BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

TREDDIA CROUCH,	)	
Petitioner,	)	
	)	
v.	)	SEAC NO. 01-12-001
	)	
PENDLETON CORRECTIONAL	)	
FACILITY,	)	
Respondent.	)	

FINAL ORDER OF SETTLEMENT AND DISMISSAL

The parties now report they have completed an amicable settlement of this matter, and jointly stipulated/moved the Commission on August 1, 2013 to dismiss on the basis of settlement.[1] The Stipulation/Motion is **GRANTED**. On behalf of the Commission, the ALJ accordingly now enters a final order of settlement and dismissal with prejudice.

This order is the Final Order of the State Employees' Appeals Commission in this matter. A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this order and must otherwise comply with I.C. 4-21.5-5.

DATED: August 5, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
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[1] This case was previously set for oral argument before the Commission and stayed/continued on the state's motion because of a possible settlement.

A copy of this order was sent to the following:

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SEAC Commissioners (by email)

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

I. Introduction and Summary of Decision

This Indiana Civil Service System case concerns Petitioner Crouch's ("Crouch") claims that Respondent Pendleton Correctional Facility ("PCF") violated public policy by terminating and reprimanding Petitioner's unclassified (at-will) state employment. Petitioner Crouch specifically challenges the state's adverse employment decisions as the product of race or sex discrimination and retaliation, including for the filing of a prior EEOC Charge. Respondent PCF argues in defense that it has lawful reasons for the relevant decisions; namely, that the termination was based on the abuse of sick time or Petitioner providing false information as to sick leave. Petitioner, in turn, asserts these reasons were pretextual.

On December 5 and 6, 2012, the evidentiary hearing in this case was held before the undersigned Chief Administrative Law Judge ("ALJ") at the main office of the State Employee's Appeals Commission in Indianapolis, Indiana. Opening statements by both parties were heard, the testimony of witnesses was taken, numerous exhibits were admitted and considered into evidence[2], and both parties provided closing arguments. The ALJ has also reviewed the parties' post hearing proposals. The parties reported at the hearing that they were unable to settle. The case is now ready for Findings of Fact, Conclusions of Law, and Non-Final Order.

As further set forth herein, Petitioner Crouch, a black female, has sustained her burden of proof by a preponderance of the evidence. Respondent PCF violated public policy in

[2] See Petitioner's Exhibits 1-28, and Respondent's Exhibits A-B. For brevity the exhibits are not listed but discussed within the Findings of Fact. The ALJ also takes official notice of the pleadings upon the docket and the State of Indiana Employee Handbook, public copy available from the State Personnel Department (SPD) at http://www.in.gov/spd/2732.htm. See, I.C. 4-21.5-3-26(f). The proceedings were additionally conducted under the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5-3.

terminating, on December 14, 2011, and earlier reprimanding[3] Petitioner Crouch's state employment. Both unlawful retaliation and gender discrimination is demonstrated. The employment decision reasons advanced by PCF are shown tainted by unlawful motives or disproven as prextual. Respondent is entitled to judgment only in part that it did not discriminate on the basis of race as Petitioner did not prove a preponderance of the evidence to support the race claim. Petitioner's discipline and termination are rescinded, and backpay/benefits are awarded among other remedies. Recommendations are further made to SPD's Director under I.C. 4-15-1.5-6(3).

Petitioner's immediate supervisor at the time of the discipline, Mr. Karl Downey, a white male, relentlessly sought, and did, unlawfully retaliate for the exercise of Petitioner's statutory rights and also considered Petitioner's gender in making both the reprimand decision and in recommending the termination.[4] The termination itself was then carried out by a more senior white male supervisor, Assistant Superintendent Bruce Helming who primarily based his decision on the information that Downey provided. Minimal or no independent investigation was done by Helming or white male Alan Ferguson, Manager of PCF Human Resources.[5] Respondent PCF violated its own civil rights policies and the state Employee Handbook with respect to Petitioner's discipline and HR handling. Petitioner thus satisfies causation (and other elements) of her claims, including by the showing of, at minimum, a mixed motive or "cat's paw" unlawful retaliatory and gender discriminatory motives by Respondent for the termination.

II. Employment at Will, Public Policy, Gender Discrimination and Unlawful Retaliation

The generally applicable law is reviewed to ease discussion of the facts. Petitioner Crouch, is a former unclassified state employee for Respondent PCF. An unclassified state employee is at will, and serves at the appointing authority's pleasure. However, a termination or lesser discipline of an unclassified, at will state employee may not violate public policy. (I.C. 4-15-2.2-1 et seq., 42, the Civil Service System). Petitioner Crouch challenges her termination from state employment, and an earlier reprimand, as the product of race or sex discrimination and retaliation, including the filing of a prior Charge with the Equal Employment Opportunity Commission ("EEOC"). Prohibited discrimination or retaliation would violate federal and state law and public policy.

Indiana follows the employment at will doctrine which allows an employer or an employee to terminate the employment at any time for a "good reason, bad reason, or no reason

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[3] On September 27, 2011 for Petitioner ostensibly not attending training. Not to be confused with a withdrawn reprimand in early 2011 or another reprimand that occurred in November, 2011 just prior to the termination in December, 2011. (See Findings of Fact.)

[4] The preponderance of the credible evidence at the hearing showed supervisory actions towards Petitioner included a personality clash, but were further discriminatory and retaliatory to statutory rights, unlawful, and more than a mere social dislike.

[5] Because adverse action was taken by Respondent supervisors against Petitioner no affirmative 'harassment' defense may apply. Regardless, the state's own anti-discrimination and anti-retaliation policies were not effectively followed by Respondent.

at all." *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705 (Ind. 2007). However, there are three recognized exceptions to the at will doctrine including "a public policy exception . . . if clear statutory expression of a right or duty is contravened." *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind.App. 2012). Whether public policy was violated is the issue in the instant matter. I.C. 4-15-2.2-42.

