2012 BASIC SKILLS IN VERMONT PRACTICE & PROCEDURE

Workers’ Compensation & Employment Law

August 23 & 24, 2012
Windjammer Conference Center
South Burlington, VT

Faculty:
Stephen D. Ellis, Esq.
Robert D. Mabey, Esq.
Stephen D. Ellis. Mr. Ellis graduated from Hampshire College with a concentration in philosophy and political theory. He received his J.D. in 1986 from Rutgers University School of Law, where he was Editor of the Rutgers Law Review and President of the International Law Society. He practiced at a large firm in Philadelphia, PA before moving to Vermont in 1994 and joining the firm that was the predecessor to Ellis Boxer & Blake. His practice includes workers' compensation defense, intellectual property, contracts, commercial and employment law, general civil litigation and insurance law and defense. He is an active and experienced trial and appellate advocate and is frequently engaged to serve as an arbitrator, mediator or neutral evaluator. He is a frequent speaker and has authored numerous publications on employment law, advocacy, and legal ethics. He currently serves as chair of the Vermont Bar Association Employment Law Section. He is the former Chair of the VBA's Bench/Bar Committee.

Robert D. Mabey. Mr. Mabey graduated from Moravian College in Bethlehem, Pennsylvania where he earned a Bachelor of Arts in History. He attended New England School of Law and earned a Juris Doctor, cum laude. He served as Executive Case and Note Editor of the New England Journal of Civil and Criminal Confinement in his third year, was a two time recipient of the New England Scholar Award for academic achievement and was also named to the dean's list for all three academic years. Prior to joining Ellis Boxer & Blake, Mr. Mabey was an associate attorney with a large Boston firm where he practiced in the general insurance defense litigation group. Mr. Mabey also worked in the title insurance litigation and real estate conveyance department of another Massachusetts law firm after graduating from law school. Mr. Mabey's practice focuses on insurance defense litigation, including liquor liability and premises liability matters, personal injury and business disputes and workers' compensation claims. He also advises clients on a variety of complex real estate transactions and represents businesses and individuals in property and land use litigation matters.
**CONTENTS:**

Part I: Key Statutory Provisions ........................................ 4
  - Aliens ........................................................................... 5
  - Comfort .......................................................................... 6
  - Department of Labor ...................................................... 7
  - Discrimination/ Harassment ............................................ 8
  - Drug Testing ................................................................. 13
  - Employment Practices ................................................... 16
  - Employer Defined .......................................................... 18
  - Leave ............................................................................... 21
  - Medical Information ....................................................... 23
  - Minimum Wage/ Overtime ............................................... 24
  - Minors ............................................................................ 26
  - Polygraph Testing .......................................................... 29
  - Records ........................................................................... 31
  - References ...................................................................... 32
  - Safety ............................................................................. 34
  - Wages/ Payment .............................................................. 37
  - Whistleblower Protection ............................................... 41

Part II: Key Cases ................................................................. 45

Part III: Workers’ Compensation ............................................ 140
PART I: KEY STATUTORY PROVISIONS

Most of the statutory provisions governing employment and labor law in Vermont are contained in Title 21 of the Vermont Statutes. The entire contents of Title 21 are as follows:

Chapter 1. COMMISSIONER OF LABOR (§§ 1-6)
Chapter 3. SAFETY (§§ 101-109 - 269)
Chapter 4. ACCESSIBILITY STANDARDS FOR PUBLIC BUILDINGS AND PARKING (§§ 271-277 - 286)
Chapter 5. EMPLOYMENT PRACTICES (§§ 301 - 561)
Chapter 7. MEDIATION AND ARBITRATION (§§ 501-513a)
Chapter 8. LABOR MEDIATION AND ARBITRATION (§§ 521-526 - 551-554)
Chapter 9. EMPLOYER'S LIABILITY AND WORKERS' COMPENSATION (§§ 601 - 711)
Chapter 11. COMPENSATION FOR OCCUPATIONAL DISEASES (§§ 1001-1023)
Chapter 12. EMPLOYEE LEASING COMPANIES (§§ 1031 - 1043)
Chapter 13. APPRENTICESHIP (§§ 1101 - 1105)
Chapter 14. YOUTH IN AGRICULTURE, NATURAL RESOURCES, AND FOOD PRODUCTION (§§ 1151 - 1153)
Chapter 15. VERMONT EMPLOYMENT SERVICE (§§ 1201 - 1206)
Chapter 16. DISPLACED HOMEMAKERS (§§ 1231 - 1233)
Chapter 16A. DOMESTIC AND SEXUAL VIOLENCE SURVIVORS' TRANSITIONAL EMPLOYMENT PROGRAM (§§ 1251 - 1255)
Chapter 17. UNEMPLOYMENT COMPENSATION (§§ 1301 - 1471)
Chapter 19. VERMONT STATE LABOR RELATIONS ACT (§§ 1501 - 1623)
Chapter 21. COLLECTIVE BARGAINING IN CERTAIN PUBLIC EMPLOYMENT (§§ 1701-1710)
Chapter 22. VERMONT MUNICIPAL LABOR RELATIONS ACT (§§ 1721 - 1735)
Chapter 24. DEATH BENEFITS (§§ 2001)
Chapter 25. EMPLOYERS' HEALTH CARE FUND CONTRIBUTION (§§ 2001 - 2004)

This program will focus on four of the 25 Chapters contained in Title 21: Chapters 1, 3, 5 and 9. A selection of provisions from these statutes are set forth below, organized alphabetically by topic.
ALIENS

§ 444a. Employment of aliens

(a) For the purposes of this section:

(1) "Alien" means any person not a citizen of the United States;

(2) "Employer" means any person, including any partnership, firm, corporation or association, or any agent thereof, who engages or utilizes the personal services of one or more individuals for a salary or wage;

(3) "Illegal alien" means any person not a citizen of the United States who has entered the United States in violation of the Federal Immigration and Naturalization Act or regulations issued thereunder, who has legally entered but without the right to be employed in the country, or who has legally entered subject to a time limit but has remained illegally after expiration of such time limit.

(b) No employer or agent for an employer shall knowingly recruit, solicit or refer for employment, or employ, an illegal alien.

(c) No employer shall knowingly employ any alien unless the employer determines that the alien possesses the required certificate under the Federal Immigration and Naturalization Act or regulations issued thereunder, or has authorization from the immigration services.

(d) A person convicted of violating this section shall be fined not less than $100.00 or more than $300.00 for conviction of a first offense. For any subsequent offense, a person convicted of violating this section shall be fined not less than $300.00, nor more than $750.00.
COMFORT

§ 304. Employment conditions

An employer shall provide an employee with reasonable opportunities during work periods to eat and to use toilet facilities in order to protect the health and hygiene of the employee.

§ 305. Nursing mothers in the workplace

(a) For an employee who is a nursing mother, the employer shall for three years after the birth of a child:

(1) provide reasonable time, either compensated or uncompensated, throughout the day to express breast milk for her nursing child. The decision to provide compensated time shall be in the sole discretion of the employer, unless modified by a collective bargaining agreement; and

(2) make a reasonable accommodation to provide appropriate private space that is not a bathroom stall.

(b) An employer may be exempted from the provisions of subsection (a) of this section if providing time or an appropriate private space for expressing breast milk would substantially disrupt the employer's operations.

(c) An employer shall not retaliate or discriminate against an employee who exercises the right provided under this section.

(d) In lieu of an enforcement action through the Vermont Judicial Bureau, the attorney general or a state's attorney may enforce the provisions of this section by bringing a civil action for temporary or permanent injunctive relief, economic damages, including prospective lost wages for a period not to exceed one year, investigative and court costs. The attorney general or a state's attorney may conduct an investigation of an alleged violation and enter into a settlement agreement with the employer. Such investigation shall not be a prerequisite to bringing a court action.
DEPARTMENT OF LABOR

Title 21, Chapter 1. COMMISSIONER OF LABOR (§§ 1 - 6)

§ 1. Department created; commissioner, appointment
  § 1a. Reports
  § 2. Cooperation with United States
  § 3. Repealed
  § 4. Duties as to employment and payment of wages
  § 5. Repealed
  § 6. Duty when United States at war

§ 1. Department created; commissioner, appointment

(a) The department of labor is hereby created to administer the laws relating to labor in chapter 1, subchapters 4 and 5 of chapter 3, and chapters 5, 9, and 12 through 17 of this title and other laws assigned to the department for administration. There shall be within the department the apprenticeship council and other boards, councils, and committees specially assigned to the department.

(b) Biennially, with the advice and consent of the senate, the governor shall appoint a commissioner of labor.
§ 495. Unlawful employment practice

(a) It shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, place of birth, age, or physical or mental condition:

(1) For any employer, employment agency, or labor organization to discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, or age or against a qualified disabled individual;

(2) For any person seeking employees or for any employment agency or labor organization to cause to be printed, published, or circulated any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination based upon race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, age, or disability;

(3) For any employment agency to fail or refuse to classify properly or refer for employment or to otherwise discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, or age or against a qualified disabled individual;
(4) For any labor organization, because of race, color, religion ancestry, national origin, sex, sexual orientation, gender identity, place of birth, or age to discriminate against any individual or against a qualified disabled individual or to limit, segregate or qualify its membership;

(5) For any employer, employment agency, or labor organization to discharge or in any other manner discriminate against any employee because such employee has lodged a complaint of discriminatory acts or practices or has cooperated with the attorney general or a state's attorney in an investigation of such practices, or is about to lodge a complaint or cooperate in an investigation, or because such employer believes that such employee may lodge a complaint or cooperate with the attorney general or state's attorney in an investigation of discriminatory acts or practices;

(6) For any employer, employment agency, labor organization or person seeking employees to discriminate against, indicate a preference or limitation, refuse properly to classify or refer, or to limit or segregate membership, on the basis of a person's having a positive test result from an HIV-related blood test;

(7) For any employer, employment agency, labor organization or person seeking employees to request or require an applicant, prospective employee, employee, prospective member, or member to have an HIV-related blood test as a condition of employment or membership, classification, placement, or referral;

(8) For any employer, employment agency, labor organization, or person seeking employees to discriminate between employees on the basis of sex by paying wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility, and is performed under similar working conditions. An employer who is paying wages in violation of this section shall not reduce the wage rate of any other employee in order to comply with this subsection.

(A) An employer may pay different wage rates under this subsection when the differential wages are made pursuant to:

(i) A seniority system.

(ii) A merit system.

(iii) A system in which earnings are based on quantity or quality of production.

(iv) Any factor other than sex.

(B) No employer may do any of the following:
(i) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.

(ii) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.

(iii) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.

(b) The provisions of this section shall not be construed to limit the rights of employers to discharge employees for good cause shown.

(c) The provisions of this section prohibiting discrimination on the basis of age shall apply for the benefit of persons 18 years of age or older.

(d)(1) An employee shall not have a cause of action in negligence for any injury occurring to the employee on the account of an employer complying with subdivisions (a)(6) and (7) of this section.

(2) A person shall not have a cause of action in negligence for any injury occurring to the person on the account of an employer complying with subdivisions (a)(6) and (7) of this section.

(e) The provisions of this section prohibiting discrimination on the basis of sexual orientation and gender identity shall not be construed to prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained.

(f) The provisions of this section prohibiting discrimination on the basis of sexual orientation or gender identity shall not be construed to change the definition of family or dependent in an employee benefit plan.

(g) Notwithstanding any provision of this subchapter, an employer shall not be prohibited from establishing and enforcing reasonable workplace policies to address matters related to employees’ gender identity, including permitting an employer to establish a reasonable dress code for the workplace.

§ 495b. Penalties and enforcement

(a) The attorney general or a state's attorney may enforce the provisions of this subchapter by restraining prohibited acts, seeking civil penalties, obtaining assurances of discontinuance and
conducting civil investigations in accordance with the procedures established in sections 2458 - 2461 of Title 9 as though an unlawful employment practice were an unfair act in commerce. Any employer, employment agency or labor organization complained against shall have the same rights and remedies as specified therein. The superior courts are authorized to impose the same civil penalties and investigation costs and to order other relief to the state of Vermont or an aggrieved employee for violations of this subchapter as they are authorized to impose or order under the provisions of sections 2458 and 2461 of Title 9 in an unfair act in commerce. In addition, the superior courts may order restitution of wages or other benefits on behalf of an employee and may order reinstatement and other appropriate relief on behalf of an employee.

(b) Any person aggrieved by a violation of the provisions of this subchapter may bring an action in superior court seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney's fees and other appropriate relief.

§ 495h. Sexual harassment

(a) All employers, employment agencies and labor organizations have an obligation to ensure a workplace free of sexual harassment.

(b) Every employer shall:

(1) Adopt a policy against sexual harassment which shall include:

(A) a statement that sexual harassment in the workplace is unlawful;

(B) a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of sexual harassment;

(C) a description and examples of sexual harassment;

(D) a statement of the range of consequences for employees who commit sexual harassment;

(E) if the employer has more than five employees, a description of the process for filing internal complaints about sexual harassment and the names, addresses, and telephone numbers of the person or persons to whom complaints should be made; and

(F) the complaint process of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact such agencies.

(2) Post in a prominent and accessible location in the workplace, a poster providing, at a minimum, the elements of the employer's sexual harassment policy required by subdivision (1) of this subsection.
(3) Provide to all employees an individual written copy of the employer’s policy against sexual harassment.

(c) Employers shall provide individual copies of their written policies to current employees no later than November 1, 1993, and to new employees upon their being hired. Employers who have provided individual written notice to all employees within the 12 months prior to October 1, 1993, shall be exempt from having to provide an additional notice during the 1993 calendar year.

(d) The commissioner of labor shall prepare and provide to employers subject to this section a model policy and a model poster, which may be used by employers for the purposes of this section.

(e) A claim that an individual did not receive the information required to be provided by this section shall not, in and of itself, result in the automatic liability of any employer to any current or former employee or applicant in any action alleging sexual harassment. An employer’s compliance with the notice requirements of this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

(f) Employers and labor organizations are encouraged to conduct an education and training program within one year after September 30, 1993 for all current employees and members, and for all new employees and members thereafter within one year of commencement of employment, that includes at a minimum all the information outlined in this section. Employers are encouraged to conduct additional training for current supervisory and managerial employees and members within one year of September 30, 1993, and for new supervisory and managerial employees and members within one year of commencement of employment or membership, which should include at a minimum the information outlined in subsection (b) of this section and the specific responsibilities of supervisory and managerial employees and the methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints. Employers, labor organizations and appropriate state agencies are encouraged to cooperate in making this training available.
DRUG TESTING

§ 511. Definitions
§ 512. Drug testing of applicants; prohibitions; exceptions
§ 513. Drug testing of employees; prohibitions; exceptions
§ 514. Administration of tests
§ 515. Positive test results; opportunity to retest
§ 516. Confidentiality
§ 517. Employer's authority
§ 518. Designated laboratory; rule making authority of the commissioner
§ 519. Enforcement
§ 520. Transitory provisions

§ 512. Drug testing of applicants; prohibitions; exceptions

(a) General prohibition. Except as provided in subsection (b) of this section, an employer or an employment agency shall not, as a condition of employment, do any of the following:

(1) Request or require that an applicant for employment take or submit to a drug test.

(2) Administer or attempt to administer a drug test to an applicant for employment.

(3) Request or require that an applicant for employment consent, directly or indirectly, to a practice prohibited under this subchapter.

(b) Exception. An employer may require an applicant for employment to submit to a drug test only if all of the following conditions are met:

(1) Conditional offer of employment. The applicant has been given an offer of employment conditioned on the applicant receiving a negative test result.

(2) Notice. The applicant received written notice of the drug testing procedure and a list of the drugs to be tested. The notice shall also state that therapeutic levels of medically-prescribed drugs tested will not be reported. The notice required under this subdivision may not be waived by the applicant.

§ 513. Drug testing of employees; prohibitions; exceptions

(a) General prohibition. Except as provided in subsection (c) of this section, an employer shall not, as a condition of employment, promotion or change of status of employment, or as an expressed or implied condition of a benefit or privilege of employment, do any of the following:

(1) Request or require that an employee take or submit to a drug test.
(2) Administer or attempt to administer a drug test to an employee.

(3) Request or require that an employee consent, directly or indirectly, to a practice prohibited under this subchapter.

(b) Random or company-wide tests. An employer shall not request, require or conduct random or company-wide drug tests except when such testing is required by federal law or regulation.

(c) Exception. Notwithstanding the prohibition in subsection (a) of this section, an employer may require an individual employee to submit to a drug test if all the following conditions are met:

(1) Probable cause. The employer or an agent of the employer has probable cause to believe the employee is using or is under the influence of a drug on the job.

(2) Employee assistance program. The employer has available for the employee tested a bona fide rehabilitation program for alcohol or drug abuse and such program is provided by the employer or is available to the extent provided by a policy of health insurance or under contract by a nonprofit hospital service corporation.

(3) Employee may not be terminated. The employee may not be terminated if the test result is positive and the employee agrees to participate in and then successfully completes the employee assistance program; however, the employee may be suspended only for the period of time necessary to complete the program, but in no event longer than three months. The employee may be terminated if, after completion of an employee assistance program, the employer subsequently administers a drug test in compliance with subdivisions (1) and (4) of this subsection and the test result is positive.

(4) Administration of test. The drug test is administered in accordance with section 514 of this title.

§ 519. Enforcement

(a) Private right of action. An applicant or employee aggrieved by a violation of this subchapter may bring a civil action for injunctive relief, damages, court costs and attorney's fees.

(b) Burden of proof. In a private right of action alleging that an employer has violated this subchapter, the employer has the burden of proving that the requirements of sections 513, 514 and 516 of this title have been satisfied. In any civil action alleging that a laboratory has violated the reporting or confidentiality sections of this subchapter, the laboratory shall have the burden of proving that the requirements of sections 514 and 516 of this title have been satisfied.

(c) State action to obtain civil penalty. A person who violates any provision of this subchapter shall be subject to a civil penalty of not less than $500.00 nor more than $2,000.00.
(d) State action to obtain criminal penalty. A person who knowingly violates any provision of this subchapter shall be fined not less than $500.00 nor more than $1,000.00 or shall be imprisoned not more than six months, or both.
EMPLOYMENT PRACTICES

Title 21, Chapter 5. EMPLOYMENT PRACTICES (§§ 301 - 561)

§ 301. Medical examination, expense
§ 302. Definitions
§ 303. Penalty; judicial bureau
§ 304. Employment conditions
§ 305. Nursing mothers in the workplace
§ 306. Public policy of the state of Vermont; employment separation agreements
§ 307. Repealed
§ 308. Employers of individuals who work with minors or vulnerable adults; job reference information from former employers; limitation from liability
§ 341. Definitions
§ 342. Weekly payment of wages
§ 342a. Investigation of complaints of unpaid wages
§ 342b. Repealed
§ 343. Form of payment
§ 344. Assignment of future wages
§ 345. Penalty for nonpayment of wages
§ 345a. Failure of any employer to provide benefits for employees
§ 346. Repealed
§ 347. Forfeiture
§ 381. Declaration of policy
§ 382. Coverage
§ 383. Definitions
§ 384. Employment; wages
§ 385. Administration
§ 386. Investigations
§ 387-389. Repealed
§ 390. Repealed
§ 390a. Repealed
§ 391. Modification of wage orders
§ 392. Court proceedings
§ 393. Employers' records
§ 394. Penalties
§ 395. Civil actions
§ 396. Appeals from commissioner's decisions
§ 430. Policy; definitions; rules
§ 431. Age limit; certificate as to eligibility of child under 16
§ 432. Restrictions
§ 433. Repealed
§ 434. Employment of children under 16
§ 435. Examination and report
§ 436. Employment of children under 14 years
§ 437. Employment of children; special restrictions; hours for children under 16 years
§ 438. Exceptions
§ 439. Repealed
§ 440. Repealed
§ 441. Repealed
§ 442. Posting notices of hours of labor
§ 443. Repealed
§ 444. Repealed
§ 444a. Employment of aliens
§ 445. Repealed
§ 446. Duties of commissioner as to employment of children
§ 447. Repealed
§ 448. Duty of person having control of child
§ 449. General penalty
§ 450. Repealed
§ 451. Complaints
§ 452. Suspension of subchapter
§ 453. Sale of goods made in violation of subchapter
§ 470. Purpose
§ 471. Definitions
§ 472. Leave
§ 472a. Short-term family leave
§ 472b. Town meeting leave; employees; students
§ 473. Retaliation prohibited
§ 474. Enforcement
§ 491. Absence on military service and training; employment and reemployment rights
§ 492. Rights and benefits
§ 493. Enforcement
§ 494. Definitions
§ 494a. Polygraph testing as condition of employment
§ 494b. Employers permitted to require polygraph examinations
§ 494c. Duties of examiner
§ 494d. Employee rights in related proceedings
§ 494e. Penalties
§ 495. Unlawful employment practice
§ 495a. Persons entering into contracts with this state
§ 495b. Penalties and enforcement
§ 495c. Application
§ 495d. Definitions
§ 495e. Restitution
§ 495f. Exemptions
§ 495g. Provision applicable to college professors
§ 495h. Sexual harassment
§ 496. Legislative leave
§ 497. Purpose
§ 497a. Committee established
§ 497b. Duties
§ 497c. Disability awareness month
§ 497d. Powers
§ 497e. Funds; revenue; use
§ 498. Repealed
§ 499. Jurors and witnesses
§ 501. Definitions
§ 502. Duties
§ 503. Vending machines
§ 504. Income from vending facilities and machines
§ 505. Vending facilities; operation by other than blind or visually impaired person
§ 506. Exemptions
§ 507. Whistleblower protection; health care employees; prohibitions; notice
§ 508. Enforcement
§ 509. Notice
§ 511. Definitions
§ 512. Drug testing of applicants; prohibitions; exceptions
§ 513. Drug testing of employees; prohibitions; exceptions
§ 514. Administration of tests
§ 515. Positive test results; opportunity to retest
§ 516. Confidentiality
§ 517. Employer's authority
§ 518. Designated laboratory; rule making authority of the commissioner
§ 519. Enforcement
§ 520. Transitory provisions
§ 561. Health coverage status discrimination prohibited
EMPLOYER DEFINED

§ 302. Definitions

For the purposes of this subchapter:

(1) "Employer" means any individual, organization, or governmental body, including any partnership, association, trustee, estate, corporation, joint stock company, insurance company, or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, and any common carrier by mail, motor, water, air, or express company doing business in or operating within this state, and any agent of the employer, that has one or more individuals performing services for it within this state.

(2) "Employee" means every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to perform services.

§ 341. Definitions

(a) "Employee" as used in this chapter means a person who has entered into the employment of an employer, where the employer is unable to show that:

(1) the individual has been and will continue to be free from control or direction over the performance of such services, both under the contract of service and in fact; and

(2) the service is either outside all the usual course of business for which such service is performed, or outside all the places of business of the enterprise for which such service is performed; and

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business.

(b) "Employer" as used in sections 342 - 345 of this title means any person having employees in his or her service.

§ 2002. Definitions

For the purposes of this chapter:

(1) "Employee" means an individual over the age of majority employed full-time or part-time by an employer to perform services in this state.
(2) "Employer" means a person who is required under subchapter 4 of chapter 151 of Title 32 to withhold income taxes from payments of income with respect to services, but shall not include the government of the United States.

(3) "Full-time equivalent" or "FTE" means the number of employees expressed as the number of employee hours worked during a calendar quarter divided by 520. "Full-time equivalent" shall not include any employee hours attributable to a seasonal employee or part-time employee of an employer who offers health care coverage to all of its regular full-time employees, provided that the seasonal employee or part-time employee has health care coverage under either a private or any public plan except VHAP or Medicaid.

(4) "Seasonal employee" means an employee who:

(A) works for an employer for 20 weeks or fewer in a calendar year; and

(B) works in a job scheduled to last 20 weeks or fewer.

(5) "Uncovered employee" means:

(A) an employee of an employer who does not offer to pay any part of the cost of health care coverage for its employees;

(B) an employee who is not eligible for health care coverage offered by an employer to any other employees; or

(C) an employee who is offered and is eligible for coverage by the employer but elects not to accept the coverage and has no other health care coverage under either a private or public plan.

(6) "Part-time employee" shall mean an employee who works for an employer for fewer than 30 hours a week.
LEAVE

§ 470. Purpose
§ 471. Definitions
§ 472. Leave
§ 472a. Short-term family leave
§ 472b. Town meeting leave; employees; students
§ 473. Retaliation prohibited
§ 474. Enforcement
§ 491. Absence on military service and training; employment and reemployment rights
§ 492. Rights and benefits
§ 493. Enforcement
§ 494. Definitions

§ 470. Purpose

(a) Strong families are the foundation for a productive and competitive state. There are a growing number of single-parent families where the sole parent works and two-parent families where both parents work. Most people who work while raising families do so out of economic necessity.

(b) Leave from employment for the birth or adoption of a child or to care for a seriously ill family member addresses one of the important needs of changing family structures. The support of families is a principle recognized and valued by the state of Vermont. When employees have security about their employment and the well-being of their children, parents and other family members, businesses benefit economically from increased worker productivity and stability.

(c) The provisions of this subchapter are enacted in recognition of the fact that both employers and employees benefit from the establishment of parental and family leave as a condition of employment.

§ 473. Retaliation prohibited

An employer shall not discharge or in any other manner retaliate against an employee because:

(1) the employee lodged a complaint of a violation of a provision of this subchapter; or

(2) the employee has cooperated with the attorney general or a state's attorney in an investigation of a violation of a provision of this subchapter; or

(3) the employer believes that the employee may lodge a complaint or cooperate in an investigation of a violation of a provision of this subchapter.
§ 474. Enforcement

(a) The attorney general or a state's attorney may enforce the provisions of this subchapter by bringing a civil action for temporary or permanent injunctive relief, economic damages, including prospective lost wages for a period not to exceed one year, and court costs. The attorney general or a state's attorney may conduct an investigation to obtain voluntary conciliation of an alleged violation. Such investigation shall not be a prerequisite to the bringing of a court action.

(b) As an alternative to subsection (a) of this section, an employee entitled to leave under this subchapter who is aggrieved by a violation of a provision of this subchapter may bring a civil action for temporary or permanent injunctive relief, economic damages, including prospective lost wages for a period not to exceed one year, attorney fees and court costs.

(c) An employer may bring a civil action to recover compensation paid to the employee during leave, except payments made for accrued sick leave or vacation leave, and court costs to enforce the provisions of subsection 472(h) of this title.
§ 301. Medical examination, expense

It shall be unlawful for any employer, as defined in section 302 of this title, to require any employee or applicant for employment to pay the cost of a medical examination as a condition of employment.

§ 561. Health coverage status discrimination prohibited

(a) For the purposes of this section:

(1) "Employee" shall have the same meaning as in section 2002 of this title.

(2) "Employer" shall have the same meaning as in section 2002 of this title.

(b)(1) No employer or employment agency or agent of either shall inquire about the health coverage status of a job applicant or in any way discriminate among applicants or employees on the basis of health coverage status.

(2) Nothing in this section shall prevent:

(A) an employer, employment agency, or agent from informing an applicant about the employer's health coverage benefits; or

(B) an employer from inquiring about the health coverage status of an employee to enable the employer to determine the number of uncovered employees pursuant to chapter 25 of this title, provided that the inquiry conforms to the employer obligations in chapter 25 of this title.

(c) Any person aggrieved by a violation of the provisions of this subchapter may bring an action in superior court seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney's fees, and other appropriate relief.
MINIMUM WAGE/ OVERTIME

§ 384. Employment; wages

(a) An employer shall not employ an employee at a rate of less than $7.25, and, beginning January 1, 2007, and on each subsequent January 1, the minimum wage rate shall be increased by five percent or the percentage increase of the Consumer Price Index, CPI-U, U.S. city average, not seasonally adjusted, or successor index, as calculated by the U.S. Department of Labor or successor agency for the 12 months preceding the previous September 1, whichever is smaller, but in no event shall the minimum wage be decreased. The minimum wage shall be rounded off to the nearest $0.01. An employer in the hotel, motel, tourist place, and restaurant industry shall not employ a service or tipped employee at a basic wage rate less than $3.65 an hour, and beginning January 1, 2008, and on each January 1 thereafter, this basic tip wage rate shall be increased at the same percentage rate as the minimum wage rate. For the purposes of this subsection, "a service or tipped employee" means an employee of a hotel, motel, tourist place, or restaurant who customarily and regularly receives more than $120.00 per month in tips for direct and personal customer service. If the minimum wage rate established by the United States government is greater than the rate established for Vermont for any year, the minimum wage rate for that year shall be the rate established by the United States government.

(b) Notwithstanding subsection (a) of this section, an employer shall not pay an employee less than one and one-half times the regular wage rate for any work done by the employee in excess of 40 hours during a workweek. However, this subsection shall not apply to:

(1) Employees of any retail or service establishment. A "retail or service establishment" means an establishment 75 percent of whose annual volume of sales of goods or services, or of both, is not for resale and is recognized as retail sales or services in the particular industry.

(2) Employees of an establishment which is an amusement or recreational establishment, if:

(A) it does not operate for more than seven months in any calendar year; or

(B) during the preceding calendar year its average receipts for any six months of that year were not more than one-third of its average receipts for the other six months of the year.

(3) Employees of an establishment which is a hotel, motel, or restaurant.

(4) Employees of hospitals, public health centers, nursing homes, maternity homes, therapeutic community residences, and residential care homes as those terms are defined in Title 18, provided:

(A) the employer pays the employee on a biweekly basis; and
(B) the employer files an election to be governed by this section with the commissioner; and

(C) the employee receives not less than one and one-half times the regular wage rate for any work done by the employee:

(i) in excess of eight hours for any workday; or

(ii) in excess of 80 hours for any biweekly period.

(5) Those employees of a business engaged in the transportation of persons or property to whom the overtime provisions of the Federal Fair Labor Standards Act do not apply, but shall apply to all other employees of such businesses.

(6) Those employees of a political subdivision of this state.

(7) State employees who are covered by the U.S. Federal Fair Labor Standards Act.

(c) However, an employer may deduct from the rates required in subsections (a) and (b) of this section the amounts for board, lodging, apparel, rent, or utilities paid or furnished or other items or services or such other conditions or circumstances as may be usual in a particular employer-employee relationship, including gratuities as determined by the wage order made under this subchapter.

§ 394. Penalties

(a) Any employer, subject to this subchapter or any regulations or orders issued thereunder, or any of the employer’s agents or the officer or agent of any corporation who pays or permits to be paid or agrees to pay to any employee engaged in any industry or occupation less than the applicable rate to which the employee is entitled under this subchapter, shall be fined not more than $100.00 for each day the employee is paid less than the rate required under this subchapter.

(b) Any employer or any of the employer’s agents or the officer or agent of any corporation, who fails to keep the records required under this subchapter, or refuses to permit the commissioner to enter the place of business, or who fails to furnish the records to the commissioner upon demand, shall be fined not more than $100.00.

§ 395. Civil actions

If any employee is paid by an employer less than the applicable wage rate to which the employee is entitled under this subchapter, the employee shall recover, in a civil action, twice the amount of the minimum wage less any amount actually paid by the employer, together with costs and reasonable attorney fees, and any agreement between an employer and an employee to work for less than the wage rates is no defense to the action.
MINORS

§ 430. Policy; definitions; rules

(a) It is the policy of Vermont that children shall be protected from employment in harmful and dangerous occupations. Toward this end, Vermont law should reflect federal protections regarding the employment of children, but should continue to provide additional protection for children in Vermont where particular circumstances warrant greater protection for children.

(b) For the purposes of this subchapter:

(1) "Child" or "children" means an individual under the age of 18 years.

(2) "Commissioner" means the commissioner of labor or the commissioner's designee.

(3) "Employee" means any individual suffered or permitted to work by an employer.

(4) "Illegal child employment" means the employment of any child under the age of 18 in any work or occupation specifically prohibited by state or federal law. "Illegal child employment" does not include work performed by students as part of an educational program, provided this subchapter or federal law specifically permits this work.

(c) The commissioner shall adopt rules to carry out the purpose and intent of this subchapter, provided the rules are consistent with federal child labor laws and rules. However, the commissioner shall not be required to adopt or modify rules in order to conform with a change in federal child labor laws or regulations which weakens or eliminates an existing child labor protection policy.

§ 453. Sale of goods made in violation of subchapter

No person, partnership, corporation or association shall knowingly sell, offer or expose for sale, take orders for the future delivery of, or possess with intent to sell any article, product or compound in the production, manufacture or distribution of which children have been employed in violation of the provisions of this subchapter, or in a manner or under conditions that would be in violation of these provisions if the employment had occurred in this state. Any complaint alleging a violation of this section shall be filed with the commissioner, who shall investigate, and if the commissioner determines there is sufficient evidence to substantiate the allegations, shall transmit the complaint to the attorney general or to the state's attorney of the county in which the violation is alleged to have occurred. A person who violates a provision of this section shall be fined not more than $10,000.00.

§ 431. Age limit; certificate as to eligibility of child under 16

§ 432. Restrictions
§ 433. Repealed
§ 434. Employment of children under 16
§ 435. Examination and report
§ 436. Employment of children under 14 years
§ 437. Employment of children; special restrictions; hours for children under 16 years
§ 438. Exceptions
§ 439. Repealed
§ 440. Repealed
§ 441. Repealed
§ 442. Posting notices of hours of labor
§ 446. Duties of commissioner as to employment of children
§ 447. Repealed
§ 448. Duty of person having control of child
§ 449. General penalty
§ 450. Repealed
§ 451. Complaints
POLYGRAPH TESTING

§ 494. Definitions
§ 494a. Polygraph testing as condition of employment
§ 494b. Employers permitted to require polygraph examinations
§ 494c. Duties of examiner
§ 494d. Employee rights in related proceedings
§ 494e. Penalties

§ 494a. Polygraph testing as condition of employment

(a) Except as provided in section 494b of this title an employer or an employment agency shall not as a condition of employment, promotion, or change in status of employment, or as an express or implied condition of a benefit or privilege of employment, do any of the following:

(1) request or require that an employee or applicant for employment take or submit to a polygraph examination; or

(2) administer, cause to be administered, threaten to administer, or attempt to administer a polygraph examination to an employee or applicant for employment; or

(3) request or require that an employee or applicant for employment give an express or implied waiver of a practice prohibited under this subchapter.

(b) An employer shall not refuse to hire, promote, or change the status of employment of an applicant for employment because the applicant refuses or declines a polygraph examination.

§ 494b. Employers permitted to require polygraph examinations

The following employers may require that an applicant for employment take or submit to a polygraph examination, or administer or cause to be administered, a polygraph examination to an applicant for employment:

(1) the department of public safety; the department of motor vehicles, for applicants for law enforcement positions; the department of fish and wildlife, for applicants for law enforcement positions; the department of liquor control and the liquor control board, for applicants for investigator positions; municipal police departments and county sheriffs, as to sworn police officers and deputy sheriffs;

(2) any employer whose primary business is the wholesale or retail sale of precious metals or gems and jewelry or items made from precious metals or gems;
(3) any employer whose business includes the manufacture or the wholesale or retail sale of regulated drugs as defined in section 4201 of Title 18; provided, however, that only employees who come in contact with such regulated drugs may be required to take a polygraph examination;

(4) any employer authorized or required under federal law or regulations to administer polygraph examinations.
§ 393. Employers' records

Every employer, subject to the provisions of this subchapter or of any regulation or order issued thereunder, shall keep a true and accurate record of the hours worked by each employee and of the wages paid to him or her and shall furnish to the commissioner upon demand a sworn statement of the same. Such records shall be open to inspection by the commissioner, his or her deputy or any authorized agent of the department at any reasonable time. Every employer subject to the provisions of this subchapter or of any regulation or order issued under the provisions thereof shall keep a copy of them posted in a conspicuous place in the area where employees are employed. The commissioner shall furnish copies of such orders and regulations to employers without charge.
REFERENCES

§ 306. Public policy of the state of Vermont; employment separation agreements

In support of the state's fundamental interest in protecting the safety of minors and vulnerable adults, as defined in 33 V.S.A. § 6902, it is the policy of the state of Vermont that no confidential employment separation agreement shall inhibit the disclosure to prospective employers of factual information about a prospective employee's background that would lead a reasonable person to conclude that the prospective employee has engaged in conduct jeopardizing the safety of a minor or vulnerable adult. Any provision in an agreement entered into on or after the effective date of this section that attempts to do so is void and unenforceable.

§ 308. Employers of individuals who work with minors or vulnerable adults; job reference information from former employers; limitation from liability

(a) As used in this section:

(1) "Job performance" means:

(A) The suitability of the employee for employment;

(B) The employee's work-related duties, skills, abilities, attitude, effort, knowledge, and habits as they may relate to suitability for future employment;

(C) In the case of a former employee, the reason for the employee's separation; and

(D) Any illegal or wrongful act committed by the employee.

(2) "Prospective employer" means a person or organization who employs or contracts with one or more individuals whose duties may place that individual in a position of power, authority, or supervision over a minor or vulnerable adult, or whose duties are likely to permit regular and unsupervised contact with a minor or vulnerable adult, on either a paid or volunteer basis.

(3) "Vulnerable adult" shall have the same meaning as in 13 V.S.A. § 1375(8).

(b)(1) An employer who in good faith provides information about a current or former employee's job performance to a prospective employer of the current or former employee upon request of the prospective employer or the current or former employee shall not be subject to liability for such
disclosure. An employer who provides the information in writing to a prospective employer shall provide a copy of the writing to the employee.

(2) The limitation on liability set forth in this subsection shall not apply if the employee shows, by a preponderance of the evidence, that the current or former employer:

(A) disclosed information which was false and which the employer providing the information knew or reasonably should have known was false;

(B) knowingly disclosed materially misleading information; or

(C) disclosed information in violation of the law.
SAFETY

Chapter 3. SAFETY (§§ 101-109 - 269)
§ 101-109. Repealed
§ 111-124. Repealed
§ 141. Purpose; definitions
§ 142. Conveyances regulated
§ 143. License required
§ 144. Elevator safety review board; members; duties
§ 145. Elevator mechanic license and lift mechanic license
§ 146. Elevator inspector license
§ 147. Examination not required
§ 148. Issuance and renewal of licenses; fees
§ 149. Civil penalties; suspension; revocation of license
§ 150. Registration of conveyances
§ 151. Permits
§ 152. New installations; annual inspections and registrations
§ 153. Insurance requirements; license
§ 154. Enforcement
§ 155. Liability
§ 156. Penalty
§ 157. Elevator safety fund; creation
§ 191, 192. Repealed
§ 201. Occupational policy
§ 202. General purpose
§ 203. Definitions
§ 204. Rules and procedure
§ 205. Variances
§ 206. Inspections and investigations
§ 207. Trade secrets
§ 208. Imminent danger
§ 209. Appeals
§ 210. Penalties
§ 221. State plan and cooperation
§ 222. Application
§ 223. Duties
§ 224. Rules and standards
§ 225. Citations
§ 226. Enforcement
§ 227. Judicial review
§ 228. Reports
§ 229. Repealed
§ 230. Occupational safety and health review board
§ 201. Occupational policy

(a) It is the policy of the state of Vermont that in their employment all persons shall be provided by their employers with safe and healthful working conditions at their work place, and that insofar as practicable no employee shall suffer diminished health, functional capacity or life expectancy as a result of his or her work experience.

(b) It is also the policy of the state that practices and procedures prescribed by an employer for performance of work or duties by his or her employees shall not be insofar as practicable, dangerous to the life, body or well being of the employees.

(c) It is the legislative intent that:

(1) The provisions of the Occupational Safety and Health Act of 1970, as enacted by the Congress of the United States of America, which may be administered by a state agency, shall be administered and enforced in this state, by the state.

(2) To effectuate the policy of the state, standards promulgated under the Occupational Safety and Health Act of 1970, enacted by Congress, and as amended at any time, when applicable to employment in the state of Vermont, shall be prescribed in rules made under this subchapter; and

(3) The state of Vermont shall cooperate with the appropriate federal agencies in carrying out the purposes of the Occupational Safety and Health Act of 1970 and the VOSHA Code of the state.

§ 231. Employee rights

(a) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself, herself, or others of any right afforded by this chapter.
(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of this section may, within 30 days after such violation occurs, file a complaint with the commissioner alleging such discrimination. Upon receipt of such complaint, the commissioner shall cause such investigation to be made as he or she deems appropriate. If upon such investigation, the commissioner determines that the provisions of this section have been violated, he or she shall bring an action in any appropriate state court against such person. In any such action, the state courts shall have jurisdiction, for cause shown to restrain violations of subsection (a) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.

(c) Within 90 days of the receipt of a complaint filed under this section, the commissioner shall notify the complainant of his or her determination under subsection (b) of this section.

§ 232. Private right of action

An employee aggrieved by a violation of section 231 of this title may bring an action in superior court for appropriate relief, including but not limited to reinstatement, triple wages, damages, costs and reasonable attorney's fees. Such an action may be brought in addition to or in lieu of an action under section 231 of this title.
WAGES; PAYMENT

§ 342. Weekly payment of wages

(a)(1) Any person having employees doing and transacting business within the state shall pay each week, in lawful money or checks, the wages earned by each employee to a day not more than six days prior to the date of such payment.

(2) After giving written notice to the employees, any person having employees doing and transacting business within the state may, notwithstanding subdivision (1) of this subsection, pay bi-weekly or semi-monthly in lawful money or checks, each employee the wages earned by the employee to a day not more than six days prior to the date of the payment. If a collective bargaining agreement so provides, the payment may be made to a day not more than 13 days prior to the date of payment.

(b) An employee who:

(1) Voluntarily leaves employment shall be paid on the last regular pay day, or if there is no regular pay day, on the following Friday.

(2) Is discharged from employment shall be paid within 72 hours of discharge.

(3) Is absent from his or her regular place of employment on the employer's regular scheduled date of wages or salary payment shall be entitled to payment upon demand.

(c) With the written authorization of an employee, an employer may pay wages due the employee by any of the following methods:

(1) Deposit through electronic funds transfer or other direct deposit systems to a checking, savings, or other deposit account maintained by or for the employee in any financial institution within or without the state.

(2) Credit to a payroll card account directly or indirectly established by an employer in a federally insured depository institution to which electronic fund transfers of the employee's wages, salary, or other employee compensation is made on a recurring basis, other than a checking, savings, or other deposit account described in subdivision (1) of this subsection, provided all the following:

(A) The employer provides the employee written disclosure in plain language, in at least 10-point type of both the following:
(i) All the employee's wage payment options.

(ii) The terms and conditions of the payroll card account option, including a complete list of all known fees that may be deducted from the employee's payroll card account by the employer or the card issuer and whether third parties may assess fees in addition to the fees assessed by the employer or issuer.

(B) Copies of the written disclosures required by subdivisions (A) and (F) of this subdivision (c)(2) and by subsection (d) of this section shall be provided to the employee in the employee's primary language or in a language the employee understands.

(C) The employee voluntarily consents in writing to payment of wages by payroll card account after receiving the disclosures described in subdivision (A) of this subdivision (c)(2), and this consent is not a condition of hire or continued employment.

(D) The employer ensures that the payroll card account provides that during each pay period, the employee has at least three free withdrawals from the payroll card, one of which permits withdrawal of the full amount of the balance at a federally insured depository institution or other location convenient to the place of employment.

(E) None of the employer's costs associated with the payroll card account are passed on to the employee, and the employer shall not receive any financial remuneration for using the pay card at the employee's expense.

(F)(i) At least 21 days before any change takes effect, the employer provides the employee with written notice in plain language, in at least 10 point type, of the following:

(I) any change to any of the terms and conditions of the payroll card account, including any changes in the itemized list of fees;

(II) the employee's right to discontinue receipt of wages by a payroll card account at any time and without penalty.

(ii) The employer may not charge the employee any additional fees until the employer has notified the employee in writing of the changes.

(G) The employer provides the employee the option to discontinue receipt of wages by a payroll card account at any time and without penalty to the employee.

(H) The payroll card issued to the employee shall be a branded-type payroll card that complies with both the following:

(i) Can be used at a PIN-based or a signature-based outlet.
(ii) The payroll card agreement prevents withdrawals in excess of the account balance and to the extent possible protects against the account being overdrawn.

(I) The employer ensures that the payroll card account provides one free replacement payroll card per year at no cost to the employee before the card's expiration date. A replacement card need not be provided if the card has been inactive for a period of at least 12 months or the employee is no longer employed by the employer.

(J) A nonbranded payroll card may be issued for temporary purposes and shall be valid for no more than 60 days.

(K) The payroll card account shall not be linked to any form of credit, including a loan against future pay or a cash advance on future pay.

(L) The employer shall not charge the employee an initiation, loading, or other participatory fee to receive wages payable in an electronic fund transfer to a payroll card account, with the exception of the cost required to replace a lost, stolen, or damaged payroll card.

(M) The employer shall ensure that the payroll card account provides to the employee, upon the employee's written or oral request, one free written transaction history each month which includes all deposits, withdrawals, deductions, or charges by any entity from or to the employee's payroll card account for the preceding 60 days. The employer shall also ensure that the account allows the employee to elect to receive the monthly transaction history by electronic mail.

(d)(1) If a payroll card account is established with a financial institution as an account that is individually owned by the employee, the employer's obligations and the protections afforded under subsection (c) of this section shall cease 30 days after the employer-employee relationship ends and the employee has been paid his or her final wages.

(2) Upon the termination of the relationship between the employer and the employee who owns the individual payroll card account:

(A) the employer shall notify the financial institution of any changes in the relationship between the employer and employee; and

(B) the financial institution holding the individually owned payroll card account shall provide the employee with a written statement in plain language describing a full list of the fees and obligations the employee might incur by continuing a relationship with the financial institution.

(e) The department of banking, insurance, securities, and health care administration may adopt rules to implement subsection (c) of this section.

§ 345. Penalty for nonpayment of wages
Each employer who violates sections 342 and 343 of this title and the officers of any corporation, cooperative or stock association, who fraudulently permit their corporation, or cooperative association to violate these sections, shall be fined not more than $500.00 or imprisoned not more than one year or both. Upon conviction, the court shall make an order requiring the payment of wages due and not paid.

§ 345a. Failure of any employer to provide benefits for employees

In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to a written agreement to provide benefits or wage supplements, and who fails to pay the amount required by the agreement:

(1) shall be liable to the employee for actual damages caused by the failure to pay; and

(2) where the failure to pay is fraudulently made and continues for 30 days after such payments are required to be made, shall be fined not more than $500.00 or imprisoned not more than one year, or both. Where the employer is a corporation, the president and other officers who have control of funds of the corporation shall be considered employers for the purposes of this section. The court, in passing sentence, shall make an order requiring the employer to pay over to the employee the benefits or wage supplements to which he or she is entitled.
WHISTLEBLOWER PROTECTION

§ 507. Whistleblower protection; health care employees; prohibitions; hearing; notice

(a) For the purposes of this subchapter:

(1) The "American Nurses Credentialing Center (ANCC)" means the national organization that developed the Magnet Recognition Program. The Magnet Recognition Program recognizes excellence in nursing services and is based on quality indicators and standards of nursing practice as defined in the American Nurses Association's Scope and Standards for Nurse Administrators. The ANCC has the authority to designate "Magnet" status to hospitals that have demonstrated their current and ongoing commitment to excellence in nursing practice.

(2) "Employee" means any person who performs services for wages or other remuneration under the control and direction of any public or private employer.

(3) "Employer" means:

(A) a hospital as defined in subdivision 1902(1) of Title 18; or

(B) a nursing home as defined in subdivision 7102(7) of Title 33.

(4) "Improper quality of patient care" means any practice, procedure, action, or failure to act of an employee or employer that violates any provisions of the Nurse Practice Act, codes of ethics, hospital policies, or any other established standards of care related to public or patient health or safety.

(5) "Law" means any law, rule or regulation duly enacted or adopted by this state, a political subdivision of this state, or the United States.

(6) "Public body" means:

(A) the United States Congress, any state legislature or any popularly elected local government body, or any member or employee thereof;

(B) any federal, state, or local judiciary, or any member or employee thereof, or any jury;

(C) any federal, state, or local regulatory, administrative, or public agency or authority, or instrumentality thereof;

(D) any federal, state, or local law enforcement agency, prosecutorial office, or police or peace officer; or
(E) any division, board, bureau, office, committee, or commission of any of the public bodies described in this subdivision.

(7) "Retaliatory action" means discharge, threat, suspension, demotion, denial of promotion, discrimination, or other adverse employment action regarding the employee's compensation, terms, conditions, location, or privileges of employment.

(8) "Supervisor" means any person who has the authority to direct and control the work performance of an employee.

(b) No employer shall take retaliatory action against any employee because the employee does any of the following:

(1) Discloses or threatens to disclose to any person or entity any activity, policy, practice, procedure, action, or failure to act of the employer or agent of the employer that the employee reasonably believes is a violation of any law or that the employee reasonably believes constitutes improper quality of patient care.

(2) Provides information to, or testifies before, any public body conducting an investigation, a hearing, or an inquiry that involves allegations that the employer has violated any law or has engaged in behavior constituting improper quality of patient care.

(3) Objects to or refuses to participate in any activity, policy, or practice of the employer or agent that the employee reasonably believes is in violation of a law or constitutes improper quality of patient care.

(c) Subdivisions (b)(1) and (3) of this section shall not apply unless an employee first reports the alleged violation of law or improper quality of patient care to the employer, supervisor, or other person designated by the employer to address reports by employees of improper quality of patient care, and the employer has had a reasonable opportunity to address the violation. The employer shall address the violation under its compliance plan, if one exists. The employee shall not be required to make a report under this subsection if the employee reasonably believes that doing so would be futile because making the report would not result in appropriate action to address the violation.

(d) Nothing in this subchapter shall be deemed to diminish the rights, privileges, or remedies of any employee under any law or under any collective bargaining agreement or employment contract.

§ 508. Enforcement

(a) An employee aggrieved by a violation of this subdivision may:
(1) utilize any available internal process, grievance procedure, or similar process available to the employee to maintain or restore any loss of employment rights with the employer; or

(2) bring an action in the superior court of the county in which the violation is alleged to have occurred.

(b) The initiation or completion of an internal process, grievance procedure, or similar process under subdivision (a)(1) of this section shall not be a condition precedent to bringing an action in superior court under subdivision (a)(2) of this section.

(c) No later than July 1, 2005, all hospitals as defined in subdivision 1902(1) of Title 18 shall revise their internal processes referred to in subdivision (a)(1) to include and be consistent with ANCC Magnet Recognition Program standards that support the improvement of quality patient care and professional nursing practice.

(d) If the court finds that the employer has violated subsection 507(b) of this title, the court shall order, as appropriate:

(1) reinstatement of the employee, including employment benefits, seniority, and same or equivalent position, shift schedule, or hours worked as the employee had before the retaliatory action;

(2) payment of back pay, lost wages, benefits, and other remuneration;

(3) any appropriate injunctive relief;

(4) compensatory damages;

(5) punitive damages;

(6) attorney fees; or

(7) any other appropriate relief.

§ 509. Notice

(a) No later than December 1, 2004, the commissioner of labor shall develop and distribute to each employer a standard notice as provided in this section. Each notice shall be in clear and understandable language and shall include:

(1) a summary of this subchapter;
(2) that an employee, in order to receive the protections of this subchapter, must report, pursuant to subsection 507(c) of this title, to the employer, to the supervisor, or to the person designated to receive notifications; and

(3) a space for the name, title, and contact information of the person to whom the employee must make a report under subsection 507(c) of this title.

(b) No later than January 1, 2005, each employer shall post the notice in the employer's place of business to inform the employees of their protections and obligations under this subchapter. The employer shall post the notice in a prominent and accessible location in the workplace. The employer shall indicate on the notice the name or title of the individual the employer has designated to receive notifications pursuant to subsection 507(c) of this title.

(c) An employer who violates this section by not posting the notice as required is liable for a civil fine of $100.00 for each day of willful violation.
EMPLOYMENT LAW

PART II

KEY CASES
LoPresti v. Rutland Regional Health Services, Inc., 2004 VT 1102


JOHNSON, J.

¶ 1. Plaintiff, Dr. Leigh LoPresti, appeals from the superior court's summary judgment in favor of defendant, Rutland Regional Physician Group, Inc. (Physician Group), his former employer. Dr. LoPresti claims that he was fired for his refusal to refer his patients to certain other Physician Group doctors whom he believed provided substandard and unnecessary care to his patients. Dr. LoPresti claims that by firing him for this reason Physician Group violated the implied covenant of good faith and fair dealing. Alternatively, he seeks damages under a promissory estoppel theory. Physician Group argued, and the trial court agreed, that the written employment contract allowed for termination “with or without cause” after 180-day notice, the reasons for firing were immaterial as a matter of law. The court granted summary judgment on all counts. We affirm the court's judgment on the implied covenant of good faith and fair dealing. Alternatively, he seeks damages under a promissory estoppel theory.

¶ 2. In July 1994, Dr. LoPresti entered into a "Physician Employment Agreement" with Physician Group, a "Vermont Non-Profit Corporation ... rendering professional services through those of its employees who are duly licensed to practice medicine in the State of Vermont." Physician Group is not a hospital; it is a business arrangement among a group of doctors. Physician Group employees receive a base salary plus incentive payments, group liability insurance, accounting, administrative and marketing services, support staff and office facilities. In exchange, Physician Group collects and retains the fees that patients pay to the doctors it employs.

¶ 3. Dr. LoPresti's contract was to continue until terminated in accordance with § 1.2 of the agreement. Notwithstanding any provision to the contrary, § 1.2 set out a number of different circumstances under which the agreement could be terminated. Section 1.2(c)(ii) states that the agreement could be terminated "[o]ne hundred eighty (180) days after written notice of termination with or without cause from either party to the other." The agreement also provides that Dr. LoPresti would render medical services primarily at the Manchester Family Health Center, "and at such other locations as mutually agreed between [Dr. LoPresti] and [Physician Group]."

¶ 4. As a primary care physician, Dr. LoPresti often had to refer patients to specialists for further care, and, as part of his referral responsibility, he would follow up with patients to assess their status after receiving specialized treatment. Dr. LoPresti began practicing in the Rutland area in 1991. In his affidavit, Dr. LoPresti stated that, after several years in the area, he had familiarized himself with the practices of many area specialists. During the course of his practice with Physician Group, Dr. LoPresti developed concerns about the quality of care that some of his patients were receiving from particular Physician Group specialists. Dr. LoPresti alleged that one Physician Group doctor, Orthopedic Surgeon Doe, was "performing unnecessary procedures unnecessarily hospitalizing patients." Dr. LoPresti also concluded that two other Physician Group specialists, Obstetrician Doe and Surgeon Doe, were "providing clearly substandard care" that had "actually harmed more than one patient." Though he routinely referred patients to other doctors within Physician Group, Dr. LoPresti greatly reduced the number of referrals he was making to the three specialists or stopped referring patients to them altogether. At one point, Physician Group's President, Thomas Huebner, apparently told Dr. LoPresti that Orthopedic Surgeon Doe was complaining about the small number of cases that Dr. LoPresti had been referring to him.

¶ 5. In 1998, Physician Group officials, including Mr. James Hagen, Dr. Robert Cross, and President Huebner, informed Dr. LoPresti that the Manchester office, where he worked with one other primary care physician, Dr. Leffel, might be closed due to insufficient revenue. Dr. LoPresti did not agree with Physician Group's revenue conclusions and proposed course of action. He requested, and was granted, a meeting with President Huebner and Physician Group's Medical Practice Committee (MPC).

¶ 6. At the July 1998 MPC meeting, Dr. LoPresti made a detailed presentation on the Manchester office revenue situation with suggestions for how it could be improved. After his presentation, Dr. LoPresti was asked to leave so that the MPC could meet in executive session. As a result of the July meeting, the MPC decided to move Dr. Leffel to another office, close the Manchester office, and terminate Dr. LoPresti's contract. The day after the MPC executive session, Huebner gave Dr. LoPresti written notice of termination pursuant to § 1.2(c)(ii) of his contract. Consistent with the terms of the contract, the letter of
termination provided no explanation as to why Dr. LoPresti was being fired except to say that the decision was made “[a]fter seeking input from the Medical Practice Committee as well as the Board of Directors.”

¶ 7. Despite its decision to terminate Dr. LoPresti, Physician Group did not ultimately close the Manchester office. Dr. LoPresti asserts that he was more senior than Dr. Leffel, was seeing more patients than she was, and that he participated on three Physician Group committees while Dr. Leffel did not serve on any. In addition, of all the Physician Group primary care physicians, Dr. LoPresti had received the highest satisfaction ratings from his patients. Thanks to Dr. LoPresti’s high ratings, Physician Group received a financial award from the HMO Kaiser Permanente. Dr. Leffel had not received any comparable recognition. Dr. Leffel had, however, been making regular referrals to the Physician Group specialists that Dr. LoPresti avoided using.

¶ 8. Unsatisfied with the circumstances of his termination, Dr. LoPresti filed suit in July 2001 alleging breach of contract based on the implied covenant of good faith and fair dealing, wrongful discharge in violation of public policy, and promissory estoppel. Initially, Dr. LoPresti alleged that Physician Group retaliated against him for his frequent complaints regarding proposed benchmarks for physician profitability related to the number of patients a Physician Group doctor should see in one day.

¶ 9. Due to a number of scheduling conflicts, discovery proceeded very slowly. By deposing Dr. Cross, one of the physicians present during the MPC executive session when the MPC decided to terminate Dr. LoPresti, the doctor learned that there was perhaps another reason why he was terminated: his referral practices.

¶ 10. Of the Physician Group personnel who were at the MPC executive session and were deposed by Dr. LoPresti, only Dr. Cross could remember details of the one and one-half hour conversation that took place. Dr. Cross stated that the MPC “talked about Leigh's style of practice, Leigh's style--and his interaction with specialists in the area. And the feeling--and the interaction with other members of [Physician Group], and the feeling was that he hadn't created the relationship with the specialists to be optimistic that it would grow into the future.” Dr. Cross also indicated that physicians from other offices lacked enthusiasm about the prospect of Dr. LoPresti joining them in the event that the Manchester office was closed. Dr. Cross testified that this feeling was “[m]ostly ... based on that Leigh had created a lot of--I guess had created a lot of lack of support by the specialists in the Rutland area. As the person to lead that practice, there were a number of specialists that thought Leigh ought not to be the head of the practice there.” When asked to describe the nature of the concern raised by the specialists, Dr. Cross responded in part by stating that “he [Dr. LoPresti] could have consulted and utilized the specialists more for patient benefit.” Prior to the MPC executive session, Dr. Cross had also heard complaints from certain specialists about the lack of referrals from Dr. LoPresti. Dr. Cross summed up the situation as one of "frustration and dissatisfaction among the specialists."

¶ 11. Based on these late-stage revelations, Dr. LoPresti sought to amend his complaint to incorporate the allegations that his termination was related to his referral practices. [3] Specifically, he alleged that his referral practices had been guided by both the American Medical Association’s Principles of Medical Ethics (AMA Principles) and Physician Group’s own internal Code of Ethics. He claimed that the implied covenant of good faith and fair dealing prohibited Physician Group from firing him for these reasons because doing so would undermine the parties’ reasonable expectations about the contract’s common purpose. Further, he claimed that clear and compelling public policy restrained Physician Group from firing him over his referral practices. He argued that his obligation to abide by the ethical code of his profession, thereby protecting his patients, took precedence over Physician Group’s conflicting demands.

¶ 12. Physician Group moved for summary judgment on July 15, 2002. In its memorandum of law accompanying its motion, Physician Group argued that the contract provision requiring 180-day notice prior to no-cause termination controlled the dispute absolutely. Accordingly, it argued that its reasons for termination were immaterial as a matter of law, notwithstanding the implied covenant of good faith and fair dealing or public policy restraints on contracts. It argued that no compelling public policy supported Dr. LoPresti’s theory that Physician Group should have been prohibited from firing him because of his resistance to proposed benchmarks requiring Physician Group doctors to see a certain number of patients per day, or his ethical concerns about referring patients to certain specialists. Physician Group also argued that Dr. LoPresti’s promissory estoppel claim must fail because that theory is unavailable when there is a written contract between the parties, as there was in this case. Further, in its reply memorandum to Dr. LoPresti’s memorandum in opposition to summary judgment, Physician Group argued that “[p]laintiff has not produced admissible evidence of specific facts to show a genuine issue for trial as to the alleged reason for termination.”

