

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUSTIN (MICHAEL) KING,

Petitioner,

vs.

Case No. 16-4415

OVERHEAD DOOR CORP., d/b/a WAYNE
DALTON,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 12, 2016, December 16, 2016, and February 9, 2017, in Pensacola, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Justin Michael King, pro se
2237 Kingfisher Way
Pensacola, Florida 32534

For Respondent: B. Tyler White, Esquire
Jackson Lewis P.C.
Suite 902
501 Riverside Avenue
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Respondent, Overhead Door Corporation, d/b/a Wayne Dalton ("Overhead Door"), committed an unlawful employment practice against Petitioner ("Justin King") by

subjecting him to disparate treatment based on his race, and/or retaliating against him.

PRELIMINARY STATEMENT

Mr. King filed a Charge of Discrimination with the Florida Commission on Human Relations ("the Commission") on July 8, 2015, alleging that he was subjected to disparate treatment during his employment with Overhead Door.

The Commission conducted an investigation and issued a Determination on June 29, 2016, concluding that there was no reasonable cause to believe that an unlawful employment practice had occurred:

[Mr. King] filed a charge of discrimination against [Overhead Door] alleging that he was disciplined, retaliated against and discharged based on his race. The facts and evidence as set forth in the Investigative Memorandum do not support [Mr. King]'s allegation. The evidence in this matter reveals that [Mr. King] was discharged for repeated acts of insubordination not because of race. [Mr. King] failed to provide any competent substantial evidence to prove that he was discharged based on his race or that he was retaliated against for engaging in a protected activity.

Mr. King responded by filing a Petition for Relief with the Commission on July 28, 2016.^{1/}

On July 28, 2016, the Commission referred this matter to DOAH for a formal administrative hearing.

The final hearing was commenced as scheduled on October 12, 2016. Because the final hearing could not be completed that day, the undersigned conducted additional proceedings on December 16, 2016, and February 9, 2017.

Mr. King offered Exhibits 1 and 3, and they were accepted into evidence without objection. Mr. King offered Exhibit 2, and that exhibit was marked for identification during the final hearing without a ruling being made as to its admissibility. The undersigned now accepts Exhibit 2 into evidence due to the lack of any prejudice to Overhead Door.

Mr. King called himself as a witness.

Overhead Door's Exhibits 1 through 9 and 11 through 16 were admitted into evidence. The undersigned provisionally accepted Overhead Door's Exhibit 10 into evidence over a hearsay objection. However, the undersigned reserved ruling on Exhibit 10's ultimate admissibility in order to ascertain if it would supplement or corroborate other non-hearsay evidence. Overhead Door's Exhibit 10 is now accepted into evidence.

Overhead Door presented the testimony of Don Duncan, Jack Miller and Michael Vazzana.

Transcripts from the aforementioned hearing dates were filed with DOAH on March 9, 2017, March 24, 2017, March 27, 2017, and March 28, 2017.

After receiving two extensions, Overhead Door filed a timely Proposed Recommended Order on April 21, 2017.

Because Mr. King filed a timely Proposed Recommended Order prior to the undersigned granting Overhead Door's first extension motion, the undersigned sua sponte gave Mr. King an opportunity to file an amended proposed recommended order following the filing of Overhead Door's Proposed Recommended Order. In compliance with the undersigned's "Order Granting Respondent's Second Motion for Extension of Time to Submit Recommended Order," Mr. King filed a timely Proposed Recommended Order on May 2, 2017.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

Findings Regarding the Parties

1. Overhead Door manufactures residential and commercial garage doors and has plants in Florida, Oregon, and Washington. Overhead Door's Florida facility is located in Pensacola.

2. Overhead Door has policies prohibiting unlawful discrimination. For example, one provision within Overhead Door's employee handbook stated that:

We have a policy of Equal Employment Opportunity and will not discriminate against any employee or applicant for

employment because of race, color, religion, sex, national origin, disability, age, marital status, veteran status, or sexual orientation in those states, cities, or counties where it is a violation of the law. In compliance with Section 503 of the Rehabilitation Act of 1973 and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, the Company's affirmation of non-discrimination also applies to qualified disabled veterans, veterans of the Vietnam era or any other war era and handicapped persons.

