IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH E. SWEENEY,

PLAINTIFF,

v. **CASE NO: 96-2447-CIV-T-25A**

ADVANCED TECHNOLOGIES AUTOMOTIVE, INC.,

DEFENDANT.
_____/

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant files this Memorandum of Law In Support of Its Motion For Summary Judgment, pursuant to the local rules of this Court.[1]

STATEMENT OF THE CASE

Plaintiff, Deborah E. Sweeney, a black female, sued the Defendant for a violation of Title VII and the Equal Pay Act of 1963. Plaintiff's Title VII claims rests upon a July 23, 1996 discrimination charge alleging only a discriminatory termination (Complaint Exhibit 1, Appendix Tab 1), but her complaint is much broader than the charge. In this vein she claims that because she is an African American female she was (1) paid lower wages than non-African Americans (Complaint ¶¶ 29, 38); (2) denied a promotion to Junior Technician

[1]Citations are to Plaintiff's Complaint by paragraph number; depositions by name, page and line number (Smith Deposition P ___, L ___); deposition exhibits by number; interrogatories by number; and affidavits by paragraph number. Where appropriate, citations are also to the appendix filed concurrently herewith by appendix tab and page number.

in 1994 (Complaint ¶¶ 32, 38); (3) given a greater work load and less break time than non-African Americans (Complaint ¶¶ 30, 38); (4) denied educational benefits (Complaint ¶¶ 31, 38); (5) discriminated against for travel and expenses in connection with company-required training (Complaint ¶ 38); and (6) terminated from Defendant's employ. (Complaint ¶ 33.) Plaintiff's EPA violation is based upon a contention that she was paid less because of her sex than male comparators for jobs requiring equal skill, effort, and responsibility and performed under similar conditions. (Complaint ¶¶ 47-50.)

Defendant denied Plaintiff's claims and raised several affirmative defenses. With respect to her Title VII claims, Defendant asserted that (1) all claims, except termination, are beyond the scope of her charge and Plaintiff has, therefore, failed to meet the jurisdictional prerequisites to filing suit in federal court by a timely charge of discrimination (Defendant's Answer ¶ 56); and (2) all allegations except for termination are beyond the statute of limitations for Title VII claims. (Defendant's Answer ¶ 57.) With respect to Plaintiff's EPA claim, Defendant has raised the two- and three-year statute of limitations (Defendant's Answer ¶ 58) and has asserted that any difference in pay between Plaintiff and her male comparators was based on a bona fide seniority system, a merit system, or factors other than sex. (Defendant's Answer ¶ 60.)

Based upon the pleadings, interrogatories, affidavits, and depositions on file, there is no genuine issue of material fact, and Defendant is entitled to summary judgment as a matter of law because the uncontradicted evidence shows (1) Plaintiff was paid the same as non-African American employees (her Title VII claim) and her male comparators (her EPA claim); (2) the promotion claim is barred by the statute of limitations because it relates to the

September 1994 promotion of Don Rogers; (3) her Title VII claim of greater work and less break times is barred by the statute of limitations because it relates to events in 1994; (4) her Title VII claim that she was denied educational benefits is barred by the statute of limitations as it relates to training (educational benefits) given to Don Rogers in 1992 or 1994; (5) her Title VII claim relating to discriminatory travel and expense reports is barred by the statute of limitations as it relates to expenses in connection with schooling which occurred *before* October 1994; and (6) Plaintiff has no competent evidence to show that the Defendant's articulated reason for her termination is a pretext, nor does she have competent evidence from which to infer that the Defendant was motivated to terminate her because of her race or sex.

Because Plaintiff has no competent evidence to show she was paid less than male comparators nor evidence of pretext or discriminatory motivation, Defendant is entitled to summary judgment on her EPA Claim as a matter of law.

