

token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The summary judgment record contains the following undisputed material facts, appropriately supported in the parties’ statements of material facts submitted pursuant to this court’s Local Rule 56.

The defendant is in the business of the sale and maintenance of power supply products. Defendant’s Statement of Undisputed Material Facts (“Defendant’s SMF”) (Docket No. 8) ¶ 1; Plaintiff’s Opposing Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 15) ¶ 1. The defendant employs field service engineers who are on call seven days per week and 24 hours per day to provide maintenance and service to its customers throughout the United States. *Id.* It markets

itself to customers as an emergency service company and strives to respond immediately to emergency service situations. *Id.* ¶ 2. When the defendant enters into contracts with customers, it agrees to provide service within a certain range of response time, based on the location and availability of its field service engineers. *Id.*

The defendant has 62 customers in Massachusetts, Rhode Island, Connecticut and Vermont to whom it promises varying response times for service, beginning at two hours. *Id.* ¶ 3. It has one customer in New Hampshire and four customers in Maine. *Id.* For its Maine customers, the defendant promises response times ranging between four and twelve hours. *Id.*

Tony Santangelo was, throughout the term of the plaintiff's employment, the defendant's regional service manager for the northeast/New England region. *Id.* ¶ 4. In or about October 1999, he viewed the plaintiff's resume on the internet, contacted him by telephone and met with him in Boston, Massachusetts to interview him for the position of field service manager for the New England region. *Id.* ¶ 5. The plaintiff listed his residence as Dracut, Massachusetts. *Id.* ¶ 6. During the interview, the plaintiff told Santangelo that he spent some weekends at a vacation home in Saco, Maine. *Id.* ¶ 7. Santangelo told the plaintiff that, if he was hired, he would be on call 24 hours a day and seven days a week, other than vacation, sick or "off-pager" time. *Id.*

On or about October 27, 1999 James Fields, vice-president of customer service and support for the defendant, made a written offer of employment to the plaintiff. *Id.* ¶ 9. Under the heading "Employment Location," Fields' offer letter read: "**Boston, MA** will be the hub of service activity, plus any travel as may be required to perform your duties." *Id.* ¶ 10. Under the heading "Availability for Work," the offer letter stated:

Understand that the work performed by PMI can and does occur at all times (24 hours a day, seven days a week). As an emergency service company for the "Critical Power" industry, PMI strives to respond immediately to emergency service situation[s].

Id. After confirming a few terms for his employment with Santangelo, the plaintiff accepted the offer in writing, attaching an addendum. *Id.* ¶ 12. By the terms of the offer, the plaintiff’s pay was set at \$17.31 per hour and he was entitled to two weeks of vacation per year. *Id.* ¶ 13.

The plaintiff worked for the defendant from January 1, 2000 until his termination on July 2, 2001. *Id.* ¶ 15. He received a copy of the defendant’s Policies and Procedures Manual (“the Manual”) after he accepted the employment offer and before he started to work for the defendant. *Id.* ¶ 17 & Defendant’s Reply Statement of Undisputed Material Facts (“Defendant’s Reply SMF”) (Docket No. 17) ¶ 17. Due to an on-the-job injury, the plaintiff was out of work on a workers’ compensation leave from February 14, 2001 to May 29, 2001. Defendant’s SMF ¶ 16; Plaintiff’s Responsive SMF ¶ 16. While on leave, the plaintiff sold his house in Dracut, Massachusetts and as of April 1, 2001 he changed his residence to his home in Saco, Maine. *Id.*

Policy No. 411 in the Manual states as follows:

Vacation must be taken in the year it is earned. The company does not provide vacation pay unless vacation time is actually taken as time off from work, or upon separation. **Use** it or **lose**. However, if business dictates, vacation may be carried over for 90-days with the written approval of the President of the Company.

Id. ¶ 21. The plaintiff did not take his two weeks of vacation in 2000, nor did he seek or obtain written permission from the president of the defendant to carry his 2000 vacation time over into 2001.

