BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

CHARLES SAGE Petitioner, vs. PUTNAMVILLE CORRECTIONAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)))))))))	SEAC No. 01-18-009

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On September 12, 2018, Respondent Putnamville Correctional Facility, which is a part of the Indiana Department of Correction ("Respondent"), by counsel, filed a Motion for Summary Judgment regarding Petitioner's Complaint ("Motion"). Petitioner Charles Sage ("Petitioner"), by counsel, timely replied to the Motion on October 15, 2018. Petitioner also filed a Motion to Strike certain portions of Respondent's evidence on October 15, 2018 as well. Thereafter, on November 16, 2018, Respondent filed a response in support of its Motion and to Petitioner's Motion to Strike.

This case considers Petitioner's termination on October 13, 2017, for failing to report illegal activity to Respondent when Petitioner became aware of materials from Respondent's facility being used for personal use by another employee.[1] At the time of his termination, Petitioner was an unclassified, at-will Maintenance Foreman with Respondent. Petitioner asserts that he was terminated because of his age, in violation of the Age Discrimination in Employment Act ("ADEA"). Under Ind. Code § 4-15-2.2-42, 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 is the Complaint originally received on January 25, 2018, Petitioner's amended Complaint received on February 27, 2018, Respondent's Motion, Petitioner's reply to Respondent's Motion and Respondent's surreply.

[1] Jurisdiction was granted to the State Employees' Appeals Commission under Ind. Code § 4-15-2.2 *et seq.* ("Civil Service System"); and the Administrative Orders and Procedures Act, Ind. Code § 4-21.5-3 *et seq.* ("AOPA").

After review of the pertinent pleadings noted above, the ALJ finds Respondent's Motion meritorious and hereby **Grants** it. The ALJ also finds that Petitioner's Motion to Strike should be denied. Petitioner's Complaint, with its factual allegations accepted as true, fails to allege a violation of a law, rule, or public policy exception to Indiana's at-will employment law, and this case must therefore 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. 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

1. Petitioner was first hired by Respondent in 1987 (Pet'r Reply, Ex. 2).

2. From November, 2000, until his termination, Petitioner worked for Respondent as a Maintenance Foreman (Pet'r Reply, Ex. 2).

3. In September, 2017, Petitioner was outside of the maintenance area in Respondent's facility when he noticed a metal object (Pet'r Reply, Ex. 2).

4. Upon inquiry, Petitioner was told by an offender that the object was a deer cart and that it belonged to Kevin Daniels ("Daniels"), another employee of Respondent who resided in a house belonging to Respondent on the grounds of Respondent's facility (Pet'r Reply, Ex. 2).[2]

5. Petitioner, relying upon said information, then transported the deer cart to Daniels' house (Pet'r Reply, Ex. 2).

6. In the interim, Respondent began investigating the theft of Respondent's materials by Dallas Strother, another of Respondent's employees, and their subsequent transport to Daniels' house (Resp't Motion).

7. As part of that investigation, Petitioner was initially interviewed by Respondent's Internal Affairs Department on September 27, 2017, wherein he was asked about his involvement in the above-mentioned investigation (Pet'r Reply, Ex. 2).[3]

8. Petitioner stated that while he had seen things being made in the maintenance area by virtue of his position, he had no knowledge about the construction of the deer cart or how it got to Daniels' house (Pet'r Reply, Ex. 2).

9. On October 10, 2017, Petitioner was interviewed a second time by Respondent's Internal Affairs Department and was again asked how the deer cart got to Daniels' house (Pet'r Reply, Ex. 2).

10. Petitioner answered that he had transported the deer cart to Daniels' house after an offender told him that it belonged to Daniels (Pet'r Reply, Ex. 2).

11. Respondent, having concluded its investigation, then terminated Petitioner on October 13, 2017, for violation of Respondent's Code of Ethics and its Standards of Conduct Policy No. 04-03-103, specifically Section VI (Code of Ethics), Items E and L (failure to report unethical or corrupt behavior), Section IX, subsection D (Investigations and duty to report), Subsection M (Reporting) and Subsection R (Property, Equipment and Resources) (Resp't Motion, Ex. G).

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[2] Certain of Respondent's employees, by virtue of their position, are allowed to reside for free in homes owned by Respondent located on the grounds of Respondent's facilities across the state.

[3] Daniels was also interviewed by Respondent on September 27, 2017, and admitted that the deer cart was made for him by offenders at Respondent's facility and also admitted that Petitioner transported the deer cart to Daniels' residence (Resp't Motion).

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. The ALJ will first address Petitioner's Motion to Strike.

6. In its Motion, Petitioner asks that Respondent's investigation report (Resp't Motion, Ex. B) be stricken under Indiana Trial Rule 56(E) because it was not sworn or otherwise signed. Petitioner also asks that Respondent's Exhibit G (Kathy Goss Affidavit) be stricken, since Petitioner claims Goss has no personal knowledge of the events.

