**STATE OF INDIANA**
**INDIANA CIVIL RIGHTS COMMISSION**

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| LAWRENCE KEY,<br><br>Complainant,<br><br>vs.<br><br>CAMPAGNA ACADEMY, INC.,<br><br>Respondent. | Docket No.: EMra16061232<br><br>EEOC No.: 24F-2016-00900 |



## FINAL ORDER:

## FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 15, 2018, Hon. John Burkhardt, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") issued his initial Findings of Fact, Conclusions of Law, and Order ("Initial Decision"). Complainant objected to the Initial Order on August 30, 2018, to which Respondent responded on September 12, 2018. Both Respondent and Complainant filed briefs on November 15, 2018, and the Commission held oral arguments on Complainant's objections on December 21, 2018. After due consideration of the record in this matter and the Initial Order, the Commission adopts the following and **HEREBY ORDERS:**

### FINDINGS OF FACT

The Commission adopts and incorporates the proposed findings of fact as stated in the Initial Decision issued by Administrative Law Judge, Hon. John Burkhardt, on August 15, 2018, a copy of which is attached hereto and incorporated herein by reference.

### CONCLUSIONS OF LAW

The Commission adopts and incorporates the proposed conclusions of law as stated in the Initial Decision issued by Administrative Law Judge, Hon. John Burkhardt, on August 15, 2018, a copy of which is attached hereto and incorporated herein by reference.

### ORDER

The Commission adopts and incorporates the order as stated in the Initial Decision issued by Administrative Law Judge, Hon. John Burkhardt, on August 15, 2018, a copy of which is attached hereto and incorporated herein by reference.

Any party aggrieved by the Indiana Civil Rights Commission's decision may seek judicial review with the Indiana Court of Appeals within 30 days following the date of notification of such decision. This is a final order and resolves this case.

Adopted and ORDERED by the Commission by the affirmative vote of 5 Commissioners on January 31, 2019

Adrianne Slash, Chair

Indiana Civil Rights Commission

**Certificate of Service**

Served this 1 day of February by United States Mail on the following:

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# STATE OF INDIANA
# INDIANA CIVIL RIGHTS COMMISSION

LAWRENCE KEY,
Complainant,

vs.

CAMPAGNA ACADEMY, INC.,
Respondent.

Docket No.: EMra16061232

EEOC No.: 24F-2016-00900



## FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 26, 2018, the presiding Administrative Law Judge for the Indiana Civil Rights Commission ("ICRC"), Hon. John F. Burkhardt, held a public hearing in The Gary Room of Gary City Hall located at 401 Broadway, Gary, Indiana. Complainant Lawrence Key ("Key") appeared personally, and the case in support of his complaint of discrimination was presented by the ICRC's Staff Attorney, Frederick S. Bremer, in the public interest. Campagna Academy, Inc. ("Campagna") appeared personally by Nancy Vinluan ("Vinluan") and was represented by Counsel Kimberly P. Peil of Hoeppner Wagner & Evans LLP.

At the hearing, Key and Campagna ("the Parties") submitted a "Joint Exhibit Book" composed of the Parties' pre-marked exhibits. Exhibits therein that were not admitted into evidence were removed from the Joint Exhibit Book and retained by the parties. Key presented his case in chief by eliciting testimony from Michael Chelich, Angela Carter, Penny Nelson, Jennifer Poole, Melissa Ferba, Roxanne Wright, as well as by testifying on his own behalf. Following the conclusion of his own testimony and the witnesses he called, Key rested his case. Thereupon Campagna offered the testimony of Mary Kapitan, Nancy Vinluan, and Carol White. Following the hearing, the Parties each filed – pursuant to the Administrative Law Judge's order under Ind. Code § 4-21.5-3-17(b) & 27(f) and 910 IAC 1-11-3 – **proposed** findings of fact, conclusions of law, and orders.

Having carefully considered the foregoing and being duly advised in the premises, the presiding Administrative Law Judge for the ICRC issues – pursuant to IC 4-21.5-3-27 – the

following findings of fact, conclusions of law, and order. **In the absence of an objection by a party under IC 4-21.5-3-29(d) or the ICRC's voluntary administrative review under IC 4-21.5-3-29(e), the ICRC shall affirm this order and it will become the final order disposing of this case.** (IC 4-21.5-3-27(a); IC 4-21.5-3-29(c)).

## FINDINGS OF FACT

### I. Respondent

#### A. Background

1. Campagna Academy, Inc. ("Campagna") is a child and family services agency licensed by the Indiana Department of Child Services. (Exhibit E, p.6). Campagna operates a twenty-four hour residential facility and provides round-the-clock nursing staff to care for its residents. (Tr. 135:18-19).

2. At all relevant times, Campagna's approximately 86 residents were mostly minors with "medical issues" and "developmental and behavioral issues." (Tr. 196, 216:18).
3. Campagna's nurses are responsible for direct and sometimes urgent care of residents; they provide medication, assess symptoms requiring immediate medical intervention, monitor vital signs, give injections, treat injuries, triage patients, and provide general care for residents' well-being. (Tr 196-197, 223:16-21; Exhibit H, U). They administer restraints, and, when those are ineffective, sedatives. (Tr. 25, 37). Without a nurse onsite, Campagna could not administer medication to its residents, such as insulin to its diabetic residents. (Tr. 136). The nurses are responsible for appropriately escalating patient care as warranted by emergencies. (Tr. 47:13-48:9).
4. Campagna's round-the-clock delivery of care to individuals who live onsite entails operational demands different than those of a facility only open during standard day-time business hours. (Tr. 198:11-16, 295:1-7).
5. Because Campagna's nurses are the only staff qualified to deliver medications and immediate medical interventions, Campagna's policy is to have at least one nurse present "at all times." (Tr. 225:4-10, 135:20-23, 224:12-24, 256:6-7).
6. Therefore, since Campagna did not at relevant times have a "PRN pool" – a group of "nurses who…understand that their job is to come in at the last minute" to fill-in for Campagna's nurses when scheduling issues arise - Campagna's scheduling policies and

practices reflect a need for all nurses' flexibility in scheduling and availability. (Tr. 273:3-14, 272:1-5).

**B. <u>Scheduling Policies and Procedures.</u>**

7. Campagna's personnel manual contained a job scheduling policy, "Policy 3.1.1 Scheduled Work" ("Scheduling Policy") which provided in part that:

> Department/unit work schedules are designed to meet the operational demands required to effectively deliver services.... In addition, [Campagna] may find it necessary to change an employee's work schedule to meet temporary or permanent operational needs. Employees affected by a schedule change will be given notice as far in advance as is reasonably possible.
> (Tr. 181; Exhibit E, p.35).

8. Campagna administered "Work Schedule Acknowledgements," which provided as follows:

> All staff are required to have a flexible work schedule to accommodate the needs of the program for which he/she is hired. I acknowledge that there is no guarantee of a set work schedule. Work schedules are determined by the Supervisor and are structured to fit the needs of Campagna Academy. I also acknowledge that a work schedule is subject to change depending on the needs of the program.
> (Tr. 182; Exhibit G).

