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INVESTIGATIVE REPORT

Complainant: Rebecca McGurl - Vermont HRC Case - HRC Complaint # E18-0003
 Respondents: Agency of Transportation (AOT)
 Charge: [REDACTED] Retaliation/FMLA

BACKGROUND AND SUMMARY OF COMPLAINT

Rebecca McGurl filed a complaint of discrimination based on [REDACTED] retaliation based on her use of FMLA leave and for engaging in an otherwise protected activity. [REDACTED] She [REDACTED] claimed that the AOT retaliated against her [REDACTED] by taking her keys, restricting her computer use and accusing her of wrongdoing while she was out on the leave.

SUMMARY OF RESPONSE

AOT denied [REDACTED] that it retaliated in any way against her and that any actions it took while she was on leave were justified due to concerns over security or personnel matters.

PRELIMINARY RECOMMENDATION

[REDACTED]

- 2) This investigation makes a preliminary recommendation to the Human Rights Commission to find there are *reasonable grounds* to believe that the Agency of Transportation retaliated against Rebecca McGurl pursuant to 21 V.S.A. §495(a)(8) and pursuant to 21 V.S.A. §473 of the Vermont Parental and Family Leave Act.

DOCUMENTS

- Complaint – 9/15/17
- Response to Complaint – 10/16/17
- Response to Request for Information – 12/26/17
- Response to Request for Information – 2/23/18
- Rebecca McGurl's Complete Personnel File
- Emails – Approximately **700MB**
- Human Rights Commission Investigative Report – E11-0005 – McGurl v. Department of Public Safety (NRG) –with supporting documents
- DHRIU – Final Report – Patnoe – 3/9/18
- DHRIU – Final Report – Blackmore – 3/9/18
- DHRIU Investigative Interviews
- DHR Personnel Policy 11.7 - ELECTRONIC COMMUNICATIONS & INTERNET USE
- DHR Personnel Policy 3.3. - DISCRIMINATION COMPLAINTS
- Supervisory Feedback Memo – 7/20/17
- Mileage Reimbursement Excel Charts – Jim Cota and Rebecca McGurl
- AOT Leave and Separation Data – Excel Spreadsheet – 2016-2017
- AOT DISTRICT INFORMATION TECHNICIAN II Job Description
- Dave Blackmore Meeting Notes – 8/31/17
- DHR Correspondence to McGurl re: FMLA Leave – 8/31/17
- EEOC ENFORCEMENT GUIDANCE ON RETALIATION – 8/25/16

INTERVIEWS

- Rebecca McGurl – Complainant – 11/2/17, 1/24/18, 6/1/18
- David Blackmore – AOT Senior Manager II- 6/18/18
- Tracey Cassano - AOT District Information Tech IV -Bennington – 2/12/18
- Melissa Champney -AOT Dist. Information Tech III –Colchester – 2/15/18
- Mike Chrastina – AOT Technician IV – 6/13/18
- Jim Cota – AOT District Project Manager - 6/13/18
- Heidi Dimick – DHR – Human Resources Manager – 7/12/18
- Christine Emmons - AOT Dist. Information Tech II - St Johnsbury – 2/12/18
- Anna Firliet – DHR Administrator IV – 7/11/18
- Janelle Green - AOT Dist. Information Tech III-Derby – 2/15/18
- Donna Howard – AOT Regional Storekeeper II– 2/21/18
- Joe LeClair – Digital Services - IT Specialist IV - 7/20/18
- Ernie Patnoe – AOT Senior Manager III- 6/18/18
- Scott Rogers – AOT Senior Manager III – 7/23/18
- Joseph Schmidlen- AOT Dist. Information Tech II-St Albans – 2/12/18
- Angela Thompson - AOT Dist. Information Tech II -White River Junction – 2/12/18

[REDACTED]

[REDACTED]

[REDACTED]

3) **RETALIATION – INTRODUCTION: (See Timeline – ATTACHMENT 1)**

The statute governing retaliation for exercising rights under the FMLA and VFEPA respectively read as follows:

- **21 V.S.A. § 473. Retaliation prohibited**
An employer shall not discharge or in any other manner retaliate against an employee who exercises or attempts to exercise his or her rights under this subchapter. The provisions against retaliation in subdivision **495(a)(8)** of this title and the penalty and enforcement provisions of section **495b** of this title shall apply to this subchapter.
- **21 V.S.A. 495(a)(8). Retaliation prohibited.** An employer, employment agency, or labor organization shall not discharge or in any other manner discriminate against any employee because the employee:
 - (A) has opposed any act or practice that is prohibited under this chapter;
 - (B) has lodged a complaint or has testified, assisted, or participated in any manner with the Attorney General, a state's attorney, the Department of Labor, or the Human Rights Commission in an investigation of prohibited acts or practices;
 - (C) is known by the employer to be about to lodge a complaint

The events underlying the retaliation complaint began on August 30, 2017, when Ms. McGurl emailed Heidi Dimick at DHR stating that she wanted to file a complaint against Blackmore. Ms. Dimick told her there was no form to fill out, that she should come in and make an appointment to talk about the situation. She made an appointment for the following week, on September 5, 2017. Dimick had been working with Blackmore and others to devise a plan for improving Ms. McGurl's performance. Dimick did not disclose this to Ms. McGurl, she simply assigned the interview and subsequent follow-up to her co-worker, Anna Firliet as she felt this would resolve any conflict of interest.

