

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

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| SUSAN BOCOCK, |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 5:14-cv-00050 |
| |) | |
| SPECIALIZED YOUTH SERVICES OF |) | |
| VIRGINIA, INC., d/b/a Shenandoah |) | <u>REPORT AND RECOMMENDATION</u> |
| Academy, a Virginia Corporation, |) | |
| |) | |
| and |) | By: Joel C. Hoppe |
| |) | United States Magistrate Judge |
| TARIE SHULL, |) | |
| Defendants. |) | |

Before the Court is Plaintiff Susan Bocoock’s motion to voluntarily dismiss Count Three of the Complaint under Rule 41(a)(2) of the Federal Rules of Civil Procedure. ECF No. 41. Defendants, Specialized Youth Services of Virginia, Inc. (“SYS”) and Tarie Shull, oppose the motion. ECF No. 47. This matter is before me by referral under 28 U.S.C. § 636(b)(1)(B). ECF No. 9. Having considered the parties’ briefs and the applicable law, I recommend that the presiding District Judge GRANT the motion and DISMISS WITHOUT PREJUDICE Count Three of the Complaint, subject to certain conditions.

I. Procedural History

Bocoock filed the Complaint for this action in the Circuit Court of Rockingham County, alleging three counts: (1) wrongful termination in violation of the Americans with Disabilities Act (“ADA”), (2) interference in violation of the ADA, and (3) wrongful discharge in violation of Virginia public policy. Compl. 8–13, ECF No. 1-1. Count Three, which is the subject of this motion, alleges that Bocoock was terminated in retaliation for complying with a Virginia Department of Education (“VDOE”) investigation into suspected child abuse or neglect at SYS. *Id.* at 11–13. The count is based upon Virginia Supreme Court precedent prohibiting termination

for exercising or complying with Virginia statutory rights and obligations. *See Jones v. HCA*, 16 F. Supp. 3d 622, 636 (E.D. Va. 2014) (summarizing the classes of common-law claims established by *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985)). On October 1, 2014, the Defendants removed the case to federal court. ECF No. 1. Bocoock voluntarily dismissed Count Two with the Defendants' consent on November 25, 2014. ECF No. 18.

On August 26, 2015, the Defendants moved for summary judgment on Counts One and Three. ECF No. 35. In her brief in opposition to summary judgment filed on September 15, 2015, Bocoock reported that she had requested the Defendants' consent to her voluntary dismissal of Count Three and been denied. Pl.'s Br. in Opp'n Mot. Summ. J. 2 n.1, ECF No. 40. She did not otherwise address the Defendants' argument as to Count Three. On September 21, 2015, Bocoock filed the instant motion. The Defendants filed a brief in opposition, ECF No. 47, and Bocoock filed a further reply brief, ECF No. 53.

II. Discussion

Rule 41 allows for the voluntary dismissal of a claim, but once an answer or counterclaim has been filed, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Voluntary dismissal under Rule 41(a)(2) should be freely allowed unless the parties would be unfairly prejudiced, and the court should "focus primarily on protecting the interests of the defendant" when weighing prejudice. *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987). In general, "[f]actors a district court should consider in ruling on such motions are: (1) the opposing party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment is pending." *Gross v. Spies*, 133 F.3d 914 (4th Cir.

1998). “These factors are not exclusive, however, and any other relevant factors should be considered by the district court depending on the circumstances of the case.” *Hobbs v. Kroger Co.*, 175 F.3d 1014 (4th Cir. 1999) (citing *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998)). Whether to grant voluntary dismissal under Rule 41(a)(2) is firmly within the discretion of the court. *Davis*, 819 F.2d at 1273.

The Fourth Circuit has acknowledged that its “jurisprudence on the issue of what constitutes sufficient prejudice to a nonmovant to support denial of a motion for voluntary dismissal under Rule 41(a)(2) is not free from ambiguity.” *Howard v. Inova Health Care Servs.*, 302 F. App'x 166, 179 (4th Cir. 2008). Nonetheless, it is clear that prejudice is not proven by the prospect of a subsequent lawsuit, *Ellett Bros., Inc. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 388–89 (4th Cir. 2001), the possibility that the movant will gain a tactical advantage through the dismissal, *Davis*, 819 F.2d at 1275, or the mere filing of a motion for summary judgment, *Andes v. Versant Corp.*, 788 F.2d 1033, 1036 n.4 (4th Cir. 1986). Additionally, extensive production of discovery is not prejudicial where the evidence discovered may be used in a subsequent action. *Davis*, 819 F.2d at 1276 (citing *Tyco Labs. Inc. v. Koppers Co.*, 627 F.2d 54, 56 (7th Cir. 1980)). Voluntary dismissal is not appropriate, however, if the movant is simply attempting to avoid an adverse result in the current litigation. *See Councell v. Homer Laughlin China Co.*, No. 5:11cv45, 2012 WL 896646, at *2 (N.D. W. Va. Mar. 15, 2012).

