BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

CRYSTAL JOHNSON Petitioner,	))	
	)	SEAC No. 03-18-021
vs.	)	
	)	
INDIANA DEPARTMENT OF CHILD SERVICES Respondent.	)))	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On October 30, 2018, Respondent Indiana Department of Child Services ("Respondent"), by counsel filed a Motion for Summary Judgment under Indiana Trial Rule 56 ("T.R. 56") ("Motion") seeking to dismiss Petitioner Denise Donaldson's ("Petitioner") Complaint. Petitioner, by counsel, responded to the Motion on November 29, 2018. Respondent thereafter filed a surreply on December 21, 2018.

This case considers Petitioner's termination for failing to remain at a drug testing center for the required period of time following her insufficient production of a specimen, resulting in a "refusal to test" status. Under Ind. Code § 4-15-2.2-42(g), the agency (here, Respondent) must show that it had just cause to issue the discipline. The controlling pleadings for purposes of this decision are the Complaint originally received on March 30, 2018, Respondent's Motion, Petitioner's Reply to the Motion and Respondent's surreply. In order to survive a T.R. 56 Motion, material issues of fact must exist such that judgment as a matter of law for the moving party would be inappropriate.

The ALJ finds that no issues of material fact exist with regard to Petitioner's claims such that this matter should continue. Therefore, Respondent's Motion for Summary Judgment is hereby GRANTED. The following additional findings of fact, conclusions of law, and order are entered.

I. The 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 hired by Respondent on January 23, 1994 (Pet'r Reply).

2. At all relevant times, Petitioner was a Family Case Manager 2 (Pet'r Compl.).

3. Petitioner is diabetic (Pet'r Compl.).

4. On December 4, 2017, Petitioner was selected to participate in a random drug screen (Pet'r Compl.).

5. On December 4, 2017, Petitioner reported to the drug testing center, Nova Medical Center ("Nova") (Resp't Motion).

6. At 11:26 A.M., Petitioner attempted to produce a full urine sample, 45 ml, but was unable to do so (Pet'r Compl.).

7. Petitioner was provided with and signed Nova's "Insufficient Specimen Water Log" ("Log") (Resp't Motion Ex. E).

8. The Log indicates that patients, upon failing to provide a 45 ml sample on their first attempt, must remain at the collection site for three (3) hours in an attempt to provide a sufficient sample (Resp't Motion Ex. E).

9. Failure to remain at the collection site until the process was complete would be considered a refusal to test (Resp't Motion Ex. E).

10. Petitioner attempted to provide a sample two (2) more times at 12:06 P.M. and 12:50 P.M., but was unable to produce a sample of 45 ml on either occasion (Pet'r Compl., Resp't Motion Ex. D).

11. After Petitioner's third attempt, the Nova collector, Dorothy Saye ("Saye"), told Petitioner that she would let Respondent's Human Resources department know Petitioner was unable to produce a sufficient sample (Pet'r Reply Ex. 3).

12. Saye left for lunch at approximately 1:00 P.M. and a second collector[1] arrived to take her place (Pet'r Reply, Resp't Motion Exs. E, F).

13. At 1:20 P.M., Petitioner attempted to provide a fourth sample, but was again unable to produce 45 ml (Pet'r Reply).

14. The second collector asked Petitioner if she was diabetic, which Petitioner confirmed (Pet'r Reply).

15. The second collector told Petitioner to follow her to the lobby (Pet'r Reply).

16. Once Petitioner reached the lobby, the receptionist proceeded to tell Petitioner, "Bye, have a nice day" (Pet'r Reply).

17. Petitioner then left Nova at approximately 1:30 P.M. after having been there for a total of two (2) hours (Resp't Motion Ex. D).

18. On the morning of December 5, 2017, Petitioner notified Human Resources Generalist, Lauren Bowles ("Bowles"), that she was unable to produce a sufficient sample during her drug screen (Pet'r Compl., Resp't Motion Ex. D).

19. Petitioner was told to contact the central HR office (Pet'r Reply).

20. The central HR office scheduled Johnson to take a second drug test on December 5, 2017.

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[1] Neither Petitioner nor Respondent further identify the second collector.

