STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY L. YOUNG, Petitioner, vs. FLORIDA AGRICULTURAL MECHANICAL UNIVERSITY, Respondent.	)	Case No. 07-0794

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida, on February 19 and 20, 2008. The appearances were as follows:

APPEARANCES

For Petitioner: Mary L. Young, pro se
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Tallahassee, Florida 32314

For Respondent: Elizabeth T. McBride, Esquire
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Office of the General Counsel
Lee Hall, Suite 300
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STATEMENT OF THE ISSUES:

The issues to be resolved in this proceeding concern whether an unlawful employment practice was imposed upon the

Petitioner by the Respondent, based upon her race, through a denial of her tenure and resultant termination from employment, as well as whether the Petition for Relief was timely filed, and therefore jurisdictional.

PRELIMINARY STATEMENT

This cause arose when the Petitioner, Mary L. Young, was informed by the Florida Agricultural and Mechanical University (FAMU) (Respondent), that her employment would be terminated as of May 6, 2006. The letter by which she was so informed was dated June 22, 2005. The reason for her termination was described in that letter as being that the Petitioner had not met the Respondent's requirements for academic tenure, and therefore continued employment. This is because the applicable rules related to such academic status require that faculty in a tenure-earning position must be nominated for tenure by the end of six years of continuous, full-time service, or given notice that further employment will not be available if tenure is not to be granted. Fla. Admin. Code R. 6C-5.940(1)(e) and 6C3-10.211(5)(a).

On September 1, 2005, the Respondent University advised the Petitioner that she was being denied tenure because of insufficient documentation of any scholarly publications. She was also advised in that letter of her right to appeal the University's decision, as outlined in its complaint procedure in

Florida Administrative Code Rule 6C3-10.232. Apparently the Petitioner requested a review of her application in order to alter the decision in her favor, amounting to a "step one review" request. Dr. Debra Austin, then the University's Provost, advised the Petitioner by letter of December 5, 2005, that the step-one review had been completed and that the Respondent University would not recommend her for tenure. It again advised her of her right to "appeal" to the Interim President, or the Division of Administrative Hearings, within 30 days of receiving the Respondent's letter. That letter included direction on how to request a formal proceeding with the Division of Administrative Hearings.

According to Ms. Austin, the reviewer for the step-one review had agreed that the Petitioner did not satisfy the tenure requirements, referenced above, for scholarly publications, although that reviewer recommended the Petitioner to receive tenure based on her years of service. There is no provision in the relevant tenure rule or regulations of the University, however, providing for the substitution of years of service for the scholarly publications proof requirements. Years of service do not substitute for the requirement for the number of scholarly publications referenced in the rule.

The Petitioner thereafter had a meeting with the Interim President of the University, Dr. Castell Bryant, on March 8,

2006, concerning reconsideration of her tenure application. The Petitioner was informed by the Respondent, by letter of April 3, 2006, that the tenure decision would not be reversed and the University would maintain its position of recommending denial of tenure to the University Board of Trustees. The Board of Trustees makes the final decision in tenure application situations.

The Petitioner thereafter filed a Charge of Discrimination on July 7, 2006, with the Florida Commission on Human Relations (Commission). She alleged in that filing that she was denied tenure based upon her age and sex and that the failure to grant tenure also involved discriminatory retaliation.

Thereafter, on October 30, 2006, she filed another charge of discrimination with the Commission, alleging this time that the failure to grant tenure was based upon her race.

A Determination of "No Cause" was issued by the Commission regarding the claim of age, sex discrimination and retaliation by its Notice of January 8, 2007. The Petitioner filed a Petition for Relief from that decision by the Commission on February 12, 2007, and the Petition was referred to the Division of Administrative Hearings on February 15, 2007, and given Case Number 07-0793.

Another Notice of Determination was issued by the Commission concerning the second filed Charge of Discrimination

based upon the Petitioner's race. That Notice was entered by the Commission on January 10, 2007. The Petitioner filed a Petition for Relief concerning that determination, regarding the racial discrimination charge, on February 12, 2007. It was also referred to the Division of Administrative Hearings and given DOAH Case No. 07-0794. The two cases were consolidated by Order of the Administrative Law Judge on May 18, 2007.

This case was set for hearing three times, on May 8, 2007, October 25, 2007, and November 15, 2007. Each of those hearings was cancelled and the case continued, based upon cause shown, and by agreement of the parties. The delay in completing the formal hearing was addressed by the Order of the undersigned entered November 13, 2007, referencing delays in discovery, primarily caused by the Petitioner's failure to respond to the Respondent's Request for Production and Petitioner's counsel's withdrawal from the case, which was granted, several months previously. The parties were advised that no additional discovery delays would be entertained, and by subsequent Notice of Hearing the matter was set for hearing on February 19, 2008, and heard on that day and February 20, 2008.

