

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

MICHELE C. KRAUSE, )  
Plaintiff, )  
 )  
v. ) CIVIL ACTION  
 ) NO. 08-cv-10237-DPW  
UPS SUPPLY CHAIN SOLUTIONS, INC., )  
Defendant. )  
 )

MEMORANDUM AND ORDER  
October 28, 2009

The Plaintiff, Michele C. Krause, a New Hampshire resident, brought this action against her former employer UPS Supply Chain Solutions, Inc. (the "Defendant" or "UPS SCS"), a corporation authorized to do business, and with a usual place of business, in Massachusetts. Krause alleges that, when she became pregnant, the responsible agents of the Defendant treated her differently from her colleagues and dismissed her shortly after she returned from maternity leave. Additionally, Krause contends that the Defendant refused to pay her nearly \$60,000 in commissions. Specifically, she asserts claims for (1) discrimination under federal law in violation of Title VII; (2) discrimination under state law in violation of MASS. GEN. LAWS ch. 151B, § 4(1); (3) violation of the Massachusetts Maternity Leave Act; (4) retaliation in violation of MASS. GEN. LAWS ch. 151B, § 4(4); (5) violation of the Massachusetts Wage Act, and (6) breach of contract. The Defendant moves for summary judgment in its favor on all of Krause's claims.

## I. FACTUAL BACKGROUND<sup>1</sup>

Viewing the evidence in the light most favorable to the Plaintiff, the non-moving party, the record before me discloses the following.

### A. *Krause's Employment Before Maternity Leave*

In April 2003, Krause was hired by the Defendant UPS SCS, a wholly-owned subsidiary of United Parcel Service, Inc., as a director of sales for its high tech sector in the region based in Charlestown, Massachusetts ("High Tech East"). Her responsibilities included the sale of warehousing and transportation services to new and existing customers. The job involved domestic and international travel. Krause's direct supervisor was a regional sales manager, Steve Coser, who reported to the Vice President of Strategic Accounts, Peter Brennan.

In late 2004 and early 2005, Krause took medical leave to undergo treatments for *in vitro* fertilization, and ultimately

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<sup>1</sup> The Defendant has filed a motion (Doc. No. 41) to strike certain paragraphs of the Affidavit of Kira C. Ramirez (the "Ramirez Affidavit") (Doc. No. 25). Arguing that the requirements of Federal Rule of Civil Procedure 56(e) are not met, the Defendant asks me to disregard these paragraphs for purposes of determining whether the Plaintiff has raised a genuine issue of material fact that is sufficient to defeat summary judgment. For the most part, the disputed paragraphs contain allegations that appear elsewhere in the Record. I have not, in any event, relied on the Ramirez Affidavit in determining whether summary judgment is appropriate; therefore, I will deny the Defendant's motion to strike as moot.

became pregnant with twins. In March-April 2005, Krause told Coser that she was pregnant. She claims that, upon learning about her pregnancy, Coser became standoffish and, along with another co-worker Mark Eisenberg, made dismissive and critical comments about her and Jessica Joyce, a female colleague in High Tech East who also was pregnant. Coser invoked the pregnancies of his two female subordinates for "office humor;" for example, in response to a work-related email on June 20, 2005, Coser wrote "I think we had quintuplets this week. No, not Jessica and Michele!"

Coser also suggested that Krause planned to get pregnant at the same time as Joyce ostensibly to inconvenience him. In June or July 2005, after Joyce took a pregnancy-related disability leave, Coser and Eisenberg commented to the Plaintiff that Joyce "wanted to spend the summer on her deck," and asked the Plaintiff if she was going to do the same. Joyce testified that Coser was "primarily" the one who was "insensitive about me having to go out early," and "the impression was . . . that [her pregnancy was] incredibly inconvenient for [him]." Overall, Joyce testified she "could sort of sense a general irritation" from Coser when she took a medical leave for her pregnancy.

The Plaintiff's pregnancy involved substantial health risks, and in July 2005, she provided the Defendant a letter from her physician stating that she should not travel, particularly on an

airplane. Coser insisted nevertheless that Krause travel to Atlanta in August 2005, even though this trip necessitated air travel. That month, the Plaintiff went into pre-term labor, and took disability leave for the remainder of her pregnancy until she gave birth on October 15, 2005. She contends that the pressure from management was so intense that she had to participate in a conference call on August 30, 2005 while having contractions. The Plaintiff emailed Coser and Eisenberg that she "was having contractions on the call. Hopefully, it will stop soon." Coser responded only to Eisenberg "oh my god ... I feel like I am in the delivery room;" Eisenberg replied to Coser "I actually heard her breathing funny . . . I thought she was panting for you . . . ."

Additionally, the Plaintiff contends that the Defendant resisted paying her the maternity leave to which she was legally entitled under the Massachusetts Maternity Leave Act, MASS. GEN. LAWS ch. 149, § 105D ("MMLA"). Krause informed Joyce about Joyce's rights under the Act. After learning that the Plaintiff had done so, Coser and Kathryn Schaefer of the Defendant's human resources office expressed their resentment and were critical of the Plaintiff. In November 2005, Joyce quit UPS SCS soon after taking her maternity leave, and Coser called the Plaintiff and asked if she was also using UPS to pay for her pregnancy and was planning to quit.

**B. Krause's Return From Maternity Leave**

After Krause gave birth to twins, she took a maternity leave. The Plaintiff claims that she had been approved for sixteen weeks of maternity leave, but returned to work in January 2006, after only eleven weeks, due to pressure from Coser. Upon her return, the Plaintiff found Coser "standoffish" and Eisenberg "condescending to her because she was a woman" and treated her differently by giving her less pricing support than others. When the Plaintiff complained to Coser about Eisenberg's behavior, Coser responded that "Eisenberg's wife was a bitch and that's why he didn't seem to like women."

In April 2006, the Plaintiff and Coser were on a business trip to Louisville, Kentucky to visit a client, Konica Minolta. Krause claims that when they walked back from a client dinner to their hotel, Coser touched her buttocks; she removed his arm and said that she was not a hooker. In the hotel elevator, she allegedly declined Coser's offer to walk her to her room and turned her cheek when he tried to kiss her. Krause, however, never discussed what had happened with Coser or reported the incident to UPS SCS, despite the company's sexual harassment policy.

In June 2006, the Plaintiff resigned from UPS SCS and accepted an offer to work for her former employer, FedEx. Around the time of the Plaintiff's resignation, she wrote in her

employment review that "I had the best management team at UPS SCS;" on June 22, 2006 she emailed Coser that "I thought you were a fabulous boss which made the decision to got [sic] to FedEx very hard. . . . It was a pleasure working for you and Peter [Brennan]." But in early July 2006, the job offer at FedEx fell through and the Plaintiff felt compelled to return to UPS SCS for "financial reasons." She approached Coser about returning to UPS SCS. Coser, Brennan, and Brennan's boss Martin Thompson agreed to reinstate the Plaintiff.

