No. 01-13-00466-CV

IN THE COURT OF APPEALS
FOR THE FIRST CIRCUIT
HOUSTON, TEXAS

KARL WAWAROSKY,

Plaintiff-Appellant,

V.

FAST GROUP HOUSTON INC.,

Defendant-Appellee,

On Appeal from the 157th Judicial District Court Of Harris County, Texas, Cause No. 2011-62792

APPELLEE'S BRIEF

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TO THE HONORABLE COURT OF APPEALS:

Appellee, FAST Group Houston, Inc. ("FAST") files this brief in response to the brief of Appellant, Karl Wawarosky ("Wawarosky").

I. STATEMENT OF THE ISSUES

Wawarosky's brief appears to raise four distinct issues on appeal:

1. Did the district court properly grant summary judgment against Wawarosky's age discrimination claim?

2. Did the district court properly grant summary judgment against Wawarosky's race discrimination claim?

3. Did the district court abuse its discretion and commit reversible error when it overruled Wawarosky's objections to FAST's summary judgment evidence?

4. Did the district court abuse its discretion and commit reversible error when it denied Wawarosky's motion to compel two interrogatory responses from FAST?

II. STATEMENT OF THE CASE

Wawarosky claims FAST terminated his employment because of his age (51 years-old) and race (white).[1] The trial court granted FAST's traditional and no evidence motion for summary judgment. Wawarosky then filed this appeal.

III. STATEMENT OF THE FACTS

A. FAST's Policies Against "Possession of Firearms, Weapons, Or Incendiary Devices" And Against "Intimidating, Coercive, Violent, Abusive, Or Hostile Behavior"

FAST is an industry leader in the designing, manufacturing and processing of quality, high-performance seals, packing, fluoropolymers and other high-performance resins.[2] Wawarosky began his employment with EGC Corporation, a predecessor of FAST, on June 2, 1997.[3] He was originally hired as an Industrial Engineering Technician.[4] In October 2006, FAST purchased EGC Corporation.[5]

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[1] Wawarosky's Original Petition at ¶ 12; CR at 6; Wawarosky Dep., Ex. A to FAST's Motion for

[2] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 42; CR at 52.

[3] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 15-16; CR at 45.

[4] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 15; CR at 45.

[5] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 16; CR at 45; Transcribed Recording of TWC Hearing Volume 2, Ex. D to FAST's Motion for Summary Judgment (Pg. 16, Lines 24-25; Pg. 17, Lines 1-14); CR at 105-06.

FAST's handbook provides that there are certain personal conduct offenses that "may result in immediate discharge."[6] Among those offenses are: 1) "possession of firearms, weapons, explosives, or incendiary or other destructive devices on company property" and 2) "intimidating, coercive, violent, abusive, or hostile behavior."[7] As a supervisor with the company, Wawarosky was responsible for ensuring that the employees that reported to him were abiding by these policies.[8] He also admittedly had an obligation to act as a role model for his subordinates by complying with these policies.[9] Wawarosky admits that these policies are consistent with common sense.[10]

B. Wawarosky Was A Supervisor Who Was Supposed To Be A Role Model To Other Employees

Over the course of his 14 years with FAST and its predecessor, EGC Corporation, Wawarosky received numerous promotions, eventually being promoted to the position of Tape Department Supervisor in 2008.[11] Wawarosky also received

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[6] Excerpts of FAST's Employee Handbook, Ex. B to FAST's Motion for Summary Judgment at 11; CR at 84.

[7] Excerpts of FAST's Employee Handbook, Ex. B to FAST's Motion for Summary Judgment at 12; CR at 85.

[8] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 42; CR at 52.

[9] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 114; CR at 70.

[10] Excerpts of EGG Employee Handbook, Ex. E to FAST's Motion for Summary Judgment at Policy No. 610; CR at 116-17; Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 29-32; CR at 49.

[11] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 16; CR at 45.

close to a dozen raises, including two merit increases in 2010.[12] Waworosky supervised five employees, and admits that he was supposed to act as a role model to his subordinates.[13]

C. Wawarosky Never Felt Discriminated Against During His Employment

FAST employs a diverse workforce.[14] Wawarosky admits that, during his entire employment, he never felt that FAST was discriminating against him because of his age or race. As Wawarosky testified:

> Q: Prior to or before April 29th, 2011 [the day he was terminated], did you ever feel, in your mind, that you were being discriminated against by the company because of your race?
>
> Mr. Manley: Objection, form.
>
> A: No.
>
> Q: Prior to April 29, 2011, did you ever feel like you were being discriminated against by the company because of your age?
>
> Mr. Manley: Objection, form.
>
> A: No.[15]

D. Wawarosky's Termination From FAST On April 29, 2011, For Intimidating And Hostile Behavior Involving A Bullet

On Thursday, April 28, 2011, at approximately 10:00 a.m. that morning, Wawarosky approached coworkers James Wicmandy (Continuous Improvement

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[12] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 21; CR at 47.

[13] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 17, 22; CR at 46, 47.

[14] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 22-23; CR at 47.

[15] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 23; CR at 47.

Manager) and Jose DeLeon (Safety Coordinator) while they were having a work related conversation on FAST property.[16] During the conversation, Wawarosky produced a bullet from his pocket.[17] When asked if the bullet was real, Wawarosky indicated that it was and then went on to state to Wicmandy: "This one's got your name on it."[18]

Later in the day, Wawarosky was involved in another conversation, this time with Jose DeLeon and DeLeon's supervisor, James Barnett (Safety Director).[19] According to DeLeon, during this second conversation, Wawarosky again produced the bullet from his pocket.[20] DeLeon claims that Wawarosky stated that the bullet

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[16] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 52-53; CR at 54-55; Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 27, Lines 9-24); CR at 96; Transcribed Recording of TWC Hearing Volume 2, Ex. D to FAST's Motion for Summary Judgment (Pg. 9, Lines 21-22; Pg. 11, Lines 18-19; Pg. 30, Lines 7-10); CR at 104, 109.

[17] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 53; CR at 55; Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 28, Lines 2-3); CR at 96; Transcribed Recording of TWC Hearing Volume 2, Exhibit D to FAST's Motion for Summary Judgment (Pg. 10, Lines 3-5; Pg. 30, Lines 17-21); CR at 104, 109.

[18] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 53-55; CR at 55; Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 28, Lines 5-12); CR at 96; Transcribed Recording of TWC Hearing Volume 2, Ex. D to FAST's Motion for Summary Judgment (Pg. 10, Line 12; Pg. 31, Lines 4-5); CR at 104, 109.

[19] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 57; CR at 56; Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 18, Line 20 through Pg. 19, Line 7; Pg. 31, Lines 7-24; Pg. 32, Lines 11-12); CR at 94, 97.

