



The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

## **II. Factual Background**

The statements of material facts submitted by the parties pursuant to this court's Local Rule 56 include the following undisputed material facts appropriately supported by citations to the summary judgment record.

In 1994 the defendant created its Outsourcing Division ("OSD"). Defendant's Separate Statement of Material Facts as to Which There is No Genuine Issue ("Defendant's SMF") (Docket No. 10) ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 12) ¶ 1. OSD was created to contract with hospitals to provide information systems and services to information technology ("IT") departments. *Id.* ¶ 2. At the time OSD was formed the defendant had only one outsourcing contract. *Id.* ¶ 3. OSD's services vary from hospital to hospital and may include partial or full outsourcing of the hospital's IT needs, including any or all of

the following: network connections, hardware services and maintenance, personal computer services and maintenance, applications services, telephony services, data operations services and help desk services. *Id.* ¶¶ 4-5. OSD hires employees to work on its outsourcing contracts in various positions; in these positions OSD employees perform the same tasks and have the same responsibilities they would have if they worked directly for the hospital. *Id.* ¶¶ 6-7.

As time went on, OSD was able to attract larger contracts from larger hospital systems than it could attract in its first few years. *Id.* ¶ 8. The role of OSD's site managers evolved into more complex jobs than they were during the first few years of OSD's existence. *Id.* ¶ 9. OSD needed to be able to staff the larger and more complex contracts with site managers with significant experience in large hospital environments, which the customers on those contracts expected. *Id.* ¶¶ 10-11.

The plaintiff worked for OSD from 1995 until February 2000; her job title was site manager level III ("SM III"). *Id.* ¶¶ 12-13. The plaintiff began working as a registered nurse in 1973. Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute ("Plaintiff's SMF") (Docket No. 13) ¶ 82; Defendant's Response to Plaintiff's Separate Statement of Material Facts as to Which There is No Genuine Issue ("Defendant's Responsive SMF") (Docket No. 17) ¶ 82. In 1980 she received a bachelor's degree in business administration. *Id.* From 1981 to 1983 the plaintiff was a branch manager for a temporary home health care nursing service. *Id.* ¶ 83. From 1983 to 1987 she was employed by the defendant in its field operations department, where she did project management and installation, working with clients after they had purchased applications from the defendant. *Id.* ¶ 84. From 1987 to 1990 the plaintiff was MIS director at Northeast Regional Medical Center in Humble, Texas. *Id.* ¶ 85. For two years starting in 1990 the plaintiff was project manager in the professional services group at HBO, where she was responsible for higher-level management of implementations. *Id.* ¶ 86. During this time she consulted with East Texas Regional Medical Center

in Lufkin, Texas. *Id.* From 1992 to 1995 the plaintiff worked at the University of Texas M.D. Anderson Cancer Center as clinical systems manager. *Id.* ¶ 87. She worked essentially as an applications manager managing implementation, maintenance and acquisition of clinical systems. *Id.* In her position with the Cancer Center she was a customer of the defendant. *Id.* She is familiar with the defendant's Invision and Signature product lines. *Id.* ¶ 89.

In June 1995 the plaintiff was hired to be the Interim CIO on an outsourcing contract at a hospital in Tulsa, Oklahoma. Defendant's SMF ¶ 15; Plaintiff's Responsive SMF ¶ 15. This position was intended to oversee the general operation of the IT department at that site and did not include any service level guarantees like those included in the typical agreement entered into between OSD and customers. *Id.* ¶ 16. The interim CIO role is much less demanding than the typical site manager role at OSD. *Id.* ¶ 19. At the job she had before she began working for the defendant in 1995 the plaintiff was an applications manager. *Id.* ¶ 25. When the plaintiff was hired in 1995 most of the development and implementation work on the Tulsa contract was complete. *Id.* ¶ 28. The plaintiff was hired by Steven Zeelau, who was her supervisor while she worked in Tulsa. *Id.* ¶ 27. One of the reasons he hired the plaintiff even though she had not been a CIO before was that her responsibilities would only include monitoring operations at the Tulsa site. *Id.* ¶ 29.

The plaintiff did a very good job under Zeelau's supervision; she worked on the Tulsa contract until it ended in July 1996 and her position was eliminated. *Id.* ¶¶ 33-34. The plaintiff was then assigned to a contract at Denver Health which involved a not-for-profit county hospital where only four of the IT responsibilities were outsourced to OSD. *Id.* ¶¶ 35-36. The plaintiff's job at Denver Health was as applications manager, which was below the position of site manager, which was held by a male with over 15 years experience as a CIO. *Id.* ¶¶ 37-39. The plaintiff's salary was increased

when she went to Denver Health. *Id.* ¶ 40. In late June 1997 the plaintiff became the interim CIO/site manager on the Denver Health contract. *Id.* ¶ 41.<sup>1</sup> The plaintiff was put into this

