IP 03-1583-C M/L Skorjanc v Clarian
Judge Larry J. McKinney Signed on 1/24/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KATHLEEN M. SKORJANC,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:03-cv-01583-LJM-WTL
	)	
CLARIAN HEALTH PARTNERS, INC.,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KATHLEEN M. SKORJANC, Plaintiff,	)	
vs.	)	1:03-cv-1583-LJM-WTL
CLARIAN HEALTH PARTNERS, INC., Defendant.	)	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on defendant's, Clarian Health Partners, Inc. ("Clarian"), Motion for Summary Judgment. Plaintiff Kathleen M. Skorjanc ("Skorjanc"), claims that Clarian discriminated against her in violation of the Age Discrimination in Employment Act ("ADEA"), when she was terminated for violating Clarian's Attendance Management Policy ("Policy"), because she was treated less favorably than younger employees with similar violations.[1]

For the reasons stated herein, the Court **DENIES** defendant's Motion for Summary Judgment.

I. BACKGROUND

Clarian is a health care organization with approximately 10,000 employees and is located in Indianapolis, Indiana. Middlebrook Aff. ¶ 2. Skorjanc began her employment with Indiana University Hospital ("IU") in 1967 and became a Clarian employee as a result of a 1997 merger

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[1] Skorjanc also brought a claim under the Americans with Disabilities Act ("ADA"). Subsequent to her deposition, Skorjanc voluntarily dismissed her ADA claim so that only her ADEA claim remains. Skorjanc also alleges that her supervisor harassed and intimidated her because of her age. *See* Comp. ¶ 16. However, Skorjanc has stipulated that she is not asserting a hostile work environment claim.

between IU and Clarian Health Partners, Inc. Pl.'s Dep. at 51. At the time of her discharge, Skorjanc had worked as the Administrative Secretary in Pediatric Cardiology at Riley Hospital for 27 years. *Id*. at 54. Starting in 1998, Skorjanc reported to the Departmental Administrator, Patrick Hurley ("Hurley"). Hurley Aff., ¶ 3. Skorjanc was the only Administrative Secretary in Pediatric Cardiology. Pl.'s Dep. at 82-83. The Administrative Secretary is held to higher expectations, performs different duties and responsibilities, has supervisory responsibilities at times, and is paid more than Department Secretaries. *Id*. at 51, 54-55, 82-83, 191.

Clarian maintains a written "no fault" Policy that clearly articulates its expectations for employee attendance. Pl.'s Dep., Exh. 23, ¶ I. According to the Policy, "[a]ll unscheduled absences are considered equal regardless of the reasons . . ." *Id*. One (1) unscheduled absence or each sequence of consecutive unscheduled absences is one (1) occurrence. *Id*., ¶ III. Three (3) tardy incidents equal one (1) occurrence. *Id*. "Any absence related misconduct such as failing to follow the department call-in procedures for an unscheduled absence . . . will be addressed as a formal performance issue under the Corrective Action policy." *Id*., ¶ 4, A, 3. Clarian follows progressive discipline for Policy violations. After five (5) occurrences, a full-time employee is placed on "Warning Level I;" after six (6) occurrences, "Warning Level II;" seven (7) occurrences, "Warning Level III," and after eight (8) occurrences, the employee is terminated. *Id*., ¶ IV, A, 7. Employees are expected to call their supervisor if they are going to be absent or tardy to work. Pl.'s Dep. at 68-69.

From 1999 until December 9, 2002, Skorjanc's work schedule entailed working four (4) ten (10) hour days each week. *Id*. at 63-64. On August 10, 2001, Hurley informed all department employees, including Skorjanc, that they were required to notify him when they were going to be late to work. *Id*. at 192; Pl.'s Dep., Exh. 30 ("contact your supervisor if you are sick, late, want to

leave, etc!!!”).

