IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHELEEN DUMAS	:	
v.	:	Civil Action No. DKC 2007-3364
THE EASTER SEAL SOCIETY FOR DISABLED CHILDREN AND ADULTS, INC.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this employment discrimination case is Defendant's Motion for Summary Judgment. (Paper 4). The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, Defendant's motion will be granted.

I. Background

On March 29, 2006, Sheleen Dumas ("Plaintiff"), an African-American female, was hired by The Easter Seal Society for Disabled Children and Adults, Inc. ("Defendant" or "Easter Seals") as Vice President of Child Development Centers. Defendant is a non-profit organization that provides assistance to people with disabilities, including day care for children, adults, and senior citizens. As Vice President of Child Development Centers, Plaintiff was responsible for supervising employees at Defendant's child development centers located in Maryland, Virginia, and the District of Columbia. Plaintiff was assigned to work out of Defendant's

Child Development Center in Falls Church, Virginia. She was terminated on September 14, 2006, less than five months later. Defendant contends that she was relieved of her position for unsatisfactory performance.

In October 2006, Plaintiff filed a race and sex discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). On or about September 21, 2007, the EEOC issued a right to sue letter. On December 12, 2007, within the required 90-day period, Plaintiff filed a lawsuit against Easter Seals for (1) race and sex discrimination under Title VII of the Civil Rights Act of 1964, and (2) wrongful termination under Virginia law.

II. Facts Relating to Termination

Plaintiff was terminated on September 14, 2006, for deficient performance and her inability to resolve performance issues, including late arrival to meetings and company events, failure to meet deadlines or accurately follow through on requests, lack of positive communication, and poor comprehensive decision making. (Paper 4, Ex. 2, Judy Aff. ¶¶ 8, 11). The following facts are either undisputed, or taken in the light most favorable to Plaintiff, except where otherwise specifically noted.

On August 18, 2006, while the Falls Church Center Director, Laurence Nurse, was on vacation, Plaintiff received reports from four permanent teachers at the Center alleging that the substitutes in the Ladybug classroom had been involved in serious child abuse

and neglect. (Paper 7, Ex. 2, Dumas Aff. ¶ 17). Upon receiving the reports of abuse from the permanent teachers, Plaintiff sent the substitute teachers home early for the day and told them to contact Nurse when he returned to work the following Tuesday. (*Id.* ¶ 21). Two of the substitutes became very angry and created a disturbance in the Center parking lot by stopping cars of parents who were arriving to pick up their children. (*Id.*). In response to the disturbance, Plaintiff called the Falls Church Police to report both the disturbance in the parking lot and, she asserts, the alleged child abuse. (*Id.* ¶ 23).

Later that day, Plaintiff informed her supervisor, Patricia Rohrer, Senior Vice President of Programs for Easter Seals, of the incident with the substitute teachers and the report to the police. (Paper 7, Ex. 2, Dumas Aff. ¶ 24). Rohrer suggested holding a meeting with both Plaintiff and Nurse on Tuesday, August 22. (*Id.*). At the meeting, Nurse suggested that he should meet with the parents to inform them of what happened. (*Id.* ¶ 40). Six days later, August 28, Nurse had not contacted the parents, prompting two parents, Kathleen Tremblay and Jennifer Ives, to send emails to the Center expressing concern for its failure to keep parents abreast of changes in staffing. (*Id.* ¶ 42). Upon receiving the emails from Tremblay and Ives, Rohrer requested a telephone conference with Plaintiff and Nurse to determine how to respond to the parents. (*Id.*, Ex. A, Rohrer Email). During the telephone

conference, Nurse volunteered to write a response to send via email, but later decided the letter should come from Plaintiff. (*Id.*, Ex. C, Nurse Email).

On August 30, Plaintiff submitted a draft of the letter to Rohrer. (*Id.*, Ex. D1, Dumas Email). Rohrer changed the letter but Plaintiff was not certain of which edits to include because some of Rohrer's changes were in blue while others were not. Plaintiff emailed a version of the letter that was different from Rohrer's edited version. (*Id.*, Ex. F2).