Id. ¶ 22. His request to take vacation at one specific time in 2000 was denied. Plaintiff’s Responsive SMF ¶ 22; Defendant’s Reply SMF ¶ 22. The Manual also provides as follows:

If employment is terminated, employees will receive vacation pay for any unused vacation earned at the time of termination . . . If a[n] employee is terminated due to “Gross Misconduct” vacation will be forfeited. “Gross Misconduct” is defined as: insubordination, theft or destruction of company property, fighting on company property, carrying of illegal firearms, etc. . .

Defendant’s SMF ¶ 23; Plaintiff’s Responsive SMF ¶ 23.

Policy No. 311 in the Manual described the defendant's standard workweek and workdays as well as its overtime policy as it applied to non-exempt field employees including the plaintiff. *Id.* ¶ 24. Monday through Friday, the "standard workday" for a field employee was an eight hour day, 8:00 a.m. to 5:00 p.m., with one hour for lunch. *Id.* ¶ 25. The plaintiff was guaranteed to be paid for a 40-hour workweek even if he was never called to a customer site. *Id.* If he had to work on a Saturday or Sunday, the plaintiff was paid 1.5 times his hourly rate for any time worked. *Id.* ¶ 26. If he worked more than 40 hours in a seven day workweek, the plaintiff was paid 1.5 times his hourly rate for all hours over 40. *Id.* Under certain circumstances the plaintiff would also be entitled to "overtime" at his hourly rate even if he did not work over 40 hours. *Id.*

The plaintiff was required to record his time on a form called a labor distribution report ("LDR"). *Id.* ¶ 27. This form was then submitted for processing and payment. *Id.* While the plaintiff would be paid his regular 40-hour salary every two weeks regardless of when he submitted his LDRs, any extra money owed and reflected on the LDRs was only paid after the forms were submitted and processed. *Id.* Processing of LDRs typically took two or more weeks from the time they were submitted to the time of payment. *Id.* If the plaintiff was not called to a customer site during an eight-hour day, his hours were "down time" which was recorded on the LDR in a row so identified. *Id.* ¶ 28. If he was called to a customer site, those hours were deemed hours "worked" and were to be recorded in the "work-order hours" row on the LDR. *Id.* Only this row is relevant to a determination whether the plaintiff "worked" more than 40 hours in a given week. *Id.*

On the LDR form, there is an "S.T." column and an "O.T." column for each weekday as well as a row in which the employee indicates whether the hours worked were on-site or in travel. *Id.* ¶ 29. The "S.T." column is for work performed between 8:00 a.m. and 5:00 p.m. *Id.* The "O.T." column is for work performed either before 8:00 a.m. or after 5:00 p.m. *Id.* The fact that an employee

records time in the “O.T.” column does not mean that he is paid “overtime.” *Id.* An employee receives overtime pay at either his hourly wage or 1.5 times his hourly wage depending on the time of day worked, the number of hours worked in the standard workday, whether he has worked more than 40 hours that week and whether he worked on a Saturday or Sunday. *Id.* ¶ 30.

The plaintiff’s claim for unpaid overtime is based on LDRs for the weeks ending June 3, June 10, June 17, June 24 and June 31 [sic], 2001. *Id.* ¶ 32. These LDRs include 50 hours of claimed overtime at the plaintiff’s hourly wage and 54.5 hours at 1.5 times his hourly wage. *Id.* ¶ 33. In his last paycheck on July 6, 2001 the plaintiff was paid for 33 hours at his hourly wage and 35 hours at 1.5 times his hourly wage. *Id.* On July 10, 2001, after his termination, the plaintiff made a demand for payment. *Id.* ¶ 35. By letter to the plaintiff’s attorney dated July 17, 2001 the defendant paid the plaintiff for an additional 19.5 hours at his hourly wage and 14.5 hours at 1.5 times his hourly wage. *Id.* The defendant later discovered a calculation error by which five hours of time at the plaintiff’s hourly wage had been omitted from this payment. *Id.* ¶ 36. Triple the amount due for this time (\$86.55) was then paid to the plaintiff by the defendant. *Id.*

