STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

DON WRIGHT, Complainant, v. PENN TOWNSHIP TRUSTEE, Respondent.	ICRC NO.: EMha15020122 EEOC NO.: 24F-2015-00356

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 19 2017, the presiding Administrative Law Judge for the Indiana Civil Rights Commission ("ICRC"), Hon. John F. Burkhardt, held a public hearing at the Mishawaka-Penn-Harris Public Library located at 209 Lincolnway East in Mishawaka, Indiana. Complainant Don Wright ("Wright") appeared personally, and the case in support of his February 19, 2015 complaint of discrimination was presented by the ICRC's Staff Attorney, Frederick S. Bremer, in the public interest. The Penn Township Trustee ("Respondent") appeared personally by Trustee Doris J. Portolese ("Portolese") and was represented by counsel, Mark D. Boveri of Krieg DeVault, LLP.

Joint Exhibits numbered 1-12 for Wright and lettered A-K for Respondent, regarding which the admissibility and authenticity were stipulated, were all offered and admitted into evidence, as was Wright's Exhibit 13 over Respondent's objection. Wright called Portolese and Janet Whitfield-Hyduk ("Whitfield-Hyduk") as witnesses and also testified on his own behalf. Respondent called Portolese as witness. Following the hearing, Wright and Respondent ("the Parties") each filed pursuant to the Administrative Law Judge's order proposed findings of fact, conclusions of law, and orders.

Having carefully considered the foregoing and being duly advised in the premises, the presiding Administrative Law Judge for the ICRC issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Respondent

1. Respondent's office provides temporary financial assistance to qualifying residents of Penn Township in St. Joseph County, Indiana. (Tr. 14:1-5). The Trustee's office operates within demanding budget constraints. (Tr. 16:13-14; 28:8-10).
2. Whitfield-Hyduk was Penn Township Trustee from July 2012 through December 2014. (Tr. 40:10-11). Whitfield-Hyduk grew up with Wright's sister-in-law and was generally friendly with Wright during her tenure as it overlapped with Wright's. (Tr. 51:24-52:4).
3. Whitfield-Hyduk revised the Penn Township Trustee Office Personnel Policy Manual ("Policy Manual") in 2014 to require that Respondent "shall evaluate each employee at least annually" by way of a documented "performance appraisal." (Exhibit 4, p.7). However, during her tenure, Whitfield-Hyduk did not formally evaluate or discipline any of the staff pursuant to the Policy Manual. (Tr. 42:25-43:10, 48:17-21, 44:15-20).
4. In 2014, Whitfield-Hyduk was not re-elected as Trustee; she lost the election to Portolese. (Tr. 40:23-41:3). Portolese's election campaign platform included efficiency of operations and stewardship of the resources entrusted by taxpayers. (Tr. 12:20-23). Portolese took office as the Penn Township Trustee on January 1, 2015. (Tr. 19:13). She started working in the office on Monday, January 5, 2018, and began learning how the office operated – in part by observing, working with, and talking to the staff. (Tr. 26:11; Exhibit 1, p.1). At all times relevant to Wright's allegations, Portolese was yet unaware of the Policy Manual's existence. (Tr. 54:18-23, 57:10-14, 58:9-10).
5. As of January 2015, before Wright's termination, the Penn Township Trustee's office was staffed by:
   i. Wright (male), Complainant, a full-time Investigator working 8:00AM to 4:30PM Monday through Friday (Exhibit K, 103:5-8);
   ii. Johnson-Thomas (female), a part-time Investigator working three days per week (Exhibit 1, p.3);
   iii. Richey (female), a full-time Investigator Supervisor working 8:00AM to 3:30PM Monday through Friday (Exhibit K, 105:3-20; Exhibit 1, p.3);
   iv. Smith (female), a full-time Office Manager (Exhibit 1, p.3);

v. Croy (male), part-time maintenance staff (Tr. 65:22-11); and

vi. Portolese (female), the full-time Trustee (Exhibit 3, p.11).

6. Wright was Respondent's only male Investigator and only male member of the professional staff, but he was not Respondent's only male employee. (Tr. 66:14, 97:16-23).
7. Respondent also oversaw certain aspects of the Penn Township Fire Department which was staffed by approximately 50 male and female firefighters and emergency medical technicians. (Tr. 25).

