VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 05-13
ELLEN HARRIS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 18, 2005, Ellen Harris ("Appellant") filed an appeal through Attorney Scott Cameron, contending that Appellant was dismissed during her probationary period by the Vermont Department of Education ("Employer") in violation of 3 V.S.A. Section 1001(a). Appellant alleged that she was subjected to, and terminated as a result of, discriminatory terms and conditions of employment based on her gender. She also alleged that she was terminated in retaliation for confronting the Employer about the disparate and discriminatory treatment of her based on gender.

The Labor Relations Board conducted hearings on October 27 and 28, 2005, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Carroll Comstock and John Zampieri. Attorney Scott Cameron represented Appellant. Assistant Attorney General Joseph Winn represented the Employer. At the hearing, the Employer filed a motion to dismiss the appeal. The Board reserved judgment on the motion.

The parties filed post-hearing briefs pursuant to a briefing schedule established at the conclusion of the hearings. Appellant filed Proposed Findings of Fact, Conclusions of Law and Memorandum of Law on November 14, 2005. The Employer filed Proposed Findings of Fact on November 14, 2005, and a Memorandum of Law on December 2, 2005. Appellant filed a Reply Memorandum on December 27, 2005. By order issued

January 31, 2006, the Labor Relations Board provided the Employer with an opportunity to file a response concerning the applicability of a United States Supreme Court decision relied on for the first time by Appellant in her December 27 reply memorandum. The Employer filed such a response on February 10, 2006.

FINDINGS OF FACT

1. Number 5.3 of State Personnel Policies and Procedures addresses probationary periods. It provides in pertinent part as follows:

> **PURPOSE AND POLICY STATEMENT**
>
> It is the purpose of this policy to establish probationary periods for all employees entering the classified service . . .
>
> The probationary period is designed to give the employee time to learn the duties of the position and to give the supervisor time to evaluate the employee's potential and performance. It is a working test period during which an employee is expected to demonstrate his or her capacity for the position by adequate performance of its duties.
>
> Probationary employees may: have their probationary status extended; be disciplined; be laid off; or be dismissed by the State solely at the discretion of management, without regard to the provisions of the current Agreements between the State of Vermont and the Vermont State Employees' Association, Inc. (VSEA), and with no right to the grievance process.
>
> **DEFINITIONS**
>
> **ORIGINAL PROBATIONARY PERIOD** – that working test period, normally six months from the effective date of appointment plus any extensions, served by all employees entering the State classified service by any means other than restoration and reemployment, in which the employee is expected to demonstrate satisfactory performance of job duties.
>
> . . .
>
> **ORIGINAL PROBATION**
>
> . . .
>
> 2. PERFORMANCE EVALUATION: It is expected that the supervisor will conduct informal evaluations with the employee during the course of the probationary period to assess performance and to advise the employee of expectations regarding performance (and employment issues such as

attendance, etc.). Significant job deficiencies should be discussed with the employee and documented in the employee's personnel file.

3. COMPLETION OF PROBATION: A performance evaluation of at least satisfactory is required for completion of original probation, and appointment to the position. . . The State reserves the right to terminate the probationary employee's service on the basis of unsatisfactory performance, or on the basis of other reasons deemed sufficient by the State, at any time during the first six (6) months. . .

(State's Exhibit 1)

2. Appellant received a Bachelor of Science degree from the University of New Hampshire in 1978. She subsequently earned a Master of Education degree in 1997 in Leadership and Curriculum Development from Plymouth State College. She also was awarded a Certificate of Advanced Graduate Studies in Educational Leadership from Plymouth State College in 2002 (Appellant's Exhibit 5).

3. Appellant was a full-time Instructor and coach in the Health, Physical Education and Recreation Department at Plymouth State College from September 1979 to May 2002. After moving to Vermont in 2002, she was Assessment Specialist in Health and Physical Education at Vermont Institutes in Montpelier from September 2002 to June 2004. She worked extensively with physical education teachers and the State Department of Education in that position. She left that position when the grant funding for it expired. Appellant is married to Raymond McNulty, the Commissioner of Education immediately preceding Richard Cate, the current Commissioner (Appellant's Exhibit 5).

4. In August 2004, Appellant applied for a full-time Education Consultant II position, Pay Grade 23, in the Safe and Healthy Schools Division of the Vermont Department of Education. This was a new position recently approved by the Vermont General Assembly pursuant to an act relating to nutrition policy in Vermont schools. The position involves working with schools to design, implement and promote physical

education programs which are standards-based and support lifetime physical fitness. The Consultant oversees the establishment of a model physical education curriculum and the preparation of an annual report to parents describing children's performance on fitness and wellness indicators. The Consultant provides professional development and technical assistance to physical educators throughout the state, and collaborates with the Vermont Institutes of Higher Education on teacher preparation courses (Appellant's Exhibits 3, 4).

5. At all times relevant, Douglas Dows was Director of the Safe and Healthy Schools Division. Shavonne Travers was the Assistant Division Director. Travers reported directly to Dows and supervised the Educational Consultant II.

