

issued a preliminary order in the first direct appeal on February 20, 2008 and a preliminary order on February 21, 2008 in the second direct appeal. Both orders gave the Appellees a time certain to answer or deny in writing the facts set out in the employee's appeal. The preliminary orders stated that facts set out in the preliminary appeal must be taken as true if the employer fails to deny the facts.

The two direct appeals were consolidated and Appellees filed an "Answer and Motion to Dismiss or Alternatively Stay" on March 13, 2008. The response did not deny Appellant's specific factual allegations. Instead it sought a dismissal or stay based upon certain arguments that the Fair Dismissal Act did not apply to Appellant and that the case was due to be stayed due to a proceeding in state court involving the same parties.

On May 12, 2008, Appellant filed a Response to the Motion to Dismiss.

Factual Findings

The material facts of this case do not appear to be in dispute although the inferences to be drawn from the facts and legal conclusions based upon those facts and inferences are disputed.

1. Appellant Susan Salatto began working for the Southern Union State Community College as a part time instructor in 1975. In 1976, she began working as a full time employee with Southern Union State Community College and has continued as such until she was terminated in January of 2008.

2. Appellant Susan Salatto has held different positions with the school

during those years. Around 1987, she was promoted from Instructor to Director of Enrollment Services at the College. In 1988, she was promoted to Director of Enrollment and Counseling Services for the College. In 2000, she became Associate Dean of Student Development for the College. In 2002, she became Dean of Student Development for the College.

3. On August 3, 2004, she was temporarily loaned to Central Alabama Community College as Interim President. This move was accompanied by an agreement among her, the College and the Chancellor of the Department of PostSecondary Education that this would be a temporary position and that she would retain her tenured position as the Dean of Student Development of Southern Union State Community College. It is not contested that the Appellant had tenure (non-probationary status) in her employment with Southern Union State Community College as Dean of Student Development. The undersigned finds that the assignment to the temporary position at Central Alabama Community College was in the nature of an employee loan and that it was done with the intent of all relevant parties that she retain her position with Southern Union State Community College and retain her tenured "non-probationary status" at the Southern Union State Community College. This finding is based upon the affidavit of Susan Salatto and the letter attached to it from the Chancellor as well as the lack of any evidentiary submission by Appellees contradicting such evidence.

4. On April 27, 2006, Appellant was appointed President of Southern Union State Community College. Appellant held this position until January 24, 2008 when the State Board of Education voted to terminate her employment as President of Southern Union State Community College. Appellant Salatto was not provided a notice and a hearing before the termination. She was not returned to her position of Dean of Student Development. Although she requested that the College state its position regarding her employment in the College after the Chancellor recommended her termination to the State Board of Education and once again after the Board voted to terminate her employment as President, the College did not state its position regarding her employment, failed to respond with any notice or a hearing pursuant to the Fair Dismissal Act and appeared to simply ignore her request for reinstatement. The College never provided Ms. Salatto, a thirty-year employee, any notice or hearing under the Fair Dismissal Act or any notice at all regarding its position relative to her employment. The College simply terminated her pay.

5. This position by the College and by the Appellees is particularly difficult to understand in light of statements by the Chancellor to Ms. Salatto in December of 2007, when Salatto was approached by the Chancellor regarding possible retirement. The Chancellor stated at that time that Salatto would have tenure rights, (in other words, non-probationary rights), in her position as Dean of Student Development. Appellees have introduced no evidence to dispute the

evidence that the Chancellor so stated. They argue legally that she had no such rights, but do not contradict the evidence of the Chancellor's statement. Despite the Chancellor recognizing that Salatto had this tenure in her prior position as Dean of Student Development or a similar position at that level, Salatto's employment was terminated completely with the College after the Chancellor recommended the termination to the State Board of Education and the State Board of Education voted to terminate Salatto on January 24, 2008. Again, despite Salatto's letters written to the College on January 23, 2008 and February 6, 2008, the College simply terminated her pay without providing her any reason for the termination of her pay, any reason why she would not be allowed to return to her position as Dean of Student Development or given notice and hearing before that position in her employment with the College is terminated. The College never explained to Appellant Salatto, a thirty-year employee, why it was taking a position inconsistent with that of the Chancellor.