[20] Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 20, Lines 5-9; Pg. 32, Lines 19-22); CR at 94, 97.

had DeLeon's name on it.[21] DeLeon alleged that he felt threatened by the comment, and told that to Barnett.[22]

After Barnett discussed these incidents with Joy Cook, the Director of Human Resources for FAST at the time, and told her that DeLeon felt threatened, the decision was made that Wawarosky violated company policy, and that because of FAST's zero tolerance for this sort of violation, Wawarosky would be terminated.[23] The following morning, April 29, 2011, Wawarosky met with Cook and was informed of the decision.[24] FAST's termination form states that Wawarosky was terminated because he "made threats towards employees."[25]

Wawarosky's termination was consistent with FAST's policies and its practice of firing every employee who violated its policies against 1) "possession of firearms, weapons, explosives, or incendiary or other destructive devices on company property"

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[21] Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 20, Lines 7-9; Pg. 32, Line 23 through Pg. 33, Line 2); CR at 94, 97-98.

[22] Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 25, Lines 19-25; Pg. 26, Lines 1-3; Pg. 36, Lines 3-6; Pg. 34, Lines 10-15); CR at 96, 98.

[23] Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 18 – Lines 7-9); CR at 94; Transcribed Recording of TWC Hearing Volume 2, Ex. D (Pg. 25, Lines 6-11); CR at 108.

[24] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 66; CR at 58; Transcribed Recording of TWC Hearing Volume 2, Ex. D to FAST's Motion for Summary Judgment (Pg. 35, Lines 14-17); CR at 110; Termination Form of Karl Waworosky, Ex. K-1 to FAST's Motion for Summary Judgment; CR at 140.

[25] Termination Form of Karl Waworosky, Ex. K-1 to FAST's Motion for Summary Judgment; CR at 140.

and 2) "intimidating, coercive, violent, abusive, or hostile behavior.[26] Other FAST Employees terminated for violating these policies include at least two nonwhites, Donetta Spiller and Luis Galvan.[27] FAST has not permitted any employee to violate these policies and not be fired for doing so.[28]

E. The TWC Rejected Wawarosky's Unemployment Claim, And Agreed With FAST That Waworosky Had Been Justly Terminated For Violating Company Rules And Policies

Wawarosky applied for unemployment benefits with the Texas Workforce Commission ("TWC"), and his application was denied on May 12, 2011.[29] The TWC investigated, and concluded that "[o]ur investigation found your former employer fired you from your last work for violation of company rules and policies."[30] Wawarosky appealed that decision and a lengthy hearing was conducted via telephone on July 15, 2011 and continued on August 1, 2011, after which, on August 15, 2011, the TWC maintained its prior ruling and denied Wawarosky's application for

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[26] Excerpts of FAST's Employee Handbook, Ex. B at 12, 15-16 to FAST's Motion for Summary Judgment; CR at 85-87.

[27] Affidavit of Patti Saurage, Ex. K to FAST's Motion for Summary Judgment; CR at 133-34; Termination Forms of Kenneth Martinak, Donnetta Spiller, and Luis Galvan, Ex. K-1; to FAST's Motion for Summary Judgment CR at 136-37, 139; Transcribed Recording of TWC Hearing Volume 2, Ex. D to FAST's Motion for Summary Judgment (Pg. 22, Lines 7-25; Pg. 23, Lines 1-5); CR at 107.

[28] Affidavit of Patti Saurage, Ex. K to FAST's Motion for Summary Judgment; CR at 133-34.

[29] TWC Determination on Payment of Unemployment Benefits, Ex. F to FAST's Motion for Summary Judgment; CR at 120; Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 73; CR at 60.

[30] TWC Determination on Payment of Unemployment Benefits, Ex. F to FAST's Motion for Summary Judgment; CR at 120; Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 73; CR at 60.

unemployment benefits.[31] Wawarosky appealed this decision as well, only to have the Commission affirm the decision, yet again, on October 25, 2011.[32]

F. The EEOC Threw Out Wawarosky's Charge Of Discrimination In Just Eight Days, But Wawarosky Filed This Lawsuit In October 2011 Anyway

Wawarosky also filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on September 22, 2011, in which he claimed only that he was discriminated against based on his race and did not mention anything about his alleged age discrimination claim.[33] When Wawarosky filed his EEOC Charge, he admits that he knew that he was not claiming age discrimination in the Charge.[34] Further, Wawarosky was already represented by his lawyer in this case when he filed the Charge.[35] The EEOC found no statutory violations that would warrant their involvement and issued a right to sue letter eight days later on September 30, 2011.[36]

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[31] Decision of TWC Appeal Tribunal, Ex. G to FAST's Motion for Summary Judgment; CR at 122-25; Wawarosky Dep., Ex. A at 73-74 to FAST's Motion for Summary Judgment; CR at 60.

[32] Findings and Decisions of Commission Upon Review of Claim for Benefits, Ex. H to FAST's Motion for Summary Judgment; CR at 127; Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 74; CR at 60.

[33] EEOC Charge of Discrimination, Ex. I to FAST's Motion for Summary Judgment; CR at 129; Wawarosky Dep., Ex. A at 74 to FAST's Motion for Summary Judgment; CR at 60.

[34] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 76-77, 81; CR at 60-61, 62.

[35] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 76; CR at 60.

[36] EEOC Dismissal and Notice of Rights, Ex. J to FAST's Motion for Summary Judgment; CR at 131.

Wawarosky filed his lawsuit on October 18, 2011, claiming that he was discriminated against because of his age and race.[37]

G. In September 2012, Wawarosky's Case Was Dismissed On Summary Judgment, After He Was Given A Continuance To Do More Discovery

On June 19, 2012, after the case had been pending for eight months, FAST filed its motion for summary judgment.[38] FAST's motion was set for hearing on July 20, 2012, at 10:00 a.m.[39] On July 13, 2012, Wawarosky filed his response (which included an unsworn request for continuance),[40] along with objections to FAST's summary judgment evidence.[41] On July 20, 2012, the trial court judge continued the hearing on FAST's motion for summary judgment until September 14, 2012, at 10:00 a.m., so that Wawarosky could conduct additional discovery.[42] Wawarosky actually did take two depositions before the rescheduled summary judgment hearing, but he failed to submit the transcripts to the court.[43]

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[37] Wawarosky's Original Petition at ¶ 12; CR at 6.

[38] CR at 15-140.

[39] CR at 142.

[40] CR at 149-96.

[41] CR at 144-46.

[42] CR at 263.

[43] Wawarosky's Brief at 9 n. 1. Accordingly, contrary to the impression Wawarosky attempts to create in his brief (Wawarosky's Brief at 9 n. 1 and 11), the district court did not prematurely cut off his discovery in the face of FAST's summary judgment motion. Rather, the district court permitted Wawarosky to do additional discovery, and he did, but then he decided not to submit the results of his discovery efforts to the court.

