

**OF INDIANA
RIGHTS COMMISSION**

**DOCKET NO. EMra06060220
EEOC NO. 24F-2006-05087**

ETHEN E. BEARD,
Complainant,

v.

**CITIZENS GAS & COKE
UTILITY,**
Respondent.

FILE DATED

AUG 28 2009

Indiana State Civil Rights Commission

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 14, 2009, Robert D. Lange, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") entered his Proposed Findings Of Fact, Conclusions Of Law, And Order ("the proposed decision"). On April 28, 2009, Complainant, Ethen E. Beard ("Beard"), filed Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order ("Objections"). On July 10, 2009, Beard filed his Brief In Support Of Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order. On July 10, 2009, Respondent, Citizens Gas & Coke Utility (now "Citizens Energy Group") ("Citizens"), filed Respondent's Brief In Response To Complainant's Objections To Administrative Law Judge's Proposed Findings Of Fact, Conclusions Of Law, And Order.

David C. Carter, Vice-Chairperson, presided over oral argument on Beard's Objections on July 24, 2009. Other Commissioners present were Barry Baynard and Charles D. Gidney. Commissioners absent were Alpha Blackburn (the Chairperson) Tehiji G. Crenshaw, John E. Garcia and Steven A. Ramos. Beard was present and was represented by counsel, Frederick S. Bremer, Esq., Staff Attorney with the ICRC. Citizens was represented by counsel, Wayne O. Adams III, Esq. of the Indianapolis firm

of ICE MILLER LLP and Ryan A. Cook, Esq., Counsel at Citizens. Arguments of counsel were heard, questions were asked by members of the ICRC, and the cause was taken under advisement. Copies of the transcript of the oral argument were mailed to the Commissioners who had not attended the oral argument.

Having carefully considered the foregoing and being duly advised in the premises, the ICRC finds and rules as follows.

1. Beard's Objections set out 6 objections to the ICRC's adoption of the proposed decision.

2. Beard's Objections 1 and 2 object to Conclusion Of Law 17 in the proposed decision arguing that the correct standard under the Indiana Civil Rights Law, IC 22-9-1 *et. seq.* ("the ICRL"), for rebutting a *prima facie* case of employment discrimination because of religious practices is that the employer must prove that an accommodation at issue would result in the employee and/or fellow employees not performing all assigned duties or some other equivalently serious circumstance. This argument is unpersuasive.

A. Beard has cited no case, statute, regulation, or other authority in which the standard he asserts has been utilized.

B. Conclusion Of Law 17 does not purport to state the standard for rebutting a *prima facie* case; it merely concludes that a *prima facie* case can be rebutted by an employer showing that it could not provide a reasonable accommodation without undue hardship or that it offered a reasonable accommodation that was not accepted by the employee. Both of these showings are, logically, ones that demonstrate that the adverse action was not one that occurred because of any opposition by the employer to the religious practice.

3. Beard's Objection 3 objects to Conclusion Of Law 18 claiming that the proposed decision "... erroneously declines to subject the complaint to a mixed motives analysis despite the fact that there is evidence that [Citizens] terminated [Beard] on his refusal to agree to the terms of a performance improvement conditioning his continued employment on both religiously nondiscriminatory requirements and a religiously discriminatory requirement reasonably inferred from other evidence that he not speak about his faith or faith experiences in the hearing of any person thought to be unsympathetic to what he

was saying.” Objections, ¶3, (unnumbered) pp. 2 and 3. This Objection is neither sufficient nor persuasive.

A. The Conclusion at issue does **not** decline to subject Beard’s claim to mixed motives analysis; instead, it concludes that the evidence cited is not evidence that unlawful religious discrimination was any part of the reason for the adverse action.

B. Beard has conceded that mixed motives is an applicable theory only if undue hardship is not an applicable rebuttal. Since we have concluded that undue hardship is an appropriate rebuttal, the mixed motives theory, by Beard’s own argument, does not apply.

