2018 IL App (1st) 171465-U

SECOND DIVISION
September 18, 2018

No. 1-17-1465

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SIMONA WELLS, Petitioner-Appellant, v. ADVOCATE CHRIST MEDICAL CENTER, Respondent-Appellee, and ILLINOIS HUMAN RIGHTS COMMISSION, ILLINOIS DEPARTMENT OF HUMAN RIGHTS, COMMISSIONER NABI FAKRODDIN, COMMISSIONER HERMENE HARTMEN, COMMISSIONER ROSE MARY BOMBELA-TOBIAS, and ADMINISTRATIVE LAW JUDGE LESTER G. BOVIA, JR., Appellees.	)	Appeal from the Illinois Human Rights Commission No. 08-0288

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Hyman and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Complainant filed charge of employment discrimination against former employer, alleging that she was discharged because of unlawful race discrimination. Summary decision for employer was proper given that complainant presented no evidence that (i)

> she was meeting her employer's legitimate business expectations at the time of her termination or (ii) similarly situated employees outside her protected class received more favorable treatment.

¶ 2 Petitioner Simona Wells filed a charge of discrimination with the Illinois Department of Human Rights (Department), alleging that respondent Advocate Christ Medical Center fired her because of her race. The Department filed a complaint on her behalf with the Illinois Human Rights Commission (Commission). The Commission granted Advocate's motion for summary decision, finding no evidence that Wells was fired because of her race rather than inadequate job performance. Wells brought this action seeking direct administrative review. We agree with the Commission and affirm.

¶ 3 BACKGROUND

¶ 4 Wells was first employed by Advocate in 1999. She became a patient account specialist in 2003. She worked in the call center of the Business Office Department, where her job was to resolve patients' telephone, mail, and internet inquiries regarding their bills. When a patient requested a payment arrangement, Wells had authority to grant a payment extension. She would also negotiate a down payment and monthly payment amount with the patient. For all such patients, Wells was supposed to add the patient's account to her "Specialist's Patient Accounting Worklist" (PAWS), noting the terms of the payment arrangement and the monthly due date. Additionally, once the patient's down payment was received, Wells was supposed to place the account on a "COLL strategy."[1] Accounts on a COLL strategy are no longer tracked on Advocate's accounts receivable system, which means that they will not be sent to a collection agency or recorded as bad debt. All such accounts are added to a report, known as the COLL

[1] The significance of the acronym is not found in the record.

report, which Advocate periodically reviews to ensure that the accounts are being properly monitored.

¶ 5 Wells was responsible for monitoring all accounts that she placed on a COLL strategy. If a patient completely fulfilled his or her obligations under the payment arrangement, Wells was to remove the account from her PAWS and from the COLL strategy, and note that the account was paid in full. If the patient defaulted on the agreement, Wells was also to remove the account from her PAWS and from the COLL strategy and code the account as FNL9000, which would send a letter to the patient requesting payment in full. This would also put the account back in the accounts receivable system.

¶ 6 Advocate has a four-tier disciplinary system, known as its "Corrective Action Policy." An employee who commits one infraction is issued a Level 1 warning, which lasts for six months. If the employee violates the same or another rule while subject to an active Level 1 warning, a Level 2 warning is issued, which also lasts for six months. Another rule violation while a Level 2 warning is active results in a "Level 3 – Final Warning." This warning lasts 12 months, and any further infraction within that time period "may result in corrective action," including demotion, transfer, or termination.

¶ 7 Wells received a performance review on August 18, 2005, stating that her level of performance met expectations. Her job performance issues began in 2006, when Sandra Frederick was her supervisor. In July 2006, Zaida Perez, another patient account specialist, went on vacation, and Frederick put Wells in charge of checking Perez's voicemails. On July 13, Wells informed Frederick that Perez's voicemails had not been checked since June 29. After investigating, Frederick determined that Perez was responsible for the unchecked voicemails from June 29 through July 7, and Wells was responsible for the unchecked voicemails from July

10 to 13. Thus, Frederick issued a Level 1 warning to Wells and a Level 2 warning to Perez, who was already at Level 1.

¶ 8 Wells disputed her Level 1 warning through Advocate's Conflict Resolution Program, requesting a hearing before an arbitration panel. She asserted that she was never clearly told that she was responsible for checking Perez's voicemails. Following a hearing, the arbitration panel upheld the warning. Wells's performance review on August 18, 2006 referenced this voicemail incident, but nevertheless stated that Wells's overall level of performance met expectations.

¶ 9 Sharon Clifford became Wells's supervisor later that year. On November 13, 2006, Wells was absent from work, her fifth unscheduled absence during a twelve-month period, which, pursuant to Advocate's attendance policy, subjected her to corrective action. Because Wells was already subject to a Level 1 warning, Clifford issued her a Level 2 warning. Wells did not dispute the Level 2 warning.

¶ 10 Later that month, Carrie Thompson, a financial counselor at Advocate, informed Clifford that Wells had several accounts on the COLL report that should have been removed. Clifford investigated and found that Wells (i) failed to add 3 accounts to her PAWS that she placed on a COLL strategy and (ii) failed to remove 15 accounts from the COLL strategy where the patient had defaulted. Clifford therefore issued Wells a "Level 3 – Final Warning" on November 26, 2006.

¶ 11 Wells disputed her Level 3 warning through the Conflict Resolution Program. Mario Bailey, a human resources specialist, set up a meeting with Wells, Clifford, and Clifford's supervisor. But on December 11, 2006, Wells canceled the meeting because she was taking a leave of absence under the Family and Medical Leave Act (FMLA).

