

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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PROFESSOR LULU SUN AND  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION  
Complainants

Against

Docket No. 05 BEM 00783  
06-BEM-02993

UNIVERSITY OF MASSACHUSETTS,  
DARTMOUTH,

Respondent

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Appearances: Jeffrey Petrucelly, Esq. and Eliza Minsch, Esq. for Complainant Sun  
Geoffrey McCullough, Esq. and Brandon Moss, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 9, 2005, Professor LuLu Sun (“Complainant”) filed a charge with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that she was the victim of discrimination because of gender, race, and/or Chinese ancestry when she applied for promotion to Full Professor effective September 1, 2004. Complainant filed an amended charge of discrimination with the MCAD on October 18, 2005 alleging that she had been denied a course release and a travel grant in retaliation for her refusal to withdraw her application for promotion at the request of Dean Steinman. On October 27, 2006, Complainant filed a second charge incorporating prior allegations and including the

additional claim that her second application for promotion had again been denied by a new white male Dean, the same male Provost, and the same Chancellor.

The MCAD issued a probable cause finding and certified the case for public hearing on August 13, 2009. A public hearing was held on December 6, 7, 8, 10, and 13, 2010 and on January 31, 2011. Counsel submitted a post-hearing briefs on March 28, 2011.

The following individuals testified at the public hearing: Drs. Judy Schaaf, Edwin Thompson, William Hogan, James Griffith, Jean MacCormack, Michael Steinman, Catherine Houser, Louis Esposito, Betty Mitchell, Paul Mitchell, Kenneth Langley, Christina Biron, and Complainant.<sup>1</sup>

To the extent the testimony of the witnesses is not in accord with or irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

### FINDINGS OF FACT

1. Complainant was born in Taiwan in 1954. She is female and of Chinese ancestry. Complainant received a Bachelor of Arts in English Language and Literature from the University of Toronto in 1978, a Master of Arts in Journalism from the University of Western Ontario in 1979, a Master of Arts in English Language and Literature from the University of Michigan in 1984, and a Ph.D in English Education from the University of Michigan in 1989. Joint Exhibit 1.
2. Respondent University of Massachusetts at Dartmouth is one of five campuses

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<sup>1</sup> All of the witnesses have Ph.D degrees and, hence, doctoral titles. The witnesses employed by Respondent will be referred to by the professional titles they held during the period of time relevant to their testimony.

within the University of Massachusetts system. It employs approximately 1,300 individuals.

3. Dr. Jean F. MacCormack was appointed Chancellor of University of Massachusetts, Dartmouth in 2001. She serves as Respondent's Chief Executive Officer and is responsible for all of the school's academic and administrative programs.

4. The Provost is the Chief Academic Officer of the University and reports to the Chancellor. In 2003, Chancellor MacCormack appointed Professor Louis Esposito as Provost. He held the position of Provost until 2006.

5. The Dean of each College within the University reports to the Provost. Between 2001 and 2004, Professor Michael Steinman served as Dean of the College of Arts and Sciences. In 2004, Professor William Hogan was appointed Dean of the College of Arts and Sciences on an interim basis and was thereafter appointed permanent Dean. Dean Hogan was a Professor of Economics prior to becoming Dean.

6. The College of Arts and Sciences contains a Humanities Division which consists of five Departments: English, History, Philosophy, Portuguese, and Foreign Literature and Languages. The Humanities Academic Council ("HAC") is comprised of two tenured elected members from each of the five Departments of the Humanities Division.

7. Departmental faculty select Department Chairpersons. During the 2003-2004 academic year, the English Department Chairperson was Professor Edwin Thompson. He was succeeded by Professor Catherine Houser.

8. The tenured members of the English Department comprise the English

Department Faculty Evaluation Committee (“FEC”). The FEC provides annual reviews of its faculty and provides tenure and promotion reviews for the positions of Associate Professor and Full Professor.

**9.** In September of 1994, Complainant accepted an offer by Respondent for an Assistant Professor position. She was asked to coordinate the English Department’s Master of Arts in Teaching (“MAT”) program which involved, among other responsibilities, the supervision of student teachers in high school settings.

Complainant also directed the First Year English Writing Program from 1995 to 1998. All first year students are required to participate in the Writing Program. Complainant received one course release per semester for directing both programs. She resigned as Director of the First Year English Writing Program in the Fall of 1998 because of the demands of directing two programs. She continued to direct the MAT Program and to receive one course release per semester for this service.

**10.** Three years after she began teaching at the University of Massachusetts, Dartmouth, Complainant applied for and received tenure, effective August of 1997 and a promotion to Associate Professor, effective September of 1997. Joint Exhibit 3; Complainant’s Exhibit 9.

**11.** In 2002, the English Department promulgated “Standards for Evaluating Faculty Activities” (the “2002 Standards”). Complainant’s Exhibit 1. The document listed the following categories as subjects for evaluation: Teaching Effectiveness and Advising, Scholarship and Professional Activities, Activities for University Service, and Activities for Public Service. Id. The 2002 Standards provided an appeals process for faculty members who disagreed with their FEC assessments, were denied

tenure, were denied promotion, or did not receive a contract renewal. Id. at p. 5.

**12.** On September 19, 2003, Complainant applied for promotion to Full Professor. Joint Exhibit 4A. Complainant's original application (or "dossier") was evaluated in accordance with the 2002 Standards. Transcript, Volume IV at p. 164.

**13.** Pursuant to the parties' Collective Bargaining Agreement ("CBA"),<sup>2</sup> faculty seeking promotion in academic year 2003-2004 were evaluated in accordance with the four categories set forth therein and in the 2002 Standards. Joint Exhibit 6, p. 52; Complainant's Exhibit 1. At the time Complainant applied for promotion to Full Professor on September 19, 2003, the English Department did not require that applicants satisfy a specific publication requirement and it did not set forth guidelines for determining their quality or impact. Chancellor MacCormack testified that external reviewers are one source of information about the impact of published work and that another source of information is the "Citation Index." Transcript, Volume VI at pp. 12, 30. According to Chancellor MacCormack, professors typically produce one publication per year after receiving tenure. Id.

**14.** In order for faculty members to be recommended for promotion to Full Professor in 2003-2004, they had to receive a rating of excellent in either teaching or scholarship and no unsatisfactory ratings in any of the four categories. Joint Exhibit 6 at p. 54. A candidate did not have to be evaluated in both university and public service but needed to receive a satisfactory rating in one of the two categories. Id. Candidates were reviewed by six individuals/entities in the following order: 1) the

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<sup>2</sup>The CBA governing Complainant's application for promotion to Full Professor was the July 1, 1998 Agreement between Respondent's Board of Trustees and the American Federation of Teachers, Local 1985, AFL-CIO Faculty Federation. Joint Exhibit 6; Transcript, Volume III at p. 48; Joint Stipulation.

FEC; 2) the Department Chair; 3) the Dean of the College of Arts and Sciences; 4) the HAC; 5) the Provost; and 6) the Chancellor. Joint Exhibit 14. The CBA required that “substantial weight” be given to a candidate’s annual faculty evaluations. Joint Exhibit 6, p. 62.

**15.** Complainant received annual ratings of excellent in all categories from the English Department FEC and the English Department Chairperson from 1997 to 2003 with the exception of one “very good” in Scholarship and Professional Activities and one “very good” in university service. Complainant’s Exhibit 10.

**16.** Complainant’s original application for promotion to Full Professor contained all of her annual faculty evaluations from 1997-2003, information about six national conference presentations, student evaluations from the fall of 1996 to the spring of 2003, three external letters of review (not required for promotion), and four peer-reviewed journal articles. Joint Exhibit 4.

**17.** The student evaluation forms which Complainant included in her 2003 application for promotion were the same forms used by all English Department faculty. Joint Exhibit 4; Transcript, Volume I at pp. 141, 143, and 147; Volume IV at p. 128.

Complainant included student evaluations from the 1996-1997 academic year as well as those from 1997-2003 because the 1996-1997 evaluations had not been included in her 1997 application for promotion to Associate Professor.

**18.** Complainant also included in her application for promotion to Full Professor the four articles which she wrote and published after her promotion to tenured Associate Professor in 1997. They consist of the following: 1) “The Loss of Narrative Innocence: The Development of Narrative Consciousness From Child to Adolescent”

in Narrative Inquiry; 2) “The MLA Job Information List: The Perils of Not Paying Attention” in the Journal of the Midwest Modern Language Association; 3) “Affirming the Need for Continued Dialogue: Refining an Ethic of Students and Student Writing in Composition Studies” in the Journal of Teaching Writing; and 4) “Presenting and Misrepresenting Students: Constructing An Ethic of Representation in Composition Studies” in Writing on the Edge. Complainant also presented eight papers at various meetings. Joint Exhibit 5(D) at p. 2.