The next day, on August 31, 2017, McGurl formally filed for FMLA leave. Her provider faxed the completed FMLA form to her office, where Blackmore received it. The provider identified Blackmore as the cause of Ms. McGurl's stress and need for leave on the FMLA form, upsetting Blackmore. Ms. Firliet approved the leave that same day. The next week, on September 5, 2017, Ms. McGurl gave a recorded interview to Firliet at DHR about Blackmore. Firliet, at Blackmore's request, asked Ms. McGurl for her work keys, and at Blackmore's request, Firliet asked Ms. McGurl not to use her State email account while on leave. Firliet framed it as a way for Ms. McGurl to avoid stress, however this was not the real reason for the request. Blackmore had asked Firliet to convey this to Ms. McGurl, claiming she had sent out misleading emails to people giving erroneous instructions about what to do while she was on leave. In fact, she had simply sent out a typical out-of-office email saying she was out on FMLA.

On September 15, 2017, after she realized DHR was not going to formally investigate, Ms. McGurl filed a complaint with the HRC claiming discrimination and retaliation and specifically naming Blackmore and Patnoe as having committed discriminatory acts. On September 22, 2017, notice of the HRC complaint was forwarded to Scott Rogers, Dave

Blackmore and Ernie Patnoe. It is unclear whether the actual complaint itself was attached, however those employees were put on notice that Ms. McGurl had filed the complaint and named them. Subsequent email exchanges show that AOT's Civil Rights Compliance Chief, Lori Valburn, voiced concern over this with Scott Rogers, who dismissed her concerns.

On October 4, 2017, two weeks after the HRC complaint naming Patnoe and Blackmore, another DIT employee "discovered" one of Ms. McGurl's hard copy files and brought it to Blackmore's attention. The file contained usernames, passwords and PIN #s that Ms. McGurl had used to help people set up iPhone and IPADS and other equipment. While expressing concern that the find revealed a security breach, no one contacted the Agency of Digital Services (ADS) to report it. Instead, they had Ms. McGurl removed from the OPS-Tech Team contact list on October 4, 2017. On October 8, 2017, Blackmore requested that Ms. McGurl's "IT privileges to ALL state computer access be immediately restricted until further notice." On October 10, 2017, Patnoe, without explicitly naming Ms. McGurl, sent out an email to people who would have known he was implicating Ms. McGurl in a possible security breach. He characterized the information he was providing as a "factual" and "not just hearsay breach."

A. *Prima Facie Case*

To establish a *prima facie* case of retaliatory discrimination based on a complaint of discrimination or for using FMLA, Ms. McGurl must show that:

- (1) she engaged in a protected activity;
- (2) her employer was aware of that activity;
- (3) she suffered adverse employment decisions; and
- (4) there was a causal connection between the protected activity and the adverse employment actions.¹⁹

Generally, protected activity consists of either participating in a VFEPA protected process (filing a complaint of discrimination), or opposing conduct made unlawful by VFEPA or related statutes (retaliation for going on leave). Retaliation can be proven even when there is insufficient proof of the underlying complaint, so long as the complaint was made in good faith.²⁰ The burden of establishing a *prima facie* case is not an "onerous" one.²¹

First element

Ms. McGurl can clearly prove the first element of the *prima facie* case. She engaged in two protected activities. First, she emailed Heidi Dimick at DHR on August 30, 2017, to ask how

¹⁹ *Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 376 (2004).

²⁰ *Cooper v. New York State Dept. of Labor*, 819 F.3d 678, 681 (2nd Cir. 2016).

²¹ *Beckmann v. Edson Hill Manor, Inc.*, 171 Vt. 607, 608 (2000)(mem.).

to file a complaint against her supervisor, Dave Blackmore.²² A reasonable person in Dimick's position would have known there was a good chance the complaint would be about discrimination since Blackmore had brought Ms. McGurl's use of the terms "discrimination" and "retaliation" to Dimick's attention a few months before.²³ Ms. McGurl indisputably engaged in protected activity by filing for FMLA leave on August 31, 2017. Her provider faxed the leave form to her office naming Blackmore as the source of her work-related stress. He read the form and was familiar with its contents. On September 5, 2017, Ms. McGurl met with and was interviewed by Anna Firliet at DHR as a follow-up to her request to file a complaint about Blackmore and AOT management knew Firliet had interviewed her and took the interview date as an opportunity to have Firliet get her keys and tell her not to use her state email account. Finally, on September 15, 2017, Ms. McGurl filed an HRC complaint. These actions represent protected activities under the VFAPA and FMLA.

Second Element

Some of the facts that establish the first element of the *prima facie* case also establish the second element. The notification to DHR that she wanted to file a complaint against Blackmore, the receipt by Blackmore and DHR of the FMLA form, her interview with Ms. Firliet and AOT's knowledge of the interview and her HRC complaint represent her employer's awareness of her exercise of protected activity. On September 22, 2017, AOT received the McGurl HRC complaint filed with the HRC on September 15, 2017. That same day notice of the complaint was forwarded to a group including Scott Rogers, Dave Blackmore and Ernie Patnoe. It is unclear whether the complaint itself was attached.

Subsequent emails between Lori Valburn, Civil Right Compliance Chief, and Scott Rogers revealed that Ernie Patnoe, now Blackmore's supervisor, was concerned because the email about the HRC complaint had been sent to Blackmore. However, Ms. Valburn was also concerned that Patnoe knew about the HRC complaint since he was also named in it. In response to her concerns, Mr. Rogers wrote: "I mentioned it to Ernie this morning while we were catching up. He knows she complained via the Dr [sic] note when he got in [sic] FMLA and he knows DHR was looking into it because he was looped into all that... so I didn't see any reason not to tell him she filed an HRC complaint against Dave. He is daves [sic] supervisor and a senior manager and I do normally share with him as I used to with Wayne."²⁴ Ms. Valburn responded: "Normally it would be totally fine and appropriate for Ernie to know about (and review) the HRC complaint for all the reasons you just said. But in this case, there are at least two allegations

²² *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir.1990)(holding that protected activities include "making complaints to management.").

