



STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)		
)		
LEONARD TREJO,)		
)		
Complainant,)		
and)	CHARGE NO:	1997SF0356
)	EEOC NO:	21B970474
UNIVERSITY OF ILLINOIS,)	ALS NO:	S-10306
)		
Respondent.)		

RECOMMENDED ORDER AND DECISION

This matter comes to me on a motion by Respondent, The Board of Trustees of the University of Illinois, seeking summary decision in its favor in this matter. Complainant has filed a response, and Respondent has filed a reply. Accordingly, this matter is ripe for a decision.

Contentions of the Parties

In the instant Complaint, Complainant contends that he was the victim of discrimination based upon his national origin when his supervisor conducted a biased investigation concerning charges made by female graduate students. He also asserts that Respondent failed to re-appoint him to his assistant professorship position at the University due to his national origin. In its motion for summary decision, Respondent maintains that, due to certain prior findings made by the federal court in Complainant's related §1983 action against Respondent, as well as Complainant's concessions made in this record, Complainant will not be able to establish a *prima facie* case of national origin discrimination. Complainant, however, submits that there is a material fact as to whether his supervisor correctly determined that he was not trustworthy, lacked professional judgment, and had problems with his relationships with female graduate

students. Moreover, he contends that he was treated less favorably than other, non-Hispanic professors accused of similar misconduct.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. In August of 1994, Complainant, a Hispanic whose national origin is of Mexico, was hired through an affirmative action plan as a non-tenured assistant professor in Respondent's Department of Psychology. As a non-tenured assistant professor, Complainant's employment was subject to renewal at the end of each school year. Complainant's appointment, though, did not carry any guarantee that Respondent would renew the appointment despite Complainant's satisfactory discharge of his duties. Respondent's guidelines further provided that Complainant would be eligible for tenure status after a period of time.

2. In October of 1995, Complainant attended an academic conference in Toronto, Canada with several graduate students in Respondent's Psychology Department. After the first day of academic presentations, Complainant and several of Respondent's graduate students and other professors gathered for late night drinks and a meal in a restaurant/bar at the hotel where Complainant and the graduate students were staying. While the group was seated at a table, Complainant initiated a discussion about a recent documentary regarding the sexual behavior of primates. During the discussion, Complainant asserted that there was a relationship between pregnancy, orgasms and extra-marital affairs and incorporated the use of hand gestures demonstrating a dilating cervix. Some students were under the impression that Complainant was attempting to convince the women at the table that it was acceptable to have an extra-marital affair, and that Complainant was attempting to find female companionship for the evening.

3. While no one in the group protested to Complainant about the subject matter of the discussion or told him to stop, everyone at the table felt uncomfortable about Complainant's discussion. Once Complainant left the table, Darryl Humphrey, a professor from Wichita State, apologized to the students for Complainant's behavior.

4. Later that same evening, Complainant invited Jennifer Keller and Brandy Isaacks (both female graduate students in Respondent's Psychology Department) up to his hotel room to play cards with Tim Weber, Complainant's hotel roommate and a male graduate student in Respondent's Psychology Department. After playing cards for approximately 45 minutes, Complainant made the statement: "Well, it's either we're going to quit playing cards or we're all going to get naked and go to bed." Both Keller and Isaacks left the room.

5. The next evening after the bar conversation, Complainant and Humphrey were present at a party in Humphrey's hotel room. At some point during the party Complainant suggested that they go to a different party to see if "we can bring some women back." At some point during this party, Humphrey informed Keller to keep an eye on Isaacks because he thought Isaacks was Complainant's target. While Complainant was in Humphrey's room, he asked Keller to pour beer in his mouth while he was attempting to stand on his head. Keller declined Complainant's request.

6. On the next evening after the bar conversation, Complainant attended a second party where he mentioned to Judy Ford, a professor at Stanford University, that he wanted to get "his hands on Isaacks." Ford attempted to clarify Complainant's statement by asking whether he wanted Isaacks to work in his laboratory, and Complainant replied: "no, I really want to get my hands on Brandy."

7. Complainant returned by 2:00 a.m. to his room after attending the second party referred to in Finding of Fact No. 6. At that time he telephoned Isaacks' room and invited her to come down to his room. During the telephone call he identified himself as

Weber on a couple of occasions. Isaacks eventually declined the invitation and spoke briefly with Keller, who was still in Complainant's hotel room, to see if she was all right.

