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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROLINE PIESZAK, M.D.,

Plaintiff,

v.

GLENDALE ADVENTIST MEDICAL
CENTER, et al.,

Defendant.

CV 97-4705 ABC (CWx)

ORDER (1) GRANTING DEFENDANT
LOPEZ' MOTION FOR SUMMARY
JUDGMENT; (2) GRANTING IN PART
AND DENYING IN PART DEFENDANT
RIFFEL'S MOTION FOR SUMMARY
JUDGMENT; AND (3) GRANTING IN
PART AND DENYING IN PART
DEFENDANT GLENDALE ADVENTIST'S
MOTION FOR SUMMARY JUDGMENT

Defendants filed three separate motions pursuant to Fed. R. Civ. P. 56 on January 31, 2000. Defendants' motions came on regularly for hearing before this Court on July 17, 2000. After considering the materials submitted by the parties, argument of counsel, and the case file, the Court GRANTS AND DENIES the motions as indicated herein.

I. Procedural Background

On June 26, 1997, Plaintiff Caroline Pieszak, M.D., filed a Complaint against Defendants Glendale Adventist Medical Center ("GAMC"), Hugo Riffel, M.D., and Robert Lopez, M.D. The Complaint alleged various claims stemming from Pieszak's participation in GAMC's Obstetrics/Gynecology residency program. A First Amended Complaint

1 was filed on March 24, 1998. On October 15, 1998, the Court granted
2 Pieszak leave to file a Second Amended Complaint ("SAC") and a
3 Supplemental Complaint ("SupC"). Pieszak filed the SAC on December
4 17, 1998.

5 The SAC alleges twelve claims for relief. Eight claims seek
6 relief from GAMC only. These claims are three Title VII, 42 U.S.C. §
7 2000e, claims (gender discrimination, sexual harassment, and
8 retaliation), a breach of contract claim, a bad faith claim, a state
9 Fair Employment and Housing Act ("FEHA") claim for gender
10 discrimination, a negligent supervision claim, and a wrongful
11 termination claim. The SAC alleges one claim against GAMC and Riffel:
12 A denial of fair procedure claim. Two claims seek relief against all
13 three Defendants: a FEHA sexual harassment claim and a FEHA
14 retaliation claim. The final claim is a slander claim against Riffel
15 only. The Defendants answered the SAC.

16 The SupC alleges two retaliation claims against GAMC. One of the
17 claims is based on Title VII; the other is based on FEHA. GAMC
18 answered the SupC.

19 Before the SAC was filed, Defendants filed various motions for
20 summary judgment. On October 15, 1998 and again on December 16, 1998,
21 the Court took those motions under submission pending the California
22 Supreme Court's ruling in *Kelly v. Methodist Hospital of Southern*
23 *California*.

24 On November 23, 1999, the California Supreme Court still had not
25 heard oral argument on *Kelly*. On that date, the Court informed the
26 parties of its intent to proceed with the case. After receiving a
27 status report from the parties, the Court ordered the parties to re-
28 file their motions for summary judgment and issued a briefing and

1 hearing schedule. Before the hearing, however, the California Supreme
2 Court heard oral arguments in *Kelly*. On March 10, 2000, the Court
3 once again continued the hearing to July 10, 2000 to await the *Kelly*
4 decision. The *Kelly* decision was issued on May 11. See *Kelly v.*
5 *Methodist Hosp. of S. Cal.*, 22 Cal. 4th 1108, 95 Cal. Rptr. 2d 514
6 (2000).

7 **II. Summary Judgment Standard of Review**

8 It is the burden of the party who moves for summary judgment to
9 establish that there is "no genuine issue of material fact, and that
10 the moving party is entitled to judgment as a matter of law." Fed. R.
11 Civ. P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951
12 (9th Cir. 1978). If the moving party has the burden of proof at trial
13 (the plaintiff on a claim for relief, or the defendant on an
14 affirmative defense), the moving party must make a showing sufficient
15 for the court to hold that no reasonable trier of fact could find
16 other than for the moving party. *Calderone v. United States*, 799 F.2d
17 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under*
18 *the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D.
19 465, 487-88 (1984)). This means that, if the moving party has the
20 burden of proof at trial, that party "must establish beyond
21 peradventure all of the essential elements of the claim or defense to
22 warrant judgment in [that party's] favor." *Fontenot v. Upjohn Co.*,
23 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original).

24 If the opponent has the burden of proof at trial, then the moving
25 party has no burden to negate the opponent's claim. *Celotex Corp. v.*
26 *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). In other words,
27 the moving party does not have the burden to produce any evidence
28 showing the absence of a genuine issue of material fact. *Id.* at 325.

1 "Instead, . . . the burden on the moving party may be discharged by
2 'showing'--that is, pointing out to the district court--that there is
3 an absence of evidence to support the nonmoving party's case." *Id.*

4 Once the moving party satisfies this initial burden, "an adverse
5 party may not rest upon the mere allegations or denials of the adverse
6 party's pleadings . . . [T]he adverse party's response . . . *must set*
7 *forth specific facts* showing that there is a genuine issue for trial."
8 Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material
9 fact exists only when the nonmoving party makes a sufficient showing
10 to establish the essential elements to that party's case, and on which
11 that party would bear the burden of proof at trial. *Celotex*, 477 U.S.
12 at 322-23. "The mere existence of a scintilla of evidence in support
13 of the plaintiff's position will be insufficient; there must be
14 evidence on which a reasonable jury could reasonably find for
15 plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106
16 S. Ct. 2505 (1986). The evidence of the nonmovant is to be believed,
17 and all justifiable inferences are to be drawn in favor of the
18 nonmovant. *Id.* at 248. However, the court must view the evidence
19 presented to establish these elements "through the prism of the
20 substantive evidentiary burden." *Id.* at 252.

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1 **III. Factual Background¹**

2 **A. GAMC.**

3 Pieszak joined GAMC's OB/Gyn residency program on June 21, 1995.
4 (Riffel Decl. ¶ 7.) GAMC is a California corporation organized under
5 the California Nonprofit Religious Corporation Law. (Pl.'s Stmt. of
6 Genuine Issues re: Lopes Motion ("L. Facts") ¶ 6; Patten Decl. Ex. 1.)
7 GAMC initially incorporated as a nonprofit religious corporation in
8 October 1980. (L. Facts ¶ 4; Patten Decl. Ex. 1 at 131-163.)

9 GAMC maintains an OB/Gyn residency program. Since 1981, Riffel
10 has been the director of the OB/Gyn residency program. (Pl.'s Stmt.
11 of Genuine Issues re: Riffel Motion ("R. Facts") ¶ 62.) The GAMC's
12 OB/Gyn residency program has as one of its purposes to provide
13 graduate training on OB/Gyn and related specialties. (R. Facts ¶ 1.)
14 The program lasts for four years. (*Id.*) The residents in the program
15 provide medical services to GAMC's patients. (See Riffel Decl. Ex.
16 D.) Moreover, the residents in the program are compensated by GAMC
17 for these services. (R. Facts ¶ 1.) GAMC also provides insurance,
18 vacation and sick leave, and maternity leave to its residents.
19 Residents are required to devote their entire professional time to
20 GAMC and are expressly precluded from offering their services anywhere
21 else. (Riffel Decl. Ex. D.) In short, a resident is also an employee

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24 ¹ As required for purposes of a summary judgment motion, this
25 section views the evidence in the light most favorable to Pieszak, the
non-movant.

26 The Court also notes that various objections to evidence were
27 filed by both sides. The Court reviewed all the objections to the
evidence upon which it has relied. To the extent that the Court has
28 relied on that evidence in this order, the objections are **OVERRULED** on
the merits. Objections to evidence upon which the Court does not rely
are **OVERRULED** as moot, except as indicated herein.

1 vis-a-vis GAMC. The residency program consists of only eight
2 residents, two for each year of the program. (R. Facts ¶ 3.)

3 GAMC participates in a nationwide "matching program" to select
4 its residents. (Riffel Reply Decl. ¶ 2.) Each participating
5 institution submits a ranked list of preferred applicants, and each
6 applicant also submits a ranked list of preferred institutions. (*Id.*)
7 The "program" then uses an algorithm to match applicants with
8 institutions.

9 Eighteen individuals were part of the GAMC residency program from
10 July 1992 to June 1998. (Russo Decl. ¶ 6.) Of these eighteen
11 individuals, six (or 33%) were females. At any one time, females
12 comprised no more than 37.5% of the residents in the GAMC program.
13 (*Id.*) During the same period of time, over 50% of the residents in
14 OB/Gyn programs nationwide were female. (*Id.* at ¶ 6.)

15 During Pieszak's residency at GAMC, the hospital did not provide
16 readily available shower facilities for female residents. (Pieszak
17 Decl. ¶ 40.) Female residents had to either shower in the male
18 doctor's shower facilities or in a patient room. The physician scrub
19 clothes were also stored in the male doctor's facility. Thus, female
20 residents were forced either to enter the male facilities to get
21 physician scrub clothes or to wear scrub clothes identifying them as
22 nurses. (*Id.* at ¶ 40.)

23 **B. Pieszak's First Year Residency.**

24 Pieszak applied for the GAMC residency program while still in
25 medical school. (Pieszak Depo at 10-15, 17-18, 24.) As part of the
26 application process, Lopez conducted a "one-on-one personal interview"
27 with Pieszak. (*Id.* at 24.) During this interview, Lopez asked
28 Pieszak about her birth control methods. (*Id.* at 10-15, 17-18.) He

1 told Pieszak that "it was well known that Dr. Riffel did not like his
2 female residents to get pregnant during residency" and that "[i]t was
3 not appreciated by the team." (*Id.* at 18:7-10.)

4 Pieszak first learned that she had been accepted into GAMC's
5 residency program when she received a letter, dated March 15, 1995,
6 from Riffel welcoming her to the program. (R. Facts ¶ 6.) On March
7 27, 1995, Pieszak signed a one-year contract with GAMC formalizing the
8 terms of her residency with GAMC. (R. Facts ¶ 7.) The contract
9 stated that she was to start her residency on June 19, 1995. (*Id.*)
10 Unfortunately, she did not arrive at GAMC until June 21, 1995.
11 (Riffel Decl. ¶ 7.)²

12 The other first year resident in the program was also a female,
13 Michelle May. (See Pl.'s Stmt. of Genuine Issues re: GAMC Motion
14 ("G. Facts") ¶¶ 7 & 8.) All of the other residents in the program
15 were male.

16 Pieszak spent the first three months of her residency at White
17 Memorial Medical Center on a "medicine rotation." (R. Facts ¶ 11.)
18 At the end of this rotation, Pieszak received favorable reviews from
19 her supervising physicians. (Pieszak Decl. Exs. B & C.) She then
20 returned to GAMC in late September 1995. (R. Facts ¶ 11.)

21 When Pieszak returned to GAMC, Lopez, a third-year resident by
22 that time, was assigned to "train [her] in." (Pieszak Decl. ¶ 5.)
23 Lopez welcomed Pieszak by throwing a chart at her and giving her "ten
24 minutes to review the chart and report it to the senior resident."

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27 ² Pieszak appears to contest this fact. (See R. Facts ¶ 8.)
28 However, her evidence merely states that she "did not arrive late
. . . on June 21, 1995." (Pieszak Decl. ¶ 3.) This statement does
not create a genuine issue as to when she arrived.

1 (*Id.*) Lopez then told Pieszak that even though he was a better
2 surgeon, nurses and patients would like her better because she was
3 female. The rest of the day, Lopez was hostile, demeaning and abusive
4 towards Pieszak. Lopez continued his attacks the following day and
5 told Pieszak that when he was a fourth year, he would make her life
6 miserable. (*Id.*)

7 Over the next few days, Lopez continued to belittle, demean, and
8 abuse Pieszak, at times in front of patients and nurses. (Pieszak
9 Decl. ¶ 6.) Pieszak complained to a program physician about Lopez'
10 treatment and about a week later, the second year residents officially
11 assumed Lopez' training role. (Pieszak Decl. ¶ 7.)³ However, this
12 change did not stop Lopez' harassment of Pieszak. At various times
13 during the next year, Lopez harangued Pieszak. He also made some
14 gender and sex related comments.

15 For instance, at a Christmas party hosted by the residents for
16 the residents and their significant others, Lopez and some of the
17 other residents told crude, graphic jokes about patients and their
18 gynecologic anatomy. (Pieszak Depo. 93-95.) It was also common for
19 these male doctors to make fun of their patients' gynecological
20 problems. (*Id.* at 146.) Furthermore, Lopez told Pieszak that he had
21 made most of the nurses in the program cry. (*Id.* at 133.) He then
22 proceeded to list the "incompetencies" of these nurses. (*Id.*) Lopez
23 also had been disrespectful to female doctors at the hospital. For
24 instance, Lopez once referred to a female physician as a "hysterical"
25 woman. (Marshall Decl. ¶ 3.) Lopez' treatment of female staff earned
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28 ³ Defendants' hearsay objection to a portion of Pieszak Decl. ¶
7 is SUSTAINED.

1 him a reputation as someone who harassed, yelled at, belittled, and
2 demeaned female staff members. (See, e.g., Agunbiade Decl. ¶ 7.)