4. Beard’s Objection 4 objects to Conclusions Of Law 19, 20 and 21 as “inconsistent with genuine issues of material fact raised by (Beard) in evidence ... supportive of a reasonable inference that [Citizens] unlawfully conditioned Beard’s continued employment on his agreement to not talk about his faith or his faith experiences in the hearing of any other person at work unless that other person was thought by [Beard] to be sympathetic therewith”. Objections, ¶4, (unnumbered) p. 3. This Objection is not persuasive.

A. The inference of which Beard speaks, if one leaves out the adverb “unlawfully”, is another way to describe a reasonable accommodation offered by Citizens in seeking to allow Beard to engage in religious practices and to provide to other employees a workplace free of harassment because of religion.

B. While Beard is certainly earnest in his belief that it is inappropriate to agree to limit the places in which he will discuss matters of faith, what the ICRL entitles him to is a reasonable accommodation of his religious practices, not the accommodation he desires.

5. Beard’s Objection 5 objects to Finding Of Fact 37 contending that Finding 37 erroneously provides that Beard was not similarly situated to fellow employee Colette Bonds (“Bonds”). This Objection is unpersuasive.

A. Finding 37 relies on the fact that Bonds acknowledged responsibility for her actions and pledged to conform to Citizens’ expectations while Beard did not. Beard does not even claim that there is any issue as to those facts and those facts

do show that Bonds is not similarly situated to Beard.

B. It is entirely possible that Bonds' warning is not even admissible because it occurred 15 months after the termination of Beard. See *Cullen v. Olin Corp.*, 195 F.3d 317 (7th Cir. 1999).

6. Beard's Objection 6 contends that Conclusion Of Law 11 "to some extent erroneously adopts", Objections, ¶6, (unnumbered) p. 3, a standard accepted by the Alaska Supreme Court. The proposed decision looked at two states with statutes that, like the ICRL, prohibited discrimination because of religion and had not been amended since the 1972 amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII"), to expressly state anything similar to 42 U.S.C. §2000e(j) defining religion to include "... all aspects of religious observance and practice as well as belief unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business." Conclusion Of Law 10 noted that Michigan held that its statute should be interpreted like Title VII had been interpreted before that amendment, that is, that the statute only prohibited discrimination because of religious belief. *Ureche v. Home Depot U.S.A., Inc.*, 2006 WL 3825070 (E.D. Mich., 2006). Conclusion 11 noted that Alaska, on the other hand concluded that its state law precluding discrimination because of religion requires an employer to reasonably accommodate to the religious practice or observance of an employee or prospective employee unless doing so would create an undue hardship on the conduct of the employer's business, even in the absence of statutory language like 42 U.S.C. §2000e(j). *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860, 20 FEP Cases 509 (1978). Conclusion 11, correctly, concluded that Alaska's was the better view.

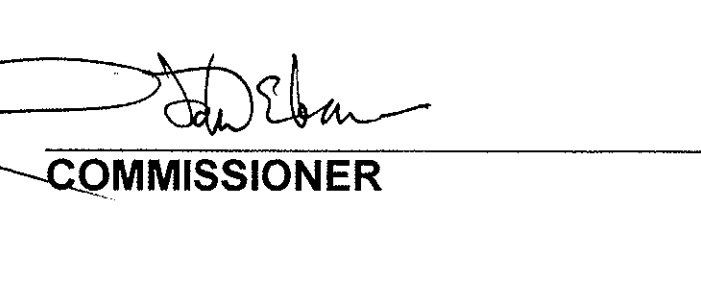
IT IS, THEREFORE, ORDERED

1. Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order are **OVERRULED**.

2. The ICRC hereby adopts as its own the findings of fact, conclusions of law and order proposed by the ALJ in the proposed decision, a copy of which is attached hereto and incorporated herein by reference.

