IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARCIA WALDEN,

Plaintiff,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION, COMPUTER SCIENCES CORP., CHRISTIE ZERBE, CDC Project Officer for Occupational Health and Preventive Services, and L. CASEY CHOSEWOOD, Director of the Office of Health and Safety at the CDC,

Defendants.

CIVIL ACTION NO.

1:08-CV-2278-JEC
MAGISTRATE JOHNSON

O R D E R & O P I N I O N

This action is presently before the Court on the Magistrate Judge's Report and Recommendation ("R&R") [111] granting defendants' Motions for Summary Judgment [74] and [78] and denying plaintiff's Motion for Summary Judgment [85]. The Court has reviewed the record and the arguments of the parties and, for the foregoing reasons, **ACCEPTS** and **ADOPTS** the R&R in part. The Court agrees with the Magistrate Judge's disposition of the motions, and thus **GRANTS** defendants' Motions for Summary Judgment [74] and [78] and **DENIES** plaintiff's Motion for Summary Judgment [85].

BACKGROUND

Defendant Centers for Disease Control and Prevention (the "CDC") is a federal agency headquartered in Atlanta, Georgia.[1] (R&R [111] at 10.) The CDC has over 6,000 employees in the Atlanta area. (*Id.*) In an effort to maintain a healthy and productive worksite for those employees, the CDC utilizes an Employee Assistance Program ("EAP"). (*Id.*) The EAP provides health and wellness services, including counseling services, to CDC employees. (*Id.* at 11-13.)

The CDC's EAP is operated by defendant Computer Sciences Corporation ("CSC") pursuant to a contract (the "EAP contract") that is held by CSC and overseen by the CDC's Office of Health and Safety. (*Id.* at 11.) The EAP contract requires CSC to manage and staff all CDC clinics in Atlanta. (R&R [111] at 11.) The individuals providing health and wellness services under the EAP contract are employees of CSC. (*Id.*) They are interviewed, hired, and supervised by CSC personnel. (*Id.* at 14.) However, the CDC retains the right under the EAP contract to provide input on performance, and to request the "immediate removal" of an EAP employee from the program. (*Id.* at 15, 53.) The EAP contract

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[1] Plaintiff objects to several of the Magistrate Judge's evidentiary rulings and statements of fact. (Pl.'s Objections [112] at 1-15.) After a thorough review of the record, the Court agrees with the Magistrate Judge's evidentiary rulings, and accepts and adopts his statement of undisputed facts. The Court will address plaintiff's particular objections where appropriate.

states that:

> The Contracting Officer may . . . require the Contractor to immediately remove any contract employee from the on-site facility should it be determined that the individual who is being assigned to duty has been disqualified for suitability reasons, or who is found to be unfit for performing duties during their tour(s) of duty.

(*Id.* at 53.)

In February, 2006, CSC hired plaintiff to be one of four EAP counselors at the CDC. (R&R [111] at 15.) As an EAP counselor, plaintiff was required to provide assessment, short-term counseling, and referral services to CDC employees with professional or personal problems, including troubled relationships. (*Id.* at 14, 16.) When she accepted the EAP position, plaintiff was aware that CSC policy required employees to adhere to its principles of inclusion and diversity. (*Id.* at 16.)

Plaintiff is a devout Christian and believes it is immoral to engage in same-sex relationships. (*Id.* at 16.) As a result, plaintiff believes that she is prohibited from counseling people to fix or promote a same-sex relationship. (*Id.*) Plaintiff's religion does not require her to explain the reason for her conflict to the client. (R&R [111] at 17.) However, it prevents plaintiff from supporting or encouraging (through counseling) a same-sex relationship. (*Id.* at 17.)

In July, 2006, plaintiff referred a gay client with multiple

issues to an outside counselor. (*Id.* at 17.) Plaintiff subsequently had a conversation with her supervisor, CSC's EAP director William Hughes, about the conflict between her religious beliefs and providing counseling to clients regarding same-sex relationships. (*Id.*) According to plaintiff, Mr. Hughes responded that he did not have a problem counseling clients under those circumstances, but he did not provide her with any direction as to how to handle those situations in the future. (*Id.* at 18.)

On August 21, 2007, plaintiff met with a CDC employee (referred to as Jane Doe) for an initial intake counseling session. (R&R [111] at 19.) In response to plaintiff's inquiry as to the reason for the visit, Ms. Doe explained that she had been in a same-sex relationship for eighteen years, that she and her partner had an eight-year-old son, and that she recently learned that her partner had forged her name in order to obtain lines of credit. (*Id.* at 19.) During the course of this discussion, Ms. Doe became highly emotional. (*Id.*) She told plaintiff that she was very upset about the situation, and that she was wondering whether she could trust her partner again. (*Id.*)

Plaintiff concluded that Ms. Doe's desire to obtain same-sex relationship counseling conflicted with her religious beliefs. (*Id.* at 20.) She informed Ms. Doe that, based on her personal values, she could not provide the requested counseling. (R&R [111] at 22.)

