

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

EMORY CARL SIMS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 12-1799  
 )  
 VALENCIA COLLEGE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 17, 2012, and August 20, 2012, by video teleconference at sites in Tallahassee and Orlando, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Respondent committed an unlawful employment practice against Petitioner in violation of chapter 760, Florida Statutes (2012),<sup>1/</sup> and Title VII of the Civil Rights Act.

PRELIMINARY STATEMENT

On May 9, 2012, the Florida Commission on Human Relations (Commission) issued a Determination finding no cause to believe that Respondent, Valencia College, committed an unlawful employment practice in violation of section 760.10, Florida Statutes, against Petitioner, Emory Sims (Mr. Sims).

On May 14, 2012, Mr. Sims filed a Petition for Relief alleging that Valencia College engaged in an unlawful employment practice based on race.

On May 17, 2012, the Commission transmitted Mr. Sims' Petition for Relief to DOAH for a final hearing. The undersigned was assigned, and set the case for hearing on June 29, 2012. Valencia College requested a continuance of the hearing date, which was granted; and the hearing was reset for July 17, 2012.

The hearing began on July 17, 2012, but was not completed. The undersigned scheduled an additional day for testimony. On August 20, 2012, the hearing was reconvened and concluded.

Mr. Sims testified on his own behalf and introduced into evidence Petitioner's Exhibits numbered 1 through 15, 20, 27

through 38, 48 through 50, 52, 53, and 55 through 59. Valencia College presented the testimony of Elizabeth Washington (Ms. Washington) and Melissa Perdone, Ed.D. (Dr. Perdone), and introduced into evidence Respondent's Exhibits numbered 1 through 5, 7 through 9, and 16.

Valencia College provided a court reporter to transcribe the proceedings, and the court reporter filed a three-volume transcript with DOAH. The parties submitted Proposed Recommended Orders which the undersigned considered in preparing this Recommended Order.

#### FINDINGS OF FACT

1. Mr. Sims is an African-American man who worked as an adjunct professor for Valencia College from August 31, 2009, until August 6, 2011. During his employment with Valencia College, Mr. Sims taught pre-algebra and introduction to algebra.

2. Valencia College is a two-year community college located in Central Florida, and is comprised of several different campuses. Mr. Sims was an adjunct professor of mathematics for the Osceola campus.

3. Mr. Sims' Charge of Discrimination, initially filed with the Commission, alleged that he was terminated from his employment as an adjunct professor based on his race. After the Commission's determination that there was no cause to believe

that a discriminatory practice had occurred, Mr. Sims filed his Petition for Relief. In the Petition for Relief, Mr. Sims alleged that Valencia College had discriminated against him based on race by: 1) not renewing his employment as an adjunct professor; 2) scheduling him fewer class assignments; and 3) paying him less than other adjunct professors.

4. According to Ms. Washington, the math coordinator for Valencia College, an adjunct professor is one that enters into a contract to teach a specific class for a semester. Usually, an adjunct professor teaches between one and two classes a semester. Adjunct professors are paid by the hour for the number of classes. All adjunct professors in the mathematics department were paid pursuant to a scale based on the individual's educational background and number of hours taught. For example, as shown by Respondent's Exhibit 5, all adjunct professors, who had a bachelor's degree in mathematics, were paid \$525.00 for one contract hour course. An adjunct professor does not receive any payment if he or she is not on the teaching schedule. Further, as Dr. Perdone, the head of Valencia College's math and science department at the Osceola campus explained, Valencia College uses adjunct professors as a means of controlling costs, and providing flexibility for meeting its students' needs.

5. Mr. Sims did not bring forward any evidence showing that Valencia College engaged in a discriminatory employment practice.

6. Part of Ms. Washington's responsibilities is collecting data concerning the adjunct professor's effectiveness at the end of each semester. In evaluating an adjunct professor's performance, Valencia College's math department examines the "test-taker pass rate," "overall retention," and "overall pass rate."