On September 7, 2006, Rohrer summoned Plaintiff to a meeting with Rohrer and Sue Judy, Easter Seals Director of Human Resources. (*Id.* ¶ 27). At the meeting, Rohrer gave Plaintiff a two-page summary of concerns critical of Plaintiff's actions on August 18, 2006. (*Id.*). On September 12, 2006, Plaintiff sent an email to Rohrer and carbon copied Lisa Reeves, Easter Seals Chief Executive Officer, disputing the performance issues raised in the two-page summary. (*Id.* ¶ 28). On September 14, 2006, Rohrer and Judy told Plaintiff that her employment "was not working out" and offered her a severance package in exchange for waiving her right to complain about her termination. (*Id.* ¶ 29). Plaintiff did not accept the severance package and was fired the same day. (*Id.*).

Other facts will be discussed as relevant to the following analysis.

III. Standard of Review

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Catawba Indian Tribe of S.C. v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *United States v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential

element . . . necessarily renders all other facts immaterial." *Celetox Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324. However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 (4th Cir. 1997), *cert. denied*, 522 U.S. 810 (1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

IV. Analysis

Plaintiff contends that she was terminated both because she is an African-American woman (itself a composite class) and because she filed a complaint alleging child abuse with the local government authorities. In this type of multiple motive case, in order to proceed under Title VII, Plaintiff must prove that the "protected trait actually motivated the employer's decision." *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 286 (4th Cir. 2004)(en banc)(quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000)). There is no question that

the events of and following August 18 led to Plaintiff's termination. Easter Seals also points to other performance concerns predating August 18 that it contends contributed to its decision to terminate her.

A. Count I - Race and Gender Discrimination

A Title VII plaintiff may "avert summary judgment . . . through two avenues of proof." *Hill*, 354 F.3d at 284. A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment action. *Id.* Pursuant to the 1991 Act, the impermissible factor need not have been the sole factor. So long as it motivated the adverse action, the plaintiff can establish an unlawful employment practice. *See* 42 U.S.C.A. § 2000e-2(m). Alternatively, a plaintiff may "proceed under [the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)] 'pretext' framework, under which the employee, after establishing a *prima facie* case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination." *Hill*, 354 F.3d at 285. Plaintiff fails to present evidence to satisfy the standards of proof under either method.

First, there is no direct or circumstantial evidence of discrimination based on race and gender. Second, as shown below,

Plaintiff's evidence fails under the *McDonnell Douglas* framework as well.

1. *Prima Facie* Case - Intentional Discrimination - Termination

To satisfy the *McDonnell Douglas* framework, the plaintiff must first present enough evidence to establish a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff is able to do so, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the defendant provides a legitimate, nondiscriminatory reason for the adverse employment action, the ultimate burden shifts to the plaintiff to show that the defendant's stated reason is pretextual. *Id.* at 804. To satisfy her initial burden, Plaintiff must show that she (1) is a member of a protected class, (2) suffered adverse employment action, (3) was qualified for the job, performing her job in a satisfactory manner, and met her employer's legitimate expectations, and (4) was replaced by an individual of comparable qualifications outside the protected class following her discharge.[1] *Hill*, 354 F.3d at 285.

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[1] There may be circumstances where a plaintiff need not show that a person outside the protected class filled the vacancy created by her termination, such as when different decision makers are involved, or the replacement was selected to mask discrimination. *See, e.g., Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007). Neither circumstance is present in this case.

Plaintiff has alleged discrimination based on both race and gender.[2] As an African-American female, Plaintiff is a member of a protected composite class, and she clearly suffered an adverse employment action when she was terminated. Whether she has support for the other elements of a *prima facie* case is more complicated.

Plaintiff was replaced by Marilyn Ricker, a white female.[3] To the extent that Plaintiff may be seeking to assert a claim of gender discrimination by itself, her *prima facie* case would fail. On the other hand, either for a combination claim or a claim of racial discrimination, replacement by Ms. Ricker satisfies the final element, that is, replacement by a person outside the protected class. What remains is to examine whether Plaintiff has raised a genuine issue of material fact as to whether her performance was satisfactory or was in accordance with Defendant's legitimate expectations.

Plaintiff must produce sufficient evidence from which a jury could conclude that she met the legitimate job expectations of her employer, that is, she was performing her job in a satisfactory

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[2] Combination or composite claims have been recognized. *See, e.g., Jeffers v. Thompson*, 264 F.Supp.2d 314, 326 (D. Md. 2003); *Johnson v. Dillard's Inc.*, No. 3:03-3445-MBS, 2007 WL 2792232, slip op. at 4 (D. S.C. Sept. 24, 2007).

