IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID SHANNON, SR.,	*	
	*	4:06-cv-00173
Plaintiff,	*	
	*	
v.	*	
	*	
BARILLA AMERICA INC., LARRY COVINGTON, JASON MOREY, and STACEY CALE,	*	ORDER ON MOTION FOR SUMMARY JUDGMENT
Defendants.	*	
	*	

Before the Court is Defendants', Barilla America Inc. ("Barilla"), Larry Covington ("Covington"), Jason Morey ("Morey"), and Stacey Cale ("Cale") (collectively "Defendants") Motion for Summary Judgment, filed January 11, 2008. Clerk's No. 28. Plaintiff, David Shannon, Sr. ("Shannon") filed a resistance on February 4, 2008.[1] Clerk's No. 30. Defendants filed a reply on February 14, 2008. Clerk's No. 33. Defendants have requested oral argument on this matter, however, the Court finds that such argument would not materially aid the resolution of this case. Accordingly, the matter is fully submitted.

I. FACTS

Barilla produces, manufactures, and packages pasta products at its Ames, Iowa plant.

[1] The Court notes that Shannon did not file a paper copy of his resistance. Local Rule 56(f) provides: "[i]f a . . . resistance. . . together with the appendix and any other supporting filings, totals more than 100 pages in length and is filed electronically, within three court days after the document is filed, the filer must deliver to the Clerk of Court, for use by the presiding judge, a paper copy of the . . . resistance . . . together with the appendix and any other supporting filings, reproduced on one side of the page, bound or fastened at the left margin, and tabbed to facilitate ready reference." Plaintiff's counsel is reminded of the importance of complying with the Local Rules.

Defs.' Statement of Material Facts ¶ 2. Shannon was hired by Barilla in 1998, when it first opened the Ames plant. *Id.* ¶ 6. By December of 2004, Shannon (fifty-one years of age) was working in the receiving warehouse as a forklift operator. *Id.* ¶¶ 1, 7. As a forklift operator, Shannon's responsibilities included unloading goods between the processing and packaging departments, which primarily involved the use and operation of forklifts. *Id.* ¶ 7. At that time, Morey (thirty years of age) was Shannon's direct supervisor, and had been for approximately two and one-half years. *Id.* ¶¶ 4, 8. Morey, in turn, reported to Covington (forty-nine years of age), the Production Manager. *Id.* ¶ 3.

During Shannon's employment with Barilla, he made himself available to work extra hours and "cover" for other employees. Pl.'s Statement of Additional Material Facts ¶ 3. Indeed, Morey testified that Shannon was a "helpful" employee, in that Shannon "would come in [to work] when [Barilla] needed [him] to come in, and he was always there." Pl.'s App. at 4. According to Barilla, however, Shannon also had performance problems leading up to his December 22, 2004 termination. First, on or about April 18, 2004, Shannon caused a battery spill. Defs.' Statement of Material Facts ¶ 11. While Shannon was changing a forklift battery, the battery slipped off a pallet, fell over, and required clean up. *Id.* ¶ 12. Second, on or about September 13, 2004, Shannon received a "Barilla America Corrective Action Form" for failing to mark dates on pallets before putting them away. *Id.* ¶ 14. Although Shannon disputes that he was provided with any written document, he does acknowledge that he was verbally warned about the pallets. *Id.* ¶ 15. Third, in October of 2004, Shannon was involved in a forklift collision while elevating a maintenance employee who was in a "cage." *Id.* ¶ 16. It appears that while another employee was in a cage attached to the forklift, Shannon caused the forklift to

move. *See id.* According to Covington, the forklift should not be moving when the cage is elevated. *Id.* Shannon, on the other hand, explains that the cage was not elevated any more than necessary to move the forklift, but does admit he knew that he should not have moved the forklift with the maintenance employee in the cage. *See* Pl.'s Response to Defs.' Statement of Material Facts ¶ 16; Defs.' App. at 45. Fourth, on or about October 26, 2004, Shannon had another collision with a forklift. Defs.' Statement of Material Facts ¶ 18. In that instance, the forklift Shannon was driving collided with a large production machine known as a "Senzani." *Id.* The forklift struck the platform on which the Senzani operator was standing with such force that it caused the structure to move several inches. *Id.* Apparently, the collision was caused by Shannon attempting to move pallets with the forklift while his view of the Senzani platform was obstructed. *Id.*

