

VERMONT

I. AT-WILL EMPLOYMENT

A. Statute

Vermont has no specific statute discussing “at-will” employment. Case law in Vermont recognizes “at-will” employment agreements, however, with numerous common law exceptions.

B. Case Law

Vermont law has long recognized that under a written employment agreement stating employment is “at-will,” an employee may be discharged at any time with or without cause unless there is a clear and compelling public policy against the reason advanced for the discharge. *LoPresti v. Rutland Reg'l Health Serv., Inc.*, 865 A.2d 1102, 177 Vt. 316 (2004).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

At-will employment may be modified based on the terms that may be present in, e.g, an employer’s policy, procedure or handbook. The common law does not imply any specific terms to the modification. Therefore, terms like “just cause”, “cause” or “good cause” do not apply as the grounds for termination unless contained within the basis for modification employment, as distinguished from collective bargaining circumstances. *Straw v. Visiting Nurse Ass’n and Hospice of VT/NH*, 86 A.3d 1016, 195 Vt. 152 (2013). In many cases, public policy exceptions will not be considered if there is no mention of the alleged public policy in the terms of modification. *Boynton v. ClearChoice MD*, 2019 VT 49, 210 Vt. 454.

1. Employee Handbooks/Personnel Materials

Personnel manual provisions that are inconsistent with an at-will relationship can be used as evidence that there is a contract of employment or a requirement of good cause for termination.

In *Taylor v. Nat’l Life Ins. Co.*, 652 A.2d 466, 161 Vt. 457, 464 (1993), the Vermont Supreme Court held that although an employment is normally at-will, terminable at any time for any reason, “personnel manual provisions

VERMONT

inconsistent with an at-will relationship may be used as evidence that the contract requires good cause for termination.” *Id.* Even without an explicit policy, where “a reasonable interpretation of [the employee’s] submissions suggests” that the employee admitted to improper conduct based on the employer’s assurance of no reprisals, this may “create a promise for which the employer is ultimately bound.” *Leblanc v. United Parcel Service, Inc.*, D. Vt. 1996 WL 192011 (considering Vermont law and relying on *Taylor* specifically).

An employment manual or policy statement does not automatically become a binding contractual commitment under Vermont law. *Ross v. Times Mirror Inc.*, 665 A.2d 580, 164 Vt. 13 (1995). The Vermont Supreme Court has held that an employee manual must be definitive in form, communicated to its employees, and evince an employer’s intent to bind itself to be enforceable. *Havill v. Woodstock Soapstone Co.*, 783 A.2d 423, 172 Vt. 625 (2001). In *Havill*, the plaintiff appealed a grant of summary judgment in favor of her employer. The plaintiff asserted on appeal that her employer’s personnel policies entitled her to continued employment absent just cause. The court examined the policy manual, which included a progressive discipline procedure detailing the consequences for violations of the personnel policies and a provision stating that a supervisor can dismiss an employee for just cause with a list of what constitutes just cause. The court held that the above provisions raised a genuine issue of material fact as to whether the employer’s personnel policies modified the at-will employment relationship. The specific location of a disclaimer or other provision in an employee handbook is not critical when considering whether the manual is definitive in form and evinces an employer’s intent to bind itself. *Sargent v. Columbia Forest Products, Inc.*, 75 F.3d 86 (2d. Cir. 1996) (considering a Vermont case in which plaintiff relied on *Ross* in his appeal).

A reduction in force policy might be a contractual obligation that must be followed by an employer even where there is financial exigency. *Taylor v. Nat’l Life Ins. Co.*, 652 A.2d 466, 161 Vt. 457 (1993).

Any handbook or policy with a discipline or disciplinary step policy must be reviewed with caution, as they are generally disfavored given Vermont case law. See *Green v. Vt. Country Store*, 191 F. Supp. 2d 476 (D. Vt. 2002); *Dulude v. Fletcher Allen Health Care Inc.*, 807 A.2d 390, 395, 174 Vt. 74 (2002); *Trombley v. Sw. Vt. Med. Ctr.*, 738 A.2d 103, 108, 169 Vt. 386 (1999); *Hayes v. Golub Corp.*, 692 A.2d 377, 166 Vt. 228 (1997); *Ross v. Times Mirror Inc.* at 583-84.

2. Provisions Regarding Fair Treatment

Statements of policy, including statements that terminations will be handled in a fair, just and equitable manner, are general statements of policy which do not imply a contract to discharge only for cause. *Ross v. Times Mirror Inc.*, supra.

VERMONT

Vague assurances, guaranteeing fair treatment for satisfactory work performance, do not constitute negotiated contract terms. *Marcoux-Norton v. Kmart Corp.*, 907 F. Supp. 766 (D. Vt. 1993).

3. Disclaimers

In *Dillon v. Champion Jogbra, Inc.*, 819 A.2d 703, 175 Vt. 1 (2002), the defendant distributed an employee manual to all employees at the commencement of their employment that contained a disclaimer stating: “The policies and procedures contained in this manual constitute guidelines only. They do not constitute part of an employment contract, nor are they intended to make any commitment to any employee concerning how individual employment action can, should, or will be handled . . . Champion Jogbra reserves the right to terminate any employee at any time “at-will” with or without cause.” *Dillon*, 175 Vt. at 3.

The manual also stated that a “corrective action policy required management to use training and employee counseling to achieve the desired actions of employees.” *Dillon*, 175 Vt. at 8. This policy required progressive steps to be taken for certain types of cases, including unsatisfactory quality of work, and included time periods governing issues such as how long a reprimand is considered active. *Id.*

Within one month of the plaintiff’s employment, she was informed that things were not working out and was offered a temporary position that would expire in three months. Prior to the meeting, the plaintiff was never told her job was in jeopardy, nor did the defendant follow the corrective action procedures laid out in its employee manual when terminating the plaintiff. The plaintiff brought a claim asserting breach of contract, asserting that the defendant had unilaterally altered her at-will employment status by means of its employment manual and practices. The trial court determined as a matter of law that defendant’s manual was unambiguous and that “as a matter of law Dillon’s status was not modified.” *Dillon*, 175 Vt. at 7. The plaintiff disagreed, asserting the manual was ambiguous, requiring a jury to determine whether the plaintiff’s status as an at-will employee had been modified.

“When the terms of an employment manual are ambiguous, or send mixed messages regarding an employee’s status, the question of whether the presumptive at-will status has been modified is left to the jury.” *Dillon*, 175 Vt. at 1, *citing Farnum v. Brattleboro Retreat, Inc.*, 671 A.2d 1249, 1254, 164 Vt. 488, 494 (1995). If a court determines that a contract is unambiguous it must interpret the contract as a matter of law. *Dillon*, 175 Vt. at 1.

