STATE OF VERMONT
FRANKLIN COUNTY, ss.

VERMONT SUPERIOR COURT
DOCKET NO. S 346-07 FC

Pamela Bass and Barbara Carlson,
Plaintiffs,

v.

Land Air Express of New England, Ltd.,
Defendant.

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant Land Air Express of New England, Ltd. ("Land Air")'s Motions for Summary Judgment, filed on or around May 31, 2009. Plaintiffs Pamela Bass and Barbara Carlson have filed a joint Opposition. Plaintiffs are represented by Edwin L. Hobson, and Defendant is represented by Stephen D. Ellis of Ellis Boxer & Blake.

For the foregoing reasons, the Court DENIES Defendant's Motions for Summary Judgment as to each respective Plaintiff.

BACKGROUND FACTS AND PROCEDURE

Defendant Land Air is a northeastern freight company headquartered in Williston, Vermont. Plaintiffs Pamela Bass and Barbara Carlson were formerly employed by Land Air, in the accounts receivable department. Plaintiffs allege that their employment with Land Air was terminated in retaliation for their questioning about and reporting of the company's alleged deceptive and unlawful billing practices, including eliminating credits from customer accounts, re-billing customers who had already paid, using the complexity of bills and frequency of invoices to confuse customers regarding amounts due, refusing to provide payment summaries to customers, and billing customers for services that had already been paid for by another customer.

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Land Air contends it is entitled to summary judgment regarding Plaintiffs Pamela Bass and Barbara Carlson, respectively, for the following reasons: (1) Bass fraudulently procured her employment by lying about her criminal record and employment history; (2) Carlson was not fired, but rather, voluntarily elected not to continue working after being advised that her supervisor intended to replace her; (3) Bass's reporting of and Carlson's questioning about Land Air's alleged fraudulent billing practices to company management are not "protected activities" under Vermont law; and (4) neither Bass nor Carlson was fired for reporting Land Air's alleged fraudulent billing practices, but rather, Bass was fired for insubordination and lack of cooperation regarding Land Air's internal investigation of her complaints, and Carlson was fired because her supervisor was genuinely dissatisfied with her performance.

In opposition, Plaintiffs argue that the issues raised by Land Air are matters for the jury, and that Land Air's explanations for the respective firings of Bass and Carlson are mere pretext. Additionally, Plaintiffs claim that, although there are no Vermont statutes expressly protecting whistle-blowing with respect to a company's fraudulent and unfair billing practices, there are Vermont statutes – including Vermont's Consumer Fraud Act (*see* 9 V.S.A. §§ 2451, 2453(a)) – which make such practices illegal. Moreover, Plaintiffs claim there is case law from Vermont and other states finding that public policy necessitates the prohibition of an employer's firing of an employee for his or her reporting of the employer's alleged unlawful conduct or conduct in violation of safety and health regulations or professional standards.

STANDARD OF REVIEW

"In order to succeed on a motion for summary judgment, the moving party must satisfy a stringent two-part test: first, no genuine issue of material fact must exist between the parties, and second, there must be a valid legal theory that entitles the moving party to judgment as a matter of law." *Price v. Leland*, 149 Vt. 518, 521 (1988) (citing V.R.C.P. 56(c) and *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 264 (1981)). "The moving party has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists." *Id.* (citing *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 520 (1985)). Before

the opposing party is required to come forward with "suitable opposing affidavits," the party moving for summary judgment must show "an absence of controverted material fact." *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 515 (1979) (quotation omitted). "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied [e]ven if no opposing evidentiary matter is presented." *Id.* (quotation omitted).

Courts analyze a claim for retaliatory discharge under the three-part burden shifting analysis first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), wherein the U.S. Supreme Court held that, in order to make out a prima facie case of retaliation, a plaintiff must show by a preponderance of the evidence: (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. *See also Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15, ¶ 42, 176 Vt. 356 (2004) (citing *Gallipo v. City of Rutland*, 163 Vt. 83, 92 (1994) and *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)) ["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."]