Complainant

8. Wright is a male of approximately 63 years in age. (Exhibit I, p.1, Exhibit K, 30:17-18).
9. Wright began his employment with Respondent in December 2011 and served as an "Investigator" throughout his tenure. (Exhibit 3, p.12; Tr. 41:12). Wright's chief function as Investigator was to take in and assess applications for financial aid from individual residents of the township; the process usually required interviewing applicants and gathering and assessing documentation related to applicants and their needs. (Exhibit 3, p.16).
10. Wright had his own office where only his desk was located. (Exhibit K, 107:1-3). Given the layout of Respondent's office, Wright's computer screen was visible from the entrance of his office. (Exhibit K, 122:16:19; Tr. 106:4-9).
11. In the fall of 2014, Wright was supportive of Whitfield-Hyduk's candidacy to be re-elected; he voted for her, and when she lost the election to Portolese, he was "disappointed." (Tr. 52:5-7, 40:23-41:3, 104:13-24).
12. Wright alleged that he "worked the posted hours" of Respondent's business operations but that "female employees were not required to." (Exhibit A). Wright testified that his being the only Investigator responsible to work the office's entire hours of operation was not because of his sex, but rather because one of the Investigators worked one hour less each day as a health-related accommodation and the other was simply part-time; it undermines Wright's credibility that his testimony indicates he knew these facts at the time of his discrimination complaint. (Exhibit K 128:15-24, Tr. 126:11-127:1).
13. During Wright's employment, neither he nor any other of Respondent's staff received written performance appraisals from either Whitfield-Hyduk or Portolese as required by Respondent's Policy Manual. (Tr. 48:17-21, 58:24-59:7, 126:4-10).

14. Respondent never issued any written reprimands regarding Wright's job performance. (Exhibit 3, p.6)

Background

15. In December 2014, Whitfield-Hyduk, upon Portolese's request, arranged a meeting between Portolese and Respondent's staff; Whitfield-Hyduk set the time and communicated to staff concerning their expected attendance. (Tr. 55).
16. Wright was meeting with a client – and absent – during the majority of the meeting but later joined in for the approximately ten (10) remaining minutes. (Exhibit H, p.1; Exhibit K, 20:22-24). This was the first time Wright and Portolese met. (Exhibit K, 19:13-14). Nothing in the record indicates he meeting started without him because of his sex. (Exhibit K, 130:6-12).
17. At that meeting, Wright perceived that his mention of his three (3) weeks of vacation time "hit a nerve" with Portolese, that "[s]he was in disagreement with the amount" of vacation time, and that "it was very irritating to her, the fact that [he] was going to get three weeks of vacation when [he] had only been there for three years." (Exhibit K, 22:3-6, 24:13, 25:4-13). Nevertheless, Portolese told Wright that he was "entitled to three weeks [of] vacation," and that staff entitled to that amount of time "would be grandfathered in" to a new vacation time policy. (Exhibit K, 24:15-19; Exhibit H, 102:4).
18. Wright's impression of Portolese following the December meeting was that she was very "dictatorial," "very snide," "very – very mean," but also "pleasant." (Exhibit K, 27:20-21, 28:8-9).
19. Between Portolese's start date and Wright's end date, Portolese and Wright interacted and worked together in the office. (Exhibit K, 26:17-21). Portolese came by Wright's workplace and spoke with him about what he was doing. (Exhibit K, 106:20-24). Wright generally had "a lot of suggestions" for Ms. Portolese. (Tr. 111:6-9).
20. The record shows that Portolese's disposition towards Wright was not profoundly or disparately critical; rather, the record indicates Portolese believed she could and sought to learn from Wright. (Exhibit 1, p.1,2; Tr. 12:12-17, 14:10, 29:14, 31:6-12, 33:5-8, 34:9, 38:9-10, 138:20-25).

21. The week leading up to Wright's termination saw multiple events implicated in both Wright's and Respondent's explanations of this case.

Home Visit

22. Wright asked Portolese if she wanted to join him on a "home visit" – a visit to an applicant's residence – and she said yes. (Exhibit K 125:3-4). Portolese indeed accompanied Wright on the home visit. (Tr. 27.5-12). Portolese testified – and Wright corroborated – that he was missing a form during the home visit. (Tr. 27:16; Tr. 76:9-14).
23. While the visit provided Portolese with time to "observe Don working," Wright has no concerns about the events constituting the home visit with Portolese. (Tr. 27.5-12; Exhibit K, 125:7-13).

Tuesday, January 6, 2015

24. Record evidence bears out that, on one of Portolese's first encounters with Wright in the office, she asked what he was doing and he responded: "Nothing." (Tr. 31:11-12, 134:7-25, 138:18-20). Wright's hearing testimony was that he could not recall saying this, yet this response was evidenced by Portolese's credible hearing testimony consistent with her near-contemporaneous notes and her March 2015 testimony during the ICRC's investigation. (Tr. 131:9; Exhibit C, p.1).

