BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

ROBERT STORM Petitioner,	)	
	)	SEAC No. 02-17-007
vs.	)	
WABASH VALLEY CORRECTIONAL INSTITUTE BY INDIANA DEPARTMENT OF CORRECTION Respondent	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On October 2, 2017, Respondent, Wabash Valley Correctional Institute by Indiana Department of Correction ("IDOC") ("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 Robert Storm ("Petitioner"), by counsel, responded to the Motion on November 10, 2017. Thereafter on December 8, 2017, Respondent filed its surreply to the Motion as well as a Motion to Strike.[1]

This case considers Petitioner's demotion for breaching Respondent's confidentiality requirements when he shared confidential information with his wife. Under Ind. Code § 4-15-2.2-42, an unclassified employee's complaint must demonstrate a violation of a law, rule or public policy to oppose the challenged employment decision. The controlling pleadings for purposes of this decision is the Complaint originally received on February 17, 2016, Respondent's Motion, Petitioner's reply to the Motion, and Respondent's Motion to Strike and surreply. In order to survive a T.R. 56 Motion, material issues of fact must exist such that judgment as a matter of law for the moving party would be inappropriate.

[1] Respondent's Motion to Strike targeted a number of exhibits in Petitioner's Reply that it felt were not admissible and should be removed from consideration. Respondent's main objections rest upon Ind. T.R. 56(E). However, since the ALJ grants Respondent's Motion for Summary Judgment and because his decision does not rest upon any of the exhibits Respondent desires to have stricken from the record, the ALJ finds Respondent's Motion moot.

The ALJ finds that no material issue of fact exists with regard to Petitioner's claims. Therefore, Respondent's Motion for Summary Judgement is hereby GRANTED. The following additional findings of fact, conclusions of law, and order are entered.

I. Summary Judgment Standard

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Simon Prop. Grp., L.P. v. Acton Enterprises, Inc.*, 827 N.E.2d 1235, 1238 (Ind. Ct. App. 2005). A party seeking summary judgment bears the burden to make a prima facie case showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. *Id. See also Am. Mgmt., Inc. v. MIF Realty L.P.,* 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to T.R. 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. *Simon Prop. Grp., L.P.*, 827 N.E.2d at 1238*; Am. Mgmt., Inc*, 666 N.E.2d at 428.

The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. *Simon Prop. Grp., L.P.* at 1238; *Shambaugh & Son, Inc. v. Carlisle,* 763 N.E.2d 459, 461 (Ind. 2002). A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth ... or if the undisputed material facts support conflicting reasonable inferences. *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 253 (Ind. 2015).

II. Findings of Fact

The following facts are taken from the filings by both parties, as construed in the light most favorable to Petitioner.

1. Petitioner began employment with Respondent in 1997. (Pet'r. Compl.).

2. At all times, Petitioner was an unclassified, at-will employee, an Internal Affairs Investigator 4. (Resp't. Ex. A).

3. On July 15, 2016, Petitioner met with Kevin Allen ("Allen"), Internal Affairs Officer 3, in which they discussed Petitioner's deficiencies in his job performance. (Resp't. Ex. B-1).

4. In September 2016, Allen and Robert Marshall ("Marshall"), an internal investigator, who was also Storm's supervisor, noticed marked improvements in the spelling and grammar of Petitioner's reports. (Resp't. Ex. B).

5. On September 20, 2016, Marshall opened an investigation into Petitioner's reports and emailed Warden Richard Brown ("Brown"), requesting permission to access Petitioner's email account. (Resp't. Ex. C).

6. On September 20, 2016, Allen and Marshall were given access to Petitioner's email account. (Resp't Ex. B.).

7. After a review of Petitioner's emails, it was discovered that Petitioner had sent drafts of his reports to his wife, Jackie Storm ("Jackie"). (Resp't. Ex. B).

8. On September 27, 2016, Marshall and Allen met with Petitioner regarding his breach of confidentiality. (Resp't. Ex. B).

9. Petitioner indicated that he had written the reports himself without help from his wife. (Resp't. Ex. B.).

10. Allen and Marshall informed Petitioner that he would likely receive discipline for his breach of confidentiality and suggested that his position in Internal Affairs ("I & I") may not be an appropriate fit for Petitioner. (Resp't. Ex. B).

