Term

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COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

RACHEL ROCHAT *vs.* L.E.K. CONSULTING, LLC & another. [FN1]

12-P-54

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, L.E.K. Consulting, LLC (LEK), is a business consulting firm. In September of 2004, the plaintiff, Rachel Rochat, was hired as a consultant in LEK's Boston office. After she was terminated from that position approximately two years later, Rochat brought an action against LEK and Peter McKelvey, the head of LEK's Boston office, alleging that they discriminated against her based on gender in violation of G. L. c. 151B, § 4(1), as in effect prior to St. 2011, c. 199, §§ 7 and 9. [FN2] Following extensive discovery, LEK moved for summary judgment. For purposes of its motion, LEK did not contest that Rochat could make out a prima facie case of discrimination. Instead, LEK focused on demonstrating that it had valid, nondiscriminatory reasons for terminating her. In a detailed and thoughtful opinion, a Superior Court judge ruled that Rochat's claims failed as a matter of law. Although the question is close, we conclude that the summary judgment record, construed in the light most favorable to Rochat, contains sufficient evidence suggesting that her termination was motivated by discriminatory animus to warrant sending the case to a jury. Therefore, we reverse and remand. *Background. The job of consultant.* During her tenure at LEK, Rochat worked on eighteen consulting projects. As with other LEK consultants, she had full-time responsibility for one project at a time, and she managed a team of associates. For each project, she typically answered to a 'manager' (the supervisor immediately above her) and to two partners. [FN3] The managers supervised two projects at a time, and each partner typically supervised six or so projects at a time. Thus, the consultant was the highest LEK employee with full-time responsibility for a project.

In accordance with standard LEK policy, Rochat received a written evaluation of her performance on each project at the end of that project. In addition, through a consensus process, she received an overall evaluation of her work every six months (in this case, March of 2005, September of 2005, March of 2006, and September of 2006). With that comprehensive performance evaluation system in place, LEK was able to produce a rich record of the views held by the various managers and partners with whom Rochat worked regarding her performance.

Rochat's first year. During her first year as a consultant, Rochat generally received positive marks in both her project-specific evaluations and six-month reviews. She received consistent praise for her hard work, enthusiastic attitude, and professionalism, with a typical comment as follows: '[Rochat] had a great attitude throughout the case. She did a good job establishing a team rapport which helped as the team did have some weekend work. She was a pleasure to work with.'

Altho[illegible]he reviews identified some areas where she needed improvement, she received overall evaluations of 'at expectations' or 'exceeds expectations' for every project she worked on. The overall message communicated by her March, 2005, and September, 2005, six-month reviews was positive. For example, the 'most important message' section of her September, 2006, review closed by stating, 'Strong skills in team management and research give [Rochat] a good foundation on which she can build; improved communication and increasing her role in development of the case thinking will make her a strong C2 [second year consultant].' She was told orally that her career was 'on track.'

The first half of Rochat's second year. In the first four months of her second year, Rochat worked on four projects. She received 'at expectations' evaluations on three of the projects. One of these projects was considered more difficult than average, and on that project she received 'exceeds expectations' marks for her attitude and professionalism, with the comments: 'Professionalism was strong as always with [Rochat],' and '[Rochat] demonstrates a good attitude, great initiative, and a strong commitment to LEK at all times.' On the remaining project, which was also considered more difficult than most, Rochat received an 'exceeds expectations' mark overall, and she received 'far exceeds expectations' marks (the highest possible mark) in client relations and professionalism.

In the fifth and sixth months of her second year, Rochat took a leave of absence to play on the Swiss hockey team in the 2006 Winter Olympics. That leave lasted from late December to early March, and she therefore received her mid-year review for her second year as a consultant shortly after her return. Although Rochat had received an 'at expectations' (or higher) score for each of her four projects, her mid-year review noted (with apparent accuracy) that her performance scores had 'trended downward during this review period.' It also noted that the feedback provided by the people she supervised rated 'below her peer group in all categories.' The report closed by stating the following 'most important message':

'[Rochat] should build upon her demonstrated professionalism, commitment to her cases, and positive attitude and re-dedicate her energy to her career as she returns from her leave of absence. She needs to step beyond the role of being the primary analyst on her teams and [to] take on the team leadership and case management role as she progresses through her C2 year.'

