BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

BERNARD POLLARD Petitioner,	))	
	)	SEAC No. 06-19-040
vs.	)	
	)	
INDIANA DEPARTMENT OF CHILD SERVICES Respondent.	))	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On January 10, 2020, Respondent Indiana Department of Child Services, ("Respondent"), by counsel, filed a Motion for Summary Judgment regarding Petitioner's Complaint ("Motion"). Petitioner, Bernard Pollard ("Petitioner"), pro se, responded to the Motion on February 17, 2020.[1] Thereafter, on March 3, 2020, Respondent filed its surreply.

This case considers Petitioner's termination on April 22, 2019, for violating Respondent's Code of Conduct. The controlling pleadings for purposes of this decision is the Complaint originally received on June 22, 2019, Respondent's Motion, Petitioner's Reply, and Respondent's Surreply.

After review of the pertinent pleadings noted above, the ALJ finds Respondent's Motion meritorious and hereby **Grants** it. Petitioner's Complaint, with its factual allegations accepted as true, fails to state a material issue of fact, which could cause SEAC to retain jurisdiction over this matter. Respondent must show that as a classified employee under I.C. § 4-15-2.2-23, Petitioner's discipline was issued for just cause under I.C. § 4-15-2.2-42(g), which it has done. Thus, this case must be dismissed. The following additional findings of fact, conclusions of law, and final order of dismissal for lack of jurisdiction are entered.[2]

[1] While Petitioner labels his brief as "Plaintiff's Motion for Summary Judgment", the ALJ finds that Petitioner's brief constitutes his Reply to Respondent's Motion rather than a cross-motion for summary judgment.

[2] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), Ind. Code § 4-21.5 *et seq*. *See* Ind. Code § 4-15-1.5-6(1). Accordingly, the Commission has delegated to its Administrative Law Judges pursuant to Ind. Code § 4-21.5-3-28 of AOPA, the authority to issue final orders in this class of proceedings.

II. Summary Judgment Standard

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Simon Prop. Grp., L.P. v. Acton Enterprises, Inc.*, 827 N.E.2d 1235, 1238 (Ind. Ct. App. 2005). A party seeking summary judgment bears the burden to make a prima facie case showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. *Id. See also Am. Mgmt., Inc. v. MIF Realty L.P.,* 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to T.R. 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. *Simon Prop. Grp., L.P.*, 827 N.E.2d at 1238*; Am. Mgmt., Inc*, 666 N.E.2d at 428.

The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. *Simon Prop. Grp., L.P.* at 1238; *Shambaugh & Son, Inc. v. Carlisle,* 763 N.E.2d 459, 461 (Ind. 2002). "A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth or if the undisputed material facts support conflicting reasonable inferences." *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 253 (Ind. 2015).

II. Findings of Fact

1. At all times relevant to this matter, Petitioner was a Family Case Manager 2 ("FCM"), a classified employee, at Respondent's DeKalb County Office (Pet'r Compl.).

2. On February 13, 2018, Petitioner received a written counseling for disrespectful communication with a foster family (Resp't Motion Ex. K).

3. The foster mother complained to Respondent, indicating that Petitioner refused to let her speak, dodged her emails and questions, and made sexist and inappropriate comments to her (Resp't Motion Ex. K).

4. On an unspecified date, Petitioner engaged in a conversation with coworkers concerning whether or not a husband can rape his wife. Petitioner stated that the Bible indicates the wife should not withhold herself from her husband (Pet'r Compl.; Resp't Motion Exs. G, I).

5. On October 4, 2018, Petitioner was asked by coworkers his opinion on black people and homosexuals facing similar discrimination (Pet'r Compl.).

6. Petitioner stated that the discrimination he faced, as a black individual, and the discrimination experienced by the coworker, who is homosexual, are not equivalent because Petitioner was born black, but the coworker chose to be gay (Pet'r Compl.; Resp't Motion Ex. G).

7. On March 18, 2019, an intern working at Respondent's office shadowed Petitioner during a meeting at school to discuss one of the children on Petitioner's caseload (Resp't Motion Ex. D; Pet'r Compl.).