We will not tolerate any form of prohibited discrimination including harassment. In keeping with this policy of equal employment opportunity, we will continue to recruit, hire, train, and promote into all job levels the most qualified individuals without regard to their race, color, religion, sex, national origin, disability, age, marital status, veteran status, or sexual orientation, in those states, cities, or counties where it is a violation of the law, by ensuring that we base all employment decisions only on valid job requirements. Similarly, we will continue to administer all other personnel matters such as compensation, benefits, transfers, reductions, education, tuition assistance, and social and recreational programs in accordance with our policy of Equal Employment Opportunity.

3. Overhead Door also has a policy against retaliation providing in pertinent part that, "We will not subject employees and applicants for employment to harassment, intimidation, threats, coercion, or discrimination because they have, in good faith, filed a complaint pursuant to this policy . . ."

4. In January of 2014, Overhead Door hired Mr. King, an African-American male, as a temporary employee at its Pensacola facility.

5. Mr. King worked in the facility's small roll form ("SRF") department. The SRF department is responsible for making the parts used by every other department in the Pensacola facility.

6. The SRF department has 20 to 24 employees, and five to six are African-American. Approximately 80 percent of the employees at Overhead Door's Pensacola facility are African-American.

7. Overhead Door refers to forklift drivers as "material handlers." At the beginning of his tenure at Overhead Door, Mr. King was the only material handler within the SRF department. As such, he was responsible for transporting goods to other departments, emptying out trash bins, and keeping the production lines supplied with materials.

8. Mr. King reported directly to Jack Miller, who is the lead person in the SRF department. Mr. Miller reports to Michael Vazzana who manages the Pensacola facility's tool and die and SRF departments.

9. Based on the recommendations of Mr. Miller and Mr. Vazzana, Overhead Door hired Mr. King as a permanent employee on June 1, 2014.

Findings Regarding the Alleged Incidents of Disparate Treatment

10. Overhead Door's employee handbook states that Overhead Door is a "drug-free and alcohol-free workplace to ensure a productive and safe environment for all employees." Accordingly, Overhead Door has "zero tolerance" for violations of that policy and reserves the right to terminate employment for first violations.

11. In addition, the employee handbook provides that Overhead Door "will immediately drug and/or alcohol test any employee who caused, contributed to, or was involved in an on-the-job accident." Mr. King acknowledged through a written signature that he was aware of the aforementioned policies when he became a permanent employee of Overhead Door.

12. On July 31, 2014, Mr. King's forklift collided with a barrel filled with brackets, and the brackets spilled onto the floor.

13. Mr. Miller did not witness the accident, but Mr. King reported it to him soon thereafter. In accord with Overhead Door's drug-testing policy, Mr. Miller immediately required Mr. King to take a drug test, and Mr. King passed.

14. A subsequent drug test of another employee at Overhead Door led Mr. King to conclude that he had been subjected to disparate treatment via the aforementioned drug test.

15. Josh Isaac, an African-American material handler who worked outside the SRF department, dropped a pallet during the morning of September 16, 2014, and product damage occurred. Mr. Isaac was subsequently drug tested.

16. Because his accident on July 31, 2014, resulted in no product damage, Mr. King believes that he should not have been drug-tested. However, Overhead Door's post-accident drug-testing policy makes no distinction as to whether product damage occurred. Therefore, the greater weight of the evidence indicates that Mr. King's July 31, 2014, drug test was not disparate treatment.

17. The remaining allegations of disparate treatment primarily pertain to Mr. King's workload and the division of duties between himself and a second material handler.

18. During the first five months of his tenure at Overhead Door, Mr. King expressed no concerns about his workload.

19. Overhead Door experienced a great deal of growth in 2014. At some point in June of 2014, Mr. King told Mr. Miller and Mr. Vazzana that he was overwhelmed.

20. At that point in time, Don Duncan was the regional human resources manager for Overhead Door and was physically located at the Pensacola facility. He, Mr. Miller, and Mr. Vazzana responded to Mr. King's concern by studying the

situation and concluding that the SRF department needed a second material handler.

21. After gaining approval from Overhead Door's corporate headquarters to hire a second material handler, the Pensacola facility advertised this new position internally and ultimately hired Manny Torres in September of 2014.

22. Mr. Torres is Hispanic and had been working for Overhead Door outside the SRF department.

23. Mr. Vazzana and Mr. Miller created job descriptions for both of the material handler positions now within the SRF department. Mr. King would be Material Handler A and be responsible for keeping the production lines running, taking finished goods off the production lines, and bringing raw materials to the production lines.