The second half of Rochat's second year. In the remainder of her tenure at LEK, Rochat worked on four additional projects. Two of the projects went reasonably well, earning her 'at expectations' evaluations overall. On one of these cases she received an 'exceeds expectations' mark for her 'management skills.' By all accounts, the other two projects did not go well, even though the clients were not unhappy with the final work product.

The first of the two problematic cases was HIG4, a due diligence review involving industrial cranes. The manager on HIG4 was Jonathan Chou, who had a reputation as being an extremely demanding supervisor. [FN4] Chou had various problems with Rochat's performance, particularly in the areas of 'analytical execution and day-to-day management of the team.' Her review on HIG4, which was completed in June of 2006, was her first overall 'below expectations' mark for any project. The review was not entirely negative, and it noted that Rochat had 'worked very hard' attempting to overcome 'less-than-ideal circumstances' outside of her control, and 'generally had a good attitude even during times of frustration.'

Rochat considered her HIG4 review unfair on the grounds that it blamed her for things outside of her control. There is evidence in the record to support this contention; for example, it is undisputed that Rochat was put on this three-week case after it was already a third over and that her assigned team of associates was considered below average in capability. She made various unsuccessful efforts to have her review modified.

The other project that had significant problems was ACO1, which involved an analysis of the

world : market for metal bottle caps. It was a much larger case than HIG4, and it required the team members to spend a substantial amount of time residing in Indianapolis. Rochat had a strong aversion against working on the case, because she wanted to remain in the Boston area to attend to a health crisis that a family member was facing. Her efforts to be removed from the case proved unsuccessful.

As noted, ACO1 did not go well. Although Rochat's portrayal of the problems that arose on the case is less dire than LEK's, she acknowledges that she and her supervisors had some substantive conflicts, that Robert Rourke, one of the partners on the case, 'wanted things done a certain way,' that she pushed back on this (including when Rourke was on a speaker phone in the same room as the client), and that her relationship with Rourke was sometimes 'contentious.' While the two versions of the problems on the case vary somewhat, under both versions there were strained personal relationships and periods of low morale.

One of the problems that Rochat highlights about the case is her relationship with her immediate supervisor, Thilo Henkes. On a regular basis, Henkes subjected Rochat to 'inappropriate' belittling comments such as 'Oh, that's a typical female thing to do.' What bothered Rochat more than the substance of such comments was that Henkes made them specifically to try 'to get a reaction from [her]' in front of her male colleagues. Rochat's deposition testimony paints Henkes as the source of many of the problems that arose on ACO1, for example, through his failure to serve as an effective intermediary between her and Rourke. Henkes also blamed Rochat for certain things without any factual basis. Most pointedly, he inaccurately told Rourke that Rochat viewed him (Rourke) as too demanding and that she had bad mouthed Rourke to the associates.

For his part, Henkes describes ACO1 as a case that was fraught with 'a lot of negative vibes' and where the team of associates was 'miserable.' He blamed Rochat for the negativity he observed, characterizing her as 'being really sour on everything and anything.' Henkes stated that some of the associates had come to him to relay their unhappiness about the case and to try to ensure that they were not themselves blamed. At one point in his deposition, he stated that he recalled that a particular associate had told him that Rochat had blamed the manager or partners for 'things going wrong.' Later in the deposition he corrected this, stating that 'I don't remember the specifics of the conversation. So I don't recall if he said specifically [Rochat] specifically was pointing the finger at specific people.'