In the meantime, the Petitioner voluntarily dismissed DOAH Case No. 07-0793 on or about June 22, 2007. Thus the case proceeding to hearing was only that related to the charge of

discrimination based upon race, embodied in the Case No. 07-0794.

The cause came on for hearing as noticed, at which the Petitioner testified on her own behalf. The Petitioner also presented 14 exhibits, 12 of which were admitted into evidence, and presented the testimony of four witnesses in addition to herself. Petitioner's Exhibits 12 and 13 were not admitted on the basis of being inadmissible hearsay.

The Respondent's exhibits A through G and I through K, as well as H, L, M, and P were admitted into evidence, for a total of 14. The Respondent presented the testimony of five witnesses.

Upon concluding the proceeding, the parties ordered a Transcript thereof. The parties also requested an extended schedule for submitting proposed recommended orders. Thereafter, one extension thereof was requested and obtained. The Proposed Recommended Orders were timely submitted and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, at times pertinent hereto, was an Assistant Professor of Business Education. She was employed by the Respondent, FAMU and had worked in that capacity for a number of years since 1988, prior to which she had been employed by the Respondent University as an instructor. The Respondent,

FAMU, is a university which is a part of the State of Florida University system, administered by the Board of Governors of the State University System, as well as its own Board of Trustees.

2. The Petitioner was employed by the Respondent since 1983. She began as an instructor but was promoted to Assistant Professor of Business Education in 1988. In January 1999, she began working in a tenure-earning position as an Assistant Professor in the College of Education's Department of Business and Technology Education. She also served as chair of the department from 1998 through 2004.

3. Florida Administrative Code Rules 6C-5.940(1)(e) and 6C3-10.211(5)(a) allow a period of six years during which one situated as the Petitioner, in a tenure-earning position, in continuous, full-time service, must earn and be granted tenure. If tenure is not earned and granted during that period, the Respondent must give notice to such an employee that further employment beyond the end of the seventh year of employment, without tenure, is not possible.

4. The Petitioner applied for tenure on September 17, 2004. That tenure application was denied, which engendered the dispute involved in this proceeding. Prior to that application, however, at some point during her employment in a tenure-earning position, the Petitioner had previously applied for tenure, but the previous application had also been denied. That denial was

presumably with leave for her to re-apply for tenure at a later time during her six year tenure-earning time period.

5. After the Petitioner began her employment she received a copy of the applicable tenure criteria. The tenure criteria for scholarly publication require that a tenure candidate show that at least three publications by that candidate have at least been accepted for publication or have actually been published. Publications include books, monographs, and articles in national, regional, state or local journals, which meet peer review requirements. The publication requirements also mandate additional publication credit, which may include individual citations in quotations in a text or credits for scholarly endeavors. The requirements also contain the condition that at least two papers must be presented at state, regional or national professional meetings.

6. The Petitioner's tenure application was submitted on September 17, 2004, and included references to three publications used by the Petitioner as meeting the publication requirements for tenure: a) a project for spring 2005 entitled "Professional Report Writing" with reference to Thomson Publishing Company; b) a 2005 project entitled "English and Grammar Skills Review for Business" also with reference to Thomson; and c) a 2005 project entitled "Charles Spencer Smith," with reference to the "Oxford Press."

7. During the hearing, in her Exhibits 10 and 11, the Petitioner presented the cover pages of two of the projects, the "Professional Report Writing" text, as well as the "English and Grammar Skills Review for Business" text, in an attempt to prove compliance with the publication requirement for tenure. There was no showing, however, that the Respondent was provided with any documentation by the Petitioner during the tenure application process showing that these publications had been accepted by publishers for any of the projects.

8. In September 2004, the Tenure and Promotion Committee within the College of Education (COE) was composed of Chair-Person Dr. Mary Newell, Dr. Arland Billups, Dr. Bernadette Kelly, Dr. Maria Okeke, and Dr. Theresa Shotwell. Dr. Shotwell did not vote on the Petitioner's tenure application to avoid the appearance of impropriety because she was chair of the department to which Petitioner belonged at the time.

9. The COE Tenure and Promotion Committee considered the tenure application of the Petitioner and a secret ballot was held, resulting in a unanimous vote against granting tenure. The four members who testified in this hearing stated that they were not motivated by considerations of race when they considered the Petitioner's application.

