UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

August 12, 2003

CORNELIU CURUTA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 02B00027
NORTH HARRIS MONTGOMERY COMMUNITY COLLEGE DISTRICT, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA), in which Corneliu Curuta is the complainant and the North Harris Montgomery Community College District (NHMCCD or the District) is the respondent. Curuta filed a complaint alleging that Tomball College (Tomball or the College), a component of the District, discriminated against him on the basis of his citizenship and national origin by terminating his employment as an adjunct instructor at the college. The District filed an answer, discovery was undertaken and completed, and the parties filed cross motions for summary decision.[1] Each party responded to the other's motion as well.

[1] Curuta's motion was captioned "Motion to Request the Court to Decide upon my Complaint." After discussion at a telephonic case management conference on May 14, 2003, it was agreed that the motion would be treated as one for summary decision. The District was given until June 16 to respond and to file a cross-motion; Curuta was given until July 31 to respond to the District's motion but filed his response early on July 14, 2003.

II. BACKGROUND FACTS

Corneliu Curuta was born in Romania and is a naturalized citizen of the United States. He holds a Ph.D. degree which he earned in Romania. Tomball College is one of five separate campuses which together comprise the NHMCCD, a public junior college district established pursuant to section 130.004 of the Texas Education Code. During the period at issue the District had 1,378 full-time and 2,441 part-time employees; 242 at Tomball were full-time and 474 were part-time. At all times relevant the Chancellor for the District was Dr. John E. Pickelman, and the General Counsel and Vice Chancellor for Human Resources for the District was Sandra McMullan Liggett.

The President of Tomball College during the period at issue was Dr. Raymond Hawkins, and its Vice President for Academic and Student Development was Dr. Judy Murray. Dr. Robert A. Jones was the Associate Dean responsible for the Natural Sciences and Mathematics Departments at the college during all relevant times. The Program Coordinator for biology at Tomball during the academic year 2000-2001 was William Simcik, Professor of Biology. His successor as the Program Coordinator after the spring semester of 2001 was Prof. Cathy Kemper Switzer, who in turn remained in that position until the fall of 2002 when she became the Chair of the Division of Natural Sciences at the college.

As Program Coordinator for 2000-2001, Prof. Simcik was the person who initially recommended Curuta to Associate Dean Jones to be hired as an adjunct instructor to teach a single course in biology at the college during the spring semester of 2001. The Memorandum of Assignment for that course (CXE) reflects that Curuta was assigned to teach one biology class for the term from January 16, 2001 to May 13, 2001, and that the class consisted of two components: lectures were scheduled from 7:00 to 8:30 p.m. on Mondays and Wednesdays, while labs were scheduled from 8:45 to 10:00 p.m. on days to be arranged (TBA). Curuta completed this assignment but was not offered any additional teaching opportunities after that, either for the following summer sessions or for the fall semester of the 2001-2002 academic year. During the summer Curuta contacted Switzer, the new Program Coordinator, seeking to obtain more assignments, but without any success.

Curuta then worked his way up the chain of authority, meeting first with Dean Jones, then with Vice President Murray, and subsequently with President Hawkins. Curuta attempted to arrange a meeting with Chancellor Pickelman as well, but when he went to Pickelman's office he was met by Vice Chancellor Liggett instead. They spoke only briefly. The record does not reflect that Curuta ever did meet with Chancellor Pickelman; however, he evidently wrote Pickelman a letter dated August 15, 2001, to which Pickelman responded on August 27, 2001. A copy of Pickelman's response to Curuta's letter was included with correspondence Curuta sent to this office in August of 2002 which was made a part of the record. Pickelman acknowledged receipt

of Curuta's letter, but advised him that hiring decisions for adjunct faculty were campus-based and that the decision as to him would not be changed. Curuta had previously received a letter dated August 8, 2001 signed by Dean Jones informing him that the college no longer needed him as an adjunct instructor.

Curuta filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on January 18, 2002. OSC investigated his charge and sent him a letter on May 28, 2002 advising him of his right to file his own complaint within 90 days of his receipt of the letter and he did so on June 20, 2002.