STATEMENT OF THE FACTS

The Defendant, Advanced Technologies Automotive (hereinafter "UTA") is an equal opportunity employer. It hires, trains, and promotes persons in all job classifications without regard to race, color, sex, etc. (Appendix Tab 4), and until her termination in June 1996, Plaintiff, a black female, had progressed steadily through the Defendant's ranks. She began work with Defendant on June 18, 1990 as an Assembler at $5.06 per hour. Three months later she was promoted to Machine Operator at $5.50 per hour. By March 1992, she had received eight raises bringing her rate to $7.32 an hour. In May 1992, she received a promotion to Maintenance Helper and in the next two years her salary increased to $8.87 per

hour. In October 1994, she was promoted to the salaried position of Junior Technician at $22,360 per year. Later she received a pay raise of $924.00 per year. (Appendix Tab 2, Tessin Affidavit ¶ 3, Appendix Tab 3.)

A combination of two events resulted in Plaintiff's termination: her unexcused absences in the week of June 7, 1994, and the fact that she hid her incarceration over an altercation in which she brandished a gun against her roommate and co-worker, Sonya Jenkins.[2] Plaintiff was suspended for unexcused absences which occurred during the week of June 17, 1995 (Appendix Tab 5) and then was terminated for what Lynda Barr, Defendant's Manager of Human Resources, felt was deception in explaining those unexcused absences. (Appendix Tab 6; Barr Deposition P45, L1-9.) Plaintiff was suspended for a late arrival on Tuesday, June 11, 1996 and unexcused absences on the following Thursday, June 13, and Friday, June 14. (Appendix Tab 5.)[3]

Plaintiff admitted that she was four hours late to work on June 11, 1996. She was scheduled to report to work on June 11 at 10:30 p.m., and was going to work until she

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[2]While there is some factual dispute with respect to predicate information as to whether or not the Plaintiff called in on the sick line the evening of June 13 and 14 to report the fact she would not be at work, there is no dispute that Lynda Barr, the director of Human Resources for UTA and an African American female (Barr Deposition P8, L25; P9, L1-4), said even if Plaintiff called in on the sick line that was not acceptable as she should have called in to speak to a live person. There is no dispute that Barr's decision to terminate Plaintiff was based upon her belief, from an undisputed factual predicate, that Plaintiff was deceptive as to why she missed work on Friday and attempted to hide from the company the fact she had been incarcerated for brandishing a gun against her roommate. These points are discussed, *infra*, in the statement of facts.

[3]Both the suspension letter (Appendix Tab 5) and the termination letter (Appendix Tab 6) were sent to the address of record Defendant had for Plaintiff. (Barr Deposition P40, L5-25.) Plaintiff admitted she used to live at this address, had moved, but had never given UTA her new address. (Sweeney Deposition P126, L12-18.)

stopped by a friend's house and decided to take a nap and did not report to work until 2:00 a.m. that morning, three and one-half hours after the shift started. (Sweeney Deposition P77, L15-25; P78, L1-25; P79, L1-22; P80, L9-25; P84, L17-25; P85, L1-10.) This created a problem for the shift supervisor because Sander's job as a Junior Maintenance Technician was critical and they were already short one technician. (Linder Deposition P38, L18-25; P39, L1-6.) Because the Plaintiff decided not to show up, on short notice or no notice, there was no way the shift supervisor could plan to have the critical job she held covered. (Linder Deposition P50, L17-25; P51, L1-23.) Plaintiff's excuse was that she decided to use her school time (which Defendant admits was available to her in an appropriate situation), but that was totally unacceptable as school time was not a time to take a nap whenever she felt sleepy; it was to be used on a prescheduled basis. (Barr Deposition P82, L16-25; P83, L1-14.)

Barr also received a report that on June 13 and 14, Plaintiff was a no-call, no-show for her shift. Plaintiff admits she missed work on those days and never spoke to a live person, but states she called in and left a message on the sick-line voice mail, which Barr said was totally unacceptable.[4]

Had the absences been Plaintiff's only deficiency, the matter would have ended. Unfortunately, the situation was compounded by the way Plaintiff attempted to hide a

[4]Plaintiff's contention that she called in on the sick line misses the point because both her supervisor, Cheryl Browder, whose married name is Cheryl Linder, and H.R. Manager Barr said the sick line was not an acceptable way to report an absence at that point in time. An employee had to call in and speak to someone in person to explain their absence, a point that has not been contradicted with respect to either Supervisor Linder or H.R. Manager Barr. (Barr Deposition P27, L2-10; P55, L22-25; P56, L1-2; Linder Deposition P20, L1-7.)

