BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

AMBER CHILDERS,	)	
Petitioner,	)	
	)	
v.	)	SEAC No. 04-12-041
	)	
MIAMI CORRECTIONAL	)	
FACILITY,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND NON-FINAL ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT MCF AND DENYING RESPONDENT MCF'S MOTION TO DISMISS

On September 21, 2012, Respondent MCF, by counsel, moved for summary judgment and also moved to dismiss for lack of jurisdiction. Petitioner Childers, pro se, timely responded with a brief on November 12, 2012. Respondent filed a reply on November 27, 2012. This case considers, under the Indiana Civil Service System (I.C. 4-15-2.2), the Petitioner's state employment termination from Respondent MCF on January 13, 2012. Petitioner Childers is an unclassified, at-will employee who alleges that her termination arose from unlawful sex discrimination and/or retaliation contrary to public policy.

Having duly reviewed the pleadings, the briefing and motions, the ALJ determines there are no genuine issues of material fact and Respondent MCF is entitled to judgment as a matter of law. Among other grounds, Respondent MCF advances legitimate non-discriminatory and non-retaliatory grounds for the state employment termination in question. These grounds have not been rebutted by Petitioner Childers – no question of genuine material fact for an evidentiary hearing is demonstrated. Respondent MCF additionally shows that Petitioner cannot establish causation, a required element, in her sex discrimination or unlawful retaliation claims. As a former at-will employee, Petitioner could thus be freely terminated by Respondent because a public policy exception cannot be demonstrated.

Respondent MCF's Motion for Summary Judgment is therefore **GRANTED**. However, SEAC has jurisdiction of the case because Petitioner's Complaint was timely, and under the lower standard of notice pleading establishes a possible cause of action. Therefore, Respondent MCF's Motion to Dismiss for lack of jurisdiction is **DENIED**.

I. The Summary Judgment Standard

Summary judgment proceedings before SEAC are governed by Indiana Trial Rule 56. I.C. 4-21.5-3-23. Summary judgment is only appropriate when the designated evidence shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Swineheart v. Keri*, 883 N.E.2d 774, 777 (Ind. 2008). All inferences from the designated evidence are drawn in favor of the non-moving party. *Id*. "The burden is on the moving party to prove the nonexistence of material fact; if there is any doubt, the motion should be resolved in favor of the party opposing the motion." *Oelling v. Rao (M.D.) et al*, 593 N.E.2d 189, 190 (Ind. 1992).

II. The Motion to Dismiss Standard

Dismissal proceedings test the legal sufficiency of a complaint. All facts plead in the non-moving party's complaint, and reasonable inferences therefrom, are taken as true. A party's complaint should only be dismissed if it is legally insufficient or fails to plead essential elements of the claim(s). *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007); *Huffman v. Office of Envt'l. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004); *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind. Ct. App. 2003); and *Steele v. McDonald's Corp. et al.,* 686 N.E.2d 137 (Ind. Ct. App. 1997). See also, Ind. Trial Rule 12(b)(1) and (6).

III. Employment At Will and Title VII Discrimination and Retaliation

In this Indiana Civil Service System case, Petitioner Childers is a former unclassified state employee for Respondent MCF. An unclassified state employee is at will, and serves at the appointing authority's pleasure. However, a termination or lesser discipline of an unclassified, at will state employee may not violate public policy. I.C. 4-15-2.2-1 et seq., 42. Petitioner Childers challenges her termination from state employment, as the product of sex discrimination and retaliation, including for the filing of a charge of discrimination based on gender with Respondent MCF's human resources department. Prohibited discrimination or retaliation, if proven true by Petitioner Childers, would violate federal and state law, and public policy.

Indiana follows the employment at will doctrine which allows an employer or an employee to terminate the employment at any time for a "good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction*, 861 N. E.2d 704, 705 (Ind. 2007). However, there are three recognized exceptions to the at will doctrine including "a public policy exception . . . if clear statutory expression of a right or duty is contravened." *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. Ct. App. 2012). Whether public policy was violated is the issue in the instant matter. I.C. 4-15-2.2-42. An unclassified state employee may be "dismissed, demoted,

disciplined or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b).