**19.** One of the external reviewers who submitted a letter in support of Complainant’s 2003 application for promotion was Dr. Robert Brooke, a well-recognized scholar in the field of composition and writing, with whom Complainant did not have a close personal relationship. Dr. Brooke provided a detailed and “extremely positive endorsement” of Complainant according to Professor Judy Schaaf, Dean of Respondent’s College of Arts and Sciences from 1996-2000. Transcript, Volume I at p. 38. Professor Schaaf testified that because of the detail in Dr. Brooke’s letter, his academic prominence, his lack of a personal relationship with Complainant, and his description of Complainant’s research as “cutting-edge scholarship,” the letter constituted an unusually strong endorsement of Complainant’s candidacy for promotion. Id. at 41. Professor Schaaf interpreted Dr. Brooke’s reference to Complainant’s administrative work as complimentary and distinct from his admiration of Complainant’s scholarly work. Transcript, Volume I at pp. 38, 41.

**20.** The other external reviewers relied on by Complainant were Dr. Laurence Goldstein (Complainant’s dissertation chair) and Dr. Maureen Hourigan (co-author of an article with Complainant). Joint Exhibit 4. According to Professor Schaaf, the

fact that a reviewer has a professional relationship with an applicant does not detract from the external reviewer's impartiality. Transcript, Volume I at p. 37.

**21.** At the initial stage of the promotional review process, the English Department's FEC unanimously rated Complainant as excellent in Teaching Effectiveness and Advising, as excellent in Scholarship and Professional Activities, and as excellent in University Service. Joint Exhibit 5(b). Under Teaching Effectiveness and Advising, the FEC described Complainant as a "dedicated, careful, and enthusiastic teacher and advisor, [who] consistently earns strong praise from her students." Id. It cited student evaluations which described her as "patient, knowledgeable, and enlightening," "enthusiastic," "extremely well informed," "amazing," and "an incredible teacher." It noted that 92% of the students who submitted evaluations for Complainant rated her excellent or very good, and that 72% of the students who submitted evaluations rated her as excellent. Id. The FEC characterized Complainant as "an accomplished scholar who publishes in prestigious journals" and "produces groundbreaking influential work." Id. In University Service, the FEC noted that Complainant made an "exemplary" contribution as Director of the First Year English Program and as Coordinator of the MAT Program. Id. Based on the foregoing the FEC recommended that Complainant receive promotion to Full Professor.

**22.** At stage two of the promotional review process, English Department Chairperson Edwin Thompson evaluated Complainant as excellent in all three categories of promotion and recommended her for promotion to Full Professor in a memo dated October 27, 2003. Joint Exhibit 5 (C). He noted that Complainant's student ratings were very high in comparison to other faculty members, that "many of her students

regarded her as one of the finest teachers they have ever had,” and that the relatively low number of students who submitted evaluations was due to Complainant receiving course releases for serving as First Year English Coordinator from 1995-1998, for serving as the English Department’s MAT Program Coordinator from 1995 to 2003, and for teaching high-level courses with a maximum enrollment of fifteen students. Joint Exhibit 5 (C). Professor Thompson characterized Complainant as an “extremely conscientious advisor” to English majors, students in the MAT Program, and students in the Professional Writing Program. Id. He described Complainant’s scholarly productivity as “outstanding” and he noted that Complainant was accorded respect by her peers, as evidenced by her 1996 selection to review The Little, Brown Compact Handbook and her selection as a presenter at numerous major national scholarly conferences. Id.

**23.** Between 1997 and 2003, Professor Thompson recommended eight to ten members of the English Department for promotion. Id. He acknowledged in his public hearing testimony that he had never recommended against the promotion of an English Department Associate Professor to Full Professor while he served as Department Chairperson. Transcript, Volume II at p. 125. Professor Thompson testified that his unanimous support of applicants resulted from the fact that faculty did not apply for promotion until their dossiers supported a positive outcome.

**24.** Following the promotion recommendation from the English Department Chairperson, Complainant’s application went to the Dean of the College of Arts and Sciences, Michael Steinman. Dean Steinman issued a memo stating that he did not concur with the recommendations of the FEC and English Department Chairperson

that Complainant be promoted to Full Professor. Joint Exhibit 5 (D). Dean Steinman excluded Complainant's student evaluations for the 1996-1997 academic year because they preceded her promotion to tenured Associate Professor in 1997 even though they had not been examined as part of her prior promotional materials. Transcript, Volume I at p. 170. Dean Steinman asserted that, in the absence of 1996-1997 evaluations, only 66% of reviewing students rated Complainant as excellent in teaching/advising and claimed that the 66% figure was an "aggregated rating" which "obscured some semester-based results in which majorities of students rated her 'very good' or there was a 'split vote.'" Joint Exhibit 5(D). Dean Steinman cited as "[a]nother problem" the fact that student evaluations of Complainant's teaching were based on responses to a summary question rather than to narrow questions about specific aspects of teaching, and he characterized the number of students completing evaluations each semester as "very small." *Id.* On the basis of the Dean's concerns, he rated Complainant as very good in Teaching Effectiveness and Advising. Dean Steinman also reduced the excellent rating in Scholarship and Professional Activities given to Complainant by the FEC and English Department Chairperson Thompson to a rating of satisfactory on the basis that Complainant's publications were "modest" in number and the MLA job list article, which Dean Steinman did not read, "doesn't seem to have a scholarly subject." *Id.*; Transcript, Volume IV at pp. 20-22. Dean Steinman asserted that there was a lack of evidence that Complainant's scholarship influenced colleagues based on the fact that one of her external letters of support was written by her dissertation committee chairperson, a second was written by a co-author, and a third contained the "unhelpful" statement that the "primary case for

promotion must be the administrative work she has done.” Id.

**25.** Dean Steinman met with Complainant on November 3, 2003 to discuss her application for promotion. According to Complainant’s credible testimony, Dean Steinman stated that it would be an “embarrassment” to send her dossier forward to the Provost, asked Complainant to withdraw her application, suggested that she take it with her when she left the meeting, and patted her on the back and said, “it’s okay Lulu.” Transcript, Volume I at p. 166. Dean Steinman claims that he did not meet with Complainant in November of 2003, but his testimony is not credible.

Complainant’s testimony about the meeting is corroborated by her November 9, 2003 memo which references a November 3, 2003 meeting with Dean Steinman (Joint Exhibit 5(E)), by her October 18, 2005 Amended Charge of Discrimination in which she references the meeting, and by the credible testimony of Professors Leclair, Schaaf, and Thompson. Transcript, Volume I at pp. 50-52; Volume II at pp. 110-111, and Volume V at pp. 153-155. Complainant’s testimony about the November 3, 2003 meeting is also corroborated by an email which Dean Steinman sent to Complainant four days after the meeting in which he states the following: “Lulu – I haven’t heard from you and thought I’d better get in touch. Have you decided what you want to do with your promotion file? We have it in the office. Thanks. Mike.” Complainant’s Exhibit 11.

**26.** Rather than withdraw her application, Complainant requested Dean Steinman to forward her dossier to the next level of review.

**27.** Complainant drafted a November 9, 2003 memo to the HAC in which she responded to Dean Steinman’s October 29, 2003 memorandum. Joint Exhibits 5 (E).

Complainant characterized the Dean's evaluation of her teaching, advising and scholarship as "selective at best and discriminatory and arbitrary at worst." Id.

**28.** During the ensuing months, Dean Steinman took away Complainant's yearly course releases (one per semester) for her service in the MAT program. Transcript, Volume I at p. 191. As a result, Complainant resigned as coordinator of the English Department's program. Id.

**29.** Shortly after Complainant requested that Dean Steinman forward her dossier to the next level of review and drafted her rebuttal to his recommendation against promotion, Complainant applied for a \$500.00 travel grant in connection with presenting a paper at the Conference on College Composition and Communication (the "4Cs" Conference) in San Antonio, Texas to be held on March 24-27, 2004.

Complainant's Exhibit 12; Transcript, Volume I at p. 184. Complainant's application contained a seven-sentence paragraph describing the paper she proposed to present at the conference. Complainant's Exhibit 12. The travel grant was denied by Provost Esposito on November 15, 2003 on the basis that the description of the paper "lacks sufficient detail to justify the awarding of a travel grant at this time." The description of the paper which Complainant gave to the Provost was the same description she presented to the 4Cs Conference upon which she was invited to speak. Complainant Exhibit 13. Complainant had never before been turned down for a travel grant and testified that she was "stunned." Transcript, Volume I at pp. 181, 185. A travel grant submitted by Professor Schaaf during the fall of 2003 was granted even though Professor Schaaf described her presentation in only a "few sentences." Transcript I at pp. 69, 186.