[3] The parties disagree whether Marilyn Ricker was a "similarly qualified" applicant. (*See* Paper 1 ¶ 33; Paper 4, at 6-7). An analysis of Ms. Ricker's qualifications is unnecessary to determine that Plaintiff does not satisfy the requirements of a *prima facie* case under Title VII.

manner. *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 517 (4th Cir. 2006), *cert. denied*, 127 S.Ct. 53 (2006). Although Plaintiff is "require[d] to prove by the preponderance of the evidence a *prima facie* case of discrimination," the performance expectations requirement should not be applied too strictly for fear of dismissing an otherwise meritorious claim. *Id.* at 515-16 (citations omitted). To be sure, establishing the *prima facie* case is not meant to be prohibitive or onerous. *Id.*

A plaintiff may satisfy the third prong of the *prima facie* case in at least two ways. First, a plaintiff may show that the legitimate expectations of the employer were in fact met. *See Love-Lane v. Martin*, 355 F.3d 766, 787 (4th Cir. 2004); *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998). Alternatively, a plaintiff may show that an employer's expectations were not met because they were, in fact, not legitimate. *Warch*, 435 F.3d at 517.

Plaintiff offers several documents praising her work to show that her performance generally was satisfactory. On July 21, 2006, Lisa Reeves, Easter Seals President, sent Plaintiff an email telling Plaintiff she did a "great job." (*Id.* Ex. M4). In early August, Rohrer sent emails thanking Plaintiff and praising her ideas and negotiating skills. (Paper 7, Exs. M1-M3, M6). On September 12th and 13th, immediately before she was fired, Plaintiff received complimentary letters from Marilyn Ricker, Director of the

District of Columbia Child Development Center, and Jennifer Strong, Director of the College Park, Maryland Child Development Center. (*Id.* Exs. I-J). Plaintiff asserts that these documents are independent, corroborative evidence that her performance was "excellent." (Paper 7, at 11-12). Defendant counters that the emails do not relate to the primary reasons for Plaintiff's termination, which stemmed from events following the weekend on August 18, 2006.

Letters of praise from Plaintiff's colleagues or subordinates are insufficient to support Plaintiff's bald assertion that her performance was "excellent." "[I]n a wrongful discharge action it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff. The alleged opinions of [an employee's] co-workers as to the quality of her work are . . . close to irrelevant." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000)(internal citations and quotations omitted). The latest of the emails from Rohrer and Reeves is dated August 8, 2006, 10 days before Plaintiff's performance became unsatisfactory, and do not shed light on the assessment of the decision makers, Rohrer, Reeves, or Director of Human Resources, Sue Judy. (Paper 8, at 4). "[Plaintiff's] unsubstantiated allegations and bald assertions . . . fail to . . . show discrimination." *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *see also Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th

Cir. 1988) (explaining that the plaintiff's own naked opinions and conclusory allegations are insufficient to withstand summary judgment). Plaintiff has not presented evidence to show that following the August 18 incident, her supervisors believed she was performing in accordance with Defendant's legitimate expectations.

Plaintiff must acknowledge that the incident of August 18, explained in detail above, and the aftermath were precipitating factors in her termination. Defendant also points to Plaintiff's failure to send the correct version of the email to parents following the substitute teacher incident as evidence of Plaintiff's failure to follow through on requests accurately. (Paper 8, at 5). Plaintiff argues that she was confused regarding which email to send and that her mistake, at most, was honest and inadvertent. Plaintiff offers a series of emails between herself and Rohrer as evidence to support her claim that she was merely confused as to which edits to include in the email. (Paper 7, Ex. D2-F2). Plaintiff argues that Defendant's failure to excuse her mistake is evidence of racial and gender discrimination. However, the evidence Plaintiff has offered simply substantiates her claim that she made a mistake, not that Defendant did not have a legitimate expectation that she would send the email approved by her supervisor.

Defendant cites several examples to show that Plaintiff failed to communicate effectively with her colleagues. First, Defendant

asserts that Plaintiff told Easter Seals Grant Manager Dan Driscoll to "stop being condescending." (Paper 4, Ex. 3, Rohrer Aff. ¶ 3). Second, Defendant claims Plaintiff spoke to Nurse in a combative, accusatory manner during the August 22 meeting and raised her hand towards him in an aggressive manner and said, "I'm talking." (*Id.*). Finally, Defendant alleges that during a meeting with senior management, Plaintiff failed to participate and said, "you all decide," instead of recommending and presenting her ideas. (*Id.* at ¶ 17).