8. Upon his return to Respondent's campus, Complainant sent an e-mail on October 26, 1995 to Keller, Isaacks and Weber asking for an "obligatory" rematch of the card game that Complainant and Weber had lost to Keller and Isaacks at the Toronto conference. In the e-mail, Complainant referred to his soon to be ex-wife.

9. Before responding to this e-mail, Keller had a discussion with Jennifer Isom, another graduate student in Respondent's Psychology Department, who had gone to the Toronto conference and who had witnessed Complainant's conversation at the hotel bar. Isom told Keller that she thought Complainant's conversation was an inappropriate subject to have between faculty and students, and that she should have done something to stop it.

10. Before replying to the e-mail, Keller and Isaacks spoke with Professor Greg Miller, their faculty advisor in Respondent's Psychology Department, about Complainant's conduct at the Toronto conference. During the discussion Keller told Miller that she felt that Complainant's behavior at the conference was inappropriate and asked for advice as to how to respond to Complainant's e-mail. Isaacks also told Miller that she believed that Complainant was making sexual comments to her during the conference in an effort to see if she was interested in him sexually and noted that Complainant had asked her at the bar about whether she was seeing anyone. After this discussion, Isaacks sent an e-mail to Complainant indicating that neither she nor Keller was interested in playing cards.

11. At some point around November of 1995, Keller, Isaacks and Isom reached an agreement to meet with Dr. Edward Shoben, the head of Respondent's Psychology Department, to talk to him about Complainant's conduct at the conference. Thereafter, these three graduate students, plus Professor Miller and Louise Fitzgerald,

another Professor in Respondent's Psychology Department, met with Shoben, but did not identify Complainant as the culprit at this meeting. During the conversation, though, Dr. Shoben was told that a professor with the Psychology Department engaged in a conversation at a hotel bar in which the topic was sex, love, women and psychology during sex, and that the Professor had sought an agreement with the graduate students that sex outside of marriage was "okay."

12. At some point after his meeting with the graduate students, Dr. Shoben, before even meeting with Complainant or knowing the identity of the person who acted inappropriately at the conference, told Miller that he was angry at hearing these allegations, and that he wanted to "nail the bastard."

13. After learning that Complainant was the professor at issue in the accusations of Isaacks, Isom and Keller, Dr. Shoben conducted several interviews with these graduate students and also spoke to Professors Humphrey and Ford about Complainant's conduct at the Toronto conference. He also talked with two graduate students (Tessa Gordon and Julie Ann Fox) about unrelated incidents involving Complainant's contact with female students.

14. In November and/or December, 1995, Humphrey spoke to Dr. Shoben about an incident occurring in May of 1995 at the Midwestern ERP conference when, according to Humphrey, Complainant made an inappropriate comment about a female student's physical beauty. As to the Toronto conference, Humphrey told Shoben that: (1) during the party in Humphrey's room, Complainant said something like "what is this a sausage fest? Where are the women?"; and (2) Complainant had stated during the hotel bar discussion: "Don't you think that extra-marital affairs are a good thing if the intercourse is of high quality?" In March of 1996, Humphrey told Dr. Shoben that Complainant had recently telephoned him in an attempt to make him feel responsible for Complainant's predicament.

15. In early December, 1995, Dr. Shoben confronted Complainant about the allegations of Complainant's conduct at the October conference. In his response, Complainant gave Dr. Shoben the impression that he never called Isaacks at the Toronto conference, and that if someone identified himself to Isaacks on the telephone during the conference as Tim Weber, it was probably Tim Weber.

16. Thereafter, Dr. Shoben confronted Weber on the issue of whether Weber telephoned Isaacks in the early morning hours at the Toronto conference, and Weber denied having made the telephone call. Isaacks also told Dr. Shoben that Complainant had made the telephone call. Complainant subsequently admitted that he had dialed Isaacks' hotel room during the October conference and said "Hi Brandy, this is Tim."

