BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

MICHAEL JONES Petitioner, vs. WABASH VALLEY CORRECTIONAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)))))))))	SEAC No. 05-18-037

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On October 1, 2018, Respondent Wabash Valley Correctional Institute, a part of the Indiana Department of Correction, ("Respondent"), by counsel, filed a Motion for Summary Judgment regarding Petitioner's Complaint ("Motion"). Petitioner Michael Jones ("Petitioner"), by counsel, timely replied to the Motion on October 15, 2018. Thereafter, on November 14, 2018, Respondent filed a response in support of its Motion.

This case considers Petitioner's termination on March 28, 2018, for trafficking with offenders inside Respondent's facility. The controlling pleadings for purposes of this decision is the Complaint originally received on May 17, 2018, Respondent's Motion, Petitioner's reply to Respondent's Motion and Respondent's surreply.

After review of the pertinent pleadings noted above, the ALJ finds Respondent's Motion meritorious and hereby **Grants** it. Petitioner's Complaint, with its factual allegations accepted as true, fails to allege a violation of a law, rule, or public policy exception to Indiana's at-will employment law, and this case must therefore be dismissed under I.C. § 4-15-2.2-42. The following additional findings of fact, conclusions of law, and final order of dismissal for lack of jurisdiction are entered.

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

1. Petitioner was first hired by Respondent in 1994 (Pet'r Reply).

2. Petitioner held the title of Correctional Officer from the date of his hire until his termination (Pet'r Reply).

3. In 2009, Petitioner's wife filed suit in federal court, alleging gender discrimination against Respondent (Pet'r Compl).[1]

4. As part of the suit, Petitioner submitted a witness statement (Pet'r Compl).

5. In 2011, the Parties reached an agreement in the above-described suit and the case was ultimately dismissed (Pet'r Compl).

[1] Petitioner's wife worked for Respondent at the time and was accused of having sexual encounters with various offenders.

6. In March, 2018, an offender wrote a note to Respondent stating that he had witnessed Petitioner giving his personal pedometer to offenders every day while they walked around the recreational yard of Respondent's facility in order to track their steps (Resp't Motion).

7. Thereafter, Respondent began an investigation regarding the allegations (Resp't Motion).

8. During the investigation, it was determined that Petitioner had given his pedometer to at least one (1) offender (Resp't Motion).

9. The offender in question was interviewed, where he admitted that he had worn Petitioner's pedometer on seven (7) or eight (8) occasions (Resp't Motion, Ex. B-2).

10. Petitioner was subsequently interviewed, where he admitted to letting several offenders use his pedometer (Resp't Motion, Ex. B-2).

11. Petitioner, as part of the investigation, was also asked to log into his Go365 account, where it was discovered that the pedometer in question was registered as an active device and that steps taken by the offenders were uploaded and credited to Petitioner's account. *Id.*[2]

12. Following the conclusion of its investigation, Respondent determined that Petitioner willingly gave an unauthorized device to offenders, which it considered trafficking, and subsequently terminated Petitioner on March 28, 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." 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. sec. 4-15-2.2.-24(b).

[2] The State uses a program called Go365 as part of its wellness program. If employees meet certain goals in the program, they qualify for reduced insurance premiums and are given an extra sum of money by the State for use in their personal Health Savings Accounts. One of the main ways to achieve these goals is to track the number of steps taken each day, with points awarded for achieving certain benchmarks.

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. The ALJ will first address Petitioner's contention that he was the victim of retaliation under Title VII of the Civil Rights Act of 1964.

6. While Petitioner can prove retaliation via the burden shifting method laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a more simplistic way now exists to do so.

7. While *McDonnell Douglas* still applies, the 7th Circuit, in *Ortiz v. Werner Enters.* laid out a more simplistic approach to proving discrimination. *Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016). In *Ortiz*, the Court held that "[e]vidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself- or whether just the 'direct' or 'indirect' evidence does so." *Id.* "Evidence is evidence," and are "means to consider whether one fact . . . caused another . . . and therefore are not 'elements' of any claim." *Id.* The legal standard is merely "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Id.*

8. Petitioner alleges that Frank Littlejohn ("Littlejohn"), Respondent's Deputy Warden. was involved both in the original suit filed by Petitioner's wife in 2009, and with Petitioner's termination and argues that comments Littlejohn made in conjunction with the original suit against Petitioner's wife suggest an implicit bias toward Petitioner.