**C. Krause's Termination**

The Defendant contends it experienced financial difficulties in 2006, and as part of a restructuring plan, terminated about 1,200 employees including approximately 112 individuals in the Plaintiff's business development group. At that time, Krause was the only female member of High Tech East. As part of its decision about whom to terminate, the Defendant says that it considered factors such as skills and qualifications, length of service, and ability to relocate. From the eight account managers in the eastern region, Coser and Brennan independently chose to terminate Krause because she was one of five account managers for the Northeast, her accounts could be transitioned without undue risk to the business, she had less extensive experience and a shorter tenure than others, and her performance was satisfactory but not above average. Moreover, the Defendant

was concerned that the Plaintiff might resign again and leave the company shorthanded. For purposes of selecting who to terminate, Coser says he "looked at [the employees'] whole body of work, but obviously their last year would be the year I would have looked at . . . I probably looked at 2006, which would have been January to October." Krause contends that, in this statement, Coser "admitted that he considered [her] performance during the time period that she was on maternity and/or disability leave when he selected [her] for dismissal."

On October 19, 2006, the Defendant terminated Krause's employment as part of "a business decision" purportedly unrelated to gender, pregnancy, and retaliation. It is undisputed that the Plaintiff neither received negative performance reviews during her employment with UPS SCS, nor received any written warnings. Krause disputes that the Defendant terminated her based on a legitimate business reason such as skills and qualifications, length of service, and ability to relocate.<sup>2</sup> Instead, she contends that the ostensible reason for her dismissal was a pretext for unlawful, discriminatory, and retaliatory motives.

In support of her position, Krause claims that, in 2005, she had the third largest book of business and the second highest

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<sup>2</sup> There is no dispute that in her only performance review with the company, the Plaintiff wrote, in response to "Willing to Relocate," "Yes" and "I will be willing to relocate to any place that I can add value to UPS SCS."

"percentage effective"<sup>3</sup> in High Tech East; while at least four of her male counterparts in High Tech East had smaller books of business and many male colleagues did not meet their revenue goals, all of Krause's male counterparts were retained by the Defendant.<sup>4</sup> The Plaintiff alleges that while the Record appears to be incomplete for 2006, based on the year-to-date figures, she was in line to have the second highest percentage effective in 2006. A male colleague, Brad Elliot, was retained, but it is disputed whether he had less seniority than the Plaintiff. Additionally, the now exclusively-male High Tech East group replaced the Plaintiff with another male, Richard Olney.

***D. Krause's Unpaid Commissions***

In early October 2006, before the Plaintiff's termination, she submitted forms for new business bonuses ("commissions") for three accounts: PerkinElmer, Konica Minolta, and Bose. The parties agree that the Plaintiff was "substantially involved in the sale" of these three accounts. While the Plaintiff was on maternity leave, the Defendant created a new 2006 New Business

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<sup>3</sup> In his deposition, Coser explained the concept of "percentage effective": "[I]f your goal was \$100 million and you ended up the year at \$102 million, you were 102 percent effective. If your goal was \$100 million and you attained \$98 million, you were 98 percent effective to your business plan."

<sup>4</sup> The Defendant disputes the Plaintiff's contention that she had the third largest book of business in High Tech East in 2005 because the document she cites "does not set forth raw data on books of business, but instead sets forth payments under the Sales Incentive Plan for book of business bonuses and new business bonuses."

Bonus form, but due to problems on the Plaintiff's work laptop, Coser told her to submit the 2005 forms for these accounts instead. It is undisputed that the Plaintiff signed an Acknowledgment Form that she had "read, and accepted the terms and conditions set forth in" the 2006 Sales Incentive Plan ("2006 SIP").

The Defendant decided that the Plaintiff was not entitled to commissions on these accounts under the terms of the 2006 SIP because the Plaintiff was terminated before any of these accounts were in the "measurement period," i.e., the period during which revenue was to be measured for the purpose of calculating commissions.<sup>5</sup> In contrast, the Plaintiff asserts that she was contractually entitled to sales commissions on these accounts, and that subsequent to her dismissal, the Defendant failed and refused to pay her these commissions, totaling approximately \$60,000. In support of her entitlement to commissions, the Plaintiff cites an October 20, 2006 email from Bill Norris, a human resources employee, stating "I have been told that eligible people will receive their earned commissions up to the last full month they worked in separate checks." However, the Plaintiff

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<sup>5</sup> The Plaintiff does not dispute this definition of the measurement period. There also is no dispute about the ramp up and measurement periods for the PerkinElmer, Konica Minolta, and Bose accounts. The measurement period for PerkinElmer began in February 2007; it began for Konica Minolta in March 2007; and it began for Bose in January 2007. Each of these measurement periods, therefore, began after the Plaintiff's termination in October 2006.

testified that she was not aware of any former employees who received commissions after they were terminated, and that no one at UPS SCS ever told her that she was entitled to commissions on these three accounts.

***E. Procedural History***

On March 1, 2007, Krause filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD").<sup>6</sup> More or less contemporaneously, she also filed a nonpayment of wages complaint with the Massachusetts Attorney General's Office, and she received a right to sue letter on the wage dispute on or about March 7, 2007. The Plaintiff's charges of discrimination were withdrawn from the MCAD and the Equal Employment Opportunity Commission ("EEOC") on or about July 17, 2007 and December 21, 2007, respectively. The Plaintiff alleges that she has met all administrative prerequisites to suit, but the Defendant contends that she has not done so to the extent that the lawsuit contains discrimination matters pre-dating May 3, 2006.

On February 12, 2008, the Plaintiff commenced this action for sex discrimination and retaliation in violation of federal and state law, violation of the MMLA, failure to pay wages in violation of the Massachusetts Wage Act, and breach of contract.

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<sup>6</sup> The Complaint incorrectly states that the MCAD complaint was filed on February 27, 2007.

The Defendant has filed the instant motion for summary judgment in its favor on all claims asserted in the Complaint. With respect to the discrimination-related claims (Counts I-IV), the Defendant argues that the record cannot support a finding that the Plaintiff was terminated from employment because of her gender, pregnancy, or for retaliation, and that any pre-termination conduct is not actionable because it is outside the statute of limitations. As to the commission-related claims (Counts V-VI), the Defendant argues that the record cannot support a finding that the Defendant failed to pay the Plaintiff compensation to which she was entitled.

