

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

JENNIFER ELLER, )  
)  
Plaintiff, )  
)  
v. )  
)  
PRINCE GEORGE’S COUNTY )  
PUBLIC SCHOOLS, ET AL., )  
)  
Defendants. )  
\_\_\_\_\_)

Case No.: 18-cv-03649-TDC/TJS

**DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Defendants Prince George’s County Public Schools, Board of Education of Prince George’s County, and Monica Goldson (“Defendants”), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 56, hereby file this Motion for Summary Judgment (“Motion”). The reasons why Defendants’ Motion should be granted are set forth in the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Defendants' Motion for Summary Judgment and Memorandum of Points and Authorities in Support thereof were served via the Court's CM/ECF system on this 29th day of March, 2021, to:

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants Prince George's County Public Schools ("PGCPS"), Board of Education of Prince George's County ("Board of Education"), and Monica Goldson ("Goldson") (collectively "Defendants"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 56, hereby file this Motion for Summary Judgment ("Motion"). The reasons why Defendants' Motion should be granted are set forth below.

**Introduction**

In this case, Plaintiff Jennifer Eller ("Plaintiff"), a transgender woman, alleges that she was subjected to a sex-based hostile work environment and retaliation by students, parents, and staff and has asserted a litany of employment discrimination claims arising out of her former employment with the Board of Education. Nevertheless, as set forth more fully below, Plaintiff's claims fail as a matter of law for a variety of reasons including asserting claims against improper defendants, being barred by the statute of limitations, the 300-day rule, her inability to establish *prima facie* cases for discrimination and retaliation, and failing to designate expert witnesses regarding areas of relief that she seeks.

**Statement of Facts Not In Dispute**

Plaintiff is a transgender person. (JS ¶ 1.) A transgender person is someone whose gender identity diverges from the sex they were assigned at birth. (JS ¶ 2.) The process by which transgender people come to live in a manner consistent with their gender identity, rather than their sex assigned at birth, is known as “transitioning.” (JS ¶ 3.) This process may include “coming out,” requesting that others use gender pronouns that match the transgender person’s identity, changing the transgender person’s name, and wearing clothing and adopting grooming habits associated with the individual’s gender identity. (JS ¶ 4.) Plaintiff asserts that while she was incorrectly assigned the sex of male at birth, she is a woman. (JS ¶ 5.)

Plaintiff was formerly employed by the Board of Education as a teacher from 2008 until her resignation in August of 2017. (JS ¶ 6.) Plaintiff began her employment with the Board of Education as a teacher at Kenmore Middle School and was employed there from 2008 until 2011. (JS ¶ 7.) In or around March of 2011, Plaintiff informed her supervisor that she would be transitioning and began to wear articles of traditionally-feminine attire in school. First Am. Compl. ¶ 44.

Plaintiff was next employed as an English Teacher at Friendly High School from August of 2011 to June of 2016. (JS ¶ 8.) Plaintiff alleges that she was subjected to a sex (gender identity) based hostile work environment by students, parents, and staff as a result of transitioning and becoming a transgender woman. First Am. Compl. ¶¶ 44-89.

On or about February 20, 2015, Plaintiff submitted a Discrimination or Harassment Incident Report, also known as an AP 4170 Form (“4170 Complaint”), in which she complained about misgendering by Assistant Principal Robinson. (J.R. 94-95, Ex. 2.)

On or about June 3, 2015, Plaintiff filed her Charge of Discrimination (“Charge”) with the U.S. Equal Employment Opportunity (“EEOC”), Charge No. 531-2015-01787C, in which she alleges

discrimination on the basis of her sex by the Board of Education. (J.R. 97-98, Ex. 3.) However, the EEOC did not provide notice of Plaintiff's Charge to the Board of Education until on or about October 2, 2015. (J.R. 100, Ex. 4.)

On or about June 25, 2015, Ms. Simmons issued her Letter of Determination regarding Plaintiff's Discrimination or Harassment Incident Report, in which she stated that "the investigation is unable to conclude that Charging Party has been subjected to discrimination and/or harassment. . . ." (J.R. 102-105, Ex. 5.)

On or about April 29, 2016, Plaintiff filed her Amended Charge of Discrimination ("Amended Charge"), in which she alleges sex discrimination and retaliation by the Board of Education. (J.R. 107, Ex. 6.) The EEOC did not provide notice of Plaintiff's Amended Charge to the Board of Education until on or about May 3, 2016. (J.R. 109, Ex. 7.)

Finally, Plaintiff was lastly employed at James Madison Middle School from August of 2016 until the end of that school year in 2017. (JS ¶ 9.) Plaintiff requested and was afforded FMLA leave from October 18, 2016, until January 6, 2017. (JS ¶ 10; J.R. 111-112, Ex. 8.) Plaintiff requested and was afforded a Leave of Absence from January 9, 2017, until June 15, 2017. (J.R. 111-112, Ex. 8.)