6. While Appellant worked as President of Southern Union State Community College, her W-2 Form showed the College as her employer, her paycheck reflected the College as her employer, and she received PEEHIP (teachers) insurance benefits which are only available to College employees and not PostSecondary employees. She worked a College schedule (a schedule based on the College's calendar, not the PostSecondary calendar), and she was listed on PostSecondary rosters as an employee of the College, not of PostSecondary. It is

apparent that all parties treated her as, and she understood she was, an employee of Southern Union State Community College.

Conclusions

The Fair Dismissal Act in Alabama does not prohibit the termination of non-probationary employees, but out of a sense of fairness and with a belief in the due process of law, the Alabama Legislature has established a process to be followed requiring notice and a hearing when an employer is terminating a non-probationary employee.

It is undisputed that Appellees did not follow the procedures of the Fair Dismissal Act, for instance its requirements of notice and hearing prior to termination. Appellees' position appears to be simply that Appellant was not covered by the Act and so was not entitled to its protections.

1. Non-Probationary Status as President.

In her first direct appeal, Appellant argues that she has a non-probationary status as an employee with the school in her position as President. Appellees' argument in response is that she is not an employee of the school. Ms. Salatto obviously has vastly more than the three years' service for the college that is necessary in order to gain non-probationary status.¹ Presidents are covered by

¹ The Appellees cannot maintain a claim that the Chancellor's request for her to serve as Interim President of Central Alabama Community College divested her of non-probationary status that she had earned. Any such contention would be unwarranted and unjust. That service appeared to simply be in the nature of an employee loan and that all parties understood and agreed that she was still an employee and retained her rights as an employee of Southern Union State Community College. Further, in *Ex parte Clayton*, 552 So.2d 152 (Ala. 1989), the Court held that the Fair

the Fair Dismissal Act by virtue of the 2002 amendment to the Act. That amendment made clear that all college employees are covered. See Section 36-26-100, Code of Alabama (1975). (“The term ‘employees’ as used in this article, is deemed to mean and include all persons employed by two-year educational institutions under the control and auspices of the State Board of Education. . . . (emphasis added)”. By the amendment, the legislature intentionally removed the basis that had existed under prior law for the conclusion that college presidents are outside the coverage of the Act.

The key authority in this argument is *Glass v. Anniston City Board of Education*, 957 So.2d 1143 (Ala. Civ. App. 2006). Under *Glass*, Ms. Salatto comes within the definition of covered employees in Section 36-26-100, Code of Alabama (1975), and is therefore entitled to the substantive and procedural protections of the Act.

As the Court in Civil Appeals held in *Glass*, the coverage of the Fair Dismissal Act was intentionally expanded in 2002. Before that time, the Act had covered (among others) “all persons employed by county and city boards of education, two-year educational institutions under the control and auspices of the State Board of Education.. ,” but have then excluded those who were “otherwise covered by the State Merit System, Teacher Tenure Law or other state statute at

Dismissal Act only requires three years of service, not three consecutive years of service with the employing school. Therefore even if the employment as Interim President represents some break in service with the school she would still have over three years of service with Southern Union State Community College at the time of her dismissal.

the time this article is adopted”. *Glass*, 957 So.2d at 1145-46. Based on the “other state statute” language, it had previously been held that a Custodian of School Funds was not covered by the Act, since such Custodians were “covered” by some “other state statute” in the sense that there was a preexisting statute regarding their employment status. *Stephenson v. Lawrence County Board of Education*, 782 So.2d 192, 199-200 (Ala. 2000).

But in 2002, the Legislature amended Section 36-26-100, to remove the exclusion of those “covered by other state statute.” The Court of Civil Appeals in *Glass* gave effect to the statutory change, and gave effect to the plain language of the Act as amended. Section 36-26-100, Code of Alabama (1975), now covers “all persons employed by two-year educational institutions under the control and auspices of the State Board of Education,” excluding only those “covered by the state Merit system or the Teacher Tenure Law.” *Glass*, 957 So.2d at 1146. The Court gave effect to this Legislative choice, holding that the amendment “was intended to eliminate that restriction previously relied upon in *Stephenson*.” The Court continued by stating, “we conclude that the Legislature intended that the FDA would govern dismissal of employees as defined under the FDA even though the dismissal of such employees is covered under some “other state statute.” *Id.*, at 1148. For this reason, Ms. Glass, an attendance officer, was covered by the Fair Dismissal Act, even though under pre 2002 law, attendance officers would have been deemed at-will employees. See also *Glass*, 957 So.2d at

