BEFORE THE
STATE EMPLOEES' APPEALS COMMISSION

IN THE MATTER OF:

SUZANNE E. ESSERMAN Petitioner,	)	
v.	)	SEAC No. 03-14-018
INDIANA DEPARTMENT OF ENVIROMENTAL MANAGEMENT Respondent.	)	

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER OF THE ADMINISTRATIVE LAW JUDGE

I. Introduction and Summary

The ALJ issued the original Findings of Fact, Conclusions of Law, and Non-Final Order on April 14, 2016 in this matter, which is hereby incorporated by reference and oral argument was held on August 9, 2016. The Commission affirmed the ALJ's decision, but remanded to the ALJ to address the issues regarding Petitioner's sexual harassment complaint, as well as Petitioner's disabilities claim. The ALJ was also instructed to analyze Petitioner's cat's paw theory. In accordance, the ALJ discusses the following issues below.

II. Sexual Harassment

Petitioner claims that she was retaliated against for reporting sexual harassment in the workplace. In order to prove a claim of retaliation, Petitioner "must show (1) that she engaged in a statutorily protected activity; (2) that she suffered a materially adverse action by her employer; and (3) there was a causal link between the two." *Silverman v. Bd. of Educ. of City of Chicago*, 637 F.3d 729, 740 (7th Cir. 2011) (internal citations omitted).

Petitioner asserted that in order to prove retaliation, she used a "convincing mosaic" of circumstantial evidence to infer intentional discrimination by the decision maker." *Id.* "The "convincing mosaic" approach to prove a discrimination claim may present any of three broad types of circumstantial evidence." *Id.* The first type of circumstantial evidence is "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of

discriminatory intent might be drawn." *Id.* The second type of circumstantial evidence is "evidence showing that the employer systematically treated other, similarly situated" employees better. *Id.* 'The third type of circumstantial evidence is evidence that the plaintiff suffered an adverse employment action and that the employer's justification is pretextual." *Id.*

As for the first type of circumstantial evidence, Petitioner filed a sexual harassment complaint against two (2) of her co-workers in May, 2011. (Pet'r. Test.). Once the complaint was filed, Petitioner went on Family Medical Leave ("FML") for six months. (Pet'r. Test.). While Petitioner was out on leave, the Indiana State Personnel Department ("SPD") investigated the sexual harassment complaint, but concluded in November, 2011, through a letter to Petitioner that the allegations were unwarranted and unsupported by the evidence (Pet'r. Ex. 5). In regards to timing and other bits and pieces from which an inference of discriminatory intent may be drawn, Petitioner filed the sexual harassment complaint in May, 2011, but wasn't terminated until January, 2014, a lapse of over 2 (two) years. The timing in this case does not help to establish a causal link between Petitioner's sexual harassment complaint and her termination. *See Everroad v. Scott Truck Sys., Inc.,* 604 F.3d 471, 481 (7th Cir. 2010).

Additionally, Petitioner claimed that she was terminated for filing the complaint because Ms. Peggy Dorsey ("Dorsey"), the Deputy Assistant Commissioner in the Office of Land Quality for Respondent, had recommended the termination of Petitioner before she was transferred to the Excess Liability Trust Fund ("ELTF") section. Yet, instead of being terminated, Petitioner was transferred to the ELTF section because the then-Commissioner, Thomas Easterly ("Easterly"), felt she could do the work if given a change of scenery. (Easterly Test.) This proves that Respondent did not terminate Petitioner for filing the complaint, but instead terminated her for failed performance.

In reference to the second type of circumstantial evidence, there is no evidence that Petitioner was treated systematically different than similarly situated employees. In fact, Petitioner was given a second chance by Easterly to be transferred to a different section on a clean slate. (Easterly Test.). As for the third type of circumstantial evidence, Petitioner failed to establish a pretext with "evidence suggesting that retaliation was the most likely motive for the termination." *Sanchez v. Henderson*, 188 F.3d 740, 746 (7th Cir. 1999).