¶ 12 Wells returned from her FMLA leave in February 2007, and the previously-planned meeting regarding her Level 3 warning was held on February 19. The parties have differing accounts of what happened at this meeting. According to Bailey, Wells acknowledged her errors and said that she was going to change her job performance. According to Wells, she pointed out that her 2005 and 2006 performance reviews stated that she met expectations and handled COLL/PAWS issues appropriately. Wells recalled that on hearing this, Bailey stated that all COLL/PAWS errors that occurred before August 18, 2006, should be removed from Wells's record (*i.e.*, all but four of the errors for which she received her Level 3 warning). In any event, it is undisputed that Wells did not pursue her dispute further, and the Level 3 warning remained on her record.

¶ 13 After her FMLA leave, Wells was assigned a restricted-duty schedule of four hours per day. On February 19, 2007, Clifford emailed the patient account specialists to temporarily redistribute Wells's duties while she was on restricted duty. The email states:

> "[Perez] will be responsible for checking and returning voice mail messages left before 12 p.m. on Fridays and [Wells] will be responsible for checking and returning voice mail message left between 12 p.m. and 4 p.m. on Fridays.
>
> [Wells] will also be responsible for checking and returning voice mail messages on Wednesdays that are left between 2:30 p.m. and 4 p.m. after Chantel [Green] has left for the day.
>
> Again, these changes are temporary. I will advise you when the work load will return to normal."

¶ 14 On April 4, 2007, a Wednesday, the telephones in Wells's department were shut down because of a staff party. Wells arrived at work at around noon. According to Wells, she checked

for voicemails at 1:45 p.m. and again at 2:10 p.m.; there were none (because the system was down). At around 2:15 p.m., the system came back online, and Wells was continuously occupied with answering calls until 4 p.m., her scheduled time to leave. Thus, she was not able to check voicemails again that day.

¶ 15 The next morning, Donna Kirby, a collection liaison who was assigned to help with voicemails, found seven unchecked voicemails from the previous day. Three of those voicemails were left between 2:30 p.m. and 4 p.m. Clifford confronted Wells that afternoon. According to Wells, she explained to Clifford that she was not able to check voicemails because the phones were ringing non-stop. But according to Clifford, Wells said that she did not check voicemails because she believed that Clifford's earlier reassignment of her work to include Wednesday afternoons was only for one week. Clifford, believing her directions were clear, recommended to her supervisors that Wells be terminated. She was advised that termination was appropriate, so Wells was fired that day.

¶ 16 In the notice of termination that Clifford sent to Wells, Clifford incorrectly stated that Wells failed to retrieve seven voicemails; Clifford later clarified in proceedings before the Commission that the actual number attributable to Wells was three. The notice of termination advised Wells that she had seven days to file a dispute through the Conflict Resolution Program, if she wished. Wells did not do so.

¶ 17 Procedural History

¶ 18 On August 2, 2007, Wells filed a charge of employment discrimination with the Department, alleging that she was fired because of her race, her mental handicap, and in retaliation for filing a union grievance, in violation of the Illinois Human Rights Act (Act) (775 ILCS 5/1-101 *et seq.* (West 2006)). The Department determined that substantial evidence

supported her allegations of race discrimination. Accordingly, on June 27, 2008, the Department filed a "Complaint of Civil Rights Violation" with the Commission on behalf of Wells.

¶ 19 During discovery, Wells sought production of the COLL report that led to her Level 3 warning, and the ALJ ordered Advocate to produce the report "if it is readily available in the ordinary course of business." After searching, Advocate asserted that the report could not be located because it "was not retained in the ordinary course of business." Wells did not pursue any form of relief before the ALJ as a result of this alleged nondisclosure, aside from arguing the ALJ should presume the report's contents were adverse to Advocate.

¶ 20 Advocate moved for summary decision (the Commission's version of summary judgment), arguing that Wells could not establish a *prima facie* case of race discrimination because she could not show that she was meeting Advocate's legitimate business expectations at the time of her termination or that similarly situated employees outside her protected class were treated more favorably than she was.

¶ 21 Wells filed a response in which she asserted there was "ample evidence" that Clifford's stated reason for firing Wells—her failure to retrieve three voicemails on April 4, 2007—was merely a pretext for unlawful discrimination. First, Wells argued that it was not her responsibility to retrieve voicemails on April 4. Per Clifford's February 19 email, Wells was responsible for voicemails on Wednesdays "between 2:30 p.m. and 4 p.m. *after [Green] has left for the day*." (Emphasis added.) On April 4, Green worked from 7:54 a.m. until 4:30 p.m., although her time was split between working in Wells's department and in another department. Wells argued that because Green had not "left for the day," Wells was not responsible for voicemails and therefore did not commit any infraction at all.

¶ 22 Second, Wells argued that even if she did commit an infraction, it was *de minimis* and not proper grounds for termination, as evidenced by the fact that Advocate, by its own admission, did not fire any other patient account specialists for failure to retrieve voicemails during the time when Wells was a specialist.

¶ 23 Third, Wells disputed the severity of the infraction for which she was issued a Level 3 warning. Wells committed 18 COLL/PAWS errors from November 2005 through October 2006. For these errors, she was issued a Level 3 warning on November 26, 2006. But at the meeting on February 19, 2007, Bailey stated that all COLL/PAWS errors that occurred before August 18, 2006, should be removed from Wells's record. This left only four such errors on Wells's record (all of which occurred on October 30, 2006). Wells argued that four errors were not enough to warrant a Level 3 warning.

¶ 24 Finally, Wells pointed out that in the initial notice of termination, Clifford stated that Wells failed to retrieve seven voicemails, but she later revised that number down to three. Wells argued that this gave rise to an inference that Clifford did not care about the actual facts and was merely looking for an excuse to fire Wells.