Lastly, in the early morning hours of December 17, 2004, Shannon was involved in his third and final forklift accident. On that day, Shannon was scheduled to work his normal shift from 7:00 p.m. (December 16, 2004) to 7:00 a.m. (December 17, 2004). Pl.'s App. at 5. During the shift, however, Shannon had to perform another employee's job duties. Pl.'s Statement of Additional Material Facts ¶ 82. That is, Shannon's duties for that shift were not those of his "normal job." Pl.'s App. at 5. Shannon was, nonetheless, familiar with the alternate duties because he operated the machine at issue and the stand-up forklift approximately ten percent of the time within his "normal" duties. *Id.* Regardless, on December 17, 2004, Shannon was driving a forklift through the warehouse when, according to Shannon, he heard another forklift driver honk the horn. Defs.' Statement of Material Facts ¶ 23. Shannon testified that he turned his head for a second in response to the horn, and the next thing he knew, his forklift had

collided into a structural support column in the warehouse. *Id.* The collision caused significant damage to the forklift. Defs.' App. at 91. Specifically, the shafts of the tilt control cylinders were sheared, the bolts on the back rest were sheared, and the frame on the unit was bent. *Id.* at 174. As a result of the accident, the forklift was damaged in excess of $11,000.[2] *Id.*

Shannon was suspended from work pending an investigation of the December 17, 2004 accident. Defs.' Statement of Material Facts ¶ 24. Barilla conducted an investigation and obtained a statement from a warehouse forklift driver who witnessed the collision. *Id.* The witness stated that the accident occurred around 5:00 a.m., while Shannon had previously told a supervisor that the accident occurred around 6:50 a.m. *See* Defs.' App. at 175. Prior to meeting with Shannon on December 22, 2004 to discuss the results of the investigation, Morey and Covington considered potential disciplinary actions for Shannon, including suspension and termination. Defs.' Statement of Material Facts ¶ 28. Morey, Shannon's direct supervisor, recommended Shannon's termination to Covington. *Id.* Morey felt that further counseling or warnings would not be effective on Shannon. *Id.* Covington agreed that Shannon's past behavior showed an unwillingness to change his work performance or take personal responsibility for his actions. Defs.' App. at 114-17. Thus, Covington, who has the final authority on termination decisions, testified that he prepared a termination letter for Shannon to present at the December 22, 2004 meeting. Defs.' Statement of Material Facts ¶ 27. Covington, however, had the ability to alter his termination decision based on the results of the meeting. *See id.*

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[2] It appears that the replacement cost for the damaged forklift is approximately $18,000. Defs.' App. at 174.

Shannon, Covington, Morey, and Stacey Cale (thirty years of age), Human Resources Manager, were all present for the December 22, 2004 meeting. *Id.* ¶¶ 5, 26. At some point during the meeting, Cale asked Shannon what he was going to do to prevent future accidents. *See* Defs.' App. at 42, 175. Shannon replied: "Let me do my own job instead of doing someone else's and also get the forklift fixed," and "Them [warehouse] poles could have something put around them." *Id.* at 42. Cale stated that she wanted to hear what behaviors Shannon was going to change to prevent future accidents. *Id.* at 175. Shannon stated that he would be more safe when using the forklift. *Id.* Cale testified that Shannon's responses were not satisfactory because he did not specifically demonstrate what he was going to change or what initiatives he was going to take to prevent future accidents. *Id.* at 165. Morey also testified that, during the meeting, Shannon acted like he had done nothing wrong. *Id.* at 139. More importantly, Covington felt that, based on Shannon's responses and past performance issues, continued coaching or an improvement plan was not the answer. *Id.* at 116. According to Barilla, the cumulation of these performance problems, along with Shannon's lack of personal responsibility, led to the decision to terminate Shannon, effective December 22, 2004. Shannon, however, alleges that he was unlawfully terminated because of his age. Shannon was 51 years of age when he was terminated by Barilla. Defs.' Statement of Material Facts ¶ 1.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment has a special place in civil litigation. The device "has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991). In operation, the role of summary judgment is to pierce the boilerplate