There is no causal link between Petitioner filing a sexual harassment complaint against her co-workers and her termination. Petitioner was not terminated as retaliation for complaining of sexual harassment; she was terminated because she received "does not meet expectations" performance appraisals from 2009 through the time she was terminated in 2014. Dorsey recommended termination before Petitioner was transferred to the ELTF section, not because Petitioner had filed a sexual harassment complaint against her co-workers, but because of Petitioner's continued lack of work performance (Pet'r. Ex. 6). Petitioner has failed to offer any

evidence to show that her protected activity was related to her termination. "Title VII retaliation claims require proof that the desire to retaliate was the but—for cause of the challenged employment action." *Otey v. City of Fairview Heights*, 125 F. Supp. 3d 874, 884 (S.D. Ill. 2015) (internal citations omitted). Respondent did not show a desire to retaliate against Petitioner causing her termination. In fact, after Petitioner was transferred, she continued to not meet Respondent's work expectations and was ultimately terminated in 2014. Thus, Petitioner's sexual harassment allegations bear no fruit here.

III. Petitioner's disability claims

Petitioner next asserts that she was terminated in retaliation for her disability. In order to prove a claim of retaliation, Petitioner "must show (1) that she engaged in a statutorily protected activity; (2) that she suffered a materially adverse action by her employer; and (3) there was a causal link between the two." *Silverman*, 637 F.3d at 740. As she did with her sexual harassment argument, Petitioner asserted in her findings that in order to prove retaliation, she used a ""convincing mosaic" of circumstantial evidence to infer intentional discrimination by the decision maker.

According to *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 681 (5th Cir. 1996), "the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability...." 42 U.S.C. § 12112(a)." Discriminating against an individual with disabilities means that the employer is not providing that individual with the proper reasonable accommodations to meet their physical or mental needs, unless that employer can show that the accommodation would pose an undue burden on the employer. *Id.* Reasonable accommodations can include "job restructuring, part-time or modified work schedules...." *Id.*

"Reasonable accommodation is an element of a *prima facie* case of discrimination under the ADA, § 12111(8), and Petitioner thus bears the burden of proof of reasonableness." *Id.* at 683. First, Petitioner must show that her disability limited her life activities. *Id.* at 682. Then she must have show that "with or without reasonable accommodations, she could perform the essential functions of the employment position." *Id.* "An employer does not violate the ADA when it fires an employee for inability to perform any job function, however trivial, when that inability has nothing to do with the employee's disability." *Id.*

In this case, Petitioner was not retaliated against for being accommodated during all aspects of her employment for her disabilities. Petitioner went on approved leave for six months starting in June, 2011 until December, 2011. *See also* ALJ's Conclusions of Law No. 28. She again went on approved medical leave from March, 2012 through April, 2012. *Id.* Petitioner then went on FML a third time from January 28, 2013 through June 2, 2013. *Id.* When she came back to work on June 3, 2013, Petitioner was told by her doctor to work no more than twenty

(20) hours per week for four (4) weeks, then thirty (30) hours per week for two (2) weeks. *Id.* Petitioner was then hospitalized from June 25-26, 2013 and was unable to work. *Id.* Petitioner began work again on June 27, 2013 and then was out for a doctor's appointment on July 5, 2013. *Id.* After her doctor's appointment, Petitioner worked until July 22, 2013, after which Petitioner returned to work full-time. *Id.* On August 13, 2013, Petitioner was out again on FML, which lasted until October 21, 2013. *Id.*

Petitioner met with SPD on November 30, 2012, to discuss her medical accommodations. *See also* ALJ's Conclusions of Law No. 33. At the meeting, Petitioner indicated that because of her condition and the amount of medicine she was required to take, she had to use the restroom frequently. *Id.* Petitioner claimed that while she was accommodated to use the restroom whenever she wanted, extra time was needed because she had difficulty walking to the restroom which caused her to be slower completing her work. (Pet'r. Objections at 10). Petitioner's restrictions did not indicate that Petitioner's work should be adjusted because she needed additional time walking to and from the restroom nor did she bring up the issue of needing extra time at the meeting. (Resp't. Ex. B). The doctor's note stated only that Petitioner had difficulty walking and breathing, and that her bladder and respiratory systems were affected by her disability. *Id.*

