BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

RACHEL BODKIN Petitioner, vs. CORRECTIONAL INDUSTRIAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)))))))))	SEAC No. 09-18-066

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On April 22, 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 Rachel Bodkin ("Petitioner"), by counsel, timely replied to the Motion on May 20, 2019. Thereafter, on June 3, 2019 Respondent filed a response in support of its Motion.

This case considers Petitioner's Termination on July 30, 2018, for failing to comply with Respondent's Code of Ethics and Policies against trafficking. The controlling pleadings for purposes of this decision are the Complaint originally received on September 22, 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 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 September 19, 2016, Petitioner was hired as a Correctional Officer at the Correctional Industrial Facility, which was an unclassified, at-will position (Resp't Motion Ex. B).

2. Petitioner was sometimes referred to as "Mrs. B" by offenders (Resp't Motion Ex. E).

3. At some point, Petitioner was assigned to the "B" housing unit (Resp't Motion Ex. E).

4. While Petitioner was assigned to the "B" housing unit, offender J.H. was housed in the "B" unit (Resp't Motion Ex. E).

5. Offender J.H. is also known as "Mamo" at Respondent's facility (Resp't Motion Ex. E).

6. Petitioner was later re-assigned from the "B" housing unit to the "E" housing unit (Resp't Motion Ex. E).

7. While Petitioner was assigned to the "E" unit, offender L.J. ("L.J.") was housed in the "E" unit (Resp't Motion Ex. E).

8. On June 11, 2018, offender S.S. told Internal Investigations ("II") Investigator Sarah Jones ("Jones") that "'Mrs. B' was trafficking for 'Mamo'" (Resp't Motion Ex. F).

9. On June 29, 2018, Jones interviewed Offender T.S. who reported that Petitioner was trafficking with offender "Mamo" (Resp't Motion Ex. F).

10. On unspecified dates, two (2) offenders, D.O. and D.B., also reported to Jones that "Mrs. B" was trafficking with another, unnamed offender (Resp't Motion Ex. F).

11. On July 3, 2018, at approximately 4:28 A.M., offender L.J. entered his cell (Resp't Motion Ex. C-4, 4:28:24).[2]

12. On July 3, 2018, at approximately 4:28 A.M., Petitioner approached L.J.'s cell (Resp't Motion Ex. C-4, 4:28:51).

13. Petitioner stood in the doorway of the cell, blocking the security camera view of the cell door, for approximately five (5) minutes (Resp't Motion Ex. C-4, 4:28:51-4:34:16).

14. Petitioner then gave L.J. approximately three-hundred (300) Suboxone[3] strips wrapped in black electrical tape, which, as discussed below, L.J. later reported when being interviewed by II shortly after the incident (Resp't Motion Ex. C-3).

15. On July 6, 2018, L.J. made a phone call to an unknown recipient outside of Respondent's facility (Resp't Motion Ex. H).

16. II Analyst Taylor Elrod ("Elrod") later reviewed the phone call (Resp't Motion Ex. H).

17. During the call, L.J. referred to needing "to get this done" due to someone's impending vacation (Resp't Motion Ex. H-1).

18. Elrod believed L.J. was talking in code and "was attempting to bring contraband into the facility with the aid of an unknown staff member, who was 'getting ready to go on vacation'" (Resp't Motion Ex. H).

19. On July 11, 2018, Petitioner reported for her scheduled shift at Respondent's facility (Pet'r Compl.).

20. While on her way to roll call, Petitioner and the other officers she was walking with were stopped by II and a K-9 unit to search the officers' belongings (Pet'r Compl.).

21. II Investigator John Poer ("Poer") asked Petitioner to speak with him privately and took Petitioner to the II room (Pet'r Compl.).

22. Poer questioned Petitioner about the evening of July 7, 2018 (Pet'r Compl.).

---

[2] Petitioner contends that she did not visit L.J.'s cell on July 4, 2018, and rather the security footage shows Petitioner visiting the cell on July 3, 2018 (Resp't Motion Ex. C-4). Respondent confirms in its surreply that the usage of July 4, 2018, instead of July 3, 2018, in Respondent's Motion was simply a scrivener's error.

