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.	)	

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

I. Introduction and Summary

This administrative review is conducted pursuant to Ind. Code § 4-15-2.2 *et seq.* (the "Civil Service System") and Ind. Code § 4-21.5-3 *et seq.* ("AOPA"). The operative pleading is Suzanne Esserman's ("Petitioner") Complaint filed March 10, 2014, with the State Employees' Appeals Commission ("SEAC") against the Indiana Department of Environmental Management ("Respondent"). Petitioner was an unclassified (at-will) employee working as a Senior Environmental Manager I for Respondent at the time of her termination. The issue before SEAC is whether Petitioner was terminated in contravention of a law, rule or public policy.[1]

An evidentiary hearing in this matter was held on January 27-28, 2016, before the undersigned Chief Administrative Law Judge. Petitioner Esserman appeared by counsel, Ms. Mary J. Lapointe. Respondent appeared by counsel, Ms. Julie Lang. Having reviewed the arguments, witness testimony, admitted evidence, applicable law, and proposals,[2] and being duly advised, the ALJ issues the following Findings of Fact, Conclusions of Law, and Non-Final Order. Petitioner was unable to prove by a preponderance of the credible evidence that Petitioner's termination breached public policy. Judgment for Respondent.

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[1] *See,* Ind. Code § 4-15-2.2-24(b) (stating that an unclassified employee may be terminated for any reason that does not contravene public policy).

[2] Both parties were given an opportunity to submit post-hearing briefs or proposals, which each subsequently filed.

II. Legal Standard

Under the Civil Service System, a state agency may dismiss, demote, discipline, or transfer an employee in the unclassified service "for any reason that does not contravene public policy." Ind. Code § 4-15-2.2-24(b). "An employee in the unclassified service is an employee at will and serves at the pleasure of the employee's appointing authority." I.C. § 4-15-2.2-24(a). "Indiana generally follows the employment at-will doctrine, which permits both the employer and the employee to terminate the employment at any time for a good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction,* 861 N.E.2d 704, 706 (Ind. 2007) (citations omitted).

Recognized exceptions to the at-will doctrine based on public policy have traditionally only been found where an employee was terminated or disciplined for exercising a statutory right or refusing illegal conduct that would lead to personal liability. Put another way, the courts ask whether the termination or discipline itself was illegal in light of applicable statutory law;[3] a merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *Baker v. Tremco Inc.*, 917 N.E. 2d 650, 653-655 (Ind. 2009); *Meyers*, 861 N.E.2d at 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

III. Findings of Fact

1. Petitioner began her employment with Respondent on April 11, 1983 and was terminated on January 17, 2014. (Pet'r. Compl.).

2. At the time of her termination, Petitioner was employed as an unclassified (at-will) Senior Environmental Manager I in the Excess Liability Trust Fund ("ELTF") claims section of Respondent. (Pet'r. Compl.).

3. Before this, however, Respondent employed Petitioner first as a Grant Coordinator working in the Super Fund Federal Program, followed by stints in the Office of Water Quality as an Environmental Scientist and the Office of Environmental Response as a Senior Environmental Manager III. (Pet'r. Test.).

[3] Non-comprehensive examples include illegal discrimination on the basis of race, national origin, sex, age, disability, veteran status, religion, free speech, political affiliation; or retaliation for filing a discrimination Compl. or exercising statutory rights such as workers' compensation rights.

4. As a Senior Environmental Manager I, Petitioner worked from Respondent's Office of Land Quality in Indianapolis, Indiana and was responsible for reviewing claims, budgets, invoices, payments, and doing cost benefit analyses. (Pet'r. Compl.).

5. Mr. Kent Abernathy ("Abernathy"), Respondent's then Chief of Staff, testified that Petitioner was in his Contract Section in 2011. (Abernathy Test.).

6. Abernathy testified that he was familiar with Petitioner's work and that problems with Petitioner occurred between late July, 2011 and early August, 2011. (Abernathy Test.). Abernathy stated that Petitioner approved certain contracts without transmitting them to him for final approval. *Id.* He questioned why these contracts had never been processed. *Id.*

7. Once Petitioner approved a contract, it went to Abernathy for final approval and execution. (Abernathy Test.). According to Abernathy, Petitioner had contracts on her desk that were well over their due dates (4-5 months) before he ever saw and was able to execute them. *Id.*

8. Abernathy then began to question Petitioner's work ethic. (Abernathy Test.).

9. Similarly, Ms. Peggy Dorsey ("Dorsey"), who was the Deputy Assistant Commissioner in the Office of Land Quality for Respondent, testified that Petitioner had trouble managing her workload. (Dorsey Test.).

