STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

ADAM KUSS, Complainant, vs. CTI, Respondent.	ICRC No.: EMha17051071 EEOC No.: 24-2017-01228 DATE FILED JUN 24 2019 ICRC COMMISSION

FINAL ORDER

On March 13, 2019, Hon. Caroline A. Stephens Ryker, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") issued her Initial Findings of Fact, Conclusions of Law, and Order ("Order"). The Parties had opportunity to object to the Order, and Complainant objected to the Order on March 28, 2019. IC 4-21.5-3-29. Both Parties submitted briefs to the Commission on May 23, 2019, and the Commission held oral arguments on Complainant's objections on June 21, 2019. After due consideration of the complete record in this matter, the Commission adopts the following and HEREBY Orders:

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(g)(2).
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.

ORDERED by the Commission majority vote of 3 Commissioners on June 21, 2019

Steven A. Ramos, Chair
Indiana Civil Rights Commission

Certificate of Service

Served by Certified Mail on the Following on this 24 day of June, 2019.

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STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

ADAM KUSS, Complainant, vs. CTI, Respondent.	ICRC No.: EMha17051071 EEOC No.: 24-2017-01228 DATE FILED MAR 13 2019 OFFICE OF THE ADMINISTRATIVE JUDGE

NOTICE OF APPOINTMENT OF AN ADMINISTRATIVE LAW JUDGE; ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, pursuant to IC 22-9-1-6(i), the appointment of an Administrative Law Judge ("ALJ") was deemed necessary by a majority of the members of the Indiana Civil Rights Commission ("ICRC"), and the undersigned ALJ for the ICRC, Hon. Caroline A. Stephens Ryker ("ALJ Stephens Ryker"), a member in good standing before the bar of Indiana, has been appointed by the Chair to serve in that capacity as Presiding Officer over this matter. The former ALJ Hon. John F. Burkhardt no longer presides over this matter.

ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On April 30, 2018, Respondent CTI ("Respondent"), by counsel, filed Respondent's Motion for Summary Judgment and CTI's Brief in Support of Its Motion for Summary Judgment ("MSJ"), to which Complainant Adam Kuss ("Complainant"), by counsel, filed a response, Complainant's Memorandum of Law in Response to Respondent's Motion for Summary Judgment ("Memorandum"), on May 30, 2018. Respondent filed a reply brief, Respondent's CTI's Reply Brief in Support of Its Motion for Summary Judgement ("Reply") on June 18, 2018, and Complainant filed a surreply brief, Complainant's Surreply Brief in Response to Respondent's Reply Brief in Support of Its Motion for Summary Judgment ("Surreply") on June 29, 2018. The undersigned ALJ for the ICRC has reviewed the parties' briefs and supporting documents and being duly advised in the premises, enters the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant began working for Respondent in December of 2015 and was assigned to Respondent's only client, SIA. (MSJ, Ex. 3 at 2.)
2. SIA was Respondent's only client for the duration of the time that Complainant worked for Respondent. ((MSJ, Ex. 3 at 1.)
3. On January 15, 2016, Complainant began an extended leave of absence for pneumonia that resulted in SIA terminating his assignment, coded as "voluntary medical," on February 2, 2016. Respondent also terminated Complainant's employment on February 5, 2016, retroactively effective on January 15, 2016. (MSJ, Ex. 3 at 3 and Ex. A; Exhibit 6.)
4. Complainant inquired about returning to work with Respondent twice between February 5, 2016 and April 30, 2016, and he was told by two of Respondent's employees that he needed to wait one (1) year before reapplying. (MSJ, Ex. 4 at 10-11.)
5. In May of 2016, Complainant was rehired by Respondent and began working as a new hire on assignment at SIA after completing a six (6) to eight (8) week manufacturing program through Work One. (MSJ, Ex. 4 at 11-12.)
6. On August 26, 2016, Complainant began an extended leave of absence for medical issues that resulted in SIA terminating his assignment, coded as "voluntary medical," on September 7, 2016. Respondent terminated Complainant's employment on September 8, 2016. Afterwards, Complainant notified Respondent four (4) times that he would like to reapply and return to work, but each time he ultimately notified Respondent that he would be unable to return to work.
    a) On September 13, 2016, Complainant notified Respondent that he would be able to return to work on September 26, 2016. On October 3, 2016, Complainant notified Respondent that he would be unable to return to work. Respondent had not yet requested reassignment for Complainant from SIA.
    b) On October 3, 2016, Complainant provided Respondent with a Physician's note that stated he could return to work on October 10, 2016. On October 7, 2016, Complainant notified Respondent that he would be unable to return to work until November of 2016. Respondent had not yet requested reassignment for Complainant from SIA.