¶ 25 Wells additionally argued that two similarly-situated patient account specialists, Karen Bowdish and Perez, received more favorable treatment than Wells because they are not African American. Regarding Bowdish, Wells alleges that she received no discipline for patient account errors she committed. More specifically, on November 26, 2006 (the same day that Wells received her Level 3 warning), Wells saw Bowdish leaving Clifford's office. Wells then overheard Bowdish telling her co-workers, "Don't bring me any more mistakes" and "I just got seven handed back to me." Wells took this to mean that Bowdish committed seven patient

account errors. Bowdish's personnel files indicate that she was not disciplined for any patient account errors that she made prior to November 26, 2006.

¶ 26 Wells also claimed that Bowdish received no discipline for patient account errors documented on February 15 and August 28, 2007. The record is unclear as to what, if anything, the February 15 error was. On August 28, a patient called to make a credit card payment. Bowdish made a typographical error when inputting the payment amount. She realized her mistake and informed the patient, who suggested that Bowdish send him a refund check. Bowdish then forwarded the patient's account to another employee for, apparently, processing of the refund check. According to Advocate, Clifford had "coaching moments" with Bowdish but did not issue her a warning on either occasion.

¶ 27 As for Perez, she received a Level 1 warning on June 7, 2006, for making an erroneous charge to a patient's account. She then received a Level 2 warning for failing to check voicemails from June 29 to July 7, 2006. (As noted, this was the same incident in which Wells was issued her Level 1 warning.) After those warnings expired, Perez received a Level 1 warning on August 1, 2007, for failing to add 12 accounts to her PAWS even though they were placed on a COLL strategy. Finally, on November 21, 2007, Perez received a Level 2 warning for absenteeism.

¶ 28 In October 2013, the ALJ recommended that Advocate's motion for summary decision be granted. He stated that Wells could not establish a *prima facie* case of race discrimination because her job performance did not meet Advocate's legitimate expectations. Prior to April 4, 2007, Wells exhausted three levels of Advocate's progressive disciplinary program and was aware that a fourth infraction was cause for termination. Additionally, Wells did not establish that similarly situated non-African-American employees were treated more favorably than she

was, since none of the employees cited by Wells committed an infraction after having been issued a Level 3 warning. The ALJ also found that Advocate articulated a legitimate, nondiscriminatory reason for terminating Wells—*i.e.*, her disciplinary record—and Wells could not establish that the reason was pretextual.

¶ 29 Wells filed exceptions to the ALJ's recommendation, contending that questions of disputed fact precluded summary decision for Advocate. The Commission declined further review of the matter and adopted the ALJ's recommendation in its entirety.

¶ 30 ANALYSIS

¶ 31 Wells argues that the Commission's summary decision should be reversed because (i) there are questions of disputed fact as to whether she was fired due to race discrimination; (ii) Advocate committed discovery violations which prevented her from uncovering further evidence of discrimination; (iii) the Commission erred when it declined to consider her challenge to her Level 3 warning as untimely; and (iv) the Commission denied her due process.

¶ 32 Propriety of Summary Decision

¶ 33 The Act prohibits employers from discriminating on the basis of race. 775 ILCS 5/1-102, 2-102(A) (West 2006). A complainant can establish unlawful discrimination by one of two methods: (i) the *McDonnell Douglas* method or (ii) the *Troupe* method. *Sola v. Illinois Human Rights Comm'n*, 316 Ill. App. 3d 528, 537 (2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994))[2]; see also *Lalvani v. Illinois Human Rights Comm'n*, 324 Ill. App. 3d 774, 790 (2001)

[2] These methods are frequently referred to as the "indirect method" (for the *McDonnell Douglas* method) and the "direct method" (for the *Troupe* method). But these terms are misnomers, since, as shall be discussed, *Troupe* permits a complainant to prove discrimination either by direct or by circumstantial (*i.e.*, indirect) evidence.

(we analyze claims under the Act using the same analytical framework used for claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act).

¶ 34 *McDonnell Douglas* employs a three-step burden-shifting analysis. *Owens v. Department of Human Rights*, 403 Ill. App. 3d 899, 918 (2010). First, the complainant must establish a *prima facie* case by showing (i) she is a member of a protected class, (ii) she was meeting her employer's "legitimate business expectations," (iii) she suffered adverse employment action, and (iv) her employer gave more favorable treatment to similarly situated employees outside her class. *Id.* at 918-19. This creates a rebuttable presumption that the employer unlawfully discriminated against the complainant. Second, the employer can rebut the presumption by articulating a legitimate, nondiscriminatory reason for its action. *Id.* at 919. Third, the complainant ultimately bears the burden of proving that the employer's reason was a pretext for discrimination. *Id.*

¶ 35 Under *Troupe*, a complainant can prove discrimination through either direct or circumstantial evidence. *Troupe*, 20 F.3d at 736; see also *Sola*, 316 Ill. App. 3d at 538. Direct evidence of discrimination is "an acknowledgment of discriminatory intent by the defendant or its agents." *Troupe*, 20 F.3d at 736. (Wells admits that she has no such proof.) In the absence of direct evidence, a complainant may prove discrimination with circumstantial evidence, such as (i) evidence of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn"; (ii) evidence that similarly situated employees outside the complainant's protected class received "systematically better treatment"; and (iii) evidence that the complainant was qualified for the job but passed over for, or replaced by, someone outside her protected class, and the employer's stated reason for the difference in

treatment is a mere pretext for discrimination. *Id.* A complainant may prove her case using any or all of these types of circumstantial evidence. *Id.*

