BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

CLINT HARRIS Petitioner,	)	
	)	SEAC No. 04-14-036
vs.	)	
	)	SEAC ISSUED
INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION Respondent.	)	APR 13 2015

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" 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 **May 4, 2015**:

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 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 regularly scheduled meeting of 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 SEAC as outlined above.

DATED: April 13, 2015

Hon. Gabriel Paul
Chief Administrative Law Judge
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IN THE MATTER OF:

CLINT HARRIS	)	
Petitioner,	)	
	)	SEAC No. 04-14-036
vs.	)	
	)	SEAC ISSUED
INDIANA FAMILY AND SOCIAL	)	APR 13 2015
SERVICES ADMINISTRATION	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND NON-FINAL ORDER OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION AND SUMMARY

This administrative review is conducted pursuant to Ind. Code § 4-15-2.2 *et seq.* (the "Civil Service System") and Ind. Code § 4-21.5-3 *et seq.* ("AOPA"). The operative pleading is Petitioner Clint Harris's Complaint filed April 25, 2014 with the State Employees' Appeals Commission ("SEAC") against Respondent Indiana Family and Social Services Administration. Petitioner was a classified employee for the Respondent's Disability Determination Bureau. On February 20, 2014, Petitioner was terminated from his position as a Disability Claims Adjudicator 3. The issue before SEAC is whether Respondent had just cause by a preponderance of the credible evidence to terminate Petitioner.[1]

An evidentiary hearing in this matter was held on January 29, 2015, before the undersigned Chief Administrative Law Judge. Petitioner Harris appeared pro se. Respondent appeared by counsel, Ms. Erin McQueen. Having reviewed the arguments, witness testimony, admitted evidence, applicable law, and proposals;[2] and being duly advised, the ALJ issues the following Findings of Fact, Conclusions of Law, and Non-Final Order. Respondent proved by a preponderance of the credible evidence that just cause supported Petitioner's termination. Second, the preponderance of credible evidence shows that Petitioner's termination was not based on animus towards his political beliefs. Judgment for Respondent.

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[1] *See,* Ind. Code § 4-15-2.2-23 (asserting that a classified employee "may be dismissed, demoted, or suspended only for just cause").

[2] Both parties were given an opportunity to submit post-hearing briefs or proposals, which each subsequently filed.

II. LEGAL STANDARD

This is a classified (just cause) case under the Civil Service System. A state agency may only terminate or take material adverse employment actions against a classified state employee for just cause. I.C. § 4-15-2.2-23. In a disciplinary case involving a classified employee the state agency has the initial and ultimate burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. Ind. Code § 4-15-2.2-42(g); see *Non-Final and Final Orders in Miller v. FSSA*, SEAC No. 05-12-060 (2012); *Non-Final and Final Orders in Cole v. DWD*, SEAC No. 02-12-019 (2013); *Non-Final and Final Orders in Johnson v. DWD,* SEAC No. 05-13-034 (2014). Therefore, if the Respondent does not establish just cause, the challenged adverse employment action is invalid.

To establish just cause, the Respondent may refer to the Petitioner's work performance or service rating. I.C. § 4-15-2.2-36(e). An agency's service ratings and employee performance standards "must be specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive." *Id.* Therefore, in determining whether just cause was established, SEAC may consider Petitioner's performance as compared to the Respondent's employee performance standards. I.C. § 4-15-2.2-12, 36 and 42.

Additionally, the inquiry focuses on the reasonableness of the employer agency's workplace expectations. Employer expectations must be reasonably well communicated and consistently applied to similarly situated employees. *See Miller, Cole* and *Johnson, supra.* The reasonable expectations of the Respondent may include its communicated employee performance standards and expected outcomes. *Id.* The just cause standard requires the Respondent to act with reasonableness, not perfection. See *Conklin v. Review Bd. of DWD*, 966 N.E.2d 761, 764 (Ind. Ct. App. 2012); *Ghosh v. Ind. State Ethics Com'n*, 930 N.E.2d 23 (Ind. 2010); *Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992) (just cause standards in other contexts in Indiana similarly looks to the reasonable expectations of the employer).

