BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

NINA JACKSON	)	
Petitioner,	)	
	)	SEAC No. 12-17-059
vs.	)	
	)	
PLAINFIELD CORRECTIONAL	)	
FACILITY BY INDIANA	)	
DEPARTMENT OF CORRECTION	)	
Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR LEAVE TO FILE AMENDED PLEADING

On May 22, 2018, Respondent, Plainfield Correctional Facility, a part of the Indiana Department of Correction ("DOC") ("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 Nina Jackson ("Petitioner"), by counsel, Ms. Dakota Scheu, responded to the Motion and filed a Motion for Leave to File Amended Pleading on July 6, 2018. Thereafter on July 18, 2018, Respondent filed its surreply to the Motion and Reply in Opposition to Petitioner's Motion for Leave to File Amended Pleading.[1]

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[1] The ALJ notes that Petitioner's allegations of disparate treatment and gender discrimination were not raised in Petitioner's original Complaint, but rather in her Reply and Petitioner's Motion for Leave to File Amended Pleading. "A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Shanahan v. City of Chi.*, 82 F.3d 776 (7th Cir. 1996). Petitioner failed to present to the ALJ any claim regarding disparate treatment or gender discrimination in her complaint. Respondent correctly notes that Petitioner did not ask to amend her Complaint before Respondent's original Motion was filed, in accordance with Ind. T.R. 15, which states that

> [a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within twenty [20] days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Ind. Trial Rule 15(A).

Therefore, Petitioner's Motion is denied.

This case considers Petitioner's termination for a violation of Respondent's Code of Ethics when she failed to report illegal activity by a convicted felon in a home Petitioner often visited. Under Ind. Code § 4-15-2.2-42(f), 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 are the Complaint originally received on December 3, 2017, Respondent's Motion, Petitioner's reply to the Motion, and Respondent's 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.

The ALJ finds that no material issue of fact exists with regard to Petitioner's claims. Therefore, Respondent's Motion for Summary Judgment 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 on June 1, 2015, as a Correctional Officer (Pet'r Compl.).

2. In 2017, Petitioner began dating a fellow Correctional Officer, Jason Trinh ("Trinh") (Pet'r Compl.).

3. While searching for a new home, Trinh stayed at his sister, Jamie Trinh's ("Jamie"), home in Avon, (the "residence") where he paid half of the bills (Pet'r Compl.; Resp't Motion Ex. A-2).

4. Jamie lived with Djamil Roberts ("Roberts"), the father of Jamie's two children (Pet'r Compl.).

5. Petitioner also spent time at the residence (Resp't Motion Ex. A-2).

6. On August 30, 2017, Petitioner went to the residence to check on Trinh because he had not been at work that day. (Pet'r Compl.).

7. When Petitioner arrived, she found that a search warrant was being executed at the residence and was unaware as to the reason for the search (Pet'r Compl.).

8. Police found firearms, scales with white powder residue, and $200,000 at the residence (Pet'r Reply).

9. Petitioner was voluntarily placed in handcuffs at the searching officer's request and was released before the search began (Pet'r Compl.).

10. Petitioner was not charged with any crime (Pet'r Compl.).

11. Petitioner did not report the search to her supervisor (Pet'r Compl.).

12. On the evening of August 30, 2017, Petitioner searched for Roberts' name in Respondent's offender database Roberts was not listed in the database (Pet'r Compl.).

13. On August 30, 2017, Detective Jeff Sequin ("Sequin") of the Indianapolis Metro Drug Task Force, emailed Respondent's Office of Investigations and Intelligence ("I & I"), alerting Respondent that a search warrant for marijuana dealing had been executed at the residence, where police arrested Roberts (Resp't Motion Ex. A-1; Pet'r Reply).

14. Sequin indicated that Trinh lived at the residence and that Petitioner was present at the residence when the search was executed; however he did not believe Petitioner was involved in the dealing (Resp't Motion Ex. A-1; Pet'r Reply).

15. Sequin's email stated that Petitioner told the police that Trinh had placed a tracking device on her car to see if Petitioner was "snitching" because she had previously reported people throwing contraband over the fence at Respondent's facility. Although Petitioner did not directly tell Sequin, he believed Petitioner's theory that Trinh was responsible for trafficking contraband into the facility such that Trinh became suspicious of Petitioner (Resp't Motion).

16. When she arrived for work on September 1, 2017, Petitioner was stopped at the sally port and brought into the Major's office (Pet'r Compl.).

17. Petitioner was asked if she needed to report anything and Petitioner told the Major about the incident at the residence the previous day (Pet'r Compl.).

18. Petitioner was interrogated by I & I investigators after speaking to the Major (Pet'r Compl.).

19. Petitioner told the investigators that she was unaware that correctional officers were required to report being stopped by the police when they were not actually charged with a crime (Pet'r Compl.).

20. Respondent's investigators specifically asked Petitioner about Roberts, to which she explained her relationship to him (i.e. the father of Petitioner's boyfriend's sister's children) (Pet'r Compl.).

21. Investigators also asked if Petitioner knew what Roberts did for a living, to which she replied that he did construction work (Pet'r Compl.).

22. Investigators then continued to ask Petitioner about Roberts. They asked if she was aware that Roberts was a convicted felon, to which Petitioner stated no and that. P she knew very little about him (Pet'r Compl.).

23. Petitioner told investigators that there had previously been an attempted armed robbery at the residence when she was not present (Pet'r Reply).

