

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

<i>NANANDA COL, M.D.,</i>)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>No. 2:11-cv-249-JHR</i>
)	
<i>MAINE MEDICAL CENTER,</i>)	
)	
<i>Defendant</i>)	

MEMORANDUM DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT

In this action arising out of the termination of the plaintiff’s employment, the defendant seeks summary judgment on Counts V (Breach of Contract), VI (Defamation), and VIII (Punitive Damages) of the plaintiff’s complaint. Defendant Maine Medical Center’s Motion for Partial Summary Judgment (“Motion”) (ECF No. 25). I grant the motion in part.¹

I. Applicable Legal Standard

A. Fed. R. Civ. P. 56

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.” *Rodríguez-Rivera v. Federico Trilla Reg’l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). “A fact is material if it has the potential of determining the outcome of the litigation.” *Id.* (quoting

¹ The parties have agreed to have me conduct all further proceedings in this matter, including entry of final judgment. ECF No. 14.

Maymi v. P.R. Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008)).

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. *Santoni*, 369 F.3d at 598. 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(c). "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).

B. Local Rule 56

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the local rules of this district. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive "separate, short, and concise" statement of material facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also

submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(f). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id.*; *see also, e.g., Sánchez-Figueroa v. Banco Popular de P.R.*, 527 F.3d 209, 213-14 (1st Cir. 2008); Fed. R. Civ. P. 56(e)(2) ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]").

II. Factual Background

The parties have submitted a joint statement of undisputed facts, and each party has also submitted its own additional statement of facts. The following facts are taken from those documents, as indicated.

On July 12, 2007, the defendant sent a letter to the plaintiff offering her a position as Senior Scientist and Director of the Center for Outcomes Research and Evaluation ("CORE") at Maine Medical Center Research Institute. Joint Statement of Undisputed Fact ("JSMF") (ECF

No. 26)² ¶ 1. The plaintiff signed the offer letter on July 18, 2007, accepting the position as Senior Scientist and Director of CORE. *Id.* ¶ 2. Pursuant to the terms of the offer letter, the plaintiff was appointed to the medical staff of the defendant. *Id.* ¶ 3. The offer letter did not specifically mention or refer to any grants from the National Cancer Institute. *Id.* ¶ 4.

When the prior director of CORE stepped down, the defendant was looking for someone who was a leader in the field, with a national reputation, who had funding, and could provide mentoring. Plaintiff's Statement of Additional Material Facts ("Plaintiff's SMF") (included in Plaintiff's Opposing Statement of Facts ("Plaintiff's Responsive SMF") (ECF No. 33), beginning at [6]) ¶ 25; Defendant's Reply to Plaintiff's Statement of Additional Material Facts ("Defendant's Responsive SMF") (ECF No. 39) ¶ 25. After checking reference and talking to people, the defendant understood that the plaintiff had a national reputation and was well thought of in her field. *Id.* ¶ 28. The defendant expected that at least 50% of the plaintiff's salary would be funded through grants. *Id.* ¶ 32.

Before coming to the defendant, the plaintiff was named as the principal investigator on a grant from the Department of Health and Human Services entitled "Incorporating Temporary Health States Into Decision Support" (the "WISDOM Grant"). JSMF ¶ 5. When the plaintiff joined the defendant, the WISDOM Grant was transferred to the defendant. *Id.* ¶ 6. On or about April 13, 2010, the defendant was awarded a National Cancer Institute Community Cancer Center Program ("NCCCP") grant pursuant to the terms of a subcontract between SAIC Frederick and the defendant. *Id.* ¶ 7. The only parties to this subcontract are Science Applications International Corporation of Frederick, Maryland ("SAIC-Frederick, Inc."), a subsidiary of Science Applications International Corporation, and the defendant. Defendant's

² There are two documents on the docket that bear this ECF number; they appear to be identical, although the second filing adds Exhibit 17. *Compare* ECF No. 26 *with* ECF No. 36.

Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment (“Defendant’s SMF”) (ECF No. 27) ¶ 1; Plaintiff’s Responsive SMF ¶ 1.