Wednesday January 7, 2015

25. Wright was, by virtue of previously volunteering, responsible for the purging of files from the office and movement of them to storage in the basement. (Tr. 107:19-108:7; Exhibit K, 58:12-16). Wright's testimony is that once files were placed in a box, staff knew the files had to go to the basement. (Exhibit K, 56:21-22). Wright admits that, during Portolese's first week, file boxes that "should have been downstairs in storage" remained upstairs; some of the boxes were stacked as high as Portolese is tall. (Tr. 31, 108:13-15).
26. Portolese inquired of Wright as to the nature of the file boxes around his work area and then requested he put them where they belong; Wright stated he could not do so due to his hip. (Tr. 14:9-22). Portolese instructed Wright to mark with "Post-it" notes those boxes which should be moved to the basement, and she would make arrangements to have them moved. (Tr. 14:9-15:11). Wright's testimony is that Portolese said she would have some "young

men" move them, that she "was being very gender [specific]," and that her "focus was on having a man do it." (Exhibit K, 58:1-4, 57:21-22, 58:9-10; Tr. 142:19-21). Portolese does not recall saying "young men" and testifies that she said "I have people that can do that" in reference to maintenance staff she knows in her capacity as a property manager. (Tr. 65:1-11). Wright testified that Portolese "could have asked for some assistance from the women that were there;" yet, Wright admits he does not know – but only speculates – the female staff were not asked to move them. (Exhibit K, 55:3-4, 55:16-18, 134:23-135:1). The record does not confirm Wright's speculation.

27. Though Wright proceeded to place notes on some boxes, later, he "just went ahead and did it" – carrying other boxes downstairs by himself – in knowing contravention of Portolese's directive. (Exhibit K, 59:7; Tr. 110:9-11, 15:4-11; Exhibit C, p.1).

Thursday January 8, 2015

28. Portolese discussed with Wright his work and discovered he was researching an issue related to a two-year old file; she asked him to cease working on that file and tend to recent files. (Tr.15:12-24, Exhibit C, p.1). Respondent's records support Portolese's testimony that, in walking by Wright's office several times later that day, she perceived that "he did not appear to be doing anything" in response to her directive but rather was insubordinate. (Exhibit C, p.2); (See also Exhibit 2, p.1: "Mr. Wright defied my order.").
29. In a separate conversation, Portolese asked if Wright could provide her information about the prevailing rental rates in the community. (Exhibit K, 113:22-25). This information was important to Respondent and relevant when considering HUD guidelines and modifying current policies. (Exhibit K 120:19-22, 121:2-14). Wright admits the information he tendered "was obsolete" and "outdated" – a reference book from 2011. (Exhibit K, 111:15, 115:25). Wright gave Portolese a reason why he was not able to provide her with a current version of the information she requested: despite Wright's belief that the Mishawaka Housing Authority was the appropriate source for such information, after having tried unsuccessfully to reach by phone a representative there – prior to 2015 – Wright had not since taken any other steps to reach out to the office for assistance. (Tr. 113:18; Exhibit K, 119:11-22, 117:8-23).

Friday January 9, 2015

30. Portolese's perception of Wright, based on what she saw on his computer screen when she walked by several times, was that sometimes during business hours he appeared to be doing nothing. (Tr. 36: 21-23, Exhibit C, p.2). Portolese was disturbed in perceiving that Wright remained insubordinate to her previous directive by not "working on any files that [she] asked [him] to work on." (Tr. 37:20-24, Exhibit C, p.2).
31. "Late in the day" on Friday after around 4:20PM, Portolese told Wright that she had just met individually with each of the other two investigators about things they liked and disliked about the office and what changes might be appropriate; Portolese stated she wanted to meet with Wright on Monday to "discuss the same issues" "and go over the same thing[s]" with him. (Exhibit C, p.2; Tr. 75:7-14, 76:24-77:1; Exhibit H, p.3; Tr. 128:11-18). Wright's testimony is that Portolese said, "Don, I want to talk to you on Monday afternoon about things that you like and don't like about the office. That's what I've been discussing with the other women." (Exhibit K, 31:16-19). Portolese arranged to speak with Wright on Monday in a manner similar to how she spoke with the female staff. (Exhibit K, 141:10-12; Tr. 129:3). While Wright complains that he was not given a one-on-one meeting with Portolese as were the female staff, he contradicts this notion in admitting that "[s]he wanted also to meet with me and go over the same thing that she went over with... the female employees." (Tr. 76:24 – 77:1).
32. Based on what Portolese witnessed during her first week, she contemplated over the weekend giving Wright a warning or terminating Wright's employment. (Tr. 16:14-15, 63:12-20).
33. Substantial evidence shows that Wright was extended the same meeting opportunity as the female employees enjoyed, but that his intervening conduct ultimately motivated termination at the already scheduled meeting. (Tr. 63:12-20; Exhibit C, p.2; Exhibit H, p.3).

<u>Monday January 12, 2015</u>

34. Wright's one-on-one meeting with Portolese was set to occur on Monday. (Tr. 16:16). In the morning, before the meeting, Wright was assisting an applicant from approximately 8:00AM until 10:15AM. (Tr. 38:1-2). Following that appointment, Wright visited Portolese and reported that based on the information the applicant just provided him, the applicant should have been denied assistance due to being over Respondent's income guidelines and having disqualifying "wasted resources" but that he "pended" the applicant for an extended review

of her situation (Tr. 77:19-78:9, 38:12-14 & 18-22). Portolese perceived that Wright's appointment with the applicant lasted over two (2) hours and that extended review based on any outstanding information was not warranted. (Tr. 38:9-39:7). Wright perceived Portolese to be "kind of antsy," "wondering what was taking so long" and "upset over the time it was taking." (Exhibit H, p.3, l.13; Tr. 78:3-4). Portolese requested to begin the one-on-one; Wright stated he would finish his notes first and then met her at her office, which he did. (Tr. 80:4-7; Exhibit C, p.2).

