STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
CHRIS BLANKS,	)	
	)	Charge No.: **2014CA1147**
Complainant,	)	EEOC No.: **21BA40270**
	)	ALS No.: **19-0337**
And	)	
	)	
CURRAN CONTRACTING COMPANY, INC.,	)	
	)	
Respondent.	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision and the Complainant's Exceptions filed thereto.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Pursuant to 775 ILCS 5/8A-104(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Supplemental Recommended Order and Decision, entered on December 31, 2024, has become the Order of the Commission.[1]

STATE OF ILLINOIS)
) **Entered this 13th day of MAY 2025.**
HUMAN RIGHTS COMMISSION)

Commissioner Demoya R. Gordon

Commissioner Howard A. Rosenblum

Commissioner Stephen A. Kouri II

[1] This order is entered pursuant to a 2-0-1 vote by the Commissioners.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: CHRIS BLANKS, Complainant, v. CURRAN CONTRACTING COMPANY, INC., Respondent.	IDHR Charge No.: 2014-CA-1147 EEOC Charge No.: 21-BA-40270 ALS Case No.: 19-0337 Administrative Law Judge Jennifer S. Nolen

RECOMMENDED ORDER AND DECISION

Before this administrative court is a motion for summary decision filed by Respondent Curran Contracting Company.[1] Complainant Chris Blanks ("Complainant") alleged that Respondent unlawfully discriminated against him based on race and age on or about May 20, 2013. Complainant filed a complaint of civil rights violations before the Illinois Human Rights Commission (the "Commission") on July 19, 2019.

On August 26, 2022, Respondent filed a motion for summary decision under 56 Ill. Admin. Code § 5300.735(a) ("Mot."). On October 12, 2022, Complainant filed a response in opposition. *See* Complainant Chris Blank's Response in Opposition to Respondent's Motion for Summary Decision ("Resp."). On November 9, 2022, Respondent filed a reply in further support of its motion for summary decision ("Reply").

[1] Respondent identified that the case caption contains an incorrect name for Respondent. The correct name for Respondent is Curran Contracting Company. For purposes of maintaining a correct record, Respondent will be referred to as Curran Contracting Company in this Recommended Order and Decision.

Respondent's motion for summary decision is GRANTED. I therefore enter judgment in Respondent's favor and recommend that the Commission affirm this action pursuant to 56 Ill. Admin. Code § 5300.910.

RESPECTIVE CONTENTIONS OF THE PARTIES

Respondent operated throughout Northeastern Illinois as an asphalt paving and excavating contractor for residential, commercial, and public projects. The construction season during which Respondent provides its services typically starts in the early spring and concludes in the early winter. On October 12, 2007, Respondent hired Complainant as a Local 152 seasonal laborer to work on a road construction paving project. According to Complainant, Respondent hires laborers in the spring, and lays them off in the fall. On December 4, 2007, Complainant, along with other seasonal laborers, were laid off. Seasonally, Complainant worked for Respondent from 2007 to 2010 in Lake County. Complainant was not rehired to work for Respondent in 2011, 2012, or 2013.

Complainant asserts that Respondent "calls back" or rehires seasonal workers from the previous year for employment, and the returning workers did not need to formally apply to be hired back. *See* Resp. at 2. Complainant alleged that employees from the previous construction season expressed interest to work for Respondent in a new season by attending Respondent's Spring Safety Meeting hosted annually in March. *Id*. at 3. Complainant attended the 2011 Spring Safety Meeting, but he was not hired to work in 2011. *Id*.

Complainant alleged that throughout 2011, he reached out to Respondent's President, Rick Noe ("Noe"), to express his belief that Respondent engaged in discriminatory hiring practices for Black workers. *See* Resp. at 3. According to Complainant, Noe explained that Respondent would not have any work for him that construction season. *Id*.

Respondent asserts that Complainant was not recalled in 2011 due to the reports by Complainant's prior supervisors that Complainant had issues with productivity, and because of the expected workload in Lake County during the 2011 season. *See* Mot. at 3-4. Respondent asserts that Complainant's alleged productivity issues were not a factor for their decision not to hire Complainant in 2013. *See* Reply at 7.

Complainant alleged that he expressed interest in working with Respondent in 2013 when he attended the 2013 Spring Safety Meeting for prospective laborers. *See* Resp. at 2-3. Complainant asserts that he called Noe in April 2013 to express an interest in seasonal work. *Id.* Complainant alleged that when he did not receive a return response from Noe, he submitted a formal application for employment in May 2013 so that there would be a paper record of his attempts to obtain work. *See* Resp. at 3. and Resp. Ex. A. Affidavit of Chris Blanks ("Blanks Aff.") ¶18 (Oct. 11, 2022). Complainant's application for a seasonal labor position was emailed to Respondent on May 20, 2013. *See* Mot. Ex. G.

Respondent articulates that Complainant was not hired for the 2013 construction season because at the time of Complainant's May 20, 2013 application, all seasonal laborers for the 2013 season were hired and there were no positions available. *See* Mot at 7. Respondent alleges that Complainant and 50 other applicants (40 non-Black applicants, 7 Black applicants, and 3 undisclosed applicants) submitted unsolicited applications during the 2013 season, and they were not hired but their applications were kept on file. *See* Mot. at 4.

Complainant asserts that in July 2013, Respondent hired Shelly Moser (Moser)(White and under 40 years of age at the time of the alleged discrimination). *See* Resp. at 4. Respondent asserts that Moser was hired as a laborer on an emergency basis because a laborer was terminated near the end of the day on July 10, 2013, which resulted in an unexpected opening for a laborer that

needed to report by 7:00 a.m. on July 11, 2013. *See* Mot. at 4 and *See* Mot. at Ex. F. Affidavit of Brad Quinn ("Quinn Aff.") ¶9 (Aug. 23, 2022). Respondent asserts that Respondent's Superintendent, Brad Quinn ("Quinn"), did not have access to the applications on file at the time of the decision to hire Moser, and Moser was recommended by other employees to fill the immediate vacancy. *Id*.

At issue in this case are the events surrounding Respondent's May 20, 2013 application, the decision not to rehire Complainant for the 2013 construction season, and Respondent's subsequent July 2013 hiring decision. Complainant alleged that Respondent failed to rehire him in 2013 because he is Black, and because he was 51 years of age at the time of the alleged discrimination. Respondent alleges that Complainant cannot establish a *prima facie* case of discrimination. Further, Respondent alleges that it has a legitimate nondiscriminatory reason for its decision not to hire Complainant in 2013, and Complainant has not submitted evidence to establish a pretext for unlawful discrimination. *See* Mot. at 7.

CONCLUSIONS OF LAW

I make the following conclusions of law based on the evidence submitted in this case and the pleading before me:

1. This administrative court has jurisdiction over this matter and over the parties who have appeared in this case.

2. During the time relevant to the allegations described in the Complaint, Complainant was a potential "Employee" as that term is defined by the Illinois Human Rights Act. *See* 775 ILCS 5/2-101(A)(1)(a). As such, Complainant is authorized to invoke the protections of the Act.