7. Under Indiana Trial Rule 56(E), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

8. When considering both the affidavit and the investigation report, the ALJ notes that the United States Supreme Court has indicated that at least some forms of inadmissible evidence can be considered at the summary judgment stage of the proceedings. *See Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *see also Reeder v. Harper*, 788 N.E.2d 1236 (Ind. 2003).

9. The 7th Circuit has also weighed in on this topic, holding that "the evidence need not be in admissible *form*; affidavits are ordinarily not admissible evidence at a trial." *Winskunas v. Birnbaum*, 23 F.3d 1264 (7th Cir. 1994) (emphasis added). "But it must be admissible in *content*." *Id.* (emphasis added); *See also Reeder*, 788 N.E.2d at 1240.

10. In *Reeder*, the Indiana Supreme Court concluded that "an affidavit that would be inadmissible at trial may be considered at the summary judgment stage of the proceedings if the substance of the affidavit would be admissible in another form at trial." *Reeder* at 1241.

11. The ALJ finds that if this matter were to proceed to a hearing, Respondent could call both Goss, as well as the investigators who wrote the original report as witnesses to testify as to their personal knowledge of the events in question. Since such testimony would be admissible, the ALJ finds that the affidavits and the report in question can both be properly considered at this stage of the proceedings. The ALJ therefore DENIES Petitioner's Motion to Strike.

12. The ALJ will now turn to Petitioner's first contention that his termination was in violation of the ADEA.

13. The ADEA prohibits taking adverse actions against employees who are forty (40) years old or older because of their age. 29 U.S.C. §§ 623(a), 631(a). *See also Dayton v. Oakton Cmty. Coll.*, 907 F.3d 460 (7th Cir. 2018).

14. To prevail on a disparate-impact claim, a plaintiff must demonstrate that a "specific, facially neutral employment practice caused a significantly disproportionate adverse impact based on age." *Carson v. Lake County*, 865 F.3d 526, 536 (7th Cir. 2017) (citation omitted).

15. "Unlike disparate-treatment claims, disparate-impact claims do not require proof of discriminatory motive." *Dayton*, 907 F.3d at 465. "If a plaintiff establishes a prima facie case for a disparate-impact claim, the defendant may avoid liability by showing that the policy was based on a reasonable factor other than age ('RFOA')." *Id.*

16. "To establish this affirmative defense, a defendant must show that the disparate impact was 'reasonably designed to further or achieve a legitimate business purpose' and that it was 'administered in a way that reasonably achieves that purpose in light of the particular facts and

circumstances that were known, or should have been known, to the employer.'" *Id.* (citation omitted).

17. "When courts assess whether an RFOA exists, they need not consider whether there existed alternative ways the employer could have achieved its goals without causing a disparate impact on a protected class." *Id.* "As such, the affirmative defense is a 'relatively light burden' for employers to carry." *Id.* (citation omitted).

18. Similarly, Petitioner can prove discrimination under the ADEA via the burden shifting method laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

19. While *McDonnell Douglas* still applies, the 7th Circuit, in *Ortiz v. Werner Enters.* laid out a more simplistic approach to proving discrimination. *Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016). In *Ortiz*, the Court held that "[e]vidence 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' or 'indirect' evidence does so." *Id.* "Evidence is evidence," and are "means to consider whether one fact . . . caused another . . . and therefore are not 'elements' of any claim." *Id.* 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.* While the ALJ normally analyzes such claims under the *Ortiz* standard, given the facts here, an analysis under *McDonnell Douglas* is more helpful.

20. "Under *McDonnell Douglas,* an employee claiming that age discrimination was a factor in an employment decision where the employee was demoted must prove each of the following by a preponderance of the evidence to make out a prima facie case and trigger the employer's burden: '(1) that he is a member of a protected age group, [i.e., age 40 or over]; (2) that he was performing his job at a level that met his employer's legitimate expectations; (3) that he was subject to an adverse employment action; and (4) that he was replaced by a younger person.'" *Ind. Dept of Envt'l. Mgmt. v. West*, 838 N.e.2d 408 (Ind. 2005) (citation omitted).

21. From the Complaint, there can be no doubt that Petitioner met the first and third prongs of the above-mentioned test. Respondent also admitted that since Petitioner's termination it has filled one (1) of two (2) vacancies for maintenance foreman positions with someone who was significantly younger than Petitioner, who was fifty-three (53) at the time of his termination (Pet'r Compl.; Resp't Motion).[4]

22. Despite meeting the first, third and fourth prongs, the ALJ finds that critically, Petitioner fails the second prong because he was not performing up to Respondent's expectations.

23. Once Petitioner saw the deer cart, he should have immediately reported its existence to his supervisor. Instead, Petitioner relied upon the statement of an offender that the deer cart belonged to Daniels.

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[4] Respondent filled the other maintenance foreman position with someone who is older than Petitioner (Resp't Motion).

