

**STATE OF INDIANA  
INDIANA CIVIL RIGHTS COMMISSION**

CHRISTOPHER GAVIN,  
Complainant,

vs.

STANDENS INC.,  
Respondent.

) Docket No.: EMra16101525

) EEOC No.: 24F-2017-00272

DATE FILED

FEB 21 2020

ICRC  
COMMISSION

**FINAL ORDER**

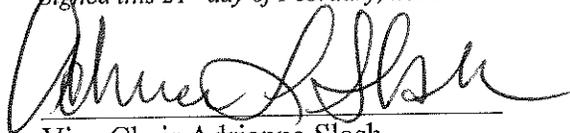
On January 10, 2020, Hon. Caroline A. Stephens Ryker, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") issued her Order Granting in Part and Denying in Part Respondent's Motion to Strike; Order Granting Respondent's Motion for Summary Judgment ("Order"). The parties had opportunity to object to the Order; neither party objected. With no objection or intent to review on record, the Commission shall affirm the Order. IC 4-21.5-3-29. After consideration of the record in this matter and the Order, **THE**

**COMMISSION HEREBY ORDERS:**

1. The findings of fact and conclusions of law as stated in the Order, a copy of which is attached hereto, are incorporated herein by reference. IC 4-21.5-3-28.
2. The Order is AFFIRMED under IC 4-21.5-3-29 and hereby becomes the Final Order disposing of the proceedings. IC 4-21.5-3-27(a)

Either party to a dispute filed under IC 22-9 may, not more than thirty (30) days after the date of receipt of the Commission's final appealable order, appeal to the court of appeals under the same terms, conditions, and standards that govern appeals in ordinary civil actions. IC 22-9-8-1.

SO ORDERED by the majority vote of 4 Commissioners on February 21, 2020  
*Signed this 21<sup>st</sup> day of February, 2020*

  
Vice Chair Adrienne Slash

**CERTIFICATE OF SERVICE**

Served this 21st day of February, 2020 by United States Mail on the following:

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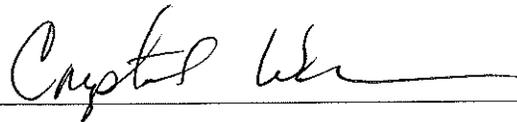
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DATE FILED

JAN 10 2020

OFFICE OF THE  
ADMINISTRATIVE JUDGE

STATE OF INDIANA  
INDIANA CIVIL RIGHTS COMMISSION

CHRISTOPHER GAVIN,  
Complainant,

vs.

STANDENS INC.,  
Respondent.

) Docket No.: EMra16101525  
)  
) EEOC No.: 24F-2017-00272

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION  
TO STRIKE; ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY  
JUDGMENT**

On August 19, 2019, Respondent, by counsel, filed Respondent's Motion for Summary Judgment ("Motion for Summary Judgment" and "MSJ"), Respondent's Designation of Evidence ("RP Designation"), Respondent's Brief in Support of Motion for Summary Judgment ("Brief"), and Respondent's Motion to Strike Sham Deposition Testimony of Christopher Gavin from Consideration Regarding Respondent's Motion for Summary Judgment ("Motion to Strike") with the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"). On September 18, 2019, Complainant, by counsel, filed Complainant's Memorandum of Law in Response to Respondent's Motion for Summary Judgment ("Response") and Complainant's Designation of Materials Supporting Complainant's Response to Respondent's Motion for Summary Judgment ("CP Designation"). On September 26, 2019, Complainant additionally filed Complainant's Response to Respondent's Motion to Strike ("Response to Motion to Strike"). On October 3, 2019, Respondent filed Respondent's Reply in Support of Motion for Summary Judgment ("Reply"), and Complainant did not file a Surreply.

