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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ELVA MANDOKI,)	3:11-cv-00398-HDM-WGC
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
CARSON-TAHOE REGIONAL MEDICAL)	
CENTER,)	
)	
Defendant.)	
_____)	

Before the court is defendant's motion for summary judgment (#27). On June 6, 2011, plaintiff filed a complaint in this court alleging a single cause of racial discrimination (#1). Defendant filed a motion for summary judgment (#27), plaintiff opposed (#32) and defendant replied (#36). For the reasons set forth below, defendant's motion is granted.

I. Factual Background

Plaintiff is Elva Mandoki, a United States citizen who was born in Mexico and is of Hispanic descent. (Pl.'s Opp'n Def.'s Mot. Summ. J. Ex. A ("Mandoki Dep."), 10:25-11:7). Defendant is Carson-Tahoe Regional Health Care, improperly named Carson-Tahoe Regional Medical Center, ("CTRH"). (Def.'s Mot. Summ. J. Ex. B

1 ("Wilkins Decl."), ¶ 2). Mandoki was employed by CTRH as a nurse
2 beginning in 2002 until her termination in 2009. (Mandoki Dep.
3 22:16-23).

4 Mandoki began working in the nursing field in 1996, when she
5 took a position as a Certified Nursing Assistant in a nursing and
6 rehabilitation center. (Mandoki Dep. 17:7-9; Pl.'s Opp'n Def.'s
7 Mot. Summ. J. Ex. B). In 1998, Mandoki became a Licensed Practical
8 Nurse. (Pl.'s Opp'n Def.'s Mot. Summ. J. Ex. B). Thereafter
9 Mandoki attended classes in order to receive her Registered Nurse
10 ("RN") license. (Mandoki Dep. 18:7-16). On July 1, 2002, the
11 defendant hired Mandoki as a graduate nurse and assigned her to the
12 night shift in the Surgical/Orthopedics Unit. (Pl.'s Opp'n Def.'s
13 Mot. Summ. J. Ex. D; Shirey Decl. ¶ 2). On September 5, 2002,
14 after completing her requirements for an RN and receiving her RN
15 license, Mandoki was promoted to staff nurse. (Wilkins Decl. ¶ 2;
16 Mandoki Dep. 18:7-9; Pl.'s Opp'n Def.'s Mot. Summ. J. Ex. E). In
17 or about June 2005, defendant promoted Mandoki to team leader.
18 (Pl.'s Opp'n Def.'s Mot. Summ. J. Ex. G). Later, Mandoki applied
19 for the position of charge nurse. (Def.'s Mot. Summ. J. Ex. D).
20 In November 2005, Mandoki's supervisor, Leighanne Shirey, promoted
21 Mandoki to charge nurse—the position Mandoki occupied until her
22 termination. (Mandoki Dep. 30:25-31:23, Shirey Decl. ¶ 3; Def.'s
23 Mot. Summ. J. Ex. E; Pl.'s Opp'n Def.'s Mot. Summ J. Ex. H).

24 As the charge nurse for the night shift in the
25 Surgical/Orthopedics Unit, Mandoki was responsible for facilitating
26 all patient care for the overnight shift, and also remained
27 responsible for her own assigned patients. (Def.'s Mot. Summ. J.
28 Ex. F; Shirey Decl. ¶ 4). Mandoki also acted as a resource and

1 facilitator for other staff nurses. (Def.'s Mot. Summ. J. Ex. F;
2 Shirey Decl. ¶ 4). Further, Mandoki was responsible for following
3 established hospital policies. (Def.'s Mot. Summ. J. Ex. F). At
4 the time of hire, she was required to have passed the hospital's
5 medication test and be trained in hospital policies, including use
6 of the Pyxis machine. (Def.'s Mot. Summ J. Exs. F, K ¶ 20, N;
7 Mandoki Dep. 63:18-64:2; 68:7-13; Dinauer Decl. ¶ 6).

