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INVESTIGATIVE REPORT

VHRC Case E17-0002

Complainant: Ismina Francois

Respondent: Vermont Department of Mental Health

Charge: Employment Discrimination: Race & Color

Summary of Complaint

Ismina Francois is an African-American woman employed as a Mental Health Specialist by the Vermont Psychiatric Care Hospital for the Department of Mental Health. Ms. Francois says she was subjected to repeated hostile, offensive and racist comments and actions by her co-workers and patients which created an intimidating, hostile and offensive work environment that interfered with her work performance.¹

Summary of Response

The Department of Mental Health made limited and narrow admissions to facts but primarily asserted it was without sufficient information to admit or deny the allegations and thereby denied the substantive allegations of discriminatory hostile work environment, in both its original and amended Response.²

¹ Complaint.

² This investigation reached out to the State to identify any defenses it intended to raise pursuant to the Vermont Human Rights Commission Rules, since it had not done so in its original complaint. The State amended its response to include seven standard litigation Affirmative Defenses but provided no factual or legal basis or argument to support those defenses. Amended Response.

Preliminary Recommendations

This investigation makes a preliminary recommendation that the Vermont Human Rights Commission find that there are **reasonable grounds** to believe that the Department of Mental Health discriminated against Ismina Francois on the basis of her race and color under The Vermont Fair Employment Practices Act, codified at 21 V.S.A. §495.

Documents

Complaint

Response

Complainant's notes

Respondent's Objections to HRC's Request for Information

Agency of Human Services Investigative Report 9/12/2016 re Sara Wilson

Agency of Human Services Investigative Report 12/14/2016 re Sam Jensen

Agency of Human Services Investigative Report 1/5/2017 re Holly Newman

Agency of Human Services Investigative Report 1/30/2017 re Dan Carver

Investigation Audio Recordings

Email Communications

Diversity Training related documents

2015 VHRC Investigative Report

2017 Cultural Competency Power Point Presentation

VTDigger Article, 7/14/2017

VTDigger Article, 9/23/2017

Vermont Psychiatric Care Hospital Dashboard Performance Measures 2016

Interviews

Ismina Francois, Complainant, Mental Health Specialist	1/23/2017
Sam Jensen, Mental Health Specialist	4/14/2017
Beverly Ordway, Mental Health Specialist	4/14/2017
Holly Newman, Mental Health Recovery Specialist	4/14/2017
Mark Kavanagh, R.N. Charge Nurse	4/14/2017

Sara Wilson, Mental Health Specialist	4/14/2017
Beverly Croteau, R.N., Night Nurse Supervisor	4/19/2017
Timothy McCants, Mental Health Specialist	4/19/2017
Colleen Schmitt, R.N.	4/19/2017
John Cote, Senior Mental Health Specialist	6/9/2017
Mediatrice Muzima, Mental Health Specialist	6/9/2017
David Mitchell, Former Chief Nursing Executive	9/18/2017
Annette Brennan, R.N., Traveling Nurse	9/19/2017
Brenda Shattuck, Mental Health Specialist	9/22/2017
Dan Carver, Mental Health Specialist	9/22/2017
Richard Munson, M.D., Attending Psychiatrist	9/28/2017
Jeffrey Rothenberg, Former Chief Executive Officer	10/13/2017
Carolyn Robinson, R.N., Traveling Nurse	10/13/2017
Kathleen Bushey, Associate Nurse Executive	10/18/2017
Sonya Fuller, Mental Health Specialist	10/24/2017

Facts

Vermont Psychiatric Care Hospital

In May 2014, Ismina Francois, a long-time employee of the State was hired at The Vermont Psychiatric Care Hospital (VPCH); a 25-bed acute care facility in Berlin, serving involuntary psychiatric patients. Patients are housed in four units: A, B, C and D. Unit B contains eight beds and is reserved for male patients. Unit D has the least amount of beds, with only four.³ While some staff expressed a distaste for working in Unit A and B, the majority of VPCH staff said they had no preference to work in any one unit. Generally, all units have acute patients; patients with rapidly progressing psychotic symptoms in most need of urgent care.⁴ If possible, acute patients are placed in units with fewer beds to mitigate disturbances due to noise and stimuli.

³ Interview with Jeffrey Rothenberg.

⁴ Id., Dr. Richard Munson.

The Chief Executive Officer (CEO) and Medical Staff determine acuity, after reviewing the patient's file and history of dangerous behavior.⁵

Jeffrey Rothenberg, VPCH's former CEO said VPCH was a very challenging and intense place to work for his staff and himself and referenced constraints and limitations on running a state facility.⁶ Mr. Rothenberg said the chances of violence at VPCH were greater than any other employment environment. While staff were trained in restraint and seclusion as a matter of safety, there was growing pressure on hospitals to reduce restraint and seclusion of the mentally ill.⁷ Former VPCH Associate Nurse Executive Kathleen Bushey said that there was a general risk of violence most of the time.⁸

The VPCH's Dashboard Performance Measures reported anywhere between 1-6 monthly assaults from patient to staff, resulting in no injury to moderate injury.⁹ Dr. Richard Munson, a retired attending psychiatrist at VPCH said VPCH's quality assurance director only counted direct blows from patient to staff but did not consider a patient assaulting staff with urine or feces.¹⁰ Vermont Digger reported in 2017 that VPCH was fined \$14,000 for failing to protect staff from patients, citing The Vermont Occupational Safety and Health Administration (VOSHA) report.¹¹ The article also quotes Doug Gibson, Communications Director for the Vermont State Employees' Association who said "there have been more than 200 assaults – mostly minor- at the hospital between January 2015-June 2016.¹² There's also evidence to believe that employees were sent to the emergency room with serious concussions and injuries.¹³

The Vermont Psychiatric Care Hospital was periodically short on staff, especially nurses, which caused units to be closed as well as mandatory and irregular staffing orders.¹⁴ David Mitchell, VPCH's Chief Nursing Executive until December 2016, was primarily responsible for nursing staff at VPCH; hiring, delegating, orienting and evaluating local and traveling nurses. Mr.

⁵ Interview with Jeffrey Rothenberg.

⁶ Id.

⁷ Id.

⁸ Interview with Kathleen Bushey.

⁹ Vermont Psychiatric Care Hospital Dashboard Performance Measures, 2016.

¹⁰ Interview with Dr. Richard Munson.

¹¹ "Psych facility fined \$14,000 for not protecting staff from patients." VTDigger, June 14, 2017

¹² Id.

¹³ "VOSHA-Hospital must investigate complaints into worker injuries." VTDigger, 9/22/2017

¹⁴ Interview with Jeffrey Rothenberg.

Mitchell said that less than 5% of nurses choose psychiatric nursing as a specialty which makes recruiting challenging.¹⁵ When VPCH opened, staff had to be expanded by 100% and contracts were created with 15 traveling nurses.¹⁶ Traveling nurses come from all over the country and state.¹⁷ Mr. Mitchell screened and chose candidates for interviews who worked on renewable 13-week contracts.¹⁸

The Vermont Psychiatric Care Hospital has between 4-5 full-time equivalent psychiatrists with coverage around the clock.¹⁹ Dr. Richard Munson said he was assigned 8-10 patients that he engaged with 3-5 times per week. In addition to administrative and committee responsibilities and extensive documentation, Dr. Munson conducted interviews and assessments and regularly met with the care team to develop and review care plans.²⁰

The care team consisted of a psychiatrist, psychologist, nurse, social worker, unit staff, patient and guardian, if applicable.²¹ The team met every week or two to review and revise the care plan. Revisions to care plans could be made in the interim by the Psychologist or Nurse and were flexible in nature, to reflect new information such as an allergic reaction to medication or to include family members who unexpectedly became involved.²² A care plan for a patient first identifies the assessment and condition of the patient, i.e. Schizophrenia, and then lists measurable and practical problems such as “aggressive behavior” or “diabetes” along with corresponding goals and interventions. For example, for a patient with aggressive behavior, a goal could be: *two weeks from now, patient will have had at most hostile verbal episodes without menacing behavior or verbal threats.* Interventions may include: *Nurse will try to address behavior by not reacting to how request was phrased, provide the bar of soap requested, etc.*²³ If Dr. Munson determines a patient’s needs merit a 1:1 staff to patient assignment, that designation is also identified in the care plan. Dr. Munson said he relied heavily on the input of staff and patient but ultimately, he decided 1:1 assignments based on whether the patient was physically

¹⁵ Interview with David Mitchell.

¹⁶ Id.

¹⁷ Id., Interview with Jeffrey Rothenberg.

¹⁸ Interview with David Mitchell.

