American Arbitration Association

EMPLOYMENT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

NATALY MINKINA, M.D., Claimant

and

MEDICAL CARE OF BOSTON MANAGEMENT CORP.,[1]
d/b/a AFFILIATED PHYSICIANS GROUP and
JEFFREY LIEBMAN, Respondents

AAA Case No. 11 166 02219 07

OPINION AND INTERIM AWARD

The parties submitted this case to arbitration pursuant to their employment agreement dated June 4, 2002 and a demand for arbitration submitted by the Claimant under the Employment Rules of the American Arbitration Association. Hearings were held before Mark L. Irvings, who had been duly designated and sworn, on June 2 and 3, and September 15, 2008. William Van Lonkhuyzen, Esq. and Emma Quinn-Judge, Esq., appeared on behalf of the Claimant; and Tracey Spruce, Esq., and Susan Bozoth, Esq., appeared on behalf of the Respondents. Post-hearing briefs were submitted by the parties by December 5, 2008.

[1] The original arbitration demand included Harvard Medical Faculty Physicians at Beth Israel Deaconess Medical Center as a named respondent, but the parties stipulated to its dismissal during the course of the arbitration.

FACTUAL BACKGROUND

Initial Employment. Nataly Minkina was trained as a physician in the Soviet Union and practiced internal medicine there for ten years, until she immigrated to the United States in 1991. After completing licensing and training requirements, she got her permanent license in 2000 and worked in a number of different practices. Harvard Medical Faculty Physicians (HMFP) employs hundreds of physicians. Affiliated Physician's Group (APG), which is associated with Beth Israel Deaconess Medical Center (BIDMC), hires approximately 100 physicians employed by HMFP to staff a number of its locations around Boston. In April, 2002, Minkina responded to an advertisement for a primary care physician in the Brookline/Boston area placed by APG. In her letter to APG Medical Director Dr. David Ives, Minkina highlighted her clinical interests and noted that her fluency in Russian would be useful to a practice in the Brookline/Boston area.

Minkina was initially interviewed by Ives, and later by the physicians at APG's Chestnut Hill office. At the time, the office was staffed by one full-time male, and four female physicians who shared two full-time positions, including Susan Frankl, the medical director of the office. Minkina was ultimately offered a full-time position and on June 4, 2002 signed an employment agreement.

The agreement specified her duties and responsibilities relating to providing direct primary care services to patients of APG, and it required her to "[o]btain and maintain membership in good standing, with appropriate clinical privileges, on the medical staff of BIDMC, and to abide by all rules, guidelines and procedures promulgated by APG, HMFP, and BIDMC . . ." The term of the agreement was two years, with an automatic

one year renewal unless either party provided notice of intent not to renew six months prior to its expiration. The agreement could be terminated for cause with sixty days notice, or without cause by APG with six months notice to the physician. It could also be terminated "[u]pon suspension, termination or non-renewal of Physician's BIDMC appointment . . . or termination of Physician's Harvard Medical School faculty appointment."

The agreement did not specify an office location to which Minkina would be assigned. It did provide an annual starting salary of $120,000 per year, which was guaranteed for the first three years of employment. During the first year, Minkina would earn that amount, but from the second year on she would be eligible to earn in excess of that guarantee under a detailed Performance Based Compensation Plan, which allocated certain costs between the individual physicians and the central office, and reflected revenues produced. APM contributed 12% of Minkina's salary to a 401(K) retirement plan, and she was allocated up to $3000 to spend on approved continuing medical education or conference expenses. In additional to her base monthly salary of $10,000, $168 a month was imputed to her compensation to cover the cost of short and long term disability benefits and life insurance, and that amount was also deducted from her check. Although the $168 was never available to Minkina, she paid income taxes on that amount.

Emergence of Air Quality Issues. Minkina began practicing in Chestnut Hill in September, 2002. Respondents have stipulated that throughout her employment Minkina "performed her duties to APG's satisfaction." During her time at the Chestnut Hill office, Minkina's patient load was largely comprised of the overflow from the panels of

the other physicians in the office; and urgent care, meaning patients who do not have pre-scheduled appointments but must be seen immediately by whoever is available. She also taught as part of the Harvard Medical School primary care course, which was directed by Frankl. A student was assigned to her one afternoon session a week, and Minkina received a $650 stipend for her involvement in the program.

Within a month of her arrival, Minkina noticed intermittent exhaust fumes in her office, examination rooms, and other parts of the office suite. By February, 2003, she found the fumes had become more frequent and stronger, and that there were problems with the airflow in her office. She also observed there were frequent problems with the HVAC systems, with wide fluctuations in temperature. As the exhaust fumes became more prevalent, Minkina began to experience nausea, excruciating and debilitating headaches, dizziness, chest discomfort, and eye and throat irritation. From March through May, Minkina spoke to Linda Martin, the practice manager in Chestnut Hill, about her concerns about the air quality and the physical discomfort.

Beginning in June, 2003, Minkina began to communicate regarding the air issues directly with Jeffrey Liebman, the president and chief executive officer of APG. Liebman, who had years of experience turning around financially ailing hospitals and large medical group, had been hired by APG in February, 2003 to address the fact that the organization had been losing large amounts of money for years. Minkina also communicated with Mel Barkan, the landlord of the building. Barkan arranged for David Gordon, a certified industrial hygienist, to perform an air quality assessment of Suite 204, APG's offices, on June 6. In a June 16 report, he found that all monitored gas concentrations were well within allowable limits, as were airborne particle counts. The

HVAC system was functioning properly, with the exception of the air grill in the rest room near Minkina's office, which had positive pressure. This meant it was blowing air and possibly particles out from the plenum space above the ceiling, whereas it should have had negative pressure. He recommended an exhaust fan be installed in the rest room with exterior venting. A copy of the report was sent to Liebman on June 26.

Minkina and her husband, Leonid Winestein, who has a degree in mechanical engineering, met on July 2 with Liebman, Martin, and an Human Resources representative. Minkina related to Liebman the physical symptoms she was experiencing, which substantially worsened over the course of her work day. The participants discussed what additional testing might be employed to find the source of the problem. Liebman proposed that Minkina move to an office at the other end of Suite 204 to see if that would alleviate her symptoms. Minkina accepted the suggestion and she moved to the other space around July 14. She initially felt the air quality was better there, but within a week she began to notice ventilation problems and odors in that office and adjacent examination rooms. The distressing symptoms she had suffered earlier returned, and technicians were sent by Barkan to investigate and remedy air quality and HVAC problems, but to no avail. During this time, Minkina underwent numerous medical tests, but her doctors were unable to identify any specific cause for her physical symptoms.

On or about August 11, Barkan's HVAC contractor performed the annual cleaning of the building's boiler. As a result, significant fumes were seen and felt throughout the building. According to the contractor, this was caused by particles loosened during the cleaning process being expelled from the system's exhaust when the

boiler was restarted. Because the building's fresh air intake vents are located near the exhaust stack, the particulate-laden air was drawn back into the building's air distribution system. To Minkina, the smell was similar to, but much stronger than, the noxious fumes she had been detecting for some time. The building felt to her like a gas chamber and it was making her, and co-workers who complained to her, very nauseous.

On August 14, the same people who had met on July 2 reconvened. Winestein expressed his belief that pressure had to be put on Barkan to invest the money necessary to correct the air quality problem. Both Winestein and Minkina stressed that this was a matter of health and comfort for not only Minkina, but also for the co-workers in the practice, the patients, and members of the general public who came into the building. Minkina remembered Liebman saying that he had already spoken with Barkan, who had spent $20,000 on inspections and repairs, and he did not want to apply more pressure and create complications over a new lease. Winestein countered that if Liebman did not want to take the necessary steps, he would contact the Occupational Health and Safety Administration (OSHA) and the Environmental Protection Agency, and they would act. Liebman asked Winestein not to file complaints with those agencies, since it would generate bad publicity for the office and scare away patients. Liebman pledged to hire his own contractor to investigate further, and Winestein offered to help Liebman find a qualified person.

Proposals to Move from Chestnut Hill. At that meeting Liebman raised the issue of Minkina moving to some other, as yet unidentified, location, since this building was making her sick. While neither Minkina nor Liebman could recall details surrounding the discussion of the idea at the meeting, Winestein testified his wife

objected to the idea because she did not want to lose patients in the transition to a new location, and because she was concerned that the air quality problem had to be corrected for the sake of everyone. Winestein recollected that he raised the question of how they would know the new location would not also have air quality problems. Liebman supposedly assured them he would choose a place with no problems. Winestein also testified Liebman said Minkina could go there on a part-time basis while he hired contractors to correct the situation in Chestnut Hill, and that if she did not like it at the new location she could return to Chestnut Hill.

On August 17, Minkina sent Liebman a lengthy email in which she thanked him for his prompt involvement after the cleaning-induced air quality incident. She stated she was already feeling better, and was comforted by Barkan's memorandum to building occupants explaining what had occurred, and the omnipresence of the HVAC contractors in recent days. Minkina expressed optimism that the air quality situation would be resolved, and she therefore declined to accept Liebman's suggestion of a transition to a different office. Minkina recounted the many advantages of the Chestnut Hill location for her patients, such as the proximity to their residences, and the availability of specialists, radiology facilities, and labs in the building. She stated it would cause her embarrassment and humiliation to explain to her patients why she was relocating.

