*2010 U.S. Dist. LEXIS 3386, **

DIANE OLVERA, Plaintiff, v. SIERRA NEVADA COLLEGE; SCOTT GOODIN; LARRY LARGE; RAY RYAN; and DAVID WEBB, Defendants.

3:08-cv-00355-LRH-VPC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

2010 U.S. Dist. LEXIS 3386

January 14, 2010, Decided
January 15, 2010, Filed

CORE TERMS: summary judgment, notice, retaliation, terminated, termination, hostile, discrimination claim, work environment, citation omitted, discriminatory treatment, prima facie case, discriminatory, harassment, pretext, sexual, emotional distress, genuine, gender, work performance, evidence suggesting, harassing conduct, employment practice, burden shifts, nondiscriminatory reason, female employees, gender-based, male, counters, evidence indicating, material fact

COUNSEL: **[*1]** For Diane Olvera, Plaintiff: Mark L. Mausert, LEAD ATTORNEY, Law Office Of Mark Mausert, Reno, NV; Robert R. Hager, Hager and Hearne, Reno, NV; Treva J. Hearne, Hager & Hearne, Reno, NV.

For Sierra Nevada College, Scott Goodin, Larry Large, Ray Ryan, David Webb, Defendants: Arthur A Zorio, WATSON ROUNDS, P.C., Reno, NV; Kelly G Watson, Watson Rounds, Las Vegas, NV.

JUDGES: LARRY R. HICKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: LARRY R. HICKS

OPINION

ORDER

Before the court is Defendants Sierra Nevada College, Scott Goodin, Larry Large, Ray Ryan, and David Webb's (collectively "Defendants") Motion for Summary Judgment (# 37 [1]). Plaintiff Diane Olvera has filed an opposition (# 41) to which Defendants replied (# 42). Defendants have also filed a motion to supplement the exhibits submitted in support of the motion for summary judgment (# 44). In response, Plaintiff filed a "Motion to Strike Supplemental Filing or, in the alternative, Motion to Submit Supplemental Evidence" (# 45) to which Defendants filed a reply and opposition (# 46).

FOOTNOTES

[1] Refers to the court's docket entry number.

As a preliminary matter, the court will deny Defendants' Motion to Supplement (# 44). In the motion, Defendants seek to introduce evidence of **[*2]** harassing conduct Plaintiff engaged in after filing the complaint in this matter. On the whole, this evidence is not relevant to the dispute now before the court and does not assist the court in its consideration of the motion for summary judgment. Accordingly, the court will deny the motion.

I. Facts and Procedural History

This is an employment discrimination dispute arising out of Plaintiff's work as an administrative assistant for Sierra Nevada College. In June of 2007, the college hired Defendant Scott Goodin as its Chief Financial Officer. Shortly after, Goodin hired Plaintiff as his administrative assistant. Plaintiff also served as an administrative assistant to the college's Provost, Defendant Ray Ryan, the college's President, Defendant Larry Large, and the college's Human Resources Director, Defendant David Webb.

Plaintiff's employment with the college was relatively short-lived, and on December 4, 2007, the college terminated her. The parties dispute what led to Plaintiff's termination. Defendants allege that in late November or early December, 2007, they decided to terminate Plaintiff because of poor work performance. [2] However, in November of 2007, before Defendants decided **[*3]** to terminate her, Plaintiff submitted a medical leave request form informing Defendants of an upcoming medical procedure. Because of the procedure, Defendants decided to delay Plaintiff's termination.

FOOTNOTES

[2] Defendants also fault Plaintiff for (1) dressing provocatively, (2) injecting sexual innuendo and humor into conversations, and (3) taking an interest in on-campus events. Plaintiff disputes each of these allegations. Regardless, beyond Plaintiff's involvement in on-campus events negatively affecting her work performance, Defendants do not appear to contend that these issues caused Plaintiff's termination.

Plaintiff denies ever under-performing at work and counters that Defendants terminated her (1) because of her gender and (2) because she complained about discriminatory treatment. Plaintiff notes that in October of 2007, the college hired Theresa DiMaggio to serve as Executive Assistant to the President. Plaintiff states that shortly after starting work, DiMaggio began dating Plaintiff's supervisor, Goodin. Thereafter, Plaintiff alleges she suffered discriminatory treatment because DiMaggio had a sexual relationship with Goodin, and Plaintiff did not.