3 On one occasion, Lopez discussed his desire to have sex with his
4 wife as he, Pieszak, and other physicians were preparing for a
5 surgery. (Pieszak Depo. at 137-139.) One of the attending physicians
6 told Lopez to stop and Lopez complied. (*Id.*) At other times,
7 however, Lopez commented to Pieszak that he had not had sex with his
8 wife in a long time. (*Id.* at 141.) At other times, Lopez and some
9 other residents would make sexual comments and gestures about a female
10 drug company representative who occasionally visited GAMC. (*Id.* at
11 147.)

12 GAMC's other male residents and physicians also would joke about
13 the three female surgeons and the female nurses and criticize them as
14 inadequate. (*Id.* at 145.) The male residents made jokes about the
15 weight of female staff members, including Pieszak. (*Id.* at 144, 218.)

16 On October 19, 1995, Pieszak received an initial evaluation from
17 Riffel. (Pieszak Decl. ¶ 8; Hensleigh Decl. Ex. 51.) She received a
18 satisfactory-high satisfactory overall rating and was rated
19 satisfactory or high satisfactory in every category. (Hensleigh Decl.
20 Ex. 51.) During the evaluation, Riffel said "words to the effect that
21 [Pieszak] was performing well and to 'keep up the good work.'"
22 (Pieszak Decl. ¶ 8.) Pieszak also received some general, routine
23 counseling on studying and other "educational" goals. (R. Facts ¶
24 12.)⁴

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26 ⁴ The Court notes that Defendants assert that this counseling
27 was unusual. However, the evidence presented supports an inference
28 that this type of "counseling" was routine. The Court also notes that
Riffel declares that Plaintiff received an evaluation in December
1995. (See R. Facts ¶ 12.) Defendants, however, present no evidence

1 On February 27, 1996, Pieszak signed another one-year contract
2 governing her second year of residency which was to begin July 1,
3 1996. (R. Facts ¶ 9.)

4 In April 1996, Pieszak received another evaluation. (R. Facts ¶
5 13.) This time, she was evaluated by three individuals: Riffel,
6 Raleigh Unterseher,⁵ and Dr. Leffler, a fourth year resident in the
7 program. (Pieszak Decl. ¶ 9.) She received a few low satisfactory
8 marks, mostly satisfactory marks, and a few high satisfactory marks.
9 (Riffel Decl. Exs. F-G.) She was also counseled on study habits and
10 told to complete reading certain textbooks. (Hensleigh Decl. Ex. 55.)
11 The evaluation team also reviewed Pieszak's results from a test
12 referred to as "CREOG." (R. Facts ¶ 13.) Although the score was
13 below the "mean," it was in line with the results of other first year
14 residents. (*Id.*; Hensleigh Decl. Ex. 56.) Moreover, the primary
15 purpose of this CREOG exam was to evaluate the strength and weaknesses
16 of the residency program. (Hensleigh Decl. Ex. 3.)

17 **C. Pieszak's Second Year Residency until September 19, 1996.**

18 On July 30, 1996, Pieszak received notice that she did not pass
19 Part III of the United States Medical Licensing Exam ("USMLE"). (R.
20 Facts ¶ 15.) At some point thereafter, she informed Riffel of this
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23 besides Riffel's statement of this evaluation. In opposition,
24 Plaintiff declares that no December 1995 evaluation ever occurred.
25 (Pieszak Decl. ¶ 8.) That, in and of itself, is sufficient for this
26 Court to find, on this motion for summary judgment, that no December
27 1995 evaluation occurred. Nevertheless, Plaintiff also provides
28 GAMC's records which omit any mention of a December 1995 evaluation.
(Hensleigh Decl. Ex. 55.)

⁵ Unterseher is one of the faculty members of the residency program.

1 result. (Hensleigh Decl. Ex. 6.)⁶ Although Pieszak did not request
2 any additional assistance from Riffel, Riffel decided to make changes
3 in the schedule to insure that Pieszak had sufficient study time for
4 the next USMLE scheduled for December 2. (R. Facts ¶ 18.) These
5 changes consisted of ordering the fourth-year residents to give
6 Pieszak priority in scheduling the vacation time to which she was
7 entitled.⁷ (Riffel Decl. ¶ 16.) Additionally, Riffel instructed the
8 fourth-year residents to give Pieszak vacation time from November 26
9 to December 4, 1996. (*Id.*)

10 In early September, Riffel instructed the fourth-year residents
11 to relieve Pieszak of most of her normal duties on Wednesday mornings
12 and Friday afternoons so that she could study for the USMLE. (R.
13 Facts ¶ 22; Frye Depo. at 354:12 - 355:9.) Riffel selected these time
14 periods so that Pieszak's study program would have the least impact on
15 other residents. (Frye Depo. 358:7-17, 362:2-21.) Generally,
16 Wednesday mornings were idle time and the clinic was closed on Friday
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19 ⁶ There is some dispute as to the exact date that Plaintiff so
20 informed Riffel. Riffel declares that Plaintiff told him on or about
21 July 30, 1996. (See Riffel Decl. ¶ 13; accord Hensleigh Decl. Ex. 6
22 (Riffel's notes).) Plaintiff, however, asserts that she did not
23 provide that information on July 30. She does not state on what date
24 she did inform Riffel about the results. However, she did inform
25 Riffel, or GAMC, some time before September 19, 1996. (See Hensleigh
26 Decl. Ex. 9 at 5 (Lopez knew of USLME score before September 19,
27 1996).)

28 ⁷ The fourth year residents controlled the residents' schedules.
The GAMC residency program appears to follow a strict hierarchical
structure not unlike the military. (Hensleigh Decl. Ex. 2.) The
fourth-year residents have substantial supervisory power over the less
senior residents. Similarly, third-year residents supervise second
and first-year residents and second-years provide guidance to first-
years. The fourth-year residents during Pieszak's second year were
Lopez and Lance Frye.

1 afternoons. (Pieszak Decl. ¶ 17.) Thus, the study program imposed on
2 Pieszak mainly required that she give up her "down" time.

3 On September 10, 1996, Patrick Johnson, a nurse at GAMC, wrote a
4 memorandum to Riffel describing his concern about the "alarming" and
5 "unquestionably unsafe" manner in which Pieszak was treating the
6 clinic's patients.⁸ (R. Facts ¶ 26.) However, Riffel did not
7 immediately discuss any of these allegedly "alarming" and
8 "unquestionably unsafe" practices with Pieszak. Indeed, Riffel did
9 not take any immediate action except to place the letter in Pieszak's
10 file.

11 **D. Events from September 19, 1996 to December 12, 1996.**

12 **1. September 19, 1996.**

13 On September 19, 1996, Pieszak gave a morning lecture to the
14 other residents in the program. (Pieszak Decl. ¶ 18.) Lopez arrived
15 late as Pieszak was completing the lecture. He stopped the lecture
16 and ordered Pieszak to start over so that he could hear the lecture
17 from start to finish. He also wanted to know why she did not have a
18 handout available. Finally, he took over the lecture without letting
19 her finish. (*Id.*) Pieszak felt humiliated and demeaned by Lopez'
20 conduct. (*Id.*)

21 After the lecture, Pieszak reported Lopez' demeaning conduct
22 during the lecture to Riffel. (R. Facts ¶ 28; G. Facts ¶ 12.) She
23 also recounted to him her previous experiences with Lopez:

24 Dr. Lopez instructed Plaintiff that she was required to address
25 him as "Dr. Lopez" and he was going to refer to Plaintiff as "Dr.
26 Pieszak" when all the other residents referred to each other by
first name; Dr. Lopez . . . refused to return Plaintiff's beeper
pages with regard to the medical care of patients, in at least

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28 ⁸ Defendants' objection to Pieszak Decl. ¶ 26, (see Evid. Objs.
to Pieszak Decl. at 4:1-5), is SUSTAINED.

1 one situation endangering the life of a patient; when Plaintiff
2 attempted to discuss the medical care of a patient with Dr. Lopez
3 . . . on the telephone, Dr. Lopez would either hang up on
4 Plaintiff, tell her that she was stupid, tell her that he already
5 had gone over 'that' with her before, tell her that she just did
6 not 'get it;' or to ask an attending physician . . . ; with an
7 intern present who Plaintiff was supervising, Dr. Lopez
8 instructed Plaintiff that she could only speak to him [Lopez]
9 with a third person present . . . ; Dr. Lopez refused to confirm
10 Plaintiff's diagnoses of patients; Dr. Lopez instructed Dr.
11 Pieszak to page him inserting her pager number, so that he could
12 distinguish between Plaintiff's pages and others; Dr. Lopez was
13 continuing to assign Plaintiff work to be performed by an intern,
14 when Plaintiff was a resident; . . . Dr. Lopez informed a Unasyn
15 representative, in front of Plaintiff and with other residents
16 present, that Plaintiff had failed Part III of her Medical
17 Boards, and because he was inconvenienced by this, he had the
18 right to tell everyone about it; and Dr. Lopez informed Plaintiff
19 that she could only speak to him in front of third persons.

11 (Hensleigh Decl. Ex. 9 at 5 (Pl.'s Resp. to Interrogs.)) Pieszak
12 informed Riffel "that [she] could no longer tolerate the verbal abuse
13 and badgering." (Pieszak Decl. ¶ 18.) She also warned Riffel that
14 Lopez' conduct was "harassment." (R. Facts ¶ 28.) Riffel told
15 Pieszak to go the resident's call room, compose herself, and return in
16 the afternoon. (Pieszak Decl. ¶ 18.)

17 According to Riffel, that very same day, he had a meeting with
18 Lopez and "strongly counseled" Lopez about the seriousness of
19 Pieszak's harassment charge. (Riffel Decl. ¶ 29.) Although he has a
20 note dated September 19 attesting to this conversation, (see Riffel
21 Decl. Ex. M), Lopez does not recall any such conversation on that day,
22 (Lopez Depo. at 574:14-18). Indeed, Riffel did not talk to Lopez
23 about Pieszak's complaints anytime before October 1, 1996. (Lopez
24 Depo. at 439:13-21.)

25 Riffel, however, did conduct a meeting with some of the
26 residents. (Pieszak Decl. ¶ 19; R. Facts ¶ 32.) Riffel met with May,
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1 Frye, and Steven Katsuyama⁹ to "confer" about Pieszak's complaint
2 about the lecture. (R. Facts ¶ 32.) Pieszak was informed that she
3 was expressly excluded from the meeting. (Pieszak Decl. ¶ 19.) The
4 three residents all stated that Lopez' conduct at the lecture was not
5 harassing or demeaning. (Riffel Decl. ¶ 26.) However, according to
6 Riffel, these residents began to complain about Pieszak. (Riffel
7 Decl. Ex. O.) Specifically, they accused Pieszak of having a bad
8 attitude, being late, being absent, lacking knowledge, and asking
9 repetitive questions. (*Id.*) Riffel requested that they write down
10 their grievances and forward the grievances to him. (*Id.*)

11 It did not take long before Riffel began receiving grievances
12 against Pieszak. On September 19, Riffel received a report from a
13 third-year resident, Charles Whiting. (R. Facts ¶ 27.) The report
14 purports to chronicle Pieszak's failure to perform a Norplant removal.
15 According to the report, during her first year as a resident, Pieszak
16 refused to perform the Norplant removal on April 24 and May 8, 1996.
17 The report also asserts that an "intern" was teaching Pieszak to
18 perform a Norplant removal on August 14, 1996.¹⁰ (Riffel Decl. Ex.
19 L.) Without addressing the "problem" described in the letter, Riffel
20 merely placed the letter in the Pieszak file.

21 **2. September 20 to September 30, 1996.**

22 On September 20, 1996, Riffel wrote a letter to Lopez warning him
23 about Pieszak's accusations. (Riffel Decl. ¶ 25.) Riffel, however,
24 never actually provided that letter to Lopez. (Lopez Depo. at 437:21-

26 ⁹ At the time, Katsuyama was a first-year resident.

27 ¹⁰ It appears that "intern" is another term for a first-year
28 resident.

1 24.) Riffel did briefly show the letter to Lopez sometime after
2 October 1 and then simply placed it in Lopez' file. (*Id.* at 436-37

3 Some time after September 19, 1996, Riffel received a letter from
4 Katsuyama. (R. Facts ¶ 14.) Although the letter is dated September
5 9, 1996, Katsuyama believes he wrote the letter either on September 19
6 or September 29. (Hensleigh Decl. Ex. 58 at 191.) The letter
7 criticizes Pieszak for conduct that Katsuyama found objectionable.
8 Katsuyama claimed that on July 25, 1996, Pieszak cursed at him and May
9 for changing a recording procedure in a way that would reveal that
10 Pieszak did not see as many patients as May. (Riffel Decl. Ex. I.)