Bocock argues that she is entitled to voluntary dismissal because “the claim sought to be dismissed is purely a state law claim, Plaintiff initiated this case in her preferred state jurisdiction, and further because of Defendant [SYS’s] spoliation of electronic evidence of one of its purported decision makers as reflected in Plaintiff’s brief in opposition to summary judgment.” Pl.’s Mot. for Voluntary Dismissal 1–2. In response, the Defendants argue that they

have incurred significant time and expense litigating Count Three through summary judgment, discovery has yielded no evidence to support the claim, Bocock's explanation for the need for dismissal is insufficient, and dismissal without prejudice would waste judicial time and effort. Defs.' Br. in Opp. to Mot. to Dismiss 4–7, ECF No. 47. They request that the Court dismiss Count Three with prejudice rather than without. *Id.* at 2, 7–8.

As grounds for dismissing Count Three without prejudice, Bocock relies heavily on a claim that SYS purposefully deleted emails from Steve Jurentkuff, the Executive Director for SYS when Bocock was terminated.¹ *See* Pl.'s Reply Br. 1-4, ECF No. 53; Pl.'s Br. in Opp'n Summ. J. ¶ 34. Although the Defendants do not dispute that Bocock participated in the VDOE's investigation, they assert that Bocock developed no affirmative evidence showing that anyone at SYS knew of her involvement. Defs' Br. in Opp. to Mot. to Dismiss 5. Her communication with VDOE was anonymous, and she refused to cooperate with Jurentkuff's investigation on behalf of the VDOE. *Id.* at 5, 7; Bocock Dep. 165:5–14, July 31, 2015, ECF No. 36-10. Brushing aside this deficiency, Bocock posits that there must have been email communications between

¹ The evidence for Bocock's spoliation argument is laid out in her brief in opposition to summary judgment as follows. Bocock filed her Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on June 6, 2013, and Steve Jurentkuff responded as Executive Director for SYS on June 12, 2013, by submitting an acceptance to participation in mediation. Pl.'s Br. in Opp'n Summ. J. ¶ 34; Letter from Warren Bull, Pres. and CEO, SYS, to Rosalind Hall-Smith, Investigator, EEOC (July 22, 2014), ECF No. 40-17. SYS fired Jurentkuff in the end of August 2013. Bull Dep. 26:16–18, Aug. 25, 2015, ECF No. 40-7; Bull Letter to EEOC.

SYS submitted its position statement to the EEOC on July 28, 2014. Bull Letter to EEOC, ECF No. 40-17. The EEOC issued a Notice of Right to Sue to Bocock on July 31, 2014. Br. in Opp. Summ. J. ¶ 34. Around the end of August 2014, information technology at SYS removed Jurentkuff's emails from the server. Bull Dep. 26:5–22. Bocock filed suit on August 29, 2014. Br. in Opp. Summ. J. ¶ 34. In his deposition, SYS CEO and President Warren Bull stated that emails are removed "for any employee after they're gone for a year." Bull Dep. 26:20–11.

Jurentkuff and Shull or Bull related to the investigation in addition to those between Jurentkuff and the VDOE . Bocoock Reply Br. 3.

Bocoock does not present a strong argument connecting the possible spoliation of evidence to a need for voluntary dismissal of Count Three. Her counsel learned of the deleted emails the day before the Defendants filed for summary judgment and

realized that there were numerous issues raised by the spoliation of the emails, that the discovery period was concluded, that the spoliation of emails was under circumstances in which Defendants knew there were pending claims against them which implicated Jurentkuff's actions and communications, and that it was unfair to Plaintiff to be forced to pursue a claim relating to the VDOE issue in the face of destroyed evidence.