On Thursday, June 28, 2001 the plaintiff sent a fax of three LDRs to Santangelo asking for, *inter alia*, expedited payment of all overtime claimed. *Id.* ¶ 37. Santangelo referred the plaintiff to Fields. *Id.* ¶ 38. Fields spoke to the plaintiff by telephone, and the plaintiff was surprised when Fields told him that Fields felt that the plaintiff should not be paid for some of his claims. *Id.* ¶ 41. Fields told the plaintiff that the plaintiff would have to attend a meeting on Monday, July 2, 2001 at the company’s headquarters in Texas to discuss his residential move and that travel arrangements had been made for him. *Id.* ¶ 42. The plaintiff refused to attend the meeting unless Fields first made payment for all of the plaintiff’s claims for reimbursement and overtime. *Id.* ¶ 43.¹ Fields informed

¹ The plaintiff purports to admit this paragraph of the defendant’s statement of material facts in part and deny it in part but does not (*continued on next page*)

the plaintiff that he should not refuse to attend the meeting and that his failure to attend the meeting would be deemed insubordination and result in this termination. *Id.* ¶ 44.

The plaintiff was dispatched to perform work on Saturday, June 30, 2001 at a site in Portland, Maine. *Id.* ¶ 45. The plaintiff did not perform this work and did not inform the defendant's dispatcher that he would not be there. *Id.*² The plaintiff did not attend the July 2, 2001 meeting in Texas. *Id.* ¶ 46. Fields then made the decision to terminate the plaintiff's employment based on this failure and the plaintiff's failure to work on June 30, which Fields deemed to be insubordination. *Id.*³

III. Discussion

The plaintiff's remaining claims assert a claim for overtime pay under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 207(a) and 216(b) (Count I); a claim for discrimination and retaliatory discharge under the FLSA (Count II); a claim for overtime pay and vacation pay under Maine law, specifically 26 M.R.S.A. §§ 626, 626-A and 670 (Count III); and a claim for unlawful discrimination under Massachusetts law by virtue of denial of the overtime pay and vacation pay, denial of a raise and discharge (Count IV).

A. Overtime Pay

The defendant first contends that it has paid the plaintiff all overtime that was due and that his claims based on that form of payment are now moot. Motion at 5. The plaintiff responds that the defendant's delay and errors in calculating and paying him for overtime "completely undermine[s]" its argument and that hours worked at home must be counted as hours worked under the FLSA for

specify which allegations are admitted and which are denied. Plaintiff's Responsive SMF ¶ 43. Furthermore, the authority cited by the plaintiff does not refute the factual statements included in this sentence.

² The plaintiff denies the defendant's assertion that he did not inform Santangelo that he would not perform this work. Plaintiff's Responsive SMF ¶ 45. However, the citations given in support of his denial only provide that he informed Fields sometime before June 30, 2001 that he would not go on any customer calls until he received all of the money that he believed the defendant owed him. Deposition of Walter E. Gibson (Exh. 5 to Defendant's SMF) ("Plaintiff's Dep.") at 118.

³ The plaintiff purports to deny the factual allegations in this sentence, but his denial does not address the substance of the assertions. (*continued on next page*)

overtime purposes. Opposition at 1. Apparently, the plaintiff takes the position that during some unidentified hours of those recorded on the LDRs at issue he was working at home, making some or all of the hours recorded on those forms as overtime compensable at 1.5 times his hourly wage rather than merely at the hourly wage. *Id.* at 2-3. However, he does not specify how the defendant “drop[ped] below FLSA minimums” with respect to his claim. *Id.* at 3. Nor does he provide any facts to support his argument. The parties’ statements of material facts are devoid of any reference to work done by the plaintiff at home on the dates in question.⁴ From all that appears in the summary judgment record, the hours spent at home by the plaintiff during this period were on-call time, for which payment is not required under the FLSA. *See generally Skidmore v. Swift & Co.*, 323 U.S. 134, 136-37 (1944); 29 C.F.R. § 778.223; *Dinges v. Sacred Heart St. Mary’s Hosps., Inc.*, 164 F.3d 1056, 1057-59 (7th Cir. 1999) (FLSA claim); *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 676-79 (5th Cir. 1991) (same); *Crook v. Russell*, 532 A.2d 1351, 1354 (Me. 1987) (claim under 26 M.R.S.A. § 626).