6. Appellant interviewed for the Educational Consultant II position on September 20. During the interview, Appellant informed Dows and Travers that she had an ongoing consulting commitment in Hawaii that would require her attention if she received the job. In addition to Appellant, there was another qualified applicant for the position. Travers had concerns about hiring Appellant over the other applicant. Travers knew that Appellant frequently traveled out-of-state to attend professional conferences and she was concerned that such travel would become an issue if Appellant was hired. She expressed these concerns to Dows. Dows favored hiring Appellant over the other applicant, and Travers concurred with offering Appellant the position.

7. On September 24, Travers telephoned Appellant and offered her the Educational Consultant II position. Appellant requested that she be hired into range in the position, meaning that she would be paid higher than the pay rate for the first step of Pay Grade 23. Specifically, she requested that she receive the pay at Step 14 of Pay Grade 23, which was $27.85 per hour. On October 6, 2004, Richard Cate, Commissioner of the

Department of Education, submitted a request to the State Department of Human Resources that Appellant receive the pay at Step 5 of Pay Grade 23, which was $21.24 per hour (Appellant's Exhibit 10; State's Exhibits 4, 5).

8. On October 26, 2004, prior to the Department of Human Resources making a decision on the Employer's pay request, Appellant informed Dows and Travers of the details of the ongoing consulting commitment that she had in Hawaii that she had mentioned during her September 20 job interview. Dows had asked Appellant a few days before October 26 to let him and Travers know the details of the commitment. Appellant told Dows and Travers that this commitment would mean that she would have to go to Hawaii for one week in December 2004, and then two to three more weeks from January – June 2005. She said she would have no problem going off payroll during this time, or using vacation time or personal leave.

9. On October 27, Travers informed Appellant through an e-mail message that she and Dows would need to meet with Appellant on issues of travel, hours and expectations once the Department of Human Resources acted on the pay request. Appellant responded by stating: "Just let me know when you want to meet . . . I need to discuss with both of you what Boards I can be on, and positions I can or can not(sic) hold. At this time I have not told anyone that I can not(sic) serve on their Boards till I talk with you or Doug". The meeting referred to in these e-mail exchanges did not occur (Appellant's Exhibits 11, 12; State's Exhibit 6).

10. In mid-November 2004, the Department of Human Resources denied the Employer's request that Appellant be hired into range. Instead, the Department determined that Appellant's starting salary would be at Step 1 of Pay Grade 23, which

was $18.33 per hour. Dows informed Appellant of this decision on November 18. In an e-mail message to Dows and Travers later that day, Appellant informed them that she "was in shock and extremely upset, the salary that you are now offering me is very different than what we had discussed in Oct." Nonetheless, Appellant informed them that she was accepting the job (Appellant's Exhibits 10, 14; State's Exhibit 9).

11. Appellant met with Betty Fredericks of the Employer's human resources section on November 19. Fredericks provided Appellant with orientation materials discussing employee benefits and Employer policies. Appellant began employment on November 22 as a probationary employee (Appellant's Exhibits 14B, 15; State's Exhibit 10).

12. On January 19, 2005, Appellant filled out a request for out-of state travel to attend a conference in Springfield, Massachusetts, of the Eastern District Association of the American Alliance for Health, Physical Education, Recreation and Dance ("AAHPERD") from February 8 – 12, 2005. Appellant was a member of the Executive Board of the Eastern District Association. Travers approved the request on February 1 (State's Exhibit 11).

13. During the period between November 22, 2004, and April 18, 2005, Appellant made three trips to Hawaii in connection with her consulting commitment. She missed a total of six workdays as a result of the trips. She went off payroll for each of the trips .

14. Sometime in February, Travers asked Appellant about her next scheduled trip to Hawaii. Appellant first informed Travers that she would not be going to Hawaii because she was too busy. Subsequently, Appellant told Travers that she had changed her

mind and would be going to Hawaii. Appellant informed Travers of her change in plans three days to a week before she left for Hawaii. Prior to this, neither Dows nor Travers had established a protocol for Appellant notifying them in advance of her trips to Hawaii (Appellant's Exhibit 37, State's Exhibit 17).

15. In late February or early March, Travers and Appellant discussed Appellant's attendance at two conferences, one of the AAHPERD to be held in Chicago from April 12 – 16, and the other of the Association for Supervision and Curriculum Development ("ASCD") to be held in Orlando, Florida from April 2 - 4. Appellant was a member of both organizations. Travers thought that the AAHPERED conference was more applicable to Appellant's position and believed that was the better conference for Appellant to attend. Appellant indicated that she would rather attend the ASCD conference than the AAHPERD conference. Travers approved of Appellant attending the ASCD conference. She would not have approved of Appellant attending the ASCD conference if Appellant also wished to attend the AAHPERD conference.

16. On March 18, Appellant sent an e-mail message to Travers which provided in pertinent part:

> . . . I also want to begin committee work on putting together the curriculum manual . . . In order to be fully on top of what is going on in the field (nationally) curriculum wise I reassessed attending the AAPHERD conference in April. At this time I have made some very good contacts nationally and I would like to maintain those contacts and continue to expand my knowledge of innovative curriculums. I took another look at the program and in fact there are numerous sessions that would be very helpful in working with the schools here and putting together the manual. (prior to I had only looked at assessment sessions of which there are just a few) I also realized that the educators in the field are looking at me to attend in order to not only represent Vermont nationally but to also bring back the newest and latest ideas. I believe that if I did not attend my validity in the field would be greatly diminished. There is also a meeting that NASPE is having for all people who are involved in the piloting of their assessments…Bev Nicholas and I

were in charge of VT for NASPE last year and I would like to see where that project is progressing.