17. On February 7, 1996, Complainant again met with Dr. Shoben concerning Complainant's conduct at the Toronto conference. During this meeting, Complainant denied: (1) ever calling Isaacks in the middle of the night; (2) ever saying to Professor Ford "I can't wait to get my hands on Brandy"; or (3) ever speaking to Ford at the President's party (as Ford had claimed). Complainant also suggested to Dr. Shoben that Weber had an interest in Isaacks, and that possibly Weber had made the late night/early morning telephone call to Isaacks. Complainant additionally admitted to making a statement about going to a different party to bring back women to Humphrey's room, but that he intended the comment as a joke.

18. By March 20, 1996, Shoben had met with Isaacks, Keller, Isom, as well as Professors Miller and Fitzgerald approximately eight to ten times. At some point during these meetings Dr. Shoben had discussed the question of issuing Complainant a notice of non-reappointment, and at least Isaacks came to the conclusion that she would not object to such an action.

19. On March 29, 1996, Dr. Shoben met with Jesse Delia, Respondent's Dean of the College of Liberal Arts and Sciences. During the meeting, Dr. Shoben

informed Delia of his intention to issue a notice of non-reappointment based on his perception that Complainant lacked trustworthiness, professional judgment and had poor relations with female graduate students. Delia's role was not to form an independent judgment as to whether Complainant should be re-appointed but rather to provide direction to Dr. Shoben as to how to conclude the investigation and reach a decision about Complainant's future with Respondent.

20. On March 26, 1996, Dr. Shoben wrote Complainant a letter indicating that he was considering making a recommendation to the Department's Advisory Committee that Complainant be given a notice of non-reappointment based on Complainant's lack of trustworthiness, professional judgment and his relations with female graduate students. In making this recommendation, Dr. Shoben found persuasive: (1) Complainant's remarks to Ford that he "wanted to get his hands on" Isaacks; (2) his belief that Complainant telephoned Isaacks in the middle of the night at the October conference, concealed his identity, and impersonated Weber; (3) Complainant's initial refusal to admit that he telephoned Isaacks despite the fact that witnesses were present when he placed the telephone call; (4) Complainant's statement to Humphrey that they should go to a different party to see if they could find some women to bring back to their hotel room; (5) Complainant's attempt to persuade graduate students to pour a beer in his mouth while he stood on his head; (6) Complainant's comment to Keller and Isaacks during a late night card game that "we're going to quit playing cards or we're all going to get naked and go to bed"; (7) Complainant's attempt to solicit dates from graduate students, including his e-mail to Keller and Isaacks that referred to his impending divorce and to an "obligatory rematch" of a card game; (8) his belief that Complainant attempted to have Humphrey recant certain statements he made to Shoben about Complainant's conduct; and (9) Complainant's discussion during the Toronto conference indicating a relationship between pregnancy, adultery, and sexual pleasure.

21. On April 5, 1996, Complainant wrote an eight-page rebuttal to Dr. Shoben's March 26, 1996 letter.

22. After receiving Complainant's rebuttal, the Department's Advisory Committee met and agreed that Complainant should receive a non-reappointment notice. On May 9, 1996 Dr. Shoben sent another letter to Complainant giving him notice of his intention to recommend non-reappointment.

23. On June 5, 1996, Dr. Shoben gave Complainant an opportunity to submit additional material to be considered for an internal appeal. Dr. Shoben subsequently gave Complainant extensions of time to do so, but Complainant did not do so by the June 28, 1996 deadline. Thereafter, the Department Advisory Committee met a second time and again agreed that Complainant should not be re-appointed.

24. In July of 1996, Complainant met with Dean Delia to discuss his concerns about the Department's process that had led to the issuance of a notice of non-reappointment. At this meeting Complainant received permission to make a written statement to the Department Head and the Department's Advisory Committee. Complainant thereafter provided a letter from his attorney requesting that Complainant be able to meet with the committee members. Complainant's request was denied, and the Advisory Committee met again to consider the materials provided by Complainant, as well as letters that were sent on his behalf.

25. On July 30, 1996, the Advisory Committee reaffirmed Dr. Shoben's recommendation not to reappoint Complainant to his teaching position.

26. On August 3, 1996, Larry Faulkner, Respondent's Provost and Vice Chancellor for Academic Affairs, informed Complainant that he had accepted the decision not to reappoint Complainant. Complainant was thereafter given a terminal contract that called for Complainant to teach one more academic school year but forego a scheduled pay raise.