On July 30, 2012, Wawarosky filed a motion to compel responses to interrogatory numbers 1 and 3.[44] FAST filed a response to that motion on July 31, 2012.[45] The trial court denied Wawarosky's motion to compel on September 7, 2012.[46]

On September 14, 2012, after hearing oral argument, the trial court granted FAST's motion for summary judgment,[47] and overruled Wawarosky's objections to FAST's summary judgment evidence.[48] After filing an unsuccessful motion for new trial,[49] Wawarosky filed a timely notice of appeal.[50]

IV. STANDARD OF REVIEW

This Court reviews *de novo* the trial court's ruling on a summary judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When a party moves for both traditional and no-evidence summary judgment, the Court first reviews the trial court's ruling under the no-evidence standard of review. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If

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[44] CR at 254-62.

[45] CR at 263-67.

[46] CR at 268-69.

[47] CR at 274.

[48] CR at 270-72.

[49] CR at 275-79.

[50] CR at 287-88.

the trial court properly granted the no-evidence motion, the Court does not consider the arguments raised regarding the traditional summary judgment motion. *See id.*

After an adequate time for discovery, a party may move for no-evidence summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *see Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.–Houston [1st Dist.] 1999, no pet.). The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the elements specified in the motion. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The trial court must grant the motion unless the nonmovant presents more than a scintilla of evidence raising a fact issue on the challenged elements. *Flameout Design & Fabrication*, 994 S.W.2d at 834; *see also Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam) ("An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented."). To determine if the nonmovant has raised a fact issue, the Court reviews the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). The Court indulges every reasonable inference and resolves any doubts in the nonmovant's favor. *See Sw. Elec. Power Co. v.*

Grant, 73 S.W.3d 211, 215 (Tex. 2001) (*citing Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997)).

To prevail on a traditional summary judgment motion, the movant must establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Little v. Tex. Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004). When, as here, the trial court's summary judgment does not state the basis for the court's decision, this Court must uphold the judgment if any of the theories advanced in the motion are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

V. SUMMARY OF THE ARGUMENT

As to age discrimination, Wawarosky failed to exhaust mandatory administrative remedies, because he never complained about age discrimination in his Charge of Discrimination with the EEOC.[51] For that reason alone, his age discrimination claim fails as a matter of law.

As to race discrimination, Wawarosky has no evidence that his white race was a motivating factor in his termination. The claim itself is bizarre, because all the decision-makers involved in his termination are also white, and Wawarosky admits he never felt discriminated against based on his white race.[52] The fact of the matter is

[51] EEOC Charge of Discrimination, Ex. I to FAST's Motion for Summary Judgment; CR at 129; Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 76-77, 81; CR at 60-61, 62.

[52] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 23; CR at 47.

that FAST terminated Wawarosky because of his admitted possession of a bullet on company property as well as his own intimidating and hostile behavior relating to the bullet, both of which violated FAST's clear policies.[53] Wawarosky has no proof to the contrary. Wawarosky admitted under oath to most of the actions for which he was terminated at his deposition,[54] and again at his hearing regarding his failed unemployment claim before the TWC.[55] Further, Wawarosky flat-out admitted that he had no evidence of race discrimination:

> Q: In your opinion, do you have any evidence that you were terminated because you're white?
>
> A: I have no evidence.[56]

Accordingly, Wawarosky's race discrimination claim also fails as a matter of law, and the district court properly granted FAST's motion for final summary judgment in this case.

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[53] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 52-58; CR at 54-56; Excerpts of FAST's Employee Handbook, Ex. B to FAST's Motion for Summary Judgment at 12; CR at 85.

[54] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 52-58; CR at 54-56.

[55] Transcribed Recording of TWC Hearing Volume 2, Ex. D to FAST's Motion for Summary Judgment (Pg. 30, Lines 19-21; Pg. 31, Lines 4-5); CR at 109.

[56] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 123; CR at 72.

VI. ARGUMENT AND AUTHORITIES

A. Response To First Point Of Error: The District Court Properly Dismissed Wawarosky's Age Discrimination Claim On Summary Judgment Because He Admittedly Failed To Exhaust Mandatory Administrative Remedies

1. Law

To bring a suit for unlawful employment practices, a plaintiff must first have filed an administrative complaint with the EEOC or the Texas Workforce Commission – Civil Rights Division ("TWC-CRD") not later than the 180th day after the date the alleged unlawful employment practice occurred." *University of Texas v. Poindexter*, 306 S.W.3d 798, 807 (Tex. App.–Austin 2009, no pet.) (citing TEX. LAB. CODE ANN. § 21.202(a)). An employment discrimination plaintiff is not required to "check a certain box or recite a specific incantation to exhaust his or her administrative remedies before the proper agency." *Pacheco v. Mineta*, 448 F.3d 783, 792 (5th Cir. 2006). "Instead, the plaintiff's administrative charge will be read somewhat broadly, in a fact-specific inquiry into what EEOC [or TWC-CRD] investigations it can reasonably be expected to trigger." *Id.* A plaintiff may only bring claim in court that was included in his Charge of Discrimination, or could have been reasonably expected to grow out of the allegations in the charge. In other words, the charge must contain a sufficient factual basis to put the employer on notice of the existence and nature of the charges. *See Preston v. Texas Department of Family & Protective Services*, 222 Fed.Appx 353, 356 (5th Cir. 2007) (per curiam); *Estate of Martineau v.*

ARCO Chemical Co., 203 F.3d 904, 913 (5th Cir. 2000) (Title VII claims are limited to those claims that "could reasonably be expected to grow out of the initial charges of discrimination."); *Poindexter*, 306 S.W.3d at 811-13 (holding that employee's disparate impact claim under the Texas Labor Code was barred because she did not raise it in her EEOC charge) (citing *Pacheco*, 448 F.3d at 790-92).

2. Analysis

Contrary to his argument on appeal,[57] Wawarosky failed to fully exhaust his administrative remedies regarding his age discrimination claim. Specifically, Wawarosky's EEOC's Charge does not include any claim of age discrimination.[58] Rather, in his EEOC Charge, Wawarosky only claimed that he was discriminated against based on his race (white).[59] Wawarosky was already represented by his lawyer in this case when he filed the Charge.[60] And, Wawarosky admitted that when he signed his EEOC Charge, he knew that he was complaining of race discrimination only, and nothing in the Charge suggested that he was also alleging age discrimination. As Wawarosky testified:

> Q: And so before you signed it [the EEOC Charge], you realized that you were claiming discrimination in this charge based solely on race, correct?

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[57] Wawarosky's Brief at 21-22.

[58] EEOC Charge of Discrimination, Ex. I to FAST's Motion for Summary Judgment; CR at 129.

[59] EEOC Charge of Discrimination, Ex. I to FAST's Motion for Summary Judgment; CR at 129.

[60] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 76; CR at 60.

A: Yes.[61]

* * *

Q: Would you agree with me that nothing in this charge of discrimination that you signed on September 22, 2011, indicates that you believe that you were discriminated against because of your age? Correct?

