

REDACTED
VERSION

INVESTIGATIVE REPORT
VHRC Case PA16-0007 & PA16-0019

Complainant: Amadou Diallo

Respondents: DTG Operations, Inc. d/b/a Thrifty Car Rental

Charge: Public Accommodations – race, color, national origin, and retaliation

Summary of Charges: On October 16, 2015, Mr. Diallo filed a discrimination complaint with the Vermont Human Rights Commission alleging that he had been discriminated against based on his color, race, and national origin, when Thrifty counter agents refused to rent him a car. The second incident, later that same day, occurred after he went home and as able to make an on-line rental reservation but was again denied a rental car when he returned to the Thrifty rental site with his reservation.

On June 23, 2016, during the investigative process, it was discovered that the "facts" presented, if true, could constitute a prima facie case of public accommodation retaliation. Mr. Diallo stated that when he returned to Thrifty with a reservation for a vehicle he was denied service because he complained about having been discriminated against earlier that day and expressed his frustration about what he perceived as discriminatory actions by the Thrifty staff.

Summary of Responses: On November 30, 2015, the respondent made its first response to the complaint. The second refusal occurred when a Thrifty agent decided not rent to Mr. Diallo because he was rude, agitated and would not engage in the rental process.

On August 3, 2016 the respondent denied it had retaliated against Mr. Diallo, again stating the reason Mr. Diallo was not rented a car was because he was not willing to enter into and complete the rental process.

Preliminary Recommendation: This investigation makes a preliminary recommendation that there are **reasonable grounds** to believe that Mr. Diallo was discriminated against when he returned a second time with a reservation and the counter person refused to rent him a car. This investigation further recommends that there are **reasonable grounds** to believe that Thrifty retaliated against Mr. Diallo in violation of 9 V.S.A. § 4506(e)

Interviews:

3/16/16 - Randy Zeno, Thrifty customer service/counter agent & 5/20/16
3/16/16 - Jeff Nicholson, Thrifty customer service/counter agent & 6/24/16
3/16/16 - Ken Barton, Thrifty Operations Manager
3/16/16 - Kamil Walus, Thrifty Area Manager
4/19/16 - Officer Tanner Palermo, South Burlington Police Dept.
4/22/16 - Amadou Diallo
6/20/16 - Greg Keough, former VT area Manager
6/24/16 - Usivio Pugh, Thrifty bus driver

Documents:

07/29/15 - Copy of Complainant's Thrifty reservation
07/29/15 - Copy of email sent to Hertz management regarding the Diallo incident
07/29/15 - Copy of South Burlington Police report
07/20/15 - Mr. Nicholson's time card
10/16/15 - Complaint
11/30/15 - Response to complaint
12/15/15 - Complainant's response to response
12/29/15 - Letter from Chief of Police South Burlington to Mr. Diallo
02/12/16 - Second response from Thrifty (includes information/documentation regarding number of reservations and Thrifty policies)
02/18/16 - Complainant's response to data provided by Thrifty
03/14/16 - Email from Thrifty's attorney providing additional information
05/02/16 - Respondent's attorney's response to Mr. Diallo's interview
08/3/16 - Respondent's response to retaliation complaint

Applicable law

Title 9 VSA § 4502. Public Accommodations & §4506. Enforcement; civil action; retaliation prohibited

§ 4502. Public accommodations

(a) An owner or operator of a place of public accommodation 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.

§4506. Enforcement; civil action; retaliation prohibited

(e) Retaliation prohibited. A person shall not coerce, threaten, interfere, or otherwise discriminate against any individual:

(1) who has opposed any act or practice that is prohibited under section 4502 or 4503 of this title;

Elements of prima facie case for §4506 (e)

1. Mr. Diallo engaged in a protected activity under Title 9 VSA § 4502
2. Thrifty was aware of Mr. Diallo's participation in the protected activity
3. Thrifty took adverse action against Mr. Diallo
4. A causal connection existed between Mr. Diallo's activity and the adverse action taken by Thrifty

Undisputed Facts

On July 29, 2015, at approximately 10:20 a.m. Mr. Diallo, a person of color whose national origin is not the United States and who speaks with a distinct foreign accent, went to the Thrifty Car Rental in South Burlington to rent a car.¹ He did not have a reservation (this is referred to as a walk-up.) He was informed by the counter agent, Randy Zeno, that there were no cars available. At about 10:45 a.m. Mr. Diallo went home and attempted to make an on-line reservation to

¹ This is located at 1700 Williston Road not at the airport though it is considered the airport site.

rent a car from Thrifty and was successful. The reservation was for a 12:30 p.m. pick-up time that day.

At about 12:30 p.m. he returned to the Thrifty rental site with his on-line reservation. Mr. Diallo was upset because he believed he had been discriminated against earlier in the day when he was denied a car and told there were no cars available. He believed he had been discriminated against because he was able to make a reservation on-line, where the color of his skin and his accent were not part of the process. Mr. Diallo expressed his displeasure and his belief that he had been discriminated against to the counter agent, Jeff Nicholson. Mr. Diallo admits he called "them liars." Mr. Nicholson, the Thrifty counter person, told Mr. Diallo was that he would not be renting him a car. Thrifty originally alleged that it did not honor Mr. Diallo's reservation because of his irate/agitated state.²

Mr. Diallo left the building and called the South Burlington Police to complain about being discriminated against. The police arrived and spoke to Mr. Diallo, then to Mr. Nicholson and Mr. Barton, the on-site manager. The police officer asked Mr. Diallo to leave the Thrifty property.

Documentation provided by Thrifty

Thrifty provided this investigation with numerous documents that support their statement that on July 29, 2015 and projected into the near future, vehicle reservations were very high and the availability of vehicles was low. This type situation causes Thrifty to suspend walk-up rentals.³ They also provided documentation that

² Even though Thrifty has a security camera they did not save the recording from this date. This investigation could not verify exactly how Mr. Diallo's irritation was manifested.

³ The documentation is rather complicated, very industry specific and involves acronyms and charts that are too complicated to explain in this report. This

supports their contention that suspending walk-ups is a common practice. The documentation shows that their rates and availability of vehicles changes rapidly throughout each day.

Additionally, Thrifty provided this investigation with a copy of a 2010 revision to its policies. The policy was sent to employees and management regarding Thrifty's specific procedures for handling a situation where a walk-up who is denied a vehicle claims s/he was discriminated against. That policy specifically addresses the situation experienced by Mr. Diallo. In other words, Mr. Diallo's experience occurs frequently enough that it is officially addressed in Hertz's⁴ field bulletins. In a section that addresses how to deal with the situation where a walk-up customer is denied a rental and then receives a rental by calling the Customer Contact Center.⁵ The policy states:

While we understand that our actions in a situation such as this [where a walk-up customer has been denied a vehicle but very shortly after procures a reservation through calling the Customer Contact Center] are based solely on the immediate demands of our business, **it may appear to the customer that we have acted in a discriminatory manner.**

Discrimination Charge from the Customer – The following steps **must** be taken when a customer further disputes the situation or indicates a belief that Hertz personnel acted in a discriminatory manner. **(Emphasis added.)**

- 1) Notify the manager.

investigation, after reviewing the documents, talking with the respondents' counsel and interviewing staff believes that there is ample support through the documentation to believe that Thrifty had a very tight inventory and that because of the level of inventory they it was justified.

⁴ Hertz is the parent company for Thrifty.

⁵ This investigation recognizes that Mr. Diallo did not get his reservation through the Customer Contact Center, but on-line. This information is applicable to on-line reservations made after being denied a vehicle through the walk-up process.

- 2) The **manager** must attempt to explain the Hertz policy concerning Res Only [reservations only] and why these situations may sometimes occur (emphasis added).
- 3) Compensation for the inconvenience (vehicle upgrade, rental certificate or revenue adjustment) may be offered by the manager.
- 4) If the situation still is not resolved, advise the customer that a report on the situation will be filed with the Customer Relations Department in Oklahoma City, and that someone from that office will contact the customer. Obtain the customer's name, address and daytime phone number.

The manager must complete an Irregularity Report providing a detailed description of the situation, including statements from all employees involved. Include the customer's name, address and daytime phone number in the report.

Statement by Mr. Diallo

Mr. Diallo has resided in the United States for 16 years. He is a person of color who came to the United States from West Africa.

Mr. Diallo explained that the evening prior to the incident that is the subject of this complaint, he had returned a car he had rented from Thrifty the day before. He distinguished his July 27, 2015⁶ experience from the incident that gives rise to this complaint because, he had no difficulty renting a vehicle. He stated that when he rented the car the counter person was a "foreigner" (based on the way he spoke) and when he returned it the counter person was a "black" person. He recalled that even though he returned the car a little late on July 28th he was not charged a late fee by the counter person. He was happy with his experience.⁷

⁶ This was the only other time he had rented a car from Thrifty at the South Burlington location.

⁷ A history of non-discriminatory treatment by specific employees does not assure that on any given day in a specific situation an employee did not act in a discriminatory manner.

On July 29, 2015, he returned to the same Thrifty office in South Burlington at around 10:30 in the morning. Mr. Diallo explained that as he entered the office and waited in line there were employees standing around (maybe 4 of them). He felt they were staring at him. When he asked to rent a car he was told that there were no cars available. When he left after being unable to rent a car he believed Thrifty employees were laughing at him. He said he was told that there were "no cars available for the next two weeks." Mr. Diallo stated that one of the men standing there confirmed this statement - "no cars for two weeks." Mr. Diallo said he questioned this because he saw cars in the parking lot and he had returned a car a few hours earlier. He stated that the conversation lasted less than 5 minutes.

Mr. Diallo then went home and immediately went on line and was able to make a reservation to rent a car that day from Thrifty at the South Burlington site, where he had just been told there were no cars available.⁸ He stated that on-line he was offered three different options of rental cars.

At approximately 12:30 p.m. that same day he returned to the Thrifty site with his reservation to rent a car and he handed it to the person behind the counter (Mr. Nicholson.) He stated that he recognized Mr. Nicholson as one of the men who had been there earlier in the day and that Mr. Nicholson had confirmed that there

⁸ This investigation asked Mr. Diallo why he went on line to check if there were cars available. He stated that he has a lot of experience renting cars over the past 16 years and that his experience has been that if a company does not have a car available they help you find one somewhere. Thrifty did not offer any help. He stated it was clear to him that Thrifty just wanted to get rid of him. Mr. Diallo then explained his experiences in Vermont with being told that services were not available. He did not say these situations were discrimination he was just pointing out that he had experienced this response other times in Vermont when he sought various services.

were no cars available for the next two weeks.⁹ Mr. Nicholson said to him, "Oh, you managed to find a reservation." Mr. Diallo, believing he had been lied to and discriminated against earlier that day said, "You guys are liars." Mr. Diallo further explained that Mr. Nicholson then said, "If we are liars why did you come back to us?" Mr. Diallo replied that he had the right to rent a car. At that point Mr. Nicholson allegedly told Mr. Diallo that he was not going to rent him a car because Mr. Diallo had called him a liar. Mr. Diallo said he countered with that fact that he had a reservation but Mr. Nicholson told him again that he was not going to rent him a car and to get out of there.

Mr. Diallo went outside and called 911. He remained outside until the South Burlington Police arrived. He said he explained the situation to the officers. Mr. Diallo added that one of the officers, not Officer Palermo, screamed at him, "Where are you taking this to." Mr. Diallo stated that he kept his cool even though the police officer acted this way because he (the police officer) would have "knocked me out." He said the police told him that Thrifty has the right to refuse him service without explanation. Mr. Diallo told the police he was going to sue Thrifty and he wanted to know how he could get a copy of the police report. Mr. Diallo raised this question at the interview, "If they [Thrifty] knew I was going to sue why wouldn't they save the [security] tape to show I was acting that way [the way Thrifty alleged]?"

