

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & JOSEPH NICHOLSON,
Complainants

v.

DOCKET NO. 05-BEM-02717

BRIDGEWATER STATE COLLEGE¹ &
BENEDICTA EYEMARO,
Respondents

Appearances:

William Green, Esquire, Commission Counsel
James Cox, Esquire and Alison J. Little, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 12, 2005, Complainant Joseph Nicholson filed a complaint with this Commission charging Respondents Bridgewater State College and Benedicta Eyemaro with discrimination on the basis of his age and unlawful retaliation in violation of M.G.L. c. 151B §4(1B and 4) The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on May 6, 10, 11 and 13, 2010. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Respondent Bridgewater State College (“the college”) is part of the Massachusetts higher education system. The college operates the School of Education and

¹ Respondent is now known as Bridgewater State University. For the sake of continuity, throughout this decision, it will continue to be referred to as Bridgewater State College, or “the College”

Allied Studies, within which it offers a Masters Degree in Educational Leadership (ELP). Through the ELP, students can obtain a Masters in Education Degree (M.Ed.) or a Post-Masters Certificate of Advanced Graduate Studies (CAGS). Such students are seeking licensure and accreditation for positions such as superintendent, assistant superintendent, business manager and other school administration positions. ELP students seeking licensure must participate in a practicum in order to fulfill their licensure and accreditation requirements.

2. In September 2003, Respondent Benedicta Eyemaro was hired as a tenure-track professor in the ELP.

3. Complainant Joseph Nicholson resides in Mashpee, Massachusetts. His date of birth is 1/31/1931. Nicholson holds a Doctorate in Education from Boston College. After a long career as an educator, school principal and superintendent, Complainant retired as Superintendent of the Sandwich public schools 1995. After his retirement, Complainant was hired as a Visiting Lecturer/Supervisor (VL) in Respondent's ELP program where he continues to work.² Complainant is the oldest VL employed by Respondents.

4. Anna Bradfield is the Dean of the School of Education and Allied Studies. As Dean, Bradfield supervises all programs and curricula within the school, including five departments, 22 programs and approximately 62 full time faculty members. She reports to the Provost and Academic Vice President, Howard London.

5. The ELP utilizes VLs (or "supervisors" or "field supervisors") to mentor students enrolled in the ELP program as they perform their practicum at either a public or private school where they work as teachers or acting administrators. The students are

² Complainant's charge concerns only events occurring during the period from January 2005 through June 2006.

responsible to locate their own practicum sites, but if they are unable to do so, VLs may, through their contacts, locate schools for the students. Field supervisors are hired solely to supervise students in the field. There are also full-time professors who supervise students in the field in addition to teaching courses. Supervisors must have a minimum of a master's degree and licensure. The VL often shares responsibilities with a "cooperating practitioner," usually a principal in the school where the student is placed. Complainant usually meets with his students at the school where they are doing their practicum and only comes to the college campus for meetings. VLs are paid based on the number of students assigned to them.

6. A cohort is an off-campus group of students that starts a program at the same time and moves together through the program. The College arranges the classes for each cohort so that the students may obtain licensure on a certain schedule.

7. The Leadership Through Accelerated Development ("LEAD") program or cohort is a program for 12 students in the ELP who have masters degrees and are seeking only licensure (24 credits) as opposed to a full CAGS certificate (39 credits) The LEAD program was established in either the spring or summer of 2005 in order to boost enrollment after the state changed its licensure regulations. LEAD students obtain their licenses by taking six courses and a practicum.

8. In September 2003, Benedicta Eyemaro was hired as a tenure-track professor in the ELP. When the program's previous program coordinator, Joanne Newcombe, retired in December 2003, Eyemaro and Corinne Taylor-Dunlop became co-coordinators of the program. The coordinator assigns the VLs to students each semester. For personal reasons Taylor-Dunlop was unable to do much of the coordinator work. Consequently, most of the

coordinator's duties for the spring 2004 semester fell to Eyemaro, who as the only full-time faculty member in the ELP, was overwhelmed with work.

9. Eyemaro made most of the VL student assignments for the spring 2004 semester. She did not know any of the VLs at the time and spread the assignments out among the VLs. For the spring 2004 semester, Complainant (age 74) was assigned nine students. Charles Elliott (age 62)³ was assigned five students; Dr. Frederick Tirrell (age 70) was assigned one student; Sr. Kristin Hokanson (58) was assigned eight students; Claire McCarthy (54) was assigned two students; Joanne Newcombe was assigned two students and P. Zinni (41) was assigned one student.⁴

10. For the fall 2004 semester, 71 students enrolled in the ELP program, which was an unusually high number.⁵ In September 2004, Eyemaro met for the first time with the VLs who had been assigned students. Complainant was assigned 18 students. In 2004, the ELP established a cohort in the Sandwich school system where Peter Cannone (age 63) was the superintendent. Cannone had become a VL and taught some classes for the Sandwich cohort in the fall 2003, but did not begin supervising ELP students' practicums until the fall 2004⁶ when seven students enrolled in the Sandwich cohort were assigned to him. Dean Bradfield testified that Cannone's assignment as VL benefited the ELP students because of his contacts within the Sandwich district, and his expertise and familiarity with the school system. I credit her testimony.

