INVESTIGATIVE REPORT

Vermont HRC Case PA15-0012

Complainant: Abdel R. Rababah

Respondent: Vermont Department of Motor Vehicles

Charge: Race, Color, Religion, and National Origin Discrimination

---

Summary of Complaint:

On January 13, 2015 Abdel R. Rababah, a Jordanian citizen, filed a complaint with the Vermont Human Rights Commission (VHRC), alleging that the Vermont Department of Motor Vehicles (DMV) discriminated against Mr. Rababah on the basis of his race, color, religion and national origin. Specifically, Mr. Rababah alleges that DMV violated the Vermont Fair Housing and Public Accommodations law (VFHPA), 9 V.S.A. § 4502(a) when it made improper requests for information, did not allow Mr. Rababah to take the driving test, accused Mr. Rababah of committing fraud, and ultimately contacted U.S. Immigration and Customs Enforcement (ICE) resulting in deportation proceedings being commenced against Mr. Rababah.

Summary of Response:

On January 30, 2015, DMV responded to the Complaint. DMV admitted that Mr. Rababah is a citizen of Jordan, and that he applied for a driver privilege card at the Dummerston, VT DMV, that he passed the written test, and that he was not permitted to take the road test in his vehicle, because of a broken windshield. Respondent further admitted that Mr. Rababah did pass the road test in another vehicle. Respondent admitted that Mr. Rababah's case was referred for investigation to DMV Detective Jeremy Desjardins; that Detective Desjardins arranged for a meeting at DMV with Mr. Rababah; that Detective Desjardins arranged for ICE officers to be present at that meeting; and that ICE officers took Mr. Rababah into custody at that meeting. Notwithstanding, Respondent denies that it discriminated against Mr. Rababah in any manner.

Preliminary Recommendations:

This investigation makes a preliminary recommendation that the Human Rights Commission find there **are reasonable grounds** to believe that the Respondent discriminated against Mr. Rababah by denying him access to the services and privileges of Vermont DMV, a place of public accommodation, in violation of the Vermont Fair Housing and Public Accommodations law, 9 V.S.A. § 4502(a).

Documents:

- Complaint
- Response to Complaint
- DMV case file for Abdel R. Rababah
- Report of the Study Committee on Migrant Worker Access to Driver's Licenses and Non-Driver Identification Cards, dated January 15, 2013
- Internal DMV email regarding DMV – ICE collaboration
- Vermont State Police Bias-Free Policing policy
- Vermont Attorney General's Proposed Bias Free Policing policy
- 23 V.S.A. §603. Application for and issuance of license.
- 20 V.S.A. §2366. Law enforcement agencies; fair and impartial policing policy.
- Article: Robert Audette, "Migrant Justice: Is Vermont DMV collaborating with ICE?" *Brattleboro Reformer*, January 9, 2015.

Interviews:

- Lieutenant Mary McIntyre, DMV Criminal Investigations Unit, Southern Team Supervisor
- Det. Jeremy Desjardins, DMV Criminal Investigations Unit, Southern Team
- Deborah Sheldon, Dummerston DMV
- Donna Thompson, Dummerston DMV
- Robin Jackson, Supervisor, Dummerston DMV
- Det. John Purdy, DMV Criminal Investigations Unit, Southern Team
- Abdel Rababah, Complainant

Prima Facie Case

In order to make out a *prima facie* case of discrimination in public accommodations, the Complainant must prove each of the following elements:

1. Complainant is a member of the protected class;

2. The Respondent is a place of public accommodation;

3. Complainant attempted to avail himself of services ordinarily provided by the Responding Party to all members of the public in the manner in which they are ordinarily provided; and

4. Complainant was denied the privileges and benefits of the place of public accommodation; and

5. The denial was because of Complainant's membership in one or more protected categories.

Where there is no direct evidence of a respondent's motivations, courts have held that the fifth element will be supported if the "factual circumstances giving rise to the denial rationally support ***an inference*** of unlawful discrimination." (Emphasis added.) Such circumstances include either

- that the Complainant was treated differently than similarly situated persons who were not members of the protected category; or

- that the Complainant received services in a "markedly hostile manner" which "a reasonable person would find objectively unreasonable."

Facts

Introduction.

Abdel Rababah is a citizen of Jordan of Muslim faith who has lived in and around Putney, Vermont since approximately 2006. He arrived in the United States on a student visa, which has since expired. He therefore has no legal presence in the United States.[1] This Complaint stems from his attempt to secure a driver privilege card (DPC) from the Dummerston DMV in April 2014. It is undisputed that after filling out the required applications, obtaining a learner's permit, and passing the written and road tests, Mr. Rababah was issued a DPC. Immediately thereafter he was referred to the DMV Investigations Unit. Detective Jeremy

[1] Interview of Det. Jeremy Desjardins; Investigation of Det. Jeremy Desjardins, Case No. 14MV003159, dated 5/6/2014.

Desjardins contacted the U.S. Border Patrol/Immigration and Custom Enforcement ("Border Patrol" or ("ICE") office to enquire about Mr. Rababah's status, called Mr. Rababah to ask him to come in for an interview, and then contacted ICE again to alert them to that meeting. ICE officers met Mr. Rababah at that interview and took him into custody.[2]

Given the above outlined scenario, this fact section will focus first on the state of the current law governing DPCs in Vermont. Section 2 will then examine the policies and practices of the DMV generally with regard to the handling of foreign document applications. Section 3 covers the specific incidents which occurred at Dummerston DMV, including how Mr. Rababah's applications were filled out, his treatment by counter staff, and the refusal to allow him to take the road test in his own vehicle because of a cracked window. Finally, Section 4 describes Mr. Rababah's referral to the DMV Investigations Unit, the two investigations that were done, and the involvement of ICE in that investigation.

Section 1: The New Law.

The Federal REAL ID Act was passed in 2005 in response to the threat of terrorism after the 9/11 attacks. It was "designed to improve the reliability and accuracy of state-issued identification documents, which should inhibit terrorists' ability to evade detection by using fraudulent identification."[3] In brief, the law requires states to apply heightened identity standards for persons requesting REAL ID Driver's Licenses. States were permitted, however, to continue issuing driver's licenses or identity cards that did not meet the standards of REAL ID, although those cards would not necessarily be accepted as identification for federal purposes (boarding airlines, entering federal buildings, etc.) Prior to 2014, however, even those Vermont issued non-REAL ID cards, required proof of legal presence in the U.S.

In January 2014 a new Vermont law went into effect allowing persons residing in Vermont to obtain what was termed an operator's privilege card (more commonly referred to as a "driver privilege card" or "DPC") without needing to show proof of legal presence. The DPC law, found at 23 V.S.A. § 603, states as follows:

> (e)(1) A citizen of a foreign country *unable to establish legal presence in the United States* who furnishes reliable proof of Vermont residence and of name, date, and place of birth...shall be eligible to obtain an operator's privilege card.... (Emphasis added.)
>
> The proofs required may be achieved by providing, among other options,
>
> (e)(2) (A) a valid foreign passport, *with or without* a U.S. Customs and Border Protection entry stamp . . . (Emphasis added.)
>
> (e)(2)(C) a certified record of the applicant's birth . . . , [and]
>
> (e)(3)(A)(i) two pieces of mail received by the applicant within the prior 30 days with the applicant's current name and residential Vermont address...

