Superior Court of Massachusetts.
Middlesex County
Nancy Falco CHEDID, M.D.,
v.
CHILDREN'S HOSPITAL & Others.
No. 09-0981.
May 20, 2011.

Memorandum of Decision and Order on the Defendants' Motion for Summary Judgment

Douglas Wilkins, Justice of the Superior Court.
The plaintiff, Nancy Chedid, M.D., brought this action against her former employers, Children's Hospital ("the Hospital") and the Boston Plastic and Oral Surgery Foundation, Inc. ("the Foundation"), and her supervisor, John Meara (collectively "defendants"), alleging sex discrimination (count I), unlawful retaliation (count II), breach of contract (count IV), and breach of the covenant of good faith and fair dealing (count V). She asserts additional claims against Meara for aiding and abetting discrimination (count III) and intentional interference with contract or advantageous business relations (count VI). The defendants have moved for summary judgment on all counts. For the reasons explained below, the defendants' motion is ALLOWED IN PART with respect to (1) those contract claims that are based on breach of an alleged referral agreement and (2) the contract claims against Meara individually; the motion is otherwise DENIED.

BACKGROUND

The parties have filed an extensive statement of material facts under Superior Court Rule 9A(b)(5). Given the denial of the summary judgment motion in most respects, it is not necessary to reprise those facts in detail. For background, I set forth some of those facts, along with the reasonable inferences drawn in favor of the opposing party. In denying summary judgment, I have also considered the plaintiff's version of disputed facts, even though they remain unproven.

With one exception, I have disregarded the extensive commentary and argument included in the responses to the Rule 9A(b)(5) statements, because such argument is not called for under Rule 9A(b)(5) and is an improper end-nm around the 20-page limit upon briefs in Rule 9A(a)(5). See Fabricant, J., "Just the Facts," Boston Bar Journal Advance (2/16/11). The one exception: I will consider such commentary and argument *against* the party who submitted such improper material, in interest of fairness to the other party, who may have relied upon such concessions.

The Foundation is an independent Massachusetts non-profit corporation, and one of fifteen such foundations affiliated with the Hospital. The Hospital is one of the country's largest pediatric academic medical centers and is the world's largest pediatric research institute. It has 396 beds and 38 training programs accredited by the Accreditation Council on Graduate Medical Education. It is the fifth largest independent hospital recipient of National Institutes of Health funding. By agreement with the Hospital, the Foundation, which employs all members of the Department, operates for the benefit of the Hospital and Harvard Medical School. The Hospital's plastic surgeons all perform community-based (simple) procedures as significant parts of their practices. The Hospital built its satellite at Waltham to perform such procedures.

Dr. Chedid was hired to work at the Hospital in September, 2005 by its then Chief of Plastic Surgery, Elof Eriksson, M.D. Ph.D. At the time, she had not practiced medicine since 2002 and needed to perform surgeries to obtain recer-

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tification, lest she lose her credentials as a plastic surgeon. During the spring of 2004, Dr. Eriksson, her former mentor, hired her. He did not have concerns about the plaintiff's absence from practice for a few years, because a refresher course would suffice. He told Dr. Chedid that the department was so busy that she could count on the other surgeons having an “overflow,” allowing her to begin rebuilding her practice. She started out with eight hours. While a draft employment agreement was prepared, neither the plaintiff nor Dr. Eriksson signed it. The draft provided for yearly renewal and (like other agreements with the Hospital's doctors) included a clause forgiving any revenue deficits for the first year of practice. At the time of Dr. Chedid's hire in 2005, she was the only female plastic surgeon in the Foundation.

On August 1, 2006, John Meara, M.D., D.D.S., M.B.A. replaced Dr. Eriksson as Chief of the Department and President of the Foundation. Meara's first appointments at Waltham began on September 18. Dr. Chedid noticed a sharp drop in the referrals she received, as referrals went to Dr. Meara instead, so that he could build his practice.

Shortly after his arrival at the Foundation, Dr. Meara met with Chedid and discussed his strategic vision. At their first meeting on September 21, 2006, Dr. Chedid stated that she worked a reduced hours position and had family responsibilities. Dr. Meara said that he understood about child care responsibilities and schedule restrictions because his wife is also a physician and the primary caretaker of their children. He also stated that his wife had worked almost since their children were born and that she stopped working on a full-time basis in 1999. Dr. Meara testified that certain subspecialities, including dermatology, are more amenable to a part-time arrangement than is plastic surgery. Dr. Meara told Dr. Chedid that the Hospital's CEO wanted to rid the department of plastic surgery of all the “part timers.” Among other things, there are fixed costs, such as malpractice insurance, that are uniform for all surgeons, no matter how many hours they work. Dr. Meara has also testified to the need for full-time work to meet the professional vision he had for the Foundation. The jury could believe the plaintiff's testimony that Meara nodded “yes” when asked if he was pushing her out and that he did so without even getting to know the plaintiff and her abilities.