[3] Suboxone is the brand name for the drug buprenorphine, which is used by medical personnel to assist in the reduction of heroin or other opiate drug use by those with an opioid dependency. However, because buprenorphine provides an opioid effect—a "significant euphoria"—it is therefore at risk of being misused. *See* https://www.deadiversion.usdoj.gov/drug_chem_info/buprenorphine.pdf.

23. Petitioner informed Poer that on July 7, 2018, after finishing her shift, she went home to sleep (Pet'r Compl.).

24. Poer told Petitioner that he believed she did not go home, but rather met with some people during which time she appeared to be angry (Pet'r Compl.).

25. Petitioner told Poer he could strip search her and search her car and phone which Respondent did with the assistance of a K-9 unit, but ultimately did not find anything that could be construed as contraband (Pet'r Compl.).

26. Poer told Petitioner that II had been investigating her for suspected trafficking for over two (2) months and had now acquired enough evidence to demonstrate she was trafficking (Pet'r Compl.).

27. Petitioner denied the alegations (Pet'r Compl.).

28. Following the interview, Petitioner was placed in Control, where she did not have contact with offenders (Pet'r Compl.).

29. Petitioner worked two (2) days in Control (Pet'r Compl.).

30. On July 12, 2018, while working in the Control office, Petitioner spoke to Correctional Sergeant Thomas Foster ("Foster") about the cameras, blind spots in the employee parking lot and recreational area, and asked about the security lights on the perimeter road (Resp't Motion Ex. G).

31. Foster found Petitioner's questions to be odd and informed II about Petitioner's comments (Resp't Motion Ex. G-1).

32. On July 13, 2018, Petitioner began her two (2) week vacation (Pet'r Compl.).

33. On July 13, 2018, Jones and II Investigator James Stevens ("Stevens") interviewed Offender L.J. (Resp't Motion Ex. C).

34. L.J. reported to the II investigators that Petitioner was trafficking controlled substances into the facility (Resp't Motion Ex. C-2, C-3).

35. L.J. also reported to Respondent that Petitioner trafficked Suboxone strips to L.J. when Petitioner visited his cell on July 3, 2018, at approximately 4:00 A.M. (Resp't Motion Ex. C-2; *See supra* FOF 11-15).

36. On July 16, 2018, Stevens and Jones interviewed L.J. a second time regarding Petitioner and a second unnamed employee's alleged trafficking (Resp't Motion Ex. C-3).

37. L.J. told Stevens that while Petitioner used to traffic with Mamo, when Petitioner was reassigned to housing unit "E", separating her from Mamo, Petitioner began trafficking with L.J. (Resp't Motion Ex. C-3).

38. L.J. was expected to transfer the trafficked items to Mamo (Resp't Motion Ex. C-3).

39. On July 18, 2018, Offender T.S. again told Jones that "'Mrs. B' and 'Mamo' [were] trafficking" (Resp't Motion Ex. F).

40. On July 30, 2018, Petitioner was scheduled to start her shift at 5:45 P.M. (Pet'r Compl.).

41. Earlier that day, Petitioner was called by Human Resources and asked to attend a 2:30 P.M. meeting (Pet'r Compl.).

42. Petitioner met with Warden Wendy Knight ("Knight") and Human Resource Generalist Hannah Stultz (Pet'r Compl.).

43. Knight told Petitioner that there was enough evidence to terminate Petitioner for trafficking (Pet'r Compl.).

44. Petitioner asked Knight what she was accused of trafficking and Petitioner was told that she could not be given any more information but could appeal the termination (Pet'r Compl.).

45. On July 30, 2018, Petitioner was terminated for failing to comply with the Indiana Department of Correction 04-03-103 Information and Standards of Conduct, Section B – Trafficking and Section VI Code of Ethics.

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." 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).

