BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

WILLIE REED Petitioner,	) SEAC No. 04-18-030	ISSUED FEB 13 2019 STATE EMPLOYEES' APPEALS COMMISSION
vs.		
INDIANA STATE PRISON BY INDIANA DEPARTMENT OF CORRECTION Respondent.		

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On December 7, 2018, Respondent Indiana State Prison, a part of the Indiana Department of Correction, ("Respondent"), by counsel, filed a Motion for Summary Judgment regarding Petitioner's Complaint ("Motion"). Petitioner Willie Reed ("Petitioner"), pro se, timely replied to the Motion on January 16, 2018. Thereafter, on January 28, 2019, Respondent filed a response in support of its Motion.

This case considers Petitioner's termination on March 12, 2018, for failing to return a pair of needle nose pliers and corresponding sockets to Petitioner's vehicle after arriving to Respondent's facility for his regularly-scheduled shift on March 9, 2018. The controlling pleadings for purposes of this decision is the Complaint originally received on April 27, 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.[1]

[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. *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. At all pertinent times, Petitioner was an unclassified, at-will Correctional Officer (Pet'r Compl.)

2. On November 11, 2017, as Petitioner was starting his shift at Respondent's facility, he was discovered with a pair of computer speakers during Petitioner's "shakedown", which is the procedure Respondent uses on those entering/exiting its facilities in an effort to prevent trafficking (Resp't Motion).

3. The speakers were confiscated and Petitioner was sent to Respondent's Internal Affairs division to discuss the situation[2] (Resp't Motion).

4. Thereafter, since it was his first offense, Petitioner was given a two (2) shift suspension (Resp't Motion).

5. Petitioner did not appeal this suspension to SEAC (Resp't Motion).

[2] Respondent also mentions in its Motion that Petitioner failed to attend his interview on two (2) different occasions, but such failure does not appear to have been considered when issuing Petitioner's discipline for this incident as more fully described in the body of this ruling below.

6. On February 21, 2018, as Petitioner was entering Respondent's facility to begin his shift, a pair of needle nose pliers, as well as sockets, were found in Petitioner's jacket via the shakedown procedure described above (Resp't Motion).

7. When asked about the tools, Petitioner responded that he was working on his car's windshield wipers just before he entered the facility and was unaware that he placed the tools in his jacket (Pet'r Compl.).

8. The tools were then brought inside the facility for further inspection, after which Petitioner was given permission by his supervisor to retrieve and return them to Petitioner's car. Petitioner could then begin his shift without further incident (Resp't Motion, Exs. B;C).

9. Petitioner did not return to his vehicle, but rather obtained the tools and proceeded to his post inside the facility to begin his shift (Resp't Motion, Ex. C).

10. Upon conclusion of his February 11, 2018 shift, as Petitioner was leaving Respondent's facility, the tools described above were again found in Petitioner's jacket (Resp't Motion, Ex. B-1).

11. Petitioner, when asked by Respondent, admitted that he disobeyed the order to return the tools to his car because he felt that his supervisor lacked the authority to order Petitioner to return the tools and because Petitioner worried that Respondent would punish him for returning the tools (Resp't Motion, Ex. B-1).

12. Petitioner, when interviewed, also stated that a change in his medication caused him to forget to return the tools to his car (Resp't Ex. B).

13. Respondent, upon conclusion of its investigation, determined that the February 21, 2018 incident constituted Petitioner's second offense and also found that Petitioner was insubordinate for failing to obey a direct order from his supervisor regarding the tools and terminated Petitioner as a result on March 12, 2018 (Pet'r Compl.).

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. 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. § 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. *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. At the outset, the ALJ notes that Petitioner spends the entirety of his Reply discussing the March 11, 2017 incident involving the computer speakers. However, as noted above, Petitioner failed to properly appeal this suspension to SEAC. As such, any arguments Petitioner has concerning this incident are deemed waived.[3] Petitioner's remaining contentions regarding a hostile work environment, disparate treatment, and a failure to accommodate under the Americans with Disabilities Act will be discussed below.

6. While Respondent is correct in its surreply that Petitioner's hostile work environment claims should be precluded under Indiana Trial Rule 15 since they were first raised in Petitioner's Reply, the ALJ nevertheless will include a brief discussion showing why such claims fail.

7. "In determining whether a workplace is objectively hostile, [the ALJ must] consider the totality of the circumstances, including: 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Alamo v. Bliss,* 864 F.3d 541 (7th Cir. 2017) (citations omitted).

