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

IN THE MATTER OF:

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| LINDSEY ORR<br>Petitioner, | ) | |
| | ) | SEAC No. 03-19-025 |
| vs. | ) | |
| CORRECTIONAL INDUSTRIAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION<br>Respondent. | ) | |



**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

## I. Introduction and Summary

On October 18, 2019, Respondent Correctional Industrial Facility, a part of the Indiana Department of Correction, ("Respondent"), by counsel, filed a Motion for Summary Judgment regarding Petitioner's Complaint ("Motion"). Petitioner Lindsey Orr ("Petitioner"), pro se, replied to the Motion on December 16, 2019. Thereafter, on December 17, 2019, Respondent filed a response in support of its Motion.

This case considers Petitioner's termination on January 9, 2019, for failing to meet Respondent's expectations and standards. The controlling pleadings for purposes of this decision are the Complaint originally received on March 15, 2019, 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.[1]

[1] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), Ind. Code 4-21.5 *et seq.* *See* Ind. Code § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to Ind. Code § 4-21.5-3-28 of 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. *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).

## III. Findings of Fact

1. On March 3, 2008, Petitioner was hired as a Correctional Officer at the Correctional Industrial Facility, which was an unclassified, at-will position (Pet'r Compl.; Resp't Motion Ex. B-1).

2. On April 13, 2008, Petitioner received a Written Reprimand for the unauthorized removal of keys from the facility[2] (Resp't Motion Ex. B-4).

3. On February 12, 2011, Petitioner received a Written Reprimand for unauthorized leave when he used an improper call-in procedure (Resp't Motion Ex. B-5).

4. On September 28, 2011, Petitioner received a Written Reprimand for unauthorized leave when he failed to report for his scheduled shift (Resp't Motion Ex. B-6).

5. On April 30, 2012, Petitioner received a Written Reprimand for violating Respondent's Information and Standards Conduct policy when he made an inappropriate comment in the dining area and threw a bread rack (Resp't Motion Ex. B-7).

[2] Petitioner did not appeal any of the following discipline, other than the instant matter, to SEAC while he was employed by Respondent, therefore the ALJ will consider it as discipline for purposes of these proceedings (Resp't Motion Ex. E at 10).

6. On July 1, 2013, Petitioner received a Written Reprimand in Lieu of a One (1) Day Suspension for unauthorized leave when he arrived 1.5 hours late for his scheduled shift (Resp't Motion Ex. B-8).

7. On September 25, 2013, Petitioner received a Written Reprimand in Lieu of a Three (3) Day Suspension for unauthorized leave when he took 11.5 hours of personal leave without having the personal leave time available to use (Resp't Motion Ex. B-9).

8. On December 8, 2014, Petitioner received a Written Reprimand for violating Respondent's Dress Standards for Uniform Staff and Staff Grooming policies when he arrived for his shift not shaven and wearing a multi-colored T-shirt (Resp't Motion Ex. B-10).

9. On January 28, 2015, Petitioner received a Five (5) Day Suspension for unauthorized leave when he took more days off than for which he had previously been approved (Resp't Motion Ex. B-11).

10. On March 13, 2015, Petitioner received a Five (5) Day Suspension for violating Respondent's Dress Standards for Uniform Staff and Staff Grooming policies and accumulating unauthorized leave when he failed to have his uniform with him and had to leave to get in proper dress (Resp't Motion Ex. B-12).

11. Petitioner received an overall "Does Not Meet Expectations" rating on his 2015 Annual Performance Appraisal ("Appraisal") (Resp't Motion Ex. B-18).

12. On October 6, 2016, Petitioner received a Written Reprimand for failing to follow post orders and offender accountability procedures when he was taking count of offenders (Resp't Motion Ex. B-13).

13. On October 6, 2016, Petitioner received a Five (5) Day Suspension for failing to follow post orders, in an incident separate from the immediately preceding event, when he failed to take the appropriate corrective action with offenders during a fight that had taken place on his unit (Resp't Motion Ex. B-14).

14. On November 21, 2016, Petitioner received a Written Reprimand in Lieu of a One (1) Day Suspension for failing to follow post orders (Resp't Motion Ex. B-15).

15. Petitioner received an overall "Does Not Meet Expectations" rating on his 2016 Appraisal (Resp't Motion Ex. B-19).

16. On October 16, 2017, Petitioner received a Written Reprimand in Lieu of a One (1) Day Suspension for failing to follow an order and violating post orders while passing out meal trays (Resp't Motion Ex. B-16).

17. Petitioner received an overall "Does Not Meet Expectations" rating on his 2017 Appraisal (Resp't Motion Ex. B-20).

18. On October 26, 2018, Petitioner received a Written Reprimand in Lieu of a One (1) Day Suspension for unauthorized leave when he failed to attend roll call (Resp't Motion Ex. B-17).

19. Petitioner received an overall "Does Not Meet Expectations" rating on his 2018 Appraisal (Resp't Motion Ex. B-21).

20. When Petitioner arrived to work on January 5, 2019, he heard rumors from coworkers and inmates that he was going to be terminated (Pet'r Compl.).