¶ 36 Summary decision under the Act is appropriate where there is no genuine issue as to any material fact and the movant is entitled to decision as a matter of law. 775 ILCS 5/8-106.1(2) (West 2016). To defeat summary decision, the complainant must present evidence sufficient to allow a reasonable finder of fact to infer that her employer took action against her because of her race. *Sola*, 316 Ill. App. 3d at 538. As with summary judgment, summary decision is a purely legal determination; thus, our review is *de novo*. *Tate v. American General Life and Accident Insurance Co.*, 274 Ill. App. 3d 769, 774 (1995).[3]

¶ 37 Wells argues that under both the *McDonnell Douglas* and *Troupe* standards, she has presented issues of material fact as to whether her termination was the result of racial discrimination. We start by considering Wells's case under *McDonnell Douglas*. The parties do not dispute that Wells was a member of a protected class or that she suffered adverse employment action. Wells additionally argues that (i) she met Advocate's legitimate business expectations; (ii) Advocate gave favorable treatment to her coworkers Bowdish and Perez; and (iii) Advocate's stated reason for her termination—her failure to retrieve voicemails while she had an active Level 3 warning—was a mere pretext for discrimination.

¶ 38 In determining what constitutes a "legitimate" business expectation, our role is not to second-guess whether the employer's decisions are the product of sound business judgment. *Huhn v. Koehring Co.*, 718 F.2d 239, 244 (7th Cir. 1983). Thus, an employer's expectation is

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[3] Advocate argues for a manifest weight of the evidence standard, citing *Sola*, 316 Ill. App. 3d at 535, for the proposition that "[o]n administrative review, questions of fact are reviewed with deference and subject to a manifest weight of the evidence standard." But as *Sola* correctly pointed out, summary decision, like summary judgment, is only appropriate where there is no genuine issue as to any material fact. *Id.* If the Commission decided any disputed issue of material fact at the summary decision stage, it would be grounds for reversal.

legitimate as long as it is (i) objectively reasonable and (ii) adequately communicated to the employee. *Mills v. First Federal Savings & Loan Ass'n of Belvidere*, 83 F.3d 833, 843 fn.7 (7th Cir. 1996) (citing *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 463 (7th Cir.1986)). Moreover, "[t]he employee's perception of [herself] *** is not relevant. It is the perception of the decision maker which is relevant." (Internal quotation marks omitted.) *Karazanos v. Navistar International Transport Corp.*, 948 F.2d 332, 338 (7th Cir. 1991) (employee's assertion that his performance problems were "99% the fault" of others was insufficient to create an issue of fact as to whether his firing was discriminatory); see also *Mills*, 83 F.3d at 843-44 (employee failed to show that she was meeting her employer's legitimate expectations, notwithstanding her assertion that she "always completed her work in an acceptable manner," where numerous shortcomings were documented in the record).

¶ 39 Here, it is undisputed that on July 28, 2006, Wells received a Level 1 warning for failing to check voicemails; on November 13, 2006, she received a Level 2 warning for absenteeism (specifically, her fifth unscheduled absence in the preceding 12 months); and on November 26, 2006, she received a Level 3 warning for 18 COLL/PAWS errors (later reduced to four) that she made over the past year. Pursuant to Advocate's disciplinary policy, that warning made her subject to termination for any further infraction within the next 12 months. On April 5, 2007, when it was discovered that she failed to retrieve three voicemails on the previous day, she was terminated.

¶ 40 Notwithstanding her disciplinary record, Wells claims that she met Advocate's legitimate business expectations. In support, she cites her August 2005 and August 2006 performance reviews, both of which stated that her overall competence level met expectations. But these reviews do not create an issue of fact as to whether she was meeting expectations when she was

terminated in April 2007. See *Stern v. St. Anthony's Health Center*, 788 F.3d 276, 287 (7th Cir. 2015) (employee's favorable performance evaluation in 2009 did not create an issue of fact as to whether he was able to perform his job in 2010 when he was terminated). Notably, her Level 2 and 3 warnings, as well as the incident that led to her firing, all occurred after her 2006 performance review.

¶ 41 *Johnson v. Zema Systems Corp.*, 170 F.3d 734 (7th Cir. 1999), is readily distinguishable. Following his termination in October 1994, Johnson brought a claim of racial discrimination against his former employer. As evidence that he was meeting his employer's expectations, Johnson cited his 1993 and 1994 performance reviews, "each of which spoke in superlatives about the quality of Johnson's work." *Id.* at 737. The Seventh Circuit found that Johnson had raised an issue of fact as to whether he was meeting his employer's expectations, explaining:

> "Although Johnson's positive employment evaluations might be insufficient if they evidenced a pattern of declining performance [citation], here no such pattern appears. [Citation.] We find it significant that at the point of his termination, [his employer] continued to assert that Johnson was meeting, in fact exceeding, its expectations." *Id.* at 743.

Here, by contrast, Wells's disciplinary record evidences a pattern of sharply declining performance, since three out of her four disciplinary incidents occurred after her August 2006 review, and she was issued a "Level 3 – Final Warning" in November 2006. Nor did Advocate assert at any point after August 2006 that Wells was meeting its expectations.

¶ 42 Wells additionally raises a bevy of arguments about her Level 3 warning and the incident that led to her firing. (She does not dispute the propriety of her Level 1 and 2 warnings.) Regarding her Level 3 warning, Wells does not deny making the 18 COLL/PAWS errors in

question, but she asserts that the errors were "insignificant" compared to her total workload. According to her 2006 performance review, Wells handled around 42 calls a day, on par with her coworkers. Wells argues that it is objectively unreasonable, and therefore not "legitimate," for Advocate to expect patient account specialists to handle that volume of calls without making any errors.