## II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "A 'genuine' issue is one that could be resolved in favor of either party, and a 'material fact' is one that has the potential of affecting the outcome of the case." *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004). Once a party moves for summary judgment, the burden is on the nonmoving party "to point to specific facts demonstrating that there is, indeed, a trialworthy issue." *Id.* To survive a motion for summary judgment, the nonmoving party "may not rest

upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The court must evaluate "the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor," *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990), in order to determine "whether the evidence presents a sufficient disagreement . . . or . . . is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

### III. DISCUSSION

#### A. Choice of Law

The Plaintiff invokes federal question, diversity, and supplemental jurisdiction over her respective claims. To determine, in a diversity case, which state's laws apply to the claims that do not arise under the Constitution or the laws of the United States, a federal court must apply the substantive law of the forum state, including that state's conflict-of-laws provisions. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). "This principle applies with equal force to a state-law claim brought under supplemental jurisdiction . . . ." *Dykes v. DePuy, Inc.*, 140 F.3d 31, 39 (1st Cir. 1998); see also *Mariasch v. Gillette Co.*, 521 F.3d 68, 71 (1st Cir. 2008) (applying the applicable state laws in diversity case by looking

to the choice-of-law jurisprudence of the forum state). The parties do not dispute that the choice-of-law tenets of Massachusetts, the forum state, apply in the instant case.

Massachusetts adopts "a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole." *Bushkin Assoc. v. Raytheon Co.*, 473 N.E.2d 662, 668 (Mass. 1985). "[T]his functional approach 'is explicitly guided by the Restatement (Second) of Conflict of Laws (1971).'" *Levin v. Dalva Bros.*, 459 F.3d 68, 74 (1st Cir. 2006) (citing *Clarendon Nat'l Ins. Co. v. Arbella Mut. Ins. Co.*, 803 N.E.2d 750, 752 (Mass. App. Ct. 2004)).

#### 1. State Discrimination and Retaliation Claims

The Plaintiff's state law discrimination and retaliation claims under Chapter 151B and the MMLA (Counts II-IV) are akin to tort. "Under Massachusetts choice of law rules, 'tort claims are governed by the law of the state where the alleged injury occurred, unless another state has a more significant relationship to the cause of action.'" *Bergin v. Dartmouth Pharm. Inc.*, 326 F. Supp. 2d 179, 183 (D. Mass. 2004) (quoting *Dunfey v. Roger Williams Univ.*, 824 F. Supp. 18, 21 (D. Mass. 1993)). The facts outlined above weigh in favor of the application of Massachusetts law to the Plaintiff's discrimination and retaliation claims. Any discriminatory or

retaliatory measures against the Plaintiff took place during the course of the Plaintiff's employment in the Defendant's Massachusetts office, where her supervisors were located, where she allegedly confronted a hostile work environment, and where she was terminated. The Defendant has not identified any meaningful incidents or facts that connect New Hampshire to the discrimination or retaliation claims at issue in this case. As a result, Massachusetts law applies to Counts II-IV.

2. Commissions-related claims (Counts V and VI)

The Plaintiff's commissions-related claims for violation of the Wage Act and breach of contract (Counts V and VI) are contractual in nature. To determine the applicable state law "in the absence of a choice of law by the parties, their rights 'are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . . .'" *Bushkin*, 473 N.E.2d at 669 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1)); see also *Dunfey*, 824 F. Supp. at 20.<sup>7</sup>

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<sup>7</sup> To determine which state has the most significant relationship to the transaction, the relevant factors to be considered and weighed are:

- 1) the place of contracting; 2) the place of negotiation of the contract; 3) the place of performance; 4) the location of the subject matter of the contract; and 5) the domicile, residence, nationality and place of incorporation of the parties; 6) the needs of the interstate and international system; 7) the relevant policies of the forum; 8) the relevant policies of other interested states and the

In this case, the contract is the 2006 SIP which governs commissions. The record does not reflect the place of contracting or negotiation. But the place of performance was plainly Massachusetts, which was where the Plaintiff was hired, employed and dismissed; the state specified in Plaintiff's job description; where the Plaintiff maintained an office; where her supervisors were based; and where all of her business-related correspondence was directed. Although the Plaintiff was identified as an "outside sales person" and often spent time at customer sites, most of her clients were located in Massachusetts.

The Defendant, however, argues that New Hampshire law should apply because, as a New Hampshire resident, the Plaintiff had "no justifiable expectation that Massachusetts law would apply to her claims for commissions."<sup>8</sup> However, even assuming the Plaintiff "had such an expectation, it is only one factor to be

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relative interest of those states in the determination of the particular issue; 9) the protection of justified expectations; 10) the basic policies underlying the particular field of law; 11) certainty, predictability and uniformity of result; and 12) ease in the determination and application of the law to be applied.

*Dunfey*, 824 F. Supp. at 20.

<sup>8</sup> Arguing that New Hampshire law applies, the Defendant indicates that the Plaintiff sometimes worked from home, filed New Hampshire tax returns, and applied for New Hampshire unemployment compensation. None of these factors is persuasive; the Plaintiff's purported entitlement to commissions overwhelmingly relates to activity that occurred in Massachusetts.

considered." *Dunfey*, 824 F. Supp. at 21; see also *Levin*, 459 F.3d at 75 ("[O]ne of the guiding principles of the Restatement's choice-of-law analysis [is] that the governing law should reflect the parties' justified expectations."). The Plaintiff asserts that she had no customers in New Hampshire, never had a work station in New Hampshire, and never even visited the UPS office there. Given "the greater number and significance" of the Massachusetts contacts, Massachusetts law governs the Plaintiff's contract claims. *Dunfey*, 824 F. Supp. at 21.

**B. Statute of Limitations**

As a threshold matter, I must decide whether the Plaintiff's claims under Title VII, 42 U.S.C. § 2000e-2(a) & § 2000e(k), (Count I) and Chapter 151B (Counts II-IV) are time-barred. An employee asserting claims in violation of Title VII and MASS. GEN. LAWS ch. 151B must file charges with the EEOC and MCAD, respectively, "within 300 days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); MASS. GEN. LAWS ch. 151B, § 5 (permitting a discrimination claim under Chapter 151B if a complaint is filed with the MCAD "within 300 days after the alleged act of discrimination"). In an employment discrimination case brought under federal law, "the limitations period begins to run when the claimant learns of the adverse employment action, not when a plaintiff learns of the improper motives." *Svensson v. Putnam Investments LLC*, 558 F. Supp. 2d

136, 140 (D. Mass. 2008). Under state law, however, the 300-day statute of limitations<sup>9</sup> "does not begin to run until the plaintiff knows, or should have known, that she has been harmed by the defendant's conduct." *Silvestris v. Tantasqua Reg'l Sch. Dist.*, 847 N.E.2d 328, 336 (Mass. 2006). Once the defendant raises the statute of limitations as an affirmative defense and offers evidence to show that the action was brought more than 300 days from the date of the plaintiff's injury, the plaintiff bears the burden of proving facts that take the case outside the statute of limitations. *Id.* at 337.