**30.** In a memorandum dated December 2, 2003 to Provost Louis Esposito, the HAC evaluated Complainant as excellent in all applicable categories and gave her a “unanimous” and “enthusiastic” recommendation for promotion to Full Professor. Joint Exhibit 5(F). The HAC noted that Complainant had submitted her entire record of student evaluations rather than selected samples as did most professors and that her student evaluations were “overwhelmingly positive.” Id. The HAC characterized Complainant’s scholarship as “exemplary” and noted that she submitted external letters of support from eminent scholars who characterized Complainant’s research as “cutting edge.” Id. The HAC commented on Complainant’s “visible” and “critical” work in the First Year English program and in the MAT program as well as her “essential” work in the re-accreditation of two university programs. Id. History Professor Betty Mitchell, a HAC member in 2003-2004, testified that Complainant’s promotion was a “slam/dunk ... we thought that she was a strong candidate for promotion.” Transcript, Volume V, pp. 10-11.

**31.** Shortly after issuing its recommendation for Complainant’s promotion on December 2, 2003, the HAC forwarded Complainant’s application materials to Provost Esposito. Transcript, Volume IV, pp. 178-179. On May 11, 2004, Complainant received Provost Esposito’s recommendation to the Chancellor regarding her promotion to Full Professor. Joint Exhibit 5(G). Provost Esposito concurred with Dean Steinman’s ratings and declined to recommend Complainant for promotion to Full Professor. Id. The Provost deemed Complainant’s 127 student evaluations to be an insufficient basis for a rating of excellent in Teaching and Advising and asserted that Complainant’s dossier lacked evidence about the quality

of her advising and mentoring in the MAT program. Id.; Transcript, Volume IV at pp. 195-198. The Provost characterized Complainant's publications as "modest" and insufficient in quality to support a rating of excellent or very good; expressed concern that two of Complainant's outside evaluators were individuals with whom Complainant had a "close professional and/or personal relationship;" suggested that several of her papers were not subjected to rigorous review because they were solicited for publication; and claimed that there was no evidence of the prestige of the journals in which she published articles. Id.

**32.** Provost Esposito's review of Complainant's application for promotion took place during his first year as Provost. Provost Esposito testified that he lacked expertise in the fields of English Composition and Rhetoric and English Education because his background is in economics. Transcript IV at p. 216.

**33.** Provost Esposito's deposition testimony states that he sought information in May of 2004 from two former colleagues regarding the quality of the journals in which Complainant published articles, but credible public hearing testimony establishes that he did not actually seek their opinions until June of 2005, after he had already negatively evaluated Complainant's application. Transcript IV at p. 217; Joint Exhibit 10. Public hearing testimony indicates that Provost Esposito obtained the information from his former colleagues in order to prepare for an investigative conference at the MCAD. Transcript, Volume IV at pp. 218-220.

**34.** The parties' CBA required that promotional decisions be made by the Chancellor before May 15<sup>th</sup> of an academic year and gave professors a rebuttal period of seven days at each level of review. Joint Exhibit 6, p. 64; Transcript, Volume IV, pp. 180-

181. Complainant did not receive the Provost's recommendation until May 11, 2004.

**35.** On May 12, 2004, less than one day after Complainant received the Provost's recommendation, Chancellor Jean MacCormack sent Complainant a letter denying her promotion to Full Professor. Joint Exhibit 5(H). The Chancellor's letter was drafted by Provost Esposito. Transcript, Volume IV at p. 190. The one-day period between the Provost's decision and the Chancellor's decision failed to give Complainant the contractually-required seven days to respond to the Provost prior to the May 15th deadline. Joint Exhibit 6, p. 64.

**36.** On or about May 17, 2004, Complainant sent the Chancellor a detailed memorandum challenging the denial of promotion and her failure to receive a seven-day period in which to file a response. Joint Exhibit 5 (I).

**37.** On or about June 17, 2004, Chancellor MacCormack sent a letter to Complainant acknowledging the failure to afford Complainant the required seven days to respond to the Provost's evaluation. The Chancellor rescinded her decision and permitted Complainant to submit additional material within ten days. Joint Exhibit 5(J). Complainant responded in a memo dated June 25, 2004 which highlighted material previously submitted in support of her application for promotion. Joint Exhibit 5 (K).

**38.** On August 18, 2004, Chancellor MacCormack once again denied Complainant a promotion to Full Professor. Joint Exhibit 5(L). Chancellor MacCormack's letter focused on a purported lack of evidence concerning the quality of Complainant's advising and mentoring of students in the English MAT Program, a purported lack of evidence concerning the reputation and prestige of the journals in which Complainant published articles, and a purported lack of "impartial" external reviewers. Id. The

letter was drafted by Provost Esposito, although signed by the Chancellor.

Transcript, Volume III at p. 176; Volume V at p. 60.

**39.** Complainant's promotion dossier contains the following comments on the quality of her advising: In her 1997 annual evaluation, Complainant is described as a "conscientious and effective" advisor. Joint Exhibit 5(A). In her 2000 annual evaluation, the Chairperson of the English Department describes Complainant as "one of the most conscientious and helpful advisors in the department ..." Id. In an October 27, 2003 memo to Dean Steinman recommending Complainant's promotion to Full Professor, Chairperson of the English Department Edwin Thompson described Complainant as an "extremely conscientious advisor." Joint Exhibit 5(C).

**40.** Chancellor MacCormack testified that she went to the University library to personally research the quality of the publications in which Complainant published articles. Transcript, Volume III at p. 188. The Chancellor testified on direct examination that Complainant's articles appeared in refereed-journals that were considered in the English field to be "very good journals" and recognized as "major journals in the English field" although on cross-examination she characterized only one of the journals as "very prestigious" or "top-tier" and asserted that the others were "good" or "second tier or third tier" but not "tier-one journals." Id. at 191-192; Volume VI at p. 28, 49. In Chancellor MacCormack's deposition dated November 3, 2010, she testified that at least two of the journals were top-tier. Transcript, Volume VI at 49.

**41.** On September 21, 2004, Provost Esposito issued a memo entitled "Suggested Guidelines for Major Faculty Personnel Reviews." Respondent's Exhibit 2. Provost

Esposito called for a detailed analysis by FECs and by Department Chairpersons of the following measures of teaching: course syllabi, student evaluations (individually and in comparison with those of other faculty), teaching methods, the impact of courses, examinations, writing assignments, grading, and advising.

**42.** Complainant grieved the denial of promotion. On December 16, 2004, the Faculty Federation Grievance Committee (“Grievance Committee”) found that the Dean and the Provost had violated the 1998 CBA in regard to evaluating Complainant as very good rather than excellent in “Teaching Effectiveness and Advising” and that the Chancellor had violated the 1998 CBA by failing to give Complainant a period of seven days in which to respond to the recommendation of the Provost. Joint Exhibit 8.<sup>3</sup> The Grievance Committee recommended that the promotional process start fresh at the FEC level. Id.

**43.** On January 18, 2005, Chancellor MacCormack rejected the Grievance Committee’s findings that the decisions of Dean Steinman and Provost Esposito lacked supporting evidence, accepted the finding that Complainant was not given seven days to respond to the recommendation of the Provost, and agreed to the recommendation of the Grievance Committee that the promotion process start again based on the standards in effect in 2003 for promotion to Full Professor. Joint Exhibit 9. Because Chancellor MacCormack agreed with the recommendation that the promotion process start again based on standards in place in 2003, Respondent did not seek to apply standards subsequently enacted in September of 2004 to

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<sup>3</sup> Complainant subsequently filed a second grievance pertaining to her activities as English Department coordinator for the MAT program, the quality of the journals in which she published articles, her involvement in grant writing, and her relationship with her external reviewers. Respondent’s Exhibit 1. On February 17, 2005, a grievance committee denied the grievance, but the parties nevertheless proceeded to re-do the entire promotional process. Id.; Transcript, Volume VI at pp. 22-24.

Complainant's application."<sup>4</sup>

**44.** On February 7, 2005, Complainant re-applied for promotion to Full Professor by submitting a twelve-page letter in support of her second application. Joint Exhibit 4.

**45.** On April 3, 2005, a new FEC re-evaluated Complainant's application and considered additional materials consisting of letters of recommendation by the University's MAT Director Gerard Koot and by Professor Christin Biron and copies of three websites that cited Complainant's published work. Transcript I at pp. 142-143; Joint Exhibit 4. Professor Koot wrote that Complainant "did an excellent job advising all MAT students in English." Joint Exhibit 4. Professor Biron, in an unsolicited letter, noted that Complainant provided "extended, individualized written feedback to students" which "all faculty should seek to emulate" and that her university service included writing up and editing documents for committee work. Joint Exhibit 4. Professor Biron described Complainant as a "professional of the highest quality." Id.