21. Petitioner worked his normal shift on January 5 and 6, 2019 (Pet'r Compl).

22. Petitioner was scheduled to be off work on January 7 and 8, 2019 (Pet'r Compl.).

23. When Petitioner arrived for his scheduled shift on January 9, 2019, Petitioner again heard rumors of his termination (Pet'r Compl.).

24. On January 9, 2019, Petitioner was terminated for "multiple years of 'does not meets' expectations for performance management" on his Appraisals [3] (Resp't Motion Ex. B-22).

## IV. 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. When disciplining classified employees, Respondent must show that just cause existed for its decision to issue discipline. I.C. § 4-15-2.2-42 (g).

3. However, the same does not hold true for issuing discipline to at-will employees. 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." Ind. Code § 4-15-2.2.-24(b).

[3] While Petitioner's termination letter does not explicitly state that he was terminated for the accumulation of discipline Petitioner received during his employment with Respondent, the ALJ finds that Petitioner's poor Appraisals were a result of the discipline received by Petitioner and thus Petitioner's termination was a result of the discipline Petitioner amassed, which ultimately led to the "does not meet expectations" on Petitioner's Appraisals.

4. 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. *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).

5. "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; Ind. Code § 4-15-2.2-42. A viable public policy exception must be present for the Complaint to survive.

6. Petitioner first alleges that his termination was based on his race, African American, and was discriminatory in nature and constituted disparate treatment. (Resp't Motion Exs. E at 5, 19; F at 5).

7. 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 (Ind. Code § 22-9), which prohibits racially based 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).

8. There are three steps to this analysis. First, the petitioner-employee "has the initial burden of establishing a prima facie case of discrimination." *Ind. Civil Rights Comm'n v. S. Ind. Gas & Elec. Co.*, 648 N.E.2d 674 (Ind. Ct. App. 1995). This includes showing that he belongs to a protected class, his job performance met the employer's legitimate expectations, he suffered an adverse employment action, and another similarly situated individual who was not in the protected class was treated more favorably (*Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012); *McDonnell Douglas*, 411 U.S. 792). 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). *McDonnell Douglas Corp.*, 411 U.S. 792. 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. at 804).

9. When analyzing claims of discrimination under McDonnell Douglas, 7th Circuit courts are directed to look at the evidence as a whole. *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 764 (7th Cir. 2016) ("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. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled 'direct' or 'indirect.'").

10. In order to show discrimination, the Petitioner must present evidence that, considered as a whole, would allow a reasonable juror (here, the ALJ) to conclude that the plaintiff was discriminated against due to a protected characteristic." *Knapp v. Evgeros, Inc.*, 205 F. Supp. 3d 946, 956 (N.D. Ill. 2016). If when considering the collective evidence there remains unanswered questions regarding material facts of discrimination against a plaintiff, that would be sufficient to defeat a motion for summary judgment. *Simonis v. City of Fort Wayne*, No. 1:15-CV-235-PPS, 2017 WL 1927750 (N.D. Ind. May 10, 2017).

11. While Petitioner is of a protected class (African American) and suffered an adverse employment action (termination), he fails to successfully establish a prima facie case of discrimination via disparate treatment.

12. First, Petitioner fails to show that he was meeting Respondent's legitimate expectations. Petitioner was aware of his duties and responsibilities as a Correctional Officer (Resp't Motion Exs. B-2, B-3). Regardless, Petitioner received six (6) Written Reprimands, seventeen (17) days of suspension, and four (4) subpar Appraisals during his tenure with Respondent. Respondent was therefore aware on several occasions that his conduct was not meeting Respondent's expectations, yet failed to make any corrections such that Respondent finally felt that it could no longer continue Petitioner's employment.

13. Petitioner also fails to demonstrate that another similarly situated individual, who was not in the protected class, was treated more favorably.

14. Petitioner claims that other Caucasian employees who had committed similar or more severe offenses remain to be employed (Pet'r Compl). Specifically, Petitioner mentions that he has known a Major, Captain, and two (2) Lieutenants who have been disciplined, but not terminated, for sexual harassment (Pet'r Compl.; Resp't Motion Ex. F at 5-8).

15. A "similarly-situated analysis calls for a flexible, common-sense examination of all relevant factors." *Coleman*, 667 F.3d 835, 846 (7th Cir. 2012). "Similarly situated employees 'must be directly comparable to the [Petitioner] in all material respects,' but they need not be identical in every conceivable way." *Id.* at 846 (citation omitted). Typically, a Petitioner must show the comparators: "(1) dealt with same supervisor; (2) were subject to the same standards; and (3) engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Id.* at 847.

16. Petitioner fails to properly show that another employee, dealing with the same supervisor and engaging in similar conduct to that of Petitioner's, was treated differently than he. Petitioner admits that he cannot identify another employee at Respondent's facility who received four (4) consecutive "Does Not Meet Expectations" rating on their Appraisals (Resp't Motion Ex. E at 11). Further, the individuals Petitioner vaguely references in his Complaint were disciplined for sexual harassment, conduct wholly different than that in which Petitioner engaged and for which he was eventually terminated.