INDIANA CIVIL RIGHTS COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER


COMMISSIONER

Dated: 28 August 2009

To be served by first class mail on the following parties and attorneys of record:

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STATE OF INDIANA
CIVIL RIGHTS COMMISSION

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Indiana State Civil Rights Commission

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

On January 8, 2009, Respondent, Citizens Gas & Coke Utility ("Citizens"), filed its Motion For Summary Judgment With Respect To All Claims Of Complainant, Respondent's Brief In Support Of Motion For Summary Judgment With Respect To All Claims Of Complainant, and Respondent's Appendix To Brief In Support Of Motion For Summary Judgment. On February 6, 2009, Complainant, Ethen E. Beard ("Beard"), filed Complainant's Response To Respondent's Motion For Summary Judgment and Complainant's Designation Of Materials Supporting Complainant's Response To Respondent's Motion For Summary Judgment. On February 16, 2009, Citizens filed Respondent's Reply Brief In Support Of Its Motion For Summary Judgment. On February 20, 2009, Beard filed Complainant's Sur-Reply To Respondent's Reply Brief In Support Of Its Motion For Summary Judgment.

A hearing was held on the motion on February 25, 2009 before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"). Citizens was represented by counsel, Wayne O. Adams III, Esq. of the Indianapolis firm of ICE MILLER LLP and Ryan A. Cook, Esq., Counsel at Citizens. Beard was

represented by counsel, Frederick S. Bremer, Esq., Staff Attorney with the ICRC. Beard arrived after the hearing had begun and stayed until it was over. The parties elected not to present any evidence at the hearing and, after arguments of counsel were heard, the matter was taken under advisement.

On February 25, 2009, Citizens filed its Motion For Leave To File Corrected Appendix To Brief In Support Of Motion For Summary Judgment And Supplement Omitted Pages From Appendix A, Exhibit 2. On March 10, 2009, the ALJ entered his Order Granting Leave To File Corrected Appendix.

Having carefully considered the foregoing and being duly advised in the premises, the ALJ proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Beard's complaint alleges that he was terminated by Citizens on May 26, 2006 when he refused to sign a Performance Improvement Plan ("PIP") because it included provisions limiting where and when he could discuss religion in the workplace.
COMPLAINT OF DISCRIMINATION (June 19, 2006).
2. Beard is an adult male who has resided, at all material times, in the state of Indiana. He identifies himself as a Christian and is a member of a Full Gospel nondenominational church that teaches spiritual gifts like faith, healing, miracles, encouragement, exaltation, laying on of hands and casting out of demons. Beard testified that in every conversation in which he engaged with fellow employees, he managed to say something about God. He saw himself as a messenger to spread truth and light.
3. Beard commenced employment at Citizens on October 30, 2000 as a part-time Customer Service Representative ("CSR"). During the course of the interview, Beard was not asked what his religion was. He was permitted to keep a Bible at his desk.
4. Beard moved to full time on April 30, 2001. On August 23, 2004, he became a Client Eligibility Services Tier 1 Associate, the last position he held with Citizens.

5. In mid-March of 2006, Amy Danbury ("Danbury"), a CSR, placed an anonymous complaint in Customer Relations' suggestion box. When a couple of days passed with no action, Danbury approached Dennis Claffey ("Claffey"), Manager of Customer Relations. Danbury complained that co-workers Beard, Collette Bonds ("Bonds"), Deborah Warren ("Warren"), Karsha Russell ("Russell"), and Cynthia Halliburton ("Halliburton") were engaging in what she described as constant religious conversations in the Call Center that were making her feel frustrated, distracted, anxious, and uncomfortable.

6. Management in Customer Relations discussed among themselves how best to respond to Danbury's complaint. Others involved were Greg Sawyers ("Sawyers"), Director of Customer Services, Rhonda Harper ("Harper"), a Supervisor in Customer Relations and Beard's immediate supervisor, Kim Hackett, Director of Human Resources, and Craig Miles ("Miles"), a Manager in Human Resources.