Dr. Meara testified that, for purposes of allocation of operating room time, Dr. Chedid was similar to those private practitioners who sometimes operate in Foundation facilities, including Drs. Richard Bartlett, Joseph Upton, Elof Eriksson, Lifei Guo, Nalt Ferraro and Chris Sampson. He also testified that Dr. Chedid was the only part-time doctor. While Dr. Meara reduced the operating room block time assigned to the male doctors just named, he eliminated only the plaintiff's and Dr. Bartlett's time altogether.

Dr. Meara explained to the plaintiff that he intended to start hiring full-time surgeons in July, 2007. He also explained that Dr. Chedid's schedule of four hours of clinic time per week was causing coverage issues for the Department. He did not offer a full time position to Dr. Chedid, encourage her to apply for it when he began the process, or tell her that he was about to begin the application process. He offered a full time position to Bartlett, however, who the jury could (but need not) find to be similarly situated to the plaintiff in material respects.

Upset and disturbed by her understanding that Dr. Meara intended to push her out of her position at the Hospital, Dr. Chedid met at her request on October 2, 2006 with Dr. Jean Emans, the Hospital's Director of the Office of Faculty Development (“OFD”). As OFD Director, Dr. Emans works with faculty to “problem solve” when they have issues related to their career advancement. Dr. Chedid sought to discuss her part-time work arrangement and, specifically, Dr. Meara's stated intention to phase out part-time work at the Foundation. Initially, Emans was supportive of Dr. Chedid's desire to maintain her position and appeared optimistic that something could be worked out.[FN1] The jury could find that, when she asked whether Chedid was willing to increase her hours, Chedid said “yes.” Emans encouraged Chedid to meet with Meara before going to see a lawyer to avoid conflict. She explained that Children's had a large number of part-time physicians and that with regard to work and family balance some chiefs “get it” and others do not. She offered to speak to Dr. Meara at their upcoming annual meeting and recommended that Dr. Chedid present her case in a letter to Dr. Meara.

FN1. The recurring hearsay objection to this testimony is overruled under well-settled law, as Dr. Emans

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> was plainly an agent of the defendants, speaking within areas of her authority. See *Ruszcyk v. Secretary of Public Safety,* 40 1Mass. 418 (1988).

Dr. Chedid met with Dr. Emans a second time in October, 2006 to follow up on her suggestions and to receive comments on the draft letter. Dr. Emans encouraged Chedid to think about increasing her work hours, and the plaintiff expressed willingness to do so. Dr. Emans believed that Dr. Chedid did not want to do so. Her edits of Chedid's letter included, among other things, deleting references to a “hostile work environment” and to the prospect that Chedid might be “unjustly terminated from my job because of my status as a working mother, at an institution whose mission is defined by its devotion to the care of children.” Emans, if not others, was therefore aware that the plaintiff perceived -- and was reporting -- concerns about gender discrimination on or before October 7, 2006.

Accepting these and other edits by Dr. Emans, Dr. Chedid sent her letter to Dr. Meara on November 8, 2006, explaining her situation and wishes and acknowledging that Dr. Meara had informed her of his plans to hire more full-time surgeons. Chedid and Meara met on November 16, 2006. She explained to him how she could fit into his vision for the department and never demanded that her current arrangement continue. She also explained that she spent more than eight hours working already. She made a number of proposals, including a suggestion to increase patient referrals and to expand access to breast surgeries and cosmetic procedures. Dr. Meara assured her that he was not pushing her out, but then stated his intention to hire a surgeon in 2007, which might mean that Chedid would have to leave. The plaintiff reiterated her desire to stay and suggested further meetings. The parties exchanged emails, including a statement by Dr. Meara that he did not think that Dr. Chedid's ability to obtain recertification “will turn into an indefinite position given my vision and goals for the Department.” He apparently did not consider the plaintiff's willingness to work more hours.

At her yearly meeting with the chiefs, Emans spoke to Meara at length about Chedid. Afterwards, Emans told Chedid about balance sheets showing a negative picture of the plaintiff's practice, which she had received from Dr. Meara. Emans tried to persuade Chedid that Meara's desire to push her out was reasonable; that Meara was seeking a “high powered,” mid-level, academic surgeon” and that Chedid did not “fit in” to Meara's department, which at that time, would be all male without Chedid. Indeed, while Meara later hired two women, both were childless. In the meeting or a subsequent email, Dr. Emans offered to help the plaintiff “brainstorm” about additional opportunities and said she would be “happy to contact any colleagues in Derm[atology], etc. in practice.”

As it happens, Chedid had asked Hospital Administrator Nesta earlier in the year about her financial position, and he had told her not to worry about it. Disturbed about the alleged losses on the balance sheet, on December 12, 2006, Dr. Chedid met with Nesta and Ronald Heald, Administrative Coordinator of Children's Division of Plastic Surgery, to go over her finances. Nesta showed Chedid a balance sheet Meara asked him to prepare, which showed a $3,125 per month charge for shared expenses in addition to her other expenses. That charge put Chedid's expenses at about $7,000 per month, much greater than the numbers she had discussed with Eriksson. He professed not to know why Chedid was suddenly presented with all these expenses, but did explain that the $3,125 charge per month was obtained by allocating the monthly practice costs of $50,000 per month. Without that charge, her practice would have been in the black.