In order to establish a prima facie claim of retaliation, the plaintiff's burden is de minimis. *Regimbald v. General Elec. Co.*, 2007 WL 128963, *5 (D. Vt. Jan. 12, 2007) (citing *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir. 2002)). If the plaintiff-employee establishes a prima facie case, the burden shifts to the defendant-employer to articulate some legitimate reason for the adverse employment action. *Robertson*, 176 Vt. at 376-377. If the defendant carries this burden of production, the plaintiff must then demonstrate that the defendant's reasons are pretext for retaliation. *Id.*; *see also Adams v. Green Mountain R. Co.*, 177 Vt. 521, 524 (2004). The plaintiff may succeed in this "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered

explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), citing *McDonnell Douglas*, 411 U.S. at 804-805.

ANALYSIS

Bass's Fraudulent Procurement of Employment

Land Air's contention that Bass's claims must be summarily dismissed because Bass's employment with Land Air was fraudulently procured fails.[1] Contrary to Land Air's arguments, there is no binding authority compelling this Court to find that an employee who has fraudulently induced an employment relationship is barred from bringing a wrongful discharge action based on whistle-blowing/retaliation (as opposed to an action based on breach of contract), where the employer was unaware of the employee's fraud at the time of the discharge. Citing *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), Land Air states: "An employer's after-the-fact discovery of a lawful ground to discharge the plaintiff bars a claim for wrongful discharge if the employer would have discharged the employee for that misconduct, had it been discovered earlier." (MSJ re: Bass, p. 3, ¶ 1.) *McKennon* does not make this holding, however. Rather, the Court in *McKennon* (which dealt with an employee's claim against her former employer under the Age Discrimination in Employment Act ("ADEA")) questioned and rejected the stated proposition, stating: "We . . . question the legal conclusion reached by [the lower] courts that after-acquired evidence of wrongdoing which would have resulted in discharge bars employees from any relief under the ADEA. That ruling is incorrect." *McKennon*, 513 U.S. at 356. The Court explained: "The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." *Id.* at 360. The Court continued:

> Equity's maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands, . . . has not been applied where Congress

[1] Notably, Plaintiffs do not even address the issue of Bass's alleged fraudulent procurement of employment in their Opposition, instead focusing almost exclusively on arguing and proving that Land Air's billing practices are fraudulent.

> authorizes broad equitable relief to serve important national policies. *We have rejected the unclean hands defense where a private suit serves important public purposes.* [Citation.]

Id. at 360 (internal quotation omitted) (emphasis added).

However, the Court in *McKennon* went on to state that, in employment discrimination cases where, after termination, it is discovered that the plaintiff employee had engaged in misconduct, such misconduct is not irrelevant in determining the appropriate remedy. *Id.* at 361. The Court held that, in such cases, neither reinstatement nor front pay would be appropriate, as "[i]t would be both inequitable and pointless to order reinstatement of an employee who the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.* at 362. Rather, the Court found that, in such cases, "[t]he beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered[,]" explaining that, "[a]n absolute rule barring any recovery of backpay . . . would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination." *Id.*

Land Air also cites *Sarvis v. Vermont State Colleges*, 172 Vt. 76 (2001) for the proposition that after-acquired evidence of an employee's wrongdoing bars an employee from recovery for wrongful discharge. (See MSJ re: Bass, p. 3, ¶ 2; Reply, p. 2, ¶ 1.) At issue in *Sarvis* was whether an employer had just cause to terminate an employee for resume fraud or misrepresentation during the hiring process. The Vermont Supreme Court held as follows:

> We agree that principles of fraudulent inducement support a rule allowing an employer to avoid liability for breach of contract arising from an employment relationship induced by an employee's fraud. Thus, misrepresentation during the hiring process can be a basis for rescission of an employment contract. Further, we hold as a matter of law, such misrepresentation can constitute misconduct sufficient to support a just cause dismissal.

Id. at 81. *Sarvis* is distinguishable from this case because there, the employer discovered the employee's fraud prior to terminating her, and in fact terminated her because of such

fraud. Here, the basis for Land Air's termination of Bass was unrelated to Bass' misrepresentations regarding her criminal record, as Land Air did not even discover such misrepresentations until after Bass was terminated. *Sarvis* does not address after-acquired evidence. In the court's own words, *Sarvis* was "not an after acquired evidence case." *Id.* at 85. Rather, in that case, as noted, the defendant "fired plaintiff precisely because of plaintiff's misrepresentations during the hiring process." *Id.* (emphasis added). That is obviously not the case here.

