BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

LAURIE JOHNSON Petitioner,	)	
	) SEAC No. 09-19-053	
vs.	)	
INDIANA WOMEN'S PRISON BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. Introduction and Summary

On December 6, 2019, the Indiana Women's Prison, a part of the Indiana Department of Correction ("Respondent") by counsel, filed a Motion to Dismiss Petitioner's Complaint ("Motion"). Petitioner Laurie Johnson, ("Petitioner"), pro se, submitted a response to Respondent's Motion on January 13, 2020, to which Respondent replied on January 27, 2020. 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 written reprimand for engaging in inappropriate conduct and unprofessional behavior—namely for promoting her external business while working for Respondent. Petitioner bases her challenge on the allegation that her termination was retaliatory in response to participating in an investigation by the Office of Inspector General ("OIG").

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 Ind. Code § 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.

[1] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), Ind. Code § 4-21.5 *et seq.* *See* Ind. Code § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to Ind. Code § 4-21.5-3-28 of 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 the Warden of Respondent's Indiana Women's Prison ("IWP") (Pet'r Compl.).

2. Petitioner was previously employed at Respondent's Indianapolis Re-entry Educational Facility ("IREF") (Pet'r Compl.).

3. While employed at IREF, Petitioner discussed with IWP Deputy Warden LaShelle Turner ("L. Turner") regarding L. Turner's desire to become Warden of IWP after the current Warden retired (Pet'r Compl.).

4. Thereafter, however, Respondent decided to close IREF, after which Petitioner was named Warden of IWP (Pet'r Compl.).

5. L. Turner's behavior soon became troublesome and there were rumors circulating about her speaking negatively about Petitioner with subordinate staff (Pet'r Compl.).

6. At some time in Spring 2018, Petitioner was told by L. Turner that Respondent wanted to talk to L. Turner about Petitioner.

7. Petitioner told L. Turner she had nothing to hide and that L. Turner should tell the truth.

8. On April 25, 2018, Petitioner mentioned this conversation to Melody Turner ("M. Turner"), who was Petitioner's direct Supervisor, and asked if she had heard anything about Respondent wanting to speak to L. Turner about Petitioner (Pet'r Compl.).

9. M. Turner said she had not heard anything; thus, both Petitioner and M. Turner believed L. Turner was being deceitful (Pet'r Compl.).

10. On May 2-3, 2018, Petitioner attended the Spring Leadership Symposium, where she had a conversation with Laura Twyman ("Twyman"), Respondent's Human Resources Director, in which Petitioner was informed that a hostile work environment claim had been made against her (Pet'r Compl.).

11. Petitioner was told that there had not yet been an official written complaint, but that L. Turner had spoken to Twyman on behalf of other staff, alleging a hostile work environment (Pet'r Compl.).

12. Twyman told Petitioner that L. Turner had stated she personally did not feel that there was a hostile work environment between herself and Petitioner, but that several staff had come to her complaining of such that she felt the need to report it (Pet'r Compl.).

13. Petitioner was told that once written statements from said staff were received, it would be determined if an investigation was warranted (Pet'r Compl.).

14. M. Turner insisted an investigation be opened into the complaints (Pet'r Compl.).

15. On May 21, 2018, an anonymous complaint was made to the OIG alleging that various employees were engaging in ghost employment by selling certain commercial products during work hours. A supervisor—Petitioner—was among the employees named in the complaint (Pet'r Compl.).

16. Initially, the OIG closed the complaint and referred it to Respondent for internal review, requesting that Respondent report back to the OIG on its findings (Pet'r Compl.).

17. On June 8, 2018, M. Turner informed Petitioner of the anonymous letter that was sent to the OIG (Pet'r Compl.).

18. Petitioner informed M. Turner that while she did sell essential oils, she did not sell them during work hours or on Respondent's property; rather Petitioner would talk to a few individuals that she ate lunch with regularly about them (Pet'r Compl.).

19. M. Turner told Petitioner to stop talking about the oils and to tell other staff to stop talking about them as well (Pet'r Compl.).

20. M. Turner then told Petitioner that the allegations were unsubstantiated and that all of the investigations against Petitioner were concluded with the direction to tell L. Turner of such (Pet'r Compl.).

21. M. Turner also told Petitioner to tell L. Turner to "knock it off" and to have a plan to go over with L. Turner about how Petitioner would hold L. Turner accountable (Pet'r Compl.).

22. Petitioner asked if HR would be involved in this conversation, to which M. Turner indicated they would not because HR believed it would be better for Petitioner to handle this on her own (Pet'r Compl.).

23. On June 12, 2018, Petitioner returned to work following the weekend and believed it would be a conflict of interest for her to talk to L. Turner alone without HR (Pet'r Compl.).

24. Petitioner emailed Twyman, copying M. Turner, asking her to be present at the meeting to tell L. Turner the outcome of the investigations (Pet'r Compl.).

25. Petitioner was then informed that the investigations had not actually concluded and that she was not to discuss such with L. Turner (Pet'r Compl.).

