

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KA'JUEL J. WASHINGTON,

Petitioner,

vs.

Case No. 17-4950

FLORIDA A AND M UNIVERSITY
COLLEGE OF LAW,

Respondent.

_____/

KA'JUEL WASHINGTON,

Petitioner,

vs.

Case No. 17-5340

FLORIDA A AND M UNIVERSITY BOARD
OF TRUSTEES,

Respondent.

_____/

RECOMMENDED ORDER

An evidentiary hearing was conducted on January 24 and 25, and February 26 and 27, 2018, by video teleconference with sites in Orlando and Tallahassee, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jerry Girley, Esquire
The Girley Law Firm
125 East Marks Street
Orlando, Florida 32803

Ka'Juel Washington, Esquire
The Washington Trial Group, PLLC
37 North Orange Avenue, Suite 500
Orlando, Florida 32801

For Respondents: Maria A. Santoro, Esquire
Teresa Cooper Ward, Esquire
Dennis, Jackson, Martin & Fontela, P.A.
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STATEMENT OF THE ISSUES

The issues in this case are:

1) whether Petitioner, Ka'Juel Washington, was subject to discrimination by the Florida A & M University College of Law (FAMU-COL) on the basis of race, color, sex, or age,^{1/} and, if so, what remedy is appropriate; and

2) whether the Florida A & M University Board of Trustees (FAMU-BOT) wrongly terminated Petitioner's employment.^{2/}

PRELIMINARY STATEMENT

Discrimination Allegation

On March 6, 2017, Petitioner filed an employment complaint of discrimination with the Florida Commission on Human Relations (FCHR) against the FAMU-COL. In the complaint, Petitioner alleged that he was (as of March 6, 2017) a 41-year-old African-American, who worked for the FAMU-COL between November 2006 and June 2016.^{3/} Petitioner alleged that he "was discriminated against by a female dominated department because [he was] a dark-skinned, African-American, heterosexual Christian male."

Petitioner's complaint also alleged that a female adjunct instructor, who had less experience than he, was awarded a contract to work the summer 2016 schedule while he was not, and that he "was terminated from [his] job for these reasons."

FCHR conducted an investigation, after which it issued its determination of no reasonable cause on August 25, 2017, finding that "the facts and evidence as set forth . . . do not support the [Petitioner's] allegation," and Petitioner "did not provide any credible evidence to prove that he was subjected to different terms and conditions of employment based on his race, sex, age and religion."

On September 1, 2017, Petitioner timely filed a Petition for Relief (Petition) with FCHR. The Petition contained the following handwritten response to the request for a concise statement of the ultimate facts alleged:

The Ultimate Facts will Demonstrate That The Petitioner was subjected to unlawful Discrimination in violation of Chapter 760 of The Florida Statutes. The Petitioner was removed from The Summer Teaching Schedule and replaced by a Female of Indian decent [sic]. The Petitioner was also issued undue reprimands and ultimately terminated for alleged poor performance and unauthorized outside employment. The Petitioner actually had permission to work an outside job, but he never did so until his employment with the Respondent was interrupted. Additionally, the Petitioner was admonished for not attending a "Voluntary" event which took place on the day he normally attended Christian religious services.

Petitioner was asked which Florida Statute he alleged FAMU-COL had violated. A check mark designated the "Florida Civil Rights Act of 1992, as Amended." Petitioner provided the explanation of how the alleged facts related to the specific Florida Statute:

The Facts Delineated in Paragraph #5 State violations of the Law based upon, Gender race, Color, XXXX and AGE.

FCHR timely referred the matter to DOAH for assignment of an Administrative Law Judge to conduct all necessary proceedings. This case was assigned DOAH Case No. 17-4950.

Termination Allegation

By letter dated June 15, 2016, the FAMU-BOT notified Petitioner that his employment with the FAMU-COL was terminated, immediately. The termination action was taken against Petitioner for his "misconduct in the workplace as well as incompetence in the exercise of [his] duties as an employee of FAMU." Attached to the two-page termination letter were approximately 60 pages of university memoranda in support of the action.

On September 18, 2017, following the completion the FAMU-BOT "Step 1" and "Step 2" grievance procedures, Petitioner filed a "Step 3 Request for Hearing pursuant to FAMU Regulations 10.206." One week later, Florida A & M University (FAMU) President Larry Robinson^{4/} referred the matter to DOAH for an administrative hearing. This case was assigned DOAH Case No. 17-5340.

Consolidated Cases

On October 23, 2017, counsel for Respondents FAMU-COL and FAMU-BOT, filed a motion to consolidate and continue the final hearing in both DOAH cases. Following a telephonic motion hearing, both motions were granted and the case was scheduled for a two-day hearing beginning January 24, 2018.

Prior to the hearing, Respondents filed a Pre-hearing Statement which offered six points on which Respondents thought there would be agreement. Those six points were discussed at the start of the hearing, and with a modification to two of the statements, both parties agreed to the statements. To the extent the statements are relevant, they are incorporated in the findings below.

At the final hearing, Petitioner testified on his own behalf and also presented the testimony of Ann Marie Cavazos, professor of law and former director of the Clinics at FAMU-COL; Angela Felecia Epps, professor of law and former dean of the FAMU-COL; Leroy Pernell, professor of law, former dean of the FAMU-COL and its Interim Dean; Marcella David, former provost of FAMU and current professor of law; Maritza Reyes, professor of law at the FAMU-COL; and Andrew Ladores, Esquire. Petitioner's Exhibits 1, 2, 5, 6, 8, 14, 16, 19, 23, and 32 were admitted into evidence.

In addition to former Provost David, Professor Cavazos, Professor Epps, and Dean Pernell, Respondents called David Hamilton Jackson, Jr., Ph.D., professor of history, Associate Provost for Graduate Education and Dean of the FAMU School of Graduate Studies and Research; Cynthia Hughes Harris, Ph.D., professor and Dean of the FAMU School of Allied Health Services; Mildred Graham, director of Advancement and Alumni Affairs at FAMU; and Ashley Rawlings Boatwright, Esquire.

