Discrimination Based on Sex, Race, National Origin and Other Characteristics

The unfair labor practice sections of each of the applicable labor relations statutes make it an unfair labor practice for an employer to discriminate against an employee on account of race, color, creed, religion, disability, sex, sexual orientation, gender identity, and national origin.[1] In determining whether an employee was discriminated against on account of the prohibited factors of sex and national origin, the VLRB 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.[2] The Court has made it clear that the burden of proof remains at all times with the plaintiff.[3]

The Vermont Labor Relations Board has accepted this analysis in sex discrimination cases brought before the Board.[4] 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".[5] The Board has held that this analysis also is applicable to discrimination based on race, national origin and age.[6]

To establish a disparate treatment claim, “it is the plaintiff’s task to demonstrate that similarly situated employees were not treated equally.”[7] In

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[1] 3 V.S.A. §961(6), 3 V.S.A. §1026(6), 21 V.S.A. §1621(a)(7), 21 V.S.A. §1637(b)(6), 21 V.S.A. §1726(a)(7), 21 V.S.A. §1637(b)(6), 33 V.S.A. §3612((b)(6).
[2] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[3] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
[4] Grievance of McIsaac, 26 VLRB 24 (2003). Grievance of Butler, 17 VLRB 247 (1994); *Affirmed*, 166 Vt. 423 (1997). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Smith, 12 VLRB 44 (1983). Grievance of Rogers, 11 VLRB 101 (1988).
[5] Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).
[6] Grievances of Choudhary, 15 VLRB 118 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994). Grievance of Day, 14 VLRB 229, 286 (1991). Gamez v. Brandon Training School, 12 VLRB 160 (1989).
[7] Butler, 166 Vt. at 431; *citing* Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

comparing employment discipline decisions, “precise equivalence in culpability between employees” is not required.[8] Rather, the plaintiff must show that the employees were engaged in misconduct of “comparable seriousness.”[9] “The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.”[10]

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination.[11]

A. “Pretext” Analysis

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is a pretext for the real reason of discrimination.[12] The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision.[13] In pretext cases, the analysis used is that which is set forth in U.S. Supreme Court cases.[14]

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination.[15] The burden of establishing a *prima facie* case of disparate treatment is not onerous.[16] The complainant must prove by a preponderance of the evidence that he or she was

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[8] Butler, 166 Vt. at 431; *citing* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976).
[9] Id.
[10] Butler, 166 Vt. at 431, *citing* Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989).
[11] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[12] Id.
[13] Id.
[14] Burdine, supra. Lowell, 15 VLRB at 329.
[15] Id.
[16] Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330.

subject to an adverse employment action under circumstances that give rise to an inference of discrimination.[17] The U.S. Supreme Court stated:

> As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[18]

A *prima facie* case of discrimination when employment hiring or termination is involved consists of proving that: 1) the employee belongs to a protected class, 2) he or she was qualified for the position, 3) despite such qualifications he or she was rejected, and 4) after the rejection, a party not part of the protected class was hired or retained for the position.[19] The burden of demonstrating that an employee is qualified for a position is limited to showing that she or he possesses the basic skills for such a position.[20]

In cases where there is an allegation of sex discrimination regarding compensation, a female employee may establish a *prima facie* case of discrimination by proving that she is paid less than a male employee for work requiring substantially equal levels of skill, effort and responsibility.[21]

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[17] Id.
[18] Burdine, 450 U.S. at 254.
[19] McDonnell Douglas Corp., 411 U.S. at 802. Carino v. University of Oklahoma Board of Regents, 750 F.2d at 818. Day, 14 VLRB at 288. Smith, 12 VLRB at 53.
[20] Grievances of Choudhary, 15 VLRB 118, 158 (1992).
[21] Grievance of Lowell, 15 VLRB at 330. Grievance of United Academics, AAUP/AFT (Re: Clinical Assistant Professors of Nursing), 31 VLRB 88, 118-124 (2010).

