

¹COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 07-02749

RACHEL ROCHAT

vs.

L.E.K. CONSULTING, INC. & another²

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

This is an employment discrimination action in which the plaintiff, Rachel Rochat, alleges that the defendants, L.E.K. Consulting, Inc. ("LEK") and Peter McKelvey ("McKelvey") terminated her employment on the basis of unlawful sex discrimination and subjected her to a hostile work environment. She asserts the following counts: (1) sex discrimination in violation of G. L. c. 151B, § 4(1) (Count I); (2) hostile work environment in violation of G. L. c. 151B, § 4(16A) (Count II); (3) violation of the covenant of good faith and fair dealing (Count III); (4) intentional interference with contractual relations as to McKelvey only (Count IV); (5) aiding and abetting in violation of G. L. c. 151B, § 4(5), as to McKelvey only (Count V); and violation of G. L. c. 93, § 102, Massachusetts' Equal Rights Act ("MERA") (Count VI). The matter is before the court on the defendants' motion for summary judgment as to all counts. For the reasons set forth below, the motion is **ALLOWED**.

BACKGROUND

The following facts are taken from the summary judgment record and viewed in the light

¹This decision has been significantly delayed. This delay was occasioned by misplacement of the motion papers when the motion judge moved to a different county. The Court takes responsibility for this and apologizes to the parties.

² Peter McKelvey

most favorable to the plaintiff. See Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982).³

LEK is a strategy consulting firm with offices in North America, Europe, Asia, and Australia. Its primary focuses are business strategy development, shareholder value consulting, and merger and acquisition support. LEK also assists CEOs, senior management, and boards of directors on issues such as new product introductions, assessment of new technologies and markets, pricing analyses, and turnarounds of underperforming business units. Its clients include Fortune 500 companies with high demands.

For each project, LEK assigns a “team.” The composition of the team varies from project to project, but it typically includes two partners, a manager, a consultant, and two or more associates. The consultant is the highest-ranking full-time member on a project. The consultant’s role is to assess the situation and make suggestions to the partners and manager about different solutions that they might have missed. Consultants are also expected to report any problems to the partners and manager as needed. They monitor associates’ research and analyze the data produced to account for gaps and to explain unexpected deviations. The amount of time that consultants spend overseeing associates varies based on the associates’ experience and performance level.

At the end of each project, LEK completes a case review that evaluates the consultant’s performance. Additionally, every six months, LEK conducts a comprehensive consensus review for each consultant. First-year consultants are typically afforded some leniency in their

³ The court has omitted the vast majority of the plaintiff’s statement of additional facts, which comprises 248 paragraphs of assertions that are mostly irrelevant. In so doing, the court notes that the plaintiff’s Rule 9A(b)(5) responses and additional statement of facts do not comport with the spirit of the rule, which “is an ‘anti-ferreting’ rule designed to assist a trial judge in the all too typical situation in which the parties throw a foot-high mass of undifferentiated material at the judge.” Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 399 (2002). See also Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 46 n.18 (2005).

evaluations and must perform extremely poorly to receive a “below expectations” rating. Conversely, they must do something exceptional to receive an “exceeds expectations” rating. Generally, an “at expectations” rating means that a first-year consultant is on track.

Each September, LEK hires a class of new consultants who are recent graduates from MBA programs. It has hired consultants “off-cycle” as needed. LEK typically hires Ph.D. graduates as associates and places them on a “consultant track.” The plaintiff was hired as a consultant as part of LEK’s September 2004 class. She received the same starting salary and benefits as the other consultants in her class. At the end of her first year, the plaintiff’s performance was rated as “at expectations.” When rated against her peer group during a consensus review on an A-to-C scale, she received a “B” grade, which correlates to having “some strengths and some development needs.” The plaintiff did not dispute the results of this review.

Shortly after completing her first year at LEK, the plaintiff requested and was granted a two-month leave of absence to play for the Swiss women’s ice hockey team in the Olympics. Upon her return in March 2006, LEK informed her during a summary review that her performance had “trended downward” during the prior six-month review period. The summary review indicated that the plaintiff’s “upward feedback” reviews (evaluations by subordinates) showed room for improvement in several areas and that she had been rated below her peer group in all categories. At that time, the plaintiff expressed her disagreement with her negative “upward feedback” reviews and suggested to LEK that problems with its review system might have caused skewed ratings. She also disagreed that her performance was declining and stated that her participation in the Olympics had not affected her performance.

During a March 2006 summary review, the plaintiff was rated as “at expectations.” However, she received a “B-” grade during a consensus review, which was the lowest grade

assigned to anyone in her peer group. Three female consultants received higher grades than the plaintiff. Four consultants in her peer group received “A” grades, two of whom were women. Shortly thereafter, the two female consultants who had received the highest grades were promoted to manager positions.

Between March and September 2006, the plaintiff worked on four projects. On two of the projects, HIG4 and ACO1,⁴ the plaintiff was rated as “below expectations.” ACO1 was the plaintiff’s final project at LEK. Throughout the project, manager Thilo Henkes (“Henkes”) made sexist comments and looked at the plaintiff to gauge her reaction.⁵ At a dinner with the plaintiff and the rest of the male project team, partner Robert Rourke (“Rourke”) told an anecdote about how his young son had seen a woman on the scoreboard at a baseball game and screamed that she had large breasts. The story made the plaintiff uncomfortable.

Although the parties do not agree as to who bears ultimate responsibility for the project’s failings, they agree that ACO1 did not go smoothly. At the outset, the plaintiff spoke to the Human Resources department to request that she not be assigned to ACO1, even though she knew that such a request could harm her career. Her request was denied because no other consultants were available to take her place. At some point during ACO1, the plaintiff requested

⁴ On HIG4, the manager was Jonathan Chou and the partners were Robert Rourke and Steven Rosner. On ACO1, the manager was Thilo Henkes and the partners were Rourke and Chris Kenney.