Thus I quickly looked up the program, found which sessions I would like to attend, all of which are mostly on Thurs. and Friday. I then was able to find a very cheap flight to Chicago ($234.00). Registration was $275.00 for the conference. I decided to go for it as I really feel I need if professionally and also the educators in the field are really expecting me to attend as I stated earlier. I am staying with my daughter who lives in Chicago. So at this time I have paid for this myself. If the DOE wants to cover those two charges fine…if not I will pay for them and that is fine with me. I don't eat much so I'm not even throwing food into the mix!! The conference goes from Wed. – Sat. but Thurs. and Fri are the only two days with sessions that are valuable. My flight goes out late on Wed. and I come back on Friday evening.

Since I have made this decision without consulting you, I did it late one evening this week as I didn't want to lose the flight, it is your decision as to if I do this on my own time or not . . . I will respect whatever you decide. . .
(Appellant's Exhibit 31, State's Exhibit 13)

17. On Sunday, March 20, at 7:37 p.m., Travers sent an e-mail message to Appellant in response to her March 18 e-mail message. The message from Travers provided:

> Once again that got away from me. Anyway, to continue, I only OKed the other trip because you told me you had decided not to request going to AAPHERD. Now, you have changed your mind and decided on your own to travel to a conference without seeking approval from me. I need to talk both to Doug and the Personnel department about this because to date, no other staff members under my supervision have taken it upon themselves to go to a conference without going through all of the proper DOE channels.
> (Appellant's Exhibit 34, State's Exhibit 13)

18. On March 20, at 7:52 p.m., Travers sent an e-mail message to Dows and John Turner, Human Resources Administrator for the Employer, which provided:

> I am requesting your assistance with this issue. Can we talk about this on Monday? Ellen apparently made her own decision to go to a conference without approval for either funds or time off. How should I best handle this – I do not want this to become a pattern. Ellen has already traveled three times to Hawaii since she began in late November. Though she had notified the DOE before she started about some of this trips(sic), I had no knowledge of her plans to travel most recently until she let me know about 48 hours before she was leaving. Two weeks ago she asked permission to attend the annual ASCD conference, which I initially turned down because there were not many sessions that pertained to her

> present work and because she told me she wanted to go to the AAPHERD conference as well. Then after I did not approve the ASCD trip, she told me she would not request the trip to AAPHERD. Given that information, I changed my mind and approved the ASCD trip which will not cost the DOE any money, except for Ellen's time. According to the following e-mail Ellen has now changed her mind again and without any consultation with me, signed up for the AAPHERD conference, booked a flight, will be taking more time away from her work in Vermont and is asking for some reimbursement. I would appreciate guidance on how best to handle this.
> (Appellant's Exhibit 33, State's Exhibit 13)

19. On March 20, at 9:00 p.m., in response to Travers's 7:37 p.m. e-mail message to Appellant, Appellant sent Travers an e-mail message which provided in pertinent part:

> As I told you in the first email, I am more than happy to pay for everything myself and take the days off from work. When I first looked at the conference I was looking at the assessment sessions and not the curriculum sessions. Since I will be spending the next couple of months working on the curriculum I thought it would be extremely beneficial to be up to date on the curriculum developments across the country. . .
>
> The pressure from the field was becoming very strong for me to attend, I do know I should have asked you before booking everything, but the flight I found was very cheap and would not have lasted another 24 hours… and you were not going to be in the office on Friday (the next day) to discuss it. If you still feel so strongly that I should not attend, I just got an email that they have not processed my registration because they have not yet received my renewed membership payment…I can call them back up and back out of it…I will absorb the cost the(sic) flight.
>
> As for the ASCD engagement… that is not costing the DOE anything, and the benefits are tremendous. This is all work related and will only compliment(sic) and assist the work I am doing for the DOE.
>
> I would be happy to discuss this all with you and Doug on Tues. . .
> (Appellant's Exhibit 34, State's Exhibit 14)

20. On March 20, at 9:29 p.m., Appellant sent another e-mail message to Travers which provided:

> Shevonne, I'm sorry for not asking your permission first. I made my decision purely on the basis of pressure from the field and finding a low cost

> flight…neither of which should have driven my decision, and for that I am sorry. You are my supervisor and I respect that. I will email AAPHERD and withdraw my registration since it has not been processed yet. . .
> (Appellant's Exhibit 35, State's Exhibit 15)

21. A personnel officer for the Employer conducted an employee orientation session on the morning of Monday, March 21. Appellant attended the meeting. Following the meeting, Appellant sent Travers an e-mail message at 11:31 a.m. on March 21 which provided:

> I have tried calling you all morning to chat..maybe we will connect after I am done in Burlington this afternoon. I just came from a mandatory meeting with Kathy F. over forms and process…I must say I now have a much better picture of the long time line and the 'process' involved in nearly every move…something I was not fully aware of the numerous details and length of time of processing…it was a very good and informative meeting.
> . . .
> (Appellant's Exhibits 32, 36; State's Exhibit 16)

