

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 94-66
CHARLES JAMESON)

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 31, 1994, Charles Jameson ("Grievant") filed a grievance against the University of Vermont ("Employer" or "UVM") concerning his dismissal from employment. The grievance alleged that the Employer: 1) retaliated against Grievant for his using the Employer's grievance procedures; and 2) discriminated against Grievant because of his mental disability.

A hearing was held on March 27, 1995 before Board members Charles McHugh, Chairman, Catherine Frank and Carroll Comstock. Grievant appeared pro se. The Employer was represented by Attorney Jeffrey Nolan. Grievant filed a post-hearing brief on April 12, 1995. The Employer filed Proposed Findings of Fact and Conclusions of Law on April 13, 1995.

FINDINGS OF FACT

1. The University of Vermont is an institution of higher education with its principal place of business in Burlington, Vermont.
2. At all times relevant, the Employer set forth staff employees' rights and responsibilities in its Staff Handbook, which it provides to newly hired staff. The Staff Handbook is binding on employees and the Employer (Employer Exhibit 1).

3. The Staff Handbook contains a notice of nondiscrimination, which states in pertinent part:

... (E)mployees ... are hereby notified that the University of Vermont does not discriminate on the basis of ... disability ... in ... employment in, its programs and activities. In addition, it is the policy of the University that harassment for any reason is unacceptable and will not be tolerated.

It is therefore the intent of the University to comply with the spirit and the letter of ... Section 504 of the Rehabilitation Act of 1973; the Vermont Fair Employment Practices Act and such other federal, state and local nondiscrimination laws as may apply.

...

(Employer Exhibit 1, p. I).

4. The Staff Handbook contains a description of constructive discipline, which states in pertinent part:

The principle underlying all discipline of UVM employees is constructive discipline, not punishment. Consequently, discipline should be administered primarily to help you correct behavior that has caused problems, thus enabling you to continue effectively as a UVM employee.

All constructive action must be undertaken with the primary goal being to develop and retain efficient, productive employees. Punitive and other negative motives have no place in constructive discipline. Constructive actions must be fair and not discriminatory. The same standards should be applied to all employees who do similar jobs.

In addition to meeting the criteria of sound managerial practice, constructive discipline must take into account your right to

challenge constructive actions through the Staff Grievance Procedure (see page 107-114) and in certain instances through the civil courts . . .

(Employer Exhibit 1, p. 99).

5. The Staff Handbook contains an illustrative description of the circumstances under which a non-probationary employee may be terminated for cause, which states in pertinent part:

Occasionally your employment may be terminated because of poor job performance, improper attitude, misuse of medical leave, habitual lateness, illegal possession or use of alcohol or drugs in the workplace, theft, fighting, possession of dangerous weapons, misconduct, violation of UVM policies, unauthorized access or use of computerized information or files, or for other appropriate reasons.

...

(Employer Exhibit 1, p. 100).

6. The Staff Handbook describes a grievance procedure that may be used by non-probationary employees. The grievance procedure covers employee complaints relating to, among other things, disciplinary action (including dismissal), acts of reprisal as a result of using the grievance procedure, and complaints involving alleged violations of federal, state and UVM statutory or regulatory provisions. Complaints alleging discrimination based on disability are not covered under the internal UVM grievance procedure. Such complaints are administered through the University's Office of Affirmative Action, Equal Opportunity and Diversity Programs (Employer Exhibit 1).

7. Grievant was hired by the Employer as a custodian in the Athletic Department on February 19, 1991. This was the third time Grievant had been

employed by UVM as an athletic custodian. As one of approximately 15 athletic custodians, Grievant generally was responsible for the cleaning and maintaining of UVM's athletic facilities, as well as preparing facilities for athletic events (Employer Exhibit 18).

8. Grievant was hired by Donald LaCross, the Employer's manager of athletic facilities/equipment. At the time Grievant was hired, LaCross and another of Grievant's supervisors, William "Gordie" Leeuw, knew that Grievant had previously had problems with alcohol abuse, which had manifested itself on the job during Grievant's previous employment with UVM.

9. LaCross rehired Grievant based, in part, on Grievant's apparent desire to "change the problems of the past" and Grievant's on-going effort to maintain sobriety through professional counseling (Employer Exhibit 12, p. 1).

10. Beginning in July 1990 and ending in November 1990, prior to his February 1991 reemployment by UVM, Grievant was hospitalized at the Vermont State Hospital, where he was diagnosed with bipolar ("manic depressive") disorder, and subsequently diagnosed as suffering from "atypical psychosis with schizotypal features." Grievant also suffers from panic attacks.