10. Once the individual college tenure and promotion committee votes on a tenure application, the matter is elevated

for consideration by the University-Wide Tenure and Promotion Committee (University Committee). That committee considered the Petitioner's application for tenure on January 18, 2005, and voted to recommend approval of the application for tenure by a vote of 10 yeas, 1 nay, and 2 abstentions.

11. The University Committee then considered the Petitioner's application for promotion from Assistant Professor to Associate Professor, on February 23, 2005. That promotion apparently requires approval of tenure status, because the committee voted to recommend denial of the application for the promotion.

12. During the time the Petitioner's tenure and promotion applications were pending, Dr. Larry Robinson served as the Vice-President of Academic Affairs and as Provost of the university. Dr. Robinson reviewed the Petitioner's tenure application after the University Committee and recommended against granting her tenure. His decision, according to his testimony, was not racially motivated, but rather he explained that the Petitioner's application was recommended to be denied by him because he to thought it lacked sufficient documentation of scholarly publications.

13. The Interim President of the Respondent University during the time the Petitioner's tenure and promotion applications were pending was Dr. Castell Bryant. Dr. Bryant

was responsible for making a final review or consideration at the University level, taking into account recommendations of the tenure committees reporting to her. She then had the duty to nominate for tenure, or to decline nomination, to the University's Board of Trustees. The Board of Trustees had the authority to make final decisions concerning tenure applications. The Board would not consider a tenure application without a nomination by the University President.

14. Dr. Bryant did not nominate the Petitioner for tenure to the Board of Trustees. She informed the Petitioner by letter of June 22, 2005, that the Petitioner's application for tenure was not approved for submission to the Board of Trustees. Dr. Bryant's letter to Dr. Young, in which she denied tenure, seems to indicate that Dr. Bryant was under the misapprehension that the University Committee had voted against recommending tenure when, in fact, it had voted in favor of tenure. Nonetheless, Dr. Bryant declined to nominate the Petitioner for tenure to the Board of Trustees, which act constituted a final denial, subject to the Petitioner's review rights concerning the decision.

15. Dr. Deborah Austin was the Provost and Vice-President for Academic Affairs after Dr. Robinson left that position in September of 2005. She was requested to review the Petitioner's tenure denial, so Dr. Austin requested a "step-one grievance"

reviewer, Dr. Charles MaGee, to review the Petitioner's tenure application.

16. Dr. McGee found that the Petitioner's application did not satisfy the College of Education's tenure criteria (concerning scholarly publications) but he did recommend that the Petitioner actually receive tenure based upon her many years of service. Dr. Austin, however, did not agree with his assessment. She stated that the requirements for tenure don't provide for a substitution of the tenure criteria concerning scholarly publications and sponsored research, for years of service.

17. In her letter of December 5, 2005, to the Petitioner Dr. Austin stated this reason for disagreement with Dr. McGee's assessment. She informed the Petitioner that this was the second time that she had applied for tenure and that, indeed, most faculty members are not given more than one opportunity to apply for tenure at the University. In that letter she also informed the Petitioner that she could file an appeal of the decision with Dr. Bryant within 30 days of receipt of the "step-one response" or file for an Administrative Proceeding with the Division of Administrative Hearings. She also advised the Petitioner of the steps to take in order to file a request for a proceeding before the Division of Administrative Hearings.

18. Dr. William Tucker who testified on behalf of the Petitioner, and who has participated in faculty tenure review committees during his years at FAMU, pointed out that Dr. Bryant, the Interim President, had somehow misunderstood the university committee's vote. Dr. Tucker, however, indicated that he agreed with Dr. Austin that 22 years of service does not suffice as a criterion for granting tenure, although he did not agree with Dr. Austin's conclusion on the issue of tenure. The Petitioner sent a letter to Dr. Bryant requesting an appeal of Dr. Austin's decision (to Dr. Bryant) on January 4, 2006. She enclosed with that letter the cover pages for two of her projects and indicated that she thought they would serve as documentation for two of three publications needed for tenure. On April 3, 2006, Dr. Bryant sent a letter to the Petitioner as a follow-up to a meeting between those two on March 8, 2006, regarding re-consideration of the Petitioner's tenure application. Dr. Bryant indicated in that letter that, after thorough review of her tenure application package, Dr. Bryant found no reason to reverse the tenure decision previously made.

19. The Petitioner contends that a comparator employee, Dr. Nancy Fontaine, was given an additional year to apply for tenure when she failed to achieve tenure and that the Petitioner was not accorded that opportunity. Dr. Fontaine is white. The Petitioner thus maintains that Dr. Fontaine was treated better

than she and is a comparator employee outside her protected class.