Plaintiff denies saying "you all decide" or making any such comments. (*See* Paper 7, Ex. 1, Dumas Aff. ¶ 66). Plaintiff argues that she was not the only employee who failed to communicate properly, but was the only employee who was disciplined on this ground. (*Id.* ¶ 67). Plaintiff argues that she can testify that "Rohrer admitted to her that [Dan] Driscoll's manner was inappropriate and that it was Driscoll who should be fired." (*Id.* ¶ 66). Plaintiff states that "Driscoll admitted . . . that he had been condescending toward me, not the other way around." (*Id.*). Plaintiff maintains that Defendant's failure to terminate Driscoll, a white male, for engaging in the same activity for which she was terminated is evidence that she was discriminated against on the basis of race and gender. However, Plaintiff has not offered any evidence to corroborate her statements about Driscoll, or presented evidence that his overall performance mirrored her own.

Defendant states that Plaintiff's unilateral decision on August 18 to fire the substitute teachers is also evidence that Plaintiff made poor business decisions. (Paper 8, at 5). Defendant argues that Plaintiff fired the substitute teachers without first consulting with Nurse, senior management, or human resources, and caused "significant ramifications for Easter Seals at the Falls Church Child Development Center." (Paper 8, at 6). Defendant presents a declaration from Patricia Rohrer, stating that plaintiff told Rohrer that she had terminated the teachers. (Paper 4, Ex. 3. ¶ 9). Defendant also presents the police report supported by the declaration of Lieutenant Campbell, Commander of the Services Division of the City of Falls Church Police Department. (*Id.* Ex. 4; Ex. 4A). The report reflects that Plaintiff told the responding officers that she "fired" the teachers. (*Id.* Ex. 4A).

Plaintiff argues that she sent the substitutes home for the day after receiving reports that one of them pushed a child on the head and that the substitutes left the children unsupervised. (Paper 1, ¶ 18). Plaintiff insists that it was impossible for her to fire the teachers as she did not have hiring or firing authority and the substitutes were not Defendant's direct employees. (*Id.* ¶ 16). She does acknowledge that she told them not to return before Mr. Nurse returned to work on the following Tuesday, when he would talk with them. (Paper 7, Ex. 2, Dumas Aff. ¶ 21.)

Whether the teachers were fired — or merely temporarily suspended for several days — is not material. There can be no dispute that Plaintiff's actions vis a vis the substitute teachers caused a disturbance and resulted in complaints from parents. Her role in causing the problem, and deficiencies in performance in dealing with the aftermath constitute failures to meet her employer's legitimate expectations.

On the other hand, any suggestion of late arrival to meetings pales in comparison. Rohrer claims Plaintiff was late to the IGC Silver Spring meeting and a program managers meeting. (Paper 4, Ex. 3 ¶ 15). Defendant's company policy specifically states, "[c]hronic tardiness or absenteeism will result in termination." (Paper 4, Ex. 2A, at 8). Plaintiff maintains that she was not late to the ICG Silver Spring meeting; she arrived on time, but waited for a colleague. (Paper 7, at 12). Further, Plaintiff contends that Defendant caused her to be late to the program managers meeting by asking her to pick up another director, Cheryl Dorsey, and bring her to the meeting. (*Id.*). She also states that these meetings took place weeks before her termination, a fact Defendant does not challenge. There is no evidence that any tardiness resulted in any independent disciplinary action.

Although Plaintiff apparently successfully completed her 90 day probationary period, she began to develop performance problems in the ensuing three months, so that by August and September, her

employer had grounds to terminate her, arising from her decision making and difficulty in communicating. These events, whether viewed collectively or individually, do not show that the reasons stated for her termination were not legitimate expectations. Plaintiff has not offered any evidence to show that she was performing in accordance with Defendant's legitimate expectations or that the expectations were not legitimate. Thus, Plaintiff has not made out a *prima facie* case of discrimination.