Martin had been making comments to Minkina that she was using the air quality issue as an excuse for not building her practice. This upset Minkina and she had requested a meeting with Frankl, but was then surprised when Frankl supported Martin's perspective. As a result, Minkina sought a meeting with Liebman to review her current numbers relating to patient visits, billing, and her potential for growth. This meeting was

held on August 19. At this meeting Liebman proposed that Minkina consider moving to an APG office located at 33 Pond Avenue, Brookline, which was just a few miles from the Chestnut Hill office towards Boston. Recollections as to the precise discussion surrounding the proposal do not coincide. Minkina testified that Liebman told her one of the physicians there, Joseph Pines, was leaving APG to join MD/VIP, a concierge practice which would require him to jettison a significant number of his patients. Liebman said this created a good business opportunity for Minkina to pick up those patients, as well as get her away from the building that was making her sick. According to Minkina, Liebman said she should try spending a few days a week there while he worked on improving the air quality in Chestnut Hill. If things worked out well at Pond Avenue, Liebman would support her relocation there. If they did not, she could return to Chestnut Hill full-time.

Liebman's perception of the proposal was different. He testified that his primary concern was Minkina's health, but he also suggested a move to Pond Avenue because it provided Minkina a chance to build her practice. Pond Avenue was not what he considered to be an underperforming practice, but in the spring of 2003 one of the established doctors had left, Pines had announced his intention to leave APG, and Dr. Stuart Bless was there part-time, spending the balance of the week at Beth Israel seeing hematology patients. Liebman had made a decision in the spring to reinvigorate the practice, since APG owned the office suite and wanted to spread the overhead over a number of doctors. A female physician named Weihong Zheng had been hired on August 15, 2003 to pick up the overflow from Bless and Pines and to build her own practice, particularly with Chinese patients. Liebman testified that he believed Minkina

would be well-positioned to gain the patients whom Pines would be terminating, and to marketing herself to the substantial Russian population in Boston, Brookline, and Newton. Liebman asserted it was his intention that Minkina transition from Chestnut Hill to Pond Avenue as quickly as possible, so as to get her out of the building where she experienced such adverse symptoms, and he never said she should try it on a temporary basis, or that she could return to Chestnut Hill after a trial period.

Minkina left the meeting on the 19th promising to think about the proposal. On August 24 she emailed Liebman, stating the idea had become attractive to her. She suggested a gradual transition to Pond Avenue so she would not lose patients, spending three days in Chestnut Hill and two in Brookline. Minkina opined that patients who would see her in Chestnut Hill should be willing to make the short drive to Pond Avenue, and she noted that her presence there should help APG retain the large numbers of patients Pines was going to have to release. Minkina thanked Liebman for his concerns about her health and complimented his "inventive business strategy."

Liebman responded the next day, expressing his pleasure that the plan made sense to her. He suggested that they meet during the following two weeks to discuss the plans for developing her practice in Brookline. Minkina sent another email on September 4 in which she referenced the plans for her transition, including a Tuesday and Thursday afternoon and all day Friday schedule, which would allow her to use Bless's office when he was at the hospital; and Martin's directive to staff that all new patients seeking Minkina as their physician would be scheduled to see her at Pond Avenue. Minkina also raised the need for there to be newspaper ads regarding her move. In a follow-up email to Liebman on September 8, she asked when he planned to complete her transition. She

wanted this information so she would know how it would affect her call schedule, vacation, and continuing medical education plans. Also on September 8, Tracy Stein, the practice manager of Beth Israel Deaconess Healthcare, sent an email to various APG personnel regarding how to schedule Minkina, noting that patients who already see her in Chestnut Hill should continue to see her there, and that Minkina "will have two separate practices."

Aftermath of Move. On September 2, Liebman emailed Frankl, who had been out of the country, to inform her that Minkina "has agreed to go part-time to Brookline as soon as Linda finalizes a transition plan" and that the physicians there had agreed to accept her. Liebman asked Frankl what kind of physician she wanted to replace Minkina, and Frankl emailed back that they should discuss it soon. In mid-September, Liebman met with Martin, who expressed her concern that the practice was experiencing significant waiting times for male patients who wanted to see the only remaining male physician in the practice, and she was getting complaints from female patients that their spouse was unable to get in to see a doctor. Contemporaneously, Liebman received an email from Dr. Jonathan Smith, a physician in an APG practice in Needham, which was under Liebman's purview. Smith was seeking approval to attend two medical education conferences, but the email caused Liebman to reflect on the fact that this was a well-trained male doctor who might be interested in finding a larger practice location. Liebman replied on September 14, acknowledging notification of the conferences and stating that he might have a "great idea for you." Liebman subsequently spoke to Smith and broached the idea of coming to Chestnut Hill to work the days Minkina would be in

Brookline. Smith agreed to come to Chestnut Hill to meet and be interviewed by the doctors there.

Minkina began working at Pond Avenue on September 16, for two and one-half days a week. Up until the day she went there she had not seen the office nor met with Pines, Bless, or Zheng. During the first two weeks she there she saw just one patient, and she used Bless's office when not in an examination room. She found that the HVAC system at Pond Avenue was problematic, with rooms being too hot or too cold. On September 28, Minkina sent Liebman an email proposing to modify her schedule. She noted she had seen just one patient in two weeks, while her patients at Chestnut Hill were calling that office with questions, medication refills, and requests for urgent appointments, all of which placed burdens on the other doctors. She suggested that she would call Pond Avenue the day before each of her scheduled sessions and if there were no patients, she would go to Chestnut Hill, where she could handle overflow and urgent care patients.

On September 29, Martin sent an email to all doctors in which she mentioned that Smith would be meeting with the Chestnut Hill doctors, with Minkina's name being omitted from the list, on the 29th and 30th. Minkina learned that these meetings would be interviews regarding possibly bringing Smith into the Chestnut Hill office. Minkina prepared a lengthy letter to Liebman on the 29th, in which she recapitulated their discussions since August 14 regarding her relocation possibilities. She repeated the points she had made the day before about her minimal activity since her move, and she stated that she had learned Pines was a pulmonologist, while Bless was a hematologist, both with very small primary care panels, which meant they had little overflow. She said

even if Pines leaves, there would not be many primary care patients seeking a doctor, and she would be competing with Zheng to build a practice. In contrast, the Chestnut Hill office had six primary care doctors with much need for coverage. It also had a computerized records system, which Brookline lacked, making it difficult to treat the patients she had seen previously. Minkina said Barkan had done much to address the air quality issues and there were no more problems. She stated that for all these reasons she had changed her mind and definitely decided to stay in Chestnut Hill.

Minkina met with Liebman on September 30 and presented her letter. She also expressed concern that Smith was being hired to replace her. Again recollections vary somewhat about exactly what was said. Minkina testified Liebman assured her Smith was not being hired to replace her, but to add another male to the staff, and that there was plenty of room in the building to accommodate both of them. Liebman testified he told Minkina he was very surprised she wanted to come back to Chestnut Hill, since the building had made her sick. Minkina responded that there had been changes made to the HVAC system since August 14 and she could now work there without discomfort. Liebman told Minkina Smith had not been hired to replace her, since it was expected she would take her entire practice with her to Pond Avenue, but rather to do urgent care and build his own practice. Liebman did not say there would or would not be enough space for both of them in Chestnut Hill.

After the meeting, Liebman checked with Martin to see what work had been done in the building and he learned only some minor ceiling work had been performed. Around October 2, the staff in Chestnut Hill, other than Minkina, was informed that Smith had been hired to work part-time initially, and would be full-time when Minkina's

practice was shifted completely to Brookline effective January 1, 2004. Minkina discovered on October 6 that her electronic patient calendar in Chestnut Hill would only accept appointments until January 1. Minkina sent Liebman an email on October 6 advising him of these developments and asking if he had approved them. Minkina and Liebman spoke on the telephone on October 7 about these issues, and on October 9 Liebman sent her the following email:

> . . .
> As I mentioned the Chestnut Hill group has already committed to Dr. Smith and he will be using your space when you are not there. In addition, there is a consensus that he will solve the problem that we have had of turning away male patients because of a lack of male primary care physicians. For this reason we are planning to phase him into a full-time role at that site at some point in the future. This could not occur for several months because of coverage issues and other obligations.
> . . .
> At this time we should assess the current situation which is:
>
> The Chestnut Hill Medical Staff wants to resolve the loss of male patients issues by having Dr. Smith there.
> . . .

Liebman went on to discuss Bless's upcoming back surgery, Zheng's imminent maternity leave, and Pines's planned departure for a concierge practice freeing up office space in Brookline; the fact that Minkina's 500 patient panel included many people from Brookline and Brighton; and the allocation of marketing dollars to promote her practice at Pond Avenue. Based on these factors, Liebman stated they should continue with their plans to have her in both offices initially, and to phase her into Brookline full-time over the next few months.

Developments Between the Fall of 2003 Through Termination. Minkina retained an attorney in October, and discussions ensued between the attorney and APG's in-house counsel regarding Minkina's issues, including the possibility of Minkina leaving the practice. When it became clear to Minkina that APG would not agree to return her to Chestnut Hill, her attorney filed an injunction to stop the transition to Brookline. As a result of this development, APG elected not to spend money converting two unused examination rooms into an office for Minkina.

Earlier in the fall a taskforce had explored the future of the Beth Israel Deaconess Hospital-Needham, a facility which had been losing money for eighteen years, and was also placed under Liebman's purview. The taskforce decided that fifteen doctors should be recruited to open practices in the Needham area, including two or three primary care doctors. In November, during a meeting with Bless about other matters, Liebman talked about the recommendation. Bless had been politically active for years within the APG staff and Liebman asked if he knew of anyone who might be interested in locating in Needham. Bless had recently bought a house near the hospital and jokingly raised the possibility of moving there himself. Liebman asked Bless to think about it and get back to him by the end of the year.

During late November or early December, Minkina communicated by email with Kathleen Schnaidt, who assigned students to doctors as part of the Harvard Medical School clinical program. On December 2, Minkina confirmed that Thursday was a fine day for a student to be assigned, and she explained that while she was working in two offices and her schedule for the new year was not yet set, either office was accessible by public transportation. Schnaidt replied three days later that she had Minkina down for

Thursdays. On December 17 Minkina sent an email inquiring if it would be possible for the student to come in the morning. Schnaidt answered later that day that the student had to be assigned either Tuesday or Thursday afternoon.

