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## **INVESTIGATIVE REPORT**

HRC Case No.: E17-0007

**Complainant:** Abdullah Sall  
**Respondent:** Department of State's Attorneys and Sheriffs & the Chittenden County State's Attorneys' Office  
**Charge:** Discrimination based on race, color, national origin, [REDACTED]

### **Summary of Complaint**

In February 2016, Abdullah Sall became an intern with the Chittenden County State's Attorney's Office (CCSAO) after taking a course taught by then Chittenden County State's Attorney, T.J. Donovan. Mr. Sall is of African descent and was born in Liberia. He is Muslim and has dark skin tone. At the end of the internship, Mr. Donovan told the office manager, Jennifer Bouffard, to find Mr. Sall a position in the office. An opening in the secretarial pool had become available, so other staff were shifted around and Mr. Sall became the receptionist. The position was formally classified as a "Secretary" at pay grade 15, step 1. Mr. Donovan unilaterally made the decision to hire Mr. Sall without using a formal interview process. On January 5, 2017, T.J. Donovan assumed the office of Attorney General for the State of Vermont. On January 19, 2017, Governor Phil Scott appointed Sarah Fair George to be the State's Attorney for Chittenden County. Eight days later, Ms. George terminated Mr. Sall at a meeting she held with him and Jennifer Bouffard, the Office Manager and Mr. Sall's direct supervisor. Ms. George did not terminate any other employees at that time. Mr. Sall alleged that Ms. George brought up his accent as one of the reasons for terminating him, and he alleged that Ms. George told him that some people had a difficult time understanding him. In addition, he alleged that he had been treated less favorably than similarly situated White employees with similar performance issues. Mr. Sall subsequently filed a complaint of discrimination with the Human Rights Commission alleging discrimination based on race, color, [REDACTED], national origin, [REDACTED].

### **Summary of Response**

Respondent has asserted that Mr. Sall was not qualified for the receptionist position at the time he was hired and that Mr. Donovan should not have hired him in the first place. Respondent argued that he was unable to perform even the basic duties to which he was assigned and that his inability to do his job compromised the functioning of the office. Respondent also argued that Mr. Sall had been offered extensive support and training but was unable to fully comprehend and execute his assigned duties. Thus, Respondent argued that the basis of Mr.

Sall's termination was his performance, and not any of Mr. Sall's protected statuses. Respondent denied that there was any reference to Mr. Sall's accent during the termination meeting with Ms. George and Ms. Bouffard and that there were no similarly situated comparators to Mr. Sall.

### **PRELIMINARY RECOMMENDATIONS**

1) This investigation makes a preliminary recommendation to the Human Rights Commission that there are *reasonable grounds* to believe that the Department of State's Attorneys and Sheriffs & the Chittenden County State's Attorneys' Office discriminated against Mr. Sall in violation of 21 V.S.A. § 495, on the basis of his national origin, race and color.



## **DOCUMENTS**

### **HRC Requests for Information**

- Request for Information to Kerin Stackpole, Esq. – 6.20.17
- Second Request for Information to Kerin Stackpole, Esq. – 10.17.17
- Follow-up letter to Kerin Stackpole, Esq. – 4.20.18
- Follow-up Request for Information to Kerin Stackpole, Esq. – 11.9.18
- Request for Completion of Interrogatories – Joshua Diamond, Esq. Deputy Attorney General – 10.30.19

**Confidential Email Accounts** – Approximately 1GB plus of emails from CCSAO employees, Defender General Employees, Judiciary employees and Windsor County State Attorney’s Office

### **Documents Submitted by Complainant Sall**

- Abdullah Sall answers to written questions from HRC – 8.7.17
- Email response from Sall – 8.15.17
- Email response from Sall – 9.26.17
- Email response from Sall – 10.16.17
- Email response from Sall – 10.18.17
- Email from Sall – forwarded 1.30.17 email exchange with Brooks McArthur, Esq. – 4.30.18
- Email from Sall – 3.20.18
- Email from Sall – forwarded 4.14.17 email exchange with John Franco, Esq. – 5.1.18
- Email from Sall – forwarded 5.28.18 email exchange with Lt. Garry Scott, VT State Police – 5.28.18
- Email from Sall – 5.28.18

### **Documents Submitted by Respondent’s Counsel**

- Request for extension for response from Kerin Stackpole, Esq., Respondent’s Counsel – 5.31.17
- Response #1 from Respondent’s Counsel Kerin Stackpole Esq., (5 pp.) – 6.16.17
- Response #2 from Kerin Stackpole, Esq., (6 pp.) – 8.29.17
- Nine (9) Exhibits from Respondents, (93 pp.) – 8.30.17
  - List and Explanation of job duties – dated 8.2.16 (Respondent’s Exhibit #2)

- Email exchanges between Sarah George, Esq., Jennifer Bouffard, Ashley Perry and Barbara Bernadini after termination of Sall – (Respondent’s Exhibit #3)
- Position Description for Secretary IV and email exchange between Jennifer Bouffard and Ashley Perry – (Respondent’s Exhibit #4) – 7.14.17
- Email exchanges regarding performance of duties by Sall from and to Jennifer Bouffard – (Respondent’s Exhibit #6)
- List of CCSAO employees and Victim Advocate job description – (Respondent’s Exhibit #8)
- Further email exchanges regarding performance of duties by Sall from and to Jennifer Bouffard – (Respondent’s Exhibit #11)
- Further email exchanges regarding performance of duties by Sall from and to Jennifer Bouffard – (Respondent’s Exhibit #14)
- Further email exchanges regarding performance of duties by Sall from and to Jennifer Bouffard – (Respondent’s Exhibit #23)
- Response from Kerin Stackpole, Esq. to the HRC’s further Requests for Information (19 pp.) – 1.16.18
- Supplemental Response and Exhibits to Request for Further Information from Kerin Stackpole, Esq., (21 pp.) – 3.12.18
  - Timesheets for Abdullah Sall, Jennifer Bouffard and Employee A from 6.26.16 to 1.27.17
- Confidential Personnel Files – 8 – Receipt – 2.21.19
- Media Materials from Facebook, Seven Days (with comments), 2/28/17, 2/21/17; VT Digger (with comments), 2/22/17; Sall Facebook Posts (undated).
- VT State Police documents and email exchanges from 2018 regarding stops of Mr. Sall by the Vermont State Police for using “under-lights,” 2018 Richmond Police parking ticket at Huntington Gorge in a no-parking area, and 2018 Williston Police Department Ticket for under-lights.

**SWORN WITNESS INTERVIEWS**

1. Abdullah Sall – Complainant – 5.14.18,
2. Ashley Beach – Courtroom Operator, Vermont Judiciary – 10.15.19
3. Ashley Perry – Executive Staff Assistant, Department of State's Attorneys and Sheriffs – 8.26.19
4. Barbara Bernadini – Business Manager, Department of State's Attorneys and Sheriffs – 8.26.19
5. Kathyria Ferrer-Rodriguez – Victim’s Advocate, CCSAO – 12.16.19
6. Dana DiSano, Esq. – Deputy State’s Attorney, CCSAO – 11.15.19

7. Employee C – Secretary, CCSAO – 11.6.19
  8. Franklin Paulino, Esq. – Deputy State’s Attorney, CCSAO – 11.5.19
  9. Jamie Lee Kiley – Investigator, Defender General Office – 12.9.19
  10. Jennifer Bouffard – Office Manager, CCSAO – 12.27.19
  11. Julie Kolinich, Esq. – Deputy State’s Attorney, CCSAO – 11.15.19
  12. Justin Jiron, Esq. – Chief Deputy State’s Attorney, CCSAO – 11.5.19
  13. Karen Burns – Victim’s Advocate, CCSAO – 10.2.19
  14. Katie Allaire – Secretary, CCSAO – 11.6.19
  15. Krystyn Perretine, Esq. – former intern and employee at Defender General’s Office – 10.28.19
  16. Employee A – Secretary, CCSAO – 12.16.19
  17. Employee B – Secretary, CCSAO – 12.16.19
  18. Melissa Fattal – Secretary, CCSAO – 11.6.19
  19. Nietra Panagoulis – Victim’s Advocate, CCSAO – 10.2.19
  20. Sarah George, Esq. – State’s Attorney for Chittenden County – 12.27.19
  21. Susan Hardin, Esq. – Deputy State’s Attorney, CCSAO – 11.5.19
  22. John Campbell – Executive Director, Department of State's Attorneys and Sheriffs 1.31.20
  23. Bram Kranichfeld – former Chief Deputy State’s Attorney, CCSAO – 2.21.20
- \* By Sworn Interrogatory – T.J. Donovan – Attorney General – Received 3.11.20.

## **I. FACTUAL & LEGAL SYNOPSIS**

In February 2016, Chittenden County State's Attorney T.J. Donovan, (now Attorney General), offered Abdullah Sall an internship in the Chittenden County State's Attorney's Office (CCSAO). Mr. Sall is of African descent, originally from Liberia.<sup>1</sup> He is Muslim and has dark skin tone.<sup>2</sup> Internships involved providing administrative support to office staff and attending court hearings and meetings, and interns reported directly to Jennifer Bouffard, the Office Manager and Legal Secretary. Mr. Donovan was asked via interrogatory how Mr. Sall was chosen for an internship:

### **Q. Please describe how you selected Mr. Sall for an internship.**

A: I recall that Mr. Sall indicated an interest in public service and a desire to get involved in the criminal justice system. As a result, I offered him an internship. Before offering the internship, I spoke with Eric Miller. Mr. Miller was the United States Attorney at the time and had interviewed Mr. Sall previously for a position. Mr. Miller did not hire Mr. Sall, but he was impressed with Mr. Sall's willingness to learn and interest in public service.<sup>3</sup>

On June 27, 2016, a position in the secretarial pool opened and Mr. Donovan asked the CCSAO Office Manager, Jennifer Bouffard, to find Mr. Sall a paid position in the office. Mr. Sall was hired as a Secretary IV, pay grade 15 step1, to perform receptionist duties as assigned. At the time he was hired, there was no separate job description for the receptionist job duties, and no reference manual or specialized training. He was hired without any group interview or formal application process. He joined five women in the front office area – Melissa Fattal, Employee B, Employee A, Employee C<sup>4</sup> and Katie Allaire. All women held the same technical job title and all were directly supervised by Jennifer Bouffard. The duties of all the Secretary IV employees were somewhat flexible in the sense that Ms. Bouffard could add to their list of duties or subtract from them as she saw fit.<sup>5</sup> Mr. Sall's assignment to receptionist shifted Employee A from the receptionist position into a position that provided direct support to three attorneys, including Sarah George who was then a deputy state's attorney. Ms. George had no direct supervisory role over Mr. Sall in his position.<sup>6</sup>

In November of 2016, Mr. Donovan won election to the position of Attorney General. Governor Phil Scott appointed Ms. George to be his successor in January 2017. A week into her new position, and seven months into Mr. Sall's paid position, Ms. George fired Mr. Sall. He was the only employee hired by Mr. Donovan that was terminated by Ms. George.<sup>7</sup> Mr. Sall filed a complaint with the HRC in May of 2017.<sup>8</sup>

In order to prove that his firing was discriminatory, Mr. Sall must prove either that he experienced a "hostile work environment" or that he experienced "disparate treatment" – that is,

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<sup>1</sup> Complaint of Discrimination.

<sup>2</sup> Id.

<sup>3</sup> Donovan Interrogatories no.2.

<sup>4</sup> Related to Jennifer Bouffard distantly by marriage. This was not known to either person when Employee C was hired.

<sup>5</sup> Interview with Jennifer Bouffard; Personnel File of Employee B.

<sup>6</sup> Interview with Jennifer Bouffard.

<sup>7</sup> Interview with Justin Jiron.

<sup>8</sup> Sall Complaint, May 7, 2017.

that he was treated less favorably than one or more members of the office based on one or more of his protected categories. In a hostile work environment case, a complainant must show that they experienced acts or conduct so “severe or pervasive” that it changed the terms and conditions of their employment to an extent which amounts to discrimination.

In a disparate treatment case involving job termination a complainant must show direct evidence of discriminatory intent or alternatively, that there are similarly situated employees outside of their protected category who were not subjected to the same adverse actions of the employer. The determination of whether there are similarly situated comparators relies on a comparison and assessment of a number of factors, including the nature of the positions, commonality of supervisor, knowledge of a supervisor of poor performance, nature of the poor performance and the timing of the adverse action.

Mr. Sall identified Employee A and Employee B as two White employees that he believed had been treated more favorably than he had been treated by the Respondent. Like Mr. Sall, they held the technical job title of Secretary IV, worked in an administrative capacity in the same general area of the office and had the same direct supervisor (Jennifer Bouffard). Unlike Mr. Sall, Employee A and Employee B were each assigned to specific attorneys to help them manage the administrative tasks associated with their caseloads. However there were no separate job descriptions for the work either of these two women performed and no specific training manual associated with learning the job.

All secretarial positions were primarily trained by Ms. Bouffard with backup from the rest of the office depending on seniority, knowledge base and availability at the moment.<sup>9</sup> Employee A and Employee B were able to perform any of Mr. Sall’s duties, however he did not get to the point where he was qualified or trained to do the tasks that they did due to his inability to perform many of the tasks to which he was assigned. Had he been able to perform all his basic duties, Ms. Bouffard could have assigned an attorney to his workload. Employee A, for instance, had been assigned both receptionist duties and as well as administrative duties specific to one of the deputy state’s attorneys in the office prior to Mr. Sall’s arrival.<sup>10</sup>

In order to add support to his argument that Employee A and Employee B are comparators, Mr. Sall would have to show that one or more of his comparators demonstrated comparably poor performance or misconduct, so that Ms. George had one or more employees she could have terminated in addition to Mr. Sall. Ms. George emailed a list of reasons for his termination to John Campbell, Executive Director of State’s Attorneys and Sheriffs. They will be reviewed below. None of them mentioned misconduct or bad behavior of any kind by Mr. Sall, and in fact Ms. George made a point of saying that Mr. Sall was well-liked in the office. The performance issues cited in the email are similar to the performance issues cited in the personnel file of Employee B and this will be reviewed in detail below. The evidence in Ms. Jarvis’s personnel file ultimately shows that Employee B is a comparator and that Ms. George and Ms. Bouffard thus had not one (Mr. Sall), but two (Mr. Sall and Ms. Jarvis) employees with comparable poor performance, though they chose to fire only Mr. Sall.

This investigation would likely not have considered Employee A as a comparator to Mr. Sall had the Respondent not raised evidence of misconduct and inappropriate behavior by Mr. Sall during the investigation. This opened the door to looking more closely at Mr. Sall’s

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<sup>9</sup> Interview with Jennifer Bouffard; Donovan Interrogatories; Respondent’s Responses.

<sup>10</sup> Interview with Employee A. Interview with Jennifer Bouffard.



complaints about Employee A's bad behaviors and his allegations that she directed racist "microaggressions" in his direction and other inappropriate behavior in the office. As interviews progressed, it became clear that Respondent intended to portray Mr. Sall not only as incompetent, but also as a liar, as a sexist, as culturally insensitive to a co-worker, even as abusive to Ms. Bouffard, and as someone who had said highly inappropriate things in the office that he should not have said. In addition, there was an effort to try and convince this investigation that Ms. George had meant to imply or suggest these inappropriate things in her list of reasons, but had just left them out. Perhaps she was remarkably circumspect despite being given an opportunity to unload every reason under the sun for firing Mr. Sall, however ultimately, this investigation is not convinced that Ms. George intended to include them because this investigation does not believe they played much, if any, a role in his termination. It also finds some, but not all, of these stories credible.

It is convinced however that if Mr. Sall was really being fired for his actions, words and behaviors in the office, in addition to his poor work performance, then Employee A's conduct should be examined to determine whether she is a proper comparator given the level of bad behavior and misconduct she demonstrated in the office while Mr. Sall was there - misconduct for which he was fired and she was not. Ultimately, this investigation finds that Employee A is not a comparator to Mr. Sall, however the differential treatment between her and Mr. Sall is evidence of pretext for discrimination. In sum, when Mr. Sall was fired, there were in fact two White employees with comparable performance issues to those of Mr. Sall. Ms. Bouffard and Ms. George – and thus the Respondent CCSAO - had sufficient actual and constructive knowledge of both comparators' performance issues when the decision to fire only Mr. Sall was made.

This investigation found some evidence of explicit bias and convincing evidence of implicit bias. The evidence of more explicit bias towards Mr. Sall took the form of an email between Employee C and Employee A discussing about Mr. Sall's accent. In addition, there was ample anecdotal evidence that Mr. Sall was sometimes abused in person and on the phone by the public due to his accent. While there are two emails from him reporting two specific instances of this to two staff members and one supervisor, there was no evidence that the office took any measures to shield him from third party harassment and provide support to him by changing his duties so he would not experience that type of harassment or that it answered his requests for support in those two cases.

Implicit bias "suggests the possibility that people are treating others differently even when they are unaware that they are doing so."<sup>11</sup> This poses a particular problem for anti-discrimination laws which require that "intent" be proven – either directly or circumstantially. At the time Mr. Sall worked at the CCSAO, it had no written performance measures, written disciplinary guidelines, concrete written job descriptions, identifiable essential and discrete job functions, or training criteria. There were too many supervisors, all with different styles.<sup>12</sup>

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<sup>11</sup> Cass R. Sunstein & Christine Jolls, The Law of Implicit Bias, 94 California Law Review 969 (2006).

<sup>12</sup> There was Mr. Donovan, the head of the office, two Chief Deputies, Bram Kranichfeld and Justin Jiron, both of whom were involved in overseeing and disciplining Mr. Sall, Employee A and Employee B at various points. Finally, there was Ms. Bouffard, the Office Manager and direct supervisor of the three employees at issue, in addition to the other three secretaries. Ms. Bouffard also provided support to Mr. Donovan, Susan Hardin, the most senior deputy in the office and Mr. Jiron.



