UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MICAH WILLIAMS, Plaintiff, V. JUDITH LOVCHIK, Ph.B., A.B.M.M., in her official and/or individual capacity as the Assistant Commissioner and Laboratory Director of the Indiana Department of Health, JUDITH MONROE, In her official and/or individual capacity as the Commissioner of the INDIANA DEPARTMENT OF HEALTH, MITCH DANIELS, in his official and/or individual capacity as the Governor of the State of Indiana, and the STATE OF INDIANA, Gregory N. Larkin M.D., as the successor to Judith Monroe, in his individual capacity and/or official capacity as the Commissioner of the INDIANA DEPARTMENT OF HEALTH Defendants,	)	Case No. 1:09-cv-01183-TWP-DML

PLAINTIFF'S SURREPLY AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE THE AFFIDAVIT OF MICAH WILLIAMS

Plaintiff's Surreply and Response in opposition to Defendants' Motion to Strike Micah Williams' Affidavit is hereby tendered, for the reason that, in Defendants' Reply and Motion to Strike: (1) Defendants concede outright that judgment should be rendered in favor of Plaintiff on one of Plaintiff's core claims—seeking relief for segregating the ISDH lab along racial lines, (2) Defendants' effort to prevent this Court from considering relevant and probative evidence is unavailing, and (3) the Defendants attempt to suggest that Plaintiff has not provided references to the record is disingenuous, particularly in light of the fact that over 150 pinpoint references to the record were made in Plaintiff's Response to Defendants' Motion for Summary Judgment.

1. Defendants Concede Judgment Should be Granted to Plaintiff, on Plaintiff's "Lab Segregation" Claim.

In this matter, Plaintiff raises three core claims: (1) That the ISDH lab employees were unlawfully segregated along racial lines, (2) that he was unlawfully singled out for discriminatory treatment, and (3) that he was retaliated against. Defendant's reply concedes that judgment should be granted on the lab segregation claim, by their statement in their Reply at page 11, that "[Defendants] are unaware of an "adverse impact theory. . ."

To state the obvious, this lack of awareness of a cognizable legal action does not constitute a defense to one of Plaintiff's core claims. Irrespective of Defendants' assertion that Defendant Lovchik did not act with an intention to segregate the workforce at the Indiana State Department of Health Laboratory, one who is impacted by segregation can seek relief, under the Constitution and Title VII, in order to rectify the wrong, and obtain prospective equitable relief to prevent recurrence. The adverse impact analysis—that relief can be afforded for discriminatory effects of management policies, irrespective of feigned or genuine lack of discriminatory animus—has been recognized since *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), and regularly receives recognition in Seventh Circuit cases, such as *Petit v. Chicago,* 325 F.3d 1111 (7th Cir. 2003).

Following Defendants' logic would put this Court in the unenviable position of saying no relief exists for those State employees, at ISDH and elsewhere, who are placed in the spot of being a pawn or a dupe, so as to facilitate racial segregation. As for the "cat's paw" analogy, Defendants again willfully misperceive what Plaintiff was stating. The analogy is to a 15th century French fable, designed to give warning against being duped into acting in an inadvisable way, and, consequently, getting burned. The fable entails a mythical monkey who abuses the

trust of a mythical feline, so as to use the cat's own paw to pluck chestnuts from burning embers on a hearth.

Defendants know full well that Plaintiff was asserting that Defendant Lovchik was using Plaintiff as her dupe, but spends time in the Reply creating a straw man legal argument, never advanced by the undersigned. Defendants' argument over "cat's paw" is a red herring meant to distract the Court from dispensing justice. This Court should proceed with denying Defendants' ill-advised Motion for Summary Judgment, since it was advanced knowing facts are in dispute. The legion of factual disputes is evidenced by the length of the Reply itself.

