BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

MICHELLE DAVIS Petitioner,	))
	) SEAC No. 11-13-099
vs.	)
	)
INDIANA WOMEN'S PRISON BY INDIANA DEPARTMENT OF CORRECTION Respondent.	))))

NOTICE OF FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER OF ADMINISTRATIVE LAW JUDGE

The attached "Findings of Fact, Conclusions of Law and Non-Final Order of Administrative Law Judge" granting summary judgment to Respondent DOC has been entered as required by I.C. 4-21.5-3. To preserve an objection to the document, either the Petitioner or the Respondent must submit a written objection that:

1. Identifies the basis of the objection with reasonable particularity.
2. Is filed at the following address, with service to the other party, by **July 11, 2014**:

State Employees' Appeals Commission
Indiana Government Center North
100 N. Senate Avenue, Room N501
Indianapolis, IN 46204-2200

Since the Commission has designated the Administrative Law Judge as the "trier of fact" for this cause, objections will not include items of evidence. If evidence is included with the objections it will be struck. The objections may include a brief addressing the applicable law being relied upon by the party.

If objections are filed within the time specified, the State Employees' Appeals Commission (SEAC) will hear the objections at a regularly scheduled meeting. Prior to that meeting any motions filed regarding the objections will be dealt with by the Administrative Law Judge.

During the time specified above any member of the SEAC may express the desire to review any specific issue addressed in the "Findings of Fact and Conclusions of Law" pursuant to I.C. 4-21.5-3-29(e). If such a review is ordered, it will be conducted at a regular scheduled meeting of the SEAC, and each party will be notified.

A party may move to strike any objections believed to be untimely. The Administrative Law Judge shall act upon a motion to strike. If the Administrative Law Judge grants the motion, the attached document will become final absent any desire to review an issue expressed by a member as discussed above. If the Administrative Law Judge denies the motion to strike, the findings and non-final order shall be reviewed by the SEAC as outlined above.

DATED: June 23, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
araff@seac.in.gov

Copy of the foregoing sent to:

Charles White
Petitioner's Counsel
Law Office of Charles White
8117 E. Washington Street, Suite B
Indianapolis, IN 46219

Jon A. Ferguson
Respondent's Staff Counsel
Indiana Department of Correction
302 W. Washington St., Rm W341
Indianapolis, IN 46204

Additional copy to:

Joy Grow (SPD)
IGCS, Room W161
402 W Washington St.
Indianapolis, IN 46204

SEAC Commissioners

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IN THE MATTER OF:

MICHELLE DAVIS Petitioner,	)	
v.	)	SEAC No. 11-13-099
INDIANA WOMEN'S PRISON BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)	

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

On December 18, 2013, Respondent Indiana Women's Prison by Indiana Department of Correction ("IWP-DOC"), by counsel, moved for summary judgment.[1] Petitioner Davis did not timely file a response to the summary judgment motion or timely move to enlarge time to do so within the April 28, 2014 deadline set by the prior Case Management Order.

This case considers, under the Indiana Civil Service System (I.C. 4-15-2.2), whether the Petitioner's termination of employment from Respondent IWP-DOC on August 9, 2013 was contrary to public policy as a violation of the federal Family and Medical Leave Act (FMLA) and Title VII/Pregnancy Act provisions of the Civil Rights Act of 1964, as amended.

Having duly reviewed the timely designated record, the Administrative Law Judge ("ALJ") determines there are no genuine issues of material fact, and Respondent IWP-DOC is entitled to judgment as a matter of law. Respondent IWP-DOC's Motion for Summary Judgment is therefore **GRANTED**. The ALJ enters the following findings of fact, conclusions of law and non-final order.

[1] By agreement of the parties, the ALJ's Initial Case Management Order of January 23, 2014 converted Respondent's Motion to Dismiss to a summary judgment motion. The motion had included a fact affidavit, Exhibit A. See Ind. T.R. 12, 56.

