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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 21-00393

JOSHUA BRZUCHALSKI

vs.

DIGITAL GUARDIAN, LLC, and others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS

The plaintiff, Joshua Brzuchalski ("Brzuchalski"), brings this action claiming employment discrimination (hostile work environment and disparate treatment) and retaliation by his former employer, Digital Guardian, LLC and Digital Guardian, Inc. (collectively "DG"), where it allegedly condoned a hostile environment where employees repeatedly engaged in discriminatory behavior against Brzuchalski based upon his religion (Jewish) in violation of G. L. c. 151B, §§ 4(1) and 4(4). Brzuchalski also asserts claims for unpaid wages in violation of G. L. c. 149, § 148B (the "Wage Act") and retaliation under the same statute. Brzuchalski also asserts claims of unjust enrichment and breach of the covenant of good faith and fair dealing against DG and his former supervisor, Derek Richardson ("Richardson"). Additionally, Brzuchalski asserts intentional or negligent interference with an advantageous business relationship against three co-workers who allegedly interfered with his employment relationship, Greg Cranley ("Cranley"), Jason Wallace ("Wallace"), and Howie Burton ("Burton") (collectively, the "Individual Defendants").

[1] Digital Guardian, Inc.; Greg Cranley, Jason Wallace, and Howie Burton.

The defendants have filed a partial motion to dismiss ("Motion") Brzuchalski's G. L. c. 151B claims, Wage Act claims, and common law claims asserted against DG and the Individual Defendants.[2] For the following reasons, the defendants' Motion is **DENIED**.

BACKGROUND

The court accepts the allegations of Brzuchalski's complaint as true with all reasonable inferences drawn in his favor. See Marram v. Kobrick Offshore Fund Ltd., 442 Mass. 43, 45 (2004); Spinner v. Nutt, 417 Mass. 549, 550 (1985).[3]

Brzuchalski was employed by DG from October 2015 until his termination on February 28, 2018. Brzuchalski is a Jewish man. He "proudly" wears a star of David necklace and routinely took time off work at DG to observe Jewish holidays. Brzuchalski alleges that from the inception of his employment he witnessed and experienced discriminatory treatment, as well as tolerance by his employer of an openly hostile work environment. Brzuchalski alleges the Individual Defendants discriminated against and harassed him and another employee, Jeremy McNair ("McNair"), who was the only other Jewish employee in Brzuchalski's work group.

Brzuchalski describes the Individual Defendants as outspoken and self-proclaimed "right wing conservatives." Mr. Cranley, described as the "ringleader," openly displayed a red "MAGA" hat, a Trump poster, and a "don't tread on me" flag in his cubicle. The three Individual Defendants regularly spoke openly about their support for views Brzuchalski associates with the "Trump MAGA movement," such as lack of tolerance for Jews, Black Lives Matter supporters, immigrants, and diversity in the United States.

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[2] Count III (G. L. c. 151B retaliation) and Count VI (unjust enrichment) are the only claims not directly challenged.

[3] Brzuchalski's 37-page complaint contains numerous detailed allegations about the conduct of the Individual Defendants. I limit recitation of the allegations to those most relevant to the motion to dismiss.

I. Unjustified Animosity Toward Brzuchalski and Racially Insensitive Remarks

Brzuchalski claims the targeting of him and McNair was present from the very beginning of his employment. Within the first three weeks of working at DG, Brzuchalski went for a walk with McNair to inquire as to why the Individual Defendants seemed to dislike him. McNair stated that Cranley "hated" Brzuchalski. Brzuchalski said to McNair that "hate is a strong word." McNair replied that "hate is the right word." McNair said his opinion was based on things said when Brzuchalski was not in the presence of Cranley. Cranley called Brzuchalski a "piece of shit" and stated he "didn't like him." McNair said these statements were made within the first week of Brzuchalski's employment. McNair relayed that Cranley had stated about Brzuchalski, "yeah, I hate that fucking guy." When McNair asked why, Cranley said "I just don't like his kind, I know his type, I don't trust him and he is shifty." Brzuchalski was surprised to hear of Cranley's statements so soon after meeting him. Brzuchalski also identified Cranley's statements that he "knew his kind," "knew his type," and was untrustworthy and "shifty" as derogatory stereotypes historically used to describe Jewish individuals.