Skorjanc received occurrences for not coming to work on January 10, March 26, May 20, October 7, and November 21, of 2002, moving her to Warning Level I. Pl.’s Dep., Exh. 10. Skorjanc also violated Clarian’s Policy on several occasions by coming in late to work. For example, on November 19, 2004, Skorjanc did not attend a morning meeting and did not notify Hurley that she would be tardy until 2:00 p.m. Pl.’s Dep., Exh. 7. Consequently, Skorjanc received a Corrective Action / Performance Improvement Plan (“Corrective Action”). *Id*. The Corrective Action stated that Skorjanc was expected to notify Hurley when she was going to be absent or tardy. *Id*.

On November 25, 2002, Skorjanc received another Corrective Action and was moved to Warning Level II for failing to arrive at work until 11:30 a.m. on November 22, 2002, failing to notify Hurley that she would be tardy, then leaving work at 12:20 p.m. that day without speaking to a supervisor. Pl.’s Dep., Exhs. 8, 9. The Corrective Action dictated that effective immediately, Skorjanc was required to be at work by 7:30 a.m., and must notify her manager of any absences or tardies by 8:00 a.m. on work days. *Id*. The next day, on November 26, 2002, Hurley sent an e-mail to Skorjanc and other employees stating that Skorjanc was expected to be at work by 7:30 starting December 9, 2002. *See* Pl.’s Exh. G, Attach. E; Def.’s Br. Supp. at 5.

After receiving two Corrective Actions, the Attendance Warning, and having her schedule changed, Skorjanc continued to violate Clarian’s Policy by being tardy and not calling Hurley to notify him by 8:00a.m. that she would be tardy. Skorjanc was tardy on December 11, 12, and 16, of 2002, and January 2, 3, 6, 7, 9, 13, 14, and 15, of 2003. Pl.’s Dep. at 85-87; Pl.’s Dep., Exhs. 11,

12, 16.[2] Skorjanc received a two (2) day suspension and another Attendance Warning on January 24, 2003. Pl.'s Dep., Exhs. 11, 12, 16. Skorjanc left work on March 4, 2003, at 11:06 a.m., and failed to come to work on March 5, 2003. Pl.'s Dep., Exhs. 15, 16. The parties dispute whether Skorjanc notified Hurley that she was going to be absent. Clarian contends that she provided no notice to Hurley. Pl.'s Dep., Exh. 15 ("Kathleen did not provide her supervisor with 24-hour notice of her expected absence."). Skorjanc asserts that she notified Hurley and that he agreed to her early departure on March 4, and her absence on March 5, 2003. Pl.'s Resp. Br. at 4 (*citing* Pl.'s Exh. I at 70, *ll*. 13-25; 120, *ll* 1-5).

Dawn Carr ("Carr") was a forty-three year old Departmental Secretary who, like Skorjanc, was supervised by Hurley. Pl.'s Exh. H. Starting on January 6, 2003, Hurley required Carr to report to work by 8:00 a.m. *Id*.; Pl.'s Exh. G, Attach. E. With the exception of February 5, 2003, Carr arrived at work after 8:00 a.m. each day between January 9, 2003, and March 7, 2003. Pl.'s Exh. A. During this period, Carr was tardy thirty-one (31) times. *Id*. Carr was not disciplined by Hurley, nor was she given an Attendance Warning. Pl.'s Exh. H; Pl.'s Exh. F, Interrogatory No. 10.