Ms. Doe agreed to meet with another EAP counselor, and plaintiff left the room to see if anyone was available. (*Id.*) Shortly thereafter, plaintiff introduced Ms. Doe to her colleague Ken Cook, who proceeded to counsel Ms. Doe. (*Id.*) Mr. Cook was the only counselor available when plaintiff decided to make the referral. (*Id.*)

Ms. Doe had a satisfactory counseling session with Cook. (Doe Dep. at 14.) However, Ms. Doe was upset by the way she had been treated by plaintiff. (*Id.* at 17-18, 21, 44.) Ms. Doe testified that she felt "judged and condemned" by plaintiff. (*Id.* at 20, 44.) According to Ms. Doe, she felt that way because of the manner and the timing of plaintiff's explanation as to why she could not counsel her. (*Id.* at 18.) Ms. Doe felt that plaintiff's nonverbal communication also indicated disapproval of her relationship. (*Id.*) Following her counseling session with Mr. Cook, Ms. Doe contacted EAP Director Hughes to complain about plaintiff. (R&R [111] at 25.) Mr. Hughes told Ms. Doe that he would investigate the situation and get back to her. (*Id.*)

Later that day, Mr. Hughes discussed Ms. Doe's complaint with plaintiff. (*Id.* at 28.) Plaintiff reiterated to Mr. Hughes that her religious beliefs prevented her from counseling clients about their same-sex relationships. (*Id.* at 29.) Mr. Hughes suggested to plaintiff an alternative way that she could refer such clients to

another counselor without stating that the reason for the referral was her "personal values." (*Id.*) Specifically, Mr. Hughes asked plaintiff if she could tell clients seeking same-sex relationship advice that she did not have relationship counseling experience. (R&R [111] at 30.) Plaintiff refused to consider that alternative because she believed that would be "lying to the client." (*Id.*) According to Mr. Hughes' notes of the conversation, plaintiff also stated that "people have a right to beliefs and why can't she have hers." (*Id.* at 31.)

Mr. Hughes resumed his discussion with plaintiff the following day. (*Id.* at 32.) According to plaintiff, Mr. Hughes again asked plaintiff if she had to tell clients seeking same-sex relationship advice that she could not treat them because of her personal values and if, instead, she could say that she did not have experience in relationship counseling. (*Id.*) Plaintiff continued to decline this alternative as "dishonest." (Walden Dep. at 154.)

Mr. Hughes subsequently informed CSC's Program Director Melvin Shelton of plaintiff's referral of Ms. Doe and of Ms. Doe's complaint. (R&R [111] at 34.) After his conversation with Mr. Hughes, Mr. Shelton called the CDC's Director of Health and Safety, Dr. Casey Chosewood, to make him aware that a CDC employee might be filing a complaint about her EAP experience. (*Id.* at 35.) Mr. Shelton advised Dr. Chosewood that he "should be aware of a

situation where [plaintiff] had told one of our CDC workers that she would not be able to counsel her because of her religious objections to the patient's issues around her same-sex relationship. And that the employee was quite upset about that fact." (*Id.* at 36.) Mr. Shelton told Dr. Chosewood that CSC was going to investigate the situation and that he would get back to Dr. Chosewood with more information. (*Id.*)

Based on the facts as relayed by Mr. Shelton, Dr. Chosewood felt that plaintiff's conduct fell short of the expectation that the EAP provide a welcoming environment for any CDC employee who sought help.[2] (*Id.* at 38.) Dr. Chosewood understood that there might be times when a counselor needed to refer a client to another counselor, but he was concerned that plaintiff had shared her objections to the client's lifestyle in doing so. (R&R [111] at 37.) In that respect, Dr. Chosewood felt that "[plaintiff's] behavior was not appropriate, that it's not part of the image and service level that we want to have available for our CDC workers." (*Id.* at 44.) Dr. Chosewood also was concerned that this incident

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[2] Plaintiff contends that Dr. Chosewood's recollection of his conversation with Mr. Shelton is hearsay. (Pl.'s Objections [112] at 12.) However, Dr. Chosewood's recollection is not offered to show the truth of the matters asserted by Mr. Shelton, but rather to show Dr. Chosewood's state of mind and knowledge. *See* Fed. R. Evid. 801(c) and *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 557 (11th Cir. 1998). Dr. Chosewood's testimony is therefore admissible.

had occurred during the client's first intake session at the EAP. (*Id.*) According to Dr. Chosewood, the intake session is a particularly sensitive and vulnerable time in the client/counselor relationship because the counselor knows nothing about the client or her state of mind. (*Id.*)

Dr. Chosewood informed defendant Christie Zerbe, the project officer for the EAP contract, about the incident involving Ms. Doe. Ms. Zerbe shared Dr. Chosewood's concerns, and worried that if other employees learned about the incident it would undermine the effectiveness of the EAP program. (*Id.* at 39.) Ms. Zerbe agreed with Dr. Chosewood that a counselor with a religiously based conflict might need to refer a client to another counselor. (R&R [111] at 39.) However, with regard to the incident at issue, Ms. Zerbe was not pleased with the fact that:

> an individual came in for counseling, and an individual coming in for counseling is already at a hypersensitized state. This individual was made to feel worse coming in to - for counseling. And that was done by letting the individual - by [plaintiff] judging the individual as opposed to simply referring her to another counselor.

(*Id.*)

On August 23, 2007, Mr. Shelton asked CSC Employee Relations Specialist Jackie Byrum to investigate plaintiff's referral of Ms. Doe. (*Id.* at 40.) As part of her investigation, Ms. Byrum asked plaintiff the same questions that Mr. Hughes had asked, and

plaintiff gave her the same responses. (*Id.* at 49.) In particular, plaintiff continued to reject the alternative of telling clients that she did not have experience in relationship counseling. (*Id.*) Ms. Byrum explained to plaintiff that if she were to find herself in a similar situation she should refrain from making personal statements of her belief system to the client and immediately contact her manager. (R&R [111] at 50.) Ms. Byrum testified that, based on her discussions with plaintiff, Byrum concluded that plaintiff would not be willing to refrain from disclosing the reason for her refusal to provide same-sex relationship counseling because plaintiff "felt that would be dishonest."[3] (*Id.* at 51.)

