IP 00-0866-C T/K Scott v. Genuine Parts Company
Judge Tim A. Baker Signed on 2/1/02

INTENDED FOR PUBLICATION AND PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTT, CANDY J,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
GENUINE PARTS COMPANY,	)	CAUSE NO. IP00-0866-C-T/?
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CANDY J. SCOTT	)	
	)	
Plaintiff,	)	
	)	
	)	
	)	
vs.	)	CAUSE NO. IP00-866 C- T/K
	)	
GENUINE PARTS COMPANY	)	
	)	
Defendant.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Candy J. Scott is a licenced truck driver who sought employment with Defendant Genuine Parts Company. Upon learning that it had misfiled Scott's application for employment, Defendant invited Scott to interview for a truck driver position at its Indianapolis facility. When Scott notified Defendant in her interview that she had a criminal record that included three felony convictions, and explained she had been terminated from her most recent job for failing a drug test, Defendant did not offer Scott employment. In turn, Scott filed suit, claiming that Defendant failed to hire her because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.

There are two motions before the Court: Scott's motion to strike Defendant's interrogatory responses filed with the Court in support of Defendant's motion for summary judgment, and Defendant's motion for summary judgment. For the reasons set forth below, the Magistrate Judge

recommends that Scott's motion to strike be DENIED, and Defendant's motion for summary judgment be GRANTED.

I. Factual Background

The evidence viewed in a light most favorable to Scott reveals the following. Defendant Genuine Auto Parts [1] and its subsidiaries ("Defendant") manufacture and supply automobile parts. Since 1997, Steven Ward has served as Defendant's Midwest Terminal Manager at its Indianapolis facility. Ward's responsibilities include overseeing all dock and trucking operations and hiring truck drivers.

On or about December 26, 1998, Scott and her ex-husband, Paul Scott ("P. Scott"), submitted applications of employment to Defendant for the position of truck driver. Since Ward was

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[1] Scott attempts to distinguish the parent corporation Genuine Parts Company (GPC) from NAPA, Rayloc, and Rayloc Merchandise Distribution Service (R.M.D.S.), claiming the latter three are not parties to this action. [Pl.'s Brief, p. 2]. However, the record reflects that these companies are all interrelated, and an employee of one is an employee of all. The relation between companies is as follows: NAPA is an operating division of GPC. [Ward Dep., pp. 7, 20-21]. Rayloc is a division of GPC that supplies NAPA with certified manufactured automobile parts. Id. R.M.D.S. is a subsidiary Rayloc, serving as its "trucking arm." Id. at 6-8, 16. Therefore, a person seeking employment with Rayloc or R.M.D.S. submits an application with GPC. Accordingly, an employee of Rayloc and/or R.M.D.S. is also an employee of GPC. Id. at 8, 24. For example, Ward is employed as the Midwest Terminal Manager for GPC/R.M.D.S./Rayloc at its Indianapolis facility. Id. at 14, 18, 42-43.

Therefore, the Court finds as a matter of law that if hired, Scott would have been an employee of Genuine Parts Company, Rayloc, and R.M.D.S (collectively referred to in this Entry as "Defendant"). See, e.g., Heinemeier v. Chemetco, Inc., 246 F.3d 1078, 1082 (7th Cir. 2001) ("When facing questions regarding the employee-employer relationship under Title VII or the ADEA, we look to the economic realities of the relationship and the degree of control the employer exercises.). Cf. Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202 (1997) (discussing "payroll method" in assessing whether an employee has an employment relationship with an employer); Papa v. Katy Industries, Inc.,166 F.3d 937 (7th Cir. 1999) (discussing "enterprise liability").

on vacation that day, the Scotts slid their applications under Ward's office door. Subsequently, on March 31, 1999, Ward interviewed P. Scott for a vacated truck driver position. During the interview, P. Scott inquired into the status of Scott's application. Vaguely recalling that he received two applications for employment with the same last name, Ward discovered that Scott's application was erroneously filed in a folder for a position other than truck driver due to the application's references of other positions on Scott's application. Upon this discovery on March 31, Ward invited, and Scott accepted, an invitation to submit another application for employment and interviewed her the same day.