11. Eyemaro testified that at the September 2004 meeting, she asked the VLs for help with the coordinator's job because she was overwhelmed with work. Charles Elliott

³ Elliott retired as a high school principal in 1999

⁴ The ages of the VLs are as of 2005.

⁵ In fall 2003, Complainant was assigned 9 of 35 students; in spring 2003, he was assigned 9 of 22 students in fall 2002, he was assigned 13 of 30 students. (Ex. C-1)

⁶ The record is not clear as to when Cannone retired from Sandwich as superintendent.

offered to help her. Elliot ultimately put in so much time, that upon the recommendation of Eyemaro and Dean Bradfield, he was appointed to a one-year full-time non-tenure track faculty position beginning in the spring 2005 semester. Elliot was reappointed to another one-year contract the following year. His duties in this position were primarily to assist Eyemaro as ELP coordinator. He supervised the practicums, performed duties related to the new LEAD cohort and assisted Eyemaro in preparing for an upcoming accreditation visit. Elliott also supervised practicum students in order to fulfill his contractual course load requirement.⁷

12. Eyemaro testified that in assigning students to supervisors, she first determines the total number of students in need of supervision. Next, she assigns students to full-time faculty to meet the faculty's required course loads; she then assigns any students seeking special education or other special licensure to the supervisors with expertise in that specialty, such as Dr. Jeri Katz (special education), Claire McCarthy (special education), E. Driscoll (technology), Dr. Carol Young (special education) or P. Zinni (director of pupil services).

13. After making assignments to full-time faculty and specialized faculty, Eyemaro assigns the remaining students to VLs based on the geographic location of the placement site and the VLs' residence; any VL's travel restrictions; the VL's participation in any cohort; students' request for a particular VLs; the VLs' contacts within certain school districts; continuity of supervision between students and VLs and the number of students a VL semester is willing to supervise.

⁷ Under their union contract, full-time faculty serving as supervisors must have full course loads equaling 12 credits per semester. In the ELP, supervision of three students counts as one credit. Therefore, the college gives full-time faculty priority over VLs in assigning students.

Spring 2005 Semester

14. For the spring 2005 semester, the number of enrollees in the ELP dropped drastically from the previous semester of 71 students down to 12 students.⁸ When student assignments were made in January 2005, Complainant received two students; Sr. Kristin Hokanson was assigned three students; Dr. Elliot was assigned five students; and Drs. Katz and Young were each assigned one student. Complainant testified that after the VL meeting, he questioned Eyemaro as to why the number of students assigned to him had been steadily decreasing. Eyemaro denied that Complainant questioned her about the numbers at this time. I credit Complainant's testimony that he questioned her about the assignments at this time, but she did not respond, and did not tell him about the drop in enrollment.

April 2005 Meeting

15. In April 2005, while on campus for a seminar, Complainant and Sr. Kristin Hokanson, who has been a VL since 2003, asked to meet with Eyemaro in order to discuss Eyemaro's expectations and goals for the program, as they were concerned about the changes in the program since she came onboard. At an impromptu meeting in Eyemaro's office, Sr. Hokanson expressed her concern about her salary for the upcoming year because her religious community had asked her to project her income for the next year.⁹

16. Complainant testified that he asked Eyemaro whether she had a new "philosophy" about making student assignments that caused her to assign him so few

⁸ In May 2005, the Department of Education changed its law so that education students seeking professional licensure must have a master's degree in teaching in content area or a masters in any educational related area and 12 content credits. Student numbers dropped because the ELP did not provide credits toward licensure. At the same time the masters core program numbers spiked.

⁹ Sr. Hokanson has been a teacher and administrator since 1973 and was vice principal and then principal at Pope John XXIII High School. Since 2001, she has created the Notre Dame virtual school for all the schools of the Sisters of Notre Dame and is Director of the Consortium of High Schools in the Boston Archdiocese for the virtual high school program.

students. Eyemaro responded that that she had no new philosophy and that the distribution of intern assignments was her prerogative. Complainant and Hokanson also questioned why Charles Elliott was sending them emails about the program instead of Eyemaro. They told Eyemaro that in order for them to help her achieve program goals she had to communicate more frequently with them and meet regularly. They asked Eyemaro to schedule a meeting of the VLs and to submit agenda items in advance. I credit the testimony of Complainant and Hokanson with respect to the topics discussed at this meeting.