²³ Email from Blackmore to Dimick and Rogers with three email attachments reporting McGurl's use of the word "discrimination" and "retaliation," on 3/19/17.

²⁴ September 22, 2017 5:18 PM. Scott Rogers to Lori Valburn.

in the complaint against Ernie, [REDACTED]

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Third Element

The third element requires that Ms. McGurl establish an “adverse employment action.” A complainant bringing a retaliation claim under VFEPA/FMLA need show only that “a reasonable employee [in the employee's situation] would have found the challenged action materially adverse,”²⁶ meaning that it “well might have dissuaded a reasonable employee from engaging in the protected activity.”²⁷ Even if a single action does not “rise to the level of an adverse employment action,” “multiple incidents taken together might dissuade a reasonable worker from making or supporting a discrimination charge.”²⁸

The Vermont Supreme Court has suggested that adverse employment actions should be “distinct” from the actions underlying the original filing of discrimination.²⁹ In addition, “[N]ormally petty slights, minor annoyances, and simple lack of good manners” are not, without more, instances of adverse employment actions.³⁰ The Supreme Court has been clear that context matters greatly when analyzing whether a particular action by an employer is adverse:

...the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. ‘The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed...’ A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a

²⁵ Sep 22, 2017, at 5:24 PM. Lori Valburn to Scott Rogers.

²⁶ See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006) (“We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here.”).

²⁷ *Hall v. State*, 192 Vt. 63, 77 (2012) (quoting *Burlington N. & Santa Fe Ry. Co.* at 68 (2006)).

²⁸ *Spence v. Donahoe*, 515 Fed.App'x 561, 572 (6th Cir. 2013). See also *Gallipo v. City of Rutland*, 178 Vt. 244, 262 (2005) (discussing a number of incidents claimed by the plaintiff to be retaliatory in nature).

²⁹ *Mylan* at 378. “Furthermore, the incidents of unfair treatment that plaintiff contends were retaliation for her filing of a gender discrimination claim are of the exact same character as the incidents of alleged unfair treatment that apparently led to the filing of the claim in the first place. Thus, plaintiff has not satisfied either the third or fourth element of the prima facie case of retaliation based on these actions by Govil.” The *Mylan* opinion demonstrates how fact-dependent the analysis is. In *Mylan*, the plaintiff claimed that she had been retaliated against by the employer for being terminated. While the court agreed that termination was an adverse employment action, it pointed out she had been terminated some seven months after she had filed the lawsuit and a year and half after she had filed the original claim of discrimination. Similarly, her demotion occurred prior to the filing of her complaint, thus, neither action was found to have been causally related. See *Mylan* at 378-379.

³⁰ *Burlington N. & Santa Fe Ry. Co.*, at 68.

young mother with school-age children.... A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination....Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."³¹

This report finds several adverse employment actions, including the confiscation of Ms. McGurl's keys, changing the District 8 locks, the request that she restrict her State email use, the order to remove her from the OPS-Tech Team contact list and the accusation that she had engaged in some sort of security breach related to the password file that was found while she was out of the office.

Fourth Element

To establish the fourth element of the *prima facie* case, there must be evidence that there was a causal connection between the protected activity and the adverse employment action as well as temporal proximity.³² This investigation finds sufficient causal connection and temporal proximity between the exercise of the protected activity and the adverse employment actions.

2) Further Analysis of Third and Fourth Elements of the Prima Facie Case:

A closer look at the third and fourth elements of the *prima facie* case is warranted. The third element requires McGurl to show she suffered adverse employment decisions. The fourth element requires that there be a causal connection and temporal proximity between the protected activity (telling Dimick she wanted to file a complaint against Blackmore and filing for FMLA) and the adverse employment actions (loss of keys, change of locks, restriction from computer use, being taken off listservs and accused of a possible security breach). The timeline of events supports the causal connection. Some of these actions occurred within days of her August 30, 2017 request for a complaint form from Ms. Dimick, her FMLA filing on August 31, 2017, and her subsequent interview with Ms. Firliet on September 5, 2017. Some of them occurred more than a month after she filed for FMLA, but within two and three weeks after notice of her HRC complaint was forwarded to Patnoe, Blackmore and Rogers. AOT's actions, directly and through DHR, collectively represent proof of retaliation.

³¹ *Id.* at 69 (Internal citations omitted).

³² See *Nguyen v. City of Cleveland*, 229 F.3d 559, 566–67 (6th Cir.2000) (plaintiff who relies on temporal proximity between the protected activity and the adverse action alone must generally show a proximity less than six months to establish a prima facie case); *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir.1990) (three months between the protected activity and adverse action alone is insufficient to make prima facie case).

In the absence of direct or obvious evidence of discrimination,³³ Vermont has adopted the three-part burden-shifting framework first articulated in *McDonnell Douglas v. Green*.³⁴ Once a complainant has established a *prima facie* case, an employer may offer a “legitimate non-discriminatory reason for their actions.”³⁵ The burden on the employer is “only a burden of production, rather than one of persuasion.”³⁶ If established, the burden is on the complainant to persuade a fact-finder that those reasons are pretext.³⁷

The AOT has produced reasons for its post-FMLA filing actions, however this investigation finds them unpersuasive. Blackmore, Patnoe and to some degree Rogers, by not holding Blackmore and Patnoe accountable, took actions against someone they viewed as a difficult employee and those actions seemed oriented towards making sure she did not want to return to work. DHR acted as AOT’s agent and at its request and was not transparent in its dealings with McGurl (though there was no requirement that it be fully transparent). As AOT’s agent, DHR’s role was primarily to support Blackmore in dealing with Ms. McGurl. Dimick said the goal of AOT and DHR had not been to terminate Ms. McGurl for her behavior but to figure out a way to manage her performance. However, the actual reason her keys were requested was not disclosed to her, nor was the real reason for the restriction on her state email account, thus, these acts cannot qualify as efforts to manage or improve her performance. Plus, the mere fact they were made in the context of discussions over leave – not work-- defeats such an argument.