Dr. Chedid requested another meeting with Dr. Meara soon thereafter. As the jury could find, Dr. Meara informed Chedid that, in his mind, he classified her with all the other “part time” physicians who had private practices and used Children's facilities. He repeated a rumor that Chedid had previously heard, namely that Eriksson had hired her solely for her to become recertified. Chedid explained that that was not true, detailed her plans for the future, including expanding her schedule, increasing her schedule and exploring different sorts of cases she could perform. She explained her agreement with Dr. Eriksson, which she claimed had been breached, and pointed out that her revenues were increasing to the point where she would have been “in the black” under any view if her patient referrals had not suddenly ceased in September, 2006. Dr. Meara defended his accounting method and insisted that her practice was unprofitable. At the time, he had already hired Dr. Greene, who was finishing his fellowship projects and ramping up his practice. Dr. Chedid offered some suggestions for her practice at the Hospital, which the jury could find, were

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consistent with what Dr. Greene (and Dr. Shrier in the Department of Adolescent Medicine) were doing at the Hospital. Dr. Meara promised not to terminate Chedid or change her current working conditions abruptly. Chedid also told Meara that she had met with Dr. Emans and was concerned that she was being pushed out because she was a woman with childcare responsibilities.

After that meeting, at the end of 2006 or the beginning of 2007, Dr. Meara contacted Stewart, the new Vice President of Human Resources at Children's regarding Dr. Chedid's situation. A few weeks later, Chedid was invited to attend an Open Meeting to discuss, among other things, Children's as the "workplace of choice" on February 16, 2007. Chedid confronted the Hospital's COO and other employees leading the discussion with Meara's new policy of filling his department with only full time employees. After the meeting, the COO complained to Emans about Chedid making her situation public and asked her to assist in addressing Chedid's behavior. Emans emailed the COO, stating that she thought that Dr. Chedid's situation had been resolved and that she would work with Meara to resolve the problem. The COO stated that she thought that Chedid's comments were "the most bizarre thing" she had ever seen.

Chedid followed up with Stewart regarding part time work at the Hospital and attempted to coordinate with two other physicians who had studied part time work at Children's. Dr. Emans and Ms. Stewart assisted Dr. Chedid in pursuing options at other institutions. Stewart explained that both she and Emans believed in what Chedid was saying, but that plaintiff had to accede to Dr. Meara's right to eliminate part-time positions from his department for "business reasons." Chedid explained her objections to Meara pushing her out of her job, describing his actions as discriminatory and unfair. She stated that she wanted to work within the system, but that if she could not, her only option was to sue. She also expressed a fear of retaliation. She proposed remaining employed and covering hand-surgery call at both Children's and the Brigham.

After meeting with Emans and Stewart, Chedid met with Chief of Surgery, Robert Shamberger, whom she knew through her general surgery residency. Dr. Shamberger questioned her qualifications to work at the Foundation and explained to her that although she might see the issue as gender discrimination, it was not and if she persisted in claiming that it was, her protests would make things "difficult" for her.

In a March 16, 2007 meeting, Emans and Stewart informed Dr. Chedid that Meara was willing to allow her to work only through the end of June. Emans explained that Meara wanted someone with special pediatric training in the department and that Chedid should obtain special pediatric training and reapply in the future. Chedid asked why she had to apply when Bartlett had been invited to join the Foundation and Greene had been hired with far less experience than she. Stewart responded that Greene had special pediatric training. However, Chedid also had pediatric training. Stewart and Emans then argued that Meara had the right to decide that he did not want a part time physician. Chedid countered that she had offered to increase hour hours and expand her practice. On the spot, she offered to become full time. Stewart became exasperated and angry at Chedid's offer. She said she would draft a memo of the meeting and discuss matters with Meara. Emans stated that she did not believe Chedid's offer to work full time.

Stewary never circulated the memo. Dr. Emans does not recall whether she informed Dr. Meara of Chedid's offer to become full time.

In a letter dated March 23, 2007, Dr. Meara informed Chedid that her employment with the Foundation would end effective June 30 of that year. The letter also stated that, if her profit and loss statement showed a positive balance, "you will be eligible for a discretionary bonus; this bonus will be determined based on the amount of the positive balance, as well as other factors, such as whether the transition proceeds smoothly and in accordance with the professional expectations of the Foundation." On April 6, 2006, Chedid protested that decision since the discussion was not final and she had received no response to her offer of full time employment. Dr. Meara was thus on notice no later than early April, 2007, of her willingness to work full-time. On April 9, 2007, Dr. Meara stated that he had filled a position at the Hospital, namely Dr. Green, who had already started work. He claimed that Chedid had not wanted to change her part time status until very recently. He explained that he had not yet decided whether to give

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the plaintiff a discretionary bonus and that the plaintiff had not responded to his email request that she come speak to him regarding the positive balance on Chedid's account ($12,150.00 as of the date of her termination). Despite that positive balance, Meara claimed that Chedid's arrangement did not benefit the Foundation financially.

