STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIRK CUMMINGS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-2493
	)	
UNIVERSITY OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for a disputed-fact hearing before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings, on November 3-4, 2003, in Gainesville, Florida.

APPEARANCES

For Petitioner: Kirk Cummings, pro se
Post Office Box 140508
Gainesville, Florida 32614

For Respondent: Charles M. Deal, Esquire
University of Florida
123 Tigert Hall
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STATEMENT OF THE ISSUE

Is Respondent, as an employer, guilty of an unlawful employment practice(s) against Petitioner as its employee through discrimination by race.[1/]

PRELIMINARY STATEMENT

Petitioner filed a Charge of Employment Discrimination with the Florida Commission on Human Relations on July 30, 2002, and an amendment thereto on January 1, 2003. On or about June 2, 2003, the Commission entered its Determination: No Cause. Petitioner timely filed his Petition for Relief, and on or about July 10, 2003, the case was referred to the Division of Administrative Hearings.

The interim progress of the case before the Division is adequately revealed by the record.

At the commencement of the disputed-fact hearing on November 3-4, 2003, Petitioner's pending Motion to Compel was orally denied, and Respondent's pending Motion to Permit Telephonic Testimony of Lisa Severy was granted with appropriate parameters established.

Petitioner presented the oral testimony of Helda Montero and Dr. Carlos Hernandez, and the testimony of Lisa Severy by deposition (P-12). Petitioner had Exhibits P-1 through P-20 admitted in evidence.[2/]

Respondent presented the oral testimony of Petitioner, Lisa Severy (by telephone), Dr. Carlos Hernandez, and Helda Montero. Respondent offered no exhibits.

Petitioner took the stand on his own behalf in rebuttal.

The two-volume Transcript was filed with the Division on November 24, 2003.

Petitioner timely filed his Proposed Recommended Order. Respondent's Proposed Recommended Order was filed four days late, but Petitioner has filed no motion to strike. Therefore, Respondent's proposal has also been considered.

FINDINGS OF FACT

1. Petitioner is an African-American male.

2. Respondent is the Career Resource Center at the University of Florida (CRC). The CRC specializes in developing individuals' skills in career counseling, administering vocational assessments, presenting workshops, assisting in job searches, critiquing resumes, and assisting students with career plans. CRC is within the University's Division of Student Affairs. Within CRC itself, there are three divisions dealing respectively with career development, experiental education, and job search issues. CRC's administrative group manages the three internal divisions.

3. CRC is the "Harvard" or "Yale" for training career counselors, so the opportunity to train at CRC to be a career counselor greatly enhances trainees' skills, resumes, and hireability.

4. CRC utilizes full-time employees, mostly in the administrative group; graduate assistants; and interns. Both

graduate assistants and interns are in training to become career counselors. Some witnesses considered the terms "assistant" and "intern" to be interchangeable. The greater weight of the credible evidence is that they are not.

5. Graduate assistantships at CRC have a student fee waiver attached to them. Graduate assistants are paid at an hourly rate of pay negotiated annually on an academic year basis by their union. Typically, graduate assistantships are funded, in whole or in part, by specific departments of specific academic colleges within the University, and therefore those departments/colleges specify the qualifications for hiring applicants for the graduate assistant positions at CRC.

6. Internships at CRC fall into paid and unpaid categories. Paid internships do not entitle the intern to a fee waiver, but they are paid an hourly wage set by the CRC. Unpaid internships have no fee waiver or hourly wage associated with them. Interns receive undergraduate or graduate credit, regardless of whether they are paid or unpaid.

7. Graduate assistants and interns do not share the same program, but each program usually requires 40 hours of work per week for one semester or 20 hours of work per week for two semesters. Interns and assistants are usually subject to the same work standards.

8. Assistantship positions were required to be advertised, giving the number of required hours and the hourly rate of pay for those hours. Petitioner never applied for an assistantship.

9. At all times material, CRC had a variety of ways of advertising for interns: word of mouth, fliers, and advertisements. At all times material, CRC fliers did not indicate the number of internships available; did not specify whether any internship was paid or unpaid; and did not include anything about assistantships. The fliers were intentionally vague in the foregoing ways because CRC staff wanted to be able to use them year after year, even though the number of paid and unpaid internships varied from year to year with fluctuations in the funding and space available. The fliers were changed to be more specific the year after the year in which Petitioner applied.