7. It was decided to take an informal approach, not a disciplinary one. As a result, Harper met with Beard, Bonds, and Warren on March 31, 2006¹. Harper advised them about the complaint and the effect that they were having on a co-worker and asked them to be more circumspect about their conversations and where they were holding them. Harper advised Beard, Bonds, and Warren that, based on Citizens' harassment policy, the issue needed to be addressed. She asked that they refrain from discussing religion when others are privy to the conversation and may find it uncomfortable. Harper did advise the employees if they were alone and are aware that those they are with have the same views they may discuss it; however to be careful not to discuss it in the presence of those that may not share the same views. The employees agreed to refrain from discussing their religious experiences and beliefs around others at work. Deposition of Rhonda Harper, Plaintiff's Exhibit 1. Beard characterizes this as being told he could not discuss religion unless everyone who could hear him agreed with him, a standard that is so stringent as to be tantamount to a prohibition of religious discussion. Citizens argues that the phrase "be careful" is equivocal; however, that is an inference and inferences

¹. Harper had a similar meeting and discussion with Russell and Halliburton on April 21, 2006.

must be drawn in favor of the non-movant, Beard. This creates an issue of fact as to whether Citizens had told Beard not to discuss religion unless everyone who could hear him agreed with him. In light of Beard's response to Citizens' attempts to accommodate his religious practices, this issue is not material

8. Danbury reported by voice mail on April 1, 2006 that Beard, Warren, and Halliburton were "pretty much holding the service right behind me". On April 6, 2006, Danbury told Harper that the situation had improved and she hadn't had any additional problems since April 1.

9. On April 24, 2006, in response to more complaints from employees besides Danbury, Harper again met with Beard, Warren, and Halliburton, separately. Again, this was not a disciplinary meeting. Harper asked that Beard only discuss issues of religious or spiritual content with individuals who shared his beliefs. Harper told Beard, Warren, and Halliburton that it was permissible to discuss religion in the Customer Relations break room, but they needed to be careful who might overhear the conversations and to be sensitive to the possibility that a co-worker might find the conversations to be offensive.. Harper reminded Beard, Warren, and Halliburton about the outdoor employee benches and the vending/break area in the basement that could be used for religious discussion so long as they were careful about other employees who were present and did not want to hear such conversation. Harper also advised them that they could request to reserve a room in which they could hold religious conversations.

10. Beard told Harper that he could see how some people didn't want to hear certain things, but he claimed not to know who those people were or how he would know who believed as he did. He agreed with Harper's statement that "we must be respectful of everyone's feelings".

11. Citizens still continued to receive complaints about religious expressions. On April 29, 2006, Vicki Hughes ("Hughes"), a Customer Relations Supervisor, sent an e-mail to the Customer Relations supervisory e-mail group informing them of a complaint reported by two CSRs, Kym Al-Ismael and Erin Whitley informing her that Beard and Warren were calling themselves prophets and that they "manipulate the break room with religious talk during their breaks and lunches", reporting that the break room was no longer fun and

that employees were avoiding the break room. They reported an incident in which Beard responded to a co-worker's comment about storm damage to his home by stating that that his home had been spared because it was on sacred ground. This e-mail identified three other employees – Stephanie Faulk (“Faulk”), Roger Brown (“Brown”), and Julia Orozco (“Orozco”)- who had voiced complaints.

12. Claffey decided that the informal approach to dealing with the prior complaints was not working and that it was time for a new, more formal, approach.

13. On May 1, 2006, Harper met with Faulk and Brown. Faulk told Harper about two incidents where Faulk perceived that Beard was criticizing co-workers, including Faulk and Halliburton, on religious grounds. Brown said that he had made no complaints, but that conversations had occurred that “did make him feel bad and uncomfortable” and that certain things that Beard and Warren had said to him had “disturbed him”.

14. On May 8, 2006, Hughes received yet another complaint, this time from CSR Arlean Johnson (“Johnson”). Johnson informed Hughes that she had issues with conversations that she was overhearing or that Beard was having with her and that the religious conversations going on around her were bothering her.