A: Correct.[62]

This evidence is fatal to Wawarosky's age discrimination claim, because, while courts do permit litigants to bring claims in court so long as they could reasonably be expected to grow out of their underlying Charged of Discrimination, that rule does not extend so far as to permit claims in court that are based on a specific type (*e.g.*, age, race, sex, etc.) of discrimination that was not mentioned at all in the underling Charge of Discrimination. As if to prove this point, none of the cases Wawarosky cites to in his brief allowed such a thing, and, in fact, courts have repeatedly dismissed claims of specific forms of prohibited discrimination that were not alleged in a charge of discrimination with the EEOC or TWC-CRD. *See, e.g., El Paso County v. Navarrete,* 194 S.W.3d 677 (Tex. App.–El Paso 2006, pet. denied) (plaintiff who alleged sex discrimination in her administrative charge of discrimination failed to exhaust administrative remedies as to her claim for retaliation); *Kretchmer v. Eveden, Inc.*, 374 Fed. Appx. 493, 495 (5th Cir. 2010) (plaintiff who checked off the boxes for "age" and "religion" as bases of discrimination on EEOC charge could not sue for sex

[61] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 76-77; CR at 60-61.

[62] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 81; CR at 62.

discrimination in court); *Anderson v. City of Dallas*, 116 Fed. Appx. 19, 25 (5th Cir. 2004) (plaintiff who alleged retaliation and racial discrimination in her EEOC charge failed to exhaust administrative remedies as to her claims in court for age and sex discrimination). These cases control the outcome here. Accordingly, Wawarosky's age discrimination claim is barred, because of his admitted and knowing failure to exhaust his administrative remedies by not mentioning anything about age discrimination in his Charge of Discrimination.[63] The district court thus properly granted summary judgment against the claim.

B. Response To Second Point Of Error: The District Court Properly Dismissed Wawarosky's Race Discrimination Claim On Summary Judgment Because: (1) He Failed To Present A *Prima Facie* Case Of Race Discrimination; And (2) Did Not Offer Any Evidence To Prove That The Reason FAST Gave For Wawarosky's Termination Is A Pretext For Race Discrimination

1. Legal Standards

Chapter 21 of the Texas Labor Code, also known as the Texas Commission on Human Rights Act ("TCHRA"), prohibits an employer from refusing to hire an individual, discharging an individual, or discriminating in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment on the basis of race, color, disability, religion, sex, national origin, or age. TEX. LAB. CODE ANN. § 21.051 (Vernon 1996). The TCHRA is modeled on the

[63] Even if Wawarosky had exhausted his administrative remedies on his age discrimination claim – and he did not – the claim still fails because there is no evidence that FAST's given reason for his termination is pretext for illegal discrimination. *See infra.*

federal civil rights statute, Title VII; therefore, Texas courts follow federal statutes and cases in applying the TCHRA. *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001); *Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 574 (Tex. App.–Houston [14th Dist.] 2004, no pet.); *Russo v. Smith Int'l, Inc.*, 93 S.W.3d 428, 433 (Tex. App.–Houston [14th Dist.] 2002, pet. denied).

In analyzing cases brought under the TCHRA, Texas courts follow the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Winters*, 132 S.W.3d at 574; *Russo*, 93 S.W.3d at 434. Under the burden shifting analysis, the plaintiff is first required to present a *prima facie* case of discrimination. *See Winters*, 132 S.W.3d at 574; *Russo*, 93 S.W.3d at 434; *Gold v. Exxon Corp.*, 960 S.W.2d 378, 381 (Tex. App.–Houston [14th Dist.] 1998, no pet.). If the plaintiff is successful in demonstrating a *prima facie* case, the burden shifts to the defendant to produce evidence showing a "'legitimate, nondiscriminatory reason' for the adverse employment actions." *Gold*, 960 S.W.2d at 381 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)). If the defendant succeeds in carrying its burden, the plaintiff must then prove, by a preponderance of the evidence, that the defendant's reasons are merely a pretext for discrimination. *See Russo*, 93 S.W.3d at 434 (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981)). Although a *prima facie* case is a condition precedent to the pretext analysis, the plaintiff need only make a minimal showing to satisfy a *prima facie* case. *See Winters*, 132 S.W.3d at 574; *Russo*, 93 S.W.3d at 435. A *prima facie* case of race discrimination requires proof that the plaintiff is: (1) a member

of a protected class; (2) he was qualified for the job from which he was discharged; (3) was discharged; and (4) after discharge, the employer filled the position with a member of an unprotected class. *See Sibley v. Kaiser Found. Health Plan of Tex.*, 998 S.W.2d 399 (Tex. App.–Texarkana 1999, no pet.).

Once the plaintiff has established a *prima facie* case, the defendant employer must articulate a nondiscriminatory reason for the adverse employment action. *See Winters*, 132 S.W.3d at 576; *Gold*, 960 S.W.2d at 381. Following the Supreme Court's holding in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000), the employer bears only a burden of production, not of persuasion, when tendering its nondiscriminatory reason for discharging the plaintiff. *See Winters*, 132 S.W.3d at 576; *McKinney v. Tex. Dep't Transp.*, 167 F. Supp. 2d 922, 925 (N.D. Tex.), *aff'd*, 31 Fed. Appx. 152 (5th Cir. 2001).

Proving "pretext for discrimination" requires the plaintiff to show "both that the reason [for termination] was false, and that discrimination was the real reason." *Winters*, 132 S.W.3d at 576. More specific to Texas, a plaintiff pursuing a claim under the TCHRA must "show that discrimination was a motivating factor in an adverse employment decision." *Winters*, 132 S.W.3d at 576 (quoting *Quantum*, 47 S.W.3d at 482). An employer is entitled to summary judgment "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no

discrimination had occurred." *Winters*, 132 S.W.3d at 574 (quoting *Reeves*, 530 U.S. at 148); *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 740 (Tex. 2003); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 24 (Tex. 2000).

"[A]n employee's own subjective belief of discrimination, no matter how genuine, cannot serve as the basis for judicial relief." *Winters*, 132 S.W.3d at 577 (quoting *Martin v. The Kroger Co.*, 65 F. Supp. 2d 516, 553 (S.D. Tex. 1999), *aff'd*, 224 F.3d 765 (5th Cir. 2000); *see also Gold*, 960 S.W.2d at 384. The Court's role in employment discrimination cases is not to second-guess every personnel decision. *See Winters*, 132 S.W.3d at 578; *Martin*, 65 F. Supp. 2d at 553; *see also Deines v. Texas Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir. 1999) ("Whether an employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide. The single issue for the trier of fact is whether the employer's [decision] was motivated by discrimination.").