This investigation asked Mr. Diallo a series of questions:

- 1) Did Mr. Nicholson ever state that Thrifty would honor the reservation? Mr. Diallo replied, "No."

⁹ Mr. Nicholson denies this. Mr. Nicholson's time card indicates that he had clocked in at 9:55 a.m. that morning, based on this it is possible this occurred.

- 2) Did Mr. Nicholson ever explain why you could get a reservation on line when you could not get one as a walk-up? Mr. Diallo replied, "No." Were you told this was a busy time of the year? "No."
- 3) How long did you talk with Mr. Nicholson? Mr. Diallo replied "2 – 3 minutes." Were there other customers in the building? He replied "No."
- 4) Did you yell at Mr. Nicholson? He replied, "No." Wave your arms? "No." Pound your fist on the counter? "No." Mr. Diallo added, "If I had they would have saved the video. Now they can say whatever want. If I had behaved that way I would have been on TV by now. Mr. Nicholson asked me to leave."

Statement of Randy Zeno

Mr. Zeno has worked for Thrifty for 26 years in various positions. He became a customer service/counter agent twelve years ago. He stated that when he came into work on July 29, 2015 at about 4:30 a.m. he noticed there were no cars on the lot. When his manager, Ken Barton, arrived at around 6:15 a.m. Mr. Barton spoke with the general manager and directed Mr. Zeno to not take "walk-ups." Mr. Zeno stated that he always wants to make walk-up rentals because he gets paid a commission for making them. When there is a "no-walk-ups" situation, staff are informed by sticky notes on their computers. There is not a sign posted visible to the public.

Mr. Zeno recalled that sometime mid-morning Mr. Diallo approached the counter to rent a car. He recalled that he spoke with Mr. Diallo for about 10 – 15 minutes and that Mr. Diallo became "kind of rude" and said that Thrifty was discriminating against him. Mr. Zeno said that if he had an extra car at that time he would have given

it to Mr. Diallo. Mr. Zeno did not **recall** telling Mr. Diallo that there were no cars available for two weeks; he did not say that he did not say this to Mr. Diallo.

Mr. Zeno explained that he does not keep a written record of how many walk-ups are turned away but that he does verbally tell his manager when he loses one. He said that there are usually 10-12 cars on the lot in the morning from the night before. He explained that renting cars is all a timing issue and depends on people returning vehicles on time. He further explained that if there is a cancellation a car can become available unexpectedly. Mr. Zeno said that it can take three to four hours for the on-line rental systems to reflect a local update after making a decision to not take walk-ups.¹⁰ "It makes us look bad" if customers walk away and can make a reservation another way.

This investigation asked Mr. Zeno in his 12 years of being a customer counter agent how many customers had he refused to honor a reservation because they were rude. He replied, "None, never." This investigation wanted to make sure of his response and so asked him, "Never done that?" He said, "No. I have never refused. I have seen other employees say to people who got hot-headed to step back." He added that they want to defuse the problem and honor the reservation. This investigation asked what would happen for refusing service to a customer because s/he was being rude? He replied that he could be disciplined.

This investigation asked Mr. Zeno if he suggested to Mr. Diallo that Thrifty might have a car later. He responded that he probably did but he could not remember for sure. Mr. Zeno said that he did not

¹⁰ Even when Thrifty decides to say "no walk-ups" there can still be a small number of cars still available. These cars are a cushion to cover on-line reservations and late returns.

know why Mr. Diallo "said he was being discriminated." Mr. Zeno told this investigation that he has participated in yearly on-line non-discrimination courses. The courses last two to four hours and include do's and don'ts regarding dealing with customers.

Statements of Jeff Nicholson

Mr. Nicholson has worked at Thrifty for three years as a customer service/counter rental person. He explained that he has learned about Hertz/Thrifty policies through bi-annual on-line trainings, orally, and postings on a bulletin board in the staff lunch area. Mr. Nicholson stated that when Hertz acquired Thrifty about two years ago he received notes regarding Hertz's policies and learned the policies over the course of the twice a year on-line trainings. This investigation asked him if he believed that he was now aware of all of Hertz's policies. He answered, "I feel I know what I need to know to do my job."

This investigation asked Mr. Nicholson if he knew the policy/steps regarding a situation such as what Mr. Diallo experienced (being told no cars available for rent that day, then being able to make a reservation on-line for a car and feeling he had been discriminated against.) He said that he could not list them [the steps in the policy] but that it included "notify your supervisor." He stated that he did notify his supervisor but that it was not while the situation was occurring.¹¹

This investigation asked Mr. Nicholson if he had ever used the "panic button" that is available at the counter. He stated he had not

¹¹ The policy requires that the supervisor be notified during the incident so the supervisor can speak with the person, offer some compensation and demonstrate understanding of the customer's experience. In customer service businesses it is a very common practice to offer speaking to a manager when a problem is not getting resolved to the customer's satisfaction.

because it is there to use only if he felt physically threatened. He further explained that he has experience dealing with people who are upset because he had worked in an airport and that people in airports "can get pretty angry."

He stated that on July 29, 2015, he came to work his mid-day shift. His timecard indicates he arrived at 9:55 a.m. Mr. Nicholson stated that generally when he arrives at work he checks the daily briefing sheet in the main room which is where the rental counter is.¹² If there is a line of customers he said he would "jump in and help" but after he had first checked things out. He stated that he was not at the office when Mr. Zeno talked with Mr. Diallo. This investigation pointed out that his time card indicated that he had punched in a little before 10:00 a.m. and that Mr. Diallo was at Thrifty at about 10:20 a.m. Mr. Nicholson said that he did not notice Mr. Diallo, could not recall seeing him and that he did not recognize him when he came in later in the day. This investigation asked him if Mr. Diallo could have seen him. Mr. Nicholson replied that it was possible.

When Mr. Diallo came in to rent a car, Mr. Nicholson said he asked him for his driver's license, credit card and reservation paper work. Mr. Nicholson recalled that Mr. Diallo immediately started to ask why he could not rent a car that morning and called them liars.¹³ Mr. Nicholson told this investigation that he explained as best he could that he had not been there earlier but by the notes left it appeared they did not have vehicles that morning. Mr. Nicholson said the situation made sense to him but not Mr. Diallo.

¹² This is a relatively small area perhaps 20 feet by 40 feet.

¹³ During the course of the interview with Mr. Nicholson the events of this situation were recounted by him several times. During the last time that Mr. Nicholson recounted the exchange between Mr. Diallo and himself did he state that Mr. Diallo was screaming about discrimination and called him a bigot.

Mr. Nicholson said the more he tried to explain the situation it seemed to increase Mr. Diallo's level of agitation to the point that Mr. Nicholson was unable to refocus Mr. Diallo on renting the car. Mr. Nicholson told this investigation, "We now had cars and I would have been happy to rent him one." Mr. Nicholson explained that he was never able to refocus Mr. Diallo because Mr. Diallo was only talking about "this bad thing that happened to him" and that our "company would not rent to me [him]."

Mr. Nicholson alleged that Mr. Diallo was insulting and threatening to him and it was clear that he was not going to be able to move through the rental process with him. Mr. Nicholson said that he told Mr. Diallo at least three times that he would honor his reservation. This investigation asked Mr. Nicholson what he meant by Mr. Diallo "threatened and insulted" him. He responded by saying, "It wasn't that big of a deal for me that I have a clear memory of it - I remember him in the office being very agitated" saying that we were racist and wouldn't rent to him. Mr. Nicholson said he told Mr. Diallo that he was ready to rent to him, but Mr. Diallo kept saying "they wouldn't rent to me- blah, blah blah."¹⁴ Mr. Nicholson described Mr. Diallo as being physically agitated, waving his arms and talking loudly. There were no other customers around. Mr. Nicholson told this investigation "it was not Mr. Diallo's' behavior as such" that caused him to not rent; it was what he believed was Mr. Diallo's inability to focus on the rental process."

Mr. Nicholson said he told Mr. Diallo at some point that he would not talk about this (Mr. Diallo's complaint of discrimination) any more or be yelled at anymore. He told Mr. Diallo that he needed to decide if

¹⁴ This investigation thinks that it is informative that Mr. Nicholson chose to characterize Mr. Diallo's complaints about being discriminated against as "blah, blah, blah."

he wanted to rent a car or not. When Mr. Diallo continued to complain about discrimination he told Mr. Diallo, "I'm sorry we are not going to be able to continue with this transaction." Mr. Nicholson at that point said he returned Mr. Diallo's credit card and driver's license. Mr. Nicholson said he understood how the situation Mr. Diallo experienced could be hard to understand. Mr. Nicholson said it was clear to him that Mr. Diallo felt he had been discriminated against earlier in the day. He recalled that the police mentioned that Mr. Diallo said he had been discriminated against.

Mr. Nicholson said Mr. Diallo walked outside and just stood there. Mr. Nicholson added that Mr. Diallo was not interfering with business. When the police arrived he saw the police officer talk with Mr. Diallo and then the officer came in and talked with him. Mr. Nicholson said that he explained that Mr. Diallo was too agitated to complete the transaction but Mr. Nicholson did not see a need to remove him from the property as he was not causing any trouble. Mr. Diallo eventually left. Mr. Nicholson said after he told Mr. Diallo that he was not going to be able to "rent him a car today." It was clear that there was no reason for Mr. Diallo to remain on the property. He did not have to ask him to specifically leave the property.

Mr. Nicholson said it was not that unusual for customers to have complaints but usually they calm down. He stated that because he had worked in the airline industry with people stressed about getting to where they needed to be, this was "not such a memorable event for me to remember specifics." Mr. Nicholson said the interaction was more than 3 minutes (as stated by Mr. Diallo) because it "took a while for him to get revved up." Mr. Nicholson stated the interaction was about 10 minutes in duration.

Mr. Nicholson also stated, "I communicated to him [Mr. Diallo] that I was not going to rent a car and that this conversation needed to end . . . I did not kick him out." Mr. Nicholson said he could not meet Mr. Diallo's need for an explanation as to why he could not rent a car four hours earlier. He said that Mr. Diallo was not a problem when he went outside.

This investigation asked Mr. Nicholson if he recalled ever not renting to someone because they were agitated or rude. He said he could not think of a parallel situation because people are usually upset about a specific practice or policy such as not providing snow tires or not accepting debit cards. Thrifty would not be able to change those types of situations to satisfy a customer. So if the person was upset they would either decide to rent anyway or the rental would not happen because they wanted the undoable specific thing, such as snow tires.

He did recall a woman being fixated on wanting snow tires on her rental and they do not provide snow tires. She was very agitated and making lots of noise when other customers were around which interfered with Thrifty business. This person was asked to leave the area. He also recalled another time when a man had rented a car and discovered after he had left the lot, that it had a speed regulator on it. He returned to Thrifty and wanted the regulator turned off. Mr. Nicholson told the man that they would not do that. The customer was so angry that the person who drives the shuttle for Thrift feared there would be a physical altercation. The bus driver wanted to do something about the situation but Mr. Nicholson felt it was not needed. He said it was not necessary for the driver to "have his back." This investigation asked Mr. Nicholson if the agitated customer was a person of color and he said that the person was not black but tan so

he was not sure. When asked what percentage of Thrifty's customers were persons of color, Mr. Nicholson opined that about 70% of their customers were white.

