ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ANDREW PACHTMAN,

Complainant,

v.

MERCY COLLEGE,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10155145

Federal Charge No. 16GB203062

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on March 2, 2015, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Migdalia Pares, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING AMENDMENTS:

- To the extent Complainant asserts in its Objections to the Alternative Proposed Order ("APO") that Dr. Ramaswamy's book was, in fact, self-published, the

record does not support this conclusion. Dr. Sperling testified that the publishing house in question "sometimes" produced self-published work. When asked specifically if Dr. Ramaswamy's book was self-published, Dr. Sperling said he was not sure. It might be, but there is no evidence that it was in fact. Complainant submitted no evidence on this point and there is nothing more in the record. Dr. Sperling did testify that even if it were self-published, the book would be more widely disseminated than a presentation at a national conference because the book would be indexed and searchable. (Vol. VI at 531-32). The fact of this wider dissemination was important in Dr. Sperling's consideration of Dr. Ramaswamy's application. (Vol. V 347; Vol. VI 528) In any event, Dr. Sperling's impression of the level of peer-review and breadth of dissemantion of each applicants' scholarship at the time he reviewed their dossiers is what is relevant here and the evidence shows that he was satisfied with Dr. Ramaswamy's work and dissatisfied with Complainant's as detailed in the APO.

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within

sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: APR 07 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ANDREW PACHTMAN,

Complainant,

v.

MERCY COLLEGE,

Respondent.

ALTERNATIVE PROPOSED ORDER

Case No. **10155145**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him by denying his application for tenure because of his age and creed. Complainant also alleged that Respondent subjected him to a hostile work environment. Because the record does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On May 21, 2012, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Migdalia Parés, an Administrative Law Judge ("ALJ") of the Division. ALJ Parés held public hearing sessions on March 18, April 5, 22, May 17 and August 8 and 29, 2013[1].

Complainant and Respondent appeared at the hearing. Complainant was represented by Starvaggi Law Offices, P.C., by Michael A. Starvaggi, Esq. Respondent was represented by Jackson Lewis P.C., by Michael A. Frankel and Greg Riolo, Esqs.

Complainant and Respondent filed timely post-hearing briefs.

On July 2, 2014, ALJ Parés issued a Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order").

Complainant requested and all parties were granted an extension of time to file Objections. Thereafter, both parties filed Objections to the Recommended Order with the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Respondent Mercy College is an institution of higher learning. (Resp. Ex. 15 at 4)

2. During the relevant time, Dr. Michael Sperling was Provost and Vice-President of Academic Affairs and Dr. Alfred Posamentier was Dean of the School of Education. (Vol. IV 318) The Provost was chief academic officer and responsible for the quality and outcome of the curriculum. He was responsible for academic policies, faculty development and assessment, including the hiring, supervision, promotion and tenure of all faculty. The Provost reported to the school's President. (Vol. V 281-82)

[1] Because the page numbers in the various transcripts repeat, references to the transcript for each hearing date are designated as follows: Vol. I - March 18, 2013; Vol. II - April 5, 2013; Vol. III - April 22, 2013; Vol. IV - May 17, 2013; Vol. V - August 8, 2013; Vol. VI - August 29, 2013.

3. Tenure-track professors are required to disseminate scholarship and work toward a permanent appointment. (Vol. V 297) Tenure-track faculty receive up to six annual renewable contracts. (Resp. Ex. 20 at 26-28) After their sixth year, a tenure-track professor must apply for tenure. If tenure is denied, the professor is offered a one-year terminal contract. (Vol. II 139; Vol. V 309) A professor can apply for tenure one year early. In the event an early application appears deficient, the applicant may be offered the opportunity to withdraw and reapply the following year. (Vol. II 139; Vol. V 310-11)

4. Complainant is Jewish and was born in 1948. In 2007, Provost Sperling hired Complainant as a tenure-track professor in Respondent's School of Education. Complainant was fifty-nine years old at the time. (Comp. Ex. 5 at 15; Vol. I 88; Vol. II. 41-42, 88, 133)

5. Based on his previous experience, Respondent credited Complainant professional service towards tenure. As a result, Complainant began as a fourth-year Associate Professor. (Comp. Ex. 5 at 8; Resp. Ex. 1, 20 at 13; Vol. II 41, 136; Vol. V 284-87)