The Vermont Supreme Court began its analysis stating that at-will employment relationships have fallen into disfavor. It held that there is no limit on the right of contracting parties to modify terms of the arrangement, or to specify other terms that supersede the terminable at-will arrangement. The court went on to state that an employer, “not only may implicitly bind itself to terminating only for

VERMONT

cause through its manual and practices, but may also be bound by a commitment to use only certain procedures in doing so.” *Dillon*, 175 Vt. at 5. The court found the terms within the policy inconsistent with the disclaimer. It ruled that the terms were ambiguous and that summary judgment was inappropriate, and thus remanded for trial.

In *Mecier v. Brannon*, 930 F. Supp. 165 (D. Vt. 1996), a former employee alleged a breach of contract claim against his former employer claiming that the employee manual created an employment contract terminable only for cause. The district court reversed summary judgment against the employee and remanded the case stating that disclaimers must be evaluated in the context of all the other provisions in the handbook and any other circumstances bearing on the status of the employment agreement.

4. Implied Covenants of Good Faith and Fair Dealing

In *Dicks v. Jensen*, 768 A.2d 1279, 172 Vt. 43 (2001), the Vermont Supreme Court declined to recognize the implied covenant of good faith and fair dealing as grounds for recovery where the employment relationship is unmodified and at-will. The court reasoned as follows:

An at-will employment agreement is flexible, terminable at any time, for any reason or for none at all. Just as the employer is free to terminate the employee absent a clear and compelling public policy reason against doing so, so may the employee end the relationship as he or she chooses. That is precisely the case that confronts us here. The plaintiff’s [employer] argument amounts to no more than an objection to the freedom of his employees to avail themselves of the at-will arrangement. Defendants [employees] did not breach any duty because we decline to recognize the implied covenant of good faith and fair dealing as a means of recovery where the employment relationship is unmodified and at-will.

Dicks, 768 A.2d at 1286; see also *Ross v. Times Mirror Inc.*, 665 A.2d 580, 164 Vt. 13 (1995).

The Vermont Supreme Court in *LoPresti v. Rutland Reg’l Health Services, Inc.*, 865 A.2d 162, 177 Vt. 316 (2004), held that where there is an express employment contract signed by both parties requiring a notice period before no-cause termination, the implied covenant of good faith and fair dealing does not apply. “Although we endorse the applicability of the good faith and fair dealing principle to employment contracts, its essence is the fulfillment of the reasonable expectations of the parties. Where employment is clearly terminable at will, a party cannot ordinarily be deemed to lack good faith in exercising this contractual right.” *LoPresti*, 177 Vt. at 334.

VERMONT

B. Public Policy Exceptions

1. General

In Vermont, under an at-will employment contract, an employee may be discharged at any time with or without cause unless there is a clear and compelling public policy against the reason advanced for the discharge. *Jones v. Keogh*, 409 A.2d 581, 582, 137 Vt. 562, 564 (1979).

Public policy may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like...

Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.

Payne v. Rozendaal, 520 A.2d 586, 588, 147 Vt. 488, 492-93 (1986).

A nurse's professional disagreement with the employer hospitals narcotics practices and subsequent discharge were insufficient to support a public policy claim. *Dulude v. Fletcher Allen Health Care, Inc.*, 807 A.2d 390, 174 Vt. 74 (2002). However, it was held that a physician's discharge for refusal to refer patients to physicians whom he believed provided substandard care was against recognized AMA Principles of Ethics thus, public policy. *LoPresti v. Rutland Reg'l Health Servs., Inc.*, 865 A.2d 1102, 1113-14, 177 Vt. 316, 330 (2004); see also *Boynton v. ClearChoice MD*, 2019 VT 49, 210 Vt. 454 declining to extend this concept to medical assistants, who do not have an equivalent to the AMA Principles of Ethics, and *Petterson v. Monaghan Safter Durham, PLLC*, 2021 VT 16, 214 Vt. 269 declining to find that a dispute regarding an associate attorney's future compensation had bearing on public policy.

2. Exercising a Legal Right

Vermont law provides that no employee may be discharged for filing a complaint or testifying in proceedings under the state occupational safety and health act, 21 VT. STAT. ANN. § 231(a), or for lodging a complaint for discrimination or cooperating with the attorney general. 21 VT. STAT. ANN. § 495 (a)(5). Nor shall an employee be discharged or discriminated against from employment for asserting a claim for benefits under the Workers' Compensation Act, 21 VT. STAT. ANN. § 710(b).

Vermont law generally prohibits an employer from requesting or requiring an employee to take a polygraph examination as a condition of employment, promotion,

VERMONT

change in status of employment, or as an express or implied condition of a benefit or privilege. 21 VT. STAT. ANN. § 494a. That right cannot be waived even intentionally and in writing voluntarily. In other words, an employer is forbidden from even asking the employee that they waive this right, save for limited statutory exceptions.

The few exceptions for which an employer is permitted to require a polygraph examination include:

- a) Application for employment with the department of public safety, municipal police departments and sheriff offices (if applying for the position of police officers and deputy sheriffs):
- b) Application for employment in an industry engaged in the sale of precious metals, gems, or jewelry;
- c) Application for employment into a position requiring contact with regulated drugs;
- d) Application for employment with an employer who is authorized under federal law to administer polygraph examinations.

21 VT. STAT. ANN. § 494b.

An employer shall not discharge, discipline or discriminate against an employee who files a complaint or testifies against the employer regarding violations of the Polygraph Protection Act. 21 VT. STAT. ANN. § 494(d).

Vermont law prohibits discharge of or discrimination against an employee who has disclosed his/her wages, has inquired about other employees' wages, and/or has lodged a complaint or testified regarding equal pay issues. 21 VT. STAT. ANN. § 495(a)(8)). Retaliation is, of course, illegal.

Public policy exceptions in Vermont have been extended to professional ethical standards. In *LoPresti v. Rutland Reg'l Health Services Inc.*, supra, the plaintiff alleged he was terminated because he refused to refer patients to certain physicians whom he believed provided substandard care and, in some cases, performed unnecessary invasive procedures. *LoPresti*, 177 Vt. at 330. The plaintiff claimed that his decision not to refer patients to these specialists was guided heavily by Vermont's prohibition on unprofessional conduct contained in medical ethical codes. The plaintiff claimed that his employers wanted him to make the referrals for financial reasons and that his discharge based on these grounds violated public policy.