3. During the time relevant to the allegations described in the Complaint, Respondent was a potential "Employer" of Complainant as that term is defined by the Illinois Human Rights Act. *See* 775 ILCS 5/2-101(B)(1)(a). As such, Respondent is subject to the provisions of the Act.

4. Complainant cannot establish a *prima facie* case of race and age discrimination because he cannot demonstrate that a laborer/flagger employment opportunity was open and available at the time of his application, and Respondent sought other applicants from persons of petitioner's qualifications.

5. Even if he could establish a *prima facie* case of discriminatory failure to hire against Respondent, Complainant is unable to show that Respondent's legitimate, non-discriminatory reason for not hiring Complainant in 2013 was somehow a pretext for unlawful discrimination.

6. Finally, there is no genuine issue of material fact on the issue of pretext and Respondent is entitled to a recommended order in its favor as a matter of law.

7. A summary decision in Respondent's favor is appropriate in this case.

LEGAL STANDARD

Section 8-106.1 of the Illinois Human Rights Act authorizes any party to move for summary decision "as to all or any part of the relief sought." *See* 775 ILCS 5/8-106.1. Summary decision is the "procedural analogue" to a motion for summary judgment filed under the Illinois Code of Civil Procedure. *Cano v. Vill. of Dolton*, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200 (1st Dist. 1993). As such, summary decision (or summary judgment) is only granted where the pleadings, depositions, admissions, and affidavits on file—when viewed in the light most favorable to the non-moving party—demonstrate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Adams v. N. Illinois Gas Co.*, 211 Ill. 2d 32, 43 809 N.E.2d 1248 (2004). "Material" facts are those that might affect the outcome of

the case under the applicable substantive law. *GreenPoint Mortgage Funding, Inc. v. Hirt*, 2018 IL App (1st) 170921, ¶ 17, 97 N.E.2d 66 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Summary judgment is not granted where material facts are in dispute, or where reasonable persons might draw different inferences from undisputed facts in the record. *Adams*, 211 Ill. 2d at 43. At the same time, a court may not weigh the evidence or assess the credibility of a witness when ruling on a motion for summary judgment. *See Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, ¶ 34 (citing *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396, 893 N.E.2d 303 (2008)). This is because the purpose of summary judgment is not to try a question of fact, but rather to determine if one exists. *See Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186, 766 N.E.2d 1118 (2002). Because summary judgment is a "drastic" method of resolving litigation, it is generally granted only where the right of the moving party is "clear and free from doubt." *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 518, 622 N.E.2d 788 (1993) (citations omitted).

FINDINGS OF FACT AND DISCUSSION

In analyzing employment discrimination claims brought under the Act, the Commission and the Illinois Supreme Court have adopted the analytical framework set forth by the United States Supreme Court in its decisions addressing claims brought under Title VII of the Civil Rights Act of 1964. *Zaderaka v. Ill. Human Rights Comm'n*, 131 Ill. 2d 172, 178, 545 N.E.2d 684, 687, 137 Ill. Dec. 31 (1989).

The three-step analysis set forth in *Zaderaka* is as follows: (1) First, the complainant must establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against him; (2) Second, to rebut the presumption, the employer must articulate (not

prove) a legitimate, nondiscriminatory reason for its decision to take an adverse action against the complainant; and (3) Finally, if the respondent carries its burden of production, the presumption of unlawful discrimination falls and the complainant must then prove, by a preponderance of the evidence, that the respondent's articulated reason was not its true reason, but instead a pretext for unlawful discrimination. *Maye v. Ill. Human Rights Comm'n*, 224 Ill.App.3d 353, 360, 586 N.E.2d 550 (1st Dist. 1991). *Champaign-Urbana Pub. Health Dist. v. Ill. Human Rights Comm'n*, 2022 IL App (4th) 200357, P204. The ultimate burden of persuading the trier of fact that Respondent engaged in unlawful discrimination remains at all times with Complainant. *Zaderaka*, 131 Ill. 2d at 178-79.

I. Complainant Failed to Establish a *Prima Facie* Case of Discriminatory Failure to Hire.

Complainant's main argument is that he applied to be called back to work during the 2013 construction season, and Respondent failed to hire him because of his race and age. The burden to establish a *prima facie* case for an employment discrimination based on a failure to hire, requires Complainant to show by a preponderance of the evidence that: (1) he is a member of a protected class; (2) he applied and was qualified for an available position; (3) he was rejected despite his qualifications; and (4) the position remained open and the employer sought other applicants from persons of petitioner's qualifications. *See Oak Lawn v. Human Rights Comm*., 133 Ill. App. 3d 221, 224 (1st Dist. 1985); and *C.R.M. v. Chief Legal Counsel of Ill. Dept. of Human Rights*, 372 Ill. App. 3d 730, 733 (2007).

Complainant provided evidence to meet the first and third prongs to establish a *prima facie* case for a discriminatory failure to hire claim. Complainant is a member of a protected class based on his race and age. There is no dispute that Complainant was not hired or called back to work for Respondent during the 2013 construction season. The core questions for this court to decide is

whether the position sought by Complainant was available at the time of application, remained open after application, and the employer sought other applicants from outside of Complainant's protected class to fill the position.

A. Complainant failed to provide sufficient evidence that the position he applied for was available and open for application.

The evidence shows that there are two separate types of employees in this case. The first type are the seasonal workers who worked the previous season. The second type are the seasonal workers who did not work the previous season. For these two groups, the evidence suggests that there are two different ways in which Respondent will select the employee to work for the upcoming construction season.

The evidence suggests that those seasonal employees who worked in consecutive construction seasons were not required to submit a formal application. Complainant avers that each year Respondent "calls" back or rehires seasonal employees from the previous year, and those workers did not need to formally apply for rehire. *See*. Resp. at 2. It is uncontested that Complainant did not work for Respondent in the 2011 or 2012 seasons.

The seasonal workers who did not work in a previous season or had a gap in employment were considered for rehire after submitting a written application. *See* Mot., Ex. A. Deposition of James Rick Noe ("Noe Dep.") 115:9-21 (Jun. 2, 2022). Complainant fits into the category of employees who would need to submit a written application for rehire because he last worked for Respondent during the 2010 construction season.

Complainant attempts to backdate the timeframe in which he applied for employment with Respondent to early March 2013. Complainant asserts that he expressed interest in working with Respondent in March 2013 when he attended Respondent's Spring Safety meeting, and when he had subsequent conversations with Noe. *See*. Resp. at 4-6. Respondent's Spring Safety meeting

was an optional meeting for invited employees to receive instruction on safety rules, training for permanent employees, harassment training, and other general requirements. *See* Mot., Ex. A. Noe Dep.35:15-24;36:1-22. Attending this meeting was not mandatory to be hired as a seasonal worker. *Id*.

Complainant confirms that he attended the 2011 Spring Safety meeting, and he had conversations with Noe and Respondent's owner, Bill Curran, but Complainant was not hired for the 2011 or 2012 construction seasons. *See* Blanks Aff. at ¶¶13-15. Therefore, it is reasonable for this court to conclude that attending the 2013 Spring Safety meeting and having subsequent conversations with Noe were not ways for the Complainant to apply for available positions with Respondent. He would be required to submit a written application.