In this investigation’s opinion, AOT’s actions were simply not justified by enough credible evidence on the part of AOT. These actions could certainly discourage an employee from participating in a protected activity and would cause no small worry about coming back from leave. No matter how difficult Ms. McGurl was, no matter how much management might have wanted her to resign (they claimed they did not), these actions in her absence made it nearly impossible for her to contemplate returning from leave and undermined future efforts to improve her performance. DHR and AOT may believe she filed for FMLA to avoid further interaction with her supervisor or negative supervisory feedback and this investigation also believes there is a good argument for that. However, DHR approved the leave and interviewed her about the complaint. She was engaging in a protected activity, AOT and DHR knew it, she suffered several

³³ This investigation argues that there is direct evidence of discrimination when AOT’s actions are considered collectively, however it analyses those facts using the burden shifting framework to give AOT’s reasoning a fair airing.

³⁴ See *Gauthier v. Keurig Green Mountain, Inc.*, 200 Vt. 125, 134 (2015) (adopting *McDonnell-Douglas* in a worker’s comp retaliation complaint.).

³⁵ Examples of non-retaliatory reasons include: poor performance; inadequate qualifications for position sought; qualifications, application, or interview performance inferior to the selectee; negative job references; misconduct (e.g., threats, insubordination, unexcused absences, employee dishonesty, abusive or threatening conduct, or theft); and reduction in force or other downsizing. See EEOC ENFORCEMENT GUIDANCE ON RETALIATION, 2016 WL 4688886 (E.E.O.C. Guidance) at 24-25.

³⁶ *Id.* at 137.

³⁷ *Id.*

adverse employment actions and those actions had enough of a causal connection to the exercise of the protected activity to be actionable.

(A) SPECIFIC ADVERSE EMPLOYMENT ACTION: KEYS, LOCKS and SITE BAN

Blackmore immediately requested that DHR take Ms. McGurl's work keys from her. In addition, he had the locks changed and had DHR tell her she could not go on site while on leave.³⁸ AOT and DHR suggested she had taken some personnel files with her when she left, but no one was able to substantiate any details with any specificity.³⁹ Ms. McGurl denied that she had inappropriately removed any such documents.⁴⁰ The only other person who anyone knew of who had their keys confiscated had gone to the work site several weeks or months into a workers' compensation claim and removed files, but this was not similar to Ms. McGurl's situation.

Blackmore ordered that the locks be changed which Ms. McGurl discovered when she went to the office to get her FMLA paperwork. She went after hours because she did not want to run into Blackmore or anyone else in the office. She did not try to hide that she had been there – she emailed Firliet to ask why the locks had been changed. Neither AOT nor DHR could produce any policy, or best practices guide, or procedure that demonstrated how and when an employee's keys should be taken from them when going out on leave of any kind and there was absolutely no consistent practice. In fact, Blackmore had not bothered to take the keys from Sharon Resseguie, the office administrator who had retired in May 2017. Emails show he did not even know what had happened to her keys.⁴¹

Dimick, who has worked for the State for over a decade, said she had never been asked to confiscate keys from an employee going out on FMLA leave before Blackmore requested it in Ms. McGurl's case. Ms. McGurl expressed bewilderment in an email to Firliet about the confiscation of her keys, the changing of the locks and the site ban. On September 7, 2017, she wrote Firliet: "...[taking the keys] makes me feel like I am being punished and isolated. Others have been on FMLA and/or WC and they have never taken keys before." The State was asked to produce evidence of other employees who had been treated similar to Ms. McGurl when going out on FMLA or any kind of leave and it was unable to produce such evidence.

³⁸ 9/1/17 email from Blackmore to Firliet and Dimick: "I ask that she does not enter the district office or garages during this off time."

³⁹ Email from Blackmore to Dimick and Firliet, 9/1/17. The nature of the alleged missing documents was vague and this investigation did not receive any supplementary information about them.

⁴⁰ On August 31, 2017, Anna Firliet emailed her asking for some first round interview notes identified by number. It was not clear whether those were the same documents Blackmore was referring to. In any event, Ms. McGurl emailed Firliet documents she had which she identified as "the only first round interview notes I have" which Firliet said were not the ones she was looking for. Email exchange between Firliet and Ms. McGurl, 8/31/2017. There is no evidence that Firliet or Blackmore ever followed up.

⁴¹ Tue 9/12/2017 11:57 AM from Blackmore to Patnoe. "Did Sharon ever give you her keys? I never received them. Do you remember what type of key it was? The master? I think this is the key Becky may has [sic]. Did we give Becky a key? I know she has access to the garages when nobody is there." She had had access since 2015 without incident.

(B) SPECIFIC ADVERSE EMPLOYMENT ACTION: STATE EMAIL ACCESS AND LISTSERVS

In addition to the key confiscation, lock change and site ban, Blackmore asked DHR to tell McGurl not to use her state email address for work and he had her removed from the 'TAMS' listserv.⁴² One stated reason for doing this was that she had sent an out-of-office message the day she went on leave which he alleged caused a lot of confusion.⁴³ Her message seemed innocuous enough - it went to twelve people in her district and read: "Hello just letting all of you know I will be out on FMLA until further notice. If you need any IT assistants [sic] please reach out to [sic] IT help desk. Thank you."⁴⁴ The other stated reason was that she had used her State email to send out a lot of emails to other State employees, but an inspection of her 'sent' box in her email account does not support any abuse of the system. There was no indication whatsoever that Ms. McGurl received any direction from anyone at AOT or DHR as to what kind of message to send and to whom. This is important because she is later characterized as having disobeyed Blackmore's instructions, which is incorrect because he gave her no directions.⁴⁵