Scott's application revealed that she had been convicted of two Class B felonies and one Class D felony for "Marijuana and LSD." [Pl. Dep. Ex. 6]. In 1980, Scott was convicted of "[p]ossession with the intent to deal marijuana and LSD and dealing LSD." [Pl. Dep., p. 14]. Scott served time in prison for these offenses. Scott also noted on her application that in July 1997 she had been terminated from her employment as a truck driver with Ryder Integrated. In her interview, she told Ward that she was terminated from Ryder for failing a drug test. Scott indicated that at the time of the failed drug test she was "on a lot of meds" and that she "wasn't allowed to retest." Id. at 78. According to Defendant, Ward advised Scott that her previous felony convictions, coupled with her recent termination for failing a drug test, rendered her an undesirable candidate. [Ward Dep., pp. 49, 103]. However, Scott testifies that Ward told her neither the convictions or the termination would be a problem, and that she was eligible for hire. [Scott Affid., ¶ 4].

P. Scott, now an employee of Defendant, urged Ward to reconsider his decision not to hire Scott. Ward agreed, and contacted his supervisor Paul Williams at Defendant's corporate

headquarters in Atlanta. When Ward discussed Scott's candidacy, Williams responded by saying there was "no need to send [Scott's application] down based on [Scott's history]." [Ward Dep., pp. 104-05]. At P. Scott's further insistence, and despite Williams' instructions, Ward forwarded Scott's application to Tom Williams ("T. Williams"), Defendant's personnel manager also located in Atlanta. Upon reviewing the application, T. Williams requested that Scott complete and return a missing form so he could conduct a background check. After review, T. Williams also concluded that Scott was not a suitable candidate for hire.

II. Discussion

A. Motion to Strike

Scott moves to strike Defendant's interrogatory responses that include: (1) Defendant's Responses and Objections to Plaintiff's First Set of Interrogatories; (2) Defendant's Supplemental Responses and Objections to Plaintiff's First Set of Interrogatories; (3) Defendant's Responses and Objections to Plaintiff's Second Set of Interrogatories; (4) Defendant's Second Supplemental Responses and Objections to Plaintiff's First Set of Interrogatories; and (5) Defendant's Responses and Objections to Plaintiff's Third Set of Interrogatories. Scott claims, in part, that Defendant did not comply with 28 U.S.C. §1746's requirement that a statement be "under penalty of perjury." [Pl.'s Mot. to Strike, p. 4]. Scott's reliance on this statute is misplaced, given that the discovery responses were verified under oath before a notary public.

Federal Rule of Civil Procedure 33(b)(1) does not incorporate the language of § 1746, but rather provides:

> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

Fed. R. Civ. P. 33(b)(1).

In this case, Defendant submitted with each set of interrogatory response a "verification" page in which the signator was "duly sworn" before a notary public who signed, placed a notary seal, and dated the document. [See Pl. Exs. B-J]. Accordingly, Defendant has complied with Rule 33 in submitting its responses to the interrogatories. See Pfeil v. Rogers, 757 F.2d 850, 859 (7th Cir. 1985) (in the execution of affidavit, court refused to be "hyper-technical," holding that "the absence of the formal requirements of a jurat in . . . sworn affidavits [does] not invalidate the statements or render them inadmissible [if] they were sworn to before an officer authorized to administer an oath." Id. at 859.

Scott also states that Defendant's interrogatory response should be stricken because Defendant must answer through an "officer or agent" of the corporation, and that Ward and T. Williams cannot sign the verification since they are not employees of Genuine Parts Company. [Pl.'s Mot. to Strike, pp. 3-4]. As noted in footnote one, the Court finds that Ward, as the Midwest Terminal Manager for General Parts Company/R.M.D.S./Rayloc, is an employee of the named Defendant in this action, and therefore has personal knowledge to sign the verification to the interrogatory responses. Likewise, T. Williams, as the Human Resource Manager for Defendant, also has personal knowledge to be a signator to the interrogatories.

