UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIELLE M. MILLER, Ph.D., M.D., Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	02-11151-DPW
WHITNEY D. TOPE, M.D. and MARK V. DAHL, M.D., Defendants.	)	

MEMORANDUM AND ORDER
November 24, 2003

Plaintiff Danielle Miller, M.D., brings this diversity action in five counts against defendants Whitney Tope, M.D., and Mark Dahl, M.D. The case stems from defendants' written evaluations of plaintiff, which were sent to the Massachusetts Board of Registration in Medicine as part of plaintiff's medical licensing application process. Plaintiff alleges that defendants' evaluations constituted defamation which delayed the issuance of her medical license, thereby causing her both economic and emotional harm. Defendants have moved for summary judgment on all the counts alleged; plaintiff moves for partial summary judgment on two of the five counts.

I. BACKGROUND

The following facts, unless otherwise indicated, are not disputed by the parties.

Plaintiff Danielle Miller was a resident in dermatology at the University of Minnesota from 1995 to 1998. During the last year of Miller's residency, defendant Whitney Tope was the director of the dermatology residency program, and throughout Miller's residency, defendant Mark Dahl was the chair of the Dermatology Department.

Two incidents which occurred during Miller's residency are particularly relevant to this case. The first, which occurred in November of 1997, concerns Miller's alleged failure to comply with the residency program's formal leave policy. According to a letter written by Dahl and Tope to Miller on November 25, 1997, Miller did not provide proper notice that she had an interview away from the university and would be absent from the clinics to which she was assigned. The letter states that while prior to the absences, Miller had spoken to Dahl about the time she would miss, she did not provide the advance written notice that was formally required by the residency program guidelines.[1] As a result, Miller was required to "make up," without pay, four days in July 1998.

The second incident involved a meeting in January 1998

[1]Miller disputes that she never provided proper written notice. She testified in her deposition that she gave Tope a letter in September 1997 with her interview dates on them and that she subsequently wrote down for him scheduling changes on several occasions. She does not have a copy of the original letter, but has provided what she alleges is one of the subsequent notes of scheduling changes. It is not clear from the record before me, however, whether these notes were written by Miller or Tope.

between Miller, Dahl, and Tope, during which the three discussed evaluations of Miller from the preceding academic quarter. The evaluations, one by Tope and another by Dr. John Fenyk,[2] contained a number of four-point ratings ("Excellent," "Above Average," "Average," or "Unsatisfactory") concerning Miller's knowledge base, clinical skills, and teaching skills, as well as a number of interpersonal and personality characteristic ratings. Both Tope's and Fenyk's evaluations contained a number of "Unsatisfactory" ratings,[3] and in written comments attached to the evaluations, each noted several areas of particular concern. Tope indicated that both her test scores and her interpersonal relationships within the department needed improvement, writing:

> Dr. Miller has a tendency to function very well and work hard with some faculty, but exhibits borderline performance with others. Despite her baseline satisfactory performance of obligations to patients and clinic duties, Dr. Miller appears to withdraw from professional relationships with faculty, fellows residents and ancillary staff; she does not routinely

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[2]Miller states in her deposition that she was shown three evaluations, from Dahl, Tope, and Fenyk. She also contends that she would have been evaluated by several other physicians in addition to those three, and thus that her file, as provided by defendants, is incomplete.

[3]Tope gave Miller "Unsatisfactory" ratings for "Clinical Dermatology," "Medical dermatologic therapy," "Clinical judgment in patient management," "Compassion and courtesy in care of patients," "Communication skills with other physicians," "Emotional maturity," "Dependability," "Response to criticism," and "Availability and punctuality." Fenyk rated her "Unsatisfactory" in "Clinical Dermatology," "Medical dermatologic therapy," "Clinical judgment in patient management," "History taking and physical examination skill," "Medical record keeping skills," "Teaching ability," "Dependability," and "Acceptance of responsibility." All other ratings on the two evaluations were either "Average" or "Above Average."

> develop positive relationships with all of her colleagues. This significantly adversely affects her overall performance as a physician trainee.

Tope further noted that Miller occasionally did "not respond well to constructive criticism, becoming angry, then withdrawing from those who offer such criticism" and that she potentially harbored anger that "interfere[d] with training and personal and professional relationships."

In his comments, Fenyk also noted several concerns. He wrote:

> I have some concerns about Dr. Miller's general dermatologic knowledge. She may be exhibiting simply a lack of interest in general derm or a lack of stimulation by my clinic, but the net result is the appearance of poor understanding, poor general knowledge base and poor attitude regarding the practice of medical dermatology. [4]

During the January 1998 meeting, Tope and Dahl expressed concern about Miller's performance as reflected in the evaluations and in her in-training examination test scores.[5] Tope and Dahl contend that they discussed steps Miller would need to take in order to complete the program,[6] and they believe they

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[4]Miller states that her contact with Fenyk was a total of two half days and that his negative evaluation was submitted after she rejected his offer to work in his office.

[5]Residents annually took the American Board of Dermatology in-training written examination as part of the department's internal evaluations. Miller received total scores placing her in the 4th, 14th, and 8th percentiles for each of her three years, respectively.

[6]In his written evaluation, Tope laid out a list of six recommendations "to ameliorate these concerns and to improve her academic and professional performance."

told her they were placing her on probation.[7] Miller disputes that she was ever advised, in writing or otherwise, that she was placed on probation or that she ever thought she had been put on probation.

During the meeting, Tope and Dahl also discussed with Miller rumors that were circulating in the dermatology community about Tope that were threatening to Tope's marriage. Miller contends that Tope and Dahl accused her of spreading the rumors and causing Tope's marriage to fail, which she denied.[8]

Several days later, in an unscheduled meeting of the residents, Tope discussed various rumors, including rumors that he had interfered with Miller's fellowship applications by limiting Miller's fellowship interviews and by contacting some of Miller's fellowship interviewers. Miller testified that she

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[7]Dahl stated in his deposition: "[W]e never sent her a formal notice of probation, but in our meeting we discussed with her her failure to meet the standards on the in-training examination, as well as her below normal performance on the clinics, and indicated to her that she was on departmental probation." In his deposition, Tope did not state that he or Dahl specifically told Miller she was on probation. Rather, Tope testified that setting forth the six steps in the comments in his evaluation constituted putting Miller on probation. He stated: "[W]e recommended that Dr. Miller do five different things--six different things . . . . This was placing her on probation. These things we were asking her to do was placing her on academic probation."

[8]In the February 1998 letter to Tope from Miller's attorney, described below, Miller's attorney stated that Tope "accused Dr. Miller of spreading false rumors that [Tope] was trading sex for career advancement within the Program, and specifically, that such rumor expressly identified Ann Norland as the person with whom [Tope was] trading sexual favors."

volunteered that she had never heard about the fellowship rumors and that Dahl said that he believed her. In written notes from the meeting, Tope wrote that Miller denied starting any rumor and that he and Dahl accept her denial.

After the January 1998 meeting, Miller retained an attorney who wrote to Tope on February 4, 1998. In the letter, Miller's attorney notified Tope that Miller had retained his legal services and that she was concerned about Tope's accusations that Miller was spreading rumors about him, Tope's statement to a Dr. Eric "Louis"[9] that "Dr. Miller would be a casualty" in the program,[10] and other negative statements Tope was making about Miller, including statements to a physician in St. Paul that she was a "liar" and "was not to be trusted." Miller's attorney stated that Miller would pursue legal action if Tope did not "cease and desist" from making further untrue allegations and statements.

Following her completion of the residency program, Miller began a fellowship in pediatric dermatology at the Miami Children's Hospital in Miami, Florida. In October 1998, Miller resigned and left the fellowship, citing, among other things,

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[9]This apparently is a misspelling. I assume that the letter refers to Eric Lewis, a co-resident, who has submitted an affidavit on behalf of Miller.