⁵ With respect to the nature of Henkes’ alleged comments, the plaintiff’s deposition testimony is as follows:

Q: What types of things was he saying to you?

A: He would just say jokes. I don’t remember specific jokes, but each time he would say something, and then he would look at me very directly and clearly awaiting a reaction.

Q: What kind of jokes are we talking about?

A: I think typically something inappropriate. I don’t remember if that was about women, about gays, I don’t know, but something that in my mind was not appropriate for the workplace. You know, nothing – I don’t know, just things that are inappropriate.

The plaintiff proceeded to relate an anecdote in which a client said “something about lifting a skirt on an issue, so you know, just telling all on an issue,” and then Henkes “repeated it when we were all speaking together internally.” She also testified that Henkes said to her at some point, “Oh, that’s a typical female thing to do.”

a leave of absence from the project to attend to her ill sister, but again she was told that there was no one to replace her. She asked LEK to award her a compensation day two months early so that she would not have to use up a vacation day. LEK viewed her protest of the need to use a vacation day as “whining” and pointed to her request for an exception from company policy as an example of her putting her own interests before the company’s. On August 26, 2006, amid a clash between the plaintiff and Rourke regarding a certain phase of ACO1, Rourke sent an e-mail to Henkes and partners McKelvey, Eileen Coveney, Steven Rosner, and Chris Kenney venting his frustration with the plaintiff and lobbying for her termination.

Shortly before the plaintiff’s September 2006 consensus review, Rourke told McKelvey that he thought LEK should terminate the plaintiff. Jonathan Chou (“Chou”) was selected as the plaintiff’s primary reviewer during her consensus review because he had worked with her on HIG4 and was in the best position to explain what had happened on that case. The review group focused on the plaintiff’s performance on four projects—HIG4, PNT3, VLC1, and ACO1—which spanned the final six months of her employment. Rourke, Henkes, and Chou did most of the talking during the evaluation. Their opinions of the plaintiff’s performance were negative.

The review group ultimately decided against placing the plaintiff on a Performance Improvement Plan, instead opting to terminate her. On October 9, 2006, McKelvey informed the plaintiff that her employment was terminated. LEK’s stated reasons for its termination decision were the plaintiff’s difficulties crafting solutions to analytical problems, managing her cases, and performing quality control, as well as her poor attitude.

The plaintiff received a severance package that included compensation equal to salary for three weeks, plus two weeks per year of employment, for a total of seven weeks. LEK offered

the plaintiff outplacement services after she threatened to file a lawsuit. The plaintiff did not receive a “Worldwide Bonus” based on LEK’s profits from the previous year, which is awarded to employees in good standing who are either employed as of December 31 or have sufficient accrued vacation time to cover the gap between an employee’s termination and that date. After the plaintiff was terminated, Henkes drafted a written review of her performance on ACO1 in order to document its stance that her poor performance had prompted her termination.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The moving party bears the burden of affirmatively showing that there is no triable issue of fact. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party’s case or by showing that the nonmoving party has no reasonable expectation of proving an essential element of its case at trial. Kourouvacilis, 410 Mass. at 716. Once the moving party “establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact.” Pederson, 404 Mass. at 17. The court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. Bailey, 386 Mass. at 370-371.

Summary judgment is admittedly a disfavored remedy in discrimination cases. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 127 (1997) (citations omitted). Nonetheless,

summary judgment may be appropriate in cases where the defendants' motion demonstrates that the plaintiff is unable to offer admissible evidence of the defendants' discriminatory intent, motive, or state of mind sufficient to carry the plaintiff's burdens and to support a judgment in her favor. Id.

The defendants move for summary judgment as to all counts on the following grounds: (1) the plaintiff cannot show that LEK's rationale for terminating her (poor performance and negative attitude) was a pretext for unlawful sex discrimination; (2) she cannot maintain her hostile work environment claim because she failed to include it in her Massachusetts Commission Against Discrimination ("MCAD") complaint or, alternatively, because the alleged statements were not severe or pervasive as a matter of law; (3) her claims against McKelvey are barred because she did not identify him in her MCAD complaint or, alternatively, because the claims fail as a matter of law;⁶ and (4) her MERA claim is subsumed by her G. L. c. 151B claims.

II. Analysis

A. Sex Discrimination

General Laws chapter 151B, § 4(1), provides: "It shall be an unlawful practice . . . [f]or an employer, by himself or his agent, because of the . . . sex . . . of any individual, to refuse to hire or employ or bar or to discharge from employment such individual or discriminate against such individual in compensation or in terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification."

In Massachusetts, when a plaintiff has no direct proof to support her G. L. c. 151B discrimination claim based on disparate treatment, courts analyze the claim pursuant to a three-

⁶ In view of the court's disposition below, it does not address the defendants' procedural argument that the failure to identify McKelvey by name in the MCAD charge is fatal to Counts IV and V.

stage order of proof. See Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 385 (1993), citing Wheelock Coll. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130, 135-139 (1976).⁷ First, the plaintiff must establish a prima facie case of sex discrimination.⁸ See, e.g., Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 540 n.4 (1995). Once the plaintiff has established a prima facie case, unlawful discrimination is presumed. See Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 116 (2000). The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its adverse employment decision. Id. Once the employer states such a reason and presents facts to support it, the presumption of discrimination vanishes and the burden shifts back to the plaintiff to prove by a preponderance that the stated reason for the adverse employment decision is a mere pretext. Id. at 116-118. The jury may, but is not required to, infer a discriminatory animus from evidence that an employer's stated reason is untrue. Id. at 118. The ultimate burden of persuasion remains with the plaintiff at all times. Id.

