VERMONT LABOR RELATIONS BOARD

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| GRIEVANCE OF: | ) | |
| | ) | DOCKET NO. 98-65 |
| NORMA BARNEY, BRENDA | ) | |
| CHAMBERLAIN AND GLORIA | ) | |
| DANFORTH | ) | |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 28, 1998, the Vermont State Employees' Association, Inc. ("Association") filed a grievance on behalf of Norma Barney, Brenda Chamberlain and Gloria Danforth ("Grievants") against the State of Vermont, Department of Public Safety ("Employer"). Grievants alleged that the Employer violated Article 5 of the collective bargaining agreements between the State of Vermont and the Vermont State Employees' Association for the Non-Management Unit and the State Police Bargaining Unit, effective for the period July 1, 1997 to June 30, 1999 ("Contracts") and Articles 65 of the Non-Management Unit Contract and Article 53 of the State Police Bargaining Unit Contract. Specifically, Grievants alleged that the Employer and Lieutenant Glenn Cutting discriminated against them, intimidated them and retaliated against them on the basis of their gender, union membership and complaint and grievance activity and created a hostile work environment after they filed an unfair labor practice charge against the Employer. Further, Grievants alleged that the Employer discriminated and retaliated against them for whistleblowing activities.

On December 23, 1998, attorney Norman Blais filed a motion to intervene on behalf of Lieutenant Glenn Cutting. On December 28, 1998, Grievants filed a memorandum in opposition to the motion to intervene. On January 4, 1999, the

Employer filed a memorandum in support of the motion to intervene. On January 14, 1999, the Board issued a Memorandum and Order denying Cutting party status, but granting the right to intervene to the extent of allowing Cutting's attorney to advise him during the grievance proceedings. Grievance of Barney, Chamberlain and Danforth. 22 VLRB 1 (1999). On March 31, 1999, Grievant Chamberlain withdrew the grievance as it pertained to her.

Hearings were held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Richard Park and John Zampieri on April 1 and 27; May 6, 13, 20, and 27; and June 1 and 22, 1999. Legal Counsel for the Department of Public Safety Elizabeth Novotny, Assistant Attorney General William Reynolds, and Legal Counsel for the Department of Personnel David Herlihy represented the Employer. VSEA General Counsel Samuel Palmisano and VSEA Deputy General Counsel Mark Heyman represented Grievants. Both parties filed post hearing briefs on July 20, 1999.

After the second day of hearing, Grievant Barney withdrew the grievance as it pertained to her. On May 28, 1999, the Board dismissed this grievance as it pertained to Barney and Chamberlain. This left Grievant Danforth as the only remaining Grievant. Hereinafter, she is referred to in this decision as "Grievant".

## FINDINGS OF FACT

1. Article 5 of the Contract provides in pertinent part:

**ARTICLE 5**
**NO DISCRIMINATION OR HARRASSMENT;**
**and AFFIRMATIVE ACTION**

1. In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of

discrimination, neither party shall discriminate against nor harass any employee because of . . . sex . . .filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

2. Article 53 of the Contract provides in pertinent part:

**ARTICLE 53**
**WHISTLEBLOWER**

1. A "Whistleblower" is defined as a person covered by this Agreement who makes public allegations of inefficiency or impropriety in government. No provision of this Agreement shall be deemed to interfere with such an employee in the exercise of his or her constitutional rights of free speech, and such person shall not be discriminated against in his employment with regard thereto.

. . .

3. Employees who possess information about inefficiency or impropriety in State government are urged to bring that information to the attention of appropriate government officials prior to making public allegations.

3. Grievant has worked for the Employer since 1976. She started her career working as a trooper at the Middlesex barracks. She then worked as a trooper at the Chelsea outpost and as a detective trooper assigned to the Washington County State Attorney's Office. In 1981, Grievant passed a promotional exam and became a corporal, a position now equivalent to the position of sergeant, and was assigned to the St. Johnsbury barracks. She later became patrol commander/shift supervisor at the Bethel Barracks. Grievant was the first female officer to reach the rank of sergeant and her promotion was publicized in local newspapers (Grievant Exhibit 8).

4. After three years as a patrol commander in Bethel, Grievant transferred to Public Safety headquarters in Waterbury and worked in a newly created child protection unit. In 1991, Grievant started working as a detective sergeant in the Employer's bureau of criminal investigation unit ("BCI") working out of the Bethel barracks. She has

remained in that unit and barracks since that time. During all relevant time periods, BCI Lieutenant Myles Heffernan has been Grievant's immediate supervisor. Heffernan is stationed in the Rutland barracks.

5. Throughout her career, Grievant has received numerous letters of commendation from various private and public officials, including Governor Howard Dean (Grievant Exhibit 8).

6. Grievant has been an active member of the VSEA. She has been involved in complaint and grievance activity, as well as private litigation, against the Employer. Such complaint and grievance activity include: 1) a 1987 grievance over a physical assessment test by the Employer which required Grievant to remove her pants and blouse as part of the testing process; such grievance was resolved and did not go to hearing; 2) a 1991 sex discrimination grievance against the Employer which was dismissed by the Labor Board. Grievance of Danforth, *16 VLRB 7 (1993)*; 3) a *1991* private sex discrimination lawsuit against the Employer which settled in 1994; Gloria Danforth v. State of Vermont, Department of Public Safety, Docket No. S 438-91 WnC; 4) a 1995 grievance by 18 BCI officers, including Grievant, over a unilateral schedule change by the Employer; this grievance was affirmed by the Board and the Vermont Supreme Court. Grievance of Whitney et al, 19 VLRB 210 (1996), __ Vt. __(1998); and 5) a May 19, 1998, Step II grievance against the Employer over a promotional procedure which settled at the Step II level and did not go to hearing (Grievant Exhibit 10).

7. Lieutenant Bruce Lang was the station commander of the Bethel barracks from 1987 until early 1998. Although Grievant worked out of the Bethel barracks, Lang

was not her direct supervisor or in her chain-of-command. She is directly supervised by Lieutenant Heffernan.

8. For many years the Department of Buildings had a contract with an individual, Eva Doty, to perform custodial duties at the Bethel barracks.

9. During the early Summer 1997, Doty had open heart surgery and was unable to perform her custodial duties. The majority of the personnel at the Bethel barracks liked Doty and were sympathetic to her situation because she was elderly and lived on a limited income. Lang asked the personnel at the Bethel barracks to pitch in and perform Doty's cleaning tasks while she was in the hospital. Lang signed weekly memoranda, or time sheets, which indicated that Doty was working, enabling Doty to be paid while she was in the hospital. Custodial time sheets are sent to the Department of Buildings to the attention of Thomas Sandretto. Many employees in the Bethel barracks were aware that Lang was sending Sandretto time sheets which falsely indicated that Doty was working.