17. Eyemaro testified that at the April meeting Complainant's only concern was why Elliot and not Eyemaro was sending them email notice of meetings. She told him that Elliott now worked for the program full-time and she had delegated the responsibility of setting up meeting space to him. Eyemaro testified that Sr. Hokanson's only concern was the number of students she would be assigned in the fall. Eyemaro explained to Sr. Hokanson that she could not know the enrollment for the fall because it was only April. I do not credit Eyemaro's testimony that they only discussed Hokanson's assignments and the role of Charles Elliott. I find Complainant's and Sr. Hokanson's testimony more credible

18. By all accounts, Eyemaro did not explain to Complainant and Sr. Hokanson that the number of students enrolled in the program had steeply declined in the spring 2005 semester and no one raised the issue of age discrimination at this meeting.

19. Following the meeting with Eyemaro, Complainant met with Dean Bradfield. He told Bradfield that Eyemaro's lack of communication and failure to conduct regular

supervisors' meetings made him feel "left out of the process." He asked Bradfield to discuss these matters with Eyemaro.

20. Bradfield subsequently met with Eyemaro and told Eyemaro that Complainant found her "abrupt" and "insensitive." Bradfield testified that she counseled Eyemaro to think about her words and tone before speaking. Eyemaro corroborated Bradfield's testimony that they had such a discussion. Eyemaro told Bradfield that all future emails to the VLs would come from either her or the program secretary instead of from Elliott and that in advance of future meetings she would email the agenda to supervisors and would seek their input. Bradfield had several additional discussions with Eyemaro about her communication style that were unrelated to Complainant. I credit Bradfield's and Eyemaro's testimony with respect to their meetings.

21. Sr. Hokanson testified that Eyemaro scheduled a supervisors' meeting in June 2005 and that Eyemaro made her feel uncomfortable at the meeting. According to Sr. Hokanson, Eyemaro was disrespectful to her directly after the meeting and the number of students assigned to her dropped significantly after the April 2005 meeting. She noted, however, that in recent years there has been a more equitable allotment of students.

22. Sr. Hokanson testified that at some time between 2006 and 2008, she was having difficulties with a student and attempted to discuss the matter by telephone with Eyemaro, who yelled at her, causing Hokanson to end the call. Eyemaro's conduct was so disturbing that Sr. Hokanson reported the matter to Dean Bradfield and another administrator. Hokanson felt that Eyemaro retaliated against her and Complainant after their April 2005 meeting because she and Complainant were thereafter assigned fewer students than Cannone, Fox-Melanson and Elliott. I credit her testimony.

23. Eyemaro testified that in the spring of 2005 she and Bradfield discussed the “passive-aggressive” manner in which Complainant and Hokanson had been treating her since the previous fall. She told Bradfield that she was “not connecting with them” and they were not helping her with the program and she wondered whether their negative attitude toward her was based on racial animus, since Eyemaro is black and of Nigerian national origin.

24. Bradfield corroborated that sometime in the fall 2004 or spring 2005, Eyemaro met with her to discuss her difficulties with Complainant and Sr. Hokanson and Eyemaro raised questions about whether their attitude was based on her race. Bradfield asked whether Eyemaro wanted to pursue the issue and Eyemaro responded that she wanted to think about it. Later, upon reflection, Eyemaro decided that her race was not the basis of the difficult interactions with Complainant and Sr. Hokanson.

25. Eyemaro testified that Complainant and Sr. Hokanson were resistant to the “electronic notebook” that she was implementing that was intended to replace the paper-based portfolios used by students and that they never completed the training. I do not credit her testimony that Complainant and Sr. Hokanson were resistant to the electronic notebook. I find it particularly unlikely that Sr. Hokanson, who developed an on-line school and described herself as computer savvy, would be resistant to a computerized system of record keeping.

26. There were other clashes between Complainant and Eyemaro. Complainant testified that on one occasion, after two of Complainant’s students complained to Eyemaro that they could not reach him, Eyemaro left Complainant a voice mail stating she was not going to take calls for him. On another occasion in 2005, Complainant waited outside

Eyemaro's office as she met with a student, trying to catch her eye and Eyemaro got up, told him she was busy and closed the door in his face. I credit his testimony.

Fall Semester 2005

27. Eyemaro hired Davida Fox-Melanson (age 59), a retired school superintendent in the fall 2005. According to Eyemaro, she interviewed and hired Fox- Melanson notwithstanding the enrollment numbers because she felt Fox-Melanson would benefit the program and believed that that Fox-Melanson's skills and contacts would make her an asset to the staff as the program grew. I credit Eyemaro's testimony.

Events of September 8, 2005

28. In the fall 2005 semester, enrollment in the ELP was 19 students. On September 8, 2005, Eyemaro held a routine meeting for all supervisors in order to make their assignments. Complainant was assigned two students, Sr. Hokanson was assigned three students, Professor Elliot was assigned four students; Peter Cannone was assigned four students, Fox-Melanson was assigned four students and Carol Young was assigned one special education student. Eyemaro testified that Cannone was assigned students in the Sandwich cohort who had requested him. She assigned two students who had had previous conflicts in their classes at their high school practicum worksite to Fox-Melanson because Fox-Melanson was skilled at resolving conflicts. She assigned a third student to Fox-Melanson because of her contacts at the district where the student did her practicum. Eyemaro did not recall why she assigned the fourth student to Fox-Melanson.