Debbie McCloud ("McCloud") was a forty-seven year old Departmental Secretary, who, like Skorjanc, was supervised by Hurley. Pl.'s Exh. F. Starting on December 9, 2002, Hurley required McCloud to report to work at 7:00 a.m. Pl.'s Exh. G, Attach. E. Between December 10, 2002, and March 7, 2003, McCloud was tardy thirty-eight (38) times. Pl.'s Exh. B. Pursuant to Hurley's application of the Policy, thirty-eight tardies equals 12 occurrences, and should have resulted in

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[2] Skorjanc disputes the fact that she was late on the aforementioned dates. However, Skorjanc mischaracterizes the November 25, 2002, Corrective Action which requires that "HER DAILY SCHEDULE WILL BE FROM 7:30 A.M. to 4:00 P.M. SHE WILL NOTIFY HER MANAGER OF ANY ABSENCES OR TARDIES BY 8:00 A.M. ON WORK DAYS." Pl.'s Dep., Exh. 8. Contrary to Skorjanc's argument, she was not required to be at work by 8:00 a.m., but rather, was to report any tardies to her supervisor no later than 8:00 a.m.

McCloud's termination. Pl.'s Dep., Exhs. 31, 32. However, McCloud was not disciplined by Hurley for violating the policy. Pl.'s Exh. F, Interrogatory No. 10.

Jeannie Koerber ("Koerber") was a twenty-two year old Specialist-Registration who, like Skorjanc, was supervised by Hurley. Pl.'s Exh. F, Interrogatory No. 8. On February 13, 2002, Hurley administered an Attendance Warning Record - Warning I to Koerber for incurring five (5) occurrences resulting from absences on December 4, 2001, January 3, 15, 29, 2002, and February 6, 2002. Pl.'s Exh. D. Hurley administered an Attendance Warning Record - Warning II to Koerber for a sixth occurrence on September 26, 2002. Pl.'s Exh. E. Hurley noted in the warning that, "should Jeannie incur another occurrence prior to 12/4/02 she will face suspension. Two such occurrences prior to 12/4/02 will result in termination." *Id*. Koerber was tardy ten (10) times between September 30, 2002, and December 4, 2002. Pl.'s Exh. C. Koerber was neither suspended nor terminated for these additional occurrences. Pl.'s Exh. F, Interrogatory No. 10.

II. SUMMARY JUDGMENT STANDARD

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). *See also United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

> issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp*., 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc*., 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp*., 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co*., 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or

unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co*., 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

On certain occasions, the Seventh Circuit had suggested that a court approach a motion for summary judgment in an employment discrimination case with a particular degree of caution. *See e.g ., Sarsha v. Sears, Roebuck & Co*., 3 F.3d 1035, 1038 (7th Cir. 1993); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989). The language implied that summary judgment might be less appropriate in this context based upon the presence of issues of motive and intent. *Holland*, 883 F.2d at 1312. As the Seventh Circuit has emphasized, however, these cases do not establish a heightened summary judgment standard for employment-related cases. Instead, the language from the prior cases simply means "that courts should be careful in a discrimination case as in any case not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be." *Wallace v. SMC Pneumatics*, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997). Even when discriminatory intent is at issue, summary judgment is appropriate when the nonmovant presents no evidence to indicate motive or intent in support of her position. *See Holland*, 883 F.2d at 1312. Further, the nonmovant will not defeat summary judgment merely by pointing to self-serving allegations without evidentiary support. *See Cliff v. Board of School Comm'rs*, 42 F.3d 403, 408 (7th Cir. 1994).

III. DISCUSSION

Two methods exist for Skorjanc to satisfy her burden of proof: by direct evidence that age discrimination motivated Clarian's decisions, or by the indirect, burden-shifting method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, Skorjanc has the burden of demonstrating, by a preponderance of the evidence, a *prima facie* case of age discrimination. *See Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1119 (7th Cir. 1999). To establish a *prima facie* case of age discrimination, Skorjanc must demonstrate: (1) she is at least age 40; (2) she was meeting Clarian's legitimate expectations; (3) she suffered an adverse employment action; and, (4) a substantially younger similarly situated employee was treated more favorably. *See Griffin v. Potter*, 356 F.3d 824, 828 (7th Cir. 2004); *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 772 (7th Cir. 2002). If Skorjanc succeeds in establishing her *prima facie* case, the burden then shifts to Clarian to come forward with evidence of a legitimate and non-discriminatory reason for the employment decision. *See Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1168-69 (7th Cir. 1998). If Clarian does so, the inference of discrimination dissolves and Skorjanc must prove, by a preponderance of the evidence, that Clarian proffered reasons are false and only pretexts for discrimination. *See Crim v. Bd. of Educ. of Cairo Sch. Dist.*, 147 F.3d 535, 540 (7th Cir. 1998). "The ultimate question is 'whether the same events would have transpired if the employee had been younger than 40 and everything else had been the same.'" *Wilson*, 167 F.3d at 1120 (*quoting Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994)).