The Vermont Supreme Court reversed summary judgment for the doctor's employer and held that the plaintiff's claim "is consistent with our view that compelling public policy is intended to prevent injuries to the public – especially in

VERMONT

matters of public health.” *LoPresti*, 177 Vt. at 326. The court held that the substantial difference in professional status between the nurse in *Dulude v. Fletcher Allen Health Care, Inc.*, 807 A.2d 390, 174 Vt. 74 (2002), and the doctor in *LoPresti* distinguished the two cases. The nurse in *Dulude* worked as a hospital employee under the direct supervision of other licensed medical professionals, a status that afforded her less discretion over patient care decisions than that required a primary care physician. Also, the nurse in *Dulude* was required to follow certain policies and she failed to do so, while Dr. *LoPresti* was solely responsible for deciding which of the various area specialists would best treat his patients without approval from any supervisors.

Since *LoPresti*, the Vermont Supreme Court has declined to extend this doctrine to a medical assistant whose employment was terminated after reporting alleged unprofessional behavior from a co-worker where no current patient was threatened by the alleged behavior (*Boynton v. ClearChoice MD*, 2019 VT 49, 210 Vt. 454); and an associate attorney fired after threatening suit regarding his future compensation (*Petterson v. Monaghan Safter Durham, PLLC*, 2021 VT 16, 214 Vt. 269), demonstrating the high bar that must be cleared to invoke a public policy exception in Vermont.

3. Refusing to Violate the Law

See discussion below on Vermont's whistleblower statute.

4. Exposing Illegal Activity (Whistleblowers)

Whistleblower protection Vermont's employees is generally covered by the Federal OSH Act of 1970. However, Vermont has enacted special whistleblower statutes protecting whistleblowers in the healthcare industry and to protect state employees.

Vermont's healthcare whistleblower statute is codified under 21 VT. STAT. ANN. § 507. It provides that no employer shall take retaliatory action against any employee because the employee does any of the following:

- a) Discloses or threatens to disclose to any person or entity any activity, policy, practice, procedure, action, or failure to act of the employer or agent of the employer that the employee reasonably believes is a violation of any law or that the employee reasonably believes constitutes improper quality of patient care.
- b) Provides information to, or testifies before, any public body conducting an investigation, a hearing, or an inquiry that involves allegations that the employer has violated any law or has engaged in behavior constituting improper quality of patient care.

VERMONT

- c) Objects to or refuses to participate in any activity, policy, or practice of the employer or agent that the employee reasonably believes is in violation of a law or constitutes improper quality of patient care.

21 VT. STAT. ANN. § 507(b).

There are steps that an employee must follow before alleging a violation of this statute. First, an employee must report the alleged violation of law to his employer, supervisor, or other person designated by the employer to address reports by employees and the employer must be given a reasonable opportunity to address the violations. The employee does not need to report the alleged violation if the employee reasonably believes that doing so would be futile because making the report would not result in appropriate action to address the violation. 21 VT. STAT. ANN. § 507(c). *See Griffis v. Cedar Hill Health Care Corp.*, 2008 VT 125 (2008) (Plaintiff's insubordination and usurpation of unassigned responsibility served as legitimate grounds for termination. Plaintiff was not terminated by her engaging in protected activities).

Employers must post notice of the Whistleblower Protection Statute indicating that an employee must report to the person designated to receive notifications in order to receive the protection. 21 VT. STAT. ANN. § 509(a) and (b). The notice must have a space for the name, title and contact information of the person to whom the employee must make a report to. An employer who does not post notice as required is liable for a civil fine of \$100.00 for each day of willful violation. 21 VT. STAT. ANN. § 509(c).

Further, Vermont has enacted a law so that state employees shall be free to report, in good faith, waste, fraud, abuse of authority, violation of law or threats to health of employees, public or persons under the care of the state without fear or reprisal, intimidation or retaliation. 3 VT. STAT. ANN. §971-978.

III. CONSTRUCTIVE DISCHARGE

The Vermont Supreme Court has not directly addressed the elements of a constructive discharge claim. The following dicta from *In re Bushey*, 455 A.2d 818, 142 Vt. 290 (1982), is instructive, however:

[Constructive Discharge] is the shorthand expression that refers to a discharge that was improperly produced or induced to the point that, conceptually, the resigned employee should be taken to have been discharged, and his rights evaluated accordingly.

The law is certainly no stranger to the notion that an action, binding if voluntary, is released from its conclusiveness if, in the eyes of the law, it is not

VERMONT

validly voluntary. Examples abound involving instruments such as confessions, contracts, releases, deeds, mortgages, and receipts. The notion that certain documents, such as those under seal, will be conclusive in their operation no matter whether their execution was obtained by fraud or force has long since been rejected, first in equity and now in law.

142 Vt. at 291-92.

In later Vermont cases, the Vermont Supreme Court has rejected constructive discharge arguments. See *In re Baldwin*, 604 A.2d 790, 791, 158 Vt. 644, 646 (1992) (affirming board's finding that evidence failed to support grievant's claim that working conditions were so intolerable as to support wrongful constructive discharge claim); *In re Moriarty*, 588 A.2d 1063, 1065, 156 Vt. 160, 165 (1991) (finding that plaintiff failed to show that his resignation was involuntary and was "the product of purposeful actions directed at obtaining the resignation").

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

An employment contract with a provision for "no cause" termination is enforceable. *LoPresti v. Rutland Reg'l Health Servs., Inc.*, supra.

An employment contract for a definite term may not be terminated by the employer before the expiration of that term except for just cause. *Sarvis v. Vt. State Colls.*, 772 A.2d 494, 172 Vt. 76 (2001). "Just cause is some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognizes as a good cause for . . . dismissal." *In re Grievance of Hurlbut*, 820 A.2d 186, 192, 175 Vt. 40, 47 (2003); see also *In re Towle*, 665 A.2d 55, 164 Vt. 145, 148 (1995), citing *In re Brooks*, 382 A.2d 204, 134 Vt. 563, 569 (1977).

A discharge for just cause will be upheld if it meets two criteria:

- (1) it is reasonable to discharge the employee because of misconduct, and
- (2) the employee had notice, express or fairly implied, that such conduct would be grounds for discharge.

Towle, 164 Vt. at 149.

In discipline cases, the just cause analysis should center upon the nature of the employee's misconduct. *In re Towle*, 665 A.2d 55, 164 Vt. 14 (1995), citing *In re Morrissey*, 538 A.2d 678, 149 Vt. 1, 13 (1987). Off-duty conduct may be just cause for

VERMONT

termination if an employer shows a nexus between the off-duty conduct and employment. *In re Grievance of Hurlbut*, 175 Vt. at 47.