In early December, Minkina called the Massachusetts office of OSHA and discussed what she felt was occurring in the APG offices regarding air quality. On December 17, her attorney filed a charge at the Massachusetts Commission Against Discrimination alleging that the decision to relocate her from Chestnut Hill to Brookline was the result of discrimination on the basis of sex, handicap, and national origin. The following day a judge denied Minkina's request for a restraining order to block her full-time transfer to Pond Avenue. Because of the holidays, APG could not get workmen in to start building Minkina's office. When her lawyer declined to help Minkina file an official complaint with OSHA, Minkina discharged her attorney, and on December 23 submitted a complaint about the air quality in both the Chestnut Hill and Pond Avenue offices. On January 2, a motion for reconsideration of the denial of the temporary restraining order was filed, so the plans for the renovation were again put on hold.

In discussions with the director of the Massachusetts OSHA office, Minkina learned she could file for protection under Section 11(c) of the Occupational Safety and Health Act if she believed APG was discriminating against her for her pursuit of the air quality complaints. Minkina filed such a request with OSHA on January 12, 2004.

The plan to expand in Needham was presented to the BIDMC administration in December, and it was approved by the Board of Directors in January, 2004. In mid-January, Bless told Liebman that he did want to move his practice to space in the Needham hospital, and Bless brought up the idea of Zheng coming with him. Bless and

Liebman did not discuss the idea of Minkina being asked if she too wanted to relocate to Needham. Bless approached Zheng with the idea and she said she would be interested in joining him.

An OSHA employee conducted an inspection of the Chestnut Hill and Pond Avenue offices on January 15. In his report, the inspector noted that Michael McCarthy, who had replaced Martin as the practice manager, asked that employee interviews be delayed until he spoke with the BIDMC attorney. Thereafter, when the inspector introduced himself to employees and asked to speak to them as part of the confidential interview process, McCarthy interjected that the employees had the right to have management present. The inspector explained to McCarthy that this was very intimidating, but the manager insisted that the attorney said it was their right. The inspector noted that only a limited number of employees, including Minkina, were willing to speak with him, but they all confirmed there had been a burning smell on and off for a year. He wrote: "EEs that would interview had a common theme – that they all complain amongst themselves and after seeing how, Dr. Minkina, was treated they would never say anything to their ER."

On January 20 Minkina emailed Schnaidt, stating that she had not received any information about the student being assigned to her. Schnaidt responded the same day that she had had two concerns about assigning Minkina a student: that Minkina had requested the student attend in the morning and that Minkina was going through a transition in her offices. Schnaidt said she had consulted with Frankl and they had decided it was best to hold off on assigning a student to her. Schnaidt invited Minkina to follow up with Frankl. Minkina replied that night that she had merely inquired whether it

was possible to have the student come in the morning, and once she got a clear answer from Schnaidt she did not pose any other questions. Regarding her transition, Minkina said she had not yet received any official memorandum notifying her of her transfer from Chestnut Hill. Schnaidt answered the following day that after consulting with Frankl, the lack of an assignment

> . . .seemed the right thing, but now it seems clear that it wasn't the best course of action. In the crush of completing the assignment of 140 students . . . it is sometimes difficult to think things through properly. I hope you will forgive us, and that there will be no hard feelings.

In the late fall Liebman had learned that contrary to previous assumptions, MD/VIP would allow a concierge practice to exist within an office housing a panel practice. In January, Pines spoke to Liebman about the possibility of staying in the Pond Avenue office. They discussed what alterations to the space would have to be made to meet the requirements of MD/VIP. An architect was brought in to evaluate the space on January 22. Pines told the architect that it was his understanding that Bless and Zheng would be moving to Needham, that Minkina would be staying, and that APG would be bringing in another physician to practice in the space.

Minkina ultimately came to Pond Avenue on a full-time basis on February 2, 2004. Work began on her office space, but the office was not completed until February 17. In the meantime, when Bless was in the office, Minkina did not have a private office in which to work when she was not examining patients. On one occasion when she was sitting at the receptionist's desk, a patient joked about Minkina having a new job, a comment which caused Minkina to feel humiliated. Minkina called Liebman to complain

about the situation and he suggested that she work from home on days when Bless was present and she did not have to be in the office because of patient appointments.

In March, 2004, APG hired Dr. Evelyn Picker and housed her in a suite which had become vacant that month on the third floor of the Chestnut Hill building. Picker came with a full patient panel and her practice was completely independent from the one Minkina had been part of in Suite 204. OSHA notified APG on March 17 that it had found no violations in either office, although it advised the management to follow up with the landlord on the recommendations previously made by Gordan. On March 25, 2004, the Respondents filed their verified position statement with the MCAD. In April, Pines left APG and began working for MD/VIP in the same suite in Pond Avenue. APG signed a letter of intent to lease office space in Needham for the new practice. The space was sufficient to eventually house five or six physicians.

At some point during this time frame Minkina's retaliation claim under Section 11(c) was denied by the Massachusetts office of OSHA. She appealed that ruling to the OSHA Directorate of Enforcement Program in Washington, but that appeal was denied. On April 26, 2004, Minkina wrote to Secretary of Labor Elaine Chao and Attorney General John Ashcroft seeing redress for what she described as APG's failure to address the air quality issues and its retaliatory acts committed against her, including her permanent transfer to Pond Avenue.

Minkina filed an amended charge with the MCAD on May 13, 2004 alleging that APG and Liebman were retaliating against her because she had filed the initial charge of discrimination. In June, APG signed a lease for the Needham space, and plans were pursued to renovate the space and open the practice. Zoning disputes with the Town of

Needham ensued and it was finally agreed that the practice would initially open with no more than three doctors. At some point in this period Ives informed Liebman that Jane Fogg, a doctor who had trained at Beth Israel and was working at the Dimock Health Center, was interested in transitioning her practice to the Needham area. Liebman made the decision to hire Fogg for the new Needham practice when it opened.

In August, Liebman conducted the annual budget review and he determined that with Minkina alone in the Pond Avenue office after Bless and Zheng went to Needham, the office would lose $192,000. To place this figure in some context, Ives testified that the average loss per primary care physician in a hospital feeder practice is between $125,000 and $150,000. APG had been losing an average of $250,000 per physician until it introduced its productivity-based compensation model in 2002, after which the average loss fell to approximately $70,000. Liebman testified that it was then that he decided the Pond Avenue office should be closed as an APG practice and Minkina should be terminated at that point. He testified that he did not consider offering Minkina the opportunity to go to Needham because APG had no obligation to offer a position. He also stated that she had demonstrated a problem growing her practice, attracting and retaining enough patients to be viable under a productivity model. Liebman acknowledged that he had never spoken to Minkina about deficiencies in her performance or regarding her inability to grow her practice. Liebman claimed Minkina had at some point during the spring mentioned in a hallway conversation that she felt betrayed by Zheng and was not interested in moving to Needham with her.

Minkina disputes that she ever had a conversation with Liebman about moving to Needham. In a deposition taken of Zheng, Zheng testified that during a brief interaction

with Minkina sometime in the spring of 2004, Zheng asked Minkina if she were interested in going to Needham and Minkina said she was not. In her April letter to the Secretary of Labor and Attorney General, Minkina wrote:

> . . . Besides the doctor who goes into MD/VIP practice and myself there are currently two other doctors practicing at the Pond Ave office, who have been already notified that they will be transferred to a new APG location in Needham, Massachusetts. I, however, was not informed about any further relocation. Thus the only possible conclusion is that my contract will be terminated at the end of the second year (it is guaranteed for two years, but after than can be terminated with three months notice). Furthermore, it did not make any sense to transfer me to the Pond Ave. location and then to transfer further, especially since Liebman knew that I would not agree back in August of 2003 to the transfer to Needham location. . .

On September 17, 2004, the Respondents submitted their amended verified position statement in response to the amended MCAD charge. In it Respondents stated, and Liebman verified as factually accurate, that among the reasons Minkina's claim of retaliation must fail is that Minkina had suffered no adverse employment action. Four days later Liebman directed his administrative assistant to set up a meeting with Minkina, which she tried to do by email for September 27. Minkina replied with queries about who would be present and what was the agenda. The assistant responded that Liebman and a Human Resources representative would be there to discuss APG. Minkina countered that she needed clarification about the topic so she could be prepared and to determine if she should bring someone else. Liebman next emailed Minkina that since Bless and Zheng would be moving shortly, he and Minkina needed to discuss plans for the Pond Avenue site. Minkina answered that this was the first time she was hearing from APG management that Bless and Zheng were moving, and in light of pending

litigation, she would have to consult with her attorney before deciding if he should be present. Liebman ultimately notified Minkina that since she was unwilling to meet to discuss APG's plans, he would communicate by letter.

Liebman delivered to Minkina the following letter on September 30:

> . . . We have examined the financial condition of Pond Avenue, including revenue projections in light of Dr. Bless's and Dr. Zheng's departures. Unfortunately, these changes mean that the Pond Avenue site is no longer profitable and, in fact, is projected to lose money. For these reasons, we have decided to close the Pond Avenue Site. The Pond Avenue practice will be winding down over the next few months.
>
> Pursuant to paragraph 9(Bless)(iii) of your employment contract, this letter will serve as your written notice that HMFP/APG is terminating your employment contract dated June 4, 2002 without cause. You will be expected to work with Johanna Rodgers over the next ten (10) days to finalize a letter to your patients notifying them of this change. . .
>
> Assuming your cooperation with the process of transitioning your patients, your final day of practice at Pond Avenue will be Friday, November 5, 2004. . . The six (6) month period will begin on the day after your last day of employment. During this six (6) month period, APG will continue to pay your base salary and your current benefits will continue. . .

