BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

ROBERT J. HAZZARD	)
Petitioner,	)
	) SEAC NO. 05-13-038
vs.	)
	)
INDIANA DEPARTMENT OF	)
TRANSPORTATION	)
Respondent.	)

FINAL ORDER OF DISMISSAL

On August 5, 2013, Respondent Indiana Department of Transportation ("INDOT"), by counsel, moved to dismiss the Amended Complaint[1] for failure to state a claim. Petitioner Robert Hazzard, pro se, did not respond. Petitioner Hazzard is a former unclassified, at-will state employee, a real estate buying manager, for Respondent INDOT. Petitioner challenges his February 8, 2013 termination from state employment by Respondent INDOT as the product of age discrimination.

Petitioner Hazzard's factual allegations must be assumed true for purposes of this motion's review. However, Respondent INDOT's motion to dismiss must be granted because the Amended Complaint does not allege sufficient facts that could establish a *prima facie* legal case of age discrimination as being the but-for cause of his termination. No other statutory public policy basis is apparent either. Therefore, Respondent INDOT's motion to dismiss is GRANTED. The following additional findings of fact, conclusions of law, and notice of final order of dismissal are entered.

I. Dismissal & At-Will Employment Standards

Dismissal proceedings test the legal sufficiency of the complaint. *Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1349 (Ind. Ct. App. 1998). All facts plead in the petitioner's complaint, and reasonable inferences therefrom, are taken as true. However, when a party's complaint is legally insufficient or fails to plead essential elements of the claim(s), the complaint 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 (6).

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) (Civil Service System, Section 24(a)). "An employee in the

[1] The operative pleading is the Amended Complaint filed by Petitioner Hazzard on July 15, 2013.

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). "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) (internal quotes omitted).

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 penal consequence. The courts ask whether the termination or discipline itself 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. *Baker v. Tremco Inc*., 917 N.E. 2d 650, 653-655 (Ind. 2009); *Meyers*, 861 N.E.2d at 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997) (the at-will presumption is strong in Indiana); *Frampton v. Cent. Indiana Gas Co*., 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

Petitioner Hazzard was ostensibly terminated from state employment for the unprofessional conduct of undermining his management's authority and failing to follow proper procedures. Petitioner alleges, and it is taken as true, that Respondent INDOT's reasons for terminating his state employment are undocumented or unsupported allegations. Petitioner challenges Respondent INDOT's reasons as pretext and alleges that his termination was actually the product of unlawful age discrimination. At the dismissal stage, however, Petitioner Hazzard's Amended Complaint must still plead the essential factual elements of a *prima facie* case for age discrimination (or another claim) in violation of public policy. I.C. 4-15-2.2-42; *Meyers* at 706.[2]

II. Age Discrimination

Age discrimination violates Indiana and federal public policy, and applicable federal law[3], specifically the Age Discrimination in Employment Act (the "ADEA"). However, an unclassified petitioner is limited by sovereign immunity to equitable relief before SEAC for age discrimination in a Civil Service Case. See *Montgomery v. Bd. of Trustees of Purdue Univ.*, 849 N.E.2d 1120 (Ind. 2006); *Ind. Dep't. of Envtl. Management v. West*, 838 N.E.2d 408 (Ind. 2005); *Non-Final and Final Orders in Eugene Young v. CSBC*, SEAC No. 07-12-077. In relevant part, the ADEA makes it unlawful for an agency-employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

To determine if a *prima facie* case has been pled for age discrimination under the ADEA, SEAC uses the familiar modified *McDonnell Douglas*[4] test. *Bennington v. Caterpillar, Inc.*, 275

[2] Respondent INDOT's motion is not for summary judgment – the motion focuses only on the *prima facie* age discrimination elements, not the entire *McDonnell Douglas* burden-shifting analysis.
[3] The Indiana Age Discrimination Act, I.C. 22-9-2-2, states that age discrimination violates public policy, but does not directly apply to state employees because the ADEA applies. See citations main body.
[4] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

F.3d 654, 659 (7th Cir. 2001); see also *IDEM v. West*, supra. However, unlike other civil rights cases under Title VII, the United States Supreme Court has held that "mixed motive" causation is never appropriate in a suit brought under the ADEA, concluding that "the ADEA required plaintiffs to prove by a preponderance of the evidence that age was the but-for cause of the challenged adverse employment action." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

Under the modified *McDonnell Douglas* test, the petitioner holds the initial burden to establish a *prima facie* case of age discrimination under the ADEA. To satisfy the initial burden and survive dismissal proceedings, the petitioner must allege sufficient facts to show that he was: (1) in a protected class; (2) performing his job satisfactorily; (3) the subject of an employment action that was materially adverse; and (4) that other substantially younger and similarly situated employees were treated more favorably than the Petitioner. *Bennington v. Caterpillar, Inc.*, 275 F.3d at 659.