B. Status of Arbitration Clauses

Generally, a provision in a written contract to submit to arbitration creates a duty to arbitrate if the contract contains a written acknowledgement of arbitration displayed prominently. 12 VT. STAT. ANN. § 5652. The specific language required by Vermont law can be found in 12 VT. STAT. ANN. § 5652(b). This does not apply to “labor interest arbitration.” 12 VT. STAT. ANN. § 5653(a). “Labor interest arbitration” is “the method of concluding labor negotiations by having a disinterested person determine what will be the terms of an agreement.” 12 VT. STAT. ANN. § 5652(a).

Effective October 1, 2020, Vermont passed legislation limiting “unconscionable terms,” including many arbitration clauses, in standard form contracts, including employment contracts. The act created a rebuttable presumption that certain terms are substantively unconscionable when included in a standard form contract, including any provision that would constitute a waiver of an employee’s right to assert claims or seek remedies provided by State or federal statute (most arbitration clauses), and any requirement that resolution of legal claims take place in an inconvenient venue (defined as a venue other than that of the employee’s residence or where the contract was consummated). Each “unconscionable term” is a separate violation of this legislation and could result in up to \$1,000 in statutory damages per violation and an award of attorney’s fees. 9 V.S.A. § 6055.

The Vermont Supreme Court has addressed the issue of arbitration clauses only in collective bargaining situations, and these cases were decided before the above-referenced “unconscionable acts” litigation went into effect. “Parties to a collective-bargaining agreement are required to exhaust contractual remedies before bringing a statutory unfair-labor-practice charge.” *Milton Educ. & Support Ass’n v. Milton Bd. of Sch. Trustees*, 759 A.2d 479, 171 Vt. 64 (2000). “Where a collective bargaining agreement establishes grievance and arbitration procedures for redress of grievances, [an] employee must . . . attempt to exhaust these procedures before resorting to judicial remedies.” *Potvin v. Champlain Cable Corp.*, 687 A.2d 95, 165 Vt. 504 (1996), citing *Ploof v. Village of Enosburg Falls*, 147 Vt. 196, 200 (1986). Therefore, courts “should defer to the grievance procedure in an agreement if the issue in the complaint is covered by the agreement, regardless of whether the issue might also involve an unfair-labor-practice claim.” *Milton Educ. & Support Assoc.*, 171 Vt. at 70.

“The exhaustion doctrine, [however], does not bind the parties if the issue ‘does not qualify as a matter of contract interpretation, if an overriding statute negates deferral, or if the Board’s own deferral guidelines indicate that deferral

VERMONT

would not serve the purposes of the statute.” *Milton Educ. & Support Assoc.*, 171 Vt. at 70, citing *Burlington Area Pub. Employees Union v. Champlain Water Dist.*, 156 Vt. 516, 520 (1991).

Although the issue has never been determined by the courts, arguably the language required in 12 Vt. Stat. ANN. § 5652 (b) is applicable to the resolution of disputes relative to labor relations for teachers. Unions have recently requested the acknowledgment of arbitration language required in 12 Vt. STAT. ANN. § 5652 (b) in union contracts in order to avoid the challenge of the obligation to arbitrate.

V. ORAL AGREEMENTS

“[A]ffidavit statements by employees regarding oral representations made in a review process and in conversations [were] insufficient as a matter of law to show unilateral modification of their at-will employment status.” *Madden v. Omega Optical, Inc.*, 683 A.2d 386, 165 Vt. 306 (1996). “Only those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer’s intent to bind itself will be enforced.” *Id.*, quoting *Ross v. Times Mirror*, 665 A.2d 580, 584 (Vt. 1995); see also *Havill v. Woodstock Soapstone Co.*, 783 A.2d 423, 172 Vt. 625 (2001).

A. Promissory Estoppel

“[E]ven if an employee . . . enjoys only at-will employment status, [the] employee may still be able to establish a claim for wrongful termination under a theory of promissory estoppel if that employee can demonstrate that the termination was in breach of a specific promise made by the employer that the employer should reasonably have expected to induce detrimental reliance by the employee, and that the employee did in fact detrimentally rely.” *Dillon v. Champion Jogbra Inc.*, 819 A.2d 703, 175 Vt. 1 (2002), citing *Foote v. Simmonds Precision Prod. Co. Inc.*, 613 A.2d 1277, 158 Vt. 566 (1992).

The doctrine of promissory estoppel may modify an employment contract that is otherwise terminable at-will. *Foote*, 158 Vt. 566.

To take an employee out of an at-will status, “an employer must do more . . . than [simply] promise continuous employment.” *Ross v. Times Mirror, Inc.*, supra.

Promissory estoppel is inapplicable to cases that arise out of a valid written contract between the parties. *LoPresti v. Rutland Reg'l Health Services, Inc.*, supra.

B. Fraud

“[P]rinciples of fraudulent inducement support [the] rule [that] an employer [may] avoid liability for breach of contract arising from an employment relationship

VERMONT

induced by an [applicant's or] employee's fraud." *Sarvis v. Vt. State Colleges*, 772 A.2d 494, 172 Vt. 76 (2001).

Likewise "an employer may owe an employee entering into a business transaction . . . a duty of care to disclose matters which are known to the employer and necessary to prevent its partial or ambiguous statements from being misleading . . . [or known] facts about which the employee is mistaken, if the employee would reasonably expect disclosure." *Morton v. Allstate Ins. Co.*, 58 F. Supp. 2d 325 (D. Vt. 1999), citing *Pearson v. Simmons Precision Products, Inc.*, 624 A.2d 1134, 1136 (1993).

C. Statute of Frauds

The Vermont Statute of Frauds states:

An action at law shall not be brought in the following cases unless the promise, contract, or agreement upon which such action is brought or some memorandum or note thereof is in writing, signed by the party to be charged therewith or by some person by him lawfully authorized:

(2) A special promise to answer for the debt, default or misdoings of another; [...]

(4) An agreement not to be performed within one year from the making thereof;

12 VT. STAT. ANN. § 181.

In *Cliché v. Fair*, 487 A.2d 145, 145 Vt. 258 (1982), the Vermont Supreme Court held that the Statute of Frauds does not apply to an employee's claim of quantum meruit. *Cliché*, 145 Vt. at 262; see also *Beattie v. Traynor*, 49 A.2d 200, 114 Vt. 495 (1946) (holding that an oral agreement which, according to the intention of parties as shown by the terms of the contract might be fully performed within a year from the time it was made is not within the statute of frauds although the time of its performance is uncertain and may probably extend beyond the year).

