

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BOARD OF TRUSTEES OF THE
UNIVERSITY OF MASSACHUSETTS
BOSTON

and

JOINT COORDINATING
COMMITTEE/ FACULTY STAFF
UNION/MTA/NEA

Case No. SUP-20-8208

Date Issued: March 16, 2023

Hearing Officer: Meghan Ventrella, Esq.

Appearances:

James Racine, Esq.

Representing the Faculty Staff Union

Ethan Mutschler, Esq.

Representing the University of
Massachusetts

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the University of Massachusetts Boston
2 (University) violated Section 10(a)(3), and derivatively, Section 10(a)(1) of Massachusetts
3 General Law Chapter 150E (the Law) by notifying Maria Mellone (Mellone), a bargaining
4 unit member, that she would not be re-appointed as an associate lecturer nor assigned
5 any classes for the fall 2020 semester. I find that the University did not violate the Law as
6 alleged.

STATEMENT OF CASE

7
8 On September 21, 2020, the Faculty Staff Union (Union) filed a charge of
9 prohibited practice (Charge) with the Department of Labor Relations (DLR) alleging that

1 the University had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.
2 On November 17, 2020, a DLR Investigator investigated the Charge. On November 25,
3 2020, the Investigator issued a Complaint of Prohibited Practice (Complaint) alleging that
4 the University violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. On
5 December 5, 2020, the University filed its Answer to the Complaint. On May 21, 2021,
6 May 25, 2021, May 26, 2021, June 29, 2021, July 12, 2021, and August 30, 2021, I
7 conducted a hearing by video conference during which the parties received a full
8 opportunity to be heard, to examine and cross-examine witnesses, and to introduce
9 evidence. On November 15, 2021, the parties filed post-hearing briefs. Based on my
10 review of the record, including my observation of the demeanor of the witnesses, I make
11 the following findings of fact and render the following opinion.

12 STIPULATIONS OF FACT

- 13 1. The University of Massachusetts Boston is a public employer within the meaning
14 of the Law.
- 15 2. Faculty Staff Union is an employee organization within the meaning of the Law that
16 serves as the exclusive representative for a bargaining unit comprised of tenure
17 track and non-tenure track faculty employed by the University.
- 18 3. At all relevant times, Maria Mellone was employed by the University as a non-
19 tenured associate lecturer in the Math Department.
- 20 4. Mellone served [on] the Union's Core Bargaining Team for successor negotiations
21 between the Union and the University in April 2020, [and] remains a member of
22 the Core Bargaining Team at present.
- 23 5. On or about May 12, 2020, the University issued 259 reappointment letters to the
24 non-tenured faculty members including Mellone.
- 25 6. In August of 2020, the University reappointed a number of associate lecturers for
26 the fall 2020 semester.
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1 7. On August 8, 2020, Gonzalez notified Mellone that she would not be reappointed
2 as associate lecturer nor assigned any classes for the fall 2020 semester.
3

4 **FINDINGS OF FACT**

5 **CBA**

6 *Article 5.6:*
7

8 At the preference of the unit member, the Administration agrees to provide a
9 reduced workload or stipend of \$3000 for a maximum of three (3) faculty
10 bargaining-unit members and a maximum of one (1) librarian bargaining-unit
11 member from each campus for each academic semester in which collective
12 bargaining occurs. Requests for reduced workloads shall be made in writing to
13 the campus Provost's Office at least two (2) weeks prior to the start of registration
14 in the semester in advance of the semester in which the reduction is to occur. For
15 any bargaining-unit member who is unable to meet this notice provision, the
16 Administration agrees to provide the reduced workload in one of the two
17 semesters subsequent to that in which the individual would otherwise have been
18 eligible. In the case of faculty, instructional workload shall be reduced by one (1)
19 course per semester. In the case of librarians, release time shall be granted one
20 and one-half (1/2) days per week during those weeks when bargaining occurs
21 and one-half (1/2) day per week during those weeks when bargaining does not
22 occur. Librarians' release time pursuant to this Section may be accumulated and
23 used as needed. A librarian or a faculty member on a non-teaching assignment
24 who elects to fulfill his or her full-time commitment through rescheduling, in
25 consultation with the Director of Libraries or Department Head, rather than utilize
26 the released time provided in Article 5.6, will receive \$3000 for each semester in
27 which bargaining occurs.
28

29 *Article 11: Faculty Roles and Responsibilities in Personnel Matters*

30 11.1 The faculty shall have primary responsibility in the area of personnel matters.
31 This shall mean the capacity to initiate or review faculty personnel
32 recommendations. Academic administrative officials may make a recommendation
33 or decision counter to the original faculty recommendation only in exceptional
34 circumstances and with compelling reasons in written detail which shall specifically
35 address the content of that recommendation as well as the established standards
36 and criteria.

37 11.2 The faculty shall have the right to grieve based on the terms and conditions
38 of this Agreement any modification or reversal of such recommendations.
39

40 *Article 15: Faculty Workload*
41

1 15.1 The goals of the University require that the average workload for tenure-
2 stream faculty members consist of three basic elements: (a) the basic
3 instructional workload, (b) research, creative or professional activity and (c)
4 service both on and off the campus (for non-tenure- track faculty workload see
5 Article 21.2).

6 15.2 Subject to the provisions of this Agreement and to budgetary constraints,
7 the Administration shall, as a high academic priority, maintain the goal of
8 achieving a student-faculty ratio appropriate to a high quality of education and
9 fulfilling the mission of the University.

10 15.3 Instructional workload assignments to faculty members shall reflect (a) the
11 academic needs of the department or program, (b) the faculty member's
12 qualifications and expertise and (c) the faculty member's professional interests.
13

14 15.4 The number of classroom contact hours, class size and total number of
15 students taught by each faculty member are expected to vary widely among and
16 within schools and departments, depending on the nature of the subject or activity
17 being taught and upon the amount of teaching assistance provided (in the form
18 of teaching assistants, graders, etc.). Departments and faculty set course
19 enrollment caps, for all departmental courses, subject to the approval of the chair,
20 where applicable, and dean. Should the dean deem that circumstances require
21 increases to instructional efficiency, department faculty shall have primary
22 responsibility for proposing academically and pedagogically sound plans for
23 achieving fiscal savings targets assigned by the dean. Once course capacities
24 are announced for a given semester schedule, individual course capacities may
25 be increased only at the discretion of the instructor of the course.
26

27 The average faculty workload practices of the various departments/programs in
28 the recent past shall remain in effect for the duration of this Agreement.
29

30 15.5 The Administration recognizes the central fact, common to all institutions of
31 higher education, that, generally, one (1) hour of scheduled instruction by a
32 faculty member requires several hours of instruction-related work that takes place
33 outside the classroom. This includes preparation and ongoing revision of
34 teaching material, remaining professionally up to date, as well as being available
35 to students both through scheduled office hours and other methods of student-
36 faculty contact. These activities are expected of all faculty members and are
37 taken into account in the assignment of instructional workloads.
38

39 15.6 The regularly-scheduled instructional workload as described in Sections
40 15.1 through 15.5 may include such nonscheduled instruction as the supervision
41 of internships, fieldwork, dissertations and theses, external degree contracts and
42 competencies, honors projects, independent study programs, instruction in
43 special programs and direction and/or coordination of laboratories and/or multi-
44 sectional courses. In accordance with past practice and procedures, certain
45 faculty members may be involved in pre-college programs, continuing and adult

1 education, and summer session activities as a part of their basic instructional
2 workload.

3 15.7 A faculty member shall be assigned courses to teach in his/her area(s) of
4 expertise as much as possible. An individual faculty member's rank, status and
5 seniority shall not be the controlling factors in said assignment of courses.
6

7 15.8 The Administration recognizes the contribution that can be made by the
8 faculty regarding the development of faculty teaching schedules. Accordingly,
9 within assigned section and space allocations, faculty teaching schedules shall
10 be developed at the department/program level in accordance with procedures
11 established within said department/program and subject to the approval of the
12 department chair, where applicable. These procedures shall insure that each
13 affected faculty member shall have prior and reasonable consultation regarding
14 his/her schedule. These schedules shall then be submitted to the appropriate
15 Dean or designee for approval. If the Dean or designee wishes to revise the
16 schedule developed by the department/program: (a) an opportunity will be
17 provided for discussion with the department chair; and (b) reasons shall be
18 provided and they shall not be arbitrary or capricious.
19

20 15.9 In determining instructional workloads, the faculty member's research
21 commitment, service contributions and prior instructional workload shall be taken
22 into account to determine whether these warrant adjustment of instructional
23 workload.
24

25 15.10 Faculty members on active appointment are expected to participate in: (a)
26 student orientation, (b) advising, and (c) commencement.
27

28 15.11 During the first week of classes, each faculty member shall, in each course
29 taught, provide a copy of his or her syllabus to his or her department chair and
30 all students in the course.
31

32 Math Department Background

33 Within the University are various academic departments, including the Math
34 Department. The University appoints a Chair to the Math Department who oversees the
35 administrative staff and faculty, including tenure track and non-tenure track faculty. The
36 Department Chair is responsible for assigning the faculty courses to teach each semester.
37 Maureen Title (Title), the Math Department's administrative assistant, reaches out to the
38 faculty members on behalf of the Department Chair to inquire about their preferences for

1 course selection and schedules.¹ However, the Chair of the Department decides which
2 courses are assigned to which faculty members and then relays the information to Title
3 to input into Peoplesoft. The Department Chair assigns courses to tenured faculty first
4 and to non-continued contract faculty, such as associate lecturers, last.

5 The Department Chair reports directly to the Dean of the College of Science and
6 Mathematics. The Department Chair hires faculty as associate lecturers, which is a non-
7 continuing contract position, and the faculty member must be reappointed each semester.
8 Unlike other faculty members, associate lecturers are appointed on a semester-by-
9 semester basis, and the CBA does not require notice of non-appointment or an
10 explanation for non-reappointment, or access to the grievance procedure for the non-
11 appointment for cause.

12 After two years of consecutive full-time work, an associate lecturer is eligible to be
13 promoted to lecturer. After three years of consecutive full-time work, the faculty member
14 is eligible for a continuing contract. When a faculty member is up for promotion to a
15 continuing contract, the Personnel Committee assesses the faculty member and makes
16 a recommendation to the Department Chair. The Department Chair then reviews the
17 faculty member and the Personnel Committee's recommendation and makes a
18 recommendation to the Dean. If a faculty member is not on a continuing contract, the
19 Department Chair does not have to request a recommendation from the Personnel
20 Committee to decide if the individual would be reappointed for another semester. The

¹ As the administrative assistant for the Math Department, Title reports to the Chair of the Department. At the direction of the Chair, Title is responsible for setting up courses and course schedules on PeopleSoft, the Department's platform for courses and faculty schedules.

1 Department Chair has the authority to decide that a non-continuing contract faculty
2 member is not a right fit for the Department and decide not to reappoint the individual.

3 In addition to the Department Chair, the Math Department has course coordinators,
4 who oversee lower-level classes with multiple sections and multiple teachers teaching
5 said course. Once a faculty member is assigned a course, they are informed who the
6 Course Coordinator is and instructed to reach out to that person. The Course Coordinator
7 provides the professor with the course's books, syllabus, common final, pacing guides,
8 and other materials. Course Coordinators create a common final exam for all the
9 professors teaching a certain class, and those professors are required to utilize the
10 common final in their courses.