Brzuchalski alleges the actions of the Individual Defendants in the following months constituted harassing treatment directed at him. In October 2015, Nerf balls were thrown at Brzuchalski and McNair by the Individual Defendants under the pretense of "playing catch."

Brzuchalski also recalls offensive and racially insensitive conversations between the Individual Defendants that took place in their working area. In one instance, Mr. Burton discussed in graphic terms a girl that he "hooked up" with so loudly it disrupted Brzuchalski's call with a client. In another, in January 2016, Mr. Cranley stood up and announced his dislike of "people that claim to have American Indian in them just to get a government handout."

Brzuchalski was also made to feel unwelcome in the group during group conversations about non-work topics, such as sports or home mortgages, where he felt his comments were excessively challenged or fact checked. Brzuchalski also witnessed similar treatment of McNair, the other Jewish employee in his group.

In August 2016, Gibbons said to the entire office, "Let me ask a question, black lives matter. Don't all lives matter? Oh, maybe I shouldn't have said that. Now don't go to HR guys I'm only making a joke, I'm just saying." The statement made Brzuchalski uncomfortable.

Brzuchalski also alleges that when he would leave work early to visit his pregnant wife or newborn child, the Individual Defendants would comment "I wish I had this guy's deal," and laugh at whispered comments they made to each other as Brzuchalski passed. Brzuchalski was scared and said these actions felt like a punch to the gut.

II. First Complaint and Acts of Physical Intimidation

Following the "American Indian" comments of Mr. Cranley, Brzuchalski made his first formal complaint to his supervisor, David Pettigrew ("Pettigrew"). He reported that it had become difficult to do his job because of the excessive inappropriate statements made by the Individual Defendants throughout the day, especially when Pettigrew was out of the office. Because he was fearful of retaliation by the group, Brzuchalski asked Pettigrew to wait a few days to speak to them and Pettigrew agreed. Pettigrew apparently did not wait because the next day Cranley walked across the sales floor to Brzuchalski's cubicle and stood next to it with his arms folded and chest puffed out. Cranley held the stance, which Brzuchalski described as intimidating, for over a minute. When Brzuchalski looked at Cranley, Cranley stared him down for a few moments before leaving. Brzuchalski felt scared and shaken. Brzuchalski reported the

incident to Pettigrew who confirmed he talked with Cranley. Pettigrew told Brzuchalski to "keep your head down and let me know if they do anything else."

In March 2016, Brzuchalski alleges that Wallace purposefully rammed his shoulder into Brzuchalski while leaving the bathroom. Wallace did not apologize. McNair told Brzuchalski that he had experienced the same conduct from Wallace. There are no allegations that Wallace behaved similarly to his non-Jewish co-workers.

III. The Mel Gibson Conversation

In November 2016, Brzuchalski was sitting at his desk. Burton turned to Wallace and said loud enough for the entire office to hear, "What do you think about that Mel Gibson thing?" Wallace responded, "the thing with the cops?" Burton replied "yes." Wallace responded, "yeah, that was pretty f*cked up." Burton replied, "it was f*cked up right, he kinda got railroaded by the cops, right?" Wallace replied, "yeah I can see that, they were recording it after all." Brzuchalski was shocked that the men were freely and openly expressing their sympathy and support for the actor's well-publicized racist and anti-Semitic rant in front of the entire sales floor. The exchange shook and demoralized Brzuchalski, who lost family members in the Holocaust. Brzuchalski felt at that moment that the treatment he and McNair had been receiving from the Individual Defendants was because they were Jewish. The conversation left Brzuchalski feeling unsafe at work.

IV. McNair's Complaint and HR Investigation

In March 2017, McNair made a formal complaint to Human Resources ("HR") against the Individual Defendants about the racist and anti-Semitic environment created by their conduct.

On March 10, 2017, someone from HR emailed Brzuchalski and asked him to discuss the working environment which was part of a larger HR investigation into an incident between Cranley and McNair. Brzuchalski told the HR representative everything he had witnessed between the Individual Defendants, McNair, and himself. Brzuchalski also complained that he had also experienced a similar hostile work environment as McNair because of the Individual Defendants. Brzuchalski alleges that no action was taken following the HR investigation and McNair was terminated shortly thereafter.

V. Harassment Following Brzuchalski's HR Complaint

Following the HR investigation and McNair's termination, Brzuchalski experienced an increase in disparate and threatening treatment by the Individual Defendants.