[10]Lewis has submitted an affidavit on behalf of Miller, but in it he does not refer to any such threats by Tope about Miller. Miller testified in her deposition that Lewis told her that Tope had told him that Miller's "medical career would be brief." This, however, is hearsay as to whether Tope in fact made such a statement to Lewis, and I therefore do not consider it for the purposes of the present summary judgment motions.

breach of contract as a reason for her departure.[11] Tope testified in his deposition that in a subsequent conversation with Miller's fellowship director, Dr. Ana Duarte, Duarte stated that Miller "had simply left the job" and sent the resignation letter several days later, which Duarte characterized as "very unprofessional."[12] Miller, on the other, hand points to Duarte's evaluation of Miller sent to the Massachusetts Board of Registration in Medicine (the "Board"), in which Duarte rated her categorically "Above Average."

On April 11, 2000, Miller filed an application for a Massachusetts medical license with the Board.[13] On April 12, 2000, Dr. Thomas Kupper, Chief of the Dermatology Division of Brigham and Women's Hospital ("BWH") and a professor of dermatology at Harvard Medical School, sent a letter to Miller offering her a joint position as Instructor in Dermatology at Harvard Medical School and Associate Physician in Medicine at

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[11]Miller stated in her resignation letter that she had decided to leave because the terms and schedule of her fellowship were not being adhered to, because she had ethical conflicts with the approach of the hospital's Children's Skin Center, and because of comments made to her in the presence of others regarding her pregnancy and decision to obtain prenatal care. Defendants point out that in her Massachusetts licensing application, she stated she left her fellowship because her husband had received employment at Harvard University and they had moved to Cambridge, Massachusetts.

[12]Tope has produced notes which he testified were from his conversation with Duarte.

[13]Miller disputes this in her summary judgment submissions, at least to the extent she signed and dated the application on March 19, 2000. I note that plaintiff asserts in her amended complaint that she filed the application on April 15, 2000.

BWH. The offer was expressly contingent on her receiving a Massachusetts medical license and insurance carrier provider numbers. It also stated that since Miller already had a Federal DEA number, she would be able to begin practicing at the Veterans Administration Hospital in West Roxbury ("VA"), which was affiliated with BWH, at her "earliest convenience."[14]

On April 6, 2000, Miller sent a letter to Dahl requesting that an "Evaluation Form" and a "Postgraduate Training Verification Form" be completed and returned directly to the

[14]In a letter back to Kupper, Miller stated that she wished to begin working at the VA on June 1, 2000 while her Massachusetts medical licensure was pending. Miller, however, never began work at the VA. As Miller's counsel represented at the motion hearing, Miller's prior medical license--it is not clear whether from Florida or Wisconsin--had lapsed by the time she started work at BWH, and she therefore was unable to begin work at the VA prior to the issuance of her Massachusetts license.

Board. Dahl completed the evaluation form and Tope completed the training verification form.

In the evaluation form, Dahl rated Miller, on a five-point scale ("Superior," "Above Average," "Average," "Below Average," and "Poor"), as "Below Average" for "Clinical knowledge," "Character and ethics," "Relationship with staff," and "Cooperativeness/ability to work with others."[15] Dahl responded "No" to a question asking whether "this applicant [has] ever been the subject of disciplinary action or had staff privileges, employment or appointment at this hospital or facility voluntarily or involuntarily denied, suspended, revoked or has (s)he resigned from the medical staff in lieu of disciplinary action?"

In the post-graduate training verification, Tope answered "Yes" to all five of the question concerning "Unusual Circumstances." The questions asked whether the applicant took any leaves of absence or breaks from post-graduate training, was ever placed on probation, or was ever disciplined or under investigation, whether instructors ever filed negative reports regarding the applicant, and whether any limitations or special requirements were imposed on the applicant because of questions of academic incompetence or disciplinary problems.

[15]He rated her as "average" in all other ratings except the one for technical skills, in which he rated her as "superior."

Both Tope and Dahl also attached to the respective forms a copy of a letter dated December 8, 1998, which Tope had written to the Wisconsin Department of Regulation Licensing to explain his answers on a certificate of post-graduate training for Miller. In the letter, Tope described the incident concerning Miller's absences for fellowship interviews, and he additionally gave explanations for what presumably[16] were negative answers to questions on the certificate regarding Miller's academic performance, steps Miller was required to take due to her poor performance relative to her peers, and her interpersonal relationships. Tope further stated that in her final evaluation, Miller had agreed with the assessment regarding her academic and interpersonal performance. Tope concluded the letter by stating that "[w]e did certify, based on Dr. Miller's completion of her clinical responsibilities, that her training was satisfactory to be judged Board Eligible."

In a letter dated June 8, 2000, Miller's attorney sent a letter to the University of Minnesota, expressing concern over Tope and Dahl's statements, in particular Tope's responses on the post-graduate verification form concerning "Unusual circumstances" and the negative responses on the evaluation form. The letter stated that the information contained on the forms completed by Dahl and Tope was untrue and defamatory, and recounted some of the circumstances concerning the incidents

[16]Neither party has produced a copy of the Wisconsin post-graduate training certificate completed by Tope.

described above concerning Miller and Tope. Miller's attorney demanded that Miller be sent her complete evaluative file and that Tope retract in writing his statements in the post-verification form submitted to the Board.

By letter dated June 26, 2000, Tope told the Board that after further review of the post-graduate training verification form, he wished to correct his answers to questions two and three--regarding probation and formal discipline. He stated that his responses to the questions stemmed from the incident regarding Miller's absences for fellowship interviews but that Miller "was not placed on formal probation nor was she subject to formal discipline." He further stated that the incident was the basis for his affirmative answer to the question on the form regarding absences. Tope further stated that his answers to questions four and five reflected concerns about Miller's academic performance as reflected in her test scores, lack of conference attendance, and negative evaluations.

Meanwhile, through a form dated June 27, 2000, Tope responded to a request for information from BWH regarding Miller.[17] Tope answered Yes" to a question asking whether he had "any other concerns relating to this physician's professional performance, clinical skills or mental or physical status and any impairments related to chemical dependency?" Tope also indicated that he would not "recommend this physician for a medical staff

[17]According to the form, the request was made on May 25, 2000.

appointment." In an attached letter dated June 27, 2000, Tope wrote that

> at the conclusion of her training Dr. Miller was not felt to have a sufficiently broad knowledge base in dermatology as reflected in low In-Training Examination scores for all three years of her training. This was felt to relate to poor conference attendance during her training. Dr. Miller also demonstrated poor interpersonal skills in her interactions with her peers, ancillary staff, and faculty. Finally, Dr. Miller did not respond well to constructive criticism.

Tope also stated that his recommendation against appointing Miller to a medical staff position, "must be tempered by Dr. Miller's professional performance since the conclusion of her training. A sufficient knowledge base in dermatology would be reflected by her passing the American Board of Dermatology Examination for Board Certification."

According to Sarah Donnelly, the Keeper of the Records for the Board, it is the Board's policy to request the complete evaluative file from a post-graduate training program when any of the questions in the training verification form are answered in the affirmative. On June 28, 2000, the Board received the complete file from Tope, along with his June 26, 2000 letter purporting to clarify information contained in the training verification form.

On July 12, the Board's Licensing Committee (the "Committee") recommended that Miller appear for an interview on August 9, 2000. After interviewing Miller, the Committee requested that Dahl submit additional information in writing to explain his "Below Average" evaluations of Miller. Dahl sent a letter of additional information which the Board received on September 5, 2000. In the letter, Dahl stated he wanted to clarify his relatively low rating with respect to "Character and ethics." He stated that he gave the rating to alert the Board to "an anomaly with respect to termination of [her Miami] fellowship" but that he had since learned that Miller's departure was "in no way related to either unethical or unprofessional conduct on her part." Dahl also stated that the basis for his "Below Average" rating for "Clinical knowledge" was Miller's "consistently lower than average scores on the in-training examination" as well as his personal opinion that her clinical knowledge was below average as compared to her fellow residents. Dahl, nevertheless, concluded that if he were sitting on the Board, he would grant Miller a medical license.

