

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

YU ZHANG,

Complainant,

v.

NEW YORK STATE, STATE UNIVERSITY OF
NEW YORK, STATE UNIVERSITY COLLEGE AT
GENESEIO,

Respondent.

and NEW YORK STATE, DEPARTMENT OF
CIVIL SERVICE, NEW YORK STATE, OFFICE
OF THE STATE COMPTROLLER, Necessary
Parties.

NOTICE AND
FINAL ORDER

Case Nos. 10119118
10119377

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on November 24, 2008, by Spencer D. Phillips, 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 Recommended Order, and all Objections received have been reviewed.


PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). 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: **FEB 13 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**NEW YORK STATE, STATE UNIVERSITY
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COLLEGE AT GENESEO,**

Respondent.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 10119118, 10119377

SUMMARY

Complainant alleged that Respondent denied his application for continuing appointment because of his race and national origin, and failed to promote him in retaliation for his filing of a complaint of discrimination with the Division of Human Rights. Complainant has failed to prove his claims and his complaints are dismissed.

PROCEEDINGS IN THE CASE

On July 19, 2007, 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 Spencer D. Phillips, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on July 16-17, 2008 and August 22, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Michael P. Leone, Esq. Respondent was represented by Lewis E. Rosenthal, Esq., Associate Counsel, The State University of New York.

Permission to file post-hearing briefs was granted, and timely briefs were received from both parties.

FINDINGS OF FACT

1. Complainant was born in China and is Asian. (Tr. 19)
2. Respondent, a very selective public college, requires teachers to attain and demonstrate a high level of teaching effectiveness as a condition of continued appointment (*i.e.* tenure) and promotion. (Dahl Aff. ¶7; Tr. 253-54)
3. In or about September, 2001, Complainant interviewed with each member of Respondent’s Communications Department and was subsequently hired as an Assistant Professor in that Department. The Communications Department consisted of two tenured faculty members and three to four non-tenured faculty members. (Tr. 25-26; Mohan Aff. ¶5)

Short-Term Appointment Process

4. Respondent hires assistant professors under short-term contracts of one to three years’ duration. An assistant professor is subject to periodic reviews which, if favorable, may lead to short-term contract renewals until such time as the professor becomes eligible for continuing appointment. The relevant appointment and review processes are set forth in Respondent’s

“Processes and Procedures for Renewal of Term Appointments, Continuing Appointment, and Promotion” and “Policies of the Board of Trustees, 2006, Article XI, Title D.” (Complainant’s Exh. 18; Tr. 247-49)

5. In 2002, near the conclusion of Complainant’s first contract term, his overall performance was reviewed by Joseph Bulsys, Chair of the Communications Department, and Mary Mohan, a tenured Associate Professor and member of the committee that recommended Complainant’s appointment as an assistant professor in 2001. Bulsys and Mohan recommended renewal of Complainant’s contract. Accordingly, Respondent renewed Complainant’s contract through 2005. (Complainant’s Exh. 1, 2; Mohan Aff. ¶4, 6)

6. In 2004, near the conclusion of Complainant’s second contract term, Bulsys and Mohan again reviewed his performance. They recommended that Complainant’s contract be renewed, but cautioned that he must “improve his level of class performance” prior to the upcoming tenure review period. Accordingly, Respondent renewed Complainant’s contract through 2007. (Complainant’s Exh. 3; Mohan Aff. ¶ 6)

7. In 2006, near the conclusion of Complainant’s third contract term, Bulsys and Mohan again reviewed Complainant’s performance. They recommended renewal of Complainant’s contract, but specifically admonished Complainant to improve his teaching effectiveness in order to prepare for his pending tenure review. Respondent renewed Complainant’s contract through 2008. (Complainant’s Exh. 4, 5, 10; Mohan Aff. ¶ 6)

Continuing Appointment and Promotion Review Process

8. Applications for continuing appointment and promotion are subject to a multi-level review process in which a Department Personnel Committee (DPC), a Faculty Personnel Committee (FPC), the Department Chair, and the Provost carefully evaluate a candidate’s

teaching, scholarship, and service. Each individual and group make a non-binding recommendation whether the applicant should be granted continuing appointment or promotion. The recommendations are then forwarded to the President who, upon careful review of all recommendations and the candidate's application materials, makes a decision upon the application. (Complainant's Exh. 18; Dahl Aff. ¶ 6, 8; Tr. 247-50)