Id. at 3–4. Bocoock does not explain what issues were raised or why pursuing Count Three specifically was rendered unfair. The Court has been unable to find cases holding that spoliation of evidence warrants voluntary dismissal as opposed to an evidentiary sanction or adverse inference to bolster her other supporting evidence. *See AF Holdings LLC v. Navasca*, No. C-12-2396 EMC, 2013 WL 1748011, at *4–5 (N.D. Cal. Apr. 23, 2013) (“[A]s the Court noted at the hearing, even if CCleaner did irrevocably destroy electronic files, that might actually work in AF's favor; in other words, the stronger the evidence of improper spoliation, the better the chance AF stood of obtaining, *e.g.*, an evidentiary sanction or adverse inference in its favor based on the spoliation.”). Regardless of the merits of the spoliation argument, it appears that Bocoock's counsel was surprised when, at a late stage in the case, he learned that a key decision maker's emails had been deleted. With a trial date rapidly approaching, opting to dismiss the claim that could be most affected by the missing emails and pursue other avenues of discovery in state court is not unreasonable.

Strangely, neither party discusses whether Bocoock attempted to obtain emails sent from Shull's or Bull's accounts to Jurentkuff during the period of the VDOE investigation to confirm

or dispel Bocoock's suspicions that they discussed her participation in it. Not pursuing other potential sources for the missing emails could show lack of diligence. Even so, I do not find that Bocoock's counsel failed to pursue discovery diligently. Counsel represented that they worked cooperatively to extend the exchange of discovery and taking of depositions beyond the discovery cutoff. Bocoock's counsel learned at a deposition on the day before the dispositive motions deadline that Jurentkuff's emails had been destroyed. After considering this revelation and the stage of the case, counsel explains that he decided to dismiss Count Three. Accordingly, I do not find that Bocoock engaged in excessive delay in filing the motion for voluntary dismissal at a late stage in the case.

The Defendants argue that Bocoock has failed to marshal the evidence necessary to survive summary judgment on Count Three. Bocoock did not respond to the Defendants' summary judgment motion on Count Three; instead, she sought voluntary dismissal. Without input from both sides, the Court is hamstrung in its ability to assess the substantive merits of Count Three. Moreover, it would not be surprising if the Defendants had a stronger case on Count Three at this time. After all, Bocoock seeks to dismiss her claim, at least in part because of an evidentiary shortfall she attributes to the destruction of Jurentkuff's emails.

The Defendants primarily protest the possibility that Bocoock will be able to bring Count Three against them in state court. "It is well established that, for purposes of Rule 41(a)(2), prejudice to the defendant does not result from the prospect of a second lawsuit." *Davis*, 819 F.2d at 1274. Furthermore, Count Three is a state law claim. The cause of action pled in Count Three was created by the Supreme Court of Virginia in *Bowman*, when the court recognized an exception to Virginia's employment-at-will doctrine and allowed some discharged employees to recover against their former employers in tort. 331 S.E.2d at 801. The Supreme Court of Virginia

has emphasized that this exception is narrow, found in three limited circumstances: “(1) where an employer violated a policy enabling the exercise of an employee’s statutorily create right; (2) where the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy; and (3) where the discharge was based on the employee’s refusal to engage in a criminal act.” *Jones*, 16 F. Supp. 3d at 636 (internal quotation marks omitted) (citing *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709 (Va. 2002)). The facts pled in Boccock’s complaint appear to be of a type that fit squarely within existing *Bowman* claim precedent. The Court, however, has not been able to find a case with a *Bowman* claim based upon the particular statutes cited in the Complaint. Though Count Three does not exactly present a “difficult question of state law,” *Davis*, 819 F.2d 1275, it does involve application of novel facts to a state cause of action. The Fourth Circuit has observed, “in cases involving the scope of state law, courts should readily approve of dismissal when a plaintiff wishes to pursue a claim in state court. In this case, for example, a lawsuit in state court is preferable because it would allow the courts of [Virginia] to resolve a difficult question of state law.” *Davis*, 819 F.2d 1275.