2. Analysis

a. Wawarosky Cannot Establish A *Prima Facie* Case Of Race Discrimination

There is no evidence with which Wawarosky can meet the initial burden of establishing a *prima facie* case of race discrimination, because there is no evidence that Wawarosky was replaced by an employee of a different race. Also, it bears noting that Wawarosky was employed by a company that employees numerous Caucasian

individuals.[64] His supervisor, John Pate, is Caucasian.[65] The Safety Director who reported his actions to HR, James Barnett, is Caucasian.[66] The HR Director who terminated him, Joy Cook, is Caucasian.[67] In fact, Wawarosky was employed by FAST for 14 years without ever having made a single solitary complaint that he was being treated differently from anyone else based on his race.[68] All this undisputed evidence also shows that Wawarosky cannot make out a *prima facie* case of race discrimination. *See, e.g.*, *Taylor v. Procter & Gamble Dover Wipes*, 184 F. Supp. 2d 402, 413 (D. Del. 2002) (finding inference of discrimination "less plausible" when the decision-maker is the same race as the plaintiff, making the likelihood that a supervisor's statement evidenced discrimination "remote."), *aff'd*, 53 Fed. Appx. 649 (3rd Cir. 2002); *Rajbahadoorsingh v. Chase Manhattan Bank, NA*, 168 F. Supp. 2d 496, 502 (D. Va. 2001) (finding, where plaintiff and decision-maker were of same race, "it is hard to fathom how [decision-maker's] statements could be construed to show that [plaintiff's] termination was racially motivated"); *Kendrick v. Penske Transp. Servs., Inc.*, No. Civ.A. 98–2289–KHV, 1999 WL 450886 at *8 (D. Kan. Apr. 13, 1999) (race discrimination case noting, "the plaintiff may have difficulty establishing

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[64] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 23; CR at 47.

[65] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 20; CR at 46.

[66] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 83, 115; CR at 62, 70; Affidavit of Patti Saurage, Ex. K; CR at 133-34.

[67] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 21; CR at 47.

[68] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 23; CR at 47.

discrimination where the alleged discriminatory decision-maker is in the same protected class as plaintiff") *aff'd*, 220 F.3d 1220 (10th Cir. 2000); *Anderson v. Anheuser-Busch, Inc.*, 65 F. Supp. 2d 218, 229 (S.D.N.Y. 1999) (finding fact that plaintiff and a decision-maker were both African-American "weakens the inference of discrimination"), *aff'd*, 229 F.3d 1135 (2d Cir. 2000); *Toliver v. Community Action Comm'n to Help the Economy, Inc.*, 613 F. Supp. 1070 (S.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2d Cir. 1986) (finding "implausible" any inference that African-American's termination was due to race discrimination where six of eleven persons on the decision-making board were African-American).

b. Wawarosky Admittedly Has No Proof That FAST's Given Reason For His Termination Is A Pretext For Race Discrimination

i. No Proof Of Pretext

Even assuming, solely for the sake of argument, that Wawarosky could establish a *prima facie* case of race discrimination, FAST had a legitimate, non-discriminatory reason for Wawarosky's termination: His possession of a bullet on company property and his intimidating and hostile behavior, in violation of FAST's policies.[69] *See supra.* It goes without saying that terminating an employee – and especially a supervisory employee – for behavior that clearly and directly violates Company policies is a legitimate, non-discriminatory reason for termination. This is

[69] Excerpts of FAST's Employee Handbook, Ex. B to FAST's Motion for Summary Judgment at 12; CR at 85; Termination Form of Karl Waworosky, Ex. K-1; CR at 140.

especially obvious here, because FAST's employee handbook expressly provides that there are certain personal conduct offenses that "may result in immediate discharge."[70] Among those offenses are the very ones Wawarosky violated: 1) "possession of firearms, weapons, explosives, or incendiary or other destructive devices on company property" and 2) "intimidating, coercive, violent, abusive, or hostile behavior."[71] Wawarosky admittedly had a duty to adhere to these policies.[72]

Thus, the burden shifts to Wawarosky to present proof that FAST's reason for his termination is a pretext for race discrimination. To do so, Wawarosky must present evidence showing "both that the reason [for termination] was false, and that discrimination was the real reason." *Winters*, 132 S.W.3d at 576; *see also Canchola*, 121 S.W.3d at 740. Absent such evidence, summary judgment should be entered against Wawarosky's race discrimination claims. *See, e.g., Winters*, 132 S.W.3d at 576; *see also Canchola*, 121 S.W.3d at 740. Wawarosky has no such proof – FAST's reason for termination is based on facts that were provided by its witnesses, and were largely admitted by Wawarosky himself, under oath, at the TWC unemployment hearing,[73]

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[70] Excerpts of FAST's Employee Handbook, Ex. B to FAST's Motion for Summary Judgment at 11; CR at 84.

[71] Excerpts of FAST's Employee Handbook, Ex. B to FAST's Motion for Summary Judgment at 12; CR at 85.

[72] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 114; CR at 70.

[73] Transcribed Recording of TWC Hearing Volume 2, Ex. D to FAST's Motion for Summary Judgment (Pg. 30, Lines 19-21; Pg. 31, Lines 4-5); CR at 109.

and confirmed again by him under oath in his deposition.[74] Even Wawarosky admits he has no proof of race discrimination. As he testified:

> Q: In your opinion, do you have any evidence that you were terminated because you're white?
>
> A: I have no evidence.[75]

ii. Contesting The Details Fails To Create A Fact Issue On Pretext, As Does Complaining About FAST'S Alleged Failure To Investigate The Grounds For Termination

Wawarosky admits to the key conduct supporting his termination. But, even if he had not, it would not preclude summary judgment. This is so because, among other reasons, where, as here, an employee is discharged based on complaints lodged by other employees, the validity of the complaints is not the central issue, because the ultimate falseness of the complaints proves nothing as to the employer, but only as to the complaining employees. *See Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1165 (5th Cir. 1993). The real issue is whether the employer believed the employees' allegations and acted on them in good faith or, to the contrary, whether the employer did not believe the employees' allegations but instead used them as a pretext for an otherwise discriminatory dismissal. *Id.* Merely disputing or denying the underlying facts of an investigation, fails to create a fact issue as to the falsity of the defendant's explanation. *See Jackson v. Cal–Western Packaging Corp.*, 602 F.3d 374, 379 (5th Cir.

[74] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 52-58; CR at 54-56.

[75] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 123; CR at 72.

2010). The burden is on the plaintiff to demonstrate that the employer did not believe the employees' complaints in good faith but instead relied on them as a pretext for discrimination. *Id.* at 1106. *See also Gallow v. Autozone, Inc.*, 952 F. Supp. 441, 446 (S.D. Tex. 1996).

