

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HISHAM ABUDAYA,)
)
 Petitioner,)
)
 vs.) Case No. 11-1496
)
 EVEREST UNIVERSITY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on August 26, 2011, in Viera, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elaine W. Keyser, Esquire
Littler Mendelson, P.C.
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For Respondent: Hisham Aboudaya, pro se
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STATEMENT OF THE ISSUES

The issues in this case are:

1. Whether Respondent, Everest University (the "School"), discriminated against Petitioner, Hashim Aboudaya, on the basis of his place of natural origin (Middle Eastern), race

(Caucasian), and/or religion (Muslim) in violation of the Florida Civil Rights Act by twice failing to promote Petitioner to the position of associate dean or director of Student Services; and

2. Whether the School retaliated against Petitioner based on his place of natural origin, race, and/or religion by refusing to pay for his doctoral level college courses.

PRELIMINARY STATEMENT

Petitioner filed a Complaint of Discrimination with the Florida Commission on Human Relations (the "Commission") on September 20, 2010. A Determination of No Cause was entered by the Commission on February 16, 2011. Petitioner filed a Petition for Relief with the Commission on February 28, 2011. A copy of the Petition was forwarded to the Division of Administrative Hearings ("DOAH") on March 18, 2011. The undersigned Administrative Law Judge was assigned to the case and the final hearing was held on the date set forth above.

At the final hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 4, 6, and 7 were admitted into evidence. The School called three witnesses: Jeanne Teeter, director of Organizational Development; Jeannie Lesser, academic dean; and Mark Judge, president of the School. The Board's Exhibits 1, 3, 7, 10, 11, 13, 16 through 18, and 20 through 23 were admitted into evidence.

The parties advised that a transcript of the final hearing would be ordered. By rule, the parties are allowed ten days to submit proposed recommended orders (PROs) following filing of the transcript at DOAH. The parties requested and were allowed up to 30 days after the transcript was filed. The Transcript was filed on October 14, 2011. Respondent filed its PRO on October 13, 2011, i.e., before the Transcript was officially filed. Petitioner filed his PRO on November 14, 2011. Both PROs were duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a Caucasian male, born in Lebanon and, therefore, of Middle Eastern heritage. He is a practicing Muslim. In July 2003, Petitioner began teaching as an adjunct professor at the School, teaching computer information services and teaching a few classes per year. In or around August 2007, Petitioner was promoted to senior network administrator, a non-teaching position, for the School. At all times relevant hereto, Petitioner served in that position. He currently teaches classes on an as-needed basis also.

2. The School is a private college formerly known as Florida Metropolitan University. There are ten related campuses in the State of Florida, with one being in Melbourne, Brevard

County, Florida. The Melbourne campus has two locations, one on Sarno Road and the "main" campus on U.S. Highway 1.

3. Petitioner holds two master's degrees, one in management and one in computer resources and information management, from Webster University in Saint Louis, Missouri. He is pursuing a third master's degree, but it is "on hold" pending his completion of studies in a doctoral program. The doctoral program being sought by Petitioner is in the field of business administration with a major field of study in computer security. The degree is being pursued on-line through Capella University based in Minneapolis, Minnesota. Petitioner's resume indicates that the Ph.D. will be "done in the end of 2007," but it has obviously taken longer than planned.

4. Petitioner has applied for several vacancies listed at the School, but for purposes of this proceeding, the following are relevant: (1) The associate academic dean position advertised in January 2010; (2) The associate academic dean position advertised in April 2010; and (3) The director of Student Services position advertised in August 2009.

Associate Academic Dean Positions

5. The following qualifications were specified in the School's job description for the associate academic dean positions. The applicant must:

- Possess the necessary academic credentials and work related experience mandated by the Company, State accreditation agencies and any other regulatory agency that monitors compliance.
- Have a minimum of 2 years practical work experience in business or education.
- Have a minimum of 1 year teaching experience, but
- The years of experience may be waived at the sole discretion of the college president so long as the incumbent meets the accreditations, State and Federal requirements necessary to hold the position.