At some point during Ms. Byrum's investigation, Mr. Shelton informed Dr. Chosewood that CSC had talked to plaintiff and advised her about methods to refer employees without mentioning her religious objections or personal values, but that plaintiff was not willing to change the way she approached such situations in the

[3] For purposes of resolving defendants' motions for summary judgment, the Court assumes that plaintiff did not "insist[] on disclosing the religious basis for her ethical conflict." (Pl.'s Objections [112] at 4-5.) Instead, the Court assumes that Ms. Byrum reached the above conclusion because plaintiff repeatedly rejected the suggestion that she tell same-sex clients that she lacked relationship counseling experience. (*Id.* at 3.) Plaintiff concedes that she rejected that alternative as "dishonest." (*Id.*)

future.[4] (*Id.* at 42.) Dr. Chosewood was surprised that plaintiff wasn't willing to change her approach. (*Id.* at 43.) He shared with Mr. Shelton his "continuing concerns over [plaintiff's] behavior [and his] . . . fear[] that it very likely could happen again." (*Id.* at 43.)

Following his conversation with Mr. Shelton, and while CSC's investigation was still ongoing, Dr. Chosewood and Ms. Zerbe made a joint decision that plaintiff should be removed from the CDC's account with CSC. (R&R [111] at 46.) On August 30, 2007, Ms. Zerbe sent an email to Mr. Shelton stating, "Per our contract and the actions of the contractor . . . we would like [plaintiff] removed from this contract. Thank you." (*Id.* at 52.) As required by the EAP contract, CSC complied with the CDC's request to remove plaintiff from the EAP. (*Id.* at 54.)

At the time of the incident at issue, CSC's only counseling positions in the Atlanta area were EAP positions at the CDC. (*Id.* at 58.) Thus, in conjunction with plaintiff's removal from the CDC

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[4] In her objections, plaintiff disputes that Mr. Shelton had a second conversation with Dr. Chosewood. (Pl.'s Objections [112] at 5-8.) However, in her own statement of facts, plaintiff asserts that Mr. Shelton contacted Dr. Chosewood on August 28, 2007 to give him an update on CSC's investigation. (Pl.'s Statement of Material Facts [85] at ¶ 122.) Plaintiff states that, during their ensuing conversation, Mr. Shelton told Dr. Chosewood that plaintiff was unwilling to change the way she approached similar situations in the future. (*Id.* at ¶ 123.)

contract, Mr. Shelton decided to lay plaintiff off. (*Id.* at 54.) On September 10, 2007, Mr. Shelton told plaintiff that she was being laid off because the CDC was not comfortable with her returning to the EAP position. (R&R [111] at 56.) On that same date, CSC issued a letter to plaintiff stating that her "employment with CSC will end due to layoff effective" immediately. (*Id.* at 55.)

Because plaintiff was laid off, as opposed to being terminated for cause, she was provided access to several resources to help her find another job within CSC. (*Id.* at 56.) Plaintiff's termination letter encouraged her to "seek other opportunities within CSC by using CSC CareerSource and the Employee Reassignment Service." (*Id.* at 56.) As a laid off employee, plaintiff would retain her tenure with CSC if she was rehired within one year. (*Id.* at 56.)

At least once after September 10, 2007, plaintiff logged onto CSC's website to see if there were job openings. (R&R [111] at 59.) Although there were openings, plaintiff did not apply for any available positions. (*Id.*) Plaintiff testified that she felt that another position at CSC would not have been a good fit after her layoff, because CSC did not respect her religious beliefs. (*Id.*)

Plaintiff subsequently filed this lawsuit asserting numerous constitutional and statutory claims against CSC, the CDC, and CDC employees Dr. Chosewood and Ms. Zerbe. (*Id.* at 61.) Following discovery, the parties filed cross-motions for summary judgment.

(Defs.' Mots. for Summ. J. [74] and [78]; Pl.'s Mot. for Summ. J. [85].) During the course of summary judgment briefing, plaintiff abandoned several of her claims, leaving the following claims for resolution: (1) a First Amendment free exercise claim against the federal defendants and CSC; (2) a free exercise retaliation claim against the federal defendants; (3) a claim that the federal defendants and CSC violated plaintiff's rights under the Religious Freedom Restoration Act ("RFRA"); and (4) a Title VII religious discrimination claim against CSC. (R&R [111] at 2-3.)

The parties' motions for summary judgment were referred to Magistrate Judge Johnson. (*Id.*) Judge Johnson issued an R&R [111] recommending that the Court grant defendants' motions for summary judgment, and deny plaintiff's motion for summary judgment. (*Id.* at 4.) Plaintiff has filed Objections to the R&R, in which she objects to the Magistrate Judge's rulings that: (1) the *Pickering* balancing test applies to her free exercise claim, and weighs in favor of defendants; (2) the RFRA does not apply in a suit brought against a government employer; (3) CSC is not a "state actor" for purposes of the free exercise clause and the RFRA; and (4) plaintiff did not establish a *prima facie* case of religious discrimination under Title VII. (Pl.'s Objections [112] at 22-47.) Those objections, and the parties' cross-motions for summary judgment, are presently before the Court.

Pursuant to 28 U.S.C. ¶ 636(b)(1) and Federal Rule of Civil Procedure 72, the Court has conducted a careful, *de novo* review of the Magistrate's legal conclusions, and to those portions of the R&R to which plaintiff objected. The Court has reviewed the remainder of the R&R for clear error.

DISCUSSION

I. Plaintiff's Claims Against the Federal Defendants

A. Plaintiff's Free Exercise Claim

The free exercise clause of the First Amendment bars a government actor from "prohibiting the free exercise" of religion. U.S. Const. Amend. I. Plaintiff contends that the CDC violated the free exercise clause, and infringed upon her free exercise rights, when it asked for her removal from the EAP contract. (Pl.'s Objections [112] at 21-35.)