At-will employment is the default in Indiana, and most state employees are considered non classified in that regard. I.C. §§ 4-15-2.2-22,24. However, the General Assembly also recognized some employees as classified given federal regulations and laws, but did not define "just cause" in the Civil Service System. Therefore, the ALJ first looks to Indiana law, but also to the federal standard. The federal employment just cause standard is defined as "[s]uch cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). See also *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 477 (2010) (federal system looks at factors such as inefficiency, neglect of duty, and reasons provided by the legislature).

If an agency establishes just cause, "the [C]ommission shall defer to the appointing authority's choice as to the discipline imposed . . . " I.C. § 4-15-2.2-42(g). The ALJ is not

authorized to substitute his own judgment after the agency proves it had just cause to impose the adverse employment action.

Title VII, 42 U.S.C. § 2000e (the Civil Rights Act of 1964, as amended), makes it unlawful under federal law for an employer to discriminate by terminating an employee because of that person's race or sex, among other grounds. Indiana law contains similar, state law based, public policy prohibitions. I.C. § 22-9-1 (Indiana Civil Rights Act); See also, I.C. § 4-15-2.2-1 *et seq.*, 12, and 42. Indiana civil rights laws look to federal law for guidance. *Filter Specialists, Inc. v. Dawn Brooks et al.*, 906 N.E.2d 835, 839-842 (Ind. 2009).

A petitioner may prove discrimination either through direct or indirect evidence. *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012). A petitioner can also present either a single motive or mixed motive theory of discrimination. *Id.* To establish a *prima facie* case of discrimination using the indirect method, a petitioner must offer evidence that: (1) he is a member of a protected class, (2) his job performance met the employer'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. *Id.* Once a petitioner establishes a *prima facie* case of discrimination, the burden then shifts to the employer to show a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Once the employer has presented this reason the burden shifts back to the petitioner "[w]ho must present evidence that the stated reason is a 'pretext,' which in turn permits an inference of unlawful discrimination." *Id.*

Under Title VII, "[u]nlawful retaliation occurs when an employer takes an adverse employment action against an employee for opposing impermissible discrimination." *Williams v. Lovchik*, 830 F. Supp. 2d 604, 620 (S.D. Ind. 2011). A petitioner asserting a claim of retaliation under Title VII can prove his case with either direct or indirect methods of proof. *Id.* In order to prove retaliation by the direct method, the petitioner must present evidence, direct or circumstantial, demonstrating that: (1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action by the employer; and (3) a causal connection exists between the two. *Id.*

III. FINDINGS OF FACT

1. Petitioner Harris was hired as a Disability Claims Adjudicator 4 for the Respondent's Disability Determination Bureau on January 25, 2011. Resp't Ex. C.

2. Early in Petitioner's tenure with Respondent, Petitioner met with a supervisor to discuss a Facebook post written by Petitioner that discussed work related events. Petitioner was

not disciplined, and neither Petitioner nor Respondent put forth evidence regarding the discussion. Funk Testimony.

3. Respondent trains its adjudicators for the first three years of their employment according to a *Plan for Training, Workload Distribution, and Specialization*. Resp't Ex. B; Funk Testimony.

4. On May 10, 2011, Petitioner was notified by a memorandum from his Unit Supervisor, Cynthia Anderson, that Petitioner was below quality standards for a particular subset of the cases Petitioner was responsible for evaluating.[3] Due to the errors present in Petitioner's evaluations, Petitioner was notified that he would remain on full review for that subset of cases during the next review period. Resp't Ex. G.

5. On June 28, 2011, Petitioner was promoted to Disability Claims Adjudicator 3 after successfully completing his initial training. Resp't Ex. E.

6. On August 9, 2011, Petitioner was again notified by Cynthia Anderson that Petitioner was not meeting case completion expectations, in that his accuracy ratings fell below the acceptable level of 87% accuracy. Petitioner's accuracy was found to be 63.6% for the previous three months, 76.9% for the previous six months, and 83.6% for the previous nine months. Petitioner was placed on an Enhanced Quality Review for two months, and was informed that failure to improve would result in a Work Improvement Plan. Resp't Ex. H; Anderson Testimony.

7. Cynthia Anderson was notified by Respondent's psychiatric staff on September 16, 2011, that work Petitioner did with the Disability Determination Bureau in conjunction with the psychiatric staff was too brief and inconsistent with information present in a patient's case file. Resp't Ex. I.