10. Norma Barney was a dispatcher at the Bethel barracks during 1997 and had been performing that duty for many years. Barney has been an active union member of VSEA since 1981. She served as a union steward for several years and was a member of a labor-management committee from late 1996 until 1998. The labor-management committee addressed working conditions for dispatchers throughout the State.

11. Until late Spring or Summer 1997, Barney frequently engaged in banter with co-workers that included the use of derogatory sexual references and vulgar language. Many employees in the barracks thought Barney's banter sometimes was mean

spirited because she often discussed and joked about employees' personal lives and private issues. Barney was never disciplined for such conduct.

12. In early 1997, Barney attended a domestic violence training workshop at the Vermont Police Academy. After attending such workshop, Barney thought about her situation at the Bethel barracks and understood for the first time that she should not engage in degrading sexual banter and that she also should not allow it to continue in her presence.

13. Barney initially shared her concerns with Grievant, who neither participated in such banter nor used inappropriate or offensive language. Barney also talked about her concerns with Lang. On or about May 21, 1997, Barney sent Lang an e-mail message which stated in part that she had "found [herself] being increasingly uncomfortable with the raw and offensive language that just seems to be common practice". She requested a meeting with Lang, Captain Dean George and her VSEA field representative, Laurie Webster, to talk about her concerns (Grievant Exhibit 9).

14. Lang met with Barney and her VSEA representative and agreed to clean up the language in the barracks. On June 23, 1997, Lang wrote a letter to Webster, restating his commitment to not tolerate an offensive work environment (Grievant Exhibit 9).

15. The Bethel barracks generally was not clean while Doty was out on extended sick leave. The uncleanliness of the barracks and the fact that Lang submitted false time sheets for Doty concerned Barney. She discussed her concerns with Grievant.

16. Grievant felt she had an obligation under the Department Code of Conduct to report Lang's conduct, but she never spoke directly to Lang about her concerns.

Grievant called Lieutenant Colonel John Sinclair and told him about Lang submitting time sheets for Doty while she was not working. Sinclair advised Grievant that he would take care of the matter. Someone from headquarters contacted Lang.

17. It became common knowledge in the barracks that someone had reported Lang to headquarters. People generally assumed that person to be Barney.

18. Barney felt that many co-workers shunned her after she complained about the offensive work environment in June and after Lang had been reported to headquarters.

19. Bethel barracks personnel generally considered Doty the "grandmother" of the barracks and were upset that Lang had been turned in for trying to help her. On or about July 17, 1997, Barney contacted Captain Dean George because Lang had told co-workers Barney turned him in to headquarters. Barney told George that she was feeling isolated because of Lang's accusations to co-workers. George told Barney that he would get back in touch with her regarding the matter. However, he never did get back in touch with her (Grievant Exhibit 9).

20. On or about August 5, 1997, Lang met with several officers of the Bethel barracks, including Grievant. He expressed displeasure that someone had turned him in to headquarters regarding Doty's time sheets. Grievant confessed at this meeting that she was the one who had reported Lang to Sinclair.

21. BCI Sergeant Ray Keefe was displeased with Grievant for turning in Lang. Keefe felt that no one in the barracks thought what Lang had done was a "big deal".

22. Grievant and Keefe worked in the same area of the Bethel barracks and were the only two BCI officers stationed in Bethel. They were not friends, but had a civil relationship. After Grievant turned Lang in to headquarters, the relationship between Keefe and Grievant became strained and there was less small talk between them.

23. Grievant's complaint to headquarters had not resulted in any apparent adverse action against Lang. Sometime during the Fall 1997, Barney called Sandretto at the Department of Buildings and asked him if he had been aware that Lang had sent him false time sheets for Doty. Sandretto had not been informed of this and immediately reported it to the Department of Public Safety. The Department commenced an internal affairs ("IA") investigation. Internal Affairs Investigator Timothy Bombardier contacted Barney, informed her that she was the named complainant in the investigation, and interviewed her regarding her allegations. IA investigations are tape recorded and witnesses are ordered to answer all questions truthfully.

24. Barney felt a great deal of stress at work after she complained about the language in the barracks and the Doty matter. She went on extended sick leave in December and remained out of work until sometime in January (Grievant Exhibit 11).

25. Lang became a detective lieutenant and transferred to the St. Johnsbury barracks in early February 1998. Lang was replaced as station commander by Lieutenant Glenn Cutting. Cutting had been the station commander of the Rockingham barracks for over three years. Cutting is a member of VSEA and has held various positions in the VSEA, including VSEA President. He has filed grievances against the Employer and has encouraged others to file grievances. He currently has a grievance pending before the Labor Relations Board.

26. At some point in early 1998, Barney learned that Lang may have used a Department account at a local car wash to have his personal car washed. She reported this to Bombardier and he initiated another IA investigation of Lang.

27. The Bethel barracks had been through a significant amount of turmoil prior to Cutting's arrival. Morale was low among the officers and dispatchers. In addition to the two Lang complaints, two officers assigned to the Bethel barracks had been accused of inappropriate conduct in making an arrest; there was a great deal of negative publicity surrounding the accusation, investigation and resolution of that matter (Grievant's Exhibit 11).

28. Cutting made several changes in the operation of the barracks. Bethel personnel generally welcomed a change in command. One of the changes Lang made was to require troopers to spend more time on the road. This resulted in fewer officers being in the barracks at the same time and less socializing in the barracks.

29. Grievant and Cutting had known each other for years. Cutting knew about Grievant's civil law suit and at least one other grievance she had filed.

30. Sometime in February 1998, Bombardier interviewed Grievant regarding the car wash allegations. Grievant expressed concern to Bombardier that co-workers would retaliate against her for participating in another investigation of Lang. She did not want to go through another experience like she had in August 1997.

31. On or about February 19, 1998, Bombardier sent Barney a letter stating that the Commissioner of the Department of Public Safety, A. James Walton, concluded that Lang had violated the Department Code of Conduct in the Doty matter and he was preferring charges against him. It is routine IA procedure to inform the complainant of

the outcome of the investigation and also to inform the complainant that he or she may contact the Chairperson of the State Police Advisory Commission ("SPAC") if he or she has additional concerns (Grievant Exhibit 35).

32. SPAC is a panel of citizens appointed by the Governor who advises the Commissioner with respect to IA investigations. SPAC either recommends that charges be preferred or concludes that the charges are unfounded.

