

Nevertheless, plaintiff persists. She should not be permitted to do so. Ms. Bates's decision was based on the unassailable, non-discriminatory conclusion that plaintiff lacked and that Ms. McRae possessed certain skills and experience that the position required. Plaintiff has no evidence that this was not the basis for Ms. Bates's decision. She has no such evidence because this was the basis for the decision. There are two gaping holes, therefore, in plaintiffs' case — she cannot show either that she was qualified or similarly qualified for the position, or that Ms. Bates's reason for the decision is not the real reason. Plaintiff has gone astray because she has a fundamental misconception of the nature of her claim. She believes, incorrectly, that she can claim discrimination even if Ms. Bates did not give her age a thought in connection with the challenged decision.

Plaintiff's retaliation claims are similarly flawed. Before she left Bull in April 1995, plaintiff signed a release of all claims arising out of her lay-off. In exchange, she was given severance pay. Nevertheless, a few months later, she asserted through prior counsel broad discrimination claims that implicated the lay-off. Perceiving a breach of the release, Bull filed a simple declaratory judgment action in this Court, seeking enforcement of the release. After full clarification that her claim was limited to post-release events and circumstances, the case was dismissed without prejudice. The lawsuit is the sole and exclusive basis for plaintiff's retaliation claim. It is no basis. A retaliation claim requires proof of an adverse employment action. Plaintiff can show no such action because she was long gone from Bull when suit was filed. Moreover, plaintiff's only reaction to the suit was surprise, hardly a reaction that the anti-retaliation statutes are designed to redress. And, the suit was not, as a matter of law, prohibited retaliatory activity; it was, instead, a good faith response to a perceived violation of a release.

Statement of Facts¹

The Parties And Involved Persons. Plaintiff was employed by Bull, a computer company headquartered in Billerica, from 1981 to April 1995. Her last position at Bull was manager of international and domestic employee relocation. She also had responsibility for the employee records room and recognition programs. Ms. Sahli was never a human resources generalist, i.e., a human resources representative responsible for assisting and counseling an employee client base as to a broad range of human resources issues. She had virtually no staffing experience; during her time at Bull, she hired only a few administrative personnel. She had no experience in executive recruiting.

In 1995, Gwen Bates was the Director of Human Resources of a division of Bull. She was 53. She had been at Bull for 22 years. She previously worked for the Tampa, Florida, Urban League. Ms. Bates has held various Human Resources positions at Bull. She currently is Director of Human Resources for Billerica and the "Field."

As of 1995, Ms. Sahli had known and worked with Ms. Bates for at least seven years. Ms. Sahli does not believe that Ms. Bates is biased against persons over 40. Ms. Sahli has no evidence to suggest that Ms. Bates has any type of discriminatory animus. In 1995, Ms. Bates reported to Kathy McGirr, who was Vice President of Human Resources. Ms. Sahli does not believe that Ms. McGirr is biased against persons over 40.

In 1994, Ms. Sahli reported to, and was a personal friend of, Susan Mitchell. Ms. Mitchell was Director of Compensation and Benefits and Services. She left Bull in early 1995.

¹ The Statement of Facts tracks the Superior Court Rule 9A(b)(5) statement (which contains citations to admissible evidence) submitted herewith.

Ms. Mitchell never was a human resources generalist at Bull. Ms. Mitchell believes Ms. Bates was a very respected human resources employee, had good judgment, and had no bias against people over the age of forty or over the age of fifty.

The Lay-Off. Bull has had numerous workforce reductions in the last ten years. A reduction took place in late 1994. Ms. Sahli's position, among others, was eliminated. She was notified of the lay-off in January 1995. She was offered another position at the time, but declined it.

The Open Position. Under Bull's written employment policy governing laid-off personnel, an employee may be considered for open positions, but it is the employee's responsibility to identify such positions and to apply for them. The policy expressly provides that: "[t]here is no provision for 'recalling' salaried employees on layoff status."

