BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

BARBARA HUMPHREY	)
Petitioner,	)
	) SEAC NO. 09-12-096
vs.	)
	)
INDIANA DEPARTMENT OF	)
ENVIRONMENTAL MANAGEMENT	)
Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING RESPONDENT'S PARTIAL MOTION TO DISMISS AND DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On August 2, 2013, Respondent Indiana Department of Environmental Management ("IDEM"), by counsel, moved for summary judgment and also for dismissal in part of the Amended Complaint.[1] Petitioner Barbara Humphrey, by counsel, timely responded on September 10, 2013. Respondent IDEM replied on October 14, 2013.

I. Summary of Order

Petitioner Humphrey is a former unclassified, at-will employee who alleges that her termination by Respondent IDEM was the product of unlawful race discrimination. Petitioner Humphrey further alleges that her termination by Respondent IDEM arose in retaliation for complaining to IDEM supervisors about discrimination and hostility in the workplace. Both of these are public policy claims. Respondent's Motion for Summary Judgment is denied as to the race discrimination claim and the retaliation claim. Questions of material fact remain which must be resolved at an evidentiary hearing. While these claims survive a dispositive motion, Petitioner will have a substantial evidentiary burden to satisfy at trial. Petitioner must show by a preponderance of the evidence that her employment was terminated because of her race and/or in retaliation for protected activity.

[1] This unclassified case proceeds under the Indiana Civil Service System (Ind. Code § 4-15-2.2). Petitioner Humphrey's state employment was terminated by Respondent IDEM on June 19, 2012. Petitioner's Amended Complaint is the operative pleading.

Petitioner also claims that she is entitled to a hearing as a merit employee under SEAC's "general statute", Ind. Code 13-13-4-2[2] and Executive Order 05-14. Petitioner has failed to present a legally persuasive argument as to these assertions. The Civil Service System controls, not prior merit law. Petitioner Humphrey was an unclassified employee when terminated and does not retain any special status or rights under Petitioner's cited laws. Respondent IDEM's motion to dismiss this portion of Petitioner Humphrey's Complaint is granted.

Lastly, Petitioner Humphrey has limited her discrimination claims and is now only claiming race discrimination. Petitioner's brief states: "Humphrey has opted only to pursue a claim of race discrimination." (See Petitioner's Brief, p. 6). Therefore, Petitioner's claims concerning age, gender and sexual harassment are voluntarily withdrawn, and so dismissed.

II. The Dismissal Standard and Resolution of IDEM's Partial Motion to Dismiss

Dismissal proceedings before the State Employees' Appeals Commission ("SEAC" or "Commission") are governed by the Administrative Orders and Procedures Act ("AOPA"). Dismissal proceedings assess the legal sufficiency of a complaint. All facts pled in the non-moving party's complaint, and reasonable inferences therefrom, are taken as true. When a complaint is found to be legally insufficient, only then should it be dismissed. *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007); see also, Ind. Trial Rule 12(b)(1) and (6).

Respondent IDEM is correct that Petitioner Humphrey has failed to state an actionable claim under the SEAC "general statute", Ind. Code 13-13-4-2 or Executive Order 05-14. SEAC's general statute (I.C. 4-15-1.5) places no duty upon IDEM. Primarily, the SEAC statute is one of creation and lays out the structure, duties and powers of the Commission. Petitioner cannot maintain that IDEM violated a duty that does not exist for IDEM.

At the time of termination, Petitioner was an employee at will in accordance with the State Civil Service System set forth in I.C. 4-15-2.2. Respondent IDEM correctly points out that Petitioner Humphrey is not covered by the repealed merit employees' statute, I.C. 13-13-4-2. (Repealed July 1, 2012). I.C. 13-13-4-2 provided merit status to non-management IDEM employees through cross-reference to I.C. 4-15-2 (repealed July 1, 2011). While the General Assembly did not repeal I.C. 13-13-4-2 until after Petitioner's termination, the repeal of I.C. 4-15-2 on July 1, 2011, provided an unequivocal assertion that I.C. 4-15-2 would cease to apply in the future classification of any state employee. See I.C. 4-15-2.2-52(b). The new chapter, I.C. 4-15-2.2-52(b), provides affirmative language that any future reference or cross-reference to I.C. 4-15-2 shall be treated as a reference to the newer Civil Service System. Even if the portion

[2] This is a repealed, IDEM specific statute.

addressing the predecessor law were not included, the earlier statute would have been impliedly repealed.[3] *State ex rel. Sendak v. Marion County Superior Court Room No.* 2, 373 N.E.2d 145 (Ind. 1978).

