STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2013CF0668**
	)	EEOC NO.: **21BA22672**
	)	ALS NO.: **13-0416**
RONALD D. WOODS,	)	
Petitioner.	)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Robert A. Cantone, Hamilton Chang, and Nabi R. Fakroddin presiding, upon Ronald D. Woods's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2013CF0668, the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW**,** THEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge for **LACK OF SUBSTANTIAL EVIDENCE** is **SUSTAINED**.

DISCUSSION

On September 17, 2012, the Petitioner, a former full service driver, filed a charge of discrimination with the Respondent, alleging that American Bottling Company ("Employer") retaliated against him for filing a previous charge of discrimination with the Respondent, by issuing him a written reprimand, changing his work assignment, and suspending him, in violation of Section 6-101(A) of the Illinois Human Rights Act ("Act"). On June 25, 2013, the Respondent dismissed the Petitioner's charge for lack of substantial evidence. The Petitioner filed a timely Request.

For the reasons that follow, the Commission concludes that the Respondent properly dismissed the Petitioner's claim for lack of substantial evidence. Substantial evidence is that which "a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance." 775 ILCS 5/7A-102(D); Owens v. Dep't of Human Rights, 403 Ill. App. 3d

[1] In a request for review proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Illinois Department of Human Rights's action shall be referred to as the "Petitioner."

899, 917, 936 N.E.2d 623, 638 (1st Dist. 2010). If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. Id.

The Petitioner worked as a Full Service Driver for the Employer, which involved driving to customers' vending machines to collect money and stock beverages. The Petitioner was employed for 10 years under the same supervisor, apparently without any significant disciplinary incidents, which changed after 2010 when a new supervisor, Tomas Gallegos, took the helm. Mr. Gallegos changed the areas to which the drivers delivered, and the areas to which the Petitioner delivered increased. However, the number of accounts he serviced actually decreased, and the Employer's daily production targets did not change.

On December 22, 2011, Mr. Gallegos gave the Petitioner a written reprimand for failing to service three different accounts for an important corporate customer. In a letter dated December 28, 2011, the Petitioner wrote to the Employer's Human Resources Manager that he felt Mr. Gallegos was discriminating against him and harassing him by giving him an increased workload. It is not clear how fully that report was investigated. In April 2012, the Employer issued the Petitioner a one-day suspension for failing to service a customer account, which was converted to a written reprimand after the Petitioner filed a union grievance. On May 14, 2012, the Petitioner reported to a different Human Resources Manager that he felt he was being discriminated against based on race (black). The Employer conducted an investigation and concluded in early June that it could not substantiate the Petitioner's claim.

On June 18, 2012, the Petitioner filed a prior charge of discrimination with the Respondent, alleging that he had been subject to discipline because of his race. Thereafter, the Petitioner was again given a written reprimand on July 23, 2012, for failure to service all of his accounts on June 17 and June 18. The Employer's written policy stated that Full Service Drivers were expected to service 15 to 20 vendors daily and sell in excess of 100 cases per day (although Mr. Gallegos stated the expectation was actually around 50 per day), within their forty-hour work week. Those same written expectations had been in place for the entirety of the Petitioner's tenure. The undisputed evidence shows that on June 17, the Petitioner serviced only seven accounts and sold 15 cases, and on June 18, serviced only six accounts and sold 35 cases.

Despite those numbers, and despite not servicing all accounts on those days, the Petitioner nevertheless took 2.5 hours of overtime on June 17, and 1.25 hours of overtime on June 18. The Petitioner also clocked out after 3:30 p.m. on both days, despite Mr. Gallegos's notice to all drivers that they must clock out no later than 3:30 p.m., even when working overtime. Although all drivers routinely worked some overtime, the Employer's

records show that for the period of December 2011 through July 2012, the Petitioner regularly averaged the most out of all the drivers, over 10 hours per week.

Approximately two months later, on September 11, 2012, the Petitioner called Mr. Gallegos from his route to ask how he should note a refund on invoices involving swapped products. He was concerned because another driver had been recently disciplined for doing this incorrectly. Mr. Gallegos became angry with the Petitioner, told him that he should know the refund procedure after having performed it for 10 years, and instructed him to bring his truck back. Mr. Gallegos then assigned the Petitioner to be a Helper for another driver from September 11 through September 14. The Petitioner's pay remained at its normal level. As evidence the Petitioner should have known this procedure, the Employer submitted its "Full Service Vendor Procedures" dated November 17, 2010, which includes written information about refund procedures for swaps, expired/bad product, initial fills, and close-outs.

