BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

EUGENE V. YOUNG, JR.	)	
Petitioner,	)	
v.	)	SEAC No. 07-12-077
	)	
CAMP SUMMIT BOOT CAMP	)	
BY INDIANA DEPARTMENT	)	
OF CORRECTION	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND NON-FINAL ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT CSBC

On November 27, 2012, Respondent CSBC, by counsel, moved for summary judgment and also moved to dismiss. Petitioner Eugene Young, pro se, timely responded with briefing on January 10, 2013. This case considers, under the Indiana Civil Service System (I.C. 4-15-2.2-1, 42), the Petitioner's state employment termination from Respondent CSBC on May 4, 2012. Petitioner Young is an unclassified, at-will employee who alleges that his termination arose from unlawful age discrimination contrary to public policy.

Having duly reviewed the record, the Administrative Law Judge (ALJ) determines there are no genuine issues of material fact and Respondent CSBC is entitled to judgment as a matter of law. Respondent CSBC has designated sworn evidence to defeat Petitioner Young's prima facie age discrimination case, and additionally shows a legitimate, non-discriminatory reason supporting the termination, the belief that Petitioner used excessive force with a custodial juvenile. Petitioner Young responded by a brief, but has not designated any evidence, and does not otherwise successfully rebut the state's arguments. No question of genuine material fact for an evidentiary hearing is demonstrated. As a former at-will employee, Petitioner could thus be freely terminated by Respondent because a public policy exception cannot be demonstrated.

Respondent CSBC's Motion for Summary Judgment is therefore **GRANTED**. Respondent alternatively moved to dismiss on the grounds that the Petitioner's Step I Complaint did not originally state the age discrimination claim, which was stated as an amendment at the Step III level. However, that motion to dismiss is denied. Petitioner's amendment was effective, but not enough to keep his claim alive in the face of Respondent's summary judgment motion.

I. The Summary Judgment Standard

Summary judgment proceedings before SEAC are governed by Indiana Trial Rule 56. I.C. 4-21.5-3-23. Summary judgment is only appropriate when the designated evidence shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Swineheart v. Keri*, 883 N.E.2d 774, 777 (Ind. 2008). All inferences from the designated evidence are drawn in favor of the non-moving party. *Id*. "The burden is on the moving party to prove the nonexistence of material fact; if there is any doubt, the motion should be resolved in favor of the party opposing the motion." *Oelling v. Rao (M.D.) et al*, 593 N.E.2d 189, 190 (Ind. 1992).

II. The Motion to Dismiss Standard

Dismissal proceedings test the legal sufficiency of a complaint. All facts plead in the non-moving party's complaint, and reasonable inferences therefrom, are taken as true. A party's complaint should only be dismissed if it is legally insufficient or fails to plead essential elements of the claim(s). *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007); *Huffman v. Office of Envt'l. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004); *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind. Ct. App. 2003); and *Steele v. McDonald's Corp. et al.,* 686 N.E.2d 137 (Ind. Ct. App. 1997). See also, Ind. Trial Rule 12(b)(1) and (6).

III. Order denying Respondent's alternate Motion to Dismiss

Respondent alternatively moved to dismiss on the grounds that the Petitioner's Step I Complaint did not originally state the age discrimination claim, which was stated by Petitioner as an amendment at the Step III level. However, that motion to dismiss is denied. Petitioner's amendment was effective. This case will proceed to the merits of summary judgment, upon which Respondent prevails as discussed in the other sections.

A. The facts as to the Motion to Dismiss

This section only discusses the facts, in the light most favorable to non-movant Petitioner Young, related to disposition of the motion to dismiss. Petitioner Young is sixty-four years of age. (Petitioner's Step III Complaint). Petitioner was terminated from his unclassified, at-will employment as a teacher for Respondent CSBC on May 4, 2012. (Petitioner's Step I Complaint) Petitioner, pro se, timely filed a Step I Civil Service Complaint on June 1, 2012 regarding his termination. (Resp. Ex. A)

The Step I Complaint asserts that Petitioner Young was terminated by Respondent CSBC for "grievances of two disgruntled students" and were "without merit and were retaliation against

the teacher." (Resp. Ex. A) Petitioner timely filed a Step II Civil Service Complaint. This Complaint alleges that Respondent "targeted this petitioner because of petitioner's age, experience, and professional standing." (Pet. Step II Complaint.) Petitioner's Step II Complaint was denied on June 27, 2012. Petitioner then timely filed a Step III (SEAC) Complaint on July 13, 2012, and an Amended Complaint on August 22, 2012.