Respondents' Exhibits 1, 2, 5, 7 through 12, 14 through 16, 20 through 24, 28 through 31, 33 through 36, 38, 41, 46, 51, and the deposition testimony of Ashley Rawlings Boatwright were admitted in evidence. Respondents' Exhibits 25 and 26 were offered, with their admissibility taken under advisement. At this time, those two exhibits are admitted.

At the conclusion of the hearing, the deadline for the parties to file proposed recommended orders (PROs) was discussed. The parties were informed the deadline, provided by rule, is ten days after the transcript is filed at DOAH. Petitioner requested additional time, and Respondents did not object. The PRO deadline was established at 30 days after the filing of the complete transcript.

The Transcript of the hearing was filed on three separate days: February 12 and 28, and March 26, 2018. On March 26, 2018, Petitioner filed a request for extension of time to file

findings of fact and conclusion of law without complying with Florida Administrative Code Rule 28-106.204(3). The request for an extension of the PRO deadline was denied at that time. Respondents timely filed their PRO, which has been considered in the rendering of this Recommended Order. To date Petitioner has not filed a PRO.

FINDINGS OF FACT

1. Petitioner is an African-American male, whose date of birth is November 27, 1975. Petitioner graduated from the FAMU-COL in 2005.

2. Petitioner was an instructor at the FAMU-COL Legal Clinics (Clinics) from October 2009 to May 2016. Petitioner was not tenured and was not tenure seeking at the FAMU-COL. Petitioner's last contract with the FAMU-COL was executed in May 2015 for employment from August 3, 2015 to May 6, 2016.

3. University Professor Cavazos was the director of the Clinics.

4. University Professor Pernell was dean of the FAMU-COL from 2008 to 2015. During the hearing, Dean Pernell was serving as the FAMU-COL interim dean.

5. University Professor Epps^{5/} became dean of the FAMU-COL in January 2016. As she was preparing for her new position, Dean Epps made it known that she wanted to have one-on-one meetings with each faculty member. She prefers to meet members

of the faculty in their own office environment because that can give her a sense of each person.

6. Petitioner began preparing a power-point presentation and a 15-page "Annual Report" about the Clinics on November 10, 2015. At no time between November 10th and when he made his presentation to Dean Epps, did Petitioner discuss its contents with his supervisor, Director Cavazos.

7. As he was preparing the power-point presentation and report, Petitioner contacted Ms. Graham, the director of Advancement and Alumni Affairs. Ms. Graham manages and handles all FAMU-COL public relations, media relations, fundraising (including restricted and unrestricted endowment funds), development, support, advancement activities and special events. In response to a request by Petitioner, Ms. Graham determined that she was not able to provide him with information on all donors, gifts, contributions, endowments or grants made to the FAMU-COL.

8. In 2005, the Walt Disney World Company (Disney) pledged \$250,000 to the FAMU-COL. The goal of this endowment was to support a pro bono legal clinic created to serve indigent children, youth and family legal issues. The FAMU president at the time of the endowment determined to use the money to endow a professorship. Disney fulfilled its pledge in three years, and the money has been invested since its receipt. Although Disney

was asked by the FAMU-COL if it could use the endowment in a different way, no money has been spent from the Disney endowment. The endowment has not been misused or misappropriated.

9. Petitioner reached out to Dean Epps and scheduled an appointment with her shortly after she began her tenure as dean. Petitioner did not schedule the appointment for his own office, but instead set up in a FAMU-COL classroom. Petitioner spread a tablecloth with the FAMU logo on a table, along with a mug, a bottle of water, a pad of paper and a pen for Dean Epps. Petitioner's presentation included information about what legal clinics were offered, clinical instructors, other personnel, the Clinics' expenses, clients, grants, funding, student enrollment, student jobs and Petitioner's Curriculum Vitae with his contact information.

10. Dean Epps thought Petitioner was "auditioning for the Clinic director's position" which confused her because she did not know that Director Cavazos was leaving.

11. Immediately after Petitioner's presentation, Dean Epps attended the FAMU-COL school faculty function where she was to see the Clinics' setting and meet "everyone": instructors; adjuncts; and the Fellows.^{6/} After the function, Dean Epps told Director Cavazos of Petitioner's presentation (including the tablecloth and mug) and inquired of Director Cavazos if she were

leaving. Director Cavazos replied "not that I'm aware of. At least not this moment."

12. Director Cavazos then told Dean Epps that she was unaware of Petitioner's presentation to her, and had never seen it. Dean Epps provided a copy of Petitioner's presentation to Director Cavazos.

13. Director Cavazos had seen Petitioner enter the FAMU-COL school faculty function and noticed he had the FAMU tablecloth under his arm. When Director Cavazos asked Petitioner about his use of the tablecloth, Petitioner responded that he was recruiting students to the Clinics program.

14. Shortly after the FAMU-COL school faculty function, Dean Epps provided Petitioner with a memo regarding his responsibilities to the Clinics. Dean Epps' management style was different than the prior FAMU-COL administrator. Her memo was intended to facilitate Petitioner and Director Cavazos working together, and to instill a "chain of command" structure. Dean Epps' memo directed Petitioner to meet with his supervisor, Director Cavazos, to discuss his responsibilities, and to follow Director Cavazos' directives on the Clinics' operations and programs. Dean Epps appreciated Petitioner's work in putting together the report and power-point presentation, but found the presentation to be inappropriate and unprofessional in light of Petitioner's failure to work with Director Cavazos. Dean Epps

expressed her preference that Petitioner needed to talk with Director Cavazos prior to bringing any other suggestions to her attention.

15. Petitioner acknowledged the chain of command structure in a response memo to Dean Epps on January 14, 2016. However, Petitioner qualified his response during the hearing by saying he was aware of what the chain of command meant in the military, but not in the legal profession. Petitioner's testimony is unpersuasive.