Lastly, Respondent IDEM correctly asserts that Executive Order 05-14 did not apply to Petitioner at the time of her termination. The Executive Order was issued in January 2005 as a means to extend SEAC's complaint procedure for contested disciplinary actions to non-merit employees under repealed I.C. 4-15-2. As this order was issued prior to the creation of the State Civil Service System, it ceased to remain relevant and did not apply to Petitioner at the time of her termination. Petitioner was, therefore, an unclassified employee under the State Civil Service System (I.C. 4-15-2.2) at the time of her termination.

Petitioner has voluntarily withdrawn her claims of sexual harassment, age discrimination, and gender discrimination. These claims are thus also dismissed. In sum, the ALJ grants IDEM's partial motion to dismiss. The remainder of this Order addresses Respondent's Motion for Summary Judgment.

III. The Summary Judgment Standard

The threshold issue is whether a dispute remains as to any material fact. 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).

IV. Employment At-Will Doctrine

Petitioner Humphrey is a former, unclassified state employee for Respondent IDEM. An unclassified state employee is employed at will, serving at his or her appointing authority's pleasure. I.C. 4-15-2.2-24(a). The Indiana at-will doctrine allows an employer or an employee to terminate the employment at any time for "good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction*, 861 N. E.2d 704, 706 (Ind. 2007). However, the Indiana at-will doctrine is limited by a "public policy exception . . . if clear statutory expression of a right or

[3] Petitioner cites an archaic case that is not analogous to the facts of this case. See, *Robinson v. Rippey*, 12 N.E. 141 (Ind. 1887). The legislature, through I.C. 4-15-2.2-52(b), provided an affirmative expression that any reference or cross-reference to I.C. 4-15-2 would no longer apply. Respondent put forth a more applicable case.

duty is contravened." *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. App. 2012); *McClanahan v. Remington Freight Lines*, 498 N.E.2d 1336, 1339 (Ind.App. 1986).

The Civil Service System's statutes mirror this caselaw. A termination or lesser discipline of an unclassified, at-will state employee is wrongful if it violates public policy. I.C. 4-15-2.2-42(f). Otherwise, 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).

V. Race Discrimination

Petitioner Humphrey alleges race discrimination caused the discharge. 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 terminate an employee because of discrimination against that person's race, among other grounds. Indiana law contains similar, state law-based, public policy prohibitions. I.C. 22-9-1 (Indiana Civil Rights Act); see also, I.C. 4-15-2.2-12 and -24. Furthermore, 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).

The Title VII discrimination analysis is often referred to as the modified *McDonnell Douglas*[4] burden-shifting framework. See *Pantoja v. American NTN Bear. Manuf. Corp*., 495 F.3d 840, 845 (7th Cir 2007). There are three steps to this analysis. First, the petitioner-employee has the burden of establishing a *prima facie* case of discrimination through either direct or indirect evidence. *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012). Direct evidence "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus." *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003). See also, *Morgan v. SVT, LLC*, 724 F.3d 990 (7th Cir. 2013). Absent the rare case where direct evidence of discrimination is available on the record, the petitioner-employee must offer indirect evidence that: (1) (s)he is a member of a protected class; (2) his/her job performance met the respondent-agency's legitimate expectations; (3) (s)he 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-employee. See *Pantoja.* Second, if the petitioner-employee establishes a *prima facie* case of discrimination, the burden shifts to the respondent-agency to show a legitimate, nondiscriminatory reason for the adverse employment action(s). *Id.* Third, once the respondent-agency shows such reason, the burden shifts back to the petitioner employee to "present evidence that the stated reason is a 'pretext,' which in turn permits an inference of unlawful discrimination." *Id.*

[4] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

According to the Supreme Court of Indiana, in an employment discrimination lawsuit the central question is one of causation: "What caused the adverse employment action of which the plaintiff complains?" *Filter Specialists* at 839. An adverse employment action is wrongful, unlawful and against public policy when it is motivated by (caused by) illegitimate reasons. *Id.* at 840 (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003)). A respondent-agency is held strictly/vicariously liable (as opposed to a negligence standard) for an illegally-motivated adverse employment action caused by a "supervisor". However, "supervisors" are only employees empowered by the respondent-agency to take tangible employment actions against the petitioner-employee. See *Vance v. Ball State University*, 133 S. Ct. 2434 (US 2013).

VI. Unlawful Retaliation

Petitioner alleges she was terminated in retaliation for complaining about discrimination and harassment in the workplace. Retaliation against an employee for the filing of an EEOC charge or the reporting of discrimination to the employer is also unlawful under Title VII. 42 U.S.C. § 2000e-3(a); *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012). Similar to Title VII discrimination claims, the petitioner-employee can provide indirect evidence of the prohibited animus through the modified *McDonnell Douglas* burden-shifting framework. *Hobgood v. Illinois Gmaing Board*, 731 F.3d 635 (7th Cir. 2013). Or instead, a direct case of retaliation can be made by showing that the petitioner-employee: (1) engaged in statutorily protected activity; (2) the respondent-agency took an adverse employment action against him/her; and (3) the adverse action was causally connected to the petitioner-employee's protected activity. *Hobgood*; and *Gary Comm. School Corp. v. Powell*, 906 N.E.2d 823, 830 (Ind. 2009).

