BEFORE THE

STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

TIMOTHY MEYER Petitioner,	)	ISSUED
	) SEAC No. 02-19-012	
vs.	)	OCT 31 2019
INDIANA VETERAN'S HOME Respondent.	)	STATE EMPLOYEES' APPEALS COMMISSION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

Normally, Halloween brings with it scary fun and delicious candy. However, this case involves more "trick" than "treat". On August 23, 2019, the Indiana Veteran's Home ("Respondent") by counsel, filed a Motion ("Motion") for Summary Judgment under Ind. T.R. 56, seeking to dismiss Petitioner Timothy Meyer's ("Petitioner") Complaint ("Complaint"). On September 25, 2019, Petitioner, by counsel, filed a Reply to Respondent's Motion. Thereafter, on October 10, 2019, Respondent filed its surreply.[1] This case considers Petitioner's termination for failing to perform his job duties in an acceptable manner.

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 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.

[1] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA). I.C. § 4-21.5 *et seq.* *See* I.C. § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to I.C. § 4-21.5-3-28 of the AOPA, the authority to issue final orders in this class of proceedings.

II. 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. Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial." *Id.* (citing *Am. Mgmt., Inc*, 666 N.E.2d 424, 428 (Ind. Ct. App. 1996)).

"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." *Id.* (citing *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) (internal citations omitted).

I. Findings of Fact

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

1. At all relevant times, Petitioner was the Food Service Director at Respondent's facility (Pet'r Compl.).

2. Petitioner began his employment with Respondent in September, 2018 (Pet'r Compl.).

3. On October 3, 2018, one of Petitioner's supervisors, Tammy Bolen ("Bolen"), first emailed Petitioner regarding deficiencies in Respondent's kitchen, such as improperly labeled food and the overall cleanliness of the kitchen. Bolen also offered to help Petitioner fix the problems, which she did by sending Petitioner a list of action items (mostly involving food labeling and kitchen cleanliness) on October 4, 2018 (Resp't Motion, Exs. G, H).

4. On October 5, 2018, Petitioner received an email from another one of his supervisors, Brenda Stichter ("Stichter"), regarding Petitioner's failure to use hair and beard nets while working in the kitchen (Resp't Motion, Ex. A.).

5. Stichter thereafter met with Petitioner to help cure the deficiencies (Resp't Motion, Ex. B).

6. On October 9, 2018, Stichter directed Petitioner to limit the time spent inside his office and to focus instead on helping his staff in the kitchen (Resp't Motion, Ex. C).

7. On October 13, 2018, Stichter sent Petitioner an email detailing what tasks she wished Petitioner to complete (Resp't Motion, Ex. D).

8. On October 16, 2018, Petitioner sent an email to his state representative on his state-issued computer identifying himself as Respondent's Food Service Director detailing his dissatisfaction with both his and his staffs' salaries and asked for assistance (Resp't Motion, Ex. E).

9. On October 17, 2018, Stichter sent Petitioner a PowerPoint document outlining the issues still present in Respondent's kitchen (Resp't Motion, Ex. I).

10. On October 19, 2018, Petitioner and Stitcher completed the action items noted above (Resp't Motion, Ex. B).

11. On October 23, 2018, Petitioner received an email from Bolen inquiring about the temperature of a food cooler that had not been checked since October 10, 2018 (Resp't Motion, Ex. J).

12. On October 24, 2018, Bolen again notified Petitioner about unresolved issues in the kitchen (Resp't Motion, Ex. J).

13. On November 2, 2018, Petitioner received an email from Stichter regarding Petitioner's conduct at a meeting. Petitioner was described as being unprepared and displayed a negative attitude throughout the meeting (Resp't Motion, Ex. K).

14. On November 5, 2018, Petitioner received an email from Stichter about not being available to handle an issue over the previous weekend. Petitioner did not respond, so a follow up email was sent on November 8, 2018, after which Petitioner responded on November 9, 2018 that he understood his job responsibilities (Resp't Motion, Ex. L).

15. On November 14, 2018, Petitioner received a response from his state representative's office regarding the wages issue. The response indicated that the representative would attempt to facilitate an increase during the 2019 legislative session that began in January, 2019 (Resp't Motion, Ex. E).