6. There was also a job posting (as opposed to a job description) for the associate dean position on a website associated with Corinthian Colleges, Inc. ("CCI"), the School's parent company. That job posting indicated that a master's degree was required for the job and included other requirements not set out in the School's official job description. The college president, Mark Judge, could not verify the accuracy of the job posting. There is no persuasive, credible evidence that the job posting was produced by the School or intended to be used as the basis for filling the associate dean position.

7. The first associate dean position was for the Sarno Road site which housed the School's allied health programs, e.g., medical assistant training, pharmacy technician associate degrees, medical insurance billing and coding, and healthcare administration. Besides the requirements set forth in the job

description, the School was looking for someone with health-related experience as well.

8. Terri Baker, a registered nurse, was ultimately hired to fill the associate dean position. Baker had approximately 20 years of experience with the School. During that time, Baker had taught classes in the allied health program, had served as a program director, and was an associate dean at other campuses within the CCI system.

9. Baker does not hold a master's degree, but the job description issued by the School does not require that level of education. The job posting, which appeared in a publication issued by the School, does say that a master's degree is required, but there is no competent and substantial evidence to suggest the job posting supersedes the job description. Notwithstanding her level of schooling, it is clear Baker was a perfect fit for the job. The decision to appoint her, rather than Petitioner, to the position was based on factors other than race, national origin or religion.

10. The second associate dean position was advertised in the Spring of 2010. The job description for that job is the same as the previous associate dean position. However, there are many different duties and expectations associated with the second position. For example, while the first position was related directly to the allied health programs at the School,

the second position had a different focus. The person filling this position would be working on the main Melbourne campus, rather than the satellite campus. His or her duties would be directed toward tasks such as transfer of credit analysis, scheduling, and registering new students. The dean would also be responsible for monitoring the School's compliance with accreditation standards and internal audit standards.

11. Betty Williams was hired to fill the second associate dean position. Williams had significant management experience in academic settings. She had served as an academic dean for one of the School's competitors and had extensive knowledge and experience with compliance accreditation standards. As compared to Petitioner, Williams was a much better fit for the position. Her experience would allow her to step into the position and begin working on problems immediately without the necessity of a period of training and acclimation.

Director of Student Services Position

12. The director of Student Services was expected to help students who were experiencing hardships in their academic progress. The director would help students who were forced to withdraw from school for financial or other personal reasons. He/she would provide support for students taking online classes and assist students trying to re-enroll into school following

dismissal or withdrawal. A close working relationship with students was an important factor in this position.

13. The School's job description listed the following requirement for the director of Student Services position:

- Bachelor's degree required
- Minimum of 3 years practical work experience or equivalent training
- Excellent communication and customer service skills
- Excellent computer skills

14. The person who ultimately was hired for this position, Stacey Jacquot, was an outstanding employee at the School and had been selected as its Employee of the Year in two different positions. Jacquot is a Caucasian female; neither her religion, nor her place of natural origin was alluded to at final hearing.

15. The hiring of Jacquot, as opposed to Petitioner, for this position was based on Jacquot's experience and background. She had worked in the student services department for the school as both an online coordinator and as a re-entry coordinator. Thus, her experience was directly related to the requirements of the position.

16. Petitioner provided unsubstantiated testimony that by virtue of his teaching a number of classes over the past few years, he has some experience in counseling students concerning

their issues. However, even if true, his experience did not match that of Jacquot.

Request for Reimbursement for Doctoral Coursework

17. Petitioner alleges retaliation by the School. The specific retaliatory action was the denial of his request to be reimbursed for coursework as he pursued a doctorate degree. In February 2010, Petitioner submitted a request to the School, asking that tuition expenses for his coursework be paid under the School's tuition reimbursement program. The program is set forth in policies maintained by the School and is available to "eligible employees for eligible classes." A benchmark for reimbursable tuition is that the courses being taken enable the employee to be more efficient in a current role or prepare them for a role at the next level of their employment.