[2] Complaint and Response; interview of Jeremy Desjardins, Investigative Report of Jeremy Desjardins.
[3] http://www.dhs.gov/real-id-public-faqs

The DPC law stands in contrast to the requirements for an operator's license, which include proof of legal presence.[4] It was passed in response to a recognized need for migrant workers and other undocumented persons to have a legal means of driving on Vermont roads despite their undocumented status. According to the Study Committee on Migrant Worker Access to Driver's Licenses and Non-Driver Identification Cards,

> [m]igrant workers in Vermont, *regardless of their lawful presence in the United States*, provide a valuable service to the state... [and] [a]uthorizing Vermont residents *unable to establish lawful presence in the United States* to obtain DLs/IDs will encourage their participation in community life, promote positive relationships and diversity within our community, and stimulate economic development. (Emphasis added.)[5]

The report further suggested that

> (3) those applicants for DLs/IDs who are unable to meet current eligibility criteria [including proof of legal presence] might be required to provide a valid passport....A valid passport should be accepted *without regard to lawful entry or departure*. (Emphasis added.)[6]

In other words, the Driver Privilege Card is specifically designed to be used by persons who do not necessarily have proof of legal presence.

Section 2: DMV policies and practices for handling foreign document applications

Prior to the DPC law, one piece of DMV's mandate was to establish the applicant's legal presence.[7] Although the DPC was created to bypass any requirement of legal presence, it is still a state issued identity card, and does require "reliable proof of Vermont residence and of name, date, and place of birth."[8] DMV retains the responsibility for authenticating these proofs.[9]

From the time the DPC law was instituted in January 2014 up to the present time the DMV has not implemented any formal policy regarding the processing and investigation of foreign document DPC applications. By necessity, however, certain informal policies and practices did develop.

First, it should be noted that no new application paperwork was developed for the DPC applications. All persons ("applicants") applying for REAL ID Licenses ("Licenses") or Driver

---

[4] 23 V.S.A. §603(d).

[5] Report of the Study Committee on Migrant Worker Access to Driver's Licenses and Non-Driver Identification Cards: Report to the House and Senate Committees on transportation and on Agriculture Pursuant to No. 95 of the Acts of 2012, dated January 15, 2013.

[6] *Id.*

[7] DMV Standard Operating Procedure: Foreign Documents 12/15/05.

[8] 23 V.S.A. §603(e).

[9] Interview of Lt. McIntyre.

Privilege Cards fill out one application. There is nothing on the face of the application indicating the type of ID being requested. There is, however, a question on the application regarding the Citizenship and legal status of the applicant. Applicants bring the completed application to counter staff ("cashiers") who examine the application and the documents presented.

If a person applies for a REAL ID, cashiers run the applicant's name through a computer database called SAVE. SAVE contains information about persons with legal status in the United States.[10] If SAVE flags a problem, the application is forwarded to the DMV enforcement Division for further enquiry. It is common practice for an administrative assistant to contact ICE for "clarification on authenticity of the documents [and/or] the applicant's legal presence."[11] If the matter is not resolved at that level, the application is forwarded to an investigator for follow-up.[12]

Persons without legal status in the U.S. will not be in the SAVE system.[13] Thus, if a person applies for a DPC, a SAVE check is only run if the applicant claims legal presence.[14]

If, on the other hand, a person applies for a DPC and indicates that they are undocumented, the cashier need only verify that the applicant has valid proof of identity and residence pursuant to section (e)(2-3) of the DPC law described above.[15] It is not the policy of DMV to make sure DPC applicants have legal status; indeed, almost by definition they will not.[16] However, all DMV staff interviewed agreed that from the cashiers on up through the investigation team, a primary goal is to make sure everything is "in order," "correct," and to identify "any red flags."[17]

If the cashiers identify a problem, they are trained not to challenge applicants. Instead, they contact the DMV Investigations Unit if there is anything at all that makes them uncomfortable.[18] Both the cashiers interviewed and Detective Jeremy Desjardins of the Criminal Investigation Unit describe a fluid relationship in which cashiers can contact investigations informally to ask questions, and can refer applications for review if anything seems wrong or questionable for any reason.[19] An unsigned draft memo outlining the policy for Referrals For Investigation ("RFIs") lists the following as events that trigger an RFI:

- If we suspect customer hands us fraudulent documents…
- If we suspect customer is lying on an application that is signed…

---

[10] Interviews of Donna Thompson, Debbie Sheldon, and Robin Jackson. See also, email from Glen Button to Sue Minter and Robert Ide, among others, dated January 8, 2015.
[11] Email from Glen Button to Sue Minter and Robert Ide, among others, dated January 8, 2015.
[12] *Id.*
[13] Interview of Robin Jackson.
[14] *Id.*, See also, email from Glen Button to Sue Minter and Robert Ide, among others, dated January 8, 2015; email from Bruce Miles to Jonathan Purdy, dated November 7, 2014.
[15] Interviews of Deborah Sheldon, Donna Thompson and Robin Jackson.
[16] Interviews of Donna Thompson, Deborah Sheldon and Robin Jackson.
[17] Interviews of Donna Thompson, Deborah Sheldon and Robin Jackson.
[18] Interviews of Donna Thompson and Deborah Sheldon.
[19] Interviews of Donna Thompson, Deborah Sheldon, and Detective Desjardins.

- If a customer seems overly friendly or extremely upset or just seems not right ...
- If a customer brings in a letter from Social Security saying they are ineligible for a Social Security Number and they also bring me...a Social Security Card or W-2.
- If we see multiple customers with the same address.
- If a customer repeatedly comes in with an address far away...
- If we know the area and suspect that an address is fake. [20]

An email from Michael Smith to Lieutenant Mary McIntyre, among others in the foreign document "working group" in December 2014, underscores this policy, stating "if we find ourselves doubting the validity of any of the documentation, or anything just seems out of the ordinary...provide a temporary license/ID to the applicant and complete the referral for investigation."

Once an application is referred for investigation, a detective is assigned to the case. The detective reviews the applications and gathers additional information as necessary. The detective may, for example, contact the applicant, contact consulates for assistance interpreting foreign documents, and call the Social Security Administration to check that a number provided matches a name given.[21] Detectives are members of the police force, and are bound by the bias-free policing policy adopted by the Vermont State Police.[22]

With regard to use of ICE databases, the Bias-Free Policing policy provides:

> If a member needs to identify an individual *and that individual does not have identification*, the member may use whatever tools, including federal databases, are reasonably necessary to identify the individual under the circumstances. Identification methods *may include a foreign passport...or other government-issued documents that are reasonably reliable*, subject to the same scrutiny and follow-up for authentication as any other forms of identification.

With regard to checking immigration status, the policy states

> A member may ask an individual about his or her immigration status...[i]f the member is conducting a criminal investigation or an investigation of suspicious activity... and the immigration status of the suspect is relevant to the investigation.

Suspicious activity is defined narrowly as

[20] While this investigation is aware that this memo is informal and not necessarily implemented, it supports the testimony of staff regarding the high level of subjective individual judgment given to the cashiers to determine when they might make a RFI.

[21] Interview of Detective Purdy.

[22] Interviews of Detectives Purdy and Desjardins.

> [o]bserved behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity.

While not adopted verbatim, it is also instructive to review the Attorney General's model bias-free policing policy, which emphasizes limiting enquiry into immigration status. It states that

> ...inquiry into and disclosure of information regarding immigration status should only occur in *limited circumstances*...
>
> The federal government prioritizes for arrest, detention, prosecution and removal of those undocumented nationals *who pose a danger to national security or a risk to public safety....*
>
> Law enforcement officers may disclose Confidential Information in cases where the information is *material* to the advancement of...(1) Investigations of violations of the law; or, (2) Homeland Security and public safety....
>
> Law enforcement officers should always seek to identify a person suspected of a ...criminal violation. Officers should inquire into immigration status *only when that information is necessary to properly identify such a person.* (Emphasis added.)

The DMV detective assigned reviews all the documents, and conducts interviews as necessary to gather information. These interviews may include contacting the applicant for additional information, and contacting the Social Security Administration to determine the authenticity of any Social Security documents provided.[23] Additionally, Border Patrol/ICE has databases that are inaccessible to Vermont police. It is therefore the practice of some detectives to contact Border Patrol/ICE for assistance.[24] Indeed, while not ever formally implemented, Captain Drew Bloom did request that contacting ICE be written into a new policy in development. His September 2014 email advises that "the policy will need to cite how we first run a SAVE check, then call ICE or Border Patrol."