¶ 43 We disagree with Wells's characterization of 18 errors as insignificant, particularly since many of those errors were not corrected for months and, in fact, there is no indication in the record that Wells attempted to correct any of the errors prior to her disciplinary citation. We additionally note that Wells's 18 errors were not the sole cause of her Level 3 warning. At the time her errors were discovered, Wells already had an active Level 2 warning because of multiple infractions within the last five months. In light of these facts, we decline to find that Wells's Level 3 warning was objectively unreasonable.

¶ 44 Wells additionally points out that, according to her affidavit, Bailey agreed to retroactively remove 14 COLL/PAWS errors from her record (*i.e.*, the ones occurring before her 2006 performance review). But even taking this as true, Bailey did not remove the remaining four COLL/PAWS errors, nor did he remove the Level 3 warning premised on those errors. As such, Wells was still on notice that any further infraction within 12 months could lead to her termination.

¶ 45 In this regard, *Gordon v. United Airlines, Inc.*, 246 F.3d 878 (7th Cir. 2001), cited by Wells, is inapposite. Gordon was terminated for an "unauthorized deviation" from company policy, but his employer could not provide a consistent definition of what constituted an unauthorized deviation. *Id.* at 887. Additionally, although Gordon had "past incidents" in his work record, his employer allegedly assured him that those incidents would not be used in

evaluating his performance. *Id.* Based on these facts, the Seventh Circuit found an issue of fact as to whether Gordon was performing according to his employer's expectations. *Id.* By contrast, Wells's Level 1, 2, and 3 warnings were the result of violating clearly articulated job requirements, and Wells was never assured that all of her "past incidents" would be wiped from her record. Thus, *Gordon* does not support Wells.

¶ 46 Wells next challenges the incident that led to her termination, arguing that she was not required to retrieve voicemails that afternoon. According to Clifford's email, Wells was supposed to retrieve voicemails on Wednesdays "between 2:30 p.m. and 4 p.m. after [Green] has left for the day." Green normally left work at 2:30 p.m., but on April 4, 2007, she stayed until 4:30 p.m. because she was training for a new position in another department. Wells argues that because Green had not "left for the day," it was not Wells's responsibility to retrieve voicemails.

¶ 47 But there is no issue of fact as to whether Clifford believed it was Wells's responsibility to retrieve the voicemails that afternoon. On the contrary, Clifford stated in her affidavit that she believed her instructions to Wells were "clear." Nor is there any evidence that Wells thought she was relieved of her duties to check voicemails because Green had not "left for the day." Rather, it is apparent from the record that Wells either knew or should have known that Clifford expected her to check voicemails on the afternoon of April 4, regardless of whether Wells's or Clifford's version of events is correct.

¶ 48 According to Wells, she checked for voicemails twice that afternoon, and was unable to check again because she was occupied with incoming calls until it was time to leave. When Clifford confronted her about the unchecked voicemails, Wells explained the situation and offered to submit proof of the times she checked. Notably, Wells never contemporaneously

claimed it was not her responsibility to check voicemails because Green was still present at work, nor would such a claim be consistent with her alleged actions.

¶ 49 Meanwhile, according to Clifford, Wells's stated reason for not retrieving the voicemails was that she thought Clifford's reassignment of her work to include Wednesday afternoons was only for one week. But this excuse is directly contradicted by Clifford's email, in which she says, "[T]hese changes are temporary. I will advise you when the work load will return to normal." Moreover, Wells did not claim that Green's continued presence relieved her of her responsibility to retrieve voicemails. Accordingly, under either version of events, we find that Clifford's expectation that Wells would check voicemails after 2:30 p.m. on April 4, 2007 was adequately communicated and, therefore, legitimate. See *Mills*, 83 F.3d at 843 fn.7 (to be legitimate, employer's business expectation must be adequately communicated to employee).

¶ 50 Wells also argues that her failure to retrieve voicemails is "insignificant" and a "flimsy justification" for terminating her. But as a patient account specialist working in the call center, resolving patients' telephone inquiries was one of Wells's primary responsibilities. Indeed, at the time of Wells's termination, it was department policy that patient account specialists were required not only to retrieve all voicemails, but also to make same-day callbacks for all messages left before 2 p.m., and they were strongly encouraged to make same-day callbacks for later messages if possible. Accordingly, retrieving voicemails was a core part of Wells's job, not an "insignificant" one. Moreover, even if Wells viewed her failure to retrieve voicemails as insignificant, it is well established, as noted above, that the employer's perception, not the employee's, is the basis for our analysis. *Karazanos*, 948 F.2d at 338. Thus, Wells has not presented an issue of fact as to whether she was meeting Advocate's legitimate business expectations at the time of her termination.

¶ 51 Finally, Wells argues that she need not show that she was meeting Advocate's expectations because she was singled out for discipline among her peers. In support, she cites *Flores v. Preferred Technical Group*, 182 F.3d 512 (7th Cir. 1999), in which a group of 10 to 12 employees, including Flores, took an unauthorized break to protest their employer's prohibition of unauthorized breaks. Flores, who was Hispanic, was fired, while many of her fellow protesters who were not Hispanic were not fired. Under those circumstances, the Seventh Circuit held that "[i]t makes little sense in this context to discuss whether [Flores] was meeting her employer's reasonable expectations" since she admitted that she broke a rule but claimed to have been singled out for discipline because of her race. *Id.* at 515.