Title VII, 42 United States Code, Section 2000e and following sections (the Civil Rights Act of 1964, as amended), makes it unlawful under federal law for an employer to discriminate by terminating or disciplining an employee "because of that person's race or sex, among other grounds." Retaliation against an employee for the filing of an EEOC Charge or the reporting of discrimination to the employer is also unlawful. *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012). Indiana civil rights laws contain similar, state law based, public policy prohibitions. I.C. 22-9-1 (Indiana Civil Rights Act); See also, I.C. 4-15-2.2-1 et seq., 12, and 42.

The application of the Title VII analysis, at the summary judgment stage, in termination cases is often referred to as the *McDonnell Douglas* burden shifting framework, which has evolved and been modified over time in federal law. See *Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 8400-845 (7th Cir. 2007) discussing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Indiana civil rights laws look to federal law for guidance. At the summary judgment stage, Indiana courts use the modified *McDonnell Douglas* analysis in race and sex based discrimination and retaliation cases.

At the summary judgment stage, the Petitioner presented evidence sufficient to show a triable issue of genuine, material fact. Petitioner established the elements of her *prima facie* case for discrimination and retaliation, and additionally raised factual questions of whether the Respondent's articulated, legitimate, non-discriminatory reasons were actually unlawful pretexts (or at least a mixed, unlawful motive) under the modified *McDonnell Douglas* burden shifting analysis. *Coleman* at 845*; Filter Specialists Inc.* at 839, 847. (See ALJ's Order Denying Respondent's Motion for Summary Judgment.)

"A 'pretext' is not merely a mistake or an imprudent reason; it is a false reason or a dishonest explanation, which, because of its falseness or dishonesty, raises a question as to whether the employer is hiding a discriminatory motive." *Vance v. Ball State Univ. et al*., 2008 U.S Dist. Lexis 69288, *59, (S.D. Ind. 2008, Hon. Sarah E. Barker) (discussing pretext in the Title VII context).

The 'mixed motive' or 'motivating factor' analysis comes in two flavors. The normal, vanilla flavor is that an unlawful mixed motive can occur if the employer, when making the adverse employment decision, considers a retaliatory or discriminatory motive alongside an acceptable, lawful motive. Unlawful discrimination based on race or sex may not be a "motivating factor" in the employer's adverse employment decision. See, *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1192 (U.S. 2011)(a USERRA case that also reviewed Title VII and federal tort law); *Schandelmeier-Bartels v. Chicago Park District*, 634 F.3d 372, 383-4 (7th Cir. 2011)(a Title VII matter); *Vance*; *Coleman*; and Title VII at 42 U.S.C. 2000e-

2(a),(m)(prohibiting an employer from using a sex or race based 'motivating factor' in employment decisions).

Second, an alternate theory, but one of application in this case, in Petitioner's favor, is the "cat's paw" theory. This theory is applicable when a lower ranked supervisor, who has discriminatory or retaliatory motives, provides substantial input or information into the decision of a senior chain of command. "Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a "motivating factor in the employer's action", precisely as the text requires." *Staub* at 1193. "Under any formulation of the cat's paw standard the chain of causation can be broken if the unbiased decisionmaker conducts a meaningful and independent investigation of the information being supplied by the biased employee…Here, however, Schandelmeier presented ample evidence from which the jury could have concluded that, whether the decisionmaker was McDonald or Rowland, the Park District's "investigation" into Schandelmeier's job performance was not independent of Adam's input. The jury could find that, in fact, the supposed investigation, was based almost entirely on Adam's input." *Schandelmeier-Bartels* at 383-4 (further internal cites omitted).

At the evidentiary hearing stage of the proceedings, the *McDonnell Douglas* inquiry collapses to the simple inquiry of whether the plaintiff/petitioner has proven by a preponderance of the evidence that the employer/respondent intentionally discriminated in violation of the law. *Filter Specialists, Inc.* at 845-846. That said, the summary judgment analysis is recited above because it reviews the essential prima facie elements of the case, and provides a structure helpful to consideration of the issues of causation, mixed motive and pretext.

III. Findings of Fact

A. Background of the parties and events leading up through August, 2011

1. Petitioner Treddia Crouch, a black female, began her employment with the Indiana Department of Correction ("DOC") on January 27, 1997. She began working at the DOC's Pendleton Correctional Facility ("PCF"), formerly known as the Indiana Reformatory ("IR") in September, 2006. Between May, 2007 and her termination on December 14, 2011, Petitioner was a case manager, which is a non-custody chain of command position working with offenders.[6]

2. PCF is a varied security state correctional facility. PCF, DOC and the State of Indiana as a whole, are equal opportunity employers with written policies against racial or gender harassment, discrimination or retaliation for such complaints. Complaints of discriminations or retaliation are to be appropriately investigated. (See, Employee Handbook) Respondent, and the State of Indiana as a whole, require reasonable workplace decorum by

[6] For about 9 months in 2006, Petitioner worked in custody at PCF with then Lt. Karl Downey, who later became Petitioner's non-custody supervisor in 2011 as discussed.

employees and avoidance of derogatory language or insults on state time. Additionally, while a state agency may discipline or terminate an unclassified employee for any reason not violating public policy, the state instructs supervisors to follow a progressive discipline model when making adverse employment decisions. (Id.) Herein all these policies are collectively called "Respondent's policies" or "Handbook policies".

3. The record shows no discipline for Crouch before she supported a claim of gender discrimination by another female employee, Dianna Pfleeger, near the end of 2010. Crouch had good work performance before and during 2011. For instance, she received positive employer feedback and at least one cash award in 2008-2010. Her co-workers also thought highly of her abilities and reputation. (Petitioner exhibits 1-4; numerous witness testimony). As discussed below, the alleged deficits, and resulting discipline, claimed by PCF in her work performance or use of sick time were exaggerated, pretextual or tainted by mixed, unlawful motives.

