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December 6, 2019

VIA U.S. MAIL AND ELECTRONIC MAIL

Charles E. Fitzpatrick III
Investigator
Indiana Department of Labor - OSHA
402 West Washington Street
Room W195
Indianapolis, IN 46204
cfitzpatrick@dol.in.gov

Re: Complainant: Melissa McMann
Respondent: Indiana Legislative Services Agency
Case No. 190158

Dear Mr. Fitzpatrick:

This letter responds to the allegations made by Melissa McMann against her former employer, Indiana Legislative Services Agency (“LSA”). LSA denies violating Indiana Code § 22-8-1.1-38.1, or any other law, with respect to Ms. McMann. Rather, Ms. McMann was unable to meet the requirements of her position. LSA did not have a role that Ms. McMann was qualified to perform, so she was reassigned to a temporary project on October 3, 2019, which terminated on November 29, 2019. LSA further denies Ms. McMann was ever threatened with harm to her reputation or that a payout for her unused vacation would be withheld. As detailed below, Ms. McMann’s complaint is baseless, and LSA requests the Department to dismiss her complaint.

I. Indiana Legislative Services Agency

LSA provides members of the Indiana General Assembly with nonpartisan, objective legal support, fiscal analysis, and technology services. George Angelone is the Executive Director of LSA. As the Executive Director, Mr. Angelone has discretion to transfer, demote, suspend, or dismiss LSA employees.

Because people are its most important resource, having a safe and productive work environment is a top priority for LSA. LSA complies with and implements various workplace safety programs to keep current with all applicable safety and health standards established by the

Occupational Safety and Health Administration and other agencies that have jurisdiction over LSA.

II. Relevant Factual Background

A. Ms. McMann's Employment

Ms. McMann was hired by LSA in July 2015 for the position of Business Process Analyst 2. In this role, Ms. McMann was responsible for leading the documentation, assessment, and improvement of processes throughout LSA. Ms. McMann was assigned to the Business Services Group of the Office of Technology Services (OTS).¹ However, Ms. McMann was expected to work with the executive leadership of LSA, as well as members of other departments, in the performance of her job duties. Ms. McMann reported to the Business Services Manager. A written description for the Business Process Analyst is attached at Tab 1.

Ms. McMann proved ill-suited for the role of Business Process Analyst from the start. From the beginning, LSA noticed that Ms. McMann was having trouble performing her job duties. She appeared to lack a basic understanding of both the technical applications and the legislative processes the applications supported. One of Ms. McMann's first assignments was to analyze and map LSA processes for the Office of Code Revision (OCR). At the time, certain long-term employees of OCR were approaching retirement, so it was important that Ms. McMann be able to work with these employees to document existing business processes and capture their institutional knowledge. She continuously frustrated the employees whose processes she was supposed to document by failing to accurately document business processes, even after being advised of the inaccuracies. Ms. McMann was also briefly assigned to document the procedure for making legislative business cards. Again, however, her work product was substandard.

Despite efforts to train Ms. McMann, she never became proficient at her position. She also skipped trainings on both coding and legislative processes. After roughly a year with little improvement, it was determined that Ms. McMann could not perform the duties of a Business Process Analyst.

Instead of terminating Ms. McMann's employment, however, LSA tried to find Ms. McMann another position she was capable of performing. LSA allowed Ms. McMann to transfer to a Business Analyst role while remaining at the significantly higher pay rate of a Business Process Analyst. Ms. McMann continued to be a part of the Business Services Group of OTS and report to the Business Services Manager. Business Analysts serve a critical role in coordinating with end users and programmers to ensure that new or updated features of the applications used by legislators and their staff satisfy underlying business needs. In this role, Ms. McMann would be one of several Business Analysts and would have the opportunity to complete additional training. A written description for the Business Analyst is attached at Tab 2.

¹ OTS is a department within LSA that is responsible for building and supporting the applications used by legislators and their staffs, as well as providing the hardware, software, and connectivity necessary to support the legislative process.

Despite the extra training opportunities, Ms. McMann performed poorly in her new role. Although Ms. McMann was assigned to the simplest applications, she nonetheless failed to perform her job duties in an acceptable manner. In fact, Ms. McMann was eventually so limited that she was largely functioning as an administrative assistant for the Business Services Group. Her poor performance, limited abilities, and relatively high salary also hurt morale.

In May 2019, OTS Director Geoff DePriest and Business Services Manager Carrie Curtis determined that Ms. McMann should no longer be employed by LSA. Thereafter, Mr. DePriest told Ms. McMann she should start networking and update her resume. He also told her she could not expect any more raises or to advance any further within LSA. Ms. McMann voiced her understanding.

