BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

ROBBIE MARSHALL Petitioner,	))) SEAC No. 01-17-002	
vs.	))	
WABASH VALLEY CORRECTIONAL INSTITUTE BY INDIANA DEPARTMENT OF CORRECTION Respondent.	))))	

ISSUED
SEP 11 2019
STATE EMPLOYEES'
APPEALS COMMISSION

NOTICE OF FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER OF ADMINISTRATIVE LAW JUDGE

The attached "Findings of Fact, Conclusions of Law and Non-Final Order of Administrative Law Judge" has been entered as required by I.C. § 4-21.5-3. To preserve an objection to the document, either the Petitioner or the Respondent must submit a written objection that:

1. Identifies the basis of the objection with reasonable particularity.
2. Is filed at the following physical and/or email address, with service to the other party, by **September 27, 2019**

State Employees' Appeals Commission
Indiana Government Center North
100 N. Senate Avenue, Room N103
Indianapolis, IN 46204-2200
gapaul@seac.in.gov

Since the Commission has designated the Administrative Law Judge as the "trier of fact" for this cause, objections will not include items of evidence. If evidence is included with the objections it will be struck. The objections may include a brief addressing the applicable law being relied upon by the party.

If objections are filed within the time specified, the State Employees' Appeals Commission (SEAC) will hear the objections at a regularly scheduled meeting.[1] Prior to that meeting any motions filed regarding the objections will be dealt with by the Administrative Law Judge.

[1] The next Commission meeting will be held on November 12, 2019, at 10:00 A.M.

During the time specified above any member of SEAC may express the desire to review any specific issue addressed in the "Findings of Fact and Conclusions of Law" pursuant to I.C. 4-21.5-3-29(e). If such a review is ordered, it will be conducted at a regular scheduled meeting of the SEAC, and each party will be notified.

A party may move to strike any objections believed to be untimely. The Administrative Law Judge shall act upon a motion to strike. If the Administrative Law Judge grants the motion, the attached document will become final absent any desire to review an issue expressed by a member as discussed above. If the Administrative Law Judge denies the motion to strike, the findings and non-final order shall be reviewed by the SEAC as outlined above.

DATED: September 11, 2019

Hon. Gabriel Paul
Chief Administrative Law Judge
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INSTITUTE BY INDIANA)
DEPARTMENT OF CORRECTION)
Respondent.)

ISSUED
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER

I. Introduction and Summary

This administrative review is conducted pursuant to Ind. Code § 4-15-2.2 *et seq.* (the "Civil Service System") and Ind. Code § 4-21.5-3 *et seq.* ("AOPA").[1] The operative pleading is Petitioner Robbie Marshall's ("Petitioner") Complaint filed January 19, 2017, with the State Employees' Appeals Commission ("SEAC") against Respondent Wabash Valley Correctional Institute by Indiana Department of Correction ("Respondent").[2] Petitioner alleges that his termination by Respondent was discriminatory based on his sexual orientation and in retaliation for reporting Storm's breach of confidentiality.[3] Petitioner was an unclassified (at-will)

[1] Commission proceedings are additionally 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.

[2] On January 11, 2018, Respondent, by counsel, filed a Motion for Summary Judgment under Indiana Trial Rule 56 ("T.R. 56") seeking to dismiss Petitioner's Complaint ("Motion"). Petitioner, by counsel, responded to the Motion on February 23, 2018. Thereafter on March 29, 2018, Respondent filed its surreply to the Motion as well as a Motion to Strike and on April 13, 2018, Petitioner filed its Reply to Respondent's Motion to Strike. On May 31, 2018, the ALJ denied Respondent's Motion for Summary Judgment and Motion to Strike.

[3] On August 24, 2018, the ALJ issued an Order Clarifying Petitioner's Issues for Hearing in which the ALJ ordered that the claims for which Petitioner could present at the Hearing and for which Respondent could rebut were whether Petitioner's termination was in violation of Title VII of the Civil Rights Act and whether Petitioner's termination was in retaliation for reporting Storm's behavior.