Complainant acknowledged that for the position that he worked with Respondent, he had to reapply or apply for it in March or April of that construction season. *See* Mot., Ex. C. Deposition of Chris Blanks ("Blanks Dep.") 32:7-34-33:1-2 (May 31, 2022). Respondent confirms that the labor/construction season begins in April and ends in November. *See* Mot., Ex. A. Noe Dep.15:10-15. Based on Complainant's acknowledgment, it is reasonable for this court to find that Complainant's May 2013 application was not timely submitted for consideration at the beginning of the 2013 construction season. Therefore, the laborer position was not open in May 2013.

Complainant did not submit evidence of a job posting or that there were laborer positions open and available at the time of his application. Complainant's deposition testimony was that he submitted an application on May 20, 2013 because he was looking to be recalled to work, and he wanted to give Respondent the benefit of the doubt that he would be treated fairly. *See* Mot., Ex. C. Blanks Dep. 87:24-88:1-4. Respondent is not required to reopen a position simply because an employee or potential employee submits an application after March or April of the construction

season. Complainant failed to provide sufficient evidence that a laborer position was open and available at the time of his May 20, 2013 application, which is immediately fatal to his *prima facie* case.

B. Complainant failed to provide sufficient evidence that the applied for position remained open and Respondent sought other applicants from persons of petitioner's qualifications.

For the reasons previously stated herein, the laborer position was not open in May 2013. It is uncontested that March and April are the months to apply for a laborer position that starts Respondent's constructions season. Complainant did not submit evidence that Respondent sought applications in May or June 2013 for a laborer. Additionally, Complainant failed to present evidence that Moser was a similarly situated applicant. Therefore, it is reasonable to find that the laborer position did not remain open but was closed in May and June 2013. The evidence suggest that an unexpected opening occurred in July 2013.

In this case, Complainant named Moser as a comparator who was hired in July 2013 to be a laborer. This court finds that there is no issue of fact that Respondent sought a laborer worker to fill a seasonal laborer vacancy in July 2013. However, the hiring of Moser was not to fill a vacancy that remained opened from May 2013 to July 2013. There was a two-month window during which time there was no need to fill a vacancy.

Therefore, Complainant fails to show that there is an issue of fact as to whether a laborer position remained open, and Respondent sought other applicants from persons of petitioner's qualifications.

II. Complainant Failed to Prove That Respondent's Articulated Reason is A Pretext to Unlawful Discrimination

As explained above, where (as here) Respondent has articulated a legitimate, non-discriminatory reason for its employment decision, Complainant must prove that Respondent's

articulated reason was really a "pretext" for unlawful discrimination. *Owens v. Dep't of Human Rights*, 403 Ill. App. 3d at 919 (citing *Zaderaka*, 131 Ill. 2d at 179-80). "Pretext" is more than a suggestion of falsehood or ulterior motive. "In short, pretext is a lie." *In re Kolin and Steinhagen v. Town of Cicero*, ALS No. 13-0526(C), 2018 ILHUM LEXIS 837, at *13 (Aug. 13, 2018) (citation omitted).

To show pretext, Complainant is required to demonstrate: (1) that the proffered reason has no basis in fact; (2) that the proffered reason did not actually motivate Respondent; or (3) that the proffered reason was insufficient to have motivated Respondent's actions. *See id*. (citation omitted). When offering evidence to make these required showings, the question is not whether the rationale proffered by Respondent was "accurate, wise, or well-considered," but rather whether Respondent honestly believed the legitimate, non-discriminatory reasons offered for Complainant's termination. *In re Kolodzik v. Astellas Pharma, U.S., LLC*, ALS No. 17-0055, 2018 ILHUM LEXIS 958, at *19 (Oct. 25, 2018) (citation omitted). In fact, even where Complainant can establish that Respondent's articulation was a lie, this does not automatically entitle him to prevail on his cause of action. *See Id*. Instead, he must concurrently demonstrate a discriminatory animus or motivation on the part of Respondent to successfully prove his allegations of discrimination. *Id*.

Respondent's articulated reason for not hiring Complainant, was that as of May 20, 2013, all 2013 seasonal laborer positions had been filled and that there were no positions open at the time of Complainant's application. As for the hiring of Moser in July 2013, Respondent proffered that Moser was hired on an emergency basis and Quinn did not have access to applications or personnel files when the hiring decision was made.

Complainant alleged that he witnessed that predominately White laborers were performing services that he was qualified for at Respondent's work sites. *See* Blanks Aff. ¶19. Complainants' reliance on his opinion that the racial composition of seasonal workers at one of Respondent's worksite, on an arbitrary day, is self-serving and speculative at best without a proper foundation. Speculation is insufficient to avoid summary decision. *See Sorce v. Naperville Jeep Eagle, Inc*., 309 Ill. App. 3d 313, 328 (2d Dist. 1999) (*citing Sanchez v. Firestone Tire & Rubber Co*., 237 Ill. App. 3d 872, 874 (3d Dist. 1992)).

Complainant alleged that White laborers who attended the 2013 Spring Safety meeting, who also had no experience, were hired. *See* Blanks Aff. at ¶21. Complainant relies on Respondent's 2013 employment and payroll report to suggest that over 140 White seasonal employees, including Moser, were hired in 2013. Respondent asserts that the 2013 employee and payroll report is a list of all employees (not just seasonal), in all positions, and all of Respondent's locations (not just for the Lake County location where Complainant applied). *See* Reply at 4. This court had the opportunity to review the evidence submitted by the parties and referenced in each respective filing in response or support of Respondent's motion for summary decision. Respondent's 2013 employment and payroll report gives no indication that the list contains only seasonal employees, and it does not support Complainant's position.

Finally, Complainant does not offer evidence to refute Respondent's claim that Quinn decided to hire Moser based on recommendations from employees, and that Quinn did not have access to personnel or application files at the time that he made the decision.

Viewing the evidence in the light most favorable to Complainant (the non-moving party), even if Complainant could establish a *prima facie* case of discrimination in this matter (which I have already determined that he cannot do), Complainant fails to present evidence showing that

Respondent's legitimate, non-discriminatory reason for failing to hire Complainant in 2013 was really a pretext for unlawful discrimination based on Complainant's race and age. I therefore find that Respondent's arguments for summary decision in this matter are persuasive, and that judgment as a matter of law must be granted in Respondent's favor.

RECOMMENDATION

For the reasons discussed above, Respondent's motion for summary decision is GRANTED, and judgment as a matter of law is entered in Respondent's favor. I further recommend that the Illinois Human Rights Commission affirm this Recommended Order and Decision pursuant to 56 Ill. Admin. Code § 5300.910.

NOTICE TO THE PARTIES REGARDING EXCEPTIONS

Pursuant to 56 Ill. Admin. Code § 5300.920, any party that wishes to file exceptions to this Recommended Order and Decision must do so within thirty (30) days of service of this Recommended Order and Decision. Parties wishing to file exceptions to this Recommended Order and Decision must ensure that such exceptions arrive at the Commission by mail, email, fax, or in-person service within thirty (30) days, as required by 56 Ill. Admin. Code § 5300.920.