16. Early in the FAMU-COL spring 2016 term, Director Cavazos became aware that Petitioner had unilaterally changed the class meeting time of the Homelessness and Legal Advocacy Clinic (HLAC) from an evening class to a late morning-noon class time. For the entire time that Petitioner had been the HLAC instructor (2009-2016), the HLAC was designated as an evening clinic to accommodate evening students. This designation is a requirement of the American Bar Association (ABA), in that evening students must have the same opportunity as day students for experiential learning. In previous terms, the HLAC met on Monday evenings from 6:00 p.m. to 7:40 p.m. On Tuesday through Thursday evenings, the students and Petitioner went to local shelters or other organizations to conduct intake interviews and speak with the HLAC's clients.

17. Petitioner explained that it was his "intent" to accommodate one student who wanted to take the HLAC, when he changed the class time. Petitioner admitted that changing the class time was the first time he had done so, because "every other time it was the same time as the schedule stated." Petitioner testified that there were no evening students in the HLAC that semester and the three full-time students would have to vote unanimously to change the class meeting time. Petitioner contradicted his own testimony when he testified he changed the class time and then testified the students had to vote unanimously to change the class time. Petitioner's testimony is not credible.

18. A meeting was held with Petitioner, Director Cavazos, and Associate Dean Bullard. No testimony was provided that the evening intake interviews, i.e., the time in which to speak with HLAC's clients, was altered, nor was it clear exactly when the HLAC actually met during the spring 2016 semester. Because many of the HLAC's clients were homeless, speaking to them during the evening was feasible, but difficult. Speaking to the HLAC's clients during the day was nearly impossible, as no one ever knew where the clients could be found.

19. Director Cavazos issued a Notice and Warning of Unprofessional Conduct to Petitioner on January 15, 2016. Director Cavazos took this action because Petitioner had lied to

her, the power-point he presented to Dean Epps was not accurate, and the report suggested that he had the authority and information to present such information. Director Cavazos also expressed concern with Petitioner's unilaterally changing the HLAC schedule and the possible impact that could have on the school's ABA status.

20. In February 2016, then Provost David^{7/} issued a memo to Dean Epps regarding the University's "2016-2017 Reduction Plan." The memo dealt with the financial situation of the FAMU-COL, and what steps were to be taken to reduce the law school's expenditures. Based on enrollment, Dean Epps determined that only two summer Clinics would be offered.

21. Once the FAMU-COL summer Clinics course offerings were published, Petitioner noticed that the HLAC was not offered. A meeting was held with Petitioner, Director Cavazos, Associate Dean Bullard, and Dean Epps. At that time Petitioner was told of the budget issues and that only two Clinics were going to be offered that summer, neither of which would be the HLAC.

22. Several weeks later, Director Cavazos requested that a third clinic be added to the summer 2016 course offering, a Guardian Ad Litem Clinic (GALC). Director Cavazos provided compelling reasons to continue the GALC through the summer, and the GALC was added. The adjunct professor, who was already handling the GALC and was immersed in the on-going six cases,

remained to teach the course and continue working those cases to completion.

23. In preparation for the summer term without the HLAC, the current cases were to be handed over to the Fellows. Petitioner was aware of this plan.

24. Despite knowing that the Fellows were to get HLAC's cases, on April 8, 2016, Petitioner e-mailed Director Cavazos a substitution of counsel draft, inserting her name as the attorney of record in all the HLAC's pending cases.

25. On April 9, 2016, Director Cavazos responded to Petitioner that the semester had not ended and there were to be additional discussions with the Fellows about the cases that were to be transferred to them. Director Cavazos contacted Petitioner and attempted to obtain case status reports on all of the transferring cases by April 13, 2016. Director Cavazos planned to meet with all the Fellows and university staff involved in the transfer.

26. Petitioner advised Director Cavazos that he had provided information on all of the cases through attachments to the e-mail, and that each client had a memo in their file in CLIO.^{8/}

27. Director Cavazos responded that the information Petitioner provided was not helpful for determining the current status of each case, and that she needed an overview of each of

the 17 cases. Director Cavazos provided a time for a meeting with the Fellows to occur two days later, on April 13, 2016.

28. On April 13, 2016, a meeting was held with Petitioner, the Fellows, Professor Caussade-Garcia, and Director Cavazos. This meeting was to discuss the multiple HLAC cases that needed to be transferred to the Fellows for the summer term. The intention was for Petitioner to return for the fall semester and resume any remaining cases.

29. During this meeting or shortly thereafter, Director Cavazos learned the HLAC's client files that were to be transferred to the Fellows were not complete per the Clinics' policy and procedure for file maintenance. Some HLAC's client file documentation was in CLIO; however, not all of the HLAC's client files had the requisite paper or hard copies. Petitioner expressed that he did not have paper files, but had notes about each case. Additionally, Director Cavazos first learned that Petitioner had an auto negligence case within the HLAC. These types of cases are outside the HLAC (and the Clinics) practice parameters.^{9/}

30. The long-standing FAMU-COL clinical program policy is to educate law students on the appropriate method to maintain client files, both in hard copy and electronically. The Clinics' policy and procedure manual (which encompasses the HLAC) details that each client file is to be maintained in a

six-section file folder that makes it easy for the next student, instructor, or Fellow to know the case status. The Clinics' client files are not to be removed from the Clinic, unless the matter is scheduled for a mediation, deposition or court appearance.

31. At the meeting or shortly thereafter, Petitioner acknowledged that he would update the HLAC's client files.

32. On April 18, 2016, Dean Epps advised Petitioner that she was not recommending Petitioner be given a terminal contract^{10/} for the 2017-2018 academic year. Dean Epps advised Provost David, Professor Bullock, and Director Cavazos of her decision. Dean Epps had a priority on experiential learning, and although there was a need to reduce expenses for the law school, she believed the FAMU-COL needed more not less full-time clinical instructors. She directed Petitioner to take the necessary steps to ensure that the HLAC's cases were covered for the summer by the Fellows. Dean Epps reiterated that her leadership style was different than prior administrators, and requested that Petitioner first consult with Director Cavazos before seeking others input.