The defendants concede, for the purposes of this summary judgment motion only, that the plaintiff can establish a prima facie case of gender discrimination. The defendants have met their

⁷ The plaintiff characterizes Henkes' and Rourke's remarks during ACO1 as direct evidence of sex discrimination. "When the cases speak of direct evidence they generally refer to evidence which, if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Johansen v. MCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). "Stray remarks suggestive of impermissible bias do not constitute the sort of evidence that places a case in the mixed motive category and requires the employer to prove that its decision was made only on the basis of legitimate criteria." Johansen, 30 Mass. App. Ct. at 302. See also Zhang v. Massachusetts Inst. of Tech., 46 Mass. App. Ct. 597, 605 (1999), citing Fontaine v. Ebtec Corp., 415 Mass. 309, 314 n.7 (1993) ("isolated or ambiguous remark, standing alone, is insufficient to prove discriminatory intent"). Given the isolated and ambiguous nature of the alleged discriminatory comments, the court shall apply the framework for evaluating discrimination claims based on indirect evidence.

⁸ Generally, a plaintiff who is terminated from her position establishes a prima facie case of unlawful sex discrimination by producing evidence (1) that 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 her position by hiring another individual with qualifications similar to hers." Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 41 (2005). The burden of establishing a prima facie case is not onerous. Id. at 40. The purpose of this first stage of proof is to eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection," including "lack of competence." Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 116 (2000) (internal quotations omitted).

stage-two burden by articulating a legitimate, nondiscriminatory reason for terminating the plaintiff, namely, that her performance reviews after one year placed her in the bottom half of her associate class and that her performance only declined from that point. For her part, the plaintiff seeks to meet her stage-three burden of showing that LEK's stated reason was a pretext to mask unlawful gender discrimination by introducing evidence that: (1) LEK's employee evaluation process is subjective and therefore susceptible to bias; (2) statistical analysis of performance reviews of consultants in LEK's Boston and Chicago offices shows that men score higher than women; (3) LEK treated other male consultants who received "below expectations" ratings more favorably than it treated the plaintiff; (4) the facts underlying her unfavorable performance reviews were inaccurate; and (5) LEK has a "leaky pipeline" that prevents women from retaining top positions in the company. The court concludes that the plaintiff has not met her burden of showing pretext.

1. Subjectivity of LEK's evaluation process

First, the plaintiff argues that LEK's performance evaluations are not objective measures of performance that are immune to bias. She raises this point for the unremarkable proposition that an employee's scores might be influenced by any discriminatory animus that a particular reviewer might have.

The Supreme Judicial Court has held that a plaintiff may not show pretext merely by pointing to the subjectivity and unreliability of assessments. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 56 (2005). Indeed, the court's task is "not to evaluate the soundness of [the employer's] decision making, but to ensure it does not mask discriminatory animus." Id. Accordingly, evidence that LEK's review process was flawed is not sufficient to defeat summary judgment. See id. at 56 & n.38.

2. *Statistical comparison of male and female LEK employees*

The plaintiff has submitted charts highlighting the disparity between male and female consultants' average overall performance ratings in LEK's Boston and Chicago offices, as well as testimonial evidence of a disparity between the number of male and female partners and managers worldwide. Joint App., Ex. 61; Joint App., Ex. 3, p. 29.

Statistical evidence may support an inference that a particular decision was made because of discriminatory animus. Lipchitz v. Raytheon Co., 434 Mass. 493, 508-509 (2001). On the other hand, statistics that fail to eliminate other possible nondiscriminatory explanations for disparities between male and female employees—e.g., random chance, or the possibility that the lifestyle attracts more men than women—are not sufficiently probative to show pretext and to defeat summary judgment. See Sullivan, 444 Mass. at 55-56, and cases cited. Here, the plaintiff has not placed her statistical data in any meaningful context to enable the court (or, for that matter, a jury) to determine whether the information is probative. Contrast Lipchitz, 434 Mass. at 508-509 (statistical evidence of gender composition at company's highest ranks established that there were *no* women in corporate ranks). For example, she has not offered evidence, via expert testimony or otherwise, to explain whether the 0.1 percent difference between male and female consultants is statistically significant or whether, given the relatively small sample size, the small gap is attributable to random chance. See Sullivan, 444 Mass. at 56.

3. *Comparison of plaintiff with similarly situated male consultants*

The most probative means of establishing that the plaintiff's termination was a pretext for gender discrimination is to demonstrate that similarly situated male employees were treated differently. Cf. Matthews, 426 Mass. at 129 (race discrimination).⁹ "Membership in the

⁹ "We adopt the approach taken by Federal courts under Title VII that in order to establish that the defendant's stated reasons for terminating him were a pretext, the plaintiff must identify and relate specific instances where persons similarly situated in all relevant aspects were treated differently. The plaintiff must identify other

protected class aside, a comparator's circumstances need not be identical to those of the complainant." Trustees of Health & Hosps. of City of Boston v. Massachusetts Comm'n Against Discrimination, 449 Mass. 675, 682 (2007). "The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. . . . Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." Id., citing Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1991).

The plaintiff identifies no less than fourteen male "comparators" who allegedly received more favorable treatment than she did.¹⁰ However, in her opposition to the defendants' summary judgment motion, she focuses on only four: Jared Carver, David Maier, James Crimmins, and Peter Rho. Although the realistic aim of a comparison of "similarly situated" employees is to ensure that "apples [are] compared to apples," see id., the matter is further complicated by the fact that these particular apples come in many varieties. While the plaintiff and most of her chosen comparators held the title of "consultant," their differences in terms of work experience, case difficulty, and the nature and severity of their conflicts with supervisors, make comparisons among them inapt.