27. On August 18, 1997, Complainant filed an appeal/grievance of his termination with Respondent's Faculty Advisory Committee. In the appeal, Complainant asserted that Dr. Shoben had conducted an unfair investigation of the charges against him and had failed to afford him due process. Complainant made no specific reference in his appeal papers to his national origin as a potential factor in the decision to terminate his teaching position.

28. On January 16, 1998, the Faculty Advisory Committee wrote a letter to Dr. Shoben indicating that it affirmed the decision of non-reappointment.

29. In addition to filing a Charge of Discrimination with the Department of Human Rights, Complainant filed a complaint in federal district court, asserting that Respondent had denied him due process and violated his First Amendment Rights when it terminated his employment.

30. The federal district court granted Respondent's motion for summary judgment, and the Seventh Circuit Court of Appeals affirmed, after finding that "casual chit-chat" between individuals in a small group setting was not protected activity under the First Amendment. In resolving Complainant's due process claims, the Seventh Circuit held that: (1) it was "eminently reasonable for the University to take action against Trejo"; and (2) "it was proper for the University to terminate [Complainant] because of his conduct and comments during...[the Toronto conference]...as well as his conduct before and after the conference which did not come to light until such time as the investigation was completed." **Trejo v. Shoben**, No. 00-3341, January 30, 2003, Slip op. at 15.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant has failed to establish a *prima facie* case of national origin discrimination since the record fails to contain any evidence linking his national origin with the process used by Dr. Shoben to investigate the charges against Complainant or the decision not to reappoint him to his teaching position.

Determination

Dismissal of the instant case is warranted since Complainant failed to present evidence establishing either that other similarly situated individuals outside of Complainant's protected classification were treated more leniently, or that Respondent terminated Complainant from his teaching position on account of his national origin.

Discussion

Collateral Estoppel.

This case presents an interesting question as to what, if any, effect a prior ruling in a related federal court case has on a proceeding pending before the Commission. Generally, the doctrine of collateral estoppel precludes parties from relitigating facts determined in prior judicial proceedings where: (1) the issue decided in the prior adjudication is identical with the one presented in the pending lawsuit; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party in the prior adjudication. (See, for example, **DuPage Forklift Service v. Material Handling Services**, 195 Ill.2d 71 (2001).) In our case, the doctrine potentially applies since: (1) Complainant had previously filed a §1983 action alleging that his termination was in retaliation for exercising his First Amendment rights and violated his substantive and procedural due process rights; and (2) the resolution of Complainant's federal lawsuit concerned the same core of operative facts that are at issue in his Human Rights Act claim. As to the §1983 action, the federal district court, and ultimately the Seventh Circuit Court of Appeals made the determination that:

“[Respondent] terminated [Complainant] because his lack of professionalism, poor judgment, and insufferable behavior around his colleagues and fellow graduate students disrupted the educational process and tarnished the University’s good name.”

(**Trejo v. Shoben**, No. 00-3341, January 30, 2003, slip op. at 20.) In view of this finding, Respondent maintains that the conclusion by the Seventh Circuit effectively precludes Complainant from ever establishing in his Human Rights Act claim that something other than “his [own] lack of professionalism, poor judgment and insufferable behavior” motivated Respondent to terminate him from his teaching position.

But Respondent’s arguments in this regard cannot be correct since the federal district court was not asked to consider whether national origin discrimination played a role in Respondent’s decision, and I would note that the actual issues before the federal court were limited to: (1) whether Complainant’s conversation with the graduate students and professors at the bar/restaurant during the Toronto conference qualified as protected speech under the First Amendment; and (2) whether Respondent gave Complainant, as a non-tenured professor, sufficient due process prior to issuing a notice of non-reappointment. While the federal court ultimately decided that Complainant was not entitled to First Amendment protection for the discussion that took place at the restaurant/bar and that Complainant received greater procedural benefits than what he was entitled to receive as a non-tenured employee, these findings do not control the issues in Complainant’s discrimination claim to the extent that Complainant is arguing that, regardless of what due process procedures he received from Dr. Shoben, it was still less than what others outside his protected classification received. Moreover, as the Appellate Court in **Loyola v. University of Chicago v. Illinois Human Rights Commission**, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1st Dist., 3rd Div. 1986), observed, employees who are discharged for admittedly serious offenses can still prevail under the Human Rights Act where co-workers committing similar offenses received a

lesser sanction. Thus, I cannot agree with Respondent that Complainant has somehow forfeited any potential Human Rights Act claim based on findings of misconduct made by the federal court.