4. Shortly after Petitioner Crouch supported the claim of discrimination, Crouch was treated differently from past practice and other employees with respect to her gate entry into PCF on January 18, 2011. Before that date, Crouch had removed her hat to show that nothing was under her hat and was allowed to proceed to work. On January 18, 2011, Crouch did as she had previously done. Tom Francum, Internal Affairs, watched Crouch enter that day, and told the gate officer that all hats were to be removed. (Francum testimony.)

Respondent PCF then later gave Petitioner Crouch a Notice of Disciplinary Action that stated that when Francum told the gate officer that all hats were to be removed and run through the X-Ray machine, the gate officer instructed Crouch three times to remove her hat and place it in the tote to be run through the X-Ray machine. (Pet. Ex. 5.) That statement in the Notice of Disciplinary Action is contradicted by the evidence that neither the gate officer, nor Francum, demanded Crouch to come back and run her hat through the scanner, but rather, allowed Crouch to proceed to her work. PCF did not discipline the gate officer or Francum for allowing Crouch to enter the building and proceed to work. (Id.)

Crouch explained that she removed hat every time she enters, but she has never been required to run it through the scanner. (Crouch testimony; and Pet. Ex. 5) Petitioner did not know that she should run it through the scanner, and that she did not hear anyone say that she had to. (Id.) The Notice of Disciplinary Action originally stated that it would serve as a Letter of Reprimand – but later Respondent reduced it to a letter of counseling, as below. (Id.) Respondent treated Crouch differently than the gate officer and Francum. (Id.)

In fact, the different treatment of Crouch by Respondent PCF was specifically raised as an issue at the Affirmative Action Committee Meeting of January 19, 2011 and recorded in the minutes distributed to all PCF employees. (See Ex. 6; and Lisa Ash testimony)[7] Crouch also presented to PCF several supporting statements, including a statement from Counselor Samantha

[7] This older memo is the only mention of race relations being a factor. There is no substantial evidence that Respondent considered Petitioner's race in making the later adverse decisions.

Maddox stating that the officer at the gate, Officer Bodkin, did not ask her to put her hat in the scanner until January 31, 2011, after the Notice of Disciplinary Action was given to Crouch. (Pet. Exs. 8-9.)

Crouch complained about the disparate treatment of her and requested copies of the tapes showing the disparate treatment. (Pet. Exs. 10-11.) Respondent did not produce any tapes of her entry or the entry of other employees. Crouch's prior SEAC complaint of disparate treatment resulted in PCF reducing her Letter of Reprimand, which the employer considers as discipline, to a Letter of Counseling, which PCF does not consider as discipline. However, Respondent, by Helming, later used, in part, the Letter of Counseling for the "hat incident," which is not discipline, in the termination of Crouch.

5. Witness Billy Wharton, a black male, and a former custody employee of the Department of Correction, testified that in or about 2006 that Karl Downey ("Downey"), then a lieutenant, would be "rough with Crouch". Wharton perceived that Downey would object to or informally discipline Crouch in a manner different than he treated Wharton. Wharton was specific that he could perform a task, and watch Crouch be chastised by Downey for performing the same way. Wharton testified that he believed Downey was treating Crouch more negatively on the basis of sex/gender; but not race. (Wharton testimony.) Respondent's cross-exam tried to paint Wharton as a disgruntled former employee with prior (but not current) claims of some kind against DOC, but Wharton showed candor on the stand and his testimony is credible. Witness Tom Richardson, current Unit Manager at PCF, also observed that Downey was specifically "rough" or "by the book" in supervision of Crouch. (Richardson testimony.)

6. Shonda McWilliams, a subordinate of Downey, credibly testified in a similar way, that in 2011, Downey would provide Petitioner a larger numerically or, at least, subjectively heavier case-load. McWilliams offered her belief that the different treatment was based on gender, not race. (McWilliams testimony.) Both witness Lisa Ash and Petitioner's own testimony also supported this evidence. (Crouch and Ash testimony.) Another witness, Anthony Walker testified Petitioner was given more work by Downey, and that Petitioner had a good work ethic. (Walker testimony.)[8] See also Fitzgerald testimony; Petitioner received extra work, but Fitzgerald did not personally see discrimination.

7. In 2010 and the first part of 2011, Downey was PCF's major in charge of custody. He supervised about five hundred employees. (Downey testimony.) The employer had received complaints about him, primarily from female employees. (Griffin testimony.) Assistant Superintendent Kathy Griffin testified that on one occasion, she herself had experienced Downey becoming aggressive with her by telling her words to the effect that something was none of her business. Another employee, Rick Perrault, intervened and told Downey that it was Griffin's business. After the intervention of the male employee, Downey then provided the information to

[8] Another witness, David Tresdale, a co-worker with Crouch at PCF, offered that Petitioner's work on the Plus Program was helpful, and that Petitioner carried extra work. Tresdale described it, oddly and in gender terms, as "behind every male lion there is that female to get the job done." (Tresdale testimony.)

Assistant Superintendent Griffin. (Id.) Griffin also confirmed that to her knowledge, and she knew Petitioner, that Petitioner's work had been satisfactory. Griffin suggested that Downey's words were "poorly chosen". (Id.)

8. In August, 2011, Respondent PCF removed Downey from his position of Major in Charge of Custody and placed him in the position of Unit Team Manager supervising five employees. (Downey testimony.) Those five employees were one male and four female employees, including Petitioner. Those employees were Rick Shannon ("Shannon"), who served as acting Unit Team Manager before Downey and in Downey's absence, Treddia Crouch, Kim Jones, Sarah Peckham, and Diane Ripberger ("Ripberger").

9. Ripberger,[9] a white female, had also supported a merit complaint of discrimination by another female employee in 2010. (Ripberger testimony.) That occurred well before PCF assigned Downey to supervise her, Crouch, two other females, and Shannon. When Ripberger had been in the hallway at PCF waiting for that prior 2010 SEAC proceeding, Downey was also in the hallway waiting for that SEAC proceeding. Ripberger complained to Downey that Downey had harassed the complaining female. Downey then called Ripberger a "fucking bitch", a derogatory and gender specific insult. (Ripberger testimony.)

