**BEFORE THE**
**STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

| | | |
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| JACKIE WALKER<br>Petitioner, | )<br>) | SEAC ISSUED<br>MAR 01 2018 |
| | ) SEAC No. 01-18-004 | |
| vs. | ) | |
| | ) | |
| PUTNAMVILLE CORRECTIONAL<br>FACILITY BY INDIANA<br>DEPARTMENT OF CORRECTION<br>Respondent. | )<br>)<br>)<br>) | |

## ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

### I. Introduction and Summary

On February 8, 2018, Respondent Indiana Department of Correction ("Respondent") by counsel, filed a Motion to Dismiss Petitioner's Complaint ("Motion"). Petitioner Jackie Walker ("Petitioner"), pro se, submitted a response to Respondent's Motion on February 13, 2018. Thereafter, on February 19, 2018, Respondent filed a response in support of its Motion. The ALJ has duly considered the parties' filings, arguments and the pleadings, and this matter is ripe for ruling.

This case considers Petitioner's challenge of the fairness of his termination after felony criminal charges were brought against Petitioner. Petitioner challenges his ability to appeal his termination based on timeliness. Petitioner bases his challenge on the information he was given by his human resources representative. Petitioner was informed that he would be able to file an appeal to seek rehire with Respondent and that there was not a statute of limitations governing when he could file such appeal.

After review of the pertinent pleadings noted above, the ALJ finds Respondent's Motion meritorious and hereby **Grants** it. Petitioner's Complaint, with its factual allegations accepted as true, fails to both state a claim upon which relief could be granted and allege a violation of a law, rule, or public policy exception to Indiana's at-will employment law. Thus, this case must be dismissed under I.C. § 4-15-2.2-42. The following additional findings of fact, conclusions of law, and final order of dismissal for lack of jurisdiction are entered.

## I. Motion to Dismiss Standard

Dismissal proceedings test "the legal sufficiency of the complaint." *Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1349 (Ind. Ct. App. 1998). All facts plead in Petitioner's complaint, and reasonable inferences therefrom, are taken as true. *Bee Windows, Inc. v. Turman*, 716 N.E.2d 498, 500 (Ind. Ct. App. 1999). However, when a party's complaint is legally insufficient or fails to plead essential elements of the claim, the complaint or deficient claim should be dismissed. *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 12(b)(6).

## II. Findings of Fact

The facts relevant to the instant Motion's resolution, and construed in favor of the non-movant Petitioner, are as follows:

1. Petitioner began employment with Respondent on July 15, 2002. (Pet'r. Compl.).

2. At all times relevant to this matter, Petitioner was an unclassified, at-will employee, a Correctional Lieutenant, for Respondent. (Pet'r. Compl.).

3. On September 11, 2016, Petitioner was arrested and charged with domestic battery committed in the presence of a child less than 16 years old as a level 6 felony, intimidation as a level 6 felony, and domestic battery as an A misdemeanor. (Resp't. Motion).

4. On September 14, 2016, Petitioner was terminated from his position. (Pet'r. Compl.).

5. Petitioner was subsequently informed by his human resources representative, Kathy Goss ("Goss"), that after Petitioner's legal issues were resolved Petitioner would be allowed to appeal his termination and that there was not a time limit on the appeals process. (Pet'r. Compl.).

6. On October 17, 2017, Petitioner was convicted on a misdemeanor domestic battery and a misdemeanor invasion of privacy. (Pet'r. Compl.).

7. On January 3, 2018, Petitioner filed an appeal with the State Employees' Appeals Commission regarding his September 14, 2016, termination.

## 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. sec. 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); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

4. "Indiana generally follows the employment at will doctrine, which permits both the employer and the employee to terminate the employment at any time for a 'good reason, bad reason, or no reason at all.'" *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 a termination was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction. Nor does such an assertion state a claim for which relief can be granted in an unclassified—at-will—Civil Service System case. *Meyers,* 861 N.E.2d at 704; I.C. § 4-15-2.2-42. A viable public policy exception must be present for the Complaint to survive.

5. Petitioner first contends that the statutory timeline to submit a civil service complaint should not apply in this matter because Goss allegedly informed Petitioner that there was no time limit on appealing his termination. (Pet'r. Reply).

6. The Civil Service Statute is clear about filing deadlines. *See* I.C. § 4-15-2.2-42 (c)(e). Under subsection c, Petitioner was required to file his Complaint not more than thirty (30) days after the date the employee became aware of his termination. The statute is also clear that if Petitioner fails to adhere to this procedure, he waives the right to file a complaint. Petitioner failed to file his complaint within thirty (30) days from his termination and therefore waived his right to appeal.

7. However, Petitioner claims that he detrimentally relied on Goss, an employee of the State of Indiana, telling him there was not a timeframe to appeal and therefore Petitioner believes the deadlines should not apply to him.