Both federal and state law recognize the "continuing violation doctrine" as an exception to the statute of limitations where "[a] party alleging employment discrimination may, in appropriate circumstances, file suit based on events that fall outside the applicable statute of limitation." *Tobin v. Liberty Mutual Ins. Co.*, 553 F.3d 121, 130 (1st Cir. 2009) (citing federal and Massachusetts law). Under this doctrine, a plaintiff may recover for "discriminatory acts that otherwise would be time-barred so long as a related act fell within the limitations period." *Id.*; see also *Cuddyer v. Stop & Shop Supermarket Co.*, 750 N.E.2d 928, 936 (Mass. 2001) (recognizing "that some claims

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<sup>9</sup> In 2002, the limitations period under MASS. GEN. LAWS ch. 151B, § 5 was extended from six months to 300 days. *Silvestris v. Tantasqua Reg'l Sch. Dist.*, 847 N.E.2d 328, 336 n.17 (Mass. 2006) (citing 2002 Mass. Legis. Serv. ch. 223, § 1 (West)).

of discrimination involve a series of related events that have to be viewed in their totality in order to assess adequately their discriminatory nature and impact." ).<sup>10</sup>

Moreover, even if a discriminatory act is time-barred, both federal and Massachusetts law recognize that an employee is not barred "from using the prior acts as background evidence in support of a timely claim." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 112, 113 (2002) (discussing Title VII); *Cuddyer*, 750 N.E.2d at 935 n.10 (holding, under Massachusetts law, "[a] plaintiff who has a seasonable claim may use events that occurred prior to the [300 day] limitation period as background evidence . . . even though she cannot recover damages for the time-barred events"); *see also Ocean Spray Cranberries, Inc. v. MCAD*, 808 N.E.2d 257, 269-70 (Mass. 2004) (considering employer's previous responses to handicapped employee's time-barred request for accommodation as relevant background evidence in evaluating whether employer subsequently failed to accommodate employee). Similarly, "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts

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<sup>10</sup> The continuing violation doctrine is codified in Massachusetts. 804 CODE MASS. REGS. § 1.10(2) ("The complaint may be filed . . . at any time within 300 days after the alleged unlawful conduct; provided, however, that the 300 day requirement shall not be a bar to filing in those instances where facts are alleged which indicate that the unlawful conduct complained of is of a continuing nature . . . .").

are independently discriminatory and charges addressing those acts are themselves timely filed." *Morgan*, 536 U.S. at 113.

In the instant case, it is undisputed that the 300-day statute of limitations does not bar the Defendant's allegedly discriminatory acts that occurred *after* May 3, 2006; that time period includes the Plaintiff's resignation (June 2006), her return to UPS SCS (early July 2006), her subsequent work environment (between July and October 2006), and her termination (October 19, 2006). The Defendant contends that because the Plaintiff filed her charge of discrimination with the MCAD on March 1, 2007, acts prior to May 3, 2006 cannot be the subject of her discrimination claims. The Plaintiff ignores in her briefing this timing issue, the continuing violation doctrine, and her burden of proving facts that take her claims outside the statute of limitations. *Cf. Svensson*, 558 F. Supp. 2d at 141.

Nevertheless, the Plaintiff asks me to consider facts that pre-date May 3, 2006 in support of her discrimination and retaliation claims, and seeks to recover for her termination, an adverse employment action that occurred *within* the statute of limitations period on October 19, 2006. In support of her timely claim under Title VII and MASS. GEN. LAWS ch. 151B regarding termination, I find that the events occurring before May 3, 2006, while not fairly to be characterized as continuing violations, can properly be considered as "background evidence." I also recognize that

only events occurring within the statute of limitations period are themselves actionable.<sup>11</sup>

**C. Discrimination (Counts I and II)**

The Plaintiff alleges that the Defendant willfully and knowingly discriminated against her "in the terms and conditions of her employment on account of her sex and pregnancy" in violation of Title VII and MASS. GEN. LAWS ch. 151B, § 4(1) by terminating her employment less than a year after she returned from her maternity leave.

It is an unlawful employment practice under both Title VII and Massachusetts law for an employer to discharge or discriminate against an individual in compensation or in terms, conditions, or privileges of employment because of that individual's sex. 42 U.S.C. § 2000e-2(a)(1); MASS. GEN. LAWS ch. 151B, § 4(1). Discrimination on the basis of pregnancy is a form of gender discrimination under federal and Massachusetts law. 42 U.S.C. § 2000e(k) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ."); *Gauthier v. Sunhealth Specialty Services, Inc.*, 555 F. Supp. 2d 227, 236 (D. Mass. 2008) ("Discrimination on the basis of pregnancy is a form of gender discrimination prohibited by MASS. GEN. LAWS ch. 151B, §

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<sup>11</sup> The Plaintiff, therefore, may not pursue the hostile work environment claim that was alleged in her Complaint because the statute of limitations bars that claim.

4." ). The analysis of a gender discrimination claim is "essentially the same under the State and Federal statutes," *Beal v. Bd. of Selectmen of Hingham*, 646 N.E.2d 131, 138 n.5 (Mass. 1995) (quoting *White v. Univ. of Mass. at Boston*, 574 N.E.2d 356, 358 (Mass. 1991)); consequently the discussion of these claims under Chapter 151B and Title VII are combined in this Memorandum.

The three-stage, burden-shifting paradigm set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) can guide analysis of claims of employment discrimination when only circumstantial evidence is available. *Lewis v. City of Boston*, 321 F.3d 207, 213 (1st Cir. 2003). The employee bears the initial burden of establishing a prima facie case of discrimination by showing: (1) she is a member of a protected class; (2) her employer took an adverse employment action against her; (3) she was qualified for the employment she held; and (4) her position remained open or was filled by a person with similar qualifications.<sup>12</sup> *Douglas v. J.C. Penney Co.*, 474 F.3d 10, 14-15 (1st Cir. 2007). However, "the burden for establishing a prima facie case is not onerous." *Id.* at 14.

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<sup>12</sup> In a reduction in force setting, "the fourth prong is unworkable because the plaintiff's position no longer exists." *Lewis v. City of Boston*, 321 F.3d 207, 214 n.6 (1st Cir. 2003). The further inquiry in the reduction in force setting becomes whether the Defendant did not treat gender neutrally "in making its decision to terminate [the Plaintiff] or retained personnel outside of [her] protected class in the same position." *Id.* at 214 (applying federal case law construing federal anti-discrimination statutes to interpret Chapter 151B).