Captain Bloom's inclusion of the directive to first run a SAVE check indicates that this policy was only to be used when a person is claiming legal residence. This protocol is affirmed by Lt. McIntyre, who was part of the group tasked with working on the policy. She stated that the meaning of the directive was to authorize calls to ICE when SAVE turned up a problem, not to call ICE in every instance. Further, she states that contact with ICE is not made as way to intentionally turn in undocumented applicants, but rather is tool for DMV to use to assist with identification of applicants.

At the same time, however, Lt. McIntyre stated that using ICE is an easy way to get all the information available, because with ICE you "always get someone on the phone." She contrasted this ease with the difficulty of contacting the Social Security Administration (SSA). The SSA is a much slower process, and it sometimes takes several days or several attempts to get

---

[23] Interview of Detective Purdy.

[24] Interview of Lt. McIntyre.

any answer. For his part, Det. Desjardins reports using ICE as a go-to resource when anything seems out of the ordinary. Thus, as with the interface between cashiers and detectives, the interface between detectives and ICE officers is fluid. Indeed, the close camaraderie and relationship between DMV and ICE officers is illustrated in the way the two organizations worked together to shut down a fraud scam in the Bennington in the summer and fall of 2014. For example, an email thread in November 2014 between DMV Detective Purdy and ICE officer Steven Day reads as follows:

> Day: [regarding test dates for applicants reasonably suspected of fraud] None for Mon or Tuesday?
>
> Purdy: I believe there were one or two...Didn't figure you'd want to make the drive unless something solid.
>
> Day: OK...didn't see any on schedule but feel free to send names anyway...never know what kind of fugitive criminal we might come across.

A later email from Detective Purdy in December 2014 explains that

> [e]ventually ICE says they will try to come down once a week or so...When we get to that point maybe we can schedule any test dates for a particular day of the week, and have ICE come then.

While this email references the efforts of DMV and ICE to stop a known fraud ring, it does serve to underscore the closeness of the relationship between DMV and ICE. Indeed, in October 2014 one ICE officer wrote to Detective Purdy in email, "Thanks Jon. That's amazing. We're going to have to make you an honorary ICE officer!"

According to the same Det. Jonathan Purdy, however, when a case involves document verification, as opposed to a problem identified by SAVE, his common practice is not to contact ICE right away. Rather, he first attempts to verify the authenticity of the documents by contacting the issuing organizations. Only if a problem is revealed does he believe it is proper to contact Border Patrol.[25] This process is illustrated in an email he sent to Lt. Mary McIntyre regarding one of his cases in September 2014:

> FYI Rutland Social Security advised the SS number does [not] match [sic] their files. Border Patrol ran the A# and it also does not match. I've emailed the docs to Border Patrol....

Section 3: Mr. Rababah's treatment at Dummerston DMV.

A. The learner's permit application process.

On February 4, 2014, Mr. Rababah went to the Dummerston DMV and filled out an application for a learner's permit pursuant to the 2014 law change. On the application, question number 6 reads first "Are you a U.S. citizen?" and then, "If no, do you have proof of legal

[25] Interview of Det. Jonathan Purdy.

presence?" As is clearly visible on the document, Mr. Rababah answered part one of the question "no." He left part two blank. He provided his valid Jordan passport, a birth certificate, a social security card marked "valid for work only with AHS authorization," and two bills addressed to 125 Dummerston Station Rd., the same address he listed on his application.[26]

Deborah Sheldon, who assisted him with this application, called a supervisor for clarification on how to process the application because she had previously only seen DPC applications from Mexican migrant workers. She was confused about whether a person who was not working, such as Mr. Rababah, could get what she terms an undocumented worker card.[27]

Ms. Sheldon was told to process the application as an undocumented worker application for a DPC, which she did. She wrote "undocumented worker" on the bottom of the application. Mr. Rababah passed the written test and was issued the learner's permit without incident.[28]

B. The permanent DPC and road test application process.

1. Ms. Thompson's questioning about legal status.

On April 28, 2014, Mr. Rababah returned to the Dummerston DMV office and filled out a second application for the permanent DPC and to take the road test. He was assisted by Donna Thompson, who asked to see his passport and birth certificate.[29] Mr. Rababah told Ms. Thompson that the requested documents had all been provided previously and were scanned into the DMV computer. He also informed her that he had been told that all that was required at that phase was his permit card, insurance, registration and inspection.[30] Respondents admit that the automated line does state as described by Mr. Rababah.[31]

According to Ms. Thompson, she asked for the additional identity documents because she "was confused with changing Department procedures."[32] Ms. Thompson's supervisor, Robin Jackson, suggested that Ms. Thompson's actions were reasonable because people's addresses and situations change between getting the learner's permit and getting the permanent DPC.[33]

Ultimately, Mr. Rababah did provide the requested identity documents to Ms. Thompson. They show that he is from Jordan and list his religion as "Islam. In addition, Ms. Thompson also had a copy of the Social Security card that Mr. Rababah had presented in February. She states that seeing the Social Security card made her unsure whether Mr. Rababah had legal status, and also whether he was applying for a REAL ID or a DPC. She questioned him about the card and

---

[26] Authorized copy of Application for License/Permit with supporting documentation.

[27] Interview of Deborah Sheldon; Investigation of Lt. Mary McIntyre, case number 14MV003159, dated August 8, 2014.

[28] Complaint at ¶ 2.

[29] Complaint at ¶ 3; Response at ¶ 3 (admitting that Ms. Thompson asked for documentation that "had already been furnished.")

[30] Complaint at ¶ 3.

[31] Response to Complaint, dated January 29, 2015.

[32] Response at ¶ 3.

[33] Interview of Robin Jackson.

what documents he used to obtain it.[34] She states that her questions were aimed at helping Mr. Rababah because she thought it would be better for him to show legal status, and perhaps get a REAL ID, than to get a DPC as an undocumented person.[35]

In response to Ms. Thompson's questions, Mr. Rababah quoted the DPC law to Ms. Thompson, and told her he was undocumented.[36] Nonetheless, Ms. Thompson ran a SAVE check, which came back "No Match Found."[37] She then tried to contact Ms. Jackson, but Ms. Jackson was not available.[38] She contacted the DMV Enforcement Division for advice, but they were uncertain how she should proceed.[39] Finally, her co-worker, Deborah Sheldon, contacted Detective Jeremy Desjardins in the investigations unit. Det. Desjardins advised that Mr. Rababah did not have the necessary documents to get a REAL ID license, and that he could only get a DPC.[40] Ms. Thompson processed Mr. Rababah's application as a DPC.

Mr. Rababah states that after seeing his passport and birth certificate, Ms. Thompson became "rude and disrespectful."[41] Ms. Thompson denies any untoward behavior on her part, stating that she simply remained concerned about Mr. Rababah's status.[42] Because of that continued concern, Ms. Thompson decided that she would "at least foreign doc him anyways," [43] (referring to the process of requesting an investigation).

2. <u>The response to question 6 on the application</u>.

The application for the permanent DPC is identical to the application for the learner's permit. It therefore contains the same question number 6 as the learner's permit application did. Mr. Rababah states that he answered the question in the same manner as he previously did, checking the box acknowledging that he is not a U.S. Citizen, and leaving blank the box asking whether or not he had proof of legal presence.

However, on this application, there is a black "X" in the box indicating that Mr. Rababah had proof of legal presence in the U.S.

The appearance of the black "X" is critical because, as will be discussed later in this Fact Section, it ultimately became the impetus for calling ICE in this matter. Prior to discussing that event, however, two questions must be considered: who made the mark, and when was the mark made?