¹⁹ Interview with Dr. Richard Munson.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

volatile, suicidal or was a danger to self or others beyond what could typically be managed.²⁴ As for which staff would be assigned 1:1 with a patient, Dr. Munson said this was up to the charge nurses unless assigning specific staff to a patient would be counter-productive to the patient. Dr. Munson wasn't aware of any efforts on his part or the care team to remove certain staff members from 1:1 assignments for safety reasons.²⁵

The care team's case plan is carried out every shift, through the work of nurses and mental health specialists such as Ms. Francois. On every VPCH shift, there is a charge nurse assigned to two units, a shift leader who has completed classes to become a senior mental health specialist or an associate mental health specialist with more experience and seniority, along with two mental health specialists, per unit.²⁶ The transition between shifts included a brief shift report where staff share updates, issues or concerns arising from the previous shift.²⁷ Charge nurses had wide discretion in delegating daily assignments to mental health specialists. However, they considered the skill, education level and experience of staff members along with patient needs.²⁸ On occasion, a mental health specialist might complain about an assignment, the charge nurse would take the complaint into consideration, but the goal was to ensure the safety and care of patients.²⁹

Ms. Francois alleged in her interview that African-Americans were disproportionately assigned to kitchen duty, the least desirable assignment.³⁰ There was no method or strategy for assuring equitable assignments and charge nurses had wide discretion. Sonya Fuller, an African-American Mental Health Specialist said charge nurses will sometimes work with shift leaders to delegate assignments and it wasn't always fair. Ms. Fuller said kitchen duty was not well liked and felt that some charge nurses gave kitchen duty to some staff more often than others based on their personal preferences for those staff members. However, Ms. Fuller never felt like assignments were unfair to her.³¹ Overall, there was no supporting evidence that kitchen duty

²⁴ Id.

²⁵ Id.

²⁶ Interview with Kathleen Bushey.

²⁷ Id.

²⁸ Id.

²⁹ Id., Interview with Colleen Schmitt.

³⁰ Interview with Ismina Francois.

³¹ Interview with Sonya Fuller.

was given to African-Americans more often. Most of the Mental Health Specialists interviewed said they had no preference or dislike for any assignment and that people's preferences were specific to them. Brenda Shattuck, an African-American Mental Health Specialist at VPCH for three and half years said she didn't mind kitchen duty and has never been assigned to it more than twice in a row.³² Mr. Rothenberg wasn't aware that there were any complaints about how charge nurses were assigning daily responsibilities.³³ Lastly, Ms. Francois did not allege this in her complaint and this investigation did not find any supporting statements or evidence that would have merited an amendment of the complaint.

Statements Made by Patients

Patients were physically and verbally abusive to staff and they targeted staff based on any vulnerability they saw. Patients used words like "fat," "cocksucker," "gay" and said things like, "I fucked your mother" and whatever they could to arouse any reaction.³⁴ And on a regular basis, patients targeted African-American staff with racial epithets, specifically using the word "nigger." Every VPCH staff confirmed having heard patients use the term "nigger;" some reported hearing it on occasion while others reported hearing it daily.

Beverly Ordway, Mental Health Specialist, Chapter Vice President and Steward said she heard patients say "nigger" to African American staff and confirmed there were safety issues at VPCH³⁵ as did Beverly Croteau and Holly Newman, Mental Health Specialists.³⁶ Colleen Schmitt, a VPCH nurse said patients often said "nigger."³⁷ John Cote said patients use whatever they could to verbally attack staff including calling African-American staff "nigger."³⁸ This was also confirmed by traveling nurse, Annette Brennan and Mental Health Specialists, Sonya Fuller and Brenda Shattuck.³⁹ Sarah Wilson, a temporary Mental Health Specialist said she hears the

³² Interview with Brenda Shattuck.

³³ Interview with Jeffrey Rothenberg.

³⁴ Interview with John Cote, David Mitchell, Kathleen Bushey.

³⁵ Interview with Beverly Ordway.

³⁶ Interview with Beverly Croteau and Holly Newman.

³⁷ Interview with Colleen Schmitt.

³⁸ Interview with John Cote.

³⁹ Interviews with Annette Brennan, Sonya Fuller, Brenda Shattuck.

word “nigger” on a regular basis and heard it 3-4 times on the day she was interviewed in this investigation.⁴⁰

When Tim McCants, an African American, was first hired as a Mental Health Specialist in 2007, a traveling nurse from Chicago warned him about how often he would hear “nigger” and Mr. McCants confirmed that he routinely heard this term used at VPCH.⁴¹

Mediatrice Muzima, an African-American Mental Health Specialist, said she heard the term “nigger” on a daily basis and that supervisors did not take it seriously when patients called them “nigger.” Ms. Muzima spoke to a supervisor who assured her he would take it to a staff meeting but knows that it was never followed up on. Ms. Muzima said these words were often used towards non-white staff members and caused her to feel dehumanized. Ms. Muzima said she didn’t believe supervisors or managers were very responsive to concerns about race and hostility and that there was no one at the hospital that she felt she could trust with a discriminatory complaint.⁴²

Traveling nurse, Carolyn Robinson, an African-American said she heard “nigger” several times a week and patients targeted African-American staff with these terms and other offensive racial epithets. Ms. Robinson has heard patients tell her and others to go back to Africa. Ms. Robinson was disturbed by how her colleagues reacted to these comments; stating that staff members who overheard these racial epithets laughed or said nothing. Ms. Robinson said she was vocal about the hostility and specifically complained to Administrators to no avail. Ms. Robinson said her co-workers laughed at jokes about African-Americans and poked fun at an African-American staff member from Haiti. Ms. Robinson said she was not alone in complaining about these issues as she witnessed other African-American co-workers, including Complainant, Ms. Francois, report these concerns to David Mitchell and other supervisors, all of whom did nothing. At times, nurses supported patient’s racist preferences. Once, a patient said in reference to Ms. Robinson, “I don’t want that nigger giving me medication.” The charge nurse gave the medication to the patient instead of allowing Ms. Robinson to administer the medication, although there had been no indicators that the patient was dangerous, or the situation was unsafe.

⁴⁰ Interview with Sarah Wilson.

⁴¹ Interview with Tim McCants.

⁴² Interview with Mediatrice Muzima.

Ms. Robinson said patients may have been psychotic, but they were still intentional in their words.⁴³

Ms. Robinson said the orientation she received before working at VPCH was inadequate in preparing her for the racist attacks by patients and the lack of support from colleagues and Administrators. Ms. Robinson said she often saw staff members looking at her car and she generally felt very uncomfortable and uneasy working at VPCH. Ms. Robinson shared her concerns with David Mitchell, Beverly Croteau and then CEO, Jeffrey Rothenberg, emphasizing the necessity of creating a diversity plan not only for patients but for staff as well. Ms. Robinson believes that voicing her objections to the racist hostility at the hospital caused her contract to not be renewed.⁴⁴

Ms. Robinson's supervisor, Mr. Mitchell recalled that Ms. Robinson made some "non-specific broad" statements about discrimination but could not recall why she had left. Mr. Mitchell said he was aware that patients said "nigger" but again said everyone was verbally attacked and explained that patients had severe psychiatric illnesses.⁴⁵

Former CEO Mr. Rothenberg said he was aware that traveling nurses who came from all over the country were surprised by what patients were allowed to say at VPCH and words like "nigger" and "kike" were used.⁴⁶ Mr. Rothenberg also knew that there were on-going issues about native white Vermonters who had had very little interaction with non-whites working alongside staff members who were refugees. When patients yelled racial epithets at their African-American co-workers, white staff members were confused on how to show support. Nevertheless, Mr. Rothenberg did not think the stress on African-American employees was any more prevalent than that on white employees working at VPCH, although he admitted that he couldn't recall any white employees being targeted by patients for their race or the color of their skin. According to Mr. Rothenberg, patients yelled homophobic remarks and targeted staff on their weight as well.⁴⁷

⁴³ Interview with Carolyn Robinson.

⁴⁴ Id.

⁴⁵ Interview with David Mitchell.

⁴⁶ Interview with Jeffrey Rothenberg.

⁴⁷ Id.