Further, on January 29, 2019, Respondent filed a Motion in Limine requesting that the ALJ exclude certain matters from being heard at the hearing, including any evidence that would lead the ALJ to re-examine the investigations. On February 1, 2019, Petitioner replied. On March 13, 2019, Respondent filed a series of Motions

employee working as an Internal Affairs Investigator 2 for Respondent at the time of his termination. The issue before SEAC is whether Petitioner was terminated in contravention of a law, rule or public policy.[4]

An evidentiary hearing in this matter was held on June 25, 2019 and July 9, 2019, before the undersigned Chief Administrative Law Judge. Petitioner Marshall appeared by counsel, Ms. Jamie Maddox. Respondent appeared by counsel, Ms. Sarah Haefner[5] and Mr. David Fleischhacker. Following the hearing, the ALJ gave each party an opportunity to file proposed findings of fact and conclusions of law, which Petitioner and Respondent did on August 12, 2019. Having reviewed the arguments, witness testimony, admitted evidence, applicable law, and proposals, and being duly advised, the ALJ issues the following Findings of Fact, Conclusions of Law, and Non-Final Order. Petitioner was unable to prove by a preponderance of the credible evidence that Petitioner's termination breached public policy. Judgment for Respondent.

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to Quash the subpoenas of five (5) witnesses listed by Petitioner. On March 15, 2019, the ALJ heard oral arguments from the Parties on these motions and concluded, in part, that Petitioner may ask witnesses about their *personal* involvement in the investigations (emphasis added). Further, during such oral arguments, Petitioner stated that he had no intention of producing evidence at hearing related to claims precluded by the ALJ's Order Denying Respondent's Motion for Summary Judgment.

At the hearing, Petitioner asserted that both the IA Conference and SPD Sexual Harassment Complaint investigations were shams and not conducted properly or thoroughly. (Pet'r. Test.). These arguments by Petitioner are essentially due process arguments which SEAC barred as untimely in its May 31, 2018, *Order Denying Respondent's Motion for Summary Judgment*. Even so, because Petitioner does not have a constitutionally protected property interest in his employment, the protections that exist under the Due Process Clause are not applicable to his employment. *See McQueeney v. Glenn,* 400 N.E.2d 806, 811 (Ind. Ct. App. 1980) (at will employee had no interest protected by procedural due process); *Greenwood v. Westville Correctional Facility*, SEAC No. 05-12-053; *Falconberry v. Madison Juvenile Correctional Facility*, SEAC No. 10-15-072. Therefore, the ALJ will only address any investigation-based items Petitioner has asserted as they specifically relate to his discrimination or retaliation claims.

Further, Petitioner asserts in his Proposed FOF & COL that his termination was a result of retaliation because Respondent believed Petitioner would file an EEOC complaint. Notwithstanding the fact that this is a wholly new argument which was not plead at any prior point in time and thus not within the scope of claims for which Petitioner can now allege, this was also not an argument Petitioner made at the hearing. Therefore, the ALJ will only consider Petitioner's claim of retaliation for reporting Storm's breach of confidentiality.

[4] *See,* Ind. Code § 4-15-2.2-24(b) (stating that an unclassified employee may be terminated for any reason that does not contravene public policy).

[5] Ms. Haefner subsequently left employment with Respondent, withdrawing her appearance in this matter, and is thus not a listed individual to whom service was made.

II. Legal Standard

Under the Civil Service System, a state agency may dismiss, demote, discipline, or transfer an employee in the unclassified service "for any reason that does not contravene public policy." Ind. Code § 4-15-2.2-24(b). "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). "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 v. Meyers Construction,* 861 N.E.2d 704, 706 (Ind. 2007) (citations omitted).

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 liability. Put another way, the courts ask whether the termination or discipline itself was illegal in light of applicable statutory law;[6] 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*, 861 N.E.2d at 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

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[6] Non-comprehensive examples include illegal discrimination on the basis of race, national origin, sex, age, disability, veteran status, religion, free speech, political affiliation; or retaliation for filing a discrimination complaint or exercising statutory rights such as workers' compensation rights.