Finally, Scott asserts that Defendant's Second Supplemental Responses to Plaintiff's First Set of Interrogatories (Ex. E) should be stricken from the record because the verification page (Ex. F)

signed by Ward (who works and lives in Indiana) was signed by a notary public in the state of Georgia. [Def.'s Mot. to Strike, pp. 4-5]. Assuming that the Georgia notary public's affirmation to Ward's signature made the document inadmissible, this defect was cured when Defendant submitted a verification page bearing Ward's signature with an Indiana notary's signature.

Accordingly, Scott's motion to strike Defendant's interrogatory responses is DENIED.

B. Standard for Summary Judgment

A grant of summary judgment is appropriate if the pleadings, affidavits, and other supporting materials leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Hall v. Bodine Elec. Co., _ F.3d _, 2002 WL 15815, *3 (7th Cir. Jan. 8, 2002); Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the Court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. First Bank & Trust v. Firstar Information Services, Corp., _ F.3d _, 2001 WL 1662511, *3 (7th Cir. Dec. 31, 2001). Thus, in ruling on a summary judgment motion, the district court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Oest v. Ill. Dep't of Corrections, 240 F.3d 605, 610 (7th Cir. 2001), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

There is no special version of Rule 56 that applies to employment discrimination cases. Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1996). However, the Court applies the summary judgment standard with "particular care" in employment discrimination cases since intent and

credibility are crucial issues. Adusumilli v. City of Chicago, 164 F.3d 353, 361 (7th Cir. 1998); Alexander v. Wisconsin Dept. of Health and Family Services, 263 F.3d 673, 681 (7th Cir. 2001). The Court must view the evidence making all reasonable inferences in favor of the non-moving party, (Anderson, 477 U.S. 242, 250; Warsco v. Preferred Technical Group, 258 F.3d 557, 563 (7th Cir. 2001)), and is not permitted to conduct a paper trial on the merits of the claim. Ritchie v. Glidden Co., 242 F.3d 713, 723 (7th Cir. 2001).

C. Title VII Claim

Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's.... sex." 42 U.S.C. § 2000e-2(a)(1); Bahl v. Royal Indemnity Co, 115 F.3d 1283, 1290 (7th Cir. 1997).

Scott may either present direct evidence of discrimination or utilize a burden-shifting approach. Fyfe v. City of Fort Wayne, 241 F.3d 597, 601 (7th Cir. 2001). Since Scott offers no direct evidence of discrimination, she seeks to prove her claim under the McDonnell Douglas burden-shifting framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this "indirect evidence" approach, a plaintiff must first establish a prima facie case of discrimination. Id. at 800; Gosh v. Ind. Dept. of Environmental Management, 192 F.3d 1087, 1090-91 (7th Cir. 1999). Once a plaintiff has successfully established a prima facie case, a presumption of discrimination is created and the burden shifts to the defendant, who must provide a nondiscriminatory reason for the adverse employment actions. McDonnell Douglas, 411 U.S. 802; Walker v. Glickman, 241 F.3d 884, 888 (7th Cir. 2001).

If a defendant rebuts the presumption by presenting evidence that its adverse employment action was not discriminatory, then the plaintiff must show the reason offered by the defense was false and only a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08 (1993); Pafford v. Herman, 148 F.3d 658, 665 (7th Cir. 1998). The ultimate burden of persuasion remains at all times with the plaintiff. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-56 (1981).

1. Prima facie case

In order to prove a prima facie case of sex discrimination, Scott must show that she: (1) is a member of a protected class; (2) applied for and was qualified for an open position; (3) was rejected; and (4) the position was filled with a person not in the protected class or remained open. Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 764-65 (7th Cir. 2001), citing Mills v. Health Care Serv. Corp., 171 F.3d 450, 454 (7th Cir. 1999).