29. Complainant became upset when he was assigned fewer students than any other VL. He testified that he believed he should have been assigned the most students because of his 20 years of experience, his seniority and because he held a Ph.D. and the others did

not. Complainant believed that there should be an equitable distribution of students, and that students who were training to be superintendents should be supervised by former superintendents and that those training to become principals should be trained by principals, etc. He also testified that he believed he was more qualified than Cannone because Cannone did not have a PhD, had not been a superintendent as long as he had been and Cannone had never been a business manager as Complainant had. Complainant believed that he was assigned the smallest number of students because of his age.

30. Complainant testified that after the meeting, he went to Eyemaro's office and confronted her as she sat at her desk, accusing her of age discrimination in assigning students. Eyemaro offered no explanation of how the assignments were made and according to Complainant, she responded, "If that's what you think, do what you have to do."

31. Eyemaro stated that Complainant angrily entered her office and was screaming and yelling. He approached her desk, demanding to know why he had been assigned so few students and threatened to file an age discrimination suit against the college. Eyemaro testified that Complainant's demeanor frightened her, as she had never seen him like that before. She told him that because he mentioned the word "discrimination" she was ending their conversation and she advised him to talk to Dean Bradfield and Dr. Comedy. Complainant then immediately left Eyemaro's office.

32. While I do not credit Eyemaro's testimony that Complainant screamed, yelled, and frightened her, I credit her testimony that Complainant was angry, raised his voice to her and threatened to file an age discrimination complaint against the college and that she

terminated the discussion at that point. I credit Complainant's testimony that when he threatened a discrimination lawsuit, Eyemaro told him to "do what he had to do."

33. Immediately after Complainant left her office, Eyemaro reported the incident to Dr. Bradfield and to Alan Comedy¹⁰, who is charged with investigating internal complaints of discrimination at the College. Bradfield testified that she advised Eyemaro to continue working with Complainant and make sure that all of the VLs received the appropriate number of students.

34. On or about September 21, 2005, Complainant met with Bradfield and reiterated his claim that Eyemaro was discriminating against him because of his age and asked Bradfield to explain the assignment process to him.¹¹ Bradfield told Complainant she would discuss the issue with Eyemaro and would refer him to the appropriate department within the college to handle his claim of age discrimination. Bradfield testified at the public hearing that she did not believe that the assignment of students was unfair, because the introduction of cohorts had changed the program's structure and assignment of students. She did not explain this to Complainant in the course of their meeting or at any time.

35. Bradfield testified that within days of her September 21 meeting with Complainant, she reviewed with Eyemaro her rationale for student assignments for the fall 2005 semester. Bradfield believed that Eyemaro's assignments were fair and reasonable and did not take into consideration the age of the VLs. Inexplicably, Bradfield could not

¹⁰ Comedy was Assistant to the President for affirmative action, equal opportunity and disability compliance.

¹¹ Bradfield approved the assignments, but her approval was pro forma and she never rejected an assignment by Eyemaro.

remember the details of her conversation with Eyemaro and did not follow-up with Complainant to explain that she viewed the assignments as fair and unbiased.

36. Complainant declined Comedy's offer to meet with him. He believed that such a meeting would serve no purpose as he had already made his views known to Bradfield and Eyemaro and planned to wait until the spring semester assignments were made to see if matters improved.

Meeting of October 6, 2005

37. Shortly after the confrontation with Eyemaro, Complainant learned that Eyemaro had scheduled a VL meeting in October 6, 2005 for which he did not receive notice. He believed that the purpose for the meeting was to assign students for the spring 2006 semester. In past years, the spring semester meeting had been held in January and a meeting in October was, in Complainant's words, "unprecedented." Complainant emailed Eyemaro to inquire whether her failure to invite him to the meeting was an oversight and Eyemaro sent an email response stating that it was not an oversight. Complainant did not attend the meeting.

38. Sr. Hokanson testified that she attended a meeting in the fall of 2005 when student assignments were made and Complainant was the only VL not present. At the meeting, she had three interns assigned to her. Sr. Hokanson was surprised not to see Complainant at the meeting and called him afterward to ask if he did not know about the meeting.

39. Eyemaro testified that the October 6, 2005 meeting was only for supervisors of the 12 students enrolled in the new accelerated LEAD cohort starting in the spring 2006 semester. Eyemaro testified that there were no students present at the meeting, and that the

VL student assignments were made prior to the October 6 meeting. Five of the LEAD students were assigned to Elliott; two were assigned to Sr. Hokanson, one of whom was having trouble in class Eyemaro thought Hokanson could handle, and the other was assigned to the same middle school. One student was assigned to Fox-Melanson because the district she was working in was assigned to Fox-Melanson; two were assigned to Cannone. Two special education students and a director of technology were assigned to Katz¹² Eyemaro testified that she did not explain to Complainant the purpose of the meeting because he had threatened to sue her and because she did not want to be subjected to his anger. She did not testify as to why Complainant was not assigned students in the LEAD program.