10. Dorsey was familiar with Petitioner's work performance because she was involved in Petitioner's performance appraisals and reviews. (Dorsey Test.).

11. In May, 2011, Petitioner filed both a sexual harassment complaint and a ghost employment complaint against two (2) of her co-workers. (Pet'r. Test.).

12. Petitioner went on Family and Medical Leave ("FML") in the middle of June, 2011 for six months. (Pet'r. Test.).

13. On October 27, 2011, (during Petitioner's FML) Dorsey emailed Mr. Rich Ligman ("Ligman"), the Section Chief in the Operations Section, and asked him for all documentation that he had on Petitioner's work performance. (Pet'r. Ex. 4). In the same email, Dorsey also noted that she wanted the co-worker from the sexual harassment complaint to

document the problems he was having with Petitioner's workload so she could show Human Resources.[4] *Id.*

14. 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).

15. As a result of SPD's findings, Petitioner's counsel sent a letter to Respondent requesting that Petitioner be transferred out of the Office of Land Quality because Petitioner felt uncomfortable around her co-workers as a result of the sexual harassment complaint. (Pet'r. Ex. 7).

16. When Petitioner returned from FML in December, 2011, she was given her Annual Performance Appraisal ("Appraisal") by Ligman. (Resp't. Ex. G).

17. In Petitioner's Appraisal, Ligman gave her an overall "Does Not Meet Expectations" rating. (Resp't. Ex. G at 7). In the Appraisal, Ligman noted that there was a contract under Petitioner's control which was not executed on time, resulting in Respondent having to award it to the next highest bidder. *Id.* at 2. He also noted Petitioner took almost two (2) years to work on a simple contract involving a remediation that resulted in phone calls from the public and complaints to the Environmental Protection Agency accusing Respondent of not conducting proper operations and maintenance of the site. *Id.*

18. Ligman further noted in his evaluation that Petitioner did not demonstrate teamwork and that she had repeatedly failed to fulfill her designated role. (Resp't. Ex. G at 2). Ligman recommended to then-Commissioner Thomas Easterly ("Easterly") that Petitioner be terminated. *Id.*

19. Additionally, Dorsey also recommended to Easterly that Petitioner be terminated based upon her poor work performance. (Dorsey Test.).

20. Easterly testified that Respondent's policy on terminating employees during his tenure was that anyone could be hired to work for Respondent, but no one could be fired unless he signed off on the termination. (Easterly Test.). After hearing the recommendations regarding termination, Easterly decided to transfer Petitioner into a different section because he felt she could do the work, given a change of scenery. *Id.*

[4] The co-worker alleged to have been involved in a sexual affair by Petitioner was in charge of getting Petitioner's work done while she was on FML because he was in the same work group as her. (Dorsey Test.).

21. Petitioner was subsequently transferred to the ELTF on December 20, 2011, based on Easterly's decision. (Pet'r Test.).

22. When Petitioner was transferred into the ELTF, Dorsey asked the ELTF's then Section Chief, Mr. Roy Harbert ("Harbert"), and Branch Chief[5], Mr. Craig Schroer ("Schroer"), to monitor and communicate with Petitioner and report back to Dorsey about any negative communication involving Petitioner, due to Petitioner's previous problems. (Pet'r. Ex. 10). Dorsey asked Harbert to do this because Harbert was a new supervisor and Petitioner was a new employee of the ELTF. (Dorsey Test.).

23. When Petitioner first came into the ELTF, Bobby Steiff ("Steiff") was assigned to help train Petitioner on Senior Quality Control ("SR QC") review. (Steiff Test.).

24. Steiff became the ELTF Claims Section Chief in July, 2012. (Steiff Test.).

25. After Steiff became ELTF Section Chief, she gave Petitioner an Interim Appraisal which covered the period of January 1, 2012 to October 1, 2012. (Steiff Test.).

26. Petitioner's overall rating on the 2012 Interim Appraisal ("2012 Appraisal") was "Does Not Meet Expectations". (Resp't. Ex. H). The 2012 Apprasisal did note that Petitioner's work was well prepared, clear, and usually accurate; however, she lacked urgency, commitment, and effort in completing her work in a timely manner. *Id.* at 3.

27. Along with the 2012 Appraisal, Steiff also gave Petitioner a Work Improvement Plan ("WIP"). (Pet'r. Ex. 18).

28. The WIP was designed to set Petitioner up for success by giving her work that she liked to do. (Steiff Test.). The WIP did not include full claims review or SR QC claims review, and instead focused on triage, data package prep, and writing denial letters. (Pet'r. Ex. 18 at 2).