10. Petitioner responded to one of the internship fliers in June 2001.

11. For the academic year 2001-2002, CRC counseling internships and assistantships required a two-semester commitment from the applicant. CRC teaching internships required only a commitment to teach one class for a full semester.

12. Each semester is made up of 16 weeks. An academic year equals 32 weeks.

13. The number of paid interns accepted by the CRC per year is dependent on available funding sources. The number of unpaid internships depends, from year to year, upon the needs of the CRC career development team and the space available to CRC for counseling purposes.

14. Most internships in career development are unpaid internships, but students are glad to get them anyway, because it is the counseling experience and resume status that is valuable. Also, the clinical practicum requirements inherent in graduate student programs often can be fulfilled while earning academic credit in the teaching and/or counseling components of a CRC internship.

15. In the summer of 2001, applicants for internships and assistantships were required to submit a resume and a statement of what they hoped to gain from their CRC experience. They were then interviewed. After the review, CRC employees either extended an offer or did not.

16. Throughout the summer of 2001, internship applicants usually would be told whether they were being offered a paid internship only at the point of interview and/or offer by the CRC.

17. Through the summer of 2001, CRC used an "open until filled" method of filling internship positions. CRC's hiring process then was not to interview everyone who applied over a

period of several months and then select candidates from the accumulated pool of interviewees all at one time, based on a comparison of their qualifications. Instead, CRC's process was to interview candidates sequentially, as each person applied, and to hire him or her sequentially.

18. In June 2001, Helda Montero, supervisor of the CRC's teaching component, reviewed Petitioner's resume and completed a telephonic interview with him the night before he interviewed with the full CRC team, because she had a conflict with the scheduled team interview time. She concluded Petitioner was qualified to be an intern. She was unsure, but "felt" that she had told him he was interviewing for an unpaid internship.

19. The next day, Petitioner interviewed with the remainder of the CRC team, headed by Dr. Carlos Hernandez, then-Associate Director of the CRC. Afterward, Dr. Hernandez recommended to the CRC's Director that Petitioner be hired; hiring was approved; and a few days later, Dr. Hernandez offered Petitioner an unpaid internship for two semesters, the academic year August 2001 through May 2002.

20. It is not clear whether Petitioner was told at the team interview, or a few days later, when the offer of an unpaid internship was extended by Dr. Hernandez, or whether he was told at both times, but at one or more times, Dr. Hernandez told

Petitioner that he was interviewing for/being offered an unpaid internship.

21. In previous years, CRC had utilized between one and four unpaid interns. For the August 2001-2002 academic year, there was only one unpaid internship, the one offered to Petitioner. At the time Petitioner was offered an unpaid internship, there were no vacant paid internships available.

22. At all times material, Petitioner was a graduate student of the University of Florida's Department of Psychology in the College of Arts and Sciences. At the time he applied to CRC, Petitioner had completed his master's degree in psychology. He previously had done a lot of volunteer counseling, but it was counseling outside the area of career counseling. Also, he had never filled a full-time counseling position of any kind.

23. For the 2001-2002 academic year, the CRC, had funding for only two paid internships.

24. One paid internship was all, or partially, funded by the College of Education. Therefore, only graduate students of the College of Education's Department of Counselor Education were eligible to fill it. Petitioner did not have those qualifications.

25. The other paid internship was open to the general graduate student population, including Petitioner.

26. However, both paid internships had been offered to, and been filled by, Caucasian students as of May 24, 2001, and Petitioner did not even apply to the CRC until June 15, 2001. Therefore, when Petitioner had applied, there were no longer any unfilled paid internships available. When Dr. Hernandez extended an offer of a two-semester unpaid internship to Petitioner on June 22, 2001, there was only the single unpaid internship available. Clearly, the CRC could have waited until a Caucasian applicant turned up, but staff offered the sole unpaid internship to Petitioner, an African-American. Petitioner was the only African-American hired in that hiring sequence.