15. Harper then met with Johnson. Johnson told Harper of a conversation Beard had with her and Brown in which Beard advised Brown that Brown's daughter did not need the liver transplant her doctor had recommended and that Brown needed to have faith because God was going to heal her.

16. In mid-May of 2006, Johnson arranged a meeting with Claffey. In this meeting, Johnson complained about Beard subjecting her to conversations of a religious nature that were making her stressed about coming to work, that made her feel bad, and were even making her physically ill.

17. After receiving this complaint from Johnson, Claffey informed Sawyers and Miles about this development, advising them that the informal approach they had been using was not working and some other action needed to be taken.

18. Also in May of 2006, Beard had a conversation with Hughes about a meeting request that had been e-mailed to him. Beard said he believed that the meeting would be an attempt to forbid him and other Citizens' employees from talking about God. In this

conversation, Hughes asked Beard if it would be a good idea if a quiet room were available for believers to use for conversations, adding that she knew others had done this. Beard responded that he did not think this would be a good idea, stating that he felt it was not "right to be limited to a particular area and time" to speak about God.

19. On May 19, 2006, Harper and Miles met with Bonds, who was a Team Leader among the CSRs. Bonds was informed about the ongoing complaints of a hostile work environment being caused by excessive and inappropriate religious conversations. Bonds was reminded of her lead position and asked to set a good example. Bonds received the discussion as Miles and Harper had hoped, and agreed to be more circumspect with her workplace discussions, to pay attention to the nature of her co-worker's discussions, and to not do anything to instigate others to engage in religious discussions.

20. On May 23, 2006, Harper and Miles held individual meetings with Beard, Warren, Halliburton, and Russell. Harper and Miles advised Beard that they had received additional complaints and again reminded him of the need to respect others' views and asked that he limit the conversations he was having and that he not have them at his desk or work area. They also advised Beard that other areas in the building could be used for conversations if he would like to use them.

21. Beard was offended at being called into the meeting and told Miles and Harper that he was going to continue with his conversations and he was not going to change anything. He complained for the first time that others said things he did not want to hear, citing topics as sex, drugs, alcohol, vulgar and obscene language, and profanity. Miles requested that he put his complaint in writing.

22. Beard had requested several times to be excused from the meeting and Harper believed that they were not accomplishing what they had hoped to accomplish, so the meeting was terminated.

23. After the meetings on May 23, Harper and Claffey briefed Sawyers on the outcome of the meetings.

24. On May 24, 2006, a petition was circulated by Beard for Citizens' employees to sign. Nobody from Citizens' management read the petition at the time. The petition

purported to be on behalf of employees who “have spoken of their personal spirituality (using the name of Jesus Christ or “God”)” and who “would feel [Citizens] would become a more hostile and stressful environment if their spiritual and civil rights to freedom of speech were violated, oppressed and bound in any way by the leaders at [Citizens]”. Although Beard apparently intended the petition to be the complaint he told Miles and Harper he’d be filing, there was no reference to people talking about drugs, sex, alcohol, or using vulgar or obscene language.

25. The circulation of Beard’s petition caused some disruption in the workplace, with some employees reporting some pressure to sign. Sawyers made some efforts to get the petition, but he was unsuccessful.

26. Later on May 24, Sawyers and Miles had yet another meeting with Beard. Sawyers told Beard that the petition was making some people uncomfortable and that rumors and discussion about the petition were disruptive. Beard claimed that he’d started the petition because Miles had told him to do so in their meeting the previous day, which was not what Miles had told him. Beard added that he would not betray Jesus for \$39,000 per year. Sawyers reminded Beard that in order to work for Citizens, he had to abide by company policy and that the Utility would not allow an employee to continue engaging in behavior that offends other employees. Beard refused to tell Sawyers the contents of the petition. At the close of the meeting, Sawyers asked Beard to go home for the remainder of that day and the next day so he could consider whether he wanted to continue working at Citizens and so that Citizens could conduct additional investigation. Sawyers made this decision because Beard’s comments during the meetings on May 23 and 24 and his actions in distributing the petition made it clear to Sawyers that Beard was refusing to comply with what management had asked of him. Sawyers expressed the hope that Beard would want to continue working for Citizens and told him that if he did, then “when you come back, we’ll have a discussion on where we need to go from there”.