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<sup>1</sup> The plaintiff “disputes” the characterization of this position as “interim,” but she admits that this is how the defendant characterized it. Plaintiff’s Responsive SMF ¶ 41.

position at the request of Fred Morefield, a consultant hired by the customer. *Id.* ¶ 44. While she was at Denver Health the plaintiff learned about and expressed interest in a site manager position in Pennsylvania. Plaintiff's SMF ¶ 15; Defendant's Responsive SMF ¶ 15. She was not asked to interview for this position, for which a male candidate was hired. *Id.*

Zeelau, the plaintiff's supervisor, felt that Morefield made all major decisions pertaining to IT operations at the Denver Health site, so that the site manager essentially worked under his direction rather than as a lead person. Defendant's SMF ¶¶ 45, 47; Plaintiff's Responsive SMF ¶¶ 45, 47. According to the plaintiff, she managed 20 people at the Denver Health site. *Id.* ¶ 48. Zeelau felt that the plaintiff and Morefield were often at odds over how to manage IT operations at that site. *Id.* ¶ 47. The plaintiff was asked to take a demotion at Denver Health and she refused. Plaintiff's SMF ¶ 23; Defendant's Responsive SMF ¶ 23. In October of 1997 the plaintiff was removed from her position at Denver Health. Defendant's SMF ¶ 50; Plaintiff's Responsive SMF ¶ 50.<sup>2</sup> The plaintiff testified at her deposition that she asked to be transferred from the Denver Health site. *Id.* ¶ 51. OSD transferred the plaintiff to work as a project manager on a contract in Youngstown, Ohio without reducing her pay. *Id.* ¶ 56. From 1994 through 1997 it was not uncommon for OSD to allow employees who left their sites to help out at other sites while maintaining their salary level and title even if the position they were helping out in was below the level of their position until another job at their level became available. *Id.* ¶ 57.

Beginning in 1998 it became clear to OSD that every site manager did not fit into every site manager role; whether they did so depended on the size and complexity of the account. *Id.* ¶ 59. In order to maximize revenue and allow for the fact that new contracts were not being obtained as

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<sup>2</sup> The plaintiff purports to "dispute" paragraph 50 of the defendant's statement of material facts, but her denial is not responsive, Plaintiff's Responsive SMF ¶ 50, and the paragraph is therefore deemed admitted to the extent that it is supported by the citation given to the summary judgment record.

quickly as OSD had anticipated, its policy was changed so that an employee whose position was terminated could maintain his or her salary and position while helping out for a brief period of time, after which the employee would have to take a salary cut and title change in order to stay in that position. *Id.* ¶¶ 59-60. The defendant also has a policy that gives an employee whose job is eliminated or who leave a site for any reason 45 days to find another job with the defendant; if this does not occur, the employee is laid off. *Id.* ¶ 75. Since April 1998 the defendant has followed this policy for all SM IIIs whose jobs have been eliminated. *Id.* ¶ 78.

In March 1998 Jim Way, OSD's eastern regional manager, told the plaintiff about an open SM III position at Catholic Health in Buffalo, New York. *Id.* ¶ 61. As of late January 1998 the site manager position at Catholic Health reported to Way. *Id.* ¶ 63. Way chose the plaintiff over a male candidate who was not an employee of the defendant for the Catholic Health position. *Id.* ¶ 65.<sup>3</sup> Way encouraged Catholic Health to approve the plaintiff as the site manager, and it did so. *Id.* ¶¶ 67-68. Because of the size of the contract, Way considered the site manager position at Catholic Health to be a significant increase in responsibility for the plaintiff. *Id.* ¶ 70. The plaintiff supervised between 26 and 33 employees at Catholic Health. *Id.* ¶ 71. In January 1999 the plaintiff received a performance review covering 1998 from Way. *Id.* ¶¶ 79-80. At this time, Way felt that the plaintiff was holding her own on the site as he expected her to and was on her way to being able to run things on her own at a site, but she still had much to learn. *Id.* ¶ 84. He considered that his evaluation of the plaintiff's performance reflected that she was doing an average job. *Id.* ¶ 90.

In January 1999 the plaintiff learned that the defendant might be entering into a contract with Scott & White in Texas and asked to be considered for the SM III position on that contract. *Id.* ¶ 91. Since July 1999, when the Scott & White contract began, the site manager has supervised almost 50

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<sup>3</sup> Again, the plaintiff purports to deny this paragraph of the defendant's statement of material facts, but the substance of her denial is not (continued on next page)

people. *Id.* ¶ 93. Jean LaFond, who participated in negotiating the Scott & White contract, considered it to be far bigger and more complex than the Tulsa, Denver Health and Catholic Health contracts. *Id.* ¶¶ 92, 95. LaFond hired employees for the Scott & White contract; he decided that the plaintiff did not have the experience or business sophistication to run an operation as large and complex as Scott & White. *Id.* ¶¶ 97, 100. LaFond told the plaintiff that, having spent a considerable amount of time understanding the requirements of the contract and the Scott & White personnel, he did not think that the plaintiff would be a “good fit” for the job. *Id.* ¶ 103.