In order to prevail on her free exercise claim, plaintiff must show that the CDC "impermissibly burdened" one of her "'sincerely held religious beliefs.'" *Watts v. Florida Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007)(quoting *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989)). Whether a burden is "impermissible" depends on the standard that is applied to the challenged government action. In her objections, plaintiff urges the Court to apply the analytical approach adopted in *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963). (Pl.'s Objections [112] at

23.) In *Sherbert*, the Supreme Court held that a state law that infringes on a person's free exercise rights must be narrowly tailored to serve a "compelling state interest." *Id.* at 403.

The Magistrate Judge held that *Sherbert* does not apply to the CDC's removal of plaintiff from the EAP contract, because in taking that action the CDC was acting in its role as a government employer. (R&R [111] at 68.) Instead of applying *Sherbert*, the Magistrate Judge applied the more lenient standard developed in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 566-68 (1968). (*Id.*) Under *Pickering*, a government employer does not have to show that its infringement of an employee's constitutional rights is narrowly tailored to serve a compelling state interest. *Shahar v. Bowers,* 114 F.3d 1097, 1102-03 (11th Cir. 1997). Rather, the legality of the government employer's action turns on a balancing between the government's interest in the efficient and effective provision of government services and the employee's asserted constitutional interest. *Pickering*, 391 U.S. at 568.

1. The *Pickering* Test Applies to Plaintiff's Free Exercise Claim

As the Magistrate Judge correctly noted, it is the nature of the relationship between plaintiff and the CDC that determines the standard that is applicable to her free exercise claim. (R&R [111] at 68.) Both the Supreme Court and the Eleventh Circuit have

refused to apply the *Sherbert* standard in the government employment context. *See Waters v. Churchill,* 511 U.S. 661, 671 (1994)("the government as employer . . . has far broader powers than does the government as sovereign") and *Shahar,* 114 F.3d at 1102 ("because the government's role as employer is different from its role as sovereign, we review its acts differently in the different contexts"). Their rationale is simple:

> When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Waters, 511 U.S. at 675.

That *Pickering*, itself, involved a free speech claim, as opposed to a free exercise claim, is unimportant. Numerous courts, including the Eleventh Circuit, have extended the *Pickering* balancing test into the free exercise realm. *See Shahar,* 114 F.3d at 1103, n. 27 (applying *Pickering* to plaintiff's free exercise claim) and *Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir. 1995)(noting that *Pickering* "dealt with free speech rather than the free exercise of religion" but finding "no essential relevant differences between those rights"). The salient fact in *Pickering* is that it involved a government employer, with the attendant need to promote the effective and efficient provision of government services. *Waters,* 511 U.S. at 675.

Neither does it matter that plaintiff was an employee of CSC, as opposed to the CDC. During the relevant time period, CSC was an independent government contractor. (R&R [111] at 69.) The Supreme Court has applied *Pickering* to government contractors. *Wabaunsee County v. Umbehr*, 518 U.S. 668, 684-685 (1996). There is no reason that *Pickering* should not also apply to employees of government contractors, who are "similar in most relevant respects to government employees." *Id.*

2. Plaintiff Has Failed to Make the Required Threshold Showing that the CDC Infringed Her Free Exercise Rights

To prevail under *Pickering*, plaintiff initially must show that the CDC infringed her constitutional rights. *See Connick v. Myers*, 461 U.S. 138, 146-47 (1983)("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."). As applied in the free exercise context, the relevant inquiry is whether the CDC's removal of plaintiff from the EAP contract substantially burdened plaintiff's exercise of one of her "sincerely held religious beliefs." *Watts*, 495 F.3d at 1294. *See also Altman v. Minnesota Dep't of Corr.*, 251 F.3d 1199, 1204 (8th Cir. 2001)(to prevail on their free exercise claim, plaintiffs "must first show

'that the governmental action complained of substantially burdened their religious activities'")(quoting *Brown*, 61 F.3d at 658). To "substantially burden" means to "prevent[] [an] individual from engaging in religiously mandated activity, or [to] . . . require[] participation in an activity prohibited by religion." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004).

The Court assumes that plaintiff's sincerely held religious beliefs prohibit her from encouraging or supporting same-sex relationships through counseling. However, there is no evidence in the record to suggest that the CDC removed plaintiff from the contract because of her religiously based need to refer clients seeking same-sex relationship counseling. Rather, the undisputed facts show that the CDC removed plaintiff from the contract because of the manner in which plaintiff handled the situation involving Ms. Doe, and the CDC's reasonable concern about how plaintiff would handle similar situations in the future.[5] (R&R [111] at 71.)

Plaintiff does not dispute that Dr. Chosewood thought that

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[5] In an effort to create an issue of fact as to the reason for the CDC's action, plaintiff cites a CSC HR report indicating that Mr. Shelton initiated a reduction-in-force ("RIF") against plaintiff on August 22, 2007. (Pl.'s Objections [112] at 8-10.) Plaintiff fails to explain why this factual allegation is material to her claim against the CDC. There is no evidence that the CDC was involved in the RIF, or that it was even aware that a RIF had been initiated.

plaintiff's conduct with regard to Ms. Doe was inappropriate and unprofessional. Although Dr. Chosewood recognized that a religious conflict of interest might require a referral, he objected to plaintiff's "sharing her objections to the [client's] circumstances, her life." (Chosewood Dep. at 27.) Dr. Chosewood explained that:

> as the director of the [CDC's] Office of Health and Safety, I felt a responsibility to provide a high-quality, welcoming environment for any of CDC's workers who might come forward. I think that's especially true in the first intake session when the [counselor] is unsure of where an employee might be in a situation, how vulnerable they might be, how much difficulty or struggle they might be having with a situation, what their frame of mind, their mental state is. That's a particularly sensitive and vulnerable period in the client/[counselor] relationship, and I would hope that our program would be at its best during that window. And certainly, I felt that [plaintiff's conduct] was falling short of that expectation of a high-quality program.