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; I.C. § 4-15-2.2-42. A viable public policy exception must be present for the Complaint to survive.

6. Petitioner first alleges that she was a classified employee for purposes of this appeal and argues that Respondent therefore must show just cause for her discipline under I.C. § 4-15-2.2-42(g). *See* I.C. § 4-15-2.2-23; *see also* https://www.in.gov/spd/files/discrandp.pdf.

7. The focus in determining whether or not Petitioner was a classified employee should be on whether Petitioner presented any evidence that leads the ALJ to find that she was classified under I.C. § 4-15-2.2-4.[4]

8. I.C. § 4-15-2.2-4 defines a classified employee as an employee who has been appointed to the state classified service, has completed a working test period, and has been certified by the appointing authority for that classification.

9. I.C. § 4-15-2.2-21 defines the classified service as consisting of those "positions in programs that have a federal statutory or regulatory requirement for the establishment and maintenance of personnel standards on a merit basis", and includes examples of such positions as falling under Employment Security, Federal Payments for Foster Care and Adoption Assistance, Medicaid and Social Security, among others. *See* I.C. § 4-15-2.2-42(a).

10. Petitioner first suggests that her "merit position fits squarely as a classified employee" (Pet'r Reply).

11. Although Petitioner does not cite to any statute or policy that explains what is meant by a "merit position" and why Petitioner falls under such category, the ALJ assumes Petitioner is referring to the 1941 State Personnel Act, which split the Indiana workforce into merit and non-merit positions. I.C. § 4-15-2 (2010).

12. However, in 2011, the State Personnel Act was repealed and replaced with the current Civil Service System, which divides state employees into classified and unclassified positions. I.C. § 4-15-2.2 (2019). Petitioner began employment with Respondent in 2016 (Pet'r Reply Ex. 1). Therefore, Petitioner's employment with Respondent has always been controlled by the State Civil Service System and any assertions that she held a merit position is moot to any argument regarding her classification under current state law.

---

[4] The ALJ notes that Petitioner uses a "kitchen sink" approach in attempting to demonstrate why she is a classified employee. Ind. T.R. 8(E)(1) holds that "[e]ach averment of a pleading shall be simple, concise, and direct." "Not only does the 'kitchen sink' approach to briefing cause distraction and confusion, it also 'consumes space that should be devoted to developing the arguments with some promise.'" *Howard v. Gramley*, 225 F.3d 784, 791 (7th Cir. 2000) (internal citations omitted). "The great rule to be observed in drawing briefs consists in conciseness with perspicuity." *Gardner v. Stover*, 43 Ind. 356 (1873). "[The ALJ] focus[es] on the minimally developed claims as best [he] can, grouping like contentions where possible and addressing the many claims of error in turn." *Dynegy Mktg. & Trade v. Multiut Corp.*, 648 F.3d 506 (7th Cir. 2011).

13. Petitioner next submits her Personnel/Payroll Action (pay stub) as proof of her Job Code. (Pet'r Reply Ex. 1). However, Petitioner does not otherwise explain in her Reply why her job code (005LA2) lends any credence to the claim that she is a classified employee. Further, the same Personnel/Payroll Action labels Petitioner as "Unclassified" under the "Class" category, which gives rise to the assumption that Petitioner was aware of her unclassified status at all times. *Id.*

14. Petitioner next claims that she successfully completed the working test period as defined in the State of Indiana Employee Handbook ("Handbook"). (Pet'r Reply Ex. 3; *see* https://www.in.gov/spd/files/eehandbook.pdf).

15. The Handbook states that every employee appointed to the classified service shall complete a working test period of at least six (6) months, which may be extended up to twelve (12) months if need be. Also, during the working test period, a classified employee will receive a performance appraisal, which is used to measure the (classified) employee's work and to ascertain: whether the working test period should be extended; whether the classified employee has successfully completed the working test period; or whether the classified employee should be terminated. *See also* I.C. § 4-15-2.2-34; 31 IAC 5-3-1.