22. On March 21, Travers and Dows discussed Appellant's attendance at the AAHPERD and ASCD conferences. Dows decided to allow Appellant to attend the AAHPERD conference on payroll and to attend the ASCD conference off payroll, and to not reimburse Appellant for travel expenses for either conference. At 3:49 p.m. on March 21, Travers sent Appellant an e-mail message which provided:

> OK, so here is the scoop. Please from now on, provide me with two weeks notice when you are planning on traveling to Hawaii and taking time off. That is the first issue we need to resolve. I feel as though I was in the dark about your most recent absence because when I asked you in February about the next time you were traveling you indicated you did not have time. Then a few days before you went to Hawaii you told me you had changed your mind and would be gone on Monday and Tuesday.
>
> Secondly, please follow DOE procedures when you are interested in attending a conference. While you did this for the ACSD conference you chose not to for the AAPHERD conference. That totally surprised me.
>
> As for paid time, first of all, I changed your time sheet and gave you eight hours of sick time for your travel to see the baby and mom. You do get sick time.

> Secondly, consider yourself on payroll for the time at AAPHERD and off payroll for ACSD.
>
> As for reimbursable travel expenses, DOE is not going to reimburse you for travel to AAPHERD this year. I have no idea whether funds were available nor do I know whether this would have made it through the approval process. . .
> (Appellant's Exhibit 37, State's Exhibit 17)

23. In response to this e-mail message, Appellant sent an e-mail message to Travers on March 21, at 5:08 p.m., which provided in pertinent part:

> Sounds very fair to me, thank you. I would like to sit down with you and go over future dates, so I can make sure I have everything in line and in place and we are on the same page. . .
>
> There was no intention to keep you in the dark, I had not expected to go to Hawaii in March, nor had planned it myself, but I was pressured to go. As for ACSD and AAPHERD, your plan sounds just fine to me. In the future since I now know the very lengthy process I will definitely follow the DOE requirements.
> . . .
> (Appellant's Exhibit 38, State's Exhibit 17)

24. Appellant attended both the ASCD and AAHPERD conferences in April. She missed a total of four work days as a result of attending the conferences.

25. On Friday, March 25, Appellant sent an e-mail message to Travers requesting permission to take a week of unpaid leave from April 18 – 22 to spend time with her sons during their spring break (Appellant's Exhibit 39, State's Exhibit 18).

26. On Monday, March 28, at 3:34 p.m., Travers attached a copy of the March 25 e-mail message from Appellant to an e-mail message she sent to Turner which provided in pertinent part:

> Is there any direction regarding employees who want to take frequent vacations without pay? . . . I do not like it that we do not have a clear policy as it means some people who do not need the dollars regularly can do this. Ellen is still on probation. I did let her know that I expected two weeks notice before any trips to Hawaii and that we were not going to finance her trip to Chicago. However, Doug decided we should still cover her time in Chicago because it is in our best interest given the subject material. My initial reaction to this request is no given all the

time Ellen has already been out. Perhaps we should make this a part-time position.
. . .
(Appellant's Exhibit 39, State's Exhibit 18)

27. Later that day, at 10:37 p.m., Travers sent an e-mail message to Appellant which provided:

> In response to your earlier request for more unpaid time off, I am not giving my approval to this request. I think we have sent you the wrong message by continuing to approve such time before you have earned it. It is not common practice for state employees to be granted unpaid time off on a consistent basis. My understanding was that in order to accept the DOE position, you wanted to take some unpaid leave time to finish the work you had begun in Hawaii last year. This was the only unpaid time you asked for in the request you forwarded. Since that request last October, you have now asked for unpaid time to travel to ASCD and most recently time for travel with family members during spring vacation. Regardless of your ability to work on-line, I believe you may have incorrectly assumed that your present practice of requesting unpaid time and receiving approval is something that I support. Such is not so. I expect the employees I supervise to follow current state employee practices. This includes taking vacation time after you have earned it and completed the probationary period successfully. I look forward to talking with you more about these issues this week.
> (Appellant's Exhibit 40, State's Exhibit 19)

28. On Monday, March 28, Appellant sent an e-mail message to Dows and Travers asking to meet with them sometime that week. The meeting occurred on March 29. Appellant began the meeting by asking Dows about his expectations of her. Dows asked Appellant what she meant by this question and where she was going with it. Appellant stated that in her role as physical education consultant she needed to have current knowledge and skills to work with physical education teachers. Appellant indicated that she was going to continue to have multiple opportunities for development due to her involvement with various associations, and that this would benefit Vermont. Dows indicated to Appellant that employees of the Employer were lucky to have one opportunity a year to participate in a professional development conference outside

Vermont. Appellant indicated that she did not understand why the Employer would object to an employee taking advantage of professional development activities if the Employer did not have to pay the employee while attending a conference or reimburse the employee's expenses. Appellant proposed having her position changed from full-time to 80% time so she would have more freedom to travel and stay involved with the associations. Dows told Appellant that he and Travers would consider her request (Appellant's Exhibit 55; State's Exhibit 25).

29. During the March 29 meeting, Dows also mentioned to Appellant that she was new in her position and needed to be in the office more frequently. Appellant mentioned two male employees of the Division whom she had infrequently seen in the office during her tenure. Appellant indicate that this was a "double standard" and was not fair. She indicated that she should not be held to a different standard. Dows indicated that the situations were different. At this point in the meeting, Appellant and Dows were both agitated. The meeting ended shortly after this exchange (Appellant's Exhibits 41, 55; State's Exhibit 25).