40. Eyemaro did not recall whether additional students were assigned between the October 6 meeting and the start of the spring 2006 semester but testified that there were no further meetings after October 6. I do not credit her testimony as it is inconsistent with Respondents' records showing that a total of 40 students enrolled in 2006 spring semester, including 12 in the LEAD cohort. I find that students were assigned to supervisors for the upcoming spring semester at an October meeting in 2005, and as students continued to enroll, Eyemaro assigned them to supervisors other than Complainant.

41. Of the 40 students enrolled for the spring 2006 semester (including LEAD students), Elliott was assigned 16 students; Katz was assigned four students, Cannone was assigned eight students; Fox-Melanson was assigned four new students, in addition to four students carried over from the fall semester, Sr. Hokanson was assigned five students and Complainant was assigned no new students, although he carried over two students from the

¹² The figures total 13, according to Respondent's records. (R-6). The discrepancy was not explained

fall 2005 semester. (Ex. R-6) Eyemaro testified that she did not recall why Complainant was assigned no new students for the spring 2006 semester. I do not credit her testimony.

42. Eyemaro testified that Cannone's students were all members of the Sandwich cohort who requested him as a supervisor. Of the five students assigned to Hokanson, two were assigned to the same building as described in #34 above. Eyemaro believed another student was in a vocational school and she does not recall the details concerning the other two students. With respect to Fox-Melanson, two students assigned to her were members of the LEAD cohort as described above; a third was a school business administration student who could not find a practicum placement and Fox-Melanson was able to find her a placement. Another student was placed in a private special education school, requiring supervision by a K-12 principal whom Fox-Melanson, through her contacts, was able to recruit to be co-coordinator. Another student was placed in the same district as two of Fox-Melanson's carry-overs from the previous semester who were in the same school district. Eyemaro acknowledged that she could have assigned this student to Complainant and did not recall the district where the student was assigned. There were discrepancies in the numbers of students enrolled according to the two documents (Exs. C-1 and R-6), each purporting to list the numbers of students enrolled in Spring 2006, and with respect to Dr. Eyemaro's testimony as to how many students were assigned to each VL. Her explanation of how assignments were made was vague and confusing; thus, the exact assignment of students and reasons therefore could not be determined.

43. Dr. Frederick Tirrell, age 70, spent 37 years as a teacher, administrator and superintendent in public and private schools. He served as both an adjunct professor and

full-time associate professor at the college. He testified that in 2004 Joanne Newcombe asked him to teach two courses; however, when Eyemaro replaced Newcombe, she did not call him to teach or supervise students. He acknowledged that he had been more involved in teaching than with the supervision of students. Through his other contacts at the college, Tirrell received assignments to supervise between one to three student teacher interns per semester from 2004-2008, depending on enrollment. He never discussed with Eyemaro the fact that he was no longer asked to teach or to supervise students in the ELP. I credit his testimony.

44. Complainant earned the following amounts in the years at issue:

\$5,350.42 in 2000
\$4,507.99 in 2001
\$7,226.10 in 2002
\$15,866.06 in 2003
\$15,287.47 in 2004
\$2,255.14 in 2005
\$1,882.50 in 2006
\$5,814.00 in 2007
\$2,329.25 in 2008
\$7,203.00 in 2009. (Ex. C-3)

45. Complainant testified that the decline in his income in 2005 and 2006 affected his family in that it inhibited his ability to help his grandchildren financially.

46. Complainant testified credibly that the assignment of no students to him in the spring 2006 semester had an even greater effect on him than the reduction in assignment of students in earlier semesters that had caused him insomnia and caused him to wonder why Eyemaro did not want to assign him students after his long, successful career. He was very emotionally upset and very troubled. He spent a lot of time thinking about and discussing the matter, and continued to suffer from insomnia. He testified that he continued to be emotionally upset up to the time of the hearing and testified, "That is why

I'm sitting here today.” I credit his testimony and find that he continues to be distressed by the loss of student assignments.

III. CONCLUSIONS OF LAW

A. Age Discrimination

Complainant alleges that he was subjected to disparate treatment because of his age, with respect to the number of student interns assigned to him in the spring and fall 2005, semesters and the spring 2006 semester. M.G.L. c. 151B, sec. 4(1B) makes it unlawful "[f]or an employer . . . because of the age of any individual . . . to discriminate against such individual . . . in terms, conditions or privileges of employment unless based upon a bona fide occupational qualification." The statute protects persons of age 40 and over. The elements of a prima facie case of discrimination vary depending on the type of discrimination alleged. See Knight v. Avon Products, 435 Mass 413, 420, n.4 (2003). In order to establish a prima facie case of age discrimination in this case, Complainant must demonstrate that he is a member of a protected class who was adequately performing the responsibilities of his position and was assigned fewer student interns while other younger supervisors' student assignments were not reduced. See id. Complainant must show he was denied a condition or privilege of employment granted to someone at least five years younger, or present other evidence that the disparate treatment occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000);

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass.

