavior that began with the conflict of interest issue. After the conflict of
22 interest issue arose, Kim undertook a campaign that undermined the mission of Career
23 Services generally and Hubacheck specifically.

1 The Union argues that the University's proffered legitimate reasons are
2 pretextual. Specifically, the Union points to the conflict of interest issue, the St. Jean's
3 issue, and the lack of any prior reprimand for the conduct cited in the Discharge Letter.
4 For the following reasons, I find that the Employer satisfied its burden to produce
5 evidence that legitimate, non-discriminatory reasons motivated the discharge.

6 The Discharge Letter twice references the conflict of interest issue. In the first
7 paragraph, the University cites the conflict of interest issue as an example of the
8 "unprofessional behavior" that made the preceding eight months "challenging." In the
9 second paragraph, the University summarizes the conflict of interest issue before
10 asserting that, "From this date forward your conduct as an employee of the university
11 spiraled downward." The evidence supports these assertions.

12 Without opining on whether a conflict of interest actually existed, I note the
13 following: although Kim denied that a conflict of interest existed, she did list LRC
14 Advisors on an account that the University paid for, and she did not deny that she
15 posted blog entries she authored as a University employee on her LRC Advisors
16 website. This issue arose prior to Kim engaging in any concerted, protected activity.
17 Keenan never rescinded the Cease and Desist Letter, and, contrary to the Union's
18 assertions, the Cease and Desist Letter unambiguously articulates that listing LRC
19 Advisors on the LinkedIn account and posting blog content written in Kim's capacity as
20 a University employee is "precisely the conduct the State Ethics law prohibits."
21 Additionally, despite Kim's incorrect assertion that any conflict of interest was a state
22 issue and not a departmental issue, Appendix L of the parties' CBA brings conflicts of

1 interest within the purview of the Employer. These facts demonstrate that the alleged
2 conflict of interest is a legitimate issue.

3 Furthermore, despite an agreement at the November 30, 2015 meeting that
4 moving forward there would be no more discussion of the conflict of interest issue, Kim
5 then refused to attend a December 7, 2015 meeting with Hubacheck, Kim continued her
6 attempt to separate Employer Relations from Career Services without informing
7 Hubacheck that she was so doing after Quigley had referred her to Hubacheck about
8 this idea, and Kim requested "coaching" only to reject as inadequate that coaching once
9 the Employer offered it. All of this post-November 30 conduct related to Kim's
10 unwillingness or inability to move forward following the conflict of interest issue.

11 Accordingly, the Employer could legitimately address the conflict of interest issue
12 in an evaluation that covered the period during which the event that triggered Kim's
13 performance issues occurred, and it could also legitimately include in the Discharge
14 Letter the event that triggered these performance issues after Kim's professional
15 conduct continued to deteriorate in the wake of the 2015 Evaluation. I therefore
16 conclude that the conflict of interest issue is not pretextual, but rather a legitimate,
17 performance-related issue unrelated to Kim's concerted, protected activity.

18 The Union argues that the St. Jean's issue is pretextual because Hubacheck did
19 not mention the October meeting in the 2015 Evaluation, and, in any event, missing a
20 meeting and being late for another meeting are not terminable offenses. According to
21 the Union, Surface's failure to timely register for the Career Fair provided Hubacheck
22 with an excuse to take action against Kim that Hubacheck knew or should have known
23 was false. The facts do not support this position.

1 Hubacheck did not learn about the issue with St. Jean's until after she completed
2 the written portion of the 2015 Evaluation, which is dated February 11, 2016. She
3 spoke with Surface on February 25, 2016, and Surface informed her at this time about
4 the mix-up related to the October meeting. Hubacheck's un rebutted and credible
5 testimony was that Surface expressed displeasure about her dealings with Kim after
6 being placed on the waitlist for the Career Fair. Moreover, the record establishes that a
7 mistake occurred within Employer Relations regarding notifying St. Jean's that it could
8 register for the Career Fair.

9 Consequently, Hubacheck could legitimately seek to investigate the
10 circumstances of this mistake, and the Employer could legitimately conclude that Kim
11 did not conduct herself professionally during that investigation. The Discharge Letter
12 states: "When I asked to meet with [you] on this matter you solicited a letter of
13 recommendation from another employer that the university engages with. This type of
14 behavior is another example of your lack of judgment and failure to take ownership of a
15 shortcoming."

16 I agree with the Employer that Kim's soliciting of the Target Letter further
17 demonstrates a lack of judgment and failure to take ownership of a shortcoming. The
18 Target Letter is not only unrelated to Kim's interaction with St. Jean's, but would serve
19 no purpose other than to redirect the investigatory meeting away from the issues at
20 hand: how St. Jean's got on the waitlist, and the nature of Kim's prior interactions with
21 St. Jean's. The Employer could therefore legitimately conclude that Kim's attempt to
22 introduce the Target Letter in a discussion about St. Jean's further demonstrated an

1 ongoing pattern of Kim exercising poor judgment and failing to take ownership of a
2 shortcoming.