33. On April 27, 2016, another meeting was held with Petitioner, Director Cavazos, and the Fellows, and there were still incomplete HLAC client files.

34. Ms. Boatwright, one Fellow who was taking on cases from Petitioner for the 2016 summer, provided Petitioner and Director Cavazos a draft notice of appearance (NOA) for the multiple cases that were to be transferred to the Fellows. Petitioner responded that he thought the NOA "should work."

35. Further, Ms. Boatwright did a comprehensive review of the HLAC's client files that were transferred to the Fellows. She determined that there were multiple HLAC client case files that were incomplete and had not been updated to a current status. She also discovered that court hearings had recently been set in a few cases, but that no work had been done on the files in months. Other HLAC client files were missing mandatory disclosure items. In yet another case, nine months had elapsed since the client's documents were ready to be filed, but were not.

36. Ms. Boatwright compared the HLAC's client files to the Orange County Clerk of Court dockets and was able to determine what was missing from the HLAC files. She reconstructed the HLAC's client files and determined the status of those cases.

37. On May 5, 2016, Director Cavazos issued a written reprimand to Petitioner. This reprimand reiterated the January issues regarding Petitioner's unilateral change to the designated HLAC class meeting time, and Petitioner's meeting with Dean Epps without sharing the power-point presentation and

"Annual Report" with Director Cavazos prior to that meeting. The reprimand included that Director Cavazos had also determined that Petitioner had ceased going to the HLAC night intake locations. Director Cavazos re-established the intake schedules for the HLAC.

38. The reprimand included that in preparing for Petitioner's summer sabbatical, Director Cavazos had met with Petitioner and discovered that he was not maintaining HLAC client files according to the Clinics' policy and procedures. Director Cavazos included a list of the cases that were incomplete for the transfer to the Fellows. The reprimand also suggested a possible violation of university regulations regarding Petitioner's opening of his own law practice, of which Director Cavazos was unaware.

39. Director Cavazos requested that an exit meeting needed to be held to discuss the transfer of the HLAC's files to the Fellows prior to Petitioner's last day. Late on May 6, 2016, Petitioner delivered the transferring files to a FAMU-COL assistant. The Fellow's received the files on Monday, May 9, 2016. Petitioner's nine-month contract with the FAMU-COL ended on May 6, 2016.

40. Petitioner informed Director Cavazos of one HLAC client who requested a copy of her file. Ms. Boatwright discovered that the client had made the request for her file a

month earlier, and Petitioner had failed to respond to the request.

41. Petitioner admitted during the hearing that on May 10, 2016, four days after his annual contract ended, he sent the following letter, using outdated FAMU stationary, to 17 HLAC clients:

Dear [Name obliterated]
This letter is being sent to advise you that, as of next week, I will be setting your case for hearing on a Motion to Withdraw. So, you will soon be without legal representation.

My contract with the FAMU Clinics Department has expired and will not be renewed until August 2016. In the meantime, the Clinical Director, Ann Marie Cavazos, was supposed to arrange for you to have legal representation. Unfortunately, no notices have been filed with the clerk of court on your behalf.

If you have any questions, comments or concerns about your lack of legal representation on such short notice, please contact:

Ann Marie Cavazos, Clinical Director
Phone: (407) 254-4000
Email: Ann.cavazos@famuedu

If you find that she is unresponsive and difficult to get a hold of, you may want to contact her direct supervisors:

Dean Bullock
Phone: (407) 254-3257
Email: Joan.Bullock@famuedu

Dean Epps
Phone: (407) 254-3204
Email: Felecia.Epps@famuedu

This concludes the extent of our representation of you regarding this matter. It is the policy of the clinic to keep all files on record for a period of six (6) years before destroying them.

Sincerely,
/s/ Ka'Juel J. Washington
Ka'Juel J. Washington
Attorney & Counselor At Law

42. On May 17, 2016, Dean Epps contacted Petitioner via e-mail. Dean Epps had read Director Cavazos' written reprimand, and requested that Petitioner complete an outside employment form and return it as soon as possible. Dean Epps included a copy of the applicable University Regulation and a form for Petitioner's use.

43. Petitioner responded within several hours to Dean Epps request. Petitioner provided that he "filed [sic] out, submitted [the form] and [it was] approved around May of 2015."

44. On May 19, 2016, Dean Epps responded to Petitioner and again asked for an updated outside employment form, as the two forms^{11/} she found were not current. One form related to Petitioner's run for public office in the fall of 2015, and the second for consulting work he would be performing for the Washington Trial Group PLLC (WTG). Dean Epps requested a description of the nature of the work to determine if there was any overlap between the Clinics' clients and clients of WTG. Dean Epps made a second request that the outside employment form

be returned as soon as possible. Petitioner did not respond to Dean Epps' second request nor did he file a current outside employment form.

45. Petitioner maintained that he had the authority from Dean Pernell to engage in the consulting work. Petitioner readily admitted that his outside employment form was for the WTG, his "law firm." Petitioner intended to open his own small private solo practice, yet he stated the nature of the employment was "consulting," and he failed to provide an employment "Beginning Date" or an "Ending Date."^{12/}

46. Director Cavazos is a member of her husband's LLC, entitled Voice by John (Voices). Director Cavazos does not receive any remuneration from her position in the Voices corporation, and there is no potential for a conflict of interest with the Clinics.^{13/} Petitioner's Exhibit 32 was admitted over objection. This exhibit is a hearsay document upon which no direct testimony from Professor Bullard was taken. As such, no finding of fact will be found based upon Petitioner's Exhibit 32.