8 Pyxis machines are located throughout the hospital in the
9 hospital's different units. (Dinauer Decl. ¶ 2). The Pyxis
10 machine is a means by which medication is provided to hospital
11 patients. (Def.'s Mot. Summ. J. Ex. K). Each patient is assigned
12 a profile, and when a doctor orders medication for that patient,
13 the hospital's pharmacy enters the order into the computerization
14 system, which then creates authorization to access the medication
15 and deliver it to the patient. (Mandoki Dep. 64:7-18; Dinauer
16 Decl. ¶ 2; Def.'s Mot. Summ. J. Ex. K). CTRH's Pyxis policy
17 requires that all orders be reviewed by a pharmacist to ensure
18 compliance with state and federal laws. (Dinauer Decl. ¶ 3; Def.'s
19 Mot. Summ. J. Ex. K ¶¶ 3.4, 4.1). Under the policy, only
20 authorized hospital employees may administer medicine to patients.
21 The lone exception is the employees of the Emergency Department
22 ("ED"). (Def.'s Mot Summ. J. Ex. K ¶ 10.2-.3). The ED may
23 dispense medicine for at home use after pharmacy hours because
24 unlike other departments, the ED has a physician present at all
25 times.¹ (Dinauer Decl. ¶ 5; Def.'s Mot. Summ. J. Ex. M). Even

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27 ¹ NAC 639.450 provides: "[d]ispense' means the furnishing of a controlled
28 substance or dangerous drug in any amount greater than that necessary for the
present and immediate needs of the ultimate user. The term does not include the
furnishing of a controlled substance or dangerous drug by a pharmacy in a medical

1 CTRH's pharmacy cannot furnish medicine to patients upon release
2 from the facility because the hospital is not licensed to do so.
3 (Def.'s Mot. Summ. J. Ex L).

4 Users of the Pyxis machine are assigned a password and also
5 use a fingerprint to access the medication for that particular
6 patient once the medication is placed into the patient's profile.
7 (Mandoki Dep. 64:19-23). Privileges to the Pyxis machine differ by
8 user. (Mandoki Dep. 64:24-65:1). For example, new nurses are
9 unable to obtain narcotics. (Mandoki Dep. 65:2-6; Def.'s Mot Summ.
10 J. Ex. K ¶ 4.2). Other employees possess override capabilities to
11 obtain medication not within the system that can't be provided due
12 to the closure of the pharmacy. (Mandoki Dep. 66:7-18; Def.'s Mot.
13 Summ. J. Ex. K ¶ 4.2). In such cases, the employee seeking the
14 medication will manually override the Pyxis system, then a report
15 will automatically be sent to the pharmacy, and the report will be
16 reviewed by the pharmacist in the morning. (Def.'s Mot. Summ. J.
17 Ex. K 4.4-5).

18 On the night of October 28, 2009, Mandoki was working as the
19 charge nurse during the night shift at CTRH in the
20 Surgical/Orthopedic Unit. (Pl.'s Opp'n Def.'s Mot. Summ. J. Ex. L).
21 Mandoki, in her capacity as charge nurse for the Unit, assigned a
22 particular patient to Nurse Cassady Jeremias, a newly licensed RN.
23 (Mandoki Dep. 76:25:77:1; Def.'s Mot. Summ. J. Ex. O ("Jeremias
24 Decl.") ¶ 1). This patient was recovering from an appendectomy,
25 but was not considered an inpatient. (Mandoki Dep. 76:19-25,
26 82:24-83:1). Mandoki instructed Nurse Jeremias to discharge the

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facility to an inpatient of the medical facility in which the pharmacy is located."

1 patient once he met the parameters for discharge, including being
2 pain-free. (Mandoki Dep. 78:3-8).

3 Around 9:30 p.m., Nurse Jeremias informed Mandoki that
4 everything was going OK with the patient, but he was still having a
5 lot of pain. (Mandoki Dep. 78:9-12; Jeremias Decl. ¶ 2). Since
6 there were no orders for pain medications to give the patient,
7 Mandoki told Nurse Jeremias to telephone Dr. De Mar, the patient's
8 physician. (Mandoki Dep. 78:13-14; Jeremias Decl. ¶ 2).

9 Mandoki overheard Nurse Jeremias' call to Dr. De Mar.
10 (Mandoki Dep. 78:25-79:11). According to Mandoki, she heard Nurse
11 Jeremias repeat back the Doctor's orders. (Mandoki Dep. 79:12-18).
12 The Doctor's order included an IV of Morphine and six (6) Percocet
13 to take home until a prescription could be filled in the morning.
14 (Mandoki Dep. 79:19-20; Jeremias Decl. ¶ 2). Dr. De Mar also
15 allegedly instructed Nurse Jeremias not to keep the patient
16 overnight. (Mandoki Dep. 79:6-11, 79:22-80:2). Mandoki then
17 directed Nurse Jeremias to fax the Percocet order to the pharmacy
18 while Mandoki administered the morphine. (Mandoki Dep. 80:3-6;
19 Jeremias Decl. ¶ 2). Later, Mandoki saw Nurse Jeremias next to the
20 fax machine. She assumed Jeremias had sent the order to the
21 pharmacy, and gave Nurse Jeremias the morphine to administer
22 herself. (Mandoki Dep. 81:11-16).