3 The Union also argues that the University's failure to administer any discipline for
4 any of the conduct cited in the Discharge Letter strongly suggests that none of this
5 behavior was seen as worthy of discipline at the time it happened. According to the
6 Union, this establishes that the University's reasons for discharging Kim are pretextual.
7 Although the Union is correct that the University did not discipline Kim prior to
8 discharging her, I conclude differently.

9 The 2015 Evaluation, which positively evaluates aspects of Kim's individual
10 performance, contains numerous, specific references to Kim's professional conduct
11 during the evaluation period to support the rating of Needs Improvement in Kim's
12 professional conduct. Hubacheck cites, inter alia: Kim's resignation and same day
13 rescission of that resignation; Kim's insubordinate refusal to attend operational, non-
14 disciplinary meetings; Kim's use of University materials and technology in her private
15 business; Kim's unwillingness to accept constructive feedback; Kim's attempt to
16 separate Employer Relations from Career Services; and Kim's ongoing difficulty
17 interacting with staff. The 2015 Evaluation further asserts that Kim's conduct during the
18 evaluation period has "resulted in a lack of trust with her colleagues." The 2015
19 Evaluation concludes by proposing a plan of professional development and stating that:
20 "In the area of trust, integrity, and mutual respect these are all items that could be
21 regained with actions over a period of time."

22 These factually supported criticisms unequivocally demonstrate that, prior to Kim
23 submitting her Rebuttal Statement, Hubacheck conveyed to Kim that Kim's professional

1 conduct needed to improve. Yet, as already discussed, Kim responded to these
2 criticisms with an insubordinate statement within her Rebuttal Statement, and when the
3 Employer conducted the March investigatory meeting about St. Jean's with Kim after
4 the Career Fair, Kim again demonstrated the same manner of unprofessional conduct
5 that Hubacheck cited in the 2015 Evaluation.

6 The Employer gave Kim an opportunity to correct her professional conduct and
7 regain "trust, integrity, and mutual respect." After the 2015 Evaluation, however, Kim not
8 only refused to do so, but continued to escalate her unprofessional conduct. At that
9 point, the Employer discharged her for the totality of what it considered to constitute that
10 unprofessional conduct, beginning with the event from which her conduct deteriorated.
11 This conduct also included, inter alia: the insubordinate refusal to attend operational
12 meetings, the attempt to separate Employer Relations from Career Services, the
13 insubordinate statement within the Rebuttal Statement, and Kim's unprofessional
14 conduct at the March investigatory meeting. Accordingly, I conclude that the
15 Employer's failure to discipline Kim prior to discharging her does not establish that its
16 stated reasons for discharging her were pretextual. See City of Easthampton, 35 MLC
17 257, 265, MUP-04-4244, (April 23, 2009) (Discharge not pretextual when credible
18 evidence supported city's proffered legitimate reason for discharge); See also, Town of
19 West Springfield, 8 MLC 1041, 1048, MUP-3914 (June 4, 1981) (Employer did not
20 violate the Law when it discharged employee for insubordinate and confrontational
21 attitudes rather than protected activity).

22 The Employer has met its burden of producing evidence that legitimate reasons
23 motivated the discharge. Under the indirect evidence analysis, the Union must

1 establish that but for Kim's protected activity the Employer would not have discharged
2 her. The Union does not raise any new arguments at this stage of the analysis, but
3 instead reiterates its argument that the Employer's failure to discipline Kim prior to the
4 incident with St. Jean's proves that but for Kim's protected activity, the Employer would
5 not have discharged her. For reasons I have already explained, I disagree.

6 Additionally, I note that I have not found any facts that evidence Employer
7 hostility to concerted, protected activity. As already discussed, the 2015 Evaluation and
8 the Discharge Letter criticized Kim's unprotected activity rather than her protected
9 activity. Specifically, the Employer criticized Kim's insubordinate refusal to attend
10 operational meetings, and not her request for Union representation at operational
11 meetings; and Kim's insubordinate statement within her Rebuttal Statement, and not her
12 act of submitting a rebuttal along with supporting letters of recommendation. Moreover,
13 the Employer generally cooperated with the Union throughout this ordeal. Specifically,
14 the parties met on November 30, 2015, and agreed to move beyond the conflict of
15 interest issue; the Employer advised Kim of her right to Union representation prior to the
16 March investigatory interview; and Quigley paused the April 6, 2016 meeting to allow
17 Kim to contact Pelletier, even though the University had already decided to separate
18 Kim from employment. These facts further support the Employer's position that it
19 discharged Kim because of her escalating, unprofessional conduct rather than for her
20 concerted, protected activity.

21 In sum, the Union did not establish that but for Kim's protected activity the
22 Employer would not have discharged her.

23 CONCLUSION

- 1 The Employer did not violate Section 10(a)(3) and, derivatively, Section 10(a)(1)
2 of the Law when it discharged Kim. I therefore dismiss the Complaint.
3 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.