In July 2017, at a sales kickoff party, Wallace walked by Brzuchalski in the hotel lobby and asked, "What are you doing?" Brzuchalski replied, "nothing." Wallace said, "Well, stop acting f*cking creepy." Brzuchalski felt belittled and intimidated by the exchange.

At the same party, a newer co-worker, Andrew Olmstead ("Olmstead"), who had been friendly with the Individual Defendants, interrupted a conversation Brzuchalski was having and said, "Oh didn't you buy a fixer upper recently. Congratulations. It's around Sherborn or something, right?" Brzuchalski asked how Olmstead would know that. Olmstead answered, "I don't know just saw it." When asked how Olmstead saw Brzuchalski's new house, Olmstead said he did not remember. Brzuchalski had never discussed his personal life with Olmstead or at the office. Brzuchalski surmised that the Individual Defendants had taken the time to look up his new home and shared the information with Olmstead. Learning that group knew his address made Brzuchalski very uncomfortable and fearful for the safety of his family. Brzuchalski's fear

was increased due to the anti-Semitic remarks made by the group on several occasions and his knowledge that one of them carried a concealed weapon.

On October 13, 2017, while making required customer phone calls, Brzuchalski overheard a co-worker tell a lewd account of another co-worker walking in on two men engaged in a homosexual act at the gym. A conversation ensued between the Individual Defendants and the other co-workers whose cubicles surrounded Brzuchalski's. The conversation was loud and graphic and included "gay bashing" and offensive jokes. Brzuchalski had to stop making calls until the conversation calmed down. Later, while on a call, a co-worker loudly proclaimed only feet from Brzuchalski's cubicle, "Well, that would be quite an orgy!" at the precise moment a client's voicemail picked up. Brzuchalski was embarrassed that the comment would be heard by the client on their voicemail. Brzuchalski confronted the employee and made it clear the inappropriate comment could be heard by clients on the phone. The co-worker apologized. However, a few moments later, Wallace asked Brzuchalski a question about the exchange with the other employee. It was clear to Brzuchalski that Wallace was inserting himself into the conversation to "rattle" and upset Brzuchalski in front of the work group. As the exchange with Wallace continued, Brzuchalski felt under attack and said to Wallace, "Jason what are you driving at, are you just trying to stir the pot here, I wasn't talking to you." As Brzuchalski was speaking another co-worker, Patrick Woodward ("Woodward"), cut him off and said in an aggressive tone, "Hey Josh you don't want to make friends here and nobody likes you so why don't you just quit it and chill out." Brzuchalski responded that he was trying to make money to feed his family. The conversation left Brzuchalski physically shaken. Brzuchalski concluded that he must complain to HR again to address the behavior directed toward him, which he felt was intensifying now that he was the only Jewish employee.

VI. Brzuchalski's third HR Complaint and Investigation by Outside Counsel

Brzuchalski contacted Pettigrew immediately after the above confrontation to report what had happened and inform Pettigrew that he was going to file another complaint with HR, as he felt his prior complaints to Pettigrew went unaddressed.

After filing the HR complaint about the hostile work environment, Brzuchalski met with HR representative Jessica Katz ("Katz"). During his meeting with Katz, Brzuchalski was informed that the people named in his complaint, Wallace and Woodward, had been "spoken to" and that "was all that was going to be done."

Brzuchalski followed up with his managers, Pettigrew and David McKeough ("McKeough"), who expressed sympathy and told Brzuchalski that he was a "model employee" and they wished they had "ten more like [him]." In response to the hostile work environment complaints, they granted Brzuchalski permission to work from home on a permanent basis.

Shortly thereafter, Brzuchalski learned that Burton had been promoted, Pettigrew had been terminated, and McKeough was leaving the company at the end of the calendar year. He then received an email from DG's CEO, Ken Levine ("Levine"), asking all employees working from home to return to the office. Brzuchalski emailed Levine and informed him of past events and requested instructions on how to proceed. Soon after, Brzuchalski was contacted by DG's outside counsel, Erin Horton ("Horton") of Foley and Lardner LLP, who informed him she would be investigating his allegations.

On December 21, 2017, Brzuchalski met with Horton and provided her with a detailed chronology of events and the discriminatory treatment he had experienced and witnessed in the office. He strongly encouraged Horton to interview McNair, who had also experienced and witnessed discriminatory treatment.