23 Around 11:30 p.m. that night, Nurse Jeremias informed Mandoki
24 that the Percocet Dr. De Mar had ordered was not loaded to the
25 patient's profile in the Pyxis machine. (Mandoki Dep. 83:8-12;
26 Jeremias Decl. ¶ 3). Mandoki proceeded to use the Vocera, an
27 intra-hospital communication device, to call down to the
28 administrative coordinator or house supervisor for assistance.

1 (Mandoki Dep. 83:22-84:2). On the receiving end of the Vocera was
2 Renee Crookham, Night Shift House Administrator. (Mandoki Dep.
3 84:11-12; Jeremias Decl. ¶ 3). Mandoki told Crookham that there
4 was an order for Percocet for an out-patient, that the Percocet was
5 not loaded into the Pyxis and asked if Crookham could get the
6 Percocet for them. (Mandoki Dep. 84:11-14). Crookham indicated
7 that she "did not know, but [to] call down here and talk to the
8 pharmacy." (Mandoki Dep. 84:15-17). Crookham then handed the
9 Vocera to pharmacist Susan Williams, who Mandoki claims did not
10 identify herself. (Mandoki Dep. 84:18-20, 87:5-9; Def.'s Mot.
11 Summ. J. Ex. P ("Williams Decl.") ¶ 3). Mandoki explained who she
12 was, that she was working in the Surgical/Orthopedics Unit, that
13 they had faxed a doctor's order for six Percocet that were not in
14 the patient's profile, and she wanted the pharmacy to send the
15 Percocet up because the patient needed to go home with the pills.
16 (Mandoki Dep. 84:21-24, 87:15-21). The pharmacist responded she
17 could not give Mandoki the Percocet because it would "be against
18 [her] license." (Mandoki Dep. 84:25-85:1, 87:22-24; Williams Decl.
19 ¶ 3). At this point in the conversation, Mandoki may or may not
20 have told the pharmacist of her intent to override the Pyxis system
21 to obtain Percocet for the patient.² (Mandoki Dep. 88:7-13).

22 Mandoki asserts that because the woman in the pharmacy did not
23 represent who she was or what her position was, the late hour, the
24 pharmacist's disconnected attitude, the representation that filling
25 the prescription would be against the pharmacist's license, and

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27 ² In her deposition, Mandoki stated "I guess I might have said I'm going to
28 override the two, I'm going to take from the Pyxis, but it was more like talking
to myself, because I knew I couldn't take two pills by myself with a witness from
our Pyxis on the floor." (Mandoki Dep. 88:7-13).

1 that nobody from the pharmacy had previously called up to the unit
2 to say the order was incorrect, Mandoki believed that the person
3 she was speaking to was a pharmacy technician and not the
4 pharmacist. (Mandoki Dep. 85:6-8, 87:13-88:1). Furthermore,
5 Mandoki believed her actions were authorized because she had
6 previously given patients painkillers when discharging them from
7 the ED, where she was a floating nurse. (Mandoki Dep. 73:16-74:13,
8 89:7-91:18). Thus, allegedly upon these mistaken beliefs, Mandoki
9 chose to override the Pyxis system to obtain the Percocet pills.
10 (Mandoki Dep. 93:12-94:3; Jeremias Decl. ¶ 3).

11 Nurse Jeremias could not override the Pyxis system by herself
12 to obtain the Percocet because she only had the authorization to
13 obtain Percocet from the machine if an order was entered. (Mandoki
14 Dep. 94:8-11). Since no order was entered, and Nurse Jeremias was
15 relatively new, Mandoki's override privileges were required.
16 (Mandoki Dep. 94:8-22). Mandoki, in the presence of Nurse Jeremias,
17 executed the override. (Mandoki Dep. 92:25-96:3, 94:4-7). Mandoki
18 withdrew the maximum amount of two pills she could obtain via an
19 override. (Mandoki Dep. 88:14-17). Nurse Jeremias then took the
20 pills to give to the patient. (Mandoki Dep. 94:23-25). Mandoki
21 did not instruct Nurse Jeremias to administer the pills to the
22 patient because it was understood that the pills were supposed to
23 go home with the patient. (Mandoki Dep. 95:1-5). Shortly after
24 Mandoki executed the override of the Pyxis, the patient was
25 discharged. (Mandoki Dep. 94:23-25).

