BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

SUZANNE E. ESSERMAN Petitioner,	)	
vs.	)	SEAC No. 03-14-018
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT Respondent.	)	SEAC ISSUED SEP 11 2015

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On June 29, 2015, Respondent Indiana Department of Environmental Management ("Respondent"), by counsel, moved for partial summary judgment ("Motion"). Petitioner Suzanne Esserman ("Petitioner"), by counsel, timely responded on July 20, 2015, and Respondent replied on August 13, 2015. This unclassified case considers, under Ind. Code § 4-15-2.2 *et seq.* ("the Indiana Civil Service System"), Petitioner's termination by Respondent on January 17, 2014. Petitioner's Complaint filed on March 10, 2014, is the operative pleading.

I. Summary of Order

Petitioner is a former unclassified, at-will, employee who alleges that her termination by Respondent arose due to four separate claims. Petitioner's first claim asserts that Petitioner was terminated in retaliation for her objections to what Petitioner believed were misused funds, and that both Ind. Code § 5-11-5.5-8 and Ind. Code § 4-15-10-4 protected her reporting activities. Petitioner's Response to the Motion fails to show that there is a genuine question of material fact regarding Ind. Code § 5-11-5.5-8, and as such Respondent's Motion for Summary Judgment is granted regarding this component of Petitioner's first claim. The whistleblower protections invoked by Petitioner under Ind. Code § 4-15-10-4 are unaffected by this ruling, and can be addressed at the Evidentiary Hearing scheduled in this matter.[1]

Petitioner's second claim asserts that Petitioner was terminated for refusing to break a law for which Petitioner could be personally liable. Petitioner's Response fails to show a

[1] The State Employees' Appeals Commission ("SEAC") has limited jurisdiction to hear state employee complaints that concern "the application of a law, rule, or policy to the complainant." Ind. Code § 4-15-2.2-42(a). As such, SEAC is without jurisdiction to assess the validity of Petitioner's allegations that Respondent was misusing state funds. SEAC has jurisdiction to hear Petitioner's assertion that Indiana's Employees' Bill of Rights was violated by Petitioner's termination, but not whether the Petitioner's allegations were grounded in fact.

genuine issue of material fact on this claim, and as such Respondent's Motion regarding Petitioner's second claim is granted. Respondent's Motion did not raise issue with Petitioner's third or fourth claims regarding a hostile work environment or alleged violations of the Americans with Disabilities Act. Thus, Petitioner's third and fourth claims are still viable, and may be addressed at the pending evidentiary hearing.

II. The Summary Judgment Standard

Summary judgment proceedings before the State Employees' Appeals Commission ("SEAC") are governed by Indiana Trial Rule 56. Ind. Code § 4-21.5-3-23. Summary judgment is only appropriate when the designated evidence shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hartman v. Keri,* 883 N.E.2d 774, 777 (Ind. 2008). All inferences from the designated evidence are drawn in favor of the non-moving party. *Id.* "The burden is on the moving party to prove the nonexistence of material fact; if there is any doubt, the motion should be resolved in favor of the party opposing the motion." *Oelling v. Rao,* 593 N.E.2d 189, 190 (Ind. 1992).

III. Whistleblower Protection Under the Indiana State Employees' Bill of Rights

The State Employees' Bill of Rights, Ind. Code § 4-15-10 *et seq.*, "provides remedies for state employees whose rights are violated by a state agency." *Nobles v. Cartwright,* 659 N.E.2d 1064, 1072 (Ind. Ct. App. 1995). Specifically, Ind. Code § 4-15-10-4, otherwise known as Indiana's State Employees' Bill of Rights Whistleblower Law (the "WBL"), protects state employees that are retaliated against for reporting violations of state or federal laws. There is no common law public policy protection for a state employee whistleblower beyond the terms and conditions of the WBL. *See, Ogden v. Robertson,* 962 N.E.2d 134, 146 (Ind. Ct. App. 2012). To invoke the whistleblower protections of I.C. § 4-15-10-4 a state employee is required to:

> [R]eport in writing the existence of: (1) a violation of a federal law or regulation; (2) a violation of a state law or rule; (3) a violation of an ordinance of a political subdivision . . . ; or (4) the misuse of public resources; to a supervisor or to the inspector general.

I.C. § 4-15-10-4(a).