¶ 13. After hearing oral argument from the parties, the trial court granted Physician Group summary judgment. In its opinion and order, the court concluded that Dr. LoPresti’s assertions regarding the causal connection between his discharge and his refusal to refer to specialists based on professional ethical objections were immaterial and did not alter the right of either party to terminate the agreement for any reason. The only facts that the court considered relevant were the written contract between the parties containing the “with or without cause” termination clause and Physician Group’s compliance with the clause’s terms when it terminated Dr. LoPresti. The court ruled that
the reasons why Physician Group terminated Dr. LoPresti were "moot, as a matter of law." The court also noted that Dr. LoPresti's complaint had been filed more than one and one-half years earlier, and on summary judgment, "other than Dr. LoPresti's conclusory allegations, there [was] no evidence of bad faith in [Physician Group]'s utilization of the explicit termination clause of the employment contract." For the reasons set forth below, we disagree in part with the trial court's ruling, and so reverse and remand for further proceedings.

¶ 14. We review a trial court's decision on summary judgment de novo, applying the same standard as the trial court. White v. Quechee Lakes Landowners' Ass'n, 170 Vt. 25, 28, 742 A.2d 734, 736 (1999). Summary judgment is appropriate only when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Id.

¶ 15. Before the trial court could rule on the summary judgment motion, the parties alerted the court to a stipulation they had reached, limiting the issues before the court for purposes of the motion. At the outset of oral argument on the motion, Physician Group's counsel engaged in the following exchange with the court:

MR. KEYES: Part of the reason is that counsel, we're in the process of trying to narrow the issues and we did reach an agreement that was kind of contingent on the timing of the court's consideration....

TRIAL COURT: Have you done adequate discovery? There seem to be discovery issues that one party, probably the Plaintiff raised, that discovery hadn't been completed to the extent where they could raise an argument to your motion.

MR. KEYES: Right. That's where we've reached the agreement. Our motion was basically in two parts, as a matter of law, even assuming you can prove the facts you allege, you're not entitled to relief. And part two was, you can't prove the facts you allege, you don't have sufficient evidence with specificity required by the rule to prove those facts. And because Mr. Dumont still has several depositions that he intends to complete, we've agreed to withdraw without prejudice that second part of the argument.

(Emphasis added.)

¶ 16. Contrary to this stipulation, Physician Group urges this Court to affirm the grant of summary judgment on grounds that Dr. LoPresti lacks admissible evidence to support an essential element of his case--the very ground it withdrew before the trial court's decision. We decline to consider arguments on appeal that were withdrawn in the trial court. See Morais v. Yee, 162 Vt. 366, 372, 648 A.2d 405, 410 (1994) (argument not raised before the trial court will not be considered on appeal). We will abide by the stipulation reached by the parties and limit ourselves, as the trial court largely did, to the issues of law raised by Dr. LoPresti's amended complaint. [4] Accordingly, we have assumed the truth of Dr. LoPresti's allegations as they pertain to his claims. As we discuss below, we affirm the trial court's ruling on the doctor's promissory estoppel and breach-of-the-IMPLIED-Covenant-of-good-faith claims as a matter of law, but we reverse and remand for further proceedings on his claim of wrongful discharge in violation of public policy.

I. Wrongful Discharge in Violation of Public Policy

¶ 17. For purposes of our de novo summary judgment review, defendant has provisionally agreed that the Court may assume as true Dr. LoPresti's allegation that he was terminated because he refused to refer patients to certain physicians whom he believed provided substandard care to his patients and in some cases performed unnecessary invasive procedures. Dr. LoPresti claims that his decision not to refer patients to these specialists was guided heavily by Vermont's prohibition on unprofessional conduct contained in 26 V.S.A. §§ 1354, 1398, and by numerous provisions of the AMA Principles. Dr. LoPresti asserts that his employers wanted him to make the referrals for financial reasons, notwithstanding the prohibition of such practices contained in the aforementioned ethical codes. He alleges that a discharge based on these grounds violates compelling public policy that restricts an employer's otherwise unfettered discretion to discharge employees. See Payne v. Rozendaal, 147 Vt. 488, 491-92, 520 A.2d 586, 588 (1986) (recognizing public policy limits on employer discretion in discharging employees). The trial court summarily rejected this argument because, in its view, this case was clearly governed by the termination clause in Dr. LoPresti's employment contract. Without analysis, the trial court also cited our decision in Dulude v. Fletcher Allen Health Care, Inc., 174 Vt. 74, 807 A.2d 390 (2002), as additional, alternative support for its conclusion that no public policy prohibited Dr. LoPresti's firing, even if it were for the reasons that he alleged.

A. ¶ 18. As an initial matter, we cannot accept the trial court's apparent holding that the existence of and adherence to a "with or without cause" termination provision of an express contract is sufficient to insulate an employer from a claim that it discharged an employee for reasons that violate public policy. In the employment context, Vermont law has long recognized that, under an at-will employment contract, "an employee may be discharged at any time with or without cause, 'unless there is a clear and compelling public policy against the reason advanced for the discharge.' " Payne, 147 Vt. at 491, 520 A.2d at 588 (quoting Jones v. Keogh, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979)). Clause 1.2(c)(ii) of the "Physician Employment Agreement" states that, notwithstanding any provision to the contrary, the "Agreement shall terminate... One Hundred Eighty (180) days after written notice of termination with or without cause from either party." As Physician Group argues, this clause afforded Dr. LoPresti the security of six months in which to close out his practice and make arrangements to find new employment. This distinguishes the doctor's contract from the typical at-will employment relationship that is terminable immediately.
See Sherman v. Rutland Hosp., Inc., 146 Vt. 204, 207, 500 A.2d 230, 232 (1985) (at-will employment agreement can be terminated at any time with or without cause). Nonetheless, the agreement still left the employer with the power to fire him “with or without cause.” Such employer discretion is the defining characteristic of the at-will relationship. See Payne, 147 Vt. at 491, 520 A.2d at 588. Accordingly, the distinction that Physician Group draws between the contract provision at issue in this case and at-will agreements controlled by Payne is immaterial.

¶ 19. In Payne, we expressly recognized that an employer’s contract rights with regard to terminating an employee “are not absolute,” and must yield to public policy considerations. Id. While we have not expressly extended this principle to written employment contracts that require a notice period before no-cause termination, we see no reason why it does not apply in such cases. Vermont law has long held that courts have the power to void written contract provisions that violate public policy in either their terms or contemplated performance. See Baldwin v. Coburn, 39 Vt. 441, 444-46 (1867) (voiding written contract between liquor commissioner and agents he appointed as against public policy). Such contract terms can be voided as against public policy only when “it could be said that they were injurious to the interests of the public or contravened some established interest of society.” State v. Barnett, 110 Vt. 221, 232, 3 A.2d 521, 526 (1939).

¶ 20. Without analysis or citation to Payne, the trial court “refuse [d] to treat this discharge as a violation of public policy” because it “is clearly governed by the termination clause.” Defendant amplified this position by pointing out that the six-month provision evidences the doctor’s substantial bargaining power in the contract and argues that the Court, “as conscience of the community, does not have to supply terms to protect the doctor.” This argument fails to grasp the nature of public policy restraints on contract, which are enforced to protect community norms for the benefit of the public at large, as well as the individual employee. Rocky Mt. Hosp. & Med. Serv. v. Mariani, 916 P.2d 505, 513-14 (Colo. 1980) (accepting professional codes of ethics as source of public policy in wrongful discharge case); Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505, 513-14 (1980) (accepting professional codes of ethics as source of public policy, but rejecting wrongful discharge claim of doctor who failed to prove that conduct requested by employer would lead to an ethical violation). In Pierce, the New Jersey Supreme Court observed that “[e]mployees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.” 471 A.2d at 512; see also Mariani, 916 P.2d at 525.

¶ 21. Our law specifically recognizes public policy limits on employer discretion in at-will situations. And it recognizes that, in the appropriate case, all written contract provisions may be voided as against public policy if the terms as written or actually performed could be injurious to the public. Accordingly, the trial court erred in concluding that the written contract provision in this case insulated the employer from Dr. LoPresti’s claim that the termination decision violated public policy.

B.

¶ 22. Having decided that the existence of the written employment contract in this case will not, as a matter of law, preclude a determination that Physician Group wrongfully terminated Dr. LoPresti in violation of public policy, we must now assess whether Dr. LoPresti has identified clear and compelling public policy to support his claim. In Payne, we recognized that public policy in the employment context may be found in sources other than statutes and constitutions. Id. at 493-94, 520 A.2d at 589 (rejecting notion that public policy exception to at-will employment must be legislatively defined). Other jurisdictions recognize that professional ethical codes can be an important source of public policy in employment matters involving employees who are subject to the mandates of such codes. Mariani, 916 P.2d at 524-25 (relying on state professional accountancy ethical codes as source of public policy in wrongful discharge case); Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505, 513-14 (1980) (accepting professional codes of ethics as source of public policy, but rejecting wrongful discharge claim of doctor who failed to prove that conduct requested by employer would lead to an ethical violation).

¶ 23. We agree, as a general matter, with those courts that accept professional ethical codes as potential sources of public policy. Nonetheless, employees who invoke such codes, as Dr. LoPresti has, still bear the burden of demonstrating that such codes are "clear and compelling" in their mandates to employees who claim that their professional ethical obligations supersede those owed to their employers. Payne, 147 Vt. at 495, 520 A.2d at 590. Specifically, employees must show that the ethical provisions relied on are "sufficiently concrete to notify employers and employees of the behavior [they require]," and the code provision being applied must be primarily for the benefit of the public as opposed to the interests of the
profession alone. *Mariani*, 916 P.2d at 525; accord *Pierce*, 417 A.2d at 512. The employee must show that he had an objective, good faith belief that the conduct requested by the employer would violate an ethical rule that satisfies the preceding definition. To succeed, an employee cannot rely on his or her personal moral beliefs, or on an overly cautious reading of the mandates in a particular code. *Pierce*, 417 A.2d at 512 ("[A]n employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee's personal morals, as distinguished from the recognized code of ethics of the employee's profession.").

¶ 24. Moreover, in a case like this one, a professional employee must show that the specific provisions contained in the ethical code relied upon apply in the particular professional context in which the employee is working. Here, for example, Dr. LoPresti relies on Principle E-8.132 among others. By its terms, Principle E-8.132 governs a central issue in this case: referral practices of physicians. Much of its operative language, however, specifically addresses the financial pressures that a physician faces when dealing with patients who belong to Preferred Provider Organizations (PPO) and Health Maintenance Organizations (HMO). As the Court understands it, Physician Group is neither a PPO, nor an HMO. Principle E-8.132 specifically references "referral to outside specialty services," as opposed to those available within the PPO or HMO. Because the court summarily rejected Dr. LoPresti's public policy claim without examining or applying this and other ethical provisions in question, the record and briefing contain very little detail about the organizational structure of Physician Group and its expectation of employees as they pertain to referrals. Without knowing how Physician Group handled referrals, it is difficult for this Court to apply an ethical provision, most of which is addressed to physicians working within the constraints of an HMO or PPO.

¶ 25. On remand, Dr. LoPresti must carry the foregoing burdens with respect to the AMA Principles he relies on, and then must show that he can satisfy the elements of wrongful discharge in violation of public policy as they are set out below.

¶ 26. In *Mariani*, the Colorado Supreme Court held that an employee's wrongful discharge claim could be based on public policy found in professional ethical codes, 916 P.2d at 525. The court set out four elements of the prima facie case for such claims. *Id.* at 527. The employee must show that (1) the employer directed the employee to perform an illegal or unethical act as part of the employee's duties; (2) the action directed by the employer would violate a statute or clearly expressed public policy; (3) he or she was terminated as a result of refusing to perform the requested act in violation of public policy; and (4) "the employer was aware or should have been aware that the employee's refusal was based upon the employee's reasonable belief that the act was illegal" or in violation of the employee's professional ethical code. *Id.*

¶ 27. Despite the trial court's citation to it, our holding in *Dulude v. Fletcher Allen Health Care* is addressed to a situation that is materially different from the present case, and thus is not an obstacle to Dr. LoPresti's claim. In *Dulude*, we held that, as a matter of law, a nurse's professional disagreements with the employer's hospital's narcotics practices were insufficient to support a public policy claim. *Dulude*, 174 Vt. at 82, 807 A.2d at 397. Prior to her ultimate termination, nurse Dulude's discretion in dispensing narcotics to patients had been curtailed significantly in response to patient complaints and an internal audit indicating that her medication practices were aberrant. *Id.* at 76-77, 807 A.2d at 393. The nurse was under strict supervision, and was required to obtain approval from a support person prior to administering any controlled substance. *Id.* Multiple letters of understanding between the nurse and the hospital clearly indicated that any deviation from the hospital's pain medication policies would result in her termination. *Id.* at 77-78, 807 A.2d at 393-94. Despite these warnings, the nurse deviated from the hospital pain medication policy several times and on occasion failed to obtain necessary approval from a support person. *Id.* Under these circumstances, we refused to accept the plaintiff's claim that public policy prevented the hospital from lawfully firing her, even though she had repeatedly violated hospital policy set by her supervisors.

¶ 28. In reaching our conclusion that public policy would not prevent the employer's termination decision, we emphasized that "[a]s a licensed hospital in Vermont, FAHC has the ultimate responsibility to provide for, and protect, its patients, and to set its own standards for safeguarding the life and health of the people of this state." *Id.* at 82, 807 A.2d at 397. We also cited to *Aiken v. Employer Health Serv., Inc.*, No. 95-3196, 1996 WL 134933, at *6 (10th Cir. March 23, 1996), for the proposition that there is no "public policy which prohibits an employer from terminating a health care employee over a disagreement or difference of professional judgment where the judgment of each is within the bounds of reasonable care." *Id.* (internal quotations omitted). This is not the case here.

¶ 29. The substantial difference in professional status between the nurse in *Dulude* and Dr. LoPresti distinguishes the two cases. The nurse in *Dulude* worked as a hospital employee under the direct supervision of other licensed medical professionals—a status that afforded her less discretion over patient care decisions than that required of Dr. LoPresti, a primary care physician. Her job was to execute policies established by supervisors. *Dulude*, 174 Vt. at 77, 807 A.2d at 393. Time and again, she proved herself incapable of abiding by specific pain-medication-admission plans and directives from her supervisors. By contrast, as a primary care physician, Dr. LoPresti was solely responsible for deciding which of the various area specialists would best treat his patients. Nothing in the
record before us indicates that he was expected or required to receive approval from supervisors before making referrals.

¶ 30. Moreover, Dr. LoPresti has alleged more than a "difference of professional judgment where the judgment of each [party] is within the bounds of reasonable care; " Id. at 82, 807 A.2d at 397 (quoting Aiken, 1996 WL 134933, at *6). Dr. LoPresti claims that specific provisions of the AMA Principles set strict guidelines governing physician referral practices. Dr. LoPresti believes that he will be able to prove, with additional discovery, that his refusal to violate the codified ethical standards of his profession solely for the financial benefit of his employers led to his discharge. The nurse in Dulude made no claim that her aberrant medication practices were mandated by any professional ethical code. Id. Instead, she was following nothing more than her own personal philosophy of pain-medication administration, and the appellate record revealed that her practices were the source of numerous patient complaints. Id. at 76-78, 807 A.2d at 392-94.

¶ 31. Because Dr. LoPresti's claim, as alleged, is materially distinguishable from the claim brought in Dulude, the trial court erred by citing it as additional support for its conclusion that Dr. LoPresti's public policy count could not succeed as a matter of law.

¶ 32. Due to the undeveloped state of the record as it pertains to this claim, we express no opinion as to Dr. LoPresti's ability to satisfy the elements articulated above. At this stage, we acknowledge only that, contrary to the trial court's legal conclusions, Dr. LoPresti's amended complaint has stated a claim upon which relief can be granted, assuming that he can support it with admissible evidence.

¶ 33. Dr. LoPresti has also alleged that the conduct that Physician Group required of him would have violated Vermont law regulating the practice of medicine. Specifically, Dr. LoPresti relies on 26 V.S.A. §§ 1354(a)(7), 1358. Section 1354(a)(7) states that unprofessional conduct includes "conduct which evidences unfitness to practice medicine." Section 1398 allows the Board of Medical Practice to suspend or revoke licenses of doctors who engage in unprofessional conduct. Dr. LoPresti argues that a violation of a professional ethical code, like the AMA Principles, can amount to "unfitness to practice medicine." See, e.g., Shea v. Bd. of Med. Examiners, 81 Cal.App.3d 564, 146 Cal.Rptr. 653, 662 (1978) (unfitness to practice medicine is evidenced by "conduct which breaches the rules or ethical code of [doctor's] profession"). Dr. LoPresti cites no case in which the Vermont Board of Medical Practice has actually interpreted the statutory language as he does. The board is entrusted with enforcing the statute in the first instance, and it does so in the context of cases where the specific facts amounting to allegedly unprofessional conduct are before it. We are, therefore, hesitant to usurp the board's role by issuing an advisory opinion on the type of conduct that would not be "unprofessional" as that term is used in the statute. While we are allowing further proceedings in which Dr. LoPresti will have the chance to prove that the AMA Principles, standing alone, are clear and compelling public policy that controlled the employer's termination decision, we decline Dr. LoPresti's invitation to incorporate the AMA Principles into 26 V.S.A. § 1354(a)(7).

¶ 34. Finally, we reject the aspect of Dr. LoPresti's public policy claim that relies on certain provisions of Physician Group's own "Code of Ethics." Our review of the policy provisions that Dr. LoPresti relies on leads us to the conclusion that they are "broad hortatory statement[s] of policy that give[] little direction as to the bounds of proper behavior," and thus do not comply with the public policy standards we set out above. [5] Mariani, 916 P.2d at 525.

II. Implied Covenant of Good Faith and Fair Dealing

¶ 35. Dr. LoPresti also claims that, notwithstanding the express "with or without cause" termination clause of his written contract, the implied covenant of good faith and fair dealing (the covenant) imposes limits on both the reasons and process for terminating an employee in his position. In Vermont, the covenant of good faith and fair dealing is implied in every contract. Carmichael v. Adirondack Bottled Gas Corp., 161 Vt. 200, 208, 635 A.2d 1211, 1216 (1993); see also Restatement (Second) of Contracts § 205 (1981) (stating that the covenant is implied in every contract). Dr. LoPresti's theory has both a substantive and a procedural component which we will deal with separately.

A. Substantive Protection of the Implied Covenant of Good Faith and Fair Dealing

¶ 36. "[G]ood faith' is a concept that 'varies ... with the context' in which it is deemed an implied obligation," Carmichael, 161 Vt. at 208, 635 A.2d at 1216 (quoting Restatement (Second) of Contracts§ 205 cmt. a (1981)) (omission in original). The covenant's purpose is to ensure "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," Restatement (Second) of Contracts § 205 cmt. a (1981).

¶ 37. As Dr. LoPresti views it, the agreed common purpose of the physician's employment contract was providing the highest possible quality of patient care. He argues that "[a] jury would be entitled to find that firing a doctor because he had upheld the ethical standards of his profession by taking reasonable steps to protect his patients from harm violates the covenant," as it applies to the agreed common purpose he posit[s]. In this respect, his claim based on a violation of the covenant is practically indistinguishable from his public policy claim discussed above. This point is illustrated by the following statements Dr. LoPresti's counsel made at the oral argument on summary judgment in the trial court:
The covenant of good faith and fair dealings is a very strong part of Vermont law that stands on equal footing with FEPA [the Vermont Fair Employment Practices Act]. There's some protections for the public that really [] the contracts can't[1] outweigh. Our argument about the compelling public interest, the compelling public policy is pretty much the same. I wouldn't make the argument if what Dr. LoPresti did was just to protect his own rights or his own interests. (Emphasis added.)

¶ 38. In the employment termination context, some courts have also recognized the difficulty of distinguishing between violations of the covenant and wrongful termination in violation of public policy. For example, in the seminal case of Monge v. Beebe Rubber Co., the New Hampshire Supreme Court applied the covenant and held that an employer had

Page 1116

violated it by terminating an at-will employee who refused to date her foreman. 114 N.H. 130, 316 A.2d 549, 551-52 (1974). The court stated that "termination by the employer of a contract of employment at will which is motivated by bad faith or malice ... constitutes a breach of the employment contract." Id. at 551. In a subsequent case, however, the court clarified that Monge applied "only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273, 1274 (1980). In concurrence with the Idaho Supreme Court's decision to recognize the applicability of the covenant in the at-will employment context, Associate Justice Huntley discussed the interplay of the covenant and public policy as he saw it:

When the contract is "at will," the employer need not show good cause for the termination. However, the "at will" employer may not terminate an employee for bad causes or reasons, i.e., those contrary to public policy, because such terminations are made in bad faith, and as such, are in contravention of [the covenant].

Metcalf v. Intermountain Gar Co., 116 Idaho 622, 778 P.2d 744, 752 (1989) (Huntley, J., concurring) (emphasis added). We see no reason, in the context of this case, to blur the distinction between harms for which the covenant provides a remedy and harms for which public policy provides a remedy. We will not, therefore, allow Dr. LoPresti's claim for breach of the covenant, as he has fashioned it, to go forward.

¶ 39. More importantly, we have already held that the covenant does not apply to at-will employment agreements when the plaintiff's argument amounts to no more than an objection to the other party's freedom to avail itself of the at-will arrangement by terminating the agreement for reasons that the other party does not accept. Dicks v. Jensen, 172 Vt. 43, 52, 768 A.2d 1279, 1285-86 (2001). While the agreement at issue here is not truly at-will in the sense that there is a written contract that requires a notice period before no-cause termination, we have treated them as equivalents for the reasons stated supra ¶ 18. Accordingly, the rationale behind our rejection of the employer's claim in Dicks applies here.

¶ 40. Though writing in the context of classic at-will employment arrangements, the Supreme Court of Connecticut summarized what is our essential position in this case:

Although we endorse the applicability of the good faith and fair dealing principle to employment contracts, its essence is the fulfillment of the reasonable expectations of the parties. Where employment is clearly terminable at will, a party cannot ordinarily be deemed to lack good faith in exercising this contractual right. Like other contract provisions, which are unenforceable when violative of public policy, the right to discharge at will is subject to the same restriction. We see no reason presently, therefore, to enlarge the circumstances under which an at-will employee may successfully challenge his dismissal beyond the situation where the reason for his discharge involves "impropriety ... derived from some important violation of public policy."


¶ 41. Above and beyond the allegations that Physician Group fired him in violation of public policy, Dr. LoPresti also claims that he was fired because he demanded a higher standard for patient care than Physician

Page 1117

Group was interested in providing. His specific allegations were related not only to the referral issue, but also to clashes he had with management over the number of patients a Physician Group doctor would be required to see in a day. He claims that termination for this reason was inconsistent with his justified expectations under the contract that incorporated the notion, contained in Physician Group's own code of ethics, that "care of the sick" was the physician's "first responsibility" and "sacred trust." See Carmichael, 161 Vt. at 208, 635 A.2d at 1216 (covenant emphasizes " 'consistency with the justified expectations of the other party' ") (quoting Restatement (Second) of Contracts § 205 cmt. a (1981)). Assuming that Dr. LoPresti can prove this allegation, as a matter of law, the covenant still will not provide a remedy where the express contract makes both parties aware that either party can terminate the agreement, upon proper notice, for any reason. Putting aside the public policy aspect, Dr. LoPresti's claim under the covenant is based on his not unwarranted dissatisfaction with the reasons he believes were behind his firing. We cannot recognize this as an acceptable ground on which to challenge employer personnel decisions that are based on freely negotiated "with or without cause" termination clauses, because to do so would essentially render such clauses meaningless.

¶ 42. We note, however, that our holding in this case will not necessarily preclude the covenant's application in the employment termination context when a plaintiff's claim for damages is based on "accrued benefits" and not solely on implied tenure, i.e., permanent employment until
just cause for termination arises. See Ross v. Times Mirror, Inc., 164 Vt. 13, 23, 665 A.2d 580, 586 (1995) (reserving judgment on whether Court would recognize the covenant in the context of nontenure terms of at-will contract). Even when the employment arrangement gives the employer absolute discretion to terminate the contract without cause, courts have held employers liable for breaching the covenant where the termination was based on the employer's desire to avoid paying the employee benefits earned under the contract. See, e.g., Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251, 1255-57 (1977) (notwithstanding written contract allowing either party to terminate the contract on written notice, employer violated implied covenant of good faith and fair dealing by terminating employee in order to avoid paying him commissions and bonuses to which he would have been entitled but for the termination); see also Magnus, 479 A.2d at 787-88 (expressing a willingness to accept employee claims based on implied covenant of good faith and fair dealing when the employer's termination decision has the effect of "depriving the employee of compensation that is clearly identifiable and is related to the employee's past service.") (internal quotation marks omitted). Such cases are based on the principle that "any action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant of good faith and fair dealing." Metcalf, 778 P.2d at 750; see also Restatement (Second) of Contracts § 205 cmt. a (1981) (covenant emphasizes "consistency with the justified expectations of the other party").

¶ 43. Dr. LoPresti's claim does not require us to apply the covenant to restore accrued benefits that were lost as a result of his being fired. He cannot claim that Physician Group deprived him of any benefit of the employment contract by terminating him when it did. The contract required only that Dr. LoPresti be given written notice of termination six months in advance, and the opportunity to work for the contracted salary during the period following the notice until the date of termination. He does not dispute that he was given this notice, nor does he dispute that he was paid for all the services he rendered. Moreover, in light of the freely negotiated "with or without cause" termination clause, lifetime employment was clearly not a benefit of the contract.

B. Procedural Protection of the Implied Covenant of Good Faith and Fair Dealing

¶ 44. Dr. LoPresti's claim that Physician Group breached the covenant by employing a bad faith process in firing him is similarly unavailing. To the extent that Physician Group provided him with a reason for his termination, [6] ostensibly that the office where he worked was being closed, he argues that this was a pretext for the real reason he was terminated--failure to refer patients to certain specialists. He argues that this alleged subterfuge "deprived him of the opportunity to protect his rights," because he would have made a greater effort to explain his referral practices in hopes of reversing Physician Group's decision to terminate him. The flaw in this argument lies in Dr. LoPresti's suggestion that he had the "right" to permanent employment absent just cause for termination. The contract makes clear that he had no such right.

¶ 45. In Carmichael, we accepted the Restatement's view that "[s]ubterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified." 161 Vt. at 209, 635 A.2d at 1217 (quoting Restatement (Second) of Contracts § 205 cmt. d (1981)). Again, we stress that the covenant's application varies with the context. Dicks v. Jensen, 172 Vt. at 52, 768 A.2d at 1285-86; Carmichael, 161 Vt. at 202, 635 A.2d at 1213. As a general matter, we discourage any subterfuge and evasion in employer/employee relations. Nonetheless, when, as here, the employer has no duty to provide the employee with any reason why he or she is being fired, subterfuge and evasions, though they may be reprehensible, are not actionable. Dr. LoPresti could have negotiated for terms that would have required Physician Group to provide him not only with notice prior to termination under § 1.2(c)(ii), but also with the reason for the termination decision. In fact, under Dr. LoPresti's physician's agreement § 1.2(c)(i), either party could terminate the agreement ninety days after providing the other party notice of a material breach. In that case, the alternative termination clause contemplates that, after receiving notice of a material breach, the other party will work to cure it. If the breaching party can cure the breach within thirty days, then the contract will not terminate. The bargain Dr. LoPresti struck with Physician Group left both parties with the choice of at least two means to terminate the contract. Physician Group cannot be penalized for exercising its choice as it did, even when doing so deprived Dr. LoPresti of the opportunity to change the minds of Physician Group's decisionmakers.

¶ 46. While public policy could supersede the written termination provision in this employment contract, the implied covenant of good faith and fair dealing, as Dr. LoPresti has invoked it, will not. As we noted above, public policy restrictions on an employer's personnel decisions protect the public from conduct that transgresses widely held community values. Though the effect of its enforcement may be to protect a specific employee, its purpose is to deter conduct that is also directly or indirectly injurious to the public. To the extent that Dr. LoPresti invokes the implied covenant of good faith and fair dealing to perform a like function in this case, we decline to write this redundancy into the law. If Dr. LoPresti falls short of carrying his burden on the public policy theory, we will not accept his invitation to apply the covenant as a remedy for what he sees as the unduly harsh operation of a freely bargained contractual term; in this case, the arms-length bargaining process between professionals delivered sufficient protection.

III. Promissory Estoppel
¶ 47. In reviewing Dr. LoPresti's promissory estoppel claim, the trial court correctly noted and applied the well-established rule that promissory estoppel will not apply when the relationship of the parties is governed by a contract. E.g., *Big G Corp. v. Henry*, 148 Vt. 589, 594, 536 A.2d 559, 562 (1987). In this case, the parties entered into a written agreement and ostensibly performed according to its terms until it was terminated after approximately four years.

¶ 48. Dr. LoPresti attempts to avoid the bar to his promissory estoppel claim by arguing that the contract was unconscionable and illusory, or alternatively, that the contract was not formed because, due to a unilateral mistake, the parties did not reach the necessary "meeting of the minds." These sparsely briefed arguments are based on Dr. LoPresti's view that Physician Group and the trial court interpreted the contract in a way that left Physician Group "free to deliberately submit patients to substandard care, and free to substitute profit for patient care as the 'sacred trust.' " Dr. LoPresti argues that a "conscientious and careful physician" like himself would not have entered into such an agreement.

¶ 49. Our resolution of the legal issues involved in Dr. LoPresti's public policy claim makes clear that the contract does not permit Physician Group to require Dr. LoPresti to subjugate patient care to financial considerations when doing so would result in a violation of law or the AMA Principles. On the other hand, when viewed objectively, a reasonable person would have understood that the "with or without cause" termination provision in the contract allowed Physician Group to discharge Dr. LoPresti for failure to comply with employer practices even if those practices compromised his personal standards of patient care, but were otherwise ethical and lawful. Moreover, the termination clause also allowed Dr. LoPresti the freedom to leave Physician Group, after appropriate notice, if he did not agree with its practices. We decline, therefore, to hold that there was a defect in formation of the contract between the parties.

¶ 50. We affirm the trial court's conclusion that promissory estoppel is inapplicable to this case because the dispute arises out of a valid contract between the parties. See *Housing Vt. v. Goldsmith & Morris*, 165 Vt. 428, 431, 685 A.2d 1086, 1089 (1996) (promissory estoppel does not apply when contract governs the relationship of the parties).

The superior court's grant of summary judgment for Physician Group on Dr. LoPresti's breach of contract and promissory estoppel claims is affirmed. The superior court's judgment as to Dr. LoPresti's claim of wrongful termination in violation of public policy is reversed and the case is remanded for additional proceedings consistent with the views expressed herein.

Notes:
[1] Chief Justice Amestoy sat for oral argument but did not participate in this decision.

[2] For purposes of this case, Dr. LoPresti has assigned all the specialists in question with aliases which we have incorporated into our discussion.

[3] We note that the status of plaintiff's motion to amend his complaint appears unresolved. At the November 14, 2002 hearing on defendant's motion for summary judgment and plaintiff's motion to amend his complaint, neither the parties nor the court engaged in any significant discussion of the motion to amend, even though the proposed amendments contain many of the case's central allegations. In the hearing's closing exchange, the judge stated: "Well, I'll take the motion for summary judgment under advisement. I'll grant the motion to amend for pro forma, if it becomes vital. If the summary judgment was granted, that would be the end of that. And I'll grant it pursuant to V.R.C.P. 15 pro forma." Thus, it appears that the court tentatively granted the motion to amend, subject to its decision on summary judgment. On appeal, both parties have referred to allegations and claims asserted in the amended complaint, notwithstanding the absence of a formal order from the trial court allowing the amendments. We assume that the trial court will formally resolve this matter on remand.

[4] Dr. LoPresti filed a Verified Motion to Alter or Amend the court's judgment based on his view that the trial court had ignored the parties' stipulation in ruling on summary judgment. In his motion, Dr. LoPresti reiterated the discovery problems that had plagued the case, and which the court knew were the reason for the stipulation. The motion also stated with specificity the discovery that remained to be completed. Dr. LoPresti pointed out that summary judgment should not be granted where the nonmoving party has not had adequate opportunity for discovery. See V.R.C.P. 56(f) (court may refuse to grant summary judgment where nonmoving party can show reasons why essential affidavit facts are not available); see also *Doe v. Doe*, 172 Vt. 533, 534-35, 768 A.2d 1291, 1292-93 (2001) (mem.) (summary judgment was premature when no discovery had occurred). In its Opinion and Order denying Dr. LoPresti's Motion to Vacate or Amend, the court made clear that because "Defendant moved for summary judgment as a matter of law ... the reasons for plaintiff's termination are irrelevant as a matter of law."

[5] For example, Dr. LoPresti argues that the referrals Physician Group wanted him to make would have violated Physician Group Policy 1: employees "[s]hould recognize that the care of the sick is their first responsibility and a sacred trust, RRPG employees must at all times strive to provide the best possible care and treatment to all in need."

[6] The written notice informing Dr. LoPresti that he was being terminated in accordance with § 1.2(c)(ii) did not state any reason for the firing.

**DISCRIMINATION/RETALIATION**
Gallipo v. City of Rutland, 163 Vt. 635 (1994)

Before GIBSON, DOOLEY, MORSE and JOHNSON, JJ., and PECK, J. (Ret.), Specially Assigned.

GIBSON, Justice.

Plaintiff Raymond F. Gallipo appeals a grant of summary judgment in favor of defendants City of Rutland and Rutland Fire Chief Gerald Lloyd, and the denial of his motion to disqualify the trial judge. We affirm summary judgment in part and reverse in part, and we affirm the decision of the administrative trial judge denying the motion to disqualify.

Plaintiff joined the Rutland Fire Department in 1962. In November 1985, when plaintiff was the most senior firefighter, a lieutenant's position opened up in the department. Chief Gerald Lloyd posted a notice of requirements for the position, which included responsibility for supervision of the fire alarm and traffic system—a responsibility not included in the job description set forth in the personnel manual. Plaintiff was not selected for the position, nor was he selected for two subsequent promotions, notices for which also included job requirements not listed in the personnel manual.

In September 1987, plaintiff filed a complaint under the Vermont Fair Employment Practices Act, 21 V.S.A. §§ 495-496, alleging handicap discrimination because the department had not promoted him due to his known reading problem. Plaintiff subsequently was assigned to menial tasks at the firehouse, and for the first time in his career, received disciplinary memoranda in his personnel file. In January 1988, plaintiff filed a complaint in superior court, alleging that defendants' failure to promote him deprived him of a property right under 42 U.S.C. § 1983, which the department violated when it passed him over for promotion in favor of persons less senior than he. The trial court granted on all counts. Plaintiff thereafter filed a petition for a rehearing of the summary judgment motion. Administrative Judge Richard W. Norton, who had heard the summary judgment motion, and Ru

Page 638

not included in the job description set forth in the personnel manual. Plaintiff was not selected for the position, nor was he selected for two subsequent promotions, notices for which also included job requirements not listed in the personnel manual.

Defendants moved for summary judgment, which the trial court granted on all counts. Plaintiff thereafter filed a motion to disqualify Judge Richard W. Norton, who had heard the summary judgment motion, and for a rehearing of the summary judgment motion. Administrative Judge Stephen B. Martin denied the motion, and this appeal followed.

Summary judgment will be granted if, after an adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial. Poplaski v. Lamphere, 152 Vt. 251, 254-55, 565 A.2d 1326, 1329 (1989). In reviewing a grant of summary judgment, we will affirm if there is no dispute as to a genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. See Cavanaugh v. Abbott Laboratories, 145 Vt. 516, 520, 496 A.2d 154, 157 (1985) (Supreme Court will apply same standard as trial court in considering correctness of disposition of summary judgment motion).

I.

Plaintiff's major contention is that the standard practice in the Rutland Fire Department was to promote the most senior candidate unless that person did not want the job or had an alcohol problem. He contends that this policy established a property right protected under 42 U.S.C. § 1983, [1] which the department violated when it passed him over for promotion in favor of persons less senior than he. The trial court found that plaintiff had not established such a protected property right. We agree.


Further, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). A legitimate entitlement may arise from existing rules or understandings [163 Vt. 87] that come from an independent source such as state law. Id.; see also Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699-70, 33 L.Ed.2d 570 (1972) (benefit may be property interest under due process if rules or mutually explicit understandings support claim of entitlement to benefit that party may invoke at hearing). Cf. Roth, 408 U.S. at 578, 92 S.Ct. at 2709-10 (where one-year employment contract was not renewed, there was no deprivation of property interest).

Page 639

Plaintiff has not cited, nor do we find, any cases holding that, absent statutory or regulatory provisions, a right to promotion is a property right. See Bigby v. City of Chicago, 766 F.2d 1053, 1056-57 (7th Cir.1985) (where statute provided for promotion of police officers based on merit, seniority and examination, choice between highest-ranking candidates remained discretionary and was not a matter of right); Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir.1980) (police officer's expectation of promotion not a property interest where state law permitted consideration of subjective factors).

Plaintiff contends that a genuine issue of material fact exists as to whether it was the department's policy to promote solely on the basis of seniority. He asserts in his deposition that such was the case, while Chief Lloyd, himself a firefighter since 1974, asserts in an affidavit that this was not the case. These assertions alone, however, are insufficient to raise a question of fact regarding the
department's policy, particularly when they are considered in light of the entire record.

Relevant documents contained in the record include the City's personnel manual and the City Charter. Section IV of the personnel manual provides:

I. Promotion Policy

A. Vacancies in positions above the lowest rank in any category in the classified service shall be filled as far as practical by the promotion of employees in the service. Promotion in every case must involve a definite increase in duties and responsibilities and shall not be made merely for the purpose of effecting an increase in compensation.

City of Rutland, Vermont, Personnel Rules & Regulations (1978). The City Charter sets forth the powers of the fire chief in appointing subordinates:

The [fire chief] shall appoint ... two (2) Lieutenants. The Chief may make such other appointment of subordinate Officers as he [163 Vt. 88] or deems necessary. All qualifications being equal, the Chief shall appoint Officers in the time of service to said subordinate offices.


Thus, under the charter, seniority serves only as a tie-breaker, “[a]ll qualifications being equal.” The job description for the position of fire lieutenant, as set forth in the personnel manual, includes a list of educational and other minimum requirements in addition to five years of successful experience as a firefighter. We conclude that plaintiff had no property right to promotion based on seniority alone.

Nor is plaintiff's evidence sufficient to raise a genuine issue of an implied contractual provision justifying an expectation of promotion based on seniority. An implied contractual provision may arise through "established past practices." Burlington Area Pub. Employees Union v. Champlain Water Dist., 156 Vt. 516, 521, 594 A.2d 421, 424 (1991), where "the conduct of the parties ... encompass[es] a continuity, interest, purpose and understanding which elevates a course of action to an implied contractual status." Id. at 525, 594 A.2d at 426 (Dooley, J., concurring) (quoting General Comm. of Adj. v. Burlington Northern, 620 F.2d 161, 163 (8th Cir.1980)).

Here, plaintiff offers the deposition of former Fire Chief Gerald Moore, who, when asked if officers had been appointed on the basis of seniority, replied: "In a general way. Not necessarily all the time." Plaintiff acknowledges that on more than one occasion within his memory the most senior firefighter at the department was passed over for promotion. He attributes these exceptions to the candidates' alcohol problems or their lack of desire for the promotion, but he fails to demonstrate a course of conduct on the part of defendants that an implied contractual provision existed for promotion based solely upon seniority. A bare allegation that seniority was routinely the determining factor in promotions will not suffice. See id. Plaintiff's evidence does not raise a genuine issue of material fact precluding judgment for defendants as a matter of law.

II.

Plaintiff also asserts that Chief Lloyd interfered with his implied contract with the City for promotion according to seniority. We have held that interference with a contractual relation may be found even [163 Vt. 89] where the contract itself is unenforceable. Mitchell v. Aldrich, 122 Vt. 19, 23, 163 A.2d 833, 836 (1960). Nevertheless, the plaintiff must have a reasonable expectancy of gain, a "rightful interest in having the ... promise performed free from other outside interference." Id. As stated above, plaintiff's evidence is insufficient to show a property interest or an implied contract, or even to show a reasonable expectancy that he would be promoted solely on the basis of his seniority. Plaintiff's claim must therefore fail.

III.

Plaintiff next alleges violations of Vermont's Fair Employment Practices Act (VFEP). 21 V.S.A. §§ 495-496. Specifically, plaintiff claims that he suffered religious and disability discrimination, and that the Department retaliated against him for filing a VFEPA complaint with the attorney general. The standards and burdens of proof to be applied under the VFEP are the same as those under Title VII of the federal Civil Rights Act of 1964. Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 161, 624 A.2d 1122, 1128 (1992); see 42 U.S.C. § 2000e. To withstand summary judgment, plaintiff must present a prima facie case of discrimination. If plaintiff presents evidence that an impermissible factor played a motivating part in the employment decision, then the burden shifts to, and remains with, the employer, who must show that it would have made the same decision even if it had not considered the impermissible factor. See Hodgdon, 160 Vt. at 161, 624 A.2d at 1128-29. [2] "[U]nless the trial court finds that the plaintiff's evidence is insufficient to make this preliminary showing as a matter of law, under Vermont law, the issue must go to the jury." Id. at 162, 624 A.2d at 1129.

A.

Plaintiff claims defendants discriminated against him because of his religious practices, a violation of 21 V.S.A. § 495(a)(1). Cf. 42 [163 Vt. 90] U.S.C. § 2000e(j) (religion defined as all aspects of religious observance, practice, and belief). He alleges that his viewing of the religious television program "700 Club" was a factor in Chief Lloyd's decision not to promote him. He also claims discrimination based upon his dyslexia, a reading disability. See 21 V.S.A. § 495d(5) (defining handicapped individual) & (6) (defining qualified handicapped individual).

In support of his claim of religious discrimination, plaintiff submitted the deposition of Rutland City Alderman John Cassarino, who testified to a conversation with Chief Lloyd:

[Cassarino]: I asked [Chief Lloyd] what was going on with Ray, and [he] told me that there was some problems with Ray.... And Ray was involved in his religion. He was
watching PTL or 700 Club all the time, and the guys were sort of making fun of that, and he wasn't really commanding. He didn't say it in so many words, but he insinuated it. He wasn't going to get any respect because of this he also told me at that time.

Q. Can you recall exactly what was said about his religion or about his--

A. Well, that he was watching that on TV down there, and I understand that, and I did say that part of the reason Ray was watching it on TV is because of his reading problem....

In addition, plaintiff submitted Chief Lloyd's answers to plaintiff's interrogatories. In Page 641

those answers, Chief Lloyd recounted the same conversation:

Chief Lloyd informed Chairman Cassarino that the most qualified applicant had been appointed to the posted officer's position and that the plaintiff had not demonstrated he had developed the leadership knowledge and qualifications necessary to assume this position.... It was also explained to Mr. Cassarino that the plaintiff had a great deal of free time at the station, and most of his free time was spent watching TV. Chief Lloyd further stated that the free time could be used in a more constructive manner by the plaintiff if he were to ... prepare himself for future officer vacancies.

The trial court found Mr. Cassarino's testimony to be insufficient evidence of religious discrimination, but that it did call into question plaintiff's ability to assume an effective leadership position if other fire department employees did not respect him. Notwithstanding [163 Vt. 91] other possible inferences that could be drawn from this testimony, it does support plaintiff's contention that Chief Lloyd unlawfully took into account plaintiff's religious practices in evaluating plaintiff for promotion and created a genuine issue of fact sufficient to go to a jury.

Chief Lloyd's interrogatory answers indicate that "leadership" was one qualification for the officer's position. One could readily infer from the Chief's interrogatory answers and Cassarino's testimony that the Chief believed plaintiff lacked leadership qualities and was unsuitable for the lieutenant's position because the other firefighters would not respect plaintiff because of his religious practices. An employer may not consider its employees' animosity toward a protected class in making an employment decision. This is precisely the kind of discriminatory decision-making VFEPA was enacted to prevent. The deposition testimony and interrogatory answers create a genuine issue of fact regarding whether Chief Lloyd considered plaintiff's religious practices or beliefs in passing over plaintiff for promotion.

With respect to the claim of disability discrimination, Alderman Cassarin testified that he had discussed plaintiff's dyslexia with Chief Lloyd. When asked by counsel whether Chief Lloyd mentioned anything about plaintiff's ability to read, Cassarino replied:

We discussed that specifically, and I think this is the part that's really got me a little bit, because I asked Chief Lloyd, and he told me that he was going to pick a lieutenant and that the next lieutenant would be the chief--or the assistant chief in time ... so he felt it was very important that the next person he pick[ed] would be his person. And one of the reasons he wasn't going to pick Ray was because of that.... [T]his person would have to be able to have the ability to do a lot of book work ... and [Chief Lloyd's] comment was that he would hate to see Ray because of his learning disability, his inability to read, on the spot....

(Emphasis added.) Cassarino's testimony creates a strong inference that Chief Lloyd considered plaintiff's dyslexia in making the promotion decision. Although Chief Lloyd may have considered plaintiff's disability for benevolent reasons, VFEPA makes such consideration impermissible in most instances.

The VFEPA defines a handicapped individual as one who "has a physical or mental impairment which substantially limits one or more major life activities." 21 V.S.A. § 495d(5)(A). To prove discrimination under the Act, plaintiff must show he is a "qualified handicapped individual," that is, one "who is capable of performing the essential

[163 Vt. 92] functions of the job or jobs for which he is being considered with reasonable accommodation to his handicap." Id. § 495d(6); see also id. § 495d(12) (defining reasonable accommodation).

Plaintiff submitted the deposition of Patricia Stone, an expert in evaluating reading disabilities, who testified that plaintiff has dyslexia and reads unfamiliar words at a second-grade level. She testified that plaintiff has a higher ability to recognize common words, probably due to memorization. Stone testified that, with accommodations, plaintiff could qualify to perform a job requiring high-school-level reading skill. Plaintiff also submitted the affidavit of Chester Brunell, a

Page 642

retired deputy chief of the Burlington Fire Department, who stated that in his experience, the occasions necessitating reading are rare. Plaintiff contends, therefore, that he is a "qualified handicapped individual," and able, with reasonable accommodations, to perform the tasks required of a fire lieutenant.

On both the religious and disability discrimination claims the trial court found that plaintiff had failed to demonstrate that his lack of promotion was due to discrimination, and that he possessed the minimum qualifications required for the position of lieutenant. We disagree. Plaintiff has provided sufficient evidence to support a prima facie case of discrimination on both claims. There being deposition, affidavit and other evidence advanced by plaintiff to create genuine issues of fact on his claims of religious and disability discrimination, we reverse summary judgment on these issues.

B. Plaintiff need not succeed on the merits of his discrimination claims in order to be protected from retaliatory action by defendants. See Davis v. State Univ. of N.Y., 802 F.2d 638, 642 (2d Cir.1986) (finding of unlawful
retribution not dependent on merits of underlying discrimination charge). A prima facie case for retaliatory discrimination requires plaintiff to show that (1) he was engaged in protected activity, (2) his employer was aware of that activity, (3) he suffered adverse employment decisions, and (4) there was a causal connection between the protected activity and the adverse employment action. *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir.1988).

The filing of a complaint under the VFEPA with the Attorney General is a protected activity. See 21 V.S.A. § 495(a)(5) (employer may not retaliate against employee for filing discrimination complaint with Attorney General); see also *EEOC v. Locals 14 & 15, Int'l Union [163 Vt. 93]* of Operating Eng'r's, 438 F.Supp. 876, 881 (S.D.N.Y.1977) (filing of EEOC charges alleging retaliation is "protected participation" under Title VII). The Attorney General notified defendants of the VFEPA complaint shortly after it was filed in September 1987.

Plaintiff commenced his lawsuit on January 22, 1988, and was first assigned to "detail" on January 29, 1988. The reprimand letters came in April, May and September of 1988. On "detail," plaintiff performed menial chores, such as trash-hauling and taking coffee orders, that he had not performed in ten or more years. Moreover, the reprimand letters issued to him after his VFEPA complaint and lawsuit were the first he had received in twenty-six years as a firefighter.

Defendants contend, however, that plaintiff has failed to present evidence of a causal link between his complaint and the allegedly retaliatory actions. For purposes of a prima facie case, plaintiff may establish a link indirectly by showing that the timing of the complaint and the retaliatory action was suspect. *In re McCort*, 162 Vt. 481, ----, 650 A.2d 504, 512 (1994). The trial court found that the first disciplinary memorandum came seven months after the filing of plaintiff's VFEPA complaint, an interval the court felt was too long to establish the necessary causal link to show retaliation. But more significant, in our view, is the fact that plaintiff had no "detail" assignments in at least ten years, nor had he received any disciplinary memorandum in twenty-six years until after he had filed a complaint with the Attorney General. Cf. *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1525 (11th Cir.1991) (pronounced increase in negative reviews and careful scrutiny of plaintiff's performance, coupled with testimony that management personnel were acutely aware of EEOC charge filed by plaintiff, were sufficient to establish causal link for plaintiff's prima facie case of retaliatory discharge). Considering the evidence in the light most favorable to plaintiff, we conclude that there is a genuine issue of material fact concerning his claim of retaliatory discrimination. Summary judgment on this claim is reversed.

IV.

Plaintiff contends that Chief Lloyd failed to comply with the City Charter and the City personnel regulations when he added...
VI. Plaintiff alleges violations of his rights under the Vermont Constitution, charging that Chief Lloyd's failure to promote him violated fundamental principles of fairness. See Vt. Const. ch. I, art. 18 (referring to accountability of officers and their duty to adhere to principles of "justice, moderation, temperance, industry, and frugality"). But plaintiff has not shown its application here. Likewise, in asserting violations of other constitutional provisions, he has failed clearly to show how his rights have been violated under Article 7, which, among other things, prohibits government action "for the particular emolument or advantage of any single man," id. ch. I, art. 7, or under Article 3, securing the free exercise of religion, id. ch. I, art. 3. We therefore will not address those issues. See Fitzgerald v. Congleton, 155 Vt. 283, 295-96, 583 A.2d 595, 602 (1990) (declaring to address state constitutional issue where plaintiff failed clearly to delineate how her rights had been violated).

VII. In June 1992, plaintiff filed a motion for Judge Norton to disqualify himself and to vacate the summary judgment order in this case. Plaintiff alleged that Judge Norton's position as Rutland City Attorney from 1969 to 1976 coincided with some of the years during which plaintiff claims the Rutland Fire Department pursued a policy of promotion based on seniority. According to plaintiff, Judge Norton's prior service as City Attorney raises an appearance of allegiance or bias toward the City.

Judge Norton refused to disqualify himself, and the matter was referred to Administrative Judge Stephen B. Martin. See V.R.C.P. 40(e)(3). Judge Martin found that plaintiff had failed to meet his burden of showing bias or prejudice on the part of Judge Norton. We agree.

[163 Vt. 96] As we have stated on more than one occasion, it is not enough merely to show the existence of adverse rulings, no matter how erroneous or numerous, or that the judge expressed a comment or opinion, uttered in the course of judicial duty, based upon evidence in the case. See Cliche v. Fair, 145 Vt. 258, 262, 487 A.2d 145, 148 (1984). Judge Norton's rulings do not on their face demonstrate bias, and the fact that he served as city attorney many years prior to the events at issue herein is not sufficient by itself to warrant disqualification. National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953, 958 (2d Cir.1978) (prior representation of party by judge in unrelated matter does not automatically require recusal); Black v. American Mut. Ins. Co., 503 F.Supp. 172, 173 (E.D.Ky.1980) (same). In the absence of supporting evidence of actual bias, we are unable to discern "a doubt of impartiality [that] would exist in the mind of a reasonable, disinterested observer." Richard v. Richard, 146 Vt. 286, 288, 501 A.2d 1190, 1191 (1985). Accordingly, the decision of the administrative judge must be upheld.

Denial of motion for disqualification is affirmed. Reversed on claims of violations of Vermont Fair Employment Practices Act; in all other respects, the judgment of the trial court is affirmed. Cause remanded.

MORSE, Justice, concurring and dissenting.

I respectfully dissent from the reversal of the judgment dismissing the claim under the Vermont Fair Employment Practices Act for religious discrimination and the claim of retaliation. Otherwise, I concur.

The links in the circular chain of inferences the Court employs to arrive at religious discrimination are derived only from the statement of Alderman Cassarino and Chief Lloyd's answer to an interrogatory question, both quoted in the Court's opinion. According to Cassarino, Chief Lloyd insinuated, but did not say, that "the guys" made fun of plaintiff for "watching PTL and 700 Club all the time," and that plaintiff wasn't really commanding." Lloyd stated plaintiff lacked "leadership" and spent most of his considerable free time at the station "watching TV" rather than constructively preparing for "future officer vacancies."

The Court assumes that watching such television during working hours is a protected religious practice. May a court take judicial notice that "PTL or 700 Club" are "religious" observances within the meaning of the Act? The Court next assumes that plaintiff's coworkers made fun of plaintiff's "religion," rather than his choice of television entertainment. The Court further assumes, based on [163 Vt. 97] Lloyd's insinuation, that plaintiff was not "commanding" only because he watched a particular form of programming. Making yet another assumption, the Court states that Chief Lloyd's statement describes the same conversation that Cassarino vaguely remembers.

Chief Lloyd's statement does not remotely supply evidence of discrimination found wanting in Cassarino's deposition. The Court, nevertheless, makes a quantum leap from one statement to the other. Lloyd's observation that plaintiff's watching television during most of his free time at the station instead of working toward his promotion becomes Lloyd's assessment of plaintiff's religious observance; practicing religion fosters disrespect by coworkers; the disrespect becomes a motivating, if not sole, consideration in making the decision not to promote plaintiff. Under the Court's factual analysis, surmise leads to speculation forming a conjectural waft of religious prejudice.

Page 645 Summary judgment should be available to screen out such frivolous attacks. I would also affirm the grant of summary judgment on the claim of retaliation. Plaintiff has not shown a causal connection between his complaint and the allegedly retaliatory actions. The record only indicates that plaintiff was assigned "detail" work on an average of once per month. The record does not indicate, beyond plaintiff's assertion, that plaintiff was singled out to perform this type of work. Plaintiff made no showing that only new recruits

© 2012 ELLIS BOXER & BLAKE
were required to perform menial tasks or that menial tasks were assigned as a form of discipline.

Nor has plaintiff shown that defendant's nondiscriminatory reasons for disciplining plaintiff were pretextual. Plaintiff complains that three reprimand letters were retaliatory because the subject of the reprimands were actions that are not normally the subject of discipline. I fail to see how insubordination, failure to respond to an emergency call in a timely fashion, nonresponse to emergency calls on two separate occasions, failure to wear proper equipment, and abuse of sick leave would not be subject to such mild sanctions. Where plaintiff had some legitimate explanation for his behavior, Lloyd accepted the explanation and took no disciplinary action. Moreover, plaintiff has introduced no evidence that other firefighters were treated differently for these same actions. By not requiring this showing, the Court assumes that these letters resulted from increased scrutiny and fails to take into account that even twenty-six year employees may misbehave after being passed over for promotion.

Page 315

[163 Vt. 98] In my opinion, the Court's decision today, as I have discussed, encourages the practice of making spurious claims against employers and wastes the limited resources of all concerned.

Notes:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured....

[2] The parties and the trial court incorrectly applied the McDonnell Douglas framework to plaintiff's discrimination claims under § 495. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); see also Hodgdon, 160 Vt. at 161, 624 A.2d at 1128-29 (explaining different burdens of production depending upon evidence presented by plaintiff). The trial court's decision was prior to our decision in Graff v. Eaton, 157 Vt. 321, 324, 598 A.2d 1383, 1384 (1991), where we adopted the Price Waterhouse framework, which is applicable to the claims raised by plaintiff. See Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 109 S.Ct. 1775, 1785-86, 104 L.Ed.2d 268 (1989); Hodgdon, 160 Vt. at 161, 624 A.2d at 1128-29. If the plaintiff fails to establish that an impermissible factor played a motivating part in the employment decision, then the McDonnell Douglas analysis applies. Hodgdon, 160 Vt. at 162, 624 A.2d at 1129.

---

**DISCRIMINATION/RETAIATION**

**Robertson v. Mylan Laboratories, Inc., 2004 VT 15**

Present: AMESTOY, C.J., DOOLEY, MORSE [1], JOHNSON and SKOGLUND, JJ.

¶ 1. In this workplace gender discrimination case brought under the Vermont Fair Employment Practices Act, 21 V.S.A. §§ 495-496, plaintiff Lynne Robertson appeals the superior court's grant of summary judgment in favor of defendants Mylan Laboratories, Inc., Bertek, Inc., and Sharad Govil. Plaintiff claims that defendants discriminated against her by failing to promote her, by giving her a low level of pay relative to her male peers at the company, and by terminating her in retaliation for her gender discrimination complaint. We affirm.

I. Facts and Procedural History [2]

¶ 2. Plaintiff was employed as a scientist in the Research and Development Division at Bertek, Inc. (now known as Mylan Technologies, Inc.), a St. Albans-based pharmaceutical company that develops and manufactures transdermal (through the skin) drugs. Bertek is a subsidiary of Mylan Laboratories, Inc. Plaintiff was hired by Bertek in September 1993 after interviewing with Dr. Ludwig Weimann and Dr. Sharad Govil. According to Govil, he supported hiring plaintiff, although plaintiff disputes that fact. At that time, plaintiff held a B.S. degree in biology and a master's degree in biochemistry, and had previous experience in the pharmaceutical industry and drug formulation, but had no prior educational or work experience in transdermal drug development. Throughout her career at Bertek, she worked directly or indirectly under Govil, who is now General Manager of Bertek.

¶ 3. In 1994, while working full-time at Bertek, plaintiff began taking courses in pharmacology at the University of Vermont in pursuit of her doctoral degree, with Govil's approval. Plaintiff claims that Govil initially did not wish to approve her education, and did so only after she went to higher management with her request. Regardless, Govil twice approved plaintiff's request for a flexible work schedule, and also approved Bertek's payment of her tuition. Plaintiff completed the course requirements for the Ph.D. at the end of 1995.

¶ 4. Plaintiff worked under Govil in 1994 and 1995, and was promoted twice during that time, first to Senior Scientist in May 1995 at a salary of $46,275, then to Manager of Permeation and Dissolution in July 1995 at a salary of $52,000. In late 1996, plaintiff asked Govil to transfer her to the Formulations Group because she did not like the way she was being treated by her supervisor. Govil...
granted this request, and plaintiff became Manager of Permeation in the Formulations Group.

¶ 5. Despite the promotions and the discretionary transfer Govil approved, during 1997 and early 1998 plaintiff complained to several Bertek personnel that Govil treated her unfairly because of her gender. She claims that Dr. Scott Burton, Manager of Formulations and plaintiff's immediate supervisor, indicated to her that he agreed with her, and that Interim President Lou Debone and General Manager Matthew Costigan told her that Govil's actions were due to his "cultural differences" with respect to the treatment of women. Also during that period, several scientists in the Research and Development department, including Burton, left Bertek. Plaintiff claims that many of those employees—most of whom were male—left because they were dissatisfied with Govil's style and management.

¶ 6. The events underlying much of this case relate to Govil's actions in response to the departure of Burton and others. Govil proposed to upper management to split the Formulations Group into two groups: drug delivery and polymer science. In response to problems with drugs under development, he proposed to upgrade the scientific ability of the staff leaders in product development. As the restructuring was approved in February of 1998, the Manager of Formulations position was eliminated, and a new position of Director of Research and Development created. The positions of Supervisor of Drug Delivery and Supervisor of Polymers were created to report to the new research and development director.

¶ 7. While the restructuring was going on, Govil announced an interim organization. On January 21, 1998 he made plaintiff interim head of formulations while she continued to serve as Manager of Permeations.

Page 316

Govil asserts that this promotion was due to plaintiff's seniority, although plaintiff claims that Govil never conveyed that reason to her. Govil drafted job descriptions for two new supervisor positions. For the position of Supervisor of Drug Delivery, the job description required a Ph.D. in Pharmaceutics, Material Science, or Chemical Engineering, as well as five years of transdermal formulations experience.

¶ 8. Consistent with the view that Bertek needed to upgrade the scientific skills of key employees in product development, Govil initiated a search for qualified persons. He identified Dr. Kenneth Miller as the most likely candidate for Supervisor of Drug Delivery, based on an interview in January 1998 before the position was approved. Govil posted the Supervisor of Drug Delivery position on February 13, 1998, and shortly after the application closing date, one week later, hired Dr. Miller.

¶ 9. Plaintiff believes that she should have been hired as Supervisor of Drug Delivery and she was rejected because she is a woman. She alleges a number of "irregularities" in the hiring of Dr. Miller:
1. He was interviewed before the job was even created. In plaintiff's view, this process violated a policy requiring that open positions be posted and that internal candidates be interviewed before external candidates.
2. The job description was created to mirror Dr. Miller's qualifications, rather than the reverse.
3. The opening was posted on Friday in violation of a policy requiring posting on Wednesday and was open for a week for which Govil believed plaintiff would be on vacation.
4. Bertek had on other occasions waived minimum education requirements for applicants who were close to having the needed education qualifications. Govil refused to waive the minimum qualifications in plaintiff's case.
5. Miller was unqualified because he lacked industrial experience, which is generally favored at Bertek; during the interview process, Miller stated that "getting drugs to go through skin" was not his area of expertise.