When the plaintiff was hired by the defendant, Kenneth Ault was the Director of the Maine Medical Center Research Institute (MMCRI”), which includes CORE as a division. JSMF ¶ 8. Donald St. Germain took over as Director of MMCRI after Dr. Ault’s retirement in or about January 2009. *Id.* ¶ 9. The Director of MMCRI was the plaintiff’s supervisor while she was employed as Director of CORE and a Senior Scientist. *Id.* ¶ 10.

On May 6, 2010, Dr. St. Germain called a meeting with the plaintiff to discuss concerns about Dr. Col’s leadership of CORE and interactions with personnel there. *Id.* ¶ 11. During the meeting, Dr. St. Germain recited a poem about a little girl with a curl who, when she was good, was very good, and when she was bad, she was horrid. *Id.* ¶ 12. On or about May 13, 2010, the plaintiff reported the meeting to Peter Bates, M.D., Chief Medical Officer at the defendant. *Id.* ¶ 13. Dr. St. Germain described to Dr. Bates his use of the poem as a process of trying to acquaint the plaintiff with what Dr. St. Germain thought was unpredictable behavior by the plaintiff. *Id.* ¶ 14. Dr. St. Germain was never disciplined for making this comment to the plaintiff. Plaintiff’s SMF ¶ 50; Defendant’s Responsive SMF ¶ 50.

Dr. Bates had also heard from others that Dr. St. Germain and the plaintiff were not interacting well. JSMF ¶ 15. Dr. Bates decided to hire an outside consultant, Karen Moran, to assist with the conflict between the plaintiff and Dr. St. Germain. *Id.* ¶ 16. Moran had done similar work for the defendant in the past. *Id.* ¶ 17. In some instances, the defendant performs “360 reviews” on employees, to give them a well-rounded-perspective look at their performance. *Id.* ¶¶ 18-19.

At a meeting on May 20, 2010, Dr. Bates discussed with the plaintiff his concerns about

her working relationship with Dr. St. Germain, her effectiveness as the administrative director of CORE, and her behavior as described by other CORE employees. *Id.* ¶ 20. At this meeting, or shortly thereafter, Dr. Bates told the plaintiff that he would be employing Moran to evaluate some of the underlying issues involving the plaintiff's relationship with Dr. St. Germain. *Id.* ¶ 21. The plaintiff agreed that she would be willing to participate. *Id.* Moran interviewed the plaintiff, Dr. St. Germain, and some individuals whom they identified. *Id.* ¶ 22.

Sometime after the May 20, 2010, meeting, the plaintiff reported to Susan Pelletier, then the associate vice president of the human resources department, that Dr. St. Germain had recited a poem that the plaintiff felt was inappropriate, and that another employee, Carol Ewan Shyte, was being discriminated against based on her race and gender. *Id.* ¶ 23. Prior to Dr. St. Germain's recitation of the poem, the plaintiff had not reported to human resources or management at the defendant that she had any concerns that Dr. St. Germain was racist or sexist. *Id.* ¶ 24. Dr. St. Germain believed that the plaintiff's complaints about discrimination were destructive to the organization. Plaintiff's SMF ¶ 51; Defendant's Responsive SMF ¶ 51. In May 2010, Dr. St. Germain pointed out to the plaintiff that her start-up package was due to expire. *Id.* ¶ 56.

Following Moran's interviews, Dr. Bates decided that the plaintiff would be removed as director of CORE. JSMF ¶ 25. On July 12, 2010, he told the plaintiff of his decision and said that he would like her to stay on as a senior scientist. *Id.* ¶ 26. The plaintiff signed an offer letter effecting the position change on August 3, 2010. *Id.* ¶ 27. As late as July 21, 2010, the plaintiff was communicating with the University of New England about potential employment there. *Id.* ¶ 28.

After the plaintiff's change in position at CORE, the defendant's finance department

raised concerns with Dr. Bates about payments to two external consultants, Dr. Griffin Weber and Dr. Valerie Reyna, that the plaintiff had requested from her start-up funds. *Id.* ¶¶ 29-30. The payments totaled \$125,125. *Id.* ¶ 30. Start-up funds are given to research scientists when they join MMCRI to assist them in setting up their operations. *Id.* ¶ 31.

