UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

AMERIPRIDE SERVICES, INC.,

Defendant.

CASE NO. 03-065-S-MHW

~~[TENTATIVE]~~ **O R D E R DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING MOTION TO EXCLUDE MYNEAR AFFIDAVIT**

Before the Court is a motion by Defendant, Ameripride Services, Inc. ("Ameripride"), for summary judgment on the issue of damages. Following the filing of the moving, opposing, and replying papers, Ameripride submitted in support of the motion for summary judgment a Supplemental Memorandum (document # 39) and an affidavit by Shawn Mynear, the general manager of the Ameripride Twin Falls office, ("Mynear Affidavit"). Plaintiff, the Equal Employment Opportunity Commission ("EEOC" or "the Commission"), subsequently moved to exclude the Mynear Affidavit. After reviewing the papers, the oral argument, and for the reasons set forth below, the Court DENIES the motion for summary judgment on the issue of

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damages and DENIES the motion to exclude the Mynear affidavit.

I.

BACKGROUND

The Commission brought this action against Ameripride under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to correct allegedly unlawful employment practices on the basis of sex. The alleged discrimination occurred when Sandra Robison, an intervenor in this action, and Brenda Foster submitted applications in October of 2001 for a Customer Service Representative ("CSR") position at the Ameripride facility in Twin Falls. The CSR position required the delivery of Ameripride products to customers through the use of one of Ameripride's delivery vehicles. Ameripride interviewed both Robison and Foster for the position, but ultimately hired a different applicant, Mark Brown. Robison's deposition testimony recounts Robison's experience interviewing with Ameripride, during which the interviewer allegedly made sexist comments, stating that Robison "looked more like a secretary" than a truck driver. Robison Depo., 158:10–18.

Brown applied for the position on or around October 29, 2001, was hired and began employment during November, 2001, and continued employment through July, 2002. The parties do not dispute that on June 28, 2002, Ameripride hired Ryan Wilson in some capacity. The Commission contends that Ameripride hired Wilson as a CSR, whereas Ameripride claims that it hired Wilson as a "hopper," which is different from a CSR. Additionally, the parties do not dispute that on August 19, 2002, Ameripride hired Tuan Pothoff, another male, as a CSR in Twin Falls.

The parties also dispute how long Robison and Foster would have remained with Ameripride in a CSR position in the event that they had been hired. Ameripride contends that the deposition testimony of Robison and Foster conclusively establishes that they would have remained there only one or two years before resigning. In support of this contention with respect to Robison, Ameripride cites to Robison's deposition testimony in which she described how she and her husband decided to relocate to Las Vegas, Nevada, in May of 2003. Ameripride

contends that Robison's testimony establishes that Robison's husband relocated to Las Vegas in order to work there beginning in April, 2002. Robison Depo., 238:18–240:17. At that point in April 2002, Robison decided to work only part time because she had at least one child still living with her in Idaho. Robison also decided that she would move to Las Vegas once her son had completed high school in Idaho. *Id.* at 214:12–215:4, 236:10–20. Robison finally did move to Las Vegas in May, 2003 once her son graduated.

On the other hand, the Commission asserts that Ameripride misconstrues the import of Robison's deposition testimony. The Commission asserts that, although all of the above facts are accurate regarding Robison's decision to work part time and to relocate, Robison's husband would not have accepted employment in Nevada and Robison would not have relocated to Nevada if she had obtained employment at Ameripride or else where in Twin Falls. As evidence for this assertion, the Commission cites to Robison's deposition testimony in which she describes that her husband had previously turned down a number of job offers in Nevada when Robison was gainfully employed in Twin Falls. *Id.* at 207:11–208:8. The Commission contends that if Ameripride had hired Robison in October, 2001, she would not have had any reason to move to Nevada in May, 2003.

With respect to Foster, Ameripride asserts that she would have worked there only until her children had moved from the family home, at which time she would "go trucking" with her husband, who drove trucks for a living. *See* Foster Depo., 103:24–104:8; 109:24–110:14. The Commission, on the other hand, argues that nothing in the record supports Ameripride's assertion that Foster would have remained in the CSR position for only one or two years. At the time that Foster interviewed with Ameripride, her youngest child was only fourteen years old. Foster Depo., 39:2-6. As further support for its argument, the Commission cites the fact that shortly after being rejected by Ameripride, Foster was hired to drive a school bus and has remained in that position since that time, for almost three years. *Id.* at 119:25-120:7

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II.

LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962). However, the existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; to defeat the motion, the non-moving party must affirmatively set forth facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Id.* at 256, 106 S. Ct. at 2514. When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence of a genuine issue of material fact from the non-moving party. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). The moving party need not disprove the other party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2553-54 (1986).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512.

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III.

DISCUSSION

A. Motion for Summary Judgment

At issue in this motion for summary judgment is the amount of damages that would be available to Robison and Foster in the event that they prove liability for discrimination. Defendant argues that the amount of damages available depends on two factors: (1) the number of positions that would have been available to Robison and Foster at Ameripride and (2) the length of time that the applicant probably would have worked at the position if she had been hired. Defendant contends that the amount of damages available to Robison and Foster should be limited to "the applicants' probable career(s) with AmeriPride, and then divided in half." Def. Memo. in Support of Mot. for Summary Judgment, 17.

One of the purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372 (1975). "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Id.* at 418-19. Ameripride cites to Fourth Circuit law to establish that when a company is found to be liable for discrimination in hiring, the company is liable for the injured party's "loss of opportunity to bid on a job" because of the injured party's protected characteristic. *See White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1086 (4th Cir. 1977). The Fourth Circuit, in the context of racial discrimination in hiring, stated that the company "should be required to pay for each vacancy which existed and to which the eligible black employees could not aspire because of their race." *Id.* The Fourth Circuit went on to state that "if only one vacancy existed, for example, with twelve black employees eligible, it would be equally unjust to make the company pay twelve times for one injury as not to require it to pay at all." *Id.* Ameripride further cites Fourth Circuit law for the proposition that the "hypothetical work histories" of the discriminated-against applicants determines the amount of damages that is available to them. *Equal Employment Opportunity Comm'n v. Ford Motor Co.*, 645 F.2d 183, 189 (4th Cir. 1981).

In other words, Ameripride argues that the correct way to calculate the amount of damages available to Robison and Foster in this action is to determine the total amount each applicant would have earned had she been hired by Ameripride, then multiply that amount by the ratio of positions for which the applicants could have been hired to number of discriminated-against applicants. Ameripride argues that summary judgment is appropriate on the question of damages by arguing that it is undisputed that Robison and Foster could have been hired for only one potential position as a CSR at Ameripride and that it is further undisputed that Robison and Foster would have worked at Ameripride for only one or two years had they been hired for that one position.

1. Female Applicants' Hypothetical Work Histories

Without disputing Ameripride's proposed method of determining damages in this action, the Commission opposes the motion for summary judgment by arguing that there is a genuine dispute of facts that are material to Ameripride's proposed damage calculation. With respect to each applicant's hypothetical work history, clearly a genuine dispute exists. Because the inquiry here as to how long each applicant would have stayed in the CSR position is necessarily speculative, the Court is especially hesitant to find that no genuine dispute of material fact exists. Although Ameripride asserts that the deposition testimony indisputably shows that neither of the applicants would have stayed with Ameripride beyond two years, the Commission convincingly points out flaws in Ameripride's argument. While Foster may have planned to "go trucking" with her husband once her children were no longer dependent on her, it is not plausible to assert that she would have done so when her daughter was only sixteen years old. Similarly, Ameripride's assertion that Robison would have relocated to Nevada even if Ameripride had hired her as a CSR in Twin Falls is equally implausible. Robison's deposition testimony at least suggests that the only reason her husband accepted employment in Nevada was that it was the family's only option in light of Robison's inability to find work. Robison Depo., 207:11–208:8. In light of the conflicting interpretations of the deposition testimony and in light of the speculative nature of this inquiry, the issue of the applicants' hypothetical employment history is

one better left to determination by a jury.