But what can be said about Complainant's ability to re-litigate the underlying facts that supported the federal court's conclusion that Complainant did not have a viable First Amendment or due process claim? According to the Complainant, factual determinations made by the federal court as to what actually happened at the Toronto conference and during Dr. Shoben's subsequent investigation are subject to a new and potentially more sympathetic look by the Commission. For example, Complainant claims that: (1) the discussion with the graduate students at the restaurant/bar during the Toronto conference was a "lively academic and intellectual debate" rather than an example of poor judgment and insufferable behavior, as found by the federal court; and (2) contrary to Dr. Shoben's finding, Complainant never denied calling Isaacks during the Toronto conference. Yet, these claims are just a re-hash of the factual battles played out and lost by the Complainant in the §1983 action that cannot be replayed here in the absence of any proof that the prior federal court proceeding lacked minimum standards of due process. (See, **Herzog v. Lexington Township**, 167 Ill.2d 288 (1995), and **Buie v. Quad/Graphics, Inc.**, No. 03-2026, (April 27, 2004) Slip. Op. at p. 11.) Complainant has not made such a claim, and so, for better or worse, he is stuck with the findings made by the federal court regarding his "lack of professionalism, poor judgment and insufferable behavior."

Alternatively, I find that Complainant's own concessions attached to pleadings in this case preclude him from contesting certain factual question regarding his conduct during the fall of 1995. Specifically, Complainant admitted that: (1) Dr. Shoben was the fact-finder in the investigation, who collected evidence that he deemed relevant in reaching a decision about Complainant and then presented his evidence to the

Department's Advisory Committee; (2) the reason Dr. Shoben recommended a notice of non-reappointment for Complainant was because he believed that Complainant was untrustworthy, was guilty of unprofessional conduct, and displayed a lack of professional judgment in his relations with female graduate students; and most significantly (3) Dr. Shoben actually believed in the truth of the facts and conclusions that he set forth in his summary of his investigation into Complainant's conduct. Thus, either through an application of collateral estoppel or through Complainant's own admissions, he cannot contest in this forum issues regarding whether he was actually guilty of the infractions set forth in Dr. Shoben's report. Indeed, as shall be seen below, the truth of whether he actually was guilty of the stated infractions is totally irrelevant where, as here, Complainant conceded that Dr. Shoben honestly believed that he had committed the infractions. See, **Buie**, Slip op. at pp. 10-11.

The merits

Count I of the instant Complaint alleges that Respondent subjected Complainant to unequal terms and conditions of employment by subjecting him to a biased and unfair investigation which it did not impose upon non-tenured assistant professors who were outside Complainant's protected classification. Initially, Respondent submits that Count I, as phrased, does not constitute a violation of the Human Rights Act since: (1) being the subject of a biased or unfair investigation does not subject any employee to a material adverse act; and (2) the federal court already determined that Complainant received sufficient procedural due process prior to Respondent terminating him from his teaching position. While I would agree with Respondent that a mere investigation that does not lead to any adverse effect on an employee's conditions of employment would not be sufficient to establish a viable claim under the Human Rights Act, the record in this case supports a finding that Dr. Shoben's investigation had an adverse effect on Complainant's employment since the results of the investigation ultimately led to Dr.

Shoben's recommendation that Complainant not be re-appointed as an assistant professor. See, for example, **Rivera and Group W Cable, Inc.**, ___ Ill. HRC Rep. ___ (1985CF1866, October 25, 1993) where the Commission found in favor of a complainant who had been terminated following the submission of a biased internal investigation conducted by a supervisor.

In **Rivera**, though, it was clear from the record that the ultimate decision-maker would have come to a different result but for the nature of the investigation conducted by the supervisor, and that supervisor had demonstrated an animosity against the complainant's Puerto Rican national origin. Indeed, in our case Complainant suggests that Dr. Shoben's decision to recommend issuance of a notice of non-reappointment could have been different had he not been in a rush to judgment to "nail the bastard", or had considered more carefully the fact that none of the females seated at the restaurant/bar's table objected to him at that time about the subject matter of his discussion. Similarly, Complainant maintains that the investigation conducted by Dr. Shoben was flawed because his recommendation rested in part on complaints that he never revealed to Complainant or allowed him to provide a response thereto.