The Committee reviewed Miller's application and recommended approved of it on September 13, 2000. However, by the time her license was approved, Miller had learned that she was pregnant,[18]

[18]There is a dispute about when Miller actually learned about her pregnancy. In an affidavit, she claims that she learned she was pregnant around July 1, 2000. However, defendants argue this contradicts her own deposition testimony. I find that in that testimony Miller merely states that she was pregnant from April to December, 2000, but does not testify as to when she learned of the pregnancy. Nor do I do find the April

and it was the policy of BWH not to allow physicians to begin seeing patients until they could commit to six consecutive months of patient care. As a result, Miller did not begin work at the hospital as a physician until February of 2001, after returning from maternity leave.[19]

Miller originally brought this case in the Superior Court of Massachusetts and defendants removed to federal court on diversity jurisdiction grounds. In her Amended Verified Complaint, Miller has asserted five separate counts. First, she alleges defamation stemming from the evaluation and post-graduate training verification forms submitted to the Board by Dahl and Tope, respectively (Count I).[20] She further alleges four counts arising out of the allegedly defamatory conduct: negligent infliction of emotional distress (Count II), intentional infliction of emotional distress (Count III), interference with contractual relations (Count IV), and tortious interference with

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29, 2000 record relied upon by defendant dispositive. The record does not establish that its contents were reported in that form to Miller and the reference to pregnancy as a matter of history may be viewed as ambiguous in light of her prior pregnancy.

[19]Miller began working as a research fellow in Kupper's lab in June 2000, and she was paid as a fellow starting in October 2000. Her salary was not raised to the level of a physician's salary until she returned from maternity leave in February 2001.

[20]Defendants apparently are under the impression that Miller's claims include statements in the May forms sent to BWH. However, the Amended Verified Complaint refers only to the April 13 and 17, 2000 forms as the basis of the underlying defamation claim. In any event, even if Miller had alleged defamation as to the May letter to the BWH, she has not produced any evidence that the letter constituted something other than a protected opinion or had any effect on BWH's decision to hire her or otherwise influenced her relationship with BWH.

a business relationship (Count V).

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if it has the "potential to affect the outcome of the suit under the applicable law." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000), and a "genuine" issue is one that "may reasonably be resolved in favor of either party." Cadle Co. v. Hayes, 116 F.3d 957, 960 (1st Cir. 1997).

Partial cross-motions for summary judgment do not alter the basic summary judgment standard, but rather simply require courts to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. See Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103 (1st Cir. 2001); Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996). Thus, in deciding cross-motions for summary judgment, courts must consider each motion separately, drawing inferences against each movant in turn. Reich v. John Alden Life Ins. Co., 126 F.3d 1, 6 (1st Cir. 1997).

B. Absolute Immunity

At the threshold, defendants argue they enjoy absolute

immunity under Minnesota law for remarks made pursuant to their employment by the University of Minnesota. There is an antecedent question as to whether Minnesota law of public official immunity should apply to this case, but I need not fully address that issue because I find, as a more substantive matter, that such immunity, even if applicable, would not serve to shield defendants from liability.[21]

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[21]That said, I note that I do not find defendants' argument that Minnesota law should apply compelling. Under the Restatement (2d) of Conflicts, the following factors govern which state has the more significant relationship with an issue: (1) the place of the injury; (2) the place of the injury-causing conduct; (3) the parties' domiciles; and (4) the place where the relationship between the parties is centered. Restatement (2d) of Conflicts § 145. Here, the alleged injury was in Massachusetts, as was the publication of the defendants' statements. Moreover, Miller is domiciled in Massachusetts, so the only factors favoring application of Minnesota law are defendants' domicile and the fact that Miller's medical residency was in Minnesota. Under the circumstances, Minnesota has a less significant interest than Massachusetts which will be enforcing its policy against libel because both the injury and injury-causing conduct occurred in the Commonwealth. None of the cases cited by defendants that deal with choice of law in the application of immunity or privilege to defamation claims lead to the opposite conclusion, as each involved a different balancing of interests. See Wilkow v. Forbes, Inc., 2000 WL 631344 (N.D. Ill. 2000) (applying New York privilege law and Illinois substantive law where injury-causing conduct occurred in New York and two of the three parties were domiciled in New York), aff'd, 241 F.3d 552 (7th Cir. 2001); Block v. First Blood Associates, 691 F.Supp. 685, 698 (S.D.N.Y. 1988) (refusing to apply California statutory privilege because "New York has a compelling interest in policing tortious conduct committed in New York, by a New York attorney, with reference to future or pending litigation in New York"); Bio/Basics Intern. Corp. v. Ortho Pharm. Corp., 545 F.Supp. 1106, 1114 (S.D.N.Y. 1982) (New York, as place of publication and place of business of injured party had "powerful" interest whereas because publication was before a federal legislative committee, D.C.'s interest was "minimal, at best, notwithstanding the fact that the challenged conduct was performed there"). As the Restatement directs, "the rule of liability of the state of injury should usually be applied unless the policy underlying the rule of non-liability is a strong one,

Defendants cite a number of Minnesota cases in which courts have afforded an "absolute privilege" to Minnesota officials for statements made in furtherance of the performance of their official duties. Even assuming Dahl and Tope were public officials and that their statements were made as part of their official duties, the absolute immunity doctrine does not apply in this case. In Bauer v. State, 511 N.W.2d 447 (Minn. 1994), the Minnesota Supreme Court made clear that the official immunity doctrine does not generally apply to claims of defamation. The Bauer court explained:

> [O]fficial immunity does not fit defamation. In defamation, the essential focus is not so much on alternative courses of conduct and the reasonableness of the actor's conducts, as it is in most torts, but on the nature of the published statement. . . . A true statement does not depend on the judgment of the speaker, but on its accordance with the facts; either the statement is true or it is not, and there is no discretionary conduct for official immunity to cover and protect.

Id. at 449.

In explaining the inapplicability of official immunity to ordinary defamation cases, the Bauer court explicitly distinguished the line of cases relied on by defendants.[22] For

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as would probably be true if the conduct was required as opposed to being only privileged." Restatement (2d) of Conflicts § 163. I find no such overriding policy in this case.

[22]Importantly, Minnesota courts, like Massachusetts courts, have recognized a qualified privilege based on public policy considerations, see Lewis v. Equitable Life Assur. Soc. of the U.S., 389 N.W.2d 876, 889 (Minn. 1986) ("[A] communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause." (quoting Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 256-57

example, the court observed that Johnson v. Dirkswager, 315 N.W.2d 215 (Minn. 1982), afforded official immunity only for statements made by "high-level, executive-type government officials" and noted that Johnson itself acknowledged that it was dealing only with "top-level, cabinet-equivalent executives." Bauer, 511 N.W.2d at 450. The Bauer court also distinguished Freier v. Independent School District No. 197, 356 N.W.2d 724 (Minn. Ct. App. 1984), which applied to officials "acting in a judicial or quasi-judicial capacity." Bauer, 511 N.W.2d at 450. Finally, the court held that Carradine v. State, 511 N.W.2d 733 (Minn. 1993), which involved statements made by a police officer in a written arrest report, was inapposite. The Bauer court stated that "the governmental interests involved do not raise public policy considerations of the same urgency as Carradine. Instead, we have allegedly defamatory statements made within the context of an administrative personnel matter, not unlike those that occur in the private sector." Bauer, 511 N.W.2d at 450.