III. Findings of Fact[7]

1. Prior to his termination, Petitioner was employed with Respondent for approximately twenty-two (22) years (Pet'r Test.).
2. At all times relevant to this matter, Petitioner was an Internal Affairs ("IA") Investigator 2 (Pet'r Test.).[8]
3. Petitioner identifies as homosexual (Pet'r Test.).
4. Petitioner received discipline three (3) times prior to his dismissal: a two (2)-day suspension in 1999, a suspension in January 2002[9], and a written reprimand in 2015 (Pet'r Test.; Resp't Ex. F[10])
5. Petitioner's 1999 and 2002 suspensions were a result of Petitioner being charged with Operating a Vehicle While Intoxicated ("OVWI") on two (2) separate occasions (Pet'r Test.).
6. Petitioner's 2015 written reprimand was a result of Petitioner again being charged with OVWI, which was subsequently pled down to a charge of public intoxication (Pet'r Test.; Resp't Ex. F).
7. Petitioner received a misdemeanor conviction, probation, and short-term incarceration for each arrest (Pet'r Test.).
8. On or about September 2016, Petitioner attended a law enforcement conference ("Conference") in Indianapolis, Indiana (Pet'r Test.).
9. Fernell "Keith" McDonald ("McDonald"), IA Investigator 4, and Kevin Allen ("Allen"), then-IA Investigator 3, also attended the Conference (Allen Test.; McDonald Test.).
10. Following the end of the educational component of the Conference, the attendees went to the courtyard of the Conference's location to network with one another (Pet'r Test.; Stip. Ex. VII).

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[7] Because this matter concerns several separate events, namely the Conference and Storm's sexual harassment claims against Petitioner, the ALJ found it in the reader's interest to convey the Findings of Fact separated by the events, leaving the FOF to be presented slightly out of chronological order, but more sensical for the reader.

[8] While the department is now called "Investigations and Intelligence", at the time Petitioner was employed the department was called "Internal Affairs" and will thus be referred to as such for purposes of this Order.

[9] No evidence or testimony was submitted indicating how long Petitioner's 2002 suspension lasted.

[10] The ALJ notes that Respondent submitted and discusses a Written Counseling given to Petitioner in 2014 (Resp't Ex. D; Resp't Proposed FOF 6). While Respondent is free to discuss Petitioner's counseling, the ALJ does not treat Counselings as formal discipline for purposes of SEAC matters (*See* https://www.in.gov/spd/files/discrandp.pdf).

11. Most individuals in the courtyard were consuming alcoholic beverages, including Allen and McDonald (Allen Test.; McDonald Test.; Stip. Ex. VII).

12. Petitioner consumed four to five (4-5) alcoholic beverages (beer) throughout the course of the evening (Pet'r Test.).

13. At some point in the evening, Petitioner sat at a table with Miami County, Indiana Sheriff Tim Miller ("Miller") and a few of Miller's deputies (Allen, Test.; McDonald Test.).

14. Petitioner, Miller and the deputies spent time discussing offenders' attitudes at Respondent's facilities (Stip. Ex. VIII).

15. While talking with Petitioner, Miller determined that Petitioner was intoxicated (Stip. Ex. VII).

16. Petitioner told Miller that he "was wrong", to which Miller asked what he was wrong about (Raderstorf Test.; Stip. Ex. VIII).

17. Petitioner replied with, "you're fucking wrong" (Raderstorf Test.; Stip. Ex. VIII).

18. Petitioner then asked one of the deputies for a beer from their small personal cooler and was told that they were out of beer (Raderstorf Test.; Stip. Ex. VIII).

19. Petitioner then became angry and suggested that the deputy was lying (Raderstorf Test.).

20. Petitioner moved to a chair closer to one of the deputies and began whispering to the deputy (Stip. Ex. VIII).

21. Petitioner pointed to the other deputy and stated, "he's the fucking problem" (Stip. Ex. VIII).

22. One of the deputies approached Allen and McDonald's table and asked if they knew Petitioner (Allen Test.; McDonald Test.).

23. Allen and McDonald confirmed that Petitioner was their supervisor (Allen Test.; McDonald Test.).

24. The deputy told Allen and McDonald to come get Petitioner "before they kicked his ass" (Allen Test.; McDonald Test.).

25. Allen and McDonald walked Petitioner back to his room (Allen Test.; McDonald Test.).

26. Shortly after the Conference, Todd Tappy ("Tappy), Executive Director of IA, was informed of the incident in the courtyard by Lorna Harbaugh ("Harbaugh"), IA Officer at Miami Correctional Facility, who had been made aware of the situation by Miller (Tappy Test.).

27. Tappy informed Deputy Chief Investigator Jaime Raderstorf ("Raderstorf") of the incident and directed him to conduct an investigation (Tappy Test.; Raderstorf Test.).