III. QUESTION PRESENTED

The precise basis for Curuta's claim of discrimination is not entirely clear. He contends that despite his superior qualifications he was terminated from Tomball without a formal evaluation and without any valid reason being given. His OSC charge said, "I have Romanian background and I am a naturalized citizen and I believe that is the reason for my discharge," which may be construed either to allege national origin discrimination based on his Romanian background, or citizenship status discrimination based on his status as a naturalized United States citizen, or both. In Curuta's OCAHO complaint, he identified himself as a United States citizen and alleged both national origin and citizenship status discrimination. His letter-pleading of October 21, 2002, however, said that he was discriminated against based on the fact that he had received his doctoral degree in Romania, and that discrediting his educational background was a form of discrimination. In a subsequent motion filed April 30, 2003, Curuta alleged for the first time in the record that the basis for the discrimination against him was his Romanian citizenship, rather than his status as a naturalized United States citizen.[2]

Curuta's claims as to national origin discrimination were dismissed from the case because, based on the number of its employees, NHMCCD is an employer covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, and claims of national origin discrimination against such employers are excepted from coverage under the INA by § 1324b(a)(2)(B) and the so-called no-overlap provision, § 1324b(b)(2). It is long established that OCAHO jurisdiction over claims of national origin discrimination is limited to claims

[2] Curuta's Request for Production dated March 2003 also contains the statement "I have been fired from the college without any reason because of my Romanian citizenship." A letter Curuta sent to this office in August of 2002 indicates that he has "double citizenship American and Romanian," but it does not appear from the record that Curuta claimed at any time prior to March 2003 that Romanian citizenship was the basis for the discrimination alleged. It is thus not clear that OSC investigated this allegation.

against employers of between four and 14 employees. *Wisniewski v. Douglas County Sch. Dist.*, 1 OCAHO no. 29, 153, 155-56 (1988).[3] Accordingly issues of national origin discrimination, including allegations of discrimination based on the country in which Curuta received his degree, are not cognizable in this forum. *Cf. Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO no. 568, 1641, 1674-75 (1993) (stating that the country where complainant received her primary legal education "is a choice unrelated to citizenship status"). The only question to be examined in this proceeding is thus whether Curuta's citizenship status, be it as an American citizen, or, as has been more recently asserted, as a Romanian citizen, was a factor in his failure to obtain additional teaching assignments after the spring semester of 2001.

IV. EVIDENCE CONSIDERED

Both parties identified their attachments and exhibits numerically; the complainant's exhibits have been redesignated alphabetically. The complainant's exhibits are accordingly denominated as CXA-CXF while the respondent's exhibits are identified as RX1-RX14.

Curuta's motion was accompanied by Attachment 1 (CXA), NHMCCD Policy Statement DLA (Local); Attachment 2 (CXB), a newspaper advertisement dated February 10, 2002; and Attachment 3 (CXC), an undated letter to the District's counsel captioned "Request for Interrogatories" consisting of requests made by Curuta for the production of documents and the District's responses thereto.

The District's response to Curuta's motion included documentary evidence consisting of RX1, the affidavit of Sandra McMullan Liggett dated June 12, 2003; RX2, the affidavit of William Simcik dated June 12, 2003; RX3, NHMCCD Policy DDB (Local) consisting of two pages; RX4, NHMCCD Policy DDC (Local) consisting of three pages; RX5, an uncompleted Memorandum of Assignment form; RX6, three completed student evaluation forms consisting of one page each; RX7, the affidavit of Cathy Switzer dated June 13, 2003; RX8, the affidavit of Katherine Miller dated June 11, 2003; RX 9, a letter dated August 8, 2001 from Dean Jones to Curuta; and RX10, NHMCCD Policy DLA (Local), consisting of two pages, the first of which is a duplicate

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is omitted from the citation.

of CXB.

In support of its own motion for summary decision, NHMCCD incorporated the same ten exhibits by reference, and in addition filed RX11, a letter from Curuta to the administrative law judge dated January 21, 2003; RX12, Curuta's answers to the District's Interrogatories and Respondent's First Request for Interrogatories; RX13, a single page purporting to be the third page of a letter from Sandra McMullan Liggett to an attorney at OSC; and RX14, a letter from Curuta to the administrative law judge dated October 21, 2002.

In response, Curuta tendered additional exhibits consisting of CXD, four completed student evaluation forms consisting of one page each; CXE, a Memorandum of Assignment for the period January 16, 2001 to May 13, 2001; and CXF, two letters, the first dated May 19, 2003 from Prairie View A&M University and the second dated May 19, 2000 from the Foreign Credentials Service of America.

Other discovery requests and responses have been made a part of the record, either with or without accompanying correspondence, and these have been considered as well.

V. STANDARDS APPLIED

OCAHO rules[4] provide that summary decision as to all or part of a complaint may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).