However, unlike the supervisor in **Rivera** who drafted an investigational report that was intentionally skewed against the employee, Complainant in our case conceded that Dr. Shoben honestly believed that his conclusions regarding Complainant's poor judgment, lack of professionalism and trustworthiness, as well as the underlying facts supporting those conclusions, were true. Perhaps Complainant is correct that, in spite of his five-month investigation, Dr. Shoben made a rush to judgment, or that he might have come up with a different result had he given Complainant an opportunity to provide more input into the investigation. But these alleged defects in Dr. Shoben's investigation are immaterial where: (1) Complainant admits that Dr. Shoben honestly believed in the truth of the facts and conclusions of his investigation; and (2) unlike the investigation at issue

in **Rivera**, Complainant has not provided any evidence indicating that the procedures and methods used by Dr. Shoben in the investigation prevented him from obtaining a good faith belief regarding Complainant's judgment, professionalism and trustworthiness. (See, **Lenoir v. Roll Coaster, Inc.**, 13 F.3d 1130, 1134 (7th Cir. 1994, and **Clayton and Caterpillar, Inc.**, ___ Ill. HRC Rep. ___ (1993SF0549, November 6, 1998).) This is especially so since the procedures used by Dr. Shoben, i.e., interviews with the graduate students, Complainant and other professors, were reasonably calculated to uncover the truth of what had occurred at the Toronto conference. And, for purposes of his discrimination claim, an investigation that provides management with a reasonable opportunity for uncovering the truth is the only thing that matters, regardless of the outcome of the investigation. See, **Ford and Caterpillar, Inc.**, ___ Ill HRC Rep. ___ (1993SF0242, October 28, 1996).

Alternatively, even if Complainant could show that the investigation conducted by Dr. Shoben was flawed for the reasons he cited, such that one could say that the results of the investigation were "biased" in the sense that it produced a wrong recommendation, Complainant would still need to show that his Mexican national origin was responsible for Dr. Shoben's allegedly biased investigation. Complainant contends in his Complaint that he can do this by presenting evidence the others outside of his national origin were not subjected to biased and unfair investigations. The record, though, demonstrates that Dr. Shoben has not been involved in any similar investigation into similar charges involving non-tenured assistant professors. Thus, Complainant really has no answer to the question as to how, according to the allegations of the Complaint, Dr. Shoben could have treated other professors more favorably.

True enough, Respondent's university employs many department heads who conducted other investigations concerning other assistant professors. However, those investigations could never be used to establish a discrimination claim based on

disparate treatment since they were performed by other supervisor/decision-makers who cannot shed any light on Dr. Shoben's motivation when he recommended issuance of a notice of non-reappointment. (See, for example, Radue v. Kimberly-Clark Corp., 219 F.3d 612 (7th Cir. 2000), and Buie, slip op. at pp. 16-17.) In short, due to Complainant's concession that Dr. Shoben was the relevant decision-maker in this case, Complainant's discrimination claim is necessarily limited to evidence pertaining to Dr. Shoben's mind-set when he investigated the allegations of misconduct by the female graduate students at the University. Moreover, because Complainant has done nothing in this record to show that Dr. Shoben had any animosity against Complainant's national origin when he set forth the procedural perimeters of his investigation and then conducted his investigation, I will grant Respondent's motion for summary decision as it pertains to Count I.

The same result obtains for Count II of the Complaint. In Count II, Complainant alleges that Respondent denied him a pay raise and issued him a terminal contract in August of 1996 on account of his national origin, and that Respondent treated similarly situated assistant professors outside of his protected classification more favorably. If Dr. Shoben had the last word on Complainant's non-appointment, this case could end at this juncture given the above finding that Complainant failed to establish that Complainant's national origin played any role in Dr. Shoben's investigation of Complainant. However, the record shows that other individuals/entities, including Respondent's Provost (Larry Faulkner) and the Faculty Advisory Committee (FAC), played a role in the eventual issuance of a terminal contract in terms of providing Complainant with a procedural review of the Department's actions taken against Complainant. Indeed, as noted above, the fact that Dr. Shoben actually believed that Complainant was guilty of misconduct only answers a portion of the relevant *prima facie* question as to whether, given Complainant's perceived misconduct, Respondent's failure to tender a scheduled pay

raise and the issuance of a terminal contract were sanctions that Respondent did not impose on others outside of Complainant's protected classification who had committed similar infractions. (See, Loyola, 500 N.E.2d at 646, 102 Ill.Dec. at 753.) Indeed, as a member of the FAC pointed out in the materials associated with the proposed discipline of another professor, there were "many precedents" within the University in which a romantic/sexual relationship between a professor and his/her student did not result in any sanction at all.