35. Portolese's hearing testimony was that she "was floored that he would take the time and waste the time of this individual who is desperately in need of funds" by "pending" them when, in her view, Wright had "admitted he should have denied them;" Portolese was also offended of his use of Respondent's time and budget in this manner, and upon learning of this conduct she concluded he "wasn't working efficiently and he wasn't working on the behalf of the township and the clients that [Respondent] serve[s]" and "realized that [she could] no longer have him working for [her]." (Tr. 39:8-12, 63:17-20, 38:21-22).
36. Portolese did not consider putting Wright on a work improvement plan or suspending him. (Tr. 63:2-6). Portolese alone arrived at and executed the decision to terminate Wright's employment; she did not consult with Whitfield Hyduk, the Office Manager, or anyone else. (Tr. 19:23-25, 24:16-18, 62:23-63:1).
37. When Wright arrived, the Office Manager was in Portolese's office; Portolese invited her to stay, and she was the only other person present at the meeting. (Tr. 24:5-7; Exhibit K, 33:11-12).
38. Portolese terminated Wright's employment at the meeting; she told him she "no longer needed his services." (Exhibit C, p.2). The Parties agree and the record evidences that when Wright inquired as to Portolese's reason, she declined to entertain substantive conversation about the details; Portolese's credible testimony is that this curtness was due to her feeling "a little uneasy" and "trying to avoid confrontation with him." (*Id.*; Tr. 30:7-8). The Parties agree that Portolese said something to the effect that she "didn't feel that it was necessary or that [she] had to" discuss her reasoning. (Tr. 80:19-22; Exhibit C, p. 2).
39. In a document included in the ICRC's investigatory record jointly referred to by the parties as "Don Wright's answers to questions posed by Bernadette Nichols, Commission's Investigator, during February 27, 2105, interview" (*sic*) regarding which the Parties stipulate

as to the admissibility and authenticity, an investigative question reads: "What reason was given for the termination?" The answer credited to Wright reads: "She really did not give a reason just said my job performance was poor" (*sic*). (Exhibit D, p.1).

40. During the meeting, when Wright asked the Office Manager if she had known about the impending termination, she stated, "I didn't know and I am just as shocked as you are." (Exhibit C, p.2).
41. Portolese requested Wright turn in his keys and clean out his desk. (Exhibit C, p.2; Tr. 80:21). According to Wright, he "threw down [his] keys on her desk," and, as an "empty threat," told Portolese that he "knew a lot of people in this town." (Exhibit H, p.3, Exhibit K, 41:6-7).
42. After Portolese felt threatened at that meeting, she journaled her recollection of "each day that [she] had contact with [Wright];" those notes were admitted into evidence as Exhibit C. (Tr. 22:2-14).
43. There is significant disagreement between the Parties about how much total exposure Portolese had to Wright before ultimately deciding to terminate his employment. Wright says Portolese had not more than two hours of "interaction time" with him, while Portolese says that her "interaction time" plus "observation" time amounted to "several hours" – "[t]en at the most," and nothing in the record – including Wright's testimony – refutes Portolese's credible testimony as to her total exposure time. (Tr. 70:1, 107:4-12, 26:17-19).
44. Record evidence indicates that, from their first becoming acquainted, Portolese and Wright faced multiple bases for relational tension other than Wright's sex, including the politics behind Whitfield-Hyduk's ousting, mutual perceptions of "cockiness," and disagreements about multiple of Portolese's business decisions related to things such as vacation time, Respondent's funeral-related assistance, and a "unity garden." (Tr. 114:8-15, 116:6-8, 122:12-123:5, 124:22-24, 87:3-12, 100:5, 137:11).

Wright's Replacement

45. After terminating Wright's employment, Respondent hired, Kisrow (female), a full-time Investigator, at the same pay rate as Wright. (Exhibit 3 & 6). Kisrow had previously worked at the Mishawaka High School where Portolese's husband worked part-time. (Exhibit K, 143:7-9).

Wright's Complaint of Discrimination

46. On February 19, 2015, Wright filed with the ICRC his complaint of discrimination which named Respondent, alleged unlawful discrimination in employment based on "gender" and "disability," and was dually filed with the Equal Employment Opportunity Commission ("EEOC") (Exhibit A). Wright complained of discriminatory termination and also disparate terms and conditions of employment.
47. Wright admits no evidence showing that the types of interactions Wright had with Portolese were – on Respondent's end – not comparable to the types of interactions Respondent had with other investigators, and Respondent flatly denies any such disparate treatment (Tr. 125:4-8, 132:16-20).
48. Wright admits that there was no one else terminated at a time relevant to his claims and therefore no one else "terminated from their employment at the trustee's office that was treated differently than [him]" (*sic*). (Exhibit K, 132:23-133:1).