Kathleen Bushey, Associate Nurse Executive, recalled a conversation with an African-American traveling nurse in the hallway of VPCH at the end of sensitivity training about the necessity of trainings for all staff.⁴⁸ According to Ms. Bushey, the suggestion was made based on “certain feelings on the unit that she was attuned to.”⁴⁹ Ms. Bushey denied that the traveling nurse voiced specific concerns about co-workers. Ms. Bushey remembered one time when a patient called a white employee “honkey” and being targeted by a patient because of her weight which left her very upset and said working at VPCH was a challenge for everyone.⁵⁰ She was surprised to hear that other VPCH staff reported hearing “nigger” frequently at VPCH because it was not common for patients to say “nigger.”⁵¹ Although Ms. Bushey admitted that on occasion, a single patient would use the term frequently.⁵²

Dr. Munson said that in the majority of cases, he was not concerned about staff safety although he recognized that there was risk to staff. Dr. Munson recalled an African-American female staff in tears who wanted to leave a unit after being verbally attacked by a patient, that caused him to be concerned for her safety. Dr. Munson also recalled a Caucasian patient with dementia who had an extreme agitated reaction to persons of color and another intimidating Caucasian patient with anti-social personality disorder who attacked an African-American staff member with a torrent of verbal assaults with “eyes-blazing and gesturing with his finger over his head” and used words like “nigger” and “coon.”⁵³ The patient was at the hospital for a year but to the best of Dr. Munson’s knowledge, there wasn’t a medical order or case plan to address the safety of African-American staff around this patient.⁵⁴ Mr. Mitchell said, “it comes with the territory” and that there wasn’t much recourse.⁵⁵ On occasion, charge nurses might reassign a staff member, but they had wide-discretion and the hospital had no protocol or policy on how to handle these issues.⁵⁶

⁴⁸ Interview with Kathleen Bushey.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Interview with Dr. Richard Munson.

⁵⁴ *Id.*

⁵⁵ Interview with David Mitchell.

⁵⁶ *Id.*

Ismina Francois' Request to be Removed from an Assignment

Ms. Francois alleges in her HRC Complaint that on or around August 1, 2015, Shift Leader Dan Carver knowingly assigned her to a racist patient with acute dementia who was dangerously agitated around African-American staff.⁵⁷ Ms. Francois said the patient had a swastika tattoo, was highly aggressive and was easily triggered by African-Americans. Ms. Francois asked her supervisors to create a plan that would avoid an assignment with this patient.⁵⁸ Colleen Schmitt, a floor nurse recalled a discussion between a Charge Nurse and Dr. Munson about the necessity of a medical order removing African-American employees from the patient. Both Ms. Francois and Ms. Schmitt recalled the charge nurse using the term "colored people" which left them both shocked.⁵⁹ Dr. Munson denied ever using that term and did not write that in his order.⁶⁰ They were notified by Administrators shortly thereafter, that a formal order removing all African-Americans from an assignment was inappropriate and were told to address Ms. Francois' concerns more informally.⁶¹ As a result, Ms. Francois' daytime shift supervisors respected her request to not be assigned to this patient. However, on the evening of August 1, 2015, Ms. Francois was asked by the Shift Leader, Dan Carver to remain with this racist patient despite her protests.

Although it is typically the job of charge nurses to delegate assignments, shift leaders sometimes assist. This was the case when Ms. Francois came in early around 3 a.m. and was assigned by Mr. Carver to a 1:1 with the patient.⁶² Mr. Carver said Ms. Francois immediately informed Mr. Carver that she was not routinely assigned to this patient because of "racial this or that."⁶³ Mr. Carver said because the patient was asleep at the time, he did not understand Ms. Francois' concerns. However, he admitted that 1:1 assignments on the night shift remain essential because patients wake up a few times a night disoriented or needing to use the restroom. Furthermore, Mr. Carver said he was aware that the patient often said "nigger," would get in staff's faces and

⁵⁷ Complaint, Interview with Ismina Francois.

⁵⁸ Interview with Ismina Francois.

⁵⁹ Id., Interview with Colleen Schmitt.

⁶⁰ Interview with Dr. Richard Munson.

⁶¹ Interview with Colleen Schmitt.

⁶² The patient was designated in need of a 1:1 and 2:1 during different shifts. It's not clear which designation was in place at 3 a.m. in the morning.

⁶³ Interview with Dan Carver.

staff has had to physically contain the patient using emergency protocols. Nevertheless, Mr. Carver did not believe the patient was intentional or targeted any person and said African-American staff on the evening shift had been assigned to the patient.⁶⁴ Mr. Carver also said that every staff at VPCH is aware that they will be verbally and physically abused, and it wasn't routine to change people's assignments absent persistent or extreme circumstances.⁶⁵ For Mr. Carver, the specific circumstances in that moment with the patient being asleep and it being the end of the evening shift did not warrant an assignment change for Ms. Francois. Ms. Francois disagreed.

Ms. Francois said she felt extremely unsafe around this patient since the patient had tried to physically assault her by lunging at her a couple of times. Ms. Francois said that the patient could not be re-directed and said twice, "Get that nigger away from me!"⁶⁶ Ms. Francois told Mr. Carver that she was not assigned to this patient during the day and wanted a reassignment. Mr. Carver refused and expressed to Ms. Francois that the assignment was only for a minute although Ms. Francois remained with the patient for at least 40 minutes.⁶⁷ Later in the shift, Ms. Francois and another staff member were changing the patient when the patient once again became extremely agitated by her presence. Fearful, Ms. Francois left her assignment and was confronted by Mr. Carver for leaving her post.⁶⁸ Upset over the situation, Ms. Francois went to Charge Nurse Mark Kavanagh, who remembered Ms. Francois crying during their 15-20 minute conversation.⁶⁹ Ms. Francois explained the situation to Mr. Kavanagh and shared that there was "on-going racial animus towards her and other people of color who work at the hospital" and provided several examples.⁷⁰ Mr. Kavanagh said he knew the patient was racist and had made racist comments regularly although he didn't believe there was any control over it as he used the term "nigger" with everyone. Mr. Kavanagh was aware the patient was combative and had the ability to be harmful and had in fact, pushed staff at the hospital.⁷¹ Another Mental Health Specialist replaced Ms. Francois in the 1:1 assignment. Mr. Kavanagh asked Ms. Francois'

⁶⁴ Id., Email from Beverly Croteau to Kathleen Bushey and David Mitchell, 8/8/2015.

⁶⁵ Interview with Dan Carver.

⁶⁶ Interview with Ismina Francois.

⁶⁷ AHS Investigative Report re Dan Carver.

⁶⁸ Id., Interview with Ismina Francois.

⁶⁹ Interview with Mark Kavanagh.

⁷⁰ Interview with Mark Kavanagh, Email from Mark Kavanagh to David Mitchell, Kathleen Bushey, 8/8/2015.

⁷¹ Interview with Mark Kavanagh.

permission to report the incident to the Director of Nursing and wrote an extensive email to David Mitchell, Beverly Croteau, Kathleen Bushey.⁷² Mr. Carver also complained to Beverly Croteau, who emailed Kathleen Bushey and David Mitchell as well, summarizing what Mr. Carver had shared with her.⁷³

Ms. Francois and Mr. Carver had on-going conflicts outside of this incident with Ms. Francois accusing Mr. Carver of being under the influence on the job and Mr. Carver calling Ms. Francois “dumb bitch” in front of other co-workers.⁷⁴ It’s not clear how much of their on-going conflict played a role in Mr. Carver’s decision to not remove Ms. Francois from the assignment that day. Regardless, there is consensus on these facts: Ms. Francois requested to be removed from a 1:1 with a known racist patient who had a volatile and combative history and Mr. Carver refused. This wasn’t the first time VPCH supervisors were unwilling to reassign African-American staff who felt targeted and/or unsafe because of the color of their skin.

Carolyn Robinson, an African-American traveling nurse said she was assigned a 1:1 with a racist patient who used racial names and often said he didn’t want to be near African-Americans. The patient had a history of violence, threatened bodily harm and was moving back and forth uneasily when Ms. Robinson asked to be removed from the patient. Because they were short staffed, she was forced to remain with the patient despite feeling unsafe. Ms. Robinson said her supervisors and managers did nothing to deescalate the situation.⁷⁵

Tim McCants, an African-American a Mental Health Specialist said that he’s been given 1:1 assignments with many racist patients who say “nigger” continuously but he typically would not ask to be taken off an assignment unless he feels he could get physically hurt and/or he thought the patient would be unreasonably agitated or triggered by his presence. Once, Mr. McCants asked to be removed from a 1:1 assignment with a racist patient who said “nigger” continuously for several hours but this request was denied and a different time, the charge nurse refused saying, “it comes with the territory.” Mr. McCants said he is not one to complain or “rock the

⁷² Email to and from Mark Kavanagh to David Mitchell, Kathleen Bushey, 8/8/2015.

⁷³ Email from Beverly Croteau to Kathleen Bushey, David Mitchell, 8/8/2015.

⁷⁴ Interview with Sarah Wilson. Emails to and from Beverly Croteau and David Mitchell, Kathleen Bushey, Jeffrey Rothenberg.

⁷⁵ Interview with Carolyn Robinson.

boat” and as much as possible, tries to avoid race or racial issues at work despite race being a common thread in the rhetoric of VPCH patients and staff.