9. Respondent utilizes "evaluation[s] by superiors, colleagues and students, including classroom visitation[s]" to assess an applicant's history of teaching effectiveness. Student ratings and comments are collected via "Survey of Faculty Instruction" (SOFI) forms. (Complainant's Exh. 18; Respondent's Exh. 1)

10. Throughout all steps of the multi-level review process, teaching effectiveness is the most important factor in determining whether an applicant will receive continuing appointment or promotion. (Complainant's Exh. 18; Respondent's Exh. 17; Dahl Aff. ¶ 7)

11. Promotion entails a higher performance standard than continuing appointment. (Complainant's Exh. 19; Dahl Aff. ¶ 9, 10; Tr. 289, 448-49)

Complainant Did Not Receive Continuing Appointment or Promotion

12. In January, 2007, Complainant submitted his application materials for continuing appointment and promotion. (Complainant's Exh. 8; Tr. 62-67)

13. In or about January, 2007, one of Complainant's colleagues, Andrew Herman, visited Complainant's office and stated, in effect, that he and his wife neither buy nor like products made in China. (Tr. 89-91, 432-33)

14. On March 1, 2007, Bulsys reviewed Complainant's application for continuing appointment and recommended in favor of the appointment. (Tr. 415)

15. Bulsys' favorable recommendation was an improper act of advocacy rather than an objective assessment of Complainant's strengths and weaknesses. Bulsys acted as an advocate for Complainant because, over the past two years, Complainant had intimidated Bulsys by repeatedly threatening that he would commence litigation if he did not receive continuing appointment. (Complainant's Exh. 6; Tr. 416-421)

16. The DPC reviewed Complainant's application for continuing appointment. The DPC originally consisted of Mohan, Herman and Christopher Pruszynski. However, Mohan resigned from the DPC after an incident in which Mohan felt physically threatened by Complainant. Bulsys and Provost Kathrine Conway-Turner jointly selected James Bearden, a former department chair, to replace Mohan as Chair of the DPC. (Mohan Aff. ¶ 11; Tr. 258-61, 410-13, 460-61)

17. Complainant asked Professor Anthony Gu, a Chinese individual, to join the DPC. Bearden invited Gu to participate in the process and notified Gu of the DPC meetings. However, Gu did not appear at the meetings and did not participate in the DPC review process. (Respondent's Exh. 25; Tr. 462-66)

18. Each member of the DPC attended a class taught by Complainant in order to evaluate his teaching effectiveness. These classroom observations confirmed to the DPC that Complainant's teaching was not sufficient to justify continuing appointment. The DPC members also reviewed Complainant's application materials and found them to be disorganized and incomplete. (Respondent's Exh. 2, 3, 9; Herman Aff. ¶ 5; Pruszynski Aff. ¶6; Tr. 467, 472)

19. On March 7, 2007, the DPC unanimously recommended against continuing appointment. (Respondent's Exh. 9; Tr. 472-76)

20. On April 3, 2007, Bulsys reviewed Complainant's application for promotion and, acting as an advocate rather than an objective evaluator, recommended that promotion be granted.

(Complainant's Exh. 7; Tr. 61-62, 416-421)

21. On April 9, 2007, the DPC completed its review of Complainant's application for promotion and unanimously recommended against promotion. (Respondent's Exh. 10; Tr. 473)

22. The FPC is a college-wide committee comprised of senior faculty members. The FPC does not conduct classroom observations, but bases its recommendation on careful reviews of each candidate's application materials. The FPC carefully reviewed Complainant's application materials and concluded that the materials did not demonstrate effective teaching by Complainant. (Tr. 442-47)

23. On May 4, 2007, the FPC unanimously recommended against continuing appointment. (Respondent's Exh. 6; Tr. 445-46)

24. On May 9, 2007, the FPC completed its review of Complainant's application for promotion and unanimously recommended against promotion. (Respondent's Exh. 11; Tr. 448-50)