24. As Material Handler B, Mr. Torres was responsible for ensuring that inventory was transported to the proper storage areas. Mr. Torres was also responsible for taking items to shipping.

25. Mr. King was never satisfied that the division of duties between himself and Mr. Torres was equitable. Mr. King always felt that Overhead Door's management gave Mr. Torres preferential treatment by: (a) allocating fewer responsibilities to Mr. Torres; and (b) consciously allowing him to neglect the responsibilities he did have.

26. Approximately one month after Mr. Torres began working as Material Handler B, Mr. King approached Mr. Duncan and stated that he was doing more work than Mr. Torres.

27. Mr. Duncan responded by asking Mr. Vazzano and Mr. Miller to review the duties allocated to the Material Handler A and Material Handler B positions.

28. Mr. Vazzano and Mr. Miller re-examined the allocation of duties and adjusted them in order to make the division of responsibilities equal.

29. After meeting with Mr. Duncan, Mr. Vazzano, and Mr. Miller to discuss the reallocation of duties, Mr. King and Mr. Torres appeared to be satisfied.

30. However, two or three weeks later, Mr. King again approached Mr. Duncan and complained that he was still doing more work than Mr. Torres.

31. Mr. Duncan asked Mr. Vazzano and Mr. Miller to re-examine the duties allocated to the Material Handler A and Material Handler B positions a second time.

32. Mr. Miller and Mr. Vazzano met with Mr. King and Mr. Torres on November 11, 2014. This meeting resulted in a further reallocation of duties between Material Handler A and Material Handler B pertaining to the removal of scrap and trash.

33. The November 11, 2014, meeting also addressed ongoing communication issues between Mr. King and Mr. Torres. While the

reasons as to why they did not work well together are unclear, it is perfectly clear that Mr. King and Mr. Torres' working relationship was toxic.

34. Mr. Vazzano counseled Mr. King and Mr. Torres on the need for them to work together and to have mutual respect for their coworkers.

35. On November 20, 2014, Overhead Door's Pensacola facility was experiencing great difficulty because of employee absences and a particularly heavy workload. As a result, a supervisor outside the SRF department directed Mr. Torres away from his normal duties and had him assisting the material handlers outside the SRF department.

36. Mr. King was unaware that Mr. Torres had been directed away from his normal duties.

37. Over the course of that day, Mr. Miller asked Mr. King three times to retrieve pallets from an outside storage area. Mr. King responded by stating he had other tasks that needed to be accomplished and that he was not receiving any support from Mr. Torres. Also, Mr. King objected to retrieving the pallets because he felt that was Mr. Torres' responsibility as Material Handler B.

38. Mr. King eventually retrieved the pallets after Mr. Vazzano intervened and directed him to do so.

39. The November 20, 2014, incident resulted in Mr. King receiving an employee counseling report ("a write-up") for insubordination. The write-up noted that this was a "final warning" and that "[t]he next breach of discipline, act of insubordination or rule violation will result in immediate termination."^{2/}

40. Because of the ongoing problems between Mr. King and Mr. Torres, Overhead Door's management decided on December 4, 2014, that Mr. King and Mr. Torres would exchange responsibilities. In other words, Mr. King would be Material Handler B, and Mr. Torres would be Material Handler A.

41. The greater weight of the evidence indicates that there was no disparate treatment with regard to how Overhead Door allocated duties between Mr. King and Mr. Torres. To whatever extent that Mr. King had greater responsibilities during any point in time, Overhead Door's management did its best to alleviate the situation so that Mr. King and Mr. Torres would have identical workloads.

42. Nevertheless, the tension between Mr. King and Mr. Torres continued.

43. On December 9, 2014, Mr. Vazzano asked Mr. King to locate coils and write down their location. When Mr. King responded by stating that he had no training for that task, Mr. Vazzano stated that he would send Mr. Miller to train him.

However, Mr. Miller was unavailable at that time, and Mr. Torres was sent to train Mr. King.

44. After Mr. King refused to take training from Mr. Torres, Mr. Vazzano deemed him to be insubordinate and issued a third write-up.

45. Mr. King brought this latest incident to Mr. Duncan's attention, and Mr. Duncan agreed that Mr. King should not have been disciplined. In reaching that conclusion, Mr. Duncan reasoned that it had been unwise to expect Mr. King to accept training from Mr. Torres given their tense working relationship.

46. On December 17, 2014, Mr. King saw Mr. Miller loading a flatbed truck while Mr. Torres stood by.^{3/} This upset Mr. King because Mr. Miller was performing a task within the scope of Material Handler A's duties, and Mr. Miller never did that when Mr. King was Material Handler A.

47. Mr. Torres was unfamiliar with the products that were being shipped at that time, and Mr. Miller wanted to ensure that the truck was safely loaded and evenly balanced.

48. Rather than being an example of disparate treatment, the greater weight of the evidence indicates Mr. Miller was providing training to Mr. Torres.

49. Mr. King alleged that he usually had to clear items from a dock in order to load a truck when he was Material Handler A. According to Mr. King, the outside material handlers

should have cleared the dock, and Mr. Torres never had to do that when he became Material Handler A.

50. The greater weight of the evidence does not demonstrate that this circumstance amounts to disparate treatment. Moreover, Overhead Door appears to have addressed the issue by having Mr. King and Mr. Torres switch roles.

Findings Regarding the Alleged Retaliation

51. At approximately 4:00 p.m. on December 30, 2014, Mr. Miller asked Mr. King to empty a trash hopper that was overflowing with pieces of scrap steel.

52. Mr. King determined that his fork lift was not strong enough to lift that particular hopper, and Mr. King reported that to Mr. Miller in his office. Mr. Miller responded by instructing Mr. King to use a stronger forklift. Mr. Miller also told Mr. King to finishing emptying the hopper before he left work that day.

53. Material Handler A and Material Handler B were responsible for emptying the hoppers.

54. Mr. Torres was in Mr. Miller's office when Mr. King reported the situation with the overflowing hopper.

55. Because Mr. Miller did not instruct Mr. Torres to assist with the overflowing hopper, Mr. King viewed this as another example of Mr. Torres receiving preferential treatment.

56. Mr. King became upset. In the course of emptying the overflowing hopper, several pieces of scrap steel fell onto the floor, and Mr. King left work for a pre-arranged vacation without picking up the pieces of scrap.

57. Soon thereafter, Mr. Miller discovered that Mr. King had left work without removing the spilled pieces of scrap steel from the floor. That amounted to a safety hazard because the pieces of scrap steels were razor sharp and covered with oil.

58. Mr. Vazzana discussed this situation with Mr. Duncan later that day and recommended that Mr. King be terminated. However, Mr. Duncan had to discuss potential terminations with Overhead Door's Vice President of Human Resources.

59. Ultimately, the Vice President of Human Resources agreed with the termination recommendation after reviewing Mr. King's personnel file.

60. Mr. King learned of his termination in early January after returning from his vacation.

61. Because the pieces of scrap steel left on the plant floor amounted to a safety hazard, Overhead Door had just cause for terminating Mr. King on December 30, 2014. The greater weight of the evidence demonstrates Mr. King's termination was not retaliation for his complaints of disparate treatment.^{4/}

Findings Regarding Mr. King's Allegations of Belonging to a Protected Class

62. Mr. King alleged in the Charge of Discrimination filed with the Commission on July 8, 2015, that "I believe I was discriminated against and ultimately terminated because of my race, African American, and in retaliation for repeatedly complaining about discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Florida Civil Rights Act, Chapter 760, Florida Statutes."

63. However, Mr. King's testimony indicated that he believed that he was subjected to disparate treatment because (unlike many of his coworkers) he had a college degree and lacked a criminal background:

ALJ: Are you saying, Mr. King, that because you were able to read employee handbooks and know what your rights are and then exercise those rights, that made you a less desirable employee because if something was going wrong you would speak up for yourself, but someone else who didn't have a college degree, maybe had a criminal background, it is like maybe their last chance for a job, so they're not going to do anything. They are just going to take - live with an undesirable environment and not speak up for themselves?

A: Yes, Your Honor.

ALJ: Okay.

Q: So are you saying that that had anything to do with your race?

A: As it pertains to me being the only African-American inside material handler, yes, it also did. And like I said, and that is what the part was, it also pertains to the systematic racial and discrimination, yes.

Q: But you are saying you are the only African-American inside material handler, but you were the only inside material handler up until August when Manny Torres became an inside material handler, correct?