**46.** The FEC again rated Complainant as excellent in all three performance categories and recommended promotion to Full Professor. Joint Exhibit 5(M). Although the FEC applied the English Department's 2002 standards of evaluation to its reconsideration of the Complainant's candidacy for promotion, it concluded that Complainant met, and even exceeded, the more stringent 2004 English Department

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<sup>4</sup>The 2004 standards, when enacted, were entitled "English Department Faculty Evaluation Standards for Tenure and Promotion to Associate Professor." As standards for promotion to Associate Professor, they would not have been applicable to Complainant's application for promotion to Full Professor even if the second review of her dossier was not made retroactive to 2003. Complainant's Exhibit 2; Transcript, Volume IV at pp 162-164. In 2006, the English Department deleted the reference to "Associate Professor" and thereafter made the standards applicable to promotion to Full Professor. Transcript, Volume IV at pp. 162-166.

standards. Transcript, Volume I at p. 73. The FEC defended the English Department 2002 performance standards as “the most thorough and comprehensive standards document of any department in the university, a document used over a number of years to guide many promotions of faculty and which was widely praised by numerous deans and provosts.” Joint Exhibit 5(M).

**47.** On April 12, 2005, English Department Chairperson Catherine Houser reviewed Complainant’s second application dossier and the FEC recommendation.

Chairperson Houser rated Complainant as excellent in all three performance categories and recommended that she be promoted to Full Professor. Joint Exhibit 5(N). Professor Houser testified that Complainant satisfied the English Department’s 2004 standards for tenure and promotion even though she acknowledged that the standards did not apply to applications for promotion to Full Professor until 2006. Transcript, Volume IV at pp. 143-144 and 170. Professor Houser testified that there was no legitimate reason to give less weight to positive evaluations from students in small classes than to positive evaluations from students in large classes. *Id.* at 172-173.

**48.** Complainant’s second application package next went to then-Dean William Hogan. At the time that Dean Hogan received the application in or around the end of April of 2005, he was aware of Complainant’s pending MCAD complaint, having heard about it in September or October of 2004 from Provost Esposito. Transcript, Volume II at p. 159.

**49.** An MCAD investigative conference took place in June of 2005. According to Complainant’s credible testimony, Provost Esposito stated during the conference that

her scholarship was “garbage.” Transcript, Volume II at p. 13. When asked at the public hearing whether he made the alleged statement at the investigative conference, Provost Esposito responded, “Absolutely not.” Transcript, Volume IV at p. 221. I do not find his denial to be credible.<sup>5</sup>

**50.** Dean Hogan drafted an eight-page memorandum dated November 7, 2005 in which he recommended against promoting Complainant to Full Professor. Joint Exhibit 5(O). He evaluated Complainant’s teaching by creating a chart from which he concluded that only 35.6% of the students “enrolled” in Complainant’s courses from the Fall of 1997 to the Spring of 2003 evaluated Complainant’s teaching as excellent. Dean Hogan based his calculation on a definition of “enrolled” which included students who were not present on the day of evaluation, students who did not fill out evaluations during the 2002 and 2003 spring semesters because Complainant had exercised her contractual right not to be evaluated during those semesters, and students who had dropped courses taught by Complainant. Transcript, Volumes I at pp. 45 & 180; II at pp. 18-19; III at pp. 16, 19, & 53; V at p. 16. Dean Hogan also excluded from consideration students who filled out evaluations in her 1996-1997 classes. Dean Hogan testified that, in his opinion, the failure of “enrolled” students to fill out evaluations reflected negatively on Complainant, notwithstanding the fact that they did not know when evaluations were going to be handed out. He testified, as well, that the low numbers of students in Complainant’s classes reflected negatively on Complainant despite the fact that she taught upper-level and graduate

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<sup>5</sup> In making this finding I accord no weight to Provost Esposito’s purported deposition testimony at p. 200 line 15 in which he allegedly responds to a question about using the term “garbage” in relation to Complainant’s research as follows: “That, I would have said that.” Transcript, Volume IV at p. 221. It is more likely that Provost Esposito responded by saying, “I would **not** have said that” [emphasis supplied] and that his answer was mistakenly recorded by the court reporter.

courses. Transcript, Volume VI at p. 117. Dean Hogan did not use the same statistical methodology in evaluating other applicants for Full Professor.

**51.** Dean Hogan downgraded Complainant's advising based, in part, on a misconception that she was removed as the English Department's MAT coordinator when, in fact, Complainant had resigned from the position when denied a course release by former Dean Steinman. Transcript Volume I at p. 191.

**52.** In the area of "Scholarship and Professional Activities," Dean Hogan downgraded Complainant from excellent to very good. Dean Hogan's review did not address the three web-based citations to Complainant's publications which she included in her second application for promotion. Dean Hogan faulted Complainant for using external reviewers who sat on her dissertation committee and co-authored articles even though Respondent had no policy prohibiting such a relationship between reviewers and promotional candidates. Dean Hogan mischaracterized Dr. Brooke's evaluation as a "mixed" recommendation. Transcript, Volume III at p. 124.

**53.** Dean Hogan downgraded Complainant's "Activities for University Service" to very good, in part, because he excluded her administrative and website activities in the MAT program from this category and did not address Complainant's role as Director of the First Year Writing Program in this category. Transcript Volume III at pp. 90-91.

**54.** Complainant arranged for Dr. Paul Anderson to serve as a fourth outside evaluator. Complainant had no personal or professional relationship with Dr. Anderson who serves as Director of the Howe Center for Writing Excellence at Miami University in Ohio, is an authority in the field of Composition and Rhetoric,

and has chaired committees for the 4Cs Conference, a major professional organization in composition and rhetoric. Complainant Exhibit 46. Dr. Anderson submitted a letter of external review of Complainant's scholarly work for her second application for promotion. In the letter, he evaluated Complainant's scholarship as excellent. Joint Exhibit 12; Transcript I at p. 84.

**55.** On December 5, 2005, Complainant prepared an eleven-page rebuttal to Dean Hogan's evaluation which she submitted to the HAC. Joint Exhibit 5(P). In her rebuttal, Complainant cites passages in her second application in which she describes her participation as a committee member who co-authored a proposal resulting in an award of an \$83,000.00 grant and as a member of another grant committee which secured funding for the inclusion of a multicultural dimension in the first-year English program. Joint Exhibit 5 (P) at pp. 8-9.

**56.** The HAC met on December 7, 2005. On March 1, 2006, the HAC "emphatically and without reservation" rated Complainant as excellent in all three categories of review and recommended her for promotion to Full Professor. Joint Exhibit 5(Q). The HAC criticized Dean Hogan for penalizing Complainant's contractual right not to be evaluated in the Spring semesters of 2002 and 2003 and for his use of "problematic ... statistics." Id. The HAC disputed Dean Hogan's rating of very good in Service, citing Complainant's writing of the English Department's section of the report for re-accreditation of the Education Department's undergraduate programs, her creation of pathway courses for English majors pursuing teacher certification, and her design of a website for the English Department's MAT program in Secondary English. The HAC considered Complainant's MAT service activities to be examples

of university service rather than examples of teaching/advising as did Dean Hogan.

**57.** Professor Judy Schaaf, a member of the HAC during the 2005-2006 academic year and former Dean of the College of Arts and Sciences (1996-2000), testified that Dean Hogan's analysis and chart were "unprecedented." Transcript, Volume I at pp. 81-82. Professor Betty Mitchell, another HAC member in 2005-2006 and Full Professor of History at the University for more than twenty years, testified<sup>6</sup> that she was "shocked" by the way that Dean Hogan manipulated numbers and data to negatively impact Complainant. Transcript, Volume V at pp. 15-16.

**58.** On March 21, 2006, Provost Esposito issued his evaluation of Complainant's second application for promotion to Full Professor. Joint Exhibit 5(R). At the time, he was aware that Complainant had filed a claim of discrimination with the MCAD. Transcript, Volume IV at pp. 218-219. Provost Esposito changed his original ratings, which had mirrored Dean Steinman's recommendations, to ratings which reflected those of Dean Hogan. Transcript, Volume IV, pp. 230-231. Without reading Complainant's publications or her student evaluations, Provost Esposito disagreed with the HAC evaluation of Complainant as Excellent in "Scholarship and Professional Activities" and in "Teaching and Advising." Transcript, Volume IV at p. 183. He criticized Complainant for opting not to be evaluated during both semesters of two academic years even though it was her right under the CBA. He criticized the English Department's FEC and Chairperson for failing to provide comparisons between Complainant's course work and that of her colleagues, even though such comparisons were inconsistent with English Department practice. Joint

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<sup>6</sup> Professor Mitchell was permitted to testify from Northampton, Massachusetts via SKYPE technology.