Where, as in this case, the plaintiff has no direct evidence of age discrimination, she must proceed under the indirect, burden shifting method articulated in *McDonnell Douglass*. Clarian does not dispute whether Skorjanc was a member of the protected class and was terminated, but argues that Skorjanc cannot establish a *prima facie* case of age discrimination because she was not meeting

Clarian's legitimate expectations at the time of her discharge, and she has not identified any similarly situated younger employees who were treated more favorably than she. Clarian also claims that it has articulated a legitimate, non-discriminatory explanation for Skorjanc's discharge that Skorjanc cannot demonstrate is a pretext for unlawful discrimination.

A. LEGITIMATE EXPECTATIONS

Skorjanc presents no evidence that she was meeting Clarian's legitimate performance expectations. Rather, she admits engaging in the conduct that led to her discharge. She admits that she violated the policy; that Hurley followed the Policy; that the Policy was a legitimate expectation of employment; and that she was discharged for violating the Policy. *See* Pl.'s Dep. at 111, 119, 127, 176. Skorjanc's sole argument is that substantially younger employees[3] were treated more favorably. More specifically, under the Policy that applied facially to Skorjanc, Carr, McCloud, and Koerber individually, she was disciplined more harshly than her co-workers for similar conduct. Skorjanc states:

> Clarian treated [fellow employees] Carr, McCloud, and Koerber more favorably than it treated Skorjanc. Despite implementing an attendance policy that facially applied to each of these individuals equally, Skorjanc was disciplined more harshly than her co-workers for similar conduct. Had Skorjanc been treated the same as her younger co-workers, i.e. had these tardies not been counted as occurrences, Skorjanc's absence on March 5, 2003[,] would have been her sixth occurrence moving her from a Warning I level to a Warning II level.

Pl.'s Resp. Br. at 19 (*citing* Pl.'s Dep., Exh. A).

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[3] The Seventh Circuit has defined "substantially younger" as generally ten years younger. *See Balderston v. Fairbanks Morse Engine Div. of Coltec Indust.*, 328 F.3d 309 (7th Cir. 2003) (internal citation omitted). The younger employees "need not be outside the protected class, i.e., under the age of forty. *See Hoffmann v. Primedia Special Interest Publications.*, 217 F.3d 522 (7th Cir. 2002) (internal citations omitted). The fact that McCloud, then age 47, is within the protected class identified by the ADEA, is inconsequential.

When a plaintiff produces evidence sufficient to raise an inference that the employer applied its legitimate employment expectations in a disparate manner, the second and fourth prongs of *McDonnell Douglas* merge, allowing the plaintiff to establish a *prima facie* case by establishing that similarly situated employees were treated more favorably. *See, e.g., Peele v. Country Mutual Ins. Co.*, 288 F.3d 319, 329-30 (7th Cir. 2002); *Curry v. Menard*, 270 F.3d 473, 478 (7th Cir. 2001); *Johnson v. West*, 218 F.3d 725, 733 (7th Cir. 2000); *Flores v. Preferred Tech. Group*, 182 F.3d 512, 515 (7th Cir. 1999).