The remaining cases cited by defendants are similarly inapplicable because each, unlike this case, involved public policy considerations that warranted the protections of official immunity, rather than qualified immunity, because they greatly

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(Minn. 1980))), and have applied such a qualified privilege, rather than absolute immunity, in cases similar to this case. See Stuempges, 297 N.W.2d at 257 ("In the context of employment recommendations, the courts generally recognize a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose.").

outweighed the right of individuals to seek redress for defamation.[23] See Redwood County Tel. Co. v. Luttman, 567 N.W.2d 717 (Minn. Ct. App. 1997) (statements by county sheriff were closely related to duty of sheriff's office of providing dispatch services for emergency calls from county residents), Fieno v. State, 567 N.W.2d 739 (Minn. Ct. App. 1997) (dean of state college immune from claims of defamation based information that was public personnel data under Minnesota statute), Bd. of Regents of Univ. of Minnesota v. Reid, 522 N.W.2d 344 (Minn. Ct. App. 1994) (public's right to know outweighed individual's right to sue for defamation where alleged defamatory statements were made in course of state university spokespersons' assigned functions during press briefing). I find therefore that this case is closely aligned with and controlled by Bauer and

[23]I note here that defense counsel did not so much as mention Bauer in their briefs. While counsel may believe Bauer is distinguishable from this case, failure to cite to a Minnesota Supreme Court case that directly contradicts defendants' legal contentions and which explicitly distinguishes cases defendants cite in support of their position borders on sanctionable conduct. At the very least, such a failure is a violation of the duty of candor to which defense counsel, as officers of this Court, are firmly bound. During questioning at the motion hearing, counsel made clear that she was aware of Bauer. Both Minnesota and Massachusetts have adopted Rule 3.3 of the ABA Model Rules of Professional Conduct ("Candor Toward the Tribunal") which states that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Counsel's failure to cite Bauer is especially egregious given that it is central to understanding the law of an unfamiliar jurisdiction invoked by defense counsel's insistence that the application of Minnesota law would afford defendants absolute immunity from suit.

defendants are not entitled to the protections of official immunity under Minnesota law, were it applicable, see supra note 21, for the underlying defamation claim.

C. Defamation (Count I)

To prevail on a common law claim of defamation in Massachusetts,[24] one must show (1) a false and defamatory communication (2) of and concerning him or her, (3) which is published or shown to a third party. McAvoy v. Shufrin, 401 Mass. 593, 597 (1988). In this case, since Miller alleges that written communications--namely, the evaluation and post-graduate verification forms--constitute the defamatory matter, the cause of action is more specifically a claim of libel. See id. at 595; cf. Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 635 (1996) (slander is defamation through oral communication). It is undisputed by the parties that the allegedly libelous material concerned Miller and was published to a third party, the Board. Thus, if this were a run-of-the mill defamation case, the only remaining issues to be considered would be whether the forms contained information that was false and whether they were defamatory. However, defendants argue that the completed forms cannot lead to liability for libel because they constitute protected opinions. Moreover, defendants contend that because the allegedly defamatory writing occurred in the context of the

[24]While the parties disagree as to whether Minnesota law concerning official immunity should apply to this case, neither apparently disputes that Massachusetts law provides the governing law as to the substantive aspects of the tort claims.

parties' prior employment relationship, Miller cannot prevail on her libel claim, even if the information in the forms was false and defamatory, unless she can prove that defendants acted with malice. I consider these contentions in turn.

1. *Protected Opinion*

As the Supreme Judicial Court of Massachusetts has stated, "[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." Lyons v. Globe Newspaper Co., 415 Mass. 258, 262 (1993).

Whether a challenged statement constitutes an expression of opinion rather than of fact is a question of law for the court to decide. Id. In deciding whether a statement is opinion or fact, a court must

> examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Lyons, 415 Mass. at 263 (quoting Fleming v. Benzaguin, 390 Mass. 175, 180-81 (1983)). For the purposes of this issue, I will considered Dahl's and Tope's statement separately.

a. Dahl's Statements

I find nothing in the evaluation form completed by Dahl that can be construed as anything other than his opinion, based, as he

indicated, on his general impressions. The eight ratings concern Miller's character, knowledge, skills, and interpersonal relationships, and it is unclear how in indicating ratings ranging from "Superior" to "Poor," Dahl was stating any facts. The only overtly factual statements, other than information regarding the dates and general circumstances of Miller's residency, are Dahl's answers to questions 2 and 4, which respectively ask whether the applicant's privileges to treat patients were ever altered and whether the applicant has ever been the subject of disciplinary action. However, Dahl responded "No" to both questions and thus they would not be defamatory.

It is true that an "expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based" is not protected opinion. Lyons, 415 Mass. at 262. Rather, such a "mixed" opinion is actionable if it may reasonably be understood to imply underlying defamatory facts about the plaintiff. See Berard v. Town of Millville, 113 F. Supp. 2d 197, 202 (D. Mass. 2000). In this case, however, Dahl's ratings do not imply any undisclosed facts. Indeed, Dahl attached the letter to the Wisconsin Department of Regulating Licensing, written by Tope, that provides the factual bases for his "Below Average" ratings as to Miller's character, clinical knowledge, and interpersonal relationships within the department.[25]

[25]As it turns out, in his subsequent August 24, 2000 letter to the Board, Dahl explained that he gave Miller a low rating for "Character and ethics" to alert the Board to "an anomaly with

Miller contends that the statements indicating that she was placed on probation and disciplined by the department constituted statements of fact. But, Dahl never stated to the Board that Miller was put on probation or disciplined. Thus, I find that the evaluation form itself cannot be the basis for Miller's defamation claim as it constitutes protected opinion.[26]

On the other hand, Tope's letter to the Wisconsin Department of Regulating Licensing, which Dahl attached to and referenced in

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respect to termination of [her Miami] fellowship." In the letter, he stated that he had since been advised that the termination was not a result of unethical or unprofessional conduct on Miller's part. Despite this further explanation, I do not find that the "Character and ethics" rating in the original evaluation form, along with the attached Wisconsin letter, imply any undisclosed facts. The test regarding "mixed" opinions is not whether there is in fact some undisclosed fact underlying the opinion but rather whether the opinion implies that such a fact exists. I find that the facts explicated in the letter pertain generally to character and therefore suffice as an explanation for the low character rating without implying additional undisclosed facts.

[26]While not controlling, I find the court's statement in Baldwin v. Univ. of Texas Med. Branch at Galveston, 945 F. Supp. 1022 (S.D. Tex. 1996), aff'd, 122 F.3d 1066 (5th Cir. 1997), compelling in justifying such a conclusion. The court in that case stated that

> to permit such claims in this environment would cast an appalling chill over candor in medical education. Professors must be free to exercise precise and insightful judgment, so that doctors may be properly trained, and the public will not be victimized by the incompetence which would invariably flow from timid evaluations.

Id. at 1035 n.8.

Also, while the ratings in the evaluation form cannot constitute the basis for a libel action, they still may be relevant to the issue of malice in connection with other statements, as discussed below.

the evaluation form, did contain a number of factual allegations that Miller has alleged were false and defamatory. The fact that Dahl did not actually write the letter himself does not immunize him from liability for republishing it. See Appleby v. Daily Hampshire Gazette, 395 Mass. 32, 36 (1985) ("Generally speaking, the republisher of a defamatory statement 'is subject to liability as if he had originally published it.'" (quoting Restatement (2d) of Torts § 578 (1977))). Consequently, I find that while the information contained in the evaluation form completed by Dahl constitutes protected opinion, there are factual assertions contained in the attached letter which are not similarly protected.

b. Tope's Statements

Because Tope also included with the post-graduate verification form his previously-written letter to the Wisconsin Department of Regulating Licensing, the analysis above applies with equal force to his statements in that letter. Additionally, the post-graduate verification form itself contained a number of factual statements. In fact, all five questions concerning "Unusual Circumstances" were clearly factual in nature, and thus, I find that in answering "Yes" to each of those questions Tope made factual assertions, which cannot, as defendants urge, be construed as protected opinions.