of the pleadings and assay the parties' proof in order to determine whether trial is actually required. *See id*.; *see also Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). "[S]ummary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 209 (8th Cir. 1976) (citing *Windsor v. Bethesda Gen. Hosp.*, 523 F.2d 891, 893 n.5 (8th Cir. 1975)). The purpose of the rule is not "'to cut litigants off from their right of trial by jury if they really have issues to try,'" *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627 (1944)), but to avoid "useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried." *Anderson v. Viking Pump Div., Houdaille Indus., Inc.*, 545 F.2d 1127, 1129 (8th Cir. 1976) (citing *Lyons v. Bd. of Educ.*, 523 F.2d 340, 347 (8th Cir. 1975)).

The plain language of Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The precise standard for granting summary judgment is well-established and oft-repeated: summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Harlston v. McDonnell*

Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994). The court does not weigh the evidence nor make credibility determinations, rather the court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987) ("Summary judgment is not designed to weed out dubious claims, but to eliminate those claims with no basis in material fact.").

Employment actions are inherently fact based, and the Eighth Circuit has repeatedly cautioned that in employment discrimination cases, summary judgment should "seldom be granted . . . unless all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the nonmoving party." *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998) (citations omitted); *see also Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) ("summary judgment should seldom be used in employment-discrimination cases"); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). This is because "inferences are often the basis of the claim, and 'summary judgment should not be granted unless the evidence could not support any reasonable inference' of discrimination." *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (quoting *Lynn v. Deaconess Med. Ctr. - W. Campus*, 160 F.3d 484, 486-87 (8th Cir. 1998)). This does not mean, however, that summary judgment is never proper in employment cases.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *See Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 248. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and,

by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *See id.* at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

III. LAW AND ANALYSIS

The Age Discrimination in Employment Act ("ADEA"), as well as the Iowa Civil Rights Act ("ICRA") prohibits an employer from discharging any individual on the basis of age. 29 U.S.C. § 623(a)(1) (prohibiting employers from discharging "any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or other privileges of employment, because of such individual's age"); Iowa Code § 216.6(1)(a) (stating that it will be unfair or discriminatory practice to discharge any employee because of age). A plaintiff alleging age discrimination may prove intentional discrimination by direct evidence or circumstantial evidence. The Eighth Circuit has recognized that because "discrimination is difficult to prove by direct evidence, employment discrimination cases require a 'simplified proof from a claimant in order to create an inference of discrimination and thereby establish a prima facie case.'" *Johnson v. Minn. Historical Soc.*, 931 F.2d 1239, 1244 (8th Cir. 1991) (quoting *Hillebrand*, 827 F.2d at 364-65). Because Shannon does not seek to establish age

discrimination based on direct evidence, the Court turns to the familiar *McDonnell Douglas* burden-shifting analysis.[3]

Under *McDonnell Douglas*, Shannon must establish a prima facie case of age discrimination. That is, Shannon must prove that: (1) he was at least forty years old; (2) he suffered an adverse employment action; (3) he was meeting Barilla's legitimate performance expectations; and (4) he was replaced by someone substantially younger. *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1039 (8th Cir. 2007). Once a prima facie case of discrimination is established, the burden of production shifts to Barilla to articulate a legitimate, non-discriminatory reason for the employment decision. *Hindman*, 145 F.3d at 991. If Barilla provides a legitimate, non-discriminatory reason, the presumption of discrimination disappears, and Shannon must present evidence that considered in its entirety: (1) creates a question of material fact as to whether Barilla's proffered reasons are pretextual; and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. *Id.*

A. *Shannon's Prima Facie Case*

As noted above, to establish a prima facie case, Shannon must prove that: (1) he was at least forty years old;[4] (2) he suffered an adverse employment action; (3) he was meeting Barilla's

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[3] Although Shannon alleges violation of the ADEA and the ICRA, the analysis under the ADEA does not significantly differ from the ICRA. *See, e.g., Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 n.2 (8th Cir. 2000) (explaining that the court's analysis of the ADEA claim applies equally to the ICRA claim). Accordingly, the Court will analyze the ADEA and the ICRA claims together.