(*Id.* at 25-26.)

Ms. Zerbe agreed with Dr. Chosewood's assessment. Like Dr. Chosewood, Ms. Zerbe was concerned that:

> an individual coming in for counseling is already at a hypersensitized state. This individual was made to feel worse coming in to - for counseling. And that was done by letting the individual - by [plaintiff] judging the individual as opposed to simply referring her to another counselor.

(Zerbe Dep. at 89.) According to Ms. Zerbe, the manner in which plaintiff handled Ms. Doe's referral was "an unacceptable reaction to the situation." (*Id.*)

Plaintiff also does not dispute that Dr. Chosewood was afraid

that plaintiff would react in a similarly inappropriate manner when faced with future clients seeking same-sex relationship counseling. Dr. Chosewood stated that he had "continuing concerns over [plaintiff's] behavior, could it happen again and certainly feared that it very likely could happen again." (Chosewood Dep. at 33.) Consequently, Dr. Chosewood "began to worry about the overall fit of [plaintiff] within [the CDC's] program, about the quality of service [plaintiff] would be providing." (*Id.*) Again, Ms. Zerbe shared Dr. Chosewood's concerns. (Zerbe Dep. at 89-90.)

Contrary to plaintiff's argument, Dr. Chosewood and Ms. Zerbe's fear about how plaintiff might handle future situations involving same-sex clients was well-founded. Their concern was based on Mr. Shelton's report, during the course of CSC's investigation, that plaintiff had refused to consider alternative methods of referring clients seeking same-sex relationship counseling. (Chosewood Dep. at 31.) Plaintiff admits that she rejected CSC's suggestion that, when referring such clients in the future, she "say something other than it's because of [her] religious or personal values" such as that she lacked relationship counseling experience. (Walden Dep. at 101, 110.) Plaintiff told CSC that she couldn't say that because it would be "lying." (*Id.* at 101.) There is no evidence that plaintiff offered any suggestions of her own as to how she could "honestly" refer such a client without expressing a value judgment

about the client's relationship or lifestyle, which is what Dr. Chosewood and Ms. Zerbe found to be objectionable.

The Court also rejects plaintiff's argument that Dr. Chosewood and Ms. Zerbe acted unreasonably in relying on the CSC, and Mr. Shelton in particular, to obtain information about the incident involving Ms. Doe. Plaintiff contends that the CDC should have conducted its own investigation, instead of relying on Mr. Shelton's "third-hand" statements about the Doe incident and CSC's pending investigation. (Pl.'s Objections [112] at 18-20.) Plaintiff accurately cites Supreme Court authority for the proposition that: "It may be unreasonable . . . for the [government] to come to a conclusion based on no evidence . . . [or] based on extremely weak evidence when strong evidence is clearly available." *Waters*, 511 U.S. at 677. However, CSC's investigation, and Mr. Shelton's statements to Dr. Chosewood about the investigation, do not constitute "no evidence" or "extremely weak evidence." Dr. Chosewood could have interviewed plaintiff or conducted his own investigation, but he was not required by *Waters* to do so.

In any case, it is doubtful that an investigation by the CDC would have helped plaintiff. Based on plaintiff's own testimony, the essential facts that Mr. Shelton relayed to Dr. Chosewood were accurate: plaintiff told a client seeking same-sex relationship counseling that she could not provide the counseling because of her

"personal values" and when asked whether she could use an alternative method of referring such clients in the future, plaintiff refused. (Walden Dep. at 86-87, 101, 110.) Those are the facts, admittedly true, upon which the CDC based its decision.

Plaintiff testified that her religion did not require her to tell clients seeking same-sex relationship counseling the reason for her need to refer them. (*Id.* at 291-92.) Apparently, plaintiff wanted to share her reason for the referral because she "want[ed] to be honest with [her] clients." (*Id.*) However, what plaintiff viewed as an "honest" communication, CDC officials considered to be potentially harmful both to CDC employees seeking counseling and to the EAP as a whole. (Chosewood Dep. at 33, 37-39; Zerbe Dep. at 89-90.) Accordingly, the CDC asked for plaintiff's removal from the EAP contract. There is no evidence that plaintiff's removal was based on her religious beliefs, including her religiously based need to refer clients seeking same sex-relationship counseling.[6] Thus, as the CDC did not "substantially burden" plaintiff's free exercise rights, its motion for summary judgment on plaintiff's free exercise claim should be **GRANTED**.

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[6] Indeed, Dr. Chosewood and Ms. Zerbe consistently testified that they understood and respected a counselor's need to refer clients, be it based on a religious objection or some other conflict of interest. (Chosewood Dep. at 27, 37-38; Zerbe Dep. at 58, 92.)

3. The *Pickering* Balance Weighs in Favor of the CDC

Even assuming that the CDC's action somehow burdened plaintiff's exercise of her religious beliefs, plaintiff still cannot prevail on her free exercise claim. Under *Pickering*, once the Court determines that an employee's constitutional rights have been infringed, it must weigh those rights against the government employer's interest in the efficient and effective provision of services. *Pickering*, 391 U.S. at 568. *See also Shahar*, 114 F.3d at 1106-07 (applying *Pickering* in the free exercise and free association context). In this case, the balance tips in favor of the CDC.

