BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

JESSE M. BRAVO Petitioner,	))	
v.	)	SEAC NO. 10-12-100
INDIANA STATE DEPARTMENT OF HEALTH Respondent.	))	

FINAL ORDER
OF THE STATE EMPLOYEES' APPEALS COMMISSION

On May 28, 2013 the assigned ALJ issued notice and a copy of "Findings of Fact, Conclusions of Law and Non-Final Order of Administrative Law Judge" granting summary judgment to Respondent Indiana State Department of Health (ISDH) (the "ALJ's Order"), which is hereby incorporated by reference as if fully set forth in this document. Petitioner Bravo timely filed objections, to which Respondent ISDH timely responded.

Thereafter, on August 20, 2013, the Commission held a public oral argument on this matter during its regular meeting. Upon public deliberation, motion and 4-0 (unanimous) vote at that meeting the Commission **UPHELD/AFFIRMED** the ALJ's Order. Accordingly, the ALJ's Order, in its entirety, is hereby adopted as the Findings of Fact, Conclusions of Law and Final Order of the Commission pursuant to the public Commission decision. Ind. Code §§ 4-21.5-3. This written copy of the order is thus issued on the Commission's behalf by the undersigned.

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: August 21, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
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SEAC Commissioners (by email pdf)

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	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER GRANTING RESPONDENT ISDH'S MOTION FOR SUMMARY JUDGMENT

On April 8, 2013, Respondent Indiana State Department of Health ("ISDH"), by counsel, moved for summary judgment and designated evidence in support thereto. On April 9, 2013, Petitioner Jesse M. Bravo ("Bravo"), pro se, responded via email(s).[1] This case considers, under the Indiana Civil Service System (I.C. 4-15-2.2), Petitioner Bravo's termination of employment from Respondent ISDH on August 17, 2012. Petitioner Bravo is a former unclassified, at-will employee who challenges his termination from state employment as contrary to public policy.

Having duly reviewed the record, the Administrative Law Judge ("ALJ") determines there are no genuine issues of material fact and Respondent ISDH is entitled to judgment as a matter of law. The designated evidence shows Petitioner Bravo has not established a *prima facie* case of unlawful discrimination. Furthermore, Respondent ISDH has advanced a legitimate, nondiscriminatory reason for terminating Petitioner Bravo's state employment. Finally, Petitioner Bravo has not rebutted this reason or shown any unlawful pretext. Respondent ISDH's Motion for Summary Judgment is therefore **GRANTED**.

[1] Petitioner Bravo's short emails did not designate evidence or respond in detail to Respondent ISDH's Motion for Summary Judgment or briefing.

I. The Summary Judgment Standard

Summary judgment proceedings before the State Employees' Appeals Commission ("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. Employment At-Will Doctrine

Petitioner Bravo is a former unclassified state employee for Respondent ISDH. 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, 705 (Ind. 2007). However, the Indiana at-will doctrine is limited by 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). 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). 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).

Whether Petitioner Bravo's termination violated public policy is the issue in this Civil Service System case. Petitioner Bravo challenges his termination as a product of race, color, national origin, age and disability discrimination, as well as fraudulent practices. Prohibited discrimination, if found, is a violation of federal and state law, and public policy.

III. Discrimination Based on Race, Color and National Origin

Petitioner Bravo self-identifies as being part of the Hispanic protected class. Petitioner Bravo primarily challenges his termination as a product of race, color and national origin discrimination, which are all resolved under the same federal Title VII and state law legal analysis. For ease of reference, the Petitioner's claims of race, color and national origin discrimination will be jointly referred to as a claim of 'national origin discrimination'.

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 national origin, 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. 4-15-2.2-1-12, 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). At the summary judgment stage, Indiana courts use the modified *McDonnell Douglas*[2] analysis in national origin 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). 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). 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-employer'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. *Id.* Second, if the petitioner-employee establishes a *prima facie* case of discrimination, the burden shifts to the respondent-employer to show a legitimate, nondiscriminatory reason for the adverse employment action(s). *Id*. Third, once the respondent-employer 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.*

According to the Indiana Supreme Court, "in an employment discrimination lawsuit . . . the case is one of causation: What caused the adverse employment action of which the plaintiff complains?" *Filter Specialists* at 839. The adverse employment action is wrongful 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)). Therefore, Respondent ISDH's termination of Petitioner Bravo is deemed to violate public policy only if Respondent ISDH's decision was motivated, at least in part, by national origin discrimination.