Ultimate Factual Issue

49. The preponderance of the evidence does not establish that Respondent subjected Wright to disparate terms or conditions in employment – or to termination – because of his sex or that Respondent's offered reasons for its actions are a pretext for sex discrimination. To the contrary, record evidence shows that Wright was actually not meeting Respondent's business expectations, that Respondent perceived this, and that this – and not Wright's sex – in fact motivated Respondent to terminate Wright's employment. The record evidences no similarly-situated individuals treated more favorably than Wright with respect to any of the alleged disparate terms and conditions of employment or termination. Wright failed to present evidence that any of Respondent's actions were motivated by sex-based animus or unlawful discrimination as alleged. In short, substantial evidence compels the ultimate finding that Respondent did not treat Wright differently or terminate his employment because he is male.
50. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

The ICRC has jurisdiction over the subject matter and the Parties, and each party is a "person" as that term is defined in Ind. Code § 22-9-1-3(a). Additionally, Respondent is an "employer" as defined in Ind. Code § 22-9-1-3(h). Wright's complaint against Respondent of an unlawful discriminatory practice relating to employment is subject to adjudication in accordance with the provisions of the Indiana Civil Rights Law, Ind. Code § 22-9-1 *et seq*. and the Indiana Administrative Orders and Procedures Act, Ind. Code § 4-21.5 in consultation with cases decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e, *et seq.* See Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 839 (Ind. 2009) ("In construing Indiana civil rights law our courts have often looked to federal law for guidance"); See also Indiana Civil Rights Comm'n v. Culver Educ. Found. (Culver Military Acad.), 535 N.E.2d 112, 115 (Ind. 1989) ("federal cases interpreting Title 7 of the Civil Rights Act of 1964…are entitled to great weight"); See also Indiana Civil Rights Comm'n v. City of Muncie, 459 N.E.2d 411, 418 (Ind. Ct. App. 1984) ("federal decisions are helpful in construing Indiana's Civil Rights Act").

"It is the public policy of the state to provide all of its citizens equal opportunity for…employment," and such equal employment opportunities are "declared to be civil rights." Ind. Code § 22-9-1-2. "It is also the public policy of this state to protect employers… from unfounded charges of discrimination." *Id.*

Not all discrimination is declared "contrary to the principles of freedom and equality of opportunity" and "a burden to the objectives of the public policy of this state." *Id.* Discrimination is simply "[t]he intellectual faculty of noting differences and similarities." DISCRIMINATION, Black's Law Dictionary (10th ed. 2014). "The dictionary sense of 'discrimination' is neutral while the current political use of the term is frequently non-neutral, pejorative." *Id.* In the "neutral" context, "*[e]*very employment decision involves discrimination," and "[a]n employer, when deciding whom to hire, whom to promote, or whom to fire, must discriminate among employees." Filter, 906 N.E.2d at 838.

While the two most common reasons for lawful employment discrimination are "an absolute or relative lack of qualifications or the absence of a vacancy in the job sought," other reasons might include attendance, job performance, personality conflict, erroneous evaluations, and even unusual business practices." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977); Rose-Maston v. NME Hosps., Inc., 133 F.3d 1104, 1109 (8th Cir. 1998). In Indiana, no reason

for employers' discretion is required at all. "Indiana follows the doctrine of employment at will, which means that employment of indefinite duration may be terminated by either party at will, *with or without reason.*" Peru Sch. Corp. v. Grant, 969 N.E.2d 125 (Ind. Ct. App. 2012) (emphasis added).

Unlawful discrimination is discrimination based on *unlawful criteria.* See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon *unlawful criteria*") (emphasis added). Under the Indiana Civil Rights Law, unlawful "discriminatory practices" include those denying equal employment opportunities "to properly qualified persons *by reason of* the…sex…of such person…" Ind. Code § 22-9-1-2(b) (emphasis added). Such discriminatory practices are "contrary to the principles of freedom and equality of opportunity" and therefore "shall be considered unlawful." Ind. Code § 22-9-1-3.

In the present case, the Parties agree that Respondent took an action against Wright; significantly, that action is the same termination of which Wright complains. Therefore, to determine as required whether Respondent "has engaged in an unlawful discriminatory practice" as alleged here, the critical inquiry is: "On what basis did the employer discriminate?" Ind. Code § 22-9-1-6; See Filter, 906 N.E.2d at 838–39 ("[T]he case is one of causation: What caused the adverse employment action…"); See also Ortiz v. Werner Enterprises, Inc., 834 F.3d 760, 763 (7th Cir. 2016) (phrasing the inquiry as "whether one fact (here, [sex]) caused another (here, discharge)." Was the termination of Wright's employment by reason of Respondent's "illegal motivation" – namely, "sex"? Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 154 (2000). Put another way, "would [Wright] have kept his job if he had a different [sex], and everything else had remained the same." Ortiz, 834 F.3d at 764. In a word, the question to be answered is: "Why?"