For example, in *Waggoner*, the plaintiff was terminated based on sexual harassment complaints by a coworker. *See Waggoner*, 987 F.2d at 1162. He then sued for age discrimination. The Fifth Circuit held that the plaintiff's evidence of innocence of the sexual harassment charges was "irrelevant." *Id.* at 1166. Rather, to survive summary judgment, the plaintiff was required to present evidence that the employer "did not in good faith believe the allegations, but relied on them in a bad faith pretext to discriminate against him *on the basis of his age*." *Id.* (italics in original). Since the plaintiff presented no proof of that, the court affirmed summary judgment for the employer. *Id.* The same analysis and result follow here: Even if Wawarosky contests some details of what occurred, summary judgment is still proper under *Waggoner* because there is not a shred of evidence that FAST did not believe in good faith that Wawarosky had violated the at-issue policies, but instead manufactured the allegation to fire him because of his race.[76] *See Chandler v. CSC Applied Technologies, LLC*, 376 S.W.3d 802, 818-21 (Tex. App.–Houston [1st Dist.] 2012, pet. denied)

[76] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 83, 115; CR at 62, 70.

(recent decision from this Court affirming summary judgment against TCHRA race discrimination claim and following *Waggoner* analysis).

Similarly, Wawarosky's grousings about FAST's supposed failure to investigate the grounds for his termination (because the essential grounds in his particular case were crystal clear, and thus required no further investigation) fails to generate a fact question. As the Texas Supreme Court has held:

> An at-will employer does not incur liability for carelessly forming its reasons for termination. *See Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 609 (Tex. 2002); *Garcia v. Allen*, 28 S.W.3d 587, 591 (Tex.App.-Corpus Christi 2000, pet. denied). As long as its reason for terminating Canchola was not illegal, Wal–Mart could have fired Canchola, an at-will employee, for his failure to remove out-dated products from the deli, or for the sexual harassment accusations made against him, or for no reason at all. *Sears*, 84 S.W.3d at 609. Although Wal–Mart could have terminated Canchola without investigating the charges against him, we have encouraged employers to investigate complaints made against employees before deciding to fire them by refusing to second-guess the results of such investigations whenever they are imperfect. *Id.* at 610. Thus, it is not sufficient for Canchola to present evidence that the harassment investigation was imperfect, incomplete, or arrived at a possibly incorrect conclusion.

Canchola, 121 S.W.3d at 740.

iii. Wawarosky's Comparison To Marco Chavez Fails To Create A Fact Issue On Pretext Under Texas Supreme Court Precedent

Wawarosky's main argument in his effort to prove pretext is based on his claim that a Hispanic ex-employee who was fired before he was, named Marco Chavez, was

treated better than him.[77] Under Texas Supreme Court precedent, to establish that he suffered disparate treatment by comparing his treatment with Chavez, Wawarosky must demonstrate that preferential treatment was given under "nearly identical" circumstances; more specifically, he must show that he was discharged for conduct that Chavez was not. *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 594 (Tex. 2008). Wawarosky's claim of disparate treatment fails to satisfy the *AutoZone* standard. His evidence shows that Chavez had many disciplinary write-ups for safety violations, loafing, insubordination, attendance, and tardiness, but was not fired until he committed an especially egregious safety violation.[78] But his evidence does not show that Chavez, or anyone else, was not fired after they violated FAST's policies against: 1) "possession of firearms, weapons, explosives, or incendiary or other destructive devices on company property" and 2) "intimidating, coercive, violent, abusive, or hostile behavior." Those are the policies Wawarosky was fired for violating.[79] Without any proof that other non-white employees violated those same policies and were not fired, Wawarosky's disparate treatment claim fails as a matter of law.

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[77] Wawarosky's Brief at 10, 12-13; Affidavit of Patti Saurage, Ex. K to FAST's Motion for Summary Judgment; CR at 133-34; Termination Form of Marco Chavez, Ex. K-1 to FAST's Motion for Summary Judgment; CR at 138.

[78] Wawarosky's Response to FAST's Motion for Summary Judgment, Ex. B; CR at 170-96; Affidavit of Patti Saurage, Ex. K to FAST's Motion for Summary Judgment; CR at 133-34; Termination Form of Marco Chavez, Ex. K-1 to FAST's Motion for Summary Judgment; CR at 138.

[79] Excerpts of FAST's Employee Handbook, Ex. B to FAST's Motion for Summary Judgment at 12; CR at 85; Termination Form of Karl Wawarosky, Ex. K-1 to FAST's Motion for Summary Judgment; CR at 140.

AutoZone, 272 S.W.3d at 594-95 (reversing jury's verdict for the plaintiff and rejecting disparate treatment claim where employee who was not terminated did not violate the same policy or work-rule as the plaintiff); *see also Baker Hughes Oilfield Operations, Inc. v. Williams*, 360 S.W.3d 15, 27-29 (Tex. App.–Houston [1st Dist.] 2011, pet. denied) (reversing jury verdict for the plaintiff in a race discrimination case and concluding that the plaintiff had not proven disparate treatment).

Additional evidence bolsters this point. Specifically, undisputed evidence demonstrates that minority employees who violated the same policies Wawarosky violated were fired for doing so, just like Wawarosky.[80] This proof bolsters FAST's already clear entitlement to summary judgment in this case. *See, e.g., Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 345 (5th Cir. 2005) (affirming summary judgment in a discrimination case brought by a white employee of a 95% Indian company, partially because "[t]he record also specifically identifies two Indian salespersons who were discharged in January 2002 for the identical reason Majesco gave for Keelan's termination – nonproduction in sales."); *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 329-30 (5th Cir. 1998) (affirming summary judgment against race discrimination claim even though plaintiff's supervisor despicably called him "Buckwheat" and "Porch Monkey," partially because State Farm terminated white employees for the same reason it terminated the plaintiff).

[80] Affidavit of Patti Saurage, Ex. K to FAST's Motion for Summary Judgment; CR at 133-34; Termination Forms of Donnetta Spiller and Luis Galvan, Ex. K-1 to FAST's Motion for Summary Judgment; CR at 137, 139.

Wawarosky also claimed that employees brought guns on FAST's property, but were not disciplined.[81] But Wawarosky admitted in his deposition that he did not know the names of anyone who supposedly brought a gun on FAST's property, did not know their races, and he did not claim that any FAST manager knew about such a thing, and permitted it.[82] Without such evidence, Wawarosky cannot prove disparate treatment based on race under the aforementioned *AutoZone* standard.

iv. Far Stronger Race Discrimination Claims Have Failed To Survive Summary Judgment

Wawarosky asserts that summary judgment is rarely proper in discrimination cases.[83] On a general level, Wawarosky's argument is belied by numerous appellate court decisions from the Houston Courts of Appeals affirming summary judgments in discrimination cases. *See, e.g.*, *Navy v. College of the Mainland*, __ S.W.3d __, __, 2013 WL 3945983, at *4 (Tex. App.–Houston [14th Dist.], Aug. 1, 2013); *Chandler*, 376 S.W.3d at 818-21; *Gold*, 960 S.W.2d at 384-85; *Russo*, 93 S.W.3d at 441.

On a specific level, Wawarosky's argument fails to account for the fact that Plaintiffs with race discrimination claims infinitely stronger than his have been thrown out as a matter of law for lack of proof of pretext, or that the real reason for their termination was race discrimination. *See, e.g., M.D. Anderson Hosp. & Tumor Inst.*, 28

[81] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 35; CR at 50.