11 Katsuyama also claimed that he performed a Norplant removal on
12 August 14, 1996 and taught Pieszak how to perform that procedure.
13 (*Id.*) However, Pieszak states that Katsuyama did not teach her how to
14 perform the Norplant removal. Pieszak had learned that procedure at
15 medical school. (Pieszak Decl. ¶ 38.) Furthermore, Pieszak claims
16 that Katsuyama did not perform the Norplant removal; he watched as
17 Pieszak performed the procedure.¹¹ (*Id.*)

18 Katsuyama had a series of other complaints which Pieszak explains
19 or rebuts. (see Pieszak Decl. ¶¶ 37 & 38.) Moreover, Katsuyama
20 himself is unable to verify all the accusations he leveled at Pieszak.
21 (See Hensleigh Decl. Ex. 58.) Unfortunately, Riffel never discussed
22 any of Katsuyama's accusations with Pieszak. (Pieszak Decl. ¶ 36.)
23 Instead, he merely placed the Katsuyama letter in Pieszak's file.
24 (*Id.*)

25
26 **3. October 1 to October 21, 1996.**

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¹¹ Of course, for purposes of summary judgment, the Court
accepts Pieszak's version of events.

1 On October 1, 1996, Pieszak returned from her vacation. (Pieszak
2 Decl. ¶ 22.) Riffel immediately summoned her into a meeting with
3 Riffel, Lopez, and Frye. (Pieszak Decl. ¶ 22.) Pieszak was told that
4 the meeting's purpose was to mediate the conflict between her and
5 Lopez. However, during the meeting, Riffel lunged at Pieszak and
6 shouted that she was a "prima donna." (*Id.*) Pieszak felt that she
7 was being attacked and attempted to leave. (*Id.*) At that point,
8 Riffel ordered the fourth-year residents out of the office. (*Id.*)
9 Riffel then counseled Pieszak to get professional psychological
10 counseling and offered her a \$40 check to cover the co-payment for the
11 first five visits. (*Id.*; R. Fact ¶ 33.) Pieszak refused the check.
12 (Pieszak Decl. ¶ 22.)

13 According to Riffel, May approached him the following day to
14 complain about Pieszak. (Riffel Decl. ¶ 28.) Riffel made a note of
15 this alleged conversation and placed it in Pieszak's file. (*Id.* at
16 Ex. Q.) Riffel made no effort to mediate the alleged dispute between
17 May and Pieszak and did not confront Pieszak with May's allegations.
18 (Pieszak Decl. ¶ 36.)

19 That same day, Riffel also received a "Senior Residents Report"
20 signed by Lopez and Frye. (R. Facts ¶ 35.) The report was typed by
21 Lopez. (Frye Depo. 403:11-14.) Lopez and Frye had never before
22 created a Senior Residents Report and had never heard of a Senior
23 Residents Report being prepared. (Frye Depo. 405:7-17.) The report
24 was critical of Pieszak's practices, tardiness, and medical knowledge.
25 Attached to the report were some patient charts showing purported
26 errors. (Riffel Decl. Ex. R.) The senior residents should have
27 discussed with Pieszak any perceived charting errors. (Frye Depo.
28 424.) No senior resident, however, talked to Pieszak about the errors

1 identified in the report. (See *id.*) Riffel took this report and,
2 again, placed it in Pieszak's file. Riffel made no effort to discuss
3 the allegations in the "Senior Residents Report" with Pieszak.

4 On October 7, 1996, Whiting approached Pieszak and asked to speak
5 privately with her. (Pieszak Decl. ¶ 23.) He informed her that "he
6 had been told that [Pieszak] was suing the residency and he had been
7 manipulated into" writing the September 19 report. (Pieszak Decl. ¶
8 23.)

9 On October 8, Riffel received a letter from May complaining about
10 Pieszak. (R. Facts ¶ 37.) Riffel placed the letter in Pieszak's
11 file. On October 13, Riffel received another letter from Whiting.
12 (*Id.* at ¶ 38.) Riffel placed the letter in Pieszak's file. On
13 October 15, Riffel received a second memorandum from Johnson. (*Id.* at
14 ¶ 39.) Although Johnson again expressed concerned about the effect of
15 Pieszak's conduct on patients, Riffel merely put the letter in
16 Pieszak's file.

17 **4. October 22, 1996.**

18 On October 22, Pieszak met with Riffel, Frye, and Unterseher for
19 her fall evaluation. (Pieszak Decl. ¶ 26.) Pieszak received one
20 written evaluation by Riffel. The evaluation gave her unsatisfactory,
21 low satisfactory, and satisfactory marks. (Riffel Decl. Ex. V.) It
22 also gave an overall performance score of 1.83 with "1" defined as
23 unsatisfactory and "2" as low satisfactory. (*Id.*)

24 At that meeting, Riffel presented Pieszak with two letters.
25 (Pieszak Decl. ¶ 26; R. Facts ¶ 17.) The first letter was a notice of
26 disciplinary action placing Pieszak on probation. (See Pieszak Decl.
27 Ex. K.) The notice gave three reasons for the probation: "Deficient
28 fund of knowledge for [her] level . . . [; i]nability to carry out

1 full responsibility for a [second-year resident; and] . . .
2 [p]romoting an atmosphere that is detrimental to the educational
3 process of [her] fellow residents." (*Id.*) The notice further
4 informed Pieszak that she would receive "periodic evaluations to
5 determine [her] response to this action" and provided some general
6 standards that would be considered. (*Id.*)

7 The second letter informed Pieszak that "[i]n the event [she did
8 not] pass the USMLE test December 2 and 3, then [her] position in
9 program is [sic] in jeopardy." (Riffel Decl. at ¶ 15 & Ex. J.)

10 Riffel signed both letters.

11 When Pieszak asked for specific information about her
12 deficiencies, Riffel disclosed that he had collected eight letters
13 critical of her conduct. (Pieszak Decl. ¶ 26.) He also accused
14 Pieszak of spreading rumors that Lopez was harassing her because
15 Riffel had received four calls from different departments informing
16 him of Lopez' harassment. (*Id.*) Finally, he showed Pieszak
17 Johnson's first memorandum accusing her of alarmingly unsafe
18 practices. (*Id.* at ¶ 27.) Pieszak noted that the accusations in the
19 letter were false and asked to see the rest of her file. (*Id.* at ¶¶
20 27 & 28.) Riffel refused but volunteered that he was maintaining two
21 files on Pieszak: "one with [her] evaluations and one that had
22 'special' letters and things in it." (*Id.* at ¶ 28.) "Riffel said
23 that he hoped that a year from now that the file could be destroyed
24 'if everything work[ed] out.'" (*Id.*)

25 Riffel purportedly based his probation decision on the letters
26 and memoranda he had received. However, he failed to investigate the
27 accusations asserted in these letters. Accordingly, Riffel did not
28 learn that Pieszak's performance in the program was satisfactory. For

1 instance, Michael Frields, M.D., found that Pieszak was "among the
2 best residents that we have had through the years." (Frields Decl. ¶
3 2.) Frields reached this conclusion based on his "opportunity to
4 observe and evaluate numerous residents that have progressed through
5 the program." (*Id.*) Frields also found that Pieszak demonstrated
6 surgical and procedural skills, medical knowledge, and interpersonal
7 skills that were above average. (*Id.* at ¶¶ 3 & 4.) In short,
8 "Pieszak demonstrated a degree of progress that place[d] her ahead of
9 the average resident at her level of training" and showed that she
10 "was the most promising of the current group of residents." (*Id.* at
11 ¶¶ 3 & 5.) Frields was the chair of GAMC's OB/Gyn department during
12 the first part of Pieszak's first year and has been associated with
13 the GAMC residency program for over fourteen years.

14 Ray Iskander, M.D., also found that "Pieszak related well to her
15 and to [his] patients[;] . . . consistently did what she was asked to
16 do with a wonderful, positive attitude[; and had] . . . surgical
17 skills [that] were well above average." (Iskander Decl. ¶ 2.)
18 Iskander was on the faculty of the OB/Gyn resident program during the
19 time that Pieszak was in the program and he was the Chair of the
20 OB/Gyn department for part of the time that Pieszak was a resident.
21 (*Id.* at ¶ 1.)

22 These observations were not isolated. Various doctors, including
23 other residency faculty members, found that Pieszak had good inter-
24 personal skills and noted that she had a good bedside manner with
25 patients. (Arslanian Decl. ¶ 2; Aryasingha Decl. ¶¶ 3 & 5; Benedon
26 Decl. ¶ 3; Burton Decl. ¶ 3; Mapp Decl. ¶ 2; Sampson Decl. ¶ 3.) Many
27 of the GAMC doctors also commented that Pieszak had a positive,
28 enthusiastic, and pleasant attitude. (Arslanian Decl. ¶ 2; Aryasingha

1 Decl. ¶ 2; Burton Decl. ¶ 3; Mapp Decl. ¶¶ 2 & 3.) Finally, these
2 doctors complimented Pieszak's medical knowledge and clinical skills.
3 (Arslanian Decl. ¶ 2; Aryasingha Decl. ¶ 4; Benedon Decl. ¶ 3; Mapp
4 Decl. ¶ 2; Sampson Decl. ¶ 3.)

5 **5. October 23 to December 6, 1996.**

6 On October 23, Riffel received a third memorandum from Johnson.
7 Johnson expressed concern about Pieszak's interaction with "difficult"
8 patients and recommended "[e]valuation and corrective intervention."
9 (Riffel Decl. Ex. Y.) Riffel, however, did not intervene. He merely
10 continued his pattern of simply filing the document in Pieszak's file.
11 (Pieszak Decl. ¶ 36.)

12 In late October, Pieszak enrolled in a review course to prepare
13 for the USLME test. (Pieszak Decl. ¶ 24.) Riffel accommodated
14 Pieszak with seven days of "conference" although residents typically
15 only get five "conference" days a year. (*Id.*; R. Facts ¶ 19.)
16 Although she received two extra "conference" days, Pieszak was on call
17 on two nights during this conference time. Because of a time conflict
18 between the review course and her on-call period, Pieszak twice was
19 late in relieving another of the residents. (Pieszak Decl. ¶ 24.)
20 The resident, Henry Chang,¹² berated Pieszak for her tardiness and an
21 argument ensued. (*Id.*) This incident resulted in two letters in
22 November from Chang to Riffel critical of Pieszak. (Riffel Decl. Exs.
23 Z & FF.) As with almost every other letter that Riffel received about
24 Pieszak, Pieszak was never informed of the accusations, no
25 investigation was conducted, and the letter was merely put into the
26 Pieszak file. (See Pieszak Decl. ¶ 36.)

27
28 ¹² Chang was a first-year resident at the time.

1 Concerned about the secret file that Riffel was creating, Pieszak
2 talked to various attending physicians. (Pieszak Decl. ¶ 30.) She
3 also began to maintain a log book which she had GAMC personnel sign to
4 confirm her time of arrival. (*Id.*) That effort was terminated by
5 Johnson who forbade Pieszak from having anyone but him and one other
6 employee sign the log. (*Id.*) Johnson's instruction made maintaining
7 a log effectively impossible. (*See id.*)

8 On November 1, Pieszak and her husband met with Leroy Reese, the
9 Chair of GAMC's Graduate Medical Educational Committee. (Pieszak
10 Decl. ¶ 32.) Pieszak expressed her concern about the manner in which
11 she was being treated, her fear that Riffel was actively collecting
12 evidence against her, and her fear that she would not be allowed to
13 survive her probation. (Pieszak Depo. 399-401.) She presented Reese
14 with the names of physicians who had expressed a favorable view of her
15 and asked him to intervene and mediate. (*Id.*) She also asked Reese
16 for assistance in getting into some other residency program that would
17 be more nurturing. (*Id.*) At the time, Reese was unaware that Riffel
18 had placed Pieszak on probation. (Pieszak Decl. ¶ 32.) "Reese
19 informed [Pieszak] that he was placing [her] on a short leave of
20 absence, without repercussions, so that he could talk to people at the
21 residency about what had transpired." (*Id.*) Pieszak was placed on
22 leave from Friday, November 1 to Monday, November 4. (Reese Depo. at
23 236.)

24 Unfortunately, this leave had the effect of increasing the other
25 residents' resentment of Pieszak. Lopez, Frye, May, and possibly
26 Whiting with Unterseher approached Reese to express their frustration
27 that Pieszak's leave had placed an extra burden on their functions.

28

1 (Reese Depo. at 229.) May complained that Pieszak's leave required
2 her to be on call during the weekend. (Reese Depo. at 230.)

3 On November 5, Pieszak's husband wrote a letter to David Nelson,
4 who was the Chief Operation Officer for GAMC. The letter described
5 Lopez' mistreatment of Pieszak, Riffel's efforts to gather evidence
6 without disclosing any information to Pieszak, and Pieszak's desire to
7 leave the program in good standing. (Pieszak Decl. Ex. H.) Pieszak's
8 husband also wrote a letter to David Iglar, GAMC's Vice-President.
9 Neither individual took any action.

10 On November 25, Riffel received two letters from Frye. (R. Facts
11 ¶¶ 44, 47.) One of the letters indicates that Pieszak erred in
12 ordering a third vaginal ultrasound of a patient. This error was
13 described as "just one of the many mismanagement [sic] of patients
14 with first trimester vaginal bleeding that Dr. Pieszak has continued
15 to make despite intensive proctoring and repetitive instruction."
16 (Riffel Decl. Ex. BB.) Riffel's response: place the letter in
17 Pieszak's file.