20. The Petitioner's evidence, however, does not establish that Dr. Fontaine and the Petitioner are actually similarly-situated employees. The Petitioner was not sure why Dr. Fontaine was initially denied tenure, but stated in her testimony that Dr. Fontaine was given another year to write an article or whatever she needed to do to qualify for tenure. The Petitioner did not, however, show that Dr. Fontaine lacked the same number of scholarly publications that the Petitioner lacked at the time of the tenure application, or that lack of publications was even the reason for Dr. Fontaine's initial tenure denial. She expressed no clear information in her testimony or other evidence as to what frailty, or degree of it, attended Dr. Fontaine's tenure application which was initially denied.

21. Moreover, the Petitioner had a six-year period, as would any university personnel in tenure earning positions, to apply for tenure and then to re-apply if tenure were not granted on the first effort. The Petitioner, however, during that six-year period did not satisfy the Respondent's written scholarly publication requirement.

22. The Petitioner adduced no persuasive evidence to show at what point in her tenure-seeking effort Dr. Fontaine was when

she was denied tenure, and then given an additional year to earn tenure. It may be that Dr. Fontaine had a substantial portion of her six-year allowable period for tenure-earning still ahead of her. The evidence does not show.

23. In any event, although the Petitioner attempts to compare the results of Dr. Fontaine's grievance process regarding her tenure denial to the Petitioner's application process, denial, and ultimate result, by way of showing disparate treatment, the evidence still does not show that Dr. Fontaine is a similarly-situated employee. When she was denied tenure, the Petitioner asked for a review of that decision and was granted one. As a result of that review, Dr. McGee recommended her for tenure, but acknowledged that she did not meet the requirement for scholarly publication. His recommendation had no binding effect, in any event, with regard to the Provost's and the Interim President's ultimate decision on the matter. Despite his recommendation, Provost Austin and Interim President Bryant chose not to grant tenure to the Petitioner on the basis of her publication deficiencies.

24. Dr. Fontaine, on the other hand, used the complete grievance process under the university rules to file a complaint against the university pursuant to Florida Administrative Code Rule 6C3-10.232. During this process Dr. Fontaine requested additional time to apply for and earn tenure and, as a result,

in a settlement of the dispute by settlement agreement, Dr. Fontaine was given another year to apply for tenure. The Petitioner, however, although being informed by Provost Robinson in his September 1, 2005, letter to the Petitioner that she could use that process, chose not to do so. The Petitioner also conceded that she did not request additional time to satisfy tenure requirements.

25. Therefore, the Petitioner and Dr. Fontaine are not truly comparable and similarly-situated employees in the above-referenced particulars.

26. Parties settle litigation for many reasons. Often the motivations are grounded in practicalities, such as limitation of litigation expenses balanced against the perceived likelihood of a successful litigated result. There is no evidence that the decision by FAMU to enter into a settlement agreement with Dr. Fontaine, whereby she was accorded additional time to qualify for tenure, was predicated, in any way, on Dr. Fontaine's race. There is no sufficiently detailed evidence to support a finding that the factual circumstances of Dr. Fontaine's tenure application, and its grant-versus denial consideration, were substantially similar to that of the Petitioner's.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

28. In view of the conclusions below concerning jurisdiction of the subject claim, it would not appear that jurisdiction has been established, pursuant to Section 760.11(1), Florida Statutes (2007). Nonetheless, an analysis and discussion of the parties' evidence, and conclusions of law on the merits of the claim and the defense against it, are made infra as well.

29. In resolving such disputes Florida and federal courts have determined that Chapter 760, Florida Statutes, closely mirrors Title VII of the Civil Rights Act of 1964, as amended, at 42 U.S.C. Section 2000E et seq. and therefore that federal decisions interpreting Title VII and applying it to case situations of similar factual and legal issues, are persuasive when construing Florida Civil Rights claims arising under Chapter 760, Florida Statutes. See Florida Department of Community Affairs v. Bryant, 580 So. 2d 1205 (Fla. 1st DCA 1991); and Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998). A complainant must file a complaint with the Florida Commission on Human Relations (Commission) within 365 days of the alleged violation, pursuant

to Section 760.11(1), Florida Statutes. The initial charge in this instance was filed on July 7, 2006, wherein the Petitioner charged discrimination based upon age and gender as well as retaliation. That claim however, was dismissed as to all three of those reasons. A second and separate charge involving racial discrimination was filed on October 30, 2006. This charge has been challenged as being untimely and therefore non-jurisdictional. That second charge identified the date of the most recent discrimination as having occurred June 22, 2005. The charge therefore should have been filed no later than June 22, 2006, in order to be jurisdictional.