HUMAN RIGHTS COMMISSION

BY:

JENNIFER S. NOLEN
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: August 2, 2023

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
CHRIS BLANKS,	)	
	)	Charge No.: **2014CA1147**
Complainant,	)	EEOC No.: **21BA40270**
	)	ALS No.: **19-0337**
And	)	
	)	
CURRAN CONTRACTING COMPANY, INC.,	)	
	)	
Respondent.	)	

REMAND ORDER

This matter coming before the Commission on May 22, 2024, by a panel of three, Chair Mona Noriega, Commissioner Jacqueline Y. Collins, and Commissioner Janice M. Glenn presiding, upon the Exceptions filed by Chris Blanks ("Complainant") to the Recommended Order and Decision ("ROD") issued by Administrative Law Judge ("ALJ") Jennifer S. Nolen, on August 2, 2023;[1]

NOW, THEREFORE, it is hereby **ORDERED** that the ALJ's ROD is reversed, and the matter is remanded back to the Administrative Law Section for the scheduling of a public hearing on the merits of the complaint.[2]

DISCUSSION

On July 30, 2019, Complainant filed a complaint with the Commission, alleging that Curran Contracting Company, Inc. ("Respondent"), failed to hire him in 2013 on account of his race, Black (Count A), and age, 51 (Count B). On August 26, 2022, Respondent filed its motion for summary decision, requesting that ALJ Nolen enter judgment as a matter of law in Respondent's favor. On August 2, 2023, ALJ Nolen granted Respondent's motion. On August 22, 2023, Complainant filed Exceptions to ALJ Nolen's ROD.

Factual Background

On October 12, 2007, Respondent hired Complainant as a Local 152 Seasonal Laborer in Lake County, Illinois. On December 4, 2007, toward the conclusion of the construction season, Complainant was laid off. The typical construction season runs from approximately April to November each year. Complainant returned to work for Respondent for the 2008, 2009, and 2010 construction seasons, but was not rehired in 2011.

[1] The Illinois Department of Human Rights ("Department") is an additional statutory party that has conducted state action in this matter. It is named as an additional party of record. The Department did not participate in the Commission's consideration of this matter.
[2] This Order is entered pursuant to a 3-0-0 vote by the Commissioners.

According to Complainant, employees from previous construction seasons applied for work with Respondent for a new construction season by attending a spring safety meeting hosted by Respondent in March of each year. Complainant asserted that calling one of Respondent's locations to inquire would also suffice. According to Complainant, for seasonal laborers that worked with Respondent before, there was no need to submit a written application to be "called back" or rehired.

In March 2011, Complainant attended the spring safety meeting, but he was not hired for that season, or for any season since. Complainant averred that he did not receive any feedback related to his performance during the 2010 construction season. Complainant asserted that he was very vocal about Respondent's discriminatory hiring practices against Black applicants and that Complainant continually brought his concerns up to management at Respondent since 2008.

In March 2013, Complainant attended Respondent's spring safety meeting to apply for seasonal employment with Respondent. Complainant asserted that he also called and spoke with Respondent President James Rick Noe on April 8, 2013, about employment and his concerns about Respondent's discriminatory hiring practices. Complainant also went to Respondent's office, in person, in April 2013, and talked to an employee, who directed him to call Superintendent Brad Quinn, who was responsible for hiring. Complainant asserted that he spoke to Quinn over the phone on April 25, 2013, and was told that he would be "added to the list."

In May 2013, having heard nothing from Respondent, Complainant submitted a written application for employment. Complainant asserted that he only submitted the written application because he "felt compelled to document that [he] was still looking to be employed." Ultimately, he was not hired in 2013, although Respondent hired several employees for that construction season. Complainant also asserted that, in July 2013, Respondent hired Shelly Moser, who is White and under 40 years old, as a seasonal laborer but did not hire him.

According to Respondent, Complainant was not hired back in 2011 because there were reports from his prior supervisors that Complainant had productivity issues. Respondent also stated that the reason Complainant was not hired in 2013 was because, by the time it received Complainant's written application in May 2013, there were no seasonal laborer positions available.

Noe asserted that seasonal laborers who worked the most recent construction season were not required to submit a new application for employment. Instead, these seasonal laborers were informally "called back" for the next season by Respondent. In contrast, seasonal laborers who did not work during last year's construction season were required to submit a written application to be rehired. According to Noe, foremen and superintendents "ranked" the employees during the "call back" process at the end of each season and used the rankings to determine who to hire the next season. Respondent did not have a written policy regarding the hiring process for seasonal laborers.

Noe stated that he was told by one of his employees that Complainant was not brought back in 2011 because of productivity issues in 2010. Noe further stated that Complainant attended Respondent's spring safety meeting in 2013 and that, though Complainant was not invited, Noe

permitted Complainant to stay. Specifically, Noe stated that he allowed Complainant to stay at the meeting because "[Complainant] had worked [there] prior" and that Respondent "might have work [and] [Complainant] was available." Noe also stated that attending the spring meeting did not guarantee that a person would be hired on.

As to Respondent's hiring of Moser in July 2013, Respondent asserted that she was hired on an emergency basis to fill a position that unexpectedly came open in the middle of construction season. Respondent further asserted that Quinn did not have access to the applications that were submitted at the beginning of the 2013 construction season and that Moser came recommended by other employees to fill the vacancy.

Recommended Order and Decision

In ruling on Respondent's motion for summary decision, ALJ Nolen found that Complainant failed to establish a *prima facie* case of race and age discrimination and, even if he could, that Respondent sufficiently articulated a legitimate, non-discriminatory reason for not hiring Complainant. Accordingly, ALJ Nolen granted Respondent's motion for summary decision.

The ALJ found that Complainant did not establish a *prima facie* case because he applied after Respondent completed its hiring for the season. The ALJ determined that, going into the 2013 construction season, there were two types of applicants: (1) employees who worked last year's construction season and (2) applicants who had not worked last year's construction season. Further, the ALJ found that, consistent with Respondent's articulation of its hiring policy, the first type of employees did not have to submit a written application, whereas the second type did have to submit a written application. Accordingly, the ALJ found that Complainant, because he had not worked the last construction season, had to submit a written application. Thus, according to the ALJ, Complainant did not apply until he submitted his written application in mid-May 2013, after Respondent had concluded its hiring for the 2013 construction season. Consequently, the ALJ found that Complainant failed to apply for an open position.

The ALJ also found that, although Respondent hired Moser in July 2013, the hiring did not constitute a hiring for the same position that Complainant had applied for. The position Moser was hired for did not come open until mid-season, in July 2013, about two-months after Complainant submitted his written application. Accordingly, the ALJ found that there was insufficient evidence to support a *prima facie* case.

Second, the ALJ found that, even if there was sufficient evidence to support a *prima facie* case, Complainant did not present evidence sufficient to rebut Respondent's legitimate, non-discriminatory reason for not hiring him, which was that there were no positions available by the time Complainant applied in mid-May 2013. The ALJ found that, although Complainant provided payroll documents from 2013 suggesting that Respondent hired over 140 White seasonal workers that year, the list was not composed in a way so as to assure the ALJ that it accurately represented the number and

demographics of the seasonal workers Respondent hired. Accordingly, the ALJ found that the documents did not support Complainant's position.