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). The work of adjudicating "illegal or legal motives" "obliges finders of fact to inquire into a person's state of mind." Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989); Aikens, 460 U.S. at 716. However, "[t]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else." Aikens, 460 U.S. at

716–17 quoting Eddington v. Fitzmaurice, 29 Ch.Div. 459, 483 (1885). Because the Indiana Civil Rights Law tolerates no unlawful discrimination – subtle or otherwise – the ICRC, with expertise and a charge to administer the Indiana Civil Rights Law, is in the best position to ascertain the matter. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 526 (1993); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

In the difficult enterprise of proving an employer's motive, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's, 509 U.S. at 507. To carry this burden of persuasion, Wright is required to "prove his case by a preponderance of the evidence…" Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

What evidence? All of it. As in any lawsuit, Wright "may prove his case by direct or circumstantial evidence," and "[t]he trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." Aikens, 460 U.S. at 714; See also Ortiz, 834 F.3d at 764-766 (7th Cir. 2016) (requiring that "[a]ll evidence should be considered together to understand the pattern it reveals" and instructing that "all evidence belongs in a single pile and must be evaluated as a whole").

While all evidence is considered, the ICRC Director's previous finding of "probable cause" – other than as the warrant of the hearing in this case – is of no relevance or import; the question to be answered now is different and the hearing on the question is *de novo:* from the beginning, without regard to previous determinations. Ind. Code § 4-21.5-3-14(d). Specifically, the question is not whether probable cause exists to believe unlawful discrimination occurred, but whether an unlawful discriminatory practice actually occurred: "discrimination *vel non*" – discrimination "or not." Ind. Code § 22-9-1-6(j); Filter, 906 N.E.2d at 842. Therefore, the ICRC is not "erroneously focused on the question of *prima facie* case rather than directly on the question of discrimination." Aikens, 460 U.S. at 711.

The McDonnell Douglas framework is a conventional method of allocating the burden of production to parties and providing an "orderly way to evaluate the evidence" as it pertains to the ultimate question of unlawful discrimination. St. Mary's, 509 U.S. at 525. Because the Parties, during the hearing and in their Proposed Findings of Fact, Conclusions of Law, and Orders, presented their arguments in terms of the framework, it is where the following holistic

assessment of the evidence begins. David v. Bd. of Trustees of Cmty. Coll. Dist. No. 508, 846 F.3d 216, 224 (7th Cir. 2017).

Under the framework, Wright is expected to produce evidence establishing the case on its face – a *prima facie* case; this eliminates the most common nondiscriminatory reasons for the adverse action and raises an inference of discrimination. See Teamsters, 431 U.S. at 358. Then, the common lawful motives off the table, Respondent must "clearly set forth" legitimate nondiscriminatory reasons for termination, thus putting Wright on notice of the targets for his pretext arguments and affording Wright a full and fair rebuttal opportunity; the sufficiency of the Respondent's explanation is evaluated by the extent to which it fulfills these functions. Burdine, 450 U.S. at 256. Finally, Wright can proceed to rebut each of Respondent's identified motives as "pretext for unlawful discrimination."

However, since affording Wright a full and fair rebuttal opportunity is the purpose of the framework, when Respondent does its part and meets its burden of production – putting Wright on notice of its explanations – "whether [Wright] made out a *prima facie* case is no longer relevant," "McDonnell Douglas drops out," and the factfinder "must decide which party's explanation of the employer's motivation it believes." Aikens, 460 U.S. at 715-716; Filter, 906 N.E.2d at 846. The factfinder "has before it all the evidence it needs to decide *not* . . . whether defendant's response is credible, but whether the defendant intentionally discriminated against the plaintiff." St. Mary's, 509 U.S. at 519.

Since Respondent's burden is one of production – and not persuasion – Respondent has "only to state a legitimate reason" for the adverse action. Bd. of Trustees of Keene State Coll. v. Sweeney, 439 U.S. 24, 24 (1978); Kephart v. Inst. of Gas Tech., 630 F.2d 1217, 1222 (7th Cir. 1980). Determining whether Respondent carried its burden "can involve no credibility assessment." St. Mary's, 509 U.S. at 509. Respondent need not even establish that it was actually motivated by its proffered reasons. Burdine, 450 U.S. at 254. Respondent may state as its reasons subjective requirements and motives. Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 135 (7th Cir. 1985).

Here, Respondent carried its burden. On this there is no dispute, rather, Wright, in his Proposed Findings of Fact, Conclusions of Law, and Order, indeed suggests the ICRC conclude as a matter of law that "Trustee rebutted Wright's *prima facie* case" (Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, p. 11). In fact, in explaining what it has done,

Respondent clearly set forth "poor job performance" as a reason for terminating Wright's employment.