30. Immediately following the meeting, Dows and Travers discussed Appellant's request to change her position from full-time to 80% time. They agreed that it was the intent of the Legislature to fund a full-time position. They agreed to reject her request for an 80% time position. Dows then stated that he and Travers needed to talk more about whether to retain Appellant before her probationary period ended (Appellant's Exhibit 55, State's Exhibit 25).

31. On March 30, Travers sent Betty Frederick an e-mail message which provided:

> Ellen asked Doug and me yesterday about moving her position from 100% to 80% so she could have the flexibility she desires to receive to travel and partake of multiple professional development events. Doug and I have decided that is not an option because the legislature funded a full time position. I will let her know our decision when I see her next. Of interest to me as well is the date when her probation is up. I am assuming it is sometime in mid-May but I am wondering if it has been pushed back until a later time because of her unpaid absences. Could you provide me that date, please? I am seriously contemplating not continuing her employment given the issues that continue to arise and want to make sure I have adequate time to notify her of such a decision.
> (Appellant's Exhibit 42, State's Exhibit 20)

32. In response to this e-mail message, Frederick sent Travers an e-mail message on March 31, which provided:

> Her date of hire was 11/22/04 – so this means that her six month date will be: May 22, 2005 regardless of whether she has been off payroll or not. We can be safe with this date. If you are going to cut her loose you should give her a written letter soon.
> (Appellant's Exhibit 42, State's Exhibit 20)

33. On or about March 30, Travers met with Appellant. In referring to the March 29 meeting, Travers stated that Appellant had "pushed (Dows') buttons" at the meeting. Travers indicated that she had lost her job previously when she crossed her boss. Travers told Appellant that she and Dows would not approve of Appellant's position being reduced to 80% time. Appellant asked Travers what options she would have for future professional development activities. Travers told Appellant that she first needed to get past her probationary period and then she could use annual or personal leave as she earned it. Travers also told Appellant that there was some flexibility in the Division with reported time within a two-week period; that if employees worked more than eight hours on days due to commitments outside regular working hours then they could work less than eight hours on other days to balance their schedule so they did not work more than

the normal number of hours during the two-week period (Appellant's Exhibit 55, State's Exhibit 25).

34. On April 13, Commissioner Cate, Deputy Commissioner Elaine Pinckney and Turner met with Dows. Commissioner Cate told Dows that he had heard through Turner of concerns that Dows and Travers had with Appellant. Dows indicated that he and Travers had concerns with Appellant's desire to travel to professional conferences and her requests for unpaid leave during her original probationary period. During these discussions, Dows did not mention that Appellant had claimed that she was being subjected to a double standard. The Commissioner mentioned to Dows that a concern about Appellant had been raised by someone outside the Safe and Healthy Schools Division. The Commissioner also mentioned concerns that he had expressed before Appellant was hired about whether Appellant would have difficulty fitting into the more restrictive environment of state government given her extensive experience. By the end of this meeting, it appeared that Appellant may be dismissed.

35. On April 14, Commissioner Cate, Deputy Commissioner Elaine Pinckney, Dows and Travers met to discuss Appellant. At the outset of the meeting, Commissioner Cate said something to the effect of "I am not going to say I told you so". By this comment, he was referring to the concerns he had expressed before Appellant was hired about whether Appellant would have difficulty fitting into the more restrictive environment of state government given her extensive experience. During the meeting, Cate did not mention that someone outside of the Healthy and Safe Schools team had expressed concerns about Appellant to him. Dows and Travers expressed concerns that they had with Appellant. Although Travers stated at the meeting that Appellant was a

high caliber employee who did good work, Travers indicated her displeasure at the time off without pay requests that Appellant continued to make and the number of out-of-state trips she had in a short time. There was no discussion during the meeting of Appellant's claim made during the March 29 meeting with Dows and Travers that she was being subjected to a double standard. The consensus reached at the meeting was that Appellant's employment was not a good match and that Appellant should be dismissed the following Monday, April 18 (Appellant's Exhibit 55, State's Exhibit 25).

36. On the afternoon of Monday, April 18, Dows and Travers informed Appellant that her employment was terminated. Dows and Travers informed Appellant that the work she produced was fine, but that they had concerns regarding her travel, professional development activities and the time she requested off payroll. They indicated to Appellant that she and the Employer were a "mismatch". Dows also indicated that someone outside of the Healthy and Safe Schools team had expressed concerns about Appellant to Commissioner Cate, and that the Commissioner had concerns about her. Dows offered Appellant an opportunity to resign. April 18 was Appellant's last day of work, and she was granted pay in lieu of working for the period April 19 through April 29 (Appellant's Exhibits 45, 46, 55; State's Exhibits 21, 22, 23, 25).