Dr. Reyna is a professor at Cornell University who has a Ph.D. in psychology. *Id.* ¶ 33. Her research focuses on medical decision-making. *Id.* In May, 2010, Dr. Reyna gave a lecture at the defendant on risky decision-making, for which she was paid a \$1,000 honorarium plus expenses. *Id.* ¶¶ 34-35. This was the only payment to Dr. Reyna by the defendant during the plaintiff's tenure until a July 2010 payment of \$70,125, authorized by the defendant. *Id.* ¶ 35.

The plaintiff initiated the idea of paying Dr. Reyna. *Id.* ¶ 37. On July 14, 2010, she sent an email to Dr. Reyna setting out the terms of a research project. *Id.* ¶ 36. On July 15, 2010, in an email to Dr. Reyna, the plaintiff suggested that the amount of Dr. Reyna's invoice should be between \$65,000 and \$70,000, and that it should be submitted that day. *Id.* ¶ 38. Also on July 15, 2010, the plaintiff provided Dr. Reyna with Dr. Weber's invoice as a form to use, and Dr. Reyna drafted an invoice following that format for the amount the plaintiff proposed. *Id.* ¶ 39. After receiving the invoice, the plaintiff told Dr. Reyna that the amount should be increased, which Dr. Reyna authorized. *Id.* ¶ 40. Dr. Reyna's invoice closely followed the terms of the research project set out by the plaintiff. *Id.* ¶ 41.

Dr. Reyna received a check from the defendant in the amount of \$70, 125. *Id.* ¶ 42. On August 27, 2010, the plaintiff sent an email to Dr. Reyna, advising her that the defendant needed her to resubmit her invoice, "separating out how much was already done vs how much remain[s] to be done." *Id.* ¶ 44. Dr. Reyna decided to return the entire amount of the payment that she had received from the defendant. *Id.* ¶ 45. She had planned to send the money directly to the

defendant, but the plaintiff's attorney advised her that he would send it to the defendant. *Id.* ¶ 46.

On September 12, 2010, Dr. Reyna sent a letter to the attorney, enclosing a check for \$70,000, stating, in part, that the bulk of the work on the project remained to be performed and that she preferred "to simply wash my hands of this matter." *Id.* ¶ 47. On September 15, 2010, the attorney wrote to the defendant's general counsel, enclosing the check from Dr. Reyna and the letter that she had sent to him. *Id.* ¶ 48.

Dr. Griffin Weber has M.D. and Ph.D. degrees awarded by Harvard Medical School and MIT. *Id.* ¶ 49. In July 2010, the plaintiff asked Dr. Weber to submit an invoice quickly. *Id.* ¶ 50. On July 15, 2010, the plaintiff sent Dr. Weber an email in which she asked to talk with him. *Id.* ¶ 51. Dr. Weber responded by sending an invoice to the plaintiff's personal email address, asking her to let him know "if it's ok." *Id.* ¶ 52. The plaintiff asked Dr. Weber to increase the amount of the invoice to \$55,000. *Id.* ¶ 53. She also asked him to remove the word "ongoing" from the invoice. *Id.* ¶ 54. She also advised Dr. Weber to "Add in rate (not too high) and total so I can fiddle with bottom line across other invoices." *Id.* ¶ 55.

Dr. Weber guessed at the amount of hours to include in the invoice. *Id.* ¶ 56. The plaintiff decided to pay \$55,000 to Dr. Weber based on her desire to spend down the funds she believed to be left in her start-up package before it expired, although she did not know how much she owed Dr. Weber at that time. *Id.* ¶¶ 57-58. The plaintiff did not know how much time Dr. Weber spent on projects and did not ask him to keep track of his time so that she could determine whether his bills were appropriate. *Id.* ¶ 59. Dr. Weber received a check in the amount of \$55,000 from the defendant on or about July 22, 2010. *Id.* ¶ 61.

Prior to that payment, the only consulting fee Dr. Weber ever received from the

defendant under the direction of the plaintiff was \$15,000 in June 2008. *Id.* ¶ 62. Dr. Weber had last submitted an invoice to the defendant on July 29, 2008. *Id.* ¶ 63. According to Dr. Weber, all of the 440 hours listed on his July 15, 2010, invoice were performed prior to July 15, 2010. *Id.* ¶ 64. The July 15, 2010, invoice did not differentiate between work done and work to be done, and did not specify when the work started or ended, as requested by Dr. Bates. *Id.* ¶ 65.