26 At the end of Mandoki's shift, Mandoki attended a meeting
27 where she disclosed to Crookham that she had discharged the patient
28 before midnight with the two Percocet obtained using her override

1 powers. (Mandoki Dep. 97:22-98:25). Nothing further was
2 discussed. (Mandoki Dep. 99:25-100:2).

3 The day after speaking with Mandoki, pharmacist Williams
4 reviewed the override report and discovered Mandoki had withdrawn
5 Percocet to provide to the patient on discharge. (Williams Decl. ¶
6 4). Williams reported the incident. (Williams Decl. ¶ 4).

7 Upon appearing for her shift that night, Mandoki was told by
8 the day shift charge nurse that Mandoki had to go home. (Mandoki
9 Dep. 100:3-10). Mandoki refused to leave until she was told why,
10 so the day shift charge nurse told Mandoki to talk to the AC.
11 (Mandoki Dep. 100:11-13). Mandoki spoke with the day shift AC but
12 did not receive any information about why she was being sent home.
13 (Mandoki Dep. 100:18-101:9). When Mandoki arrived home, she found
14 a message from Shirey, her supervisor. (Mandoki Dep. 101:7-11). The
15 message indicated that an emergency happened during the previous
16 night and they would see Mandoki in Human Resources the next
17 morning. (Mandoki Dep. 101:10-16). Shirey called again and this
18 time spoke with Mandoki, but did not divulge the reason for the
19 meeting the next morning. (Mandoki Dep. 101:16-102:1).

20 The next day, Mandoki met with Shirey and Carie Wilkens from
21 Human Resources. (Mandoki Dep. 103:12-13). Mandoki asserts she
22 was told that since Mandoki had "prescribed and diverted"
23 narcotics, in violation of hospital policy, she was being
24 terminated and the incident would be reported to the Nursing
25 Board.³ (Mandoki Dep. 102:19-103:1). Mandoki asked Shirey and

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27 ³ The record belies this assertion. Mandoki was terminated for "dispensing"
28 two tablets of Percocet in violation of hospital policy and practicing outside the
scope of her nursing license. See (Mandoki Dep. 114:9-115:16; Wilkens Decl. ¶ 7;
Shirey Decl. ¶ 9; Def.'s Mot. Summ. J. Exs. R, S).

1 Wilkens to call Dr. De Mar, Crookham, Nurse Jeremias, and Williams
2 to substantiate Mandoki's version of the events. She alleges no
3 inquiries were made. (Mandoki Dep. 103:2-5). Moreover, Mandoki was
4 given an Employee Counseling Memo with an erroneous version of the
5 events. See (Def.'s Mot. Summ. J. Ex. S).

6 On November 2, 2009, defendant submitted a complaint to the
7 Nevada State Board of Nursing. (Def.'s Mot. Summ. J. Ex. T).

8 On November 4, 2009, Mandoki filed a wrongful termination
9 grievance with the Employee Association. (Pl.'s Opp'n Def.'s Mot.
10 Summ. J. Ex. N).

11 On November 5, 2009, the Board notified Mandoki of defendant's
12 assertion the Mandoki had practiced outside the scope of her RN
13 license in dispensing Percocet to a patient for home use. (Mandoki
14 Dep. 114:9-19).

15 On or about March 12, 2010, the Nursing Board determined that
16 Mandoki's actions on October 28, 2009 did not warrant formal
17 disciplinary action. (Mandoki Dep. 116:21-117:3). However,
18 Mandoki received a statement of caution that she follow the
19 policies and procedures in the different units in which she worked.
20 (Mandoki Dep. 117:4-10).