26. At an unspecified time, Respondent reported back to the OIG that Petitioner had sold products to her subordinate staff members during her work time and sometimes spent one (1) to three (3) hours per day discussing the products with staff (Pet'r Compl.).

27. In October 2018, the OIG, in response to the above, opened an investigation into Petitioner's activities.[2]

28. An employee of Respondent told an OIG agent that Petitioner first approached her about the products during a meeting in 2017, where Petitioner gave the employee a product sample. The employee stated that Petitioner frequently discussed the products during meetings and brought a book to Respondent's facility showing various products that were for sale (Pet'r Compl.).

29. The employee also stated she saw another employee give Petitioner money, which she assumed was payment for a purchase of the product and that Petitioner had recruited three (3) other employees to sell the product (Pet'r Compl.).

30. The OIG Report ("Report") indicated that Petitioner confirmed she began offering and promoting products through a private company during the Fall of 2017, but stopped when Respondent began its investigation (Pet'r Compl.).

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[2] While the OIG report does not specifically name Petitioner as the "supervisor" being investigated, Petitioner concedes that the report is referring to her.

31. Petitioner told the OIG that she did not use state equipment or resources to promote the company and did not retaliate against anyone for refusing to engage in business with her (Pet'r Compl.).

32. In June, 2018, Respondent, along with the State Personnel Department ("SPD") began formal interviews at Respondent's facilities concerning both the hostile work environment and ghost employment claims (Pet'r Compl.).

33. In July, 2018, Petitioner was interviewed and questioned about both claims by SPD and Respondent (Pet'r Compl.).

34. On March 6, 2019, Petitioner was interviewed by the OIG (Pet'r Compl.).

35. On May 23, 2019, the OIG issued its findings regarding Petitioner's alleged ghost employment. While the Report found that Petitioner did engage in misuse of state property, it was low in volume and spread over a time frame of several months. Further, the Report found that Petitioner spent one (1) to three (3) hours a day discussing products with her staff. Despite its findings, the OIG found insufficient evidence to bring a complaint against Petitioner before the State Ethics Commission for the allegation of ghost employment and therefore closed the file (Pet'r Compl.) .

36. On June 17, 2019, Petitioner met with Deputy Commissioner James Basinger ("Basinger") and M. Turner (Pet'r Compl.).

37. Basinger informed Petitioner that all investigations were concluded. As a result of Petitioner's poor judgment she demonstrated with her staff regarding Petitioner's external business, Petitioner was issued a Written Reprimand that same day (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.

5. A viable public policy exception must be present for the Complaint to survive. "A complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts that would support his claim of entitlement to relief. When considering a motion to dismiss, the court must accept as true all the well pleaded facts in the plaintiff's complaint. The purpose of the motion to dismiss is to test the legal sufficiency of the complaint and not to decide the merits. As such, a motion to dismiss is disfavored and should be rarely granted, for the court prefers to resolve a case on its merits rather than to dispose of it on technical grounds." *United States v. Cameron*, Civil No. F 89-216, 1991 U.S. Dist. LEXIS 12830 (N.D. Ind. Aug. 23, 1991). *See also DuRocher v. Riddell, Inc.*, 97 F. Supp. 3d 1006 (S.D. Ind. 2015); *Ryan v. Pa. Higher Educ. Assistance Agency (In re Ryan)*, Nos. 14-31991 HCD, 14-3081, 2016 Bankr. LEXIS 4659 (Bankr. N.D. Ind. May 26, 2016).

6. Petitioner first cites to the State's Discipline Policy ("Policy") with the premise that her discipline was not for just cause. (Pet'r Compl.; https://www.in.gov/spd/files/discpol.pdf). However, the Policy clearly states that it is only applicable to classified employees, which Petitioner was not. Therefore, this argument fails.

7. Petitioner next contends that her discipline was retaliatory for her participation in the OIG investigation. Petitioner asserts that because the OIG declined to bring an ethics complaint against Petitioner and did not recommend she be disciplined, her reprimand is retaliatory. (Pet'r Am. Compl.). However, Petitioner failed to establish facts in her Complaint that properly plead retaliation.

8. An allegation of retaliation can be proven by either the direct or indirect method. *Metzger v. Ill. State Police*, 519 F.3d 677, 681 (7th Cir. 2008). Under the direct method, Petitioner must show direct or circumstantial evidence that: (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse action; and (3) a causal connection exists between the two. *Id.*

9. While Petitioner participated in a statutorily protected activity—providing information to the OIG under the protection of Ind. Code § 34-44.2-1-2(b)(2)—and she suffered a materially adverse action[3]—a written reprimand—she failed to show that she satisfies the additional requirements.