8. While Petitioner was driving, Petitioner and the intern discussed a variety of topics, such as Bill Cosby and a book that Petitioner was writing (Resp't Motion Ex. D; Pet'r Compl.).

9. The intern mentioned how black men tried to date her in college, to which Petitioner indicated that everything with young kids today is all about sex (Resp't Motion Ex. G; Pet'r Compl.).

10. Petitioner told the intern that 'back in the day, [he] was smooth. [H]e had more white women than [she has] relatives". The intern told Petitioner that he could not have had her, to which he replied, "you're lucky" (Resp't Motion Ex. G).

11. Petitioner told the intern that she was attractive, mentioning several of her physical features, such as her "flat stomach" and her being a "white girl stuck in a black girl's body" and continued to tap her leg while doing so (Resp't Motion Exs. D; G).

12. Petitioner asked the intern if she considered certain hypothetical situations he posed to constitute sexual harassment, indicating that he was an advocate for men falsely accused of such (Resp't Motion Exs. D; G).

13. When the intern would indicate that a situation did constitute harassment, Petitioner told her she was wrong because a woman needed to directly tell a man not to do or say what they had for it to be harassment (Resp't Motion Ex. D; Pet'r Compl.).

14. During the conversation, Petitioner tapped the intern's left knee several times, after which the intern readjusted her position in an attempt to indicate she did not like him doing so (Resp't Motion Ex. D).

15. Petitioner then offered to take the intern out to lunch at a sit-down restaurant, but the intern declined. Petitioner insisted on getting food on the way back to the office, so the intern told Petitioner that going to Arby's would be fine. Petitioner insisted on paying for her food, despite the intern stating she did not want him to. Petitioner did not eat his own food, stating he did not like Arby's, but would try it since she did (Resp't Motion Ex. D).

16. Upon returning to the office, the intern quickly thanked Petitioner for taking her to the meeting and went into the office (Resp't Motion Ex. D).

17. On March 20, 2019, the intern spent most of her time behind another employee's desk. When Petitioner arrived to the office, he began asking around for the intern and eventually found her behind the desk (Resp't Motion Ex. D).

18. Petitioner told the intern that he was getting some sausage from Mississippi and offered to pick her up some, as he does for everyone in the office. The intern agreed. (Pet'r Compl.; Resp't Motion Ex. D).

19. Petitioner then tried to get her contact information, to which the intern told Petitioner she would reach out to him via email. Petitioner then gave the intern his personal email and continued to ask her throughout the day if she had emailed him yet (Resp't Motion Ex. D).

20. Petitioner gave the intern a hug before she left the office that day (Resp't Motion Ex. D).

21. On March 22, 2019, the intern went to Misty Schoenherr ("Schoenherr"), a supervisor in Respondent's Dekalb County office, and told her about what had occurred during her trip with Petitioner (Resp't Motion Exs. D, E).

22. After the intern had relayed her story to Schoenherr, Schoenherr asked Wesley Husselman ("Hussleman"), DeKalb County Director, to join her and the intern to further discuss the situation (Resp't Motion Ex. F).

23. Husselman asked the intern if she could write a statement detailing the events on March 18, 2018, indicating that he would take it to Human Resources ("HR") to see what could be done next (Resp't Motion Ex. F).

24. On March 22, 2019, Hussleman sent the signed statement to HR (Resp't Motion Ex. E).

25. On April 3, 2019, Petitioner was contacted by, Kara O'Dell ("O'Dell"), concerning the start of an investigation into Petitioner's conduct (Pet'r Compl.).

26. Several individuals, including Petitioner, the intern, Schoenherr, Husselman, and the coworkers involved in the conversations concerning sex and race were interviewed as part of the investigation (Resp't Motion Ex. G).

27. On April 6, 9, and 10, 2019, Petitioner emailed O'Dell stating that he was being discriminated against and facing a double standard (Pet'r Compl.).