Petitioner's Amended Complaint, filed on August 22, 2012, includes all of the facts of his Step I and Step II Complaints with the addition of alleging his termination was due to a public policy violation based on age discrimination. (Am. Complaint.) The Amended Complaint specifically alleges that "at the time of dismissal, petitioner was sixty-four years of age, which is over forty years of age, and in a protected class." Petitioner also alleges that other employees asked "when the Petitioner was going to retire" and also remarked that Petitioner "made more in salary than the Superintendent." (Id.)

B. Liberal amendment standard

Indiana law recognizes that not all complaint filings are original complaints. Indiana law embraces the notion that once an original complaint is timely filed that certain later filed complaints are actually amendments that may relate-back to the original complaint. Complaints may also be supplemented when new events arise. Given AOPA's relative silence on the topic, the ALJ looks to both Indiana case law and the Indiana Trial Rules for guidance:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleadings . . ."
>
> Ind. T. R. 15(C)
>
> "Upon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense."
>
> Ind. T. R. 15(D)
>
> See further, *M.C. Welding & Machining Co. v. Kotwa*, 845 N.E.2d 188, footnote 4 (Ind. App. 2006)(Where a later-filed retaliatory discharge claim

> arose out of the same occurrence set forth in the original complaint and therefore the amendment related-back to the date of the original pleading and replaced the original pleading.) *Harp v. Indiana Department of Highways*, 585 N.E.2d, 652, 659 (Ind. App. 1992)(Holding that even a new party may be added by amendment under Ind. T. R. 15(C) if "the claim or defense against the added party arose out of the conduct, transaction, or occurrence set forth in the original pleading . . .," and (to paraphrase) the responding party had fair notice of the general notice of the claim.) And see, *Porter v. Guzorek*, 857 N.E.2d 363 (Ind. 2006) *reh'g denied* 2007 (The doctrine of relation-back amendments promotes the preference of decision on the merits, but should be balanced with fair notice and finality.)

In conclusion, Indiana law permits the amendment of complaints that relate-back to the original pleading. See, Ind. T.R. 15. This rule also allows more cases to move forward as "Indiana law strongly prefers disposition of cases on their merits." *Coslett v. Weddle Bros. Constr. Co*., 798 N.E.2d 859, 861 (Ind. 2003).

C. Resolution of the dismissal motion

The addition of the age discrimination allegation in the Amended Step III Complaint is considered an amendment and not a new complaint under Ind. T.R. 15 (C). As long as the responding party "had fair notice of the general notice of the claim" then due process has been satisfied. *Harp* at 659. Here, Respondent CSBC had notice as to the issues of the Complaint – the termination and the circumstances surrounding the termination. Respondent had sufficient opportunity to investigate the circumstances following the Step I filing. The addition of a new or refined legal theory – age discrimination – by Petitioner related to the original facts of the termination does not make the Step III Amended Complaint to SEAC a "new" Step I complaint. The amendment arises out of these same issues and therefore relates-back to the original June 1, 2012 Complaint by Petitioner Young.

Respondent CSBC's Motion to Dismiss regarding the amendment of the complaint is **DENIED**.

IV. Is an age discrimination claim a viable claim for relief before SEAC in an unclassified Civil Service Case?

This matter, to a degree, presents a complex question of initial impression for SEAC as to exactly how to consider age discrimination claims by unclassified, at-will state employees under the Civil Service System.[1] The parties have not briefed the issue other than that the state's summary judgment motion affirmatively, and meritoriously, asserts Respondent did not discriminate based on age or violate public policy.[2] Petitioner meanwhile claims age discrimination is contrary to public policy as applied through the Civil Service System.

Petitioner Young is a former unclassified state employee for Respondent CSBC. An unclassified state employee is at will, and serves at the appointing authority's pleasure. An unclassified state employee may thus be "dismissed, demoted, disciplined or transferred for any reason that does not contravene public policy." IC 4-15-2.2-24(b). I.C. 4-15-2.2-1 et seq., 24(b), and 42 (Civil Service System). *Meyers v. Meyers Construction*, 861 N. E.2d 704, 705 (Ind. 2007)(Indiana's employment at will doctrine allows an employer or an employee to terminate the employment at any time for a "good reason, bad reason, or no reason at all.") . Recognized exceptions to the at-will doctrine include "a public policy exception . . . if clear statutory expression of a right or duty is contravened." *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. App. 2012). Whether public policy was violated is the issue in the instant matter. I.C. 4-15-2.2-42.