8. "[T]he specific circumstances of the working environment and the relationship between the harassing party and the harassed also bear on whether that line is crossed." *Id. See also Robinson v. Sappington*, 351 F.3d 317, 330 (7th Cir. 2003). "Still, this liability has limitations, and Title VII was not designed to become a 'general civility code'". *Alamo*, 864 F.3d at 550; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

9. "Instead, although a workplace need not be 'hellish' to constitute a hostile work environment, it must be so pervaded by discrimination that the terms and conditions of employment are altered." *Alamo* at 550; *see also Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013) (citations omitted).

10. Petitioner claims that his workplace was hostile due to his relationship with one of Respondent's Internal Affairs ("IA") investigators and contends that the investigator should not have been involved with Respondent's investigation into the February 21, 2018 incident because Petitioner had previously filed a complaint against the investigator and also because the supervisor participated in the investigation into Petitioner's November 11, 2017 incident.

[3] In Petitioner's Reply, he makes mention of the fact that his termination came while he was still in the midst of allegedly appealing his suspension. However, since SEAC has no record of an appeal from Petitioner regarding the suspension, the ALJ assumes that Petitioner decided not to pursue appeal of it further.

11. In support of this claim, Petitioner cites to 42 IAC 1-5-6, which in turn cites to I.C. § 4-2-6-9, both of which deal with conflicts of interest and the procedures related to it. While Petitioner contends that Respondent's IA investigator had a conflict as described above, the ALJ does not agree. Given the nature of the job performed by IA investigators, it is not unreasonable to think that the same IA investigator could be assigned to more than one case involving a particular employee. Petitioner presented no evidence other than the fact that he and the IA investigator were involved in a previous investigation (which the ALJ assumes was the November 11, 2017 incident) and that Petitioner felt that the IA investigator held an implicit bias against Petitioner as a result. Without more, the ALJ finds that this alone does not rise to the level of a hostile work environment.

12. Petitioner also contends that he was the victim of a hostile work environment due to a discussion he had with one of Respondent's Administrative Assistants ("AA") on March 5, 2018, regarding his February 21, 2018 incident where the AA allegedly told Petitioner that he would be returning to work soon.[4] However, given the description, the ALJ finds that Petitioner is more appropriately discussing a theory under the detrimental reliance standard of discrimination. Therefore, the ALJ will more appropriately analyze this contention under such standard.

13. "Detrimental reliance arises when there is 'a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance.'" *Burton v. GMC*, 2008 U.S. Dist. LEXIS 62758 (S.D. Ind. 2008) (quoting Restatement (Second) of Contracts § 90).

14. In the instant matter, Petitioner has failed to show detrimental reliance. Indeed, his Complaint states that when Petitioner spoke to Respondent's HR representative about the investigation, he was told that the ultimate decision was up to the Warden. Therefore, Petitioner could not have relied upon the statements given to him by an Administrative Assistant. The ALJ therefore rejects this claim.

15. Petitioner next alleges that he was treated differently than two (2) similarly situated co-workers, Madeline Vicari ("Vicari") and Anthony Thomas[5] ("Thomas"), when he was terminated.

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[4] While not specifically stated, it appears as if Petitioner was suspended without pay pending the outcome of Respondent's investigation into the February 11, 2018 incident.

[5] Vicari left Respondent's employ in July, 2018, while Thomas left in August, 2018 (Resp't Motion).

16. "If an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination." *Abrego v. Wilkie.*, 907 F.3d 1004 (7th Cir. 2018). "In presenting a similarly-situated employee, the comparator must be similar enough to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, so as to isolate the critical independent variable: complaints about discrimination." *Id.*

17. The evidence is clear, however, that the discipline issued when an employee is caught bringing in unauthorized objects for the first time is usually a two (2) shift suspension (Resp't Motion, Ex. F).

18. Vicari was given a two (2) shift suspension for bringing unauthorized items into Respondent's facility on February 23, 2018, which was her first offense, while Thomas was also given a two (2) shift suspension on December 1, 2016, for bringing unauthorized items into Respondent's facility (Resp't Motion, Exs. F, F-2, F-3).

19. Petitioner was also given a two (2) shift suspension for the March 11, 2017 incident, which was his first offense. Thus, Petitioner's argument as to disparate treatment fails with regards to him.

20. Petitioner next argues that his failure to return the tools to his car was the result of side effects related to medication he was taking and that Respondent should have been aware that such lapses in judgment could occur.

21. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1211 *et. seq*. bars employers from discriminating against an individual with a qualified disability because of the disability in regard to discharge of the employee. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, (2001).

22. 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).

23. "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).

24. "[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).

25. "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).