¶ 52 But Wells cannot establish any such differential treatment on this record. As the Commission found, Wells has not presented evidence that Advocate treated more favorably similarly situated employees who were outside her protected class. The purpose of the similarly situated requirement "is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination." *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007). There is no single test that determines whether employees are similarly situated; rather, courts employ a common-sense factual inquiry, asking whether there are enough common characteristics among the individuals to allow for meaningful comparison. *Id.* The complainant need not show "complete identity" with the better-treated employee, but she must show "substantial similarity." (Internal quotation marks removed.) *Id.*

¶ 53 Wells contends that two of her fellow patient account specialists, Bowdish and Perez, were similarly situated to her but received more favorable treatment. Specifically, she alleges

that Bowdish received no discipline for various patient account errors that she committed, while Perez had a "far more serious" history of infractions but was not terminated.

¶ 54 With regard to Bowdish, Wells cites three incidents: (i) seven patient account errors that Bowdish allegedly committed prior to November 26, 2006; (ii) an error she allegedly committed on February 15, 2007; and (iii) an error she committed on August 28, 2007. But the record does not support Wells that the first two alleged incidents, in fact, occurred. Wells's evidence for her first assertion is that on November 26, 2006, she overheard Bowdish telling her coworkers, "Don't bring me any more mistakes" and "I just got seven handed back to me." Wells postulates that the "mistakes" that were "handed back to" Bowdish may have been patient account errors that she committed, but Wells's speculation, without more, is insufficient to create an issue of material fact on this subject. See *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 453 (2009) ("inferences of fact based on imagination, speculation, and conjecture cannot stand as a matter of law" (internal quotation marks omitted)). Moreover, Wells's speculation is contradicted by the record, since Clifford, who was Bowdish's supervisor, stated that to her knowledge, no other employee she supervised had patient account errors on the COLL report that revealed Wells's errors.

¶ 55 As for Bowdish's alleged error on February 15, 2007, Wells's only cited source for this allegation is a one-page computer database printout that does not, on its face, appear to reflect any error. Nor does Wells offer any cogent explanation in her brief as to what the alleged error might be.

¶ 56 Bowdish's only error reflected in the record was her inadvertent overcharge of a patient's account on August 28, 2007. Bowdish immediately realized the error on her own, explained the situation to the patient, and forwarded the account to another employee to send the patient a

refund check. This singular error is not comparable to Wells's multiple COLL/PAWS errors, all of which apparently went uncorrected until Thompson reviewed the COLL Report in November 2006. Moreover, "[i]t is not the province of this court to question an employer's decision to punish some conduct more harshly than other conduct." *Gordon*, 246 F.3d at 890-91. Accordingly, the fact that Bowdish was not disciplined for this error is not evidence that she was treated more favorably than Wells.

¶ 57 Wells next claims that Perez's work history is "riddled with criticisms" and her disciplinary record is "far more serious" than Wells's record. The record flatly contradicts this assertion. On June 7, 2006, Perez received a Level 1 warning for making an erroneous charge to a patient's account. On July 31, 2006, she received a Level 2 warning for failing to check voicemails, in the same incident for which Wells received her Level 1 warning. Perez had no further disciplinary incidents until August 1, 2007, when she received a Level 1 warning for 12 COLL/PAWS errors. Clifford explained that it was a Level 1 warning because Perez had no active warnings at the time. Finally, on November 21, 2007, Perez received a Level 2 warning for having five absences in a 12-month period. Thus, the record shows that Perez, unlike Wells, never progressed beyond a Level 2 warning and so is not "similarly situated" to Wells in terms of her performance history. Moreover, the record does not show that Perez was treated more favorably than Wells; on the contrary, they were both disciplined in July 2006 for their failure to check voicemails, and they both also received warnings for excessive absenteeism.

¶ 58 Wells theorizes that Perez may have committed additional infractions that are not reflected in her disciplinary record. In particular, on March 19, 2007 and April 4, 2007, patient information was mailed to the wrong address; Wells suggests that Perez might have been responsible for those errors. But, as discussed, speculation is not sufficient to create an issue of

fact (*Budzileni*, 392 Ill. App. 3d at 453), and Wells does not cite any evidence that Perez committed either error. On the contrary, Clifford explained that it is common practice for call center employees to pick up and mail out all itemized bills in the printing area, as a courtesy to their coworkers who may be busy at their desks answering calls. Thus, it is impossible to know who mailed out any given bill.

¶ 59 In sum, Wells has not presented an issue of material fact as to whether (i) she was meeting Advocate's legitimate business expectations or (ii) Bowdish and Perez were similarly situated to her and received more favorable treatment. Accordingly, the Commission correctly found that Wells did not establish a *prima facie* case of discrimination under the *McDonnell Douglas* standard.

¶ 60 Wells's case fares no better under a *Troupe* analysis. As discussed, Wells has not presented evidence that similarly situated employees received systematically better treatment than her. Nor has she presented evidence that she was qualified for her job but replaced by someone of a different race. Wells nevertheless argues that Advocate's discriminatory intent is evidenced by "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn" (*Troupe*, 20 F.3d at 736).

¶ 61 With regard to "suspicious timing," Wells argues that it is suspicious that she accrued three infractions in a period of several months after Clifford became her supervisor in November 2006. But, as discussed, all three of those infractions were the result of Wells's well-documented failures to meet Advocate's legitimate business expectations. Thus, the timing of Wells's warnings is not evidence of unlawful discrimination. See *Morgan v. SVT, LLC*, 724 F.3d 990, 998 (7th Cir. 2013) (alleged "suspicious timing" of employee's termination was not

sufficient to defeat summary judgment for the employer where there was a reasonable, non-suspicious explanation for the employee's termination, *i.e.*, that he was not performing his job duties).