11 The Math Department has a Curriculum Committee, and those individuals decide
12 which textbooks are approved for any given course.² The Math Department utilizes a
13 common text and common final exam to ensure that the students are covering all the
14 necessary material for the course, the lower-level courses adequately prepare students
15 for higher level courses, and so the courses are uniformed in a way that makes it possible
16 for credits to transfer.

17 Prior to the pandemic in 2020, the Math Department had two types of course
18 models, fully in-person or fully remote. The Math Department did not allow a hybrid
19 teaching model where the faculty member instructed some days in-person and other days

² The Committee is responsible for making academic proposals to the Department Chair. If the proposal is approved, the proposal is sent to the Dean and Provost's office for approval. Academic matters include student placement and course proposals such as what material will need to be covered in certain courses, particularly in lower level courses which are meant to be a foundation for higher level classes. The Committee deals with course objectives, course goals, standards of instruction, and course texts.

1 remotely. If a faculty member wanted to try a new learning model, textbook, etc. in their
2 courses, they were expected to bring the request to their Course Coordinator who would
3 then bring the request to the Curriculum Committee, and then finally, the Department
4 Chair.

5 2018/2019 School Year

6 Mellone has a bachelor's degree, a post-bachelor's degree in elementary
7 education, and a master's degree in education. For years, Mellone taught at the
8 elementary and high school level. Approximately ten years ago, Mellone started teaching
9 mathematics on the college level for Fischer College and Wheelock College.

10 In 2018, Mellone interviewed for a lecturer position with the University. Mellone
11 interviewed with Charles Wilbiraske (Wilbiraske), the quantitative reasoning Course
12 Coordinator for the Math Department. Mellone had a second-round interview with Eric
13 Grinstead (Grinstead), who was the Department Chair at the time. Thereafter, the
14 University hired Mellone as an associate lecturer for the Math Department. For the fall of
15 2018 semester, Grinstead assigned Mellone to teach Math 115, which is college algebra
16 and Math 114, which is quantitative reasoning.³ For the spring semester of 2019,
17 Grinstead assigned Mellone three sections of quantitative reasoning and one section of
18 statistics.⁴

19 2019/2020 School Year

³ Mellone taught two sections each of Math 114 and Math 115.

⁴ While teaching at Wheelock college, Mellone taught quantitative reasoning, but she never taught a statistics course.

1 By memo dated August 15, 2019, Emily McDermitt (McDermitt), Interim Provost
2 and Vice Chancellor of Academic Affairs, informed all faculty members that every faculty
3 member was responsible for conforming to basic practices. McDermitt also informed
4 faculty that everyone was required to provide their department chairs with a syllabus for
5 each course that they taught during the first week, and that all planned absences for
6 legitimate professional or personal reasons must be approved in advance by the
7 department chair (or dean or designee in schools and colleges without a departmental
8 structure).

9 Beginning with the 2019/2020 school year, the University appointed Eduardo
10 Gonzalez (Gonzalez) as Chair of the Math Department. For the fall semester of 2019,
11 Gonzalez assigned Mellone two courses of statistics and two courses of quantitative
12 reasoning. Mellone was scheduled to teach her statistics course in-person every Monday,
13 Wednesday, and Friday for the semester. However, Mellone decided to teach her
14 statistics courses in a hybrid model.⁵ On Monday and Wednesdays, Mellone would

⁵ At the hearing, Mellone testified that in August of 2019, Mellone informed Title that if she was assigned a Monday, Wednesday, and Friday class, she would need to keep one day open to take her elderly father to appointments. Mellone testified that that Title told her that she could always teach in a hybrid model and that Wilbiraske was doing a hybrid model with his quantitative reasoning classes. Mellone testified that Title allegedly said that Mellone could teach the courses as a hybrid model, but she would just need to take notes on her methods and share the notes with Wilbiraske. At the hearing, Title denied that she and Mellone had such a conversation, testified that she did not ever advise or approve Mellone teaching statistics in a hybrid model, and further stated that as an administrative assistant she did not have the authority to approve such changes. I credit Title's testimony over Mellone's testimony. I do not find that the Union provided sufficient evidence to demonstrate that Title, as the administrative assistant to the Department, had the authority to approve changes to the curriculum or staffing such as allowing Mellone to teach statistics in a hybrid format. Furthermore, I find that Title did not inform Mellone that she was allowed to teach statistics in a hybrid format. Title does not have authority to make decisions pertaining to academics nor is she involved in decisions pertaining to academics. Title, as an administrative assistant, may help faculty with non-academic

1 lecture in person for her statistics courses. On Fridays during the semester, Mellone
2 would either give tests or quizzes or assign study groups. On Fridays, Mellone often would
3 make herself available virtually to the class but would not come in person.⁶ Mellone did
4 not request or receive approval for teaching a hybrid model statistics course from the
5 statistics Course Coordinator, the Curriculum Committee, or the Department Chair.

6 In the spring semester of 2020, Gonzalez assigned Mellone three courses in
7 statistics.⁷ Again, Mellone adopted a hybrid teaching approach for her Monday,
8 Wednesday, and Friday courses.⁸ Again, Mellone did not request or receive approval for
9 teaching statistics in a hybrid model from the Course Coordinator, Curriculum Committee,
10 or the Department Chair. In her 2019 fall semester statistics course syllabus, Mellone
11 stated the course was a hybrid class wherein learning would take place in the classroom
12 and online.⁹ Additionally, Mellone's syllabus stated that she would assign homework
13 through the Khan Academy.¹⁰ Mellone noted that the Khan Academy assignments were

issues such as changing the classroom location for an assigned course or helping to process paperwork for adding a student to an already full course.

⁶ Approximately every third Friday, Mellone would make herself available to the class in person.

⁷ As the Department Chair, Gonzales reports directly to the Robin Cote (Cote), the Dean for the College of Science and Mathematics.

⁸ After the COVID-19 pandemic began in March of 2020, the University transitioned to fully remote instruction for the rest of the spring 2020 semester.

⁹ Mellone testified that her Fall 2019 syllabus also served as her Spring 2020 syllabus, but she never changed the date. By email dated January 27, 2020, Mellone sent Danielle Fontaine (Fontaine), another administrative assistant in the Math Department, her syllabus. In the spring of 2020, faculty were expected to submit their syllabuses to Fontaine to keep on file. At the time, Gonzales did not review any faculty members' syllabus.

1 only a student learning tool and would not be graded but would be used in certain
2 circumstances.¹¹

3 By email dated November 4, 2019, Mellone emailed the Math Department asking
4 if anyone knew who the Course Coordinator was for statistics. On November 5, Gonzalez
5 responded to Mellone stating that Sheldon Kovitz (Kovitz) was the statistics Course
6 Coordinator, and that Kovitz had a webpage with class guidelines and other material. By
7 email dated November 5, Kovitz informed Mellone that he was the statistics Course
8 Coordinator and would create the common final, and he attached some materials to the
9 email. On November 17, Mellone responded by asking Kovitz if there was a list of course
10 objectives.¹² On November 19, Kovitz responded with a list of chapters which formed the
11 “critical core of the course”.

12 On or about November 27, 2019, at Mellone’s request, Gonzales and Mellone met
13 at the University in person.¹³ At the November 27 meeting, Mellone addressed her
14 concerns with Gonzales regarding being hired as an associate lecturer instead of lecturer,

¹⁰ Khan Academy is an online teaching tool wherein students can log onto the platform to watch tutorial videos.

¹¹ At the end of each semester, students fill out course evaluations. After the fall semester of 2019, several students in Mellone’s statistics class commented on her use of the Khan Academy. No one from the Department spoke with Mellone about her fall semester 2019 student evaluations.

¹² By email dated November 8, 2019, Mellone asked Fontaine if the professors were required to utilize the common final and who she should contact to find out the answer. Fontaine never responded.

¹³ Mellone informed Fuget, Wilbiraske, fellow lecturers Mohammed Louti Shedley, and Nina Yamkovy about requesting a meeting with Gonzalez to discuss her concerns. The other faculty members expressed similar concerns about the Math Department to Mellone and supported her decision to meet with Gonzales.

1 scheduling concerns, academic freedom, performance review, teacher evaluations, and
2 a reduced course load for the next semester to accommodate her time on the Union's
3 bargaining committee. Specifically, Mellone complained to Gonzales that she should not
4 have been hired as an associate lecturer under the contract. Mellone also expressed her
5 concerns about the Department's late notification of scheduling for the following semester
6 to the professors.¹⁴ Mellone explained that she had never received a formal evaluation
7 from the Department as required by the contract.¹⁵

8 After the meeting, by email dated November 27,¹⁶ Mellone thanked Gonzales for
9 the meeting and told him that he had "restore[d] a lot of hope in me around teaching at
10 UMB that I had lost over the past few months.¹⁷ By taking the time to meet with me, you
11 have made me feel way less "invisible" in the department and the school. I will take all of
12 your advice and continue to try and bridge the gap between the FSU and our department."
13 Later that day, Gonzales responded to Mellone that "it is quite reassuring to hear that you

¹⁴ Fuget and Wilbiraske had expressed their concerns to Mellone about the timing of schedules.

¹⁵ Mellone testified that Gonzales informed her that Steven Jackson (Jackson), who was the Coordinator for all lower division Coordinators, was helping the Math Department with providing the common final to faculty in a more timely manner.

¹⁶ November 27 was the first time Mellone and Gonzales ever met in person.

¹⁷ At the hearing, Mellone testified that Gonzales had told Mellone during the November 27 meeting that "he had to be careful about what he said because the Union tries to catch the University." However, Gonzales denied making such a statement. The Union did not provide any evidence to corroborate Mellone's rendition of the November 27 meeting. Moreover, immediately after the meeting, Mellone thanked Gonzales for restoring her hope and making her feel less invisible. Mellone's post meeting positive review of Gonzales' behavior does not match the assertion that Gonzales made potentially negative comments about the Union. As such, I credit Gonzales' testimony that he did not inform Mellone that he "had to be careful about what he said because the Union tries to catch the University" or words to that effect.

1 are also trying to improve our work environment. I appreciate the effort and I am hopeful
2 that we all can work together to make our department a great place to be.”¹⁸

3 On December 11, 2019, the Curriculum Committee met to discuss Department
4 policies regarding course coordination (common syllabi, exams, textbooks, etc...). On
5 February 5, 2020, the Curriculum Committee met and decided that Math 115, 130, 140,
6 and 141 would continue to have common exams and common grading. However, the
7 Curriculum Committee decided that Math 125 [statistics] instructors would give a common
8 exam but would not be required to do the common grading for that semester.

9 By email dated February 14, 2020, Kovitz emailed the professors who were
10 teaching Math 125/statistics, stating that the Math Department voted to use one particular
11 textbook for all Math 125 sections. Kovitz also stated that he had heard rumors of “rogue”
12 textbooks being used in classes either instead of or in conjunction with the required text.
13 Kovitz stated that “the assigned text is 29 chapters therefore there is no time to cover
14 other materials.” Kovitz instructed that any faculty member using a text other than the
15 approved text should see him immediately. Kovitz further explained that the required
16 textbook did not have any application or use for Excel, therefore he failed to understand
17 how Excel could be included in the Math 125 syllabus. Additionally, Kovitz stated that the
18 common final would be based off the assigned textbook and no other finals should be
19 given for Math 125. Finally, Kovitz advised that the process of changing a text for a course

¹⁸ After the November 27 meeting and before the Fall semester ended, Wilbiraske stopped by Mellone’s office to introduce Jackson to Mellone. Jackson asked Mellone to provide him with a list of areas that the University could improve upon when onboarding a new hire.

