BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

SANDRA CAESAR Petitioner,	))		ISSUED
	)	SEAC No. 03-18-020	DEC 05 2018
vs.	))		
INDIANA DEPARTMENT OF CHILD SERVICES Respondent.	)))		STATE EMPLOYEES' APPEALS COMMISSION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On September 10, 2018, Respondent Indiana Department of Child Services, ("Respondent"), by counsel, filed a Motion for Summary Judgment regarding Petitioner's Complaint ("Motion"). Petitioner Sandra Caesar ("Petitioner"), by counsel, timely replied to the Motion on November 2, 2018. Thereafter, on November 19, 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 28, 2017, for failing to meet the standards required of her as an Adoption Manager. The controlling pleadings for purposes of this decision is the Complaint originally received on March 29, 2018, Respondent's Motion, Petitioner's reply to Respondent's Motion and Respondent's surreply.

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.

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 1996 (Pet'r Compl.)

2. Petitioner was promoted to Adoption Manager in 2011, which was a managerial, or "E6" classification (Pet'r Compl.)[1]

3. Prior to her termination, Petitioner received an "exceeds expectations" on her 2013 Performance Appraisal ("Appraisal") and a "meets expectations" on her 2014, 2015 and 2016 Appraisals (Pet'r Compl.)

4. In 2015, Petitioner signed an agreement with Respondent which provided Petitioner with tuition assistance so that Petitioner, who was working on her Master's Degree in Social Work, could complete those studies (Resp't Motion, Ex K).

[1] The ALJ need not elaborate on this point, aside from mentioning that the state classifies every job into a certain category. In Petitioner's case, a classification of "E6" designates a managerial role. (Resp't Motion).

5. Included in the agreement was a provision which stated that, in the event of a default by the employee, all previously-paid amounts made on behalf of Petitioner were to be repaid via an installment plan. *Id.*

6. Failure to continue employment with Respondent was listed as an item of default. *Id.*

7. In August, 2017, Petitioner received an interim Appraisal, which reflected an overall rating of "does not meet expectations" in the areas of Job Knowledge, Change Management and Organizational/Commitment (Resp't Motion, Ex. E).

8. As a result of this interim Appraisal, Petitioner met with her supervisor shortly thereafter in an effort to better understand the areas in which Petitioner needed improvement (Pet'r Compl).

9. On Thursday, September 7, 2017 (a workday), Petitioner, along with other managers, attended a retreat at the Fourwinds Resort just south of Bloomington, Indiana, which featured drinking, along with a boat excursion on Lake Monroe (Pet'r Compl).

10. Petitioner did not feel comfortable attending, due to the fact that alcohol was being provided, as well as the fact that she was told to only claim a certain number of hours of work, with the rest to be claimed as personal or vacation time (since the retreat was being held during the week) (Pet'r Compl).

11. On October 17, 2018, Petitioner's supervisor sent an email to Respondent's HR expressing concern that Petitioner was still not meeting the expectations listed in her interim Appraisal (Resp't Motion, Ex. G).

12. On October 19, 2017, just before she was to depart for a mandatory managers' staff meeting in Nashville, Indiana, Petitioner was given another interim Appraisal, which provided Petitioner with additional feedback on how to improve her performance (Pet'r Compl).

13. The interim Appraisal noted that Petitioner's duties as an Adoption Manager were being curtailed or otherwise removed, but that Petitioner would be allowed to seek out another position with Respondent in the meantime (Pet'r Compl).

14. Based on this Appraisal, Petitioner did not attend the meeting in Nashville (Pet'r Compl).

15. On October 23, 2017, Petitioner was told to no longer communicate with external stakeholders and was replaced as a supervisor with another co-worker (Resp't Motion, Ex. I).

16. On October 24, 2017, Petitioner sent an email to her supervisor complaining about a project of hers (Resp't Motion, Ex. H).

17. October 25, 2017, Petitioner's supervisors emailed each other, expressing concern that the project Petitioner was working on was meant for someone of a lower classification. *Id.*

18. On October 28, 2017, Respondent terminated Petitioner for failing to meet its standards (Pet'r Compl).

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 contention that she was entitled to progressive discipline.

6. The State Personnel Department's Policy on Discipline clearly states that it applies only to those in the classified service, to which Petitioner did not belong. *See https://www.in.gov/spd/files/discpol.pdf.* Therefore, Petitioner fails to prove a public policy exception with this argument.

7. Petitioner next argues that Respondent did not adhere to the State's Performance Management Policy ("Policy"). She bases this argument on the fact that in the years leading up to her termination, she received above average Appraisals.