While there were no formal performance evaluations at the time, written and verbal feedback were used and employed if deemed necessary, but their use was ad hoc and inconsistent and its presence was the exception, not the rule. These are the kinds of circumstances in which implicit bias intrudes and causes problems: “[P]ersonnel systems whose criteria for making decisions are arbitrary and subjective are highly vulnerable to bias due to the influence of stereotypes--as, for example, when individual managers have a great deal of discretion with little in the way of written guidelines or effective oversight.”<sup>13</sup> In the opinion of this investigation, implicit bias explains, in part, why written and verbal feedback and probation were used by Ms. Bouffard and others to the benefit of Employee B— repeatedly - for well over a year, but were not offered to Mr. Sall. It also explains, in part, why Employee A’s conduct was tolerated and excused, but Mr. Sall’s was not.

The Attorney General Donovan recognized that implicit bias was in play when Mr. Sall was hired. In his response to interrogatories, he replied that reservations had been expressed in the office about hiring Mr. Sall as the receptionist and that he believed those reservations reflected a “lack of cultural competency” in his own former office staff.<sup>14</sup> Mr. Donovan believed that Mr. Sall need not have been fired and suggested that Mr. Sall should have and could have been offered a structured performance improvement plan and a probationary period by Ms. George and Ms. Bouffard.<sup>15</sup>

There was recklessness in both the hiring and the firing of Mr. Sall, and much along the way in terms of differential treatment that supports the reasonable grounds recommendation. There were several factors considered. First, this investigation finds that Mr. Sall’s early training was sorely lacking and even inept at times. Second, it finds not a single piece of documentation that a reasonable person in Mr. Sall’s position could have interpreted as performance feedback sufficient to put them on notice that they were doing a poor job. Third, this investigation did find documented evidence that Employee B was receiving a degree of structured supervisory feedback from Ms. Bouffard, Mr. Jiron, and Mr. Kranichfeld, while Mr. Sall was employed. This raises the question of why there is no evidence of the same investment in improving his performance and holding him accountable. Fourth, this investigation finds that Employee A and Mr. Sall both received verbal reprimands from Mr. Donovan and Ms. Bouffard. Mr. Sall was counseled about a remark he made in the office concerning the role of women within the Islamic religion and the fact that others found it demeaning or offensive. Employee A was verbally reprimanded by Mr. Donovan for discussing masturbation in the front office within earshot of anyone who could have been coming in and out of the office. Both Employee A and Mr. Sall were counseled by Ms. Bouffard to treat each other respectfully.

The following sections will explore: 1) the theory and analyses of hostile work environment, and 2) the theory and analyses of disparate treatment, and finally, 3) conclude with a review of the factors in support of the recommendation

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<sup>13</sup> See Stephanie Bornstein, Reckless Discrimination, 105 Calif. L. Rev. 1055, 1064 n. 47 (2017) (citations omitted).

<sup>14</sup> Donovan Interrogatories no.10.

<sup>15</sup> Donovan Interrogatories No.59.

## II. HOSTILE WORK ENVIRONMENT: FACTS AND ANALYSIS

### **21 V.S.A. § 495. Unlawful employment practice**

(a) It shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, place of birth, age, crime victim status, or physical or mental condition:

(1) For any employer, employment agency, or labor organization to discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, crime victim status, or age or against a qualified individual with a disability;

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The two theories of discrimination examined in this report are hostile work environment and disparate treatment, as noted in the synopsis. In order to state a prima facie case of a hostile work environment because of discrimination on the basis of national origin, race, color,

██████████ Mr. Sall must show:

- (1) the workplace was permeated with discriminatory harassment or intimidation that was sufficiently severe or pervasive to alter the conditions of his working environment, and,
- (2) “that a specific basis exists for imputing the conduct that created the hostile environment to the employer.”<sup>16</sup>

The standard for stating a hostile work environment “is a demanding one.” More than an “inference of discrimination...is required” in order to establish the first element of a hostile working environment claim.<sup>17</sup> In a hostile work environment case involving national origin, the Second Circuit has found that “ethnic slurs and the broader bullying and physical harassment” were “(barely) enough evidence” to reverse the district court’s grant of summary judgment to the employer.<sup>18</sup> In other words, the complainant must be able to at least articulate the experience in some detail in order to prevail beyond just raising the inference that discrimination occurred.

In *In re Butler*,<sup>19</sup> the Vermont Supreme Court recognized that hostile work environment cases are rarely cases of “outright and blatant discrimination....They are based,...upon the accretion of seemingly small incidents—of being criticized more harshly, scrutinized more

<sup>16</sup> *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122 (2d Cir.2003).

<sup>17</sup> *Risco v. McHugh*, 868 F.Supp.2d 75, 115 (S.D. N.Y. 2015).

<sup>18</sup> *Rivera v. Rochester Genesee Regional Transp. Authority*, 743 F.3d 11, 23 (2d Circuit 2014).

<sup>19</sup> *In re Butler*, 166 Vt. 423 (1997).

closely, ridiculed for lack of aggression, or diminished for one's appearance, that in the aggregate create an environment of hostility and discrimination.”<sup>20</sup>

There are both objective and subjective components, thus “the misconduct must be ‘severe or pervasive enough to create an objectively hostile or abusive work environment,’ and the victim must also subjectively perceive that environment to be abusive.”<sup>21</sup> In the *Butler* case, this involved the plaintiff’s experience of having “vulgar and derogatory remarks about her appearance, cursing at her, comments about her personal relationships, and an incident in which Officer Lucas demonstrated his kick-boxing skills by assaulting her and warning, “[I]f you can't take it in here, you're not going to take it in the streets.”<sup>22</sup> The objective aspect of the inquiry “is not, and by its nature cannot be, a mathematically precise test.”<sup>23</sup> Courts look at all the circumstances, “including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance” [and] “no single factor is required.”<sup>24</sup>

With respect to hostile work environment, the issue of Mr. Sall’s accent – and thus his national origin, race and color, were the only protected categories to emerge from the investigation with any evidentiary support, and as noted above, Mr. Donovan himself pointed to it as an early issue in the office.<sup>25</sup> There is one email exchange showing that two of the secretaries discussed Mr. Sall’s accent. On September 15, 2016, Employee C sent an email to Employee A titled “Earlier I had a victim request to speak with me because they could not understand Abdullah.”<sup>26</sup> In the email, Employee C asked Employee A “I wonder if that is why people get mad at him...”<sup>27</sup> Employee A then responded “Yes I think that is one of the reasons why people get mad and swear at him a lot. Also I heard and listened to him answering the phone today and he doesn’t asks [sic] what this is regarding.”<sup>28</sup> Employee C then wrote back, “Nope. He does not. I feel like he doesn’t listen to anything we say either. Just does what he wants. I’m not trying to be mean but it is frustrating.”<sup>29</sup> Employee A responded again, stating “Yes, A [sic] lot of people have been saying that and he has been here for over two months in that position also. It is weird and he can never get stuff done it seems really. Just labels and VOPS sometimes warrants and barley [sic] he [sic] mail.”<sup>30</sup> Employee A reiterated how frustrated callers would sometimes get with him on the phone and stated she felt bad for him, but was uncertain if he knew the alphabet that well.<sup>31</sup>

Chief Deputy Justin Jiron was asked to describe whether Mr. Sall’s accent impacted his performance. He stated, “I know there was – there was difficulty in interactions sometimes with

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<sup>20</sup> *Id.* at 430.

<sup>21</sup> *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Circuit 2003).

<sup>22</sup> *Id.* at 429.

<sup>23</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

<sup>24</sup> *Harris*, 510 U.S. at 23.

<sup>25</sup> Mr. Sall stated that he experienced “microaggressions” from office staff, but was unable to describe any particularized incidents or examples.

<sup>26</sup> Email exchange between Employee C and Employee A– September 15, 2016, 10:33 am.

<sup>27</sup> *Id.*

<sup>28</sup> Email exchange between Employee A and Employee C, September 16, 2016 at 10:54 a.m.

<sup>29</sup> Email exchange between Employee C and Employee A– September 15, 2016, 1:18 pm.

<sup>30</sup> Email exchange between Employee A and Employee C, September 16, 2016 at 10:54 a.m.

<sup>31</sup> Interview with Employee A.

the public, people that would come to the front door, but I don't remember if there were – I know we would get complaints sometimes from people that would come in. And I know it would mainly be language barrier – he has a strong accent. But I do remember there were times where people would complain, and I know he complained – that he represented that people weren't being fair to him. Not in the office but in the public.”<sup>32</sup> Mr. Jiron stated that he himself had not had problems understanding Mr. Sall's accent.<sup>33</sup> Former Chief Deputy Bram Kranichfeld did not recall any details about his accent although he recalled he had no problem understanding him.<sup>34</sup>

When Jennifer Bouffard was asked about the impact or lack thereof of his accent, she stated she had not received a formal complaint about him, but she was “sure we've had those conversations.”<sup>35</sup> When asked if she had any problem understanding him, she said “I think there were a couple times I would say, wait, say that again. And sometimes it was because I wasn't paying attention, I'll be honest....And so if you're not clearly paying attention, I think his accent could take you off. But I – I don't think I ever had any issues with him.”<sup>36</sup> When asked whether his accent came up in his termination meeting, Ms. Bouffard stated “Not that I recall, no.”<sup>37</sup> Ms. George on the other hand stated that it had come up.<sup>38</sup>

Mr. Sall said the issue of his accent had been brought up when he was terminated and he had been told by Ms. George that no one could understand what he was saying.<sup>39</sup> Ms. George denied that his accent or protected characteristics had anything to do with his termination, and stated that “he had an accent, but I don't recall it ever being, you know, I think that sometimes when he would talk really fast, it might be a little harder, but I never had trouble understanding him. I never got the impression that others did.”<sup>40</sup> Conversely, she stated that she felt he did not understand what other people were telling him.<sup>41</sup> From an objective standpoint with respect to treatment by co-workers, there is insufficient support of a hostile work environment. There was one email discussion about it by co-workers, of which Mr. Sall was unaware. Thus, there are insufficient number of objective factors, such as frequency and severity, along with a lack of subjective awareness that it had happened.

However a finding of hostile work environment can also be made based upon the failure of an employer to protect the employee from discriminatory conduct by a third party when the employer knows the employee is being harassed in a discriminatory manner.<sup>42</sup> However the Second Circuit has adopted the “well-reasoned rules of the Equal Employment Opportunity Commission (“EEOC”) in imputing employer liability for harassment by non-employees according to the same standards for non-supervisory co-workers, with the qualification that we

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<sup>32</sup> Interview with Justin Jiron.

<sup>33</sup> Id.

<sup>34</sup> Interview with Bram Kranichfeld.

<sup>35</sup> Interview with Jennifer Bouffard.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Interview with Sarah George.

<sup>39</sup> Interview with Abdullah Sall.

<sup>40</sup> Interview with Sarah George.

<sup>41</sup> Id.

<sup>42</sup> See 29 C.F.R. 1604.11(e) (stating that employer can be liable for harassment by third parties “where the employer ... knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”).

‘will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.’”<sup>43</sup>

There were two documented instances where Mr. Sall reported being mistreated by members of the public because of his accent, both in the month he was fired. On January 3, 2017, Mr. Sall wrote the other victim’s advocate, Nietra Panagoulis, and Chief Deputy Justin Jiron to complain about being mistreated by a caller:

Hi Justin and Nietra, ...[Jane Doe], the presumed victim [sic] to speak to someone. I told her Nietra was her victim advocate. I transferred her but it rang three times and put her through Nietra’s voicemail to leave her a voice message. A minute later she called back to tell me to put through to someone and I told her, Nietra was her victim advocate. She need to leave Nietra a message, she flipped out and started to insult me, telling me, I was not a person. She need [sic] English person to talk to. She was interrupting me constantly with mean/ rude words regarding my non-American background. She was very hurtful and crude worst [sic] than JONES. I have been in sick bed for the past week and I am not fully recovered yet and behaviors like these do not improve I hope you can talk to them both to learn how to be respectful. Thanks!<sup>44</sup>

On January 25, 2017, the day before he was terminated, he wrote an email to victim’s advocate Karen Burns, stating the following:

Hi Karen, Can you tell this guy who from this number [xxx-xxx-xxxx] that is ok to be respectful to people who are not Anglo Saxons and the world is made up He seems very rude I asked him for his name he can't give me his name and he can't give me a docket number. He knows how to say I can't understand your what you say. We have protocols to follow when people call here. The need to give their name, docket number, reason for calling, and identify themselves either as a victim, defendant, or witness. Thanks, I will appreciate it that Best regards, Abdullah Sall<sup>45</sup>

Neither Ms. Panagoulis, Mr. Jiron nor Ms. Burns were unable to recall whether they took any action to address Mr. Sall’s complaints. However there is evidence that some level of abuse was not unusual. Employee A and Employee C’s email mentions negative third-party reactions to his accent, Employee A noted that in her interview with this investigation and Mr. Jiron noted that it happened frequently in his interview as well as stated above. Katie Allaire also noted that people from outside the office would complain.<sup>46</sup>

There is no way that anyone in the office could have effectively predicted or controlled the behavior of members of the public such as victims, witnesses, callers, and walk-ins.

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<sup>43</sup> *Summa v. Hofstra University*, 708 F.3d 115, 123 (2d Cir. 2013).

<sup>44</sup> Email from Abdullah Sall to Nietra Panagoulis and Justin Jiron, 1/3/17, 19:52. It is not clear whether any action was taken.

<sup>45</sup> Email from Abdullah Sall to Karen Burns, January 25, 2016, 5:03:25 a.m. Ms. Burns could not recall for sure whether she followed up.

<sup>46</sup> Interview with Katie Allaire: “Maybe I would be the lucky one to pick up a phone call and it would be a victim and they would say ‘I couldn’t understand the person I was talking to. I need to talk to this person and I don’t think they understood me,’ it was that sort of thing but nothing within the office.”

However once it became known that Mr. Sall was experiencing abuse from third parties, or even regular abuse, the office could have intervened on the spot if someone was available, or had another employee return that call, or assigned phone duty to another employee in order to stop the level of harassment he experienced and given it to someone else especially since duties were shifted about as needed without notice when called for, or, at a minimum, worked out a safety plan with Mr. Sall to minimize his exposure. While it seems to have been well-known that Mr. Sall experienced these issues, there is insufficient evidence about their actual severity and frequency. They were likely very humiliating at times and they likely did interfere with his work and his feelings of satisfaction with it. It is unclear whether the two documented complaints from him were documented because they were the worst thing he had experienced to that point, or whether he just had the time and energy to complain about them that particular day.

It is also impossible to determine to what degree they “pervaded” his work environment and altered the conditions of his employment due to a lack of evidence. Mr. Sall claimed to have been satisfied at his job in many respects and was surprised that he had been terminated, though once terminated, he believed it to be based upon his protected status.<sup>47</sup> Indeed Ms. Bouffard described him as “always just positive.”<sup>48</sup> Ultimately, there was insufficient evidence from Mr. Sall or in the documentation examined to find liability on the part of the CCSAO with respect to third party harassment on the basis of Mr. Sall’s national origin.<sup>49</sup> or that his “work environment was so pervaded by discrimination that the terms and conditions of employment were altered.”<sup>50</sup> Nevertheless, the CCSAO should not wait to intervene until they are legally required to do so. Inclusive and equitable best practices demand at least some intervention at an earlier stage. Here, they failed to do the minimum which was check in with Mr. Sall about how these interactions with the public were affecting him at work.

### **III. DISPARATE TREATMENT: FACTS AND ANALYSIS**

#### **1) Prima Facie Case Established & Legitimate Non-Discriminatory Reasons Produced**

Direct evidence of discrimination is relatively rare and may not be readily available.<sup>51</sup> There was some direct evidence of hostile, third party-discrimination, as noted above, and an absence of evidence showing that the Respondent did anything to mitigate it. However that evidence was not sufficient to prove hostile work environment, and that evidence, on its own, would not be sufficient to prove disparate treatment. Mr. Sall did have some significant

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<sup>47</sup> Interview with Abdullah Sall.

<sup>48</sup> Interview with Jennifer Bouffard.

<sup>49</sup> Naumovski v. Norris, 934 F.3d 200, 212 (2<sup>nd</sup> Cir. 2019): “A plaintiff claiming a hostile environment must plausibly allege offensive conduct based on sex that was ‘sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.’”

<sup>50</sup> Vance v. Ball State University, 570 U.S. 421, 427 (2013).

<sup>51</sup> See U.S. v. City of Black Jack, Missouri, 508 F.2d 1179, 1185 (8<sup>th</sup> Cir. 1974) (“The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated....Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because whatever our law was once, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.” (All citations omitted).

problems with his performance and had some other issues in the workplace. However so did other employees and that is the point in a disparate treatment case. Thus, poor performance does not preclude a finding against the Respondent if Mr. Sall can prove that the Respondent had “mixed motives” for firing him – that is that while it may have provided legitimate reasons for firing him, it also possessed a discriminatory reason. Absent more direct evidence, Mr. Sall would have to demonstrate that there were “similarly situated” employees who were treated better than he was treated despite the fact that they had similar performance issues.<sup>52</sup> Under a mixed motive analysis a “plaintiff has the initial burden of showing that the adverse employment action at the moment it was made was motivated by a mixture of legitimate and illegitimate reasons.”<sup>53</sup>

In the absence of direct evidence of unlawful discrimination, courts apply a three-step burden-shifting framework first set forth in *McDonnell Douglas Corp. v. Green*.<sup>54</sup> This framework requires that Mr. Sall present circumstantial evidence by establishing a prima facie case of discrimination.<sup>55</sup> If successful, the burden shifts to the Respondent to “articulate some legitimate, nondiscriminatory reason” for the adverse employment action.<sup>56</sup> If the Respondent is successful, the burden shifts back to Mr. Sall to prove by a preponderance of the evidence that the legitimate reasons given by the Respondent are a pretext for discrimination.<sup>57</sup> Evidence used at the stage of the prima facie case may also be used to argue pretext, but the burden at this stage is heavier than at the prima facie case stage. The preponderance of the evidence standard in a civil case is defined as more than a 50% chance or as more likely than not.<sup>58</sup> It does not require that Mr. Sall prove his case beyond a reasonable doubt as is required in a criminal case.