While all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), a summary decision may nevertheless issue if there are no specific facts shown which raise a contested material factual issue. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Factual controversies are thus resolved in favor of the nonmoving party only where an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999), citing *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). In the absence of any proof, it will not be assumed that the nonmoving party could or would prove the necessary

[4] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (2001).

facts. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Summary resolution requires determining first whether there are material fact issues, and, if there are none, whether the moving party is entitled to judgment as a matter of law. Both are legal issues (questions of law); neither is a finding of fact. *Douglass v. United Services Auto Ass'n*, 79 F.3d 1415, 1423 n.11 (5th Cir. 1996).

When the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case because a failure of proof on any element upon which the nonmoving party bears the burden necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000), *petition for review denied*, 2 Fed. Appx. 554, 2001 WL 114717 (7th Cir. Feb. 5, 2001), *cert. denied,* 534 U.S. 836 (2001). Thus to withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with sufficient competent evidence to support all the essential elements of the claim.

The traditional burden shifting analysis in an employment discrimination case is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's articulated reason is false and that the defendant intentionally discriminated against the plaintiff. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Because § 1324b was expressly modeled on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2001), *Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189, 1235, 1251 (1990), case law developed under that statute has long been held to be persuasive in interpreting § 1324b. *See, e.g., Fakunmoju v. Claims Admin. Corp.*, 4 OCAHO no. 624, 308, 322 (1994), *aff'd*, 53 F.3d 328 (4th Cir. 1995) (Table). The tripartite *McDonnell Douglas* scheme accordingly provides the analytical framework for a § 1324b case as well.

The employer's burden to produce a nondiscriminatory reason is a burden only of production, not one of persuasion; no assessment of credibility is involved. *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 898 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2572 (2003). Once the employer sets forth and supports a facially valid reason for the employment decision, any presumption created by the prima facie case disappears and the burden reverts to the employee to prove that the employer's reason is pretextual and that the real reason is discrimination. *Stults v. Conoco, Inc.*, 76 F.3d 651, 656-57 (5th Cir. 1996); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 377-78 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992). Evidence of pretext must be "substantial." *Laxton v. Gap, Inc.*, 333 F.3d 572, 2003 WL 21309679 *5 (5th Cir. 2003). Evidence is substantial if it is "of such quality and weight that reasonable and fair-minded men (sic) in the exercise of impartial

judgment might reach different conclusions." *Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996), quoting *Boeing v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc). Self-serving, subjective or speculative allegations do not serve to establish pretext, *Eugene v. Rumsfeld*, 168 F. Supp. 2d 655, 677 (S.D. Tex. 2001), and conclusory or unsubstantiated allegations do not create a genuine issue of material fact. *Little*, 37 F.3d at 1075.

The initial prima facie discharge case under the traditional formulation requires a showing that the plaintiff is a member of a protected class, was qualified for the position held, was discharged, and was replaced by a person not in the plaintiff's protected class. *Manning v. Chevron Chem. Co.,* 332 F.3d 874, 881 (5th Cir. 2003), citing *Price v. Federal Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002). A discharged employee may alternatively establish the fourth prong of a disparate treatment case by a showing "that others similarly situated were treated more favorably." *Okoye v. University of Texas Houston Health Sci. Ctr.*, 245 F.3d 507, 513 (5th Cir. 2001), quoting *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999). The single fact of replacement by an employee who is also a member of a protected class is thus not always fatal to the prima facie showing. *Nieto v. L & H Packing Co.*, 108 F.3d 621, 624 n.7 (5th Cir. 1997); *Perez v. MCI World Com Communications*, 154 F. Supp. 2d 932, 939 (N.D. Tex. 2001); *Khanna v. Park Place Motorcars of Houston, Ltd.*, 2000 WL 1801850 *3 (N.D. Tex. 2000).

VI. THE VIEWS OF THE PARTIES

A. Curuta's Motion

Curuta says that despite his superior qualifications he was terminated without ever having been given an evaluation and without being given any valid reason. He contends that despite his efforts to go up the chain of command, he was never given a valid explanation nor was he given additional courses to teach. In his view the District still has not provided written documentation sufficient to sustain the decision to terminate his employment. Curuta believes that his citizenship status was the reason he was not given additional assignments.

In response, NHMCCD says that Curuta has failed to make out a prima facie discharge case because he has not proved he was qualified for the position, nor has he shown either that he was replaced by someone not in his protected group or that another similarly situated person was treated differently. The district also says that because Curuta's appointment was only for one course during one semester and he completed and was paid for that assignment, he cannot show that he was discharged. Even had Curuta shown a prima facie case, the district says further that in any event it has given a nondiscriminatory reason and there is no evidence that its explanation is pretextual.