18 As far as Frye remembered, however, the "many mismanagement[s] of
19 patients with first trimester vaginal bleeding" referred to one other
20 incident. (See Frye Depo. at 519.) As far as Frye knew, the
21 "intensive proctoring and repetitive instruction" consisted of talking
22 to her briefly about the second incident that prompted the letter.
23 (*Id.* at 521-22, 524-26.)

24 The second letter described another erroneous diagnosis by
25 Pieszak. This time, Frye stated that Pieszak's conduct "represent[ed]
26 a clean [sic] cut risk of patient endangerment and subsequent legal
27 action against [GAMC]." (Riffel Decl. Ex. CC.) On November 26,
28 Johnson sent another memorandum addressing the same incident. (R.

1 Facts ¶ 48.) Johnson represented that the patient was threatening
2 legal action. The letter also described a separate incident in which
3 Pieszak supposedly caused a patient unnecessary "bleeding and pain."
4 (Riffel Decl. Ex. DD.) Once again, two persons contacted Riffel to
5 accuse Pieszak of endangering patients and placing GAMC at financial
6 risk. Once again, Riffel believed it would be prudent to simply place
7 the letters in Pieszak's file.

8 Johnson's letter was not the only letter that Riffel received on
9 November 26. Apparently, four residents felt compelled to write
10 letters to Riffel on that date. November 26 was also the date that
11 Pieszak started her "study vacation." (Riffel Decl. ¶ 16.)

12 One of the letters was another letter from Katsuyama. In this
13 letter, Katsuyama expressed his disdain for Pieszak's ability and
14 knowledge. (R. Facts ¶ 49.) Interestingly, according to Katsuyama,
15 he had been away from GAMC and at White Memorial Medical Center since
16 September. (Riffel Decl. Ex. EE.) Thus, he apparently did not have
17 any residency-related contact with Pieszak since September. However,
18 his belief that he, a first-year, had taught Pieszak, a second-year,
19 how to conduct a Norplant removal in August made a lasting impression
20 on him. After spending three months "pondering" the Pieszak
21 situation, he determined that his "educational goals could not be
22 fulfilled" as long as Pieszak was part of the residency program.
23 (Riffel Decl. Ex. EE.) Katsuyama concluded, "I literally abhor the
24 thought of returning to [GAMC] and having to work alongside Dr.
25 Pieszak." (*Id.*)

26 Chang also wrote a short letter, which again repeated his
27 perception that Pieszak's conference schedule and tardiness forced him
28 to work extra hours. (Riffel Decl. Ex. FF.) The letter also attacked

1 Pieszak's knowledge and skills and blamed Pieszak for creating a "very
2 difficult" "working and learning environment." (*Id.*) Chang
3 concluded, "It will be of great benefit for my graduate medical
4 training if the situation can be remedied." (*Id.*)

5 May wrote the third letter. She describes her letter as "a plea
6 to improve the residents' academic environment." (Riffel Decl. Ex.
7 GG.) In her opinion, the whole cause of the strained environment was
8 Pieszak. (*Id.*)

9 Whiting also wrote a five-page letter which Riffel describes as
10 "extremely remarkable." (Riffel Decl. ¶ 46.) It describes a "toxic
11 environment" which, as expected, the author opines is caused by
12 Pieszak. Whiting describes Pieszak as untrustworthy, irresponsible,
13 incompetent, unteachable, divisive, and an embarrassment to the
14 program. (*Id.* at Ex. HH.)

15 All these November 26 letters cry out: terminate Pieszak.
16 However, Riffel did not interview any one, "counsel" these residents,
17 or conduct any investigation. Instead, after Pieszak returned from
18 her "vacation" on December 5, Riffel terminated her.

19 **6. The Termination.**

20 On December 6, Riffel, Untersher, Frye, and Lopez evaluated
21 Pieszak. She received two satisfactory marks from these four
22 individuals and the remaining marks were all unsatisfactory or low
23 satisfactory. (Riffel Decl. Exs. II-NN.) Her average score was 1.47,
24 placing her solidly in the unsatisfactory column. (*Id.*) Riffel did
25 not bother to show these evaluations to Pieszak; he just placed them
26 in her file. (Pieszak Decl. ¶ 36.)

27 That same day, Riffel called Pieszak into his office and fired
28 her. (Pieszak Decl. ¶ 34.) Riffel told her that she and her husband

1 had made a mistake by writing a letter to Nelson. (Pieszak Depo. at
2 854:12-17.) According to Riffel, however, she was terminated for "her
3 deficient fund of medical knowledge, poor patient care, and poor
4 attitude." (R. Facts ¶ 57; see also Riffel Decl. ¶ 49.) Riffel also
5 offered that he could write a better letter of recommendation for
6 Pieszak if she just resigned. (*Id.*) Pieszak refused.

7 Riffel's summary dismissal of Pieszak violated GAMC's process for
8 firing personnel. (Froberg Depo. 76.) The process required two
9 different tiers of hearings and notification to the Educational
10 Director, Georgia Froberg, and the medical director, Reese. (*Id.*)
11 Riffel failed to take any of these steps.

12 Pieszak immediately contacted Reese, who told her he was ignorant
13 of Riffel's actions. (Pieszak Decl. ¶ 34.) Pieszak then hired an
14 attorney. (*Id.*) On December 12, 1996, Pieszak received a letter from
15 Riffel terminating her effective January 12, 1997. (Riffel Decl. ¶ 49
16 & Ex. NN.)

17 The letter stated that the termination was "pursuant to Section
18 5.05 of the Agreement." (*Id.* at Ex. NN.) In the interim, she was
19 placed on administrative leave. (*Id.*) The letter also stated:

20 In accordance with Sections 5.04 and 5.05 of the Agreement
21 and the Program's Fair Hearing Procedure, you have the right to
22 request a Residency Program Hearing regarding the termination of
23 the Agreement. At such a hearing, you would be permitted to
24 appear before a committee of three Program faculty to present
25 your position. A copy of the Fair Hearing Procedure, which
26 consists of page 12 of the Program's House Staff Manual, is
27 attached for your reference.

28 If you wish to request a Residency Program Hearing, your
written request for the hearing must be received in my office by
no later than 5:00 p.m. on Thursday, December 19, 1996.

(*Id.*)

1 **E. The Post-Doctoral Training Agreement.**

2 The contract governing Pieszak's second-year residency is
3 entitled the "Post-Doctoral Training Agreement" ("PDTA"). Section
4 5.05 of the PTDA provides that "[e]ither party may terminate this
5 Agreement with or without cause at any time during the term hereof
6 upon thirty (30) days, written notice to the other party. . . . Said
7 termination shall have no effect upon Resident's right to a fair
8 procedure hearing if applicable upon termination hereof." (G. Facts ¶
9 3.)

10 Under the PDTA, a resident, "upon suspension or termination," is
11 entitled to "the procedure, if any, required under California law."
12 (*Id.* at ¶ 6.) The contract provides two exceptions to this right.
13 (*Id.*) A resident terminated because of his or her failure to obtain
14 the necessary medical licenses is not entitled to a hearing. (*Id.* at
15 ¶¶ 5 & 6.) The second exception is where a resident is terminated
16 because he or she did not satisfy certain personal and educational
17 requirements before entering the program. (Riffel Decl. Ex. E at §
18 2.02.)

19 Finally, the PDTA contains an integration clause: "Resident and
20 Hospital agree that neither party has made any representations,
21 warranty or covenant not set forth herein, and that this Agreement is
22 a complete statement of the entire Agreement which supersedes all
23 previous communications between the parties hereto." (G. Facts ¶ 4.)

24 //
25 //
26 //
27 //
28 //

1 **F. Post-Termination Events.**

2 Pieszak requested the hearing to which she was entitled.
3 (Hensleigh Decl. Ex. 43.) GAMC never held any such hearing.¹³
4 (Pieszak Decl ¶ 35.) Instead, on January 14, 1997, Riffel offered
5 Pieszak's position to another female doctor, Diep Nguyen. (Hensleigh
6 Decl. Ex. 44.) Nguyen began as a second-year resident in late January
7 1997. (Nguyen Decl. ¶ 5.)

8 On May 5, 1997, Pieszak applied to the California Medical Board
9 for a license to practice medicine. (Pieszak Decl. in Supp. of TRO ¶
10 6.) On June 26, 1997, Pieszak filed suit. On July 1, 1997, Pieszak
11 entered a residency program at the University of Southern California.

12 On July 31, 1997, the Medical Board sent a letter to Pieszak
13 indicating certain deficiencies in her application. (Pl.'s Supp. Ex.
14 3.)¹⁴ The letter stated that Pieszak needed to have GAMC release
15 documents concerning employment history directly to the Medical Board.
16 (*Id.*) In response to this letter, on August 10, Pieszak sent letters
17 to Riffel and GAMC requesting that they forward this material directly
18 to the Medical Board. (Pl.'s Supp. Exs. 4 & 5.) When, in the second
19 part of August, the Medical Board had not received anything from GAMC,

20
21 ¹³ The Court notes that Defendants present some evidence in
22 their replies supporting an inference that a hearing was held or that
23 Pieszak abandoned the hearing procedure. Although the SAC repeatedly
24 asserts that Pieszak did not get a hearing, (SAC ¶¶ 53, 56, 108),
25 Defendants did not challenge those allegations in the initial motion
26 papers. Accordingly, at best for Defendants, their reply evidence
27 merely creates a genuine issue for trial.

28 ¹⁴ At the hearing on these motions, the Court permitted the
parties to submit supplemental evidence and briefing on the issue of
the release of documents to the Medical Board. "Pl.'s Supp." refers
to Plaintiff's supplemental evidence and "Defs.' Supp." refers to
Defendants' supplemental evidence. The Court, however, notes that
most of the supplemental evidence is the same and, therefore,
undisputed.

1 it sent a letter directly to GAMC requesting the information.

2 (Hensleigh Decl. Ex. H ("Park Decl.") ¶ 5.)

3 On September 24, 1997, GAMC sought to have Pieszak sign a form
4 releasing GAMC from liability for forwarding the documents to the
5 Medical Board. (Defs.' Supp. Ex. 4.) The release form required
6 Pieszak to

7 release and forever discharge [GAMC], its representatives,
8 agents, employees, medical staff members, officers and directors
9 . . . from any and all actions, causes of action, obligations,
10 costs, expenses, attorneys' fees, damages, losses, claims,
11 liabilities and demands of whatsoever nature, character and kind,
12 whether known or unknown, suspected or unsuspected, matured or
13 contingent, which I now own or hold or at anytime hereafter own
14 or hold [sic] arising out of or resulting from the disclosure of
15 the information . . . to the Board or to its representatives.

16 (*Id.* (italics added).)

17 Pieszak, however, refused to sign the release on the ground that
18 the release would allow GAMC to "lie about her to the Medical Board
19 with impunity." (Defs.' Supp. Ex. 5.) In response, on October 6,
20 GAMC simply sent the documents requested by the Medical Board to
21 Pieszak's attorney, Barbara Hensleigh. (Pl.'s Supp. Ex. 7.)
22 Hensleigh kept a copy of the documents and returned the documents to
23 GAMC's attorney on October 23, 1997. (Def.'s Supp. Ex. 7.) Pieszak,
24 through her attorney, stated that she would "not participate in
25 supplying false information to the Medical Board" and that she would
26 "not waive the right she has to require GAMC to provide accurate
27 information to the Medical Board." (*Id.*) As Pieszak saw it, "GAMC
28 ha[d] the obligation to conduct a reasonable investigation of the
29 facts and to provide accurate information to the Medical Board."

30 (*Id.*)

31 Although Hensleigh kept a copy of the documents, she did not
32 initially forward a copy of the documents to the Medical Board. (Park

1 Decl. at ¶ 8.) Hensleigh did not forward them to the Medical Board
2 because she and Pieszak believed that the documents "contained false
3 information," (Pl.'s Supp. Ex. 8), and because Hensleigh was aware
4 that the Board required documentation directly from the primary
5 source, GAMC, (Hensleigh Supp. Decl. ¶ 9). Eventually, at the request
6 of the Medical Board's representative, Hensleigh forwarded the
7 documents on December 24, 1997, over two months after she had received
8 them. (Park Decl. at ¶¶ 7 & 8.)

9 The documents from Hensleigh, however, proved insufficient. On
10 December 31, 1997, the Medical Board sent a letter to Pieszak stating
11 that it could not grant her license without receiving "primary source"
12 documentation. (Pl.'s Supp. Ex. 6.) The Medical Board also
13 prohibited Pieszak from continuing in her residency program at USC
14 effective the very next day. (*Id.*)

15 On January 9, 1998, the Court granted Pieszak's Temporary
16 Restraining Order against the Board and allowed Pieszak to continue in
17 USC's residency program. (Defs.' Ex. 1.) On January 13, 1998, the
18 Medical Board served a subpoena on GAMC for Pieszak's records and
19 other documents. (*Id.*) On January 26, in a preliminary injunction
20 order, the Court found that the Board had failed to provide Pieszak
21 with due process in its review of her application and its decision to
22 preclude her participation in the USC residency program. The Court,
23 therefore, enjoined the Medical Board from prohibiting Pieszak's
24 participation in the USC residency program, pending a proper review of
25 Pieszak's application. (*Id.*) After reviewing Pieszak's file, the
26 Board issued a medical license to Pieszak on May 4, 1998. (Pl.'s Ex.
27 11.)