The burden on a complainant at the stage of the prima facie case is “a relatively light one.”<sup>59</sup> Thus, in order to establish a prima facie case of discrimination pursuant to the VFEPA, Mr. Sall must therefore prove the following:

- (1) That he was a member of one or more protected classes;
- (2) that he was qualified for the position in question;
- (3) that he suffered an adverse employment action; and
- (4) the circumstances surrounding this adverse employment action give rise to an inference of discriminatory intent.<sup>60</sup>

#### A. First Element: Member of a Protected Category

Mr. Sall’s complaint cited several different protected categories. Enforcement Guidance on National Origin Discrimination from the Equal Employment Opportunity Commission (EEOC) suggests that ancestry and place of birth can be subsumed under “national origin” since

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<sup>52</sup> *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 379 (2d Cir.2003).

<sup>53</sup> *Lamay v. State*, 191 Vt. 635, 636 (2012).

<sup>54</sup> 411 U.S. 792, 802–04 (1973). See *Beckmann v. Edson Hill Manor, Inc.*, 171 Vt. 607, 608, (2000) (mem.).

<sup>55</sup> *Human Rights Comm’n v. LaBrie, Inc.*, 164 Vt. 237, 244 n. 2, 668 A.2d 659, 665 n. 2 (1995)

<sup>56</sup> *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 159 (1992) (quoting *McDonnell Douglas*, 411 U.S. at 802.

<sup>57</sup> *Beckmann*, 171 Vt. at 608.

<sup>58</sup> See generally, Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. Penn. L.Rev. 1159 (1983).

<sup>59</sup> *Beckmann v. Edson Hill Manor, Inc.*, 171 Vt. 607, 608 (2000).

<sup>60</sup> See *Robertson v. Mylan Labs*, 2004 VT at ¶ 25. See also *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004).



a “national origin group,” or an “ethnic group,” is “a group of people sharing a common language, culture, ancestry, race, and/or other social characteristics.” Thus, for the purpose of this report, national origin, race, and color are the protected categories under consideration. [REDACTED]

The aspect of Mr. Sall’s national origin that came up the most in the complaint was his accent. Mr. Sall is originally from Liberia, as noted above, and his family still resides there. He speaks with an accent and has dark skin tone. Mr. Sall was interviewed for over six hours to try and understand the work he was assigned to do, the work others were assigned to do, and the general workings of the office, including its interrelationships with other offices and the court. He also responded to these questions in written form. This investigator found Mr. Sall’s explanations of his duties and others’ duties to be clear, consistent and thorough. In light of the fact that the focus of his complaint and of the evidence in the case relates to his accent, which is part of his national origin and is connected to his race and color, this investigation finds that his national origin, race and color are the protected categories at issue. [REDACTED]

## B. Second Element: Qualified for the position

### a. Qualifications at the time of hiring

Courts have approached the question of whether an employee was “qualified for the position” by examining both whether a complainant was qualified for the job when hired, as well as whether a complainant was performing satisfactorily at the time of the termination. The burden at the stage of the *prima facie* is, as noted above, a light one.

The Respondent has urged this investigation to find both that Mr. Sall was unqualified for the position initially and that he was performing so poorly when he was terminated that he cannot make out a *prima facie* case. With respect to performance at the time of a termination, courts have held that a complainant:

[N]eed not show perfect performance, or even average performance, to establish that the plaintiff was satisfying the normal requirements of his or her work. The plaintiff need only show that his or her performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the employer's decision.<sup>61</sup>

In *Herbert v. City of New York*,<sup>62</sup> the court extended an even greater benefit of the doubt to the employee in terms of performance at the time of termination:

[A] plaintiff need not demonstrate “satisfactory performance of job duties” in order to make out a *prima facie* case. The *prima facie* showing requires only a showing that she was “qualified for the position she held”....Plaintiff “need not show perfect performance or even average performance,”... but only that she

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<sup>61</sup> § 938.Satisfactory performance requirement, 45B Am. Jur. 2d Job Discrimination § 938 (citations to cases omitted).

<sup>62</sup> *Herbert v. City of New York*, 748 F.Supp.2d 225 (S.D.N.Y. 2010) (“[A] plaintiff need not demonstrate “satisfactory performance of job duties” in order to make out a *prima facie* case. The *prima facie* showing requires only a showing that she was ‘qualified for the position she held.’” (citations omitted) (emphasis in the original)).

“possesses the basic skills necessary for performance of the job.”...[a]ll that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer.”<sup>63</sup>

Thus, the question about job performance at the time of termination blends with the inquiry into the initial qualification for the job. This investigation has evaluated both questions. The evidence establishes that the Respondent cannot claim that Mr. Sall was qualified for the job of a receptionist. It was an entry level position – a Secretary IV position like every other administrative employee in the office – and it involved a number of clerical duties. During the time that Attorney General Donovan was the State’s Attorney, there was no formal performance evaluation or disciplinary process or procedures in the CCSAO office, although there were informal evaluations, and the use of written “warnings,” or written reprimands as well as verbal reprimands.<sup>64</sup>

There was no formal job description for a “Receptionist” only for a “Secretary IV.”<sup>65</sup> There was no work manual provided when Mr. Sall started. Nor was there a comprehensive pre-existing manual associated with the position at the time he was hired other than some “cheat sheets” that Employee A had made for herself when she began the receptionist position and those original documents were not available.<sup>66</sup>

Mr. Sall did not receive a manual until August 2, 2016 some thirty-six days (36) into his job and he received it only after he requested it. Respondent characterized the existence of the manual as evidence of a performance failure on Mr. Sall’s part instead of something that it should have provided to him on his first day: “This document [manual] was generated in response to repeated questions by Mr. Sall regarding his job duties and repeated complaints

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<sup>63</sup> Herbert 748 F.Supp.2d at 236-37.

<sup>64</sup> See interviews with Chief Deputies Justin Jiron, Bram Kranichfeld and Office Manager Jennifer Bouffard.

<sup>65</sup> SECRETARY IV -Job Code: 002700 Pay Plan: Classified Pay Grade: 15 Occupational Category: Office & Administrative Support -Effective Date: 02/10/2002 - Class Definition: Advanced secretarial and clerical work involving operation of a secretarial/clerical support services unit or serves as principal support to division management. Work differs from other advanced clerical positions in that either supervisory responsibilities are a significant factor or there is a requirement for significant technical and program knowledge. Positions generally require significant interaction with the general public, service providers, or other agencies and departments. Supervisory responsibilities include participation in employee training and work orientation, hiring and motivating employees, and evaluating employee performance. Work is performed under the supervision of an administrative supervisor. Examples of Work: May determine priorities and may assign major projects and work assignments such as large mailings, reports, etc., to subordinates or other clerical employees, ensuring work is prepared and sent out in a timely and efficient manner. Provides secretarial or specialized clerical training and work indoctrination to subordinates as required, including instruction in operation of new equipment, new filing systems, work flow systems, etc. Serves as advisor to other clerical employees in problem situations. Provides clerical support requiring significant knowledge of technical program rules, regulations, and requirements. May perform editing and design duties in preparation of standard forms such as tax forms. May prepare layouts, graphic design and printing activities. Incumbent may personally answer certain pieces of mail in accordance with established policies and procedures. Answers telephone and provides information of a technical nature to the public and other state employees and in accordance with policies, rules and regulations. May maintain some control records and monitor review processes for adherence to deadlines and approval procedures. Performs related work as required. Environmental Factors: Work is performed under normal office working conditions. Considerable human relations skills are needed in dealing with subordinates, work originators, and other employees.

<sup>66</sup> Interview with Employee A.

about his performance from his superiors.”<sup>67</sup> This description of the manual as a wholly new product created just for Mr. Sall was somewhat undermined during the interview with Employee A. She stated that she had created “cheat sheets” of her duties when she began as the receptionist with the help of Employee C.<sup>68</sup> She stated “She or I or we both gave him those cheat sheets I had.”<sup>69</sup> This suggests that what was given to Mr. Sall was actually a more formalized version of the cheat sheets Employee A created with Employee C’s help. Mr. Sall denied he had been given an formal manual in the interview and identified the Respondent’s production as something that Employee C had created.<sup>70</sup> Employee A’s testimony makes Mr. Sall’s statement make more sense. When asked if there was a manual, Ms. Allaire stated, “I think that there was a- it was probably like two or three pieces of paper stapled together and it was like “how to answer the phone”, and “this is the greeting you should use”, “how to separate a case”, that sort of thing. I think- I think I got one when I was hired so...Q: So there’s something in existence when Abdullah came? A: Yeah. Q: Do you know who authored that? A: Probably Jen.

Jennifer Bouffard stated she had created the manual given to Mr. Sall without anyone else’s assistance:

I drafted this after, you know, after struggling with Abdullah to sort of get these things correct. Q. And this had never existed before him? A. Parts of it probably had. You know, the protocol for screening calls, we’ve sort of developed through the years, and so I -- I think I recall cutting and pasting this from somewhere else and then sort of revising it to the time period that we have now, which is where I think that the form for answering the phones, I think that was part of the initial phone protocol was, and so I pulled that out for him as well. But what -- so what I had done is I had sort of gone through in my head, okay, what are the parts of the job that he’s doing now? He wasn’t doing the full job, but what is he doing now, and let me lay it out for him, so that he has a better understanding of, you know, what should happen, and then he would pull this out and take notes when he had questions or when I would come to him and say, you know, oh, this notice of appeal went to this attorney, but it really should -- all of those should go to Pam (ph.), so he could make notes on it, and those kinds of things. Q. And did anybody else contribute to the creation of that document? A. No. No -- Q. Okay. A. I did this myself.<sup>71</sup>

Even so, the manual did not reflect all the duties to which he was assigned. For instance, there was a page titled “Closed Cases” and a typed notation which stated, “We will come up with a process.”<sup>72</sup> His duties included, but were not limited to, answering the phones, transferring calls, greeting people who entered the office, which included attorneys, law enforcement officers, witnesses, members of the public and employees from agencies and the court.<sup>73</sup> Mr. Sall was also required to do database entry, perform scanning, handle requests for arrest warrants, paperwork for diversion, the Rapid Intervention Community Court (RICC) and

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<sup>67</sup> Respondent’s response #2, August 27, 2017.

<sup>68</sup> Interview with Employee A.

<sup>69</sup> Id.

<sup>70</sup> Interview with Abdullah Sall.

<sup>71</sup> Interview with Jennifer Bouffard.

<sup>72</sup> See Respondent’s Exhibit 2.

<sup>73</sup> Interview with A. Sall; Interview with Jennifer Bouffard.

the assignment of victim's advocates.<sup>74</sup> There is not a sufficient amount of documentation to determine the order in which these duties were assigned to him.

The fact that there was no memorialized, written description of Mr. Sall's actual job description and a complete list of his essential duties until thirty-six days (36) after he was hired makes it difficult for Respondent to claim he was not qualified for the position. The fact that the manual was incomplete also undermines Respondent's claim that Mr. Sall was not qualified.<sup>75</sup> It is disingenuous to state that someone is not qualified for a job which has no well-defined parameters.

Mr. Sall reported to Jennifer Bouffard both as an intern and once he became the receptionist.<sup>76</sup> She had ample opportunity to evaluate his attitude, demeanor, competence, or lack thereof during the four months (approximately) of his internship, and thus many chances to raise any concerns or objections about his qualifications or performance with Mr. Donovan during his internship, or upon being informed that Mr. Donovan wanted to find Mr. Sall a position in the office. Mr. Donovan recalled no concerns about Mr. Sall's competence or lack thereof in his response to interrogatories:

**Q:** Please explain why Mr. Sall did not have to apply for the job formally and proceed through the interview process.

**A:** *It is my recollection that the office was satisfied with his job performance as an intern, and therefore, Mr. Sall was functionally promoted to a full-time position.*<sup>77</sup>

Mr. Donovan reiterated this point in his response to a separate question which specifically asked about Mr. Sall's job qualifications:

*It is my recollection that Mr. Sall successfully performed his internship. In addition, the hiring of Mr. Sall was important and consistent with my practice to hire folks in entry level positions that would create diversity at the CCSAO and provide economic opportunities for folks that came from vulnerable communities and/or disadvantaged backgrounds and circumstances.*<sup>78</sup>

**FINDING:** Mr. Sall was qualified for the position at the time he was hired.

#### b. Performance at the time of termination

A significant problem for this investigation was trying to get a sense of how much *documentation* there was about Mr. Sall's failure to perform some of his job duties and how frequently this was discussed with him and how frequently he was put on notice of his performance deficiencies or reprimanded by his supervisors. Objective, contemporaneously documented evidence is always preferable over witness testimony alone. In this case, factors

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<sup>74</sup> Emails reflecting Mr. Sall's assignment from various parties inside and outside of the office.

<sup>75</sup> See Respondent's Exhibit 2 at 00009.

<sup>76</sup> Q. Do the attorneys and the deputy state's attorneys have any sort of say in who does an internship, or is that the state's attorney's prerogative? A. Neither. It's Jennifer's. Transcript of recorded interview with Sarah George. Mr. Donovan also noted Ms. Bouffard had sole oversight over interns, including hiring and monitoring. See TJ Donovan Response to Interrogatory #12.

<sup>77</sup> TJ Donovan Response to Interrogatory #10.

<sup>78</sup> Id. at 7 (emphasis added).

such as the age of the case, the length of the investigation, the initial negative media coverage of Ms. George for her decision to terminate Mr. Sall, then the ensuing public discounting of Mr. Sall and his version of events made this investigator very aware of the potential for biased witness testimony. With all of that in mind, this investigator sought to find commonalities between witnesses' versions of events. Instances of significant and unresolvable factual conflict among witnesses, as well as potential bias towards Mr. Sall and in favor of Ms. George due to the position she holds have been accounted for as has the inevitable assertion of lack of memory.

There were very few supporting documents that corroborated the reasons Ms. George gave for terminating Mr. Sall. This investigator requested and examined several types of documentary evidence, including approximately 10,000 internal office emails between Mr. Sall and anyone he communicated with inside and outside of the office. This included his inbox, sent folder, draft folder and deleted folders. He seemed to correspond very little with anyone. In addition, emails from all the other secretaries as well as Ms. Bouffard and Ms. George were also reviewed to the extent that there was no attorney-client privilege.

Despite thousands of emails, this investigator was only able to find documentation supporting some of Mr. Sall's performance deficiencies, but not all. Importantly, the seriousness of his oversights and mistakes was clear only because the issue kept coming up – time and again – NOT because he received any type of clear warning or reprimand that he was performing poorly. Finding evidence of repeated mistake demonstrated and confirmed to this investigator some of the testimony provided - that he was not doing things the way he should be doing them in the time frame he needed to do them. At best, the email correspondences showed that Mr. Sall was frequently forgetful, distracted, or overwhelmed with respect to some duties and tasks to which he was assigned, both large and small. At worst, he may have ignored repeated instructions or perhaps not even cared enough to pay attention to instructions and follow through. Whatever the reason, the available emails show his work falling by the wayside in many instances months after he was hired. They showed that staff inside and outside of the office had to remind him – time and again – to perform his duties correctly and remind him to do them in the first place. Personnel files were also requested and reviewed, as were time sheets so that his own attendance could be evaluated to see if that was part of the problem.

Beyond the pattern of emails in some areas, there was no documentary support for his failure to perform many of his duties. There was no personnel or performance file on Mr. Sall showing how poorly he was doing or detailing his mistakes and no formal or informal evaluation or notes on his performance. There was an email to him from Ms. Bouffard in which she used 'CAPS' to remind him of the way he was supposed to do something he had not done, but nothing that was methodical or substantive.<sup>79</sup> There were emails from others inside and outside the office that showed Mr. Sall was forgetting to follow up on things; they were mild in tone and often involved people outside of the office.

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<sup>79</sup> Thursday, October 27, 2016 10:03 AM, copied to Chief Deputy Justin Jiron: Abdullah: I have had a couple people mention that they have been getting phone calls from you, when you weren't sure of the person's full name or the case the caller had been calling about. Please be sure before trying to transfer a call you get the caller's FIRST AND LAST NAME, THE NAME OF CASE THEY ARE CALLING ABOUT AND THE ROLE THEY HAVE IN THE CASE. This is helpful for the employee to make a decision about whether they can take the call or if they want the call to go to voicemail. Thanks. Jennifer (emphasis added, bold in original).

When Mr. Sall was fired, John Campbell, Executive Director of the Department of State's Attorneys and Sheriffs, contacted Ms. George to get more information about the basis for her decision. It is unclear at this point how Mr. Campbell found out about the termination. In his email, Mr. Campbell wrote the following:

Sarah, we need more information regarding his termination. There are a number of collateral issues that may arise depending on the facts. Some of them quite significant... and almost assuredly come with an associated financial consequence. Normally, you would have had the assistance of the Department of Human Resources, however, the Supreme Court collective bargaining opinion tanked that. Now, all you have is our office, which quite frankly, is not resourced to provide the intricate legal advice surrounding terminations. However, there is basic information that I will definitely need in order to give you as much advice as I can. I will also check to see if any office has recently terminated administrative staff. So, in the meantime, I need to know whether it was a termination or a resignation? What was the effective date? Was there cause? (ie: dishonesty, misconduct, attendance issue, gross misconduct, insubordination, et al) What type of access did he have to the building or parking areas? Have you notified your building security? Did you notify BGS security? We have taken care of the IT issues, but these other matters have to be addressed. Please advise asap.<sup>80</sup>

In response, Ms. George wrote:

Hi John, Sorry to have sprung this on you. I did want to speak with you before doing it but it didn't work out. So, this was a termination. Mr. Sall was personally liked in our office, but his work product was far below par and created more work for everyone in the office and liability for our office. The circumstance and the justifications are:

1. Misplacement of paperwork
2. Failing to file paperwork with the court and instead putting all three copies of said paperwork in a file folder and putting in file cabinet (so paperwork, like Requests for Arrest Warrants), never get filed with the Court, and therefore arrest warrants are not being issued.
3. Significant delays in labeling file folders and distributing file folders to staff
4. Providing inaccurate information to people who call our office
5. Placing file folders directly on filing cabinet without them going through attorneys first (so attorneys never saw the file)
6. Excusing witnesses from subpoenas without verifying with an attorney
7. Excusing defendant's [sic] from Court without verifying that they can (telling a Defendant that we don't have any paperwork for them and telling them to leave and call arresting agency - only to learn later that Defendant's name is on the daily calendar and paperwork was filed with the Court - so Defendant would have had a warrant issued for their arrest). '

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<sup>80</sup> January 27, 2017 11:25 am email from John Campbell to Sarah George.