Beyond general allegations that DiMaggio **[*4]** received favorable treatment, Plaintiff largely fails to identify particular instances of harassing conduct or evidence suggesting that Defendants' possessed gender-based animus. However, she does note that, in response to hearing about Plaintiff's upcoming medical procedure, which involved Plaintiff's breasts, Goodin stated, "[A]though [your surgeon is] a good surgeon, if he cut[s] too much, your boobs [are] big enough [that you will] have plenty left over." (Pl.'s Opp. (# 41), Ex. 1 at 7, P 11.) In addition, two weeks before the procedure, Goodin told her she might die.

On December 3, 2007, Ryan and Goodin state that they met with Plaintiff to discuss her work performance. After the meeting, Plaintiff immediately went to Webb, the Human Resources Director, and complained about discriminatory treatment and a hostile working environment. Webb states that when Plaintiff complained, she was visibly upset and did not speak to him for more than ten seconds. Plaintiff counters that she never attended such a meeting, but she admits that on December 3, 2007, she complained about her discriminatory treatment and work environment.

The following day, Larry, Webb, and Ryan met to discuss Plaintiff's **[*5]** employment. At the meeting, Ryan stated that Plaintiff had given him a photograph of DiMaggio's car parked in front of Goodin's house as evidence of their "affair." Because of security concerns arising out of this incident and other incidents where Plaintiff allegedly stated that she had guns at her house and knew how to use them, Defendants decided to immediately inform Plaintiff of her termination.

Plaintiff counters that Defendants terminated her on December 4, 2007, because of her complaints about the relationship between Goodin and DiMaggio. She alleges that when asked, Webb confirmed that she was terminated for making the complaints. Webb denies ever making such a statement.

II. Legal Standard

Summary judgment is appropriate only when "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). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party **[*6]** opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.,* 236 F.3d 1148, 1154 (9th Cir. 2001).

The moving party bears the burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that is "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.,* 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

To successfully rebut a motion for summary judgment, the non-moving party must point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J,* 208 F.3d 736 (9th Cir. 2000). A "material fact" is a fact "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Where reasonable minds could differ on the material facts **[*7]** at issue, summary judgment is not appropriate. *See v. Durang,* 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material fact is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby,* 477 U.S. at 248. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to establish a genuine dispute; there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at 252.

III. Discussion

Plaintiff asserts the following claims for relief: (1) discrimination; (2) retaliation; (3) intentional infliction of emotional distress; and (4) a violation of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1462. Defendants seek summary judgment on each of these claims.

A. Discrimination

Plaintiff alleges Defendants discriminated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and the Fourteenth Amendment of the United States Constitution.

As a preliminary matter, the court first finds that Plaintiff's claim based on the Fourteenth Amendment must fail. To establish liability under 42 U.S.C. § 1983, **[*8]** a plaintiff must demonstrate the following: (1) the defendant acted under color of state law; and (2) the defendant deprived the plaintiff of a right secured by the Constitution or laws of the United States. *Learned v. Bellevue,* 860 F.2d 928, 933 (9th Cir. 1988) (citing 42 U.S.C. § 1983). Sierra Nevada College is a private institution, and Plaintiff has failed to present any evidence indicating that Defendants otherwise acted under color of state law. Accordingly, summary judgment on this claim is appropriate.

Title VII makes it an unlawful employment practice to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." [3] 42 U.S.C. § 2000e-2. To prevail, the plaintiff must establish a prima facie case of discrimination by presenting evidence that "gives rise to an inference of unlawful discrimination." *Cordova v. State Farm Ins. Co.,* 124 F.3d 1145, 1148 (9th Cir. 1997); *see also McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). A plaintiff can establish a discrimination claim through either the burden shifting framework set forth in *McDonnell* **[*9]** *Douglas* or with direct or circumstantial evidence of discriminatory intent. *See Metoyer v. Chassman,* 504 F.3d 919, 931 (9th Cir. 2007) ("When responding to a summary judgment motion . . . [the plaintiff] may proceed using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer].") (citation omitted) (alterations in original). Because the parties have proceeded under the *McDonnell Douglas* framework the court will do so here.

FOOTNOTES

[3] The court notes that Plaintiff has failed to present evidence indicating that prior to filing suit, she filed a claim with the Nevada Equal Rights Commission or the Equal Employment Opportunity Commission ("EEOC"). "A person seeking relief under Title VII must first file a charge with the EEOC within 180 days of the alleged unlawful employment practice, or, if . . . the person initially instituted proceedings with the state or local administrative agency, within 300 days of the alleged unlawful employment practice." *Surrell v. Cal. Water Serv. Co.,* 518 F.3d 1097, 1104 (9th Cir. 2008) (citing 42 U.S.C. § 2000e-5(e)(1)).