2. This Court Should Reject Defendants' Effort to Prevent This Court From Considering Relevant Evidence

Defendants endeavor to prevent this Court from considering relevant and probative evidence as to the core components of Plaintiff's Complaint, including: (1) discrimination, as evidenced by Defendants' singling out Mr. Williams out for a draconian pay cut of twenty percent, that later mutated, *inter alia,* into a demand for his forced resignation and involuntary reassignment, and (2) retaliation, as evidenced, *inter alia, by* his being forcibly denuded of all supervisory responsibility when no cause existed for doing so, as well as being shuffled into a location and position in which he had no job duties whatsoever.

The untenable nature of Defendants' effort is evidenced by seeking to strike Mr. Williams' affidavit in its entirety. The Motion to Strike is premised on the fact that Mr. Williams' affidavit highlights various statements made by Defendants' own employees, who were charged with the responsibilities for which Defendants now seek to disavow any accountability whatsoever. This effort is inartful, to say the least, as undertaken without any citation to legal authority whatsoever; moreover, the effort is wholly contrary to Fed.R.Evid.

801(d)(2)(D). *Simple v. Walgreen Co.,* 511 F. 3d 668 (7th Cir. 2007) (statements that were a euphemism for discriminatory refusals of a job, made to someone with a different race from those with whom he would be associating if the job was granted, were admissible, as an admission against the *employer*, along with an after-the-fact assessment and advisement to the Plaintiff that "race played a factor" in the decision to appoint a white co-worker, even though the person making the statements/admissions was neither the decision-maker nor the Plaintiff's supervisor.)

Defendants, regrettably, neglect to advise the Court that the Motion to Strike, premised on hearsay, is unavailing, due to the fact that the statements objected to were made by Defendants' employees, in the capacity of their respective employment. Mr. Williams' supplemental Affidavit, filed concurrently herewith as Exhibit 1, sets the record straight on that score. With respect to statements made by ISDH Chief of Staff/Assistant Commissioner Lance Rhodes, statements attributable to ISHD management, Amanda Writt, Rene Dreher, Ella Yeakey, Judith Lovchik, Gary Couch, Bart Carroll, and Jennifer Pitcher, all were communicating as employees within the scope of their respective employment.

As can be seen from the attached email from Bart Carroll (attached as Exhibit 2), Defendants have done everything imaginable to keep Plaintiff from advancing such relevant and probative evidence to this Court, in derogation of their duties not only officers of the Court, but also, as representatives of the Office of Indiana's Attorney General. Attorney Carroll even went to the extreme of claiming to represent all ISDH employees, including the several who have come to the undersigned for legal counsel, an untenable position. Document 23 of this Court's file indicates that the probative value of the statements made by ISDH's investigators in their September 9, 2009 report, affirming unlawful discrimination was afoot, was of dispositive effect,

in that they were made with full candor, in order for Counsel for the Defendants to determine, *inter alia*, the validity of the instant claims. The report in question, in fact, was withheld from Plaintiff for some two and one-half years.

The admissions sought to be excluded are telling. The Chief of Staff, Assistant Commissioner Lance Rhodes revoked the draconian pay cut proposal, an admission in response to Mr. Williams 'complaint that the proposed pay cut was discriminatory. Mr. Rhodes then singled Mr. Williams out for a forced resignation, as of December 15, 2008, which was both retaliatory and discriminatory, spoken in the same breath as his soliloquy in admitting that the Department of Health was wrongheaded in the proposed cut, by analogizing his own experience when he was an assistant coach, and the head coach was heading the team in the wrong direction.

The statements made to Mr. Williams by Amanda Writt, as is known by Defendants' counsel, were made, verbally and in writing, in a capacity as one who facilitated resolution of employee complaints of discrimination and/or retaliation. Now Defendants seek to distance themselves from these statements, some of which are just plain obvious in their veracity– Defendant Lovchik's management practices in fact segregated the ISDH Lab staff by race, whether as a result of impermissible animus or not.

The statements made to and by Renee Dreher were made to Mr. Williams in a capacity as a recruitment specialist. She affirmed the propriety of his being paid a higher rate of pay, which dispels the idea that there was any pay discrepancy that Defendant Lovchik needed to ameliorate, since the pay rate was set after appropriate consideration was given to Mr. Williams' many talents. Indeed, Defendant Lovchik initially lied when the undersigned asked her the straightforward question: "who among the Directors were complaining about unfairness?"