Petitioner also claimed that no one from SPD who was at the accommodation meeting testified at the evidentiary hearing. (Pet'r. Objections at 10). However, it is obvious that accommodations were made, a fact that Petitioner admitted at the hearing (Resp't Test.). Further accommodations consisted of Respondent's HR Department telling Steiff to suspend the Work Improvement Plan ("WIP") while Petitioner's disability accommodations were being met. (Steiff Test.). Although the WIP was never reinstated, Petitioner was not held accountable for it never being completed. *Id.* When Petitioner came back from her FML and was only working twenty (20) hours a week, her work load was reduced and a Development Plan ("Plan") was set in place to refocus Petitioner, allowing her to complete each week of tasks in two week increments since she was only working part time, based on her restrictions. *See also* ALJ's Findings of Fact No. 43. Steiff had modified a 2013 Work Profile upon Petitioner's return from leave in June 2013, which removed two of the lesser important Performance Expectations in order to focus Petitioner on the core parts of Petitioner's job duties. (Steiff Test.). Ultimately, Petitioner could not meet Respondent's expectations even when Steiff reduced Petitioner's goal amounts based upon her being out for vacation or sick leave. *Id.*

Respondent never claimed that accommodating Petitioner would pose an undue burden on them. Quite the opposite. SPD met with Petitioner on November 30, 2012, to go over specific accommodations that Petitioner needed in order to get her work done. Petitioner never mentioned that she wasn't capable of doing her work or that she needed extra time using the restroom; she merely stated that she would need more bathroom breaks to accommodate her

disability. (Pet'r. Test.). Even with all these accommodations, Petitioner was still unable to meet Respondent's expectations and to perform in her job.

Lastly, Petitioner was not retaliated against because she had a disability. There is no causal link between Petitioner's disability and her termination. Petitioner was not terminated as retaliation for needing accommodations due to her disability; she was terminated because she received "does not meet expectations" performance appraisals from 2009 through the time she was terminated in 2014. Petitioner was accommodated by Respondent and was even given a modified work profile to help Petitioner succeed and to focus Petitioner on the more important work items, but she still was unable to perform by receiving a does not meet expectation performance appraisal in 2013. (Pet'r. Ex. 25 at 5). Petitioner has failed to offer any evidence to show that her protected activity was related to her termination. "Title VII retaliation claims require proof that the desire to retaliate was the but—for cause of the challenged employment action." *Otey v. City of Fairview Heights*, 125 F. Supp. 3d 874, 884 (S.D. Ill. 2015) (internal citations omitted). Respondent did not show a desire to retaliate against Petitioner causing her termination. In fact, after Petitioner was accommodated for the things she requested accommodation for during the meeting with SPD on November 30, 2012, she continued to have work performance issues. Thus, Petitioner's retaliation claim for her disability falls short.

IV. Petitioner's "cat's paw" theory of liability.

Petitioner finally alleged that she was the victim of the "cat's paw" theory. The "cat's paw" theory of liability may be imposed on an employer "where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action." *Smith v. Bray*, 681 F.3d 888, 897 (7th Cir. 2012) (internal citations omitted). Petitioner claims Dorsey deliberately put a target on her back by telling her new supervisors that they needed to monitor her and report back to Dorsey. Petitioner claims that Bobby Steiff had discriminatory animus toward her which ultimately lead to her termination. Petitioner also claims that Commissioner Easterly and Kent Abernathy were involved in her termination but had no personal knowledge of Petitioner's performance. Further, Petitioner claims that her performance expectations did not take into account her absences from work due to her FML or disabilities.

