BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

DAVID WEINSTOCK,	)
Petitioner,	)
	) SEAC NO. 03-13-018
vs.	)
	)
INDIANA DEPARTMENT OF	)
TRANSPORTATION	)
Respondent.	)

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

On August 28-29, 2013, Respondent Indiana Department of Transportation ("INDOT"), by counsel, moved to dismiss and subsequently moved for summary judgment. Petitioner David Weinstock, pro se, timely responded on October 9, 2013. Respondent INDOT replied on October 15, 2013, with Petitioner filing a sur-reply on October 21, 2013. This unclassified case considers, under the Indiana Civil Service System (Ind. Code §§ 4-15-2.2), Petitioner Weinstock's termination of employment from Respondent INDOT on December 10, 2012. Petitioner's Amended Complaint is the operative pleading.

I. Summary of Order

Petitioner Weinstock is a former unclassified, at-will employee who alleges that his termination by Respondent INDOT arose in retaliation for complaining to INDOT supervisors about unsafe working conditions. This is a claim for retaliatory discharge that displaces the common law and must be viewed under the precise terms of Indiana's whistle blowing law applicable to state employees (I.C. 4-15-10-4, the "WBL"), as discussed in detail below. Petitioner's Response shows genuine question(s) of material fact on this question, which must be resolved at an evidentiary hearing. Respondent's Motion for Summary Judgment is denied on this part. That said, this case is not a general inquiry into Respondent's overall safety practices[1] as Petitioner's briefing seeks. Petitioner must show by a preponderance of the evidence at trial

[1] SEAC decides specific state employment cases. SEAC is not a safety regulator. The ALJ declines to intrude into the province of the Indiana Department of Labor.

that his specific employment was terminated in whistle blowing retaliation for his prior written complaints of workplace safety to supervisors.

Petitioner's Amended Complaint makes many additional claims labeled as bullying, favoritism in overtime assignments, undefined harassment or retaliation, age discrimination and possibly national origin discrimination. Respondent INDOT shows it is entitled to summary judgment against this entire set of additional claims. Therefore, INDOT's Motion for Summary Judgment is granted against these claims.

Lastly, Respondent INDOT's Motion to Dismiss is denied because the Administrative Law Judge ("ALJ") chooses to exercise his discretion under I.C. 4-21.5-3-24(a)(3) and declines to dismiss this cause for Petitioner's failure to follow a procedural order related to structured settlement negotiations as explained in Section II. Dismissal is too heavy a sanction in this applied circumstance.

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

Dismissal proceedings before the State Employees' Appeals Commission ("SEAC") are governed by the Administrative Orders and Procedures Act ("AOPA"). Respondent INDOT moves to dismiss this case for Petitioner's failure to submit a settlement demand within thirty (30) days of the effective date of the May 29, 2013 Case Management Order ("CMO"). Respondent cites to I.C. 4-21.3-24(a)(3) as support. I.C. 4-21.3-24(a)(3) states that "if a party fails to: (3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action; the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order." This is discretionary by the ALJ as applied here.

In exercising this discretion, weight is to be given to the judicial preference in Indiana that a case should be decided on its merits when the party's failure to act is comparatively minor. See *Howell v. State*, 684 N.E.2d 576 (Ind. App. 1997). All facts pled in the non-moving party's complaint, and reasonable inferences therefrom, are taken as true. *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007)

Respondent is correct that Petitioner has not complied with the CMO. The parties attended a prehearing conference on May 28, 2013. At this conference, the parties indicated that they were willing to engage in informal settlement discussions. The ALJ issued a CMO on May 29, 2013, in which deadlines were set out for concluding settlement discussions. Belatedly, Petitioner now offers to discuss settlement in the Response. However, while administrative forums (and courts) may order parties to *discuss* settlement, they cannot force parties *to settle*. The parties are actively litigating and do appear not to want to settle. The parties can settle anytime before trial if they wish.

In this case, Petitioner Weinstock's failure to tender a settlement demand is not sufficient to justify dismissal. The fact that Respondent INDOT must go forward with briefing or hearing on the WBL issue is not unduly prejudicial. Litigation is the default path to determine the parties' rights in contention. Given the judicial guidance of *Howell v. State* and the discretion granted in I.C. 4-21.5-3-24, the ALJ declines to dismiss this case. The remainder of this Order addresses the Respondent's Motion for Summary Judgment.

III. 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).

IV. Employment At-Will Doctrine

Petitioner Weinstock is a former, unclassified state employee for Respondent INDOT. 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); *McClanahan v. Remington Freight Lines*, 498 N.E.2d 1336, 1339 (Ind.App. 1986).

The Civil Service System's statutes mirror this caselaw. A termination or lesser discipline of an unclassified, at-will state employee is wrongful if it violates public policy. I.C. 4-15-2.2-42(f). Otherwise, an unclassified state employee may be "dismissed, demoted, disciplined or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b). One statute a state agency may not violate in effecting a discharge is the WBL, discussed next.