c) On November 1, 2016, Complainant provided Respondent with a Physician's note that stated he could return to work on November 7, 2016. On November 4, 2016, Respondent requested placement for Complainant at SIA, to begin on November 7, 2016 as a new hire, and SIA accepted Complainant for assignment.

d) However, after Complainant was evaluated at a SIA Clinic, Complainant was informed that he should not return to work until December 10, 2016. SIA terminated Complainant's assignment, coded as "voluntary medical," on November 7, 2016.

e) Based on the SIA Clinic's recommendation, Respondent requested placement for Complainant at SIA on December 6, 2016 to begin on December 10, 2016. Complainant informed Respondent on December 14, 2016 that he would be unable to return to work until January 4, 2017.

(MSJ, Ex. 3 at 3-6 and at Ex. A; Ex. 6; Ex. 12; Ex; 17.)

7. On December 16, 2016, Respondent's Regional Manager was notified by a SIA employee that SIA would not accept Complainant for placement. (MSJ, Ex. 3 at Ex. A.)
8. On January 4, 2017, Complainant called Respondent to ask about reassignment. Respondent told Complainant that no positions were open and that he should check back in March of 2017. (MSJ, Ex. 4 at 16.)
9. On April 3, 2017, Complainant again called Respondent to check about reassignment. Respondent told Complainant that he needed to wait one (1) year to reapply and that SIA would not accept him for assignment because of his attendance record. (MSJ, Ex. 4 at 24.)
10. Respondent does not dispute that Complainant had a disability. By at least November 10, 2016, both SIA and Respondent were aware that Complainant had a disability that impacted his attendance. Based on the records provided, the earliest that SIA and Respondent knew about Complainant's disability was around August of 2016. (MSJ, Ex. 3 at 13-14; Ex. 18; Ex. 4 at 13-15.)
11. At all times relevant to Complainant's employment with Respondent, SIA had a 98% attendance policy, which Respondent adopted. However, SIA managed the tracking of Respondent's employees' attendance and the disciplining of Respondent's employees for any attendance policy violations, not Respondent. SIA notified Respondent if SIA took action

concerning attendance, and Respondent could request attendance records of Respondent's employees at any time. (MSJ, Ex. 7; Ex. 3 at 2.)

12. Complainant was evaluated by SIA on December 19, 2015, June 14, 2016, and August 2, 2016. On June 25, 2016, SIA issued a Discussion Planner for Complainant because his attendance had dropped below 98% to 96.8%, but the Discussion Planner was ultimately vacated because SIA had not calculated Complainant's attendance correctly. During Complainant's employment with Respondent, Complainant's attendance never dropped lower than 96.8%. (MSJ, Ex. 3 at 2-3; Ex. 4 at 19; Ex. 5; Ex. 8; Ex. 10.)
13. Complainant's most recent evaluation on August 2, 2016 indicated that Complainant's SIA Group Leader recommended that SIA accept Complainant for additional temporary assignments and that while Complainant's work was "going well," his "attendance need[ed] to improve." (MSJ, Ex. 10.)
14. During the time relevant to Complainant's complaint, Respondent had a universally applied policy of allowing dismissed employees to reapply after one (1) year had passed. After one (1) year and upon reapplication, Respondent would resubmit the employee for assignment to SIA. Respondent's policy applied to employees whose employment was terminated for attendance issues, performance, and explicit rejection by SIA. (MSJ, Ex. 22.)
15. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. "...[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(a); Ind. Code § 4-21.5-3-23(b). 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. R. Tr. Pro. 56(c).
2. To succeed on a Motion for Summary Judgment, Respondent must "...affirmatively negate..." Complainant's claim. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). 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).