At this December, 2012 SEAC hearing for Crouch, Downey did not have a clear memory of the events, but denied calling Ripberger a "fucking bitch". He recalled telling her or others (e.g. Griffin) that the matter was "none of her business". (Downey testimony.) Ripberger's recollection was more specific and credible; while witness Downey appeared both evasive and increasingly uncomfortable on the stand to the ALJ. Downey's statement occurred during paid state worktime.

B. <u>September-December 2011: the circumstances culminating in the Petitioner's termination</u>

10. During the workday at PCF of Friday, September 9, 2011 at about 9:30 a.m., PCF supervisor Downey told his subordinate Petitioner Crouch that "in his opinion, this was no place for women and that women should not be here."

11. Downey was clearly referring to Petitioner's employment at PCF or, at minimum, his attitude towards women working in a prison setting. Petitioner reasonable believed her job security was shadowed by this statement, which turned out true. (Crouch testimony; Ex. 15, page 15.) Downey's denial of this statement was not credible – the ALJ finds that this statement was made, including on the witness' respective demeanors, and the nuances and balance of their testimony. Downey's comment violated the Respondent's Handbook policies.

12. Downey's statement is the rare, direct evidence of an invidious and illegal motive to discriminate against Petitioner's protected statutory civil rights. When coupled with Downey's

[9] Ripberger has past and current litigation pending against DOC. Whatever motive she may or may not have to embellish, she was more credible on the stand as to these events than Downey.

other actions, and the circumstantial evidence, there is a strong preponderance of the evidence showing gender and retaliatory based thinking by supervisor Downey towards Petitioner and women in the DOC workplace. As the story progresses, retaliation for Petitioner complaining of sexual harassment or discrimination then takes the forefront of the actions taken against Petitioner by Downey, Helming and, by legal extension, employer Respondent.

13. Downey lacked experience as a Unit Team Manager for eight years prior to when Respondent PCF assigned him to be Unit Team Manager of Mr. Shannon and the four female employees in August, 2011. On September 27, 2011, Downey wrote a Letter of Reprimand by himself against Treddia Crouch for missing training when she was scheduled on Monday September 26, 2011 and Tuesday September 27, 2011. Yet, Downey himself was not working on Monday, September 26, 2011.[10]

14. On Monday, September 26, 2011, Crouch returned from vacation, went to her work, and forgot that she was scheduled for 40 hour training. (Crouch testimony; Pet. Ex. 15, page 13.) Under the practice existing before September 30, 2011, when a PCF employee missed scheduled days of training, they reschedule their days to attend training. (Crouch testimony; Pet. Ex. 15, page 13.)[11] By giving Crouch the Letter of Reprimand, Downey treated her more severely than other employees. Also, in that timeframe at PCF, Letters of Reprimand could be, but usually were not signed by the immediate supervisor. (Pet. Exs. 5, 13, 18.)

15. Downey had been on that job only a month. (Downey testimony.) Crouch had years of experience doing her job before the employer assigned Downey to supervise her, three other females, and Shannon. (Crouch testimony.) Downey claimed that he did not know how long Crouch had been doing her job. (Downey testimony.) Bruce Helming ("Helming") testified that a person giving discipline should review the employees' entire personnel file, including positive information and negative information. (Helming testimony.) This is often referred to as progressive discipline, and is part of the Respondent's Handbook policies. (See, Handbook). Downey did not review Crouch's personnel history. His attitude and responses on the stand, and the other witness testimony, reflected that Downey intended to be hard on Petitioner, and did not care about her actual performance history. (Downey testimony.)

16. On September 30, 2011, a policy was issued stating that if an employee is unable to attend training on the scheduled date, changes must be approved by the Assistant Superintendent and sent to the Training Department for a make-up date. (Pet. Ex. 14.)

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[10] Downey's discipline or attempts to discipline Petitioner often followed his return from being out of the office – and often sought to overrule *approvals* given to Petitioner by the interim supervisor, such as Shannon.

[11] The ALJ's understanding from some muddier testimony and documentation was that Petitioner either rescheduled and completed the 40 hour training or at least expressed a clear intent to reschedule do so before termination. Other exhibits show Petitioner's completion of previous and yet other training on August 31, 2011. (See, Pet. Exs. 1-3, 12, 15.) The state may at-will reprimand an unclassified employee for 'forgetting' required training. However, in this case, the supervisor, Downey, who issued the reprimand had illegal retaliatory and discriminatory motives for doing so. Petitioner's training was not treated similarly to other employees at PCF in that time frame.

17. On Tuesday, September 27, 2011, Downey returned to work. (Crouch testimony.) He ordered Petitioner Crouch to stand mainline in the chow line in place of Downey when he was absent. The proper – or at least customary – procedure is for a person who has the responsibility of standing mainline in the chow line to ask another employee to voluntarily substitute for him. (Crouch testimony.) Downey treated Crouch differently than other employees and ordered her to stand mainline in the chow line for him.

18. On about October 15 or 16, 2011, Crouch verbally complained to PCF Superintendent Keith Butts about the discrimination against her by Downey and Helming.

19. About two days later, Crouch was told to go to a meeting with Downey and Helming in PCF's E-Building. This means both Downey and Helming had been promptly internally notified of the pending complaint. Petitioner was not told what it was about. When she arrived, Downey and Helming locked the door, did not allow Petitioner to have a witness present, and retold Petitioner what she had told Superintendent Butts. (Crouch testimony; Ex. 15, p. 15.) Downey and Helming specifically told her that "they were not harassing [or discriminating]" against her [Petitioner]. The moment caused anxiety or fear in Crouch. (Crouch testimony.) (Id.) The direct conveyance by PCF/Superintendent Butts to the lower supervisors of Crouch's complaint may have violated the Employee Handbook or was at minimum not-ideal Human Resources (herein "HR") judgment; more importantly, it leaves the ALJ firmly convinced that Downey and Helming knew Crouch was complaining prior to the coming further discipline and termination.