2. *Malice Requirement*

The malice requirement, as advocated by defendants, derives from either of two possible sources: (i) a common law

conditional privilege and/or (ii) an explicit waiver of liability by Miller. I find that both sources are applicable here and that they independently require Miller to establish that defendants, in providing information to the Board, acted with malice. In this connection, I find that the standards for malice under each source can be conflated in this case into one analysis for summary judgment purposes.

(i) Conditional Privilege - Massachusetts courts have recognized that a person possesses a conditional privilege to publish defamatory material if "the publication is reasonably necessary to the protection or furtherance of a legitimate business interest." Bratt v. Int'l Bus. Machs., Corp., 392 Mass. 508, 512-13. Courts have made clear that such a conditional privilege applies to situations in which an employer makes an allegedly defamatory statement about a former employee, Ezekiel v. Jones Motor Co., Inc., 374 Mass. 382 (1978); Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373 (D. Mass. 1980), aff'd, 636 F.2d 1199 (1st Cir. 1980), cert. denied, 454 U.S. 821 (1981), and more specifically where an employer makes a defamatory statement about a former employee in providing a recommendation, at the former employee's request, to a prospective employer. Childs v. Erhard, 226 Mass. 454 (1917); Doane v. Grew, 220 Mass. 171 (1915); see Burns v. Barry, 353 Mass. 115, 118-19 (1967) (conditional privilege applied where plaintiff employee brought defamation action against employer for statement made to one posing as prospective employer). I find

these cases controlling and consequently I conclude that Dahl and Tope were conditionally privileged in responding to the Board's request for completion of the evaluation and post-graduation verification forms.

A holder of a conditional privilege abuses the privilege and thereby forfeits it either by acting with "actual malice" or through "unnecessary, unreasonable or excessive publication of the defamatory matter." Catrone v. Thoroughbred Racing Assocs. of N. Am., 929 F.2d 881, 891 (1st Cir. 1991). Conduct that is "unreasonable or excessive" constitutes "malice in fact" and requires, at a minimum, proof that the defendant acted with reckless disregard of the truth. Bratt, 392 Mass. at 515-16.

Whether Miller can prevail against the motion for summary judgment on the issue of abuse of the privilege therefore turns on whether she can demonstrate a trialworthy issue as to whether defendant acted (1) with actual knowledge of the falsity of the information he provided to the Board or (2) without a reasonable basis for forming a belief in the truth of their statements. Catrone, 929 F.2d at 891. A similar conclusion follows from an closer examination of the waiver issue.

(ii) Waiver - Along with the forms submitted to defendants, Miller included a signed "Authorization for Release of Information, Documents and Records" which stated, under the heading "Immunity and Release":

> I hereby extend absolute immunity to, and release, discharge, and hold harmless from any and all liability . . . any third parties and organizations for any acts, communications, reports, records, transcripts,

> statements, documents, recommendations or disclosures involving me, made in good faith and without malice, requested or received by the Board of Registration in Medicine.

Miller does not dispute that the authorization form applied to the forms completed by both Dahl and Tope.[27] Thus, by the express language in the written authorization, defendants are exposed to liability for providing information to the Board only if Miller can show that they did so in other than good faith and with malice.

(iii) Malice Standard - While there is language in the case law implying that in the defamation context lack of good faith and recklessness may be coterminous, see Petition of Retailers Commercial Agency, Inc., 342 Mass. 515, 521 (1961); Arsenault, 485 F. Supp. at 1380, the terms do not seem to me to be exactly so. Thus, whether to analyze the malice requirement as derived from the conditional privilege or whether to analyze the requirement as it arises out of the waiver language may pose a material question. If lack of good faith is not identical to

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[27]In addition, the top portion of the "Evaluation Form" completed by Dahl stated:

> I hereby authorize the representatives or staff of the facility listed below to provide the *Board of Registration in Medicine* with any and all information requested requested [sic] in this evaluation form, whether such information is favorable or unfavorable, and I hereby release from any and all liability the named facility and/or any person for any and all acts performed in fulfilling this request, provided that such acts are performed in good faith and without malice.

Because this paragraph applied only to the evaluation form and therefore, unlike the authorization, did not apply to Tope--and because the paragraph is essentially redundant of the authorization--I consider only the authorization in my analysis.

recklessness, then satisfying that one form of the requirement might still leave the other unsatisfied.

To the degree that lack of good faith and recklessness are not synonymous, it is at least clear that the latter represents the minimum requirement to survive summary judgment here. In Bratt while the court did not specifically reference "good faith," it made very clear that showing recklessness is the bare minimum a plaintiff must show to establish malice in fact. 392 Mass. 516 (answering "No" to the certified question whether abuse of privilege could result in something less than recklessness). Thus, insofar as lack of good faith is to be read as pertaining to some sort of malice in fact in the authorization, it would appear to involve something more than simple recklessness, at least to the degree the two differ.[28]

Because Miller must show both that defendants abused the conditional privilege and that they acted outside the scope of the waiver contained in the authorization, my analysis will be guided by the recklessness standard.

(iv) Evidence of Dahl's Malice - Miller points to a patchwork of evidence which she claims demonstrates malice on the part of defendants in providing the Board with information. Miller has labored to stitch the evidence together to show malice

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[28] Indeed, lack of good faith in this setting seems to be more closely aligned with ill will and actual malice than with malice in fact. See Retailers, 342 Mass. at 521 (stating that "an absence of good faith may tend to prove ill will and thus actual malice" and that "a lack of good faith may be shown by recklessness"); Arsenault, 485 F. Supp. at 1380 ("an absence of good faith by the publisher may be evidence of malice").

by both Tope and Dahl. On closer analysis, however, I find that she has not produced sufficient evidence to create a triable issue as to whether Dahl acted either with actual malice or in reckless disregard of the truth. All of the evidence Miller points to tends only to show that Tope accused her in the January 1998 meeting and in the subsequent residents meeting and that Tope and Miller had a tumultuous relationship. None of this directly implicates Dahl, except that he was present at the meetings. Indeed, Miller herself testified in her deposition that in the residents meeting in which Tope brought up certain rumors, she said she had not heard of such rumors and Dahl said he believed her.

As noted above, the only information for which Dahl can be liable for libel is his republication of Tope's letter to the Wisconsin Department of Regulating Licensing. Dahl did not himself write the letter, and while that fact alone does not relieve him of liability, I see no evidence indicating that he attached the letter out of actual malice or that he should somehow have known that the facts contained in the letter were false. In the evaluation form, he specifically indicated that he recommended Miller for licensure in Massachusetts. This severely undermines any inference that Dahl acted with malicious intent to hinder Miller's ability to obtain a license. Indeed, in his August letter to the Board, Dahl stated:

> I personally liked Dr. Miller very much. She was always pleasant, courteous, and respectively [sic] to me, to my patients, and to her patients
> . . .

> [] I know if I were sitting on a Board of Medical Examiners, I would grant her a medical license. She is really a nice, and smart but independent physician who I am confident will take care of her patients in a professional, ethical, and careful way.

Miller attempts to characterize this as a delayed effort, motivated by the prospect of legal action, to avid responsibility for the defamatory statements. However, she has not provided sufficient evidence to support such a characterization.

While the evaluation form, as protected opinion, cannot be the basis for Miller's libel claim, it might nevertheless provide relevant as to the issue of malice. For example, if Dahl had no reasonable basis for his negative ratings, then an inference of malice might be warranted. A close examination of the ratings in the evaluation form, however, leads to the opposite conclusion. The facts set forth in the Wisconsin letter as well as Dahl's August 24, 2000 letter to the Board provide a reasonable basis for Dahl's "Below Average" ratings, and Miller has not shown otherwise. Thus, it is difficult to discern how the ratings can be seen to indicate malicious intent on the part of Dahl.