3. ICRC has subject matter jurisdiction over complaints of employment discrimination on the basis of disability. Ind. Code § 22-9-1-2; Ind. Code § 22-9-5-7; Ind. Code § 22-9-1-6(d).
4. Indiana courts look to federal precedent under Title VII of the Federal Civil Rights Act for assistance 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).
5. To prove disability discrimination in employment, Complainant must establish: 1) Complainant has a disability as defined by law, 2) Complainant was meeting Respondent's legitimate expectations, 3) Respondent took an adverse action against Complainant, and 4) circumstantial evidence indicates that it is more likely than not that Complainant's disability was the "but for" reason for Respondent taking the adverse action. *Knox Cty. Ass'n for Retarded CTIizens, Inc. v. Davis*, 100 N.E.3d 291, 300 (Ind. Ct. App.), *aff'd on reh'g*, 107 N.E.3d 1111 (Ind. Ct. App. 2018); *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 853 (7th Cir. 2015); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010).
6. If Complainant establishes his prima facie case of disability discrimination in employment, then Respondent can defeat Complainant's claim by articulating a legitimate, nondiscriminatory reason for its action. *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 853 (7th Cir. 2015); *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1259-1262 (Ind. Ct. App. 2002). Complainant must then establish that Respondent's stated reason is pretextual by demonstrating that "(1) the employer's stated reason has no basis in fact; (2) although based on fact, the stated reason was not the actual reason ...; or (3) the stated reason was insufficient to warrant..." the action taken. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1262 (Ind. Ct. App. 2002).
7. When a Complainant must establish that his or her employment would not have been terminated "but for" discriminatory intent, then the Complainant cannot prevail on a mixed-motive claim. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963 (7th Cir. 2010)("Although the jury agreed with her that Rockwell's perception of her limitations contributed to the discharge, it also found that Rockwell would have terminated Serwatka notwithstanding the improper consideration of her (perceived) disability. Relief is therefore not available to her under the ADA.")

8. Respondent argues that it is entitled to have its MSJ granted because Complainant has failed to make his prima facie case of employment discrimination on the basis of disability and because Respondent can articulate a legitimate, nondiscriminatory reason for refusing to rehire Complainant. Respondent argues that Complainant cannot make his prima facie case because 1) Complainant failed to meet the legitimate expectations of Respondent to maintain 98% attendance and 2) Complainant was a not a qualified individual because he could not perform the essential function of regular attendance. Respondent's alleged legitimate, nondiscriminatory rationale for refusing to hire Complainant is that SIA, Respondent's only client, did not accept Complainant for assignment.
9. In response, Complainant argues that material issues of genuine fact exist as to whether Complainant has established his prima facie case because 1) Complainant is a qualified individual and 2) the reliance on the attendance policy is pretext. Additionally, Complainant argues that material issues of genuine fact exist as to whether or not Respondent's stated reason for not hiring Complainant in 2017 is pretextual. Furthermore, Complainant alleges that Respondent has not explained or provided a rational as to why Respondent prevented Complainant from reapplying, a decision Complainant alleges Respondent made based on Complainant's disability.

Inability and Failure to Adhere to Attendance Policy

10. Respondent and Complainant disagree as to the existence of genuine issues of material fact concerning Complainant's prima facie case of employment discrimination. Respondent argues that attendance at the 98% level is an essential requirement of employment with Respondent. Accordingly, Respondent reasons that failure to meet the attendance policy demonstrates that Complainant was not a qualified individual under Indiana Code 22-9-5-16 and that Complainant was not meeting Respondent's legitimate expectations at the time Respondent refused to rehire Complainant. Alternatively, Complainant argues that the reliance on the attendance policy is pretext for discrimination because Complainant was never disciplined for attendance violations.
11. Courts have recognized that attendance is an essential job requirement and a legitimate expectation for an employer when permanent employees fail to attend work to a degree that