30. The Petitioner had argued that this was merely an amendment to the original charge (although it was processed by the Commission as a separate case) but the Respondent countered by arguing that the new charge was not legally encompassed by the initial charge filed on July 7, 2006, which had been based on sex and age discrimination. Although racial discrimination might be fairly embraced by an initial charge of national origin discrimination, no federal or state decisional law or other authority has been cited for the proposition that a racial discrimination charge is reasonably contemplated as being a sub-set or related charge to an initial charge of gender or age discrimination.

31. The Petitioner argued during the hearing that she had decided to include a allegation of racial discrimination only after discovering that a white professor, Dr. Nancy Fontaine, had been allowed an additional year to seek and earn tenure. This extension was granted to Dr. Fontaine in 2003. Once an employee has notice and believes that there has been an improper motive for an employment decision, then the employee must bring allegations related to that decision with the filing of the charge in the proper time period.

32. The Petitioner conceded at hearing that she had heard about Dr. Fontaine's situation, and the granting of more time to earn tenure, within approximately the first year after Dr. Fontaine's extension was granted. Evidence has shown that the extension was granted in 2003. The Petitioner therefore would have learned of Dr. Fontaine's extension by some time in 2004 or, at the very latest, in early 2005. Since the Petitioner filed her initial charge in July 2006, she already knew of Dr. Fontaine's being granted the additional year for tenure earning before she filed her initial charges and therefore could have filed the race-related charge at that time and did not. Her claim for racial discrimination is thus time-barred pursuant to the above statutory section. See Williams v. Shands at Alachua General Hospital and Santa Fe Health Care, DOAH Case No. 98-2539 Recommended Order January 8, 1999; (Final

Order filed July 16, 1999) (striking as untimely a Petitioner's attempt to add age to a Petition for Relief filed after receiving a "determination of No Cause" on an initial charge of race discrimination); Haynes v. State of Florida, Department of Insurance, 11 FLLW F. D497 (So. Dist. Fla. 1998) (holding that a later-filed FCHR age discrimination and retaliation claim did not amend a plaintiff's original equal employment opportunity commission complaint based upon race discrimination; also finding that the age discrimination and retaliation claims were not reasonably related to the plaintiff's original race discrimination claim to permit consideration of those claims outside of the EEOC 300-day limitations period for filing).

33. There is no basis to apply the Doctrine of Equitable Tolling based upon the evidence. The Petitioner initially claimed and testified that she did not know about Dr. Fontaine and her situation prior to filing her initial charge with the Commission. The Petitioner later testified that she simply forgot to add race as a charge when she filed her first charge of retaliation and gender and age discrimination. This contradicts her initial contention that she was unaware of Dr. Fontaine's situation, involving a second chance to earn tenure, at the time the Petitioner filed her original FCHR charge.

34. There was no evidence to show, however, that she was duped or misled into not timely filing the charge of racial discrimination at issue in this case, which was filed on October 30, 2006, almost four months after the expiration of the 365-day period for filing the Charge. There were no other extenuating circumstances to justify her failure to file the charge of racial discrimination based upon the Dr. Fontaine situation, within 365 days of June 22, 2005, or earlier when she was on notice of Dr. Fontaine's situation. The Doctrine of Equitable Tolling would therefore not apply.

35. The limitations period in Chapter 760, Florida Statutes, begins to run when the Petitioner knew or reasonably should have known that she was discriminated against. Wakefield v. Cordis Corp., 211 Fed. Appx. 834, 836 (11th Cir. 2006); Carter v. West Publishing Company, 225 F.3d 1258, 1265 (11th Cir. 2000). Even if the Petitioner was unaware of all the facts regarding the mechanisms of the alleged discrimination, equitable tolling would be inappropriate if the Petitioner was aware that the Respondent was purportedly violating her right to be free from racial discrimination in her employment. See Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 660 (11th Cir. 1993). Equitable tolling is an extraordinary remedy that is applied sparingly. Wakefield v. Cordis Corp., supra. The Petitioner bears the burden of showing it to be appropriate. Ross v.

Buckeye Cellulose Corp., supra, at 661. There was no showing that action of the Commission, the Respondent, or any other person or entity induced the Petitioner to thus delay exercising her rights under Chapter 760, Florida Statutes. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Justice v. U.S., 6 F.3d 1474, 1480 (11th Cir. 1993) citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151-152 (1984). Inasmuch as the racial discrimination claim at issue in this case was not timely filed, it must be deemed to be barred and the case should be dismissed on that basis for lack of jurisdiction.