Once the employee establishes a prima facie case, the burden shifts to the employer to establish a "legitimate, non-discriminatory reason for its adverse employment action." *Id.* If the employer meets that burden, "the burden returns to the employee to show that the proffered reason was a mere pretext . . . ." *Id.* Federal law and Massachusetts law diverge at this third stage, however. Under Title VII, the plaintiff must meet a "pretext plus" requirement and show, in addition to pretext, that the true reason for the hiring decision was intentional discrimination.<sup>13</sup> See *McDonnell v. Certified Eng'g & Testing Co.*, 899 F. Supp. 739, 745-46 (D. Mass. 1995). In contrast, Chapter 151B is "less stringent." *Douglas*, 474 F.3d at 14 n.2. Massachusetts is a "pretext only jurisdiction" and requires the

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<sup>13</sup> The Supreme Court has held that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose . . . [A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000) (internal citation omitted). Based on *Reeves*, Judge Stearns determined, in a Title VII case, that there was a factual issue as to whether the employer's reduction in force was a pretext for sex-based and pregnancy discrimination in the termination of an employee on maternity leave. *Daley v. Wellpoint Health Networks, Inc.*, 146 F. Supp. 2d 92, 103-04 (D. Mass. 2001) (finding "a reasonable trier of fact could find that [the employer's] overt displeasure at the 'disruption' caused by [the employee's] prenatal visits betrayed a discriminatory animus, and that [the employer's] explanation that [the employee's] job had become redundant during her absence was simply a pretext").

plaintiff to "establish[] a prima facie case and persuade[] the trier of fact that the employer's articulated justification is not true but a pretext." *McDonnell*, 899 F. Supp. at 746. See generally *Haddad v. Wal-Mart Stores, Inc.*, - - N.E.2d - -, 455 Mass. 91, 98 (2009) ("[I]f . . . at least one of the proffered reasons for the plaintiff's termination was a pretext, that alone would constitute sufficient evidence to support an inference that [the employer] acted with a discriminatory animus); *Knight v. Avon Prods., Inc.*, 780 N.E.2d 1255, 1261-62 n.4 (Mass. 2003); *Lipchitz v. Raytheon Co.*, 751 N.E.2d 360, 369 (Mass. 2001); *Abramian v. President & Fellow of Harvard College*, 731 N.E.2d 1075, 1085 ("A showing that the employer's reasons are untrue gives rise . . . to an inference that the plaintiff was a victim of unlawful discrimination. . . . Together they provide sufficient basis for the jury to return a verdict for the plaintiff.").

In this case, the Plaintiff contends that the adverse employment action was her termination, and that the Defendant's explanation of an economic layoff was a pretext for discrimination based on her sex and pregnancy. There is no dispute that the Plaintiff can establish the first three elements of a prima facie case based on her discharge by the Defendant: she is female and was pregnant, she was performing her job satisfactorily, and her employment was terminated. See *Sullivan*

*v. Liberty Mut. Ins. Co.*, 825 N.E.2d 522, 531 (Mass. 2005) (“Indeed it is likely that in a reduction in force case every plaintiff claiming sex . . . discrimination can easily satisfy the first three elements of the prima facie case.”). The Defendant argues that the Plaintiff cannot satisfy the fourth element - that the Defendant did not treat gender or pregnancy neutrally in making its decision to terminate her or retained male personnel in the same position - because male account managers in the Central and West regions were laid off. See generally *Lewis*, 321 F.3d at 214.

Taking the facts adduced by the Plaintiff in the light most favorable to her claim and recognizing her burden is not onerous, I find that she has alleged a prima facie case of discrimination. The Defendant’s admission that all of the male account managers in the Plaintiff’s High Tech East group were retained, such that the group became exclusively male, is sufficient evidence for the Plaintiff to meet the fourth prong under both federal and Massachusetts law. See *McDonnell v. Certified Eng’g & Testing Co.*, 899 F. Supp. 739, 747 (D. Mass. 1995) (“In a gender discrimination context . . . the plaintiff [must] show that the employer did not undertake the reduction in force in a gender neutral manner, or, that it retained employees of the opposite gender in the same position.”); *Sullivan v. Liberty Mut.*, 825 N.E.2d at 533, 536 (holding under Massachusetts law, “a plaintiff

in a reduction in force case may satisfy the fourth element of her prima facie case by producing *some evidence* that her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination," such as the employer's retention of lower-rated, similarly situated male employees) (emphasis added).

The burden then shifts to the Defendant to establish a nondiscriminatory reason for her termination. *See Douglas*, 474 F.3d at 14. The Defendant claims that, in addition to an economic layoff, the Plaintiff was one of five account managers in her group, her accounts could be easily transitioned, she had less extensive experience and a shorter tenure than others,<sup>14</sup> her performance was satisfactory but not above average, she had previously resigned,<sup>15</sup> and Olney's placement in High Tech East

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<sup>14</sup> The Plaintiff's allegation that Elliot had less seniority than she appears inaccurate. The Defendant produced documents showing Elliot's employment date as October 1999 (before the Plaintiff's date of hire in 2003) because Elliot previously worked for a company acquired by the Defendant. Additionally, the Plaintiff produced a chart of the High Tech East group that shows her as less senior than Elliot and therefore the least senior member of High Tech East.

<sup>15</sup> The Plaintiff's resignation does not necessarily undermine her discrimination claim, as the Defendant urges. To be sure, the Plaintiff's resignation from the company - five months after returning from maternity leave and less than two months after Coser grabbed her buttocks and tried to kiss her - shows that she was unhappy about the sexual assault and how the Defendant treated her during and after her pregnancy. But it does not bar her claim that her subsequent termination was gender-based. In any event, credibility of the Plaintiff's explanation as to why she resigned must not be decided on summary judgment, rather that determination and its implications are reserved for the finder of fact. *Chaloult v. Interstate Brands Corp.*, 540 F.3d 64, 81 (1st Cir. 2008) ("[I]n the summary

was "part of a total reorganization" of the company.

The Plaintiff counters that her dismissal was a pretext for discriminatory motives because the Defendant replaced her with a male, and she had a larger book of business and a higher percentage effective than some of her male counterparts in High Tech East who were retained by the Defendant. See *Sullivan v. Liberty Mut.*, 825 N.E.2d at 536 (holding, where employer retained lower-rated, similarly situated male employees, that "evidence alone, and certainly in combination with other admissible evidence, would permit a jury reasonably to conclude that [the employer's] termination of [the employee] . . . [is] more likely than not based on the consideration of impermissible factors") (internal quotations omitted). The parties quibble over the sufficiency of the Defendant's production of comparator information,<sup>16</sup> which as the Plaintiff correctly acknowledges, is

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judgment analysis . . . we are not permitted to draw negative inferences about the [employee's] credibility. That is a job for the jury at trial.").