problem she had with her roommate and co-worker, Sonya Jenkins, from H.R. Manager Barr. After living together for a short while, Jenkins and Plaintiff decided to part company and Jenkins moved out of the house she shared with Plaintiff on Thursday and Friday, June 13 and 14, 1996. (Sweeney Deposition P52, L1-25.) On Friday, June 14, the two were involved in an altercation, and Plaintiff went for her gun. When she pulled it from under the driver's seat of her car (where she kept it), a man, who had come to help Jenkins move, disarmed Plaintiff. Later that day, Plaintiff was arrested for aggravated assault. (Sweeney Deposition P53, L21-24; P54, L1-6, 14, 15; P62, L4-25; P63, L1-11.) She stayed in jail until late Saturday afternoon. (Sweeney Deposition P64, L7-16.)[5]

Because Jenkins and Plaintiff worked the same shift, Jenkins feared Plaintiff might come to work that night and harm her. Therefore, on Friday, June 14, Jenkins asked H.R. Manager Barr if she could have a week or so of unpaid leave to let things cool down. Barr allowed Jenkins to take the leave of absence (Barr Deposition P10, L21-25; P11, L1-25), reported the incident to some of the other managers who were meeting that afternoon (Barr Deposition P12, L17-24), and then called the jail to verify Jenkins's version of events. (Barr Deposition P14, L1-12.) There was no discussion of terminating Plaintiff that day. (Barr Deposition P16, L1-17.)

[5]The felony charges filed against Plaintiff were reduced to a misdemeanor charge in return for her plea of guilty, and she was sentenced to a one-year probation. (Sweeney Deposition P67, L10-25; P68, L1-2.)

On the following Monday, Sweeney called H.R. Manager Barr to explain her previous absences and ascertain the status of her employment.[6] In this conversation, Sweeney told Barr about being dehydrated, not being able to keep anything on her stomach, and even that her children had been sick. (Barr Deposition P19, L1-25.) Because Barr had conflicting information about what had occurred the previous Friday (referring to the incarceration of Plaintiff), she did not ask Plaintiff specific questions but waited to see what Plaintiff would tell her. (Barr Deposition P21, L1-11, 22-25; P22, L1-4.)[7] She was waiting to see if the Plaintiff would tell her the full story about what happened on Friday night. When she did not, Barr told Plaintiff that, given the facts she had stated (about being sick), Plaintiff would need a doctor's note to cover June 13 and 14 because, at that moment, she was looking at a suspension for the absences of the previous week. (Barr Deposition P20, L1-10.) Barr suspended Plaintiff on that date and then sent her the suspension letter bearing the same date. (Barr Deposition P20, L18-23; Appendix Tab 5.)

After the letter of June 17, Barr said not much happened. She was waiting on the doctor's note Plaintiff said she would bring in to cover June 13 and 14 and set a meeting for June 19, but Plaintiff missed it. Plaintiff did not show or call about the meeting, and Barr

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[6]Sweeney said she was going to the doctor Monday afternoon when she saw a friend in her front yard. She stopped to speak to the friend and the friend advised her she needed to call the company to ascertain the status of her employment. Instead of proceeding to the doctor, Sweeney made a U-turn, went home and called Barr. (Sweeney Deposition P44, L1-16.)

[7]Significantly, Plaintiff did not volunteer any information about her incarceration and made no mention of it, even when she said Sonya Jenkins's name was brought up. Plaintiff said she did not mention it to Barr on her own; she was waiting for her to ask about it. (Sweeney Deposition P68, L3-7.)

said this was typical of her behavior in the previous week. (Barr Deposition P24, L9-17.) After Plaintiff was a no-call no-show on June 19, 1996, Barr made the decision to recommend her termination to Grant Wurtz.[8] Barr strongly encouraged him that terminating Sweeney was the right thing to do, and he agreed. (Barr Deposition P22, L18-25; P23, L1-5.)