IV. Fraudulent Practices and Discrimination Based on Age and Disability

Beyond the national origin claim, Petitioner Bravo's Complaint asserts three claims that must be rejected under the standard of review. The ALJ diverts to address these additional claims before a return to this order's discussion the topic of national origin discrimination. First, Petitioner Bravo vaguely challenges his termination from at-will employment as a product of "fraudulent practices". However, an at-will employee may be terminated from employment for

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

any reason that does not contravene public policy. I.C. 4-15-2.2-24(b). Respondent ISDH has advanced affirmative evidence showing legitimate non-discriminatory reasons (that were non-fraudulent in the plain sense of that word) for the employer's action. Absent a public policy breach, Respondent ISDH is generally permitted to control its own workplace, which could include requiring Petitioner Bravo to attend ham radio training.[3] Although the ALJ agrees with Petitioner Bravo that ham radio training seems relatively unnecessary for his position, there is no public policy exception established by a poor management decision alone. This claim of fraudulent practices is vague and unsupported. The fraudulent practices claim is affirmatively overcome by the Respondent's designated evidence, and dismissed.

Second and third, Petitioner Bravo challenges his termination from at-will employment as a product of age and/or disability discrimination. Beyond simply naming these two serious allegations in his kitchen sink approach to alleging potential public policy violations, Petitioner Bravo never mentions them again. The only exception is that Petitioner does identify himself as being over 40 years of age. This is one *prima facie* element in an age claim, but Petitioner does not support the other elements. *Ind. Dep't. of Envtl. Management v. West*, 838 N.E.2d 408 (Ind. 2005) Petitioner Bravo has not designated any evidence to support the age or disability claims. Meanwhile, as discussed *infra*, Respondent ISDH has advanced a legitimate, nondiscriminatory reason for terminating Petitioner Bravo's state employment through designated evidence. Petitioner Bravo's claims of age and disability discrimination are dismissed.

V. Findings of Fact

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

1. Petitioner Bravo, a Hispanic male (over age 40), was at all relevant times an unclassified, at-will employee, serving as a communications analyst for Respondent ISDH. (Petitioner's Complaint ["Pet. Compl."], p. 1)

2. On June 11, 2012, Petitioner Bravo was hired by Respondent ISDH. (Respondent's Designation ["Resp. Desig."] 13, p. 1)

3. While working for Respondent ISDH, Petitioner Bravo was supervised by Robyn Porter and managed/supervised by Chuck Berning. (Resp. Desig. 13, p. 1)

[3] As discussed below, Petitioner Bravo and other white co-workers were sent to perhaps unnecessary ham radio training by their supervisor.

4. On Petitioner Bravo's second day of employment, Chuck Berning made several comments in front of Petitioner Bravo regarding his Hispanic ethnicity.[4] Petitioner Bravo testified under oath that he was not offended by these comments and did not consider them discriminatory in nature. (Resp. Desig. 9, pp. 24, 26-27)

5. Supervisor Chuck Berning ("Berning") told Petitioner Bravo to attend a ham radio training course at the Lighthouse Readiness Group ("Lighthouse") to receive an amateur radio license. Ham radio training is not a specified part of Petitioner Bravo's job description as a communications analyst. The record shows that Berning's decision to promote or require ham radio training outside the normal scope of a state job description could be considered a poor management choice, but there is no evidence that the ham radio decision was discriminatory. A clear distinction must be drawn between a lawful, poor management choice and an unlawful discriminatory choice of a state employer. *Meyers,* 861 N. E.2d at 705. (Pet. Compl., p. 1; Resp. Desig. 5, p. 3-4; Resp. Desig. 9, p. 9)

6. Three other men under Berning's management, all of whom are white/Caucasian, were also told to attend ham radio training at various times. (Resp. Desig. 9, p. 9) This evidence shows that whites/Caucasians were being required to attend the training, not just Hispanic employees. Compared to the other three men, Petitioner Bravo alleges he was afforded less time to study due to the timing of his hiring and his hire's close proximity to the next available course at Lighthouse. Yet, there is no showing that having less time to study was caused by a pretexual motive – it was simply a fact of scheduling, which is a lawful cause for any slight difference in treatment. (Resp. Desig. 9, p. 9; Resp. Desig. 13, pp. 1-2)