Despite being on approved FMLA Leave from October 18, 2016, until January 6, 2017, and on approved Leave of Absence from January 9, 2017, until June 15, 2017, from her employment with the Board of Education to deal with her alleged mental issues, Plaintiff began to work at Target in January of 2017 and the Department of Defense in March of 2017. (J.R. 23, Ex. 1 (82:21-83:21).)

Plaintiff resigned from her position with the Board of Education on or about August 18, 2017. (JS ¶ 11.) As a result, Plaintiff was out of school, not working for the Board of Education, and on approved leave from October 18, 2016, until her resignation on August 18, 2017.

Plaintiff filed her Complaint [ECF No. 1] in this Court on November 28, 2018. (JS ¶ 12.)

Plaintiff filed her First Amended Complaint [ECF No. 4] on December 20, 2018, in which Title IX claims were asserted.

In her First Amended Complaint, Plaintiff asserts claims against Defendants for deprivation of equal protection in violation of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 (“Section 1983”) (Count I), hostile work environment in violation of Title VII (Count II), Title IX (Count III), Maryland Fair Employment Practices Act (“FEPA”) (Count IV), and the Prince George’s County Code (“County Code”) (Count V), and retaliation in violation of Title VII (Count VI), Title IX (Count VII), FEPA (Count VIII), and the County Code (Count IX).

### **Argument**

#### I. STANDARD OF REVIEW

Summary judgment is appropriate only “if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). The movant has “the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any which it believes will demonstrate the absence of any genuine issue of material facts.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In considering the motion, “the judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). The Court must “draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence.” *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

To withstand a motion for summary judgment, the nonmoving party must do more than present a mere scintilla of evidence. *See Phillips v. CSX Transport, Inc.*, 190 F.3d 285, 287 (4<sup>th</sup> Cir. 1999), *cert. denied*, 529 U.S. 1004 (2000). Instead, “the adverse party must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 250. A disputed fact presents a genuine issue “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. Material disputes are those which “might affect the outcome of the suit under the governing law.” *Id.*

Indeed, the court has an affirmative obligation to prevent factually unsupported claims from proceeding to trial. *See Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 526 (4<sup>th</sup> Cir. 2003). Here, Defendants’ Motion should be granted for the reasons set forth below.

II. DEFENDANT PGCPS IS NOT A LEGAL ENTITY AND CANNOT BE SUED

Defendants’ Motion for Summary Judgment should be granted in favor of Defendant PGCPS as to all counts asserted against it (Counts II-IX) because it is not a legal entity and cannot sue or be sued.

In *Rushdan v. Surrattsville High School*, this Court explained:

Maryland law provides that “[e]ducational matters that affect the counties shall be under the control of a county board of education in each county.” Md. Code Ann., Educ. § 4-101(a). **Each county school board is a “body politic and corporate” that may sue and be sued.** Md. Code Ann., Educ. § 3-104(a). **Because the Board of Education of Prince George’s County is responsible for matters affecting education, the Board of Education is the appropriate Defendant in this suit, not Johnson or PGCPS.** Therefore, this Court will grant Defendants PGCPS and Johnson’s Motions to Dismiss.

Civ. No. AW-05-880, 2005 WL 8174691, \*3 (D. Md., Oct. 4, 2005) (emphasis added). *See also James v. Frederick County Public Schools*, 441 F.Supp.2d 755, 758 (D. Md. 2006) (“Instead of FCPS, James should have named the Board.”); *Adams v. Calvert County Pub. Schs.*, 201 F.Supp.2d 516, 520 n. 3 (D. Md. 2002) (“The school district, however, does not exist as a separate entity for

purposes of suit.”); *Forte v. Board of Education of Hartford County*, Civ. No. WMN–14–1490, 2014 WL 6893829, \*1, n. 1 (D. Md., Dec. 4, 2014) (“Although Ms. Forte named Harford County Public Schools as a defendant in her complaint, it does not exist as a legal entity”).

Similarly, here, the proper party is Defendant Board of Education, not PGCPS. Therefore, summary judgment should be granted in favor of Defendant PGCPS as to Counts II-IX of the First Amended Complaint.

### III. DEFENDANT GOLDSON IS NOT A “PERSON” UNDER SECTION 1983

Defendants’ Motion for Summary Judgment should be granted in favor of Defendant Goldson as to Plaintiff’s claim under the Fourteenth Amendment pursuant Section 1983 (Count I) because Dr. Goldson is not a “person” under Section 1983.

42 U.S.C. § 1983 provides in pertinent part that “[e]very *person* who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party in an action at law, suit in equity, or other proper proceeding for redress . . . .” (Emphasis added.)