On August 17, 2010, Dr. Weber received a telephone call from Dr. St. Germain, who left his name and telephone number and advised that he wanted to discuss a collaborative arrangement that Dr. Weber had with a Maine Medical Center scientist. *Id.* ¶ 66. Dr. Weber emailed the plaintiff to advise her of this voicemail; the plaintiff advised Dr. Weber not to return the call, and Dr. Weber took that advice. *Id.* ¶¶ 67-68.

On August 18, 2010, Stephanie Stevens of the defendant's finance department emailed the plaintiff, with a copy to Dr. Bates, informing her that she did not have \$125,125 in uncommitted funds in her start-up package at the end of July 2010, when those payments were made to Dr. Weber and Dr. Reyna. *Id.* ¶ 69. Stevens informed the plaintiff that there was only \$31,268 in uncommitted funds in the plaintiff's start-up package at the end of June 2010. *Id.* ¶ 70. Dr. Bates told the plaintiff that there was a lack of documentation as to what the understanding was with the contractor and thus he could not justify the payments because he could see no evidence that the work was actually done. *Id.* ¶ 71. It was part of the plaintiff's responsibility to make sure that the account from which the funds were spent had a balance sufficient to cover the expenses. *Id.* ¶ 72.

On August 18, 2010, the plaintiff sent an email to Dr. Bates describing the work done by Dr. Weber, but it did not indicate specific dates worked or the number of hours worked on the specified tasks, and it referred to completed tasks that were not related to the projects for which

Dr. Weber was supposedly consulting. *Id.* ¶ 74. On or about August 24, 2010, the plaintiff asked Dr. Weber to provide additional details in the invoice and to contact her attorney. *Id.* ¶ 75.

After speaking with the plaintiff's attorney, Dr. Weber prepared another invoice. *Id.* ¶ 76. The plaintiff never received from Dr. Weber a detailed invoice describing what he had done on what dates and at what expense. *Id.* ¶ 77. The plaintiff failed to provide documentation justifying the \$55,000 payment to Dr. Weber by stating when his work started and ended, what his work was, and the tasks that he accomplished in order to complete the work. *Id.* ¶ 78.

By letter dated November 11, 2010, the plaintiff was notified that her paid leave was ended as of November 5, 2010, and that she was terminated from employment by the defendant as of November 11, 2010. *Id.* ¶ 79.

The plaintiff is aware of one instance when she had to explain the circumstances of her termination to a prospective employer, the VA Hospital in Togus. *Id.* ¶ 81.

III. Discussion

A. Count V – Breach of Contract

Count V of the plaintiff's complaint alleges that the defendant breached an employment contract with the plaintiff. Complaint (ECF No. 1) ¶ 87. At the pre-filing conference required by this court's Local Rule 56(h), counsel narrowed some of the legal issues by agreement. "Count V, as narrowed, presents the legal issue of whether the NCCCCP grant, with a set term of 24 months, effectively made the plaintiff an employee who could only be terminated for cause." Report of Pre-Filing Conference Under Local Rule 56(h) (ECF No. 24) at 1-2.

The defendant argues that the plaintiff was not a third party beneficiary of the NCCCCP grant, Motion at 11-14, to which the parties agree the plaintiff was not herself a party. Defendant's SMF ¶ 1; Plaintiff's Responsive SMF ¶ 1. The plaintiff does not respond directly to

this argument, stating the summary judgment issue as “whether a reasonable jury could conclude that when Dr. Col was hired, and/or when her position was redefined at her demotion, the parties agreed to ‘expressly restrict the employer’s common law right to discharge at will.’” Plaintiff’s Opposition to Defendant’s Motion for Partial Summary Judgment (“Opposition”) (ECF No. 32) at 9 (citation omitted). The problem with this formulation, as the defendant points out, Defendant’s Reply in Support of Motion for Summary Judgment (“Reply”) (ECF No. 38) at 1-2, is that it is inconsistent with the agreement reached at the pre-filing conference. Indeed, it does not mention the NCCCP grant at all.

