IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROBIN HESS-WATSON,	)	
	)	
Plaintiff,	)	**Civ. Action No. 7:03cv00389**
	)	
v.	)	**MEMORANDUM OPINION**
	)	
JOHN E. POTTER, Postmaster General, U.S. Post Office,	)	**By: Samuel G. Wilson, Chief United States District Judge**
	)	
Defendant.	)	

Robin Hess-Watson brings this suit against the Postmaster General ("Postmaster") alleging "sex-plus" employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 *et seq*. The Postmaster has moved to dismiss Hess-Watson's claim, or in the alternative, for summary judgment.[1] Hess-Watson's claim is now before the court on that motion. Since Hess-Watson cannot demonstrate that she was treated differently than similarly situated males, the court grants the Postmaster's motion for summary judgment.[2]

I.

Hess-Watson was employed by the U.S. Postal Service as a Data Conversion Operator

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[1] In the Postmaster's brief supporting its motions, he asserts that Hess-Watson's claim should be barred because it was not filed in a timely manner. At oral argument, however, the Postmaster withdrew that assertion and this court does not consider it.

[2] In addition to not establishing a male comparator, Hess-Watson fails to show that the Postmaster actually discriminated against women with young children by extending to them less favorable employment positions. Other than her own allegations, Hess-Watson presents the affidavit of a co-employee, Kelly McCroskey, who likewise believed the Postmaster discriminated against her because she had small children. These bear-boned beliefs, however, do not prove that the Postmaster discriminated against them.

("DCO") at the Postal Service's Salem, Virginia Remote Encoding Center. When an item of mail is unreadable by the Postal Service's automated equipment, a photograph of the item is sent to a DCO at a remote encoding center. The DCO reads the photograph, deciphers the address, and correctly routes the item. Many DCOs are transitional employees, or temporary employees hired for 360 day periods with no right of employment. If the volume of work is less than expected, the Postal Service may terminate transitional employees at anytime. Hess-Watson was a transitional employee.

In June 2001, the Postal Service notified employees that it was closing the Salem remote encoding center, and that center closed on May 4, 2002. At the same time, several transitional employee DCO positions opened in Roanoke, Virginia. The Postal Service notified the Salem employees of the openings and invited interested employees to apply for a transfer. A total of six transitional employees from the Salem facility, all of whom were women, requested a transfer to Roanoke. Hess-Watson's request was the last request received.

Robin Lovelace, a human resources employee at the Roanoke facility, processed the transfer requests. In accord with her typical practice, she reviewed each applicant's personnel folder and placed each applicant's file in the order in which she received the transfer request. Although it is unclear if the applicants were notified of this procedure, Lovelace allowed the applicants to choose from the available positions in that same order. Once the plant manager determined the schedules and hours of the available positions, Lovelace called the applicants in order and asked them to rank their choices.

Lovelace spoke to Hess-Watson, who chose a probable schedule of 1 a.m. to 7 a.m. with an estimated 24 hours of work per week. After this conversation, however, the plant manager received a

call from one of Hess-Watson's co-workers, asking why she had not been offered a position prior to Hess-Watson because she knew her transfer request was received before Hess-Watson's, who had been "out having the baby." After reviewing her files, Lovelace learned that the transfer requests were out of order, and that Hess-Watson had inadvertently been placed ahead of her fellow co-workers. Lovelace then called all the applicants again, but this time in the correct order, and informed the applicants of the error. The applicants chose their desired time slots. Hess-Watson's original choice was picked by a co-worker, who had submitted her transfer request before Hess-Watson.

Hess-Watson filed an EEO Complaint, which was fully investigated.[3] On March 20, 2003, the Postal Service issued a Final Agency Decision finding no discrimination. Hess-Watson then filed this current action on June 24, 2003.

II.

Hess-Watson attempts to assert a Title VII claim under the theory of "sex plus" discrimination, as established by Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (holding that a lower court erred by interpreting the civil rights statutes to permit "one hiring policy for women and another for men – each having pre-school-age children"). Although Hess-Watson presents no direct evidence of discrimination, she claims that the Postmaster violated Title VII by extending less desirable employment

[3] Hess-Watson's EEO Complaint alleged pregnancy discrimination, but her current action is based on a theory of "sex plus" discrimination. However, if a claim is not presented in the EEO Complaint, it may be presented in a Title VII action only if the claim is reasonably related to the administrative claim or was covered by the administrative investigation. Evans v. Tech. Applications Serv. Co., 80 F.3d 954, 963 (4th Cir. 1996). Because this court finds that Hess-Watson failed to establish a prima facie case of "sex plus" discrimination, it does not reach the question of whether the complaints are reasonably related or whether the administrative investigation covered the current allegation.

positions to women with small children, thus permitting an inference of discrimination. Because Hess-Watson has no evidence that she was treated differently than similarly situated men, she cannot establish a prima facie case of "sex plus" discrimination, and this court grants the Postmaster's motion for summary judgment.