21 On or about, December 29, 2010, the arbitration award relating
22 to Mandoki's grievance was executed. (Pl.'s Opp'n Def.'s Mot. Summ.
23 J. Ex. P). The arbitrator determined that Mandoki was not
24 terminated for just cause. (Pl.'s Opp'n Def.'s Mot. Summ. J. Ex.
25 P). Mandoki was reinstated as an RN at the same rate of pay as a
26 charge nurse. (Pl.'s Opp'n Def.'s Mot. Summ. J. Exs. P, R).
27 Mandoki was assigned to the Oncology Department because her previous
28 position in Surgical/Orthopedics allegedly had been eliminated.

1 (Mandoki Dep. 147:23-148:9). Furthermore, a counseling memo was
2 placed in her file per the terms of the arbitration award. (Pl.'s
3 Opp'n Def.'s Mot. Summ. J. Ex. P; Ex. S; Mandoki Dep. 161:24-165:2).
4 Mandoki still disputes some of the facts contained in the memo.
5 (Mandoki Dep. 162:2-10).

6 After her reinstatement, Mandoki attended work for a single day
7 and then resigned because she could "not trust anyone." (Mandoki
8 Dep. 160:19-23, 163:14-17; Pl.'s Opp'n Def.'s Mot. Summ. J. Ex. T).

9 **II. Summary Judgment Standard**

10 Summary judgment "shall be rendered if the pleadings, the
11 discovery and disclosure materials on file, and any affidavits show
12 that there is no genuine issue as to any material fact and that the
13 movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
14 56(c). The burden of demonstrating the absence of a genuine issue of
15 material fact lies with the moving party, and for this purpose, the
16 material lodged by the moving party must be viewed in the light most
17 favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398
18 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141 F.3d
19 1373, 1378 (9th Cir. 1998). A material issue of fact is one that
20 affects the outcome of the litigation and requires a trial to
21 resolve the differing versions of the truth. *Lynn v. Sheet Metal*
22 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*
23 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

24 Once the moving party presents evidence that would call for
25 judgment as a matter of law at trial if left uncontroverted, the
26 respondent must show by specific facts the existence of a genuine
27 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
28 (1986). "[T]here is no issue for trial unless there is sufficient

1 evidence favoring the nonmoving party for a jury to return a verdict
2 for that party. If the evidence is merely colorable, or is not
3 significantly probative, summary judgment may be granted." *Id.* at
4 249-50 (citations omitted). "A mere scintilla of evidence will not
5 do, for a jury is permitted to draw only those inferences of which
6 the evidence is reasonably susceptible; it may not resort to
7 speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946,
8 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*
9 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event the
10 trial court concludes that the scintilla of evidence presented
11 supporting a position is insufficient to allow a reasonable juror to
12 conclude that the position more likely than not is true, the court
13 remains free . . . to grant summary judgment."). Moreover, "[i]f the
14 factual context makes the non-moving party's claim of a disputed
15 fact implausible, then that party must come forward with more
16 persuasive evidence than otherwise would be necessary to show there
17 is a genuine issue for trial." *Blue Ridge Insurance Co. v.*
18 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
19 *Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818
20 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are
21 unsupported by factual data cannot defeat a motion for summary
22 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

23 **III. Mandoki's Title VII Racial/National Origin Discrimination Claim**

24 Mandoki fails to establish that there is a genuine issue of
25 material fact in her discrimination claim. Federal law prohibits an
26 employer from discharging an employee on the basis of her race or
27 national origin. 42 U.S.C. § 2000e-2. The court follows the
28 *McDonnell Douglas* framework on summary judgment.

1 Under the *McDonnell Douglas* framework, a plaintiff must first
2 establish a prima facie case of racial/national origin
3 discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802
4 (1973). In order to establish a prima facie case of racial/national
5 origin discrimination, a plaintiff must show (1) that she belongs to
6 a protected class; (2) she was qualified for her job and performing
7 it satisfactorily; (3) she was subject to an adverse employment
8 action; and (4) similarly situated individuals outside her protected
9 class were treated more favorably. *Leong v. Potter*, 347 F.3d 1117,
10 1124 (9th Cir. 2003) (citing *McDonnell Douglas*, 411 U.S. at 802).
11 Once plaintiff establishes her prima facie case, the burden of
12 production shifts to the employer to provide a legitimate,
13 nondiscriminatory reason for the adverse employment decision. *Id.*
14 If the employer offers a nondiscriminatory reason, the burden
15 returns to the plaintiff to show that the articulated reason is a
16 pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804.
17 "The requisite degree of proof necessary to establish a prima facie
18 case for Title VII . . . on summary judgment is minimal and does not
19 even need to rise to the level of a preponderance of the evidence."
20 *Wallis v. J.R. Simplot Co.*, 26 F.3d 886, 889 (9th Cir. 1994).