The plaintiff does eventually discuss, briefly, a contract claim based on the NCCCP grant, Opposition at 10-11, and my review of Count V will be limited to that discussion. *See generally Osher v. University of Maine Sys.*, 703 F.Supp.2d 51, 54 n.1 (D. Me. 2010). She asserts that the terms of the NCCCP grant were incorporated into the employment agreement between her and the defendant because the document she identifies as “the Demotion Letter” specifically refers to that grant. Opposition at 10.³

The only mention of the NCCCP Grant in the “Demotion Letter” is the following:

Your professional responsibilities and time allocation initially, though subject to periodic review and change, are as follows:

NCS Contract (role: co-PI)	35%
NCCCP Contract (role: co-PI)	15%
PATHS Grant (role: PI)	10%
Miscellaneous	40%

Letter dated July 28, 2010 from Peter Bates, MD to Nanada Col, MD (ECF No. 26-14) at [1].

This single reference expressly incorporates none of the terms of the NCCCP Contract and does not constitute incorporation of the NCCCP Contract into the plaintiff’s employment contract

³ The plaintiff says the same of “the NCS Contract” and “the PATHS grant,” Opposition at 10 (acronyms undefined), but those documents are beyond the scope of the stipulated claim asserted by Count V, as set forth in the report of the pre-filing conference.

with the defendant. *See, generally Northrop Grumman Info. Techs., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008); *see also Piampiano v. Central Maine Power Co.*, 221 F.Supp.2d 6, 9 (D. Me. 2002) (mere reference to a document in complaint does not render document incorporated by reference); *Fudge v. Penthouse Intern., Ltd.*, 840 F.2d 1012, 1015 (1st Cir. 1988) (limited quotation does not constitute incorporation by reference).

Even if the NCCCP Contract had been incorporated into the agreement set forth in the “Demotion Letter,” its term did not and could not transform the employment agreement into one with a definite termination date, thereby limiting termination before that date to termination for cause under Maine law, as the plaintiff contends. As the sole case cited by the plaintiff as authority for this position makes clear, “[t]he duration of an employment contract is definite if it is for a fixed period of time capable of measurement.” *Burnell v. Town of Kingfield*, 686 A.2d 1072, 1074 (Me. 1996). Here, the defendant clearly intended to employ the plaintiff beyond the stated terms of any of the contracts or grants to which the letter refers.⁴

The plaintiff contends that the terms of the NCCCP grant or contract, which she also refers to as “the Subcontract,” limit the defendant’s ability to terminate her, “the designated P[rincipal] I[nvestigator].” Opposition at 10. That may well be, but such a term does not prevent the defendant from terminating its own employee, if that employee happens to be the designated principal investigator on the research project funded by the grant or contract. Rather, removal of a principal investigator without the approval of the contracting funding source would result in loss of the remaining grant or contract. Few, if any, responsible research institutions would agree to give their funding sources control over their decisions to hire or fire their own employees, particularly when those sources provide less than full funding for the position

⁴ In addition, the plaintiff does not contend that each of the three referenced contracts or grants had the same expiration date, which would be necessary in order for her argument to succeed. A single employment contract for a single employee cannot have multiple termination dates.

occupied by the employee in question. *See generally Taliento v. Portland West Neighborhood Planning Council*, 705 A.2d 696, 698-99, 700 (Me. 1997).

The motion for summary judgment on Count V is granted.

B. Count VI – Defamation

Count VI of the complaint alleges that the defendant “has published and forced Dr. Col to publish false and defamatory statements defaming her occupational and professional performance, including statements concerning her leadership qualities at CORE and statements that she engaged in financial irregularities.” Complaint ¶ 90. This claim has been narrowed, by agreement at the pre-filing conference, to “whether the plaintiff suffered forced publication in connection with employment applications.” Report of Pre-Filing Conference at 2.

The parties agree that the Maine Law Court has not yet recognized a cause of action based on self-publication of allegedly defamatory statements. Motion at 15; Opposition at 12. However, this court has held that it is likely that the Law Court will recognize the tort when presented with a case in which it is necessary to address the issue. *Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 10-13 (D. Me. 1995); *Smith v. Heritage Salmon, Inc.*, 180 F.Supp.2d 208, 222 (D. Me. 2002). Those cases govern here.