The State personnel policy does give the State the "discretion to limit an employee's access to email or other State electronic systems, particularly when the employee is out of the office and has no legitimate business reason to access the State email system"⁴⁶ but the policy gives no guidance to the employee about what process to follow so they do not get into trouble. From Ms. McGurl's perspective the out-of-office message was a perfunctory courtesy - people that needed to get in touch with her would be informed she was unavailable. It did not occur to her to question the nature of the message or its recipients. Had she had a question, it would have been difficult to communicate with Blackmore considering the situation. In any event, his response to her out-of-office message seemed disproportionate relative to the likely ease of its fix, or simply *de minimis* in nature.⁴⁷ Ms. McGurl continued to get work-related emails for

⁴² In an email to other District 8 AOT personnel, Dave Blackmore wrote: "Please remind our TAMS to take Becky off ALL correspondents until further notice." 9/4/17 email from Dave Blackmore to Kyle Carpenter.

⁴³ The email is as follows: From: "McGurl, Rebecca" Rebecca.McGurl@vermont.gov Date: September 1, 2017 at 7:42:53 AM EDT To: [12 recipients] - Hello just letting all of you know I will be out on FMLA until further notice. If you need any IT assistants [sic] please reach out to IT help desk. Thank you

⁴⁴ 9/1/17 Blackmore to Dimick and Firliet: "Heidi, Anna: Couple concerns with email below. You can see there was no supervisors or managers on the email list. As a result I now have to reach out to the group for different guidance. I do not want staff calling IT for concerns. My plan is to have the DIT in D5 cover first stop complaints preventing premature calls to Montpelier IT therefore it needs to be communicated to Becky to stop all correspondence to NW Regional staff. I also need the key she has in her possession for security reasons. This key not only has access to the district office it also has access to all D8 garages."

⁴⁵ A 10/10/17 email from Scott Rogers to Dimick, Firliet, Valburn and Hackney: "I seem to recall other concerns with Becky, to include her sending a mass email to district staff letting them know she'd be out on FMLA and to send any tech related questions to the IT Help desk, which was directly contrary to what Dave had decided to do..."

⁴⁶ Vermont State Personnel Policy 11.7.

⁴⁷ The State did not provide any emails that showed Blackmore taking corrective action with the people who had been sent the out-of-office message and Ms. McGurl continued to receive emails from people who it seems should have known she was out on leave either from her or as a result of Blackmore sending out a corrective email. For

months after she filed for leave from other employees who seemingly should have known she was out which calls into question whether Blackmore ever actually instituted a fix.

Dimick stated that DHR does not have the time or personnel to police employee use of State email when someone is out on leave, so it requires specific intent to do it. Firliet tried to soften the email restriction by telling Ms. McGurl she needed a break from stress. However, the original request to limit email access was from Blackmore – not Firliet - and this investigation was not persuaded that there was genuine concern for Ms. McGurl. Prior to the FMLA filing, Dimick was working with Blackmore to fashion an employee management plan for Ms. McGurl due to the tensions between Ms. McGurl and Blackmore. When Ms. McGurl asked Dimick for a “complaint form,” to file a complaint against Blackmore, Dimick told her they did not have one and directed her to her supervisee, Firliet, to set up an interview. Dimick had no obligation to divulge to McGurl that she was working with Blackmore or that Firliet was familiar with the situation, and she did not do so.⁴⁸ Ms. McGurl believed her September 5, 2017, meeting with Firliet was an opportunity to file a complaint and have it investigated, perhaps assuming the complaint process was like that of the HRC.⁴⁹ In this case, DHR acted at AOT’s request and did not challenge Blackmore’s requests.

Confiscating Ms. McGurl’s keys, changing the locks, explicitly banning her from the job site, asking her not to use her State email, and removing her from the TAMS list collectively begins to paint a picture of retaliation. They convey an animus that suggests that the aim was to penalize her for exercising her right to protected activities and that there was an intent to discourage her from returning to work.

(C) SPECIFIC ADVERSE EMPLOYMENT ACTION - OFFICE PASSWORD FILE

Approximately two weeks after notice of the HRC complaint was sent to Blackmore, Patnoe and Rogers, a series of events began to unfurl which would result in an oblique accusation against Ms. McGurl for a possible security breach. The triggering event was the discovery of one of Ms. McGurl’s hard-copy files by another DIT in the District 8 office. That employee brought the file to Blackmore’s attention on October 4, 2017. The file contained usernames, passwords and PIN #s that Ms. McGurl had jotted down while helping employees set

instance, on 9/26/17, she received an email from a Financial Manager III from AOT Accounts Receivable Unit asking if she had information on an accident on I-89. Ms. McGurl immediately emailed her back and told her she was on FMLA and to get in touch with Tracy Zeno. On 9/27/17 she received a telephone bill from AOT accounts payable. On 10/19/17 she received another work-related email. This suggests that a corrective email was either not sent at all or not widely distributed to all the parties who needed to have contact with her.

⁴⁸ Ideally, DHR could set up a complaint process that allows the employee an opportunity to put a complaint into writing and then channels it away from front line DHR staff to DHRIU. Obviously, this is a suggestion only and completely outside of the HRC’s purview.