[4] The ADEA protects individuals that are at least forty years of age. 29 U.S.C. § 631(a). The ICRA, however, is "age-neutral," in that it prohibits discrimination "because of age," with certain exceptions not relevant to this case. *See Underwood v. Monroe Mfg., L.L.C.*, 434 F. Supp. 2d 680, 687 n.9 (2006). Thus, the first element in an ADEA prima facie case is not required under the ICRA, but this difference is not important here, because Shannon is over the

legitimate performance expectations; and (4) he was replaced by someone substantially younger.[5] *Morgan*, 486 F.3d at 1039. For purposes of summary judgment, Barilla does not contest the first three elements of the prima facie case. Defs.' Br. at 5. The only element at issue, then, is the fourth element, e.g., whether Shannon was replaced by someone substantially younger. The United States Supreme Court explained that the fourth element does not require that someone under the age of forty replace the plaintiff, but rather, that the replacement be substantially younger than the plaintiff. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (explaining that "there can be no greater inference of *age* discrimination . . . when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old").

Shannon states that after his termination, he was replaced by twenty-seven year old Ryan Smith ("Smith"). Barilla contends that Smith and fifty year old[6] Mike Caruth ("Caruth") temporarily took over Shannon's position, while fifty-eight year old Dwight Clark ("Clark") permanently replaced Shannon. Defs.' Br. at 6, Defs.' Reply Br. at 4-5. Thus, while Barilla acknowledges that Smith replaced Shannon immediately after Shannon's termination, Barilla argues that Smith should not be considered a replacement because the replacement was only

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age of 40, and Barilla concedes the first element of the prima facie case. Defs.' Br. at 5 n.1.

[5] The "Supreme Court and [the Eighth Circuit] have recognized that the prima facie case in discrimination suits varies somewhat with the specific facts of each case," and specifically noted differences in the fourth element of the prima facie case in age discrimination cases. *Hindman*, 145 F.3d at 990-91 (citing *McDonnell Douglas*, 411 U.S. at 802 n.13). Here, both parties agree to the elements of the prima facie case.

[6] While preparing their Reply, Defendants discovered that they mistakenly stated that Caruth was forty years of age during the relevant time period, when in fact, Caruth was fifty years of age. Defs.' Reply Br. at 5.

temporary. In his deposition, Covington explained that Smith filled Shannon's position on a short-term basis because he was qualified to drive the forklift, and "[b]ased on how many other individuals might want to go into [Shannon's former] position, [Smith] may have ended up in [the position] long term, or may [not have] ended up in it long term." Defs.' App. at 98. It appears, however, that Smith and Caruth were the only employees who showed interest in Shannon's former position. Defs.' Supp. App. at 56. Smith, therefore, initially filled the position for approximately three weeks before he quit his job with Barilla in mid-January,[7] and "Caruth was selected for the position and served in that role for approximately eight months before switching shifts . . . [at which time] Clark moved into the position." *Id.*

The inquiry, then, is whether Smith temporarily filled Shannon's former position while Caruth was getting "qualified" for the position, or whether Caruth replaced Smith after Smith quit his job with Barilla approximately three weeks into the new position. In his affidavit, Smith states that "[a]t no time did Barilla management tell me that I was a temporary replacement for Mr. Shannon." Pl.'s App. at 44 (Smith Aff. ¶ 6). Barilla offers no evidence to contradict Smith's assertion. Therefore, based on the record before the Court, the Court cannot conclude that Smith was a temporary replacement for Shannon. *Cf. Orluske v. Mercy Medical Center - N. Iowa*, 455 F. Supp. 2d 900, 917 (N.D. Iowa 2006) (explaining that "where a younger employee is the '*obvious* temporary replacement,' the focus of the analysis must be on the age difference between the plaintiff and his *permanent* replacement, not between the plaintiff and his *temporary* replacement") (first alteration added) (citation omitted). Shannon, therefore, has satisfied his

[7] Smith states that he quit his job because he "no longer desired to work at Barilla and was having trouble traveling to work." Pl.'s App. at 44 (Smith Aff. ¶ 8).

burden of proof that he was replaced by someone substantially younger. *See Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 322 (7th Cir. 2003) (explaining "substantially younger" as generally ten years younger); *Keathley v. Ameritech Corp.*, 187 F.3d 915, 923-24 (8th Cir. 1999) (stating replacement of salespersons over 45 by those under 35 created reasonable inference of age discrimination). Accordingly, Shannon has established his prima facie case of age discrimination.