[82] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 35-36; CR at 50.

[83] Wawarosky's Brief at 14-16.

S.W.3d at 24 (holding that two racial comments made by the plaintiff's supervisor did not create an issue of fact in a race discrimination case); *Niu v. Revcor Molded Products Co.*, 206 S.W.3d 723, 729-30 (Tex. App.–Fort Worth 2006, no pet.) (holding that a manager's racist and outrageous statements that the plaintiff needed to "not talk like a Negro," along with other repeated racial comments and jokes, were insufficient to create an issue of fact regarding race discrimination); *Bryan v. McKinsey & Co.*, 375 F.3d 358, 361-62 (5th Cir. 2004) (affirming summary judgment in a race discrimination case based on poor performance, even though some whites were given longer to prove whether they could perform before being fired); *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 882 (5th Cir. 2003) (affirming summary judgment in a race discrimination case even though one of the company's decision-makers outrageously used the word "nigger" in the plaintiff's presence); *Auguster v. Vermillion Parish Sch. Bd.*, 249 F.3d 400, 404 (5th Cir. 2001) (affirming summary judgment in a race discrimination case even though the plaintiff presented "some direct evidence of [race] discrimination . . . ."); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995) (holding that even though the Department of Labor had previously found the employer had discriminated against African-American employees in promotional decisions, those prior findings were not competent evidence that the employer terminated the plaintiff because of his race). Wawarosky's far weaker claim clearly fails as a matter of law, and was properly dismissed on summary judgment.

v. Wawarosky's Whole Theory Is A Legal Nonstarter

Wawarosky speculated in his deposition that FAST fired him because he initiated a report against Marco Chavez that ultimately got Chavez fired in January 2011.[84] Wawarosky speculated that Chavez's father, who is a vice president of FAST, fired him in retaliation for making the report that got his son fired.[85] Wawarosky's speculation is silly – Chavez's own father, in fact, literally signed off on his son's termination.[86]

More importantly, even assuming solely for the sake of argument that Wawarosky's speculation were true, that would not constitute race discrimination. Rather, that would constitute nepotism-based retaliation. That is not race discrimination, and is not prohibited by Title VII or the Texas Labor Code. As the Second Circuit U.S. Court of Appeals has pointed out, an employer can fire an employee for any reason as long as the reason is non-discriminatory even if based on reasons that are "unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, **nepotism**, spite, or personal hostility." *Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997) (bold added). Texas law is

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[84] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 90, 114; CR at 64, 70.

[85] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 90, 114; CR at 64, 70.

[86] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 103; CR at 67; Termination Form of Marco Chavez, Ex. K-1 to FAST's Motion for Summary Judgment; CR at 138.

the same: FAST was free under Texas law to terminate Wawarosky "for a good reason, a bad reason, or no reason at all." *Figueroa v. West*, 902 S.W.2d 701, 704 (Tex. App.–El Paso 1995, no writ); *see also Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *Jones v. Legal Copy, Inc.*, 846 S.W.2d 922, 925 (Tex. App.–Houston 1993, no writ). Hence, Wawarosky's entire theory of his case, as articulated by him in his deposition, is a non-starter as a matter of law. This perhaps explains why even Wawarosky himself agreed that he had no evidence of racial discrimination.[87]

C. Response To Third Point Of Error: The District Court Did Not Abuse Its Discretion, Or Commit Reversible Error, When It Overruled Wawarosky's Objections To FAST's Summary Judgment Evidence

Wawarosky claims that the district court committed reversible error in denying his objections to FAST's summary judgment exhibits B-D and F-J.[88] Wawarosky is wrong.

1. Legal Standards

This Court reviews a trial court's ruling sustaining objections to summary judgment evidence for an abuse of discretion. *Finger v. Ray*, 326 S.W.3d 285, 290 (Tex. App.–Houston [1st Dist.] 2010, no pet.). The appellant bears the burden to bring forth a record sufficient to show that the trial court abused its discretion when it sustained the objections. *Cantu v. Horany*, 195 S.W.3d 867, 871 (Tex. App.–Dallas 2006, no pet.). To reverse a judgment based on the erroneous exclusion of evidence,

[87] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 123; CR at 72.

[88] Wawarosky's Brief at 22; CR at 270-72.

the appellant must demonstrate that the exclusion probably resulted in an improper judgment. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); *see also* TEX. R. APP. P. 44.1(a)(1). A successful challenge to the trial court's evidentiary rulings generally requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded. *Interstate Northborough P'ship*, 66 S.W.3d at 220 (citing *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000)). Ordinarily, an appellate court will not reverse a judgment due to the erroneous exclusion of evidence when the evidence in question is cumulative and not controlling on a material issue dispositive to the case. *Id.*

2. Analysis

The trial court did not abuse its discretion in denying Wawarosky's objections to FAST's summary judgment exhibits. Exhibit B is FAST's Employee Handbook, which was authenticated as an admissible business record by FAST's HR Manager in an affidavit.[89] Exhibits C and D are transcripts of the sworn testimony of the parties at the TWC unemployment hearing, which were authenticated by the certified court reporter who transcribed the audio recording from the hearing.[90] Exhibits F, G, H, I, and J are governmental documents concerning Wawarosky's claims with the TWC

[89] Affidavit of Patti Saurage, Ex. K to FAST's Motion for Summary Judgment; CR at 133-34.

[90] Transcribed Recording of TWC Hearing Volume 1, Ex. C to FAST's Motion for Summary Judgment (Pg. 44); CR at 100; Transcribed Recording of TWC Hearing Volume 2, Ex. D (Pg. 42,); CR at 112. The case Wawarosky cites on the admissibility of such transcripts involved a lawyer's secretary who typed up a "transcript" herself. *See* Wawarosky's Brief at 22 (citing *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980). That case has no application here, where a certified court reporter typed and authenticated the transcript.

and EEOC, which were self-authenticated, and also authenticated by Wawarosky himself in his deposition.[91]

In any event, even assuming solely for the sake of argument that the district court abused its discretion in any respect, the error would be harmless, not reversible. This is because Wawarosky's own deposition testimony was the primary basis for the grant of summary judgment against him, and he does not contend that his testimony was not admissible. *See, e.g.*, *Chandler*, 376 S.W.3d at 825 ("Because Chandler has not demonstrated that any of the summary judgment evidence excluded by the trial court is not cumulative and is controlling on a material issue and that the summary judgment turns on the particular evidence excluded, we conclude that any error by the trial court in sustaining CSC's objections is harmless."). Wawarosky does not contend otherwise: the section of his brief that contains his argument on this point does not argue that the district court's alleged error was harmful.[92]

D. Response To Fourth Point Of Error: The District Court Did Not Abuse Its Discretion, Or Commit Reversible Error, When It Denied Wawarosky's Motion To Compel Two Interrogatory Responses From FAST

Wawarosky claims the district court committed reversible error in denying his motion to compel.[93] Again, Wawarosky is wrong.