If the employee makes a report in accordance with the aforementioned subsection, that employee "may not: (1) be dismissed from employment; (2) have salary increases or employment related benefits withheld; (3) be transferred or reassigned; (4) be denied a promotion the employee otherwise would have received; or (5) be demoted." I.C. § 4-15-10-4(b). If a state employee is disciplined for making a report according to I.C. § 4-15-10-4(a) they

are "entitled to process an appeal of the disciplinary action" under the State Civil Service System.[2] I.C. § 4-15-10-4(c). A caveat to the protections offered by the WBL is that an employee making a report "must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary actions for knowingly furnishing false information . . . ." *Id.*

IV. The Indiana False Claims and Whistleblower Protection Act

The Indiana False Claims and Whistleblower Protection Act ("IFCA") applies to fraudulent claims against the state, defined as "Indiana or any agency of state government." Ind. Code § 5-11-5.5-1(7). The IFCA is patterned after the Federal False Claims Act, 31 U.S.C. §§ 3729-3730(h), and applies to:

> A Person who knowingly or intentionally: (1) presents a false claim to the state for payment or approval; (2) makes or uses a false record or statement to obtain payment or approval of a false claim . . . ; (3) with intent to defraud . . . , delivers less money or property to the state than the amount recorded on the certificate or receipt the person receives from the state; (4) with intent to defraud the state, authorizes issuance of a receipt without knowing that the information on the receipt is true; (5) receives public property as a pledge of an obligation on a debt from an employee who is not lawfully authorized to sell or pledge the property; (6) makes or uses a false record or statement to avoid an obligation to pay or transmit property to the state; (7) conspires with another person; or (8) causes or induces another person to . . . [violate the statute].

Ind. Code § 5-11-5.5-2(b). "Person" is defined to include "a natural person, a corporation, a firm, an association, an organization, a partnership, a limited liability company, a business, or a trust." Ind. Code § 5-11-5.5-1(5).

The Attorney General and Inspector General have concurrent jurisdiction to investigate violations of the aforementioned statute. Ind. Code § 5-11-5.5-3(a). The Attorney General may initiate a suit if the Attorney General's investigation uncovers a violation of the IFCA. The Inspector General must first certify their findings to the Attorney General, and if the Attorney General declines to act the Inspector General may then proceed. Ind. Code § 5-11-5.5-3(b)-(c), (e).

Additionally, the IFCA contains qui tam provisions that allow a private citizen to initiate a civil lawsuit against a violator on behalf of the state. Ind. Code § 5-11-5.5-4. The term "relator" is used in federal parlance to describe a private citizen who brings a

[2] Ind. Code § 4-15-2.2-42

qui tam action, and will be used hereinafter to describe a person bringing a qui tam action under the IFCA. Once an action is filed by a relator, no person other than the Attorney General or Inspector General may bring another action based on the same facts. Ind. Code § 5-11-5.5-4(g). The venues available to the Attorney General, Inspector General, and relator are limited by the IFCA. Ind. Code §§ 5-11-5.5-3(h), Ind. Code § 5-11-5.5-4(a)(2).

Additionally, as with the federal statute, the IFCA includes a whistleblower provision that grants a right of action to "an employee who has been discharged, demoted, suspended, threatened, harassed, or otherwise discriminated against in the terms and conditions of employment . . . ." Ind. Code § 5-11-5.5-8(a). In order to qualify for the IFCA's whistleblower protections, an employee is required to have "objected to an act" in violation of the statute; or "initiated, testified, assisted, or participated in an investigation" or related proceedings. Ind. Code § 5-11-5.5-8(a)(1), (2). A whistleblower may bring a retaliation claim "in any court with jurisdiction." Ind. Code § 5-11-5.5-8(c).

V. The Employment At-Will Doctrine

Petitioner is a former unclassified state employee for Respondent. An unclassified state employee is employed at-will, serving at his or her appointing authority's pleasure. Ind. Code § 4-15-2.2-24(a). The Indiana at-will doctrine allows an employer or employee to terminate the employment relationship at any time for a "good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction,* 861 N.E.2d 704, 705 (Ind. 2007). However, Indiana courts "have acknowledged a public policy exception to the doctrine if [a] clear statutory expression of a right or duty is contravened." *Ogden v. Robertson,* 962 N.E.2d 134, 145 (Ind. Ct. App. 2012) (citing *Baker v. Tremco,* 917 N.E.2d 650, 654 (Ind. 2009)).