8. Transferring calls to attorneys instead of Victim Advocate (despite repeatedly being told to do otherwise)
9. Transferring Defendants to attorneys
10. Not having appropriate information regarding the person on the phone when transferring a call
11. Giving inaccurate information to people on the phone
12. Making statements in the lobby, with people in the lobby, about his personal opinions of cases we are charging.
13. Would argue with other staff members in the lobby
14. 7 months in - Mr. Sall was only doing approximately 2/3 of the assigned tasks for that position because he could not keep up with the work he had.
15. Was not receptive to suggestions about how to better do the work.
16. Was defensive in response to constructive criticism regarding weaknesses in his work. Would blame others or make excuses and get defensive.<sup>81</sup>

Mr. Campbell sent the following response:

Sarah, no problem. Don't worry about any work on our part, I just want you protected. Unfortunately, I know from personal experience what can happen if you don't dot your I'd and cross your t's with terminations. Again, the in re election [sic] has had a serious impact on office operations. Anyway, I'll give you a call sometime later today if I need more info. Did he make any threats re: lawsuit for discrimination or anything of that nature?"<sup>82</sup>

In reply, Ms. George wrote back:

Hi John, When I first told Abdullah that his employment was being terminated, he implied that he believed it had something to do with his immigration status. I told him that was absolutely not the case and then I went through all the reasons we were terminating him, and Jennifer added to that and confirmed what I had stated. With every reason that we gave him (including what we stated below) he made an excuse about it or blamed it on someone else, which is exactly how he has responded to our requests or criticisms of his work throughout his employment. We stressed to him what our actual reasons were and he ultimately said that he understood and that it was "fine" and he hugged the remaining admin staff and then left without incident. I know that he texted TJ almost immediately to tell him, but I do not know what he told TJ regarding a reason. I would just add that I was informed today of approximately 50 cases that the Court has been waiting for dismissals on that we thought Abdullah had taken care of but in fact he had not. They were long overdue to the Court. Let me know what you need from me.<sup>83</sup>

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<sup>81</sup> January 27, 2017, 11:56 a.m., email from Sarah George to John Campbell.

<sup>82</sup> January 27, 2017, 12:16 p.m., email from John Campbell to Sarah George.

<sup>83</sup> January 27, 2017, 2:48 p.m., email from Sarah George to John Campbell.



There are three notable aspects of this exchange. The first is that Ms. George gave an extensive list of Mr. Sall's mistakes, but had only been in charge for eight days. While Ms. George stated in her interview that she had observed many of Mr. Sall's work issues as a Deputy State's Attorney, the extent of the list demonstrates that she was relying on and accepting as true and accurate the overall information Ms. Bouffard was providing as Mr. Sall's direct supervisor. Second, Mr. Campbell offered Ms. George and Ms. Bouffard a "golden opportunity" to assert every negative thing Mr. Sall had done as a basis for terminating him, from administrative inefficiency to "**dishonesty, misconduct,...gross misconduct, insubordination, et al.**" It was a perfect leading question, yet Ms. George's response at the time was bland, considering the testimony this investigation has heard about Mr. Sall during the investigation from Ms. George herself, including his alleged inappropriate statements about rape victims and rape cases as well as her personal observations and frustrations with his work and her expressed inability to get him to improve, as discussed further below. Third, the length of the list, while formidable, lacked much in the way of either documented corroboration or evidence that Mr. Sall was sufficiently informed of his errors. Incidentally, Mr. Campbell was unable to recall any other administrative staff that had been terminated.<sup>84</sup>

One of the significant failings this investigation found was with respect to Mr. Sall's training. The Respondent's responsive documents and witness testimony tried to underscore how much extra attention Mr. Sall received in his job training and how rife with errors his work product was. While it is true that his performance was poor in certain respects, and that he was making errors he should not have been making in November and December of 2016 and in December of 2017, this investigation finds that his early training was spotty, lacking in cohesion in the early days of his employment, haphazard in nature and overseen in part by Employee A, who, Ms. Bouffard admitted in her interview, should never have been assigned to train him.<sup>85</sup> Furthermore, there were no manuals provided to Mr. Sall with respect to two of the required software programs he had to use Valcour and Justware. Justware was entirely new to the office at the time<sup>86</sup> and there were frequent office-wide emails about its various "bugs."

There were significant office absences by Jennifer Bouffard in the first two months after he was hired. Mr. Sall started on June 27, 2016.<sup>87</sup> Ms. Bouffard took her first vacation day on Friday, July 1, 2016 and did not return until Tuesday, July 12, 2016.<sup>88</sup> She thus missed one day his first week, his whole second week, and one day of his third week (minus the July 4<sup>th</sup> holiday).<sup>89</sup> She then went back out on medical leave on August 2, 2016. She was sick 8 hours on Tuesday, August 2, 2016, worked a full day on Wednesday, August 3, 2016, took 2.5 hours of sick time on Thursday, August 4, 2016. She then took 8 hours of sick time on Friday, August 6, 2016. She was gone the entire following week from August and then was out full workdays August 6, 8, 9, 10, 11, 12, then took a half day on August 15, 2016. August 16 was Bennington Battle Day, so she did not return to the office again until Wednesday, August 17, 2016.<sup>90</sup> Mr.

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<sup>84</sup> Interview with John Campbell.

<sup>85</sup> Interview of Jennifer Bouffard.

<sup>86</sup> Respondent's Response 8.29.17; Interview of Jennifer Bouffard.

<sup>87</sup> Personnel records of Abdullah Sall

<sup>88</sup> Time sheet of Ms. J. Bouffard for July 2016.

<sup>89</sup> Id.

<sup>90</sup> timesheets

Sall's first missed workday, in contrast, was December 28, 2016 and it was one of only three sick days he took during his time there.<sup>91</sup>

In the opinion of this investigator, this represents important missed training and orientation time with a new employee whose job required significant amounts of multi-tasking, some slightly familiar, but mostly unfamiliar, and all taking place in a fast-paced environment driven by the demands of the criminal court. Also in the opinion of this investigator, Ms. Bouffard's absences were made even more problematic because she left much of Mr. Sall's training to Employee A, the prior receptionist. Respondent was asked the following:

Q12: Please provide a description of the training Mr. Sall underwent with respect to the Diversion program, including name(s) of trainer(s). Please provide the name and contact information for the employee Mr. Sall reported to in the Diversion program.

RESPONSE: As Mr. Sall's predecessor, **Employee A**, Secretary IV, was initially responsible for training Mr. Sall regarding the diversion program. However, Mr. Sall often asked questions of any available staff person, including Ms. Bouffard.

Q13. Please provide a description of the training Mr. Sall underwent with respect to the RICC court.

RESPONSE: As Mr. Sall's predecessor, **Employee A**, Secretary IV; was initially responsible for training Mr. Sall regarding the RICC court. However, Mr. Sall often asked questions of any available staff person, including Ms. Bouffard.

Q15. Please provide a description of the training Mr. Sall underwent with respect to the Valcour database.

RESPONSE: As Mr. Sall's predecessor, **Employee A**, Secretary IV, was initially responsible for training Mr. Sall regarding the Valcour database. However, Mr. Sall often asked questions of any available staff person, including Ms. Bouffard.

Employee A was temperamentally unsuited to train anyone. Mr. Sall claimed that she subjected him to behavior which made him personally uncomfortable and he claimed that she directed racist micro-aggressions toward him; however, he could not specifically identify anything in particular that Employee A had said to him.<sup>92</sup> He claimed that this was due to the fact that she had grown up in West Virginia with a parent whose views were inimical to civil rights.<sup>93</sup>

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<sup>91</sup> Timesheet of Abdullah Sall.

<sup>92</sup> Correspondence from Sall, 8/9/17: I was given a minimal training possible but yet after playing with the software program for a while I figured out how the system works. I began to make notes of my experiences with the software. I am comfortable with technology as long I have sufficient time to play around, but had I depended on their training I wouldn't have last long. Jennifer was out all the time and Employee A was never a pleasant person to be around. Any question I asked her she will react angrily with something insulting. I was determined to succeed and excel at my job and made every effort to learn, but sarah somehow was determined to crushed me whenever she finds the opportunity. Frankly, I was never given training. I was told to asked [Employee A] questions and when I do I get snapped at.

<sup>93</sup> Interview with Abdullah Sall.

Jennifer Bouffard acknowledged in her interview that having Employee A train him had been a bad idea, and that she stepped in when she saw it going awry.<sup>94</sup> Ms. Bouffard stated that she would sit with him at his desk for hours trying to train him.<sup>95</sup> One of the deputy state's attorneys stated that when she was newly hired, she observed Ms. Bouffard sitting with Mr. Sall at his desk so often that she assumed at first that Ms. Bouffard was another receptionist, rather than the Office Manager.<sup>96</sup> During training, phones were still ringing around him, requests for information were likely being made around him and to Ms. Bouffard, and other people were watching him being trained. It was not necessarily conducive to concentration and retention.

The description of the reason for firing Mr. Sall at the time of termination versus in the years following the media coverage and HRC investigation show why documentation is so critical. Mr. Sall went from being portrayed as a widely liked but inept poor performer, to possibly the worst employee the office had ever seen as well as sexist, culturally insensitive, and a defender of men accused of date rape. Perhaps all of that is true – but if so, why did no one other to make it very clear that it was a significant basis for firing him at the time he was fired? Employee A and Ms. Allaire claimed that Mr. Sall had insulted them for being a single mother and for working outside the home.<sup>97</sup>

One of the Victim's Advocates, Kathyria Ferrer-Rodriguez, who is Dominican, claimed that Mr. Sall stated that she was not "representing" her ancestry or religion appropriately enough.<sup>98</sup> She was offended and stated that she tried to make light of it by bringing maracas to work the next day.<sup>99</sup> Mr. Sall was accused of making Employee C, the secretary for the Victim's Advocates, feel uncomfortable by allegedly suggesting that she knew "all the people in the filing cabinet," because he believed she had struggled with law enforcement in the past and the filing cabinet was full of files of people who had been accused of crimes.<sup>100</sup> Indeed, Employee C had joined the office through the same program as Employee A and had a felony theft conviction associated with a past addiction, so perhaps Mr. Sall did say such a thing.<sup>101</sup> Employee A stated he wouldn't talk to her for two months at a time and was mean about how one of her "boyfriends" looked.<sup>102</sup> She also stated that a different "boyfriend" – an electrician who worked in the building – would bring her coffee to her desk and that Mr. Sall would tease her and call him "coffee boy."<sup>103</sup> She also complained that he would sing a "Lil Wayne" song at his desk that referenced oral sex and that this bothered her.<sup>104</sup>

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<sup>94</sup> Interview with Jennifer Bouffard.

<sup>95</sup> Id.

<sup>96</sup> Interview with Dana DiSano.

<sup>97</sup> Interview with Katie Allaire and Employee A.

<sup>98</sup> Interview with Kathyria Ferrer-Rodriguez.

<sup>99</sup> Id.

<sup>100</sup> Interview with Employee C.

<sup>101</sup> Personnel File of Employee C. BURGLARY STATUTE: 13V1201A Disposition: 2006 FELONY CONVICTION DISPOSITION: SENTENCED DEFERRED FOR 2 YEARS.

<sup>102</sup> Interview with Employee A. Employee A's own interview and interviews with her co-workers and supervisors revealed that Employee A office social skills and observations about who was "mean" and who was "nice" leave out any sense of self-reflection as to her own contribution to the quality of relationships.

<sup>103</sup> Id.

<sup>104</sup> Id. This certainly seems hypocritical in light of the goings on and discussions that Mr. Sall described.

Victim's Advocates, Kathyria Ferrer-Rodriguez and Nietra Panagoulis stated that Mr. Sall blamed a rape victim for "getting drunk" and essentially allowing her rape to happen.<sup>105</sup> There is another variation on this story from Ms. George, who reported, "I remember him making a statement again in the lobby full of people about a sex assault on a UVM student saying that -- and it was actually like a forcible rape, him making a statement that we shouldn't be charging that kid because he was going to lose his -- he was going to get kicked out of college."<sup>106</sup> Ms. George mentioned Mr. Sall making statements in the lobby in item number 12 of her list. Why did she not provide details? Surely they would have merited a very serious reprimand of some kind if not more. The only confirmed account of Mr. Sall being reprimanded for inappropriate comments was from Mr. Donovan, who wrote:

[I]t is my general recollection that at some point in time a complaint arose from a remark made by Mr. Sall concerning the role of women within the Islamic religion. It was my general understanding that some folks in the office considered the remark offensive. I was concerned that any comment such as this could be interpreted as demeaning towards women. Accordingly, I counseled Mr. Sall about how his words, as I understood them, could be interpreted as inappropriate in the workplace and counseled him to be more aware of his comments.<sup>107</sup>

This investigator posed a question to Mr. Donovan via interrogatory about his awareness of Mr. Sall's performance issues (versus his conduct), and received the following response:

**Q:** Please describe the extent of supervisory feedback you provided to Mr. Sall after he was hired.

**A:** I generally recall there was a time when concerns were raised about Mr. Sall's mastery of the phones, his ability to transfer calls, and English language skills.<sup>108</sup> It was my practice to delegate such issues to Ms. Bouffard to address.

When asked to identify those who complained about Mr. Sall, Mr. Donovan answered that "It is my general recollection that those who made such complaints or raised such issues were Jenn Bouffard, Mellissa Fattell, [sic] Employee A, and Employee B."<sup>109</sup> When asked about communication with Jennifer Bouffard, Mr. Sall's direct supervisor, Mr. Donovan responded:

**Q:** Did Jen Bouffard inform you at any time that Mr. Sall's job duties were being scaled back because his job performance was poor? If so when?

**A:** I have a vague recollection about a plan to address performance difficulties, but cannot recall the specific details.

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<sup>105</sup> Interviews with Panagoulis and Ferrer-Rodriguez.

<sup>106</sup> Interview with Sarah George.

<sup>107</sup> Donovan Interrogatories no.13.

<sup>108</sup> Because the Attorney General would not sit for an under-oath interview, this investigator does not know whether this reference to Mr. Sall's accent was a repeat of the initial concerns expressed when he was hired, or a separate and subsequent "complaint" about his accent.

<sup>109</sup> Donovan Interrogatories no. 14.

**Q:** Did either Bram Kranichfeld or Justin Jiron discuss problems with Mr. Sall's job performance with you? If so, describe those discussions and any actions taken by you or them as a result.

**A:** I do not recall such an occurrence.<sup>110</sup>

Mr. Kranichfeld also did not recall speaking to Mr. Donovan about Mr. Sall.<sup>111</sup> Ms. George stated in her interview that she spoke to Mr. Donovan about Mr. Sall a "couple of times."<sup>112</sup> She described his reaction as being one of "Thanks for letting me know."<sup>113</sup> Mr. Donovan did not recall any conversations about Mr. Sall with Ms. George:

**Q:** Did you ever have a direct conversation with Ms. George about Mr. Sall's work performance?

**A:** I do not recall having such a conversation.<sup>114</sup>

**Q:** Did Ms. George complain to you in writing or in person about Mr. Sall's work performance while you were the State's Attorney for Chittenden County?

**A:** See previous response. In addition, I do not recall receiving a written complaint from Ms. George regarding Mr. Sall's work performance while State's Attorney.<sup>115</sup>

When asked a specific question about the different types of documentation that might have been available about Mr. Sall's performance and corrective measures, Respondent acknowledged the dearth of documentation in its response to the complaint and was unable to provide further information:

**5. [Please provide] Dates, locations and persons present for the verbal feedback provided by Ms. Bouffard and Ms. George to Mr. Sall. If feedback was by email, please provide copies of all emails.**

RESPONSE: Most feedback from Ms. Bouffard (unless otherwise noted as attachments to this document) took place at Mr. Sall's workstation as issues arose and directions were required to be reiterated. Ms. Bouffard recalls two separate occasions where Mr. Sall requested discussions in her office. These discussions were not memorialized in writing. Ms. Bouffard recalls encouraging Mr. Sall to continue to work diligently and use the guidance document she provided (Exhibit 2) to perform his daily job duties. All feedback from Ms. George was verbal and typically occurred at Mr. Sall's workstation in the front lobby. Ms. George, as a Deputy State's Attorney, regularly spoke to Mr. Sall about issues as they arose over the course of his employment. No exact dates or other individuals present for these conversations are known.<sup>116</sup>

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<sup>110</sup> Id.

<sup>111</sup> Id. number

<sup>112</sup> Interview with Sarah George.

<sup>113</sup> Interview with Sarah George.

<sup>114</sup> Donovan Interrogatories no.27.

<sup>115</sup> Donovan Interrogatories no.28.

<sup>116</sup> Id. #6.

**6. [Please provide the following:] Any notes, logs, emails or other contemporaneously recorded memorialization made by Mr. Donovan, Ms. George and/or Ms. Bouffard regarding Mr. Sall's work performance.**

RESPONSE: To the best of Respondents' knowledge, no responsive documents exist outside of the emails attached hereto at Exhibit 6. Included in the attached emails are several communications regarding arrest warrants that were not properly processed by Mr. Sall.

**7. All documented communication about Ms. Sall's work performance between any party within or outside of the office, regardless of position and regardless to whom the complaint was made.**

RESPONSE: See Exhibit 6. To the best of Respondents' knowledge, no other responsive documents exist.<sup>117</sup>

Respondent's exhibit 6 contains five email exchanges none of which reflect the extent of Mr. Sall's involvement in the issues mentioned, provide any details of his mistakes, or any response from Ms. Bouffard or anyone else that could be interpreted as a corrective action versus a mere reminder, although close inspection does show a number of problems with Mr. Sall's performance that were repetitive in nature.