28. On April 12, 2019, the Indiana State Personnel Department ("SPD") concluded its investigation, finding that the specific allegation of sexual harassment was unsubstantiated, but the comments to the intern were "unwelcome, unprofessional, and do not meet agency standards". SPD recommended Petitioner be dismissed from State employment (Resp't Motion Ex. G).

29. On April 16, 2019, and April 22, 2019, Petitioner participated in a bifurcated predeprivation hearing, in which James Pippin ("Pippin"), Region Four Manager, acted as the hearing officer (Pet'r Compl.).

30. During the predeprivation meeting, when being questioned about the events discussed above, Petitioner used the word "Nigga" twice, indicating to the hearing officer that he does not act "ghetto" and then stated that he "knows how to act professional" (Pet'r Compl.).

31. Also on April 16, 2019, Petitioner emailed Director Terry Stigdon ("Stigdon"), telling her that Petitioner has been subjected to discrimination based on his color, age and gender

and referred to his upcoming predeprivation hearing as a "modern day lynching", citing Justice Clarence Thomas of the United States Supreme Court.

32. On April 18, 2019, Petitioner again emailed Stigdon, along with Pippin, Ellis Dumas ("Dumas"), Region One Manager and Respondent's witness at the April 16, 2019, hearing, stating that the intern did not act like a victim, and essentially indicated that she was lying about what had occurred as well as suggesting that Respondent was attempting to find fault in Petitioner's actions because he is black and also made allusions to a Caucasian man that was investigated differently than he was (Pet'r Compl.; Resp't Motion Ex. A).

33. On April 18, 2019, Pippin emailed Petitioner telling him that he had concluded his investigation and was ready to resume the predeprivation hearing.

34. On April 22, 2019, Pippin informed Petitioner that the allegations by the intern were found to be unsubstantiated, but that Petitioner had a history of behaving in an unprofessional manner—citing the previous conversations Petitioner engaged in with coworkers as well as his behavior with the intern (Pet'r Compl.).

35. On April 22, 2019, Petitioner's employment with Respondent was terminated (Pet'r Compl.; Resp't Motion Ex. A). [3]

IV. Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. I.C. § 4-15-2.2 *et seq*. SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). I.C. §§ 4-15-2.2-23, 24. Petitioner was a classified employee at all relevant times.

2. This is a classified (just cause) case under the Civil Service System. A state agency may only terminate or take material adverse employment actions against a classified state employee for just cause. I.C. § 4-15-2.2-23. In a disciplinary case involving a classified employee the state agency has the initial and ultimate burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. Ind. Code § 4-15-2.2-42(g); *see also* Non-Final and Final Orders in *Miller v. FSSA*, SEAC No. 05-12-060 (2012); Non-Final and Final Orders in *Cole v. DWD*, SEAC No. 02-12-019 (2013); Non-Final and Final Orders in *Johnson v. DWD*, SEAC No. 05-13-034 (2014). Therefore, if the Respondent fails to establish just cause, the challenged adverse employment action is invalid.

[3] On June 12, 2019, a complaint of child abuse was lodged against Petitioner, which was substantiated in August 12, 2019 (Resp't Motion, Ex. C). While such complaint was lodged subsequent to Petitioner's termination, Respondent points out that since the allegation was substantiated, Respondent's policies dictate that Petitioner is ineligible for rehire with Respondent. *Id.* The ALJ assumes that Respondent mentioned this allegation in case the ALJ came to the conclusion that Respondent did not prove that Petitioner was terminated for just cause. However, since the ALJ does so find, as explained below, he need not address this fact further.

3. To establish just cause, the Respondent may refer to the Petitioner's work performance or service rating. I.C. § 4-15-2.2-36(e). An agency's service ratings and employee performance standards "must be specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive." *Id*. Therefore, in determining whether just cause was established, SEAC may consider Petitioner's performance as compared to the Respondent's employee performance standards. I.C. § 4-15-2.2-12, 36 and 42.