The defendant argues that its allegedly defamatory statements are protected from liability under this theory by a conditional privilege. Motion at 15-17. Specifically, it contends that, under Maine law, statements made by an employer about the reasons for an employee’s termination are conditionally privileged. *Id.* at 16-17. That is correct. *Cole v. Chandler*, 2000 ME 104, ¶¶ 5-6, 752 A.2d 1189, 1193-94. The privilege applies unless the originator of the statement abused it. *Id.* ¶ 7, 1194. When a defendant is entitled to the privilege, as it appears to be here, the burden shifts to the plaintiff to come forward with evidence of abuse. *Id.*

Abuse includes making the statement outside normal channels or with malicious intent. For purposes of defamation claims, malice means when the originator of the statement knows his statement to be false, recklessly disregards its truth or falsity, or acts with spite or ill will. Reckless disregard for the truth can be proved by evidence that establishes that the maker of a statement had a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.

Id. (citations and internal punctuation omitted).

Here, the allegedly defamatory statements were made by the defendant to the plaintiff in a letter terminating the plaintiff's employment. The defendant contends that this was within "normal channels" of employment practices, Motion at 17, and the plaintiff does not offer any evidence or argument to the contrary. Opposition at 15-19. Accordingly, I will not consider this alternative further.

As to the other alternative, the defendant asserts that "there is no evidence that MMC made statements related to Dr. Col's termination with knowledge that the statements were false, with reckless disregard of the truth, or solely out of ill will." Motion at 17. The plaintiff responds that certain facts "demonstrate MMC's bad faith." Opposition at 17. These include the following:

1. Dr. Bates and Dr. St. Germain "have conceded that Dr. St. Germain's bias against Dr. Col made it inappropriate for Dr. St. Germain to be involved in matters relating to Dr. Col's performance, [yet] it was Dr. St. Germain who spearheaded the investigation into alleged financial misconduct[.]"
2. Although Dr. St. Germain "essentially encouraged" the plaintiff to "spend down" her start-up package, "there is no evidence that he ever disclosed that he was the person who got the ball rolling during the investigation."
3. "No one had ever been required to provide the level of documentation Dr. Col was

required to provide,” the defendant’s human resources department was not involved in questions about expenditures except in the plaintiff’s case, and no one else had ever been terminated for failure to provide documentation.

4. The plaintiff was terminated for paying consultants without a contract or work agreement, but the defendant does not require a contract or work agreement, and for paying for services neither authorized nor fully performed, but the defendant does not require authorization for payment from start-up packages nor does it prohibit paying for future services.

5. The defendant “either concealed or turned a blind eye to obvious and incontrovertible evidence that payments to the two consultants were appropriate.”

6. Before making the payments at issue, the plaintiff was told by the defendant’s financial department that she had sufficient funds.

7. Dr. St. Germain “began planning for Dr. Col’s departure from MMC within days of her demotion.”⁵

8. “After Dr. St. Germain illegally advocated for Dr. Col’s dismissal for engaging in protected conduct, MMC’s legal department was heavily involved meetings at which her dismissal was discussed, thereby shielding the discussions from discovery and creating an adverse inference about the nature of those discussions.”

9. Unspecified “MMC witnesses” have provided conflicting testimony on certain issues, “such that a reasonable jury could question their motivation in this case.”

Opposition at 17-19.

Unfortunately, many of the citations given by the plaintiff to support these alleged facts

⁵ The plaintiff provides no citation to record evidence to support this alleged “fact,” Opposition at 18, and, therefore, I will not consider it.

do not in fact support them. In the first paragraph, the citations given do not support the assertion that Dr. Bates conceded anything, nor that Dr. St. Germain “spearheaded the investigation into financial misconduct.” The citation given in the second paragraph does not support the assertion that Dr. St. German “essentially encouraged Dr. Col to spend down her start-up package,” and, more important, it is the plaintiff’s burden in opposition to a motion for summary judgment to provide evidence to demonstrate the existence of one or more disputed issues of material fact. She may not rely on the absence of evidence to support the opposite of her theory of recovery. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

In the third paragraph, the cited paragraphs of the plaintiff’s statement of material facts do not support any of the factual assertions. In the fourth paragraph, the assertion that “the Hospital does not require a contract or work agreement” is not supported by the citation given. None of the citation given in the fifth paragraph supports the factual assertions made in that paragraph.