27. When, on or about June 22, 2001, Dr. Hernandez offered Petitioner the sole unpaid internship available, Petitioner expressed disappointment. Dr. Hernandez told him that CRC would try to revisit funding his position. However, it is clear that Petitioner accepted the two-semester unpaid internship, knowing it was unpaid, and it is equally clear that it was never promised by Dr. Hernandez or anyone else that Petitioner would eventually become a paid intern.

28. Petitioner conceded that there was no intentional discrimination in Respondent's advertising methods, but he felt that in practice, it would have been better and fairer if CRC had refused to hire him for the unpaid internship.

29. Petitioner testified that if Dr. Hernandez discriminated in hiring him it had been "inadvertent" and not intentional.

30. Respondent's employees agreed that the 2001 advertising and hiring process for interns could have been clearer, but no discrimination on the basis of Petitioner's race was demonstrated.

31. Petitioner tried to show that in some previous years, unpaid interns had begun to be paid when new funding was acquired, or that they had been moved into paid internships as vacancies occurred, but he was only able to show that unpaid interns sometimes had been hired into paid internships the semester following the semester in which they served as unpaid interns. Ms. Montero had been one such intern, and an African-American male also had been one.

32. Petitioner worked as an unpaid intern for CRC for two semesters of the 2001-2002 academic year. Throughout that period, Petitioner made the work environment difficult for all staff and graduate students by reminding everyone that he was the only one among the assistants and interns who was not being paid.

33. Upon joining the CRC team, Petitioner was required to sign a record of volunteer service; a loyalty oath and an intellectual property agreement; a controlled substance

questionnaire; and a retirement form. The loyalty oath and intellectual property agreement identify Petitioner as an "employee." The record of volunteer service identifies him as a "volunteer." On the other forms, he declared that he was not drawing state retirement and that he was a potential employee. In fact, Petitioner never was paid retirement benefits, insurance benefits, or compensation of any kind by CRC.

34. Petitioner's two-semester commitment as an unpaid intern was designed to contain a teaching component and a counseling component for both semesters.

35. The first semester, Petitioner was assigned to teach a section of a career development course, supervised and evaluated by Helda Montero, and to provide intake for counseling appointments and individual follow-ups for those appointments, supervised by Elaine Costellani.

36. Petitioner's teaching component was discontinued for the second semester due to a December 6, 2001, written evaluation by his teaching supervisor, Helda Montero.

37. Ms. Montero counseled Petitioner on his teaching flaws as she perceived them throughout the first semester, and particularly in a mid-semester oral progress report. The mid-semester progress report was done orally to give teaching interns an opportunity to improve and grow before a written evaluation was made for their files. Petitioner made slight

improvements during the last half of the first semester, but Ms. Montero's December 6, 2001, written evaluation was based on her perception of his poor classroom management, specific oral complaints by two students, written classroom evaluations of him by all his students which were significantly lower than those for other teaching interns, his poor participation in the teaching supervision process (weekly meetings, etc.), and other teaching problems.

38. Ms. Montero's December 6, 2001, evaluation was based partly on two of Petitioner's students separately seeking her out and relating that Petitioner's humor in class had embarrassed and demeaned them. Ms. Montero also placed great emphasis on the many student evaluations which complained about Petitioner's assignments being too difficult and his grading scale being too strict for a one-hour, one-credit class. Part of her evaluation of his classroom technique was based on observational supervision of his classroom performance through a window. This is a teaching mode widely recognized as valid. Another part of her evaluation was based on her perception that Petitioner was defensive and resistant to incorporating interactive periods into his own lecture style of teaching and on his "difficult" personality in group meetings. Ms. Montero's perceptions may have been correct or incorrect, but there is no

persuasive evidence that she had any racial motive in her written evaluation of Petitioner's teaching.

39. Likewise, the students who complained to Ms. Montero about Petitioner may or may not have had the motivation to do Petitioner harm so as to get a better grade, but there is no persuasive evidence their complaints were racially motivated.

40. Also, although there is a suggestion within the collected written student evaluations of Petitioner's teaching that some students just did not want to work hard in a one-credit course or did not consider spelling, grammar, and presentation of projects and tests as important as Petitioner did, such student evaluations are considered a valid tool by the University. The University uses these student evaluation forms to review all its instructors. Finally, there is no persuasive evidence that the written student evaluations of Petitioner's teaching were applied selectively to Petitioner or were racially motivated.