10. The final factor of the direct method is that a causal connection exists between Petitioner's statutorily protected activity and the materially adverse action taken against her. Although Petitioner's discipline was received following the release of the Report, she provides no evidence to establish a causal connection. "Temporal proximity between an employee's protected activity and an adverse employment action is rarely sufficient to show that the former caused the latter." *O'Leary v. Accretive Health, Inc.*, 657 F. 3d 625, 635 (7th Cir. 2011) (citing *Leitgen v. Franciscan Skemp Healthcare, Inc.,* 630 F.3d 668,675 (7th Cir. 2011)). Petitioner fails to establish that her discipline was based on her providing information to the OIG. Rather, Respondent based its discipline upon the results of its own internal investigation with SPD and the subsequent findings by OIG—not for her participation in said investigation. Petitioner offers no evidence that her discipline was given for any other reason than the findings of the investigation. Thus, Petitioner cannot prevail under this method.

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[3] Respondent argues in its Surreply that Petitioner did not suffer a materially adverse action. A "materially adverse action" is defined as one that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N & Santa Fe Ry. Co. v. White*, 548 US. 53, 68 (2006). In other words, "if the challenged action would discourage other employees from complaining about employer conduct that violates Title VII, it constitutes an adverse employment action." *Vance v. Ball State Univ.*, 646 F.3d 461, 473 (7th Cir. 2011). The ALJ finds that any discipline which has the potential to affect an individual's employment status could be determined to be a materially adverse action. Petitioner's written reprimand will be listed in her employee fact file, will be considered during her annual performance appraisal and in any future promotion opportunities. Merely because Petitioner did not face any financial harm from the reprimand does not negate the adverse consequences a reprimand carries.

11. Under the indirect method, Petitioner may establish a prima facie case of retaliation by presenting evidence that: (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse action; (3) she met her employer's legitimate expectations; and (4) she was treated less favorably than some similarly situated employee who did not engage in statutorily protected activity. *Id.* "If [Petitioner] succeeds in establishing a prima facie case, the burden shifts to the employer to produce a non-discriminatory reason for its employment action. If the employer meets its burden of production, the burden of proof then remains with [Petitioner] to show that the employer's proffered reason is pretextual." *Id.*

12. Again, the ALJ finds that Petitioner satisfies the first two (2) requirements to establish a prima facie case of retaliation under the indirect method. However, Petitioner fails to satisfy the remaining requirements. First, Petitioner was not meeting Respondent's legitimate expectations. Investigations by Respondent, SPD, and the OIG determined that Petitioner demonstrated poor judgment with her staff regarding her external business, which did not meet agency standards and were deemed unacceptable. Further, Petitioner failed to show that she was treated less favorably than a similarly situated employee who did not engage in statutorily protected activity.

13. Petitioner cites to *Palmateer v. International Harvester Co.* in her Reply as support for her retaliation claim. *Palmateer v. Int'l Harvester Co.*, 406 N.E.2d 595 (1980). Notwithstanding the fact that this case, being from the Appellate Court of Illinois, has no binding effect on this forum, Petitioner's reliance on *Palmateer* is misplaced.

14. First, Palmateer was fired for supplying information to local law enforcement authorities that another employee might be involved in a violation of the criminal code and agreeing to assist in the investigation and trial of the employee. The trial court granted the employer's motion to dismiss the claim. Petitioner cites to the dissenting opinion in *Palmateer*, which does not reflect the majority opinion decision to affirm the circuit court and uphold Palmateer's termination (*Atcha v. Indiana*, No. 2:15cv110, 2015 U.S. Dist. LEXIS 150853 (N.D. Ind. Nov. 6, 2015) (a "dissent . . . holds no binding authority").

15. Further, *Palmateer* is distinguishable from and inapplicable to Petitioner's situation. In *Palmateer*, an employee disclosed evidence of criminal activity of another employee. Here, Petitioner was being interviewed as part of an investigation into her own actions. Even if the court in *Palmateer* had held that speaking to law enforcement was a protected activity, Petitioner was not disciplined for engaging in a protected activity, but rather for failing to meet the legitimate expectations of her employer. Petitioner was disciplined after an investigation determined she engaged in poor judgment and conduct that failed to meet agency standards. In other words, *Palmateer*, as a form of persuasive precedent only, actually bolsters Respondent's defense that Petitioner does not successfully plead a public policy exception to Indiana's at-will employment laws.

16. Finally, Petitioner contends that the written report generated by Respondent did not accurately reflect the evidence provided during the investigation—namely recordings of Petitioner and other employee interviews—and was biased against her (Pet'r Compl.).

17. However, Respondent has the discretion to conduct internal investigations as it finds appropriate within the confines of state and federal laws. *Connick v. Myers*, 461 U.S. 138 (1983) ("The government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."). Mere perceived unfairness is not a public policy exception recognized by Indiana courts to the at-will employment doctrine. *Orr v. Westminster Vill. N.*, 689 N.E.2d 712 (Ind. 1997).

18. Petitioner failed to establish sufficient facts in her Complaint that a public policy exception to the employment at will doctrine served as the basis for her reprimand.

19. Petitioner failed to raise any additional claims. The ALJ thus finds that Petitioner has failed to state a claim upon which relief can be granted and which are incapable of supporting relief under any set of circumstances under Ind. T.R. 12(B)(6). *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999). Therefore, dismissal is appropriate.

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: February 21, 2020

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