It is undisputed that the CDC has a strong interest in the effective operation of its EAP. *See Oleszko v. State Compensation Ins. Fund*, 243 F.3d 1154, 1155-56 (9th Cir. 2001)(discussing the benefits of EAPs to employers and workers). Dr. Chosewood and Ms. Zerbe believed that the way plaintiff handled the situation involving Ms. Doe significantly interfered with that interest. (Chosewood Dep. at 25-27; Zerbe Dep. at 89-90.) Their belief was reinforced by Ms. Doe's complaint, indicating that plaintiff's statements during her initial counseling session made her feel "judged and condemned." (Doe Dep. at 20, 44.) In light of Ms. Doe's complaint, Dr. Chosewood felt that plaintiff's conduct with respect to Ms. Doe "f[ell] short of [his] expectation of a high-

quality [counseling] program." (Chosewood Dep. at 26.) Ms. Zerbe echoed that sentiment, and was particularly concerned that Ms. Doe had been "made to feel worse" for coming in to counseling. (Zerbe Dep. at 89.)

In addition, Dr. Chosewood and Ms. Zerbe both believed that plaintiff was unwilling to change the way she handled such situations in the future. (Chosewood Dep. at 31-34.) Based on the initial results of CSC's investigation, their belief was eminently reasonable. Indeed, even by the time of her deposition, plaintiff did not fully comprehend why a change of approach might have been necessary. (Walden Dep. at 311.) Relating a conversation that she had with a CSC official about the matter, plaintiff testified as follows:

> A. And what I said was that it seemed unfair that she was able to talk about being gay and lesbian, and yet I couldn't freely talk about me and my religious beliefs, or being Christian, or why am I being told I can't say that. . . .
>
> Q. And do you think that Jane Doe shouldn't have talked about being gay and lesbian, in the counseling session?
>
> A. No. But at the same time, as I mentioned to him, why am I being told that I can't say "personal values."
>
> Q. But would you agree that it's a different role? She's the person seeking counseling; you're the counselor. So you're sort of comparing apples and oranges there.
>
> A. To me, it's about honesty. If she can be honest - I mean, I should be honest about why I'm transferring

her.

(*Id.*)

In her objections, plaintiff argues that the CDC has not shown "actual interference with the EAP." (Pl.'s Objections [112] at 33.) According to plaintiff, the CDC "only conjecture[s] about [its] concerns for [the EAP's] future effectiveness." (*Id.*) Plaintiff "overstates the [CDC's] 'evidentiary burden.'" *Shahar*, 114 F.3d at 1107 (quoting *Waters*, 511 U.S. at 675-77). A government employer need not make a particularized showing that an employee's conduct actually interferes with the effective provision of services. *Id.* at 1107-08. Neither does the government employer have to "allow events to unfold to the extent that the disruption . . . is manifest before taking action." *Id.* at 1107. Rather, the Court must defer to the government employer's reasonable view of the facts and its reasonable predictions of harm. *Id.* *See also Waters*, 511 U.S. at 673. In any case, Ms. Doe's complaint does show "actual interference" at least with the way that Dr. Chosewood and Ms. Zerbe envisioned the EAP operating.

Under the circumstances, Dr. Chosewood and Ms. Zerbe's request that plaintiff be removed from the EAP contract was reasonable, and must be upheld under *Pickering*. *Shahar*, 114 F.3d at 1103 (holding that defendant's revocation of plaintiff's job offer was reasonable because her purported marriage to another woman could "jeopardize

the proper functioning of [the] [AG's] office"). For this additional reason, the CDC's motion for summary judgment on plaintiff's free exercise claim should be **GRANTED.**

B. Free Exercise Retaliation

The Magistrate Judge correctly summarized the standard that applies to plaintiff's free exercise retaliation claim. (R&R [111] at 79.) In order to make out a *prima facie* case of retaliation, plaintiff must show (1) that her speech or conduct was protected by the First Amendment, and (2) that her protected speech or conduct played a "substantial or motivating role" in the alleged adverse employment action, in this case plaintiff's removal from the EAP contract. *Akins v. Fulton County*, 420 F.3d 1293, 1303 (11th Cir. 2005) (setting out the elements of a First Amendment retaliation claim). If plaintiff can establish these elements, the defendant is given the opportunity to rebut the presumption of retaliation by proving that it would have made the same decision even if the speech or conduct at issue had never taken place. *Id.*

As is apparent from the above discussion, there is no evidence to support either of the required elements of a *prima facie* retaliation case. Plaintiff testified that her religion did not require her to tell clients seeking same-sex relationship counseling the reason that she could not counsel them. (Walden Dep. at 292.) Thus, plaintiff's statement that she could not counsel Ms. Doe

because of her "personal values" was not protected by the First Amendment. The undisputed evidence in the record shows that plaintiff's "personal values" statement, and the CDC's reasonable fear that plaintiff would make similar statements in the future, was the only "substantial or motivating" factor in the CDC's decision to remove plaintiff from the EAP contract. (Chosewood Dep. at 25-27; Zerbe Dep. at 89-90.) Accordingly, the CDC's motion for summary judgment on plaintiff's free exercise retaliation claim should be **GRANTED**.

C. Plaintiff's RFRA Claim

The RFRA prohibits a federal government actor[7] from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). Subsection (b) of the RFRA provides for an exception pursuant to which the government *may* substantially burden a person's exercise of religion if the challenged action: (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling government interest. 42 U.S.C. § 2000bb-1(b).