11. Grievant did not inform his supervisors, either prior to or during his employment, that he had been hospitalized at the Vermont State Hospital, or that he suffered from any mental impairment or disability. Grievant's supervisors did not otherwise become aware of Grievant's mental impairment or disability during Grievant's employment.

12. Prior to being hired in February 1991, Grievant showed his mother, Dee Dee Jameson, a letter intended to inform LaCross and Leeuw that Grievant had previously been hospitalized at the Vermont State Hospital. Neither LaCross nor Leeuw received this letter.

13. Some time during Grievant's employment, Leeuw completed a Supplemental Security Income questionnaire concerning Grievant. The questionnaire requested work information on Grievant, and did not disclose that Grievant suffered from a disability. Leeuw did not question Grievant about the questionnaire's meaning or why it was sent.

14. Shortly after Grievant was rehired, LaCross told Grievant's mother in a phone conversation that he was glad to see Grievant "turn his life around". LaCross was referring to Grievant's problem with alcohol abuse (Grievant Exhibit 30).

15. On May 13, 1991, LaCross relieved Grievant of his assigned duties because Grievant had consumed alcohol prior to arriving at work that date and was intoxicated on the job. LaCross transported Grievant home (Employer Exhibit 12).

16. Following the above described intoxication incident, LaCross requested that Grievant contact a counselor at the University's Employee Assistance Program ("EAP") for alcohol-related counseling. LaCross informed Grievant that Grievant's involvement with the EAP program would be confidential (Employer Exhibit 12).

17. Grievant met with Diane Freiheit, an EAP counselor. Freiheit, consistent with EAP confidentiality rules, did not inform Grievant's supervisors of the substance of her meetings with Grievant. Grievant's supervisors neither sought

nor received information from EAP as to the nature and subject matter of Grievant's counseling. Grievant's supervisors allowed him time off from work to attend any counseling sessions or meetings related to treating his alcohol problem.

18. In June or July of 1992, Grievant received a written performance appraisal prepared by his immediate supervisor, Irving Coburn, and reviewed by Leeuw, who at that time was Grievant's custodial supervisor. Grievant was praised for the quality of his custodial work, but was told he needed to improve his relations with co-workers (Employer Exhibit 9).

19. On October 22, 1992, Grievant received a "notice of verbal counseling" from LaCross for negative work relationships with supervisors and co-workers, critiquing the work of co-workers, complaining about equipment, failing to cooperate in improving his relationships with co-workers and supervisors and, at an October 22 meeting with LaCross, responding 'with a tirade of insults, foul language and complete arrogance'. In the notice of verbal counseling, LaCross informed Grievant that if he was "having any problems that may be alleviated by meeting with an E.A.P. Counselor", LaCross was available to assist him (Employer Exhibit 8).

20. Prior to receiving the notice of verbal counseling, Grievant prepared and posted a note on a piece of machinery in the Employer's facility directed to another member of the custodial crew, which included the statement that Grievant did not think "Don [LaCross] should expect [a co-worker] to cover his ass for som[e]thing he should have taken care of years ago..." This referred to problems Grievant had with a tennis sweeper not being repaired (Employer Exhibit 10, p. 1-2).

21. In December 1992, Grievant filed a grievance pursuant to the internal UVM grievance procedure, claiming that the verbal counseling he received on October 22, 1992 had not been proper (Grievant Exhibit 26).

22. The staff grievance panel found that the verbal counseling was appropriate and denied the grievance (Grievant Exhibits 24-25).

23. In January of 1993, Grievant was informed by his supervisors that the third shift, in which Grievant had been working, was to be eliminated. The Employer eliminated this shift because there was no supervision available for the third shift, and because it was not needed during the summer months. Grievant was offered his choice of the other two shifts, and chose the early first shift. As a result, Grievant's work hours changed in January 1993 from a 11:00 p.m. - 7:30 a.m. shift to a 4:00 a.m. - 12:30 p.m. shift (Grievant Exhibit 44).

24. On February 2, 1993, Grievant filed a complaint with staff advisor Brenda Potvin concerning the shift change. He alleged in the complaint that the shift change constituted "retribution" against him by his supervisors for pursuing the grievance concerning the verbal counseling. Grievant subsequently withdrew the complaint filed with Potvin (Grievant Exhibit 23).