116-117; Wynn & Wynn v. MCAD, 431 Mass 665, 665 (2000). If Respondent meets this burden, then Complainant must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knigh t v. Avon Products, 438 Mass. 413 420, n. 4 (2003). In other words, Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. If the Complainant presents such circumstantial evidence, the trier of fact may, but is not compelled, to infer discrimination. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Spring 2005 Semester

Complainant is a member of a protected class based on his age. He was 74 years old in January 2005, when he was assigned to supervise two students for the spring 2005 semester, significantly fewer than he was assigned in the past. Sr. Kristin Hokanson, then age 58, was assigned three students; Dr. Charles Elliott, then age 62, was assigned five students; Dr. Jeri Katz, then age 53, and Dr. Carol Young, then age 59, were each assigned one student.¹³ As each of these other supervisors was more than five years younger than Complainant, the facts are sufficient to establish a prima facie case of age discrimination. Knigh t v. Avon Products, supra.

¹³ Katz and Young are not similarly situated to Complainant because they are always assigned special education students and Complainant is never assigned special education students.

Respondents' articulated legitimate, nondiscriminatory reason for assigning fewer students to Complainant in the spring 2005 semester are that Respondent's enrollment decreased significantly from prior semesters and that Charles Elliott, a full-time faculty member, was entitled to priority and was assigned five students in order to maintain the required credit for his full-time position. After the two special education students were assigned to Jeri Katz and Carol Young, there remained only five students, three of whom were assigned to Sr. Hokanson and two who were assigned to Complainant.¹⁴ These are legitimate non-discriminatory reasons sufficient to rebut an inference of age discrimination since the employer's burden of production at stage two is not onerous. See Knigh t v. Avon Products, 435 Mass. 413, 420, n. 4 (2003).¹⁵

I conclude that Complainant has failed to present credible evidence at stage three to prove that Respondent's articulated reason for assigning him fewer students was not the real reason for its action. Based on the foregoing, I conclude that the number of students assigned to Complainant in spring 2005 semester was based on legitimate, non-discriminatory reasons, that is, a sharp decline in enrollment and the assignment of Elliot as a full-time faculty member.¹⁶

Fall 2005 Semester and Spring 2006 Semester

In the fall 2005 semester, enrollment in the ELP was 19 students.

¹⁴ That Hokanson received one more student than Complainant is of no significance, given the small number of students available.

¹⁵ Respondents assert that Complainant has failed to make a prima facie case of age discrimination because all of the comparators are in the protected class, i.e. over forty. While the other VLs were in their 50s and 60s and Respondents clearly valued experience over youth in selecting supervisors, the comparators were nonetheless more than five years younger than Complainant, which is the standard under which a prima facie case is established in Knigh t v. Avon Products, supra.

¹⁶ Eyemaro's failure to inform Complainant of the sharp decline in student enrollment supports Complainant's view of her as a poor communicator and suggests that Eyemaro withheld the information because she resented Complainant's questioning of her authority and her handling of the program.

Complainant was assigned two students, Sr. Hokanson was assigned three students; Peter Cannone was assigned four students and Davida Fox-Melanson was assigned four students.¹⁷ Given that Complainant was assigned the fewest number of students, he has established a prima facie case of age discrimination for the fall semester.

Respondents' articulated reasons for the allocation of assignments and Complainant's low number, was 1) that they were not bound contractually to assign Complainant any set number of students in a given semester, yet they continued to assign him students, 2) that Respondents were changing the nature of the program and developing off campus "cohorts" including a Sandwich program developed in part by Cannone, who was assigned four students from that cohort; and 3) more students were assigned to Fox-Melanson in part because of her mediation skills and her contacts. Eyemaro had no explanation for one of the student assignments to Fox-Melanson.

Complainant must show by a preponderance of evidence that Respondents' articulated reasons were not the real ones but a cover-up for a discriminatory motive. Knight, supra. at 420, n. 4. Complainant was unable to establish that the various reasons Respondent articulated to justify the assignments were pretextual. Respondents sought to expand its program and increase enrollment by the creation of off-campus cohorts and by utilizing VLs who are either active school administrators or recently retired and who therefore have greater contacts in a school district. While Respondents' inability to articulate a reason for each one of its VL assignments is not wholly worthy of credence, this does not compel me to draw an inference of

¹⁷ Carol Young was assigned one special education student and Professor Elliot was assigned four students. As Young supervised only special education students and Elliott was allowed as many students as necessary to fulfill his duties as a full-time faculty member, I conclude that they were not similarly situated to Complainant.