In or about February 1995, Charles Pistorino, another Bull Human Resources employee, resigned. It fell to Ms. Bates to find a replacement. On February 27, 1995, Ms. Bates published on a Bull internal on-line system a "Job Posting" for the position. The posting gave a summary of the job:

DESCRIPTION: PROVIDE HR CONSULTING SERVICES TO NIPSON AND CENTRAL SUPPORT CLIENT GROUPS, MANAGE STAFFING FUNCTION AND CONTINGENT WORKFORCE. WORK WITH EMPLOYEES UP THROUGH SR. MANAGEMENT LEVEL. MANAGE EMPLOYMENT ACTIVITY. DEVELOP EEO/AA PLANS. CONDUCT CLIMATE ASSESSMENT AND DEVELOP ACTION PLANS. IDENTIFY HR TRENDS & ISSUES. MUST HAVE OVERVIEW OF ALL FUNCTIONAL AREAS; VERBAL/WRITTEN COMMUNICATION SKILLS; INFLUENCING SKILLS; INTERPERSONAL SKILLS. MUST HAVE STRONG STAFFING SKILLS AND EXPERIENCE. DEGREE PLUS 4-6 YEARS HR EXPERIENCE OR EQUIVALENT. (Emphasis added.)

The position involved principally staffing (hiring) for the Billerica corporate headquarters and entailed recruiting, even high-level executive recruiting. A secondary function was to act as a generalist for a small client group.

Two Bull generic written job descriptions were applicable — the description of HR Generalist II and the description of Level II Staffing Specialist. An HR Generalist II "[p]rovides HR consulting services to client groups in all major HR functional areas;" influences, consults, makes innovative proposals that affect the business through HR intervention; and assists client groups toward strategic objectives. The "functional areas" are compensation, staffing, training and development, employee relations, organization development/change agent, EEO/AA workforce diversity, and procedures. This is not an entry-level generalist position. A Level II Staffing Specialist is responsible "for sourcing, interviewing and recruiting for all types of positions; may be responsible for managing the staffing function for a major group or geographical area; manages executive search firm relationships; and manages relationships with vendors." The job entails multiple specific areas of responsibility, including agency/search firm management, college relations, policies and procedures, outplacement, recruitment, and coop/intern programs. This is not an entry-level staffing position.

Because the principal responsibility of the position was staffing, Ms. Bates's wanted someone who was able to perform all of the duties of the Level II Staffing Specialist position and as many as possible of the duties of the HR Generalist II position. She wanted someone with substantial staffing skills and experience and as much broad human resources experience as possible. Because she had an enormous workload herself, Ms. Bates needed someone who could "hit the ground running," i.e., who had the requisite skills then and there.

On March 3, 1995, Ms. Sahli submitted an application for the position with a resume.

Bull also had two prior resumes from Ms. Sahli. In the most recent resume, the only reference to any staffing experience appears in connection with a job Ms. Sahli held elsewhere in 1970 to 1981. The resume states, in pertinent part:

Recruitment for all levels of sales, engineering, manufacturing, administrative, purchasing, accounting and temporaries. Successfully sourced (sic) new graduate, conference and job fair recruiting.

In contrast, the description in a prior resume of the same position is:

Responsibilities included Affirmative Action plan development, which required three sets of written manuals and charts; conducted communications and training sessions; recruitment and placement activities in addition to relocation responsibilities within the division.

The description in the other prior resume is virtually identical. Clearly, Ms. Sahli embellished for her 1995 audience.

Ms. Bates hired an outside contractor, Nancy Beaumont, to assist her in filling Mr. Pistorino's position and others. She told Ms. Beaumont to interview candidates and to narrow the field down to a suitable few. She told Ms. Beaumont that, with respect to the position vacated by Mr. Pistorino, she wanted somebody who had generalist experience with some specialities in at least one or two areas, such as compensation and benefits or affirmative action, and who was a very strong recruiter.