Although Instruction 1.11 of Vermont's Employment Law Jury Instructions, entitled "After-Acquired Evidence," states that a defendant "can avoid legal responsibility *for breach of an employment contract* if, after it made the decision complained of by [. . . plaintiff], it learns that [. . . plaintiff] engaged in some conduct that would have caused [. . . defendant] to end the employment relationship . . . if it had learned about [. . . plaintiff's] conduct before it made the decision," the Reporter's Notes appended to such Instruction correctly state that "[m]any courts . . . have decided that the after-acquired evidence rule is applied differently in breach of contract cases than it is in employment discrimination cases." For example, the U.S. Supreme Court in *McKennon*, discussed above, determined that the rule is inapplicable in age discrimination cases; and in *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 323-324 (D. N.J. 1993), the U.S. District Court for the District of New Jersey determined that it is inapplicable in race discrimination cases. *See also Langdon v. Correctional Medical Services, Inc.*, 2005 WL 5716000 (Vt. Super. Aug. 4, 2005) [In an action for violations of Vermont's Fair Employment Practices Act, trial court rejected defendant's contention that the after-acquired evidence rule could be used as a shield against claims of unlawful discrimination, stating: "Defendant cites no legal authority supporting its proposition that the doctrine of rescission can serve to immunize defendant employers from civil liability for unlawful discrimination and retaliation, and *Sarvis* does not supply it."]

For purposes of application of the after-acquired evidence rule, this whistle-blowing/retaliatory discharge case is more akin to a discrimination case than to a breach of contract case. Therefore, Land Air's request for summary judgment on Bass's claims based on a theory of post-termination rescission of the employment contract fails.

Carlson's Termination

Likewise, Land Air's contention that Carlson's claims must be summarily dismissed because Carlson did not suffer an adverse employment action fails. The evidence demonstrates that Carlson's supervisor, Cecile Provost, advised Carlson on or around February 20, 2007 that her comprehension of issues and procedures was inadequate, and Land Air would have to "let her go," but that she could stay on for an indefinite period of time until her replacement was hired. (See Provost Aff. re: Carlson, ¶¶ 3-5, Ex. 1; Carlson Depo., vol. II, 23:20-26:25.) The evidence further demonstrates that Land Air's Director of Human Resources stated in an email sent the day after Carlson's termination that "[Carlson] was not planning to leave and did not give notice, she was being terminated for performance reasons." (Smith Aff. re: Carlson, Ex. 1.) For purposes of this litigation, it is immaterial whether the discharge was effective immediately or until a replacement was hired, and Land Air has failed to direct the Court's attention to law stating otherwise.

"Protected Activity"

The Court in this case has already ruled that Plaintiffs' questioning about and reporting of Land Air's alleged fraudulent billing practices reports are "protected activities" under Vermont law, as a matter of public policy. (See Judge Joseph's 2/5/08 Entry Order on Land Air's Motion for Judgment on the Pleadings.) Although the U.S. District Court for the District of Vermont stated in *Regimbald v. General Elec. Co.*, 2007 WL 128963, * 3 (D. Vt. 2007) that "in most cases, improprieties in a private company's billing practices are unlikely to rise to the level of a compelling public policy concern," there is precedent in Vermont supporting the treatment of whistle-blowing as a protected activity. *See, e.g., Marcoux-Norton v. Kmart Corp.*, 907 F. Supp. 766, 771 (D. Vt. 1993) [noting that, in *Burt v. Standard Register Co.*, No. 90-295, slip op. at 5-6 (D. Vt. June 19, 1992) (Coffrin, J.), the court found that plaintiff's termination because he had "blown the whistle" on his employer violated a compelling public policy]; *see also Payne v. Rozendaal*, 147 Vt. 488, 491-495 (1986) [recognizing public policy exception to at-will

doctrine and rejecting argument that public policy exception applies only where discharged employee engaged in conduct protected by statute].