1 needed to have approval from the Course Coordinator, Curriculum Committee, and
2 Department Chair.

3 At this time, Mellone was using another online textbook to supplement the required
4 text and was using Excel in her courses. Mellone had used the online textbook in her
5 statistics course in the fall semester of 2019 as well. Additionally, Mellone had used Excel
6 in teaching her statistics courses since the spring semester of 2018. Mellone did not go
7 to see Kovitz after receiving this email. Mellone went to see Jackson, who was the
8 Coordinator of all Course Coordinators.

9 Later on February 14, 2020, Mellone emailed Jackson apologizing that it took her
10 so long to reach out, and requested to meet with Jackson. Mellone asserted that the
11 Department had not been helpful and left her to "fall on her face." Mellone outlined that
12 as a new hire she needed but did not receive: 1) a job title or job description, 2) a mentor
13 or a point of contact for questions, 3) a tour of the department or university, 4)
14 introductions to her colleagues, or 5) a sense of belonging in the math community.
15 Mellone asserted that she was not informed which books she was supposed to teach
16 from or where to acquire the books. Shortly thereafter, Jackson responded to Mellone
17 asking if she was available to meet that afternoon. When Mellone responded that she
18 was not available that afternoon, Jackson asked if she was free on Wednesday.

19 On or about February 21, 2020, Mellone and Jackson met in person in his office
20 at the University. During the meeting with Jackson, Mellone explained the email Kovitz
21 had sent. She told Jackson that she was unaware that she had to only use the required
22 text, was not allowed to use Excel, and could not add questions to the final. Mellone also
23 mentioned to Jackson that she had not received an evaluation since she started with the

1 University.¹⁹ Additionally, Mellone opined that the Department's requirement for a
2 common textbook may violate the principle of "academic freedom" in the CBA. Jackson
3 listened to all of Mellone's complaints and passed her concerns about the common
4 textbook to the Curriculum Committee.

5 By email dated February 21, 2020, Mellone informed Jackson that she had begun
6 taking a "pedagogical" approach in her courses, in an effort to encourage her students to
7 take responsibility for their own learning. Mellone stated that she wanted to teach her
8 students to be self-learners while supporting them minimally along the way. Mellone told
9 Jackson that:

10 One way I am trying to do this is by assigning homework problems,
11 not for grades, but rather purely for practice and mastery. I also
12 provide the answers to the problem sets so they can self-check. We
13 are also doing "study groups" which are groups of students (6-7) that
14 work together on an assignment once a week without me. This past
15 Friday I gave my first test and as a part of the test, I asked students
16 to fill out an anonymous survey about the course thus far. I wanted
17 to share my results with you because they are basically what I was
18 looking for! You can view the excel sheet here, but if you would rather
19 just look at my charts (it's what I'm sharing with the students) I have
20 attached it.²⁰

21
22 Jackson responded to Mellone asking if she could provide him with the link to the textbook
23 she was using in class and her syllabus. Mellone sent Jackson her syllabus.

¹⁹ Mellone testified that Jackson's general response throughout the conversation was that he was listening to her concerns and the Department was trying to address these issues.

²⁰ Mellone's survey included a question on her providing instructions on only two days (Monday and Wednesday).

1 By email dated February 25, 2020, Jackson forwarded Mellone an email from
2 Gonzales which was addressed to “all” and dated October 21, 2019.²¹ In the October 21
3 email, Gonzales informed everyone that their annual faculty reviews were available and
4 that everyone must sign their reviews by October 26. In the February 25 email, Jackson
5 asked Mellone if she had received this communication from Gonzales. Jackson explained
6 that after the Personnel Committee reviews the report, the instructor is supposed to read
7 their comments and electronically sign the report.²² By email dated February 26, 2020,
8 Mellone informed Jackson that she logged into her AFR account, but that the Spring 2020
9 semester’s courses were not logged in. Mellone asked if the annual part coincides with
10 the school year and when she should put in for the spring 2020 semester’s courses.
11 Shortly thereafter, Jackson replied that she could do it over the summer, but many faculty
12 members did it the first week of September. Later, Jackson replied again, informing
13 Mellone that she could fill it out any time after the drop deadline at the end of the first
14 week of classes, as it is the first moment at which enrollment is known.²³

15 On February 26, 2020, the Curriculum Committee met to discuss common
16 textbooks for each lower-level course and a plan to create a list of default textbooks. The
17 Curriculum Committee discussed the requirement for instructors to use the common text

²¹ At the hearing, Mellone did not deny ever receiving Gonzales’ email, but she testified that she didn’t know at the time what “AFR” meant. “AFR” is the annual faculty review.

²² The Personnel Committee meets each fall to discuss faculty evaluations and throughout the year if an issue comes up, like a potential promotion. The Personnel Committee does not meet to discuss whether a faculty member who is not on a continuing contract should be reappointed for another semester.

²³ Jackson never followed up with Mellone again on this issue because he was distracted with the University shut down from the pandemic in March of 2020.

1 books and the requirement to obtain approval from the Course Coordinator, Curriculum
2 Committee, and Department Chair if they wanted to adopt a different book.

3 By email dated March 4, 2020, Kovitz informed several faculty members who
4 taught statistics, including Mellone, that he had a website with supplemental materials.
5 Additionally, Kovitz informed Mellone and the other faculty members that he had
6 “additional materials, such as class worksheets which could be made into slides, that
7 cannot be put on the web site because they are copyright. (sic)” Kovitz stated that:

8 Ask me for them, if they would help you. The final exam on Friday,
9 May 22, will be common. I have a test this semester with 12
10 questions. If you want to see the actual exam, come to my office. It
11 is very important--the Curriculum Committee and the Department
12 have affirmed this--that the course be taught from
13 Freedman/Pisani/Purves. Any other book would have to be approved
14 by the Curriculum Committee. For those who do not want the current
15 book, I say. Please, at least teach from it for two semesters before
16 complaining. I expect that you will see the value of the logic, verbal
17 comprehension, and conceptual understanding that this treatment
18 entails. As I said many times, as coordinator I am prepared to make
19 serious efforts to help you. I will, for example, welcome you to my
20 class to visit. I would visit your class if you want me to. I will
21 specifically go over a day's lecture with you to share ideas. Attached
22 are this year's final reviews and solutions. Conflict exams for Math
23 125 are available under a procedure to be promulgated by the staff.
24 Any student who has another exam at the same time or a total of 3
25 exams on May 22 will get to take my conflict exam earlier in the day
26 on Friday. Watch for the official announcement. No other conflicts
27 will be accommodated by the Department staff.

28
29 By email dated March 4, 2020, Mellone responded to Kovitz that she wanted to speak
30 with him about statistics.

31 By email dated April 3, 2020, Kovitz emailed several faculty members stating that:

32
33 I am teaching Math 125 this semester and it is going pretty well.
34 Attendance is about the same and interest of the students is holding
35 firm. The biggest problem is grading the homework. The Department
36 wants me to collect a one-sentence or two-sentence answer from each
37 of you to the question: How's it going in Math 125. Please send

1 something back by Sunday, if you can. For the final, you may choose
2 to give your own exam or use the common final. If you give a take-
3 home final, be careful not to give any problems that are calculational
4 and could be done by an on-line web site for the students. If you would,
5 could you tell me if you are thinking of giving a common final or leaning
6 towards making up your own. I personally have not decided and might
7 opt for a take-home true-false version. This has been a very trying time
8 for all, and I appreciate your efforts more than ever.
9

10 On April 8, Kovitz again emailed Mellone and several other faculty members who taught
11 statistics that the Department would set up an IT webinar for anyone who wanted to use
12 Gradescope, and to let him know if anyone wanted to participate.

13 On or about April 13, 2020, the Lower Division Committee met via Zoom and
14 discussed the creation of “new instructor” packets that would include policies on
15 textbooks, grading, and contact information for persons to contact for various issues.
16 During the April 15, 2020, Math Department meeting conducted via Zoom, Mellone asked
17 Gonzalez about the history behind the use of common finals. Gonzalez responded that
18 common finals create fairness, and if professors have questions about the common final
19 they should speak with their Course Coordinators.

20 On or about April 15, 2020, the Lower Division Committee informed Gonzales that
21 certain faculty members were not responding to Course Coordinators, and one of the
22 faculty members listed was Mellone. By email dated April 16, 2020, Gonzales told Mellone
23 that he had been informed that Mellone was not responding to messages from her Course
24 Coordinator, and he told her to stay in touch with her Course Coordinator. Shortly
25 thereafter on April 16, Mellone responded that “I’m confused. What am I supposed to be
26 responding to? The last email I received seemed informative and did not ask for any
27 feedback except to let him know by May 1st if we plan to use the common final. Did I miss
28 an email that required a more immediate response?” Afterwards, Mellone responded to

1 Gonzales again stating she “found an older email and responded. Sorry for the
2 confusion.”²⁴

3 Course Release Communications

4 By email dated November 3, 2019, Mellone informed Gonzalez and Title that she
5 was on the bargaining team for contract negotiations for the Union and would only be able
6 to teach three courses the following semester. Additionally, Mellone requested that she
7 teach three quantitative reasoning courses. Mellone said that she did not have childcare
8 for the next semester, so she requested that her assigned courses start at 9.a.m and end
9 by 1:50 p.m. By email dated November 4, 2019, Title reminded Mellone of the following
10 course assignment procedure: first assignments start with Tenured/Tenure Track Faculty
11 members, second assignments are the continued contract members, and third
12 assignments are with non-continued contract members, like Mellone. Title also reminded
13 Mellone that course assignment is affected by course enrollment, and that the
14 Department offers fewer math courses in the spring semester. By email dated November
15 4, 2019, Mellone responded to Title and Gonzalez that one of the reasons she wanted to
16 teach quantitative reasoning was a lack of support. Mellone stated she would be most
17 comfortable with three quantitative reasoning classes the next semester if possible.

²⁴ By email dated April 17, 2020, Mellone responded to Kovitz’ April 3 email, stating that she “received an email from [Gonzales] to the effects of me not “responding” to you. I just went back through my emails from you and saw this one. I’m sorry that I missed it the first time around. Stats has been “ok” since moving online. I usually do a lot of group work and one to one explanations with students which has halted due to the nature of the online class. Luckily, at the point where we went remote, my class had already covered much of the material that is on the final, so these past few weeks have been easier than if I had to teach a lot of new materials. I’m posting test 3 tomorrow and I will see how that goes. On April 27, Kovitz responded by saying that he was glad it was working out.