Barr, Plaintiff, and Supervisor Browder (Linder) met on Thursday, June 20, 1996 to review the facts. Barr was going to give Sweeney an opportunity to present some facts that would affect her thinking on the termination. Unfortunately, the Plaintiff did not present anything that would change Barr's mind. As a result, Barr's earlier termination recommendation stood and Plaintiff was terminated. The reason for Plaintiff's termination was stated by Barr on two occasions in her deposition to Plaintiff's attorney:

> I fully believe, based on what I heard from Sonya, talking to the person at the jail only briefly, then hearing Deborah's story, that she was clearly trying to make me believe a series of events that didn't happen the way she explained them to me . . . I saw this as a violation of our code of conduct which was in her Employee Handbook.

(Barr Deposition P28, L10-25; P29, L1-5.)

> If I didn't make it clear earlier, she was at home sick, unable to keep anything down, and she mentioned that the children were there as well and that they were also ill. I mean there was nothing that she said to help me connect and say, okay, all three of you were at jail ill because . . . Deborah would like me to believe this story but I have an independent common, non-interested person telling me she was elsewhere.

(Barr Deposition P31, L1-20.)

[8]Mr. Wurtz recently died of cancer and is not available to testify in this proceeding.

Plaintiff has no competent evidence of pretext or evidence from which an inference of discriminatory motive can be inferred. The only thing Plaintiff advances is her own opinion as to the circumstances surrounding her termination. (Appendix Tab 7, Interrogatory Nos. 3, 4.)

The remaining claims Plaintiff asserts are either time-barred, without merit, or both. Most of her complaints relate to events which occurred in 1994 or the preceding years:

1. Her claim of less benefits relates to Rogers going to school before Plaintiff in connection with her promotion to Maintenance Helper in 1992. (Appendix Tab 3, Sweeney Deposition P92, L6-25; P93, L1-25; P112, L12-24.)

2. Plaintiff's claim of less travel expenses than other employees because of her sex and race relates to an expense report she submitted before 1994 in connection with schooling where the company reduced a reimbursement on her expenses for excessive meals by $400. (Sweeney Deposition P99, L1-22; P100, L11-24.)

3. The discriminatory promotion she asserts occurred in 1994. (Sweeney Deposition P93, L20-25; P94, L1-14; P96, L11-20; P113, L1-5.)
4. Her claim of less break time relates to 1994. (Sweeney Deposition P102, L2-25; P103, L1-25; P104, L1-25; P105, L1-4.)

5. She has no evidence that she was given higher work loads because of her race or sex.

6. Her claim that she received less pay because of her race is also without merit. A comparison of non-African American employees hired as a "B" Class Assembler in 1990 and later promoted to Machine Operator shows that their starting pay and increases tracked hers in all respects and she was paid in accord with the company's pay scales. (Appendix Tab 9.) In this regard, compare Plaintiff's pay and progression at Appendix Tab 3 with non-African American employees, specifically but not limited to Adajean Foley (white female) at Appendix Tab 8, P2.

Her EPA claim is based on the fact that she had to train Gary Paul (a black male) on a particular machine, and later he got the job working on the machine and the raise that went with it. (Sweeney Deposition P109, L1-9; P112, L3-6.) But a comparison of Plaintiff's pay as a salaried employee in 1994 with males who were promoted to the same position she held, Junior Technician, shows her pay was in accord with the company salary schedules for salaried employees. (Appendix Tab 9, P4-5.) In this regard, Plaintiff received a salary of $22,360 in 1994 and, after a raise, a salary of $23,284 in 1995 (Appendix Tab 3), while a male, Luke Baker, started as a Junior Technician in 1993 at $21,840 (Appendix Tab 10, P1), Paul Krewson started at $20,796 as a Junior Technician in 1994 (Appendix Tab 10, P2), Michael Majerick started in that job at $20,796 in 1994 (Appendix Tab 10, P3), Gary Paul (African American male) started in the job at $21,336 in 1994 (Appendix Tab 10, P4), and Dave Lekawn started at $21,696 in 1993. (Appendix Tab 10, P5.) In sum, there is no evidence to indicate that Plaintiff was paid any less because of her sex in violation of the Equal Pay Act.