On April 12, 1995, Ms. Bates interviewed Ms. Sahli for the position. Ms. Sahli indicated during the interview that her staffing experience at her prior employer had been "very light" and that she had had no staffing experience at Bull. Ms. Bates concluded that Ms. Sahli was not the right person for the job. As she explained during her deposition:

Because while she did have some previous generalist experience it had been a number of years ago and the job as I viewed it then was more of a personnel administrative job versus a generalist job. Her staffing experience I thought was very limited. I didn't think she had done much in the area of compensation and benefits. I also thought that — my observation of her was that she tended to be a very rigid person which I think is an important part of a generalist function when it comes to problem solving and employee relations.

Ms. Bates was correct that Ms. Sahli's generalist experience had been many years ago, with a prior employer. Ms. Bates discounted this experience as dated and inapplicable. Ms. Bates was also correct that Ms. Sahli had very limited staffing experience. Ms. Sahli acknowledges that she filled at most a few administrative positions at Bull. The position, however, involved staffing and included even executive-level recruitment, which Ms. Bates correctly recognized Ms. Sahli had not done. Ms. Bates's assessment that Ms. Sahli was rigid was based principally on her experience training Ms. Sahli for the international relocation position.

Ms. Sahli's Departure. Two days after the interview with Ms. Bates, Ms. Sahli signed a General Release and Severance Agreement. Under it, Ms. Sahli received severance pay in exchange for a general release of all claims. Ms. Sahli's last day was April 28, 1995.

Mr. Pistorino's Replacement. Ms. Bates, with Ms. Beaumont's assistance, identified two finalists for the position vacated by Mr. Pistorino — Velda McRae and Raymond DuBose. Ms. McRae has a B.S. in Organizational Behavior and an M.S. in Applied Management. (Ms. Sahli does not have a college degree.) By 1995, Ms. McRae had fifteen years of experience in the human resources field, having held human resources positions at several major entities. She had extensive experience in training and development, compensation and benefits, employee relations, and, most important, recruitment. Mr. DuBose also had many years of diverse human resources experience. In addition, he is a personal friend of Ms. Bates.

During the period that the search for Mr. Pistorino's replacement was underway, Ms. McGirr, then Ms. Bates's boss, submitted her resignation. Because she was leaving Bull, Ms. McGirr left the decision to Ms. Bates. Ms. Bates made the decision.

Although it meant passing on, among others, a personal friend, Ms. Bates decided that Ms. McRae was the best candidate for the job. It was offered to Ms. McRae, and she accepted it.

Ms. Bates did not consider Ms. Sahli's age in deciding not to hire Ms. Sahli.

Ms. Sahli's Claims Of Discrimination. On or about September 11, 1995, Thomas Gallagher, then General Counsel of Bull, received from Ms. Sahli's then counsel, a letter alleging that Bull had discriminated against Ms. Sahli. The letter and the materials submitted with it, including a draft charge of discrimination, quite clearly based the allegation, and sought damages, in part on events and circumstances covered by Ms. Sahli's release. An allegation that Ms. Sahli's lay-off, which clearly was covered by the release, had been discriminatory was included. On or about October 26, 1995, Ms. Sahli filed the charge against Bull with the MCAD and the EEOC. Bull, believing that Ms. Sahli had breached the release by raising released claims, filed in this Court an action to enforce the release. After Ms. Sahli and her then counsel fully clarified that she was not seeking damages for events and circumstances covered by the release, the case was dismissed without prejudice.

The Alleged Bases For Ms. Sahli's Claims Of Discrimination And Retaliation. The basis for Ms. Sahli's claim of a discriminatory failure-to-hire is that (1) it was a "policy," "practice," "culture," "procedure," or "norm" (the "policy") of the management of the Human Resources department at Bull that, if a human resources employee had been identified for lay-off, and another position within the department was vacant, the employee would be placed in the vacant

position if he or she was minimally qualified for it and with training could do the job; (2) the alleged "policy" was not applied to Ms. Sahli; (3) when the "policy" had been applied previously, it had been in connection with younger employees. Ms. Sahli has no basis for suggesting that Ms. Bates was aware of the alleged policy. Indeed, when asked to identify the persons whom Ms. Sahli contends were aware of and implemented the alleged "policy," she did not name Ms. Bates. In fact, Ms. Bates is not aware of any such "policy."