I. The Summary Judgment Standard

Summary judgment proceedings before the State Employees' Appeals Commission (the "Commission" or "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). When the moving party has met this burden, the non-moving party must present evidence which demonstrates a genuine issue of material fact does exist. "[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Ind. Trial Rule 56(E) and *Mesa v. State*, 5 N.E.3d 488, 491 (Ind. Ct. App. 2014).

When a non-moving party fails to timely respond (or to timely request more time to respond) to summary judgment then review is limited to those materials timely designated to the court by the moving party. *Mitchell v. 10th and the Bypass, LLC et al.*, 3 N.E.2d 967, 973 (Ind. 2014); *Delage Landen Financial Services, Inc. v. Community Mental Health Center, Inc.*, 965 N.E.2d 693 (Ind. App. 2012); *Marvin Miller M.D. v. Tiffany Yedlowski et al*, 916 N.E.2d 246, 249-252 (Ind. App. 2009); *HomeQ Servicing Corp. v. Baker*, 883 N.E.2d 95 (Ind. 2008); and *Naugle et al. v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007).

II. Findings of Fact

The following facts are taken from Respondent's timely designated evidence. Petitioner did not timely respond to Respondent IWP-DOC's motion for summary judgment.

1. At the time of discharge, Petitioner Michelle Davis was an unclassified, at-will employee, a Correctional Sergeant, with Respondent IWP-DOC.

2. Petitioner was discharged from employment on August 9, 2013. The Amended Complaint claims wrongful discharge in breach of public policy under the federal Family and Medical Leave Act (FMLA) and federal Title VII of the Civil Rights Act of 1964 with specific respect to gender discrimination and "pregnancy" under the protection of the Pregnancy Act amendments (Title VII/PDA).

3. Petitioner's Amended Complaint timely reached Step III of the appeals process, SEAC, on November 21, 2013.

4. Respondent's Human Resources (HR) Director, Anne Shelton, is responsible for keeping the relevant HR records of IWP-DOC employees. (Resp. Ex. A, Shelton's sworn affidavit).

5. Respondent was unaware of Petitioner's pregnancy and did not receive any pre-litigation information indicating Petitioner had applied for any type of FMLA leave. (Ex. A).

6. Respondent IWP-DOC was unaware of Petitioner's pregnancy or FMLA request at the time of discharge. (Ex. A.)

7. The Complaint and Amended Complaint state that Respondent allegedly discharged Petitioner for a different, unspecified reason, which the Amended Complaint labels a pretext. Petitioner's pleadings state she was twenty-six (26) weeks pregnant at the time.

8. The ALJ cannot infer or presume that Respondent would automatically know Petitioner was pregnant at 26 weeks. No documents, medical or sworn narrative evidence has been provided by Petitioner. Petitioner has not provided any timely evidence of either a prima facie case or to show a pretext. Petitioner may not rest on her pleadings compared to the sworn affidavit of Respondent.

9. The designated evidence shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, as further discussed. Ind. T.R. 56

III. Conclusions of Law

1. Petitioner Davis is a former, unclassified state employee for Respondent IWP-DOC. 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, 706 (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).

2. Petitioner argues two public policy exceptions apply under federal law, the FMLA and Title VII with respect to gender discrimination and pregnancy. Respondent's motion seeks to overcome both arguments.

3. To establish a prima facie FMLA claim there must be a showing that: (1) Petitioner Davis was eligible for FMLA protection; (2) the Respondent IWP-DOC employer is covered by the FMLA; (3) Petitioner was entitled to take leave under the FMLA; (4) Petitioner provided sufficient notice of her intent to take leave to IWP-DOC; and (5) IWP-DOC denied her FMLA benefits to which she was entitled. *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055 (7th Cir. 2014). While notice can be constructive or actual, when leave is foreseeable the employee should provide thirty (30) days notice, absent exigent circumstances. *Id.*

4. The Pregnancy Discrimination Act ("PDA") adds discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" to Title VII's definition of gender-based discrimination. 42 U.S.C. 2000e(k). As with other Title VII claims, discrimination can be shown through the direct method or indirect burden shifting methods. *Adams v. City of Indianapolis*, 742 F.3d 720 (7th Cir. 2014). Either way, a claim will not survive summary judgment unless the plaintiff produces "sufficient evidence, either direct or circumstantial, to create a triable issue as to whether pregnancy was a motivating factor in her discharge." *Makowski v. SmithAmundsen LLC,* 662 F.3d 818, 823-824 (7th Cir. 2011); *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1005 (7th Cir. 2000). Direct evidence establishes a discriminatory intent without the need for inference. The indirect method allows for an inference of intentional discrimination and can be shown through a "convincing mosaic of circumstantial evidence." *Makowski,* 662 F.3d at 824; *Phelan v. Cook County.,* 463 F.3d 773 (7th Cir. 2006).