On January 31, 2018, Brzuchalski received the results of the investigation over the phone from DG's General Counsel. The investigation concluded that there was no evidence of discrimination and no violation of employment laws, and that no remedial action would be taken. Brzuchalski was shocked by the result. The General Counsel also informed him that McNair had not been interviewed and that Brzuchalski was no longer allowed to work from home.

Upon his return to the office on February 2, 2018, Brzuchalski was informed he must work in a new location on a separate floor from his work group. Brzuchalski says the new workspace was roughly the size of a "very small closet." The workspace was away from the sales floor, where the Individual Defendants continued to work. Brzuchalski felt he was "hidden away" in this workspace even though there were better options available, including offices, cubicles, or allowing him to continue to work from home.

VII. Severance Negotiations, MCAD complaint, and Termination

At the end of his first week back in the office, on February 9, 2018, Brzuchalski was asked to meet with the company's General Counsel and James McCarthy ("McCarthy"), another manager with whom he had not previously worked. The two suggested that Brzuchalski was not happy at DG. They suggested he accept a severance package and leave. They made it clear to Brzuchalski that the company wanted him to leave. Frustrated that he had not been given a fair investigation, Brzuchalski told McCarthy, "I am not in your ear like [Wallace] and [Burton]. I do not have a personal relationship with you like [Wallace] and [Burton], and I do not go out drinking with you each time you're in town like [Wallace] and [Burton]."

Brzuchalski was surprised to receive a severance offer as he hoped to continue at the company. However, he was frustrated with the HR investigation of his complaints conducted by DG's outside counsel and not an independent third-party investigator.

On February 12, 2018, Brzuchalski submitted a charge of discrimination to the MCAD and the EEOC via overnight mail.

On February 16, 2018, Brzuchalski emailed DG's General Counsel and informed him about the MCAD/EEOC complaint. He also informed the company that he wished to stay at DG and succeed. However, Brzuchalski provided a counteroffer to the severance he was previously offered, asking that he be allowed to continue to receive commissions on certain accounts he had originated as an inside sales representative. Brzuchalski emailed certain information to his personal email account to allow him to track those commissions.

On February 20, 2018, Brzuchalski was told in a meeting with his new supervisor and the General Counsel that he was to clean out his desk and leave the premises. They informed Brzuchalski that his system access was revoked, as well as his building access. They informed Brzuchalski that DG would be sending him a severance package with some of the terms he requested. Brzuchalski understood after this meeting that he was terminated.

Later that day, Brzuchalski's attorney emailed a personnel file request to DG. In response, he was told that Brzuchalski had not been terminated and was "still on the payroll of [DG]."

In the days that followed, Brzuchalski's attorney and DG's General Counsel exchanged several communications negotiating the potential terms of separation. Chief among them was a form of continued commission payments on several accounts initiated by Brzuchalski.

By February 27, 2018, it was clear the parties would not reach a negotiated severance. Brzuchalski's attorney asked when Brzuchalski could return to work. DG's response was to terminate Brzuchalski on February 28, 2018.

VIII. Unpaid Commissions

Brzuchalski claims he is owed unpaid commissions. Under the DG Compensation Plan ("CP"), salespeople are entitled to earned commissions, which are "calculated on a monthly basis based upon bookings amounts and paid at the end of the following calendar month." Commissions are considered "earned" when "payment is received from the Customer or Partner." The CP also states that "Upon termination, any liability will be paid in full from the amount due the employee."

Up to and including February 20, 2018, Brzuchalski had been working on several accounts that were in the final stages of procurement. This means the companies were in the process of signing a purchase agreement. When DG locked Brzuchalski out of its computer system on February 20, 2018, he lost his ability to see whether those customers signed a purchase agreement before Brzuchalski's termination on February 28, 2018. Brzuchalski lists at least three clients that were scheduled to sign purchase agreements between February 20, 2018 and February 28, 2018, when he was terminated. The amounts of the commissions Brzuchalski details in his Complaint are not relevant to the present Motion that challenges only the statute of limitations for such earned commissions.

Brzuchalski alleges he was not paid any commissions for the clients he identifies in his complaint in his final paycheck following his termination on February 28, 2018.

Brzuchalski filed his complaint in this action on February 19, 2021.