Ms. Sahli relies on Ms. Mitchell for proof that the policy existed, and she defers to Ms. Mitchell's articulation of it. According to Ms. Mitchell, the alleged "policy" applied only before employees had been notified of lay-off, was not a guarantee of a job, and would benefit only employees who were at least minimally qualified, meaning capable of doing the job effectively after a reasonable period of training. Ms. Mitchell admits that any decision pursuant to the alleged "policy" had to meet the business needs of the relevant department, and that the final decision whether to place the employee in the vacant position was within the discretion of the senior Human Resources executive(s). Ms. Mitchell does not attribute age bias to Bull in connection with the use or implementation of the alleged "policy."

Ms. Sahli has identified five Bull employees as beneficiaries of the alleged policy: Winnie Leung; Dick Henderson; Walter Orlow; Ellen Moffatt; and Ron Sullivan. Contrary to the suggestion that only (or primarily) younger persons benefitted from the alleged policy, four of the five are about the same age as Ms. Sahli.

Ms. Sahli admits that she does not know the identity of the person or persons who allegedly discriminated against her. Ms. Sahli has no evidence to suggest that it is not the case that Ms. Bates selected Ms. McRae because she felt Ms. McRae was the most qualified

candidate. Ms. Sahli knows nothing about Ms. Bates's assessment of the relative qualifications of Ms. Sahli and Ms. McRae. Ms. Sahli has no evidence that it is not the case that Ms. McRae was selected rather than Ms. Sahli because Ms. McRae was considered to have better qualifications than Ms. Sahli. Ms. Sahli in fact knows nothing about why Ms. McRae was hired instead of her. Further, Ms. Sahli is unaware of any incidents of discrimination at Bull before her lay-off. She does not claim there was a pattern or practice of discrimination at Bull. Before her claim in 1995, she never complained about any discrimination at Bull. Ms. Sahli believes that she has a claim for age discrimination even if Ms. Bates did not give age a thought in connection with her decision not to hire Ms. Sahli.

Ms. Sahli contends that Bull's lawsuit was an act of retaliation. The lawsuit is the exclusive basis for her retaliation claim. Her only reaction to the lawsuit was "surprise." She did not feel threatened, coerced, intimidated, or harassed.

Argument

MS. BATES DID NOT DISCRIMINATE, AND BULL DID NOT RETALIATE, AGAINST MS. SAHLI

A. The Summary Judgment Standard

Summary judgment is to be granted where there is no genuine issue of material fact and, under the facts, the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); see, e.g., Community National Bank v. Dawes, 369 Mass. 550, 553, 340 N.E.2d 877, 879 (1976). The party seeking summary judgment must establish that no triable issue exists and that the record entitles it to judgment as a matter of law. See, e.g., Pederson v. Time, Inc., 404 Mass. 14, 16-17, 532 N.E.2d 1211, 1212 (1989). It may meet this burden by negating an essential

element of the non-moving party's case or by demonstrating that the non-moving party has no reasonable expectation of proving an essential element of its case. See, e.g., Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734, 740-41 (1991).

Ms. Sahli has no reasonable expectation of proving either that she had qualifications similar to the person who was hired in her stead (an essential element of her prima facie case of discrimination) or that the reasons given for the decision to hire someone in her stead are a pretext for discrimination (another essential element of her case). Ms. Sahli also has no reasonable expectation of proving either that she suffered an adverse employment action as a result of her claim of discrimination (an essential element of her prima facie case of retaliation) or that the reasons given for the allegedly retaliatory action are a pretext for retaliation (another essential element of her case). Therefore, summary judgment against Ms. Sahli on both of her claims should be granted.