47. On May 24, 2016, Director Cavazos issued another written reprimand regarding Petitioner. This reprimand encompassed: the April 8, 2016, e-mail from Petitioner which included the draft notice of substitution of counsel to the Director; the discovery that Petitioner had an auto negligence case, which is outside the HLAC's practice area; Petitioner's

failure to ensure the transferred cases were complete and up-to-date; Petitioner's failure to provide a client with a copy of their case file when requested; the use of outdated letterhead for letters to HLAC clients; and the sending of a "disengagement" letter when the clients were still being represented by the HLAC.

48. On May 25, 2016, Dean Epps requested Petitioner's contract with the FAMU-COL be terminated. Dean Epps included the written documentation to support her request.

49. Prior to issuing the dismissal letter, Provost David requested information regarding the appropriate university procedures for such action, reviewed the documentation provided to her regarding Petitioner's circumstances, and reviewed elements of Petitioner's personnel file. Following her thoughtful consideration, Provost David dismissed Petitioner by letter dated June 15, 2016. The letter provided that the dismissal was based on his "misconduct in the workplace as well as incompetence in the exercise of [his] duties as an employee of FAMU." The letter also included memoranda in support of the decision. Petitioner was 40 years old when he was terminated.

50. Following his receipt of the employment termination letter, Petitioner believed he had the right to file a FAMU grievance challenging his dismissal. The grievance alleged Petitioner was terminated for: blowing the whistle on some

negligent FAMU-COL practices; documentation for his termination started after Petitioner met with Dean Epps in January 2016; discrimination or harassment by Director Cavazos; and his outside employment. In the grievance, Petitioner did not allege any discrimination or harassment based on religion, age, color, or race. Petitioner sought removal of the reprimands from his personnel file, reinstatement to his clinical instructor position, and receipt of back pay and other benefits; and that Director Cavazos, Dean Epps and other FAMU-COL employees not retaliate against him.

51. Petitioner was afforded the Step 1 grievance process by FAMU. In the Step 1 process, FAMU Associate Provost Jackson (Mr. Jackson) examined the facts as he could ascertain them. This included reviewing the written records, talking to people involved in the process, and specifically talking with Petitioner. During the Step 1 process, Petitioner alleged he was terminated for blowing the whistle on Director Cavazos and there was collusion between Director Cavazos and Dean Epps to get rid of Petitioner from the FAMU-COL. In September 2016, Petitioner submitted a 15-page response to a request by Mr. Jackson. Petitioner's response did not mention discrimination based on race, color, sex, religion or age as part of his Step 1 grievance.

52. In order to understand the sequence of events, Mr. Jackson compiled the information in date order to scrutinize the actions taken. Mr. Jackson determined that Petitioner committed misconduct in the workplace and incompetence in the performance of his duties as a FAMU-COL employee when Petitioner failed to follow a variety of the Clinics' policies, opened his own private law firm without proper approval, and sent letters with misinformation to 17 HLAC clients.

53. Mr. Jackson pointed out that if Petitioner's contract with the FAMU-COL had expired, Petitioner "should not have been communicating at all with the clients." Further, the letters contained misinformation that could have harmed the reputation of the FAMU-COL.

54. After reviewing Petitioner's power-point presentation, Mr. Jackson found that the presentation did not "indicate to me at all that there was any effort to blow the whistle on the supervisor of the law clinic." Mr. Jackson went on to testify that Petitioner:

[A]rticulated the points very well that he wanted to share with the dean of the school and that he is erudite enough to know that if he was blowing the whistle that he would put that in writing just like he did the other information in that report . . . the other stuff was very explicit in the report that he presented. And so if something is as critical as blowing the whistle on some

individual, I felt that if that was something that he was trying to do, that it would be explicit and not implicit.

55. Mr. Jackson found that Petitioner's grievance was unsupported. Mr. Jackson further found there were no violations of the FAMU regulations in terminating Petitioner's employment. Mr. Jackson determined that the remedy sought by Petitioner should be denied. Lastly, Mr. Jackson found there was just cause for Petitioner's termination.

56. Petitioner sought and received the FAMU Step 2 grievance review. Step 2 was conducted by Dean Hughes, the current dean of the School of Allied Health Sciences at FAMU. Petitioner again sought the removal of the reprimands from his personnel file, reinstatement to his instructor position, his back pay and other benefits, and the assurance that Director Cavazos, Dean Epps and other FAMU-COL employees did not retaliate against him.

57. The first thing Dean Hughes did was to hear from Petitioner about what he was grieving. Petitioner, with his attorney present, alleged he was terminated without a terminal contract, he was being retaliated against for exposing issues related to a grant from Disney, and he was being discriminated against by the FAMU-COL officials. Petitioner did not allege that he was being discriminated based on his race, color, sex, religion or age. Following the conversation with Petitioner and

his counsel, Dean Hughes reviewed the materials provided by Petitioner and spoke with those persons whom she thought would have information about the matter.

58. Dean Hughes determined that Petitioner was not a tenured professor, and was not entitled to a terminal contract. Non-tenured professors may be terminated for cause. Dean Hughes determined there was cause for Petitioner to be terminated based on Petitioner's performance.

59. Dean Hughes looked into the allegation that the FAMU-COL was misusing funds from a Disney grant/endowment.^{14/} Other than making the allegation of misuse of the funds, Petitioner did not provide any documentation demonstrating that the Disney money was being misused. Further, Petitioner's claim of whistle blower status was unsupported. Dean Hughes confirmed that the Disney funds had not been misused or, in fact, spent.

60. Petitioner alleged that he was discriminated against when he did not receive a summer contract, when he had always worked through the summer term. Dean Hughes determined that due to budget reasons, the HLAC that Petitioner taught was not being offered, and the cases that he was involved with would be assigned to the Fellows.