8. On November 9, 2011, Petitioner was notified that he had achieved the requisite accuracy rate of 87%, and was being taken off the Enhanced Quality Review. Petitioner's accuracy rate during the Enhanced Review period was 100 %. Resp't Ex. J.

9. On December 28, 2011, Petitioner was granted permanent status after successfully completing his working test period. Resp't Ex. F.

[3] The evidence and testimony did not indicate what the quality standards were; however, 87% was consistently noted to be the acceptable accuracy level in other evidence regarding quality standards. Throughout the remainder of this order if no specific standard is mentioned the ALJ has assumed the standard was 87%.

10. From April 2 through April 4, 2012, Petitioner underwent Continuing Disability Review ("CDR") training. Resp't Ex. K.

11. On May 9, 2012, Petitioner received an email from his Unit Supervisor, Rita Nibbs, notifying Petitioner that he had successfully underwent CDR case development, and that his accuracy exceeded the requisite accuracy levels. Additionally, the email notified Petitioner that he was removed from CDR development and interim review, but that his final decisions would require final review until further notice was given. Resp't Ex. L.

12. On August 8, 2012, Petitioner was removed from a review of a subset of his cases, and was notified that he had successfully completed CDR training with only one omission, which had not resulted in an error after it was corrected. Resp't Ex. M.

13. On September 17, 2012, Petitioner was observed sleeping at his desk during work hours, and was notified by written memorandum that this was not the first instance of such behavior. Additionally, Petitioner was advised that this behavior was unacceptable, and that future instances could result in disciplinary action being taken by Respondent. Resp't Ex. N.

14. On March 5, 2013, Petitioner received a written memorandum from Rita Nibbs. The memorandum discussed that his Quality Assurance report for the previous three months had shown an accuracy rate of 77.8%. Because Petitioner was below expectations for accurate case completion he was again placed on an Enhanced Quality Assurance Review for the next two months. Resp't Ex. O

15. Operations Manager Sylvia Funk and Unit Supervisor Cynthia Anderson testified on behalf of Respondent that it was uncommon for an employee to be put on more than one Enhanced Quality Review period. Anderson testimony; Funk testimony.

16. On April 19, 2013, Petitioner received a written reprimand for failing to follow business plan procedures after Petitioner released case information to an attorney that no longer represented the claimant in question. The written reprimand also noted that Petitioner was directed by his supervisor to take no further action with the claim while the issues were clarified. Petitioner disobeyed this directive and deleted attorney information from the file. Resp't Ex. P.

17. On May 7, 2013, Rita Nibbs emailed Petitioner regarding Petitioner's failure to correctly complete fifteen of sixteen notices accurately. The email noted that Petitioner needed to include an explanation for the decision he rendered in each case, and that due to his performance he would be placed on case review until further notice. Resp't Ex. Q.

18. On June 13, 2013, Petitioner received a memorandum from Rita Nibbs, notifying Petitioner that he was within Respondent's expectations during the previous two months of Enhanced Quality Assurance Review. Petitioner was reminded to remain within Respondent's acceptable accuracy rating of greater than or equal to 87%. Resp't Ex. U.

19. On June 17, 2013, Rita Nibbs emailed the Regional Supervisor, Shannon Kelly and Operations Manager, Sylvia Funk, noting Petitioner's continued CDR claim accuracy issues. Ms. Nibbs noted that on two separate occasions, she had offered Petitioner additional training, but that Petitioner failed to respond to her offers. Resp't Ex. V.

20. On June 21, 2013, Petitioner was informed that additional CDR claim training was necessary after Petitioner continued to have technical issues with CDR cases during the aforementioned case review. Resp't Ex. W.

21. On June 25, 2013, Petitioner received training regarding the accurate processing of CDR claims. Resp't Ex. X.

22. On July 31, 2013, Petitioner was given a three-day unpaid suspension for sleeping at his desk during work hours. This punishment was handed down after Petitoner was given a pre-deprivation hearing, and followed the September 17, 2012 written counseling Petitioner received for the same offense. Resp't Ex. Y, N.

23. On September 3, 2013, Petitioner was noted to have claim processing issues after he improperly cited evidence for a case determination. Petitioner was given an oral explanation of the issue, and offered training on the matter. Resp't Ex. BB.