25. Grievant was involved in a number of incidents between December 18, 1992, and February 11, 1993. On December 18, 1992, Grievant accused, without substantiation, a co-worker of drinking alcohol during work hours. On January 14, 1993, Grievant responded angrily to his immediate supervisor's inquiries regarding the locking of doors in the Employer's facility. On February 3, 1993, Grievant criticized the work of a a co-worker to another employee. On February 6, 1993,

Grievant responded to constructive criticism from his immediate supervisor regarding Grievant's use of an ice melter by complaining about his immediate supervisor to Sally Guerette, who was the Employer's assistant athletic director and outside Grievant's chain of command. On February 11, 1993, Grievant complained again to Guerette regarding the cleanliness of an area for which a co-worker was responsible, despite having been previously informed that Guerette was not in Grievant's supervisory chain and that Grievant should address complaints through appropriate channels (Employer Exhibit 7).

26. On February 12, 1993, Grievant received a letter of written counseling and written reprimand from LaCross for the above-described incidents. LaCross informed Grievant that he would “not . . . tolerate any further undue criticism of the supervisory staff, and must insist that you focus on your assigned duties”. LaCross further stated: “I do not expect you to check on or evaluate the work of other employees, and expect you will work within the areas to which you are assigned.” LaCross informed Grievant that “any further violations of University rules, policies, or accepted work practices may result in suspension without pay or in dismissal” (Employer Exhibit 7).

27. During February, 1993, Grievant became ill with pneumonia and missed some work. On February 25, 1993, approximately a week after returning to work, Grievant went to the hospital complaining of a reaction to stress. Leeuw spoke with Grievant's mother at the time, and told her that Grievant had a problem dealing with stress. Grievant had told Leeuw on several occasions that the schedule change was stressful to him (Grievant Exhibit 13).

28. In April 1993, Grievant's supervisors prepared a performance evaluation regarding Grievant's performance for the period July 1992 to April 15, 1993. Grievant's supervisors rated the quality of his work consistently good. Grievant was informed through this evaluation, however, that he needed to improve his on the job interpersonal relations, as well as his ability to adapt to position demands and changing work conditions and job scheduling. Grievant was also informed that he needed to improve his ability to accept supervision and instruction (Employer Exhibit 6).

29. On May 6, 1993, in a meeting with LaCross and Leon Lawrence of the UVM Employee Relations Department, Grievant responded in an angry manner and cursed when he was informed that he could not attend a retirement party during his shift. Following the meeting, LaCross wrote a memorandum to Grievant which provided in pertinent part:

I . . . made clear to you I will not tolerate any future outbursts of foul language on your part when expressing your dissatisfaction with a decision not to your liking. To be brief, there is no need for vulgar expression to get your point across. Should your conversation escalate to that point, and you use foul language, I will relieve you of duty with pay, and will request you leave the facility.

. . .

(Employer Exhibit 5)

30. In June, 1993, Grievant's work schedule changed to a 3:00 p.m. - 11:30 p.m. shift for the Summer (Grievant Exhibit 44)..

31. On June 24, 1993, Grievant called the office of Athletic Director Richard Farnham to speak with Farnham. When the secretary answering the

telephone informed Grievant that Farnham was not available, Grievant responded in an angry manner that he needed to talk with Farnham "immediately" about work problems he was having. Grievant also stated in an angry manner that he was "tired of the coverup", and that if Farnham did not contact him quickly he would notify the media and engage in a "silent strike"(Employer Exhibit 3).

32. On June 28, 1993, Grievant received a letter of suspension from LaCross, thereby suspending Grievant for one working day. The reasons for the suspension were set forth in this letter, which reads in pertinent part:

...

The cause of this action is due to your telephone call to the Office of the Director of Athletics on Thursday, June 24, 1993, during which time a Secretarial Staff Member, while explaining to you the Director was not available, was subjected to what she felt to be angry, threatening remarks. The individual, in reporting the incident to me, advised you had called and, in an angry manner, had stressed you needed to "talk with Rick immediately" about your "situation." Further, you stated you were "tired of the cover up," and that if Rick did not contact you before Friday Noon, you would "notify the media and stage a silent strike." She states your words at that point were angry, and threatening.

Unfortunately Chuck, this type of behavior is not a first time occurrence. There are several pieces of documentation in your personnel file that relate to your continued verbal confrontations with individuals who work at the facility, your co-workers, and supervisory staff persons.

On October 22, 1992, you were given a notice of Verbal Counseling. That counseling was initiated due in part to your continued attitude and behavior in performing your duties at the facility. A part of that notice from myself reads (I was) "met with a tirade of insults, foul language, and complete arrogance on your part."