61. Dean Hughes found that Petitioner was terminated with just cause. She denied the grievance and remedy sought.

62. Petitioner filed his FCHR employment complaint of discrimination on March 6, 2017. Therein he checked the following boxes as the cause of his discrimination complaint: race, color, sex, religion and age. However, the Petition for Relief, as previously mentioned did not include religion.

63. Other instructors, their sex, and their possible courses at the FAMU-COL Clinics included: Eunice Caussade-Garcia, a female whom Petitioner guessed was "considered Hispanic" in the GALC or mediation clinic; Nickola Booth-Perry (sex not offered) in the GALC; Mrs. Naguv, a female whom Petitioner thought was Asian, but was not positive about where she was from; Robert Minarcin, a male in the criminal defense clinic; Cynthia Ramkellawan, a female who is Indian ("as in East India, not native American") in the GALC; and Mrs. Moore in the criminal defense clinic. For clarity Ms. Caussade-Garcia, Mr. Minarcin, and Ms. Ramkellawan taught the Clinic courses during the 2016 summer term. Ms. Ramkellawan was teaching the GALC during the spring 2016 term, and continued to teach it in the summer term.

64. No evidence was presented of any racial statements or of any racial overtones made directly or indirectly to Petitioner. There was no circumstantial evidence presented to support even an inference that Respondents intentionally

discriminated against Petitioner based on his race. The undersigned observed Petitioner to be an African-American male.

65. Other than Petitioner's admission of his age, there was no evidence presented regarding the ages of the other clinical instructors or professors at the FAMU-COL, nor of the individual who taught the 2016 third summer clinic. There was no circumstantial evidence presented to support even an inference that Respondents intentionally discriminated against Petitioner based on his age.

66. The claim of religious discrimination was not in the Petition for Relief. However, to stave off a claim that it was unintentionally left off, the following is provided. Other than Petitioner stating that he was admonished for not attending an event on Easter Sunday that conflicted with his Christian faith, there was no evidence presented regarding what the "event" was, who sponsored it or anything that provided a basis that religious discrimination occurred. The reprimands and the termination letter fail to state religion as a basis for the actions taken. There was no circumstantial evidence presented to support even an inference that Respondents intentionally discriminated against Petitioner based on his religion.

67. Provost David, Dean Epps, and Director Cavazos all credibly testified that Petitioner's race, color, age, sex, or religion had nothing to do with the discipline imposed.

Mr. Jackson and Dean Hughes credibly testified that during the Step 1 and Step 2 proceedings, Petitioner never alleged that he was discriminated against on the basis of his race, color, age, sex or religion.

68. Respondents have a diverse staff and an anti-discrimination, no-harassment policy that is enforced as to all its employees.

69. The undersigned finds as a matter of ultimate fact that Respondents did not discriminate against Petitioner based on his race, color, sex, or age (or religion) that might have applied to Petitioner but was not proven at hearing.

70. The undersigned finds as a matter of ultimate fact that the FAMU-BOL has just cause to terminate Petitioner's employment based on the facts above.

CONCLUSIONS OF LAW

71. DOAH has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11(6), Fla. Stat. (2017); and pursuant to FAMU Regulation 10.206(9).

Discrimination Allegation

72. Petitioner filed his FCHR complaint alleging FAMU-COL discriminated against him on the basis of his race, color, sex, age and religion.

73. The Florida Civil Rights Act of 1992 (the FCRA), prohibits discrimination in the workplace. Among other things, the FCRA makes it unlawful for an employer:

To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

§ 760.10(1)(b), Fla. Stat.

74. Florida's chapter 760, Florida Statutes (2016), is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzula v. Globeground N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009).

75. Petitioner claims he was discriminated against by FAMU-COL because of his race, color, sex, religion, or age. Petitioner alleges that Director Cavazos in collusion with Dean Epps denied him a summer teaching position.

76. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the DOAH. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommended affirmative

relief from the effects of the practice, including back pay.”

Id.

77. Petitioner has the burden of proving by a preponderance of the evidence that Respondents discriminated against him. See Fla. Dep’t of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

78. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzula v. Globeground N. Am., LLC, 18 So. 3d at 22.

79. Direct evidence is evidence that, “if believed, proves [the] existence of [a] fact in issue without inference or presumption.” Burrell v. Bd. of Tr. of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of “only the most blatant remarks, whose intent could be nothing other than to discriminate” on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

80. The record in this case did not establish unlawful race, color, sex, or age discrimination by direct evidence.

81. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory

reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 25. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

82. Accordingly, Petitioner must prove discrimination by indirect or circumstantial evidence under the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Petitioner must first establish a prima facie case by showing: (1) he is a member of a protected class; (2) he was qualified for the position held; (3) he was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004).

83. In order to establish a prima facie case of disparate treatment based on race, color, sex, or age, Petitioner must show that Respondents treated similarly-situated employees differently or less severely. Valdes v. Miami-Dade Coll., 463 Fed. Appx. 843,

845 (11th Cir. 2012); Camara v. Brinker Int'l, 161 Fed. Appx. 893 (11th Cir. 2006).

84. Petitioner offered proof sufficient to establish his race (African-American), color (black), sex (male) and age (40 at the time of termination), but failed to prove discrimination, or that similarly-situated employees were treated differently than he.

85. Finally, Petitioner offered no proof that Respondents proffered reasons for not hiring him for the summer was a pretext for unlawful discrimination. In order to prove that an employer's asserted reason is merely a pretext:

A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute [his] business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarrelling with the wisdom of that reason.

Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000).

86. The FAMU-COL proved legitimate, nondiscriminatory reasons for not hiring Petitioner for the 2016 summer clinic. Petitioner failed to show that the budget issue and the continuity of clinical supervision and instruction for the GALC were a mere pretext for unlawful discrimination. Therefore, it is concluded, based upon the evidence, the FAMU-COL did not

violate the Florida Civil Rights Act of 1992, and is not liable to Petitioner for employment discrimination.