28

1 In February 1998, Dr. Leah Heap, a resident at USC, was contacted
2 by a Dr. Kessler, who claimed to be a "friend of the attorney that is
3 representing" GAMC. (Heap Depo. at 27.) Kessler asked Heap, "Do you
4 have any resident that you think is very incompetent in your program?"
5 (*Id.* at 26.) Pieszak's name never came up in the conversation. (*Id.*
6 at 29.) Because Kessler stated that one of the USC residents was
7 suing GAMC, Heap made the assumption that Kessler had questions about
8 Pieszak. (*Id.* at 28-29.)

9 On February 14, 2000, Riffel filed a letter in support of his
10 summary judgment motion. The letter purports to be written on May 19,
11 1996 from May to Riffel complaining about Pieszak. (Riffel Decl. Ex.
12 AA.) Apparently, this letter never made it into Riffel's Pieszak
13 file. (Pieszak Decl. ¶ 36.) This letter was also not previously
14 disclosed to Plaintiff or her counsel, even though the letter was
15 responsive to discovery requests. (*Id.*; Hensleigh Decl. ¶ 3.)
16 Needless to say, Riffel never discussed May's accusations in that
17 letter with Pieszak. And Riffel did not conduct any investigation
18 into May's accusations.

19 **G. Evidence of Pieszak's Misconduct.**

20 Although Defendants point to the variety of complaints found in
21 Riffel's special Pieszak file, they fail to support the complaints
22 with corroborative or documentary evidence.¹⁵ Moreover, there is a
23 genuine issue of fact as to the conduct of Pieszak.

24 For instance, May testified that Pieszak encouraged her not to go
25 to certain conferences during May's emergency medicine rotation

26
27 ¹⁵ Thus, to the extent that Plaintiff has lodged hearsay
28 objections to the letters written by the other GAMC residents, the
Court DENIES those objections but notes that the letters are not being
admitted for the truth of the matter asserted.

1 because then Pieszak would "have to go when [she was] doing emergency
2 medicine." (May Depo. at 390:14-22.) Pieszak, however, testifies
3 that she never made these statements. (Pieszak Decl. ¶ 41.)
4 Accordingly, on a summary judgment motion, the Court assumes that this
5 incident never happened.

6 Defendants, however, present undisputed evidence that Pieszak
7 "would become upset in the clinic and leave, and no one would know if
8 she was coming back, when she was coming back." (May Depo. 391:3-7.)
9 These incidents occurred about three times during Pieszak's second
10 year. (*Id.* at 391:17-20.)

11 **H. Treatment of Other Residents.**

12 Various male GAMC residents have committed serious medical error
13 or have been accused of mistakes and deficiencies but were not
14 terminated or disciplined.

15 One patient who was pregnant with twins was admitted to the
16 hospital at 1 a.m. Both babies were dead, however, by 7 a.m. that
17 morning. Chang was responsible for the treatment of this individual.
18 Whiting saw the patient one time that night. Twin pregnancies are
19 considered high risk pregnancies and, therefore, an attending
20 physician or a senior resident should be involved in medical decisions
21 concerning such a patient. Chang, however, never contacted a senior
22 resident or attending physician. He was never disciplined. (Russo
23 Decl. Ex. 1 at 5.)

24 Frye ordered a narcotic pain medication and "Taradol" for a
25 breast-feeding patient who had just come out of an operation.
26 Hospital policy, however, prohibited narcotic pain medication within
27 24 hours of an operation. Similarly, Taradol should not have been
28 given to a breast-feeding mother. Frye was not disciplined. (*Id.*)

1 When GAMC determined that Dr. Dennis' progress was deficient, the
2 staff "counseled" him. After the intial contact, Dennis received a
3 letter identifying departmental expectations. Approximately three
4 weeks later, Dennis received a second letter describing his progress
5 and providing additional expectations. Dennis was never placed on
6 probation nor was he terminated. (*Id.* at 5.)

7 Several residents have been sued in medical malpractice suits and
8 were not placed on probation or terminated. (*Id.* at 6.) Other
9 residents and even Riffel ordered ultrasounds that were unnecessary.
10 None of these residents were disciplined for their "mismanagement."
11 (*Id.* at 8.) Other residents failed to properly advise patients about
12 recommended testing without criticism. (*Id.* at 8-9.) GAMC's
13 residents are frequently late and occasionally miss conferences. (*Id.*
14 at 10-11.) None have been terminated because of these problems.

15 Lopez was written up three times. In his first year, Lopez used
16 a gel on a patient that, under the circumstances, was dangerous and
17 could have caused serious problems for the fetus. Lopez' action
18 violated written hospital policy and was "contraindicated." During
19 his second year, Lopez mistreated a patient in the Emergency Room and
20 misrepresented his care on the patient chart. This incident resulted,
21 by GAMC's own evaluation, in a "very significant breakdown of
22 confidence" between Emergency Department staff and the residency
23 program. In his fourth year, Lopez raised his voice at an operating
24 room nurse for not having the type of gloves he liked. (*Id.* at 6-7.)
25 Lopez also recommended the wrong treatment for another patient, (*Id.*
26 at 9), and mistreated much of the hospital staff, (*E.g.*, Agunbiade
27 Decl. ¶ 7.) Lopez received a diploma from the residency program.

28

1 **IV. Analysis**

2 **A. Title VII Claims.**

3 Pieszak alleges that GAMC's treatment of her constitutes gender
4 discrimination, sexual harassment, and retaliation precluded by Title
5 VII of the Civil Rights Act of 1964. In a Title VII claim, the
6 allocation of burdens follows a three-step process:

7 [A] plaintiff must first establish a prima facie case of
8 discrimination. If the plaintiff establishes a prima facie case,
9 the burden then shifts to the defendant to articulate a
10 legitimate nondiscriminatory reason for its employment decision.
Then, in order to prevail, the plaintiff must demonstrate that
the employer's alleged reason for the adverse employment decision
is a pretext for another motive which is discriminatory.

11 *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985) (citing
12 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817
13 (1973)); accord *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 916
14 (9th Cir. 1996); *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995).

15 **1. Gender discrimination claim.**

16 Pieszak contends that her termination was motivated by
17 impermissible gender discrimination. In contrast, GAMC asserts that
18 Pieszak cannot assert a gender discrimination claim because she cannot
19 (1) establish a prima facie case of gender discrimination, or (2)
20 rebut GAMC's purportedly legitimate reasons for terminating her.

21 **a. Pieszak's prima facie case.**

22 "In order to show a prima facie case of discrimination, a
23 plaintiff must offer evidence that gives rise to an inference of
24 unlawful discrimination." *Nidds*, 113 F.3d at 917 (internal quotations
25 omitted). On a motion for summary judgment, the degree of proof
26 required for a prima facie case "is minimal and does not even need to
27 rise to the level of a preponderance of the evidence." *Wallis v. J.R.*
28 *Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1991). The prima facie case

1 may be based on (1) direct or circumstantial evidence of
2 discriminatory intent or (2) a rebuttable presumption of
3 discrimination arising from the factors set forth in *McDonnell*
4 *Douglas*.¹⁶ *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1409
5 (9th Cir. 1996).

6 ***i. The "direct" evidence by itself is insufficient.***

7 Pieszak presents evidence that, according to her, directly shows
8 that her termination was a result of gender discrimination. Pieszak's
9 "direct" evidence, however, is by itself insufficient. Pieszak
10 presents no actual direct evidence showing that she was fired because
11 of her gender. Riffel never commented that she was being fired
12 because she was a woman and Pieszak cannot point to a single incident
13 or statement showing gender bias during her second year in residence.
14 She refers to crude comments made by residents and purportedly
15 tolerated by Riffel but fails to provide the dates of most of these
16 incidents. Pieszak does identify some statements that were made at
17 the beginning of her first year and before she started in the program.
18 The most severe of these statements is Lopez' statement that Riffel
19 did not want his female residents to get pregnant during the program.
20 Because of the time gap between that statement and Pieszak's

21
22 ¹⁶ *McDonnell Douglas* involved a claim of racial discrimination
23 in violation of Title VII. The Court held that a plaintiff can
24 establish a rebuttable presumption of discrimination by showing "(i)
25 that [the plaintiff] belongs to a racial minority; (ii) that [the
26 plaintiff] applied and was qualified for a job for which the employer
27 was seeking applicants; (iii) that, despite [the plaintiff's]
28 qualification, he [or she] was rejected; and (iv) that, after his
rejection, the position remained open and the employer continued to
seek applicants from persons of complainant's qualifications."
McDonnell Douglas, 411 U.S. at 802. The Court noted that the test it
created depended on the specific facts of the case at issue and that
the specifications for a prima facie case would vary based on the
facts of the case. *Id.* at 802, n.13.

1 termination, however, the connection between the two is too attenuated
2 to create direct evidence.¹⁷ None of the statements that she has
3 identified have more than an attenuated contact with her termination.

4 Moreover, Pieszak claims that Riffel terminated her for
5 complaining to Riffel about Lopez' harassment and to Nelson about
6 Riffel's inept handling of her initial complaint. However, the Court
7 finds that these complaints had nothing to do with sexual harassment.
8 See *infra* § IV.A.3. No reasonable jury could find that Pieszak was
9 fired because of her gender based on this attenuated evidence.

10 ***ii. McDonnell-Douglas factors.***

11 No party bothered to describe the specific *McDonnell-Douglas*
12 factors that apply to a termination based on gender discrimination.
13 However, the Court has surmised two different tests that it could
14 apply to termination cases. Under the first one, Pieszak would have
15 to show that "(1) she belongs to a protected class, (2) she was
16 performing according to her employer's legitimate expectations, (3)
17 she suffered an adverse employment action, and (4) other employees
18 with qualifications similar to her own were treated more favorably."
19 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998).

20 The second test would require a showing that the position
21 "remained open and was ultimately filled by a [male]" instead of
22 simply showing that others received more favorable treatment. See *St.*
23 *Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742
24 (1993). GAMC relies upon this second test. (See GAMC's Memo. In
25 Supp. of Summ. Judgment. Mot. ("GAMC's Mot.") at 6-7.) The Court,
26 however, finds that the first test is appropriate for three reasons.

27 ¹⁷ Moreover, she was not fired because Riffel thought that she
28 was pregnant.

1 First, the Ninth Circuit has held that “[s]ubsequent hiring or
2 promotion practices are clearly not relevant to the question of
3 whether discrimination occurred prior to the commencement of a Title
4 VII action.” *Gonzalez v. Police Dep’t*, 901 F.2d 758, 762 (9th Cir.
5 1990). Although the employment action here was not taken subsequent
6 to the filing of this Title VII action, it was taken subsequent to
7 Pieszak’s attorney’s initial contact with GAMC. Although the record
8 is somewhat unclear, it is possible that Pieszak’s attorney broached
9 the topic of Title VII liability. Second, the Ninth Circuit has held
10 that a Title VII claim is not precluded merely because the plaintiff
11 was replaced by someone of the same protected class. See *Diaz v.*
12 *American Telephone & Telegraph*, 752 F.2d 1356 (9th Cir. 1985).
13 Finally, the focus of the fourth factor is not on the person, if any,
14 who replaced the plaintiff, but on whether the position was still
15 available. See *id.* at 1359; Barbara Lindemann & Paul Grossman,
16 *Employment Discrimination Law*, Vol. 1 at 16 (3d ed. 1996)
17 (“Establishing a prima facie case under the *McDonnell Douglas* . . .
18 model creates a presumption of illegal discrimination because it
19 eliminates the most likely legitimate explanations for the employer’s
20 adverse action, such as lack of qualification and the absence of a job
21 opening”). Thus, the Court finds that the fact that Pieszak was
22 replaced by another female is irrelevant to determining whether the
23 *McDonnell-Douglas* factors are met.

24 ***iii. Applying the McDonnell-Douglas factors.***

25 The parties do not dispute that Pieszak is a member of a
26 protected class or that the termination was an adverse employment
27 action. GAMC, however, argues that Pieszak cannot show that her
28 performance was satisfactory. GAMC relies on Pieszak’s failure to

1 pass Part III of the USMLE, Pieszak's negative evaluations in October
2 and December 1996, and the complaint letters received by Riffel.
3 Moreover, GAMC asserts that Pieszak's reliance on her first year
4 evaluations is insufficient to show satisfactory performance. (GAMC
5 Mot. at 4.) Pieszak, however, does not rely solely on her first year
6 evaluations. She points to the declarations of some of the physicians
7 with whom she worked to show that she was performing up to
8 expectations.¹⁸ Thus, for purposes of summary judgment, Pieszak has
9 refuted the negative evaluations and the critical letters.