20. On October 28, 2011, Crouch signed a complaint related to Downey's Letter of Reprimand. Downey had arranged for Crouch to stand mainline for Downey on Tuesday, September 27, 2011, but in a way different than others had been treated. (Pet. Ex. 15, pp. 10-16.)

21. Four days later, on November 1, 2011, Downey wrote to Helming a two-page list of requests for administrative actions against Crouch for five things, beginning with an accusation that it was her duty to find a replacement for her to stand mainline in October, 2011. That was the same subject matter that she had complained about Downey to Superintendent Butts in her October 28, 2011 written complaint. (Pet. Exs. 15-16.) Crouch offered that Downey was getting back at her for her complaint. Crouch explained each of the five accusations that Downey made against her in his November 1, 2011 Request For Administrative Action. (Crouch testimony.)

22. This event, and the other events leading up to the termination, all show suspicious and contemporaneous timing. Petitioner would complain of harassment or working conditions, and discipline would promptly follow by Respondent supervisors Downey and Helming. This is the classic pattern of retaliation for protected activity, which is expressly forbidden by Indiana public policy, federal and state civil rights laws, and the Respondent's Handbook.

23. On November 3, 2011, Superintendent Butts denied the complaint of Crouch. Ex. 17. On November 4, 2011, Helming told Crouch that he would take no action on the mainline issue and the second issue, which involved an offender with dementia. (Crouch testimony; Pet. Ex. 18.) Helming told Crouch that he was giving her a Letter of Reprimand in Lieu of 1 day

suspension for the other three accusations made against her by Downey.[12] (Pet. Exs. 16-18.) While Helming exercised some review over the reprimand, he relied almost exclusively on information from Downey. Downey's input was "a motivating factor" in both the September and November, 2011 reprimands (and termination).[13] (Helming testimony; Pet. exhibits.) Crouch explained that she was not guilty of those accusations. (Crouch testimony.)

24. On November 11, 2011, Petitioner signed a Charge of Discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). (Pet. Ex. 19.) Her complaint was formally filed with the EEOC on November 14, 2011. (Id.)

25. On November 14, 2011, Crouch became sick at work, made an appointment with her doctor for the end of the day, and requested sick leave of 1.75 hours. (Crouch testimony.) Crouch knew that a doctor's statement was not required to take leave for a few hours after reporting to work. (Crouch testimony.) Other employees confirmed that practice. (Pet. Exs. 20, 25.) The Secretary of the Unit Team told Crouch that she only needed a leave slip approved. (Norma Brenneman testimony.) Crouch submitted a leave request and it was *approved* by the acting Unit Team Manager, Rick Shannon. (Pet. Ex. 20.) Shannon confirmed the testimony of Crouch that he personally approved her sick leave and was aware of no leave problem. (Shannon testimony.)(Shannon also testified that such an approval was routine for him, subject to minimal review.) As discussed below, neither Downey or Helming ever spoke to Shannon about the leave approval before making the termination decision. (Id.)

26. Downey was not at work on Monday, November 14, 2011. When he returned to work on Tuesday, November 15, 2011, he asked Crouch for a doctor's excuse for sick leave. She explained that her sick leave was approved by Shannon, and that she did not need a doctor's excuse. Downey then talked to Helming about using sick time in less than 7.5 hour increments, and he told Crouch that she had to furnish a doctor's slip for any amount of sick time. (Pet. Ex. 21.) Respondent's practice was not to require a doctor's excuse for leaving work for a doctor's appointment, but that a supervisor was not prohibited from requesting a doctor's excuse for leaving work for a doctor's appointment. Downey's request to Crouch for a doctor's excuse for leaving work for a doctor's appointment was different treatment of Crouch than the treatment of other employees. (Testimony of Crouch, Shannon, Brenneman, Ash, and Pet. Ex. 25.)

27. Crouch's doctor provided a doctor's statement that Petitioner was unable to work for two hours on November 14, 2011. (Pet. Ex. 22.) The reason was not questioned by Respondent. The evidence shows that Crouch was sick, that she had a doctor's appointment, that she was delayed in the Human Resources office from the doctor's appointment and that she had to reschedule her appointment. Those facts were not disputed or disproven by Respondent.

[12] Not to be confused with the reprimand of September 27, 2011 for Petitioner ostensibly not attending training.
[13] At some point in fall, 2011, Crouch also applied for a promotion/transfer to Correctional Industrial Facility (CIF) and was told the reprimand or other discipline by Downey and Helming prevented the same. (Crouch testimony.)

When Downey requested a doctor's excuse, Crouch explained in writing to Helming that she did not think that taking 1.75 hours of sick time for an appointment without a doctor's excuse was giving false information, that she had to cancel the doctor's appointment due to the amount of time spent at Human Resources that day, that in fact she was in the Human Resources office until approximately 3:15 p.m., that she was surprised when questioned and did not change her leave slip, that she does not want to lie on her A-4 time card, that she offered to carry .75 of an hour as personal time on her leave slip to cover the time in question, and that she apologized for any inconvenience. (Pet. Ex. 24.)

28. Crouch was not asked if she actually went to the doctor on November 14, 2011. She only stated that she had a doctor's appointment, which was true. Respondent reasonably knew where Crouch was, because she was in employer PCF's Human Resources office. Alan Ferguson, the Human Resources manager, confirmed to Helming that Crouch was in the PCF Human Resources office. (Crouch, Ferguson and Helming testimony.)

