COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of: BOARD OF HIGHER EDUCATION/SALEM STATE UNIVERSITY and ASSOCIATION OF PROFESSIONAL ADMINISTRATORS/MTA/NEA

Case Number: SUP-16-5246
Date Issued: September 6, 2018

Hearing Officer:
James Sunkenberg, Esq.

Appearances:
Paul J. Hodnett, Esq. Representing the Board of Higher Education
Mark A. Hickernell, Esq. Representing the Association of Professional Administrators

HEARING OFFICER'S DECISION

SUMMARY

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

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

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

**STIPULATIONS OF FACT**

1. The Employer is a public employer within the meaning of Section 1 of the Law.

2. The APA is an employee organization within the meaning of Section 1 of the Law.

3. The APA is the exclusive bargaining representative for all regular full-time and regular part-time employees holding bargaining unit positions as set forth in Appendix A to the parties' Collective Bargaining Agreement (CBA).

4. At all relevant times, Angelique Torres Kim (Kim) was Associate Director of Employer Relations in the Employer's Career Services Department and a member of the bargaining unit described in Stipulation 3.

**FINDINGS OF FACT**

**General Background**

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

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

\(^2\) Neither Neely nor Reed testified at the hearing.
Performance Rating of Above Standard. In the written component of the 2014 Evaluation, Hubacheck described Kim as “an incredible addition to the Career Services Team,” and “an asset to the Career Services and the University.”

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

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

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

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

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

4 “LRC” stands for: Lead Generation, Relationship Fostering, and Communication.
the LRC Advisors website that she believed Kim had written in Kim’s capacity as Associate Director of Employer Relations. Accordingly, Hubacheck reached out to Human Resources for guidance, and Human Resources forwarded the issue to John D. Keenan (Keenan), then the University’s General Counsel and Vice President for Administration.

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

Cease and Desist Letter

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

Although Kim denied that any conflict existed, she acknowledged on cross-examination that she had listed LRC Advisors on her Premium LinkedIn account when she stated that her co-workers “might have seen it on my LinkedIn profile.” Also, the record contains no evidence that Kim ever denied that her private website contained blog posts that she had written in her capacity as a University employee.
By letter to Kim dated September 15, 2015, Keenan wrote:

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

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

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

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

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

After receiving this letter, Kim scheduled a meeting with Keenan to discuss the conflict of interest issue, and on September 23, 2015, Kim met with Keenan. By email to Hubachek dated September 23, 2015, Keenan wrote:

Just wanted to let you know that I had a very positive and productive meeting today with Angelique. I told her that I did appreciate her coming in to discuss my letter and to get an understanding of the potential issues raised by her outside
employment. I am comfortable that she does understand the need to keep separate her day job here at SSU with what she does on her own time.

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

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

St. Jean's Credit Union

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

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

I also do not credit Kim's testimony that Keenan thanked her for not bringing the Union to the meeting. In a case in which Kim extensively documented what she perceived to be inappropriate remarks, this allegation appears nowhere in the evidentiary record before her testimony at the hearing, over twenty-two months after the alleged statement. Not only did she not record it, but she also did not report it to the Union.
St. Jean's Credit Union (St. Jean's) operates on the North Shore of Massachusetts and, for at least the past five years, has been both a donor to the University and a recruiter of its graduates. By email dated September 21, 2015, Debora Lee Surface (Surface), a University alumna and the Marketing Manager of St. Jean's, agreed to participate at the University's Majors/Minors Fair on October 13, 2015. By email to Kim dated October 14, 2015, Surface expressed her pleasure in participating in this Majors/Minors Fair, and asked Kim if they could meet to discuss further building the partnership between St. Jean's and the University.

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

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

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

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

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

October 28 Associate Director Meeting

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

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

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*8 The Career Fair occurs in the first week of March, and is an opportunity for students seeking internships and/or employment to connect with over 130 companies that attend the event.
managed. Kim told Neely not to speak to Flores, but instead to speak to Kim.\(^9\) Hubacheck then told both of them that they were one team, and that there needed to be communication regarding the employers involved in the “GoPro” course. Hubacheck, the Director of Career Services, did not consider it improper for Neely to speak to Flores about the GoPro course.