11. On September 28, 2016, Petitioner filed a sexual harassment claim against Marshall with Respondent's human resources officer, alleging that Marshall made unwanted sexual advances towards Petitioner. (Resp't. Ex. A).

12. On September 29, 2016, Petitioner's harassment complaint was sent to the Indiana State Personnel Department ("SPD"). (Resp't. Ex. A).

13. On October 6, 2016, SPD staff interviewed Petitioner about his harassment complaint against Marshall. (Resp't. Ex. A).

14. During the interview, Petitioner indicated that he had sent reports to his wife for proofreading because he is dyslexic and had a difficult time writing the reports. (Resp't. Ex. D-1).

15. On October 13, 2016, IDOC Executive Director of Adult Facilities, Michael Osburn ("Osburn") met with Respondent's legal, I & I and SPD staff to discuss Petitioner's allegations of sexual harassment against Marshall. (Resp't. Ex. E).

16. Osburn determined that demoting Petitioner out of the I & I unit for his breach of confidentiality was the best course of action. (Resp't. E).

17. On October 14, 2016, Petitioner was demoted into a Correctional Officer position. (Resp't. Ex. A-3).

III. Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. Ind. Code § 4-15-2.2 et seq. SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). Ind. Code § 4-15-2.2-23, 24. Petitioner was 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. *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).

4. "Indiana generally follows the employment at will doctrine, which permits the employer to discipline the employment at any time for a 'good reason, bad reason, or no reason at all.'" *See 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 the discipline 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.

5. The ALJ will first address Petitioner's contention that Respondent discriminated against Petitioner because of his learning disability.

6. Allegations of discrimination are handled under Title VII of the Federal Civil Rights Act of 1964, as amended. *See also*, the Indiana Civil Rights Act (I.C. 22-9), which prohibits national origin employment discrimination under state law. The Title VII discrimination analysis is often referred to as the modified *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *See also Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 840, 845 (7th Cir 2007). 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).

7. 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.

8. "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.*

9. While the *McDonell Douglas* analysis is still employed, under the doctrine first laid out under *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016), 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. While the decision does not specifically extend to administrative bodies such as SEAC, the ALJ nevertheless finds that the *Ortiz* decision should be followed in this case.

10. Per the Americans with Disabilities Act ("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).

11. "Although federal courts generally find dyslexia to constitute a 'disability' under the ADA, no per se rule requires such a finding. Rather, the determination of whether or not a person has an ADA disability is to be made on an individualized case-by-case basis. 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).

12. On July 15, 2016, Allen met with Petitioner to discuss deficiencies in Petitioner's job performance. Petitioner indicated that he was having difficulty writing reports due to a learning disability (dyslexia) but did not indicate that it impacted his job performance. (Resp't Ex. B and B-1).

13. While Petitioner's dyslexia could be considered a disability under the ADA, Petitioner fails to provide evidence that Respondent formally acknowledged Petitioner's disability and that Petitioner requested any form of accommodation as a result.

14. "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 (7th Cir. 1996) (citing 29 C.F.R. § 1630.2(o)(3) (1995)).

15. "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).

16. "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).

17. During their meeting on July 15, 2016, Allen asked Petitioner if he needed any assistance in writing his reports after Petitioner indicated he was having some difficulty because of his learning disability. However, Petitioner replied that he did not want any assistance from Respondent and would handle it on his own. (Resp't Ex. B, B-1).

18. Therefore, Respondent made a good faith attempt to discuss Petitioner's disability and offer an accommodation, which Petitioner declined; thus Respondent did not breach its duty to Petitioner per the ADA as Petitioner suggests.

19. Additionally, had Petitioner actually requested an accommodation from Respondent, as was his responsibility to do so, Petitioner could not have used it to have his wife review and edit his reports as he did here, since Petitioner's wife was not authorized to see the reports, due to their confidential nature.

20. Respondent's Investigations and Intelligence Policy states that, "[t]he reports generated [by I & I] during investigations shall be considered confidential to the extent provided by State law and Department policies and procedures." (Resp't. Ex. B-2).