41. The two Caucasian interns who were paid were rated higher in teaching by Ms. Montero than Petitioner was, but Petitioner did not establish that there was any inaccuracy or racial motivation in her ratings of them or of Petitioner.

42. Petitioner protested, and was afforded a conference with Ms. Montero and Ms. Montero's supervisor, Ms. Severy. Afterwards, he was permitted to place a written rebuttal of

Ms. Montero's December 6, 2001, evaluation in his file, but Ms. Severy upheld Ms. Montero's decision to remove the teaching component from Petitioner's internship program for the second semester.

43. Petitioner claimed that he was rated on different forms than the two Caucasian interns, but the difference in forms appears to be associated with differences in on- and off-site counseling assignments. In any case, that issue is immaterial in that the different forms were not associated with teaching, which was the only component wherein Petitioner was found deficient.

44. Despite curtailment of the teaching component of his internship, Petitioner was permitted to continue career counseling through both semesters of the 2001-2002 academic year, and despite some other problems,[3/] he was ultimately rated satisfactory by his counseling supervisor, Ms. Costellani. (See also, Finding of Fact 51) During both semesters, his counseling responsibilities were the same as the Caucasian assistants and interns who were paid.

45. In the Spring of 2002, CRC lost the intern whose position had been funded by the Department of Education. This left one vacant paid internship and rendered the remaining counseling staff, regardless of their titles or paid or unpaid status, overwhelmed with counseling work.

46. CRC staff, most notably Lisa Severy, made the decision not to pay Petitioner, who was already on board as an unpaid intern and counselor, but to recruit someone new, so as to replace the missing counselor with an additional counselor who was sorely needed.

47. As noted above, there was never any promise that Petitioner would be moved into a paid internship if a vacancy occurred. This was not a promotion-type situation. The CRC was looking for an additional qualified "warm body." Moving Petitioner into a paid position would not have represented a net gain in the number of counselors.

48. It also would not have been possible to replace Petitioner as an unpaid intern in the middle of the second semester.

49. CRC did not re-advertise for a paid intern, graduate assistant, or a new counseling position. Ms. Severy heard about Kristin Mercer by word of mouth. Ms. Mercer was an experienced counselor with years of full-time counseling experience. She had completed a master's degree and a counseling specialist certification program, and was on maternity leave at the time she was hired by CRC. CRC hired Ms. Mercer, a Caucasian, effective May 3, 2002, for 15 hours per week. At the time of hire, Ms. Mercer's credentials exceeded those of Petitioner. (See Finding of Fact 22) Ms. Mercer was not a University of

Florida student at the time of hire, and therefore she was not eligible for an internship or graduate assistantship. However, upon being hired, she performed the same counseling duties as CRC's graduate assistants, paid interns, and Petitioner, the sole unpaid intern.

50. Although Ms. Severy first testified that the remaining money allocated to the internship funded by the Department of Education and vacated by a paid intern in the Spring of 2002, was used to pay Ms. Mercer, I find more persuasive Ms. Severy's later testimony, the corroborative testimony of Ms. Montero, and Petitioner's own testimony, that Ms. Mercer's salary for 15 hours of counseling per week was funded out of OPS funds originally allocated to a 40-hour per week secretarial position which had been vacated by a promotion in December 2001.

51. Petitioner completed his two-semester commitment to CRC and was almost immediately employed by Union Correctional Institution as a Psychological Specialist. As such, he assesses and counsels but does not teach. In aid of his almost immediate hiring by the correctional facility, the CRC sent a favorable reference on his behalf to the facility.

52. Petitioner continued to be fully employed, as set out above, through the date of the disputed-fact hearing. He does not seek "damages" after leaving CRC. Rather, Petitioner seeks $9.50 for 20 hours per week for the 32 weeks he was with CRC.

This figure is based on his belief that paid interns were paid $9.50 per hour while he was there. This figure is in dispute, but since CRC had time to research and thereafter formally admitted in materials submitted to the Florida Commission on Human Relations that $9.50 was the hourly rate for paid interns in 2001-2002, that figure is accepted over Ms. Montero's testimony that the hourly rate was $8.75.