21. On December 5, 2017, Petitioner returned to Nova and produced a sufficient sample for a drug screen (Pet'r Compl.).

22. On December 5, 2017, Nova Medical Review Officer Dr. S. Moffatt, informed Respondent that Petitioner's test was being reported as a "refusal" because she failed to provide a sufficient specimen and failed to remain at the testing site for three (3) hours to complete collection on December 4, 2017 (Resp't Motion Ex. E).

23. On December 7, 2017, Saye also informed Respondent that on December 4, 2017, Petitioner left the testing center before three (3) hours had elapsed (Resp't Motion Ex. F).

24. On December 7, 2017, Petitioner informed Amanda Resler ("Resler"), Respondent's Local Office Director that she was diabetic, which possibly caused her insufficient samples on December 4, 2017 (Pet'r Reply).

25. On December 12, 2017, Petitioner participated in a predeprivation meeting (Pet'r Compl.).

26. On December 13, 2017, Respondent terminated Petitioner's employment for violation of its Code of Conduct and Child Welfare Policies for failure to complete the specimen collection processes on December 4, 2017 (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 a classified employee at all relevant times.

2. As a classified employee, Respondent must show that just cause existed for its decision to reprimand Petitioner. I.C. § 4-15-2.2-42 (g).

3. Petitioner contends that her termination was in violation of the Americans with Disabilities Act ("ADA") because Respondent failed to provide a reasonable accommodation for her known disability, diabetes.

4. The ADA bars employers from discriminating against an individual with a qualified disability because of the disability in regard to discharge of the employee. *Bd. of Trs. v. Garrett*, 531 U.S. 356, (2001).

5. Allegations of discrimination under the ADA are often analyzed using the modified *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *See also Jackson v. Lake Cty.*, No. 01 C 6528, 2003 U.S. Dist. LEXIS 16244 (N.D. Ill. Sep. 15, 2003).

6. Although Petitioner can attempt to prove discrimination via the burden shifting method laid out in *McDonnell Douglas*, an easier way now exists to do so.

7. 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 just 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.*

8. Per the ADA, "[t]he term 'disability' means, with respect to an individual (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102 (1).

9. "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors." *Merry v. A. Sulka & Co.*, 953 F. Supp. 922 (N.D. Ill. 1997).

10. "[T]he ADA requires employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer's business." *Garrett*, 531 U.S. at 361 (2001).

11. "While requesting a reasonable accommodation is the employee's responsibility... [t]o determine the appropriate reasonable accommodation, it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1286 (7th Cir. 1996) (citations omitted).

12. "The term 'reasonable accommodation' may include (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111 (9).

13. "Courts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility." *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

14. While Petitioner's diabetes could be considered a disability under the ADA, Petitioner fails to provide evidence that Respondent had any knowledge of Petitioner's disability prior to her December 4, 2017 drug screen or that Petitioner requested any form of accommodation as a result.

15. Had Petitioner wished to obtain an accommodation as it related to her diabetes, it was Petitioner's responsibility to begin the interactive process by informing Respondent of her diabetes and requesting an accommodation. While Petitioner indicates that Respondent failed to participate in the interactive process, it was, in fact, Petitioner who failed to act in good faith with respect to requesting an accommodation prior to the drug screen.

16. Additionally, had Petitioner requested an accommodation from Respondent, as was her responsibility to do so, it is unlikely that Petitioner could have used it in this instance to circumvent the three (3) hour rule regarding the specimen sample collection process.

17. Per the State Personnel Department ("SPD") Drug and Alcohol Testing Policy, "[i]f an employee is unable to provide 45 ml of urine, the DOT "shy bladder' rule will apply. An employee will have up to 3 hours to provide the required 45 ml . . . if, after 3 hours of waiting and no request for a medical evaluation, an employee is unable to provide 45 ml of urine, appropriate disciplinary action up to and including dismissal may result following a predeprivation meeting, if required" (Resp't Motion, Ex. A).

18. Not only did Petitioner fail to request a medical evaluation, which would have triggered the interactive process under the ADA, she failed to stay for the full three (3) hours in an effort to produce a sufficient sample. Petitioner, through her own admission, only remained at the testing center for two (2) hours.