Her response was the perjurious dissembling:

"I don't know."

Lovchik, p. 39, line 2-4. (Perhaps it dawned on her that penalties for perjury may be severe, because she then, after the falsehood, inquired "Am I required to name names?" *Id.*)

Defendants, in a word, are asking this Court to provide its stamp of approval to various efforts to undermine not only the administration of justice in this matter, but also the ability of ISDH employees, or State of Indiana employees generally, to have complaints of segregation and discrimination taken seriously, and not suffer adverse consequences for advancing them. Defendants' position as to the Motion to Strike, simply, is untenable.

In addition, the affidavit statements, along with potential hearsay, are admissible as probative of the good faith with which Mr. Williams advanced his opposition to what he perceived as unlawful segregation, discrimination and/or harassment. *Sweeney v. West,* 149 F. 3d 550, 554 (7th Cir.1998); *Drake v. Minnesota Min. & Mfg. Co.*, 134 F.3d 878, 885-886 (7th Cir. 1998); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir.1982); *Berg v. LaCrosse Cooler Co*., 612 F.2d 1041 (7th Cir. 1980).

3. <u>The Reply's Distortions, Including the Claim That Plaintiff Made no References to the Record, Are Unavailing, and May be Ignored.</u>

Defendants, in their Brief, cite to four supposed examples as to how Plaintiff has failed to cite to this Court the relevant portions of the record, and disingenuously implies that Plaintiff neglected to place a citation at the end of a sentence, in rather peculiar fashion, by stating the sentence's citation to the record occurred at the end of a paragraph (Reply item E on page 8). Not surprisingly, perhaps, Defendants cite to the Court to *Unites States v. Dunkle*, 927 F. 2d 955, 956 (7th Cir. 1991), which has no bearing on the issues at hand. There, the Seventh Circuit was not discussing disputes of fact in the summary judgment context whatsoever. Rather, the

Appellate Court in that case was discussing the apparent stealth argument of the Defendant in a tax evasion case. Here, the Court is not faced with pigs, truffles, or anything of the sort. Instead, Plaintiff, in response to an unfounded Motion for Summary Judgment on his core disputes of segregation, discrimination, and retaliation, has pointed out in excess of 150 citations to specific record evidence, much of which constitutes admissions by Defendants' duly authorized representatives. There is no need to root around like a pig searching for a mushroom, only to use a mouse to click on the relevant portion of a deposition transcript, affidavit, or exhibit.

Also, Defendants curiously cites this Court to *Gatzimos v. Garrette,* 2001 W.L 1726651, *1, (S.D. Ind. 2001). That case has no precedential authority, and, moreover, states that, unlike the Plaintiff here, references there were not made to the record. In an indication of just how desperate the attempt to maneuver the Court away from consideration of the various evidence in Plaintiff's favor (S.D.Ind.LR. 56.1(b), after all, expressly permits the non-movant to submit evidence not already in the record), Plaintiff seems to say that the undersigned's placement of citations to the record at the end of a sentence is somehow in violation of the rule.

Regrettably, Defendants have also elected to reply to the Plaintiff's response in a way, through the use of ellipses and other rhetorical slight-of-hand, so as to only provide half of the relevant information required by the Court, in order to make an informed decision. Moreover, because the facts adduced by Plaintiff are not contested, it shows the Plaintiff is entitled to judgment on his claims.

In spite of Defendants' claims that there were not specific references to the record (specifically referencing merely four bullet points), the invalidity of Defendants' arguments is

shown by the fact that the substance of each of the bullet points were specifically referenced by Plaintiff to the record. This is shown by the following analysis of Defendants' bullet points:

- (Defendants' bullet point) Moreover, she [Dr. Lovchik] confesses she didn't ever discuss with Mr. Williams that his regular pay was somehow excessive, in comparison to others at the time she became director on February 14, 2008.