---

[34] Interview of Donna Thompson; Request for Investigation dated 4/28/2014.
[35] Interview of Donna Thompson.
[36] Interview of Abdel Rababah; Request for investigation dated 4/28/2014.
[37] Interview of Donna Thompson; Request for Investigation dated 4/28/2014.
[38] Interview of Donna Thompson.
[39] Interview of Donna Thompson; Request for Investigation dated 4/28/2014.
[40] Interview of Det. Jeremy Desjardins; Investigation of Det. Jeremy Desjardins: Investigation Case No. 14MV003159, dated 5/6/2014; Request for investigation of Donna Thompson dated 4/28/2014.
[41] Complaint at ¶ 4.
[42] Interview of Donna Thompson.
[43] Interview of Donna Thompson, Request For Investigation dated 4/28/14.

With regard to the question of ***who*** made the mark, Mr. Rababah is certain that he did not. Examination of the original application shows that Mr. Rababah used a blue ink pen and made checks to mark the boxes,[44] and Ms. Thompson herself recalls that the application "as presented" was filled out in blue.[45] Ms. Thompson also recalls that "I believe I may have marked that box after examining the supporting documents . . . and questioning [Mr. Rababah]."[46] An internal investigation done by Lt. Mary McIntyre accepts Ms. Thompson's admission and concludes that "it is very likely that [Mr. Rababah] did not answer "Yes" regarding having legal presence in the US...."[47]

In her interview for this investigation, Ms. Thompson again admitted that she might have made the mark, but also stated that Mr. Rababah may have taken his application back and made the "X" himself after talking with her.[48] Given the weight of all the evidence, however, this investigation finds it highly unlikely that Mr. Rababah would indicate he had legal presence on this application after leaving the question blank on his first application and telling Ms. Thompson he was undocumented. This investigation therefore finds that Ms. Thompson made the "X", and that she made it knowing that Mr. Rababah presented himself as undocumented.

The question of ***when*** Ms. Thompson made the "X" is more specifically stated as a question of whether the "X" was made before or after Mr. Rababah swore to and signed the application. According to Mr. Rababah, the "X" was made *after* he handed in the application, and the box was blank when he signed. According to Ms. Thompson and Ms. Jackson, it is possible that Ms. Thompson made the mark *before* Mr. Rababah signed the application, and his signature therefore endorsed the answer.[49] Once again, this scenario is unsupported by any specific evidence, and appears to be an attempt to protect Ms. Thompson after the fact. By contrast, Ms. Thompson's own statement that "the blue in writing and marks were on the application ***as presented to me*** by Rababah" (emphasis added), Mr. Rababah's clear recollection of signing the application before he handed it to Ms. Thompson, Ms. Thompson's own shaky recollection of events, and the lack of any mention of Mr. Rababah revising question 6 in Ms. Thompson's Request For Investigation, all point to the conclusion that the application was already signed when it was handed to Ms. Thompson, and the "X" was added after the signature.

In addition, Ms. Thompson's Request for investigation states that after reviewing the application, accepting it, and taking Mr. Rababah out for the road test, she again questioned him about his status.

> When we got back I asked him again about whether he had a VISA, an I-94, was he an H1 or a student, etc.?? He said that was a very long time ago, 7 years when he had that...."

---

[44] Application for DPC dated April 28, 2014; Interview of Abdel Rababah.

[45] Statement of Donna Thompson to Lt. McIntyre, reported in Investigation Case No. 14MV003159, dated 8/22/14.

[46] Investigation Report of Lt. Mary McIntyre, Interview of Donna Thompson.

[47] Investigation of Lt. Mary McIntyre: Investigation Case No. 14MV003159, dated 8/22/14.

[48] Interview of Donna Thompson.

[49] Interviews of Donna Thompson and Robin Jackson.

The timing of this conversation suggests that Ms. Thompson still had questions about Mr. Rababah's status after the road test. Had the box already been checked at that time, it is unlikely that she would still have been questioning him about his status. This investigation therefore finds that Ms. Thompson made the "X" after Mr. Rababah signed the application, and that as opposed to endorsing the "X", Mr. Rababah never wavered in his attempts to apply as undocumented.

C. The windshield.

Having accepted Mr. Rababah's application, Ms. Thompson then proceeded to take Mr. Rababah outside for the road test. Upon arriving at his car, Ms. Thompson noticed that Mr. Rababah's windshield was cracked, and was not suitable for the road test. Mr. Rababah claims that the vehicle was inspected with the crack and that he was told that he could use it.

Respondents agree that the vehicle was rejected for use in the test because of the windshield. The DMV Inspection Manual (provided by the Respondents) provides guidance for assessing windshield cracks. According to that manual, vehicles should be rejected if, in pertinent part,

(1) There are cracks...which interfere with vision . . . .

(9) There is, in any area, a crack of 24" in length or two or more cracks . . . with a cumulative total of 24".

(10) There is a crack in the acute area." (The acute area is the 81/2 x 11" horizontal rectangle area directly in front of the driver).[50]

According to Ms. Thompson, the crack was at least two feet across, and was in the middle section of the windshield. Mr. Rababah agreed that her description was approximately correct.

In the Department's reply to the Complaint, Ms. Thompson states that after being told he could not use his car, Mr. Rababah exhibited a "demanding demeanor and tone," and that he made her "nervous."[51] However, in her interview, she describes Mr. Rababah as "desperate" and "upset." He reportedly said "you don't know what it's like," and demanded to be permitted to take the road test. She states that Mr. Rababah was not threatening or scary in any way.[52]

Eventually, a kind DMV patron loaned her vehicle to Mr. Rababah to use for his road test. He took and passed the test, and Ms. Thompson issued him a temporary DPC. After Mr. Rababah left, Ms. Thompson proceeded with her Request For Investigation.

---

[50] DMV Inspection Manual at page CAR 6.4.

[51] VT DMV Investigation Form, Case Number 14MV003159 at page 2-3, dated 8/22/14.

[52] Interview of Donna Thompson.

Section 4: Detective Desjardins' investigation and ICE involvement.

On May 6, 2014, Detective Jeremy Desjardins was assigned to investigate Mr. Rababah's application and documents. While Det. Desjardins agrees that he received training on the bias-free policing policy, and that he is bound by that policy, he could not recall the specific requirements of the policy. He described the duty to be bias free with the general statement that police need to "treat everyone the same."[53]

With regard to Mr. Rababah's case, Det. Desjardins was specifically tasked with

> investigat[ing] the foreign documents submitted by Abdel Razaq Rababah...[and] look[ing] at the documents Rababah provided when the Customer Service Specialist asked about his work status and documentation and was told he was undocumented and it had been 7 years since he had documentation.[54]

In other words, according to Det. Desjardins' own report, he was only supposed to look at the documents provided. He was not tasked with investigating Mr. Rababah's legal status.

As Det. Desjardins describes it, however, the case changed to a legal status case once he started looking at the file.[55] Det. Desjardins first looked at the application itself, of which he had only a black and white copy.[56] He immediately saw that question 6 was answered with a check for "No" to US Citizenship, and an "X" for "Yes" to legal presence. He did not notice that the "X" was different from the checks made on the rest of the application, and he assumed it was made by Mr. Rababah prior to signing the application.[57] Det. Desjardins is aware that DPC applications do not require proof of legal presence. He states that when an application is processed with "no legal presence" marked, he does not look into legal status. However, because of the black "X" indicating legal presence, Det. Desjardins mistakenly thought he was investigating a "false statements" case, and that he therefore needed to ascertain Mr. Rababah's legal status.[58]

What followed is undisputed. Det. Desjardins contacted U.S. Border Patrol on May 19, 2014.[59] He did not call the Social Security Administration to verify the validity of the card. He knew from his prior consultation with Ms. Sheldon that Mr. Rababah had told Ms. Thompson he was undocumented, but he did not contact Mr. Rababah to enquire about the discrepancy with question 6.[60]

---

[53] Interview of Jeremy Desjardins.
[54] Investigation of Det. Jeremy Desjardins, Case No. 14MV003159, dated 5/6/2014.
[55] Interview of Det. Jeremy Desjardins.
[56] Interview of Det. Jeremy Desjardins.
[57] Interview of Det. Jeremy Desjardins; Investigation of Det. Jeremy Desjardins, Case No. 14MV003159, dated 5/6/2014.
[58] Interview of Det. Jeremy Desjardins.
[59] Investigation of Det. Jeremy Desjardins, Case No. 14MV003159, dated 5/6/2014.
[60] Interview of Det. Jeremy Desjardins.