28. Raderstorf interviewed Allen, McDonald, Miller, and Petitioner about the Conference (Raderstorf Test.; Stip. Exs. VIII, IX, X, XI)

29. Petitioner did not recall being aggressive, threatening, or extremely intoxicated (Raderstorf Test.; Pet'r Test.).

30. Raderstorf determined that Miller, Allen, McDonald's accounts of the situation were credible and informed Tappy of his findings (Tappy & Raderstorf Tests.).

31. Raderstorf concluded that Petitioner's behavior constituted conduct unbecoming in violation of Respondent's Information and Standards of Conduct for Departmental Staff Policy 04-03-103[11] ("Policy") (Stip. Ex. I; Raderstorf Test.; Tappy Test.).

32. In late September 2016[12], Petitioner opened an investigation into Robert Storm's ("Storm"), then-IA Investigator 4, IA reports as they contained marked and suspicious improvements that did not reflect Storm's previous work (Pet'r Test.). Petitioner was Storm's supervisor at the time.

33. On September 29, 2016, Storm filed a complaint against Petitioner, Storm's supervisor, for sexual harassment (Stip. Ex. XII).

34. Brittany Kirton ("Kirton"), State Personnel Department ("SPD") Human Resources ("HR") Generalist embedded in Respondent's facility, and Warden Richard Brown ("Brown") told Petitioner that he would be put in a separate office during the investigation to avoid any potential conflict (Kirton Test.).

35. Kirton and Brown decided that it would be best for SPD, rather than internal HR, to investigate the claims against Petitioner because he was a department head (Kirton Test.).

36. Jordan Bolden was assigned to the investigation and was subsequently informed of Storm's complaint by Kirton (Bolden Test.; Stip. Ex. XII).

37. Bolden began investigating the complaint along with Stephen Hewitt (Bolden Test.; Hewitt Test.).

38. Storm alleged that he was harassed on multiple occasions by Petitioner (Stip. Ex. XII).

39. Bolden and Hewitt interviewed both Storm and his wife Jackie, along with Allen, McDonald, Brown, and Petitioner concerning Storm's complaint (Bolden Test.).

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[11] Due to the close timeframes of both the Conference and Storm's allegations, Respondent did not issue separate discipline for Petitioner's behavior at the Conference but rather considered the results of both investigations simultaneously when making its disciplinary decision (Osburn Test.).

[12] Petitioner was unable to provide a precise date on which he began his investigation.

Storm filed a case with SEAC on February 17, 2016, concerning the investigation into his breach of confidentiality, which was dismissed via summary judgment on January 25, 2018 (*Robert Storm v. Wabash Valley Correctional Institute by Indiana Department of Correction*, SEAC No. 02-17-007).

40. One part of the complaint against Petitioner involved an incident in January, 2015 at the Hymera, Indiana Masonic Lodge. ("Lodge") While at the Lodge, Storm alleged that Petitioner told Storm that [Petitioner] was going to kiss him and made an attempt to do so (Stip. Ex. XII; Storm Dep.).

41. Another portion of the complaint related to an April, 2015 event at the French Lick, Indiana casino ("Casino"). Storm alleged that Storm, Storm's wife, Petitioner, and Petitioner's significant other ("Clay")[13] went to the Casino together (Stip. Ex. XII; Storm Dep.; Jackie Storm Test.).

42. While Storm and Petitioner were in the Casino, Petitioner yelled to Storm that, "[w]e are going to go back to the room and have the wildest, craziest sex we've ever had" (Stip. Ex. XII; Storm Dep.; Jackie Storm Test.). Storm, embarrassed, then made his way back to his room, with Petitioner following close behind. *Id.*

43. Upon returning to their hotel room, Petitioner made Storm repeat the story to Jackie and Clay (Stip. Ex. XII; Storm Dep.; Jackie Storm Test.).

44. The third portion of the Complaint alleged that in October, 2015, Storm and Jackie agreed to share a condominium for a week in Gulf Shores, Alabama with Petitioner and Clay, but Storm and Jackie left early due to Petitioner making them feel uncomfortable (Stip. Ex. XII; Storm Dep.; Jackie Storm Test.).