On April 13, 2007, Meara denied Chedid fourteen of the same privileges that Dr. Eriksson had approved, claiming that he needed additional proof of recent experience with some of the procedures. There is a dispute as to whether Chedid was treated equally with other surgeons in this respect.

After learning that Chedid had been terminated, some of her colleagues wrote to Mandell to protest the termination. Meara found out about the petition and called Chedid on June 21,2006. During the phone call, Meara demanded to know why people were telling him that Chedid was circulating "some sort of petition" and asked what she was trying to accomplish. She explained that many people were upset about her termination. Meara repeatedly said that "really, honestly, it's not a gender issue, it's not."

At the end of her employment, Chedid had a positive balance. Meara had discretion to pay a bonus should Chedid have a positive balance. On July 20, 2007, Dr. Meara emailed the plaintiff to request that they talk about the accounts receivable. Chedid emailed him back the next day, asking to elaborate. Meara never responded. He then blamed Chedid's failure to meet with him, among other reasons, as a justification for not paying her a bonus. As a result, Chedid's profit went into the Foundation's cash reserves. Meara paid a bonus to everyone in the department except himself and Abramowicz who operated at a deficit for her first year of practice. The jury could infer that the refusal to pay a bonus was retaliation for Chedid's protests about discriminatory treatment.

There is a dispute whether Meara's actual hiring practices reflected his stated criteria to select internationally known surgeons who, compared to the plaintiff, excelled at research, clinical practice and teaching. There is also a dispute whether those physicians in fact spent most of their time doing the kinds of complex procedures that Meara emphasizes, as opposed to doing mostly simple procedures. Meara continues to invest significant resources to assist the entry-level surgeons that he hired or contemplated hiring during the period when he was telling the plaintiff that she would be terminated (Greene, Taghinia and Abramowicz). A jury could find that Chedid was at least as qualified as Dr. Greene, who was hired during that period. The plaintiff also points to certain shortcomings in the performance of others who, in some sense at least, worked part-time at the Hospital.

From all of these facts, the jury could find that Dr. Meara gave at least one, if not two, false and pretextual reason(s) for terminating the plaintiff, for reducing her privileges and denying her a bonus, purportedly because of her level of qualifications and her alleged refusal to work full time, despite her March 16, 2007 offer to work full time.

DISCUSSION

Summary judgment is appropriate when there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c), as amended, 436 Mass. 1404 (2002). The moving party bears the initial burden of affirmatively demonstrating that there is no genuine issue of material fact. *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by showing that there is an absence of evidence to support the opposing party's case or by submitting affidavits or other materials referenced in Mass. R. Civ. P. 56(c) that demonstrate the opposing party has "no reasonable expectation of proving an essential element of that party's case" at trial. *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 711, 716 (1991). Once the moving party has shown that there is no genuine issue of material fact, the burden shifts to the party opposing the motion to respond and allege specific facts that establish the existence of a genuine triable issue. *Pederson,* 404 Mass. at 17.

I. Sex Discrimination

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General Laws c. 151B, § 4(1) makes it illegal for "an employer, by himself or his agent, because of the ... sex ... of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." Proof of sex discrimination in employment may be established through either direct or circumstantial evidence. See *Haddad v. Wal-Mart Stores, Inc.,* 455 Mass. 91, 98 n.14 (2009).

In cases that rely on circumstantial evidence, the court applies a three-stage order of proof. *Somers v. Converged Access, Inc.,* 454 Mass. 582, 595 (2009). "In the first stage, the employee has the burden to establish a prima fade case of discrimination by showing that '(1) [she] is a member of a class protected by G. L. c. 151B; (2) [she] performed [her] job at an acceptable level; (3) [she] was terminated; and (4) [her] employer sought to fill the plaintiff's position by hiring another individual with qualifications similar to the plaintiff's ...." *Abramian v. President & Fellows of Harvard College,* 432 Mass. 107, 116 (2000). These elements may vary depending on the facts of the case and the type of discrimination alleged. *Id.* However, I reject the defendants' argument that the Court must view this as an "unwillingness to work full time" or a "failure to hire" case. The plaintiff ultimately expressed a willingness to work full time and does not argue failure to hire. While she did not respond to posted advertisements for permanent positions, there is no reason why she would apply for a job she already had (as the jury could find). Indeed, Dr. Chedid made clear to Stewart, Emans and Meara her interest in working full time instead of leaving the Hospital. The jury could find that the Hospital's officials were not in the least receptive and did not even respond to that offer -- just as they rejected the plaintiff's previous offers to increase her hours to meet her employer's professed concerns. The record contains not a word of criticism about Dr. Chedid's abilities as a physician and surgeon, while it raises jury questions about the allegedly superior resumes of those whom Meara hired to replace her. A jury could find that, despite the plaintiff's credentials, an application for full time employment would have been futile, given the cavalier manner in which the Hospital treated her stated interest in working full time instead of being terminated.