1152-53 (Crawley, J., concurring specially) (“I agree with the main opinion that the 2002 amendment to §36-26-100, Code of Alabama (1975), extended the procedural safeguards of the FDA to school attendance officers. Before the amendment, attendance officers served ‘at the pleasure of the appointing Board’, see §16-28-19 Code of Alabama (1975), and were therefore ‘at-will’ employees. . . . now, after the amendment, school attendance officers can be dismissed, pursuant to FDA, only for certain enumerated causes.”). Ms. Salatto as President of Southern Union would therefore be covered by the Fair Dismissal Act, just as in *Glass*. Just as in *Glass*, the only argument against including her within the Act would be that there is a preexisting statute that rendered two-year college president “at-will employees”. But the holding of *Glass* is that such older statutes are no longer controlling. The case of *DeWitt v. Gainous*, 628 So.2d 418 (Ala. 1993) and *Shuford v. Alabama State Board of Education*, 978 F. Supp. 1008 (M.D. Ala. 1997) do hold that Presidents of Alabama’s Junior Colleges are at-will employees. The Court based these rulings on its interpretation of Section 16-60-11.4(3), Code of Alabama 1975. Those decisions all were prior to the 2002 amendments and prior to the *Glass* case. The rationale that was the basis for the decision in *Stephenson* which was overruled by *Glass* was the same rationale used in the *DeWitt* and *Shuford* cases. The Appellees’ position in their briefs appear to recognize this change in the law and only seems to make the argument that Appellant is not covered by the Fair Dismissal Act because as President she is not

an employee of the college but an employee of the Department of PostSecondary or the State Board of Education. Logically based upon the positions asserted by the Appellces if Appellant is an employee of the College it appears that Appellces concede that she would be covered under the Fair Dismissal Act. Based upon the materials presented by the parties, it appears that the parties clearly intended and recognized Appellant Salatto as an employee of Southern Union State Community College. Therefore, this Administrative Law Judge finds that she has obtained and has non-probationary status as an employee of Southern Union State Community College with a right to appropriate statutory notice and hearing prior to her termination from her position as President of the community college.

2. Non-probationary status by virtue of her employment prior to being President.

In the alternative, Ms. Salatto was at least entitled to notice and hearing under the Fair Dismissal Act before she could be removed altogether from employment with the College. Even if her employment as President were not covered, still she retained non-probationary status in her pre-Presidency service.

The Chancellor's temporary assignment of Ms. Salatto as Interim President of Central Alabama Community College, in 2004, did not eliminate her rights under the Fair Dismissal Act. In other words, she retained her non-probationary status in her career at Southern Union State Community College. This principle is supported by Alabama Case Law. Under Alabama law, "it is well established a transfer of positions within the same system does not result in a loss of tenure

already earned.” *Dickey v. McClammy*, 452 So.2d 1315, 1319-20 (Ala. 1984). This conclusion is consistent with - even mandated by - the Chancellor’s promise to her, in writing: “upon completion of this assignment you will return to your current position as Dean of Student Development at Southern Union State Community College.” And this conclusion is bolstered also by simple common sense. No one would ever accept an assignment as Interim President, as Ms. Salatto willingly did, if accepting that assignment meant that one was giving up job security that she had worked for decades to enjoy. No one would throw all that away for a temporary assignment. So, both as a matter of the Fair Dismissal Act and as a matter of Constitutional Law based upon the Chancellor’s expressed promise, Salatto retained her Fair Dismissal Act non-probationary protections in her career at Southern Union State Community College, even while on temporary assignment by the Chancellor to be Interim President of Central Alabama Community College.