A. Jared Carver

The plaintiff attempts to show pretext by pointing out that Carver received an "exceeds expectations" rating from Chou on one case, RIP1, despite the fact that he had made an error in a presentation to the client. She suggests that Chou showed "leniency bias" toward Carver, whereas he had blamed the plaintiff for poor performance on HIG4.

employees to whom he is similarly situated in terms of performance, qualifications and conduct, without such differentiating or mitigating circumstances that would distinguish their situations" (internal quotations and citations omitted). Matthews, 426 Mass. at 129-130.

¹⁰ Jared Carver, David Maier, James Crimmins, Peter Rho, Philip Benson, Benjamin Riley, Sam Hariri, Darren Perry, David Titus, Tom Madjanics, Karl Tucker, Raul Pandhi, James Clark, and David Yong

There is uncontroverted evidence that LEK considered RIP1 to be a more difficult case than HIG4, and the challenges of the particular assignment are reflected in Carver's review. Moreover, Carver was in his first year as a consultant when he worked on RIP1, while the plaintiff was a second-year consultant during HIG4. As the plaintiff concedes, the expectations for second-year consultants are higher than for first-year consultants. Joint App., Ex. 4, pp. 30, 68. Given the undisputed fact that Carver worked on a particularly difficult case at a time in his career when LEK is more tolerant of mistakes, the fact that Carver, a male, received a generally favorable review does not tend to show pretext.

Additionally, the plaintiff's speculation that Chou and Rourke showed "leniency bias" and "recall bias" in focusing on the negatives of her past performances is not probative without the aid of expert testimony to put these psychological phenomena in proper context. Because there are "differentiating or mitigating circumstances that . . . distinguish their situations," Carver is not a similarly-situated comparator for purposes of showing that LEK's adverse action against the plaintiff was taken for discriminatory reasons. Matthews, 426 Mass. at 130.

B. David Maier

Unlike Carver, Maier *was* in the same class as the plaintiff and started his career at LEK with similarly lukewarm reviews. Both received "B" grades during the LEK's September 2005 consensus review. Both received two "below expectations" case reviews during their respective tenures. Maier received a "below expectations" rating on one project during his first year and on another in May 2006 during his second year, while the plaintiff received both of her "below expectations" ratings in a single review period during her second year.

During LEK's March 2006 consensus review, Maier received a "B" grade and the plaintiff received a "B-" grade. LEK's Fall 2006 review notes for Maier indicated that he had

problems with analytics, but that he was aware of his deficits and was gradually improving. The reviewers expressed doubts as to whether he would progress quickly enough to suit them. Meanwhile, review notes for the plaintiff for the same period indicated that her communication skills were lacking and that she had been “butting heads” with Rourke.

LEK monitored Maier’s performance closely after his second “below expectations” review. In January 2007, LEK informed Maier that he was no longer in “jeopardy” and supported him when he voluntarily left LEK for another position. By contrast, the plaintiff was not granted a probationary period, nor was she given advance notice of her termination.

While the plaintiff focuses on her performance relative to Maier’s in an effort to show that LEK’s rationale for terminating her without notice was a pretext for gender discrimination, she neglects to account for the fact that LEK had identified the plaintiff’s attitude toward her superiors as a significant problem, which might rationally explain why LEK did not offer the plaintiff another chance to improve. Although the defendants’ motive or intent would ordinarily present a question of fact for the jury, the plaintiff has not sustained her initial burden of identifying Maier as a comparator whose on-the-job conduct was “roughly equivalent” to her own. See Trustees of Health, 449 Mass. at 682.

Even if the plaintiff established that her performance was somewhat similar to Maier’s (notwithstanding the fact that her negative ratings were clustered within the same review period), their perceived deficiencies were of such a different character as to distinguish their situations. See Matthews, 426 Mass. at 129-130 (“The plaintiff must identify other employees to whom he is similarly situated in terms of performance, qualifications and conduct, without such differentiating or mitigating circumstances that would distinguish their situations” [internal quotations and citations omitted]). The plaintiff’s performance *and* attitude were cited as reasons

for her termination, and although she insists that the defendants' portrayal of her attitude is unfair, she does not seriously contest the sincerity of their belief that she was overly defensive and insubordinate.

This case is not like Trustees of Health, where it was inappropriate to compare laid-off employees' relative performance, qualifications, and conduct in evaluating their treatment during the implementation of layoffs because the employer had established a uniform policy that employees selected for layoffs would receive no advance notice and would be monitored while they gathered their belongings. 449 Mass. at 677, 683. Under those circumstances, performance, qualifications, and conduct were not relevant considerations because the employer's policy had effectively removed any discretion in carrying out the layoff procedures. Id. at 683-684. Therefore, the fact that a white employee had different job responsibilities from the African-American complainants did not excuse the fact that the employer did not subject him to the same humiliating layoff procedure that the complainants were forced to endure. Id. at 684-685.

Here, the parties agree that LEK's procedures for evaluating whether employees have a future with the company are not written in stone. Unlike the situation in Trustees of Health, the plaintiff's relationship with her supervisors is a relevant consideration in assessing whether she is similarly situated to other consultants who were not terminated. To that end, she has not mustered any evidence to show that Maier or any other second-year consultant had similar conflicts with managers or partners such that they could serve as reasonable comparators for purposes of establishing pretext.

C. James Crimmins

Crimmins was promoted from consultant to manager at LEK before the plaintiff was hired in 2004. He performed poorly as a manager and was encouraged to seek employment

outside LEK. The plaintiff points out that, despite the fact that she and Crimmins both had development needs as consultants, Crimmins was promoted and she was terminated. She also notes that Crimmins was allowed to exit gracefully, while her termination was abrupt.

As discussed above, the plaintiff's perceived bad attitude is a significant distinguishing factor. Moreover, she fails to account for the fact that Crimmins' longevity and LEK's financial incentives for encouraging managers to leave on good terms are obvious nondiscriminatory reasons for nurturing Crimmins through his transitional period, as opposed to simply terminating him without notice.