DISCUSSION

A motion to dismiss pursuant to Rule 12(b)(6) calls upon the court to determine whether the factual allegations of the complaint, taken as true, with all reasonable inferences drawn in favor of the claimant, are sufficient to warrant relief. See Marram v. Kobrick Offshore Fund

Ltd., 442 Mass. 43, 45 (2004); Spinner v. Nutt, 417 Mass. 549, 550 (1985). The complaint must be sufficient to "raise a right to relief above the speculative level." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting from Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2008). However, the plaintiff's burden at this time is not one of probability; rather, he must show only that his claims are facially plausible. See Twombly, 550 U.S. at 556; Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

I. G. L. c. 151B claims of discrimination (Counts I, II)

Brzuchalski asserts discrimination claims for hostile work environment and disparate treatment under G. L. c. 151B. DG argues for dismissal of the c. 151B claims because the "allegations lack the necessary connection to plaintiff's religion" and "fail to establish [DG] knew of, or otherwise condoned, discriminatory treatment or a hostile work environment." Here, the allegations of the complaint sufficiently tie Brzuchalski's religion to at least some of the conduct described, and sufficiently allege DG's knowledge of the conduct and Brzuchalski's belief he was being targeted for harassment by certain co-workers for being Jewish.

To state a claim for hostile work environment under G. L. c. 151B, a plaintiff must allege discriminatory conduct based upon their membership in a protected class, such as a religious group. See G. L. c. 151B, § 4(1). The plaintiff must allege facts to support a finding that the abusive conduct was "sufficiently severe and pervasive to interfere with a reasonable person's work performance." Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 411 (2001); Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 532 (2001). "A hostile work environment may be manifested by a series of harassing acts that have been as 'pinpricks [that] only slowly add up to a wound.'" Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 617 n.5 (2005), quoting Keeler v. Putnam Fiduciary Trust Co., 238 F. 3d 5, 12 (1st Cir. 2001). A court must

"examine all of the attendant circumstances including the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance." Pomales v. Celulares Telefonica, Inc., 447 F. 3d 79, 83 (1st Cir. 2006). An employer may be liable where it fails to take appropriate remedial action after having knowledge of potential unlawful treatment in the workplace. See Wilson v. Moulison N. Corp., 639 F. 3d 1, 8 (1st Cir. 2011).

Brzuchalski alleges a pattern of harassing and offensive conduct over a two-year period, some of which may not at first be viewed as directed at his religion, but when coupled with other more overt conduct satisfies the requirements of Mass. R. Civ. P. 12 to demonstrate his claims are facially plausible. See Twombly, 550 U.S. at 556. Brzuchalski's allegations that the harassing treatment was directly primarily at him and McNair, the only Jewish employees in their group, along with certain comments that could be interpreted as meant to offend someone of the Jewish religion, particularly the comments about Mel Gibson's widely-publicized anti-Semitic statements made ten years prior, and the physical intimidation described after Brzuchalski filed a formal complaint against the Individual Defendants with HR, are sufficient show a pattern of harassing conduct tied to Brzuchalski's being Jewish. Brzuchalski alleges the conduct left him scared and shaken at times, interfered with his client calls, and ultimately forced him to work apart from his work group. These allegations are enough to raise a jury question concerning the severity of the harassment and its impact on Brzuchalski's work.

Brzuchalski also alleges that he made at least five reports over two years to his supervisors, HR, and DG's CEO that he believed the offending conduct was targeted at him because he was Jewish, and that after an outside investigation no action was taken by DG.

Ultimately, DG's only response was to separate Brzuchalski from the offending employees by having him work at home or on another floor, apart from the rest of the sales department. Under these circumstances, Brzuchalski has alleged sufficient facts to show DG knew of the alleged discriminatory treatment and failed to take adequate remedial action. See Wilson, supra. He has also alleged a facially plausible hostile work environment claim based upon harassing conduct that was tied to his Jewish religion. See Clifton, supra.

The motion to dismiss Brzuchalski's hostile work environment claim is denied. The Defendants do not make any different argument in favor of dismissing Count II (disparate treatment). Accordingly, the motion to dismiss Count II is also denied.

II. Wage Act claims (Counts IV and V)

a. Unpaid Wages

Defendants argue that Brzuchalski's claim for unpaid wages under the Wage Act was filed beyond the three-year statute of limitations required by G. L. c. 149, §150. They argue that Brzuchalski had notice of the commissions no later than February 16, 2018, when he and his attorney began negotiating a potential severance package, including provision for payment of the commissions at issue. They conclude that his complaint, filed on February 19, 2021, is time barred. I disagree.