Det. Desjardins informed a Border Patrol agent that he was investigating a possible false statement on a DPC application, and asked specifically about whether the Social Security Card was evidence of legal presence. He was told that Mr. Rababah is a "student violator" who has failed to check in since 2006. The agent asked him "if I [Det. Desjardins] came in contact with Rababah, could I detain him and arrange a transport to the nearest station...."[61]

Det. Desjardins called Mr. Rababah directly for the first time after hanging up with Border Patrol. He asked Mr. Rababah if he had legal presence in the U.S., and Mr. Rababah again said he is "undocumented and had not renewed any paperwork in 7 years."[62] Det. Desjardins then asked Mr. Rababah to meet him at the DMV to discuss "some discrepancies" on the application. They made an appointment, and Det. Desjardins then "followed up" with the Border Patrol agent, telling him that Mr. Rababah would be at the DMV office on May 21, 2014 at 8:45. Border Patrol told Det. Desjardins that Mr. Rababah was from a "security interest" country, although Det. Desjardins states that that information did not influence him in any way. (Indeed, he had already called Border Patrol prior to receiving that information.) Later, Det. Desjardins was contacted by Immigration Customs and Enforcement (ICE) Agent, Jason Brownfield, who arranged to meet Det. Desjardins at the Dummerston DMV 15 minutes prior to Mr. Rababah's appointment.[63] At no time did Det. Desjardins tell Mr. Rababah that he had involved ICE in the DMV matter.

On May 21, 2014, Mr. Rababah arrived at the Dummerston DMV unaware that an ICE agent was waiting there for him. He had done nothing wrong in the entire process of applying for his DPC. It was only then that Det. Desjardins finally asked him for an explanation of the "X" indicating legal presence. Mr. Rababah again denied having legal presence and told Det. Desjardins that he had not made the "X." Not being aware that Ms. Thompson had made the "X", Mr. Rababah accused Det. Desjardins of making the "X" to set him up. Det. Desjardins describes Mr. Rababah's affect as "aggressive," although there is no evidence that Mr. Rababah was physically threatening in any way. Instead, the sum total of the aggressive acts appear to be that Mr. Rababah threatened to "contact the Governor and [said] that VT DMV had violated his rights."[64] At this point, Mr. Rababah was asked whether he had weapons. According to Mr. Desjardins, Mr. Rababah truthfully acknowledged that there was a knife in his car. According to Mr. Rababah, the knife was a bread knife. He had it because he was coming from a gathering to which he had brought bread to share, and the knife to cut it. This is corroborated by Mr. Rababah's attorney, John Barnett, who just happened to be at the same gathering. Notwithstanding the nature of the knife, it was removed from the car, and the ICE agent took Mr. Rababah into custody.

---

[61] Interview of Det. Jeremy Desjardins; C

[62] Interview of Det. Jeremy Desjardins; Investigation of Det. Jeremy Desjardins, Case No. 14MV003159, dated 5/6/2014.

[63] Interview of Det. Jeremy Desjardins; Investigation of Det. Jeremy Desjardins, Case No. 14MV003159, dated 5/6/2014.

[64] Interviews of Det. Jeremy Desjardins and Abdel Razaq Rababah.

Without further investigation of Mr. Rababah's claims, Detective Desjardins concluded that Mr. Rababah "provided false statements on his application and has been illegally in the U.S."[65]

Section 5: Lt. Mary McIntyre's Second Investigation.

On August 8, 2014, Director Glen Button asked Lt. Mary McIntyre to review the investigation and conclusions of Det. Desjardins. This request was made because Mr. Rababah's attorney had contacted Director Button and said that Mr. Rababah never made any false statements.[66]

Lt. McIntyre began her investigation by obtaining and reviewing colored copies of the two applications Mr. Rababah had filled out. She noted that the applications were foreign document applications, which receive "special care to ensure validity." She noted that on both applications, checks were used to fill in the boxes (black on the learner's permit and blue on the permanent DPC application). She particularly noted the black "X" indicating legal presence on the permanent DPC application.

Lt. McIntyre next spoke to Donna Thompson and Deborah Sheldon about their interactions with Mr. Rababah. She learned that both women had noticed the blank box on the legal presence question, and that Ms. Sheldon had been told to process the application as an undocumented foreign document case. She also learned that Ms. Thompson believed she might have made the "X," having "told [Mr. Rababah] he was not undocumented as he had a SS card...."[67] Based on this information, Lt. McIntyre concluded that

> it is very likely Abdel Razaq Rababah did not answer "Yes" regarding his legal presence in the US on the VT license application he submitted to VT DMV in Dummerston, VT on 4/28/14....

Lt. McIntyre next considered the question of Det. Desjardins actions. He told her that he based his investigation on the "X" marking "Yes" for proof of legal presence, and the SAVE printout showing no match for Mr. Rababah (and thus indicating no legal presence), as well as the Jordan passport and the U.S. Social Security card. This conflicting information led him to call Border Patrol "to determine Rababah's legal status in the US." He further told Lt. McIntyre that "based on his training and the false statement on Rababah's application..." he set up the meeting with Mr. Rababah and informed ICE about it.[68]

Det. Desjardins also told Lt. McIntyre that he "noted most of the questions...were answered with a check mark; thus he wondered if Rababah answered with the "X" or if a DMV staff member made that mark. When questioned about the "X" this during this investigation, Mr.

---

[65] Investigation of Det. Jeremy Desjardins, Case No. 14MV003159, dated 5/6/2014.

[66] Interview of Lt. Mary McIntyre.

[67] Sworn statement of Donna Thompson to Lt. Mary McIntyre, Investigation case number 14MV003159, dated August 8, 2014.

[68] Investigation of Lt. Mary McIntyre, case number 14MV003159, dated August 8, 2014.

Desjardins clarified that at the time of his investigation he did not notice the "X" was different from the checks. It was only upon later review that he questioned the origin of the mark.

Based Det. Desjardins' reasoning, Lt. McIntyre concluded that

> Detective Desjardins acted appropriately by contacting US Border Patrol to verify Rababah's legal presence in the US.[69]

Lt. McIntyre and Det. Desjardins acknowledge that she was sitting with and actively supervising Det. Desjardins when he made the decision to call Border Patrol.[70] While Det. Desjardins states that the decision was ultimately his, he also states that Lt. McIntyre knew he was calling Border Patrol, and did not dissuade him from making the call.[71]

Legal Analysis

I. Legal Framework

In 1973 the U.S. Supreme Court, in its seminal case *McDonnell Douglas Corp. v. Green*, set forth a three-part burden shifting framework to analyze claims of discrimination when, as in this case, there is no direct evidence of discriminatory intent.[72] Pursuant to that framework, a plaintiff must first prove a *prima facie* case of discrimination that satisfies the elements required by statute. Once the plaintiff has proven its *prima facie* case by a preponderance of the evidence,[73] the burden shifts to the defendant to produce a legitimate non-discriminatory reason for its behavior.[74] At this stage, the employer is only required to *produce* evidence – there is no burden on the employer to persuade the fact finder that the evidence is valid.[75] Finally, the burden shifts back to the plaintiff to prove that the reason(s) offered by the defendant "were not its true reasons, but were a pretext for discrimination."[76]

---

[69] Investigation of Lt. Mary McIntyre, case number 14MV003159, dated August 8, 2014.