The Supreme **[*10]** Court has held that while the timely pursuit of administrative remedies is a condition precedent to a Title VII Claim, the requirement is not jurisdictional. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982)). Thus, like the statute of limitations, the requirement is subject to waiver, estoppel, and equitable tolling. *Zipes,* 455 U.S. at 393; *see also Surrell,* 518 F.3d at 1104.

Here, although Plaintiff appears to have failed to file a claim with NERC or the EEOC, Defendants do not argue that Plaintiff's claims are barred for this reason. As such, Defendants have effectively waived this argument. *See Temengil v. Trust Territory of Pac. Islands,* 881 F.2d 647, 654 (9th Cir. 1989) (applying *Zipes* to situation where the plaintiff completely failed to file any claim with the EEOC).

Under the *McDonnell Douglas* framework, the plaintiff carries the initial burden of establishing a prima facie case of discrimination. *See McDonnell Douglas,* 411 U.S. at 802. In particular, the plaintiff must show that (1) she belongs to a protected class, (2) she was qualified for her position, (3) she suffered an adverse employment action, and (4) similarly situated individuals outside of her protected **[*11]** class were treated more favorably. *Davis v. Team Elec. Co.,* 520 F.3d 1080, 1089 (9th Cir. 2008) (*citing Chuang v. Univ. of Cal. Davis,* 225 F.3d 1115, 1126 (9th Cir. 2000)). If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly

discriminatory conduct. *McDonnell Douglas,* 411 U.S. at 802. If the defendant provides such a justification, the burden shifts back to the plaintiff to show that the defendant's justification is a mere pretext for discrimination. *Id.* at 804.

In supporting her discrimination claim, Plaintiff relies on two theories of discrimination. First, Plaintiff appears to assert the so-called "paramour" theory of discrimination. Under this theory, a plaintiff bases her discrimination claim on allegations of favoritism arising out of a supervisor's relationship with a co-worker. However, unless a plaintiff identifies employment benefits or opportunities that she was entitled to but did not receive because of the relationship, the plaintiff's claim fails. *Candelore v. Clark County Sanitation Dist.,* 975 F.2d 588, 590 (9th Cir. 1992). Here, Plaintiff has not identified **[*12]** the denial of any such benefits or opportunities. Accordingly, to the extent Plaintiff bases her discrimination claim on the effects of DiMaggio and Goodin's relationship, summary judgment is appropriate.

Plaintiff also alleges she was discriminated against because of her gender. However, Plaintiff has failed to cite any evidence suggesting that she was terminated because of her gender or that Defendants treated similarly situated males more favorably. Plaintiff's citation to *Equal Employment Opportunity Commission v. National Education Association,* 422 F.3d 840 (9th Cir. 2005), and other cases is unavailing. For example, in *National Education Association,* female employees brought a claim for hostile work environment harassment alleging that the assistant executive director of the National Education Association-Alaska frequently shouted at female employees in a loud and hostile manner and was physically threatening to female employees. *Id.* at 842-844. Although the conduct was not sex or gender-based, the court held, "[O]ffensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences **[*13]** in the harassment suffered by female and male employees." *Id.* at 842. Thus, the court noted, regardless of whether harassing conduct is sex or gender related, the ultimate question is whether the conduct affected women more adversely than it affected men. *Id.* at 845.

This case is distinguishable from *National Education Association.* There, the plaintiffs brought a claim for hostile work environment harassment. Here, Plaintiff alleges a claim for disparate treatment discrimination. [4] Moreover, unlike in *National Education Association,* Plaintiff has not cited to any evidence suggesting objective differences in Defendants' treatment of male and female employees. In fact, Plaintiff has failed to present any evidence of Defendants' treatment of similarly situated male employees. As such, to the extent Plaintiff alleges gender-based discrimination, the court will grant summary judgment on Plaintiff's discrimination claim. [5]

FOOTNOTES

[4] To the extent Plaintiff believes she has stated a claim for hostile work environment harassment, the court rejects such a claim. Plaintiff has not identified harassing conduct sufficiently severe or pervasive to alter the conditions of her employment. *See Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 270-71, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001); **[*14]** *see also Candelore v. Clark County Sanitation Dist.,* 975 F.2d 588, 590 (9th Cir. 1992) ("A co-worker's romantic involvement with a supervisor does not by itself create a hostile work environment.").

Likewise, Plaintiff does not appear to state a claim for quid pro quo sexual harassment. To establish such a claim, Plaintiff must show that an individual "explicitly or implicitly conditioned a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct." *Heyne v. Caruso,* 69 F.3d 1475, 1478 (9th Cir. 1995) (citation omitted). There is no evidence in the record suggesting that Defendants asked Plaintiff to submit to sexual demands or conduct.