Complainant's Exceptions

In his Exceptions, Complainant argues that he applied for a position with Respondent when he attended the spring safety meeting in March 2013. Complainant argues that, pursuant to Respondent's practice in years past, he was not required to submit a written application to be considered for employment, as he had worked with Respondent during previous construction seasons and attended the spring safety meeting. According to Complainant, only brand-new applicants who had never worked with Respondent were required to submit a written application.

Analysis

The standard for a motion for summary decision is the same as the standard for a motion for summary judgment—it is only to be granted when "the pleadings and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a recommended order as a matter of law." 775 ILCS 5/8-106.1(2). Therefore, the standard of review for this Commission is the same as the appellate court would apply to a motion for summary judgment—*de novo*. See *Murray v. Chicago Youth Ctr.*, 224 Ill. 2d 213, 228 (2007).

Under the Illinois Human Rights Act, either party may move for a summary decision in its favor. 775 ILCS 5/8-106.1(1). If the pleadings and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a recommended order as a matter of law, the motion must be granted. 775 ILCS 5/8-106.1(2). A summary decision is the Commission's procedural analogue to the motion for summary judgment in the Illinois Code of Civil Procedure. *Cano v. Village of Dolton*, 250 Ill. App. 3d 130, 138 (1st Dist. 1993). Accordingly, when considering a motion for summary decision, an ALJ may not weigh the evidence or assess the credibility of a witness. *Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, ¶ 34 (citing *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008)). This is because the purpose of a summary decision is not to try a question of fact, but rather to determine if one exists. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). A motion for summary decision is an extraordinary measure and should only be granted where the right of the movant is clear and free from doubt, and any evidence in support of the motion must be construed strictly against the moving party and liberally in favor of the opponent. *In re Nora A. Hess and State of Illinois, Department of Corrections*, IHRC, ALS No. S07479, 2008 ILHUM LEXIS 160, *10 (September 10, 2008); *Carona v. Illinois C. G. R. Co.*, 203 Ill. App. 3d 947, 949 (5th Dist. 1990).

Even though a complainant is still required to present some factual basis that would potentially entitle them to a judgment under the law, there is no requirement that a complainant prove their case to overcome a motion for summary decision. *In re Nora A. Hess*, 2008 ILHUM LEXIS 160 at *10. Where a complainant presents enough evidence to establish a *prima facie* case and to raise a question of material fact as to whether a respondent's legitimate non-discriminatory reason is pretext for

discrimination, it is proper to deny a party's motion for summary decision. *See In re Julie Ann Bernicky and Nationsbank, CRT*, IHRC, ALS No. 10530, 2001 ILHUM LEXIS 168, *9-13 (May 17, 2001) (denying respondent's motion for summary decision where ALJ found that complainant established her *prima facie* case and provided enough evidence to raise an issue of material fact as to whether respondent's non-discriminatory reason was pretext for discrimination).

Counts A & B

Complainant maintains that Respondent failed to hire him for the 2013 construction season on account of his race (Count A) and age (Count B). In order to support a *prima facie* failure-to-hire case, Complainant must establish that: (1) he is a member of a protected class; (2) he applied and was qualified for an available position; (3) he was rejected despite his qualifications; and (4) the position remained open, and Respondent sought or hired other applicants from persons of Complainant's qualifications. *See* C*.R.M. v. Chief Legal Counsel*, 372 Ill. App. 3d 730, 733 (1st Dist. 2007); *Stone v. Department of Human Rights*, 299 Ill. App. 3d 306, 315 (4th Dist. 1998*); Oak Lawn v. Human Rights Comm.*, 133 Ill. App. 3d 221, 224 (1st Dist. 1985).

Here, prong one is met, as Complainant is a member of a protected class. Prong two is met because, according to Complainant, consistent with Respondent's hiring practices, he applied for the seasonal laborer role when he attended the 2013 spring meeting. Prong three is met because he was not offered the seasonal laborer role he sought. Prong four is also met because Respondent hired several other applicants outside of Petitioner's protected classes for the 2013 construction season. Accordingly, Petitioner has presented sufficient evidence to support a *prima facie* failure-to-hire case.

In contrast, specifically as it relates to prong two of the *prima facie* test, Noe maintained that only employees that worked in last year's construction season would be hired without submitting a written application. In other words, because there was a gap between when Complainant last worked for Respondent and the upcoming construction season, Complainant had to submit a written application. There is no written policy referenced in the record supporting Respondent's articulation of its hiring practices.

Because it is disputed whether Complainant had to submit a written application to be considered by Respondent for employment, granting Respondent's motion for summary decision required ALJ Nolen to make a credibility determination in favor of Respondent's testimony, which, at this stage, is not permitted. *Destiny Health, Inc. v. Connecticut General Life Insurance Co.*, 2015 IL App (1st) 142530, ¶ 22 ("[A] court cannot make credibility determinations or weigh evidence in deciding a summary judgment motion"). Whether Complainant sufficiently applied for a position with Respondent in March 2013, before Respondent began hiring for the construction season, or May 2013, after Respondent had concluded hiring for the season, constitutes an unresolved, genuine issue of material fact that must be adjudicated at a public hearing.

Further, regarding ALJ Nolen's determination that, even if Complainant could establish his *prima facie* case, Complainant could not show that Respondent's legitimate, non-discriminatory reason was

pretextual, in order to establish pretext, the evidence must show that: (1) the proffered reason has no basis in fact; (2) the proffered reason did not actually motivate the decision; or (3) the proffered reason is insufficient to have motivated the decision. *In re Fernando Valladares and Bob Chinn's Crab House*, IHRC, ALS No. 07-0011, 2010 ILHUM LEXIS 321, *15 (December 20, 2010). Respondent's articulated non-discriminatory reason for not hiring Complainant is that there were no positions available when Complainant applied in May 2013. However, as described above, there is a dispute as to when Complainant applied for the seasonal laborer position in 2013. This disputed fact may yet be adjudicated in Complainant's favor, in which case Respondent's non-discriminatory reason for not hiring Complainant would have no basis in fact and, therefore, would be pretext for discrimination.

CONCLUSION

After reviewing the record, the Commission reverses the ALJ's ROD and remands this matter to the Administrative Law Section for a public hearing on the merits of the complaint.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission accepts review of the cause and Exceptions in the above-captioned matter, reverses the Administrative Law Judge's August 2, 2023, Recommended Order and Decision, and remands the cause to the Administrative Law Section for further proceedings consistent with this determination.

This Order is not yet final and appealable.