¶ 10. Plaintiff submitted an application for the Supervisor of Drug Delivery position on February 19, and the next day met with Govil for over an hour to discuss the position. According to defendants, Govil did not believe that plaintiff was qualified for the position due to her lack of a Ph.D. and the requisite five years of transdermal formulations experience. In contrast, Miller held a B.S. and a Ph.D. in chemical engineering, had worked for a successful competitor as well as several universities where he had performed transdermal drug research work for private corporations, and had authored publications and made numerous presentations on transdermal drugs.

¶ 11. Plaintiff was subsequently told that she was being promoted and that her salary would be increased to $60,000 (approximately $4,000 more than she was being paid at the time). The exact position that plaintiff was promoted to is disputed. Plaintiff claims that her new title was to be Senior Manager of Projects, and that she was to be in charge of all of the corporation's projects. She contends that this promotion was inexplicably delayed, and that her new pay was substantially less than the $80,000 that other staff at that level—specifically, new Supervisor of Drug Delivery Miller—were receiving. Defendants respond that, after plaintiff had submitted a proposed job description, defendants provided plaintiff with a revised position description stating that her title would be Project Manager and that her salary would be $60,000. Defendants also claim that plaintiff was told that there would be a transition period as she wrapped up work on her other projects.

¶ 12. In May 1998, plaintiff filed a formal complaint with Bertek, claiming that she was denied the Supervisor of Drug Delivery position, the Senior Manager of Projects title, and an $80,000 salary due to her gender. Plaintiff alleges that as a result of her complaint she was treated unfairly by Govil and other Bertek personnel. The Human Resources department subsequently conducted an investigation of the complaint and ultimately found that plaintiff had not been subject to unfair or discriminatory treatment. In July 1998, plaintiff filed a charge of gender discrimination with the Vermont Attorney General and the

Page 317

EMPLOYMENT LAW AND WORKERS’ COMPENSATION
© 2012 ELLIS BOXER & BLAKE
Equal Employment Opportunity Commission (EEOC). Following an investigation, the EEOC concluded that there was no evidence to suggest that plaintiff had been discriminated against based on her gender or retaliated against for filing a complaint, and dismissed her charge.

¶ 13. Plaintiff continued to work for Bertek as Project Manager, even after she filed the current lawsuit in Franklin County Superior Court in July 1999. Finally, in February 2000, plaintiff was terminated for breach of her confidentiality agreement with Bertek for alleged dissemination, via a resume submitted to a recruiter, of information regarding projects she had worked on for the company. Plaintiff contends that none of the information found on the resume was detrimental to the company and that other employees had divulged similar types of information and had not been punished. She added to this litigation a count that defendants retaliated against her for her complaint to the Vermont Attorney General and the filing of this case.

¶ 14. As amended after plaintiff was terminated, the complaint in this case had three counts: (1) defendants Govil, Bertek and Mylan Laboratories committed unlawful employment practices in violation of the Vermont Fair Employment Practices Act (FEPA), 21 V.S.A. § 495 et seq., in failing to hire plaintiff as Supervisor of Drug Delivery; (2) defendants committed unlawful employment practices in violation of FEPA by actions against plaintiff taken in retaliation for her complaints of gender discrimination directly to defendants and to the Attorney General; and (3) defendants committed unfair employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., by all the above actions. In response to a motion by defendants, the trial court rendered summary judgment for defendants on all counts on July 31, 2001. Plaintiff subsequently brought this appeal contesting the dismissal of the two FEPA counts.

II. Summary Judgment Standard

¶ 15. On review of a grant of summary judgment, this Court will apply the same standard as that used by the trial court. White v. Quechee Lakes Landowners’ Ass’n, 170 Vt. 25, 28, 742 A.2d 734, 736 (1999). Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether there is a genuine issue as to any material fact, we will accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material. Quechee Lakes Landowners’ Ass’n, 170 Vt. at 28, 742 A.2d at 736. Further, the nonmoving party receives the benefit of all reasonable doubts and inferences.

Page 318

Sampled Enters., Inc. v. First Vt. Bank, 165 Vt. 22, 25, 676 A.2d 774, 776 (1996). Nevertheless, the opponent to a summary judgment motion cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits, Gore v. Green Mountain Lakes, Inc., 140 Vt. 262, 266, 438 A.2d 373, 375 (1981), but must respond with specific facts that would justify submitting her claims to a factfinder. V.R.C.P. 56(e); State v. G.S. Blodgett Co., 163 Vt. 175, 180, 656 A.2d 984, 988 (1995). If such facts are contained in affidavits, these affidavits must be made on personal knowledge and set forth facts that would be admissible in evidence. V.R.C.P. 56(e).

III. Failure to Promote Claim

¶ 16. We first address plaintiff’s FEPA claim of discrimination for failure to promote her. Under FEPA, it is an "unlawful employment practice ... [f]or any employer, employment agency or labor organization to discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth, or age or against a qualified individual with a disability." 21 V.S.A. § 495(a), (a)(1). The standards and burdens of proof to be applied under FEPA are identical to those applied under Title VII of the United States Civil Rights Act. See Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 161, 624 A.2d 1122, 1128 (1992).

A. The Applicable Framework

¶ 17. Plaintiff's first claim of error is that the trial court applied the wrong burden allocation framework. Plaintiff argues that since she presented direct evidence—in particular, alleged comments made to her or her husband by senior officers at Bertek—that gender played a motivating factor in defendants' decision not to promote her, the two-step framework of Price Waterhouse v. Hopkins, 490 U.S. 228, 241-44, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), should apply, rather than the three-step burden shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), that the trial court applied. Defendants counter that the evidence presented is insufficient to trigger the Price Waterhouse analysis, and that the trial court correctly applied the McDonnell Douglas framework. We agree with defendants that the McDonnell Douglas analysis was the correct framework to apply in this case.

¶ 18. This Court has adopted both the Price Waterhouse and the McDonnell Douglas frameworks. Hodgdon, 160 Vt. at 161, 624 A.2d at 1128. The Price Waterhouse framework "is invoked when the plaintiff initially establishes that her sex played a motivating part in an employment decision." Id.; see also Graff v. Eaton, 157 Vt. 321, 324-25, 598 A.2d 1383, 1384-85 (1991). If such direct evidence of discrimination is presented, "the burden of persuasion then falls upon, and remains with, the employer to prove 'by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.'" Graff, 157 Vt. at 324, 598 A.2d at 1384 (quoting Price Waterhouse, 490 U.S. at 258, 109 S.Ct. 1775). If the plaintiff presents only circumstantial evidence of discrimination, however, the three-step burden shifting analysis of McDonnell Douglas is applied. Hodgdon, 160 Vt. at 162, 624 A.2d at 1129. Under McDonnell Douglas, in contrast to the analysis under...
Page 319

Price Waterhouse, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Tex. Dept. of Cnty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

¶ 19. Plaintiff relies particularly on four statements, three to her and one to her husband, that she or her husband testified to in their respective depositions. Three of these precede Govil's actions in creating and filling the position of Supervisor of Drug Delivery. Apparently, plaintiff was complaining about Govil's treatment of her to her supervisor, Scott Burton, to the interim President of Bertek, Lou Debone, and to the General Manager of Bertek, Matthew Costigan. Plaintiff alleges that when she asked why Govil unfairly treated her, both Debone and Costigan answered it was because of "cultural differences." She alleges that when she asked Burton if Govil unfairly treated her because she is a woman, he answered "there's some of that." The fourth, by Costigan to plaintiff's husband, is alleged to have come after Dr. Miller was hired. Again, Costigan attributed Govil's treatment to cultural differences and when asked if that meant that it was because plaintiff is a woman, "He didn't answer, but he winked and nodded his head to me and pointed like that in an affirmative action."

¶ 20. We do not believe these statements meet the strict requirement of direct evidence set out in Price Waterhouse. Neither "stray remarks in the workplace ... nor ... statements by nondecisionmakers, nor statements by decisionmakers unrelated to the decisional process itself" will be considered as direct evidence of an employer's discriminatory intent. Price Waterhouse, 490 U.S. at 277, 109 S.Ct. 1775 (O'Connor, J., concurring); EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920, 923 (8th Cir. 2002); Fakete v. Aetna, Inc., 308 F.3d 335, 338 n. 2 (3d Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581 (1st Cir. 1999); see also 1 L. Larson, Employment Discrimination § 8.07[3], at 8-86 (2d ed. 2003) ("A statement will not be considered direct evidence of an employer's discriminatory intent if it is made by an individual who was not a participant in the decision-making process.").

¶ 21. Plaintiff does not dispute that neither Costigan, Debone nor Burton—despite their high positions within Bertek—was part of the decision not to promote her. The alleged comments to plaintiff did not diminish these administrators' own decision-making process, but were instead mere speculation as to Govil's state of mind during his decision making. At least three of the statements were about other actions of Govil, not the decision to hire Ken Miller as Supervisor of Drug Delivery. The statements are insufficient as direct evidence of discrimination. Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 397 (7th Cir. 1997) (statements made by nondecision maker amount to mere speculation as to thoughts of decision maker, and do not provide "smoking gun" evidence required for direct inference of discriminatory intent); Edwards v. Schlumberger-Well Servs., 984 F.Supp. 264, 275 (D.N.J.1997) (statements by nondecision maker that plaintiff was terminated because she was female were not "discriminatory statements made in the decisionmaking process, but rather were statements about discriminatory views that were held by decisionmakers" and therefore were insufficient to satisfy burden in a mixed-motive analysis); see also Taylor v. Va. Union Univ., 193 F.3d 219, 232 (4th Cir. 1999) (statement that police chief would never send a female to the academy did not bear directly on the contested employment decision" so as to trigger a mixed motive standard of liability) (internal quotations omitted); Kneibert v. Thomson Newspapers, Mich. Inc., 129 F.3d 444, 452-53 (8th Cir. 1997) (statement by person with no decision making authority that plaintiff "was not terminated because of his ability or his quality of work but because of a[sic] litigation that he is involved in" did not constitute direct evidence) (internal quotations omitted); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1218 (5th Cir. 1995) (statements by nondecision maker that plaintiff had a "good case of age discrimination" and that it "must have been your age" did not provide direct evidence of age-related animus) (internal quotations omitted); Ahrens v. Perot Sys. Corp., 39 F.Supp.2d 773, 781 (N.D.Tex.1999) (statements by supervisor and fellow employees might be sufficient to infer a discriminatory motive, but were insufficient to constitute direct evidence of discrimination under mixed-motive analysis).

¶ 22. Plaintiff urges that we look at the remaining evidence, much of it set forth in the statement of facts above and discussed later in this opinion, as direct evidence that gender discrimination motivated Govil's action. To the extent the evidence involves the hiring decision, it does not show directly that plaintiff's gender was a motivating factor in that decision. To the extent the evidence goes to what plaintiff characterizes as an abusive working environment for women in the company, it is not related sufficiently to the hiring decision to invoke the Price Waterhouse standard.

B. The McDonnell Douglas Analysis

¶ 23. Plaintiff next claims that the trial court erred in finding that she failed to make out a prima facie case as required by McDonnell Douglas. Defendants argue that the court was correct in finding that plaintiff had not made out her prima facie case, and, even so, plaintiff failed to demonstrate that Bertek's justification for its actions was a mere pretext for unlawful discrimination. We find that plaintiff produced sufficient evidence to make out a prima facie case, but that she has not carried her burden to show that defendants' actions were pretextual, sufficient to withstand summary judgment.

1. The McDonnell Douglas Framework

¶ 24. McDonnell Douglas "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), in order to "progressively ... sharpen the inquiry into the elusive
factual question of intentional discrimination." Burdine, 450 U.S. at 255 n. 8, 101 S.Ct. 1089. At the outset, the plaintiff has the burden of establishing a prima facie case of employment discrimination. Boulton v. CLD Consulting Engrs., Inc., 2003 VT 72, ¶ 15, 175 Vt. 413, 834 A.2d 37; Hodgdon, 160 Vt. at 159, 624 A.2d at 1127. This step serves a screening function: it eliminates the most patently meritless claims—i.e., where the plaintiff was rejected for "common nondiscriminatory reasons." Burdine, 450 U.S. at 254, 101 S.Ct. 1089. The evidentiary burden required of the plaintiff at this stage is a relatively light one. See id. (burden at prima facie stage is "not onerous"); Beckmann v. Edson Hill Manor, Inc., 171 Vt. 607, 608, 764 A.2d 1220, 1222 (2000) (mem.).

¶ 25. The specific elements of a prima facie case may vary depending on the claim and the particular facts of the case. See Burdine, 450 U.S. at 253 n. 6, 101 S.Ct. 1089 (prima facie standard is "not inflexible" and may differ given differing factual situations). In general to establish a prima facie case of employment discrimination, the plaintiff must demonstrate that: (1) she was a member of a protected group; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances surrounding this adverse employment action permit an inference of discrimination. See McDonnell Douglas Corp., 411 U.S. at 802, 93 S.Ct. 1817; Bennett v. Watson Wyatt & Co., 136 F.Supp.2d 236, 246 (S.D.N.Y.2001); see also State v. Whitingham Sch. Bd., 138 Vt. 15, 19, 410 A.2d 996, 998-99 (1979); Carpenter v. Cent. Vt. Med. Cir., 170 Vt. 565, 566, 743 A.2d 592, 594-95 (1999) (mem.) (elements for age discrimination).

¶ 26. Once the plaintiff has established a prima facie case, a presumption of discrimination arises, Hicks, 509 U.S. at 506, 113 S.Ct. 2742, and the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Hodgdon, 160 Vt. at 159, 624 A.2d at 1127 (quoting McDonnell Douglas Corp., 411 U.S. at 802, 93 S.Ct. 1817). This second step serves to respond to the plaintiff's prima facie case as well as "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Burdine, 450 U.S. at 255-56, 101 S.Ct. 1089. The employer's burden at this second stage is solely one of production, not persuasion. Id.

¶ 27. If the employer meets his burden at this stage, the presumption of discrimination disappears, Hicks, 509 U.S. at 510-11, 113 S.Ct. 2742, and the burden then shifts back to the plaintiff to prove that the employer's justification is a mere pretext for discrimination. Hodgdon, 160 Vt. at 159, 624 A.2d at 1127. This third step is in keeping with the fact that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S.Ct. 1089.

2. The Prima Facie Case

¶ 28. Returning to the case at hand, the first issue concerns plaintiff's attempt to establish a prima facie case of discrimination. The trial court found that plaintiff did not establish a prima facie case for two reasons: (1) plaintiff failed to satisfy the second element because she did not demonstrate that she was qualified for the Supervisor of Drug Delivery position, and (2) plaintiff failed to satisfy the fourth element because she did not demonstrate that Miller had similar or lesser qualifications for the position than she, and thus there could be no inference of gender discrimination. Plaintiff contends that in making such a finding the trial court ignored relevant evidence suggesting that plaintiff was qualified for the open position but that Govil manipulated the job opening in order to prevent her from obtaining that position because of her gender. We find that plaintiff's proffer of evidence was sufficient to meet her burden at the prima facie case stage.

¶ 29. Under McDonnell Douglas, if plaintiff is not objectively qualified for the position, then she cannot make out a prima facie case. Defendants persuaded the trial court to conclude that defendant was not qualified because the job description required a Ph.D. in Pharmaceutics, Material Science, or Chemical Engineering, and plaintiff did not have a Ph.D. at that time. We do not find the educational qualification conclusive. Plaintiff was close to obtaining her Ph.D., and her evidence suggests that Bertek had often let other employees assume positions when they did not meet all of the educational requirements but were close to completing them. Moreover, plaintiff was performing the nearest comparable job, Manager of Formulations, on an interim basis. She claimed that the responsibilities did not substantially change, but that Govil changed the title and added qualifications to give the job to his hand-picked male candidate. See Arrington v. Cobb County, 139 F.3d 865, 875 (11th Cir. 1998) (prima facie case established where plaintiff presented evidence that responsibilities of new position given to male employee were the same as those that plaintiff had performed before restructuring); Gates v. BEA Assoc., No. 88 Civ. 6522(JSM), 1990 WL 180137, at **1-2, (S.D.N.Y. Nov.13, 1990) (summary judgment at prima facie stage not warranted where there were disputed issues as to whether degree requirement was bona fide job qualification and whether it was added solely to exclude plaintiff from consideration); Larson, supra, § 8.02[3], at 8-25 ("A court may be inclined not to take the employer's stated qualifications seriously when in fact the employer does not consistently adhere to those stated qualifications when making employment decisions."). Again, we stress that plaintiff's burden is relatively light at the prima facie case stage.

¶ 30. We have a similar view of the trial court's holding that plaintiff failed to demonstrate the fourth element of her prima facie case because she could not show that Miller had similar or lesser qualifications for the position than she. See Walker v. Mortham, 158 F.3d 1177, 1185 (11th Cir. 1998) (issue of comparative qualifications
more appropriate for rebuttal stage, as employer is in better position to provide information pertaining to this issue); _Thomas v. Denny's, Inc._, 111 F.3d 1506, 1510 (10th Cir. 1997) (requiring plaintiff to establish comparative qualifications at prima facie case stage effectively removed his opportunity to establish pretext); _Larson v. supra_, § 8.02[6], at 8-31 ("Courts have generally repudiated th[e] view [that failure of the plaintiff to present evidence of comparative qualifications is fatal to the prima facie case], holding that there is no such requirement and that a plaintiff need only demonstrate minimum qualifications."). Plaintiff must come forward with evidence to show that the circumstances surrounding her failure to receive the Supervisor of Drug Delivery job permit an inference of unlawful discrimination. See _Carpenter_, 170 Vt. at 567, 743 A.2d at 595. Again, we find that the evidence that the job description and job qualifications were manipulated, combined with the fact that a man was chosen for the position over plaintiff, is sufficient to permit such an inference, see, e.g., _Holt v. KMI-Continental, Inc._, 95 F.3d 123, 129 (2d Cir. 1996) (plaintiff made out prima facie case "by showing that she is a member of a protected class, a black female; that she applied for the positions; that she was qualified for the positions; and that the positions were filled by a white male and a white female"), and discharge plaintiff's very light burden at this stage. See _Boulton_, 2003 VT 72, at ¶ 16, 834 A.2d 37; see also _Quaratino v. Tiffany & Co._, 71 F.3d 58, 65 (2d Cir. 1995) ("Plaintiff's burden of proof in a discrimination action is de minimis at the prima facie stage ...."). We therefore hold that plaintiff has demonstrated a prima facie case of discrimination.


¶ 31. Pursuant to the second stage of the _McDonnell Douglas_ analysis, defendants have offered evidence in support of a legitimate business reason for their actions: the elimination of the Manager of Formulations position, and the inclusion of certain qualifications in the job description for the new Supervisor of Drug Delivery position were the result of restructuring done in response to large employee turnover, and a perceived lack of scientific ability and expertise in certain specialty areas in the Research and Development department. The important element of this justification, for purposes of this case, is that Govil, and senior management who approved the restructuring, made an early, pre-recruitment decision that the necessary qualifications and skill for the senior drug development jobs did not exist among the employees who were left after the extensive turnover. Thus, in creating the restructuring plan and job descriptions, Govil made the decision that neither plaintiff or any other existing employee would be hired to fill the new jobs. At this second stage of the _McDonnell Douglas_ analysis, defendants have only a burden of production, rather than one of persuasion, see _Boulton_, 2003 VT 72, at ¶ 15, 834 A.2d 37, and plaintiff does not dispute that the reasons defendants proffered for their hiring decision, if believed, were legitimate and nondiscriminatory. We conclude that defendants have met their burden under _McDonnell Douglas_. Thus the only question that remains is whether the total evidence offered by plaintiff is sufficient to carry her ultimate burden of demonstrating that Bertek's justification is a mere pretext for discrimination. We conclude that plaintiff has not carried her burden here.

¶ 32. As we indicated above, we have generally followed the burden allocation rules applicable to Title VII of the Civil Rights Act of 1964. The United States Supreme Court has addressed the burden of demonstrating pretext in a number of cases, and its latest discussion of the nature of the burden in _Reeves v. Sanderson Plumbing Prods., Inc._, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), is the most pertinent. Although _Reeves_ is an Age Discrimination in Employment Act (ADEA) case, it was decided on the basis that the burdens for the ADEA and for Title VII are the same. See 530 U.S at 142, 120 S.Ct. 2097. The Supreme Court took the case "to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." _Id._ at 140, 120 S.Ct. 2097 (internal citations omitted). The Court answered the question in the affirmative, holding that a plaintiff's prima facie case, combined with sufficient evidence of pretext, "may permit the trier of fact to conclude that the employer unlawfully discriminated." _Id._ at 148, 120 S.Ct. 2097. The Court also recognized, however, that this will not always be the case: Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff

Page 324 created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

_Id._ Although the Court was describing the standard for determining whether the employer was entitled to a judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, commentators and courts after _Reeves_ have concluded that the decision also describes the standard for determining whether the employer is entitled to summary judgment. See _Williams v. Raytheon Co._, 220 F.3d 16, 19 (1st Cir. 2000) (applying _Reeves_ to a summary judgment motion); _C. Thompson, Juries Will Decide More Discrimination Cases: An Examination of Reeves v. Sanderson Plumbing Products, Inc._, 26 Vt. L. Rev. 1, 2 (2001); _L. Ware, Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment_, 4 Employee Rts. & Emp. Pol'y J. 37, 63 (2000);
Note, Reeves v. Sanderson Plumbing Products: Stemming the Tide of Motions for Summary Judgment and Motions for Judgment as a Matter of Law, 52 Mercer L. Rev. 1549, 1565 (2001). In part, they have reached this conclusion because the Reeves Court commented that “the standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same.” Reeves, 530 U.S. at 150, 120 S.Ct. 2097 (internal quotations omitted).

¶ 33. Reeves explained the application of its ruling in terms consistent with our law on summary judgment, as set out above. Whether summary judgment is appropriate under Reeves depends on a number of factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered" on a summary judgment motion. Reeves, 530 U.S. at 148-49, 120 S.Ct. 2097. The Reeves Court further clarified this standard:

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. Id. at 150-51, 120 S.Ct. 2097 (internal citations and quotations omitted).

¶ 34. Plaintiff has relied in part on the Reeves holding. Having adopted the burden shifting analysis of McDonnell Douglas, we see no reason not to adopt the standard of Reeves as a reasonable approach to analyzing evidence in an employment discrimination claim brought under FEPA. Thus, we would normally allow plaintiff to avoid summary judgment at this third step of the McDonnell Douglas analysis by demonstrating that there is an issue of material fact underlying the question of whether the employer's reason for its action was pretextual. We conclude that plaintiff has failed to meet this burden.

¶ 35. The difficulty with plaintiff's position is that the hiring decision was not a simple choice among applicants for a preexisting job. Defendants' assertion that they restructured and redefined the research and development management Page 325

is largely unchallenged by plaintiff. This Court "may not second-guess an employer's non-discriminatory business decisions, regardless of their wisdom." Williams v. New York City Dept of Sanitation, No. 00 Civ. 7371(AJP), 2001 WL 1154627, at *18 (S.D.N.Y. Sept.28, 2001) (citing cases); see also Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001) (courts should not act as "super personnel departments" that second-guess employer's business judgments); Tarshis v. Riese Org., 211 F.3d 30, 37 (2d Cir. 2000) ("Title VII ... [does] not grant courts authority to second-guess the wisdom of corporate business decisions ...."). Moreover, much of the evidence plaintiff has relied upon is entirely consistent with defendants' reason for their action and does not raise an inference of pretext.

¶ 36. To the extent that plaintiff has attempted to show that defendants' rationale for the hiring decision was a pretext, she has relied upon three theories. The first is that Govil manipulated the hiring process in violation of company policies to allow him to hire Miller. As we held above, this evidence helped plaintiff to demonstrate a prima facie case, the first stage of the McDonnell Douglas framework, but it is unhelpful in demonstrating pretext. Once Govil decided that the existing Bertek employees did not have the necessary skills to lead the research and development of drugs, he had to conduct a search for persons with the needed qualifications. It is obvious that he could not find highly skilled persons with advanced educational degrees in the narrow field involved by simply announcing that positions were open and hoping that the right persons saw the announcement and applied. Consistent with his goals, Govil actively recruited Dr. Miller even before the restructuring was approved. Although Govil put less emphasis on the application process for internal candidates, we cannot conclude that he violated any company policies in the process, [5] and plaintiff did apply and was interviewed. In summary, at best plaintiff may have showed that Govil violated the spirit of company hiring procedures, but the arguable violations reinforced Govil's rationale for hiring Miller, rather than showing the rationale was a pretext for discrimination.

¶ 37. Her second theory of pretext—that she was more qualified than Miller—also does not meet her burden. It is undisputed that plaintiff did not meet the posted minimum qualifications for the job of Supervisor of Drug Delivery. There is no evidence to support plaintiff's argument that Govil adopted the minimum qualifications solely to give the job to Miller. Indeed, the minimum qualifications were entirely consistent with the business rationale of upgrading skill levels.

¶ 38. We cannot agree with her arguments against these central facts. Plaintiff's personal opinion of her relative qualifications cannot be determinative. See Lee v. GTE Florida, Inc., 226 F.3d 1249, 1255 (11th Cir. 2000) (plaintiff's opinion that she was more qualified than the person who was hired for the job she sought "is insufficient to raise a genuine issue of Page 326

fact" as to whether the reasons given for the hiring decision were pretextual). Nor can we conclude that plaintiff has met her burden by showing that some of the responsibilities of the new job of Supervisor of Drug Delivery overlapped with those of the job she was performing on an interim basis. See Lesch v. Crown Cork & Seal Co., 282 F.3d 467, 473 (7th Cir. 2002).
¶ 39. We do not believe that plaintiff's related allegation that the company had waived minimum qualifications in the past helps plaintiff's position in this context. Since the whole point of the restructuring was to upgrade skill and competency of research and development managers, any waiver of qualifications to hire an existing employee would defeat this point. Nor are we persuaded that plaintiff showed pretext by her husband's testimony that the General Manager of Bertek, Matthew Costigan, once told him that Miller should not be interviewed because he was an academician and did not have the "industrial experience" necessary for the job. Irrespective of the views of Costigan, who was not responsible for the hiring, it is undisputed that Miller met the minimum qualifications for the job, including five years of transdermal formulations experience, and that plaintiff did not.

¶ 40. We do not belittle plaintiff's evidence in support of her third theory—that women were subject to widespread discrimination at Bertek. Her evidence suggested that Bertek's work culture was frequently hostile to women, [6] that men held the upper research and development positions, [7] that Govil was a poor manager and supervisor especially with respect to women employees, or that "cultural differences" adversely affected his attitude toward women employees. This evidence may be relevant under Reeves, 530 U.S. at 151-52, 120 S.Ct. 2097, to support sufficiently evidence that the stated reason for the hiring decision was pretextual, but it does not replace such evidence. It does not respond to defendants' business rationale for their hiring decision and show that it is a pretext.

¶ 41. In general, plaintiff has failed to present sufficient evidence to rebut defendants' rationale beyond her own conclusory allegations, see Quechee Lakes Landowners' Ass'n, 170 Vt. at 28, 742 A.2d at 736 (conclusory allegations without facts to support them are insufficient to survive summary judgment), to contradict this evidence. See Smith v. Am. Express Co., 853 F.2d 151, 154-55 (2d Cir. 1988) (summary judgment for defendant appropriate when plaintiff failed to show pretext in selection of better qualified candidate for promotion). We conclude that plaintiff failed to meet her burden and that the trial court properly granted summary judgment against her on her claim that defendants illegally failed to promote her. [8]

IV. Claim of Retaliation

¶ 42. Plaintiff's final claim is that Bertek retaliated against her for bringing a gender discrimination claim against it. To establish a prima facie case of retaliatory discrimination under FEPA, the plaintiff must show that (1) she engaged in a protected activity; (2) her employer was aware of that activity; (3) she suffered adverse employment decisions; and (4) there was a causal connection between the protected activity and the adverse employment action.

Galippo v. City of Rutland, 163 Vt. 83, 92, 656 A.2d 635, 642 (1994); Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). If the plaintiff establishes a prima facie case, the burden shifts to the defendant-employer to articulate some legitimate nondiscriminatory reason for the alleged retaliation. Tomka, 66 F.3d at 1308. If the defendant carries this burden of production, the plaintiff must then demonstrate that the defendant's reasons are pretext for discriminatory retaliation. Id. The trial court found that plaintiff had not established a prima facie case of retaliatory discrimination under FEPA and thus granted summary judgment in defendants' favor on these claims. We agree that the grant of summary judgment was appropriate.

¶ 43. Plaintiff claims that, as a result of filing a complaint with the company and later with the Vermont Attorney General's office, (1) she received a negative performance appraisal criticizing her knowledge of project management and her interpersonal communication skills; (2) Govil excluded her from interviews of job applicants, excluded her from project meetings, and ignored and failed to support her; (3) she was "demoted" to the position of Project Manager and (4) Bertek terminated her employment. It is not disputed that plaintiff's filing of a gender discrimination complaint with the company and later with the Vermont Attorney General's office is a protected activity and that Bertek was aware of this activity. We thus turn to whether the individual actions that plaintiff complains of are "adverse employment actions" and, if so, whether these actions were the result of her filing of a complaint.

¶ 44. Neither the negative performance appraisal or Govil's alleged unfair treatment of plaintiff constitutes an "adverse employment action" so as to satisfy plaintiff's prima facie case. See Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (reassignment of staff was not adverse employment action); Johnson-Carter v. B.D.O. Seidman, LLP, 169 F.Supp.2d 924, 936-39 (N.D.III.2001) (employer's denial of one training class in which African-American employee already had expertise, noninvitation to three staff meetings, requirement that employee work outside her area of expertise, and denial of an isolated request for compensatory time off did not constitute material "adverse employment actions"); Bennett, 136 F.Supp.2d at 247 (exclusion from performance evaluation process and compensation communication meetings were not adverse employment actions as would support prima facie case of race discrimination); Martin v. Kroger Co., 65 F.Supp.2d 516, 539 (S.D.Tex.1999) (plaintiff's "allegations about undermining her authority as a supervisor, increasing her workload, and giving credit for her work to undeserving non-minorities," did not rise to level of adverse employment actions). Furthermore, the incidents of unfair treatment that plaintiff contends were retaliation for her filing of a gender discrimination claim are of the exact same character as the incidents of alleged unfair treatment that apparently led to the filing of the claim in the first place. Thus, plaintiff has not satisfied either the third or
fourth element of the prima facie case of retaliation based on these actions by Govil.

¶ 45. In regards to the negative performance appraisal, “[n]egative evaluations alone, without any accompanying adverse result, ... are not cognizable.” Valentine v. Standard & Poor’s, 50 F.Supp.2d 262, 283-84 (S.D.N.Y.1999) (collecting Page 329 cases). Here, plaintiff does not claim that the negative performance appraisal caused any change in the conditions of her employment, nor does she claim that her eventual discharge was the result of this appraisal. As such, this action similarly does not satisfy the third element of the prima facie case.

¶ 46. As for the “demotion,” the record indicates that the events that plaintiff complains about—the alleged promotion to Senior Project Manager followed a week later by a “demotion” to Project Manager—occurred before plaintiff filed her claim with Bertek. Indeed, it seems that it was precisely this “demotion”—which occurred in late April—that led to the filing of her complaint in early May. Thus, the causation element of the prima facie case is not satisfied for this claim of retaliation. See McLee v. Chrysler Corp., 109 F.3d 130, 136 (2d Cir. 1997) (no inference of discriminatory motivation where plaintiff contacted civil rights offices after, and because of, alleged adverse employment action); Zorn v. Helene Curtis, Inc., 903 F.Supp. 1226, 1250 (N.D.Ill.1995) (no causal relationship established where evidence giving rise to alleged constructive discharge began before employee complained of discrimination).

¶ 47. Plaintiff’s termination is clearly an adverse employment action. Yet we find it difficult to see, absent other evidence, how this action was the result of a protected activity: plaintiff’s termination came nearly seven months after she filed the current lawsuit, and over one and a half years after she filed the original claims of discrimination with Bertek, the Vermont Attorney General, and the EEOC. See Nguyen v. City of Cleveland, 229 F.3d 559, 566-67 (6th Cir. 2000) (if plaintiff relies solely on temporal proximity between the protected activity and the adverse action to show retaliation, a proximity of time of less than six months generally is required to establish a prima facie case); Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (proximity in time of three months between the protected activity and the adverse action is alone insufficient to make out a prima facie case). Plaintiff has not pointed to other evidence of retaliation.

¶ 48. Even were we to accept that plaintiff has made out a prima facie case of retaliation in regards to her termination, we find that she has not demonstrated that defendants’ reasons for the discharge were a pretext for retaliation. Defendants claim that plaintiff was discharged due to the disclosure of confidential company information to a recruiter and one of Bertek’s competitors. Plaintiff does not argue against the claim that the information she disclosed via her resumé was confidential and that, in distributing the resumé, she violated the confidentiality agreement that she had signed. She contended in an affidavit that the trial court struck that there was no injury to the company for any information revealed and that other individuals had revealed similar information without consequences. Even if the information were properly before us, her statements constitute only general, conclusory and self-serving allegations with no supporting detail that allows a trier of fact to determine their credibility and weight. As we emphasized earlier, conclusory allegations without facts to support them are insufficient to survive summary judgment. Quechee Lakes Landowners’ Ass’n, 170 Vt. at 28, 742 A.2d at 736. Thus, plaintiff has not met her burden at this stage, and the grant of summary judgment in favor of defendants was appropriate.

V. Other

¶ 49. The parties have briefed two other issues that we do not reach in light of our disposition. Plaintiff argues that the trial court erred in finding that an individual supervisor is not liable under FEPA and in dismissing Sharad Govil as a defendant. Because we uphold the decision to grant summary judgment to defendants on all claims, we need not reach this issue.

¶ 50. Defendants argue that the dismissal of the retaliation claim should be upheld as a discovery sanction because of plaintiff’s refusal to identify her current employer despite the trial court’s order to do so. We have upheld the grant of summary judgment for defendants on this claim and do not have to reach this argument.

Affirmed.

Notes:
[1] Justice Morse sat for oral argument but did not participate in this decision.
[2] We note at the outset that there is a confusion over the admissibility of the contents of certain affidavits submitted by plaintiff, in particular two affidavits of plaintiff and one affidavit of Michael Fulton, a prior Bertek employee. The trial court apparently struck these three affidavits in them that it found to be inadmissible. Plaintiff failed to challenge this ruling in her brief, but in response to defendants’ reliance on the rulings in their brief, asserted in her reply brief that the court’s ruling was error. We need not consider an argument raised for the first time in a reply brief. See In re Wal Mart Stores, Inc., 167 Vt. 75, 86, 702 A.2d 397, 404 (1997). In any event, given that virtually all of plaintiff’s factual allegations appear in depositions, particularly hers, and documentary evidence, striking the affidavits is of limited significance. Moreover, to the extent that this decision relies on the absence of evidence that might have been supplied by the affidavits, it also relies on other grounds.
[3] Plaintiff’s husband is Maurice Miller, who was Director of Manufacturing at Bertek during the relevant time period.
[4] We recognize that in prior cases this Court, after finding that the trial court erred in finding that the FEPA
plaintiff had failed to prove a prima facie case, reversed and remanded a summary judgment finding against the plaintiff without addressing the issue of pretext. See, e.g., Carpenter v. Cent. Vt. Med. Ctr., 170 Vt. 565, 569, 743 A.2d 592, 597 (1999) (mem.). Here, however, the pretext issue was specifically addressed by the trial court as an independent ground for its decision and has been fully briefed by both parties.

[5] For example, plaintiff argued that Bertek's policy required that internal candidates be interviewed before external candidates are interviewed. In fact, the policy requires only that internal candidates be interviewed before the position is filled. While it suggests that internal candidates be interviewed first, it does not require this procedure.

Plaintiff also argued that the position opening was posted on Friday, in violation of a company policy that required posting on Wednesday. In fact, the posting policy had been eliminated in 1997, well before the posting here.

[6] Plaintiff relies on our decision in In re Butler, 166 Vt. 423, 697 A.2d 659 (1997), for the proposition that evidence of a hostile work environment can show disparate treatment and pretext. Butler was an appeal from a decision of the Vermont Labor Relations Board concluding that the decision to terminate a female state police officer because she failed to successfully complete her probationary period was based on gender discrimination. We affirmed holding that a hostile work environment was relevant to show "whether she was judged differently and more harshly than her male colleagues." 166 Vt. at 428, 697 A.2d at 663. There was no claim of pretext in Butler, and the decision did not address pretext. Although there may be cases where the presence of a hostile work environment is relevant to show pretext, this is not such a case. Plaintiff was denied the job she sought because she lacked education and experience qualifications, and not because her performance was inadequate although adversely affected by a hostile work environment. Moreover, plaintiff does not claim sexual harassment by Govil or other supervisors and employees. Nor does she claim that Govil, the only person involved in the alleged discriminatory action, was influenced by a general discriminatory atmosphere at Bertek; instead, plaintiff argues that her unfair treatment was the result of Govil's "cultural differences" with respect to his attitude towards women.

[7] Although this is a disparate treatment case, plaintiff has detailed the careers of other women in the company to argue that a "glass ceiling" exists, especially as to research and development jobs. We have inadequate information to determine whether the career moves are typical of those of women in the company generally, are different from those of men or show evidence of discrimination. In any event, statistical evidence of treatment of other women is rarely sufficient to show that an adverse employment decision with respect to plaintiff was pretextual. See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 848 (1st Cir. 1993).

[8] Although not clearly delineated in either her complaint or her brief on appeal, two other counts of gender discrimination under FEPA appear to have been raised by plaintiff. Perhaps in an excess of caution, we address them as if they had been separately raised.

First, plaintiff claims that she was discriminated against by being paid less than her male counterparts at Bertek. Second, plaintiff claims that she was discriminated against by Govil who she alleges treated her poorly compared to men at the company. The trial court addressed both of these issues and granted summary judgment in favor of defendants on both. We find that the trial court was correct in its reasoning and conclusions.

As to the claim of discrimination based on unequal pay, plaintiff has failed to make out a prima facie case. FEPA prohibits "paying wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility, and is performed under similar working conditions." 21 V.S.A. § 495(a)(8). As part of her prima facie case of discrimination based on unequal pay, plaintiff must demonstrate that she was paid less than similarly situated males. See Buettner v. Arch Coal Sales Co., 216 F.3d 707, 719 (8th Cir. 2000); Belfi v. Prendergast, 191 F.3d 129, 139-40 (2d Cir. 1999); see also ¶ 25, supra (laying out basic elements of prima facie case of gender-based employment discrimination under FEPA). Plaintiff's sole piece of evidence in support of her unequal pay claim, however, is that Suresh Borsadia, a Principal Scientist, was paid $65,000 in 1996 at the same time that plaintiff, a Project Manager, was being paid $52,000. Because these two positions involved substantially different job duties, plaintiff and Borsadia were not similarly situated such as to provide evidence for the prima facie case. See Boudon, 2003 VT 72, app 19-20, 834 A.2d 37. Furthermore, plaintiff has not disputed defendants' claim that she was paid more than Joe Duda, a male Project Manager. Therefore, plaintiff has failed to establish her prima facie case, and thus the trial court was correct in granting summary judgment to defendants on this issue.

The trial court was also correct in granting summary judgment for defendants on the issue of Govil's alleged poor treatment of plaintiff. As part of her prima facie case, plaintiff must show that she suffered an "adverse employment decision" that affects the terms or conditions of her employment. See Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Bennett v. Watson Wyatt & Co., 136 F.Supp.2d 236, 247 (S.D.N.Y.2001); see also Gallipo v. City of Rutland, 163 Vt. 83, 92, 656 A.2d 635, 642 (1994) (primafacie case for retaliatory discrimination requires showing of adverse employment action). Plaintiff alleges that Govil left her out of meetings, did not provide her with information, transferred her staff from her group without consulting her, and reassigned her duties to men without consulting her. None of these instances of alleged unfair treatment, however, constitute an "adverse employment action." See ¶ 43, infra.

In view of our resolution of these claims, we do not reach defendants' argument that they are barred in whole or in part by the applicable statute of limitations.
EMOTIONAL
DISTRESS


Before


[154 Vt. 287] ALLEN, Chief Justice.

Defendant appeals from a jury verdict in favor of plaintiff on grounds of defamation and intentional infliction of emotional distress. We affirm.

The present action arose after defendant dismissed plaintiff as an employee in August 1983. Plaintiff had been employed by defendant for eighteen years and held the position of head receiver for dry goods at defendant's Vermont distribution center at the time of his dismissal. Plaintiff's dismissal followed an incident in which he placed some rejected merchandise on an outgoing truck, intending to pick it up later for his personal use.

One of plaintiff's responsibilities was to reject merchandise delivered to the facility if it was either damaged or had not been ordered by defendant. Truckers would at times refuse to take rejected merchandise back onto their trucks, and would leave it at the distribution center, where it was either salvaged and placed in inventory, or given to the employees to take home for their own use. The incident which triggered plaintiff's dismissal involved two rejected cases of merchandise, one of breakfast cereal and one of toaster pastries. Defendant had no obligation to pay for these rejected cases. The independent trucker to whom they were returned declined to receive them back onto her truck and remove them. Instead, she offered them to plaintiff, after asking if he had any grandchildren, and he accepted them. Plaintiff offered to share them with some fellow employees and then placed them by his desk to take them home.

At trial, plaintiff argued that once the merchandise was rejected and returned to the independent seller, it became the trucker's property who in turn could give it to him. Therefore, plaintiff's later removal of it from defendant's premises was not theft. Defendant contended that it did not allow employees to remove merchandise delivered to its facility in that manner, or to receive gratuities from customers or distributors, and that even if defendant never paid for the merchandise, any such removal constituted theft.

Defendant's evidence showed, and plaintiff admitted, that he had failed to follow defendant's prescribed procedures for such rejected merchandise in two respects. First, plaintiff did not place the rejected merchandise in defendant's salvage area for it to be packaged for resale or distribution among the warehouse employees; second, plaintiff failed to obtain a gate pass from either of two supervisors, but instead, in their absence, issued one himself. Plaintiff did not deny that he violated company procedures for accepting gifts of unwanted merchandise from independent truckers. But the basis of plaintiff's defamation claim was that defendant wrongly characterized him as a thief. Plaintiff argued that because the trucker gave the rejected merchandise to the plaintiff, his acceptance and removal of it without following the prescribed company procedures could not have constituted theft.

Plaintiff's evidence showed that he was called a thief at a meeting held at the distribution center a few days after the incident, and that in two written reports prepared subsequent to that meeting, he was characterized as a problem employee and his actions were referred to as employee theft. Three representatives of defendant participated in that meeting: the director of transportation and warehousing; a loss prevention specialist; and the director of loss prevention and safety from defendant's Syracuse office. Written reports submitted as exhibits at trial were prepared about a month and a half after the meeting by the loss prevention specialist who had attended the meeting, and by another loss prevention specialist who had originated the investigation and then had gone on vacation. These reports were distributed by their authors to the two directors who had attended the meeting and to three other representatives of defendant: the vice-president who was the general manager of defendant's New England Division, defendant's director of employee relations, and the director of store operations in defendant's New England division. There was disputed evidence that a report was also made orally to the security manager for the trucking firm whose driver had taken the merchandise out of defendant's facility, and that the incident was discussed with the driver and another employee of that trucking firm. Plaintiff also presented evidence on the effect of the incident on his social life, his health, his personal and family life, and his reputation in the community.

The basis for plaintiff's claim of intentional infliction of emotional distress was the nature of the meeting and the manner in which he was fired: that the meeting was called without prior notice to him; that it went on for three hours without an opportunity for him to have lunch at his normal time; that he was badgered by repeated requests to sign a statement, and to add material to the statement he had already signed; that he feared that his failure to sign a statement would adversely affect the driver of the outgoing truck; that directly after this meeting he was told to "clean out his desk"; and that he was fired summarily after eighteen years of service.
Plaintiff brought the present action seeking damages for defamation, intentional infliction of emotional distress, unlawful employment practices and breach of contract. As plaintiff is black and was 57 at the time of his dismissal, his count for unlawful employment practices included claims of discrimination on the basis of age and race, as well as termination without cause. Before trial, the trial court granted defendant's motion for summary judgment on the issue of termination without cause and denied the motion with respect to intentional infliction of emotional distress and employment discrimination on the basis of age and race. The trial court partially granted defendant's summary judgment motion as to the defamation count, ruling that the testimony given by defendant's employees were absolutely privileged. At trial, defendant moved for a directed verdict at the close of the plaintiff's case, but did not renew the motion until after the charge to the jury, just before the jury left to deliberate. The motion was denied at both times. The jury returned a verdict for the plaintiff on the defamation and intentional infliction of emotional distress claims and awarded him $19,000 in compensatory and $25,000 in punitive damages for each claim. Defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The court denied defendant's motion and the present appeal followed.

I. Waiver

Plaintiff argues that defendant should be precluded from raising any of its points on appeal because defendant failed to renew its motion for directed verdict at the close of all the evidence, which is a prerequisite for making a motion for judgment notwithstanding the verdict. See Lemnah v. American Breeders Service, Inc., 144 Vt. 568, 571, 482 A.2d 700, 702 (1984). Defendant moved for a directed verdict at the close of plaintiff's case, but failed to renew the motion at the close of its own case. The trial court allowed defendant to renew the motion after it had charged the jury and before the jury began deliberation. While this procedure is not preferred, it is not error. A purpose of the requirement that a movant renew a motion for directed verdict at the close of all the evidence is to give the nonmoving party an opportunity to cure the defects in proof that might otherwise preclude the case from going to the jury. Maynard v. Travelers Insurance Co., 149 Vt. 158, 162, 540 A.2d 1032, 1034 (1987); McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1556 (7th Cir.1987). Further, the rule is designed to prevent a litigant from gambling on winning a favorable verdict and yet retaining a challenge to the sufficiency of the evidence on appeal. Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018, 1024-25 (5th Cir.1979). The timing here afforded the trial court the opportunity to properly determine whether sufficient evidence existed for the issues to be decided by the jury and gave the nonmoving party the opportunity to attempt to rectify any deficiencies in proof.

II. Defamation

Defendant challenges the trial court's denial of its motion for judgment notwithstanding the verdict on the defamation count, claiming there was insufficient proof at trial of the elements of the tort. Defendant argues that there was insufficient evidence that the defamatory statements were false, that defendant acted with the malice necessary to overcome the conditional privilege.

Page 446

that the statements were made in a negligent fashion, and that the defamatory statements were the proximate cause of plaintiff's injuries.

As we have recently noted, Ryan v. Herald Association, Inc., 152 Vt. 275, 277, 566 A.2d 1316, 1317-18 (1989), the elements of a defamation action in Vermont are:

(1) a false and defamatory statement concerning another;
(2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.


Because the common-law privileges have not necessarily been adequate to protect First Amendment values, federal constitutional jurisprudence has modified the elements of defamation, at least in cases in which the plaintiff is in some way a "public figure," see, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), or the material published is "of public concern," Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Ryan v. Herald Association, Inc., 152 Vt. at 280 n. 2, 566 A.2d at 1319 n. 2; or, possibly, if the defendant is engaged in the dissemination of information to subscribers or the general public, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593

[154 Vt. 292] (1985). Gertz struck one balance between the competing concerns of protecting First Amendment values and compensating defamed individuals. But as we noted in Ryan v. Herald Association, Inc., 152 Vt. at 279 n. 1, 566 A.2d at 1317 n. 1, where the defamatory statements are made by private individuals to private individuals, "the First Amendment interest in protecting the defendant's speech is arguably less pressing, and the resulting accommodation might be different." Unlike Ryan, which involved a matter of public concern and a defendant belonging to the "institutional media," the case at hand involves statements made privately in the employment context about an employee to agents of the employer and several other persons. However, we need not establish whether plaintiff must prove merely "some negligence" or a greater degree of fault in a "private" defamation case after Greenmoss Builders, Inc., 472 U.S. at 757-61, 105 S.Ct. at 2944-46, because here, defendant concededly enjoys a conditional privilege for intracorporate communications to
protect its legitimate business interests. To prevail, plaintiff must show malice or abuse of the privilege sufficient to defeat it. Lent v. Huntoon, 143 Vt. at 549, 470 A.2d at 1169 (malice); Restatement (Second) of Torts §§ 599-605A (1977) (abuse of privilege).

In reviewing the denial of motions for judgment notwithstanding the verdict, we must assess the elements of defamation by viewing the evidence in the light most favorable to the prevailing party, excluding the effect of any modifying evidence. Westchester Fire Ins. Co. v. Deuso, 146 Vt. 424, 426, 505 A.2d 666, 667 (1985). A judgment notwithstanding the verdict is improper if the record contains any evidence that fairly and reasonably supports the verdict. Kinzer v. Degler Corp., 145 Vt. 410, 413, 491 A.2d 1017, 1019 (1985). Viewed in that light, we discuss in turn each element of defamation put in issue by the parties.

With regard to the first element, plaintiff presented evidence sufficient to support the jury verdict that the statements were false and defamatory. A review of the record shows evidence that plaintiff's actions, while violating defendant's procedures, could fairly and reasonably be interpreted by the jury as not constituting theft, and that plaintiff's past employment record did not warrant his being called a "problem employee."

With respect to the second, third, and fourth elements, the trial court found as a matter of law that defendant enjoyed a conditional privilege for the protection of its legitimate business interests. See, e.g., Lent v. Huntoon, 143 Vt. at 548-49, 470 A.2d at 1169

Page 447
A.2d at 1169 (holding conditional privilege applicable in Vermont). Plaintiff presented evidence that defendant acted with malice or abused its conditional privilege sufficient for the jury to find that the privilege had been overcome. The jury was properly instructed that plaintiff had to prove malice to defeat the privilege by clear and convincing evidence.

Under Vermont law, a plaintiff must show one of two types of malice in order to overcome the conditional privilege protecting legitimate business interests. Lent v. Huntoon, 143 Vt. at 549, 470 A.2d at 1169. For the purposes of clarity in this discussion, [1] we will use the following full-phrase definitions for each type: "knowledge of the statement's falsity or with reckless disregard of its truth," id., or "conduct manifesting personal ill will, reckless or wanton disregard of plaintiff's rights, or carried out under circumstances evidencing insult or oppression," id. at 550, 470 A.2d at 1170. The first type of malice may be inferred.

[154 Vt. 294] Plaintiff presented evidence showing both types of malice. The jury could have found that the merchandise did not belong to defendant and therefore that defendant's characterization of the incident as theft evidenced a reckless disregard both for the truth and for plaintiff's rights. See, e.g., Litman v. Massachusetts Mutual Life Ins. Co., 739 F.2d 1549, 1561 (11th Cir.1984) (defendant employer's statements to former colleagues of discharged employee were not privileged where evidence supported jury finding that statements were made wilfully, maliciously, and with reckless disregard of plaintiff's rights); Loughry v. Lincoln First Bank, N.A., 67 N.Y.2d 369, 376, 494 N.E.2d 70, 72-73, 502 N.Y.S.2d 965, 968 (1986); Worley v. Oregon Physicians Service, 69 Or.App. 241, 245, 686 P.2d 404, 407-08 (1984) (en banc); Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 152, 334 S.E.2d 846, 853 (1985). The jury could also have interpreted the circumstances of the meeting as "conduct evidencing oppression." Moreover, plaintiff's showing that the statements went to people in the trucking company, outside defendant's organization, who were therefore not proper persons to receive the communications, is evidence from which the jury could have found abuse of the privilege. See, e.g., Gibby v. Murphy, 73 N.C.App. 123-33, 325 S.E.2d 673, 676 (1985); Restatement (Second) of Torts § 604 (excessive publication).

Defendant next argues that plaintiff did not present sufficient evidence on the fifth and sixth elements to warrant compensatory damages by failing to show actual harm proximately caused by the defamatory statements. We agree that plaintiff failed to prove that the defamation, rather than his discharge from employment, caused his inability to obtain new employment, or caused the changed attitudes shown towards him by his former friends, associates and members of the community. Plaintiff counters both that false accusation of theft is actionable per se, and that he presented sufficient evidence of injury caused by the defamation.

False accusation of theft is actionable per se. As the Court noted in Lent v. Huntoon, the law of defamation in Vermont,

Page 448
[154 Vt. 295] with a few exceptions, [2] "must be gleaned from nineteenth century case law." 143 Vt. at 545, 470 A.2d at 1167. The plurality decision in Greenmoss Builders, Inc., 472 U.S. at 749, 105 S.Ct. at 2939 has been characterized as "restor[ing] the common law of defamation where the defamatory statement concerns a private issue, at least as far as presumed and punitive damages are concerned." Comment, American Defamation Law: From Sullivan, Through Greenmoss, and Beyond, 48 Ohio St.L.J. 513, 532 (1987); see 5 M. Minzer, J. Nates, C. Kimball and D. Axelrod, Damages in Tort Actions § 45.21[i], at 45-50 (1986).

Lent v. Huntoon confirmed the continuing validity of "slander per se" in Vermont. Under this doctrine, certain types of false statements, including false accusation of theft, see Sabin v. Angell, 46 Vt. 740, 745 (1874); Redway v. Gray, 31 Vt. 292, 297-98 (1858), constitute slander without requiring proof of special damages. Plaintiff bore the burden of introducing evidence of actual harm resulting from being called a thief, Lent v. Huntoon, 143 Vt. at 549, 470 A.2d at 1169, and he did put forth sufficient evidence of actual harm to himself for the case to go to the jury on the issue of damages for defamation. In addition to the

ELLIS
BOXER
BLAKE
ATTORNEYS
EMPLOYMENT LAW AND WORKERS’ COMPENSATION
© 2012 ELLIS BOXER & BLAKE
emotional harm he suffered during the incident, plaintiff showed that he had problems sleeping, experienced a loss of appetite, developed a temporary drinking problem, and that his relationship with his wife and his children deteriorated. Such cases may go to the jury, as did this case, on broad jury instructions. See R. Sack, Libel, Slander, and Related Problems § VII.2.4, at 348-49 (1980).

We conclude that plaintiff produced sufficient evidence at trial to go to the jury on each element of defamation, and that the trial court did not abuse its discretion by denying defendant's motion for judgment notwithstanding the verdict.

[154 Vt. 296] III. Intentional Infliction of Emotional Distress

Defendant next challenges the trial court's denial of its motion for judgment notwithstanding the verdict on the intentional infliction of emotional distress claim because there was insufficient proof that defendant's conduct was extreme and outrageous, that plaintiff's emotional distress was severe, and that defendant's actions were the proximate cause of injuries received.

Vermont recognizes the tort of intentional infliction of emotional distress. To prevail, plaintiff must demonstrate "outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct." Birkenhead v. Coombs, 143 Vt. 167, 174-75, 465 A.2d 244, 247 (1983) (quoting Sheltra v. Smith, 136 Vt. 472, 476, 392 A.2d 431, 433 (1978)). We address these elements again excluding modifying evidence presented by defendant.

We agree with defendant that the mere termination of employment will not support a claim for intentional infliction of emotional distress. However, if the manner of termination evinces circumstances of oppressive conduct and abuse of a position of authority vis-a-vis plaintiff, it may provide grounds for the tort action. See, e.g., Gordon v. Matthew Bender & Co., 562 F.Supp. 1286, 1299 (N.D.Ill.1983) (employer's motion to dismiss denied where employer alleged that employer maliciously terminated him for failure to meet sales goals); Smithson v. Nordstrom, Inc., 63 Or.App. 423, 425-27, 664 P.2d 1119, 1120-21 (1983) (plaintiff produced sufficient evidence for case to go to jury where employer did not reasonably believe there was sufficient evidence to charge employer with theft but nevertheless interrogated her for three hours and threatened her

Page 449

with criminal prosecution if she did not sign confession). Plaintiff's evidence showed that defendant's representative summoned plaintiff to a lengthy meeting without notice, continued the meeting without a break for rest or food, repeatedly badgered him to amend and sign a statement, and that plaintiff did not

[154 Vt. 297] feel free to leave the meeting. Immediately after the meeting, defendant's representative directed plaintiff to clean out his desk, a summary dismissal after eighteen years of service.

We conclude that plaintiff produced sufficient evidence at trial for the case to go to the jury on the elements of intentional infliction of emotional distress, and that the trial court did not abuse its discretion by denying defendant's motion for judgment notwithstanding the verdict.

IV. Punitive Damages

Defendant argues that the trial court erred by failing to grant its motion for judgment notwithstanding the verdict on the jury's award of punitive damages, claiming that there was insufficient proof that defendant's conduct manifested personal ill will, evidenced insult or oppression, or showed a reckless or wanton disregard of plaintiff's rights. Plaintiff argues that defendant waived this issue on appeal by not raising it below, but our review of the transcript reveals that defendant raised it in both its motion for directed verdict and its motion for judgment notwithstanding the verdict, and therefore, preserved the issue.

The same evidence of malice--i.e., conduct manifesting personal ill will, evidence of insult or oppression, or showing a reckless or wanton disregard of plaintiff's rights--which supported the jury verdicts on both counts was also sufficient to allow the jury to impose punitive or exemplary damages on both counts. Coty v. Ramsey Assoc., 149 Vt. 451, 464, 546 A.2d 196, 205 (1988); cf. Wheeler v. Central Vt. Medical Center, Inc., No. 88-050, slip op. at 12-13, --- Vt. ----, --- - ----, (Vt. Oct. 27, 1989). The jury could have fairly and reasonably concluded that the conduct of defendant's representatives manifested personal ill will, was carried out under circumstances of insult or oppression, or manifested a reckless and wanton disregard for plaintiff's rights. Phillips v. Aetna Life Ins. Co., 473 F.Supp. 984, 990 (D.Vt.1979); Crable v. Veve Associates, 150 Vt. 53, 58, 549 A.2d 1045, 1049 (1988); Appropriate Technology Corp. v. Palma, 146 Vt. 643, 647, 508 A.2d 724, 726-27 (1986). Once evidence was presented which

[154 Vt. 298] could support that finding by the jury, the imposition of punitive damages was within the discretion of the jury. Pezzano v. Boneau, 133 Vt. 88, 91, 329 A.2d 659, 661 (1974); Woodhouse v. Woodhouse, 99 Vt. 91, 155, 130 A. 758, 788 (1925).

V. Motion for New Trial

Defendant argues that the trial court erred in failing to grant its motion for a new trial, claiming that the jury disregarded the reasonable and substantial evidence, that the evidence does not support the verdict, and that the damages awarded were excessive and bore no relation to any harm established by plaintiff. When reviewing a trial court's denial of a motion for new trial, we consider whether the denial amounted to an abuse of discretion. Costa v. Volkswagen of America, 150 Vt. 213, 217, 551 A.2d 1196, 1200 (1988); Lent v. Huntoon, 143 Vt. at 552, 470 A.2d at 1171. Based on our review of the record as explained above in our discussion of the motions for judgment notwithstanding the verdict, we conclude that the jury had before it sufficient evidence to reach the verdict it
reached. Therefore, we cannot find the trial court's decision to decline to overturn the jury's award of compensatory damages to be an abuse of discretion.

Moreover, the amount of the punitive damages need bear no particular relationship to the amount of compensatory damages. Appropriate Technology Corp. v. Pulma, 146 Vt. at 648, 508 A.2d at 727. An award of punitive damages may stand as long as the evidence supports the showing of malice. Ryan v. Herald Association, Inc., 152 Vt. at 281, 566 A.2d at 1319. Since we conclude that the jury had evidence from which it could conclude that defendant acted with malice, we affirm the punitive damages award. We do not find the punitive damages awarded in this case to be "manifestly and grossly excessive." Coty v. Ramsey Assoc., 149 Vt. at 466-67, 546 A.2d at 206; see Glidden v. Skinner, 142 Vt. 644, 648, 458 A.2d 1142, 1145 (1983).

Affirmed.

Notes:

[1] We note that much confusion has arisen over the terminology applied to the malice requirement in its various contexts: courts have used the term "actual malice" in reference to both types of malice. Compare New York Times Co. v. Sullivan, 376 U.S. at 280, 84 S.Ct. at 726 ("'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not") with Lent v. Huntoon, 143 Vt. at 550, 470 A.2d at 1170 ("punitive damages may be awarded on a showing of actual malice ... shown by conduct manifesting personal ill will or ... circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights"); see also Ryan v. Herald Ass'n, 152 Vt. at 281 n. 5, 566 A.2d at 1320 n. 5.