B. The District's Motion

The district contends that Curuta was not recommended for or offered another appointment because of concerns about his teaching and because Switzer found his conduct unprofessional and his interaction with her inappropriate. It contends further that Curuta has produced no evidence that its reasons are unworthy of belief or are otherwise a pretext for discrimination, and accordingly his complaint should be dismissed.

Curuta responded by contending that the feedback from the students was not presented accurately by the District so that the District failed to prove he was not a good instructor. In his view, his demeanor toward Switzer was always professional. He believes the real reason for the decision was his citizenship.

VII. DISCUSSION AND ANALYSIS

A. The Prima Facie Case

For purposes of considering Curuta's motion I view the record in the light most favorable to the District. Either as a United States citizen or as a Romanian citizen, Curuta is a member of a protected class within the meaning of § 1324b(a)(3). Whether characterized as a termination of his employment or as a refusal to offer him a new assignment, the record reflects that there was an adverse employment decision made which affected Curuta. The parties dispute whether Curuta was qualified to receive additional assignments, and there is no evidence that Curuta was replaced by someone not in his protected group, as provided in *Manning*. Neither is there any evidence that a similarly situated adjunct instructor not in Curuta's protected group was treated more favorably than Curuta was, as provided in *Okoye*. If there were complaints about other adjunct instructors who nevertheless received new assignments, that fact has not been supported by evidence or even alleged. For purposes of a disparate treatment analysis, another person is similarly situated to the plaintiff only if different treatment occurs under "nearly identical" circumstances. *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991). No such person was identified.

While Curuta considers that his Ph.D. shows he had better qualifications than other instructors, he identified no comparators and presented no evidence as to the qualifications of any other instructor. Neither did he present any evidence of complaints about other adjunct biology instructors or problems they might have had or otherwise identify any evidence which could

satisfy the fourth element of a prima facie case.[5] Indeed, he makes no discernable argument that he has done so, and does not address the prima facie showing requirement at all. Thus it appears that Curuta's own motion for summary decision must fail at the threshold for failure to adduce evidence sufficient to establish an essential element upon which he bears the burden of proof. While the burden of stating a prima facie case is not onerous, it is still a burden and Curuta has not met it. His motion for summary decision will accordingly be denied.

B. The District's Explanation of the Decision

The District nevertheless met its burden of production by putting forward competent evidence explaining the reasons for the decision not to offer Curuta new assignments. I will therefore assume for purposes of considering the District's motion that Curuta could make out a prima facie case by showing that the District continued to advertise for adjunct instructors in biology (CXC), thereby providing Curuta an opportunity to make a showing of pretext. The District's evidence may be summarized as follows:

1. The Simcik Affidavit (RX2)

Prof. Simcik said that as the Program Coordinator for the biology department at Tomball, he initially recommended Curuta to Dean Jones as an adjunct to teach a class for the spring semester of 2001. Simcik said he counseled Curuta about concerns raised by students about his presentation of the materials and whether he was covering the materials and the course content. Simcik said that during the semester he met periodically with Curuta and provided frequent feedback aimed at improving Curuta's delivery of the course materials, that he made specific suggestions about the use of videos, drawings, diagrams and charts, and that he provided materials to Curuta that he had used himself when he taught biology. Simcik formed the impression that many of the examples Curuta was using in his class were outdated and he suggested more current examples. Simcik said despite frequent meetings with Curuta there were still complaints from students about delivery of the material, and some of them dropped the course before the end of the semester. Simcik said he probably provided Curuta more feedback and personal time and attention than he did any other adjunct. Simcik did not prepare a formal evaluation of Curuta that semester, nor did he prepare such an evaluation of any of the other adjuncts who taught biology in the spring semester of 2001. Three student rating forms (RX6)

[5] There is scant record evidence about potential comparators. Switzer's affidavit (RX7) says that 11 adjuncts taught biology in the spring of 2001; two were citizens of countries other than the United States. Three adjuncts in addition to Curuta were not given additional assignments. One took a permanent job and two, like Curuta, were not offered additional classes because of poor classroom performance. They were evidently citizens of the United States. Neither was formally evaluated and there is no documentation about their specific teaching deficiencies.

reflect negative comments and ratings of Curuta's teaching during that semester.