In the second stage, the employer may rebut the plaintiff's assertion of discrimination by "articulating 'a lawful reason or reasons for its employment decision [and] produc[ing] credible evidence to show that the reason or reasons advanced were the real reasons.' " Id., quoting *Blare v. Husky Injection Molding Sys. Boston. Inc.,* 419 Mass. 437, 442 (1995). At the third stage, the burden shifts back to the employee to demonstrate that the reason advanced by the employer was "a mere pretext and that the true reason [for the employer's action] was discriminatory animus." *Somers,* 454 Mass. at 599.

In some cases, however, the evidence presents both legitimate and illegitimate considerations that contributed to the employer's action. *Haddad,* 455 Mass. at 112-113. In a "mixed motive" case, the plaintiff must first establish that a proscribed factor played a motivating part in the challenged employment decision." *Id.* at 113. Once the requisite showing is made, the "employer may not prevail [merely] by showing ... a legitimate reason for its decision; the employer 'instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.' " Id., quoting *Wynn,* 431 Mass. at 666. "[W]hether the employer has met its burden of proving that another legitimate, nondiscriminatory reason actually led it to make the decision, is normally for the jury or other finder of fact to decide." *Wynn,* 431 Mass. at 670. The mixed motive analytical framework is appropriate in cases where the plaintiff presents "either 'direct or strong' evidence" that "the employer's action was based on an illegitimate motive." *Haddad,* 455 Mass. at 114.

In the present case, the parties have analyzed the plaintiff's sex discrimination claim under two separate, generalized categories-disparate treatment and disparate impact. Under the disparate treatment analysis, the plaintiff contends that the defendant treated her unfavorably based on a perceived stereotype that women with children are less capable of being skilled surgeons due to having family obligations. With respect to disparate impact, the plaintiff claims that the defendants' policy of hiring only full-time surgeons has a disparate impact on women with children.

The basic flaw in the defendants' position on both types of claims is their failure to acknowledge all of the evidence, let alone integrate the facts upon which the plaintiff relies into any coherent theory that would justify taking this case from the jury. At this stage, I reject the defendants' repeated assertions that major portions of the plaintiff's case --

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often those portions from which a jury might infer discriminatory intent -- are not relevant or are otherwise inadmissible. The defendants have made arguments that a jury may or may not find persuasive. Nothing more.

A. Disparate Treatment Based on Gender Stereotyping

Adverse employment actions based on a stereotypical belief that women with children will be less committed to their jobs due to their childcare responsibilities constitutes actionable sex discrimination. *Chadwick v. Wellpoint. Inc.,* 561 F.3d 38, 44-45 (1st Cir. 2009) (Title VII); *Silvieri v. Dep't of Transitional Assistance,* 21 Mass. L. Rptr. 97, 100 (Mass. Super. Ct. 2006) (G. L. c. 151B). As this case does not present direct evidence of gender stereotyping, such as stereotypical remarks, the court applies the three-stage order of proof

The defendants have only satisfied part of the second stage of proof. They have articulated a lawful reason or reasons for its employment decision. Having a full time staff is a gender-neutral and therefore lawful reason. There is nothing wrong on its face with a policy designed to ensure performance of duties by the minimum number of physicians on staff, which may reduce administrative burdens and hasten acquisition of skill and expertise. See *Chadwick v. Wellpoint, Inc.,* 561 F.3d 38, 45 (1st Cir. 2009). Where the defendants fall short is "produc[ing] credible evidence to show that the reason or reasons advanced were the real reasons" for their treatment of Dr. Chedid. *Blare* v. *Husky Injection Molding Sys. Boston, Inc.,* 419 Mass. 437, 442 (1995). It is undisputed that, after Dr. Chedid tried to persuade her employer to allow her to work part time, she finally informed the Hospital of her willingness to work part time. The Hospital never followed up on her offer. The defendants have introduced no evidence or reason showing why the Hospital refused her offer of full-time employment. If, in fact, her part time status were the reason for her termination, then terminating her after she offered to become full time reflects, at best, an incoherent rationale.

Even if the defendants had met the requirements of stage two, the same facts would defeat their motion at the third stage. Dr. Chedid's ultimate willingness to work full time permits a fact-finder to view as pretextual the defendants' statement that they terminated the plaintiff due to her part-time status. The Hospital's failure to give serious consideration to the inferably inconvenient fact that she would work full time -- even to the point of not recalling whether her statement was ever communicated to Dr. Meara -- may also support an inference of pretext. Similarly, the evidence that Dr. Meara's contemporaneous employment decisions did not, in practice, reflect his stated high standards for hiring physicians for the Foundation would permit a fact-finder to conclude that those standards -- and the full-time requirement that he tied inextricably to those standards -- were either a pretext or were applied in a discriminatory manner to Dr. Chedid's detriment.

The permissible inference of pretext, if made, is enough to support a finding that the defendants acted with discriminatory animus under the Massachusetts "pretext only" rule. *Haddad,* 455 Mass. at 98 ("There was ample evidence from which a jury could have inferred that Wal-Mart's stated reasons were pretexts, and consequently that Wal-Mart acted with discriminatory intent."); *Abramian,* 432 Mass. at 118; *Blare,* 419 Mass. at 443-446. The defendants do not seriously address the thrust of Dr. Chedid's factual presentation. Their primary strategy to ignore or object to admissible evidence does not carry the day in showing the absence of a genuine dispute of material fact on pretext.

