Handout Prepared By Timothy Noonan, Executive Director, Vermont Labor Relations Board, In Conjunction With Scheduled May 5, 2015, Testimony

The Vermont Labor Relations Board has had many grievance decisions in which employees have alleged that management took action against them for engaging in protected activities. The Board has determined that it will employ the analysis used by the United States Supreme Court in such cases: once the employee demonstrates his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.[1] This analysis has been employed by the VLRB in protected activity grievance cases involving whistleblowing.[2] The Vermont Supreme Court has approved use of such analysis.[3]

A threshold issue in protected activity cases is whether an "adverse action" actually has occurred. The Vermont Supreme Court has indicated that "adverse action" should not be limited to dismissal, suspension, reprimand, adverse evaluation, diminished responsibilities, excessive work assignments or lost compensation.[4] In one case, the Court concluded that assignment of an undesirable snowplowing route to a transportation maintenance worker constituted an adverse action.[5]

---

[1] Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, 16 VLRB 70 (1993), *Affirmed*, (Unpublished decision, Supreme Ct. Docket No. 93-237, 1994).

[2] Grievance of Brewster, 23 VLRB 314 (2000); Grievance of Cronin, 6 VLRB 37 (1983); McCort, supra; Grievance of Robins, 21 VLRB 12 (1998), *Affirmed*, 169 Vt. 377 (1999); Grievance of Danforth, 22 VLRB 220 (1999), *Affirmed*; 172 Vt. 530 (2001). Grievances of Choudhary, 15 VLRB 118, 159-160 (1992).

[3] Cronin, supra, (Unpublished decision, February 4, 1987); McCort, supra; Robins, supra.

[4] In re Grievance of Murray, (unpublished decision, Supreme Ct. Docket No. 96-237, 1997).

[5] Id.

The VLRB has noted the issues it would consider in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision protected activities;
- whether an employer interrogated the employee about protected activities;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.[6]

In general, an adverse employment decision following engaging in protected activity is not legally suspicious on its own.[7] Moreover, the longer the time period between the adverse decision and the protected activity the more attenuated causation becomes.[8] In such cases, there must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious.[9]

A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of

---

[6] Sypher, 5 VLRB at 131.
[7] In re Grievance of Rosenberg and Vermont State Colleges Faculty Federation, AFT, UPV, Local 3180, AFL-CIO, 176 Vt. 641 (2004).
[8] Id.
[9] Id.

employee rights".[10] The critical inquiry is not whether the coercion succeeded or failed, but whether the employer's conduct reasonably tended to interfere with or restrain an employee's exercise of protected rights.[11]

The presence of improper employer motivation need not be shown by direct evidence. An employer's unlawful motive may be inferred from the circumstances where no direct evidence of the employer's intent exists in the record.[12]

Whistleblowing is a protected activity pursuant to the state employees collective bargaining contract, which defines a "whistleblower" as a person who makes "public allegations of inefficiency or impropriety in government", and provides that a "whistleblower" shall not be discriminated against for exercising free speech rights. The first step in the analysis in a whistleblowing case is to determine whether a grievant was involved in the protected activity of whistleblowing. The Board has held that an employee is not a whistleblower if such employee only reported acts of inefficiency or impropriety within his or her department and did not make such claims public.[13] However, the Board concluded in another state employee case that an employee of the Department of Public Service met the definition of a whistleblower by contacting the Governor's office and alleging that he had been the victim of discrimination by the Department.[14]

In one whistleblowing case, the Board concluded that an employee who did not actually engage in the protected activity of whistleblowing, but was suspected of doing so, was entitled to protection under the whistleblowing provisions of the collective bargaining contract.[15] The Vermont Supreme Court affirmed this decision, stating "the State is responsible for its improper motive and actions,

---

[10] Grievances of McCort, (Unpublished decision, Supreme Court Docket No. 93-237, 1994).
[11] Id.
[12] Kelly v. The Day Care Ctr., Inc., 141 Vt. 608, 613 (1982).
[13] Robins, 21 VLRB at 22; *Affirmed*, 169 Vt. 377, 385-386 (1999). McCort, 16 VLRB at 106.
[14] Grievances of Choudhary, 15 VLRB 118, 159-160 (1992).
[15] Danforth, 22 VLRB at 246-48.

whether or not it undertook the action upon actual facts or mere suspicion."[16] The Court indicated that the underlying purpose of the whistleblowing article of the contract is to permit employees to expose wrongdoing on the part of state officials without fear of retaliation by the State, and stated that "it is difficult to conceive how employees will be motivated to expose wrongdoing if any perceived association with public complaints, no matter how tenuous, will leave them subject to retaliation".[17]

[16] 172 Vt. at 533.
[17] Id. at 532-33.