VI. DEFAMATION

A. General Rule

In Vermont, the general elements of a private action for defamation, libel and/or slander, are (a) a false and defamatory statement concerning another; (b) some negligence, or greater fault, in publishing the statement; (c) publication to at least one third person; (d) lack of privilege in the publication; (e) special damages,

VERMONT

unless actionable per se; and (f) some actual harm so as to warrant compensatory damages. *Lent v. Huntoon*, 470 A.2d 1162, 143 Vt. 539 (1983).

1. Libel

Libel is generally considered “actionable per se”: the plaintiff need not allege nor prove that he or she suffered any “special damages” as a direct or proximate result of the libel. *Lent v. Huntoon*, 470 A.2d 1162, 143 Vt. 539 (1983). Special damages, in short, are presumed. *Id.* Special damages have a unique connotation in the law of defamation; they are of a pecuniary nature and historically they have included loss of customers or business, loss of contracts, or loss of employment. *Id.*

2. Slander

Slander is generally not actionable per se; special damages are not presumed and must be alleged and proven. *Lent v. Huntoon*, 470 A.2d 1162, 143 Vt. 539 (1983).

However, Vermont recognizes three types of spoken statements as slander per se: (1) imputation of a crime; (2) statements injurious to one’s trade, business, or occupation, or (3) charges of having a loathsome disease. *Id.*

In *Lent*, an employer was held liable for defamation when it sent letters to former customers, now doing business with a former employee, indicating that the employee had been discharged for sound business reasons, and that the former employee had a lengthy criminal record and had stolen from the employer. *Id.*

Under Vermont common law, actual harm to one’s reputation is presumed from the mere publication of a defamatory falsehood. *Ryan v. Herald Ass’n, Inc.*, 566 A.2d 1316, 1320, 152 Vt. 275, 281 (1989).

B. References

The Vermont job reference law, which had temporarily granted immunity to employers who in good faith provide job performance information about individuals who work with minors or vulnerable adults, was repealed effective July 1, 2013. 21 VT. STAT. ANN. § 308.

C. Privileges

A conditional privilege to protect legitimate business interests is recognized as a defense to a defamation claim. The person asserting the privilege has the burden of proving the privilege. When a defendant proves the existence of a privilege, the plaintiff may overcome the protection of the privilege by proving clear and convincing evidence of malice. *Rubin v. Sterling Ents., Inc.*, 674 A.2d 782, 164 Vt. 582 (1996). Under Vermont law, a plaintiff must show one of two types of malice in order to

VERMONT

overcome the conditional privilege protecting legitimate business interests: knowledge of the statement's falsity or reckless disregard of the plaintiff's rights; or was carried out under circumstances evidencing insult or oppression. *Crump v. P & C Food Mkts.*, 576 A.2d 441, 154 Vt. 284, 293 (1990).

Malice can be shown by demonstrating that the defendant engaged in conduct manifesting personal ill will or reckless or wanton disregard of the plaintiff's rights, or conduct carried out under circumstances evidencing insult or oppression. *Rubin*, 674 A.2d 782, 164 Vt. 582.

In *Crump*, an employee who was summarily dismissed after 18 years of service because of an alleged theft, sued his employer for defamation. After a jury trial, the employee was awarded compensatory and punitive damages on his defamation claims. To prevail in a defamation action against an employer, who enjoys conditional privilege for intra-corporate communications to protect its legitimate business interests, a plaintiff must show malice or abuse of privilege sufficient to defeat the privilege. *Crump*, 154 Vt. at 292. The Vermont Supreme Court affirmed, holding that the evidence was sufficient for a jury to find the employer acted with malice and abused the conditional privilege in disseminating allegations of theft by the employee. *Id.* at 297-298.

D. Other Defenses

1. Truth

Truth is a defense to a defamation claim. *Lent*, supra.

2. No Publication

Publication must be to at least one third person under Vermont law. See *Lent*, supra. A plaintiff has no cause of action if the defamatory statements are not published.

3. Self-Publication

Compelled self-publication is an emerging exception to the general rule, whereby the person who originally made the defamatory statement may be held liable if the defamed person is compelled to publish the statement to a third party. The Vermont Supreme Court has not adopted the doctrine of compelled self-publication. The federal district court in *Raymond v. Int'l Bus. Mach. Corp.*, 954 F.Supp 744 (D. Vt 1997) has predicted, however, that Vermont will recognize the doctrine. *But see Moss v. Mutual of Omaha Inc., Co.*, 1990 WL 485666, 1990 U.S. Dist. LEXIS 20188 (D. Vt. April 9, 1990) (relying upon *Crane v. Darling*, 44 A. 359, 71 Vt. 295 (1899), to conclude that Vermont does not recognize the doctrine of compelled self-publication).

4. Invited Libel

There is no specific case law addressing invited libel in Vermont. However, more broadly a federal district court judge, construing Vermont law, has dismissed a libel per se claim based on the concept of “invited harm,” stating that “[t]his case would not exist but for [employee’s] request for review,” relying on the Restatement (Second) of Torts for its interpretation. *Long v. Quorum Health Resources, LLC*, 2014 WL 1795156 (D. Vt.).

5. Opinion

Vermont requires a plaintiff to show that a defendant acted with malice to prove a defamation claim. There are different standards regarding “public” or “private” persons who are defamed. *Ryan v. Herald Ass’n. Inc.*, 566 A.2d at 1319.

A “public” official or figure must show that the defendant acted with “actual malice.” That is, the defendant must know the defamatory statement is false, or at least have serious doubts as to its truth, or else publish the material exhibiting “reckless disregard” for the truth, in order to qualify. A “private” individual, by contrast must show only Constitutional malice. Malice in this sense “may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one’s rights.” *Ryan*, 152 Vt. at 281, quoting *Lent v. Huntoon*, 470 A.3d at 1170, 143 Vt. at 550.

It is often difficult to prove that mere opinion is equivalent to either actual or Constitutional malice. Opinion is “a belief not based on absolute certainty or positive knowledge, but on what seems true, valid or probable to one’s mind.” WEBSTER’S DICTIONARY 950 (3d College ed. 1994). The *Huntoon* test appears to require actual conduct to prove malice by either standard.

E. Job References and Blacklisting Statutes

Vermont does not have a blacklisting statute.

F. Non-Disparagement Clauses

Vermont does not have a statute addressing non-disparagement clauses.