Courts have also termed the first type of malice as "constitutional" malice. See Gertz v. Robert Welch, Inc., 418 U.S. at 342, 94 S.Ct. at 3008; Ryan v. Herald Ass'n, 152 Vt. at 280, 566 A.2d at 1319. Moreover, the terms "simple malice" and "common-law malice," Ryan v. Herald Ass’n, 152 Vt. at 291, 566 A.2d at 1319-20, as well as "express malice," Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737, 748 (1975), are used interchangeably in reference to the second type of malice.

[2] Two limited constitutional areas, one involving public figures, Lent v. Huntoon, 143 Vt. at 545, 470 A.2d at 1167, and another regarding matters of public concern disseminated to subscribers or the general public, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 762, 105 S.Ct. at 2946, have developed more recently.

EMPLOYEE HANDBOOKS/

ALLEN, Chief Justice.

Plaintiff appeals from an order of the Chittenden Superior Court granting defendants' summary judgment motion on plaintiff's claims of wrongful discharge, age discrimination, and tortious interference with an employment contract. We affirm.

Plaintiff was employed by defendant Times Mirror, Inc. (TMI) in 1980 as a sales representative for some of its magazines and worked out of the New York office. In 1984, plaintiff was promoted to New England sales manager of SKI magazine and transferred to Burlington, Vermont. Shortly after arriving in Vermont, difficulties arose between plaintiff and his new supervisor, advertising manager Ellen McVickar. McVickar complained to both plaintiff and her supervisor, defendant George Bauer, that plaintiff's communication [164 Vt. 17] with the New York office was inadequate. In June 1988, McVickar issued a written warning to plaintiff, which was placed in his personnel file. Later that same month, plaintiff received a letter from Bauer placing him on probation, explaining that if he did not improve his communication, he could be terminated. Plaintiff's correspondence improved and he was taken off probation in September 1988.

Although plaintiff received a laudable annual review in May 1989, the friction continued to plague plaintiff and McVickar's relationship. In June 1989, an important advertiser wrote a letter to Bauer which criticized McVickar and praised plaintiff. Convinced that plaintiff had enticed the advertiser to write the letter, McVickar recommended to Bauer that he terminate plaintiff. Bauer then scheduled an August meeting with him in New York. When plaintiff did not attend the meeting, Bauer terminated plaintiff by phone.

Plaintiff believed he was terminated without good cause and in retaliation for the embarrassing letter. He brought the present action advancing three wrongful discharge theories: (1) breach of an oral contract to employ him until his retirement, (2) promissory estoppel based on a promise of permanent employment and promises implicit in TMI's employee handbook and a progressive disciplinary policy and (3) breach of an implied covenant of good faith and fair dealing. Plaintiff also claimed that his termination constituted age discrimination, and he accused defendant Bauer of interference with his employment contract with TMI. Defendants denied the allegations, and after several months of discovery moved under V.R.C.P. 56 for summary judgment.

Page 450
The court granted defendants’ motion, concluding that permanent employment status, even if a correct characterization, did not rebut the presumption of at-will employment and that any promised employment until retirement was barred by the Statute of Frauds. It also concluded that a disclaimer in TMI’s personnel handbook negated any effect defendant’s disciplinary policy had on the at-will relationship. It rejected plaintiff’s implied covenant of good faith and fair dealing claim for lack of adequate factual support on the element of bad faith. Finally, the court concluded that plaintiff had not raised a genuine issue of fact with respect to either age discrimination or contract interference.

In reviewing a grant of summary judgment, we apply the same standard as the trial court, namely, that the motion should be granted when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled

[164 Vt. 18] to judgment as a matter of law. Pierce v. Riggs, 149 Vt. 136, 139, 540

Page 583

A.2d 655, 657 (1987). Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. State v. G.S. Blodgett Co., 163 Vt. 175, ----, 656 A.2d 984, 988 (1995). The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact. Id. In the present action, plaintiff has not met his burden on any of his claims.

Plaintiff argues that an oral contract for permanent employment was made when he was hired by TMI. Thus, it was his understanding that his employment would be continuous until plaintiff’s retirement, and terminable only for just and sufficient cause. Alternatively, plaintiff argues that he detrimentally relied on TMI’s oral representations that his employment would be continuous until he reached retirement.

In Benoix v. Ethan Allen, Inc., 147 Vt. 268, 270, 514 A.2d 716, 717-18 (1986), we stated that “the term 'permanent,' when used in an employment contract with reference to a term of employment, normally means nothing more than indefinite employment.” An employer must do something more than promise continuous employment to take an employee out of an at-will status. "[A]n employment contract for an indefinite term is an ‘at-will’ agreement, terminable at any time, for any reason or for none at all.’ ” Larose v. Agway, Inc., 147 Vt. 1, 3, 508 A.2d 1364, 1365-66 (1986) (quoting Sherman v. Rutland Hospital, Inc., 146 Vt. 204, 207, 500 A.2d 230, 232 (1985)). In addition, there is no support in the record for plaintiff's allegations that any oral representations for continuous employment were made to plaintiff at the time of hiring or later. See V.R.C.P. 56(e) (nonmoving party may not rest on unsupported allegations). Plaintiff's deposition reveals that only salary and sales territory were discussed at his hiring meeting. Moreover, he presented no evidence of detrimental reliance. Plaintiff's contract and promissory estoppel claims fail.

Plaintiff next claims that certain established employment policies limited TMI's discretion to terminate him. Specifically, plaintiff contends that TMI's personnel handbook, which contained a list of conduct warranting discipline, created an enforceable promise to terminate only for cause. Plaintiff also maintains that defendant had instituted a progressive three-step disciplinary procedure, upon which TMI employees relied. In plaintiff's view, these policies sufficiently

[164 Vt. 19] rebut the at-will presumption. The trial court concluded that the disclaimer in TMI's handbook effectively trumped any claim that the at-will relationship had been unilaterally modified by either the handbook or disciplinary policy. Plaintiff initially presented this claim to the trial court under the rubric of promissory estoppel. The trial court addressed it as a unilateral contract modification claim. On appeal, plaintiff challenges only the trial court's contract modification analysis. While summary judgment was appropriate, we disagree with the trial court's reasoning. See Goche v. Bombardier, Inc., 153 Vt. 607, 613-14, 572 A.2d 921, 925 (1990) (Supreme Court is not bound by reasoning of trial court).

The effectiveness of a disclaimer depends on the circumstances. See, e.g., McGinnis v. Honeywell, Inc., 110 N.M. 1, 791 P.2d 452, 457 (1990) (disclaimer rebutted by evidence to contrary of parties' norms of conduct and expectations). Notably, in Benoix, 147 Vt. at 271, 514 A.2d at 718, we concluded that a written disciplinary procedure used whenever a possible discharge arose altered the at-will relationship, despite the fact that the employer had expressly reserved the right to bypass the disciplinary process. See also Foote v. Simmonds Precision Prods. Co., 158 Vt. 566, 568-72, 613 A.2d 1277, 1278-80 (1992) (defendant's handbook stating that employment relationship could be terminated at any time did not defeat plaintiff's claim of retaliatory discharge where employer promised not to retaliate for use of grievance procedure). Without such a principle, an employer could have it both ways—enjoying the morale-enhancing benefits of fair procedures most of the time, but relying on a handbook disclaimer whenever it chose to jettison its procedures in a particular case. See Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 1277, 170,

Page 584

174 (1984) (employer cannot selectively abide by or treat as illusory officially announced employment policies). Because the disclaimer is not dispositive, we must determine if plaintiff raised a genuine issue of material fact as to whether defendant's handbook or disciplinary procedure unilaterally modified plaintiff's at-will employment agreement.

We have stated on numerous occasions that the presumption of an at-will employment contract is a rule of contract construction that can be overcome by evidence to the contrary. See, e.g., Taylor v. National Life Ins. Co., 161 Vt. 457, 462, 652 A.2d 466, 470 (1993). An employer may
limit its discretion to terminate an employee at will by instituting company-wide personnel policies. See Thompson v. St.

[164 Vt. 20] Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081, 1088 (1984). To determine whether a particular policy modifies the at-will relationship or creates an enforceable promise of specific treatment, we are guided by our recent decision in Taylor, in which we held that provisions of a personnel policy manual may unilaterally alter the at-will relationship. 161 Vt. at 464, 652 A.2d at 471. Relying on Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880, 892 (1980), we reasoned that:

[W]here an employer chooses to establish [personnel] policies and practices and makes them known to its employees, the employment relationship is presumably enhanced.... It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."

Taylor, 161 Vt. at 464-65, 652 A.2d at 471.

Employee manuals or policy statements do not automatically become binding agreements. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708, 711 (Colo.1987). Whether a particular policy is meant to be a unilateral offer is an issue of proof. See Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn.1983) (whether proposal is meant to be unilateral contract is determined by outward manifestations of parties). Only those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced. Id.; Gilbert v. Durand Glass Mfg. Co., 258 N.J.Super. 320, 609 A.2d 517, 522 (1992) (enforceable policies must constitute accurate representation of the policies which the employer was authorized to make). General statements of policy will not meet the requirements of a unilateral contract. Pine River, 333 N.W.2d at 626; see Thompson, 685 P.2d at 1085 (employer's statements that terminations will be handled in a fair, just and equitable manner were general policy statements and did not imply contract to discharge only for cause). In contrast, definitive policies, which expressly or impliedly include a promise for specific treatment in specific situations, especially when the employer expects the employee to abide by the same, may be enforceable in contract. Thompson, 685 P.2d at 1088. We note that an [164 Vt. 21] employer may not always be bound by statements if it conspicuously and effectively states that the policy is not intended to be part of the employment relationship. Id.

In the present case, plaintiff argues that the catalogue of reasons for employee discipline was sufficient proof to imply a promise to terminate only for cause or after using a progressive disciplinary procedure. TMI's handbook, which was circulated to all employees, identified specific conduct that warranted discipline. The list was preceded by the following disclaimer:

While the Company expressly reserves the right to terminate the employment relationship at will, conduct such as, but not limited to, the examples below are causes for disciplinary action up to and including discharge: ....

The noninclusive list of actionable conduct is a general statement of defendant's policy to discipline its employees. No promise for just cause termination or for specific treatment in a specific situation can be implied from this statement. See Martin v. Capital Page 585 Cities Media, Inc., 354 Pa.Super. 199, 511 A.2d 830, 838 (1986) (list of conduct requiring disciplinary action does not imply just cause dismissal). In fact, the policy expressly leaves the disciplinary sanction to the employer's discretion. Contrary to plaintiff's assertion, defendant's handbook policy, by itself, does not create an enforceable promise to terminate for cause or only after disciplinary action had been taken.

Plaintiff also insists that TMI failed to use an established progressive disciplinary procedure before terminating him. According to plaintiff, the procedure provided for an initial warning, then a probationary period if the employee did not improve. Both the warning and notification of probation were communicated in writing to the employee and recorded in the employee's personnel file. At the end of the probationary period, the employee would be reinstated or terminated. Plaintiff contends this procedure implied a promise to terminate for good cause and only after using the three-step procedure. Defendant TMI denies that the three-step procedure exists. No written policy is in evidence.

As a threshold matter, we note that disciplinary procedures are not inconsistent or in conflict with the at-will doctrine. Sherman, 146 Vt. at 208, 500 A.2d at 231. They may, however, create an enforceable promise to use those procedures. Id.; see Continental Air Lines, 731 P.2d at 711 (employee at-will may be able to enforce termination procedures under unilateral contract modification theory.

[164 Vt. 22] Suburban Hosp. Inc. v. Dwiggin's, 596 A.2d 1069, 1074-75 (Md.1991) (if employee is not afforded established job termination procedures, employee may have breach of contract claim); Pine River, 333 N.W.2d at 631 (employer breached employment contract because it did not use disciplinary procedure; had it done so, plaintiff might have corrected deficiencies to employer's satisfaction). While disciplinary procedures do not necessarily limit the grounds for dismissal, they may limit how a dismissal is carried out. Compare Taylor, 161 Vt. at 465-66, 652 A.2d at 471-72 (handbook disciplinary policy created just cause termination requirement), with Suburban Hosp., 596 A.2d at 1074-75 (disciplinary procedure did not impose just cause termination, only procedural requirements). The critical inquiry is, of course, whether the procedure
amassed to an enforceable promise of specific treatment in a specific circumstance.

A proffered procedure or practice may be enforceable, if it is clearly established and uniformly and consistently applied throughout the company. Toussaint, 292 N.W.2d at 892; see Gilbert, 609 A.2d at 522 (unwritten disciplinary policy, publicized and implemented throughout company, constituted enforceable promise to use procedure before terminating at-will employee). An employer's official statement does not have to be in writing in order to be enforceable. See Gilbert, 609 A.2d at 522 (unwritten disciplinary policy to sanction employees for lateness enforceable). Requiring such a formality, in this context, would favor form over substance.

Considering the above parameters, the fact that a written policy is not in evidence is not fatal to plaintiff's claim. In addition, defendant's denial does not end the matter. See V.R.C.P. 56(e) (adverse party may not rest upon mere allegations or denials of adverse party's pleadings). However, plaintiff has offered only his own experience and hearsay statements regarding what "he had heard" about other employees. While his own experience is relevant, it does not, by itself, suggest a definitive company-wide practice. See Gilbert, 609 A.2d at 518-22 (plaintiff established prima facie breach of contract claim by submitting personnel records of employees who were subjected to unwritten disciplinary policy and affidavits of managers who attested to using alleged policy). Further, plaintiff's recollection about what other employees had told him is insufficient to support his opposition to summary judgment. See 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2738, at 489-94 (1983) (hearsay statements contained in deposition not supported by

Page 586

promise to terminate an employee only after using the progressive procedure. Next, plaintiff argues that the court erred in concluding that no genuine issue of material fact existed as to his claim that defendant violated the implied covenant of good faith and fair dealing. Relying on Carmichael v. Adirondack Bottled Gas Corp. of Vermont, 161 Vt. 200, 208, 635 A.2d 1211, 1216 (1993), the trial court ruled that such a covenant could coexist with an at-will relationship, but concluded that plaintiff had made an insufficient showing of bad faith to create a genuine issue of fact. Again, we agree that summary judgment was appropriate, but disagree with the trial court's reasoning.

It is axiomatic that an at-will employee "may be discharged at any time with or without cause, 'unless there is a clear and compelling public policy against the reason advanced for the discharge.' " Payne v. Rozendaal, 147 Vt. 488, 491, 520 A.2d 586, 588 (1986) (quoting Jones v. Keogh, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979) (emphasis in original), or unless the at-will relationship has been modified. See, e.g., Taylor, 161 Vt. at 464-65, 652 A.2d at 471 (handbook may modify at-will). To imply a covenant as to tenure in an unmodified at-will contract irreconcilably conflicts with the employment-at-will doctrine, Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983), and results in unreasonable judicial interference into what is a private relationship. Accord Spanier v. TCF Bank Savings FSB, 495 N.W.2d 18, 21 (Minn.Ct.App.1993); Thompson, 685 P.2d at 1086-87. Further, implying such a covenant "would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith." Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625, 629 (1982). Therefore, we decline to recognize the implied covenant of good faith and fair dealing as means of recovery where the employment relationship is unmodified and at-will and the employee is challenging the dismissal based on a right to tenure.

In the present case, plaintiff believed that he was entitled to permanent or continuous employment until defendant had just cause. Because plaintiff's theory was based solely on an implied tenure, we do not decide whether we would recognize such a covenant in the context of nontenure terms of at-will employment contracts, such as accrued benefits. See, e.g., Fortune v. National Cash Register Co., 373 Mass. 96, 364 [164 Vt. 24] N.E.2d 1251, 1257 (1977) (bad faith termination to prevent salesperson from obtaining earned commission actionable under breach of implied covenant of good faith and fair dealing).

In rejecting this theory, we note that at-will employees are not without remedies for wrongful termination. In addition to statutory protections such as Vermont's Fair Employment Practices Act (VFEPA), 21 V.S.A. § 495, relief may be had under several common law theories. See Taylor, 161 Vt. at 464-65, 652 A.2d at 471 (employee handbook may unilaterally modify employment relationship); Foote, 158 Vt. at 571, 613 A.2d at 1279-80 (promissory estoppel may modify employment contract otherwise terminable at will); Payne, 147 Vt. at 491, 520 A.2d at 588 (recognizing public policy exception to at-will doctrine).

Plaintiff next asserts violations of VFEPA. Specifically, he argues that TMI unlawfully terminated him on the basis of age, unlawfully retaliated against him, and subjected him to unlawful harassment. In support of these allegations, he points to a memorandum from McVickar to defendant Bauer in which McVickar recommended terminating plaintiff. She stated that she was unwilling to deal with plaintiff's uncooperative attitude until he "decided to retire at 55" and recommending plaintiff's termination. Plaintiff suggests that the fact that his responsibilities were covered by his former assistant, a much younger person, also indicates age discrimination.

VFEPA prohibits employment discrimination on the basis of age. 21 V.S.A. § 495(a). The Age Discrimination
Under the VFEPA and proceed with her claims against the
former supervisor did not reference against the defendant also fail.
Filing a discrimination by their supervisors and also cannot fail.
Additionally, plaintiff's brief describes what is, at most, deceptively invade area of another's agreement. In 238 A.2d 63, 67 (1st
Cir.1994). Plaintiff has not presented a prima facie case of age discrimination.
The memorandum, read in full, simply supports defendant's proffered reason for plaintiff's termination. McVickar complained that plaintiff:
continues to flaunt authority and follow his own schedule in a most cavalier manner. He has been warned, put on probation, reprimanded etc. on many occasions and frequently
[164 Vt. 25]. There is a limit to the acceptance of this behavior and the limit has arrived... I feel, as you do that we will not sit still with a situation where we are put in a position of waiting until Ted decides to leave SKI,... I refer to Ted's monologue ... where Ted [said he would] stay on a few more years ... until he can retire at 55....
(Emphasis in original.)
Defendant's decision to assign the only other person in SKI magazine's two-person office to cover a portion of plaintiff's territory three months after his termination strikes us as a reasonable stop-gap, rather than prima facie evidence of age discrimination. Plaintiff has failed to present sufficient evidence to reasonably indicate that his termination was motivated by his age.
Plaintiff's allegations of retaliation must also fail. VFEPA prohibits retaliation when an employee "has lodged a complaint ... or has cooperated with the attorney general or a state's attorney in an investigation of" discriminatory practices, or an "employer believes that such employee may lodge a complaint or cooperate with [the authorities]." 21 V.S.A. § 495(a)(5). Plaintiff has presented no evidence that he engaged in any activity protected by the statute; therefore, he may not rely on this remedy.
Finally, the claims of tortious interference against defendant George Bauer are meritless. Bauer is not a third party, but an employee of TMI, and plaintiff has not explained how Vermont law provides a remedy in such circumstances. See Giroux v. Lussier, 126 Vt. 555, 561-62, 238 A.2d 63, 67 (1967) (outsider has no legal right to deceptively invade area of another's agreement). In addition, plaintiff's brief describes what is, at most, personal differences with Bauer, falling short of stating a cause of action. There was no error in granting defendant's motion for summary judgment.
Affirmed.

INDIVIDUAL LIABILITY

Payne v. US Airways, Inc., 2009 VT 944

Present: REIBER, C.J., DOOLEY, JOHNSON, SKOGLUND and BURGESS, JJ.
BURGESS, J.

¶ 1. Plaintiff appeals from a superior court order granting summary judgment to defendant Michael Cline on plaintiff's claims that he is not personally liable to her for acts of discrimination and retaliation under the Vermont Fair Employment Practices Act (VFEPA) and the Workers' Compensation

Page 946

Act (WCA). The central issues on appeal are whether the acts provide a right of action against a coemployee or supervisor in an individual capacity, rather than imposing direct and vicarious liability on employers only for unlawful discrimination by their supervisors and employees. The superior court concluded that the acts provide a right of action against employers alone, and not against individual employees or supervisors. We reverse and remand.

I. Background

¶ 2. Plaintiff originally sued her former employer, U.S. Airways, M. Cline, her former supervisor at U.S. Airways, and several former coworkers for: sexual harassment and discrimination against a person with a disability under the VFEPA, discrimination for filing a complaint under the VFEPA, discrimination for filing a workers' compensation claim, and several other claims. After U.S. Airways filed for bankruptcy, which placed an automatic stay on her action, plaintiff settled with U.S. Airways so that she could proceed with her claims against the individual defendants. Plaintiff eventually dropped her former coworkers as defendants and, consequently, the sole remaining defendant in this action is her former supervisor, whom plaintiff now seeks to hold liable under the VFEPA and the WCA.

¶ 3. When reviewing a grant of summary judgment, we use the same standard as the trial court. Savage v. Walker, 2009 VT 8, ¶ 5, 185 Vt. __, 969 A.2d 121 (mem.). We must take all allegations of the nonmoving party as true, and uphold the grant of summary judgment only when "there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Id.; see also V.R.C.P. 56(c). Accordingly, we recite the background facts of this case as they have been alleged by plaintiff.

¶ 4. The events giving rise to this lawsuit began in the spring of 1999, when, during her employment with U.S. Airways, plaintiff suffered a work-related back injury. After learning of her injury, plaintiff's supervisor did not observe WCA mandates when he failed to promptly...
investigate her complaint to determine whether compensation was due, forced her to use sick leave as compensation for the work days she missed while recovering from the back injury, interfered with her course of treatment, and then, after she requested WCA benefits, told her she could not receive any compensation retroactively. According to the record, supervisor did not allow plaintiff workers' compensation for missed work until she filed a claim with the Department of Labor, complaining of U.S. Airways' failure to compensate her through the WCA system.

¶ 5. When plaintiff returned to work in June 1999, she was on a limited work schedule to accommodate her recovery. Supervisor interfered with plaintiff's medical treatment by calling her physical therapist to request that the therapist approve longer work hours. Additionally, supervisor began to have individual meetings with plaintiff to criticize her performance, to take away some of her supervisory duties, and to consult about her-as he had not before-with the employees she was supposed to supervise. Prior to these actions, plaintiff and supervisor maintained a problem-free work relationship, and plaintiff's employment record, covering about ten years with U.S. Airways, reflected only positive evaluations of her work. In July 1999, plaintiff complained directly to U.S. Airways about supervisor's treatment of her. About a month after her written complaint to the company, when she felt that the company was not responding appropriately, she filed a complaint for workplace discrimination against U.S. Airways with the Vermont Attorney General.

Page 947

¶ 6. In November 1999, plaintiff took another medical leave from her job, this time claiming anxiety and depression from her workplace conditions, not because of her back injury. For the next two years, plaintiff did not return to work. During this time, plaintiff's doctor and therapist submitted letters to U.S. Airways stating she was suffering anxiety and depression "clearly related to and aggravated by her ongoing stressful work situation," and recommending that plaintiff not return to work until her workplace problems could be successfully mediated. U.S. Airways terminated plaintiff's employment in October 2001. In its termination letter, the company stated that plaintiff failed to abide by the U.S. Airways policy of providing supplemental medical reports and seeking an extension of medical leave every ninety days, and this failure led the company to conclude that she had apparently abandoned her employment. The Attorney General's Office completed its investigation of plaintiff's discrimination complaint in April 2002 and agreed that plaintiff had been subject to discrimination for asserting a workers' compensation claim, but determined that there was insufficient evidence to support plaintiff's claim that U.S. Airways discriminated against her based on gender. Plaintiff filed this lawsuit in May 2002.

II. Individual Liability under the Vermont Fair Employment Practices Act

¶ 7. Plaintiff's amended complaint states VFEPA claims against supervisor for: sexual harassment, 21 V.S.A. §§ 495(a)(1), 495d(13), discrimination for lodging complaints against U.S. Airways with the Vermont Attorney General's Office and with the Vermont Department of Labor and Industry, id. § 495(a)(5), and discrimination for being perceived to suffer from a handicap, id. § 495(a)(1). Supervisor's motion for summary judgment on these claims argued first, that there is no provision for individual liability under the VFEPA and second, that plaintiff failed to make a prima facie showing of sexual harassment or discrimination based on disability or handicap. The superior court granted summary judgment for supervisor based on its determination that there is no individual liability under the VFEPA.[1]

¶ 8. The VFEPA prohibits "any employer, employment agency, or labor organization" from engaging in a range of discriminatory acts and practices. Id. § 495(a). The term "employer" refers to "any individual, organization, or governmental body ... whether domestic or foreign ... and any agent of such employer, which has one or more individuals performing services for it within this state." Id. § 495d(1) (emphasis added). Plaintiff argues that the term "any agent of such employer" extends liability to employees, as individuals, who engage in discriminatory actions forbidden by the VFEPA.

¶ 9. This Court has yet to construe the term "any agent" in the context of the VFEPA. While the question has been raised here in at least two earlier cases, we have never reached it before today. See Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 49, 176 Vt. 356, 848 A.2d 310 (upholding summary judgment for defendants on other grounds, thus not reaching the issue of individual liability); Gallipo v. City of Rutland, 173 Vt. 223, 238-39, 789 A.2d 942, 953-54 (2001) (not reaching the issue because separate statutory provision dictated that municipal officials could not be sued in their individual capacities).[2] As with any issue of statutory construction, we seek here to give effect to legislative intent. To do so, we start with the language of the statute and read it according to its plain and ordinary meaning. Burlington Elec. Dept v. Vt. Dept of Taxes, 154 Vt. 332, 335, 576 A.2d 450, 452 (1990). Under this approach, the Legislature's use of the conjunctive "and any agent" in the definition of "employer" in the VFEPA signals that the Legislature intended that, in addition to those traditionally categorized as employers, agents of the employer can be held liable. The employer-employee relationship is a traditional, common-law agency relationship. Restatement (Third) of Agency § 1.01 cmt. c (2006). Thus, an ordinary reading of the language "any agent" supports the conclusion that the statute allows for suits against employees acting as agents for the employer. Although no ambiguity exists on the face of this statutory definition, and thus we would ordinarily simply enforce the statute according to its plain meaning, State v. O'Dell, 2007 VT 34, ¶ 7, 181 Vt. 475, 924 A.2d 87, supervisor entreats us to
consider the large body of federal law reaching the opposite conclusion with respect to the federal Fair Employment Practices Act. 42 U.S.C. § 2000e(b).

¶ 10. Our construction of the VFEPA, which is patterned on Title VII of the federal Civil Rights Act protecting against employment discrimination based on race, color, religion, sex, or national origin, is often guided by the federal courts' interpretations of Title VII. Lavalley v. E.B. & A.C. Whiting Co., 166 Vt. 205, 209, 692 A.2d 367, 369 (1997). Indeed, we have said that "the VFEPA is patterned on Title VII of the Civil Rights Act of 1964, and the standards and burdens of proof under [V]FEPA are identical to those under Title VII." Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 161, 624 A.2d 1122, 1128 (1992). Supervisor points out that it is settled law in every federal circuit that has considered the meaning of the term " any agent" in Title VII's definition of " employer." 42 U.S.C. § 2000e(b), that the phrase does not provide a right of action against individual employees. Lissau v. S. Food Serv., Inc., 159 F.3d 177, 181 (4th Cir.1998) (citing cases from the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits of the United States Courts of Appeals).[3] Indeed, the federal consensus is that the " any agent" language expresses congressional intent to hold employers vicariously liable for the acts of their employees, but not to hold employees individually liable for their own discriminatory acts in the workplace. See, e.g., Wathen v. Gen. Elec. Co., 115 F.3d 400, 405-06 (6th Cir.1997). The definition of " employer," however, is not a " standard[ ] or burden[ ] of proof" as described in Hodgdon. Cf.

Page 949

Colby v. Umbrella, Inc., 2008 VT 20, ¶ 9, 184 Vt. 1, 955 A.2d 1082 (discussing standard for prima facie VFEPA case by reference to federal Title VII case law); Gallipo v. City of Rutland, 2005 VT 83, ¶ 15, 178 Vt. 244, 882 A.2d 1177 (same). Moreover, as demonstrated below, the definition of employer in the VFEPA is markedly and substantially different than that used in Title VII. Thus, even if the term " any agent" is identical in both definitions, the definitions as a whole are far from identical, which implies that we have no duty to interpret the VFEPA's definition of " employer" identically to how the federal courts have interpreted Title VII's definition. And although federal decisions can be persuasive, they are not binding and " we will not adopt an interpretation of [V]FEPA solely because the federal courts, including the United States Supreme Court, have so interpreted Title VII." Lavalley, 166 Vt. at 209-10, 692 A.2d at 369-70.

¶ 11. While our past decisions demonstrate that we may depart from federal interpretations of Title VII when we construe our own fair employment practices law, it is important to explain why the federal analysis is particularly unpersuasive in this case. The definition of " employer" in the federal FEPA of Title VII is, in pertinent part:
a person engaged in an industry affecting commerce ..., and any agent of such a person ..., except that ... persons having fewer than twenty-five employees (and their agents) shall not be considered employers. 42 U.S.C. § 2000e(b). In holding that this definition connotes only vicarious liability for employers, and not individual liability for their agents, federal courts have relied on two main rationales. The first is that the federal definition expressly excludes small businesses from liability by excluding any employer who employs fewer than twenty-five people. For example, the Fourth Circuit reasoned that " it would be incongruous to hold that Title VII does not apply to the owner of a five-person company but applies with full force to a person who supervises an identical number of employees in a larger company," Lissau, 159 F.3d at 180. The federal courts have also noted that the definition of " employer" in Title VII is " essentially the same" as the definition in the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 630(b); Wathen, 115 F.3d at 404 n. 6. Because the courts have held that there is no individual liability for age discrimination under the ADEA, based on similar reasoning regarding the small-employer exclusion, they have held that it is merely a logical extension of the ADEA case law to hold that Title VII does not impose individual liability for employment discrimination based on race, color, religion, sex, or national origin. Lissau, 159 F.3d at 181.

¶ 12. This logic cannot apply to the VFEPA. Vermont's law contains no small-business exclusion. In fact, the definition of " employer" in the VFEPA expressly includes any employer who has but a single employee within the state. Moreover, Vermont's definition of employer includes " any agent" of such employer, regardless of size.

¶ 13. The other rationale relied on by the federal courts for excluding individual liability under Title VII relates to the enforcement provisions in that statute. 42 U.S.C. § 2000e-5. Originally, relief included only " back pay and equitable relief such as reinstatement," which are remedies available only from an actual employer, not from a mere supervisor or fellow employee. Lissau, 159 F.3d at 181; accord Tomka v. Seller Corp., 66 F.3d 1295, 1314 (2d Cir.1995), abrogated on other grounds by

Page 950

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). In 1991, Congress amended the relief provisions to include compensatory and punitive damages. 42 U.S.C. § 1981a. as amended by Pub.L. No. 102-166, 105 Stat. 1072 (1991). However, the amendments tied the amount of damages available to a plaintiff " to the size of the employer." Lissau, 159 F.3d at 181; accord Tomka, 66 F.3d at 1315. Federal courts interpret this relationship between available relief and the size of the employer as another indication that Congress did not intend for Title VII to provide a statutory cause of action against agents or supervisory employees of employers. Further, because there is no mention of " individual liability as an available remedy," even in the 1991 amendments, when Congress could have added it if it saw a need, the courts
conclude that Title VII provides no such avenue of relief for potential plaintiffs. Lissau, 159 F.3d at 181.

¶ 14. The VFEPA does not similarly limit its remedies to relief typically available just from employers rather than individuals working for the same company. The VFEPA originally contained a single penalty provision stating that any employer "who willfully violates any of the provisions of this act, shall be fined not more than $500.00 for each violation." 1963, No. 196, § 3. In 1976, the Legislature amended the penalty section generally, and recodified it as 21 V.S.A. § 495b. 1975, No. 198 (Adj.Sess.), § 2. The new provision allowed the Attorney General or state's attorneys to enforce the act "by restraining prohibited acts, seeking civil penalties, obtaining assurances of discontinuance and conducting civil investigations in accordance with the procedures established in [the Consumer Fraud Act] as though an unlawful employment practice were an unfair act in commerce." Id. It also provided that the superior courts could impose the same civil penalties and costs, and any other relief for the State or injured employee, as they could under the penalty provisions of the Consumer Fraud Act. Id. Finally, the 1976 amendment to the VFEPA provided that the superior courts could "order restitution of wages or other benefits ... and may order reinstatement and other appropriate relief on behalf of an employee." These changes provided that the penalties could go toward making the injured employees whole, instead of merely punishing the employers. Further, it is apparent from these amendments that the Legislature intended that employers could be forced to stop discriminatory practices and incur liabilities substantially greater than a $500 fine.

¶ 15. The 1976 amendments retained remedies usually imposed on traditional employers in control of payroll and hiring, rather than coemployees or supervisors who might not enjoy such powers, but later changes-many of which occurred before the 1993 addition of the term "any agent" to the VFEPA definition of employer-evinced an even more definite expansion of the remedial scheme. The Legislature amended the penalty and enforcement provisions again in 1981-twelve years prior to the "any agent" amendment-adding subsection (b), which allows a private right of action by injured employees against an employer who violates the VFEPA. In this subsection, any "person aggrieved by a violation" may seek "damages or other equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney's fees and other appropriate relief." 1981, No. 65, § 2. In 1999, the Legislature specified that the damages available under the private right of action included "compensatory and punitive." 1999, No. 19, § 5. 21 V.S.A. § 495b(b). Any one of those remedies can be extracted from an individual

agent or coemployee, as well as from the traditional employer.

¶ 16. Reference to the penalty provisions for federal Title VII violations as interpretive support for the conclusion that Title VII allows for only respondent superior liability does not transfer with equal force to the VFEPA context. Comparison of the VFEPA penalty provisions and the federal penalty provisions illustrates that the VFEPA never existed in a form where a private right of action could be remedied by solely equitable remedies, which an employer, but not a supervisor, would be in a position to provide. Further, the VFEPA does not tie the size of the possible damages award to the size of the employer, and there is no restriction on the damages available-such as limiting the equitable remedy to back pay-that suggests the Legislature intended that employers alone would be liable for VFEPA violations. Consequently, the rationale of the federal courts provide no basis for interpreting the VFEPA to mean that employees cannot be held liable as individuals.

¶ 17. Decisions by other state courts construing their own Title VII-patterned state statutes can also inform our construction of the VFEPA. Lavalley, 166 Vt. at 210, 692 A.2d at 370. Nearly half of the states define "employer" in their antidiscrimination statutes similarly to the VFEPA. These state statutory definitions either include the phrase "an agent" of the employer, see, e.g., Mich. Comp. Laws § 37.2201(a), or an equivalent phrase, such as "any person acting in the interest of an employer, directly or indirectly," see, e.g., Wash. Rev.Code § 49.60.040(3). Of these similar statutes, eleven have been construed by state appellate courts, which have split six to five in favor of holding that the agency provisions render coemployees individually liable for discriminatory acts in the workplace. [4]

¶ 18. We are not convinced by the five state-court decisions that preclude individual liability. Two of the courts, Florida and Texas, give virtually no reason for their decisions. The California, Idaho, and Tennessee courts cite the consensus of the federal courts regarding individual liability for agents under the federal FEPA as one of the main reasons for rejecting individual liability under their state workplace discrimination statutes.
835 (citing Restatement (Second) of Torts § 320 (1977)[5] and Janken v. GM Hughes Elecs., 46 Cal.App.4th 55, 53 Cal.Rptr.2d 741, 745 (1996)). Under an agency theory of discrimination liability, the supervising employee is not a party to the employer-third-party employee contract, unless otherwise explicitly agreed. Restatement (Third) of Agency § 6.01(2) (expressing the general rule of § 320 in the revised and renumbered restatement). Thus the agent is not subject to liability if the principal fails to perform obligations created by the contract, id. § 6.01 cmt. a, even if those obligations include protecting the employee from discrimination by that very supervisor. However, the California courts, in using this rule, were able to further rely on their statutory distinction between workplace "discrimination" and workplace "harassment," specifying that while "any person" may be liable for harassment, only "employers" are liable for discrimination. Reno, 957 P.2d at 1335. The Reno court concluded that, since discrimination claims "arise out of the performance of necessary personnel management duties" such as "hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, [and] the assignment or nonassignment of supervisory functions," the legislature properly made only the employer liable for discrimination claims. Id. at 1336, 1343 (quotation omitted).

¶ 20. Assuming, without deciding, that we were to apply the Restatement § 6.01(2) rule to limit the situations where employees could be individually liable under the VFEPA, § 6.01(2) does not apply to the many situations where an employee might be acting outside the scope of legitimate management authority. In these situations, existing case law establishes that employers are not insulated from liability under Title VII. The United States Supreme Court has unequivocally concluded that Title VII makes employers vicariously liable for many discriminatory and harassing acts of their employees that are outside the scope of employment. Ellerth, 524 U.S. at 758, 118 S.Ct. 2257 (holding that employers are liable when the employee unlawfully discriminates beyond the scope of his or her employment, but "was aided in accomplishing the [discrimination] by the existence of the agency relation." (quoting Restatement (Second) of Agency § 219(2)(d))). We have not had occasion to consider the Ellerth holding in the context of a VFEPA claim, but given that the VFEPA's "standards and burdens of proof ... are identical to those under Title VII," Hodgdon, 160 Vt. at 161, 624 A.2d at 1128, the expansive employer vicarious liability standard of Ellerth is likely to apply equally under the VFEPA. In those cases where the employee is aided in his or her discriminatory acts by the existence of the agency relation to the employer, but is acting outside the scope of his or her employment, Restatement § 6.01(2) would not bar the employee from being held individually liable for his or her actions, in addition to holding the employer vicariously liable for the same.

¶ 21. Turning to state court decisions that adopt employee liability, we find two categories of reasoning in support of our conclusion regarding individual liability under the VFEPA. First, courts have noted, as we have, that the statutory language "by its very terms, encompasses individual supervisors and managers whose conduct violates the provisions of [the nondiscrimination statute]." Genaro, 703 N.E.2d at 785; accord Elezovic, 697 N.W.2d at 858 (concluding that "if the words [of the statutory definition of 'employer'] are going to be read sensibly, [they must] mean that the Legislature intended to make the agent tantamount to the employer so that the agent unmistakably is also subject to suit along with the employer") ; Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 244 (Mo.Ct.App.2006) (holding that "the plain and unambiguous language with the definition of 'employer' ... imposes individual liability in the event of discriminatory conduct"); Brown, 20 P.3d at 926 (stating "[w]e find [the statutory definition of 'employer'], by its very terms, contemplates individual supervisor liability"). Second, allowing such suits is consistent with the remedial purpose of those statutes "to deter and to eradicate discrimination in [the state]." Brown, 20 P.3d at 927 (quotation omitted).[6] In sum, we conclude that by including the phrase "and any agent" in the definition of "employer," the VFEPA allows for suits against employees as individuals.

III. Individual Liability under the Workers' Compensation Act

¶ 22. The second issue on appeal is whether the Workers' Compensation Act allows employees to be sued as individuals for discriminating against another employee who has asserted a claim for workers' compensation benefits. Although supervisor moved for summary judgment on the basis that plaintiff failed to establish a prima facie case of discrimination under Page 954 the WCA, plaintiff's opposition to summary judgment raised the issue of individual liability, and the superior court granted summary judgment on the basis that the WCA does not allow employees to be sued in their individual capacities. The court did not address whether plaintiff had made a prima facie case. Accordingly, we review only the purely legal question of whether the WCA permits employees to be held individually liable and reverse summary judgment on that ground.[7]

¶ 23. Under the WCA, "[n]o person shall discharge or discriminate against an employee ... because such employee asserted a claim for benefits." 21 V.S.A. § 710(b). We decided in Murray v. St. Michael's College, 164 Vt. 205, 209-10, 667 A.2d 294, 298-99 (1995), that this statutory section provides a private right of action for damages. However, as with the VFEPA, whether the statutory term "person" means that employees and supervisors, as well as employers, may be held personally liable for workers' compensation discrimination has not before been addressed.
¶ 24. As we have already stated, the starting point for statutory interpretation is to give effect to legislative intent. We first look to the language of the statute and seek to construe it according to its plain and ordinary meaning. *State v. LeBlanc*, 171 Vt. 88, 91, 759 A.2d 991, 993 (2000). Where the language is clear and unambiguous, we enforce the statute according to its terms. *Id.* As the term "person" is not defined in the WCA, we are obliged to interpret the term consistently with the rules set out in Title 1, chapter 3. 1 V.S.A. § 101. Chapter 3 defines "person" as including "any natural person." *Id.* § 128. Accordingly, we find no ambiguity in the meaning of "person" in this statute, and we see no reason to second-guess what the Legislature meant by its use of the term.[8] The statute allows an employee to be sued as an individual—which is consistent with the Legislature's approach to personal liability for violation of the VFEPA.

¶ 25. The superior court, in reaching the opposite conclusion, stated that "[i]f the Legislature wanted to create a private right of action against supervisors, it could easily have done so clearly and directly." It is not apparent, however, why the Legislature need be more clear than to use the term "person" in its most plain and all-encompassing sense. This legislative language choice straightforwardly applies the nondiscrimination provision to coworkers as well as to employers. As plaintiff points out, the Legislature used the term "employer" throughout the WCA to specify liability and responsibilities of employers for work-related injuries. Its decision to use the term "person" in § 710(b) instead of "employer" marks a clear departure from its approach to employer-only liability in the rest of the WCA. Rather than ignore this distinction and assume the Legislature meant what it did not say, we will interpret the statute according to its plain meaning.

¶ 26. Supervisor argues that it undermines the overall structure and purpose of the WCA to interpret the nondiscrimination provision as applying to individuals. The WCA "represents a public policy compromise in which the employee gives up the right to sue the employer in tort in return for which the employer assumes strict liability and the obligation to provide a speedy and certain remedy for work-related injuries." *Murray*, 164 Vt. at 209, 667 A.2d at 298 (quotation omitted). Prohibiting coworkers from discriminating against those who file workers' compensation claims has no bearing on this original compromise. Statutory authorization for employees to sue other employees for discrimination exposes employers to no greater risk of suit or liability than an employer could expect from suits against employers alone based on statutory or vicarious liability for discrimination by employees or supervisors. Nor does this construction interfere with injured workers securing the speedy and certain compensation intended by the enactment. The legislative choice to expose coemployees to discrimination liability is consistent with preventing workplace cultures that discourage employees from obtaining compensation to which they are entitled. Our reading of § 710(b) is fully consistent with the WCA as a whole.

¶ 27. Supervisor cites case law from Texas, Illinois, and Kansas in support of construing Vermont's WCA to exclude employees from personal liability for violating the antidiscrimination clauses of the Act. However, those cases rely on reasoning that we have already rejected as inapposite or unpersuasive. Particularly unconvincing is a Texas court's overly stingy reading of the term "person" to exclude "any person." *Stewart v. Littlefield*, 982 S.W.2d 133, 136-37 (Tex.Ct.App.1998) (quoting with approval *Stoker v. Furr's, Inc.*, 813 S.W.2d 719, 723 (Tex.Ct.App.1991), which concluded that it was inconceivable that the Legislature would have intended "person" to mean "any person," and "[h]ad the legislature intended to create a cause of action against any person ..., it could have easily said so"). As stated above, we are content to interpret the statutory term "person" as it is defined by statute, rather than as meaning "employer"–a term eschewed by the Legislature.

¶ 28. Supervisor next directs us to some courts that have limited potential defendants in common-law retaliatory-discharge suits to employers alone. The basis for this limit is that "only the employer ... has a 'motive' to fire an employee for seeking workers' compensation benefits." *Buckner v. Atl. Plant Maint., Inc.*, 182 Ill.2d 12, 230 Ill.Dec. 596, 694 N.E.2d 565, 570 (1998). While this is likely true, it fails to acknowledge that Vermont's statutory provision is clearly aimed at any form of discrimination, not simply discharges. Further, it is reasonable to understand that the Legislature, in enacting 21 V.S.A. § 710(b), was as concerned with ensuring employees' access to workers' compensation benefits without fear of reprisal, in any form, as it was with removing employers' economic incentives to retaliate by discharging those employees who file claims. From the employee-protection perspective, the Legislature had good reason to prohibit fellow employees, not just employers, from creating hostile work environments for those who file workers' compensation claims. In sum, none of the authority offered by supervisor is persuasive on this point, and we reverse summary judgment on plaintiff's WCA claim.

*Reversed and remanded for further proceedings not inconsistent with this opinion.*

Notes:
[1] Defendant argues that we can affirm the superior court's decision based on the lack of a prima facie case for discrimination. We do not take the court's aside that it was "mindful that Plaintiff has not alleged acts of unwanted sexual conduct by [defendant] and claims that she is not capable of performing the essential functions of her job" as a ruling on whether plaintiff made a prima facie case under the VFEPA. Further, we note that plaintiff's amended complaint relied on at least one provision of the VFEPA under which defendant did not argue that plaintiff failed to state a prima facie case. While we sometimes choose to reach issues that were not decided by the trial court, see
The cases holding that state antidiscrimination statutes allow employees to be held individually liable are Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 887 (D.C.1998); Elezovic v. Ford Motor Co., 472 Mich. 408, 697 N.W.2d 851, 857-58 (2005); Hill v. Ford Motor Co., 277 S.W.3d 659, 669 (Mo.2009); Fandrich v. Capital Ford Lincoln Mercury, 272 Mont. 425, 901 P.2d 112, 115 (1995) (this case does not address the issue in the same manner that it is addressed here, but the reasoning indicates that employees are subject to individual liability); Genaro v. Cent. Transp., Inc., 84 Ohio St.3d 293, 703 N.E.2d 782, 785-86 (1999); and Brown v. Scott Paper Worldwide Co., 143 Wash.2d 349, 20 P.3d 921, 926 (2001) (en banc). The cases where courts have rejected individual liability under state workplace antidiscrimination statutes are Reno v. Baird, 18 Cal.4th 640, 76 Cal.Rptr.2d 499, 957 P.2d 1333, 1335-37 (1998) (but suggesting that the harassment provision of the statute, which applies to "any employer" and any "person," does impose individual liability on supervisors); Patterson v. Consumer Debt Mgmt. & Educ., Inc., 975 So.2d 1290, 1292 (Fla.Dist.Ct.App.2008); Foster v. Shore Club Lodge, Inc., 127 Idaho 921, 908 P.2d 1228, 1233 (1995); Carr v. United Parcel Serv., 955 S.W.2d 832, 834-35 (Tenn.1997), overruled on other grounds by Parker v. Warren County Utility Dist., 2 S.W.3d 170, 176 (Tenn.1999) (suggesting, however, that individuals could be liable under the aiding and abetting provision of the law, which applies to "any person"); Washington v. Robertson County, 29 S.W.3d 466 (Tenn.2000) (holding that individuals can be liable under the malicious harassment provision); and Jenkins v. Guardian Indus. Corp., 16 S.W.3d 431, 439 (Tenn.App.2000).

The superior court ruled that either Lasker's continued employment or the promotions and increased pay she received during her employment with Summits 7 was sufficient consideration to support the agreement. We agree with the superior court that Lasker's continued employment constituted sufficient consideration.

The superior court ruled that either Lasker's continued employment or the promotions and increased pay she received during her employment with Summits 7 was sufficient consideration to support the agreement. We agree with the superior court that Lasker's continued employment constituted sufficient consideration. Further, we discern no basis for granting Lasker's request that we reverse the superior court's judgment and remand the matter for the court to consider whether the geographic scope of the agreement's restrictions was unreasonably broad.
department for ten dollars an hour. In April 2000, Lasker became a sales assistant and received a fifteen percent raise. Within the next three months, she received another promotion and raise and, in November 2000, she was assigned to the sales department and given a $30,000 salary plus commissions. Lasker continued to assume greater and greater responsibilities with Summits 7, eventually becoming a supervisor. Her pay increased along with the additional responsibilities, reaching $39,000 in 2001, $49,000 in 2002, and $19,000 for the first three months of 2003 before she left her employment.

¶ 3. In January 2001, one year after Summits 7 hired her, Lasker signed a noncompetition agreement prohibiting her from working in Vermont, New Hampshire, or a designated part of New York for any direct or indirect competitor of Summits 7 for a period of twelve months "following termination of your employment for cause or a voluntary termination of employment." Lasker signed a second agreement containing similar language in October 2002 after Summits 7 purchased another company and expanded the kinds of services it provided. In April 2003, Lasker voluntarily terminated her employment with Summits 7. Two months later, in June 2003, she began working for Offset House, Inc., a competitor of Summits 7 located in nearby Essex Junction, Vermont.

¶ 4. In October 2003, Summits 7 filed a complaint seeking to enjoin Lasker from working for Offset House. Following a trial in April 2004, the superior court entered judgment in favor of Summits 7. The court enjoined Lasker from working for Offset House, extended the effective terms of the noncompetition agreement until March 30, 2005, and awarded Summits 7 $11,552 in attorney's fees. With respect to the principal point in dispute, the court failed to consider the unreasonably broad geographic scope of the agreement. According to Lasker, in an at-will employment context, continued employment means nothing because the employer has the right to terminate the employment at any time for any reason. Lasker further contends that the promotions and raises she received were not ancillary to the noncompetition agreements that she signed.

I.

Ellis Boxer Blake
Attorneys

EMPLOYMENT LAW AND WORKERS’ COMPENSATION

© 2012 ELLIS BOXER & BLAKE
employment agreement to the extent that enforcement is reasonably tailored to protect a legitimate interest of the employer.

¶ 8. But before examining the reasonableness of a noncompetition agreement to determine whether it is narrowly tailored in terms of geographical, temporal, and subject matter restrictions to protect the employer's legitimate interests, courts first consider whether the agreement is ancillary (connected and subordinate) to another valid contract and, if not, whether there is adequate independent consideration to support the agreement. See Abel v. Fox, 274 Ill.App.3d 811, 211 Ill.Dec. 129, 654 N.E.2d 591, 593 (1995). These requirements are intended to ensure that the noncompetition agreement is not a naked restraint on trade but rather the result of a bargained-for exchange that furthers legitimate commercial interests in the context of another transaction or relationship. Id. at 595; T. Staidl, supra, at 97-98. As one commentator has stated,

Even if a covenant is otherwise reasonable, a court will not enforce it unless it is ancillary to an agreement that has a purpose other than the restraint of competition. The rationale for this ancillarity requirement is that only if the restraint accompanies a valid transaction will there be the possibility of the unrestrained party having an interest deserving of protection that would perhaps outweigh the interest of the restrained party and the public. Corbin on Contracts, supra, § 80.7, at 72.

¶ 9. For the most part, courts have generally assumed that the requirements of ancillarity or consideration are satisfied when the noncompetition agreement is made at the onset of an employment relationship, even an at-will relationship. Corbin on Contracts, supra, § 80.7, at 73, and § 80.23, at 169. But see Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 832-33 (Tex. 1991) (because at-will employment relationship is not otherwise enforceable agreement, covenant not to compete executed either at inception of or during at-will employment relationship cannot be ancillary to otherwise enforceable agreement and thus is unenforceable as matter of law). The courts are split, however, on the principal question raised in this appeal—whether continued employment is sufficient, without additional independent consideration, to support a covenant not to compete entered into after an at-will relationship has begun. See Corbin on Contracts, supra, § 80.23, at 170-73; H. Specter & M. Finkin § 8.02, at 447-49; T. Staidl, supra, at 104-07; Columber, 804 N.E.2d at 30; Hopper, 861 P.2d at 541.

¶ 10. Many courts hold that continued employment alone is sufficient consideration to support a covenant not to compete entered into after the commencement of an at-will employment relationship. E.g., Columber, 804 N.E.2d at 32; Camco, Inc. v. Baker, 113 Nev. 512, 936 P.2d 829, 832 (1997); see also Corbin on Contracts supra, § 80.23, at 170 n.4 (citing cases); Restatement (Third) of Employment Law, Preliminary Draft No. 2, supra, § 6.05 cmt. d ("Continuing employment of an at-will employee is enough consideration to support an otherwise valid restrictive covenant. This means that parties may agree to enforceable restrictive covenants after the beginning of an employment relationship."). Some of these courts reason that the presentation of a noncompetition agreement is, in effect, a proposal to renegotiate the at-will relationship, and that the employee's acceptance of the agreement is given in exchange for the employer's forbearance from firing the employee. E.g., Columber, 804 N.E.2d at 32. Others reason that because employers can fire employees at any time with or without cause, every day of an at-will employment relationship is a new day, and thus there should be no distinction in disallowing noncompetition agreements for lack of consideration based on whether they are entered into at the beginning or during the relationship. E.g., Copeco, Inc. v. Caley, 91 Ohio.App.3d 474, 632 N.E.2d 1299, 1301 (1992).

¶ 11. Commentators have questioned this reasoning, noting that when a noncompetition agreement is entered into after commencement of the employment relationship, the employer can still fire the employee without cause, but the "new day" for the employee has dramatically changed in that the employee's ability to leave and pursue the same line of work with a new employer is significantly restricted. E.g.,

Page 371


¶ 12. Other courts hold that continued employment alone is not adequate consideration to support a noncompetition agreement but rather require some additional independent consideration such as increased compensation, a promotion, or other benefits. E.g., Sanborn Mfg. Co. v. Currie, 500 N.W.2d 161, 164 (Minn.Ct.App. 1993); Poole v. Incentives Unlimited, Inc., 338 S.C. 271, 525 S.E.2d 898, 900 (Ct.App. 1999), aff'd by 345 S.C. 378, 548 S.E.2d 207 (S.C. 2001); Hopper, 861 P.2d at 541; see Corbin on Contracts, supra, § 80.23, at 173; T. Staidl, supra, at 106. "This view recognizes the increasing criticism of the at-will relationship, the usually unequal bargaining power of the parties, and the reality that the employee rarely 'bargains' for continued employment in exchange for a potentially onerous restraint on the ability to earn a living." H. Specter & M. Finkin, supra, § 8.02, at 450. Courts adhering to this view also require that the independent consideration be connected directly with the
covenant not to compete. E.g., *Carrie*, 500 N.W.2d at 164 (no evidence that increased compensation and promotions were attributable to anything other than employee's performance during employment relationship).

¶ 13. In Vermont, we have not addressed the issue of whether independent consideration beyond continued employment is necessary to support a noncompetition agreement entered into after the onset of an at-will employment relationship. Indeed, although our law on restrictive covenants is consistent with the reasonableness standard of other modern courts, it is limited. We have emphasized that we will proceed with caution when asked to enforce restrictive covenants against competitive employment because such restraints "run counter to that public policy favoring the right of individuals to freely engage in desirable commercial activity." *Vt. Elec. Supply Co. v. Andrus*, 132 Vt. 195, 198, 315 A.2d 456, 458 (1974) ("Restrictions on doing business or on the exercise of an individual's trade or talent are subject to scrutiny for reasonableness and justification."); accord *Roy's Orthopedic, Inc. v. Lavigne*, 142 Vt. 347, 350, 454 A.2d 1242, 1244 (1982).

¶ 14. Our general rule is that a restrictive covenant in an employment context will be enforced unless the agreement is found to be contrary to public policy, unnecessary for protection of the employer, or unnecessarily restrictive of the rights of the employee, with due regard being given to the subject matter of the contract and the circumstances and conditions under which it is to be performed. *Andrus*, 132 Vt. at 198, 315 A.2d at 458. In *Andrus*, we stated that the burden of establishing such facts is on the employee, id.; however, we note that while other courts have recognized that the employee has the burden of proving a failure of consideration, "the employer has the burden of proving the reasonable necessity of the restrictive covenant." *NBZ, Inc. v. Pilarski*, 185 Wis.2d 827, 520 N.W.2d 93, 97 (Ct.App. 1994); see Restatement (Third) of Employment Law, Preliminary Draft No. 2, supra, § 6.05 ("The employer bears the burden of proving that a restrictive covenant comply with the requirements of this section."). This makes some sense because the employer generally would have access to facts that could demonstrate the necessity of a restrictive covenant.

¶ 15. The primary issue that Lasker raises in this case is whether the most recent noncompetition agreement she signed was supported by adequate consideration. We emphasize that Lasker has not challenged the agreement on the basis that it is unreasonable with respect to the type of restrictions imposed on her or whether those restrictions are narrowly tailored to address Summit 7's legitimate interests. Nor has Lasker contended that the agreement is unreasonable with respect to the length of time that it imposes restrictions on competition. Lasker does argue that the superior court erred by not addressing whether the geographic scope of the agreement was unreasonably broad, but, as we explain later, we need not consider this issue because Lasker plainly sought and obtained employment within a reasonably restricted geographic area, and the court may enforce the agreement to the extent that it is reasonable. Hence, if we conclude that the agreement was supported by adequate consideration, we will affirm the superior court's judgment in favor of Summits 7.

¶ 16. As noted, the trial court ruled that continued employment would be sufficient consideration to support the covenant not to compete, but that it was unnecessary to even reach that conclusion because the increased compensation and promotions that Lasker received during her employment with Summits 7 were adequate consideration to support the covenant. We disagree with the latter determination. There is no evidence that Lasker's promotions and raises were connected in any way with the noncompetition agreements she signed. See *Carrie*, 500 N.W.2d at 164 (no evidence that employee's promotions and salary increases were tied to noncompetition agreement or were attributable to anything other than performance that was expected of him under initial employment agreement). We can only assume that she received these promotions and raises because she performed her job well and was rewarded for that performance.

¶ 17. We also decline to give controlling weight to the fact that, by its terms, the noncompetition agreement could be enforced only if Lasker were fired for cause or left her employment voluntarily. One might argue that the agreement provided some incentive for Summits 7 not to fire Lasker without cause, but any such incentive did not constitute a tangible benefit beyond continued employment in exchange for signing the agreement. Indeed, the agreement explicitly states that it neither creates a contract of employment nor alters in any way Lasker's status as an at-will employee.

¶ 18. Nevertheless, we agree with the superior court, the majority of other courts, and the recent Restatement draft that continued employment alone is sufficient consideration to support a covenant not to compete entered into during an at-will employment relationship. See *Mattison*, 730 P.2d at 288 (although there is authority to contrary, most jurisdictions have found that continued employment is sufficient consideration to support restrictive covenant executed after at-will employment has begun); Restatement (Third) of Employment Law, Preliminary Draft Page 373 No. 2, supra, § 6.05 cmt. d ("Continuing employment of an at-will employee is enough consideration to support an otherwise valid restrictive covenant. This means that parties may agree to enforceable restrictive covenants after the beginning of an employment relationship."). A noncompetition agreement presented to an employer at any time during the employment relationship is ancillary to that relationship and thus requires no additional consideration other than continued employment. See H. Specter & M. Finkin, supra § 8.02, at 447 (majority of jurisdictions hold that restrictive covenant executed at any time during bilateral employment agreement is considered ancillary to
¶ 19. Moreover, because an at-will employee can be fired without cause at any time after the initial hire, the consideration is the same regardless of what point during the employment relationship the employee signs the covenant not to compete. See Caley, 632 N.E.2d at 1301 (there is no substantive difference between promise of employment upon initial hire and promise of continued employment during employment relationship); Baker, 936 P.2d at 832 (accord). As one commentator has noted, it is not logical for a court to treat differently a covenant presented on the first day of work and one presented one week after the first day in the at-will employment setting. While the contemporaneous nature of the exchange differs, both employees will be faced with the threat of not having a job if they choose not to sign.

T. Staidl, supra, at 103. Indeed, "the only effect of drawing a distinction between pre-hire and post-hire covenants is to be induce employers . . . to fire those employees and rehire them the following day with a fresh covenant not to compete." see Curtis 1000, Inc. v. Suess, 24 F.3d 941, 947 (7th Cir. 1994).

¶ 20. In either case, the employee is, in effect, agreeing not to compete for a given period following employment in exchange for either initial or continued employment. Looked at another way, in either case the consideration is the employer's forbearance from terminating the at-will employment relationship. See Columber, 804 N.E.2d at 32 (employer's presentation of covenant not to compete to employee during at-will employment relationship, in effect, proposes to renegotiate terms of relationship; employee's assent to covenant is given in exchange for employer's forbearance from ending relationship). Regardless of what point during the employment relationship the parties agree to a covenant not to compete, legitimate consideration for the covenant exists as long as the employer does not act in bad faith by terminating the employee shortly after the employee signs the covenant. See Zellner, 589 N.Y.S.2d at 907 (forbearance of right to terminate at-will employee is legal detriment that can stand as consideration for restrictive covenant; where employment relationship continues for substantial period after covenant is signed, that forbearance is real, and not illusory).

¶ 21. Of course, the fact that a covenant not to compete is supported by consideration in no way deters the employee from later challenging the covenant as unnecessary to protect the employer's legitimate interests or as unreasonable with respect to its temporal or geographic scope. For the most part, Lasker has failed to mount any such challenge to the instant noncompetition agreement, which is enforceable under its terms because Lasker voluntarily left her position with Summits 7 and shortly thereafter accepted a job with a nearby direct competitor. See T. Staidl, supra, at 120.