The defendants' motion for summary judgment on the plaintiff's sex discrimination claim is therefore denied.

B. Disparate Impact of Policy Against Part-Time Employees

Discrimination claims based on a disparate impact "involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another." *School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination,* 377 Mass. 424, 429 (1979). Unlike disparate treatment claims, claims based on a disparate impact do not require proof of the employer's discriminatory motive, making inapplicable the three-stage burden-shifting analysis. *Cox v. New England Tel. & Tel. Co.,* 414 Mass. 375, 384-385 (1993). Rather, to prevail under this theory, a plaintiff must identify a specific employment practice that is responsi-

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ble for the disparity. *Watson v. Fort Worth* Bank & Trust, 487 U.S. 977, 994 (1988). The plaintiff may present statistical evidence to demonstrate that the challenged practice causes a disparate impact on females or female parents. *Capruso v. Hartford Fin. Servs. Group, Inc.,* 2003 U.S. Dist. LEXIS 6044, at *21 (S.D.N.Y. 2003). See also *Watson,* 487 U.S. at 994.

The plaintiff asserts that she has been deprived of the opportunity to present sufficient statistical evidence due to the defendants withholding discovery. Since the defendants' motion is denied on the discrimination count, the parties are directed to resolve this discovery dispute or re-present it for decision at least one month before the pretrial conference.

II. Retaliation

General Laws c. 151B, § 4(4), makes it unlawful for an employer "to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, § 5]." The Supreme Judicial Court has recently articulated the elements of a claim under this subsection:
A claim of retaliation may succeed even if the underlying claim of discrimination fails, provided that in asserting her discrimination claim, the claimant can "prove that [she] reasonably and in good faith believed that the [employer] was engaged in wrongful discrimination." *Abramian v. President & Fellows of Harvard College,* 432 Mass. 107, 121 (2000), quoting *Tate v. Department of Mental Health,* 419 Mass. 356, 364 (1995). In the absence of direct evidence of a retaliatory motive, to make out a prima facie case of retaliation, the plaintiff must show that "he engaged in protected conduct, that he suffered some adverse action, and that 'a causal connection existed between the protected conduct and the adverse action.' " *Mole v. University of Mass.,* 442 Mass. 582, 591-592 (2004), quoting *Mesnick v. General Elec. Co.,* 950 F.2d 816, 827 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992). This causal connection may be inferred, for example, where "adverse action is taken against a satisfactorily performing employee in the immediate aftermath of the employer's becoming aware of the employee's protected activity." *Mole v. University of Mass.,* supra at 592. However, the employer's desire to retaliate against the employee must be shown to be a determinative factor in its decision to take adverse action. *Abramian v. President & Fellows of Harvard College,* supra.

Psy-Ed Corp. v. Klein, ___ Mass. ___, No. SJC-10722 (Sup. Jud. Ct. May 12, 2011), slip op. at part 2a. The defendants challenge the retaliation claim on the grounds that (1) the plaintiff suffered no adverse employment action and (2) no such action was causally related to her protected activity.

On the first point, the defendants read the plaintiff's claims too narrowly. Dr. Chedid does not allege only nonrenewal of privileges and termination of her employment as adverse employment actions. She also attributes the deprivation of a bonus -- available to all others whose practice generated some profit -- to retaliation. Indeed, the defendants squarely acknowledge the "quarterly bonus payments" and lack of referral claims in their discussion of the contract cause of action. Those claims also warrant consideration on the retaliation count.

The phrase "adverse employment action" does not come from the statute.
Rather, courts use "adverse employment action" as a convenient term of reference to the more detailed statutory language when assessing, for example, whether actions taken by employers were substantial enough to have materially disadvantaged an employee, see *MacCormack v. Boston Edison Co.,* 423 Mass. 652, 662-663 (1996), or whether actions of employers were causally related to employees' protected conduct. See, e.g., *Pardo v. General Hosp. Corp.,* 446 Mass. 1, 19-20 (2006), quoting *Mole v. University of Mass.,* supra at 592, 595 (juries may infer retaliation from timing and sequence of "protected activity" and "adverse employment actions"). Cf. *Lipchitz v. Raytheon Co.,* 434 Mass. 493, 505-506 (2001) (discussing causal link required between "discriminatory animus" and adverse employment action).

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Psy-Ed Corp. at *id.* Considered in light of this very recent precedent, the plaintiff's proof suffices to show that she suffered actions at the hands of the defendants that were substantially enough to materially disadvantage her. Loss of bonus payments "materially disadvantaged" Dr. Chedid. The question is not whether she had a contractual entitlement to such payments, but whether she was denied such payments when others received them, because of retaliation. The same is true of referrals. Indeed, the defendants never explain why her termination despite her ultimate willingness to work full-time fails to constitute an "adverse employment action."