prevents them from effectively performing their job duties.[1] *See generally, Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441, 200 L. Ed. 2d 717 (2018)(a permanent employee requested an additional three months of leave after using 12 months of leave under the Family Medical Leave Act); *Byrne v. Avon Prod., Inc.*, 328 F.3d 379 (7th Cir. 2003)(a permanent employee requested a reasonable accommodation of not working intermittently for at least one year, during which he committed various acts of misconduct like sleeping on the job); *Moore-Fotso v. Bd. of Educ. of the CTIy of Chicago*, 211 F. Supp. 3d 1012 (N.D. Ill. 2016)(a permanent employee was dismissed after she was tardy 34 times and absent 18 times during a school year, a continuation of a longstanding pattern that predated her alleged disabilities).

12. Additionally, courts have allowed employers to apply past behavior to decisions concerning the future employment of an employee and to draw reasonable conclusions that attendance will not improve such that the employee is not able to meet the requirements of the position or the reasonable expectations of the employer. *Moore-Fotso v. Bd. of Educ. of the CTIy of Chicago*, 211 F. Supp. 3d 1012, 1027-28 (N.D. Ill. 2016).
13. Furthermore, the Indiana Civil Rights Law specifies that "...consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job the description shall be considered evidence of the essential functions of the job." Ind. Code § 22-9-5-16. At all times relevant, Respondent had a written policy in place requiring 98% attendance.
14. During the time that Complainant worked for Respondent, Complainant maintained an attendance rate below 98% and was not disciplined. The designated evidence from Respondent and Complainant reflects that Complainant's very lowest attendance percentage, which resulted only in his being placed on a Discussion Planner[2], was 96.8%, and Respondent previously rehired Complainant despite his noncompliance with the 98%

[1] This decision does not address instances where an employee has requested a reasonable accommodation with respect to an attendance policy because Complainant has not alleged that he requested a reasonable accommodation.
[2] The ALJ recognizes that the Discussion Planner was later vacated because the calculations concerning Respondent's attendance were incorrect. However, at issue is Respondent's response when Respondent thought that Complainant's attendance was correctly calculated as 96.8%. (MSJ, Exhibit 4 at 19.)

attendance policy. Furthermore, Respondent states that it was Respondent's practice not to discipline employees for attendance policy violations.

15. Respondent argues that it could reasonably anticipate that Complainant would "repeatedly require leaves of absences because of his disability," which it should be allowed to consider when determining if Complainant should have been rehired. (MSJ at 12.) However, the record indicates that Complainant never took a leave of absence; his employment was terminated, allowing Respondent to assign a different temporary employee to Complainant's temporary assignment.
16. The ALJ notes that Complainant also drew a distinction between the Indiana Civil Rights Law and the Disability Discrimination Act to argue that Complainant's complaint would not be extinguished by a failure to meet the definition of qualified employee. An analysis of Complainant's argument is not necessary to reach a decision concerning Complainant's prima facie case.
17. Genuine issues of material fact exist as to whether Complainant has met his prima facie case because Complainant has designated evidence of pretext with respect to Respondent's reliance on its attendance policy. However, Respondent has additionally alleged that it refused to hire Complainant for a legitimate, nondiscriminatory reason, and so the success of Respondent's Motion for Summary Judgement turns on whether Complainant has identified material issues of genuine fact concerning pretext with respect to Respondent's stated rationale.

Sole Client's Refusal to Accept Complainant for Assignment

18. After a Complainant articulates a prima facie case of discrimination, a Respondent may articulate a legitimate, nondiscriminatory reason for its actions. To overcome a Respondent's Motion for Summary Judgment, a Complainant must illustrate genuine issues of material fact exist as to whether the stated rational is pretext. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1262 (Ind. Ct. App. 2002).
19. Respondent asserts that Complainant's disability was not the "but for" reason that Respondent did not rehire Complainant because Respondent honestly believed that it would not be able to assign Complainant to its only client, SIA.