¶ 62 *All Purpose Nursing Service v. Illinois Human Rights Comm'n*, 205 Ill. App. 3d 816 (1990), upon which Wells heavily relies, is distinguishable. The complainant, Walton, was subpoenaed to testify against her employer in a lawsuit (the *Forni* case); the very next day, Walton was fired for "insubordination." *Id.* at 821. The Commission found this to be unlawful retaliatory discharge, and this court affirmed, explaining:

> " 'Ms. Walton had never received any kind of written warning regarding her job performance under a variety of supervisors prior to the time it appeared likely that she was going to testify in the *Forni* case. Every evaluation had listed her as either "excellent" or "good." *** It defies common sense to believe that Ms. Walton's job performance had suddenly become so bad in such a short period of time.' " *Id.* at 828.

By contrast, Wells had already been issued a written Level 1 warning before Clifford became her supervisor. With regard to her Level 2 warning for absenteeism—the propriety of which she does not dispute—four of her five absences occurred before Clifford became her supervisor. Additionally, the timing of Wells's termination, around five months after Clifford became her supervisor, is not comparable to the suspicious timing in *All Purpose*, in which the employee was fired the day after she was subpoenaed.

¶ 63 Next, Wells argues that Advocate's "ambiguous statements" preclude summary decision. In the *Troupe* context, "ambiguous statements" are statements made by decisionmakers that "are not discriminatory in themselves but may support an inference of discrimination." *Young v. Illinois Human Rights Comm'n*, 2012 IL App (1st) 112204, ¶ 44. Moreover, "there must be a

causal connection between the discriminatory remark and the adverse employment action, or the comment must be made contemporaneously with the adverse action." *Id.*

¶ 64 Wells cites three "ambiguous statements" as evidence of discrimination: (i) in her affidavit, Clifford stated that she was not aware of any other employee that she supervises having COLL errors on the same COLL report that revealed Wells's errors, but Clifford did not unequivocally assert that Wells was the only such employee; (ii) likewise, Thompson, the financial counselor who first noticed Wells's COLL/PAWS errors, did not assert that Wells was the only person supervised by Clifford with improperly monitored accounts; and (iii) in response to interrogatories, Advocate stated that it was not aware of any other employees who were terminated for failure to retrieve voicemail messages. None of these statements imply racial animus, since they do not reference race in any way. See *Sola*, 316 Ill. App. 3d at 542 (employer's comments were not probative of age discrimination where they did not mention or refer to age). Additionally, none of these comments was made contemporaneously or in connection with Wells's termination. See *Young*, 2012 IL App (1st) 112204, ¶ 44. Accordingly, these comments do not support an inference of race discrimination.

¶ 65 Wells also cites miscellaneous "bits and pieces" of evidence in support of her claim of discrimination. She argues that we may infer discrimination from the fact that Clifford initially said that she failed to retrieve seven voicemails, but later revised that number down to three. But this is not evidence that Wells's termination was racially motivated, since Wells was on notice that *any* infraction could be cause for termination; it does not matter whether the number of unchecked voicemails was seven or three.

¶ 66 Finally, Wells argues that Advocate did not follow its own procedures in terminating her. Advocate's Corrective Action Policy provides that in non-health-policy cases where termination

may be warranted, the employee "will" be suspended without pay to allow "an expeditious yet thorough review and final decision regarding the circumstances of the offense." Additionally, Advocate's Termination of Employment Policy provides that when an employee is terminated, her supervisor should schedule her for an exit interview with the human resources department prior to her last day of work. Wells asserts that, because neither policy was followed in her case, it gives rise to an inference that Advocate discharged her because of her race.

¶ 67 We fail to see how Advocate's actions imply any racial animus toward Wells, since the investigation necessary to determine her infraction was summary: there were unchecked voicemails and Wells failed to retrieve them, which she admitted to Clifford, claiming that she was too busy. Having determined grounds for discipline, Advocate was entitled to terminate Wells without first suspending her without pay, and there is no reasonable inference of discrimination to be drawn.

¶ 68 If Wells wished to argue that her termination was not in accordance with Advocate policy, she could have disputed her termination through Advocate's Conflict Resolution Program, an opportunity which she declined. But regardless of whether Advocate followed its discharge policies to the letter, the fact remains that Wells racked up four infractions in less than a year, an objectively reasonable explanation for her discharge. Thus, the Commission did not err in entering summary decision for Advocate.

¶ 69 Discovery

¶ 70 Wells next contends that during discovery, Advocate "submitted conflicting facts and misleading information and refused to provide straight forward [*sic*] discovery responses." In particular, Advocate did not produce a copy of the COLL report that led to Wells's Level 3 warning. Wells argues that Advocate's attempts to "hide the ball" give rise to an inference that it

is hiding evidence of discrimination, or, alternately, those efforts negatively impact Advocate's credibility.

¶ 71 When Wells requested production of the COLL report, Advocate initially refused, stating that the report was "completely irrelevant." Wells then filed a motion to compel production of the report. At a status hearing, the ALJ verbally issued an order regarding the COLL report and also ordered the parties to draft an agreed order setting forth his ruling. According to Advocate's counsel, the ALJ stated that Advocate should produce the report only if a hard copy was available, and he said that electronic discovery was not required. According to Wells's counsel, the ALJ stated that the report should be produced "if it is available in the ordinary course of business," meaning that "a complete analysis or tear-down of the hard drive is not required, but *** if it is something that can be found by putting in a search term and pressing a button, the document should be printed and produced." In any event, the written agreed order stated that Advocate was required to produce the report "if it is readily available in the ordinary course of business."