However, claims for sex-based wage discrimination also can be brought even though no member of the opposite sex holds an equal but higher paying job.[22] The complainant must present evidence creating an inference that the wage disparity, if otherwise unexplained, is more likely than not based on intentional sex discrimination.[23] Discriminatory intent will not be inferred merely from the existence of wage differentials between jobs that are only similar.[24] However, the comparability of jobs can be relevant to determining whether discriminatory animus can be inferred. The comparability of the involved positions is considered, along with other evidence of discriminatory animus to determine whether an inference of discriminatory motive can be supported.[25]

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.[26] 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.[27] To accomplish this, the employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions.[28] The explanation provided must be legally sufficient to justify a judgment for the employer.[29] This second step serves to respond to the employee's *prima facie* case as well as "to frame the factual issue

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[22] Grievance of United Academics, 31 VLRB at 117, 124-125.
[23] Id. at 126.
[24] Id.
[25] Id. at 126-127.
[26] Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53.
[27] Burdine, 450 U.S. at 254.
[28] Id. at 255.
[29] Id.

with specific clarity so that the (employee) will have a full and fair opportunity to demonstrate pretext."[30]

The employer must produce admissible evidence that would allow the court or the board rationally to conclude that the employer's actions were not motivated by discriminatory animus.[31] The determination whether the employer has met the burden of production involves no credibility assessment.[32] If the employer fails to meet its burden of production, then the employee prevails on his or her claim of discrimination as a matter of law.[33]

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.[34] The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant.[35] A complainant may succeed in this burden of persuasion either directly by establishing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.[36]

In determining whether the employer's explanation was pretextual, the trier of fact may consider the evidence, and inferences properly drawn therefrom, previously introduced by the complainant to establish a prima facie case.[37] Disbelief of the reasons put forward by the employer (particularly if disbelief is accompanied by a

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[30] Robertson v. Mylan Laboratories, Inc., 176 Vt. 356, 367 (2004); *citing* Burdine, 450 U.S. at 255-256.
[31] Burdine, 450 U.S. at 257.
[32] St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).
[33] Id. Grievance of Day, 16 VLRB 312, 344 (1993).
[34] Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Rogers, 11 VLRB at 126.
[35] Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 125-26.
[36] Burdine, 450 U.S. at 256. Lowell, 15 VLRB at 336.
[37] Burdine, 450 U.S. at 255, n.10. Lowell, 15 VLRB at 336-37.

suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.[38]

B. "Mixed Motive" Analysis

In a "mixed motive" case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives.[39] Once an employee shows that a prohibited factor, such as race, national origin or sex, played a motivating or substantial part in an employment decision, the burden shifts to the employer to prove that the same decision would have been made if the prohibited factor had not played such a role.[40]

Direct evidence or circumstantial evidence may be used to show that one of the employer's motives was improper in "mixed motive" cases.[41] Direct evidence is evidence that, if believed, proves the existence of the fact in issue without inference or presumption.[42]

C. Sexual Harassment

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

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[38] Hicks, supra. Day, 16 VLRB at 345.
[39] Price Waterhouse, 490 U.S. at 244-249. Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261,294 -295 (1995)
[40] Id. Grievance of McCort, slip op. at 11-15 (Vt. Supreme Court, Docket No. 93-237, 1994).
[41] Id.
[42] VSCFF (Re: Yu Chuen Wei), 18 VLRB at 295.

A hostile work environment exists when conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[43] This occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult" that "are sufficiently severe or pervasive to alter the conditions of the victim's employment".[44]

This standard requires an objectively hostile or abusive environment - one that a reasonable person would find hostile or abusive - as well as the victim's subjective perception that the environment is abusive.[45] The determination whether an environment is "hostile" or "abusive" can be made only by looking at all the circumstances.[46] "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[47]

If a worker is subjected to unwelcome sexual advances, such harassment is actionable even though no tangible job benefit is implicated, such as termination, demotion or loss of promotion in retaliation for refusing to submit to the unwelcome advances.[48] The predicate acts underlying a sexual harassment claim need not take the form of sexual advances or of other incidents of clearly sexual overtones to be