The Civil Service System's statutes mirror the case law. A termination or lesser discipline of an unclassified, at-will, state employee is wrongful if it violates public policy. Ind. Code § 4-15-2.2-42(f). Otherwise, an unclassified state employee may be "dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." Ind. Code § 4-15-2.2-24(b). The aforementioned State Employees' Bill of Rights codifies the WBL as one such public policy that protects employees who report violations of state or federal laws. Ind. Code § 4-15-10-4.

VI. The Public Policy Exception to At-Will Employment for Refusal to Break a Law

"[I]n Indiana, the presumption of at-will employment is strong," and courts are "disinclined to adopt broad and ill-defined exceptions to the employment-at-will doctrine. *Orr v. Westminster Village North,* 689 N.E.2d 712, 717 (Ind. 1997). "On rare occasions, narrow exceptions have been recognized." *Meyers v. Meyers,* 861 N.E.2d 704, 706 (Ind. 2007). One such narrow exception exists when an employee is retaliated against for refusing to commit an illegal act for which the employee would be personally liable. *McClanahan v. Remington Freight Lines,* 517 N.E.2d 390, 393 (Ind. 1988). In *McClanahn*, a truck driver was terminated for refusing to drive an overweight truck through Illinois because he feared he would be personally liable for violating Illinois law. *Id.* at 391.

The decision in *McClanahan* "flowed from *Frampton v. Cent. Ind. Gas Co.,* 297 N.E.2d 425 (1973)," where the Indiana Supreme Court "first recognized the public policy exception to the employment at-will doctrine." *Baker v. Tremco Inc.,* 917 N.E.2d 650, 654 (Ind. 2009). In *Frampton* an employee was fired for filing a workers' compensation claim, and the Court declared that, "when an employee is discharged solely for exercising a statutorily conferred right[,] an exception to the general rule must be recognized." *Frampton,* 297 N.E.2d at 428. The *McClanahan* Court recognized that "fulfilling a statutory duty (declining to drive an overweight truck in abrogation of a statute) rather than exercising a statutorily conferred right" still fell under the public policy exception to at-will employment. *Baker,* 917 N.E.2d at 654.

The *Baker* decision recognized the important public policy goals furthered by the *Frampton and McClanahan* decisions, but would only allow an exception to at-will employment where "the fulcrum of the discharge [] fit[s] within the exception as recognized by *Frampton* and *McClanahan*. *Id.* at 655. The claims in *Baker* rested on an employees' alleged constructive discharge for refusing to defraud Indiana public schools by selling his employer's products in violation of public bidding laws. *Id.* at 653. The Indiana Supreme Court held that the employees' claims were "not on par with the rights and obligations recognized" under *Frampton* and *McClanahan*, even though the employees' claim rested on an allegation that his employer's activities contravened other statutes. *Id.* at 656.

VII. Findings of Fact

The following facts are taken from the designated evidence, as construed in the light most favorable to non-movant Petitioner:

1. At the time her Complaint was filed, Petitioner was a Senior Environmental Manager 1 within Respondent's Excess Liability Trust Fund ("ELTF") section. (Complaint, pg. 2).

2. Beginning on December 2, 2011, Petitioner, by counsel, began submitting letters to Respondent regarding legal matters concerning Petitioner's employment with Respondent. (Pet'r Ex. 1).

3. On October 25, 2012, Petitioner, by counsel, submitted a letter to Respondent regarding an Interim Appraisal that Petitioner had received. In the letter, amidst other allegations, Petitioner asserted that she was unwilling to sign off on documentation she was responsible for without properly reviewing it first. In the letter, Petitioner asserts that it was her belief that she could not legally sign off on the documentation without completing a more thorough review than Respondent desired. Petitioner's Complaint cited Indiana's False Claims Act as support for this contention, but did not note any other law that would pertain to her ability to process the documentation required by her position with Respondent. (Pet'r Ex. 4).

4. Thereafter on June 21, 2013, Petitioner, by counsel, submitted another letter to Respondent regarding Petitioner's difficulty performing the reviews required by her position in the timeframe required by Respondent without "rubber stamping" the review. (Pet'r Ex. 5).

5. Petitioner was terminated on January 17, 2014, for failing to satisfactorily perform her assigned job duties, and for failing to meet agency standards as evidenced by Petitioner's 2013 Annual Performance Appraisal. At the time of her employment, Petitioner was an unclassified at-will state employee. (Resp't Ex. A).