25. On June 6, 2007, after carefully reviewing Complainant's application for continuing appointment, his SOFI scores, and the recommendations of the DPC, the FPC and Chair Bulsys, Provost Conway-Turner concluded that Complainant had not demonstrated a level of effective teaching sufficient to warrant continuing appointment. Therefore, she recommended against continuing appointment. (Complainant's Exh. 8; Respondent's Exh. 7; Tr. 262-63, 266-79, 282-87)

26. On June 21, 2007, after carefully reviewing Complainant's application for promotion, his SOFI scores, and the recommendations from the DPC and FPC and Chair Bulsys, Provost

Conway-Turner decided not to recommend Complainant for promotion. (Respondent's Exh. 12; Tr. 263, 266-79, 282-89)

27. On or about June 29, President Dahl received Complainant's application for continuing appointment, along with Bulsys' favorable recommendation and the negative recommendations from the members of the DPC, the FPC, and Provost Conway-Turner. President Dahl carefully reviewed each of the recommendations, and he spent several hours reading and reviewing Complainant's application materials. President Dahl concluded that Complainant's teaching record did not warrant continuing appointment. He notified Complainant of his decision in writing. (Respondent's Exh. 8; Dahl Aff. ¶ 5, 9)

28. On July 19, 2007, Complainant filed a verified complaint with the Division alleging unlawful discrimination because of his race and national origin. (ALJ Exh. 1)

29. On or about July 23, 2007, President Dahl received Complainant's application for promotion, accompanied by Bulsys' favorable recommendation and the negative recommendations from the DPC, the FPC and Provost Conway-Turner. President Dahl reviewed the recommendations and Complainant's application, concluded that Complainant would not be promoted, and notified Complainant of his decision in writing. President Dahl was not aware of Complainant's protected activity at the time his application for promotion denied. (Respondent's Exh. 13; Dahl Aff. ¶ 5)

30. In 2007, President Dahl promoted Gu to the rank of Professor. (Dahl Aff. ¶10)

31. In 2007, Complainant's SOFI scores were consistently lower than those of the fifteen similarly-situated colleagues who were granted continuing appointment. Of those fifteen colleagues, four were born outside of the United States and were of Asian origin. Throughout Complainant's teaching career, his SOFI scores were also consistently lower than his colleagues

on a department; discipline and college-wide level. (Respondent's Exh. 24; Dahl Aff. ¶ 13; Tr. 266-79, 282-89)

32. Complainant's applications for continuing appointment and promotion were not affected, in whole or in part, by his race and national origin, or by unlawful retaliation. Complainant's applications were denied because his teaching record did not satisfy Respondent's criteria for continuing appointment and promotion. (Respondent's Exh. 24; Tr. 288-89, 324, 454-56, 476)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's race or national origin, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *Human Rights Law* §§ 296.1(a), (e); 296.7.

Unlawful Discrimination

A complainant alleging unlawful discrimination in employment must establish a prima facie case by proving that (1) he belongs to a protected class, (2) he was qualified for the position he held or sought to obtain, (3) he suffered an adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004).

Complainant has established a prima facie case of unlawful discrimination. He was born in China and is of Asian national origin. Respondent renewed his teaching contract three separate times over a six-year period and his application for continuing appointment was

supported by the Chair of the Communications Department. He suffered an adverse employment action when Respondent denied his application for continuing appointment. Finally, Complainant alleged that discriminatory comments were made by one of the individuals who recommended against continuing appointment, thereby suggesting that the review process was unlawfully tainted by discriminatory animus.

Because Complainant has satisfied his prima facie burden, Respondent must set forth a legitimate, independent and nondiscriminatory reason for not continuing Complainant's appointment. *Ferrante v. American Lung Association*, 90 N.Y.2d 623 (1997). The proof demonstrates that Respondent denied Complainant's application for continuing appointment because his teaching record did not satisfy the high level of teaching effectiveness required by Respondents for continuing appointment. This is a legitimate, independent and nondiscriminatory reason for denying Complainant's application.