By its very language, in order to be held liable the defendant must be a “person.” As this Court explained in *Dennis v. Board of Educ. Of Talbot County*, 21 F.Supp.3d 497 (2014):

Section 1983 allows individuals to sue any “person” who violated their constitutional rights while acting under the color of law. 42 U.S.C § 1983. **But state agencies and state officials acting within their official capacities cannot be sued under § 1983 because they are not “persons”.** See *Will*, 491 U.S. at 64, 109 S. Ct. 2304; *Mayo v. Bd. Od Educ. Prince George’s Cnty.*, 797 F. Supp. 2d 685, 689 (D. Md. 2011), *aff’d*, 713 F.3d. 735 (4<sup>th</sup> Cir. 2013). **County and school boards and their officials are considered state agencies and state officials.** *Mayo*, 797 F.Supp.2d at 689; *Rosenfeld v. Montgomery Cnty. Pub. Sch.*, 41 F.Supp.2d 581, 586 (D. Md. 1999); *Beka Indus., Inc. v. Worcester Cnty. Bd. Of Educ.*, 419 Md. 194, 18 A.3d 890, 900 (2011). **Because the Board and individually named Defendants in their official capacities are a county school board and school officials, they are not “persons” and cannot be sued under § 1983.**

*Dennis v. Board of Educ. of Talbot County*, 21 F.Supp.3d 497, 501-02 (D. Md. 2014) (emphasis added). See also *Schiffbauer v. Schmidt*, 95 F.Supp.3d 846, 852 (D. Md. 2015); *J.G. by and through Gusman v. Prince George's County Board of Education*, Civ. No. PWG-16-1008, 2017 WL 930130, \*4 (D. Md., March 8, 2017).

Accordingly, Defendant Goldson, in her official capacity, is not amenable to suit under Section 1983 since she is not a “person” and summary judgment should be granted in her favor as to Count I of the First Amended Complaint.

#### IV. PLAINTIFF’S CLAIMS UNDER TITLE IX ARE BARRED BY THE STATUTE OF LIMITATIONS

Defendants’ Motion for Summary Judgment should be granted in favor of Defendants as to Plaintiff’s claims under Title IX (Counts III and VII) because these claims are barred by the statute of limitations.

In *Washington v. University of Maryland, Eastern Shore*, Civ. No. RDB-19-2788, 2020 WL 5747199, \*3 (D. Md., Sept. 24, 2020), this Court held that Title IX’s limitation period is two (2) years:

Title IX prohibits sex-based employment discrimination in federally financed education programs. 20 U.S.C. § 1681(a); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35, 102 S. Ct. 1912 (1982). Congress did not supply an express statute of limitations applicable to Title IX. *Wilmink v. Kanawha Cnty. Bd. of Educ.*, 214 F. App’x 294, 296 n.3 (4th Cir. 2007). When a federal law does not set forth a statute of limitations, courts “apply the most closely analogous statute of limitations under state law.” *Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 109 S. Ct. 621 (1989). A state law which provides essentially “the same rights and remedies” as its federal counterpart will supply the applicable statute of limitations. *Ott v. Md. Dep’t of Pub. Safety & Corr. Servs.*, 909 F.3d 655, 659 (4th Cir. 2018).

**In this case, MFEPA is the state law most analogous to Title IX.** As a result of recent amendments to MFEPA, both statutes now provide a private cause of action against state entities for sex-based employment discrimination and retaliation and permit similar remedies. In 2007, the Maryland General Assembly amended MFEPA to provide a new private cause of action for employment discrimination.

See S.B. 678/H.B. 314, 2007 Md. Laws, Chs. 176 & 177, *codified as amended at* Md. Code Ann., State Gov't §§ 20-601, *et seq.* In 2009, MFEPA was again amended to waive sovereign immunity defenses to employment discrimination cases against state entities. See H.B. 51, 2009 Md. Laws, Ch. 120, *codified at* Md. Code Ann., State Gov't § 20-903. Similarly, Title IX has been interpreted to provide an implied private right of action to remedy employment discrimination in federally funded state education programs. *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 530, 102 S. Ct. 1912 (1982).

Like Title IX, MFEPA permits hostile work environment claims, discriminatory termination claims, and retaliatory discharge claims. See *Churchill v. Prince George's Cnty. Public Schools*, PWG-17-0980, 2017 WL 5970718, at \*5 (D. Md. Dec. 1, 2017) (hostile work environment); *Wright v. SunTrust Bank*, RDB-15-3985, 2017 WL 633470, at \*1 (D. Md. Feb. 16, 2017) (discriminatory termination); *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 211 (2013) (retaliatory discharge). **Accordingly, MFEPA's two-year statute of limitations governs.**

*Washington v. University of Maryland, Eastern Shore*, Civ. No. RDB-19-2788, 2020 WL 5747199, \*3 (D. Md., Sept. 24, 2020) (emphasis added).

Here, Plaintiff's Title IX claims were not asserted until the First Amended Complaint was filed on December 20, 2018. Therefore, Plaintiff may only assert claims under Title IX arising on or after December 20, 2016. However, no such claims exist because Plaintiff was out on approved leave from October of 2016 until her resignation in August of 2017.