On November 29, 2019, the undersigned ALJ conducted an oral argument on Respondent's Motion for Summary Judgment and Motion to Strike, at which Attorney Brown, Attorney Kautzman, Attorney Bremer, and Mr. Gavin were present. The undersigned ALJ for the ICRC has reviewed the parties' arguments, briefs, and supporting documents and being duly advised in the premises, proposes that the Commission enter the following findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

### Motion to Strike

1. On August 15, 2018, Complainant answered Respondent's Requests for Admissions and Alternative Interrogatories. (Motion to Strike at Ex. 1)
2. In Complainant's Admission Responses, Complainant admitted that the only application that he requested from Respondent was for the position in which he was currently employed. *Id.*
3. On July 17, 2019, during his deposition testimony, Complainant testified as follows:  
Q: "Did you ever request an application for the Office Manager position?"  
A: "I did, once, but as I said, things usually traveled by word of mouth..."  
(Motion to Strike at Ex. 2 at 48.)
4. Complainant's July 17, 2019 deposition testimony and Complainant's August 15, 2018 Admission Response are in direct conflict as to whether Complainant ever requested an application for the Office Manager position from Respondent.
5. However, Complainant's July 17, 2019 deposition testimony that he asked Respondent if Respondent would consider him for the position of Office Manager is reconcilable with Complainant's August 15, 2018 Admission Responses. (Motion to Strike at Ex. 2.)
6. In Complainant's Admission Responses, Complainant additionally denied that he had no interest in the Office Manager position, reflecting that he did have an interest in the Office Manager position. (Motion to Strike at Ex. 1.)
7. In his Alternative Interrogatory Response for the same Admission, Complainant clarified that he was interested in the "assistant office manager position" and not the "assistant to the assistant office manager position," which was held by Savanna Eland ("Eland"). *Id.*
8. Respondent and Complainant disagree on the proper title for Eland's position; however, they both agree that the position described in Complainant's complaint is the position ultimately filled by Eland.<sup>1</sup> (Tr. 8-9; 20-22.)
9. On July 17, 2019, during his deposition testimony, Complainant clarified that he was interested in the position held by Eland. (Motion to Strike at Ex. 2.)

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<sup>1</sup> In Complainant's Deposition, Respondent's Admission and Interrogatory Requests, and Complainant's Admission and Interrogatory Requests Responses, Eland's position is described as Office Manager, Assistant to the Assistant Office Manager, Office Position, and Secretary. This Order uses the term Office Manager Position to refer to the position held by Eland.

10. Given the variety of names used to describe Eland's position, Complainant's Admission Response is reasonably understood to mean that Complainant was interested in Eland's position and that the parties dispute the proper title for her position. Accordingly, Complainant's Admission Response does not conflict with his July 17, 2019 deposition testimony.

Motion for Summary Judgment

11. Respondent's Office Manager position is secretarial in nature, and the position involves general tasks associated with facilitating the smooth operation of an office. The typical job duties of the Office Manager position include: customer service, paperwork preparation, work in Microsoft Office, managing the weekly shipment schedule, email correspondence, and additional office work as needed. (RP Designation at Ex. 1.)
12. The Office Manager position first became vacant on May 4, 2016. (RP Designation at Ex. 1 and Ex. 2.)
13. During the time that Respondent sought candidates for the Office Manager position, a sales representative performed the role of Office Manager. (RP Designation at Ex. 2.)
14. Respondent began seeking candidates for the Office Manager position on May 13, 2016. (RP Designation at Ex. 2.)
15. Primarily, Respondent sourced candidates through the use of temporary staffing agencies, with the exception of one (1) candidate who was hired based on a truck driver's recommendation. (RP Designation at Ex. 2.)
16. In 2016, Respondent's Internal Salary Job Posting Policy ("Policy") stated that business conditions like "...organizational restructuring; position requirements that include skills, education, and/or experience that are not known to match any existing Employee; and critical business operational needs..." could result in a position being filled without the position being posted. (RP Designation at Ex. 1, Ex. 7, and Ex 8.)
17. Even when Respondent replied on its Policy to no post a position, Respondent had a practice of allowing internal applicants to apply for the un-posted position if they expressed an interest in the position while it was vacant. (CP Designation at Ex. 2.)
18. Between May 13, 2016 and August 5, 2016, three Caucasian candidates were temporarily hired for the position of Office Manager, but they left or were asked to leave the position shortly after beginning. (RP Designation at Ex. 2; CP Designation at Ex. 2.) Respondent's

sales representative continued to perform the role of Office Manager while the Office Manager position was vacant. (RP Designation at Ex. 2.)