⁴⁹ Emails also show that people who heard the interview of her tape did not find her sympathetic although there was some voiced concern about the possible appearance of retaliation.

up new iPhones, IPADS and other equipment.⁵⁰ Ms. McGurl has maintained that the file was in Blackmore's office at all times and accessible to him and that the passwords and usernames were not current or active – they had been used to provide access and “unlock” phones and iPads. Once the phone was unlocked, the employee chose a new username and password and the others became defunct.⁵¹

AOT did not make any immediate request for support from Agency of Digital Services (ADS) or report it to Buildings and General Services (BGS). It rolled out a slow response over the course of 6 days, culminating with an email from Patnoe to several of Ms. McGurl's co-workers with a thinly veiled accusation that she had done something inappropriate. The initial response from Blackmore came the day the file was found, and he requested that Ms. McGurl be removed from the OPS-Tech Team contact list.⁵² On October 8, 2017, Blackmore requested that her “IT privileges to ALL state computer access be immediately restricted until further notice.” This increased the restriction on email use already in place. Still, AOT did not contact ADS. Rogers briefly appeared to caution restraint,⁵³ even though the next day he characterized her file as her “secret stash” of passwords.⁵⁴

Finally, on October 10, 2017, Patnoe sent out an email to several of her co-workers. The email did not mention her by name, but it was unmistakable given the circumstances, that he was talking about Ms. McGurl. He characterized the information he was providing as a “factual” and “not just hearsay breach:”

Good morning D8 friends, Well not so good actually ;-[Your Apple ID passwords have been compromised and will need to be changed today. Allen Myott was on the list but I'm thinking it is now Jordan's phone. Dave and I also got hit. This has to be completed very quickly as all information on the I-pads and your phones are at risk. This is factual and not just a hearsay breach. Tracy

⁵⁰ The other DITs at AOT were interviewed and asked what they did and how they set up iPhones and iPads. They did not describe doing it the way Ms. McGurl had done it. However there is still no evidence of wrongdoing on her part. One would have to do a close comparative analysis of their process and her process which is beyond the scope here. Either way, they could have and should have handled it differently than they way it was handled.

⁵¹ There were no written protocols dictating the procedures DITs were supposed to use to set up the phone and iPads. All other DITs were interviewed. None of them did things the way Ms. McGurl did them or exactly like each other. Ms. McGurl claimed Blackmore was aware of the manual and what was in it; he denied that. In any event, there was no investigation and no indication that Ms. McGurl had used any of those passwords or that information to hack into anyone else's account.

⁵² The removal from the OPS-Tech Team was communicated to Dimick and Firliet, who seemed somewhat unclear what the underlying issue was, and Dimick and Firliet confirmed to AOT that Firliet had told her to stay off State email. Dimick added “I believe she continues to use her State e-mail.” In fact, Ms. McGurl did not discover she had been denied access until October 23, 2017. She contacted an ITT manager, but Blackmore instructed him not to speak to her, even though there was no investigation into her actions at the time and no rebuttable justification for continuing to deny her access while on leave.

⁵³ On 10/9/17, in an email exchange with Lori Valburn and other recipients, Rogers wrote: “This is concerning, and my knee jerk reaction is to support Dave's request. However, we don't yet have evidence that she has used the passwords for any inappropriate activity. So I wanted to see what you all think first before we contact IT and have them take appropriate action. IF we decide to do this, we need to consider how to let Becky know.”

⁵⁴ Scott Rogers to Dimick, Firliet, Valburn and Hackney, 10/10/17.

and Melissa may be able to help if you are unsure how to make this happen. Also would someone send me confirmation when it is completed?

When asked why he would make a potentially damaging implicit accusation using words such as “compromised” and “breach” and risk” and “got hit,” without requesting an investigation first to see if there actually was a security breach, Patnoe stated that he had a “knee jerk” reaction. However, given that he sent the email at the end of a 6-day period, it is hardly credible to describe it as “knee-jerk.” It is an email containing very serious accusations which Ms. McGurl had not been informed of and did not know about until this investigation.⁵⁵ AOT had no concern for the possibility that Ms. McGurl had done nothing wrong or for the negative impact such a widely disseminated email could have on her.⁵⁶ The only person who cautioned against a rush to judgment was again, Lori Valburn, who emailed Rogers, copying Ms. Dimick and Ms. Firliet: “I agree this is deeply concerning but needs to be handled delicately in light of the pending HRC complaint, to avoid any appearance of retaliation. It would be helpful if DHR General Counsel could weigh in.”⁵⁷ Of note, this investigation asked Scott Rogers during his interview why no investigation was done, his response was that it was a “fair question” and that “Perhaps we should [do one].”

While it is understandable that the file caused concern and raised questions, the course of action chosen by three high-level supervisors – Blackmore, Patnoe and Rogers - in concert with 1) taking Ms. McGurl’s keys, 2) changing the office locks, 3) banning her from the work site 4) putting a restriction on state email use, 5) removing her from the TAMS listserv 6) completely shutting down email access, 7) removing her from the OPS-Tech Team and 8) sending out an accusatory email supports a finding of retaliation.

3) Retaliation - Conclusion

Courts have held that some of an employer’s actions can be separately characterized as non-retaliatory, but when viewed in the aggregate, they become retaliatory.⁵⁸ Furthermore, these actions changed the conditions of her employment by creating an environment that she felt she could not successfully return to.⁵⁹ This investigation concludes that Ms. McGurl can make a *prima facie* case of retaliation against AOT due to actions its employees took directly and through DHR. AOT’s actions were hostile, out of ordinary for employees who take FMLA leave, and more akin to someone who had been placed on some sort of administrative leave while under

⁵⁵ AOT argued that Patnoe did not implicate her because he did not use her name. This investigation finds this assertion to be unpersuasive.

⁵⁶ Note that this harm could have gone beyond the four corners of the workplace, a fact which courts have recognized: “But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the antiretaliation provision’s objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.” *Burlington Northern and Santa Fe Ry. Co.*, 548 U.S. at 63.

⁵⁷ Email from Valburn to Rogers 10/9/17.

⁵⁸ See *supra* note 29.