Mr. Nicholson said the incident with Mr. Diallo is the only incident when he has not rented to someone merely because of the way the customer was behaving. He further explained that every other time that the rental did not happen it was connected with a specific issue such the snow tires that could not be changed or remedied. He said that he did not recall the specific language Mr. Diallo used. He recalled this incident when it was referred to as the incident "where the guy called the cops."

Statements of Ken Barton

Mr. Barton is the Operational Manager for Thrifty, Hertz and Dollar car rentals in Burlington. He has been with the company for 26 years in several managerial positions. His duties include managing the fleet of cars for the three entities. In the morning when he arrives at work he has to juggle the fleet of vehicles between the three locations. Along with the General Manager, Greg Keough, he determines the supply and demand for vehicles. Together they make the call as to whether they should have a "no walk-up" policy in effect for the day. He acknowledged that depending on many factors including reservation no shows, the "no-walk-up" status could change throughout the day. He stated that if there is a "no-walk ups" in effect the public would not see the signs as they are only posted on the counter staffs' computers.

This investigation asked Mr. Barton about the availability of vehicles on July 29, 2015. He stated that July and August are very busy months and "things were incredibly tight that day." He further

explained that the situation can shift by the hour. He confirmed that counter staff want to be able to rent to walk-ups because they make a commission on those types of rentals. He also admitted that the situation Mr. Diallo experienced happens frequently.¹⁵

Mr. Barton said he was on site in the afternoon when Mr. Diallo returned to the office but he was not aware that there was a problem until the police officer knocked on his door.¹⁶ He did not hear any raised voices and Mr. Nicholson did not ask for his assistance during the interaction with Mr. Diallo. Mr. Nicholson did not call him to the counter before telling Mr. Diallo that that he would not be renting him a car. He stated that he never saw or heard Mr. Diallo. Mr. Barton stated that the police officer said there was a "very rude and upset"¹⁷ customer and then asked did he want to rent a vehicle to him.¹⁸ Mr. Barton said he told the officer, "Then [based on what the police had allegedly told him about Mr. Diallo's behavior] we don't need to rent to him." Mr. Barton stated that the police officer said that he would not rent to him and that he would remove him from the property.¹⁹ Mr.

¹⁵ This statement is confirmed by the fact that the policy manual specifically addresses how staff should handle this situation.

¹⁶ Mr. Barton's office is not in or next to the rental space. He is about 15 yards away at the other end of the building.

¹⁷ The police officer did not experience Mr. Diallo being "very rude or upset" as the police officer came to the rental site in response to Mr. Diallo's call which was made after Mr. Diallo went outside and was standing on the sidewalk. This is Mr. Barton's recollection of what the police officer said.

¹⁸ Mr. Diallo contacted the South Burlington Police Department after this incident to complain about how the officer handled the situation at Thrifty. In December Mr. Diallo received a letter from Police Chief Whipple stating that after reviewing the incident report he spoke with the officer and pointed out that Mr. Diallo was probably upset because he believed he had been discriminated against. He explained to the officer that even though they cannot force a business to provide service to a person, the officer could have done a better job cautioning Thrifty about the possibility of a discrimination complaint.

¹⁹ This is not confirmed by the police report or the interview with the police officer. This would have been inconsistent with how Mr. Diallo was acting when the officer arrived.

Burton said he then told the officer, "please do." He further explained that since Mr. Diallo was already outside the office, the situation was not noteworthy enough for him to have taken notes.

Mr. Barton did not seem to be aware of the company policy that states when there is a refusal to rent a vehicle to a customer who is alleging discrimination the following steps must be taken:

1. Notify the manager.
2. The **manager** must attempt to explain the Hertz policy concerning Res Only [reservations only] and why these situations may sometimes occur (emphasis added).
3. Compensation for the inconvenience (vehicle upgrade, rental certificate or revenue adjustment) may be offered by the manager.
4. If the situation still is not resolved, advise the customer that a report on the situation will be filed with the Customer Relations Department in Oklahoma City, and that someone from that office will contact the customer. Obtain the customer's name, address and daytime phone number
5. The manager must complete an Irregularity Report providing a detailed description of the situation, including statements from all employees involved. Include the customer's name, address and daytime phone number in the report.²⁰

Mr. Burton thought perhaps this policy was a Hertz policy and that Hertz had bought Thrifty two years ago.

Statements of Greg Keough

Mr. Keough was the Vermont area manager from November 2014 until October 2015. He supervised Mr. Burton. He stated that

²⁰ The documentation provided by Thrifty shows that Greg Keough, the Burlington Operations Manager, sent an email to the Zone Vice president of operations for New England. The brief email contained inaccuracies; 1) it stated that the officer gave Mr. Diallo the option of leaving the property or being taken to the station (this was **not** the officer's or anyone else's testimony to this investigation nor was it in the police report); and, 2) the email also stated the police were called because Mr. Diallo was bothering staff and the operation. (Mr. Diallo was the one who called the police.) In this investigation's interview with Mr. Nicholson he stated that there were no other customers.

he was involved in customer satisfaction and that any major issue was brought to his attention. In his interview he confirmed that records are not kept regarding how many "walk-ups" are turned away; that taking care of customers with a reservation is top priority; he could not recall other incidents when a customer was asked to leave; and, that there can be up to a four-hour delay to reflect on line once the no walk-up decision is made.

Mr. Keough recalled sending David Field the email (discussed below) regarding the incident with Mr. Diallo (though he did not know Mr. Diallo's name at the time.) He said he heard about the incident from Mr. Burton who called him. He then delegated the matter to Mr. Burton and was aware that he was tracking down information through the South Burlington police department. This investigation asked if Mr. Burton got back to him and Mr. Keough stated that Mr. Burton did but it was a while later.

Mr. Keough was a little vague in his recollection of the specifics. He recalled that Mr. Burton's investigation into the incident was before Mr. Diallo filed his VHRC complaint on 10/16/15. He stated that he wanted as much information as possible. They were able to get Mr. Diallo's name but because the police report was redacted there was no way to get in touch with Mr. Diallo. Mr. Keough said that "nothing happened" as a result and that he assumed the matter just passed and was gone. He said it was many months before he heard anything again.

He recalled that his follow up with Mr. Field on this matter consisted of two or three phone conversations after the original email but that there was no written record of this. He recalled at a later date being contacted by the legal department and asked a few questions. Mr. Keough described Mr. Diallo's behavior to this

investigation as "bothering staff", "pounding his fists on the counter", and "putting a finger in Jeff's face." However, Mr. Keough prefaced his remarks and closed his remarks by saying, "this is all here say." He also recalled being told that Mr. Diallo was saying that they would not rent to him because he was African-American.

Statements of Kamil Walus

Mr. Walus has worked for Hertz for five years at various managerial positions. He is now and was at the time of this incident an area manager for the Burlington Airport Hertz and its subsidiaries, Thrifty and Dollar, car rental services. He oversees staffing and general management, including hiring and promotions. He stated that the "diversity training" required of staff is an annual on-line one-hour training. He did not recall if it included the subject of implicit/unconscious bias.

Mr. Walus stated that he worked the customer service counter for six or seven months. This investigation asked him if he ever turned a customer away because s/he was acting rudely. He stated that he had not. He agreed that what Mr. Diallo experienced in the morning when he first attempted to rent a car, "can feel like discrimination."

Mr. Walus then provided information/documentation that supports one of the respondent's defenses that when Mr. Diallo first attempted to rent a car on the morning of July 29, 2015 there was a "no-walk-ups" policy in place because of the low availability and high demand for vehicles that day.²¹

²¹ This investigation decided to not include the details of this documentation in the Investigative report because it is overly complex, includes terms that would mean little to most people, included charts and flow sheets that thoroughly convinced this investigator that what Mr. Diallo was told about no cars "available" had a specific

Statements of Officer Tanner Palermo

Tanner Palermo has been a police officer for the South Burlington Police Department since June 2015. He had been an officer for less than 2 months when this incident occurred. He stated that he responded to a call from Mr. Diallo regarding a dispute at the Thrifty Car Rental in South Burlington, Vermont. He said that Mr. Diallo said that Thrifty had earlier told him there were no cars but that he went home and was able to reserve a car on line. Officer Palermo recalled that Mr. Diallo wanted him to help resolve the issue because Thrifty was refusing to rent to him.

This investigation asked Officer Palermo what Mr. Diallo's demeanor was when he, the officer, arrived at Thrifty. He answered that Mr. Diallo was obviously agitated and "a little angry . . . not over the top by any means." He further explained that he thought Mr. Diallo was just upset with the situation not a person. This investigation asked if Mr. Diallo appeared to be a threat to anyone and he said, "No." He said that he spoke with Mr. Diallo for about five minutes.

The officer then went inside and spoke to the employees. He said that he was told that Mr. Diallo called "them liars" and that he was agitated and yelling at the employee. Mr. Nicholson told the officer that he was trying to explain the situation to Mr. Diallo but that Mr. Diallo kept saying he was being discriminated against. This investigation asked Officer Palermo if any employee expressed that they were being threatened and he said, "no." He further stated that Thrifty just wanted him to take his business elsewhere. This

industry meaning (no cars available for walk-ups) and that at the time he first attempted to rent a car there were not cars available for any walk-up customers.

investigation asked the officer if anyone mentioned Mr. Diallo "pounding his fist on the counter." He stated "No."²²

Officer Palermo stated that he also spoke to the manager, Mr. Barton, who allegedly told him that he was not interested in issuing a no trespass but that he just wanted him (Mr. Diallo) to take his business elsewhere. The officer informed Mr. Barton that Mr. Diallo stated he was going to sue for discrimination.²³

Finally, this investigation asked the officer on a scale of 1 – 10 (10 being a danger to someone) how he would rate Mr. Diallo's degree agitation. The officer said 3 to 4 and that Mr. Diallo never increased in his agitation during his contact with him.

Statements of Usivio Pugh

Mr. Pugh is a bus driver for the Thrifty shuttle. He is a person of color. Mr. Pugh told this investigation that he recalled a time when a customer, perhaps from Egypt rented a car, left the lot, but soon returned because he was upset that the car had a speed regulator. The customer engaged in an intense, heated conversation with Mr. Nicholson because he wanted the regulator to be removed. Mr. Pugh felt threatened by the situation and felt he needed to have Mr. Nicholson's "back" and should call the police. However, Mr. Nicholson did not believe that was necessary and the customer eventually left with the car and the regulator still functioning.

²² This investigation believes this is an important piece of information because Thrifty's original response stated that Mr. Diallo "banged his fists on the counter" and implied this was part of the reason he was denied service. However, when the officer responded to Mr. Diallo's call, Mr. Nicholson did not mention fist pounding. Additionally, during two interviews with Mr. Nicholson he never mentioned fist pounding on the counter.

²³ This investigation wondered why having been informed of Mr. Diallo's intent to bring a discrimination complaint/suit Thrifty did not preserve the security tape. Especially when their reason for refusing Mr. Diallo was allegedly because of his behavior which could have been corroborated by the security tape.

Other Documents Provided

Police Report

The police report shows that at 12:33 Mr. Diallo called 911 to report "discrimination and a verbal argument." Mr. Diallo told police he attempted to rent a car earlier in the morning but was told there were no cars for two-weeks. He went home and was able to rent one on-line. When he returned, he was again refused service. He told the Thrifty counter person that they were discriminating against him. He left the building and called 911.