STATE OF ILLINOIS)
) Entered this 30th day of MAY 2024.
HUMAN RIGHTS COMMISSION)

Chair Mona Noriega

Commissioner Jacqueline Y. Collins

Commissioner Janice M. Glenn

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: CHRIS BLANKS, Complainant, v. CURRAN CONTRACTING COMPANY, INC., Respondent.	IDHR Charge No.: 2014-CA-1147 EEOC Charge No.: 21-BA-40270 ALS Case No.: 19-0337 Administrative Law Judge Jennifer S. Nolen

SUPPLEMENTAL RECOMMENDED ORDER AND DECISION

On May 30, 2024, a three-member panel of the Illinois Human Rights Commission ("Commission") issued a Remand Order to be addressed by the Administrative Law Section. *See* Remand Order ("Remand Order") (entered May 30, 2024). The Remand Order identified a discrete issue of fact that needed to be resolved at a public hearing. Accordingly, a public hearing was held on December 9, 2024. Complainant appeared on his own behalf (self-represented), while Respondent appeared through counsel. Both parties actively participated in the proceedings by presenting witness testimony and documentary evidence. Each party also submitted a pre-hearing brief prior to the start of the public hearing. This matter is thus ready for decision.

For the reasons discussed below, I find that Complainant was unable to establish a *prima facie* case of discrimination during the public hearing. Judgment in this case is therefore entered in Respondent's favor.

INTRODUCTION

A. Relevant Case History

On July 30, 2019, Complainant filed his Complaint with the Commission alleging that Respondent failed to hire him on May 20, 2013, because of his Race (Count A) and his age (Count B) in violation of the Illinois Human Rights Act (the "Act"). *See* Compl. ¶¶ 12 & 13. Complainant self-identified his race as Black, and at the time of the alleged incident, Complainant was 51 years of age. *See id*. ¶¶ 3 & 11. Complainant specifically alleged that "on or around May 2013, Complainant applied for a job with Respondent via email." *See id*. ¶ 6.

On August 2, 2023, I entered a Recommended Order and Decision ("ROD") granting Respondent's motion for summary decision. In the ROD, I concluded:

> Complainant cannot establish a *prima facie* case of race and age discrimination because he cannot demonstrate that a laborer/flagger employment opportunity was open and available at the time of his application, and [that] Respondent sought other applicants from persons of petitioner's qualifications.

See ROD at 5. This conclusion was supported by the fact that Complainant did not submit evidence of a job posting or other announcement demonstrating that the position that he applied for by email was open and available at the time of his application in May of 2013. *See id*., at 9.

The Commission, by a panel of three Commissioners, determined that a material dispute of fact existed as to whether a hiring opportunity was available to Complainant in 2013. Specifically, the panel concluded that evidence was needed to determine whether Complainant was even required to submit a written application to be considered for employment in 2013, and whether Complainant's act of showing up to an employee safety meeting in the spring of 2013 was a viable method of applying for a position with Respondent. *See* Remand Order at 5.

B. Public Hearing

At the commencement of the public hearing, I made my ruling and record on both of the parties' respective motions *in Limine*. Complainant's motion *in Limine* and request to declare his May 2013 voluntary employment application inadmissible was denied. *See* Hr'g Tr. 13:18-2, Dec. 9, 2024. I granted and denied portions of Respondent's motions *in Limine*. Most relevant, I granted Respondent's Motion *In Limine* No. 9 to preclude testimony from any witness who lacks personal knowledge, and Respondent's Motion *In Limine* No. 10 to bar testimony or references to allegations of discrimination occurring prior to 2013 (which were not included in Complainant's complaint, and which were thus time-barred). *See* Hr'g Tr. at 18:5-12.

Complainant's witness, Leroy Walker ("Walker"), was not present for the public hearing. To ensure due process, I asked Complainant to make an offer of proof regarding what Walker would testify to if he were present. *See id*. at 99:10-24; 100:1-24; and 101:1-16. Complainant indicated that Walker was employed with Respondent prior to 2013 and had no personal knowledge as to what happened at the 2013 spring safety meeting.[1] *See id*. at 101:1-16. Therefore, Walker was excluded as a witness (notwithstanding the fact that he was not present). *See id*.

Complainant testified on his own behalf in his case-in-chief and called Rick Noe ("Noe"), the former President of Respondent, as an adverse witness in his case-in-chief. The following exhibits from Complainant were admitted into the record:

- (Ex. 1) Discovery Deposition of Rick Noe (June 2, 2022); and
- (Ex. 3) Commission's Remand Order (entered May 30, 2024).

In its defense, Respondent also elicited testimony from both Complainant and Noe. The following exhibits from Respondent were admitted into the record:

[1] Complainant later testified that Walker was employed with Respondent "long before" Complainant began his employment with Respondent. *See* Hr'g Tr. 100:6-8.

- (Ex. 1) Respondent's Equal Employment Opportunity Policy;
- (Ex.2) Complainant's Application for Employment (signed May 16, 2013);
- (Ex.3) Respondent's 2013 Employee Demographics Chart; and
- (Ex. 4) Respondent's Payroll Report for Complainant.

Both parties concluded their case-in-chief on December 9, 2024. I then advised both parties that following the close of the public hearing, I would issue either a Recommended Liability Determination or a Supplemental Recommended Order and Decision ("SROD") to address the evidentiary question raised in the Commission's Remand Order. *See* Hr'g Tr. at 9:1-6.

THE ISSUE ON REMAND

The Commissions' Remand Order reversed and remanded the ROD issued on August 2, 2023. The Commission determined that a genuine issue of material fact existed that needed to be adjudicated at a public hearing. *See* Remand Order, at 5. Specifically, the Commission remanded this matter back to me to determine: "[W]hether Complainant sufficiently applied for a position with Respondent in March 2013 before Respondent began hiring for the construction season, or May 2013, after Respondent had concluded hiring for the season". *See id*.

SUPPLEMENTAL FINDINGS OF FACT

The findings of fact made in my original ROD are adopted and incorporated here by reference. The supplemental findings of fact enumerated below are based on the record file in this matter, as well as from testimony and exhibits admitted at the public hearing. Factual assertions not addressed here were determined to be either unproven by a preponderance of the evidence, or immaterial to the supplemental recommended decision:

1. Respondent is an asphalt paving and excavating business, which begins its seasonal work "as soon as the weather breaks," which is usually before May 20th of any given year. *See* Hr'g Tr. at 79:18-24; 80:1-5.

2. Complainant worked as a seasonal worker with Respondent from 2007 to 2010. *Id*. at 83:4-9.

3. Complainant received a letter to make him aware of the 2010 safety meeting. Complainant testified that he was not considered a new applicant in 2010 because he was an employee in the prior season. *Id*. at 28:6-20.

4. Complainant testified that letters about Respondent's safety meetings were usually sent out in January, February, or March of each year. Hr'g Tr. at 30:3-11.

5. Complainant testified that after the 2010 safety meeting, he began working in April 2010. *Id*. at 30:12-19.

6. Complainant's 2010 employment ended with Respondent in November 2010. *Id*. at 30:20-24; 31:1-2. As suggested here and above, Complainant did not work for Respondent after 2010.

7. Complainant worked for Stuckey Construction between 2010 and 2015 earning $40.00 per hour, and there were no overtime opportunities with Stuckey Construction. *Id*. at 38:24.

8. Unlike in 2010, Complainant did not receive a letter about the March 2013 safety meeting (as he had not worked for Respondent since 2010). *Id*. at 31:3-9. It is undisputed that Complainant was not invited to attend the March 2013 safety meeting. *Id.* at 86:17-20.