Plaintiff's First Amended Complaint is devoid of any alleged incident of hostile work environment or retaliation from December of 2016 to her eventual resignation in August of 2017 or thereafter. That is because Plaintiff was out of the school and on leave from October 18, 2016, until her resignation on August 18, 2017. (J.R. 22, Ex. 1 (79:13-80:18).) Instead, the last incident alleged by Plaintiff in her First Amended Complaint was an incident that took place on October 6, 2016. First Am. Compl. ¶ 105.

The lack of any alleged incident of hostile work environment and/or retaliation during the statute of limitations period was confirmed Plaintiff in her deposition. Specifically, Plaintiff only identified incidents contributing to her alleged hostile work environment that took place as late as

September of 2016 to October of 2016. (J.R. 67-69, Ex. 1 (259:17-265:3).) Moreover, Plaintiff testified that during the 2016-2017 school year, she was not subjected to any form of retaliation. (J.R. 69, Ex. 1 (265:4-13).)

Finally, Plaintiff's Answers to Interrogatories also fail to identify any such incident of discrimination or hostile work environment, let alone incidents within the limitations. Plaintiff is bound by her sworn Answers.

9. Please identify each and every incident of discriminatory treatment on the basis of your sex (including any other category you contend is encompassed by sex discrimination) by Defendant that you believe occurred. For each alleged occurrence, please (a) provide the date of the alleged discrimination; (b) identify all persons engaging in conduct that you believe constituted such discrimination; (c) state the words, actions, or conduct that constitute the basis of your claim of discrimination; (d) state your claimed injury as a result of the alleged discrimination; and (e) state when and to whom you reported the alleged discrimination, what you reported, what action you requested taken, and what action you are aware of being taken.

**Response to Interrogatory 9:** Plaintiff objects to this Interrogatory as duplicative and unduly burdensome where she has already identified numerous instances of discriminatory treatment in the Complaint and additional information regarding instances of discrimination would be contained in documents and information within Defendants' custody and control, and more easily accessible by Defendants than Plaintiff, to the extent they occurred at the hands of Defendants' agents and employees. The Interrogatory fails to adequately define what is meant by "discrimination" or "discriminatory treatment." Plaintiff further objects to this Interrogatory to the extent that what qualifies as "discrimination" or "discriminatory treatment" calls for a legal conclusion. Plaintiff further objects to this Interrogatory as compound. Without waiving any of the objections and qualifications noted herein, Plaintiff is still reviewing documents recently produced by Defendants and will supplement this response in accordance with the Federal Rules of Civil Procedure.

10. Please identify each and every incident of hostile work environment by Defendant that you believe occurred. For each alleged occurrence, please (a) provide the date of the alleged hostile work environment; (b) identify all persons engaging in conduct that you believe constituted such hostile work environment; (c) state the words, actions, or conduct that constitute the basis of your claim of hostile work environment; (d) state your claimed injury as a result of the alleged hostile work environment; and (e) state when and to whom you reported the alleged hostile work environment, what you reported, what action you requested taken, and

what action you are aware of being taken.

**Response to Interrogatory 10:** Plaintiff objects to this Interrogatory as duplicative and unduly burdensome where she has already identified facts supporting her claim of hostile 10 work environment in the Complaint and additional information regarding the hostile work environment she experienced would be contained in documents and information within Defendants' custody and control, and more easily accessible by Defendants than Plaintiff, to the extent the conduct occurred through Defendants' agents and employees. The Interrogatory fails to adequately define what is meant by "hostile work environment." Plaintiff further objects to this Interrogatory to the extent that what qualifies as a "hostile work environment" calls for a legal conclusion. Plaintiff further objects to this Interrogatory as compound. Without waiving any of the objections and qualifications noted herein, Plaintiff is still reviewing documents recently produced by Defendants and will supplement this response in accordance with the Federal Rules of Civil Procedure.

11. Please set forth all facts that tend to support your allegation that you were subject to retaliation. Specifically, please (a) identify each and every act/conduct you engaged in, which caused Defendant to retaliate against you; (b) provide the date of your act/conduct; (c) state the specific actions by Defendant constituting retaliation; (d) provide the date of Defendant's actions; and (e) identify all person engaged in such retaliation.

**Response to Interrogatory 11:** Plaintiff objects to this Interrogatory as duplicative and unduly burdensome where she has already identified facts supporting her claim of retaliation in the Complaint and additional information regarding retaliation she experienced would be contained in documents and information within Defendants' custody and control, and more easily accessible by Defendants than Plaintiff, to the extent the conduct occurred through Defendants' agents and employees. The Interrogatory fails to adequately define what is meant by "retaliation" Plaintiff further objects to this Interrogatory to the extent that what qualifies as "retaliation" calls for a legal conclusion. Plaintiff further objects to this Interrogatory as compound. Without waiving any of the objections and qualifications noted herein, Plaintiff is still reviewing documents recently produced by Defendants and will supplement this response in accordance with the Federal Rules of Civil Procedure.

(J.R. 122-123, Ex. 9.)