D. Peter Rho

Rho was hired as a consultant off-cycle in June 2006. Almost immediately, he was placed on a Performance Improvement Plan and given three months to get on track. He failed to do so, and was notified in December 2006 that he would be terminated. He was officially terminated on January 5, 2007, after the holidays, which made him eligible for the Worldwide Bonus.

Rho's relative inexperience precludes any meaningful comparison between his departure from LEK and the plaintiff's, due to LEK's increased tolerance for the shortcomings of newer consultants. Additionally, Rho did not alienate his supervisors during his brief time at LEK, which might provide a benign justification for LEK's decision to extend him courtesies that it did not extend to the plaintiff. With respect to Rho's eligibility for the Worldwide Bonus, the plaintiff has not offered any evidence to suggest that the defendants orchestrated consultants' effective termination dates based on bonus considerations.

In sum, the plaintiff has not established that the aforementioned individuals are similarly situated in all relevant aspects for purposes of showing that the defendants' stated reasons for

terminating her without notice are pretext. Cf. Dorman v. Norton Co., 64 Mass. App. Ct. 1, 7, 10 (2005) (where the plaintiff in an age discrimination case failed to show that younger employees were similarly situated, he could not “avoid summary judgment merely by speculating that his treatment by the employer came about not because of the merits of his performance as the employer observed it, but rather because of impermissible consideration of his age”).

4. *Disputes regarding facts underlying plaintiff's performance reviews*

The plaintiff fiercely contests the defendants' characterization of her performance on HIG4 and ACO1. “To withstand a defendant's motion for summary judgment, a plaintiff claiming discrimination must show something more than a conflict in the evidence regarding the employer's legitimate, nondiscriminatory explanation for the employment decision and the plaintiff's membership in a protected group.” Wooster v. Abdow Corp., 46 Mass. App. Ct. 665, 673 (1999). Indeed, in some cases, “factual disputes underlying performance evaluations will not be enough to defeat summary judgment.” Dragonas v. Melrose Sch. Comm., 64 Mass. App. Ct. 429, 444, rev. denied, 445 Mass. 1105 (2005).

For example, in Sullivan, a case involving claims of sex and age discrimination, the defendant employer stated that it had decided to reduce its workforce by laying off the plaintiff, as opposed to other employees, in part because she had mishandled an environmental case and had poor human relations skills. 444 Mass. at 54 n.35. Although the plaintiff submitted evidence that the defendant's assessment of her job performance was incorrect, there was still “ample, uncontroverted evidence that the negative impression [the manager making the layoff decision], staff in the environmental unit, and others had formed of [the plaintiff's] abilities was a primary reason she was selected for layoff.” Id. at 57. While the plaintiff presented evidence to show that the premise upon which the employment decision was based was false, she did not

challenge “whether [the manager] *truly believed* that her mishandling of the environmental case jeopardized the Boston office’s ability to retain environmental cases during a period of declining caseloads.” *Id.* (emphasis supplied). In upholding the trial court’s grant of summary judgment to the defendant, the Supreme Judicial Court noted, “[O]ur task is not to evaluate the soundness of Liberty’s decision making, but to ensure it does not mask discriminatory animus.” *Id.* at 56.

The principles discussed in Sullivan are applicable here. Even if the court were to accept as true the plaintiff’s own characterization of her job performance, she has not sufficiently rebutted LEK’s evidence that her supervisors truly believed that her performance was “below expectations.” Such a belief, even if incorrect, would furnish a legitimate, non-discriminatory reason for terminating the plaintiff. See *id.*

Put another way, assuming that the plaintiff’s poor performance reviews were based on falsehoods, there is no credible evidence in the summary judgment record to suggest that these falsehoods were perpetrated to mask discriminatory animus. See Sullivan, 444 Mass. at 55; Chi-Sang Poon v. Massachusetts Inst. of Tech., 74 Mass. App. Ct. 185, 198 (2009) (evidence of pretext must be “credible”). See also Romero v. UHS of Westwood Pembroke, Inc., 72 Mass. App. Ct. 539, 547 (2008) (inference of pretext must be “reasonable”).

In particular, the plaintiff has not raised a triable issue as to whether her unfavorable performance reviews did not reflect “good faith” judgments on the part of her supervisors. Contrast Dragonas, 64 Mass. App. Ct. at 443 n.27, 444 (employee raised triable issues regarding whether supervisor’s recommendation not to hire her for lead teacher position did not reflect good-faith judgment, thereby permitting an inference of discrimination, where supervisor who had previously disparaged her publicly had prominent role on hiring committee and was sole source of information regarding committee’s deliberations). The only evidence that LEK’s

evaluations of the plaintiff's performance might not have been made in good faith is the plaintiff's vague testimony that she endured sexist remarks during her work on ACO1, the most insidious of which was Henkes' alleged comment that something was "a typical female thing to do." As a matter of law, Henkes' isolated and ambiguous remark is insufficient, standing alone, to prove pretext or discriminatory intent. See Zhang v. Massachusetts Inst. of Tech., 46 Mass. App. Ct. 597, 605 (1999).

Even if the plaintiff could convince a jury that Henkes harbored a bias against women, she would still be unable to show that such discriminatory animus was the basis for her termination. See Abramian, 432 Mass. at 117. The record establishes that McKelvey terminated the plaintiff with considerable input from Rourke and Chou, neither of whom made any comments suggesting a bias against women (Rourke's offhand anecdote about his son notwithstanding). Although a third party's independent decision to take adverse employment action does not automatically break the causal connection between one supervisor's discriminatory animus and the adverse action where the third person merely "rubber stamps" the supervisor's recommendation, there is no support in the record for the plaintiff's assertion that McKelvey rubber-stamped Henkes' complaints about the plaintiff without conducting further investigation. See Mole v. University of Mass., 442 Mass. 582, 598-599 (2004).