9. Complainant learned about the date of the March 2013 safety meeting from other employees, who he contacted expressly to determine the date and time of the safety meeting. *Id*. at 32:17-24; 33:1-4.

10. Complainant testified that the purpose of the safety meeting was to "make everybody aware of what the EEOC policies are, the safety policies are, and things of that nature". *Id*. at 33:5-14.

11. Complainant attended Respondent's March 2013 safety meeting and was permitted to remain at the meeting. *Id*. at 86:9-21.

12. Attendance at the safety meeting was by invitation only. *Id*. at 76:7-24; 77:1-2.

13. Complainant was the only prior employee, with a gap in employment, to show up uninvited to the safety meeting in March 2013. *Id*. at 77:10-20.

14. On May 16, 2013, Complainant applied for employment with Respondent via email. His application was stamped as "Received" by Respondent on May 20, 2013. Hr'g Tr. at 35:8-24; 36:1-9.

15. In 2013, Respondent did not have a written policy regarding whether showing up to the safety meeting was a means of applying for employment. *Id*. at 37:1-24.

16. Approximately 80% of the seasonal employees receive a call back to work during the next work season in the following year. *Id*. 62:20-24; *See also* Complainant's Ex. 1. Deposition of Rick Noe, ("Noe Dep."), 25:11-13, June 2, 2022.

17. Respondent had an unwritten policy that if there was a gap in employment, an employee would need to submit an application for employment to be rehired by Respondent. Noe testified that this was required for payroll purposes. *Id*. at 63:1-15.

18. Those seasonal employees who were called back to work, within one year from their previous assignments, were not required to submit renewed employment applications. *Id*. at 65:2-11.

19. Complainant was not hired to work during the 2013 construction season.

20. Complainant testified that, traditionally, Respondent's safety meeting was to make sure employees were aware of safety procedures as well as Equal Employment Opportunity ("EEO") policies. However, Complainant believed that there was nothing preventing him from showing up to inquire about available work during the safety meeting. *Id*. at 104:9-18.

21. The evidentiary record was closed at the conclusion of the December 9, 2024, public hearing.

CONCLUSIONS OF LAW

Based on the record in this case and the pleadings before me, I make the following conclusions of law:

1. This administrative court has jurisdiction over this matter and over the parties who have appeared in this case.

2. During the time period relevant to the allegations described in the Complaint, Complainant was a potential "Employee" as that term is defined by the Illinois Human Rights Act. *See* 775 ILCS 5/2-101(A)(1)(a). As such, Complainant is authorized to invoke the protections of the Act.

3. During the time period relevant to the allegations described in the Complaint, Respondent was a potential "Employer" as that term is defined by the Illinois Human Rights Act. *See* 775 ILCS 5/2-101(B)(1)(a). As such, Respondent is subject to the provisions of the Act.

4. Complainant failed to establish a *prima facie* case of race and age discrimination because he could not demonstrate by a preponderance of the evidence that a laborer/flagger

employment opportunity was open in March 2013 when he attended the safety meeting, or that he somehow "applied" for employment when attending the safety meeting.

5. Respondent articulated a legitimate, nondiscriminatory reason for not hiring Complainant in March 2013, in that there were no positions available, Complainant was not invited to attend the safety meeting, and the safety meeting was not traditionally a hiring meeting.

6. Complainant failed to establish a *prima facie* case of race and age discrimination by a preponderance of the evidence because he could not demonstrate that a laborer/flagger employment opportunity was open in May 2013 when he submitted an application for employment by email.

7. Respondent articulated a legitimate, nondiscriminatory reason for not hiring Complainant in May 2013, in that there were no positions available and all of the workers for that season were already hired prior to Complainant's May 2013 application.

8. Complainant failed to meet his burden of proving that Respondent's articulated reasons were a really a pretext for unlawful discrimination because Complainant could not demonstrate, by a preponderance of the evidence, that Respondent's stated reasons for not hiring him in March 2013 or May 2013 were either a lie or unworthy of credence.

DISCUSSION

In analyzing employment discrimination claims brought under the Act, the Commission and the Illinois Supreme Court have adopted the analytical framework set forth by the United States Supreme Court in its decisions addressing claims brought under Title VII of the Civil Rights Act of 1964. *Zaderaka v. Ill. Human Rights Comm'n*, 131 Ill. 2d 172, 178, 545 N.E.2d 684, 687, 137 Ill. Dec. 31 (1989). The three-step analysis set forth in *Zaderaka* is as follows: (1) first, the complainant must establish by a preponderance of the evidence a *prima facie* case of unlawful

discrimination. If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against him; (2) second, to rebut the presumption, the employer must articulate (not prove) a legitimate, nondiscriminatory reason for its decision to take an adverse action against the complainant; and (3) finally, if the respondent carries its burden of production, the presumption of unlawful discrimination falls and the complainant must then prove, by a preponderance of the evidence, that the respondent's articulated reason was not its true reason, but instead a pretext for unlawful discrimination. *Maye v. Ill. Human Rights Comm'n*, 224 Ill.App.3d 353, 360, 586 N.E.2d 550 (1st Dist. 1991). *Champaign-Urbana Pub. Health Dist. v. Ill. Human Rights Comm'n*, 2022 IL App (4th) 200357, P204. The ultimate burden of persuading the trier of fact that Respondent engaged in unlawful discrimination remains at all times with Complainant. *Zaderaka*, 131 Ill. 2d at 178-79.

The burden to establish a *prima facie* case for an employment discrimination claim based on a failure to hire requires Complainant to show by a preponderance of the evidence that: (1) he is a member of a protected class; (2) he applied and was qualified for an available position; (3) he was rejected despite his qualifications; and (4) the position remained open and the employer sought other applicants from persons of equal or lesser qualifications. *See Oak Lawn v. Human Rights Comm*., 133 Ill. App. 3d 221, 224 (1st Dist. 1985); and *C.R.M. v. Chief Legal Counsel of Ill. Dept. of Human Rights*, 372 Ill. App. 3d 730, 733 (2007).

I. Complainant Failed to Establish a *Prima Facie* Case of Discriminatory Failure to Hire in March 2013 or May 2013

The sole directive of the Remand Order was for this administrative court to conduct a public hearing and make credibility determinations as to whether Complainant sufficiently and timely applied for employment with Respondent in March 2013 or May 2013. Complainant failed

to present sufficient evidence to meet the second and fourth prongs needed to establish a *prima facie* case of discriminatory failure to hire in March 2013 or May 2013.

A. Complainant Did Not Timely Apply for Employment in March 2013

The first hurdle for Complainant was to demonstrate that applications for seasonal or permanent employment were submitted and accepted at Respondent's safety meetings. At the public hearing, Complainant failed to clear that hurdle. Complainant's own testimony confirmed that the purpose of the safety meeting was for Respondent to share EEO and safety instructions. *See* Hr'g. Tr. 33:5-14. Respondent's former President, Noe confirmed that the purpose of the safety meeting was to cover Respondent's safety handbook, safety rules, EEO policy, sexual harassment policy, drug policy, and other administrative matters. *See id*.at 76:7-16. In light of the uncontested testimony from Complainant and Respondent, I find that the purpose of Respondent's safety meeting was to provide instructions to hired employees on Respondent's discrimination and workplace safety policies and procedures.