27. On May 25, 2006, Harper met with Johnson and Orozco, separately. In both cases, Harper heard new complaints about Beard’s religious communications.

28. On May 26, 2006, Sawyers and Harper met with Beard to discuss his desire to continue working for Citizens and to present him with a PIP. The first section of the PIP

referred to events and meetings leading up to it, including some descriptions of the complaints and statements made by Beard's co-workers. At the end of the PIP were management's corrective action requirements for Beard to remain employed at Citizens, including that he must not engage in any harassing behavior and must adhere to Work Rules that require him to be at his work station during assigned times and to perform work as assigned.

29. When Harper went through the PIP, Beard disagreed with nearly every statement in it. The word "outspoken" was changed to "emotional" because Beard claimed he was emotional but not outspoken.

30. There is an issue of fact concerning discussion in the May 26 meeting of saying "God bless you".

A. Beard testified that, during this meeting, he was told that he could not say "God bless you" when someone sneezes.

B. Citizens' position is that Beard objected to one point in the PIP by saying that he would not be able to say "God bless you" when somebody walks past. Sawyers interrupted and told Beard "no, Ethen; that is not what we mean".

Sawyers told Beard that it wasn't the content of the discussions but the manner or way he was talking to people, i.e. that people were intimidated or made to feel bad by his comments.

C. While it might seem unlikely that Sawyers or Harper would, of their own accord, say that Beard could not say "God bless you" if someone sneezed, this goes to credibility, an issue not to be addressed at summary judgment.

D. Notwithstanding the foregoing, this issue is not material in light of Beard's response to Citizens' efforts to accommodate his religious practices.

31. Four or five times during the May 26 meeting, Sawyers repeated that the problem was not the content of his speech but the manner or delivery that is perceived by co-workers to be condescending, commanding, threatening, intimidating, hurtful, and/or coercive.

32. As the meeting went on, Beard was abrupt and defiant and somewhat argumentative. When asked if he would sign the PIP, Beard refused, and said, among

other things, that he would speak as God instructed him, that he would not become a Judas on Jesus for the small wages he was being paid, that he would not be silenced, that he would not be made a prisoner at his desk, and that he would not change any of his behavior.

33. Both Sawyers and Harper appealed to Beard to sign the PIP, asking him to consider his family responsibilities, but Beard continued to refuse. Sawyers then told Beard that he left them little or no option but to terminate his employment. Beard told them they had to do what they had to do and Beard was terminated.

34. Beard has testified that the PIP in the record is not a true copy of the PIP he was given. Yet he has not produced another version and could not point out where the PIP in the record differed from the one he claims was given to him.

35. Citizens attempted to make reasonable accommodations to Beard's religious practices. All of its suggestions, noting places where religious conversations could be held privately, were rejected by Beard and he made no suggestions of his own.

36. It would have been an undue hardship to Citizens to allow Beard to engage in ~~religious discussions without any limitation since this would be to permit unwelcome~~ conduct of a religious nature sufficiently pervasive to alter the working conditions of at least some of Beard's co-workers. This would not only be a disruption of Citizens' business, but also would subject Citizens to liability for unlawful religious discrimination against those co-workers.