In August 1999 the plaintiff learned that Bill Stewart had been hired for the site manager position at Scott & White. Plaintiff’s SMF ¶ 34; Defendant’s Responsive SMF ¶ 34. Charles (Bill) Stewart was hired by OSD as an SM III in July 1999. Defendant’s SMF ¶ 147; Plaintiff’s Responsive SMF ¶ 147. Stewart had over 30 years experience in the IT field, 19 of which were in healthcare. *Id.* ¶ 148. Before he was hired by the defendant, Stewart had been vice-president and CIO of an enormous hospital system. *Id.* ¶ 149. For seven years he had been the director of information services for a 362-bed hospital during installation of major primary and departmental applications. *Id.* ¶ 151. He had also served for two years as the president of a group of the defendant’s customers that provided feedback to the defendant about future product releases, for five years as the chair of the defendant’s advisory committee and for nine years as a participant in development and testing of new products for the defendant. *Id.* ¶¶ 154-57.

In August 1999 Way learned that senior executives at Catholic Health were reaching a very high level of frustration with OSD on the contract on which the plaintiff was the site manager. *Id.* ¶ 106. The defendant worked hard to keep the contract and the plaintiff continued to do her job as she had so that the customer could not use her performance to end the contract. *Id.* ¶ 109. Catholic Health

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responsive to the facts stated, Plaintiff’s Responsive SMF ¶ 65, and they are accordingly deemed admitted.

notified the defendant on December 5 that it would terminate the contract on December 31. *Id.* ¶ 110. Catholic Health offered jobs to all of the defendant's employees working at that site except the plaintiff. *Id.* ¶ 111. The plaintiff was unable to find another position at the SM III level and was laid off in February 2000. *Id.* ¶¶ 116-17. After she left employment with the defendant, the plaintiff was paid \$30,000, the maximum incentive payment available to her for 1999, by the defendant. *Id.* ¶¶ 118-20, 122-24.

Between August 1999 and February 2000 only two SM III positions were available. *Id.* ¶ 126. In October 1999 the plaintiff and a male employee of the defendant, Frank Magrath, interviewed with LaFond for a site manager job at the Vanguard site in Nashville, Tennessee. *Id.* ¶ 127. At the time, LaFond expected the Nashville contract to grow into two dozen contracts covering many hospitals, for all of which the person hired for the Nashville site manager job would be responsible. *Id.* ¶ 128. Before he was hired by the defendant Magrath had been the CIO for five years at OhioHealth, a for-profit entity composed of nine hospitals, 35 family practices and multiple ambulatory and outpatient sites and an operating budget of \$12 million. *Id.* ¶¶ 130-31. At OhioHealth Magrath led the successful implementation of a large, clinical information system at an 1100 bed hospital and merged the information systems and staffs of two hospitals into one cohesive division composed of over 150 professionals. *Id.* ¶¶ 132-33. Magrath was hired in July 1999 to be the site manager of OSD's outsourcing contract in Albany, New York. *Id.* ¶¶ 140, 142. The Albany contract was very important to OSD and Way concluded that he needed a site manager for that contract who had extensive experience in running large IT departments. *Id.* ¶ 143. The customer eliminated the position of site manager at that site in August 1999. *Id.* ¶ 144. Magrath was given 45 days to find a new job with the defendant or be laid off. *Id.* ¶ 146. Magrath was selected to be the Nashville site manager. *Id.* ¶ 129.

The second SM III position available during this period was apparently located in Chicago with MacNeal. *Id.* ¶¶ 217, 220.

In November 1999 the plaintiff made a complaint of gender discrimination to the defendant's human resources department. *Id.* ¶ 279. Leslie Smurthwaite conducted some interviews as a result of this complaint. Plaintiff's SMF ¶¶ 38-39; Defendant's Responsive SMF ¶¶ 38-39.

Following termination of the Catholic Health position, Way directed the plaintiff to Debra Warshawsky as her contact for job placement in the defendant's human resources department. *Id.* ¶ 59. On December 7, 1999 Way and Warshawsky flew to Buffalo to meet with the plaintiff to discuss career opportunities within OSD. Defendant's SMF ¶ 190; Plaintiff's Responsive SMF ¶ 190. At that meeting, Way and Warshawsky told the plaintiff about an opportunity as site manager on OSD's Jameson contract. *Id.* ¶ 191. The plaintiff told Way and Warshawsky that she was not interested in the Jameson position because it was a level SM II position. *Id.* ¶ 193. Way and Warshawsky also tried to discuss with the plaintiff the possibility of working for Magrath in the Vanguard web of sites, but the plaintiff told them that she was not interested in working for Magrath. *Id.* ¶¶ 194-95. Way and the plaintiff agreed to set up weekly telephone conferences to discuss her progress in finding a position within the defendant or outside. *Id.* ¶ 196. Warshawsky delegated the responsibility for assisting the plaintiff during her 45-day period to Kathy Lawlor Reilly, who worked for Warshawsky. *Id.* ¶ 255.