Because Plaintiff's incidents of alleged hostile work environment and retaliation are barred by the statute of limitations, summary judgment should be granted in favor of Defendants as to Counts III and VII of the First Amended Complaint.

V. PLAINTIFF'S CLAIMS UNDER FEPA AND THE COUNTY CODE ARE BARRED BY THE STATUTE OF LIMITATIONS

Defendants' Motion for Summary Judgment should be granted in favor of Defendants as to all claims asserted against it under FEPA (Counts IV and VIII) and the County Code (Counts V and IX) because those claims are also barred by the statute of limitations.

Section 20-1013 of the *State Government Article* provides that a civil action alleging "an unlawful employment practice" be filed "within 2 years after the alleged unlawful employment practice occurred." Md. Code Ann., State Gov't § 20-1013(a)(3). In addition, Section 20-1202 of the *State Government Article* requires plaintiffs to assert discrimination claims based on county codes "within two years after the occurrence of the alleged discriminatory act." Md. Code Ann., State Gov't § 20-1202(c)(1).

In *Westmoreland v. Prince George's County*, Civ. No. TDC-14-0821, 2015 WL 996752, \*13 (D. Md., March 4, 2015), this Court explained:

**There is no provision in the MFEPA to toll the two-year statute of limitations while the administrative process unfolds.** Westmoreland argues that the statute creates a "completely unreasonable situation for plaintiffs" because it requires them to exhaust their administrative remedies but also file suit within two years. Westmoreland Supp. Resp. at 3, ECF No. 19. But the exhaustion requirement in MFEPA is not as robust as the one under Title VII. Title VII requires a complainant to file an administrative charge and then permits a complainant to file suit only after the agency has investigated that charge and determined that it will not pursue it. *See* 42 U.S.C. § 2000e-5(f)(1). **The MFEPA, by contrast, requires only that a complainant file an administrative charge, then wait 180 days before filing suit. With no requirement that a complainant see the state administrative process through to its end, the MFEPA's two-year statute of limitations is perhaps not the untenable requirement Westmoreland makes it out to be. To be sure, these differing approaches to exhaustion and the statute of limitations may place plaintiff's in the position of having to decide between pursuing remedies under the federal statutory scheme or the state statutory scheme, but to interpret MFEPA otherwise would ignore the plain language of the statute. See Dale v. Maryland Dept. of Tramp., No. ELH-13-0191, 2015 WL 221628 at \*20-21 (D. Md. January 15, 2015) (rejecting an argument for a tolling provision under the MFEPA because the statutory language "unambiguously commands" that all three requirements of the statute be satisfied, "not just any one of them").**

**Accordingly, all of Westmoreland's claims under the MFEPFA are barred by the statute of limitations and thus are dismissed with prejudice.**

*Westmoreland v. Prince George's County*, TDC-14-0821, 2015 WL 996752, \*13 (D. Md., March 4, 2015) (emphasis added).

The statute of limitations for these claims is well-settled. *See Lowman v. Maryland Aviation Administration*, Civ. No. JKB-18-1146, 2019 WL 133267, \*3 (D. Md., January 8, 2019) (“Where a plaintiff fails to file MFEPFA claims within two years of the alleged discrimination or retaliation, the claims are time barred and must be dismissed.”); *McCray v. Md. Dep't of Transp.*, 662 F.App'x 221, 225 (4th Cir. 2016) (affirming dismissal of MFEPFA claims as untimely because plaintiff did not file the civil suit within two years of her termination); *Fenicle v. Towson Univ.*, Civ. No. ELH-18-917, 2018 WL 5885526, \*12 (D. Md. Nov. 8, 2018) (“Because Fenicle has not alleged any acts of discrimination occurring within the applicable two-year limitations period after March 30, 2016, his [MFEPFA] claims ... must be dismissed.”); *Melendez v. Board of Educ. for Montgomery County*, Civ. No. DKC-14-3636, 2015 WL 3540947, \*10 (D. Md. June 3, 2015) (rejecting plaintiff's argument that she did not file because of pending EEOC determination because plaintiff “provide[d] no explanation ... for why she needed to wait for any EEOC action before pursuing her state law claims”); *Ward v. STG International, Inc.*, Civ. No. PWG-14-4040, 2016 WL 3257823, \*7, n. 5 (D. Md., June 14, 2016) (Therefore, Ward's state and county claims, had they been pleaded sufficiently, filed eight and a half years after the alleged unlawful employment practice, i.e., her termination, would be barred by the applicable two year statutes of limitation.)

As set forth above in Section IV, Plaintiff asserts no claims of alleged hostile work environment and/or retaliation within the two-year statute of limitations period because she was at home and out of the classroom. As a result, summary judgment should be granted in favor of Defendants as to Counts IV, V, VIII, and IX of the First Amended Complaint as the claims that are

asserted are time-barred.

