Discrimination Due to Union Activities and Other Protected Activities

The unfair labor practice sections of each of the applicable labor relations statutes in Vermont make it an unfair labor practice for an employer to discriminate against an employee for engaging in union activities or other protected activities.[1] In determining whether action was taken against an employee for engaging in union activities, the VLRB employs the analysis used by the U.S. Supreme Court and National Labor Relations Board in such cases. Once an employee demonstrates protected conduct, he or she must show the conduct was a substantial or 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.[2]

The U.S. Supreme Court has set forth the reason why it is not sufficient for a terminated employee to simply show protected conduct played a part in the employer's adverse action:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision – even if the same decision would have been reached had the incident not occurred.[3]

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[1] 3 V.S.A. §961(1), (3); 3 V.S.A. §1026(1), (3); 21 V.S.A. §1621(a)(1), 21 V.S.A. §1637(b)(1), (3); 21 V.S.A. §1726(a)(1), (3); 33 V.S.A. §3612(1), (3), (4).

[2] In re McCort, 162 Vt. 481, 492 (1994). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Wright Line, 251 NLRB No. 150 (1980).

[3] Mt. Healthy, 429 U.S. at 285.

The Court reasoned in the same decision that the allocation of burdens ensures that an employee is:

> placed in no worse a position than if (the employee) had not engaged in the (protected) conduct . . . But that same (employee) ought not to be able, by engaging in such conduct, to prevent (the) employer from assessing his performance record and reaching a decision to (terminate) on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[4]

A threshold issue in these cases is whether an "adverse action" actually has occurred. The Vermont Supreme Court has indicated that "adverse action" should not be limited to dismissal, suspension, reprimand, adverse evaluation, diminished responsibilities, excessive work assignments or lost compensation.[5] In one case, the Court concluded that assignment of an undesirable snow plowing route to a transportation maintenance worker constituted an adverse action.[6]

In a subsequent case, the Board concluded that an adverse action had not occurred in a school case in which a teacher had been reassigned from one school to another school. The Board held that the teacher had presented insufficient information to overrule the provision of the collective bargaining agreement stating that the employer "will use its best efforts to specify the location of a district teacher's assignment for the next school year by the end of the school year."[7]

At the heart of any employment action allegedly linked with anti-union discrimination is the question of employer motivation.[8] The Vermont Supreme Court has held that, "because of the difficulty in proving that illegal considerations figure in the employer's subjective motivation", the Court has approved the practice of

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[4] Id. at 285-86.
[5] In re Grievance of Murray, (unpublished decision, Supreme Ct. Docket No. 96-237, 1997).
[6] Id.
[7] Samler v. Burlington School District, 35 VLRB 262, 264, 272 (2019).
[8] Ohland v. Dubay, 133 Vt. 300, 302 (1975).

inferring unlawful motivation from the circumstances where no direct evidence of the employer's intent exists in the record.[9]

Among the circumstances to be considered in determining whether the protected conduct of engaging in union activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 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 such activity.[10]

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".[11] 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.[12]

A climate of coercion exists if the employer takes actions compelling employees by pressure or threats to limit their protected activities.[13] The VLRB also concluded that a climate of coercion existed in a case where management took the following actions against an employee who had prevailed in a grievance before the Board: insufficient and insubstantial assignment of duties, assignment of inadequate

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[9] Kelley v. The Day Care Center, Inc., 141 Vt. 608, 613 (1982). Grievance of McCort, 162 Vt. 481, 492-493 (1994). Grievance of Rosenberg and Vermont State Colleges Faculty Federation, 176 Vt. 641, 644 (2004).
[10] Ohland v. Dubay, 133 Vt. at 302-303. Kelley v. The Day Care Center, 141 Vt. at 613. Horn of the Moon, 12 VLRB at 126-127.
[11] Grievances of McCort, 162 Vt. 481, 494 (1994).
[12] Id.
[13] Grievance of Carbone, 16 VLRB 282, 305 (1993). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 127 (1988).

office space in the far corner of the office, and exclusion of the employee from meetings.[14]

The Board and the Vermont Supreme Court have indicated that coincidence of timing, although cause for rigorous scrutiny, is not sufficient evidence standing alone of improper motivation behind an employee discharge or other adverse action.[15] Moreover, the longer the time period between the adverse decision and the protected activity the more attenuated causation becomes. In such cases, there must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious.[16] In a recent decision, the Board cited these standards and held that the fact a teacher had a grievance pending over a five-day suspension was insufficient without supporting factual allegations to rule that the employer may have retaliated against him due to his protected grievance activities.[17]

The Board may determine in protected activity cases that there is a dual motive for the employment decision - a legitimate business reason and an illegitimate employer reaction to its employees engaging in protected activities. In dual motive cases, the Board weighs the interests of the employees in engaging in protected activities and the interests of management in protecting the efficiency of the public services it performs through its employees and strikes a balance between the competing interests.[18]