In the summer of 1999 OSD hired Nick Thimis as transition manager for all new contract sites. *Id.* ¶ 164. Thimis began work as the transition manager for OSD's Vanguard contracts in December 1999. *Id.* ¶ 165. He performed this role at the MacNeal site in Chicago, among others. *Id.* ¶ 172. In November 1999 Way was promoted to the position of area operations manager. *Id.* ¶ 179. He did not believe that any of the site managers then in his region, five males and two females, met the requirements to be regional manager for the east coast, the position he was leaving. *Id.* ¶ 184.

By e-mail sent on December 22, 1999 the plaintiff informed Way and Warshawsky that she viewed the position in Chicago reporting to Magrath to be a constructive demotion. *Id.* ¶ 204. Warshawsky responded that the position would have the same title and salary that the plaintiff currently had, with a much larger scope than the Catholic Health account. *Id.* ¶ 205. On January 3, 2000 Way spoke to the plaintiff about possible future opportunities at the MacNeal site and in Orange County, California. *Id.* ¶ 209. The plaintiff saw the California position as a two step demotion. *Id.* ¶ 210. On January 25, 2000 Way told the plaintiff about an open site manager position at the MacNeal site at the SM III level. *Id.* ¶ 217. On January 26, 2000 the plaintiff told Way by e-mail that she was pursuing various jobs and “I’ll keep your offer in mind.” *Id.* ¶ 218. In January 2000 the plaintiff decided that she wanted the MacNeal job because she had not found anything else. *Id.* ¶ 226. Timis considered fifteen candidates for the position, including the plaintiff. *Id.* ¶ 229. Timis did not speak to Way about the plaintiff in considering her for this job and did not know that she had made an earlier complaint of discrimination. *Id.* ¶ 231.

In 2000 Mark Fehling was hired for the MacNeal site manager position. *Id.* ¶ 220. Fehling had 18 years of information services management experience before being hired for the MacNeal site position. *Id.* ¶ 221. For eleven years he had been the CIO at a \$1 billion multi-site health system. *Id.* ¶ 222. Timis concluded that the plaintiff was not qualified for the MacNeal position because she did not have enough experience playing the lead role at such a site. *Id.* ¶ 232. He rejected one male candidate with experience similar to the plaintiff’s and five males with more experience than the plaintiff. *Id.* ¶ 233. The MacNeal contract involved ten primary care centers, a 350-bed hospital, a home health network and a physicians’ organization with 150 doctors; the information services staff had 109 employees. *Id.* ¶¶ 234-35.

When Reilly processed the plaintiff's paperwork upon her layoff, she checked the box that said "no" after the question "Recommend for rehire?" on the form. *Id.* ¶ 251. Way was not involved in the decision to check this box. *Id.* ¶ 253. Reilly made this decision based on her experience with the plaintiff during the 45-day period; she felt that the plaintiff was uncooperative. *Id.* ¶¶ 257-60. The plaintiff's work performance was not a factor in Reilly's decision to check the "no" box. Plaintiff's SMF ¶ 74; Defendant's Responsive SMF ¶ 74. Reilly did not know when she checked the box that the plaintiff had made an internal complaint of discrimination. Defendant's SMF ¶ 262; Plaintiff's Responsive SMF ¶ 262. Reilly discussed her decision to check the "no" box with Michelle Nofer, in-house counsel for the defendant. Plaintiff's SMF ¶ 71; Defendant's Responsive SMF ¶ 71.

At OSD, the factors considered in filling SM III positions include a person's level and type of experience; business maturity; results such as customer satisfaction, budget and revenue growth; performance and to a lesser extent the length of his or her employment at the defendant. *Id.* ¶ 135. The most important of these factors is a person's level and type of experience. *Id.* The defendant does not give internal candidates preference over external candidates when filling positions. *Id.* ¶ 265. During the plaintiff's employment, the defendant had a "hotlist" on which open jobs could be listed at a manager's discretion if the manager felt that there was a need to fill the position quickly. *Id.* ¶ 270.

The plaintiff filed an administrative complaint with the Equal Employment Opportunity Commission on March 9, 2000. *Id.* ¶ 295.