> Q: Why did you terminate Mr. Wright's employment?
>
> A: Because he had poor job performance. I have a very small office and I need people that know their job, know where to find the answers if they don't have them, and do their job efficiently.

Tr. 28:4-8.

In hearing testimony, Portolese unpacked her perception of "poor job performance" to include what she perceived as lackadaisical effort (Tr. 35:17-25, 36:11-15, 36:21-23; Tr. 31:11-12); deficient job-related knowledge in light of tenure (Tr. 36:11-15; Exhibit 1); poor customer service (Tr. 39:8-12); insubordination (Tr. 37:9-11, 22-24); objectionable attitude (Tr. 31, 137:10-14); and inefficiency (Tr. 63:15-20; 137:16).

On their face, such reasons are legitimate and inherently business related and sufficient to retire the McDonnell Douglass framework. The ICRC is therefore "in a position to decide the ultimate factual issue in the case," which is "whether the defendant intentionally discriminated against the plaintiff." St. Mary's, 509 U.S. at 519. On the state of the record at the close of evidence, the ICRC proceeds to this specific question directly. See Aikens, 460 U.S. at 715 (1983).

Wright claims Respondent's motivation was his sex. In making his case, Wright seeks to rebut Respondent's proffered reasons as pretext for discrimination. Proving that Respondent's proffered reasons are "pretext for discrimination" entails proof of the component parts: "pretext" and "discrimination." See St. Mary's, 509 U.S. at 515 ("[A] reason cannot be proved to be 'a pretext *for discrimination'* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason"); See also Radentz v. Marion Cty., 640 F.3d 754, 757, 2011 WL 1237931 (7th Cir. 2011) ("In order to demonstrate that the reason for the termination was pretextual, the plaintiffs must demonstrate that the nondiscriminatory reason was dishonest and that the defendants' true reason was based on discriminatory intent."); See also Reeves, 530 U.S. at 147 ("[i]t is not enough ... to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.")

In Wright's showing of falsity on Respondent's part, Wright "must specifically rebut *each* legitimate, non-discriminatory reason given" for the termination. Reed v. Lawrence

Chevrolet, Inc., 108 Fed. Appx. 393, 398 (7th Cir. 2004) (original emphasis). Three possible ways Wright may demonstrate the untruthfulness of a reason are "through evidence showing: (1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the adverse employment action or (3) that the proffered reason was insufficient to motivate the adverse employment action." Filter, 906 N.E.2d at 847.

Wright fails to show that any of Respondent's reasons are imagined, irrelevant to Respondent's actions, or insufficient to motivate them. With respect to Respondent's overarching reason of "poor job performance" – or with respect to any of the conduct said to constitute it (inefficiency, lackadaisical effort, poor attitude, etc.) – the record evidence does not demonstrate falsity. To the contrary, substantial evidence corroborates the existence, nexus, and sufficiency of Respondent's reasons for termination.

Wright's argument sounded largely under the "insufficiency" approach in claiming that Respondent's reasons "seem to be trifling" and "seem to be inconsequential," rendering termination an "illogical" and "draconian measure" (Tr. 143:1-3; Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, p.12). However, such arguments alone do not nullify the nexus of sufficient business reasons corroborated by Wright's testimony and shown to have existed in the mind of an employer at the time of its adverse action. The record contains no confounding variable in time or space unhitching the nexus between the "poor job performance" (evidenced by credible documentary and testimonial evidences) and the termination.

Arguing that Respondent's "poor job performance" reason has no basis in fact, Wright offers the judgments of the previous Trustee, Whitfield-Hyduk, as to performance she deemed satisfactory. However, Portolese did not in her discretion choose to obtain her predecessor's opinions, Wright's evidence does not contradict the performance Portolese perceived and relied upon, and "contrary assessments of [Wright's] performance do not impeach the legitimacy of his employer's expectations." Kephart v. Inst. of Gas Tech., 630 F.2d at 1223.

While unusual departures from official policy, suspect practices, and statistical proofs can also be relevant to a showing of pretext, and Wright alleges these also, they do not transform the record in this case. Deviations from standard procedures can give rise to an inference of pretext, and Wright complains Respondent deviated from the Policy Manual in failing to utilize progressive discipline, however, it is already established that Portolese was unaware of the manual at the time of the termination. See Baines v. Walgreen Co., 863 F.3d 656, 664 (7th Cir.

2017). Suspect practices can lead to a finding of pretext, and Wright invokes as such Portolese's refusal to discuss the reasons for termination, her not issuing a written notice of termination, her decision not to consult with the previous Trustee, and her decision not to administer performance improvement mechanisms; however, in the context of this record, none of these actions are evidentially tainted with sexual animus, profoundly suspect, or otherwise probative of pretext. The Indiana Civil Rights Law only warrants inquiry into the veracity – not the wisdom – of business decisions, no matter how "high-handed," "mistaken," or "irrational." See Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 560 (7th Cir. 1987); See also Zick v. Verson Allsteel Press Co., 644 F. Supp. 906, 911 (N.D. Ill. 1986), aff'd, 819 F.2d 1143 (7th Cir. 1987). Lastly, though Wright's termination and replacement rendered Respondent's small investigative team all-female, this statistical result is not availingly suspicious and is too lightweight an anchor in a tug against the preponderance of substantial evidence pointing to nondiscriminatory motives.