<sup>16</sup> While the Defendant argues that the Plaintiff has failed to show pretext through the use of comparators, the Plaintiff argues in her Supplemental Brief that, "despite numerous discovery requests and discovery conferences, the defendant has produced only sparse and incomplete information with regard to [the Plaintiff's] comparators from which no proper comparison can be drawn at least with regard to their job performance." In particular, the Plaintiff objects to the Defendant's incomplete production of the performance reviews for the seven other employees (all male) in High Tech East. The Defendant acknowledges that the Plaintiff "may not have performance evaluations for all of the comparators, but UPS SCS has produced documents showing how the alleged comparators performed in terms of sales numbers . . . ." As a result, the Defendant asks that

relevant to determine the Defendant's treatment of similarly situated employees. *Cf. Rhodes v. JPMorgan Chase & Co.*, 562 F. Supp. 2d 186, 195-96 (D. Mass. 2008) (granting summary judgment for employer in a pregnancy discrimination case where there was "no evidence in the record" suggesting that an employee whose position was eliminated shortly after returning from maternity leave was treated any differently from similarly situated employees).

Critically, the parties dispute whether the Defendant considered the Plaintiff's performance during the period she was on maternity and disability leave as part of its decision to dismiss her. The Plaintiff argues that "[t]he jury is entitled to consider whether employing that period as a measure of [the Plaintiff's] work expressed a discriminatory animus." See *Sullivan v. Liberty Mut.*, 825 N.E.2d at 531 ("[B]ecause an employer seeks to reduce its workforce does not mean that it is free to make its employment decisions on impermissible grounds" such as "unlawful discriminatory reasons.").

I conclude that there is a genuine issue of material fact as

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an adverse inference not be drawn against it because it "made extensive and reasonable efforts to comply with broad and often belatedly articulated requests."

With its Reply brief, the Defendant filed a grid that compares High Tech East employees during the third and fourth quarters of 2005 and the first and second quarters of 2006. (Avery Aff. (Doc. No. 45), Ex. A.) The Plaintiff claims that the majority of the information therein was not produced during discovery, despite the Plaintiff's repeated requests for the production of comparator information.

to whether the Defendant retained lower-rated, similarly situated male employees, particularly with respect to the Plaintiff's book of business and percentage effective. Because this finding creates a factual issue as to whether the Defendant's asserted reason for the Plaintiff's termination was pretextual and/or motivated by intentional discrimination based on the Plaintiff's sex or pregnancy, I will deny summary judgment on Counts I and II with respect to the Plaintiff's termination.

**D. Violation of Massachusetts Maternity Leave Act (Count III)**

The Plaintiff argues that the Defendant also discriminated against her "in the terms and conditions of her employment on account of her pregnancy and her exercise of her right to a maternity leave under Massachusetts law." In Massachusetts, it is unlawful "[f]or an employer . . . to refuse to restore certain female employees to employment following their absence by reason of a maternity leave taken in accordance with [the MMLA] . . . or to impose any other penalty as a result of a maternity leave of absence." MASS. GEN. LAWS ch. 151B, § 4(11A). Under the MMLA, a female employee returning from maternity leave "shall be restored to her previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave." *Id.* at ch. 149, § 105D.

The Plaintiff's claim under the MMLA is barred under the statute because she was on maternity leave for over eight weeks.

*McKearney v. Answer Think Consulting Group, Inc.*, No. 993606, 2001 WL 417179, at \*3 n.9 (Mass. Super. Ct. Mar. 9, 2001) ("A female employee is protected under the statute if [her] maternity leave is for a period 'not exceeding eight weeks.'").<sup>17</sup> The fact that the Plaintiff was approved for sixteen weeks of maternity leave, but felt pressured to return after eleven weeks, has no bearing on her claim because her eleven-week maternity leave still exceeded the eight-week period under the MMLA. See *Caola v. Delta Air Lines, Inc.*, 35 F. Supp. 2d 47, 52 (D. Mass. 1999) (interpreting "the eight-week period" in the MMLA "as a ceiling rather than a floor" such that the plaintiff's six-week maternity leave did not violate Massachusetts law); *Guo v. Datavantage Corp.*, No. 07-40051-FDS, 2008 WL 660338, at \*4 (D. Mass. Jan. 28, 2008) (dismissing MMLA claim because the plaintiff "took a twelve-week maternity leave" that falls "outside the protection of § 105D").

In Count III, the Plaintiff also alleges that, after her maternity leave, the Defendant temporarily allowed her to return to the company where she was unfairly evaluated based on her productivity during maternity and/or medical leave and terminated

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<sup>17</sup> In *McKearney*, the court declined to consider whether employers could effectively "evade the statute by giving employees over eight weeks of maternity leave," finding "[t]his issue is for the legislature to address and not for the courts." No. 993606, 2001 WL 417179, at \*3 n.9 (Mass. Super. Ct. Mar. 9, 2001).

shortly thereafter. This recasting of her MMLA claim does not permit avoidance of the eight-week limitation. I will grant summary judgment on Count III.

**E. Retaliation (Count IV)**

The Plaintiff asserts a retaliation claim, under MASS. GEN. LAWS ch. 151B, § 4(4), arguing that the Defendant retaliated against her, through termination of her employment, because she took a maternity leave and advised her co-worker of her right to the same. Under subsection 4(4), it is unlawful for an employer to discharge or otherwise discriminate against an employee because she has opposed any practice forbidden under Chapter 151B; subsection 4(11A) of Chapter 151B prohibits an employer from imposing a penalty as a result of a maternity leave.<sup>18</sup> To establish a prima facie case for retaliation, the plaintiff must show that: "(1) [s]he engaged in conduct protected under Massachusetts or federal law; (2) [s]he suffered an adverse employment action; and (3) a causal connection existed between

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<sup>18</sup> I note that a judge of the Massachusetts Superior Court has held that "taking maternity leave . . . is not protected activity under § 4.4 [sic]" and denied a plaintiff's retaliation claim on that basis. *Frederick v. Richardson Electronics, Ltd.*, No. 0300928, 2005 WL 2542929, at \*6 (Mass. Super. Ct. Sept. 19, 2005). I consider this holding erroneous because subsection 4(11A) expressly prohibits employers from "impos[ing] any other penalty as a result of a maternity leave of absence." MASS. GEN. LAWS ch. 151B, § 4(11A). And in this connection, I further note that section 9 directs that Chapter 151B "shall be construed liberally for the accomplishment of its purposes . . . ." MASS. GEN. LAWS ch. 151B, § 9.

the protected conduct and the adverse action." *Sullivan v. Raytheon Co.*, 262 F.3d 41, 48 (1st Cir. 2001) (internal quotations omitted). Termination of employment constitutes an adverse employment action under Chapter 151B, § 4(4). *Clifton v. Mass. Bay Transp. Auth.*, 839 N.E.2d 314, 318 (Mass. 2005) (holding unlawful retaliation may involve a discharge).