1 By email dated December 12, 2019, Marlene Kim (Kim), Union president,
2 requested to speak to Gonzales. After Gonzales spoke with Kim, she informed him it was
3 a pleasure to speak with him.²⁵ Additionally, Kim notified Gonzales that Mellone had
4 informed her earlier that day that Mellone had been scheduled for four courses for the
5 next semester, “even though she has a CLR for being on the FSU bargaining team that
6 should reduce her teaching load to 3 courses (but be paid for 4).” Kim requested Gonzales
7 “fix the issue.” By email dated December 13, 2019, Gonzales informed both Kim and
8 Mellone that he “will send this to [Title], to fix the schedule in the classes. I just want to
9 emphasize that the assignment is not final and that it might change if sections are
10 cancelled because of low enrolment, as I explained to [Kim] yesterday. I will ask [Title] to
11 keep [Mellone] in the loop if her assignment changes of course. [Mellone], feel free to
12 check periodically with [Title] or me.”²⁶

13 By email dated December 20, 2019, Kim informed Gonzales that Mellone reached
14 out to Title several times and had not heard back. Later that day, Gonzales responded to
15 Kim that Title had been informed to keep Mellone “in the loop” regarding scheduling.
16 Gonzales stated in his email that:

17 So far, M[ellone] has been tentatively assigned three sections, two
18 of Math 125 and one of Math 114. The sections are at 9, 12 and
19 1pm on a MWF schedule, as her preference. However, due to low

²⁵ The parties did not indicate whether this meeting was in person or on the phone. However, during the meeting, Gonzales explained to Kim that the approval for a course release is made by the Provost, not Gonzales. Once the Provost approves a course release, they inform Gonzales of the approved course release and Gonzales makes the necessary adjustments in the faculty member’s schedule.

²⁶ By email dated December 17, 2019, a day before finals, Mellone sent the entire Math Department a request for help. Mellone explained that her car had just broken down and asked if someone could cover proctoring her 8:00 a.m. exam. Ultimately, Mellone was able to sort out her car troubles and proctor her exams.

1 enrollment, it is highly possible that we might need to both reduce
2 her assignment or assign a different section at a different
3 time/days. These are the reasons: We have so far 5 critically low
4 sections of Math 114, which means that we might need to
5 consolidate those five into three, so that they can run. There are
6 6 sections of Math 125 critically low, we might have to consolidate
7 some of them and cancel others, perhaps two. There are (at least)
8 five people with continuing contract/higher seniority assigned to
9 teach Math 114 and Math 125 on a MWF, which means that if
10 sections are cancelled we might need to change/reduce
11 M[ellone's] assignment to comply with the contract. This is where
12 we are so far. So her tentative assignment is far from final and we
13 cannot confirm yet what classes she will be teaching nor the
14 number of sections she will be teaching. We cannot finali[z]e her
15 assignment until the administration finali[z]es and approves the
16 Spring 2020 schedule and we know for sure what sections are
17 approved to run. As I mentioned to you in our meeting. We are
18 caught in the middle of uncertainty, and it is truly unfair for all the
19 parties involved. It is a frustrating situation for us as well, and it
20 makes my job much more difficult, since I have to mediate
21 between mandates from the administration and the FSU contract.
22 We have to do this every single semester. We truly believe, just
23 as you, that the most ideal situation is to know in advance which
24 sections will run for certain, so that we can let our lecturers know
25 their assignments, but this depends on a final schedule, which
26 depends on enrollments, which in turn depend on students
27 registering for the class on time. All of these variables are out of
28 our control.

29
30 Later that day, Mellone responded to Gonzales that her "request is that [she] EITHER
31 have MWF or TTh. I just need to have one weekday off for doctor appointments (I am a
32 caregiver to my elderly parent.) So if the MWF is the issue, I'll GLADLY take TTh - in fact
33 I prefer that. Thanks for all you guys are doing to help me in this situation. I'm truly lucky
34 to have such a great support system." Gonzales responded that all the Tuesday/
35 Thursday classes were taken but would keep it in mind if a class became available.

36 By email dated January 9, 2020, Title informed all faculty members that the
37 University had experienced a decline in enrollments and several classes had been
38 cancelled. Title acknowledged that several faculty members had reached out about their

1 schedules and that the Department was working to schedule course assignments. By
2 email dated January 10, 2020, Mellone informed Title that she had only been assigned
3 one course for the spring semester and wondered if she would be assigned more courses
4 as she couldn't afford not to teach full time. Later that day, Title forwarded Mellone a
5 schedule for three courses and stated that she and Gonzales hoped to assign those
6 classes to Mellone. Mellone responded to Title commenting on her assigned statistics
7 classes instead of quantitative reasoning classes, and asking if she could work with the
8 register to arrange for all three cases to be in the same building. Title responded that
9 quantitative reasoning classes had low enrollment that semester. Additionally, Title told
10 Mellone that Gonzales and Kovitz thought she was an excellent statistics lecturer.²⁷

²⁷ Title testified that neither Gonzales nor Kovitz ever told her they thought Mellone was an excellent teacher for statistics. Additionally, Title testified that she only told Mellone that to make her feel better, and no one actually instructed her to provide such a message. The Union argued that Title's credibility was called into question because she admitted that she only sent this email to make Mellone feel better. The Union asserts that Title's admission is evidence that she lied about approving Mellone's request to teach statistics in a hybrid model. However, Title's admission proved that she would tell the truth while testifying even if the testimony was against her own best interests. Moreover, the Union could have, but did not, call Wilbiraske to testify to confirm that Mellone had been working with him at Title's behest or submitted the notes that Title allegedly instructed Mellone to take and review with Wilbiraske. At the hearing, Union representative Katie D'Urso (D'Urso) testified that she thought Title had the authority to ask Mellone to teach a hybrid class based on emails between Title and Mellone regarding other topics and Mellone's reiteration of the conversation with Title regarding the hybrid format. D'Urso did not have any firsthand knowledge of Title's role in the Department and primarily based her assumptions on Title's authority in the Department on Mellone's rendition of events. However, I found that Mellone was not credible in her testimony that Title approved her teaching in a hybrid model. Moreover, during D'Urso's testimony regarding Title's alleged authority as administrative assistant to approve changes in teaching models, she appeared to be very uncomfortable. Based on the D'Urso's demeanor as a witness, I do not find that D'Urso believed that Title, as an administrative assistant, had the authority to request or approve a faculty member to teach a course in a hybrid format. As such, the Union failed to provide any corroborating evidence to demonstrate that Title had approved Mellone's request to teach statistics in a hybrid teaching model.

1 Mellone responded that teaching all statistics classes was fine and it was easier to teach
2 all of the same course. However, Mellone stated she still wanted to be assigned
3 quantitative reasoning classes in future semesters. Title responded that quantitative
4 reasoning professors were hard to find so she would always be assigned those classes.

5 By email dated January 16, 2020, Mellone asked Gonzales what the latest date
6 was when she would know her official schedule. Mellone stated that she was still only
7 assigned one course but knew of the potential for another course. Mellone stated that the
8 delay would make it difficult to prepare for the semester.²⁸ By email dated January 17,
9 2020, Mellone inquired with Gonzales if the schedule was finalized by Title or if they
10 worked together. Mellone requested a meeting with Gonzales. Later that day, Gonzales
11 responded that he was out of town for a workshop, but he could meet at a later date or
12 speak with her on the phone. Eventually, the University assigned Mellone to teach three
13 statistics courses for the spring semester starting on January 27, 2020. The Provost
14 granted Mellone a course release for her time on the Union's bargaining team for the
15 spring semester, and Gonzales made the necessary adjustments in her schedule.

16 Evaluations

17 In or about the fall of 2018, the University hired Katherine Newman (Newman) as
18 the Chancellor. After Newman became Chancellor, the University conducted reviews on
19 the various academic departments. As part of the review, the University looked at each
20 department's grades for the courses. The University took into account the "DFW rate" of
21 a course (i.e., how many students received a D in the course, failed the course or

²⁸ The spring semester started January 27, 2020.

1 withdrew from the course.) Newman informed the Math Department that it needed more
2 consistent ratings for grades and perhaps needed to revamp the courses to make them
3 more appealing. Newman did not specify how the Math Department should fix this issue.
4 As a result of the University's review and the Chancellor's complaints, the Math
5 Department formed a "restructuring committee" to address the issues. The Restructuring
6 Committee reviewed the faculty's student evaluations for the various courses.²⁹ In
7 addition to student evaluations and faculty evaluations, the Restructuring Committee
8 began to look at DFW rates and scores from placement exams such as SATs.

9 At the end of the fall 2019 semester, students filled out evaluations for their
10 courses. The Math Department's course evaluation form for the statistics course included
11 nine areas of focus, and the student could rate the course in those areas.³⁰ Additionally,
12 the course evaluation had four write-in questions regarding: 1) the strong points of the
13 instructor; 2) the weak points of the instructor; 3) the strong points of the course; and 4)
14 any other suggestions or comments. For Mellone's statistic course, the student
15 evaluations showed mixed reviews. Some students praised Mellone's ability to answer

²⁹ The Math Department created and distributed a student evaluation form. Quantitative reasoning courses have a different student evaluation form from statistics courses. Each faculty member was responsible for giving the students in their respective classes the evaluation form in the last week of classes. Evaluations were then collected and filed in the Math Department, and Fontaine created an evaluation report.

³⁰ The evaluation form asked the student to rate from 1 to 5 the following questions: 1) from this course I learned; 2) I used the text book and found it helpful; 3) doing the homework/exams that were assigned helped me learn the materials for this course; 4) grading and comments on exams and homework were useful and timely; 5) what is your expected grade for this course; 6) the instructor's presentation in class was; 7) the instructor's responsiveness to in-class questions; 8) taking everything into account the instructor was; and 9) over all how would you rate this course.

1 emails fast while others stated she did not answer emails fast enough. Similarly, some
2 students claimed that Khan Academy was helpful, while others stated it was a waste of
3 time. Several students stated they really enjoyed talking statistics with Mellone, while a
4 few others said that the class was a waste of time or that they did not learn anything of
5 value. Similarly, some students cited Mellone as an organized teacher, while others
6 stated she was easily distracted and disorganized.

7 On or about February of 2020, Mirjana Vuleric (Vuleric),³¹ a professor in the Math
8 Department, received a copy of Mellone's statistics course syllabus.³² Upon review of the
9 syllabus, Vuleric noticed that Mellone stated that her statistics course was hybrid, and
10 she was on campus Mondays and Wednesdays when her statistics class was scheduled
11 for Monday, Wednesday, and Friday of each week. Additionally, Vuleric noted that
12 Mellone was utilizing a textbook that had not been approved by the Department.
13 Furthermore, Vuleric reviewed Mellone's student ratings on a "Rate My Professor"
14 website³³ and found other negative comments.³⁴ Afterwards, Vuleric presented all the

³¹ Vuleric is the Chair of the Curriculum Committee within the Department, is the Chair of the College Curriculum Committee, which is an Academic Affairs Committee and a subcommittee of the Senate Faculty, and she serves on the Personnel Committee and Restructuring Committee.

³² Vuleric works with a team of tutors for lower-level classes. While working with a tutor, Vuleric asked Fontaine to forward her Mellone's syllabus for statistics.

³³ "Rate My Professor" is not a University-sponsored website or course evaluation. It is an on-line forum where individuals can leave ratings and comments on Professors' courses at various universities and colleges.