21 Summary judgment is not appropriate if, based on the evidence
22 in the record, a jury could conclude by a preponderance of the
23 evidence that the defendant undertook the challenged employment
24 action because of the plaintiff's race. *Id.*

25 **A. Mandoki's Prima Facie Case**

26 It is undisputed that Mandoki is a member of a protected class
27 since she was born in Mexico and is of Hispanic descent. (Mandoki
28 Dep. 10:25-11:1). Second, it is undisputed that Mandoki was subject

1 to an adverse employment action because she was terminated from her
2 employment with defendant. See, e.g., (Mandoki Dep. 123:22-124:1);
3 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000).
4 Defendant, however, disputes that Mandoki was performing her job
5 satisfactorily, or was treated less favorably than individuals
6 outside of her protected class. (Def.'s Mot. Summ. J., at 13)

7 The second prima facie prong requires that a plaintiff must
8 establish that she was qualified for the position. Courts also have
9 stated that a plaintiff must offer proof that she performed her job
10 satisfactorily. See e.g. *Cornwell v. Electra Cent. Credit Union*,
11 439 F.3d 1018, 1028 (9th Cir. 2006). The defendant asserts Mandoki
12 was not performing satisfactorily because she dispensed drugs in
13 violation of protocol. (Def.'s Mot. Summ J., at 14).

14 The court in *Villiarimo v. Aloha Air*, addressed a similar
15 issue. 281 F.3d 1054 (9th Cir. 2002). In *Villiarimo*, the defendant
16 terminated one of the plaintiffs for an error in performing her job.
17 *Id.* at 1059. Plaintiff admitted to the error, however, she claimed
18 she was terminated because she was female. *Id.* The court was not
19 entirely certain plaintiff had made her prima facie case, even given
20 the low threshold of evidence required. *Id.* at 1062. The court
21 noted:

22 [a]s the district court correctly observed, it is not
23 clear that Villiarimo has produced sufficient evidence
24 regarding the second prong, i.e., that she was qualified
25 for the position. See *Villiarimo*, No. CV-99-00252-SPK,
26 slip op. at 7-8. Villiarimo admits that Aloha told her
27 that she was fired because she did not perform her job
28 satisfactorily. . . . Thus, it is not clear that
Villiarimo was performing her job 'well enough to rule out
the possibility that [s]he was fired for inadequate job
performance.'

Id. at 1062 n. 8 (quoting *Pejic v. Hughes Helicopters, Inc.*, 840

1 F.2d 667, 672 (9th Cir. 1988)). Nevertheless, the court went on to
2 consider the remaining steps under *McDonnell Douglas*. *Villiarimo*,
3 281 F.3d at 1062.

4 Here, Mandoki was told she was being terminated for dispensing
5 narcotics to a patient upon discharge and this amounted to a
6 violation of hospital policy and practicing outside of her nursing
7 license. (Mandoki Dep. 108:15-22, 114:12-115:1). Although Mandoki
8 has repeatedly indicated that she did not know the policy existed
9 prior to her termination, defendant has shown evidence that the
10 policy was in place at the time of the incident. (Mandoki Dep.
11 119:21-120:2; Def.'s Mot. Summ. J. Ex. K).

12 However, Mandoki has presented evidence that she met or
13 exceeded her job expectations during performance reviews, that she
14 received multiple promotions, and she had never been disciplined
15 prior to this incident. (Pl.'s Opp'n Def.'s Mot. Summ. J Exs. F, G,
16 H, I, J). Although it is not clear that Mandoki was performing her
17 job well enough to rule out the possibility that she was terminated
18 for inadequate job performance, the evidence is sufficient to show
19 that material issues of fact exist as to whether she was qualified
20 for her position at the time she was terminated.

21 Whether employees are similarly situated is usually a question
22 of fact. *Hawn v. Executive Jet Management, Inc.*, 615 F.3d 1151,
23 1157 (9th Cir. 2010) (citing *Beck v. United Food & Commercial*
24 *Workers Union Local 99*, 506 F.3d 874, 885 n. 5 (9th Cir. 2005)).
25 Individuals are similarly situated when they have similar jobs and
26 display similar conduct. *Vasquez v. County of Los Angeles*, 349 F.3d
27 634, 641 (9th Cir. 2003). "The employees roles need not be
28 identical; they must only be similar "in all material respects."