**C. <u>Staffing.</u>**

9. Campagna is an Indiana non-profit corporation and at all times during calendar year 2016 employed more than six individuals. (Exhibit 2, p.1, NO.2). At the time of the hearing, Campagna had approximately 207 employees, and approximately sixty (60) percent of Campagna's staff was comprised of African American individuals. (Tr. 135:1-3, 217).
10. Campagna employed both Licensed Practical Nurses ("LPNs") and Registered Nurses ("RNs").
11. Campagna's Director of Nursing ("DON"), Nancy Vinluan ("Vinluan"), a Caucasian female RN, began her role in May 2015. (Exhibit 2, p.2, NO.7; Tr. 244, 31:18-19). She was hired by Campagna's CEO, Elena Dwyre, a Hispanic female. (Tr. 242:9-17).
12. Some employees of Campagna working under Vinluan included:

- Angela Carter ("Carter"), an African American female who worked for Campagna as an RN from 2014-2016 (Tr. 53:5-6, 22:21, 23:5-11, 26:19, 27:18-19);

a. Penny Nelson ("Nelson"), a Caucasian female who worked for Campagna as an LPN from 2013-2016 (Tr. 70:7-15);

b. Jennifer Poole ("Poole"), a Caucasian female who worked for Campagna as an RN from 2015-2016 (Tr. 87:18, 90:7-8);

c. Melissa Ferba ("Ferba"), a female who worked for Campagna as an LPN from approximately 2012-2016 (Tr. 111:21-25, 112:7-8, 115:17-18); and

d. Roxanne Wright ("Wright"), a Caucasian female who at the time of the hearing still worked for Campagna as an RN (Tr. 120:11-14, 121:1-2).

**D. <u>Termination Policies and Procedures.</u>**

13. Campagna's process for terminating employment entailed a supervisor's recommendation to the Human Resources Department ("HR") accompanied by a statement and supporting documentation, all of which was submitted to a committee comprising the CEO, the Deputy Director, and the HR Director. (Tr. 225).

14. At all relevant times, Campagna's CEO was Elena Dwyre, a Hispanic female; its Deputy Director was Kynesha Swain, and African-American female; and its HR Director was Carmen Murcet, a Hispanic female. (Tr. 226).

15. As a supervisor of nurses, Vinluan lacked authority to independently terminate any nurse's employment. (Tr. 225-226, 247).

## II. <u>Complainant</u>

16. Lawrence Key ("Key") is an African American male. (Tr. 146:25).

17. At all times relevant to the Complaint, Key was an LPN licensed in Indiana. (Tr. 146:10-21). At the time of the hearing, Key had been an LPN for approximately twenty (20) years. (Tr. 147:5).

18. Key was employed by Campagna as an LPN from October 2013 until May 2016. (Tr. 147).

19. He was hired by the DON prior to Vinluan, also a Caucasian female, and then worked under Vinluan, his immediate supervisor, when she came onboard. (Tr. 179:20-23).

20. Key was the only male nurse working for Campagna during his period of employment. (Tr. 30, 147:22). He was not the only male working for Campagna. (Tr. 217:10-13).
21. Key's colleagues at Campagna included Carter, Nelson, Poole, Ferba, and Wright.
22. Key's duties as an LPN at Campagna included but were not limited to those listed in NO. 3 above. (Tr. 196-197, 147:16-19; Exhibit H, U).
23. Key's job description required "schedule and task assignment flexibility" and "on[-]call responsibilities." (Tr. 223-224; Exhibit H).
24. Key had the admiration of and was "well-liked" by his colleagues who deemed him "a great nurse," "a good employee," "very thorough," "very helpful," "very professional," "very, very respectful," "a team player," "a hard worker," "polite and respectful," "very knowledgeable," and "a good worker," (Tr. 71:16-17, 76:19, 29:1, 29:5, 29:6, 29:19, 71:7, 88:12-23, 112:14-17). Key did his job well; he loved his job and took both his employment and his professional duties seriously. (Tr. 164)

III. **Precipitating Events**

**A. Scheduling Issues.**

25. Prior to Vinluan's onboarding, challenges existed in the organization, including inefficiency, lack of "structure," and "a lot of overtime" due to being "understaffed." (Tr. 244:2-10).
26. Vinluan was specifically charged with increasing efficiency and decreasing scheduling issues. (Tr. 244:12-15). Therefore, Vinluan took issue with early and late attendance and issued discipline accordingly. (Tr. 246:2-6 "It affects the running of the department and it affects -- creates incidental overtime, clocking in early before you're supposed to without authorization or staying past your time without approval."). For example:
    a. After Poole violated the Scheduling Policy at "Offense Level I," on February 18, 2016, Campagna issued discipline to Poole requiring: (i) her review and affirmed understanding of the Scheduling Policy, and (ii) her conformance to her scheduled work hours, stating that upon the next offense she would receive "Progressive Disciplinary Action per policy." (Exhibit T; Tr. 106:6-9). Poole notated that she agreed with the discipline report. (*Id.*)
    b. Similarly, the next day, after Key violated the Scheduling Policy at "Offense Level I," on February 19, 2016, Campagna issued discipline to Key requiring: (i)

his review and affirmed understanding of the Scheduling Policy, and (ii) his conformance to his scheduled work hours, stating that upon the next offense he would receive "Progressive Disciplinary Action per policy." (Exhibit F; Tr. 106:6-15). Key notated that he agreed with the discipline report. (*Id.*)

27. In order to remedy the inefficiency and scheduling issues in NO. 25 above, Vinluan began changing procedures, modifying schedules, and doubling staff. (Tr. 244:20-24).
28. Still, the issues were not resolved overnight; scheduling conflicts posed by staff calling off of work continued and required flexibility of all nurses, sometimes on short notice. (Tr. 40:5-6, 40:20, 27:7-10).
29. Some nurses, including Caucasians and females, felt they were not provided as much notice as they desired – or as much as could have been possible for Vinluan to have provided. (Tr. 41:14-17, 40:10-14 "...we'll find out -- oftentimes, the nurse that called off -- "I called at 7:00 a.m." We may not get the notice until 3:30 p.m. when we're scheduled to leave at 4:00 p.m., for example.").
30. At least some Caucasian and female nurses found Vinluan's overall expectations unreasonable. (Carter at Tr. 36-38, 38:2-5 "she just looked at me and said, 'Well, it's not like you can't handle it.' I'm like, 'That's beside the point. I need help. I don't want to be super nurse. I just want help.'). (Poole at Tr. 100:1-5, 101:16-21 "you would have to kind of guess when you were working the next schedule.... And, in my mind, that was not acceptable to have a family and a life.").
31. Vinluan's requests for staff to fill in were sometimes sporadic and "last minute." (Tr. 92:9-10, 92:24 "There was no pattern."; 223:1-2 "it could change at anytime."; 92:24-93:8 "Usually, it was a nurse finding out that there was no one coming in, then the next shift starting, and no one showing up."; 38:25-39:2 "it was a ghost schedule. We just didn't know what was happening that day. Sometimes we'd just go make our own schedule up...").
32. On such occasions when a nurse was needed to cover a shift, it was the prevailing practice for the nurses – who functioned in a very team-like manner – to work out schedule conflicts on their own, choosing among themselves who would take the upcoming shift. (Tr. 17:3-4 "We would usually decide between whoever is working who will stay for the next shift."; 33:4-7 "... we just made deals amongst ourselves. 'Okay.