The citations given in support of the sixth paragraph do not support the clause reading “and even as late as when her deposition was taken, Ms. Stevens believes there was over \$190,000 left in the account.” In the eighth paragraph, the citation given does not support the assertion that Dr. St. Germain “illegally advocated for Dr. Col’s dismissal for engaging in protected conduct,” that the defendant’s legal department was “heavily” involved in meetings “at which her dismissal was discussed.” In addition, the assertion that the alleged activity creates “an adverse inference about the nature of those discussions” is not a factual assertion but rather a legal conclusion for which no authority is cited.

Finally, the factual allegations in the ninth and final paragraph are not supported by any of the citations given.

What remains of the plaintiff's factual support for her argument that the evidence would allow a reasonable jury to find that the defendant "acted with sufficient malice to entitle[] Dr. Col to prevail on her claims for defamation and punitive damages," Opposition at 19, is the following: Dr. St. Germain conceded that it was inappropriate for him to be involved in matters relating to the plaintiff's performance, but he nonetheless was involved in the investigation of the plaintiff's alleged financial misconduct and led Dr. Bates to the question of whether the payments to the two consultants were appropriate; the plaintiff was terminated for paying for services neither authorized nor fully performed, despite the fact that the defendant does not require authorization for payments from start-up packages nor does it prohibit paying for future services; the plaintiff was told by the defendant's financial department before she made the expenditures at issue that sufficient funds remained in her start-up package account to cover those expenditures; and the defendant's legal department was involved in multiple meetings involving the plaintiff's alleged financial misconduct.

This evidence is sufficient, but barely, to raise one or more issues of disputed material fact on the question of whether the defendant acted with malice or out of bad faith when it terminated the plaintiff's employment. The defendant contends that, even so, it is entitled to the benefit of the conditional privilege because there is no dispute that Dr. Bates made the decision to terminate the plaintiff's employment and made the statements at issue in the letter terminating her employment, and none of the evidence proffered by the plaintiff on the question of malice addresses Dr. Bates's state of mind. Reply at 6.

This argument is based on too narrow a view of the legal standard. Dr. Bates is not the defendant; the hospital which employed him is. Further, Dr. Bates's state of mind obviously can only be inferred from whatever evidence is presented. The plaintiff has presented evidence,

albeit disputed by the defendant, that Dr. St. Germain “led” Dr. Bates to question the plaintiff’s arrangements to pay Dr. Reyna and Dr. Webber, Plaintiff’s SMF ¶ 69,⁶ although that is not the only possible interpretation of the portion of Dr. Bates’s deposition testimony cited by the plaintiff in support of this assertion. *See* Deposition of Peter W. Bates, M.D. (ECF No. 33-4) at 84. With the indulgent reading of the plaintiff’s supported factual statements required at this stage of the proceeding, that is enough to resist the entry of summary judgment on the basis of the question of malice or ill will. *See generally Kelleher v. Boise Cascade Corp.*, 683 F.Supp. 858, 859 (D. Me. 1988) (“Great circumspection is required where summary judgment is sought on an issue involving malice, since a defendant’s state of mind is difficult to prove.”)

The defendant’s final argument with respect to Count VI is that it is “statutorily immune from statements made to prospective employers about former employees[,]” citing 26 M.R.S.A. § 598. Motion at 19. That statute provides immunity for such statements “unless lack of good faith is shown by clear and convincing evidence,” which means “evidence that clearly shows the knowing disclosure, with malicious intent, of false or deliberately misleading information.” 26 M.R.S.A. § 598. The fact that this standard appears in a statute does not affect my analysis of the record evidence of malice or ill will.

C. Count VIII – Punitive Damages

The parties agree that the plaintiff’s claim for punitive damages rises and falls with her defamation claim. Motion at 19-20; Opposition at 19. Accordingly, denial of the motion for summary judgment on Count VI requires the same result as to this count.

IV. Conclusion

For the foregoing reasons, the defendant’s motion for summary judgment is **GRANTED**

⁶ The defendant’s request to strike this paragraph of the plaintiff’s statement of material facts, Defendant’s Responsive SMF ¶ 69, is denied.

as to Count V and otherwise **DENIED**.

Dated this 30th day of August, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

Plaintiff

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V.

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