33. Barney expressed concern to Major Vallie about her role again as the complainant in another IA investigation of Lang. On March 18, 1998, she sent him an e-mail asking what safeguards were in place to protect her. Vallie replied by e-mail that IA investigations were confidential, but if she felt she had been impacted by her participation in an IA investigation, she should immediately tell her supervisor or contact headquarters. Barney forwarded both e-mails to Cutting so that he would be apprised of her concerns and her role in the IA investigation of Lang's purported conduct (Grievant Exhibit 11).

34. Barney was hopeful that her situation would improve with Lang's departure. However, she continued to feel shunned and isolated from many colleagues after Cutting replaced Lang. Barney contacted her VSEA representative in early April 1998 to discuss her concerns. Cutting observed Barney away from her desk and talking on the telephone in the conference room. He asked her whether she was talking about a personal matter or work related business. Barney told Cutting that she was talking to someone at VSEA. He asked if there was anything he needed to know; this implied to Barney that Cutting was questioning her decision to call the union. Barney also felt that Cutting was singling her out for using the telephone for personal business. She observed

everybody at the Bethel barracks, including Cutting, using the telephone for personal business.

35. On April 9, 1998, Barney met with Cutting and her VSEA representative and discussed her concerns.

36. On April 10, 1998, VSEA and Barney filed an unfair labor charge with the Labor Relations Board, alleging that Barney had been subjected to a hostile work environment in retaliation for her complaint and grievance activity. In such charge, Barney referenced her complaint to Lang in June 1997 regarding the inappropriate language in the barracks. She also referenced her role in alerting the Department of Buildings to Lang's conduct in submitting time sheets for Doty.

37. Someone alerted Sarah Strohmeyer, a reporter with a local newspaper, the *Valley News*, that VSEA and Barney had filed an unfair labor practice charge with the Labor Relations Board. On Thursday, May 21, 1998, Strohmeyer called the Bethel barracks and asked to speak with Cutting. Dispatcher Brenda Chamberlain answered the telephone and gave Cutting the message. Chamberlain was aware of the unfair labor practice charge filed by VSEA and Barney, but believed Strohmeyer was calling Cutting about an article regarding teenage drinking in Vermont.

38. Cutting returned Strohmeyer's call. Strohmeyer asked Cutting about the unfair labor practice charge and about the various allegations in the charge, including the allegation that Lang had submitted false time sheets for a custodian. After talking with Strohmeyer, Cutting called Captain George and warned him that he may be receiving a call from the press. Cutting then met with BCI Sergeant Keefe and a uniformed officer in the Bethel barracks, Sergeant Jonathan Keith, to talk about the call from Strohmeyer.

39. Cutting asked Keefe and Keith if they knew who had gone to the press about the charge. They all agreed that any negative publicity regarding the Bethel barracks was going to be embarrassing. Keefe stated that it was "going to get ugly".

40. During this May 21, 1998, meeting with Cutting, Keefe and Keith discussed many of the offensive statements Barney had made in the past about co-workers and spouses of co-workers, including but not limited to her use of vulgar language, her statements about an officer's penis size, and her accusations about the sexual orientation of a trooper. Keefe and Keith stated that Barney had never done anything to improve the atmosphere in the barracks. Many of the incidents they discussed took place several years previously and none had taken place since Barney complained about inappropriate language in the barracks in June 1997. Cutting, Keefe and Keith then discussed seeing Barney, Chamberlain and Grievant whispering to each other. They surmised that either Barney, Chamberlain or Grievant had gone to Strohmeyer.

41. Despite the suggestion and implication that employees were angry that the problems of the Bethel barracks were again going public, Cutting took no proactive measures to restrain co-workers from retaliating against any of these women.

42. The next day, May 22, 1998, Cutting arrived at work early and asked Keefe to cover Chamberlain's dispatch duties while he had a closed door meeting with Chamberlain. Chamberlain had never had a closed door meeting with Cutting (State Exhibit 8).

43. Cutting asked Chamberlain if she had spoken to Strohmeyer about the issues in the office. Chamberlain told him she only had taken a message from Strohmeyer

and that she had not discussed office issues with Strohmeyer. Cutting wanted to know who had spoken to Strohmeyer about the allegations in Barney's charge. Chamberlain indicated she did not know. She told him that anything filed at the Labor Relations Board would be a public document (State Exhibit 8).

44. Cutting told Chamberlain that he had concerns over her whispering in the office with Barney and Grievant. He said it was causing mistrust among co-workers and problems in the barracks (State Exhibit 8).

45. Chamberlain, who was a VSEA member and active on a labor-management committee at the time, explained that there is no privacy in the office and she sometimes needed to talk about union related issues. Chamberlain also told Cutting that it was not just she, Barney and Grievant who whispered, as she observed many other employees doing the same thing (State Exhibit 8).

46. Cutting told Chamberlain that he did not want her to get caught up in Barney and Grievant's problems, indicating that they were troublemakers. Cutting said that the "guys are going to get together and things are going to get messy", or words to that effect. Chamberlain understood "guys" to mean the "uniform officers", as opposed to "males" (State Exhibit 8).

47. Chamberlain was upset by this meeting with Cutting, although at some point she did tell Cutting that the working conditions had improved at the Bethel barracks since he had become station commander (State Exhibit 8).

48. After this meeting, Cutting overheard Chamberlain forward a call to Grievant. He asked Chamberlain who was calling Grievant and if she knew what the call was about (State Exhibit 8).

49. Chamberlain later told Grievant about her meeting with Cutting set forth in Findings of Fact 42 - 47. Grievant suggested that Chamberlain take notes so that she would not forget what Cutting had said to her (State Exhibit 8).

50. Later that day, Cutting met with Grievant at her suggestion. Grievant confronted him about his earlier conversation with Chamberlain. Grievant told Cutting that she saw other employees whispering in the office and that he should not single out her, Barney and Chamberlain for whispering. Cutting told Grievant that he would not issue a blanket order about whispering, but would address it when he saw it.

51. Grievant confronted Cutting regarding his threat that the "guys" were going to get together; he did not respond to this.

52. Grievant also confronted Cutting about monitoring her telephone calls. He stated that he intended to continue to monitor her calls because he thought there was an issue about not returning phone calls. Grievant had never been warned there was a problem with her not returning telephone calls. The meeting did not end on a good note and Grievant left angry.

53. Prior to Strohmeyer calling Cutting, Cutting had never mentioned that he had concerns regarding Grievant, Barney or Chamberlain engaging in private conversations or whispering.