On September 14, 2012, the Petitioner was suspended pending further investigation of an earlier incident that occurred on August 28. On that date, a set of the Petitioner's keys went missing, which he admitted during the investigation that he left in his truck while making a delivery. Mr. Gallegos stated the Employer's policy was that drivers should keep all keys on their person when not in the truck. Moreover, the Petitioner was accused of giving conflicting contemporaneous accounts of the missing keys; he told Mr. Gallegos that the keys had been stolen when he left them under the seat of his truck, but when Mr. Gallegos spoke to a loss prevention employee of the store where the Petitioner was parked, she said the Petitioner told her he left the keys in the ignition. The Petitioner also reported the incident to the local police, who recorded the Petitioner as reporting the keys to be lost after he left the store.

To establish a *prima facie* case of retaliation, the Petitioner must show: (1) he engaged in a protected activity; (2) the Employer took an adverse action against him; and (3) a causal nexus exists between the protected activity and the adverse action. Hoffelt v. Illinois Dep't of Human Rights, 367 Ill. App. 3d 628, 634, 867 N.E.2d 14, 19 (1st Dist. 2006). An adverse employment action arising a relatively short time after protected activity raises a reasonable inference of retaliatory conduct. See Maye v. Human Rights Comm'n, 224 Ill. App. 3d 353, 362, 586 N.E.2d 550, 556 (1st Dist. 1991).

The Petitioner has introduced evidence supporting a *prima facie* inference of retaliatory conduct, because although it is not clear when Mr. Gallegos actually became aware of the Petitioner's discrimination charge, he initiated several disciplinary actions against the Petitioner shortly after the charge was filed.

However, that does not end the inquiry. Once the Petitioner has established a *prima facie* case, the burden shifts to the Employer to articulate a non-discriminatory reason for its employment action. Owens v. Dep't of Human Rights, 403 Ill. App. 3d 899, 919, 936 N.E.2d 623, 640 (1st Dist. 2010). If the Employer does so, the Petitioner must then show that the Employer's articulated reason for its employment action was a pretext. Id. Pretext may be shown if the Employer's stated reasons are untrue, did not actually motivate the Employer's decision, or were insufficient to motivate the Employer's decision. Sola v. Illinois Human Rights Comm'n, 316 Ill. App. 3d 528, 537, 736 N.E.2d 1150, 1158 (1st Dist. 2000). One method of showing pretext is to demonstrate that employees involved in misconduct of comparable seriousness were retained while the complainant was discharged. Loyola Univ. of Chicago v. Illinois Human Rights Comm'n, 149 Ill. App. 3d 8, 19, 500 N.E.2d 639, 646 (1986).

The investigation did not uncover substantial evidence that Mr. Gallegos's disciplinary actions were pretextual. The record showed that Mr. Gallegos began issuing disciplinary warnings to the Petitioner well before the filing of his June 2012 charge, and that trend continued thereafter. Moreover, the actions Mr. Gallegos took had a demonstrated basis in the Petitioner's performance issues. The write-up in July 2012 involved a documented failure to service customer accounts and failure to abide by guidelines regarding overtime and clocking out. The re-assignment in September 2012 resulted from the Petitioner expressing uncertainty about a procedure routinely performed and documented in the drivers' manual since at least 2010. And the suspension that same month resulted from the Petitioner's admitted action of leaving his keys unattended, which violated the Employer's safety procedures.

Moreover, the investigation did not show that Mr. Gallegos treated other employees, who had not engaged in protected activity, more kindly than he treated the Petitioner. The Employer provided documentation that Mr. Gallegos issued at least seven written reprimands to other employees for neglect of duty around the same time, and suspended eight other employees, none of whom had engaged in protected activity. The Petitioner has asserted that another driver, Kenny Zschach, also asked Mr. Gallegos about the refund policy. However, the investigation revealed that Mr. Zschach was the Petitioner's union steward and asked the question in that capacity in a meeting involving the Petitioner.

In his Request, the Petitioner states he does not believe the Employer followed its own policy to investigate claims of discrimination, because it is not clear what action was taken regarding his December 2011 letter. But the pertinent question to the Petitioner's present retaliation claim is what adverse actions were taken against him after he engaged in protected activity, and whether those actions were prompted by the protected activity. Substantial evidence of that has not been shown through the Respondent's investigation.

Moreover, after the Petitioner sent another letter to the Employer in May 2012 reporting the alleged discriminatory conduct, the Employer did affirmatively investigate his claims.

Accordingly, the Petitioner has not presented enough evidence to show that the Respondent's dismissal of the charge was not in accordance with the Act.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The dismissal of the Petitioner's charge is hereby **SUSTAINED.**

2. This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and The American Bottling Company as respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS)
) **Entered this 21st day of December 2018**
HUMAN RIGHTS COMMISSION)

Commissioner Robert A. Cantone

Commissioner Hamilton Chang

Commissioner Nabi R. Fakroddin