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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KUSUM SINHA, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	D045444 (Super. Ct. No. GIC818808)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed.

The plaintiff in this sex discrimination case was employed as a contract physician at a teaching hospital where, in addition to her clinical duties, she was responsible for training resident physicians. In moving for summary judgment, the defendant presented uncontroverted evidence the hospital had decided it would only retain those contract physicians it believed it would be promoting to positions as permanent full-time faculty members. The defendant presented evidence plaintiff had not met the curriculum and

training expectations of her supervisors, had received the second lowest rating in a survey of patients and had the lowest rating in a survey of residents. Finally, the defendant presented evidence that given the plaintiff's performance it had decided she was not a candidate for a full-time faculty position and therefore her contract would not be renewed.

In opposing the defendant's motion, plaintiff relied on three comments made by her supervisor over a period of two years which she interprets as proof of a discriminatory animus. The statements, while relevant, admissible and in retrospect, ill-advised, were not *by themselves* sufficient to show her services were terminated because of her gender. In light of the undisputed evidence of the deficiencies in plaintiff's performance, a trier of fact could not reasonably rely upon the supervisor's three isolated statements as evidence of what motivated him in deciding not to renew plaintiff's contract. Thus, the defendant was entitled to a judgment as a matter of law.

FACTUAL BACKGROUND

In June 1999 plaintiff and appellant Dr. Kusum Sinha began working as a geriatric physician at the University of California San Diego hospital (UCSD), which is operated by defendant and respondent the Regents of the University of California (the Regents). She was employed under a one-year Management and Senior Professional (MSP) contract with the prospect that eventually she would obtain a permanent faculty appointment. However, the MSP contract did not provide any guarantee such an appointment would be made. Dr. Sinha's MSP contract was renewed in June 2000 and June 2001.

In September 2001 Dr. Gene Kallenberg, became the Chief of the Division of Family Medicine at UCSD. The geriatric department in which Dr. Sinha worked was under Dr. Kallenberg's supervision. Dr. Kallenberg did not believe in retaining MSP physicians indefinitely. He believed the MSP positions should only be filled by physicians UCSD believed would eventually be offered permanent faculty positions. He believed the current holders of MSP positions should be evaluated on the basis of whether they could be offered permanent faculty positions.

In the fall of 2001 and early 2002 Dr. Kallenberg evaluated Dr. Sinha's performance. In conducting his evaluation, Dr. Kallenberg met with Dr. Sinha and spoke to members of the Executive Committee of the Division of Family Medicine. Dr. Kallenberg also reviewed a patient satisfaction survey UCSD had conducted in 2001 and teacher evaluations prepared by resident physicians in 2000 and 2001.

While he was evaluating Dr. Sinha, Dr. Kallenberg ran into her at a Thanksgiving dinner which members of the UCSD staff were sponsoring for the homeless. According to Dr. Sinha, Dr. Kallenberg approached her at the dinner and said: "'Dr. Sinha, what are you doing here? I thought you are only good at needling?'" At her deposition Dr. Sinha stated she did not know what Dr. Kallenberg meant by the comment.

Dr. Kallenberg was advised by Dr. Tyson Ikeda, who was the director of the residency program for the division, that Dr. Sinha had not met Dr. Ikeda's expectations with respect to developing curriculum and training activities for residents. Dr. Ikeda further stated that at least one presentation Dr. Sinha had given residents was of unsatisfactory quality.

Dr. Sinha ranked last overall in the patient evaluation survey. She ranked next to last in the evaluation prepared by residents.

Based on his discussions with Dr. Ikeda and his review of the patient and resident evaluations, Dr. Kallenberg decided UCSD would not renew Dr. Sinha's MSP contract in 2002. On February 6, 2002, Dr. Kallenberg called Dr. Sinha into his office and told her that her MSP contract would not be renewed. According to Dr. Sinha, Dr. Kallenberg told her: "'You worry about home. Why don't you go home. A woman's place is in the home.'" Dr. Sinha was shocked by the news her contract would not be renewed and began crying; she thought Dr. Kallenberg called her into his office to promote her to a faculty position.