On the causation question, there is evidence from which a jury could find that the defendants intended to retaliate -- i.e., make things difficult for the plaintiff-- as a result of her asserting sincere perceptions of gender discrimination. Emans, at least, knew of plaintiff's discrimination concerns in October 2006. Meara knew of them by the end of 2006 or early 2007. The plaintiff asserts that, at a meeting on March 2, 2007, with Emans, and the Vice President of Human Resources, Inez Stewart, she complained about Meara acting in a discriminatory and unfair manner by pushing her out of her job. (Pl.'s Aff. pars. 88, 91). After the meeting, the plaintiff approached the Chief of Surgery, Dr. Robert Shamberger, to express her concerns about opportunities for women students and residents at the hospital. In response, Dr. Shamberger "questioned [her] qualifications to work at the Foundation and explained to [her] that although [she] might see the issue as gender discrimination, it was not and if [she] persisted in claiming that it was, [her] protests would make things 'difficult' for [her]." (Pl.'s Aff. par. 94; Pl.'s Dep. 62). As statements go, that one, combined with the Hospital acting as predicted, is strong enough to raise a serious question for the jury, even if there were nothing more. There is more, however.

Shortly after Dr. Shamberger's statement, the plaintiff claims that Meara balked at providing her medical privileges to perform certain procedures, declined to issue her a bonus based on her profits, and terminated her employment effective June 30, 2007, despite having told her the prior fall that her employment would end in an estimated eighteen month to five or six year timeframe. (Pl.'s Aff. pars. 35, 101, 103, 106.) These adverse actions followed closely in time after the plaintiff's complaints of discrimination, and present a triable claim for unlawful retaliation in violation of G. L. c. 151B, § 4(4).

III. Intentional interference with Contract/Advantageous Business Relations

A claim for intentional interference with advantageous relations requires proof that "(1) [the plaintiff] had an advantageous relationship with a third party (e.g., a present or prospective contract or employment relationship); (2) the defendant knowingly induced a breaking of the relationship; (3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *Blackstone v. Cashman.* 448 Mass. 255, 260 (2007); see also *Psy-Ed. Corp.,* _____ Mass. at _____, slip op., part 4; *Draghetti* v. *Chmielewski,* 416 Mass. 808, 816 (1994). When a supervisor acts within the scope of his responsibilities, he has the protection of a conditional privilege. *Clement v. Rev-Lyn Contracting Co.,* 40 Mass. App. Ct. 322, 325 (1996). To defeat that privilege, the plaintiff must demonstrate that the supervisor acted with "actual malice," that is, with "a spiteful, malignant purpose, unrelated to the legitimate corporate interest" [internal quotation marks and citations omitted]). *King v. Driscoll,* 418 Mass. 576, 587 (1994). Compare *Shea v. Emmanuel College,* 425 Mass. 761, 764 (1997) (summary judgment properly granted where evidence insufficient to infer actual malice in discharging plaintiff) with *Bray v. Community Newspaper Co,* 67 Mass. App. Ct. 42, 42, 47-48 (2006) (reversing grant of summary judgment where there was evidence that defendants subjected plaintiff to pattern of age discrimination, causing her to resign from her job). "Discrimination constitutes an improper means or motive for purposes of an interference claim, and constitutes actual malice that, if proved, would defeat the

[defendant's] conditional privilege." *Bray,* 67 Mass. App. Ct. at 48. See also *Comey v. Hill,* 387 Mass. 11, 19-20 (1982) (action based on age discrimination supported jury verdict for plaintiff on intentional interference claim); *Martins v. University of Mass. Medical Sch.,* 75 Mass. App. Ct. 623, 634 (2009) (holding that interference claim against supervisors should have been submitted to jury in conjunction with discrimination claims). Because the plaintiff's sex discrimination claim presents triable issues of fact based upon Dr. Meara's conduct, her intentional interference claim against him survives summary judgment as well.

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IV. Breach of Contract

The plaintiff's breach of contract claim is twofold. First, she claims that the defendants breached her employment contract by referring patients to Meara, rather than to her. Second, the plaintiff claims the defendants breached the contract by failing to pay her a bonus or share of her profits for the 2006-2007 fiscal year.

The plaintiff must first establish the existence of a contract between the defendants and herself in order to prevail on her breach of contract claim. She does not contend that she entered into any contract with Meara, personally. Dr. Meara was acting as an agent for a disclosed principal, namely his employer. See *Porshin v. Snider,* 349 Mass. 653, 655 (1965). Dr. Meara is therefore entitled to summary judgment on that count.[FN2]

FN2. While it is not clear whether the plaintiff worked for one or both of the other defendants, the defendants do not seek to limit the plaintiff's contract claim as to institutional defendants. I therefore assume, for purposes of the present motion only, that the plaintiff was employed by both institutional defendants.