### **III. Discussion**

The complaint alleges violations of unspecified civil rights and equal pay acts and retaliation for filing a complaint of gender discrimination. Complaint (Docket No. 1) at 5-8. It alleges generally that the plaintiff's claims "arise[] out of federal law," *id.* at 2, and the parties have proceeded as if only claims based on federal law have been asserted. The plaintiff's motion to dismiss Count I, the

equal pay claim, has been granted. Docket No. 14. The defendant moves for summary judgment on the remaining two counts of the complaint.

### **A. Discrimination**

In order for a claim of disparate treatment under 42 U.S.C. § 2000e-5 (also known as Title VII) to be timely, a plaintiff must file an administrative complaint with the Equal Employment Opportunity Commission within 300 days after the allegedly unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1).<sup>4</sup> The defendant contends that any incidents mentioned in the plaintiff's complaint that occurred before May 14, 1999 (300 days before the plaintiff filed her administrative complaint on March 9, 2000) accordingly may not provide any basis for relief. Defendant's Motion for Summary Judgment, etc. ("Motion") (Docket No. 9) at 8-9. The plaintiff was not hired by the defendant for two available positions in which she was interested during that time period. *Id.* at 10-14. The plaintiff responds that her claim is one of a "pattern of conduct" and "claims of disparate treatment creating a hostile work environment" that is not subject to the 300-day limitation. Opposition to Defendant's Motion for Summary Judgment, etc. ("Opposition") (Docket No. 11) at 10. The complaint cannot reasonably be read to allege the existence of a hostile work environment based on gender as the basis for a Title VII claim. Assuming *arguendo* that this significant change in the plaintiff's theory of recovery at this late stage of the proceedings is permissible, the defendant's contention that the plaintiff has not submitted evidence to support a hostile work environment claim, Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Reply") (Docket No. 15) at 2-4, is correct.

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment

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<sup>4</sup> The parties agree that Maine is a "deferral state" under this statute, meaning that it is a state in which a plaintiff may institute proceedings on such a claim with a state agency, making the deadline for filing court action 300 days after the practice at issue occurred rather than 180 days. 42 U.S.C. § 2000e-5(e)(1).

practice” therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative affect [sic] of individual acts.

*National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (citations omitted).

When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.

*Id.* at 116 (citation and internal quotation marks omitted). The plaintiff offers no evidence of such a situation. Only one entry in her statement of material facts could reasonably be read to relate to a hostile work environment claim: an assertion that Al Colledge, identified as “OSD/IT General Manager,” Plaintiff’s SMF ¶ 9, commented “in front of several of her male subordinates” at Catholic Health “that the only reason that the client liked her was because she is a woman,” *id.* ¶ 27. This single instance does not a hostile work environment make, however favorably to the plaintiff it may be interpreted. The other factual instances on which the plaintiff relies, Opposition at 10-12, simply cannot reasonably be interpreted as anything other than discrete acts or occurrences of discrimination based on gender. Such an event is discrete “even when it has a connection to other acts.” *Morgan*, 536 U.S. at 111. “Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred.” *Id.* at 113. “Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’” *Id.* at 114.

In this case, only incidents that occurred after May 14, 1999 may be considered as the basis for relief under Title VII. The plaintiff argues that she has presented sufficient evidence to proceed to

trial on her discrimination claim even if she has not shown the existence of a hostile work environment, but she does not identify any specific incidents that she contends are timely. Opposition at 13-20. She discusses the Scott & White and Nashville positions. *Id.* at 16-17, 19. However, as the defendant points out, Motion at 9, the undisputed fact is that the plaintiff was told that she would not be hired for the Scott & White SM III position in March 1999, Defendant's Statement of Material Facts ¶¶ 100, 103; Plaintiff's Responsive SMF ¶¶ 100, 103, outside the 300-day limitation period. Despite alleging that she learned in August 1999 that Stewart had been hired for the Scott & White position, Plaintiff's SMF ¶ 34, she offers no evidence that the allegedly unlawful employment practice, the hiring of Stewart for the position instead of her, actually occurred after May 14, 1999.

The plaintiff's failure to discuss the MacNeal position in Chicago constitutes a waiver of any opposition to the defendant's argument on that incident, and I accordingly will not discuss it further. *Green v. New Balance Athletic Shoe, Inc.*, 182 F.Supp.2d 128, 136 (D. Me. 2002).

The parties agree that the burden-shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to the plaintiff's claim of gender-based discrimination in the award of the Nashville position to Magrath. Motion at 9-10; Opposition at 13. In this case, the plaintiff is required to show that:

- (i) she was a member of a protected class; (ii) she was qualified for the . . . position [at issue]; (iii) she was not hired despite her qualifications; and
- (iv) the job was given to a person outside the protected group.

*Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1023 (1st Cir. 1988). If the plaintiff succeeds in establishing this *prima facie* case, the burden shifts to the defendant to produce evidence that the plaintiff "lost out for some nondiscriminatory reason." *Id.* The "articulation of legitimate, nondiscriminatory reasons for hiring [Magrath] in lieu of [the plaintiff] suffice[s] to erase the presumption raised by plaintiff's *prima facie* case." *Id.* It then becomes the plaintiff's burden to show

that the defendant's reason (or reasons) is a pretext for discrimination. *Id.* The plaintiff must show not only "that the defendant[ 's] proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts *aimed at masking sex . . . discrimination.*" *Id.* at 1026 (emphasis in original). The defendant contends that the plaintiff was not qualified for the Nashville position, that it hired the more qualified individual in any event and that there is no evidence of pretext. Motion at 10-12. The plaintiff responds that she "met all of Defendant's published criteria for the Site Manager III position" and that the value given to Magrath's experience outside the defendant's employ was "merely a pretext to justify the hiring of male employees." Opposition at 15, 17.

It is not necessary to discuss the question whether the plaintiff was qualified for the Nashville position because the defendant has offered a legitimate, nondiscriminatory reason for hiring Stewart and the evidence proffered by the plaintiff cannot reasonably be interpreted to establish pretext. The plaintiff does not contest that Magrath's related experience before he was hired by the defendant was superior to hers. The evidence in the summary judgment record supports this conclusion. *Compare* Defendant's SMF ¶¶ 130-33, 142-43; Plaintiff's Responsive SMF ¶¶ 130-33, 142-43 *with* Plaintiff's SMF ¶¶ 82-87; Defendant's Responsive SMF ¶¶ 82-87. Magrath had already been employed by OSD, since July 1999, before he was given the Nashville position. Defendant's SMF ¶¶ 127, 140; Plaintiff's Responsive SMF ¶ 127, 140. The plaintiff had been with OSD since 1995, *id.* ¶ 12, but her experience with the defendant by October 1999, when she and Magrath were interviewed for the Nashville position, *id.* ¶ 127, was limited to contracts much smaller in scope than the Nashville contract, *id.* ¶ 128, and smaller facilities than those for which Magrath had been responsible before coming to work for the defendant. The defendant contends that Magrath was chosen for the position as a result of his superior relevant experience. Motion at 11.

The plaintiff can meet her burden of showing pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation was unworthy of credence.” *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 109 (1st Cir. 1988) (citation and internal punctuation omitted). As evidence of pretext, the plaintiff contends that the defendant’s “own criteria indicate a strong desire for SMS specific experience,” little or no value was placed on her experience with the defendant, the plaintiff had extensive experience before coming to work for the defendant, another female employee was told that her experience outside the company was not marketable, the plaintiff was paid approximately as much as Magrath, and Magrath’s “passage [through the interview for the Nashville job] was eased by prior coaching.” Opposition at 16-19. None of this is direct evidence of a discriminatory motive. Nor does it establish that the defendant’s proffered reason is unworthy of credence. In addition, the fact that the plaintiff was paid approximately as much as the selected candidate cannot possibly serve as evidence of an actual motive based on gender discrimination. I will accordingly not consider this assertion further in my analysis of the plaintiff’s burden with respect to pretext.

The plaintiff has admitted that

[i]n OSD, the factors considered in filling SM III positions include a person’s level and type of experience, business maturity, results such as customer satisfaction, budget and revenue growth, performance and to a lesser extent the length of a person’s employment at SMS. The most important of these factors is a person’s level and type of experience.

Defendant’s SMF ¶ 135; Plaintiff’s Responsive SMF ¶ 135.<sup>5</sup> Nevertheless, she contends that these factors are overridden by an alleged OSD “corporate policy” to the effect that “any internal candidate

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<sup>5</sup> The plaintiff admits this paragraph “[t]o the extent that it is an accurate reflection of Jim Way’s opinions as to what is most important.” Plaintiff’s Responsive SMF ¶ 135. The paragraph is not presented by the defendant as Way’s opinion, but it is presented in an affidavit from Way. Declaration of James Way (Exh. 1 to Motion) ¶ 88. Since Way is an OSD executive who chose among applicants for SM III positions at OSD, *id.* ¶¶ 14, 63, his statement is more than merely his opinion; it is at least a statement of the factors that he considered in filling those positions and may fairly be considered to be a statement of the factors that were used across (continued on next page)

with a performance rating of ‘meets requirements’ will be considered and will be interviewed if they meet the minimum qualifications of the job listed.” Opposition at 17. Contrary to the assertion in her brief that follows this quoted language, the plaintiff was in fact “permitted to interview” for the Nashville position. Therefore, even if the plaintiff has stated the “policy” correctly, an assertion which the defendant denies,<sup>6</sup> she gains nothing in the pretext analysis from this assertion. Further, the plaintiff has not offered evidence that would support an inference that Magrath had no “SMS specific experience.” In any event, neither of the citations to her statement of material facts given by the plaintiff in support of her assertion that the defendant’s “own criteria indicated a strong desire for SMS specific experience” actually supports that assertion. Opposition at 17 (citing paragraphs 82 and 96 of the Plaintiff’s SMF).