Exhibit 5(R); Transcript, Volume IV, p. 195. In his memorandum recommending against Complainant's promotion, Provost Esposito failed to mention new letters from Professors Biron and Koot which addressed Complainant's MAT advising and university service, a new letter from Dr. Anderson, and the letter from Dr. Brooke. Transcript Volume IV at p. 206; Volume V at pp. 94-95.

**59.** On April 3, 2006, Complainant provided the Chancellor with a rebuttal to the Esposito memorandum. Joint Exhibit 5(S).

**60.** On or around April 24, 2006, Chancellor MacCormack denied Complainant's second application for promotion to Full Professor without addressing Complainant's rebuttal or the additional materials in her dossier. Joint Exhibit 5(T). The Chancellor testified at the public hearing that the analysis employed by Dean Hogan to evaluate Complainant's student evaluations -- dividing the total number of students enrolled by the number of excellent ratings -- had not been used previously by the English Department to evaluate any other candidates for promotion to Full Professor.

Transcript Volume III at pp. 232-233. Chancellor MacCormack testified that she did not remember looking at the external review letter from Dr. Anderson. Id. at 234-235. At the time of her decision denying promotion to Complainant, the Chancellor was aware of the MCAD charges filed by Complainant against the University.

**61.** Chancellor MacCormack relied on Provost Esposito to communicate the denial of promotion to Complainant. Joint Exhibit 5(T); Transcript Volume VI at pp. 34-36. He did so in a one-sentence letter dated April 24, 2006 which he did not personally sign. Chancellor MacCormack admitted during her testimony that this was an "insensitive" method by which to inform Complainant of the denial of her application

for promotion. Transcript, Volume VI at p. 36.

**62.** Dr. Paul Anderson testified at the public hearing<sup>7</sup> that Complainant’s scholarly articles are “notable for their range and quality” and make “substantive and enduring contributions” to the field of Composition and Rhetoric. Dr. Anderson supported his evaluation of Complainant’s scholarship by citing the fact that the 4-Cs Conference includes Complainant’s “Affirming the Need” article in a conference bibliography. He described Complainant’s article on “The Loss of Narrative Innocence” as a scholarly work which “extends and deepens the understanding of the unfolding of human consciousness” and provides “new insights into the growth of writing abilities.” Dr. Anderson noted that the “The Loss of Narrative Innocence” article represents a “very rare” and “singular achievement” insofar as it is cited in journals devoted to bioscience, psychology, and educational psychology, and disability. He described Complainant’s “MLA Job Information List” article as a “trenchant inquiry” which examines the “future of English departments, the shape of undergraduate and graduate programs in English, the way the discipline of English defines itself, and the nature of the humanities in an intellectual environment increasingly infused with technology.” Dr. Anderson described the journals in which Complainant published articles between 1997 and 2003 as “top-tier” journals with low acceptance rates, highly respected editorial boards, and articles by prominent scholars. Complainant’s Exhibit 46; Transcript, Volume I at p.154; Volume V at pp. 32-33, 37-38, 43; Transcript V at pp. 24-27, 34, 44-46. Dr. Anderson noted that Complainant’s article in Narrative Inquiry has been cited in many diverse journals and that her MLS Job

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<sup>7</sup> Dr. Anderson testified from Ohio via SKYPE technology.

Information List article is an “[a]bsolutely a scholarly article.” Transcript V at pp. 38-41. According to Dr. Anderson, Complainant’s record of citation is noteworthy because the majority of articles published in scholarly literature are never cited. Complainant’s Exhibit 46.<sup>8</sup> Dr. Anderson asserted that Complainant “without question” met the standard for scholarship at the University of Massachusetts, Dartmouth based on her four journal articles and her presentations at scholarly conferences. Id.

**63.** Professor Schaaf testified that Complainant’s MLA Job Information List article was scholarly and was published in a top-tier, highly-selective journal. Transcript, Volume I at pp. 85-86.

#### Comparators

**64.** Evidence was presented that around the same time that Complainant unsuccessfully sought promotion to Full Professor, the following candidates applied for and received promotion to Full Professor in the Humanities Division of the College of Arts and Sciences: Professor William Nelles (2003-2004); Professor James Brobrick (2002-2003); Professor Frank Sousa (2004-2005); Professor Everett Hoagland (2002-2003) and Professor Linsun Cheng (2005-2006).

**65.** In the Fall of 2003, Associate Professor Nelles, like Complainant, applied for promotion to Full Professor in the English Department. He was described by then-English Department Chairperson Thompson and then-FEC/HAC member Schaaf as “equivalent” to Complainant as a candidate for promotion. Transcript, Volume I at p. 92-93; II at p. 114. Professor Nelles received a split evaluation (very good/excellent)

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<sup>8</sup> I accepted Complainant Exhibit 46 on a de bene basis at the public hearing, but I have decided to accord it substantive weight in view of the fact that it corroborates Dr. Anderson’s public hearing testimony.

as a teacher and advisor from Dean Steinman, notwithstanding Dean Steinman's criticism of Complainant for receiving a split evaluation from one of her students. Transcript, Volume IV at pp. 36-37; Joint Exhibits 4 & 5(D); Complainant's Exhibit 37. Professor Nelles submitted documents from the 1995-1998 period prior to his promotion to tenured Associate Professor in 1999<sup>9</sup> (external letters of review, publications, and student evaluations); he submitted external letters from his dissertation chair and from a colleague with whom he had a close personal relationship; he listed himself as the sole author of an article "Improving First-Year Engineering Education" on which he appeared as the fifth author out of seven; and he failed to submit student evaluations from all academic semesters. Transcript, Volume IV at pp. 47-49, 66-68, 209-210; Complainant's Exhibits 24, 37 & 37A. Dean Steinman recommended Professor Nelles for promotion to Full Professor in the English Department on the same day that he recommended against Complainant's promotion to Full Professor. Complainant's Exhibit 37. Provost Esposito concurred in Dean Steinman's recommendation. Transcript, Volume II at pp. 56-57; III at p. 120; IV at pp. 206-209; V at pp. 68-70, 86; Joint Exhibits 5(G), (R), and 6 at p. 62. Provost Esposito did not criticize Professor Nelles for declining to be evaluated by students during all the semesters he taught. Complainant's Exhibit 37A and 54. Provost Esposito did not criticize the English Department FEC and the English Department Chairperson for failing to compare Professor Nelles's course evaluations with those of his colleagues who taught courses of similar size and level. Complainant's Exhibit 37A. Provost Esposito did not express concerns about the

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<sup>9</sup> The CBA specifies that the relevant period of review is from the receipt of tenure to application for Full Professor. Joint Exhibit 6, p. 62; Transcript, Volume II at pp. 56-57.

impartiality of Professor Nelles's external reviewers or the reputation and prestige of the journals in which Professor Nelles published his work.

**66.** Professor Hoagland applied for promotion to Full Professor in the English Department in September of 2002. He was described by then-English Department Chairperson Thompson and FEC/HAC member Schaaf as "equivalent" to Complainant as a candidate for promotion. Transcript, Volume I at pp. 98-99; II at p. 119. Dean Steinman rated Associate Professor Hoagland as excellent in teaching even though Professor Hoagland chose not to be evaluated for thirteen semesters between 1984 and 2002 and had received several unsatisfactory or satisfactory (i.e., below very good) annual evaluations by the English Department. Complainant's Exhibits 5, 19, 20, and 38.

**67.** Professor Bobrick applied for promotion to Full Professor in the English Department in September of 2001, approximately two years prior to Complainant. Professor Bobrick submitted student evaluations from nine out of eighteen semesters between 1992 and 2001. Complainant's Exhibit 21. In recommending the promotion of Associate Professor Bobrick, Dean Steinman did not criticize his student evaluation forms even though they were identical to the forms submitted by Complainant, i.e., one summary question with narrative responses. Complainant's Exhibits 5(D) & 39; Transcript, Volume I, pp. 171-172; Volume IV at pp. 60-61. During the two years prior to his application for promotion (academic years 1999-2000 and 2000-2001), Professor Bobrick failed to receive excellent ratings from either the FEC or the English Department Chairperson in "Teaching Effectiveness and Advising" or in "University Service." Complainant's Exhibit 22. According to

English Department Chairperson Thompson and FEC/HAC member Schaaf, there was no legitimate reason why Professor Bobrick was promoted and Complainant was not. Transcript, Volume I at pp. 97-99; II at pp. 114-115.

**68.** Dean Steinman admitted that in regard to Professors Bobrick and Hoagland, he “sort of grandfathered their performances a little bit” because they had been around for “some time” and were “close to retirement.” Transcript, Volume IV at pp. 59-60, 62-63, & 79. Dean Steinman described grandfathering as applying “different, earlier, less rigorous ways” of evaluating candidates than the standards he was hired to apply. Transcript, Volume IV at p. 59. Dean Steinman described Professor Hoagland as “about to retire” and Professor Bobrick as “nearing retirement” at the time they applied for promotion to Full Professor in the early 2000s even though Professor Bobrick was still on the faculty as of 2010. Transcript, Volume IV at p. 62, 80, 112 and Volume VI at p. 126.