³⁴ As "Rate My Professor" is not a University run forum, the University has no means to verify that comments or ratings left by individuals were in fact past or current students who took Mellone's class. Just as with the student evaluations the University provides, the comments and ratings for Mellone's statistics course on "Rate My Professor" were both positive and negative. Additionally, Vuleric received both negative and positive

1 information to Gonzales, who stated he did not approve Mellone to teach a hybrid course.
2 However, Gonzales did not want to rely on “Rate My Professor” for confirming that
3 Mellone was teaching her statistics course in a hybrid method. Vuleric informed Gonzales
4 that she would attend one of Mellone’s Friday classes to determine if she was teaching
5 in-person on all three days.

6 On Fridays, Mellone had been assigned three statistics courses that all met in the
7 Healy Library. On or about February 14, 2020, Vuleric went to Healy Library where
8 Mellone’s statistics courses were assigned a room. During Mellone’s first scheduled
9 Friday class on February 14, Vuleric sat outside the classroom and observed students
10 coming and going throughout the class time. At the end of that class, Vuleric noted that
11 Mellone did not exit the classroom. After a break, Vuleric again sat outside the classroom
12 assigned to a different Friday class and observed that students were leaving in the middle
13 of class and that there seemed to be no instructor in the room. After the end of the second
14 class, Vuleric entered the classroom and observed that Mellone was not in the room.

15 After confirming that Mellone was not teaching in person on Fridays, Vuleric
16 reported back to Gonzales with the information. Vuleric and Gonzales spoke about
17 Mellone’s decision to only teach in person on Mondays and Wednesdays and her usage
18 of unapproved textbooks in her statistics courses. Additionally, Vuleric brought up
19 Mellone’s detour from the approved textbooks and hybrid teaching method to the
20 Curriculum Committee. Shortly thereafter, the COVID-19 pandemic hit and Gonzales

reviews on “Rate My Professor” as well. Vuleric testified that not all of the comments on
“Rate My Professor” were accurate.

1 needed to prioritize developing policies and procedures for the Math Department
2 regarding the pandemic.

3 COVID-19 Bargaining

4 At the end of the spring 2019 semester, Mellone joined the Union's seven-person
5 core bargaining team for contract negotiations with the University.³⁵ In March of 2020, the
6 University created several policies regarding COVID-19, and impact bargained with the
7 Union on COVID-19 related issues. Mellone was on the bargaining team for those
8 negotiation sessions for the Union.³⁶

9 Grievance

10 By email dated February 15, 2019, Ellen Frank, Monique Fuget, Joe Ramset, and
11 Peggy Walsh, the members of the FSU Executive Committee, informed bargaining unit
12 members that the collective bargaining agreement covered everything from just cause to
13 promotional eligibility. Mellone asked the FSU representatives "what do we do if we were
14 hired as associate lecturers but should have been hired as a lecturer?" Mellone stated
15 that she had already reached out to her Department Chair. By email dated February 19,
16 2019, Lorenzo Nencioli (Nencioli), a FSU representative, informed Mellone that she could
17 talk to a grievance officer to see if there was cause for filing a grievance. Also, Nencioli

³⁵ Mellone was the only associate lecturer on the bargaining team.

³⁶ On or about May 8, 2020, the parties met to discuss the last remaining issues for the COVID-19 MOA. In the last ten minutes of the May 8th meeting, the parties discussed "expanded bargaining" for the successor contract negotiations.

1 informed Mellone that the Associate Lecturer Review Subcommittee was looking at this
2 issue on a broader scale and that she could work with the Union to resolve the issue.³⁷

3 On or about March 27, 2019, Nencioli filed a grievance on behalf of the Union with
4 Emily A. McDermitt (McDermitt), the Interim Provost and Vice Chancellor for Academic
5 Affairs stating that the University's hiring practices were in violation of the parties'
6 contract.³⁸ Mellone was not mentioned on the grievance form. Mellone did not attend the
7 April 2019 grievance hearing. The University issued a denial after the Step 1 hearing, and
8 the Union did not pursue the grievance further.

9 By email dated April 10, 2019, Nencioli informed Mellone that the Union had filed
10 a grievance regarding the misuse of the Associate Lecturer title which alleged that there
11 were systematic violations of the contract, rather than isolated individual violations.
12 Mellone responded that the Union was welcome to use any of her information on the
13 grievance. Mellone asserted that she was hired as full-time with the understanding that
14 she would be employed long-term. Mellone stated that she sent highlighted portions of
15 the contract to Grinstead and Title inquiring when she would be moved up to lecturer.
16 Grinstead informed Mellone that she could move up per the contract after six semesters.
17 The Union did not supply any evidence to suggest that it used or cited Mellone's
18 experience when pursuing the grievance.

19 Reappointment

³⁷ Mellone testified that she never spoke with Kovitz or Vuleric about the grievance or any other Union related matters. However, Mellone testified that she had spoken with Jackson about this grievance. Mellone did not explain when, where or any other details about her conversation about the grievance with Jackson.

³⁸ The grievance did not identify any particular individual or Department at the University.

1 On or about May 12, 2020, McDermitt, issued a letter to all Associate Lecturers
2 and Clinical Associate Lecturers, stating that they “shall be appointed to one-semester
3 contracts and, per article 21.8.2, are thereby “exempt from formal non-reappointment
4 notice requirements.” McDermitt stated that:

5 At this time, nonetheless, the University is giving notice to all
6 department chairs and all non-tenure-stream faculty active on campus
7 in Spring 2020 at the rank of Associate Lecturer or Clinical Associate
8 Lecturer of its intent not to appoint or reappoint any associate lecturers
9 or clinical associate lecturers for the Fall 2020 semester. This non-
10 reappointment applies to you and supersedes any formal or informal
11 offers of Fall 2020 classes to you. Please understand that, as the
12 summer progresses and the University is better able to gauge its
13 academic needs in the face of evolving health and budgetary
14 conditions, it is possible that, with the approval of your Department
15 Chair, Dean, and me, you may be offered one or more classes for Fall
16 2020. I am very sorry for the consternation I know this notice will cause
17 you. I join your chair and departmental colleagues in valuing your past
18 contributions to UMass Boston, and I sincerely hope to be able to
19 provide you with better news in the future. If you have any questions,
20 please contact your department chair or dean.
21

22 By email dated July 10, 2020, Mellone asked Gonzales if there were any updates
23 on fall semester schedules and assignments. By email dated July 12, 2020, Gonzales
24 informed Mellone that the Department had not received approval to rehire instructors at
25 will, nor to staff all classes. Gonzales stated “[T]his is due to many factors that have not
26 been fully explained nor clarified to us. We will contact you only after receiving approvals
27 from the upper administration and after assessing departmental needs/plans for Fall
28 2020.” Later that day, Mellone responded that she was bargaining with the administration
29 over the same issues and wanted to check in because she would rather return to the
30 University then look for work elsewhere.

1 On or about July of 2020, Vuleric and Gonzales discussed who the Department
2 would reappoint for the fall of 2020 semester.³⁹ Vuleric informed Gonzales that she did
3 not think Mellone was the right fit for the Department, and that Gonzales had the authority
4 to decide not to reappoint Mellone for the next semester.⁴⁰ Vuleric explained that in
5 addition to Mellone's negative student reviews, her decision to teach a hybrid class
6 without approval, and her refusal to use the approved text, that Mellone did not have the
7 necessary educational requirements. Vuleric stated that Mellone only had a minor in math
8 for her bachelor's degree and her master's degree was in education, not math. Vuleric
9 stated that Mellone had never taught statistics before, Mellone had never even taken a
10 statistics course and thought the tutor was more qualified to teach than Mellone.
11 Moreover, Vuleric discussed with Gonzales how the Department did not need any more
12 professors in quantitative reasoning. Vuleric wanted to find someone to teach statistics
13 who had a PhD in math.

14 After speaking with Vuleric and discussing with the Lower Division Committee
15 about reorganizing the Math Department, Gonzales checked Mellone's evaluations.⁴¹
16 Gonzales opened a free account for Khan Academy and reviewed the statistics materials
17 that Mellone utilized and determined the material was all high school level. Additionally,
18 Gonzales concluded that Mellone did not effectively cover all the course material as she

³⁹ Prior to recommending to Gonzales that Mellone not be reappointed, Vuleric reviewed Mellone's student evaluations from fall semester of 2018 and spring and fall semester of 2019.

⁴⁰ Vuleric only spoke with Gonzales about Mellone's reappointment.

⁴¹ Gonzales decided that starting in the Fall of 2020 and moving forward, the Math Department would require a faculty member upon hire to possess a PhD in math.

1 was not providing instruction to the students three days a week. Next, Gonzales reviewed
2 the CBA and determined that he had the ability to use his professional judgment to decide
3 if a non-continuing contract faculty member should be reappointed for another semester.
4 Gonzales decided not to reappoint Mellone, Shedly Louati (Louati),⁴² and John Jean
5 (Jean). Gonzales did not reappoint Louati because students had complained about Louati
6 skipping classes and asking for non-anonymous feedback on his classes. Gonzales
7 decided not to reappoint Jean because the Course Coordinator had concerns about
8 Jean's level of participation in his courses.

9 By email dated August 8, 2020, Mellone inquired again with Gonzales about the
10 fall semester assignment. Mellone stated that she "noticed classes have been assigned
11 to some other NTTs without continuing contract[s] so I was wondering if you plan to
12 schedule classes for me as well. As you know, my appointment/non-reappointment
13 directly affects my son[']s ability to attend college, so I am just trying to plan accordingly."⁴³
14 By email dated August 8, 2020, Gonzales informed Mellone that "unfortunately, the
15 department is not considering offering you any sections for the Fall 2020 semester.⁴⁴ We
16 truly wish you the best in your future endeavo[rs]." By email dated August 9, 2020,

⁴² In the spring of 2020, Louati needed his courses covered by other faculty for medical reasons. Neither party elaborated on the circumstances surrounding Louati's leave of absence. In the summer of 2020, Louati contacted Gonzales asking if the Math Department had any courses for him to teach for the fall 2020 semester. Gonzales responded to Louati that the Math Department did not have any courses to offer him and wished him luck in the future.

⁴³ Gonzales reappointed non-tenure track faculty member Matt Lehman (Lehman), who did not have a PhD in math, for the fall 2020 semester but not Mellone.

⁴⁴ The Union and University's contract does not require an investigation before an associate lecturer is informed they will not be reappointed, and associate lecturers do not have a just cause provision under the contract.

1 Mellone responded to Gonzales that she was disappointed by this news and asked if he
2 could offer an explanation as to why she was not being reappointed.⁴⁵ Gonzales did not
3 respond to Mellone's email. Shortly after August 8, Mellone attended a bargaining session
4 with the Union for successor contract negotiations. Mellone informed the rest of her
5 bargaining team, including D'Urso , that she was not going to be reappointed.