A: Not Jack Miller, Josh Isaac, he was an outside material handler.

Q: And he is African-American, correct?

A: And that is where the systematic parts come in and that is where the status of Josh Isaac and myself [differs], because he has a different background as I have as it pertains to educational and it pertains to criminal background. We have two different backgrounds.

Q: So are you saying that the company, Jack Miller and Michael Vazzana, wanted someone who is less educated and willing to go along with whatever they wanted them to do?

A: As it pertains to exactly what the Judge just stated, that is everything that I stated, the difference between me and any other African-American associate.^{5/}

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (2016),^{6/} and Florida Administrative Code Rule 60Y-4.016(1).

65. The State of Florida, under the legislative scheme contained in sections 760.01-760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 ("the FCRA"), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

66. Section 760.10 prohibits discrimination "against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status." § 760.10(1)(a), Fla. Stat.

67. Mr. King alleged in his Charge of Discrimination that he was the victim of disparate treatment under the FCRA; in other words, he claimed that he was treated differently because of his race. He also alleges that Overhead Door retaliated against him when he was terminated following the incident with the overflowing hopper. As a result, Mr. King has the burden of proving by a preponderance of the evidence that Overhead Door discriminated against him. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

68. A party may prove unlawful race discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631 (M.D. Fla. May 27, 2009); 2009 U.S.

Dist. LEXIS 44885 (M.D. Fla. 2009). When a petitioner alleges disparate treatment under the FCRA, the petitioner must prove that his race "actually motivated the employer's decision. That is, the [petitioner's race] 'must have actually played a role [in the employer's decision making] process and had a determinative influence on the outcome.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (alteration in original).

69. Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Trs. of Ga. Mil. Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

70. There is no direct evidence of unlawful race discrimination in the instant case. That is not uncommon because "direct evidence of intent is often unavailable." Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). Accordingly, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

71. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 25 (Fla. 3d DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

72. Under the McDonnell Douglas framework, one can establish a prima facie case of discrimination by demonstrating that: (a) he is a member of a protected class; (b) he was qualified for the position held; (c) he was subjected to an adverse employment action; and (d) other similarly-situated employees, who are not members of the protected group, were treated more favorably. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004).

73. With regard to the first element of a prima facie case, Mr. King belongs to a protected class, and his Charge of Discrimination filed with the Commission cited race as the basis for discrimination. However, Mr. King testified that Overhead Door discriminated against him because he has a college degree and lacked a criminal record.

74. Mr. King's testimony on this point, by itself, would be grounds to conclude that he failed to present a prima facie case. See generally Francis v. Dep't of Juv. Just., Case No. 05-2958 (Fla. DOAH Sept. 1, 2006; FCHR Feb. 15, 2007) (stating "Petitioner did not timely raise any allegation of discrimination against her status as a college student, but in an abundance of caution, it is here concluded that status as a college student is not a protected class under Chapter 769, Florida Statutes.").

75. Nevertheless, even if the undersigned were to overlook Mr. King's testimony regarding the asserted basis for the alleged discrimination, the undersigned would still conclude that Mr. King has failed to present a prima facie case.

76. With regard to Mr. King having to take a drug test, Overhead Door's drug-testing policy made no distinction between accidents that resulted in product damage and those that did not. As a result, Mr. King cannot demonstrate that a similarly situated employee outside his protected class was treated more

favorably. See Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir. 1998) (noting that “[i]f Plaintiff fails to identify similarly situated, nonminority employees who were treated more favorably, her case must fail because the burden is on her to establish her prima facie case.”).

77. As for Mr. King’s allegation that Mr. Torres received more favorable treatment from Overhead Door with regard to job responsibilities, the greater weight of the evidence demonstrates that Overhead Door went to great efforts to address Mr. King’s concerns by reallocating the duties of Material Handler A and Material Handler B multiple times. In addition, Overhead Door even had Mr. King and Mr. Torres switch positions as a means of addressing Mr. King’s concern that Mr. Torres was performing less work than him.

78. With regard to Mr. King’s allegation that Mr. Torres never had to clear a dock when he was Material Handler A, this allegation (even if accepted as true) is not serious enough or sufficiently material to rise to the level of an adverse employment action. “Not all conduct by an employer negatively affecting an employee constitutes adverse employment action.” Davis v. Town of Lake Park, Fla., 245 F. 3d 1232, 1238 (11th Cir. 2001) (ruling that the plaintiff, who received one oral reprimand, one written reprimand, the withholding of a bank key, and a restriction on cashing non-account holder checks, did not

suffer an adverse employment action). "The asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment." Id. at 1239. An employee is required to show a "serious and material change in the terms, conditions, or privileges of employment." Id.