Skorjanc has adduced support for her claim that younger employees to whom the Policy was applicable violated the tardiness provision and did so without equivalent consequence, if any. Skorjanc presents evidence that between January 9, 2003, and March 7, 2003, Carr was tardy thirty-one times (31) and was not disciplined. *See* Pl.'s Exh. A; Pl.'s Exh. H. In the same time period, McCloud was tardy thirty-eight (38) times and was not disciplined. *See* Pl.'s Exh. B; Pl.'s Exh. F, Interrogatory No. 10. Koerber, who received an Attendance Warning Level II on September 30, 2002, was warned that should she incur another occurrence prior to December 4, 2002, she will face suspension, and two occurrences will result in termination. *See* Pl.'s Exh. E. Koerber was tardy ten (10) times between September 30, 2002, and December 4, 2002, and was not further disciplined under the Policy. *See* Pl.'s Exh. C; Pl.'s Exh. F, Interrogatory No. 10.

Clarian does not challenge that the three younger employees incurred the aforementioned tardy incidents. Clarian also does not dispute that Hurley has not counted tardies against the other employees mentioned, nor that such tardiness, if unexcused, would result in disciplinary action similar or equal to that inflicted on Skorjanc. Skorjanc has shown that Hurley, as supervisor, was responsible for monitoring tardiness and absenteeism among the three younger employees, and that three younger employees had notable tardiness issues but were not similarly disciplined.

Accordingly, Skorjanc need not prove she was meeting Clarian's reasonable expectations because she instead provides evidence that she was treated less favorably than the three younger employees. *See Peele*, 288 F.3d at 329-30.

Clarian argues that Skorjanc's reliance on other younger employee's attendance records fails to create a genuine issue of fact because she presents no evidence that Hurley knew of these individuals' tardies, and without presenting evidence that Hurley knew the occasions in which the three younger employees were tardy, it is impossible for Skorjanc to establish he treated them more favorably.[4] *See* Def.'s Rep. Br. at 10. However, the Court must draw all reasonable inferences in favor of the non-moving party for the purposes of the instant motion, see *Estate of Cole*, 94 F.3d at 257, and must view the evidence in the light most favorable to Skorjanc. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1968). As the moving party, the burden was on Clarian to provide the Court with evidence to support it's argument that the employees' immediate supervisor, who dealt with issues of tardiness and absenteeism, was unaware of his employees' behavior. The Court is unable to draw the inference sought by Clarian – that Hurley was ignorant of these various absences.[5]

B. SIMILARLY SITUATED ANALYSIS

Because Skorjanc raised an inference that Clarian applied its legitimate employment expectations in a disparate manner, the second and fourth prongs of *McDonnell Douglas* merge, see,

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[4] Clarian also claims that Skorjanc, in her deposition, admitted that the three younger employees did call when they were going to be absent or tardy. Pl.'s Mem. Supp. at 7 (*citing* Pl.'s Dep. at 73, 78, 80). A review of the record reveals no such admission.

[5] Clarian also argues that Skorjanc's evidence of tardiness among the other employees does not account for whether or not the tardies were excused or whether the three younger employees notified Hurley when they were going to be tardy. But Clarian, the moving party, has not presented evidence that the tardies were excused or that notice was given. As explained, the Court cannot draw an inference in Clarian's favor.

e.g., *Peele*, 288 F.3d at 329-30, the next question for the Court is whether Skorjanc is similarly situated to the three younger employees. The Court answers in the affirmative. In determining whether two employees are similarly situated, the Court must look at all relevant factors, the number of which depends on the context of the case. *See Spath v. Hayes Wheels Int'l-In., Inc.*, 211 F.3d 392, 397 (7th Cir. 2000). In disciplinary cases such as this, in which a plaintiff claims that she was disciplined by her employer more harshly than a similarly situated employee based on some prohibited reason, the plaintiff must show that she is similarly situated with respect to performance, qualifications, and conduct. *See Radue v. Kimberly-Clark*, 219 F.3d 612, 617 (7th Cir. 2002) (internal citation omitted). This normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. *See id*. at 618 (internal citation omitted).