29. On October 25, 2012, a letter was sent to Respondent from Petitioner's counsel alleging that full claim review and SR QC review had been removed from Petitioner in the WIP because of her objections to reduced scrutiny of certain timesheets that were discussed in an October 1, 2012 section meeting. (Pet'r. Ex. 15).

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[5] In Respondent's chain of command, the Assistant Commissioner was in charge of running the day to day affairs of the entire office, followed by the Deputy Assistant Commissioner, the Branch Chief, Section Chief, and line staff. When Petitioner was transferred to the ELTF, Schroer was the Branch Chief and Harbert was the Section Chief until Bobby Steiff was appointed as Section Chief.

30. Steiff testified that she did not remove the full claim review or SR QC reviews from Petitioner because she objected to the reduced scrutiny; rather, it was because Steiff wanted Petitioner to improve. (Steiff Test.). Steiff gave Petitioner tasks that she could easily accomplish, even though she had been trained in claim review and SR QC review. *Id.*

31. The October 25, 2012 letter also addressed Petitioner's disabilities, which prompted a meeting with SPD on November 30, 2012 to discuss her accommodations. (Pet'r. Ex. 29).

32. At the meeting with SPD, Petitioner notified them that her conditions required her use of the restroom frequently (about four (4) times daily with each trip taking about 5-10 minutes). (Pet'r. Ex. 29 at 1).

33. When Petitioner needed to use the restroom, she would use the handicap stall on her floor. (Pet'r. Test.). If the handicap stall didn't have enough toilet paper, she would then use a different handicap bathroom on another floor, which caused her to be away from her desk for more than the time Petitioner requested in her accommodation. *Id.*

34. Petitioner acknowledged that the building janitors were instructed to leave extra toilet paper in the bathroom stalls and on the bathroom counter for Petitioner, but she claimed that it was hard to carry the toilet paper to her stall because she often used a cane or walker and that using another floor's restroom seemed easier to her. (Pet'r. Test.).

35. Respondent's HR Department told Steiff to suspend the WIP while Petitioner's disability accommodations were being met. (Steiff Test.). Ultimately, the WIP was never reinstated. *Id.* It was never held against Petitioner that the WIP was never completed. *Id.*

36. Aside from Petitioner's disability accommodations, Petitioner had alleged that she was being retaliated against for not applying reduced scrutiny to certain contractors' timesheets.

37. In October, 2012, a meeting was held in the ELTF in which the claims reviewers were instructed to apply reduced scrutiny to claims submitted by certain contractors. (Pet'r. Post Hr'g. Br. at 4). Petitioner stated that she objected to applying reduced scrutiny both at the meeting and in a letter from Petitioner's counsel to Respondent. *Id.*

38. Schroer clarified in his testimony that there had been reduced scrutiny when it came to the Corrective Action Progress Report (CAPR) claims. (Schroer Test.). These reduced scrutiny claims were not elaborate claims and were the most common ones received in the

program. *Id.* Reduced scrutiny only applied to the labor costs and time sheets for Respondent's most compliant contractors. *Id.*

39. Since Petitioner refused to apply reduced scrutiny to timesheets on certain claims, she was not to work on the claims that were given reduced scrutiny, but was instead to continue working on SR QC claim reviews. (Steiff Test.).

40. It was Petitioner's job to sign off on reviewed claims. (Schroer Test.). If Petitioner had an issue with a claim, she was to discuss the problem with Steiff, and if the problem persisted, with Schroer. *Id.*

41. Schroer found that Petitioner was not achieving the quantity measures of her job description. (Schroer Test.). He stated that Petitioner was capable of meeting her monthly goals, but was unwilling to follow the direction of her supervisor when reviewing SR QC claims. *Id.*

42. Petitioner went on FML from January 28, 2013-June 2, 2013. (Pet'r. Ex. 26). On June 10, 2013, she was given her 2012 Annual Performance Appraisal. *Id.* Her overall rating in this appraisal was "Needs Improvement". (Resp't. Ex. J). Petitioner did not receive another WIP based on this appraisal, but instead was given a Development Plan. ("Plan") (Resp't. Ex. K).