37. On April 20, Appellant sent an e-mail message to Travers which provided in pertinent part:

> . . . I have . . found out that Doug is now bad mouthing my quality of work to others at the department…I find this appauling(sic) but it does not surprise me…a lawsuit against him would prove to be very interesting…I will not have my name slandered nor the work I did for you while I worked at the DOE!!!!
> For whatever it's worth on a personal level with us…I really enjoyed working with you and the team . . . I must say I still feel like I have been kicked in the gut without any explaination(sic) which is a horrible feeling . . .
> (Appellant's Exhibit 44)

38. In response to this e-mail message, Travers sent an e-mail message to Appellant on April 20, which provided in pertinent part:

> . . . I have my own thoughts now about what happened though I will never have confirmation. I think in your efforts to move things forward you encountered a hornet's nest. I miss you and I will continue to miss the opportunity to work together on the multiple projects you were pursuing.
> (Appellant's Exhibit 44)

39. Appellant and her husband met with Commissioner Cate on April 25 to discuss her termination of employment. Appellant questioned why she had been terminated. Commissioner Cate indicated that she was dismissed based on concerns expressed by Dows and Travers. Appellant told the Commissioner that Dows had stated at the April 18 meeting that she was terminated because the Commissioner had heard a rumor about her, and she asked what rumor the Commissioner had heard about her. The Commissioner indicated that he had not heard a rumor about her, and that the decision to dismiss her was not based on a rumor. Towards the end of the meeting, Appellant told the Commissioner that she had been discriminated against by Dows compared to the treatment of two male employees. Cate responded that gender discrimination did not exist under him, and that he had placed more women in leadership roles than any prior Commissioner.

` 40. Travers sent Appellant a letter dated April 25, providing in pertinent part: "This letter is sent to advise you that you will be separated from employment as a Physical Education Consultant with the termination effective at the close of business on April 29, 2005, during your original probationary working test period" (Appellant's Exhibit 46, State's Exhibit 22).

41. On April 26, Appellant sent an e-mail message to Travers which provided:

As you write this letter of termination I want stated in that letter **EXACTLY** what was said to me during my meeting with you and Doug. Word for word!! as that was the reason that you and Doug gave me that day.

1. That my work had nothing to do with my being fired and my work was just fine
2. that Doug Dows told me that I was being terminated due to a rumor that Richard Cate heard
3. that both Shevonne and Doug thought it was a 'miss match'(sic)

(State's Exhibit 23)

42. On May 13, Dows faxed a letter to Appellant which provided:

A copy of e-mail you sent Shevonne requesting the reasons for your dismissal has been forwarded to me. This is a fair request and you deserve a written reply. I have also had an opportunity to review the e-mail sent by Ray as a follow-up to your meeting with the Commissioner.

Given the nature of the meeting you had with Shevonne and me, I can understand why there may be discrepancies between your recollection of the meeting and what you may have heard second hand from others. The purpose of this letter is to clarify the reasons for your dismissal.

It became apparent to Shevonne and me that your desire to travel and acquire professional development was incompatible with our ability to provide the same. We also concluded that your approach to meeting these needs was inconsistent with our approach to employee management. It was also our determination that these conditions would not change over time.

I also mentioned at the meeting that the Commissioner had concerns as well. We could not have taken any personnel action without the approval of the Commissioner. Once we were aware that he had concerns as well, it was apparent that he would support our decision to terminate your employment.

We also stated at the meeting that the work you had done on the wellness policy was not at issue.

I hope this letter brings closure to this situation and wish you well in your pursuit of future endeavors.

(State's Exhibit 24)

43. Assistant Attorney General Joseph Winn sent a letter dated May 16, 2005, to Scott Cameron, Appellant's attorney. The letter provided in pertinent part:

> I am representing the Department of Education . . . and have been asked to respond to your letter of May 10, 2005. In your letter, you requested that . . . (w)e provide to you specific reasons for Ms. Harris' termination from probationary employment . . .
>
> The primary reason for Ms. Harris' termination from probationary employment was her approach on travel matters evidencing a fundamental incompatibility between Ms. Harris and DOE which negatively affected DOE's ability to properly manage its employee. Ms. Harris was specifically informed she could only apply to attend one conference for professional development. The conference in question was her national association's event and was appropriate to her work duties. However, she informed her supervisor she had decided against attending the more relevant conference and wanted to attend another that was not especially relevant to her work assignment. While she was permitted to attend the less relevant conference, it was neither paid for by the Department nor considered Department work time.
>
> After having made her choice, Ms. Harris informed her supervisor she wanted to attend the other conference as well and had already purchased registration and tickets and wanted reimbursement for these expenditures. These incidents, along with an incident in which she informed her supervisor she was too busy to travel to Hawaii to satisfy a pre-existing commitment but turned around a few days later, notified her supervisor she had changed and left for Hawaii, led the Department to the conclusion that this employment relationship would not work out.
>
> Ms. Harris handling of the travel issues was, in DOE's view, part of a larger problem. As you are aware, the position for which Ms Harris was (sic) one newly created by the Legislature. In the beginning stages of this new position, it was important for DOE to be able to rely on Ms. Harris' consistent attendance at work. The manner in which Ms. Harris handled the travel issues along with other requests for time away from the office indicated to DOE there would be a continuing problem if Ms. Harris were hired permanently. . .
> (Appellant's Exhibit 51)

44. Neither Dows nor Travers informed human resources employees or supervisors of Dows of Appellant's claim made during the March 29 meeting with Dows and Travers that she was being subjected to a double standard

45. Other female employees have made complaints to superiors of Dows about his treatment of them. Dows' supervisor has counseled Dows about his conduct in those instances.

46. During Appellant's probationary period, two employees complained to Travers about the Employer approving Appellant's out-of-state trips.

OPINION

The Employer contends that the Labor Relations Board does not have subject matter jurisdiction over this appeal which is now limited to a claim that Appellant was dismissed during her probationary period in retaliation for her complaint that she was treated differently than male co-workers. Appellant alleges that her dismissal in retaliation for making a gender discrimination complaint violated the prohibition of gender discrimination contained in 3 V.S.A. Section 1001(a), which provides in pertinent part that "classified employees in their initial probationary period . . . may appeal to the state labor relations board if they believe themselves discriminated against on account of their . . . sex . . ."

The Employer contends that the Board does not have jurisdiction pursuant to this statute to hear an appeal from a probationary employee based solely on retaliation for making a claim of gender discrimination. Instead, the Employer maintains that the statute is clear that the basis for jurisdiction is limited to an allegation that Appellant was discriminated against based on her sex. The Employer asserts that, while Appellant may have a remedy elsewhere for her claim of retaliation, the Board's jurisdiction under Section 1001(a) does not extend so far. The Employer contends that, since Appellant is not claiming that her dismissal was due to her gender but resulted from retaliation for complaining of gender discrimination, the Board is without jurisdiction to hear this appeal and must dismiss it.

Appellant responds that, although the language of Section 1001(a) could be more clear, the phrase "discriminated against on account of . . . sex" must reasonably be interpreted to apply not only to the act of unlawful discrimination complained of in the first instance, but also to any subsequent discriminatory action taken against the employee for engaging in the protected activity. Appellant asserts that Section 1001(a), like other statutes which protect employees from discrimination in the workplace, is remedial in nature. As such, Appellant maintains that it should be interpreted broadly, and in light of its intended purpose, to effectuate the goals of the entire statutory scheme.

Appellant further contends that acceptance of the Employer's argument would deny a probationary employee a meaningful opportunity to have a claim of retaliation for complaining of unlawful discrimination heard and addressed by the Board. Appellant asserts that the Employer's position defies logic and common sense. She states that a dismissal or other discriminatory action taken by an employer in response to an employee's complaint of unlawful discrimination is a direct continuation and escalation of the discriminatory conduct complained of in the first instance. If a probationary employee lodges a complaint of discrimination based on sex or any other category protected by Section 1001(a), and is subsequently fired for doing so, Appellant contends that it follows that retaliatory action is also a form of discrimination which connects directly back to the protected classification. Appellant maintains that, if the Board finds that she was fired as a result of complaining of discrimination in her employment based on sex, then her dismissal was discrimination "on account of . . . sex" pursuant to Section 1001(a).

Appellant contends that the Employer's constricted interpretation of Section 1001(a) would yield a result that is offensive and contrary to public policy. She maintains that probationary employees forever would be chilled from complaining about discriminatory treatment for fear they would lose their job and have no recourse to the appeal process provided to them in Section 1001(a).

Appellant cites a recent decision of the United States Supreme Court, Jackson v. Birmingham Board of Education, 544 U.S. ___ (2005), as presenting "facts and issues which are nearly identical to those raised in this appeal." Jackson involved a complaint filed by a male coach of a high school girls basketball team alleging that the school board retaliated against him in violation of Title IX of the Education Amendment of 1972, 20 U.S.C. Section 1681 *et seq.*, because he complained about sex discrimination in the high school athletic program. The Supreme Court held that retaliation against a person because that person has complained of sex discrimination constitutes discrimination "on the basis of sex" under Title IX. 544 U.S. at ___ (slip op. at 4).

The Court rejected a conclusion that Title IX does not prohibit retaliation because it makes no mention of retaliation. The Court recognized that some statutes, such as Section 704 of Title VII of the Civil Rights Act of 1964, spell out in detail conduct which constitutes discrimination, while Title IX contains a "broadly written general prohibition on discrimination". The Court stated: "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." Id. (slip op. at 5-6).

The Supreme Court indicated that the objective of Title IX to provide citizens effective protection against discriminatory practices would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation. The Court stated: "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." Id. (slip op. at 11). The Court noted that "(w)e should not assume that Congress left such a gap in its scheme." Id. (slip op. at 12).

Appellant contends that, similar to the protections found in Title IX, the language of 3 V.S.A. Section 1001(a) is general and broad; that it presents a broadly written general prohibition against discrimination and does not attempt to define what constitutes discrimination. Appellant asserts that the Jackson decision constitutes persuasive authority for the proposition that "discrimination" as used in Section 1001(a) includes retaliation against an individual for reporting or making complaints of sex discrimination, and thus the Board has jurisdiction over this appeal.

We disagree with Appellant that the holding in the Jackson case constitutes persuasive authority for a conclusion that "discrimination" as defined in Section 1001(a) encompasses retaliation against an individual for reporting gender discrimination. The language of Title IX at issue in Jackson is fundamentally different from the language of 3 V.S.A. Section 1001(a). The language of Title IX interpreted by the Court prohibited discrimination "on the basis of sex". 20 U.S.C. Section 1681(a). The Court stated that discrimination should be construed "broadly" given this language. Id. (slip op. at 4–5).

The language of Section 1001(a) is not as broad. In providing that "classified employees in their initial probationary period . . . may appeal to the state labor relations board if they believe themselves discriminated against on account of their . . . sex . . .", Section 1001(a) adds the word "their" as a qualifier on prohibited discrimination. That this addition is not without effect is indicated by the Supreme Court in the Jackson case stating that it would have agreed with the employer in that case if Title IX provided instead that "no person shall be subject to discrimination on the basis of such individual's sex". Id. (slip op. at 10).

Here, we conclude that it would be a strained construction of Section 1001(a) to conclude that the Vermont General Assembly intended that discrimination claims on account of a probationary employee's sex pursuant to Section 1001(a) included alleged retaliation against that employee for reporting gender discrimination. An employer allegedly retaliating against a probationary employee for reporting gender discrimination is distinct from the employer allegedly discriminating against a probationary employee due to that employee's gender.

Further, the unraveling of a discrimination statute's enforcement scheme that concerned the Court in Jackson is not present in this case if Section 1001(a) is interpreted to not encompass alleged retaliation for reporting gender discrimination. This is because we conclude that the unfair labor practice provisions of the State Employees Labor Relations Act ("SELRA"), 3 V.S.A. Section 901 *et seq.*. protect probationary employees from being retaliated against for making gender discrimination complaints.

In Grievance of Peplowski, 6 VLRB 16, 26-28 (1983); Mailhiot v. Brandon Training School, 9 VLRB 67, 68 (1986); and VSEA and Carbone v. State of Vermont, 16

VLRB 282, 301-304 (1993); the Board recognized that probationary employees have some protection under SELRA's unfair labor practice provisions. These cases required examination of SELRA in its entirety as does the case before us. Section 902(4) and (5) of SELRA provide in pertinent part:

> 4) "Employee" means a state employee as defined by subdivision (5) of this section except as the context requires otherwise.
> 5) "State employee" means any individual employed on a permanent or limited status basis by the State of Vermont . . . and an individual whose work has ceased as a consequence of, of in connection with . . . any unfair labor practice . . ."

We conclude that in this case "the context requires otherwise", and probationary employees are protected by 3 V.S.A. Section 961(1) if they allege retaliation against them for making a gender discrimination complaint. Section 961(1) makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed by section 903 of this title, or by any other law, rule or regulation." The Board previously has held that Section 961(1) protects probationary employees when they engage in the protected conduct of union activities or other concerted activities, filing a workers' compensation claim, or filing a federal housing discrimination complaint. Carbone, supra. Mailhiot, supra.

Similarly, the prohibition in Section 961(1) of an employer interfering with, restraining or coercing employees in the exercise of their rights guaranteed by law protects probationary employees when they allege retaliation against them for making a gender discrimination complaint. Otherwise, the right of probationary employees to be protected against gender discrimination pursuant to 3 V.S.A. Section 1001(a) would be frustrated if they could not make a gender discrimination complaint without fear of reprisal. Peplowski, 6 VLRB at 27. Carbone, 16 VLRB at 302-03.

Appellant takes the position that unfair labor practice provisions do not apply in this case. Appellant cites 3 V.S.A. Section 965(f) for the proposition that the Board is not empowered to reinstate or to make an award of back pay to an employee like her who has been discharged unless the employee follows the grievance procedure, in this case 3 V.S.A. Section 1001(a). We disagree that Section 965(f) applies here.

Section 965(f), contained in the unfair labor practice provisions of SELRA, provides that "(n)o order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, if such individual was suspended or discharged for cause, except through the grievance procedure." This section only applies when an employer is required to show cause for dismissal of an employee and the employee is able to contest such action through the grievance procedure. Burgess v. State of Vermont, Dept. of Buildings and General Services, 25 VLRB 281, 282-83 (2002). VSEA v. State of Vermont, Office of the Secretary of State, 25 VLRB 274, 275-76 (2002). Choudhary v. State of Vermont, 15 VLRB 185, 186 (1992). It does not apply in a case like this where dismissal of a probationary employee is at issue and the employer is not required to demonstrate cause for dismissal.

In sum, in examining SELRA in its entirety, we conclude that a claim by a probationary employee of retaliation by an employer due to the employee complaining of gender discrimination does not constitute a valid cause of action pursuant to the prohibition of discrimination "on account of their . . . sex" contained in Section 1001(a). Instead, a probationary employee making such a claim must file an unfair labor practice charge. The prohibition in Section 961(1) of an employer interfering with, restraining or

coercing employees in the exercise of their rights guaranteed by law protects probationary employees when they allege retaliation against them for making a gender discrimination complaint.

The only claim Appellant continues to assert in this appeal is that her dismissal constituted retaliation due to her complaining of gender discrimination, and she bases such claim on Section 1001(a). She has not filed an unfair labor practice charge, and the deadline for filing one has passed. Unfair labor practice charges must be filed within six months of the occurrence of the alleged unfair labor practice. 3 V.S.A. Section 965(a). More than six months have passed since the termination of Appellant's employment. Thus, we have no jurisdiction over this matter and we dismiss this appeal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Appeal of Ellen Harris is dismissed.

Dated this ____ day of March, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Chairperson

_____
Carroll P. Comstock

_____
John J. Zampieri