With respect to referrals, Dr. Eriksson's assertion that the plaintiff would receive "overflow" patients from other surgeons is too vague and indefinite to form the basis of a contractual obligation. See *Lambert v. Fleet Nat'l Bank,* 449 Mass. 119, 125 (2007) (holding that there was no contract where the terms of the purported agreement were too vague). There is no indication, for example, of the quantity of patients to be referred to the plaintiff, the circumstances under which they must be referred, or the duration of ant such agreement. Not is there proof that Dr. Eriksson intended his statements to bind his employer contractually at all - let alone to bind his successor in office -- as opposed to expressing his own intentions regarding the exercise of his discretion while he held his position. Dr. Eriksson's statement to the plaintiff thus reflects a gratuitous undertaking for purposes of assisting the plaintiff in building her medical practice, rather than a contractual obligation for which her employer must answer.

The bonus or profit sharing arrangement presents a closer call. Assuming, for the sake of argument, that the plaintiff was an at-will employee, the defendants had the right to modify the terms of the plaintiff's employment at any time. See *York v. Zurich Scudder Invs., Inc.,* 66 Mass. App. Ct. 610, 614 (2006) (employer can modify terms of at-will employment "at any time for any reason or for no reason at all"). To do so, however, requires proper notice to the plaintiff of the change. The law does not permit an employer secretly to modify the terms of the working relationship, and then reap the benefits of the bargained-for exchange at the expense of the unwitting employee. Cf. *O'Brien v. New England Tel. & Tel. Co.,* 422 Mass. 686, 694 (1996) (noting the reluctance of courts "to permit management to reap the benefits of a personnel manual and at the same time avoid promises freely made in the manual that employees reasonably believed were part of their arrangement with the employer"). In this case, the terms of the plaintiff's profit sharing arrangement, whether written or oral, are the subject of a genuine dispute of material fact appropriate for resolution by the jury.

V. Breach of Implied Covenant of Good Faith and Fair Dealing

Every employment contract in Massachusetts is subject to an implied covenant of good faith and fair dealing. *Fortune v. Nat'l Cash Register Co.,* 373 Mass. 96, 104 (1977). The covenant does not expand existing contractual rights or duties. Ayash v. *Dana-Farber Cancer Inst.,* 443 Mass. 367, 385 (2005). Rather, "the purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.,* 441 Mass. 376, 385 (2004). In the employment context, the covenant prohibits an employer from terminating an at-will employee in bad faith, *Fortune,* 373 Mass. at 104, or without good cause, thereby depriving the employee of compensation attributable to past services, *Gram v. Liberty Mut. Ins. Co.,* 384 Mass. 659, 672 (1981).

It is axiomatic that a breach of an implied covenant is a breach of the contract itself. See Fortune, 373 Mass. at 101

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(holding that a written employment contract “contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract”); *Williams v. B&K Med. Sys., Inc.,* 49 Mass. App. Ct. 563, 569 (2000) (permitting recovery on breach of contract claim based on employer's violation of implied covenant of good faith and fair dealing). Whether viewed as a separate cause of action, or merely one aspect of a breach of contract claim, a breach of the covenant entitles the injured party to a contract-based measure of damages. See *Linkage Corp. v. Trustees of Boston Univ,* 425 Mass. 1, 20 (1997) (concluding that damage award on breach of implied covenant of good faith and fair dealing claim was duplicative of damage award on breach of contract claim and thus could not be recovered); *Maddaloni v. Western Mass. Bus lines, Inc.,* 386 Mass. 877, 883 (1982) (contract measure of damages for breach of covenant of good faith and fair dealing).[FN3]

FN3. A count for breach of the implied covenant of good faith and fair dealing is therefore already encompassed within the breach of contract claim

In any event, the court finds a sufficient basis for finding the institutional defendants liable for breach of the implied covenant. The fundamental purpose of implying a covenant of good faith and fair dealing in all contracts is to prevent one party from exercising its discretionary power so as to deprive the right of the other party to receive the “fruits of the contract.” See *Fortune,* 373 Mass. at 104; see also Restatement (Second) of Contracts § 205 cmt. d, at 101 (covenant breached by “evasion of the spirit of the bargain”). Characterizing the bonus as discretionary is not dispositive, where everyone else in the department who generated a profit (with the exception of Meara) was paid a bonus. (Meara Dep. dated Oct. 7, 2010, at 104) and the evidence permits an inference that denial of the bonus was unlawfully retaliatory. See *Cheney v. Automatic Sprinkler Corp.,* 377 Mass. 141, 150 (1979) (permitting employee to amend complaint to allege employer's bad faith in denying discretionary incentive compensation). Cf. *Pillois v. Billingsley,* 179 F.2d 205, 207 (2d Cir. 1950) (finding employer obligated to make good faith determination of reasonable value of compensation where contract left that decision to employer's “sole judgment”).

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants' Motion for Summary Judgment is *ALLOWED* with respect to the contract claims (counts IV and V) to the extent they are based on breach of a referral agreement. The motion is further *ALLOWED* on counts IV and V against defendant John Meara. The motion is otherwise *DENIED.*

Dated: May 20, 2011

<<signature>>

Douglas Wilkins

Justice of the Superior Court

Chedid v. Children's Hosp.
2011 WL 2477235 (Mass.Super.) (Trial Order)

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