18. There are a number of written policies addressing the tuition reimbursement program. Those policies are fluid and have changed from time to time over the past few years. The policies are implemented and overseen by the director of Organizational Development for CCI, Jeanne Teeter. Teeter resides and works in California, corporate home of CCI. It is Teeter's duty to ultimately approve or deny all requests for tuition reimbursement by employees of all of CCI's colleges around the country.

19. Teeter reviewed Petitioner's request for tuition reimbursement pursuant to a preliminary approval by the School's president, Mark Judge. It was Judge's initial decision to approve Petitioner's request, but Judge sent it to Teeter for a final decision. Teeter had never met Petitioner and did not know anything about him, except as found in his personnel file and his application for tuition reimbursement. Teeter, as was her normal procedure, considered the relevance of the degree being sought, not only to Petitioner's current role, but as to potential future roles as well. Because the course work for which reimbursement was being sought related to an advanced degree, a doctorate, Teeter was less inclined to approve it. Approval would necessitate a clear line of sight between the employee's current role to a role that would require a Ph.D. Inasmuch as Petitioner's role as senior network administrator did not require a doctorate and there was no clear line of sight between his present position and that of a professor or management employee requiring one, Teeter declined the request.

20. At the time she made her decision, Teeter was not aware that Petitioner had made a discrimination claim against the School. Her decision, therefore, could not be retaliatory in nature. Rather, she acted in concert with the policies that address tuition reimbursement and made a decision based solely upon those policies.

21. Petitioner appears to be an energetic and hard-working member of the School's staff. His testimony was credible, but was sometimes off the point. Although he is a well-educated person with three college degrees and is pursuing others, it is clear that English is his second language.^{1/} Petitioner seemed to be sincere in his belief that he was discriminated against, but did not provide persuasive evidence to support that claim.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011). Unless specifically indicated otherwise herein, all references to Florida Statutes will be to the 2011 codification.

23. Florida's Civil Rights Act (the "Act") is codified in sections 760.01 through 760.11, and 509.092, Florida Statutes. The Act is patterned after Title VII of the Civil Rights Act of 1964 and 1991, 42 U.S.C. § 2000, et seq. Discrimination claims arising under the Act are analyzed in the same manner as Title VII claims, and precedent from Title VII claims is applicable to cases filed under the Act. Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); Maniccia v. Brown, 171 F.3d 1364, 1368 n.2 (11th Cir. 1999). The Act makes it unlawful to discriminate against any individual with respect to the

compensation, terms, conditions or privileges of employment on the basis of, inter alia, race, national origin, or religion. Petitioner is claiming violation of the Act by the School because it discriminated, i.e., denied his applications for promotion and retaliated, i.e., refused to pay his tuition for doctorate level coursework.

24. A person filing a discrimination claim under the Act must do so within 365 days of the conduct forming the basis of the complaint. § 760.11(1). Petitioner filed his initial claim against the School on September 20, 2010. Thus, no actions occurring prior to September 20, 2009, are relevant to this proceeding.^{2/}

25. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination. In cases alleging discriminatory treatment, a petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

26. A petitioner may establish a prima facie case of discrimination in one of three ways: (1) by producing direct evidence of discriminatory intent; (2) by circumstantial evidence under the framework in McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973); or (3) by establishing statistical proof of a pattern of discriminatory conduct. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989). Failure to establish a prima facie case will require entry of a decision in favor of the employer. Earley v. Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).

27. To establish a prima facie case of discrimination, Petitioner must show: that he is a member of a protected class; that he suffered an adverse employment action; that he received disparate treatment from other similarly-situated individuals in a non-protected class; and that there is sufficient evidence of disparate treatment. Andrade v. Morse Operations, Inc., 946 F. Supp. 979 (M.D. Fla. 1996).