19. On August 5, 2016, Respondent hired Eland, a Caucasian woman, as Respondent's temporary Office Manager under contract with a temporary staffing agency. (RP Designation at Ex. 2.)
20. At the time, Eland represented the following about her relevant credentials: a) prior office manager experience with three (3) businesses; b) experience in payroll, money management, data entry, customer service, scheduling, Microsoft Office, and computers; and c) post-secondary training from Central Nine Career Center and Ivy Tech Community College. (RP Designation at Ex. 4.)
21. Prior to Respondent hiring Eland, Complainant expressed interest in the Office Manager position; however, he was not considered for the position. (RP Designation at Ex. 3; CP Designation at Ex. 1.)
22. At the time he inquired about the position, Complainant's qualifications included: a) experience with Respondent's products, customers, truck drivers, and manuals; b) training in office management provided by a previous employer's office manager; and c) experience in customer service. (CP Designation at Ex. 1.)
23. Eland was more qualified for the Office Manager position than Complainant.
24. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

#### CONCLUSIONS OF LAW

##### Motion to Strike

1. An ALJ may not use a party's own conflicting testimony as the basis for denying a motion for summary judgment; put another way, a party may not defeat a motion for summary judgment by providing conflicting testimony on a genuine issue of material fact. *Crawfordsville Square, LLC. v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 938-39 (Ind. Ct. App. 2009).
2. Complainant has provided testimony that he both did and did not request an application for the Office Manager position. Accordingly, his deposition testimony, during which he contradicted his Admission Response, should not be considered.

3. However, Complainant's additional Admission and Alternative Interrogatory Responses and deposition testimony are not in conflict and may be used to support Complainant's Response to Respondent's Motion for Summary Judgment, particularly in light of the parties' disagreement surrounding the correct name for Eland's position. *Id.* at 939.

#### Motion for Summary Judgment

4. "[A]t any time after a matter is assigned to an administrative law judge..., " a party to an administrative proceeding can "...move for a summary judgment..., " which an ALJ must consider under Indiana Rule of Trial Procedure 56. IND. CODE § 4-21.5-3-23. Summary judgment is only appropriate where "...there is no genuine issue as to any material fact..." and "...the moving party is entitled to a judgment as a matter of law." IND. TR. R. 56(c).
5. Material facts "...affect the outcome of the case..., " and genuine issues are disputes in narrative or conflicts in inferences that must be resolved before one party's version of events can be credited over the other party's. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009).
6. When considering a motion for summary judgment, an ALJ draws all reasonable inferences in favor of the nonmoving party. *Id.* Similarly, "[I]ndiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014).
7. To succeed on its Motion for Summary Judgment, Respondent must "...affirmatively negate..." Complainant's claim. *Id.* at 1003-1004. Specifically, "[t]he movant's burden is to show that its designated evidence, with all conflicts, doubts, and reasonable inferences resolved in the non-moving party's favor, affirmatively negates the non-moving party's claim." *Ellis v. Keystone Constr. Corp.*, 82 N.E.3d 920, 924 (Ind. Ct. App. 2017). However, "[s]ummary judgment is not an appropriate vehicle for the resolution of questions of credibility or weight of evidence..." *Bell v. Northside Fin. Corp.*, 452 N.E.2d 951, 953 (Ind. 1983).
8. ICRC has subject matter jurisdiction over complaints of employment discrimination on the basis of race. IND. CODE § 22-9-1-2; IND. CODE § 22-9-5-7; IND. CODE § 22-9-1-6(d). Federal precedent under Title VII of the Federal Civil Rights Act provides guidance in interpreting the Indiana Civil Rights Law. *Indiana Civil Rights Comm'n v. S. Indiana Gas & Elec. Co.*, 648 N.E.2d 674, 680 (Ind. Ct. App. 1995).