43. The Plan was set in place to refocus Petitioner on the tasks that were taken away from her in the original WIP, including the claim reviews and the SR QC claim reviews. (Steiff Test.). Petitioner's responsibilities under this Plan were to complete each week of tasks in two week increments because she was working part time (4 hours a day), based on instructions from her doctor. *Id.*

44. Petitioner never completed the Plan. (Steiff Test.). She completed some of the tasks in the Plan, but not all of them. *Id.* Steiff testified that the items in the Plan were designed to help Petitioner complete the items in her work profile. *Id.* Steiff and Schroer periodically checked on Petitioner to make sure she was completing her tasks. *Id.*

45. On December 28, 2012, Petitioner was given a work profile by Steiff which focused on a core number of tasks for Petitioner to accomplish. (Resp't. Ex. I at 8; Steiff Test.). Steiff revised the work profile when Petitioner got back from FML on June 3, 2013, to eliminate lower priority tasks. (Resp't. Ex. D).

46. When Petitioner returned from FML on June 3, 2013, she started working part-time for twenty (20) hours per week for four (4) weeks, and then thirty (30) hours per week for two (2) weeks. (Pet'r. Ex. 26). Shortly thereafter, Petitioner was out on FML from June 25-26,

2013. *Id.* Upon her return on June 27, 2013, Petitioner resumed working part time and on July 22, 2013, Petitioner returned to work full-time. *Id.*

47. In the 2013 revised work profile, Petitioner was required to perform SR QC reviews on no less than $1.4 million dollars in claims per month. (Resp't. Ex. D at 4).

48. Steiff created the $1.4 million dollar goal by dividing the total number of claims that came in by the number of employees in Petitioner's section. (Steiff Test.).

49. Claims being reviewed were expected to be accurate 90% of the time. (Steiff Test.). Steiff testified that she did not add the 90% figure to the employees' expectations, but was merely in place to "keep the employees honest." *Id.*

50. Steiff stated that if Petitioner kept finding errors in the claims she was reviewing during SR QC, she should have sent them back to the claims reviewer to make corrections because there was not enough time in SR QC for her to re-review an entire claim. (Steiff Test.).

51. Each employee's computer had a device that tracked the claims and their dollar amounts. (Steiff Test.). Steiff would ask each employee for their tracker on a monthly basis to see their progress. *Id.* Steiff testified that when she asked Petitioner for her tracker, Petitioner would tell her that she was doing the best she could. *Id.* Meanwhile, Steiff would hear Petitioner chatting with other employees about non-work related things. *Id.* By the end of 2014, Steiff stated she was asking for Petitioner's tracker almost every week. *Id.*

52. Petitioner's overall rating for her 2013 Annual Performance Appraisal was "Does Not Meet Expectations". (Pet'r. Ex. 25).

53. In evaluating Petitioner's 2013 work performance, Steiff only counted the time when Petitioner was in "work status", or able to come to work and not on FML. (Steiff Test.). Steiff did not hold Petitioner responsible for any monthly goals in which she was on FML. *Id.* Petitioner subsequently went on FML from August 13, 2013 through October 21, 2013, had an approved vacation day November 4, 2013, and had approved vacation and sick days from December 4-5, 2013. *Id.* At no time was Petitioner held responsible for the work that came in while she was not in the office. *Id.* Further, Steiff prorated Petitioner's work expectation goals based on her disability accommodations. *Id.*

54. Petitioner did not meet her goals for any month in 2013, even when prorated for her FML. (Pet'r. Ex. 25 at 3). Petitioner testified that she did not believe she met any of her numeric goals for 2013. (Pet'r. Test.).

55. The Assistant Commissioner of Land Quality for Respondent, Bruce Palin ("Palin"), made the recommendation to Easterly that Petitioner be terminated based on her repeated lack of meeting expectations in her work profile, along with her failure on every WIP (excluding the one which was never reinstated). (Palin Test.). Palin testified that Petitioner was terminated because she wasn't performing at the level required for her job. *Id.*

56. Easterly ultimately made the decision to terminate Petitioner on January 17, 2014, after meeting with groups of staff, assistant commissioners, and deputies regarding Petitioner's work- including Palin, Dorsey and Abernathy. (Easterly Test.). Thereafter, on January 17, 2014, Petitioner was formally terminated. (Pet'r. Ex. 28).

IV. Conclusions of Law

1. Indiana follows the at-will employment doctrine, which permits an employer to dismiss, demote, discipline, or transfer an employee "for any reason that does not contravene public policy." I.C. § 4-15-2.2-24(b).

2. Petitioner bears the burden of proving "that a public policy exception to the employment at will doctrine was the reason for the employee's discharge." I.C. § 4-15-2.2-42(f).