Statements Made by Co-Workers

Tim McCants has been working for DMH since he was 21 years old.⁷⁶ As mentioned earlier, he was warned by an African-American traveling nurse that he’d hear patients call him “nigger” frequently. But Mr. McCants said he was also subjected to discriminatory actions and language by his colleagues and found an Administration who did very little or nothing to address these behaviors.⁷⁷

One evening in 2007, as Mr. McCants walked to his car after work, he discovered that someone had written “NIGGER” on his windshield. He informed his supervisor at the time, Linda Keefer. A co-worker was suspected of having committed the act, but no investigation took place, he was never interviewed and there was no further discussion. The State has no record this incident was ever investigated or reported to Human Resources. Mr. McCants said the co-worker suspected of having written “NIGGER” on his windshield continued to work there. This incident left him incredibly scared for his life as he worked the night shift and arrived and left work in the dark.

For a lengthy period, co-workers called Mr. McCants “Chocolate Boy” or “Little Bill” as in Bill Cosby.⁷⁸ One time in 2010 at the Waterbury Complex, while playing a card game of “Spades” with patients and staff, a staff member said to him, “I noticed you re-nigged on cards so that would make you a re-nigger.”⁷⁹ Another staff member said “whoa, whoa.” Mr. McCants said he felt humiliated by this statement but didn’t say anything out of fear of retaliation or retribution.⁸⁰ Once, Mr. McCants overheard colleagues discuss inter-racial dating and a white co-worker said she could not date someone outside of her race because people would ask, “Why are you dating that nigger?”⁸¹ Mr. McCants said he’s often felt cognitive dissonance for recognizing the wrongness of these statements and behaviors and doing nothing about them. Because Mr. McCants was one to remain silent about these issues, he was well-liked and perceived as

⁷⁶ Interview with Tim McCants.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

approachable and many white co-workers commented directly to him about other African-American employees. For example, a former Mental Health Specialist and African-American named Mary wore her hair in a natural state which caused their white co-workers to directly ask Mr. McCants, “what’s up with her hair?” Why does she wear her hair like that?” Other co-workers would say, “Mary plays with the race-card” and “Ismina plays with the race-card.”⁸² Mr. McCants said that once last year, a nurse made an impromptu reference to him as “white-washed” because he had lived in Vermont a long time.⁸³ Another time, when it was snowing out, a staff member came in and asked who the owner of a Lincoln was because it needed to be moved from the parking lot for plowing. Mr. McCants’ co-worker said, “Is that your car, is that your hood car?” The co-worker later apologized for the statement.⁸⁴ Although CEO Jeffrey Rothenberg was made aware of the statement, there was no follow-up or investigation by VPCH or Human Resources.⁸⁵

Mr. McCants happened to be present when his colleagues made the specific comments alleged in Ms. Francois’ HRC Complaint. Mr. McCants said he was smoking cigarettes outside with Annette Brennan, a traveling nurse who is white when Ms. Brennan started to complain about another traveling nurse named Theresa, who is African-American. Theresa had refused a mandate to work and Ms. Brennan said, “You and your nappy hair can come (sic) back to where you came.” She then looked at Mr. McCants and said, “Sorry, I just get feisty when I’m mad.”⁸⁶ Ms. Brennan admitted to having said, “Get your nappy-ass in here and work.”⁸⁷ Mr. McCants felt the statement was racially loaded. However, Ms. Brennan said she didn’t intend the statement to be racist and certainly does not see it as so. Ms. Brennan said she’s used the term to refer to her children and dogs saying, “Get your nappy ass in gear” or “Get your nappy ass in the house.” Ms. Brennan said the term “nappy-ass” refers to pubic hair and not African-American hair.⁸⁸

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Interview with Jeffrey Rothenberg.

⁸⁶ Interview with Tim McCants.

⁸⁷ Interview with Annette Brennan.

⁸⁸ Id.

In August 2016, Mr. McCants was outside of VPCH smoking cigarettes with his co-workers Pat, Beverly, Lori and Sarah Wilson when they saw Ms. Francois walking across the parking lot towards VPCH. Mr. McCants just listened as his co-workers asked each other what Ms. Francois was doing as she typically drove to work. Ms. Wilson said, “she probably got dropped off by the welfare bus. Oh sorry, did I say that out loud?”⁸⁹ Everyone except for Mr. McCants laughed. Mr. McCants said he was offended by the comment and didn’t understand what would have prompted Ms. Wilson to make it. Again, Mr. McCants felt the statement was made based on Ms. Francois’ race as many people associate African-Americans with welfare.⁹⁰ Although Mr. McCants did not report this statement directly to his supervisors, he did share it with Ms. Francois who became very upset and asked Mr. McCants what he said in response. Mr. McCants told Ms. Francois all he said was, “wow.” Ms. Francois said she was disappointed that Mr. McCants did not confront Ms. Wilson and take a stance.⁹¹ Ms. Francois cried when she heard the comment and immediately reported it to her supervisors Mr. Kavanagh, Ms. Bushey, Mr. Mitchell and then CEO, Mr. Rothenberg.⁹² Ms. Wilson admitted to having made the statement but said it wasn’t racially motivated as her daughter also rides the bus and thought the comment was harmless since everyone laughed.⁹³

In September 2016, Ms. Francois and Mr. McCants were walking down the hallway at VPCH, discussing lunch. Ms. Francois offered her lunch of chicken to Mr. McCants when Sam Jensen appeared and blurted out, “What kind of chicken? Fried chicken? Mmm, I love fried chicken.”⁹⁴ Mr. McCants remembered Ms. Francois offering food from a closed container but said there was never a discussion about chicken when Mr. Jensen came out from Unit B and spontaneously blurted out, “Fried Chicken!” with an intonation and then walked away.⁹⁵ Both Ms. Francois and Mr. McCants said they were not engaged in a conversation with Mr. Jensen immediately before or after the comment was made.⁹⁶ Mr. McCants was surprised by the comment and felt disappointed that Mr. Jensen would make a stereotypical comment about African-Americans and

⁸⁹ Interview with Tim McCants.

⁹⁰ Id.

⁹¹ AHS Investigative Report re Sarah Wilson.

⁹² Id., Email from Ismina Francois to Kathleen Bushey, David Mitchell, Jeffrey Rothenberg, 8/29/2016.

⁹³ AHS Investigative Report re Sarah Wilson, Interview with Sarah Wilson.

⁹⁴ Interview with Ismina Francois, AHS Investigative Report re Sam Jensen.

⁹⁵ Interview with Tim McCants.

⁹⁶ Id., Interview with Ismina Francois.

fried chicken. Mr. McCants believed the statement was discriminatory but did not follow up because he did not want to “ruffle any feathers.”⁹⁷ Mr. Jensen admitted to having made a comment about fried chicken but denies it had anything to do with Ms. Francois and Mr. McCants’ race. Mr. Jensen said he was returning from break and just had lunch at Kentucky Fried Chicken (KFC), a nearby fast food restaurant. He overheard a conversation between Mr. McCants and Ms. Francois about lunch and decided to chime in. Mr. Jensen said, Ms. Francois asked Mr. McCants about having chicken for lunch and Mr. Jensen said, “maybe fried chicken?”⁹⁸ Mr. Jensen said he had joined in the conversation with Ms. Francois and Mr. McCants for a few minutes and was not making a joke. Mr. Jensen admits that at the time he made the comment, he was aware of the stereotype of African-Americans eating fried chicken.⁹⁹ There was no way for this investigation to assess whether Mr. Jensen had eaten at KFC on that day and if that was what prompted him to blurt out “Fried Chicken!” Although that possibility exists, this investigation finds that Mr. Jensen’s version of the incident in which he was engaged in a short but friendly conversation with both Ms. Francois and Mr. McCants to be uncorroborated and untrue. Mr. Jensen’s statement about fried chicken was unprovoked, unwelcomed, made in isolation and with an awareness of the racial stereotype about African-Americans.

Ms. Francois alleged that her co-worker Holly Newman, a Mental Health Specialist sang the words, “my nigga, my nigga” at work.¹⁰⁰ Ms. Newman said she did not recall having done this but admits in her AHS interview that it was possible and shared with this investigation that a song came on, she stood up and nodded her head.¹⁰¹ Ms. Newman said patients like hip hop and remembered a patient in the room who liked using the word “nigger.”¹⁰² Ms. Newman was also accused of making a discriminatory statement about Mr. McCants. Ms. Newman admitted that while working in the nurses’ station in September 2017, she made a phone call to another unit asking for Tim McCants by saying, “Put the little black man on the phone.”¹⁰³ Ms. Newman admitted to calling Mr. McCants “the little black man” and was apologetic about making that

⁹⁷ Interview with Tim McCants.

⁹⁸ Interview with Sam Jensen, AHS Investigative Report re Sam Jensen.

⁹⁹ Interview with Sam Jensen.

¹⁰⁰ Complaint, Interview with Ismina Francois.