20. An employer's legitimate and honest belief can rebut a prima facie showing of disability discrimination provided the stated reason is also nondiscriminatory. *Skiba v. Illinois Cent. R.R. Co.*, 884 F.3d 708, 724 (7th Cir. 2018).

21. An employer has a duty to protect an employee from discrimination, even from its clients. *U.S. E.E.O.C. v. Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d 1029, 1036 (W.D. Wis. 2009). The 7th Circuit Court of Appeals has also concluded, in the context of a Title VII sexual harassment claim concerning independent contractors, that

> "...it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer. Ability to 'control' the actor plays no role. Employees are not puppets on strings; employers have an arsenal of incentives and sanctions (including discharge) that can be applied to affect conduct. It is the use (or failure to use) these options that makes an employer responsible..."

Dunn v. Washington Cty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005). In order for Respondent to be considered liable for acquiescing to a discriminatory policy, Complainant must establish that Respondent was negligent because 1) Respondent knew or should have known SIA was discriminating against Complainant and 2) Respondent took no reasonable corrective action within its control. *U.S. E.E.O.C. v. Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d 1029, 1036-37 (W.D. Wis. 2009). While not binding, the EEOC has issued instructive guidance on the relationship between staffing agencies and their clients that states "...a staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client."[3]

22. However, Complainant has not asserted that SIA was discriminating against Complainant or that SIA's enforcement of the 98% policy was discriminatory as applied to Complainant. Instead, Complainant has alleged that Respondent's actions alone were discriminatory.

[3] United States Equal Employment Opportunity Commission, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firm*, EEOC.GOV (Dec. 3, 1997), *available at* https://www.eeoc.gov/policy/docs/conting.html.

23. To support the argument that genuine issues of material fact exist as to whether Respondent refused to hire Complainant based on SIA's refusal to accept Complainant for reassignment, Complainant points to

    a) Respondent's invitation to reapply after one (1) year,
    b) the fact that no reason for SIA's directive was documented,
    c) the lack of a reason for SIA to call regarding Complainant's assignment on the date alleged,
    d) a delay between Respondent's receipt of Complainant's fitness for duty form and Respondent's request to reassign Complainant to SIA,
    e) the failure of Respondent to immediately inform Complainant that SIA would not accept Complainant for reassignment, and
    f) the fact that Respondent gave more than one reason for not rehiring Complainant.

    Complainant couples the above described events with SIA's generally positive reviews of Complainant and a positive conversation with Complainant's supervisor regarding his return to SIA for assignment to support the inference that Respondent never received a call from SIA refusing to accept Complainant for assignment or the inference that SIA did not really have a ban on accepting Complainant for assignment that would have prevented Respondent from hiring Complainant. In short, Complainant alleges that Respondent's reliance on SIA's alleged refusal is pretextual.

24. The designated evidence, as a whole, does not support Complainant's inferences. Respondent designated evidence establishing that Respondent's employee noted a call from SIA on December 16, 2016 stating that SIA would not accept Complainant for assignment. The phone call was predicated by Respondent's December 6, 2016 request that SIA accept Complainant for assignment starting December 10, 2016, quickly followed by the December 12, 2016 withdrawal of the request.

25. Additionally, Respondent's invitation to Complainant to apply again within one (1) year is consistent with Respondent's polices concerning any employee who was rejected for assignment by SIA. Complainant has not designated any evidence that indicates Respondent did not have a policy of waiting one (1) year or that Respondent's policy was incorrectly and discriminately applied to Complainant. Respondent's argument is bolstered by evidence that

indicates Complainant was told the same policy applied when his employment was terminated in January of 2016, before Respondent knew of Complainant's disability.

26. Furthermore, Respondent did not delay in submitting Complainant for placement with SIA after Respondent received Complainant's December 14, 2016 fit for duty form; rather, SIA interrupted Respondent's normal process of submitting Complainant for reassignment by calling on December 16, 2016 to decline any further assignments with Complainant.[4]

27. Despite Complainant's contentions that the positive conversations with an SIA employee indicate SIA would have continued to accept Complainant for employment, Complainant has not argued or designated evidence that shows that Complainant's supervisor at SIA had any authority or involvement in the placement of Respondent's employees outside of providing a general recommendation on the review documents.