45. During his interview concerning Storm's allegations, McDonald indicated that on a previous occasion when Petitioner was intoxicated, McDonald felt as if Petitioner was "feeling him out" regarding his sexuality and thereafter ensured he and Petitioner were not alone if they were consuming alcohol together (McDonald Test.; Hewitt Test.; Pet'r Ex. 75).

46. Bolden found Storm to be sincere and his allegations supported by witness statements (Bolden Test.).

47. Bolden and Hewitt made the recommendation to Respondent that Petitioner be terminated based on the entirety of the situation involving Storm's allegations, the severity of Petitioner's behavior towards not only Storm but towards other employees who gave statements during the investigation, and the type of workplace environment that resulted from Petitioner's behavior (Bolden Test.; Hewitt Test.).

48. Bolden, Deputy Commissioner of Operations James Basinger ("Basinger"), Southern Regional Director Michael Osburn ("Osburn"), Respondent's legal counsel, and SPD HR Director Laura Twyman ("Twyman") then met to discuss Petitioner's behavior at the law enforcement conference and allegations by Storm. (Bolden Test.).

49. Respondent came to a general consensus that Petitioner should be dismissed based on the investigations (Twyman Test.).

[13] Clay's last name was not provided.

50. Osburn was given the authority to make, and ultimately made, the final determination to dismiss Petitioner (Basinger Test.; Twyman Test.; Osburn Test.; Brown Test.).

51. On October 14, 2016, Petitioner met with Kirton and Osburn and was dismissed from employment with Respondent for conduct unbecoming and sexual harassment (Osburn Test, Stipulated Ex. V).

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. "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. A viable public policy exception must be present for the Controlling Complaint to survive.

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. *See Baker v. Tremco Inc.*, 917 N.E.2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction*, 861 N.E.2d 704, 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

5. In the unclassified (at-will) context, absent a breach of public policy, Respondent may discipline inconsistently or without sufficient evidence. I.C. § 4-15-2.2-24, 42. *See further, Baker v. Tremco Inc.*, 917 N.E. 2d 650, 653-655 (Ind. 2009); and *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007).

6. Petitioner, as an unclassified employee, bears the burden of proving "a public policy exception to the at-will doctrine was the reason for the employee's discharge." Ind. Code § 4-15-2.2-42(f).

7. The ALJ will first address Petitioner's contention that he was terminated as a result of his sexual orientation.

8. Allegations of discrimination are handled under Title VII of the Federal Civil Rights Act of 1964, as amended, which prohibits sexual orientation employment discrimination under state law. *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017); *See* Indiana Civil Rights Act (I.C. 22-9).

9. 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). There are three steps to this analysis. First, the petitioner-employee "has the initial burden of establishing a prima facie case of discrimination" through either direct or indirect evidence. *Ind. Civil Rights Comm'n v. S. Ind. Gas & Elec. Co.*, 648 N.E.2d 674 (Ind. Ct. App. 1995). While indirect evidence is merely circumstantial, direct evidence "establishes [discrimination] without resort to inferences from circumstantial evidence." *Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 840, 845 (7th Cir 2007). 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). *Id.* 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. 804). "Evidence is evidence," and are means to consider whether one fact . . . caused another . . .) and therefore are not "elements" of any claim." *Id.* at 763. 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.* at 765.

10. "The plaintiff in such a case must first establish a 'prima facie' case of discrimination." *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009). "Once the plaintiff has established a prima facie case, unlawful discrimination is presumed." *Id.* at 840. The defendant-employer can rebut this presumption by producing evidence that the adverse employment action was taken "for a legitimate, nondiscriminatory reason." *Id.* (internal citations omitted). "Should the defendant-employer carry this burden, the plaintiff must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant-employer are but a pretext for discrimination." *Id.*

11. While the *McDonell Douglas* analysis is still employed, under the doctrine first laid out in *Ortiz v. Werner Enters., Inc.*, using the *McDonnell Douglas* direct v. indirect analysis on various piles of evidence is too cumbersome. *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 763 (7th Cir. 2016). Instead, 7th circuit courts are now directed to look at the evidence as a whole when analyzing claims of discrimination under *McDonnell Douglas*. *Id.* at 764. "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." *Ortiz*, 834 F.3d at 763.

12. However, the burden-shifting model applies only to pretrial proceedings, not to evaluation of evidence presented at trial. "Once the judge finds that the plaintiff has made the minimum necessary demonstration (the "prima facie case") and that the defendant has produced an [discrimination]-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question . . . is whether the plaintiff is a victim of intentional discrimination." *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) (internal citations omitted).