[5] The court further notes that Plaintiff has failed to demonstrate that Defendants' offered

reasons for her termination are a mere pretext for discrimination. When the defendant demonstrates a legitimate, nondiscriminatory reason for its employment decision, the *McDonnell Douglas* presumption of discrimination "simply drops out of the picture." *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir. 1994) (*quoting St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1994)). The ultimate burden rests on the plaintiff **[*15]** to demonstrate that the defendant's offered reasons are a pretext for the employer's true discriminatory motive. *Id.* at 890. A plaintiff may demonstrate pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Snead v. Metro. Prop. & Cas. Ins. Co.,* 237 F. 3d 1080, 1093-94 (9th Cir. 2001) (*quoting Texas Dept. Cmty. Affairs v. Burdine,* 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

Plaintiff has failed to meet her burden here. No evidence before the court suggests that Defendants took the above-described actions because of Plaintiff's gender. While, as discussed below, Defendants' actions may give rise to a claim for retaliation, the evidence before the court does not support a gender-based discrimination claim. Accordingly, summary judgment with regard to Plaintiff's discrimination claim is appropriate.

B. Retaliation

Plaintiff alleges Defendants retaliated against her for complaining about her allegedly discriminatory treatment and hostile work environment. Under § 2000e-3(a), it is unlawful "for an employer to discriminate against any of his employees . . . **[*16]** because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

To establish a prima facie case of retaliation, a plaintiff must demonstrate that "(1) she engaged in an activity protected under Title VII; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action." *Thomas v. City of Beaverton,* 379 F.3d 802, 811 (9th Cir. 2004) (*citing Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir. 2000)). If a plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for its decision. *Ray,* 217 F.3d at 1240. If the defendant demonstrates such a reason, the burden shifts back to the plaintiff to show that the defendant's reason was a mere pretext for a discriminatory motive. *Id.*

Although Defendants assume without admitting that Plaintiff can establish a prima facie case of retaliation, the court will address this aspect **[*17]** of the *McDonnell Douglas* analysis briefly. Viewing the evidence in the light most favorable to Plaintiff and resolving all factual disputes in her favor, the evidence suggests that Plaintiff was terminated a day after complaining that her work environment was hostile and that she suffered discriminatory treatment because DiMaggio had a sexual relationship with Goodin, and Plaintiff did not. In light of the close temporal proximity between Plaintiff's complaint and her termination as well as Plaintiff's evidence suggesting that Webb confirmed that she was fired because of her complaint, the court finds that issues of fact remain concerning whether Defendants terminated Plaintiff because she complained about harassment and discrimination.

Regardless, Defendants argue they have demonstrated legitimate, nondiscriminatory reasons for terminating Plaintiff. For example, Defendants contend that they terminated Plaintiff because of her poor work performance and because she engaged in bizarre and threatening behavior. Plaintiff counters that her work performance was never sub-par and that she did not engage in inappropriate behavior. Thus, Plaintiff contends the reasons now offered by Defendants **[*18]** are a pretext for their true retaliatory motive. [6]

FOOTNOTES

[6] While Plaintiff does not phrase her challenge in the specific terms used in the *McDonnell Douglas* framework, the court nonetheless finds that Plaintiff raises arguments and presents evidence addressing the pretextual nature of Defendants' asserted reasons for her termination.

Plaintiff supports her arguments almost entirely through statements in her affidavit. Defendants ask the court to reject Plaintiff's affidavit pursuant to the "sham affidavit rule." "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.,* 952 F.2d 262, 266 (9th Cir. 1991) (citations omitted).

Here, Defendants have not identified any deposition statement or other sworn testimony contrary to the statements in Plaintiff's affidavit. Accordingly, the court finds that Plaintiff's affidavit is not an attempt to create a "sham issue of fact." *Id.* at 266. [7]

FOOTNOTES

[7] Defendants' contention that the allegations in Plaintiff's complaint are sufficient to invoke the sham affidavit rule is unsupported by legal authority.

Because disputed issues of fact remain concerning **[*19]** Plaintiff's prima facie claim of retaliation and the pretextual nature of Defendant's offered reasons for the decision to terminate Plaintiff, the court must deny summary judgment on Plaintiff's retaliation claim.