With respect to the assertion that another female employee of OSD, who apparently had never held an SM III position, Plaintiff’s SMF ¶¶ 41-42, 48, 54-55, 57, was told that “she could not be promoted based on experience gained outside the company, she needed experience from within to be considered for a Site Management positions [sic],” *id.* ¶ 102,<sup>7</sup> the undisputed fact is, again, that the plaintiff was considered for the Nashville position. This assertion is accordingly not probative of pretext with respect to the decision to award the Nashville position to Magrath.

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OSD in filling those positions. The plaintiff has offered no evidence, beyond that discussed above, that could reasonably be construed to the contrary.

<sup>6</sup> The plaintiff supports this assertion with a reference to paragraph 27 of her affidavit. Plaintiff’s SMF ¶ 97. The defendant responds that this document “is not a policy manual or an employee handbook. It was a training manual used in 1995 to train managers about how to effectively attract and maintain good employees. That training and the document had nothing to do with manager level positions at SMS.” Defendant’s Responsive SMF ¶ 97. The section of the document quoted at paragraph 27 of the plaintiff’s affidavit is consistent with the defendant’s representation. Affidavit of Edith Hunter (“Plaintiff’s Aff.”) (Exh. H to Plaintiff’s SMF) ¶ 27. It appears to deal with the hiring of employees below the level of managers rather than managers like SM IIIs. The document itself is clearly a training document rather than a policy statement. “Foundation for New Managers,” Exh. B to Declaration of Debra Warshawsky Kestenbaum (Exh. 5 to Defendant’s Reply to Plaintiff’s Response to Defendant’s Statement of Material Facts (“Reply”) (Docket No. 16)).

<sup>7</sup> This assertion is denied by the defendant. Defendant’s Responsive SMF ¶ 102 and Second Declaration of Steven Zeeleau (Exh. 1 to Reply) ¶ 4. The defendant also objects to this paragraph on the grounds that it is irrelevant and immaterial and hearsay. The relevant assertion in the paragraph is neither irrelevant nor immaterial. It is not hearsay to the extent that it is offered as an admission by the defendant.

The assertion that McGrath was coached before his interview for the Nashville position, Opposition at 19, is not supported by the citations to the summary judgment record given by the plaintiff. The cited paragraphs of the plaintiff's statement of material facts assert only that McGrath had reviewed the contract and "the scope of the agreement" before the interview and "was working on site helping out." Plaintiff's SMF ¶ 62. The defendant responds to this paragraph with an assertion that the first assertions are immaterial and irrelevant. Defendant's Responsive SMF ¶ 62. They are neither. The defendant correctly contends that the second assertion (McGrath was already "helping out" in Nashville) is not supported by the citation given to the summary judgment record. The plaintiff cites her own deposition testimony on this point, which was that she did not know whether McGrath was doing so. Deposition of Edith Hunter (Exh. E to Opposition) at 82.

As evidence of pretext offered by the plaintiff the court is left with the assertions that little or no value was placed on the plaintiff's OSD experience, the plaintiff had extensive experience before coming to OSD and McGrath had reviewed the contract for the Nashville site before being interviewed. This evidence simply cannot outweigh the superiority of McGrath's relevant experience.

According to the defendant — an assertion not effectively disputed by the plaintiff — this was the most important factor to be considered in filling SM III positions. Even if the defendant's view of McGrath's qualifications as superior were shown to be incorrect — a circumstance not present here — "the question is not whether the [employer's assessment was] *right* but whether the employer's description of its reasons is *honest*." *Brill v. Lante Corp.*, 119 F.3d 1266, 1273 (7th Cir. 1997) (citation and internal punctuation omitted) (emphasis in original). The plaintiff has not offered evidence sufficient to allow a reasonable factfinder to conclude that the defendant's proffered reason for the decision to place McGrath in the Nashville position is unworthy of credence. *See generally Gu v. Boston Police Dep't*, 312 F.3d 6, 13 (1st Cir. 2002) ("Our role is not to second-guess the business

decisions of an employer, imposing our subjective judgments of which person would best fulfill the responsibilities of a certain job.” (Citation omitted.)

The defendant is entitled to summary judgment on Count II.

### **B. Retaliation**

Count III of the complaint alleges that the defendant unlawfully retaliated against the plaintiff after she filed a complaint of gender discrimination in November 1999. Complaint ¶¶ 41-47. The defendant contends that the plaintiff cannot establish the factual basis for this claim. Motion at 14-17.

To establish a prima facie case of retaliation, a plaintiff must prove that (1) she engaged in protected conduct under Title VII; (2) she suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity.