3. Petitioner was responsible for knowing what her job description was and performing those duties. Respondent provided Petitioner with the tools to succeed in her job, including the implementation of a WIP and Development Plan when Petitioner struggled with the quantity and quality of work. Respondent transferred Petitioner to another section to accommodate her after the sexual harassment claim was decided and accommodated her once she got back from FML. Because Petitioner was in a job position that required not only quality but also quantity work, Petitioner needed to meet work deadlines even after all her accommodations had been made.

4. Petitioner alleges that she was terminated in retaliation for being a whistleblower, for filing a sexual harassment complaint against two of her co-workers, and requesting disability accommodations. (Pet'r. Test.).

5. First, Petitioner claims she was unjustly terminated in retaliation for being a whistleblower. She alleges that she made numerous objections to the misuse of State funds and Respondents use of reduced scrutiny for certain timesheets on claims and was terminated in retaliation to those objections. (Pet'r. Compl.).

6. Petitioner cites both I.C. § 5-11-5.5-8 and I.C. § 4-15-10-4 in her Complaint as the basis for relief. (Pet'r. Compl.). However, Petitioner is not entitled to seek relief under the Whistle Blower Law ("WBL"), I.C. § 5-11-5.5-8, because she was a state employee at the time of termination. Rather, the State Employee Bill of Rights ("BOR"), I.C. § 4-15-10-4, is applicable in this case. The ALJ will discuss the BOR in more detail below; however, a short discussion of Petitioner's claims as they relate to the WBL is warranted beforehand.

7. In Indiana, the WBL protects whistleblowers from retaliation against their employers. I.C. § 5-11-5.5-8 provides relief for those petitioners who have been "(a) discharged, demoted, suspended, threatened, harassed, or otherwise discriminated against in the terms and conditions of employment by the employee's employer because the employee: (2) initiated, testified, assisted, or participated in an investigation, an action, or a hearing under this chapter." I.C. § 5-11-5.5-4 and I.C. § 5-11-5.5-7 together prohibit state employees from bringing a claim under the WBL. Under I.C. § 5-11-5.5-4, a civil action can only be brought by a state employee on behalf of the state. Under I.C. § 5-11-5.5-7, an individual lacks jurisdiction if they are a state employee, because this statute only applies to private, non-state employee citizens and not an at-will state employee such as Petitioner. Petitioner also cannot bring a claim under the WBL because in doing so, she would be bringing a claim on behalf of the Respondent against the Respondent, a rare occurrence, if ever. Therefore, the legislature created the BOR so that individual state employees could bring claims against their State employers.

8. Since Petitioner was a state employee at the time of her termination, her action is being addressed under the State Employee Bill of Rights, I.C. § 4-15-10-4 ("BOR").

9. The BOR states that a whistleblower making a report may not be dismissed, denied salary increases, deprived employment-related benefits, denied a promotion, transferred, reassigned, or demoted. *Ogden v. Robertson*, 962 N.E.2d 143, 146 (Ind. Ct. App. 2012). Under section (c) of this statute, if an employee is disciplined for blowing the whistle, they are entitled to the administrative appeals process outlined in I.C. § 4-15-2.2-42. *Id.* In order to qualify for relief under this statute, a prior written report to a supervisor or the Inspector General upon which the alleged retaliation is based is a required prerequisite. *Pickens v. DOC*, SEAC 10-11-160, Final and Non-Final Orders (2012), (subsequently affirmed on judicial review 2013) analyzing I.C. § 4-15-10-4 to 5 in detail, and citing *Ogden v. Robertson*, 962 N.E. 2d 134 (Ind. Ct. App. 2012)).

10. Here, Petitioner provided a written letter to Respondent regarding Petitioner's whistle blowing allegation on October 25, 2012. Although Petitioner did follow the proper procedure in making the claim, she has not shown that her termination was due to her being a whistleblower.

11. Under subsection (c) of the BOR, "an employee must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary action for knowingly furnishing false information." Here, Petitioner makes numerous allegations about being retaliated against for refusing to sign off on claims for misuse of State funds, but she did not provide proof of these allegations. Instead, Petitioner's supervisors accommodated Petitioner by telling her that if there was an issue with a claim, she was to send it back to the claims reviewer (Steiff Test.), or if the problem continued, to take the issue up with Steiff, and/or Schroer. (Schroer Test.). Also, Petitioner has not shown that she was terminated for refusing to apply reduced scrutiny to certain timesheets because Steiff testified that Petitioner was not required to work on these types of claims. (Steiff Test.; Pet'r. Post Hr'g. Br. at 4). Therefore, Petitioner's claims under the BOR must fail.