Complainant's teaching record was carefully and independently examined by the members of the DPC and the FPC, Provost Conway-Turner, and President Dahl, all of whom unanimously agreed that Complainant should not receive continuing appointment. The decisions of these committees and administrators were fully supported by Complainant's SOFI evaluations, collected throughout his teaching career with Respondent, which consistently reflect a level of teaching effectiveness below that of his colleagues. Finally, the only individual to offer a favorable recommendation on Complainant's behalf admitted at public hearing that his recommendation was an act of improper advocacy rather than an objective assessment of Complainant's teaching effectiveness.

In light of Respondent's articulated legitimate, independent and nondiscriminatory reasons for not continuing Complainant's appointment or promoting him, Complainant must

prove that such reasons are merely a pretext for unlawful discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d at 305; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508 (1993).

Complainant attempts to show pretext by arguing that his SOFI scores are unreliable indicators of his teaching effectiveness because they were allegedly tainted by discriminatory attitudes of the student body. However, at the time that Respondent denied Complainant's application for continuing appointment, Respondent also granted continuing appointment to four other Asian faculty members with higher SOFI scores than Complainant. Because the proof does not support Complainant's pretext argument that SOFI scores were an inherently discriminatory tool used by Respondent to deny his application for continuing appointment because of his race and national origin, his unlawful discrimination complaint is dismissed.

Unlawful Retaliation

Complainant also asserts that Respondent retaliated against him in violation of the Human Rights Law by denying his application for promotion because he previously filed a verified complaint with the Division. Complainant must therefore establish, by a preponderance of the evidence, that he engaged in protected activity, that Respondent was aware that he engaged in the protected activity, that he suffered an adverse employment action, and that there is a causal connection between the protected activity and the adverse action. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 298, 313 (2004).

Complainant engaged in protected activity when he filed a verified complaint with the Division on July 19, 2007. Complainant suffered an adverse employment action when his application for promotion was denied on July 23, 2007. However, Complainant's retaliation claim must fail because Respondent was not aware of his protected activity and because

Complainant failed to demonstrate a causal connection between the filing of his Complaint and his failure to receive promotion.

President Dahl, Provost Conway-Turner, Chair Bulsys and the members of the DPC and the FPC were not aware of Complainant's protected activity at the time his application for promotion was being reviewed and decided upon. Complainant filed his verified complaint on July 19, 2007. However, the DPC completed its review of his promotion application more than three months earlier, and issued its unanimous recommendation against promotion on April 9, 2007. Similarly, the FPC completed its review of Complainant's promotion application more than two months earlier, and issued its unanimous recommendation against promotion on May 9, 2007. Provost Conway-Turner reviewed the various recommendations, completed her own evaluation of Complainant's promotion application, and decided to recommend against promotion on June 21, 2007, nearly one month before Complainant filed his complaint. Finally, President Dahl received and reviewed the various recommendations, completed his own review of Complainant's application, and decided against promotion, on or before July 23, the same day Respondent first received notice of Complainant's protected activity. Because Respondent was unaware of Complainant's protected activity throughout the promotion review process, Complainant can not satisfy his prima facie burden and his retaliation claim must fail.

Pursuant to Respondent's Policies of the Board of Trustees, applications for promotion are subject to a higher performance standard than applications for continuing appointment. Therefore, because Complainant was found unqualified for continuing appointment, promotion was essentially foreclosed. Nevertheless, the DPC, the FPC, Bulsys, Provost Conway-Turner and President Dahl independently reviewed Complainant's application and ultimately concluded that promotion was not warranted.

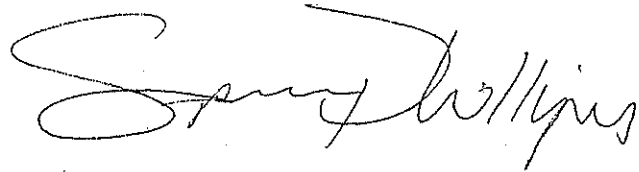
Finally, it should be noted that President Dahl granted promotion to another Chinese professor in 2007, the same year in which he denied Complainant's application for promotion. Because the proof establishes that Complainant's application for promotion was denied because he was not qualified to receive a promotion, Complainant's unlawful retaliation claim must be dismissed.

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 complaints be, and hereby are, dismissed.

DATED: November 24, 2008
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is fluid and cursive, with a large initial "S" and "P".

Spencer D. Phillips
Administrative Law Judge