The Magistrate Judge held that the RFRA does not apply to government employers, such as the CDC. (R&R [111] at 83.) His

[7] The RFRA has been held unconstitutional as applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

ruling, which is based on the legislative history of the RFRA, is well-reasoned and logically sound. The RFRA was passed in response to the Supreme Court's decision in *Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). (*Id.* at 81.) According to Congress, the *Smith* decision "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." (*Id.*) The RFRA was intended to restore the compelling interest test set forth in *Sherbert* to cases involving laws that are neutral toward religion. (*Id.*) In other words, the RFRA's purpose was to return the law to its pre-*Smith* state. (*Id.* at 82.)

The Magistrate Judge astutely notes that, even before *Smith*, courts did not apply the *Sherbert* test in cases involving government employers. (R&R [111] at 82.) Moreover, the Supreme Court and the Eleventh Circuit long have recognized that the *Sherbert* test should not apply to First Amendment claims involving a government employer. *See Pickering*, 391 U.S. at 566-68 and *Shahar*, 114 F.3d at 1103. By analogy, and in accordance with cases such as *Pickering* and *Shahar*, the RFRA should not apply to government employers either. (*Id.* at 83.)

Although the Magistrate Judge's reasoning is persuasive, plaintiff points out that his position on her RFRA claim is

unprecedented. (Pl.'s Objections [112] at 36.) Moreover, the plain language of the RFRA defines the term "government" broadly to encompass any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb-2(1). The RFRA does not by its terms exclude government employers. Presumably for that reason, several courts have entertained RFRA claims against the government when acting in its role as employer. *See Lumpkin v. Brown*, 109 F.3d 1498, 1501 (9th cir. 1997) and *Gunning v. Runyon*, 3 F. Supp. 2d 1423, 1432-33 (S.D. Fla. 1998).

Fortunately, the facts of this case do not require the Court to resolve this difficult issue. Indeed, the Court finds that plaintiff's RFRA claim is more appropriately decided on narrower grounds. By its terms, the RFRA only prohibits the government from "substantially burden[ing]" a person's exercise of religion. 42 U.S.C. § 2000bb-1(a). Plaintiff's RFRA claim against the CDC thus fails for the same reason that her free exercise claim fails: the CDC's decision to remove plaintiff from the EAP contract did not "burden" plaintiff's religion because it was not based upon plaintiff's religiously based refusal to provide same-sex relationship counseling. The undisputed evidence shows instead that the CDC's decision was motivated by the manner in which plaintiff handled the situation involving Ms. Doe, and the CDC's reasonable

concern about how she would handle similar situations in the future. Accordingly, the CDC's motion for summary judgment on plaintiff's RFRA claim should be **GRANTED**.

D. Qualified Immunity

Finally, the Court agrees with the Magistrate Judge that Dr. Chosewood and Ms. Zerbe are entitled to a defense of qualified immunity on the claims brought against them in their personal capacities. (R&R [111] at 83-85.) Qualified immunity confers complete protection upon government officials sued in their personal capacities unless their conduct "'violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). As long as the official was acting within the scope of his discretionary authority at the time of the alleged misconduct, he is entitled to qualified immunity if an objectively reasonable official in the same situation could have believed that his actions were lawful. *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 638-41 (1987)).

It is undisputed that Dr. Chosewood and Ms. Zerbe were acting within the scope of their discretionary authority when they removed plaintiff from the EAP contract. (R&R [111] at 85.) Thus, the Magistrate Judge correctly framed the issue as: (1) whether the

facts that plaintiff has shown make out a violation of a constitutional right and, if so (2) whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. (*Id.* at 84.) Given the Court's conclusions above, it necessarily finds that plaintiff has not shown that Dr. Chosewood and Ms. Zerbe violated a "clearly established" constitutional right. Accordingly, the Court accepts and adopts the part of the R&R finding that the defendants are entitled to qualified immunity on plaintiff's claims, and **GRANTS** summary judgment to Dr. Chosewood and Ms. Zerbe on those claims.

II. Plaintiff's Claims Against CSC

A. Plaintiff's Free Exercise and RFRA Claims

Private employers are not subject to liability under the free exercise clause or the RFRA. *See Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001)("§ 1983 only provides for claims to redress State action") and 42 U.S.C. § 2000bb-1(a)(imposing the obligations of the RFRA upon "Government" actors). Thus, in order to prevail on her free exercise and her RFRA claims against CSC, plaintiff must show that CSC was a "government actor" when it removed plaintiff from the EAP and terminated her employment. *Rayburn*, 241 F.3d at 1347. Plaintiff must also show that CSC's actions "substantially burdened" her religious beliefs. *Watts*, 495 F.3d at 1294 and 42 U.S.C. § 2000bb-1(a).

The Magistrate Judge found that CSC did not qualify as a "government actor." (R&R [111] at 90.) That conclusion is questionable. Under Eleventh Circuit precedent, a private employer may be considered a "government actor" when the government "has coerced or at least significantly encouraged the action alleged to violate the Constitution ('State compulsion test')." *Rayburn*, 241 F.3d at 1347. It is undisputed that the CDC requested that plaintiff be removed from the EAP, and that CSC was contractually obligated to comply with the CDC's request. (R&R [111] at 53.) Under the circumstances, the CSC arguably meets the definition of a "government actor" under the "State compulsion test." *Id.*

Nevertheless, and in large part because of the CDC's role in plaintiff's termination, plaintiff's free exercise and RFRA claims against CSC still fail. As discussed above, the CDC's request to remove plaintiff from its EAP was not motivated by, and therefore did not substantially burden, plaintiff's exercise of her religious beliefs. Consequently, the CSC's contractually mandated compliance with the CDC's request to remove plaintiff from the CDC's EAP cannot have substantially burdened plaintiff's free exercise rights.