Miller alleged in her complaint that Dahl attached the Wisconsin letter to the evaluation with reckless disregard as to whether it was true. However, Miller has not provided sufficient evidence to put in question whether any of the factual assertions in the letter were false--much less that Dahl knew they were false. The letter merely recounts the details of the fellowship interview absences and makeup time, notes Miller's below-average performance as indicated in the faculty evaluations and her test

scores, and describes her interpersonal relationships. The only fact contained in the letter that Miller has specifically disputed is that she failed to provide Tope with the required notice for her interviews.[29] However, Miller has not provided any evidence supporting her contention that she complied with the formal notice policy other than her own assertions that she gave written notice to Tope. In any event, even if believed, this would not be enough to demonstrate that Dahl should have known that the statement in the Wisconsin letter was false.

Accordingly, I find that Miller has not demonstrated a triable issue as to whether Dahl acted with malice, either actual or in fact. As indicated above, in the absence of a showing of malice or bad faith, the waiver in the authorization form signed by Miller serves to bar all claims arising out of the alleged defamatory conduct. I therefore grant summary judgment as to all counts in favor of Dahl.[30]

(v) Evidence of Tope's Malice - Miller has produced

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[29]Miller also contends that her evaluative file was incomplete. She has submitted an affidavit of Michelle Blaeser, one of her co-residents, who asserts conclusorily that Miller's file was incomplete. Even if true, it is unclear how this leads to the presumption that allegedly missing evaluations were positive and that Dahl and Tope both knew or should have know that they were positive. To be sure, Blaeser states that she expects that the allegedly missing evaluations would have been positive, but that is mere speculation at best.

[30]Application of the conditional privilege defeats only Miller's underlying defamation against Dahl, and thus it may not necessarily bar her other claims against him. However, since the waiver she signed extends "absolute immunity to, and release, discharge . . . from any and all liability," Miller's inability to create a triable jury issue as to Dahl's malice precludes, through the waiver, all of her claims against him.

evidence demonstrating that her relationship with Tope during her residency was, at best, unhappy. Her testimony regarding Tope's accusations that she was spreading rumors about him, if true, would tend to demonstrate his animosity towards and distrust of Miller.[31] Indeed, the incident apparently was serious enough to warrant Miller's retention of legal counsel. Moreover, the incident concerning Miller's absences for her fellowship interview also shows some ill will between the two, especially given that Tope admitted that Miller had given him oral notice of the interviews but he nevertheless enforced the formal requirements of the policy. Finally, in his responses to the BWH information request, Tope indicated that he would not recommend Miller for a medical staff appointment. In short, there is meaningful evidence of ill will between Miller and Tope.

While a showing of ill will may be sufficient to show abuse of a conditional privilege, it is only so if it is sufficiently tied to the alleged defamatory statement. See Ezekiel v. Jones Motor Co., Inc., 374 Mass. 382 (1978) ("if the motivating force for the publication of an allegedly defamatory statement is shown not to be the defendant's ill will, then the existence of ill

[31]Miller also offers the affidavits of Michelle Blaeser, a co-resident of Miller, who states that Tope "demonstrated a degree of anger and personal dislike for Dr. Miller which . . . was not only inappropriate, but also not based upon her performance or conduct as a resident." Similarly, Eric Lewis, another co-resident in the program, submitted an affidavit which states that Tope "openly demonstrated bias against Dr. Miller which, in my opinion, was inappropriate." Defendants challenge these affidavits as untimely submitted and as hearsay. As there is sufficient evidence even without the affidavits, I have not considered them.

will is immaterial"); Catrone 929 F.2d at 890 ("A genuine dispute as to whether [defendants] were motivated by ill will toward [plaintiff] is not necessarily trialworthy, as ill will, without more, is insufficient to establish 'actual malice,' which need 'have nothing to do with ill will in the conventional sense.'" (quoting Boston Mutual Life Ins. Co. v. Varone, 303 F.2d 155, 159 (1st Cir. 1962))).

Here, I find presented at least a triable issue for the jury whether the alleged ill will expressed by Tope toward Miller was the "motivating force" for the alleged defamatory statements. See Catrone, 929 F.2d at 890. Miller alleges that Tope submitted the information to the Board in an attempt to delay or derail the issuance of her medical license, and drawing all inferences in her favor, I find that summary judgment is not appropriate as to this issue.[32] While not determinative, Tope's letter to BWH confirms that he did not believe that Miller should be hired by BWH. If this recommendation, along with his statements to the Board, were motivated by some residual ill will towards Miller in

[32]Defendants note that generally courts favor the use of summary judgment procedures in defamation cases. While this generally may be the case, see Mulgrew v. City of Taunton, 410 Mass. 631, 632 (1991), it does not excuse them from meeting the usual summary judgment burdens. Godbout v. Cousens, 396 Mass. 254, 258 (1985). Moreover, because the issue of actual malice involves a determination of state of mind, summary judgment will frequently be inappropriate in defamation cases. Id. Thus, while the issue of malice is not automatically a jury question, the plaintiff is entitled to a jury trial if there is some indication from which an inference of malice could be drawn. Id. at 259.

the hopes of disrupting Miller's medical career, a jury could reasonably find that Tope exceeded the scope of the conditional privilege, which covered his completion of the post-verification form. See Catrone, 929 F.2d at 890 (privilege is abused if "defamatory material is published for some purpose other than that for which the particular privilege is given" (quoting Sheehan v. Tobin, 326 Mass. 185, 190 (1950))). Whether this is the case or, as Tope contends, his statements were merely based in his opinions regarding Miller's competency and performance as a resident is a question for a jury.

Even absent evidence of ill will, I find that, at a minimum, there is a triable issue for the jury as to whether Tope abused the privilege through malice in fact. At the motion hearing, Tope's counsel argued that because Tope claims that Miller was effectively placed on probation and disciplined, there is not a triable issue as to whether he "in fact entertained serious doubts as to the truth of his publication" to the Board. McAvoy, 401 Mass at 599. However, that Tope claims he had proper bases for making the statements does not end the inquiry. See id. ("[A] defendant cannot ensure a favorable verdict merely by testifying that he published under the subjective belief that the statements were true."). Rather, "'since it would perhaps be rare for a defendant . . . to admit to having had serious, unresolved doubts,' the jury may reach their conclusion as to the defendant's subjective knowledge based on inferences from objective evidence." Id. (quoting Stone v. Essex County

Newspapers, Inc., 367 Mass. 849, 867 (1975)).

As noted below, discrepancies between Tope's statements about probation and discipline to the Board and both his previous statements and Dahl's statements to the Board create a genuine issue of material fact as to whether Tope's statements to the Board were false. While the falseness of a statement does not alone indicate malice, it is at least relevant to the malice issue, see McNamee v. Jenkins, 52 Mass. App. Ct. 503, 507 (2001) (where plaintiff had written several negative reports about defendant and there had been a work-related dispute between the parties, jury permissibly could infer malice if it concluded that defendant's allegedly defamatory statements were false), rev. denied, 435 Mass. 1107 (2001), and the discrepancies belie the contention that Tope had no serious doubts about the true of his statements to the Board. See Retailers, 342 Mass. at 522-23 (finder of fact could conclude that defendant made a report "recklessly, without reasonable grounds for believing it was true" where the report was substantially different from a subsequent report).

Finally, Tope contends that because he and Dahl told Miller that she was on probation there is not a triable issue as to whether he reasonably believed his statements to be true.[33] But whether Tope reasonably believed, based on the alleged statements to Miller, that she was on probation depends on whether in fact

[33]I note that Dahl, not Tope, stated in his deposition that they told Miller she was on probation.