[70] Interview of Lt. Mary McIntyre and Det. Jeremy Desjardins.

[71] Follow up telephone interview of Det. Desjardins.

[72] 411 U.S. 792 (1973).

[73] The "preponderance of the evidence" standard is generally interpreted as "more likely than not." Federal Jury Practice And Instructions define it as follows: "When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it." 3 Fed. Jury Prac. & Instr. § 101:41 (6th ed.).

[74] *Robertson* at 367. *Gallipo v. City of Rutland*, 178 Vt. 244 (2005)(employment discrimination case adopting the three-part burden shifting analysis set forth in *McDonnell-Douglas*); *Callwood v. Dave Buster's, Inc.*, 98 F.Supp.2d 694, 704 (2000);

[75] *Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 367 (2004).

[76] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

While *McDonnell Douglas* involved a Title VII claim of employment discrimination, the Vermont Supreme Court has specifically adopted the framework for claims of discrimination in public accommodations.[77]

In this case, there **are reasonable grounds** for a finding of discrimination based on race, color, national origin and religion because the Complainant was able to prove his *prima facie* case of discrimination. Further, while the Respondent was able to produce a legitimate non-discriminatory reason for some, but not all of its actions, the Complainant also met his burden of proving that the ostensibly legitimate reasons were a pretext for discrimination.

II. The Complainant succeeds in making a *prima facie* case of discrimination based on race, color, national origin and religion.

The Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §4502 provides as follows:

> (a) An owner or operator of a place of public accommodations or an agent or employee of such owner or operator shall not, because of the ***race, creed, color, national origin***, marital status, sex, sexual orientation, or gender identity of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation. (Emphasis added.)

Thus, in order to make out a *prima facie* case of discrimination in public accommodations, the Complainant must prove each of the following elements:

1. Complainant is a member of the protected class(es);

2. The Respondent is a place of public accommodation;

3. Complainant attempted to avail himself of services ordinarily provided by the Responding Party to all members of the public in the manner in which they are ordinarily provided; and

4. Complainant was denied the privileges and benefits of the place of public accommodation; and

5. The denial was because of Complainant's membership in one or more protected categories.

---

[77] *Carpenter v. Central Vermont Medical Center*, 170 Vt. 565 (1999)(stating that the McDonnell-Douglas burden shifting analysis is designed to be "flexible" and may be used in public accommodations cases). See also, *Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694(D.Md. 2000)(confirming that the *McDonnell Douglas* framework is "generally appropriate whenever a claim requiring proof of intentional discrimination is based...on indirect or circumstantial evidence."), citing, *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130 (4th Cir. 1988).

In this case, the Complainant is a brown-skinned Muslim person from Jordan, and is therefore undisputedly a member of one or more of the protected classes. Respondent is a State Agency with offices open to and services provided to the public. It is therefore equally undisputedly a place of public accommodation.[78]

Further, by all accounts the Respondents are tasked with providing Driver Privilege Cards under the laws of the State of Vermont, and Complainant was attempting to procure one of these cards in the manner prescribed by law. In the course of Complainant's lawful application for the Driver Privilege Card, Respondent altered his application, falsely accused him of lying, lured him to a meeting to which ICE officers had been alerted, and ultimately delivered him into the hands of the ICE authorities. For all of these reasons, this investigation finds that Complainant has proved that he attempted to avail himself of services ordinarily provided by the Respondent and that he was denied the privileges and benefits of the DMV. The only question remaining for the *prima facie* case is whether Respondent's actions were because of Complainant's membership in one or more protected categories.

Where, as here, there is no direct evidence of a respondent's motivations, courts have held that the fifth element will be supported if the "factual circumstances giving rise to the denial rationally support ***an inference*** of unlawful discrimination." (Emphasis added.) Such circumstances include either

- that the Complainant was treated differently than similarly situated persons who were not members of the protected category; or
- that the Complainant received services in a "markedly hostile manner" which "a reasonable person would find objectively unreasonable."[79]

This Investigation finds that although there is not sufficient evidence to find that Mr. Rababah was treated differently from other similarly situated persons, there is sufficient evidence to find that his treatment was "markedly hostile" and "objectively unreasonable."

a. <u>There is insufficient evidence to prove that Mr. Rababah was treated differently from similarly situated persons.</u>

The determination of whether or not Mr. Rababah was treated differently from other similarly situated persons, depends largely on how such persons are defined. For example, this Investigation first considered a definition of "similarly situated persons not in the protected class" as white, U.S. citizen DPC applicants. Using this framework, the Investigation was able to determine that the only DPC applicants referred for investigation by the Dummerston DMV

---

[78] The VFHPAA defines a place of public accommodation as "any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public."

[79] *Lizardo v. Denny's Inc.*, 270 F.3d 94 (2d Cir. 2001), following, *Callwood v. Dave & Buster's Inc.*, 98 F.Supp.2d 694, 707 (D.Md. 2000)(providing an in depth analysis of competing factors which led to its development of a *prima facie* case for race discrimination in a public accommodations case.).

from January 2014 to May, 2015 were eight (8) non-U.S. citizen persons (including Mr. Rababah).

The fact that no white citizen DPC applicants have ever been referred for investigation tends to support a finding that Mr. Rababah and other non-white, non-U.S. citizen applicants are treated differently from their white, U.S. citizen counterparts.

However, there have also been 46,030 foreign persons who have applied for DPC cards and have not been referred for investigation. According to DMV, this is because nothing in their documentation raised any questions or seemed unusual in any way. This Investigation must consider, then, whether the critical factor in determining whether to refer an applicant for investigation is the presentation of unusual documentation. In that case, the definition of a "similarly situated person" becomes, a white, non-Muslim U.S. citizen who requests a Driver Privilege Card *and provides documents that are out of date or give rise to confusion over the person's legal status.* This Investigation was unable to find such a person for comparison largely because DMV personnel interviewed have never seen an application for a DPC from a white American who did not have a valid birth certificate.

Given the large number of non-U.S. citizens who obtain DPC cards without referral for investigation, and given the DMV policy (however vague) of referring anyone for investigation if "anything" seems unusual, and given that Mr. Rababah's Social Security Card did give rise to confusion, this Investigation concludes that the definition of "similarly situated" must take into account the type of documentation presented at the time of the application. Since this Investigation found no applicants to use as similarly situated comparators, it must conclude that there exists insufficient evidence to find that the Complainant was treated differently than similarly situated persons who were not members of the protected class. For purposes of clarity, as discussed in section (b), below, this finding does not mean that Ms. Thompson's actions were blind to Mr. Rababah's status. It merely means that the evidence does not exist at this point to prove by apt comparison that she would have treated a white U.S. citizen differently.

Finally, it should be noted that DMV denied the HRC request to see all applications from DMV during the time period in question. The only statistical information about referrals that DMV chose to share was that described above. It is possible that a more detailed statistical analysis could shed additional light on this question.

b. Mr. Rababah proves the fifth element of his *prima facie* case because there is sufficient evidence showing that he was treated in a markedly hostile manner which a reasonable person would find objectively unreasonable.

1. Treatment by Ms. Thompson.

While there is insufficient evidence to prove that Mr. Rababah was treated differently from other similarly situated persons, there is extensive evidence that his particular treatment,

both when applying for a DPC and during the course of the DMV investigation, was markedly hostile and objectively unreasonable.

First, this Investigation considers Ms. Thompson's behavior the day Mr. Rababah applied for the DPC. This behavior included in pertinent part

- pressuring Mr. Rababah to apply for the license instead of the DPC;
- refusing to accept Mr. Rababah's assertion that he was undocumented;
- marking the box in question 6 of his application indicating that he had legal presence in the U.S.; and
- becoming rude and abrupt with Mr. Rababah when he refused to proceed how she thought he should.