16. Petitioner provides no evidence to show that she successfully completed a working test period nor does she provide a performance appraisal or any other evidence demonstrating that Respondent considered her to be within a working test period at any point during her employment. Rather, Petitioner simply states that she completed the working test period pursuant to the Handbook, but does not go further in her reasoning (Pet'r Reply). Therefore, the ALJ finds that Petitioner did not complete a working test period and cannot use such unfounded statements to support an argument that she was a classified employee.

17. Petitioner next claims that because, as a Correctional Officer, she is a member of the "Protective Occupations-Law Enforcement" ("POLE") job category, she is a classified employee. While the ALJ agrees that Petitioner falls under the POLE category, Petitioner mistakenly assumes that this equates to being in the classified service. POLE, along with other similar job categories, are simply the categories used to determine compensation range and are not indicative of whether an employee is unclassified or classified. In other words, the "Job Family" (such as POLE), is only used in determining minimum, midpoint, and maximum salaries for those employees. *See* https://www.in.gov/spd/files/job_titles.pdf. Therefore, the ALJ finds Petitioner's argument that her categorization under POLE makes her a classified employee unpersuasive.

18. Next, Petitioner cites to *Indiana State Personnel Board v. Martin*, claiming that the Indiana Court of Appeals found that similar Correctional Officers were classified employees. *Ind. State Pers. Bd. v. Martin*, 167 Ind. App. 408, 338 N.E.2d 743 (1975).

19. *Martin* proceeds under an analysis using The State Personnel Act (Ind. Code 4-5-2-1 (1971)) as the basis for its ruling that the State employees, correctional officers suspended for theft, were classified employees. *Martin*, 338 N.E.2d at 747 (1975).

20. However, as previously discussed, The State Personnel Act was repealed in 2011, rendering the holding in *Martin* moot and not applicable to an analysis of Petitioner's classification under current state law. (*See supra* COL 11-12).

21. Finally, in support of her argument that she should be considered a classified employee, Petitioner cites the definitions of "classified" and "unclassified" employees under the Fair Labor Standards Act ("FLSA").[5] 29 U.S.C. §§ 201-219 (2019).

22. The FLSA sets standards on minimum wage and overtime and classifies employees for the purpose of determining how employees are paid. *Id.* However, Petitioner's classification under the FLSA is not related to or binding on her classification under the State Civil Service System.

23. Petitioner provides no argument for how the FLSA and the State Civil Service System are interconnected, nor why Petitioner's classification under the FLSA should be binding on Respondent with regards to Petitioner's classification under the State Civil Service System. Since Petitioner fails to cite to any case law, statute, or policy showing such, the ALJ is wholly unconvinced by this argument.

---

[5] The ALJ notes that a majority of Petitioner's argument regarding the FLSA (Pet'r Reply at 7-8) is copied verbatim from https://smallbusiness.chron.com/unclassified-employee-42317.html. The ALJ cautions Counsel from failing to cite sources, as courts have found that plagiarism is "reprehensible", "unacceptable", and "an imposition on the Court." *Velez v. Alvarado*, 145 F. Supp. 2d 146 (D.P.R. 2001); *United States v. Bowen*, 194 F. App'x 393 (6th Cir. 2006); *Frith v. State*, 263 Ind. 325 N.E.2d 186 (1975). Although "some amount of quotation or paraphrasing [is necessary], citation to authority is absolutely required when language is borrowed." *Bowen*, 194 F. App'x 393 (2006). Further, "[a] brief is not to be a document thrown together without either organized thought or intelligent editing on the part of the brief-writer. Inadequate briefing is not, as any thoughtful lawyer knows, helpful to either a lawyer's client or to the Court." *Frith*, 325 N.E.2d 186 (1975). According to the Indiana Clerk of the Appellate Courts, Counsel has been a member in good standing of the Indiana Bar since 2013 and should not be committing what could best be described as "rookie mistakes". Therefore, Counsel is admonished from simply "cutting and pasting" legal analysis from other sources and is instead directed to properly paraphrase, render his own analysis, and provide correct citations, or face potential sanctions in this forum.