ARGUMENT

I. THE PLAINTIFF'S CAUSES OF ACTION UNDER TITLE VII FOR CLAIMS WHICH ACCRUED PRIOR TO SEPTEMBER 27, 1995, OR WITHIN 300 DAYS OF HER JULY 23, 1996 EEOC CHARGE, ARE TIME-BARRED.

The timely filing of a charge with the EEOC is a prerequisite to filing suit under Title VII. A charge is deemed timely if it is filed "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). The Plaintiff in the instant case filed her EEOC charge on July 23, 1996. Thus, any cause of action asserted by the Plaintiff based on events which occurred prior to September 27, 1995 must be dismissed.

The Supreme Court has made it clear that a cause of action for discrimination accrues at the time the plaintiff receives notice of the adverse employment action, *not* when the plaintiff suffers from the *effects* of the adverse action. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Thus, when a plaintiff is discharged, the cause of action accrues, and the filing period begins to run on the date the employee receives notice of the termination. *See Delaware State College v. Ricks; Chardon v. Fernandez*, 454 U.S. 6 (1981) (applying accrual rule of *Ricks* to employment discharge). The Fifth Circuit has gone even further in applying this doctrine, holding that the filing period begins to run when the employee knew, or should reasonably have known, that the discriminatory act has occurred. *McWilliams v. Escambia County School Bd.*, 658 F.2d 326 (5th Cir. 1981).

Applying these principles to the instant case, it is clear that all of Plaintiff's claims under Title VII except for the claim based on her termination are time-barred. First, it should

be noted that, to the extent the Plaintiff brings a claim of discriminatory pay under Title VII, her cause of action accrued when she first learned of the pay differential. This date was clearly well before the 300 days prior to the filing of her charge with the EEOC. The fact that the Plaintiff contends that she continued to be paid less is of no consequence, even if it were factually accurate, which it is not. As the Supreme Court has noted, the cause of action accrues at the time the plaintiff receives notice of the alleged adverse employment action, *not* when the plaintiff suffers from the *effects* of the adverse action. Therefore, the Plaintiff's discriminatory pay claim under Title VII is time-barred.

The Plaintiff's other claims are likewise barred. The Plaintiff's promotion claim is barred by the statute of limitations because it relates to the September 1994 promotion of Don Rogers. Her Title VII claim of greater work and less break times is barred by the statute of limitations because it relates to events in 1994. The Plaintiff's claim that she was denied educational benefits is likewise barred by the statute of limitations as it relates to training (educational benefits) given to Don Rogers in 1992 or 1994. Finally, her claim relating to discriminatory travel and expense reports is barred by the statute of limitations because it relates to expenses in connection with schooling which occurred before October 1994.

Thus, the only cause of action under Title VII for which Plaintiff filed a timely charge is her claim for discriminatory termination. All other claims asserted by the Plaintiff under Title VII are time-barred.

II. EVEN IF THE PLAINTIFF'S CLAIMS OTHER THAN HER TERMINATION CLAIM WERE WITHIN THE 300 DAY PERIOD, THOSE CLAIMS WERE NOT MADE THE SUBJECT OF THE EEOC CHARGE AND ARE NOT WITHIN THE SCOPE OF A REASONABLE EEOC INVESTIGATION BASED ON THE CHARGE.

The rule in this Circuit regarding litigation of claims not raised in the EEOC charge is that the scope of the complaint is limited by "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *see also Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985) (stating that judicial complaint in Title VII action is limited to scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination).