V. WBL Retaliation

The General Assembly has passed a specific statute, the WBL, that displaces a more general common law inquiry about what happens when a petitioner-employer complains in a prior writing to a state supervisor(s) about alleged breaches of law, which then allegedly leads to a retaliatory discharge. *Ogden v. Robertson*, 962 N.E.2d 134 (Ind. App. 2012)(a WBL claim must go through the SEAC administrative process and is under the WBL statute, not the common law.) I.C. 4-15-10-1, 4 et seq.[2] The WBL states in pertinent part:

> Sec. 4. (a) Any employee may report in writing the existence of:
> (1) a violation of a federal law or regulation;
> (2) a violation of a state law or rule;
> (3) a violation of an ordinance of a political subdivision (as defined in IC 36-1-2-13); or
> (4) the misuse of public resources;
> to a supervisor or to the inspector general.
>
> (b) For having made a report under subsection (a), the employee making the report may not:
> (1) be dismissed from employment;
> (2) have salary increases or employment related benefits withheld;
> (3) be transferred or reassigned;
> (4) be denied a promotion the employee otherwise would have received; or
> (5) be demoted.
>
> (c) Notwithstanding subsections (a) and (b), an employee must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary actions for knowingly furnishing false information… [truncated] However, any state employee disciplined under this subsection is entitled to process an appeal of the disciplinary action under the procedure as set forth in IC 4-15-2.2-42.
> (d) [truncated]

[2] The WBL is part of the State Employees' Bill of Rights, I.C. 4-15-10. Section 5 further indicates state employees shall not 'suffer penalties' for rights under the chapter.

VI. Age Discrimination

Another issue in this case is whether Petitioner Weinstock's termination violated public policy based on age discrimination. Age discrimination violates Indiana and federal public policy, and applicable federal law[3], specifically the Age Discrimination in Employment Act (the "ADEA"). However, an unclassified petitioner is limited by sovereign immunity to equitable relief before SEAC for age discrimination in a Civil Service Case. See *Montgomery v. Bd. of Trustees of Purdue Univ.*, 849 N.E.2d 1120 (Ind. 2006); *Ind. Dep't. of Envtl. Management v. West*, 838 N.E.2d 408 (Ind. 2005); *Non-Final and Final Orders in Eugene Young v. CSBC*, SEAC No. 07-12-077. In relevant part, the ADEA makes it unlawful for an agency-employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

To determine if a *prima facie* case has been pled for age discrimination under the ADEA, SEAC uses the familiar modified *McDonnell Douglas*[4] test. *Bennington v. Caterpillar, Inc.*, 275 F.3d 654, 659 (7th Cir. 2001); see also *IDEM v. West*, supra. The petitioner holds the initial burden to establish a *prima facie* case of age discrimination under the ADEA. To satisfy the initial burden and survive dismissal proceedings, the petitioner must allege sufficient facts to show that he was: (1) in a protected class; (2) performing his job satisfactorily; (3) the subject of an employment action that was materially adverse; and (4) that other substantially younger and similarly situated employees were treated more favorably than the Petitioner. *Bennington v. Caterpillar, Inc.*, 275 F.3d at 659.

However, unlike other civil rights cases under Title VII, the United States Supreme Court has held that "mixed motive" causation is never appropriate in a suit brought under the ADEA, concluding that "the ADEA required plaintiffs to prove by a preponderance of the evidence that age was the but-for cause of the challenged adverse employment action." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

VII. National Origin Discrimination

Yet another issue in this case is whether Petitioner Weinstock's termination violated public policy based on national origin discrimination. Petitioner Weinstock verbally raised the issue that he was discriminated against on the basis of his national origin at the prehearing conference. Petitioner's written contentions about "bullying" in the original and Amended Complaint may be references to this topic.

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[3] The Indiana Age Discrimination Act, I.C. 22-9-2-2, states that age discrimination violates public policy, but does not directly apply to state employees because the ADEA applies. See citations main body.

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

Allegations of discrimination based on national origin are resolved under Title VII[5]. The Title VII discrimination 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). Direct evidence "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus." *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003). See also, *Morgan v. SVT, LLC*, 2013 U.S. App. LEXIS 16045 (7th Cir. 2013). Absent the rare case where direct evidence of discrimination is available on the record, the petitioner-employee must offer indirect evidence that: (1) he is a member of a protected class; (2) his job performance met the respondent-agency'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-employee. See *Pantoja.*

Second, if the petitioner-employee establishes a *prima facie* case of discrimination, the burden shifts to the respondent-agency to show a legitimate, nondiscriminatory reason for the adverse employment action(s). *Id*. Third, once the respondent-agency shows such reason, the burden shifts back to the petitioner-employee to "present evidence that the stated reason is a 'pretext,' which in turn permits an inference of unlawful discrimination." *Id.*

VIII. Findings of Fact as to Summary Judgment Motion

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

1. Petitioner Weinstock began working for Respondent INDOT on December 3, 2007. His state employment was terminated on December 10, 2012.