4. Additionally, the inquiry focuses on the reasonableness of the employer agency's workplace expectations. Employer expectations must be reasonably well communicated and consistently applied to similarly situated employees. *See Miller, Cole and Johnson*, *supra*. The reasonable expectations of the Respondent may include its communicated employee performance standards and expected outcomes. *Id*. The just cause standard requires the Respondent to act with reasonableness, not perfection. *See Ghosh v. Ind. State Ethics Com'n*, 930 N.E.2d 23 (Ind. 2010); *Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992) (just cause standards in other contexts in Indiana similarly looks to the reasonable expectations of the employer).

5. At-will employment is the default in Indiana, and most state employees are considered unclassified in that regard. I.C. §§ 4-15-2.2-22, 24. However, the General Assembly also recognized some employees as classified given federal regulations and laws but did not define "just cause" in the Civil Service System. Therefore, the ALJ first looks to Indiana law, but also to the federal standard. The federal employment just cause standard is defined as "[s]uch cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). *See also Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 477 (2010) (federal system looks at factors such as inefficiency, neglect of duty, and reasons provided by the legislature).

6. If an agency establishes just cause, "the [C]ommission shall defer to the appointing authority's choice as to the discipline imposed" I.C. § 4-15-2.2-42(g). The ALJ is not authorized to substitute his own judgment after the agency proves it had just cause to impose the adverse employment action.

7. Petitioner contends that his termination constituted disparate treatment, discrimination, and retaliation. Petitioner also alleges that the termination was a violation of his Fourteenth Amendment rights and was without just cause. The ALJ will discuss in turn why each of these claims fail, starting with Petitioner's disparate treatment and discrimination claims.[4]

[4] Petitioner offers evidence of the decision made by the Unemployment Insurance Appeals division of the Indiana Department of Workforce Development ("DWD") ("Insurance Appeal") and alleges that Respondent prevented Petitioner from collecting unemployment benefits. However, DWD and SEAC are two separate entities and a decision rendered by DWD is inadmissible at SEAC. "Any finding of fact, judgment, conclusion, or final order made by a person with the authority to make findings of fact or law in an action or proceeding under this article is

8. Petitioner first claims that his termination constituted disparate treatment and discrimination based on gender, race, ethnicity, and age because other employees who engaged in the conversations concerning sex and race were not disciplined. Petitioner indicates that while he was "the perfect employee" he was just "the wrong color". However, the facts presented by both Parties demonstrate Petitioner's reprehensible behavior alone was the cause for his termination.

9. Petitioner has the initial burden of establishing a prima facie case of discrimination under the *McDonnel Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Petitioner must show that he 1) belongs to a member of a protected class; 2) his job performance met Respondent's legitimate expectations; 3) he suffered an adverse employment action; and 4) another similarly situated individual who was not in the protected class was treated more favorably that Petitioner. *See Id.* The Seventh Circuit however, has recently disregarded the use of "direct" and "indirect" methods of proof and rather held that courts should determine "whether the evidence [as a whole] would permit a reasonable factfinder to conclude that the [Petitioner's membership in a protected class] caused the discharge or other adverse employment action." *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016).

10. Petitioner did face an adverse employment action—termination—and he was a member of a protected class—African American—satisfying the first and third prongs. However, Petitioner did not demonstrate that he was meeting Respondent's legitimate expectations at the time of his termination nor did he offer an appropriate comparator, thus failing to meet the second and fourth elements of proving discrimination.

11. First, Petitioner was not meeting Respondent's legitimate expectations when he violated several of Respondent's policies when he engaged in inappropriate conversations and behavior with coworkers. SPD's Workplace Harassment Prevention Policy ("Policy") states that

> [e]ach employee has the right to work in a professional environment that promotes equal opportunities and prohibits sexual harassment and harassment based on race, color, creed, religion, sex, national origin, age, sexual orientation or gender identity, and physical or mental disability, hereinafter referred to as protected status or protected class. Workplace harassment, whether verbal, physical or environmental, is unacceptable and will not be

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not conclusive or binding and shall not be used as evidence in a separate or subsequent action or proceeding between an individual and the individual's present or prior employer in an action or proceeding brought before an arbitrator, a court, or a judge of this state or the United States regardless of whether the prior action was between the same or related parties or involved the same facts." I.C. § 22-4-17-12(h). Therefore, the Insurance Appeal is not binding on SEAC and will not be considered in these proceedings.

> tolerated in State Government. The State will not tolerate workplace harassment, whether engaged in by fellow employees, supervisors, officers, or by outside clients or other non-employees who conduct business with the State. Sexual Harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. The behavior need not be intentional in order to be considered sexual harassment. Examples of conduct of a sexual nature include, but are not limited to . . . repeated sexual jokes, flirtations, graphic, verbal commentary about an individual's body, touching, obscene comments. This behavior is unacceptable in the workplace itself and in other work-related settings such as business trips and business-related social events. (Resp't Motion Ex. L).

12. Petitioner additionally did not meet Respondent's expectations as laid out in its Code of Conduct which holds that

> every DCS staff member must act with the utmost level of professionalism, honesty and integrity; staff will treat all children and their families, colleagues and members of the general public in a respectful, honest and fair manner; An employee whose unacceptable behavior or conduct violates a State and/or DCS standard, rule, regulation, policy, procedure, directive, written or verbal order, agreement, responsibility, or condition of employment may be subject to disciplinary action, up to and including dismissal (Resp't Motion Ex. M).

13. Petitioner was not meeting Petitioner's legitimate expectations when he created an intimidating, hostile, and offensive working environment by making inappropriate conversation with an intern, touching her leg, commenting on her body, and using a seemingly harmless favor—offering to bring her back sausages from his vacation—in order to continue communication with the intern after the initial incident. Further, Petitioner failed to act with professionalism and integrity when he made comments concerning race and sex to his coworkers, regardless of whether or not he initiated the conversation or was

asked to comment on such—Petitioner made the conscious decision to make his own personal comments to his coworkers.

14. Similarly, even in his predeprivation hearing, Petitioner failed to meet Respondent's legitimate expectations by acting in a hostile manner towards Pippin, becoming irate and using derogatory words. Petitioner suggests that his comments to coworkers and during the predeprivation hearing were not egregious and it is unlawful for Respondent to base Petitioner's termination off someone else's perception of his comments. (Pet'r Compl.).

15. However, Petitioner's "behavior need not [have been] intentional in order to be considered sexual harassment" (Resp't Motion Ex. L). Notwithstanding that intent need not be a factor, on April 17, 2019, Petitioner emailed Dumas, stating he "wanted to say that [he] apologize[d] if [he] made [Ellis] feel uncomfortable in any way from the things [Petitioner] said" at the hearing (Pet'r Compl). From this alone, it is clear that Petitioner knew that the comments he made could be perceived as offensive, yet chose to say them anyway. However, even if Petitioner felt that his comments were not offensive, his intent is not what determines their nature. Thus, Petitioner fails to meet the second requirement of proving discrimination—that his job performance met Respondent's legitimate expectations, when he made inappropriate remarks to several of Respondent's employees over a period of time.

16. Further, Petitioner failed to introduce any viable comparators demonstrating that another similarly situated individual who was not in the protected class was treated more favorably that Petitioner. "All things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination." *Filar v. Bd. of Educ. of City of Chi.*, 526 F.3d 1054, 1061 (7th Cir. 2008). In presenting a similarly-situated employee, "the comparator must . . . be similar enough 'to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, [so as to] isolate the critical independent variable: complaints about discrimination.'" *Id* (internal citations omitted).

17. Petitioner failed to introduce any legitimate comparators demonstrating why his termination was unfair or otherwise demonstrated disparate treatment. Rather, Petitioner simply indicates that other employees who engaged in the conversations concerning race and sex were not disciplined, but he does not demonstrate that they were outside of his protected class nor that they were similarly situated to Petitioner. Similarly, Petitioner references a Caucasian male employee's questionable interactions with a few female coworkers, stating that these allegations were handled differently than the allegations against Petitioner. However, Petitioner again failed to establish that this individual was similarly situated to Petitioner in any manner and only makes a passing remark concerning such a person.

18. Therefore, because Petitioner failed to demonstrate that his job performance met Respondent's legitimate expectations and did not produce any legitimate comparators

demonstrating why his termination was unfair or otherwise demonstrated disparate treatment, Petitioner fails to meet his initial burden of establishing a prima facie case of discrimination under *McDonnel Douglas* and thus this claim fails.

19. Next, Petitioner claims that he was retaliated against due to emailing Stigdon on April 16 and 18, 2019 (Pet'r Compl.).

20. An allegation of retaliation can be proven by either the direct or indirect method. *Metzger v. Ill. State Police*, 519 F.3d 677, 681 (7th Cir. 2008). Under the direct method, Petitioner must show direct or circumstantial evidence that: (1) he engaged in statutorily protected activity; (2) he suffered a materially adverse action; and (3) a causal connection exists between the two. *Id.*

21. While Petitioner suffered a materially adverse action, he failed to show that he satisfies the additional requirements.

22. First, Petitioner has failed to demonstrate that emailing Stigdon was a statutorily protected activity. "For purposes of retaliation claims, statutorily protected activity generally consists of either an employee filing a charge with the Equal Employment Opportunity Commission or opposing any practice made unlawful under 42 U.S.C. § 2000e-3(a)." *Nielsen v. Acorn Corrugated Box Co.*, Case Number: 01 C 1988, 2002 U.S. Dist. LEXIS 15473 (N.D. Ill. Aug. 14, 2002). Therefore, Petitioner emailing Stigdon stating that the intern's actions did not demonstrate that of victimization and that a Caucasian individual received a different investigation into that individual's alleged sexual harassment of females than did Petitioner, did not constitute a statutorily protected activity.

23. Even if Petitioner's email to Stigdon constituted a statutorily protected activity, Petitioner still fails to meet the final factor of the direct method, which is that a causal connection exists between Petitioner's statutorily protected activity and the materially adverse action taken against him. Although Petitioner's discipline was received following the email to Stigdon, he provided no evidence to establish a causal connection. "Temporal proximity between an employee's protected activity and an adverse employment action is rarely sufficient to show that the former caused the latter." *O'Leary v. Accretive Health, Inc.*, 657 F. 3d 625, 635 (7th Cir. 2011) (citing *Leitgen v. Franciscan Skemp Healthcare, Inc.,* 630 F.3d 668,675 (7th Cir. 2011)). Petitioner fails to establish that his discipline was based on him emailing Stigdon. Rather, Petitioner had already been called into a predeprivation hearing to discuss his conduct. Although the final decision to terminate Petitioner was made following his email to Stigdon, the disciplinary procedure had already commenced prior to the email and thus the necessary nexus between Petitioner's discipline and his emails is not present. Thus, Petitioner cannot prevail under this method.

24. Under the indirect method, Petitioner may establish a prima facie case of retaliation by presenting evidence that: (1) he engaged in statutorily protected activity; (2) he suffered a materially adverse action; (3) he met his employer's legitimate expectations; and (4) he was treated less favorably than some similarly situated employee who did not engage in statutorily protected activity. *Id.* "If [Petitioner] succeeds in establishing a prima facie case, the burden shifts to the employer to produce a non-discriminatory reason for its employment action. If the employer meets its burden of production, the burden of proof then remains with [Petitioner] to show that the employer's proffered reason is pretextual." *Id.*

25. Again, the ALJ finds that Petitioner satisfies the second requirement to establish a prima facie case of retaliation under the indirect method. However, Petitioner fails to satisfy the remaining requirements. First, as discussed above, Petitioner failed to show that he engaged in a statutorily protected activity nor was he meeting Respondent's legitimate expectations. Respondent determined that Petitioner failed to act with integrity and professionalism in his conversations and interactions with coworkers, which did not meet agency standards and were deemed unacceptable. Further, Petitioner failed to show that he was treated less favorably than a similarly situated employee who did not engage in statutorily protected activity. Therefore, Petitioner failed to demonstrate his claim of retaliation under this method, either.

26. Petitioner next alleges that Respondent violated his Fourteenth Amendment rights to due process when he "should have been given the reason for discipline so a defense [could] be rendered" prior to his predeprivation hearing (Pet'r Reply).

27. The Fourteenth Amendment to the U.S. Constitution states, in part, that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." "Property interests whose deprivation requires the provision of due process protections are not created by the U.S. Constitution. Rather, a property interest arises where an independent source, either state or federal law, directly or indirectly confers an entitlement upon a public employee. Accordingly, federal property interests under the Fourteenth Amendment usually arise from rights created by state statutes, state or municipal regulations or ordinances, and contracts with public entities. Once such an interest is established, it may not be deprived without due process of law. Under well-established United States Seventh Circuit case law addressing procedural due process, a plaintiff must create an issue of material fact as to whether he suffered an actionable deprivation of his property interest." *Wehner v. Ball State Univ*., 2003 U.S. Dist. 1194 (S.D. Ind. Jan. 18, 2003).

28. "Due process requires pre-termination notice and an opportunity to respond." *Stimeling v. Bd. of Educ. Peoria Pub. Sch. Dist. 150*, No. 07-1330, 2008 U.S. Dist. LEXIS 120274 (C.D. Ill. June 23, 2008). Petitioner did in fact receive such pre-termination notice and an opportunity respond in the form a predeprivation hearing, given his classified status. Thus, Petitioner's claim that his Fourteenth Amendment rights were violated fails.

29. Finally, Petitioner claims that his termination was not for just cause and failed to constitute progressive discipline, in accordance with the SPD Discipline Policy ("Policy").

30. The purpose of the Policy is "[t]o provide an opportunity to correct inappropriate behavior and *to separate employees who exhibit unacceptable behavior*." (Resp't Motion Ex. N) (emphasis added). "This policy applies to classified employees in the state civil service who have successfully completed the required working test period for initial appointment to a classification in the state classified service and have not left the classified service since that appointment or who have completed a working test subsequent to reemployment or rehire. It also applies to employees in the state civil service who are covered by a separate statute that expressly provides that the employee may be disciplined only for cause." *Id.*

31. It is uncontested that Petitioner is a classified employee and thus subject to the Policy.

32. "A classified employee in the state civil service is subject to discipline for just cause. Just cause can include: 1) [d]oing of an act which a person ought not to do; 2) [t]he omission of an act which a person ought to do; [or] 3) [t]he improper doing of a permissible act." *Id.*

33. Per the Policy, just cause may include: "violation of, or failure to comply with, Federal or State law, rules, executive order, policies or procedures" and "failure to maintain satisfactory, effective working relationships with the public or other employees", "workplace harassment based, in whole or in part, on race, color, sex, religion, age, disability, or national origin which manifests itself in the form of comments, jokes, printed material and/or unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;" and "actions which bring the agency or the individual into disrepute or impair the effectiveness of the agency or individual". *Id.*

34. "Where appropriate, employee disciplinary actions are to be corrective and progressive in nature. The discipline imposed should be determined by taking into account such factors as the seriousness of the offense and the record of the employee's service with the State. An employee's work record may provide the basis for differentiating in the degree of discipline imposed for like or similar offenses. While the State will generally follow the principles of progressive discipline, *the State reserves the right to impose discipline commensurate with the offense*." *Id.* (emphasis added).

35. Petitioner includes in his Complaint his 2018 Annual Performance Appraisal, suggesting that his positive past performance should have mitigated the discipline he received. Similarly, Petitioner includes several emails and letters of reference from his supervisors suggesting that he was a good employee. (Pet'r Compl.).

36. However, "the critical inquiry is [Petitioner's] performance at the time of [his] termination. Therefore, although prior evaluations can be relevant in some circumstances, they cannot, by themselves, demonstrate the adequacy of performance at the crucial time when the employment action is taken." *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 753 (7th Cir. 2006).

37. While Petitioner may have been meeting Respondent's expectations prior to 2019, his behavior at the time of his termination proved otherwise. Thus, while Respondent may consider an employee's past performance in making a disciplinary decision, in Petitioner's instance it failed to move the needle when considering his total contravention of Respondent's policies and expectations over time and at the time of his termination.

38. Respondent found that Petitioner had violated several of its policies, such that his actions constituted termination.

39. As discussed, Petitioner, on at least two (2) occasions, engaged in inappropriate conversations with coworkers in which he made comments about race and sexual preference. Petitioner states that because he was simply commenting on the conversations when asked, and was not the one to initiate them, he should not be held responsible. Further, he claims that because it is only another person's perception that his comments were offensive, he is not liable (Pet'r Compl.). However, Petitioner concedes that he did make such comments, and therefore Respondent was within its rights to determine if such comments were inappropriate and unprofessional.

40. Further, Petitioner engaged in inappropriate behavior with an intern. Petitioner justifies his interaction with the intern and claims it did not constitute harassment because "it is taught by all states that the accuser must make the person aware of their advances or any inappropriate conversation is unacceptable [sic]". However, Petitioner fails to provide any citation to a state law or policy which indicates that behavior can only be considered harassment if a victim makes it known to the perpetrator that they are harassing them. In fact, sexual harassment, as defined by State policy, need not be intentional. (Resp't Motion Ex. L).

41. Petitioner also states that the intern herself participated in the conversation, asking why black men like her. However, this too is not a mitigating factor for Petitioner.

42. Petitioner has been in the workforce for several years and an FCM with Respondent for three (3) years. As Petitioner flaunts in his Reply, he has sat through numerous classes and presentations on harassment. Taking this statement as true, Petitioner should be well versed in the policies and laws of the state, none of which indicate that an individual must profess to their abuser that they are feeling harassed at the time of the harassment for the abuser to be held culpable.

43. Petitioner states that because the sexual harassment claims were not substantiated, Respondent found other reasons to terminate him (Pet'r Compl.). However, although the specific *legal* allegation of sexual harassment was unsubstantiated, Petitioner still failed to meet Respondent's policies and expectations (emphasis added). An unsubstantiated allegation in terms of federal or state law does not absolve Petitioner from any wrongdoing under Respondent's policies. Thus, SPD, finding Petitioner's behavior egregious, recommended he be dismissed from employment.

44. Respondent's decision to use termination as the first disciplinary action taken against Petitioner was due to Petitioner's abhorrent violation of Respondent's Code of Conduct and SPD's Workplace Harassment Prevention Policy (Resp't Motion Exs. L, M). Respondent found Petitioner's violation of such policies to be so blatant that even his past performance did not offset the seriousness of the offenses when a disciplinary decision had to be made. Thus, Petitioner's violation of policy, workplace harassment, and actions bringing Respondent and Petitioner into disrepute constituted just cause for Petitioner's termination.

45. No other public policy exception has been raised by Petitioner. Petitioner fails to present factual allegations, which even accepted as true, state a material issue of fact regarding whether Respondent had just cause to terminate Petitioner. Therefore, the ALJ concludes that SEAC lacks subject matter jurisdiction to further consider Petitioner's Complaint. Thus, Respondent's Motion must be granted.

To the extent a finding of fact is deemed a conclusion of law, or a conclusion of law is deemed a finding of fact, it shall be given such effect.

V. Final Order of Dismissal

Respondent's Motion for Summary Judgment is GRANTED. This action is hereby dismissed with prejudice. All case management deadlines are vacated.

This is the final order of the Commission. A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this order and must otherwise comply with Ind. Code § 4-21.5-5.

DATED: March 24, 2020

Hon. Gabriel Paul
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm. N103
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
Fax: (317) 972-3109
Email: gapaul@seac.in.gov

A copy of the foregoing was sent via email to the following:

Bernard Pollard
8202 Fountainhead Drive
Fort Wayne, Indiana 46835
izentar@yahoo.com

Whitney Fritz
Rachel Russell
Counsel
Indiana Department of Child Services
302 W. Washington Street
Room E306
Indianapolis, Indiana 46204
whitney.fritz@dcs.in.gov
rachel.russell@dcs.in.gov

Courtesy Copy to:

David Fleischhacker
State Personnel Department
402 West Washington Street
Room W141
Indianapolis, Indiana 46204
dfleischhacker1@spd.in.gov