Dorsey testified at the evidentiary hearing that when Petitioner was transferred to the ELTF section, she asked ELTF's then Section Chief and Branch Chief to monitor and communicate with Petitioner and report back to her about any negative communication involving Petitioner, due to Petitioner's previous problems. *See also* ALJ's Finding of Facts No. 22. Dorsey claims that she did this because she had a new supervisor and he wanted him to be aware about Petitioner's issues and to give her a chance. (Dorsey Test.).

Petitioner was given multiple chances by Steiff to show that she could do her work and was also placed on a WIP which was designed to set Petitioner up for success by giving her work she liked to do. *See also* ALJ's Findings of Fact No. 28. Petitioner was also given a Plan that was set in place by Steiff in order to refocus Petitioner on tasks that were taken away from her in the original WIP. *See* ALJ's Findings of Fact No. 42-43. Petitioner was then given a work profile by Steiff which focused on a core number of tasks for Petitioner to accomplish. Steiff revised the work profile to fit around Petitioner's FML leave, allowing Petitioner leeway on lower priority tasks. *See* ALJ's Findings of Fact No. 45. When evaluating Petitioner's work performance, Steiff took into account Petitioner's FML leave and whether or not she had come to work and for how many hours. *Id.* No. 53. Steiff did not show discriminatory animus toward Petitioner. Petitioner showed that she could not meet her performance goals even when prorated for her FML throughout her time working for Respondent. (Pet'r. Ex. 25 at 3).

Lastly, it cannot be said that Abernathy did not have personal knowledge of Petitioner's work performance. When Petitioner was working as a Senior Environmental Manager I in the Contract Section in 2011, Abernathy was the then Chief of Staff for the Contract Section. Abernathy was very familiar with Petitioner's work and the problems she was having. (Abernathy Test.). Abernathy stated that Petitioner approved certain contracts without transmitting them to him for final approval and he had questioned why those contracts had never been processed. *Id.* Also, according to Abernathy, Petitioner had contracts sitting on her desk that were well over their due dates (4-5 months) before he ever saw them and was able to execute them. He questioned Petitioner's work ethic. *See also* ALJ's Findings of Fact No. 5-8. Aside from Abernathy having knowledge of Petitioner's work performance, Easterly was well aware of Petitioner's poor work performance. Easterly was the one who disregarded Dorsey's recommendation to terminate Petitioner and instead transferred her to a different section because he felt that she could do the work, given a change of scenery. (Easterly Test.). Easterly ultimately made the decision to terminate Petitioner after meeting with groups of staff, assistant commissioners and deputies regarding Petitioner's work- *Id. See also* ALJ's Findings of Fact No. 20, 56. Thus, the ALJ finds that there was no animus on the part of Respondent that affected the decision to terminate Petitioner and that the decision to terminate was based solely on Petitioner's inability to perform the work assigned to her.

V. Conclusion

All other aspects of the ALJ's original Findings of Fact and Conclusions of Law remain unchanged. Accordingly this Order constitutes the Final Order of the Commission under I.C. § 4-15-2.2-42(h). The Commission is the ultimate authority, and this action is its Final Order and determination in this matter. A person who wishes to seek judicial review must file a petition with an appropriate court within thirty (30) days and must otherwise comply with I.C. § 4-21.5-5.

DATED: August 23, 2016

Hon. Gabriel Paul
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Room N501
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
gapaul@seac.IN.gov

A copy of the foregoing was sent to the following:

Mary J. Lapointe
Lapointe Law Firm, P.C.
One North Pennsylvania Street
Suite 730
Indianapolis, IN 46204

Kathleen Mills
Julie Lang
Counsel
Indiana Department of Environmental Management
100 N. Senate Avenue, IGCN Room 1307
Indianapolis, IN 46204

Courtesy Copy to:

Matt Brown
State Personnel Department
402 W. Washington Street
Room W161
Indianapolis, IN 46204