Where the EEOC charge specifies a particular discriminatory practice, such as discriminatory discharge, but the complaint asserts discrimination in a broad range of working conditions, courts hold that expansion of the claim is precluded. *See, e.g., Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925 (11th Cir. 1983) (holding that claims of widespread discrimination rooted in subjective decisionmaking were not within the scope of EEOC charge claiming discrimination in promotion and harassment); *Metcalf v. Omaha Steel Castings Co.*, 507 F. Supp. 679 (D. Neb.), *aff'd*, 676 F.2d 703 (8th Cir. 1981) (holding that charge of racially discriminatory discharge could not be expanded to include claims of discriminatory employment patterns and practices); *Jackson v. Ohio Bell Tel. Co.*, 555 F. Supp. 80 (S.D. Ohio 1982) (allegations of discriminatory seniority system, discriminatory standards of conduct, and harassment could not reasonably be expected to grow out of charge of discriminatory discharge); *Conrad v. Amp, Inc.*, 20 F.E.P. Cas. (BNA) 905 (M.D.N.C.

1979) (a charge of discriminatory discharge could not support claims of discrimination in promotions and work assignments).

In the case at bar, the Plaintiff's July 23, 1996 charge of discrimination specifically stated that it was based on discriminatory termination. (Complaint Exhibit 1, Appendix Tab 1.) The charge made no mention of any claims for discrimination in promotion, pay, benefits, or any other matter. Therefore, the Plaintiff's claims, other than her claim of discriminatory termination, are barred by the Plaintiff's failure to exhaust her administrative remedies.

III. THE PLAINTIFF HAS FAILED TO PRESENT A GENUINE ISSUE OF DISPUTED MATERIAL FACT REGARDING HER CLAIM UNDER THE EQUAL PAY ACT.

The Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1) (1978), prohibits discrimination in wages on the basis of sex. In order to prove a violation of the EPA, a plaintiff must make the following showing:

- The employees compared must be in the same establishment;
- They must be performing work that is equal, i.e., similar in content and equal in skill, effort, and responsibility;
- They must work under similar working conditions;
- The discrimination must be based on sex.

It is clear that, in the instant case, the Plaintiff has failed to present a genuine issue of disputed material fact with respect to the second and fourth elements set out above.

The Plaintiff's EPA claim is based on the fact that she had to train Gary Paul (a black male) on a particular machine and later he got the job working on the machine and the raise

that went with it. (Sweeney Deposition P109, L1-9; P112, L3-6.) To the extent that she bases her EPA claim on the comparative pay between Gary Paul and the Plaintiff, however, the claim must fail. The Plaintiff is not performing work that is similar in content and equal in skill, effort, and responsibility to the work performed by Gary Paul.

Any difference in pay between the Plaintiff and her male comparators is based solely on the company's bona fide salary schedule, which is based on job classification and experience. It is clear that an employee salary schedule based on experience is a factor other than sex which will preclude a finding of a violation of the EPA. *Irby v. Bittick*, 44 F.3d 949, 955-56 (11th Cir. 1995); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988). Likewise, no EPA violation is present where wages are set pursuant to an organization and compensation system which is based on legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue. *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520 (2d Cir. 1992).

As the affidavit of Kathy A. Tessin shows, the difference in pay between the Plaintiff and Gary Paul was based solely on the fact that Gary Paul was promoted in April 1992 to the job of Test Technician and in January 1994 to Junior Technician. During this time, the Plaintiff held the position of Maintenance Helper. The positions of Test Technician and Junior Technician are different in terms of job content and in the skill, effort, and responsibility required to successfully perform them than the job Plaintiff held at the time. (Tessin Affidavit ¶ 12.) It was the difference in the duties of the positions occupied by the Plaintiff and Paul at the time that accounted for any disparity in pay, and the disparity had

nothing to do with the sex of Gary Paul and the Plaintiff.[9] Any difference in pay between the Plaintiff and any other employee is likewise not attributable to sex, but rather to experience or job classification.

Furthermore, there simply is no evidence that any employee in the same position of Junior Technician, who performed work similar in content and equal in skill, effort, and responsibility, was paid more than the Plaintiff. In fact, under the company's salary schedule, the Plaintiff actually received a higher salary than many of her male comparators.