Shortly after advising Dr. Sinha that her MSP contract would not be renewed, Dr. Kallenberg offered an MSP position to a male physician who, unlike Dr. Sinha, was not board certified in geriatric medicine.

Dr. Sinha filed a discrimination claim with UCSD's Equal Employment Office on June 12, 2002. On June 25, 2002, UCSD's medical director sent Dr. Sinha a letter advising her that her hospital privileges had been renewed for another two years. However on July 3, 2002, the medical director received a request from the Family & Preventive Medicine division that Dr. Sinha's hospital privileges be terminated in light of the fact her MSP contract had not been renewed. Thereafter, on August 27, 2002, the medical director of the hospital notified Dr. Sinha her staff privileges had been terminated effective on the date her MSP contract expired, June 20, 2002.

In the course of discovery in this case, Dr. Sinha took Dr. Ikeda's deposition. Dr. Ikeda testified that in the summer of 2003 he had a conversation with Dr. Kallenberg about the fact two female physicians had resigned from UCSD after Dr. Kallenberg had made special efforts to retain them. According to Dr. Ikeda, in apparent frustration, Dr. Kallenberg stated: "Maybe we shouldn't hire female doctors anymore."

PROCEDURAL HISTORY

In October 2003, after her administrative complaint was denied, Dr. Sinha filed a complaint against the Regents in which she alleged causes of action for violation of the Fair Employment and Housing Act (FEHA), Government Code section 12940 et. seq., breach of contract and intentional infliction of emotional distress. In particular, she alleged that the decision to terminate her employment was made on the basis of her sex. She further alleged the Regents terminated her staff privileges in retaliation for her initial administrative complaint. The trial court sustained the Regents' demurrer to the breach of contract and distress causes of action.

The Regents then moved for summary judgment on Dr. Sinha's remaining discrimination claims. The Regents relied on a declaration from Dr. Kallenberg, the evaluations from patients and residents and portions of Dr. Sinha's deposition. The Regents argued this evidence demonstrated Dr. Sinha's employment was terminated because of her inadequate performance. In response, Dr. Sinha relied on evidence of Dr. Kallenberg's statements to her at the Thanksgiving dinner, at the time he advised her that her contract would not be renewed, and his statement to Dr. Ikeda when two other female physicians left UCSD. She argued these statements taken together demonstrated a gender

based animus on Dr. Kallenberg's part and were evidence the decision to terminate her employment was made because she is a woman. She also relied on the fact she had received positive employment reviews before Dr. Kallenberg became head of the division and that the one physician who was ranked lower than her by residents was a male and UCSD had kept him in his permanent full-time faculty position, and that shortly after she was terminated an MSP position was offered to a male physician who was not board certified. In support of her retaliation claim, she relied on the proximity of her initial discrimination claim and the decision to terminate her privileges.

The trial court granted the motion and entered a judgment dismissing the complaint. Dr. Sinha filed a timely notice of appeal. On appeal she challenges only the order granting summary judgment.

DISCUSSION

I

Summary judgment may be granted only when a moving party is entitled to a judgment as a matter of law. (§ 437c, subd. (c).) In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*) the Supreme Court clarified the law courts must apply in California in ruling on motions for summary judgment.

Where the motion is brought by a defendant, the defendant will bear the burden of persuasion that "'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar, supra*, 25 Cal.4th at p. 850, citing § 437c, subd. (o)(2).) In *Aguilar* the Supreme Court established summary judgment law in California does not require a defendant conclusively negate an element

of the plaintiff's cause of action. Rather, in accordance with federal law, "All that the defendant need do is to 'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff. [Citation.] In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element *X*. Although he remains free to do so, the defendant need not himself conclusively negate any such element -- for example, himself prove *not* X." (*Aguilar, supra*, 25 Cal.4th at pp. 853-854, fns. omitted.)