36. Assuming arguendo that the claim is not so barred, an analysis will be made concerning whether the Petitioner presented a prima facie case of racial discrimination, whether the Respondent articulated and advanced a legitimate, non-discriminatory reason for the employment action taken and, finally, whether the Petitioner, in the face of that showing, came forward with evidence to show that the Respondent's reasons for the denial of tenure and promotion, were a pretext for what really amounted to racial discrimination. In this regard the cases of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); and McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973) are instructive as to the elements of proof, the shifting burdens of going forward with evidence and the ultimate

burden of proof or persuasion. See also St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). A Petitioner may establish a prima facie case with statistical proof of a pattern of discrimination or direct evidence of discrimination, or the Petitioner may rely on circumstantial evidence to establish discriminatory intent.

37. In order to prove a prima facie case the Petitioner must prove that she is a member of a protected class; that she was qualified to do her job or attain the status sought, (tenure); that she was subjected to an adverse employment action; and that her employer treated similarly-situated employees who were outside of her protected class more favorably. The Petitioner has shown that she is a member of a protected class as a minority or a Black employee and that she was subjected to an adverse employment action involving the denial of tenure. She does not offer persuasive evidence showing that she was qualified for tenure, however. Therefore, she does not meet the qualification standard referenced as part of the prima facie showing required by case law, nor does she establish that the purported comparator employee, who is not a member of her protected class, was actually a similarly situated employee who was treated more favorably.

38. Concerning the second criteria referenced above for establishment of her prima facie case for disparate treatment

discrimination, the Respondent's College of Education tenure criteria applicable to the Petitioner and her situation in this case outline the requirements for scholarly publications as follows:

> In the College of Education, faculty members in a tenure earning position-Assistant Professor, Associate Professor and Professor-are eligible for tenure.
>
> Criteria are as the following:
>
> 4. Scholarly publication
>
> (A) Publishes or shows acceptance of at least three publications including books, monographs, articles in local, state, regional and national journals, and others which meet the peer review process. Abstracts/proceedings are not included. (Exhibit C in evidence).

39. Evidence adduced at the hearing and culminating in the above findings of fact shows that the Petitioner did not meet this criterion for the granting of tenure. The Petitioner's own testimony and her January 4, 2006, letter to Interim President Bryant revealed that she understood that three publications were necessary. Pursuant to the greater weight of the persuasive evidence, the Petitioner lacked the three necessary publications as specifically required by the university's criteria.

40. The Petitioner listed the following three publications on her application: (a) Professional Report Writing, First Edition, Thomson Southwestern Publishing; (b) English and

Grammar Skills Review for Business, First Edition, Thomson; and (c) Charles Spencer Smith, Oxford Press. The greater weight of the persuasive, credible evidence shows that purported publications did not meet the criteria because they were neither published at the time tenure was applied for nor were they even accepted for publication.

41. In an attempt to show that her first project met the tenure criteria, the Petitioner produced a November 8, 2004, contract between Thomson Custom Publishing and the Petitioner, in evidence as Exhibit "M." The contract was not signed by the Petitioner until November 17, 2004, however. Thus the Petitioner's contract had not been established with Thomson prior to her September 17, 2004, tenure application. The Petitioner was unable to prove that the contract signified an acceptance of a particular manuscript for publication. Testimony from all four members of the COE committee, as well as Dr. Robinson, indicated that the Petitioner did not submit a manuscript or other evidence that Thomson promised to publish, any of her work. Thus that project did not meet the published, or accepted for publication, requirement specified in the tenure criteria.

42. The Petitioner also contended that "Professional Report Writing" was published by 2005 and that she was using the text in her class during the Spring 2005 semester. These

assertions are not deemed accurate. The book itself was entered into evidence as Exhibit "9." A review of the publication page of the book reveals that it was not even published until 2006. In view of the greater weight of the persuasive and credible testimony and evidence, the Petitioner's assertion that she had used the book during her spring 2005 class and had left a copy of the book for Dr. Robinson to review prior to his making a decision in his 2005 review of her application, as well as her assertion that she had submitted copies of the cover of the book along with her tenure application to the university committee, is not factually accurate.

43. In order to substantiate her claim that her second project, "English and Grammar Skills Review for Business," met the tenure criteria, the Petitioner produced the same agreement used in her attempt to substantiate her first publication. The contract date again was November 8, 2004, which shows that she had neither published the work, or received acceptance for publication, prior to submitting her September 17, 2004, application for tenure. Here again, the Petitioner did not show that the project was either published or accepted for publication as required by the tenure criteria.