9. Complainant's complaint is based on two different actions taken by Respondent: 1) Respondent suspended Complainant for one (1) day without pay and 2) Respondent did not consider Complainant for an office position. (RP Designation at Ex. 3 and Ex. 6.)
10. However, Complainant has waived his disparate discipline complaint. (Tr. 31-23.) Summary judgment is therefore appropriate on Complainant's allegation regarding Respondent's decision to suspend Complainant for one day without pay.
11. Generally, Respondent argues that summary judgment is appropriate with respect to Complainant's remaining claim because Complainant cannot make a prima facie case of employment discrimination and Respondent has articulated legitimate nondiscriminatory reasons for its actions. Alternatively, Complainant argues that summary judgment is inappropriate because Complainant has raised genuine issues of material fact as to his prima facie case of discrimination and as to pretext.
12. Although Complainant may allege discrimination using the direct or indirect method, Complainant has proceeded using only the indirect method. *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860-62 (7th Cir. 2007). Under the indirect method, Complainant's allegation is assessed under a burden-shifting analysis. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839-42 (Ind. 2009).
13. To succeed on his discrimination complaint, Complainant must first establish a prima facie case of race discrimination in employment. *Id.* Once his prima facie case is established, the burden of production shifts to Respondent to articulate a nondiscriminatory reason for taking the alleged adverse action. *Id.* If Respondent articulates a nondiscriminatory rationale, then Complainant must demonstrate that Respondent's stated reason is pretextual by designating evidence "(1) that the employer was more likely motivated by a discriminatory reason, or (2) that the employer's proffered reason is unworthy of credence." *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 59, 63 (7th Cir. 1986). However, "[t]he burden of persuasion remains with the employee at all times." *Id.*
14. The parties dispute the correct characterization of Complainant's allegation concerning the Office Manager position. Complainant characterizes his complaint as a claim based on Respondent's alleged refusal to allow Complainant to apply for a position; Respondent characterizes Complainant's complaint as a failure to promote claim. However, the distinction drawn by the parties is not outcome determinative in this instance.

15. While the elements of a prima facie case are flexible, the general purpose of the prima facie case is to: “[c]lose[] the causal gap between the employer's decision making process and the complained-of condition of the employee, thus allowing a tentative inference of bad motive on the employer's part.” *Loyd v. Phillips Bros.*, 25 F.3d 518, 523 (7th Cir. 1994)
16. A refusal to allow application claim is analyzed under the same prima facie elements as a failure to promote claim, with only the slight modification that Complainant need not have actually applied for the position in question. *Hobbs v. City of Chicago*, 573 F.3d 454, 460-61 (7th Cir. 2009); *Fischer v. Avandade, Inc.*, 519 F.3d 393, 402-03 (7th Cir. 2008).
17. Specifically, “...if an employer disregards an application process, the employer cannot defeat a [Complainant's] prima facie case by arguing that the [Complainant] did not apply for a position. The employee must still meet the fourth prong of the prima facie case and prove [his] superior qualifications.” *Hobbs*, 573 F.3d at 461.
18. Accordingly, Complainant must demonstrate the following elements to make a prima facie case of employment discrimination: 1) Complainant is a member of a protected category, 2) Complainant was a qualified applicant, 3) Complainant was rejected, and 4) an applicant outside of Complainant's protected category was hired who was as qualified or less qualified than Complainant. *Hobbs*, 573 F.3d at 460-611; *Fischer*, 519 F.3d at 402-03.
19. Complainant is a member of a protected class by virtue of his race.
20. When a Complainant alleges that he was prevented from applying for an open position for a discriminatory reason, the refusal to allow the Complainant to apply for the position serves as evidence that 1) the Complainant was a qualified applicant 2) who was rejected. *Hobbs*, 573 F.3d 454, 460-61; *Fischer*, 519 F.3d 393, 402-03.
21. Complainant has designated evidence that Complainant expressed an interest in the Office Manager position prior to Respondent hiring Eland and that it was Respondent's typical practice to consider internal applicants for positions if an employee expressed interest, even when the position was not posted. A material issue of genuine fact exists as to whether Complainant 1) expressed interest in the position 2) to a degree that Respondent would typically have considered him to be an eligible applicant for the position.
22. However, Complainant is not relieved of the burden to provide evidence on the other prima facie elements, including that Complainant was as qualified or was more qualified than the applicant who was ultimately hired. The material harm caused by an employer refusing to

accept an application is that the candidate cannot compete for the position, and accordingly, Complainant must show that he would have been a realistically competitive candidate with respect to the Office Manager position. *Loyd*, 25 F.3d at 523; *Hobbs*, 573 F.3d at 460-61.