In an August 25, 2006, electronic mail (e-mail) to the head of the Boston office, Rourke harshly criticized Rochat's performance on ACO1. He cautioned that his 'frustration' with Rochat should be taken in the context that (in his view) she thought him 'too particular.' However, he added, 'That said, I can't imagine that she is going to be successful at LEK over the long, intermediate, or even frankly the short term with her attitude and capabilities.' This e-mail came three weeks before Rochat's all-important September, 2006, six-month review. [FN5]

The decision to terminate Rochat. Chou, Rochat's immediate supervisor on HIG4, took the lead in pulling together Rochat's six-month review, and he prepared a set of slides that were presented at the meeting where her performance was reviewed. Chou spoke with Henkes and Rourke before finishing his slides, and all three participated in the meeting, together with other managers and partners. The presentation that Chou prepared was not uniformly negative. On the positive side, it noted that Rochat '[w]orks incredibly hard in all cases,' she did a '[s]olid job of summarizing and executing the research on [two of her four] cases,' and 'she comes across as credible in front of clients.' On the negative side, it characterized her 'overall analytical leadership' as 'inconsistent,' and it questioned her ability in 'keeping up with the raised level of expectations for a Consultant of her tenure.' However, where the presentation was particularly damning was with respect to her attitude: '[Rochat's] attitude has deteriorated and has been difficult to deal with for partners and managers.' '[S]he seems to be more difficult to deal with and appears to harbor negative feelings visible to the team.' According to Chou, this information likely came from Henkes. While Chou's presentation concluded that Rochat should not be promoted to manager at that time, it

conte . ted her remaining at LEK. For example, the recommended 'most important message' in Chou's slides was that Rochat 'needs to seriously focus on improving the areas listed under her development needs this period; she should try to be more receptive to her feedback and stay positive to advance to the next level.' [FN6] Chou's presentation stated that Rochat 'will need at least 6-12 months before the next evaluation' and that having her placed on a formal 'performance improvement plan' should be considered.

According to a partner who attended the September, 2006, meeting, Henkes actively participated in the discussions about Rochat, and Henkes and Chou in fact did most of the talking. There emerged a 'prevailing view' that Rochat was 'underperforming,' and a discussion ensued about whether to put Rochat on a performance improvement plan. This option was rejected because of concerns about her attitude. As one attendee of the meeting explained -- in response to a question about what 'pushed the decision to be termination instead of something else' -- 'the decision-makers decided that this was not a person that we wanted to have in our Office for 90 days and that it would be a morale drain for others and not a positive outcome.'

LEK executed its decision to terminate Rochat on October 9, 2006. Although Rochat was given seven weeks of severance pay and health care coverage, she was asked to leave the premises immediately. LEK did not offer her the use of a head hunter to find a new job (a service sometimes offered to terminated employees) until after she threatened suit. She did not receive the company's annual bonus (available to those employed on December 31 of the year).

The day *after* Rochat was terminated, LEK produced a project review for ACO1 apparently authored by Henkes. This review was extremely harsh. It rated her overall performance as 'below expectations,' and it gave her a 'significantly' below expectations mark (the lowest possible grade) for her attitude and professionalism. According to the report, '[Rochat's] consistently negative attitude made it very difficult to work with her. [Rochat] would bad mouth the [partners] in front of the team and despite [Henkes's] attempt at coaching her, she would not change her attitude or perspective on the case.' Although some of the specific concerns noted in the review previously had been documented, the timing of the report would have given the jury reason to question whether, at a minimum, the severity of the review had been 'shaded' in an effort to justify an employment decision that had already been made.

Discussion. Standard of review. We review a decision to grant summary judgment de novo, to determine 'whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.' *Bank of N.Y.* v. *Bailey,* 460 Mass. 327, 331 (2011), quoting from *Augat, Inc.* v. *Liberty Mut. Ins. Co.,* 410 Mass. 117, 120 (1991). Because allegations of discrimination involve questions of intent, motive, and bias that are generally ill-suited to resolution by judges as a matter of law, summary judgment is disfavored in disparate treatment cases. See *Matthews v. Ocean Spray Cranberries, Inc.,* 426 Mass. 122, 127 (1997). See also *Santiago-Ramos v. Centennial P.R. Wireless Corp.,* 217 F.3d 46, 54 (1st Cir. 2000) ('courts should exercise particular caution before granting summary judgment for employers on such issues as pretext, motive, and intent'). To obtain summary judgment, LEK must 'demonstrate that the plaintiff is unable to offer admissible evidence of the defendant's discriminatory intent, motive, or state of mind sufficient to carry the plaintiff's burdens and support a judgment in the plaintiff's favor.' *Matthews v. Ocean Spray Cranberries, Inc., supra.*