B. *Barilla's Legitimate, Non-Discriminatory Reason for Shannon's Termination*

Because Shannon established a prima facie case of age discrimination, the burden of production shifts to Barilla to articulate a legitimate, non-discriminatory reason for Shannon's termination. *Hindman*, 145 F.3d at 991. Barilla states that Shannon was terminated because: (1) Shannon was involved in a forklift collision causing in excess of $11,000 in property damage; (2) Shannon had two other forklift collisions within the prior two months, and other incidents involving property damage and substandard work performance; and (3) Shannon's prior disciplinary history in conjunction with his attitude and responses demonstrated to Barilla that Shannon was not willing to accept responsibility for his actions, change his behavior, or that additional discipline or counseling would change Shannon's behavior. *See, e.g.*, *Hannoon v. Fawn Eng'g Corp.*, 324 F.3d 1041, 1047 (8th Cir. 2003) (explaining poor job performance is a legitimate, non-discriminatory reason); *Gulley v. Firestone Bldg. Prods.*, No. 00-1140, 2000 WL 1459988, at *1 (8th Cir. Oct. 3, 2000) (stating poor performance and refusal to adjust behavior after counseling were legitimate, non-discriminatory reasons). Barilla, therefore, has proffered legitimate, non-discriminatory reasons for Shannon's termination.

C. *Shannon's Burden to Establish Pretext for Intentional Discrimination*

As noted above, Barilla articulated legitimate, non-discriminatory reasons for Shannon's termination. Therefore, the "presumption of unlawful discrimination disappears, and the burden shifts to [Shannon] to demonstrate [Barilla's] articulated reasons for termination were a pretext for intentional age discrimination." *Thomas v. Corwin*, 483 F.3d 516, 529 (8th Cir. 2007). Thus, to avoid summary judgment, Shannon must provide evidence which creates: (1) a fact issue as to whether Barilla's proffered reasons are pretextual; *and* (2) a reasonable inference that age was a determinative factor in his termination. *See Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1035 (8th Cir. 2005). In some cases, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Carraher v. Target Corp*., 503 F.3d 714, 717 (8th Cir. 2007) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)).

In an attempt to establish that Barilla's proffered reasons for his termination are pretextual, Shannon argues that he was not coached or counseled by Barilla concerning safety. Shannon contends that "[a] reasonable jury could conclude that the Defendants' claim that [he] had a 'history of unsafe acts' and failed to respond to coaching is unworthy of credence because the Defendants never once disciplined [him] for any unsafe acts until his termination on December 22, 2004." Pl.'s Br. at 17. Shannon, however, admits that he had two other forklift collisions within the prior two months before his termination. Thus, it appears that Shannon does not contest Barilla's claim that Shannon had a "history of unsafe acts," but contests Barilla's claim that Shannon failed to respond to coaching because he was never disciplined for the previous two forklift accidents. Indeed, Morey testified that he never disciplined Shannon for the forklift accidents. Pl.'s App. at 18. Morey, however, testified that he had coaching and

counseling sessions with Shannon "[m]aybe once or twice a week," and specifically coached and counseled Shannon about forklift accidents "three or four [times], that [he knew] for sure." *Id.*

It is unclear from the record if the coaching and counseling sessions were considered a "verbal warning" under Barilla's progressive discipline policy, or whether it was an informal effort prior to resorting to the progressive discipline policy. Regardless, even if the coaching and counseling sessions were only informal efforts, and Shannon, indeed, did not get the benefit of the progressive discipline policy for his December 17, 2004 forklift accident, Shannon still cannot establish pretext for intentional age discrimination. The progressive discipline policy expressly provides:

> Barilla reserves the right to alter the above schedule of discipline[8] whenever it is necessary to do so and to treat each work rule violation or other inappropriate behavior on an individual basis. In other words, circumstances may warrant skipping steps or even immediately terminating an employee. A discussion of the latter types of situations follows:
>
> B. Circumstances Calling for Immediate Dismissal
>
> The following offenses against the well-being of the Company are considered sufficiently severe that they may result in immediate discharge. The list is not all-inclusive.
>
> * Willful destruction of Barilla property, or property belonging to another.
>
> * Insubordination or refusal to do assigned work that the employee is capable of performing.
>
> . . . .