9. While true that Littlejohn held supervisory roles with Respondent during both timeframes and conducted an investigation in 2009, which led in part to the Jones lawsuit, that, in and of itself, is not enough to show bias (Pet'r Ex. F).

10. Petitioner "must respond to the moving party's properly-supported motion by identifying specific, admissible evidence showing that there is a genuine dispute of material fact for trial." Johnson v. Advocate Health & Hosps. Corp., 892 F.3d 887 (7th Cir. 2018). "Inferences supported only by speculation or conjecture will not suffice. Neither will the mere scintilla of evidence." *Id.*

11. Given that Petitioner provided no further evidence on this front, it cannot be said that Littlejohn was biased against Petitioner as a result of comments he made during the 2009 suit.

12. Similarly, Petitioner argues that even though the warden at Respondent's facility had the final say with regards to employment decisions, Littlejohn, who was subordinate to the warden, was responsible for terminating Petitioner.

13. Thus, this argument relies upon the so-called "cat's paw" theory.

14. The "cat's paw theory applies when a biased subordinate who lacks decision-making power uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Milligan-Grimstad v. Stanley*, 877 F.3d 705 (7th Cir. 2017).

15. "To survive summary judgment on such a theory, the plaintiff must provide evidence that the biased subordinate actually harbored discriminatory animus against the victim of the subject employment action, and evidence that the biased subordinate's scheme was the proximate cause of the adverse employment action." *Id.*

16. Despite the warden having the ultimate authority over personnel matters, it was clear that Littlejohn, in fact, handled such decisions routinely on his own.

17. During sworn testimony, Littlejohn stated that "I handle most terminations and employee meeting results myself . . . I hold a meeting with the staff member to be disciplined . . . I will issue discipline at the conclusion of the meeting or after the meeting." (Pet'r Reply, Ex. A)

18. While Littlejohn states that, in this instance, the warden was the primary decision maker, it is clear from his testimony that Littlejohn provided the necessary proof to the warden in order for him to approve the termination ("[the warden] did discuss the matter in person with me. I knew that [Petitioner] knowingly and willingly gave an offender unauthorized personal property . . . I indicated that to be consistent with past discipline, termination seemed appropriate." *Id.*

19. Therefore, the warden in this case was not a mere dupe in a scheme perpetrated by Littlejohn. In fact, the opposite holds true. Littlejohn collected the necessary evidence against Petitioner, presented such evidence to the warden, who, in the end, made an informed decision to terminate Petitioner.

20. The ALJ thus finds that Petitioner's cats-paw argument is unfounded.

21. Petitioner next argues that while he did give the pedometer to offenders, it did not constitute trafficking.

22. Section IX (B) of Respondent's Information and Standards of Conduct Policy for Departmental Staff No. 04-03-103 ("Policy") states that employees are "strictly prohibited from giving any unauthorized physical object to an offender." Doing so constitutes trafficking, which is grounds for immediate termination (Resp't Motion, Ex. C-1).

23. The Policy defines a physical object as "a thing having mass in the physical world regardless of the use, size, amount, value or any other characteristics of the object." *Id.*

24. There can be no doubt that the pedometer in this case falls under the definition of a physical object. In his reply, however, Petitioner argues that in letting the offenders use his pedometer, he was not giving the pedometer away, since it was undisputed that at all times Petitioner maintained ownership of the pedometer.

25. Petitioner additionally argues that Respondent allowed Petitioner to possess the pedometer.

26. Petitioner finally argues that by Respondent's definition, any instance where an employee gives something to an offender qualifies as trafficking.

27. The ALJ finds these arguments unpersuasive.

28. Respondent's Policy is clear that trafficking only occurs when an unauthorized object is given to an offender (Resp't Motion, Ex, C-1).

29. Further, Respondent correctly notes instances where offenders are allowed to use certain objects, such as cleaning supplies, as part of their day to day routine. Respondent also notes that if, for example, an offender dropped an (authorized) piece of property and an employee returned it to him, that is not considered trafficking (Resp't surreply).