26. "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).

27. "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).

28. Several years before the present incident, Petitioner asked Respondent to be excused from performing certain duties, due to his depression and anxiety, for which he was taking medication. Respondent accommodated the request (Resp't Motion, Ex. P).

29. Similarly, Petitioner expressed a desire to move to a less stressful position in 2016, which Respondent also accommodated. *Id.*

30. Petitioner then admits that his medication changed in October, 2017 (Pet'r Compl.).

31. Petitioner contends that the change in medication caused side effects such as confusion, difficulty concentrating, and impaired thinking (Pet'r Compl.).

32. However, Petitioner provided no evidence that the medication ever caused such side effects, or that he suffered from them in the days leading up to the February, 2018 incident.

33. Additionally, Petitioner never told Respondent about the change in medication, nor did he ask for an accommodation in writing as required under Respondent's Human Resources Policy (Resp't Motion, Ex. O).

34. Therefore, while Petitioner's depression and related anxiety could be considered a qualifier under the ADA, Petitioner failed to ask Respondent for a reasonable accommodation and further cannot show how the February 21, 2018 incident was a direct result of his condition. As a result, the ALJ finds that Respondent was not required to provide a reasonable accommodation to Petitioner in advance of the February 21, 2018 incident.

35. While Respondent's Information and Standards of Conduct Policy No. 04-03-103 ("Policy") allows for termination when bringing unauthorized items into the facility, the fact remains that in this instance, Petitioner was given an opportunity to avoid discipline by simply returning the tools to his car before his shift began on February 21, 2018 (Resp't Motion, Ex. N).

36. Petitioner, having previously served a suspension for a similar offense in March, 2017, should have known that his refusal to comply[6] could be construed as insubordination and, as his second offense, could lead to his termination (Resp't Motion, Exs. F, N).

37. Despite Petitioner's contention that he interpreted his supervisor's comment about returning Petitioner's tools to his car as voluntary, the ALJ finds that the comment was a direct order (Resp't Ex. C, ¶ 10, "I instructed [Petitioner] to take the pliers and sockets back to his vehicle").

38. Further, Petitioner agreed to follow the order, which he then failed to do. *Id.* at ¶ 11, "[Petitioner] agreed to take the pliers and sockets back to his vehicle." Having so agreed, Petitioner cannot now claim that his failure to return the tools was the result of his confusion surrounding the language used by his supervisor.

39. Therefore, the ALJ finds that Petitioner was solely at fault for the February 11, 2018 incident, such that termination was warranted.

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.[7]

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[6] In its Motion, Respondent also argues that Petitioner was guilty of insubordination, which is also grounds for discipline under Respondent's Policy. However, while such insubordination could be inferenced from Petitioner's termination letter, it was not specifically mentioned. Therefore, the ALJ refrains from further analyzation of this topic.

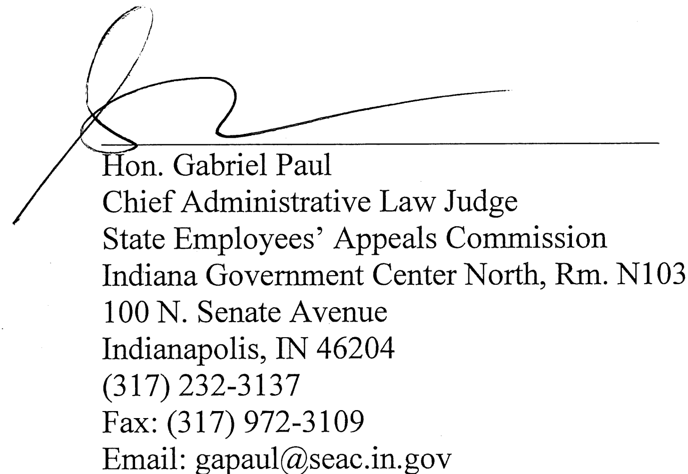
[7] The ALJ notes in passing that Petitioner perhaps raises a defamation claim as well in his Reply. In addition to this claim being precluded by T.R. 15, Petitioner failed to offer any evidence supporting this allegation which would

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.



DATED: February 13, 2019

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trigger further analysis. "A party opposing a properly supported summary judgment motion may not rely on allegations or denials in his own pleading, but rather, must "marshal and present the court with the evidence she contends will prove her case." *Hope v. Arcelormittal Burns Harbor, LLC*, No. 2:13-CV-493-TLS, 2019 U.S. Dist. LEXIS 17866 (N.D. Ind. Feb. 4, 2019). The ALJ therefore declines to address this allegation further.

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

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