24. The burden is on Petitioner to demonstrate that she was a classified employee at the time of her dismissal, which she failed to do. Petitioner did not provide any evidence that she was certified by Respondent for inclusion into the classified service. Further, Petitioner did not show that she completed a working test period, nor did she show that her position had a federal statutory or regulatory requirement. The ALJ therefore finds that Petitioner was not a classified employee under I.C. § 4-15-2.2-24, but was rather an unclassified employee within the unclassified service and thus **Grants** Respondent's Motion with regard to Petitioner's classification status.

25. An employee in the unclassified service serves at will and at the pleasure of Respondent. I.C. § 4-15-2.2-24(a). As such, an unclassified employee may be dismissed, demoted, disciplined or transferred for any reason that does not contravene public policy. I.C. § 4-15-2.2-24(b). In order to prevail, Petitioner has the burden of proof to show that a public policy exception to the employment at will doctrine was the reason for his discharge. See I.C. § 4-15-2.2-42(f).

26. The ALJ therefore turns to Petitioner's contention that because Respondent provided cause for her termination, Respondent is estopped from considering Petitioner as an at-will employee.

27. Although Petitioner is an at-will employee—allowing Respondent to terminate her employment for any reason not contravening public policy—this does not amount to Respondent *only* being allowed to terminate at-will employees for arbitrary reasons, as Petitioner's argument would suggest.

28. Respondent, in terminating Petitioner for trafficking, went beyond its statutory duties by providing Petitioner with a specific reason for her termination, rather than dismissing Petitioner for no reason at all, which it legally could do.

29. Petitioner's argument that because Respondent chose to provide Petitioner with a reason for her termination, Respondent in turn cannot claim the defenses provided by employment at will law, is not supported by any case law, statute, or sound reasoning.

30. The ALJ further finds this argument to be nonsensical and posits that should this standard be adopted, it poses the risk of setting precedent detrimental to any at-will employee or employer thereof. As Respondent suggests in its surreply, it would be absurd to require employers *only* arbitrarily discipline their at-will employees so as to avoid a shift in the burden of proof and be required instead to discipline at-will employees only for just cause because a specific reason for discipline was given. Therefore, the ALJ will not further address this argument.

31. The ALJ will next address Petitioner's contention that her termination constituted disparate treatment and discrimination based on Petitioner's sex, which was first raised in her Reply to Respondent's Motion for Summary Judgment (Pet'r Reply).

32. The controlling pleading in this matter is Petitioner's Complaint originally received on September 22, 2018. Petitioner's original Complaint did not contain any allegation of discrimination and therefore the issue cannot now be raised through Petitioner's response to Respondent's Motion for Summary Judgment.

33. Petitioner had ample opportunity to amend her Complaint to include this allegation, since the ALJ's September 27, 2018, Notice of Prehearing Conference and Scheduling Order, which noted that since Petitioner " feels as if her Civil Rights have been violated under I.C. 22-9., Petitioner would be allowed to elaborate on this claim "either through an amended complaint, which she may file either during, or after discovery ends, but before Respondent files its subsequent dispositive motion if it so chooses to."

34. While "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served", "[a] plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." Ind. T.R. 15(A); *Shanahan v. City of Chi.*, 82 F.3d 776 (7th Cir. 1996). Petitioner failed to present to the ALJ any claim regarding disparate treatment or discrimination in her Complaint. Rather, Petitioner's attempt to amend her Complaint via her Reply to Respondent's Motion was received on May 20, 2019, after Respondent's Motion was served on April 22, 2019. Therefore, Petitioner is barred from presenting any new allegations in this matter.

35. Although Petitioner is barred from bringing any claim of disparate treatment or discrimination, the ALJ will briefly show why such claims still fail, beginning with an analysis of Petitioner's disparate treatment claim.