Appellant Salatto did not lose her non-probationary rights in her deanship, by virtue of her agreeing to become President of Southern Union State Community College itself in 2006. Even if the Presidency was an at-will position, Appellant retained non-probationary status that her decades of service had earned her in her pre-presidency career. This conclusion is first supported by the admission of the Chancellor to Salatto in December 2007 that Salatto retained those rights in the pre-presidency position and would have those rights in the event that her

presidency was terminated. Further, it is established in the law. As quoted above in the case of *Dickey v. McClammy*, 452 So.2d 1315, 1319-20 (Ala. 1984), the Court held that a transfer of positions within the same system does not result in a loss of tenure already earned. Further, in the area of Teacher Tenure Law, it has clearly been recognized that if a teacher who has gained tenure becomes Superintendent, he or she retains the tenure earned as a teacher even if he or she is removed as Superintendent of the school. See *Ex parte Weaver*, 559 So. 178 (Ala. 1989).² This legal principle is consistent with the Fair Dismissal Act and is analogous to the case before this Administrative Law Judge. The Appellees have not contested the admission by the Chancellor that Salatto had these rights in her pre-presidency employment and have offered no meaningful, legal support to contradict the law provided by Appellants. Therefore, this Administrative Law Judge finds that Salatto retained tenure rights in her pre-presidency positions and employment with the school and therefore could not have been terminated from any pre-presidency position without compliance with the Fair Dismissal Acts' requirements of notice and a hearing.

3. This Administrative Law Judge finds that the Motion to Stay is due to be denied. This Office under Section 36-26-115, Code of Alabama is the proper body to decide this direct appeal. It appears that the Circuit Court's equitable

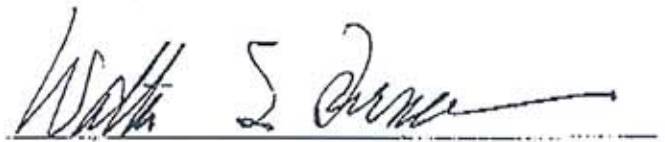
² The Court clarified *Weaver* in *Mitchell v. Skinner*, 603 So.2d 1023 (1992). The Court held in *Mitchell* that a Superintendent is not a "teacher" within the meaning of the Teacher Tenure Law. But the Court in *Mitchell* left intact, and reaffirmed, the principle that a person who has earned tenure as a teacher, and therefore becomes a Superintendent, retains his or her right to tenure as a teacher upon being removed from the position of Superintendent, *Mitchell*, 603 So.2d at 1025-26.

jurisdiction was only invoked to maintain status quo pending this Administrative Law Judge's decision and its jurisdiction would only have been further invoked if this Administrative Law Judge had declined to hear this direct appeal. Further, the Motion to Dismiss of Appellees is denied on the basis set out above.

Relief

Based upon the foregoing, this Administrative Law Judge has reviewed the Appellant's request and the Appellees' answer and has now determined that the Appellees have failed to comply with the Fair Dismissal Act in terminating Appellant Susan Salatto. Based upon this finding, the Administrative Law Judge hereby determines that the termination of Appellant Susan Salatto has been done in violation of the applicable law and hereby rescinds the action taken by Appellees. The Appellees are further ordered that the Appellees must comply with the Fair Dismissal Act requirements of notice and a hearing prior to any purported termination of Appellant Salatto's employment.

DONE this the 23rd day of May, 2008.



Walter S. Turner
Chief Administrative Law Judge
Administrative Hearings
11 South Union Street – Room 224
Montgomery, AL 36130
Telephone: 334-242-7433
Fax: 334-353-9050

cc: William F. Patty, Esquire
Beers, Anderson, Jackson, Patty & Fawal, P.C.
P. O. Box 1988
Montgomery, AL 36102
Telephone: 334-834-5311
Fax: 334-834-5362
(First Class & Certified Mail)

J. Cecil Gardner, Esquire
Samuel H. Heldman, Esquire
Gardner, Middlebrooks, Gibbons, Kitreell,
Olsen, Walker & Hill, P.C.
P. O. Box 3103
Mobile, AL 36652
Telephone: 251-433-8100
Fax: 251-433-8181
(First Class & Certified Mail)

Dr. Bradley R. Byrnc
Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Southern Union State Community College
750 Roberts Street
Wadley, AL 36276
(First Class & Certified Mail)

Gov. Bob Riley
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Mr. Randy McKinney
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Ms. Betty Peters
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Ms. Stephanie Bell
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Dr. Ethel Hall
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Ms. Ella Bell
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Mr. David Byers
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Ms. Sandra Ray
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)

Dr. Mary Jane Caylor
c/o Alabama Department of Postsecondary Education
401 Adams Avenue
Montgomery, AL 36130-2130
(First Class & Certified Mail)