Defendants assert that this is unsubstantiated by the record, by citing only to the place in the Response where it appears, rather than informing the Court that the Response makes direct citation to Dr. Lovchik's own words:

> Q: And as far as this is concerned did you advise him whether or not you thought his compensation was appropriate, inappropriate, too high, too low?
> A: I did not.

Id. Lovchik, page 30, line 1-4; moreover Lovchik page 43, line 15 – page 46, line 5 was a chapter and verse effort to avoid just the kind of specious argument that is now advanced.

> Q: If Lixia Liu and Dave Dodson had made complaint to you in 2007 about Micah Williams' being unfair, did you discuss it with him when you became lab director on February 14, 2008?
> A: No I didn't.
> Q: How about February 15?
> A: No, I didn't.
> Q: February 16?
> A: Not at all
> Q: February 17?
> A: No
> Q: How about February 18
> A: No
> Q: February 19
> A: No
> Q: Did you discuss with him on February 20?
> A: No
> Q: Did you ever discuss it with him on February 21?
> A: No
> Q: How about February 22?
> A: No
> Q: That was a leap year the 29th did you discuss it with him then?
> A: No.

Q: How about between the 29th and the 22nd, did you think to discuss it with him then?
A: With him?
Q: Yes.
A: I thought you were talk them.
Q: With him
A: I am sorry. I thought you said did I discuss it with Lixia Liu and Dave Dodson. You are asking did I discuss it with Micah?
Q: Correct.
A: The answer is the same: No I didn't I'm sorry.
Q: Thanks for the clarification. How about March 1st?
A: I don't remember when I first discussed with Micah.
Q: Ok. March 23rd was Easter. Does that help refresh your recollection?
A: It does not. What was the day?
Q: Do you recall discussing it with him perhaps on Good Friday, March 21st?
A: I don't remember the date that I first discussed it with Micah.
Q: Do you recall discussing with between March 1 and March 20?
A: I don't remember the date that I discussed it with Micah.
Q: You have no memory at all of discussing it with Micah?
A: I do remember discussing with Micah. I don't remember the date.
Q: You don't recall any discussion with him in April of 2008?
A: It might have been April.
Q: April 1?
A: I don't remember the date.

Ms. Isenberg: I am going to object to any additional questions as to the exact date she has told you at least four times she doesn't know what day it was that she talked to him, but that she talked to him about it.

Q: You have no recollection of discussing it with Micah Williams a date when you discussed Micah Williams' pay with him?
A: That is exactly right.
Q: You cut his pay on July 25. You don't recall that?

Ms. Isenberg: I am going to object to the characterization that they cut his pay because I think he is testifying that his pay was never cut.

Q: Let me rephrase it you discussed cutting his pay with him on July 25 how about that: Did you discuss it with him then?
A: It might have been that date. I don't know.
Q: You know he was getting a cut approximately 20 percent of his pay, and you have no recollection as to when you might have – of the date,
A: That's correct.
Q: You know it prompted an EEOC charge, right?

To assert that there was no reference to the record is absurd as it is disingenuous.

Defendants reply then asserts that there wasn't record reference in the Response to the following bullet point, by only citing the Court to Response page 8 where it appears, rather than the record reference made by Plaintiff.

- Within four weeks of Director Williams protesting the racism inherent in the lab the employee's segregation in the Defendants' effort to cut his pay, spearheaded by Defendant Lovchik, Defendants admitted their fault by rescinding the pay cut proposal on September 25, 2008.

The record citation, in Plaintiff's Response, however, demonstrates that there is no dispute over this fact, as the only evidence in front of the Court on the rescission comes by way of Williams' affidavit paragraph 17, which states unequivocally as follows:

> Subsequent to my complaint about segregation, and my pay being singled out for reduction, unlike any other Caucasian male division male director, much less one whose responsibilities had been substantially increased, ISDH admitted its wrongdoing to me. This occurred when ISDH Assistant Commissioner and Chief of Staff Lance Rhodes told me, through a parable-like story, that my complaint was meritorious, and the proposed reduction would not occur. Notwithstanding these confessions he told me no less than five times that he variously expected/desired, sought my resignation, effective December 15, 2008, with no explanation as to any legitimate cause or rationale for this advisement.