7. Ms. Washington and Dr. Perdone explained the definitions of each of these terms as follows:

- a) "test-taker pass rate" means percentage of students that passed the exam out of those who took the final exam;
- b) "overall retention rate" means percentage of students that sat through the entire course and attempted the final out of the total number of students that began the class; and
- c) "overall pass rate" is the successful completion rate, the percentage of students who actually passed the class at the end from of the number of students that begin the class.

8. Ms. Washington explained that the "overall retention rate" is important because it indicates that students remained in the classroom for the entire semester, and that the students,

if they initially failed, are more likely to pass the class the following semester.

9. Dr. Perdone explained that in reviewing an adjunct professor, she was most interested in the "overall pass rate" which showed the student's successful completion of the course. In a developmental math class, such as pre-algebra or introduction to algebra, the students must successfully complete the class before being enrolled in a college credit math class.

10. The data compiled by Ms. Washington showed that Mr. Sims' teaching performance in his pre-algebra and introduction to algebra classes for the spring and summer semesters 2011 was substandard. Specifically, the evidence showed that the "overall retention rate" for Mr. Sims' developmental math classes for the Spring Semester 2011 were at 50 percent and 35 percent. Further, the percentage of students successfully completing the two classes taught by Mr. Sims had an "overall pass rate" of 35 percent. These numbers represented the lowest for all adjunct math professors on the Osceola campus. Further, Mr. Sims' teaching performance for the Summer 2011 semester also showed a 41 percent "overall retention rate" and a 36 percent "overall pass rate." Again, Mr. Sims had the lowest percentage of students successfully completing his class out of all the adjunct professors for the math department.

11. The data compiled by Ms. Washington was provided to Dr. Perdone, and Ms. Washington recommended that Valencia College not continue hiring Mr. Sims as an adjunct professor.

12. Dr. Perdone credibly testified in relation to reviewing the data concerning Mr. Sims' teaching that "when we're not seeing enough students getting through the course, sitting for the exam, and passing the exam was my primary concern." Further, Dr. Perdone credibly testified that she had received student complaints about Mr. Sims' teaching not being a "positive experience," and him being condescending to students.

13. In June 2011, Dr. Perdone provided Mr. Sims with an evaluation for the Spring Semester 2011. The evaluation states that Mr. Sims was satisfactory in the areas of "Effectiveness of Teaching/Learning Process," "Scope and Content" of material presented, "Departmental Communication and Support," and in "Testing and Evaluation." However, Dr. Perdone rated Mr. Sims as unsatisfactory in the area of "Review Prior Session Student Assessment Data." Specifically, Dr. Perdone's comments on the evaluation state:

Prof. Sims had a challenging year in the math department. He had prior improvements but his successful completion rates and student feedback have taken a negative turn. The rate of students making it successfully through the entire course has dropped to 35 percent. Also, students have visited the office to express their concerns that Prof. Sims does not show a caring and supportive

demeanor with students in class. These issues cannot continue if Prof. Sims would like to continue to teach in the math department.

14. On receiving this evaluation, Mr. Sims became upset and spoke with Dr. Perdone. Mr. Sims was upset and questioned why he was being held accountable for students withdrawing from his class. Dr. Perdone explained that Valencia College kept track of the data, and that she was concerned about the number of students successfully completing the class. She found the conversation with Mr. Sims argumentative about Valencia College's keeping track of the data on student withdrawals. It was Mr. Sims' contention that he should not be held responsible for students withdrawing from his class. Dr. Perdone credibly testified that her discussion with Mr. Sims did not progress past his displeasure with Valencia College keeping track of student withdrawals. At the heat of the discussion, and during the presentation of the evidence in this case, Mr. Sims claimed he never understood how the "retention rate" and "overall pass rate" were calculated. Further, Dr. Perdone credibly testified that at no point in their discussion did Mr. Sims ask or seek guidance on how to improve his teaching. Finally, Dr. Perdone credibly testified that her conversation with Mr. Sims confirmed the student complaints about his teaching being condescending.