B. Ms. Sahli Cannot Prove Discrimination

1. The Burden Shifting Analysis. The familiar burden-shifting analysis applies to Ms. Sahli's claim of a discriminatory failure to hire. See, e.g., Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 731 N.E.2d 1075 (2000); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 646 N.E.2d 111 (1995). Under it, Ms. Sahli bears the initial burden of establishing a prima facie case of age discrimination; in a failure-to-hire case, this requires evidence that (1) she is a member of the protected class (over 40), (2) she applied for an open position, (3) she was not selected for the position, and (4) Bull filled the position with an individual with qualifications similar or equivalent to hers. See, e.g., Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665 n.22, 729

N.E.2d 1068, 1077 n.22 (2000); Staffier v. Sandoz Pharmaceuticals Corp., 888 F. Supp. 287, 291 (D. Mass. 1995) (citations omitted), aff'd without op., 78 F.3d 577 (1st Cir. 1996); Reidy v. The Travelers Insurance Co., 928 F. Supp. 98, 108 (D. Mass. 1996), aff'd without op., 107 F.3d (1st Cir. 1997). A failure of proof of one of these elements requires summary judgment in Bull's favor. See, e.g., White v. University of Massachusetts at Boston, 410 Mass. 553, 558-59, 574 N.E.2d 356, 359 (1991). If Ms. Sahli meets this burden, a presumption of discrimination will arise, and the burden will shift to Bull to articulate a legitimate, non-discriminatory reason for its decision and to produce credible evidence to show that the reason advanced is the real reason. See, e.g., Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 128, 686 N.E.2d 1303, 1308 (1997) (citations omitted). The reason may be "unsound or even absurd," and the action may appear "arbitrary or unwise," but the burden has been met if the reason advanced is non-discriminatory and supported. See id. at 128, 686 N.E.2d at 1309. Further, Bull has no obligation to prove that it was correct in the belief underlying the decision. See, e.g., id. The question is, instead, whether Bull's articulated reason "lacks reasonable support or is wholly unbelievable." Tardanico v. Aetna Life & Casualty Co., 41 Mass. App. Ct. 443, 448, 671 N.E.2d 510, 513, rev. denied, 423 Mass. 1114, 674 N.E.2d 246 (1996) (quoting Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 765, 493 N.E.2d 867, 870 (1986)). If Bull meets its burden of articulation, the presumption of discrimination will vanish, and the burden will shift back to Ms. Sahli to demonstrate that the proffered reason for the hiring decision is not the real reason, but is a pretext for discrimination. Matthews, 426 Mass. at 128, 686 N.E.2d at 1308 (quoting Blare, 419 Mass. at 442, 646 N.E.2d at 115). If Ms. Sahli fails, at this stage, in this context, to establish a genuine issue of facts as to pretext, summary judgment in Bull's favor

is appropriate. See, e.g., Tate v. Department of Mental Health, 419 Mass. 356, 364, 645 N.E.2d 1159, 1165 (1995); Blare, 419 Mass. at 440, 646 N.E.2d at 114.

2. Ms. Sahli Cannot Establish A Prima Facie Case. Ms. Sahli cannot establish one of the elements of her prima facie case — that she was qualified for the position for which she applied or that her qualifications were similar to those of the person who was hired. The requisite qualifications for the position at issue were present skill and experience in staffing, including executive-level staffing, and present skill and experience in multiple human resources generalist fields (e.g., compensation and benefits, employee relations, etc.). The position was, after, all not an entry-level position. It entailed, as the job descriptions demonstrate, significant and numerous responsibilities. Try as she might to claim otherwise, the fact is, as Mss. Bates, McGirr, and Beaumont recognized and have sworn, Ms. Sahli just did not have the requisite skills and experience. She had little or no staffing experience of any kind at Bull, and no executive recruiting experience. She had little or no experience at Bull in the diverse fields for which a Generalist II is responsible. Ms. Sahli was not capable of taking on the role and hitting "the ground running."²

² Ms. Sahli admits as much. She claims that she should have been given Mr. Pistorino's position under the alleged policy of placing employees identified for lay-off in vacant positions provided they were minimally qualified and could do the job with training. She admits that she needed training. One who needs training in order to do a job does not come to the job with the requisite skills.