In broadly outlining the law of summary judgment, the Supreme Court stated: "If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case . . . the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device." (*Aguilar, supra*, 25 Cal.4th at p. 855.)

We review orders granting summary judgment de novo. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.)

II

A. *The Regents Met Their Initial Burden*

The employer in a discrimination case is entitled to judgment as a matter of law if the record shows the employer took adverse action against the plaintiff for legitimate, nondiscriminatory reasons. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358-360 (*Guz*).) In making its motion for summary judgment, the Regents met this burden. The Regents' evidence of the poor evaluations Dr. Sinha received from her

superior, from patients and from the residents she was responsible for training was sufficient to establish Dr. Sinha's employment was terminated because of her inadequate performance rather than because of her gender. Thus, the Regents met their initial burden on a motion for summary judgment: they presented evidence of a complete defense to Dr. Sinha's complaint. (*Id*. at p. 360; see also *Aguilar*, *supra*, 25 Cal.4th at p. 850.)

Because the Regents met their initial burden on a motion for summary judgment, Dr. Sinha had the burden of presenting evidence that decisions leading to her termination as an MSP physician "were actually made on the prohibited basis" of her gender. (*Guz, supra,* 24 Cal.4th at p. 360.) As we have noted, in response to the Regents' motion, Dr. Sinha relied on evidence of the statements Dr. Kallenberg made before, during and after she was advised her contract would not be renewed. As we explain more fully below, this evidence does not show the decision to end Dr. Sinha's employment was made on any unlawful basis and hence Dr. Sinha did not meet her burden.

B. *Direct and Indirect Evidence of Discrimination*

In order to prevail on a claim of employment discrimination, a plaintiff bears the ultimate burden of showing the employer took adverse action against the plaintiff *because of the* plaintiff's sex, race, religion, age, disability or sexual orientation. (See *Guz, supra,* 24 Cal.4th at p. 356; *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 508-509 (*Hicks*); *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251 (*Price*

Waterhouse); *Heim v. State of Utah* (1993) 8 F.3d 1541, 1545-1547.)[1] Evidence of bias on the part of an employer's supervisors or managers, while relevant, does not meet this burden. (*Heim v. State of Utah*, *supra*, 8 F.3d at pp. 1545-1547.) The employee must also show bias actually played a role in the employer's decision to terminate or otherwise adversely impact the employee. (See *Price Waterhouse*, *supra*, 490 U.S. at p. 251.)

The available case law has discussed two means by which a plaintiff may show bias caused the employer to take adverse action against him or her. First, a plaintiff may present direct evidence an adverse employment decision was made for an unlawful reason. For instance, in *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121 (*Thurston*), the employer's written policy made older pilots ineligible for a certain type of transfer. Evidence of the policy met the plaintiff's burden because the policy showed on its face the ineligible pilots lost transfer opportunities because of their age.

Cases such as *Thurston*, where there is direct evidence an employment decision was made on an unlawful basis, are rare. (*Guz*, *supra*, 24 Cal.4th at p. 354.) Given the oftentimes hidden nature of discrimination, the cases recognize that as a practical matter discrimination claims "must usually be proved circumstantially." (*Ibid*.) In particular, our courts have permitted "discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Ibid*.)

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1 "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz*, *supra*, 24 Cal.4th at p. 354.)