36. "Disparate treatment claims require proof of intentionally discriminatory treatment of a protected class." *Villas West II of Willowridge Homeowners Ass'n v. McGlothin*, 885 N.E.2d 1280, 1285 (Ind. 2008). Such claims are also analyzed under Title VII of the Federal Civil Rights Act of 1964, as amended. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016). In order to show a *prima facie* case of discrimination, the Petitioner must present evidence that (1) he was in a protected group, (2) he was performing to his employer's legitimate expectations, (3) he was given discipline, and (4) he was treated less favorably than similarly situated individuals. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009).

37. Although Petitioner, as a female, is in a protected class and received discipline, there is no evidence that Petitioner was otherwise performing to her employer's legitimate expectations; in fact, the evidence shows the opposite—that Petitioner was not performing to her employer's expectations when she trafficked with offenders.

38. In support of her claim that she was meeting Respondent's legitimate workplace expectations, Petitioner cites to her performance review for the period of January 1, 2017, through December 31, 2017 (Pet'r Ex. 5).

39. While Petitioner's overall rating was "meets expectations", with one category rated as "exceeds expectations", the performance review was written nearly six (6) months prior to Petitioner's termination and four (4) months prior to the beginning of II's investigation into Petitioner's alleged trafficking.

40. It is well established that when evaluating "the question of whether an employee was meeting an employer's legitimate employment expectations, the issue is not the employee's past performance but whether the employee was performing well at the time of discipline." *Peele v. Mut. Ins. Co.*, 288 F.3d 319 (7th Cir. 2002). The Court concluded in *Peele* that it was "unpersuaded by Peele's argument that evidence of her poor job performance must be balanced against the 'favorable performance reviews, raises, and promotions' she received." *Id.*

41. "Certainly, earlier evaluations cannot, by themselves, demonstrate the adequacy of performance at the crucial time when the employment action is taken." *Adams v. Univ. of Indianapolis*, No. 1:17-cv-2101-WTL-MJD, 2019 U.S. Dist. LEXIS 47843 (S.D. Ind. Mar. 22, 2019). Therefore, Petitioner cannot seek to have her performance review act as a mitigating factor in arguing that her discipline was otherwise unfair.

42. Additionally, Petitioner claims that Respondent failed to show any similarly situated person of the opposite gender that was terminated for allegations of trafficking based on circumstantial evidence (Pet'r Reply).[6]

---

[6] Petitioner suggests that her discovery of such persons was severely hampered by Respondent, leading to Petitioner's inability to supply SEAC with any named comparators. For example, Petitioner claims that Respondent's control over the historical personnel files hindered her ability to become aware of any male employees who have been terminated without at least some evidence of physical contraband being trafficked. However, Respondent contends that it did not provide Petitioner with the names of male employees disciplined for trafficking not because the names were confidential, but rather because Petitioner never requested any such information during discovery in the first place (Resp't Surreply Ex. L).

Nevertheless, Petitioner is barred from making claims regarding discovery at this point. If Petitioner had any qualms about Respondent's discovery responses, Petitioner had a wide array of options to pursue. Petitioner could have attempted to informally resolve any discovery disputes with Respondent's counsel; requested that the ALJ rule on contested discovery requests pursuant to Ind. T.R. 26(E); or file a motion to compel under Ind. T.R. 37. The

43. Although it is Petitioner's burden to provide evidence that she was treated less favorably than a similarly situated individual, Respondent itself offers a comparator to demonstrate that Petitioner was in fact not treated less favorably. (Resp't Motion Ex. J). In May 2016, a male employee was investigated for trafficking. The video footage used in the II investigation did not show the actual handoff of contraband, but rather showed the employee going to the offender's cell. The video, coupled with a Confidential Offender Informant's statement, led to the conclusion that the employee was trafficking. The employee was subsequently dismissed from employment. (Resp't Motion Ex. B-2).

44. This situation mirrors Petitioner's, where no video evidence directly shows her trafficking with an offender, but rather the summation of all the evidence led II investigators to the conclusion that trafficking was occurring. Also, as in Petitioner's situation, the male employee was terminated, despite only circumstantial evidence being available to decision makers.