You stay this time. I'll stay next time.' That's how we did it amongst ourselves."; Tr. 28:9-10, 32:5-8, 78:13-20, 17:5-9, 40:2-4, 77:16-24; Exhibit K). Key, who often worked with Roxanne Wright, usually worked out overtime requests and scheduling conflicts collaboratively with her. (Tr. 153:3-9 "Well, the majority of the time Rox and I would decide between us, you know, who would stay. And if it was the case where that couldn't happen, then Nancy would try to make arrangements for someone else to come in, but the majority of the time we decided amongst ourselves who would stay.").

33. Sometimes, Vinluan requested nurses to cover shifts or work overtime in an "optional" manner, and sometimes nurses would decline without disciplinary consequence and another nurse would cover for them – informally or at Vinluan's request in her attempt to accommodate. (Tr. 254-255; See Carter at Tr. 27:1-28:12, 34:9-13; Nelson at Tr. 73:14-74:5, 77:7-20; Poole at Tr. 91-94, 99:9-22, 102:22-103:3; Ferba at Tr. 114:15-20, 115:7-14; and Key at Tr. 190:12-192:25; Exhibits I & K). In these respects, Key was treated similarly to his Caucasian and female counterparts.
34. Sometimes, Vinluan mandated staff to cover shifts or work overtime in a non-optional manner and would not accommodate the nurses' stated unavailability or inconvenience. (Tr. 259:2-5; See Nelson at 255:10-256:1, 79-80, Exhibit R; Ferba and Bree Dorrance at Tr. 118:10-11, 256:25-257:1, Exhibit S; Anita Fuller at 258:5-259:1, Exhibit X; and Key at 151:1-4, 251:25, 254:12-21, Exhibit N). In this respect, Key was treated similarly to his Caucasian and female counterparts.
35. Nurses testifying at the hearing, Nelson and Key excepting, denied that they ever left or would leave Campagna's premises with no other nurse present; each nurse so testifying also matter-of-factly cited "abandonment" and professional licensure standards as their underlying reason not to do so. (E.g. See Chelich at Tr. 20:23-25, 21:3-4; Carter at Tr. 54:4-6, 54:8-9; and Ferba at Tr. 117:6-13, 117:16-18).
36. Poole testified that, at times she refused Vinluan's requests to work past her scheduled hours, "there were two nurses" on the shift and one would arrive and the other would not; it was in such circumstances that Poole admittedly texted Vinluan to say "I'm leaving," and Vinluan replied "Okay." (Tr. 91:13-92:19). The result is that Poole was only leaving when another nurse was present. (Tr. 91-92, 92:10-12 "I know there was a nurse when I left. My other team mate was there, but there was supposed to be two.").

**i. Nelson's attendance.**

37. Penny Nelson's departures from the workplace are of primary interest to the parties. Key claims Nelson committed an "act of abandonment." (CP PFFCLO p.12, NO.17). Under examination by Campagna, Nelson testified at the hearing to – multiple times – departing from Campagna's premises when no other nurse was present onsite, leaving the facility "completely unstaffed by nursing." (Tr. 81:1-9). Nelson did not recall when. *Id.* But she admitted her leaving was of such a character as to violate her professional obligations as a licensed nurse. (Tr. 82:1-3).

38. The highly disputed issue of fact is whether Vinluan actually *knew* Nelson ever left the facility without a nurse. Key claims Nelson committed "a *known* act of abandonment" – known by *Vinluan*. (CP's FFCLO p.12, NO.17, emphasis supplied). Vinluan – and Campagna - flatly deny knowing that Nelson or any other employee besides Key ever left the facility without a nurse onsite. (Tr. 262:12-13; RP's Proposed FFCLO p.20, NO.39). Furthermore, Campagna staff testified that a thorough review of all records yielded no documentation indicating Nelson ever left the premises without a nurse. (Tr. 215-216; 230-231). Key provided no documentation showing Campagna's staff had knowledge of Nelson leaving the premises unstaffed by a nurse. (Tr. 82:4-6).

39. Nelson deduced Vinluan knew that she had left the facility without a nurse (i) because of Vinluan's supervisory status (Tr. 81:10-11 "Q: And was Ms. Vinluan aware of that? A. Well, she was over us. She should be."); and (ii) because of Nelson's contemporaneous correspondence with Vinluan (Tr. 81:17-18 "I did on numerous times e-mail her or text her and tell, 'I can't stay. So and so called off.'"; Tr. 83:4-10 "Q. What leads you to believe she should have know(*sic*)? A. Because I would text back, and I would say, "I cannot stay." I recall one time -- unfortunately, I can't recall the date. I told her where the keys would be, and she said, "She would get someone in as soon as possible.'"; Tr. 81:16-18 "Q. So you let her be aware that you had to leave and you were going to leave, right? A. Yes."). Key adopts Nelson's assumptions, offering as a proposed finding of fact: "obviously there would be no nurse on duty since Nelson on this occasion let Vinluan know where Nelson was leaving the keys." (CP's Proposed FFLCO, p. 6, NO.21). But the circumstances of Nelson's departures as perceived by Vinluan are not so obvious.

40. While the record indicates Vinluan knew of Nelson's schedule conflict and desire and intention to leave *at some point*, the record does not support or ultimately prove that Vinluan indeed knew that Nelson would dare to – and in fact did – leave the premises unstaffed by any nurse. The record – and the norms it evidences – point to a different mental state in Vinluan regarding Nelson's admitted abandonment.

    a. One such norm is staffs' frequently reporting their inability to stay without then *actually leaving* until endorsing care to the next nurse. Significantly, Nelson herself was one such staff member who had on other occasions shown that her "no" still yielded to operational demands and professional obligations. (Tr. 255:20-256:1 "[Nelson] was mandated to stay. She was upset. She told me she couldn't. I told her she had to. We went -- you know, she said again she couldn't and I said you have to. And she told me that there was a death and she had to go to awake, and I said you need to stay and she did." (emphasis supplied)). From Vinluan's perspective, even when nurses like Nelson often replied to Vinluan's overtime needs with: ""I have plans. I can't stay." Tr. 27:18-19; "I can't. I cannot do it." Tr. 35:17; "I can't stay. You know, I have other plans." Tr. 54:12-13; "I said, "No. I cannot stay" Tr. 94:5-6; each time, these staff would at least stay until a proper endorsement of care occurred. (Tr. 58:9-16 "Q. The time when Nancy came in to relieve you, if she wouldn't have come in, would you still have stayed at that facility? A. I would have stayed until somebody would have helped, yeah. Q. And why is that? A. Because, once again, it would have been job abandonment."; Tr. 54:15-18 "Q. But...would you leave if there was no nurse present onsite? A. No. Not if there was no nurse, no."; Tr. 54:1-6 "sometimes Ms. Vinluan would direct you to stay, and you didn't always stay. Do you remember that? A. Yes. Q. Did you ever leave the Campagna campus when there was no other nurse present onsite? A. No."). In context, the seemingly contradictory yet normative coexistence of (i) staff's rebuffs to overtime and (ii) staff's ultimately remaining onsite until endorsing care to another nurse weighs against – just on account of Nelson's subject correspondence – imputing to Vinluan knowledge that Nelson would have left – and actually did leave –

patients without a nurse. Nelson testified that she told Vinluan she needed to leave, not that she had left. (Tr. 81:12-25).