LEK's liability. To prevail on a claim under G. L. c. 151B, an employee must prove four elements: (1) membership in a protected class, (2) harm, (3) discriminatory animus, and (4) causation. *Lipchitz v. Raytheon Co.,* 434 Mass. 493, 502 (2001). The first two elements are undisputed in this case. In attempting to establish animus and causation, Rochat proceeded under the three-stage burden-shifting framework outlined in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973). See *Haddad v. Wal-Mart Stores, Inc.,* 455 Mass. 91, 97-98 & n.14 (2009). LEK does not dispute that Rochat met her burden of showing a prima facia case, focusing instead on

estab g that it terminated her for legitimate, nondiscriminatory reasons.

Armed with its detailed and comprehensive performance evaluation process, LEK was able to build a robust case that its reasons for terminating Rochat were facially valid. This placed the burden squarely on Rochat to 'establish that the basis of [LEK's] decision was unlawful discrimination 'by adducing evidence that the reasons given by [LEK] for its actions were mere pretexts to hide such discrimination." *Sullivan v. Liberty Mut. Ins. Co.,* 444 Mass. 34, 54-55 (2005), quoting from *Lewis v. Boston,* 321 F.3d 207, 214 (1st Cir. 2003). Moreover, 'our task is not to evaluate the soundness of [LEK's] decision making, but to ensure that it does not mask discriminatory animus. See *Mesnick v. General Elec. Co.,* 950 F.2d 816, 825 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992).' *Sullivan v. Liberty Mut. Ins. Co., supra* at 56. Thus, Rochat needs to demonstrate not only that she was treated unfairly, but that she was treated unfairly *on account of her gender.* Similarly, the fact that the performance evaluation process includes some subjectivity, by itself, is of little moment. Rochat ultimately needs to show that the evaluation in fact masked a discriminatory intent, not merely that it had the potential to do so. *Ibid.*

This is not a case where an employee is claiming that her employer had a performance evaluation process in place and then ignored its results. [FN7] See *Kouvchinov v. Parametric Tech. Corp.,* 537 F.3d 62, 68 (1st Cir. 2008) ('pretext can be demonstrated through a showing that an employer has deviated inexplicably from one of its standard business practices'). However, even if a company relied on its performance evaluation process, that process itself might be infected by the bias of those performing the evaluations. This is the nature of Rochat's claim. Further, the principal thrust of her arguments is that gender bias resulted in her being terminated in a precipitous way, rather than claiming that it alone prevented her from thriving at the firm.

Rochat paints a picture of a male-dominated work culture at LEK. There was only a single female partner in the Boston office, and -- at the time of the summary judgment ruling -- not one woman at the manager level. [FN8] Indeed, the lack of gender diversity at LEK was so pronounced that it became the subject of a 2006 holiday skit that featured a video in which the lone female partner was filmed in an empty office asking 'where did all the women go?' Although the unexplained absence of women in high level positions at the firm is hardly dispositive (given that there might be valid explanations for this), it is a factor the jury could consider. See *Lipchitz v. Raytheon Co.,* 434 Mass. at 509 (jury may consider whether 'the highest ranks of an employer's organization are closed to members of a protected class').