12. In addition to Petitioner's allegations, Petitioner received "Does Not Meet Expectations" in performance ratings from 2009 up until her termination in 2014. (Resp't. Ex. F).

13. The 2009 Annual Performance Appraisal, the 2011 Annual Performance Appraisal, the 2012 Interim Appraisal, the 2012 Annual Performance Appraisal, and the 2013 Annual Performance Appraisal all portrayed Petitioner's trouble balancing her work and meeting deadlines. (Resp't. Ex. F at 4; Resp't. Ex. G at 4; Resp't. Ex H at 3; Resp't. Ex. J at 4; Pet'r. Ex. 25 at 2).

14. Dorsey, Steiff, Easterly, Schroer, and Palin all testified about Petitioner's performance issues and her failure to meet job expectations and work deadlines. Petitioner believes she was terminated because she refused to sign off on claims that had not been fully reviewed and because some contractors were given reduced scrutiny. More specifically, Petitioner complained about the reduced scrutiny timesheets. Petitioner stated that she refused to sign off on claims if she felt the numbers were wrong. (Pet'r. Test.).

15. At an October 2011 meeting, SR QC reviewers were told to apply reduced scrutiny to some of the contractors' timesheets. (Pet'r. Post Hr'g. Br. at 4.) At this meeting, Petitioner refused to apply the reduced scrutiny to the timesheets and therefore was not assigned this task. *Id.* Instead, Petitioner was to continue her SR QC tasks. (Steiff Test.). Petitioner testified that as a Senior Environmental Manager I, her task in doing SR QC review of claims was to review the claims to make sure that costs were being reimbursed correctly. (Pet'r. Test.). She stated that adequate claims were not being sent out because certain documents were not present or accurate. *Id.* She also stated that she could have reviewed claims more quickly if the correct and accurate documentation had been made available. *Id.* Further, Petitioner claims that

if reduced scrutiny had been applied to claims[6], she would have gotten through claims more quickly, but because she refused to do so, her work suffered. (Pet'r. Test.).

16. Steiff, who introduced the reduced scrutiny application to certain claims, applied reduced scrutiny to time sheets because she thought it was the most efficient thing to do at the time. (Steiff Test.). Steiff testified that her department can, but usually does not ask contractors for time sheets. *Id.* By not adding up time sheet hours, a claims reviewer could review the claim more quickly. *Id.* Steiff stated that Petitioner had not been doing the reduced scrutiny on the timesheets and was not required to do them. *Id.* Further, because Petitioner had previously expressed an issue with these claims at an October, 2012 meeting, they were never required of her and she never worked on them. Therefore, Petitioner was not retaliated against for refusing to apply reduced scrutiny to claims.

17. Steiff testified that she never forced Petitioner to sign anything. (Steiff Test.). As a Senior QC reviewer, Petitioner was supposed to skim through the claim, sign off on it, and send it to her supervisor to make the final decision. Signing off meant that she was signing off on limited QC Review sections, focusing primarily on "costs denied". (Schroer Test.). Petitioner was not supposed to review and add up all the costs in the claim because that was someone else's job at a lower level. *Id.* If Petitioner found a problem with a claim, Respondent's protocol was to send it back down to the lower level claims reviewer so that they could make the changes. According to Steiff, Petitioner only sent three claims back to the claims reviewer to make the changes. *Id.*

18. Schroer reiterated that when Petitioner did SR QC claim reviews, she was not supposed to review the entire claim; she was only supposed to review the claim as stated in her job description, which was usually the section of the "costs denied". (Schroer Test.).

19. Steiff wanted Petitioner to excel and focus on what she was good at, which was the reason for the centralized focus on triage and data packaging in Petitioner's 2012 WIP. (Steiff Test.). Petitioner was terminated because of her performance problems, not because she was retaliated against for refusing to sign off on claims or objecting to the misuse of State funds. *Id.* Therefore, Petitioner was not retaliated against for refusing to apply reduced scrutiny to claims.

20. Petitioner next alleges she was retaliated against and ultimately terminated because she complained about and objected to what she believed to be a sexually hostile work environment. (Pet'r. Compl.).

[6] Reduced scrutiny claims were not reviewed as carefully as other claims. (Schroer Test.).

21. Petitioner filed her sexual harassment complaint in May, 2011, complaining about a relationship between two co-workers that evolved into a sexual relationship within the office. (Pet'r. Test.). Petitioner stated that their behavior was taking away from her work because one of the co-workers was in her work group and his desk was located near her cubicle. *Id.*

22. Respondent had a Workplace Harassment Prevention Policy in place to prevent workplace harassment. (Pet'r. Ex. 2 at 1).