On February 12, 1993, you were given a letter of Written Counseling. This letter again addressed your "ongoing negative attitude and behavior," and that you had "not made changes,"

but had "continued with the same pattern of behavior that existed before the counseling."

On May 6, 1993, in a written confirmation of the discussion between you, myself and Leon Lawrence of the Personnel Office, I advised I would not tolerate any future outbursts on your part when expressing your dissatisfaction with a decision not to your liking.

My point Chuck, quite simply put, is that there is a way in which to peacefully settle any disputes that may arise out of one's employment. While the actions taken may not necessarily be what you would wish to have implemented, it is not necessary to attempt settlement of a dispute through intimidation, foul language, or threats. Placing a deadline on response, with an "or else" threat, is neither productive or beneficial to anyone. As you should see, your attitude again placed someone on the end of what they perceive to be a threatening situation. I cannot tolerate that kind of behavior, and have no alternative but to suspend you without pay for the time period indicated.

Should you desire to meet with an EAP counselor, I am available to assist you in setting up an appointment with that office.

Any further violation of University rules, policy, or accepted practices may result in your dismissal from University employment.

...

(Employer Exhibit 4)

33. In September, 1993, Grievant's work schedule changed to a 4:30 a.m. -1:00 p.m. shift, and the days of the week in which he worked changed (Grievant Exhibit 44).

34. At some point prior to September 1, 1993, Grievant called the office of the UVM President regarding concerns about his work schedule. Prior to

September 1, 1993, Grievant also called the office of Athletic Director Farnham complaining of the condition of various equipment used by the Athletic Department.

35. On September 1, 1993, UVM Athletic Director Richard Farnham sent Grievant a memorandum. The memorandum stated in pertinent part:

...

1. I would like to make it extremely clear that your actions of calling the President's Office regarding your concerns, and your consequential meeting with Vice-President Andreas in my office, are inappropriate behaviors. Their involvement into matters on this level should not be an expectation from you. There are specific procedures within our Department and within the University system, as outlined in the Staff Handbook, that should be followed.

...

3. It is the position of this Office that any failures of equipment, etc. in the future should be brought to the attention of your immediate Supervisor and not the Director's Office. Requests from your Supervisor to my Office will be dealt with appropriately.

...

(Employer Exhibit 3)

36. On November 11, 1993, Grievant again complained directly to Farnham about equipment and other aspects of his employment (Employer Exhibit 11).

37. On November 11, 1993, Leeuw was supervising custodial staff at the Employer's facility, including Grievant. Leeuw told Grievant to clean the ice rink. Grievant told Leeuw he had other tasks to do. Grievant insisted on cleaning the pool, and Leeuw told Grievant that he needed him to clean the rink. Grievant then told

Leeuw that Leeuw would have to clean the rink himself. Leeuw then relieved Grievant from work for the day.

38. Leeuw dismissed Grievant on November 16, 1993. Leeuw described the reasons for dismissal in a letter to Grievant on that date. The letter reads in pertinent part:

For some time now it has been necessary to correct your work attitude and behavior on numerous occasions. One of my primary problems with your behavior has been your continued failure to respond to directions from management. This failure has had a negative effect on your own work and created an atmosphere of tension within the Department.

On November 11, 1993, you left a note for Rick Farnham, Director of Athletics, concerning problems with the sweeper. Previously, on September 1, 1993, you were given specific written notice to bring any complaints to your supervisor and not to the Athletic Director. Also, on November 11, 1993, you were assigned to rink clean up. When I tried to have you come to the rink, you stated that you had put in two hours at the rink and now you were too busy with your own work to help. Also, you said you were tired and leaving soon.

You frequently find my instructions to conflict with your ideas of what and how things should be done. You become uncooperative and argumentative.

Your unacceptable attitude and behavior have been ongoing, for example, on October 22, 1992, you were given a verbal warning about your attitude and demeanor toward the supervisory staff. On February 12, 1993 and May 6, 1993, you were given written warnings about your ongoing negative attitude, angry outbursts, and told that these would no longer be tolerated. Also, you were suspended on June 28, 1993 for this same behavior directed towards an administrative secretary.

...

(Employer Exhibit 2).

39. Grievant challenged the dismissal through the grievance procedure, alleging that the third shift was eliminated in January 1993 in retaliation for his use of the grievance procedure in October 1992, and that his supervisors harassed him in an effort to get him to terminate his employment. On September 27, 1994, the staff grievance hearing panel unanimously affirmed Grievant's dismissal (Employer Exhibit 16. p. 1-2).