The plaintiff attempts to create a triable issue by suggesting that she was punished for displaying typical male leadership behaviors that would have been better-received by management had she not been a woman. See Lipchitz, 434 Mass. at 498-499 (where plaintiff testified that the difficulties she had with her supervisors and her fluctuating performance reviews were not actually the result of her personality and work style, "the jury could reasonably have believed that, had she been a man, her strict adherence to her principles and the official

lines of command and her determination about advancing her career, might have been viewed with admiration rather than resentment”). In Lipchitz, the plaintiff raised a triable issue as to whether the defendant employer’s decision not to promote her to corporate medical director because she lacked board certification was a pretext for gender discrimination. Id. at 497-498. The record showed that (1) the plaintiff’s performance evaluations included comments suggesting that she was qualified for a management position, and (2) the person who previously occupied the position had not been board-certified. Id. at 496-498. Under the circumstances, the jury could have found that the plaintiff’s lack of board certification was a pretext and that, in other circumstances, the defendant might have accommodated the lack of board certification. Id. at 498. The defendant employer also stated that it had passed over the plaintiff for a promotion due to her conflicts with a supervisor and her unwillingness to be a “team player.” Id. at 497. The evidence showed, however, that from 1980 to 1993, the plaintiff had received highly favorable written performance reviews, and any disagreements with managers or supervisors had not been documented in those reviews. Id. at 496-497.

Here, there is no dispute that the HIG4 and ACO1 project teams were dysfunctional; the only dispute concerns whether the plaintiff bears the blame. A review of the summary judgment record shows that what the plaintiff describes as “falsehoods” regarding her job performance are not, in fact, complete fabrications that the plaintiff can controvert with overwhelmingly positive reviews, but rather are differences of opinion regarding whether the defendants’ focus on her negative feedback was justified. Where, as here, the complaints regarding the plaintiff came from several sources not shown to be biased, there is no evidence that would allow a factfinder reasonably to conclude that she was terminated for any reason other than the negative impression that she left on numerous LEK employees. See Sullivan, 444 Mass. at 57. Because the plaintiff

has failed to place in legitimate dispute the sincerity of her supervisors' beliefs that her declining performance and negative attitude warranted termination, she may not avoid summary judgment by challenging the accuracy of her evaluations. See *id.* at 56-57.

5. *LEK's poor record of retaining women in top positions*

Finally, the plaintiff argues that LEK fosters a culture of gender bias, as evidenced by the fact that the number of women thins considerably at the highest levels of the company. As noted above, this is not a case where the significance of the statistical data is self-evident. Contrast *Lipchitz*, 434 Mass. at 508-509 (statistical evidence that there were *no* women in corporate ranks suggested "that the highest ranks of an employer's organization are *closed* to members of a protected class" [emphasis supplied]). Because the plaintiff's figures reflect only a disparity, and not a complete moratorium on female higher-ups, they are not probative unless offered in a context that eliminates possible nondiscriminatory explanations. See *Sullivan*, 444 Mass. at 55-56, and cases cited.

In sum, the plaintiff's assertion that she was discriminated against on the basis of gender is vague, conclusory, and the evidence does not support it. See *Brooks v. Peabody & Arnold, LLP*, 71 Mass. App. Ct. 46, 56 (2008), quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) ("Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation."). Beyond generically alleging that men fare better at LEK and that her performance evaluations were subjective and unfair, the plaintiff has not offered a shred of evidence to show that LEK harbored a discriminatory intent, motive, or state of mind based on the plaintiff's gender and that "any such animus was a material and important ingredient in the [adverse employment action]."

Liberty, 444 Mass. at 57 (internal quotations omitted). It is true that, in appropriate circumstances, a jury may infer a discriminatory motive if it determines that an employer's stated reason for an adverse employment action is false. See Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (under both federal and Massachusetts law, falsity of employer's explanation may permit the jury to infer discriminatory motive, but does not compel such a finding). Accord Abramian, 432 Mass. at 117-118. Here, however, there is *no* evidence of pretext or discriminatory animus on the part of LEK in reaching its termination decision, other than the plaintiff's baseless speculation that gender discrimination is the most likely reason for LEK's negative characterization of her work performance. Contrast id. at 114 (evidence warranted finding of pretext where plaintiff presented "graphic evidence of discriminatory animus," including derogatory references to plaintiff's national origin, denigration of other employees based on national origin, and a general atmosphere of bigotry, and where other employees had been punished less severely for similar conduct).¹¹ Accordingly, LEK is entitled to summary judgment on Count I.

B. Sexual Harassment (Hostile Work Environment)

The bases for the plaintiff's hostile work environment claim are Henkes' remarks about "lifting a skirt on an issue" and something being "a typical woman thing to do," and Rourke's anecdote about his young son screaming that a woman featured on a scoreboard had large breasts. The defendants argue that they are entitled to summary judgment on Count II because they did not have proper notice of the claim based on the plaintiff's MCAD charge or, alternatively, because the alleged comments were not severe or pervasive as a matter of law. See

¹¹ Notably, the plaintiff has also failed to "identify and relate specific instances where persons similarly situated in all relevant aspects were treated differently." Id. (internal quotations omitted).

G. L. c. 151B, §§ 1(18[b]), 4(1), 4(16A); Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 411 (2001).

The court first addresses whether the MCAD charge, alleging only gender discrimination in violation of G. L. c. 151B, § 4(1), and Title VII, put LEK and McKelvey on notice of a hostile work environment claim. See Windross v. Village Automotive Group, Inc., 71 Mass. App. Ct. 861, 864 (2008) (The purpose of the requirement that a plaintiff timely file an unlawful discrimination complaint with the MCAD is two-fold: “(1) to provide the MCAD with an opportunity to investigate and conciliate the claim of discrimination; and (2) to provide notice to the defendant of potential liability. . . . Because those purposes would be frustrated if the claimant were permitted to allege one thing in the MCAD complaint only to allege something entirely different in the ensuing civil action, the scope of the subsequent civil proceeding is limited to matters alleged in the administrative complaint” [internal citation omitted]). “A claim that is not explicitly stated in the administrative complaint may be asserted in the subsequent Superior Court action so long as it is based on the acts of discrimination that the MCAD investigation could reasonably be expected to uncover.” Id. at 864-865.