The drafting of the patient letter was delayed, in part, because of Minkina being away on a pre-scheduled vacation. On October 25, the following letter was sent to her patients:

> I am writing to let you know that I will be leaving Beth Israel Deaconess Healthcare, effective November 12, 2004. Beth Israel Healthcare has decided to close the Pond Avenue practice and my employment with Beth Israel Deaconess Healthcare has been terminated. At this time, I

> have not found a new position and thus I do not know where my next office will be.
>
> If you would like to make an appointment with another Beth Israel Deaconess Healthcare physician, please call Beth Israel Deaconess Healthcare's "Find a Doctor" Line at (800)667-5356. . .
>
> It has been a pleasure caring for you and I will inform you as soon as I am settled in a new practice. I wish you all the best and hope to be able to serve you in the future. If you have any questions or concerns, please do not hesitate to contact me at (617)734-7979 prior to November 12, 2004.

Post-Termination Events. Minkina's employment ended on November 12, 2004, and she received six months additional compensation as severance pay. Her new lawyer removed her case from the MCAD and filed it in superior court. In December, Bless and Zheng moved to Needham and began practicing there with Fogg. In February, 2005 additional renovations were made to the Needham space to add a fourth office and Dr. Diane London was hired. Liebman had initially spoken with London's father-in-law in the spring of 2004 to see if he would move his practice to Needham. Although declining the invitation, the father-in-law suggested that Diane, who was looking to move from a Natick practice, might be interested. Liebman began the process of recruiting her in June, 2004.

Minkina felt great pressure to quickly find another job so her license, hospital privileges, and malpractice insurance would not be suspended. She was able to secure a half-time position with the Urban Medical Group in Jamaica Plain, a practice also affiliated with Beth Israel Deaconess and located very near Pond Avenue. Her starting salary was $51,000, based on an annual full-time salary of $102,000, and she received no

retirement contribution. Her annual continuing medical education allowance was $1000. She gradually increased her hours, attaining full-time status in November, 2005, and earning a full-time salary of $108,000. While working full-time for Urban, she began moonlighting at Harvard Vanguard Urgent Care in Boston, earning $80 an hour for weekend work and $70 per hour on weekdays. She had not moonlighted while working for APG, but other APG physicians, including Ives, picked up hours as hospitalists at Beth Israel Deaconess or at Harvard Vanguard. Minkina was offered a full-time position at Harvard Vanguard in June, 2007 at an annual salary of $153,000, with a 10% retirement contribution by the employer and $3000 a year CME allowance.

Minkina and her husband testified that the entire experience with APG, both before and after her termination, had caused her significant emotional distress. She took increasing dosages of Zoloft but still suffered from depression, which caused her to be irritable with her husband and withdrawn from family and friends. She stopped participating in favored cultural activities, such as reading *The New Yorker,* going to films at the Museum of Fine Arts, and traveling to New York City to see plays. She did not seek professional counseling or therapy because she felt she knew full well what was making her so depressed – the air quality dispute and the treatment by APG – and a therapist could do nothing to change that reality. She also believed that her husband was the most effective therapist she could find. Although it took great effort, at all times she felt she provided competent and caring medical attention to her patients at her new practices.

In March, 2005 the Respondents' motion to dismiss the discrimination claim was denied by the superior court. Minkina changed lawyers again in May, and the following

month the Respondents filed a motion to compel arbitration. The superior court granted that motion in February, 2006. In June, 2006, lawyers in the Zalkind firm entered their appearance in the case and in February, 2007 they made their initial contact with the Respondents' counsel, Tracey Spruce, to discuss arbitration issues. After a flurry of communications, the matter lay fallow until Will Van Lonkhuyzen notified Spruce that he had taken over the file and communications resumed regarding arbitration issues. He filed for arbitration with the American Arbitration Association on October 26, 2007, and the Respondents subsequently filed a motion to dismiss on the grounds that the filing was untimely, since all relevant events had occurred more than three years prior. Without repeating all the ground covered in the February 24, 2008 ruling, I found that there were equitable grounds for allowing the arbitration to proceed, with the following caveat:

> Respondents did raise in their reply memorandum for the first time a claim that at most only the termination claim should be deemed timely, and that the concept of "continuing violation" is not applicable to the events which occurred up until May, 2004. Claimant has not had the opportunity to address these arguments. At the very least, the evidence of the earlier events will be admissible to establish the context of the subsequent actions, so the parties will have to address them in discovery and at the hearing. The parties will be free to raise legal arguments at the conclusion of the hearing as to whether the events up until May, 2004 would be compensable, assuming they would constitute violations of law. at 15

Arbitration Testimony. Bless testified that his experience with Minkina in Pond Avenue caused him to have serious reservations regarding any suggestion that she move to Needham. He said he had received a significant number of complaints from his patients who had been seen by Minkina in his absence. While a few said they found her to be fine, most told Bless they never wanted to be seen by her again. The patients

indicated she was very directive, and talked down to them in a demeaning manner. Because he was not her supervisor, Bless did not feel it was appropriate for him to speak to her about her interactions, or to advise her to change her style of practice. Bless stated that he mentioned these patient complaints to Liebman, but did not discuss them at length. Bless contrasted how he felt regarding Minkina with his experience with Zheng, with whom he got along quite well and had developed a close professional and personal relationship.

David Ives testified that he had regarded Pond Avenue to be an underperforming center. This was due to the fact that there were two low volume doctors in terms of primary care – Bless and Pines – and two new doctors without established panels – Zheng and Minkina. After Minkina was moved to that office, there was no discussion about hiring additional doctors to replace Pines, Bless, and Zheng. He stated that when the decision was made to close Pond Avenue, it would generally have been APG policy to offer Minkina a position in Needham, which was opening. He stated, however, that in 2004 there would not have been space for her without making renovations to the suite.

Liebman testified that he was not aware of how APG handled the shutdown of offices in Newton and Coolidge Corner in Brookline, which occurred before he came to the company. He did not know if doctors who were not being terminated for cause were offered positions in other APG offices. Since his arrival, Liebman has closed a number of practices besides Pond Avenue. One in Dedham was closed in 2003 because it was not financially viable. The one male doctor was told what would be happening and an arrangement was made under which he was able to leave on his own terms. Liebman said he would have worked out a similar plan with Minkina had she been willing to meet

with him in September, 2004. Liebman closed Dr. Picker's practice in 2006 because of issues relating to her failure to follow mandated documentation procedures. When confronted with the evidence, Picker chose to leave and take another job, rather than be terminated. Dr. Garland's practice was closed in 2007, but there was no evidence on the record of the surrounding circumstances. Regarding the closing of Pond Avenue, Liebman had answered an interrogatory on November 9, 2005 which asked for each and every reason why he did not offer to transfer Minkina to the Needham office: "APG had no obligation to offer to transfer" Minkina to Needham.

CLAIMANT'S POSITION[2]

The statute of limitations does not bar recovery for events which transpired before August or September, 2004; that is, all claims except those related to Minkina's termination. Minkina should receive the benefit of G.L. c. 260, §32, which provides:

> If an action duly commenced within the time limited in this chapter is dismissed for insufficient service of process by reason of an unavoidable accident or of a default or neglect of the officer to whom such process is committed or is dismissed because of the death of a party or for any matter of form, or if, after judgment for the plaintiff, the judgment of any court is vacated or reversed, the plaintiff or any person claiming under him may commence a new action for the same cause within one year after the dismissal or other determination of the original action, or after the reversal of the judgment; and if the cause of action by law survives the executor or administrator or the heir or devisee of the plaintiff may commence such new action within said year.

Minkina filed her claim in Superior Court in a timely fashion and Respondents had actual notice of her action within the original statute of limitations period. The Superior Court

[2] Although Minkina included Jeffrey Liebman as a named respondent, no argument was advanced as to why he should be held liable individually. All the evidence in the record establishes that he acted solely in his role as an agent of his employer, so there is no basis for finding any individual liability.

found it lacked jurisdiction, due to the arbitration agreement, and the Court's subsequent decision issued June 17, 2006 was a dismissal for a "matter of form." Applying the statutory rule, events which occurred up to June 17, 2007 – everything that is relevant to all the claims – should fall within the scope of this action.

Even if c. 260, §32 is not applicable, the statute of limitation should be tolled for equitable reasons. The Respondents had full notice of all of Minkina's claims in a timely fashion as a result of her filings with the MCAD and the Superior Court, and the parties have been litigating aspects of this case for more than four years. The Respondents suffered no prejudice from the filing of the demand for arbitration on October 26, 2007 and Minkina should not be deprived of the opportunity to fully pursue all her claims in arbitration. Lastly, even if evidence of conduct which occurred prior to August 1, 2004 is not considered for the purposes of damages, it should be considered for the purposes of evaluating all counts, since the September, 2004 termination was the culminating event of discrimination and retaliation.

Whether one applies a mixed motive analysis or a traditional *McDonnell-Douglas* analysis, it is apparent that the Respondents discriminated against Minkina on the basis of gender, in violation of M.G.L. c.151B when they forced her to permanently relocate to Pond Avenue, replaced her in Chestnut Hill with a male physician, and terminated her instead of affording her the right to transfer when the Pond Avenue office was closed. All of these events constituted adverse employment actions, as was the related blocking of her teaching assignment with the Harvard Medical School preceptor program.