The Defendants’ argument that they have incurred significant time and expense litigating through summary judgment is well taken. By the time Boccock filed her motion for voluntary dismissal, discovery was finished, summary judgment had been briefed by both sides, oral argument on summary judgment was one day away, and the trial was seven weeks away. On the spectrum of cases considering the stage of litigation, this case has progressed to a point where the amount of effort expended by the defendants can merit denial of voluntary dismissal. *See, e.g., Howard*, 302 F. App’x at 179–80 (upholding denial of voluntary dismissal when discovery was complete and the trial was two weeks away); *Francis v. Ingles*, 1 F. App’x 152, 154 (4th

Cir. 2001) (affirming denial of dismissal when discovery was complete and trial was one week away). This dispute differs from these cases in one fundamental aspect: in *Howard, Francis*, and most cases concerning voluntary dismissal, the plaintiff moved to dismiss the entire suit. In this dispute, Bocock seeks to dismiss only one count of her Complaint. While Counts One and Three concern different causes of action, they both arise from Bocock's employment at SYS and the conditions of her termination. The players comprise a relatively small group of SYS employees. Certainly the Defendants expended some additional effort in discovery and briefing a summary judgment motion on Count Three, but they have not demonstrated that it was significant. Thus, it appears that had Bocock never brought Count Three, the Defendants would still have engaged in similar discovery, deposed similar witnesses, and filed similar motions to address the allegations in Count One.

This point is illustrated in the case of *Bridge Oil, Limited v. Green Pacific A/S*, which emerged from a consolidation of actions against Green Pacific concerning provision of marine fuel and other services. 321 F. App'x 244, 245 (4th Cir. 2008). After Green Pacific engaged in discovery and filed summary judgment against Bridge Oil, the district court granted Bridge Oil's motion for voluntary dismissal. *Id.* The district court found that Green Pacific was not unduly prejudiced by dismissal because the discovery that had taken place "would have occurred in the multi-party litigation even without the presence of Bridge Oil's unjust enrichment claim." *Id.* at 245–46. Additionally, "Green Pacific's summary judgment motion against Bridge Oil was also directed against a similar claim by another party and, therefore, would have been filed in any event." *Id.* (noting additionally that Bridge Oil had already brought a separate suit in a more natural forum for the dispute). The Fourth Circuit found no error in the district court's reasoning. *Id.* at 245.

Similar logic applies here. Although the parties have completed discovery and briefed summary judgment, the prejudice to the Defendants from dismissal is lessened by the significant overlap between the work done for Count One and that done for Count Three. *See Davis*, 819 F.2d at 1276; (citing *Tyco Laboratories Inc. v. Koppers Co.*, 627 F.2d 54, 56 (7th Cir. 1980), for the proposition that extensive discovery is not prejudicial where evidence discovered may be used in subsequent action). Combined with the baseline that dismissal should be freely granted when possible and the novel application of Virginia common law found in Count Three, I find that dismissal without prejudice is warranted in this case.

The Court acknowledges some differences between the present dispute and *Bridge Oil* or similar cases. Discovery was complete in this case before Bocoock brought her motion, and Bocoock's explanation for the need of dismissal is on the light side. Even so, any prejudice to the Defendants can be addressed by placing conditions upon the dismissal. The time and effort the Defendants have spent on discovery thus far should not be wasted and the costs they have incurred should not go unacknowledged. *See Davis*, 819 F.2d at 1276 (citing Wright & Miller, *Federal Practice and Procedure* § 2366; 5 *Moore's Federal Practice* ¶ 41.05[1] (1986)) (“We find no abuse of discretion in the requirements that the plaintiff pay a portion of USX's taxable costs and agree to the use of discovered materials in any state court proceeding. Such conditions should be imposed as a matter of course in most cases.”).

Accordingly, the undersigned **RECOMMENDS** that Bocoock's motion for voluntary dismissal, ECF No. 41, be **GRANTED** and Count Three of the Complaint, ECF No. 1-1, be **DISMISSED WITHOUT PREJUDICE**, subject to the following conditions: (1) all discovery produced in this case may be used in any future state or federal proceeding raising the allegations

in Count Three, and (2) Bocock must pay one-third of the Defendants' taxable costs through the filing of her motion to voluntarily dismiss Count Three.

Furthermore, as Count One is alleged solely against SYS, I recommend **DISMISSAL** of Tarie Shull as a defendant in this suit.

Notice to Parties

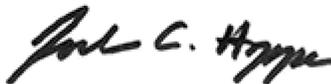
Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Elizabeth K. Dillon, United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: October 14, 2015



Joel C. Hoppe
United States Magistrate Judge