b. Another such norm is the completely universal condemnation of abandonment by every character in this case. While it could reasonably be inferred a subordinate would report to a superior a scheduling conflict, and such was clearly the frequent case at Campagna, it is too strained a factual inference here to assume – in a case in which everyone involved agrees leaving patients untended by nurses is unpardonable, Vinluan would readily understand her subordinate (Nelson) was actually reporting in advance her own abandonment of patients – especially in direct contravention of Vinluan's stated attempt to quickly send a fill in to whom care could be endorsed.

c. Another segment of record evidence weighing against assuming Vinluan's knowledge is the character of Vinluan's response: a supervisor-to-subordinate promise, the conveyance of which makes less sense if Vinluan was not assuming Nelson would wait in response rather than leave before the arrival of the replacement Vinluan promised. This type of conveyance was not out of the ordinary; it was Vinluan's practice to reassure staff that a fill in would soon arrive to relieve them. (E.g. Tr. 54:12-14 "Like, 'I can't stay. You know, I have other plans, and Nancy would say, 'I will be there in this amount of time.'"). This norm clarifies that – when Vinluan similarly reassured Nelson – she was thinking Nelson would wait. The record does not permit inferring from Vinluan's "get someone in *as soon as possible*" comment that Vinluan was understanding, acknowledging, or ratifying an act of abandonment, but rather reinforces the evidence of Vinluan's expectation that a proper transfer of care would soon occur to relieve Nelson. Simply stated, Vinluan's promise that someone was on the way functioned as an implied directive: "Hold on." Furthermore, the nature of Vinluan's reassuring response is distinctly different from the "warning" style she used upon strong suspicion a nurse was contemplating resisting mandatory overtime, a style replete with references to professional duties and the Nurse Practice Act. (Exhibit S).

d. Another norm weighing against the assumption that Vinluan perceived Nelson's leaving the facility nurse-less is the established practice of the team-like staff to work out schedule conflicts on their own and among themselves. (Tr. 17:3-4 "We would usually decide between whoever is working who will stay for the next shift."; Tr. 33:4-7 "So amongst ourselves -- we just made deals amongst ourselves. 'Okay. You stay this time. I'll stay next time.' That's how we did it amongst ourselves."; Tr. 28:9-10, 32:5-8, 78:13-20, 17:5-9, 40:2-4, 77:16-24; Exhibit K). That Nelson may have worked with any of her colleagues to resolve her scheduling needs appears a more obvious dynamic than that Nelson would actually leave Campagna's premises unstaffed by a nurse.

41. The DON prior to Vinluan had established a practice of filling in as a nurse in order to help cover staffing needs. (Tr. 36:18-13 38:23-24). In the beginning of her tenure, Vinluan followed in this practice "to actually see how the job was and provide the coverage, and let everybody…know that [they were] a team," but even when she would decide to fill in, the nurse she would be relieving would have to wait until Vinluan arrived before departing so as to ensure a nurse was present at all times. (Tr. 255:1-7, 35:21-23, 114:15-23).
42. Vinluan did not want to continue the practice of covering nurses' shifts, but rather, wanted to dedicate her time to her managerial and administrative duties. (Tr. 36:22-23, 248:10-17 "I had been covering a lot of shifts, that I was going to be focusing now back on getting policies and procedures updated, doing administrative work as the DON, training new staff, preparing for the DCS audit, and doing the administrative duties of the director of nursing, as opposed to covering the units as much as I had been.").
43. As a result, at least some staff perceived that Vinluan was not as present on the front-lines of patient care as the previous DON. (Tr. 36-37, 36:24-25 "Nancy -- half the time, we didn't even know if she was in the building.").

**B. <u>Change in Organizational Structure: LPN vs. RN Duties</u>**

44. Around February 2016, Vinluan made changes that affected the structure of the organization and job functions. Specifically, Vinluan changed the RN and LPN duties so as to be different, when previously they had been essentially the same. (Tr. 50:7-8).
45. All the LPNs were treated the same under the new changes. (Tr. 208:14-16).

46. The changes were, widely, "pretty unpopular" with all nurses except Jennifer Poole, RN. (Tr. 55:1, 108:18-20, 108:18-20). They caused a new dynamic between the LPN and RN roles, which resulted in tension amongst staff. (Tr. 49:24 "It destroyed relationships."; Tr. 50:10-11 "What happened was the separation came, and it put the LPNs on the unit.").
47. Staff perceived the changes were more unfavorable to LPNs. (Tr. 50:11-15 "some LNPs couldn't distinguish, you know, the fact of if you are an RN, does this mean you're better than me? Does it mean I'm an LPN and my job is not as important?"). Some staff perceived this treatment as a result of a disparately negative disposition – on Vinluan's part - towards LPNs. (E.g. Tr. 115:25-116:22).
48. While Vinluan was attempting to implement the changes, some staff, including Key, took issue with them and complained to Vinluan. (Tr. 52:17-18, 50:17-22 "Lawrence actually voiced that in a meeting. He said, "What does this mean for the LNPs? What am I? What does that mean?" I know Nancy was stressing. Ms. Vinluan was stressed. And in so many words, you know, like, the LPNs -- you know, "I just need you on the unit."""; 51:11-16 "Lawrence has always been respectful, but he's -- he's very opinionated as well. He never bit his tongue. He --but he was -- he was never rowdy or loud talking. He was just to the point like, "Answer my question. Why are we doing" -- he never beat around the bush."; 51:24-52:1 "he would ask, you know, "Well, explain to me why are you separating LPNs," for example."; 130:3-7 "he conveyed that he felt it was demeaning toward the LPNs to just have them be on the units and not doing all of the extra nursing duties that they were always doing before."; 60:19-22 "We would be in a meeting, and he'll ask questions and press the issue. Sometimes -- oftentimes, she kind of just shrugged and changed the subject."; 63:24-65:3 "Nancy Vinluan disliked the complainant because he repeatedly stood up to her at staff meetings, which is -- and I said I believe that Ms. Vinluan had it in for the complainant"; 66:16-18 "was very persistent when he would ask his questions. And, personally, I felt Nancy would shut down.").
49. Both Key and Caucasian female LPNs found Vinluan's changes – and lack of answers about them – unsatisfying. (Tr. 52:1-3 "Ms. Vinluan would never give a direct, you know, answer or an answer we were happy with, I should say"; 52:13). Nothing in the record demonstrates that Vinluan's demeanor toward inquisitive Key was race- and/or

sex-based, in whole or in part. Furthermore, in the specific factual context of this case, Campagna's demeanor towards Key in policy discussions does not constitute an adverse employment action.