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

actionable.[49] To demonstrate a hostile environment the conduct need not be of an explicitly sexual nature so long as it is directed against women because of their sex.[50] Any harassment of an employee that would not have occurred but for the sex of the employee may, if sufficiently patterned or pervasive, constitute actionable sexual harassment.[51]

Intimidation and hostility toward women because they are women obviously can result from conduct other than explicit sexual advances.[52] For example, the pervasive use of derogatory and insulting comments relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.[53] Similarly, so may the posting or display of any sexually oriented materials in common areas that tend to denigrate or depict women as sexual objects serve as evidence of a hostile environment.[54] Derogatory comments about a woman do not have to be made in the woman's presence to constitute evidence of an atmosphere of on-the-job harassment.[55]

The VLRB has indicated that, in addition to establishing being subjected to a hostile employment environment, an employee must establish that the conduct that created the hostile situation should be imputed to the employer based upon agency principles.[56] The Board concluded that, to hold the employer liable where the hostile environment is created by a supervisor, the employee must prove that the supervisor uses actual or apparent authority to further the harassment.[57] In situations where a

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[49] Butler, 17 VLRB at 315; *citing* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990); Hall, 842 F.2d at 1014; McKinney v. Dole, 765 F.2d 1129, 1138-39.
[50] Butler, 166 Vt. at 429.
[51] Butler, 17 VLRB at 315; *citing* McKinney, 765 F.2d at 1138.
[52] Butler, 17 VLRB at 315-16; *citing* Hall, 842 F.2d at 1014.
[53] Butler, 17 VLRB at 316; *citing* Andrews, 895 F.2d at 1485.
[54] Butler, 166 Vt. at 430.
[55] Id.
[56] Butler, 17 VLRB at 316; *citing* Meritor Savings Bank, 477 U.S. at 70-71.
[57] Butler, 17 VLRB at 316; *citing* Karibian v. Columbia University, 14 F.3d 773, 780 (1994).

supervisor does not rely on supervisory authority to carry out the harassment, such as when co-workers carry out the harassment, the VLRB indicated the employer will be held liable if the employer provided no reasonable avenue for complaint, or the employer knew or should have known of the harassment and failed to take prompt remedial action.[58]

D. Pregnancy Discrimination

The VLRB has not ruled in an unfair labor practice case whether discrimination against an employee due to a pregnancy constitutes sex discrimination. However, the Vermont Supreme Court has held that pregnancy discrimination qualifies as sex discrimination under the Vermont Fair Employment Practices Act if employers treat workers who request accommodation for pregnancy disability differently from workers requesting accommodation for other disabilities.[59]

E. Disability Discrimination

The VLRB has not been called on to examine in unfair labor practice cases whether employees have been discriminated against based on disabilities. However, the Vermont Supreme Court has developed precedents on cases arising under the Vermont Fair Employment Practices Act ("VFEPA"), which is patterned after federal anti-discrimination laws. These precedents may inform any handling of unfair labor practice cases which arise alleging discrimination against an employee based on a disability.

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[58] Id. Andrews, 895 F.2d at 1486.
[59] Lavalley v. E.B. & A.C. Whiting Co., 166 Vt. 205, 210-212 (1997). Woolaver v. State of Vermont, 175 Vt. 397, 411 (2003).

The first issue under VFEPA is whether the employee is an individual with a disability and thus within the protection of VFEPA's provisions prohibiting an employer from discriminating against a qualified individual with a disability.[60] An individual with a disability is a person who "has a physical or mental impairment which substantially limits one or more major life activities, has a history or record of such an impairment; or is regarded as having such an impairment."[61] "An individual with a disability who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited."[62]

To make a successful discrimination claim, an employee must show not only that he or she was individual with a disability, but that she or he was a qualified individual with a disability entitled to the protection of VFEPA.[63] A "qualified individual with a disability" is a person "capable of performing the essential functions of the job . . . with reasonable accommodation to (the) disability."[64] Determining whether an employee has a valid discrimination claim requires two distinct determinations: what constitutes the essential functions of the job and what constitutes reasonable accommodation.[65]