2. Legitimate Non-Discriminatory Reason and Pretext

Assuming, *arguendo*, Plaintiff presented a *prima facie* case of discrimination, the burden would shift to Defendant to "explain[] clearly the nondiscriminatory reasons for its actions." *Burdine*, 450 U.S. at 260. "This burden, however, is a burden of production, not persuasion." *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007). In reviewing the defendant's explanation, this court does not "sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination." *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298-99 (4th Cir. 1998)(internal quotations and citations omitted). Rather, when an employer offers a legitimate non-discriminatory reason for termination, "it is not [the court's] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it was truly the reason for plaintiff's termination." *Id.* at 299. "[N]o court sits to

arbitrate mere differences of opinion between employees and their supervisors." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000). Here, Defendant has met its burden by producing affidavits demonstrating that Plaintiff was fired due to her unsatisfactory performance and her handling of the substitute teacher incident. If the Plaintiff cannot present facts that would permit a reasonable inference that the stated reason is a pretext for discrimination, summary judgment should be granted in favor of the defendant. *See Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000) (citing *Reeves*, 530 U.S. at 146-47 (2000)).

In addition to Plaintiff's performance problems enumerated above, Defendant argues that Plaintiff's apparent refusal to correct her behavior were legitimate reasons for termination. (Paper 4, at 5-6). On September 7, 2006, Plaintiff, Judy, and Rohrer met to discuss Plaintiff's performance problems. (*Id.* at 12). At the meeting, Rohrer gave Plaintiff a two-page summary of concerns critical of the way Plaintiff handled the events of August 18. (Paper 7, Ex. 2, Dumas Aff. ¶ 27). Judy and Rohrer also told Plaintiff they did not believe she was a "good fit" for the company. (*Id.*). Plaintiff responded to Judy and Rohrer's concerns by sending a detailed "protest email" disputing the performance issues raised at the September 7 meeting. (Paper 4, Ex. 1A, Dumas Email). Defendant interpreted Plaintiff's response as not accepting her "supervisor's perspective on her performance

deficiencies" and as an "unwilling[ness] to take steps to improve her performance." (*Id.* at 6). Plaintiff acknowledges that she wrote a protest email and grievance over the performance concerns, but argues that purpose of the email was "not to be insubordinate, but to challenge the factual inaccuracies in the accusations." (Paper 7, at 18). Plaintiff further argues, "[i]t is the height of inconsistency, on the one hand for the defendant to make false allegations against Ms. Dumas, yet on the other, to fire her after she refuses to accept the truth of these false allegations." (*Id.*).

In accordance with the *McDonnell Douglas* framework, Plaintiff now shoulders the ultimate burden to demonstrate that Defendant's legitimate, nondiscriminatory reasons for terminating her employment were pretextual. *McDonnell Douglas*, 411 U.S. at 804. In order for Plaintiff's complaint to withstand summary judgment, she must produce circumstantial evidence of a purpose to discriminate on the basis of race and gender, with sufficient probative force to reflect a genuine issue of material fact. *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996). In addition, "[P]laintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. 133, 148 (2000). Thus, "a key factor for courts to consider is the probative value of the proof

that the employer's explanation is false." *Holland*, 487 F.3d at 215 (internal quotations omitted). To show pretext, Plaintiff challenges the factual basis for her termination and points to events she claims show that Defendant engaged in a pattern of discrimination against her soon after she was hired.

First, she claims that her first assignment was to fire Kamila Johnson, an African-American female subordinate who "was not in favor with [D]efendant's white, Caucasian management, including [Patricia] Rohrer." (Paper 7, Ex. 2, Dumas Aff. ¶ 6). Second, Plaintiff alleges that because of her race, Defendant invited Marilyn Ricker, a white female, to company functions that Plaintiff, as Vice President of Child Care Centers, would normally attend. (*Id.* ¶ 12). Plaintiff alleges that even though Ricker was her subordinate, Rohrer insisted that Ricker review Plaintiff's work assignments. (*Id.* ¶ 13). Third, Plaintiff alleges that she was disciplined more harshly than Defendant's other employees. Specifically, Plaintiff claims that Laurence Nurse, an African-American male, was not disciplined for his "repeated misconduct," namely, the alleged failure to supervise the substitute teachers or report suspected child abuse. (*Id.* ¶¶ 24-26). Plaintiff also claims that Dan Driscoll, a white male, was not disciplined for his contribution to problems with completing a grant proposal to Freddie Mac. (*Id.* ¶ 68-69.)