Title VII, 42 U.S.C. § 2000e (the Civil Rights Act of 1964, as amended), makes it unlawful under federal law for an employer to discriminate by terminating or disciplining an employee "because of that person's race or sex, among other grounds." *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012). Retaliation against an employee for reporting discrimination to the employer is also unlawful under Title VII. 42 U.S.C § 2000e-3; *Coleman* at 845. Indiana civil rights laws contain similar, state law based, public policy prohibitions. I.C. 22-9-1 (Indiana Civil Rights Act); See also, I.C. 4-15-2.2-1 et seq., 12, and 42.

The application of the Title VII analysis, at the summary judgment stage, in termination cases is often referred to as the *McDonnell Douglas* burden shifting framework, which has evolved and been modified over time in federal law.[1] See *Pantoja v. American NTN Bear. Manuf. Corp*., 495 F.3d 840,845 (7th Cir. 2007) discussing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Indiana civil rights laws look to federal law for guidance. *Filter Specialists, Inc. v. Dawn Brooks et al*., 906 N.E.2d 835, 839-842 (Ind. 2009). At the summary judgment stage, Indiana courts use the modified *McDonnell Douglas* analysis in gender based discrimination and retaliation cases. *Id.*

Under the current form of *McDonnell Douglas* analysis, a petitioner/plaintiff may prove sex discrimination either through direct or indirect evidence. A petitioner may present either a single motive or a mixed-motive theory of discrimination. *Coleman* at 845; *Filter Specialists, Inc*. at 839-840. To establish a *prima facie* case of discrimination using the indirect method, the petitioner must offer evidence that: (1) she is a member of a protected class, (2) her job performance met the employer's legitimate expectations, (3) she suffered an adverse employment action, and (4) another similarly situated individual who was not in a protected class was treated more favorably than the petitioner. *Id*. Once a petitioner establishes a *prima facie* case of discrimination the burden then shifts to the employer to show a legitimate non-discriminatory reason for the adverse employment action. *Id*. Once the employer has presented this reason the burden shifts back to the petitioner who must present evidence that the "stated reason is a pretext, which in turn permits an inference of unlawful discrimination." *Coleman* at 845.

Under Title VII "[u]nlawful retaliation occurs when an employer takes an adverse employment action against an employee for opposing impermissible discrimination." *Williams*

[1] At trial (an evidentiary hearing in AOPA parlance), the inquiry collapses to a factual, evidence specific one of whether the plaintiff/petitioner can prove by a preponderance of the evidence that the employer/respondent intentionally discriminated in violation of the law. *Filter Specialists, Inc*. at 845-846.

v. Lovchik, 830 F. Supp. 2d 604, 620 (S.D. Ind. 2011). A petitioner asserting a claim of retaliation under Title VII can prove her case with either direct or indirect methods of proof. *Id*. In order to prove retaliation, the petitioner must present evidence, direct or circumstantial, demonstrating that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action by the employer; and (3) a causal condition exists between the two. *Id*. Filing a harassment claim is considered a statutorily protected activity. *Id*.

IV. Order Denying Respondent's Motion to Dismiss

A petitioner "must initiate the complaint procedure as soon as possible after the occurrence of the act or condition complained of" and not later than thirty (30) days after the petitioner became aware of the occurrence giving rise to the complaint. I.C. 4-15-2.2-42. In this case the complained of employment action is the *termination* of state employment of Petitioner Childers. All other preceding acts or omissions that are alleged by Petitioner to be examples of sexual harassment, discrimination and/or unlawful retaliation by MCF become possible evidence for the claim that the adverse employment action contravened public policy. Respondent's motion to dismiss briefing argues that these discrete prior events triggered the running of the clock. Respondent, based on this premise, argues that therefore the Petitioner's Step I filing was late. This is incorrect. The termination is the challenged, materially adverse employment decision, which Petitioner challenged at Step I within thirty (30) days.