50. Vinluan did not go on the defensive about her new system; not only did Vinluan choose not to entertain detailed discussion about it, but she also expressed a firm willingness to part with employees, including but not limited to Key, who disagreed with it. (Tr. 130:11-14 "I think that she answered [in reaction to Key's questions at a group meeting] that if -- if these changes weren't acceptable, then anyone who very much disagreed with them -- you know, maybe they weren't a good fit for Campagna anymore."; Tr. 38:6-11 "I (Carter) went to her office, and she held a folder up. She said, 'You see in this folder, there's applicants.' I'm like, 'You're right. I think I should just leave then.'"). Vinluan's perception was that Key found the changes not "acceptable."

51. Vinluan was perturbed by the vocal push back she received about her new system and expectations. Vinluan discussed the changes with Poole – the RN not opposing the changes – and in so doing, Vinluan expressed that she did not like Key's vocal resistance. (Tr. 96:20-97:11 "It was a phone conversation. I [Poole] had called her about a staffing issue, and she had called me back. And we were discussing what was going on in the units as far as staffing. And that's when we were talking about changing over to the LPNs going to the floor and the RNs staying in the – doing the more managerial tasks. And we were talking about the staff that were for it and against it. And she was saying that, yes, Lawrence definitely was not for it and was being very vocal with that. And she didn't like that. And I said, "Yes. I've heard that. I've heard a lot of people, you know, not be vocal for it." And she was like, "Well, I would love to get rid of him now, but I'm just going to give him enough rope to hang himself."). Key suggests the ICRC find that any such statement "was said in the course of a discussion between Poole and Vinluan about [him] being in vocal disagreement with a policy implemented by Vinluan." (CP's FFCLO, NO.25). The record corroborates the exclusive business – and not sex or race – related basis of any such otherwise gruesome sounding statement.

**C. <u>Circumstances of Key's termination</u>**

52. On April 14, 2016, Vinluan sent a group e-mail to all nurses under her, including Key, asking about their availability to pick up extra night and evening shifts for the temporary

schedules she was making due to staff shortages; Vinluan reminded the nursing staff that the needs of Campagna come first, but that she would make every effort to accommodate. (Exhibit K). She never received a reply from Key. (Tr. 247-49).

53. On May 2, 2016, Key was scheduled to work his typical shift from 5:00PM to 3:30AM. (Tr. 154, Exhibit J).
54. On May 2, 2016 at 11:10PM, Vinluan sent the temporary schedule to a group of nurses, including Key, who was thereby scheduled to work until 7:30AM on May 3, 2016. (Tr. 249; Exhibit L, M). Key received over four hours' notice of the temporary schedule change. (Exhibit J).
55. During these early AM hours, only one nurse would be scheduled to be on duty. (Tr. 44:22-23). The nurse on that shift was responsible to pass meds early in the morning, beginning around 5:45AM-6:00AM. (Tr. 42:22, 200-202).
56. When Key discovered that he would have to work past his regularly scheduled shift, he called Vinluan and told her that he could not stay because he had to take his daughter to school the following morning. (Tr. 150).
57. At the hearing, Key testified he was needing to be home by 6AM. (Tr. 156:14). Key described his personal predicament in multiple ways: at one time he characterized his dilemma as having to choose between losing his job and having his daughter stay somewhere without adult supervision. (Tr. 157:24-158:3). Later he testified that his brother was caring for his daughter at the time and that his brother would not have left her if Key had not returned when expected. (Tr. 205-206). Key was married, but separated, at the time, and Key testified as to not finding it appropriate to seek a "special favor" from his wife, and he testified that he also determined that he did not want to delay his brother's commute to work; ultimately, he found himself the only option to pick up his daughter, "take her home and get her ready to go to school." (Tr. 156-157, 165:1 "right there I had no choice," 165:8-11 "the only thing I could do was just make sure that the facility was okay, let them know the time that I was leaving, and I had to be with my daughter."). Despite Key's intention to otherwise leave work, he chose not to be proactive with his brother or wife.
58. Vinluan responded that Key was mandated to stay and had to stay. (Tr. 150-151; Exhibit N).

59. As to whether Vinluan was opportunistic about Key's dilemma – and that based on his sex and/or race: the record does not indicate so. Vinluan's advance email to Key to prevent his scheduling conflicts weighs against such a notion, as do (i) Vinluan's apparently being originally unaware of his conflict when scheduling his overtime, (ii) her notifying Key of the overtime more than four (4) hours before his overtime would begin (far sooner than appears to have been average for the nurses generally), (iii) her previous attempts to accommodate Key when possible at the expense of Caucasian female nurses, (iv) her not having known that Key would, contrary to usual practice, not work out the conflict with Roxanne, and (v) her progressive issuance of discipline and warning along the way in her correspondence with Key on the night in question.
60. At 12:43AM, Key sent Vinluan an e-mail stating in part: "I do not believe that you just found out about this at 11pm tonight;" Vinluan took this as him accusing her of lying. (Tr. 251; Exhibit N).
61. In a response email sent at 2:06AM, Vinluan in part reminded Key of his professional duty to stay under Campagna's policy and the Nurse Practice Act. (Tr. 251, Exhibit N.).
62. At 3:04AM, Key sent a reply email to Vinluan – and copied multiple other nurses – stating in part: "I [h]ave to do this," and "if you can't understand that then you have to do what you think is best and I will do what I have to do." He also said, "maybe I don't need to work under you." (Tr. 252, Exhibit N.).
63. Key was working with Wright that night, but, contrary to established practice, he chose not to attempt working out his schedule conflict with Wright. (Tr. 153:10-21 "Q: On the occasion of May 2nd and May 3rd of 2016, why didn't you just work it out with Roxanne on that occasion? A: Well, I felt that, I mean, by -- Roxanne, well, she knew that one of us was going to have to stay, and usually if she could stay, she would say something. So she didn't say anything, so I didn't really want to push the issue. And I told her, well, I'm going to talk to Nancy and I'm sure that she can probably find someone to cover for it. So we didn't discuss it.") Despite Key's intention to actually leave, he chose not to be proactive with Wright.
64. Key complains that Vinluan's not having sought or provided accommodation to Key was sex and/or race based. The facts do not bear this out. Key's own testimony is that Nancy's accommodation usually took place *after* he had first exhausted Roxanne's

availability, and he admits he did not attempt this. (Tr. 153:3-9). Furthermore, Campagna had accommodated Key previously in the same manner as done for Caucasians and females when he refused optional overtime, but Campagna's position – which is borne out in the record, is that on the night of this climactic conflict, he was being mandated to stay, and accommodations were not issued to Key – or to Caucasian and female counterparts – in such "mandate" situations. In the specific factual context of this case, Campagna's denying Key something that was not available – accommodation in his "mandate" situation – does not constitute an adverse employment action.