¶ 22. Lasker argues, however, that even if we determine that the noncompetition agreement is supported by adequate consideration, the case nonetheless must be reversed and remanded either (1) for a new trial so that the court can examine and limit the geographic scope of the agreement, or (2) with instructions for the trial court to limit the scope of the order to cover only her employment with Offset House. In support of this argument, Lasker cites Lavigne, 142 Vt. at 350-51, 454 A.2d at 1244, a case in which this Court reversed the superior court's conclusion that a noncompetition agreement was reasonably limited with regard to time and place and remanded the matter for a new trial because the court failed to make findings on the extent of the geographic area covered by the agreement. We discern no basis for remanding this case to the superior court to reconsider the reasonableness of the geographic scope of the restrictions imposed by the noncompetition agreement at issue.

¶ 23. Most modern courts agree that a trial court can enforce restrictive covenants to the extent that they are reasonable. Corbin on Contracts, supra, § 80.26, at 179, 189 ("The rule for partial enforcement is the better rule, and courts should apply it in any case in which nothing is wrong with the agreement except that the parties have agreed upon a restraint that is somewhat in excess of what protection of the good will or other protectable interest requires."); see A.N. Deringer, Inc. v. Strong, 103 F.3d 243, 247-48 (2d Cir. 1996) (noting "modern trend" away from all-or-nothing rule and predicting that Vermont would permit enforcement of defective restrictive covenant to limit of its validity); Happner, 861 P.2d at 545-46 (noting that "in the best considered modern cases," courts have enforced covenants not to compete against defendants whose breach occurred within plainly reasonable restricted area, even though terms of agreement imposed larger and unreasonable restraint). Thus, it may not be necessary for a court to determine the exact limiting boundary of a restriction so long as the employer can show that the employee breached a reasonable restriction. See Corbin on Contracts, supra, § 80.26, at 182-83.

¶ 24. In this case, the superior court found that Lasker "pursued employment with a direct competitor, within a short geographic distance and in precisely the market served by plaintiff." Based on this and other findings, the court enjoined Lasker from working for "Offset House or any other direct competitor of Summits 7." Lasker has not challenged the superior court's findings or argued, either
here or before the trial court, that restricting her from working for Offset House or any other nearby direct competitor of Summits 7 was unreasonable or unnecessary. Further, to the extent that Lasker wants the superior court to establish a reasonable geographic limit so that she can know where she might work in the trade, that point is moot because the effective term of the noncompetition agreement has expired.

Affirmed.

Page 375

¶ 25. JOHNSON, J., dissenting.

The majority emphasizes the close scrutiny that we must give to noncompetition agreements, but nonetheless enforces the present agreement based on illusory consideration and absent any assurance that the agreement is reasonable or is protecting any legitimate interest of the employer. Long after Staci Lasker began working for Summits 7, the company required her to sign an extremely broad noncompetition agreement forbidding her from directly or indirectly participating in any enterprise providing services related to those offered by Summits 7. The restriction on her employment was for one year following her termination for cause or voluntary resignation and covered all of Vermont and New Hampshire and part of New York. For signing this highly restrictive agreement, Lasker received nothing other than the right to continue the job that she already had. The majority holds that Summit 7's forbearance from firing her was sufficient consideration for requiring Lasker to sign the covenant not to compete. By finding consideration under these circumstances, the majority has eviscerated the public policy concerns requiring consideration for-and close scrutiny of-covenants not to compete in employment relationships. Accordingly, I respectfully dissent.

¶ 26. A brief examination of the facts demonstrates that Lasker's continued employment is illusory consideration for her signing the noncompetition agreement. The day before Summits 7 presented the agreement to Lasker, she was an at-will employee who could be fired at any time with or without cause, but who was free to leave her employ at any time and seek any other job. The day after she signed the agreement, she was still an at-will employee who could be fired at any time for any or no reason, but she had lost her right to seek any other job after leaving her employ. Indeed, extremely broad restrictions were imposed on her ability to obtain work for which she was qualified anywhere near her home. The agreement created both a benefit to Summits 7 and a detriment to Lasker, but neither a benefit to Lasker, the promisor, nor a detriment to Summits 7, the promisee-less than a peppercorn! See Bergeron v. Boyle, 2003 VT 89, ¶ 19, 176 Vt. 78, 838 A.2d 918 (either benefit to promisor or detriment to promisee is sufficient consideration).

¶ 27. Because Summits 7 relinquished nothing, and Lasker gained nothing, any consideration was illusory. See Gagliardi Bros., Inc. v. Caputo, 538 F.Supp. 525, 528 (E.D.Penn. 1982) (continued employment was not adequate consideration to support noncompetition agreement because restricted employee received no corresponding benefit or change in status); Sanborn Mfg. Co. v. Currie, 500 N.W.2d 161, 164 (Minn. Ct.App. 1993) (no independent consideration exists unless employer provides real benefits beyond those already obtained by employee); Lake Land Employment Group of Akron v. COLUMBUS, 101 Ohio St.3d 242, 804 N.E.2d 27, 34 (2004) (Resnick, J., dissenting) (continued employment is illusory consideration for signing noncompetition agreement in at-will employment relationship because employee has gained nothing while employer retains same right it always had to discharge employee at any time for any reason); Poole v. Incentives Unlimited, Inc., 338 S.C. 271, 525 S.E.2d 898, 900 (Ct.App. 1999) (promise of continued employment to at-will employee is illusory because employer retains right to fire employee at any time).

¶ 28. The majority obscures the illusory nature of the consideration it finds here by suggesting that continued employment is sufficient consideration as long as the employer

Page 376

does not terminate the employment relationship in bad faith shortly after the agreement is reached. I find this reasoning illogical and unpersuasive. Whether there is adequate consideration should be judged based on the expectations of the parties at the time they enter into the agreement. Applying a retrospective analysis to determine whether there was consideration gets us away from traditional notions of consideration and instead transforms an illusory promise into enforceable consideration through performance. T. Staidl, The Enforceability of Noncompetition Agreements when Employment is At-Will: Reformulating the Analysis, 2 Employee Rts. & Emp. Pol'y J. 95, 106 (1998); see 15 G. Giesel, Corbin on Contracts § 80.23, at 173 (Rev. ed. 2003) (backward-looking analysis applies form of doctrine of promissory estoppel rather than traditional notion of consideration). In any event, the analysis does not work because, in the end, the employee still gained nothing but continued employment, a legally unenforceable promise, while the employer gained the benefit of the legally enforceable agreement without suffering any detriment. T. Staidl, supra, at 106.

¶ 29. As the majority recognizes, historically courts have closely scrutinized post-employment covenants not to compete. 1 H. Specter & M. Finkin, Individual Employment Law and Litigation § 8.01, at 443 (1989). Judicial scrutiny is necessary because such covenants are often the result of unequal bargaining power between the parties. Id. Employers may take advantage of that unequal bargaining power by imposing restrictions intended to ensure that their employees will not compete with them after they leave their employ. On the other side, employees interested in obtaining or keeping their jobs are likely to give scant attention to the hardship that they may suffer later through the loss of their livelihood as the result of the restriction on their future employment. Id. § 8.08, at 485. In the interests of free commerce and freedom to choose one's employment, courts have felt obligated to assure that
restrictive covenants are aimed at protecting legitimate employer interests rather than restricting trade or competition.

¶ 30. Although these public policy concerns are ultimately addressed by determining whether the covenant in dispute is reasonably related to a legitimate employer interest and has reasonable geographic and temporal restrictions, the issue of whether adequate consideration exists for such covenants has become a flashpoint for those same concerns. In the light of the increasing criticism of and restrictions upon at-will employment relationships, and the lack of any real bargaining between employer and employee when continued at-will employment is exchanged for restrictions on future employment, the "better view" is to require additional consideration beyond continued employment to support a restrictive covenant entered into during the employment relationship. Id. § 8.02, at 450; Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993); see Currie, 500 N.W.2d at 164 (when employer requires employee to sign covenant not to compete after employee has commenced employment, without giving employee any consideration beyond continued employment for signing the agreement, employer takes undue advantage of unequal bargaining power between parties). In short, the critical public policy concerns underlying close scrutiny of noncompetition agreements require us to "examine the extent and character of the consideration received by the [employee] to a degree perhaps not true in ordinary contract cases." Corbin on Contracts, supra, § 80.23, at 168 ("The common interest in an open market, with everyone free to buy and sell and exchange, causes the courts to scrutinize the consideration.").

¶ 31. In this case, Staci Lasker began working for Summits 7 in 2000 as a ten-dollar-an-hour employee and gradually progressed in the company. More than a year after she commenced her employment with Summits 7, the company required her to sign a noncompetition agreement severely restricting her post-employment rights. The trial court suggested in its decision that Lasker's general development as an employee-her learning how to handle increased responsibilities concerning the business-was adequate consideration for signing the noncompetition agreement. I concur with the majority's rejection of this position. An employee's development of skills during the employment period is neither adequate consideration nor a legitimate protectable interest of the employer sufficient to justify a restraint on trade. See id. § 80.16, at 143-46 ("If the harm caused by service to another [employer] consists merely in the fact that the new employer becomes a more efficient competitor just as the first employer did through having a competent and efficient employee, courts should not enforce the restraint.").

¶ 32. The trial court also rejected Lasker's argument that requiring her to sign the noncompetition agreement upon threat of dismissal amounted to coercion. The court reasoned that because employers have a legal right to offer continued employment in consideration for signing a noncompetition agreement, requiring Lasker to enter into such an agreement in exchange for continued employment and/or other benefits was not coercive in nature. By engaging in this circular reasoning, the court avoided examining both the specific facts of this case and the public policy concerns that are at the heart of a strict-construction approach to noncompetition agreements. Lasker had argued that she did not really have a choice as to whether to sign the agreement because her marriage was breaking up at the time and she had to stay financially solvent to support her two children. Her situation illustrates the unequal bargaining power that typically exists between employer and employee, particularly when the employer requires the employee to sign a noncompetition agreement upon threat of dismissal after the employee has become established in the job. Like Lasker, employees often have obligations and responsibilities that require them to stay with their job, even if it means signing onto an agreement that restricts their right to seek other jobs in the future. In such situations, employers should not be able to take advantage of their unequal bargaining power by requiring the employee to sign an agreement in exchange for mere continued employment. See T. Staidl, supra, at 118 (requiring employee to sign noncompetition agreement upon threat of discharge should be treated as irrefutably coercive in nature).

¶ 33. The existence of unequal bargaining power between employers and employees and the resulting restraint on trade require courts to carefully scrutinize covenants not to compete. See Vt. Elec. Supply Co. v. Andrus, 132 Vt. 195, 198, 315 A.2d 456, 458 (1974) ("Restrictions on doing business or on the exercise of an individual's trade or talent are subject to scrutiny for reasonableness and justification."). Yet, here, the trial court ceased its scrutiny of the noncompetition agreement upon ruling that it was supported by adequate consideration. After finding consideration for the agreement, the court never questioned whether the agreement was reasonable or based on any legitimate employer interest. But even assuming that adequate consideration existed, that fact should not have been dispositive of the case. As our case law demonstrates, the focus of cases involving noncompetition agreements should be on whether the employer had a legitimate protectable interest sufficient to justify the restraint on trade resulting from limiting the employee's future employment. See id. (restrictive covenants will not be enforced if they are "contrary to public policy, unnecessary for protection of the employer, or unnecessarily restrictive of the rights of the employee"). Unfortunately, that is not what occurred here.

¶ 34. It may be true that at trial Lasker emphasized the absence of consideration for the noncompetition agreement rather than the lack of a legitimate protectable employer interest. Nevertheless, Lasker did generally argue in her motion for partial summary judgment that the agreement was unreasonable and unduly restrictive of her rights. I

Page 377

Page 378
agree with the majority that the employer, not the employee, should bear the burden of demonstrating the existence of a legitimate protectable interest. NBZ, Inc. v. Pilarski, 185 Wis.2d 827, 520 N.W.2d 93, 97 (Cl.App. 1994) (“The employer has the burden of proving the reasonable necessity of the restrictive covenant.”); Restatement (Third) of Employment Law, Preliminary Draft No. 2, supra, § 6.05 (employer bears burden of proving that restrictive covenant is reasonably tailored to protect its legitimate interests). Under the circumstances of this case, the trial court should have examined the reasonableness of the parties’ agreement, including whether Summits 7 had a legitimate protectable interest.

¶ 35. In sum, I believe that requiring an employee to sign a post-employment covenant not to compete upon threat of dismissal, without conferring any benefit upon the employee other than continued at-will employment, which can be terminated at any time after the agreement is reached, is coercive in nature and unsupported by any real consideration. I would strike the agreement in this case for lack of consideration.

Notes:
[*] Defendant’s maiden name is Staci Kelly, but by the time of trial, she was using her married name, Staci Lasker.

PRIVACY

Before
160 Vt. 150] ALLEN, C.J., GIBSON, DOOLEY and MORSE, JJ., and PECK, J. (Retired), Specially Assigned.

Plaintiff Mary Hodgdon appeals the superior court’s decision that defendant Mt. Mansfield Company, Inc., did not discriminate against her on the basis of sex or handicap and did not invade her privacy when it fired her from her position as a chambermaid. Plaintiff also appeals the trial court’s decision to grant defendant’s motion for a trial before the court on the handicap-discrimination claim. We affirm the superior court’s decision regarding plaintiff’s claim of invasion of privacy and reverse the court’s rulings on the sex- and handicap-discrimination claims. We also hold that parties are entitled to trial by jury on claims for legal damages brought under the Fair Employment Practices Act (FEPA), but we affirm the decision to have trial by court in this case because plaintiff did not request such damages.

Defendant operates a ski resort in Stowe. Plaintiff began working for defendant as a chambermaid in August 1986. She has not had natural upper teeth since 1981, but had a set of dentures made before she went to work for defendant. She did not wear them, however, because they hurt her.

During the fall of 1987, defendant hired Marguerite Pearson as its executive housekeeper. Pearson was responsible for housekeeping schedules and standards, and reviewing staff performance. She participated in discussions on upgrading the image of the resort in order to obtain a “four-star” rating. Patty Clark, her supervisor, mentioned that the appearance of members of the housekeeping staff, including plaintiff, needed improvement, and Pearson communicated this concern to her staff members.

Pearson asked plaintiff to volunteer for layoff in October 1987, but assured her that she would be rehired in six weeks. In the meantime, however, management personnel decided that plaintiff would not be allowed to return to work without dentures, despite her neat and clean appearance and her good work record. On November 24, Pearson sent plaintiff a letter informing her that Mt. Mansfield was concerned about upgrading “the way employees are seen by the public” and that “employees will be expected to have teeth and to wear them daily to work.”

Plaintiff called Pearson upon receipt of the letter and explained that she had dentures but had not been able to wear them because they did not fit. She asked to be allowed to return to work so that she could earn enough money to purchase a new set. Pearson told plaintiff that she could not come back to work without dentures, but that she would hold plaintiff’s job open until December 21. The company fired plaintiff when she did not report to work on that date.

Plaintiff filed suit, claiming that defendant violated FEPA, 21 V.S.A. §§ 495–496, by firing her because of a perceived handicap and because of her sex. Plaintiff also brought claims for invasion of privacy, intentional infliction of emotional distress and wrongful discharge. The trial court granted defendant’s motion for summary judgment on the sex-discrimination and invasion-of-privacy claims and defendant’s motion for trial before the court on the handicap-discrimination charge. Plaintiff dismissed the infliction-of-emotional-distress
Page 1125

and wrongful-discharge claims, and the case proceeded to trial solely on the handicap-discrimination claim.

Plaintiff claims that the trial court erred by (1) granting defendant’s motion for trial by court on the handicap-discrimination claim, (2) granting defendant’s motion for summary judgment on the sex-discrimination and invasion-of-privacy claims, and (3) finding, as a matter of law, that plaintiff is not a handicapped individual under FEPA.

160 Vt. 155]

Plaintiff first argues that, to the extent there were factual issues to resolve, she was entitled to trial by jury on her sex- and handicap-discrimination claims brought under FEPA. In response, defendant argues that because FEPA did not exist at the time the Vermont Constitution was adopted, and because the statute does not provide for trial by jury, plaintiff has no right to a jury trial in her FEPA actions.
Chapter I, Article 12 of the Vermont Constitution provides: "That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." This provision guarantees a right to jury trial to the extent that it existed at common law at the time of the adoption of the constitution in 1793. State Department of Taxes v. Tri-State Industrial Laundries, Inc., 138 Vt. 292, 297, 415 A.2d 216, 220 (1980). The right to trial by jury is not, however, restricted to those common-law causes of action recognized by the Vermont courts in 1793. Rather, we look at the nature of the action and whether it is the type of controversy that would have been tried by a jury under common law at that time. Plimpton v. Town of Somerset, 33 Vt. 283, 291-92 (1860). As we stated in Plimpton: All the rights, whether then or thereafter arising, which would properly fall into those classes of rights to which by the course of the common law the trial by jury was secured, were intended to be embraced within this article. Hence it is not the time when the violated right first had its existence, nor whether the statute which gives rise to it was adopted before or after the constitution that we are to regard as the criterion of the extent of this provision of the constitution; but it is the nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law that must decide the question.

Id. (emphasis in original).

The United States Supreme Court has applied a similar test in construing the Seventh Amendment to the federal constitution, [160 Vt. 156] [1] preserving the federal right to trial by jury. In Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), the Court held that the Seventh Amendment guaranteed the right to trial by jury in a housing discrimination action brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612, in which the plaintiff sought actual and punitive damages. 415 U.S. at 195, 94 S.Ct. at 1008. The Court declared that "[a]lthough the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time." Id. at 193, 94 S.Ct. at 1007. The term "common law" in the Seventh Amendment means those suits in which legal rights or relief were determined as opposed to equitable rights or relief. Id. Because the plaintiff in Curtis sought actual and punitive damages, the traditional form of relief granted by courts of law, the Court determined that she was enforcing "legal rights" within the meaning of the Seventh Amendment and was entitled to a trial by jury. Id. at 195, 94 S.Ct. at 1008.

Thus, we look to the nature of a FEPA suit and the forms of relief available under that Act to determine whether there is a right to trial by jury. FEPA makes it unlawful for an employer "to discriminate against any individual because of [her] ... sex ... or against a qualified handicapped individual." 21 V.S.A. § 495(a)(1). It provides that any person aggrieved by a violation of the Act may bring an action to seek "damages or equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney's fees and other appropriate relief." 21 V.S.A. § 495(b). [2] The meaning of this statute is plain on its face; it is clear that the Legislature intended to include legal damages among the remedies available under FEPA. [3] Because this is the traditional form of relief offered in the courts of law, Curtis, 415 U.S. at 196, 94 S.Ct. at 1009, we hold that parties claiming such damages under FEPA are entitled to trial by jury pursuant to Chapter I, Article 12.

Defendant argues that the right to a jury under the Vermont Constitution does not apply to statutory actions but only to common-law causes of action. It maintains that because FEPA does not grant a right to jury trial, there is no such right in actions under the Act. The petitioner in Curtis advanced the same argument, but the Court held that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194, 94 S.Ct. at 1008. Similarly, this Court has found that "[t]he [Vermont] [C]onstitution was intended to provide for the future as well as the past, to protect the rights of the people ... whether those rights then existed by the rules of the common law, or might from time to time arise out of subsequent legislation." Plimpton, 33 Vt. at 291 (emphasis added). Thus, we conclude that the right to trial by jury under the Vermont Constitution is not limited to causes of action recognized at common law in 1793.

Defendant also argues that we should adopt the federal rule, under which there was no right to trial by jury in a Title VII action, because FEPA is patterned on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. See Graff v. Eaton, 157 Vt. 321, 323 n. 2, 598 A.2d 1383, 1384 n. 2 (1991) ("The consensus has been that there is no right to trial by jury under Title VII because the remedy it provides--reinstatement and award of back pay--is essentially equitable."). The decisions denying trial by jury under the federal employment discrimination law, however, were based on the remedy provided under Title VII prior to its amendment in 1991. See id.; Curtis, 415 U.S. at 197, 94 S.Ct. at 1010. Unlike FEPA, Title VII relief was essentially equitable in nature until 1991, when Congress amended Title VII [160 Vt. 158] extending the relief available to include compensatory and punitive damages. See Civil Rights Act of 1991, Pub.L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (codified at 42 U.S.C. § 1981a). In 1981, the Vermont Legislature extended FEPA remedies to include "damages" by an amendment in which it provided for private actions under the Act. See 21 V.S.A. § 495(b). Thus, we are not inclined to follow pre-1991 Title VII case law on the jury trial issue. Accordingly, to the extent that factual issues are in dispute, the parties to an action under
FEPA are entitled to trial by jury when the plaintiff requests legal damages.

Finally, defendant argues that, even if claims under FEPA may be tried by jury, the right to a jury trial still turns on whether the complaint seeks legal or equitable relief. Defendant maintains that because plaintiff in this case sought solely equitable relief in her FEPA claims, she is not entitled to trial by jury on these claims. We agree.

Although plaintiff maintains that she seeks to recover legal damages in her handicap- and sex-discrimination claims, in her complaint, she requests "back pay, restitution of wages, and other benefits including salary increases, costs, reasonable attorney fees and such other relief as the court deems just and proper." Because plaintiff lists only equitable forms of relief in this request, we find that "other relief that the court deems just and proper" cannot be construed to include legal damages. Therefore, we conclude that plaintiff is not entitled, on the present state of her complaint, to trial by jury on her claims under FEPA.

II. Plaintiff also claims that the trial court erred in granting defendant's motion for summary judgment on the sex-discrimination and invasion-of-privacy claims. On appeal of an order granting summary judgment, we apply the same standard as the trial court. Kelly v. Town of Barnard, 155 Vt. 296, 299, 583 A.2d 614, 616 (1990). To prevail on summary judgment, the moving party has the burden of establishing that no genuine issues of material fact exist. In determining if there is a genuine issue of material fact, we give the opposing party the benefit of all reasonable doubts, and we regard all properly supported allegations presented by the opposing party as true. Messier v. Metropolitan Life Ins. Co., 154 Vt. 406, 409, 578 A.2d 98, 99-100 (1990).

A. Plaintiff's sex-discrimination claim asserts that defendant violated FEPA by requiring her to wear dentures as a condition of employment while no such requirement was imposed on male employees. She argues that summary judgment on this claim was improper on two grounds. First, plaintiff contends that there were material facts in dispute. We agree.

The trial court applied the shifting-burden analysis first established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973), and set out by this Court in State v. Whitingham School Board, 138 Vt. 15, 19, 410 A.2d 996, 998 (1979). Under McDonnell Douglas, plaintiff has the initial burden of establishing a prima facie case of disparate treatment. This burden is a relatively light one. Whitingham School Board, 138 Vt. at 19, 410 A.2d at 998; see Texas Dep't of Community Affairs v. Burdine, 454 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (plaintiff must prove that she applied for available position for which she was qualified, but was rejected under circumstances which give rise to inference of unlawful discrimination). Establishing a prima facie case essentially raises a presumption of unlawful discrimination. Burdine, 450 U.S. at 253, 101 S.Ct. at 1089.

Under McDonnell Douglas once plaintiff has established a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802, 93 S.C.t. at 1824. Shifting the burden to the employer to rebut the prima facie case serves to frame the factual issue. Burdine, 450 U.S. at 255, 101 S.Ct. at 1094. If the employer meets its burden, the burden then shifts back to the plaintiff to prove that the employer's proffered reason is pretext. Id. at 256, 101 S.Ct. at 1095.

In this case, the trial court ruled that plaintiff had established a prima facie case by showing that she was terminated because she did not wear dentures while two male employees working in the maintenance department were not required to wear dentures. It concluded, however, that defendant had rebutted the prima facie case by showing its employment decision [160 Vt. 160] was based on nondiscriminatory considerations. The court found that defendant legitimately imposed higher "grooming" standards for the housekeeping employees because employees in this department have direct contact with guests of the resort while those in the maintenance department have no similar contact. Consequently, the burden shifted back to plaintiff, and the court concluded that plaintiff failed to demonstrate that defendant's nondiscriminatory reason was mere pretext. Thus, on cross motions for summary judgment, the court ruled for defendant.

Plaintiff disputes the court's finding regarding guest contact, maintaining that employees of both departments have similar guest contact. We agree that plaintiff's evidence indicated that one of the maintenance workers who had lost his teeth had contact with the public to the same extent as plaintiff. According to plaintiff, he met and spoke with guests in the parking lot and while shoveling the driveway. He also helped guests when their cars were stuck in the snow. In addition, plaintiff presented evidence indicating that other "grooming" standards, such as those regarding hair length, were not enforced against male employees. Taking plaintiff's allegations as true, we conclude that summary judgment for defendant was improper. The evidence indicates there is a factual dispute regarding employee-guest contact that is central in this case. We, therefore, hold that the trial court erred in granting summary judgment on the sex-discrimination claim.

We also note that in reaching the decision to grant summary judgment in favor of defendant, the trial court considered subsequent acts of the employer. The court concluded that "the fact that shortly after plaintiff's termination Ms. Pearson refused to hire a male without teeth for the housekeeping staff shows that the defendant's action was not based on sex discrimination." We do not find this evidence determinative. The fact that defendant later refused to hire another man without teeth may be
relevant to defendant's intent at the time of plaintiff's termination. It does not, however, show that its decision to fire the female employee without teeth while continuing to employ two men without teeth was not sex discrimination.

Although we reverse the summary judgment on the sex-discrimination claim because there is an issue of material fact, [160 Vt. 161] we also address plaintiff's second claim of error because it is likely to arise again on remand. See in RE Iluzzi, --- vt. ---, 516 A.2d 233, 235 (1992) (on grounds of judicial economy, Court addressed issue likely to arise on remand). Plaintiff contends that the trial court incorrectly allocated burdens of proof between the parties. While the court applied the standard set out in McDonnell Douglas, 411 U.S. at 802-04, 93 S.Ct. at 1824-25, plaintiff maintains that, because she presented direct evidence that gender played a motivating factor in defendant's decision to fire her, the court should have allocated burdens according to Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268 (1989), [4]

FEPA is patterned on Title VII of the Civil Rights Act of 1964, and the standards and burdens of proof under FEPA are identical to those under Title VII. In the case of Graff v. Eaton, 157 Vt. at 323, 598 A.2d at 1384. Both McDonnell Douglas and Price Waterhouse were actions brought under Title VII. We adopted the McDonnell Douglas framework under FEPA in 1979, see Whitingham School Board, 138 Vt. at 19, 410 A.2d at 998, but adopted the Price Waterhouse framework in 1991, after the decision by the trial court herein. See Graf, 157 Vt. at 324, 598 A.2d at 1384.

The Price Waterhouse framework is invoked when the plaintiff initially establishes that her sex played a motivating part in an employment decision. If the plaintiff makes this initial showing, then the burden shifts to the employer and remains with the employer who "may avoid a finding of liability only by proving that it would have

Page 1129

made the same decision even if it had not allowed gender to play such a role." 490 U.S. at 244-45, 109 S.Ct. at 1787-88 (footnote omitted). The employer's burden under this framework is no different from establishing an affirmative defense. Id. at 246, 109 S.Ct. at 1788.

We adopted the Price Waterhouse framework under FEPA in Graf, but concluded that, under the state statute, it is for the jury to determine initially whether the plaintiff's evidence [160 Vt. 162] establishes that her sex was a motivating factor in the defendant's employment decision. 157 Vt. at 326-27, 598 A.2d at 1385. If the plaintiff fails to make this initial showing, then the McDonnell Douglas analysis is applicable. Nevertheless, unless the trial court finds that the plaintiff's evidence is insufficient to make this preliminary showing as a matter of law, under Vermont law, the issue must go to the jury. Id. B.

Plaintiff argues that summary judgment was improper on the invasion-of-privacy claim. She asserts that the trial court usurped the jury's role by deciding as a matter of law

that the letter defendant sent-informing plaintiff that she could not return to work without dentures--was not a substantial intrusion that could be highly offensive to a reasonable person. We disagree.

The right of privacy is the right to be let alone. Restatement (Second) of Torts § 652A (1977). The Restatement of Torts 2d identifies four forms of invasion of privacy. Only one, the intrusion upon seclusion, does not require publicity of a person's private interests or affairs. Id. § 652B. To state a cause of action for intrusion upon seclusion, the plaintiff must allege "an intentional interference with [her] interest in solitude or seclusion, either as to [her] person or as to [her] private affairs or concerns, of a kind that would be highly offensive to a reasonable [person]." Id. Moreover, the intrusion must be substantial. Id.

We agree with the trial court that the single letter from defendant threatening termination, although perhaps insensitive under the circumstances in this case, was insufficient to constitute an invasion of privacy as a matter of law. There was simply no substantial intrusion and no error in the trial court's ruling. See DeAngelo v. Fortney, 357 Pa.Super. 127, 131, 515 A.2d 594, 595 (1986) (one telephone call and one mailing from contractors soliciting business insufficient to establish invasion of privacy); Corder v. Champion Road Machinery Int'l Corp., 283 S.C. 520, 525-26, 324 S.E.2d 79, 82 (Cl.App.1984) (no invasion of privacy where employer told plaintiffs they would be fired unless they withdrew workers' compensation claims and then mailed them each a letter of termination). [5]

III.

Plaintiff also argues that the trial court erred by ruling, as a matter of law, that she is not a handicapped person under FEPA. FEPA prohibits employers from discriminating against a qualified handicapped individual, unless a bona fide occupational qualification so requires. 21 V.S.A. § 495d(5). Plaintiff in this case argues that her handicap discrimination claim is whether the plaintiff is a "handicapped individual" and thus within the protection of the Act. A "handicapped individual" is defined as a person who:

(A) has a physical or mental impairment which substantially limits one or more major life activities;
(B) has a history or record of such an impairment; or
(C) is regarded as having such an impairment.

21 V.S.A. § 495d(5). Plaintiff in this case argues that she is a handicapped individual under the third category because she claims she was regarded as having a "physical ... impairment which substantially limits

Page 1130

one or more major life activities." The Act defines these terms as follows:

"Physical or mental impairment" means

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs;
cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; or endocrine....

Id. § 495d(7)(A).

"Substantially limits" means the degree that the impairment affects an individual's employability. A handicapped individual who is likely to experience difficulty in securing, retaining, or advancing in employment would be considered substantially limited.

[160 Vt. 164] Id. § 495d(8).

"Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing,... [and] working....

Id. § 495d(9).

Finally, a person "[i]s regarded as having such an impairment" when she:

(A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer as constituting such a limitation;

(B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(C) has none of the impairments defined in subdivision 7(A) of this section but is treated by an employer as having such an impairment.

Id. § 495d(11).

Plaintiff maintains that she has a physical impairment that does not substantially limit major life activities but that defendant treated her as though she had such a limitation. We agree that plaintiff's lack of upper teeth is a physical impairment within the meaning of the act because it is a cosmetic disfigurement and an anatomical loss affecting the musculoskeletal and digestive systems. See id. § 495d(7)(A). Plaintiff does not, however, regard herself as handicapped. Rather, she claims that, by firing her solely because she has no upper teeth, defendant treated her as though she were handicapped.

Defendant contends that it does not regard plaintiff as handicapped, but simply fired her because she did not comply with the requirement that she wear dentures. The superior court agreed, concluding that defendant perceived plaintiff as a woman who would not wear her dentures and simply told her that she would have to wear them as a condition of employment, nothing more. The court's decision rested on the underlying conclusion that plaintiff's failure to retain this particular job did not constitute being limited in a major life activity, namely, working, and, consequently, defendant's failure to retain her did not indicate that it regarded her as handicapped. We believe the court's reasoning is flawed.

[160 Vt. 165] The definition of "handicapped individual" under FEPA is identical to the definition under the Federal Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796l, which prohibits federally funded employers from discriminating against handicapped individuals who are otherwise qualified for the job in question. Compare 21 V.S.A. § 495d(5) with 29 U.S.C. § 706(7)(B). Moreover, the Rehabilitation Act is governed by regulations almost identical to the other definitions in § 495d of FEPA. See, e.g., 45 C.F.R. § 84.3 (defining "handicapped person," "physical or mental impairment," "major life activities," "is regarded as having an impairment"). Because the Vermont Legislature patterned our handicap-discrimination statute on federal legislation, we look to federal case law for guidance in construing the definitions at issue. See Graff, 157 Vt. at 323-25, 598 A.2d at 1384-85 (relying on case law construing Title VII and federal age-discrimination statute in construing FEPA in sex-discrimination claim).

In School Board of Nassau County, Florida v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987), the Court discussed the purpose of including persons

Page 1131

regarded as handicapped within the protection of the Rehabilitation Act. By extending coverage to those persons who are regarded as handicapped, Congress intended, in part, 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. Id. at 282-83, 107 S.Ct. at 1128-29. The Court noted:

The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

Id. (quoting S. Rep. No. 93-1297, at 64) (citation and footnote omitted). [6] Moreover, the regulations promulgated by the Department

[160 Vt. 166] of Health and Human Services include "cosmetic disfigurement" among the physical impairments covered by the Act. 45 C.F.R. § 84.3(j)(2)(i)(A). As the Arline Court acknowledged, a cosmetic disfigurement cannot substantially limit any of the listed major life activities except the ability to work, and even in this regard, only as a result of the attitudes of others toward the impairment. 480 U.S. at 283 n. 10, 107 S.Ct. at 1128 n. 10.

[7] We believe this case presents precisely the type of visible physical impairment discussed in Arline. Plaintiff has a physical impairment, lack of upper teeth, that does not substantially limit her in any major life activity. Nonetheless, defendant treated her as if she had such a limiting condition because it decided that a visible physical impairment rendered plaintiff unfit to fill a position in which she had some contact with defendant's guests. Defendant, thus, treated plaintiff as if her ability to work were substantially limited by her impairment. Cf. Chico Dairy Co., Store No. 22 v. West Virginia Human Rights Commission, 181 W.Va. 238, 247, 382 S.E.2d 75, 84-85 (1989) (employer who regarded employee with sunken and hollow eye socket "unsavory and unacceptable" to deal with customers does not establish employee as handicapped individual under state statute that did not include "is regarded as" clause of Federal Rehabilitation Act).

ELLIS
BOXER
BLAKE
ATTORNEYS
EMPLOYMENT LAW AND WORKERS’ COMPENSATION
© 2012 ELLIS BOXER & BLAKE
We distinguish the instant case from those relied on by defendant on two grounds. In one category of cases, the plaintiffs had no physical or mental impairments. See, e.g., de la Torres v. Bolger, 610 F.Supp. 593, 597 (N.D.Tex.1985) (left-handed)

[160 Vt. 167] postal worker fired for slowness had no statutorily recognizable impairment); Tudyman v. United Airlines, 608 F.Supp. 739, 746 (C.D.Cal.1984) (avid body builder who voluntarily exceeded the maximum weight for flight attendant had no physical impairment). These cases were brought under the federal counterpart to the third prong of subsection (11), § 495d(11)(C), under which a plaintiff having no physical or mental impairment must show that the employer treated the employee as having such an impairment. The third prong is not at issue in this case. Plaintiff, here, asserts her claim under the first prong, § 495d(11)(A): she has an impairment;

Page 1132

the employer treated it as substantially limiting her ability to work.

The other category of cases defendant relies on concludes that the plaintiffs simply failed to meet the unique qualifications required for the job at issue. See, e.g., Daley v. Koch, 892 F.2d 212, 215 (2d Cir.1989) (applicant for position of New York City police officer unable to meet unique qualifications because of "poor judgment, irresponsible behavior and poor impulse control" could not be considered a handicapped person under the Act); Forrissi v. Bowen, 794 F.2d 931, 933 (4th Cir.1986) (utility systems repairer, fired because of his fear of heights, had no impairment causing significant barrier to employment); Elsner v. Southwestern Bell Tel. Co., 659 F.Supp. 1328, 1343 (S.D.Tex.1987), aff'd, 863 F.2d 881 (5th Cir.1988) (knee problem only affected plaintiff's ability to climb telephone poles and thus only disqualified him from positions requiring pole climbing). The employers in these cases regarded the employees' impairments as preventing them from performing a single job because the job involved a particular activity, such as climbing telephone poles.

Here, however, defendant regards plaintiff as unfit to be seen by customers. This is not a qualification unique to the position from which she was fired, but, rather, is to regard plaintiff as substantially limited in her ability to work. Cf. E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1102 (D.Haw.1980) (employer who perceived applicant with congenital back anomaly as poor risk for heavy labor regarded employee as substantially limited in his ability to work).

Finally, defendant argues that this case simply involves enforcement of a grooming standard. We believe defendant's [160 Vt. 168] characterization of its policy is incorrect. Requiring an employee to conceal a visible physical impairment as a condition of employment is not equivalent to requiring an employee to be clean or wear a uniform.

In determining that plaintiff is a handicapped individual under FEPA, we make no decision regarding the factually dissimilar cases relied on by defendant. We decide only that when 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 ... capable of performing the essential functions of the job." 21 V.S.A. § 495d(6). And the employer may still show that a particular physical condition is a bona fide occupational qualification for the particular job.

Reversed and remanded, except for the rulings on the invasion-of-privacy claim and the right to jury trial, which are affirmed.

PECK, J., dissented without opinion.

Notes:

[1] The Seventh Amendment provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

[2] Defendant maintains that this Court should not address the issue of damages because the trial court's disposition of the FEPA counts precluded it from considering the type of relief available under the Act. While in general we do not decide issues that have not been addressed below, in this case we find it necessary to resolve the issue concerning damages in order to address the jury trial issue.

[3] The court in Buckley v. American International Adjustment Co., No. 91-242 (D.Vt. March 26, 1992), was incorrect to the extent that it determined that compensatory damages are not available under FEPA.

[4] Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), was superseded by the Civil Rights Act of 1991, Pub.L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2), which provides that the complaining party establishes unlawful employment practice by demonstrating that race, color, religion, sex, or national origin was a motivating factor in the employment decision, even if other factors also motivated the decision.


[6] The Arline Court provides two examples from the Congressional Record of discrimination based on the attitudes of others toward a visible physical impairment. In the first case, a child with cerebral palsy was excluded from public school because his teacher believed that his physical appearance " [produced a nauseating effect " on classmates. Arline, 480 U.S. 273, 282 n. 9, 107 S.Ct. 1123, 1128 n. 9, 94 L.Ed.2d 307 (1987) (quoting 117 Cong.Rec. 45974

96
In the second case, a woman with arthritis was denied a job solely because college trustees believed that "normal students" should not be exposed to her. Id. (quoting 118 Cong.Rec. 36761 (1972)). The legislative history indicates that Congress intended to prohibit such discrimination when it extended the Rehabilitation Act to cover those individuals regarded as handicapped although not substantially limited in any major life activity.

[7] FEPA also lists a "cosmetic disfigurement" under the definition of physical impairment, 21 V.S.A. § 495d(7)(A), and includes "the attitudes of others toward such impairment" as capable of substantially limiting a life activity. Id. § 495d(11)(B).

PROMISSORY ESTOPPEL


Before

The primary issue before us is whether the doctrine of promissory estoppel may modify an employment contract that is otherwise terminable at will. We hold that it may and affirm.

This is an appeal from a jury verdict for plaintiff, Fletcher Foote, against his former employer, Simmonds Precision Products Co., Inc. Plaintiff was discharged from his employment as a computer operator after approximately twenty years of service. Defendant claimed that plaintiff was fired for falsifying his time card. Plaintiff alleged that his discharge was the result of his efforts to use the grievance procedure published in the company's employee handbook. The procedure assured employees that "[i]f you follow these steps, you cannot be criticized or penalized in any way." Plaintiff claimed that he relied on this promise of nonretaliation. Defendant pointed to another passage in the employee handbook, which stated that "[t]he employment relationship between the company and you may be terminated by either party at any time." On that basis, it contended that plaintiff was an at-will employee and it was entitled to discharge him.

The evidence showed that, prior to his use of the grievance procedure, plaintiff had an excellent work history as a senior computer operator at Simmonds. His periodic evaluations were consistently very good to outstanding. In the late summer of 1986, he and other operators became concerned about the hiring of a supervisor whom they considered unqualified, and about changes in pay and benefit practices. Although plaintiff wanted to pursue these problems through defendant's grievance process, he was concerned about losing his job. He consulted an employee relations manager about how to pursue grievances within the company's policy. The manager referred him to the "Problem-Solving Procedure" in the employee handbook, containing the language that employees could not be criticized or penalized in any way if they complied with the procedures. Defendant's personnel manager testified that the company intended that employees rely on the statement.

Plaintiff attempted to follow the procedure, but was met with increasing irritation by his supervisors. In December 1986, plaintiff suffered a poor work evaluation, which he claimed was unjustified. Three months later, he was discharged. According to defendant, plaintiff recorded hours on his time card that he had not actually worked. Plaintiff contended he was relying on a policy that allowed computer operators to leave before the end of their shifts. Defendant claimed it had discontinued the policy and specifically notified plaintiff.

The jury believed plaintiff's side of the story. Although plaintiff proceeded on express and implied contract theories, as well as promissory estoppel, the jury based its verdict solely on promissory estoppel. Its verdict was reflected in a series of interrogatories. The relevant interrogatories and answers were:

[158 Vt. 569] 1. At the time of termination of employment of Fletcher Foote, was there an employment contract that could be terminated at will by the employer? Yes.
2. At the time of termination of employment, was there an employment contract that required good cause for termination of employment by the employer? No.
3. Did Simmonds Precision Products Co., Inc. breach a contract of employment when Fletcher Foote was terminated from employment? No.
4. Was Fletcher Foote terminated from employment by Simmonds Precision Products Co., Inc. for breach of contract? $150,000.00.

After the jury returned its verdict, an additional interrogatory was submitted and answered, as follows:

Is the damage amount of $150,000.00 for damages proximately caused by the promissory estoppel answer of question # 5. Yes.

On appeal, defendant argues that the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. Although variously phrased, defendant's arguments boil down to three--promissory estoppel should not have been charged as an independent cause of action that may modify an at-will employment contract, the jury's answers to the interrogatories are legally inconsistent, and alternatively, that the evidence was insufficient to prove the elements of promissory estoppel.

[1]
The legal question raised by motions for directed verdict and for judgment notwithstanding the verdict under [158 Vt. 570] V.R.C.P. 50 is the same. The question is whether the result reached by the jury is sound in law on the evidence produced. Kinzer v. Degler Corp., 145 Vt. 410, 412, 491 A.2d 1017, 1018 (1985). In reviewing the denial of these motions, we view the evidence in the light most favorable to the nonmoving party and exclude the effect of any modifying evidence. Center v. Mad River Corp., 151 Vt. 408, 413, 561 A.2d 90, 93 (1989). If any evidence fairly or reasonably supported a lawful theory of the plaintiff, then the trial court acted properly in denying the motions. Id.

I.

We turn first to defendant's argument that at-will employment and the doctrine of promissory estoppel are mutually exclusive, and that the court's instructions on these issues produced a verdict that is legally inconsistent.

As we stated in Sherman v. Rutland Hospital, 146 Vt. 204, 207, 500 A.2d 230, 232 (1985), an employment contract for an indefinite term is an "at-will" agreement, terminable at any time, for any reason. However, this is simply a rule of contract construction. Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 596-97, 292 N.W.2d 880, 884 (1980). The common law presumes the existence of an at-will provision when employment is for an indefinite term. It is a presumption that may, like any other, be overcome by evidence to the contrary. Pugh v. See's Candies, Inc., 116 Cal.App.3d 311, 324, 171 Cal.Rptr. 917, 924 (1981). The rule imposes no substantive limitation on the right of contracting parties to modify terms of their arrangement or to specify other terms that supersede the terminable-at-will provision. Sherman, 146 Vt. at 207, 500 A.2d at 232; Helle v. Landmark, Inc., 15 Ohio App.3d 1, 7, 472 N.E.2d 765, 772 (1984).

Aside from bilateral modifications as in Sherman, at-will employment contracts may be modified by statute or common law. Federal and state laws prohibiting discrimination on the basis of race, sex, religion, national origin, handicap and age are examples of statutory modifications that alter every at-will contract in Vermont. 42 U.S.C. § 2000e-2(a); 21 V.S.A. § 495(a). Common law public policy exceptions to the at-will doctrine [158 Vt. 571] have also been recognized in this state. Payne v. Rozendaal, 147 Vt. 488, 491, 520 A.2d 586, 588 (1986); Jones v. Keogh, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979).

A number of courts have held that an employer may unilaterally modify an at-will contract, by publishing a company handbook Page 1280 or manual on which it intends employees to rely. See Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 229-30, 685 P.2d 1081, 1087-88 (1984) (employer's unilateral objective manifestation of intent that employee will remain on job creates expectation, and obligation of treatment in accord with written promises); Toussaint, 408 Mich. at 619, 292 N.W.2d at 895 (employer may not treat announced promise to dismiss for cause only as illusory); Continental Air Lines v. Keenan, 731 P.2d 708, 711-12 (Colo.1987) (at-will employee may be able to enforce termination procedures in employee manual under theories of unilateral contract or promissory estoppel).

Similarly, promissory estoppel may modify an at-will employment relationship and provide a remedy for wrongful discharge. Mers v. Dispatch Printing Co., 19 Ohio St.3d 100, 105, 483 N.E.2d 150, 155 (1985); Rognlien v. Carter, 443 N.W.2d 217, 220 (Minn.Ct.App.1989). Contrary to defendant's assertion, it is an independent cause of action, and may be used affirmatively, if the elements are present. See Larose v. Agway, Inc., 147 Vt. 1, 3-4, 508 A.2d 1364, 1366 (1986) (insufficient evidence on element of reliance deprived discharged employee of promissory estoppel claim).

Nothing about the at-will doctrine suggests that it does not coexist with numerous modifications and exceptions imposed by law, including the law of promissory estoppel, depending on the facts of a particular case. Whether or not these modifications technically remove the employment contract from the at-will realm, as defendant argues, is form over substance. Even with modifications, employees for an indefinite term are still considered at-will employees, who may be discharged for any number of reasons not prohibited by the modifications.

In this case, the jury's answers to the interrogatories showed that they believed the company's right to discharge was modified in the at-will employment contract in one respect—plaintiff could not be discharged for the pursuit of grievances in accordance with the handbook. Because it determined that he [158 Vt. 572] was discharged for that reason, the jury found liability against the company. That the plaintiff was otherwise an at-will employee, and legally could have been discharged for any other reason not in violation of statute or public policy, does not mean that the verdict is inconsistent. In fact, the employer advanced such a reason—that plaintiff had falsified his time cards—but the jury did not believe it.

II.

Defendant makes a more direct attack, grounded on the same legal theory, asserting the legal inconsistency of the answers to the interrogatories. It contends that, once the jury found that plaintiff was an at-will employee (interrogatory 1), and that defendant did not breach an employment agreement (interrogatory 3), the jury could not find defendant liable for discharging plaintiff, no matter what the reason. According to defendant, the jury's deliberations should have ended after it made the at-will finding.

A party has an obligation to object to the portions of the charge or interrogatories it challenges, "stating distinctly the matter objected to and the grounds of the objection."

" Hartnett v. Union Mut. Fire Ins., 153 Vt. 152, 160, 569 A.2d 486, 490 (1989) (quoting V.R.C.P. 51(b) ). Thus, errors in jury interrogatories can be raised before this Court only if the party claiming error seasonably objects.

The record reveals no objection by defendant to the interrogatories as written and submitted. The interrogatories themselves, as set forth above, are devoid of instructions that would limit the jury's responses to the questions in any way. The court instructed that there were three claims in the case--contract, estoppel, and tort. As already discussed, it was proper for the court to charge the jury that promissory estoppel is an independent cause of action. The court instructed that if the jury found defendant not liable on the theories of contract and estoppel, it need not go
Page 1281
any further, and that it could continue with deliberations on damages only if it said yes to contract or estoppel. Again, defendant did not object to this oral instruction
[158 Vt. 573] on how the jury was to proceed. [2] The only objection to the inconsistency of the interrogatories on the ground defendant now claims--that answering all the interrogatories as the jury did produced inconsistent results--came after the jury rendered its verdict. This was too late, however, and defendant must take the answers as given.

III.
Defendant argues, alternatively, that there was insufficient evidence for the jury to make a finding of promissory estoppel.

The doctrine of promissory estoppel, as recognized in Vermont, is set forth in the Restatement (Second) of Contracts § 90(1) (1981). A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.


There was sufficient evidence on each element. The promise in the employee handbook relating to "Problem Solving Procedures" within the company stated, "If you follow these steps, you cannot be criticized or penalized in any way." The maker of such a statement in an employee handbook should expect action or forbearance on the part of the promisee as a result of the statement. Indeed, defendant's personnel manager testified that the company intended that employees rely on the statement. Even without that testimony, the entire tone of the "Problem Solving Procedure" indicates defendant's intention to create a working environment in which its employees could expect
[158 Vt. 574] to be treated fairly in the pursuit of grievances. [3] See Toussaint, 408 Mich. at 613, 292 N.W.2d at 892 (employer's establishment of fair policies enhances the employment relationship to the employer's benefit, and creates an obligation to follow them). Defendant does not now argue that it did not intend reliance; instead, it contends plaintiff exceeded the bounds of what defendant expected its employees to do and became a pest. But, the jury implicitly rejected that view when it found for plaintiff on the estoppel theory. There is no basis for overturning the jury's determination.

Affirmed.

Notes:
[1] Defendant also assigned as error the trial court's charge on the elements of promissory estoppel, claiming the charge was confusing and misleading; however, defendant failed to preserve an objection on this ground, and indeed, the transcript reveals defendant's agreement with the charge as given.
[2] Defendant did preserve its objection to the charge on promissory estoppel insofar as it was charged as a separate and independent cause of action, but it did not

PUNITIVE DAMAGES


[173 Vt. 421] DOOLEY, J.

Defendants Marcien Roy, Leon Roy, and the Marcien and Mary Anne Roy Trust (the trust) appeal from a judgment entered in Bennington Superior Court on a jury verdict in favor of plaintiff Jodi Sweet. Defendants made several claims of error in a post-judgment motion for judgment as a matter of law or for a new trial, and renew those arguments here: (1) the trial court abused its discretion in admitting evidence of defendants' prior bad acts; (2) the court erred in ruling plaintiff was entitled to the protections of the Mobile Home Park Act, 10 V.S.A. §§ 6201-6266; (3) the trust was entitled to judgment as a matter of law; (4) the jury's damage award should have been set aside; (5) it was error to dismiss defendants' counterclaim for slander; and (6) the court erred in excluding evidence of a threat made against defendants by an alleged agent of plaintiff. We affirm.

The trial focused on events with respect to Jodi Sweet after she purchased a mobile home located in the Royal Pine Villa Mobile Home Court (the park), and with respect to others who owned homes in the park. The park had been owned and managed by Marcien and Mary Anne Roy for twenty years, but in 1993 ownership was transferred to the trust. The park was originally managed by Marcien, but by the time of this case management responsibility had been assumed by Leon Roy, son of Marcien and Mary Anne. Paula Roy, wife of Leon, was responsible for running the park office, bookkeeping and answering the telephone. The Roys all lived on the park premises.

The park consists of sixty-six mobile home lots. Some of the mobile homes are owned by individual lessees who
pay defendants a monthly lot rental; others are owned by defendants, in which case the rent is higher than it would be for the lot alone. For example, lot rent typically runs about $200-230 per month, whereas rent for a lot and mobile home is two to three times that amount.

Plaintiff purchased her mobile home, which was located on lot 35 in the park, from Justin Schwartz in February 1997 after several unsuccessful attempts to contact defendants in order to determine what she needed to do to obtain a lease. Plaintiff and her three-year-old daughter moved into the mobile home that month. She called defendants and left voice messages with them on a daily basis; she also sent them letters and mailed them lot rent checks for February and March 1997. The checks were not cashed, and defendants never responded to the calls and the letters. Plaintiff spent $3800 on improvements to the heating, flooring and wiring of the mobile home.

[173 Vt. 422] Soon after sending her third letter to defendants in March 1997, plaintiff returned home from work and discovered that someone had systematically smashed out all thirteen glass windows in her mobile home. One week later, plaintiff approached Marcien Roy in the park, and he told her he wanted her out of the park and offered her $500 for her mobile home. Shortly thereafter, plaintiff returned home from work to discover she had no electricity. She called an electrician, who determined that the underground electrical wires to her mobile home had been cut and covered between the home and the service meter. To restore service, plaintiff and several friends spent a day hand-digging a trench approximately two feet deep and sixty feet long so that new wires could be installed the next day. Leon Roy backfilled the trench with a backhoe before the wires could be run. Plaintiff had to redig the trench again by hand. By the time the new wiring was installed, she had been without power for about a week. Upon returning to the mobile home with her daughter after power was restored, she "felt terrified" and "under a lot of stress."

Defendants Marcien and Leon Roy denied responsibility for the vandalism to plaintiff’s mobile home, although Leon did admit to filling in plaintiff’s hand-dug ditch because “it was a dangerous thing.” Marcien, Leon, and Paula testified that plaintiff was a trespasser and had no rights as a resident because she and the party she bought the mobile home from had not followed the required procedures.

Virtually all of the rest of plaintiff’s evidence dealt with other mobile home owners

Page 698

who resided at one time in the park. The most important of this evidence involved an earlier similar suit brought in 1986 by Mark Wright and the State of Vermont against Marcien and Mary Anne Roy. In that suit plaintiffs alleged defendants had instituted an illegal policy requiring that any tenant who wished to sell a home in the park sell to defendants and prohibiting any sale to others unless the home was removed from the park. Plaintiffs also alleged that defendants had vandalized plaintiff Wright and his mobile home when he tried to sell it to a third party.

The court found that the plaintiff’s allegations were true and that the Roys had initiated the plan to acquire homes in the park because they could charge substantially higher rents for a lot and mobile home than they could for a lot alone, and would realize larger profits from their park, especially if they were able to drive down the capital expenses associated with this enterprise—namely, the purchase price of the mobile homes. The court found that in June 1986, the Roys sent the park residents a notice declaring their policy to require all mobile [173 Vt. 423] homes to be moved out of the park upon resale. The Roys also required each resident who sold a mobile home to pay the Roys a $200 brokerage fee whether or not the Roys assisted in the sale of the mobile home. The court found that the Roys would refuse to accept willing purchasers when a park resident sought to sell a mobile home to a third party.

The court found that the Roys used illegal self-help eviction measures against Mr. Wright. Specifically, the court found that in May 1986, Mr. Wright wanted to sell his mobile home and move in with his parents in order to regain a solid financial footing. Wright had a willing purchaser who offered $12,000, but the Roys refused to approve the sale and said no prospective purchasers would be approved. In September of that year, Wright told the Roys he would withhold his lot rent until allowed to sell his mobile home. Later that fall, Wright took a roommate to share expenses. In December, the roommate moved out after the tires on his and Wright’s cars were slashed and the cars were spray painted. The television cable was cut, and snow was plowed into the driveway, blocking in the cars. The court found by a preponderance of the evidence that these acts were performed by Leon Roy.

The court found that defendants had violated the Vermont Mobile Home Park Act, 10 V.S.A. §§ 6201-6266 (the Act) in four respects. Specifically, it found illegal the policy of requiring tenants who wished to leave the park to remove the mobile home or sell it to defendants. It found illegal the rejection of prospective purchasers “for reasons that theretofore had not been prohibitions in the terms of the lease.” The court also found two violations of the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451-2480g. Specifically, it found that defendants violated the act in “the strong-arm tactics used in an apparent attempt to persuade Mr. Wright to abandon his tenancy in the park.”

As part of its relief, the court enjoined the Roys from “unreasonably refusing entrance [to the park] to purchasers or prospective purchasers” and from refusing entry to any purchaser who “qualifies under uniformly enforced, written, reasonable terms of the park lease.” The court also awarded damages and attorney’s fees for the State and Mr. Wright.

At the time of the Wright suit, the park contained sixty-six lots of which sixty-five contained a mobile home. Residents of the park owned fifty-seven of these mobile homes, and the Roys owned just eight.
By the time of this trial in January 1999, and despite the judgment in the Wright case, the Roys owned approximately thirty of sixty-three mobile homes in the park. From 1993 until 1997, no homes were sold to new park residents.

Most of the rest of plaintiff’s evidence involved incidents close in time to the events involving plaintiff. Ken Scott testified that he purchased the mobile home on the lot next to plaintiff’s, lot 34, in February 1997. He used his $5000 savings to buy the mobile home. Prior to doing so, he had his real estate agent send defendants a certified letter asking to be qualified as a park resident. Defendants orally refused without stating any reason and told Scott the park did not have a standard written lease. Scott moved in and began sending rent payments to defendants. He was later confronted by Leon Roy, who advised him that he would not be able to stay in the park. Soon after this encounter, someone removed the drain plug from Scott’s kerosene tank causing a fuel spill and a costly clean up by a state environmental team. Someone also threw rocks through his windows and cut off his power. Scott eventually left the park due to the vandalism and associated stress. Although he was offered $7000 for his mobile home, he could not sell it because Leon Roy refused all purchasers. A realtor used by Scott testified that she had sent defendants a certified letter on behalf of two prospective purchasers of the Scott mobile home, but that she had received no response from defendants with respect to either.

Tracey Schwartz and Justin Schwartz testified that the mobile home involved in the instant appeal, located on lot 35, was sold to plaintiff by Justin Schwartz in February 1997. He purchased the mobile home from his aunt, Tracey Schwartz in 1996; Tracey Schwartz had lived in the mobile home on lot 35 from 1982 to 1996. She tried to sell the mobile home once before. She testified that her attorney had sent defendants a letter and received no response. Later, defendants declined her prospective purchaser without a reason: they merely stated that the purchaser was refused without stating any reason and told Scott the park did not have a standard written lease. Scott moved in and began sending rent payments to defendants. He was later confronted by Leon Roy, who advised him that he would not be able to stay in the park. Soon after this encounter, someone removed the drain plug from Scott’s kerosene tank causing a fuel spill and a costly clean up by a state environmental team. Someone also threw rocks through his windows and cut off his power. Scott eventually left the park due to the vandalism and associated stress. Although he was offered $7000 for his mobile home, he could not sell it because Leon Roy refused all purchasers. A realtor used by Scott testified that she had sent defendants a certified letter on behalf of two prospective purchasers of the Scott mobile home, but that she had received no response from defendants with respect to either.

Tracey Schwartz and Justin Schwartz testified that the mobile home involved in the instant appeal, located on lot 35, was sold to plaintiff by Justin Schwartz in February 1997. He purchased the mobile home from his aunt, Tracey Schwartz in 1996; Tracey Schwartz had lived in the mobile home on lot 35 from 1982 to 1996. She tried to sell the mobile home once before. She testified that her attorney had sent defendants a letter and received no response. Later, defendants declined her prospective purchaser without a reason: they merely stated that the purchaser was refused without stating any reason and told Scott the park did not have a standard written lease. Scott moved in and began sending rent payments to defendants. He was later confronted by Leon Roy, who advised him that he would not be able to stay in the park. Soon after this encounter, someone removed the drain plug from Scott’s kerosene tank causing a fuel spill and a costly clean up by a state environmental team. Someone also threw rocks through his windows and cut off his power. Scott eventually left the park due to the vandalism and associated stress. Although he was offered $7000 for his mobile home, he could not sell it because Leon Roy refused all purchasers. A realtor used by Scott testified that she had sent defendants a certified letter on behalf of two prospective purchasers of the Scott mobile home, but that she had received no response from defendants with respect to either.

Tracey Schwartz and Justin Schwartz repeated attempts to sell the mobile home led to the instant appeal. They first moved into the park in February 1997, but they were soon confronted by Leon Roy, who advised them that they would not be able to stay in the park. Soon after this encounter, someone removed the drain plug from Scott’s kerosene tank causing a fuel spill and a costly clean up by a state environmental team. Someone also threw rocks through his windows and cut off his power. Scott eventually left the park due to the vandalism and associated stress. Although he was offered $7000 for his mobile home, he could not sell it because Leon Roy refused all purchasers. A realtor used by Scott testified that she had sent defendants a certified letter on behalf of two prospective purchasers of the Scott mobile home, but that she had received no response from defendants with respect to either.

Before moving into the mobile home, Justin Schwartz repeatedly attempted to sell the mobile home to New Hampshire residents, but defendants never responded.

Joe Candal testified that he had been a park resident for seven and a half years, residing on lot 29. He eventually decided to sell his mobile home, and sent registered letters to defendants to notify them on each occasion that he had a prospective purchaser. He had an offer of $11,000 cash from a woman from Massachusetts who had money from a divorce settlement and was looking to buy a home in Vermont. She, along with several other prospective purchasers, was refused by defendants, and eventually he had to sell the mobile home for only $4000.