For example, Dr. Perdone took exception to Mr. Sims' negative characterization of the students in the "remedial" math classes."

15. There is no direct evidence of discrimination.

16. Further, there is no evidence showing that similarly situated adjunct professors, who were not African American, were treated differently than Mr. Sims in scheduling classes, pay, or renewing the adjunct professor contract.

17. Mr. Sims' testimony was often confusing and did not support his contention that he was the victim of racial discrimination. For example, in one instance, in attempting to prove that he was discriminated against in class scheduling, Mr. Sims testified that he believed in the Spring 2011 semester, Ms. Washington and Dr. Perdone discriminated against him by not scheduling him to teach. Then, according to Mr. Sims' testimony, at the "eleventh hour" he was asked to teach a developmental class when an adjunct professor was not available. Mr. Sims contended that in scheduling him to teach this particular class, Dr. Perdone knew before assigning him to the class that students would either withdraw or not successfully complete the class. Therefore, under Mr. Sims' theory, Valencia College discriminated against him both by not scheduling him to teach, and then by scheduling him to teach.

18. Contrary to Mr. Sims' assertions, Ms. Washington credibly testified that Mr. Sims, as well as other adjunct professors, was sent an e-mail in the fall of 2010 asking if the professors would be available to teach in the Spring. Further, Ms. Washington and Dr. Perdone credibly testified that because Mr. Sims did not respond to the e-mail, he was not placed on the schedule.

19. Mr. Sims did not bring forward any evidence showing that Dr. Perdone's explanation that she decided not to contract with him as an adjunct professor, based on his poor classroom performance was pretextual.

#### CONCLUSIONS OF LAW

20. DOAH has subject matter and personal jurisdiction over the parties pursuant to sections 120.569 and 120.57, Florida Statutes (2012).

21. Mr. Sims alleges that Valencia College engaged in an unlawful employment practice by terminating his employment based on race, as well as discriminated against him in scheduling classes, pay, and providing promotions; thus, violating the Florida Civil Rights Act, as amended, chapter 760, Florida Statutes.

22. Section 760.10(1)(a) provides it is an unlawful employment practice for an employer to discharge or otherwise

discriminate against an individual on the basis of national origin, age, or handicap.

23. Mr. Sims has the burden of proving by a preponderance of the evidence that Valencia College committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Boland v. Div. of Emerg. Mgmt./ Younger v. Div. Emerg. Mgmt., Case Nos. 11-5198, 11-5199 (Fla. DOAH Jan. 26, 2012; FCHR Jun. 27, 2012).

24. Because the Florida Civil Rights Act of 1992, sections 760.01 through 760.11, is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e-et seq., the Florida courts look to federal case law in interpreting and applying the Florida law. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009) (omitting string citations). Evidence of an unlawful employment practice may be established by either direct evidence of discrimination or through circumstantial evidence, which is evaluated within the framework of the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny.

25. "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact in issue

without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of the protected characteristic constitute direct evidence of discrimination." Bass v. Bd. of Cnty Comm'rs, Orange Cnty., Fla., 256 F.3d 1095, 1105 (11th Cir. 2001).

26. Because direct evidence of discriminatory intent is often unavailable, persons who claim that they are victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997); Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). As stated earlier, the analytical framework for establishing intentional discrimination through inferential and circumstantial evidence is the shifting-burden analysis established by the United States Supreme Court in McDonnell Douglas.

27. Under the McDonnell Douglas framework, a claimant bears the initial burden of establishing a prima facie case of discrimination. If the claimant establishes a prima facie case, the claimant raises a presumption of discrimination against the employer. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) ("Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to

permit an inference of discrimination."). See also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 1093-94, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.").

28. In order to establish a prima facie case under the McDonnell Douglas framework, a claimant must show that: (1) he or she is a member of a protected class; (2) he or she was qualified for the position; (3) he or she was subjected to an adverse employment action; and (4) similarly situated employees outside the employee's protected class were treated more favorably than the claimant. See McDonnell Douglas, supra; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ., 342 F.3d 1281 (11th Cir. 2003).