44. Her third project was the biographical project concerning Charles Spencer Smith. In order to substantiate her use of that project as supportive of her compliance with the

tenure criteria, the Petitioner offered a letter from Harvard University dated October 11, 2005, more than one year after her application for tenure had been filed. She also submitted copies of the covers for two papers, one on Charles Spencer Smith and the other on William Henry Holtzclaw (Exhibit 7 and 8 respectively). These documents have no other date affixed except the date 2004, and they contain no identifiable publishing company markings. The Harvard University letter indicated that the volume of work for which these articles were submitted would not be published until 2008. The letter does not otherwise show with certainty that the Petitioner's work was accepted without any conditions. The date of the letter alone shows that the Petitioner, at the time of filing her application for tenure, did not have evidence that she had published the Charles Spencer Smith article or that it had been accepted for publication. She thus failed to show by submitting this evidence that she had met the required scholarly publication standard for tenure.

45. The testimony of the four members of the COE tenure committee as well as that of Dr. Robinson, as Provost, established that the Petitioner failed to meet the tenure criteria for publications either published or accepted for publication. Three of the Petitioner's witnesses also acknowledged that letters or contracts from publishers alone do

not establish that an article or other scholarly work has been actually accepted for publication.

46. The Petitioner has therefore not established that the tenure criteria for scholarly publications has been met during the time period available for tenure application and consideration of the application. Thus, she has not established that she was qualified to receive tenure and related promotion. Therefore, the element of her prima facie case, referenced above, concerning qualification for a position, or qualification to receive tenure and promotion in this instance, has not been established. Therefore that element of the prima facie case fails and with it the Petition for Relief.

47. It is appropriate, however, to also address the Petitioner's contention that Dr. Nancy Fontaine, a white professor at FAMU, is an appropriate "comparator employee," "similarly situated" to the circumstances surrounding the Petitioner's application, and more favorably treated by the Respondent.

48. The Petitioner argues that Dr. Fontaine was given an additional year to apply for tenure when it was initially denied. Pursuant to the opinion in Maniccia v. Brown, 171 F.3d 1364 at 1562, (11th Cir. 1999), a petitioner must establish that other non-minority employees used as comparators " . . . are similarly situated in all relevant respects."

49. The difficulty with the Petitioner's position in this regard is that she did not establish that Dr. Fontaine was similarly situated. She did not establish through her testimony or otherwise why Dr. Fontaine was initially denied tenure. It may not have been related to publications at all, or it may have been, but might have been a frailty of a different degree than that of the Petitioner. It is pointless to speculate in this regard because the evidence adduced does not establish the precise reason for Dr. Fontaine's tenure denial, nor the reason she was accorded an additional year to qualify for tenure.

50. It is noteworthy, as found above, that Dr. Fontaine was accorded the additional time to qualify for tenure after her denial as a result of a negotiated settlement, after she pursued the entire course of the university's internal grievance procedure. That in itself is a different circumstance from that attendant to the Petitioner's application for tenure and her efforts in obtaining review of her application denial. She did not pursue the Respondent's internal grievance procedure as did Dr. Fontaine.

51. The Petitioner also did not establish that Dr. Fontaine lacked the same number of scholarly publications approved that the Petitioner lacked, or that she lacked any at all; rather, her tenure denial might have been for a different reason. Moreover, it should be remembered that the Petitioner

had a six-year period to apply for tenure and then re-apply, but still failed to satisfy the written criteria for tenure established by the Respondent's rules.

52. Concerning Dr. Fontaine's pursuit of the grievance procedure at FAMU, the Petitioner attempts to compare its result with the result in her own case to show disparate treatment. After being denied tenure the Petitioner was granted another review, and as a result Dr. McGee recommended her for tenure, but for a different reason (years of service). He acknowledged that she did not meet the requirement for scholarly publication. Despite the recommendation, both Provost Austin and Interim President Bryant decided not to grant tenure because of the publications deficiencies.

53. Dr. Fontaine, however, used the entire grievance process by filing a complaint against the Respondent under Florida Administrative Code Rule 6C3-10.232. Dr. Fontaine requested additional time to establish tenure as part of this grievance process and was given another year to establish tenure. Provost Robinson informed the Petitioner in his September 1, 2005, letter that she could use that same process but Petitioner chose not to do so. The Petitioner also conceded that she did not request additional time to satisfy the tenure requirements. Therefore, it was not established that the Petitioner and Dr. Fontaine were comparable employees as to the

methods they used to pursue their grievances against the Respondent, and it cannot be concluded that the different results they achieved were not due to the different methods they used, in seeking to have their tenure application denials reviewed.