*White v. New Hampshire Dep’t of Corrections*, 221 F.3d 254, 262 (1st Cir. 2000) (citation and internal punctuation omitted). To be adverse, an action must materially change the conditions of a plaintiff’s employment. *Gu*, 312 F.3d at 14. “Adverse employment actions include demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.” *White*, 221 F.3d at 262 (citation and internal quotation marks omitted).

It is unclear from the complaint and from the plaintiff’s memorandum of law what actions of the defendant the plaintiff contends were adverse employment actions. Construing the plaintiff’s memorandum in the light most favorable to her, she apparently argues that the following were adverse employment actions: an inadequate investigation of her complaint, a lack of job placement assistance during the 45-day period following the termination of the Catholic Health contract and Reilly’s categorization of the plaintiff as ineligible for rehire. Opposition at 20-23. The first item on this list cannot be an adverse employment action for purposes of a retaliation claim; the plaintiff has made no showing that the allegedly inadequate investigation of her complaint resulted in any material change in

the conditions of her employment. The same is true of the second item, although for a different reason. The plaintiff has admitted that the defendant's policy at the relevant time was that, when an employee's position was eliminated, her salary and title would be maintained for a brief period of time if there was another position in which she could help temporarily, after which the employee would have to take a salary cut and title change in order to stay in that position, Defendant's SMF ¶ 60, Plaintiff's Responsive SMF ¶ 60; that her position at Catholic Health was eliminated, *id.* ¶¶ 110-12; that the defendant's policy at the relevant time was also that, if a job was eliminated or an employee left a site for any reason, that employee had 45 days to find another job at SMS before being laid off, *id.* ¶ 75; that the plaintiff was looking for SM III positions at the time and would not accept a lower-level position, *id.* ¶¶ 116, 193; and that only two SM III positions, Nashville and MacNeal, were available during the relevant time, *id.* ¶¶ 126-27, 217. She was made award of both of these positions by the defendant. *Id.* ¶¶ 127, 217. Accordingly, the alleged failure of the defendant to provide the plaintiff with more job placement assistance during the 45-day period could not have constituted an adverse employment action.

The plaintiff cites no authority for the necessary proposition underlying the third element of her retaliation claim: that a decision not to rehire her after layoff is an adverse employment action. Certainly such an action could not have "materially change[d] the conditions of [her] employment." However, the defendant addresses this claim as if an adverse employment action were at issue, contending only that there is no evidence of the necessary causal link between Reilly's checking of the "not eligible for rehire" box and the plaintiff's discrimination complaint. Motion at 15. The plaintiff admits that Reilly checked the box, *id.* ¶ 251, and that Reilly consulted only with Nofer regarding that decision, Defendant's SMF ¶ 256; Plaintiff's Responsive SMF ¶ 256. She admits that Reilly testified that she did not know when she checked the box that the plaintiff had made a complaint of

discrimination, Defendant's SMF ¶ 261; Plaintiff's Responsive SMF ¶ 261, but contends that this testimony "strains credibility," because Reilly "worked directly with" Warshawsky, to whom the plaintiff had made the complaint, Opposition at 22. While it is true that a plaintiff may establish the elements of a Title VII retaliation claim by circumstantial evidence as well as by direct evidence, *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003), the mere fact that Warshawsky and Reilly worked together is not enough to allow an inference that Reilly, the undisputed decisionmaker in this instance, knew about the plaintiff's discrimination complaint when she checked the box. The plaintiff offers no evidence that Nofer knew about the discrimination complaint, only her unsupported opinion that "[i]t is highly likely that in-house counsel was aware of Plaintiff's claims." Opposition at 22. This speculation is insufficient to meet the plaintiff's burden in connection with a motion for summary judgment. Similarly, the plaintiff offers no evidence that Reilly was routinely informed about or aware of such complaints when they were made or that Warshawsky discussed such complaints with Reilly. Instead, she states that Leslie Smurthwaite, whom Warshawsky directed to investigate the plaintiff's complaint, "indicated her intent to include" Reilly in her investigation as a training experience. *Id.*; Plaintiff's SMF ¶ 109. However, that SMF paragraph goes on to say that the plaintiff "indicated that she did not want anyone from OSD involved in the investigation," and the paragraph of the plaintiff's affidavit cited in support of this paragraph states that in response to Smurthwaite's alleged statement "Edith declined." Plaintiff's SMF ¶ 109; Plaintiff's Aff. ¶ 28. Thus, the plaintiff has failed to produce circumstantial evidence from which a reasonable factfinder could infer that Reilly was in fact aware of the plaintiff's complaint when she checked the box at issue. Accordingly, there is insufficient evidence of the third element of a retaliation claim, and the defendant is entitled to summary judgment on Count III.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED.**

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 14th day of May, 2003.

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David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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V.

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