2. The Switzer Affidavit (RX7)

Prof. Switzer said that as Program Coordinator from the summer of 2001 until the fall of 2002, she made recommendations for the hiring of adjunct instructors in biology at the college during that period. She said the decision not to offer Curuta an appointment in the fall was based on negative feedback from students and her concerns about Curuta's teaching, particularly in regard to the laboratory components of the course, and his teaching techniques. The decision was also based on his demeanor toward her and his unprofessional interaction with her in her classroom. She said this last incident occurred when Curuta entered her classroom unannounced and confronted her, insisting that he speak to her right then about a teaching assignment for the fall of 2001. This was after he had already telephoned her repeatedly and she had tried in response to explain how assignments were made and had told him several times that the college had no obligation to offer him additional assignments. Switzer thought his conduct in interrupting her class was unprofessional and she reported it to Dean Jones. Although she told Curuta to make an appointment and agreed to meet with him later, she told Jones she felt uncomfortable meeting him alone because of Curuta's demeanor toward her. Jones suggested that he attend the meeting as well. Switzer said as it turned out, Curuta was delayed and she was unable to wait, so Jones met with Curuta by himself.

Switzer also noted that before she became Program Coordinator, she had observed Curuta's teaching lab on two occasions and found that he was talking informally to students and not covering the required materials. She said she was in the lab prep room adjacent to the room in which he was teaching at the time, and she could hear him. Switzer said she was made aware that Curuta was unwilling to teach labs, which were supposed to be a part of the course he was teaching (CXE). Switzer said she had concerns so she put a copy of the required labs and her own lab schedule in his box before midterm in the spring of 2001 and asked the laboratory coordinator to go over the materials with him, but Curuta did not follow the instructions.

Switzer said that at the time she made her recommendation about Curuta, she did not know the country or countries of his citizenship. She said that 11 adjuncts taught biology at Tomball in the spring of 2001, two of whom were citizens of countries other than the United States. Two other poor performers were not offered courses for the fall semester. They were not citizens of countries other than the United States.

3. The Liggett Affidavit (RX1)

Liggett said that decisions about the hiring of adjunct instructors are made at the campus level by department so that as General Counsel and Vice Chancellor for the District, she had no role either in the decision to hire Curuta for the spring of 2001 in the first instance or in the subsequent decision not to offer him other assignments. Adjuncts are hired on an "as needed" basis for a particular assignment and there is no implication that any other assignments will follow.

Liggett said she first met Curuta on or about August 15, 2001 when he came to the Chancellor's office. Pickelman's secretary came to her office and asked her if she would speak with Curuta because he was upset and the Chancellor was unavailable. Liggett called the Tomball College President's office and found out that Curuta was unhappy about not getting additional adjunct assignments. She said she then tried to explain to Curuta that as an adjunct he did not have any ongoing assignment and that it was excellence in teaching, rather than the degree as such, that was the key criterion for a community college. She said Curuta was agitated, loud and rude, and routinely interrupted her. In the course of their discussion Curuta said he believed Dean Jones preferred persons from countries other than Romania, so Liggett referred him to the college's civil rights administrator. She said by the time she met with Curuta, Tomball College had already decided not to offer him new assignments and that she had no knowledge of Curuta prior to the time that decision was made.

C. Curuta's Response to the District's Evidence

Because the District satisfied its burden of production, any inference that might have been drawn from a prima facie case was dissipated. Summary decision in favor of the District can avoided at this stage only if Curuta presents sufficient competent evidence of pretext to permit a rational fact finder to find that the college discriminated on the basis alleged. *See Pratt v. City of Houston*, 247 F.3d 601, 606 (5th Cir. 2001). This means that there must be at minimum a sufficient factual basis to permit an inference that the protected characteristic actually played a role in the employment decision in question and that it had a determinative influence on the outcome. *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997).

Curuta proffers several arguments in support of his view that the explanation provided is not adequate to justify the decision not to offer him additional assignments. His arguments are for the most part unsupported by probative evidence, at odds with the only competent evidence, and to some degree internally inconsistent. His theory of the case, moreover, would require a finding that the District's affidavits were falsely made.

Curuta basically doesn't believe the explanation because there is no paper trail and because the District has not produced written documentation sustaining the assertion either that he had an unprofessional attitude or that he was unable to instruct. It is Curuta, however, who bears the burden of proof in this case; the District's obligation is one of production only. The District has met that burden by proffering its reasons, and it is Curuta who now must come up with evidence sufficient to create a factual issue casting doubt on the genuineness of those reasons. This he attempts to do principally by challenging the credibility of the affidavits offered by the District.