23. In order to prevail on a hostile work environment claim, Petitioner must show that the harassment was sufficiently severe or pervasive enough to alter the conditions of her employment, creating an abusive and hostile environment. *Tutman v. WBBM-TV, Inc. /CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000). In determining whether a hostile work environment exists there must be an "examination of all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 103, 122 S. Ct. 2061, 2067, 153 L. Ed. 2d 106 (2002).

24. Petitioner has merely alleged these things without proof, and mere allegations are not enough to win under this claim. *Jennings v. Warren County Comm'rs.*, 2006 U.S. Dist., 10, 26 (N.D. Ind. Mar. 14, 2006). Further, Petitioner does not indicate that the harassment was severe enough to alter the conditions of her employment nor does she indicate an instance where she was physically threatened or humiliated.

25. Here, Petitioner does not specifically indicate how she was harassed by Respondent due to the sexual harassment complaint. Once Petitioner filed the sexual harassment complaint with Respondent, SPD, in tandem with Respondent, conducted an investigation into the complaint. On November 11, 2011, Respondent sent Petitioner a letter stating that the co-workers' behaviors were not deemed inappropriate; therefore her claim was ultimately found to be unsupported. (Pet'r. Ex. 5).

26. Before Petitioner was transferred to the ELTF section, Dorsey recommended Petitioner be terminated due to her continued lack of performance. (Pet'r. Ex. 6). However, Easterly overruled the recommendation of termination and transferred Petitioner. (Dorsey Test.). Despite this, Petitioner's work performance continued to decline for many months hence, to the point that termination was an appropriate response. Therefore, the ALJ finds that Petitioner has not proved that she was the victim of working in a hostile environment.

27. Lastly, Petitioner claims that she was terminated due to her disabilities because her supervisor did not want to provide her with reasonable accommodations. (Pet'r. Compl.). More specifically, Petitioner contends that Respondent terminated her because of her frequent trips to the restroom, the work left on her desk when she went on FML, and because she fell asleep during a work presentation. (Pet'r. Ex. 19 at 3).

28. Petitioner went on approved leave for six months starting in June, 2011 until December, 2011. (Pet'r. Ex. 8 at 1). She again went on approved medical leave from March, 2012 through April, 2012. (Pet'r. Ex. 19 at 2). Petitioner then went on FML a third time from January 28, 2013 through June 2, 2013. (Pet'r. Ex. 26). 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.*

29. Petitioner claims that she was punished for not completing work that was left on her desk while she was out on FML starting in June, 2011. (Pet'r. Ex. 8 at 1). Petitioner claims that before she left for FML, she briefed Ligman about the work that she was leaving on her desk. (Pet'r. Test.). She stated that she had left the work in priority order and left her cell phone number in case someone had to contact her. *Id.* Petitioner claimed that she never received a phone call from anyone at work within the six months she was out regarding these issues. *Id.*

30. Dorsey testified that Petitioner was not responsible for work left on her desk after she left for FML in June, 2011, but was responsible for the work that was previously assigned to her before she left on leave. (Dorsey Test.).

31. Further, Dorsey stated that Petitioner was asked to complete work that had time frames attached to them before she left. (Dorsey Test.). Petitioner did not meet these time frames before she went on FML, and when she did take leave starting in the middle of June, 2011, all the work that was left on her desk had expired. *Id.* The consequences of this meant that employees down the work chain weren't able to get their work done because Petitioner had not completed her job by getting her work to them in a timely manner. *Id.*

32. Dorsey claims that there were numerous unexpired files and documents while Petitioner was still in the office which should have been worked on and completed before she went on leave. (Dorsey Test.).

33. Petitioner met with SPD on November 30, 2012, to discuss her medical accommodations. (Pet'r. Ex. 29 at 1). 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.* She also stated that she had difficulty walking and sometimes needed to use a cane. *Id.* SPD agreed to accommodate each of Petitioner's requests by following up with the appropriate staff on the conditions of the restrooms. (Pet'r. Ex. 29 at 2). SPD was also willing to make further accommodations if necessary. *Id.*

34. Petitioner's disability caused her to use the restroom every 1-2 hours. (Pet'r. Test.). Petitioner stated that Steiff would complain that she would take too much time using the restroom (Pet'r. Test.), but Steiff never denied Petitioner use of the restroom at any time. (Steiff Test.). Also, Dorsey stated that she told Petitioner she could use the restroom anytime she wanted and informed Petitioner's supervisors specifically to accommodate her by letting her use the restroom, in accordance with SPD's decision. (Dorsey Test.).