¶ 72 Advocate then filed a supplemental answer to Wells's interrogatories, stating that a copy of the COLL report "was not retained in the ordinary course of business, and thus, could not be located." In its reply in support of its summary judgment motion, Advocate further states that it "searched diligently for the COLL Report but could not locate a hard copy." Wells now speculates that Advocate may have had electronic access to the COLL report and that the report might have reflected infractions by other employees supervised by Clifford who were not disciplined as harshly as Wells. Wells further contends that Advocate's failure to produce the COLL report gives rise to an evidentiary presumption that its contents are adverse to Advocate. See *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 504 (2005) ("An unfavorable

evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control." (Internal quotation marks omitted.)).

¶ 73 We disagree that any such evidentiary presumption attaches. There is no indication in the record that the COLL report at issue was under Advocate's control at the time of Wells's request. On the contrary, Advocate stated that the report was not retained in the ordinary course of business. Notably, Advocate did not distinguish between a hard copy and an electronic copy, but stated broadly that "a copy" (without limitation) was not retained. Moreover, as Advocate pointed out to the ALJ, it could not reasonably have known that it would need to retain a copy of the COLL report, since Wells dropped her dispute regarding her Level 3 warning on February 19, 2005, several months before she filed her charge of discrimination.

¶ 74 Notably, Wells does not claim that the ALJ abused his discretion with regard to any discovery ruling. Nor did she pursue any relief before the ALJ for Advocate's alleged discovery violation, aside from arguing that an adverse evidentiary presumption should apply. She did not, for instance, seek an affidavit from Advocate as to whether it searched its electronic records for the COLL report, or an order explicitly compelling electronic discovery. As a result, under the record as it stands, we cannot say that the COLL report was under Advocate's control so as to warrant the imposition of an unfavorable evidentiary presumption against Advocate.

¶ 75 Wells also argues that Advocate lacks credibility because of its failure to produce the COLL report and various other allegedly vague statements it made during discovery. But it is well established that questions of credibility are inappropriate at the summary decision stage (see *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008)), and our decision here does not rest upon the credibility of any party, but on the undisputed facts in the record.

¶ 76 Timeliness of Wells's Challenge to Her Level 3 Warning

¶ 77 Before the Commission, Wells argued that she was singled out because of her race when she was issued her Level 3 warning. The ALJ refused to consider this claim, stating that it was "woefully untimely." Wells argues that this ruling was in error.

¶ 78 Under the Act, a complainant must file her charge of discrimination within 180 days of the allegedly unlawful conduct. 775 ILCS 5/7A-102(A)(1) (West 2006); see *Pickering v. Illinois Human Rights Comm'n*, 146 Ill. App. 3d 340, 347 (1986) (180-day limit is jurisdictional). But if the complainant makes a timely claim alleging a discrete discriminatory act within the statutory time frame, she may support her claim with events outside of the statutory time frame. *West v. Ortho-McNeil Pharmaceutical Corp.*, 405 F.3d 578, 581 (7th Cir. 2005); see also *Davis v. Con-Way Transportation Central Express, Inc.*, 368 F.3d 776, 784 n.4 (7th Cir. 2004) (where plaintiff filed a timely charge of discrimination, plaintiff could use events outside the statutory timeframe to support his claim of pretext) (citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (although acts outside the statutory time period cannot be the basis for liability, the statute does not "bar an employee from using the prior acts as background evidence in support of a timely claim")). Wells argues that, since she timely filed a complaint regarding her termination, she may cite her Level 3 warning as "background evidence" in support of her timely claim.

¶ 79 We agree with Wells. We additionally note, parenthetically, that Wells could not have filed a charge of discrimination at the time she received her Level 3 warning, since she had not yet suffered any adverse employment action. See *Owens v. Department of Human Rights*, 403 Ill. App. 3d 899, 920-21 (2010) (written reprimand was not an "adverse employment action" because it did not have any significant effect on the terms or conditions of complainant's employment). Nevertheless, we find that the ALJ's error in this regard was harmless, because

we have fully considered Wells's arguments regarding her Level 3 warning and, for the reasons stated above, find she has not raised an issue of fact as to whether that warning was racially motivated. See *Davis*, 368 F.3d at 784 n.4 ("[T]he district court's [erroneous] failure to include acts outside the limitations period in evaluating Davis's claims does not warrant reversal, since we have taken into consideration all acts cited by Davis in rendering our decision on appeal.").

¶ 80 Due Process

¶ 81 Finally, Wells argues that the Commission denied her due process. She bases this claim on the fact that her case was on the Commission's docket for nine years before the Commission entered a final order adopting the ALJ's recommendation without oral argument. Wells theorizes that her case may have been an "embarrassment" to the Commission because of its age, and, therefore, the Commission opted to "sweep[] her claim under the rug" by rubber-stamping the ALJ's recommendation instead of according her a fair hearing. She therefore requests that we remand for an evidentiary hearing before "an individual who is independent of the Commission."

¶ 82 But Wells has not presented any evidence, aside from speculation, that the Commission was biased against her. Moreover, "a claim of a due process violation will be sustained only upon a showing of prejudice in the proceeding." *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 825 (2009). Wells has made no such showing. On the contrary, we have reviewed her claim in its entirety, affording no deference to the findings of the Commission (*Tate*, 274 Ill. App. 3d at 774), and we have reached the same conclusion. Accordingly, while we do not condone the Commission's inordinate delay in addressing Wells's claim, her due process argument lacks merit.

¶ 83 CONCLUSION

¶ 84 Despite the voluminous record in this case, we find no evidence that Advocate was motivated to terminate Wells because of racial bias, nor do we find any evidence that employees of other races were treated more favorably than she was. Rather, the record shows that Wells was terminated because of a series of well-documented infractions committed in the final year of her employment. We therefore affirm the decision of the Commission.

¶ 85 Affirmed.