Ms. Bates presumably will attempt to rely on Ms. Mitchell's assessment of her qualifications. That assessment lacks foundation and is inapposite. Ms. Mitchell had never been a generalist at Bull, and, as Ms. McGirr testified, therefore was not in a position to assess Ms. Sahli's qualifications for a generalist position. Moreover, Ms. Mitchell's assessment incorrectly ignored that the principal responsibility of the position was staffing, including executive level staffing.

Ms. Sahli's attempts to rely on experience with a prior employer are unavailing. The human resources generalist experience at the prior employer was, due to the passage of time, inapplicable; much had changed in the field in the intervening decade plus. Any claim to have had staffing experience at the prior employer falls flat given Ms. Sahli's admission to Ms. Bates that her experience there was slim, her embellishment of her resume, and the lack of any evidence that Ms. Sahli truly and actually performed executive-level, intensive recruiting for her prior employer.

Moreover, Ms. Sahli clearly did not have qualifications similar to those of the person ultimately hired. A simple comparison of Ms. Sahli's resume (even the embellished version) with Ms. McRae's demonstrates that Ms. McRae was better qualified. Ms. McRae had an undergraduate and a masters degree in relevant disciplines. She had recent experience as a human resources generalist. And most important, she had extensive staffing experience. Ms. Sahli had no such degrees, no such generalist experience, and no such staffing experience.

Thus, Ms. Sahli cannot establish that she was qualified or that she had qualifications similar to those of Ms. McRae. She therefore cannot establish an element of her prima facie case.

3. Bull Has Articulated A Legitimate Non-Discriminatory Reason For Its Decision.

Ms. Sahli was not selected to replace Mr. Pistorino because Ms. Bates, with the concurrence of Ms. Beaumont, determined that she did not have the skills and experience for the position and determined that Ms. McRae did have them. Simply put, Ms. Bates thought Ms. McRae was the better (actually, the best) candidate. This conclusion is supported in the record.

The job Ms. Bates was trying to fill was a multi-faceted, advanced position. As the job posting, job descriptions, and Mss. Bates and Beaumont's testimony and/or sworn statements show, Mr. Pistorino's replacement was expected to perform numerous functions, from high-level recruitment to employee counseling. Experience and skill in these diverse functions were musts. Ms. Sahli was determined by both Ms. Beaumont and Ms. Bates not to have those skills and experience. Other evidence confirms Mss. Bates and Beaumont's unequivocal testimony to this

Moreover, three witnesses, including Ms. Sahli's friend Ms. Mitchell, saw a rigidity in Ms. Sahli that rendered her unsuitable for the consultative role a human resources generalist at Bull was expected to fill.

effect. Ms. Sahli's own resumes show skill and experience gaps. Ms. Sahli concedes that her generalist experience, such as it was, was dated, and she admitted limited staffing experience. Likewise supported is Mss. Bates and Beaumont's conclusion that Ms. McRae was better qualified. Not only have they sworn to these conclusions, but Ms. McRae's skills and experience are documented, and Mss. Bates and Beaumont confirmed the skills and experience during interviews.

4. Ms. Sahli Cannot Show Pretext. Ms. Sahli cannot show that Bull's articulated reason for not hiring her and hiring Ms. McRae instead is a pretext for discrimination. The real reason Ms. Sahli did not get the job is that Ms. Bates concluded she was not qualified while Ms. McRae was. This conclusion, as noted above, is amply supported. Ms. Sahli has nothing to suggest otherwise. In fact, she admits:

- She has no evidence to suggest that it is not the case that Ms. Bates selected Ms. McRae over Ms. Sahli based on relative qualifications;
- She does not even know the identity of the person(s) who allegedly discriminated against her;
- She has no evidence to challenge the reason articulated above;
- She believes Ms. Bates is not discriminatory, and she has no evidence of any discrimination by Ms. Bates;
- She does not even know who made the decision not to hire her; and
- She is unaware of any discrimination at Bull, much less a pattern of discrimination.