1. Curuta's Challenge to the Liggett Affidavit

Although Liggett's affidavit (RX1) says she met Curuta for the first time after the decision had already been made not to offer him additional classes and that she had no knowledge of him prior to the decision, Curuta nevertheless still insists that she must have played a role in that decision and evidently believes she is simply lying.

The District's Interrogatory no. 2 asked Curuta for the name of every person he believes participated in the alleged discrimination against him. The only individual Curuta identified by name in his response (in addition to "the College") was Vice Chancellor Liggett (RX12).[6] His letter of October 21, 2002 (RX14) said that one of the reasons he filed the case was the lack of respect Liggett accorded his educational background. His answers to interrogatories reasoned that "[b]eing given the fact that Ms. Liggett is the Chief of Personnel, one can reasonably conclude that she has a say in the hiring and firing process." (RX12, answer no. 13). In responding to the District's motion he asserted that Liggett "more than likely had access to his personnel file and thus more than likely knew the Complainant's citizenship status."

There is nevertheless simply no evidence that Liggett played any part in the decision not to offer Curuta additional assignments, much less that she had any knowledge of his citizenship. The record reflects, moreover, that Pickelman's letter of August 27, 2001 advised Curuta that hiring decisions for adjunct faculty were campus-based. The District's answer to Curuta's Interrogatory no. 3 notes as well that Dr. Hawkins, the President of Tomball, remembered informing Curuta when they met that adjunct instructors are selected at the division or program level, so that he, Hawkins, did not make decisions about adjuncts either.

Curuta's description of his efforts as he moved up the chain of command, as contained in his letter of October 21, 2002 (RX14), said there was no "conflict or debate" between him and Dean

[6] The allegation that Liggett was a participant in the acts complained of surfaced in the record for the first time in Curuta's letter-pleading dated October 21, 2002; it was not alleged in Curuta's charge or his complaint. Until October 21, 2002, Liggett had been acting as counsel for the District. Once identified as a potential witness, however, she withdrew as counsel and another attorney was substituted.

Jones; Jones simply told him that he was no longer needed and advised him to speak to Vice President Murray.[7] In his response to the District's motion for summary decision, however, Curuta alleged for the first time that Jones suggested at their meeting that the decision was made by someone "above" and that Jones "gesticulated putting the hand above his head as to say 'somebody in a higher position than me.'" From this Curuta concludes that "[c]onsidering Ms. Liggett's demeanor toward the Complainant, one can infer that Ms. Liggett who is in a higher leadership position than Dr. Jones had an input on making the decision not to hire the Complainant." Assuming arguendo that Jones stated or implied that the decision was made "above," whether in an effort to disclaim responsibility for the decision or for some other reason, the implication appears to be both factually incorrect and contrary to all the evidence. Notwithstanding this new allegation, moreover, it appears that when Curuta met with Liggett, the only person he accused of discriminating against him was Jones. He reportedly told Liggett at their meeting that he believed Jones preferred persons from countries other than Romania. He apparently made no allegation at that point about citizenship status discrimination.[8]

There is in any event no showing that Jones had any knowledge of Curuta's citizenship status either. Although Curuta argues that "[i]t is a logical assumption to state that Dr. Jones was aware since hire what is the Complainant's citizenship status since Dr. Jones in his administrative position most likely has access to this information," assumptions are not evidence and Curuta's speculation is no more than that.

2. Curuta's Challenge to the Switzer Affidavit

Curuta attacks the Switzer affidavit as "subjective at best as it does not state the situation de facto." He denied that his conduct toward Switzer was unprofessional, and said Jones did not speak to him about going to Switzer's classroom (RX11). His memorandum said that the real reason he went to Switzer's classroom was at Simcik's suggestion to request a teaching manual, and that he did not enter the room until the class was over. He also contended in his response to the District's motion that he doesn't believe it is physically possible to hear him from the lab adjacent to his classroom. He said he did not recall seeing Switzer in or near his classroom in the spring of 2001 and did not recall any interaction with her before she became the Program Coordinator. Again, he presented no affidavit or other evidence to support these claims.

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[7] Curuta said in the same letter that Murray was "disrespectful" to him and just told him that he was no longer an instructor at Tomball College and he didn't need to know why, so he went to President Hawkins. Curuta said that Hawkins was polite and cordial to him without providing him any help.

[8] The only allegation investigated by the college's civil rights administrator, and the only one Curuta made to that authority, was the claim that he was discriminated against based on his national origin (RX8).