With respect to classified just cause employees – which Petitioner is not – the Indiana Civil Service System clearly forbids age discrimination. Age discrimination will not support just cause discipline. I.C. 4-15-2.2-12(a)(5)(A).[3] The Civil Service System is otherwise silent as to how to specifically apply 'age discrimination' claims to unclassified employees. (For example, see Civil Service Sections 24 or 42.) The Indiana Age Discrimination Act (IADA) declares that a decision to dismiss from employment or refuse to hire a person based solely on a person's age is an unfair employment practice and against public policy. I.C. 22-9-2-2. A person, like Petitioner, over forty years of age and under the age of seventy-five is considered to be in a protected class under the IADA.

[1] The interaction of at least four statutory sections and caselaw must be considered including, the Civil Service System, Indiana's employment at will doctrine, the Indiana Age Discrimination Act, and the federal Age Discrimination in Employment Act as limited by 11th Amendment sovereign immunity.

[2] Respondent's brief implicitly assumes that proven age discrimination would violate Indiana public policy and argues the age question using the federal *McDonnell Douglas* burden shifting analysis.

[3] The prior Merit Act, I.C. 4-15-2-1, 35, expressly forbid age discrimination against state employees, and allowed for statutory equitable remedies by SEAC. See, *Ind. Dep't. of Envtl. Management v. West*, 838 N.E.2d 408, 410-411 (Ind. 2005) (SEAC could entertain and remedy an age discrimination claim under the Merit Act, but could not order the creation of a new position.)

However, the Indiana Supreme Court has held "[T]hat units of state government with twenty or more employees are subject to the federal Age Discrimination in Employment Act [ADEA] and therefore not covered by the Indiana Age Discrimination Act [IADA]. We also hold that there is no private civil damage remedy under the Indiana Age Discrimination Act." *Montgomery v. The Board of Trustees of Purdue University*, 849 N.E.2d 1120, 1122 (Ind. 2006). Sovereign immunity, e.g. the Eleventh Amendment to the U.S. Constitution, meanwhile prevents monetary legal damages against Indiana in federal or state court under the ADEA, but not injunctive relief (often referred to as *Ex Parte Young* relief), if properly captioned, directed against state officials violating the law. *Montgomery* at 1125-7. The IADA does not waive Indiana's sovereign immunity as to the ADEA. *Id*. Restated, only injunctive or equitable relief is available to a claimant against Indiana officials under the ADEA. *Id*.

Finally, noting significant differences between other Indiana civil rights laws and the IADA[4], the *Montgomery* court rejected a wrongful termination, "public policy exception" claim for monetary damages by "private judicial enforcement and has relied instead on administrative methods of resolution." *Montgomery* at 1129-1130. "We think this legislative history is persuasive evidence that the General Assembly chose to combat age discrimination primarily through administrative remedies rather than the broader remedies afforded by the ICRL." *Id*. at 1130 (emphasis added).

SEAC, itself a statutory part of state government, is an administrative adjudicatory agency that is charged by the General Assembly to fairly and impartially hears qualified employee appeals under the Civil Service System. I.C. 4-15-1.5-1, 6.[5] SEAC's remedial powers are in equity, not for traditional money damages. See, IC. 4-15-1.5, I.C. 4-15-2.2 and *Ind. Dep't. of Envtl. Management v. West*, 838 N.E.2d 408 (Ind. 2005)

In light of the foregoing authorities, the ALJ concludes that under existing Indiana state law that age discrimination, if proven true, directed to unclassified Civil Service employees would violate public policy as applied to the administrative, equitable relief available under the Civil Service System. That means Petitioner, unclassified, can attempt his age discrimination claim before SEAC and survive Ind. T.R. 12(b)(1) or (6). The problem here for Petitioner's case is that state is entitled to summary judgment against the age claim for two reasons.

[4] The category of age in Indiana's IADA has been treated differently by the General Assembly than the other protected classes in the Indiana Civil Rights act laws (ICRL) such as race, gender, national origin, or disability where private monetary suits, including for violations of the ICRL and public policy, are clearly authorized. *Montgomery* at 1130.

[5] Indiana state government, by the Indiana State Personnel Department's guidance, is also firmly committed to preventing unlawful age discrimination as a matter of internal employer practice. See, pages 12-13 of the State of Indiana Employer Handbook; copy publically available at http://www.in.gov/spd/2732.htm. See, I.C. 4-21.5-3-26(f) (official notice).