This incident increased tension in the office between Kim and Neely.\(^{10}\) After this meeting, but before the next Associate Director Meeting, Hubacheck separately told both Kim and Neely to have a professional conversation and manage any conflict that existed between them.

**November 4, 2015 Associate Director Meeting**

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

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

\(^{10}\) Hubacheck also testified about another incident, on an unidentified date, in which Neely asked Kim “for assistance with a faculty member on a specific utilization of the database system” and Kim responded “that she would not assist the faculty member.”
had a conflict of interest.\textsuperscript{11} Hubacheck said that they were not going to discuss the
conflict of interest, and that they were going to move on to the items on the agenda.
After speaking with Neely about the first agenda item, Hubacheck sought feedback from
Kim, but Kim said that she was too distracted to continue the meeting. The meeting
then ended.
After the meeting, Hubacheck spoke privately with Kim. Hubacheck told Kim that
if they were going to discuss trust within the office, then the conflict of interest issue
would come up because there was some mistrust within the office.
Later that day, Kim entered Hubacheck's office and submitted a letter of
resignation to Hubacheck. Hubacheck contacted Human Resources, and was advised
to send Kim to Human Resources, which Hubacheck did. After speaking with Human
Resources, Kim returned to Career Services and asked Hubacheck to rescind her
resignation. Hubacheck allowed Kim to rescind her resignation. Hubacheck indicated
that Kim's "actions" and "behavior" concerned Hubacheck, and then asked Kim to go for
coffee later that afternoon to discuss the ongoing issues that Kim was experiencing.
They went for coffee later that afternoon and during their conversation Kim
requested mediation with Neely to improve relations in Career Services. Hubacheck
told Kim that she would look into the possibility of mediation. During this conversation,
Kim also told Hubacheck that Kim had been keeping a log (Bullying Log) of co-worker

\textsuperscript{11}Kim testified that Neely stated: "You have a personal business and that's a conflict of
interest and people are talking about it."
incidents within the office.\textsuperscript{12} Hubacheck was concerned that Kim had not previously brought this to Hubacheck’s attention.\textsuperscript{13}

Kim Proposes Mediation Conditions

Sometime the following week, Kim gave to Hubacheck a letter, dated November 9, 2015, with the heading “Proposed Mediation Conditions.” Kim wrote:\textsuperscript{14}

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

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

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

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

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

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

\textsuperscript{13}Hubacheck testified: “I did not find that to be unprofessional. What I found concerning was the log of incidents that happened between Ms. Kim and other people that wasn’t brought to my attention until that point.”

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

\textsuperscript{15}CSO refers to on-line software that Career Services used to post jobs for students.
Janet Neely is not to discuss the proceedings with anyone on the Salem State campus and shall keep the information confidential.

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

Hubacheck told Kim that these proposed mediation conditions were not feasible.\(^{16}\)

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

**November 13, 2015 Meeting with Mark Quigley**

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

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\(^{16}\) Hubacheck testified, “Because the idea that two individuals that lead distinct areas in the office would not meet or communicate other than via email would not allow for the team to fully function and to meet our goals.”

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

\(^{18}\) Quigley did not remember ever seeing the Bullying Letter, and he further testified that the University does not have a “per se workplace bullying policy.” Hubacheck testified that she had no knowledge of Kim ever filing a workplace bullying complaint at any point during Kim’s employment.
Kim’s issues to be interpersonal.\textsuperscript{19} They decided that the next step would be to meet with Hubachek and a representative of the Union.

**Bullying Letter**

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

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

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

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

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

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

\textsuperscript{19} Quigley testified that Kim used a lot of “buzz words, about feeling safe and secure in the workplace and bullying in the workplace but didn’t provide concrete examples to me from an HR perspective, but we talked through issues that were happening in the department.” Quigley gave an example: “She mentioned one incident with Ms. Neely that she drummed her fingers on the front desk I believe she said it was, I can’t remember exactly, but I believe that was the case and there was another case where she felt that Ms. Neely was hovering over her.”
opportunities for professional and personal growth that have been provided to me by Salem State University.