1. *Dr. Sinha Did not Produce Direct Evidence of Discrimination*

Contrary to Dr. Sinha's contention, Dr. Kallenberg's statements are not direct evidence of discrimination by the Regents. In *Ramsey v. City and County of Denver* (10th Cir. 1990) 907 F.2d 1004, 1007-1009, the plaintiff alleged, among other claims, that her probationary period had been extended, that she had not been properly supervised, and that she been given inappropriate work assignments because of her sex. The court rejected the plaintiff's contention that evidence of her supervisor's biased attitude toward women was direct evidence she had been the victim of discrimination. "Ramsey claims that because the Director of the Traffic Division, James Brown, was known to believe that certain jobs were more suitable for women than others, direct evidence of discrimination existed. There was evidence that Brown was widely known to have ideas about women's place in the workforce. [Citation.] In fact Brown testified to his feelings about women being better suited to some jobs than to others. [Citation.]. . . . Abhorrent as Brown's private opinions might be, they do not constitute direct evidence of discriminatory *conduct*. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, ----, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268, 288 (1989) (emphasis added), the Court stated: 'Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.'

"We are persuaded that the evidence of Brown's statements constitutes circumstantial or indirect evidence, and not direct evidence of discrimination within the

meaning of *Thurston*, 469 U.S. at 121, 105 S.Ct. at 621-22. These statements are on their face expressions of Brown's personal opinion, and not an existing policy which itself constitutes discrimination as in *Thurston*. In *Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1549 (10th Cir.1987), we held that an offer of specific instances of discriminatory statements, from which it was argued that the determining cause of an employment decision might be inferred, was not direct evidence of causation on the employment decision." (*Ramsey, supra*, 907 F.2d at p. 1008.)

Relying on *Ramsey*, the court in *Heim v. State of Utah, supra*, 8 F.3d at pages 1544-1546, reached a similar result with respect to the following statement by a supervisor about the plaintiff's work performance: " 'Fucking women, I hate fucking women in the office.' " (*Id*. at p. 1546.) In *Heim* the court found: "Although the remark by [the supervisor] was certainly inappropriate and boorish, it was on its face a statement of [the supervisor's] personal opinion. The evidence does not the show [the supervisor] acted with discriminatory intent, only that he unprofessionally offered his private negative view of women during a display of bad temper at work. At best, it is only arguable that a discriminatory intent to keep [plaintiff] in the office *can be inferred* from the statement. This type of inferential statement is not 'direct evidence' of discrimination satisfying the plaintiff's burden." (*Heim, supra*, 8 F.3d at p. 1547, italics added).

Here, Dr. Kallenberg's ambiguous reference to needling, his attempt to console Dr. Sinha, and his later frustrated outburst are not direct evidence he decided to terminate Dr. Sinha's employment *because* of her sex. As in *Ramsey* and *Heim*, at most collectively these statements support an inference Dr. Kallenberg is biased against women; as *Ramsey*

and *Heim* make clear, evidence of a supervisor's or decision maker's personal bias is not *direct* evidence such bias influenced an employment decision.

The other pieces of evidence Dr. Sinha relies upon -- the MSP contract offered to a male physician and the retention of the one male physician with a lower evaluation by residents -- are also only circumstantial evidence of discriminatory intent.

The statements Dr. Kallenberg made are in contrast to the statements considered in *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217 (*Godwin*). In *Godwin* one of two managers who made the promotional decision which the plaintiff was challenging said the other manager " 'did not want to deal with another female after having dealt with . . . Lousie De PreFontaine.' " (*Id*. at p. 1221.) The causal link between gender and the employment decision expressed in this statement made the statement direct evidence of discrimination.

With respect, we part company from two other Ninth Circuit cases which characterized as direct evidence of discrimination remarks which, although creating definite inferences of racial discrimination, did not on their face show a causal link between a decision maker's bias and the decision maker's decision. In *Chuang v. University of California Davis* (2000) 225 F.3d 1115, 1129, the two Asian plaintiffs argued a series of actions taken by their employer were motivated by racial animus. They relied upon a statement an official made during the course of considering an employment application by a third Asian, to wit: "two Chinks" in the plaintiff's department were "more than enough." (*Id*. at p. 1128.) They also relied upon a statement made by a departmental chairman that in light of the action being contemplated by their employer,

the plaintiffs " 'should pray to [their] Buddha for help.' " (*Id*. at p. 1129.) Although we agree with the Ninth Circuit that the offensive nature of these statements and their temporal proximity to the actions taken against the plaintiffs raise a strong inference of unlawful conduct, it is nonetheless *an inference*. Unlike the policy in *Thurston* and the statements in *Godwin*, the statements considered in *Chuang* did not *on their face* show that in taking action against the plaintiffs racial animus played a role. Hence in our view they were not direct evidence of unlawful conduct.