6 D'Urso reached out to Marie Bowen (Bowen), Vice Chancellor of the Human
7 Resources Department, to find out why the Department decided not to reappoint Mellone.
8 D'Urso expressed concerns that Mellone may have not been reappointed because of her
9 participation in collective bargaining. Afterwards, Bowen met in person with Gonzales,
10 and he provided the University with the reasoning behind his decision. Gonzales
11 explained that the Math Department was concerned about DFW rates in courses so they
12 formed a Restructuring Committee to address any issues. Gonzales informed Bowen that
13 he and the Restructuring Committee discovered that Mellone's student evaluations had
14 concerning comments such as complaints about third party videos and requests from
15 students that Mellone give notice if she was going to cancel class. After reviewing the
16 student evaluations, the Restructuring Committee looked into how Mellone taught her
17 courses. The Restructuring Committee discovered that Mellone was utilizing Khan
18 Academy and that Mellone was not teaching her statistics course three times a week.
19 Gonzales explained that he had concerns about Mellone's quality of teaching and that

⁴⁵ The Math Department Chair may request the opinion of the Personnel Committee on their decision to reappoint a member of the faculty but ultimately, the decision to reappoint an associate lecturer is made by the Department Chair.

1 Gonzales was working towards requiring all non-tenure track faculty to have advance
2 degrees in mathematics.⁴⁶

3 On or about August 14, Bowen called D'Urso and informed her the University had
4 chosen not to reappoint Mellone for the following three reasons: 1) negative student
5 evaluations; 2) Mellone had taught statistics in a hybrid format without permission; and 3)
6 Mellone utilized Khan Academy in her courses. Shortly thereafter, D'Urso contacted
7 Bowen and said that Mellone was not satisfied with the University's response. D'Urso also
8 mentioned that Title had given Mellone permission to teach in a hybrid model.

9 On or about August 30, 2020, at the behest of the University's Human Resources
10 Department, Gonzales contacted Vuleric to request that she put into writing all the
11 reasons that she recommended to Gonzales that the Department not reappoint Mellone.
12 In Vuleric's summary, she explained that Mellone started teaching with the Math
13 Department in Fall of 2018. Vuleric explained that Mellone was not given an evaluation in
14 the Fall of 2019 for the previous year's work because her name was inadvertently not
15 provided to the Personnel Committee. Vuleric listed the below emerging concerns:

- 16 1. The instructor does not meet with students for all scheduled lecture
17 hours; instead, she asks students to meet and work together in groups
18 without the instructor being present,
- 19 2. The instructor was opposed to our coordination efforts; insisted on
20 using resources not recommended by the Course Coordinator or the
21 Curriculum Committee and was opposed to the common final exam,
- 22 3. The instructor's standards might be below the minimum expected
23 standards for our courses, e.g. only a part of the material is covered,
- 24 4. The instructor is unorganized, does not use the time effectively and
25 leaves the students to figure out the material themselves.
26

⁴⁶ Prior to Gonzales' decision not to reappoint Mellone, no one from the Department had spoken to Mellone about her use of the Khan Academy, reviewed her student evaluations with her, or commented on her use of a hybrid teach model.

1 Additionally, Vuleric explained that as each semester passed, student evaluations for
2 Mellone's classes became increasingly more negative. Vuleric listed some of the negative
3 comments from the student evaluations.

4 In the summary, Vuleric stated that Mellone was opposed to coordination among
5 the Department's sections. Vuleric stated that one of the students said in surveys that the
6 Department should "let her create her own curriculum & exams!" Vuleric explained that
7 "typically, students never leave th[ese] kind of comments on their own. It is a reflection of
8 what the instructor has been telling students in class. Ms. Mellone used a book that was
9 not approved neither by the Course Coordinator or the Curriculum Committee. She was
10 also opposed to giving the common final and expressed her disagreement during one of
11 the Departmental meetings." Vuleric stated that she discovered there were issues with
12 Mellone's teaching when the Math Department's tutor explained there was a wide
13 variation on the material covered for each math course. Vuleric then began collecting
14 syllabuses and discovered that Mellone was teaching a hybrid course.

15 By email dated August 30, 2020, Gonzales forwarded McDermitt and Cote
16 worksheets that Mellone utilized in her courses, Vuleric's summary, and an email chain
17 between Gonzales and Mellone. Gonzales informed McDermott and Cote that:⁴⁷

18 This was sent to me by [Vuleric]. This document [summarizes] some
19 of the data points they used for their recommendation. There are
20 multiple, from the [disorganization] in class, leniency (DFW rates are
21 atypically high, a symptom of students receiving high marks for no
22 reason), using subpar and not approved materials from the internet
23 (Khan academy, and the attached worksheets) instead of the material
24 and guidance provided by the class coordinator, and overall not

⁴⁷ Neither the University nor the Math Department had a policy regarding DFW rates. Like Mellone, Wilbiraske had low DFW rates for his statistics course. However, Wilbiraske was on a continuing contract at the time, therefore, Gonzales decided that Wilbiraske would not teach statistics courses anymore.

1 covering the material on the syllabus, and not showing up to classes.
2 She does not provide the expected quality of education that we expect
3 from our instructors, and she opposed several times our departmental
4 coordination efforts, violating class policies. I am also attaching an
5 email I sent to [Mellone] in April, when she did not reply to the class
6 coordinator. The Lower Division Committee reported this to me and I
7 had to interv[ene]. I mentioned several times in our departmental
8 meetings, coordination of the multi-level classes is the only way in
9 which the department can ensure *fairness and equity* for our
10 student's education. Instructors who do not follow class policy
11 compromise this mission. Based on these issues none of the faculty
12 involved in the re-appointment decisions nor any committee supported
13 Maria for reappointment.

14
15 The department will continue to work in improving our student's
16 experience and will follow and defend the recommendations of its
17 faculty and committees to provide a fair and equitable education to our
18 students. I hope this clarifies further the process and some of the data
19 used to make decisions around rehiring. We are trying to be
20 systematic, but this is a process that involves many data points.

21 22 Successor Contract Bargaining

23 At the end of the spring 2019 semester, Mellone joined the Union's seven-person
24 core bargaining team for contract negotiations with the University.⁴⁸ Bowen served on the
25 University's bargaining team for successor contract negotiations.⁴⁹ On or about May 20,
26 2020, the Union and the University met to start successor contract negotiations. The
27 Union attended the meeting with its expanded bargaining team, and the meeting was
28 contentious as the parties had not agreed to "expanded bargaining" teams. The May 20
29 meeting took place over a webinar, and Jen Springer (Springer), the attorney for the
30 University, would not allow approximately 30-unit members into the meeting. During the
31 meeting, Mellone, as well as other members of the Union's core bargaining team,

⁴⁸ Mellone was the only associate lecturer on the bargaining team.

⁴⁹ The Union did not establish that Gonzales or Vuleric were present or involved with successor contract negotiations.

1 advocated for an expanded bargaining team. The parties met in June twice to negotiate
2 ground rules and the issue of expanded bargaining teams.⁵⁰

3 After establishing an agreement for the number of participants for each bargaining
4 team, the parties met for contract negotiations on July 10, August 17, September 30,
5 October 14, October 28, November 13, December 9, December 22, 2020.⁵¹ In 2021, the
6 parties met for contract negotiations on January 6, February 3, February 24, March 10,
7 April 26, May 12, and May 19. During the October 14, 2020 bargaining session, Mellone
8 spoke out in negotiations about the University's alleged misuse of the associate lecturer
9 position. Mellone had computed the number of associate lecturers and lecturers that the
10 University hired in recent years and presented it to the bargaining teams.⁵² As of the date
11 of the hearing, the parties had not completed contract negotiations.

12 Opinion

13 ***Prima Facie Case***

14 A public employer that retaliates or discriminates against an employee for
15 engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the
16 Law. Southern Worcester Reg. Voc. School District v. Labor Relations Commission, 388
17 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass.
18 App. Ct. 327 (1996). To establish a prima facie case of discrimination, a charging party

⁵⁰ Before July 10, Mellone's participation in bargaining pertained to impact bargaining COVID-19 and ground rules regarding expanded bargaining teams with silent observers.

⁵¹ After Gonzales informed Mellone that she was not being reappointed, Mellone continued to serve as a member of the Union's core bargaining team for contract negotiations.

⁵² After establishing ground rules, the parties only met once on July 10 to discuss main table bargaining before the University notified Mellone that she would not be reappointed.

1 must show that: 1) an employee was engaged in activity protected by Section 2 of the
2 Law; 2) the employer knew of that conduct; 3) the employer took adverse action against
3 the employee; and 4) the employer took the adverse action to discourage the protected
4 activity. Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000);
5 Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (November 9, 1985).

6 **Protected Activity and Employer Knowledge**

7 The Union argued that Mellone engaged in numerous acts protected by Section 2
8 of the Law, e.g.: 1) participating in successor contract negotiations; 2) participating in
9 negotiations over COVID-19 policies; 3) meeting with Gonzales on November 27, 2019,
10 and 4) speaking to Jackson in February of 2020.

11 I agree with the Union that Mellone was engaged in protected, concerted activity
12 under the Law when she was participating in successor contract negotiations and COVID-
13 19 negotiations as part of the Union's core bargaining team. Additionally, it is clear that
14 the University, including Gonzales, knew that Mellone was part of the Union's core
15 bargaining team for negotiations. However, the Union did not demonstrate that Gonzales,
16 as the decision maker in Mellone's non-reappointment, knew the details of the parties'
17 negotiations for a successor contract or COVID-19 bargaining. The Union did not provide
18 any evidence to suggest Gonzales knew that the Union and the University had
19 contentious bargaining sessions over ground rules or that Mellone spoke out in support
20 of the Union's proposal for silent observers.

21 Next, the Union argued that Mellone engaged in protected, concerted activity when
22 she met with Gonzales on November 27, 2019. The Union asserted that Mellone went to
23 speak with Gonzales about issues that impacted several other faculty members and was

1 acting at the behest of those faculty members, including Fuget. Conversely, the University
2 argued that Mellone's conversation with Gonzales was in an effort to discuss issues that
3 were personal to her, therefore she did not engage in concerted activity.

4 The Commonwealth Employment Relations Board (CERB) has decided that an
5 employee's activity is protected if it focuses on generally applicable terms and conditions
6 of employment that impact the collective bargaining unit as a whole. City of Boston, 8
7 MLC 1872, 1875, MUP-3994 (February 25, 1982); Town of Shrewsbury, 5 MLC 1519,
8 1523, MUP-2999 (December 22, 1978). To be concerted, the evidence must demonstrate
9 that the employee is acting with other employees, or on the authority of other employees,
10 rather than acting out of self-interest. Town of Southborough, 21 MLC 1242, 1249, MUP-
11 8521 (August 29, 1994)(citing Meyers Industries, 268 NLRB 493, 115 LRRM 1025
12 (1984)). Compare Commonwealth of Massachusetts, 14 MLC 1743, 1747, SUP-3081
13 (May 19, 1988)(probationary employee's complaints with other employees about
14 unhealthy working conditions constituted concerted activity) with Town of Athol, 25 MLC
15 208, 211, MUP-1448 (June 11, 1999)(employee's safety and work break complaints did
16 not constitute concerted activity, because the employee was acting alone and without the
17 authority of other employees); Higher Education Coordinating Council, 24 MLC 97,102,
18 SUP-4095, 4096, 4098, 4099 (April 27, 1998)(without evidence that the employee was
19 acting with other employees or acting on their authority, the filing of a sexual harassment
20 complaint is not concerted activity).