65. Key stayed until 5:00AM and then did what no other Campagna nurse similarly did on record: broadcast his actual impending departure to staff (Tr. 168, 151:15-23 "I went around to each unit to make sure that they knew that I was leaving, to make sure that everything was okay. I went to the cottages, made sure everything was okay, no one was in need of any medical attention. And the last E-mail I sent was letting them know that I was leaving out and that everything was taken care of and I had to leave."). He sent an email to Elena Dwyre, Campagna's CEO, in which he said he "can't stay" and that "if this cannot be then [he] will help where God puts [him]." (Tr. 194, Exhibit 9).
66. Key left Campagna's facility around 5:20 or 5:30AM. (Tr. 151, 168).
67. When Key left, no other nurse was present onsite. (Tr. 199).
68. Key testified that his leaving Campagna's facility without a nurse present on May 3, 2016 constituted a violation of the standards governing his professional license – the same standards generally embedded in Campagna's policies. (Tr. 207).
69. From around 5:35Am to 5:50am, Vinluan called each of Campagna's residential buildings "inquiring if [Key] had passed medication yet." (Exhibit P). Each building reported to Vinluan that he had not.
70. According to Key, approximately forty (40) patients would have been affected by not receiving as usual their medication during the morning medication pass – which usually started between around 5:45AM and 6:15AM – due to Key's absence during scheduled hours. (Tr. 200-202).
71. Vinluan issued an "Employee Discipline Report" on May 6, 2016, specifying "May 2 and May 3" as the "Date of Violation." The "Offense Level" was stated as "Level 3," the type of offense was described as "Insubordination (May 2); Went home without endorsing pt

care to another nurse (May 3)." (*sic*). (Exhibit P). The date of Key's last warning was said to be 2/19/2016 when he was warned about leaving early and late past scheduled work hours.

72. Via the Employee Discipline Report, Vinluan requested as corrective action Key's termination. She testified her reason for the recommendation was that Key was mandated to stay and left the facility with no other nurse onsite; this reason matched that in the Employee Discipline Report. (Tr. 254; Exhibit P). Vinluan submitted her recommendation, along a copy of her email to Key, to the committee of Elena Dwyre, Kynesha Swain, and Carmen Murcet.
73. Campagna terminated Key's employment on or around May 6, 2016. (Exhibit 2, NO. 4; CP's Proposed FFCLO, p.3 NO.7). Campagna testified that its reasons for terminating Key were his leaving the facility without another nurse present onsite in violation of: (1) Campagna's policy that a nurse be present at all times; (2) Campagna's job scheduling policy; (3) the Indiana Nurse Practice Act; (4) the standard of care Key owed to his patients; (5) his supervisor's directives; and (6) his job description. (Tr. 226-231; Exhibit P, RP's Proposed FFCLO, p.8, NO.55).
74. When Carter and Nelson protested Key's termination to Vinluan, Vinluan responded, "I have to hold people accountable." (Tr. 76).
75. After Key's termination, Campagna hired Michael Chelich, a Caucasian male RN, but assigned Chelich to perform the more office-oriented duties allotted to RNs under Vinluan's new system. (Tr. 14-15, 132).
76. Vinluan denies that she ever administered counsel, discipline, or termination based on an employee's sex or race. (Tr. 245:18-12).
77. In a hearing preceding Key's award of unemployment benefits, Vinluan testified that "[Key] clearly put [his] family in front of [his] job." (Tr. 164:21-22).

## IV. Key's ICRC Complaint

78. On June 06, 2016, Key filed with the ICRC his complaint of discrimination which was dually filed with the Equal Employment Opportunity Commission ("EEOC"), named Campagna, and alleged unlawful discrimination in employment based on "race" and "sex." Key complained of discriminatory termination and also disparate terms and

conditions of employment, specifically discipline, schedule accommodation, and treatment in policy discussions.

79. Key admitted no evidence showing that the types of discipline, accommodation, or treatment he experienced were – on Campagna's end – not comparable to the experience of any similarly-situated individuals, and Vinluan flatly denies administering discipline, termination, or any other terms and conditions based on race or sex.

80. The effect of Key's testimony was to admit to violating Campagna's legitimate race- and sex-neutral policies – and his professional obligations – when he refused his supervisor's mandate and left Campagna temporarily unstaffed by a nurse.

**V. Ultimate Factual Issue**

81. The preponderance of the evidence does not establish that Campagna subjected Key to disparate terms or conditions in employment – or to termination – because of his sex and/or race or that Campagna's offered reasons for its actions are a pretext for sex and/or race discrimination. To the contrary, the record evidence – including Key's testimony – shows that Key was actually not meeting Campagna's business expectations, that Campagna perceived this, and that this – and not Key's sex or race – in fact motivated Campagna to discipline Key and terminate his employment. The record evidences no similarly-situated individuals treated more favorably than Key with respect to any of the alleged disparate terms and conditions of employment or termination. Key failed to present evidence that any of Campagna's employment actions were motivated by sex-based or race-based animus and amounted to unlawful discrimination as alleged. In short, substantial evidence compels the ultimate factual finding that Campagna did not deny Key equal employment opportunities because he is male and/or because he is African American.

## CONCLUSIONS OF LAW

The ICRC has jurisdiction over the subject matter and the Parties, and each party is a "person" as that term is defined in Ind. Code § 22-9-1-3(a). Additionally, Campagna is an "employer" as defined in Ind. Code § 22-9-1-3(h). Key's complaint against Campagna of an unlawful discriminatory practice relating to employment is subject to adjudication in accordance with the provisions of the Indiana Civil Rights Law, Ind. Code § 22-9-1 *et seq.* and the Indiana

Administrative Orders and Procedures Act, Ind. Code § 4-21.5 in consultation with cases decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e, *et seq.* See Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 839 (Ind. 2009) ("In construing Indiana civil rights law our courts have often looked to federal law for guidance"); See also Indiana Civil Rights Comm'n v. Culver Educ. Found. (Culver Military Acad.), 535 N.E.2d 112, 115 (Ind. 1989) ("federal cases interpreting Title 7 of the Civil Rights Act of 1964…are entitled to great weight"); See also Indiana Civil Rights Comm'n v. City of Muncie, 459 N.E.2d 411, 418 (Ind. Ct. App. 1984) ("federal decisions are helpful in construing Indiana's Civil Rights Act").

"It is the public policy of the state to provide all of its citizens equal opportunity for…employment," and such equal employment opportunities are "declared to be civil rights." Ind. Code § 22-9-1-2. "It is also the public policy of this state to protect employers… from unfounded charges of discrimination." *Id.*

Not all discrimination is declared "contrary to the principles of freedom and equality of opportunity" and "a burden to the objectives of the public policy of this state." *Id.* Discrimination is simply "[t]he intellectual faculty of noting differences and similarities." DISCRIMINATION, Black's Law Dictionary (10th ed. 2014). "The dictionary sense of 'discrimination' is neutral while the current political use of the term is frequently non-neutral, pejorative." *Id.* In the "neutral" context, "*[e]*very employment decision involves discrimination," and "[a]n employer, when deciding whom to hire, whom to promote, or whom to fire, must discriminate among employees." Filter, 906 N.E.2d at 838.