21. Additionally, the Policy states that "[a]ll Office of Investigations and Intelligence investigations shall be afforded the highest degree of confidentiality…[and] investigators…shall not discuss any aspect of any Office of Investigations and Intelligence investigation with any person not authorized to receive such information. Violation of this provision shall be grounds for disciplinary action." *Id.*

22. On November 16, 2009, Petitioner signed a "state of confidentiality" in which he agreed that he would "not release any confidential information to any other person unless authorized to do so by his/her supervisor or other authorized supervisory staff… [and] the release of restricted or confidential information without the required authorization may result in disciplinary action…" (Resp't. Ex. A-1).

23. Although Petitioner was dyslexic, Petitioner has not offered any evidence of discrimination nor has he shown that his demotion was discriminatory. The allegations put forth by Petitioner do not lead the ALJ to believe that he was discriminated against in any fashion. Petitioner's allegations do not lead to a pattern of discrimination by the Respondent nor any employees under its command. Respondent's demotion was a result of a breach of confidentiality policies by Respondent and not a result of discrimination. Additionally, Petitioner failed to formally inform Respondent of his disability and request any accommodation be made. Therefore, the ALJ finds that Petitioner's claim of discrimination under the ADA fails.

24. The ALJ will next address Petitioner's contention that he should not be disciplined for breaching confidentiality policies when other employees of Respondent allegedly did the same.

25. Petitioner claims that his demotion was inconsistent with the disciplinary action administered in a similar case. Petitioner suggests that another similarly situated non-disabled employee was treated differently than Petitioner when she allegedly breached confidentiality. (Pet'r. Reply).

26. "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 also*, the Indiana Civil Rights Act (I.C. 22-9), which prohibits national origin employment discrimination under state law. *See McDonnell Douglas*; *see also Ortiz v. Werner Enterprises, Inc.* In order to show a *prima facie* case of discrimination, the Petitioner must present evidence that "(1) he was in the 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.* at 846.

27. Even assuming Petitioner was in a protected class, there is no evidence that Petitioner was otherwise performing to his employer's legitimate expectations; in fact, the evidence shows the opposite—that Petitioner was not performing to his employer's expectations.

28. Petitioner presented no evidence which purports to show how his discipline was otherwise unfair *vis a vis* his other co-worker. For example, Petitioner fails to show that his co-worker was a member of a protected class, which is the first step in the above-described analysis. Failing this, the ALJ is left to conjecture whether Petitioner's co-worker met the other three prongs of the test, which the ALJ declines to do. Therefore, Petitioner's claim that other similarly situated employees were receiving different treatment than he was is unfounded.

29. The ALJ will lastly address Petitioner's contention that Respondent demoted him in retaliation for his engagement in a protected activity.

30. As noted above, on September 29, 2016, Petitioner filed a complaint with Respondent alleging that Marshall was sexually harassing him. (Resp't. Ex. D-1).

31. In order to prove a claim of retaliation, Petitioner "must show (1) that he engaged in a statutorily protected activity; (2) that he suffered a materially adverse action by his employer; and (3) there was a causal link between the two." *Silverman v. Bd. of Educ. of City of Chicago*, 637 F.3d 729, 740 (7th Cir. 2011) (internal citations omitted).

32. Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

33. There is no causal link between Petitioner's allegations against Marshall and his demotion. Petitioner was not demoted in retaliation for reporting allegations of sexual harassment; he was demoted for violating Respondent's confidentiality requirements when he shared confidential information and documentation with his wife without authorization to do so. (Resp't A-3). Therefore, Petitioner has failed to meet his burden under the *Silverman* standard noted above for this claim.

34. Respondent has successfully shown that no material issues of fact exist that would warrant further proceedings. Petitioner failed to follow Respondent's workplace standards as evidenced above. Respondent's demotion of Petitioner did not violate public policy and is hereby UPHELD.

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.

Order

Respondent's Motion for Summary Judgment is hereby GRANTED and Petitioner's Complaint is hereby DISMISSED. This is the final order of the Commission. A person who wishes to seek judicial review must file a petitioner in an appropriate court within thirty (30) days of this order and must otherwise comply with I.C. § 4-21.5-5. So Ordered.

DATED: January 25, 2018

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