Pursuant to the Wage Act, commissions are considered "earned" wages if the commissions were "definitely determined" and "due and payable." Weems v. Citigroup, 453 Mass. 151 (2009). Where the exact amount of a commission is unknown, or where the employer requires time, even post-termination, to determine the exact amount of the commission, an employee may still bring a Wage Act claim. See Feygina v. Hallmark Health Sys., Inc., 2013 WL 3776929, at *2, *5 (Mass. Super. Ct. July 12, 2013).

Under DG's Compensation Plan, commission payments were "calculated on a monthly basis based upon bookings amounts and paid at the end of the following calendar month" and that "[u]pon termination, any liability will be paid in full from the amount due the employee." The Compensation Plan also states that commissions are not due the employee until DG receives payment from the customer. Thus, Brzuchalski would expect to be paid for any commissions earned in February at the end of the following month, or, in the event of termination, in his final paycheck on February 28, 2018. The complaint alleges he was not paid commissions for the identified accounts he believes completed the procurement process, and thus paid DG for their contracts, prior to his termination.

As alleged, Brzuchalski's Wage Act claim falls within the three-year limitations period. Brzuchalski was terminated on February 28, 2018. His complaint makes a claim for commissions that were earned between February 20, 2018, the date he lost access to DG's computer system and was no longer able to see in real time when his commissions were calculated, and his date of termination. If DG received payment on any of the identified accounts before or during the nine-day time period prior to his termination, under DG's Compensation Plan, those commissions would be due and payable to Brzuchalski in his final paycheck payable on February 28, 2018. That Brzuchalski was negotiating on February 16, 2018, about the payment of commissions that he *expected* to earn in the very near future, after DG received payment, does not control the statute of limitations analysis.

Brzuchalski filed this complaint on February 19, 2021, nine days before the three-year statute of limitations would have expired for those commissions identified in his complaint that were due and payable on February 28, 2018. See Weems, supra.

b. Wage retaliation

Defendants argue that Brzuchalski's retaliation claim under G. L. c. 149 requires dismissal as he has not alleged facts to support causation. Defendants argue the "the timeline does not support the retaliation claim being tied to his demand for unpaid wages" and that the "adverse employment action could only have been tied to his complaints about the workplace." The argument ignores the allegations of the complaint.

The complaint alleges that Brzuchalski, prior to his termination, engaged in negotiations with DG concerning a severance package and his possible voluntary departure from the company. (Complaint ¶121). Upon the unsuccessful conclusion of negotiations, which centered on Brzuchalski's demand for the provision of payment for the commissions at issue, DG terminated Brzuchalski. (Complaint ¶125-126). Brzuchalski alleges that his "insistence that he would only voluntarily terminate his employment if [DG] agreed to pay his earned commission payments was a determinative factor in [DG's] decision to terminate his employment." (Complaint ¶127).

Courts have found that an employee in good standing who raises a compensation claim and "is terminated shortly thereafter" is entitled to an inference of causation. See Levesque v. Schroder Inv. Mgmt. N. Am., Inc., 368 F. Supp. 3d 302, 315 (D. Mass. 2019) (applying Massachusetts law, plaintiff who alleged he complained to managers about his unpaid bonus and was immediately terminated had pled sufficient facts to survive a motion to dismiss a Wage Act retaliation claim), citing Mole v. University of Massachusetts, 442 Mass. 582, 591-592 (2004).

Under the facts alleged, Brzuchalski is entitled to an inference of causation, having been terminated immediately after DG apparently rejected his request for payment of certain

commissions in exchange for his voluntary departure from the company. See id. The motion to dismiss his retaliation claim under G. L. c. 149 is denied.

III. Breach of the Covenant of Good Faith and Fair Dealing (Count VII)

DG argues that this claim should be dismissed because Brzuchalski fails to allege the existence of a contract between him and DG.

Inherent in all Massachusetts at-will employment contracts is the implied covenant of good faith and fair dealing. See Fortune v. National Cash Register Co., 373 Mass. 96, 104-105 (1977). However, defendants argue that Brzuchalski's claim relies on "conclusory legal assertions without providing any factual support" and should be dismissed.