**69.** Professor Frank Sousa was an Associate Professor in the Portuguese Department who applied for promotion to Full Professor in September of 2003. Complainant’s Exhibit 29. From the Fall of 1997 to the Spring of 2002, he obtained student evaluations from approximately one hundred students, of whom 35% rated him as an excellent in teaching. Transcript, Volume VI at p. 128. Dean Steinman, based on an “eyeballing” of evaluations, expressed concern that they were “wholly disaggregated”<sup>10</sup> and “pretty much impossible” to analyze but nevertheless accepted the FEC and Chairperson’s claim that they were “somewhere between” very good and

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<sup>10</sup> Dean Steinman’s concern about the “disaggregation” of Professor Sousa’s evaluations contradicts his concern about the “aggregation” of Complainant’s evaluations. Unlike his concern relative to Complainant, Dean Steinman’s concern about Professor Sousa’s evaluations did not adversely affect Professor Sousa’s ratings. Contrast Joint Exhibit 5 (D) with Complainant’s Exhibit 29.

excellent and endorsed a rating of excellent in teaching. Complainant's Exhibit 29. Dean Steinman rated Professor Sousa as excellent in "Scholarship and Professional Activities" based primarily on his service as Director for the Center for Portuguese Studies and Culture, even though Professor Sousa only published one article in a peer-reviewed journal during the relevant time period, failed to provide any external reviewers, and was described by the Chairperson of the Portuguese Department as lacking substantial scholarly research.

**70.** Professor Linsun Cheng, an Asian American male with the rank of Associate Professor in the History Department, applied for promotion to Full Professor during academic year 2004-2005. Complainant's Exhibit 51. Dean Hogan's analysis of Professor Cheng's application, unlike his analysis of Complainant's application, did not focus on the percentage of all enrolled students who rated Professor Cheng in various categories of teaching effectiveness but only on those students who submitted evaluations.. Complainant's Exhibit 51; Transcript, Volume III 111-112. Dean Hogan combined Professor Cheng's ratings in the categories of excellent and very good from 2000 through 2004 to yield a composite score of 90% of those responding to the questionnaire and Dean Hogan noted, without disapproval, that one of Professor Cheng's external evaluators was his doctoral dissertation supervisor and a co-author. Complainant's Exhibit 51.

**71.** In addition to recommending against Complainant's promotion to Full Professor, Dean Hogan also recommended against the promotion of the only other female Asian American Associate Professor in the College of Arts and Sciences, Professor Saeja Kim. Transcript, Volume VI, p. 131. Professor Kim is in the Mathematics

Department which is not in the Humanities Division. Transcript III at pp. 142-143.

### Emotional Distress

**72.** Complainant testified that as a result of Respondent's actions, she became extremely upset and distraught. Since the Fall of 2003, she has suffered from an inability to sleep, nightmares, weight loss, and a rash. Transcript Volume II at pp. 83-85. She testified that Dean Hogan's letter about her candidacy for promotion made her extremely upset – a reaction that continues to the present – has made her unable to sleep, and has given her nightmares. She has not sought medical assistance for her physical symptoms because the underlying cause of her suffering has not abated. Transcript II at pp. 83-85. Complainant has not published any new articles from 2006 to the present. Transcript, Volume II at p. 144.

**73.** Complainant's father, David Sun, testified that his daughter has been very sad since 2005, is often unable to sleep, telephones him crying and has developed a rash on her hands and legs. Transcript, Volume V at pp. 163-165.

**74.** Former English Department Chairperson and officemate Catherine Houser testified that Complainant has become nervous, distracted, and stressed since the start of the promotional process in 2003. Transcript, Volume IV at p. 159. Professor Betty Mitchell, who has known Complainant for almost twenty years, testified that since Complainant was denied promotion to Full Professor in 2004, she has become paler, thinner, and very upset. Professor Mitchell characterized the denial of promotion as a terrible blow to Complainant's self-esteem and described Complainant as "a wreck." Transcript, Volume V at pp. 21-22. Professor Christina Biron, who has known Complainant for over ten years, testified that since applying for promotion to

Full Professor, Complainant has exhibited a high degree of tension, pain, and anxiety, has had a wan and pale appearance, has suffered from a rash on her arms and hands, has engaged in episodes of crying, and has suffered from an inability to eat and sleep whereas prior to applying for promotion she was “bright, full of humor ...vital, cheerful.” Transcript, Volume VI at pp. 99-100. Professor Susan Leclair, who has known Complainant as a close colleague for over ten years, testified that Complainant has become “timid” and “insecure” about her place in the classroom since her unsuccessful application for promotion. Transcript, Volume V at pp. 153-154. Professor Leclair testified that Complainant became “terribly upset” as a result of meeting with Dean Steinman about her application for promotion, was “shaking, and had “difficulty talking about it....” Id.

#### Back Pay Losses

**75.** During the 2004-2005 academic year, Complainant’s annual salary was \$66,938.82. If she had been promoted to Full Professor, effective September 1, 2004, her annual salary would have been \$88, 813.00. Transcript, Volume II at pp. 86-88; Complainant’s Exhibit 30. Joint Stipulation No. 5. Associate and Full Professors received annual salary increases of 2% and annual merit pay increases of 1% for academic years 2005-2006, 2006-2007, and 2007-2008 but not for academic year 2008-2009. Transcript, Volume II at pp. 82-92; Volume III at pp. 56-57; Complainant’s Exhibit 30. In total, Complainant sustained lost income in the amount of \$137,467.59 for the period from September 1, 2004 through December 31, 2010. Complainant estimates that she will sustain an additional lost income in the amount of \$10,665.97 for the period of January of 2010 through the end of the Spring 2011

semester which will result in a total loss of back pay in the amount of \$148,133.56 plus \$6,369.74 representing the 4.3% contribution to her retirement account that Respondent would have provided on the lost income (\$148,133.56 X .043).

Joint Stipulation No. 6.

### III. CONCLUSIONS OF LAW

#### 1. Disparate Treatment

In order to prevail on a charge of discrimination in employment based on race, color, national origin, sex, or ancestry under M.G.L. c. 151B, s. 4(1), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Where, as here, direct evidence is absent, Complainant may establish a prima facie case of employment discrimination by showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of her protected class(es). See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts).

There is no dispute that Complainant is a member of several protected classes. She is female and was born in Taiwan of Chinese race/ancestry. At all relevant times, she was the only tenured member of the Humanities Division who was a female professor of Chinese race/ancestry and is one of only two tenured members of the College of Arts and Sciences who are female professors of Asian-American race/ancestry. Neither Complainant nor Professor Saeja Kim, the other female/Asian-American professor within

the College of Arts and Sciences, was recommended for promotion to Full Professor.

Complainant's gender and race/ancestry claims merit consideration as a single, combined category in recognition of the fact that the experiences Complainant endured might not have occurred had she been a member of only one protected group rather than two at once, i.e, a Caucasian female faculty member or a male member of the faculty of Asian race/ancestry. This case rises or falls on a combination of protected classes, each building on the other. See e.g., Moore v. Boston Fire Department, 22 MDLR 294 (2000) (gender-based harassment of a female firefighter held to be compounded by the fact that she was also black and a self-avowed lesbian).

Respondent concedes that Complainant performed her job in a satisfactory manner. Indeed, the school's administration characterizes Complainant's performance as excellent in some respects, very good in others, and in all instances satisfactory. Nonetheless, the administration maintains that Complainant's performance was not sufficiently outstanding to merit promotion to Full Professor in 2004 and in 2006. Thus, the sole issue in dispute regarding Complainant's disparate treatment claim is whether Complainant was treated differently from similarly-situated, qualified person(s) not of her protected class. I conclude that Complainant was subjected to disparate treatment by an administration which indulged in every presumption against her candidacy while, at the same time, extending every benefit of the doubt to similarly-situated comparators who did not belong to Complainant's protected groups.

Complainant's attempt to climb to the highest rung of the academic ladder was stymied by decisions which held her to different and higher standards than those applied to her counterparts who were not Asian females. For instance, the administration faulted

Complainant for submitting student evaluations from the 1996-1997 academic year because they preceded her application for promotion to Full Professor but permitted Professor William Nelles to submit pre-application material in support of his candidacy for Full Professor. The administration criticized Complainant for failing to include student evaluations from each and every semester she taught after 1996-1997, notwithstanding a provision in the parties' Collective Bargaining Agreement permitting the omission of specified semesters and despite comparators such as Professors Hoagland and Bobrick experiencing no negative consequences for similar omissions. The administration took issue with Complainant for relying on external reviewers with whom she had academic relationships but did not find fault with others for doing the same and did not prohibit or discourage such a practice either orally or in writing.