8. Respondent correctly argues that the critical inquiry is Petitioner's performance at the time of her termination. (Resp't Motion); *see also Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744 (7th Cir. 2006).

9. Therefore, although prior evaluations can be relevant in some circumstances, they cannot, by themselves, demonstrate the adequacy of performance at the crucial time when the employment action is taken. *See Burks*, 464 F.3d 744.

10. The State's Policy is meant to facilitate the creation of a culture where the employee's performance is aligned with agency objections. (Resp't Motion, Ex. D)

11. Key components of the Policy include the setting of clear annual performance expectations, regular coaching and feedback, written annual appraisals where the employee's performance is assessed relative to the performance objectives and timely corrective action when performance is not meeting expectations. *Id.* Additionally, the Policy encourages supervisors to meet at least once with each employee in the middle of a review period to conduct an interim appraisal, where needed. *Id.*

11. Petitioner's Interim Appraisal defines job knowledge as having adequate knowledge, skills and experience to perform the duties of the job (Resp't Motion, Ex. E).

12. Change Management is defined as openly supporting change. *Id.*

13. Organizational/Commitment requires Petitioner to display a high level of effort and commitment when performing her work. *See Id.*

14. As explained below, Respondent complied with the Policy, while Petitioner demonstrated a pattern of failing the above-defined objectives on her interim Appraisal.

15. Petitioner was given annual copies of her job description, along with her appraisals and was even given an interim appraisal in August, 2017, which was just over halfway through her annual review period (Resp't Motion, Exs. E, F, J).

16. Petitioner also admits in her Complaint that, following her receipt of the interim Appraisal, she met with her supervisor, ostensibly for help with improving her performance (Pet'r Compl).

17. Part of the help provided to Petitioner was a suggestion that Petitioner follow up with a coworker, who could also help with improving Petitioner's work (Resp't Ex. G).

18. However, Petitioner only contacted this person once and did not otherwise follow up on the suggestions provided to her. *Id.*

19. Respondent also provided an opportunity for Petitioner to attend a meeting on September 12, 2017, which would help Petitioner better understand what was expected of her. However, Petitioner declined this opportunity, stating she had other things on her schedule. *Id.*

20. It also appears as if Respondent attempted to ease Petitioner's workload in the years leading up to her termination by moving some of the programs Petitioner was in charge of to another manager. However, in response to this, Petitioner instead complained that she didn't like losing her ability to supervise such programs. *Id.*

21. Respondent also offered to set up a meeting between Petitioner and another manager in order to brainstorm ideas on how their areas could better work together, which Petitioner failed to do. *Id.*

22. Finally, one of Respondent's contractors offered up ideas to Petitioner in the past about how to improve her work, but Petitioner rebuffed those suggestions, leading the contractor to relate them directly to Petitioner's supervisors. *Id.*

23. Given the above, it is readily apparent that Petitioner's arguments that Respondent was deficient in administering the Policy *vis a vis* Petitioner fall flat and are therefore insufficient to prove a public policy exception.

24. Petitioner next argues that Respondent was in violation of the State Ethics laws during the September, 2017 retreat because Petitioner alleges that state money was used to buy alcohol for the event and for the boat rental.

25. In response, Respondent, under seal, provided evidence that its Internal Affairs division ("IA division") investigated the matter and ultimately found no violation of any ethics laws (Resp't Supplemental Ex. 1).[2]

26. Specifically, the IA division found that the money used for the retreat came from a fellowship obtained by a manager of Respondent that was pre-approved for the uses described above. *Id.*

27. Additionally, those attending the boat party were told to code such time as personal or vacation, since alcohol was being served, a fact supported by Petitioner. *Id*; (Pet'r Compl).

28. Therefore, the IA division concluded that no violation had occurred.

29. Petitioner does not otherwise challenge these findings, nor does she make any whistleblowing or other similar accusations. Therefore, the ALJ finds that Petitioner's complaints about the retreat held in September, 2017 are unfounded.

30. Petitioner next argues that her termination was discriminatory based on race.

31. While a petitioner can prove discrimination via the burden shifting method laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a more simplistic way now exists to do so.

32. While *McDonnell Douglas* still applies, the 7th Circuit, in *Ortiz v. Werner Enters* laid out a more simplistic approach to proving discrimination. *McDonnell Douglas Corp.*, 411 U.S. 792; *Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. Aug. 19, 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 whether through the "direct or "indirect" methods." *Ortiz*, 834 F.3d 760. "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.*

33. Considering the evidence as a whole, the ALJ can find no basis for Petitioner's discrimination claims, aside from vague assertions in her Complaint that were otherwise not discussed. In general, unsupported self-serving statements by the plaintiff are insufficient to carry the day against a motion for summary judgment. *See Castro-Medina v. P& G Commer. Co.*565 F.3d 343 (D.P.R. 2008).