45. Further, between January 2014, and January 2, 2019, nine (9) other employees were terminated as a result of trafficking or attempted trafficking at Respondent's facility. Four (4) of those employees were male and five (5) were female. (Resp't Motion Ex. B).

46. Therefore, the ALJ finds that Petitioner was not treated less favorably than similarly situated male employees.

47. The ALJ next turns to Petitioner's claim that her termination was discriminatory based on her sex.

48. While Petitioner can prove discrimination via the burden shifting method laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), an easier way now exists to do so.

49. Petitioner indicates that "the Courts consider the evidence as a whole and no evidence indicates a male counterpart was terminated based on allegation alone" (Pet'r Reply at 12). While Petitioner does not cite to a case in her Reply supporting this statement, the ALJ believes Petitioner is referring to the 7th Circuit's decision in *Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. Aug. 19, 2016).

ALJ's March 15, 2019 issued Second Case Management Order closed discovery on March 19, 2019. At no time prior to the filing of her Reply did Petitioner indicate any discovery disputes. Therefore, Petitioner is barred from using her dissatisfaction with discovery as a defense to failing to properly execute an argument for disparate and discriminatory treatment. Further, Petitioner asserts that "discovery is ongoing"; however, since discovery closed on March 19, 2019, the ALJ will not entertain further arguments on this matter and again admonishes Counsel that by addressing this argument, the ALJ wastes Commission resources that could be better deployed elsewhere (Pet'r Reply p. 4).

50. While *McDonnell Douglas* still applies, *Ortiz* laid out a more simplistic approach to proving discrimination. *McDonnell Douglas Corp.*, 411 U.S. 792 (1973); *Ortiz*, 834 F.3d 760 (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.*

51. "In order to determine whether [Petitioner's] discrimination claims are subject to summary judgment, the Court must examine the properly supported evidence pointed to by [Petitioner] to determine whether, viewed as a whole, it is 'sufficient . . . to support a jury verdict of intentional discrimination.' 'Such evidence may include (1) suspicious timing; (2) ambiguous statements or behavior towards other employees in the protected group; (3) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically receive better treatment; and (4) evidence that the employer offered a pretextual reason for an adverse employment action.'" *Adams v. Univ. of Indianapolis*, No. 1:17-cv-2101-WTL-MJD, 2019 U.S. Dist. LEXIS 47843 (S.D. Ind. Mar. 22, 2019) (citation omitted).

52. Petitioner does not claim that her termination involved suspicious timing, ambiguous statements or behaviors towards other female employees, or suggest that any of Respondent's reasons for Petitioner's termination were pretextual. The only argument Petitioner makes supporting her claim of discrimination is that Respondent cannot show that similarly situated male employees did not receive more favorable treatment than Petitioner.

53. However, as discussed earlier, Respondent has demonstrated that a similarly situated male employee was also terminated based on circumstantial evidence of trafficking. (*See supra* COL 42-45). Further, Petitioner herself, with whom the burden lies, has failed to proffer any comparators in support of her claim. Petitioner provides no evidence suggesting that her sex was a factor considered by any decision makers involved in her termination.

54. However unfair Petitioner believes her discipline was, this, in and of itself, is not enough to carry the day under even the most liberal standard contemplated by *Ortiz*.

55. The ALJ will next address Petitioner's final contention that her termination was based upon unsubstantiated accusations of an uncredible witness, which contravenes public policy (Pet'r Reply).

56. Specifically, Petitioner claims that her termination for trafficking was based on allegations of an unreliable, inconsistent witness led by overzealous investigators (Pet'r Reply). Further, Petitioner states that "termination impacting her employment record based upon hearsay and rumors warrants contradiction to public policy" (Pet'r Reply at 8-9).

57. Namely, Petitioner suggests that the main witness in the II investigation, L.J., had motivation to lie about Petitioner.