24. On September 6, 2013, Petitioner received a written memorandum from Rita Nibbs, stating that a review of his CDR claims indicated he could proficiently process CDR claims, and that future problems with his CDR claims would be construed as an unwillingness to adhere to Respondent's standards, which would be handled through progressive discipline. Resp't Ex. AA.

25. On January 30, 2014, Petitioner signed his Work Performance and Performance Appraisal Report for 2013. The Appraisal Report noted that Petitioner's Overall Performance Rating was "Does Not Meet Expectations," and he was subsequently given an Employee Development Plan. Resp't Ex. CC.

26. On February 10, 2014, Petitioner was shown to have improperly processed CDR claims again. Resp't Ex. DD.

27. On February 20, 2014, Petitioner was scheduled for a pre-deprivation meeting regarding his continued inability to properly process CDR claims. Resp't Ex. EE.

28. On February 20, 2014, the pre-deprivation meeting was held, after which Petitioner was subsequently terminated. Respondent's justification for the termination was Petitioner's "failure to appropriately cite evidence in CDR claims and follow supervisory directives" which fell below agency standards. Resp't Ex. FF.

IV. CONCLUSIONS OF LAW

1. Petitioner failed to establish a prima facie case of discrimination or retaliation for the statements made on Facebook which pertained to work related events. Petitioner has not proven that he was in a protected class, nor has he shown that his job performance met the employer's legitimate expectations. Additionally, Petitioner was unable to bring forth any evidence regarding the discussion he had with his supervisor regarding the Facebook comments. The relationship between Petitioner's comments and termination is too tenuous to establish a prima facie case of discrimination or retaliation given that the statements were made early in his tenure with Respondent. Even if Petitioner had raised a prima facie case, Respondent asserted a legitimate and nondiscriminatory rationale for Petitioner's termination which Petitioner failed to assert were pretextual in nature.[4]

2. By a preponderance of the credible evidence, Respondent proved just cause for Petitioner's termination. Petitioner fell short of satisfying the reasonable performance expectations and policies of Respondent. These expectations and policies were clearly communicated to Petitioner, and similar expectations were applied to others working in a similar capacity. Additionally, Petitioner repeatedly showed that he could meet Respondent's expectations during review periods. In spite of his ability to meet Respondent's expectations, Petitioner's consistent failure to remain at acceptable levels was such that his employment with Respondent should not be continued. Respondent thus established its burden of required proof to show just cause for the termination under Ind. Code § 4-15-2.2 *et seq.*, Ind. Code § 4-21.5-3 *et seq.*

3. During his tenure with Respondent, Petitioner received discipline in the form of a written reprimand for failure to follow Respondent's business plan, and a three-day suspension for sleeping while on the job. Respondent proved just cause to impose further discipline, and

[4] The ALJ notes that certain "concerted activities" may be protected under the National Labor Relations Act 29 U.S.C. § 157, and that in recent years the National Relations Labor Board has scrutinized comments made in social media forums through the lens of protected concerted activities. *See* NLRB, Memorandum OM 12-59, *Report of the Acting General Counsel Concerning Social Media Cases* (2012). However, Petitioner did not raise such a contention, nor was any evidence presented regarding the content of the comments in question. Therefore, it will not be given further consideration.

notified Petitioner that continued failure to meet Respondent's quality standards would result in progressive discipline, which could include termination. Because Respondent has established just cause, it is entitled to deference in its election of disciplinary actions available under the Civil Service System. Petitioner's pre-deprivation and procedural rights under the classified provisions of the Civil Service System were also respected in the discipline processes.

4. All prior sections are incorporated by reference. To the extent a conclusion of law stated herein is a finding of fact or the reverse, it shall be so deemed and remain effective.

V. NON-FINAL ORDER

Judgment is entered in favor of Respondent Indiana Family and Social Services Administration. Petitioner's termination is **UPHELD** as supported with just cause and not unlawful for any reason. Petitioner's additional claims of discrimination and retaliation regarding his political beliefs are without legal basis or merit and are accordingly **DENIED**. The parties shall bear their own fees and costs.

DATED: April 13, 2015

Hon. Gabriel Paul
Chief Administrative Law Judge
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