For instance, Barbara Bernadini, the Business Manager, often had to send very simple, routine forms back to him to add missing information, such as social security numbers, addresses, or even to tell him she could not read what he had written.<sup>118</sup> The constant reminder – from the time he started until his final month, reflected a lack of care and attention to detail on Mr. Sall's part and reflected lack of consideration towards Ms. Bernadini in the opinion of this investigator. Instructions on this duty were clearly set out in the manual.<sup>119</sup>

In addition, there were emails from staff at the Public Defender's Office, from the court personnel, and from employees inside of his own office other than Jennifer Bouffard constantly reminding Mr. Sall to do things he needed to do and that he had not done. Some of these had potentially serious consequences. In one instance, there was an email from Pam Opferman, Assistant Records Clerk at the South Burlington Police Department on September 28, 2016, to Chief Deputy Bram Kranichfeld that a suspect had been arrested before a warrant was entered, which was something that could cause procedural problems for the State since the grounds for arrests without warrants were specifically set out in the criminal rules.<sup>120</sup> Mr. Kranichfeld

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<sup>117</sup> Id.#7.

<sup>118</sup> Email exchanges between Barbara Bernadini and Abdullah Sall- On **August 25, 2016** Ms. Bernadini sent an email reminding Mr. Sall to write the forms in black ink so she could read addresses and other information. On **August 29, 2016**, she wrote him that he sent forms that had already been processed but had left out a social security number. On **October 10, 2016**, she had to write him to tell him that he had sent in three witness sheets with no addresses. On **November 08, 2016**, she had to inform him he had left out two addresses, social security numbers, fee delineations and mileage and had forgotten to get a signature from a designated person who could authorize the fees. On **December 7, 2016** and **December 28, 2016**, she had to send him back paperwork because of missing addresses. On **January 26, 2017**, she had to ask him to re-write a social security number she was unable to read.

<sup>119</sup> Manual at Respondent's 00004.

<sup>120</sup> Email from Opferman to Kranichfeld, September 28, 2016.

forwarded this information to Jennifer Bouffard two days later at 2:42 p.m.<sup>121</sup> At 2:45 p.m. on that same day, Ms. Bouffard responded to Mr. Kranichfeld and copied Mr. Sall, simply writing: “K. Thanks. I think we are up to date, so hopefully this won’t continue to be an issue.”<sup>122</sup> The manual set forth some procedures associated with warrants in a couple of different areas.<sup>123</sup>

While a potentially serious mistake, the two-day delay in notification by Mr. Kranichfeld and the neutral tone of the response from Jennifer Bouffard make it hard to assess the critical nature of the event and it is not clear what exactly Mr. Sall failed to do even when looking at the manual.<sup>124</sup> There were also no follow-up emails to Mr. Sall or any other documentation that showed he was informed of the seriousness of his oversight. Mr. Kranichfeld did not mention it during his interview.

In another instance, Ashley Beach, a criminal court clerk in Chittenden County Superior Court, wrote Jennifer Bouffard on October 3, 2016 that an incorrect docket number had been entered in a particular case and that it needed to be changed. However, the problem with doing so was that a retroactive correction caused difficulty in the court filing system.<sup>125</sup> The final exchange from Jennifer Bouffard to Ms. Beach was copied to Mr. Sall and simply said: “Abdullah: Please be sure to change our file and JustWare.”<sup>126</sup> There is simply no way to take anything away with respect to the severity of the error or even to explicitly assign it to Mr. Sall. There was also no evidence of follow-up provided.

In November 2016, Jennifer Bouffard sent Mr. Sall an email about assigning Victim Advocates to cases prior to filing. While there was testimony that this was a regular error, there is nothing in the tone of the email – and no follow up – to illustrate the level of importance associated with the error or to suggest it was ongoing. The tone suggests that it could have been a first-time instruction:

It is very important that advocates are assigned before filing the case with the court. If the reviewing attorney identifies a victim, please be sure the victim advocate's initials are on the Information before you file it and the assignment is reflected in JustWare. Secondly, all victim cases need to be scanned to JustWare and the VA button on the document center. This is how their process begins. As victims have specific rights under the law, we need to be sure the advocates have notice of every case. Thanks. Jennifer<sup>127</sup>

Nonetheless, problems continued, even after Jennifer Bouffard’s email and receipt of the manual, which set forth some, but not all the procedures for assigning Victim’s Advocates to files. Employee C, the Victim’s Advocate secretary, had to email reminders to Mr. Sall on

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<sup>121</sup> Email from Kranichfeld to J. Bouffard, September 30, 2016. Vt. R. Crim. P. 3 governs arrests without warrants and the circumstances.

<sup>122</sup> Email from J. Bouffard to A. Sall and Bram Kranichfeld, September 30, 2016.

<sup>123</sup> Manual at Respondent’s 00005 and 00012.

<sup>124</sup> The duties as set forth in the manual were: 3. Arrest warrant list print. a. Look up each case to determine which ones are felonies. b. Pull felony file. c. Give felony file to Bram for extradition parameters. d. Note extradition parameters in JustWare -Agency & Involved Parties tab/Notes field on defendant line, example: 8/3/2016 NY/NEW ENGLAND jjb e. Generate letter (NCIC letter to police) indicating extradition parameters f. Send letter to investigation police. agency.

<sup>125</sup> Email exchanges between Ashely Torrey (nee Breach) to Jennifer Bouffard and Abdullah Sall, October 3, 2016.

<sup>126</sup> Id.

<sup>127</sup> Email from Jennifer Bouffard to A. Sall, November 8, 2016.



January 4, 2017 and again on January 9, 2017 with the same instruction each time and the same instruction given by Ms. Bouffard.<sup>128</sup> Because the manual did not cover all of the details of this duty, it was difficult to figure out exactly when it was assigned and when and how often instruction was provided.

Mr. Sall also failed to keep up with adding cases to the Valcour database as can be seen in communications between him and Jamie Lee Kiley and Sarah Puls from the Public Defender's Office, and Jennifer Bouffard. Cases were not being added to the database, or were added behind schedule.<sup>129</sup> However, the manual contained no instructions on what his duties were with respect to the Valcour database. Another significant problem for Mr. Sall was the paperwork associated with the Diversion docket, to which he was assigned. The procedure appears to have been simple and straightforward and was detailed in the manual.<sup>130</sup> His failure to follow-up was cited by Ashley Beach, the Criminal Court Clerk in an email to Jennifer Bouffard on December 23, 2016.<sup>131</sup> As noted, this duty was in the manual and it was simple to do. The email showed that Mr. Sall had failed to file paperwork going back to July 7, 2016 in one case and August 9, 2016 in another.<sup>132</sup>

There were mistakes attributed to Mr. Sall that were discovered after he left as well. In March 2017, deputy state's attorney Emily McCarthy sent the following email to Jennifer Bouffard and Sarah George:

Hi-In going through my cases I found a Sex Assault in which I'd applied for an arrest warrant back in August [JOHN DOE], but the paperwork has NOT been filed with the court. I'll put the file in Jen's box now. It looks like he still has an active arrest warrant from July of 2016...so at least we know he hasn't been picked up, but still. .. eek! Emily[.]<sup>133</sup>

Additionally, there were apparently three to four file cabinets of cases that he had not closed that were discovered after he was fired. The cases had apparently not been entered into JustWare as "Closed."<sup>134</sup>

Ms. George noted that she had observed Mr. Sall's work habits and lack of attention to detail and had been frustrated over his lack of competence during the time she was a deputy state's attorney.<sup>135</sup> She described some of the problems she observed with respect to his inattentiveness:

[I] mean, he was literally doing the thing I told him the day before not to do, or to do differently, again. I mean, it -- it wasn't like he did something wrong, and then

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<sup>128</sup> Emails from Employee C to A. Sall on January 4 and January 9, 2017.

<sup>129</sup> Emails between Jamie Lee Kiley, Sarah Puls, and Jennifer Bouffard copy to A. Sall – October 6 and 7, 2016; and Jamie Lee Kiley, Jennifer Bouffard and A. Sall, December 30, 2016, January 12 and 13, 2017.

<sup>130</sup> Manual – Respondent's 00009. The duties were: Diversion: a. Accepted letters file in file. b. Resumed prosecution letters file in file. c. Completed letters - done WEEKLY a. Pull file b. Give file to TJ c. Once TJ signs letter, file signed letter with court d. Close file in JustWare (until we have a closed process, put file in closed file cabinet)

<sup>131</sup> Email from Ashley Beach to Jennifer Bouffard, December 23, 2016.

<sup>132</sup> Id.

<sup>133</sup> Email from Emily McCarthy to Jennifer Bouffard and Sarah George, March 5, 2017.

<sup>134</sup> Respondent's response and Interview with Katie Allaire.

<sup>135</sup> Interview with Sarah George.

we do it right for a while, and then do it wrong again. It was doing the same exact thing. And I know that there was a couple of times where it would happen again, and like the mail in my box, and I would consider not saying anything because I was just like this is not...it's not worth my time, but then feeling like it certainly wasn't going to change if I didn't say anything. And so I would continue to say something.<sup>136</sup>

Another example of her frustration stemmed from Mr. Sall routing information to her that was not supposed to come to her, even after she showed him how to do it properly. She said that he continued to make mistakes a “couple of times a week.”<sup>137</sup>

It also, I feel like would, like now, I get something in my mailbox every day, some type of mail every day. Then, he was really behind in even giving us that mail, so I would go days without anything in my mailbox, and then I would have like a stack, and most of them would be wrong. So it's hard to really say whether - it wasn't happening every day, but that was because I wasn't getting the mail every day.<sup>138</sup>

She stated that even after she showed him how to do it, mistakes continued to happen:

I remember actually walking him through it twice. I don't remember if it was the very next time or if it was, you know, weeks later. But I remember actually walking him through it twice, and I remember that the second time that I did it, he was annoyed because I had already done it. And he was like --Q. What did annoyed look like? A. He said, like, you already showed me this.<sup>139</sup>

Ms. George stated that she had mentioned her frustrations with Mr. Sall to Mr. Donovan, Mr. Kranichfeld and Mr. Jiron, however none of this was documented by either her or them. Mr. Kranichfeld was asked if there was any reason Ms. George would have had more opportunity to observe Mr. Sall's work than any other deputy state's attorney, Mr. Kranichfeld responded by saying that he did not see why she would have.<sup>140</sup> Ms. George recalled talking to Mr. Kranichfeld “[p]erhaps ten to twelve times,”<sup>141</sup> about Mr. Sall's poor performance, which she stated was probably “underestimated”<sup>142</sup> yet Mr. Kranichfeld provided no recollection of such conversations.<sup>143</sup>

This of course does not mean that Ms. George did not have the opportunity to observe Mr. Sall's work or that the conversations did not take place – however the fact remains that none of these three supervisors recalled her complaining to them about Mr. Sall. It is possible

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<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> Interview with Bram Kranichfeld.

<sup>141</sup> Interview with Sarah George. Ms. George recalled her conversations with Mr. Kranichfeld: “I feel like Bram, in general, is a pretty like -- I don't know. He would just sort of be like, oh, I don't know, you know, all right, thanks for letting me know. Like, and what did you say to him, and what did he say back, okay, thanks for letting me know.”

<sup>142</sup> Interview with Sarah George.

<sup>143</sup> Interview with Bram Kranichfeld.

that the conversations did not make an impact on Mr. Kranichfeld, assuming they occurred. Ms. George observed that:

I recall being careful to sort of know my place. You know, it wasn't -- I was not in the executive committee. I was not privy to personnel issues. I didn't want to put them in a position to have to tell me something they weren't supposed to. But I -- so I never said, did you ever talk to him, or what happened with that complaint. But I know that when I would go in again, I would say, this just happened again, and I just said this again, and that -- so I know that I was clear of like I've already complained to you about this once, and I'm doing it again. But I would never say, did you ever talk to him about this.<sup>144</sup>

Ms. George stated that she would “vent” a “couple of times a week” to Mr. Jiron because their offices were adjacent to each other.<sup>145</sup> Mr. Jiron did not recall Ms. George being party to any discussions about Mr. Sall since she was not an affected party with respect to specific complaints or a staff member with supervisory authority at that time.<sup>146</sup>

Thus, above information supports some but not all the reasons that Ms. George provided to Mr. Campbell for firing Mr. Sall. There is no question that he was significantly underperforming. There is support for her assertion that he misplaced paperwork.<sup>147</sup> On the other hand, there were near daily emails throughout the office about missing files and paperwork, so it is impossible to determine how Mr. Sall’s contributions were distinct from anyone else’s. Her assertion of “[s]ignificant delays in labeling file folders and distributing file folders to staff” was verifiable, as was the statement that he sometimes provided inaccurate information to people who called the office.<sup>148</sup>

There was no verifiable documented evidence of a failure to send file folders to attorneys though this investigation believes that this was likely based on the other types of verifiable errors discovered. There was no evidence of excusing witnesses from subpoenas without verifying with an attorney. There was no specific documented evidence of “Excusing defendant's [sic] from Court without verifying that they could do so, There was ample, credible support for the assertion that Mr. Sall had trouble transferring calls to the correct person or not getting the right information. Employee A stated in her interview that she had received complaints about her phone transferring skills from the same attorney who complained about Mr. Sall’s lack of telephone transferring skills to this investigator during that interview.<sup>149</sup>

There was no documented evidence that Mr. Sall made “statements in the lobby, with people in the lobby, about his personal opinions of cases we are charging.” This is particularly troubling due to the serious and inappropriate nature of the comments he allegedly made. She stated that she recalled that he, “said in the lobby full of people that we were only charging the man because he was black, and then I remember him making a statement again in the lobby full of people about a sex assault on a UVM student saying that -- and it was actually like a forcible

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<sup>144</sup> Interview with Sarah George.

<sup>145</sup> Id.

<sup>146</sup> Interview with Justin Jiron.

<sup>147</sup> Interview with Katie Allaire. Ms. Allaire said she would find missing paperwork on his desk.

<sup>148</sup> Ms. Allaire noted he would be on the phone for extended periods of time trying to give victim’s advice when that was not his role – and of course – he was not sufficiently familiar with the legal system to do so.

<sup>149</sup> Interview with Employee A.

rape, him making a statement that we shouldn't be charging that kid because he was going to lose his – he was going to get kicked out of college.”<sup>150</sup>

This raises the question of why, if Mr. Sall made these statements, and Ms. George and others heard them, 1) there were not multiple reports to Jennifer Bouffard or others, 2) there no documented evidence of reprimands, and 3) why Ms. George did not provide them to John Campbell in support of her decision to fire him. It does not makes sense that Ms. George would tell Mr. Campbell that Mr. Sall was well liked in the office; generally people who make such serious and frankly repugnant statements, in a prosecutor's office, with witnesses and victims all around waiting for court or coming in for interviews, are not well liked. His alleged comments surely could have provided ample support for a decision to terminate.

Her assertion that he argued with other staff members in the lobby seems to be unfair from the point of view of this investigation, given the testimony from multiple witnesses, backed up by documentation, including the email below that there was inappropriate behavior by some of the front office staff (excluding Ms. Allaire and Employee C):

Subject: front lobby Date: Wednesday, September 28, 2016 4:44:44 PM  
Importance: High - Just wanted to take a minute to remind everyone that although we may feel comfortable with police officers and other visitors, we need to be mindful of the discussions we are having in the front lobby. ***I mention this because it has been mentioned.*** I wanted everyone to be aware. My suggestion would be to think about whether the casual conversation would be heard at your dentist or doctor's office or in other public places. Jennifer<sup>151</sup> (emphasis added).

Ms. George stated in her list that Mr. Sall was only doing “2/3 of the assigned tasks for that position because he could not keep up with the work he had” in her list. On the one hand, perhaps this is an accurate estimate – the problem for this investigation is that it was not clear what the scope of his duties was and the manual did not set all of them out. Ms. George's accusation that he was “not receptive to suggestions about how to better do the work” was disputed by Mr. Donovan and Mr. Kranichfeld, as was her assertion that he was “defensive in response to constructive criticism regarding weaknesses in his work. Would blame others or make excuses and get defensive.” Mr. Kranichfeld stated that he had never observed Mr. Sall being defensive or resistant to feedback and that in every interaction he had had with him, he was open to feedback and constructive criticism.<sup>152</sup> Mr. Donovan stated that in his “direct experience” he also had not experienced Mr. Sall as defensive.<sup>153</sup>

This investigation thinks that this may have been likely with respect to Ms. George herself, but not necessarily with others. Mr. Sall stated in his interview that he never felt she liked him – that she smiled at him and was pleasant when “T.J. was there” but not when he was not there and that she never smiled at him with her “eyes” – only with her mouth.<sup>154</sup> This investigation believes this statement to be unfair to Mr. Sall in that it is totally subjective, not based on any verifiable documentation and because Ms. George was not Mr. Sall's supervisor at the time, thus, it might have been confusing to Mr. Sall to have her act as one. The likelihood

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<sup>150</sup> Interview with Sarah George.

<sup>151</sup> Email from Jennifer Bouffard to Secretarial Staff Wednesday, September 28, 2016.

<sup>152</sup> Interview with Bram Kranichfeld.

<sup>153</sup> Donovan Interrogatory no. 38.

<sup>154</sup> Interview with Abdullah Sall.

that it pertained to Ms. George specifically, finds some support in one of Ms. Bouffard's responses:

Q. So you mentioned that you would have your mobile station out there with him, or that you would come out and talk to him about things. Did he come back to your office and say, hey, Jen, I don't know how to do something; can you help me with something?

A. No. No. I would ask him to come back to my office periodically because it is kind of awkward to have an honest conversation in the middle of the lobby --

Q. Sure. Sure.

A. -- so you know, I would say -- I would say a handful of times. And not just him, I mean, I do that with all of the staff, you know, so I have him come in and say, hey, you know, how are things going, do you need any help with anything, what's going on, what you have on your agenda for today. *And he was always just positive. No, things are great. I'm fine, nope, things are good. I never had any sort of feedback from him that would indicate that he was struggling.* All of that was -- was sort of laid at my feet when I would find or someone would, you know, say, I haven't got my Diversion letters yet, or I haven't gotten this, then I'd have to go out and have a direct conversation with him about, you know, somebody is that this hasn't been done; what's the status of it.<sup>155</sup> (Emphasis added).

Ms. Bouffard's response is also puzzling: she suggests that she asked him how things were and he said they were fine -- and that she accepted that response, as his direct supervisor, until other people came to her, which begs the question why it took complaints for her to become aware of some of his problems. Several answers come to mind, including the massive workload she carried on her own, the chaotic nature of the office, the lack of clear job duties, the lack of consistent training, as well as the desire by Mr. Sall to do well at his job and not complain or disappoint Mr. Donovan.