34. Petitioner finally argues that she should not be required to repay the monies owed to Respondent under the agreement Petitioner signed in 2015 by virtue of her termination.

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[2] The ALJ notes that Respondent's IA division was given the directive to handle this investigation directly from the Indiana Inspector General's Office, which found no violation of any ethics laws and instead posited that Respondent was better equipped to investigate, given that the matter was HR-related (Resp't Supplemental Ex.2).

35. Section six (6) of the agreement states that an employee is in default when he/she fails to fulfill any obligation of the contract including continuing employment with Respondent (Resp't Motion, Ex. K).

36. In order to terminate the agreement, Petitioner must provide proper notice to Respondent and show good cause. *Id.* While it appears as if Petitioner satisfied the former, she failed to provide good cause.

37. While good cause is generally defined as a substantial change in circumstances that the employee did not anticipate and could not have reasonably anticipated at the time of signature and that the Deputy Director of Staff Development prevents or makes impracticable the performance or completion of Petitioner's obligations due to no fault of the employee, this clause goes on to state that good cause does not include an inability to satisfactorily perform the duties and responsibilities of Petitioner's position. *Id.*

38. Petitioner did not satisfactorily perform the duties required of her; thus, the ALJ finds that Petitioner was properly found to be in default.

39. Once found to be in default, the Agreement states that any unpaid monies must be repaid within two (2) years in equal monthly installments if the Employee so chooses. *Id.* Additionally, the agreement provides that any unpaid monies due more than five (5) days after a given due date will be subject to interest at the rate of six percent (6%) annum. *Id.*

40. Petitioner owed $13,642.53 to Respondent under the Agreement at the time of her termination, as this number ostensibly represented what Respondent had paid on behalf of Petitioner since 2015 to help Petitioner complete her Master's degree.

41. Given Petitioner's termination date of October 28, 2017, Petitioner has until October 28, 2019, to repay the money to Respondent. While the ALJ cannot change the terms of the Agreement, he nevertheless is sympathetic to Petitioner's inability to repay the money (Pet'r Reply).

42. Therefore, while the ALJ finds that Respondent is owed the money, he respectfully requests that Respondent work with Petitioner to set up a suitable repayment arrangement and that Respondent consider waiving any interest which has accrued since Petitioner's termination.[3]

43. 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.[4] Thus, Respondent's Motion must be granted.

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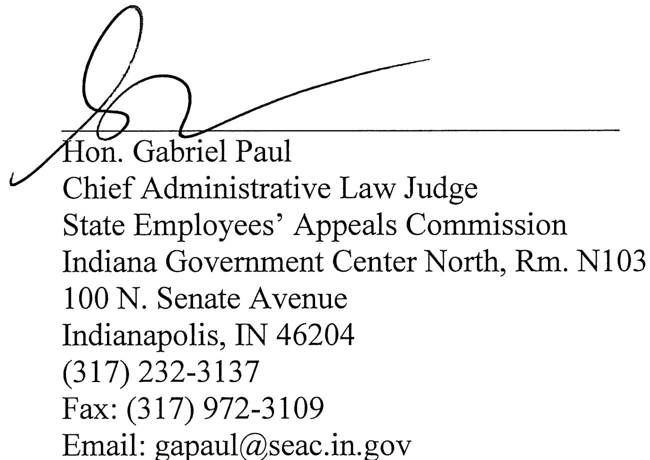
[3] The ALJ cautions Petitioner, however, that the above is simply a request and not an order. The ALJ does not have the authority under I.C. § 4-15-2.2 to modify the terms of the Agreement and advises Petitioner that Respondent is entitled to institute collection proceedings if it so chooses, which could result in Petitioner paying the full amount owed, plus interest and/or any collection fees. Despite this, the ALJ remains hopeful that Respondent's counsel can implore and otherwise convince Respondent to set up a new repayment arrangement, even if such monthly payments are small in nature.

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 5, 2018

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[4] At the outset of this case, the ALJ found that Petitioner's Complaint also seemed to allege that her termination was pretextual. At the prehearing conference, the ALJ informed Petitioner that in order for him to further consider it, Petitioner would have to provide evidence of such pretext in her eventual Reply. Petitioner failed to do so other than mentioning in her Reply that establishing the basis for pretext is difficult. Since the ALJ cannot make Petitioner's case for her regarding this argument, he will not consider it further.

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

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