5. State law follows federal law as applied here. Indiana law also protects against sex discrimination through the Indiana Civil Rights Act. Indiana law follows and looks to federal law in this regards. See, I.C. 22-9-1 (Indiana Civil Rights Act); I.C. 4-15-2.2-1-12, and -24; and *Filter Specialists, Inc. v. Dawn Brooks et al.*, 906 N.E.2d 835, 839-842 (Ind. 2009). Similarly, the Indiana State Personnel Department provides that the state agencies shall follow the FMLA, and DOC asserts affirmative compliance here. See generally, orders in *King v. IVH*, SEAC No. 03-12-024 (2013).

6. The employer must know about a pregnancy for it to be a possible motivating factor in an adverse employment decision. For example, in the specific context of a raise denial

based on allegations of pregnancy discrimination, the Seventh Circuit has found no discrimination where the employer was unaware of the pregnancy. Although the Court ultimately decided the case on other grounds, "her claim of pregnancy discrimination . . . cannot be based on her being pregnant if [respondent] did not know she was pregnant." *Miller,* 203 F.3d at 1006 (7th Cir. 2000).[2]

7. Respondent provides affirmative evidence showing that Respondent, before litigation, was unaware of Petitioner's pregnancy and did not receive any information indicating Petitioner applied for FMLA leave. (Ex. A). There is no evidence showing Petitioner was a participant, or potential participant, in FMLA leave. Petitioner failed to timely rebut same. Respondent cannot discriminate on the basis of pregnancy or FMLA leave absent knowledge of the pregnancy or an employee's intent to take leave. *Adams, supra*, and *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1006 (7th Cir. 2000).

8. There is no direct or circumstantial evidence tending to show Petitioner's pregnancy or potential FMLA leave was a motivating factor in Petitioner's discharge. Petitioner cannot rest upon the mere allegations outlined in the Amended Complaint. *Mesa v. State*, 5 N.E.3d 488, 491 (Ind. Ct. App. 2014).

9. Respondent has affirmatively disproven one or more required prima facie elements of Petitioner's FMLA and pregnancy/Title VII claims. Outside of such protections, Respondent was free to discharge for a good, bad or no reason under the at-will doctrine. *Meyers, supra.*

10. Petitioner did not timely demonstrate the existence of a genuine issue of material fact. Therefore, the ALJ is confined to Respondent's designated evidence and summary judgment is appropriate. Ind. T.R. 56; *Mesa*, 5 N.E.3d at 491; standard of review citations, *supra.*

[2] Although *Miller* was not a termination case, the same reasoning applies here.

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

Summary Judgment is entered in favor of Respondent IWP-DOC. There are no genuine issues of material fact to require an evidentiary hearing. Respondent is entitled to judgment as a matter of law against all claims of the Complaint. Respondent has satisfied the movant's burden under Ind. T.R. 56. Petitioner Davis has failed to rebut this burden under Ind. T.R. 56. Petitioner's complaint is denied. Respondent's termination of Petitioner Davis is upheld. Any remaining case management deadlines are vacated.

DATED June 23, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
IGCN, Room N501
100 Senate Avenue
Indianapolis, IN 46204-2200
(317) 232-3137
araff@seac.in.gov

Copy of the foregoing sent to:

Charles White
Petitioner's Counsel
8117 E. Washington St., Suite B
Indianapolis, IN 46219

Jon A. Ferguson
Indiana Department of Correction
302 W. Washington St., Rm W341
Indianapolis, IN 46204