28. Petitioner's effort to establish a prima facie case first included his assertion as to his place of national origin, Lebanon. He also established that he was a Muslim, but he did not establish that the other candidates were non-Muslim. As to race, Terrie Baker is Caucasian; Betty Williams is African-American; Stacy Jacquot's race was not mentioned. There is insufficient evidence of disparate treatment or that any difference in how Petitioner and the other job candidates were treated was based on race, religion or place of origin.

29. Other than his testimony regarding his belief that he had been discriminated against based on his race, Petitioner

offered no persuasive evidence--direct, circumstantial, or statistical--of the alleged discrimination. His prima facie case of discrimination is not supported by the evidence.

30. If Petitioner had satisfied his burden of establishing a prima facie case of discrimination, an inference would have arisen that the adverse employment action was motivated by a discriminatory intent. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, supra. The burden would have then shifted to the School to articulate a legitimate, non-discriminatory reason for its action.

31. In the present case, the School articulated sufficient non-discriminatory reasons for each of its actions, i.e., the hiring of Baker, Williams, and Jacquot because of their abilities and experience and the denial of Petitioner's request for tuition reimbursement.

32. Once the School articulated the aforementioned reasons for its actions, the burden shifted back to Petitioner to show that the proffered reasons were a mere pretext for unlawful discrimination. To do so, Petitioner would have to provide sufficient evidence to allow a reasonable fact-finder to conclude that the proffered reasons were not the actual motivation for the adverse employment action. Standard v. A.B.E.L. Serv., Inc., 161 F.3d 1318 (11th Cir. 1998).

33. Petitioner's burden is to show that the School's articulated reasons for its actions are pretext by showing that the non-discriminatory reasons should not be believed; or by showing that, in light of all the evidence, discriminatory reasons more likely motivated the decision than the proffered reason. Id. Petitioner did not meet this burden. See also Brooks v. Cnty. Comm'n of Jefferson Cnty., 446 F.3d 1160, 1163 (11th Cir. 2006) ("[A] plaintiff must show that the disparities between the successful applicant's and her own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'"), citing Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004), cert. den., 126 S. Ct. 478, 163 L. Ed. 2d 363 (2005).

34. Petitioner alleges discrimination based on race, national origin, and religion. However, he did not prove that any of those factors were considered by the School in making their determination to hire other persons to the positions for which Petitioner also applied. Mere speculation or self-serving belief on the part of a complainant concerning motives of a respondent is insufficient, standing alone, to establish discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) ("Plaintiffs have done little more than cite to

their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.")

35. Petitioner did not prove that the denial of his tuition reimbursement was done, because he had raised a claim of discrimination. The evidence is clear that the person making the decision to deny Petitioner's request had no knowledge whatsoever about Petitioner's claim of discrimination.

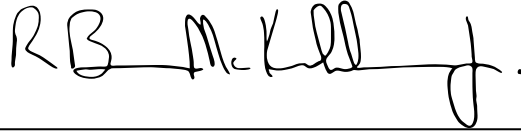
36. Petitioner is a friendly and outgoing person of Lebanese descent. He practices the religion of Islam. He is a Caucasian. But there is insufficient evidence that any of those factors formed the basis of the School's decisions, vis-à-vis, its actions concerning Petitioner's applications for employment or tuition reimbursement.

RECOMMENDATION

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

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

DONE AND ENTERED this 21st day of November, 2011, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2011.

ENDNOTES

^{1/} Petitioner's PRO, for example, while cogent and understandable, was replete with grammatical errors. The gist of the PRO was clear, but the presentation was lacking. This is not to question Petitioner's intelligence or education, only to suggest that he is not quite prepared for the positions he was seeking.

^{2/} Petitioner attempted to address several issues outside the requisite time parameters at final hearing. To his credit, he did not raise those issues in his PRO or attempt to make them a part of the ultimate decision in this matter.

COPIES FURNISHED:

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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.