21 It is clear from the record that Mellone had discussions with fellow faculty
22 members, including Yamkovy and Fuget, wherein they expressed similar concerns about
23 the Math Department as Mellone, such as late course schedules. Additionally, Mellone

1 informed several other faculty members, including Fuget and Yamkovy, about Mellone's
2 decision to speak with Gonzales about several issues in the Department, and Fuget and
3 Yamkovy expressed support of Mellone. Also, the Union established that Mellone spoke
4 with Gonzales on November 27 about issues such as the timing of receiving course
5 schedules that impacted several unit members. As such, I find that Mellone acted on the
6 authority of other unit members when she met with Gonzales and her Union
7 representative to discuss several issues in the Math Department on November 27, 2019.
8 Therefore, Mellone engaged in concerted, protected activity when she discussed working
9 conditions with Gonzales on November 27, 2019.

10 Additionally, during the November 27 meeting, Mellone explained to Gonzales that
11 she believed under the contract she should not have been hired as an associate lecturer
12 and that she was entitled to a yearly evaluation that allegedly had not happened. Given
13 that Mellone met with Gonzales on November 27 to discuss potential contract violations,
14 Mellone clearly engaged in protected, concerted activity. As Gonzales was a participant
15 in the November 27 meeting, the University was aware of Mellone's protected, concerted
16 activity.

17 Next, the Union argued that Mellone's meeting with Jackson on February 21, 2020,
18 was concerted, protected activity because Mellone informed Jackson that the University
19 may have violated the contract by failing to provide her a performance evaluation and
20 failing to adhere to the academic freedom principle. Similar to her meeting with Gonzales,
21 I agree with the Union that Mellone's conversations with Jackson about potential contract
22 violations constituted protected, concerted activity. The Union admits that Jackson did not
23 participate in the decision not to reappoint Mellone, however, Jackson was the Math

1 Department's Coordinator for all Course Coordinators, and as such I find that the
2 University was aware of Mellone's protected, concerted activity.

3 **Adverse Action**

4 The next question is whether Mellone suffered an adverse action. The CERB has
5 consistently defined adverse action as an adverse personnel action, such as a
6 suspension, discharge, involuntary transfer or reduction in supervisory authority. City of
7 Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009); Town of Dracut, 25 MLC 131,
8 133, MUP-1397 (February 17, 1999). Many management decisions, though possibly
9 inconvenient or even undesirable, do not constitute adverse employment actions unless
10 the charging party is materially disadvantaged in some way. See City of Boston, 35 MLC
11 289, 291, MUP-04-4077 (May 20, 2009)(citing MacCormack v. Boston Edison Co., 423
12 Mass. 652, 662 (1996)(plaintiff failed to prove adverse action element of a prima facie
13 case of unlawful retaliation where there was no evidence that he had been disadvantaged
14 in respect to salary, grade, or other objective terms and conditions of employment); Sallis
15 v. Univ. of Minnesota, 408 F.3d 470, 476 (8th Cir. 2005)(termination, reduction in pay or
16 benefit, and changes in employment that significantly affect an employee's future career
17 prospects constitute material employment disadvantage but minor changes that merely
18 inconvenience an employee or alter work responsibilities do not)).

19 The University asserted that Mellone was not terminated or disciplined but was
20 simply not reappointed, which falls in the University's vested authority to make academic
21 appointments under the parties' contract and under M.G.L. Chapter 75. As such, the
22 University argued that Gonzales' decision not to reappoint Mellone was not an adverse
23 action under the Law. However, an employer's adverse actions are not limited to

1 terminations or discipline. In this case, Gonzales' decision not to reappoint Mellone
2 disadvantaged her in respect to salary and other terms and conditions of employment.
3 Gonzales' decision not to reappoint Mellone was a change in her employment that
4 significantly affected her future career prospects. As such, it is clear that the University's
5 decision not to reappoint Mellone was an adverse action under the Law.

6 **Unlawful Motivation**

7 To support a claim of unlawful motivation, the last element of the Union's prima
8 facie case, a charging party may proffer direct or indirect evidence of
9 discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December
10 13, 2006) (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002),
11 aff'd sub nom. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315
12 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable, or at
13 least a highly probable inference that a forbidden bias was present in the workplace."
14 Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass.
15 655, 667 (2000) (quoting Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300
16 (1991)).

17 Unlawful motivation also may be established through circumstantial, or indirect,
18 evidence and reasonable inferences drawn from that evidence. Town of Carver, 35 MLC
19 at 48 (citing Town of Brookfield, 28 MLC at 327-328). Several factors may suggest
20 unlawful motivation, including: the timing of the alleged discriminatory act in relation to
21 the protected activity; triviality of reasons, or shifting and inconsistent reasons given by
22 the employer; disparate treatment; an employer's deviation from past practices; or
23 expressions of animus or hostility towards a union or the protected activity. Town of

1 Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61, 69, MUP-02-3549
2 (September 27, 2006)); Lawrence School Committee, 33 MLC 90, MUP-02-3631
3 (December 13, 2006); Cape Cod Regional Technical High School District Committee, 28
4 MLC 332, 335, MUP-2541 (May 15, 2002).

5 *Direct Evidence of Unlawful Motivation*

6 The Union first argued that it established direct evidence of the University's
7 unlawful motivation. Specifically, the Union argued that in her August 30 summary, Vuleric
8 states that she recommended that Mellone not be reappointed due in part to Mellone's
9 vocal disagreement of the Department's common final exam requirement. In the August
10 30 summary, Vuleric states: "Ms. Mellone was opposed to coordination among our
11 sections. One of the students said in surveys 'Let her create her own curriculum & exams!'
12 Typically, students never leave this kind of comments on their own. It is a reflection of
13 what the instructor has been telling students in class. Ms. Mellone used a book that was
14 not approved neither by the course coordinator or the Curriculum Committee. She was
15 also opposed to giving the common final and expressed her disagreement during one of
16 the Departmental meetings." The Union argued that Gonzales relied on Vuleric's opinion
17 when making the decision not to reappoint Mellone, and Vuleric's comments were a
18 criticism that Mellone voiced her disagreement with the Department's common final exam
19 requirement.

20 However, Vuleric's comments about Mellone's disagreement about the
21 Department's final common exam requirement were in the context of Vuleric insinuating
22 that Mellone was complaining to her students about the common exam final. Vuleric's
23 comments are not a criticism of Mellone's complaints to Gonzales or Jackson, but an

1 assertion that Mellone presumably disparaged the Department's common final exam
2 requirement to the students. Although, the Union has demonstrated that Mellone's
3 complaints to Gonzales and Jackson were protected, concerted activity, the Union did not
4 demonstrate that Mellone allegedly complaining to her students about the common final
5 exam was concerted, protected activity.

6 Again, Vuleric's comments are not a criticism of Mellone expressing her
7 disagreement with the Department's common final exam requirement, but an assertion
8 that Mellone may have been speaking about the requirement to the students given
9 Mellone's vocal history on the subject and the students' odd comments on the evaluation.
10 As such, the Union has not presented any evidence that either Vuleric or Gonzales made
11 any anti-union expressions of criticism for Mellone engaging in protected, concerted
12 activity. For all the above stated reasons, the Union has not established direct evidence
13 of unlawful motivation.

14 *Indirect Evidence of Unlawful Motivation*

15 The Union also argued that it provided sufficient evidence to establish indirect
16 evidence of unlawful motivation.

17 *Shifting Rationales*

18 The Union argued that the University's shifting rationale regarding Gonzales'
19 decision not to reappoint Mellone for the fall 2020 semester showed discriminatory
20 animus. The Union argued that Gonzales first refused to provide Mellone with his
21 rationale behind his decision not to reappointment. After D'Urso requested a reason from
22 Bowen, she stated that Mellone was not reappointed because she: 1) received negative
23 student evaluations; 2) used Khan Academy; and 3) taught courses in a hybrid mode

1 without authorization. The Union argued that several weeks later, the University provided
2 Vuleric's summary which listed several other reasons for not reappointing Mellone,
3 including Mellone's: 4) DFW rates; 5) opposition to course coordination in general and
4 voiced disagreement; and 6) disorganization, as evidenced by her car breaking down
5 before the day of a final.

6 The Union argued that Vuleric did not make the DFW rate chart in her summary
7 until after Gonzales informed Mellone she would not be reappointed for another semester.
8 Additionally, the Union argued that Gonzales asserted that Vuleric's August 30th summary
9 listed all of the reasons Mellone was not reappointed. However, at the hearing, Vuleric
10 testified that she recommended that Mellone not be reappointed because she did not
11 have a PhD in math and therefore was not qualified to teach at the University. The Union
12 asserted that the University had cited different reasons for Mellone not being reappointed
13 at different times, which is evidence of discriminatory motivation.

14 The record is clear that Gonzales, as the Math Department Chair, was the
15 individual who decided Mellone would not return to the University. As the Union did not
16 demonstrate that the contract required the University to provide associate lecturers with
17 explanations for non-reappointments, I do not find that Gonzales' initial non-response to
18 Mellone's request for the reasons she was not reappointed to be evidence of a shifting
19 rationale. Next, Gonzales informed Bowen that he did not reappoint Mellone because the
20 Restructuring Committee was looking into problematic DFW rates in various courses and
21 discovered several issues with Mellone's statistics course. Gonzales clearly informed
22 Bowen that he decided not to reappoint Mellone because of: 1) her negative student
23 evaluations, 2) her use of Khan Academy, 3) teaching courses in a hybrid mode without

1 authorization, 4) the quality of her teaching, and 5) the Department wanted to move
2 towards non-tenured track faculty having advanced mathematics degrees. Despite
3 Bowen only providing the Union with a partial list of reasons, Gonzales' list of reasons for
4 deciding not to reappoint Mellone remained consistent.

5 The Union argued that Vuleric's second expanded list of reasons why Mellone was
6 not reappointed was evidence of a shifting rationale. However, the Union expressed
7 dissatisfaction with Bowen's initial response, and therefore the University provided a
8 supplemental response. The Union also argued that the University shifted its rationale not
9 reappointing Mellone because Vuleric's summary included additional reasons for the non-
10 reappointment such as DFW rates and a comment on her car breaking down. However,
11 Vuleric's summary is a list of all the reasons she recommended to Gonzales that he not
12 reappoint Mellone, not Gonzales' reasons for deciding that Mellone not be reappointed.
13 Moreover, Vuleric's list of reasons for recommending Mellone's non-reappointment
14 included all the reasons Gonzales informed Bowen that he decided not to reappoint
15 Mellone. Even though Vuleric's summary included comments about Mellone's car
16 breaking down, Mellone's criticism about the common final exam requirement, and a DFW
17 rate chart, it does not mean that Gonzales' reasons changed for deciding not to reappoint
18 Mellone. As such, the Union has failed to prove that the University shifted its rationale for
19 Gonzales' decision not to reappoint Mellone.

20 Triviality of Reasons

21 The Union argued that the University's reasons for deciding not to reappoint
22 Mellone were "flimsy." First, the Union argued that despite the University's assertions,
23 Mellone had excellent student evaluations. As explained above, the student evaluations

1 for Mellone are both positive and negative. I agree with the Union that Mellone did not
2 have more negative reviews than positive reviews from the student evaluations. However,
3 Gonzales' explanation for citing the student evaluations as a reason for not reappointing
4 Mellone did not focus on the number of negative reviews but on the comments from
5 students that he found concerning. For example, Gonzales was concerned that students
6 commented negatively about Mellone's disorganization in the classroom and quality of
7 teaching. Additionally, Gonzales cited the student evaluations as a reason for deciding
8 not to reappoint Mellone because it revealed that Mellone was not teaching all three
9 scheduled days for her statistics courses and that she was utilizing Khan Academy in her
10 courses. Furthermore, Gonzales did not want to rely on just the mixed reviews in the
11 student evaluations and asked Vuleric to find out if Mellone was teaching in the classroom
12 on Fridays or not. For all the above stated reasons, Gonzales' decision not to reappoint
13 Mellone in part because of the student evaluations was not trivial.