53. Although he never applied for an graduate assistantship, Petitioner also seeks $6,000.00 as an "equivalent" to an assistant fee waiver. This is a ridiculous contention and without merit. He also claims money on the theory he was subjected to working without pay while knowing that others were paid. This also is not a legitimate element of damages under Chapter 760, Florida Statutes.

54. Since Petitioner is no longer a University student, he is no longer eligible for a CRC internship or graduate assistantship, nor has he been eligible at any time since May 2002. He is not seeking to be reinstated to a CRC internship.

CONCLUSIONS OF LAW

55. Any jurisdiction the Florida Commission on Human Relations, and derivatively, the Division of Administrative Hearings have of the parties and subject matter of this cause is pursuant to Section 120.57(1) and Chapter 760, Florida Statutes.

56. Petitioner contends that instead of telling him that the only way he could become a counseling intern in the summer of 2001 was to serve as an unpaid volunteer, CRC personnel should have refused him an unpaid position once he indicated he wanted to be paid. He further claims that CRC's taking him on as an unpaid intern constituted discrimination on the basis of his race. Also, he contends that he was racially discriminated against when Caucasians (paid interns) were paid to do counseling work identical to the work he was doing without pay; that he was racially discriminated against when a Caucasian (Ms. Mercer) was hired in a paid position to do the identical counseling work he was doing; and that he should have been moved into the paid position.

57. This forum has jurisdiction of Petitioner's claims, insofar as they relate to an alleged failure to hire him in June 2001[4/] for a paid internship or an alleged failure to hire him as a part-time counselor in the spring semester of 2002, but for the reasons hereafter enunciated, that jurisdiction does not cover any claims relating to Petitioner's work assignments (teaching and counseling components) as an unpaid intern between the two dates. On the other hand, these work assignments and other transactions and occurrences related thereto may be used as evidence of discrimination to establish discriminatory animus in support of Petitioner's two "failure to hire" claims.

58. As to Petitioner's internship work status, courts considering the issue have frequently concluded that unpaid interns in a college practicum setting, such as the CRC, are not protected by anti-discrimination laws. For example, in Jacob-Mua v. Veneman, 289 F.3d 517 (8th Cir. 2002) the court held that a researcher at the United States Department of Agriculture was not an "employee" for purposes of Title VII, and therefore could not state a viable claim, where she was not paid, did not receive annual and sick leave benefits or coverage under any retirement program, and was not entitled to merit promotion, holiday pay, insurance benefits or competitive status. There, as here, the researcher had signed a "volunteer" agreement. The research obtained for a dissertation was not sufficient compensation to convert the researcher into an "employee." The court held that some sort of economic compensation is an essential element of the employment relationship. In O'Connor v. Davis, 126 F.3d 112 (2nd Cir. 1997) cert. denied 522 U.S. 1114, 1118 S. Ct. 1048, 140 L.Ed. 112 (1998), the plaintiff was a college student performing field work as an unpaid intern in a hospital, which was a requirement for a degree in social work. That unpaid intern lost on the same premise that no economic component had been received. Chapter 760, Florida Statutes, does not define "employee," nor does Title VII. The court held that where the term "employee" is undefined by Congress, a

conventional master-servant relationship is contemplated and that requires economic exchange. See also Marvelli v. Chaps Community Health Center, 193 F. Supp. 2d 636 (E.D.N.Y. 2002), wherein student interns could not state a hostile work environment claim under Title VII because without salary or benefits they were not "employees." A factually unsupported allegation that they were "wrongfully terminated" by being promised a job and not getting it was insufficient.

59. Petitioner may establish a prima facie case of discrimination by failure to hire in three ways: (1) direct evidence of discriminatory intent; (2) statistical proof of a pattern of discrimination; or (3) circumstantial evidence that raises a rebuttable presumption of intentional discrimination under the test established in McDonnell Douglas Corp., v. Green, 41 U.S. 793, 3 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). See also Longariello v. School Board of Munroe County, Florida, 987 F. Supp. 1440 (S.D. Fla. 1977); and Walker v. Nationsbank of Florida, N.A., 53 F.3d 1548 (11th Cir. 1995).