While Ms. Sahli may chew around the edges, suggesting that based on her Control Data years she did have adequate skills and experience, she can come forward with no evidence to

suggest that Ms. Bates did not believe Ms. Sahli was under-qualified and did not believe Ms. McRae was the most qualified. Indeed, Ms. Sahli admits that she has no such evidence.

What Ms. Sahli does have is an unavailing argument based on an alleged "policy." Her argument appears to be that, because Ms. Bates ignored the alleged policy, and the alleged policy was applied to younger employees, discrimination was afoot. There are gaping holes in this argument. First, Ms. Bates was unaware of, and in fact denies the existence of, the alleged policy. Ms. Sahli has no credible evidence to the contrary. Her argument fails at the first turn, because she cannot show any conscious deviation from an alleged policy, the first premise of her argument.

Second, even if Ms. Bates consciously ignored and violated this alleged policy and it existed and was applicable, pretext would not be shown. Assuming the policy existed, applied, and was known, that it was ignored would not in any respect make any part of Ms. Bates's story untrue.³ It would remain true that Ms. Bates considered Ms. Sahli under-qualified and Ms. McRae qualified. In other words, the articulated reason would emerge unscathed.

Third, even assuming that the policy existed and that Ms. Bates was aware of it, Ms. Sahli has not shown that it was violated. Ms. Mitchell made clear that the alleged policy had limits: (1) it applied pre-notification of lay-off, (2) it was not automatic, because management always retained the right not to make the placement, and (3) it was applied only if consistent with business needs. Ms. Sahli had been laid off, so the policy did not apply to her and therefore was not violated. Further, since, under Ms. Mitchell's view, Ms. Bates had discretion not to make an automatic appointment of Ms. Sahli, she cannot be said to have violated the policy by exercising

³ The alleged policy is, after all, facially neutral.

that discretion. Further still, since Ms. Bates's decision clearly was driven by business needs, no violation occurred.

Finally, a key-component of Ms. Sahli's argument — that the policy was applied only to younger employees — is demonstrably false. As noted above, four out of five of the alleged beneficiaries were in the protected category and close in age to Ms. Sahli.

C. Ms. Sahli Cannot Prove Retaliation

1. The Burden-Shifting Analysis. To a claim for retaliation applies a burden-shifting analysis similar to the analysis applied to a discrimination claim. Ms. Sahli has an initial burden of establishing a prima facie case comprising four elements: (1) that she engaged in protected activity; (2) that Bull was aware of the protected activity; (3) that the terms of her employment were subsequently adversely affected; and (4) that the changes to the terms of employment followed the protected activity closely enough in time that retaliatory motive can be inferred. See, e.g., MacCormack v. Boston Edison Co., 423 Mass. 652, 662-63, 672 N.E.2d 1, 7-8 (1996). She must show that she was subjected to a materially adverse employment action after engaging in protected activity. Id. at 662, 672 N.E.2d at 7-8; Lewis v. Gillette Co., 22 F.3d 22, 24 (1st Cir. 1994) (quoted in MacCormack). Subjective feelings of disappointment or disillusionment are insufficient; Ms. Sahli must provide evidence that, after she engaged in protective activity, she was "disadvantaged in respect to salary, grade, or other objective terms and conditions of employment . . ." MacCormack, 423 Mass. at 663-64, 672 N.E.2d at 2. If Ms. Sahli carries her initial burden, the burden will shift to Bull to show a legitimate, non-discriminatory reason for the challenged action. See, e.g., Trabilcy v. ENSR Corp., 1999 WL 753474 (Mass. Super. Ct., Aug. 19, 1999) (McHugh, J.) (granting summary judgment). Bull will "need not prove the