Complainant failed to submit evidence that it was Respondent's practice to hire potential employees at the safety meeting. Noe permitted Complainant to stay at the 2013 safety meeting; however, Noe also informed Complainant that attending the safety meeting did not guarantee that a person would be hired. This evidence remains undisputed since my original ROD. *See* Remand Order, at 3. Therefore, I find that the purpose of the safety meeting was not to submit applications for employment, but rather to receive safety policy and procedure instructions from Respondent.

Based on the evidence presented at the public hearing, it is undisputed that Complainant was not invited to attend the safety meeting that was conducted in March 2013. In fact, the evidence showed that Complainant only knew the date and time of the March 2013 safety meeting because he contacted other employees to obtain this information. No one with the authority to hire

Complainant informed him about the meeting or otherwise solicited his involvement. Simply put, Complainant was working for another company in 2013, but took it upon himself to unilaterally appear at Respondent's safety meeting in hopes that he would be hired on the spot. This was not Respondent's hiring practice, nor was Complainant able to offer evidence at the public hearing showing that positions for the 2013 construction season were even available when Complainant crashed Respondent's safety meeting in March 2013.

During the public hearing, Complainant repeatedly suggested that positions were available in 2013, and that Respondent could have hired him at the safety meeting in March 2013. Yet these self-serving statements were based on no evidence that was put before this administrative court, and I therefore decline to credit them as based on anything more than speculation. The facts are that in March of 2013—after the seasonal termination from Respondent's employment three years earlier—Complainant showed up at the safety meeting in the hopes that Respondent would hire him. But a general "hope" to be hired is not proof of Respondent's hiring practices, nor is it evidence that positions were available in March 2013. I thus conclude that Complainant failed to show that he applied for a position with Respondent prior to the beginning of the 2013 construction/paving season, or that positions were even available for him to do so.

B. Complainant Did Not Timely Apply for Employment in May 2013

Complainant testified at the public hearing that he was not required to submit an employment application in 2010 when he was re-hired from the previous work season. The evidence shows that Complainant did not work for Respondent in the 2011 or 2012 seasons. Noe testified that if a previous employee did not work in the prior season, the employee would have to submit a new employment application. *See* Hr'g Tr. at 76:1-24; 77:1-22.

While there was no written policy for re-application, Noe testified that for payroll purposes, a gap in employment meant that a potential employee needed to submit an updated application. If an employee was in the 80 percent called back for work in a subsequent year, that individual was not required to submit an employment application for the season in which they were re-hired. *See* Noe Dep. at 29:19-24; 30:1-5. Based on Noe's testimony at public hearing, I conclude that if an employee worked in a certain year and was called back for work in the immediately following season, there was no need for that employee to submit a renewed employment application under Respondent's practice. Complainant, on the other hand, was not in this category of employees, as he had a gap in his employment and had not worked for Respondent since 2010. Yet the evidence at trial failed to establish that Complainant was treated differently than any other "gapped" employees on basis of his race or age.

Complainant emailed an application to Respondent for employment on or about May 16, 2013. As noted above, the evidence at the public hearing showed there were no positions available or held open at the time of Complainant's application. Referring back to the construction/paving timeline for Respondent that was discussed earlier, an application in May 2013 would be received ***after*** the beginning of Respondent's seasonal work schedule (which begins in March/April of each year, according to Complainant's own testimony). Complainant thus failed to present evidence showing that a seasonal position had been held open from March 2013 to May 2013 for which he could have applied. For these reasons, I find that Complainant did not submit a timely application for employment in May 2013.

II. Complainant Failed to Prove That Respondent's Articulated Reason is A Pretext to Unlawful Discrimination

As explained above, where (as here) Respondent has articulated a legitimate, non-discriminatory reason for its employment decision, Complainant must prove that Respondent's

articulated reason was really a "pretext" for unlawful discrimination. *Owens v. Dep't of Human Rights*, 403 Ill. App. 3d at 919 (citing *Zaderaka*, 131 Ill. 2d at 179-80). "Pretext" is more than a suggestion of falsehood or ulterior motive. "In short, pretext is a lie." *In re Kolin and Steinhagen v. Town of Cicero*, ALS No. 13-0526(C), 2018 ILHUM LEXIS 837, at *13 (Aug. 13, 2018) (citation omitted).

To show pretext, Complainant is required to demonstrate: (1) that the proffered reason has no basis in fact; (2) that the proffered reason did not actually motivate Respondent; or (3) that the proffered reason was insufficient to have motivated Respondent's actions. *See id*. (citation omitted). When offering evidence to make these required showings, the question is not whether the rationale proffered by Respondent was "accurate, wise, or well-considered," but rather whether Respondent honestly believed the legitimate, non-discriminatory reasons offered for Complainant's termination. *In re Kolodzik v. Astellas Pharma, U.S., LLC*, ALS No. 17-0055, 2018 ILHUM LEXIS 958, at *19 (Oct. 25, 2018) (citation omitted). In fact, even where Complainant can establish that Respondent's articulation was a lie, this does not automatically entitle him to prevail on his cause of action. *See Id*. Instead, he must concurrently demonstrate a discriminatory animus or motivation on the part of Respondent to successfully prove his allegations of discrimination. *Id*.

Respondent's articulated reason for not hiring Complainant, was that as of March 2013 and May 20, 2013, all 2013 seasonal laborer positions had been filled and that there were no positions open at the time of Complainant's application. Complainant argued at the public hearing that vague policies or a lack of written policies and procedures "leaves room for a lack of diversity, lack of inclusion, and an opportunity to be discriminated against without accountability". *See* Hr'g Tr. at 43:7-15. This argument is pure speculation, which is insufficient to serve as evidence during a

public hearing. *See Sorce v. Naperville Jeep Eagle, Inc*., 309 Ill. App. 3d 313, 328 (2d Dist. 1999) (*citing Sanchez v. Firestone Tire & Rubber Co*., 237 Ill. App. 3d 872, 874 (3d Dist. 1992)). No other tangible evidence of pretext was submitted by Complainant. I therefore find that Complainant failed to present evidence showing that Respondent's legitimate, non-discriminatory reason for not hiring Complainant in 2013 was a lie or otherwise unworthy of credence.

RECOMMENDATION

After reviewing the transcript of proceedings and all relevant pleadings in this matter, I find that Complainant failed to establish by a preponderance of the evidence that Respondent committed any cognizable violation of the Illinois Human Rights Act in the instant case. As discussed above, Complainant failed to show that he applied for employment in March 2013 when he attended Respondent's safety meeting. Further, Complainant failed to show that a position was open and available for application in either March 2013 or May 2013.

At the same time, even if Complainant had introduced evidence that a position was open for application, I have determined that he still failed to introduce evidence showing that Respondent's disinclination to hire Complainant was really a pretext for race or age-based discrimination. For these reasons, I find for Respondent in this matter and enter judgment in Respondent's favor.

HUMAN RIGHTS COMMISSION

BY:

JENNIFER S. NOLEN
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: December 31, 2024