Officer Palermo went in and spoke with Mr. Nicholson, who said Mr. Diallo had been there earlier that day to rent a car and was told that the company was not accepting walk-ups because all vehicles had previous reservations.²⁴ He told the officer that Mr. Diallo returned advising him that he was able to get a reservation on line and calling the employees "liars." Mr. Nicholson told the officer that Mr. Diallo was agitated and yelling. When Mr. Nicholson attempted to explain the no walk-up policy Mr. Diallo continued to be agitated and say he was being discriminated against. Mr. Diallo went outside and called the police.

The police report also states that Mr. Nicholson told the officer he did not wish to "trespass" Mr. Diallo, but asked that Mr. Diallo leave the property and take his business elsewhere. The officer went out to speak to Mr. Diallo and told him because he called the employees liars

²⁴ This investigation conducted a brief second interview with Mr. Zeno to help understand how Mr. Nicholson would have known this information if he had not witnessed the incident. Mr. Zeno told this investigation that Mr. Nicholson was not in the office when Mr. Diallo first attempted to rent a car and that he had not spoken to Mr. Nicholson about the incident with Mr. Diallo. In fact, he stated, "There was no incident." This issue does not affect the recommendation of this investigation as it is possible that Mr. Nicholson was repeating what Mr. Diallo told him when Mr. Diallo came in with his reservation to rent a car.

and entered the building agitated he was being refused service. The officer then advised Mr. Diallo that he was being asked to leave the property.

The officer went back inside and spoke to Mr. Barton and advised him that he would likely be contacted in regards to a civil lawsuit.

Thrifty's counsels' responses in this investigation

11/30/15 – Initial response from Thrifty Corporate attorney

Thrifty's corporate office made the following statements in Thrifty's initial response to this complaint:

- 1) All staff must adhere to its strict nondiscrimination policy at all times.
- 2) Managers have a primary responsibility to "vigorously enforce the policy and to investigate all allegations of discrimination. Any customer complaint alleging discrimination at any location must be thoroughly documented and forwarded to the appropriate Customer relations manager."
- 3) Hertz "works diligently. . . and most importantly – [to] exceed our customer's needs and expectations."
- 4) Hertz "carefully manages employee conduct and takes very seriously any allegation that an employee may have engaged in improper services, violated company policies or simply may not have provided outstanding customer service."

- 5) The attorney stated that Thrifty conducted an internal investigation and came to a very different conclusion than the facts alleged in Mr. Diallo's complaint.²⁵
- 6) The response included this statement, "Mr. Diallo verbally abused Hertz staff, banged his fists on the counter . . ." ²⁶
- 7) "Notably Hertz staff did not ask Mr. Diallo to leave the property – it was the police who gave the instruction"²⁷

2/12/15 – Response from Respondent's local counsel

This response contained detailed information that supported Thrifty's defense of a non-discriminatory reason explaining why it did not rent a vehicle to Mr. Diallo the morning of July 29, 2015. It also confirmed that the end of July and early August are very high volume times for the rental car market in Vermont. The documents proved that customers who are refused a car as a walk-up can go on line or call customer services and obtain a reservation, even when the rental place is not accepting walk-ups that day.

5/2/15 – Respondent's counsel's response to Mr. Diallo's interview

After counsel reviewed Mr. Diallo's interview a response was provided to this investigation. Basically it was a legal brief on the issues. The brief argues that Mr. Diallo does not present a *prima facie* case. This will be addressed in depth in the legal analysis section of

²⁵ It should be noted that Thrifty's investigation did not include speaking with Mr. Diallo, but only to Thrifty staff and occurred only after Mr. Diallo filed his VHRC complaint. There is no evidence a full investigation occurred because of the events that day as the policy requires.

²⁶ Mr. Nicholson did not mention during his interview that Mr. Diallo banged his fists on the counter nor did he tell the police this.

²⁷ More accurately, Mr. Diallo was asked by the police to leave at the direction of the Thrifty staff and prior to that Mr. Nicholson gave him no reason to remain on the property as he told Mr. Diallo he was not going to be renting a car from Thrifty.

this report. The brief summarizes Thrifty's reason that Mr. Diallo was not rented a car that afternoon stating, "It was because Mr. Diallo was being disruptive to business and abusive to Thrifty employees, and would not calm down and focus on the rental process, that he ultimately did not rent a car that afternoon . . ."

3/14/15 - Correspondence from respondent's attorney

Thrifty "confirmed that in the past year Thrifty has not denied anyone rental due to disruptive behavior."

8/3/16 - Thrifty's response to the retaliation complaint

The response confirms that Thrifty tries to honor if at all possible reservations. Mr. Diallo's statements of what transpired during his interaction with Mr. Nicholson were characterized as "self-serving" while Mr. Nicholson's statements were more reliable because they have been consistent throughout the process. The response relies almost completely on employment retaliation law to justify Thrifty's denial of discrimination. When examining the types of behavior that are unacceptable (again mostly in the employment context) the cases are examining proven behavior of plaintiffs that actually disrupts business. Except for the allegation by Mr. Nicholson of Mr. Diallo being loud, the examples of plaintiff behavior cited in these cases are not comparable to the alleged actions by Mr. Diallo. Finally, the response admits that Mr. Nicholson was aware that Mr. Diallo was complaining about being discriminated against earlier in the day.

7/29/15 - Thrifty internal email regarding these two incidents

An email sent by Greg Keough to David Field, Zone Vice President of Operations for New England, indicates that sometime after Mr. Nicholson's interaction with Mr. Diallo on 7/29/15, Ken Barton spoke to Mr. Keough about the incident and then Mr. Keough, contacted David Field via an email. The brief email explains that the

rental site had decided to not take walk-ups because of the availability of cars. That the customer was able to book on line and they were willing to honor the reservation but, "he became aggravated and felt as though we didn't originally rent him a car because he was African American." The email states that Mr. Diallo called the police "who gave him the option of leaving the location or being brought to the station because he was bothering the staff and the operation."²⁸ The email also states, "We are trying to track down any report with the South Burlington Police."

The email was approximately ten lines long. Even if this was the required "Irregularity Report" (Step 5 in the policy for dealing with this type of situation.) there is no evidence that this incident was "thoroughly documented and forwarded to corporate office"; or, that "[a]n investigation [was] conducted and discussed with the legal department" at least not until Mr. Diallo filed his complaint with VHRC. In addition, Thrifty's "investigation" did not include contacting Mr. Diallo to hear his side of the incident.

A Brief Timeline-

Below is a timeline based on the information provided during this investigation.

9:55 – Time Mr. Nicholson clocked in

10:20 – (approximate time) Mr. Diallo first attempted to rent a car and was told no walk-ups (both parties agree)

10:48 – Mr. Diallo made an on-line reservation for a car (confirmed on the reservation sheet)

²⁸ The police did not tell Mr. Diallo to leave or he would be brought to the station and there is no evidence to support he was bothering the operation.

12:30 – (approximate time) – Mr. Diallo and Thrifty staff stated this as the time Mr. Diallo came back to pick up the car (this is also the vehicle pick up time on the reservation) though based on his 12:28 call to 911 he probably arrived a little before 12:30

12:28 - Mr. Diallo made a call to the 911 dispatcher for South Burlington Police Department (on police report)

12:41 – South Burlington Police arrived at Thrifty rental site (on police report)

Legal Analysis

The Vermont Supreme Court has stated that Vermont's Fair Housing and Public Accommodation law "must be liberally construed in order to 'suppress the evil and advance the remedy' intended by the Legislature." Human Rights Com'n v. Benevolent and Protective order of Elks, 176 Vt. 125, 126, 2003 VT 104 One of the evils the VFHPAA seeks to suppress is the "deprivation of personal dignity that surely accompanies denial of equal access to public establishments." At 126 [citation omitted].

Direct evidence of discrimination is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions. Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001). This investigation did not find direct evidence of discrimination in this case. "Discrimination is often simply masked in subtle forms and it is always easier to assume a less odious intention to what is in reality discriminatory behavior." Brooks at 1356. (quoting LaRoche v. Denny's Inc., 62 F.Supp.2d 1375, 1384 (S.D.Fla., Aug. 19, 1999).

In analyzing Vermont's Public Accommodation law §4502 (a) if the evidence presented in a discrimination case is indirect or circumstantial the courts have set out an analysis to use in determining whether

discrimination occurred. This process is used to determine whether the alleged discriminatory treatment was "because of membership in a protected class." 9 V.S.A 4502(b) and is generally referred to as the "McDonnell Douglas burden shifting analysis."²⁹ Under this approach there are four steps:

- 1) The complainant must establish a *prima facie* case of discrimination. This requirement is a "relatively light" one as stated by the United States Supreme Court and adopted by the Vermont Supreme Court. (The burden of establishing a *prima facie* case is "not onerous.") Gallipo v. City of Rutland, 2005 VT 83, ¶ 15. See also Texas Dept. of Comm'ty Affairs v. Burdine, 450 U.S. at 248, 253 (1981). Additionally, "the precise requirements of a *prima facie* case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" Keck v. Graham Hotel Systems, Inc., 566 F.3d 634, 6th Cir. (2009). *Quoting in part Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694, 707 (D.Md.2000). If all elements of the *prima facie* case are established, it creates a rebuttable "presumption of discrimination" or inference of discrimination.
- 2) Once a *prima facie* case is shown the burden shifts to the respondent to articulate a legitimate non-discriminatory reason for its alleged discriminatory actions. This means that the defendant does not need to actually prove the non-discriminatory reason for its actions; it just needs to produce or state a non-discriminatory reason. In this situation the respondent's nondiscriminatory reason for refusing to provide its services to the complainant must be clear

²⁹ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). Thrifty counsel agreed in her May 2, 2016 response that this is the proper analysis to use. McDonnell Douglas is an employment law case but courts at all levels and in all circuits have also used this as the standard for analyzing discrimination cases in other areas of discrimination law including housing and public accommodations.

and reasonably specific and must be supported by admissible evidence. This is considered the respondent's defense or the true reason services were denied. If the respondent meets this burden, then the inference of discrimination disappears.

- 3) At this point in the analysis, the burden shifts back to the complainant to prove that the reason offered by the respondent was mere pretext or not the true reason and that discrimination was the reason. This burden is higher than the previous burden of production. This burden of proof is one of "persuasion." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981.) Thus the complainant must prove by a preponderance of the evidence that the proffered reason is pretext and discrimination was more likely than not the reason for the respondent's actions.

Use of evidence in this case

There were no witnesses to the interaction between Mr. Diallo and Mr. Nicholson. With some minor exceptions, this investigation found Mr. Diallo's statements of his interactions with Mr. Nicholson and Mr. Nicholson's statements of that interaction to be so contradictory that neither rendition is very useful in determining what actually happened during that exchange.³⁰ What this investigation found to be useful in making a recommendation in this case includes: 1) the documentation provided by Hertz/Thrifty; 2) statements by various witnesses related

³⁰ Had Thrifty preserved its security tape after the police informed the management that Mr. Diallo would probably be filing a discrimination complaint, it may have been useful in supporting its version of the incident or perhaps it would have supported Mr. Diallo. The tape may not have had audio but it certainly would have shown pounding fists or waving arms and it would have had a record of how long the interaction between Mr. Diallo and Mr. Nicholson was. Respondent's counsel emphasized many times in its response that Mr. Nicholson's statements are the truth and Mr. Diallo's "just are not credible." Additionally, had the manager been called as required in the respondent's policies there may have been corroborating evidence.

to the history of refusing service to customers in general; 3) statements made by Hertz/Thrifty's attorneys; 4) the police report³¹ and interview; and, 5) the indisputable fact that Mr. Diallo is a person of color with a strong foreign accent who wanted to rent a car at Thrifty and was unable to do so.

As stated above this step of the analysis carries a very low burden Gallipo v. City of Rutland, 2005 VT 83, ¶ 15. See also Texas Dept. of Comm'ty Affairs v. Burdine, 450 U.S. at 248, 253 1981. (proving a *prima facie* case is a very low burden and only needs to meet a preponderance of the evidence standard of proof in order to move to the next step in the legal analysis of a discrimination case).

At this step, in the analysis Mr. Diallo needs to show that either he was treated differently than "similarly situated" persons outside his protected class or that he was treated in a "markedly hostile" manner.³² In regards to showing "similarly situated" persons outside his protected class, Thrifty does not keep records on the race, sex, age, etc. of individuals who do not rent cars or who express dissatisfaction with its services. Nor do most places of public accommodation.³³ Because of this it is impossible for Mr. Diallo to produce the similarly situated person(s) outside his protected class as

³¹ Using police reports to prove what actually happened before the police arrive is not very helpful as the police report only restates each person's version of the events. However, police reports can contain helpful first-hand information and factual information such as times, places, and actions of the parties while the police are present. A police report also reflects that one party thought the interaction was serious enough to require police intervention.

³² "Markedly hostile" is a legal term of art. Courts have enumerated three issues to consider in determining what should be considered to meet this criterion. (These are listed below in the analysis.)

³³ Thrifty is not faulted for not keeping these types of records as very few place of public accommodations would be able to provide this type of record.

comparators. Given this it would be difficult, if not impossible, for Mr. Diallo or any member of a protected class to ever prove a *prima facie* case using this criterion in a public accommodations situation.

Second attempt to rent a car and allegation of discrimination – afternoon of 7/29/15

Step 1 –*Prima facie* Case (See pg. 4)

This step of the analysis carries a very low burden Gallipo v. City of Rutland, 2005 VT 83, ¶ 15. See also Texas Dept. of Comm'ty Affairs v. Burdine, 450 U.S. at 248, 253 1981. (proving a *prima facie* case is a very low burden and only needs to meet a preponderance of the evidence standard of proof in order to move to the next step in the legal analysis of a discrimination case).

At this step, in the analysis Mr. Diallo needs to show that either he was treated differently than “similarly situated” persons outside his protected class or that he was treated in a “markedly hostile” manner.³⁴ In regards to showing “similarly situated” persons outside his protected class, Thrifty does not keep records on the race, sex, age, etc. of individuals who do not rent cars or who express dissatisfaction with its services. Nor do most places of public accommodation.³⁵ Because of this it is impossible for Mr. Diallo to produce the similarly situated person(s) outside his protected class as comparators. Given this it would be difficult, if not impossible, for Mr.

³⁴ “Markedly hostile” is a legal term of art. Courts have enumerated three issues to consider in determining what should be considered to meet this criterion. (These are listed below in the analysis.)

³⁵ Thrifty is not faulted for not keeping these types of records as very few place of public accommodations would be able to provide this type of record.

Diallo or any member of a protected class to ever prove a *prima facie* case using this criterion in a public accommodations situation.

Mr. Diallo is a member of a protected class who did not receive services ordinarily provided by Thrifty.

It is undisputed that Mr. Diallo is a person of color who has a strong foreign accent. It is also undisputed the Mr. Nicholson refused to rent him a car when he appeared the second time with a reservation that he had obtained on-line. Mr. Nicholson told this investigation that he informed Mr. Diallo that he was not going to be renting him a car that day. This investigation asked Mr. Nicholson if he asked Mr. Diallo to leave the property and he stated that since he told Mr. Diallo that he was not going to be renting a car that day (even though Mr. Diallo had a reservation) there would be no reason for Mr. Diallo to remain on the premises. Mr. Diallo was denied Thrifty's services. Thrifty's counsel wanted to make sure that this investigation knew that at the beginning of the rental interaction Mr. Nicholson was willing to rent Mr. Diallo a car. Assuming *arguendo* that this is true, it still remains that ultimately, it was Mr. Nicholson who, after a rather short interaction with Mr. Diallo, made the decision not to rent a car to Mr. Diallo on July 29, 2015.³⁶ Mr. Diallo's assertion that he remained interested in renting a car was further bolstered by the statements he made to the police officer indicating that he had been refused a rental and wanted assistance in dealing with the problem. This is sufficient to meet the second prong of the analysis.

³⁶ The reason for the denial of services will be discussed below in a later step of the analysis. However, it should be noted that the plaintiff at this stage is not required to "show that the defendant had an intent to discriminate on the basis of race, such a formulation is inappropriate because the very point of a *prima facie* case requirement is to provide a basis for inferring the existence of a discriminatory motive." Callwood at 705.

Mr. Diallo did not receive the privileges and benefits under circumstances that rationally support an inference of unlawful discrimination.

As stated above it is nearly impossible for a plaintiff to provide evidence of "similarly situated" persons outside a plaintiff's protected class because of the nature of retail (public accommodation) interactions with the public. Therefore, in looking at the third prong of the test for the second interaction, this investigation will focus on whether there is *prima facie* level proof that Mr. Diallo was treated in a "markedly hostile" as defined in case law.

As the court stated in Callwood v. Dave & Buster's Inc *supra*:

"I [the judge] have borne in mind that the prima facie case requirement is essentially a "channeling device" which "is not a difficult requirement to satisfy see Gibson v. Old Town Trolley Tours of Washington D.C., Inc., 160 F.3d 177, 181 (4th Cir. 1998)(Title VII employment discrimination case). And finally, I [the judge] have attempted to take account of the largely itinerant nature of the clientele of the retail food service enterprises, and thus the fact that, if the requirement that some comparison be made between plaintiffs and "similarly situated persons outside the protected group" is applied with stringency that is unrealistic, then few *bona fide* victims of discrimination would ever be able to succeed on a section 1981 claim arising in a restaurant setting or similar place of public accommodation."

The Callwood court then set forth a *prima facie* case to use in cases involving places of public accommodations that recognizes "even in the absence of similarly situated comparators outside the protected class, 'markedly hostile' behavior towards members of the protected class may, under the circumstances of a particular case, give rise to a

rational inference of discrimination sufficient to support a *prima facie* case." ³⁷ Callwood at 708.

The court further identified factors relevant to the determination of whether conduct is "markedly hostile." "This includes [examining] whether the conduct of a merchant or her agents is 1) so profoundly contrary to the manifest financial interests of the merchant and/or her employees; 2) so far outside of the widely-accepted business norms; and 3) so arbitrary on its face, that the conduct supports a rational inference of discrimination."³⁸ Callwood at 708; Lizardo v. Denny Inc., 270 F.3d 94, (2d Cir. 2001); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir.2001); Brooks v. Collis Foods, Inc., 365 F.Supp.2d 1342, 1356 (N.D. Ga. Mar. 31, 2005) (*But see Jackson v. Waffle House, Inc.* 413 F.Supp.2d 1338, 1360 (N.D.Ga. 2000)(here the court chose to follow the older *prima facie* elements rather than those articulated in Callwood)).

Courts have examined the meaning of the above mentioned factors to be considered. Whether there has been a "complete" denial of services is one issue the courts consider in the markedly hostile analysis. "Complete failure to consummate [a] transaction" can be viewed as "contrary to [a business'] financial interest and outside of the widely accepted business." Keck v. Graham Hotel Systems, Inc., 566 F.3d 634, 641 (6th Cir.2009). In using this analysis, the courts "consider normative factors that are commonly understood to influence the conduct of merchants and their agents in a profit-motivated

³⁷ This step does not require proving that there was discrimination in fact but is about raising an inference of discrimination, meaning the facts could support a finding of actual discrimination later in the analysis.

³⁸ The Callwood case was decided on June 7, 2000. On October 5, 2001 the Second Circuit used the *prima facie* case set forth in Callwood in Lizardo v Denny, Inc., 270 F.3d 94, (2dCir. 2001) thereby adopting the analysis to use in Second Circuit public accommodation discrimination cases. It has not been overturned in in the second Circuit.

enterprise to render agreeable service to paying customers. Evidence of merchants or agents' gross deviation from business norms and financial considerations in conduct towards members of the protected class offer sufficient alternative circumstantial indicia to satisfy the function of the *prima facie* case." Callwood at 711. Another fact courts have considered in determining whether a merchant or her employees provided "markedly hostile" service to a member of a protected class is whether the customer was actually refused service or the benefits of contract.³⁹ Brooks v. Collis foods, Inc., 365 F.Supp.2d 1342, 1357-59 (N.D. Ga. Mar. 31, 2005) (In this case the court found that hostile service without actual denial of service could be enough to indicate markedly hostile treatment. The defendants in this case used as a defense the fact that the plaintiffs were not denied the benefit of services, arguing that an actual denial of services is needed to support a finding of markedly hostile treatment).

The Brooks court also stated that "policy may also be relevant in evaluating whether a defendant's actions are so contrary to the financial interests of the defendant, outside of acceptable business norms and arbitrary." *Id* at fn. 6 (citing Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 871 (6th Cir. 2001).

In Lizardo, a Second Circuit case, the court found that mistreatment was not enough to be considered markedly hostile. The plaintiff listed the failure to be greeted, a snippy retort from staff when asked a question, and being physically escorted from the building including being shoved. The court concluded that the plaintiff did not meet his *prima facie* burden even though he alleged the above mentioned treatment. However, the facts in Lizardo are

³⁹ "Benefit of contract" is considered the unspoken agreement every merchant has to provide its services to customers who seek to purchase their products.

distinguishable from the Diallo complaint because the reasons for the Lizardo plaintiff being escorted out of the establishment included the fact that the plaintiff was inebriated, loud, profane and disturbing other customers. Mr. Diallo did not disturb customers, was not inebriated, and was not profane. It is alleged that he was loud, which he denied.

Applying the above stated case law to this complaint this investigation believes that Mr. Diallo meets the low burden of proving a *prima facie* case for the following reasons:

- 1) Not providing service, by not honoring a reservation, is profoundly contrary to Thrifty's manifest financial interests.
- 2) Mr. Nicholson's decision to end the transaction with Mr. Diallo when there were no other customers waiting in line or in the building occurred after a short period of time had transpired. The interaction lasted somewhere between 3 – 10 minutes depending whose version of the events one believes.
- 3) Thrifty has a very specific policy for addressing the exact situation that Mr. Diallo experienced. Because of an earlier same-day denial of services by the on-site Thrifty staff and then his success in obtaining a reservation on-line, Mr. Diallo believed he had been discriminated against. He was expressing his irritation and in accord with the policy, Mr. Nicholson should have contacted the manager who then should have come to speak with Mr. Diallo. This would have given Mr. Diallo an opportunity to speak to someone with more power within the Thrifty system and who, according to the policy, could have offered some sort of compensation for his experience. Additionally, the manager would have or should have told Mr. Diallo that he would further investigate what occurred and get back to him. This policy was not followed. When asked

whether he knew about this policy Mr. Nicholson said that he knew the policy enough to do his job. He did not contact the manager during the interaction. He spoke with the manager about the situation only **after** he told Mr. Diallo that he would not be renting him a car that day and after the police came and spoke to him and the manager. As stated above not following a company policy (which of course exist to further overall profitability and avoid potential liability), can be seen "as contrary to the financial interests of the defendant, outside of acceptable business norms and arbitrary."⁴⁰

- 4) Mr. Diallo's concerns about previously being discriminated against were not taken seriously by the Thrifty counter person, Mr. Nicholson. He did not attempt any other way to address Mr. Diallo's concerns except to offer his own explanation of how it happened even though he said he was not there that morning. In the interview with Mr. Nicholson he referred to the issues Mr. Diallo was raising as "...blah blah blah." This response to this investigation's question reflects Mr. Nicholson's attitude toward Mr. Diallo's discrimination concerns. Serval of the Thrifty staff interviewed admitted that the experience Mr. Diallo had regarding being told

⁴⁰ It is worth rereading Thrifty counsel's original, very clear and strong explanation to this investigation of its expectations that all employees follow its policies especially related to allegations of discrimination.

- 1) All staff must adhere to its strict nondiscrimination policy at all times.
- 2) Managers have a primary responsibility to "vigorously enforce the policy and to investigate all allegations of discrimination. Any customer complaint alleging discrimination at any location must be thoroughly documented and forwarded to the appropriate Customer relations manager."
- 3) Hertz "works diligently. . . and most importantly - [to] exceed our customer's needs and expectations."
- 4) Hertz "carefully manages employee conduct and takes very seriously any allegation that an employee may have engaged in improper services, violated company policies or simply may not have provided outstanding customer service."

that no cars were available and then being able to rent a car on line is problematic and hard for a customer to understand. That being the reality Mr. Nicholson's treatment of the situation qualifies as being far outside of the widely-accepted business norms.

- 5) Mr. Nicholson, and two other counter personnel⁴¹ said they had never before turned someone down because they were rude or agitated. Mr. Nicholson's decision to choose that very rarely, if ever, used option rather than calling the on-site manager to address Mr. Diallo's issue seems to be arbitrary. It begs the question to be answered later in the analysis why choose, in this particular case, to do something admittedly never before done by Mr. Nicholson and not done by any Burlington staff in the past year?

Based on the above mentioned evidence and because the burden to establish a *prima facie* case is light, Mr. Diallo has met his burden in establishing a *prima facie* case, thereby raising an inference of discrimination.

Step 2 - Respondent must articulate a non-discriminatory reason for denying services

At this step, the respondent only needs to present a legitimate non-discriminatory reason for not renting to Mr. Diallo. This is called a "burden of production." The respondent has alleged that Mr. Nicholson felt threatened and insulted and that Mr. Diallo was in such an aggravated state that he was unable to complete the transaction. As stated above this investigation does not give much weight to either Mr. Nicholson's or Mr. Diallo's version of their interaction. This

⁴¹ Additionally, in March 14, 2016 email respondent's counsel stated, "The area manager . . . confirmed that in the past year Thrifty has not denied anyone a rental due to disruptive behavior . . . No others in the past year, only Mr. Diallo."

Investigation believes that the two varying accounts create a typical "he-said-she-said" situation. However, since Thrifty's burden is just one of production at this point Mr. Diallo's behavior could be a legitimate non-discriminatory reason for denying service.

Step 3 – In order to prove discrimination, the complainant must now show that the reason offered by the respondent for its action was mere pretext or false.

When the respondent meets its burden of production in the previous step, the complainant is given one more chance to show that the respondents' reason was untrue and mere pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08 (1973). Disbelief of the respondents' proffered reason will generally permit, but does not require, the fact finder, (here this investigator and the Vermont Human Rights Commissioners), to conclude that the defendant's real reason for refusing service to the plaintiff was discrimination. Reeves v. Sanderson Plumbing, Products Inc., 530 U.S. 133, 146-48 (2000). "[A Plaintiff] must produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not discrimination was the real reason for the [defendant's actions]. Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000).

Thrifty has stated that Mr. Diallo was unable to rent a car because of his behavior. Respondent's counsel stated in a May 2, 2016 response to Mr. Diallo's interview, that it was because Mr. Diallo "was being disruptive to business and abusive to Thrifty employees,

and would not calm down and focus on the rental process, that he ultimately did not rent a car."⁴²

Based on the following evidence this investigation concludes that Thrifty's stated reason for denying Mr. Diallo services, that he was too agitated to complete the transaction and his behavior was disruptive is false and therefore pretext. This is based on the following evidence:⁴³

Disruptive Behavior

- 1) When this investigation asked three of Thrifty's employees, who had all worked at the rental counter if they had ever turned anyone away because of their behavior all answered, in the negative."⁴⁴ Mr. Nichelson, the person who waited on Mr. Diallo, explained that there was a situation where a woman was turned away, however, it was because she wanted snow tires. Because Thrifty does not and cannot provide snow tires they could not meet her demand. She became very agitated because she could not rent a car with snow tires and she was **interfering with business**. (Mr. Diallo did not interfere with any business, no one else was even at the site, and

⁴² Respondents also cite these facts as proof that Mr. Nichelson did not discriminate against Mr. Diallo: 1) Thrifty provides some on-line annual antidiscrimination training for its staff; 2) Thrifty has a strong antidiscrimination policy; 3) Thrifty takes seriously allegations of discrimination and has not had any discrimination complaints at its South Burlington site. This information certainly speaks to the desired Thrifty culture and what may have happened historically but it does not mean that on this specific occasion Mr. Diallo did not experience discrimination. The fact that the policy designed to address alleged discrimination was not followed in this case and that employees seemed generally unaware of its requirements indicates that despite its policies and training, employees are not following through with their responsibilities in this regard.

⁴³ This investigation attempted to address separately the allegation that Mr. Diallo was too disruptive and the allegation that he would not complete the rental transaction. These issues are so intertwined that it is impossible to completely keep the facts in one category of the other.

⁴⁴ This included people who had worked at the counter 12 years, 3 years and a few months.

he wanted something Thrifty could have provided, someone to listen to and respond to his belief that he had been discriminated against earlier that day. In this type of situation, it is very common to call a manager in to help resolve the matter - - Mr. Diallo was not afforded this opportunity.)

The other incident Mr. Nicholson recalled was when a Thrifty bus driver wanted to call the police because of the way a customer, who had already rented a car and then returned because he wanted Thrifty to turn off the speed regulator, was behaving. The Thrifty bus driver felt he needed to "have Mr. Nicholson's back." However, Mr. Nicholson told the bus driver it was not necessary to call the police. Again this involved a customer upset with something that Thrifty could not address, turning off a speed regulator. The customer ultimately left with the car he had rented. He was not denied service.

Mr. Zeno, who had the most years of experience working at the counter, (12 years), was asked several times if he had ever refused to fill a reservation because a customer was being rude. He replied, "No. Never . . . I have never refused. I have seen other employees say to people to "step back." (a technique again not used by Mr. Nicholson.) He then added that if he refused a customer because he was rude he would be disciplined.

Mr. Nicholson told this investigation that Mr. Diallo was "insulting and threatening" to him. However, when this investigation asked him what he meant by "threatening and insulting", he stated, "It wasn't that big of a deal for me that I have a clear memory of it." He recalled Mr. Diallo being very agitated saying that "we were racist and would not rent to him." Mr. Diallo does not deny that he told Mr. Nicholson that "you guys are liars." Mr. Nicholson described

Mr. Diallo's concern about not being rented to earlier in the day in this manner, "Mr. Diallo kept saying, 'They wouldn't rent to me – blah blah blah.'" Mr. Nicholson said Mr. Diallo was physically agitated, waving his arms and talking loudly. However, because there is no security tape there is only Mr. Nicholson's version of what happened. Mr. Diallo denies that he acted this way because he would probably end up in serious trouble if he did.

Mr. Nicholson then explained to this investigation that it was not unusual for people to have complaints but they usually calm down. He stated that having worked in the airline/travel industry he was used to people being stressed. He summarized by saying that this [exchange] was not such a memorable event for him to remember specifics. Mr. Nicholson's recollection of his interactions with Mr. Diallo do not support a conclusion that Mr. Diallo said anything more insulting than calling the workers "liars" and accusing the company of discrimination. There was no threatening behavior that was even memorable to Mr. Nicholson or that was reported to the police officer.

Assuming *arguendo* that Mr. Diallo had raised his voice maybe even yelled (which he denied) and waved his arms these actions do not rise to the level of "disruptive behavior" that the courts have found would support a legitimate non-discriminatory reason for denying service to a person in a protected class. Respondent's counsel cited several cases stating that 'disruptive behavior' is a legitimate non-discriminatory reason for a business to refuse service to a person. However, no comparison was made of the "disruptive behavior" in the court cases cited by the respondents and Mr. Diallo's alleged disruptive behavior. Mr. Diallo is not

accused of the behaviors that are present in the cited cases even if Mr. Nicholson's description of what occurred is accurate.⁴⁵ But since this is a "he-said-he-said" situation, this investigation has no reason to believe Mr. Nicholson over Mr. Diallo." Therefore, the analysis below is only "assuming *arguendo*" that Thrifty's account of the interaction is true.

In the Lizardo case, cited by counsel, the facts include the plaintiff using "loud and profane language." Additionally, in Lizardo the plaintiff was disruptive to other customers and the defendants contended that she was inebriated, profane and used the "f" word. In the McDonnell Douglas case, an employment case, the plaintiff "protested vigorously." He illegally stalled his car on the roads leading to the petitioner's plant, blocking access at the time of the

⁴⁵ Vermont Public Accommodation law cites two specific situations when a place of public accommodation may refuse service to a customer without violating the public accommodation law.

§ 4502 (h) This section shall not be construed to require a public accommodation to permit an individual to participate in or benefit from the services, facilities, goods, privileges, advantages, and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others. For the purposes of this subsection, "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services. In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation shall make an individualized assessment based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications of policies, practices, or procedures will mitigate the risk

(i) Nothing in this section shall be construed to prohibit a public accommodation from excluding a person engaged in disruptive behavior which the place of public accommodation has reason to believe is the result of alcohol or illegal drug use.

Mr. Diallo's alleged actions do not fall into either of these categories.

morning shift change. He may have been part of a lock in wherein a chain and padlock were placed on the front door of the place of business. See *also*, Matima v. Celli, 228 F.3d 68, 79 (2d Cir.200), Hartley v. Rubio, 785 F. Supp2d 165, 179 (S.D.N.Y. 2011). There is no allegation that Mr. Diallo used **profane** language. Mr. Diallo's alleged, and unproven actions did not include any of these behaviors except possibly being loud and that alone does not rise to this level of "disruptive behavior," particularly when there were no other customers present at the time.

2) In this investigation's interview of Officer Palermo, he indicated that Mr. Diallo was "a little angry but not over the top by any means." On a scale of 1 to 10, 10 being threatening to others, the officer rated Mr. Diallo at a 3 or 4.⁴⁶ Officer Palermo said that Mr. Nicholson indicated Mr. Diallo was agitated and yelling at him. Mr. Nicholson told the Officer that he tried to explain the situation but Mr. Diallo kept saying he was being discriminated against. This investigation asked the Officer if Mr. Nicholson stated that Mr. Diallo was pounding his fists on the counter?" The officer replied, "No." The officer said the employee did not express that he was being threatened. He said Thrifty, just wanted Mr. Diallo to "take his business elsewhere." The police report indicates that Mr. Diallo called 911 to report "discrimination" and "a verbal argument." Mr. Nicholson did not wish to "trespass" Mr. Diallo but asked that Mr. Diallo take his business elsewhere. After talking with Mr. Nicholson the officer left Thrifty and told Mr. Diallo that because he called the employees "liars" and entered the building agitated he was being

⁴⁶ This investigation realizes that this impression of Mr. Diallo's demeanor was approximately 10 minutes after Mr. Diallo walked out of the office to call the police.

refused service. The officer then advised Mr. Diallo that he was being asked to leave the property.

3) Thrifty's counsel stated that Mr. Diallo was pounding his fists on the counter and used that allegation to help defend its refusal to serve Mr. Diallo. However, no one interviewed as part of the investigation made that statement nor was it mentioned to the police officer. Mr. Nicholson was asked to explain what transpired during his interactions with Mr. Diallo in two different interviews. He never made a statement to this effect. Counsel also stated that Mr. Diallo was "disrupting" business, but Mr. Nicholson specifically said he was not disrupting business and there were no other customers in the office.

Completing the Transaction

This investigation's decision to address Thrifty's allegation that Mr. Diallo's state of agitation made it impossible to complete the rental process requires assuming *arguendo* that Mr. Nicholson's version of the events is correct as this is also a "he said/she said" situation to some degree.

Thrifty has articulated in its policies, very specific steps that staff are supposed to follow when involved in a rental transaction with a customer who believes s/he has been discriminated against. One can assume that these policies are to allow the rental transaction to be completed and have a satisfied customer and to avoid potential litigation. These were not followed even though Mr. Diallo expressed the exact situation addressed in the policy and even though staff understood why he may have felt discriminated against. Mr. Nicholson chose not to provide Mr. Diallo with the benefit of speaking with a

manager or the opportunity for a manager to offer him compensation for his inconvenience even though a manager was on the premises at the time. Mr. Diallo was not advised that a report on the situation would be filed with the Customer Relations Department in Oklahoma City and that someone from the office would contact him. In fact, a full investigation of the situation never happened despite the policy.

Thrifty's policy was not followed despite respondent's original counsel's statements that all staff must adhere to its strict nondiscrimination policy at all times; that managers have a primary responsibility to "vigorously enforce the policy and to investigate all allegations of discrimination"; that any customer complaint alleging discrimination at any location must be thoroughly documented and forwarded to the appropriate Customer relations manager; and, Hertz "works diligently. . . and most importantly - [to] exceed our customer's needs and expectations."

Furthermore, Mr. Nicholson not only did not call the manager to help with the situation, it was Mr. Diallo who took the extra step of calling the police because of Thrifty's actions. Thrifty's well established history, confirmed many times during this investigation, is to provide service to a customer with a reservation even if the customer is upset. Arguably, Mr. Nicholson created the situation that made it difficult to proceed with the rental process by failing to take Mr. Diallo's concerns about discrimination seriously. Officer Palermo stated that Mr. Diallo **wanted him to resolve the issue because Thrifty was refusing to rent to him.**

The above discussion includes examining some of Mr. Nicholson's allegations regarding Mr. Diallo's behavior. It is only fair to again point out that Mr. Diallo denied all these accusations described by Mr. Nicholson, except for saying, "you guys are liars." Mr. Diallo denied

yelling, denied waving his arms or pounding on the desk and stated the interactions were shorter than the staff reported. He also stated that he had been told there were no cars available for two weeks, Mr. Zeno and Mr. Nicholson deny that statement was made.

This investigation does not contend that any one of the above mentioned points standing alone meets Mr. Diallo's "burden of persuasion" that Thrifty's nondiscriminatory reason for not providing him service is pretext. However, when viewed together in their entirety this investigation is persuaded that Thrifty's reason for denying a rental to Mr. Diallo was not the actual reason and therefore was a pretext for discrimination.

Additional Consideration

Even though this investigation's rejection of Thrifty's explanation regarding why it did not rent a car to Mr. Diallo the second time on July 16, 2016, is legally sufficient to recommend that Thrifty discriminated against Mr. Diallo, a further discussion of discrimination and the role of implicit bias, may help to provide a fuller understanding for this position. (See Appendix A for a fuller explanation of implicit bias. There are numerous articles available on this matter.)

Courts have considered the effect of implicit or unconscious bias in determining whether discrimination has taken place. (See Kimble v. Wisconsin Dep't of Workforce Dev., 690 F.Supp. 2d 765, 777 (E.D. Wis.2010) ("Thus, in addition to failing to provide a credible explanation of the conduct complained of, Donoghue behaved in a manner suggesting the presence of implicit bias."); Thomas v. Eastman Kodak Co., 183 F.3d. 38, 58-62 (1st Cir. 1999); Sweeney v. Bd. Of Trustees of Keene State Coll., 604 F.2d 106, 114 (1st Cir. 1979).

One manifestation of implicit/unconscious bias, proven in several studies, is that because of negative stereotypes associating Blacks with violence, white subjects evaluate ambiguous behaviors as more aggressive when performed by a black actor as opposed to a white actor. L. Song Richardson, Arrest Efficiency & the 4th Amendment, MN Law Review 2035-2098 (2011). (Citing H. Andrew Sagar & Janet Ward Schofield, Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts, 39 J Personality & Soc. Psychol. 590, 595-96(1980) (In this study black and white school-age children rated an ambiguous bump in the hallway as more aggressive when performed by a black actor rather than a white actor.)

Mr. Diallo's actions very possibly were unconsciously perceived as more threatening and more extreme because he was a person of color and he was complaining about discrimination.⁴⁷ In Robin v. Durkin, 8 Vt. Trial Ct. Repr., 173, 174 (Windham Super.Ct. 2004) Judge Carroll noted in her decision denying summary judgement to the defendants, that their proffered non-discriminatory reason for not renting the room plaintiffs reserved was that the plaintiffs were "threatening." The Court questioned why the defendant would have felt threatened by the plaintiffs (who were persons of color) versus a white couple who had acted objectively more aggressively towards him, questioning whether the reason was because plaintiffs were non-white a point on which a jury could "reasonably infer discrimination."

As stated above it is not necessary for the Commissioners to use this information to reach the legal conclusion stated above. But because unconscious bias plays a strong and hidden role in discrimination it is important to include it in cases that involve

⁴⁷ It is rare that a White person is comfortable with being accused of being discriminatory.

perceptions of white people about the agitation level of persons of color. This investigation believes Mr. Diallo's actions were viewed as more severe than any experienced during the previous calendar year and perhaps, more extreme than any Mr. Nicholson had experienced in his three years working the counter at Thrifty since he had never before refused service to a customer because s/he was agitated. Unconscious bias is not a defense for discrimination, it is an explanation of why discrimination happens and whether actions taken are conscious or unconscious, does not make it less discriminatory.

Elements of prima facie case for §4506 (e) (Retaliation)⁴⁸

1. Mr. Diallo engaged in a protected activity under Title 9 VSA § 4502
2. Thrifty was aware of Mr. Diallo's participation in the protected activity
3. Thrifty took adverse action against Mr. Diallo
4. A causal connection existed between Mr. Diallo's activity and the adverse action taken by Thrifty

Before turning to the analysis, it is important to note that a retaliation claim can be substantiated if proven by a preponderance of the evidence even if the underlying claim of discrimination is not sufficiently proven.

The analysis of an allegation of public accommodations retaliation is the same burden shifting analysis used in the first two allegations of discrimination. To recap in order to prove retaliation, the complainant must first establish a *prima facie* case; the respondent must then present a non-discriminatory reason for its actions; and the complainant must then prove by a preponderance of the evidence that the non-discriminatory reason is pretext. If the

⁴⁸ In the matter of Matthews & Geff Cmty. Consol. Dist. No. 14, No. 1987SP 0087, 1992 Ill. Hum. Rts. Com. WL 721917 (Aug. 12, 1992).

complainant is successful in ultimately proving pretext, then he has met the requirements to prove retaliation. (See Choudhury v. Polytechnic Institute of New York, 735 F.2d 38 (2d Cir. 1984); Wilson v Murillo, 163 Cal.App. 4th 1124 (2008).

Step 1 –Prima facie Case

Mr. Diallo engaged in a protected activity and Thrifty was aware that he was engaged in a protected activity.

One element that courts look at in determining whether a claimant has engaged in a “protected activity” is whether the person made statements indicating that s/he is a victim of discrimination or alleging that s/he is being subjected to discrimination. This is an exercise of the protected activity of asserting the right to be free from discrimination in a place of public accommodation. Lizardo v. Denny’s, Inc. No. 97-CV-1234(FJS)(GKD), 2000 WL 976808 at *8 (N.D.N.Y. July 13, 2000).

The interviews conducted in this investigation showed that Mr. Nicholson and eventually Mr. Barton, the manager, knew that Mr. Diallo was making clear statements that he believed he had been discriminated against earlier in the day. Additionally, in Thrifty’s response to the retaliation complaint counsel admitted that when Mr. Diallo returned to Thrifty in the afternoon he indicated that he believed he had been discriminated against earlier in the day.

Thrifty took adverse action against Mr. Diallo and a causal connection existed between Mr. Diallo’s activity and the adverse action taken by Thrifty.

It is undisputed that Thrifty employees refused to rent a car to Mr. Diallo that day even when Mr. Diallo presented with a reservation.

This was an adverse action. It is also undisputed that Mr. Diallo was upset because he believed he had been discriminated against earlier in the day. These two facts in combination are sufficient to establish a causal connection between Mr. Diallo's protected activity and the adverse action for purposes of the *prima facie* case particularly where the claim and denial occur in close temporal approximation. Sanderson v. New York State Elec. & Gas Corp., 560 F.App'x 88, 94 (2nd Cir. 2014) (an employment case)(temporal proximity may be sufficient to satisfy the *prima facie* burden). Because the burden to establish a *prima facie* case is light this investigation believes that this element of the *prima facie* case is met.

Step 2 - Respondent must articulate a non-discriminatory reason for denying services

As stated above Mr. Nicholson told this investigation that he did not rent to Mr. Diallo because he was insulting and threatening and that he was unable to get Mr. Diallo to focus on the significant paper work involved in the rental process. Because this step only requires Thrifty to produce (state) a believable, non-discriminatory reason for not completing the transaction, not prove that it is true, Thrifty has met its burden for this step of the analysis.

Step 3 – In order to prove discrimination, the complainant must now show that the reason offered by the respondent for its action was mere pretext or false.

The Sanderson case, *supra*, also stands for the proposition that while temporal proximity may be sufficient to satisfy the *prima facie* burden; standing alone it may not be enough to satisfy the pretext burden of proof. Thus while Mr. Diallo's complaint was lodged

close in time to the adverse action, this alone does not meet his burden to prove pretext.

Mr. Diallo presented at the Thrifty rental counter with a reservation and a complaint that he was treated in a discriminatory manner earlier in the day. Mr. Nicholson told this investigation that Mr. Diallo was insulting and threatening. He told the police officer that Mr. Diallo called them liars (a statement Mr. Diallo does not dispute), that he was agitated and yelling but that he was not threatening.

It is a natural reaction for a person accused of discrimination or of being called a liar to feel the allegation as an affront and/or an unwarranted personal attack. This would account for Mr. Nicholson's statements that Mr. Diallo was insulting and threatening (not in a violent way since he denied feeling threatened when asked by the police) but as a personal attack on his integrity.

Thrifty's statements regarding Mr. Diallo's behavior do not match Mr. Nicholson's recollection of the incident. Counsel stated that Mr. Diallo was pounding his fists on the counter, Mr. Diallo denied this and Mr. Nicholson never mentioned it in either of his HRC interviews or to the police. Counsel has stated a number of times the Mr. Diallo's behavior disrupted business, but there were no other customers in the building at the time and Mr. Nicholson summarized the incident and Mr. Diallo's actions as "unremarkable."

Taken together, it is reasonable to conclude that Mr. Nicholson refused the rental in reaction to the claimed insults and "threats", which were statements about the discrimination Mr. Diallo felt he had suffered thus denying Mr. Diallo in direct retaliation for his complaints about discrimination.