B. June 11 Incident

On June 11, 2019, LSA Deputy Executive Director Diane Powers approached Ms. McMann at Ms. McMann's workstation, which was directly outside Ms. Curtis' office, seeking an update on the status of an assigned project. Ms. McMann was unable to provide current information about the project, and Ms. Powers was dissatisfied with Ms. McMann's response. Their discussion became loud enough that Ms. Curtis heard what was going on from her office. Ms. Curtis went to intervene. Ms. Curtis met Ms. Powers, who had left the conversation and was coming to talk to Ms. Curtis, at her office doorway. Ms. McMann had followed Ms. Powers to Ms. Curtis' office. While Ms. Powers and Ms. McMann began discussing the information Ms. Powers was seeking, Ms. McMann made an agitated gesture, clapping her hands and then loosely clapping them in front of her chest. Ms. Powers placed her open hand on top of Ms. McMann's hands, pressed down briefly and lightly, and said something to the effect of "Please stop clapping." As Ms. McMann dropped her hands to her sides, Ms. Powers withdrew her hand. The conversation continued after the contact. It ended with Ms. McMann indicating she would follow up on the project and returning to her workstation, and Ms. Powers leaving the area.

Contrary to Ms. McMann's allegations, she was not struck, hit, or slapped by Ms. Powers, which is confirmed by two separate investigations and Ms. McMann's own immediate reaction to, and initial recollection of, the incident in a communication with another LSA employee.

Ms. McMann did not request a meeting or file a complaint with Mr. Angelone in accordance with LSA's grievance procedures. Rather, Ms. Curtis told Mr. DePriest about the incident, who then told Mr. Angelone. Mr. Angelone then reached out to Ms. McMann and offered a meeting to discuss the incident.

Ms. McMann met with Mr. Angelone on June 18, 2019. Ms. Curtis was present. During the meeting, Ms. McMann claimed Ms. Powers had "slapped" her hands. Mr. Angelone assured Ms. McMann that he would investigate the incident. Pending the completion of his investigation, Mr. Angelone took interim corrective measures for the benefit of Ms. McMann. He instructed Ms. Powers to have no intentional direct contact with Ms. McMann unless it was work-related and it was initiated through and occurred in the presence of Ms. Curtis or Mr. DePriest. Ms. McMann was informed of these measures.

C. Investigations and Virus Incident

After conducting a thorough investigation, Mr. Angelone concluded Ms. Powers' behavior was inappropriate, but there was no support for Ms. McMann's claim that Ms. Powers slapped or struck Ms. McMann. Nonetheless, Mr. Angelone issued Ms. Powers written corrective action, ordered her to complete management training for the purpose of modifying her management approach to be more collaborative and respectful, and issued a permanent restriction against her having any physical contact with Ms. McMann. Mr. Angelone also made it a permanent requirement that any interaction between Ms. Powers and Ms. McMann be work-related and initiated through a request to either Ms. Curtis or Mr. DePriest, with one of the two being present during the interaction (incidental contact at or outside of work, such as Ms. Powers walking past Ms. McMann to speak to another employee for legitimate business reasons or both of them participating in the same volunteer event, would not violate the restriction). Mr. Angelone reminded Ms. Powers of LSA's strong commitment to anti-retaliation.

Ms. McMann disagreed with Mr. Angelone's conclusion and demanded additional action.² The Personnel Subcommittee of the Legislative Council took immediate action by engaging an independent third party to conduct a second investigation into the incident and to review Mr. Angelone's investigation. During this time, any further personnel decisions were again put on hold until the investigation could be completed. The second investigation confirmed Mr. Angelone's findings and found that Mr. Angelone's investigation was timely, unbiased, and created an appropriate corrective action plan for Ms. Powers.

On August 28, 2019, while the second investigation was still pending, the IT department received an alert that an LSA laptop had a virus that needed to be removed. The laptop happened to be the one assigned to Ms. McMann. When Ms. McMann was asked for the laptop, her reaction was extremely unprofessional, disruptive, and created a severe security risk. She physically refused to turn over the laptop to the Chief Technical Officer, and yelled at him, "I know what you're trying to do!" Her outburst disrupted the entire open-concept office. Continuing her refusal, Ms. McMann again yelled, "I know what you're trying to do!" at Mr. DePriest through his office door while he was trying to come up with a way to secure the infected laptop, calm Ms. McMann, and allow the rest of the office to return to work. Before Mr. DePriest could react, Ms. McMann stormed out of the building, taking LSA's infected laptop with her and putting the entire legislature's computer system at risk. Hours later, Ms. McMann returned with the laptop, but demanded the virus be removed by a third party. Although Ms. McMann's behavior interfered with the efficient performance of duties by other employees and the operations of LSA, and was undoubtedly grounds for immediate discharge, Ms. McMann's employment was not terminated at that time.