Dolores Goodell testified that she had been a park resident for twenty-two years, and that when she approached an area realtor to sell her mobile home, the realtor laughed at her when she revealed where it was. She decided to sell the home herself, and she and her daughter put out a sign and listed the home in a circular. When she first moved into the park, she had a lease, but it ran out and was not renewed. When she put her mobile home up for sale in January 1998, she tried to get a copy of the lease from defendants, but they never sent her one until she called the Attorney General’s Office. After receiving the lease, Goodell sent defendants several certified letters over the next few months to notify them of prospective purchasers. She testified that in each case she had to wait thirty days for a response, and each applicant was denied. This happened four times, until, in mid June, defendants finally accepted one of the prospective purchasers. Originally, she was asking $5000 for her mobile home, and she had purchasers willing to pay that amount, but she ended up selling it for $2000.

In April 1997, plaintiff filed this action in Bennington Superior Court for damages and injunctive relief. Plaintiff alleged that defendants broke her windows, cut her electric line and refilled her trench in an effort to illegally evict her, and she sought relief under the Vermont Mobile Home Park Act and on theories of equitable estoppel and intentional infliction of emotional distress. On April 23, 1997, based on the consent of the parties, the court issued a temporary order prohibiting defendants from engaging in any further self-help eviction measures pending resolution of the suit, and no further acts of vandalism occurred.

The parties skirmished over the admissibility of the facts and order in the Wright case and the testimony of other mobile home owners as described above. As discussed in detail below, the court denied defendants’ motion to exclude the evidence, finding it admissible to identify defendants as those responsible for the acts of vandalism and to show a continuing plan and motive behind their conduct.

Defendants argued that plaintiff was not protected by the Act because she had never been accepted as a tenant. The court rejected this argument, ruling that plaintiff was a resident of the park and was entitled to the protections of
the Act as a matter of law, and instructed the jury accordingly. The court dismissed defendants' counterclaims for foreclosure of lien, ejectment, and trespass, dismissed plaintiff's claims based on equitable estoppel and intentional infliction of emotional distress, and dismissed plaintiff's claim for injunctive relief as unripe. The case was then submitted to the jury on special interrogatories, and the jury returned a verdict for plaintiff. The jury found that Leon Roy did attempt "to evict plaintiff by force or other self-help means," but found that Marcien Roy was not liable for the same conduct. In addition, the jury found that Leon Roy "wilfully caused, directly or indirectly, the interruption or termination" of plaintiff's utility service, but found that Marcien Roy did not do the same. The jury awarded plaintiff $10,000 compensatory damages against Leon and the trust. It also found that both Marcien and Leon Roy "acted recklessly and in wanton disregard of plaintiff's rights" and awarded $100,000 punitive damages against Leon, Marcien, and the trust. The jury was precluded from considering defendants' counterclaim for slander because it found for plaintiff on the illegal eviction claim.

Page 701

After judgment on the verdict was entered, defendants moved for judgment as a matter of law or for a new trial pursuant to V.R.C.P. 50(b) and 59. Defendants argued that the jury's verdict finding Marcien acted recklessly and in wanton disregard of plaintiff's rights was at odds with its finding that Marcien did not "directly or indirectly" cause the interruption of utilities or otherwise use force or other self-help means to evict plaintiff. The court agreed with defendants on this issue and set aside the verdict against Marcien Roy for punitive damages.

Defendants also argued in their motion that the trust was entitled to judgment as a matter of law. The court denied this part of defendants' [173 Vt. 427] motion, ruling that as a matter of law Leon Roy was acting in the scope of his employment and for the benefit of the trust when he carried out the illegal eviction acts because "the only reasonable inference" from the evidence was that Leon Roy's actions were "related solely to his position as a mobile home park manager and the employee/beneficiary of the trust. His self-help eviction efforts directed at plaintiff could only have been motivated by the overall financial goals of the family and the family trust." The court then upheld the punitive damage award against the trust, again ruled that plaintiff was a resident of the park and entitled to the Act's protections, declined to order a new trial due to the prior bad acts testimony, and upheld the jury awards as "plainly within the jury's discretion, and not clearly excessive." The court also ruled that defendants were not entitled to a new trial because the court had excluded threats against defendants made by plaintiff's ex-boyfriend, and that defendants' slander claim failed because the jury verdict demonstrated that the statements alleged to have been made by plaintiff were true.

I.

EMPLOYMENT LAW AND WORKERS’ COMPENSATION

© 2012 ELLIS BOXER & BLAKE
a rental agreement”); 68 Pa. Cons.Stat. Ann. § 398.2 (1994) (resident is a person who “leases or rents space” in a mobile home park). The comparison of the Vermont language with these alternatives reinforces the inference that the Legislature did not require that a mobile home park resident have a lease with the park owner in order to be protected by the Act.

Finally, under the circumstances of this case, the policy considerations favor plaintiff’s position. Defendants argue that the Legislature intended that persons in plaintiff’s position have no rights so it is permissible for the park owner to cut off heat and power without warning, or break every window in the home, as a means to evict the tenant. This extreme position ignores the state’s interest in the peaceful resolution of legal disputes without force or violence. We conclude that one of the purposes of a broad definition of ‘resident’ [173 Vt. 429] was to ensure that disputes between mobile home park owners and occupants of homes would not be resolved by the methods defendants employed here.

B.

The second argument relates to the trust. The trust argues that it can not be held liable because plaintiff failed to cover the trust in its complaint.

Plaintiff’s complaint and amended complaint named as defendants Marcien, Mary Anne and Leon Roy. Defendants answered and raised counterclaims by Marcien Roy, acting as trustee on behalf of the Marcien and Mary Anne Roy Trust, which owns the Royal Pine Villa Mobile Home Park.” Apparently, she requested the single page amendment because the prayers for relief were generally stated as against “defendants” without不同iating among them. The court allowed the amendment by an order dated April 6, 1998. Plaintiff filed no further document in response to that order.

Page 703

On the first day of trial, January 25, 1999, defendants asked the court to dismiss the trust as a party defendant on the ground that no separate amended complaint had been filed once the court granted plaintiff leave to amend. The trial court refused to do so. On appeal, defendants argue that a motion is not itself a pleading, that once a motion to amend a complaint is granted an entire new amended complaint must be filed, and that because plaintiff did not do so the court erred in refusing to dismiss the trust as a defendant.

The exact nature of the trust’s claim of error is unclear. It has not claimed that there was no jurisdiction over it because no process was served on it pursuant to V.R.C.P. 4, apparently because it recognizes that prior to the amendment it had asserted counterclaims against plaintiff without formally entering the case as a party. Instead, it argues that a motion to amend must be followed by an amended complaint, but acknowledges such a filing may be unnecessary if the moving party attaches the proposed amendment to the complaint to the motion. Thus, its claim of error apparently reduces to an assertion [173 Vt. 430] that plaintiff had to attach all pages of the complaint to her motion, or had to serve separately the entire complaint, even though none of the unattached and unserved pages were amended. While we agree that the court could have insisted that plaintiff file and serve a full amended complaint, or given the trust more time to answer, see Carter v. Church, 791 F.Supp. 297, 298 (M.D.Ga.1992), the trust seeks reversal of the judgment based on a technical rule that elevates form over substance. See North Georgia Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 432 (11th Cir. 1993). Such a rule would be inconsistent with our policy that amendments to the pleadings are to be freely given where there is no prejudice to the opposing party. See Desrochers v. Perrault, 148 Vt. 491, 493, 535 A.2d 334, 336 (1987); Reporter’s Notes to V.R.C.P. 15. We reject the trust’s claim.

II.

We turn now to three arguments, which if accepted, would require a new trial on plaintiff’s claim or on one of the counterclaims: (1) the court erred in ruling that, as a matter of law, the trust was responsible for the conduct of Leon Roy; (2) the court erred in admitting evidence of prior bad acts; and (3) the court erred in excluding evidence of threats made to the Roys by plaintiff’s agent.

A.

The first ruling occurred following the close of evidence in response to defendants’ argument that the jury would have to find agency and vicarious responsibility to hold the trust liable for the acts of either Leon or Marcien Roy. The court ruled that agency was present as a matter of law. Defendants further preserved their position by an objection following the charge to the jury.

The nucleus of defendants’ argument is that plaintiff had to prove that Leon Roy's acts were taken within the scope of his employment, Poplaski v. Lamphere, 152 Vt. 251, 257, 565 A.2d 1326, 1330 (1989), and that question should have been put to the jury. Defendants particularly rely upon our recent explanation of this element in Braeckner v. Norwich University, 169 Vt. 118, 123, 730 A.2d 1086, 1091 (1999):

To be within the scope of employment, conduct must be of the same general nature as, or incidental to, the authorized conduct. See Restatement (Second) of Agency § 229(1) (1958). Conduct of the servant falls within the scope of employment if: (a) it is of the kind the servant is employed to perform; (b) [173 Vt. 431] it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and (d) in a case in which the force is intentionally used by the servant against another, it

© 2012 ELLIS BOXER & BLAKE
is not unexpectable by the master. See id. § 228(1). Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master. See id. § 228(2).

Defendants argue that at least as to two of the elements—whether the conduct of Leon Roy was "the kind" he was employed to perform, and whether the conduct was "unexpectable" by the master—were disputed.

The court granted judgment to plaintiff as a matter of law on the issue of the trust's vicarious responsibility for the acts of Leon Roy. In reaching this conclusion, it was required to find that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." V.R.C.P. 50(a)(1). The court relied upon the undisputed evidence of Leon Roy's authority and past conduct. According to his testimony, Leon Roy was the manager of the park responsible for all phases of its policy and management. He made all decisions about how the park ran. He was responsible for all decisions on applications to rent a lot in the park. The only other employee was his wife, Paula Roy, who did the bookkeeping and office work. Marcien Roy was retired but did "a little work around the park for Leon."

The court found that there was no evidence that Leon Roy's actions were motivated by personal animus to plaintiff and concluded:

Here, the only reasonable inference from the evidence admitted and the jury's special findings is that Leon Roy's actions were related solely to his position as a mobile home park manager and the employee/beneficiary of the Trust. His self-help eviction efforts directed at plaintiff could only have been motivated by the overall financial goals of the family and the family trust.

We agree with the superior court's analysis. While there are some factual disputes in this case, there are none bearing on the scope of Leon Roy's authority. In general, we follow the modern view, "that is, the inquiry turns not on whether the act done was authorized or was in violation of the employer's policies, but rather whether the acts can properly be seen as intending to advance the employer's interests." McHugh v. Univ. of Vt., 758 F.Supp. 945, 951 (D.Vt.1991), aff'd, 966 F.2d 67 (2d Cir. 1992). Thus, there is no requirement that the master specifically authorize the precise action the servant took. See Pelletier v. Bilbiles, 154 Conn. 544, 227 A.2d 251, 253 (1967) (responsibility of store employee to ensure customers did not misbehave in the store made store owner vicariously liable when employee beat a customer to stop him from misbehaving; "fact that the specific method a servant employs to accomplish his master's orders is not authorized does not relieve the master from liability"). Such a requirement would mean that there could rarely be vicarious liability for intentional torts because the master would not specifically authorize the commission of an intentional tort. The law is to the contrary. See Restatement (Second) of Agency §§ 230, 231 (1958); see also Tarman v. Southard, 205 F.2d 705, 706 (D.C.Cir. 1953) (jury could find taxicab company vicariously liable where taxi driver drove his cab over plaintiff's leg as a result of a dispute over the fare); Sayers v. Boyles, 280 Ala. 153, 190 So.2d 707, 709 (1966) (landlord could be found responsible for action of rent-collection agent who assaulted tenant when he did not pay on time); Hechinger Co. v. Johnson, 761 A.2d 15, 25 (D.C.2000) (where supervisory staff person of store assaulted plaintiff in the course of a discussion over scraps of wood given to plaintiff by other customers, store could be held vicariously liable); Gompere Corp. v. Rebull, 440 So.2d 1307, 1308 (Fla.Dist.Ct.App.1983) (jury could find apartment owner vicariously liable where apartment manager shot tenant during discussion of tenant's eviction notice); Hinson v. Morris, 298 S.W. 254, 256 (Mo.Ct.App.1927) (apartment owner held vicariously liable where apartment manager assaulted plaintiff when he could not pay for damage to personal property in his apartment); De Wald v. Seidenberg, 297 N.Y. 335, 79 N.E.2d 430, 432 (1948) (apartment building owner could be held liable where superintendent pushed tenant down a flight of stairs in argument over breach of building rules by tenant's maid).

In this case, the trust has consistently taken the position that plaintiff was a trespasser, and, therefore, it could use self-help means to evict her. There is no dispute that Leon Roy's responsibility as park manager included the removal of trespassers from the park. See Ploo v. Putnam, 83 Vt. 252, 257, 75 A. 277, 278 (1910) (island caretaker who was responsible to keep trespassers off the island could use such force as is necessary to accomplish the purpose). The trustees were on notice that Leon used surreptitious vandalism and utility disconnection as a means of self-help eviction. They were parties to the 1986 action in [173 Vt. 433] which the court found Leon used these methods to evict Mark Wright and awarded $10,234 in compensatory and punitive damages against them. Yet, they made no change in their methods of operation after that judgment. Finally, there is no evidence that Leon acted out of personal animus against plaintiff, rather than for the business interests of the park. See id. (island owner is liable if caretaker would not allow boat to land in a storm as long as caretaker did not act for his own private purpose). It was undisputed that Leon Roy had never met, and had never communicated with, plaintiff until the trial of this case.

Where it is "clearly indicated" that the servant was acting within the scope of the employment, the court may hold the master vicariously responsible as a matter of law. Restatement (Second) of Agency § 228 cmt. d; see also Ploo, 83 Vt. at 259, 75 A. at 279 (although scope of employment is normally a question of fact, it can be decided as a matter of law where "facts and the inferences to be drawn there from are not in dispute"). It is hard to imagine a case where authorization is more clearly indicated. The superior court properly found as a matter of law that Leon's actions were taken to benefit the park and the trust, as its owner; the self-help methods Leon employed were of the kind he was employed to perform;
and Leon's intentional force was "not unexpected by the master." There is no error in holding the trust vicariously responsible for Leon's acts.

B. Defendants' second ground for its motion for a new trial was the admission of the opinion and judgment in Wright v. Roy, the testimony of the circumstances of that case, and the testimony of other mobile home owners describing events involving their sale, purchase or occupancy. Defendants filed a motion in limine seeking to exclude this evidence on the ground that it was inadmissible under V.R.E. 403 and 404.

Page 706

Plaintiff argued in response that the evidence was not inadmissible under Rule 404, because it was not offered to prove defendants' character, but rather to show motive, plan and the identity of the person who vandalized her mobile home. She argued that the evidence was not inadmissible under Rule 403 because the probative value was high, and it outweighed any prejudice to defendants.

The court denied the motion in limine, essentially for the reasons argued by plaintiff. Defendants renewed their objection to this evidence prior to trial and were granted a continuing objection to evidence of this sort by the trial court. They also renewed their arguments in their post-verdict motion for a new trial. The court [173 Vt. 434] rejected this ground for the motion, holding that the evidence was admissible "to identify defendants as the perpetrators of the acts against plaintiff and to show a continuing plan and motive behind defendants' conduct towards plaintiff."

Defendants renew their claim that the admission of the evidence violated V.R.E. 404(b). [173 Vt. 435] They argue that this evidence was not (1) probative of identity because the acts are not so distinct as to be signature-like; (2) that the evidence was not probative to show motive because there is no connection between the conduct in the case at bar and the prior conduct; and (3) that the evidence is not probative of a continuing plan because the prior acts are too remote in time and too dissimilar. Defendants argue that because admission of the evidence was not justifiable under these exceptions to Rule 404(b), a general prohibition against character evidence, the only reason the evidence was offered and admitted was to show the defendants' bad character and to prove they acted in conformity therewith, in violation of the rule. Finally, they argue that even if the evidence was admissible under Rule 404(b), it failed as a matter of law to pass the balancing test imposed by V.R.E. 403.

Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We begin by emphasizing that trial courts have wide discretion in ruling on the admissibility of evidence.
[173 Vt. 436] over a decade before the events that gave rise to this litigation and are not similar to those events. For two reasons, we disagree.

First, we believe the evidence met the Catsam and Winter standards such that its admission fell well within the discretion of the trial court. Plaintiff alleged that defendants had a plan to gain ownership of all mobile homes in the park even by unlawful methods. The court's 1987 conclusions and order in the Wright case found the plan that plaintiff alleged existed. Specifically, it found that defendants' policy of requiring owners to sell only to defendants was illegal, that defendants' refusal to approve sales of mobile homes to third parties based on reasons not provided in the park leases was illegal, and that defendants used illegal "strong-arm tactics" to persuade Mr. Wright to abandon his tenancy in the park. On the basis of these conclusions, the court issued injunctions against the first two practices and awarded damages for the third. Significantly, the injunctions were issued in favor of the State of Vermont, a plaintiff in the Wright case, so they applied to any prospective purchaser, including plaintiff in this case.

If plaintiff failed to show that anything occurred in pursuit of the plan between 1987 and 1997, defendants might have been in a position to complain about the lack of proximity in time. In fact, plaintiff showed that despite the injunction, the percentage of mobile homes in the park owned by defendants rose greatly from 13% in 1987 to 48% in 1999. She also showed that no home was sold to a new park resident between 1993 and 1997.

Finally, there was testimony that the plan, created in 1986, continued right up to the present. One of plaintiff's witnesses, Joe Candal, testified that he tried to sell his home for a year, proposing many purchasers to defendants, but they declined all of them. In frustration, Mr. Candal offered to sell the home to Leon Roy, who said he might have been interested a few months ago, but could not purchase it at that time because "[t]he state's watching us pretty good."

As we said in Winter, the important consideration is the relation between the passage of time and the inference that there is "an overall plan to the defendant's actions." Id. The inference was strong that defendants' plan to gain ownership of all the mobile homes in their park continued from 1986 right up to the present.

We have a similar reaction to defendants' claim that the prior bad acts were not sufficiently similar to the conduct involving plaintiff. On this point, defendants are apparently challenging not only the Wright [173 Vt. 437] case evidence but also the evidence of events involving other tenants which occurred around the time of the vandalism of plaintiff's home. Defendants argue that none of these events are sufficiently similar because only plaintiff claimed that her windows were broken and her electric wire cut.

The record does not support defendants' argument. Mr. Scott testified that his windows were broken and his electric power was disconnected. In any event, defendants are quibbling over minor differences and ignoring the essential similarity in the experiences of the tenants and those who bought mobile homes in the park. As the court concluded in the Wright decision, defendants engaged in "strong-arm tactics" to prevent an owner from selling to a purchaser other than defendants. Whether those strong-arm tactics involved vandalizing vehicles, cutting cable TV lines, cutting power lines, disconnecting power lines, removing a kerosene tank's drain plug, shooting a hole in a kerosene tank, throwing rocks through windows or throwing a rock through a front door is insignificant. They are all analogous acts of vandalism intended to interfere with the use and enjoyment of the mobile home premises and usually to scare and intimidate the mobile home occupant. In most cases, they were accompanied by a refusal to approve prospective purchasers and/or a refusal to recognize, or even respond to, a purchaser without a prior authorization. The similarities overwhelm any differences.

There is a second, more general, reason why the evidence was admissible under the plan exception in this case. All of our Rule 404(b) plan cases have involved a "unlinked plan," that is, a series of proximate, similar crimes which establish a plan to commit the series of crimes. See E. Imwinkelried, Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b), 43 U. Kan. L.Rev. 1005, 1011 (1995). This, however, is a "linked acts" plan, also called a true plan, where plaintiff has shown a grand design to gain ownership of the mobile homes in the park and each act of misconduct "is a means to the end of achieving the overarching end or objective." Id. at 1015; see also 1 J. Strong, McCormick on Evidence § 190, at 661 (5th ed.1999) (under plan exception "crime should be an integral part of an overarching plan explicitly conceived and executed by the defendant"). In true plan cases, an "act can be probative of a true plan even when it is dissimilar to the charged" acts and "the uncharged and charged ... [acts] need not be proximate in time." 1 E. Imwinkelried, Uncharged Misconduct Evidence § 3:22, at 118 (rev. ed.1999). Thus, while we believe that the [173 Vt. 438] trial court could consider similarity and proximity in determining the admissibility of the evidence, there are no hard and fast lines as defendants suggest.

The evidence was also admissible to show identity, a critical issue in this case where plaintiff had no direct evidence that Leon Roy committed the acts of vandalism. Particularly relevant to plaintiff's case was the evidence from the Wright case that the acts of vandalism were anonymous, but the court found by a preponderance of the evidence that Leon Roy committed those acts. Also relevant was the fact that unapproved occupants of homes suffered acts of vandalism, suggesting that the vandalism

© 2012 ELLIS BOXER & BLAKE
was being used as a method of eviction. Indeed, that was exactly the court's conclusion in the Wright case.

Defendants argue, however, that in order to use prior bad act evidence to prove identity, the acts must be so distinctive as to amount to a signature. Here, they argue, the acts of vandalism perpetrated on plaintiff were unique, and none of the witnesses were trying to force defendants to give him or her a lease. Thus, they argue the evidence was inadmissible to prove identity.

Defendants' argument is based on State v. Bruyette, 158 Vt. 21, 604 A.2d 1270 (1992), a sexual assault case in which the victim was unable to identify the perpetrator because she was blindfolded. The court admitted the testimony of the defendant's former girlfriend to describe certain sexual practices he liked to engage in, certain statements he frequently made during sex, and how he liked to use cocaine during sex. The practices and statements were similar to those that occurred with the victim, and the perpetrator had used cocaine during the sexual assault.

We upheld the admission of the evidence, noting that the pattern and characteristics of the prior act "must be so distinctive, in effect, to constitute the defendant's signature," id. at 27, 604 A.2d at 1273, and further described the standard as follows:

Although the prior acts of the accused and the charged acts do not have to be identical, they must possess common features that make it highly likely that the unknown perpetrator and the accused are the same person. Whereas a few common features that are unique may be sufficient, a larger number of them, less remarkable, but taken together, may also have significant probative value.

Id. at 28, 604 A.2d at 1273. For two reasons, evidence of the other acts in this case did not run afoul of the Bruyette standard.

First, as described above, plaintiff showed an overall plan that allowed admission of much of the evidence. The existence of the plan, and the prior finding that Leon Roy vandalized the home of Mark Wright, was relevant to show that Leon Roy was responsible for vandalizing plaintiff's mobile home. See J. Strong, supra, § 190, at 661 ("plan is relevant to show "the doing of the ... act, the identity of the actor, or his intention"). Plaintiff did not have to meet the strict standard of Bruyette to admit prior bad act evidence to show identity in this case.

Second, we conclude that plaintiff did meet the Bruyette standard. Again, defendants quibble over minor differences between the vandalism perpetrated on plaintiff and that perpetrated on others. Defendants' "signature" was: they refused to deal openly with tenants' attempts to sell their homes to third parties; they refused to approve such sales; they refused any contact with purchasers of the homes; and they surreptitiously vandalized the homes of purchasers who attempted to occupy the homes in order to induce them to leave. Since defendants remained the owners and managers of the home throughout the period covered by the evidence, it was highly likely that the same person who engaged in this conduct in 1986 was the person who vandalized the homes of plaintiff and the other witnesses in 1996 and 1997. The Bruyette standard was met.

Much of the evidence was also admissible to prove motive, another ground specifically authorized by Rule 404(b). The classic case of using prior bad act evidence to show motive is State v. Wheel, 155 Vt. 587, 587 A.2d 933 (1990), in which the defendant was prosecuted for perjury for lying at an inquest to cover up her submission of false pay vouchers for days in which she did not work as an assistant judge. The court admitted evidence that the defendant did not work on days for which she claimed pay, but altered court records to make it appear she was present. We affirmed on the basis that fear of disclosure of the misconduct in submission of the vouchers was the motive for the perjurious testimony. Id. at 604, 587 A.2d at 943-44.

As with other grounds for admission of bad act evidence, it is important that the exception not become a pretext for admission of character evidence. Thus in State v. Winter, a rape case, we held that evidence that the defendant committed a rape on another woman was not admissible based on the logic that the defendant's conduct was motivated by sexual gratification in the other rape so he must have had the same motivation for the rape for which he was being tried. 162 Vt. at 394-95, 648 A.2d at 628. We held that this logic was "no more than [173 VT. 440] an impermissible propensity analysis," id. at 395, 648 A.2d at 628, and also rejected it because it admitted "the uncharged misconduct evidence as bearing on an issue not contested." Id.

Here, plaintiff was in the position of explaining conduct that appeared bizarre. Without the historical context, and the evidence of defendants' conduct with other tenants, their actions in refusing to return telephone calls, answer letters or cash rent checks from plaintiff were inexplicable. Nor could the jury be expected to understand why defendants might vandalize plaintiff's mobile home. Only by learning defendants' motives could the jury understand why they would engage in the conduct alleged by plaintiff. See State v. Recor, 150 Vt. 40, 43-44, 549 A.2d 1382, 1385-86 (1988) (in child sexual assault case, after defense brought out in cross-examination that victim hated defendant, prosecution allowed to show in redirect that hatred was motivated by fact that defendant sexually assaulted victim on an earlier occasion). Admission of the evidence of the Wright case, and the experience of other tenants, established defendants' motives without using impermissible propensity analysis.

There is another ground for admitting the prior bad act evidence. Plaintiff sought and obtained punitive damages in this case. The evidence involving the Wright case, as well as the evidence of the experience of other tenants, was admissible on whether to award punitive damages and on the amount of any punitive damages. See Devine v. Rand, 38 Vt. 621, 626-27 (1866). As the United States Supreme Court explained:

Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it
was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's
disrespect for the law.... Our holdings that a recidivist may be punished more severely than a first offender recognize
that repeated misconduct is more reprehensible than an individual instance of malefeasance.


[173 Vt. 441] evidence of prior acts of driving while intoxicated is admissible as bearing on punitive damages); Harris v. Soley, 756 A.2d 499, 507 (2000) (in tort action against former landlord for intentional infliction of mental distress, conversion and breach of contract based on landlord failing to maintain premises and sending agents to break into the apartment, "prior misconduct by a defendant that is similar to the misconduct giving rise to liability" is admissible for "the determination of punitive damages"). The Wright case evidence was particularly relevant on punitive damages against the trust because it showed that Marcien and Mary Anne Roy were aware that Leon Roy had vandalized homes in the past as part of the scheme to gain ownership of the homes in the park. See Weeks v. Baker & McKenzie, 63 Cal.App.4th 1128, 74 Cal.Rptr.2d 510, 530-31 (1998) (in sexual harassment case against lawyer and law firm, evidence that lawyer sexually harassed other employees in the past admissible on punitive damages since firm took no action to protect plaintiff).

Finally on this point, defendants argue that even if the prior bad act evidence was admissible under V.R.E. 404(b), it should have been excluded under V.R.E. 403 because its unfair prejudicial effect substantially outweighed its probative value. The trial court has broad discretion in determining whether the unfair prejudicial effect of evidence outweighs its probative value, and the burden of showing abuse of that discretion is a heavy one. See Ulm v. Ford Motor Co., 170 Vt. 281, 290, 750 A.2d 981, 989 (2000).

The court exercised its discretion in this case. It found that the evidence was clearly relevant to show Leon Roy's identity as the person who vandalized plaintiff's home and cut her electric line, defendants' motive in refusing to respond to and deal with plaintiff, and the continuing plan to gain ownership over all homes in the park. It found that the evidence would not have the primary purpose or effect of appealing to the emotions of the jurors and, therefore, was not unduly prejudicial. We add that plaintiff demonstrated a clear need for the evidence in the absence of any witness who saw the vandalism or the cutting of the electric line and could identify the perpetrator. See Winter, 162 Vt. at 400, 648 A.2d at 631 (in sexual assault case in which State offered evidence that the defendant assaulted another woman four years earlier, "State's need for the evidence is a major factor in the balancing process").

Because of the court's findings in the Wright case, the number of tenants and occupants who had similar experiences, and the continuing increase in the number of homes owned by defendants, the likelihood that the prior bad acts occurred [173 Vt. 442] was strong. See id. at 400, 648 A.2d at 632 (aRule 403 factor is "how definitely the State has proved defendant's commission of the uncharged misconduct"). We agree with the trial court that the probative value of the evidence was high

Page 712

and the risk of unfair prejudice from it was relatively low. Accordingly, we affirm its decision to admit the prior bad act evidence.

C.

The third claim in support of defendants' request for a new trial is the exclusion of evidence of threats left on defendants' answering machine by plaintiff's ex-boyfriend, who is the father of plaintiff's daughter. The messages, expressed in aggressive and profane terms, threatened to harm "Mr. Roy" for harassing and inflicting stress on plaintiff. The ex-boyfriend lived in South Carolina, and the messages said he would fly to Vermont to carry out his threats.

Without calling the ex-boyfriend to testify, defendants sought to introduce the answering machine tapes in support of their counterclaim that plaintiff intentionally inflicted emotional distress on defendants through her agent, the ex-boyfriend. The court excluded the tapes on the ground that there was no evidence that the ex-boyfriend acted as an agent for plaintiff, and invited defendants' counsel to fill that foundational gap by testimony from plaintiff or the ex-boyfriend. The court also ruled that if the tapes were otherwise admissible, it would exclude them under Rule 403 because their prejudicial effect outweighed their probative value. Defendants' counsel never followed up to fill the foundational gap. With no other evidence to support it, the court dismissed the intentional-infliction-of-emotional-distress counterclaim.

Defendants claim that the court erred in excluding the tapes because the jury could infer that the ex-boyfriend acted as plaintiff's agent from the information he conveyed on the tapes. Although the ex-boyfriend never stated that he was acting for plaintiff, defendants argue that the information about defendants' alleged responsibility for the vandalism of plaintiff's mobile home must have come from plaintiff.

The trial court has broad discretion in determining the adequacy of the foundation for admitting evidence. See State v. Streich, 163 Vt. 331, 344, 658 A.2d 38, 47 (1995). As part of its discretion the court can require the foundational showing prior to the admission of the

108
evidence or, alternatively, admit the evidence subject to the later foundational showing. V.R.E. 104(b). The court appropriately chose the former alternative in view of [173 Vt. 443] the abusive, threatening and profane nature of the content of the messages.

The court made a ruling that the evidence was irrelevant absent some showing that the ex-boyfriend was plaintiff's agent. Defendants never attempted to show agency beyond the content of the tape itself and plaintiff's testimony that she talked to the ex-boyfriend because he is her child's father. There was no showing that plaintiff knew of the threats or authorized them in any way. Again, the court had broad discretion in making its evidentiary ruling. See State v. Hooper, 151 Vt. 42, 46, 557 A.2d 880, 882 (1988). We think the court acted within that discretion in excluding the answering machine messages.

III.
A.
Defendants have raised three issues with respect to damages. First, they argue that the $10,000 compensatory damages award was excessive in light of the fact that plaintiff could itemize damages of only $418 for spoiled food and electrician's services.

The court charged the jury, without objection, that they could award damages for "inconvenience, mental suffering, emotional distress, worry, anxiety, humiliation, and indignity." The evidence was that plaintiff was unable to live in the mobile home for a number of days, first because of the broken windows, and then because of the absence of heat and electricity. She testified that after the cutting of the electric line, she "felt terrified," she was afraid of what would happen next, she had "sleepless nights," and she was "under a lot of stress."

In response to the defendants' motion to set aside the verdict as excessive, the court ruled that the award was within the jury's discretion, especially because of the evidence of emotional distress. We also agree with the court's analysis on this issue.

We recently summarized the law applicable to a challenge to a monetary verdict on the ground it was excessive:

"In evaluating this claim, we must consider the evidence in the light most favorable to the damages found by the jury and uphold the verdict if there was evidence reasonably supporting it." Winey v. William E. Dailey, Inc., 161 Vt. 129, 144, 636 A.2d 744, 753 (1993) (citation omitted). "To overturn a jury award, an appellant must demonstrate that the verdict was entirely excessive ...." Turgeon v. Schneider, 150 Vt.


In re Estate of Peters, 171 Vt. 381, 393, 765 A.2d 468, 477 (2000). We also noted that we will not interfere with a jury award where exact computation is impossible. Id. at 393, 765 A.2d at 477-78 (citing Imported Car Center, Inc. v. Billings, 163 Vt. 76, 82, 653 A.2d 765, 770 (1994)).

Defendants' main claim is that the compensatory damages award is excessive because it is much higher than the amount awarded in other landlord misconduct cases. See Human Rights Comm'n v. LaBrie, Inc., 164 Vt. 237, 242, 668 A.2d 659, 663 (1995) (challenge to eviction from mobile home park because tenants had children; damages of $1500 for emotional injury and $3000 for loss of civil rights); Gokey v. Bessette, 154 Vt. 560, 562-63, 580 A.2d 488, 490-91 (1990) (award of $6600 for violation of warranty of habitability and retaliatory eviction). Obviously, each of the cases must be decided on its own individual facts.

Viewing the evidence here in support of the verdict, we cannot say that the verdict is entirely excessive. The anonymous attacks on the security of plaintiff's home created fear for the safety of herself and her three-year-old child and emotional damage. There is no exact right amount to compensate for this kind of injury.

B.

Defendants next argue that the court erred in allowing the jury to award punitive damages against the trust. Relying on Brueckner, 169 Vt. at 130, 730 A.2d at 1096, the trust argues that plaintiff was required to show that the trustees either directed, participated in or ratified Leon Roy's unlawful acts, but failed to do so as shown by the dismissal of Mary Anne Roy as a party and the jury verdict in favor of Marcien Roy. The language of Brueckner is taken from Shortle v. Central Vermont Public Service Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1979), and is a truncated version of the alternative elements. The showing the trust asserts is absent is required only if the act on which punitive damages is based is "that of the governing officers of the corporation or one lawfully exercising their authority." Id.

The relevant elements necessary for imposition of punitive damages against a master or principal are more fully explained in Restatement (Second) of Torts § 909 (1979).

Page 714
See also Restatement (Second) of Agency § 217C (same). Section 909 sets forth four [173 Vt. 445] alternative elements necessary to impose vicarious liability for punitive damages; the third is that "the agent was employed in a managerial capacity and was acting in the scope of employment." Restatement (Second) of Torts § 909(c). The commentary explains that the purpose of vicarious responsibility in this instance, even in the absence of fault on the part of the employer, is to serve "as a deterrent to the employment of unfit persons for important positions." Id. cmt. b. Plaintiff proved the elements of § 909(c), and for the reason stated in the commentary we affirm the court's decision to uphold the award of punitive damages against the trust.

C.

Finally, defendants argue that the punitive damages award was excessive and in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. They rely on their characterization of Leon
Roy's actions as "two minor acts of vandalism" and the ratio between the amount of punitive damages awarded--$100,000--and the amount of compensatory damages proved, which they assert is $418.

We start with defendants' due process claim. We agree that the critical precedent is BMW of North America, Inc. v. Gore, which sets forth guidelines to determine whether a punitive damage award is so excessive as to deny due process. We do not have to get into the decision in depth to decide this issue. The BMW factors are the degree of reprehensibility, the ratio between compensatory and punitive awards, and possible sanctions for similar conduct. 517 U.S. at 574-75, 116 S.Ct. 1589. All of these factors support the jury's award of punitive damages in this case.

The most important factor is the reprehensibility of defendants' conduct. On this point, defendants minimize Leon Roy's conduct to the point that it is unrecognizable. Looking at the self-help eviction actions in isolation, Leon's actions in smashing all of plaintiff's windows and cutting off her power are marked by violence or a threat of violence and demonstrate an indifference or reckless disregard for the health and safety of others. See id. at 576-77, 116 S.Ct. 1589. Although the harm he inflicted was primarily emotional and economic, there was a serious threat that the acts would cause physical harm, especially to plaintiff's three-year-old daughter.

The central point of this case, however, is that Leon's actions against plaintiff should not be viewed in isolation. Plaintiff showed that Leon Roy engaged in a pattern of unlawful self-help eviction actions against residents in the park. She demonstrated that these actions were part of an illegal scheme to gain ownership of all homes in the park at unreasonably low prices. She showed that defendants had been enjoined from such conduct in the past, but it continued. She even showed that smaller amounts of punitive damages had been awarded against defendants, but the awards had not deterred the illegal conduct. We find that defendants' conduct was particularly reprehensible and warranted a large punitive damage award.

To the extent that we need consider the ratio between the compensatory damages award and punitive damages award, we conclude that the ratio of 10 to 1 is reasonable in this case. Indeed, courts have routinely upheld much greater ratios applying the Gore standards. See, e.g., Walston v. Monumental Life Ins. Co., 129 Idaho 211, 923 P.2d 456, 467-68 (1996); Schaffer v. Edward D. Jones & Co.,

Page 715
552 N.W.2d 801, 815-17 (S.D.1996). In Harris v. Soley, 756 A.2d at 509, the Maine Supreme Court recently upheld a punitive damage award sixteen times that of the compensatory award for landlord's "intolerable" conduct toward tenants. The purpose of punitive damages is to deter misconduct, and thus, courts can consider "the possible harm to other victims" that might result if similar behavior is not deterred. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (upholding punitive damages award over 400 times greater than the compensatory damage award). Obviously, the jury here faced a strong need to fashion a punitive damage award that would deter defendants' ongoing illegal conduct and scheme and prevent further harm to park residents. In addressing this need, it had compelling evidence that a smaller punitive damage award, levied in 1986, had not deterred the misconduct.

The possible sanctions available for like conduct also weigh in favor of upholding the jury's punitive damages award. Any person who fails to comply with the Act or conditions, restrictions or limitations contained in a permit faces a fine of up to $1000, or imprisonment for up to six months, or both. 10 V.S.A. § 6205(a). The Act authorizes the State to revoke a park owner's permit to operate. Id. § 6233(c). Furthermore, it is not inconceivable that defendants' conduct could subject them to other criminal penalties. See, e.g., 13 V.S.A. §§ 3701 (unlawful mischief), 1025 (recklessly endangering another person).

Defendants' argument fares no better under our standards on the reasonableness of punitive damage awards. We overturn a punitive damage award only if it is "manifestly and grossly excessive." Crump [173 VT. 447] v. P & C Food Markets, Inc., 154 Vt. 284, 298, 576 A.2d 441, 450 (1990) (internal quotations omitted). Not only do we defer to the discretion of the jury, see Powers v. Judd, 150 Vt. 290, 294, 553 A.2d 139, 141 (1988), we also defer to the judgment of the trial court which heard the evidence. See Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 78, 461 A.2d 414, 420 (1983), overruled on other grounds by Lent v. Huntoon, 143 Vt. 539, 549, 470 A.2d 1162, 1170 (1983). Although a jury can award punitive damages only if it has awarded compensatory damages, we have no requirement that there be any particular ratio between the two awards. See Crump, 154 Vt. at 298, 576 A.2d at 449.

For the same reasons that the punitive damage award is not unconstitutional, it is also not manifestly and grossly excessive. The amount lies within the discretion of the jury.

IV.

Defendants raise two counterclaim errors: (1) Marcien and Mary Anne Roy were entitled to judgment for slander as a matter of law; and (2) the court erred in dismissing the ejectment count.

A.

The first of these issues arises from an amendment to defendants' counterclaims that they attempted to make before the start of the evidence on the first day of trial. The court denied it at that time, but allowed it at the close of the evidence. The motion was made orally, and the amendment was never reduced to writing. In essence, the charge to the jury became the only description of the slander counterclaim. It stated: "Defendants have made a counterclaim that Jodi Sweet falsely accused them in public, of criminal conduct by stating that she believed they were responsible for the acts of vandalism at her mobile home." The claim is based on plaintiff's testimony
that she stated to the police, co-workers and others that she thought the Roys were responsible for the vandalism.

The court to the jury itemized four elements of the tort, including that plaintiff’s statements were false and that plaintiff made them "without exercising the care a reasonable person would have in determining whether they were true or false." It reiterated that truth is an absolute defense to slander.

The essence of the claims of Marcien and Mary Anne Roy is that since they were exonerated from direct participation in the self-help eviction, they were entitled to recover even though the jury found that

[173 Vt. 448] Leon committed the acts alleged and the court found that the trust, as park owner, was vicariously responsible for them.

A major difficulty with defendants' argument is that they did not show the allegedly defamatory statements with any specificity and never, prior to their post-trial motion, tried to differentiate among the members of the Roy family. Although they raised an issue in the motion, they adopted a different theory from that raised here. They argued that the jury was never instructed to consider the slander claim in light of the fact that it found that Marcien Roy did not personally commit the vandalism and claimed "Marcien Roy is entitled to consideration by the jury of his claim against plaintiff for slander." We assume they did not continue with that theory because they never objected to the jury instructions.

Even if defendants have preserved their claim, we conclude that they have not shown reversible error. If they believed, as they currently argue, that plaintiff's statements were defamatory as a matter of law, they were obligated to obtain a ruling to that effect at the close of the evidence. Instead, the issue was submitted to the jury "because the connotation of the ... spoken words was ambiguous." Lent v. Huntoon, 143 Vt. at 547, 470 A.2d at 1168. While defendants proved that plaintiff made statements, they provided only sketchy evidence of the content of the statements. The jury could find that they failed to show that plaintiff made a defamatory statement against Marcien or Mary Anne. They could also find that any statements made by plaintiff were true because the trust was responsible for the actions of Leon Roy. See Weisburgh v. Mahady, 147 Vt. 70, 73, 511 A.2d 304, 306 (1986) (statement is not actionable if "substantially accurate"). Finally, they could have found that neither Marcien nor Mary Anne proved any "actual harm." Wood v. Wood, 166 Vt. 608, 609, 693 A.2d 673, 674 (1997) (mem.).

B.

Finally, defendants argue that the court erred in dismissing their counterclaim for ejectment. The court's ruling on this issue is related to that affirmed above holding that plaintiff was entitled to the protection of the Act and could not be evicted by self-help means. In resolving the counterclaim, however, the court went further and ruled that defendants were obligated to allow plaintiff to apply to be a tenant and to consider her application based on the uniform admission standards applicable to any applicant.

The court made this ruling in response to Leon Roy's testimony that he would not consider [173 Vt. 449] providing a lease to any person who bought a mobile home in the park without first going through the application process, and to defendants' legal position that anyone who did not apply for admission prior to buying a home in the park was a trespasser, not entitled to the protections of the Act.

Page 717

We need not get as far into the construction of the Act as the superior court did. We have ruled above that plaintiff was a mobile home park resident, see 10 V.S.A. § 6201(6), and, as such, could not be evicted by self-help. See id. § 6237(a)(1). The same section of the Act which prohibits self-help eviction also requires that the park owner, "[p]rior to the commencement of any eviction proceeding," notify the resident "by certified or registered mail" of the grounds for the eviction proceeding or that eviction may be commenced if the resident does not pay overdue rent within twenty days. Id. § 6237(a)(2). Defendants never proved they sent such a notice. In fact, Leon Roy testified that he had never sent any written communication to plaintiff. In the absence of such notice, the court correctly ruled that defendants could not evict plaintiff by ejectment.

Affirmed.

Notes:

[*] Defendants have treated the evidence as prior bad act evidence, inadmissible under V.R.E. 404(b), despite the fact some of it related to events subsequent to the vandalism of plaintiff's mobile home. In view of defendants' position, we have likewise assumed that all the evidence is governed by Rule 404(b).

-----

Brueckner v. Norwich University, 169 Vt. 1086 (1999)

Present AMESTOY, C.J., and DOOLEY, MORSE, JOHNSON and SKOGlund, JJ.

AMESTOY, C.J.

Norwich University appeals from the denial of its post-trial motions for judgment as a matter of law, or in the alternative, for a new trial, following a jury verdict finding it liable and awarding compensatory and punitive damages on several tort claims arising from incidents of hazing suffered by plaintiff while a freshman. Norwich University raises numerous issues with respect to its liability, the award of lost earnings damages, and the award of punitive damages. We affirm the court's rulings on liability and lost earnings damages, but reverse the award of punitive damages because there was an insufficient showing of malice to support the award.

Viewing the evidence in the light most favorable to the plaintiff, as we must on the appeal of both a motion for judgment as

[169 Vt. 121] a matter of law, see Silva v. Stevens, 156 Vt. 94, 101-02, 589 A.2d 852, 856 (1991), and a motion for a

111
new trial, see Lent v. Huntone, 143 Vt. 539, 549, 470 A.2d 1162, 1170 (1983), the facts are as follows. In August 1990, plaintiff William C. Brueckner, Jr. arrived as an incoming freshman, or "rook," at the Military College of Vermont of Norwich University (Norwich). At the time, he was a twenty-four year old, five-year veteran of the United States Navy, having been awarded a four-year naval ROTC scholarship in the amount of $80,000 to attend Norwich. Under the authority and training of Norwich and its leadership, certain upperclassmen were appointed by the university to indoctrinate and orient the incoming rooks, including plaintiff. These upperclassmen were known as the "cadre."

Plaintiff attended Norwich for only sixteen days as a result of his subjection to, and observation of, numerous incidents of hazing. In those sixteen days, plaintiff withstood a regular barrage of obscene, offensive and harassing language. He was interrogated at meals and thereby prevented from eating. He was ordered to disrobe in front of a female student, although he did not follow the order. He was prevented from studying during some of the assigned study periods and, on several occasions, cadre members destroyed his academic work with water. Members of the cadre also forced him to squat in the hall as they squirted him with water. He was forced to participate in unauthorized calisthenic sessions, despite an injured shoulder. He was slammed into a wall by a cadre member riding a skateboard in the hall. 


Page 1091

A. Vicarious Liability—Assault and Battery, Intentional and Negligent Infliction of Emotional Distress

i. Vicarious Liability

Norwich claims error in the court's entry of judgment on the claims of assault and battery, as well as negligent and intentional infliction of emotional distress, because those claims are premised on acts of the cadre members that were not authorized and did not occur within the scope of their employment. Norwich claims it should not be held vicariously liable for the cadre's hazing.

Under the settled doctrine of respondeat superior, an employer or master is held vicariously liable for the tortious acts of an

[169 Vt. 123] employee or servant committed during, or incidental to, the scope of employment. See Anderson v. Toombs, 119 Vt. 40, 44-45, 117 A.2d 250, 253 (1955); Poplaski v. Lamphere, 152 Vt. 251, 257, 565 A.2d 1326, 1330 (1989). Norwich concedes that cadre members acted as its agents in "indoctrinating and orienting" rooks such as plaintiff. Norwich claims, however, that the tortious acts complained of were not committed within the cadre members' "scope of employment." Whether a given act is committed within the scope of employment is properly determined by the finder of fact after consideration of the attendant facts and circumstances of the particular case. See Anderson, 119 Vt. at 48, 117 A.2d at 254.

To be within the scope of employment, conduct must be of the same general nature as, or incidental to, the authorized conduct. See Restatement (Second) of Agency § 229(1) (1958). Conduct of the servant falls within the scope of employment if: (a) it is of the kind the servant is employed to perform; (b) it occurs substantially within the
authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and (d) in a case in which the force is intentionally served by the servant against another, it is not unexpected by the master. See id. § 228(1). Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master. See id. § 228(2).

Here, the cadre were authorized by Norwich to indoctrinate and orient rooks through activities performed at various times of the day and night. A jury could reasonably find members of the cadre were acting in furtherance of their general duties to indoctrinate and orient the rooks and thus within their “scope of employment” at the time of the hazing incidents of which plaintiff complains.

Norwich argues that, because it had adopted policies against hazings and had instructed the cadre to refrain from mistreating the rooks, the tortious conduct was outside the scope of employment. Norwich contends that McHugh v. University of Vermont, 966 F.2d 67 (2d Cir. 1992), supports this result. In McHugh, the Second Circuit Court of Appeals, applying Vermont law, concluded that an employee who sexually and religiously harassed a fellow employee was not acting within the scope of employment. There, a major in the United States Army and an employee at the University of Vermont's Department of Military Studies told plaintiff, a female secretary, that his definition of a “secretary” was a “paid whore.” The employee repeatedly joked about plaintiff contracting AIDS, stating that he hoped she would be able to avoid infection. The employee also told plaintiff that it was “a good day to watch Catholic babies burn.” Id. at 68-69. The court rejected the argument that the employee's conduct was within his scope of employment because it was within that scope for him to talk with the plaintiff, either to give instructions or to avoid the awkwardness of silence at work. It held: “It can hardly be contended that [the employee’s] alleged conduct furthered the business” of his employer. Id. at 75.

The same cannot be said of this case, where the actions involved in hazing rooks may fairly be seen as qualitatively similar to the indoctrination and orientation with which the cadre members were charged. Indeed, Norwich described some of the acts of which plaintiff complained, such as forced calisthenics and questioning at mealtimes, as not far removed from the official system of military discipline and training which recruits are expected to endure. The evidence supported the jury's conclusion that the cadre members were acting within the scope of employment. See Belanger v. Village Pub I, Inc., 26 Conn.App. 509, 603 A.2d 1173, 1179 (1992) (under doctrine of respondeat superior, employee's failure to follow employer's orders would not relieve employer of liability for employee's tortious conduct if employee acted with apparent authority in furtherance of employer's business).

ii. Assault and Battery

Norwich next claims that there was insufficient evidence to support plaintiff's claim for assault and battery and thus, that the court erred when it denied Norwich judgment as a matter of law. Norwich concedes that an assault and battery occurred, but claims that vicarious liability cannot be established because insufficient evidence exists to identify the assailant as a member of the cadre. At trial, plaintiff could not recall whether the person who had struck him in the shoulder was a member of the cadre, but testified that he knew the assailant was not a rook and thought he was a member of the senior class. Plaintiff's counsel stressed in closing argument that, although plaintiff's memory failed him at trial, a report prepared in connection with plaintiff's case contained his earlier statement to his roommate that the hitter had been a cadre member. Norwich claims that the identification in the report is triple hearsay and amounts to "conjecture, surmise or suspicion," (quoting Burleson v. Caledonia Sand & Gravel Co., 127 VT. 594, 597, 255 A.2d 680, 682 (1969)), which is inadequate as a matter of law to support the jury's verdict.

There [169 Vt. 125] is no absolute prohibition against the use of admitted hearsay evidence to support a jury's verdict. See In re M.P., 133 VT. 144, 146, 333 A.2d 116, 118 (1975). Particularly in light of the fact that Norwich commissioned the report and moved for its introduction at trial, it cannot complain of the jury's consideration of a statement recorded therein. Notwithstanding plaintiff's memory lapse at trial, the jury reasonably could have concluded that plaintiff's statement accurately recorded the attacker's identity. The court correctly denied the motion for judgment as a matter of law.

iii. Negligent Infliction of Emotional Distress

Norwich claims that it was error for the court to uphold the jury's finding of liability for the claim of negligent infliction of emotional distress. To establish a claim for negligent infliction of emotional distress, a plaintiff must make a threshold showing that he or someone close to him faced physical peril. See Francis v. Gaylord Container Corp., 837 F.Supp. 858, 864 (S.D.Ohio 1992), aff'd, 9 F.3d 107 (6th Cir.1993). The prerequisites for establishing a claim differ according to whether plaintiff suffered a physical impact from an external force. See Kingston Square Tenants Ass’n v. Tuskegee Gardens, Ltd., 792 F.Supp. 1566, 1576-77 (S.D.Fla.1992). If there has been an impact, plaintiff may recover for emotional distress stemming from the incident during which the impact occurred. See id. If plaintiff has not suffered an impact, plaintiff must show that: (1) he was within the "zone of danger" of an act negligently directed at him by defendant, (2) he was subjected to a reasonable fear of immediate personal injury, and (3) he in fact suffered substantial bodily injury or illness as a result. See Vaillancourt v.
In this case, plaintiff withstood at least two incidents of physical impact by a cadre member. Plaintiff testified about the fear of personal injury he felt in connection with a cadre member's careening down the dormitory hallway on a skateboard and "plowing" into roofs. On one such occasion, the cadre member ran into plaintiff. Plaintiff also testified as to the fear and apprehension he felt when struck twice in the shoulder he had previously injured. Plaintiff's doctor testified that plaintiff suffered from post-traumatic-stress disorder and a major depressive disorder as a result of his perception that he was at risk of serious physical injury during the incidents just described. The evidence at trial fairly and reasonably supported the jury's verdict on negligent infliction of emotional distress. [1]

B. Direct Liability--Negligent Supervision

Norwich argues it was not liable to plaintiff for negligent supervision of the students in the cadre because it owed no duty of care to plaintiff. Norwich's claim is premised on the fact that the hazing in question came at the hands of fellow students. It cites Smith v. Day, 148 Vt. 595, 599, 538 A.2d 157, 159 (1987), for the proposition that Norwich owed no duty to control the actions of Norwich students for the protection of plaintiff. We disagree because, unlike the Smith case, Norwich specifically charged cadre members with "indoctrinating and orienting" plaintiff.

A principal may, in addition to being found vicariously liable for tortious conduct of its agents, be found directly liable for damages resulting from negligent supervision of its agents' activities. See Trahan-Laroche v. Lockheed Sanders, Inc., 139 N.H. 483, 657 A.2d 417, 419 (1995); Mainella v. Staff Builders Indus. Servs., Inc., 608 A.2d 1141, 1145 (R.I.1992) (direct liability for negligent supervision of employees or agents constitutes an entirely separate and distinct type of liability from vicarious liability under respondent superior); Restatement (Second) of Agency § 213, Norwich's claim that it owed no duty to plaintiff under the circumstances of this case fails under these established principles. Under the Restatement, "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless ... in the supervision of the activity." Id. According to the Restatement's drafters, § 213 "is a special application of the general rules stated in the Restatement of Torts ... Liability exists only if all the [169 Vt. 127] requirements of an action of tort for negligence exist." Id. cmt. a. In this instance, the cadre members, and by extension Norwich, owed plaintiff at minimum the duty to use reasonable care to avoid harming him. "One who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others. He is likewise required to make such reasonable regulations as the size or complexity of his business may require." Id. cmt. g. Norwich, therefore, owed plaintiff a duty of reasonable care in the control and supervision of the cadre.

In the instant case, the court correctly instructed the jury that Norwich owed plaintiff a duty to use reasonable care in avoiding harm to plaintiff, and the evidence in the record fairly and reasonably supports the jury's finding of liability.

II. Actual Damages--The Jury's Lost Earnings Award

Norwich argues next that the trial court erred in failing to vacate the jury's award of $300,000 in lost earning capacity, and that the expert testimony offered to support the award was based on speculation and was therefore irrelevant and should not have been admitted. When reviewing a jury's award of damages, this Court must affirm the award "unless it appears to be clearly erroneous when the supporting evidence is viewed in the light most favorable to the prevailing party and any modifying evidence is disregarded." Meadowbrook Condo. Ass'n v. South Burlington Realty Corp., 152 Vt. 16, 26, 565 A.2d 238, 244 (1989). Specifically, when a party appeals a court's refusal to set aside a verdict and grant a new trial on the grounds that the jury's verdict is not supported by the evidence, "[w]e need only determine 'whether the jury could reasonably have found its verdict for damages on the evidence before it.' " Lorrain v. Ryan, 160 Vt. 202, 209, 628 A.2d 543, 548 (1993) (quoting Brunelle v. Coffey, 128 Vt. 367, 370, 264 A.2d 782, 784 (1970)).

Viewed in the light most favorable to plaintiff, the evidence before the jury concerning lost earnings consisted of the following. Plaintiff graduated from high school and spent five years as an enlisted officer in the Navy. He consistently received high ratings by his superior officers, and he improved his aptitude examination rating during his time in the Navy. In 1990, his application for admission into the civil engineering program at Norwich was accepted, and he was granted a full four-year ROTC scholarship. Although plaintiff remained at Norwich only long enough to take one examination in the fall of 1990, he performed satisfactorily. As a result of hazing, plaintiff withdrew from Norwich and thereafter worked a series of relatively low-paying jobs, culminating with his employment as a postal worker at the time of trial. He testified that he wished ultimately to complete college but, due to work and family pressures existing since his departure from Norwich, he had not been able to resume college studies other than to take one night course at a community college. At the time of trial, plaintiff's pursuit of a college education had been delayed more than six years as a result of his experiences at Norwich.

In calculating plaintiff's lost earnings, his expert economist analyzed the difference in earnings over a lifetime between a high school graduate and a college graduate. Using U.S. Census Bureau data, and discounting the figures for present value, he determined that if plaintiff were a college graduate he would earn between $600,000 and $932,593 more over the course of his working life than $932,593 more over the course of his working life than

Page 1094

...
The difficulty of precise computation of the losses plaintiff has and will continue to incur as a result of his premature departure from Norwich is not a ground to reverse a lost earnings award. See *Imported Car Ctr., Inc. v. Billings*, 163 Vt. 76, 82, 653 A.2d 765, 770 (1994) (upholding award of damages where plaintiff continued to incur expenses throughout trial and exact amount of damages could not be ascertained). Nor do we reverse such an award where a plaintiff has not yet acquired an earning capacity. See *Melford v. S.V. Rossi Constr. Co.*, 131 Vt. 219, 223-24, 303 A.2d 146, 148 (1973) (holding that a person is not deprived of right to recover damages for loss of earning capacity in future, by fact that at time of injury he is not engaged in any particular employment).

There was ample evidence before the jury to support its award of lost earning capacity. Based upon the evidence presented at trial, the jury could have considered and weighed such issues as whether and when plaintiff would return to college, the impact of the six years that had elapsed since his departure from Norwich, as well as his likelihood of successful completion if he returned to college. Applying its assessment of these and other variables to the testimony of the expert, the jury could reasonably have found that plaintiff lost or would lose approximately one-third of a college-educated working life as a result of his withdrawal from Norwich and subsequent inability to resume a college education; the jury's award of $300,000 for past and future lost earning capacity--less than one-third of the [169 Vt. 129] total amount the expert testified plaintiff would lose over his working lifetime--is reasonably supported by the evidence.

**Page 1095**

III. PUNITIVE DAMAGES

The purpose of punitive damages is to " 'punish conduct which is morally culpable ... [and] to deter a wrongdoer ... from repetitions of the same or similar actions.' *Coty v. Ramsey Assoc's.*, 149 Vt. 451, 467, 546 A.2d 196, 207 (1988) (quoting *Davis v. Williams*, 92 Misc.2d 1051, 402 N.Y.S.2d 92, 94 (CIV.Ct.1977)). Punitive damages are permitted "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime." *W. Keeton, et al., Prosser and Keeton on the Law of Torts § 2, at 9 (5th ed.1984).* It is not enough to show that defendant's acts are wrongful or unlawful--there must be proof of defendant's "bad spirit and wrong intention." *Agency of Natural Resources v. Rien deau*, 157 Vt. 615, 624-25, 603 A.2d 360, 365 (1991). Consistent with the view that punitive damages are to be applied to deter and to punish "truly reprehensible conduct," *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me.1985), Vermont has long required a plaintiff to demonstrate that a defendant acted with malice in order to recover punitive damages. See *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921).

The Vermont test for the malice necessary to establish liability was first announced in 1921 in Sparrow, and most notably stated in *Shortle v. Central Vermont Public Service Corp.*, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979): "It must be shown that there was actual malice. This may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." This test has been cited frequently since. See, e.g., *Murray v. J & B Int'l Trucks, Inc.*, 146 Vt. 458, 465, 508 A.2d 1351, 1355 (1986); *Bruntaeger v. Zeller*, 147 Vt. 247, 252-53, 515 A.2d 123, 127 (1986); *Ryan v. Herald Ass'n*, Inc., 152 Vt. 275, 281, 566 A.2d 1316, 1320 (1989); *Meadowbrook Condominium Ass'n*, 152 Vt. at 28, 365 A.2d at 245; *Crank v. P & C Food Markets, Inc.*, 154 Vt. 284, 298, 576 A.2d 441, 449 (1990); *Wheeler v. Central Vt. Med. Ctr.*, Inc., 155 Vt. 85, 96, 582 A.2d 165, 171 (1989); *Rien deau*, 157 Vt. at 624, 603 A.2d at 365. On the other hand, punitive damages were denied in *Bruntaeger*, 147 Vt. at 254, 515 A.2d at 127 (punitive damages properly denied because "defendant's conduct, however wrongful, ... was not malicious"); *Meadowbrook*, 152 Vt. at 28, 565 A.2d at 245 (after trial court assessed punitive damages because of defendant's "willful violation" of consumer protection statute, Supreme Court reversed because "defendant's conduct ... however wrongful, did not evince the degree of malice required"). In *Rien deau*, the trial court assessed civil and punitive damages because the defendants in that case "knowingly and willfully discharged substances into waters of the state." 157 Vt. at 623-24, 603 A.2d at 361-62. This Court remanded for further proceedings on punitive damages because "we believe that there must be some showing of bad motive to make knowing and intentional conduct malicious." *Id.* at 625, 603 A.2d at 365. [2]

Here, plaintiff's theory of Norwich's liability for punitive damages was predicated not upon a showing of defendant's "bad motive" in engaging in intentional misconduct, but instead upon "Norwich's conscious choice to remain ignorant [of hazing] activities." In upholding the punitive damages award, the judge described the rationale for the punitive damages on [Page 1096] request: "The jury was asked to impose punitive damages in order to punish Norwich for its inaction and inattention to the issue of hazing on campus." (Emphasis added.)