2. Number of Vacancies to Which the Eligible Female Employees Could Not Aspire Because of Their Sex

With respect to the number of positions that would have been available to the applicants had they not been female, the Commission relies on a document produced by Ameripride in discovery, which is entitled "CSR's [sic] hired September 2001, thru [sic] September 6, 2002." The Commission relies on this document to establish that Ameripride hired Ryan Wilson as a CSR on June 28, 2002. The date of this alleged fact is significant because if Ameripride hired Wilson as a CSR on that date, it occurred prior to Mark Brown's resignation,[1] and shows that at least two positions would have been available to the applicants had they not been female.

The Court finds that summary judgment is not appropriate on the issue of how many positions would have been available to the female applicants because a genuine dispute of fact exists. For purposes of clarity and to ease the later discussion of the Commission's motion to exclude the affidavit of Shawn Mynear, the Court here recounts the sequence of facts alleged in the parties' papers. First, Ameripride moved for summary judgment stating that "[i]t is beyond dispute that between the time plaintiffs submitted their employment applications in October, 2001, and the time that Mr. Brown left his CSR position in July, 2002, there were no other CSR openings at the Twin Falls facility." In opposition, the Commission cited the list of CSRs hired between September of 2001 and 2002 to show that Ameripride hired Ryan Wilson prior to Brown's resignation, as discussed above. In reply to that opposition, Ameripride backed away from its earlier assertion and acknowledged that "two openings came about in the spring and summer of 2002," but Ameripride maintained that only one opening existed at the time that Robison and Foster applied. Pl. Reply, 2 n.1.

Two weeks later, Ameripride filed a Supplemental Memorandum in support of its motion for summary judgment. In this Supplemental Memorandum, Ameripride asserted that in spite of

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[1]As discussed in the Background section, Mark Brown was the applicant who applied and was interviewed at the same time as Robison and Foster, but who was hired following his interview. He resigned from the CSR position in July, 2002.

the list provided to the Commission showing Ryan Wilson as being hired in the Twin Falls facility as a CSR on June 28, 2002, Wilson was hired in Twin Falls not as a CSR, but as a "route hopper," which is different from a CSR. Def. Supp. Memo., 3. Along with the Supplemental Memorandum, Ameripride submitted the affidavit of Shawn Mynear ("Mynear Affidavit"). In the affidavit, Mynear states that he is the general manager of the Ameripride Twin Falls office. The Mynear Affidavit further states:

> Mr. Wilson was hired as a route hopper on June 26, 2002. When he completed his probation, he received a raise to $12.50/hr and continued in the route hopper position. The route hopper position is one which 'fills in' for absent CSRs. The route hopper does not earn commission. He also filled in as a shuttle driver during this period, out of the Twin Falls office. In December 2002, he became a CSR for Route 40 (out of Boise). . . . The [list of CSRs hired between September 2001 and 2002] was prepared by AmeriPride in 2003 when Ryan Wilson was a CSR and is unintentionally ambiguous.

Mynear Aff. ¶¶ 5-6.

Following the filing of the Supplemental Memorandum and the Mynear Affidavit, the Commission moved to exclude the Mynear Affidavit and alerted the Court to the inconsistency between the assertion in the Mynear Affidavit that the document was prepared in 2003 and the date stamp on the document stating that it was faxed on September 17, 2002. Predictably, Ameripride opposed the motion to exclude the affidavit, acknowledged that it was in fact created and faxed in 2002 for purposes of the administrative proceeding, and asserted that the Commission has known that Ameripride hired Wilson as a "route hopper" since January 26, 2004, when the Commission deposed the manager of the Twin Falls Ameripride branch, Frank Eckrote. In the Commission's Reply to Ameripride's opposition to the motion to exclude the Mynear Affidavit, the Commission raised for the first time the issue of whether Ameripride had a policy or custom of reviewing old applications on file for vacancies as they occurred and whether Ameripride is required by law to have such a policy.