As discussed above, Brzuchalski alleges in connection with his Wage Act claim for retaliation that DG terminated him immediately following the severance negotiations where he demanded provision be made for certain commissions he believed had or would become due following February 20, 2018, when he lost access to DG's computer system. Brzuchalski's complaint alleges that the termination was, in part, an attempt by DG to avoid paying him those commissions. In applying the covenant of good faith and fair dealing, courts have concluded that "an employer is accountable to a discharged employee for unpaid compensation if the employee were terminated in bad faith and the compensation is clearly connected to work already performed." Harrison v. NetCentric Corp., 433 Mass. 465, 473 (2001). That is what is alleged here: that DG terminated Brzuchalski in bad faith to avoid both addressing the discriminatory conduct of its employees and paying him earned commissions. The motion to dismiss Brzuchalski's claim for violation of the implied covenant of good faith and fair dealing is denied.

IV. Interference claims against the Individual Defendants (Counts VIII and IX)

Brzuchalski asserts claims of intentional interference with an advantageous business relationship and negligent interference with an advantageous business relationship against the Individual Defendants.

To succeed on a claim for intentional interference with advantageous business relationship, a plaintiff must show that "(1) the plaintiff had a contract or advantageous business relationship with a third party, (2) the defendant knowingly induced the third party to break the contact or to forgo the business relations, (3) the defendant's interference was improper in motive or means, and (4) the plaintiff was harmed by the interference." Kelliher v. Lowell Gen. Hosp., 98 Mass. App. Ct. 49, 54 (2020), citing Psy-Ed Corp. v. Klein, 459 Mass. 697, 715-716 (2011).

Defendants contend that Brzuchalski must also meet the heightened requirement of showing "actual malice." However, Brzuchalski argues in opposition that the "actual malice" standard is only required when the claim of interference is asserted against a "corporate official" acting within the scope of their official duties. Plaintiff is correct that the courts have applied the actual malice standard where the interference was alleged against a corporate official or supervisor, and not against mere co-workers. See Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 663-664 (1981), Gram v. Liberty Mut. Ins. Co., 391 Mass. 333 (1984). See also Alba v. Sampson, 44 Mass. App. Ct. 311, 314 (1998); Blackstone v. Cashman, 448 Mass. 255, 270 (2007). The defendants cite no case, and the court is not aware of any, where the "actual malice" standard was applied to a claim asserted against a co-worker who was not working within the scope of their official duties. See id.

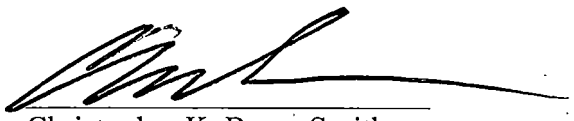
Here, Brzuchalski has alleged that he had an advantageous relationship with his employer, that the Individual Defendants, through their discriminatory conduct toward him, induced DG to break the relationship, that the conduct was motivated by discrimination, and that he was harmed as a result. Discriminatory intent has been found to be an "improper motive." See United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 817, (1990). Under these circumstances, Brzuchalski has alleged sufficient facts in support of his intentional interference and negligent interference claims against the Individual Defendants. See Kelliher, supra.

Defendants also argue that the Individual Defendants are "employee agents" of DG, which cannot interfere with its own contract. That argument is unavailing. The three co-workers cannot be said to be parties to the employment agreement between Brzuchalski and DG.

Defendants also argue that Brzuchalski cannot assert any claim of interference with his relationships with DG's clients or potential clients, as those relationships existed between DG and its clients, and Brzuchalski was acting at all times within the scope of his employment on behalf of DG. Relying on the decision in Psy-Ed Corp. v. Klien, 459 Mass. 697 (2011), Defendants correctly point out that Brzuchalski must allege he had a business relationship with a third-party, that is, a party who is not any of the Individual Defendants. The complaint does not clearly assert that Brzuchalski had a business relationship with any clients or potential clients beyond his work on behalf of DG. However, it sufficiently asserts the claim of interference with respect to the employment relationship between him and DG. Accordingly, the motion to dismiss Brzuchalski's claims for intentional interference and negligent interference is denied. Whether those claims extend to business relationships Brzuchalski had with certain clients or potential clients outside of his employment with DG is best determined on a more developed record.

ORDER

For these reasons, it is hereby **ORDERED** that Defendants motion to dismiss is **DENIED**.



Christopher K. Barry-Smith
Justice of the Superior Court

DATED: June 3, 2022