VERMONT

VII. EMOTIONAL DISTRESS CLAIMS

The Vermont Supreme Court has not squarely been presented with the question of whether damages for emotional injury are a proper remedy for breach of contract.¹

The Court has held that mere termination of employment will not support a claim for intentional infliction of emotional distress, but if "the manner of termination evinces circumstances of oppressive conduct and abuse of a position of authority vis-a-vis plaintiff, it may provide grounds for the tort action." *Crump*, supra 154 Vt. at 296, 576 A.2d at 448. In *Crump*, the employer "summoned plaintiff to a lengthy meeting without notice, continued the meeting without a break for rest or food, [and] repeatedly badgered [the employee] to amend and sign a statement" immediately before the employee's dismissal. *Id.* at 296-97, 576 A.2d at 449. However, a summary firing after a three-minute meeting and including an accusation of misuse of resources did not rise to the level of supporting a claim for intentional infliction of emotional distress. *Farnum v. Brattleboro Retreat*, 164 Vt. 488, 671 A.2d 1249 (1995).

Emotional distress damages are also available for tortious interference with contractual relations. *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 270-71, 583 A.2d 583, 590 (1990) (citing Restatement (Second) of Torts § 774A(1)(c)); see also *Cooper v. Cooper*, 783 A.2d 430 (Vt. 2001) (violation of fiduciary duty).

But a plaintiff who sues for negligent misrepresentation and negligent failure to disclose in connection with an offer of employment is limited to economic loss damages:

"Recovery for worry, distress and unhappiness as the result of . . . loss of a job . . . is not permitted when the defendant's conduct is merely negligent." *Pearson v.*

¹ *But cf. Fitzgerald v. Congleton*, 155 Vt. 283, 291-93, 583 A.2d 595 (1990) (claims for emotional distress and personal humiliation, allegedly resulting from defendant's "breach of contract, negligence, and a violation of the Code of Professional Responsibility," are time-barred because they constitute injuries "to the person" within the meaning of statute of limitations); see also *Egri v. U.S. Airways, Inc.*, 2002 Vt LEXIS 139 (three-year statute of limitations under governs plaintiff's claim for emotional distress resulting from defendant's alleged violation of the Fair Employment Practices Act); *Philip Haverly v. Kaytec, Inc.*, 169 Vt 350, 738 A2d 86 (1999) (noting, evidently with approval, the trial court's charge to the jury that damages for emotional distress were available for retaliating against plaintiff for complaining about work place health and safety regulations in violation of 21 V.S.A. § 231).

VERMONT

Simmonds Precision Products, Inc., 160 Vt 168, 624 A2d 1134 (1993)(quoting *Branch v. Homefed Bank*, 6 Cal. App. 4th 793, 8 Cal. Rptr. 2d 182 (Ct. App. 1992)).²

It is the accepted rule in Vermont that when a contract is breached the aggrieved can recover both the direct or general damages for the losses that naturally and usually flow from the breach itself, *Norton & Lamphere Construction Co. v. Blow & Cote, Inc.*, 123 Vt. 130, 136, 183 A.2d 230, 236 (1962), and also special or consequential damages. Recovery of consequential damages is subject to the limitations of causation, certainty and foreseeability. *Id.* Consequential damages are recoverable for breach of contract where they "may be reasonably supposed to have been in the contemplation of both parties[,] at the time they made the contract, [as the probable result of the breach of it]." *Norton & Lamphere Construction Co. v. Blow & Cote, Inc.*, *supra* (quoting *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)).

A. Intentional Infliction of Emotional Distress

A plaintiff must demonstrate that extreme and outrageous conduct, done intentionally or with reckless disregard of the possibility of causing emotional distress, resulted in the suffering of extreme emotional distress. *Farnum v. Brattleboro Retreat, Inc.*, 671 A.2d 1249, 164 Vt. 488 (1995), citing *Denton v. Chittenden Bank*, 655 A.2d 703, 163 Vt. 62, 66 (1994). A plaintiff's burden on a claim of intentional infliction of emotional distress is a "heavy one." *Gallipo v. City of Rutland*, 656 A.2d 635, 643, 163 Vt. 83, 94 (1994). "The standard for establishing 'outrageous' conduct is necessarily a high one." *Denton*, 163 Vt. at 66. The conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable. *Denton*, 163 Vt. at 66. A trial court must determine as a threshold issue whether the conduct was so extreme and 'outrageous' that a jury could reasonably find liability. *Id.*

Mere termination of employment cannot support a claim for intentional infliction of emotional distress, but if the manner of termination evinces circumstances of oppressive conduct and abuse of a position of authority vis-à-vis the employee, it may provide grounds for the tort action. *Farnum*, 164 Vt. at 497; *Dulude v. Fletcher Allen Health Care*, 174 Vt. 74, 84 (Vt. 2002); *Crump v. P & C Food Markets, Inc.*, 154 Vt. 284, 296, 576 A.2d 441, 448 (1990).

² Generally speaking, negligence is not a basis for recovery of emotional distress unless claimant is physically injured or in a zone of danger subjected to reasonable fear of imminent physical harm. *Jobin v. McQuillen*, 158 Vt. 322, 328, 609 A.2d 990, 993 (1992).

VERMONT

B. Negligent Infliction of Emotional Distress

There is no Vermont case law on this issue in the area of employment law.

VIII. PRIVACY RIGHTS

A. Generally

The Vermont Supreme Court has defined the right of privacy as the right to be left alone. *Pion v. Bean*, 833 A.2d 1248, 176 Vt. 1, 12 (2003), citing *Denton v. Chittenden Bank*, 655 A.2d 703, 163 Vt. 62 (1994). The invasion of privacy is an intentional interference with a person's interest in solitude or seclusion, either as to the person or as to the person's private affairs or concerns, of a kind that would be highly offensive to a reasonable person. *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1129, 160 Vt. 150, 162 (1992).

A right of action for invasion of privacy may also arise from appropriation of likeness. *Staruski v. Cont'l Tel. Co. of Vt.*, 581 A.2d 266, 154 Vt. 568 (1990).

In *Denton*, the court held that telephone calls at home during non-working hours, visiting the plaintiff at home during his child's birthday party, and inquiring into the plaintiff's medical condition, or when the plaintiff would return to work, were not highly offensive under the circumstances and not an invasion of privacy. *Denton*, 163 Vt. at 66.

The court in *Staruski* held an employee could recover for wrongful invasion of privacy where, without her permission, the employer ran an advertisement in a publicly circulated newspaper displaying her name, photograph and text falsely attributed to her, praising the employer. *Staruski*, 154 Vt. 573-75.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

See discussion below of Vermont law restricting employer use of credit reports and credit history. See also discussion in section XVI.C. of the recent law that allows undocumented migrant workers to obtain drivers' licenses in Vermont.