Bullying Log

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

1) **Date/Time:** Tuesday, February 24th, 2015. **Person:** Janet Neely. **Comment:** Janet Neely demonstrated inappropriate behavior and was not civil regarding feedback to me which I addressed with her the next day where she preceded [sic] to make comments on how I dressed and that she felt that I was condescending. **Action:** reported to Lauren. **Bullying Behavior:** Abusive conduct/insults

2) **Date/Time:** Thursday, September 3rd, 11am. **Person:** Lauren Hubacheck. **Comment:** "This would be a lot easier if you weren't good at your job" when confronting me regarding conflict of interest. **Action:** Logged as inappropriate behavior, not reported. **Bullying Behavior:** Intimidation/Threat

3) **Date/Time:** Thursday, September 17\textsuperscript{th}, after staff meeting. **Person:** Janet Neely. **Comment:** We can invite Knack for a demo, we can share best practices, and then charge them for it. **Action:** Reported to Lauren Hubacheck on Tuesday, September 22\textsuperscript{nd} at 12 pm and John Keenan on Wednesday, September 23\textsuperscript{rd}, at 9 am. **Bullying Behavior:** Intimidation.\textsuperscript{21}

4) **Date/Time:** Tuesday, September 22\textsuperscript{nd}, 9 am. **Person:** Lauren Hubacheck. **Comment:** I would rather go to your wedding than to the Meet the Firms Night event. **Action:** Reported to Lauren Hubacheck on Tuesday, September 22\textsuperscript{nd} at 12pm and John Keenan on Wednesday, September 23, at 9 am. **Bullying Behavior:** Intimidation

5) **Date/Time:** Tuesday, September 22\textsuperscript{nd}, 12 pm. **Person:** Lauren Hubacheck. **Comment:** "What did you expect? You posted your private business on your LinkedIn profile." When I requested that people in the office stop making inappropriate comments regarding the conflict of interest case and

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

\textsuperscript{21} "Knack" was career placement software for students that the University considered purchasing. Kim testified that she reported this alleged incident to Keenan.
approached her concerning her inappropriate behavior. **Action:** Logged as inappropriate behavior, not reported. **Bullying Behavior:** Intimidation.

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

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

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

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

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

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

**Kim Refuses to Attend November 18, 2015 Associate Director Meeting**

The day prior to a November 18, 2015 Associate Director Meeting, Hubachek sent an invitation to Kim regarding the meeting, and Kim declined the request.
Hubacheck responded that Kim's attendance was expected. Kim then requested that the meeting not occur until Kim could obtain Union representation, and Hubacheck did not respond to this request.\textsuperscript{22} On November 18, 2015, Kim did not attend the meeting and left the office during the meeting.\textsuperscript{23} Hubacheck reported Kim's refusal to attend the meeting to Quigley and James Stoll (Stoll), Hubacheck's direct supervisor and the Assistant Vice President and Dean of Students.

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

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

November 30, 2015 Meeting

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

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

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

\textsuperscript{24} Pelletier testified that around this time period Hubacheck reached out to him to inquire whether she needed Union representation related to the issues within Career Services.
begin taking the minutes. They also agreed that moving forward there would be no more communication, by anyone, regarding the conflict of interest issue.\textsuperscript{25}

**Kim Refuses December 7, 2015 Meeting Request with Hubacheck**

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

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

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

Similarly, Quigley testified that Kim originally “wanted some sort of communication back to Ms. Hubacheck’s team about it, that it was a non-issue, it was over.” According to Quigley, after some discussion they agreed “that we would not have further communications. Ms. Hubacheck had already spoken to Ms. Neely about it and said it was not to be discussed further, so that matter, as far as I was concerned, was put to bed.” Neither Pelletier nor Hubacheck nor Quigley testified to any discussion or agreement related to emotional intelligence training.
Hubacheck did not respond to Kim’s request for representation, and Kim did not attend the meeting.\textsuperscript{26}

Kim Attempts to Separate Employer Relations from Career Services

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

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

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

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

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

In or around late January or early February 2016, Hubacheck learned from James that Kim had requested "coaching" to mediate between Kim and Hubacheck. Hubacheck did not oppose this idea, and James offered to serve as "coach" between Hubacheck and Kim. Kim, however, rejected James' offer to serve as coach because he did not have experience coaching.