54. On this same day, there was a car fire in Granville with a dead body in it. The dispatcher informed Keefe of the incident and indicated that it was his case. Keefe called his supervisor, BCI Lieutenant Heffernan, and complained that he was swamped with work. Heffernan assigned the case to Grievant. After Grievant arrived at the scene,

both Cutting and Heffernan also arrived. It was unusual for two lieutenants to visit a scene. However, this was an unusual case.

55. Heffernan later visited the Bethel barracks and met privately with Cutting. Heffernan and Grievant then talked about the death investigation. He did not discuss Grievant's performance and did not reprimand her for whispering or for not returning telephone calls.

56. After Cutting complained about Barney, Chamberlain and Grievant whispering to each other, Grievant observed Cutting and another male officer also whispering; they stopped speaking when Grievant entered the room.

57. Sometime after May 21, Cutting asked another dispatcher in the Bethel barracks, Betty Tabor, if she had concerns regarding Barney and Chamberlain whispering. She indicated that she did. Cutting told her that she could write a memorandum to him stating her concerns, and she did so (State Exhibit 64).

58. On May 24, 1998, the *Valley News* ran a front page article written by Strohmeyer entitled " Whistleblower Complaint is Latest Blow to Bethel Barracks". The first item mentioned in the article was a "notable sex discrimination case", referring to Grievant's highly publicized private lawsuit, which Strohmeyer later discussed at length in the article. The focus of the article, however, was Barney's claim that Lang had retaliated and discriminated against her after she had complained about the inappropriate language in the Bethel barracks and after someone had turned in Lang to headquarters regarding the Doty situation (Grievant Exhibit 11).

59. Chamberlain worked from midnight until 8:00 a.m. on May 26, 1998. Cutting came into the barracks early that morning so that he could speak to her privately.

He asked Chamberlain how Grievant had known that he was monitoring her calls. Chamberlain told him that she had told her. Cutting reminded Chamberlain that he had cautioned her about getting caught up in Barney and Grievant's problems. Another officer came into the barracks during this discussion. Cutting terminated the conversation and said to Chamberlain, "if I have to shut you people off, that's what I'll do", or words to that effect. Chamberlain was very upset by Cutting's attitude. Barney came on duty and Chamberlain told her what had transpired.

60. Grievant telephoned the barracks to sign in that morning and Chamberlain also told her about her conversation with Cutting and his threat to shut off the dispatchers from the troopers. Grievant was distressed that Cutting had now confronted Chamberlain two times.

61. Grievant called Bombardier and reported Cutting's behavior. She told Bombardier that there was an unfair labor practice charge being drafted against Cutting based on gender bias and a hostile work environment. Grievant expressed concerns for her own safety, but did not provide specific examples. Bombardier understood that Grievant was filing a hostile work environment claim based on sex discrimination with him. However, he told Grievant he was going to make someone else the complainant in the sex discrimination IA investigation because of the anxiety she was feeling. Bombardier understood that he needed to follow the Employer's sexual harassment policy. He notified personnel officer Duncan Higgins.

62. Article 1, Section 3.10 (1), of the Sexual Harassment Policy of the Department of Public Safety states "The Personnel Officer will coordinate with the Commissioner to ensure that a timely and complete investigation of the complaint is

made. A report of the investigation will be provided to the Commissioner. The Commissioner will identify and take steps to promptly remedy the harassment and prevent its occurrence" (Grievant Exhibit 5).

63. Article 1 Section 3.11 (3), states, "Within five (5) working days, the Commissioner shall issue a written response to the complainant acknowledging the complaint and providing notice if applicable, that any prohibited activity is expected to cease. An investigation will be done promptly and a written response will normally take place within thirty (30) days" (Grievant Exhibit 5).

64. It is not known when Commissioner Walton received notice of Grievant's complaint. Grievant did not receive written notice acknowledging her complaint because she was not the named complainant.

65. On May 26, 1998, VSEA, Barney, Chamberlain and Grievant filed an unfair labor practice charge with the Labor Relations Board. They claimed that the Employer had committed an unfair labor practice by interfering with the administration of VSEA, by interfering with the rights of Barney, Chamberlain and Grievant to be VSEA members and active in the VSEA; by discriminating against and retaliating against Barney, Chamberlain and Grievant due to their grievance activity and the unfair labor practice charge which had been filed on April 10, 1998; and by discriminating against them and creating a hostile work environment for them on the basis of their gender. They filed a similar Step II grievance the next day, May 27, 1998.

66. On or about May 27, 1998, Cutting interrupted a meeting Grievant was having with a retired officer to deliver a telephone message from a reporter. This telephone call had nothing to do with the pending grievance and unfair labor practice

charges. Grievant felt that Cutting delivered this message in an arrogant manner and upset Grievant so much that she called Barbardier and reported this incident to him.

67. Grievant made several telephone calls to Bombardier on May 26 and May 27. Grievant made it clear to Bombardier that she wanted him to start his investigation immediately. She failed to tell him that she was leaving for a two week training session in Massachusetts. Bombardier attempted to contact Grievant on or about June 1 or 2 to set up an interview and was informed that she would be out of state for two weeks.

68. On June 7, 1998, the *Valley News* printed a second article about the unfair labor practice charge VSEA, Barney, Chamberlain and Grievant had filed. The article was entitled "3 Claim Unfair Labor Practices by State Police" (Grievant Exhibit 17).

69. It is not known who contacted the press about either the April 10, 1998, unfair labor practice charge filed by VSEA and Barney or the May 26, 1998, unfair labor practice charge filed by VSEA, Barney, Chamberlain and Grievant.

70. Tension grew in the barracks after the Step II grievance and the unfair labor practice charges were filed and after the two newspaper articles were published. Keefe called the *Valley News* and said it should not have printed the articles because they were fabricated - there was no discrimination or retaliation. Keefe thought the notification to the newspaper was a vindictive act. Keith felt that "the guys" were a lot more guarded after the newspaper articles came out. Troopers generally avoided Barney, Chamberlain and Grievant. Cutting avoided Grievant whenever possible.

71. Grievant called Lieutenant Colonel Sinclair on the telephone while she was in Massachusetts. She asked him if a therapist, Ken Kelly, could visit the Bethel

barracks to help people deal with the situation. She also told him that she feared for her safety.

72. Grievant feared that she would be shot by a trooper while she was in fire arms training which required people to be on teams; Grievant did not trust other troopers to be on her team. No trooper has ever told Grievant that he or she would kill her.

73. Grievant also feared Cutting. At some point after Strohmeyer called the office and Cutting had confronted Chamberlain and Grievant, Grievant was sitting at her desk and observed Cutting sitting in his cruiser outside her window for an extended period of time. She thought he was staring at her in an intimidating way and moved away from her desk. At times Grievant thought Cutting capable of killing her.