28. The additional concerns Complainant raised regarding SIA's failure to provide a reason for its decision, Respondent's failure to document a reason, and Respondent's failure to be direct with Complainant concerning SIA's decision do not support an inference that SIA did not provide a directive to Respondent or that Respondent relied on SIA's directive as a pretext for discriminating against Complainant on the basis of his disability. The two reasons given, attendance and refusal of SIA to accept Complainant for assignment, are not in conflict.

29. Complainant has not raised a genuine issue of material fact as to whether Respondent's reliance on SIA's refusal to accept Complainant for placement was a legitimate, nondiscriminatory, and non-pretextual reason for refusing to rehire Complainant. Accordingly, although genuine issues of material fact may exist as to Complainant prima facie case, Respondent has negated Complainant's discriminatory refusal to hire claim.

Respondent's Failure to Provide Accurate Information Concerning Reapplication

30. Additionally, Complainant argues that no reason was ever provided for Respondent's failure to provide correct information to Complainant concerning Respondent's reapplication process and the time in which Complainant could apply.

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[4] During Complainant's employment with Respondent, three (3) days was the shortest interval of time between the dates Complainant requested work and the dates that Respondent requested an assignment for Complainant from SIA. A period of only two (2) days elapsed between December 14, 2016, when Complainant requested to return to work in January of 2017, and December 16, 2016, when Respondent was notified by SIA that SIA would not accept Complainant for placement.

31. Complainant contends that Complainant could have reapplied with Respondent at any time because completing the application process was not conditioned on SIA accepting Complainant for placement.
32. However, Respondent had a universally applied policy in place that disallows dismissed employees from applying with Respondent until one (1) year has passed, which was based on Respondent's belief that SIA would immediately reject employees for reassignment if SIA had recently refused to accept those employees.
33. When Complainant's employment was terminated in January of 2016, he was told by two of Respondent's employees in two different contexts that he had to wait one (1) year to reapply with Respondent. Complainant became reemployed with Respondent in less than one year, not through the regular application process, but through the completion of a six (6) to eight (8) week program on manufacturing through Work One. Furthermore, Complainant was told about the one (1) year wait time before Respondent knew about Complainant's disability.
34. Complainant has not designated any evidence that shows Complainant was treated less favorably, that Respondent's policy was not uniformly enforced, or that Respondent's policy disparately impacted Complainant. Complainant has not made his prima facie case on his discriminatory refusal of application claim, and accordingly, Complainant has not raised any genuine issues of material fact with respect to Respondent's alleged refusal to accept Complainant's application or to provide accurate information about the application process.

Conclusion

35. Respondent did not discriminate against Complainant on the basis of disability in his employment. Respondent has articulated a legitimate, nondiscriminatory reason for refusing to hire Complainant, which would have served to prevent Complainant's employment with Respondent, regardless of Complainant's attendance record. Complainant has not alleged that Respondent was consenting to and enforcing discriminatory behavior on the part of Respondent's client, and Complainant has failed to make his prima facie case of discriminatory refusal to accept an application.
36. If the ICRC determines that a Respondent has not committed an unlawful discriminatory practice in violation of the ICRL, then it must dismiss the complaint. Ind. Code § 22-9-1-6(m).

37. 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 15 days after service of this initial decision. Ind. Code § 4-21.5-3-29(d). 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: 317-232-6580
Email: aneromosele@icrc.in.gov

38. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

IT IS THEREFORE ORDERED:

1. Respondent CTI's Motion for Summary Judgment is GRANTED.
2. Complainant Adam Kuss's complaint of discrimination is DISMISSED, with prejudice.
3. 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.

Dated this 13th of March, 2019

Hon. Caroline A. Stephens Ryker
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehita Eromosele Admin Asst. to ALJ
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Certificate of Service

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