While the plaintiff need not explicitly state the particular theory on which her Chapter 151B claim is based, the administrative complaint must allege sufficient facts to put the defendants on fair notice of the claims against them. The plaintiff’s statement of particulars alleges only that the plaintiff was not afforded the same benefits and opportunities that other male employees with similar performance records received. Joint App., Ex. 23. It does not refer to any specific incidents of harassment, nor does it allege generally that she was subjected to hostile or abusive work conditions.

Simply put, the core factual allegations did not “fairly place the [hostile work environment] issue before the agency.” Windross, 71 Mass. App. Ct. at 866. This is not a case, as in Windross, where the MCAD charge simply failed to include the term “hostile work environment,” but where the plaintiff nevertheless “alleged specific underlying facts describing a work environment in which he was persistently subjected to racially abusive comments and other conduct throughout the course of his employment that implicitly were severe and pervasive enough to interfere with the performance of his work.” Id. at 866-867. Compare Luciano v. Coca-Cola Enters., Inc., 307 F. Supp. 2d 308, 323 (D. Mass. 2004) (although “neither the charge nor the Complaint . . . ever use the term ‘hostile environment,’ . . . both the administrative charge and the Complaint recite a litany of factual assertions that more closely resemble allegations of harassment than they do claims of job status discrimination”). Here, the administrative complaint does not even allege basic facts that might plausibly give rise to a sexual harassment claim. Where, as here, the plaintiff’s hostile work environment claim appears to be a mere afterthought, devoid of specificity with regard to particular incidents, it does not necessarily follow that an MCAD investigation focused on LEK’s disparate treatment of the plaintiff “could reasonably be expected to uncover” evidence of vaguely sexist comments or anecdotes. See Windross, 71 Mass. App. Ct. at 864-865. Accordingly, the defendants are entitled to summary judgment on Count II.

Even if the court were to entertain the plaintiff’s hostile work environment claim despite her failure to place it within the scope of her MCAD charge, the defendants would likely be entitled to summary judgment on the grounds that the comments were not severe or pervasive as a matter of law. To prevail on a hostile work environment sexual harassment claim, the plaintiff must show that she worked in a hostile environment that unreasonably interfered with her work

performance. Muzzy, 434 Mass. at 411. “To sustain that burden, she [must] establish that the conduct alleged was sufficiently severe and pervasive to interfere with a reasonable person’s work performance.” Id. The evidence is considered from the view of a reasonable person in the plaintiff’s position, and the claimed conduct must be both objectively and subjectively offensive. Id. at 411-412 & n.2. “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” Oncale v. Sundowner Offshore Servcs., Inc., 523 U.S. 75, 81 (1998), quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 23 (1993). These circumstances “may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance,” but “no single factor is required.” Harris, 510 U.S. at 23. See also Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 533 (2001).

Even a single incident, if sufficiently egregious, may be severe enough to constitute sexual harassment. Cuddyer, 434 Mass. at 538-539 n.21, citing Gnerre v. Massachusetts Comm’n Against Discrimination, 402 Mass. 502, 508-509 (1988). However, this principle does not obviate the rule that “an employee who alleges sexual harassment must show that the employer’s conduct was intentionally or in effect hostile, intimidating, or humiliating to the plaintiff in a way which affected her performance or the conditions of her employment.” Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 678-679 (1993). “[S]imple teasing, offhand comments, and isolated incidents,” unless extremely serious, will not support a hostile work environment claim. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988). Although Massachusetts courts interpreting c. 151B claims diverge from federal courts interpreting Title VII claims in several important respects, see Cuddyer, 434 Mass. at 536-537, the U.S. Supreme

Court's Title VII rulings still provide useful guidance in identifying the type of conduct that typically does not amount to a hostile work environment.

Only one of Henkes' alleged remarks, with regard to "something about lifting a skirt on an issue," is even remotely susceptible of a sexual connotation, and the plaintiff concedes that it was not directed at her, but rather was repeated in the context of a group discussion. Joint App., Ex. 4, p. 189.¹² His other alleged comment, "that's a typical woman thing to do," is undeniably sexist, but the plaintiff's testimony on this point is far too vague to permit a factfinder meaningfully to evaluate its subjective and objective impact. Similarly, Rourke's inappropriate anecdote, even when considered in the context of a dinner where the plaintiff was surrounded by men, does not fit the mold of conduct supporting an actionable hostile work environment claim. See Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 619-620 (summary judgment appropriate where supervisor's use of inappropriate words, despite their explicit sexual connotation, were not sexual commands or lurid innuendos; G. L. c. 151B, § 1(18), does not mandate clean language in the workplace).

No jury could reasonably conclude on the basis of these incidents, only one of which was overtly sexist, that the plaintiff was subjected to a work environment that was so pervasively hostile as to unreasonably interfere with her work performance. Ramsdell, 415 Mass. at 678-679.