A corporation may be held directly liable for punitive damages. As stated in *Shortle*, 137 Vt. at 33, 399 A.2d at 518: The fact that the defendant is a corporation does not prevent an award of punitive damages in an appropriate case, but the malicious or unlawful act relied upon must be that of the governing officers of the corporation or one lawfully exercising their authority, or, if the act relied upon is that of a servant or agent of the corporation, it must be
clearly shown that the governing officers either directed the act, participated in it, or subsequently ratified it. While we have made clear our view that the board of trustees and management hierarchy of a corporation cannot insulate itself from the malice or its equivalent exhibited by staff, see Wheeler, 155 Vt. at 96, 582 A.2d at 171, we are not prepared to hold that inaction or inattention of senior corporate officers constitutes malice sufficient to establish punitive damages liability. This is particularly true where, as here, the findings of fact made by the judge in upholding the jury's punitive damages award are insufficient to support an inference that the defendant's inaction was infused with "a bad motive," Riendeau, 157 Vt. at 625, 603 A.2d at 365, giving rise to "outrage frequently associated with crime," Prosser, supra, § 2, at 9. [3]

Viewing the evidence in the light most favorable to plaintiff, as we must, the facts demonstrate that senior leadership at Norwich knew of numerous, often serious, hazings by the cadre that had taken place on campus during the years preceding plaintiff's arrival there, and that Norwich officials left the cadre in "virtually unsupervised control" of plaintiff as a rook. A senior vice-president knew that rooks felt intimidated by the prospect of entering a complaint about hazing through the chain of command, and that no formal method of complaining about hazing outside of the chain of command existed while plaintiff was a rook. Furthermore, a security officer testified that he felt he was not encouraged to report hazing. From 1987 to 1991, Norwich did not implement any changes to its training of student leaders related to hazing, and no changes were introduced to the training patterns that were aimed at avoiding or reducing hazing. Significantly, however, the evidence indicates that Norwich considered hazing to be an inappropriate behavior and, when training the cadre, advised its members to stay within the rules and treat each other suitably. Norwich had an honor code, sworn to by all students, which prohibited hazing. When specific incidents of hazing were reported to the senior vice-president, investigations were conducted. If reports were found to be valid, disciplinary action was taken, ranging from punishment within the corps or loss of a cadet's rank, to suspension or dismissal from Norwich. Disciplines were announced to the students by publishing an order from the administrative officer of the commandant's office, posting it on all bulletin boards, and giving it to all members of the corps. It was also read in company formation.

On the basis of this record it may be fair to conclude, as indeed the court did, that the defendant was "indifferent to the health and safety of the rooks in its custody and control." But indifference attributable to negligence is not malice. See Prosser, supra, § 2, at 10: There is general agreement that, because it lacks "the element of malice," mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," a term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. [4]

"To sanction punitive damages solely upon the basis of conduct characterized as 'heedless disregard of the consequences' would be to allow virtually limitless imposition of punitive damages." Tuttle, 494 A.2d at 1361 (quoting Miller Pipeline Corp. v. Brooker, 460 N.E.2d 177, 185 (Ind.Ct.App.1984)). [5]

We conclude, then, with the view that Norwich's action or inaction, "however wrongful, did not evidence the degree of malice required" under our cases. Meadowbrook, 152 Vt. at 28, 565 A.2d at 245. Punitive damages awarded on these facts would only "dull[] the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct." Tuttle, 494 A.2d at 1361. [6]

IV. Motion for New Trial

Finally, Norwich claims that the court erred by denying its motion for a new trial. A decision concerning a motion for new trial pursuant to V.R.C.P. 59(a) lies within the sound discretion of the trial court and will be reversed only where there has been an abuse of discretion. See Hoague v. Cota, 140 Vt. 588, 591, 442 A.2d 1282, 1283 (1982). "Such abuse will be found only when the trial court has entirely withheld its discretion or where the exercise of its discretion was for clearly untenable reasons or to an extent that is clearly untenable." Lent, 143 Vt. at 552, 470 A.2d at 1171. We afford "all possible presumptive support, similar to the support the trial court owes to a jury verdict." Gregory v. Vermont Traveler, Inc., 140 Vt. 119, 121, 435 A.2d 955, 956 (1981). In light of our consideration of the record in connection with Norwich's motion for judgment as a matter of law, we find no abuse of discretion.

The judgment of punitive damages is reversed. The judgment is affirmed in all other respects.

JOHNSON, J., dissenting.

The decision whether to award punitive damages against a defendant represents an area of unparalleled discretion on the part of the jury in a civil trial. As a result, punitive damages have been a controversial issue. For this reason, it is critical to have clear guidelines for juries to follow in deciding whether or not an award of punitive damages is appropriate. While the majority today reverses the award of punitive damages in this particular case, it leaves future defendants more vulnerable to potentially arbitrary punitive damages

Page 1098

awards by loosely applying the ill-defined concept of "malice," a term we have criticized in the criminal context as arcane and confusing. See State v. Johnson, 158 Vt. 508, 518-19, 615 A.2d 132, 136 (1992). In so doing, the majority departs from our holding in Shortle v. Central Vermont Public Service Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (malice may be shown by presence of either personal ill will or reckless disregard for rights of another), even while purporting to rely on it.

In this case, the jury was properly instructed in accordance with Vermont law on the punitive damages...
issue, and had before it sufficient evidence to support the award of punitive damages based on a theory that defendant exhibited reckless disregard for plaintiff's rights. I believe it is error to invade the province of the jury to overturn this award. I therefore respectfully dissent.

The jury had before it the following facts. Defendant Norwich University authorized certain upperclass cadets (the "cadre") to indoctrinate and orient incoming cadets ("rooks"). Norwich University trained the cadre to fulfill this role. Plaintiff, a rook, left the university after the cadre verbally and physically harassed him so as to threaten his physical and mental well-being and interfere with his academic studies. Cadre members interrogated plaintiff during meals, preventing him from eating. The cadre's harassment of plaintiff resulted in an injury to his shoulder, which was exacerbated by forced, unauthorized exercise sessions. Cadre members also vandalized plaintiff's room.

Plaintiff reported the hazing problems to the university before leaving and, in fact, Norwich University had been aware of persistent hazing problems emanating from the cadre. Despite this fact, the university did not remove the cadre from power, did not alter the training received by the cadre, and left the cadre in "virtually unsupervised control" over the rooks. Despite the cadre's proven unfitness for the task of indoctrinating and orienting the incoming cadets, Norwich continued to authorize the cadre to perform this task. The senior vice-president of Norwich knew that rooks felt intimidated about reporting hazing incidents through the chain of command but did nothing to improve the situation. On the basis of this evidence, the jury awarded plaintiff compensatory and punitive damages on plaintiff's theory that defendant had consciously chosen to remain ignorant of the hazing activities conducted by the cadre.

The majority reverses the jury's award of punitive damages. The pivotal piece of reasoning in the majority opinion equates malice with "bad motive" and concludes that, because plaintiff's theory of liability was based on defendant's "conscious choice to remain ignorant" rather than on defendant's affirmative act, this precludes a finding of bad motive and thus precludes an award of punitive damages. This reasoning is flawed on several counts.

First, the majority's reasoning is inconsistent with the doctrine established in Vermont case law. Clear guidelines for awarding punitive damages were developed by this Court in Sparrow v. Vermont Savings Bank, 95 Vt. 29, 112 A. 205 (1921), and Shortle. These cases established that punitive damages were appropriate where there was actual malice as evidenced by either one of two factual predicates: (1) where a defendant expressed personal ill will toward a plaintiff (i.e., "bad motive"), or (2) where a defendant exhibited reckless or wanton disregard of a plaintiff's rights. See Sparrow, 95 Vt. at 33, 112 A. at 207; Shortle, 137 Vt. at 33, 399 A.2d at 518. In articulating the standard in this manner, these cases broke down the vague "malice" concept into two distinct prongs.

The majority states that, "on the basis of this record it may be fair to conclude ... that the defendant was 'indifferent to the health and safety of the rooks in its custody and control.' But indifference [169 Vt. 135] attributable to negligence is not malice." The majority fails to recognize that, while Page 1099 it may be true that indifference is not the same as "bad motive," indifference can constitute "reckless disregard," a recognized component of malice under Vermont law. The majority cites a Maine case, Tuttle v. Raymond, 494 A.2d 1353 (Me.1985), and a treatise to support its conclusion that "indifference is not malice" in Vermont, a conclusion that flies in the face of the settled principles of Sparrow and its progeny.

The majority additionally cites Agency of Natural Resources v. Rienardeau, 157 Vt. 615, 603 A.2d 360 (1991), for the proposition that "there must be some showing of bad motive to make knowing and intentional conduct malicious." Id. at 625, 603 A.2d at 365 (emphasis added). Based on this quoted language, the majority concludes that bad motive is a required showing in all cases where punitive damages are awarded. This reasoning is erroneous, however, because the quoted language is taken out of context.

In a subsequent passage in Rienardeau, we note that the trial court could have alternatively awarded punitive damages on a theory that the defendants were so indifferent to the environmental consequences of their acts that their conduct could be characterized as malicious. See id. We concluded that we could not uphold the award on the basis of this alternative theory, however, because the trial court had not made findings to this effect. See id. Notably, we remanded Rienardeau to the trial court for additional findings on the issue of malice instead of simply vacating the award, as the majority does in the instant case.

Rather than supporting the majority's analysis, therefore, our holding in Rienardeau reiterates established doctrine: that there are two alternative bases for a finding of malice, bad motive or reckless disregard. There is not a single, overarching "bad motive" requirement, as the majority implies. Equating malice exclusively with bad motive in this manner distorts the doctrine established in our earlier cases, effectively abandoning the second prong of the Shortle test. The majority cannot eliminate the second prong without at least partially overruling Shortle, on which it purportedly relies.

In addition to contradicting Vermont case law, the majority's reasoning is inconsistent with the policy rationale underlying punitive damages awards. By equating malice with bad motive and personal ill will, the majority opinion articulates a new standard for malice that is ill-suited to address the conduct of institutional actors, which cannot be said to have personal will as such. The implications of the [169 Vt. 136] majority's opinion extend well beyond this case by eliminating an entire class of defendants from the scope of this important form of civil sanction. But clearly the conduct of institutional actors may reach a level of culpability meriting the imposition of punitive damages.
Institutions act through setting policies, and in some instances, those policies demonstrate such flagrant disregard for the rights of others that they can rightly be characterized as malicious. This is especially true where, as here, an institution owes a duty to the person whose rights are violated. The “reckless disregard” component of the malice test reaches this type of conduct; by abandoning this component, the majority arbitrarily eliminates a category of malicious conduct from consideration.

It is especially problematic to define malice in such a way so as to exclude institutional actors from the application of punitive civil sanctions, because in many cases, as here, an institution will be in the best position to correct a potentially recurring danger. In addition to punishing morally culpable conduct, the other primary purpose of awarding punitive damages is to deter the individual defendant and other similarly situated actors from engaging in harmful activities where they have a choice about whether or not to engage in the activity. See R. Posner, Economic Analysis of Law 209 (4th ed. 1992). Thus, punitive damages are most effective where (1) compensatory damages alone will not provide adequate deterrence and (2) the defendant is the person or entity in the best position to prevent future recurrence of the harmful activity. See id. The majority's exclusive focus on bad motive and personal ill will, therefore, does not serve the deterrence function of punitive damages because it excludes some of the most obvious targets of deterrence.

Finally, the majority's exclusive focus on bad motive and personal ill will does not place sufficient emphasis on the role of harm to the public as a policy justification for the imposition of punitive damages. Generally, the goal of criminal sanctions is to punish, while the goal of civil sanctions is to compensate. See K. Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L.J. 1795, 1796 (1992). Punitive sanctions are sometimes appropriate in the civil context, however, when a defendant “not only harms the victim, [but] undermines rules and distinctions of significance beyond the specific case.” G. Calabresi & A.D. Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L.Rev. 1089, 1126 (1972) (discussing why compensation of victim is inadequate remedy in criminal cases). In this sense, some civil defendants are similar to criminal defendants in that their conduct represents a harm to the public as well as to an individual victim. It is the presence of a harm to the public that justifies punishment.

In this case, the jury may have fairly and reasonably concluded that Norwich University undermined important rules and norms of society by sanctioning hazing by cadets it had placed in a position of power over other cadets. There was sufficient evidence indicating that the university’s policies might potentially have a negative impact on a much broader group of people than just the plaintiff alone, thereby justifying the imposition of punitive damages by the jury.

The only remaining questions, therefore, are whether the jury was properly charged and whether there was sufficient evidence on the record to support the jury’s verdict. Our review of the jury’s decision to award punitive damages is limited. When reviewing a jury verdict to determine if it was supported by sufficient evidence, the standard is whether, when the evidence is looked at in the light most favorable to the prevailing party, there is any evidence which fairly and reasonably tends to support the jury verdict. See Turgeon v. Schneider, 150 Vt. 268, 270, 553 A.2d 548, 550 (1988). The jury was properly charged in accordance with Vermont law, [1] and there appears to be no basis for challenging the jury’s verdict as a matter of law. [2]

The jury had before it sufficient evidence to support an award of punitive damages based on a theory that defendant acted with reckless disregard for plaintiff's rights. The trial court found that "[o]fficers of Norwich were aware of incidences [sic] of hazing which perennially were perpetrated by the cadre, yet the officers left the cadre in virtually unsupervised control of Mr. Brueckner as a rook at Norwich.” The majority errs by characterizing defendant's conduct as omission rather than affirmative act. It is true that the university's [169 Vt. 138] conduct can be characterized as "inaction and inattention" in the sense that, at the time of plaintiff's injuries, the university had not embarked on a new course of action but had simply allowed the status quo to continue. That status quo, however, was the result of the university's affirmative act of authorizing the cadre to discipline and orient incoming students. The jury may have fairly and reasonably concluded that maliciously understood as reckless disregarding of another's rights was evidenced by the fact that the university, which knew of the hazing problem, could have remedied it by eliminating the "virtually unsupervised control" that the cadre enjoyed over the cadets, but declined to do so. Indifference in the face of a known threat to the health and safety of another, where there is also a duty to protect that person's health and safety, as there was here, could fairly and reasonably lead to a jury's conclusion that defendant recklessly disregarded plaintiff's rights.

The decision whether to award punitive damages is firmly rooted in the discretion of the jury. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); K. Mann, supra, at 1799 (“The privately invoked [punitive civil] sanction derives from the common law right of the jury to award exemplary damages, and is thus doctrinally circumscribed by little other than the concept of discretion uninfluenced by corrupt motive.”). The jury in this case was presented with the facts, and had the opportunity to evaluate the credibility of the witnesses and to assign weight to the evidence. The jury was therefore in the best position to evaluate the moral culpability [3] of Norwich University and the need to deter
it and other similar institutions from continuing the policies that gave rise to plaintiff's injuries.

The majority's searching review for a sufficient level of malice--a review apparently guided by nothing more than a subjective sense of what is "enough" malice--represents an unjustified invasion into the province of the jury by an appellate court. The majority thus introduces arbitrariness into the process at two levels. It introduces [169 Vi. 139] arbitrariness at the level of the jury's decision by abandoning the two-pronged malice test for a single, ill-defined, subjective criterion, i.e., "enough" malice. Secondly, it introduces arbitrariness at the appellate level by encouraging this Court to impose its own sense of what is "enough" malice. Needless to say, the abandonment of clear, well-articulated standards for the award of punitive damages ultimately does a disservice to defendants.

There has been a great deal of concern expressed over the fact that jury awards of punitive damages are out of control. The only way to curb this trend is to formulate and adhere to clear principles that juries can follow in deciding whether or not to make a punitive damages award. This goal is not furthered when an appellate court imposes a vague "malice" standard that departs from established doctrine when it reviews a jury verdict. Rather, trial courts should provide guidance by directing juries to consider the purposes of punitive damages--to punish and to deter--and to follow the two-pronged test established in Shortle.

Page 1102

The trial court provided accurate guidance to the jury in the instant case, and the jury had sufficient evidence to find that Norwich University acted with reckless disregard of plaintiff's rights. Therefore, their decision to award punitive damages should be allowed to stand.

Notes:
[1] In light of our affirmance of liability for negligent infliction of emotional distress, and Norwich's failure to request a verdict form distinguishing between the two theories of emotional distress liability, we do not reach Norwich's claim of error concerning intentional infliction of emotional distress. See Contractor's Crane Serv., Inc. v. Vermont Whey Abatement Auth., 147 Vt. 441, 446, 519 A.2d 1166, 1171 (1986). "[I]n civil cases ..., involving multiple independent theories of liability, defendants who lose at trial may attempt on appeal to establish prejudicial error in either of two ways: They must show error affecting all theories of recovery, or they must show error affecting an individual theory upon which the jury relied. Here, the defendants cannot do the latter, since they did not request a special verdict or interrogatories. They must, accordingly, establish error that undermines all theories of liability submitted to the fact-finder. If any single theory of recovery is untainted by error, we will affirm the lower court's judgment.").
[2] Unlike the dissent, we do not construe the remand in Rendieder as diminishing the malice necessary for punitive damages. See Kolstad v. American Dental Ass'n, 108 F.3d 1431, 1443 (D.C.Gir.1997) (Williams, J., dissenting) (referring to Rendieder and Bruntaeger for the proposition that "Vermont courts have used 'reckless' language, but seem to require bad motive on top of the intentional tort.").
[3] The dissent asserts that our emphasis on malice abandons "clear, well-articulated standards" leaving future defendants "more vulnerable" to potentially arbitrary punitive damages awards. We are unable to discern how the reckless disregard test favored by the dissent preserves clarity or reduces vulnerability. Allowing punitive damage awards solely on the basis of a "reckless disregard of the rights of others" presents "the danger of ... a test which may be so flexible that it can become virtually unlimited in its application." Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633, 651 (1992) (quoting Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721, 731 (1972)).
[4] In closing argument, plaintiff's counsel brought home the true nature of Norwich's conduct: "Ladies and gentlemen of the jury, it's not just negligent. It's grossly negligent to do nothing in the face of knowledge that people are being injured, people for whom Norwich had responsibility. And that's the way Norwich responded, they did nothing different. Business as usual."
[5] We note that even the application of a "conscious indifference" or similar standard to the facts of this case would unlikely be sufficient to establish a claim for punitive damages. See Furek v. University of Delaware, 594 A.2d 506, 523 (Del.1991) (despite notice three years prior to plaintiff's injuries that dangerous hazing activities (including incident where student was branded with hot coat hanger) continued unabated on campus, university's ineffectual response found not a conscious disregard of known risk sufficient to sustain claim for punitive damages).
[6] Because we reverse the award of punitive damages, we do not reach Norwich's claim that the court erred in excluding evidence offered by Norwich in mitigation of punitive damages, nor do we address defendant's claim that the punitive damage award was unconstitutional.

The trial court charged the jury as follows:
The plaintiff must show that the defendant acted with malice, bad faith, or with reckless disregard of the plaintiff's rights. Malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression or by conduct showing reckless or wanton disregard of one's rights. The purpose[s] of punitive damages are to punish conduct that is morally culpable and to deter potential wrongdoers from repeating the conduct in the future. The trial court additionally instructed the jury on the correct standard for awarding punitive damages against a corporation.

The majority's analysis of the applicable legal standard is dictum, therefore, as it points to no flaw in the jury instructions and no specific inadequacy in the evidence.

[3] Defendant argues that it did not possess the degree of moral culpability that would justify an award of punitive damages by referring to other cases in which educational
institutions were found not to be liable for punitive damages for hazing that occurred on their campuses. These cases, however, are inapposite. Norwich University is unlike these institutions in that it is styled as a military academy in which students have very little personal freedom and little choice about with whom they will associate. Furthermore, a select group of students (the cadre) are trained and given explicit control over the incoming students (the rooks) by the university. Thus the university has a relationship to those students who form the cadre that is unlike the relationship between a nonmilitary university and its students, be they members of a fraternity or unaffiliated. This distinction is a sufficient basis for the jury's verdict.

---------

ask the court for any instructions that would have precluded the jury from answering subsequent questions after answering the at-will question in the affirmative.

[3] The Problem Solving Procedure begins with the following statement: "We make a constant and conscientious effort to see that all our employees are treated with consideration and fairness. We want them to be satisfied in their relations with us and with each other. So we have established our Problem Solving Procedure as a system of communication between employees and management."

---------

VICARIOUS LIABILITY

Doe v. Forrest, 2004 VT 37


[176 Vt. 477] DOOLEY, J.

¶ 1. This case requires the Court to determine whether a sheriff can be held liable as the employer of a deputy who perpetrates intentional criminal misconduct while on duty. Plaintiff-victim was coerced into performing oral sex by then-Bennington County Deputy Sheriff Richard Forrest (Forrest). Forrest voluntarily pled nolo contendere to charges of lewd and lascivious behavior in violation of 13 V.S.A. § 2601 and neglect of duty in violation of 13 V.S.A. § 3006. Plaintiff subsequently filed a civil action against Forrest's employers.

[176 Vt. 478] Bennington County Sheriff Gary Forrest (Sheriff Forrest) and Bennington County Sheriff's Department (collectively the defendants), [1] asserting several claims of vicarious liability for the injuries she suffered as a result of Forrest's criminal conduct. Forrest was initially a named defendant, but plaintiff voluntarily dismissed him from the case because of his lack of assets.

The Bennington Superior Court granted defendants' motion for summary judgment and dismissed plaintiff's claims. Plaintiff now appeals to this Court, alleging that the court improperly granted summary judgment for defendants on several theories of direct and vicarious liability. We hold that, on the record evidence, the trial court correctly ruled that defendants are not directly liable for Forrest's misconduct under 24 V.S.A.§ 309, and that summary judgment for defendants was proper on two of plaintiff's theories of vicarious liability. We also hold that there is sufficient evidence to withstand the summary judgment motion on plaintiff's theory of vicarious liability under Restatement (Second) of Agency § 219(2)(d) (1958), and reverse and remand.

¶ 2. On December 21, 1997, plaintiff, then twenty years old, was working alone as a cashier at a convenience store in East Dorset, Vermont. Forrest, who was on duty and wearing his department-issued uniform, badge, gun, and handcuffs, entered the convenience store between 8:00 p.m. and 9:00 p.m. This was Forrest's third visit to the store since 6:30 p.m. that evening. Although this particular stop was not prompted by a specific request, Forrest routinely checked the store during his East Dorset patrol as part of his "community policing function," pursuant to a contract between the Bennington County Sheriff's Department and the Town of East Dorset. As such, he had become familiar with several of the store's employees and developed something of a personal relationship with plaintiff. During some of these routine checks, Forrest jokingly threatened to handcuff or ticket plaintiff. He also bragged about his exploits as a police officer and that he was trained to "shoot to kill." In the weeks preceding December 21, his routine checks at the store increased in frequency and duration, as he apparently became more personally interested in plaintiff.

¶ 3. When Forrest entered the store, plaintiff was on the telephone with her mother while attending to customers at the check-out counter. After those customers left the store, he took the telephone from plaintiff and jokingly told her mother, who was also an employee, [176 Vt. 479] of the store, to stop harassing plaintiff. Forrest then hung up the telephone and began asking plaintiff questions that were sexual in nature. He turned the store's thermostat to ninety degrees and informed her that he had done so. As she was readjusting the thermostat, he took hold of her hair, which was in a ponytail, and used it to move her head in various directions. He told her that he liked women who wore their hair in a ponytail so that he could control them. He then put his arm around plaintiff, who said nothing, but moved away from him and returned to the check-out counter.

Page 52

¶ 4. Forrest then selected an adult magazine from the store's magazine rack and showed plaintiff a picture of a woman performing fellatio. After a short conversation pertaining to the sexual act depicted in the magazine, he began to maneuver her into a secluded area of the store, where he coerced her to perform oral sex. He also kissed...
and fondled her breasts. After approximately fifteen minutes, she moved away from Forrest, who departed soon thereafter. She then telephoned for help. Forrest did not during the sexual assault unholster his weapon or handcuffs, nor did he threaten to use either instrument on plaintiff.

¶ 5. As a result of the incident, Forrest resigned from the Sheriff's Department. Following an investigation by the Vermont State Police, he was charged with, and voluntarily pled nolo contendere to, a criminal charge of lewd and lascivious behavior for exposing and "causing his penis to contact the mouth of [plaintiff] in violation of 13 V.S.A. § 260.") He also pled nolo contendere to a charge of neglect of duty for engaging in "open and gross lewd and lascivious conduct with [plaintiff] while assigned to patrol duty in violation of 13 V.S.A. § 3006."

He was sentenced to three-to-five-years' imprisonment, all suspended, and was placed on probation and ordered to have no contact with plaintiff or her family.

¶ 6. Plaintiff filed suit against defendants, alleging various state and federal claims and seeking monetary damages for injuries she suffered as a result of Forrest's conduct. After plaintiff voluntarily dismissed all federal claims, defendants moved to dismiss her state law claims, arguing that an employee's intentional sexual misconduct could not be imputed to an employer because such conduct is beyond the scope of employment. Finding further discovery warranted, the trial court denied defendants' motion to dismiss.

¶ 7. After approximately two years of discovery, defendants moved for summary judgment, reasserting their argument that Forrest's misconduct was not within the scope of his employment; that no theory [176 Vt. 480] of vicarious liability recognized in Vermont would impute Forrest's conduct to defendants; and that there was no evidence to indicate that Sheriff Forrest had negligently trained Deputy Forrest, or that Sheriff Forrest knew or should have known that Deputy Forrest had a propensity to assault women.

¶ 8. Following a hearing, the court granted defendants' motion. The court found that 24 V.S.A. § 309, which plaintiff asserted was a basis for liability, was not applicable; that based on the undisputed material facts defendants were not vicariously liable under the doctrine of respondeat superior or alternative theories of liability under the Restatement (Second) of Agency § 219(2)(d); and that there was no evidence indicating defendants had negligently supervised Forrest. The court then entered judgment in favor of defendants. This appeal followed.

¶ 9. Our review of summary judgment is de novo, and in proceeding with that review, this Court applies the same standard as the trial court. Springfield Terminal Ry. v. Agency of Transp., 174 Vt. 341, 344, 816 A.2d 448, 452 (2002). We will affirm summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3); King v. Gorczyk, 2003 VT 34, ¶ 7, 175 Vt. 220, 825 A.2d 16. In applying this standard, we give the nonmoving party the benefit of all reasonable doubts and inferences.

Page 53

King; 2003 VT 34, at ¶ 7, 825 A.2d 16. Summary judgment is required when, after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to her case upon which she has the burden of proof. Poplaski v. Lampphere, 152 Vt. 251, 254-55, 565 A.2d 1326, 1329 (1989). Plaintiff asserts several arguments on appeal in support of her contention that the trial court erred in granting defendants' motion for summary judgment. Plaintiff argues that: (1) defendants are directly liable for Forrest's misconduct pursuant to 24 V.S.A. § 309 because Forrest neglected his duty when he failed to arrest himself for his own sexual misconduct; (2) Forrest's intentional criminal act was within the scope of his employment, even though that conduct was contrary to the wishes and/or instructions of defendants; and (3) defendants are vicariously liable under the Restatement (Second) of Agency § 219(2)(d) even if Forrest's acts were outside the scope of his employment. We address each of plaintiff's arguments in turn.

I. Direct Liability Under 24 V.S.A. § 309

¶ 10. Plaintiff alleges that Sheriff Forrest is directly liable for Deputy Forrest's misconduct under 24 V.S.A. § 309, and that the trial court failed to accord proper weight to Forrest's neglect-of-duty conviction when assessing defendants' liability under § 309. Section 309 provides that: A sheriff shall be liable for the official acts and neglects of his deputies, and may take bonds of indemnity from them. Such deputies may, and when required, shall perform any official duty which may be required of the sheriff. Returns of their acts and doings shall be signed by them as deputy sheriffs, and their official acts shall be deemed to be the acts of the sheriff.

(Emphasis added). Traditionally, § 309 and the statutes upon which the current version is based have been applied to hold sheriffs liable for their deputies' negligent or malfeasant execution of writs. See Lyman v. Holmes, 88 Vt. 431, 432, 92 A. 829, 830 (1915) (sheriff liable for deputy's malfeasant seizure of property on writ against another party); Cowdery v. Smith, 50 Vt. 235, 235 (1877) (plaintiff sued sheriff to recover for deputy's negligent failure to levy writ of execution); Buck v. Ashley, 37 Vt. 475, 477 (1865) (sheriff may be liable for deputy's negligent maintenance of attached property); Flanagan v. Hoyt, 36 Vt. 565, 571-72 (1864) (sheriff not liable for deputy's sale of attached property done in accordance with law and without sheriff's knowledge or consent); Charles Kimball & Co. v. Perry, 15 Vt. 414, 421 (1843) (sheriff not liable for deputy's sale of attached goods following direction by creditors' attorney because conduct not official); Wetherby v. Foster, 5 Vt. 136, 138 (1832) (sheriff liable for neglect of deputy to levy an execution upon personal property).

¶ 11. Apparently, plaintiff concedes that Forrest's actions cannot be considered "official acts" as those words

Ellis Boxer Blake
Attorneys
Employment Law and Workers' Compensation
© 2012 Ellis Boxer & Blake
are used in the statute. Instead, plaintiff argues that Forrest's actions represent a neglect of duty because he failed to intervene to prevent his own crime. In support of this argument, plaintiff points particularly to the fact that Forrest was convicted of neglect of duty in violation of 13 V.S.A. § 3006.

¶ 12. Because Forrest's duties cannot be construed to include committing a sexual assault, we cannot conclude that the misconduct

[176 Vt. 482] involved in this litigation supports plaintiff's novel theory. If, for example, the damages sought resulted from the robbing of another store while Forrest was engaged in sexual misconduct and not performing his duties, plaintiff's theory would better fit the statutory language.

¶ 13. While Forrest's failure to prevent his own criminal acts may in some sense constitute "neglect" because a sheriff has the statutory duty to "suppress ... unlawful disorder," 24 V.S.A. § 299, we do not believe that, reasonably construed, § 309 applies in these circumstances. See Springfield Terminal Ry., 174 Vt. at 346-47, 816 A.2d at 453; In re G.T., 170 Vt. 507, 517, 758 A.2d 301, 308 (2000) (Court will always avoid a statutory construction leading to absurd or irrational results).

Plaintiff's interpretation would effectively render sheriffs strictly liable under the statute for all criminal misconduct of their on-duty deputies, except in the wholly implausible and unlikely event that the malfeasant deputy prevented his or her own criminal undertaking. So construed, § 309 would impose a legal duty upon sheriffs to control all volitional criminal acts of their on-duty deputies despite having "absolutely no reasonably foreseeable notice [of those acts]." Smith v. Day, 148 Vt. 595, 598, 538 A.2d 157, 159 (1987) (refusing to impose duty on military university to control volitional criminal acts of its students, despite having a "large degree of control over the activities of its students," because criminal acts not foreseeable). As this Court recognized in the early case of Flanagan v. Hoyt, 36 Vt. at 571 (interpreting statutory predecessor to 24 V.S.A. § 309), an expansive reading of § 309 may "compel sheriffs to have no deputies," or cause them to deny important services to the community, such as the community policing function that Forrest was providing before engaging in sexual acts with plaintiff.

¶ 14. Given our construction of § 309, we reject plaintiff's assertion that the trial court did not accord proper weight to Forrest's conviction for neglect of duty under 13 V.S.A. § 3006. The charge was that Forrest neglected his duty by engaging in "lewd and lascivious conduct with [plaintiff] while assigned to patrol duty." Thus, his neglect of duty was his failure to perform his assigned patrol. Forrest's failure to perform his assigned patrol is not the cause of plaintiff's damages. The conviction adds nothing to plaintiff's case.

II.

[176 Vt. 483] Vicarious Liability for Conduct Within the Scope of Employment

Page 54
partially implements law enforcement goals, however inappropriately. See Brueckner, 169 Vt. at 123, 730 A.2d at 1091 (university could be liable for tortious hazing conduct of university cadre members who "were acting in furtherance of their general duties to indoctrinate and orient" first-year students). Here, Forrest's criminal misconduct—an act rooted in prurient self-interest—cannot properly be seen as intending to advance the employer's interests. [2] The superior court properly granted summary judgment to defendants on the ground that Forrest was not acting within the scope of his employment when he sexually assaulted plaintiff.

¶ 19. Because we decide that plaintiff does not meet the third prong of the scope of employment test, we need not consider plaintiff's argument that the sexual misconduct was not unexpectable, but instead was foreseeable.

III. Vicarious Liability Under the Restatement (Second) of Agency § 219(2)(d)

¶ 20. Finally, plaintiff claims that, although Forrest's sexual misconduct was outside the scope of his employment, defendants are vicariously liable for that tortious conduct, relying on the principles set forth in the Restatement (Second) of Agency § 219(2)(d). In its entirety, § 219 reads:

When Master Is Liable for Torts of His Servants

Page 56

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. (emphasis added).

Plaintiff actually asserts two different theories of liability relying upon the disjunctive language in § 219(2)(d). The first clause establishes an employer's vicarious liability for the torts of employees based on the doctrine of "apparent authority," while the second creates liability for an employer whose agent "was aided in accomplishing the tort by the existence of the agency relation." Id. Plaintiff argues that defendants are vicariously liable under both theories.

¶ 21. This Court has not explicitly adopted § 219(2)(d) as an exception to our scope-of-employment rule, although we have recognized the provision as relevant in the context of workplace sexual harassment. See Allen v. Dep't of Employment & Training, 159 Vt. 286, 291, 618 A.2d 1317, 1320 (1992) (noting that standards courts have applied to impute knowledge of workplace sexual harassment to employers is in general accord with § 219(2)(d)). We have routinely adopted provisions of the Restatement (Second) of Agency as reflecting the common law of Vermont. See Sweet, 173 Vt. at 432-33, 801 A.2d at 704-05; Brueckner, 169 Vt. at 123, 730 A.2d at 1091. This section has been relied upon by the United States Supreme Court as a general statement of agency principles. See Faragher v. City of Boca Raton, 524 U.S. 775, 801-02, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Certainly, the opening subsection, § 219(1), which states the general proposition that a master is liable for the torts of his or her servants committed while in the scope of their employment, is in accord with our current view of respondeat superior. See Breslauer v. Fayston [176 Vt. 486] Sch. Dist., 163 Vt. 416, 424, 659 A.2d 1129, 1134 (1995) (citing § 219 for the proposition that a plaintiff must show master-servant relationship to hold master vicariously liable for torts of his servant). We have also consistently recognized the doctrine of apparent authority, primarily in the context of an agent's authority to enter into a contractual relationship on behalf of the principal. See Lakeside Equip. Corp. v. Town of Chester, 173 Vt. 317, 324-25, 795 A.2d 1174, 1180-81 (2002) (apparent authority of agent sufficient to establish personal jurisdiction over the principal); New England Educ. Training Serv., Inc. v. Silver Street P'ship, 148 Vt. 99, 105, 528 A.2d 1117, 1120-21 (1987) (apparent authority recognized but not applicable because no grounds for reliance); Blitz v. Breen, 132 Vt. 455, 458-59, 321 A.2d 48, 50-51 (1974) (apparent authority recognized but not applicable because real estate agent did not act with principal's apparent authority to purchase land on behalf of plaintiff); Star Rest. v. Metro. Life Ins. Co., 105 Vt. 77, 82, 163 A. 558, 559 (1933) (stating general rule that "the tort of an agent is within the course of his employment when ... he is endeavoring to promote the principal's business within the scope of the actual or apparent authority"). (emphasis in original omitted).

¶ 22. Thus, consistent with our previous references to § 219(2)(d), we expressly adopt this provision of the Restatement as applicable in assessing whether an employer has vicarious liability for the tortious conduct of an employee when that conduct falls outside the scope of his or her employment. As a result, we analyze both of plaintiff's arguments under this section.

A. Apparent Authority

¶ 23. Plaintiff argues that, pursuant to the first clause of § 219(2)(d), defendants are vicariously liable for Forrest's sexual misconduct under the doctrine of "apparent authority" because the instruments of police power provided to Forrest, such as a gun, badge, and uniform, can "reasonably create an impression that the employer authorized the deputy to coerce sex." "As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power." Burlington Indus., 524 U.S. at 759, 118 S.Ct. 2257. "Apparent authority derives from the conduct of the principal,
communicated or manifested to the third party, which reasonably leads the third party to rely on the agent's authority. " Lakeside Equip. Corp., 173 Vt. at 325, 795 A.2d at 1181 (quoting New England Educ. Training Serv., 148 Vt. at 105, 528 A.2d at 1120). Liability under the doctrine "exists only to the extent that [176 Vt. 487] it is reasonable for the third person dealing with the agent to believe that the agent is authorized." Restatement (Second) of Agency § 8 cmt. c; see Ellerth, 524 U.S. at 759, 118 S.Ct. 2257. The existence of apparent authority "depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal--not the agent." Hallock v. State, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178, 1181 (1984).

§ 24. Based on the summary judgment record, there is no evidence of conduct by Sheriff Forrest or the Bennington County Sheriff's Department communicating or manifesting Forrest's authority to engage in sexual misconduct while on duty. See Lakeside Equip. Corp., 173 Vt. at 325, 795 A.2d at 1181 (no evidence on summary judgment record demonstrating that principal signaled to plaintiff that agent had authority to enter into contract). Defendants provided Forrest with the ordinary trappings of police power--a gun, badge and uniform. To hold that these items created apparent authority in this case would necessarily mean that all law enforcement officers have the apparent authority to engage in sexual misconduct. We cannot conclude that it would be reasonable for plaintiff to infer such authority from the visible manifestations of Forrest's power as a law enforcement officer or his threats, if any, to use his power on plaintiff. See New England Educ. Training Serv., 148 Vt. at 105, 528 A.2d at 1120-21 ("[T]here is absolutely no evidence in the record of conduct on the part of the principal ... which could reasonably have been relied on by plaintiff as a manifestation of the authority of its agent ...."). Accordingly, we conclude that summary judgment in favor of defendants on the claim of apparent authority was appropriate.

B. Aided in Accomplishing the Tort

§ 25. Finally, plaintiff argues that summary judgment was inappropriate because a question of material fact remains as to whether defendants should be held vicariously liable under the last clause of § 219(2)(d), which authorizes liability for torts committed outside the scope of the servant's employment if the servant "was aided in accomplishing the tort by the existence of the agency relation." Plaintiff argues that the agency relationship aided the commission of the tort in two ways: (1) by giving Forrest unique access to and authority over plaintiff to commit the tort; and (2) by giving Forrest [176 Vt. 488] the instruments, particularly the uniform and firearm, to prevent resistance. Because we conclude there are questions of material fact regarding this issue, we reverse the trial court's grant of summary judgment on this issue.

¶ 26. At the outset, we must acknowledge that plaintiff's theories, assuming the facts support them, appear to fit squarely within the plain language of the last clause of § 219(2)(d). Plaintiff alleges that Forrest could not have committed the sexual assault on plaintiff except by virtue of the deputy sheriff position conferred on him by defendants. In the wording of the section, plaintiff's theory is that Forrest's appointment and his official powers and responsibilities "aided in accomplishing the tort" on plaintiff.

¶ 27. As is more fully developed below, however, we are convinced that we must look further than the plain language of the clause. Indeed, as is apparent from a reading of this decision, the trial court opinion and the dissent, we must first choose among conflicting interpretations of the Restatement language before we can apply § 219(2)(d) to the facts of this case. In making this choice, we are guided by three important points.

¶ 28. First, although only a limited number of decisions from other courts have relied upon the last clause of § 219(2)(d) in reaching a comparable decision, the language has been comprehensively and persuasively construed in recent decisions of the United States Supreme Court, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Both are sexual harassment cases brought under Title VII of the Civil Rights Act and in which the central issue was employer liability for acts of a supervisor of the plaintiff employee. Both sought to implement the earlier holding of the United States Supreme Court in Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), that "Congress's intent [was] that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious." Faragher, 524 U.S. at 791-92, 118 S.Ct. 2275. In looking at the traditional principles of the law of agency, the Court looked particularly at § 219(2)(d) of the Restatement and its last phrase.

¶ 29. In Faragher, the issue was whether an employer could be liable "for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." Faragher, 524 U.S. at 780, 118 S.Ct. 2275. The Court concluded that liability could not be found under the rubric that the [176 Vt. 489] supervisor was acting within the scope of his employment, id. at 798-801, 118 S.Ct. 2275, and turned to the "aided in accomplishing the tort" language of § 219(2)(d). The Court rejected a narrow reading of the language:

The City, however, contends that § 219(2)(d) has no application here. It argues that the second qualification of the subsection, referring to a servant "aided in accomplishing the tort by the existence of the agency
relation," merely "refines" the one preceding it, which holds the employer vicariously liable for its servant's abuse of apparent authority.... But this narrow reading is untenable; it would render the second qualification of § 219(2)(d) almost entirely superfluous (and would seem to ask us to shut our eyes to the potential effects of supervisory authority, even when not explicitly invoked). The illustrations accompanying this subsection make clear that it covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship....

We therefore agree with [plaintiff] that in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.

Id. at 801-02, 118 S.Ct. 2275. In describing further the application of § 219(2)(d), the Court noted that the supervisor-employee relationship provides access, and the power of the supervisor is such that the employee who is faced with harassment by the supervisor is not in a position to defend, as is normally true with a coworker. Id. at 803, 118 S.Ct. 2275. Finally, the Court stated that recognition of liability for a supervisor's actions places the burden on the party that can guard against misconduct through screening, training and monitoring. Id.

¶ 30. Ellerth is a companion case, decided on the same day as Faragher, and addressing whether an employer has vicarious liability under Title VII when a supervisor creates a hostile work environment by threats to a subordinate of adverse employment actions, based on sex, but does not fulfill the threat. 524 U.S. at 754, 118 S.Ct. 2257. Again, the Court turned to general agency principles and rejected the argument that [176 VT. 490] the supervisor was acting within the scope of his employment. Again, it looked to the last phrase of § 219(2)(d) of the Restatement. Recognizing that in the broadest sense the tort is aided by the supervisor-employee relationship, the Court rejected a reading that broad, holding that the employer’s creation of the employment relationship alone is insufficient to meet the test of aiding in accomplishing the tort by the agency relationship as required by § 219(2)(d). 524 U.S. at 760, 118 S.Ct. 2257.

The Court held, however, that investing a supervisor with the power to take adverse employment action was sufficient to meet the section's test if the supervisor takes a tangible employment action against the employee as part of sexual harassment. Id. at 761, 118 S.Ct. 2257 (liability in such circumstances "reflects a correct application of the aided in the agency relation standard"); id. at 762, 118 S.Ct. 2257 ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates."); id. at 762-63, 118 S.Ct. 2257 ("Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate."). In situations where the supervisor engages in sexual harassment conduct but takes no employment action, the Court found the application of the standard "less obvious" and discussed how the language could be interpreted either way. Id. at 763, 118 S.Ct. 2257. Ultimately, the Court declined to "render a definitive explanation of our understanding of the standard" because other considerations controlled its interpretation of Title VII. Id.

¶ 31. We are, of course, not strictly bound by an interpretation of the Restatement of Agency by the United States Supreme Court, where we are not applying Title VII of the Civil Rights Act. We find, however, that Faragher and Ellerth are strong persuasive authority and are particularly helpful to our application of § 219(2)(d). Thus, we follow these decisions. [3]

¶ 32. Our second introductory point follows from the United States Supreme Court decisions. It is important not to adopt too narrow an interpretation of the last clause of § 219(2)(d), but it is equally important not to adopt too broad an interpretation. We are sensitive to the concern expressed by the trial court that plaintiff's arguments could lead to a rule that makes a principal liable for all intentional torts of an agent in all circumstances. Just as the Supreme Court decided that § 219(2)(d) could not be read to make employers liable for all acts of sexual harassment of supervisors against employees, we must similarly narrow any rule we decide upon.

¶ 33. Our third introductory point deals with the context of this case. The Court in Faragher was very careful to analyze the policy judgments behind § 219(2)(d) and apply it to implement those policies. We similarly examine some of those policy issues in the context of an intentional sexual tort of a law enforcement officer perpetrated on a community citizen the officer was charged to protect as part of his community policing function. The Faragher Court emphasized three main considerations in applying § 219(2)(d) in the supervisor-employee relationship: the opportunity for contact created by the relationship; the powerlessness of the employee to resist the supervisor and prevent the unwanted contact; and the opportunity to prevent and guard against the conduct. 524 U.S. at 803, 118 S.Ct. 2275.

¶ 34. What makes the circumstances of this case virtually unique from a policy perspective is the extraordinary power that a law enforcement officer has over a citizen. A number of courts have talked about this power in finding vicarious liability in cases involving sexual assaults by police officers. See, e.g., Applewhite v. City of Baton Rouge, 380 So.2d 119, 121 (La.Ct.App.1979), and Mary M. v. City of Los Angeles, 54
for protection. We are struck by how modern law enforcement philosophies increase the significance of this factor. We live now in the era of community policing. As a result, the emphasis of police work is more on prevention and interaction with community members to create conditions that inhibit crime. See D. Stevens, Community Policing and Police Leadership in Policing and Community Partnerships 163, 165 (D. Stevens ed., Prentice Hall 2001) (community policing involves "a preventative response to public order through a level of delegation of authority with community members and line officers as a response to future crimes as opposed to a response after crimes have occurred"); W. Skogan & S. Hartnett, Community Policing Chicago Style 5-9 (Oxford Univ. Press 1997) (defines community policing and explains that police are "reorganizing to provide opportunities for citizens to come into contact with them under circumstances that encourage an information exchange, the development of mutual trust, and an opportunity for joint or coordinated activities"); S. Waldeck, Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?, 34 Ga. L.Rev. 1253, 1254 (2000) (defining community policing). This role requires community members to place confidence and trust in law enforcement officers as partners in preventing crime, as "Officer Friendly." Thus, the interaction between Forrest and plaintiff in this case occurred because Forrest was acting as plaintiff’s protector and his visible presence would discourage those who might want to rob the convenience store.

¶ 38. Other courts have noted the effect of the unique access of a law enforcement officer on vicarious liability. For example, the Seventh Circuit Court of Appeals noted in a case where an officer sexually molested a thirteen-year-old girl he routinely drove home so she would not be out after curfew: [When the employee is a male police officer whose employer has invested him with intimidating authority to deal in private with troubled teenage girls, his taking advantage of the opportunity that authority and proximity and privacy give him to extract sexual favors from these girls should be sufficiently within the orbit of his employer-conferred powers to bring the doctrine of respondeat superior into play, even though he is not acting to further the employer’s goals but instead is on a frolic of his own.]

West v. Waymire, 114 F.3d 646, 649 (7th Cir. 1997) (internal citations omitted); see also Red Elk v. United States, 62 F.3d 1102, 1107 (8th Cir. 1995) (in case where officer picked up young woman for violating curfew, court held "it was also foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate his trust. Claymore had that opportunity because of his employment, the trappings of his office, and the curfew policy he was to enforce.").

¶ 39. Finally, Faragher relied on the greater opportunity that employers had to "guard against misconduct by supervisors ...; employers have greater
opportunity and incentive to screen them, train them, and monitor their performance." 524 U.S. at 803, 118 S.Ct. 2275. As the California Supreme Court noted in Mary M., 285 Cal.Rptr. 99, 814 P.2d at 1347, imposing liability on the employer may prevent recurrence of tortuous conduct by creating an incentive for vigilance by those in a position to prevent it. [4] No incentive to prevent

Page 63

this kind of conduct is created by leaving the victim uncompensated. Nor do we think we create an adequate incentive by requiring a plaintiff to prove that the employer inadequately supervised the officer. See West v. Waymire, 114 F.3d at 649 ("We want the police department to supervise its officers in this domain with especial care, and so we do not impose on the plaintiff the burden of establishing negligent supervision."). We also note the observation of the court in Mary M. that the costs of police misconduct should be borne by the community because the community derives substantial benefits from the lawful exercise of police power. 285 Cal.Rptr. 99, 814 P.2d at 1349.

¶ 40. With these three points in mind, we turn to the alternative constructions of § 219(2)(d). We start with the superior court's construction under which it held that the last clause does not apply to the facts of this case. The superior court recognized that the language of the section appeared to fit, but concluded that a "plain reading" of the exception contained in the last clause would "eviscerate the general scope of employment rule" and looked for ways to narrow its application. It settled on the limitations adopted in Gary v. Long, 59 F.3d 1391, 1397-98 (D.C.Cir. 1995), a sexual harassment case brought under Title VII of the Civil Rights Act. Gary adopted two limitations on the broad coverage of the exception. First, drawing on examples in the official comment to § 219(2)(d) as described in the concurring opinion in Barnes v. Costle, 561 F.2d 983, 996 (D.C.Cir. 1977) (MacKinnon, J., concurring), the court held that the exception makes the employer liable only if the tort was "accomplished by an instrumentality, or through conduct associated with the agency status." Gary, 59 F.3d at 1397. Second, it adopted a limitation from the comment to § 261, a section cited in the comment to § 219(2)(d). Gary, 59 F.3d at 1398. The comment stated:

Liability is based upon the fact that the agent's position facilitates the consumption of the [tort], in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Restatement (Second) Agency § 261, cmt. a. The court added from a comment to § 166:

If a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability.

Id. § 166, cmt. a. The superior court applied this second limitation in part to find that the exception in the last clause of § 219(2)(d) did not apply.

¶ 41. We conclude that the holding in Gary did not survive the Supreme Court decisions in Faragher and Ellerth. We read Faragher as [176 Vt. 496] rejecting the second limitation imposed by Gary, that the transaction seems "regular" to a third party and the agent appears to be acting within the authority given by the principal. This limitation is clearly a refinement of apparent authority analysis. See Faragher, 524 U.S. at 802, 118 S.Ct. 2275 (§ 219(2)(d) "covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship"); see also Costos v. Coconut Island Corp., 137 F.3d 46, 49 (1st Cir. 1998)

Page 64

argument that the last clause of § 219(2)(d) is a branch of apparent authority is inconsistent with the plain meaning of the words, and renders it superfluous). Since we have embraced the analysis in Faragher and Ellerth, we reject the holding of Gary and particularly its second limitation, as relied upon by the superior court. [5]

¶ 42. An alternative method of narrowing § 219(2)(d), such that plaintiff would not prevail, is presented by the recent decision of the Maine Supreme Judicial Court in Mahar v. StoneWood Transp., 2003 ME 63, 823 A.2d 540. In Mahar, the Maine court apparently held that § 219(2)(d) applies only in cases of misrepresentation or deceit. Id. at ¶ 21. In reaching this conclusion the court first relied upon the comment to § 219(2)(d) which provides:

Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant, as where one purports to speak for his employer in defaming another or interfering with another's business. See §§ 247-249. Apparent authority may also be the basis of an action of deceit (§§ 257-264), and even physical harm. See §§ 265-267. In other situations, the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons. See § 261. Again, the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position. See § 222. The enumeration of such situations is not exhaustive, and is intended only to indicate the area within which a master may be subjected to liability for acts of his servants not in scope of employment.

[176 Vt. 497] Restatement (Second) of Agency § 219(2)(d), cmt. e (emphasis added). The court found in the comment a limit on the section's applicability to "cases within the apparent authority of the employee, or when the employee's conduct involves misrepresentation or deceit." Mahar, 2003 ME 63, at ¶ 21, 823 A.2d 540. Based on a law review article discussing the deliberations in the American Law Institute over § 219(2)(d), see Casenote, Costos v. Coconut Island Corp.: Creating a Vicarious Liability Catchall Under the Aided-by-Agency-Relation Theory, 73 U. Colo. L.Rev. 1099, 1105 (2002), the court concluded that the section was intended to apply in "cases involving
apparent authority, reliance, or deceit.” Mahar, 2003 ME 63, ¶ 21, 823 A.2d 540.

¶ 43. The facts of Mahar involved only a weak claim that § 219(2)(d) provided vicarious liability. The defendant was a trucking company that employed a driver who assaulted plaintiff automobile driver in a road rage incident in which the truck driver thought that plaintiff was driving behind him with his high beams on. The court found that the truck driver engaged in no misrepresentation or deceit, and therefore § 219(2)(d) did not apply. Id. at ¶ 24.

¶ 44. Although we do not disagree with the holding of Mahar on the facts before the court, we are not persuaded by its rationale. The plain language of the section is directly against importing into it a requirement of misrepresentation or deceit. Although one of the hypotheticals in the comment involves misrepresentation or deceit,

Page 65

the other does not, and the comment does not limit the reach of the section language in this respect. Indeed, the comment specifically states that the “enumeration of such situations is not exhaustive.” Restatement (Second) of Agency § 219(2), cmt. e. Finally, the most important use of the last clause of § 219(2)(d) has been in sexual harassment law, and this application often does not involve deceit or misrepresentation. Thus, the Mahar construction of § 219(2)(d) is also inconsistent with Faragher and Ellerth.

¶ 45. More important, we doubt that the Mahar decision would determine the result in this case. As our analysis of the policy considerations shows, this is a vastly different case from Mahar. The difference is shown by the Maine court’s analysis of Cosenos in which the Court of Appeals applied § 219(2)(d) as part of Maine law to hold that the owner of an inn was vicariously liable when the inn manager entered the room of plaintiff guest using a master key and raped her. The holding of the Cosenos court is contained in the following paragraph:

Even viewing this case through the narrower focus of the commentary on Restatement § 219, which the Gary court found helpful, defendants are well within the scope of § 219(2)(d) liability. By virtue of his agency relationship with the defendants, as manager of the inn, [the manager] was entrusted with the keys to the rooms, including Costos’ room, at the Bernard House. Because he was the manager of the inn, [he] knew exactly where to find Costos. The jury could find that [the manager] had responsibilities to be at the inn or to have others there late at night. In short, because he was the defendants’ agent, [the manager] knew that Costos was staying at the Bernard House, he was able to find Costos’ room late at night, he had the key to the room and used the key to unlock the door, slip into bed beside her as she slept, and rape her.

137 F.3d at 50. In Mahar, the Maine court distinguished, but did not reject, Cosenos because the inn manager in that case “acted deceitfully by using his position as an employee to learn the number of the female guest, and by misusing a duplicate key to enter her room.” Mahar, 2003 ME 63, ¶ 50, 823 A.2d 540. The lesson from Mahar appears to be that the Cosenos analysis correctly interprets § 219(2)(d), if, in addition, plaintiff shows misrepresentation or deceit. In the same way that the Mahar court found deceit in Costos, we are convinced that it would find deceit in this case.

¶ 46. As our discussion suggests, we are more comfortable with the analysis in Costos than that in Mahar, and the Costos analysis is the only other construction of § 219(2)(d) that we have not considered above. Costos is consistent with the view of a number of commentators that employers should be vicariously liable for torts committed by employees involving an abuse of job-created authority, particularly where the tort involves sexual abuse. See L. Jorgenson et al., Transference of Liability: Employer Liability for Sexual Misconduct by Therapists, 60 Brook. L.Rev. 1421, 1435-39 (1995); Note, A Matter of Trust: Imposing Employer Vicarious Liability for the Intentional Torts of Employees, 3 D.C. L.Rev. 167, 183-85 (1995); Note, “Scope of Employment” Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees, 76 Minn. L.Rev. 1513, 1527-30 (1992). Each of the articles analyzes cases where courts have found vicarious liability under traditional principles, but the analysis is debatable and better viewed explicitly as situations where the nature and powers of the job created by

Page 66

the employer should give

[176 Vt. 499] rise to vicarious liability even for certain intentional torts outside the scope of the employment.

¶ 47. Nevertheless, we do not adopt the full rationale of Costos in this decision. Our primary reason is our second introductory point above, that we find it best to adopt a rationale as narrow as possible under the circumstances. We are guided by the Supreme Court’s decision in Ellerth not to venture beyond what is necessary to decide the case. See 524 U.S. at 2257 (“The aided in the agency relation standard, however, is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment.”). We also note that the California Supreme Court, which found vicarious liability for police misconduct in Mary M based on a rationale that is a variation of abuse of job-created authority, refused to apply its reasoning to other professions. See John R. v. Oakland Unified Sch. Dist., 48 Cal.3d 438, 256 Cal.Rptr. 766, 769 P.2d 948, 956-57 (1989) (teacher sexual assault on a ninth-grade student). [6]

Page 67

¶ 48. As our third opening point demonstrates, application of § 219(2)(d) to a sexual assault on a citizen by a law enforcement officer is probably the strongest application of the core principles behind § 219(2)(d) as explained in Faragher. See L. Jorgenson et al., supra, at 1435-36 (employer liability based on job-created authority is found most commonly in cases involving law enforcement officers). Thus, based on the Faragher analysis, we hold that if plaintiff can show that an on-duty
law enforcement officer was aided in accomplishing an intentional tort involving a sexual assault on the plaintiff by the existence of the employment relationship with the law enforcement agency, vicarious liability will apply.

¶ 49. In reaching this decision, we reject the argument of the dissent that any policy that allows vicarious liability for intentional torts of law enforcement officers must be made by the Legislature. This is a case of first impression in which we are discharging our traditional role of defining the common law. Exactly because we seek to follow the common law as it has developed in the jurisdictions in this country, we have used the Restatement of Agency to find the appropriate law. See American Law Institute, I Restatement of the Law of Contracts, introduction at viii (1932) (explaining that the purpose of a Restatement is "the preparation of an orderly restatement of the common law" to reduce uncertainty in the law). In saying this, we do not shirk from our duty "to adapt the common law to the changing needs and conditions of the people of this state." Hay v. Med. Ctr. Hosp. of Vt., 145 Vt. 533, 542, 496 A.2d 939, 944 (1985). This is not a case like Hillerby v. Town of Colchester, 167 Vt. 270, 272-73, 706 A.2d 446, 447 (1997), where our action would reverse a long-standing common law principle which the Legislature has endorsed and on which it has relied. Indeed, we have narrowly tailored our holding so that we are confident that few future cases will be controlled by it. If the Legislature disagrees with our balancing of the various considerations behind this decision, it can and should enact a different vicarious liability rule.

¶ 50. We turn now to the application of § 219(2)(d), as we have interpreted it, to the facts of this case. As we set out above, the superior court granted summary judgment to defendants because it found that plaintiff had not made a specific showing to bring herself within the language of the section; specifically, the court found: (1) even if Forrest was able to gain information about plaintiff while on duty, it was not "pursuant to an official investigation"; (2) his position did not aid him in gaining information about plaintiff because anyone was free to enter the store and ask questions; (3) Forrest never used his gun, handcuffs or other instrumentalities in accomplishing the crime; (4) even if Forrest had used the instrumentalities in committing the crime, a reasonable person would know that such use is not authorized; and (5) there is no evidence that the presence of his police car in front of the car warded off other patrons. As is apparent from our rejection of the limiting construction of § 219(2)(d) adopted by the superior court, we do not find the fourth reason relevant. We disagree that we can rely on the other reasons to deny summary judgment, generally because they are based on inferences that have not been viewed most favorably to the plaintiff as required by our summary judgment standard. See King, 2003 VT 34, at ¶ 7, 825 A.2d 16.

¶ 51. The issue of how Forrest gained access to plaintiff all alone in the store is disputed. One witness described that Forrest had been asking questions about plaintiff's work schedule. He entered the store when another employee was also working and bought food and left. He reentered about fifteen to thirty minutes after the second employee went off duty and loitered until all customers left. He parked his cruiser in front of the store with the parking lights on. When plaintiff's mother called plaintiff, Forrest took the telephone, terminated the conversation and hung it up.

¶ 52. The evidence went to Forrest's special access to plaintiff created by his job and enabling him to commit the tort. The trial court concluded that the information about plaintiff's schedule was not gathered in an investigation and could have been obtained by anyone on inquiry, and that there was no evidence that Forrest deterred anyone from entering the store. We believe that a jury could conclude that others could not ask the kind of questions and gain the kind of access Forrest did without his special status as a law enforcement officer. Moreover, the jurors could conclude based on their own experience that the presence of the cruiser with its parking lights on would deter persons from entering the store. We do not believe that the court could find as a matter of law that Forrest did not have special access to plaintiff: access created by the existence of the agency relationship that aided the commission of the tort.

¶ 53. With respect to Forrest's weapons, other instruments, and ability to inflict injury, the superior court relied upon the fact that Forrest never used his gun or other instruments on plaintiff. We do not believe the absence of evidence of actual use was determinative.