Here, the Court finds that Scott satisfies three of the four prongs of the prima facie case. The parties do not dispute the first prong since Scott, as a female, is a member of a protected class. As to the third prong, Scott satisfies this requirement since she was not hired by Defendant. In addition, Scott meets the fourth prong because around the time Scott was denied employment, Defendant hired several truck drivers, including one female and several males. [Def.'s Br., 16; Ward Affid., ¶ 14].

Defendant claims that Scott cannot establish the second prong because she was not qualified for a truck driver's position in light of her three felony convictions and her recent termination due to a failed drug test with Ryder Integrated, her previous employer. Ward testifies that he adopted a policy of not hiring individuals for truck driving positions who have felony convictions or who have been terminated

for failing a drug test. [Ward Affid., ¶ 5]. In response, Scott claims she is qualified to hold the job since she has a "CDL Class A with HazMat" license, is an "over-the-road driver with experience," and has a "clean record." [Pl.'s Resp. Br., p. 6].

The Court finds that Scott fails to meet the qualification prong. Although Scott holds the requisite licenses to work as a truck driver, the record reflects that she did not meet Defendant's requirement of a "clean record." It is undisputed that Scott has a criminal record that reflects three felony convictions resulting from dealing illegal drugs, and that she was terminated from her previous job in 1997 at Ryder Integrated for testing positive for marijuana use. The Court agrees with Defendant that in addition to her felonious criminal record, Scott's admitted drug use renders her unqualified in light of Department of Transportation regulations. The Department of Transportation's regulation enacted at 49 C.F.R. § 382.101 et. seq. was promulgated "to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 308 (6th Cir. 2000), quoting 49 C.F.R. §382.101. The regulation prohibits an employer from permitting a driver who has tested positive for controlled substances to perform safety sensitive functions. 49 C.F.R. § 382.215.

Defendant's criteria on not hiring truck drivers with felony convictions and/or who have tested positive on a drug test, coupled with its well-founded safety concerns, made Scott unqualified to work for Defendant as a truck driver. Defendant is permitted to impose these restrictions on employment as long as they are not applied in a discriminatory manner. See, e.g., Gorence, 242 F.3d at 765 ("We do not tell employers what the requirements for a job must be."); Redding v. Chicago Transit Authority, 2000 WL 1468322 (N.D. Ill. 2000) (positive drug test was a legitimate, non-discriminatory reason for

not rehiring). Simply stated, like Ryder Integrated and Layne Trucking [2] before it, Defendant should be permitted to not accept the risk of injury to its workforce and the general public by declining to hire Scott.

Accordingly, Scott's failure to establish a prima facie case, standing alone, entitles Defendant to summary judgment. See Vidovich-Gagnon v. American Trans Air, Inc., 2000 WL 1238947, *5 (S.D. Ind. 2000) (Tinder, J.), quoting Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1142 (7th Cir. 1998) ("[T]his court need not proceed any further in the McDonnell Douglas analysis once we determine that a claimant has failed to make a prima facie case."). See also Cowan v. Glenbrook Sec. Servs., Inc., 123 F.3d 438, 445 (7th Cir. 1997) (court declined to address pretext where plaintiff failed to establish prima facie case).