Clarian argues that the three younger employees are not similarly situated to Skorjanc because Skorjanc had substantially more experience, a significantly longer tenure of employment, her position is "higher" than her fellow employees, and she receives higher pay. *See* Pl.'s Mot. Supp. at 11-12; Pl.'s Rep. Br. at 7. Indeed, Carr and McCloud are Departmental Secretaries, and Koerber is an Outpatient Service Representative, whereas Skorjanc was the sole Administrative Secretary in the department, with higher pay, longer tenure, and more responsibility. However, the Court finds these characteristics to be irrelevant as this is a disciplinary case under the ADEA.

As the Seventh Circuit noted in *Radue*, 219 F.3d at 618, factors differ based on the type of ADEA case before the Court. For example, a reduction in force case requires plaintiffs to show that the retained younger employees possessed analogous attributes, experience, education, and qualifications relevant to the positions sought. In failure to transfer cases, the severity of infractions

among employees is not relevant. *See id*. Because Skorjanc's claim is predicated exclusively on allegedly disparate discipline under the Policy that applied to her and the three younger employees equally, issues of tenure, responsibility, salary differential, and experience are not pertinent to an analysis of whether these employees are similarly situated. The Policy itself states that it shall apply to "[a]ll full-time . . . employees who have successfully completed the six (6) month initial employment period." Pl.'s Dep., Exh. 23, ¶ II. Furthermore, Hurley sent a reminder to his employees, including Skorjanc, Carr, McCloud,[6] that unless he received 24 hour notice of an absence, it would result in an occurrence. *See* Pl.'s Dep., Exh. 32. Hurley also reminded them that three tardies equal one occurrence, and stressed the Policy would be applied to all department employees without exception or discrimination. *See id*. Hurley stated: "[T]his policy will be enforced without discrimation!! [sic]"). *Id*. It is apparent to the Court that Skorjanc and the three younger employees are of equal standing under the Attendance Policy and subject to its provisions without distinction.

Clarian also argues that Skorjanc's conduct was dissimilar to that of the three younger employees, which would preclude a finding that they were similarly situated.[7] Clarian first asserts

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[6] Koerber was not included on the e-mail.

[7] Clarian, in support of its dissimilar conduct argument, also presents evidence that Skorjanc's performance problems were not limited to violating the Policy. For example, in January of 2000, Hurley gave Skorjanc a written notice that she needed to improve her performance. Pl.'s Dep., Exh. 33; Def.'s Rep. Br. at 7. Those areas included excessive complaining and gossiping; failure to follow instructions; slow turn around with travel arrangements and reimbursements; and treating new employees as pariahs and subjecting them to ridiculous "initiations." *See id*. Clarian also points to a second meeting in April 2000 between Hurley and Skorjanc where more areas in which her performance was not meeting expectations were identified. *See id*.

However, the Court finds this evidence to be irrelevant for two reasons. First, in cases such as this, when the question before the Court is whether an employee was meeting an employer's legitimate employment expectations, the issue is not the employee's past

dissimilar conduct because unlike Skorjanc, the three younger employees had no unscheduled absences.[8] *See* Def.'s Rep. Br. at 9-10 (*citing Johnson v. Artim Transp. System, Inc.*, 826 F.2d 538, 543-44 (7th Cir. 1987) (internal citation omitted) ("[e]ven if a plaintiff shows disparate treatment after violations of the same rule, he or she might not succeed in establishing a *prima facie* case because, dissimilar conduct might warrant dissimilar treatment.")). The Court disagrees with Clarian's assessment of dissimilar conduct. Indeed, the Policy differentiates between absences and tardies, but three tardies also constitute one occurrence and Skorjanc has provided sufficient evidence of her co-workers' repeated tardiness that, under the Policy, would result in disciplinary measures similar or equal to that taken against Skorjanc.