discriminatory motive. Lipchitz, 434 Mass. at 504. Complainant retains the ultimate burden of proving that Respondent's adverse actions were motivated by discriminatory animus. See id.; Abramian, 432 Mass. at 117. While I found that Respondents may not have had an explanation for the assignment of one student to Fox-Melanson, Complainant has not persuaded me that Eyemaro was motivated by discriminatory animus in making these placements. The evidence in the record instead points to Eyemaro's personal animosity toward Complainant and likewise Sr. Hokanson dating back to April 2005, when they questioned her management of the program, prior to any actions giving rise to Complainant's claim of age discrimination. At that time, Complainant and Hokanson met with Eyemaro and questioned the manner in which she was running the program. When Eyemaro's curt responses did not satisfy Complainant, he went over her head and complained to Dean Bradfield about Eyemaro's lack of communication and poor attitude. Consequently, Dean Bradfield had discussions with Eyemaro about her interpersonal skills. I draw the inference that Eyemaro was angered by Complainant's charges that caused her to be counseled by her superior. Hokanson also drew Eyemaro's fire and on one occasion Eyemaro berated her during a phone conversation when Hokanson attempted to discuss a problem with a student. Therefore, I conclude that Eyemaro's assignment of one or two students to Fox-Melanson that she might otherwise have assigned to Complainant, was not motivated by discriminatory animus but by ill feelings generated from his having questioned her management of the program and having complained about her to her superior.

Spring 2006 Semester

After becoming angry about student assignments in the fall 2005, and threatening Eyemaro and Bradfield with an age discrimination complaint, Complainant was assigned no students for the spring 2006 semester and was intentionally excluded from a supervisors' meeting at which students were assigned for the 2006 spring semester. Assignments for that semester were as follows: Elliott-16 students; Katz- 3 students; Cannone-8 students; Fox-Melanson-4 students; and Hokanson-5 students. I conclude that Complainant has established a prima facie case of discrimination, in that similarly situated persons, who were more than five years younger than he, namely, Cannone, Fox-Melanson and Hokanson, were assigned new students for the spring 2006 semester and Complainant was not.

Respondents' expressed legitimate, non-discriminatory reasons for allocation of assignments for the spring semester of 2006 were, with respect to Cannone, that he was assigned four students from the Sandwich cohort at their request. However, as with the previous semester's assignments, Eyemaro was unable to articulate legitimate reasons for all of Fox-Melanson's or Hokanson's assignments and acknowledged that she could have assigned one of Fox-Melanson's students to Complainant. Incredibly, Eyemaro claimed that she could not recall why she did not assign any students to Complainant. Eyemaro did state that she did not want to communicate with Complainant after he threatened to file a discrimination lawsuit.

While Eyemaro failed to adequately explain the reasoning behind her assignments for the spring semester of 2006, I conclude that Complainant has not established Eyemaro's excluding him from a VL meeting and failing to assign him any

students was on account of his age. However, it is clear that Eyemaro's motivation was likely retaliation for Complainant's having threatened to file an age discrimination complaint against the college, as more fully discussed below.

B. Retaliation

Complainant has alleged that Eyemaro failed to assign him any students for the spring 2006 semester in retaliation for having accused her of age discrimination.¹⁸ In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003) In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the

¹⁸ To the extent that Complainant claims retaliation for assignments in previous semesters, such claims must be dismissed as there is no evidence that he ever mentioned age or threatened a claim of age discrimination prior to October 2005, which was after the assignments for fall 2005 were made.

employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." While proximity in time is a factor, "...the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). In an angry confrontation in September 2005, Complainant accused Eyemaro of age discrimination in the distribution of students for the fall semester. In October 2005, Eyemaro held a supervisors' meeting from which she intentionally excluded Complainant and when assigning students for the following semester, whether at this meeting or later, she assigned no students to Complainant and could not explain why students were assigned to other VLs and why she assigned no students to Complainant. I conclude that the credible evidence establishes a causal connection between Complainant's threat of an age discrimination complaint and Eyemaro excluding Complainant from a meeting of supervisors and failing to assign Complainant any students for the spring 2006 semester. Therefore, I conclude that Complainant has established a prima facie case of unlawful retaliation. If the Complainant establishes a prima facie case of retaliation, the burden of production shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the adverse action. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. Eyemaro's testimony that the October meeting was for supervisors in the LEAD

cohort was not credible and contradicted the credible testimony of Sr. Hokanson who attended a meeting of the supervisors where assignments were made for the spring semester. Even if the meeting was for the LEAD cohort only, Eyemaro did not explain why Complainant was excluded from supervising students in the LEAD cohort. Eyemaro testified that she did not recall why she did not assign students to Complainant for the spring 2006 semester. Finally, Eyemaro acknowledged that she did not communicate with Complainant with respect to the meeting because he had threatened a discrimination lawsuit against the college and she did not want to deal with his anger.