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

3. Petitioner Weinstock filed an Amended Complaint on March 22, 2013.

[5] Title VII of the federal Civil Rights Act of 1964, as amended. See also, the Indiana Civil Rights Act (I.C. 22-9), which prohibits national origin employment discrimination under state law.

4. According to Respondent INDOT's designated evidence, Petitioner Weinstock was dishonest about his capacity to lift weight, a required duty, to an interview panel on November 30, 2012.

5. Petitioner Weinstock presented to Respondent INDOT in February 2012 and October 2012 two statements from his doctor that he was medically restricted from lifting more than 25 pounds and 15 pounds, respectively. The doctor's statements were not presented as evidence. There is a question of material fact as to whether the statements restricted the Petitioner from lifting more than 15-25 pounds or whether the restriction was exercisable at the Petitioner's discretion.

6. Petitioner Weinstock also directly told his supervisor on or about October 31, 2012 that he would continue to follow his doctor's recommended medical restriction. (See Respondent's Designated Evidence Exhibit D and E).

7. There is a question of material fact as to whether Respondent INDOT accommodated Petitioner's weight restrictions. Affidavits from INDOT employees indicate that he was not required to lift more than the recommended weight restrictions. (See Respondent's Designated Evidence Exhibit D and E). In response, Petitioner Weinstock presented evidence that INDOT actually or constructively was on notice that Petitioner frequently lifted more than the weight restrictions at the worksites. (Petitioner's Responses to Interrogatories 14 and 31, attached to Petitioner's Response to Motions to Dismiss and Summary Judgment).

8. In the lateral transfer interview with Respondent INDOT on or about November 30, 2012, Petitioner Weinstock stated that he was able to lift 100+ pounds as required by the position for which he applied. (See Respondent's Designated Evidence Exhibit B and C). Petitioner does not dispute this fact.

9. On December 10, 2012, Respondent INDOT terminated Petitioner Weinstock's state employment due to his perceived dishonesty as to whether he was able to lift more than 15-25 pounds in the job he held at that time. (See Respondent's Designated Evidence Exhibit F).

10. However, Petitioner alleges that he was fired in retaliation for complaints that the workplace was unsafe.[6] This is in effect a WBL claim governed by statutory factors. *Ogden v. Robertson*, 962 N.E.2d 134 (Ind. App. 2012). Petitioner Weinstock further

[6] Petitioner does not name the WBL in his Complaint or briefing, but alleges and argues its factual elements. Similarly, Respondent does not name the WBL directly in its briefing, but attempts to prevail on summary judgment against all the Complaint's claims.

alleges age discrimination, unspecified harassment or retaliation, favoritism in overtime assignments, bullying and verbally alleged that he was discriminated against on the basis of national origin. (See Amended Compl. and Response).

11. Petitioner Weinstock presented evidence that he complained about unsafe working conditions prior to discharge. (Petitioner's Responses to Interrogatories 5, 6 and 13, attached to Petitioner's Response). For instance, on or about September 17, 2012, Petitioner Weinstock complained, in writing, of health problems associated with the use of curing compound to INDOT supervisors. (See photographs and email attached to Petitioner's Amended Complaint, filed March 22, 2013).

12. Petitioner's Response provides a plausible factual rebuttal of the Respondent's offered reason for the discharge as applied to the WBL's specific elements. Petitioner has thus raised a question of pretext. In other words, Petitioner has at least shown he might prevail at a hearing based on the weight and/or credibility of witness testimony or exhibits. Petitioner's WBL contentions are sufficient to require an evidentiary hearing on the WBL issue. Causation is factually contested: did Respondent really discharge Petitioner for his prior written whistle blowing or because INDOT genuinely thought Petitioner lied to the interview panel.

13. However, Petitioner Weinstock presents no prima facie evidence other than his bald allegation that he was discriminated against because of his age. He identifies other persons who he contends were subjected to harassment but does not provide sufficient evidence to support a finding that substantially younger persons were similarly situated persons who were disparately treated. Petitioner fails to satisfy the prima facie elements of his age claim.

14. Petitioner Weinstock verbally alleged that he was discriminated against on the basis of his national origin. Petitioner is of Eastern European origin. The Amended Complaint includes a bullying claim, but not an express national origin claim. Petitioner's Response fails to satisfy the prima facie elements of any national origin claim. Again, there is no showing that Respondent considered Petitioner's national origin in the discharge or that co-workers, similarly situated, were treated better.