13. Petitioner first suggests that the Warden or Deputy Warden is typically the individual tasked with determining discipline of employees and therefore Respondent's failure to include Brown, who also identifies as homosexual, in the decision-making processes is evidence of discrimination (Pet'r Test.).

14. However, the decision to leave Brown out of the decision-making process was a decision made based on several factors surrounding Brown. First, Brown was interviewed as a witness in the investigation concerning Storm's allegations. Further, he and Marshall have a long-standing friendship, having lived together for approximately six (6) years at one point (Brown Test.). Additionally, Storm expressed his fear to SPD investigators that the appropriate action against Petitioner would not take place because of the friendship and potential bias of Brown (Bolden Test.).

15. Petitioner also points to the types of questions he was asked during the investigation of Storm's complaint as evidence of discrimination. (Pet'r Test.).

16. Bolden and Hewitt asked Petitioner questions relating to his sexuality and relationships during their investigation. However, these questions were natural and appropriate as the core of the complaint was a claim of male on male sexual harassment. Bolden testified that she would have asked similar questions regarding sexuality and intimate relationships in other scenarios, whether the harassment was male-female or female-female. (Bolden Test.) Therefore, these questions were not asked with any discriminatory purpose.

17. Petitioner also testified that Bolden was aggressive and accusatory during the interview, accusing Petitioner of having an intimate relationship with Storm and Brown. (Pet'r. Test.). Petitioner also testified Bolden was judgmental, had drawn a conclusion toward him before the interview, and was targeting him because of his sexual orientation. (Pet'r Test.).

18. However, Petitioner could not corroborate those assertions with any supporting evidence. Bolden denied accusing Petitioner of having an intimate relationship with either Storm or Brown. (Bolden Test.). Bolden also denied being aggressive or assertive, but rather may have simply been expressing frustration due to Petitioner's evasiveness in answering questions. (Bolden Test.). Further, Petitioner never said he felt as though he was being discriminated against based on his sexual orientation during his interview with SPD (Pet'r Test.). Thus, the evidence does not support Bolden's conduct during Petitioner's interview as being discriminatory.

19. Petitioner further suggests that SPD's decision to question only male employees is suspicious and evidence of discrimination.

20. While it has already been clarified that Respondent was within its rights to conduct its investigation as it chose, SPD had legitimate reasons for choosing to interview who they did. SPD investigators interviewed individuals who they felt would be able to provide information pertinent to Storm's claims and Petitioner's behavior in the office. SPD specifically did not interview the two (2) women who worked in IA because they found that the individuals were new to the IA office and that they had not experienced the "before and after" interactions of Storm and Petitioner and therefore would not have much relevant information to offer. (Bolden Test.).

21. Further, SPD did not make the decision to terminate Petitioner; rather Respondent did. (Basinger Test.).

22. Typically, the Warden or Deputy Warden will make a decision regarding discipline—in this instance, whether or not to terminate based on the investigation results. (Basinger Test.).

23. However, Brown was excused by Basinger and Osburn from making such a significant decision about Petitioner because of Brown's admitted close friendship with Petitioner (Basinger Test.).

24. Similarly, Basinger decided that Osburn—an unbiased and neutral person—rather than himself, should make the decision on whether or not to terminate Petitioner (Basinger Test.).

25. It was ultimately Osburn's decision to terminate Petitioner. Osburn was not beholden to SPD's recommendation to terminate Petitioner and instead made the decision based on both investigations, which he found to be thorough and unbiased (Osburn Test.).

26. Finally, Petitioner claims that Respondent's decision to terminate was explicitly based on his sexual orientation. However, Petitioner offers no evidence to demonstrate that his sexual orientation was a factor in his termination.

27. Petitioner's sexual orientation was not discussed during the team meeting where dismissal was recommended and was not a factor in the decision-making process. (Tappy Test.; Basinger Test.; Osburn Test.; Twyman Test.; Tappy Test.). There was a general consensus among the team involved in discussing Petitioner's situation that Petitioner should be dismissed based on the SPD and Respondent's investigations. (Twyman Test.). Further, during the interviews with Bolden, Hewitt, and Raderstorf, Petitioner never said he felt as though he was being discriminated against based on his sexual orientation (Pet'r Test.).