To the extent the Plaintiff bases her EPA claim on a comparison with other employees, the claim is likewise deficient. A comparison of Plaintiff's pay as a salaried employee in 1994 with males who were promoted to the same position she held, Junior Technician, shows her pay was in accord with the company salary schedules for salaried employees. (Appendix Tab 9, P4-5.) In this regard, Plaintiff received a salary of $22,360 in 1994 and, after a raise, a salary of $23,284 in 1995 (Appendix Tab 3), while male Luke Baker started as a Junior Technician in 1993 at $21,840 (Appendix Tab 10, P1), Paul Krewson started at $20,796 as a Junior Technician in 1994 (Appendix Tab 10, P2), Michael Majerick started in that job at $20,796 in 1994 (Appendix Tab 10, P3), Gary Paul (African American male) started in the job at $21,336 in 1994 (Appendix Tab 10, P4), and Dave Lekawn started at $21,696 in 1993. (Appendix Tab 10, P5.).

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[9]It should be noted that, when the Plaintiff was promoted to Junior Technician in 1994, she was paid $22,360, and recieved an increase to $23,284. When Gary Paul was promoted to Junior Technician in 1994, he was paid a salary of $21,336. Thus, the contention that the Defendant's salary schedule discriminates against females is completely without foundation.

Even going back to September 1993, which is outside the two-year limitations period and barely within the three-year limitations period applicable to willful violations, Plaintiff was paid more than the male employee who also held the position of Maintenance Helper. Andy Ames was paid $8.27 per hour in 1993, while the Plaintiff was paid $8.41 per hour. In January 1994, Ames was paid $8.60 per hour, while the Plaintiff was paid $8.87 per hour.

In sum, there is no evidence to indicate that Plaintiff was paid any less because of her sex in violation of the Equal Pay Act. The Plaintiff can therefore present no admissible evidence which would create a genuine issue of material fact regarding whether she was paid less than other employees performing work similar in content and equal in skill, effort, and responsibility, and that this pay differential was because of her sex. Therefore, the Defendant is entitled to summary judgment on the Plaintiff's EPA claim.

IV. THE PLAINTIFF HAS FAILED TO PRESENT A GENUINE ISSUE OF DISPUTED MATERIAL FACT REGARDING WHETHER THE EMPLOYER'S ARTICULATED REASON FOR HER DISCHARGE, HER DECEIT IN CONNECTION WITH HER UNEXCUSED ABSENCE FROM WORK, WAS A PRETEXT FOR DISCRIMINATION.

An employer retains the prerogative under Title VII to discharge an employee for any reason other than discrimination against a protected class. In a disparate-treatment case analyzed under the *McDonnell Douglas* framework,[10] the burden of proof or persuasion remains at all times with the plaintiff. Once the defendant has articulated a legitimate, nondiscriminatory reason for the challenged action, the plaintiff must then prove that the

[10]The Plaintiff can point to no direct evidence of discrimination in the instant case, and therefore the case must be analyzed using the formula set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination. *St Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

It is clear that in *Hicks* the Supreme Court reaffirmed the broad prerogative retained by an employer under Title VII. Thus, as the Court held in *Hicks*, in order to find in the plaintiff's favor, the factfinder must not only disbelieve the employer, it must also believe the plaintiff's explanation of intentional discrimination and must make a finding to that effect. In the wake of *Hicks*, in order for plaintiffs to be entitled to judgment, they must persuade the trier of fact both that the employer's asserted reasoning "was false, and that discrimination was the real reason" for the employer's action. *Id*. at 2752.

The court's inquiry regarding the employer's reason for an employment decision is thus necessarily a limited one. As one court has stated:

> [i]t is not the duty of a court to attempt to decide whether the business judgment of the employer was right or wrong. All a court does is to exercise a very limited review of the employment practices of an employer to see if the practices are shown to be lawful.

Verniero v. Air Force Academy School Dist. Number 20, 705 F.2d 388, 389 (10th Cir. 1983). In fact, the court may not substitute its own judgment for that of the employer. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992) (holding that district court erred in failing to credit law firm's articulated justification of plaintiff's lack of legal analytical ability; district court improperly substituted its own judgment for that of the firm, and relied on factors not utilized by the firm in making the promotion decision).