The plaintiff’s first argument is equally unavailing. The only evidence in the summary judgment record concerning the timeliness of the payment to the plaintiff of his claimed overtime compensation is that it usually took the defendant approximately two weeks to process the LDRs and pay an employee after the LDRs were submitted. Defendant’s SMF ¶ 27. The evidence shows that all but \$86.55 of the amounts due was in fact paid within that period. *Id.* ¶¶ 32-36. The summary judgment record can only be read to demonstrate that the plaintiff had received all but a minimal amount of his claimed entitlement before he filed this action in February 2002. With respect to that

Plaintiff’s Responsive SMF ¶ 46. Because the assertions are supported by the citations to the summary judgment record given by the defendant, they are deemed admitted. Local Rule 56(e).

⁴ Had the plaintiff properly provided any factual material to support his argument, the evidence submitted by the defendant with its reply memorandum — that none of its field service engineers did any office work beyond filling out LDRs and expense reports and that the plaintiff was not expected to and could not have performed hours of office work on any day — would become relevant. Defendant’s (continued on next page)

amount, the defendant paid the plaintiff triple the amount due, *id.* ¶ 36, as required by 26 M.R.S.A. § 626-A when a wage payment is late. Once a plaintiff has received the relief sought in his complaint, his claim is moot.⁵ *See generally Knight v. Mills*, 836 F.2d 659, 669-71 (1st Cir. 1987); *Travelers Indemn. Co. v. Dingwell*, 691 F. Supp. 503, 506 (D. Me. 1988).

The defendant is entitled to summary judgment on Count I, which is based solely on allegedly unpaid overtime compensation, and so much of Count III as is based on the same allegations.

B. Vacation Pay

The plaintiff seeks payment for two weeks of vacation time accrued in 2000 and one week accrued in 2001 before he was terminated. Opposition at 4-5; Plaintiff's Dep. at 24. The defendant takes the position that any vacation pay for 2000 was forfeited under the terms of its employee manual when the plaintiff did not take vacation in 2000 and that any pay due for 2001 was forfeited under the terms of the manual when he was terminated for insubordination. Motion at 5-7. The plaintiff responds that the policies set forth in the employee manual "were never part of [the plaintiff's] contract with" the defendant; the defendant's denial of the plaintiff's request for a vacation in 2000 raises a factual issue concerning that claim; and a "use it or lose it" vacation policy is unenforceable under 26 M.R.S.A. § 626. Opposition at 4-5. Vacation pay is mentioned only in Count III of the complaint, which alleges only a state-law violation.

The plaintiff's third argument is untenable on its face. It was specifically rejected by the Maine Law Court in *Rowell v. Jones & Vining, Inc.*, 524 A.2d 1208, 1210-11 (Me. 1987). Under section 626, an employee has no right to a paid vacation except as provided by the terms of his employment. *Id.* If the defendant's vacation policy applied to the plaintiff, it was enforceable under Maine law.

Reply SMF ¶ 28 & Reply Affidavit of James L. Fields (Docket No. 18) ¶¶ 4-9.

The plaintiff's first argument also fails. The plaintiff does not identify the document or documents, or any oral agreement, which he contends is the "contract" of employment to which he refers. In the absence of such information, the only evidence in the summary judgment record that could constitute a "contract" appears to be the offer of employment which the plaintiff signed. Assuming *arguendo* that Fields' letter offering the position to the plaintiff constitutes a contract of employment, the letter does not purport to be integrated. Letter dated October 27, 1999 to Walter E. Gibson from James L. Fields, Exh. 1 to Defendant's SMF. It cannot reasonably be read to exclude any terms not explicitly stated; indeed, it states that the plaintiff must "[e]nsure [his] compliance with all-corporate [sic] Policies and Procedures." *Id.* at 2. The plaintiff himself provided an addendum to the letter when he signed it; that addendum provides, in part, that he will be paid "Compensation for Overtime in accordance with PMI's overtime policy." *Id.* at [4]. No such policy is included in the letter; it is only to be found in the defendant's Personnel Policy Manual, *see* Exh. C to Affidavit of James L. Fields ("Fields Aff.") (Docket No.10), a copy of which was given to the plaintiff before he started to work for the defendant on January 1, 2000, Receipt for PMI Personnel Policy Manual, Exh. 7 to Defendant's SMF. The plaintiff has offered no evidence to dispute Fields' assertion that the vacation policy set forth in the manual applied to all of the defendant's employees. Fields Aff. ¶ 7. The written vacation policy also provides that accrued vacation time is forfeited when an employee is terminated for insubordination. Exh. B to Fields Aff. at 3, ¶ 11.

