BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

DOYIN OGUNMOYERO	)	
Petitioner,	)	
	)	SEAC No. 11-17-056
vs.	)	
	)	
LARUE CARTER MEMORIAL	)	
HOSPITAL BY INDIANA FAMILY	)	
AND SOCIAL SERVICES	)	
ADMINISTRATION	)	
Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On February 16, 2018, Respondent, Larue Carter Memorial Hospital, a part of the Indiana Family and Social Services Administration ("FSSA") ("Respondent"), by counsel, filed a Motion for Summary Judgment under Indiana Trial Rule 56 ("T.R. 56") seeking to dismiss Petitioner's Complaint ("Motion"). Petitioner Doyin Ogunmoyero ("Petitioner"), pro se, responded to the Motion on March 26, 2018. Thereafter on March 26, 2018, Respondent filed its surreply to the Motion.

This case considers Petitioner's termination for inappropriate interaction with a patient. Under Ind. Code § 4-15-2.2-42(f), an unclassified employee's complaint must demonstrate a violation of a law, rule or public policy to oppose the challenged employment decision. The controlling pleadings for purposes of this decision are the Complaint originally received on November 15, 2017, Respondent's Motion, Petitioner's reply to the Motion, and Respondent's Motion to Strike and surreply. In order to survive a T.R. 56 Motion, material issues of fact must exist such that judgment as a matter of law for the moving party would be inappropriate.

The ALJ finds that no material issue of fact exists with regard to Petitioner's claims. Therefore, Respondent's Motion for Summary Judgment is hereby GRANTED. The following additional findings of fact, conclusions of law, and order are entered.

I. Summary Judgment Standard

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Simon Prop. Grp., L.P. v. Acton Enterprises, Inc.*, 827 N.E.2d 1235, 1238 (Ind. Ct. App. 2005). A party seeking summary judgment bears the burden to make a prima facie case showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. *Id. See also Am. Mgmt., Inc. v. MIF Realty L.P.,* 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to T.R. 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. *Simon Prop. Grp., L.P.*, 827 N.E.2d at 1238*; Am. Mgmt., Inc*, 666 N.E.2d at 428.

The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. *Simon Prop. Grp., L.P.* at 1238; *Shambaugh & Son, Inc. v. Carlisle,* 763 N.E.2d 459, 461 (Ind. 2002). A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth ... or if the undisputed material facts support conflicting reasonable inferences. *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 253 (Ind. 2015).

II. Findings of Fact

The following facts are taken from the filings by both parties, as construed in the light most favorable to Petitioner.

1. Petitioner began employment with Respondent in June 2003, as a Behavioral Health Recovery Attendant ("BHRA"). (Pet'r. Compl.).

2. Petitioner became a licensed practical nurse ("LPN") in September 2010. (Pet'r. Compl.).

3. In September 2016, Petitioner became a registered nurse ("RN"). (Pet'r. Compl.).

4. On the evening of July 6, 2017, Petitioner was working his scheduled shift at Respondent's facility.

5. A minor patient on Petitioner's unit was threatening to harm herself with a spork she had taken from the dining area back to her room. (Pet'r. Compl.).

6. Petitioner was called by the patient's assigned BHRA to assist in keeping the patient from harming herself. (Pet'r. Compl.).

7. The BHRA was struggling to retrieve the spork from the patient who was kicking, spitting, and hitting. (Pet'r. Compl.).

8. Petitioner initiated physical restraint to subdue the patient. (Pet'r. Compl.).

9. Petitioner covered the patient's mouth and nose while waiting for the patient to be placed in a restraint chair. (Resp't. Ex. B).

10. On July 6, 2017, the patient submitted a grievance form to Respondent, indicating that during the incident earlier that same day, Petitioner had pushed her head into the wall, scratched her forehead, and placed his hand over her nose and mouth, cutting off her air supply. (Resp't Ex. C).

11. Due to the patient's age, an assessment of alleged child abuse regarding Petitioner's handling of the patient was conducted by the Department of Child Services ("DCS") on July 7, 2017. (Pet'r. Compl).

12. On July 10, 2017, Respondent's Client Abuse Panel met to review the patient's report and determine what actions should be taken towards Petitioner.

13. Petitioner was terminated on July 13, 2017. (Pet'r Compl.).

14. DCS cleared Petitioner of any wrongdoing on August 3, 2017. (Pet'r. Compl.)

III. Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. Ind. Code § 4-15-2.2 et seq. SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). Ind. Code § 4-15-2.2-23, 24. Petitioner was an unclassified employee at all relevant times.

2. The general at-will employment law is well settled: "An employee in the unclassified service is an employee at will and serves at the pleasure of the employee's appointing authority." Ind. Code § 4-15-2.2-24(a). "An employee in the unclassified service may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. § 4-15-2.2.-24(b).