² Ms. McMann's list of resolution demands grew increasingly unreasonable as the original and subsequent investigations progressed, including that both Mr. Angelone and Ms. Powers be removed from any managerial authority over her whatsoever. She also demanded that Ms. Powers, if reassigned, be at least 1000 feet removed from Ms. McMann's workspace with "zero interaction" with Ms. Powers.

D. Ms. McMann's Reassignment

Although it had already been decided that Ms. McMann could not continue her employment with LSA prior to the June 11 incident, Mr. DePriest and Ms. Curtis did not have any follow-up discussions with Ms. McMann about finding a new job while the investigations were being conducted. Once the investigations concluded, however, LSA resumed the process of ending Ms. McMann's employment.

On October 3, 2019, Mr. DePriest and Ms. Curtis met with Ms. McMann. Mr. DePriest informed Ms. McMann that her last day of employment with LSA would be November 29, 2019. He also informed Ms. McMann that effective immediately and continuing to her date of termination, she would be given a special projects assignment where she would work from home and report directly to him. Mr. DePriest told Ms. McMann she could use the time to find a new job, but she needed to continue to work and to act professionally. He also explained LSA's vacation pay policy. Contrary to Ms. McMann's assertions, Mr. DePriest did not threaten to disparage her reputation or withhold her vacation pay. Likewise, Ms. McMann was not banned from OTS, One North Capital, or the State House, as she alleges. Her access badge was deactivated, and she was told to work from home, but she was not banned.

III. Legal Analysis

Ms. McMann's termination did not violate her rights in any way. Indiana follows the doctrine of employment at will, under which employment may be terminated by either party at will, with or without a reason. *Baker v. Tremco*, 917 N.E.2d 650, 653 (Ind. 2009). The presumption of employment at will is strong and may only be set aside if "a *clear* statutory expression of a right or duty is contravened." *Id.* at 653-54.

Ms. McMann's employment was terminated because she failed to meet the legitimate performance expectations of her employer. LSA, therefore, began a process to encourage Ms. McMann to find other employment, including reassigning her to a temporary project with a definite end date. LSA's actions are not actionable. *See Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 532 (7th Cir. 2003) (Those reviewing wrongful termination claims "do not sit as super personnel departments, second-guessing an employer's facially legitimate business decisions.").

Indiana Code 22-8-1.1-38.1 provides: "No person shall discharge or in any way discriminate against any employee because any employee filed a complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." Through Indiana Code § 22-8-1.1-38.1, the Indiana General Assembly created a specific statutory remedy for employees who are discharged because they complained of a safety or health violation. That said, to be protected under the statute, an employee must file a complaint or institute proceedings about a safety or health violation *with the Department of Labor*. *See Groce v. Eli Lilly & Co.*, 193 F.3d 496, 504 (7th Cir. 1999).

Ms. McMann did not file a complaint or otherwise engage in protected activity under I.C. § 22-8-1.1-38.1. Ms. McMann claims she reported the June 11 incident to Mr. DePriest, but she did not. Rather, Ms. Curtis told Mr. DePriest, who then told Mr. Angelone. It was Mr. Angelone who then reached out to Ms. McMann and offered a meeting to discuss the July 11 incident. Even if the allegation were accurate, it was not protected activity under the statute for three reasons.

First, Ms. McMann did not make a complaint to, or institute a proceeding with, *the Department of Labor*, as required by the statute. *See Groce*, 193 F.3d at 504 (noting that the plaintiff did not fulfill the statutory requirements for protection under Ind. Code 22-8-1.1-38.1 because he only reported safety violation to employer's safety division, not Department of Labor).

Second, even if reporting to Mr. DePriest were sufficient (which Ms. McMann did not even do), the alleged report did not concern an alleged safety or health violation. One employee allegedly hitting the hands of another is not a health or safety violation under OSHA regulations, and there is no language in Indiana Code § 22-8-1.1-38.1 that states or even suggests that reporting such conduct is protected activity under the statute.

Third, claims made in bad faith are not protected activity. *See Chaib v. GEO Grp., Inc.* 92 F. Supp. 3d 829, 839 (S.D. Ind. 2015), *aff'd*, 819 F.3d 337 (7th Cir. 2016) (holding an employee's fraudulent efforts to obtain worker's compensation benefits are not protected activity and cannot support a retaliation claim). Ms. McMann knows, and has admitted, that Ms. Powers never struck her, so any complaint based on the bad faith allegation that Ms. Powers struck Ms. McMann cannot support a retaliation claim. Thus, Ms. McMann did not engage in protected activity and does not have a cognizable claim under Indiana Code § 22-8-1.1-38.1, so her claim should be dismissed.