¹⁰¹ Interview with Holly Newman, AHS Investigative Report re Holly Newman.

¹⁰² Interview with Holly Newman.

¹⁰³ Interview with Holly Newman, AHS Investigative Report re Holly Newman.

comment. Mr. McCants said the phone call had been made to his unit when his co-worker John Cote answered and said, “the little black man has a phone call.”¹⁰⁴ Mr. McCants said Mr. Cote laughed and there were staff around. Mr. Cote denied having heard or said these words and did not recall this incident. Again, despite knowing that the statement was discriminatory and inappropriate, he ignored the statement to avoid a confrontation. Until most recently, VPCH employees who knew Mr. McCants had a very positive regard for him. However, traveling nurse Annette Brennan, said she recently heard rumors around VPCH that Mr. McCants was a “backstabber” and that one had to watch themselves around him although Ms. Brennan disagreed with their opinions.¹⁰⁵ This investigation found Mr. McCants to be a very credible witness. He has the longest history at VPCH amongst the African-American employees, has no interest in the outcome of this investigation, was always reluctant to complain about discrimination and until recently, was well-liked and highly regarded by all.

Ms. Francois said racial statements permeated the hallways and units of VPCH and the above described statements were not isolated. Ms. Francois said she’s heard charge nurses say, “colored children” and “I didn’t know that a person could be that black.” During shift reports, she’s heard staff members repeat what patients have said using the word “nigger” without thinking about the impact of this word. While, Ms. Shattuck said she believed staff members had said “N-word” not “nigger;”¹⁰⁶ Ms. Robinson said she heard a charge nurse say, “the patient called one mental health worker nigger.”¹⁰⁷ Ms. Robinson said the statement by the charge nurse was said in an offensive way and was unnecessary and it bothered her.¹⁰⁸ Additionally, Ms. Francois said co-workers and Administrators frequently mistook her for another African American employee, Mediatrice Muzima, a mistake that didn’t occur with her fellow white co-workers.¹⁰⁹

Ms. Francois alleged that Ms. Bushey mistakenly approached Ms. Muzima to discuss a private incident involving Ms. Francois’ car, which Ms. Muzima confirmed.¹¹⁰ Ms. Bushey admitted to

¹⁰⁴ Interview with Tim McCants.

¹⁰⁵ Interview with Annette Brennan.

¹⁰⁶ Interview with Brenda Shattuck.

¹⁰⁷ Interview with Carolyn Robinson.

¹⁰⁸ Id.

¹⁰⁹ Interview with Ismina Francois.

¹¹⁰ Id., Interview with Mediatrice Muzima.

making the mistake but said she's also made mistakes as to other white employees as well.¹¹¹ Another time, Mr. Mitchell spoke to Ms. Muzima about Ms. Francois' Family Medical leave.¹¹² Mr. Mitchell did not recall making the mistake.¹¹³ Ms. Muzima said in Vermont, everyone thinks you look alike if you're Black and patients and traveling nurses frequently mistook her for Ms. Francois.¹¹⁴ Ms. Francois' allegation is not entirely unique. Mr. McCants said he was often mistaken for two other African-American male employees named Roy Rose and Clayton Tores and that they experienced the same.¹¹⁵ Ms. Fuller, an African-American Mental Health Specialist said that she's also been mistaken for another African-American employee, Brenda Shattuck a couple of times during shift reports but has not heard those mistakes happen with other colleagues.¹¹⁶

Not every African-American at VPCH experienced discrimination. Ms. Shattuck said most of the people on her shift get along and she has not experienced offensive comments on her shift.¹¹⁷ Similarly, Ms. Fuller said she hasn't heard any insensitive comments made by her colleagues at work but did recall a single incident in which Ms. Francois said, "You don't even know what it feels like to be black because you were adopted." The statement was made outside of work at a fair and Ms. Fuller felt the statement was racist.¹¹⁸

Training

Former CEO Mr. Rothenberg said that VPCH had a two-person training team who provided extensive training to staff for two and half weeks covering an overview of the hospital, timesheets, introduction of staffing, different programs and violence prevention and de-escalation which included hands-on training regarding restraints. The Psychology Department did clinical trainings every month that were open to all staff members.¹¹⁹ David Mitchell, Chief Nursing Executive who had sole responsibility for hiring traveling nurses, who came from all

¹¹¹ Interview with Kathleen Bushey.

¹¹² Interview with Ismina Francois.

¹¹³ Interview with David Mitchell.

¹¹⁴ Interview with Mediatrice Muzima.

¹¹⁵ Interview with Tim McCants.

¹¹⁶ Interview with Sonya Fuller.

¹¹⁷ Interview with Brenda Shattuck.

¹¹⁸ Interview with Sonya Fuller.

¹¹⁹ Interview with Jeffrey Rothenberg.

over the country, provided most of the training and education. All nurses with psychiatric contracts, know CPR, complete cultural competencies, and engage in hospital specific orientation for five days with two days at the hospital, which Mr. Mitchell considers a very generous orientation. Additionally, there were weekly nursing meetings and daily communications with the CEO.¹²⁰ There were also nation-wide trainings from NAMI, Mental Health Conference, Intentional Peer Support Training, that were available to some staff. Staff completed mandatories annually.¹²¹ The mandatories included a power point presentation and quiz on cultural competence.

Except for the most recent training in October 2016, VPCH has never developed or delivered diversity training specific to their hospital employees. In its response, the State said it had begun to vet various vendors for a hospital-wide diversity training in 2015 but “the hospital has not provided diversity training specifically tailored for its employees.”¹²² Beverly Ordway, Mental Health Specialist said the October 2016 training was the first in her ten years.¹²³ Mark Kavanagh said this was the first mandatory training in the 16 years he’s been employed at DMH and at VPCH.¹²⁴ John Cote, a Senior Mental Health Specialist who has worked for DMH for 39 years said he was sure there had been a few in previous years but could only recall the most recent training.¹²⁵ Mr. Mitchell said there was a lot of initiative to develop training but there was no follow-up. In retrospect, he believes it may have been a mistake to let training drop and said, “I could not tell you that it was a priority.”¹²⁶

Mr. Rothenberg said he was aware that patients sometimes assaulted staff with homophobic and racist statements and he wanted to have training to address these issues. Mr. Rothenberg was aware that some of the traveling nurses were surprised by what patients were allowed to say and there was a need to train staff on how to support one another, referencing staff who were refugees and native Vermonters with little experience with non-whites. However, their search for adequate training did not result in a cost-effective solution and they went with the State’s

¹²⁰ Interview with David Mitchell.

¹²¹ Interview with Jeffrey Rothenberg.

¹²² Response and Amended Response.

¹²³ Interview with Beverly Ordway.

¹²⁴ Interview with Mark Kavanagh.

¹²⁵ Interview with John Cote.

¹²⁶ Interview with David Mitchell.

H.R. diversity training.¹²⁷ Ms. Bushey said the training was in response to concerns about insensitive staff members but couldn't recall if the training was in response to a specific complaint.

The State's Human Resources Department was invited to create and deliver a mandatory diversity training in the Fall 2016. All VPCH employees were required to attend a single four-hour training session; offered during several days in October and November.

Some employees never made it to the training such as Dr. Munson, Ms. Brennan, Ms. Robinson, Ms. Newman and Ms. Bushey.¹²⁸ David Mitchell, Chief Nurse Executive said he attended the training but didn't recall very much about it.¹²⁹ Ms. Bushey recalled employees giving it mixed reviews; some found the training to be valuable while others found it be "useless."¹³⁰

Ms. Francois, Mr. McCants, Ms. Muzima all found the training to be useless. Ms. Francois found the training to be "poorly-executed" where the instructors touched only on the surface issues. She thought her co-workers minimized the presentation and she was asked to work in small groups with the co-workers who made the discriminatory statements towards her. As a result, Ms. Francois left the training two hours early.¹³¹ Mr. McCants recalled seeing Ms. Francois crying and leaving.¹³² The State suggested that Ms. Francois left the training before she was able to witness meaningful discussions and a challenge of her co-workers' viewpoints. However, most of the VPCH employees interviewed said there had been no meaningful discussions or challenges.

Mr. McCants said after the training, a supervisor inappropriately approached him and asked in front of other staff, "Are you gonna be ok? I can see that you're hurting."¹³³ Mr. McCants said he tried to actively engage in the training and wasn't sure why anyone would assume he was hurting. Overall, he thought the training was "not helpful."¹³⁴ Likewise, Mediatrice Muzima said the training did not meet her expectations, she did not receive anything helpful and there

¹²⁷ Interview with Jeffrey Rothenberg.

¹²⁸ Interviews with Dr. Richard Munson, Annette Brenna, Carolyn Robinson, Holly Neman and Kathleen Bushey.

¹²⁹ Interview with David Mitchell.