10 Moreover, the facts surrounding the USMLE support an inference
11 that GAMC was willing to waive Pieszak's initial failure to pass the
12 test. As late as October 22, 1996, Pieszak was informed that her job
13 was in jeopardy *if she did not pass the next examination in December*
14 *1996*. GAMC also learned about Pieszak's results three to five months
15 before terminating her. It would be anomalous to allow GAMC to assert
16 that Pieszak's failure to pass the USMLE meant that she failed to meet
17 its legitimate expectations when its representatives allowed her to
18 continue working for months after learning about the results.

19 Pieszak also presents evidence that residents similarly situated
20 to her had not been terminated from the program, thereby satisfying
21 the fourth *McDonnell-Douglas* factor. Pieszak presents evidence that
22 various other residents, including Whiting, Chang, Frye, and Lopez,
23 had committed serious clinical errors for which they were not
24

25 ¹⁸ GAMC argues that the Court should disregard the declarations
26 of these physicians because the extent of the their working
27 relationship with Pieszak is unclear. All the physicians indicate
28 that they worked with Pieszak. The extent of that working
relationship goes to the weight of the evidence, which should be
determined by a jury.

1 reprimanded. Lopez was also written up three times but was not
2 terminated or even disciplined. Another resident, Dennis, was
3 counseled about his deficiencies and received letters informing him of
4 departmental expectations and his progress. He, however was never
5 placed on probation or terminated.¹⁹

6 Pieszak, therefore, satisfies her burden of showing a prima facie
7 case of gender discrimination.

8 ***b. GAMC's reason for terminating Pieszak.***

9 Because Pieszak has shown a prima facie case of gender
10 discrimination, the burden shifts to GAMC to offer evidence that "the
11 adverse action was taken for other than impermissibly discriminatory
12 reasons." See *Wallis*, 26 F.3d at 889. Once the employer meets this
13 burden, any presumption of discrimination drops away. *Nidds*, 113 F.3d
14 at 917.

15 GAMC has come forward with an explanation. Riffel informed
16 Pieszak that she was terminated for "her deficient fund of medical
17 knowledge, poor patient care, and poor attitude." (R. Facts ¶ 57.)
18 As support for this decision, GAMC points to the numerous sources
19 reporting "deficiencies in plaintiff's medical knowledge, performance,
20 judgment, attitude, and conduct[;]" Pieszak's failure to pass the
21 medical boards and to obtain her medical license; and Pieszak's lack
22 of improvement during her probation. (See GAMC's Mot. at 7-8.)

23
24 ¹⁹ Based on the facts presented by this case, the evidence
25 concerning the treatment of others is also related to GAMC's
26 legitimate expectations. Thus, while GMAC could expect a resident to
27 perform at a certain level, it cannot legitimately require a higher
28 level of performance only for its female residents. See *Shager v.*
Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990) ("An employer can fire a
worker for being uppitty . . . [b]ut if the employer would not fire an
uppitty worker unless he was also an old worker . . . then age would
be a causal factor in the worker's termination").

1 **c. Pieszak's Burden to Establish Pretext.**

2 Because GAMC has come forth with evidence that Pieszak was
3 terminated for a nondiscriminatory reasons, the burden shifts back to
4 Pieszak to "raise a genuine factual issue as to whether the
5 articulated reason[s were] pretextual." *Sischo-Nownejad v. Merced*
6 *Comm. College*, 934 F.2d 1104, 1110 (9th Cir. 1991). "To satisfy
7 [this] burden, and survive summary judgment, a [plaintiff] must
8 produce enough evidence to allow a reasonable factfinder to conclude
9 either: (a) that the alleged reason for [the] discharge was false, or
10 (b) that the true reason for [the] discharge was a discriminatory
11 one." *Nidds*, 113 F.3d at 918. A plaintiff must produce specific,
12 substantive evidence of pretext to avoid summary judgment. *Wallis*, 26
13 F.3d at 890-91; *Nidds*, 113 F.3d at 918-19. Alternatively, a
14 plaintiff need only produce "very little" "direct evidence of
15 discriminatory motive." *Godwin*, 150 F.3d at 1221.

16 In determining whether a plaintiff has satisfied its burden to
17 raise a genuine issue of fact, the court "must look at the evidence
18 supporting the prima facie case, as well as the other evidence offered
19 by the plaintiff to rebut the employer's offered reasons." *Wallis*, 26
20 F.3d at 890. Thus, " a plaintiff's prima facie case, combined with
21 sufficient evidence to find that the employer's asserted justification
22 is false, may permit the trier of fact to conclude that the employer
23 unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*,
24 __ U.S. __, 120 S.Ct. 2097, 2109 (2000).

25 Here, Plaintiff creates a genuine issue of fact concerning
26 whether GAMC's reasons for the termination were a pretext. Indeed,
27 the evidence used to establish the prima facie case, both as to the
28

1 disparate treatment and Pieszak's qualifications, creates that genuine
2 issue of fact.

3 Furthermore, there is no logical explanation for Riffel's
4 handling of the letter and complaints; his inexplicable behavior,
5 therefore, supports an inference of pretext. Although the complaints
6 accused Pieszak of seriously endangering the lives of GAMC's patients,
7 Riffel did not investigate or follow-up on these complaints. Even
8 when Pieszak requested information about her purported deficiencies,
9 Pieszak failed to disclose the information in these letters.
10 Additionally, Riffel failed to provide any feedback or progress
11 reports during Pieszak's probationary period and he failed to follow
12 GAMC's own procedural requirements in terminating Pieszak. Further
13 still, the timing in which all but one of the letters were sent after
14 Pieszak's complaint and the sudden emergence of one letter this year
15 is troubling. Collectively, the evidence and inferences create a
16 question as to the veracity of GAMC's reasons for termination.

17 Finally, Pieszak also can rely on the gender-related conduct,
18 remarks, and statistics to show that she was a victim of intentional
19 discrimination. GAMC asks this Court to ignore these comments and
20 conduct because they were stray remarks and had no connection with the
21 termination. However, a court cannot "impermissibly substitute[] its
22 judgment concerning weight of the evidence for the jury's." *Reeves*,
23 120 S.Ct. at 2111. In *Reeves*, the Supreme Court concluded that the
24 Fifth Circuit had made that very error by "discount[ing discriminatory
25 comments] on the ground that they 'were not made in the direct context
26 of Reeve's termination.'" *Id.* (citing appellate court opinion).
27 Thus, a stray remark "may fall far short of establishing a prima facie
28 case," but that remark still "may be relevant evidence, with greater

1 or less probative value depending on the precise character of the
2 remark." *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990);
3 *Godwin*, 150 F.3d at 1221 (finding that direct evidence of general
4 discriminatory animus toward other women in workplace supported
5 inference of discrimination in the specific employment decision at
6 issue); *Warren III v. City of Carlsbad*, 58 F.3d 439, 443-44 (9th Cir.
7 1995) (finding that derogatory race-based comment, along with other
8 evidence, created genuine issue of fact as to hiring motive). Thus,
9 sexist, "derogatory comments can create an inference of discriminatory
10 motive." *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1149 (9th
11 Cir. 1997).

12 Additionally, GAMC's non-discriminatory explanation for the
13 statistical evidence showing a gender disparity between its program
14 and the national average is insufficient on a motion for summary
15 judgment.

16 Statistical data is relevant because it can be used to establish
17 a general discriminatory pattern in an employer's hiring or
18 promotion practices. Such a discriminatory pattern is probative
19 of motive and can therefore create an inference of discriminatory
20 intent with respect to the individual employment decision at
21 issue.

22 *Diaz*, 752 F.2d at 1363. Although GAMC appears to argue that the
23 statistical evidence is highly deceptive, it does not contend that the
24 statistical record is inaccurate. Accordingly, a trier of fact may
25 consider the information. See *id.*; *Warren*, 58 F.3d at 443-44.

26 Thus, although this "direct" evidence by itself is too attenuated
27 to support a claim of intentional discrimination, it can be used as
28 evidence, in addition to the *McDonnell-Douglas* prima facie case and
the evidence of pretext, that the discharge was motivated by
discriminatory intent. Pieszak, therefore, satisfies her burden of

1 showing the existence of a genuine issue of fact as to whether GAMC's
2 true reason for the termination was gender discrimination.²⁰

3 **2. Sexual Harassment Claim.**

4 Pieszak also alleges that the male residents created a work
5 environment that was hostile to females in the program. GAMC contends
6 that Pieszak cannot show that sexual harassment at GAMC was
7 sufficiently severe or pervasive to create a hostile work environment.

8 "Title VII is violated if sexual harassment is so severe or
9 pervasive as to create a hostile work environment." *Kortan v.*
10 *California Youth Authority*, __ F.3d __, 2000 WL 897751, *5 (9th Cir.
11 2000). Sexual harassment claims usually do not fall neatly into the
12 framework provided by *McDonnell-Douglas*. Nevertheless, "a female
13 plaintiff states a prima facie case of hostile environment sexual
14 harassment when she alleges conduct which a reasonable woman would
15 consider sufficiently severe or pervasive to alter the conditions of
16 employment and create an abusive working environment." *Ellison v.*
17 *Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (footnotes omitted).
18 Moreover, the "harassing conduct need not be motivated by sexual
19 desire." *Oncale v. Sundowner Offshore Servcs., Inc.*, 523 U.S. 75, 80,
20 118 S. Ct. 998 (1998). A plaintiff can show a violation of Title VII
21 if the harassing conduct is "motivated by general hostility to the
22 presence of women in the workplace." *Id.* Finally, the conduct must
23 be unwelcomed. *Ellison*, 924 F.2d at 880.

24 _____
25 ²⁰ That a claim survives summary judgment does not necessarily
26 mean that a claim has a significant chance of success at trial,
27 especially in the Title VII arena. Both the Ninth Circuit and the
28 Supreme Court in *Reeves* have pointed out that the standard for
surviving summary judgment in a Title VII claim is fairly low. The
Court encourages Plaintiff and her counsel to keep this low standard
in mind in connection with the Rule 23 settlement proceedings.

1 Thus, an employee establishes a prima facie case where the
2 employee proves "(1) that he [or she] was subjected to verbal or
3 physical conduct of a harassing nature, (2) that this conduct was
4 unwelcome, and (3) that the conduct was sufficiently severe or
5 pervasive to alter the conditions of the victim's employment and
6 create an abusive working environment." *Kortan*, 2000 WL 897751, *5.

7 The Court's evaluation should focus on Title VII's goal of
8 prohibiting an environment where "members of one sex are exposed to
9 disadvantageous terms or conditions of employment to which members of
10 the other sex are not exposed." *Oncale*, 523 U.S. at 80. The context,
11 therefore, is highly relevant in determining whether a plaintiff
12 states a sexual harassment claim. *Id.* at 81-82. Accordingly, a Court
13 must look "at all the circumstances including the frequency of the
14 discriminatory conduct; its severity; whether it is physically
15 threatening or humiliating, or a mere offensive utterance; and whether
16 it reasonably interferes with an employee's work performance."
17 *Kortan*, 2000 WL 897751, *5.

18 This case presents a not so unusual twist in evaluating GAMC's
19 work environment. GAMC is not only a work environment; it is also a
20 training environment. As part of the training environment, GAMC has
21 adopted a hierarchical, antagonistic teaching style that teaches by
22 criticizing and demeaning the junior residents. Thus, the program
23 apparently creates an abusive environment for all junior residents.

24 Pieszak was subject to a barrage of harassing conduct. The
25 problem, however, is that the substantial majority of that barrage was
26 not connected to sex or gender. Although the harassment need not be
27 of a sexual content, Pieszak must present some evidence that ties the
28 conduct to gender. For the most part, she fails to do so.

1 For instance, Pieszak argues that she was subject to "a daily
2 onslaught of abuse by Dr. Lopez based upon her gender." (Pl.'s Opp.
3 to GAMC Mot. at 19.) She, however, fails to present evidence of this
4 daily onslaught. Pieszak merely identifies about fifteen to twenty
5 different incidents over an eighteen-month period in which residents,
6 mainly Lopez, made some comment in reference to sex or gender. (See
7 *supra* pp. 8-9.) These comments were clearly inappropriate and in bad
8 taste. However, the conduct does not rise to the level of sexual
9 harassment prohibited under Title VII.

10 Although Pieszak cites *Lipsett v. University of Puerto Rico*, 864
11 F.2d 881 (1st Cir. 1988) as supportive of her sexual harassment claim,
12 the instant case does not come close to the showing presented in
13 *Lipsett*, which also involved a residency program. In *Lipsett*, the
14 males dramatically outnumbered the females and the facilities for the
15 male residents were substantially superior to the facilities for the
16 female residents. *Id.* at 887. From the start, *Lipsett* was informed
17 by the chief resident that "surgery was a male preserve not hospitable
18 to women" and warned that any complaints that she might have about
19 this fact would result in her dismissal as had happened to a previous
20 female resident. *Id.* From that point on, she was subject to sexual
21 comments, put-downs of female residents and surgeons, differing
22 treatment from the male residents, public declarations by the chief
23 resident that he sought to have all women eliminated from the program,
24 the posting of *Playboy* centerfolds in the residents' rest facility,
25 the posting of a sexually explicit drawing of her body, being labeled
26 with a sexually explicit nickname, and quid pro quo sexual harassment.
27 *Id.* at 887-889. *Lipsett* also presented evidence that many other
28

1 female residents had been subjected to similar mistreatment in the
2 program. *Id.* at 888.