23. Based on the designated evidence, Eland was more qualified than Complainant for the position of Office Manager, despite Complainant's superior knowledge of Respondent's operations because, unlike Complainant, Eland had performed the job of office manager for three (3) previous employers and she had formal training on a broad range of relevant office managerial skills.
24. Accordingly, Complainant has not articulated a prima facie case of race-based employment discrimination, ending the burden shifting analysis. *Hobbs*, 573 F.3d at 461.
25. Additionally, Respondent has affirmatively negated a required element of Complainant's prima facie case, and summary judgment is therefore appropriate on Complainant's complaint with respect to his allegations concerning the open office position.
26. If the ICRC determines that a Respondent has not committed an unlawful discriminatory practice in violation of the Indiana Civil Rights Law, then it must dismiss the complaint. IND. CODE § 22-9-1-6(l).
25. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

**IT IS THEREFORE ORDERED:**

1. Respondent's Motion to Strike is GRANTED with respect to lines 20 through 25 on page 48 and lines 1 through 4 on page 49 of Complainant's July 17, 2019 deposition testimony.
2. Respondent's Motion to Strike is DENIED with respect to all other portions of Complainant's July 17, 2019 deposition testimony designated as Exhibit 2 to Respondent's Motion to Strike.
3. Respondent Standen's, Inc.'s Motion for Summary Judgment is GRANTED.
4. Complainant Christopher Gavin's complaint of discrimination is DISMISSED, with prejudice.

**Administrative Review**

Administrative review of this initial decision may be obtained by filing objections with the Commission that state with reasonable particularity each basis for each objection within fifteen (15) days after service of this initial decision. IND. CODE § 4-21.5-3-29. Subject to Indiana Code 4-21.5-3-1, filings can be made with the Docket Clerk of the Indiana Civil Rights Commission by email, fax, or by mail at the following:

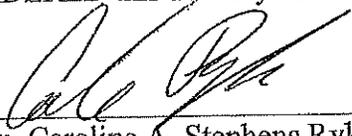
**Docket Clerk  
c/o Indiana Civil Rights Commission  
100 North Senate Avenue, N300  
Indianapolis, IN 46204  
Fax: 317-232-2600  
Email: docketclerk@icrc.in.gov**

This Initial Findings of Fact, Conclusions of Law, and Order shall be reviewed by the Commission at the next Commission meeting that falls after the expiration of the 15 days for filing objections. The Commission may affirm, remand, or modify this decision.

**Contact Information**

The name, official title, and mailing address of the Presiding Officer and a telephone number through which information concerning schedules and procedures may be obtained, is included below. **However, all *ex parte* contacts –direct or indirect communications regarding any issue in the pending proceeding without notice and opportunity for all parties to participate in the communication – are forbidden by law.** Repeat: a party shall serve copies of any filed item on **all parties**. IND. CODE § 4-21.5-3-17(c). The attached Certificate of Service includes the names and mailing addresses of all known parties and other persons to whom notice is being given. IND. CODE § 4-21.5-3-18(d)(1).

SO ORDERED this 10<sup>th</sup> day of January, 2020

  
\_\_\_\_\_  
Hon. Caroline A. Stephens Ryker  
Administrative Law Judge  
Indiana Civil Rights Commission  
100 North Senate Avenue, Room N300  
Indianapolis, IN 46204-2255  
Docket Clerk:  
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**CERTIFICATE OF SERVICE**

Served this 10th day of January, 2020 by United States Mail on the following:

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