60. "Direct evidence of intentional discrimination is evidence which, if believed, establishes the existence of discriminatory intent behind the employment decision without any inference or presumption." Chambers v. Walt Disney World Co., 132 F. Supp. 2d 1356 (M.D. Fla. 2001). See also Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318 (11th Cir. 1998).

61. Pursuant to the McDonnell-Douglas model, a prima facie case requires that Petitioner demonstrate that: (1) he is a member of a protected class; (2) he applied for, and was qualified for, an available position; (3) he was rejected for the position; and (4) Respondent filled the position with a person outside of his protected class. See Walker v. Prudential Property and Cas. Ins. Co., 286 F.3d 1270, 1275 (11th Cir. 2002), where the employee did not establish a prima facie case because no evidence was presented that the employee actually applied for the job in question. See also Walker v. Mortham, 158 F.3d 1177, 1192 (11th Cir. 1998), (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 186, 109 S. Ct. 2363, 2378, 105 L.3d 2d 132 (1989).

62. It is hard to see how Petitioner can even allege discrimination in CRC's initial June 22, 2001, offer of an internship, because Petitioner, in effect, asserts that to not hire him would have been just, but hiring him, in itself, constituted racial discrimination.

63. Indeed, Petitioner has not offered any direct evidence of discrimination for the first failure to hire charge, and he has conceded he does not believe the hiring authority was intentionally discriminatory. At most, Petitioner has established that he is a member of a protected class: African-American. However, he has failed to establish the second prong

of a prima facie case. Specifically, he has not adduced any evidence that an available, paid internship position for which he was qualified was open when he applied in June of 2001. All evidence shows that no such position was available when he applied in June 2001. There can be no inference of discrimination from Respondent's failure to hire Petitioner for a position which was not available.

64. With regard to the claim that Respondent unlawfully failed to hire Petitioner for the part-time counseling position when it hired Ms. Mercer in the spring of 2002, Petitioner has both failed to establish that he applied for the position or that he was the most qualified candidate for the position. However, his failure to apply is only minimally interesting, because Ms. Mercer also did not apply, and the disparity in their qualifications is fatal to Petitioner's prima facie case. Even if Petitioner could be considered minimally qualified for the position, Ms. Mercer was much more qualified. Accordingly, any failure to hire Petitioner for this position in the Spring of 2002, cannot serve as the basis for a viable discrimination claim. See Denney v. City of Albany, 247 F.3d 1172, 1187 (11th Cir. 2001), stating that the plaintiff must show that the disparity in qualifications is such as is "so apparent as virtually to jump off the page and slap you in the face" to maintain a successful claim.

65. Assuming arguendo, but not ruling, that a prima facie case has been made as to the Mercer hiring, Petitioner still cannot prevail.

66. In Department of Corrections v, Chandler supra., the Florida Supreme Court analyzed the types of claim under the Florida Civil Rights Act as follows:

> The United States Supreme Court set forth in procedure essential for establishing such claims in McDonnell Douglas Corp., v. Green, 41 U.S. 792 (3 S.Ct. 1817, 63 L.Ed. 2d 668 (1973), which was then revisited in detail in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed 2d 207 (1981). Pursuant to the Burdine formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which once established raises a presumption that the employer discriminated against the employee. If the presumption arises, the burden shifts to the employer to present sufficient evidence to raise a genuine issue of fact as to whether the employer discriminated against the employee. The employer may do this by stating a legitimate, nondiscriminatory reason for the employment decision; a reason which is clear, reasonably, specific, and worthy of credence. Because the employer has the burden of production, not one of persuasion, which remains with the employee, it is not required to persuade the trier of fact that its decision was actually motivated by the reason given. If the employer satisfies the burden, the employee must then persuade the fact finder that the proffered reasons for the employment decision was pretext for the intentional discrimination. The employee may satisfy this burden by showing directly that a discriminatory reason more likely than not motivated by the decision, or

> indirectly by showing that the proffered reasons for the employment decision is not worthy of belief. If such proof is adequately presented, the employee satisfies his other ultimate burden of demonstrating by a preponderance of evidence that he or she has been the victim of intentional discrimination. (Citation omitted).