The fatal problem for Complainant, though, is the fact that he failed to establish the national origins of many of his alleged comparable professors. For example, as to several of the proposed professors whom Complainant asserts received more favorable treatment, Complainant makes only an educated stab at their national origins based upon the ethnic sounding surnames of the professors whom Complainant claimed did not share his Hispanic background. However, reliance on last names to establish a comparable's national origin totally ignores the possibility that the comparable could have shared a Hispanic background from his or her mother. Moreover, even in the cases concerning the two professors whom Complainant claims to have personal knowledge as to their Australian and European ancestries, there is nothing in the record to indicate that any of the FAC members were actually aware of the national origins of Complainant or any of the proposed comparable professors. Since the decision-maker's knowledge of one's national origin is the *sine qua non* of any discrimination claim, Complainant's claim can be rejected on this basis alone.

Alternatively, even if I could accept the professors' surnames as adequate proof of their national origins, Complainant still needs to show that the circumstances surrounding their treatment raise an inference that he was being treated differently by members of the FAC on account of his national origin. In this regard, Complainant has produced case files from the FAC regarding professors who were charged with: (1)

having sex with a married graduate student that resulted in a pregnancy; (2) fondling a subordinate's breast, asking her if she liked to masturbate and exposing his genitals to her; (3) engaging in *quid pro quo* sexual harassment with a female student; and (4) sexually harassing a graduate student, being gender insensitive and committing computer piracy.

While in some cases I agree with Complainant that his misconduct pales in comparison to the behavior of some of his colleagues, Loyola teaches that co-workers are only truly comparable if they have similar or worse misconduct and similar work records. In this regard, though, each of the proposed comparables are distinguishable in that, unlike Complainant, they either concerned: (1) professors who, because of their tenured status, enjoyed certain due process rights, options and procedures not accorded to non-tenured professors; (2) students, who did not file formal complaints against the professor or who were involved in consensual relationships with the professor; or (3) professors whose charges were eventually dismissed as being unfounded. Indeed, from my review of the files, Complainant did not provide any comparable who had been found guilty of all three factors found by Dr. Shoben, i.e., lack of trustworthiness, lack of professional judgment and poor relations with female graduate students. Thus, it is either the difference in the status of the professors, the status of the students, and/or the behaviors of the professors during the investigation, that prevent any of proffered professors from being suitable comparables for Complainant's discrimination claim.

Finally, Complainant points to bits of information in the proffered files indicating that several professors may have received favorable treatment by the University when their sexual harassment charges were dropped prior to any formal action having been taken by the FAC. Even if that were true, it would not advance Complainant's discrimination claim since: (1) the record shows that FAC cannot "act" on matters that are not before it; and (2) it would establish, at most, that someone other than Dr. Shoben

or the FAC acted more leniently. Yet, as noted above, different fact-finders and different supervisors can render different results without generating liability under the Human Rights Act. In this regard, then, Complainant needed to show that either Dr. Shoben or the FAC¹ discriminated against him on the basis of his national origin. Under this record, though, Complainant loses on both accounts because he failed to present any evidence showing that Dr. Shoben's investigation was biased on the basis of Complainant's national origin, or that the FAC, after having been made aware of Complainant's national origin, ignored its prior precedent concerning the appropriate discipline of non-tenured professors who had been found guilty of similar misconduct. Accordingly, Count II of Complainant's Complaint will be dismissed as well.

Recommendation

For all of the above reasons, it is recommended that Respondent's motion for issuance of a summary decision be granted, and that the instant Complaint and the underlying Charge of Discrimination of Leonard Trejo be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 4TH DAY OF MAY, 2004

¹ Complainant made no allegation or argument in his response to the motion for summary decision that Provost Faulkner was guilty of any discriminatory conduct.