At least part of the motive for Liebman forcing the permanent relocation to Pond Avenue from the better established Chestnut Hill office was Liebman's desire to hire a male physician. Where there is evidence an employment decision is based on a mixture of legitimate and illegitimate motives – Liebman's admitted gender-based motivation – the burden of persuasion shifts to the Respondents to demonstrate that this illegal motivation was not the cause of the adverse employment action. He acknowledged this motivation in his letter to Minkina, denying her request to return from Pond Avenue. The claim that Liebman would not let her return out of a concern for her health was disingenuous and late-contrived. The eventual termination when Pond Avenue closed directly flowed from this initial action to prevent her from returning to Chestnut Hill, particularly since Respondents knew when they proposed to move Minkina to Pond Avenue that it was a failing office. While Respondents waited until Minkina's contract expired, when they could terminate her without cause, their actions from September, 2003 onward support the conclusion that the die was cast as soon as they got Minkina out of Chestnut Hill on a full-time basis. This was apparent from the fact that Respondents took no steps to ensure the survival of Pond Avenue, and in fact made a series of decisions which insured its demise. Hence, Respondents did not prove it would have made all the same employment decisions had it not considered the gender of Minkina and Smith.

A burden-shifting analysis yields the same conclusion that the Respondents' action was discriminatory. Minkina established a *prima facie* case – she is a member of a protected group, who it was stipulated performed her job at an acceptable level, and she suffered an adverse employment action. She was forced out of Chestnut Hill and

replaced by a male doctor with similar qualifications, and the non-transfer out of Pond Avenue and subsequent termination raised a reasonable inference of discrimination. Regarding the later point, Ives testified to a policy of transferring doctors who are not being terminated for poor performance out of offices that are closing, Minkina being the only person not given the benefit of this policy. Any claim that there was no position available for her is belied by the fact that while either deciding to terminate her or carrying out the plan, the Respondents hired two doctors with similar qualifications for Needham. This evidence demonstrates that all of the Respondents' articulated non-discriminatory reasons for their actions are pretextual.

Of particular note regarding the forced permanent transfer from Chestnut Hill to Pond Avenue is that the Respondents cannot rely on a claim that gender was a bona fide occupational qualification (BFOQ). This defense is an extremely narrow exception to the general prohibition against discrimination, and it cannot be based on customer or client preference. Given that all Chestnut Hill female physicians treat many males, Respondents cannot show Smith's gender was a legitimate consideration. The only time courts have allowed gender-based hiring decisions based on privacy is where patients have no choice in who will be providing care, such as in prisons. Since the actual and potential patients of the Chestnut Hill practice could choose whom they would select as their primary care physician, the BFOQ is not available.

The evidence also establishes that the Respondents retaliated against Minkina for filing a charge of discrimination with the MCAD. She filed her first charge on December 17, 2003, a protected activity, and shortly thereafter the Respondents made all the decisions which doomed the Pond Avenue office and tied her employment to the closing

of the office. In that same time frame, she was excluded from the preceptor program, depriving her of a prestigious position, bonus money, and potentially blocking her from satisfying a condition of her continuing employment. Further, she was not provided a promised private office at Pond Avenue, forcing her into the humiliating position of working at a secretarial station or staying home when Bless was in the office. All of this represented adverse employment actions which were tied to the protected activity. The pattern repeated itself after she filed an amended charge of discrimination with the MCAD in May, 2004. At the very time Respondents were working on their Amended Verified Position Statement, including the disingenuous statement that her claim should be dismissed because she had suffered no adverse employment action, Liebman made the decision to terminate her employment. For all the reasons previously stated, the non-discriminatory reasons advanced by the Respondents for their actions were pretextual.

Additionally, Respondents retaliated against Minkina and wrongfully discharged her in violation of public policy, that being because she complained Respondents were violating the Occupational Safety and Health Act. Since the Act provides no private right of action for violations of its anti-retaliation provision, an employee does not have a comprehensive remedy under the Act. The anti-retaliation provision therefore does not preempt a public policy claim based on state law. The record evidence supports the conclusion that because of her longstanding efforts to get the air quality in Chestnut Hill and Pond Avenue improved, the Respondents were upset with her. She was the most outspoken advocate for air quality, and Liebman expressly asked her not to file a complaint with OSHA. After she did file a complaint and inspections occurred, the Respondents manifested an openly hostile stance. The inspector noted that other staff

members expressed their fear of coming forward having seen how Minkina was treated. Finally, the reasons Respondents gave for terminating Minkina were pretextual, supporting an inference that one of the true reasons was retaliation in violation of public policy.

Because of the discrimination and violation of public policy, Minkina is entitled to compensatory damages through November, 2007, when she obtained a position paying more money than she would have earned with the Respondents. These include at least $56,331 in back pay and benefits, including the lost continuing medical education allowances. Minkina's moonlighting earnings should not be deducted, since other APG doctors moonlight and she could have done so even if she were working full-time for APG. Minkina experienced serious emotional distress because of the discriminatory and retaliatory treatment of the Respondents from August, 2003 onward, and this distress was exacerbated by her forced transfer to Pond Avenue and then her ultimate termination from that location. She was forced to take high levels of medication; she chose not to seek counseling because she knew what was causing her distress and was getting all possible support from her husband. Awards of $275,000 to plaintiffs in similar cases have been upheld by Massachusetts courts. Minkina is also entitled to recover for the damage to her reputation among patients and colleagues caused by the unexplainable and sudden termination of her employment.

Minkina is entitled to pre-judgment interest at the annual rate of 12% from the date her civil action was filed on November 18, 2004 to the date of judgment. Respondents have previously claimed she should not get interest for the period from February 2006 to February 2007 because she took no action during that time to advance

her case, but in actuality she filed on March 16, 2006 a petition seeking appeal of the Superior Court's February decision, and that petition was not denied until April 14, 2006. Current counsel did not enter an appearance until June 27, 2006, and needed an appropriate amount of time to get up to speed. Minkina will also be entitled to post-judgment interest.

Although the Superior Court ruled Minkina had waived her right to punitive damages under her employment agreement, this right cannot be waived in a pre-dispute arbitration clause. Numerous court have held that such waiver clauses are unenforceable. Punitive damages are appropriate in this case because the Respondents misled the MCAD in their amended position statement when Liebman alleged she had suffered no adverse employment action, despite the fact that he had already made the decision to terminate her. Finally, Minkina is entitled to reasonable attorneys' fees and costs, including the costs of the arbitration.

RESPONDENTS' POSITION

AAA Employment Rule 4(b)(i)(1) requires a party to "[f]ile a written notice (hereinafter "Demand") of its intention to arbitrate at any office of the AAA, within the time limit established by the applicable statute of limitations." Although the demand was not filed within three years of notice of termination, the Arbitrator allowed the case to proceed on equitable grounds. The only event which occurred after August 1, 2004, when communications resumed between counsel regarding the submission to arbitration, was Minkina's termination; hence, only the counts alleging retaliatory termination in violation of c.151B and wrongful termination in violation of public policy are properly

before the arbitrator.[3] Minkina cannot bring in all the prior allegations under a theory of continuing violations since the transfer to Pond Avenue, the refusal to let her return, the hiring of Smith, the denial of her participation in the preceptor program, the lack of a private office at Pond Avenue, and the failure to include her in planning for the Needham office were all separate and discrete events which occurred well before the cutoff date. Given that Minkina filed charges with OSHA and with the MCAD in December, 2003, and amended the MCAD charges in May, 2004, she cannot assert that the untimely acts did not trigger an awareness of the nature of what was occurring, and therefore a duty to assert her rights.

Minkina's claims are not saved by c.260, §32. The statute only applies to actions re-filed in court following dismissal for a matter of form, and a claim for arbitration is not an "action" within the meaning of the statute. Even if the statute were applicable, it only protects claims re-filed within one year of the dismissal, which occurred on May 3, 2006. The October, 2007 filing of a demand with the AAA fell outside the statutory grace period. There is no basis for applying the doctrines of equitable tolling or equitable estoppel to excuse Minkina from the statute of limitations. As found by the Arbitrator, the delay in demanding arbitration was not attributable to any misleading actions by Respondents. Minkina was at all times represented by counsel, and they had no trouble filing charges with the MCAD and moving the matter to Superior Court. While the lack of prejudice to the Respondents would not support a failure to apply the statute of limitations, the reality was a number of witnesses, including Zheng, were unable to recall critical conversations which had transpired many years prior.

[3] Because of the finding that this assertion is correct, Respondents' position regarding the substance of the other counts will not be presented.

Claimant's c.151B retaliation claim fails because she cannot prove that but for the filing of the MCAD charge, she would not have been terminated. There was no evidence that Liebman or anyone connected with APG made any hostile comments or expressed resentment about her pending MCAD claim. Minkina was not treated differently than her co-workers in regards to the closing of the Pond Avenue practice. The only relevant comparators are Pines, Bless, and Zheng. Pines left the practice voluntarily to go into a concierge arrangement, while Bless and Zheng were slated to move to Needham. In contrast to those two doctors, who expressed their interest in going to Needham after Liebman mentioned an office would be opening there, Minkina had no interest in moving. While she was never invited to join them, she did not ask to relocate after she learned Bless and Zheng were going, and even after she was told Pond Avenue was closing and she would be terminated. That Bless reported his patients objected to the manner in which Minkina interacted with them, and that Minkina was engaged in judicial proceedings to block her transfer to Pond Avenue, may explain some of the reasons Liebman did not suggest Minkina consider moving to Needham. Further, once it was clear to Liebman that Pond Avenue would have to close because of unacceptable financial losses, Needham did not need another physician and there was no room for one, due to the limitations imposed by the Needham Zoning Board. Fogg had been previously hired to join Bless and Zheng, and London was not brought on until February, 2005, three months after Minkina left APG, and after an office was built for her.