Thus, while there were some consistent statements from multiple witnesses that Mr. Sall was failing to do the job adequately, there is no way to ignore the fact there were four supervisors who failed to make a written record of his poor performance, including Mr. Donovan, Ms. Bouffard, and Chief Deputies Justin Jiron and Bram Kranichfeld. There were also approximately fourteen attorneys, three victim's advocates and five other administrative staff who could have sent complaints to any of these supervisors, as well as any number of persons from outside the office whose alleged complaints could have been documented. There was simply no evidence of explicitly "scolding" him, and there was nothing in the tone or words of the emails referenced that suggested the severity of his errors and mistakes. The only way that a reader would know that Mr. Sall was even involved in a problem was that an email was addressed to him or that he was copied on it. Ms. Bouffard observed that her personnel style may have contributed to this:

I don't like letting people down, and I -- and I felt a lot of the time, that it was like I -- why can't I just get him to get this work? Why can't I bring him along? It's a reflection of me kind of thing. But we couldn't have gone on. We could not have

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<sup>155</sup> Interview with Jennifer Bouffard.

gone on. I mean, with him only doing -- he was probably doing maybe three quarters of the position, maybe not quite that much. And you know, half of the -- one fourth that he wasn't doing just wasn't getting done, and then the rest of it was falling onto the other staff, and then, you know, just the mistakes that he was making was -- was a reflection of the office itself, and so I -- I couldn't have let it go on.”<sup>156</sup>

When asked if the other staff complained about his work falling on them, she answered

Not so much that as, honestly, the rumors in the building were coming back... Yeah, not to drag a million other witness into this case, but -- and I can say specifically who, but like, Wednesdays is calendar call day, and so a dozen defense attorneys are here with their clients, and so our attorneys go down to the case flow room with these defense attorneys with -- with whichever court clerk is in, you know, making the record. And our attorneys would come back from case flow and they'd be like, yeah, you know, somebody was making comments about how our office is falling apart, and how were filing paperwork incorrectly, and how we're, you know, how our arrest warrants aren't getting done and how Diversion cases aren't getting dismissed. They have a client who is still waiting for their dismissal notice. And you know, and so most of those complaints were about the position that Abdullah was doing. You know, I -- I called to talk to -- I called to talk to you yesterday and I got I got disconnected twice. I got hung up on twice, or and so there was open discussions in the building about the lack -- [response ended].<sup>157</sup>

There is credible evidence that Ms. Bouffard effectively felt it would be futile to take the matter up with Mr. Donovan. Both Ms. Bouffard and Mr. Donovan preferred not to deal with difficult personnel issues as a rule and Mr. Sall had been hired by Mr. Donovan. Mr. Donovan was described as a supervisor who liked to give people chances,<sup>158</sup> was reluctant to fire people,<sup>159</sup> who did not like to let things in the office fester,<sup>160</sup> would deal with difficult office issues if he had to,<sup>161</sup> but would be “annoyed” that he had to get involved.<sup>162</sup> Chief Deputy Justin Jiron recalled Mr. Donovan terminating only one person during the time he was State’s Attorney and that was for extreme malfeasance.<sup>163</sup> Ms. George was unsure if Mr. Donovan would even have fired Mr. Sall had he not left the office.<sup>164</sup> Ms. Allaire also thought it was possible that Mr. Sall would not have been fired had Mr. Donovan not left.<sup>165</sup> Ms. Bouffard stated that I mean, I think if I hadn't seen sort of the light at the end of the tunnel with T.J. moving on, I think I would've had -- I would've had to break down and had that conversation

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<sup>156</sup> Interview with Jennifer Bouffard.

<sup>157</sup> Id.

<sup>158</sup> Interview with Justin Jiron, Interview with Bram Kranichfeld.

<sup>159</sup> Interview with Justin Jiron.

<sup>160</sup> Id.

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> Id.

<sup>164</sup> Interview with Sarah George.

<sup>165</sup> Interview with Katie Allaire.

and say this just is not working, he just doesn't get the work. And I don't -- I don't know what else to do with him.”<sup>166</sup>

Taking into account the evidence and the lack of evidence, this investigation finds that Mr. Sall can show he was qualified for the position at the time he was fired for the same reason that he can show he was qualified at the time he was hired. In the first place, the burden at the prima facie stage is relatively light, Furthermore, it is also disingenuous to state that someone is not qualified for a job at the time they were fired when there is little to no documentation they were performing poorly and were on notice they were performing poorly in all of the areas that were cited for their termination. Thus, Mr. Sall can establish that he was qualified for the position at the time he was fired.

**FINDING:** Mr. Sall can establish the second element of the prima facie case, that is that he was qualified for the position.

### C. Third Element: Adverse Employment Action

Mr. Sall was terminated on January 27, 2017, a week after Ms. George was appointed to office. He can establish the third element of the prima facie case.

### D. Fourth Element: The circumstances surrounding the adverse employment action giving rise to an inference of discriminatory intent

In order to prove the final element of the prima facie case, Mr. Sall must raise an inference of discrimination showing disparate treatment. While Mr. Sall claims that Ms. George made one or more negative statements about his accent at his termination meeting, this cannot be verified. There is direct evidence of arguably discriminatory statements about his accent in the email between Employee C and Employee A, as well as evidence that it was well known that he was mistreated by third parties because of his accent, however that evidence on its own is insufficient to prove disparate treatment. In the absence of verifiable discriminatory statements or insufficient evidence of discriminatory intent, a complainant may prove the final element by showing that they were treated worse than other similarly situated employees who were outside his protected categories.

Mr. Sall claimed after his complaint was filed that Employee A and Employee B, both of whom are White and both of whom hold the same job title of “Secretary IV” were sufficiently similarly situated to him in terms of their positions and were treated more favorably than he despite their own failures of performance and behavior. To determine whether employees are proper comparators, courts look at several factors.

First, Mr. Sall must demonstrate that he was “similarly situated in all material respects” to the individuals with whom he seeks to compare himself.<sup>167</sup> The factors that constitute “all material respects” “varies from case to case,” but “must be judged based on whether the plaintiff and those he maintains were similarly situated were subject to the same workplace

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<sup>166</sup> Interview with Jennifer Bouffard.

<sup>167</sup> Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir.2000). See also McGuinness v. Lincoln Hall, 263 F.3d 49, 54 (2d Cir.2001) (“[W]here a plaintiff seeks to establish the minimal prima facie case by making reference to the disparate treatment of other employees, those employees must have a situation sufficiently similar to plaintiff’s to support at least a minimal inference that the difference of treatment may be attributable to discrimination.”).

standards ....”<sup>168</sup> This includes performance evaluations and disciplinary standards. The standard requires “a reasonably close resemblance of facts and circumstances” and there must be an objectively identifiable basis for comparability.<sup>169</sup> The determination of whether employees are similarly situated is typically one for the trier of fact – i.e. judge or jury.<sup>170</sup>

Similarly situated employees must have engaged in all of the same misconduct as the complainant, or at least committed the “most serious of the infractions for which the plaintiff was subjected to an adverse employment action.”<sup>171</sup> In addition, similarly situated employees must be employees who engaged in acts of comparable seriousness but were not punished as severely as the complainant.<sup>172</sup> Other factors include the knowledge of the employer of the disciplinary issues of the employees being compared and a temporal component – that is, that the employees’ conduct occurred during a period that would allow for a meaningful comparison.<sup>173</sup>

#### A. Job Similarities

There were some similarities between the three employees. All three employees held the technical title of Secretary IV and all three were originally hired at Pay Grade 15, step 1.<sup>174</sup> At the time Mr. Sall was fired, they still had the same title, though they had different steps based on time in the position. Employee B was hired in 2010 and Employee A was hired as a paid employee in April of 2016, three months before Mr. Sall.<sup>175</sup> Employee B’s mother had been a long-time employee at the office and Employee B had been coming to the office to visit her mother and occasionally help out after school.<sup>176</sup> All three were “at-will” employees as were all the CCSAO employees.<sup>177</sup> All three were directly supervised by Jennifer Bouffard and ultimately supervised by Mr. Donovan and then Ms. George after his departure. There were no formal written performance standards or disciplinary procedures in place, thus, an informal and

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<sup>168</sup> *Id.* at 40.

<sup>169</sup> *Id.*

<sup>170</sup> *Harlen Assocs. v. Incorporated Vill. Of Mineola*, 273 F.3d 494, 499 n. 2 (2d Cir.2001).

<sup>171</sup> *Jenkins v. St. Luke’s–Roosevelt Hosp. Ctr.*, 2009 WL 3682458, at \*7–8 (S.D.N.Y. Oct. 29, 2009) (comparator was not similarly situated where he did not engage in “all of the same misconduct” as plaintiff); *see also Tomasino v. Mount Sinai Med. Ctr. & Hosp.*, 2003 WL 1193726, at \*7 (S.D.N.Y. Mar. 13, 2003) (comparators were not similarly situated to plaintiff where none committed the most serious of the infractions for which plaintiff was discharged).

<sup>172</sup> *Graham*, 2301 F.3d. at 40. *See also Carter v. New Venture Gear*, 310 Fed.Appx. 454, 457 (2d Cir.2009). A proposed comparator is not similarly situated “in all material respects” unless she engaged in all of the same misconduct as plaintiff, or at least committed the most serious of the infractions for which the plaintiff was subjected to an adverse employment action. *Jenkins v. St. Luke’s–Roosevelt Hosp. Ctr.*, 2009 WL 3682458, at \*7–8 (S.D.N.Y. Oct. 29, 2009) (comparator was not similarly situated where he did not engage in “all of the same misconduct” as plaintiff); *see also Tomasino v. Mount Sinai Med. Ctr. & Hosp.*, 2003 WL 1193726, at \*7 (S.D.N.Y. Mar. 13, 2003) (comparators were not similarly situated to plaintiff where none committed the most serious of the infractions for which plaintiff was discharged).

<sup>173</sup> *Hirschberg v. Bank of America*, 754 F.Supp.2d 500, 517 (E.D.N.Y. 2010) (Plaintiff failed to produce any evidence that the employer knew or should have known that any of the comparators cut and pasted customer signatures).

<sup>174</sup> Personnel files of Sall, Employee B and Employee A.

<sup>175</sup> Personnel records of Employee B and Employee A.

<sup>176</sup> Interview with Employee B.

<sup>177</sup> “At-will” employees are still covered by anti-discrimination laws: Mr. Sall was an “at will” employee when he was hired and terminated. However, at-will employees are still protected by both the state and federal civil rights laws. Thus, he is protected by the Vermont Fair Employment Practices Act and Title VII of the Civil Rights Act.



ad hoc “system” was applied and discipline was exercised with a significant degree of discretion. Thus, on paper, the positions were exactly the same.

In addition, there was a significant degree of flexibility with respect to the positions. Job duties could be added to or taken away depending on performance. There was testimony that Mr. Sall was doing “2/3” of his job and was nowhere near the point where an attorney could be assigned to him, supporting the fact that this was nonetheless an option.<sup>178</sup> According to Ms. Bouffard:

I couldn't assign him an attorney because he wasn't getting what he's already assigned to. I couldn't give him the closed cases because he wasn't doing what -- he was already assigned to. So those were the two major things that stand out. Once those two things would have been added and sort of accomplished, then we -- then normally, we, you know, we talk about, okay, what other things do you like to do? There's room for more. You have more time in that position, so what other things would you like to do? What can we expose you to? And then we kind of, you know, pull pieces of the office itself. Here's a project that you could work on or here's something else that you can do, so -- so besides not doing two-third, you know, doing only two thirds of the job, that one-third he wasn't doing, and then there are some -- always some other tasks that we try to introduce, so that -- so that each position is a more rounded position and has -- is able to back up the other positions. Oh, we have a juvenile emergency. Let's show you how to do that today, and then you'll do every third juvenile emergency that comes in, or oh, we have an immediate arraignment. Here's a criminal case. That's something that you would be sort of set into the rotation to do. And we just never got there.<sup>179</sup>

While Employee A was the receptionist, duties were added when she was assigned one attorney.<sup>180</sup> In June of 2015, notes show that Employee B was warned that she could be moved to “another position within the office that does not have the responsibility of an attorney caseload” if she kept making mistakes.<sup>181</sup> In April/.May of 2016, Employee B was again warned that she needed to “keep[] up with her work” and Ms. Bouffard “offered to make adjustments to her workload if necessary.”<sup>182</sup>

Employee C was hired as the receptionist originally (but with the Secretary IV job title), became the Victim’s Advocate Secretary, then was assigned the receptionist position again when Mr. Sall was fired.<sup>183</sup> None of the positions seemed stable in terms of defined parameters and none of the secretaries, with the exception of Ms. Allaire, seemed to be stable within them. As noted, Mr. Sall’s hire disrupted Employee A who was not prepared to take on a full attorney caseload - it was just imposed upon her. Employee A claimed that Ms. Bouffard had wanted the secretarial position that given to Employee A, and had been upset she had not gotten it.<sup>184</sup> At the

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<sup>178</sup> Interview with Jennifer Bouffard.

<sup>179</sup> Interview with Jennifer Bouffard.

<sup>180</sup> Interview with Employee A.

<sup>181</sup> Personnel record of Employee B.

<sup>182</sup> Id.

<sup>183</sup> Interview with Katie Allaire. Personnel Record of Employee C.

<sup>184</sup> Interview with Employee A.

time Mr. Sall was there, receptionist processed arrests warrants, but Ms. Allaire stated in her interview that this had changed since then and that all secretaries do them.<sup>185</sup>

It is true that Employee B and Mr. Sall and Employee A had different job duties at the time Mr. Sall was terminated. Employee B had been hired into a secretarial position that was assigned to the juvenile docket and the two attorneys who were assigned to that docket and had always been in that position according to Ms. Bouffard.<sup>186</sup> Employee A provided secretarial support to attorneys she was assigned to by setting up depositions, maintaining their calendars, preparing and issuing subpoenas, assisting in case preparation for hearings and trials, coordinating with victims and witnesses, and in any other duties assigned.<sup>187</sup> The receptionist position primarily involved answering phones, transferring calls, distributing mail, copying, scanning and entering information into databases as well as closing files and preparing correspondence. It did not provide any direct, supportive work for any particular attorney(s) unless Ms. Bouffard believed the employee was capable of it.<sup>188</sup> All the secretarial staff were required to help with or fill in with receptionist duties as needed in case the receptionist was absent.<sup>189</sup>

In sum, these jobs were so flexible that this investigation finds they are sufficiently similar in nature. It seems unfair to construe them as dissimilar in an office where each employee had tasks taken away or added, either because they want to do more or just because they get moved around to fill in gaps, regardless of whether they want it or not. This makes it particularly hard to define each job in a discrete fashion. It also reveals an extraordinary degree of subjective assessment about who can do what. In addition, it allows favoritism to develop and for implicit bias to take root.

#### B. Similarities in Performance Issues

As noted, the essential fungibility of positions within the office, the lack of performance standards and disciplinary procedures can contribute to the development of implicit bias as evidenced by favoritism and assessments of who is worth investing in as an employee – who has potential and who does not. Which employee’s mistakes can be forgiven and whose cannot. Which employee can be worked with and which employee is not worth more time and effort. This can be a “blind spot” – a calculation that does not account for how implicit bias works. This became very clear to this investigation in Ms. Bouffard’s comparison of Employee Band Mr. Sall in response to the questions about why Employee B was given so many chances over a period of years, and Mr. Sall was not:

Q. So I guess my question is why wasn't Abdullah given the same kind of structured, you know, this is we're getting down to brass tacks here. Why wasn't he given the same sort of opportunity that she was given?

A. And I know this is going to -- this is kind of a blanket, hard-to-grasp kind of statement, but having worked with Meagan, I could see her potential. I knew she could do the job. I also know that during some of these times, there were some

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<sup>185</sup> Interview with Katie Allaire.

<sup>186</sup> Interview with Jennifer Bouffard.

<sup>187</sup> Interview with Katie Allaire.

<sup>188</sup> Interview with Jennifer Bouffard. Interview with Employee A, noting that she still sometimes asks for Ms. Bouffard to reduce her duties.

<sup>189</sup> Interview with Jennifer Bouffard.

personal issues going on with [Employee B]. And so I knew that she could pick herself up and get it done. My interactions with Abdullah, I just did not see that potential. I did not, I could not see him grasping the concept of the day-to-day work. I mean, as -- I think as you pointed out, [Employee A] had done the receptionist job for like four months, and then moved into a secretarial position, no training. Six months in, and I'm still trying to train him on how to do three quarters of the job that that job entails. I just, from my experience, could not see him flourishing in this kind of clerical position. Whereas with [Employee B], I can -- I could see it. I know what her -- her capabilities were. I knew that she was, on some level in some of these, dealing with some personal issues, and so I knew that if I said to her, look, your personal issues, your personal life is affecting your job, and it could be detrimental; let's kick it up a notch. She could do that.

Q. Except that if you look back to 2015, I mean, there's -- she's doing or not doing the same things for like years until I guess she had this like formal evaluation in 2017.

A. And I mean, I mean, I wouldn't say that she wasn't doing them for years. She would have periods of not doing them and having an effect on her job. And so for the periods in between, she could excel at that job, and she could do it without supervision and without guidance, and would do a great job and produce that work. And then she would have, you know, fall off and have something happen, and we'd need to say look, you know, this happened, this is serious; you need to kick it back up; you need to get back to where you were. So I had seen her high potential to do that. I never saw high potential with Abdullah.

Q. Do you --

A. And maybe -- not to -- I mean, maybe we didn't give him enough of an opportunity? I felt like we had. I mean, six months is --[interruption and response ended].<sup>190</sup>

Ms. Bouffard's statements about Employee B, Mr. Sall and Employee A are troubling. There is little reflection of the role of bias or responsibility for creating an office environment where such subjective assessments dictate the terms of an individual's employment. They are significant pieces of evidence that support the reasonable grounds recommendation. They not only help to establish Mr. Sall's prima facie case -- they also provide substantial proof of pretext and thus a finding of disparate treatment.<sup>191</sup>

Employee A was praised for needing no training and getting up to speed so quickly that she can have an attorney assigned, with more than an implication that something was wrong with Mr. Sall for still needing training six months into his job. There is a sense that his need for continued training was an irritant and reflected something wrong with him. There is no recognition that it might be the office's fault, at least in part. This aligns with the Respondent's response (discussed above) about the manual. When asked if there was a manual, Respondent tried to defend its absence by saying that no employee had ever needed one before Mr. Sall and that its creation was the result of complaints about his work. Thus, instead of taking

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<sup>190</sup> Interview with Jennifer Bouffard.