15. Specific to the age or national origin/bullying claims, Respondent INDOT advanced a legitimate, non-discriminatory reason for the discharge, which Petitioner has not rebutted under the burden shifting analysis. This same reasoning applies to Petitioner's overtime and unspecific 'harassment or retaliation' allegations. Namely, Respondent advances that Petitioner lied to the interview panel about

weight restrictions.[7] Petitioner's Response has only shown a genuine question(s) of material fact as to this reason for purposes of the WBL retaliation claim.

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

1. Indiana follows the at-will employment doctrine. Under this doctrine, "an employee may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b). There are public policy exceptions to the at-will doctrine, including unlawful discrimination. *Meyers* and I.C. 4-15-2.2-42.

2. Petitioner Weinstock has not established a *prima facie* case for age or national origin discrimination in violation of public policy. He does not identify similarly situated co-workers who were treated more favorably than him by INDOT.

3. Further, under the burden shifting review standard for age or national origin discrimination claims, Respondent INDOT presented affirmative evidence that Petitioner Weinstock's employment was terminated for the legitimate, nondiscriminatory reason of dishonesty to an interview panel about his capacity to perform duties required of his job. Petitioner Weinstock failed to present evidence that this was a pretext as applied to the age or national origin claim.

4. This logic applies with equal force towards Petitioner's claims of bullying, overtime favoritism or unspecific claims of harassment or retaliation. These claims are not separately viable and collapse into the Title VII and ADEA inquiries, and they suffer summary judgment. For example, there is no stand alone statutory claim under at-will Indiana employment law for "bullying"[8] outside of the confines of the WBL, or statutes like the federal Title VII or the Indiana Civil Rights Act inquiry for national original discrimination.

5. On the issue of whether the Petitioner Weinstock was terminated in retaliation for his complaints regarding workplace safety, the elements of the WBL under I.C. 4-15-10-4 control. *Ogden v. Robertson*, 962 N.E.2d 134 (Ind. App. 2012). First, Petitioner shows that he

[7] This order must separate out and grant and deny judgment on each of the various claims. While the claims seem related at first blush, the law is clear that each claim is to be viewed separately under the specific governing statute's elements. The prima facie elements under the various statutes differ. Unlike Title VII or Indiana's Civil Rights Act, Indiana's WBL has never yet been held by the Indiana appellate courts to apply federal-style burden shifting under Title VII. After the moving party designates evidence on a WBL claim, a petitioner-employee need only show a genuine question of material fact on the WBL's elements to resist summary judgment. See, *Ogden*, *supra*. Regardless, even using federal-style burden shifting, Petitioner's Response creates a pretext question for purposes of the WBL (only). Conversely, Respondent overcomes the remaining claims under the applicable standards.

[8] By no means does SEAC condone workplace bullying. However, Petitioner's bullying claim may only be viewed at law under the existing statutory structures.

complained in writing to his supervisors about alleged safety violations prior to discharge. Petitioner has also provided evidence that tends to support his allegations that safety regulations were not followed, but he has failed to identify which specific laws or regulations were violated. Again though, this case is not a wide scope inquiry into Respondent's safety practices, but instead a specific employment controversy.

6. Petitioner has put forth sufficient evidence to preclude entry of summary judgment in INDOT's favor on a WBL claim. The Motion and Response show a material, factual debate about the exact nature of the lifting restrictions and how the parties were to apply them, and whether Respondent knew Petitioner was already lifting more than 15-25 pounds on the job prior to the interview and discharge. There is one or more genuine questions of material fact regarding whether Petitioner Weinstock was improperly discharged in retaliation for reporting an alleged violation of law.

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

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

Respondent INDOT's Motion to Dismiss is **DENIED**. Respondent INDOT's Motion for Summary Judgment is **GRANTED** regarding Petitioner Weinstock's claims that he suffered discrimination on the basis of age and/or national origin. Summary judgment is further granted as to Petitioner's claims of bullying, overtime favoritism and any other claims like unspecific harassment or retaliation not concerning the WBL. Respondent INDOT's Motion for Summary Judgment is **DENIED only** on the Petitioner's claim that he was terminated in retaliation for whistle blowing by reporting alleged violations of workplace safety to supervisors. This WBL claim will be resolved at the evidentiary hearing unless the parties provide an earlier joint notice of settlement.

DATED: November 20, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employee's Appeals Commission
IGCN, Room N501
100 Senate Avenue
Indianapolis, IN 46204-2200
(317) 232-3137

araff@seac.in.gov

A copy of the foregoing sent to the following:

David Weinstock
Petitioner
9661 Prairiewood Way
Carmel, IN 46032

Lynn Butcher, Staff Counsel
Indiana Department of Transportation
100 N Senate Ave., Room N730
Indianapolis, IN 46204

Additional copy to:

Joy Grow, SPD