6. Petitioner timely appealed her termination under the State Civil Service System, and her appeal reached SEAC on March 10, 2014.

VIII. 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). I.C. §§ 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 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. "An unclassified employee must establish that the commission has subject matter jurisdiction to hear the employee's wrongful discharge claim by establishing that a public policy exception to the employment at will doctrine was the reason for the employee's discharge. The former employee has the burden of proof on this issue." Ind. Code § 4-15-2.2-42(f).

5. Petitioner asserts that Respondent terminated her in violation of: (1) The Indiana False Claims Act, Ind. Code § 5-11-5.5-8 (the "IFCA"); (2) The State Employees' Bill of Rights, Ind. Code § 4-15-10 *et seq.*; (3) the public policy exception to at-will employment that protects employees who refuse to break a law for which personal liability could attach; (4) hostile work environment protections under Title VII of the Civil Rights act of 1964, 42 U.S.C. § 2000e-(3)(a); and the state and federal policies regarding employees with disabilities. For purposes of this Motion, the ALJ restricts his conclusions of law to Respondent's first, second and third assertions.

6. The State Employees' Bill of Rights Whistleblower Law permits an employee to seek whistleblower protections under I.C. §§ 4-15-10-4, (the "WBL"). The elements of a prima facie case which must be asserted by Petitioner under the WBL are as follows: (1) a report made in writing; (2) about a covered violation of law or misuse of public resources; (3) to a supervisor or the Inspector General; (4) that triggers employment retaliation. I.C. § 4-15-10-4. The shield provided for state employee whistleblowers by the WBL explicitly allows Petitioner to bring her claims before the State Employees' Appeals Commission. I.C. § 4-15-10-4(c). Before seeking judicial review based on the WBL, Petitioner is required to exhaust her administrative remedies under I C. § 4-15-2.2-42. *Ogden v. Robertson,* 962 N.E.2d 134, 146 (Ind. App. 2012).

7. The WBL is the source directing the process for state employees acting as whistleblowers, and the terms of the WBL show legislative intent that may not be avoided in determining what constitutes a public policy claim under I.C. § 4-15-2.2-42. The Indiana Supreme Court has expressed a deep reluctance to expand public policy exceptions in the at-will employment context without statutory commands to the contrary. *Baker,* at 653-655; *Wior v. Anchor Industries Inc.,* 669 N.E.2d 172 (Ind. 1996).

8. SEAC is without jurisdiction to hear Petitioner's claims regarding whether actual false claims were made. Ind. Code § 4-15-1.5-6 permits SEAC to "hear or investigate those appeals from state employees as set forth in I.C. § 4-15-2.2-42 . . . ." SEAC is not a forum of general jurisdiction and Petitioner's claims that false claims were actually made is not within the ambit of employment matters SEAC is permitted to hear. SEAC is limited to hearing whether Respondent terminated Petitioner for reporting, in writing, that Respondent was misusing state funds. The crux of this determination does not require SEAC to inquire into the validity of Petitioner's reports, and SEAC will not entertain such claims by either party.

9. Petitioner's Complaint asserts that Petitioner made reports concerning allegedly misused state funds, and that in addition to the WBL, these claims are protected by the IFCA. The Indiana General Assembly adopted the IFCA in a form that is similar to the Federal False Claims Act. The objective of the predecessor to the current Federal False Claims Act, 31 U.S.C. § 3729, was "broadly to protect the funds and property of the Government from fraudulent claims . . . ." *Rainwater v. United States,* 356 U.S. 590, 592 (1958). Because of the shared form of the IFCA and Federal False Claims Act, it appears that the Indiana General Assembly desired a similar function from the IFCA.

10. "The first step in statutory interpretation is determining if the legislature has spoken clearly and unambiguously on the point in question. If a statute is clear on its face, no room exists for judicial construction. However, if ambiguity exists, it is then open to construction to affect the intent of the General Assembly. Where ambiguity exists, to help determine the framers' intent, we must consider the statute in its entirety . . . ." *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828-929 (Ind. 2011) (internal citations omitted). The cardinal rule of statutory interpretation is to ascertain the intent of the drafter by "giving effect to the ordinary and plain meaning of the language used." *Id.*

11. I.C. § 5-11-5.5-8 should not be read in isolation from the rest of the IFCA. Doing so could plausibly allow Petitioner to utilize IFCA as a shield in much the same manner that the WBL may be used. However, statutory construction "is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . ." *United Savings Ass'n v. Timbers of Inwood Forest Associates,* 484 U.S. 365, 371 (1988) (citations omitted). Interpreting a statute may involve looking "to the broader context of the body of law into which the enactment fits." *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 528 (1990). The whistleblower protections offered by the IFCA does not stand on its own bottom, and refers both implicitly and explicitly to other provisions in the IFCA.