Neither is there any evidence that CSC's related decision to terminate plaintiff's employment was motivated by plaintiff's

exercise of her religious beliefs.[8] Faced with an employee who no longer could do the job she was hired to do, CSC decided to layoff plaintiff after the CDC requested her removal from the EAP. (R&R [111] at 99.) CSC characterized plaintiff's termination as a layoff resulting from a "client bar action." (*Id.* at 54.) That characterization permitted plaintiff to seek other employment opportunities within CSC, and to retain her tenure with the company if she found another position within a year. (*Id.* at 56.) Following her layoff, CSC gave plaintiff access to internal career and employee reassignment services, and encouraged plaintiff to seek other employment opportunities within the company. (*Id.*)

Plaintiff did not take advantage of any of the opportunities offered by CSC to find another position within the company. (*Id.* at 59.) Plaintiff testified that she logged onto CSC's website once, but that she did not apply for any of the available positions that she found there. (R&R [111] at 59.) Apparently, plaintiff no longer believed that CSC was a good fit for her, because she felt that CSC did not respect her religious beliefs. (*Id.*) The Court

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[8] Again, plaintiff cites the RIF that Mr. Shelton initiated against her on August 22, 2007. (Pl.'s Objections [112] at 8-9.) However, plaintiff concedes that CSC never implemented the RIF. (R&R [111] at 35.) Instead, CSC commenced an investigation into the incident involving Ms. Doe, which included numerous conversations with plaintiff in the days following August 22, 2007. (*Id.*) CSC did not take any action against plaintiff until the CDC asked for her removal from the EAP contract on August 30, 2007. (*Id.*)

thus agrees with the Magistrate Judge that plaintiff initially was laid off as a result of the CDC's request that she be removed from the EAP contract, and that her layoff became permanent as a result of her own failure to seek other employment opportunities within the company. (*Id.* at 89.)

Based on the undisputed facts in the record, there simply is no basis for plaintiff's claim that CSC "substantially burdened" her religion. That is a requirement both of plaintiff's free exercise and her RFRA claims against CSC. *See Watts*, 495 F.3d at 1294 and 42 U.S.C. § 2000bb-1(a). Accordingly, CSC's motion for summary judgment on plaintiff's free exercise and RFRA claims should be **GRANTED**.

B. Plaintiff's Title VII Claim

The Magistrate Judge thoroughly and correctly analyzed plaintiff's Title VII religious discrimination claim against CSC. (R&R [111] at 91-107.) The Court thus accepts and adopts the part of the R&R that discusses plaintiff's Title VII claim. In accordance with the R&R, the Court concludes that CSC's motion for summary judgment on plaintiff's Title VII claim should be **GRANTED**.

To establish a *prima facie* case of religious discrimination, plaintiff must present evidence that: (1) she had a bona fide religious belief that conflicted with an employment requirement; (2) she informed her employer of her belief; and (3) she was discharged

for failing to comply with the conflicting employment requirement. *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994). If plaintiff meets those requirements, the burden shifts to defendant to prove that it cannot "reasonably accommodate" plaintiff's religious belief without incurring "undue hardship" on the conduct of its business. *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007).

The Court agrees with the Magistrate Judge that plaintiff cannot establish a *prima facie* case of religious discrimination. (R&R [111] at 100.) The Court assumes that plaintiff's bona fide religious beliefs prohibit her from promoting or encouraging same-sex relationships through counseling. However, the evidence does not support plaintiff's claim that CSC discharged her for failing to provide same-sex relationship counseling. (*Id.* at 98.) Instead, the undisputed evidence shows that, before CSC concluded its internal deliberations over how to handle the situation involving Ms. Doe, the CDC requested that plaintiff be removed from the EAP contract. (*Id.* at 99.) CSC was contractually obligated to comply with the CDC's request, which led directly to plaintiff's layoff as a result of a "client bar action." (*Id.* at 54.) Thus, plaintiff cannot show that she was discharged for failing to comply with an employment requirement that conflicted with her religious beliefs.

Even assuming that plaintiff could make out a *prima facie* case

of religious discrimination, the Court also agrees with the Magistrate Judge that CSC provided plaintiff with a reasonable accommodation as a matter of law. (*Id.* at 106.) Once the CDC requested plaintiff's removal from the EAP contract, plaintiff could no longer do the job that she was hired to do. (R&R [111] at 99.) Because CSC had no other available counseling positions in the Atlanta area, it laid plaintiff off. (*Id.* at 58.) However, CSC encouraged plaintiff to seek other employment opportunities within the company. (*Id.* at 56.) To assist her in this endeavor, CSC gave plaintiff access to internal career and employee reassignment services. (*Id.*)

CSC's actions were unquestionably reasonable under the circumstances. *See Bruff v. N. Mississippi Health Serv.*, 244 F.3d 495, 501 (5th Cir. 2001) (holding that defendant's provision of thirty days and the assistance of an in-house employment counselor to help plaintiff find another position fulfilled defendant's obligation to accommodate plaintiff's religiously-based refusal to provide same-sex relationship counseling in an EAP). Moreover, plaintiff failed to comply with her corresponding duty to make a "good faith attempt to accommodate h[er] religious needs through [the] means offered by [CSC]." *Beadle*, 29 F.3d at 593. For these additional reasons, CSC is entitled to summary judgment on plaintiff's Title VII claim.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** defendants' Motions for Summary Judgment [74] and [78] and **DENIES** plaintiff's Motion for Summary Judgment [85]. The clerk is directed to enter judgment in favor of defendants on all of plaintiff's claims, and to close this case.

SO ORDERED, this 18 day of March, 2010.

JULIE E. CARNES
CHIEF UNITED STATES DISTRICT JUDGE