Opposing counsel sat through the deposition where the parable-like story was relayed in its entirety. Which demonstrates once again the lengths Defendants apparently are willing to go to conceal evidence from the Court. The testimony given at Mr. Williams' deposition is accurately summarized in his affidavit paragraph 17, as Defendants well know. At the deposition, already part of the Record filed with the Court, it went like this:

Q: What was Mr. Rhodes' response to the documentation you provided to him?
A: Mr. Rhodes gave me a story. He said, "You know what I hear what you are saying. I have done a lot of things in my life." I think he said he was going on 62. "One of those things, I was a football coach. And I was a good defensive

coach. We had a head coach. We played this one team, and you know, our coach just kept on blitzing, kept on blitzing, kept on blitzing. And after awhile, they adopted. And they started dinking and dunking those little passes right over our head, right over our head. I said, Coach we have got to stop blitzing, but he was the coach and he wanted to blitz. So we ended up losing that game but I knew if we stopped blitzing that we would have a chance to win. So, Micah, we are not going to decrease your wage, but you know we are cutting down here at the Department of Health. And basically I can tell you this, we are going to eliminate your position on December 15th," I believe the date was. "I can guarantee that I can hold it up till then if you will give me a resignation now."

I said "Lance, I just had a third child. And as far as what I need to do with my job, if it comes down to mowing grass or selling popcorn at the ball games on the weekend I will do what I need to do to feed my family." I told him I knew exactly why Dr. Lovchik was doing what she was doing and why. He goes, "How do you know that?" I said, "Well I presented quite a bit of documentation at this point, but it actually goes a little bit more closer to the bone than that. It goes to the concept of how a person is raised, who they are around, and at a young age they can begin to decipher things that they carry throughout their adult life."

Then I told him the same story that I told Joe Fox one day in the office. That being good in sports kind of provided me with a different platform and things in Arizona. I played on sports teams with people who had old money and new money, so to speak, financially [a]fluent. I would be invited to different venues at a very young age. Maybe 8 and 9 till 13 or 14. Country clubs and cotillions and things of that nature. And I think my lesson from those earlier experiences, I was able to group people in three groups, Attorney Isenberg. One a group of people that didn't care if you were pink, purple with polka dots they judge you on your character. The kind of people with diversity didn't make uncomfortable. Second group of people is basically those that understood that you are different. Understood that you have the same rights that they did but more or less kind of want to keep you over there on your side of the place. You have a right to have a job, but over here. You have a right to go to school, but over here. Then the third group Attorney Isenberg are people that do not want you on God's green earth anywhere close to them,

Q: And what did Mr. Rhodes say in response to your story?
A: "Did you tell Joe Fox that?"
Q: And what was your response?
A: "Yes, I did."
Q: Then what did he say – Mr. Rhodes say?
A: "What did Joe Fox say?"
Q: Ok.
A: I said he asked me where I would rate Judith Lovchik?
Q: And what was your response?

A: "Firmly between a 2 and a 3." His response to that was, "Okay can I have your resignation?"
Q: That was Mr. Rhodes' response?
A: He asked for my resignation no less than five times in that meeting and the sixth time was at the door as I was walking out.

Williams Deposition pages 136, line 21 – page 139, line 25.

Apparently, Defendants take umbrage over the undersigned paraphrasing this lengthy story into a single paragraph in Mr. Williams' affidavit. This is a transparent effort to again request the Court to rely on only a small portion of facts, which are known to be in dispute, if not substantiate all of Plaintiff's claims. Such an effort should be eschewed.

Another bullet point where Defendants claim no record evidence exists, is in Defendant Lovchik's efforts to discredit Mr. Williams within the department, as attested to by a current employee, Chris Grimes, showing that Defendant Lovchik criticized Mr. Williams for the sort of behavior that she declared was exemplary on the part of Mr. Grimes, namely the CLIA audit.[1]

Defense Counsel's failure to produce this documentation or acknowledge that Defendant. Lovchik actively engaged in a campaign to undermine Mr. Williams' authority is proof positive that the Motion for Summary Judgment was, at best, frivolous, thereby supplying another rationale to justify entry of judgment in Mr. Williams' favor.