30. In the current case, no argument was made by Petitioner and Respondent never admitted that Petitioner could not possess the pedometer for his own use. Rather, Petitioner freely admits that he gave his pedometer to offenders to track their steps. While Petitioner argues that his intent was benevolent in nature, the Policy does not provide for an exception based upon good faith, and in fact explicitly states that "[t]he Department does not consider any act of trafficking to be benevolent and will not accept benevolent intent as a defense to a disciplinary action for trafficking misconduct" (Resp't Motion, Ex. C-1).

31. The ALJ therefore finds that Petitioner committed the act of trafficking when he freely gave his pedometer to offenders for their use.[3]

32. Petitioner lastly asserts a claim of age discrimination under the Age Discrimination in Employment Act, which prohibits discrimination on those individuals over forty (40) years of age.

33. "To succeed in an ADEA claim, a plaintiff must establish that he would not have been terminated 'but for' his employer's intentional age-based discrimination." *Chiaramonte v. Fashion Bed Group*, 129 F.3d 391 (7th Cir. 1997). Additionally, Petitioner must prove under *Ortiz* that the evidence, taken as a whole, would lead a reasonable person to suspect that Petitioner was discriminated against because of his age. *Ortiz*, 834 F.3d at 765.

34. At the time of his termination, Petitioner was fifty-nine (59) years old. (Pet'r Compl). Respondent counters by stating that, after Petitioner's termination, his position was initially vacant, then filled by "relief" (which the ALJ interprets as the remaining employees in Petitioner's group all working together to accomplish Petitioner's former duties), then eventually was filled by an individual who was fifty-eight (58) years old at the time.

35. In the age-discrimination context, Petitioner's replacement by someone substantially younger is a "reliable indicator of age discrimination". *See O'connor v. Consolidated Coin Catterers Corp.*, 517 U.S. 308 (1996). For purposes of this case, the 7th Circuit has "defined 'substantially younger' as someone more than 10 years" Petitioner's junior. *See Duncan v. Fleetwood Motor Homes of Ind.*, 518 F.3d 486 (7th Cir. 2008).

35. In the instant matter, it is undisputed that Petitioner's replacement was only one (1) year his junior. There is no evidence to suggest that someone younger than forty (40), or even ten (10) years younger than Petitioner applied for, but did not receive the position. Therefore, it is reasonable to assume that Respondent did not engage in age discrimination when it hired Petitioner's replacement.

36. No other public policy exception has been raised by Petitioner, and therefore, the ALJ concludes that SEAC lacks subject matter jurisdiction to further consider Petitioner's Complaint. Thus, Respondent's Motion must be granted.

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[3] Petitioner also argues that since the pedometer was 'malfunctioning' it could not be considered trafficking. While there remains some disagreement as to whether the pedometer was functioning or not, it is not a material fact sufficient to overcome summary judgment, nor is it proof that Petitioner did not commit trafficking. The ALJ also notes in passing that Petitioner argues that because Respondent was contemplating terminating Petitioner for insurance fraud, but instead chose to terminate based upon trafficking, constitutes evidence of 'shifting reasons' such that Petitioner's termination was not warranted.

According to Littlejohn, both Respondent's HR and Legal Departments were consulted before the decision was made to terminate (Pet'r Reply, Ex. A). Respondent felt that, while Petitioner's actions didn't necessarily rise to the level of insurance fraud, it was readily apparent that Petitioner's actions fit the definition of trafficking (Pet'r Reply Ex. B). Therefore, Respondent's decision was not made in a vacuum, but was rather well thought out and reasoned before the discipline was issued.

To the extent a finding of fact is deemed a conclusion of law, or a conclusion of law is deemed a finding of fact, it shall be given such effect.

IV. Final Order of Dismissal

Respondent's Motion for Summary Judgment is GRANTED. This action is hereby dismissed with prejudice. All case management deadlines are vacated.

This is the final order of the Commission. A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this order and must otherwise comply with Ind. Code § 4-21.5-5.

DATED: December 14, 2018

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