absence of a retaliatory motive, but only produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason." Berry v. Levinson Chevrolet, 804 F. Supp. 121, 134 (D. Colo. 1992) (irrel. subs. history omitted). If Bull meets this burden, the burden will shift back to Ms. Sahli to show that the articulated reason is pretextual. In this regard, subjective and intangible impressions will be insufficient; "deposition testimony containing bare assertions and conclusions regarding understanding, beliefs, and assumptions, is not enough to withstand a well pleaded motion for summary judgment." Goguen v. Quality Plan Administrators, 2000 WL 282485 (Mass. Super. Ct., Feb. 11, 2000) (Gershengorn, J.) (granting summary judgment). As the Supreme Judicial Court has cautioned, the "interest in remedying discrimination is weighty but not so weighty as to justify what amounts to a restriction on . . . speech." Bain v. City of Springfield, 424 Mass. 758, 767, 678 N.E.2d 155, 161 (1997).

2. Ms. Sahli Cannot Establish A Prima Facie Case. Ms. Sahli cannot prove the third element of her prima facie case. It is undisputed that the terms of her employment were not adversely affected after she filed her claim of discrimination. Ms. Sahli's employment with Bull ended months before Bull engaged in the allegedly retaliatory action — filing suit for breach of her separation agreement. The terms of her employment were not and could not have been adversely affected, simply because there was no employment and no terms of employment adversely to affect. Moreover, even assuming there were employment terms, there was no adverse affect. As Ms. Sahli testified, her only reaction to Bull's suit was "surprise." This is not the sort of adversity against which the anti-retaliation statutes are designed to guard. See, e.g., Mass. Gen. L. ch. 151B, § 4(4A) (proscribing coercion, intimidation, threats, and interference);

MacCormack, 423 Mass. at 663, 672 N.E.2d at 8 (feelings of disappointment or disillusionment insufficient).

That retaliatory activity did not occur here becomes clear by considering precisely what Bull did. Bull sued to enforce rights under the release. This, Ms. Sahli claims, Bull could not do. The logical extension of Ms. Sahli's position is that Bull would have been proscribed even from raising its claims under the agreement by way of affirmative defense to Ms. Sahli's claim for discrimination. Clearly, this is not correct. Filing suit to enforce contractual rights is not equivalent to adversely affecting terms of employment. Filing suit to enforce contractual rights is, instead, statutorily and constitutionally protected activity that the anti-retaliation statutes do not reach. See generally Bain, 424 Mass. at 767, 678 N.E.2d at 161; Mass. Gen. L. ch. 231, § 59H (proscribing claims against a party based on the party's exercise of its right to petition under the constitutions of the Commonwealth and/or the United States).

3. Bull Has Articulated A Legitimate Non-Retaliatory Reason For Its Action. As shown elsewhere, Ms. Sahli raised through her original counsel claims that violated the express terms of her release. Although she had agreed in writing to release Bull from claims arising out of her lay-off and accepted severance pay in exchange, her original counsel nevertheless thereafter asserted claims implicating the lay-off. Bull filed suit to remedy the apparent breach. (Later Ms. Sahli made clear that her claim was limited to post-agreement events and circumstances, and that clarification led to dismissal of the case.) Ms. Sahli's apparent breach triggered the lawsuit. This is a legitimate, non-discriminatory trigger. And, given the initial overreaching by Ms. Sahli's prior counsel, it is a trigger that is well-supported in the record.

4. Ms. Sahli Cannot Show Pretext. Bull is unaware of any evidence to suggest pretext. Ms. Sahli's prior lawyers' correspondence on its face shows that Ms. Sahli was asserting, at least in part, claims that were violative of the release. Ms. Sahli's claim itself and the supporting declaration on their face suggest claims that were violative of the release. Bull's complaint on its face shows that Bull's purpose was enforcement of the release. Under these circumstances, any suggestion that retaliation was intended and behind the complaint is rank speculation at best. Such does not suffice to show pretext. See, e.g., Goguen, 2000 WL 282485 at *6.

Conclusion

For the foregoing reasons, Bull respectfully requests that its motion for summary judgment be granted.

Dated: September 25, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served by hand on counsel of record for plaintiff in this matter this 25th day of September, 2000.

Kathleen A. Kelley

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