¹³⁰ Interview with Kathleen Bushey.

¹³¹ Interview with Ismina Francois.

¹³² Interview with Tim McCants.

¹³³ Id.

¹³⁴ Id.

was no deep discussion. Ms. Muzima found the audience to be very reserved and unwilling to participate. Ms. Muzima questioned the wisdom of having someone from the State of Vermont conduct the trainings as someone from outside the State could have brought a more neutral and different perspective.¹³⁵

While some VPCH employees were more neutral in their evaluation, they still left without much to ponder or use in their work environment. Beverly Ordway said the training was about “different cultures and different people” and how “we’re all the same.”¹³⁶ Ms. Ordway said the training was probably helpful to some people, but it was not very helpful to her.¹³⁷ Sarah Wilson said she didn’t learn anything new from the training and thought everything presented was “common-sense.”¹³⁸ There were no challenging discussions and nothing that she could use in her everyday work. Ms. Wilson said many of them did not understand why the training was happening.¹³⁹ Beverly Croteau recalled some general and specific exercises at the training and thought it solidified things she already knew.¹⁴⁰ Sam Jensen said he didn’t recall anything challenging about the training but thought there was a good mix of questions with the presentation.¹⁴¹

Mark Kavanagh said staff members found the training to be unnecessary, took it lightly and didn’t find much of value in the training. However, he found it helpful and it gave him some perspective and insight. Again, Mr. Kavanagh couldn’t recall anything challenging or controversial about the training.¹⁴² Similarly, Colleen Schmitt thought the training was good and thought it challenged people’s views but didn’t find it particularly helpful in her everyday work.¹⁴³ John Cote thought the training was helpful but said much of it was already part of his practice.¹⁴⁴ Brenda Shattuck said she wasn’t sure how much she learned from the training.¹⁴⁵

¹³⁵ Interview with Mediatrice Muzima.

¹³⁶ Interview with Beverly Ordway.

¹³⁷ Id.

¹³⁸ Interview with Sarah Wilson.

¹³⁹ Id.

¹⁴⁰ Interview with Beverly Croteau.

¹⁴¹ Interview with Sam Jensen.

¹⁴² Interview with Mark Kavanagh.

¹⁴³ Interview with Colleen Schmitt.

¹⁴⁴ Interview with John Cote.

¹⁴⁵ Interview with Brenda Shattuck.

Sonya Fuller said she thought the diversity training was really good and she felt comfortable asking questions and enjoyed learning.¹⁴⁶

Overall, there were mixed reviews on the only diversity training that VPCH has ever developed for its employees. Although some reviews were neutral and positive, most of the employees said they learned nothing new and did not find any useful tools to bring back to their work environment. Most VPCH employees interviewed recalled very little about the training and made general statements about the presentation. Unfortunately, a training intended to address some critical race issues in a complex and highly stressful workplace fell flat in reaching the African-American employees who felt discriminated against and the colleagues who were accused of making those discriminatory statements.

Legal Analysis

Per the Vermont Fair Employment Practices Act (VFEPa), 21 V.S.A § 495,

(a) It shall be unlawful employment practice...

(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; (emphasis added.)

The standards and burdens of proof to be applied under VFEPa are identical to those applied under Title VII of the United States Civil Rights Act.¹⁴⁷ Thus, in addition to looking at Vermont law, we also look to federal interpretations of that statute in determining whether the complainant has met the elements of her claim.¹⁴⁸ The elements of Ms. Francois' prima facie case for race and color discrimination are:

1. Ms. Francois is a member of a protected class;
2. Ms. Francois was subjected to unwanted harassment;

¹⁴⁶ Interview with Sonya Fuller.

¹⁴⁷ *Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15 citing *See Hodgdon v. Mt. Mansfield Co., Inc.*, 160 Vt. 150,161, 624 A.2d 1122, 1128 (1993)

¹⁴⁸ *Id.*

3. The harassment unreasonably interfered with Ms. Francois' work performance by creating an environment that was intimidating, hostile or offensive (severe or pervasive); and
4. That the harassment was based on Ms. Francois membership in a protected class (race or color-based).

Ms. Francois carries the burden of proving her prima facie case of employment discrimination, but the U.S. Supreme Court has said the burden is light and not onerous.¹⁴⁹ Ms. Francois need only show by a preponderance of the evidence (more likely than not), that she was discriminated against. An employer has limited defenses in hostile work environment cases. Where a supervisor has committed harassment, an employer can only escape liability if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Employers are also liable for harassment by non-supervisory employees or non-employees over whom it has control, if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.¹⁵⁰

If Ms. Francois can show she suffered from harassment that created a hostile work environment based on protected status, she has a cognizable discriminatory action. The Equal Employment Opportunity Commission has said that harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.¹⁵¹

¹⁴⁹ *Gauthier v. Keurig Green Mountain, Inc.*, 129 A.3d 108 (2015) citing *Gallipo v. City of Rutland*, 2005 VT 83 ¶15, 178 Vt. 244, 882 A.2d 1177 and *Burdine*, 450 U.S. at 253, 101 S. Ct. 1089.

¹⁵⁰ www.eeoc.gov. See also *Howley v. Town of Stratford* 217 F.3d 141, 154 (2nd Cir. 2000).

¹⁵¹ www.eeoc.gov

The EEOC defines unlawful harassment as conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.¹⁵² “Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.”¹⁵³ When investigating allegations of harassment, the EEOC looks at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.

The U.S. Supreme Court has held that where “the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” it may meet the requirements of such a claim.¹⁵⁴ Furthermore, a complainant’s perception of harassment alone is not controlling; establishment of hostile work environment requires an objectively hostile or abusive environment.¹⁵⁵ There is no one set of facts or behaviors that are deemed to be severe or pervasive conduct that rises to the level of harassment. Rather, evaluating whether a person has been subjected to a hostile work environment requires a fact-specific examination of the totality of the circumstances, including the nature of the conduct, and the context in which the alleged incidents occurred.¹⁵⁶ Courts have, however, provided some guidance in this area as the following factors may be considered:

- the frequency of the discriminatory conduct;
- the severity of the conduct;
- whether the conduct is physically threatening or humiliating, or whether it is a mere offensive utterance;
- whether the conduct unreasonably interferes with an employee's work performance; and

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

¹⁵⁵ *Id.*

¹⁵⁶ *Howley v. Town of Stratford* 217 F.3d 141, 154 (2nd Cir. 2000) *citing Harris v. Forklift Systems, Inc.*, at 23.

- the effect on the employee's psychological well-being, which is relevant in determining whether the plaintiff actually found the environment abusive.¹⁵⁷

Finally, when analyzing a hostile work environment claim, “the crucial inquiry focuses on the nature of the workplace environment as a whole.” A plaintiff need not be the target of the other instances of hostility and evidence that other minorities, even those outside of plaintiff’s protected class, is relevant to the analysis of hostile work environment.¹⁵⁸

I. Ms. Francois is a member of a protected class

Ms. Francois’ claim of discrimination in the workplace is based on her race and color, both recognized protected statuses under VFEPA and federal law. This element is undisputed.

II. Ms. Francois was subjected to unwanted harassment

A plaintiff’s claim of harassment is sometimes compromised by evidence that she welcomed the harassment, such as when a plaintiff willingly engages in a sexual relationship with the harasser or joins in the racial jokes and slurs. Here, no evidence exists that Ms. Francois made racial jokes, slurs, or welcomed being called derogatory and racist names. Ms. Francois has a clear record of complaining about discrimination in the workplace. She spoke to Associate Nurse Executive Kathleen Bushey about not wanting to be mistaken for another African-American, particularly when those mistakes revealed private information. Ms. Francois immediately addressed Sarah Wilson’s “welfare bus” comment to former CEO Jeffrey Rothenberg and her supervisors Ms. Bushey, Mr. Mitchell and Mr. Kavanagh, which in turn informed Human Resources. Ms. Francois reported Holly Newman for singing “my nigga my nigga” at work and her reference to Mr. McCants as the “little black man.”

Ms. Francois approached Colleen Schmitt, Charge Nurse Heidi Fox and Dr. Richard Munson, about not assigning her and other African-Americans to a known racist patient and asked Dan Carver, Shift Leader to remove her from a 1:1 assignment that placed her in a zone of danger.

¹⁵⁷ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21.

¹⁵⁸ *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) (superseded on other grounds) citing *Schwapp v. Town of Avon*, 118 F.3d 106, 111–12 (2d Cir.1997) (finding that harassment of other minorities was relevant to whether a black police officer experienced a racially hostile or abusive working environment).

Colleen Schmitt remembered Ms. Francois being upset when she heard the term “colored people” and Mr. Kavanagh recalled Ms. Francois being upset about the 1:1 assignment and generally, the racial animus at VPCH, which Mr. Kavanagh shared with David Mitchell, Kathleen Bushey and former CEO Mr. Rothenberg.