14 Next, the Union argued that the Chancellor had expressed concerns about the
15 Math Department's high DFW rates, whereas Mellone's DFW rates for her courses were
16 relatively low. Given Mellone's low DFW rate and the fact that the Department did not
17 have a policy on DFW rates, the Union argued that the University's reasoning was trivial.
18 However, Gonzales did not base his decision not to reappoint Mellone specifically on her
19 higher DFW rates. Gonzales considered higher DFW rates to be atypical for the
20 Department. More importantly, Gonzales found Mellone's atypical DFW rates were a
21 symptom of students receiving high marks for no reason and a red flag in the quality of
22 teaching in Mellone's courses. Gonzales' concern regarding Mellone's quality of teaching
23 was not a trivial reason for his decision not to reappoint Mellone.

1 Third, the Union argued that deciding not to reappoint Mellone because her car
2 broke down the day before a final was a trivial reason. I agree. Vuleric recommended that
3 Mellone not be reappointed in part because she requested help proctoring one of her
4 exams because her car broke down the day before the final. However, Vuleric only
5 recommended to Gonzales that he not reappoint Mellone. Gonzales was the Department
6 Chair, and the one who decided not to reappoint Mellone. Gonzales did not cite Mellone's
7 car troubles as a reason for deciding not to reappoint Mellone.

8 Finally, the Union argued that Mellone worked to help the Math Department create
9 policies and practices for new hires that were implemented in the fall semester of 2020.
10 Thus, the Union argued that the University's concerns regarding Mellone's opposition to
11 course coordination were unfounded and a trivial reason for not reappointing her for
12 another semester. Although Mellone may have worked with Jackson to help create an
13 easier transition for new hires, Mellone still utilized unapproved course textbooks and
14 expressed resistance to the Department's use of a common final exam requirement on
15 several occasions. The University established that the Math Department's policy on
16 utilizing a common text and common final exam was designed to ensure a certain level
17 of quality for instruction, that the students are covering all the necessary material for the
18 course, that the lower-level courses adequately prepare students for higher level courses,
19 and so the courses are uniformed in a way that makes it possible for credits to transfer.
20 Given the purpose behind the Department's requirement for approved texts and a
21 common final exam, Gonzales' concerns that Mellone was utilizing unapproved texts and
22 resisting a common final exam were not trivial.

23 Previously Condoned Transgressions

1 The Union argued that the University tolerated Mellone's use of unapproved
2 supplementary materials until she engaged in protected, concerted activity. The Union
3 alleged that Mellone had been utilizing Excel and Khan Academy since the spring
4 semester of 2019, but the University did not find fault in this approach until she engaged
5 in protected, concerted activity. However, Gonzales did not become aware of Mellone's
6 use of Khan Academy or Excel until February of 2020. Even after Gonzales found out
7 about Mellone's use of Khan Academy, he still reserved judgment on the quality of the
8 material until he opened an account on Khan Academy and reviewed the material himself.

9 Additionally, the Union argued that Mellone had been teaching statistics in a hybrid
10 mode since the fall of 2019. Again, Gonzales did not find out that Mellone was teaching
11 in hybrid mode until February of 2020. After finding out that Mellone may have been
12 skipping Friday classes, he asked Vuleric to inquire into the matter. After confirming that
13 Mellone was not teaching in-person on Fridays, the University shut down for a few weeks
14 and then transitioned to remote work for the pandemic. Gonzales and the rest of the
15 Department scrambled to adjust to the pandemic, and the issues with Mellone fell to the
16 side. Then, in May of 2020, the University informed all associate lecturers that they were
17 not going to be reappointed. Gonzales did not have time to address Mellone's departure
18 from Department policies until the summer of 2020 when he decided which associate
19 lecturers would come back for the fall of 2020 semester. Given that Gonzales did not
20 know about the hybrid model until after February of 2020 and the mitigating factors
21 surrounding the timing of the pandemic, Gonzales' delay in addressing the matter is not
22 evidence of discriminatory motive.

1 The Union argued that Mellone had informed Title, Wilbiraske, and Fontaine that
2 she was teaching a hybrid class, therefore the University knew or should have known
3 what she was doing. However, Wilbiraske was the Course Coordinator for quantitative
4 reasoning and Mellone needed the approval of the statistics Course Coordinator Kovitz,
5 the Curriculum Committee and the Department Chair. Moreover, the Union did not
6 establish that Wilbiraske knew that Mellone had not sought and received the approval of
7 Kovitz, the Curriculum Committee and the Department Chair. Therefore, Wilbiraske's
8 discussions with Mellone about her teaching model did not condone her choice to adopt
9 a hybrid mode for statistics without the appropriate approval.

10 As explained above, I did not find that an administrative assistant had the authority
11 to approve a faculty member adopting a hybrid teaching model. Therefore, Mellone's
12 email submission of her syllabus to Fontaine, an administrative assistant for the Math
13 Department, did not constitute University authorization to teach statistics in a hybrid
14 model without gaining the necessary approvals. Similarly, Title was an administrative
15 assistant who did not have the authority to advise or approve changes in teaching models.
16 Moreover, I found that not only did Title not have the authority to approve Mellone's hybrid
17 class, but that she never advised her on the topic. As such, the Department did not
18 condone or approve Mellone's choice to teach her statistics course in a hybrid model.

19 Disparate Treatment

20 The Union argued that the University engaged in disparate treatment when it
21 reappointed non-tenure track faculty member Lehman, who did not have a PhD in math,
22 for the fall 2020 semester but not Mellone. However, Mellone's lack of a PhD in math was
23 not the only reason that Gonzales decided not to reappoint Mellone. The Union failed to

1 demonstrate that Lehman had engaged in problematic behavior such as teaching in a
2 hybrid model without approval, or that Gonzales had any other concerns about the quality
3 of his teaching. As such, I do not find that Lehman and Mellone are similarly situated.
4 Thus, the University's decision to reappoint Lehman for the Fall 2020 semester was not
5 evidence of disparate treatment.

6 Similarly, the Union argued that Wilbiraske did not have a graduate degree in
7 mathematics, had problematic DFW rates, and student complaints. However, at the time
8 Gonzales was deciding which lecturers to bring back for the fall 2020 semester,
9 Wilbiraske was already on a continuing contract and not similarly situated to Mellone, who
10 was an associate lecturer who was hired from semester to semester. The Union asserted
11 that Wilbiraske also taught in a hybrid model but was not disciplined for his deviation in
12 teaching mode, DFW rates, or student complaints. However, Gonzales addressed many
13 of the Department's concerns regarding Wilbiraske by only assigning him quantitative
14 reasoning classes moving forward. For all the above reasons, the Union failed to
15 demonstrate that the University engaged in disparate treatment by treating Mellone
16 differently from a similarly situated faculty member.

17 Union Animus

18 The Union argued that Gonzales' statement that he "had to be careful about what
19 he said because the Union tries to catch the University" in the November 2019 meeting
20 with Mellone was evidence of union animus. However, I found that Gonzales did not
21 inform Mellone that he "had to be careful about what he said because the Union tries to
22 catch the University" or words to that effect.

1 In sum, the Union did not present any circumstantial evidence demonstrating that
2 Gonzales' decision not to reappoint Mellone was motivated by a desire to penalize or
3 discourage protected activity. Additionally, the Union did not present any evidence of
4 disparate treatment, triviality of reasons, or expressions of animus or hostility towards the
5 Union or the protected activity. Thus, the Union has not satisfied the fourth element of the
6 prima facie case of retaliation.

7 Legitimate, Non-Discriminatory Motive

8 However, even assuming that the Union established a prima facie case of
9 retaliation, which it did not, the Employer may produce evidence that it had a legitimate,
10 non-discriminatory motive for taking the adverse action. Higher Education Coordinating
11 Council, 23 MLC 90, 93, SUP-4090 (September 17, 1996); Town of Clinton, 12 MLC 1361,
12 1365, MUP-5659 (November 9, 1985) (citing Trustees of Forbes Library, 364 Mass. at
13 563). Here, the University satisfied its burden to produce credible evidence that it decided
14 not to reappoint Mellone because she decided to teach her statistics course in a hybrid
15 model without approval, utilized unapproved supplemental texts in her courses, failed to
16 provide the appropriate level of education to the students, and did not have an advanced
17 degree in mathematics.

18 The University established that Gonzales based his decision on reviewing student
19 evaluations, Vuleric's confirmation that Mellone was not attending her Friday classes, and
20 his own investigation into the quality of material on Khan Academy. The University
21 established that Gonzales set up an account on Khan Academy, reviewed the material,
22 and determined that it was not at a collegiate level. Additionally, the University established

1 that Gonzales confirmed that Mellone was not attending classes in person on Fridays,
2 and that she had not sought approval to teach her statistics classes in a hybrid model.

3 The University demonstrated that Gonzales took into consideration negative
4 student comments on the evaluations about Mellone's teaching, Mellone's use of subpar
5 teaching materials, and that she was not instructing her students three days a week as
6 scheduled, to conclude that Mellone was not providing the students with the level and
7 quality of teaching the Department required of faculty. Accordingly, I conclude that even
8 if the Union had satisfied its initial burden of establishing a prima facie case of retaliation,
9 which it did not, the University demonstrated that legitimate reasons motivated its adverse
10 action against Mellone.

11 But for Test

12 Finally, the Union did not prove that, but for her protected activity, the University
13 would have reappointed Mellone. The Union argued that the University proffered shifting
14 reasons for the decision not to reappoint Mellone and its reasons were trivial. As
15 explained above, the University did not proffer shifting reasons, nor were the University's
16 reasons trivial. Moreover, Gonzales decided in August of 2020 not to reappoint Mellone,
17 Louati, and Jean, and the Union did not establish that either Louati or Jean had ever
18 engaged in protected, concerted activity.

19 The Union argued that the misconduct that led to Gonzales not reappointing Jean
20 and Louati was distinguishable from his reasons for not to reappointing Mellone.
21 However, Gonzales did not reappoint Louati because students had complained about
22 Louati skipping classes and asking for non-anonymous feedback on his classes.
23 Gonzales decided not to reappoint Jean because the Course Coordinator had concerns

1 about Jean's level of participation in his courses. Gonzales may have based his opinion
2 on different points of information, but ultimately Gonzales found that Mellone, Jean, and
3 Louati were not providing the quality of teaching that the Department required and
4 decided not to reappoint all three faculty members. In short, the Union did not establish
5 that Gonzales would have decided to reappoint Mellone but for her protected, concerted
6 activity.

CONCLUSION

7 The University did not violate the Law by failing to reappoint Mellone as an
8 associate lecturer or assign her any classes for the fall 2020 semester. I therefore dismiss
9 the Complaint.
10 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MEGHAN VENTRELLA, 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 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.