2. Background Checks

Vermont generally prohibits employers from inquiring about an applicant or employee's credit report or credit history, and from failing or refusing to hire or recruit, discharging, or otherwise discriminating against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of the individual's credit report or credit history. 21 VT. STAT. ANN.

VERMONT

§ 495i(b)(2012). An employer is exempt from these provisions if one or more of the following conditions are met:

- (A) The information is required by state or federal law or regulation;
- (B) The position of employment involves access to confidential financial information;
- (C) The employer is a financial institution or a credit union;
- (D) The position of employment is that of a law enforcement officer, emergency medical personnel, or a firefighter;
- (E) The position of employment requires a financial fiduciary responsibility to the employer or a client of the employer, including the authority to issue payments, collect debts, transfer money, or enter into contracts;
- (F) The employer can demonstrate that the information is a valid and reliable predictor of employee performance in the specific position of employment;
- (G) The position of employment involves access to an employer's payroll information.

21 VT. STAT. ANN. § 495i(c)(2012). An employer that is exempt may not use an employee's or applicant's credit report or history as the sole factor in decisions regarding employment, compensation, or a term, condition, or privilege of employment. *Id.*

If an exempt employer seeks to obtain or act upon an employee's or applicant's credit report or credit history that contains information about the employee's or applicant's credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers, the employer shall:

- (1) Obtain the employee's or applicant's written consent each time the employer seeks to obtain the employee's or applicant's credit report;
- (2) Disclose in writing to the employee or applicant the employer's reasons for accessing the credit report, and if an adverse employment action is taken based upon the credit report, disclose the reasons for the action in writing. The employee or applicant has the right to contest the accuracy of the credit report or credit history;
- (3) Ensure that none of the costs associated with obtaining an employee's or an

VERMONT

applicant's credit report or credit history are passed on to the employee or applicant; and

(4) Ensure that the information in the employee's or applicant's credit report or credit history is kept confidential and, if the employment is terminated or the applicant is not hired by the employer, provide the employee or applicant with the credit report or have the credit report destroyed in a secure manner which ensures the confidentiality of the information in the report.

21 VT. STAT. ANN. § 495i(d)(2012).

An employer shall not discharge or in any other manner discriminate against an employee or applicant who has filed a complaint of unlawful employment practices in violation of this section or who has cooperated with the attorney general or a state's attorney in an investigation of such practices or who is about to lodge a complaint or cooperate in an investigation or because the employer believes that the employee or applicant may lodge a complaint or cooperate in an investigation. 21 VT. STAT. ANN. § 495i(e)(2012).

Notwithstanding the exemptions, an employer shall not seek or act upon credit reports or credit histories in a manner that results in adverse employment discrimination prohibited by federal or state law, including Vermont's Fair Employment Practices Act (21 VT. STAT. ANN. § 495) and Title VII of the Civil Rights Act of 1964. 21 VT. STAT. ANN. § 495i(f)(2012).

Vermont adopted a "Ban the Box" statute, 21 VT. STAT. ANN. § 495j, (effective July 1, 2017) which prohibits an employer from asking about a prospective employee's "criminal history record" 20 VT. STAT. ANN. § 2056a, unless a conviction would disqualify the person from the job or the employer would be prohibited from hiring them under state or federal law. Where such questions can be asked, they must be limited to convictions that would prohibit or disqualify from employment. An opportunity to explain must be provided.

C. Specific Issues

1. Workplace Searches

Article 11 of the Vermont Constitution states:

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their

VERMONT

property, not particularly described, are contrary to that right, and ought not to be granted.

Vt. Const. Art. XI.

Generally, the Vermont Supreme Court has held that a person has no expectation of privacy in an area open to the public at large. *State v. Rheaume*, 2005 VT 106, 179 Vt. 39, 889 A.2d 711 (Vt. 2005). In *Rheaume*, the Vermont Supreme Court agreed with the United States Supreme Court that an expectation of privacy exists in a private business office. *Id.*, citing *O'Connor v. Ortega*, 480 U.S. 709 (1987). There are currently no Vermont decisions relating to an employer's right to search an employee or his work area.

2. Electronic Monitoring

Vermont currently has no case law or statutes discussing the electronic monitoring of employees by employers.

3. Social Media

21 V.S.A. § 495k generally prohibits an employer from requiring, requesting, or coercing an employee to provide a social media account username or password, or to present or divulge social media content to the employer. It further prohibits employers from requiring or coercing an employee to add the employer to his or her list of contacts for a social media account. The law includes exemptions for certain activities conducted by law enforcement agencies and for social media accounts provided by employers. It also allows an employer to request an employee to disclose specifically identified content necessary for compliance with legal or regulatory requirements, or as part of an investigation of unlawful harassment, threats of violence, or unauthorized disclosure of confidential information.

4. Taping of Employees

A one-day public video surveillance of a plaintiff employee after he filed a second workers' compensation claim could not alone support a finding that the employer had retaliated against the employee. *Hall v. State*, 2012 VT 43, 54 A.3d 993 (Vt. 2012). The Vermont Supreme Court held that such surveillance could be expected in response to a tip claiming fraud, regardless of the tip's source, and the Court could not see how it would cause a reasonable person to forego a legitimate worker's compensation claim. *Id.*

5. Release of Personal Information on Employees

Employees have privacy rights with regard to their personnel records. 12 VT. STAT. ANN. § 1691(a) mandates a particular procedure, which litigants in a civil action not involving discrimination must comply with, in order to access an employee's personnel records. In a civil action, with the exception of employment discrimination cases, a party who is seeking production of the personnel records of an employee, must (1) provide that employee with notice of the request and (2) inform him of his rights under the law. In addition, the employee is afforded with the opportunity to object to the production of such records within 20 days after receiving notice of the request.

If an employer is permitted under Vermont law to inquire into an employee or applicant's credit report or credit history, see discussion in section VIII.B.2., the employer must ensure that the information in the employee's or applicant's credit report or credit history is kept confidential and, if the employment is terminated or the applicant is not hired by the employer, provide the employee or applicant with the credit report or have the credit report destroyed in a secure manner which ensures the confidentiality of the information in the report. 21 VT. STAT. ANN. § 495i(d)(2012).

In 2017, 14 VT. STAT. ANN. 125 §§ 3551-3568 extended a fiduciary's traditional authority to manage a person's tangible property to include management of the person's digital assets (such as on-line bank accounts, retirement accounts, email, and social media accounts).