3. Recognized exceptions to the at-will doctrine based on public policy have traditionally only been found where an employee was terminated or disciplined for exercising a statutory right or refusing illegal conduct that would lead to personal criminal liability. Put another way, the courts ask whether the termination in question was illegal in light of applicable statutory law. A merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *See Baker v. Tremco Inc.*, 917 N.E.2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction*, 861 N.E.2d 704, 706-707 (Ind. 2007); *Orr v. Westminster*

Village North, Inc., 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Ind. Gas Co.,* 297 N.E.2d 425 (Ind. 1973); *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

4. "Indiana generally follows the employment at will doctrine, which permits the employer to discipline the employment at any time for a 'good reason, bad reason, or no reason at all.'" *See Meyers*, 861 N.E.2d at 706 (Ind. 2007) (quoting *Montgomery v. Bd. of Trustees of Purdue Univ.,* 849 N.E.2d 1120, 1128 (Ind. 2006); *Cantrell v. Morris*, 849 N.E.2d 488, 494 (Ind. 2006); *Sample v. Kinser Ins. Agency*, 700 N.E.2d 802, 805 (Ind. Ct. App. 1998), trans. not sought. Correspondingly, a claim that the discipline was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction. A viable public policy exception must be present for the Controlling Complaint to survive.

5. The ALJ will first address Petitioner's contention that his termination was inconsistent with the disciplinary action administered in a similar case. Petitioner suggests that another similarly situated employee was treated differently than Petitioner when she, a Caucasian female, allegedly abused a patient. (Pet'r. Reply).

6. "Disparate treatment claims require proof of intentionally discriminatory treatment of a protected class." *Villas West II of Willowridge Homeowners Ass'n v. McGlothin*, 885 N.E.2d 1280, 1285 (Ind. 2008). Such claims are also analyzed under 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. *See McDonnell Douglas*; *see also Ortiz v. Werner Enterprises, Inc.* In order to show a *prima facie* case of discrimination, the Petitioner must present evidence that "(1) he was in the protected group, (2) he was performing to his employer's legitimate expectations, (3) he was given discipline, and (4) he was treated less favorably than similarly situated individuals." *Filter Specialists, Inc.* at 846.

7. Even though Petitioner was in a protected class and was disciplined, there is no evidence that Petitioner was otherwise performing to his employer's legitimate expectations; in fact, the evidence shows the opposite—that Petitioner was not performing to his employer's expectations when he took actions that harmed a patient. Further, the employee Petitioner mentions was not similarly situated. There was not sufficient evidence to support the allegation of abuse against Petitioner's coworker. However, there was physical evidence (namely Resp't. Ex. B, which is a copy of the security camera footage from the time of the incident) which supported the allegation of patient abuse against Petitioner himself. Therefore, Petitioner's claim that other similarly situated employees were receiving different treatment than he is unfounded.

8. The ALJ will next address Petitioner's contention that Respondent discriminated against Petitioner because of his race, color, and national origin.

9. Allegations of discrimination are handled under 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. The Title VII discrimination analysis is often referred to as the modified *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *See also 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 initial burden of establishing a prima facie case of discrimination" through either direct or indirect evidence. *Ind. Civil Rights Comm'n v. S. Ind. Gas & Elec. Co.*, 648 N.E.2d 674 (Ind. Ct. App. 1995). While indirect evidence is merely circumstantial, direct evidence "establishes [discrimination] without resort to inferences from circumstantial evidence." *Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 840, 845 (7th Cir 2007).

10. 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 was just a 'pretext' which in turn permits an inference of unlawful discrimination." *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012) (citing *McDonnell Douglas*, 411 U.S. 804). "Evidence is evidence," and are means to consider whether one fact…caused another…) and therefore are not "elements" of any claim." *Id.* at 763. The legal standard is merely "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Id.* at 765.

11. "The plaintiff in such a case must first establish a 'prima facie' case of discrimination." *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009). "Once the plaintiff has established a prima facie case, unlawful discrimination is presumed." *Id.* at 840. The defendant-employer can rebut this presumption by producing evidence that the adverse employment action was taken "for a legitimate, nondiscriminatory reason." *Id.* (internal citations omitted). "Should the defendant-employer carry this burden, the plaintiff must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant-employer are but a pretext for discrimination." *Id.*

12. While the *McDonell Douglas* analysis is still employed, under the doctrine first laid out under *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016), using the *McDonnell Douglas* direct v. indirect analysis on various piles of evidence is too cumbersome. *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 763 (7th Cir. 2016). Instead, 7th circuit courts are now directed to look at the evidence as a whole when analyzing claims of discrimination under *McDonnell Douglas*. *Id.* at 764. "Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself- or whether just the "direct" evidence does so, or the "indirect" evidence." *Ortiz*, 834 F.3d at 763. While the

decision does not specifically extend to administrative bodies such as SEAC, the ALJ nevertheless finds that the *Ortiz* decision should be followed in this case.