7. Lighthouse is a private, independent contractor and is not a state agency or part of the Respondent ISDH. (Pet. Compl., p. 2; Resp. Desig. 11, Exhibit A, p. 3)

8. On June 22, 2012, Petitioner Bravo attended the ham radio training course at Lighthouse while being paid by Respondent ISDH. On that same day, Petitioner Bravo subsequently took the ham radio examination three times without passing. (Resp. Desig. 9, pp. 8, 29, 30)

[4] Respondent ISDH briefs this in the alternative. While Respondent denies that Berning made the statement(s), Respondent also argues that even if Petitioner Bravo was referred to as "Mexican" (or Hispanic) by Berning it is of no legal consequence. Because the facts must be construed in the light most favorable to Petitioner, the ALJ accepts Petitioner's testimony for purposes of resolving this motion that Berning referred to Petitioner's ethnicity. However, as explained in this order, the reference does not create a genuine question of material fact, and Respondent is entitled to judgment as a matter of law.

9. During the ham radio examination, Petitioner Bravo became increasingly argumentative after being informed that he was not allowed to use his training manual for reference. After learning that he had not passed his third attempt at the examination, Petitioner Bravo told the test proctors that they could "shove the test up their ass," used increasingly profane language, and threw his pencil at them. (Resp. Desig. 11, p. 2; Resp. Desig. 11, Exhibit A, pp. 1-3, 7-8)

10. According to Petitioner Bravo, he used "profanity to an innocent individual" that was "unnecessary and hurtful to others" when he "lashed out" and lost his temper at Lighthouse. (Petitioner's Civil Service Employee Complaint, p. 1)

11. As a result of Petitioner Bravo's actions, Lighthouse management were concerned for their employees' and students' safety. Mike Alley, Lighthouse CEO, informed Respondent ISDH of Petitioner Bravo's behavior during the examination. (Resp. Desig. 11, pp. 1-2)

11. Shadi Lilly, Human Resources Generalist at Respondent ISDH, conducted an investigation into the allegations made concerning Petitioner Bravo's behavior at Lighthouse. (Resp. Desig. 11, p. 2)

12. During the investigation, Petitioner Bravo told Shadi Lilly on two separate occasions that he felt as though he had been treated differently at Lighthouse because of the color of his skin. Petitioner Bravo first testified that this belief was based on "their smart-aleky ways" and not on any specific incident. (Resp. Desig. 11, Exhibit A, p. 27; Resp. Desig. 9, p. 10)

13. During Petitioner Bravo's deposition, Petitioner's testimony shifted[5] and he testified that an unidentified Lighthouse employee or proctor made a comment referring to him as a "spic". Petitioner additionally explained that "Lighthouse caused the problem, not the Health Department." (Resp. Desig. 9, p. 10)

14. Following Shadi Lilly's investigation, on August 17, 2012, Petitioner Bravo was terminated by Respondent ISDH, reasoning that "[his] professional conduct does not meet agency standards." (Resp. Desig. 7, p. 1)

[5] A party may not create a genuine question of material fact to defeat summary judgment by contradicting or shifting from their own prior testimony under oath. Ind. T.R. 56; *Keesling v. Baker Daniels*, 571 N.E.2d 562, 568 (Ind. Ct. App. 1991)

15. There is no evidence of intent or pretext showing possible national origin discrimination. Petitioner's own sworn deposition testimony does not support his claim for relief. Petitioner's testimony shows that he did not consider the supervisor's fleeting reference to his Hispanic status as discriminatory.

The record further shows that even if Petitioner was called a "spic" at Lighthouse by an unidentified person, there is no evidence that Respondent ISDH was aware of that incident. Nor is there a showing that anyone at Respondent ISDH approved of that comment or that the comment effected the employer decision making of Respondent ISDH. Therefore, there is no evidence to show illegal causation (discriminatory intent).

There is no designated evidence to rebut Respondent ISDH's lawful reason for the termination; namely, Petitioner's poor behavior at the training session. Petitioner Bravo admits his own negative behavior. ISDH designated evidence affirmatively demonstrates that the state had lawful, non-discriminatory reasons for the employment actions taken. Petitioner was disciplined for his poor conduct at Lighthouse during the ham radio testing. ISDH/Mr. Berning's sending of Petitioner Bravo and other whites to ham radio training might have been silly or poor management judgment, but it was not illegal on this record.

16. As to Petitioner Bravo's other theories beyond national origin discrimination, there is no designated evidence suggesting unlawful action by Respondent ISDH or pretext of fraud, age or disability discrimination.