¶ 54. The evidence bearing on the issue came, almost entirely, from plaintiff's deposition; her testimony has aspects that support both her case and that of defendant. She testified that Forrest told her on the day of the sexual assault that if he ever used his gun he would shoot to kill. When asked whether she complained when Forrest grabbed her ponytail and used it to pull her head from side to side, she answered:

A. I kind of just went along with it hoping that he would just leave and go back to work. And I was hoping somebody would come in the store. I really--um, he was--had a controlling power over me. I mean he had a gun. He had handcuffs. I didn't--I didn't--I don't-

She went on to acknowledge that Forrest never threatened to use his gun or handcuffs. When asked why she didn't use the telephone to call for help, she answered that she "kept thinking about her cousin," who was killed in a domestic violence incident and that she was "too scared" and "who knows what would have happened. Once again, this man had a gun." When asked what made her fear that Forrest would use the gun, she answered that it was the comment that if he ever used the gun, it would be to shoot to kill. After plaintiff described the sexual assault,
she answered questions about her thoughts and motives as follows:
Q. Is there any other reason why you were intimidated by Richard Forrest?
A. Just his, his power. I mean he was a police officer.
Q. Well, you didn't have any problem calling the police about a police officer who allegedly raped you, right?
A. Right.

Page 69
Q. I mean was there some reason why you felt that you couldn't do something to help yourself because he was a police officer?
A. I don't know.
Q. Did it even enter into your mind?
A. I guess not.
Q. Right. He was just a big guy who was physically forcing you to do something you didn't want, right?
ATTORNEY MYERSON: Objection.
ATTORNEY LYNN: Q. Right?
A. I, I don't know.
Q. Well, you just don't remember?
A. I do remember. I just--I don't know if it was because of his uniform or I--I don't know.
Q. It may have been; it may not have been?
A. Yes.
Q. At this point, you just don't remember?
A. I--I do remember. I just--I don't--I don't know.

¶ 55. Defendants rely primarily on the last statements above as showing that the fact that Forrest was a police officer had nothing to do with plaintiff's submission to the sexual assault. Plaintiff relies upon her earlier statements that she went along because Forrest had controlling power over her because of the handcuffs and the gun.

¶ 56. We have cautioned about granting summary judgment "in any cases in which the resolution of the dispositive issue requires determination of state of mind, as the fact finder normally should be given the opportunity to make a determination of the credibility of witnesses, and the demeanor of the witness whose state of mind is at issue." Barbagallo v. Gregory, 150 Vt. 653, 653, 553 A.2d 151, 151 (1988) (mem.). Here, the extent to which Forrest's position as a law enforcement officer, with the gun and handcuffs, enabled him to force or persuade plaintiff to perform fellatio on him without significant physical resistance or cries for help is disputed. The issue goes to plaintiff's state of mind, and we do not believe that her state of mind can be determined as a matter of law from the summary judgment record. A jury could find based on this evidence that despite the fact that Forrest never used or threatened to use his gun on plaintiff, his position and implements sufficiently intimidated and scared plaintiff to enable him to commit the tort.

¶ 57. In summary, we find that none of the reasons advanced by the trial court warrant summary judgment for defendants on the § 219(2)(d) claim.

IV. Conclusion
¶ 58. Although we conclude that the superior court correctly held that defendants were entitled to summary judgment on the claim under 24 V.S.A. § 309 and on the theories of vicarious liability we have examined in the past, we also conclude that a fact-finder could find defendants vicariously liable under § 219(2)(d) of the Restatement (Second) of Agency, a theory of liability we expressly adopt. Specifically, the fact-finder can find that Forrest was "aided in accomplishing the tort by the existence of the agency relation," as we have defined that language in this decision.

Reversed and remanded.
¶ 59. SKOGLUND, J., dissenting.
I do not quarrel with the Court's adoption of § 219(2)(d) of the Restatement (Second) of Agency as an exception to our scope-of-employment rule for purposes of determining vicarious liability. I submit, however, that in its broad application of the last clause of that section to the facts of this case, specifically a sexual assault committed by a law enforcement officer while acting outside the scope of employment, the majority has created a threat of vicarious liability that knows no borders. While the majority limits its holding to sexual assaults committed by "on-duty law enforcement officers," ante, at ¶ 48, the standard that it articulates applies to a broad range of employees whose duties grant them unique access to and authority over others, such as teachers, physicians, nurses, therapists, probation officers, and correctional officers, to name but a few. As the trial court here aptly observed, the Court's interpretation could virtually "eviscerate [ ] the general scope of employment rule." Whether today's holding stands as a legal aberration, a special departure from the general principles of respondent superior created exclusively for law enforcement agencies, or the first in a new line of cases imposing vicarious liability on public and private employers for the sexual misconduct of their employees, only time will tell. In either case, irreparable and unwarranted damage will have been done, not only to the law enforcement agencies unfairly singled out for disparate treatment by today's decision, but to every public and private employer compelled to defend itself against the inevitable spate of lawsuits seeking to extend today's ruling. Therefore, I respectfully dissent.

¶ 60. Like the finding of a duty of care in negligence law, the imposition of vicarious liability under agency principles flows not from the rote application of rules, but from a considered policy judgment that it is fair and reasonable to hold an employer liable for the harmful actions of its employee. As Justice Souter, writing for the United States Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), cogently observed: "In the instances in which there is a genuine question about the employer's responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law....[T]he 'highly indefinite phrase' [vicarious liability] is 'devoid of meaning in itself' and is 'obviously no more than
a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not. " Id. at 796, 118 S.Ct. 2275 (quoting W. Keaton et al., Prosser and Keaton on Law of Torts § 502 (5th ed.1984)); see also Yamaguchi v. Harnsmut, 106 Cal.App.4th 472, 130 Cal.Rptr.2d 706, 713 (2003) ("[Vicarious] liability is based not on the employer's fault, but on public policies concerning who should bear the risk of harm created by the employer's enterprise.").

¶ 61. In its lengthy opinion, the majority here devotes considerable attention to the doctrinal debate over the meaning of an opaque phrase in a nonbinding provision of the restatement of the law of agency, yet barely addresses the broad policy ramifications of its decision holding a county sheriff's department vicariously liable for a sexual assault committed by a deputy sheriff acting entirely outside the normal scope of his employment duties. With respect, I submit that the majority's analysis is inadequate to support so extraordinary a holding, and that such a significant expansion of public entity liability should be left to the branch best equipped to consider all of the underlying social and economic ramifications, the Legislature.

¶ 62. "Under the settled doctrine of respondeat superior, an employer or master is held vicariously liable for the tortious acts of an employee or servant committed during, or incidental to, the scope of employment." Brueckner v. Norwich Univ., 169 Vt. 118, 122-23, 730 A.2d 1086, 1090 (1999).

Page 71

We have recognized that there are circumstances where even the intentional, unauthorized torts of an employee may be seen as "intending to advance the employer's interests" and therefore fairly considered within the scope of employment. Sweet v. Roy, 173 Vt. 418, 431-32, 801 A.2d 694, 704 (2002). Outside the context of sexual harassment in the workplace, however--a special case more fully discussed below--this Court has never held that an employer may be vicariously liable for a sexual assault committed by an employee. [7]

¶ 63. Indeed, consistent with Vermont precedent, the majority accurately characterizes Deputy Forrest's crime as "rooted in prurient self-interest"--rather than as intended to advance the interests of his employer--and therefore outside the proper scope of his employment. Ante, at ¶ 18. Nevertheless, relying on an ambiguous rule cited by the United States Supreme Court in two workplace discrimination decisions, Faragher, 524 U.S. at 801, 118 S.Ct. 2275, and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), the majority concludes that Deputy Forrest's employer--the Bennington County Sheriff's Department--may be held vicariously liable to the victim of his crime. The majority's path to this startling conclusion is worth exploring.

¶ 64. The rule in question is set forth in § 219(2)(d) of the Restatement (Second) of Agency, which provides that a master is not subject to liability for the torts of a servant acting outside the scope of employment unless "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(2)(d) (1958). While acknowledging--as indeed it must--that there was no evidence the Department had conferred upon Deputy Forrest the "apparent authority" to engage in sexual assault, the majority nevertheless concludes that there was sufficient disputed evidence that he was [176 VT. 507] "aided in accomplishing the tort by the agency relation" to survive summary judgment. In support of this conclusion, the majority relies on Faragher and Ellerth, companion cases in which the United States Supreme Court addressed the circumstances in which an employer may be held liable, under Title VII of the Civil Rights Act of 1964, for sexual harassment perpetrated by a supervisor against an employee. Observing that numerous lower court decisions had drawn upon a variety of agency law principles enumerated in the Restatement (Second) of Agency to reach conflicting holdings, Justice Souter, writing for the Court in Faragher, cautioned that "[t]he proper analysis ... calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, see, e.g., §§ 219, 228, 229, but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view." 524 U.S. at 797, 118 S.Ct. 2275 (emphasis added).

¶ 65. The Court concluded that the Congressional policies underlying Title VII--to prevent harassment in the workplace and encourage employers to adopt anti-harassment policies and establish reliable and accessible internal grievance mechanisms--would be well served by holding an employer vicariously liable when the misuse of supervisory authority, even if technically outside the scope of employment, creates a pervasively hostile work environment sufficient to alter the terms or conditions of a victim's employment or results in a tangible negative employment decision. [8] In so holding, the Court found "that the aided-by-agency relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here." Faragher, 524 U.S. at 802, 118 S.Ct. 2275. The Court was careful to explain, however, that in relying on [176 VT. 508] § 219(2)(d) its intention was not "to make a pronouncement of agency law in general," but rather "to adapt agency concepts to the practical objectives of Title VII." Id. at 802 n. 3, 118 S.Ct. 2275. [9]

¶ 66. Since the Faragher and Ellerth decisions, courts and commentators have disputed the proper scope of the "aided-in-accomplishing" clause of § 219(2)(d) outside the Title VII context. Some have severely criticized the Court for distorting the principles of vicarious liability embodied in § 219(2)(d), arguing that the Court fundamentally misinterpreted the second clause as completely independent...
of the first, and that properly understood it applies only where the agent "purported to act or speak on behalf of the principal and he was aided in accomplishing the tort by the existence of the agency relationship." P. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. Va. L.Rev. 517, 550 (2002). According to the critics, the result of that misunderstanding, if applied elsewhere, would be to "vastly expand vicarious tort liability, and would make the scope of employment requirement largely superfluous." Id. Others, relying on the history of § 219(2)(d) and the debates among the drafters at the 1956 Proceedings of the American Law Institute, have argued that the aided-in-accomplishing clause "does not properly apply in intentional physical tort cases that lack elements of reliance or deceit." Casenote, *Costos v. Coconut Island Corp.: Creating a Vicarious Liability Catchall under the Aided-by-Agency-Relation Theory*, 73 U. Colo. L.Rev. 1099, 1130 (2002); accord *Mahar v. StoneWood Transport*, 2003 ME 63, ¶ 21, 823 A.2d 540 ("section 219(2)(d)

Page 73

... is limited in its application to cases within the apparent authority of the employee, or when the employee's conduct involves misrepresentation or deceit"). An example of such reasoning can be found in *Costos v. Coconut Island Corp.*, 137 F.3d 46, 49-50 (1st Cir. 1998), where the court held that a hotel may be vicariously liable for the rape of a hotel guest by the hotel manager because the manager had been entrusted with the room keys, knew in what room the victim was located, and had access to the hotel at night, and therefore was "aided in accomplishing the tort" by the agency relationship.

¶ 67. Weighing in on this doctrinal debate, the majority here rejects the arguments for a narrow construction of the second clause of § 219(2)(d) in favor of a broader reading that would impose vicarious liability on a law enforcement agency whenever the "plaintiff can show that an on-duty law enforcement officer was aided in accomplishing an intentional tort involving a sexual assault on the plaintiff by the existence of the employment relationship with the law enforcement agency." *Ante*, at ¶ 48. Such a reading is consistent, the majority argues, with *Ellerth* and *Faragher*, where the employers purportedly created the special conditions of "access" and "power" that enabled their employees to engage in sexual misconduct. *Ante*, at pp 29, 30.

¶ 68. With respect, I submit that the majority's analysis and conclusion are fundamentally flawed. First, as noted, the high court never intended for its decisions in *Faragher* and *Ellerth* to have any influence on the development of common-law agency principles or the application of § 219(2)(d) outside the specific context of Title VII. Second, the drafters' intentions with respect to § 219(2)(d), whether expansive or narrow, are largely beside the point when it comes to deciding whether to hold a law enforcement agency vicariously liable for a sexual assault perpetrated by one of its officers. That issue--as noted--turns on policy considerations of a broad nature, considerations that the majority barely acknowledges and insufficiently analyzes.

¶ 69. The "policy" most pertinent to the issue, according to the majority, is the "extraordinary power that a law enforcement officer has over a citizen*.* *Ante*, at ¶ 34. Others mentioned are the "unique access" that a police officer's position affords for the commission of sexual assaults, particularly in the current "era of community policing," *ante*, at pp 37, 38; the "vulnerability" of the victim whose safety the officer is charged to protect, *ante*, at ¶ 36; the assumption that "imposing liability on the employer may prevent [the] recurrence of tortious conduct by creating an incentive for vigilance by those in a position to prevent it"; *ante*, at ¶ 39; and finally the idea that "the costs of police misconduct should be borne by the community because the community derives substantial benefits from the lawful exercise of police power." *Id*.

¶ 70. None of these asserted policy considerations withstands scrutiny. While it is certainly enlightening to learn that we live in a new "era of community policing" (like many so-called reforms, the concept of "community policing," viewed in historical context, looks very much [*176 Vt. 510*] like the old-fashioned policeman "on the beat" that existed for many years), the majority fails to explain how "community policing" forms the policy basis for holding the Sheriff's Department vicariously liable for the sexual assault committed by Deputy Forrest. The majority notes that Deputy Forrest's ostensible justification for being in the store may have been related to his police function, and that the assault may therefore have been facilitated by his employment

Page 74

and aided by his "power" relationship with the victim. But this does not answer the question of why it is fair to hold a law enforcement agency liable for an officer's outrageous abuse of that power. When there has been no showing that the police department itself was negligent in hiring, training, or supervising its officer, why is it fair or reasonable to burden the public with liability for a sexual assault perpetrated by a rogue employee solely for his own twisted personal gratification?

¶ 71. It is certainly true that police officers occupy a position of trust and authority by virtue of their employment, and that this authority informed the decision on which the majority principally relies, *Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 285 Cal.Rptr. 99, 814 P.2d 1341, 1349 (1991). What the majority does not explain, however, is how--if at all--this distinguishes police officers from many other employees, both public and private, who occupy parallel positions of authority. An employee's "access" or opportunity to commit an intentional tort may be facilitated by a "trust" relationship in many different contexts (e.g., the postal service employee or UPS deliverer admitted to a home by virtue of the trust engendered by the position, the tow-truck operator called to help an unsuspecting motorist stranded on the highway, the psychiatrist entrusted with a child in the privacy of his or her office), and the range of employees vested with some
form of "power"—in many cases extraordinary power—over others by virtue of their employment is considerable. Apart from labeling the police officer's authority as "unique," the majority fails to explain what qualitatively distinguishes a law enforcement officer's power over a "vulnerable" detainee from a correctional officer's power over a prisoner, a teacher's power over a student, a psychiatric nurse's power over a mentally ill patient, a residential counselor's power over the teen-age residents of a group home, or a probation officer's power over a probationer, to name only a few analogous relationships.

¶ 72. Indeed, building on the holding in Mary M., some courts have advocated for the extension of vicarious liability to other professions based precisely on such unexamined considerations. See, e.g., Harrington v. Louisiana State Bd. of Elementary & Secondary Educ., 714 [176 Vt. 511] So.2d 845, 851-52 (La.Ct.App.) (rape of student by community college instructor may be imputed to state employer based on "authority given to [the instructor]"); cert. denied, 728 So.2d 1287, 1288 (La.1998). Other courts, however, have rejected the facile argument for vicarious liability based simply on the employee's authority. In Niece v. Elmtree Group Home, 131 Wash.2d 39, 929 P.2d 420, 430 (1997), for example, the court declined to hold a residential facility vicariously liable for an employee's rape of a resident absent "sound policy reason[s] to shift the loss created by the employee's intentional wrong from one innocent party to another." Even more significantly, several justices of the California Supreme Court have concluded that Mary M. was wrongly decided and should be overruled. See Farmers Ins. Group v. County of Santa Clara, 11 Cal.4th 992, 47 Cal.Rptr.2d 478, 906 P.2d 440, 459 (1995) (Baxter, J., concurring) (writing separately to express his "disagreement with Mary M."); id. at 460-61 (George, J., joined by Lucas, C.J., concurring) (characterizing Mary M. as "an aberration that should be overruled"); see also Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 12 Cal.4th 291, 48 Cal.Rptr.2d 510, 907 P.2d 358, 367 (1995) (George, J., joined by Lucas, C.J., concurring) (calling for Mary M. to be overruled). While concurring in the court's unwillingness to extend the Mary M. rule to other professions, these justices have candidly acknowledged the absence of any

Page 75

principled distinction between the scope of authority exercised by police officers and that of other professions such as teachers, and have called for the end to the "special rules, purportedly applicable only to on-duty police officers." Farmers Ins., 47 Cal.Rptr.2d 478, 906 P.2d at 461 (George, J. & Lucas, C.J., concurring) ("Police officers should be governed by the same standard employed in determining whether the misconduct of other employees falls within the scope of employment. Police officers occupy a position of trust and authority in our society, but the same is true of other public employees, such as teachers.").

¶ 73. The majority also suggests that the imposition of vicarious liability for intentional sexual misconduct by police officers serves the public good by providing an "incentive" for better training and supervision. The injury-prevention rationale might work in the context of workplace sexual harassment, but I fail to understand how better training will deter an intentional sexual assault committed solely out of personal motivations. Indeed, the majority does not cite a single example or empirical authority suggesting what the Sheriff's Department might do differently to prevent future assaults. See Note, Mary M. v. City of Los Angeles: Should a City Be Held Liable Under [176 Vt. 512] Respondeat Superior for a Rape by a Police Officer?, 28 U.S.F. L.Rev. 419, 450-53 (1994) (noting that employers' practical ability to prevent sexual assaults of this nature is "slight"). Nor does the majority even mention the greater likelihood that vicarious liability in these circumstances may have negative public consequences, inducing departments to curtail the kinds of beneficial activities—such as "community policing"—that place officers in isolated situations with members of the public, or encouraging them to take defensive measures such as two-person police patrols, however costly to the public. See id. at 451 (sexual assaults such as that in Mary M. "realistically cannot be prevented without causing negative consequences for law enforcement").

¶ 74. Equally misguided is the majority's reliance on the notion that vicarious liability serves the interest of spreading the "costs of police misconduct" among those who benefit "from the lawful exercise of police power." Ante, at 39. Risk spreading assumes that the employer can reasonably anticipate the loss and pass the cost of injuries to the beneficiaries of the enterprise in the form of higher rates or prices. See G. Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 543-44 (1961). Public agencies such as police departments or school districts, however, cannot raise their prices, and, short of increasing already overwhelming property tax burdens, their only option may be to cut funding elsewhere. See Note, supra, 28 U.S.F. L.Rev. at 456 ("Imposition of vicarious liability could have the effect of taking away funding to pay judgments that would otherwise be allocated to pay for police services."); see also TBH v. Meyer, 168 Vt. 149, 154, 716 A.2d 31, 35 (1998) (if insurer were required to cover costs of insured's sexual misconduct, causing other policy holders to bear expense of passed along costs, "[t]he average person ... would cringe at the very suggestion") (citation omitted).

¶ 75. It has also been suggested that vicarious liability is necessary in these kinds of situations to ensure the compensation of tort victims. Mary M., 285 Cal.Rptr. 99, 814 P.2d at 1348-49. But is it really necessary or fair to impose liability without fault when the opportunity exists to hold employers directly liable if it can be proven that they were negligent in hiring, training, or supervising the tortfeasor? See Brueckner, 169 Vt. at 126, 730 A.2d at 1093

Page 76

(principal may be held directly liable for damages resulting from negligent supervision of employee); TBH, 168 Vt. at
that the assault was particularly facilitated by Deputy Forrest’s "authority" as a law enforcement officer; any other assailant with a handgun and the physical power could have committed the same offense. Thus, while the majority purports to reject the notion that simply owning a badge, gun, and uniform are enough to create vicarious liability its holding suggests exactly the reverse.

¶ 79. Recently, in Smith v. Parrott, 2003 VT 64, ¶ 7, 175 Vt. 375, 833 A.2d 843, this Court was presented with a similar opportunity to broadly expand the potential tort liability of a profession, in that case physicians and other health care professionals, by departing from the traditional causation standard and adopting the so-called "loss of chance" doctrine. While acknowledging that the doctrine had received substantial support among legal commentators and had been accepted in a number of jurisdictions, we nevertheless cautioned that its adoption here raised "fundamental questions about its potential impact on not only the cost, but the very practice of medicine in Vermont; about its effect on ... other professions and the principles--if any--which might justify its application to medicine but not other fields." Id. at ¶ 13. Confronted with these uncertainties, we concluded that the decision "involves significant and far-reaching policy concerns' more properly left to the Legislature, where hearings may be held, data collected, and competing interests heard before a wise decision is reached." Id. at ¶ 14 (quoting Crosby v. United States, 48 F.Supp.2d 924, 931 (D.Alaska 1999)). I submit that prudence dictates a similarly cautious approach here, where the issues are even more complex, the ramifications for the public welfare and safety even greater, and the Court's obvious lack of information for policy formulation that much more significant. See Niece, 929 P.2d at 430-31 (declining to impose vicarious liability on group home for employee's rape of resident because 'complex questions of public policy' as to how the cost of such liability would be borne and how it would affect residential care

[176 Vt. 515] ("dictates that we defer to the Legislature"). The better part of wisdom here is to defer to the Legislature, which is uniquely equipped to "engage in the fact-finding and problem-solving process' necessary to an informed and balanced decision on the question of whether a police department may be held vicariously liable for an intentional sexual assault committed by an officer. Hillery v. Town of Colchester, 167 Vt. 270, 276, 706 A.2d 446, 449 (1997). I would, therefore, affirm the summary judgment of the trial court in favor of defendants.

¶ 80. I am authorized to state that Chief Justice Amestoy joins this dissent.

Notes:
[1] Plaintiff also sued Bennington County and the State of Vermont, but the case against these defendants was dismissed, and plaintiff has not appealed this dismissal.
[2] Forrest's sexual misconduct also directly violated explicit Bennington County Sheriff's Department policy prohibiting sexual activities while on duty. This fact, while relevant, is not determinative in our scope of employment

Page 77
inquiry because "there is no requirement that the master specifically authorize the precise action the servant took." *Sweet v. Roy*, 173 Vt. 418, 432, 801 A.2d 694, 704 (2002).

[3] In following the United States Supreme Court decisions, we reject the dissent's claim that the Supreme Court "never intended for its decisions ... to have any influence on the development of common-law agency principles or the application of § 219(2)(d) outside the specific context of Title VII." *Post*, at ¶ 68. The Supreme Court applied the Restatement of Agency because it found that "Congress wanted courts to look to agency principles for guidance" in deciding hostile environment sex discrimination cases under Title VII. *Meritor Sav. Bank*, FSB *v.* Vinson, 477 U.S. 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Thus, in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), the Court noted that it was relying on "the general common law of agency." (Citation omitted). The Court noted that state court decisions could be "instructive," but they often relied upon federal decisions, id. at 755, 118 S.Ct. 2257 and found the Restatement of Agency a useful starting point to find the general common law. *Id.* It went through the various sections of the Restatement (Second) of Agency and finally centered on § 219(2)(d) as the most useful. It then applied the "aided in the agency relation principle" of § 219(2)(d) to the situation before it. *Id.* at 760-65, 118 S.Ct. 2257. The analysis in *Faragher v. City of Boca Raton*, 524 U.S. 775, 801-02, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), is similar, and as noted in the text, the Court resolved a dispute over the meaning of the language of § 219(2)(d), holding that the "aided-by-agency-relation principle" was not merely a refinement of apparent authority.

It is, of course, the nature of the common law that every appellate decision represents the development of the common law, and nothing in the Supreme Court decisions suggests they are not an integral part of that process. Indeed, the resolution of the dispute over the meaning of § 219(2)(d) in *Faragher* is exactly the kind of decision that best defines and develops the common law. No common-law court engaged in this process, and certainly not the highest court of this country, would expect that a common-law decision on one set of facts would have no influence on future decisions applying the same legal principle to a different factual scenario.

[4] The California Supreme Court also concluded "[t]here is little or no risk that preventive measures would significantly interfere with the ability of police departments to enforce the law and to protect society from criminal acts." *Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 285 Cal.Rptr. 99, 814 P.2d 1341, 1348 (1991) (en banc).

[5] We do not war with the first limitation of *Gary v. Long*, 59 F.3d 1391 (D.C.Cir. 1995), which was drawn from the *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir. 1977) (MacKinnon, J., concurring), concurrence and is consistent with the language of the Restatement section. Plaintiff's theory is consistent with that limitation.

[6] The dissent creates a cross-fire of criticism, arguing first that the decision is so broad as to create "a threat of vicarious liability that knows no borders," *post*, at ¶ 59, and then that it is too narrow because it "fails to set forth any basis to distinguish a police officer's 'power' from that of other employees in analogous positions of authority over vulnerable populations" and represents "it is because we say so" jurisprudence. *Post*, at ¶ 71. The criticism does not prompt us to decide cases not before us. We do cite the California cases to point out that principled distinctions can be drawn between law enforcement officers and others in positions of authority. Whether we should adopt those distinctions should be left to future decisions.

On this point, the dissent places significance on the fact that "several justices of the California Supreme Court have concluded that Mary M. was wrongly decided and should be overruled." *Post*, at ¶ 72. This criticism is misleading to the extent that it implies that the justices who authored *Mary M.* have changed their position or that *Mary M.* has been overruled. On the vicarious liability holding, *Mary M.* was a 5-to-2 decision, with Justices Baxter and Lucas writing a long and detailed concurrence where they dissented on this point. See 285 Cal.Rptr. 99, 814 P.2d at 1357-68. In December of 1995, roughly four years after issuing *Mary M.*, the court revisited the vicarious liability principles in *Farmers Ins. Group v. County of Santa Clara*, 11 Cal.4th 992, 47 Cal.Rptr.2d 478, 906 P.2d 440 (1995), and *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal.4th 291, 48 Cal.Rptr.2d 510, 907 P.2d 358 (1995), the cases cited in the dissent. In each of these cases, the plaintiff argued that the principles of *Mary M.* should be extended to cover the facts of the situation before the court in *Farmers Insurance Group* to the sexual harassment of a deputy sheriff by another deputy sheriff and in *Lisa M.* to sexual fondling of a hospital patient by an ultrasound technician during an examination. In both, a majority of the court found *Mary M.* distinguishable.

Justices Baxter and Lucas reiterated their disagreement with *Mary M.*, arguing that it should be overruled for the reasons they stated previously. They were joined by one new justice, Justice George, who replaced one of the *Mary M.* majority justices. Contrary to the dissent in this case, I draw no significance from the fact that those who disagreed with *Mary M.* continue to adhere to their position or that they are joined by an additional justice who did not sit on *Mary M.* I do find it significant, however, that *Mary M.* remains the law of California. Although the California Supreme Court has not revisited the decision since 1995, it is being applied, and distinguished where appropriate, in decisions of the California Court of Appeals. See, e.g., *Maria D. v. Westec Residential Security, Inc.*, 85 Cal.App.4th 125, 102 Cal.Rptr.2d 326, 326-27 (2000) (*Mary M.* does not apply to rape by a private security guard); *Thorn v. City of Glendale*, 28 Cal.App.4th 1379, 35 Cal.Rptr.2d 1 (1994) (*Mary M.* does not apply to suit against the city for action of fire marshal in setting fire to a building the marshal was inspecting). The analysis in these cases, as well as in *Farmers Insurance Group, Lisa M.*, and

© 2012 ELLIS BOXER & BLAKE
John R. v. Oakland Unified School District, is a strong response to the dissent's argument that the circumstances in this case cannot be rationally distinguished from others where the intentional tort is committed by a person with a position of authority over a vulnerable person. [7] Derivative or vicarious liability of an employer for the intentional misconduct of an employee is to be distinguished, of course, from an employee's direct liability for the negligent hiring or supervision of an employee. Braeckner v. Norwich Univ., 169 Vt. 118, 126, 730 A.2d 1086, 1093 (1999). There was no allegation or evidence here, however, that the assault was the result of the Sheriff's Department's failure to adequately screen, train, or supervise Deputy Forrest.

[8] In distinguishing the two types of discrimination, the Court explained that where the supervisory misconduct results in a tangible employment action, such as firing, failing to promote, or reassignment, it "requires an official act of the enterprise, a company act," and thus "becomes for Title VII purposes the act of the employer." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762, 118 S.Ct. 2257, 141 L.Ed.2d 662 (1998). For sexual harassment not involving a tangible employment decision, the Court found that imposing vicarious liability upon the employer would provide incentives to promote the policies of Title VII, but also recognized that the employer should be able to assert as an affirmative defense that it "had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards ...." Faragher v. City of Boca Raton, 524 U.S. 775, 805, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

[9] Even before the Supreme Court's decisions in Faragher and Ellerth, this Court in Allen v. Dep't of Employment & Training, 159 Vt. 286, 618 A.2d 1317 (1992), reached a similar conclusion concerning an employer's potential liability for sexual harassment in the workplace. See id. at 291, 618 A.2d at 1320 (relying on Title VII cases and § 219(2)(d) to suggest that knowledge of supervisor's sexual harassment of employee could in some circumstances be imputed to employer).

[10] In Red Elk v. United States, 62 F.3d 1102, 1104 (8th Cir. 1995), the thirteen year old victim was picked up by a tribal officer and raped in the officer's cruiser. The court of appeals described "five more incidents of intercourse" with the victim in which "in some instances the victim voluntarily submitted" until she later "put an end to the relationship." Id. at 1104. To describe the multiple sexual assaults of a thirteen-year-old girl by a grown man as a "relationship" and suggest that she "voluntarily submitted" discredits the opinion's overall analysis.
time the manager approached Griffis' supervisors, Griffis had offered a job at the Village to a Victorian House employee and had unilaterally pulled all but two staff from the Village, leaving it inadequately staffed to meet resident-care needs. Griffis' supervisors approached her about these actions, expressed their concerns, and explained the staffing hierarchy to Griffis. Griffis disagreed with her supervisors about the hierarchy and contended that, as director of nursing services, she should have the authority to hire, fire, and discipline staff.

¶ 5. At approximately this time, Griffis' supervisors began to be concerned that she was spending more time than necessary at the Village and the Victorian House, both of which had management in place, and too little time in the Health Care Center, to which she was primarily assigned. The supervisors were informed by the assistant director of nursing that Griffis was not keeping up with her responsibilities at the Health Care Center. The supervisors circulated a memorandum to Griffis and two other employees clarifying their respective responsibilities for staffing supervision, hiring, and scheduling. The memorandum stated that Griffis "is not the person responsible for the hiring of the aides or for the supervision or for the scheduling in Victorian House. The aforementioned aide staffing supervision[,] hiring[,] and scheduling is the responsibility of the Community Administrator. In the Village this is the responsibility of the Village Director." Griffis again disagreed with her supervisor about this allocation of authority, and admitted that the two "clashed" over it. Griffis' supervisor stated that, around this time, she began to see Griffis as stubborn and uncooperative.

¶ 6. Soon after, Cedar Hill filled an opening in the position of social services director with a person who was not a licensed social worker and who, according to Griffis, did not have direct experience in the nursing home setting. Although Griffis was not involved with the hiring of the new employee, and would have no supervisory responsibilities over her, Griffis was concerned with the new employee's qualifications. Griffis approached the new employee three times and told her she was not qualified under the applicable state regulations. According to the new employee, Griffis then gave her only the portion of the regulations applying to larger nursing homes, at which the social-services-director position must be filled by a licensed social worker, and not the portion of the regulations governing smaller homes, at which social services directors need not be licensed. Cedar Hill is subject to the regulations for smaller homes.

¶ 7. At the end of a staff meeting soon after the hiring, Griffis and two other employees expressed their concerns about the social services director to their supervisors. Griffis contended that the social-services-director position needed to be filled by a licensed social worker under the applicable regulation, while her supervisors believed that the regulation applied only to larger nursing homes. Griffis characterized the supervisors' response to her concerns as "angry," but the other two complaining employees stated that their concerns were acknowledged and answered respectfully. Neither of the other two employees suffered any adverse employment consequences as a result of raising their concerns about the social services director. Griffis states that she was "far more dogged" than her coworkers in making her concerns known. At the time of the decision below, the social services director was still employed at Cedar Hill, and state regulators who had evaluated the facility had found no fault with her lack of a social work license.

¶ 8. As noted, during this time Griffis' supervisors were concerned that Griffis was no longer fulfilling her original job responsibilities in the Health Care Center because she was spending too much time in the Village and the Victorian House. Thus, on August 18, 2004, they relieved her of the additional duties she had been assigned at the latter two facilities.[1] This was done by memorandum, which stated in part as follows:

Effective this date, I am requiring that you place your full attention on the duties and responsibilities as the DNS of [Page 1144]

Cedar Hill's nursing unit only. I feel that you have been spread [too] thin covering both the Victorian House and the Village....

... In addition, I am asking for detailed daily reports on resident conditions and staff issues. I need to be made aware of issues and how they are being handled-I don't want to micro-manage, just be kept informed. I would like to be kept abreast of potential employees and where you plan to put them if approved for hire.

Griffis responded, also by memorandum, on August 20, 2004, and was, in her words, "forceful" in her disagreement with the decision to reduce her responsibilities. Griffis' responsive memorandum does not assert any belief that her responsibilities were reduced in retaliation for her concerns about the social services director.

¶ 9. Griffis continued to clash with her supervisor over the latter's desire to be involved with "plan care meetings" and felt that her supervisor was micromanaging; Griffis wrote to her supervisor to express her opinion that, when people say they are not going to micromanage, they actually plan to do just that. When Griffis' supervisor asked to attend a plan care meeting, Griffis asked, "Aren't there better things for you to do?"

¶ 10. On September 9, 2004, according to Griffis, her supervisors considered hiring an unqualified eighteen-year-old as an aide in Victorian House. Griffis claims that she expressed her concern that this would undermine good patient care, and conceded that the person never was hired. Neither of Griffis' supervisors had any memory of the incident, and no such person was ever actually hired. Similarly, Griffis contended at trial that on September 9, 2004, two unqualified people dispensed medication to patients at Victorian House. Griffis' supervisor denied the allegation, and Griffis avers only that she told her...
supervisor about the alleged infraction; Griffis did not disclose the problem to anyone else.

¶ 11. Griffis' employment was terminated on September 10, 2004. She then brought this suit, alleging that she was fired in retaliation for reporting to her supervisors her concerns about the social services director, the never-hired eighteen-year-old, and the alleged dispensation of medicines by unqualified people.[2] Griffis' suit was premised on her claim that the termination of her employment violated 21 V.S.A. § 507, which provides protection for "whistleblowers" who are employees of hospitals and other health-care facilities. The trial court, after making the above findings, concluded that plaintiff had not met her burden of showing "either (1) that the reasons given for her termination were pretextual, or (2) that the real reason for her termination was that the managers of Cedar Hill wanted to retaliate against her for disclosing perceived problems." Griffis appealed. The trial court's conclusions of law are set out below, in connection with Griffis' specific claims of error.

I. The McDonnell Douglas Standard

¶ 12. Plaintiff's first claim of error is that the trial court failed to consider certain evidence pertinent to the third step in the so-called McDonnell Douglas burden-shifting framework, which we have applied in analyzing Vermont Fair Employment Practices Act (FEPA) claims. See Page 1146

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Gallipo v. City of Rutland, 2005 VT 83, ¶ 15, 178 Vt. 244, 882 A.2d 1177. Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of retaliation. Gallipo, 2005 VT 83, ¶ 15, 178 Vt. 244, 882 A.2d 1177. The elements of a prima facie case are: (1) the plaintiff engaged in a protected activity; (2) the employer was aware of the activity; (3) the plaintiff suffered adverse employment consequences as a result of the activity; and (4) there was a causal connection between the activity and the consequences. Id. If the plaintiff makes out a prima facie case, the burden of production shifts to the defendant, who must state legitimate, nonretaliatory reasons for the adverse employment action. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 26, 176 Vt. 356, 848 A.2d 310. If the employer meets this burden, the burden is again on the plaintiff to prove by a preponderance of the evidence that the articulated reasons are pretextual. Id. ¶ 27; Boulton v. CLD Consulting Eng'rs, Inc., 2003 VT 72, ¶ 15, 175 Vt. 413, 834 A.2d 37. This third step is similar to, and may require analysis of the same evidence as, the first step.

¶ 13. Here, the trial court concluded that Griffis had "not met her burden of proving either (1) that the reasons given for her termination were pretextual, or (2) that the real reason for her termination was that the managers of Cedar Hill wanted to retaliate against her for disclosing perceived problems." [3] The court noted that Griffis was fired after complaining while two other employees who raised similar concerns about the social services director's qualifications were not. The court explained that "[c]onsideration of the entire record supports the conclusion that Cedar Hill fired Griffis for insubordination, and not for reporting her concerns about possible violations of the law, or her concerns about improper ... patient care." Further, the court went on, "strong evidence supports the conclusion that Cedar Hill fired [Griffis] for legitimate, nonretaliatory reasons."

¶ 14. While the court might have been more explicit in supporting its conclusion with more specific findings, we have no difficulty affirming based on the entire record. See Gilwee v. Town of Barre, 138 Vt. 109, 111, 412 A.2d 300, 301 (1980) (this Court may affirm the trial court on any proper basis revealed by the record). There was ample support in the record for the conclusion that Griffis' termination was caused by her insubordination, and not by her engaging in protected activities. See Gallipo, 2005 VT 83, ¶ 15, 178 Vt. 244, 882 A.2d 1177. As noted above, the court found that Griffis: (1) had multiple confrontations with her supervisors over the management hierarchy at Cedar Hill, (2) acted without regard to that hierarchy in several instances, (3) confronted a coworker about her supposed underqualification despite having no supervisory authority over the coworker, (4) failed to keep up with her original responsibilities in the Health Care Center, and (5) refused to invite or notify her supervisor to attend certain meetings in which the supervisor had expressed an interest.

¶ 15. Griffis' arguments regarding causation are directed at the trial court's assessment of credibility and weight. As credibility and weight are the province of the trial court, these arguments are no impediment to affirming the trial court's decision. See In re Route 103 Quarry, 2008 VT 88, ¶ 12, 184 Vt. __, 958 A.2d 694 ("[i]t was the trial court's prerogative to assess the credibility of witnesses and weigh the evidence."). The question before us on appeal is not whether there was a basis upon which the court might have reached a different conclusion, but whether there was a basis in the record upon which the court could reach the conclusion it did. Gilwee, 138 Vt. at 111, 412 A.2d at 301.

II. Rule 52

¶ 16. Griffis next contends that the trial court "failed to make legally sufficient findings of fact and conclusions of law." See V.R.C.P. 52; Jensen v. Jensen, 139 Vt. 551, 433 A.2d 258 (1981). The first aspect of this contention is that the court "failed to adequately consider the evidence presented at trial, and thus, as a matter of law, failed to conduct the inquiry envisioned under the McDonnell Douglas framework and Vermont case law." [4] This argument appears to be little more than a recasting of the argument rejected above. See supra, ¶ 15. It is the province of the trial court to weigh the evidence. Griffis' bare assertion that the court "failed to adequately consider the evidence" can be read only as a general challenge to the trial court's exercise of its prerogative to decide which evidence and witnesses to credit.
¶ 17. Griffis also argues, in the alternative, that the "conclusory nature of the trial court ruling on liability and the lack of discussion concerning key evidence and how that evidence was weighed, support a conclusion on appeal that the court's findings of fact and conclusions of law are inadequate." Because of this purported deficiency, Griffis argues, "this Court is left to speculate as to the reasons for the [trial] court's decision." As noted above, the trial court could have more clearly linked its conclusions to its extensive findings, but the lack of more express linkage does not, by itself, require reversal. See Quazzo v. Quazzo, 136 Vt. 107, 113, 386 A.2d 638, 642 (1978) ("We examine the record to see whether a given result is supportable, upon the assumption that the trial court had the evidence in mind."). This is not a case like Jensen where the court's ultimate decision was based on no explicit findings at all and we were left to speculate as to the basis for the trial court's decision. See Jensen, 139 Vt. at 553, 433 A.2d at 260. Here, the trial court made clear enough that Griffis' insubordination and usurpation of unassigned responsibility served as legitimate grounds for termination, and that her complaints about hiring an underqualified caregiver were insufficient to carry her burden of persuasion on pretext, given that her coworkers made the same complaint without being terminated.

III. Exclusion of Evidence

¶ 18. Griffis' final claim of error is that the trial court improperly excluded "at least six evidentiary matters, all of which were relevant to considerations before the court." As plaintiff notes, the trial court ruled that the proffered evidence was irrelevant, while Griffis contended at trial that the information was relevant because "the case, by its nature, required an understanding of context and circumstances." Plaintiff's argument on appeal is that "by excluding the evidence, the trial court prevented Griffis from presenting a full picture of the context and circumstances surrounding her demotion and firing." We agree with the trial court that the proffered evidence was not relevant, and was therefore properly excluded. Rulings on the admission or exclusion of evidence are highly discretionary, and we will reverse only where discretion has been abused or withheld and prejudice has resulted. The burden on a party claiming an abuse of discretion in determining the relevance of evidence is a heavy one.


¶ 19. The testimony Griffis claims was improperly excluded appears to have been largely about events that occurred outside of Griffis' tenure at Cedar Hill. Griffis asserts that these matters were "relevant to considerations before the court" to "present[ ] a full picture of the context and circumstances surrounding her demotion and firing." Griffis has not stated with any particularity how the excluded evidence was relevant to any of her three causes of action, and we discern no error in the trial court's conclusion that the excluded evidence was irrelevant. Further, even if the excluded evidence were relevant, its exclusion would not be grounds for reversal unless Griffis had demonstrated that its exclusion likely affected the outcome of the case. See V.R.E. 103(a); Jakab v. Jakab, 163 Vt. 575, 579-80, 664 A.2d 261, 263 (1995). Griffis has made no such showing.

Affirmed.

Notes:
[1] Although the supervisors stated at the time that Griffis' compensation would be reduced to reflect her diminished responsibilities, the record reveals that her compensation did not change.
[2] The court concluded that plaintiff could not base her retaliation claim on her mere allegation that her supervisors considered hiring an unqualified eighteen-year-old, or on the alleged dispensation of medicines by unauthorized people, because plaintiff had not shown that she complained about either issue before her employment was terminated.
[4] It appears that Griffis may also intend, by citation of Rule 52(a), to assert that the trial court's findings were clearly erroneous. As Griffis does not state which findings, specifically, she claims are clearly erroneous, we do not reach the claim. See V.R.A.P. 28(a)(4).
[5] Griffis asserts that section V of her brief explains the six asserted evidentiary errors. That section, however, does not name the six errors; we assume that Griffis meant to refer to section IV of her brief, in which there appears a list of excluded evidence.
EMPLOYMENT LAW

PART III: WORKERS’ COMPENSATION
VERMONT WORKERS’ COMPENSATION OVERVIEW

Compensation for Personal Injury

Injury by Accident
In Vermont, an employee is entitled to workers’ compensation benefits if the employee receives a personal injury by accident arising out of and in the course of employment.

Arising Out of the Employment
The Vermont Supreme Court has held that an injury arises out of employment if it would not have occurred “but for” the fact that the conditions and obligations of the employment placed the claimant in the position where she was inured. This is often referred to as the positional risk doctrine. The burden is on the employee to prove that “but for” the employment and his or her position at work, the injury would not have happened.

In the Course of Employment
The Vermont Supreme Court has determined that an injury occurs “in the course of employment” when it occurs while the employee is on duty at a place where the employee was reasonably expected to be while fulfilling the duties of the employment contract.

Exceptions

Horseplay
A personal injury does not arise out of and in the course of employment if it is the result of horseplay. However, since some amount of horseplay can be expected, the Vermont Department of Labor (“Department”) applies a four part test to determine if the horseplay deviated too far from the employee’s work duties such as that it can no longer be said to have arisen out of the employment: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (i.e. was the performance of some work duty commingled or was it a complete abandonment of duty?); (3) the extent to which the activity had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some horseplay.

Intoxication
An employee is not entitled to workers’ compensation coverage for an injury that occurs while the employee is intoxicated if the employer can affirmatively show that the intoxication played a role in causing the injury, either actively – “caused by” – or passively – “caused during.”

Going and Coming Rule
In general, an employee is not within the scope of employment while traveling to or from work. However, if the employee is compensated for his or her travel, both by hourly payment and mileage, an injury occurring during travel is within the scope of employment unless there was a
substantial deviation that took the employee outside the course of the employment.

**Willful Intention to Injure**
An employee is not entitled to compensation for an injury caused by the employee’s willful intention to injure himself, herself or another.

**Failure to Use Safety Device**
An injury that is caused by an employee’s failure to use a safety appliance provided for her use is not entitled to compensation if the his or employer proves: (1) the employee was given actual notice of the rule requiring the use of the safety appliance and an explanation of the danger involved in its violation; (2) the rule is kept alive by bona fide enforcement; and (3) the employee had no valid excuse for violation of the rule.

**Personal Arguments (Fighting)**
An injury caused by purely personal animosity between the combatants is generally not compensable.

**Idiopathic Injuries**
An injury that is purely personal to the employee is not compensable unless the employment contributes to the risk or aggravates the injury.

**Mental Stress Claims**
In mental stress claims where the employee did not sustain an actual physical injury, the employee must prove something more than ordinary stress beyond what is expected for the claim to be compensable.

**Heart Attacks**
A heart attack is compensable only if the employee proves that it was causally related to the employee’s work and the product of some unusual or extraordinary exertion or stress in the work environment.

**Subsequent Intervening Events**
Once an employee suffers a work related injury, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent non-industrial cause. To foreclose workers’ compensation liability, the subsequent injury must not have been the result of a routine activity of daily living.

**Flare-Ups**
When an injury results in a distinct new injury that worsens a pre-existing condition, but only temporarily, the injury is compensable only until the employee returns to his or her pre-injury baseline.

**Multi-Carrier /Employer Disputes**
In situations where an employee is injured and subsequently suffers a second injury after changing employers or where the employer changes insurance carriers, the question is whether the second injury is a recurrence, aggravation or new injury. A “recurrence” is defined as the return of symptoms following a temporary remission while an “aggravation” is defined as an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. The original employer/carrier is liable for workers’ compensation benefits for a recurrence while the subsequent employer/carrier is liable for an aggravation or new injury. In multi-carrier/employer disputes, the employer/carrier at the time of the most recent injury is presumed liable and bears the burden of proving another employer’s/carrier’s liability.
Occupational Disease

In Vermont, employees are entitled to workers’ compensation benefits for occupational diseases. An occupational disease means a disease that results from causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and to which an employee is not ordinarily subjected or exposed outside or away from the employment and arises out of and in the course of employment.

Filing a Claim/Limitations of Benefits

Limitations on Filing a Claim
Two limitation periods apply in Vermont workers’ compensation proceedings. First, an injured employee must give the employer notice of the injury as soon as practicable and in no event later than six months after the date of injury. Second, proceedings to initiate a claim for a work-related injury must be commenced within three years from the date of injury. The date of injury is the point in time when an injury becomes reasonably discoverable and apparent.

Limitations on Filing an Occupational Disease Claim
A claim for an occupational disease must be made within two years of the date the occupational disease is reasonably discoverable and apparent.

Initial Filing of Claim

An employer is required to file a First Report of Injury (Form 1) with the Department within 72 hours of receiving notice or knowledge of each injury for which an employee losses time from work or requires medical attention. A copy of the Form 1 shall also be provided to the employee. If the employer fails or refuses to file a Form 1, the employee may file a Notice of Injury and Claim for Compensation (Form 5) directly with the Department, with a copy to the employer.

Initial Investigation
Upon receiving notice or knowledge of an injury, the employer must promptly investigate and determine if compensation is due. In all cases in which the employee is alleged to have been disabled from working for at least three calendar days as a result of the work injury, the employer must complete and file a Certificate of Dependency (Form 10), an Employee Exemption Report (Form 10S), a Wage Statement (Form 25) and a Weekly New Income Worksheet (Form 25S) with the Department. If the employer determines that compensation is due it shall enter into a Compensation Agreement (Form 32) with the employee, to be approved by the Department, and shall commence paying compensation immediately.

Denials
The employer has 21 days from receiving notice or knowledge of an injury within which to determine whether any compensation is due. If the employer determines that no compensation is due, the employer must file a Form 2 Denial with the Department within the 21 day period, with a copy to the employee. The Form 2 Denial must be accompanied by copies of all
relevant documentation, medical or otherwise. If payment or notice of denial is not made within 21 days, the Department may order that compensation be paid, with or without prejudice.

If, despite good faith efforts, the employer cannot render a decision within the 21 day time limit, it must send a written request for an extension to the Department, with a copy to the employee.

Compensation

Average Weekly Wage
Average Weekly Wage (AWW) is generally determined by determining the average weekly earnings of the employee during the 26 weeks preceding the work injury, including wages earned from any concurrent employment. The AWW is subject to a cost of living adjustment (COLA) applied annually on July 1st.

Temporary Total Disability (TTD)
Where the injury causes total disability from work, during such disability, but not including the first three days, the employer must pay the injured employee compensation equal to two-thirds of the employee’s AWW, but not more than the maximum nor less the minimum weekly compensation.

Minimum/Maximum (Injuries after 7/1/86)
7/1/07-7/1/08: $1,013 - $338
7/1/08-7/1/09: $1,053 - $351
7/1/09-7/1/10: $1,092 - $364
7/1/10-7/1/11: $1,119 - $373
7/1/11-7/1/12: $1,122 - $374
7/1/12-7/1/13: $1,145 - $382

Low Wage Earners

For purposes of determining Temporary Total or Temporary Partial Disability where the employee’s AWW is less that the minimum compensation, the employee’s weekly compensation shall be 90% of the AWW prior to any COLA.

Dependents
During the disability period, the injured employee is also entitled to $10.00 a week for each dependent child, including stepchildren, adopted children, grandchildren and children whose parentage has been established by the Probate Court, who is unmarried and under the age of 21 years, provided that no other injured worker is receiving dependency benefits for the same dependent child or children. However, in no event shall an employee’s weekly wage replacement benefit exceed 90% of their AWW prior to applying any COLA.

Temporary Partial Disability (TPD)
Where the injury causes a partial disability from work, the employer shall pay the employee weekly compensation equal to two-thirds of the difference between his or her AWW before the injury and the AWW which he or she is able to earn thereafter.

Medical Benefits
An employee is entitled to all reasonable and necessary surgical, medical and nursing services and supplies, including prescription drugs and durable medical equipment, for the treatment of a work injury. A determination of MER does not operate to terminate medical benefits. Rather, the employer continues to be responsible for all reasonable and necessary medical treatment, including palliative care, so long as the treatment is be causally related to the work injury.
Payment of Wages for Attending Medical Appointments
An employer may not withhold wages when an injured employee loses time from work to attend a medical appointment or for physical therapy for a work injury.

Mileage
An injured employee is entitled to reimbursement for mileage beyond the distance normally traveled to the workplace to receive medical treatment for a work injury.

Pre-Authorization of Medical Treatment
Under a recent amendment to the Vermont Workers’ Compensation Act, an injured employee is now permitted to request pre-authorization for a proposed medical treatment. Within 14 days of receiving a pre-authorization request and medical evidence supporting the request, the employer/insurer must either: (1) authorize the procedure; or (2) deny the treatment because the entire claim is disputed or because the proposed treatment is unreasonable or unnecessary based on a preponderance of credible medical evidence specifically addressing the proposed treatment; or (3) schedule an Independent Medical Examination (“IME”) to occur within 45 days of the pre-authorization request. Notwithstanding the employer’s denial, the Department may on its own initiative issue an order authorizing the treatment upon a finding that the evidence shows that the treatment is reasonable, necessary and related to the work injury.

Vocational Rehabilitation (VR)
When an employee is unable to perform work for which he or she has previous training or experience due to a work injury, the employee is entitled to vocational rehabilitation (VR) services. The goal of VR is to return the injured employee to suitable employment at a wage as close to the pre-injury AWW as possible.

An injured worker must be screened for VR services upon request or once they have been out of work for more than 90 days. If found eligible during the screening process, the injured worker then undergoes an entitlement assessment performed by a Vermont-certified VR counselor. An employer may contest an entitlement recommendation by filing a denial with 21 days. Otherwise, the VR counselor must provide the employer and Department with a proposed Return to Work Plan within 45 days. The employer then has 21 days to review and file any objection to the Plan, otherwise the Plan will be deemed valid.

Permanent Partial Disability (PPD)
An employee is entitled to permanent partial disability benefits where the injury results in a partial impairment which is permanent and which does not result in permanent total disability. Any determination of the existence and degree of permanent partial disability shall be made only in accordance with The AMA Guides to the Evaluation of Permanent Impairment 5th Edition based on the employee’s percentage of impairment of the whole person multiplied by 550 weeks for impairment to the back or spine and 405 weeks for all other body parts or systems. A determination as to whether the employee has any permanent impairment shall be made within 45 days of filing a notice of
termination of TTD/TPD benefits based upon a MER determination.

**Permanent Total Disability (PTD)**
An employee is entitled to permanent total disability benefits where the injury results in total and permanent blindness in both eyes, the loss of both feet above the ankle, the loss of both hands above the wrist, the loss of one hand and one foot, complete paralysis of both legs or both arms or one arm and one leg, or a skull injury resulting in incurable imbecility or insanity.

An injured employee is also entitled to PTD benefits upon a showing that the work injury has had as severe an impact as one of the scheduled injuries listed above. To satisfy this burden, the injured employee must demonstrate that he has no reasonable prospect of finding “regular gainful employment.” Regular gainful employment is work that is not “casual or sporadic.” In evaluating PTD claims under what is known as the “Odd Lot Doctrine,” the employee’s age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for PTD under the Odd Lot Doctrine, a Functional Capacities Evaluation (FCE) should be performed to evaluate the employee’s physical capabilities and a vocational assessment should be conducted and should conclude that the employee is not reasonably expected to be able to return to regular, gainful employment.

Once determined to be permanently and totally disabled, the employee is entitled to weekly compensation equal to two-thirds of the employee’s AWW for a minimum of 330 weeks. The Department may order the employer to pay these benefits in a lump sum. The employee is further entitled to weekly benefits beyond the 330 weeks for as long as he or she remains permanently and totally disabled.

**Death Benefits**
In the event that a work injury results in the death of the employee, the employer is obligated to pay $5,500 for burial and funeral expenses plus $1,000 for out-of-state transportation of the decedent to the place of burial. The employer must also pay the deceased employee’s dependants weekly benefits for specified periods set forth in the Workers’ Compensation Act. The specific percentages of the AWW owed to each dependent is set forth in 21 V.S.A. § 632.

**Discontinuance of Benefits**
In general, workers’ compensation benefits may only be discontinued upon the filing and approval by the Department of a Form 27 Notice of Intention to Discontinue Benefits. When filing a Form 27, the employer must submit all relevant evidence, including evidence that does not support discontinuance, which is not already on file with the Department. The Department will order payments to continue until a hearing if, after review of all the evidence in the file, it determines that a preponderance of all the evidence does not reasonably support the proposed discontinuance of benefits.

**Failure to Undergo Treatment**
An employee is obligated to participate actively in their medical care. Workers’ compensation benefits may be suspended or terminated should the employee unreasonably refuse recommended treatment.
Failure or Refusal to Return to Work
TTD/TPD benefits may be discontinued based on the employee’s failure or refusal to return to work provided that the employer can establish: (1) that the employee has been medically released to return to work, with or without restrictions; (2) the employee has been notified both of the fact of his or her release to work and his or her obligation to conduct a good faith search for suitable work; and (3) the employee has either failed to conduct a good faith work search or has refused an offer of suitable employment.

Failure to Attend IME or Return Medical Release
Workers’ compensation benefits may be suspended upon a showing that the employee has failed/refused to attend a properly noticed and scheduled IME or for failing/refusing to return a signed medical authorization.

Medical End Result (MER)
In general, except for cases where the injured employee returns to regular full time work, TTD/TPD shall continue to be paid until the employee reaches Medical End Result (“MER”), a/k/a End Medical Result, which is defined as the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further medical improvement is not expected, regardless of treatment. A MER determination can be made by a treating physician or an independent medical examiner hired by the employer.

Termination Unrelated to Work Injury
TTD may be discontinued/denied when, during the recovery period for a work injury, the employee quits a suitable job for reasons unrelated to the work injury or is otherwise terminated or laid off.

Discontinuance of Medical Benefits
In general, a medical opinion that a specific treatment or medication is no longer reasonable and necessary and/or related to the work injury is needed in order to discontinue medical benefits. The Department will reject any attempt at a “blanket discontinuance” of all medical benefits based upon a determination of MER.

Incarceration
An employee is not entitled to TTD/TPD while incarcerated.

Discontinuance of VR Benefits
VR benefits may be discontinued and/or terminated by filing a Form VR227 with the Department under the following circumstances: (1) a successful completion of an approved Return to Work Plan, documented by the injured employee’s successful return to suitable employment for at least 60 days; (2) when it becomes apparent because of a change in the injured employee’s current medical condition that further VR services would serve no useful purpose; (3) when it becomes apparent that the injured employee is unable to participate in VR because circumstances are such that the further VR services would serve no useful purpose; (3) the injured employee’s return to suitable employment that is not contingent upon successful completion of the Return to Work Plan; or (4) when it becomes apparent that the employee is refusing to cooperate with the VR process.

Discontinuance of PTD Benefits
PTD benefits in excess of the minimum 330 weeks may only be discontinued upon a showing that the injured employee has a reasonable prospect of finding regular, gainful employment.

Employer’s Notice of Injury:
72 Hours after Notice

Employee’s Notice of Claim:
6 Months after Injury

Employee’s Initiation of Claim:
3 Years after Injury

Superior/Supreme Court Appeals:
30 Days after Decision

Modification of Award Due to Change of Condition: 6 Years from Award

Wait Time Period to Discontinue TTD/TPD: 7 Days from Filing

Form 27
Permanent Impairment Evaluation: 45 Days from MER

**IMPORTANT TIME LIMITS**

**Denial/Dispute of Medical Bill:**
30 Days from Receipt of Bill

**Denial of Request for Pre-authorization:**
14 Days from Request

**Dispute of Return to Work Plan:**
21 Days from Receipt of Plan

**Filing Memorandum of Payment (Form 25M):**
90 Days of Continuous TTD

**IMPORTANT VT WORKERS’ COMPENSATION FORMS**

<table>
<thead>
<tr>
<th>Form</th>
<th>Description</th>
<th>When to File</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Employer 1st Report of Injury</td>
<td>Within 72 hours of receiving notice of each injury for which an employee loss time from work of requires medical attention</td>
</tr>
<tr>
<td>2</td>
<td>Denial of Workers’ Compensation Benefits</td>
<td>Within 21 days from receiving notice or knowledge of an injury or benefit sought; Within 30 days of receipt of a medical bill; Within 14 days of receipt of a request for pre-authorization for medical treatment</td>
</tr>
<tr>
<td>6</td>
<td>Notice and Application for Hearing</td>
<td>Within 3 years of discovery of the dispute</td>
</tr>
<tr>
<td>7</td>
<td>Medical Authorization</td>
<td>Upon request, an employee is obligated to provide the employer with a medical authorization for the release of all relevant medical records</td>
</tr>
<tr>
<td>10</td>
<td>Certificate of Dependency and Concurrent Employment</td>
<td>After the employee has been disabled from working for at least 3 days</td>
</tr>
<tr>
<td>16</td>
<td>Settlement Agreement</td>
<td>Upon settlement, whether full or partial, of any disputed claim for WC benefits</td>
</tr>
<tr>
<td>22</td>
<td>Agreement for PPD/PTD</td>
<td>Only in accepted claims upon agreement of any permanent impairment rating</td>
</tr>
<tr>
<td>25</td>
<td>Wage Statement</td>
<td>After the employee has been disabled from working for at least 3 days</td>
</tr>
<tr>
<td>25M</td>
<td>Memorandum of Payment</td>
<td>Whenever an employee is eligible to receive more than 90 days of continuous TTD</td>
</tr>
<tr>
<td>27</td>
<td>Notice of Intention to Discontinue Benefits</td>
<td>Whenever WC benefits are to be discontinued, except for discontinuance of TTD/TPD based upon...</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>32</td>
<td>Agreement for Temporary Compensation</td>
<td>Only in accepted claims after the employee has been disabled from working for at least 3 days</td>
</tr>
<tr>
<td>VR227</td>
<td>Denial/Discontinuance of VR</td>
<td>Whenever VR services or denied or will be discontinued</td>
</tr>
<tr>
<td></td>
<td></td>
<td>the employee's return to work</td>
</tr>
</tbody>
</table>