13. In order to show discrimination, the Petitioner must present evidence that, considered as a whole, would allow a reasonable juror (here, the ALJ) to conclude that the plaintiff was discriminated against due to a protected characteristic." *Knapp v. Evgeros, Inc.*, 205 F. Supp. 3d 946, 956 (N.D. Ill. 2016). If when considering the collective evidence there remains unanswered questions regarding material facts of discrimination against a plaintiff, that would be sufficient to defeat a motion for summary judgment. *Simonis v. City of Fort Wayne*, No. 1:15-CV-235-PPS, 2017 U.S. Dist. LEXIS 71015 (N.D. Ind. May 10, 2017).

14. Petitioner fails to go any further in his allegations than merely stating that discrimination took place. In simply claiming that he was discriminated against, Petitioner fails to neither present evidence of discrimination nor show that his termination was discriminatory. Petitioner does not provide any evidence that would suggest a pattern of discrimination by the Respondent nor any employees under their command. Therefore, Petitioner does not lead the ALJ to believe that he was discriminated against in any fashion and so the ALJ finds that Petitioner's claim of discrimination fails.

15. The ALJ will next address Petitioner's contention that because DCS completed an investigation into the patient's allegations of abuse and found the allegations to be unsubstantiated, Respondent should be unable to find to the contrary under Respondent's own policies and thus terminate his employment.

16. However, upon Respondent's own internal review, Petitioner was found to have violated Respondent's Inappropriate Interactions with or in the Presence of Patients Policy (the "Policy"). (Resp't. Ex. A).

17. In part, the Policy states that examples of inappropriate conduct while interacting with patients include overbearing conduct or exercise of poor judgment. When an employee is found to have taken an action that resulted in abuse, neglect, or mistreatment, that employee's employment shall be terminated. (Resp't. Ex. A).

18. After review of the patient's allegations, interviews with witnesses, a review of the security video and speaking with Petitioner, the Client Abuse Panel found that Petitioner used excessive force and blocked the patient's airway by covering her mouth and nose. This method is contrary to Respondent's approved technique designed for managing patients' violent or disruptive behaviors. (Resp't. Ex. C).

19. Respondent submitted a copy of the security video from the unit hallway in which the incident occurred. The video shows that Petitioner clearly blocked the patient's ability to breathe by placing his hand over her nose and mouth. While Petitioner argues that he is not

visible in much of the video, the portions in which Petitioner does appear clearly implicate him in committing the acts he was accused of doing. (Resp't. Ex. B).

20. Petitioner next contends that the investigation conducted by DCS is binding on Respondent. However, DCS used different standards in its investigation and was not concerned with Respondent's internal policies. Additionally, while DCS may have found the allegation of child abuse unsubstantiated, this finding does not have authority over Respondent's decision to terminate its employees for what its own Policy describes as patient abuse. It is a long-held rule that agencies are allowed to promulgate their own rules and policies. *See* Administrative Procedure Act, 5 U.S.C. §§ 552 and 553. *See also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).

21. Petitioner finally claims that his actions were unintentional and therefore did not violate Respondent's Policy. However, the Policy defines physical abuse as the "[i]ntentional, knowing, or reckless performance of an act…where such action…caused or could have placed patient at risk or may have caused injury, discomfort or pain to a patient." (Resp't. Ex. A). "Recklessness differs from intentional wrongdoing in that while the act must be intended by the actor in order to be considered reckless, the actor does not intend the harm that results from the act." *Mark v. Moser*, 746 N.E.2d 410 (Ind. Ct. App. 2001). While Petitioner may not have intended for his actions to cause the patient harm, the actions themselves (placing his hand over the patient's face and holding Petitioner against the wall) were intentional and therefore his actions were, at the least, reckless. Because Petitioner's actions were reckless and did cause injury, discomfort, and pain to the patient, the incident falls under the Policy's definition of physical abuse. Thus, Petitioner's termination was in accordance with the Policy which calls for the termination of employees who have been found to commit patient abuse, as Petitioner did.

22. Respondent has successfully shown that no material issues of fact exist that would warrant further proceedings. Petitioner failed to follow Respondent's workplace standards as evidenced above. Respondent's termination of Petitioner did not violate public policy and is hereby UPHELD.

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

Order

Respondent's Motion for Summary Judgment is hereby GRANTED and Petitioner's Complaint is hereby DISMISSED. This is the final order of the Commission. A person who wishes to seek judicial review must file a petitioner in an appropriate court within thirty (30) days of this order and must otherwise comply with I.C. § 4-21.5-5. So Ordered.

DATED: April 5, 2018

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