17. The designated evidence shows, under Ind. T.R. 56, that there are no questions of material fact for an evidentiary hearing on any of the Complaint claims.

V. Conclusions of Law & 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). There are public policy exceptions to the at-will doctrine, including unlawful discrimination (See *Meyers* and I.C. 4-15-2.2-42). Under the modified *McDonnell Douglas* analysis, the initial burden is on Petitioner Bravo to show a *prima facie* case of discrimination through either direct or indirect evidence. See *Coleman* at 845.

2. Petitioner Bravo failed to establish a *prima facie* case of discrimination and has therefore not shown a public policy exception to the at-will employment doctrine. In particular, the evidence shows that while Petitioner Bravo is a member of protected classes (Hispanic)

and over 40, there is no showing that similar situated white or younger employees were treated better. Respondent ISDH has further presented affirmative evidence that Petitioner Bravo's employment was terminated for the legitimate, nondiscriminatory reason of unprofessional conduct that did not meet agency standards.

3. Petitioner Bravo's job performance failed to meet Respondent ISDH's legitimate expectations. Petitioner Bravo admits that he acted unprofessionally during his training at Lighthouse by using excessive profanity, losing his temper, and lashing out at others. Furthermore, Respondent ISDH has presented affirmative evidence that Petitioner Bravo's unprofessional behavior (not following agency standards) was a legitimate, non-discriminatory reason for the termination.

4. Even if Petitioner Bravo had met Respondent ISDH's legitimate expectations, which he admits he did not, there is no affirmative evidence showing a pretext for unlawful conduct. White co-workers were made to attend the ham radio training by the same supervisor. Petitioner Bravo alleged that these three other white men under the supervision of Berning received more time to study for the ham radio examination as a product of national origin discrimination against him. However, there is no designated evidence to support this claim. Moreover, there is affirmative evidence that Petitioner Bravo's condensed study time was simply due to scheduling and not for an unlawful reason.

5. Petitioner Bravo also alleged in his deposition that Berning's reference(s) to his Hispanic ethnicity on the second day of work were discriminatory in nature, therefore challenging his termination as wrongful. This contention fails on two fronts. First, Petitioner Bravo has previously stated that he was not offended by the comments and did not consider them discriminatory. Second, even if Petitioner Bravo was offended by the comments, there is no affirmative evidence or inference to show that they motivated Respondent ISDH's decision to terminate Petitioner Bravo. To be clear, SEAC does not condone inappropriate comments about ethnicity, but a supervisor's poor choice of words alone cannot support a basis for relief. See *Filter Specialists* at 840.

6. Finally, Petitioner Bravo alleges that his termination was wrongful as a product of an unidentified Lighthouse employee's "spic" comment during the ham radio training course. The use of such a repulsive, regressive ethnic slur in a professional setting, let alone in general, is unacceptable. However, for Petitioner Bravo's termination to be deemed in violation of public policy, Respondent ISDH's decision must have been motivated by unlawful discrimination. See *Id*. Since Lighthouse was an independent contractor and not a decision-maker for Respondent ISDH, the unidentified employee's comments are not a motivating factor in Respondent ISDH's decision to terminate

Petitioner Bravo. Critically, there is no showing that Respondent ISDHs' decision makers knew of or were motivated by the "spic" comment or by national original animus of any kind. The state's designated evidence, in sum, has broken the causation chain.

7. 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.

VI. Non-Final Order Granting Respondent's Motion for Summary Judgment

Respondent ISDH's Motion for Summary Judgment is **GRANTED**. There are no genuine issues of material fact to require an evidentiary hearing. Respondent ISDH is entitled to judgment as a matter of law against all claims asserted in Petitioner Bravo's Complaint. Respondent ISDH has satisfied the moving party's burden under Ind. T.R. 56 and Petitioner Bravo has not rebutted this burden. Petitioner Bravo's Complaint is denied, and Respondent ISDH's termination of Petitioner Bravo is upheld. The hearing date and all case management deadlines are **VACATED**.[6]

DATED: May 28, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
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[6] Respondent's pending Motion to Compel, filed on April 17, 2013, is denied as moot. Petitioner filed papers on May 17, 2013, with service to the state, showing he had further responded to the discovery. It is unclear if Respondent still believes the discovery is incomplete, and unnecessary to reach a discovery issue in light of the grant of summary judgment.

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