74. On June 19, 1998, Bombardier interviewed Grievant. She told him about the conversations between Cutting and Chamberlain and between Cutting and herself. She told him that no one in the Bethel barracks was talking to her. She also said that she was concerned for her safety. She believed she, Barney and Chamberlain were being singled out because of their gender because of Cutting's remark about the "the guys". She also told Bombardier that she thought she was being retaliated against for filing complaints because of her previous litigation with the Department. Bombardier interviewed Barney and Chamberlain approximately a week after he interviewed Grievant.

75. At least two times in June 1998, Barney called Major Vallie. She complained about the tense working conditions at the Bethel barracks and asked if he could help. Vallie asked Barney if she wanted to take time off. Barney was offended by his suggestion.

76. On or about July 6, 1998, Vallie sent a letter to the Bethel barracks in response to the issues which had "surfaced within the Bethel work site" that needed resolution. He asked that each employee "exhibit and extend a professional and courteous attitude and behavior to co-workers". Keefe judged Vallie's letter as a "meager attempt" to correct the problems in the Bethel barracks. Trooper Jocelyn Stohl thought the letter was too late in coming (State Exhibit 72)

77. On or about July 7, 1998, Keith commented in front of Barney that he wished he could take a munitions shell, put it in the car of a woman seeking a restraining order and blow up the car so that he would not have to deal with her again. Barney was distressed that an officer would make such a remark about a female victim. She called Vallie again and complained about the incident. Barney felt she could no longer endure the atmosphere in the barracks and went on extended leave.

78. During this time period, Grievant complained to her direct supervisor, BCI Lieutenant Heffernan. He said that the problem was too large and he had no power to intervene.

79. Grievant contacted Heffernan's supervisor, BCI Captain Ronald Devincenzi, in July. She complained about the atmosphere in the barracks. He asked her if she wanted to transfer. She responded that it was not her problem.

80. No one in Cutting's chain-of-command instructed Cutting not to discriminate or retaliate against Grievant after the unfair labor practice charges and grievance were filed and the barracks' problems became public.

81. At some point in late June or early July 1998, the Employer decided to hire an outside law firm to complete the IA investigation. After that point, Bombardier

had limited involvement in the matter. The Employer hired attorney Mary Desautels from the law firm of Lamb & Associates to conduct an investigation of Grievant's complaint. Grievant and VSEA objected to the Employer hiring this law firm because it had represented the employer in the last round of collective bargaining negotiations between the State and the VSEA and one of the allegations in Grievant's unfair labor practice charge and grievance was retaliation for union activities.

82. Desautels did not tell Grievant that she was conducting the IA investigation and did not follow the standard IA investigatory procedures. She did not inform Grievant that she was conducting an IA interview, did not tape record the interview and did not request that Grievant answer all questions, as was the standard practice. Grievant declined to answer some questions. It is not known what information Desautels gathered and assessed to complete her investigation.

83. Grievant and her attorney met with Desautels in late July or early August 1998. Desautels asked Grievant how she could make the Bethel barracks a better place to work. Grievant did not tell Desautels about the specific conversations which transpired in May with Cutting because she had already given this information to Bombardier. She did tell Desautels that the atmosphere in the Bethel barracks was tense, that she needed help and that people would not talk to her.

84. Grievant has rarely socialized with her co-workers. She does not eat lunch and generally does not engage in office activities. She was rude to a female officer on the officer's first day of work in the Bethel barracks by chastising her about emptying her predecessor's possessions. The officer had been given permission to empty out the desk.

Danforth also indicated to a female dispatcher/janitor that she did not want the dispatcher/janitor involved in her affairs.

85. After May 1998, Grievant's relationship with her BCI co-worker become more strained. Small talk ceased. They clashed over work related issues. She also felt ostracized by her co-workers, as she had the previous summer after turning Lang in to headquarters. She was regarded as a person who was always "making book" on people.

86. Grievant has never participated in Department softball games or tournaments. In August 1998, she was offended because she was not asked to play on the barracks softball team and another woman at the barracks, who also did not play softball, was asked to play.

87. There were tense incidents after May 1998 between Grievant and Cutting. Grievant was assigned a case while she was en route to work one morning which involved a dead body in a tree. She decided to go to the barracks first and take care of procedural matters before going to the scene. Cutting visited the scene and returned to the barracks. Grievant asked Cutting what the case was about after he returned and he told her that another officer at the scene would give her the information. Cutting felt that Grievant had taken too long in going to the scene. Grievant was not disciplined for failing to arrive at the scene in a timely manner.

88. Grievant and Cutting clashed over a case involving a death in the National Forest. Cutting told Grievant that he requested that Lieutenant Heffernan address as a performance issue the fact that Grievant had taken too long in arriving at the scene. Grievant spoke to Heffernan after this National Forest investigation; he did not tell her that he was displeased with her performance, nor did he reprimand her.

89. Sometime in the Fall 1998, a financial advisor visited the barracks to speak with employees about deferred compensation. The advisor met with Cutting and another officer in the barracks and after such meeting Cutting asked a dispatcher if she wanted to meet with the advisor. Grievant felt slighted because Cutting did not invite her to meet with the woman. The advisor was clearly visible and meeting with her did not require an invitation.

90. In November 1998, the Bethel barracks received a report of a sudden infant death ("SID") from a local hospital. Initially there was confusion over which BCI officer should be assigned to the SID's case. Cutting asked Keefe to do the investigation. Keefe called Heffernan and told him he was too busy to take the case. Heffernan assigned the case to Grievant. After this incident, only Heffernan assigned cases to Grievant or Keefe.

91. On November 19, 1998, the Labor Relations Board dismissed the unfair labor practice charge filed on April 10, 1998 by both VSEA and Barney and set forth in Finding of Fact No. 36. The Board concluded that VSEA and Barney had not set forth sufficient factual allegations to support issuing an unfair labor practice complaint on discrimination against Barney due to her VSEA membership and activities, and that there was not support for a conclusion that Barney had filed a "complaint" as that term is defined by the State Employees Labor Relations Act. VSEA and Barney v. Department of Public Safety, Bruce Lang, 21 VLRB 224 (1998).

92. On November 19, 1998, the Labor Relations Board also declined to issue an unfair labor practice complaint on the unfair labor practice charge filed by VSEA, Barney, Chamberlain and Grievant on May 26, 1998, and set forth in Finding of Fact No.

65. The Board deferred the matter to the grievance proceeding. VSEA, Barney, Chamberlain and Danforth v. Department of Public Safety, Lieutenant Glenn Cutting, 21 VBLB 230 (1998).

93. In December 1998, Grievant was offended because her name appeared last on an e-mail list. The order of names on an e-mail message has no significance.