37. In August of 2007, Bonds was issued a written warning, a less severe step in Citizens' disciplinary scheme than a PIP. This warning was for comments made by Bonds, in discussing work-related matters that employees reported made them feel stupid, like children, and that they were hesitant and at times avoided speaking to Bonds. To whatever extent an event occurring some 15 months after Beard's termination can shed any light on the reason for that termination, it would have to include that Beard and Bonds are similarly situated. While Bonds and Beard both had a couple of verbal coachings before being disciplined, Bonds acknowledged responsibility for her behavior and pledged to conform to Citizens' expectations while Beard did no such thing. This

makes it impossible to infer that the difference in the severity of their discipline was the result of the difference in the substance of their comments.

38. Any Conclusion Of Law that should have been deemed a Finding Of Fact is hereby adopted as such,

CONCLUSIONS OF LAW

1. The ICRC has jurisdiction over the subject matter and the parties.
2. Beard and Citizens are each a "person" as that term is defined in section 3(a) of the Indiana Civil Rights Law, IC 22-9-1-1 *et. seq.* ("the ICRL"). IC 22-9-1-3(a).
3. Summary judgment is authorized in proceedings before the ICRC by section 23 of the Administrative Orders And Procedures Act, ("the AOPA"), IC 4-21.5-3-23. Because the substance of section 23 of the AOPA is nearly identical to the substantive portions of Ind. Trial Rule 56 ("T.R. ___"), cases decided under the substantive provisions of T.R. 56 are persuasive in the interpretation of section 23.
4. Summary judgment may be granted if the designated evidence establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. IC 4-21.5-3-23(b), *Madison County Bank & Trust Company v. Kreegar*, 514 N.E.2d 279 (Ind. 1987). No weighing of the evidence is to be involved, *Mogan v. Southern Indiana Bank and Trust Company*, 473 N.E.2d 158 (Ind. App. 1985), and all doubts must be resolved against the moving party. *Jones v. City of Logansport*, 436 N.E.2d 1138 (Ind. App. 1982).
5. Section 6(k) of the ICRL authorizes the ICRC to award relief if it finds an unlawful discriminatory practice.
6. Section 3(l) of the ICRL provides, in material part, as follows:
 - (l) "Discriminatory practice" means:
 - (1) the exclusion of a person from equal opportunities because of ... religion ...

...

Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter.
IC 22-9-1-3(l).

7. Generally, cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* ("Title VII") are entitled to great weight in the interpretation of the ICRL. *Indiana Civil Rights Commission v. Culver Educational Foundation*, 535 N.E.2d 112 (Ind. 1989).

8. The ICRL does not define the term "religion", unlike Title VII, which defines the term as follows:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.
42 U.S.C. §2000e(j).

9. That definition was enacted in 1972 in reaction to court decisions that had held that Title VII prohibited discrimination based on religious belief but not discrimination based on religious practice or observance. See *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971).

10. There is some logic to the proposition that states, like Indiana, that have not amended their civil rights law to add something akin to the definition quoted above intend that their civil rights law to be interpreted in the way Title VII was interpreted before the 1972 amendment. Michigan's statute has been interpreted in that way. *Ureche v. Home Depot U.S.A., Inc.*, 2006 WL 3825070 (E.D. Mich., 2006).

11. Alaska has held that its state law precluding discrimination because of religion requires an employer to reasonably accommodate to the religious practice or observance of an employee or prospective employee unless doing so would create an undue hardship on the conduct of the employer's business, even in the absence of statutory language like 42 U.S.C. §2000e(j). *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860, 20 FEP Cases 509 (1978). This is the better view.

12. Beard has argued that he is entitled to absolute protection for his religious practices without regard to whether that causes undue hardship. That is an untenable position, since it would mean that, among other more extreme examples, that an employer has no real right to require an employee to spend a certain amount of time

doing what s/he was hired to do. This would be an unjust and absurd result, a result that principles of statutory construction instruct is to be avoided. *Cooper Industries, LLC v. City of South Bend*, 2009 WL 146537 (Ind. 2009), *City of Carmel v. Steele*, 865 N.E.2d 612 (Ind. 2007).