February 2016 Evaluation for 2015 Calendar Year

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

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

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this proposal with Kim at their initial meeting, told her it was not feasible, and he directed Kim to speak with Hubacheck about it: "I think I had referenced her back to Ms. Hubacheck for discussion again because that was within her department solely; it wasn't something for me to decide on." Kim did not speak to Hubacheck.
Evaluation of General Skills, Hubacheck evaluated Kim as Competent in the categories of Job Knowledge and Responsiveness; and Needs Improvement in the categories of Communication and Interpersonal Skills.\textsuperscript{29}

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

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

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

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

Leadership:

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

\textsuperscript{29} Kim self-evaluated as Above Standard in all categories of Section I, Part A. In Section I, Part B, Kim rated herself as Above Standard in Management, Problem Solving, and Skills Specific to Position; and Kim rated herself as Competent in Leadership and Teamwork. In Section II, Kim rated herself as Above Standard in Job Knowledge, Communication, and Responsiveness; and Kim rated herself as Competent in Interpersonal Skills.
management meetings in lieu of promoting her personal agenda and opened a business utilizing materials and technology that was paid for by the university.

Management:

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

Problem Solving:

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

Teamwork:

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

General Skills:

Communication:

Angelique needs improvement in the areas of listening, interacting with staff and students as well as keeping appropriate people informed on status and key
issues. Angelique has exhibited the behavior of collecting instances in which she
is concerned about and bringing them to my attention months after the instance
has occurred expecting remediation.

Interpersonal Skills:

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

A Plan of Professional Development:

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

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

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

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

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

\textsuperscript{31} Hubacheck testified regarding this evaluation: “Because of the actions and what
occurred, there were a number of barriers that slipped below competent in her 2015
evaluation.”
Angelique Kim, do not agree with this performance evaluation and will be providing a rebuttal statement.\textsuperscript{32}

St. Jean's Waitlisted for Career Fair

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

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

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

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

\textsuperscript{34} On February 3, 2016, Nestle had received from Kim an email addressed to "Career Fair Participants."
informed Hubacheck that an issue existed with St. Jean's and that she needed to reach
out to the institution.35

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

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

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

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

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

37 On cross-examination, Hubacheck, who knows Surface, testified that during their
phone conversation Surface was “upset” about Surface’s interaction with Kim. Surface
At some point after speaking with Surface, Hubacheck contacted Human
Resources for guidance on the issues Surface raised about Kim during their
conversation. Hubacheck was instructed that she should have an investigatory
collection with Kim about Kim’s interaction with Saint Jean’s.

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

Kim’s Rebuttal to February 2016 Evaluation

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

I am a hard working individual who has taken the foundation of Employer
Relations started prior to my arrival and moved it forward increasing employer
engagement meetings by 13% during this evaluation period. I have facilitated
had contacted Randall about this, and Randall contacted Hubacheck. Hubacheck
believes the "wait list prompted a call."

³⁸ The letters of reference are dated between February 25, 2016, and March 1, 2016,
indicating that Kim submitted some of the references after she submitted the Rebuttal
Statement.
the growth of employers at career services signature events and hosted employer academy sessions that reached 197 registrants.

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

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

Leadership:

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

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

I chose to decline a pre-arranged office management meeting scheduled for Wednesday, November 18th, 2015 because I was being forced to engage in a conversation with a peer in which I had two previous altercations. I needed to feel safe and secure before doing so and did not feel comfortable meeting with this individual without a prior conversation and a level of mediation. This was communicated to both human resources and the director of career services
through email communication on Tuesday, November 17th, 2015. Contrary to the previous claim, I did not decline pre-arranged office management meetings in lieu of promoting my personal agenda and opening a business utilizing materials and technology that was paid for by the university.

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

Management:

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

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

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

Problem Solving:

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

An example of my problem solving ability can be demonstrated through my work in directing and managing the career fair. In order to make the annual career fair a team effort and more inclusive and transparent, I developed and facilitated a focus area and lead model using an Asana project tool where team members
could share progress on work and a level of accountability and ownership was created for the event across the team.

Teamwork:

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

General Skills: Communication

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

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

Interpersonal Skills:

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

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

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

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

The director of career services has requested from me what coaching areas I seek related to my professional development, but I will not move forward until the director is open to having a conversation regarding her role and the roles of others in the office in this unresolved conflict and coaching for others on the team. The leadership of the division has also offered to provide counseling between the director of career services and myself. However, I would like to request that a neutral party be a part of the conversation. I am currently not
receiving support from my leadership as a valued member of the career services team and the institution. I do not agree with this evaluation, and will not be moving forward with a plan for professional development that is not fair and equitable.

Hubacheck did not discuss this Rebuttal Statement with Kim.

March 2016 Meeting

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

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

\textsuperscript{39} In its post-hearing brief, the University asserts that the meeting occurred on March 17, 2016, but the record does not establish the date of this meeting other than that it occurred after March 16, 2016.
of the emails. Kim also discussed the NACE Guidelines in terms of St. Jean's receiving preferential treatment.\textsuperscript{40}

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

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

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

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

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

I do not credit the Union's testimony that Surface “miscommunicated the location.” Surface clearly communicated in her October 15, 2015 email to Kim that
Kim then changed the subject and told Hubacheck, "That I felt this meeting had nothing to do with Saint Jean’s Credit Union and everything had to do with the issues that we’ve been trying to resolve since August of last year." Kim then mentioned her concern that the meeting would lead to discipline, and Hubacheck told her “not necessarily.”

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

April 6 Meeting

On April 6, 2016, Kim received a calendar invite from Quigley to attend a same-day meeting in Quigley’s office. Kim contacted Pelletier about the meeting, and Pelletier advised Kim to attend the meeting, but to request Union representation if the subject of the meeting differed from what they had discussed during the March meeting.

Hubacheck and Siobhain Feeney (Feeney), a Human Resources employee, were also

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

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

44 Kim testified that the responsibility for registration for the Career Fair belonged to “the Employer Relations associate at the time.” According to Kim, the mistake belonged solely to Flores: “It was not my responsibility and I did not make a mistake in their ability to register.”
present at the meeting. At the meeting, Quigley informed Kim that the University was
separating Kim from employment, and Quigley presented Kim with a Separation
Agreement and General Release of Claims (Separation Agreement).45

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

Kim’s Termination

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

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

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

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

47 James, Tharp and Keenan were again consulted prior to issuing the letter.
management meetings and lastly utilizing materials and technology that were
paid for by the university for personal gain by engaging in a private business
enterprise.

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

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

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

This type of behavior indicated that you did not have the best interests of the
Career Services Office in mind which made it difficult to promote the positive
perception of the office. Your behavior at times bordered on insubordination.
For example, on November 17, 2015 you declined an invite to an Associate
Director meeting stating that as a part of your “conditions” to attend were that a
union representative attend with you. This request was denied as the meeting
was not disciplinary in nature, rather it was a prescheduled departmental meeting
that occurred regularly and you were expected to attend. You subsequently
failed to attend the meeting. This is simply unacceptable behavior in the
workplace.
When I presented you with your 2015 APA Annual Evaluation I noted that you were in fact a hard working individual who has taken the foundation of Employer Relations and moved it forward increasing employer engagement meetings by 13% during the evaluation period. At the same time I provided feedback on areas of improvement (as I do for every employee) including your challenge at times seeing the Career Service office as one team impacting the transformational experience the university provides its students and that the function of employer relations is part of the larger office mission, vision and strategy. I also provided a plan for professional development noting that your individual work is above standard but an area that needs improvement is your professional and general skills. In response to this, you provided a four (4) page inflammatory rebuttal in which you took no ownership of your actions and were again insubordinate. I requested the coaching areas you were seeking in regards to your professional development and you responded, "...I will not move forward until the director is open to having a conversation regarding her role and the roles of others in the office in this unresolved conflict and coaching for others on the team (Emphasis in original)."

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

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

**OPINION**

The issue is whether the University discharged Kim in violation of Section 10(a)(3), and, derivatively, Section 10(a)(1) of the Law. To establish a violation of Section 10(a)(3) of the Law, a charging party must first establish a prima facie case of retaliation or discrimination by demonstrating that: 1) the employee was engaged in activity protected under Section 2 of the Law; 2) the employer was aware of this activity; 3) the employer took adverse action against the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity.
Town of Carver, 35 MLC 29, 47, MUP-03-3894 (June 30, 2008); Lawrence School Committee, 33 MLC 90, 96-97, MUP-02-3631 (December 13, 2006). To support a claim of unlawful motivation, the last element of a prima facie case, a charging party may proffer direct or indirect evidence of discrimination or retaliation. Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002), aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005). A charging party may proceed on either basis, or both, depending on the nature of the evidence. Id. at 328 (citing Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 667 n. 23 (2000)).

Direct evidence is evidence that, if believed, results in an inescapable, or at least a highly probable inference that a forbidden bias was present in the workplace. Wynn & Wynn, P.C., 431 Mass. at 667 (citing Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991)). Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself do not satisfy the charging party's threshold burden. Town of Brookfield, 28 MLC at 328, (citing Wynn & Wynn, P.C., 431 Mass. at 667). Under the direct evidence analysis, the employee must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. The burden of persuasion then shifts to the employer, who may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive. Id. at 327 (citing Wynn & Wynn, P.C., 431 Mass. at 669-670).
Absent direct evidence, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Lawrence School Committee, 33 MLC at 97. Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices, or expressions of animus or hostility toward a union or the protected activity. Town of Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006)). Under an indirect, or circumstantial, evidence case, the CERB applies the tri-partite analysis articulated in Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981).

Under this analysis, once the charging party establishes a prima facie case, the employer may rebut it by producing evidence that a legitimate reason motivated the adverse action. If the employer produces one or more legitimate reasons, the charging party must establish that but for the protected activity, the employer would not have taken the adverse action. Id. at 565-566; Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001).

Activity Protected under Section 2 of the Law

The parties agree that Kim engaged in activity protected under Section 2 of the Law. They disagree, however, regarding which of Kim's activities fall within the protection of Section 2. The Union argues that Kim's protected activity includes: keeping the Bullying Log; attempting to obtain Union representation in both disciplinary meetings and in her attempt to resolve her workplace dispute; and submitting the Rebuttal Statement, in both exercising a contractual right and in exercising that right
through the mutual aid and protection of her colleagues. On the other hand, the University argues that Section 2 protects Kim's requests for Union representation on November 30, 2015, March 17, 2016, and April 6, 2016. The University argues that Section 2 of the Law does not protect Kim's request for Union representation at operational meetings on November 18, 2015, and December 7, 2015.

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

**Bullying Log**

The Union argues that the Bullying Log qualifies as concerted, protected activity because Kim kept the log in preparation for either a grievance or other workplace complaint, or to defend herself against any repercussions that might result from Neely's continued accusations of wrongdoing. The evidence in the record, however, does not
support the Union's position. Kim began drafting the Bullying Log on or around September 3, 2015, and she told Hubacheck about it on November 4, 2015. Kim presented the Bullying Log to Quigley on November 13, 2015. Kim did not seek the assistance of the Union until after November 18, 2015, and there is no evidence in the record that she ever presented the Bullying Log to anyone other than a representative of management. The Bullying Log does not relate to any grievance, and the Union has not identified any contractual right that Kim was exercising when she presented it to the Employer, but not the Union. Importantly, Kim created this Bullying Log to document what she perceived to be abuses that she sustained from her colleagues, including other members of the bargaining unit. Accordingly, Kim was not acting in concert with other employees, or on the authority of other employees. Rather, she was acting completely out of self-interest. I therefore find that Kim's keeping of the Bullying Log was not concerted, protected activity under Section 2 of the Law. See Town of Southborough 21 MLC at 1249; see also, Massachusetts Port Authority, 35 MLC 61, 63, UP-06-2686, (June 18, 2008).

Requests for Union Representation

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

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48 Although Hubacheck is a member of the bargaining unit, the meeting on November 4, 2015, resulted from Kim having submitted and then rescinded her resignation to Hubacheck on the same day, and there is no evidence that they were meeting other than in Hubacheck's capacity as Kim's supervisor and an Employer representative.
SUP-4301 (March 9, 2000). Accordingly, all of Kim’s requests for Union representation fall within the protection of Section 2 of the Law.\(^\text{49}\)

**Rebuttal Statement**

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

**Employer Knowledge and Adverse Action**

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

**Unlawful Motivation**

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

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

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

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

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

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

This reference expresses neither hostility nor animus toward concerted, protected activity. The context establishes that Hubacheck is concerned with Kim's ability to receive criticism, and not Kim's request for Union representation. This section of the evaluation "details seeking and receiving feedback in a constructive manner." Kim "chooses to deflect and assume ill intent from her peers and supervisor" when they provide her with constructive feedback. The next sentence, which contains the
reference to Kim's request for Union representation, continues along this line of thought
and merely states facts that the record supports: Kim used a request for Union
representation to avoid attending operational meetings in which the Employer could give
Kim constructive criticism. The penultimate sentence in the paragraph explains that the
Employer denied the requests because Kim had no right to Union representation at
these non-disciplinary meetings. The final sentence offers the conclusion that in "doing
so," i.e. deflecting and assuming ill intent and avoiding "environments in which
constructive criticism could be given," Kim "jeopardized the level of trust and mutual
respect in the office."

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

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

Your behavior at times bordered on insubordination. For example, on November
17, 2015 you declined an invite to an Associate Director meeting stating that as
part of your "conditions" to attend were that a union representative attend with you. This request was denied as the meeting was not disciplinary in nature, rather it was a prescheduled departmental meeting that occurred regularly and you were expected to attend. You subsequently failed to attend the meeting. This is simply unacceptable behavior in the workplace.

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

Regarding the Rebuttal Statement, the Discharge Letter states:

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

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

The University specifically identified its reason for deeming Kim's Rebuttal 
Statement insubordinate: Hubecheck requested the coaching areas that Kim sought in 
regard to professional development and Kim responded that she "will not move forward 
until the director is open to having a conversation regarding her role and the roles of 
other in the office in this unresolved conflict and coaching for others on the team." I 
agree with the Employer that Kim's response was insubordinate, and conclude that
although Section 2 protects the act of submitting the Rebuttal Statement, it does not protect Kim’s statement that the Employer cites in the Discharge Letter.

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

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

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

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

Under this analysis, the Employer may rebut the prima facie case by producing evidence that a legitimate reason motivated the discharge. The University argues that it discharged Kim for escalating poor performance and judgment over a period of a time. According to the University, Kim’s discharge resulted from eight months of Kim’s challenging behavior in which she engaged in unprofessional, insubordinate and unacceptable behavior that began with the conflict of interest issue. After the conflict of interest issue arose, Kim undertook a campaign that undermined the mission of Career Services generally and Hubacheck specifically.
The Union argues that the University's proffered legitimate reasons are pretextual. Specifically, the Union points to the conflict of interest issue, the St. Jean's issue, and the lack of any prior reprimand for the conduct cited in the Discharge Letter. For the following reasons, I find that the Employer satisfied its burden to produce evidence that legitimate, non-discriminatory reasons motivated the discharge.

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

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

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

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

The Union argues that the St. Jean's issue is pretextual because Hubacheck did
not mention the October meeting in the 2015 Evaluation, and, in any event, missing a
meeting and being late for another meeting are not terminable offenses. According to
the Union, Surface's failure to timely register for the Career Fair provided Hubacheck
with an excuse to take action against Kim that Hubacheck knew or should have known
was false. The facts do not support this position.
Hubacheck did not learn about the issue with St. Jean’s until after she completed
the written portion of the 2015 Evaluation, which is dated February 11, 2016. She
spoke with Surface on February 25, 2016, and Surface informed her at this time about
the mix-up related to the October meeting. Hubacheck’s unrebutted and credible
testimony was that Surface expressed displeasure about her dealings with Kim after
being placed on the waitlist for the Career Fair. Moreover, the record establishes that a
mistake occurred within Employer Relations regarding notifying St. Jean’s that it could
register for the Career Fair.

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

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

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

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

These factually supported criticisms unequivocally demonstrate that, prior to Kim submitting her Rebuttal Statement, Hubacheck conveyed to Kim that Kim’s professional
conduct needed to improve. Yet, as already discussed, Kim responded to these criticisms with an insubordinate statement within her Rebuttal Statement, and when the Employer conducted the March investigatory meeting about St. Jean’s with Kim after the Career Fair, Kim again demonstrated the same manner of unprofessional conduct that Hubacheck cited in the 2015 Evaluation.

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

The Employer has met its burden of producing evidence that legitimate reasons motivated the discharge. Under the indirect evidence analysis, the Union must
establish that but for Kim’s protected activity the Employer would not have discharged her. The Union does not raise any new arguments at this stage of the analysis, but instead reiterates its argument that the Employer’s failure to discipline Kim prior to the incident with St. Jean’s proves that but for Kim’s protected activity, the Employer would not have discharged her. For reasons I have already explained, I disagree.

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

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

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

[Signature]
JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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