29. If the claimant establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory explanation for the adverse employment action. McDonnell Douglas, supra; Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991).

30. If the employer produces evidence showing a legitimate, non-discriminatory reason for the employment decision, then the burden shifts to the claimant to establish that the employer's proffered reason is merely a pretext for discrimination. McDonnell Douglas, supra; St. Mary's Honor Ctr., et al. v. Hicks, 509 U.S. 502 at 516-518, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). In order to satisfy this final step of the process, claimants must "show directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Chandler, 582 So. 2d at 1186, citing Burdine, 450 U.S. at 252-256. See also Holifield, 115 F.3d at 1565. A claimant may establish that an employer's offered explanation is pretext for discrimination by offering sufficient evidence showing inconsistencies, implausibilities, or contradictions in the employer's offered explanation. See Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. N.J. 1994) ("the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them 'unworthy of credence,' (citing Ezold v. Wolk, Block, Schorr, and Solis-Cohen, 983 F. 2d 509, 531 (3d Cir. 1992)), and

hence infer "that the employer did not act for [the asserted] non-discriminatory reasons." (footnote omitted)).

31. Finally, it bears repeating that the law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was motivated by unlawful discriminatory intent. An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F. 2d 1181, 1187 (11th Cir. 1984). In a proceeding under the Civil Rights Act, the courts "are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. Ct. 1999).

32. Applying the rules of law to the facts here, Mr. Sims failed to establish a prima facie case of discrimination. Although Mr. Sims is a member of a protected class,<sup>2/</sup> was qualified for the job,<sup>3/</sup> and had suffered an adverse employment action with the non-renewal of his employment contract,<sup>4/</sup> he did not bring forward any evidence showing that similarly situated adjunct professors, who were not members of his protected class, were treated more favorably than him in scheduling of classes,

pay, or retention. For example, on the issue of adjunct professor pay, Mr. Sins did not bring forward any evidence showing that other similarly situated adjunct professors, who were not members of his protected class, received a higher pay for teaching developmental math courses. In fact, the evidence showed that Valencia College had a uniform pay scale for adjunct professors that was non-discriminatory.

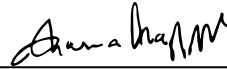
33. Even if one determined that Mr. Sims had met the prima facie showing, the record clearly shows that Valencia College brought forward a legitimate, non-discriminatory reason for its decision not to renew Mr. Sims's contract as an adjunct professor, as well as scheduling and pay. Mr. Sims did not bring forward any evidence that showed Valencia College's offered explanations for not renewing his contract; Valencia College's scheduling of classes or its pay scale were pretext for discrimination.

#### RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Petitioner failed to show that Respondent engaged in an unlawful practice in violation of the Florida Civil Rights Act, and dismissing the Petition for Relief.



DONE AND ENTERED this 21st day of September, 2012, in  
Tallahassee, Leon County, Florida.



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THOMAS P. CRAPPS  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of September, 2012.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2012 version.

<sup>2/</sup> Johnson v. Apalachee Mental Health, Case No. 11-6467 (Fla. DOAH Apr 10, 2012; FCHR June 27, 2012).

<sup>3/</sup> See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1360 (11th Cir. 1999) ("plaintiffs, who have been discharged from a previously held position, do not need to satisfy the McDonnell Douglas prong requiring proof of qualification . . . [I]n cases where a plaintiff has held a position for a significant period of time, qualification for that position sufficient to satisfy the test of a prima facie case can be inferred.") (citations and internal quotation marks omitted).

<sup>4/</sup> Gillman v. St. Leo Univ., Case No. 06-1242 (Fla. DOAH Dec. 29, 2006), 2006 Fla. Div. Admin. Hear. LEXIS 603, ("The refusal to renew Petitioner's teaching contract was an adverse employment action."); FCHR Order No. 07-025 (Mar. 29, 2007).

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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.