V. The Age Discrimination Analysis

Respondent's brief helpfully guides the ALJ to review this age case under the federally developed burden shifting precedent from *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), as evolved by progeny. *Filter Specialists, Inc. v. Dawn Brooks et al*., 906 N.E.2d 835, 839-842 (Ind. 2009); and *West* at 413-414. At the summary judgment stage, Indiana courts use the modified federal *McDonnell Douglas* analysis in age discrimination cases. *Id.*

Under the current form of the *McDonnell Douglas* analysis, a petitioner/plaintiff may prove discrimination either through direct or indirect evidence. *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012)*; Filter Specialists, Inc.* at 839-840. However, in federal age discrimination cases under the ADEA, unlike other civil rights cases under Title VII, the United States Supreme Court has held that a 'mixed motive' jury instruction is never appropriate in a suit brought under the ADEA. "[T]he Court concluded that the ADEA requires plaintiffs to prove by a preponderance of the evidence that age was the but-for cause of the challenged adverse employment action." *Smith v Wilson*, 2013 U.S. App. Lexis 1529, *15-16 (7th Cir. January 2013) citing *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 180 (U.S. 2009).

A petitioner employee holds the initial burden to show a prima facie case of age discrimination. The elements are (1) that the employee is a member of a protected class; age 40 or over; (2) that the employee met the employer's legitimate job expectations; (3) that the employee suffered an adverse action, such as termination or demotion; and (4) that he was replaced by a substantially younger person. The burden then shifts, and the state employer (the Respondent) may then rebut the prima facie case by showing a legitimate, non-discriminatory reason for the employer's action. Finally, the burden re-shifts and the petitioner employee must show that offered reason is a pretext. *Filter* at 839-842; *West* at 413-414; and *Coleman* at 845. Overall, at an evidentiary hearing, a petitioner employee holds the ultimate burden of proof by a preponderance of the evidence to show age discrimination was the but-for cause of the termination or discipline.

VI. Findings of Fact Applicable to Summary Judgment Motion

Respondent CSBC designated evidence under Ind. Trial Rule 56, but Petitioner did not. Petitioner did submit a brief which made several factual, but unsworn, contentions. The following facts are taken from the designated evidence, as construed in the light most favorable to the Petitioner:

1. Petitioner Young was at all relevant times an Institutional Teacher and an unclassified at will employee for Respondent CSBC. Petitioner Young is sixty-four years of age.

2. On April 23, 2012 a student of Petitioner Young's reported that the Petitioner "told me to sit up and I didn't so he kicked my ankles." (Resp. Ex. B)

3. John Galipeau, Commander for Respondent CSBC and a supervisor of Petitioner Young stated in a sworn affidavit that "based on [his] investigation, that Petitioner used physical force when Petitioner kicked a student on April 23, 2012." (Galipeau Affidavit ¶ 6) Galipeau also states that "Petitioner admitted to [him] that Petitioner kicked student DK on April 23, 2012." (Galipeau Aff. ¶ 8)

4. Cecil Davis, Superintendent for Respondent CSBC, has stated in a sworn affidavit that "based on internal investigation . . . Petitioner used physical force when Petitioner kicked a student on April 23, 2012" and that "[k]icking a student is an impermissible and excessive use of force except in cases of self defense." (Davis Affidavit ¶ 6)

5. On April 26, 2012, John Cosich, an employee for Respondent CSBC "observed Mr. Young toss or throw a box of sidewalk chalk into the air toward a student." (Cosich Aff.)

6. Galipeau investigated the chalk throwing incident and states in his affidavit that "[d]uring [his] investigation Petitioner admitted to [him] that Petitioner threw a box of sidewalk chalk at student CT on April 26, 2012." (Galipeau Aff. ¶ 9)

7. The Indiana Department of Corrections (IDOC) and Respondent CSBC as a facility of the IDOC, have a clear employer policy regarding the limitations on the use of physical force on juveniles in their care. Physical force against a juvenile may be used only under specific situations, reasonably and generally for self defense, to protect the juvenile from self-harm, to protect others from harm and to keep the juvenile from escaping detention. See Policy and Administrative Procedures for IDOC 03-02-109.[6]

8. Three employees of Respondent CSBC and former coworkers or supervisors of Petitioner Young have sworn under oath, and presented affidavits, stating that each of them are "unaware of any teacher working at CSC that used excessive physical force and did not report the use of physical force that did not have their employment terminated." (See the Affidavits of Galipeau, Davis, and Phelan.)