<sup>191</sup> See cases cited *infra* discussing the use of certain types of evidence to establish pretext.

responsibility for not having one, it weaponized its absence against him and tried to use it as proof of poor performance, rather than a tool that might have prevented some poor performance at the outset. Thus, the employee who needs support is undervalued.

Second, there is the troubling evaluation of who has potential and who does not. The White employee whose mother worked in the office for years, who visited the office as a child, and who had occasional personal problems is seen as having potential, but not the employee who happens to be Black, Liberian and speaks with an accent. The White employee whose mother worked in the office for years, who visited the office as a child, and who had occasional personal problems is rewarded for good days and given over two years to correct her performance, whereas the employee who happens to be Black, Liberian and speaks with an accent should have had been performing well after only six months. Incidentally, this investigation should note there is no proof that Employee B ever excelled in her job given that there were no performance evaluations.

Employee B had been having documented performance issues since 2015. In September and October of 2016, while Mr. Sall was there, Employee B was written up twice (informally) for repeated errors that were somewhat similar in seriousness to some of the errors Mr. Sall was making. She was given an unsatisfactory performance evaluation and placed on probation for three months one month before Mr. Sall was hired. Thus, she was actually on probation while he was the receptionist. One of the accusations against Mr. Sall had been for failing to file paperwork. While this was true, Employee B's personnel file revealed that she had also – for years – failed to file paperwork just as important as the paperwork Mr. Sall was not filing.<sup>192</sup>

Starting in 2015 and continuing to the time of Ms. Sall's employment, Employee B received the following feedback:

**January 29, 2015:** Email to BK [Bram Kranichfeld] about [Employee B] recording JD [jury draw] officer notice return incorrectly. EMs [Emily McCarthy's] case set for trial on date officer wasn't available. I spoke with [Employee B] on January 27, 2015. Discussed her error which she readily admitted to, working too quickly and not paying attention. We discussed the fact that the case could have been dismissed if the court hadn't changed the date to accommodate the officer's schedule, as the error was on us.

**June 23, 2015:** BC [Ben Chater] made a complaint about subpoenas/notices not getting out. BK and I spoke with her and she indicated she had been in the middle of several things when the original request from Bram came through and she just didn't get it done. We discussed two other reports of the same nature that came in prior to BCs. BK put [Employee B] on notice that if other reports come in she may be moved to another position within the office that does not have the responsibility of an attorney caseload.

**April/May 2016: [While Mr. Sall was an intern]:** Spoke with her about keeping up with her work, offered to make adjustments to her workload if necessary. After my discussion with her I received an email from BC & JK complaining they sent an email dated April.19 requesting officer notifications for a merits hearing on May 4. At that time, the notices had not been sent out.

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<sup>192</sup> Personnel Record of Employee B. Discussed further *infra*.

**June 17, 2016: [While Mr. Sall was an intern]:** Justin [Jiron] spoke with [Employee B] regarding complaints that notices weren't getting out on time and cases hadn't been filed timely. Examples were provided. Justin advised [Employee B] that, due to unsatisfactory performance, she would be on a 3-month probation period whereby our expectation were for her to improve her performance to fully satisfactory, no missed notices/subpoenas and filing cases or time. BK [Bram Kranichfeld] spoke with [Employee B] regarding the office obligation to make sure that each position is fulfilling its work responsibilities and tasks correctly and timely, and that for the last 1 ½ years there have been several negative results to cases due to her unsatisfactory work performance. Discussed the availability of the Employee Assistance Program,

**September 14, 2016: [While Mr. Sall was employed]:** Meeting on performance, and advised that we had seen some improvement, but Justin again advised her of the importance of two critical issues, notices/subpoenas and filing petitions timely. Subsequently, BC & JK sent an email on October 5, 2016 with complaints about [Employee B] not getting subpoenas/notices out timely.

**October 12, 2016: [While Mr. Sall was employed]** Meeting on performance. Justin indicated the two main concerns of notices/subpoenas and filing cases timely had shown improvement, but there were other examples discussed of non-performance, such as four examples of work I had to follow up on, as [Employee B] hadn't responded to the emails from BC & JK. There was a subsequent meeting scheduled for November 10, 2016.<sup>193</sup>

There is no indication the November meeting was held.

When Ms. George took over, in January of 2016, she accepted and adopted Ms. Bouffard's evaluations of all the employees Ms. Bouffard supervised. Thus, Employee B was given a pass. Mr. Sall was not despite the fact that they had similar performance issues during overlapping time periods.

**FINDING:** Employee B is sufficiently similarly situated to Mr. Sall and is a comparator.

When Mr. Sall first started and Employee A was displaced as the receptionist and she became a legal secretary. One of the attorneys to whom she was assigned was Ms. George. She remained Ms. George's secretary until Ms. George was appointed as the State's Attorney, after which Jennifer Bouffard took over. Employee A and Mr. Sall did not get along, and both were spoken to by Ms. Bouffard about their relationship. The known extent of Employee A's administrative challenges involved persistent spelling errors.<sup>194</sup> In addition to being spoken to about her treatment of Mr. Sall, she was also disciplined for inappropriate behavior by Mr. Donovan, Ms. Bouffard, Mr. Kranichfeld and Mr. Jiron and given a verbal reprimand for discussing masturbation in the office within earshot of other employees and the public.<sup>195</sup> Neither incident was documented. Mr. Sall, at least on paper, was not terminated for inappropriate comments, but rather mainly for administrative issues. Thus he and Employee A are not sufficiently situated to be comparators. However – though not a comparator to Mr. Sall

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<sup>193</sup> Personnel file of Employee B.

<sup>194</sup> Interview with Employee A. Personnel file of Employee A.

<sup>195</sup> Donovan Interrogatories No.21.

in this regard, the treatment of Employee A in comparison to Mr. Sall is very much a component of the disparate treatment analysis and is evidence that supports Mr. Sall's ability to establish pretext.

**FINDING:** Employee A is not sufficiently similarly situated to Mr. Sall only because this investigation is not persuaded that Respondent terminated Mr. Sall for making inappropriate comments. Should Respondent later argue that Mr. Sall was terminated for his behavior and comments, the possibility exists that a court would find Employee A an appropriate comparator.

**CONCLUSION:** Mr. Sall can establish a prima facie case of discrimination. He can show that Employee B was sufficiently similarly situated to him, that she demonstrated sufficiently similar poor work performance, and she was not terminated, but in fact, was provided numerous opportunities over a period of years to improve her work performance. As a result, the circumstances surrounding the adverse employment action give rise to an inference of discriminatory intent.

## 2) Pretext Established – Disparate Treatment Proven

Mr. Sall has established a prima facie case of discrimination, and the Respondent has produced legitimate non-discriminatory reasons for his termination, as detailed in the sections above. At that point, the burden shifts back to Mr. Sall to prove that those reasons were pretextual. The same evidence used in the prima facie case may also be used as persuasive evidence of disparate treatment.<sup>196</sup> This investigation found a number of factors that suggested pretext, including 1) the decision to fire Mr. Sall after only eight days but not fire a White employee with a history of documented and similar performance issues; 2) the lack of contemporaneous documentation of all the performance issues cited by Ms. George in her email to John Campbell; 3) the reasons given by Ms. George in 2017 for firing Mr. Sall versus the reasons given from 2017 to 2020 during interviews 4) the subsequent tolerance by Ms. George and Ms. Bouffard's of the same poor performance and conduct by Employee B and Employee A some six and nine months after Mr. Sall was fired, respectively.

Ms. George had been in office only eight days before she fired Mr. Sall, an immigrant from Africa with dark skin tone, who had an accent. He had been targeted internally and externally for having that accent. He also had performance problems. However there was also a White employee, Employee B with significant similar performance problems that had been going on since 2015. Those problems were documented – many times. She had even been placed on probation right before Mr. Sall was hired. Yet, Ms. George chose not to fire her. Furthermore, she not only chose not to fire her when she fired Mr. Sall, she also chose not to fire her six months later when the very same performance problems came up yet again. This

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<sup>196</sup> Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000) (A company may have several legitimate reasons to dismiss an employee. But when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual."); See also Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext."); Perfetti v. First Nat. Bank of Chicago, 950 F.2d 449, 456 (7th Cir. 1991), cert. denied, 505 U.S. 1205 (1992) ("If at the time of the adverse employment decision the decision-maker gave one reason, but at the time of the trial gave a different reason which was unsupported by the documentary evidence the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification.").

makes her reasons for firing Mr. Sall pretextual – i.e. if the reasons given for firing him were so important, why not also fire Ms. Jarvis?

To that end, the very (dis) organization of the office works against the Respondent. The lack of accountability and the manipulation this allowed for with respect to supervisory decisions demonstrates this. When Ms. George and Mr. Campbell corresponded about Mr. Sall's termination, Mr. Campbell essentially offered Ms. George a road map – that is what types of actions by Mr. Sall might legitimize firing him. When asked why she did not tell Mr. Campbell some of the inappropriate things she herself had allegedly witnessed and heard him say, she responded:

...[T]o this date, I'm not entirely sure what misconduct means, but I wasn't -- I remember getting it [Campbell's email] and just thinking I'll just respond and tell him all the reasons that I terminated him. I don't remember thinking, oh my God, I don't think it's any of those...Because in my mind, again, not really knowing what the actual definition of misconduct is, he would fit that, and certainly fit gross misconduct as well, so. Q. In terms of his performance? A. And insubordination. Q. Okay. A. So I don't know. Q. So you felt like he could fit into any one of those based on a loose definition of who knows what it exactly means. A. Yeah, and I don't know that I'd had any of those thoughts at the time, though, because I just responded with all of the reasons that I did terminated him, so I just don't know that I put that much thought into the which one of these it is, especially because it says, "et al". ..So I knew that there were other options.

The ability to manipulate employment decisions in this way creates the opportunities for differential treatment. In her thought provoking 2017 law review article arguing for a theory of discrimination whereby a plaintiff can establish intent and liability for discrimination through an analysis akin to the tort of recklessness, Professor Stephanie Bornstein points out the following:

First, six decades of social science research has documented again and again how bias infects common patterns of employment decision making, resulting in discriminatory outcomes and inequality. Second, this research is so established that, for at least the past two of those six decades, many employers have voluntarily and publicly adopted bias-prevention measures to counteract the known impact of bias--so much so that successful intervention measures are now well known. What is more, technology has made bias-reducing interventions cheaper and easier to adopt than ever before. Yet the law of Title VII still lags behind current scientific knowledge and modern business practices.<sup>197</sup>

To her credit and the credit of John Campbell and Annie Noonan and the Department of State's Attorneys and Sheriffs, Ms. George instituted a system of performance evaluation shortly after she took office. However this was of no benefit to Mr. Sall. Additionally, the use of a system of evaluation after Mr. Sall was fired ironically establishes evidence of pretext based on the preferential treatment that continued to be extended to Ms. Jarvis, despite the fact that she kept making the same

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<sup>197</sup> Bornstein, 105 Calif. L. Rev. 1055 at 1093.

mistakes, over and over again, despite warnings and threats, after Mr. Sall was terminated.

Respondent has argued that personnel decisions made by Ms. Bouffard and Ms. George with respect to Employee B and Employee A should not be admissible because they had no bearing on the decision to fire Mr. Sall.<sup>198</sup> It is true they had no bearing on the *reasons* to fire Mr. Sall. However that is not the purpose that this investigation seeks to use them. They do in fact have a great deal of bearing on the existence of pretext and the defeat of the legitimate non-discriminatory reasons offered. It is evidence of the options that Respondent had and extended to Employee B and that they could have extended to Mr. Sall, but chose not to.

Mr. Jiron, Mr. Kranichfeld, and Ms. Bouffard (and presumably Mr. Donovan by virtue of not doing anything to stop it) spent approximately two and a half years trying to improve [Employee B's] performance in some very specific ways because she kept on making the same sorts of mistakes. They placed her on probation, they threatened her, praised her, and considered reducing or changing her workload. They counseled her and suggested the Employment Assistance Plan (EAP) to her. Even so, after Ms. George took office, Employee B was written up yet again:

**March 22, 2017:** Evaluation held. Much discussion regarding punctuality and improving productivity. To date there has been little improvement. Continues to be late to work additional breaks during the day, all adversely impacting productivity and work product.

**June 22, 2017:** BC advised Jennifer that there was a missing flash cite. [Employee B] walked into the conversation and insisted she had no cases on her desk. I went back with [Employee B] to her desk to go through the pile of work she had. As we were looking through the pile BC came back to tell me that there was a second juvenile whose paperwork hadn't been filed. At that point, I took the pile from [Employee B] to look myself and found BOTH cases. One juvenile case was processed for the next event, but the other juvenile had to be recited by law enforcement.

**July 5, 2017:** SG [Sarah George] received a voicemail complaint from a victim on a juvenile matter upset because she received a subpoena on July 5 for July 7 merit hearing. BC provided an email that was sent to [Employee B] on June 19, 2017, requesting the issuance of subpoenas/notices for this merits hearing. [Employee B] did not do notices until July 3, 2017.<sup>199</sup>

Despite the years of serious errors in the same areas, and despite continuing complaints from the attorneys to which she was assigned, and similarity of the criticisms Mr. Sall received,

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<sup>198</sup> Respondent has argued that *Ballard v. University of Vermont*, 166 Vt. 612, 693 A.2d 713 (1997) (evidence of employee's performance after he was hired irrelevant to Title VII and FEPA claims based on defendant's hiring decision and inadmissible to bolster defendant's credibility on pretext issue) controls since, if performance after hire is irrelevant, personnel actions relating to other employees taken his terminations would have no bearing on the reasons for his termination six and nine months before. This is not the purpose for which this investigation seeks to use this evidence.

<sup>199</sup> Personnel records of Employee B.



Ms. George still chose not to fire Employee B as she had Mr. Sall. Instead she wrote the following conditions which amounted to little more than a slap in the wrist:

As a result of your unsatisfactory performance, the following steps will be instituted immediately:

1. Your desk/workspace will be relocated
2. You will check in with Jennifer upon arrival at work. Your work schedule is Mondays 7:00AM to 3:30PM, Tuesdays through Fridays 8:00AM to 4:30PM. You are expected to arrive on time and work until the end of your scheduled day.
3. Your lunch time is Mondays from 11:00AM to 12:00PM, Tuesday through Fridays, from 12:00 PM to 11:00 PM. You will keep to that schedule unless your supervisor allows a variation in that schedule on any given day.
- 4: You will check in with Jennifer any time you leave the office. You are not to leave the office, other than for authorized break-time/lunch time or scheduled time off, without approval from Jennifer, (or in her absence, from, [sic] one of the following: Sarah George; Justin Jiron or Katheryin Allaire).
5. If there are further instances of non-performance, failure to adhere to your schedule, or other performance deficiencies, you will be subject to corrective and/or disciplinary action, up to and including dismissal.<sup>200</sup>

These are not severe punishments. They sound like the reiteration of standard, ordinary work rules. The situation repeated itself with respect to Employee A. In November 2017, nine months after Mr. Sall was fired, Employee A received a letter from Labor Relations Manager Annie Noonan informing her that she was being investigated:

Employee A: This is to advise you that the Department of State's Attorneys and Sheriffs will be reviewing complaints that you may have engaged in misconduct specifically, behaviors that constitute bullying and created an antagonistic and hostile work environment. I will be investigating these allegations, and you will be interviewed as part of this investigatory process.<sup>201</sup>

Employee A stated she spent about an hour with Ms. Noonan and that she was allowed to bring her mother to the meeting, as noted above, though her mother was not allowed to speak.<sup>202</sup> After the investigation, Ms. George addressed a letter to Employee A stating the following:

After the review of the issues presented to you in writing by letter...and discussed with you in person by the SAS Labor Relations Manager...I am issuing this Letter of Feedback, as well as performance expectations that will be reviewed as part of your annual evaluation. I want to note and commend you on the changes in your attitude and behaviors. Your supervisor and I have both noticed significant improvement in the areas cited in the...letter. It is apparent to me that you have taken the directives and feedback seriously and that you are working to make the

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<sup>200</sup> Id.

<sup>201</sup> Letter from Annie Noonan to Employee A, September 20, 2017.

<sup>202</sup> Interview with Employee A.

necessary changes and work with others in a professional manner. For the record, you were warned...that you were engaging in disrespectful and unprofessional interactions with co-workers and others, affecting the work environment and morale of the office. The letter outlined examples of your behaviors, and you were advised that these behaviors were to stop immediately, and not to engage in any retaliatory actions, or you would be subject to disciplinary action, up to and including dismissal. The investigation into the complaints verified some of the allegations, and therefore, this letter of feedback is being issued. As noted above, we are encouraged by your prompt response to the directives in the...letter. If you continue to be positive and professional in your daily work tasks and interactions, and if you are meeting performance expectations outlined in the attached document, this letter will be removed from your personnel file in one year. The following areas will be part of a special evaluation and your next annual evaluation: conduct [sic] yourself in a professional manner, including your communications and interactions with co-workers, supervisors, partner agencies, and clients; that you employ customer-focused communication skills; that you work as a respectful member of this office team; and that you remain open to constructive feedback. These areas are part of the job expectations and incorporated into the performance review.<sup>203</sup>

It is notable that the letter referenced Employee A's conduct not just towards Ms. Jarvis, but towards other people as well. Employee A stated she received a separate letter from Ms. Noonan that set out a number of other incidents that were being reviewed in addition to her bullying of Ms. Jarvis.<sup>204</sup> All personnel file information on Employee A (and others) was requested by this investigation at several different intervals over three years. This letter was not provided to the investigation and it was unaware of it until the interview with Employee A.<sup>205</sup>

According to Employee A, it included a police officer calling and complaining to Ms. George that Employee A had told him she did not want to talk to him because he was a friend of [Employee B]'s.<sup>206</sup> It included a complaint by another attorney in the office to Ms. Bouffard after hearing Employee A call a police officer a "pumpkin."<sup>207</sup> Employee A referenced a long history of disagreements with [Employee B], stating that it was "very territorial" when she came to the office because both she and Employee B were single.<sup>208</sup> She stated that Employee B had been dating "a bunch of cops" and that Employee A's friendship with one of the "cops" Employee B was friends with had turned into "drama" because Employee B started reading Employee A's text messages.<sup>209</sup> Employee A was unclear how much Ms. Bouffard knew about this, though she knew at least one of the secretaries frequently spoke to Ms. Bouffard about

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<sup>203</sup> Letter from Sarah George to Employee A, November 7, 2017.