Although Curuta inexplicably argued at one point that Switzer "played no strong role in this situation," it is clear that Switzer, with the concurrence of Dean Jones, was the person responsible for the decision in question, and her affidavit, uncontradicted by competent evidence, states that at the time she made her recommendation about Curuta she was unaware of the country or countries of which he is a citizen (RX7). Curuta argued in response that she would know his citizenship because Simcik introduced him to the faculty at the beginning of the semester and mentioned that he was from Romania. He did not explain how knowing his national origin would necessarily disclose his citizenship status.

3. Curuta's Challenge to the Simcik Affidavit

Curuta takes issue with Simcik's affidavit as well. His response to the District's motion argues that Simcik's affidavit is "intentionally misleading." He did not, however, offer any counter affidavit to support a different account of their interactions. Curuta instead submitted four student evaluations (CXD) which contain more favorable ratings of his class than those in the rating forms submitted by the district (RX6), and he also says that Simcik told him twice that he was "a good teacher" and encouraged him to apply for a full-time position. In a letter dated January 21, 2003 (RX11), Curuta also denied that Simcik ever told him about the student complaints, and he denied any knowledge of a specific meeting with Simcik about incorporating videos, drawings, diagrams and charts. In the same correspondence, Curuta nevertheless acknowledged that there were several meetings between the two during the semester at which he received feedback from Simcik, and he acknowledged as well that he had received materials from Simcik. He said he did not use the materials in the form they were given to him but rather "made my own adjustments." Curuta also argues that only two of his students dropped the course. Curuta's memorandum says he is the one who sought the meetings with Simcik, and the purpose of the meetings was to share what he intended to teach, not to address problems. He also says the materials Simcik gave him were "limited to a teacher edition manual and an instructor manual."

Curuta urges that the District violated its own policy because Simcik never formally evaluated him and the District's policy (CXB) requires that all faculty be evaluated. The policy itself does not, however, prescribe exactly when evaluations are to take place other than "at periodic intervals . . . in accordance with the guidelines and schedules as established by the Chancellor." No such guidelines or schedules have been provided, but the record reflects that faculty are evaluated in the fall (RX13). Simcik confirmed that other adjunct faculty who taught biology in the spring semester of 2001 were not evaluated that semester either. Curuta also argues that the Memorandum of Assignment (CXB) provides that an assignment may be canceled on two weeks notice for "reasons of professional incompetence or otherwise unsatisfactory service" and that if

his class had really been a problem it would have been canceled. Since it was not, he concludes that it must have been satisfactory.

While the student evaluations tendered by Curuta are more favorable than the ones put forward by the District, it is well established that disputes about an employer's assessment of an employee's work performance, even with competent evidence, will not necessarily support a finding of pretext. *Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir. 2001). A conflict in the student assessments does not create an issue of material fact here because the issue to be decided in this proceeding is not the adequacy of Curuta's teaching as such; it is whether the *perceptions* of his performance by the relevant decision maker, accurate or not, were the real reason for the decision. *Shackelford*, 190 F.3d at 408-09. That students differed in their views about Curuta's teaching has limited bearing on that question, particularly in light of the fact that while Simcik's input clearly was considered, he was not the person who made the decision that Curuta would not be offered additional assignments.

Notwithstanding Curuta's disbelief of the District's affidavits, there is no genuine issue presented as to who actually made the decision not to offer Curuta additional classes. That person was Switzer, with the concurrence of Dean Jones. As the new Program Coordinator, it was Switzer's responsibility to make recommendations to Dean Jones for the hiring of adjuncts to teach biology classes for that period. She did not recommend Curuta. Discrimination is an intentional wrong. Just as an employer does not violate the National Labor Relations Act, 29 U.S.C. § 151 et seq., by discharging an employee whose protected conduct the employer doesn't even know about, *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 418 (5th Cir. 1981), an employer cannot, by definition, engage in intentional discrimination on the basis of a characteristic of which the employer is unaware. *Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094, 8 (2003), citing *Wije v. Barton Springs/Edwards Aquifer Conservation Dist*., 5 OCAHO no. 785, 499, 523 (1995) (observing that it is "patently self-evident" that complainant had to show that respondent knew of his citizenship status); *Suchta v. United States Postal Serv*., 2 OCAHO no. 327, 231, 242 (1991); *Martinez v. Lott Constructors, Inc*., 2 OCAHO no. 323, 178, 186-87 (1991). There is simply no evidence that Switzer knew what Curuta's citizenship status was, and the only competent evidence on the point, her affidavit, is to the contrary. Neither has it been shown that Dean Jones, or indeed anyone at Tomball or the District, had specific knowledge of his citizenship status.