Skorjanc has presented evidence that she and the three younger employees have violated the Policy, that she and the three younger employees were supervised by Hurley, and that they were all subject to the same standard – the Policy. *See Radue*, 219 F.3d at 618 (finding that a similarly situated analysis normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct). Moreover, the Court has not identified differentiating or mitigating circumstances as would distinguish the three younger employees' conduct from Skorjanc's or Clarian's treatment of them. *See id*.

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performance but "whether the employee was performing well at the time of [her] termination." *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 329 (7th Cir. 2002) (internal quotation omitted). Performance reviews from several years prior to Skorjanc's dismissal, for behavior unrelated to the Policy, provides no guidance to the Court in the instant case. Second, although Hurley's memorandum, attached to the Corrective Action terminating Skorjanc, mentions "overall substandard performance," the memorandum states explicitly that her employment was terminated per the Clarian Policy. Pl.'s Dep., Exh. 15.

[8] A review of the record reveals, in fact, that Koerber received an occurrence and was moved to Warning Level I for unexcused absences on December 4, 2001, January 3, 15, 29, 2002, and Feburary 6, 2002, and to Warning Level II for an unexcused absence on September 26, 2002.

The undisputed facts show that Hurley was far from methodical in monitoring employee tardiness and absenteeism in the department,[9] and that all of these employees failed to abide by the Policy. While the exact number of absences and tardies varied from employee to employee, Skorjanc has shown that the three younger employees were not punished for conduct actionable under the Policy similar to her own. As the Supreme Court noted, in *McDonald v. Santa Fe Trail Trans. Co*., 427 U.S. 273, 283 n.11 (1976), "precise equivalence in culpability between employees is not the ultimate question" with regard to the similarly situated analysis. Rather, the appropriate inquiry focuses on whether the employees engaged in acts of "comparable seriousness." *Id*. Skorjanc has met her burden of showing that the substantially younger employees are "directly comparable to [her] in all material respects." *Patterson v. Avery Dennison Corp*., 281 F.3d 676, 680 (7th Cir. 2002).

From the above undisputed facts, a reasonable fact finder could conclude that Clarian subjected Skorjanc to discipline under the policy, but did not subject the three younger employees to similar discipline for similar violations. As such, Skorjanc has satisfied her burden with respect to the *prima facie* test under the burden-shifting framework of *McDonnell Douglas*.

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[9] A review of Skorjanc's attendance and disciplinary records show there were many occasions in which she, too, was tardy without being disciplined. As summarized by Clarian:

> [b]etween September 2, 2002, and November 25, 2002, Skorjanc arrived at work after 8:30 a.m. (the time she now claims was her start time) thirty-one (31) times. (Pl.'s Dep., Exh. 16) Between November 25, 2002 (when Hurley changed Skorjanc's start time to 7:30 a.m.), and Skorjanc's discharge, she arrived after 7:30 a.m. twenty-one (21) times, for a total of fifty-seven (54) tardies [sic]. (Id.) The evidence shows that like the three younger employees, Skorjanc was tardy multiple times without being disciplined.

Def.'s Rep. Br. at 10. Although Clarian is inconsistent with the total number of tardies during this time frame, it is sufficient to illustrate that Skorjanc was tardy multiple times without being disciplined under the policy.

C. PRETEXT

As Skorjanc has established her *prima facie* case, the burden shifts to Clarian to come forward with evidence of a legitimate and non-discriminatory reason for the employment decision. *See Sattar*, 138 F.3d at 1168-69. Clarian articulated, and Skorjanc admitted to, a legitimate business justification for Skorjanc's termination; repeated violation of the Policy.[10] *See* Pl.'s Dep. at 111, 119, 127, 176. The inference of discrimination therefore dissolves and Skorjanc must prove, by a preponderance of the evidence, that Clarian's proffered reason is false and constitutes only pretexts for discrimination. *See Crim v. Bd. of Ed. of Cairo Sch. Dist. No. 1*, 147 F.3d 535, 540 (7th Cir. 1998). Thus, the burden shifts back to Skorjanc to show pretext.