1 *Hawn*, 615 F.3d at 1157 (quoting *Moran v. Selig*, 447 F.3d 748, 755
2 (9th Cir. 2006)). Materiality depends on context and the facts of
3 the case. *Hawn*, 615 F.3d at 1157.

4 The plaintiff has presented evidence that Mandoki and Nurse
5 Jeremias were similarly situated. First, Mandoki and Nurse
6 Jeremias' jobs were similar. Both held RN licenses, both worked as
7 nurses in the Surgical/Orthopedics Unit, and both were responsible
8 for following hospital policies and procedures. (Mandoki Dep.
9 125:8-19). Second, Mandoki and Nurse Jeremias' conduct was similar.
10 Mandoki executed the override of the Pyxis system to obtain Percocet
11 pills while Nurse Jeremias witnessed the override. (Mandoki Dep.
12 94:2-7). The override was not possible without the participation of
13 both Mandoki and Nurse Jeremias. (Mandoki Dep. 94:8-22). After the
14 pills were withdrawn, the pills were provided to the patient to take
15 home by Nurse Jeremias. (Mandoki Dep. 94:23-25). The conduct of both
16 nurses violated defendant's internal policy of dispensing medication
17 to patients for at home use. (Def.'s Mot. Summ. J. Exs. K, L).
18 Nurse Jeremias' discipline consisted of a written warning, while
19 Mandoki was terminated and her actions were reported to the Nursing
20 Board. (Jeremias Decl. ¶¶ 4, 5; Wilkens Decl. ¶ 8; Shirey Decl. ¶
21 10).

22 A substantial dissimilarity is that Mandoki was Jeremias'
23 supervisor and she made the decision to distribute the Percocet, in
24 violation of internal policy, and instructed Jeremias to dispense
25 the pills. Accordingly, Mandoki has marginally presented evidence
26 to sustain a prima facie showing of racial discrimination.

27 **C. Legitimate Reasons for Termination**

28 To rebut the presumption that it unlawfully discriminated

1 against plaintiff, defendant has offered a legitimate,
2 nondiscriminatory reason for Mandoki's termination. Mandoki was
3 terminated for dispensing a narcotic, in violation of hospital
4 policy and had engaged in behavior outside the scope of Mandoki's
5 nursing license. (Def.'s Mot. Summ. J. Ex. S). The dispensing
6 policy does not apply to the ED because there is an on-staff
7 physician present at all times. (Def.'s Mot. Summ. J. Exs. K, L,
8 M). Moreover, defendant has provided a disciplinary chart which
9 describes appropriate punishments in various situations. (Def.'s
10 Mot. Summ. J. Ex. Q). Here, engaging in activity outside the scope
11 of a nursing license is a major infraction, punishable by
12 termination. (Def.'s Mot. Summ. J. Ex. Q).

13 Comparatively, CTRH asserts Nurse Jeremias was less culpable
14 because she had only been an RN for four months, she consulted with
15 Mandoki regarding the Percocet and Nurse Jeremias did not execute
16 the override herself. (Dinauer Decl. ¶ 10).

17 To place Mandoki's termination in context, CTRH asserts that it
18 has also terminated two other employees for the same offense
19 (practicing outside scope of license), both of whom were Caucasian.
20 (Wilkins Decl. ¶ 9). Furthermore, Mandoki was reported to the
21 Nursing Board by Dinauer. (Dinauer Decl. ¶ 11). According to
22 Dinauer, in the last five years, she has reported twelve other
23 employees to the Board and that were all Caucasian. (Dinauer Decl.
24 ¶ 13).

25 Accordingly, CTRH has provided a legitimate, nondiscriminatory
26 reason for Mandoki's termination.

27 **D. Pretext**

28 Mandoki has not established that the defendant's alleged

1 nondiscriminatory reasons were pretextual. To survive summary
2 judgment, Mandoki must produce enough evidence that a reasonable
3 factfinder would conclude: a) defendant's alleged reason for
4 discharging her was false, or b) that the true reason for her
5 termination was a discriminatory one. *Nidds v. Schindler Elevator*
6 *Corp.*, 113 F.3d 92, 918 (9th Cir. 1996) (citations omitted). To
7 prove that defendant's motives for termination were pretextual,
8 Mandoki points to a number of instances that she claims give rise to
9 an inference of racial discrimination.