Unlike Title VII discrimination claims, the petitioner-employee may not succeed by establishing motivating-factor causation for a retaliation claim. Title VII retaliation claims must be proved according to traditional principles of but-for causation. See *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (US 2013).

VII. Findings of Fact as to Summary Judgment Motion

The following facts are taken from the designated evidence, as construed in the light most favorable to non-movant Petitioner Humphrey:

1. Petitioner Humphrey is an African American female.

2. Petitioner Humphrey began working for Respondent IDEM in August of 1991. Petitioner started working at the Office of Land Quality in January of 2012. Her state employment was terminated on June 19, 2012.

3. Petitioner Humphrey was an unclassified (at-will) state employee. Petitioner Humphrey timely appealed her termination under the Civil Service System with the appeal reaching Step III, the State Employees' Appeals Commission (SEAC), on March 5, 2013.

4. Petitioner claims her discharge was the result of race discrimination and unlawful retaliation.

5. Taking the burden shift in reverse order, there is a minimum question of material fact to whether there were shifting reasons behind Petitioner Humphrey's termination, which creates a triable question of pretext. There are subtle differences between Mr. Hayes' request for termination and Mr. Palin's deposition, notes and verbal explanation in the discharge meeting. For example, the written reprimand and letter of termination are strictly limited to harassment of a co-worker and creating a hostile work environment, but Mr. Hayes' request for termination emphasizes behavior and work productivity equally. Furthermore, Mr. Palin's handwritten notes included spending too much time on the twelfth floor and making false accusations about co-workers. (See Respondent's Exhibit G; Dorsey Attachment 4; Deposition of Bruce Palin 1; Deposition of Bruce Palin 2; and Petitioner's Exhibit 16).

6. Meanwhile, Petitioner's Performance Appraisal from 2011 and 2012 indicate Petitioner had difficulties getting along with some of her co-workers, but did not point out any glaring shortcomings in her job performance. According to the Interim Performance Appraisal, Petitioner was meeting her job expectations but continued to have problems with communication. (See Hayes Attachment 1 and 4; see Exhibit 16; see Deposition of Bruce Palin 2).

7. Petitioner Humphrey was put on a Work Improvement Plan ("WIP") based on reoccurring problems with co-workers. Petitioner did successfully complete the WIP two months prior to her termination. Petitioner's improvement goals were centered around communication and interaction with co-workers. (See Palin Attachment 6).

8. There is a question of material fact as to whether Petitioner was adequately meeting her job expectations, a prima facie element. Petitioner's Performance Appraisal Report from 2011 indicated she had interpersonal communication and teamwork problems with co-workers. The evidence tends to present a pattern of difficulties with some fellow employees. But she met expectations in job knowledge, customer service, planning and organizing and driving results. (See Hayes Attachment 4).

9. There is a question of material fact as to whether Ms. Purtell, a white female, was a similarly situated employee. Petitioner did complain to Ms. Steadham, on two separate

occasions, about aggression and insults from Ms. Purtell. While Ms. Purtell's Performance Appraisal Reports did not contain any specific documentation of the alleged conduct, it said she involved management when personnel issues developed within her section. Going to management when personnel issues arise could be complaining about co-workers behavior in the office. It needs to be determined whether Ms. Purtell was similar to Petitioner Humphrey, or complaining like Petitioner and treated differently (e.g. not disciplined). (See Exhibit H, Attachment 1 and 2).

10. There is a dispute as to whether Petitioner had a legitimate business reason for going to the twelfth floor on an almost daily basis. Petitioner asserts that she used a bathroom on the twelfth floor when the one on her floor was closed; that she used the water club; that she went to the Information Technology Department; and went to the combined file room for job duties. Respondent asserts that Petitioner had no legitimate reason to be on the twelfth floor. (See Petitioner's Brief, p. 4; see also Respondent's Brief, p. 7).

11. Petitioner Humphrey presented evidence that she complained about workplace harassment and aggressions to Ms. Steadham on May 23, 2012 and again on June 6, 2012. Ms. Steadham requested more specifics but did not receive any. Ms. Steadham treated the accusations as false because she did not hear back from Petitioner. Petitioner's failure to provide further details does not automatically convert the complaints into false accusations. Evidence of untruthfulness following an investigation might have changed the classification of the complaints. At this instant, the evidence must be viewed in the light most favorable to the non-moving party, and Petitioner's claims cannot be summarily dismissed.[5] (See Exhibit J; see also, Dorsey Attachment 2 and Deposition of Bruce Palin 1).