6. During his interview, Provost Sperling made Complainant aware that to be tenured he would have to have a body of work created during his time with Respondent. Provost Sperling made this point because Complainant requested service credit and, therefore, would have less time to establish that body of work. (Vol. V 285-87)

7. When a professor applies for tenure, the application goes through a multi-level review process. The Dean submits to the Provost his or her recommendation regarding the application. The Committee on Personnel, Promotion and Tenure ("CPPT"), a committee of tenured faculty members, votes on the application and then submits its recommendation. The Provost then makes a recommendation to the President. The President makes the final tenure determination. (Resp. Ex. 20 at 17, 25-28; Vol. V 291-93)

8. If the Provost and CPPT disagree, the Provost must meet with the CPPT to discuss their respective recommendations. (Resp. Ex. 20 at 17-18; Vol. V 293)

9. To qualify for tenure, an applicant must, among other requirements, demonstrate evidence of scholarship. (Resp. Ex. 20 at 17, 26; Vol. VI 503) Scholarship is demonstrated by sharing expertise beyond the classroom through the creation and dissemination of scholarly material in a peer-review context. (Vol. IV 338; Vol. V 297) Scholarship can be demonstrated in various ways, including through presentations, grants and publication. (Comp. Ex. 6 at 5)

10. On July 14, 2010, Complainant submitted an early application for tenure. (Comp. Ex. 5 at 6; Vol. II 140; Vol. V 310-11)

11. Andrew Peiser, then Dean of the School of Education, recommended that Complainant be granted tenure. (Comp. Ex. 5 at 6 -8)

12. Thereafter, the CPPT expressed concern that Complainant did not demonstrate sufficient evidence of scholarship. After reviewing Complainant's curriculum vitae, Provost Sperling agreed and Complainant was offered the opportunity to withdraw his application and reapply after he improved his record of scholarship. (Vol. II 140-41; Vol. III 55; Vol. V 311-16; Vol. VI 543, 546)

13. On September 1, 2010, Dr. Alfred Posamentier replaced Peiser as the Dean of the School of Education. (Vol. I 82, 140; Vol. IV 318)

14. In September 2011, both Complainant and Dr. Sudhara Ramaswamy submitted tenure applications. (Comp. Ex. 5, 9; Resp. Ex. 3; Vol II 142)

15. Ramaswamy was born May 8, 1979. Respondent hired her in 2005 as an adjunct. When she applied for tenure, she was thirty-two years old and a tenure-track Assistant Professor in the School of Education. (Comp. Ex. 9 at 7, 487-88; Resp. Ex 17; Vol. I 68)

16. Dean Posamentier recommended that Ramaswamy be granted tenure. (Vol. IV 366)

17. In reviewing tenure applications, Provost Sperling considered each application on its own merit and considered the quality and impact of the scholarship in weighing its merit. (Vol. V 296-300; Vol. VI 542) His testimony makes clear that high-quality, peer-reviewed, widely disseminated scholarship could take any form and there was no boilerplate checklist, but, he noted, there were some generalities in how it was weighed. (Vol. V 297-300) For instance, while a high profile presentation might garner more interest, "[a]s a general rule, peer review for presentations is not as rigorous as peer review for publications and it is hard to achieve a positive tenure decision without some evidence of publication." (Vol V 299) While a major book might also, by itself, satisfy the scholarship requirement (Vol. IV 339-340), "[o]ne form of dissemination of scholarly material would generally not satisfy the scholarship criteria for tenure." (Vol. V 322) Dissemination to a greater audience was important and presentations were limited to those in attendance. (Vol V 323) Provost Sperling "would generally tell people that presentations alone generally don't demonstrate a sufficient evidence of dissemination in a rigorous peer-reviewed context." (Vol. V 305) Provost Sperling further explained that the level of peer review of presentations varied depending on whether the presentation was local, national or international. The latter two being more rigorous. (Vol. V 306; Vol. VI 507-08, 522).