Termination Allegation

87. The Florida Board of Governors of the State University System (BOG) is a constitutionally created entity, which establishes the "powers and duties" of all state university boards of trustees. See Art. IX, Fla. Const. FAMU-BOG, a constitutional entity, administers FAMU. See Art. IX, § 7, Fla. Const.

88. BOG Regulation 1.001, provides that FAMU-BOG is vested with the authority to establish a personnel program, which is found at chapter 10, part I, of the FAMU Regulations.

89. FAMU Regulation 10.122 provides, in pertinent part:

(2) The responsibility of the University employee is the full and competent performance of all duties pertinent to his/her employment with the University. Outside employment/activities or financial interests which interferes with the employee's obligations to the University is prohibited. Employees of the University should avoid actual or apparent conflict of interest between their University obligations and their outside employment/activities or financial interests.

(3) Any employee who proposes to engage in any outside employment must report in writing to the President or President's designee via the employee's supervisor as soon as practicable in advance of such employment, by completing the Florida A & M University report of Outside Employment form (FAM UPO-402 EFF. 7/91, as now of hereafter amended),

which is incorporated herein by reference. The President or President's designee shall determine whether the proposed outside employment appears to constitute a conflict of interest or other interference with the employee's duties. If it is determined that the proposed outside employment appears to constitute such a conflict of interest or interference, the President or President's designee shall notify the employee that he/she may not engage in the proposed activity while employed as an employee of the University.

* * *

(5) All University employees are bound to observe, in all official acts, the highest standards of ethics consistent with the code of ethics of the State of Florida, Chapter 112, Part III, Florida Statutes, the advisory opinions rendered with respect thereto, and the rules of the University.

* * *

(7) No employee shall have an employment or contractual relationship or engage in a business or personal activity that will create a continuing or frequently recurring conflict between that employee's private interest and the performance of the employee's official duties.

90. FAMU Regulation 10.205 provides, in pertinent part:

(3) Nontenured or Nonpermanent Faculty whose appointments expire after receiving notice of nonrenewal or nonreappointment or whose appointment expires without the requirement of a written notice of nonreappointment may be separated without further notice.

* * *

(5) The President or President's designee may discipline a Faculty for just cause in accordance with the provisions set forth herein. Counseling of any nature or degree shall not be considered disciplinary action.

(a) Just cause shall be defined as:

1. Incompetence; or

2. Misconduct.

* * *

(f) Dismissal - The employee may be dismissed during the term of the employment contract for just cause, regardless of tenure status where it appears to the President or President's designee that an employee's actions adversely affect the functioning of the University or jeopardize the safety or welfare of the employee, other employees or students. The employee shall be given written notice of the dismissal by the President or President's designee specifying the reason(s) therefore. The dismissal shall take effect at the time determined by the President or President's designee and as written in the notice of dismissal.

* * *

(i) Within 30 days following the receipt of notice of disciplinary action, the employee may file a complaint in accordance with Regulation 10.20

91. FAMU Regulation 10.206 provides, in pertinent part:

(1) Purpose - The purpose of this regulation is to promote a prompt and efficient procedure for the investigation and resolution of complaints filed by Faculty or Administrative and Professional employees of the University who have tenure or permanent status or who may file a complaint pursuant to Regulation 10.206. The provisions of this regulation are not applicable to

University Support Personnel System
employees who may file a complaint pursuant
to Regulation 10.303.

(2) All problems should be resolved,
whenever possible, before the filing of a
complaint and open communication is
encouraged so that resort to the formal
complaint procedure will not normally be
necessary. Therefore, informal resolution
of complaints is encouraged.

(3) Burden of Proof - The burden of proof
shall be on the University in disciplinary
complaints. In all other complaints, except
disciplinary complaints, the burden of proof
shall be on the complainant.

* * *

(7) Step One - All complaints shall be
filed with the person designated by the
President or President's designee as Step
One Representative for the unit of the
University, in which the complainant
performs the complainant's duties, within
30 days following the act or omission giving
rise thereto, or the date on which the
complainant knew or reasonably should have
known of such act or omission if that date
is later. The complainant may, in the
written complaint which is filed, request
the postponement of any action in processing
the complaint formally for a period of up to
30 days, during which period efforts to
resolve the complaint informally shall be
made. Upon the complainant's written
request, an additional 30-day extension
should be liberally granted unless to do so
would impede resolution of the complaint.
Upon the request, the Step One
representative shall, during such
postponement period(s) arrange an informal
conference between the appropriate
administrator and complainant. The
complainant may at any time terminate a
postponement period by giving written notice

to the Step One Representative that the complainant wishes to proceed with the Step One meeting provided for below. If the initial postponement period, or any extension thereof, expires without such written notice, the complaint shall be deemed informally resolved to the complainant's satisfaction and need not be processed further. The Step One Representative shall conduct a meeting no sooner than seven and no later than 15 days following (1) receipt of the complaint if no postponement is requested, or (2) receipt of written notice that the complainant wishes to proceed with the Step One meeting. In advance of the Step One meeting, the complainant shall have the right upon request to a copy of any identifiable documents relevant to the complaint. At the Step One meeting, the complainant shall have the right to present any evidence in support of the complaint. The Step One Representative shall issue a written decision, stating the reasons therefore, within 30 days following the conclusion of the meeting. In the event the decision at Step One refers to documents not requested or presented by the complainant, copies of such documents shall be attached to the decision.