Pretext means more than a mistake on the part of the employer; it means "a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). In other words, the plaintiff bears the burden of showing that the employer's reason for the adverse employment action was a lie or had no basis in fact. *See Crim*, 147 F.3d at 541. Skorjanc must present evidence showing that Clarian's proffered reason was: (1) factually baseless; (2) not the actual motivation for the discharge; or (3) were insufficient to motivate the discharge. *See Nawrot v. CPC, Int'l.*, 277 F.3d 896, 906 (7th Cir. 2002) (citation omitted).[11] These formulations are simply different ways of recognizing that when the sincerity of an employer's asserted reasons for

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[10] Although Clarian identified other disciplinary issues, repeated violation of the Policy was the sole justification articulated for Skorjanc's dismissal. *See* Pl.'s Dep., Exh. 15.

[11] Skorjanc claims that she "relies upon the third method" articulated in *Nawrot*, that the proffered reason is insufficient to motivate the adverse action. *See* Pl.'s Resp. Br. at 19. However, her argument does not follow suit. It appears, instead, that her argument is more appropriately categorized under the second method, that Clarian's reason was not the actual motivation for the discharge.

discharging an employee are cast into doubt, a fact finder may reasonably infer that unlawful discrimination was the true motivation. *See Testerman v. EDS Tech. Prod. Corp.*, 98 F.3d 297, 303 (7th Cir. 1996) (citation omitted). "If the employee offers specific evidence from which the finder of fact may reasonably infer that the proffered reasons do not represent the truth, the case then turns on the credibility of the witnesses." *Collier v. Budd Co.*, 66 F.3d 886, 893 (7th Cir. 1995). In such circumstances, the employee creates "a factual issue as to whether the employer's explanation is credible or merely a pretext for discrimination." *Dey v. Cold Const. & Devel. Co*, 28 F.3d 1446, 1461 (7th Cir. 1994).

Skorjanc's lone citation to authority on the issue of pretext is to *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 892 (7th Cir. 2001) (*quoting Graham v. Long Island R.R.*, 230 F.3d 34, 43 (2nd Cir. 2000)), for the proposition that a showing of "similarly situated employees belonging to a different racial group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, nondiscriminatory reason for the adverse job action was a pretext for racial discrimination." Perhaps more on point, although not cited by either party, is the Seventh Circuit's opinion in *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 580 (7th Cir. 2003), in which the court observed that pretext may be inferred from the disparate way in which the plaintiff in an ADEA case is disciplined as compared to those similarly situated.

Even if Clarian had a legitimate reason for being frustrated with Skorjanc, which by Skorjanc's own admission it did, Skorjanc established an issue of fact regarding pretext by providing evidence from which a jury could find that Clarian treated similarly situated younger employees more favorably. Clarian's proffered nondiscriminatory justification for Skorjanc's termination is that it was following its Policy. But as discussed at length above, Skorjanc satisfied her burden by presenting sufficient evidence of Clarian's comparative treatment of her and the three younger

employees. This inconsistency creates a genuine issue of fact as to whether Clarian's stated reason for discharging Skorjanc was a pretext for discrimination. The Court concludes that Skorjanc has created "a factual issue as to whether the employer's explanation is credible or merely a pretext for discrimination." *Dey*, 28 F.3d at 1461. Because Skorjanc provided the Court with specific evidence from which the finder of fact may reasonably infer that the proffered reasons do not represent the truth, the case then turns on the credibility of the witnesses, see *Collier*, 66 F.3d at 893, and a grant of summary judgment in favor of Clarian is therefore inappropriate.

IV. CONCLUSION

The Court **DENIES** defendant's, Clarian Health Partners, Inc., Motion for Summary Judgment.

IT IS SO ORDERED this 24th day of January, 2005.

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LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution attached.
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