In the absence of evidence of a causal link between her MCAD charge and her termination, Minkina argues the sequence of events supports an inference of causation. Caselaw establishes, however, that an inference is permissible only when the adverse

action takes place almost immediately after the protected activity. In this case, the termination occurred nine months after the filing of the charge, far too great a hiatus. Even the gap after the filing of the amended charge in May is excessive. The claim that events leading inevitably to the closing of the Pond Avenue office were finalized in the months following the filing of the MCAD and OSHA complaints fails because the initial discussions regarding Pines, Bless and Zheng leaving arose prior to the filing of the complaints. The independent decisions of three employee doctors cannot be used to impute retaliatory motivation to the Respondents.

Even assuming Minkina established a *prima facie* case of retaliation, Respondents put forth legitimate, non-retaliatory reasons for their actions. No doctors were invited to move to Needham, and Respondents had no obligation to proffer such an invitation to Minkina. The decision to close Pond Avenue was based on the reality that the office was projected to lose $192,000 in fiscal 2005, compared to an average loss per doctor at other offices of $70,000. Claimant did not prove that these articulated reasons were pretextual. After Minkina was terminated and the practice closed, APG never employed any physicians in that location. Minkina's attempt to impute pretext into Respondents' position statement filed with the MCAD on September 17, 2004 is baseless. Respondents were answering the allegations made in May, 2004, at which time Minkina had suffered no adverse employment action. It would not have been proper to reveal that a decision to terminate Minkina had been made in late August, but not yet conveyed. Liebman affirmed the correctness of the facts in the statement; it was legal counsel who was responsible for legal arguments.

Claimant's assertion that pretext is proven because Respondents could have moved Minkina to another practice is false. It was not Liebman's practice when closing a site to move doctors to other APG sites; since he came to APG, none of the doctors from closed practices remained employed. What may have occurred before Liebman's arrival was not relevant. Liebman has consistently stated throughout this proceeding that Minkina was not offered an opportunity to move to Needham because APG had no obligation to do so. Given Bless's reservations about having Minkina join the practice in Needham, and Liebman's concerns about Minkina's ability to thrive under the productivity model, there was no reason for Respondents to go beyond their legal obligation. Further, Minkina offered no proof that in September, 2004 there were any open positions, even assuming Minkina would have consented to a move.

Minkina's claims of wrongful termination and retaliation in violation of public policy must be dismissed because M.G.L. c. 149, §187, (the healthcare whistleblower statute) provides a comprehensive remedial scheme to vindicate the public policy of protecting healthcare workers who report unlawful conditions in their workplaces. In light of the remedial statute, which allows for tort damages and attorneys' fees, there is no need for a public policy exception in this area to the traditional doctrine of at-will employment. Additionally, to the extent her only source of public policy she sought to enforce was OSHA, there is no private right of action for claims of retaliation under that act. In any event, Minkina failed to prove her OSHA complaint had anything to do with Liebman's decision to close Pond Avenue and terminate her.

Even assuming Claimant prevails on her claims, she is entitled to only minimal damages. The decision whether to award back pay is discretionary under c.151B, §9, and it is not appropriate in this case. Minkina received a $60,000 severance payment, and began a new job less than a month after her termination, which means a back pay award would be a windfall. If back pay is awarded, it should be calculated from the termination date through the date of the arbitration hearings. Her monthly salary under the employment contract was $10,000; the additional $168 a month shown on her W2 represented the cost of various insurance benefits, which were attributed to her earnings but deducted for the benefits. It would be too speculative to factor in annual salary increases, since it was not apparent Minkina would have even earned the $120,000 per year once she went on the revenue minus attributed expenses compensation model. Accounting for her moonlighting earnings, Minkina's back pay damages are actually a negative $10,014. If those moonlighting earnings are excluded, her back pay damages are just $16,226. She is not entitled to payment for continuing medical education funds, since she did not always exhaust her annual allowance, and there is no basis for concluding she would have been approved for and received the funds even if she had stayed.

Minkina provided no evidence to support a claim that she suffered any compensable damage to her professional reputation. She also failed to prove that she suffered severe emotional distress. She had experienced work stress and anxiety both before and after her employment with APG, and she and her husband described emotional distress symptoms related to the supposedly excruciating physical suffering she endured in the summer of 2004. To the extent some emotional distress can be tied to

her c.151B retaliation claim, it must be found that she did little to mitigate it. She did not seek counseling, feeling her husband provided sufficient support. She was able to find a job in her professional quickly, and at most temporarily lost interest in some cultural activities and non-work diversions. In cases with far greater evidence of emotional distress awards of $100,000 were struck down, and ones of $50,000 were reduced to $10,000.

Punitive damages are precluded under the arbitration agreement; this limitation was upheld by a superior court judge, and the Appeals Court rejected Claimant's request for review. Minkina acknowledged to the AAA that punitive damages were not available when she challenged the filing fee. This represents a binding admission and a waiver of any claim to such damages. Finally, there was no outrageous conduct which would justify an award of punitive damages, even if such damages were available.

If Claimant prevails on a claim under c.151B, she is entitled to recover reasonable attorneys' fees "unless special circumstances would render such an award unjust." During the pendency of this case, Minkina was represented by four different firms and Respondents cannot be held responsible for the successive re-education process which took place. She should also not recover for time spent on unavailing theories. Respondents reserves the right to advance more detailed arguments when and if a fee petition is submitted. Claimant would be entitled to some pre-judgment interest on successful claims, but she should not be able to get interest for periods when she undertook no action to bring the matter to arbitration, such as between February, 2006 – when the Superior Court ordered the parties to arbitrate – and February, 2007 – when

counsel began exploring arbitration options; and between April 11, 2007 – when communications stopped – and August 1, 2007 – when Claimant resumed discussions.

OPINION

Only Events Subsequent to August 1 Are Arbitrable. The Claimant initiated arbitration by submitting a demand under the American Arbitration Association's Employment Arbitration Rules. Rule 4.b.i.1 requires that a demand be filed within the applicable statute of limitation, which both parties acknowledge to be three years. The filing in this case was on October 26, 2007, which was not within three years of any relevant event. Because of equitable considerations relating to communications between counsel which began on August 1, 2007, Respondents' motion to dismiss the case in its entirety was denied. There are no statutory or equitable bases, however, for allowing Minkina to challenge events which occurred prior to August 1, 2004. As a practical matter, this means that only the decisions of Liebman and APG to close Pond Avenue, not offer Minkina a position in Needham, and to terminate her are properly addressed in this case.

Claimant's attempt to utilize c.260, §32 to rescue her stale claims is unavailing. Putting aside the question of whether the procedural statute applies to the filing of an arbitration where a court case has been dismissed because the parties had an agreement to arbitrate, Claimant waited too long before submitting her demand to seek protection under this statute. The statute only gives a one year grace period. Even utilizing the Claimant's asserted date of June 17, 2006 for when the Superior Court definitively ruled

that the matter could only proceed in arbitration, the demand was not submitted until seventeen months later.

While what occurred from August, 2003 onward was relevant and necessary to understand the ultimate termination, and the evidence was therefore discoverable and admissible, most of it constituted evidence of distinct legal claims. No damages based on acts committed prior to August 1, 2004 are recoverable under a theory of a continuing violation. The decision to transfer Minkina to Pond Avenue, the subsequent recruitment of Smith, the refusal of her request to reverse her previous acquiescence to the permanent transition to Pond Avenue, the delay in constructing her private office at Pond Avenue while she fought the permanent relocation, and the failure to assign her a student as part of the preceptor program were discrete events.

The rationale of the theory of continuing violations is that a series of incidents, which by themselves may not be apparent violations of a law, become evident as part of a pattern of discrimination or retaliation when there is some culminating event. Until the culminating event occurs, an employee may not realize he or she has a cognizable claim. In such circumstances, courts and arbitrators have allowed an employee to recover for damages from events which preceded the statute of limitations period. Given that Minkina filed charges regarding these events with the MCAD and OSHA in December, 2003, and amended or expanded those charges at various times through May, 2004, it cannot be said Minkina was unaware of the supposed violation of her rights until she was given notice of termination in September, 2004.

There was a specific, limited basis for finding that Respondents were equitably estopped from challenging the timeliness of an arbitration demand filed after August 1,

2007. There is no compelling argument based in equity to allow Minkina to challenge and seek recovery for acts which spanned August, 2003 through May, 2004. All relevant facts were known to Minkina and her succession of counsel throughout the statute of limitations period, and an arbitrator does not have the authority to simply ignore time limits because a party is adversely affected by their application.

Violation of Public Policy Claims. Respondents has cited a ruling of a Superior Court judge who dismissed a public policy wrongful termination case brought by a healthcare worker who claimed her employer was violating various laws and regulations. *Joyce v. GF/Pilgrim, Inc.*, 2003 WL 22481100 *7(Mass. Super. Ct. 2003). The judge found the availability of the comprehensive remedial scheme to protect whistleblowers in c.149, §187 pre-empted any common law action based on a violation of a public policy.

For a number of reasons, this case should not be the basis for dismissing Minkina's public policy wrongful termination and retaliation claims. First, while the reasoning of the case is very persuasive, this is a finding by a single trial court; no appellate court in the state has ruled on the issue. Particularly since the rulings of an arbitrator are virtually non-reviewable, arbitrators are hesitant to deny a party the right to pursue an action based on less than settled law. Second, Respondents brought a motion to dismiss in Superior Court and a second motion in arbitration. Certainly before the arbitrator the theory of pre-emption based on c.149, §187, which arguably is a dispositive legal issue regarding these counts, was not raised. Had it been argued earlier, Claimant could have moved to amend her complaint to allege a violation of c.149, §187, which is clearly applicable to her allegations, and which would provide a complete remedy. Whether her counts related to her pursuit of an OSHA complaint are analyzed under a

violation of public policy or a c.149, §187 framework, they are properly before this arbitrator.