More importantly, Rochat offered evidence that Henkes was a decision maker, that he influenced other decision makers, and that he acted in a belittling manner toward her based on her gender. The motion judge characterized Henkes's 'that's a typical female thing to do' remark as 'overtly sexist.' However, she ultimately discounted the import of that remark, concluding that 'Henkes's isolated and ambiguous remark is insufficient, standing alone, to prove pretext or discriminatory intent.' Even putting aside the fact that Rochat offered the specific comment as but one example of remarks that Henkes regularly made, we believe that the judge engaged in fact finding that should have been left to the jury. Put differently, a jury reasonably could have concluded -- based on the summary judgment record -- that Henkes's comments and needling behavior revealed a gender biased attitude that negatively affected Rochat's evaluation on ACO1. [FN9] See *Diaz v. Jiten Hotel Mgmt., Inc.,* 762 F. Supp. 2d 319, 323 (D. Mass. 2011) (it was for the jury to decide whether an ageist remark was 'a window on [the speaker's] soul, a reflection of his animus, or . . . just a slip of his tongue somehow unrelated to his 'true' feelings'). [FN10] 'Whether a given remark is ' ambiguous' -- whether it connotes discriminatory animus or it does not -- is precisely what a jury should resolve, considering all of the facts in context.' *Id.* at 335. See generally *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 149-153 (2000) (underscoring the importance -- in considering an employer's motion for summary judgment -- of reviewing all of the evidence in the light most favorable to the employee and of not 'impermissibly substitut[ing the court's] judgment concerning the weight of the evidence for the jury's').

Moreover, it is indisputable that Rochat's evaluation on ACO1 -- especially with regard to her attitude -- played a critical role in the abrupt manner in which she was terminated, and that much of the perceived negativity regarding her attitude was bound up in her working relationship with Henkes (such as his view that she was 'really sour' and his relaying that she had 'bad mouthed' the partners in front of the associates). A reasonable jury, viewing Henkes's evaluation of Rochat's attitude in light of his remarks and the fact that prior to ACO1 Rochat had received consistently high marks for her attitude and professionalism, could have inferred that gender bias played a role in his evaluation, and in the ACO1 evaluation as a whole due to his participation in it. Cf. *Thomas v. Eastman Kodak Co.,* 183 F.3d 38, 62 (1st Cir. 1999), cert. denied, 528 U.S. 1161 (2000) (sharp drop in plaintiff's scores when allegedly biased supervisor took over her evaluations provided some evidence of pretext).

To be sure, Henkes was hardly the sole determinant of Rochat's fate, and concerns about her performance can be traced to some sources independent of Henkes. For example, Rourke's own impression of Rochat's work on ACO1 was based in part on things that he personally observed (not just ones relayed to him by Henkes). [FN11] Further, other key players, such as Chou, formed a negative overall impression of Rochat independent of her work on ACO1. Be that as it may, reasonable jurors could have concluded on the current record that Henkes played an important role in evaluating Rochat and that he materially affected the opinion of others who were evaluating her. See *Knight v. Avon Prods., Inc.,* 438 Mass. 413, 426-427 (2003) (characterizing the causation question as whether a discriminatory 'animus was a material and important ingredient in the discharge'). See also *Lipchitz v. Raytheon Co.,* 434 Mass. at 506 n.19 (discriminatory animus may be 'determinative cause' of adverse employment action, thus giving rise to liability, without being 'the only cause of that action'). [FN12] Although LEK arrived at the termination decision by consensus, the jury readily could have found that Henkes played a major role in driving the discussions that resulted in that consensus (especially if the facts are read, as they must be in the current context, in the light most favorable to the nonmoving party). This is not a case where it could be said that the employee's case was reviewed with sufficient independence from the alleged bias as to break the chain of causation as a matter of law. See generally *Mole v. University of Mass.,* 442 Mass. 582, 598-600 (2004), and cases cited. [FN13] It was up to the jury to resolve the extent to which Henkes's comments and behavior revealed gender biased attitudes that could have infected Rochat's evaluation. [FN14]