Dean Steinman commented negatively on Complainant receiving one "split" rating out of 127 student evaluations despite his own use of a split evaluation in reviewing Professor Nelles. Complainant was criticized for failing to be more forthcoming about her role in several grant-writing activities but no such criticism was leveled at Professor Nelles for presenting himself as the sole author of a publication on which he was the fifth author out of seven. Complainant's course evaluations were deemed to lack context, i.e., comparisons to the evaluations of colleagues in similar circumstances, yet no such concern was expressed about Professor Nelles's course evaluations which were identical in format. Dean Steinman rigorously reviewed the dossier of Complainant but admittedly applied less rigorous standards to the dossiers of Professors Bobrick and Hoagland under the guise of ad hoc "grandfathering."

In contrast to the concerns expressed by the administration about the limited

number of students who took Complainant's courses and the even smaller number who submitted course evaluations on her behalf, the administration granted tenure to Professor Frank Sousa on the basis of only 100 student evaluations, a mere 35% of which rated him as excellent in teaching. Dean Steinman "eyeballed" Professor Sousa's student evaluations, accepted the FEC and Chairperson's claim that they were "somewhere between" very good to excellent, and endorsed a rating of excellent in teaching. No such eyeballing, reliance, or endorsement was extended to Complainant who was, instead, the subject of Dean Steinman's unprecedented concerns about the limited number of students submitting evaluations on her behalf, the breadth of the evaluation question posed to her students (even though it was the same question used by every professor in the English Department), and the quality of a publication which he did not bother to read.

Dean Steinman's concerns were endorsed in all respects by Provost Esposito. In agreeing with Dean Steinman, the Provost criticized: 1) the number of Complainant's student evaluations although they exceeded the number submitted by at least one comparator, 2) a purported lack evidence about the quality of her advising despite numerous compliments about her advising in her dossier, 3) the "modesty" of her publications despite glowing descriptions of the articles by experts in her field, 4) the reliability of her outside evaluators despite their academic prominence, and 5) the purported lack of prestige of the journals in which she published, despite strong evidence to the contrary.

Dean Hogan, too, limited credit for Complainant's teaching expertise by treating her excellent evaluations as a percentage of all students "enrolled" in her course offerings from 1997-2003. Such a methodology, never before or after applied to another candidate,

had the effect of diluting the statistical impact of her highest evaluations. Dean Hogan's statistical analysis was accompanied by his mischaracterizing the reason Complainant left the post of English Department MAT coordinator, his failure to consider Complainant's administrative and website activities as examples of university service, his failure to credit Complainant for her service as Director of the First Year Writing Program, his failure to properly credit Complainant's re-accreditation efforts and website activities, and his misconstruing (as did Dean Steinman and Provost Esposito) Dr. Brooke's enthusiastic letter supporting Complainant's candidacy for promotion as a "mixed" recommendation.

In regard to Dr. Brooke's letter, the administration converted an introductory compliment about Complainant's prodigious university service into an implicit criticism of her scholarship. Dr. Brooke's letter begins with a nod to Complainant's administrative efforts in developing and administrating the First Year English curriculum and the MAT in English program, to wit: "I can see from Professor Sun's vita that the primary case for her promotion must be the administrative work she has done at Massachusetts, Dartmouth ...." Both Dean Steinman and Dean Hogan interpreted this comment as denigrating the quality and/or importance of Complainant's publications despite the fact that Dr. Brooke goes on to state that that he "can speak to the excellence and clarity of Professor Sun's published writing about ethics," describes her work as "an important contribution;" describes one of her articles as "much cited;" notes that the special issue of *Writing on the Edge* in which one of her articles appeared sold out soon after its appearance; and states that her work is "of quality and is important to our field's ongoing discussion." Joint Exhibit 4.

Following Dean Hogan's rejection of Complainant's application for promotion, Provost Esposito once again rejected Complainant's bid to become a Full Professor. Provost Esposito altered his original ratings, which mirrored Dean Steinman's, to ratings reflecting those of Dean Hogan. Without reading Complainant's publications or her student evaluations, Provost Esposito disagreed with the HAC's endorsement of Complainant's teaching and research, criticized the English Department's FEC and Chairperson for not comparing Complainant's course work to that of colleagues (although such comparisons would have deviated from English Department practice), criticized Complainant for exercising her contractual right not to be evaluated during each and every semester, and failed to address significant, new faculty letters from Professors Biron and Koot or external letters from Drs. Anderson and Brooke. During the same period in which the Provost second-guessed the analysis of the FEC, the English Department Chairperson, and the HAC concerning Complainant's application for promotion, he accepted at face value the analysis of those entities regarding Professor Nelles's application for promotion.

There are, to be sure, some categories where other candidates were stronger. For instance, Professor Linsen Chen's publications exceeded those of Complainant and Professor Frank Souza's school service was superior. However, Respondent denied Complainant similar credit for her strengths, such as a rating of excellence in teaching from 72% of the students who evaluated her from 1996 to 2003, consistently excellent annual faculty evaluations, and numerous descriptions of Complainant as an excellent student advisor. The administration explained away weaknesses in the dossiers of her comparators, i.e., the lack of publications by Professor Souza and poor teaching

evaluations given to Professor Hoagland but focused disproportionate concern on Complainant's alleged weaknesses. The administration made much of the relatively low number of students who submitted evaluations of Complainant's teaching and hypothesized that students in upper-level courses should be eager reviewers, but failed to note that the low numbers Complainant's student evaluators could also be explained by the fact that Complainant received course releases as coordinator of the First Year English Program and of the English Department's MAT Program and that she taught, at the University's behest, high-level courses with limited maximum enrollments. In short, the evidence establishes that Complainant failed to receive the same consideration as her fellow applicants.

In addition to comparative evidence failing to support Respondent's position, the testimony of Dean Steinman, Dean Hogan, Provost Esposito, and Chancellor MacCormack fails to buttress Respondent's claim that Complainant received a full and fair review of her application for promotion. Dean Steinman denied that he met with Complainant in November of 2003, called her application an "embarrassment," asked her to withdraw it, patted her on the back, and said, "it's okay Lulu," but I conclude that these events did occur as described by Complainant. Provost Esposito denied calling Complainant's scholarship "garbage" at the MCAD conference, but the evidence indicates that this, too, occurred. The Provost claimed at deposition that he made inquiries to colleagues outside the University about the quality of the journals in which Complainant published articles prior to recommending against Complainant's promotion in 2004, but the public hearing evidence establishes that he did not make such inquiries until June of 2005. Based on the corrected sequence established at the public hearing, it

appears that the Provost, an economist by training, took steps in 2004 to thwart Complainant's career advancement in the absence of relevant information.

When it was Chancellor MacCormack's turn to make a final determination on Complainant's application for promotion in 2004, she did so less than one day after the Provost's negative evaluation. This time frame, along with the fact that the Provost drafted her letter, suggests that the Chancellor's denial was a rubber stamp of the earlier, flawed determinations by the administration. The Chancellor acknowledged that Dean Hogan's statistical methodology for evaluating Complainant's student evaluations was not used to evaluate any other candidate for promotion to Full Professor. Chancellor MacCormack made much of the fact that she personally went to the library to research the quality of the journals in which Complainant published articles, but her testimony vacillated about whether she considered the journals to be "major, very prestigious, and top-tier;" "very good;" or only "good, second-tier, or third-tier."

Each of the aforementioned factors raises a degree of concern about the consideration of Complainant's candidacy. Together, they present a substantial body of evidence supporting a conclusion that the deck was stacked against Complainant in her bid to become a Full Professor. Chancellor MacCormack notes, in the University's defense, that she has made efforts to increase diversity in academic positions but her efforts, if they took place, appear to have focused on entry and lower-level positions, not that of Full Professor. The Chancellor's equation of such efforts with Complainant's goal of becoming the first Asian female to join an elite circle of Full Professors at the highest rung of the professional ladder underscores Respondent's dismissive attitude towards Complainant's candidacy. Complainant sought the authority, prestige, and compensation

due her achievements, not entry level status.

## 2. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, “motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

To prove a prima facie case for retaliation, Complainant must demonstrate that she: (1) engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000).

Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if she “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 n.11 (1996), *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). The fact that Respondent knew of a discrimination claim and thereafter took some adverse action against the Complainant does not, by itself, establish causation, but it may be a

significant factor in establishing a causal relationship. “Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing or threatening to file, a discrimination complaint.” Pardo v. General Hospital Corp., 446 Mass. 1, 21 (2006) *quoting* Mesnick v. General Electric Co., 950 F.2d 816, 828 (1st Cir. 1991).