17. Petitioner also claims that Warden Wendy Knight ("Knight") altered an "unauthorized leave" to "authorized leave" multiple times for Officer Colin White ("White"), who is Caucasian, who in turn was recently promoted to Recreational Leader of Plainfield Correctional Facility (Petitioner Compl.).

18. White was hired as a Correctional Officer at Respondent's Correctional Industrial Facility on March 19, 2018 (Resp't Motion Ex. B at 44). On December 10, 2018, White transferred to Respondent's Plainfield, Indiana facility ("Plainfield") (Resp't Motion). White's employment was terminated on March 26, 2019, for multiple violations of Respondent's policies while employed at Plainfield (Resp't Motion Exs. B at 46, B-23). Therefore, White does not serve as an appropriate comparator to Petitioner as he not only had a different supervisor at the time of discipline but was employed at a different facility than Petitioner. Further, White was terminated for violations of Respondent's policies and in fact given much less leeway than Petitioner as White's termination occurred only one (1) year after his hire date whereas Petitioner spent nearly eight (8) years accumulating discipline.

19. While Petitioner makes vague mention in his Complaint of other employees who received more favorable treatment than he, Petitioner fails to further discuss in his Complaint nor his Reply who the employees are or why they are appropriate comparators. Thus, the ALJ will not consider this argument further.

20. Petitioner has not offered any evidence of discrimination, nor has he shown that his termination was discriminatory in nature. Even if taken as truth, the allegations put forth by Petitioner do not lead the ALJ to believe that he was discriminated against in any fashion. The claims by Petitioner do not lead to a pattern of discrimination by the Respondent nor any employees under its command. Therefore, the ALJ finds that Petitioner's claim of discrimination fails.

21. Petitioner next alleges that he was the victim of a hostile work environment such that he has been required to seek out counseling and medication due to the stress and anxiety of how poorly he was treated by supervisors. (Pet'r Compl.).

22. "Title VII of the Civil Rights Act of 1964, in addition to prohibiting discrimination that has direct economic consequences, forbids employers from requiring people to work in a discriminatorily hostile or abusive environment." *Boss v. Castro*, 816 F.3d 910, 919 (7th Cir. 2016). A hostile work environment can be proven "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or persuasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 920 (quoting *Alexander v. Casino Queen, Inc.*, 739 F.3d 972 (7th Cir. 2014)).

23. "Surviving summary judgment on a hostile work environment claim requires sufficient evidence demonstrating (1) the work environment was both objectively and subjectively offensive; (2) the harassment was based on membership in a protected class or in retaliation for protected behavior; (3) the conduct was severe or pervasive; and (4) there is a basis for employer liability." *Id.* (citations omitted). In discussing whether Respondent's conduct rose to the level of a hostile work environment, the ALJ considers the totality of the circumstances. *Id.*

24. Despite Petitioner's belief that he was subjected to a hostile work environment, the ALJ finds that the opposite holds true.

25. Petitioner states that because coworkers and inmates notified him of his termination before he was addressed about it by management, this constitutes a hostile work environment (Resp't Motion Ex. F at 12). However, simply having other individuals postulate as to Petitioner's impending termination does not constitute harassment. Further, Petitioner fails to state that the purported harassment meets the standards set out under *Boss*.

26. Not only does Petitioner have a slew of discipline in his history with Respondent, the matters for which Petitioner were disciplined could be seen as becoming increasingly egregious throughout the years. Petitioner's Reply simply states that the he does not agree with the conclusion determined by Respondent and is convinced he was wrongfully terminated and treated unfairly. However, Petitioner submitted no further evidence and therefore the ALJ cannot conclude that any issue of fact exists such that this case should continue.[4]

27. 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.

## V. 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.

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[4] While Respondent discusses the Americans with Disabilities Act ("ADA") in its Motion, presumably because Petitioner made note in his Complaint that he suffers from anxiety due to being subjected to an alleged hostile work environment—a claim which the ALJ finds fails—Petitioner does not properly plead a claim under the ADA, even considering Indiana's simple notice pleading standard. "To state a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, a pleading must contain [in part] a short and plain statement of the claim showing that the pleader is entitled to relief." Indiana Trial Rule 8(a). Petitioner does not make any mention of having a disability in his Complaint nor does he suggest that such was considered in his termination. Rather, Petitioner simply indicates that he is disabled in response to Respondent's interrogatories provided to Petitioner during discovery, which is not a proper form of stating a claim under Indiana Trial Rules. (Resp't Motion Ex. F). Petitioner merely mentions in his Complaint that he *now* has anxiety due to his treatment immediately prior to his termination. Therefore, the ALJ will not analyze Petitioner's status under the ADA.

DATED: December 30, 2019

Hon. Gabriel Paul
Chief Administrative Law Judge
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