Petitioner Childers was terminated on January 13, 2012 and her Step I Civil Service Complaint was timely filed with the Appointing Authority, Respondent MCF on or about January 24, 2012.[2] (See Childers' Complaint.) Steps II and III were also timely filed by Petitioner Childers in accordance with I.C. 4-15-2.2-42(c) & (e).[3]

Similarly, viewed from the lower standard of the pleadings, Petitioner Childers' complaint is sufficient to state a claim of sex discrimination and retaliation upon which relief could be granted. A motion to dismiss is not treated like a motion for summary judgment. Unlike a motion for summary judgment, a party may rely on their pleadings to oppose a motion to dismiss. Further, at the Ind. T.R. 12 stage, the pleadings are viewed in the light most favorable to the non-moving party and "every reasonable inference construed in the non-movant's favor." *Droscha v. Shepherd*, 931 N.E.2d 882, 887 (Ind. Ct. App. 2010). "A motion to dismiss for failure to state a claim tests the legal sufficiency of the claims, not the facts

[2] Although the docket does not contain a copy of Petitioner Childers' Step I Complaint itself, the Step I Response is included and the date of denial is dated February 15, 2012 which is thirty-three (33) days after the complained of termination of employment.

[3] Timely administrative exhaustion at each prior step is Petitioner's threshold burden, which she has satisfied. I.C. 4-15-2.2-42 and I.C. 4-21.5-3.

supporting it." *Id*. Petitioner Childers, by claiming a prima facie public policy exception to her termination along with her asserted facts, has stated a claim upon which SEAC has jurisdiction.

Respondent MCF's Motion to Dismiss is **DENIED**. SEAC has jurisdiction of this matter. The ALJ therefore proceeds to the summary judgment merits.

V. Findings of Fact Applicable to Summary Judgment Motion

Respondent MCF designated evidence under Ind. Trial Rule 56, but Petitioner did not. Petitioner did submit a brief which made several factual, but unsworn, contentions.[4] The following facts are taken from the designated evidence, as construed in the light most favorable to the Petitioner[5]:

1. Petitioner Childers is female and was at all relevant times a correctional officer for Respondent MCF. She was an unclassified, at will employee as a matter of law. MCF is a medium security prison. (I.C. 4-15-2.2; official notice)

2. Petitioner Childers was issued a written reprimand (in lieu of 1 day suspension) for unauthorized leave on October 5, 2011. (Resp. Exhibit Walls A) Petitioner Childers was issued a written reprimand (in lieu of 3 day suspension) for unauthorized leave on December 13, 2011. (Ex. Walls B) There may also have been similar discipline at some point concerning an offender cell search. (See generally, Petitioner's Response pp.1-2.) Captain Nelson issued or was involved in these reprimands, the lowest form of state discipline. Petitioner denies any unauthorized leave, and asserts 'other' co-employees were treated differently as to the 'tardy' policy. Petitioner does not, however, show that *males* specifically were treated better. (See, Pet. Resp.)

3. Petitioner Childers was scheduled for a mandatory training on January 11, 2012 and failed to attend the training. Petitioner admits that she missed the training as an "oversight", and noted the "precarious state" of her employment. (Ex. Walls C and E; and Pet. Resp.)

4. Petitioner Childers was then terminated on January 13, 2012 for failing to attend this mandatory training. (Ex. Walls C) As further discussed below, the termination was carried out by Assistant Superintendent Daryl Walls, not Captain Nelson.

[4] The Petitioner's brief was not under oath or signed, however the certificate of service was signed. Petitioner did not provide an affidavit. Petitioner's sworn Interrogatory Answers are on the docket as Exhibit A to Respondent's Motion to Dismiss, but do not add meaningful detail.

[5] The standard of review to be applied is critical in this context. The Petitioner may only rely on her pleadings to fend off a motion to dismiss. Petitioner may not do so to oppose a summary judgment motion.

5. Petitioner Childers was not harassed due to her use of the Lactation Policy as a nursing mother. (Pet. Resp., p.2)

6. Petitioner Childers denies the accuracy of several reports concerning her behavior as an employee (i.e., alleged flirting with the offenders or inappropriately touching fellow employees included in Cooper Ex. A). However, Respondent MCF does not present these issues as material facts, nor move for summary judgment on them. Therefore, Petitioner's asserted (although not designated) facts about these events are taken as true, but they are irrelevant to the instant issue. (Pet. Resp. p. 3)

7. Douglas Nelson is a Correctional Captain for Respondent and was a supervisor, at least part of the time, of Petitioner Childers. (Parties' briefs.)