28. Following the decision to terminate Petitioner, Respondent determined that it needed to prepare itself for an allegation by Petitioner that his dismissal was in response to his sexual orientation (Raderstorf Test.).

29. Petitioner contends that this precautionary move is evidence that Petitioner's sexuality was a motivating factor for his termination. However, the decision to terminate Petitioner had already been made when the idea that Respondent needed to prepare itself for an EEOC claim was mentioned. Further, it is reasonable to assume that anytime a disciplinary action is taken against an employee, the employer is going to analyze any potential negative outcomes that may result from the discipline.

30. Therefore, the ALJ finds that Petitioner's claim that his termination was discriminatory fails.

31. The ALJ finally turns to Petitioner's contention that his termination was retaliatory and in violation of Title VII and Respondent's policies for reporting Storm's breach of confidentiality under Respondent's Policy (Stip. Ex. IX).

32. An employer may not retaliate against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *42 U.S.C. § 2000e-3(a)*; *see also, Tomanovich v City of Indianapolis*, 457 F.3d 656, 662 (7th Cir. 2006).

33. Recognized exceptions to at-will employment include retaliation for exercising a statutory right or refusing to engage in illegal conduct with potential personal liability. *See McClanahan v. Remington Freight Lines*, 517 N.E.2d 390 (Ind. 1988) (filing a worker's compensation claim); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (refusing to commit an illegal act).

34. Petitioner presented no evidence to support he ever engaged in protected activity under Title VII while employed at Respondent. Petitioner did not file complaints with, or indicate his intention to file complaints with, Respondent, the Equal Employment Opportunity Commission, the Indiana Civil Rights Commission, SPD, or any other appropriate entity regarding his working condition prior to his termination.

35. The Policy requires all reports to be signed by the reporting party. (Stip. Ex. I). Petitioner did not submit a signed report related to Storm's breach of confidentiality. (Pet'r. Test.).

36. Petitioner has only identified his duty to report violations under the Policy as a basis for his retaliation claim. (Stip. Ex. II; Pet'r. Compl.; Pet'r. Test.). However, Respondent's Policy is not a State or Federal statute. (Pet'r. Test.; Twyman Test.; J. Storm Test.; Bolden Test.).

37. Therefore, Petitioner failed to identify a "clear *statutory* expression of a right or duty" that was contravened by IDOC. *Orr v. Westminster Vill. N., Inc.,* 689 N.E.2d 712, 718 (Ind. 1997) (emphasis added).

38. Petitioner has thus not presented sufficient evidence to support any retaliation claim, whether under Title VII or under a public policy exception argument.

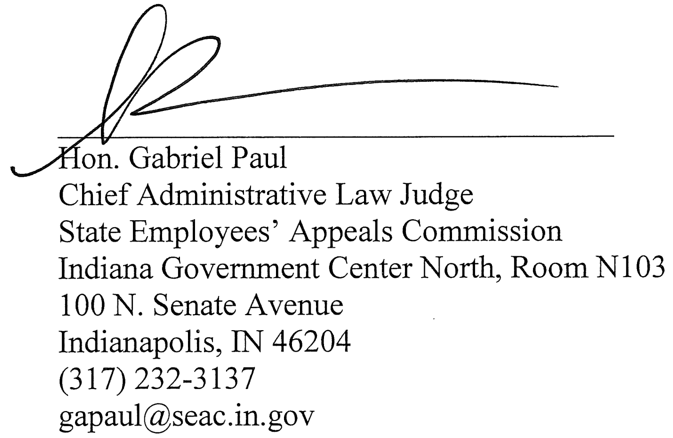
39. Petitioner's discipline was a result of his failure to meet Respondent's expectations on multiple occasions, as determined by two investigations: one concerning Petitioner's behavior at the Conference and one concerning allegations of sexual harassment against Petitioner. Petitioner has failed to present sufficient evidence to sustain his burden of proving a public policy exception to employment at-will existed regarding his dismissal by Respondent. Therefore, the ALJ finds that Petitioner's claim of discrimination based on sexual orientation and retaliation fails.

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.

V. Non-Final Order

Judgment is entered in favor of Respondent. Petitioner's termination is **UPHELD**. The Parties shall bear their own fees and costs.

DATED: September 11, 2019



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