94. On December 8, 1998, Bombardier sent a letter to Barney informing her that Commissioner Walton had preferred charges against Lang regarding the car wash matter (Grievant Exhibit 11).

95. In December 1998, Grievant complained to Captain George about Cutting impeding her investigations by withholding information from her. George discussed such complaints with Cutting and Cutting complained to George about Grievant's performance. Cutting also requested that Grievant be involuntarily transferred out of the Bethel barracks.

96. Grievant discovered in January 1999 that the IA investigation she initiated with Bombardier on or about May 22, 1998, and set forth in Finding of Fact No. 61, was completed. Although a complainant is informed of the outcome of an IA at the completion of the investigation, Grievant had not been informed because she was not the complainant. On January 28, 1999, the attorney for the Department informed Grievant's attorney that Commissioner Walton had requested and received permission from SPAC to inform Barney, Chamberlain and Grievant of the disposition of the complaint. SPAC determined that the charges were unfounded. It is unknown who was interviewed in the investigation and what facts SPAC relied on in reaching its determination (Grievant Exhibit 19).

## OPINION

Grievant contends that the Employer viola· ·cles 5 and 53 of the Contract. She contends that that Employer discriminated against her, intimidated her and retaliated against her on the basis of her gender, union membership and complaint and grievance activity; created a hostile work environment after she filed a unfair labor practice charge against the Employer; and discriminated and retaliated against her for whistleblowing activities.

As a preliminary matter, the Employer contends that the hostile work environment claim cannot be considered because the specific paragraph in the original grievance making this allegation, Paragraph 27, only alleged that former Grievants Barney and Chamberlain were subjected to a hostile work environment. The Employer contends that when Barney and Chamberlain withdrew ·' ances as it pertained to them, this specific allegation no longer was at issue in the grievance.

We disagree. Although Paragraph 27 states that "Barney and Chamberlain have been subjected to a continued and elevated hostile work environment since the filing of an unfair labor practice charge", it then lists examples of such hostile work environment and includes Grievant in such examples. Although the paragraph may have been inartfully drafted, it was clear by the examples included in the paragraph that Grievant also claimed she was subjected to a hostile work environment after filing the unfair labor practice charge. Further, we will resolve an issue on the merits if at all possible unless the Contract requires it to be dismissed on procedural grounds. Grievance of Kimble, 7 VLRB 96, 108 (1984).

Whistleblowing

We turn to the issues before us. We first examine whether Grievant was retaliated and discriminated against due to her whistleblowing activities.

In past cases, where employees claim management took action against them for engaging in protected activities such as whistleblowing, the Board has indicated that it will employ the analysis used by the U.S. Supreme Court. Once the employee has demonstrated protected conduct, she must then show the conduct was a motivating factor in the decision to take action against 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. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, 16 VLRB 70 (1993); *Affirmed,* (Unpublished Decision, 1994). The so-called Mt. Healthy analysis has been employed by the VLRB in protected activity grievance cases specifically involving whistleblowing. Grievance of Robins, 21 VLRB 12 (1998), *Affirmed*, ___ Vt. ___ (1999); Grievance of Cronin, 6 VLRB 37 (1983), *Affirmed*, (Unpublished Decision, 1987); Grievance of McCort, 16 VLRB 70 (1993), *Affirmed*, (Unpublished Decision, 1994); Grievance of McCort,. 18 VLRB 446 (1995), *Affirmed*, ___ Vt. ___ (1997); Grievance of Gadreault, 8 VLRB 87 (1985); Grievance of Choudhary, 15 VLRB 118 (1992), *Affirmed*, Unpublished Decision, 1994).

Whistleblowing is a protected activity pursuant to Article 53 of the 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 is to determine whether Grievant was involved in the protected activity of whistleblowing. We have 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. Robins, at 22. McCort at 106.

In the matter before us, there is no evidence that Grievant went outside the Department to report Lang's conduct in sending false time sheets so the custodian would be paid while she was on medical leave. Instead, in July 1997 Grievant called Lieutenant Colonel Sinclair at headquarters and informed him of the matter. Although Grievant angered Lang and her co-workers by reporting Lang to headquarters, Board and Vermont Supreme Court precedent could not have exercised whistleblowing rights at that point because she had not reported Lang's conduct outside of the Department.

Matters changed in May 1998, however, when someone informed a local reporter about Barney's unfair labor practice charge. This information technically was public the day it was filed with the Labor Relations Board; however, it was unknown to the general public and had no detrimental effect on the Employer. The reporting to the press of the charge changed that and made public Lang's alleged impropriety of the previous summer. The reporter called the barracks and questioned Lang's successor, Cutting, about the allegation. This call to Cutting set in motion events which triggered this grievance. Although it is unknown who reported Barney's unfair labor practice charge and Lang's conduct to the reporter, it generally was accepted in the Bethel barracks that it had been either Grievant, Barney or Chamberlain who had contacted the reporter.

We have never addressed the question of whether an employee who did not engage in a protected activity, but was suspected or perceived to have done so, is entitled to protections under the whistleblowing provisions of the Contract. We look to other jurisdictions for guidance.

Courts have held that protecting employees from adverse actions because they are suspected of having engaged in protected activity is consistent with anti-retaliation statutes which protect employees who actually engaged in the protected activity. Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 368 (8th Cir. 1994)(Secretary of Labor was not required to show that employer had actual knowledge that employee had engaged in activity protected by the Occupational Safety and Health Act; mere suspicion or belief was sufficient); *citing* N.L.R.B. v. Richie Mfg. Co., 354 F.2d 90, 98 (8th Cir. 1966) (fact that employer thought or believed terminated employee was a union activist and that belief was the basis for employee's discharge was sufficient to establish violation of National Labor Relations Act – need not show employer actually knew of employee's union activity); Brock v. Richardson, 812 F.2d 121, 124-25 (3d Cir. 1987) (discharge motivated by erroneous belief on part of employer that employee engaged in protected activity under the Fair labor Standards Act sufficient to trigger anti-retaliation provision of the Act); Donovan v. Peter Zimmer America, Inc., 557 F.Supp. 642, 652 (D.S.C. 1982) (discharge of three employees because employer not able to determine which of the three actually filed Occupational Safety and Health Act complaint violates anti-retaliation provision of OSH Act as to all three). See also Saffles v. Rice, 40 F.3d 1546, 1548-50 (8th Cir. 1994), (employees who are discharged due to employer's mistaken belief that they reported violations of Fair Labor Standards Act to authorities are protected under

anti-retaliation provision of FLSA), *citing* Henning and Cheadle, Inc. v. NLRB, 522 F.2d 1050, 1052 (7th Cir. 1975) (NLRA is violated if employer acts against employees in the belief that they have engaged in protected activities, whether or not they actually did so), and NLRB v. Clinton Packing Co., Inc., 468 F.2d 953, 955 (8th Cir. 1972) (employer's erroneous belief that there was a union inspired slowdown was no defense to discharge of employees).