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[91] Wawarosky Dep., Ex. A to FAST's Motion for Summary Judgment at 73-78; CR at 60-61.

[92] Wawarosky's Brief at 22.

[93] Wawarosky's Brief at 22-25.

1. Legal Standards

Generally, the scope of discovery is within the trial court's discretion; however, the trial court must impose reasonable discovery limits. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (per curiam); *see also Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (orig. proceeding) (per curiam). Texas Rule of Civil Procedure 192.3(a) provides:

> [A] party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

TEX. R. CIV. P. 192.3(a).

An appellate court reviews a trial court's ruling on a motion to compel discovery under an abuse-of-discretion standard. *Austin v. Countrywide Homes Loans*, 261 S.W.3d 68, 75 (Tex. App.–Houston [1st Dist.] 2008, pet. denied). "Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be 'reasonably tailored' to include only relevant matters." *In re CSX Corp.*, 124 S.W.3d at 152 (citation omitted). When discovery requests are not reasonably tailored to include only relevant matters, a trial court must sustain a party's objection to them. *See, e.g., In re American Zurich Ins. Co.*, No. 01–11–00816–CV, 2012 WL 2923200, at *5 (Tex. App.–Houston [1st Dist.] July 12, 2012, no pet.) (unpublished) (sustaining defendant's

objection to plaintiff's discovery request because the request was not relevant to any claim).

In addition, if the trial court errs in making a discovery ruling, the complaining party must still show harm on appeal to win reversal. TEX. R. APP. P. 41.1(a); *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009). Harmful error is error that "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 41.1(a).

2. Analysis

Wawarosky moved to compel responses to his interrogatory numbers 1 and 3, which sought information about employees who may have committed "safety" violations, or who were terminated for violating any "company policy" during the last four years.[94] But FAST terminated Wawarosky not for a "safety violation" or just "any" company policy, but rather specifically because of his possession of a bullet on company property and his intimidating and hostile behavior, in violation of FAST's policies against: (1) "possession of firearms, weapons, explosives, or incendiary or other destructive devices on company property" and (2) "intimidating, coercive, violent, abusive, or hostile behavior."[95]

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[94] Plaintiff's Motion to Compel, CR 256-57.

[95] Excerpts of FAST's Employee Handbook, Ex. B at 12; CR at 85; Termination Form of Karl Wawarosky, Ex. K-1; CR at 140.

Under Texas Supreme Court precedent, to establish that he suffered disparate treatment, Wawarosky must demonstrate that preferential treatment was given to non-white workers under "nearly identical" circumstances; more specifically, he must show that he was discharged for conduct that they were not. *See AutoZone*, 272 S.W.3d at 594 ("The situations and conduct of the employees in question must be 'nearly identical.'"). Wawarosky must prove that the same supervisors decided the discipline to administer in the situations being compared. *Id.* at 594. Furthermore – and most significant of all – to establish disparate treatment, Wawarosky must prove that the situation he compares himself to involves a violation of the same policy or work-rule. *Id.* at 594-95 (reversing jury's verdict for the plaintiff and rejecting disparate treatment claim where employee who was not terminated did not violate the same policy or work-rule as the plaintiff); *Baker Hughes Oilfield Operations, Inc.,* 360 S.W.3d at 27-29 (reversing jury verdict for the plaintiff in a race discrimination case and concluding that the plaintiff had not proven disparate treatment because the specific work rule he was fired for violating was not the same work-rule that the employees he compared himself to had violated); *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001) (holding that comparisons to other employees not terminated were inapplicable because those employees violated different workplace rules and thus were not "nearly identical").

As *AutoZone* and the other cases cited above make clear, Wawarosky cannot establish discrimination by comparing himself to employees who committed "safety"

violations, or who were terminated for violating any "company policy." Rather, under the "same work rule" line of cases cited herein, he has to compare himself only to workers who violated FAST's policies against: (1) "possession of firearms, weapons, explosives, or incendiary or other destructive devices on company property" and (2) "intimidating, coercive, violent, abusive, or hostile behavior." Accordingly, Wawarosky's interrogatories numbers 1 and 3 seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and the trial court did not abuse its discretion in sustaining FAST's objections.[96]

Wawarosky attempts to evade the "same work-rule" rule by arguing that it is up to a jury to decide which violations are sufficiently comparable to establish discrimination.[97] Wawarosky cites no precedent to support this argument. This is because the law is to the contrary. Specifically, the Texas Supreme Court and Houston Courts of Appeals have consistently resolved the question of whether a violation is sufficiently similar to establish discrimination as a matter of law. *See AutoZone*, 272 S.W.3d at 594-95 (reversing jury's verdict for the plaintiff and rejecting disparate treatment claim where employee who was not terminated did not violate the same policy or work-rule as the plaintiff); *Baker Hughes Oilfield Operations, Inc.*, 360 S.W.3d at 27-29 (same). Indeed, even when the exact same work-rule was violated, the Texas Supreme Court has concluded as a matter of law in two cases that the

[96] Order on Plaintiff's Second Motion to Compel (CR 268-29).

[97] Wawarosky's Brief at 23-24.

comparison was still insufficient for a jury to infer discrimination where the seriousness of the violation by the employees who were not fired was not nearly identical to the plaintiff's violation. *See Ysleta Ind. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 918 (Tex. 2005) (though conduct being compared violated same work-rule, it was still not sufficiently comparable in nature and degree to support a jury verdict for the plaintiffs); *AutoZone*, 272 S.W.3d at 594-95 (same). Accordingly, Wawarosky's attempt to escape the consequences of the "same work-rule" rule fails, and the district court properly denied his motion to compel.[98]

Finally, even assuming solely for the sake of argument that the trial court erred in its ruling, the error was harmless because Wawarosky has not demonstrated that it probably caused the rendition of an improper judgment or probably prevented him from presenting the case on appeal. *See* TEX. R. APP. P. 41.1(a). This independently defeats his argument. *See, e.g., Glattly v. Air Starter Components, Inc.,* 332 S.W.3d 620 (Tex. App.–Houston [1st Dist.] 2010, pet. denied) ("Here, Air Starter identifies no harm that it suffered as a result of the trial court's decision to deny discovery of Specialized's hard drives. Accordingly, we overrule Air Starter's eighth issue.").

[98] CR 268-29.

VII. PRAYER

Appellee FAST Group Houston, Inc. prays that this Court affirm the district court's grant of summary judgment in its favor, and for all other relief to which it is justly entitled.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on all counsel of record, as listed below, via ProDoc's efiling service or via certified mail, return receipt requested, and placed into an official depository of the United States Postal Service, on this the 12th day of September 2013.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4 because it contains 9,882 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

This brief complies with the typeface requirements of the Texas Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font for text and 12-point Garamond font for footnotes.

Dated this 12th day of September 2013.

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