# BEFORE THE
# STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

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| KEITH KRAJEWSKI | ) | | ISSUED |
| Petitioner, | ) | | |
| | ) | SEAC No. 02-19-019 | AUG 26 2019 |
| vs. | ) | | |
| | ) | | STATE EMPLOYEES' |
| INDIANA GAMING | ) | | APPEALS COMMISSION |
| COMMISSION | ) | | |
| Respondent. | ) | | |

## ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

### I. Introduction and Summary

On May 17, 2019, the Indiana Gaming Commission ("Respondent") by counsel, filed a Motion to Dismiss Petitioner's Complaint ("Motion"). Petitioner Keith Krajewski, ("Petitioner"), pro se, submitted a response to Respondent's Motion on July 25, 2019. Thereafter, on August 12, 2019, Respondent filed a response in support of its Motion. The ALJ has duly considered the parties' filings, arguments and the pleadings, and this matter is ripe for ruling.[1]

This case considers Petitioner's termination for repeated unprofessional conduct in the workplace. Petitioner contends his termination was a result of retaliation under Title VII of the Civil Rights Act of 1964 for his complaint of harassment.

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 both state a claim upon which relief could be granted and allege a violation of a law, rule, or public policy exception to Indiana's at-will employment law. Thus, this case must 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.

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[1] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5 et seq. *See* I.C. § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to I.C. § 4-21.5-3-28 of the AOPA, the authority to issue final orders in this class of proceedings.

## I. Motion to Dismiss Standard

Dismissal proceedings test "the legal sufficiency of the complaint." *Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1349 (Ind. Ct. App. 1998) (citation omitted). All facts plead in Petitioner's complaint, and reasonable inferences therefrom, are taken as true. *Bee Windows, Inc. v. Turman*, 716 N.E.2d 498, 500 (Ind. Ct. App. 1999). However, when a party's complaint is legally insufficient or fails to plead essential elements of the claim, the complaint or deficient claim should be dismissed. *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007); *Huffman v. Office of Envt'l Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004); *Gorski v. DRR, Inc.,* 801 N.E.2d 642, 644 (Ind. Ct. App. 2003); and *Steele v McDonald's Corp. et al.*, 686 N.E.2d 137 (Ind. Ct. App. 1997). *See also*, Ind. Trial Rule 12(b)(1) and 12(b)(6).

## II. Findings of Fact

The facts relevant to the instant Motion's resolution, as construed in favor of the non-movant Petitioner, are as follows:

1. At all relevant times, Petitioner was a Gaming Enforcement Agent for Respondent's Horseshoe Southern Indiana casino in Elizabeth, Indiana (Pet'r Compl.).

2. At an unspecified time, Petitioner was having a discussion with his supervisor, Kristy Snider ("Snider"), during which she expressed difficulty meeting people to date outside of work (Pet'r Compl.).

3. Petitioner agreed with this statement, indicating that he too had difficulty meeting people socially in the area (Pet'r Compl.).

4. Snider then made a comment about Petitioner "flirting" with women while on duty at Respondent's casino (Pet'r Compl.).

5. On another unspecified date, Petitioner had a conversation with a non-licensed team member,[2] Sydney Atkins ("Atkins"), who informed Petitioner that one of the security guards made her repeatedly feel uncomfortable (Pet'r Compl.).

6. When Petitioner returned to the office after speaking with Atkins, Agent Larry Hawkins ("Hawkins") suggested that Petitioner was attempting to make sexual advances towards Atkins (Pet'r Compl.).

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[2] Most individuals employed by Indiana casinos are licensed by Respondent. "Generally speaking, any employee of an Indiana casino who works in the casino or handles money from the casino must be licensed by the Commission." Although Petitioner does not explain what a "non-licensed team member" is, the ALJ treats such individual for the purposes of this Order as a vendor who supplies goods and/or services that do not directly relate to, or deal with money directly related to, gaming operations. *See* https://www.in.gov/igc/2344.htm; *See also* https://www.in.gov/igc/2343.htm.

7. Petitioner felt uncomfortable with this statement and decided to look at the saved surveillance videos (Pet'r Compl.).

8. Petitioner found that his conversation with Atkins had been saved on the surveillance system (Pet'r Compl.).

9. In August 2018, Petitioner, with a witness—Agent Tyson Eblen—met with Snider and told her that he felt uncomfortable with the way agents in general and one agent in particular—Hawkins—made comments and jokes of a sexual nature about Petitioner himself, team members, and guests (Pet'r Compl.).