16. On November 14, 2018, Petitioner forwarded the response both to Stichter and Respondent's Superintendent, Linda Sharp ("Sharp") (Resp't Motion, Ex. E).

17. On November 15, 2018, Sharp spoke to Petitioner about the email sent to his state representative and told Petitioner that while he was welcome to send such emails as a private citizen, he could not do so in his capacity as a state employee. Petitioner was told that all such contact must be vetted through Respondent's legal counsel. Sharp finally informed Petitioner that she had been working with other state agencies behind the scenes in an effort to raise food service worker wages, that Petitioner's email hurt those efforts and that Sharp would have to enact damage control with the Governor's Office, given her status as a gubernatorial appointee. Sharp then issued Petitioner a Written Reprimand in lieu of a one (1) day suspension for emailing his state representative on behalf of Respondent without authorization (Resp't Motion, Ex. F).

18. On November 19, 2018, Stichter sent Petitioner another email regarding the temperature of the food cooler and noted that its temperature had not been checked since the end of October, 2018. Stichter also noted in the email that multiple items in the cooler had use by dates of November 15, 16 and 17, 2018 respectively and attached pictures of the expired items to her email (Resp't Motion, Ex. M).

19. On November 27, 2018, Bolen provided Petitioner with federal regulations regarding kitchen service in an effort to reinforce the standards Respondent expected Petitioner to meet with regards to his job performance (Resp't Motion, Ex. N).

20. On November 30, 2018, Respondent terminated Petitioner for poor job performance (Pet'r Compl.).

II. 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." I.C. § 4-15-2.2-24(a). "An employee in the unclassified service may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. § 4-15-2.2.-24(b).

3. Recognized exceptions to the at-will doctrine based on public policy have traditionally only been found where an employee was terminated or disciplined for exercising a statutory right or refusing illegal conduct that would lead to personal criminal liability. Put another way, the courts ask whether the termination in question was illegal in light of applicable statutory law. A merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *See, Baker v. Tremco Inc.,* 917 N.E.2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction,* 861 N.E.2d 704, 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); 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's contentions are that he believes his First Amendment constitutional rights were violated when he was terminated and that he was retaliated against for emailing his state representative. The ALJ will address each in turn.

6. Petitioner first alleges that his constitutional right to free speech was impinged by Respondent's termination of him. In support, Petitioner cites to *Love v. Rufus* for the premise that a state employee cannot be discharged or retaliated against for engaging in rights protected by the First Amendment to the U.S. Constitution. *Love v. Rufus*, 946 N.E.2d 1 (Ind. 2011).

7. While the above dicta is true, the Court in *Love* went on to note that, "[t]he government, however, has broader discretion to regulate the speech of its employees, because there are different interests at stake when it acts as employer than when it acts as sovereign. When the government acts as an employer, its interest 'in achieving its goals as effectively and efficiently as possible' is given greater value. Similar to a private employer, the government must exercise some control over its employees' words and actions to fulfill its public duties. Thus, citizens who become government employees must accept certain limitations on their freedom." *Id.* at 9 (internal citations omitted).

8. The Court also described a balancing test in determining whether speech is protected by the First Amendment. "First, the employee must have been speaking as a citizen on a matter of public concern. If this threshold requirement is not met, then there is no First Amendment retaliation claim. If the employee satisfies this threshold, then the *Pickering* balancing test must be applied to determine if the government was justified in 'treating the employee differently from any other member of the general public.' The public employee must first establish that he or she was both (1) speaking as a citizen, and (2) speaking on a matter of public concern." *Id.* (internal citations omitted.)

9. In *Love*, the plaintiff was a volunteer and part time firefighter who wrote unflattering emails about a candidate for a township trustee post. Crucially, in applying the *Pickering* test, the Court noted that the emails Love wrote were written from his home computer while he was off duty.

10. To quote the Court, Love was thus "[e]ngaging in speech in which any other citizen could engage." *Id.* 10.

11. In contrast, Petitioner admitted that he wrote the email to his state representative on his work computer while working and identified himself as Respondent's Food Service Director (Resp't Motion, Ex. A). Therefore, Petitioner was clearly acting as a state employee when he sent the email.