After receiving all of these documents filed by the parties, it is not clear exactly how many vacancies the female applicants could have been eligible to fill, but it is clear that Ameripride's original assertion that "[i]t is beyond dispute that . . . there were no other CSR openings at the Twin Falls facility" misses the mark. Neither of the parties has succeeded in showing the number of vacancies actually available. It is not clear whether Ameripride would have or should have considered the female applicants for "route hopper" positions and whether such positions should constitute vacancies. It is also not clear whether Ameripride should have considered the female applicants for any CSR position that became available in the year following the date of their applications. It is not clear whether Ameripride had a policy of reviewing old applications and it is not clear whether, even in the absence of such a policy, Ameripride actually did reconsider the applications on file for male applicants.

The question of whether or not Ameripride had a policy of reviewing applications on file is a factual question and it is a question that the parties dispute. The Commission has offered evidence in the form of deposition testimony by Brian Gilliland, a service manager, that Ameripride routinely reviewed applications on file when openings occurred. *See* Gilliland Depo., 73:8-74:8. At oral argument, Ameripride disputed the existence of such a policy. Although the excerpts from the Gilliliand deposition support the notion that Ameripride reviewed applications on file at least sometimes, the few lines of testimony submitted to the Court are not sufficient to demonstrate conclusively that Ameripride had a policy of reviewing applications on file. However, the excerpts are sufficient to raise a genuine question of fact. If at trial the Commission can establish that Ameripride had a policy of retaining applications for one year and reviewing them when openings occurred, then the female applicants should have had the opportunity to compete for all vacancies that occurred during that year-long period.

Further, even if Ameripride does not have such a policy, if Ameripride actually retained and reviewed applications of male applicants when it was hiring in June and August of 2002, then the female applicants should have had the opportunity to compete for those positions also. Neither party has addressed the factual question of whether Ameripride actually did review CSR

applications on file when it hired Ryan Wilson (either as a CSR or a route hopper) in June, 2002 or when it hired Tuan Pothoff in August, 2002. If similarly situated male applicants were reconsidered when Ameripride made these hiring decisions in 2002, then Robison and Foster should have had the opportunity to be reconsidered also. At this point, the facts are insufficient to support a conclusion either way.

These questions of whether Ameripride would have or should have considered the female applicants for other similar positions and whether Ameripride would have or should have considered them for positions that became available after the date of their interviews significantly complicate the issue of how many opportunities to compete the female applicants were denied because of their sex. At this point, the evidence is clear that a jury could reasonably find that one vacancy existed or that two or three vacancies existed. These questions are based in fact and the parties ought to present them to a jury.

B. Motion to Exclude Mynear Affidavit

As discussed above, the Commission has moved to exclude the Mynear Affidavit. The Commission argues that Ameripride has violated Rules 26(a) and (e) and that the Court should exclude the affidavit under Rule 37(c) as a result of the violation. Under Rule 26(a)(1)(A) and (B), the parties must disclose to each other the names of people likely to have discoverable information that the disclosing party may use to support its claims and defenses and documents or tangible things that the disclosing party may use to support its claims and defenses. Fed. R. Civ. P. 26(a)(1)(A), (B). Further Rule 26(e) requires a party to supplement any disclosure "if the party learns that the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(a).

The Commission argues that Ameripride violated these discovery rules by disclosing the admittedly ambiguous document listing the CSRs hired between September of 2001 and 2002 and by failing to bring the ambiguity to light prior to filing the Mynear Affidavit. In opposition, Ameripride argues that it did not violate its duties to disclose or supplement because the

information regarding Wilson's employment as a "route hopper" was known to the Commission since the deposition of Frank Eckrote in January of 2004. Indeed, in the Eckrote deposition, the Commission discovered that Eckrote did not hire Wilson as a CSR, but as a "route hopper." Eckrote Depo., 169:10–171:6. Because the Commission was on notice that Wilson's employment status was in dispute, Ameripride did not have an obligation to disclose that under Rule 26(e) and, thus, did not violate Rule 26.

IV. DISPOSITION

For the foregoing reasons, the Court DENIES Ameripride's motion for summary judgment on the issue of damages and DENIES the motion to exclude the Mynear Affidavit.

IT IS SO ORDERED.

DATED: October 21, 2004

DAVID O. CARTER
United States District Judge

dkh

United States District Court
for the
District of Idaho
October 23, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:03-cv-00065

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

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_____Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 10-25-04

BY: DH
(Deputy Clerk)