12. Taken as a whole, the IFCA allows the State of Indiana to recoup money which is lost due to fraudulent claims made by "persons" against the "state." *See,* I.C. § 5-11-5.5-2(b). The IFCA defines the persons which the act is directed at, and that definition does not include the state. I.C. § 5-11-5.5-1(5). Petitioner's claim invoking the IFCA involves the state[3] rubber-stamping claims that the state would then be paying for through the Excess Liability Trust Fund ("ELTF"). Thus, Petitioner's claim at the outset does not fall under the types of claims contemplated under the IFCA. While the IFCA and the Federal False Claims Act are not identical and interpretation of the two statutes requires separate analysis, the Supreme Court has explicitly held that "States are not subject to *qui tam* liability." *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens,* 529 U.S. 765, 783 (2000) (noting that the provision regarding *qui tam* actions, 31 U.S.C. § 3729, lacks a definitional provision for "person" but that Congress implicitly excludes states from that definition because 31 U.S.C. § 3733 contained a provision that defined "person" as including states). Such a ruling is persuasive, and assists the ALJ in concluding that the IFCA's does not include the state of Indiana within its definition of "person". Petitioner's Complaint does not raise the allegation that individuals were acting to defraud the government, but that an agency's procedures were forcing Petitioner to process claims in a manner that might allow fraudulent claims through.

13. The IFCA is explicit when it asserts the proper venues for raising claims under the IFCA at I.C. § 5-11-5.5-3(h), I.C. § 5-11-5.5-4(a), and I.C. § 5-11-5.5-8(c). Additionally, relators raising claims under the IFCA are required to follow procedural steps which the IFCA outlines in I.C. § 5-11-5.5-4. To read I.C. § 5-11-5.5-8 apart from those sections, and grant Petitioner the capacity to raise the IFCA claims in her Complaint in this forum would thwart the legislative processes that the Indiana General Assembly utilized in forming the IFCA. In light of the WPL explicitly providing whistleblower protections for state employees, Petitioner is not left without a remedy if she can carry her burden in proving the WPL claim. Simply asserting that nothing in I.C. § 4-15-2.2-42 denies SEAC jurisdiction over an IFCA claim does not carry the day for Petitioner.

14. I.C. § 5-11-5.5-8 outlines two avenues by which a false claims whistleblower may gain protection for their activities. The first avenue requires that the employee "objected to an act or omission described in" I.C. § 5-11-5.5-2. As was previously stated, Petitioner's objections are not the kind contemplated under the IFCA because I.C. § 5-11-5.5-2 pertains to "persons" who make, or conspire to make, fraudulent claims for payment by the state. I.C. § 5-11-5.5-2(b). Petitioner's claims pertain to Respondent, a state agency, allegedly following practices that permit state funds to be spent on persons that did not rigorously follow all of the application procedures required to obtain said state funds. The second avenue available to Petitioner would require Petitioner to be involved in an investigation or claim brought under the IFCA. I.C. § 5-

[3] Defined under I.C. § 5-11-5.5-1(7) as, "Indiana or any agency of state government."

11-5.5-8(a)(2) Because the venues and procedures for raising IFCA claims are explicitly outlined by the IFCA, and have not been followed by Petitioner, Petitioner's objections to Respondent's alleged rubber-stamping of ELTF funds do not qualify for the protections offered under the second avenue either. Additionally, the IFCA requires that an employee bring an action under the aforementioned section in "any court with jurisdiction." I.C. § 5-11-5.5-8(c). "SEAC is an executive branch administrative agency, not a court." *Meeks v. Indiana Dept. of Transp.*, Further Procedural Order RE: Amended Complaint, State Emp. App. Comm'n No. 12-13-106 (Jan. 21, 2014). Thus, SEAC is without jurisdiction to hear Petitioner's claims brought under the IFCA.