24. Petitioner's time in his position, as well as his statement that he had, in the past, seen things being made in the maintenance area of Respondent's facility, should have given Petitioner pause when he discovered the deer cart (Pet'r Reply, Ex. G).

25. Petitioner instead took the deer cart to Daniels' house.

26. During Petitioner's first interview with Respondent's Internal Affairs department, Petitioner also lied about whether he moved the deer cart, initially telling the investigators both that he had no knowledge of it and that he did not transport the deer cart (Resp't Motion Ex. C).

27. Only after Daniels admitted that Petitioner moved the deer cart to Daniels' residence in a separate interview with Respondent's Internal Affairs Department did Petitioner admit at his second interview that he was indeed responsible for the transport of the deer cart to Daniels' house (Resp't Motion, Exs. D, E).

28. Petitioner attempts to shield himself from liability by arguing that he never removed the deer cart from Respondent's property, nor did he know that the item was being used for Daniels' personal use (Pet'r Reply, Ex. G). However, both arguments are insufficient to show that Petitioner was meeting Respondent's expectations. The fact that Petitioner removed the deer cart from Respondent's facility without first verifying that it was to be taken off Respondent's property was wrong. Similarly, Petitioner did not need to know Daniels' motive for using the deer cart. It was enough to remove it and subsequently attempt to cover up its disappearance by lying to Respondent to show that Petitioner was not meeting Respondent's reasonable work expectations.

29. The ALJ therefore finds that Petitioner's ADEA claim fails.

30. Petitioner next argues that he was not in violation of Respondent's policy regarding standards of conduct.

31. Section VI, Item E of Respondent's Policy No. 04-03-103, entitled "Information and Standards of Conduct for Departmental Staff" ("Policy") states that employees are to uphold all laws, rules, regulations, policies and procedures of Respondent (Resp't Motion Ex. H).

32. Similarly, Section VI, Item L of the Policy requires employees to report any corrupt or unethical behavior that could impact Respondent (Resp't Motion Ex. H).

33. Petitioner should have, at the very least, reported the existence of the deer cart to his supervisors and had it moved to a more secure location in Respondent's facility pending an investigation. Petitioner was a maintenance foreman and therefore was in a position to control what items were made in Respondent's facility. However, Petitioner admitted that he was not aware that the deer cart was being made.

34. Petitioner's failure to report the existence of the deer cart caused him to violate Section VI, Item L of Respondent's Policy.

35. Most troubling, though, was the fact that Petitioner violated Section IX, Subsection D of the Policy, which imposes a duty upon employees to cooperate in Respondent's investigations and to report any violations of the Policy to a supervisor (Resp't Motion Ex. H). Failure to abide by this section is cause for discipline, up to and including dismissal. *Id.*

36. While Petitioner is correct that he did cooperate with Respondent's investigators, he did not do so until his second interview on October 10, 2017, and only then after Respondent's investigators told him they knew of Petitioner's involvement (Resp't Motion Ex. E).

37. Once Daniels was interviewed on September 27, 2017, and implicated Petitioner, Respondent, knowing that Petitioner knew about the deer cart and his attempt to cover it up, was free to discipline Petitioner by terminating him.

38. Therefore, the ALJ finds that Petitioner violated the Policy as described above by his failure to report the existence of the deer cart to his supervisors and subsequently lying about its existence and transport to Daniels' house such that his termination was warranted.

39. The ALJ finally turns to Petitioner's argument that his termination was pretextual.

40. "An employee may establish pretext indirectly by proving one of the following: (1) defendant's explanation had no basis in fact, or (2) the explanation was not the 'real' reason, or (3) the reason stated was insufficient to warrant the adverse job action." *James v. Shehan*, 137 F.3d 1003 (7th Cir. 1998).

41. Here, Respondent's reasons for the termination were based in fact. Respondent interviewed Petitioner on two (2) separate occasions and found that Petitioner lied about his knowledge of the incident. By doing so, Respondent reasonably concluded that Petitioner's actions were serious enough to warrant termination.

42. Also, Petitioner has submitted no evidence to show that the reasons given for his termination were somehow false.

43. Finally, the ALJ finds that by taking the deer cart to Daniels' house and subsequently lying about it, Petitioner caused Respondent to lose confidence in his ability to successfully perform his job. Petitioner was in a supervisory position and therefore held to a higher standard than his subordinates. Thus, the ALJ finds that Petitioner's actions were sufficient to cause his termination.

44. Therefore, the ALJ finds that Respondent's reasons for Petitioner's terminations were not pretextual.

45. No other public policy exception has been raised by Petitioner, and therefore, the ALJ concludes that SEAC lacks subject matter jurisdiction to further consider Petitioner's Complaint. Thus, Respondent's Motion must be granted.

To the extent a finding of fact is deemed a conclusion of law, or a conclusion of law is deemed a finding of fact, it shall be given such effect.

IV. Final Order of Dismissal

Respondent's Motion for Summary Judgment 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.

DATED: December 11, 2018

Hon. Gabriel Paul
Chief Administrative Law Judge
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