Notably, this Investigation does not include Ms. Thompson's refusal to allow Mr. Rababah to use his vehicle for the road test in this analysis. This is because Mr. Rababah himself admits that the windshield was cracked in such a way as to make it unusable under DMV policy. While this investigation does not doubt that Mr. Rababah was given wrong information when his car was inspected (that it would be fine for the test), there is no evidence to show that Mr. Rababah's membership in any protected class played into Ms. Thompson's apparently correct decision on that matter.

With regard to the other actions listed, Ms. Thompson claims that she pressured Mr. Rababah to apply for the license because she thought he might qualify for it and it would be "better for him" to have a license if possible. That was not Ms. Thompson's decision; it was Mr. Rababah's. The DPC is available to anyone, whether they qualify for a license or not. Ms. Thompson's assumption that Mr. Rababah did not know his own status, or even his own desires, was paternalistic, demeaning and condescending to Mr. Rababah. That she then falsified his application without telling him she was doing so and then referred him for investigation not only compounded the ultimately catastrophic effect that her actions had on Mr. Rababah's life, but illustrated the casual disregard she showed him as a person of intelligence and dignity. Her rudeness towards Mr. Rababah when he insisted on getting the DPC only underscores a hostility borne of what can be perceived as nothing other than her own inflated sense bureaucratic power. This investigation thus finds that Ms. Thompson's actions were markedly hostile, and that any reasonable person would not only find her actions objectively unreasonable, but would be insulted, angered, and outraged if subjected to that treatment, especially given all of the attendant consequences it entailed.

Further, while we may never know exactly what motivated Ms. Thompson's actions, *the law does not require us to*. Rather, the two-prong test set forth above for determining whether an action is "because of" protected status is designed specifically to allow a finding of discrimination in cases in which the motivation for an action is obscure – perhaps even to the actor him or herself. In such cases the law allows for a logical leap from the objectively offensive behavior to the subjective motivation behind that behavior. Thus, this Investigation finds that Ms. Thompson's actions were "because of" Mr. Rababah's status as a non-white Muslim person from Jordan.

2. Treatment by Det. Desjardins

This investigation next considers the actions of Detective Jeremy Desjardins during the course of the DMV investigation.

First, it must be noted that this investigation does not consider the mere fact of performing the investigation to be a hostile act on the part of DMV. Rightly or wrongly, the matter was referred for investigation, and Detective Desjardins was required to look into it.

Secondly, as with Ms. Thompson's actions discussed above, there is no clear preponderance of evidence that proves the DMV Investigations Unit treated Mr. Rababah's investigation differently than those of similarly situated white U.S. Citizens. Again, this is due to the lack of comparative evidence available to this investigation. Because only non-white, non-citizens were referred from the Dummerston DMV to the DMV Investigations unit during the time frame examined, there is no basis for direct comparison.

However, while they may be no basis for direct comparison, the individual actions of the DMV Investigations Unit in and of themselves are a more than sufficient basis upon which to find that Mr. Rababah meets his burden of proving the fifth element of the *prima facie* case. These actions, which are described in detail in the fact section, are summarized here as follows:

- **Detective Desjardins used Border Patrol for information rather than using other sources that would not endanger Mr. Rababah's status:**

Det. Desjardins unilaterally changed the purpose of the investigation from looking into Mr. Rababah's documents (specifically, determining whether Mr. Rababah's Social Security card matched his identity and whether he had "work status") to investigating Mr. Rababah's legal status. According to Detective Desjardins, the legal status was important only inasmuch as it shed light on the real question of whether a false statement had been made on the application. However, rather than take *any* initial investigatory steps which might have shed light on the falsity of the statement, Det. Desjardins, with the knowledge and agreement of Lt. Mary McIntyre, went right to Border Patrol, the one source that was bound to have profound ramifications for Mr. Rababah thereby triggering a series of events that were *exactly the thing that the DPC law was designed to prevent*.

The decision to go right to Border patrol was not the only possible way to get the information necessary. The first call any reasonable detective would have made would have been to Mr. Rababah himself, to ask why that box was marked. Had Det. Desjardins made that call, Mr. Rababah could have explained that the mark was not his. Nor did Det. Desjardins contact the Social Security Administration, an entity that was in charge of the card at issue, and that could have given him the same information he sought from Border Patrol. Ostensibly, the reason that Social Security was not called is because they are historically slow to respond. Border Patrol, for obvious reasons, is much quicker, and has actively built a relationship with the DMV Investigators in order to get just this type of call. But calling Social Security is not unheard of, and at least one of Det. Desjardins' fellow Investigators cites the call to Social Security as the obvious proper first step in a case like this.

Lt. McIntyre's conclusion that Det. Desjardin's action in calling Border Patrol was appropriate must be considered in light of Lt. McIntyre's own involvement in the decision to call Border Patrol. While she attempts to create an air of impartiality in her report by noting that she was "aware of this investigation, but did not approve the case, as I was on vacation on 6/17/14, the date it was approved,"[80] her involvement in the decision, which was not noted in her Investigation Report, colors her ultimate finding.

Indeed, it is hard to fathom any reason why Detective Desjardins and Lt. McIntyre would opt to call Border Patrol in this type of situation other than because to make a "bust." With such clear alternate means of gaining the information needed, this Investigation finds that the jump to call Border Patrol in and of itself was a hostile act that was objectively unreasonable.

- **Detective Desjardins exceeded the scope of his investigation to affirmatively engage in the entrapment of Mr. Rababah for Border Patrol:**

Having called Border Patrol, Det. Desjardins was told that Mr. Rababah is a "student violator" who has failed to check in since 2006. At that moment, Detective Desjardins had the information he says he needed. In other words, he had determined that Mr. Rababah did not have legal presence in the U.S. (something that Mr. Rababah had been saying since he first applied for his DPC). Even if Det. Desjardins thought Mr. Rababah had marked the box indicating he had legal presence, once he learned that statement was false, he had no continuing reason to interact with Border Patrol. He could have simply completed his investigation, incorrectly found a false statement, and denied Mr. Rababah the DPC.

Instead, Detective Desjardins opted to become an instrument of Border Patrol, who asked him to detain Mr. Rababah "if he came in contact with him." Not only did Det. Desjardins agree to that request, he went a step further. On his own initiative, he affirmatively called Mr. Rababah and directly asked Mr. Rababah to meet him at the DMV, where he turned Mr. Rababah over to ICE agents. In other words, he didn't just "run into" Mr. Rababah and detain him, he actively worked to entrap Mr. Rababah, even though that entrapment had nothing to do with the investigation into the false statement.

- **Detective Desjardins ignored Mr. Rababah's attempt to clarify his status:**

Detective Desjardins always maintained that the sole reason he called Border Patrol was to determine whether or not Mr. Rababah had made a false statement on his application. As noted above, Det. Desjardins did not bother to interview Mr. Rababah about that question or call Social Security prior to calling Border patrol. However, upon finally making the phone call with Mr. Rababah, Det. Desjardins asked Mr. Rababah if he had legal presence in the U.S. Mr. Rababah again truthfully said no. However, Detective Desjardins appears to have lost sight of the "purpose" of his investigation. Rather than delving more deeply into the circumstances surrounding the answer to DPC application question 6 (for example, asking Mr. Rababah why he would have made that X if he is now saying he has no legal presence), Det. Desjardins appears to

[80] Investigation of Lt. Mary McIntyre, case number 14MV003159, dated August 8, 2014.

have lost all interest in the question. He simply called Border Patrol and arranged to have Mr. Rababah detained.