In *Cordova v. State Farm Ins. Companies* (9th Cir. 1997) 124 F.3d 1145, 1149, the Ninth Circuit stated: "Cordova has offered direct evidence of such discriminatory animus: Raker's alleged comments that Maldonado was a 'dumb Mexican' and that he was hired because he was a minority. Such derogatory comments can create an inference of discriminatory motive." In our view this statement is something of an analytical *non sequitur*. While we agree the statement is offensive and raises an inference of discrimination, because it shows discriminatory conduct *by inference,* it is not direct evidence of discrimination. (See *Heim, supra*, 8 F.3d at p. 1546.)

2. *Dr. Sinha Did Not Produce Indirect Evidence of Discrimination*

a. *Guz* & *McDonnell-Douglas*

Where, as here, an employer has presented credible evidence the employment decision was made for lawful reasons *and* there is no direct evidence of discrimination, the plaintiff opposing a motion for summary judgment faces a difficult burden. In those circumstances "the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent

explanation for its actions, *the evidence as a whole* is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361, italics added, fn. omitted.)

In reaching this conclusion about a plaintiff's burden in responding to a motion for summary judgment in a discrimination case, the court in *Guz* was required to adapt for use in summary judgments a three-stage burden shifting test which was established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) for use at trial. Under the *McDonnell Douglas* test, the plaintiff must first establish a prima facie case of discrimination by showing (1) she is a member of a protected class, (2) she was qualified for the position she held or was attempting to obtain, (3) she either lost her job or promotion and (4) some other circumstance, such as the fact the job in question was given to someone who was not in a protected class or remained open, suggests a discriminatory motive. (See *Guz, supra*, 24 Cal.4th at p. 355.) At trial, once the plaintiff has established a prima facie case of discrimination, a presumption of discrimination arises and the employer has the burden of showing there were legitimate, nondiscriminatory reasons for its employment action. (*Id*. at p. 356.) However, if the employer meets that burden, "the presumption of discrimination disappears." (*Ibid*.) At that point the plaintiff must then "have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Ibid*.) Importantly, the ultimate burden of persuasion "on the issue of actual discrimination remains with the plaintiff." (*Ibid*.)

In *Guz* the court found in the context of a motion for summary judgment, and notwithstanding the plaintiff's prima facie case, an employer's evidence of lawful reasons for its decision about the plaintiff must be met by substantial contrary evidence of discrimination. The court stated: "[E]ven where the plaintiff has presented a legally sufficient prima facie case of discrimination, and has also adduced some evidence that the employer's proffered innocent reasons are false, the fact finder is not *necessarily* entitled to find in the plaintiff's favor. . . . '*Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance*, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. [Citations.] . . . . [¶] Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. These include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case . . . .' [Citation.] [¶] [S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz, supra*, 24 Cal.4th at pp. 361-362, fn. omitted.)