40. Grievant also challenged his dismissal through the process administered by the Employer's Office of Affirmative Action/Equal Opportunity/Diversity Programs ("AA/EO/DP"), alleging that he had been discriminated against on the basis of disability. The AA/EO/DP investigator concluded that no discrimination had occurred (Employer Exhibit 16, p.3).

41. Grievant appealed the AA/EO/DP investigator's decision to the UVM President, Thomas Salmon. President Salmon, in a letter dated October 5, 1994, concluded that there had been no discrimination in Grievant's case. The letter reads in pertinent part:

...

It is apparently now undisputed that Mr. Jameson suffers from a documented mental disability and that he has a history of alcoholism. The record is less clear on when Mr. Jameson's supervisors first had notice of this disability. In his discrimination charges, Mr. Jameson suggests that, at the time of his most recent re-employment at the University, his supervisors hired him with the knowledge that he had been discharged from the State mental hospital. The evidence is ambiguous on this point, and the investigator concluded that Mr. Jameson's supervisors were not aware of the mental disability at the time of Mr. Jameson's re-employment.

..

There is a serious question as to whether Mr. Jameson timely identified his mental disability and requested accommodations specifically on account of such disability. Insofar as Mr. Jameson requested accommodations with respect to his mental disability and/or alcoholism, his supervisors responded reasonably to such accommodation requests.

(Employer Exhibit 16, p. 3-4).

OPINION

At issue in this grievance is whether the Employer, in dismissing Grievant, violated provisions of its Staff Handbook by retaliating against Grievant for his filing of grievances, and discriminating against Grievant because of his mental disability. We address each issue in turn.

Retaliation Due to Grievance Activity

Grievant alleges that the Employer violated the provision of the Staff Handbook prohibiting acts of reprisal against employees as a result of using the grievance procedure. The Board has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the statutory definition of grievance, Boynton v. Snelling, 147 Vt. 564, 565 (1987), which statutory definition provides:

"Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 V.S.A. §902(14).

Since there is no applicable collective bargaining agreement here, Grievant must allege and prove the discriminatory application of a rule or regulation.

Grievance of Gobin, 158 Vt. 432, 434 (1992). Failure of an employer to apply a binding rule is sufficient to require a finding of discrimination. Id. The Employer accepts, and we find, that the provisions of the Staff Handbook at issue in this grievance constitute a binding rule. Grievance of Lightburn, 15 VLRB 372, 392 (1992). Thus, we need to determine whether the Employer violated its binding rule prohibiting reprisal against Grievant for his use of the grievance procedure.

In previous grievances, where employees claimed management took action against them for engaging in the protected activity of pursuing grievances, the Board has determined that it will employ the analysis used by the U.S. Supreme Court. Grievances of McCort, 16 VLRB 70, 105 (1993); *Affirmed*, ___ Vt. ___ (1994). Grievance of Cronin, 6 VLRB 37 (1983); *Affirmed*, Unpublished Decision, Supreme Court Docket No. 82-310 (1987). Once the employee has demonstrated his or her conduct was protected, he or she must show the conduct was a motivating factor in the decision to take action against the employee. 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. Id. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

The first step in the analysis is to determine whether Grievant was engaged in the protected activity of filing grievances. He did engage in such activities, filing a grievance over a notice of verbal counseling which he had received from his supervisor and filing a complaint concerning a change in the shift which he worked. Thus, he meets the first step of the Mt. Healthy analysis.

The second step in the analysis is that Grievant must show his protected conduct was a motivating factor in the decision to dismiss him. The guidelines the Board follows in determining whether the protected conduct of engaging in grievance activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, 3) whether the timing of the action was suspect, 4) whether the employer gave as a reason for the decision protected activities, 5) whether the employer interrogated the employee about protected activities, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in protected activities. McCort, 16 VLRB at 107.

Grievant has presented insufficient evidence by which we can conclude that his grievance activities were a motivating factor in his dismissal. None of the elements listed above, other than knowledge of grievance activities, are present in this case. Mere knowledge, without more, is insufficient for us to conclude that grievance activity played any motivating factor in the dismissal of Grievant. Grievance of Choudhary, 15 VLRB 118, 165 (1992); *Affirmed*, ___ Vt. ___ (1994).