67. In this case, Petitioner has the burden of presenting evidence sufficient to establish that his race was a determining factor in the employment decision made to hire Ms. Mercer. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983); Penna v. Brattleboro Retreat, 702 F.2d 812 (10th Cir. 1978). In other words, Petitioner must prove that what motivated Respondent not to hire him was his race.

68. Respondent is not required to do more than present its non-discriminatory reasons. Respondent is not required to persuade. The standards of proof still require that Petitioner show the employer's evidence is merely a pretext for discrimination. See generally Bass v. Board of County Commissioners of Orange County, 242 F.3d 996, 1013 (11th Cir. 2001); Simmons v. Camden County Board of Education, 757 F.2d 1187 (11th Cir. 1985) cert. denied 474 U.S. 981, 106 S. Ct. 385 (1985).

69. CRC wanted to replace a part-time counselor to meet increased workload requirements. Paying Petitioner for 15 hours of counseling when he was already providing 20 hours of

counseling as an unpaid intern would not have secured an additional counselor for CRC and would have expended funds which could be used to hire another needed counselor. Ironically, the fact that Petitioner was already providing counseling services disqualified him from the new position because it was the number of counselors that needed to be increased. Petitioner may have established that he was badly used by CRC but not that he was discriminated against on account of his race. His was not a situation of a promised or deserved promotion which was denied on the basis of race. This was a situation involving two types of position which were entirely different as to funding resources or lack thereof. The situation is also governed by a need to hire one more warm body to do counseling.

70. In making the foregoing analysis, I have weighed the evidence concerning Petitioner's teaching component and counseling component histories. These situations represent personality conflicts and professional disagreements without indicators of racial bias. Mesdames Montero and Severy perceived the Caucasian interns as cooperative and perceived Petitioner as "difficult," but those perceptions and their actions based on those perceptions were not proven to be racially discriminatory. Petitioner's problematic approach to the teaching component was recorded by students as well as by Ms. Montero. Petitioner's "difficult" attitude with colleagues

and counseling flaws were noted by Ms. Severy as well as by Ms. Montero. Their concerns were not based on race, so even if their concerns did affect the decision to hire Ms. Mercer, a fact never actually established, their concerns do not support any aspect of Petitioner's case.

71. "Once the Plaintiff has established a prima facie case, thereby raising an inference that he was the subject of intentional. . . discrimination, the burden shifts to the defendant to rebut this inference by presenting legitimate non-discriminatory reasons for its employment action. . . . This intermediate burden is exceedingly light." Holified v. Reno, 115 F.3d 1555 (11th Cir. 1997)

72. Herein, Respondent presented legitimate non-discriminatory reasons for its hiring of Ms. Mercer. No competent evidence was presented which would establish that Respondent's reasons for hiring Ms. Mercer instead of Petitioner were pretexual. See Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996), holding that pretext must be shown with "significantly probative evidence." Therefore, Petitioner cannot prevail.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief and Charge of Discrimination.

DONE AND ENTERED this 12th day of February, 2004, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2004.

ENDNOTES

[1/] Other issues subsumed in this one are: (a) whether an employer-employee relationship ever existed and (b) whether the Florida Commission on Human Relations and the Division of Administrative Hearings have jurisdiction of any volunteers, i.e., do they constitute employees?

[2/] The table of contents of the Transcript is in error that Exhibits P-14-20 were not admitted. The express rulings on the record found at TR-118, 119, 200, 249, and 252, show that Exhibits P-14 through 20 were admitted in evidence.

[3/] Petitioner was written-up by Ms. Severy for sleeping during the counseling component of his program. He had previously been orally warned about napping until he was written-up. Ms. Severy also found Petitioner "difficult" in group meetings. (See Finding of Fact 32). Ms. Severy also did not like it that

Petitioner unilaterally reduced his one-hour follow-up slots to half-hour slots even though the counseling overload eventually caused all CRC counselors to reduce their intake slots from one hour slots to half-hour slots.

[4/] Respondent contends that the Charge of Discrimination was filed more than 365 days after the failure to hire/hire date of June 22, 2001 because it was filed July 30, 2002. This may be so, but since it is debatable when Petitioner actually began his internship (sometime in August 2001), I have given him the benefit of the doubt. See § 760.11(1), Fla. Stat.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.