While Wright makes much of the fact that "there was no effort by Ms. Portolese to connect up with the trustee who was in office before her who had had three years of exposure to Mr. Wright and his abilities as an employee," Wright also acknowledges that the "poor work performance" which Respondent claims warranted Wright's termination "occurred within the time frame that he was in the employment of the Trustee while Portolese was in charge." (Tr. 10:23-11:1; Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, p.6). Therefore, the truthfulness of Respondent's proffered reason is not diminished for lack of Whitfield-Hyduk's nod. Furthermore, the Indiana Civil Rights Law does not mandate that Portolese's failure to involve in her decision-making the Trustee she ousted by popular vote renders her decision suspect – and suspect to such a degree as to be probative of pretext.

Previous instances of disparate treatment could also be probative of pretext, and Wright alleges some, but they are refuted by the record – not infrequently by Wright's own testimony. Wright's complaint mentions disparate treatment involving file boxes; time Portolese spent with him as compared to that spent with female staff; a requirement to work "the posted hours;" assignment of workloads; and termination. (Exhibit A). However, Wright testified under oath that the only two circumstances where he believes he was treated differently than other employees because of his sex were (i) when two female Investigators returned from a home site inspection saying they were scared and that if there was a similar visit to transact in the future, Wright would have to go, and (ii) Portolese's handling of an issue related to file boxes. (Exhibit

K 88:9-12; 93). After Wright clarified the benign nature or uncertain occurrence of some of these instances, none of those which stand in the record either stand alone as disparate terms and conditions of employment or constitute evidence from which the pretextual nature of Respondent's reason for termination could be inferred.

"Especially relevant" to Wright's rebuttal case would have been an identification of comparators – similarly situated females treated more favorably under similar circumstances. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). Throughout the proceedings, no such comparators were identified. In sum, Wright's presentation falls far short of demonstrating that Respondent's reasons for terminating his employment are unworthy of credence.

Neither does the record substantiate the "discrimination" component of the alleged "pretext for discrimination." Simply stated, the instant record evidences no employment actions taken against Wright based on his sex. A full and fair opportunity to be heard yielded no indications of sex-based animus or intentional sex-based adverse actions. It is not possible to infer intentional discrimination from this record as a whole, including from Portolese's declination of a certain amount of post-termination explanations and the apparent surprise of the Office Manager who had no part in the decision; neither of these incidents undermine Respondent's proffered reason, support an inference of sex-based animus, or are probative of Portolese's motives for her unilateral decision. Nothing in the record indicates that, had Wright not been male and all else remained the same, he would have kept his job.

According to Wright, he and Respondent disagree as to whether he was rightly doing his job. (Tr. 124:17-24). As a general matter, "if [Wright] was not doing what his employer wanted him to do, he was not doing his job," and the ICRC does not "sit as a super-personnel department that reexamines an entity's business decisions." Kephart, 630 F.2d at 1223; Weihaupt v. Am. Med. Ass'n, 874 F.2d 419, 429 (7th Cir. 1989).

The Indiana Civil Rights Law promises equal opportunity in employment and remedy for the denial thereof based on one's sex. Wright failed to carry his burden of demonstrating by a preponderance of evidence that – because of sex – he was denied equal opportunity. Respondent set forth unrebutted proofs of legitimate nondiscriminatory motives. Therefore, according to the record and applicable law, it is ultimately found and concluded that Respondent did not commit an unlawful discriminatory practice as alleged.

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

ORDER

1. The above-referenced Complaint of Discrimination is **DISMISSED**, with prejudice.
2. This order becomes the final order disposing of the proceedings immediately upon affirmation under Ind. Code § 4-21.5-3-29. Ind. Code § 4-21.5-3-27(a).

Administrative review of these Findings of Fact, Conclusions of Law, and Order may be obtained by parties not in default by the filing of a writing identifying with reasonable particularity each basis of each objection within fifteen (15) days after service of this decision. Ind. Code § 4-21.5-3-29(d). Subject to Ind. Code § 4-21.5-3-1, the filing of a document in proceedings before the ICRC can be completed by mail, personal service, fax, or electronic mail to:

Docket Clerk
c/o Indiana Civil Rights Commission
100 North Senate Avenue, N300
Indianapolis, IN 46204
Fax: 317-232-6580
Email: aneromosele@icrc.in.gov

A party shall serve copies of any filed item on all parties. Ind. Code § 4-21.5-3-17(c).

SO ORDERED this 9TH day of May

Hon. John F. Burkhardt
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehita Eromosele, Admin Asst.
317-234-6358