In addition, Rochat was able to marshal some evidence that similarly situated male consultants were treated materially better than she was. See *Matthews v. Ocean Spray Cranberries, Inc.,* 426 Mass. at 129-130. Notably, Rochat's use of such 'comparators' was quite limited. She did not use her comparator evidence to try to show that male consultants who received similar evaluations to hers thrived at LEK (i.e., through being promoted or at least retained on a long-term basis). [FN15] Instead, Rochat sought to demonstrate only that men who had received generally comparable negative evaluations were treated somewhat better (e.g., by being placed on performance improvement plans, or being kept on long enough to receive the year-end bonus). For each comparator that Rochat put forward, LEK offered a plausible explanation for why it treated that employee differently. In particular, LEK urged that Rochat's situation was different from the others because LEK had concerns about her attitude in addition to some about her competence. [FN16] In short, it maintained that key decision makers at the firm began to view her as a problem employee that should be separated from the company, not merely as someone who lacked the substantive skills to be promoted up the ladder. On this basis, LEK argued that there was good reason to terminate Rochat in a different manner from underperforming male consultants who did not present the same attitudinal concerns. [FN17]

The judge observed that LEK viewed 'the plaintiff's attitude toward her superiors as a significant problem, which might rationally explain why LEK did not offer the plaintiff another chance to improve.' Largely on this basis, the judge concluded that the comparator evidence provided no aid to Rochat. The judge's acceptance of LEK's proffered explanation is inconsistent with the requirement that facts be read in favor of Rochat, the party opposing summary judgment. In

additi . ı concluding that Rochat's 'attitude problems' distinguished her situation from her comparators', the judge failed to account for Rochat's assertion that it was underlying gender bias that animated LEK's concerns about her attitude. As noted, up until her very last case, ACO1, Rochat received consistently high evaluations for her attitude and professionalism. Indeed, even on the ill-fated HIG4, her evaluators acknowledged that she generally was able to maintain 'a good attitude even during times of frustration.' This background and the issues discussed above with regard to Henkes's role in ACO1 call into some question the legitimacy of the attitudinal concerns that LEK perceived on that case (and hence the basis for distinguishing Rochat's comparators). [FN18] The comparators that Rochat offered were close enough to her situation that it was for the jury to decide the import of this evidence. See *Trustees of Health & Hosps. of Boston v. Massachusetts Commn. Against Discrimination,* 449 Mass. 675, 683 (2007).

In sum, we conclude that, based on the summary judgment record, rational jurors could have concluded that 'when [Rochat] was terminated, [at least one key LEK actor] had a discriminatory intent, motive, or state of mind based on her [gender] and that any such animus was a material and important ingredient in the discharge.' *Knight v. Avon Prods., Inc.,* 438 Mass. at 426-427. The motion judge therefore erred in ruling in LEK's favor on summary judgment regarding Rochat's discrimination claims. [FN19]

McKelvey's personal liability. Rochat argues that the judge improperly dismissed her claims against McKelvey individually. Although her complaint alleges that he was liable on numerous grounds, she focuses on appeal solely on her statutory claims that he discriminated against her directly in violation of G. L. c. 151B, § 4(1), or aided and abetted LEK's discrimination in violation of G. L. c. 151B, § 4(5). [FN20] Those claims are procedurally defective. At the time that Rochat filed her administrative complaint with MCAD, she was well aware that McKelvey played a role in her termination, yet she did not name him as a defendant. She therefore cannot now maintain

c. 151B claims against him. *Butner v. Department of State Police,* 60 Mass. App. Ct. 461, 468 (2004). [FN21]

Conclusion. We affirm the dismissal of the following counts in their entirety: count II (hostile work environment), count III (violations of covenant of good faith and fair dealing), count IV (intentional interference with contractual relations), count V (aiding and abetting discrimination), and count VI (Equal Rights Act). See note 2, *supra.* We affirm the dismissal of count I (gender bias discrimination) as against McKelvey, but reverse the judgment in so far as it dismissed count I against LEK, and remand the case to Superior Court for further proceedings consistent with this opinion.

So ordered.

By the Court (Cypher, Katzmann & Milkey, JJ.),

Entered: January 28, 2013.

FN1. Peter McKelvey.