As explained in *Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000), "discrimination suits still require evidence of discrimination." Curuta has not offered a scintilla of probative evidence that his citizenship status played any role in the college's decision not to offer him additional teaching assignments, and he produced no competent evidence to rebut the proffered explanation or to allow an inference that the explanation is pretextual. Curuta spins a web of inferences wholly dissociated from the facts; his conclusions are unwarranted in the face of the evidence. His factual representations, moreover, are wholly unsupported. He has not shown that the persons who made the decision not to offer him

additional assignments were even aware of his citizenship status, much less that they based their decision on it.

IX. CONCLUSION

In the final analysis, Curuta's subjective perception of discrimination is all there is. While Curuta's belief is no doubt sincere, it is wholly devoid of evidentiary support and contrary to the facts established in the record. Pretext cannot be established unless the employee adduces competent, objective evidence refuting the employer's reasons, and a subjective belief that he was discriminated against, however strongly held, does not suffice. *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000); *Douglass*, 79 F.3d at 1430 ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason.") (citing cases); *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246-47 (5th Cir. 1985). Conclusory allegations, speculation and unsubstantiated assertions are not evidence and cannot preclude a summary decision. *Olabisiomotosho*, 185 F.3d at 525, citing *Douglass*, 79 F.3d at 1429.

X. FINDINGS AND CONCLUSIONS

I have considered the pleadings, motions, evidence, briefs and arguments submitted by the parties on the basis of which I make the following findings and conclusions:

A. Findings of Fact

1. North Harris Montgomery Community College District is a public junior college district established pursuant to section 130.004 of the Texas Education Code.

2. Tomball College is one of five campuses which together comprise the North Harris Montgomery Community College District.

3. At all times relevant to this proceeding, North Harris Montgomery Community College District had more than 14 employees.

4. Corneliu Curuta was born in Romania and is a naturalized citizen of the United States.

5. Curuta was hired as an adjunct instructor to teach one course in biology at Tomball during the spring semester of the academic year 2000-2001.

6. Curuta did not receive any additional class assignments either for the summer of 2001 or for

the fall semester of the academic year 2001-2002.

7. Curuta received a letter dated August 8, 2001 signed by Dean Jones informing him that Tomball College no longer needed him as an adjunct instructor.

8. Decisions about the hiring of adjunct instructors by North Harris Montgomery Community College District are made at the campus level by department.

9. Professor William Simcik was the Program Coordinator for biology at Tomball College for the academic year 2000-2001.

10. Professor Simcik recommended Curuta to Dean Jones to be hired as an adjunct to teach a course in biology at Tomball in the spring semester, 2001.

11. Professor Cathy Switzer was the Program Coordinator for biology at Tomball College for the summer of 2001 and the academic year 2001-2002.

12. Professor Switzer did not recommend Curuta to Dean Jones for additional assignments either for the summer of 2001 or the fall semester of the academic year 2001-2002.

13. Switzer did not recommend Curuta for additional assignments because of concerns about his teaching, especially about the lab component, and because Switzer thought Curuta's conduct was unprofessional and his interaction with her was inappropriate.

14. At the time she made her recommendation to Dean Jones, Switzer was unaware of the country or countries of which Curuta is a citizen.

15. There was no evidence that Dean Jones had any knowledge of the country or countries of which Curuta is a citizen.

16. Curuta filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

17. OSC investigated Curuta's charge and sent him a letter advising him of his right to file his own complaint within 90 days of his receipt of the letter and he did so on June 20, 2002.

B. Conclusions of Law

1. All conditions precedent to the institution of this proceeding have been satisfied.

2. Curuta is and has been at all relevant times a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).

3. At all relevant times, NHMCCD has been an employer within the meaning of 42 U.S.C. § 2000e(b).

4. At all relevant times, NHMCCD has been an entity within the meaning of 8 U.S.C. § 1324b(a).

5. NHMCCD falls within the exception clause of § 1324b(a)(2)(B) with respect to allegations of national origin discrimination.

6. Curuta did not carry his burden of proof with respect to his allegations of citizenship status discrimination.

7. NHMCCD demonstrated that there are no genuine issues of material fact and that it is entitled to summary decision as a matter of law.

To the extent any statement of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth herein at length.

ORDER

The complaint is dismissed. All other pending motions are denied.

SO ORDERED.

Dated and entered this 12th day of August, 2003.

_____

Ellen K. Thomas

Administrative Law Judge

APPEAL INFORMATION

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.