Tope and Dahl made the statements. Miller disputes that they ever made such statements, and thus the underlying factual issue is one of credibility and thus is a triable issue for a jury. Thus, I find that there is a genuine issue of material fact as to whether Tope acted with malice, both actual and in fact.

3. *Falsity*

Miller's claims will fail if she cannot prove that the statements were false. See Fleming v. Benzaquin, 390 Mass. 175, 187 (1983) (defendant can be "liable for the disclosed facts provided they were both false and defamatory"). However, while the plaintiff bears the burden of alleging the falsity of the libel, it is up to the defendant to prove truth as an affirmative defense. McAvoy, 401 Mass. at 597.

Miller argues that all of the five statements Tope made in the post-graduate training verification form about her concerning "Unusual Circumstances"--that she (1) had taken a leave of absence or break during the residency, (2) was placed on probation, (3) was disciplined or under investigation, (4) had negative reports filed about her by instructors, (5) had been imposed with limitations or special requirements because of academic performance or disciplinary problems--were false.[34] I

[34]Miller has generally alleged that statements in the attached Wisconsin letter were also false. However, she has not produced evidence sufficient to create a genuine issue of material fact that any of the specific statements in the letter were actually false. While she contests that she did not provide proper notice for her absences, she has not adduced sufficient evidence to put the issue in dispute. The other statements contained in the letter concern mostly undisputed facts about her

find as a matter of law that only the statements that Miller had been placed on probation and that she had been disciplined are properly in dispute.

It is undisputed that Miller had taken unexcused time off for interviews,[35] that Tope and Fenyk had written negative evaluations of her in 1997, and that Miller had been require to make up four days of missed work, as well as follow the six steps outlined in Tope's 1997 evaluation.[36] These facts provide adequate bases for Tope's affirmative responses to the questions concerning leaves of absence, negative reports, and limitations or special requirements. While admittedly, the questions are somewhat vague and perhaps leave some room for interpretation, Tope explicitly set forth the bases for his responses to the

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evaluations and Tope and Dahl's responses to the evaluations. At most, any inconsistencies or untruths in the letter are minor, and as such would not be enough to survive summary judgment as the bases of Miller's defamation claim given the conditional privilege. See Catrone, 929 F.2d at 891 ("The minor inconsistencies noted [by plaintiff] may establish, at most, disputes as to the accuracy of the reports, but not a genuine dispute as to the existence of reasonable grounds for a belief in their truth."). Since all but the letter is protected opinion with regard to Dahl, I find that even assuming there is a triable issue as to Dahl's malice, there is not one with regard to whether any of the nonprotected statements Dahl made to the Board were false. Additionally, I find that the only statements that might serve as the basis for defamation with regard to Tope are the statements in the post-graduate, training verification form.

[35]Again, while Miller disputes that she did not give the required notice, she has not offered any evidence to support her contention, so I take that the absences were unexcused as undisputed.

[36]Tope also stated in his deposition that Miller was restricted from writing schedules, a normal duty for third-year residents.

three questions in the letter he attached to the form and thereby made clear how he had interpreted the questions.[37]

The same analysis does not hold true for the questions on the post-graduate verification form regarding probation and discipline. Defendants argue that while Miller was not formally disciplined or placed on formal probation, she was disciplined and was effectively put on probation. Tope stated in his deposition that setting forth the six recommendations for Miller was sufficient to place her on probation: "These things we were asking her to do was placing her on academic probation." Indeed, the Department of Dermatology Resident's Handbook ("Handbook") states:

> The Department Chair may place residents on probation for academic underachievement or other reasons. Probation will often occur when a resident fails to meet academic milestones, such as achieving at least a 20th percentile overall ranking on the "In training" exam.

Defendants argue that because Miller was on the functional equivalent of probation, as authorized by the Handbook, Tope's answers on the post-graduate verification form were not false. I do not find these arguments sufficiently persuasive in the

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[37]In an evaluation sent to the American Board of Dermatology, Tope indicated that Miller had not "spent any time away from full-time participation in the training program beyond time routinely allowed all trainees for vacation or attendance at educational meetings." While there arguably is a discrepancy between answering no to this question and answering yes to the question on the form to the Board, that discrepancy does not necessarily indicate that Tope's answer on the form to the Board was false, especially given that Miller did take the four-day unexcused absence and the absence was explicitly disclosed as the basis for the answer in the form to the Board.

summary judgment setting. While perhaps not quite terms of art, the word "probation" and the notion "being disciplined" are sufficiently precise that they do not as a matter of law lend themselves to varied individualized interpretations. In other words, the terms as commonly understood are well-defined to the extent that, for example, the functional equivalent of probation is not equivalent to actual probation.

While not exactly analogous, the court's finding in McAvoy, 401 Mass. 593, is illustrative. In that case, plaintiff claimed that defendant defamed him by stating that a complaint had been filed against plaintiff where only an application for a complaint had been made. Id. at 598. Defendant argued that a finding of falsity could not turn on the difference between "a complaint" and "an application for a complaint" since the difference was "technical." Id. The court rejected this argument, stating that "[s]uch a distinction, far from being 'technical,' may mean a great deal in terms of an individual's reputation." Id. Likewise here, I find that the difference between formal probation or discipline and their functional equivalents is significant.

I observe that Tope, in his subsequent letter to the Board, did not defend a loose, functional interpretation of the probation and discipline questions but rather stated he wished to "correct" his answers. In the letter, Tope wrote:

> After re-reading the questions on the Massachusetts verification form (some of which I confused with questions from the Wisconsin form) and re-reviewing Dr. Miller's residency file, I wish to correct two of my

> responses. Regarding questions two and three, Dr. Miller was not placed on formal probation, nor was she subject to formal discipline. Therefore, the answers to these questions should be "no."[38]

Furthermore, on two previous occasions, Tope had indicated that Miller had not been subject to discipline. Tope indicated in an evaluation of Miller sent to the American Board of Dermatology that Miller's performance during her third year of training was "Satisfactory" and indicated no disciplinary problems. He also indicated in a general certification letter that "[t]hroughout the residency Dr. Miller performed in an excellent manner and there is no disciplinary information on file."[39] Finally, it is noteworthy that Dahl indicated in the evaluation form that Miller had never been the "subject of discipline." Thus, I find that there is a triable jury issue as to whether Tope's answers to the discipline and probation questions on the post-graduate verification forms were false. I find, however, that there is no genuine issue of material fact as to the falseness of Tope's

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[38]While Tope stated in his deposition that Miller was effectively put on academic probation for her poor academic performance, he implies in this letter that his answers to the probation and discipline questions were based on the unexcused absences, which Dahl stated in his deposition would be grounds for nonacademic probation. According to the residency agreement governing Miller's residency, while discipline for "unsatisfactory academic performance" is not subject to formal procedural requirements, discipline for nonacademic reasons is. Thus, for the latter, "[a] written statement of the discipline and the reasons for imposition, including specific charges, witness and applicable evidence, shall be presented to the resident." Defendants concede that Miller was never given such a written statement.

[39]Tope contends that this was a form letter that he signed unaware that it contained such a statement.

answers to the remaining three questions or the statements on the Wisconsin letter.

D. Negligent Infliction of Emotional Distress (Count II)

To prevail on a claim of negligent infliction of emotional distress, Miller must show (1) negligence, (2) emotional distress, (3) causation, (4) physical harm manifested by objective symptomatology, and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case. Sullivan v. Boston Gas Co., 414 Mass. 129, 132-33 (1993) (citing Payton, 386 Mass. at 557).