While the two most common reasons for lawful employment discrimination are "an absolute or relative lack of qualifications or the absence of a vacancy in the job sought," other reasons might include attendance, job performance, personality conflict, erroneous evaluations, and even unusual business practices." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977); Rose-Maston v. NME Hosps., Inc., 133 F.3d 1104, 1109 (8th Cir. 1998). In Indiana, no reason for employers' discretion is required at all. "Indiana follows the doctrine of employment at will, which means that employment of indefinite duration may be terminated by either party at will, *with or without reason.*" Peru Sch. Corp. v. Grant, 969 N.E.2d 125 (Ind. Ct. App. 2012) (emphasis added).

Unlawful discrimination is discrimination based on *unlawful criteria.* See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("[T]he employer has discretion to choose

among equally qualified candidates, provided the decision is not based upon *unlawful criteria*") (emphasis added). Under the Indiana Civil Rights Law, unlawful "discriminatory practices" include those denying equal employment opportunities "to properly qualified persons *by reason of* the race [or]...sex...of such person..." Ind. Code § 22-9-1-2(b) (emphasis added). Such discriminatory practices are "contrary to the principles of freedom and equality of opportunity" and therefore "shall be considered unlawful." Ind. Code § 22-9-1-3.

The Parties agree that Campagna took employment actions against Key; significantly, those actions are the same discipline and termination of which Key complains. Therefore, to determine as required whether Campagna "has engaged in an unlawful discriminatory practice" as alleged here, the critical inquiry is: "On what basis did the employer discriminate?" Ind. Code § 22-9-1-6; See Filter, 906 N.E.2d at 838–39 ("[T]he case is one of causation: What caused the adverse employment action..."); See also Ortiz v. Werner Enterprises, Inc., 834 F.3d 760, 763 (7th Cir. 2016) (phrasing the inquiry as "whether one fact (here, [sex or race]) caused another (here, discipline or discharge)." Was the termination of Key's employment by reason of Campagna's "illegal motivation" – namely, "race" or "sex"? Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 154 (2000). Put another way, "would [Key] have kept his job [or avoided discipline] if he had a different [sex or race], and everything else had remained the same." Ortiz, 834 F.3d at 764. In a word, the question to be answered is: "Why?"

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). The work of adjudicating "illegal or legal motives" "obliges finders of fact to inquire into a person's state of mind." Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989); Aikens, 460 U.S. at 716. However, "[t]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else." Aikens, 460 U.S. at 716–17 quoting Eddington v. Fitzmaurice, 29 Ch.Div. 459, 483 (1885). Because the Indiana Civil Rights Law tolerates no unlawful discrimination – subtle or otherwise – the ICRC, with expertise and a charge to administer the Indiana Civil Rights Law, is in the best position to ascertain the matter. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 526 (1993); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

In the difficult enterprise of proving an employer's motive, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's, 509 U.S. at 507. To carry this burden of persuasion, Key is required to "prove his case by a preponderance of the evidence..." Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

What evidence? All of it. As in any lawsuit, Key "may prove his case by direct or circumstantial evidence," and "[t]he trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." Aikens, 460 U.S. at 714; See also Ortiz, 834 F.3d at 764-766 (7th Cir. 2016) (requiring that "[a]ll evidence should be considered together to understand the pattern it reveals" and instructing that "all evidence belongs in a single pile and must be evaluated as a whole").

While all evidence is considered, the ICRC Director's previous finding of "probable cause" – other than as the warrant of the hearing in this case – is of no relevance or import; the question to be answered now is different and the hearing on the question is *de novo:* from the beginning, without regard to previous determinations. Ind. Code § 4-21.5-3-14(d). Specifically, the question is not whether probable cause exists to believe unlawful discrimination occurred, but whether an unlawful discriminatory practice actually occurred: "discrimination *vel non*" – discrimination "or not." Ind. Code § 22-9-1-6(j); Filter, 906 N.E.2d at 842. Therefore, the ICRC is not "erroneously focused on the question of *prima facie* case rather than directly on the question of discrimination." Aikens, 460 U.S. at 711.

The McDonnell Douglas framework is a conventional method of allocating the burden of production to parties and providing an "orderly way to evaluate the evidence" as it pertains to the ultimate question of unlawful discrimination. St. Mary's, 509 U.S. at 525. Because the Parties, during the hearing and in their Proposed Findings of Fact, Conclusions of Law, and Orders, presented their arguments in terms of the framework, it is where the following holistic assessment of the evidence begins. David v. Bd. of Trustees of Cmty. Coll. Dist. No. 508, 846 F.3d 216, 224 (7th Cir. 2017).

Under the framework, Key is expected to produce evidence establishing the case on its face – a *prima facie* case; this eliminates the most common nondiscriminatory reasons for the adverse actions and raises an inference of discrimination. See Teamsters, 431 U.S. at 358. Then, the common lawful motives off the table, Campagna must "clearly set forth" legitimate

nondiscriminatory reasons for termination, thus putting Key on notice of the targets for his pretext arguments and affording Key a full and fair rebuttal opportunity; the sufficiency of Campagna's explanation is evaluated by the extent to which it fulfills these functions. Burdine, 450 U.S. at 256. Finally, Key can proceed to rebut each of Campagna's identified motives as "pretext for unlawful discrimination."

However, since affording Key a full and fair rebuttal opportunity is the purpose of the framework, when Campagna does its part and meets its burden of production – putting Key on notice of its explanations – "whether [Key] made out a *prima facie* case is no longer relevant," "McDonnell Douglas drops out," and the factfinder "must decide which party's explanation of the employer's motivation it believes." Aikens, 460 U.S. at 715-716; Filter, 906 N.E.2d at 846. The factfinder "has before it all the evidence it needs to decide *not* . . . whether defendant's response is credible, but whether the defendant intentionally discriminated against the plaintiff." St. Mary's, 509 U.S. at 519.

Since Campagna's burden is one of production – and not persuasion – Campagna has "only to state a legitimate reason" for the adverse action. Bd. of Trustees of Keene State Coll. v. Sweeney, 439 U.S. 24, 24 (1978); Kephart v. Inst. of Gas Tech., 630 F.2d 1217, 1222 (7th Cir. 1980). Determining whether Campagna carried its burden "can involve no credibility assessment." St. Mary's, 509 U.S. at 509. Campagna need not even establish that it was actually motivated by its proffered reasons. Burdine, 450 U.S. at 254. Campagna may state as its reasons subjective requirements and motives. Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 135 (7th Cir. 1985).

Here, Campagna carried its burden. On this there is no dispute, rather, Key, in his Proposed Findings of Fact, Conclusions of Law, and Order, indeed suggests the ICRC conclude as a matter of law that "Campagna rebutted Key's *prima facie* case" (CP's Proposed FFCLO, p. 11). In fact, in explaining what it has done, Campagna clearly set forth its reasons for terminating Key's employment.

> Q: Okay. Why was Mr. Key terminated?
>
> A: For several things. One for leaving -- leaving the agency without having another nurse present to take over the care of the clients, for insubordination, unprofessional conduct, and violating the job scheduling policy."

(Tr. 226:24-227:5).

Campagana also set for the Exhibit indicating its reasons for Key's discipline. (Exhibit F "Leaving Early and Late past Scheduled Work Hours").