FN2. The complaint included various related claims. Rochat's claims that McKelvey was personally liable for aiding and abetting LEK's discrimination and for intentionally interfering with her contractual relations are addressed at the end of this memorandum and order. Her complaint also alleged that both defendants created a hostile work environment, and violated the implied covenant of good faith and fair dealing and the Massachusetts Equal Rights Act, G. L. c. 93, § 102 (MERA). In her opening brief, Rochat affirmatively abandoned the hostile work environment claim, and failed to argue that the judge improperly dismissed the remaining claims. As well, '[w]here remedies under

G. L. c. 151B 'are or were available to a complainant, those remedies are exclusive, preempting the joining of parallel MERA claims." *Lopez v. Commonwealth,* 463 Mass. 696, 715 (2012), quoting from *Martins v. University of Mass. Med. Sch.,* 75 Mass. App. Ct. 623, 624 (2009). The dismissal of those claims is

there ffirmed.

FN3. The make-up of the individual project teams varied widely. On her eighteen projects, Rochat worked for fourteen different managers and nineteen different partners. Unsurprisingly, some managers and partners were considered harder to work for than others in terms of their management style, their standards, and the extent to which they personally got involved in the details of a case and expected their instructions to be followed.

FN4. The record does not suggest that Chou was hard only on female employees. To the contrary, the affidavit of Jared Carver, submitted by Rochat, portrays in some detail his difficulties working with Chou.

FN5. Consultants at LEK are generally put on a two to three-year track to make manager (or not).

FN6. The formal six-month evaluation report was more negative, and it rated Rochat's overall performance for the last six months 'below expectations.' It is not clear whether this draft was generated before or after the meeting.

FN7. In fact, LEK's evidence that the consultants who thrive at the firm are those who do well in the evaluation process (regardless of their gender) appears unrebutted.

FN8. LEK rated two women in Rochat's consultant peer group highly, and it promoted those women to manager. For unexplained reasons, both of the women left soon after they were promoted.

FN9. LEK highlights that Rochat never explained the context in which Henkes allegedly made his 'that's a typical female thing to do' remark. It also argues that Rochat's limited recall of other specific comments that Henkes allegedly made raises some doubt about the credibility of her claims. However, at the summary judgment stage we 'may not make credibility determinations or weigh the evidence.' *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000). Such questions are for the jury to consider.

FN10. Rochat has not argued that Henkes's comments were strong enough evidence of discrimination to justify a 'mixed motive' analysis. See *Wynn & Wynn, P.C.* v. *Massachusetts Commn. Against Discrimination,* 431 Mass. 655, 666 (2000). LEK's reliance on that case for the proposition that '[s]tray remarks in the workplace' are insufficient to show illegitimate motives, *id.* at 667, is thus misplaced. The fact that a remark may not suffice to trigger a mixed-motive analysis does not mean that it cannot be taken as circumstantial evidence of discriminatory animus. See *Fernandes v. Costa Bros. Masonry, Inc.,* 199 F.3d 572, 588-589 (1st Cir. 1999). See generally *Diaz v. Jiten Hotel Mgmt., supra* at 333-338 (chronicling the use and misuse of the 'stray remarks doctrine'). 'It may be that a single comment is made by a peer that is not reflective of the [work] environment as a whole or of management, but it is for the *jury* to determine -- in light of all the evidence before it -- that such a comment is 'stray." *Id.* at 338. Compare *Tardanico v. Aetna Life & Cas. Co.,* 41 Mass. App. Ct. 443, 450 (1996) (affirming the allowance of summary judgment where the only evidence of pretext was a 'highly ambiguous' remark readily susceptible to an interpretation that did not implicate the plaintiff's age).

FN11. Moreover, ACO1 was the sixth case on which Rourke had worked with Rochat, which was more than any other partner at the firm. In addition, Rochat acknowledges that Rourke tried to be 'very helpful' by providing her constructive advice at the beginning of ACO1. Cutting in the other direction is Rochat's allegation that Rourke himself acted inappropriately at a dinner with her and her male colleagues on ACO1 by recounting an off-color story that made her uncomfortable. Although his telling of the story might be of limited value to Rochat's case by itself, a jury could reasonably conclude that it offers contextual support for

Rocha aim that Henkes and Rourke unfairly considered her a difficult colleague because of her gender.