3 *Lipsett* presents a rather extreme example of sexual harassment.
4 A plaintiff clearly does not have to make that type of showing to
5 assert a viable sexual harassment claim. But, to the extent that
6 Pieszak implies that she has made a showing as strong as that in
7 *Lipsett*, she is wrong.

8 The showing of misconduct presented here is more analogous to the
9 Ninth Circuit's recent decision in *Kortan*. In *Kortan*, the plaintiff's
10 supervisors, Atelsap, made various offensive comments with reference
11 to gender and sex. *Kortan*, 2000 WL 897751, *1. Atelsap also took
12 some actions that undermined the authority of the plaintiff but which
13 did not appear to be motivated by gender bias. *Id.* After the
14 plaintiff complained about the gender-based comments, Atelsap directed
15 some insults at the plaintiff. The Ninth Circuit affirmed summary
16 judgment in favor of the defendant because the conduct was "simply not
17 of [the] order of magnitude" such that a jury would find that the
18 conduct was sufficiently severe or pervasive to alter the conditions
19 of employment. *Id.* at *7.

20 After a thorough review of the evidence in this case, the Court
21 finds that no reasonable jury would conclude that the conduct
22 identified by Pieszak is sufficiently severe or pervasive to
23 constitute sexual harassment prohibited by Title VII. The Court,
24 therefore, GRANTS summary judgment in favor of GAMC on Pieszak's
25 sexual harassment claim.

26 //

27 //

28 //

1 **3. Retaliation claim.**

2 **a. Prima facie claim.**

3 In a retaliation claim, a plaintiff establishes a prima facie
4 case by showing "(1) involvement in a protected activity, (2) an
5 adverse employment action and (3) a causal link between the two."
6 *Brooks v. City of San Mateo*, __ F.3d __, 2000 WL 713748, *6 (9th Cir.
7 2000); accord *Wallis*, 26 F.3d at 891.

8 Pieszak identifies four GAMC actions that constitute retaliation:
9 placing her on probation, terminating her, refusing to provide
10 documents to the California Medical Board so plaintiff could obtain
11 her medical license, and defaming her to a colleague in the USC
12 residency program.

13 Pieszak, however, does not assert a prima facie case as to the
14 probation or termination because she does not point to any involvement
15 in a protected activity. Pieszak argues that the termination was
16 Riffel's retaliation against her for complaining about her
17 "harassment" to Riffel and Nelson. The fact that Pieszak was
18 complaining about Lopez' harassment does not mean that she was
19 complaining about sexual harassment. Not once, on September 19, or in
20 any of her subsequent complaints before filing the lawsuit, did
21 Pieszak mention "sex", "gender", or any incident that would have
22 disclosed that Lopez' harassment had anything to do with sex or gender
23 bias. (See *supra* pp. 12-22.) Similarly, the letter to Nelson does
24 not claim that Pieszak had been subject to "sexual harassment."
25 Accordingly, Pieszak cannot show that the probation or termination
26 were retaliatory conduct prohibited by Title VII.

27 As to the defaming contact, Pieszak points to testimony that a
28 fellow USC resident, Dr. Heap, was contacted by a Dr. Kessler, who

1 claimed to be a "friend of the attorney that is representing" GAMC.
2 (Heap Depo. at 27.) Kessler asked Heap about the competency of the
3 USC residents but Pieszak's name never came up. Heap made the
4 assumption, possibly correctly, that Kessler had questions about
5 Pieszak. (*Id.* at 28-29.) However, Pieszak points to no evidence
6 showing that Kessler is a representative of GAMC. Thus, this evidence
7 wholly fails to show that this contact is an action, let alone an
8 adverse employment action, taken by GAMC.²¹ Pieszak, therefore, fails
9 to make a prima facie showing that the purported "defamatory" contact
10 with Heap was retaliatory conduct in violation of Title VII.

11 Pieszak does make a prima facie case as to GAMC's failure to
12 forward documents to the Medical Board. She identifies a protected
13 activity: filing this action.

14 The failure to forward the documents could also constitute an
15 adverse employment action. "A plaintiff may seek relief for
16 retaliatory actions taken after her employment ends if the alleged
17 discrimination is related to or arises out of the employment
18 relationship." *Hashimoto v. Dalton*, 118 F.3d 671, 675 (9th Cir.
19 1997). Here the document request does relate to Pieszak's previous
20 employment relationship with GAMC. The Medical Board needed
21 information about her GAMC employment to determine whether to grant
22 her medical license.

23 Finally, Pieszak can point to a causal link between the two. The
24 failure to forward the medical records occurred after she filed the
25 complaint. This order of events establishes a link, although a fairly

27 ²¹ Moreover, even assuming that Pieszak could show that the
28 contact was made on behalf of GAMC, the Court doubts that such a
contact could be viewed as either defamatory or retaliatory.

1 weak one. See *Payne v. Norwest Corp.*, 113 F.3d 1079, 1080 (9th Cir.
2 1997) (finding that protected activity followed by discharge creates
3 an inference of causation).

4 **b. GAMC's reason for not sending the documents to the**
5 **Medical Board.**

6 Because Pieszak has shown a prima facie case of retaliation, the
7 burden shifts to GAMC "to present legitimate reasons for the adverse
8 employment action." See *Brooks*, 2000 WL 713748, *6.

9 GAMC has come forward with an explanation. GAMC was concerned
10 that Pieszak would sue it again if it released documents about Pieszak
11 to the Medical Board. (GAMC's Reply at 23.)

12 **c. Pieszak's Burden to Establish Pretext.**

13 Because GAMC has come forth with a nondiscriminatory explanation
14 for its actions, the burden shifts back to Pieszak to raise a genuine
15 factual issue as to whether the articulated explanation was
16 pretextual. See *Brooks*, 2000 WL 713748, *6. Because Pieszak failed
17 to present evidence to create such a genuine issue of fact in her
18 initial opposition, the Court granted her leave to file supplemental
19 evidence in opposition. Even with this supplemental evidence, a
20 reasonable jury could not find that GAMC's proffered reason is
21 pretextual. Indeed, the evidence further shows that GAMC reasonably
22 feared further litigation if it provided the documentation to the
23 Medical Board.

24 Pieszak argued, at the hearing and in her supplemental filing,
25 that

26 GAMC's proposed release, unique to Dr. Pieszak (1) gave
27 permission to GAMC to provide whatever false information to the
28 Medical Board that it wanted . . . (2) was a "settlement"
containing broad . . . language that arguably released GAMC from
liability from this lawsuit; and (3) required Plaintiff to admit
(contrary to the facts) that GAMC's termination of her was a

1 "suspension," enabling GAMC to argue that Riffel did not violate
2 administrative procedure by terminating Plaintiff.

3 (Pl.'s Supp. Brief Letter at 2.) Pieszak's contention are either not
4 supported by the evidence or fail to show that GAMC's concern was
5 merely pretextual.

6 The release itself is limited and unobjectionable. It purported
7 to release GAMC from liability from any claim "arising out of or
8 resulting from" its disclosure of the *requested* information to the
9 Medical Board.²² (Pl.'s Supp. Ex. 2.) Thus, the release could not,
10 even arguably, be treated as a waiver of Pieszak's underlying claim
11 against GAMC.

12 Moreover, in their letters responding to GAMC's request, Pieszak
13 and her counsel do not express any belief that the release would
14 require Pieszak to waive her claim resulting from her termination.
15 Indeed, Pieszak's reason for not signing the release, at that time,
16 was that she refused to waive her right to require GAMC to provide
17 accurate information to the Medical Board. Clearly, Pieszak's reason,
18 which was expressed to GAMC, merely reinforced GAMC's perceived threat
19 of litigation.²³

20 Finally, Pieszak's complaint about the "suspension" language is
21 irrelevant to determining whether GAMC's proffered reason is

22 ²² The Court notes that in describing the information to be
23 disclosed, the release tracks the language of the Medical Board's
24 request.

25 ²³ Indeed, although Pieszak claims that GAMC was sufficiently
26 protected by the qualified privilege of California Civil Code §§ 47(c)
27 and 43.8, her responses to GAMC do not indicate that she believed that
28 she could not sue GAMC for its disclosure to the Medical Board.
Although the standard might be high (malice), that standard could
arguably be met by the disclosure of knowingly false information.
Pieszak's letters contended that GAMC's documentation contained false
information that GAMC and its representatives knew to be false.

1 pretextual. As GAMC points out, Pieszak never made any effort to
2 correct this error or to address in any other way GAMC's reasonable
3 litigation concerns.

4 Of course, GAMC was eventually forced to turn over the documents
5 without Pieszak's release. As the Court previously found, the Medical
6 Board's delay in issuing a subpoena for the documents violated
7 Pieszak's rights. However, the Medical Board's shortcomings are not
8 GAMC's fault.

9 In short, the evidence supports GAMC's proffered explanation and
10 completely dispels Pieszak's weak presumptive showing of retaliation.
11 Accordingly, the Court GRANTS summary judgment on Pieszak's Title VII
12 retaliation claim in favor of GAMC.

13 **B. FEHA and Wrongful Termination Claims.**

14 FEHA "prohibits employers from discriminating against certain
15 protected classes in compensation, terms, conditions or privileges of
16 employment." *Kelly v. Methodist Hospital of Southern California*, 22
17 Cal. 4th 1108, 1114, 95 Cal. 2d 514 (2000). Under the FEHA provisions
18 in effect at the time of the conduct at issue in this case and at the
19 time that the complaint was filed, FEHA defined an employer to exclude
20 "a religious association or corporation not organized for private
21 profit." *Id.* Most of the parties' arguments concerning this issue
22 have been resolved by *Kelly*. *Kelly* makes clear that FEHA means what
23 it says: a nonprofit religious organization is (or better stated was)
24 exempt from all FEHA provisions. *Id.* at 1119, 1124-25.

25 GAMC presents evidence that it is organized as a nonprofit
26 religious corporation under California law. Pieszak can present no
27 evidence contradicting this evidence. Accordingly, GAMC is not
28 required to comply with FEHA. Similarly, Pieszak's wrongful

1 termination claim based on gender discrimination is precluded. See
2 *Kelly*, 22 Cal. 4th at 1112 (noting that case was brought as wrongful
3 termination claim, not FEHA claim); *Jennings v. Marralle*, 8 Cal. 4th
4 121, 135-36, 32 Cal. Rptr. 2d 275 (1994).

5 The Court briefly considers one argument raised by Pieszak.²⁴
6 Pieszak argues that FEHA's religious exemption violates the Federal
7 and State Constitutions' Establishment Clauses.²⁵ Although the
8 question was raised on appeal in *Kelly*, the California Supreme Court
9 refused to address it. *Kelly*, 22 Cal. 4th at 1111 n.3. Moreover, no
10 published opinion has considered the constitutionality of FEHA's
11 religious exception. The Court concludes that the FEHA exemption is
12 not unconstitutional.

13 "This Court has long recognized that the government may (and
14 sometimes must) accommodate religious practices and that it may do so
15 without violating the Establishment Clause." *Corporation of the*
16 *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v.*
17 *Amos*, 483 U.S. 327, 334 (1987). In *Amos*, the Court, applying the
18 *Lemon* test, determined that Title VII's religious exemption did not
19 violate the Establishment Clause. *Id.* at 334-35. The *Lemon* test

20
21 ²⁴ Plaintiff's arguments that GAMC waived its FEHA exemption and
that Title VII preempts FEHA border on the frivolous.

22 ²⁵ Plaintiff also argues that the FEHA religious exemption
23 violates California's "No Preference" Clause. This argument is
24 without merit. The "No Preference" Clause prohibits giving a
25 preference in favor of "*one religion as opposed to another*" religion.
Mandel v. Hodges, 54 Cal. App. 3d 596, 617, 127 Cal. Rptr. 244 (1976)
26 (*italics added*); *accord Hewitt v. Joyner*, 940 F.2d 1561, 1566 (1991)
27 ("The no preference clause has been found to prohibit any appearance
28 that the government has allied itself with one specific religion").
The FEHA religious exemption applies to all religious non-profit
organizations. See *Kelly*, 22 Cal.4th at 1114. Thus, the FEHA
religious exemption *does not* provide a preference to one religion over
any other religion.

1 continues to be the appropriate test for determining whether a state
2 action violates the Establishment Clause. See *Children's Healthcare*
3 *Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1092-93 (8th
4 Cir. 2000); *Boyajian v. Gatzunis*, 212 F.3d 1, 4 (1st Cir. 2000).

5 The *Lemon* test concludes "that a law does not violate the
6 Establishment Clause if (1) it has a secular legislative purpose, (2)
7 its principal or primary effect neither advances nor inhibits
8 religion, and (3) the statute does not foster excessive government
9 entanglement with religion." *Boyajian*, 212 F.3d at 4.

10 In *Amos*, the plaintiff asserted that the Title VII exemption did
11 not satisfy the first *Lemon* factor because it was unnecessarily
12 broad.²⁶ The Court rejected that argument:

13 Under the *Lemon* analysis, it is a permissible legislative purpose
14 to alleviate significant governmental interference with the
15 ability of religious organizations to define and carry out their
16 religious missions. Appellees argue that there is no such
17 purpose here because [the exemption] provided adequate protection
18 for religious employers prior to the 1972 amendment, when it
19 exempted only the religious activities of such employers from the
20 statutory ban on religious discrimination. We may assume for the
21 sake of argument that the pre-1972 exemption was adequate
Nonetheless, it is a significant burden on a religious
organization to require it, on pain of substantial liability, to
predict which of its activities a secular court will consider
religious. The line is hardly a bright one, and an organization
might understandably be concerned that a judge would not
understand its religious tenets and sense of mission. Fear of
potential liability might affect the way an organization carried
out what it understood to be its religious mission.

22 *Amos*, 483 U.S. at 335-36 (footnote omitted). The same rationale
23 applicable to the Title VII exemption applies to the FEHA exemption,
24 even though the FEHA exemption is broader. Indeed, *Kelly* pointed out

26
27 ²⁶ The Court notes that Plaintiff does not even mention the
28 *Lemon* test in her opposition, let alone address the factors. It
appears that her focus is on the second factor of the *Lemon* test. The
Court, nevertheless, addresses all three factors.

1 that just because a religious organization is involved in providing
2 health care does not mean that it is engaged in non-religious
3 activity. *Kelly*, 22 Cal.4th at 1124-25. Thus, the FEHA exemption
4 satisfies the first factor in the *Lemon* test.

5 Pieszak's main argument is that the exemption impermissibly
6 endorses religion. "A law is not unconstitutional simply because it
7 allows churches to advance religion, which is their very purpose."
8 *Amos*, 483 U.S. at 337. Nevertheless, "[a]t some point, accommodation
9 may devolve into an unlawful fostering of religion." *Id.* at 334-35
10 (quotations omitted). The point is crossed when "it is fair to say
11 that the government itself has advanced religion through its own
12 activities and influence." *Id.* at 337. The FEHA exemption does not
13 reach that point.

14 Finally, "[i]t cannot be seriously contended that [Title VII
15 religious exemption] impermissibly entangles church and state; the
16 statute effectuates a more complete separation of the two and avoids
17 . . . [any] intrusive inquiry into religious belief." *Amos*, 483 U.S.
18 at 339. As with Title VII, the FEHA exemption clearly creates a
19 strong separation between church and state. Accordingly, the Court
20 finds that the FEHA exemption passes federal constitutional muster.

21 Moreover, California's Establishment Clause applies the same
22 analysis as its federal counterpart. *Duffy v. State Personnel Board*,
23 232 Cal. App. 3d 1, 9, 283 Cal. Rptr. 622 (1991); *Mandel v. Hodges*,
24 54 Cal. App. 3d 596, 616-17, 127 Cal. Rptr. 244 (1976). Accordingly,
25 FEHA religious exemption also does not offend California's
26 Constitution.²⁷

27
28 ²⁷ The Court also notes that Pieszak's FEHA retaliation and harassment claims would fail for the very same reasons that the Title

1 The Court GRANTS summary judgment for all Defendants on the FEHA
2 and wrongful termination claims.²⁸

3 **C. Contract Claims.**

4 Pieszak asserts that GAMC breached the PDTA by terminating her
5 without providing a hearing. GAMC asserts Pieszak cannot assert a
6 breach of contract claim because (1) Pieszak was an at-will employee
7 subject to termination at any time for any or no reason, and (2) in
8 any event, she was not entitled to a hearing under § 2.07 of the PDTA.

9 The PDTA did contain an at-will provision. (See PDTA § 6.07.)
10 Such a provision, however, does not mean that Pieszak was not entitled
11 to a hearing. The PDTA expressly states that termination under the
12 at-will provision "shall have no effect upon Resident's right to a
13 fair hearing if applicable upon termination hereof." (*Id.*) Thus,
14 even if GAMC had decided to terminate Pieszak by flipping a coin, the
15 contract written by GAMC required the hospital to provide her a fair
16 hearing.

17 On the other hand, the PDTA does not require GAMC to provide a
18 hearing if Pieszak was terminated for failing the USMLE. Because she
19 failed the USMLE, Pieszak was unable to obtain a medical license by
20 August 1996. That failure constituted "grounds for immediate
21 termination . . . without resort to those fair procedure rights
22 [specified in the contract]." (PDTA § 2.07.) GAMC's argument,
23 however, is unavailing for two reasons. First, although GAMC attempts
24 to use the USMLE results to show that Pieszak lacked sufficient

25
26 VII claims failed. See *Brooks*, 2000 WL 713748, *2; *Tarin v. County of*
27 *Los Angeles*, 123 F.3d 1259, 1264 n.4 (9th Cir. 1997).

28 ²⁸ The Court notes that this holding disposes of the only two
claims against Lopez: harassment and retaliation under FEHA.

1 knowledge to be in the program, Pieszak was not expressly terminated
2 for failing to pass the USMLE. Second, Pieszak provides substantial
3 evidence that GAMC waived its rights under § 2.07 until the results of
4 her second attempt at the USMLE were received. Indeed, in October
5 1996, Pieszak was warned that failing the December 1996 USMLE would
6 place her job in jeopardy.

7 Thus, Pieszak was entitled to a fair hearing in connection with
8 her termination. She presents evidence that she did not receive such
9 a hearing. Therefore, she is entitled to present her contract claim
10 to a trier of fact.

11 Pieszak also asserts a breach of the covenant of good faith
12 claim. GAMC contends that the Court should dismiss this claim because
13 it is a mere duplicate of the breach of contract claim. It does
14 appear that the bad faith claim is identical to the contract claim.
15 Moreover, Pieszak offers no challenge to GAMC's argument.
16 Accordingly, the Court finds that Pieszak's bad faith claim is not an
17 independent claim and it is merged into Pieszak's breach of contract
18 claim.

19 **D. Fair Procedure Claim Against Riffel.**

20 Riffel contends that Pieszak cannot state a fair procedure claim
21 against him. Pieszak retorts that she can state a claim because
22 Riffel acted in concert with GAMC. The Court first notes that the
23 parties' papers and citations on this issue were of no help to the
24 Court. Nevertheless, the Court finds that Riffel cannot be held
25 liable for failing to provide Pieszak with a fair procedure hearing.

26 A medical resident is entitled to a fair procedure hearing before
27 a hospital terminates him or her from the program. *Ezekial v.*
28 *Winkley*, 20 Cal. 3d 267, 275, 142 Cal. Rptr. 418 (1977). The

1 underlying rationale for providing a fair procedure hearing is that
2 "*certain private entities* possess substantial power either to thwart
3 an individual's pursuit of a lawful trade or profession, or to control
4 the terms and conditions under which it is practiced." *Id.* at 272
5 (*italics added*). The fair procedure hearing has been applied to
6 "labor unions[,] . . . professional and trade organizations, . . .
7 mutual benefit societies, and other fraternal and social groups." *Id.*
8 at 272-73. However, the Court has found no case, and Pieszak points
9 to no case, in which a court has allowed a lawsuit against an
10 individual party for failing to provide fair procedure.²⁹

11 Pieszak provides no reason, compelling or otherwise, to expand
12 the claim to agents who fail to ensure that the hospital has complied
13 with its common law obligations. Accordingly, the Court GRANTS
14 summary judgment for Riffel on Pieszak's fair procedure claim.

15 **E. Slander Claim Against Riffel.**

16 **1. Evidence presented by the parties.**

17 Pieszak presents a declaration of Nelly Dominguez. The
18 declaration states that between September 1996 and January 1997,
19 Riffel told Dominguez "several times that Dr. Pieszak was sleeping
20 with Dr. Frields." (Hensleigh Decl. Ex. 22 at ¶ 5.) Dominguez also
21 claimed that, "[a]t least one time, Dr. Riffel said all the nurses
22 . . . knew about it because Dr. Pieszak and Dr. Frields were having
23 sex in the residents' call room." (*Id.*) The declaration states it

24
25
26 ²⁹ Plaintiff's reliance on *Westlake Comm. Hosp. v. Superior*
27 *Court*, 17 Cal. 3d 465, 131 Cal. Rptr. 90 (1976) is misplaced.
28 Although the *Westlake* plaintiff did sue individuals who were members
of the hospital's committee, *Westlake* did not contain a fair procedure
hearing claim.

1 was "[e]xecuted this [blank space] day of January 1997 in [blank
2 space] California." (*Id.* at 2.)

3 At her deposition on June 4, 1998, Dominguez' memory had
4 apparently faded.³⁰ She testified that she had no recollection of
5 Riffel telling her that Pieszak had slept with anyone. Nevertheless,
6 Dominguez testified that (1) she signed the declaration in January
7 1997, (2) she "had knowledge about the contents of the declaration,"
8 and (3) at the time she signed the declaration, "the matters in the
9 declaration were fresh in [her] memory." (Dominguez Depo. at 204-
10 05.)³¹

11 **2. Pieszak presents sufficient evidence.**

12 Riffel does not dispute that making the statement he allegedly
13 made would constitute slander. He, however, states that there is no
14 admissible evidence showing that he made any such statement.
15 According to him, Dominguez' declaration is inadmissible because (1)
16 it does not state the date on which it was executed; and (2) it is
17 hearsay. Alternatively, Riffel asserts that the Court should
18 disregard the declaration because it is contradicted by Dominguez'
19 deposition.

20 Under 28 U.S.C. § 1746, a declaration must be dated to be
21 admissible. Substantial compliance with the statute, however, is
22

23 ³⁰ The Court also notes that Dominguez testified that she had
24 taken Prozac at 8:00 a.m. the morning of the deposition. (Dominguez
25 Depo. at 4-5.) She also testified that the medication affected her
26 memory. (*Id.* at 5.) The deposition started at 10:20 a.m. and ended
at 7:23 p.m. The Court further notes that it appears that no one

27 ³¹ The Court notes that Riffel presents evidence, in the form of
28 his own declaration, that he never said that Pieszak was sleeping with
Dr. Fields.

1 sufficient for admissibility. 28 U.S.C. § 1746; accord *Kersting v.*
2 *United States*, 865 F. Supp. 669, 676 (D. Haw. 1994); *E.E.O.C. v.*
3 *World's Finest Chocolate, Inc.*, 701 F. Supp. 637, 639 (N.D. Ill.
4 1988). For a declaration to be admissible, a party need only show
5 "the [execution] date or approximate date (depending on the
6 situation)." *World's Finest*, 701 F. Supp. at 639.

7 Here, Dominguez' declaration and deposition testimony provide an
8 approximate date of signature: January 1997. Riffel presents no
9 reason why this approximate date is insufficient. Accordingly, the
10 declaration is admissible for purposes of summary judgment. Moreover,
11 the declaration's contents are separately admissible under the
12 recorded recollection exception to the hearsay rule. See Fed. R.
13 Evid. 803(5).³²

14 Riffel's request that this Court disregard the declaration is
15 unavailing. The "general rule in the Ninth Circuit is that a party
16 cannot create an issue of fact by an affidavit contradicting his prior
17 deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262,
18 266 (9th Cir. 1991). Additionally, this general rule applies only if
19 the declaration "flatly contradicts earlier testimony in an attempt to
20 'create' an issue of fact." *Kennedy*, 952 F.2d at 267.

21 The declaration does not contradict *prior* deposition testimony
22 and does not flatly contradict the later deposition testimony upon
23

24 ³² The recorded recollection exceptions states:

25 The following are not excluded by the hearsay rule[:] . . . A
26 memorandum or record concerning a matter about which a witness
27 once had knowledge but now has insufficient recollection . . . ,
shown to have been made or adopted by the witness when the matter
was fresh in the witness' memory and to reflect the knowledge
correctly.

28 Fed. R. Evid. 803(5).

1 which Riffel relies. Pieszak's evidence may be weak, but it is
2 sufficient to withstand summary judgment.

3 **V. Conclusion**

4 For the reasons articulated herein, the Court GRANTS summary
5 judgment:

- 6 1) in favor of Defendant Lopez on all claims asserted against
7 him;
- 8 2) in favor of Defendant Riffel on the FEHA claims (Counts 7 &
9 8) and on the Denial of Fair Procedure claim (Count 11); and
- 10 3) in favor of GAMC on the Title VII claims for sexual
11 harassment and retaliation (Counts 2 & 3), the FEHA claims
12 (Counts 6, 7, & 8), the wrongful termination claim (Count
13 12); and all claims asserted in the Supplemental Complaint.

14 The Court DENIES the summary judgment motions on the following
15 claims: Title VII gender discrimination claim against GAMC (Count 1),
16 the breach of contract claims against GAMC (Counts 4 & 5), and the
17 slander claim against Riffel (Count 9).

18 The Court notes that the following claims were not challenged:
19 the negligent supervision claim against GAMC (Count 10) and the denial
20 of fair procedure claim against GAMC (Count 11).

21
22 **SO ORDERED.**

23 **DATED: August 1, 2000.**

24
25
26 **AUDREY B. COLLINS**
UNITED STATES DISTRICT JUDGE