There was no accusation that Crouch said that she was actually at the doctor's office, and both she and PCF knew that she was in the Human Resources office. Helming did not claim (nor allow Crouch to explain) that Crouch said that she was actually in the doctor's office on November 14, 2011. No one claimed that Crouch was actually in the doctor's office on November 14, 2011. Downey did not offer testimony that Crouch claimed that she was actually in the doctor's office on November 14, 2011. However, near the end of his testimony, Respondent's counsel asked Downey a leading question of whether Crouch said that she was in the doctor's office, and he answered yes. No details were offered as to the circumstances. This less credible tidbit is found insufficient to overcome the weight of the evidence that Crouch did not lie to Respondent about the circumstances or leave of November 14, 2011.

29. Petitioner Crouch was sick on November 14, 2011, and she had a doctor's appointment on that day. However, she was delayed in PCF's Human Resources office on her way to that doctor's appointment. Her purpose at the HR office that day was to request copies of her personnel documents. Thereafter, she rescheduled her doctor's appointment, and went to the doctor's appointment.

30. At the time, DOC left it to each facility to decide if employees are required to take leave in order to go to the Human Resources office. (Ferguson testimony.) Helming testified that it is not the policy of the Pendleton Correctional Facility to require employees to take leave to go to the Human Resources office. (Helming testimony.)

31. The preponderance of the evidence shows that Crouch's 1.75 hours of sick leave was not only approved, but permitted because she was actually sick, had a doctor's appointment, and Petitioner was only delayed attending that appointment because she was in the PCF Human Resources office. The ALJ rejects Respondent's insinuation that Crouch's mere offer to carry 0.75 of an hour as personal leave even though she was not required to do so, and employer PCF did not request her to do so, somehow impeaches her. Crouch was materially accurate in her statements to PCF. Moreover the chain of events shows Respondent was seeking to retaliate

upon a weak, pretextual excuse for the termination that was, at least, contrary in part to Respondent's own internal practices, customs and policies at the time.

32. As Downey's testimony progressed at the hearing, he became increasingly uncomfortable or nervous on the stand. As his testimony progressed, Downey had difficulty speaking. No other of the many witnesses demonstrated those kinds of difficulties.

33. Downey's testimony that he had no imput on the decisions of Helming to discipline or terminate Crouch was contradicted by Helming's testimony that the only information he received to discipline and terminate Crouch was from Downey. (Helming vs. Downey testimony.) Downey's testimony was contradicted by various witnesses on numerous points, and also by his five-paragraph statement of charges against Crouch for discipline just a few days after Crouch filed a complaint involving Downey. (Pet. Exs. 15-16.) For all of the above reasons, Downey's testimony was not credible.

34. Downey testified that Crouch could submit a doctor's statement in person by herself. Yet, he then testified that he was 'suspicious' of her doctor's statement simply because it was faxed to the Superintendent's secretary from a Marsh Supermarket on November 18, 2011. So Downey personally called the doctor's office at least once to try to interrogate the doctor or doctor's staff as to Crouch's status. If Respondent's agent(s) even had a right to make such a confirmation call, it was not done in the normal course of business, and not done by the HR department.

Downey did not give Crouch an opportunity to clarify the doctor's statement – suggesting a limited focus on the search for accuracy. Nor did Downey (or Helming) speak with Shannon about the issue who approved the leave before the termination decision. (Shannon testimony.) Crouch explained at trial that Downey had given her a deadline for her doctor's statement, so she sent it by fax. (Crouch testimony.) Crouch sent her doctor's statement to PCF promptly on November 18, 2011. (Pet. Ex. 22.) By November 22, 2011, PCF had not given Crouch's doctor's statement to Downey. (Pet. Ex. 23.) Downey's self-initiated investigation of calling Crouch's doctor office was overreaching, inappropriate, and it shows that Downey would go to some length to try to make sure Crouch was disciplined.

35. On November 23, 2011, Petitioner gave a written explanation to Helming. (Pet. Ex. 24.) Helming told Crouch not to worry about it, to go to New York as she had requested for the Thanksgiving holidays, that there might be discipline, but that it was not serious. (See, Crouch testimony; and Helming did not dispute this.)

36. If discipline is to be given, it is usually given in a week or two. (Crouch testimony.) Crouch returned from the Thanksgiving holidays, and there was no discipline. More than thirty days after her leave of November 14, 2011, on December 14, 2011, Helming told Crouch that he was terminating her for "conduct unbecoming" – a vague assertion in context. Later, Helming gave Crouch a letter of dismissal stating that he was terminating her for her request to use sick time on November 14, 2011, and her dishonesty in the use of that time, further perpetuated intentional misinformation when questioned about sick leave that does not meet agency

standards and is unacceptable. (Pet. Ex. 26.) No standard was stated. (Id.) No intentional misinformation was stated by Petitioner. (Id.)

37. No charge was given to Crouch, nor a meaningful opportunity to respond until litigation. The information for the termination of Crouch was from Downey, but Downey did not write any information to Helming for the termination of Crouch. (Helming testimony; and Pet. Exs. 20-26.) The explanation of Crouch was not disputed. (Pet. Exs. 20-26.)

38. Crouch had the authority to move offenders in the absence of Downey with notification to acting Unit Team Manager Shannon, which she did. (Crouch testimony; and Pet. Ex. 15, p.9.). The various accusations against Crouch dated November 1, 2011, resulting in a Letter of Reprimand in Lieu of 1 Day Suspension dated November 4, 2001, were unfounded.

39. Helming accurately testified that the employer's policies provide for progressive discipline, including Letter of Reprimand in Lieu of 1 Day Suspension, Letter of Reprimand in Lieu of 3 Day Suspension, Letter of Reprimand in Lieu of 5 Day Suspension, Hard Suspension, and Dismissal. (See Helming testimony and Handbook.) PCF also gives employees Work Improvement Plans. Petitioner was not given progressive discipline of a Letter of Reprimand in Lieu of 3 Day Suspension, a Letter of Reprimand in Lieu of 5 Day Suspension, a Hard Suspension, or a Work Improvement Plan. Petitioner's discipline jumped from reprimand(s), including a withdrawn reprimand and an only-partially founded reprimand (from Helming's view), to termination, and on the heels of Petitioner's harassment, discrimination and EEOC complaint.