2. Pretext

Assuming Scott establishes a prima facie case of sex discrimination (she cannot), Defendant must establish a legitimate, nondiscriminatory reason for its decision not to hire her. Defendant meets

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[2] Scott applied for a truck driver job with Layne Trucking in July 1997, after her termination at Ryder and before she applied at Defendant. After commencement of discovery, Defendant learned that Scott also tested positive in Layne's pre-employment drug test. [Pl. Dep., pp. 61-62, 65-67, Ex. 3]. In addition, on her March 31 application, Scott indicated she was terminated for failing a drug test because she was "on a lot of meds,"and that Ryder refused to retest her. [Pl. Dep., p. 78]. However, Scott later contradicts her statements on the application by testifying in her deposition that she was using marijuana around the time of drug screen, which, presumably, led to the positive drug test. While these acts might constitute a legitimate, non-discriminatory reason for termination, they were not discovered until after Defendant's decision not to hire her. Therefore, they cannot be utilized to justify Defendant's proffered reasons but rather go to the issue of damages in the event the case proceeded to trial. See McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), and Cullen v. Olin Corp., 195 F.3d 317 (7th Cir. 1999) (both discussing the "after acquired evidence" rule).

this burden by showing it did not hire Scott because of her three previous felony convictions and a termination from her previous employer for failing a drug test. [Ward Dep., pp. 49, 103]. Since Defendant offers a non-discriminatory explanations, Scott must present sufficient evidence to raise an inference that these explanations are a pretext.

The Seventh Circuit has repeatedly held that in order to raise an inference of pretext, the plaintiff must show that: (1) the employer's explanation has no basis in fact; or (2) if it has a basis in fact, it is not the real reason; or (3) the reason stated was insufficient to warrant the termination. See Vukadinovich v. Board of School Trustees of North Newton School Corp., _ F.3d _ , 2002 WL 75883, *5 (7th Cir. Jan. 22, 2002); Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374, 379 (7th Cir. 2000).

Pretext means a lie. Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 348 (7th Cir. 1997). Specifically, the plaintiff must demonstrate that the employer's stated reason is phony or completely lacking a factual basis. Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1012-13 (7th Cir. 2000); Jordan v. Summers, 205 F.3d 337, 343 (7th Cir. 2000) (pretext exists if the stated reason is a lie or is without factual support); Kulumani v. Blue Cross Blue Shield Ass'n., 224 F.3d 681, 685 (7th Cir. 2000) (pretext "means a dishonest explanation, a lie rather than an oddity or an error."). In essence, "[b]ecause a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate." Helland v. South Bend Community Sch. Corp., 93 F.3d 327, 330 (7th Cir. 1996). See also O'Connor v. DePaul University, 123 F.3d 665, 671 (7th Cir. 1997) ("On the issue of pretext, our only concern is the honesty of the employer's explanation."). When an employer proffers multiple reasons for its adverse employment decision, the employee must show that all of the proffered reasons are pretextual. Ghosh v. Indiana Dep't of

Environmental Mgmt., 192 F.3d 1087, 1091-92 (7th Cir. 1999).

Turning to this case, the Court holds that Scott fails to demonstrate pretext in Defendant's proffered legitimate, non-discriminatory reasons for not hiring her. In fact, Scott utterly fails to address the issue of pretext in her answer brief. However, she sets forth in her complaint the following three reasons why she believes Defendant's refusal to hire her are pretextual: (1) that Defendant hired a male truck driver with a felony record; (2) Defendant hired no other woman drivers other than team drivers; and (3) her felony convictions are outdated. [Complaint, ¶¶ 13, 17, 20-21]. Each is easily refuted.

First, Scott claims that Defendant hired a male truck driver by the name of Robert "Rollins" or "Rollen." who has a felony record. However, her testimony amounts to speculation since she cannot provide admissible evidence that this person worked for Defendant or even exists. Other than her own deposition testimony, Scott fails to submit admissible evidence that Defendant hired any male truck drivers with felony convictions. The Court need not accept Scott's uncorroborated, self-serving conclusory allegations regarding Defendant allegedly hiring male truck drivers with felony convictions. See Oest v. Illinois Dept. of Corrections, 240 F.3d 605, 615 (7th Cir. 2001) (plaintiff is not permitted to submit self-serving conclusory testimony or "uncorroborated generalities" testified to only by the plaintiff to satisfy evidentiary burden in a Title VII claim). In fact, Ward testifies that Defendant has never employed an individual by the name of Robert "Rollins" or "Rollen," and that he has never hired anyone with a felony record. [Ward Affid., ¶¶ 8-12].