In hearing testimony, Vinluan unpacked her perception of "insubordination" to include "refusal to do a directive from his supervisor" (Tr. 228:9-10); "unprofessional conduct" to include Key's leaving the premises in violation of Campagna's policies – such as its code of conduct requiring "safe work procedures" (Tr. 229:7-24, Exhibit E) and his email correspondence with Vinluan on May 5, 2016 in which he copied other staff when stating in part "maybe I don't need to work under you" (Exhibit P); and "violating the job scheduling policy" to include Key's having been inflexible and having "refused to abide by" the work schedule about which he had four (4) hours' notice. (Tr. 230:3-10).

On their face, such reasons are legitimate and inherently business related and sufficient to retire the McDonnell Douglass framework. The ICRC is therefore "in a position to decide the ultimate factual issue in the case," which is "whether the defendant intentionally discriminated against the plaintiff." St. Mary's, 509 U.S. at 519. On the state of the record at the close of evidence, the ICRC proceeds to this specific question directly. See Aikens, 460 U.S. at 715 (1983).

Key claims Campagna's motivation was his sex and or race. In making his case, Key seeks to rebut Campagna's proffered reasons as pretext for discrimination. Proving that Campagna's proffered reasons are "pretext for discrimination" entails proof of the component parts: "pretext" and "discrimination." See St. Mary's, 509 U.S. at 515 ("[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason"); See also Radentz v. Marion Cty., 640 F.3d 754, 757, 2011 WL 1237931 (7th Cir. 2011) ("In order to demonstrate that the reason for the termination was pretextual, the plaintiffs must demonstrate that the nondiscriminatory reason was dishonest and that the defendants' true reason was based on discriminatory intent."); See also Reeves, 530 U.S. at 147 ("[i]t is not enough ... to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.")

In Keys showing of falsity on Campagna's part, Key "must specifically rebut *each* legitimate, non-discriminatory reason given" for the alleged adverse actions. Reed v. Lawrence Chevrolet, Inc., 108 Fed. Appx. 393, 398 (7th Cir. 2004) (original emphasis). Three possible ways Key may demonstrate the untruthfulness of a reason are "through evidence

showing: (1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the adverse employment action or (3) that the proffered reason was insufficient to motivate the adverse employment action." Filter, 906 N.E.2d at 847.

Key fails to show that any of Campagna's reasons are imagined, irrelevant to Campagna's actions, or insufficient to motivate them. With respect to Campagna's reason of "unprofessional conduct" – or with respect to any of the conduct said to constitute it (leaving Campagna's facility unstaffed by a nurse in violation of policy and professional obligations, and the confrontational email exchange with Vinluan in which Key involved other staff) – the record evidence does not demonstrate falsity. To the contrary, substantial evidence corroborates the existence, nexus, and sufficiency of Campagna's reasons for termination.

Key's argument sounded largely under the "irrelevance" approach in claiming that Campagna's "abandonment" concern – though based in fact and sufficient to motivate adverse action – here was not *actually* the motivator, as evident by Campagna's supposedly overlooking Nelson's abandonment but not his. However, as explained above, the factual record does not sufficiently liken Nelson's departure to Key's so as to nullify the nexus between (i) Key's termination and (ii) Campagna's sufficient business reasons as corroborated by Key's testimony and shown to have existed in the employer's mind at the time of its adverse action. The record contains no confounding variable in time or space unhitching the nexus between Campagna's reasons (evidenced by credible documentary and testimonial evidences) and the discipline or termination.

While suspect practices, unusual departures from official policy, and statistical proofs can also be relevant to a showing of pretext, and Key alleges these also, they do not transform the record in this case. Deviations from standard procedures can give rise to an inference of pretext, and Key complains that Campagna's Employee Discipline Report deviated from Campagna's termination procedure in that it was signed by the Deptuy Director, HR Director, but not the CEO. However, it is already established that the CEO was aware of the situation, and in the context of this record, none of these circumstances are evidentially tainted with sexual or racial animus, profoundly suspect, or otherwise probative of pretext. The Indiana Civil Rights Law only warrants inquiry into the veracity – not the wisdom – of business practices, no matter how "high-handed," "mistaken," or "irrational." See Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 560 (7th Cir. 1987); See also Zick v. Verson Allsteel Press Co., 644 F. Supp. 906, 911 (N.D. Ill.

1986), aff'd, 819 F.2d 1143 (7th Cir. 1987). Lastly, though Key's termination rendered Campagna's nursing team all-female, this statistical result is not availingly suspicious and is too lightweight an anchor in a tug against the preponderance of substantial evidence pointing to nondiscriminatory motives.

Previous instances of disparate treatment could also be probative of pretext; none appear in the record. In sum, Key's presentation falls short of demonstrating that Campagna's reasons for discipline, termination, or any other treatment are unworthy of credence.

Neither does the record substantiate the "discrimination" component of the alleged "pretext for discrimination." Simply stated, the instant record evidences no employment actions taken against Key based on his sex or race. A full and fair opportunity to be heard yielded no indications of sex- and/or race-based animus or intentional sex- and/or race-based adverse actions or treatment. It is not possible to infer intentional discrimination from this record as a whole. Nothing in the record indicates that, had Key not been male or African American and all else remained the same, he would have avoided discipline, kept his job or enjoyed better treatment.

The Indiana Civil Rights Law promises equal opportunity in employment and remedy for the denial thereof based on one's race or sex. Key failed to carry his burden of demonstrating by a preponderance of evidence that – because of sex and/or race – he was denied equal opportunity. Campagnaset forth unrebutted proofs of legitimate nondiscriminatory motives. Therefore, according to the record and applicable law, it is ultimately found and concluded that Campagna did not commit an unlawful discriminatory practice as alleged.

Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

## ORDER

1. The above-referenced Complaint of Discrimination is **DISMISSED**, with prejudice.
2. This order becomes the final order disposing of the proceedings immediately upon affirmation under Ind. Code § 4-21.5-3-29. Ind. Code § 4-21.5-3-27(a).

**Administrative Review**

Before these Findings of Fact, Conclusions of Law, and Order become the final order in this case pursuant to Indiana law, administrative review may be obtained by parties not in default by the filing of a writing identifying with reasonable particularity each basis of each objection

**within fifteen (15) days after service of this order**. Ind. Code § 4-21.5-3-29(d). Subject to Ind. Code § 4-21.5-3-1, the filing of a document in proceedings before the ICRC can be completed by mail, personal service, fax, or electronic mail to:

Docket Clerk
c/o Indiana Civil Rights Commission
100 North Senate Avenue, N300
Indianapolis, IN 46204
Fax: 317-232-6580
Email: aneromosele@icrc.in.gov

A party shall serve copies of any filed item on all parties. Ind. Code § 4-21.5-3-17(c).

SO ORDERED this 15th day of August,

Hon. John F. Burkhardt
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
*Anehita Eromosele, Admin Asst.*
*317-234-6358*

**Certificate of Service**

Served this 15 day of August by United States Mail on the following:

Lawrence Key
14432 South Eggleston Avenue
Riverdale, IL 60827-2653

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Administrative Assistant to the Administrative Law Judge,
Anehita Eromosele