Having concluded this, it must be found that Minkina did not prove she was either retaliated against in some fashion subsequent to August 1, 2004, or more particularly, terminated, because she had filed an air quality complaint with OSHA. There is no question that Minkina made known her concerns about the air quality in the Chestnut Hill offices, and later in the Pond Avenue offices. She filed a formal complaint with OSHA in December, 2003, which led to inspections the following month. She did not allege any administrator in APG said a single disparaging thing to her after OSHA was contacted. She was not pressured to withdraw her complaint, or to withhold cooperation with OSHA. The only evidence of employer displeasure, diminished in significance by the fact that it represents multiple levels of hearsay, was the reference in the inspector's report to other employees saying they were reluctant to complain to management after seeing what happened with Minkina. At most these employees knew Minkina had been vocal about air quality issues and she was in the process of being transitioned to Pond Avenue, which she was fighting vigorously and loudly. They were not aware she had initially consented to the move, that a decision was made to hire Smith, and that there were legitimate management considerations for Minkina going to Pond Avenue. The employees were therefore not in a position to evaluate whether there was a causal connection between Minkina's advocacy regarding air quality and the transfer which displeased her so greatly.

Subsequent to her filing of the OSHA complaint, the ensuing inspections resulted in a March, 2004 report which found there were no air quality violations in either

Chestnut Hill or Pond Avenue. Minkina's retaliation claim filed with OSHA was denied by that agency. While Minkina continued in April to press her claims of injustice with OSHA and high government officials, APG and Liebman had no further involvement. There was no obvious reason for the Respondents to have any retaliatory motivation against Minkina for having filed the complaint. The complaint had not cost them money to remediate the physical plant, Respondents had not been found out of compliance with the law, and her complaint did not require any prospective action. The only possible evidence of causation was that Minkina's termination followed in time her complaint to OSHA. Given that the complaint was in December, 2003, and the complaint and retaliation claims were completely resolved by April, it would be unreasonable to infer a nexus to the September, 2004 termination.

Closing of Pond Avenue and Subsequent Termination of Minkina. Before getting into what transpired in September, 2004 regarding Pond Avenue and Minkina's employment, it is useful to review what preceded the closing of the office. Contrary to Minkina's perception, what occurred after Minkina's email of August 24, in which she signaling her acceptance of Liebman's "inventive business strategy" to have her permanently move to Pond Avenue, was a series of unrelated circumstances which eventually led to the decision to close Pond Avenue as an APG location. There was no proof of a series of calculated moves which positioned Minkina in a doomed office and set the stage for a termination without cause at the conclusion of her contract.

When Liebman first raised the idea of the move, he was trying to find a solution to Minkina's extreme physical reaction to the environment in the Chestnut Hill office. A suggested move within the office suite had not produced lasting improvement, so the next

reasonable alternative was to find Minkina a place in another APG office. It was also apparent to Martin, Frankl, and Liebman that Minkina was not experiencing great success building her own practice. Compared to the other doctors in the suite, she had a small panel and was kept occupied largely by taking overflow and urgent care patients.

As far as Liebman understood at that time, Pines was planning to leave Pond Avenue and jettison hundreds of patients. Liebman had no plans to close the location, since Bless had expressed no intention of departing, and APG had just hired Zheng to build up her practice there. It was not until after Liebman had already informed Minkina that she could not go back on her earlier decision to transition to Pond Avenue that the concept of expanding in Needham was approved by the APG board. Liebman did not recruit Bless and Zheng to move there; rather, Bless brought up the idea on his own when Liebman asked him for recommendations of possibly interested doctors, and Bless then asked Zheng to join him.

Even after Bless and Zheng signaled their intention to decamp to Needham, there is no evidence Liebman plotted to close Pond Avenue as a vehicle for getting rid of Minkina. The only circumstantial evidence presented indicated the architect charged with remodeling the space for Pines's concierge practice had been given the impression APG planned to bring in another doctor to practice with Minkina. Further, APG would not have spent the money building Minkina a private office in February if Liebman anticipated closing the office and terminating Minkina.

While there may be some question as to when Liebman decided that Pond Avenue would be closed as an APG practice, it is apparent that there were legitimate business reasons for taking this action, and there was no direct evidence which supported a

conclusion that it was done for the purpose of disadvantaging Minkina. Liebman had to find a way to use the office suite productively, since APG owned the space. That did not mean APG was somehow obligated to maintain its own practice there. For reasons not explored by either party, Liebman decided not to hire additional doctors to work in conjunction with Minkina. This might have been because Minkina did not have a sufficiently strong practice to serve as an anchor for new doctors, or because Bless had expressed his own concerns about patient reaction to her practice style. In any event, it cannot be disputed that the projected deficit for the space with Minkina practicing alone was going to be $192,000 in fiscal 2005. Given that there was a cap on the overhead that could be charged to an individual physician, this large projected deficit cannot be explained as the inevitable consequence of the decision not to put more doctors in with Minkina. Feeder practices were expected to lose money, but this amount far exceeded the average per physician loss APG was incurring at that time. Hence, there is no indication that closing of Pond Avenue practice was a retaliatory action directed at Minkina because she had filed a complaint with the MCAD.

Although the closing of the practice was not violative of c.151B, the way Liebman handled the consequence of the closing raised the specter of retaliation. To establish a claim of retaliation under c.151B, Minkina had to prove that she engaged in protected activity of which Respondents were aware, Respondents subsequently subjected her to an adverse employment action, and there was a causal connection between the protected activity and the adverse action. There is no question that Minkina engaged in protected activity. In December, 2003 she filed a charge with the MCAD claiming discrimination on the basis of a sex, handicap, and national origin. She filed an

amended charge in May, 2004, alleging Respondents had retaliated against her because of the earlier filing. There is also no dispute that the notification of her impeding termination constituted an adverse employment action.

There is rarely direct evidence of a causal connection in discrimination cases. Causation is usually proven through inference, and the circumstantial evidence in the record tends to support such an inference. Unlike with the OSHA complaint, the timing of the protected activity and adverse employment action suggests a link. While both the initial MCAD and the OSHA complaints were filed in December, 2003, the MCAD action was still alive when the decision to terminate Minkina was made by Liebman. The amended charge was filed in May, 2004, and it was in that time frame that APG was focused on preparing the physical space in Needham to which Bless and Zheng were to move. More importantly, it was during this period that Liebman decided that Jane Fogg would be hired by APG and placed in the Needham practice when it eventually opened. Given the fact that there were no significant developments at Pond Avenue after May which would have driven the decision to close it, a fair assumption is that Liebman at least was contemplating the real possibility that Minkina would soon be without a practice. That he elected to hire Fogg for Needham without ever explicitly offering Minkina the opportunity to move must be viewed with some suspicion. Further, Liebman was actively involved in the preparation of Respondents' amended verified position statement, which was submitted to the MCAD on September 17, 2004. This meant he was focused on Minkina's allegation of his violation of c.151B at the precise time he finalized his decision to close Pond Avenue and terminate her employment. Rather than

being too remote, the nexus between protected activity and adverse employment action was quite close.

Temporal proximity alone might not support an inference of a causal connection, but here the inference is buttressed by Liebman's failure to offer Minkina the opportunity to move to Needham with Bless and Zheng. While Liebman testified he had not offered other doctors who were terminated without cause when APG closed their practices positions in other locations, David Ives testified that this procedure had in fact been a practice within APG. Liebman's testimony about the prior instances he oversaw did not establish that they were analogous to Minkina's situation. It is not known what kind of arrangement was made with the Dedham doctor whose single-person office was closed, and no detail was provided regarding Dr. Garland. There was no evidence as to whether there were viable alternatives available at the time these two doctors were let go. As to Picker, while the termination was not denoted as being for cause, it was apparent that APG was dissatisfied enough with her manner of practice that Liebman elected to shut down a very busy office which he had just set up two years prior.

Respondents argued that making Minkina an offer to move to Needham would have been futile, since she had expressed her lack of interest in relocating, and she never asked to move there. Any expressions of desire or preference before Minkina was informed that Pond Avenue would be closing are largely irrelevant. Minkina was obviously not happy about what she came to view as an involuntary transition from Chestnut Hill to Pond Avenue, and it stands to reason she would not have wanted to move again when the Needham possibility arose in early 2004. Having finally accepted the reality of Pond Avenue, it would have been irrational for Minkina to seek out or

express an interest in going to Needham, which would extend her commute and that of her patient base. Such a change would only be rational if the alternative was a loss of employment. Had Minkina been advised that Pond Avenue would be closing, but she could move to Needham if she desired to, and had she then expressed a lack of interest in the move, Respondents could have argued Minkina did not want to move. It is true Minkina did not seek out Liebman after he sent her the termination letter to request that she be relocated to Needham, but the letter did not convey that there were any alternatives to termination.

The claim that no space was available in the Needham practice at the time Minkina was terminated is not persuasive. As was mentioned, it must have at least been contemplated that Pond Avenue would be closed at the time an offer was made to Jane Fogg. In any event, Liebman was actively engaged in recruiting Diane London beginning in June, 2004. That she did not begin working in the Needham practice until February, 2005, when a new office space was constructed, hardly proves there was no room in the Needham practice at the time Minkina was terminated. Liebman clearly had the capacity to plan ahead. Further, since Bless and Zheng did not move from Pond Avenue to Needham until December, 2004, the logistics of accommodating Minkina until space was available in Needham hardly appear to have been a real barrier to her continued employment.