¹² It is not clear from the pleadings or her brief whether the plaintiff's hostile work environment claim is based on traditional sexual harassment or on "gender harassment," for which proof that the comments were "of a sexual nature" is not necessary. See Ruffino v. State Street Bank & Trust Co., 908 F. Supp. 1019, 1036 n.28 (D. Mass. 2005), quoting King v. Hillen, 21 F.3d 1572, 1583 (Fed. Cir. 1994) ("Conduct that is based on the sex of the victim, whether or not the conduct is 'of a sexual nature,' is appropriately considered in determining whether an abusive or hostile environment has been created."). See also Lazure v. Transit Express, Inc., 22 Mass. Disc. L. Rptr. 16, 18, 2000 WL 33665418, at *4 (2000) (Single Comm'r), aff'd, 24 Mass. Discrimination Law Rep. 203, 2002 WL 31318582 (2002) (analyzing "barrage of sexist, intimidating, hostile and demeaning remarks about females" as "gender harassment," rather than as sexual harassment). The court assumes that she has alleged both, but concludes that under either analysis the comments were not objectively severe or pervasive so as to interfere with a reasonable person's work performance.

C. Violation of Covenant of Good Faith and Fair Dealing

The plaintiff alleges that the defendants violated the implied covenant of good faith and fair dealing by timing her termination before December 31 so as to deprive her of her Worldwide Bonus. She also alleges that LEK allowed two males slated for termination to remain past that date in order to collect their bonuses, which suggests that LEK had a bad-faith, discriminatory motive in terminating her when it did.

The Supreme Judicial Court has extended the implied covenant of good faith and fair dealing to at-will employment contracts where the employee has been terminated in bad faith, but has limited its application to cases where the employer has reaped a financial benefit at the employee's expense. See Fortune v. National Cash Register Co., 373 Mass. 96, 104-105 (1977). Specifically, the so-called "Fortune doctrine" has been applied where a discharge was "contrived to despoil an employee of earned commissions or similar compensation due for past services," Tenedios v. Wm. Filene's Sons Co., Inc., 20 Mass. App. Ct. 252, 254 (1985), or where a discharge offends some public policy. See Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 668 n.6 (1981). Even when the employer has not acted in bad faith, if an at-will employee is discharged without good cause, the employer is liable under its obligation of fair dealing "for the loss of compensation that is so clearly related to an employee's past service." Id. at 672. See also York v. Zurich Scudder Invs., Inc., 66 Mass. App. Ct. 610, 617-618 (2006) ("good cause" inquiry focuses on whether employer has legitimate business reason for decision).

As this court has already concluded that the plaintiff cannot establish that her termination was orchestrated in bad faith (i.e., based on unlawful discrimination) and that the plaintiff cannot establish that she was fired before the year's end without legitimate reason (i.e., based on the perception that she had a negative attitude and was insubordinate), the defendants are entitled to

summary judgment on Count III. Cf. Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 513 (1985), *aff'd*, 397 Mass. 1004 (1986) (declining to recognize common-law right of action for breach of implied covenant of good faith and fair dealing based on conduct that violates public policy against age discrimination where G. L. c. 151B provides a remedy).

D. Intentional Interference with Contractual Relations Against McKelvey

The plaintiff alleges that McKelvey intentionally interfered with her ability to collect the Worldwide Bonus by terminating her prior to December 31. As the plaintiff correctly points out, the availability of a remedy under G. L. c. 151B does not foreclose a common-law claim of intentional interference with advantageous/contractual relations. See Comey v. Hill, 387 Mass. 11, 20 (1982).

The elements of the tort of interference with an advantageous relationship that are "(1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's intentional and malicious interference with it; [and] (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct." Id. at 19. Where the plaintiff asserts such a claim against her supervisor, she must prove that the controlling factor in his interference was "actual malice." E.g., Weber v. Community Teamwork, Inc., 434 Mass. 761, 781-782 (2001).

The fact that the plaintiff's tort claim exists independent of her c. 151B claims does not rescue the count in this instance. The plaintiff's evidence that McKelvey harbored actual malice is based on her theory that he participated in unlawful sex discrimination. See Comey, 387 Mass. at 19-21 (proof of discrimination satisfies tort's "malice" requirement). The defendants provided a legitimate, nondiscriminatory reason for terminating the plaintiff in October 2006, which the plaintiff was not able to rebut with competent evidence of pretext. The evidence militates against

a finding that McKelvey's termination decision was made with actual malice, that is to say, "a spiteful, malignant purpose, unrelated to the legitimate corporate interest." Weber, 434 Mass. at 782. Accordingly, McKelvey is entitled to summary judgment on Count IV.

E. Aiding and Abetting Discrimination Against McKelvey

In Count V, the plaintiff alleges that McKelvey aided and abetted unlawful discrimination and harassment. General Laws chapter 151B, § 4(5), makes it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so." Logically, individual liability under G. L. c. 151B, § 4(5), is contingent upon the plaintiff's succeeding on her claim that the defendants discriminated against her or that she was subjected to a hostile work environment. See Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 458 n.7 (2002) (Court's conclusion that employer did not engage in employment discrimination resolved claims against individual defendant under § 4(5) for aiding and abetting such discrimination). Because the plaintiff cannot establish that the defendants violated chapter 151B, McKelvey is entitled to summary judgment on Count V.

F. Violation of MERA, G. L. c. 93, § 102

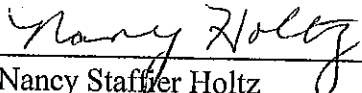
The defendants are entitled to summary judgment on Count VI, which alleges a violation of MERA. "Where G. L. c. 151B remedies are or were available to a complainant, those remedies are exclusive, preempting the joining of parallel Massachusetts Equal Rights Act claims on removal to court." Martins v. University of Mass. Med. Sch., 75 Mass. App. Ct. 623, 624 (2009). Contrast Thurdin v. SEI Boston, LLC, 452 Mass. 436, 455 (2008) (plaintiff had right to bring MERA claim in first instance in court where c. 151B remedy was unavailable).

Because G. L. c. 151B remedies were available to the plaintiff, her MERA claim is preempted.

Martins, 75 Mass. App. Ct. at 633.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's motion for summary judgment be **ALLOWED**.



Nancy Staffer Holtz
Justice of the Superior Court

DATED: December 5, 2010