[6] The ALJ further considers that the state has a significant, and legitimate, governmental and employer interest in preventing excessive force by state agents against custodial juveniles under federal and state law.

9. Petitioner Young has asserted that instead of kicking the student on April 23, he was "nudging or tapping the sole of student's shoe with Petitioner's foot" and of the April 26 incident that he "tossed the chalk into a grass area near the group" of students. (Am. Compl. ¶ 1). Even if true, these bald allegations do not show a pretext of age discrimination by the state in the employment decision. The student was at least nudged and the chalk at least tossed. Petitioner, at minimum, used some physical force around the students.

10. Petitioner Young has asserted in his pleadings, but does not present designated evidence, that he was discriminated against and terminated from employment from Respondent CSBC due to his age. (Am. Compl. ¶ 1) However, mere stray remarks by co-workers that Petitioner was earning well or close to retirement age are insufficient to show but-for age decision making by Respondent's decision-makers. (See, Am. Compl.)

11. The designated evidence refutes the establishment of a prima facie case of age discrimination. Petitioner is over 40 years of age, but the state shows that younger co-workers were not treated more favorably based on but-for age discrimination. Additionally, the state advances a legitimate non-discriminatory reason for the discharge; the state's belief that Petitioner violated written, internal use of force policies or used excessive force directed to a custodial juvenile. In summation, there is no material evidence to support the Petitioner's bald complaint allegations that age was the but-for cause of the discharge.

VII. Conclusions of Law & Analysis as to Motion for Summary Judgment

1. Indiana follows the at will employment doctrine as to unclassified state employees. Age discrimination, if proven, would violate Indiana public policy as applied to the Civil Service System sufficient to state a viable claim for relief, but Respondent is entitled to summary judgment under Ind. T.R. 56. See Sections I, IV and V above.

2. The designated evidence refutes a prima facie case of age discrimination. The state's evidence undermines several prima facie elements. For instance, while Petitioner is over 40, there is no showing of age based thinking or discrimination by Respondent's decision-makers, and no showing of substantially younger co-workers being treated differently. Nor does Petitioner rebut the state's legitimate non-discriminatory reason for the discharge, which is Petitioner's own use of force around students. There is no material evidence to support the Petitioner's bald complaint allegation that age was the but-for cause of the discharge.

3. Respondent CSBC has demonstrated that Petitioner Young cannot satisfy the public policy exception to the employment at will doctrine as an unclassified employee.

4. Prior sections reciting contentions or certain general legal standards 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.

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

Summary Judgment Motion is entered in favor of Respondent CSBC. There are no genuine issues of material fact to require an evidentiary hearing. Respondent is entitled to judgment as a matter of law against all claims of the complaint, amended or not. Respondent has satisfied the movant's burden under Ind. T.R. 56. Petitioner Eugene Young has not successfully rebutted this burden. Petitioner's complaint is denied. Respondent's termination of Petitioner Young is upheld.

DATED: February 4, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employee's Appeals Commission
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Indianapolis, IN 46204-2200
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v.	)	SEAC No. 07-12-077
	)	
CAMP SUMMIT BOOT CAMP	)	
BY INDIANA DEPARTMENT	)	
OF CORRECTION	)	
Respondent.	)	

NOTICE OF FINAL ORDER
OF THE STATE EMPLOYEES' APPEALS COMMISSION

On February 4, 2013 the ALJ issued notice and a copy of "Findings of Fact and Conclusions of Law with Non-Final Order of Administrative Law Judge" granting summary judgment to Respondent Camp Summit Boot Camp" ("ALJ's Order"), which is incorporated by reference herein. No objections were received by either party within the time of February 22, 2013 provided. Accordingly, the ALJ's Order, in its entirety, is hereby the Findings of Fact, Conclusions of Law and Final Order of the Commission pursuant to statute and Commission delegation.[1] Ind. Code §§ 4-21.5-3-27 to 29.

The Commission is the ultimate authority, and the action is its Final Order and determination in this matter. A person who wishes to seek judicial review must file a petition with an appropriate court within thirty (30) days and must otherwise comply with I.C. 4-21.5-5.

DATED: March 18, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue
Indianapolis, IN 46204

[1] A clerical edit is made. The "or" in the last sentence on page 6 of the ALJ Order is hereby corrected to "for", as in "for two reasons" by interlineation.

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A copy of the foregoing was sent to the following:

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