What is more, even if Ms. McMann had engaged in protected activity, LSA had long before determined that Ms. McMann was not meeting expectations and Ms. McMann had already been told to start her job search. LSA paused this process during the investigations but restarted it as soon as the investigations concluded. Moreover, mere temporal proximity is not enough to establish causation. *E.g., Davis v. Time Warner Cable of Se. Wis., L.P.*, 651 F.3d 664, 675 (7th Cir. 2011).

IV. Conclusion

LSA did not retaliate against Ms. McMann in any way. Ms. McMann did not engage in any protected activity, because she did not file a complaint with the DOL, the alleged incident did not concern health and safety, and the underlying allegation is made in bad faith as Ms. McMann initially admitted that Ms. Powers did not strike her. Even if Ms. McMann had engaged in protected activity, LSA had already determined it could no longer employ Ms. McMann. Accordingly, LSA requests the Department dismiss Ms. McMann's complaint.

If you have questions or require additional information, please contact us.

Very truly yours,
JACKSON LEWIS P.C.



Susan Zoeller
Michael Mohler

SZ/MM/ms
Enclosures
4849-9489-3997, v. 2



Job Description **Business Process Analyst 2**

Overview

The Legislative Services Agency (LSA) provides members of the Indiana General Assembly with nonpartisan, objective legal support, fiscal analysis, and technology services. Like most organizations, LSA has a large number of complex and inter-related business processes that rely upon the effective coordination of multiple people from multiple departments with multiple perspectives. In some cases, these processes involve the use of technology, in other cases the processes are primarily manual. In both cases, the processes are often undocumented and many could be improved so as to save time, save money, or increase accuracy.

The role of the Business Process Analyst 2 is to lead the documentation, assessment, and improvement of business processes throughout the agency. Given the increasing role of technology within our agency, and assuming that at least in some cases technology will be a part of improving existing processes, the Process Analyst 2 is a member of the Office of Technology Services. It is, however, explicitly expected for the person in this role to work directly with the executive leadership of LSA as well as members of other departments.

This position reports to the Business Services Manager (see org chart on following page).

Job Responsibilities

- Facilitate process documentation sessions, both in groups and one-on-one's, for existing business processes.
- Directly observe LSA staff as they conduct business, adding these observations to the documentation created from interviews and group sessions.
- Create business user-level documentation of processes, with an emphasis on visual representations of the interaction between LSA departments. Present and share this documentation with executive leadership and department managers.
- Identify existing constraints, risks and opportunities within business processes.
- Lead the exploration of changes to business processes with an emphasis on improving overall business outcomes (improved accuracy, reduced cost, etc).
- Identify the component costs of existing processes and estimate potential costs and/or savings from changes to those processes.
- Facilitate communication between business owners and resources within the Office of Technology Services (OTS) to leverage technology in improving processes, and iterate upon any associated documentation as needed by those parties.
- Train and mentor other LSA staff who may need to apply process improvement methodologies or tools in the execution of their roles.
- Learn how LSA's existing technology applications relate to each other, and how LSA staff use these tools to perform their daily tasks.
- Assist in creating user documentation and providing user training and/or support as needed.
- Other duties as assigned.

Job Responsibilities

Commensurate with skills and experience, expected to be in the \$65k - \$75k range.

Job Description
Business System Analyst 1

Overview

The Legislative Services Agency (LSA) provides members of the Indiana General Assembly with nonpartisan, objective legal support, fiscal analysis, and technology services. Leveraging open-source software, we've developed an integrated set of applications (collectively referred to as INscribe) that is used extensively by lawmakers and their staff. Our team is responsible for maintaining and enhancing the existing applications as well as developing new applications to solve additional business needs. Business System Analysts play a critical role in coordinating with end users and programmers to ensure that new or updated features satisfy underlying business needs.

Job Responsibilities

- Work closely with end users to gather and validate user requirements by learning the business processes and identifying underlying business needs.
- Participate in problem solving and brainstorming sessions to determine most effective way to solve business needs through technology.
- Work closely with programmers to design, prototype, build and test new functions and features within INscribe and other systems.
- Work closely with quality assurance team to develop test plans, perform manual testing during development, and facilitate user acceptance testing.
- Develop training materials to be used by legislators and legislative staff.
- Provide one-on-one training and support to legislators and legislative staff.

Job Requirements

- Bachelor's degree in a technology related field such as computer science, programming, informatics, or equivalent combination of education and experience.
- Three (3) years applicable experience in a similar environment.
- Familiarity with the standard software development life cycle for web-based applications.
- Able to collaborate effectively with software developers, business analysts, web developers and users of the software.
- Strong communication skills (written and oral) and problem solving skills.

Preferred Qualifications

- Knowledge of Indiana's legislative process. Ability to learn these processes is an absolute must.
- Experience working within an Agile framework.
- Solid understanding and practical application of systems analysis and software testing methodologies.

Compensation Expectations

Comensurate with skills and experience, expected to be in the range of \$60k to \$70k