In the instant case, there is no dispute that the Plaintiff can satisfy the first two elements. The Defendant admits that the Plaintiff engaged in protected conduct under Massachusetts law - i.e., taking her maternity leave under the MMLA and informing her co-worker Joyce of her right to the same - and that the Plaintiff suffered an adverse employment action when the Defendant terminated her employment. The Plaintiff's claim turns on the third element, whether there is a causal connection between taking her maternity leave (and advising Joyce of her right to the same) on one hand and, on the other hand, having her employment terminated.

While the mere fact that one event followed another is insufficient to prove a causal connection, an inference of causation is permissible when "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. Univ. of Mass.*, 814 N.E.2d 329, 339 (Mass. 2004). "Where adverse employment actions follow close on

*the heels* of protected activity, a causal relationship may be inferred. However, as the elapsed time between those two events becomes greater, the inference weakens and eventually collapses," such that "the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Id.* at 341 (declining to find temporal proximity where the protected activity and adverse employment action were "one to two years," "more than two years," or "many years removed") (emphasis added).

In this case, a causal connection is plausible from a temporal standpoint. The Plaintiff's protected conduct (taking her maternity leave and advising Joyce of her right to the same) preceded and therefore might thereafter have caused within relatively close temporal proximity the Defendant's adverse employment action (her termination shortly after returning from maternity leave). *Cf. Sullivan v. Raytheon Co.*, 262 F.3d 41, 49 (1st Cir. 2001) (finding employee did not demonstrate a causal connection where his protected action of filing a charge of discrimination with MCAD occurred after the employer's refusal to reinstate the plaintiff to his position). There is temporal proximity between the Plaintiff's protected activity and the Defendant's adverse employment actions: she returned from her maternity leave in January 2006 and was terminated in October 2006. *Cf. Morón-Barradas v. Dep't of Educ. of Commonwealth of P.R.*, 488 F.3d 472, 481 (1st Cir. 2007) (affirming summary

judgment for employer where it was impossible for the employer to retaliate *before* employee engaged in protected activity and, even if employer took other actions against her, more than eight months elapsed between last date in a series of events and the employer's next action); *Mole*, 814 N.E.2d at 341 (finding causation not established where the plaintiff complained of adverse employment acts that are "many years removed" from the employer's discovery of the plaintiff's involvement in protected activity).

The Plaintiff alleges evidence beyond temporal proximity to establish causation, and creates a genuine issue of material fact as to whether her maternity leave caused the Defendant's alleged retaliatory conduct. First, the Plaintiff claims that the Defendant resisted paying her maternity leave, chastised her for informing Joyce about Joyce's own rights under the MMLA, and pressured the Plaintiff to return from her maternity leave early. It is undisputed that the Plaintiff's performance was, at a minimum, satisfactory throughout her course of employment with the Defendant. The Plaintiff argues that the Defendant improperly assessed her performance based on the twelve months before her dismissal (October 2005-2006) which included her maternity and/or disability leave (October 15, 2005-January 2006) as part of the its decision to terminate her. Despite her approved pregnancy-related absence, the Plaintiff purportedly exceeded her revenue goals and was terminated, yet the Defendant

retained male members of High East Tech who failed to meet their revenue goals. The fact that the Plaintiff resigned and then returned to UPS SCS does not negate the fact that her disability and/or maternity leave were arguably factored into her annual performance for purposes of deciding to terminate her employment; instead it is part of the complex of evidence creating a genuine issue of material fact as to retaliation.

Viewing the facts in the light most favorable to the Plaintiff, the Defendant's collective actions create a genuine issue of material fact as to whether the Defendant retaliated against the Plaintiff, in violation of MASS. GEN. LAWS ch. 151B, § 4(4), by terminating her for taking her maternity leave and advising Joyce of her own rights under the MMLA.

***F. Commissions-Related Claims (Counts V and VI)***

The Plaintiff contends that the Defendant refused to pay commissions owed to her on three accounts (PerkinElmer, Konica Minolta, and Bose) in violation of the Massachusetts Wage Act, MASS GEN. LAWS ch. 149, § 148, and in breach of their contract. The Plaintiff's entitlement to commissions, in addition to her base salary, centers around the 2006 Sales Incentive Plan ("2006 SIP"). The 2006 SIP states: "Employees will be eligible for sales incentive for any SIP component that has been achieved at the time of termination. Employees will not be eligible for any subsequent 'New Business Bonus Table' payments due after the date of termination." (2006 SIP at 5.) It is undisputed that, for

PerkinElmer, Konica Minolta, and Bose, the measurement period - i.e., the period during which revenue is measured for the purpose of calculating commissions - began after the Plaintiff was terminated. The Defendant accordingly argues that "[b]y its terms, the SIP disentitles terminated employees to new *business bonuses* due after termination." I conclude that this reading of the 2006 SIP is accurate as a matter of conventional contract law because the second sentence excepts new business bonuses from the statement in the first sentence about employees' eligibility for sales incentives.

In 2005, the Defendant made initial payouts on the estimated amount of revenue; however, the 2006 SIP eliminated the initial payout for new business bonuses such that the bonuses were paid only on actual billed revenue. As a result, while the Plaintiff would have seen the initial payout numbers on the 2005 form, she would not have seen these numbers on the applicable 2006 form. The Defendant explains that under the 2006 SIP, the Plaintiff would not have been eligible for her first payout on a new business bonus until the first measurement period went into effect; the measurement periods at issue all began after the Plaintiff's termination. As a result, the Defendant argues that the Plaintiff's inadvertent submission of the new business bonus requests on the 2005 form does not entitle her to the commissions.