19. Petitioner alleges that when the receptionist told her "bye," she believed the process was completed, and thus decided to leave Nova. However, the ALJ finds this argument unpersuasive. Petitioner failed to ask any employees, including the sample collector, if the process was satisfactorily completed (Resp't Motion). Instead, Petitioner took it upon herself to leave Nova after only two (2) hours had elapsed. Further, Petitioner did not contact HR until the following morning. (Resp't Exs. D, H). Petitioner could have called HR while at the testing center to explain her disability and to further discuss the situation; however, Petitioner did none of the above, which necessarily dooms her case. Petitioner was aware, through the Log instructions and verbal communication from Saye, that leaving the testing center prior to the three (3) hours would result in a "refusal to test" status.

20. "Since Petitioner voluntarily left Nova early, Respondent was following SPD policy when it terminated her employment.

21. Petitioner finally alleges that when Respondent failed to test her second sample, given on December 5, 2017, Respondent failed to "provide [Petitioner] with the agreed upon reasonable accommodation." (Pet'r Reply).

22. However, as noted above, Petitioner has provided no evidence that Respondent was (1) aware of her diabetes prior to December 7, 2017 or; (2) that Respondent ever agreed to allow Petitioner to retake the test without penalty for her actions the previous day as an accommodation for Petitioner's diabetes.

23. "Under the ADA, an employer must make reasonable accommodations to enable a disabled employee to perform his job duties." *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993 (S.D. Ind. 2000) (citations omitted). However, a second chance "is not an accommodation, as envisioned in the ADA . . . [i]t is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." Thus, even if Petitioner had asked for her second test to replace her first attempt the day before as an accommodation under the ADA, Petitioner, would have been asking for another chance to comply with Respondent's policies, which the ADA does not require. *See Id.*

24. Petitioner asks that Respondent retroactively apply leniency, which she veils as an accommodation request under the ADA, to activities that occurred prior to her informing Respondent of her diabetes. Although the central HR office scheduled Petitioner for a second drug test the following day, there is no evidence that this was meant as an accommodation for Petitioner nor that the central HR office even knew Petitioner had failed to stay the required three (3) hours the previous day. "Since reasonable accommodation under the ADA is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability." *Id.* Testing the second specimen was not an agreed upon accommodation, nor one that Respondent was obligated to make in this instance.

25. Although Petitioner has diabetes, Petitioner has not offered any evidence of discrimination nor has she shown that her termination was otherwise discriminatory. Rather, Petitioner's termination was a result of a breach of policy and conduct. Petitioner failed to formally inform Respondent of her disability and request an accommodation. Further, Respondent was under no obligation to retroactively apply such an accommodation. Therefore, the ALJ finds that Respondent did not breach its duty to Petitioner per the ADA; thus, Petitioner's claim of discrimination under the ADA fails.

26. No further arguments were advanced by Petitioner.[2]
27. The ALJ therefore concludes that Respondent had just cause to terminate Petitioner when Petitioner violated Respondent's policies when she left the drug testing center after two (2) instead of three (3) hours, resulting in a "refusal to test" status.

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[2] Absent her claim under the ADA, Petitioner's contentions, ias they remain, are underdeveloped and unclear. The ALJ could, for example, construe a portion of Petitioner's Reply to indicate that Petitioner believes that Respondent's workplace expectations were not reasonably well communicated or consistently applied to similarly situated individuals. However, Petitioner fails to further develop this contention, nor was this allegation raised in Petitioner's original Complaint, but rather in her Reply. "A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Shanahan v. City of Chi.*, 82 F.3d 776 (7th Cir. 1996). Petitioner failed to present to the ALJ any claim regarding Respondent's workplace expectations. Petitioner also did not move to amend her Complaint before Respondent's original Motion was filed, in accordance with Ind. T.R. 15, which states that:

> [a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within twenty [20] days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Ind. Trial Rule 15(A).

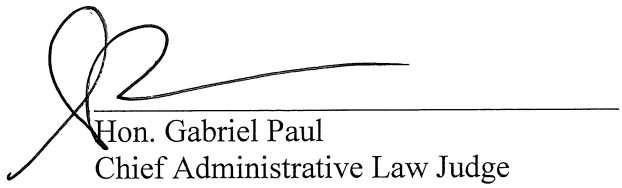
Thus, the ALJ will not consider these allegations further.

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. Additional Conclusions of Law and Order

Respondent's Motion for Summary Judgment is hereby GRANTED. Petitioner's termination was issued with just cause and is hereby upheld. The Complaint, and this action, are hereby **DISMISSED** with prejudice. This is the Final Order of the Commission in this matter. 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 IC § 4-21.5-5. So Ordered.

DATED: January 7, 2019



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