VI. PLAINTIFF'S CLAIMS FOR RETALIATION ARE BARRED BY HER FAILURE TO TIMELY EXHAUST HER ADMINISTRATIVE REMEDIES

Defendants' Motion for Summary Judgment should be granted in favor of Defendants as to Plaintiff's claims for retaliation under Title VII (Count VI) because they are time-barred pursuant to the 300-day rule.<sup>1</sup>

In Maryland, a charging party must file an EEOC charge within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1); *Van Slyke v. Northrop Grumman Corp.*, 115 F.Supp.2d 587, 592 (D. Md. 2000). If a charging party fails to comply with this statutorily mandated filing period, alleged discriminatory acts that occurred more than 300 days prior to the filing of the EEOC charge may not be subsequently challenged in a Title VII suit. *Van Slyke*, 115 F.Supp.2d at 592.

In *Angelini v. Baltimore Police Department*, 464 F.Supp.3d 756 (D. Md. 2020), this Court explained that alleged discrete acts of retaliation that occurred more than 300 days prior to the plaintiff's filing of an EEOC charge were not administratively exhausted for Title VII purposes. Specifically, the Court stated, "the alleged retaliatory and harassing acts that occurred before June 28, 2013, are time-barred for the purpose of plaintiff's retaliation claim. Thus, plaintiff must adduce retaliatory acts occurring after that date in order to survive summary judgment." *Angelini v. Baltimore Police Department*, 464 F.Supp.3d 756, 788 (D. Md. 2020).

Here, in her First Amended Complaint, Plaintiff alleges that she was retaliated when she was removed from her Advanced Placement class by Principal Adams on June 11, 2015, several days after filing her Charge with the EEOC on June 3, 2015. First Am. Compl. ¶ 95.

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<sup>1</sup> This argument also applies to Plaintiff's claims for retaliation asserted under FEPA (Count VIII) and the County Code (Count IX) to the extent they survive despite being barred by the statute of limitations as set forth more fully above in Section V.

Even accepting Plaintiff's allegations as true, which they are not as set forth in Section VII below, Plaintiff's claims for the alleged retaliation based on her removal from Advance Placement classes were not timely exhausted because Plaintiff did not file her Amended Charge with the EEOC alleging retaliation until April 29, 2016, more than 300 days later. (J.R. 107, Ex. 6.)

As a result, Plaintiff's claims for retaliation relating to her removal of the AP classes or any other incident prior to 300 days from April 29, 2016, were not timely administratively exhausted and summary judgment should be granted in favor of Defendant as to Plaintiff's claims under Count VI, VIII, and IX of the First Amended Complaint.

VII. PLAINTIFF'S CLAIMS FAIL AS MATTER OF LAW

Defendants' Motion for Summary Judgment should be granted in favor of Defendants as to Plaintiff's claims under Title VII, Title IX, FEPA, and the County Code for hostile work environment (Counts II, III, IV, and V) and retaliation (Counts VI, VII, VIII, and IX) because Plaintiff cannot establish a *prima facie* case.<sup>2</sup>

A. *Governing Law*

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee on the basis of, *inter alia*, the employee's sex. 42 U.S.C. § 2000e-2(a). A plaintiff may avoid summary judgment on a Title VII claim through "two avenues of proof." *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (overruled on other grounds by *University of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)). The first avenue requires the plaintiff to present direct or circumstantial evidence that "raises a genuine issue of

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<sup>2</sup> Defendants address Counts III, IV, V, VII, VIII, and IX again in the event that these claims survive Defendants' arguments regarding the two year statute of limitations as set forth in Sections IV and V above. Defendants also address Count VI again in the event that these claims survive Defendants' arguments regarding the 300-day rule as set forth in Section VI above.

material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision." *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005). If the plaintiff lacks direct or indirect evidence of discrimination, she may proceed using the second avenue: the burden-shifting framework first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See *Diamond*, 416 F.3d at 318.

Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *McDonnell*, 411 U.S. at 802. The requirements of a prima facie case differ depending on the type of discrimination alleged. *Jenkins v. Baltimore City Fire Dept.*, 862 F. Supp. 2d 427, 444 (D. Md. 2012) (citing *McDonnell*, 411 U.S. at 802 n.13).

If a plaintiff establishes a prima facie case, "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Hill*, 354 F.3d at 285. If the defendant provides a non-discriminatory reason for the adverse employment action, "the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's stated reasons were not its true reasons, but were a pretext for discrimination." *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (internal quotation marks omitted)).

A plaintiff meets her burden of showing that an employer's proffered reason for the adverse employment action is a pretext for discrimination if she can show that the explanation is "unworthy of credence," although proof of falsity will not always be sufficient. See *Westmoreland v. TWC Administration LLC*, 924 F.3d 718, 727 (citing *Reeves*, 530 U.S. at 146) ("[T]he fact finder's rejection of the employer's legitimate, nondiscriminatory reasons for its action does not *compel* judgment for the plaintiff.") (emphasis in original); see also *Mereish v. Walker*, 359 F.3d 330, 336 (4th Cir. 2004).