12. Petitioner's Response provides a plausible factual rebuttal of the Respondent's offered reason for the discharge as applied to the claim of retaliation. Petitioner has thus raised a question of pretext. In other words, Petitioner has at least shown she might prevail at a hearing based on the weight and/or credibility of witness testimony or exhibits. Causation is factually contested: did Respondent really discharge Petitioner for her complaints of co-worker harassment or because IDEM genuinely thought Petitioner lied to her supervisors and failed to meet job performance expectations based on time away from her desk and job task delays. (See Hayes Attachment 1 and 4; see Exhibit 16; see Deposition of Bruce Palin).

[5] Petitioner states that Ms. Wheeler and Ms. Purtell were making comments about her work station. Petitioner further states that Ms. Wheeler would chew her gum loudly and make inappropriate comments about Petitioner's cubicle.

13. Respondent suggests that Petitioner's complaints of workplace harassment may have been motivated to cover for waning job performance. Whether Petitioner made false accusations about co-workers and expressed a fear of discrimination can be answered at an evidentiary hearing.

14. In sum, Petitioner first established a minimum *prima facie* case for discrimination and retaliation. Respondent IDEM advanced a legitimate, non-discriminatory reason for the discharge, which Petitioner then sufficiently rebutted under the burden shifting analysis. Summary judgment must be denied.

VIII. Conclusions of Law & Analysis as to Summary Judgment Motion

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, including unlawful discrimination. *Meyers* and I.C. 4-15-2.2-42.

2. Petitioner has put forth sufficient evidence to preclude entry of summary judgment in IDEM's favor on both the race discrimination and retaliatory discharge claims. The Motion and Response show a material, factual dispute about the reasoning behind Petitioner's termination, the veracity of her co-worker harassment complaints and whether Petitioner failed to meet her job expectations. There is one or more genuine questions of material fact regarding whether Petitioner Humphrey was improperly discharged in retaliation for reporting workplace harassment. There is one or more genuine questions of material fact regarding whether Petitioner Humphrey was improperly discharged because of her race.

3. Petitioner Humphrey has established enough of a *prima facie* case for race discrimination to preclude summary judgment. Petitioner Humphrey, as an African American, is part of a protected class. Petitioner has identified one similarly situated employee in Karen Purtell (white); however, it must be determined whether Ms. Purtell engaged in similar conduct without mitigating circumstances which would provide a legitimate reason for more lenient treatment. *Gates v. Catepillar Inc.*, 513 F.3d 680, 689 (7th Cir. 2007). It remains to be determined whether Petitioner was meeting IDEM's legitimate expectations based on her 2011 Performance Appraisal Report, conduct on the twelfth floor and Mr. Hayes' request for termination. Lastly, Petitioner was terminated; therefore, she suffered an adverse employment action.

4. Applied to summary judgment, the ALJ must provide Petitioner her day in court if any material possibility of pretext is shown. Petitioner Humphrey has put forth enough prima facie and pretext evidence to preclude summary judgment on the retaliation claim. A question of triable pretext can be shown when an employer's reason for termination is shifting or otherwise

factually undermined. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1259 (Ind. Ct. App. 2002); *Cooper v. City of Indianapolis*, 2011 WL 5179290 (S.D. Ind. 2011).

5. Similarly, Petitioner's allegations of unjust and discriminatory treatment from co-workers may have been a fictitious perception, but her allegations drive to the heart of whether her actions were protected and whether her termination was retaliatory. The evidence, thus far, does not provide a clear cut answer. If Petitioner were simply crying wolf in an attempt to create and preserve a claim of retaliation or race discrimination, her complaints would not have been a protected activity and would destroy this portion of her complaint. The veracity of Petitioner's accusations remains central to her claim of retaliatory discharge. Petitioner's claim of retaliatory discharge warrants further inquiry.

6. All prior sections are hereby incorporated by reference. To the extent a given finding of fact is deemed to be a conclusion of law, or a conclusion of law is deemed to be a finding of fact, it shall be given such effect.

IX. Order Granting Respondent's Partial Motion to Dismiss and Denying Respondent's Motion for Summary Judgment

Respondent IDEM's Partial Motion to Dismiss is **GRANTED** as to the cause of action made under the SEAC "general statute", Ind. Code 13-13-4-2 and Executive Order 05-14 only. Additionally, Petitioner's claim related to age, gender and sexual harassment are deemed voluntarily withdrawn and dismissed. Respondent IDEM's Motion for Summary Judgment is **DENIED** regarding Petitioner Humphrey's claims that she suffered discrimination on the basis of race. Summary judgment is further **DENIED** as to Petitioner's claim of retaliation. The race discrimination claim and retaliation claim will be resolved at the evidentiary hearing unless the parties provide an earlier joint notice of settlement. The parties are **ORDERED** to discuss settlement at least one final time through counsel before the evidence hearing.

DATED: January 9, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
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