40. The decision of dismissal does not claim that Crouch said that she actually went to the doctor's office on November 14, 2011. (Pet. Ex. 26.) Petitioner was delayed to her doctor's appointment by a valid visit to the HR department, but was in fact sick and did in fact go to the doctor, who confirmed that. Then, Petitioner was terminated for an alleged tiny (less than an hour or two) discrepancy in her timesheet on the heels of the harassment, discrimination and EEOC complaint.

41. Petitioner filed a second or amended EEOC Charge of Discrimination on December 30, 2011. (Pet. Ex. 27.) Downey testified that no one interviewed him about any of Crouch's complaints. He testified that he does not know of any investigation by PCF of Crouch's complaints.

42. Helming testified that no one interviewed him about any of Crouch's complaints. He testified that he does not know of any investigation by PCF of Crouch's complaints.

43. Some of the state's other arguments, raised around the time of trial or at summary judgment, simply melted away at trial. There is no evidence to support the assertion made earlier by the Respondent that Petitioner was under the influence of alcohol. Petitioner did not refuse a direct order by her supervisor. Petitioner did not fail to report to work without notifying her chain of command.

44. It was not the routine practice of PCF, in fall 2011, to impose disciplinary action upon staff for missing the annual training, which was given in repeated sessions and could be rescheduled.

45. Petitioner was transferred from the supervision of Downey on November 28, 2011, because of Downey's actions against her. However, on about December 14, 2011, Petitioner was verbally told that she was terminated because of allegations made against her by Downey.

46. Petitioner did not make deliberate attempts to defraud and mislead the Indiana Department of Correction as previously alleged by Helming's affidavit in support of PCF's Motion For Summary Judgment. There is no requirement for an approved leave of absence to go to the Human Resources office, where Petitioner was delayed. Additionally, Petitioner had an approved leave of absence for her doctor's appointment, and was in fact sick and saw her doctor.

47. Petitioner's behavior did not show a pattern of increasing erratic and insubordinate behavior, as previously alleged by Helming's affidavit at the motion stage. On the contrary, the evidence shows that after Petitioner complained about discrimination, the Respondent engaged in increasing retaliation against Petitioner, including reprimand(s) and termination.

48. PCF HR Manager Ferguson stated that he had an "open door" policy as to receiving complaints during worktime. Petitioner was fully entitled to make an appointment or come to Ferguson on state work time to complain of alleged civil rights harassment.

49. Petitioner has submitted both direct and indirect evidence of discrimination and retaliation, including testimony about harassing conduct, an adverse employment decision shortly after an EEOC charge, testimony that she was in fact meeting expectations contrary to the proffered, alleged non-discriminatory reasons submitted by the Respondent, and comments directed to her sex by Downey.

50. For all the reasons herein, by a preponderance of the evidence, Petitioner disproves PCF's stated reasons for the discipline and termination as tainted by unlawful pretext, contrary to public policy and invalid.

C. The PCF Human Resources picture: inadequate employer response by PCF

51. Alan Ferguson, PCF Manager of Human Resources in fall 2011, did not know of any investigation of Crouch's complaints. (Ferguson testimony.) Furthermore, Ferguson did not conduct an investigation at any time. Ferguson believes he passed the reports onto to central State Personnel Department (SPD), but had no details beyond that. He did not hear back from SPD that fall. (Id.)

52. As discussed in prior Findings, Ferguson received a report of harassment, discrimination and/or feared (a civil rights complaint) retaliation by Petitioner shortly before Respondent took adverse employment action against Petitioner. Ferguson testified that the proper procedure upon receiving a civil rights complaint was primarily to "upchannel it" to

central SPD, which is found as fact. The ALJ doubts, from the nuances of Ferguson's demeanor and testimony, that central SPD was ever properly informed of the nature of Petitioner's complaint before the adverse actions took shape. Ferguson did not follow up with central SPD, investigate, or himself take steps to protect Petitioner before the adverse actions. (Ferguson testimony.)

53. The Handbook also provided certain procedures, including confidentiality and reporting chains. Yet, Ferguson either under-followed or violated state policy repeatedly by informing the alleged harassers of the complaint, failing to meaningfully upchannel it or check back, and failing to take any meaningful steps to detect, prevent or assess the complaint.

54. Moreover, Ferguson revealed that he picked up the telephone and called Helming to give him notice of Crouch's most recent harassment complaint, and the EEOC notice, before the termination. A thirty minute phone call occurred, which Ferguson poorly remembered. (Ferguson testimony.) In other words, Ferguson warned the alleged harasser(s) at least once of the claim against them without taking any other actions or reflecting on the proper investigation or confidentiality of discrimination report requirements in the State of Indiana Employer Handbook. Nor is there any evidence that Ferguson reminded either Downey or Helming of their strong legal and policy obligation not to retaliate for Crouch's complaints. (Id; and also Helming testimony.)

55. In a prior, but relatively recent, merit case, SEAC has held that state supervisors have a duty to fearlessly report up the chain of command and make reasonable efforts under the Handbook and Indiana law to protect state rank-and-file employees under their supervision from unlawful discrimination. *Burkholder v. Indiana State Prison*, SEAC 06-11-126 Final and Non-Final Orders, final dated June 25, 2012 (judgment for state on just cause demoting a prison supervisor who failed to do so.) Here, the proper reporting path for PCF HR/Ferguson was to central SPD, and to follow-up with central SPD as needed, or alternatively to senior DOC officials not involved in the allegations. The correct reporting path(s) was not followed.

56. In sum, no reasonable steps were taken by Respondent PCF in 2011 to detect, investigate, or remedy the alleged harassment or discrimination of Petitioner by supervisors Downey or Helming before the termination (or as to the earlier reprimands). The only time in the record that Respondent's agents addressed Crouch's reports related to the January, 2011 hat matter, which did not involve Downey or Helming.