12. Also in *Love*, the emails in question referenced the proposed sale of public land, whereas here Petitioner's email was only interested in raising his and his employees' wages. Thus, the emails did not reference a public concern.

13. Therefore, the ALJ finds that Petitioner has failed both prongs of the *Pickering* test; therefore, his First Amendment rights were not violated by virtue of his termination.

14. As referenced above, the government has a right to regulate its employees' speech in certain circumstances. In this case, Petitioner was not told that he could not lobby the legislature for higher wages; he was told that a process had to be followed when doing so, which he failed to do.

15. Petitioner also was told that the Superintendent had already been working with other agencies to effectuate the change Petitioner sought. Had Petitioner followed the process already in place, he likely would have been told of those efforts such that they did not warrant duplication.

16. When Petitioner accepted his position, he could have negotiated for a higher wage; the fact that he ultimately accepted his position shows that he acquiesced to the wage he was offered. Therefore, Petitioner cannot now seek to hide under the rubric of being a private citizen acting in a public capacity.

17. Most importantly, however, is the fact that Petitioner was not terminated for these actions; he was merely given a Written Reprimand. As discussed below, Petitioner's termination was directly a result of his substandard kitchen practices. Therefore, Petitioner's First Amendment argument fails.

18. Petitioner's final argument is that he was terminated in retaliation for emailing his state representative.

19. To prevail on a Title VII retaliation claim, Petitioner "must prove that (1) he engaged in an activity protected by the statute; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action." *Lewis v. Wilkie*, 909 F.3d 858, 866 (7th Cir. 2018) (internal citations omitted).

20. To do so, Petitioner must show such connections via a showing that the evidence as a whole "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.; Ortiz v. Werner Enterprises*, 834 F.3d 760 (7th Cir. 2016).

21. In the present case, the ALJ finds that Petitioner meets only the second factor of the retaliation test described above, since his termination was an adverse employment action.

22. As the Food Service Director, Petitioner was in charge of a large commercial kitchen, as well as a staff to help support him. When he first began, Petitioner was given and ostensibly trained on the machinations of Respondent's operation (Resp't Motion, Ex. B).

23. Soon after Petitioner began however, Respondent noticed that Petitioner was not meeting its expectations, so it again provided Petitioner with a list of training items Petitioner needed to improve upon and asked Stitcher to retrain Petitioner on them. (Resp't Motion, Ex. A).

24. The items ranged from the mundane (Department Tour) to the critical (Food Preparation, Trayline and Cleaning).

25. On October 19, 2018, Petitioner initialed each item in the list, signifying that he understood how to effectively perform his job duties.

26. Despite this (early) remedial training, Petitioner's troubles continued.

27. In its Motion, Respondent indicated a dozen instances between October 3, 2018 and November 19, 2018 where Petitioner's kitchen management skills would make even Gordon Ramsay blush.

28. After each instance, Petitioner was counselled on how to correct the behavior and in one instance, given remedial training to help him better execute his job duties.

29. In the middle of these problems, Petitioner emailed his state representative, which as described above, had nothing to do with his mismanagement of the kitchen. More telling was the fact that Petitioner's Reprimand made no mention of his previous problems in the kitchen. Rather, it solely dealt with Petitioner's actions with his state representative.

30. Petitioner was thus given *multiple* chances to correct the problems, to no avail. Given Petitioners disinclination to improve, Respondent rightfully began to fear for the safety of its residents, who could easily get sick or worse if they ingested expired food, while also exposing Respondent to potential fines by either the State Department of Health or the Federal Department of Health and Human Services for poor kitchen management.

31. The ALJ thus finds that Petitioner has not shown that he was engaging in activity protected by Title VII, much less that it was connected to his termination. Petitioner's termination was for failing to successfully execute the job he was hired to do, not because of a one-off email sent to his state representative. Petitioner is lucky that his actions didn't cause some of the residents in Respondent's facility to suffer a fate unbecoming of their service to this country. The ALJ hopes that in Petitioner's next endeavor, his actions more closely resemble those of Casper the Friendly ghost than Bloody Mary.

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.

III. 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.

A copy of the foregoing was sent via email to the following:

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