The plaintiff's second argument, that a disputed issue of material fact remains as to his claim for vacation pay for 2000 because he "had asked for a vacation and was denied," Opposition at 5, also fails on the summary judgment record. In support of this argument, the plaintiff offers the following: "[H]e did ask Mr. Santangelo to take vacation time in 2000 and was denied." Plaintiff's Responsive

⁵ I note that the complaint makes no claim for damages related to any delay in payment. Complaint (Docket No. 1) ¶¶ 23, 28.

SMF ¶ 22. The sources in the summary judgment record cited by the plaintiff in connection with this assertion establish only that he asked Santangelo for a week's vacation at some unspecified time in 2000 and that Santangelo said no. Plaintiff's Dep. at 47-48; Deposition of Anthony J. Santangelo at 20-21. Accordingly, the defendant has not provided any evidence to suggest that the second week of vacation pay which he now claims was even requested, and the defendant is entitled to summary judgment as to one of the two weeks claimed. With respect to the requested week, the plaintiff would have the burden at trial to establish that no week other than the one he requested was available to him for vacation during 2000 in order to recover on his claim and therefore must produce some evidence of that fact here in order to avoid summary judgment. *In re Spiegel*, 260 F.3d at 31. His failure to do so means that the defendant is entitled to summary judgment on this portion of his claim as well. *Id.*

The defendant is entitled to summary judgment on Count III.

C. Discrimination/Retaliation Under the FLSA

The plaintiff contends that his demand for overtime pay "was protected activity" under the FLSA, and apparently contends that his termination "just a few days later" violated the FLSA because the reasons for the termination offered by the defendant are "suspect" and the actual reason could have been his protected activity. Opposition at 3-4. He also apparently accepts the defendant's characterization of his claim in Count II as one for retaliation rather than some other form of prohibited discrimination, Motion at 7, because he discusses the claim only in terms of the elements of such a claim as set forth in the defendant's motion, Opposition at 3-4. The defendant asserts that the plaintiff did not engage in protected activity, was terminated before he engaged in any protected activity and was terminated for insubordination rather than for engaging in any protected activity. Motion at 7-8. It is not necessary to reach either of the latter two alternative arguments.

The relevant section of the FLSA provides:

[I]t shall be unlawful for any person —
* * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee

29 U.S.C. § 215(a)(3). The elements of a retaliation claim under this statute are the following:

a showing that (1) the plaintiff engaged in statutorily protected activity, and
(2) his employer thereafter subjected him to an adverse employment action
(3) as a reprisal for having engaged in the protected activity.

Blackie v. State of Maine, 75 F.3d 716, 722 (1st Cir. 1996). The defendant’s first argument is that the defendant did not engage in statutorily protected activity because he did not file any complaint or institute or cause to be instituted any proceeding under or related to the FLSA. Motion at 7-8. The plaintiff responds, in conclusory fashion, that his demand for overtime pay “was protected activity.” Opposition at 3.

The First Circuit held in *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999), that a written internal complaint to the employer may constitute protected activity under the FLSA. *Id.* at 41-44. There is evidence in the summary judgment record that might reasonably be construed as a written demand for overtime pay dated before the plaintiff’s employment was terminated. Exh. B to Affidavit of Anthony Santangelo (Docket No. 11). *See Lambert v. Ackerley*, 180 F.3d 997, 1001, 1005 (9th Cir. 1999) (claim that employer has failed to pay adequate overtime in violation of FLSA, communicated to employer, is protected activity under FLSA). However, that demand cannot reasonably be construed to assert that the overtime pay was being wrongfully withheld or that the plaintiff believed that the defendant was in violation of any law by virtue of not yet having paid the overtime. *See Valerio*, 173 F.3d at 45 (plaintiff’s letter constituted protected activity in part because it served to notify employer that plaintiff was asserting her statutory rights); *Cordero v. Turabo Med. Ctr.*

Partnership, 175 F.Supp.2d 124, 128 (D. P.R. 2001) (“the complaint must contain some sort of allegation of illegality in order to be protected under the [FLSA],” construing *Valerio*). The plaintiff has not provided any evidence in his responsive statement of material facts that would allow this court to conclude that he also informed the defendant that its failure immediately to pay him the overtime was wrongful or illegal.⁶ Accordingly, he has not established that a factfinder could conclude that he engaged in protected activity under the FLSA, and the defendant is entitled to summary judgment on Count II.