Finding the October 2016 Diversity Training to be inadequate in addressing her work environment, Ms. Francois left in tears, something Mr. McCants specifically remembered. Lastly, Carolyn Robinson said she remembered Ms. Francois addressing workplace harassment and hostility at staff meetings and during shift reports.

There was no confusion amongst staff or Administration that Ms. Francois was unhappy and did not welcome the harassment at VPCH. In fact, Ms. Francois’ willingness to address racial issues where she worked precipitated rumors that she “plays the race card” and was overly-sensitive as it was necessary for them to take extra precaution around her. Unfortunately, these are not atypical rumors surrounding people who file discriminatory racial claims; diminishing the validity and legitimacy of their complaints even before an investigation is completed.

III. The harassment created an intimidating, hostile, offensive environment and unreasonably interfered with Ms. Francois’ work performance.

Courts consider the totality of the circumstances in determining whether harassment in the workplace is subjectively and objectively severe or pervasive enough to create a hostile and abusive work environment. A single incident can constitute unlawful harassment if it is sufficiently severe. Courts will look to see if the conduct is physically threatening or humiliating or simply offensive. Death threats and co-workers creating safety hazards for plaintiffs could be sufficiently severe.¹⁵⁹ Here, we review the facts surrounding Ms. Francois’ request to be removed from a 1:1 assignment:

- The patient was known by VPCH to be racist and had a swastika tattoo.
- African-Americans were known to be a trigger for the patient, per Collen Schmitt, Dr. Richard Munson and Ms. Francois.

¹⁵⁹ *Kaytor v. Electric Boat Corp*, 609 F.3d 537,547 (2nd Cir. 2010). See also *Cruz v. Coach Stores, Inc.*, 202 F.3d at 571.

- Nurses and Dr. Munson had attempted to write an order prohibiting African-Americans from working 1:1 with this patient after Ms. Francois shared her concerns about her safety and the safety of her African-American colleagues.
- Ms. Francois was left to advocate for herself and informally address the matter.
- The patient lunged at Ms. Francois on at least two prior occasions and said, “Get that nigger away from me!”
- The patient was not easily re-directed. Staff had used Emergency Procedures to physically contain the patient.
- Dan Carver knew that the patient was aggressive and had gotten physical by getting in staffs’ faces.
- Mr. Kavanagh said he knew the patient was racist and was aware the patient was combative and had the ability to be harmful and had in fact, pushed staff at the hospital.
- VPCH is a dangerous place to work and staff are routinely verbally and physically attacked by patients.
- Ms. Francois unequivocally protested the 1:1 assignment.
- Ms. Francois was assigned to the patient for at least 40 minutes and was the person to remove herself.
- Ms. Francois was verbally reprimanded by Dan Carver for walking away.
- Despite complaining to Kathleen Bushey, David Mitchell and Jeffrey Rothenberg, VPCH Administrators developed no immediate or long-term protocol or procedures to keep African-American staff safe from this patient or other similar patients.
- This harassment caused Ms. Francois a great deal of unnecessary stress and emotion about her safety at work.

Ms. Francois, Ms. Robinson and Mr. McCants all have had the occasion to request a reassignment when they felt in danger of bodily harm and on each occasion, their immediate supervisor denied the request. Some cited to shortage of staff while others said that type of abuse came with working at VPCH. Although mental health specialists have on occasion been removed from 1:1 assignments, Mr. Carver said it didn’t happen, absent “persistent or extreme circumstances.” Even when nurses and Dr. Munson saw fit to not assign African-Americans to a

known racist patient with a tendency to be triggered by people of dark skin, Ms. Francois was left to informally protect herself and other African-American staff. Although VPCH was arguably correct in not issuing a formal order prohibiting all African-American staff from being assigned 1:1 to the patient, it also failed to notify evening charge nurses and shift leaders of the risks and dangers to African-American employees of being assigned to this particular patient. When the totality of the circumstances is considered, a reasonable person could find that Dan Carver's outright refusal to reassign Ms. Francois unreasonably placed her at risk for bodily harm and constituted harassment that a Court would find sufficiently severe.

Offensive jokes, slurs, epithets, name calling, insults or put-downs may constitute harassment even if they are not sufficiently severe, if they are pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive. Here, we consider the frequency of the discriminatory conduct, whether the conduct is humiliating or mere offensive utterance, whether the conduct unreasonably interfered with Ms. Francois' work and the effect on Ms. Francois' psychological well-being keeping in mind that "a discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."¹⁶⁰ The workplace environment is considered as a whole and all statements, even those that did not target Ms. Francois specifically are considered in this analysis, as they would be in court.

Mental Health Specialists, Nurses and Administrators alike said it was not unusual to hear patients say "nigger." Former CEO Jeffrey Rothenberg said traveling nurses were surprised by how often they heard "nigger" at VPCH; presumably compared to their other experiences. Tim McCants was told by a traveling nurse to expect being called "nigger" at VPCH. And although some said, they did not hear the word very often, Mental Health Specialists who worked closely with patients said this term was regularly used by patients to get a reaction. Ms. Francois, Ms. Muzima and Ms. Wilson said they heard "nigger" everyday; Ms. Wilson said she heard it 3-4 times on the day she was interviewed. Traveling nurse, Ms. Robinson said she heard it on a

¹⁶⁰ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

weekly basis in addition to words like “coon” and “kike.” Both Ms. Francois and Ms. Muzima heard a nurse repeat the patient’s use of the term “nigger” without hesitation or forethought about the impact on her African-American colleagues. Patients also said, “get that nigger away from me” and “I don’t want that nigger giving me medication” and “go back to Africa.” Ms. Robinson said co-workers laughed or did nothing when these terms were used. Mr. Rothenberg said he recognized that white staff members did not know how to support their non-white colleagues. Yet, VPCH had no policy or protocol on how to handle these situations.

In addition to hearing “nigger” every week or every day at work, Ms. Francois and her African-American colleagues were also subjected to co-workers who did and said discriminatory things:

- A co-worker wrote “NIGGER” on Mr. McCants windshield in 2007 and no investigation ensued while the co-worker continued to work at VPCH.
- A co-worker called Mr. McCants a “re-nigger.”
- Co-workers called Mr. McCants “Chocolate Boy” or “Little Bill.”
- A co-worker said, “Why are you dating that nigger?”¹⁶¹
- A co-worker referred to Mr. McCants as “white-washed.”
- A co-worker referred to Mr. McCants’ car as a “hood car.”
- Annette Brennan referred to an African American traveling nurse as “nappy-ass.”
- Sarah Wilson said Ms. Francois was riding the “welfare bus.”
- Sam Jensen called out “fried chicken” to two African-Americans and walked away, with knowledge of the stereotype.
- Colleen Schmitt and Ms. Francois both heard a charge nurse say, “colored people.”
- Ms. Francois’ statement that she’s also heard co-workers say, “colored children” and “I can’t believe someone could be that black.”
- Holly Newman singing, “my nigga, my nigga” in front of a patient she knew who liked using the word, “nigger.”
- Holly Newman calling Mr. McCants “little black man.”
- African-American staff being routinely mistaken for each other.

¹⁶¹ Id.

- A co-worker who submitted to a patient's racial preference and administered medication directly when the patient said, "I don't want that nigger giving me medication."

Ms. Muzima said that being called "nigger" regularly by patients left her feeling dehumanized. Mr. McCants admitted to feeling scared for his life as a newly employed 21-year-old and feeling dissonance for experiencing many years of discrimination and never standing up for himself or others. Ms. Robinson was upset and disappointed in her colleagues and Administrators. And finally, Ms. Francois who was visibly upset at work on several occasions and throughout her interview, shared that the harassment at VPCH has left her angry, distraught and desiring a safe place to work and live outside of Vermont. A reasonable person could conclude that the "offensive jokes, slurs, epithets, name calling, insults and put-downs" by patients and co-workers were pervasive. As such, this investigation concludes that Ms. Francois was subjected to a hostile work environment that was subjectively and objectively severe and pervasive enough to create a hostile, offensive and abusive work environment.

IV. The harassment was based on Ms. Francois' membership in a protected class (race and color based).

Harassment must be based on a plaintiff's membership in a protected category; satisfying the traditional discriminatory intent requirement.¹⁶² The law does not require racial animus or presence of a bad actor to find that harassment is based on race. The use of racial slurs typically satisfies this requirement without further analysis. This investigation makes no judgment regarding the moral character of VPCH staff or patients whose comments and actions it finds to be racially motivated.