10 First, Mandoki claims that Shirey would not allow Mandoki to
11 schedule herself as a charge nurse and Shirey reprimanded Mandoki
12 for taking herself off the schedule. (Mandoki Dep. 121:4-122:14,
13 122:23-13). Second, Mandoki speaks of an incident where Shirey
14 pressured Mandoki to refrain from writing a statement to the
15 Employee Association in regards to an incident between another nurse
16 and an interpreter. (Pl.'s Opp'n Def.'s Mot. Summ. J. Ex. L).
17 Third, Mandoki states that Shirey spoke to Mandoki and another
18 Hispanic nurse in an "abusive tone" and treated them differently.
19 (Pl.'s Opp'n Def.'s Mot. Summ. J. Exs. L, K). Finally, Mandoki
20 notes that members of upper management, Shirey, Wilkens, Dinauer and
21 Molina all appear to be Caucasian. (Mandoki Dep. 143:6-144:20).

22 Mandoki also identifies other events she maintains give rise to
23 an inference of discrimination. Mandoki speaks of an incident where
24 Mandoki was accused of gossiping about other nurses. (Mandoki Dep.
25 130:2-133:11). Mandoki also claims that a "white nurse" was
26 allegedly not punished/reported to the Nursing Board for writing
27 orders for medications, which were not signed by doctors and that
28 management had provided an email incident report to said "white

1 nurse." (Mandoki Dep. 133:17-135:1). Finally, Mandoki claims that
2 Obstetrics nurses had been engaging in the same behavior that got
3 Mandoki terminated. (Mandoki Dep. 141:3-142:19).

4 Contrary to Mandoki's assertions, the record before the court
5 does not give rise to an inference of racial or national origin
6 discrimination. While the record demonstrates some animus between
7 Shirey and Mandoki, there is insufficient evidence to infer that the
8 source of that animus is Mandoki's race or national origin. In
9 fact, there is evidence that Shirey promoted Mandoki twice and
10 regularly gave Mandoki good evaluations. (Mandoki Dep. 50:5-7).
11 Moreover, there is no evidence that the members of upper management
12 ever made discriminating comments about Hispanic people, discussed
13 Mandoki's national origin, or treated Mandoki or any other Hispanic
14 employees differently. (Mandoki Dep. 143:6-145:1). In fact,
15 Mandoki never complained of racial discrimination or harassment
16 while employed with defendant. (Mandoki Dep. 169:16-19; Def.'s Mot.
17 Summ. J. Ex. G).

18 The facts surrounding the investigation itself do not give rise
19 to an inference of racial/national origin discrimination. The
20 evidence supports an inference that, at the time of her termination,
21 CTRH had in its possession sufficient facts that plaintiff violated
22 hospital policy by dispensing narcotics to a patient for at home
23 use. Even though the Nursing Board investigation found formal
24 discipline by the Board was not necessary, and the arbitrator
25 ultimately found Mandoki's termination to be without cause, neither
26 suggest that Mandoki's termination was based upon race.

27 The evidence supports an inference Mandoki's actions on the
28 night of her termination made her more culpable than the other

1 employees involved. Nurse Jeremias engaged in similar behavior, but
2 the evidence suggests her actions were based in part on Mandoki's
3 guidance as charge nurse. Furthermore, there is no evidence that
4 Crookham and Williams violated any policy or procedure.

5 Aside from the incidents in which she was personally involved,
6 Mandoki's other assertions are completely unsubstantiated by any
7 evidence whatsoever. Thus, they cannot serve as a basis for
8 inferring that CTRH's reasons for termination were pretextual.

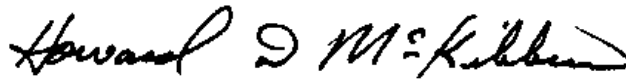
9 The record is not sufficient to establish a triable issue of
10 fact that Mandoki's race or national origin was CTRH's true reason
11 for terminating Mandoki.

12 **IV. Conclusion**

13 For the reasons set forth above, defendant's motion for summary
14 judgment (#27) is **GRANTED**.

15 **IT IS SO ORDERED.**

16 DATED: This 8th day of November, 2012.

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18 UNITED STATES DISTRICT JUDGE

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