Scott further asserts that Defendant hired no female drivers other than "team drivers." [Pl. Dep., p. 93]. Scott may show pretext by showing that similarly situated employees outside protected class were treated more favorably in Defendant's hiring decisions. See Johnson v. West, 218 F.3d 725, 733

(7th Cir. 2000). However, Scott fails to make this showing since the Defendant hired Sharon Harris, a female driver, shortly before it rejected Scott's application for employment. [Ward Affid., ¶¶ 13-14]. In addition, since January 1, 1998, Defendant has hired six female drivers at its Indianapolis terminal, which also proves fatal to Scott's claim. [Def.'s Ex. D]. Scott cannot show that similarly situated male drivers with either a felony conviction or a failed drug test were hired by Defendant.

Finally, Scott claims that her felony convictions are too remote in time for Defendant to consider since they occurred in 1980. In addition to the safety issues addressed above, Defendant's concerns about Scott's felony record are well-founded, even though the convictions occurred in 1980. Defendant's decision not to hire Scott based on her felony convictions constitutes a legitimate, non-discriminatory business decision. This Court is not permitted to sit as a super- personnel department which reviews employment decisions for their prudence. Ritter v. Hill 'N Dale Farm, Inc., 231 F.3d 1039, 1044 (7th Cir. 2000). See also Ransom v. CSC Consulting, Inc., 217 F.3d 467, 471 (7th Cir. 2000) (court held that it will not "sit as a super personnel department to review an employer's business decision."); Nawrot v. CPC Intern., _ F.3d _, 2002 WL 27528, *8 (7th Cir. Jan. 11, 2002) (same). Scott's felony convictions were not the only reason Defendant declined to hire her. Defendant also took into account her recent termination for failing a drug test.

In cases similar to this, courts have upheld the employer's decision not to hire or to terminate. See, e.g., Kehrer v. City of Springfield, 104 F. Supp. 2d 1001, 1007 (C.D. Ill. 2000) (female applicant's criminal history, among other factors, was a legitimate, non-discriminatory reason for removing applicant's name from employment eligibility list); Redding v. Chicago Transit Authority, 2000 WL 1468322 (N.D. Ill. 2000) (applicant's positive drug test was a legitimate, non-discriminatory reason

for refusing to hire); Matthews v. Runyon, 860 F. Supp. 1347, 1360 (E.D. Wis. 1994) ("At best, the plaintiff charges that [the decisionmaker] places inordinate weight on an applicant's prior convictions and/or pending criminal charges, a claim clearly not cognizable under Title VII."); Heerdink v. Amoco Oil Co., 919 F.2d 1256, 1260 (7th Cir. 1990) (employer's business decision to hire a more experienced truck driver did not violate female truck driver's right under Title VII); Grooms v. Wiregrass Electric Cooperative, Inc., 877 F. Supp. 602 (M.D. Ala. 1995) (commercial driver's positive drug test conducted pursuant to the DOT regulations was a legitimate, non-discriminatory reason for adverse employment action).

In sum, Scott fails to present evidence to cast suspicion on Defendant's reasons for not hiring her. Therefore, Scott has failed to carry her burden of establishing pretext and ultimately, that her sex was a determinative factor in Defendant's decision not to offer her employment.

III. Conclusion

Scott fails to create a genuine issue of material fact as to whether Defendant failed to hire her because of her sex. Accordingly, the Magistrate Judge recommends that Scott's motion to strike be DENIED, and Defendant's motion for summary judgment be GRANTED.

Any objections to the Magistrate Judge's report and recommendation shall be filed with the Clerk in accordance with 28 U.S.C. § 636 (b)(1), and failure to file timely objections within the ten days after service shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

So ordered.

DATED this 1st day of February, 2002.

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Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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