The Court stated in Reich v. Roy Shoe:

> It is beyond question that employers make employment decisions based upon what they actually know to be true. Likewise, common sense and experience establish that employers also make employment decisions on what they suspect or believe to be true. It would be a strange rule, indeed, that would protect an employee discharged because the employer actually *knew* he or she had engaged in protected activity but would not protect an employee discharged because the employer merely *believed* or *suspected* he or she had engaged in protected activity". Id. at 368.

We are persuaded by such reasoning. Thus, we conclude that Grievant was engaged in the protected activity of whistleblowing because she was suspected of making public allegations of impropriety in May 1998 by making public allegations of State Police impropriety.

The second step in the Mt. Healthy analysis is for Grievant to show that her protected activity was a motivating factor in the adverse action taken against her. The adverse action here is the way Grievant was treated after being suspected of bringing the problems of the Bethel barracks to the attention of the press. In Sypher, 5 VLRB at 131, the Board noted the guidelines it would follow in determining whether protected activity was a motivating factor in an adverse action taken 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; whether the employer gave protected activities as a reason for the decision; 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.

We discussed the first factor at length above and concluded that the Employer had knowledge of the protected activity. The other pertinent factors here include timing and discrimination between employees engaged in protected activities and those not so engaged.

Although Grievant had annoyed many Bethel barracks employees earlier in August 1997 when she acknowledged turning Lang in to headquarters, it is clear that after the reporter for the *Valley News* called Cutting on May 21, 1998, and asked questions about Lang's conduct, Grievant's working conditions changed. Immediately after Cutting spoke with Strohmeyer, he met with Keefe and Keith and they singled out the three individuals suspected of going to the press, Grievant and the two dispatchers. He confronted dispatcher Chamberlain and warned her not to become involved in Grievant and Barney's problems and warned her, and later Grievant, not to whisper in the barracks. Prior to this time, Cutting had never warned Grievant against whispering. Cutting also started to monitor Grievant's telephone calls, ostensibly because there was a problem with her returning telephone calls. Prior to this incident, Cutting had never reprimanded Grievant for not returning telephone calls. The timing of Cutting's actions on the heels of his conversation with the *Valley News* contributes to our conclusion that the suspected whistleblowing activities of Grievant motivated these actions.

Finally, we conclude the way Cutting treated employees who were suspected of engaging in this protected conduct was different than those he did not suspect. He confronted Chamberlain about who had gone to the press. There is no evidence that Cutting confronted other employees not suspected of going to the press in the same manner as he confronted Chamberlain. He started to monitor Grievant's telephone calls. There is no evidence that Cutting monitored other employees' telephone calls. He told Barney, Chamberlain and Grievant to stop whispering. He did not tell anyone else to stop whispering, although there is evidence that whispering in the barracks was commonplace. A week later, the day after Strohmeyer's article appeared in the *Valley News*, Cutting again confronted Chamberlain and threatened to cut her and Barney off from the rest of the barracks. Cutting then solicited complaints about the two dispatchers by encouraging another dispatcher to write down any issues she had with the two women. In short, Cutting treated employees who were suspected of whistleblowing differently than those not suspected. Under all these circumstances, Grievant has demonstrated that her suspected activities making public allegations of impropriety motivated Cutting's treatment of her.

The burden now 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. The Employer has presented no legitimate reason which would justify Cutting's treatment of Grievant, after Strohmeyer called the barracks on May 21, 1998, and after her articles were printed in the local newspaper. There is no legitimate reason which would have justified Cutting's confrontations with Chamberlain, including cautioning her not to become involved in Grievant's problems. There is no legitimate reason which

would justify Cutting's avoidance of Grievant in the workplace and his complaints about her performance. While these incidents provide convincing evidence of retaliation for whistleblowing activities, at the same time we recognize many of Grievant's concerns of adverse treatment are without foundation in the evidence – i.e., concerns about her safety at fire arms training, not being invited to play softball, not being invited to meet with a financial advisor who was visiting the barracks, appearing last on an e-mail list, and believing Cutting was capable of killing her. Nonetheless, this does not change our conclusion that there were instances of adverse treatment of Grievant as detailed above and we conclude that Cutting's conduct was motivated by suspected whistleblowing activities of Grievant.

Such conduct did not stop with Cutting. There is no legitimate reason which would justify the failure of anyone in the chain-of-command to attempt to resolve obvious problems in the Bethel barracks after receiving many requests for assistance, including requests by Grievant, after May 21, 1998. The only solution the Employer apparently ever offered Grievant was an offer to transfer her to another barracks. Under the circumstances, we find such offer an insufficient response.

Obviously, there was a problem at the Bethel barracks. Grievant made several calls to the IA investigator, as well as to various superior officers, about her deteriorating situation. These calls went largely unheeded. Besides offering transfers, management's solution to Grievant's situation appeared to be twofold: 1) sending a letter to the Bethel barracks reminding all staff to act professionally and courteously to each other; and 2) hiring an outside law firm to investigate Grievant's complaint. The letter was judged by co-workers to be too late and a "meager attempt" to correct the problems in the Bethel

barracks. The hiring of an outside law firm, whose prior affiliation with the Employer was to represent it at the bargaining table, did not improve the situation. Hiring such law firm only exacerbated the situation because of its history with the Employer and because its role in the investigation of Grievant's charges was not adequately explained.

Thus, we conclude that Grievant has established that she was entitled to the protection the Contract offers for whistleblowing, her suspected protected activity was a motivating factor in the adverse action taken against her, and the employer has not provided a legitimate reason for its actions absent the suspected protected activity.

Union Activity

We now turn to Grievant's allegation that the Employer discriminated against, intimidated and retaliated against her on the basis of her union membership and complaint and grievance activity and that the Employer created a hostile work environment after she filed a unfair labor pra[illegible]

In determining whether an employer discriminated against employees for engaging in union activities, there are two types of cases. In one type, conduct inherently destructive of employee rights is involved. In the other type, the employer's conduct does not reach the level of being inherently destructive of employee rights and proof of anti-union motivation must be presented.