Plaintiff's arguments are insufficient to show pretext for race and sex discrimination. Although Plaintiff's first assignment was to fire Johnson, Plaintiff's argument that Johnson was fired based on race must fail because Johnson was replaced by another African-American female. (Paper 4, Ex. 3, Rohrer Aff., at 3). Plaintiff's argument that she was not invited to events because of her race also fails. Defendant has presented evidence that Ricker, a white female, was invited to certain events "based upon existing or prospective donors' requests or . . . given the relationship Ms. Ricker had developed with them over her four plus years at Easter Seals. . . ." (Paper 4, Ex. 1, Reeves Aff., at 3). Plaintiff has not offered any evidence to show that Ricker's race, and not her previous relations with clients, was the actual reason Ricker was invited. Additionally, Plaintiff has not presented any evidence to substantiate her claims that Nurse and Driscoll had performance deficiencies, and even if they did, were subject to more lenient discipline or none at all.

Thus, as Plaintiff has failed to show that Defendant's reasons for firing her were pretext for discrimination, Plaintiff's claim for race and gender discrimination fails.

B. Count II - Wrongful Discharge (Virginia Law)

Plaintiff alleges she was wrongfully terminated for reporting child abuse at Defendant's Falls Church, Virginia Child Development Center. Defendant suggests that the court should decline to

exercise supplemental jurisdiction over this claim if the federal claim is dismissed. In addition, Defendant asserts that Plaintiff cannot establish a wrongful discharge claim under Virginia law. The court will not exercise its discretion to dismiss the claim pursuant to 28 U.S.C. § 1367(c)(3), because Plaintiff has not presented sufficient facts to maintain this state law claim.

The facts surrounding the child abuse report are in dispute, but, even when taken in the light most favorable to Plaintiff, they are insufficient to state a claim under Virginia law. The purported child abuse report occurred on August 18, 2006, as detailed above, when Plaintiff called the Falls Church Police Department to have the substitute teachers removed from the Center parking lot. Plaintiff insists that she called the police to report the disturbance in the parking lot *and* the alleged child abuse. (Paper 1, ¶ 27).

Virginia adheres to the at-will employment doctrine. *Anderson v. ITT Indus. Corp.*, 92 F.Supp.2d 516, 520 (E.D. Va. 2000). Under this doctrine, "when a contract calls for the rendition of services, but the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate the contract at will upon giving reasonable notice of intention to terminate." *Bowman v. State Bank of Keysville*, 229 Va. 534, 535 (1985). The Supreme Court of Virginia recognizes an exception to the at-will employment doctrine

"limited to discharges which violate public policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general." *Storey v. Patient First Corp.*, 207 F.Supp.2d 431, 450 (E.D. Va. 2002). Virginia courts narrowly construe the public policy exception, limiting claims under this exception to (1) when an employer violates a public policy enabling the exercise of the employee's statutorily created right, (2) when an employer violates a public policy that is explicitly expressed in a statute and the employee was a member of the class meant to be protected by the public policy, and (3) when an employer terminates an employee for refusing to commit a crime. *Rowan v. Tractor Supply Co.*, 263 Va. 209, 214 (2002). The public policy exception "has remained a relatively narrow exception, and attempts to expand the doctrine have [been] met with resistance" in both courts and the legislature. *Andersen v. ITT Indus., Corp.*, 92 F.Supp.2d 516, 520 (E.D. Va. 2000).

Plaintiff's actions do not give rise to a cause of action for wrongful discharge for three reasons. First, while Plaintiff's position may have given rise to a duty to report suspected child abuse under Virginia law, she did not report the alleged abuse in accordance with the procedure enumerated by the Child Abuse

Reporting statute.[4] Under the statute, Plaintiff was required to "report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse or neglect hotline." Va. Code Ann. § 63.2-1509(A). Plaintiff neither reported the abuse to the local department nor called the child abuse or neglect hotline.

Plaintiff, in her opposition, argues "the Falls Church Police Department is one of the service agencies in charge of dealing with complaints under § 63-2-1509." (Paper 7, at 26). This is incorrect. The statute defines the local department as "the public agency responsible for receiving and responding to complaints and reports . . . ." Va. Code Ann. § 63.2-1509(A). The Falls Church Police Department is not the public agency responsible for receiving and responding to complaints and reports.