Assuming that there is validity to the Thrifty's second claim for the refusal- the inability to complete the rental process--for the same

reasons stated in step 3 of the previous analysis there is sufficient evidence that Thrifty's stated reasons for refusing to honor Mr. Diallo's reservation were false.

- 1) Thrifty has a policy and strong desire to assure reservations are honored, even if they need to go to another rental company to achieve this. That did not happen for Mr. Diallo. He presented with a valid reservation but that reservation was not honored.
- 2) The interaction between Mr. Diallo and Mr. Nicholson lasted at most 10 minutes according to Mr. Nicholson but only 3 minutes according to Mr. Diallo. Either way, this was not a very long time especially considering that Mr. Diallo was upset and the explanation for the earlier refusal was somewhat complicated to explain. Mr. Nicholson did not feel physically threatened and had experience dealing with customers who were upset about travel situations. Upset people often require a period of time to vent and settle down before being able to focus. There were no other customers in the building or in line so there was no pressure to end the interaction quickly but Mr. Nicholson chose to do so without addressing Mr. Diallo's concerns about discriminatory treatment—concerns that Hertz, Thrifty's parent company understands to be common enough to have created a specific policy dealing with the issue. Mr. Nicholson never validated Mr. Diallo's experience or attempted to remedy it.
- 3) Thrifty stated that in the past year it had never denied a customer service because of their behavior. Three Thrifty staff persons who had worked the counter (including Mr. Nicholson) said that they had never denied someone service because the person was rude. Mr. Zeno stated that he would have been disciplined if he had. Yet Mr. Nicholson chose this unprecedented solution for dealing with Mr. Diallo's reservation and his complaint of discrimination.

Based on the totality of the situation and the evidence, this investigation believes that Mr. Diallo was refused service in retaliation for asserting that he believed he had been subjected to discrimination.

Preliminary Recommendations

This investigation makes a preliminary recommendation that the Commissioners find there are **no reasonable grounds** to believe that the respondent illegally discriminated against Mr. Diallo in violation of 9 V.S.A. § 4502(a) when he first attempted to rent a car. This investigation makes a preliminary recommendation that there are **reasonable grounds** to believe that Mr. Diallo was discriminated against when he returned a second time with a reservation and the counter person refused to rent him a car. This investigation recommends that there are **reasonable grounds** to believe that Thrifty retaliated against Mr. Diallo in violation of 9 V.S.A. § 4506(e).

Ellen T Maxon

Ellen Maxon, Administrative Law Examiner

8/24/16

Date

Approved by:

Karen

Karen Richards, Executive Director

8/24/16

Date

Appendix A

Implicit Bias and Social Justice
December 18, 2011 Hayley Roberts
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Implicit Bias and Social Justice

I conducted this interview with Rachel Godsil, director of research at the American Values Institute, about how implicit bias not only affects individuals but society as a whole. The American Values Institute, an Open Society Foundations grantee, is a consortium of researchers from universities across the country and social justice advocates from a wide range of groups and perspectives.

What is implicit bias?

Implicit bias occurs when someone consciously rejects stereotypes and supports anti-discrimination efforts but also holds negative associations in his/her mind unconsciously. Scientists have learned that we only have conscious access to 5 percent of our brains—much of the work our brain does occurs on the unconscious level. Thus, implicit bias does not mean that people are hiding their racial prejudices. They literally do not know they have them. More than 85 percent of all Americans consider themselves to be unprejudiced. Yet researchers have concluded that the majority of people in the United States hold some degree of implicit racial bias.

How does implicit bias manifest itself in our daily lives?

The areas researchers have studied show that implicit bias can affect people's decisions and their behavior toward people of other races. For example, a doctor with implicit racial bias will be less likely to recommend black patients to specialists or may recommend surgery rather than a less invasive treatment. Managers will be less likely to invite a black candidate in for a job interview or to provide a positive performance evaluation. Judges have been found to grant dark-skinned defendants sentences up to 8 months longer for identical offenses.

Implicit bias also affects how people act with people of another race. In spite of their conscious feelings, white people with high levels of implicit racial bias show less warmth and welcoming behavior toward black people. They will sit further away, and their facial expressions will be cold and withdrawn.

These same implicitly biased white people are also more apt to view black people as angry or threatening and to predict that a black partner would perform poorly on a joint academic task. White people with stronger implicit bias against black people actually do perform poorly on a difficult task after interacting with a black person—suggesting that, without knowing it, they were challenged mentally by the effort of appearing non-biased.

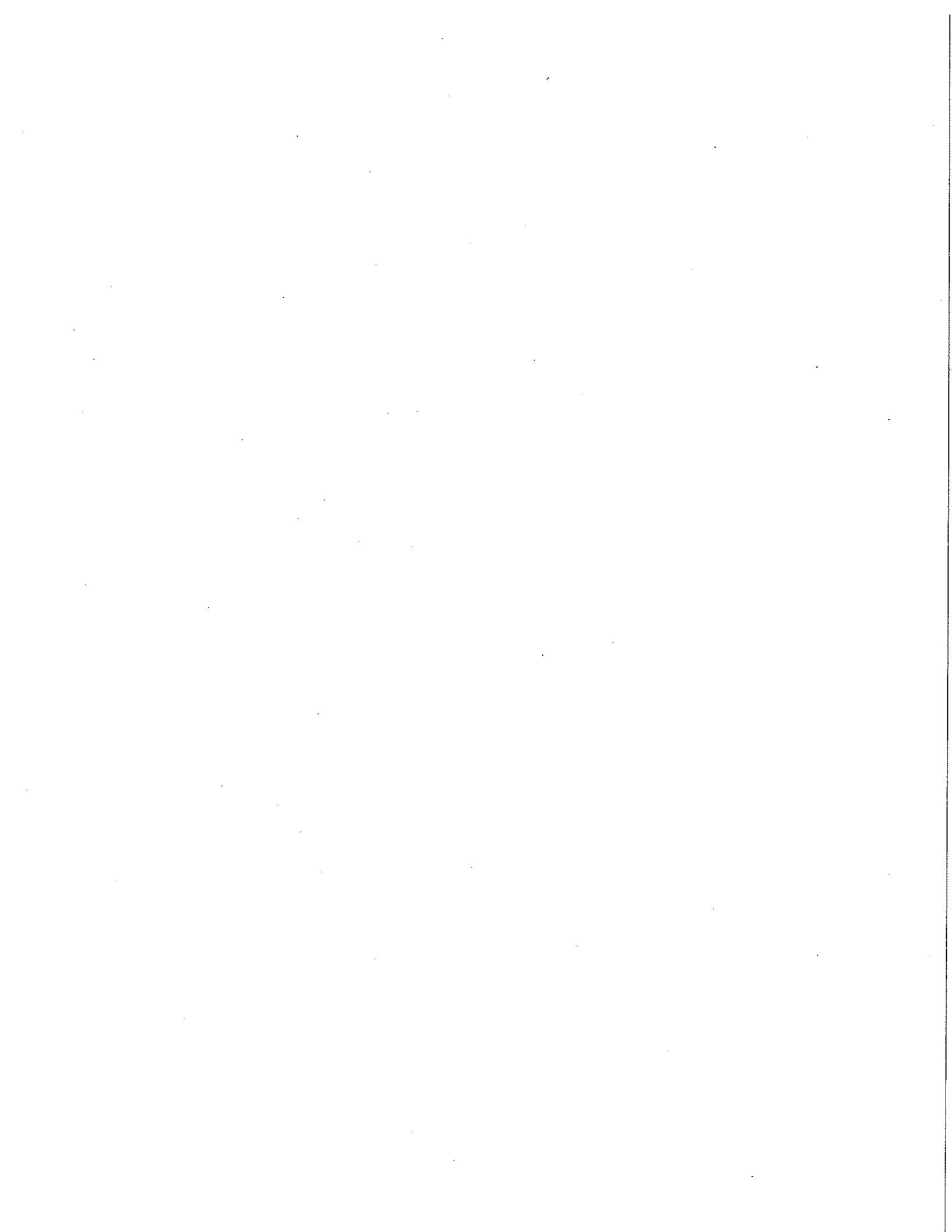
Do these research findings differ from previous studies about racial bias? What were some of your most surprising findings?

Much of this research is surprising to those working for racial justice. To begin with the positive: White people appear to want to be fair and non-discriminatory when they are *aware* that they may be influenced by race. The study involving doctors showed this clearly; when the doctors were told that race had been shown to influence treatment decisions, all signs of racially different treatment disappeared. Jurors, too, wanted to be fair. In a jury study, four sets of jurors were asked to recommend conviction and sentencing for an assault charge:

- In the first scenario, a black man hits his white girlfriend in a bar.
- In the second, a white man hits his black girlfriend in a bar.
- In the third, the black man says, "How dare you laugh at a black man in public," before he hits his girlfriend.
- And in the fourth, the white man says: "How dare you laugh at a white man in public."

White jurors recommended higher sentences for the black man than the white man in the first scenario, but not the fourth. In the fourth, race was an explicit issue, and the White jurors clearly wanted to be fair. In the first, it was more subtle, so their implicit biases affected their decision-making.

Our challenges: the levels of implicit bias are very high, and the research is far more developed in measuring bias than effectively changing it. We know that people are less implicitly biased if they are exposed to "counter-stereotypical" individuals, but most white people lead very segregated lives



STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Amadou Diallo,
Complainant

v.

DTG Operations, Inc.,
d/b/a Thrifty Car Rental,
Respondent

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)
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) VHRC Complaint No. PA16-0007 &
) PA16-0019
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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 DTG Operations, Inc. d/b/a Thrifty Car Rental, the Respondents, illegally discriminated against Amadou Diallo, the Complainant, when he returned a second time with a reservation and the counter person refused to rent him a car, in violation of Vermont's Fair Housing and Public Accommodations Act.

Mary Marzec-Gerrior, Chair	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Nathan Besio	For <input type="checkbox"/>	Against <input checked="" 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"/>
Donald Vickers	For <input type="checkbox"/>	Against <input checked="" 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"/>

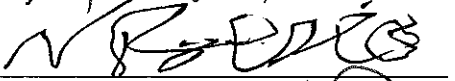
Entry: Reasonable Grounds Motion failed

Dated at Montpelier, Vermont, this 22nd, day of September 2016.

BY: HUMAN RIGHTS COMMISSION



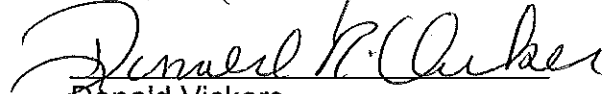
Mary Marzec-Gerrior, Chair



Nathan Besio



Dawn Ellis



Donald Vickers



Chuck Kletecka

STATE OF VERMONT
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Amadou Diallo,
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) PA16-0019
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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 DTG Operations, Inc. d/b/a Thrifty Car Rental, the Respondents, retaliated against Amadou Diallo, the Complainant, 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

Dawn Ellis For Against Absent Recused

Donald Vickers For Against Absent Recused

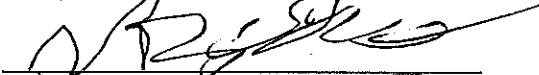
Chuck Kletecka For Against Absent Recused


Entry: Reasonable Grounds Motion failed


Dated at Montpelier, Vermont, this 22nd, day of September 2016.


BY: HUMAN RIGHTS COMMISSION


Mary Marzocco-Gerrion, Chair


Nathan Besio


Dawn Ellis


Donald Vickers


Chuck Kletecka