Employees have the initial burden on the issue of reasonable accommodation.[66] The employee need not raise all possible accommodations or prove that a particular accommodation is reasonable; they merely need to produce evidence that a reasonable accommodation is possible.[67] Once an employee has made out a *prima facie* case, the burden shifts to the employer to show that no

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[60] Hodgdon v. Mt. Mansfield Co., 160 Vt. 150 (1992).
[61] 21 V.S.A. §495d(5)(A), (B), (C).
[62] 21 V.S.A. §495d(8)
[63] State v. G.S. Blodgett Co., 163 Vt. 175, 181 (1995).
[64] 21 V.S.A. §495d(6).
[65] State v. G.S. Blodgett Co., 163 Vt. at 181.
[66] Id.
[67] Id.

reasonable accommodation is possible. Ultimately, the employer must prove an inability to accommodate because the accommodations would substantially alter the nature of the job or would be unduly burdensome.[68] An accommodation is unreasonable if it would necessitate modification or elimination of the essential nature of the job.[69]

The essential functions of a job are those that are legitimate and necessary to accomplish the goals of the position. The work an employee actually performs may be persuasive in establishing the necessity of a particular task. The focus should be on the requirements of the job at the time accommodation is requested.[70]

In one case, before the wording of the statute was changed protecting individuals with a "disability" rather than "handicapped" individuals, the Vermont Supreme Court addressed a case brought by an individual who maintained that she had a physical impairment that did not substantially limit her major life activities but that her employer treated her as though she had such a limitation.[71] The Court indicated that the intent of including persons regarded as handicapped within the protection of the Act was to prohibit discrimination based on a physical impairment where that impairment only affects major life activities as a result of attitudes of others toward the impairment.[72] In holding that the individual was a handicapped individual, the Court stated:

> (W)hen an employer makes an employment decision based on its belief that an employee with a visible physical impairment is not fit to work in a position involving any customer contact, then the employer has treated the impairment as substantially limiting the employee's ability to work. In such circumstances, the employee is a handicapped individual under FEPA. The employee must still show that she is a "(q)ualified handicapped individual . .

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[68] Id. at 181-182.
[69] Id. at 183
[70] Id. at 182.
[71] Hodgdon v. Mt. Mansfield Co., 160 Vt. at 164-166.
[72] Id.

> . capable of performing the essential functions of the job." . . . (T)he employer may still show that a particular physical condition is a bona fide occupational qualification for the particular job.[73]

The Vermont Supreme Court has considered whether an employee's disability claim under VFEPA was preempted by federal labor law in a case where the employer contended that resolution of the employee's VFEPA claim was substantially dependent upon analysis of the terms of an applicable collective bargaining agreement concerning seniority rights of employees in assignments to particular shifts.[74] The Court recognized that the collective bargaining agreement would have to be consulted in determining whether reasonable accommodation could be made to the employee's disability, but determined that the employer's position that an employee lost her rights under FEPA because she was covered under a collective bargaining agreement contradicted the strong public policy supporting state anti-discrimination laws.[75]

The Court indicated that the following quotation from the U.S. Supreme Court's *Lingle* decision applied to the case before it:

> As a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby preempted.[76]

The Court concluded that, although the collective bargaining agreement may be relevant to whether the employee could be reasonably accommodated, the meaning of the agreement was not central to the employee's claim. The Court held

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[73] Id. at 168.
[74] Potvin v. Champlain Cable Corp., 165 Vt. 504, 512 (1996).
[75] Id. at 512-513.
[76] Potvin, 165 Vt. at 514; *citing* 486 U.S. 399, 413 n.12 (1989).

that "(t)he tangential involvement of the collective bargaining agreement in this case is not sufficient to preempt" the employee's discrimination claim under VFEPA.[77]

[77] Potvin, 165 Vt. at 515.