Complainant has persuaded me that Respondent's articulated, non-discriminatory reason for not assigning him students is a pretext for unlawful retaliation. Some of the enmity between Complainant and Eyemaro can be traced to their April 2005 meeting that Eyemaro perceived as a challenge to her authority and these feelings likely played some role in Eyemaro's decision not to assign to Complainant students for spring 2006. In addition, the distribution of student assignments was impacted by Eyemaro's expansion of the program in the creation off campus cohorts and utilization of additional supervisors such as Fox-Melanson and Cannone, who as recent retirees maintained contacts with various school administrators. Notwithstanding these circumstances, I conclude that the primary motivation for Eyemaro's excluding Complainant from the fall 2005 VL meeting and not assigning him students was the Complainant's allegations of age discrimination against Eyemaro and his threat to file an age discrimination case. Complainant has persuaded me that but for these charges and his threat to file a lawsuit, he would not have been excluded from the meeting to discuss the assignment of students for the following semester and would have received student assignments for the spring semester.

Therefore I conclude that by these actions, Respondents engaged in unlawful retaliation in violation of M.G.L. ch. 151B§4(4).

C. Individual Liability

Complainant named Benedicta Eyemaro as an individual in his complaint of discrimination. Since Eyemaro is not the employer and thus not covered by G.L. c. 151B s.4 (1), individual liability must be predicated upon alternative sections of the statute. Liability has been imposed against individual Respondents for engaging in unlawful retaliation under G.L. c. 151 B, §4(4) as the statute specifically provides that it shall be unlawful "for any person ... to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five. (emphasis supplied). See Hudson v. Pembroke/ Hanover Elks Lodge, et al. 24 MDLR 19 (2002) (Full Commission found individual liable for retaliation.)

The evidence in this record establishes the requisite intent to discriminate required in order to find Benedicta Eyemaro individually liable for unlawful retaliation. Eyemaro was the decision-maker with respect to assigning students to Complainant and other VLs. Eyemaro retaliated against Complainant for threatening a discrimination suit against Respondents by excluding him from a VL meeting and declining to assign students to him. The evidence firmly established Eyemaro's intention to retaliate against Complainant in violation of c. 151B, §4(4). I conclude that Benedicta Eyemaro is individually liable for unlawful retaliation in this matter.

I therefore conclude that both Respondents are liable for unlawful retaliation, in violation of M.G.L. c. 151B §4(4).

IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Based on Complainant’s credible testimony I am persuaded that he suffered emotional distress as a result of Respondents’ unlawful conduct. Some of Complainant’s emotional distress resulted from his low number of students in 2005. Because I found that discrimination was not the motive in Respondents’ assignment of students until

October 2005, when the spring 2006 students were assigned, I cannot establish the requisite causal link between Complainant's distress for low student assignments in 2005 and any unlawful actions of Respondents.

Complainant testified credibly that the assignment of no students to him in spring 2006 semester had an even greater effect on him than the earlier reduction in assignments. He was very emotionally upset and spent a lot of time thinking and discussing the matter, and continued to suffer from insomnia. He testified credibly that the harm is ongoing and he still feels the effects today and testified at the public hearing, "that is why I'm sitting here today."

Complainant seeks \$10,000.00 in damages for emotional distress. I conclude that Complainant did suffer emotional distress in the fall of 2005 when he was the only VL deliberately excluded from a meeting where students were assigned and when he learned he had been assigned no students for the spring 2006 semester, and that this distress was directly attributable to Eyemaro's retaliatory conduct. I also find that his distress at having suffered retaliation continued up to the time of the hearing. I conclude that Complainant's emotional distress at having been frozen out of the VL program in 2006, is directly attributable to Respondents' unlawful retaliation and find that an award of \$10,000.00 is reasonable and commensurate with the emotional distress he suffered. Therefore, I find he is entitled to an award of emotional distress damages in the amount of \$10,000.00.

B. Lost Wages

Complainant earned \$5350.42 in 2000; \$4507.99 in 2001; \$7226.10 in 2002; \$15,866.06 in 2003; \$15,287.47 in 2004; \$2255.14; in 2005; \$1882.50 in 2006;

\$5814.00 in 2007; \$2329.25 in 2008 and \$7203.00 in 2009. Because of all of the variables involved in the assignment of students, it is impossible to determine how many students Complainant would have likely been assigned in the spring 2006, absent Respondents' unlawful retaliation, therefore I have calculated Complainant's lost wages based on the average of his salary from 2000 to 2009. Since Complainant made more in some years and less in others, taking the average 9 years seems a fair measure of his loss. Subtracting Complainant's actual wages for the year 2006 from the average wages, I conclude that Complainant is entitled to lost wages totaling \$5,432.99 ($\$7,315.49 - \$1,882.50 = \5432.99)

C. Civil Penalty

M.G.L.c.151B§5 states, in part, "if, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice." Having found that Respondents have engaged in unlawful retaliation and, given the evidence that the retaliation was deliberate, I conclude that a civil penalty in the amount of \$5,000.00 is warranted.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondents immediately cease and desist from engaging in unlawful retaliation.
2. Respondents pay to Complainant the sum of \$10,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.
3. Respondents pay to Complainant the sum of \$5,432.99 in damages for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.
4. Respondents pay to the Commonwealth a civil penalty in the amount of \$5,000.00

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 22nd day of February, 2011

JUDITH E. KAPLAN,
Hearing Officer