⁵⁹ See *Mylan* at note 19, *supra* at 329, wherein the court noted that negative employment actions must result in change in the conditions of employment.

investigation, rather than someone who was exercising their right to leave under FMLA. Had Ms. McGurl returned to work, she would have had to contend not only with the fallout of those acts, but also with a possible accusation she had done something illegal. The reasons AOT has offered to dispute her *prima facie* case of retaliation are ultimately not persuasive or supported by sufficient proof.

In sum, Ms. McGurl has proven her *prima facie* case. She engaged in two protected activities, her employer was aware of those activities, she suffered several adverse employment consequences because she engaged in protected activities, and there was a temporal connection between those adverse consequences and her exercise of protected activities. While the State has produced evidence to rebut the *prima facie* case, the State's evidence is unpersuasive considering the context and totality of the circumstances. Ms. McGurl can sustain her complaint of retaliation.

FINDING: AOT retaliated against Ms. McGurl for filing a complaint against Blackmore and for taking FMLA leave.

PRELIMINARY RECOMMENDATION

[REDACTED]

2) This investigation makes a preliminary recommendation to the Human Rights Commission to find there are *reasonable grounds* to believe that the Agency of Transportation retaliated against Rebecca McGurl pursuant to 21 V.S.A. §495(a)(8) and pursuant to 21 V.S.A. §473 of the Vermont Parental and Family Leave Act.

 10/30/18

Nelson M. Campbell
Administrative Law Examiner

 10/30/18

Karen Richards
Executive Director & Legal Counsel

ATTACHMENT 1

2017

8/30– Contacts DHR/Dimick to file a complaint against Blackmore (**Protected activity**)

8/31 –Files for FMLA, stress-related – forms go to Blackmore – DHR approves FMLA the same day - (**Protected activity**)

9/1 – McGurl out on FMLA email sent at 7:42 a.m.

- 10:40 a.m. Blackmore to Dimick/Firliet – says “I...need the key she has in her possession for security reasons. This key not only has access to the district office it also has access to all D8 garages.” Blackmore asks for her desk key alleging that some “recruitment files are missing.” “I ask that she does not enter the district office or garages during this off time.” He asks for McGurl to be notified to “stop all correspondence with NW Regional staff.” (**Request for keys, stay away from work site, stop contacting co-workers**).
- 9:39 a.m. McGurl to Firliet - Just a curiosity question, is it normal protocol to take keys when someone goes on Workmens [sic] comp or FMLA?

9/4 – Blackmore to Kyle Carpenter: “Please remind our TAMS to take Becky off ALL correspondents [sic] until further notice.” (**Request to remove from TAMS**)

9/5 – McGurl interview with Firliet at DHR – keys requested & retrieved – Firliet asks about desk key, writes Blackmore, “I asked her about the desk key and she said she wasn’t sure if it was at home or at the office. She stated she doesn’t lock her desk but would send the key to me if she found it.”

9/7 – McGurl emails Firliet: “They changed the two locks on the office doors which they have never done prior to this situation which makes me feel like I am being punished and isolated. Others have been on FMLA and/or WC and they have never taken keys before.

9/12 – Blackmore to Patnoe: “Did Sharon ever give you her keys? I never received them. Do you remember what type of key it was? The master? I think this is the key Becky may has [sic]. Did we give Becky a key? I know she has access to the garages when nobody is there.” (Shows lack of consistent policy on taking keys and that Blackmore does not keep up with keys of employees no longer there).

9/14 – Scott Rogers approves Blackmore’s request to double fill Ms. McGurl’s position because “we don’t known [sic] when/if she’ll come back.”

9/15 – McGurl files HRC complaint alleging [REDACTED] [REDACTED] [REDACTED] retaliation.

9/18 – Ms. McGurl texts co-worker to ask if the locks have been changed .

9/20 – Blackmore to Firliet – report to Firliet that Ms. McGurl texted that co-worker then says “I don’t think Mike has any knowledge of details of Becky’s situation other than her message about being out until further notice.”

9/21 – 1:29 pm -.HRC complaint received by Secretary of AOT and forwarded to Dimick and Valburn at DHR and AOT respectively.

- Valburn, Head of AOT Civil Rights Compliance Unit forwards McGurl’s HRC complaint to Scott Rogers, along with synopsis of Firliet’s interview with McGurl, which she states include potentially serious allegations.¹

Valburn: “Yesterday I met with AOT employee Rebecca McGurl, District 8 District Information Tech II. Rebecca has made a complaint [REDACTED]. Rebecca informed me she has also filed a complaint with the HRC. I recorded the intake and it is about an hour long- the themes included in this meeting are:

- [REDACTED]
- [REDACTED]

[REDACTED]

9/22 – 4:04 pm - Notice of the HRC complaint emailed by AAG to a number of people, including Patnoe, Blackmore, Rogers & Dimick –

- Patnoe forwards that email to Dimick from his iPhone with no comment at 4:28 pm (24 minutes later)
- 5:08 pm - Valburn writes Wayne Gammel, cc. Rogers at, characterizing Ernie as being in “a bit of a panic” which she said was due to Patnoe’s concern that Ernie had been on the email. Valburn notes that Patnoe somehow knew the HRC complaint was on its way but doesn’t know how.
- 5:18 pm - Rogers writes Valburn at– no email from Gammel but Gammel is cc’d on Roger’s email – Rogers said he told Patnoe about the HRC complaint – says he sees no reason not to tell Patnoe because Patnoe is (now) Blackmore’s supervisor and a senior manager
- 5:24 pm Valburn to Rogers - Normally not a problem “But in this case, there are
[REDACTED]

10/4 – McGurl’s hard copy “password file” is “discovered” in Blackmore’s office by another DIT employee.

10/ 5 – Blackmore requests that McGurl be removed from OPS Tech-Team.