Plaintiff further argues that the "complaint to the Falls Church Police Department was the same as, and tantamount to, filing a complaint with the local child protective service authorities." (Paper 7, at 26). This is also incorrect. The statute enumerates "any law enforcement . . . officer" under the list of persons who have a duty to report, not the person to whom abuse is reported.

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[4] As Vice President of Child Development Services, Plaintiff falls within the purview of the statute. She is a "person associated with or employed by any private organization[] responsible for the care, custody, or control of children." Va. Code Ann. § 63.2-1509(A)(11)(2007 & Supp. 2008).

Va. Code Ann. 63.2-1509(A)(8). Nothing in the statute indicates that reporting abuse to the local police department is equivalent to reporting abuse to the local child protective service authorities. In fact, when the local police receive a report of child abuse, they have an obligation to report any accusations to the local department so that a follow-up investigation can occur. (*See* Paper 4, Ex. 4, Lt. Campbell Aff. ¶ 4).

Second, Defendant has presented evidence to show that Plaintiff's sole purpose for calling the police was to remove the substitute teachers from the parking lot. Lt. Campbell, Commander of the Services Division of the City of Falls Church Police Department, stated that department records reflect that Plaintiff did not report child abuse to the 911 dispatcher or to the police officers called to the Center. (*Id.*). Additionally, in Plaintiff's August 30, 2006 email response to concerned parents, Plaintiff stated, "the Teacher Assistants in the Ladybug classroom were not dismissed due to child abuse." (Paper 7, Ex. D3)(emphasis in original). This email directly contradicts Plaintiff's assertion that she called the police to report child abuse. Therefore, Plaintiff cannot claim that she was wrongfully terminated for exercising her statutory duty when, in her own words, she said that there was no event giving rise to that duty.

Finally, assuming there was child abuse and even if Plaintiff followed proper reporting procedures, the facts do not show that

her alleged reports of child abuse were a factor leading to her termination. Plaintiff was fired because of her failure to obtain permission before acting on August 18, her subsequent response to the parents and Center management, and other performance concerns discussed above in detail.

C. Plaintiff's Request for Discovery

Generally speaking, "summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250 n.5; Fed.R.Civ.P. 56(f). "Sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party[,]" and when a case involves complex factual questions about intent and motive. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 247 (4th Cir. 2002)(quoting 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2741 at 241 (3d Ed. 1998)).

A party opposing summary judgment may not merely assert in the opposition that discovery is necessary. Rather, the party must file an affidavit that "particularly specifies legitimate needs." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995). Moreover, a request for discovery will not be granted if the party merely wishes to conduct a "fishing expedition" in search of evidence that may be helpful. *Morrow v. Farrell*, 187 F.Supp.2d 548, 551 (D. Md.

2002). In addition to the specificity requirement, a party must present reasons why it cannot put forth the necessary opposing evidence, *Pine Ridge Coal Co. v. Local 8377, United Mine Workers of America*, 187 F.3d 415, 421-22 (4th Cir. 1999), and must establish that the desired evidence could be sufficient to create a genuine issue of material fact. *McLaughlin v. Murphy*, 372 F.Supp.2d 465, 470 (D. Md. 2004). If a party meets this burden, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just." Fed.R.Civ.P. 56(f).

In Plaintiff's opposition, she states that she has not "had the opportunity to file any discovery." (Paper 7, at 28). Plaintiff requests permission to seek "all information regarding her alleged replacements, all information regarding the defendant's disciplinary policies, all evidence, including races and sexes backgrounds [sic] of persons who are managers and/or who have received discipline, evidence of other racial or sexual discrimination cases involving the defendant and other, similar information." (*Id.*).

Plaintiff has not filed an affidavit specifying her discovery needs. Ignoring this deficiency, *see Harrods Ltd.*, 302 F.3d at 244, Plaintiff's broad request for "all information" fails to "particularly specify legitimate needs," *Nguyen*, 44 F.3d at 242,

and is more akin to a "fishing expedition" to find helpful evidence. *Morrow*, 187 F.Supp.2d at 551. Plaintiff simply claims "discovery will enhance . . . already strong evidence of discrimination," (paper 7, at 28), but does not establish that the desired evidence could be sufficient to create a genuine issue of material fact. *Pine Ridge Coal*, 187 F.3d at 421-22. Therefore, Plaintiff's request for discovery is denied.

V. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment will be granted.

/s/
DEBORAH K. CHASANOW
United States District Judge