The *McDonnell Douglas* framework also applies to discrimination claims under Title IX,

FEPA and the County Code. *See Jennings v. Univ. of North Carolina*, 484 F.3d 686, 695 (4<sup>th</sup> Cir. 2007) (In evaluating Title IX claims, the United States Court of Appeals for the Fourth Circuit looks to case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq.*, for guidance.); *see also Guessous v. Fairview Prop. Investments, LLC*, 828 F.3d 208, 216–17 (4<sup>th</sup> Cir. 2016).

*B. Hostile Work Environment*

To establish a hostile work environment claim based on gender, Plaintiff must show that: (1) the harassment was unwelcome; (2) the harassment was based on her gender; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *See Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261, 266 (4<sup>th</sup> Cir. 2001).

With respect to the second element, the conduct of which Plaintiff complains must be gender-based. *Ziskie v. Mineta*, 547 F.3d 220, 226 (4<sup>th</sup> Cir. 2008). “An employee is harassed or otherwise discriminated against ‘because of’ his or her gender if, ‘but for’ the employee's gender, he or she would not have been the victim of the discrimination.” *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4<sup>th</sup> Cir.2000). A plaintiff must show that he is “the individual target of open hostility because of [her] sex.” *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4<sup>th</sup> Cir.2003) (citing *Smith*, 202 F.3d at 242–43).

There are “both subjective and objective components” to this element. *Ocheltree*, 335 F.3d at 333 (en banc) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). “The environment must be perceived by the victim as hostile or abusive, and that perception must be reasonable.” *Ziskie*, 547 F.3d at 227. “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position,

considering ‘all the circumstances.’” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris*, 510 U.S. at 23, 114 S.Ct. 367).

Such circumstances include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” *Harris*, 510 U.S. at 23, 114 S.Ct. 367. No single factor is determinative. *Id.* Determining whether conduct is so severe or pervasive as to establish a hostile work environment claim is not a “mathematically precise test.” *Id.* at 22, 114 S.Ct. 367. Indeed, the “line between a merely unpleasant working environment ... and a hostile or deeply repugnant one may be difficult to discern.” *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir.1996).

As the Fourth Circuit recently noted, “[t]he task then on summary judgment is to identify situations that a reasonable jury might find to be so out of the ordinary as to meet the severe or pervasive criterion. That is, instances where the environment was pervaded with discriminatory conduct ‘aimed to humiliate, ridicule, or intimidate,’ thereby creating an abusive atmosphere.” *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 316 (4th Cir. 2008).

Here, while Plaintiff undoubtedly believes the alleged incidents she endured was severe or pervasive, objectively it was not. For example, Principal Robin Pope-Brown testified that Plaintiff was beloved by the students, students were protective of her, received a lot of accolades from parents, and that her complains of students were anomalies, which were addressed each and every time by administrators. (J.R. 252, Ex. 11 (158:10-159:7).) Principal Thompson also stated that Plaintiff had good relationships with her students and was like and beloved by her students. (J.R. 295, Ex. 12 (157:2-14).) Likewise, Principal King testified that Plaintiff was treated fairly and was not subjected to a hostile environment. (J.R. 336; Ex. 13 (125:16-126:16).) Finally, Ms. Isom

testified that Plaintiff was a favorite of the students and that they were really supportive of her (J.R. 381, Ex. 14 (167:21-169:7).)

The objective testimony of all administrators reveals that any alleged harassment sustained by Plaintiff was not severe or pervasive. For these reasons, summary judgment should be granted.

*C. Retaliation*

To establish a prima facie case for retaliation under Title VII, a plaintiff must demonstrate that: (1) she engaged in protected activity; (2) her employer took adverse employment action against her; and (3) a causal connection existed between the protected activity and the adverse action. *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007).

Inquiries into adverse employment actions have consistently focused on whether there has been discrimination in such ultimate decisions as hiring, granting leave, discharging, promoting, and compensation. *Boone v. Goldin*, 178 F.3d 253, 255–56 (4th Cir. 1999); *see Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir.2001) (in order to establish *prima facie* case of retaliatory harassment, plaintiff must show defendant's actions “adversely affected the terms, conditions, or benefits of plaintiff's employment”).

Here, in her First Amended Complaint, Plaintiff alleges that she was retaliated when she was removed from her Advanced Placement classes by Principal Adams on June 11, 2015, several days after filing her Charge with the EEOC on June 3, 2015. First Am. Compl. ¶ 95. However, Principal Adams testified that he did not even know of the June 3, 2015, EEOC Charge until his deposition on November 3, 2019. (J.R. 190, Ex. 10 (233:2-15); J.R. 205, Ex. 10 (290:13-19).) In fact, the EEOC did not even notify the Board of Education of Plaintiff's Charge until on or about October 2, 2015. (J.R. 100, Ex. 4.) Therefore, there can be no causal connection between Plaintiff's Charge and her removal from Advanced Placement classes as Principal Adams was unaware of

the Charge.