The reply is equally frivolous in that it repeatedly claims the Court is provided no references to the record when, in fact there are in excess of 150 references to pages, paragraphs and exhibits (with innumerable line references within the page references) to substantiate each and every fact that is pleaded. Defendants seemingly dispute Dr. Lovchik's own statement in her

[1] Mr. Grimes performance review for the 2008 year was requested, but regrettably opposing counsel only supplied a few pages of that document, omitting the reverse sides which demonstrated the fact in issue—that he received an exceeds expectations evaluation for the CLIA audit letter. The altogether the positive "attaboy" letter from CLIA auditor was also omitted entirely from the documents produced by opposing counsel. Fortunately, CLIA auditor Liz Clay had the good sense to also detect the motivations of Dr. Lovchik, which are plain for all to see, and supply Mr. Williams with a copy of the same the letter that Dr. Lovchik either destroyed or has buried in her office to the point where Defense counsel could not even find it.

declaration, where she states outright, not once, but twice that she only added to Mr. Williams supervisory workload responsibilities so as to ultimately reduce the number of direct reports to Mr. Williams. Defendants seek to dance around this admission, to no avail, as it is in writing and signed by Dr. Lovchik herself. Dr. Lovchik's many lies during the course of her deposition substantiates that there is a creditability dispute over nearly everything she says.

At the end of the day, Defendants' efforts seemingly implore this Court to validate the template used by Dr. Lovchik to segregate the workforce: Shuffle all the African-Americans to the exclusive supervision of African-Americans, disclaim it was done for any intentional reason, subvert the investigation that found impermissible segregation occurred, seek an involuntary resignation or impose a draconian pay cut on any person that complains about it, or shuffle them off to no-work jobs that subjects them to criminal penalties for ghost employment if the "dupe" does not toe the line.

Lastly, Defendants bristle over the idea that Plaintiff puts disputes of fact before the court in plain English, using present tense, and active voice. Perhaps Defendants would prefer the Court to require Plaintiff to use the unduly prolix and passive voice that most grammarians find to be an anathema to the Plain English movement that started in the Michigan Bar some 25 years ago. But the undersigned respectfully submits that the plain English means of setting forth fact disputes (or supplying the facts that were left out of Defendants' version), e.g., "Defendant Lovchik retaliated/ attacked Plaintiff," etc. is a far superior as a way to alert the Court to what are the dispositive additional facts, or those in dispute, than would be a phrase replete with verbosity, e.g. "Plaintiff takes issue with the fact of Defendants' non-provision of facts, and/or Defendant Lovchik's mis-attribution of Plaintiff's accomplishments to Chris Grimes, as well a her giving him an 'exceeds expectations' evaluation in his year-end review for the 2008 performance

evaluation" as a result of the CLIA Audit, and would, in support thereof, show that defendant Lovchik supplied a negative evaluation over the same CLIA audit to Plaintiff in his year-end performance evaluation for 2008." Regardless, Plaintiff forthrightly supplied additional evidence and conflicting evidence, which shows that Defendants' Motion for Summary Judgment is unavailing as material facts are either aligned in Plaintiff's favor, or, at the least, in dispute.

CONCLUSION

For all of the above and forgoing reasons, plus those advanced earlier, Plaintiff respectfully submits that summary judgment requested by Defendants should be denied, and, in addition, judgment be entered against defendants on his segregation, discrimination and retaliation claims, with a hearing to be set to determine the legal and equitable relief to which he is entitled.

Respectfully submitted,

ROBERT W. YORK & ASSOCIATES

*/s/ James D. Masur II*_____

James D. Masur II, 19681-49

Attorney for Plaintiff, Micah Williams

CERTIFICATE OF SERVICE

Notice of this filing will be sent to the following parties by operation of the Court's CM/ECF system on October 11, 2011.

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