(8) Step Two - If the complaint is not satisfactorily resolved at Step One, the complainant may file a written request for review with the appropriate Vice President or representative within 30 days following receipt of the Step One decision. The appropriate Vice President or representative and the complainant shall schedule a meeting for the purpose of reviewing the matter no sooner than seven and no later than 15 days following receipt of the request for review. The meeting shall afford the complainant or counsel an opportunity to present written and/or oral evidence opposing the University's act or omission including a written statement challenging the grounds

upon which such act or omission is justified. If the issue involves a substantial interest of the complainant, the complainant may use the provisions of Step Three below. If the issue does not involve a substantial interest of the complainant, the Step Two decision shall be final and binding. The Step Two decision shall be in writing and be issued within 90 days of the meeting. The record of the Step Two meeting shall only consist of:

(a) The notice of the University's act or omission, and the grounds therefor:

(b) Evidence received or considered;

(c) All written statements submitted by parties to the complaint and by any other persons;

(d) A complete record of any ex parte communication made relative to the complaint, along with the disposition thereof; and if after the Step Two decision has been issued, and the complaint is not related to a substantial interest, no further review of the complaint is required. However, if the complaint is related to a substantial interest and the complaint has not been resolved to the satisfaction of the complainant, the complainant may, within 30 days of the receipt of the Step Two decision, file a request for a hearing pursuant to Step Three below, which is written to comply with the requirements of Section 120.57(1), F.S.

(9) Step Three: Formal Procedure - Either the President of the University or President's designee, or a hearing officer assigned by the Division of Administrative Hearings (DOAH) shall conduct the hearing at this step. If the University elects to use a DOAH hearing officer, it shall notify the Division within 10 days of the receipt of the request for the hearing.

92. The credible evidence established that Petitioner's employment was terminated for misconduct and incompetence in the performance of his duties as a FAMU-COL clinical instructor. Petitioner failed to prove that any other similarly-situated person at FAMU-COL was treated more favorably than he. Respondents' witnesses testified consistently and credibly that they uniformly enforce an anti-discriminatory policy to all persons, regardless of race, color, age, sex or any other factor.

RECOMMENDATIONS

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

The Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order; and the Florida A & M University Board of Trustees uphold that Petitioner's termination was justified.

DONE AND ENTERED this 30th day of May, 2018, in Tallahassee,
Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2018.

ENDNOTES

^{1/} Petitioner's March 6, 2017, complaint filed with Florida Commission on Human Relations also included an allegation of discrimination based upon religion. However, the Petition for Relief filed on September 1, 2017, with the FCHR fails to include religion as a basis for his discrimination claim.

^{2/} As the facts will show, Petitioner was on a nine-month contract, and his responsibilities to the FAMU-COL ended on May 6, 2016. In June 2016, Petitioner was terminated from his FAMU-COL employment, and he grieved the process via the FAMU grievance procedure. Petitioner's Step 1 grievance process ended with the termination being upheld. Petitioner's Step 2 grievances process also ended with the termination being upheld. Petitioner then engaged the Step 3 grievance process, and the matter was referred to DOAH.

^{3/} Petitioner's last contract with the FAMU-COL ended May 6, 2016.

^{4/} At the time this matter was referred to DOAH, Mr. Robinson was the interim president of FAMU. Mr. Robinson became president of FAMU in November 2017.

5/ Professor Epps served as dean of the FAMU-COL for approximately 18 months and is now a professor of law. For continuity she will be referred to as dean throughout this Order.

6/ The Fellows refers to a Fellowship Program of the Virgil Hawkins Florida Chapter of the National Bar Association. This program, in partnership with the FAMU-COL, provides pro bono legal services to indigent members in the central Florida area. As part of their responsibilities, the Fellows are to "upload all filings, drafts, documents and e-mails to CLIO . . . [and] print the pleadings and create a paper file to match the electronic file. The paper version of the client file will be kept in the [FAMU-COL] office."

7/ Although Professor David is no longer Provost, for ease of continuity, she will referred to as Provost David.

8/ "CLIO" is a cloud based electronic case management system.

9/ The FAMU-COL does not have insurance coverage for tort cases, nor does it have a trust fund to facilitate those types of cases.

10/ A terminal contract is given to a tenure-track professor who will not be retained at the end of the terminal contract period. Petitioner was not a tenure-track professor.

11/ The two forms included the following:

a. Petitioner listed his University Employment schedule with check marks on Monday, Tuesday, Wednesday, Thursday, and Friday. He then completed the form by indicating: Proposed Employer/and address: left blank; beginning and ending date of employment: from September 2015 through November 2015; the work schedule included Saturday and Sunday for approximately ten hours; and the nature of proposed employment: running for City Council. Petitioner checked the box which indicated no University facilities, equipment, services or personnel would be used. Petitioner signed the form on June 29, 2015, and it was hand-executed by then Dean Pernell on June 29, 2015, and by Provost David on June 30, 2015.

b. Petitioner listed his University Employment schedule with check marks on Monday, Tuesday, Wednesday, Thursday, and Friday. He then completed the form by indicating: Proposed Employer Name: The Washington Trial Group, PLLC; Employer Address: no address has been established; Beginning date of employment: no anticipated date; Ending date: left blank; Work

schedule/workdays: no days were marked; Work hours: left blank; Anticipated compensation: none; Nature of Proposed Employment: consulting. Petitioner checked the box which indicated no University facilities, equipment, services or personnel would be used. Petitioner signed the form on May 26, 2015, and it was hand-executed by then Dean Pernell on May 26, 2015, and stamped with Provost David's signature block on June 1, 2016.

^{12/} Petitioner provided direct testimony on his first outside employment form. Petitioner signed his first outside employment form on October 6, 2010, and he included not only the beginning and ending dates, but also the location, hours (8), the workdays (Saturday), the anticipated compensation (\$0.00), and the purpose (pro bono legal work). It is obvious that Petitioner knew how to complete the outside employment form.

^{13/} Petitioner attempted to equate this outside employment as an equal to his "consulting" for a law office. The undersigned does not agree with that position: a voice coach and "consulting" for a law office are two distinct occupations. In light of the FAMU Regulations, it would be prudent for Director Cavazos to file an outside employment form.

^{14/} The money from Disney was an endowment. Witnesses used the terms grant or endowment interchangeably during the hearing, and it was apparent that witnesses (save for Ms. Graham) did not have an appreciation of the difference.

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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.