8. The doctrine of equitable estoppel applies when there is "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance [and] is binding if injustice can be avoided only by the enforcement of the promise." *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884 (Ind. Ct. App. 2007). "Equitable estoppel is [generally] available if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon his conduct in good faith and without knowledge of the facts. The elements of equitable estoppel are: (1) a representation or concealment of a material fact, (2) made by a person with knowledge of the fact and with the intention that the other party act upon it, (3) to a party ignorant of the fact, (4) which induces the other party to rely or act upon it to his detriment. The reliance element has two prongs: (1) reliance in fact and (2) right of reliance." *Wabash Grain, Inc. v. Smith*, 700 N.E.2d 234 (Ind. Ct. App. 1998)

9. Nevertheless, despite what Petitioner may have been told by an employee of the State, "Indiana courts have been hesitant to allow an estoppel in those cases where the party claiming to have been ignorant of the facts had access to the correct information." *Cablevision of Chi. v. Colby Cable Corp.*, 417 N.E.2d 348 (Ind. Ct. App. 1981). In other words, "ignorance of the law is no defense." *Strowmatt v. Ind. Dep't of Corr.*, 57 N.E.3d 898 (Ind. Ct. App. 2016).

10. The statutory deadlines for filing a civil service complaint are unmistakably stated in the Indiana Code, which is accessible to the public through a variety of methods. Had Petitioner wished to appeal his termination, he should have consulted the statutory language himself which clearly outlines the timeliness guidelines for filing an appeal in this forum.

11. Additionally, even if Petitioner could prove he detrimentally relied on information given to him by an agent of the State, "[a]s a general rule, equitable estoppel will not be applied against governmental authorities." *Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Comm'n*,, 819 N.E.2d 55 (Ind. 2004).

12. Therefore, Petitioner's argument that his appeal should be considered timely fails as he is over a year past the statutory deadline which is clearly stated in the Indiana Code and also because Petitioner cannot rely upon an equitable estoppel theory.

13. Next, Petitioner claims 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 it was discovered that this employee had a felony conviction. (Pet'r. Compl).

14. "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.

15. Petitioner fails to meet the first requirement of being in a protected class as he offers no evidence that he was in a protected class during the time of his termination.

16. Even if Petitioner were in a protected class, there is also 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 committed activities that resulted in felony charges and misdemeanor convictions.

17. Respondent's Information and Standards of Conduct for Departmental Staff Policy ("Policy") states that "[d]ue to the special nature of the relationship between a staff person and offenders, as well as a staff person's duty to serve as a role model for offenders and the public, the arrest or conviction of a staff person for any crime or infraction may be grounds for disciplinary action. The Department is committed to providing the public with qualified staff persons who possess good character and standards."[1]

[1] *See* Indiana Department of Correction Manual of Policies and Procedures 04-03-103, § I, https://www.in.gov/idoc/files/04-03-103_Standards_of_Conduct_for_IDOC_Staff_12-1-12.pdf.

18. Petitioner was in violation of Respondent's Policy when he was arrested and charged with violent acts against his ex-wife. Petitioner indicates that another employee had been arrested and convicted of a crime prior to his employment with Respondent. However, Petitioner and the other employee are not similarly situated because the other employee's arrest and conviction took place prior to his employment with Respondent, while Petitioner's took place while he was currently an employee. Additionally, Petitioner's coworker's arrest was for a non-violent crime, while Petitioner's crime was violent. (Resp't. Reply).

19. Petitioner presents no evidence which purports to show how his discipline was otherwise unfair *vis a vis* his other co-worker. Therefore, Petitioner's claim that other similarly situated employees were receiving different treatment than is unfounded.

20. The ALJ finally turns to Petitioner's allegation that he was discriminated against based on his age. The controlling pleading in this matter is Petitioner's Complaint originally received on January 3, 2018. Petitioner's original Complaint did not contain any allegation of age-based discrimination and the issue cannot now be raised through Petitioner's response to Respondent's Motion to Dismiss. While "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served," Petitioner failed to file an amended complaint addressing any form of age-based discrimination prior to Respondent's filing of its Motion to Dismiss. Indiana Trial Rule 15(A). "Courts are restricted to an analysis of the complaint when evaluating a motion to dismiss," and therefore the matter will not be considered. *Hill v. Trs. of Ind. Univ.*, 537 F.2d 248 (7th Cir. 1976). While Petitioner is barred from presenting any new allegations in this matter, the ALJ will employ a short discussion of why Petitioner's claim of discrimination would still fail even if allowed.

21. 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).

22. 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.

23. "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.*

24. 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.

25. To prove that he was discriminated based specifically on his age, Petitioner would need to meet the following requirements: "(1) that he or she is a member of a protected age group, (i.e., age 40 or over); (2) that he or she was performing his or her job at a level that met his or her employer's legitimate expectations; (3) that he or she was demoted; and (4) that he or she was replaced by a younger person." *Ind. Dep't of Envtl. Mgmt. v. West*, 838 N.E.2d 408 (Ind. 2005).

26. Petitioner was not a member of a protected age group as he was under 40 years-old.[2] Additionally, as discussed previously, Petitioner does not show that he was performing his job at a level that met Respondent's legitimate expectations (due to his arrest for a violent crime, Petitioner was, in fact, not meeting Respondent's expectations that its employees serve as role models for offenders and the public). Finally, Petitioner does not provide evidence that he was replaced by a younger person. Therefore, Petitioner's claim that he was discriminated against based on his age fails.

27. 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 demotion 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.

## IV. Final Order of Dismissal

Respondent's Motion to Dismiss is GRANTED. This action is hereby dismissed with prejudice. All case management deadlines are vacated.

This is the final order of the Commission. A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this order and must otherwise comply with Ind. Code § 4-21.5-5.

[2] Petitioner was 39 years old at the time of his arrest and termination. (Pet'r. Reply).

DATED: March 1, 2018

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