10/6 – Joe LeClair to Blackmore: “I have removed Becky from the OPS-Tech Team contact list until you tell me otherwise, so she is not getting all the email I send out to the DITs using the group.

10/7 – Blackmore forwards LeClair’s email to Dimick, Firliet and Patnoe (Thus, all these people know she has been removed).

10/8 – 7:48 a.m. Blackmore to Patnoe: “I am requesting Becky’s IT privileges to ALL state computer access be immediately restricted until further notice. Let me know if you have questions.” (Note this request comes after he already asked LeClair to remove her from the OPS-Tech-Team, i.e. it expands the prohibition and her access).

10/9 – 5:53 a.m. Patnoe to Rogers – I’ll call you in a few.” Forwards Blackmore’s 10/8 email.

- 7:07 a.m. Rogers to unspecified recipients: “It would appear that... Becky McGurl has been keeping records of employee’s passwords, to include the DTA and GM. As a DIT, employees may need to tell Becky their password so she can work on their equipment. But she should not have been keeping copies of those passwords. This is concerning, and my knee jerk reaction is to support Dave’s

request. However, we don't yet have evidence that she has used the passwords for any inappropriate activity. So I wanted to see what you all think first before we contact IT and have them take appropriate action. IF we decide to do this, we need to consider how to let Becky know. (**NOTE:** Action had already been taken to restrict access via LeClair)

- 7:34 a.m. - Valburn to Rogers, Dimick and Firliet -- Recommends caution – “Hi Scott, I agree this is deeply concerning but needs to be handled delicately in light of the pending HRC complaint, **to avoid any appearance of retaliation**. It would be helpful if DHR General Counsel could weigh in. FYI, Sue and Sean Brailey (the DHRIU investigator assigned to this case) are interviewing Becky this week.
- 8:22 a.m. – Dimick to Rogers, Firliet, Valburn & Hackney – “FYI. Scott were you aware this happened...Anna can confirm, but Anna communicated to Becky that she should not be using the State e-mail to do work, but I believe she continues to use her State e-mail....”
- 8:51 AM – Firliet to Dimick, Rogers and Hackney: “I specifically stated to Becky during my meeting with her that she is not to use her state email (and to not worry about the work- to focus on getting better) and if she needed to communicate with me, then to please give me her personal email. I also stated if I needed anything from her, I would let her know. She has continued to email me from her State email. She has sent me 1 email from her personal email.

10/10 - 6:52 a.m. - Rogers to Dimick, Firliet, Valburn and Hackney – “I seem to recall other concerns with Becky, to include her sending a mass email to district staff letting them know she'd be out on FMLA and to send any tech related questions to the IT Help desk, which was directly contrary to what Dave had decided to do (have D5 DIT Melissa Champney cover). So I am guessing the below changes were contemplated because of that, and before they found her secret stash of passwords.”

- Patnoe – 8:48 a.m. – to D8 recipients- says there has been a security breach – Implicates Ms. McGurl (Blackmore cc'd but not Rogers, Dimick, Firliet or Valburn).

10/23 – McGurl emails Joe LeClair and says her email access is blocked – she thinks she locked herself out – LeClair does not respond - forwards to Blackmore the next day

10/24 – Blackmore tells LeClair not to respond that DHR will respond – forwards to Firliet.

11/7 – McGurl using state email to send message to Heidi Dimick – Dimick responds, doesn't mention prohibition on use. Also note McGurl does not know that she has been accused of a security breach. McGurl requests help with a tuition issue.

11/8 – McGurl requests more information about extending her time form work. Firliet responds.

- McGurl resigns in 2018

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Rebecca McGurl,
Complainant

v.

Agency of Transportation
Respondent

)
)
)
)
) HRC Complaint No. E18-0003
)
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)

FINAL DETERMINATION

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

The following vote was taken on a motion to find that there are **reasonable grounds** to believe that the Agency of Transportation, the Respondents, illegally retaliated against Ms. McGurl, the Complainant, in violation of Vermont's Fair Employment Practices Act.

Mary Brodsky, Acting Chair	For <input type="checkbox"/> Against <input checked="" type="checkbox"/> Absent <input type="checkbox"/> Recused
Dawn Ellis	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused
Donald Vickers	For <input type="checkbox"/> Against <input checked="" type="checkbox"/> Absent <input type="checkbox"/> Recused
Chuck Kletecka, Alternate	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused
Mary Marzec-Gerrior, Alternate	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused

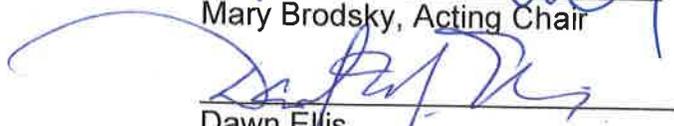
Entry: ~~No~~ reasonable grounds Motion failed

Dated at Montpelier, Vermont, this 24th day of January, 2019.

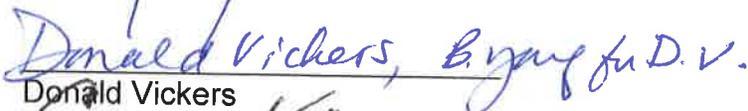
BY: VERMONT HUMAN RIGHTS COMMISSION



Mary Brodsky, Acting Chair



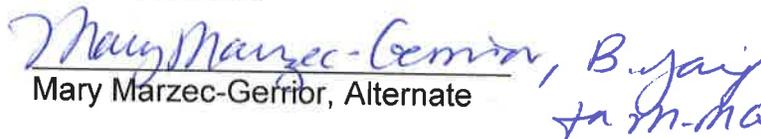
Dawn Ellis



Donald Vickers



Chuck Kletecka, Alternate



Mary Marzec-Gerrion, Alternate