58. In support of her argument, Petitioner states that during L.J.'s interview, he repeatedly asks for special treatment and discusses his desire to go home. However, the ALJ disagrees with Petitioner's interpretation of the II interviews and rather finds that L.J. was not requesting to go home early in exchange for his information on Petitioner, but was indicating that he did not want to jeopardize his impending release by admitting to trafficking with Petitioner (Resp't. Ex. C-2).

59. Next, Petitioner states that although L.J. was not afforded early release, he was placed in segregation pending his release as a reward for his testimony against Petitioner. However, Petitioner does not indicate how placement in segregation was a motivation for L.J. to inform on Petitioner. Further, Respondent indicated in its surreply that L.J. was moved to segregation for his own protection and safety, not as a special privilege for the information her provided.

60. Petitioner next cites to L.J.'s criminal charges on December 30, 2018 as evidence of his being untrustworthy. However, Petitioner fails to demonstrate how criminal charges pressed six (6) months after his interview with II regarding Petitioner damages L.J.'s credibility. The ALJ is therefore unpersuaded that he should assume the charges against L.J. lend to his credibility as a witness in an investigation that took place in early 2018.

61. Petitioner next suggests that the investigators "spoon fed" L.J. information and that L.J. gave contradictory statements throughout his interview. However, the ALJ does not find that the investigators coached L.J., but rather simply asked L.J. what he wanted to tell them and then facilitated a conversation with L.J. in order to glean what information he could provide. (Resp't Reply Ex. C-2, C-3).

62. Petitioner further indicates that one of the II investigators was new and was attempting to make a name for themselves through the outcome of Petitioner's investigation. However, Petitioner does not indicate which investigator was a new employee nor how the investigator was supposedly using the investigation to bolster their own career.

63. Petitioner merely speculates that the unnamed investigator was using the investigation to their advantage but provides no further evidence regarding this allegation, rendering this argument "insufficient to establish a genuine issue of material fact." *Briggs v. Finley*, 631 N.E.2d 959 (Ind. Ct. App. 1994) (citations omitted) (holding that "[f]ree flowing speculation cannot be construed as a fact which can shed doubt on the validity of other facts.").

64. The ALJ's responsibility when deciding on a motion for summary judgment is not to make determinations on witness credibility; rather, the ALJ "must view all the evidence in the record in the light most favorable to the non-moving party and resolve all factual disputes in favor of the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.*

65. The ALJ finds here that, even when viewing the investigation in light most favorable to Petitioner, there is no genuine issue of material fact concerning L.J.'s involvement in the investigation such that this matter should further proceed.

66. During Petitioner's investigation, Respondent followed a common practice when investigating a correctional officer's alleged misconduct, which includes interviewing offenders who claim to have valuable information. Not only did Respondent pursue its normal method of investigation, Respondent relied on more than just L.J.'s interviews in making its decision regarding Petitioner. Several other offenders individually and separately reported to II that Petitioner was trafficking and a staff member reported Petitioner's odd questions regarding the placement of security cameras. Further, Petitioner does not suggest that the other offenders or staff member lacked credibility or had undue motivation in reporting Petitioner's activities.

67. Respondent was within its rights to run the investigation into Petitioner as it saw fit and its decision to use offender and staff witness statements and video footage to conclude the act of trafficking had occurred does not contravene public policy.

68. Since Petitioner submitted no further evidence, the ALJ cannot conclude that any issue of fact exists such that this case should continue.

69. 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.

DATED: June 19, 2019

Hon. Gabriel Paul
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm. N103
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
Fax: (317) 972-3109
Email: gapaul@seac.in.gov

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

Charles Bugby
Law Office of Charles Bugby
1217 Meridian St.
Anderson, Indiana 46016
charlesbugby@cbjslaw.com

Sarah Haefner
Counsel
Indiana Department of Correction
302 W. Washington St., Room W341
Indianapolis, IN 46204
shaefner@idoc.in.gov

Courtesy Copy to:

David Fleischhacker
State Personnel Department
402 West Washington Street
Room W141
Indianapolis, Indiana 46204
dfleischhacker1@spd.in.gov