While some comments and actions are clearly racially charged, others are arguably less obvious. This investigation is not persuaded by Annette Brennan's defense that her statement referring to an African-American colleague as "nappy-ass" was not a racial slur about African-American hair. Ms. Brennan recognized the wrongness of her statement as soon as she said it in front of Mr. McCants. Although Ms. Newman did not recall singing, "my nigga, my nigga," her admission that it was possible, that she recalled a song came on, she stood up and nodded and

¹⁶² *Ward v. Connecticut Dept. of Public Safety*, 2009 WL 179786 at *12 (D Conn. January 21, 2009).

Ms. Francois' clear recollection of the incident, in the lax climate of VPCH leads this investigation to conclude that Ms. Francois' version of events is most likely to be true. Since the term "nigga" unambiguously refers to "nigger," possibly the most offensive and insulting pejorative used towards Black people, it would be hard to defend that singing the words would make it less offensive. Likewise, referring to Mr. McCants as "the little black man" while no one else at VPCH is routinely called "tall white girl" or "tiny white man" shows discriminatory intent even if Ms. Newman is apologetic and intended no offense. Statements by co-workers that repeat "nigger" or refer to African-American people as "colored people," "I can't believe someone could be that black," "re-nigger" "Chocolate boy," "little Bill," "white-washed" are on their face, race-based.

Other statements rely on stereotypes about African-Americans living in the "ghetto" or "hood" and being disproportionately on welfare, eating fried chicken and watermelon or drinking grape soda. The "hood car" comment, Sarah Wilson's "welfare bus" statement and Sam Jensen's "fried chicken" comment all fall within this category. Although Ms. Wilson and Mr. Jensen deny any racial intent when they made their statements, this investigation is not persuaded that they were not racially motivated and would have also occurred with white staff members.

Every Mental Health Specialist, Nurse and Administrator at VPCH interviewed in this investigation agreed that working with psychiatric patients was challenging and difficult and that everyone was at risk for verbal and physical attacks. But there was a complete lack of appreciation for the challenges of being an African-American working in an environment where the word "nigger" and the like was heard and used routinely. Employees compared patients' use of "nigger" with attacks on them based on their looks and weight. Former CEO Mr. Rothenberg said white employees did not know how to show support when their fellow African-American co-workers were verbally assaulted with racism and Ms. Robinson said her co-workers laughed and/or did nothing. Employees of VPCH believed that where patients lacked intent, it should have mitigated the impact on African-American employees. Some said patients called white employees "nigger" as if the impact was the same.¹⁶³

¹⁶³ Interview with Holly Newman.

Many VPCH employees emphasized how “demented,” “psychotic” and mentally ill patients were, suggesting there was nothing to be done about it.¹⁶⁴ While some patients may have been too mentally ill to form any intent, some remained cognizant of their words and its effect on those who worked with them, evidenced by the many VPCH employees who said patients said these words to get a reaction, and were thus, purposeful. Ms. Robinson said patients were intentional and Ms. Muzima said, non-whites were targeted with discrimination more than whites. While white staff members were verbally attacked by patients based on their weight, perceived sexual orientation and gender, they were not attacked based on their race or color.

V. The harassment can be imputed to VPCH and there are no recognized defenses it can raise.

The standards for imputing harassment to an employer depends on whether the harasser is a supervisor, co-worker or non-employee. The law defines a “supervisor” as someone who is empowered by the employer to take “tangible employment actions” against the victim.¹⁶⁵ Tangible employment actions mean “to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.¹⁶⁶ Someone may still be a supervisor even though his decisions are subject to review by higher management.¹⁶⁷ Where a supervisor has committed harassment, an employer can only escape liability if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Dan Carver was put in a position of authority over Ms. Francois when he was assigned Shift Leader and had the ability to assign and reassign Ms. Francois. However, Shift Leaders primarily assist Charge Nurses who typically delegate assignments to Mental Health Specialists. Mr. Carver had no power to discipline, demote, significantly change Ms. Francois’ responsibilities or cause a change to her benefits. In sum, Mr. Carver did not have the ability to make any tangible employment action as to Ms. Francois and it is unlikely a Court would deem

¹⁶⁴ Interview with Dan Carver.

¹⁶⁵ *Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013).

¹⁶⁶ *Id.* at 2446 and *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 761 (1998).

¹⁶⁷ *Id.*

him to be a supervisor. Nevertheless, VPCH may be liable for Mr. Carver and other non-supervisory employees and non-employees over whom it has control, if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.¹⁶⁸

Vermont Psychiatric Care Hospital has been on notice about discrimination in its workplace since at least 2007 when Tim McCants was first hired and found his car vandalized with “NIGGER” written on his windshield and no investigation ensued. It was put on notice again when a VPCH employee filed a complaint of discrimination at the Vermont Human Rights Commission in 2015. And yet again when Carolyn Robinson shared with former CEO Jeffrey Rothenberg, Kathleen Bushey, David Mitchell that VPCH needed diversity training and a plan for both patients and staff alike. Although Ms. Bushey and Mr. Mitchell denied specifics, Mr. Rothenberg was put on notice by traveling nurses who were surprised by how often they heard racist and derogatory remarks by patients towards African-American staff. Ms. Muzima complained to her supervisor about hearing the term “nigger” all too often but said her supervisor never followed up. Ms. Muzima said she didn’t believe supervisors or managers were very responsive to concerns about race and hostility and there was no one she could trust with a discriminatory complaint. Although Ms. Francois was not the first African-American employee to complain of discrimination, she may have been the most vocal as she put VPCH repeatedly on notice about the unwelcome discrimination she experienced by patients and co-workers.

While the State would have difficulty arguing it had no control over its own employees in a state-owned facility, an argument that it had no control over patients because of the severity of their mental health issues requires a brief review. Certainly, VPCH can be held liable when they fail to adequately address the competing needs and interests of patient services and staff safety. As a result, VPCH has invested a lot of time and resources into developing lengthy trainings and education around the safety of staff and patients who, because of their mental health issues, cause bodily injury and harm. Furthermore, Ms. Francois has never claimed that VPCH should be liable for their patients’ racism only that VPCH had a duty to protect Ms. Francois and other African-American staff members from a hostile, offensive and abusive work environment and it failed to take any preventative or corrective action in this regard. Instead, VPCH had no policies

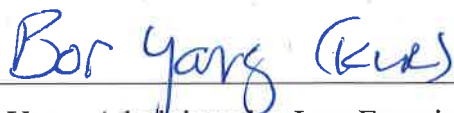
¹⁶⁸ www.eeoc.gov. See also *Howley v. Town of Stratford* 217 F.3d 141, 154 (2nd Cir. 2000).

or protocols in place and had never developed or delivered training specific to its staff; staff who work in a unique, complex and highly stressful environment in need of dynamic training. Mr. Mitchell said training wasn't a priority and admitted that perhaps this was a mistake. It was. Ignoring the urgency and necessity of training created a permissive climate for patients to verbally attack African-Americans and put them at risk for bodily harm, with little or no support. The same climate allowed staff to make unfettered and unchecked racially motivated statements. The October 2016 training was uninspiring, failed to validate the African-Americans who felt discrimination, and failed to challenge and supply the necessary tools to move forward at VPCH. Despite it being a mandatory training, some staff never attended.

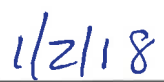
The State conducted four investigations that resulted in only one disciplinary action. The Vermont Psychiatric Care Hospital failed to follow up on several complaints of discrimination and the State failed to see the larger more concerning climate issue at VPCH.

Recommendation

This investigation recommends based on all the facts and circumstances that The Vermont Human Rights Commission find that there are **reasonable grounds** to believe that the Department of Mental Health discriminated against Ismina Francois on the basis of her race and color under The Vermont Fair Employment Practices Act, codified at 21 V.S.A. §495.




Bor Yang, Administrative Law Examiner

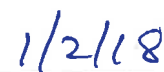


Date

Approved by:



Karen Richards, Executive Director
& Legal Counsel



Date

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Ismina Francois,)
Complainant)
)
v.) VHRC Complaint No. E17-0002
)
)
Vermont Department of Mental Health,)
Respondent)

FINAL DETERMINATION

Pursuant to 9 V.S.A. 4554, the Vermont Human Rights Commission enters the following Order:


1. The following vote was taken on a motion to find that there are reasonable grounds to believe that the Vermont Department of Mental Health, the Respondents, illegally discriminated against Ismina Francois, the Complainant, on the basis of race and color in violation of Vermont's Fair Employment Practices Act.


Nathan Besio	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Mary Brodsky	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Donald Vickers	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Dawn Ellis	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Chuck Kletecka	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>


Entry: Reasonable Grounds Motion failed

Dated at Barre, Vermont, this 25th, day of January 2018.

BY: VERMONT HUMAN RIGHTS COMMISSION


Nathan Besio


Mary Brodsky


Donald Vickers


Dawn Ellis


Chuck Klétecka