13. To establish a prima facie case of religious discrimination based upon his religious beliefs, Beard must show: (1) he was subjected to an adverse employment action; (2) his job performance was satisfactory at the time the adverse action was taken; and (3) some additional evidence that the employment actions were taken because of a discriminatory motive based on Beard's failure to hold or follow his superiors' religious beliefs. *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1998).

14. Beard has not produced evidence that meets the third element of the prima facie case.

15. Even if Beard had produced evidence of all elements of a prima facie case of discrimination against him because of his religious beliefs, Citizens has produced evidence that its adverse actions were taken for a legitimate business reason – compliance with its duty to provide a workplace for Beard's coworkers free from religious harassment – and Beard has not produced evidence that that reason is dishonest or otherwise a pretext for discrimination against Beard because of his religious beliefs.

16. To establish a prima facie case of religious discrimination based upon his religious practices or observances, Beard must show: (1) a bona fide religious practice conflicts with an employment requirement; (2) he brought the practice to the employer's attention; and (3) the practice was the basis for the adverse employment action. *EEOC v. United Parcel Service*, 94 F.3d 314 (7th Cir. 1996).

17. An employer succeeds in rebutting such a prima facie case by proving either that it could not provide a reasonable accommodation without undue hardship or that it offered a reasonable accommodation that was not accepted by the employee. *United Parcel Service, supra*. In this case, Citizens has shown both.

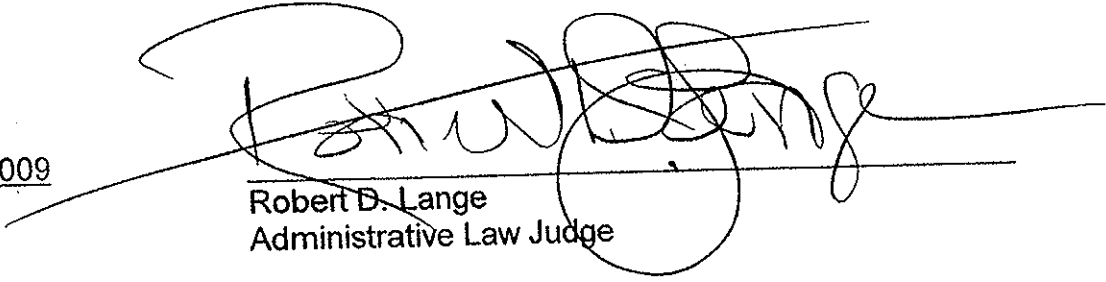
18. The mixed motives analysis for which Beard argues does not apply because the evidence that he cites – the PIP – is not evidence that unlawful religious discrimination was any part of the reason for the adverse action.

19. There is no genuine issue of material fact.
20. Citizens is entitled to a favorable adjudication as a matter of law.
21. Citizens did not commit an unlawful discriminatory practice against Beard.
22. If the ICRC finds that a person has not committed an unlawful discriminatory practice, it must dismiss the complaint as against that person. IC 22-9-1-3(m).
23. Administrative review of this proposed decision may be obtained by the filing of a writing identifying with reasonable particularity each basis of each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).
24. Any Finding Of Fact that should have been deemed a Conclusion Of Law is hereby adopted as such.

ORDER

1. Citizens' Motion For Summary Judgment With Respect To All Claims Of Complainant is **GRANTED**.
2. Beard's complaint is **DISMISSED**, with prejudice.

Dated: 14 April 2009



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 14th day of April, 2009 on the following parties and attorneys of record:

Ethen E. Beard
3662 Dayflower Way
Indianapolis, IN 46235

Citizens Gas & Coke Utility
c/o Ryan A. Cook, Esq.; Counsel
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Indianapolis, IN 46202

ICE MILLER LLP
BY: Wayne O. Adams III, Esq.
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and to be personally served this 14th day of April, 2009 on the following:

Frederick S. Bremer, Esq.; Staff Attorney
Indiana Civil Rights Commission
Attorney for Complainant Ethen E. Beard
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Indiana Civil Rights Commission
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