Tope argues that Miller's claim fails as a matter of law because she cannot show--and in fact has admitted--that she is not seeking damages for physical harm. However, to satisfy the physical harm element, Miller need not show proof of actual compensable physical injury; rather, she must provide an "objective corroboration of the emotional distress alleged." Payton, 386 Mass. at 547. Thus, while Miller must do more than allege "mere upset, dismay, humiliation, grief and anger," Sullivan, 414 Mass. at 137 (quoting Corso v. Merrill, 119 N.H. 647, 653 (1979)), and while expert medical testimony may be needed to make a sufficient showing, Sullivan 414 Mass. at 138, "[m]edical experts [] need not have observed an actual, external sign of physical deterioration." Id. They may "consider, in the exercise of their professional judgment, the plaintiffs' description of the symptoms they experience." Id.

As evidence of physical manifestation of her emotional

distress, Miller has submitted her own affidavit in which she states that, in her professional medical opinion, she suffered from "anxiety, loss of appetite, depression, insomnia, stress, and pre-term labor, and was put on bed rest because of the stressed induced, high risk nature of this pregnancy" all as a result of defendants' statements to the Board. While this self-serving evidence is hardly overwhelming, I find it nevertheless sufficient, drawing all inferences in Miller's favor, to create a genuine issue of material fact as to whether she suffered such symptoms of emotional distress and whether they resulted from Tope's actions. Accordingly, I deny Tope's motion for summary judgment as to the negligent infliction of emotional distress claim.

E. Intentional Infliction of Emotional Distress (Count III)

To prevail on a claim for intentional infliction of emotional distress, Miller must establish (1) that Tope intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of his conduct, (2) that Tope's conduct was "extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community," (3) Tope's actions were the cause of the Miller's distress, and (4) the emotional distress Miller suffered was "severe and of such a nature that no reasonable person could be expected to endure it." Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997) (citing Payton v. Abbott Labs, 386 Mass. 540, 555, (1982)). The threshold for conduct that rises to

this level is quite demanding. Indeed, liability cannot be predicated on "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities" and it is not sufficient to show only "that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Foley v. Polaroid Corp., 400 Mass. 82, 99 (1987) (quoting Restatement (2d) of Torts § 46, comment d (1965)).

Even drawing all inferences in favor of Miller, I find as a matter of law that Tope's conduct was not of the type to support a claim for intentional infliction of emotional distress. Other than her conclusory statements, Miller has not shown that Tope's conduct was "extreme and outrageous." At worst, Tope, with malice, recklessly made false statements to the Board regarding Miller's application. No matter how mean-spirited Miller apparently considers Tope's actions, his conduct does not give rise to a claim of intentional infliction of emotional distress. Thus, I will grant Tope's motion for summary judgment as to this claim.

F. Interference with Contractual Relations or Business Relationship (Counts IV and V)

To make out her claims for intentional interference with contractual or business relations, Miller must show (1) the existence of a contract or a business relationship which contemplated economic benefit; (2) Tope's knowledge of the

contract or business relationship; (3) Tope's intentional interference with the contract or business relationship for an improper purpose or by improper means; and (4) damages. Swanset Dev. Corp. v. City of Taunton, 423 Mass. 390, 397 (1996).

Tope contends that Miller's claims fail because she cannot demonstrate that he acted with an improper purpose. As noted above, however, there is a genuine of material fact as to whether Tope acted with malice, and thus summary judgment is not appropriate on motive grounds.

Tope alternatively argues that Miller's economic claims fail because, as a matter of law, she has not adduced sufficient evidence that she suffered any economic damages. This argument appears well-founded.

Miller contends that by submitting defamatory statements to the Board, defendants interfered with her employment contract with BWH by causing a delay in her medical licensing and consequently her ability to see patients as a physician. She argues that by the time she received her license, she had learned that she was pregnant and as a result was forced to work as a research fellow rather than as a physician. She contends that had defendants not defamed her, she would have been licensed before she found out that she was pregnant and therefore would have been able to begin work salaried as a physician prior to her paid maternity leave.

I find that Miller's contentions are not supported by the record. The parties do not dispute that BWH's policy requires

that a physician be able to commit six consecutive months of care before seeing patients as a physician. Given that, as Miller has stated in an affidavit, her expected delivery date was December 1, 2000, she would not have been able to commit to six months after June 1, 2000. Of course, Miller also stated in her affidavit that she did not find out she was pregnant until the beginning of her second trimester, on or around July 1, 2000 and thus even after June 1, 2000 and until about July 1, she would, in good faith, have been able to commit six months. Even assuming Miller's contention about when she learned of her pregnancy is valid,[40] she would have had to have been licensed sometime before when she concedes she learned of the pregnancy, around July 1, 2000, for any delay caused by defendants' actions to have had an impact on her ability to work as a physician. Miller, however, has not provided sufficient evidence that absent Tope's actions she would have received her license before that time. Indeed, defendants have submitted the affidavit of Sarah Donnelly, the Keeper of the Records for the Board, who states that the Board did not consider Miller's application complete until June 28, 2000 when it received a malpractice insurance report from Aon. She further states that the Board met on June

[40]As noted above, supra note 18, defendants dispute Miller's contention regarding knowledge of her pregnancy; but the deposition testimony they argue contradicts this does not support their contention adequately. Thus, drawing all inferences--even one as improbable as a female physician's assertion that she did not know or have reason to believe she was pregnant until after the second month following conception--in favor of plaintiff for the purposes of defendants' summary judgment motion on this issue, I assume it is true.

28, 2000, but because of the virtually contemporaneous receipt of the Aon report, it would not have considered Miller's application on that day. Thus, according to Donnelly, the earliest the Board would have reviewed Miller's application, even without the concerns raised by Tope's and Dahl's statements, was the next time the Board met, which was on July 12, 2000. Miller has not provided any probative evidence which puts the issue in dispute. She has, to be sure, offered deposition testimony which concerns the average amount of time licensing applications usually take and speculates that absent defendants' conduct she would have received her license on or about June 19, 2000. That, however, is not enough--given the specificity of Donnelly's testimony--to create a genuine issue of material fact as to whether in her specific case there was delay caused by defendants sufficient to create economic damage.

At the motion hearing, Miller's counsel argued that assuming Miller cannot prove that absent the alleged defamation she would have been licensed in time to fall fairly within BWH's 6-month policy, she could have nevertheless begun work at the VA in West Roxbury. But while Kupper had indicated in his original offer letter to Miller that she would be able to do so at her "earliest convenience,"[41] there is nothing in the evidence of record before

[41]Miller has also submitted an affidavit in which she states: "Had I been licensed to practice in any other states during the time between the filing of my application for and the granting of my license in Massachusetts, I could have worked at the Veterans Affairs Medical Center in Boston. However, since I did not have an active license, I could not do so."

me to demonstrate she sought to do so. For instance, while Miller's counsel represented at the hearing that BWH's 6-month policy did not extend to work at the affiliated VA, there is no evidence of this fact in the record. In fact, it is undisputed that Miller received her Massachusetts license in mid-September but, rather than begin at the VA, continued to work as a research fellow for Kupper until she took maternity leave in November. More importantly, Miller has not offered any evidence concerning damages attached to her alleged inability to begin work at the VA, as opposed to BWH. The evidence in the record only concerns the difference in pay she received as a research fellow compared with what her salary would have been had she been able to begin work at BWH as an associate physician. Thus, I find Miller's contention that she would have been able to work at the VA even if she was not licensed in time to fall within BWH's 6-month policy unavailing.

Accordingly, I will grant Tope's motion for summary judgment on the economic interference claims, and I will deny plaintiff's cross-motion for partial summary judgment on those claims.

III. CONCLUSION

For the reasons set forth more fully above, defendants' motion for summary judgment is GRANTED in part and DENIED in part. Specifically, all counts are dismissed as to defendant Dahl and Counts III, IV, and V are dismissed as to defendant Tope; summary judgment for Tope is denied on Counts I and II. Plaintiff's motion for partial summary judgment is DENIED.

/s/ Douglas P. Woodlock

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DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE