Protected Activity and Discrimination Claims in Dismissals and Other Grievances

In several grievance cases, most of which have involved termination of employment, the VLRB has indicated the analysis it will employ where employees claim management took action against them for engaging in protected activities. The Board has determined that it will employ the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.[1]

The so-called *Mt. Healthy* analysis has been employed by the VLRB in protected activity grievance cases involving union activity,[2] filing of complaints and

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[1] Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, (Unpublished decision, Supreme Ct. Docket No. 93-237, 1994).

[2] Grievance of Roy, 6 VLRB 63 (1983); Grievance of Cronin, 6 VLRB 37 (1983); Sypher, supra; Grievance of Danforth, 22 VLRB 220 (1999), *Affirmed*, 172 Vt. 530 (2001).

grievances,[3] academic freedom,[4] free speech rights,[5] and whistleblowing.[6] The Vermont Supreme Court has approved use of such analysis.[7]

A threshold issue in protected activity cases is whether an "adverse action" actually has occurred. The Vermont Supreme Court has indicated that "adverse action" should not be limited to dismissal, suspension, reprimand, adverse evaluation, diminished responsibilities, excessive work assignments or lost compensation.[8] In one case, the Court concluded that assignment of an undesirable snowplowing route to a transportation maintenance worker constituted an adverse action.[9]

The VLRB has noted the issues it would consider in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;

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[3] Grievance of Richardson, 31 VLRB 359 (2011). Grievance of Abel, 31 VLRB 256 (2011). Grievance of Benoit, 31 VLRB 237 (2011). Grievances of Cray, 25 VLRB 194 (2002); *Affirmed*, Sup.Ct. Dock. No. 2002-538 (November 6, 2003); Grievance of Brewster, 23 VLRB 314 (2000); Cronin, supra; Grievances of McCort, 16 VLRB 70 (1993), *Affirmed*, (Unpublished decision, Sup.Ct. Dock. No. 93-237, 1994); Grievance of Day, 16 VLRB 312 (1993); Danforth, supra; Grievance of Greenia, 22 VLRB 336 (1999).

[4] Sypher, supra .

[5] Grievance of Moye and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, 25 VLRB 106 (2002). Brewster, supra. Grievance of Morrissey, 7 VLRB 129 (1984). Robins, supra.

[6] Brewster, supra; Cronin, supra; McCort, supra; Grievance of Robins, 21 VLRB 12 (1998), *Affirmed*, 169 Vt. 377 (1999); Danforth, supra; Grievances of Choudhary, 15 VLRB 118, 159-160 (1992).

[7] Cronin, supra, (Unpublished decision, February 4, 1987); Morrissey, 149 Vt. 1 (1987); McCort, supra; Robins, supra.

[8] In re Grievance of Murray, (unpublished decision, Supreme Ct. Docket No. 96-237, 1997).

[9] Id.

- whether the employer gave as a reason for the decision protected activities;
- whether an employer interrogated the employee about protected activities;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.[10]

In general, an adverse employment decision following engaging in protected activity is not legally suspicious on its own.[11] Moreover, the longer the time period between the adverse decision and the protected activity the more attenuated causation becomes.[12] In such cases, there must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious.[13]

A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights".[14] The critical inquiry is not whether the coercion succeeded or failed, but whether the employer's conduct reasonably tended to interfere with or restrain an employee's exercise of protected rights.[15]

The presence of improper employer motivation need not be shown by direct evidence. An employer's unlawful motive may be inferred from the circumstances where no direct evidence of the employer's intent exists in the record.[16]

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[10] Sypher, 5 VLRB at 131.
[11] In re Grievance of Rosenberg and Vermont State Colleges Faculty Federation, AFT, UPV, Local 3180, AFL-CIO, 176 Vt. 641 (2004).
[12] Id.
[13] Id.
[14] Grievances of McCort, (Unpublished decision, Supreme Court Docket No. 93-237, 1994).
[15] Id.
[16] Kelly v. The Day Care Ctr., Inc., 141 Vt. 608, 613 (1982).

The VLRB has issued decisions in many cases concerning whether employers discriminated against employees due to their grievance activities. In one state employee case, the Board concluded that including materials relating to past grievances brought by an employee in the employee's personnel file violated the contractual right to "institute complaints and/or grievances without threats, reprisal or harassment by the employer."[17] The employee was not alleging past discrimination, but that the potential for discrimination existed due to the inclusion of grievance materials in his personnel file.

The Board determined that the potential for future discrimination existed because a management official viewing the employee's personnel file may view him as a "troublemaker" continually questioning actions, and may hold this against him when opportunities for promotion, transfer or reappointment arise. The Board concluded that to allow the grievance materials to be contained in his personnel file would be to ignore the intent of the parties to prevent future discrimination against employees for pursuing their right to present grievances, and ordered that the materials be removed from the employee's file.[18] The Supreme Court affirmed the Board decision.[19]

In several grievances in which employees have claimed violation of free speech rights, the Board has determined that claims concerning free speech rights were properly encompassed within the definition of a "grievance". In these cases, the Board has applied precedents from U.S. Supreme Court cases interpreting the First Amendment of the U.S. Constitution.[20] The problem in any case is to arrive at

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[17] Grievance of Friel, 4 VLRB 80 (1981).
[18] Id., 4 VLRB at 90.
[19] In re Friel, 141 Vt. 505 (1982).
[20] Grievance of Morrissey, 7 VLRB 129 (1984); *Affirmed*, 149 Vt. 1 (1987). Grievance of Robins, 21 VLRB 12 (1998); *Affirmed*, 169 Vt. 377 (1999). Grievance of Moye and VSCFF, 25 VLRB 106 (2002).

a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[21]

The threshold inquiry in free speech cases is whether the employee's speech conduct can be "fairly characterized as constituting speech on a matter of public concern".[22] If not, then "it is unnecessary to scrutinize the reasons for the employee's discharge. Government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[23] When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of a personal interest, absent the most unusual circumstances, a court is not the proper forum to review the wisdom of a personnel decision.[24] Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.[25] The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.[26]

If the employee's speech touches upon matters of public concern, then the employee's interest in the speech activity must be balanced against the government's interest in maintaining efficiency and discipline.[27] The task is a difficult one because the government's burden in justifying a particular discharge varies depending on the

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[21] Morrissey, 149 Vt. at 14; *citing* Pickering v. Board of Education, 391 U.S. 563 (1968). Grievance of Robins, 21 VLRB at 22.Grievance of Moye and VSCFF, 25 VLRB at 124-25.
[22] Morrissey, 149 Vt. at 15-16; *citing* Connick v. Myers, 461 U.S. 138 (1983). Robins, 21 VLRB at 22-23; 169 Vt. at 383.
[23] Id.
[24] Id.
[25] Id.
[26] Id.
[27] Morrissey, 149 Vt. at 16; *citing* Connick v. Myers, 461 U.S. at 150.

nature of the employee's expression.[28] There are several important factors to be considered in weighing the government's interest: 1) "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate"; 2) "the time, place, and manner of the employee's speech conduct is also relevant"; and 3) "the context of the underlying dispute is also significant".[29]

Also, the fact that an employee's speech is expressed privately in communications with supervisors, rather than involving public expression, does not mean the speech is unprotected. A public employee does not forfeit protection against government infringement of freedom of speech by deciding to express views privately with supervisors rather than publicly.[30]

Whistleblowing is a protected activity pursuant to the state employees collective bargaining contract, which defines a "whistleblower" as a person who makes "public allegations of inefficiency or impropriety in government", and provides that a "whistleblower" shall not be discriminated against for exercising free speech rights. The first step in the analysis in a whistleblowing case is to determine whether a grievant was involved in the protected activity of whistleblowing. The Board has held that an employee is not a whistleblower if such employee only reported acts of inefficiency or impropriety within his or her department and did not make such claims public.[31] However, the Board concluded in another state employee case that an employee of the Department of Public Service met the definition of a whistleblower by contacting the Governor's office and alleging that he had been the victim of discrimination by the Department.[32]

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[28] Id.
[29] Id.
[30] Robins, 21 VLRB at 23.
[31] Robins, 21 VLRB at 22; *Affirmed*, 169 Vt. 377, 385-386 (1999). McCort, 16 VLRB at 106.
[32] Choudhary, 15 VLRB at 159-160.

In one whistleblowing case, the Board concluded that an employee who did not actually engage in the protected activity of whistleblowing, but was suspected of doing so, was entitled to protection under the whistleblowing provisions of the collective bargaining contract.[33] The Vermont Supreme Court affirmed this decision, stating "the State is responsible for its improper motive and actions, whether or not it undertook the action upon actual facts or mere suspicion."[34] The Court indicated that the underlying purpose of the whistleblowing article of the contract is to permit employees to expose wrongdoing on the part of state officials without fear of retaliation by the State, and stated that "it is difficult to conceive how employees will be motivated to expose wrongdoing if any perceived association with public complaints, no matter how tenuous, will leave them subject to retaliation".[35]

In grievances alleging that adverse actions were taken against employees on account of characteristics such as race, national origin, sex and age, the VLRB also has indicated it will employ the analysis developed by the U.S. Supreme Court in such cases.[36] The Court has set forth the basic allocations of burden and order of presentation in disparate treatment cases.[37] The Court has made it clear that the burden of proof remains at all times with the plaintiff.[38]

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[33] Danforth, 22 VLRB at 246-48.
[34] 172 Vt. at 533.
[35] Id. at 532-33.
[36] Grievance of Richardson, 31 VLRB 359 (2011). Grievance and Appeal of Sunderland, 31 VLRB 35 (2010). Grievance of McIsaac, 26 VLRB 24 (2003); *Affirmed*, 177 Vt. 16 (2004). Grievance of Danforth, 22 VLRB 220 (1999). Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261 (1995). Grievance of Butler, 17 VLRB 247 (1994); *Affirmed*, 166 Vt. 423 (1997). Grievances of Choudhary, 15 VLRB 118 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Day, 14 VLRB 229 (1991). Grievance of Rogers and VSCSF, 11 VLRB 101, 125-126 (1988). Grievance of Harrison, 2 VLRB 304 (1979).
[37] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[38] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

The VLRB has accepted this analysis in sex discrimination cases brought before the Board.[39] The central focus of inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of their . . sex".[40] The Board has held that this analysis also is applicable to discrimination based on race, national origin and age.[41]

To establish a disparate treatment claim, “it is the plaintiff’s task to demonstrate that similarly situated employees were not treated equally.”[42] In comparing employment discipline decisions, “precise equivalence in culpability between employees” is not required.[43] Rather, the plaintiff must show that the employees were engaged in misconduct of “comparable seriousness.”[44] “The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.”[45]

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination.[46] In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination.[47] The issue in

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[39] Grievance of McIsaac, 26 VLRB 24 (2003). Grievance of Butler, 17 VLRB 247 (1994); *Affirmed*, 166 Vt. 423 (1997). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Smith, 12 VLRB 44 (1983). Grievance of Rogers, 11 VLRB 101 (1988).
[40] Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).
[41] Grievances of Choudhary, 15 VLRB 118 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994). Grievance of Day, 14 VLRB 229, 286 (1991). Gamez v. Brandon Training School, 12 VLRB 160 (1989).
[42] Butler, 166 Vt. at 431; *citing* Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).
[43] Butler, 166 Vt. at 431; *citing* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976).
[44] Id.
[45] Butler, 166 Vt. at 431, *citing* Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989).
[46] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[47] Id.

pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision.[48] In pretext cases, the analysis used is that which is set forth in U.S. Supreme Court cases.[49]

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination.[50] The burden of establishing a *prima facie* case of disparate treatment is not onerous.[51] The complainant must prove by a preponderance of the evidence that he or she was subject to an adverse employment action under circumstances that give rise to an inference of discrimination.[52] The U.S. Supreme Court stated:

> As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[53]

A *prima facie* case of discrimination when employment hiring or termination is involved consists of proving that: 1) the employee belongs to a protected class, 2) he or she was qualified for the position, 3) despite such qualifications he or she was rejected, and 4) after the rejection, a party not part of the protected class was hired or retained for the position.[54] The burden of demonstrating that an employee is

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[48] Id.
[49] Burdine, supra. Lowell, 15 VLRB at 329.
[50] Id.
[51] Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330.
[52] Id.
[53] Burdine, 450 U.S. at 254.
[54] McDonnell Douglas Corp., 411 U.S. at 802. Carino v. University of Oklahoma Board of Regents, 750 F.2d at 818. Day, 14 VLRB at 288. Smith, 12 VLRB at 53.

qualified for a position is limited to showing that she or he possesses the basic skills for such a position.[55]

In cases where there is an allegation of sex discrimination regarding compensation, a female employee may establish a *prima facie* case of discrimination by proving that she is paid less than a male employee for work requiring substantially equal levels of skill, effort and responsibility.[56]

However, claims for sex-based wage discrimination also can be brought even though no member of the opposite sex holds an equal but higher paying job.[57] The complainant must present evidence creating an inference that the wage disparity, if otherwise unexplained, is more likely than not based on intentional sex discrimination.[58] Discriminatory intent will not be inferred merely from the existence of wage differentials between jobs that are only similar.[59] However, the comparability of jobs can be relevant to determining whether discriminatory animus can be inferred. The comparability of the involved positions is considered, along with other evidence of discriminatory animus to determine whether an inference of discriminatory motive can be supported.[60]

If the employee succeeds in proving the *prima facie* case, then the burden is shifted to the employer to articulate a legitimate non-discriminatory reason for the adverse action.[61] The employer need not persuade the court or the board that the proffered reason was the true motivation for the action. It must only raise a genuine issue of fact as to whether the employer engaged in discrimination.[62] To accomplish

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[55] Grievances of Choudhary, 15 VLRB 118, 158 (1992).
[56] Grievance of Lowell, 15 VLRB at 330. Grievance of United Academics, AAUP/AFT (Re: Clinical Assistant Professors of Nursing), 31 VLRB 88, 118-124 (2010).
[57] Grievance of United Academics, 31 VLRB at 117, 124-125.
[58] Id. at 126.
[59] Id.
[60] Id. at 126-127.
[61] Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53.
[62] Burdine, 450 U.S. at 254.

this, the employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions.[63] The explanation provided must be legally sufficient to justify a judgment for the employer.[64] This second step serves to respond to the employee's *prima facie* case as well as "to frame the factual issue with specific clarity so that the (employee) will have a full and fair opportunity to demonstrate pretext."[65]

The employer must produce admissible evidence that would allow the court or the board rationally to conclude that the employer's actions were not motivated by discriminatory animus.[66] The determination whether the employer has met the burden of production involves no credibility assessment.[67] If the employer fails to meet its burden of production, then the employee prevails on his or her claim of discrimination as a matter of law.[68]

Finally, if the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination.[69] The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant.[70] A complainant may succeed in this burden of persuasion either directly by establishing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence.[71]

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[63] Id. at 255.
[64] Id.
[65] Robertson v. Mylan Laboratories, Inc., 176 Vt. 356, 367 (2004); *citing* Burdine, 450 U.S. at 255-256.
[66] Burdine, 450 U.S. at 257.
[67] St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).
[68] Id. Grievance of Day, 16 VLRB 312, 344 (1993).
[69] Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Rogers, 11 VLRB at 126.
[70] Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 125-26.
[71] Burdine, 450 U.S. at 256. Lowell, 15 VLRB at 336.

In determining whether the employer's explanation was pretextual, the trier of fact may consider the evidence, and inferences properly drawn therefrom, previously introduced by the complainant to establish a prima facie case.[72] Disbelief of the reasons put forward by the employer (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.[73]

In a "mixed motive" case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives.[74] Once an employee shows that a prohibited factor, such as race, national origin or sex, played a motivating or substantial part in an employment decision, the burden shifts to the employer to prove that the same decision would have been made if the prohibited factor had not played such a role.[75]

Direct evidence or circumstantial evidence may be used to show that one of the employer's motives was improper in "mixed motive" cases.[76] Direct evidence is evidence that, if believed, proves the existence of the fact in issue without inference or presumption.[77]

An employee claiming discrimination based on sex may include sexual harassment as part of the discrimination claim. Generally, there are two types of harassment cases: 1) *quid pro quo* cases, in which employers condition employment benefits on sexual favors; and 2) "hostile" environment cases, where employees work in hostile or abusive environments. The VLRB has decided the latter type of case, but has not been called upon to rule in a *quid pro quo* case.

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[72] Burdine, 450 U.S. at 255, n.10. Lowell, 15 VLRB at 336-37.
[73] Hicks, supra. Day, 16 VLRB at 345.
[74] Price Waterhouse, 490 U.S. at 244- 249. Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261,294 -295 (1995)
[75] Id. Grievance of McCort, slip op. at 11-15 (Vt. Supreme Court, Docket No. 93-237, 1994).
[76] Id.
[77] VSCFF (Re: Yu Chuen Wei), 18 VLRB at 295.

A hostile work environment exists when conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[78] This occurs "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".[79]

This standard requires an objectively hostile or abusive environment - one that a reasonable person would find hostile or abusive - as well as the victim's subjective perception that the environment is abusive.[80] The determination whether an environment is "hostile" or "abusive" can be made only by looking at all the circumstances.[81] "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[82]

If a worker is subjected to unwelcome sexual advances, such harassment is actionable even though no tangible job benefit is implicated, such as termination, demotion or loss of promotion in retaliation for refusing to submit to the unwelcome advances.[83] The predicate acts underlying a sexual harassment claim need not take the form of sexual advances or of other incidents of clearly sexual overtones to be

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[78] Grievance of Butler, 17 VLRB 247, 314 (1994); *Affirmed*, 166 Vt. 423 (1997); *citing* Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 65-67 (1986); Carrero v. New York City Housing Authority, 890 F.2d 569, 577 (2nd Cir. 1989); Hall v. Gus Construction Co., 842 F.2d 1010, 1013 (1988).
[79] Butler, 17 VLRB at 315; *citing* Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 370 (1993). Allen v. Dept. of Employment and Training, 159 Vt. 286, 289-90 (1992).
[80] Butler, 17 VLRB at 315; *citing* Harris, 114 S.Ct. at 370.
[81] Butler, 17 VLRB at 315; *citing* Harris, 114 S.Ct. at 371.
[82] Id.
[83] Allen v. Department of Employment and Training, 159 Vt. 286, 290 (1992).

actionable.[84] To demonstrate a hostile environment the conduct need not be of an explicitly sexual nature so long as it is directed against women because of their sex.[85] Any harassment of an employee that would not have occurred but for the sex of the employee may, if sufficiently patterned or pervasive, constitute actionable sexual harassment.[86]

Intimidation and hostility toward women because they are women obviously can result from conduct other than explicit sexual advances.[87] For example, the pervasive use of derogatory and insulting comments relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.[88] Similarly, so may the posting or display of any sexually oriented materials in common areas that tend to denigrate or depict women as sexual objects serve as evidence of a hostile environment.[89] Derogatory comments about a woman do not have to be made in the woman's presence to constitute evidence of an atmosphere of on-the-job harassment.[90]

The VLRB has indicated that, in addition to establishing being subjected to a hostile employment environment, an employee must establish that the conduct that created the hostile situation should be imputed to the employer based upon agency principles.[91] The Board concluded that, to hold the employer liable where the hostile environment is created by a supervisor, the employee must prove that the supervisor uses actual or apparent authority to further the harassment.[92] In situations where a

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[84] Butler, 17 VLRB at 315; *citing* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990); Hall, 842 F.2d at 1014; McKinney v. Dole, 765 F.2d 1129, 1138-39.
[85] Butler, 166 Vt. at 429.
[86] Butler, 17 VLRB at 315; *citing* McKinney, 765 F.2d at 1138.
[87] Butler, 17 VLRB at 315-16; *citing* Hall, 842 F.2d at 1014.
[88] Butler, 17 VLRB at 316; *citing* Andrews, 895 F.2d at 1485.
[89] Butler, 166 Vt. at 430.
[90] Id.
[91] Butler, 17 VLRB at 316; *citing* Meritor Savings Bank, 477 U.S. at 70-71.
[92] Butler, 17 VLRB at 316; *citing* Karibian v. Columbia University, 14 F.3d 773, 780 (1994).

supervisor does not rely on supervisory authority to carry out the harassment, such as when co-workers carry out the harassment, the VLRB indicated the employer will be held liable if the employer provided no reasonable avenue for complaint, or the employer knew or should have known of the harassment and failed to take prompt remedial action.[93]

Most of the sex discrimination cases decided by the Board have involved claims by women that they have been discriminated against based on their gender. There is a lone exception.[94] That case involved a claim by a male state trooper that the age and gender based cutoff standards used by the employer for physical assessment tests discriminated against him. He contended that he was held to a higher standard than women and older troopers who were required to perform the same job duties.

The Board concluded that, once the underlying purpose of the employer's physical fitness program of promoting physical fitness was considered, the different standards did not constitute impermissible age and sex discrimination.[95] The Board determined that physiological differences explained the different standards, not impermissible discrimination.[96] The Vermont Supreme Court affirmed the Board, holding that physiologically-based policies where no significantly greater burden of compliance was imposed on either sex are permissible and non-discriminatory.[97]

The tension between the "just cause" for dismissal standard and discrimination against employees was highlighted in a grievance where an African-American correctional officer contended that his dismissal was without just cause, even though he failed to report for duty and was absent without leave, because the

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[93] Id. Andrews, 895 F.2d at 1486.
[94] Grievances of Scott, 22 VLRB 286 (1999).
[95] Id. at 306.
[96] Id. at 307.
[97] 172 Vt. 288 (2001).

real reason for his dismissal was his race. The Supreme Court held that "in order to excuse absenteeism which would otherwise constitute just cause for dismissal the (employee) must show:

1. The racially motivated misconduct of his fellow employees affected the grievant's mental or physical well-being, interfering with his ability to carry out his work-related duties, and this reaction by the grievant was not unreasonable;
2. The employer, who was aware, or in the exercise of reasonable care should have been aware, of the offensive misconduct and of the grievant's reasonably based reaction to it, failed to take reasonably feasible measures to deal with the situation;
3. But for this reasonably based reaction and the employer's culpable failure to take corrective action, the grievant would have reported for duty; and
4. The employee's failure to report for duty was reasonable under the circumstances, though it might otherwise constitute just cause for dismissal."[98]

Discrimination based on political reasons was at issue in a state employee grievance. The Board concluded that an employee had an actionable grievance under the state employees contract for discrimination based on non-partisan, as well as partisan, political reasons.[99] The analysis to be applied in determining whether discrimination occurred for political reasons generally is the same as that applied when discrimination based on sex, race, national origin or age is alleged.[100] Only those modifications are made which are consistent with the nature of the alleged discrimination.[101]

Most of the discrimination cases decided by the Board have been based on the disparate treatment theory; that the employer engaged in intentional discrimination

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[98] In re Harrison, 141 Vt. 215, 222-223 (1982).
[99] Grievance of Day, 14 VLRB 229 (1991).
[100] Id. at 293.
[101] Id.

in taking adverse action against an employee. However, employees may also prevail under a "disparate impact" theory. Such a theory has been developed under the non-discrimination provisions of Title VII of the Civil Rights Act of 1964, which theory the Board has concluded is applicable to evaluating a sexual orientation discrimination claim.[102]

Non-discrimination requirements prohibit "not only overt discrimination but also practices that are fair in form but discriminatory in practice."[103] Under the disparate impact theory, a facially neutral policy may be deemed in violation of non-discrimination requirements, without evidence of the employer's subjective intent to discriminate that is required in a "disparate treatment" case, if it has an adverse impact on a protected group.[104]

Once the employee demonstrates that the employer practice causes a disparate impact on a protected class, the practice is prohibited unless the employer can demonstrate that the practice is related to job performance and consistent with business necessity.[105] Generally, the expense of changing employment practices is not a business purpose that will validate the effects of an otherwise unlawful employment practice.[106]

A conclusion of disparate impact does not require that an employer practice has no impact on individuals other than the group claiming protection against discrimination for a prohibited reason. It requires only a disproportionate impact on a protected class as compared to other individuals.[107]

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[102] Grievance of B.M., et al, 16 VLRB 207, 216 (1993).
[103] Id.; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
[104] Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 645-46 (1989). B.M., et al, 16 VLRB at 216. Grievances of Scott, 22 VLRB 286, 303-04 (1999). Grievance of Miller, 24 VLRB 1, 9 (2001).
[105] Griggs, 401 U.S. at 431. Section 703 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2), as amended by Section 105 of the Civil Rights Act of 1991. B.M., et al, 16 VLRB at 216.
[106] Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971). B.M., et al, 16 VLRB at 220.
[107] Griggs, supra. B.M., et al, 16 VLRB at 217. Miller, 24 VLRB at 10-11.

In one grievance filed by University of Vermont employees involving a disparate impact theory, the VLRB determined that the University discriminated against the employees on the basis of their sexual orientation in violation of its non-discrimination rules and regulations by denying medical and dental insurance benefits to their same sex domestic partners.[108] The Board concluded that this employer practice caused a disparate impact on gay and lesbian employees in the provision of health and dental benefits, and the employer had not demonstrated that the practice was related to job performance and consistent with business necessity.[109]

The VLRB has issued one grievance decision concerning alleged discrimination against an employee due to a disability. In that case, involving the dismissal of a University of Vermont employee, the University had adopted regulations incorporating requirements of federal disability discrimination statutes. As a result, the Board concluded that it was appropriate to look to case law under the Americans with Disabilities Act ("ADA")[110] and Section 504 of the Rehabilitation Act of 1973.[111]

Under the ADA, employers may not discriminate against qualified individuals with disabilities.[112] Disability is a recognized physical or mental impairment that substantially affects a major life activity.[113] A qualified individual is someone who can perform the essential functions of the job with or without reasonable accommodations.[114] An employer generally is required to make reasonable accommodations to the known physical or mental limitations of an otherwise

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[108] B.M., et al.
[109] Id.
[110] 42 U.S.C. §1201, et seq.
[111] Grievance of Jameson, 18 VLRB 331, 349 (1995).
[112] 42 U.S.C. §12112(a) and (b).
[113] 42 U.S.C. §12102(2)(a).
[114] 42 U.S.C. §12111(8).

qualified individual with a disability.[115] An employer is not required, however, to make accommodations to a qualified worker with a disability if doing so would present an undue hardship to the employer's business.[116]

A threshold issue in analyzing an employee's disability discrimination claim is whether the employer had knowledge of the employee's disability.[117] It is generally the employee's responsibility to request reasonable accommodation, and employers cannot be liable for failing to accommodate a disability of which it had no knowledge.[118] An employer knows an employee has a disability when the employee tells the employer about the disabling condition, or when the employer otherwise becomes aware of the condition.[119]

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[115] 42 U.S.C. §12112(b)(5)(a).
[116] Id. Jameson, 18 VLRB at 349-50.
[117] Jameson, 18 VLRB at 350.
[118] Appx. to 29 C.F.R. Section 1630.9; Schmidt v. Safeway Stores, 864 F.Supp. 991, 997 (D.Or. 1994). Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Landefeld v. Marion General Hospital, 994 F.2d 1178, 1181-82 (6th Cir. 1993). Jameson, 18 VLRB at 350.
[119] Schmidt, 864 F.Supp at 997. Jameson, 18 VLRB at 350.