10. Petitioner told Snider about the conversation with Atkins and indicated that Hawkins had saved video footage of the conversation on Respondent's surveillance system (Pet'r Compl.).

11. In mid-November, 2018, one of Petitioner's co-workers indicated that another employee was going to "set up" Petitioner with Respondent's Risk Manager, Jessica Davidson ("Davidson") (Pet'r Compl.).

12. On December 12, 2018, Petitioner went to Davidson's office to have a conversation (Pet'r Compl.).

13. While Petitioner was in Davidson's office, she received approximately two (2) phone calls (Pet'r Compl.).

14. Petitioner later learned that because Davidson was uncomfortable with their conversation, Snider had requested security call Davidson during her conversation with Petitioner in an effort to have Davidson excuse herself by stepping outside of her office (Pet'r Compl.).

15. Petitioner was terminated on December 18, 2018 (Pet'r Compl.).

## 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." 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).

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); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

4. "Indiana generally follows the employment at will doctrine, which permits both the employer and the employee to terminate the employment at any time for a 'good reason, bad reason, or no reason at all.'" *Meyers,* 861 N.E.2d at 706 (Ind. 2007) (quoting *Montgomery v. Bd. of Trustees of Purdue Univ.*, 849 N.E.2d 1120, 1128 (Ind. 2006)); *Cantrell v. Morris*, 849 N.E.2d 488, 494 (Ind. 2006); *Sample v. Kinser Ins. Agency*, 700 N.E.2d 802, 805 (Ind. Ct. App. 1998), *trans. not sought*. Correspondingly, a claim that a termination was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction. Nor does such an assertion state a claim for which relief can be granted in an unclassified—at-will—Civil Service System case. *Meyers,* 861 N.E.2d at 704; I.C. § 4-15-2.2-42. A viable public policy exception must be present for the Complaint to survive.

5. Petitioner's sole contention is that his termination was a result of retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") for making a complaint to his supervisor regarding comments made about his interactions with women at Respondent's facility.[3]

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[3] The ALJ notes that Petitioner briefly mentions another agent who made a complaint about sexual comments concerning herself and indicates that the individual was transferred to a different location (Pet'r Compl.). However, this is the only mention Petitioner makes of such instance and does not further indicate that he claims disparate treatment or suggests that such agent is a comparator.

6. To prove retaliation under Title VII, Petitioner must show that he was engaged in a statutorily protected activity, that an adverse action was taken against him and that a causal connection exists between the two. *See Baines v. Walgreen Co.*, 863 F.3d 656 (7th Cir. 2017).

7. While Petitioner did experience an adverse employment action, his Title VII retaliation claim fails because Petitioner did not engage in a statutorily protected activity and failed to show a causal connection between his termination and his complaint to his supervisor.

8. "A 'statutorily protected activity' is the act of opposing or complaining about discriminating treatment in the workplace, or participating in an investigation of discriminatory treatment." *Thatcher v. Perkins*, 2013 U.S. Dist. LEXIS 91033 (S.D. Ind. June 28, 2013). For example, filing a charge with the Equal Employment Opportunity Commission ("EEOC") about alleged discrimination would be considered a statutorily protected activity. *Murray v. Golden Rule Ins. Co.*, 23 F. Supp. 3d 938 (S.D. Ind. 2014).

9. Petitioner contends that when he reported his concerns about the sexual comments to Snider, he was engaged in a protected activity because he reported the comments, asked his supervisor to ensure they stopped, and felt that the comments were contributing to adverse working conditions and a change in Snider's behavior towards him (Pet'r Compl.).

10. However, Petitioner's complaints about his coworkers' comments do not rise to the type of conduct prohibited by Title VII. *Lord v. High Voltage Software, Inc.*, 839 F.3d 556 (7th Cir. 2016).

11. Petitioner's complaint regarded "workplace banter and conduct that had sexual overtones" but Petitioner does not suggest that "he was harassed *because* of his sex." *Id.* (emphasis added). Petitioner also does not indicate that the perceived harassment was based on his membership in a protected class or that he had engaged in a protected activity as required for a claim of retaliation under Title VII. *Carnes v. Capital Improvement Bd. of Managers*, 2013 U.S. Dist. LEXIS 103425 (S.D. Ind. July 23, 2013).