24. Petitioner also told investigators that there was a safe in the middle of the living room at the residence, along with a pitbull and bulldog. Petitioner stated that she was not allowed around the pitbull, who was kept in a separate room (Pet'r Reply).

25. Petitioner was asked if she would be willing to take a drug test. She consented and was told she would be taken to another facility with a female officer to perform the search (Pet'r Compl.).[2]

26. At the end of the meeting, Petitioner was suspended without pay for failure to report and unbecoming conduct (Pet'r Compl.).

27. On September 19, 2017, Petitioner met with Deputy Warden Tricia Pretorius ("Pretorius") and Human Resource's Adam Hutto ("Hutto") (Pet'r Compl.).

28. Petitioner was questioned about the incident on August 30, 2018.

29. On September 22, 2018, Petitioner met with Pretorius and Hutto again. Petitioner was terminated at the meeting (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. § 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).

[2] Respondent ultimately chose not to search Petitioner (Pet'r Compl.)

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 claim that Respondent cannot cite to any evidence of Petitioner's knowledge of criminal activity being afoot and therefore was not in violation of Respondent's policies.[3]

6. Petitioner claims that even an accumulation of the facts surrounding Roberts does not amount to a violation of Federal or State law or ordinance.

7. Petitioner was an at-will employee, and could be terminated "for any reason that does not contravene public policy." I.C. § 4-15-2.2.-24(b); *See McClanahan v. Remington Freight Lines*, 517 N.E.2d 390 (Ind. 1988). Notwithstanding, Petitioner is mistaken in believing that a law had to be violated in order for Respondent to justify its termination of Respondent.

8. Petitioner claims that the firearms, scales, and $200,000 found at the Residence were hidden from plain sight and that she had never seen the items. However, Petitioner was aware of a safe in the middle of the living room, a pitbull kept in a separate room, and a scale. Petitioner also had a tracking device placed on her car by Trinh because she was thought to be a "snitch".

9. Evidence supports a sensible inference that Petitioner had good reason to suspect that criminal activity was occurring in the residence by Roberts, but purposefully chose not to take steps to confirm that suspicion.

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[3] Petitioner states that she prevailed in her unemployment proceeding, where the ALJ in that matter ruled that without evidence that Petitioner was involved in a crime, there was insufficient evidence that the Petitioner engaged in unprofessional off-duty conduct that could be determined to be harmful to the State's image. (Pet'r Reply Ex. 12). However, as Respondent correctly points out, a decision rendered by the Unemployment Insurance Appeals division of the Indiana Department of Workforce Development ("Insurance Appeal"), is inadmissible at SEAC and should be stricken. "Any finding of fact, judgment, conclusion, or final order made by a person with the authority to make findings of fact or law in an action or proceeding under this article is not conclusive or binding and shall not be used as evidence in a separate or subsequent action or proceeding between an individual and the individual's present or prior employer in an action or proceeding brought 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." Ind. Code § 22-4-17-12(h). Therefore, the Insurance Appeal is not binding on SEAC and will not be considered in these proceedings going forward.

10. Petitioner attempts to present a willful ignorance defense in an attempt to distance herself from the activity.

11. "[U]nder the 'conscious avoidance' doctrine, the knowledge element of a crime 'may in some circumstances be inferred from strong suspicion of wrongdoing coupled with active indifference to the truth.' The doctrine applies 'when the defendant claims he has no guilty knowledge of the illegal activity yet the evidence supports an inference that defendant had a strong suspicion of wrongdoing, yet made a deliberate effort to avoid guilty knowledge by 'burying his head in the sand.' *Mefford v. State*, 51 N.E.3d 327 (Ind. Ct. App. 2016) quoting *United States v. Draves*, 103 F.3d 1328, 1333 (7th Cir. 1997).

12. "While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Mefford v. State*, 51 N.E.3d at 327. "These requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060 (2011).

13. While Petitioner may not have seen any drugs or been witness to any drug-dealing at the residence, it is reasonable for the ALJ to infer from the evidence that Petitioner should have "subjectively believed that there was a high probability" that criminal activity was afoot and that she remained willfully ignorant of the activities occurring at the residence and by the people frequenting the residence where she spent time. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060 (2011).

14. Petitioner had a responsibility to behave at all times in a manner that did not reflect poorly on the State or Respondent. Petitioner failed to do so when she associated with people who a reasonable person could believe were involved in criminal activity. Therefore, Petitioner fails to show that she was in compliance with Respondent's policies.

15. Petitioner next alleges that Respondent's policies are vague and do not adequately place employees on notice of prohibited and non-prohibited conduct and are arbitrarily enforced against its employees.

16. Respondent's Policy and Administrative Procedure 04-03-103 (VI)(F) states that, "I shall conduct myself, whether on-duty or off-duty, in a manner that will not bring dishonor or disrepute to the Department or the State of Indiana" (Resp't Ex. D).

17. Petitioner believes there is a limited ability to quantify what does and does not constitute conduct contrary to the State's image or disrepute to the Department. However, it would seem appropriate that a State employee, especially a Correctional Officer, involving themselves with criminals, whether or not they themselves were committing criminal activity, would bring disrepute to the Department and the State of Indiana.

18. Respondent correctly notes that conduct can be unprofessional and reflect negatively on the State even if it is not technically illegal (Resp't Surreply). Respondent determined that Petitioner's behavior was contrary to agency standards which resulted in her termination. Although Petitioner herself may not have engaged in illegal activity, her choice to associate with individuals who were is enough to warrant her termination.

19. 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 termination 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: August 28, 2018

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