79. To the extent that Mr. King alleges that the multiple write-ups he received amounted to adverse employment actions, he failed to establish that write-ups were not issued to similarly situated employees who were insubordinate or who refused requests to perform tasks well within their capabilities. See Bessemer Carraway Med. Ctr., 137 F.3d at 1311.

80. The same reasoning applies to Mr. King's assertion that his termination was retaliation for his previous complaints.

81. In order to establish a prima facie case for retaliation, a petitioner must show that: (1) he was engaged in a statutorily protected expression or conduct; (2) he suffered an adverse employment action; and (3) there is some causal relationship between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997).

82. Overhead Door terminated Mr. King's employment after he disobeyed Mr. Miller's direction to empty a hopper and left work without removing dangerous pieces of steel from the floor. Mr. King presented no evidence that similarly situated employees

did not suffer comparable disciplinary action for committing comparable acts.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing Justin King's Petition for Relief from an Unlawful Employment Practice.

DONE AND ENTERED this 23rd day of May, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2017.

ENDNOTES

^{1/} Mr. King indicated during the final hearing that racial slurs had been directed toward him during his tenure at Overhead Door. However, Mr. King made no mention of that in his Petition for Relief. Because this allegation was raised for the first time at the final hearing, the undersigned ruled that it could not be considered. See Adhim Hollis Hosein v. Miami-Dade Pub. Sch., Case No. 07-1972 (Fla. DOAH Sept. 28, 2007; FCHR Dec. 17, 2007) (stating "[o]nly those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an

administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes]' and any subsequent FCHR award of relief to the complainant.") (citing Chambers v. Am. Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994); Gwendolyn Salter v. Int'l Paper, Case No. 06-0339 (Fla. DOAH Nov. 3, 2006; FCHR Jan. 29, 2007) (stating that "[t]he Division of Administrative Hearings and the undersigned [are] without jurisdiction of any claim not raised in the initial charge of discrimination before the Commission. New or different types of discrimination cannot be alleged in the Petition for Relief or at the formal proceeding instituted under Sections 120.569 and 120.57(1), Florida Statutes, unless they were originally alleged in the Charge of Discrimination and investigated by the Commission.")).

^{2/} Mr. King had received other write-ups. One occurred on July 29, 2014, and pertained to an incident on July 21, 2014. According to the write-up, Mr. King was loading a bin onto a trailer. However, the bin tipped over and caused numerous parts to be damaged. Rather than reporting this accident, Mr. King picked up the parts and put them back in the bin. Ultimately, the parts were deemed unusable and returned to Overhead Door's Pensacola facility. The second write-up pertained to an incident on September 4, 2014. Mr. Miller and Mr. King were in Mr. Miller's office and discussing how Mr. King had been using a cell phone during working hours. Mr. King argued that he was being singled out for this particular violation and complained that Overhead Door's management was not responsive to his complaints. According to Mr. Miller, Mr. King continually interrupted him and would not allow Mr. Miller to address any of his complaints. Mr. Miller gave Mr. King a write-up for this incident and characterized Mr. King's conduct as "insubordination and attempt at intimidation."

^{3/} Mr. King testified that Mr. Torres was talking on a cell phone while Mr. Miller was loading the truck. However, it is unlikely that Mr. Miller performed a subordinate's work while knowingly allowing that subordinate to talk on a cell phone.

^{4/} Mr. King also alleged that he was retaliated against because he called a 1-800 hotline maintained by a third-party administrator that is available to Overhead Door employees who wish to report an ethics violation. While a reporting employee is asked his or name, they are not required to give it. Mr. Duncan, Mr. Miller, and Mr. Vanazza testified that they had no knowledge of Mr. King ever utilizing the hotline. As a result, the greater weight of the evidence does not support this allegation of retaliation.

^{5/} Mr. King never complained to Mr. Duncan, Mr. Miller, or Mr. Vanazza that he was being treated unfairly due to his race.

^{6/} Unless stated otherwise, all statutory references will be to the 2016 version of the Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.