Id. at 32. Although "forklift accidents causing damage in excess of $11,000" is not a situation listed under circumstances calling for immediate dismissal, the policy does state that "[t]he list is

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[8] Barilla's progressive discipline policy provides for a verbal warning, a written warning, suspension, and dismissal. Pl.'s App. at 31-32.

not all-inclusive." *Id.* Thus, given Shannon's forklift accidents in the prior two months, the seriousness of the December 17, 2004 forklift accident, and Shannon's responses during the December 22, 2004 meeting which showed Shannon's unwillingness to change and accept personal responsibility, Covington determined that immediate termination in this instance was proper. Although Shannon may believe that his harsh discipline was unwarranted, the Court does not sit as a "'super personnel department[ ] reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.'" *Edmund v. MidAmerican Energy Co.*, 299 F.3d 679, 686 (8th Cir. 2002) (quoting *Cronquist v. City of Minneapolis*, 237 F.3d 920, 928 (8th Cir. 2001)). Shannon, therefore, has not established a fact issue as to whether Barilla's proffered reasons are pretextual based on his allegation that he did not receive discipline for his prior forklift accidents. In this case, there is no issue of material fact that Shannon caused the forklift accident on December 17, 2004, which resulted in damage in excess of $11,000, that Shannon had two other forklift accidents within two months prior to his termination, and that Covington believed that Shannon would not benefit from continued coaching or counseling. *See Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1120 (8th Cir. 2006) (stating that "directly rebutting the proffered reason as false, usually involves more than a rebuttal of an employer's ultimate claims regarding its subjective motivations," but generally requires a "broader rebuttal of the employer's underlying factual claims").

Next, Shannon argues that Barilla's proffered reasons for his termination are pretextual because Barilla treated younger, similarly situated employees more favorably than him. First,

Shannon points to Brian Morey as a younger,[9] similarly situated employee who was treated more favorably. Specifically, Brian Morey was also involved in several forklift accidents. Pl.'s Br. at 24-28. Covington, however, testified that Brian Morey's forklift accidents consisted of Brian Morey's forklift coming in contact with either a rack or a file cabinet on two or three occasions. Defs.' App. at 82. Shannon, moreover, admits that Covington viewed the damage caused by these collisions as insignificant, "[c]ostwise, really nothing." Defs.' Statement of Material Facts ¶ 49; Defs.' App. at 83. Shannon further acknowledges that Brian Morey was disciplined after his forklift accidents, that Brian Morey got "some time off" (suspended) and returned to work in packaging before driving forklifts. Defs.' App. at 51. Based on these facts, Shannon contends that Brian Morey was a similarly situated employee who was treated more favorably than Shannon because Brian Morey was not terminated.

Brian Morey, however, was not similarly situated to Shannon. Shannon did not show that Brian Morey was "similarly situated in all relevant respects." *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005). Here, Covington felt that "[Brian Morey] was very troubled that these things were happening; [Brian Morey] had a very strong willingness to do something different, and [Covington] felt that [Brian Morey] would respond appropriately to [a safety plan]." Defs.' Statement of Undisputed Facts ¶ 51. Meanwhile, Covington felt that Shannon "did not change his habits on the fork truck and was not open or willing to embrace taking personal accountability for his actions and [ ] unwilling to do something different." Defs.' App. at 114. *See Edmund*, 299 F.3d at 685-86 (explaining that employers are "free to make employment decisions based upon mistaken evaluations . . . or even unsound business

[9] Covington estimates Brian Morey to be in his mid-thirties. Defs.' App. at 83.

practices"). Moreover, "[t]o be probative evidence of pretext, the misconduct of [the] more leniently disciplined employee[ ] must be of comparable seriousness." *Rodgers*, 417 F.3d at 853 (citation omitted). In this instance, the forklift accidents caused by Brian Morey are not of comparable seriousness to the accident caused by Shannon. Brian Morey coming into contact with a rack or a file cabinet on several instances, which caused insignificant damage, is not comparable to Shannon's accident, which caused in excess of $11,000 in damage. Accordingly, Shannon has not presented evidence showing that he was similarly situated to Brian Morey because they were not similarly situated in "all relevant respects," nor was the misconduct comparably serious. *See Cronquist*, 237 F.3d at 928 ("The test for whether employees are similarly situated to warrant a comparison to the plaintiff is 'rigorous.'" (citing *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994))).