8. Petitioner filed a complaint of sexual/gender harassment against Captain Nelson with Respondent's Human Resources Department (through Joan Cooper) on October 4, 2011. (Pet. Compl. p. 7; Pet. Resp. p. 2) The alleged harassment includes Nelson requiring Petitioner to keep her ID with her to enter the facility when other co-workers did not have to do so or that Petitioner was wrongly accused of being flirtatious. (See, Petitioner's unsworn Resp., pp.1-2).

9. Three disciplines[6], including the challenged termination relevant to this case, of Petitioner were issued by Assistant Superintendent Daryl Walls. (See Respondent's Exs. at Walls A, B, C)

10. Six employees of Respondent MCF and former coworkers of Petitioner Childers have sworn under oath by affidavit, stating that each of them had "never observed Captain Douglas Nelson harass nor take any action against Amber Childers because of her gender." (See the Affidavits of Strong, Chesley, Garber, Truax, Townsend, and Biddle.)

11. The Human Resources Director for Respondent MCF, Joan Cooper, has asserted that she received a complaint from Petitioner Childers regarding harassment and gender discrimination at the hands of Captain Nelson which she then investigated and was

[6] Part of the "discipline" may have been fact file entries by Walls to Petitioner's file, which strictly speaking are not discipline. Based on the designated record, Walls was the final termination decision maker for the state.

"unable to substantiate Amber Childers' complaint or find any wrongdoing on the part of Miami Correctional Facility." (Cooper Aff. ¶ 3-5)[7]

12. Assistant Superintendent for Respondent MCF, Daryl Walls, asserts that he issued Petitioner Childers three disciplines including the notice of termination of employment on January 13, 2012. He asserts that he based his decision "**solely on Petitioner's actions**" and that he reached this decision to terminate Petitioner Childers because "**Petitioner was aware of training, Petitioner admitted to missing class, and Petitioner's disciplinary history**." (Walls Aff. ¶ 4-7, emphasis added) This is a lawful, non-discriminatory/retaliatory reason to support the termination.

13. Petitioner does not show any genuine question of material fact of either unlawful intent or pretext for the termination.

In her response, Petitioner Childers states that Daryl Walls "is in a position of authority over Capt. Nelson," but that "Mr. Walls does not arbitrarily pick and choose who he disciplines." (Pet. Resp., p. 1) Petitioner alleges that Captain Nelson must have submitted some manner or report or feedback to Walls to influence his decision to terminate her employment, but there is a problem with Petitioner's argument. The record does show that Walls considered the discipline history, and thus presumably the prior reprimands by Nelson. However, there is no showing – just bald allegation – that Walls otherwise conferred with Nelson as to the termination.

Moreover, the central causation problem is that Petitioner does not show in the first instance a question of material fact that either Nelson or Walls intended to discriminate or retaliate at any stage – she merely assumes or alleges it.[8] No single or mixed motive discrimination or retaliation theory is demonstrated. Petitioner, by her own admission, clearly missed the annual training supporting discipline by Walls without public policy breach. The examples of alleged harassment that Petitioner does describe (See Paragraph 8 above) are (a) insufficient to show severe and pervasive sexual harassment; and (b) insufficient to show discriminatory or retaliatory intent whether under a single or mixed motive theory.

[7] It is not relied on by Respondent, but Cooper's investigation suggested that Petitioner had been the harasser or flirting with co-workers/offenders. However it is assumed, in Petitioner's favor, that Petitioner was not doing that. See, Cooper Ex. A1.

[8] Petitioner also does not demonstrate that Nelson knew of the October 4, 2011 harassment complaint to human resources when Nelson issued the October 5 or December 13, 2011 reprimands, or that the reprimands for unauthorized leave were unlawful pretexts.

VI. Conclusions of Law & Analysis as to Motion for Summary Judgment

1. Indiana follows the at will employment doctrine. Under this doctrine, "an employee may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b). There are public policy exceptions to the at will doctrine (See *Meyers* and I.C. 4-15-2.2-42) but in this case Respondent MCF has demonstrated that Petitioner Childers was terminated for the nondiscriminatory and nonretaliatory reason of failing to attend a mandatory training. Respondent MCF's witnesses, by affidavits, offer sworn testimony that they did not retaliate or consider Petitioner's gender in the termination decision.

2. Under the *McDonnell Douglas* burden shifting analysis, once the Petitioner has established a *prima facie* case of discrimination the burden shifts to Respondent to show a legitimate, nondiscriminatory/retaliatory reason for the adverse employment action. Here, the Respondent's asserted reason for Petitioner Childers' termination, failure to attend a mandatory meeting, is a legitimate nondiscriminatory/retaliatory reason which does not contravene public policy.

3. The burden then shifts back to the Petitioner who must show that the reason given by the employer is merely a "pretext" for unlawful discrimination. *Coleman* at 845. Petitioner Childers has not provided evidence that her termination by Respondent MCF was a pretext for unlawful gender discrimination or, alternatively, that she suffered a hostile work environment[9]. Nor has Petitioner shown a question of material fact over unlawful retaliation. In sum, no single or mixed motive discrimination or retaliation theory is demonstrated. The failure is one of causation. Petitioner has not demonstrated any discriminatory or retaliatory intent by the state's decision-maker supervisors. See, *Coleman* at 845; *Filter Specialists, Inc*. at 839-840.[10]

4. Respondent MCF has demonstrated that Petitioner Childers cannot satisfy the public policy exception to the employment at will doctrine as an unclassified employee. While Petitioner Childers demonstrated the minimum factual assertions in order to overcome

[9] Isolated comments or events which are not objectively or subjectively "so severe or pervasive as to alter the conditions of employment and create an abusive working environment [do not qualify]." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 975 (7th Cir. 2004).

[10] Similarly, a "cats-paw" theory requires at least some showing that the lower supervisor (here Nelson) *had discriminatory/retaliatory intent* and that an alleged discriminatory recommendation was passed on and influenced the more senior supervisor's decision (here Walls). There must be some minimal proximate cause link shown in the record. See generally, *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011).

the burden of establishing jurisdiction with SEAC, she has not put forth enough evidence to overcome summary judgment for Respondent as a matter of law.

5. To the extent a conclusion of law stated herein is a finding of fact, or the reverse, it shall be so deemed and remain effective.

VII. Non-Final Order Granting Motion for Summary Judgment

SEAC has jurisdiction and the ALJ proceeds to the merits. Summary Judgment Motion is entered in favor of Respondent MCF. There are no genuine issues of material fact to require an evidentiary hearing. Respondent is entitled to judgment as a matter of law against all claims of the Complaint. Respondent has satisfied the movant's burden under Ind. T.R. 56. Petitioner Childers has not rebutted this burden. Petitioner's complaint is denied. Respondent's termination of Petitioner Childers' employment is upheld. The evidentiary hearing and all case management deadlines are vacated.

DATED: December 11, 2012

Hon. Aaron R. Raff
Chief Administrative Law Judge
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BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

AMBER CHILDERS,	)	
Petitioner,	)	
	)	
v.	)	SEAC No. 04-12-041
	)	
MIAMI CORRECTIONAL	)	
FACILITY,	)	
Respondent.	)	

NOTICE OF FINAL ORDER
OF THE STATE EMPLOYEES' APPEALS COMMISSION

On December 11, 2012 the ALJ issued notice and a copy of "Findings of Fact and Conclusions of Law with Non-Final Order of Administrative Law Judge Granting Summary Judgment to Respondent MCF" ("ALJ's Order"), which is incorporated by reference herein. No objections were received by either party within the time of December 26, 2012 provided. Accordingly, the ALJ's Order, in its entirety, is hereby the Findings of Fact, Conclusions of Law and Final Order of the Commission pursuant to statute and Commission delegation. Ind. Code §§ 4-21.5-3-27 to 29.

The Commission is the ultimate authority, and the action is its Final Order and determination in this matter. A person who wishes to seek judicial review must file a petition with an appropriate court within thirty (30) days and must otherwise comply with I.C. 4-21.5-5.

DATED: January 14, 2013

Hon. Aaron R. Raff
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