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"Each averment of a pleading shall be simple, concise, and direct." Ind. T.R. 8(E)(1). In order for a pleading to state a claim for relief, it is required to contain, in part, "a short and plain statement of the claim showing that the pleader is entitled to relief." Ind. T.R. 8(A)(1). "Notice pleading merely requires pleading the operative facts so as to place the defendant on notice as to the evidence to be presented at trial. Therefore, under notice pleading the issue of whether a complaint sufficiently pleads a certain claim turns on whether the opposing party has been sufficiently notified concerning the claim so as to be able to prepare to meet it. A complaint's allegations are sufficient if they put a reasonable person on notice as to why a plaintiff sues." *Myers v. Deets*, 968 N.E.2d 299 (Ind. Ct. App. 2012). Petitioner merely fleetingly mentions the other agent, failing to provide any explanation as to how she relates to his claim against Respondent. Therefore, the ALJ declines to further speculate as to what purpose she serves and declines to analyze this further.

12. "Although filing an official complaint with an employer may constitute statutorily protected activity under Title VII, the complaint must indicate the discrimination occurred because of sex, race, national origin, or some other protected class. Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient" and fails to constitute a protected activity. *Tomanovich v. City of Indianapolis*, 457 F.3d 656 (7th Cir. 2006) (citations omitted).

13. Petitioner takes issue with several cases cited in Respondent's brief, stating that they do not apply to his situation because he is not alleging discrimination in reference to a protected class, as the plaintiffs in *Carnes, Gaff, Kodl, and Tomanovich* were. *Carnes*, 2013 U.S. Dist. LEXIS 103425; *Gaff v. Ind.-Purdue Univ. of Fort Wayne*, 45 N.E.3d 458 (Ind. Ct. App. 2015); *Kodl v. Bd. of Educ.*, 490 F.3d 558 (7th Cir. 2007); *Tomanovich*, 457 F.3d 656.

14. Petitioner contends "that an individual does not have to be part of a 'protected class' to be a victim of sexual harassment or be retaliated against for reporting such harassment." However, Petitioner specifically brings his claim of retaliation under Title VII of the Civil Rights Act, which states that an employer may not discharge an individual based on their race, color, religion, sex, or national origin." Thus, an essential element of a claim under Title VII is that an individual is alleging wrong doing occurred because of his status in a protected class. Petitioner himself admits that he does not contend any discrimination occurred based on his membership in one of these protected classes.

15. Therefore, the ALJ finds that Petitioner was not engaging in a statutorily protected activity when he complained to Snider about the perceived harassment and thus his termination was not a result of retaliation under Title VII.

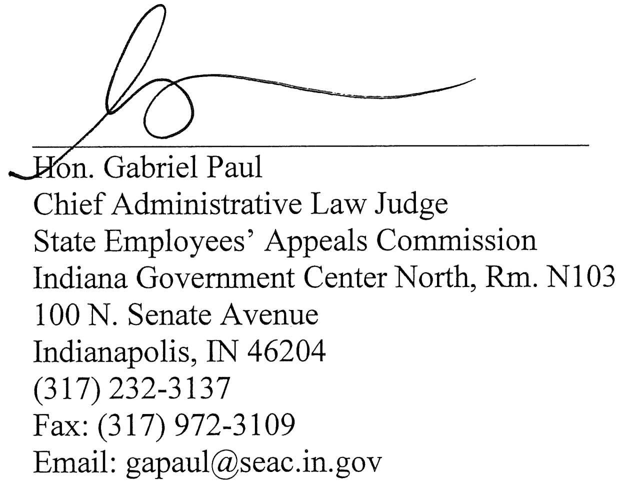
Prior sections are hereby incorporated by reference, as needed. To the extent a given finding of fact is deemed a conclusion of law, or a conclusion of law is deemed to be a finding of fact it shall be given such effect.

## IV. Final Order of Dismissal

Respondent's Motion to Dismiss 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: August 26, 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:

Keith Krajewski
10735 Sherman St
Crown Point, IN 46307
keithmad42@gmail.com

Dennis Mullen
Counsel
Indiana Gaming Commission
115 West Washington Street
Suite 1600
Indianapolis, Indiana 46204
demullen@igc.in.gov

Courtesy Copy to:

David Fleischhacker
State Personnel Department
402 W. Washington Street
IGCS, Room W161
Indianapolis, IN 46204
dfleischhacker1@spd.in.gov