Since Minkina proved a *prima facie* case of retaliation, the burden shifted to Respondents to produce evidence of legitimate, non-retaliatory reasons for their failure to offer Minkina the opportunity to move to Needham, and their decision to terminate her employment. Had Liebman testified that he decided to terminate Minkina because he had

serious concerns that she would be able to build a sufficient practice to thrive under the productivity-based compensation model, Respondents might well have defeated Minkina's claim of retaliation. Had Liebman said he did not offer Minkina a position in Needham because Bless, a well-respected physician and leader among the APG staff, had received numerous patient complaints regarding Minkina and had reservations about continuing to practice with her, there would have been an irrefutable basis for the lack of an offer. Respondents stipulated, however, that Minkina's performance was adequate throughout her employment with APG, and she was terminated without cause. While Bless recollected talking briefly to Liebman about the patient complaints, Liebman did not remember the conversation and did not claim he was motivated by it in any way.

Liebman insisted in discovery and at the hearing that he made no offer because APG was not legally obligated to do so. That may be an accurate statement when considered in a vacuum. Nothing contractually compels APG to offer a doctor a position in another location if that doctor's practice closes. Where there is evidence which supports an inference of a casual connection between protected activity and an adverse employment action, however, simply relying on an abstract legal right does nothing to refute a *prima facie* case. Based on the burden-shifting analysis, it must therefore be found that Respondents retaliated against Minkina, in violation of c.151B, when they terminated her employment.

Remedy Issues. Where a person is terminated in violation of c.151B, that person is entitled to compensatory damages. The most common element of compensatory damages is back pay. The parties disagree on a few points in computing the back pay owed Minkina, and as a result they arrived at differing figures. Respondents are correct

that the $168 a month attributed to Minkina's income, but then subtracted to pay for insurance benefits, should not be included as recoverable income. Once she was terminated, Minkina neither had to pay the income tax on this amount, nor was the $168 expended to pay for insurance. Minkina is also not entitled to recover the difference between the $3000 a year allowance for continuing medical education available while employed by APG, and the $1000 allowance provided to Urban Medical employees. That money was to pay for educational expenses, if approved. Had Minkina demonstrated that after being terminated by APG she incurred such expenses in excess of $1000, she would have been awarded that reimbursement. In the absence of such a showing, the money would just be a bonus which is not justified in a make whole remedy. Regarding moonlighting income, Minkina is correct. Full-time employees of APG can and do moonlight, and those earnings are not set off against their APG salary. That Minkina chose to moonlight, working hours in addition to her full-time Urban Medical job, placed her in the same position as people like Ives. She was obligated under the duty to mitigate to accept a comparable full-time job, and Respondents are entitled to off-set the earnings from that full-time employment against any back pay award. They are not entitled to off-set back pay with earnings from more than full-time work.

The biggest gap in the parties' calculations derives from them looking at different periods. Interestingly, Respondents claim that one computes back pay entitlement from the time of the termination until the conclusion of the arbitration hearings. In contrast, Claimant maintains that she is only entitled to back pay from the time of her termination until she obtained an equivalent or better job. Normally it is the employee who is arguing for the longer back pay period and the employer who is trying to cut it down. If the

employee is unemployed or under-employed by the time of the hearings, both parties are correct. Where the employee obtains a higher paying job prior to the hearings, only the Claimant's view of the prevailing practice is accurate.

What this means is that back pay is computed by taking the amount Minkina would have likely earned if she had continued to be employed by APG between November, 2004 and November, 2007, when she obtained a higher paying job with Harvard Vanguard; and subtracting from that the amount she earned during that period with Urban Medical. No evidence was introduced which would justify adjusting the projected APG earnings for annual raises. It was not apparent Minkina would have exceeded the $10,000 per month salary once she was on the productivity-based model, and there is no indication APG gave all comparable doctors across-the-board raises during this period.

Because she initially worked less than full-time for Urban Medical, and because her salary at Urban Medical was lower than it had been at APG, there was a loss of earnings which needs to be made up. Minkina is also entitled to be made whole for the 12% retirement contribution which APG would have made. Subtracted from that total should be the $60,000 Minkina received in severance from APG after her termination. Using $10,000 a month for the APG salary and $1200 a month in retirement contributions, and the Urban Medical earnings reported on Minkina's W-2's, the computation comes out to $43,901[4].

The figure provided by Respondents is understated because they projected back pay through the middle of August, 2008. By doing so, they used the higher salary

[4] APG salary of $10,000 a month for 35.5 months ($355,00) + retirement benefits of 12% ($42,600) – severance benefits ($60,000) – UMG earnings ($293,699).

Minkina was earning at Harvard Vanguard as of November, 2007 to effectively lower the back pay damages suffered prior to that time. According to that methodology, if the hearings went on for another year, Minkina would have ostensibly owed Respondents a large amount of money for the experience of having been terminated. Such a calculation is especially irrational because APG is using a salary rate frozen at the 2004 level to compute what she would have earned had she stayed at APG, yet is seeking to gain the credit of the 2008 salary levels paid at Harvard Vanguard.

Another major element of compensatory damages is emotional distress. Unlike back pay, there is no objective method of determining a correct figure. There is no doubt that Minkina suffered anguish as a result of the termination. Losing one's job is, for most people, the most wrenching trauma experienced, other than having a close family member or acquaintance die. Particularly for someone who already had to start her professional career over again in a new country, the fear that her license to practice and hospital privileges could be suspended if she did not find another job was especially upsetting.

It is very hard, however, to isolate out what emotional distress resulted from the employment decision and the limited period of unemployment and under-employment. Minkina clearly suffered distress over the physical symptoms brought on by her reaction to the air quality. She suffered distress because of things she felt were discriminatory and retaliatory, such as the transfer to Pond Avenue, but those claims are not properly part of this case. Minkina took medication to relieve her anxiety, but that regime started well before her termination. She was not physically disabled by the emotional distress, and she was able to find a job quickly and practice without limitation.

Although Minkina continued to function in her professional life, it was established that the termination took a toll on her personally. Her relations with her friends and husband were strained and the outside cultural activities in which she had taken great pleasure were diminished. One cannot say the attendant emotional distress was *de minimis*, which is how awards of $10,000 are often viewed. On the other hand, her symptoms and manifestations of distress do not approach those of people who have been awarded, and who courts have allowed to keep on review, $50,000 or $100,000. Balancing all the facts, an award of $25,000 for emotional distress is appropriate.

Minkina did not prove that APG or Liebman damaged her professional reputation with either patients or colleagues, so she is entitled to no damage award for this claim. The employment agreement precludes an award of punitive damages and this provision has already been ruled upon by the Superior Court, and review was denied by the Appeals Court. In any event, Minkina prevailed on the basis of a burden-shifting analysis, not because there was clear evidence of the type of outrageous conduct which would justify an award of punitive damages.

Minkina is entitled to interest at the statutory rate of 12%. While one can appreciate the frustration of Respondents in having to pay interest for periods when Claimant could have been pursuing her case with more vigor, since Claimant were deemed to have satisfied the legal requirements of acting within the mandated time lines, there is no basis for withholding a portion of the pre-judgment interest because of what was previously described as her slow march to arbitration. This does not mean, however, that Minkina is entitled to 12% interest on the entire awarded amount from the date she filed suit in November, 2004. In *DeRoche v. MCAD.* 447 Mass. 1 (2006), the Supreme

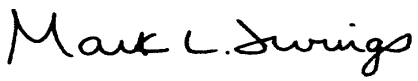
Judicial Court discussed the concept that the MCAD is empowered to award interest as part of its authority to fashion a remedy which makes whole victims of c.151B violations. Arguably, Minkina began to suffer compensable emotional distress from the time she was notified of her imminent termination, and certainly from the time her employment ended. Hence, she is entitled to 12% interest on the $25,000 emotional distress award from the November 17, 2004 filing date. Minkina's back pay damages did not begin to accrue, however, until six months after she was terminated, since she received severance pay equal to six months of salary. That the loss of retirement benefits commenced on the date of termination is more than offset by the fact that she started earning a salary from Urban Medical one month after her termination. A reasonable make whole remedy therefore should include interest at the rate of 12% per annum on the back pay and lost retirement contributions, starting April 1, 2005.

The final remedial area concerns attorneys' fees and costs. Claimant is entitled to recover the costs related to submission of this case to arbitration, including filing fees and fees of the arbitrator. Claimant is also entitled to reasonable and necessary attorneys' fees, based on a lodestar method. In preparing a fee petition, counsel should exclude time spent by current and former counsel on legal theories which were unsuccessful, including appeals to get courts and agencies to reverse prior rulings. The Arbitrator is mindful that Claimant employed a succession of counsel, and no doubt a substantial amount of time was spent by each in reviewing the file and getting up to speed. Respondents are not responsible for fees beyond those that would have been charged by a single counsel who handled the case from beginning to end.

INTERIM AWARD

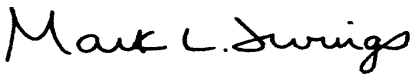
I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the rules of the American Arbitration Association and having been duly sworn and having duly heard the proofs and allegations of the parties, issue the following Interim Award, which shall remain in full force and effect until such time as a Final Award is rendered:

Claimant is directed to prepare by March 20, 2009 a proposed final calculation of damages, including interest, based on the findings in this decision, and a petition for the award of fees and costs. The petition shall be submitted to Respondents, who shall have until April 3, 2009 to notify Claimant of their concurrence with the petition, or they shall articulate areas of disagreement. The parties shall then have until April 17, 2009 to resolve their differences. If they cannot reach an agreement, both parties shall submit their respective positions on the unresolved issues in writing to the Arbitrator by May 1, 2009. The Arbitrator shall then decide whether there is a need for a hearing, or whether all issues can be decided on the basis of the written submissions. The Arbitrator shall retain jurisdiction for the sole purpose of calculating the remedy for sixty days from the receipt of the parties'statement of position.



March 4, 2009 Mark L. Irvings

I, Mark L. Irvings, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.



March 4, 2009 Mark L. Irvings