The court notes that its denial of summary judgment extends only to Sierra Nevada College. As to the individual defendants, Title VII limits civil liability to the employer. *See Miller v. Maxwell's Int'l,* 991 F.2d 583, 587 (9th Cir. 1993) (citations omitted). Thus, "individual defendants cannot be held liable for damages under Title VII . . . ." *Id.* (citation omitted). To the extent Plaintiff's retaliation claim alleges retaliation by Defendants Goodin, Large, Ryan, and Webb, the court will grant summary judgment.

C. Intentional Infliction of Emotional Distress

To establish a claim for intentional infliction of emotional distress, the plaintiff must demonstrate the following: (1) "extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress"; (2) severe or extreme emotional distress; and (3) actual or proximate causation. *Star v. Rabello,* 97 Nev. 124, 625 P.2d 90, 92 (Nev. 1981) (citation omitted).

Extreme and outrageous conduct "is that **[*20]** which is 'outside all possible bounds of decency' and is regarded as 'utterly intolerable in a civilized community.'" *Maduike v. Agency Rent-A-Car,* 114 Nev. 1, 953 P.2d 24, 26 (Nev. 1998) (citations omitted). This is not such a case. The court finds no allegations in this case that amount to extreme and outrageous conduct, and Plaintiff has pointed to no specific evidence to support such a claim. Thus, summary judgment on this claim is appropriate.

D. ERISA

Plaintiff alleges that, after her termination, Defendants failed to notify her of her right to continued health coverage under the Consolidated Omnibus Budget Reconciliation Act

("COBRA"), 29 U.S.C. §§ 1161-1169. COBRA requires administrators of covered group health plans to notify terminated employees that they may continue their benefits after their employment ends. 29 U.S.C. §§ 1161(a), 1163, 1166(a)(4).

Although § 1166(a)(4) does not specify the steps needed to notify plan participants of their right to continued coverage, courts have generally held that a "good faith attempt to comply with a reasonable interpretation of the statute is sufficient." [8] *Crotty v. Dakotacare Admin. Servs.,* 455 F.3d 828, 830 (8th Cir. 2006) (citation omitted); *see* **[*21]** *also Torres-Negron v. Merck & Co.,* 488 F.3d 34, 45 (1st Cir. 2007); *Degruise v. Sprint Corp,* 279 F.3d 333, 336 (5th Cir. 2002) ("[E]mployers are required to operate in good faith compliance with a reasonable interpretation of what adequate notice entails."); *Smith v. Rogers Galvanizing Co.,* 128 F.3d 1380, 1383-84 (10th Cir. 1997). Thus, several courts have found that the statute does not require actual notice. Instead, employers comply with § 1166(a) when they send COBRA notices by means reasonably calculated to reach the recipient. *See Crotty,* 455 F.3d at 830 (citing cases).

FOOTNOTES

[8] The Ninth Circuit has not addressed this issue.

Plaintiff argues that constructive notice is not adequate where the employer knows that the employee never actually received the notice. In support of this argument, Plaintiff cites *Scott v. Suncoast Beverage Sales, Ltd.,* 295 F.3d 1223 (11th Cir. 2002). There, the employer contracted with a third party to send the COBRA notice, but the employer failed to present any evidence indicating that the third party actually mailed the notice to the plaintiff. The Eleventh Circuit held, "Simply hiring an agent and then instructing the agent to send notice is not sufficient **[*22]** to satisfy the statute, where there is no evidence that the agent sent out a notice to the plaintiff, nor any evidence that the principal took the steps necessary to ensure that the agent would, in all cases, make such notification." *Id.* at 1231.

This case is easily distinguishable from *Scott.* Here, on December 11, 2007, through a third party administrator, Sierra Nevada College, sent Plaintiff a notice of her rights under COBRA at her last known address. Several courts have specifically found that employers comply with the statute when the send the notices via first class mail to the employee's last known address. *See Torres-Negron v. Merck & Co.,* 488 F.3d at 45 (citing cases). Although it is not clear whether Defendants mailed Plaintiff's notice via first class mail, it is nonetheless undisputed that Defendants mailed Plaintiff her COBRA notice to her last known address. Under these facts, the court finds that Defendants have met their burden, and the court will grant summary judgment on this claim.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment (# 37) is DENIED in part and GRANTED in part.

IT IS **[*23]** FURTHER ORDERED that Defendants' Motion to Supplement (# 44) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike (# 45) is DENIED.

IT IS FURTHER ORDERED that the parties shall lodge their proposed joint pretrial order within thirty (30) days from entry of this Order. *See* Local Rules 16-4 and 26-1 (e)(5).

IT IS SO ORDERED.

DATED this 14th day of January, 2009.

/s/ Larry R. Hicks

LARRY R. HICKS

UNITED STATES DISTRICT JUDGE

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