54. In summary, the Petitioner has not established that she and Dr. Fontaine were similarly-situated employees who were treated disparately and, more favorably, in Dr. Fontaine's case. Although Dr. Fontaine was not a member of the protected class occupied by the Petitioner, it was not shown that, in being treated differently by the employer in terms of her tenure application and grievance review process, that she was similarly situated to the Petitioner. Thus the Petitioner has not established a prima facie case for this additional reason, as further elucidated in the above findings of fact.

55. Assuming arguendo that a prima facie case of racial discrimination has been proven by the Petitioner, the employer then has the burden to produce evidence of a legitimate, non-discriminatory reason for the adverse action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). The Respondent established, with multiple witnesses, and documentary evidence, the requirement for scholarly publications to be considered in the process of determining awards of tenure and the Petitioner's failure to meet that requirement. The Petitioner acknowledged

that she did not have approval for publications at the time of her application and that she did not submit such proof during the course of her appeal. In a January 4, 2006, letter to Interim President Bryant wherein she asked for review of her denial, the Petitioner only mentioned that she had documentation for two of the three required publications. Neither this letter nor other evidence received at hearing confirmed that the two articles were actually published or accepted for publication. The Petitioner did not establish that her application for tenure showed that the articles had been accepted for publication.

56. If the requirement is that the Petitioner show publication or acceptance of publication at the time application for tenure is made, then merely signed contracts executed after submitting an application cannot meet those requirements. The Petitioner's publisher contracts were signed well after she submitted her application and after the COE tenure and promotion committee reviewed her application. Further, her manuscripts were not submitted until after the contracts were signed. Thus it was impossible for them to have been accepted for publication even at the point the contracts were signed. Therefore, the Respondent established its reasoning, in accordance with its rules, for denying tenure, that the publication requirements had simply not been met, after a six-year opportunity for the Petitioner to do so.

57. If an employer/Respondent makes its showing of a legitimate, non-discriminatory reason for the employment action at issue, the burden to go forward with evidence contrary to that shifts to the Petitioner, to show that the reason articulated by the employer is a pretext for what was really a discriminatory action. St. Mary's Honor Center, Id. at 515, 516. Normally this would be established by a Petitioner or complainant by demonstrating that the reason asserted by the employer is really false and that the real reason was intentional discrimination. The Petitioner has not established such a pretext in this case. She, in effect, has nothing but her own view or opinion of the reasons for the university's action to refute the evidence adduced by the Respondent's witnesses, and to some extent, by her own witnesses.

58. She offered no evidence to show that any person associated with the Respondent who had any duty, responsibility, or effect on the tenure decision at issue, exhibited any indicium of racial discrimination. A Petitioner's mere opinion regarding the discriminatory basis or motivation for employment action does not suffice to establish that discriminatory animus was present with regard to the making of the decision. Earley v. Champion International Corporation, 907 F.2d 1077 (11th Cir. 1990); William v. Hager Hinge Company, 916 F. Supp. 1163 (Middle Dist. Ala. 1995).

59. Both Dr. Robinson and every member of the COE tenure and promotion committee denied any consideration of race in connection with their recommendation that the Petitioner be denied tenure. At least two of the Petitioner's witnesses corroborated the fact that race was not a consideration in the review of the Petitioner's application and the ultimate denial of her tenure. In view of the reasons found and concluded above, there was no persuasive, credible evidence to show that the Respondent's disparate decision with regard to Dr. Fontaine's application for tenure, versus its decision with regard to the Petitioner's request, was based on any consideration of race.

60. The Petitioner herself even proposed a non-discriminatory reason for her tenure denial, which was that Dr. Shotwell disliked her and wanted her department chair. Dr. Shotwell played no part in the proceedings according to the evidence. She recused herself because she was the Petitioner's department head. Even if she managed to influence the vote on the Petitioner's tenure application, inasmuch as the COE tenure and promotion committee voted unanimously to deny tenure, the Petitioner still presented no evidence to show that it was motivated by any racially discriminatory animus. The committee decision was only a recommendation, in any event.

61. In summary, the Respondent has met its burden of establishing a legitimate, non-discriminatory reason for the employment action it took, in denying the Petitioner tenure and related promotion because of her failure to meet the publication requirement set by the Respondent university's rules. The Petitioner, on the other hand, produced no credible, persuasive evidence to show that the reason given by the Respondent for the adverse action was actually a pretext for what amounted to racial discrimination.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, the candor and demeanor of the witnesses, and the pleadings and the arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition in its entirety.

DONE AND ENTERED this 25th day of June, 2008, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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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.