Moreover, Plaintiff suffered no change in the terms or conditions of her employment as a result of her removal from Advanced Placement classes. In *Boone*, the Fourth Circuit Court of Appeals explained that a reassignment does not constitute an adverse employment action where the reassignment causes no reduction in compensation, job title, level of responsibility, or opportunity for promotion. *Boone*, 178 F.3d at 255; *James*, 368 F.3d at 376. Here, Plaintiff testified that her salary and benefits were unchanged. (J.R. 72, Ex 1 (278:3-8).)

Finally, the only other discernable adverse employment actions alleged in her Amended Charge of Discrimination was letters of counsel and unwarranted disciplinary action. (J.R. 107, Ex. 6.) With regard to letters of counsel, there are not, in and of themselves, an adverse employment action. *See Jeffers v. Thompson*, 264 F.Supp.2d 314, 330 (D. Md. 2003) (reprimand or poor performance review is not adverse employment action unless it works real harm to employment or is intermediate step to discharge); *Allen v. Rumsfeld*, 273 F.Supp.2d 695, 706 (D. Md. 2003) (low performance evaluations, reprimands, and counseling and communication card entries were not adverse employment actions); *Newman v. Giant Food, Inc.*, 187 F.Supp.2d 524, 528–29 (D. Md. 2002) (verbal warning and counseling letter did not constitute an adverse action); *Nye v. Roberts*, 159 F.Supp.2d 207, 213–14 (D. Md. 2001) (holding that written reprimand did not constitute an adverse action because “reprimands do not automatically affect the terms and conditions of employment”).

With regard to the unwarranted disciplinary action, Plaintiff alleges it concerned in part an incident where she threw a pen, which hit a student. First Am. Compl. at ¶ 97. However, Plaintiff admitted to throwing a pen, which hit a student. (J.R. 87-88, Ex. 1 (340:21-341:11).) In addition, Plaintiff acknowledged raising her voice at her class, having a panic attack and was accused by

students of saying “shut the fuck up.” (J.R. 20, Ex. 1 (71-1-72:22).) Nevertheless, Plaintiff acknowledges that she was never disciplined. First Am. Compl. at ¶ 97. Lastly, Principal Adams did not even know of the Charge of Discrimination filed by Plaintiff until his deposition after the lawsuit was filed. Therefore, there can be no causal connection between his actions and Plaintiff’s filing of her EEOC Charge.

While Plaintiff may certainly disagree with Principal Adams’ actions for her removal from Advanced Placement classes and letter of counsels, disagreement does render Defendants’ proffered reasons “unworthy of credence.” *See Villa v. Cava Mezze Grill, LLC*, 858 F.3d 896, 900–01 (4th Cir. 2017) (quoting *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998)) (“[I]t is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the [adverse employment action].”). Title VII does not remedy everything that makes an employee unhappy.” *Jeffers v. Thompson*, 264 F.Supp.2d 314, 329 (D. Md. 2003). In addition, Courts have widely held that they do not sit as a “super-personnel department weighing the prudence of employment decisions” made by the defendants. *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998).

Plaintiff is unable to establish that Principal Adams’ actions and the proffered reasons for them were a pretext for retaliation. Mere assertions of discrimination are insufficient to counter an employer’s evidence of non-discriminatory reasons for an adverse employment action. *Dugan v. Albemarle County School Bd.*, 293 F.3d 716, 722 (4<sup>th</sup> Cir. 2002). Therefore, summary judgment should be granted.

#### VIII. PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF IMPLEMENTING TRAINING

In her First Amended Complaint, Plaintiff seeks relief from the Court including, “permanent injunctive relief . . . requiring Defendants to implement such training for students,

staff, and administrative at Prince George's County Public Schools regarding the nondiscriminatory treatment of transgender and gender nonconforming persons." First Am. Compl. at 39-40.

However, such relief cannot be required of Defendants because no evidence can be offered by Plaintiff as to any alleged deficiency in discrimination training since Plaintiff failed to designate an expert witness on this topic.

Federal Rule of Civil Procedure 26 requires that parties disclose the identities of those they intend to call as expert witnesses at trial. Fed. R. Civ. P. 26(a)(2)(A). In this case, the deadline for Plaintiff to make these disclosures was August 5, 2019. Plaintiff did not designate any witness on the issue of training. (J.R. 119, Ex. 9.) However, such a witness is required.

Generally, expert testimony is required to introduce evidence regarding matters requiring "scientific, technical or specialized knowledge." Lay witness testimony cannot be used to present evidence on matters beyond the ordinary layman's knowledge or experience. Here, the average juror's knowledge would not extend to discrimination training in a professional employment setting and the sufficiency of the training that was provided.

When a party fails to make a timely disclosure under Rule 26, Rule 37 states "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Because discovery is closed, the parties are in the the midst of summary judgment briefings, Plaintiff's failure is not justified or harmless and summary judgment should be granted as to the relief requested.

**Conclusion**

For all of the foregoing reasons, Defendants respectfully request that the Court grant their Motion for Summary Judgment as to all counts of the Complaint.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via the Court's CM/ECF system  
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