D. Further analysis and summary of the evidence

57. A non-comprehensive, further summary of the preponderance of the credible evidence is as follows. Petitioner Crouch, a black female is a member of two protected classes for race and sex. Petitioner had a good work history, and at minimum received adequate performance ratings for her work for PCF.

58. Following Petitioner's support of another employee's claim in 2010 and the hat incident, which Petitioner essentially prevailed in, Petitioner was working as a case manager. In

August, 2011, supervisor Downey unlawfully harassed her and discriminated against her by giving her more job duties, by talking to her in a degrading manner, by causing multiple reprimands against her, and by causing her termination. Petitioner's evidence includes rare direct statement evidence made during worktime by state supervisor Downey ("this is no place for a women") and comprehensive indirect and circumstantial evidence. The unlawful harassment and discrimination was based on sex/gender, but not race. The retaliation was based on Downey, Helming, Ferguson and PCF learning of Crouch's harassment/discrimination complaints, both EEOC and internal with the Respondent, and retaliating in ever-greater severity, close in time. Suspicious timing and retaliatory intent, direct, mixed or imputed, by Downey, Helming, Ferguson and PCF is proven by Petitioner. The actions of Respondents involved supervisors, jointly or separately, contaminated the whole chain of Respondent's supervisory decision making with respect to Petitioner's employment.

59. There was insufficient investigation undertaken internally by Respondent at a level senior to Downey to prevent or block the harassment or adverse employment actions suggested or initiated by Downey. Once in charge of Petitioner, Downey was quick to disregard Petitioner's work record and experience, and intentionally retaliated, on the heels of, Petitioner's perceived opposition to his heavy handed treatment of her. He pushed his superior, Helming, repeatedly to discipline Crouch, and all the relevant events culminated in a retaliatory pattern that is attributable as a matter of law and fact to Respondent PCF. Downey's unlawful intent must be imputed to the Respondent. Helming primarily, if not exclusively, relied on Downey's information in making the final termination decision. Meanwhile, Petitioner's positive performance record and long state service were under-considered in Respondent's decision process. When the termination arrived, it arrived in the form of several shifting reasons centered around a supposed abuse of 1.75 hours of sick leave. Petitioner's evidence overwhelms the state's evidence surrounding that leave controversy and shows pretext. Respondent PCF, including PCF's HR department, did not follow its own policies or the Handbook with respect to progressive discipline, discrimination report handling and other facets as recounted in these Findings of Fact.

IV. Conclusions of Law

1. Petitioner Crouch shows by a preponderance of the evidence that the Respondent PCF intentionally and unlawfully discriminated, and alternatively harassed[14], against Petitioner based on her sex, and after she complained about the discrimination or filed an EEOC complaint, that Respondent intentionally retaliated against her, causing her reprimand and termination.

2. Petitioner has thus shown a public policy exception to the challenged reprimand and termination. Petitioner's burden of proof, by a preponderance of the credible evidence, is satisfied on gender/sex discrimination and harassment claim, and the retaliation claim. The state is only entitled to a defense judgment on the race claim because Petitioner did not prove that race

[14] Since the employer took unlawful adverse actions against Petitioner by supervisor(s) the analysis is primarily one of intentional discrimination.

claim by a preponderance of the evidence. I.C. 4-15-2.2-1, 42; I.C. 22-9-1; *Meyers* at 705; *Filter Specialists Inc.* at 839, 847; and *Coleman at* 845.

3. Petitioner shows, by a preponderance of the evidence, both single and mixed motive or "cat's paw" unlawful discrimination and retaliation by PCF. The supervisory actions taken against Petitioner were motivating factors in the adverse outcome. Respondent PCF never conducted an effective pre-termination independent investigation; nor did Respondent materially follow its own Handbook and internal, customary or HR policies.

4. The state made certain prior motions for summary judgment and to dismiss which were denied. The parties briefed those issues prior to trial. Those motions were renewed by the state's counsel at the commencement of trial, were denied from the bench, and remain entirely denied for all the reasons set forth in the record and prior ALJ orders (incorporated by reference). Additionally, the state's motion to dismiss on the basis that Petitioner has a separate federal action pending was and remains denied. Petitioner, as a matter of law, may elect to proceed in a federal suit separate from a state administrative action; she just cannot collect back-wages twice from SEAC's perspective which the Non-Final Order addresses.

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

V. Non-Final Order

Judgment for Petitioner Crouch as specified on the sex discrimination and harassment claim, and the retaliation for protected activity claim. Judgment for Respondent PCF against the race discrimination claim. Petitioner's reprimand and termination is hereby rescinded. Respondent PCF is ORDERED, within thirty (30) days, to: (a) cooperatively work with Petitioner to reinstate Petitioner to state employment in her prior or similar open position under new supervision, (b) and Petitioner is granted all back pay, benefits, any applicable rank seniority (under normal SPD or DOC policies), the period of December 14, 2011 to reinstatement, she would have had if she had not been reprimanded and terminated; minus any wage mitigation or wage recovery from separate litigation (if any), and (c) correct Petitioner's personnel file to show good standing, this order and removal of the litigated discipline. Each party shall bear their own attorneys' fees and costs as to this state action.

VI. Recommendations

Furthermore, without the force of an order and pursuant to I.C. 4-15-1.5-6(3), the ALJ respectfully recommends to the State Personnel Director that the following steps be taken:

1. That anti-harassment/discrimination/retaliation (federal Title VII and Indiana Civil Rights Act) refresher training be administered to all effected current employees of PCF;

2. That SPD central office review the operation of local human resources procedures at PCF as applied to civil rights complaint handling, including review of Handbook policies, the internal chain of communication and confidentiality procedures of such reports;
3. That all other reasonable steps be taken by the state to review related policies, including discipline process after a supervisor(s) are alleged to harass or discriminate the effected employee, and assess, detect, prevent and ameliorate the effects of any found unlawful discrimination or retaliation at PCF.

DATED: February 21, 2013

Honorable Aaron R. Raff
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