When the employer's discriminatory conduct is "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the

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[14] Grievance of Day, 16 VLRB 312, 352 (1993).
[15] Vermont Education Association v. City of Rutland School Department, 2 VLRB 186, 193 (1979). Barre City Police Officers Association, AFSCME v. City of Barre, 1 VLRB 223 (1978). Grievance of Rosenberg and Vermont State Colleges Faculty Federation, 176 Vt. 641, 644 (2004).
[16] Rosenberg, 176 Vt. at 644.
[17] Samler v. Burlington School District, 35 VLRB 262, 272-273 (2019).
[18] Carbone and VSEA v. State of Vermont, 16 VLRB 282, 311 (1993). Grievance of Roy, 6 VLRB 163, 195 (1983). Mt. Healthy, 429 U.S. at 284. Wright Line, supra.

Board can find a *prima facie* case of ant-union motivation absent proof of an anti-union animus.[19] The burden then is upon the employer to establish that the employer was motivated by legitimate objectives to avoid a conclusion that an unfair labor practice was committed.[20]

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".[21]

The VLRB found conduct "inherently destructive" of employee rights and concluded an unfair labor practice occurred when a municipal employer discharged employees engaged in a lawful strike.[22] The Board and the Vermont Supreme Court also determined that “inherently destructive” conduct existed and concluded that an unfair labor practice occurred when a school district contracted out janitorial services, thereby discharging union adherents, given a coercive climate and suspicious timing.[23] The Board found an unfair labor practice based on “inherently destructive” conduct in another case where a school district unilaterally decreased

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[19] In re Southwestern Vermont Education Association v. Mt. Anthony Union High School Board of Directors, 136 Vt. 490, 494-95 (1978); *citing* NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967) [construing §8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158, which contains identical language to 3 V.S.A. §961(3)].
[20] Id.
[21] 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).
[22] IBEW, Local 300 v. Enosburg Falls Water and Light Department, 8 VLRB 193, 210 (1985); *Affirmed,* 148 Vt. 26 (1987).
[23] In re Southwestern Vermont Education Association, 136 Vt. 490 (1978).

the daily number of hours worked by employees during the hiatus between certification of a union as bargaining representative and the execution of the first collective bargaining agreement.[24]

In another school case, the Board concluded that an unfair labor practice occurred based on inherently destructive conduct when a school district paid substitute teachers more than three times the normal substitute rate during a strike.[25] The Board also found inherently destructive conduct when a superintendent of schools: a) directed union leaders to provide him with a taped recording of a union meeting, a list of participants at the meeting, and a roll call list of the names of union members who voted on any issues relating to him; b) threatened the union leaders with personal liability based on their protected activities; and c) engaged in a dressing down of a union leader at a meeting based on the leader's protected activities.[26]

The Board concluded that inherently destructive conduct was not present when the employer awarded merit bonuses to employees not represented by the union, while no bonuses were awarded to employees represented by the union.[27] In another case, the Board determined that, while the layoff of thirteen bargaining unit employees soon after a union representation election was "within the purview of inherently destructive employer conduct", there was no unfair labor practice because the employer had proven that the sole reason for the layoffs was for economic reasons.[28] The Board concluded that the "employer had satisfied the heavy burden

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[24] Barre City Educational Support Personnel Association v. Board of School Commissioners of the City of Barre, 2 VLRB 244 (1979).
[25] Rutland Education Association v. Rutland City School District, 2 VLRB 250, 277-280 (1979).
[26] Valley Education Association, Vermont-NEA/NEA and Waterbury Elementary Teachers' Association/Vermont-NEA/NEA v. Washington West Supervisory Union Board of School Directors, et al, 18 VLRB 561 (1995).
[27] Vermont State Colleges, supra.
[28] Vermont Education Association v. City of Rutland School Department, 2 VLRB 186, 190-194 (1979).

of proving that the layoffs effected by the consolidation of elementary school library aides and secretaries were due to sound, legitimate economic reasons, and were not motivated by an intent to discriminate against or coerce" the employees due to union activities.[29]

Although protected activity unfair labor practice cases typically involve situations where the employee is represented by a union or is engaging in union organizing activities, unfair labor practice protection extends to employees engaging in concerted activities in the absence of a union. In one case, the VLRB concluded, and the Supreme Court concurred, that the discharge of a day care center employee for her leadership of the staff during a labor dispute, in the absence of a union, was an unfair labor practice and warranted the employee's reinstatement with back pay.[30] The Board concluded that employees were engaging in concerted activities at the day care center when they elected spokespersons to negotiate with management over changes in wages, hours and other working conditions.[31]

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[29] Id.
[30] Kelley v. The Day Care Center, 1 VLRB 347 (1978); *Affirmed,* 141 Vt. 608 (1982).
[31] 1 VLRB at 349-353.