FN12. See also *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001) ('The burden of persuasion of pretext may be met, inter alia, by showing that discriminatory comments were made by the key decisionmaker *or those in a position to influence the key decisionmaker*' [emphasis added]).

FN13. Following an amendment to the analogous Federal statute, the United States Supreme Court recently held that a supervisor's bias can in some circumstances remain a proximate cause of an adverse employment decision even if the ultimate decision maker exercised independent judgment. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1192-1193 (2011). The facts of the current case do not

require us to consider whether the Supreme Judicial Court might follow the United States Supreme Court's lead on this.

FN14. In an effort to provide mathematical proof that the evaluation process generally was gender-biased, Rochat put together a chart purporting to show that male consultants in the Boston and Chicago offices generally received higher numerical scores in the evaluation process than women. According to the chart, the observed gender gap was about 0.1 on a grading scale of 1.0 to 5.0. The judge discounted this evidence because it was presented unadorned with any explanation of its statistical significance. Compare *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. at 56 (rejecting certain statistical proof because it 'fails to eliminate other explanations for the disproportionate statistics, such as random chance [given the small discrepancies and small sample size involved here] or the actual distribution of aptitudes or expertise among [employees] of differing ages and genders both before and after [the job action being challenged]'). We have not relied on this chart for purposes of the current appeal, and do not address its admissibility at trial.

FN15. Nor was such proof apparent given that the record reveals that those who received negative evaluations were terminated or left of their own accord soon after receiving such reviews.

FN16. LEK made various other arguments as to why the comparators were differently situated. For example, it stated that one male consultant who received negative reviews was kept on longer because he had come over as a lateral hire specially recruited by one of the partners.

FN17. LEK argues that Rochat's conduct at the time of her termination demonstrated that its concerns were justified. It is undisputed that when Rochat informally learned from an unauthorized source that she was about to be terminated, she removed certain confidential files from the office (later returning the files without incident). Whether such conduct should be seen as after-the-fact proof of LEK's concerns, or as an excusable mistake she impulsively made in the heat of the moment (as Rochat maintains) is something for the jury to evaluate.

FN18. It is also apparent on the record that some of the concerns expressed about Rochat's 'attitude' related to her pushing back on suggestions made by the partners and to her otherwise bucking the culture of the firm (such as by trying to be taken off of ACO1 so that she could attend to family needs). The record indicates that such concerns were not limited to female consultants. For example, Henkes advised Rochat to drop her efforts to be removed from ACO1 lest others use it against her based on his own unsuccessful experience in seeking work relief to attend to a family crisis the previous year. In addition, when consultant Aaron Smith pushed back on a substantive suggestion that McKelvey had given him on a case, McKelvey told him 'he would bring the sledgehammer down on him if [Smith] didn't make the decision [McKelvey] wanted him to make.' However, although Henkes and Smith tested the firm culture in this manner, they both nevertheless were able to remain, indeed thrive, at the firm.

FI As noted, Rochat abandoned her claims that both defendants created a hostile work environment and violated the implied covenant of good faith and fair dealing and the Equal Rights Act, G. L. c. 93, § 102. See note 2, *supra*.

FN20. Her reference to the dismissal of her common law claims in the caption that appears on the next to last page of her opening brief is unaccompanied by argument or citation. Further, even were we to consider the argument made in her reply brief that the judge improperly dismissed her claim that McKelvey intentionally interfered with her at-will employment, she could not resurrect that claim because she failed to offer any evidence that McKelvey acted with 'actual malice.' See *Blackstone v. Cashman,* 448 Mass. 255, 260-261 (2007).

FN21. Rochat suggests in passing that her claim against McKelvey nevertheless can survive, because McKelvey may have had notice of the MCAD proceedings and an opportunity to participate in them. See *Butner v. Department of State Police, supra* at 468 n.14. She has not demonstrated her entitlement to rely on such an exception.

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