III. Findings of Fact

1. The Amended Complaint pleads that Petitioner Hazzard was approximately sixty (60) years old at the time of his termination, which satisfies the first essential element (protected class) of a *prima facie* case.

2. Next, the Amended Complaint pleads that Petitioner Hazzard was terminated from state employment by Respondent INDOT, which satisfies the third essential element (adverse employment action) of a *prima facie* case.

3. The Amended Complaint[5] also pleads that Petitioner Hazzard's position[6] was replaced by a forty-five-year-old employee with far less experience. Additionally, another management vacancy was filled by a forty-year-old employee with limited experience. Neither factual allegation satisfies the fourth essential element of a *prima facie* case. Although these two employees were substantially younger than Petitioner, his replacement(s) is not shown, nor alleged, to be similarly situated in performance or discipline history. In other words, Petitioner's pleading only compares relative experience but leaves out facts about other vital components of similar situation. As to the other vacancy, the Amended Complaint did not describe the position's duties or responsibilities to show an inference of similarity.[7]

4. Petitioner's Amended Complaint further admits a lawful motive to the state's decision. (Am. Compl, p.2) Namely, Petitioner contends multiple employment changes, an ongoing three year reduction in staff that Petitioner himself had participated in, were made for "work load adjustment". (Id.) Petitioner then additionally ascribes a pre-textual mixed motive – age discrimination (whether by disparate treatment or disparate impact) – to the state's decisions. However, age discrimination must be shown to be a "but-for" cause of the discharge for the

[5] The original Complaint makes similar factual allegations to the Amended Complaint, and also does not state a prima facie case of age discrimination.
[6] The position may have been renamed, but Petitioner contends it is the 'same'.
[7] To the degree the original Complaint describes the other management position it appears to be a different position.

Amended Complaint to be ultimately viable. A mixed motive theory is unworkable under the ADEA. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

5. Respondent's Motion also shows in the alternative that the Amended Complaint does not plead facts to show Petitioner Hazzard was performing his job satisfactorily and therefore failed to satisfy the second essential element of his *prima facie* case.

6. No other statutory public policy basis to maintain the action appears in the Amended Complaint.

IV. Conclusions of Law

1. From a review of the Amended Complaint, Petitioner Hazzard does not establish a *prima facie* case for age discrimination in violation of public policy. I.C. 4-15-2.2-42; *Montgomery*; *Young*. No other statutory public policy basis is evident either.

2. Because the Amended Complaint does not plead all the required elements of an age discrimination claim, the ALJ does not reach Respondent's alternate argument that back pay is a form of relief barred by sovereign immunity under the Eleventh Amendment. A causation proof problem is also evident. Petitioner may not rely on a mixed motive theory.

3. Prior sections reciting contentions or certain general legal standards are hereby incorporated by reference. To the extent a given finding of fact is deemed to be a conclusion of law, or a conclusion of law is deemed to be a finding of fact, it shall be given such effect.

V. Final Order

The Amended Complaint, and therefore this action, is hereby **DISMISSED**. This is the final order of the Commission in this matter. The status conference of November 5, 2013 is cancelled/vacated.

A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this final order and must otherwise comply with I.C. 4-21.5-5.

DATED: October 21, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
Email: araff@seac.in.gov

A copy of the foregoing was sent to the following:

Robert J. Hazzard
Petitioner
5119 Graceland Avenue
Indianapolis, IN 46208

Rebecca A. Brelage
Counsel for Respondent
Office of the Indiana Attorney General
IGCS, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204-2770

Kenneth Joel
Counsel for Respondent
Office of the Indiana Attorney General
IGCS, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204-2770