Grievant contends that the Employer's actions were inherently destructive of important employee rights. When the employer's discriminatory conduct is "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer intro[illegible]idence that the conduct was motivated by business considerations. In re Southwestern Vermont

Education Association v. Mt. Anthony Union High School Board of Directors, 136 Vt. 490, 494-95 (1987). The phrase "inherently destructive" is not easy to define precisely. In cases concluding that such conduct has occurred, the employer is held "to intend the very consequences which foreseeably and inescapably flow from (the) actions... because (the) conduct does speak for itself - it is discriminatory and it does discourage union membership, and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but must have intended". Vermont State Colleges Faculty Federation, Local 3180, VFT, AFT, AFL-CIO v. Vermont State Colleges, 15 VLRB 216, 226-27 (1992); *citing* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963). In examining the evidence before us, we conclude that Cutting's actions do not rise to the level of being inherently destructive of employee rights.

*In cases where conduct of the employer does not reach the level of inherently* destructive conduct, proof of anti-union motivation must be advanced by the union. The Board employs the same Mt. Healthy analysis set forth above.

The first step in the analysis is to determine whether Grievant was involved in the protected activities of union membership and filing complaints and grievance. Clearly, Grievant was involved in such protected activities. She was an active union member and has a long and public history of filing grievances and/or unfair labor practice charges against the Employer.

In applying the guidelines set forth in Sypher, supra, to determine whether these protected activities constituted a motivating factor in the employer's actions against Grievant, the pertinent factors here include knowledge, timing, interrogation and

discrimination between employees engaged in complaint and grievance activity and those not so engaged.

At the time Cutting initially singled out Grievant after May 21, 1998, Grievant was known to be an active union member. Less than a week later, on May 26 and 27, 1998, she had filed an unfair labor practice charge and Step II grievance against the Employer. As stated earlier, Grievant's work environment changed adversely after Strohmeyer's call on May 21, 1998, and continued to deteriorate after May 26, 1998. We conclude, however, that there was insufficient evidence that Cutting's actions were motivated by these protected activities of Grievant.

There was no evidence that Cutting interrogated her about her grievance or charge. There was no evidence that he attempted to interfere with her right to file additional grievances or charges. Cutting's actions, as stated earlier, were motivated by his belief that either Grievant, Barney or Chamberlain had gone to the press and reported the details of Barney's unfair labor practice charge to the *Valley News*. Although the timing was suspicious, since the adverse treatments of Grievant coincided with visible union activities and filing a grievance and an unfair labor practice charge, we believe Cutting was motivated by Grievant's suspected involvement in contacting the press rather than by union activities. Accordingly, we do not need to proceed to the third step of the Mt. Healthy analysis, requiring the Employer to show by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct.

Sex Discrimination

We turn to Grievant's claim that she was discriminated against, intimidated and retaliated against on the basis of her gender. In determining whether an employee was

discriminated against on account her gender, the Board has adopted the analysis developed by the U.S. Supreme Court, which has set forth the basic allocations of burden and order of presentation in disparate treatment cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The U.S. Supreme Court has further refined its McDonnell Douglas test by making it clear that the burden of proof remains at all times with the plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

The Board has accepted the McDonnell Douglas analysis in sex discrimination cases brought before the Board. 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). 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". Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

To establish a disparate treatment claim, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Butler, 166 Vt. at 431; *citing* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Id. The burden of establishing a prima facie case of disparate treatment is not onerous. Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330. The complainant must prove, by a preponderance of the evidence, that he or she was subject to an adverse employment action under circumstances which give rise to an inference of discrimination. Id. The Burdine 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 fac[illegible] presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 450 U.S. at 254.

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. Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53. 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. Burdine, 450 U.S. at 254. To accomplish this, the employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions. Id. at 255. The explanation provided must be legally sufficient to justify a judgment for the employer. Id.

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. Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Rogers, 11 VLRB at 126. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant. Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 125-26.

Applying these standards to this case, Grievant must prove, by a preponderance of the evidence, that she was subject to an adverse employment action under circumstances which give rise to an inference of discrimination. Grievant generally claims she was

discriminated against on account of her gender because she had raised claims of sex discrimination in the past, including a highly publicized law suit; male officers resented Barney's complaint over the use of inappropriate language in the barracks, as evidenced by the discussion on May 21, 1998, among Cutting, Keith and Keefe; there was a negative attitude about women in the barracks, as evidenced by Keith's comment regarding a female victim on July 7, 1998; and, finally, because Cutting stated that "the guys" were going to get together and things would get "messy".

Although the burden of establishing a *prima facie* case is not onerous, we conclude that Grievant has not met this burden. The evidence does not indicate that Grievant was subjected to the adverse action she experienced after May 21, 1998 under circumstances which gave rise to an inference of sex discrimination. We come to this conclusion because there is an insufficient link between the circumstances Grievant put forward to establish her sex discrimination claim and her adverse treatment.

It is true that Grievant previously had filed visible sex discrimination claims. She also experienced negative attitudes about women in the course of her employment. However, we conclude that Grievant's working conditions did not change in May 1998 because of these circumstances. We believe her working conditions changed because she was suspected of engaging in the protected activity of whistleblowing. In considering the context of Cutting's threat to Chamberlain that "the guys" were going to get together and make things "messy", we conclude that such threat was not a male vs. female statement. Such threat referred to the uniformed officers vs. whistleblowers. Cutting was angry and wanted Chamberlain to know he was not alone in his anger about the problems of the Bethel barracks again going public.

In sum, we conclude that Grievant was discriminated against because of suspected whistleblowing activities. This is a troubling case and the root cause will not be eliminated by mere technical compliance with this order. Grievant, too, was [illegible] responsible for the poor working conditions at the Bethel barracks. Many of Grievant's allegations regarding her working conditions were not found to have merit. There was no evidence to support many of the allegations which Grievant made – from such trivial matters as not being invited to play softball to such serious matters as being afraid to [illegible] life.

Management must go beyond compliance to proactive and responsible leadership – more than a memo – to co-create a harmonious environment. Grievant must adjust her behavior at least as much as management in order to expect anything other than understandably distant treatment by her colleagues. If co-workers feel that much of their conversation is going to be written in a notebook, there will be minimal interaction. Both parties have created the current milieu and both will have to be responsible and have the courage to try some new behaviors in order for there to be any real change.

## ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1) The Grievance of Gloria Danforth is DISMISSED with respect to her allegation that Article 5 of the Contract was violated;

2) The Grievance of Gloria Danforth is SUSTAINED with respect to the Vermont Department of Public Safety violating Article 53 of the Contract; and

3) The Vermont Department of Public Safety shall immediately cease and desist from discriminating and retaliating against Grievant for her suspected whistleblowing activities.

Dated this 30th day of September, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Richard W. Park

/s/ John J. Zampieri
John J. Zampieri