15. Petitioner has failed to assert how she could be personally liable under the IFCA, and does not raise any other statute whereby personal liability would attach due to her actions while working for Respondent. In *McClanahan v. Remington Freight Lines,* 517 N.E.2d 390 (Ind. 1988), McClanahan could have been personally liable for driving across Illinois with an overweight truck. His refusal to drive across Illinois cost McClanahan his job, but had he not refused he could have been subjected to a fine. No such risk existed for Petitioner when she was asked to approve ELTF claims at a more rapid clip than she would have desired.

16. Petitioner asserts in her Response to the Motion that the Indiana Court of Appeals held that Petitioner could have been personally liable for knowingly authorizing overpayments. *Esserman v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 23 N.E.3d 831 (Ind. Ct. App. 2014). However, the Courts opinion cited by Petitioner is dicta, and offers no analysis for its presumption of liability. Additionally, Ind. Code § 22-14-17-12(h) forbids determinations made by the Indiana Department of Workforce Development from being used "before an arbitrator, a court, or a judge of this state or the United States regardless of whether the prior action was between the same or related parties or involved the same facts."

17. Petitioner does not assert that her actions under Respondent's supervision would have rendered her liable under the IFCA. I.C. § 5-11-5.5-2. Petitioner does not claim that she knowingly or intentionally presented a false claim to the state, nor does she assert that she gave false information to obtain payments from the state. I.C. §§ 5-11-5.5-2(b)(1), (2). Additionally, Petitioner's argument that she might be personally liable for conspiring to perform the aforementioned actions is misplaced. While Petitioner "is not required to show an express agreement" between herself and those presenting false claims, she "must produce more than 'a whiff of the alleged conspirators' assent.'" *United States ex rel. Durcholz v. FXW Inc.*, 189 F.3d 542, 546 (7th Cir., 1999). Simply approving of the documentation before her does not rise to the level of presenting a false claim or false information for payment, nor does it show her tacit agreement with those that were allegedly presenting false claims to the ELTF. Petitioner's bald assertion that she could have been liable under the IFCA, without further evidence, does not "support the inferential leaps that would be required to conclude that" Petitioner conspired with

those presenting false claims to the state. *Id.* Thus there is no genuine issue of material fact concerning Petitioner's alleged personal liability under the IFCA.

18. In addition to liability under the IFCA, Petitioner asserts that she could be held personally liable for fraud.

> The elements of actual fraud are as follows: (1) a material representation of past or existing facts which (2) was false, (3) was made with knowledge or reckless of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) proximately caused injury to the complaining party

Billmoria Computer Sys., LLC v. Am Online, Inc., 829 N.E.2d 150 (Ind. Ct. App. 2005) (citing *Wallem v. CLS Indus., Inc.*, 725 N.E.2d 880, 889 (Ind. Ct. App. 2000). Petitioner's reliance on the possibility of a fraud claim being levied against her is misplaced. Petitioner fails to assert any intent on her part to deceive anyone, and as such there is no dispute of material fact that Petitioner could be held personally liable for fraudulently approving ELTF claims.

19. Additionally, this is not a classic case of an exception to the employment at-will doctrine, such as the *McClanahan* case. Petitioner fails to assert that she refused "to commit an illegal act for which [Petitioner] the employee would be personally liable." *Baker*, 917 N.E.2d at 654. Petitioner's assertion that common law fraud would constitute an illegal act when the Indiana Supreme Court has held that such a public policy exception is "tightly defined" is improper, and SEAC will not extend the exception to include such a claim.

20. 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.

IX. Order Granting Respondent's Motion for Partial Summary Judgment

Respondent's Motion for Partial Summary Judgment is **GRANTED** regarding Petitioner's claims involving Indiana's False Claims Act, I.C. § 5-11-5.5 *et seq.*, and Petitioner's refusal to break a law for which she could be personally liable. Petitioner's claims regarding the State Employees' Bill of Rights' Whistleblower Protections;[4] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(3)(a); and the Americans with Disabilities Act, 29 U.S.C. §§ 12112, 12203 are unaffected by this Order, and shall be resolved at the evidentiary hearing scheduled in this matter unless the parties provide an earlier joint notice of settlement.

DATED: September 11, 2015

Hon. Gabriel Paul
Chief Administrative Law Judge
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[4] The parties are reminded that SEAC is without jurisdiction to hear claims regarding the legitimacy of Petitioner's assertion that state funds were being misused. SEAC only has the jurisdiction to determine whether Petitioner's termination was a result of her filing a written report that state funds were being misused.