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id. Even if the trier of fact finds that the reason for the adverse employment action is untrue, the fact finder is not required to find discrimination in the absence of the requisite intent. See id.; Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

The events which set the stage for Complainant’s retaliation claim took place at a meeting between Dean Steinman and Complainant on November 3, 2003 at which they

discussed her application for promotion. According to Complainant's credible testimony, Dean Steinman stated that it would be an "embarrassment" to send her dossier forward to the Provost, asked Complainant to withdraw her application, suggested that she take it with her when she left the meeting, and patted her on the back and said, "it's okay Lulu." Dean Steinman denies that he met with Complainant in November of 2003, but his testimony is not credible.

Following her refusal to withdraw her application, Complainant engaged in protected activity by drafting a memo to the HAC in which she responded to the Dean's evaluation of her candidacy for promotion and asserted that the Dean's evaluation of her teaching, advising and scholarship was "selective at best and discriminatory and arbitrary at worst." Additional protected activity consisted of the Complainant filing a series of discrimination charges with the MCAD beginning in March of 2005. Adverse consequences followed during the ensuing months such as Dean Steinman taking away Complainant's yearly course releases (one per semester) for her service in the MAT program, Provost Esposito denying her a \$500.00 travel grant to attend a "4Cs" Conference, and the administration denying her application for promotion.

The administration denies a nexus between Complainant's protected activity and the subsequent adverse activity, but the credible evidence in the record indicates that the protected activity was responsible for the negative consequences which followed. It is no coincidence that after Complainant refused to accede to Dean Steinman's persistent "suggestions" to withdraw her application for promotion and called his actions discriminatory, he eliminated the course releases Complainant had been granted for years in her role as Coordinator of the English Department's MAT program. It is similarly

suspect that after Complainant engaged in protected activity, she was turned down for a travel grant for the first time whereas Professor Schaaf received a travel grant in response to a travel grant application containing a similar degree of generality. Finally, it cannot be ignored that the administration applied a host of different, more rigorous standards to Complainant's application for promotion after learning that she had filed formal charges with the MCAD. This evidence provides a strong evidentiary basis for concluding that there was a nexus between Complainant's protected activity and the adverse activity which followed.

### 3. Lost Wages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Insofar as lost wages are concerned, Complainant provided credible evidence that during the 2004-2005 academic year, her annual salary was \$66,938.82. If she had been promoted to Full Professor, effective September 1, 2004, her annual salary would have been \$88,813.00. Associate and Full Professors received annual salary increases of 2% and annual merit pay increases of 1% for academic years 2005-2006, 2006-2007, and 2007-2008. In total, Complainant sustained lost income in the amount of \$137,467.59 for the period from September 1, 2004 through December 31, 2010. Complainant estimates that she will sustain an additional lost income in the amount of \$10,665.97 for the period

of January of 2010 through the end of the Spring 2011 semester which will result in a total loss of back pay in the amount of \$148,133.56. To that figure, an additional amount of \$6,369.74 must be added, which represents the 4.3% contribution to her retirement account that Respondent would have provided on the lost income ( $\$148,133.56 \times .043$ ). Accordingly, the total amount of lost wages is \$154,503.30.

#### 4. Affirmative Relief

Pursuant to G.L.c.151B, sec. 5, the Commission has the authority to issue orders for affirmative relief, including the upgrading of employees. I conclude that the findings of fact, set forth herein, merit such action in this case. Accordingly, Complainant shall be awarded the status of Full Professor retroactive to date on which her initial application for such promotion was denied.

#### 5. Emotional Distress Damages

Complainant's entitlement to an award of monetary damages for emotional distress does not need to be based on expert testimony; it can be based solely on her testimony as to the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

Complainant testified that as a result of Respondent's actions, she became

extremely upset and distraught. Since the Fall of 2003, she has suffered from an inability to sleep, nightmares, weight loss, and a rash. She testified credibly that Dean Hogan's letter about her candidacy for promotion made her extremely upset – a reaction that continues to the present – and has resulted in her sleep difficulties. Complainant has not sought medical assistance because she believes that such assistance would be fruitless because the underlying cause of her suffering has not abated. Complainant testified that she has not published any new articles from 2006 to the present. Complainant's father, David Sun, corroborated Complainant's testimony by describing his daughter as "very sad" since 2005, often unable to sleep, and displaying a rash on her hands and legs. He testified that Complainant telephones him crying.

Former English Department Chairperson and officemate Catherine Houser testified that Complainant has become nervous, distracted, and stressed since the start of the promotional process in 2003. Professor Betty Mitchell, who has known Complainant for almost twenty years, testified that since Complainant was denied promotion to Full Professor in 2004, she has become paler, thinner, and very upset. Professor Mitchell characterized the denial of promotion as a terrible blow to Complainant's self-esteem and described Complainant as "a wreck." Professor Christina Biron, who has known Complainant for over ten years, testified that since applying for promotion to Full Professor, Complainant has exhibited a high degree of tension, pain, and anxiety, has had a wan and pale appearance, has suffered from a rash on her arms and hands, has engaged in episodes of crying, and has suffered from an inability to eat and sleep. Professor Biron contrasted Complainant's current appearance with her appearance prior to applying for promotion when she was "bright, full of humor ... vital, cheerful." Professor Susan

Leclair, who has known Complainant as a close colleague for over ten years, testified that Complainant has become “timid” and “insecure” about her place in the classroom since her unsuccessful application for promotion. Professor Leclair testified that Complainant became “terribly upset” as a result of meeting with Dean Steinman about her application for promotion, was “shaking, and had “difficulty talking about it...”

The vivacity, confidence, and vigor Complainant exhibited prior to the events at issue are hard to square with the fragile and wan woman who presented herself for public hearing. It appears that the Respondent’s discriminatory acts undermined the self-confidence and verve of a woman described by students as one of the finest teachers they had at UMass Dartmouth and by fellow academics as performing “cutting-edge” research. By her own admission, Complainant has engaged in little academic research since being denied promotion.

In light of the foregoing I award Complainant \$200,000.00 in emotional distress damages.

#### 6. Civil Penalty

Pursuant to G.L. c. 151B, section 5, the Commission may, in addition to any other action which it takes under the section, assess a civil penalty against the Respondent in an amount not to exceed ten thousand dollars if the Respondent has not been “adjudged” to have committed any prior discriminatory practice.<sup>11</sup> There is evidence that Respondent

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<sup>11</sup> The relevant language provides as follows: 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;

(b) in an amount not to exceed \$25,000 if the respondent has-been adjudged to have committed one other discriminatory practice during the 5-year period ending on the date of the filing of the complaint...

has been charged with prior discriminatory practices and that, in at least one instance, the parties entered into a Conciliation Agreement regarding the substance of the charges following a determination of probable cause. However, the record does not contain evidence that Respondent has been “adjudged” to have committed a prior discriminatory practice following an evidentiary proceeding.

On the basis of Respondent’s egregious conduct as set forth herein, I exercise the discretion inherent in Chapter 151B, section 5 to assess a civil penalty against Respondent in the amount of \$10,000.00. See Comm. v. Amcan Enterprises, 47 Mass. App. Ct. 330, 338 (1999) *citing* Comm. v. Fall River Motor Sales, 409 Mass. 302, 311 (1991).

7. Training

Respondent is directed to conduct an eight-hour training session, within ninety (90) days of the Commission’s final decision with mandatory attendance by all members of its human resource staff, the Dean of the College of Arts and Sciences, the Provost, and the Chancellor. Subjects to be covered in the training shall include all aspects of employment discrimination law. The training will be conducted by the MCAD or a graduate of the MCAD’s “Train the Trainer” course. Respondent must submit a draft training agenda to the MCAD in advance of the training and include notice of the scheduled training date and time. A Commission representative shall be permitted to observe the training if requested. Following the training, Respondent is directed to submit to the Commission the names of attendees.

#### IV. ORDER

This decision represents the final order of the Hearing Officer. Respondent is hereby ORDERED to:

- (1). Cease and desist from the discriminatory practices set forth herein.
- (2). Award Complainant the status of Full Professor retroactive to the date on which her application for promotion to said position was initially denied.
- (3). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$154,503.30 in lost wages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (4). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$200,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (5) Pay the Commonwealth of Massachusetts, within sixty (60) days of receipt of this decision, a civil penalty in the amount of \$10,000.00. Payment shall be forwarded to the Clerk of the Commission.
- (6) Conduct training in accordance with the provisions set forth in Subpart 6 of the Conclusions of Law.

The parties shall notify the Clerk of the Commission as soon as payment of lost wage and emotional distress damages have been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 1st day of June, 2011.

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Betty E. Waxman, Esq.  
Hearing Officer