In assessing a Title VII case alleging discriminatory treatment, the court employs a three-step process. First, the plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Second, if the plaintiff succeeds, the burden of proof shifts to the employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for its action. Id. Third, should the employer successfully rebut the presumption, the plaintiff must prove by a preponderance of the evidence that the employer's legitimate, nondiscriminatory reason is merely a pretext for discrimination. Id. During this three-step analysis, however, the ultimate burden of persuasion remains at all times with the plaintiff. Id.

In this case, Hess-Watson has failed to met her initial burden of establishing a prima facie case of discrimination. In order to establish a prima facie case based on a "sex plus" theory of employment discrimination, the plaintiff must show that similarly situated men were treated differently than women.[4]

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[4] Hess-Watson, relying on Bryant v. Aiken Regional Medical Centers, Inc., 333 F.3d 536 (4th Cir. 2003), claims that she does not need to establish a male comparator in order to succeed on a "sex plus" discrimination claim. In Bryant, a black employee alleged disparate treatment on the basis of race. The court held that the employee need not identify a white comparator in order to establish a prima facie case of race discrimination under Title VII. Id. at 545. "We would never hold, for example, that an employer who categorically refused to hire black applicants would be insulated from judicial review because no white applicant had happened to apply for a position during the time frame in question." Id. at 545-46.

Fisher v. Vassar Coll., 70 F.3d 1420, 1447 (2nd Cir. 1995) (refusing to consider a claimant's statistics in a "sex plus" discrimination case where the statistics did not provide a comparison of women to similarly situated men); Bryant v. Int'l Schs. Servs., Inc., 675 F.2d 562, 575-76 (3d Cir. 1982) (rejecting a plaintiff's "sex plus" claim where she failed to present evidence that similarly situated males received better or even different treatment); Fuller v. GTE Corp., 926 F. Supp. 653, 657-58 (M.D. Tenn. 1996) (dismissing plaintiff's "sex plus" discrimination claim because she failed to "even allege that males were treated more favorably"). See Earwood v. Cont'l Southeastern Lines, Inc., 539 F.2d 1349, 1651 (4th Cir. 1976) (noting that under a "sex plus" theory, "regulations limiting employment of women with small children or who are married, but not restricting men similarly situated, have been struck down"). Hess-Watson, however, presents no evidence that similarly situated males, in this case males with small children, were treated differently than women with small children. Rather, she claims that the most desirable positions were filled by women without small children, but in the absence of a male comparator, this simply does not establish a viable "sex plus" discrimination claim. Therefore, the court will grant the Postmaster's motion for summary judgment.

III.

Since Hess-Watson failed to show a male comparator and establish a prima facie case of "sex

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Hess-Watson, however, misapplies Bryant. Title VII prohibits discrimination in the workplace on the basis of race or sex. See 42 U.S.C. § 2000e *et seq*. Presumably, like Bryant, where the plaintiff alleged race discrimination, one could establish a sex discrimination claim without identifying a male comparator. Hess-Watson, however, never alleges discrimination on the basis of her sex, a requirement to establish a prima facie case. The "sex plus" theory of discrimination does not establish a new protected class, but merely allows a subgroup of an already protected class, in this case women, to establish a prima facie case of sex discrimination. Without discrimination on the basis of sex, however, a sex discrimination claim cannot be maintained.

plus" discrimination, this court need not examine the other grounds advanced by the Postmaster's motions. Therefore, for the reasons stated above, the court grants the Postmaster's motion for summary judgment.

ENTER: This ___ day of January, 2004.

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Chief United States District Judge

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ROANOKE DIVISION

ROBIN HESS-WATSON,	)	
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Plaintiff,	)	**Civ. Action No. 7:03cv00389**
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v.	)	**ORDER**
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JOHN E. POTTER, Postmaster General, U.S. Post Office,	)	**By: Samuel G. Wilson, Chief United States District Judge**
	)	
Defendant.	)	

In accordance with the court's memorandum opinion entered this day, it is **ORDERED** and **ADJUDGED** that defendant's Motion for Summary Judgment is **GRANTED**.

This action is hereby **STRICKEN** from the active docket of this court.

ENTER: This ___ day of January, 2004.

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Chief United States District Judge