Land Air's alleged fraudulent billing practices rise to the level of a compelling public policy concern, and do not involve purely personal or proprietary interests of Plaintiffs or Land Air. Therefore, summary judgment is not granted in Land Air's favor on this issue.

Reasons for Discharge

Land Air contends that its reasons for terminating Bass were Bass's unauthorized removal and refusal to return company documents, her refusal to appear for scheduled company meetings, and her attempt to dictate the scope and terms of Land Air's internal review of its billing and accounting practices. (See Smith Aff. re: Bass, ¶¶ 3-24.) Land Air contends that Carlson was terminated because "her comprehension of certain issues and procedures was not adequate, and was not likely to improve significantly." (Provost Aff. re: Carlson, ¶ 3.) These are not unlawful reasons for terminating Bass and Carlson.

However, Plaintiffs have submitted evidence demonstrating that there are genuine issues of material fact regarding whether Land Air engaged in fraudulent or otherwise unlawful and unethical billing practices (see Opposition, pp. 3-9, citing to relevant deposition testimony; see also confidential "Suspense Account" documents submitted with Opposition), and that Bass's and Carlson's respective complaints about these practices to their supervisors at Land Air were closely followed in time by their terminations (see Carlson Depo., vol. I, 50:3-65:13; Carlson Depo., vol. II, 116:13-118:20; Provost Aff. re: Bass; Smith Aff. re: Bass; MSJ re: Bass, Exs. 3-6). Generally, proof of a causal connection between a protected activity and an adverse employment action may be established indirectly by showing that the protected activity was closely followed in time by the adverse action. *Manoharan v. Columbia Univ. College of Physicians and Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988) (citing *Davis v. State University of New York*, 802 F.2d 638, 642 (2d Cir. 1986)). In this case, the timing of Bass's and Carlson's respective firings was close enough to their questioning of Land Air's alleged unethical and unlawful billing practices that a reasonable factfinder could link the two events. *See Murray v. St. Michael's College*, 164 Vt. 205, 212 (1995) ["The

timing of the alleged actions against plaintiff, relative to his filing of the workers' compensation claim, is a sufficient showing, for purposes of surviving summary judgment, of a causal connection between the protected activity and the adverse employment decisions."] Moreover, a reasonable factfinder could find that, if Land Air was in fact engaging in fraudulent billing practices, it decided that terminating Plaintiffs would be the best way to limit the potential damage Plaintiffs could cause the company, as it would remove Plaintiffs from the work environment where they had virtually unfettered access to company documents and customers. *See Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15, ¶ 33, 176 Vt. 356 (2004) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148-149 (2000)) ["Whether summary judgment is appropriate . . . 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."].

Therefore, although Land Air has submitted evidence demonstrating that its reasons for terminating Bass and Carlson were legitimate and non-retaliatory, the record, taken in the light most favorable to Plaintiffs - as it must be on summary judgment - contains sufficient evidence to support a finding that Land Air's stated reasons are, at least in part, pretextual. At trial, the jury will not be required to view the evidence in the light most favorable to Plaintiffs, and it will be Plaintiffs' burden to prove that their respective firings were motivated by their questioning about Land Air's alleged fraudulent billing practices and not by the legitimate reasons Land Air proffers. The resolution of that factual dispute is within the province of the factfinder, not this Court on summary judgment.

ORDER

For the above reasons, the Court finds that Plaintiffs have established a prima facie case of retaliatory discharge, i.e., they have shown that (1) Bass and Carlson engaged in protected activities; (2) Land Air was aware of those activities; (3) Bass and Carlson suffered adverse employment decisions; and (4) there was a causal connection between the protected activities and the adverse employment actions. Whether the

Plaintiff's evidence is sufficient to persuade a fact finder is not a matter for the Court to determine in the context of these motions. In addition, the Court finds that there are triable issues of material fact regarding whether Land Air's articulated reasons for terminating Plaintiffs were legitimate and not mere pretext for retaliation. Accordingly, the Court DENIES Land Air's Motions for Summary Judgment with respect to both Plaintiffs Bass and Carlson.

Dated at St. Albans, Vermont, this 28 day of August, 2009.

A. Gregory Rainville
Superior Court Judge

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