35. Although Petitioner used the restroom frequently, there were other alternatives she could've taken to avoid travelling to a different floor to use their restrooms if she needed toilet paper, such as going into another stall to obtain an extra roll to accommodate her in the handicap stall or retrieving one of the extra rolls which were left for her use. Petitioner's argument that she was unable to carry an extra roll into the stall because of her use of a cane or walker is wholly unpersuasive and without merit, especially given the fact that Petitioner testified that she did not always require the use of such items. (Pet'r. Test.).

36. SPD's Policies, Procedures, and Programs point out that the Americans with Disabilities Act's ("ADA") goals are to "ensure all applicants and employees are not discriminated against because of a disability" and to make sure "all programs, activities and services" are accessible to those with disabilities. (Pet'r. Ex. 9 at 1).

37. In order to establish a prima facie case of discrimination under the ADA, "Petitioner is required to prove that: (1) she is disabled within the meaning of the ADA; (2) her work performance met Respondent's legitimate expectations; (3) she was discharged; and (4) the circumstances surrounding the discharge indicate it is more likely than not that her disability was the reason for the discharge." *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1256 (Ind. Ct. App. 2002).

38. To prevail, Petitioner must satisfy certain elements of proof. *See Powdertech, Inc.*, 776 N.E.2d at 1256 (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). First, the Petitioner must show by "a preponderance of the evidence, a prima facie case of discrimination. *Powdertech, Inc.*, 776 N.E.2d at 1256. If Petitioner succeeds in proving this, the burden then shifts to Respondent to come up with a nondiscriminatory reason for the Petitioner's termination. *Id.* If Respondent is able to establish a nondiscriminatory reason, the burden then shifts back to Petitioner to prove that the articulated reason for the termination was not Respondent's true reason, but rather was due to discrimination. *Id.* At all times, Petitioner is responsible for persuading the trier of fact that Respondent intentionally discriminated against him. *Id.*

39. Petitioner was able to meet the first prong because she proved that she was disabled within the meaning of the ADA. In the medical inquiry form signed by Petitioner's doctor, he stated that she was having "difficulty walking and breathing". (Resp't. Ex. B at 1). He also stated that Petitioner had a physical impairment that limited her major life activities and that the areas affected included "caring for self, breathing, walking, and standing." *Id.* The doctor also noted that the bodily functions that affected Petitioner were the "bladder, respiratory, and musculoskeletal." *Id.*

40. As for the second prong, Petitioner's work performance did not meet Respondent's legitimate expectations. Petitioner struggled to keep up with the quality and quantity of her work. She was given accommodations due to her medical conditions and doctors' note, but she was unable to meet her reduced monthly goal of $1.4 million.

41. Petitioner did satisfy the third prong through termination by Respondent on January 17, 2014.

42. Petitioner fails the fourth prong because the circumstances surrounding her termination do not point toward her disability as being the reason for her termination. Therefore, Petitioner has failed to establish a prima facie case of discrimination under the ADA.

43. From 2011 through the time of her termination in 2014, Petitioner was given multiple chances to prove that she was capable of doing the work. Easterly even transferred Petitioner to a different section for the sole purpose of trying to get Petitioner to succeed in her work. Petitioner was given accommodations of using the restroom whenever necessary and, because of her twenty (20) hour work week, was given lower goals to meet than her fellow employees. Petitioner was given a WIP to help her succeed by only focusing on triage, data package prep, and writing denial letters. She was also given a Development Plan that was geared toward helping her be successful. The number of chances Petitioner was given to succeed at her job lead the ALJ to conclude that Respondent accommodated Petitioner both with her work and her disabilities. Petitioner had a broad understanding and knowledge of her work, and was thus given enough opportunities to meet the expectation goals set in place for her. Therefore, Respondent was within its rights to terminate Petitioner's employment.

44. Respondent's termination of Petitioner did not violate public policy. Petitioner has failed to sustain her burden of proving that a public policy exception to the employment at-will doctrine existed regarding her termination by Respondent.

45. All prior sections are incorporated by reference as necessary. To the extent a conclusion of law stated herein is a finding of fact or the reverse, it shall be deemed and remain effective.

V. Non-Final Order

Judgment is entered in favor of Respondent. Petitioner's termination is **UPHELD**. The parties shall bear their own fees and costs.

DATED: April 14, 2016

Hon. Gabriel Paul
Chief Administrative Law Judge
State Employees' Appeals Commission
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