<sup>204</sup> Interview with Employee A.

<sup>205</sup> Id.

<sup>206</sup> Interview with Employee A.

<sup>207</sup> Id. Employee A stated it was Halloween and he was wearing orange and black and that he accepted her apology.

<sup>208</sup> Id.

<sup>209</sup> Id.

what was going on.<sup>210</sup> Employee A also stated that there had been allegations that Employee B had stolen a former employee's glasses which had caused that employee to leave the office."<sup>211</sup>

Employee A also stated that there had been a follow-up meeting with Ms. George and Ms. Bouffard after the meeting with Ms. Noonan, where she reported that she had assured them things were improving since she was in counseling with her boyfriend and attending church. Ms. Bouffard's own description of Employee A's personality and office behavior was tolerant and even solicitous considering Employee A's behavior:

[She] can be abrasive. Which is why I thought she would be a good fit into the new -- into the secretary position and put Abdullah into the customer service position was another reason, or another thought of mine, was that, you know, let's -- we can work with her a little bit not so upfront, and so that was really where I was at with her. Otherwise, the work itself was getting done. We had some issues with her with some spelling mistakes in some of her letters that we talked about. You know, those kinds of things that, you know, I was working with her on, but my recollection is that she was doing the full job by then."<sup>212</sup>

Ms. Bouffard also stated, "I also think with respect to [Employee A], there isn't -- there is a maturity level that she needs to reach, and I see the potential for her, and so I would use it as sort of a teaching for her."<sup>213</sup> This is reminiscent of the observation that Employee B had "potential" and Mr. Sall did not. Ms. Bouffard viewed Employee A as a good worker who tried hard. Mr. Kranichfeld stated that describing her as a hard worker was a "stretch."<sup>214</sup>

Employee A herself noted that she was not liked by one of the attorneys to whom she was assigned.<sup>215</sup> She was verbally reprimanded by Mr. Donovan and others for discussing masturbation where the public could hear her.<sup>216</sup> She may have been verbally reprimanded by Ms. Bouffard after Mr. Donovan and Ms. Bouffard discussed her behavior towards Mr. Sall.<sup>217</sup> Ms. Allaire noted that Employee A could go "overboard" in her comments and would not "let go" of things.<sup>218</sup> She also noted that Employee A had called her a "liar" for no good reason and that she had not been happy about it.<sup>219</sup> Employee A stated that Ms. George had told her that she had considered firing her, but had not because Employee A had "really progressed."<sup>220</sup>

During interviews, both Ms. Bouffard and Ms. George stated that they believed that the experience of being given unsatisfactory performance feedback had made an impact the two women. This is exactly the point: the investment *did* make an impact on Employee B and Employee A. It might have also made an impact on Mr. Sall if Ms. George and Ms. Bouffard

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<sup>210</sup> Id.

<sup>211</sup> Id.

<sup>212</sup> Interview with Jennifer Bouffard.

<sup>213</sup> Id.

<sup>214</sup> Interview with Bram Kranichfeld.

<sup>215</sup> Interview with Employee A referencing Amy Griffin.

<sup>216</sup> Donovan Interrogatories no.21.

<sup>217</sup> Donovan Interrogatories no.19.

<sup>218</sup> Interview with Katie Allaire.

<sup>219</sup> Id.

<sup>220</sup> Interview with Employee A.

had provided him the same opportunities and chances. Mr. Donovan responded in his interrogatories that Mr. Sall should have been given a second chance:

....[W]hile Mr. Sall may have had challenges in the workplace (see previous responses), it is my belief they could be overcome by hard work, perseverance, and learning opportunities.<sup>221</sup>

Ms. George provided further contrast between Employee A and Employee B with Mr. Sall in terms of their responsiveness to feedback:

[Speaking of Employee A's September 2017 misconduct]: [S]he didn't really know why they [Employee Band Employee A] didn't like each other...she [Employee A] wanted to make things right and she certainly understood that it was not acceptable, and that if she did it again, I was going to fire her. Q. And did her behavior change --A. Yes...Yeah, significantly. Q. ....Have you had any problems with her since then of that nature? A. No, definitely not. I think the biggest issues with her is just she's loud. I often have to email her because now my office is much closer to just lower her voice....She's just a loud personality. Q. ....[S]ince [Employee B's] evaluation, have you had any problems with her? A. No. No. Q. ....[O]ne of the questions that I have is with Abdullah, why not just say hey, I'm the new boss in town; you're doing a terrible job here...I'm going to put you on probation, and were going to see...how this goes, but you're on notice...A. So again, I had had both [Employee B] [sic] and [Employee A] as my admin, and so I had had to confront them about issues over the years, and every time that I did, they were always very receptive to the criticism or the constructive criticism, and always wanting to make sure that they were doing it right and/or the way that I wanted it done, and rarely, if ever, I can't really recall either of them making that same mistake again. Maybe they'd make another mistake, but they would always learn from the conversations that we had. And again, were always very open to that, and you know, apologetic. You know, the six or seven months with Abdullah were just the complete opposite. It was very clear to me that he had no interest in listening to what I was telling him, or doing it differently, doing it the way that I was asking him to do it. He would do the same thing repeatedly, on a daily and weekly basis despite me telling him not to, despite Jennifer telling him not to, and I felt by the time I got into this position, it had been seven months of me trying to get him to a better place, and he had not gotten -- I don't want to say any better, but very close to any better at the job, and he still wasn't doing a lot of the tasks that [Employee A] and others before him were doing...I also felt like the mistakes that he was making were mistakes that were impacting the entire office rather than -- some of the stuff that was going on with [Employee A] or [Employee B] was a very personal, one-on-one thing...a...very specific issue that needed to be addressed. It wasn't these like kind of systemic issues where...having a stack of cases this big that haven't got to the attorneys yet ripples out and really impacts the entire office in a very negative way....I felt like it was really everybody was being impacted by Abdullah's lack of work. Q. Why do you think that he would not have respected your authority....you were

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<sup>221</sup> Donovan Response to Interrogatories no.59.

appointed by the governor...so why wouldn't he have said...Sarah is taking over from T.J.; she is my boss now. A. Well, a couple reasons. One, I think that state's attorney or deputy state's attorney, I'm still a supervisor or I'm still a -- not a supervisor, but you know, Jennifer is always very clear that the administrative staff works for the attorneys, and so it wasn't ever -- I was never in a position that we -- that he didn't have to listen to the things that I was asking him to do. And it didn't make any difference to him. But even in the week that I was state's attorney and he was still in that admin position, nothing changed. He had very little -- I remember when I first came back, that I came in and everybody was congratulating me, and he didn't even look up from his computer.... [T]he deputy state's attorneys are not...supervisors of the admin staff unless they are assigned an attorney...I don't mean that I was a supervisor, but me telling him that he was doing something wrong should have been enough for him to fix it, I guess is my point...he, a couple of times, gave me the impression that unless T.J. was telling him to do something, he was not going to do it, and it was not because it was T.J. was the state's attorney it was because it was T.J.. And unless T.J. told him -- I just came in on like a Monday morning with an email that said, you know, T.J. has done this, and when I went to Jen pissed off about it, she said T.J. told me find a place for Abdullah, and that was my only option, so. Q. ....I'm very struck by the specificity of your interactions with him...you know... to say, you put this piece of mail in my box....Were other attorneys having those specific types of interactions with him where they were holding him accountable? Because it sounds like you were holding him accountable. A. It was. I mean, I know that, again, when I would go back and like, you know, vent to another attorney about it, they would say, I know, he does it all the time, or I know, but I can't recall whether any of them said.<sup>222</sup>

It should be noted again that Ms. George was not Mr. Sall's supervisor during the time period referenced above. She was his supervisor for only eight days. In any case, making the time to document work performance and provide feedback represents an investment of time and effort in an employee. It provides remedial opportunities and it puts them on notice that they may lose their job if they do not change. Employee A and Employee B received a multitude of second chances. Mr. Sall did not.

It is impossible not to come away with the impression that Mr. Sall was disposable to Ms. George and Ms. Bouffard - an African immigrant, with dark skin and an accent - a person easy to get rid of once Mr. Donovan left the office - so easy to get rid of that they did not want to bother create an opportunity for him to learn to do his job better or to see why he could not do it well. They absolved themselves from any responsibility for his errors or problems. They failed to ask whether there things that made his job difficult they could have addressed - like abuse from third parties. The impression that he was negligible in comparison to Employee A and Employee B is inescapable. Those two young women were "grown," by the office; Mr. Sall was not.

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<sup>222</sup> Interview with Sarah George.

## CONCLUSION

This report represents three years of information gathering, interviews and evidence assessment. There were challenges along the way with respect to the cooperation of parties on both sides and collaterally. It required an analysis of an entire office – not just overall, but with respect to individual positions and how they contributed to the collective. This investigation was tasked with trying to understand Mr. Sall’s job duties and evaluating his training as well as how well he performed those duties. The network of supervisory relationships had to be investigated and clarified as well as the relationships Mr. Sall had with his co-workers. Finally, it had to understand how other agencies and the court interfaced with Mr. Sall in the performance of his duties. This investigation covered events at the CCSAO at a specific and fairly brief time period – approximately a year and a half.

Finding objective, fact-based evidence in this case was challenging. Some of the testimony was puzzling. In one account, one of the witnesses interviewed stated that she had seen Mr. Sall treat Jennifer Bouffard in an abusive manner.<sup>223</sup> When questioned whether Mr. Sall had ever been rude or abusive to her, Ms. Bouffard had replied “No, never.”<sup>224</sup> Mr. Sall stated that the secretaries in the office made him uncomfortable – as a male – because they talked about boyfriends, sex, referred to men as “dogs” and the like.<sup>225</sup> Several witnesses (plus the email cited above from Ms. Bouffard to secretarial staff) suggested this was true. However, in one interview a witness with as much or more opportunity to know based on his placement in the office and the fact that Employee A was his secretary, denied any knowledge of this and stated it was simply not credible.<sup>226</sup>

It is true that Mr. Sall was a male unilaterally hired by a male, and that his hire displaced women who had not been afforded the privilege of being unilaterally hired into their jobs, however Mr. Sall had no idea of that. Mr. Sall’s hire disrupted the secretarial assignments to the attorneys as the office staff assignments were moved around. Mr. Kranichfeld suggested that Mr. Donovan could have required a “diagnostic” component to see what training Mr. Sall needed, including more training in legal terminology and court processes so they had context.<sup>227</sup> Mr. Sall basically worshipped Mr. Donovan and Mr. Donovan’s closest male colleagues and this investigation believes there is evidence that their opinion of him carried more weight than the opinion of the women in the office.<sup>228</sup>

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<sup>223</sup> Interview with Nietra Panagoulis.

<sup>224</sup> Interview with Jennifer Bouffard.

<sup>225</sup> Interview with Abdullah Sall; Correspondence from Sall 8/9/17: “In the state attorney office, everyday in the office the conversation starts about a guy for Employee A and Melissa. Employee A will initiate the conversation and Melissa will offer her expertise. Melissa explains every male behavior in negative way. She routinely puts the nastiest possible spin on male behavior and motives. Men are creepy, men only wants sex, men feel like they’re owed sex, and how she read this book and that book. When I try to offer different narratives and tell them many of us male don’t walk around thinking as she explained. She intensely defended her position but said that’s American men think. In my mind you have TJ , Bram, Justin and Ryan Richards they are all decent men that are very committed to their family lives despite their workload. Their attitude was not welcoming in the first place. It so sad whenever I think about this event how in it, Sarah make me looked like I was just worthless person in my work it is painful.”

<sup>226</sup> Interview of Franklin Paulino.

<sup>227</sup> Interview with Bram Kranichfeld.

<sup>228</sup> He apparently bought Mr. Donovan a bicycle which sat in the hall until Mr. Donovan left the office.

This investigation believes that a casual and generalized “thumbs up” “doing a great job” throw-away comment from Mr. Donovan had the power to lessen the sting of any sense he was not performing well elsewhere – to the extent he sensed that, and Mr. Sall did want to do a good job for Mr. Donovan. He was utterly humiliated that he had been fired. He also believed that his termination had destroyed any chance he had for winning a seat on City on City Council.<sup>229</sup> Once hired, Mr. Donovan essentially stepped back and ceased providing any meaningful oversight. The combination of Mr. Donovan’s hands-off approach and Ms. Bouffard’s self-described tendency to avoid conflict and confrontation was not the approach Mr. Sall needed. Mr. Sall was given both mixed messages and no messages at all.<sup>230</sup>

It is not unusual for a new head of an office to terminate employees hired by a predecessor, particularly in an office where people are employed at will. This investigator had never met Ms. George before interviewing her and is not a resident of Chittenden County. This investigation finds no evidence that Ms. George or Ms. Bouffard acted out of explicit bias towards Mr. Sall because of any of the protected categories into which he falls. Rarely does such evidence exist. Support for her termination of Mr. Sall was nearly unanimous although almost every person interviewed stated that they liked Mr. Sall and felt badly that he lost his job. This investigation notes the testimony from in and outside the office and from Mr. Sall himself, described Ms. Bouffard as kind and professional. The findings and recommendations of this report are not meant to suggest that she is not. Unfortunately, good will, kindness, warmth, professionalism – none of these personal or professional attributes inoculate any of us from making employment decisions that reflect implicit bias and affinity bias if we do not commit to an office environment which is professional, transparent and accountable.

Implicit bias, explicit bias and resentment swirled around Mr. Sall, unacknowledged and unaddressed from the moment he got the job. Again, implicit bias is at work all around us – in our own offices, in our relationships, in nearly every significant choice we make. Implicit bias exists in our DNA; it is embedded in the “values” we learn and the de-valuation we learn at the knees of our families, teachers, and the media. Ms. Bouffard’s approach to supervision shielded or excused the employees she wanted to shield or excuse for as long as she chose, which reflect her own biases. Ms. George offered two potential White comparators yet another opportunity to rectify their repeated poor performance and unprofessional office conduct, but summarily dismissed Mr. Sall only eight days after she was appointed. This reflects her biases. Ms. George could have considered hitting the “reset” button with Mr. Sall. She could have told him clearly what his deficits were, what the future expectations were, and put him on probation. She chose not to; this reflects her biases. These observations are made because this is the investigation to which this investigator was assigned – they are not meant to be finger-wagging – they should be instructive and cautionary to any reader.

Many witnesses were interviewed. Not all were credible. Not everything Mr. Sall said was credible. It is typical in the defense of employment cases to put the complainant on “trial,”

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<sup>229</sup> Interview with Abdullah Sall. His name had been placed officially, on the ballot, on January 25, 2017, two days before his termination. He was running for the South District seat. Joan Shannon ultimately won the seat.

<sup>230</sup> Correspondence with Sall 8/9/17: Q: Did you ever receive constructive criticism or advice from any of your bosses? Honestly, my performance never reaches to the point where this was warranted. I have asked Jennifer many times about my work performance and she always told me I was doing a great job and she is happy to have me on team state.

but in a neutral investigation, this must be balanced with the availability of corroboration, and corroboration through documentation was inconsistent.

At the time she terminated Mr. Sall, Ms. George was a first-time supervisor in one of the most prominent positions in the State with a formidable charge. She was appointed by the Governor initially – not elected – but with the knowledge that she would have to run for election in a matter of months. She was following in the footsteps of the newly elected Attorney General with a very public persona. There were people who wished Mr. Kranichfeld had been appointed - among them Mr. Sall.<sup>231</sup> At the time she was appointed, she was personally exasperated with Mr. Sall. Her inexperience and lack of basic awareness around the issues of workplace bias are highlighted by the fact that she did not realize that firing Mr. Sall might very well believe he had been treated in a discriminatory manner. Ms. George states that she has never engaged in intentional, overt discrimination and she denies engaging in any subtle forms of discrimination.<sup>232</sup> According to John Campbell, who has known her since childhood, she is incapable of committing a discriminatory act.<sup>233</sup>

However, no one with White privilege, no matter how educated or well-meaning is immune from implicit bias or committing an unwitting discriminatory act. It takes education and effort and awareness to avoid the land mines that can so easily be triggered by something that seems obvious and simple. It is difficult to refute the very strong inference of discrimination in this case. Mr. Sall is African – he has an accent – his skin tone is dark. Ms. George fired him only eight days after taking office, but kept on a White co-worker with a significant amount of documented performance issues sufficiently similar to those of Mr. Sall. Six and nine months later, she gave more chances to Employee B and Employee A for repeated performance issues in [Employee B's] case and serious misconduct issues in Employee A's case. Considering all of the evidence and all of the lack of evidence, there is evidence of disparate treatment based on Mr. Sall's national origin, race, and color.

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<sup>231</sup> Interview with Abdullah Sall. Interview with Sarah George. Ms. George remarked that Mr. Sall did not congratulate her when he returned to the office.

<sup>232</sup> Interview with Sarah George.

<sup>233</sup> Interview with John Campbell.



**PRELIMINARY RECOMMENDATION:**

1) This investigation makes a preliminary recommendation to the Human Rights Commission that there are *reasonable grounds* to believe that the Department of State's Attorneys and Sheriffs & the Chittenden County State's Attorneys' Office discriminated against Mr. Sall based on his national origin, race and color, in violation of 21 V.S.A. § 495.



Nelson M. Campbell  
Supervising Attorney & Investigator  
June 1, 2020

Bor Yang  
Executive Director & Legal Counsel