D. Workers’ Compensation Discrimination

Count IV of the complaint alleges that the defendant discriminated against the plaintiff because of his claim for and receipt of workers’ compensation benefits by refusing to pay or delaying the payment of overtime, denying the plaintiff a raise and discharging him. Complaint ¶¶ 29-32. This claim is asserted under Massachusetts law, specifically section 75B of chapter 152 of the Massachusetts General Laws, which provides, in relevant part:

No employer or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by this chapter, or who has testified or in any manner cooperated with an inquiry or proceeding pursuant to this chapter

⁶The plaintiff admits that the June 28, 2001 fax was the only request for payment of overtime that he made in June. Defendant’s SMF ¶ 37; Plaintiff’s Responsive SMF ¶ 37. He also admits that any money owed to him in excess of his regular 40-hour salary as reflected on LDRs could not be paid until the LDRs were submitted and processed, which typically took two or more weeks. *Id.* ¶ 27. The plaintiff’s memorandum of law cites Exhibit B to his statement of material facts in support of his assertion that his demand for payment of overtime was protected activity, Opposition at 3, and that document, a memorandum or e-mail from “Tony” (presumably Santangelo) to Fields, does report that the plaintiff on June 28, 2001 during a telephone conversation “threaten[ed] me with going to the labor board,” Exh. B to Plaintiff’s Responsive SMF. However, that information is not included in the plaintiff’s statement of material facts; indeed, the exhibit is not even cited in the plaintiff’s response to paragraph 37 of the defendant’s statement of material facts, which is the only paragraph cited in the plaintiff’s memorandum of law. Opposition at 3. Were this evidence properly before the court in the summary judgment record, the favorable interpretation accorded to the party opposing summary judgment might require the court to consider whether an oral complaint to the employer might suffice to establish protected activity under the FLSA. However, the evidence has not been presented in a manner that would allow the court to consider it in connection with the motion for summary judgment and therefore no further exploration of the issue is required.

Mass. Gen. Laws ch. 152 § 75B (2002). The defendant contends, Motion at 10-11, that the plaintiff cannot establish causation, *i.e.*, that his workers' compensation leave or claim was a motivating factor for any of the three alleged adverse actions by the defendant, a necessary element of this statutory claim, *Downs v. Massachusetts Bay Transp. Auth.*, 13 F.Supp.2d 130,142 (D. Mass. 1998).

In response, the plaintiff relies on two assertions: (i) that “[a]ll [of his] problems with PMI arose after his work-related injury” and (2) that “at least one of PMI’s articulated reasons for [his] termination . . . is suspect.” Opposition at 5. Under Massachusetts law, the mere fact that an adverse employment action is close in time to a worker’s compensation claim is insufficient to sustain a claim under section 75B against a motion for summary judgment. *Diaz v. Henry Lee Willis Cmty. Ctr., Inc.*, 9 Mass.L.Rptr. 169, 1998 WL 1181731 (Mass. Super. Oct. 14, 1998), at *3; *Goncalves v. Stop & Shop Supermarket Co.*, 2001 WL 1839718 (Mass. Super. Dec. 28, 2001), at *5. The assertion that one of the reasons given by the defendant for the termination is “suspect,” which does not address the claims that the denial of a raise and the denial or delay of payment for overtime violated this statute, does not save the claim with respect to the termination. Even if all of the reasons for the termination given by the defendant for the termination of the plaintiff’s employment were in fact false, that fact does not provide support for a conclusion that the termination was actually motivated by the plaintiff’s workers’ compensation claim or status. Under the circumstances, such a conclusion would be nothing more than speculation, which is not a sufficient basis for denial of a motion for summary judgment. *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 33 (1st Cir. 2001) (even in employment discrimination cases, summary judgment compelled where non-moving party rests upon unsupported speculation).

The defendant is entitled to summary judgment on Count IV.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of October, 2002.

David M. Cohen
United States Magistrate Judge

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