- **Detective Desjardins lied to Mr. Rababah:**

When Detective Desjardins called Mr. Rababah, he did not inform Mr. Rababah that he was working with Border Patrol. He did not inform Mr. Rababah that the inquiry into his "false statement" was over. He did not inform Mr. Rababah that this inquiry was now about Mr. Rababah's legal status. Indeed, if anyone in this situation was making false statements, it was Detective Jeremy Desjardins, who told Mr. Rababah the interview at DMV was to "discuss discrepancies in the application" – an out and out lie.

As with the initial treatment Mr. Rababah received at the Dummerston DMV, the actions taken by the DMV Investigations Unit were so egregious, were taken with such obvious disregard for the unnecessary danger into which Mr. Rababah was placed, and were so contrary to the clearly stated purpose of the DPC law, that those actions clearly rise to the level of "markedly hostile" and "objectively unreasonable." Indeed, this Investigation cannot think of many things more unreasonable than finding that the very institution that had promised you safety when accessing its services, had instead become the eyes and arms of the organization designed to arrest and deport you. For all of the above reasons, this Investigation finds that Mr. Rababah has met his burden of proving that the respondent's actions were "because of" his status in one or more protected categories. He has therefore proved his *prima facie* case.

III. <u>The Respondent fails to articulate legitimate business reasons for its overall discriminatory actions.</u>

According to the McDonnell-Douglas framework, once Mr. Rababah has proven his *prima facie* case, the burden shifts to DMV to produce a legitimate non-discriminatory reason for its behavior.[81] Notably, DMV is only required to *produce* evidence – there is no burden on the Respondent to persuade the fact finder that the evidence is valid.[82]

Even though the burden on the respondent to produce a legitimate, non-discriminatory reason for its actions is very light, DMV fails to do so for the most egregious actions upon which the *prima facie* case is founded. For example, DMV offers no reasonable explanation for Ms. Thompson making the X on question 6 of Mr. Rababah's application. Additionally, Ms. Thompson's misguided desire to "help" Mr. Rababah by pressuring him to apply for the license may have been real to her, but it is not a legitimate business purpose. Changing information on an already signed application that directly contradicts what the individual filing the application is saying has no legitimate business purpose.

---

[81] *Robertson* at 367. *Gallipo v. City of Rutland*, 178 Vt. 244 (2005)(employment discrimination case adopting the three-part burden shifting analysis set forth in *McDonnell-Douglas*); *Callwood v. Dave Buster's, Inc.*, 98 F.Supp.2d 694, 704 (2000);

[82] *Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 367 (2004).

Further, once referred to Det. Desjardins, there is no legitimate business purpose for calling Border Patrol under the circumstances highlighted in Section II, above. It is true that Border Patrol has information that state law enforcement does not. Lt. McIntyre suggests that DMV uses Border Patrol for such inquiries because of the speed of the response, but there is nothing to suggest that that speed was particularly necessary for the investigation being done. Additionally, even if the Social Security Administration is slow, Det. Desjardins gave no reason for failing to call Mr. Rababah himself for an explanation.

Even if the decision to call to Border Patrol is viewed as legitimate based on what Det. Desjardins knew at the time, once he had the information that Mr. Rababah was not legally present, DMV provided no legitimate business purpose for continuing to work with Border Patrol, and lying to and entrapping Mr. Rababah. While Detective Desjardins may have had a desire to help Border patrol and ICE as fellow "officers of the law," this is not a legitimate business purpose. Indeed, it is at odds with the very intent of the DPC law. Thus, while there are some pieces of the overall DMV process that were possibly motivated by legitimate business purposes, the most egregious of those actions were unsupported by any articulated business purpose.

IV. The legitimate business reasons proffered by DMV are a pretext for discrimination.

This Investigation notes that DMV did produce a legitimate business purpose for two of the actions complained of, as follows:

- Ms. Thompson referring the matter for investigation because she was confused by the presence of the Social Security card, and had been trained to refer every matter that was at all odd; and

- According to her supervisor, Ms. Jackson, Ms. Thompson asking for additional documentation because addresses may change.

Where a respondent meets its low burden of producing a legitimate business purpose, the Complainant may still prevail if there is sufficient evidence showing that those reasons were a mere pretext for discrimination. In this case, Mr. Rababah succeeds in his claim of discrimination because the same evidence that shows Ms. Thompson's actions were "because of" nationality, also support a finding that these reasons are pretextual.

In the absence of information to support a conclusion that DMV considers nationality when deciding whom to investigate, this Investigation would have to conclude that the presence of the confusing documentation could have been the sole reason for the referral. In this case, however, additional information about Ms. Thompson's underlying motivation does exist: Ms. Thompson's casual statement that she would "foreign doc" Mr. Rababah when describing her intent to refer him for investigation. This statement illuminates Ms. Thompson's understanding that only people of foreign nationality get referred for investigation. Coupled with the actual practice revealed by the information received from DMV, it undermines her outward contention

that it was solely the confusing documents which motivated her. While this Investigation believes, and the numbers show, that Ms. Thompson does not refer every foreign national for investigation, by the same token, bias in policing does not require a showing that every person of color is treated differently than similarly situated whites. If police arrest and detain vastly more black suspects than white suspects, the fact that they are not arresting all black suspects does not save them from an inference of bias.

With regard to the request for additional documentation, Ms. Jackson stated that it was because addresses might change in the time between the learner's permit application and the permanent application. This makes no sense. If DMV were actually concerned about such changes, it would not have a policy *recorded on its help line* that those proofs were not required. In addition, Ms. Thompson did not ask Mr. Rababah if he had moved since filing his application for a learner's permit, a simple inquiry that would have obviated the need to ask for further documents, nor do the documents she requested provide proof of address. Ms. Jackson's statement appears to be an attempt to protect her employee from what was clearly an improper request.

Ultimately, however, whether or not these two actions were based on legitimate business purposes is immaterial to the final analysis. Given the myriad of extremely harmful measures taken against Mr. Rababah for which no legitimate business purpose was offered, even if these two actions were not considered, there is still ample evidence to support a finding of discrimination.

V. Conclusion

This Investigation finds that there exist **Reasonable Grounds** to conclude that Respondent discriminated against Complainant on the basis of race, color, religion, and/or national origin by denying him access to the services and privileges of Vermont DMV, a place of public accommodation, in violation of the Vermont Fair Housing and Public Accommodations law, 9 V.S.A. § 4502(a).

Prepared by:

_____

Katherine Spence, ALE

Approved by:

_____

Karen Richards, Executive Director

Prepared by:

11/10/15

Katherine Spence, ALE

Approved by:

11/10/15

Karen Richards, Executive Director

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Abdel R. Rababah, Complainant	)	
v.	)	VHRC Complaint No. PA15-0012
Vermont Department of Motor Vehicles, 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 Motor Vehicles, the Respondent, illegally discriminated against Abdel R. Rababah, the Complainant, based on his race, color, religion, and national origin, in violation of Vermont's Fair Housing and Public Accommodations Act.

Mary Marzec-Gerrior, Chair	For ✓	Against __	Absent__	Recused __
Nathan Besio	For ✓	Against __	Absent __	Recused __
Mary Brodsky	For ✓	Against __	Absent __	Recused __
Donald Vickers	For ✓	Against __	Absent __	Recused __
Dawn Ellis	For ✓	Against __	Absent __	Recused __

Entry: ✓ reasonable grounds __ Motion failed

Dated at Montpelier, Vermont, this 3rd, day of December 2015.

BY: VERMONT HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Donald Vickers

Dawn Ellis

ADDENDUM TO INVESTIGATIVE REPORT
Vermont HRC Case No. PA15-0012

The Investigative Report contains multiple references to the United States Border Patrol (BP) and the United States Immigration and Customs Enforcement (ICE) of the Department of Homeland Security. The parties to the investigation often conflated the two entities, but it is clear that in most instances, the references should have been to U.S. Immigration and Customs Enforcement (ICE).