The timing of Grievant's dismissal was not suspect. It came approximately ten months after the above-mentioned grievance activities occurred. In the intervening ten months, Grievant had demonstrated poor working relationships with co-workers, an inability on several occasions to accept direction and instruction from supervisors, improper circumvention of the chain of command in dealing with work problems, and a propensity to engage in verbal confrontations with supervisors and

other employees. These deficiencies of Grievant persisted despite ample warnings from his supervisors through counseling, performance evaluations and disciplinary actions that such conduct on his part would not be tolerated. Under these circumstances, we do not find the timing of Grievant's dismissal suspect in relation to his grievance activities.

Grievant appears to allege that he was subject to a pattern of harassment and a climate of coercion. His principal complaints in this regard are that the Employer changed the shifts in which he worked and did not address equipment problems. 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". Grievances of McCort, ___ Vt. ___, slip. op. at 16 (1994). 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. Id.

The evidence does not indicate that a climate or coercion or harassment of Grievant existed here. The change of Grievant's shift resulted from the elimination of the shift in which he was working. The Employer took such action because there was no supervision available on the shift in which Grievant was working and because it was not needed during the summer months. This constituted a reasonable management action to efficiently allocate resources, and we conclude that it was not motivated by Grievant's filing of grievances. Further, the evidence is insufficient for us to conclude that Grievant's supervisors were acting in a coercive manner, or harassing Grievant, in responding to his complaints about equipment problems.

In sum, we conclude that Grievant has not demonstrated that his grievance activities motivated the actions which Grievant's supervisors took against him, culminating in his dismissal. Thus, we reject Grievant's claim that the Employer dismissed him in reprisal for his grievance activities.

Discrimination Based on Mental Disability

Grievant alleges that, in dismissing him, the Employer violated the provision of the Staff Handbook prohibiting discriminating against employees based on a disability. Grievant alleges that the Employer discriminated against him due to his mental disability of a bipolar ("manic depressive") disorder, for which he had been hospitalized at Vermont State Hospital shortly before UVM hired him in early 1991.

Given that the Staff Handbook expressly incorporates requirements of federal and state antidiscrimination statutes in considering disability-based discrimination claims, the issue of whether Grievant was subject to impermissible disability-based discrimination is appropriately analyzed by consideration of applicable requirements, regulations, and case law under the Americans with Disabilities Act, 42 U.S.C. Section 1201, et seq. ("ADA"), and case law under Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"). The provisions of ADA are modeled after the Rehabilitation Act, and further the Vermont Fair Employment Practices Act, 21 V.S.A. Section 495 ("FEPA") also is modeled after the Rehabilitation Act. Hodgdon v. Mount Mansfield Co., 160 Vt. 150, 165 (1992). The significant parallels between these statutes makes it appropriate to look to the ADA and the Rehabilitation Act for guidance in deciding the case before us. Id.

Under the ADA, employers may not discriminate against qualified individuals with disabilities. 42 U.S.C. Section 12112(a) and (b). Disability is a recognized physical or mental impairment that substantially affects a major life activity. 42 U.S.C. Section 12102(2)(A). A qualified individual is someone who can perform the essential functions of the job with or without reasonable accommodations. 42 U.S.C.

Section 12111(8). An employer generally is required to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. 42 U.S.C. Section 12112(b)(5)(A). 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. Id.

The threshold issue in analyzing Grievant's disability discrimination claim is whether the Employer had knowledge of Grievant's mental disability. 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. 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). 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. Schmidt, 864 F.Supp. at 997.

Grievant has failed to meet this threshold test. We have concluded by a preponderance of the evidence that Grievant did not inform his supervisors, either prior to or during his employment, that he had been hospitalized at Vermont State Hospital, or that he suffered from any mental impairment or disability. Further, Grievant's supervisors did not otherwise become aware of Grievant's mental disability. We cannot hold the Employer liable for failing to reasonably accommodate

a mental disability of which it had no knowledge. Thus, we reject Grievant's claim that the Employer discriminated against him due to his mental disability.

Parenthetically, we note that Grievant has not alleged in his grievance that the Employer discriminated against him due to any disability he may have as a result of his alcohol abuse. Therefore, we need not address that issue. In any event, even if such claim was properly before us, the Employer reasonably accommodated Grievant in this regard by referring him to an Employee Assistance Counselor, and allowing him time off work to attend counseling sessions or meetings related to treating his alcohol problem.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Charles Jameson is DISMISSED.

Dated this 30th day of June, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Charles H. McHugh
Charles H. McHugh, Chairman

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Carroll P. Comstock
Carroll P. Comstock