Shannon also points to Dan Engleman ("Engleman")[10] as another younger,[11] similarly situated employee who was treated more favorably. Pl.'s Br. at 28-30. Shannon alleges that Engleman was involved in three or four forklift accidents and was transferred to another position without forklift duties, while Shannon was terminated. There is, however, no documentation of any forklift accidents caused by Engleman. Shannon's "unsubstantiated and conclusory allegations are insufficient to support an inference of pretext." *Rose-Matson v. NME Hosps., Inc.*, 133 F.3d 1104, 1109 (8th Cir. 1998). Even assuming, however, that Engleman caused forklift accidents, there is, again, nothing in the record for the Court to determine if the forklift

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[10] In the parties' submissions, there are two different spellings for this individual's last name, Defendants refer to "Dan Engelman" while Plaintiff refers to "Dan Engleman." The Court will use Plaintiff's spelling.

[11] Covington estimates Dan Engleman to be in his late-thirties. Defs.' App. at 110.

accidents were of comparable seriousness. Regardless of the comparable seriousness of the forklift accidents, if any, Engleman is not similarly situated to Shannon "in all relevant respects." *Rodgers*, 417 F.3d at 853. Specifically, Shannon acknowledges that Covington viewed Engleman as having cognitive and memory problems due to a head injury Engleman sustained years ago in a motor vehicle accident. Defs.' Statement of Material Facts ¶ 55. Covington testified that if Engleman is assigned to duties which are "very repetitive and he does it all the time . . . he gets it," while if the duties do not require "same repetition all the time, it's more difficult for him." Defs.' App. at 111. Moreover, Covington felt continued coaching was appropriate for Engleman, while it was not for Shannon. *See generally id.* at 111-12. Covington stated that Engleman "responds well to [coaching]" and if a plan is laid out "with [Engleman] that is very clear for him, he can follow [it] and abide by that." *Id.* Meanwhile, Covington felt that Shannon did not, and would not, respond well to continued coaching based on prior experiences, i.e., "no change in behavior." *Id.* at 112. *See Edmund*, 299 F.3d at 685-86 (explaining that employers are "free to make employment decisions based upon mistaken evaluations or even unsound business practices"). Accordingly, Shannon has not presented evidence showing that he was similarly situated to Engleman because they were not similarly situated in "all relevant respects."

Because Shannon was unable to create a fact issue as to whether Barilla's proffered reasons were pretextual, the Court need not address whether there is a reasonable inference that age was a determinative factor in Shannon's termination. *See Haas*, 409 F.3d at 1035 (stating that to avoid summary judgment, the plaintiff must provide evidence which creates: (1) a fact issue as to whether the employer's proffered reasons are pretextual; *and* (2) a reasonable

inference that age was a determinative factor in his termination). The Court, however, notes that based on the record, there is no reasonable inference that age was a determinative factor in Shannon's termination. Specifically, in addition to Covington stating that age was not a factor in Shannon's termination, Defs.' App. at 117, Shannon testified that during his employment with Barilla, he did not hear that Covington had a bias against older workers, or that Covington felt that older employees could not perform their duties. *Id.* at 47. The sole basis for Shannon's belief that he was discriminated against because of this age is, "[d]ue to the fact that other people younger than [Shannon] had accidents and [were] still working there . . . they're still there, [while he's] gone. " *Id.* at 49. As noted above, however, those younger employees were not similarly situated to Shannon. Accordingly, Shannon has not met his burden to establish that Barilla's legitimate, non-discriminatory reasons for his termination were pretext for intentional age discrimination.

IV. CONCLUSION

For the reasons discussed above, Defendants' Motion to for Summary Judgment (Clerk's No. 28) is GRANTED.

IT IS SO ORDERED.

Dated this ___10th___ day of March, 2008.

ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT