BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

CLARENCE FINNIE	)	
Petitioner,	)	
	)	
v.	)	SEAC NO. 08-12-084
	)	
WESTVILLE CORRECTIONAL	)	
FACILITY BY INDIANA	)	
DEPARTMENT OF CORRECTION,	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND SETTING TELEPHONIC STATUS CONFERENCE

Respondent Westville Correctional Facility ("WCF"), by counsel[1], moved for Summary Judgment on January 18, 2013. Petitioner, by counsel, timely responded on February 27, 2013. Respondent, by counsel, then replied on March 15, 2013. Having considered the parties' submissions and as further discussed herein, the ALJ determines there are genuine questions of material fact that need to be resolved at an evidentiary hearing. Respondent WCF's Motion for Summary Judgment is therefore **DENIED**. A telephonic status conference is set May 2, 2013 at 9:00 a.m. (Indianapolis time) for further handling. The parties' counsel shall jointly call the ALJ at that time.

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).

[1] Respondent's pending motion to substitute counsel is granted.

II. Employment At-Will and Title VII Discrimination

In this Indiana Civil Service System case, Petitioner Finnie is a former unclassified state employee for Respondent WCF. An unclassified state employee is at will, and serves at the appointing authority's pleasure. However, a termination of an unclassified, at will state employee must not violate public policy. I.C. 4-15-2.2-1 et seq., 42 (Civil Service System). Petitioner Finnie challenges his termination from state employment as the product of race discrimination. Prohibited discrimination is a violation of 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, one of which is "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. App. 2012). Whether public policy was violated is the specific issue in the instant matter. I.C. 4-15-2.2-42.

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 an employee because of that person's race or sex, 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. 4-15-2.2-1 et seq., 12, and 42. 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*[2] analysis in race based discrimination cases. *Filter Specialists, supra.*

The application of the Title VII analysis is often referred to as the modified *McDonnell Douglas* burden shifting framework. See *Pantoja v. American NTN Bear. Manuf. Corp*., 495 F.3d 840, 845 (7th Cir 2007). Under this analysis, a petitioner may prove discrimination either through direct or indirect evidence. *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012). A petitioner can present either a single motive or mixed motive theory of discrimination. *Id*. To establish a *prima facie* case of discrimination using the indirect method, a petitioner must offer evidence that: (1) he is a member of a protected class, (2) his job performance met the employer's legitimate expectations, (3) 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. *Id*. Once a petitioner establishes a *prima facie* case of discrimination, the

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

burden then shifts to the employer to show a legitimate, nondiscriminatory 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." *Id*.

In order to determine whether comparative employees are considered "similarly situated" for purposes of the *McDonnell Douglas* analysis, employees outside of petitioner's protected class must have been similar enough to petitioner that a finder of fact can infer a discriminatory motive on the part of employer. These similarly situated employees "must be directly comparable to the plaintiff in all material respects, but they need not be identical in every conceivable way." *Coleman* at 846. The "similarly-situated" inquiry is "flexible, common-sense, and factual" and is left for a trier of fact to determine whether there are "enough common features between the individuals to allow a meaningful comparison." *Id*. at 841.

III. Findings of Fact

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

1. Petitioner Clarence Finnie, a black male, is a member of a protected class. (See Pet. Ex F) Petitioner asserts that his race was at least an unlawful motivating factor in his termination. As discussed below, Petitioner's brief suggests that while the Respondent might have demoted Petitioner consistently with the prior treatment of certain white co-employees, that discharge was overly severe, inconsistent and based on Petitioner's race.

2. On June 15, 2012, Petitioner Finnie was terminated from his unclassified, at-will employment as a Training Officer IV for Respondent WCF. Respondent asserts the termination arose from Petitioner's "failure to report" after an offender (MS) told Petitioner that he had been sexually assaulted by another employee of Respondent WCF. (Resp. Exs. G and K)

3. Petitioner Finnie asserts that he advised Offender MS "to file a grievance" but "at no time did [he] report this incident" himself. (Resp. Ex. G)

4. Petitioner Finnie also indicates that he worked part time for Aramark Services, a food service company contracted with Respondent WCF. Petitioner asserts that it was significant that he was actually "on the clock" for Aramark when Offender MS informed Petitioner Finnie of the alleged sexual assault. (Pet. Compl., Pet. Ex. B)

5. Respondent WCF's Policy 02-01-0115 requires that "[u]pon receipt of a report of actual or threatened inappropriate sexual conduct, staff shall ensure that the Facility Head is notified as soon as possible." (Resp. Ex. B, p. 17)

6. Petitioner Finnie had been employed with Respondent WCF for twenty-three (23) years at the time of the termination of his employment. (Pet. Ex. F)

7. Petitioner Finnie was reprimanded twice by Respondent WCF between May 2002 and December 2005. (Resp. Exs. C, D)

8. Petitioner Finnie was reprimanded on November 1, 2011 for making "inappropriate comments directed to staff during a new hire class" and suspended for three days without pay. (Resp. Ex. E)

9. Ernest Pickens, a white male and former coworker of Petitioner Finnie, has presented an affidavit stating that he was employed with Respondent WCF as a lieutenant until he was demoted and transferred in July 2011 "after an alleged failure to report a specific incident to [his] superior in which another officer threatened an offender with physical abuse or contact." Pickens states that he "was not fired for this alleged failure to report but was instead demoted from the rank of lieutenant to a regular officer." (Pickens Aff. ¶¶ 5-7)

10. Pickens also states in his affidavit that he worked with another employee for Respondent WCF, Captain Steven Burkholder, a white male, who was "accused in 2011 of failing to report sexual harassment complaints made to him by two (2) female officers against" another lieutenant also working for Respondent. (Pickens Aff. ¶ 8) Burkholder was demoted and reassigned. Burkholder's employment was not terminated by Respondent WCF. (Pickens Aff. ¶ ¶ 10-11)

11. Burkholder "failed to report and/or take any action after Officers . . . reported to him that they were being harassed through inappropriate comments; gestures of a sexual nature and inappropriate physical contact." (Resp. Reply Ex. A)

12. Respondent WCF asserts that both Pickens and Burkholder were both in "higher skilled positions" than Petitioner Finnie with higher associated pay. (Resp. Reply ¶¶ 1(a) and 2(c)). However, Petitioner Finnie's designated evidence shows they engaged in arguably similar conduct as white males and were only demoted, not terminated. The fact that Pickens and Burkholder were higher ranked or had higher pay does not prevent a question of fact over similar situation, and harms the state's argument because supervisors can be reasonably understood to be held to the same or higher standards of conduct by a reasonable employer, not lower ones.

13. One or more genuine questions of material fact preclude summary judgment as further discussed below.

IV. Conclusions of Law and Analysis

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). In this case, Petitioner Finnie has asserted a *prima facie* showing of discrimination based on race, which, if true, would violate public policy.

2. Petitioner Finnie is a member of a protected class and suffered an adverse employment action, termination of employment. Relevant to the termination, Petitioner's designated evidence shows he was currently meeting his employer's legitimate employment expectations even if he had prior, older discipline. The courts when evaluating "the question of whether an employee was meeting an employer's legitimate employment expectations, the issue is not the employee's past performance but whether the employee was performing well at the time." *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 689 (7th Cir. 2008).

3. Respondent's proffered reasons for Petitioner's termination are: Petitioner failed to report an alleged incident of sexual assault and prior disciplines of Petitioner within the last ten years before his termination.

4. In order for a motion for summary judgment to be granted there can be no genuine question of material fact. *Swineheart* at 777. Petitioner Finnie has designated enough evidence to create questions of material fact as to his job performance, and whether similarly situated white co-employees were treated more favorably than Petitioner based on race. Correspondingly, at the summary judgment stage, this sufficiently rebuts the state's proffered legitimate reasons for the termination to require an evidentiary hearing.

5. To be clear, Petitioner has not proved a racial pretext by the state. He has simply designated sufficient evidence to raise a triable question of pretext. Namely, was Petitioner treated more severely based on race given employment termination for Petitioner versus only the demotion of two arguably similarly situated white males? A hearing is required to answer this question. Similarly, neither party has proven or disproven that the white males were similarly situated to Petitioner. Petitioner has prior discipline in the record that the white males may not have, but Petitioner does show that Respondent WCF's custody supervisors were apparently treated more leniently in arguably similar circumstances. In sum, Petitioner's evidence is enough to survive summary judgment by raising a genuine question(s) of material fact about work history, similar situation and pretext.

6. Prior sections reciting contentions or certain general legal standards are hereby incorporated by reference, as needed. 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.

V. Conclusions of Law and Order

Respondent WCF has not met its burden under Ind. T.R. 56 of showing that there is no genuine issue of material fact. An evidentiary hearing is necessary to determine under what circumstances Petitioner Finnie was terminated. Respondent WCF's Motion for Summary Judgment is therefore **DENIED**. A telephonic status conference is set for **May 2, 2013** at **9:00 a.m.** (Indianapolis time) for further handling. The parties' counsel shall jointly call the ALJ at that time.

DATED: April 8, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
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