As the Eleventh Circuit explained in *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991), to avoid summary judgment or a directed verdict, an employment-

discrimination plaintiff cannot simply prove that the employer was mistaken in its judgment. Rather the employee must show that the employer's asserted belief in the justification is unworthy of credence. In *Elrod*, the plaintiff had been accused of sexual harassment. After investigating the allegations, the employer discharged Elrod, claiming that it believed the allegations of harassment. At trial, Elrod's proof focused primarily on the issue of whether or not he was, in fact, guilty of the harassment. The jury found in favor of Elrod, and the trial court denied the employer's motion for JNOV.

On appeal, the Eleventh Circuit Court of Appeals held that the trial court had erred in denying the JNOV. Specifically, the court stated that the inquiry should have been "limited to whether [the employer] believed that Elrod was guilty of harassment, and if so, whether this belief was the reason behind Elrod's discharge." *Id.* at 1470. The burden was on Elrod to "offer[] substantially probative evidence that age more likely than not motivated his discharge." *Id.* at 1471. In concluding that Elrod had failed to meet this burden, the court stated as follows:

> Elrod may have convinced the jury that the allegations against him were untrue, but he certainly did not present evidence that Sears' asserted belief in those allegations was unworthy of credence.

Id.

In the instant case, the employer has stated that the Plaintiff was terminated because Barr believed that the Plaintiff lied about the reason for her absence on June 13 and 14 1996. The uncontroverted evidence is that the Plaintiff was involved in an altercation with her former roommate in which the Plaintiff brandished a weapon and that the Plaintiff was incarcerated as a result. Barr learned of these events independently and therefore believed

that the Plaintiff was lying when she told Barr that the reason for her absence on June 13 and 14 was that she and her children were at home sick.

It is clear that an employer retains the prerogative to terminate an employee who it believes has been dishonest. *Hayes v. Community Gen. Osteopathic Hospital*, 940 F.2d 54 (3d Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992); *Booker v. Georgia-Pacific Corp.*, 688 F. Supp. 1069 (W.D.N.C. 1988). In *Hayes*, the court held that an employer had not violated Title VII in terminating a black employee for lying to his supervisors about the reasons he took a day off. In *Breneman v. Kennecott Corp.*, 799 F.2d 470 (9th Cir. 1986), the court held that an employee was lawfully discharged based on her superintendent's conclusion that she had not been truthful and could no longer be trusted. As in *Elrod*, the inquiry in *Breneman* focused on the employer's belief regarding the plaintiff's veracity, rather than whether the employee was or was not deceitful.

It is clear that, in the instant case, Barr believed that the Plaintiff had lied about the reason for her absence from work. Whether the Plaintiff was, in fact, sick is irrelevant. Rather, the inquiry must focus on whether Barr's belief in the Plaintiff's mendacity is unworthy of credence. The Plaintiff can point to no evidence, however, which would support a finding that discrimination was more likely than not the true motivation for her discharge. As the Eleventh Circuit noted in *Elrod*, the Plaintiff "faces a difficult burden here" because the primary player behind her termination, Barr, is "within the class of persons protected" by Title VII. *Elrod v. Sears, Roebuck & Co.*, 939 F.2d at 1471.

The Plaintiff clearly cannot meet this difficult burden, and, therefore, the employer in the instant case is entitled to summary judgment on the Plaintiff's discriminatory discharge claim.

CONCLUSION

For the foregoing reasons, the Plaintiff has failed to present a genuine issue of disputed material fact with respect to any of her claims under the EPA or Title VII. The Defendant therefore respectfully requests that this Court grant summary judgment in its favor, and dismiss the complaint.

Respectfully submitted,

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RESEARCHER'S NOTE

It should be noted that the Eleventh Circuit has held that a prima facie case under the EPA can be made out by showing discrimination in pay affecting even one employee of the opposite sex. *Price v. Lockhead Space Operations Co.*, 856 F.2d 1503 (11th Cir. 1988). That the difference in pay is due to a factor other than sex is made an affirmative defense under the EPA. *Futran v. Ring Radio Co.*, 501 F. Supp. 734, 738 (N.D. Ga. 1980).