1. Violation of the Wage Act (Count V)

The "basic purpose" of the Wage Act is "to prevent the unreasonable detention of wages." *Weems v. Citigroup Inc.*, 900 N.E.2d 89, 92 (Mass. 2009) (quoting *Boston Police Patrolmen's Ass'n v. Boston*, 761 N.E.2d 479, 481 (Mass. 2000)). The Wage Act applies "so far as apt, to the payment of commissions when the amount of such commissions . . . has been definitely determined and has become due and payable to such employee . . . ." MASS GEN. LAWS ch. 149, § 148. The SJC has held commissions are "definitely determined" when there is no dispute concerning the applicable formulas for determining the commissions and the amount of commissions owed to the former employee is "arithmetically determinable." *Wiedmann v. The Bradford Group, Inc.*, 831 N.E.2d 304, 312 (Mass. 2005). "An employee claiming to be aggrieved by a violation of" the Wage Act may institute a civil action for "injunctive relief, for any damages incurred, and for any lost wages and other benefits." MASS GEN. LAWS ch. 149, § 150. This remedy applies to employees seeking the payment of commissions. *Id.* at § 148 ("[C]ommissions so determined and due such employees shall be subject to the provisions of section [150].").

In this case, the Plaintiff signed an Acknowledgment Form that she had "read, and accepted the terms and conditions set forth in" the 2006 SIP, and the 2006 SIP expressly states that terminated employees "will not be eligible for any subsequent

'New Business Bonus Table' payments due after the date of termination." There is no dispute that the measurement period, during which revenue is measured for the purpose of calculating commissions, for these three accounts commenced after the Plaintiff's termination. Thus, before the measurement period began, the new business bonus was neither "due and payable" to the Plaintiff, nor was it "definitely determined" because the revenue was not yet measurable. See MASS GEN. LAWS ch. 149, § 148. Bill Norris' statement that "eligible people will receive their earned commissions up to the last full month they worked in separate checks" does not help the Plaintiff because she was not eligible for these commissions under the 2006 SIP. (emphasis added.) The Plaintiff conceded during depositions that the Defendant never told her that she was entitled to commissions on these three accounts. As a result, the Plaintiff's claim under the Wage Act fails as a matter of law, and I will grant summary judgment in favor of the Defendant on Count V.

## 2. Breach of Contract (Count VI)

The Plaintiff argues that the Defendant breached the terms of their contract by failing and refusing to pay her sales commissions due. Having found that the express terms of the 2006 SIP preclude the Plaintiff's recovery of commissions, the Plaintiff's breach of contract claim can only succeed on a theory of breach of an implied covenant of good faith and fair dealing.

Pursuant to "a theory well established under Massachusetts

law," an employer breaches an implied covenant of good faith and fair dealing in an at-will employee contract when the employer terminates the employee in bad faith in order to deprive the employee of her commissions. *Bohne v. Computer Assocs. Int'l, Inc.*, 514 F.3d 141, 143 (1st Cir. 2008) (per curiam) (citing *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977)). The *Fortune* doctrine "require[s] employers who terminate 'without good cause' – even though without bad-faith intent – to pay any compensation clearly related to employees' past services, even if not yet contractually due." *Id.* at 144 (citing *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21, 28-29 (Mass. 1981)). Massachusetts case law, however, "has interpreted 'good cause' very liberally in favor of employers." *Id.* (citing *York v. Zurich Scudder Invs., Inc.*, 849 N.E.2d 892, 899-900 (Mass. App. Ct. 2006)).

The Plaintiff alleges that she was on "the brink of" earning commissions on three accounts before her termination. In *Cataldo v. Zuckerman*, the Massachusetts Appeals Court, applying *Fortune*, affirmed a wrongfully discharged employee's entitlement to a vested equity interest in projects for which he "had already done a significant amount of work, with a reasonable expectation that the work would continue . . . to the completion of that project." 482 N.E.2d 849, 855-56 (Mass. App. Ct. 1985). In contrast, the SJC has held that a corporation is not liable for a breach of the

implied covenant of good faith and fair dealing where the employee's stock agreement stated that his shares were to vest each quarter that he remained an employee until they had fully vested. *Harrison v. NetCentric Corp.*, 744 N.E.2d 622, 630-31 (Mass. 2001). Under that agreement, should the employee cease working for the company, his right to unvested shares would terminate immediately. *Id.* Explaining that "[t]he *Fortune* doctrine does not protect interests contingent on an event that has not occurred," the SJC concluded that the employee's "unvested shares are not earned compensation for past services, but compensation contingent on his continued employment." *Id.* Therefore, the SJC held that the corporation "did not deprive [the terminated employee] of any income that he reasonably earned or to which he was entitled." *Id.* at 630. The SJC found *Cataldo* "easily distinguishable" because "[w]hen *Cataldo* was fired, some of the projects in which he had an interest were 'then viable' (i.e., had already begun)" and "[i]t was his unvested interest in these 'viable' projects that . . . was reflective of past services: on each project the employee had 'already done a significant amount of work' . . . ." *Id.* (quoting *Cataldo*, 482 N.E.2d at 856). As in *Cataldo*, it is undisputed that the Plaintiff here was "substantially involved in the sale" of the three accounts at issue.

The Plaintiff also contends that her termination was not for

good cause. Termination of employment premised on unlawful discrimination or retaliation is undoubtedly "without good cause." See *Gram*, 429 N.E.2d at 27 & n.6 (citing public policy considerations, such as "an employer's retaliatory discharge," in declining to give effect to the employer's reason for termination of an at-will employee); *McKinney v. Nat'l Dairy Council*, 491 F. Supp. 1108, 1122 (D. Mass. 1980) (finding a violation of the implied obligation of good faith and fair dealing where age was the determining factor in the decision to terminate an at-will employee); *Maddaloni v. W. Mass. Bus Lines, Inc.*, 422 N.E.2d 1379, 1386-87 (Mass. App. Ct. 1981) ("[D]amages for future wages are implicit in cases which hold that a violation of public policy constitutes a breach of a covenant of good faith in an at will employment contract. Otherwise, these cases would provide no remedy and no deterrent.") (citing *McKinney*, 491 F. Supp. at 1121-23).

Because the Plaintiff was substantially involved in the sale of these three accounts and there is a genuine issue as to whether the Plaintiff's termination was without good cause, I conclude that a factfinder could determine that the Plaintiff should recover commissions under the implied covenant of good faith and fair dealing, even if those commissions were not yet due under the strict terms of the 2006 SIP. As such, I will deny summary judgment on the breach of contract claim.

#### IV. CONCLUSION

For the reasons set forth more fully above, I GRANT the Defendant's motion (Doc. No. 19) for summary judgment on Counts III and V, and DENY summary judgment on Counts I, II, IV, and VI of the Plaintiff's Complaint. I DENY the Defendant's motion (Doc. No. 41) to strike.

*/s/ Douglas P. Woodlock*  
DOUGLAS P. WOODLOCK  
UNITED STATES DISTRICT JUDGE