In *Guz* the plaintiff alleged he was terminated from his employment because of his age. In making a motion for summary judgment, his employer offered evidence plaintiff's work unit was eliminated and its tasks were transferred to another office. The employer also offered unrebutted testimony that in selecting certain members of the discontinued unit for transfer to the new unit and in filling other open positions in the new unit, the employer had done so based on supervisors' assessments of the retained employees' particular skills and not on the basis of their age. In response to this motion, the plaintiff offered evidence most of the employees who were not transferred from the discontinued unit were older than the two employees who were transferred and that two of the three vacant positions in the new unit were filled with younger employees of the company. Because the employer had presented a strong, credible case, the plaintiff's dismissal was for reasons unrelated to age, and the inferences to be drawn from the data he relied upon were relatively weak, the court in *Guz* found the employer was entitled to summary judgment. (*Guz, supra,* 24 Cal.4th at pp. 369-370.)

b. *This Record*

Here, we have a record which is very similar to the one considered in *Guz*. Dr. Sinha does not dispute UCSD had decided to limit MSP positions to physicians who were candidates for full-time faculty positions; she also does not dispute her supervisor's assessment of her contribution to the teaching program was bona fide and unrelated to her gender. In addition, Dr. Sinha accepts as accurate the results of the patient and resident evaluations. Thus as in *Guz*, here the employer has presented substantial credible evidence it took its action against the plaintiff for lawful reasons.

In the main Dr. Sinha's case boils down to the inference of discrimination she would have us draw from Dr. Kallenberg's statements. Because of its admittedly ambiguous meaning, Dr. Kallenberg's needling statement provides very little inference of bias, let alone an inference bias played a role in the decision to terminate her employment. Dr. Kallenberg's statements at the time he notified Dr. Sinha her MSP contract would not be renewed, provide little, if any, inference as to his decision making. Given the very emotional context in which the statements were made and the obvious desire of anyone in that situation to be comforting, the statements at most show Dr. Kallenberg has a very paternalistic attitude toward women. It is something of a logical leap to derive from the fact that that attitude manifested itself in an emotionally difficult situation the necessary conclusion that in selecting her for termination Dr. Kallenberg relied upon her gender. Taken in context, Dr. Kallenberg's final statement, made many months after Dr. Sinha had left the hospital, actually tends to support rather than undermine the Regents' case. As Dr. Ikeda explained, the statement was made only after Dr. Kallenberg had made a number of attempts to retain two women physicians. That fact suggests that notwithstanding his biases or paternalism, at or near the time Dr. Sinha was released, gender was not playing a role in Dr. Kallenberg's decision making.

Because of their ambiguous nature and the contexts in which they were made, the statements raise no greater inference of biased decision making when considered together as opposed to separately. The other facts Dr. Sinha relies upon, her previous positive reviews, the retention of one male physician whose evaluations were worse than hers and the employment of another male physician who was not board certified, do not add

significantly to her case when considered in light of Dr. Kallenberg's decision to limit the use of MSP's. The earlier reviews which resulted in renewal of her MSP have little bearing on the criteria Dr. Kallenberg was using in 2002: was Dr. Sinha a candidate for a full-time faculty position? The retained physician was already a permanent member of the faculty; thus, unlike Dr. Sinha's situation, in his case UCSD did not have the option of terminating his employment through the expedient means of withholding further annual contracts. Because Dr. Kallenberg was looking to use MSP positions as a means of developing physicians for faculty positions, it is not surprising he would select someone who did not yet have Dr. Sinha's credentials but who, in Dr. Kallenberg's view, showed promise.

In short, in looking at the *whole record* as we are required to do under *Guz*, Dr. Sinha did not present evidence which would permit a trier of fact to reject the Regents' explanation of the reasons it did not renew her MSP. Thus the Regents was entitled to summary judgment on Dr. Sinha's principal claim her employment was terminated because of her sex.

III

Dr. Sinha's retaliation claim was also properly dismissed. In light of the fact UCSD had lawful reasons for terminating her employment, which she did not successfully rebut, it also had lawful reasons to withdraw her hospital privileges. The only inference of retaliation is the temporal proximity between her administrative complaint and the request by the Family Medicine Division that her hospital privileges be

withdrawn in light of the termination of her employment. Given the fact her employment at UCSD had in fact ceased, any inference of retaliation was fully rebutted.

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.