18. Ramaswamy's tenure application included, in relevant part, evidence of two publications, eleven presentations made during her time at the college, four poster-presentations and a faculty development grant. (Comp. Ex. 9)

19. One of the Ramaswamy's papers was published before her time with the college. (Comp. Ex. 9) Prior published work however, was not an important factor in Respondent's

tenure review. (Vol. V 286; Vol. VI 490, 541) Provost Sperling explained that such work established a foundation, "but it's really how you build upon that foundation at the college that's going to be the subject of a tenure review." (Vol. V 286) He did not view that prior record as germane to the tenure review. (Vol. V 320) In granting tenure, the college was essentially conferring a lifetime appointment. Accordingly, it viewed applications with an eye towards evidence that the appointee would remain a productive member of the institution. (Vol. V 298-99, 321; Vol. VI 541-42)

20. Four of Ramaswamy's eleven presentations were made just after she was hired, and thus, not considered because the work towards those presentations would have been conducted before her time at the college. (Vol. V 347; Vol VI 521)

21. Provost Sperling considered her 2008 book important because publication allowed wider dissemination of her work. (Vol. V 347-48; Vol. VI 528) A majority of her conference presentations were to a national audience at a major association in her field and thus, subjected to a "reasonably rigorous" degree of peer review. (Vol. V 347-48; Vol. VI 522)

22. Provost Sperling recommended that Ramaswamy be granted tenure because her range of work demonstrated her active engagement in scholarship. (Vol. V 334, 345, 349)

23. In his application, Complainant included evidence of seven papers published prior to his employment by Respondent. (Comp. Ex. 5 at 16; Vol II 144, 147) Complainant also included evidence of two scholarly papers submitted for publication in 2011, but not yet accepted. (Comp. Ex. 5; Vol. II 144-45; Vol. V 326) Again, Respondent did not give much consideration to publications made prior to the applicant's employment and further, papers submitted, but not yet accepted for publication, did not demonstrate proof of peer-reviewed scholarship. Submission for publication did not guarantee acceptance. (Vol. IV 357-58; Vol.

V 316, 326; Vol. VI 529) Indeed, Provost Sperling testified that "there were no publications during his time at Mercy College. I will say that given – especially given that there were prior publications in his record, before he came to Mercy College, that would indicate a trend line, a kind of downward trend line in terms of publication history." (Vol. VI 528-29)

24. Complainant's application included evidence of eleven presentations made during his employment with Respondent. Complainant's application also included evidence of a faculty development grant from Respondent. (Comp Ex. 5, 17; Vol. II 145; Vol. V 330-31)

25. Dean Posamentier had also expressed concern that Complainant had not published during his time at the college. Particularly in light of the fact that he had a history of publications. It also led him to wonder if Complainant's productivity had stopped. (Vol. IV 351, 356, 419) Further, Dean Posamentier did not feel the presentations satisfied Respondent's scholarship requirements because they were not thoroughly peer-reviewed or disseminated widely. (Vol. IV 340-41, 359) Posamentier recommended that Complainant be denied tenure because he felt Complainant "lack[ed] evidence of faculty scholarship. His last publication was published in 2006, a year before he joined the Mercy College faculty. In other words, he has no publications during his time on the Mercy College faculty." (Resp. Ex. 4, 23)

26. Thereafter, the CPPT recommended granting Complainant tenure. (Comp. Ex. 7)

27. In reviewing Complainant's application, Provost Sperling noted that the earliest presentations were indicative of work Complainant completed at another institution and, thus, did not carry the same weight as the presentations prepared and delivered during his time with Respondent. (Vol. V 320; Vol. VI 512-14) The remaining presentations were at national and regional conferences and were described by Provost Sperling as "topically narrow". His evaluation of their merit was tepid, at best. He testified that they could have been weaker, but

that they also could have been stronger. (Vol. V 322-23) Several of the presentations had what he described as a "low level" of peer review. (Vol. VI 504-07)

28. From the time he withdrew his tenure application until he next applied, Complainant made only one presentation and was accepted to present one other. (Comp. Ex. 5 at 17, 89; Vol. VI 548-49, 551)

29. Provost Sperling noted that there was no evidence of publication, grants or other such peer-reviewed material during his time with the college. (Vol. V 320) The development grants that both Complainant and Ramaswamy received did not have great weight as they were not major or national grants, but local grants from within the college. (Vol. V 342)

30. Provost Sperling recommended against granting Complainant tenure because "there was not a sufficient enough record of strength of scholarly material, in a peer review – rigorous peer review context to warrant a positive tenure recommendation which I said would also be founded on the belief that one would continue to engage in active scholarship throughout the many years that one would remain at the college." (Vol. V 320-21)

31. Before discussing his recommendation with the President, Provost Sperling met with the CPPT to share his recommendation and to discuss and "consider carefully" the basis for the CPPT's contrary recommendation. (Vol. V 323)

32. Ramaswamy was ultimately granted tenure and Complainant was ultimately denied tenure. (Resp. Ex 5, 16) Complainant's employment contract with Respondent expired in June 2013. (Comp. Ex. 5)

Dean Posamentier's Comments:

33. In November or December of 2010, Dean Posamentier asked Complainant if he was a "member of the tribe." The record indicates that this is a reference to being Jewish. (Vol. II

90-93, 180; Vol. III 73) Prior to this, another professor told Complainant that Posamentier made the same inquiry regarding Complainant to this other professor. Complainant was offended by the inquiry. (Vol. II 93-96, 180-84; Vol. III 203-04) At a March 2011 monthly faculty meeting, Complainant heard Posamentier state to the faculty members present, "We need to bring in younger people." (Vol. II. 102-03) During a May 2012 faculty meeting, Complainant heard Posamentier say, "Get some younger people in here." (Vol. II 112, 188-89) In November 2012, Complainant overheard the Dean comment to another professor, "Jews don't serve in the military." (Vol. II 97)

34. Other faculty reported hearing Dean Posamentier make negative age-related comments and other comments disparaging people based on their race, national origin and sexual preference. (Vol. II 101-103; Vol. III 145-49, 195-201, 237)

35. In early October 2011, Complainant reported Posamentier's comments to Respondent's General Counsel, John Galgano. (Vol. II 116-17)

36. The following month, Respondent received an anonymous letter charging that Posamentier expressed age-related biases, made offensive statements regarding older faculty and that faculty feared reprisals were they to report his conduct. (Comp. Ex. 1; Vol. IV 224, 231-34)

37. In response, Galgano sent a letter to all faculty with a copy of Respondent's equal employment opportunity policies attached. He encouraged faculty to report policy violations because Respondent would not investigate anonymous allegations. (Resp. Ex. 18; Vol. IV 231-35)

38. In December 2011, Galgano did, in fact, investigate the complaints. He met with and questioned Posamentier, who denied the conduct. Galgano reviewed Respondent's policies with Posamentier and instructed him to abide by them. (Vol. IV 231-34)

39. Respondent's attorney also met with Posamentier in January and then again in February of 2012 to train him on Respondent's policies. (Vol. IV 235)

40. There is no evidence that Posamentier made any inappropriate comments thereafter.

OPINION AND DECISION

Complainant alleged that Respondent subjected him to a hostile work environment, denied him tenure and ultimately terminated his employment because of his age and creed in violation of the Human Rights Law. Because the record does not support the allegations, the complaint is dismissed.

Human Rights Law § 296.1(a) prohibits employers from discriminating against employees based on their age and creed. Creed and age-related harassment that rises to the level of a hostile work environment is unlawful. A hostile work environment exists when a complainant is subjected to abuse that is either sufficiently severe or pervasive enough to alter the conditions of his employment. *See Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 310-11, 786 N.Y.S.2d 382, 394-95 (2004) (*quoting Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993)). The Court explained:

> Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment – one that a reasonable person would find to be so.

(citations omitted) *Id.*

In the instant matter, the ALJ credited testimony that on two occasions, once in March of 2011 and once in May of 2012, Complainant heard Dean Posamentier comment that Respondent needed to hire younger professors. Other professors also witnessed Dean Posamentier make similar comments and the Dean was heard making various offensive comments related to race, national origin, religion and sexual preference. Though highly inappropriate, this handful of stray remarks over a period of a year and a half simply does not rise to the level of severity or pervasiveness required to establish a hostile work environment. Generally, "isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment." *Father Belle Cmty. Ctr. v. State Div. of Human Rights,* 221 A.D.2d 44, 51, 642 N.Y.S.2d 739, 745 (4th Dept. 1996), *lv. denied,* 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Moreover, upon learning of these allegations, Respondent's counsel investigated. He met with Dean Posamentier, who denied making the comments. Respondent nonetheless had him meet with outside counsel, reminded him of Respondent's equal employment opportunity policies and dispatched a letter to all faculty in the School of Education reminding them of the policies and encouraging faculty to report violations. There is no evidence that Posamentier's conduct continued thereafter. "Under New York law, in order to recover against an employer, the complainant must demonstrate that the employer acquiesced in the discriminatory conduct or subsequently condoned it." (citations omitted) *Id.* at 53. The Court explained that condonation "contemplates a knowing, after-the-fact forgiveness or acceptance of an offense. An employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation. Condonation may be disproved by a showing that the employer reasonably investigated a complaint of discriminatory conduct and took corrective action."

(citations omitted) *Id.* at 53-54. Respondent in this matter disproved condonation by demonstrating that it took appropriate and effective remedial action.

Accordingly, this claim is dismissed.

Complainant's claim that Respondent denied him tenure and ultimately terminated his employment because of his age is also dismissed.

Absent direct evidence of discrimination, a complainant can make out a prima facie case by showing he is a member of a protected class; he was qualified for the position; he suffered an adverse employment action; and the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. If a complainant establishes a prima facie case of discrimination, the respondent must then articulate a legitimate, non-discriminatory reason for its actions. In order to prevail, the complainant must then show that the proffered reason is a pretext for discrimination. *See Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d at 305, 786 N.Y.S.2d at 390.

In the instant matter, Complainant has met his initial burden. Discrimination can be inferred from the fact that Complainant's application was denied after a negative recommendation by Dean Posamentier, who expressed a desire to purge older faculty, while Ramaswamy, who was thirty-two years old and had similar qualifications, was granted tenure. These circumstances are sufficient to establish a prima facie case.

Respondent, however, articulated legitimate, non-discriminatory reasons for its actions. Complainant failed to demonstrate sufficient scholarly work during his time with the college. The Provost performed a thorough and independent review of Complainant's application. He met with the CPPT and duly considered the CPPT's reasons for their contrary recommendation,

yet remained unconvinced. The Provost pointed to Complainant's failure to publish during his time at the college. He further considered the fact that many of the presentations Complainant made were generally to smaller, local audiences, were not widely disseminated and/or were not subject to particularly rigorous peer-review. On this basis, he did not feel Complainant had produced sufficient scholarship during his time with Respondent and recommended against his tenure. Ramaswamy, on the other hand, had published during her time at the college and the majority of her presentations were made to a national audience. Further, those presentations were made to a major association in her field and thus, subjected to a reasonably rigorous degree of peer review.

While Complainant argues that the "well has been poisoned" by Dean Posamentier's bias (see August 3, 2014, objections to the Recommended Order at 5-6), the record shows that Provost Sperling's review of Complainant's tenure application was independent, well-considered and meaningful.

Moreover, it was Provost Sperling who originally hired Complainant as a tenure-track Associate Professor when Complainant was fifty-nine years old. He was presumably aware that Complainant would be applying for tenure when he was in his early sixties. Accordingly, there is no evidence that Provost Sperling's determination was tainted by age bias.

Complainant has failed to show that Respondent's reasons for its decisions are pretextual. It is not the province of the Division to supplant the college's determinations as to what scholarship warrants an acceptable level of commitment to the institution's goals. Institutions of higher learning are accorded deference in making subjective judgments. "[C]ourts should [not] invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion, and tenure, especially in

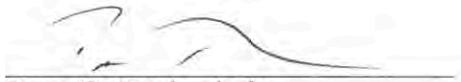
institutions of higher learning. Schools of higher learning are not 'businesses' where employees are all fairly fungible unskilled or semiskilled workers. In a professional or academic milieu subjective judgments necessarily have a proper and legitimate role." (citations omitted) *Pace Coll. v. Comm'n on Human Rights,* 38 N.Y. 2d 28, 39-38, 377 N.Y.S.2d 471 (1975).

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be, and the same hereby is, dismissed.

DATED: March 2, 2015
Bronx, New York



Peter G. Buchenholz
Adjudication Counsel