6. Medical Information

The Vermont Health Law requires the confidentiality of all certificates, applications, records and reports, other than an order of a court made for the purposes of this part of the title, directly or indirectly identifying a patient or former patient or an individual whose hospitalization or care has been sought or provided together with clinical information relating to such persons. 18 VT. STAT. ANN. § 7103. These documents may only be disclosed under certain conditions, including:

- (1) as the individual identified, the individual's health care agent under subsection 5264 of this title, or the individual's legal guardian, if any (or, if the individual is an unemancipated minor, his or her parent or legal guardian), shall consent in writing; or
- (2) as disclosure may be necessary to carry out any of the provisions of this part; or

VERMONT

(3) as a court may direct upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make disclosure would be contrary to the public interest.

Id.

Vermont law prohibits requesting or requiring an applicant or prospective employee to have an HIV-related blood test as a condition of employment. An employer needs consent from the employee before the employee's health information can be released. 21 VT. STAT. ANN. § 495(a)(7).

7. Restrictions on Requesting Salary History

21 VT. STAT. ANN. § 495(m) prohibits employers from inquiring about or seeking information about a prospective employee's current or past compensation from either the prospective employee or from any current or former employer of the prospective employee. It likewise prohibits requiring that a prospective employee's current or past compensation satisfy minimum or maximum criteria in determining whether to interview a prospective employee based on current or past compensation. However, if a prospective employee voluntarily discloses information regarding current or past compensation, the employer may, *after* making an offer of employment with compensation to the prospective employee, seek to confirm that information. This law specifically notes that employers may still inquire into a prospective employee's salary expectations or requirements.

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision/Retention

There is no case law in Vermont specifically addressing negligent hiring as a separate tort from negligent supervision. However, an employer may, in addition to being found vicariously liable for the tortious conduct of its employees, be found directly liable for damages resulting from negligent supervision of its employees' activities. *See Brueckner v. Norwich Univ.*, 169 Vt. 118, 730 A.2d 1086 (1999). The Vermont Supreme Court has relied on THE RESTATEMENT (SECOND) OF AGENCY § 213 in concluding that an employer may be liable for the negligent supervision of its employee. *Brueckner*, 169 Vt. at 126. THE RESTATEMENT (SECOND) OF AGENCY § 213 states that "[o]ne who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others." *Brueckner*, 169 Vt. at 127, citing THE RESTATEMENT (SECOND) OF AGENCY § 213. Direct actions against the employer by an injured employee would generally be barred by operation of the Worker's Compensation exclusivity rule.

VERMONT

B. Interplay with Worker's Compensation

An employer is immune from a lawsuit brought by the injured employee based on that workplace injury, but an injured employee may bring a personal injury action against a third party “other than the employer.” 21 VT. STAT. ANN. § 624(a). In evaluating whether a supervisory co-employee is protected from suit by the employer's immunity, Vermont has adopted a “nature of the duty” test: an injured employee may only bring a personal injury action against a co-employee who is not exercising managerial prerogatives and not performing the employer's nondelegable duty to maintain a safe workplace. See *Garrity v. Manning*, 164 Vt. 507, 508, 671 A.2d 808, 808 (1996); *Chayer v. Ethan Allen, Inc.*, 2008 VT 45, ¶ 24, 183 Vt. 439, 954 A.2d 783 *Gerrish v. Savard*, 169 Vt. 468, 474, 739 A.2d 1195, 1200 (1999); *Garger v. Desroches*, 2009 VT 37, ¶ 5, 185 Vt. 634, 974 A.2d 597 (2009). This exclusive remedy provision does not protect employers who fail to obtain workers' compensation insurance. Where the employer fails to obtain insurance, the worker may bring suit against the employer for full damages. 21 VT. STAT. ANN. § 618(b).

No employee may be discharged for filing a workers' compensation claim. 21 VT. STAT. ANN. § 710(b). An employer of an employee who files a workers' compensation claim shall reinstate the worker when his or her inability to work ceases provided recovery occurs within 2 years of the onset of the disability. A worker who recovers within 2 years of the onset of the disability shall be reinstated in the first available position suitable for the worker given the position the worker held at the time of the injury. 21 VT. STAT. ANN. § 643b(b). Upon reinstatement the worker shall regain seniority and any unused annual, personal, and sick leave and any compensatory time they were entitled to prior to the interruption in employment. 21 VT. STAT. ANN. § 643b(c).

A firefighter or rescue or ambulance worker with lung disease or an infectious disease is presumed to have acquired the disease as a result of his or her employment. 21 VT. STAT. ANN. § 601(11)(H) (amendment effective July 1, 2013). This presumption is not available if a vaccine was refused by worker, or if the worker has used tobacco product within 10 years of the date of diagnosis. *Id.*

C. Firearms in the Workplace

Generally, there are no laws in Vermont that prohibit firearms in the workplace; nor do any laws require employers to accept FIREARMS in the workplace. That said, Vermont prohibits any person, except for law enforcement officers engaged in official duties, from knowingly possessing a firearm or a dangerous or deadly weapon while within a state building, a school building or on a school bus, unless authorized by the board of school directors, or the superintendent or principal if delegated authority to do so by the board. 13 VT. STAT. ANN. § 4004.

VERMONT

D.. Use of Mobile Devices

Vermont currently has no case law or statutes discussing the use of mobile devices in the workplace.

X. TORT LIABILITY

A. Respondeat Superior Liability

Under the settled doctrine of respondeat superior, an employer is held vicariously liable for the tortious conduct of an employee that falls within the scope of employment. *Brueckner v. Norwich Univ.*, 169 Vt. 118, 122-23, 730 A.2d 1086, 1090-91 (1999). Vermont has adopted the four element test of Restatement (Second) of Agency § 229(1) in determining whether an employee's conduct falls within the scope of employment. *Id.*; *Doe v. Forrest*, 2004 VT 37, P15 (Vt. 2004). A plaintiff must demonstrate that the act of the employee: (a) . . . is of the kind the servant is employed to perform; (b) . . . occurs substantially within the authorized time and space limits; (c) . . . is actuated, at least in part, by a purpose to serve the master; and (d) in a case in which force is intentionally used by the servant against another . . . is not unexpected by the master. *Id.* Vermont has also expressly adopted Restatement (Second) of Agency § 219(2)(d) in assessing whether an employer is vicariously liable for the tortious conduct of an employee when that conduct falls outside the scope of employment; however while the Vermont Supreme Court has applied this test to tortious acts committed by a law enforcement officer, it has declined to do so in a case involving tortious acts committed by a pastor. *Doe v. Forrest*, 2004 VT 37, ¶ 22; *cf. Doe v. Newbury Bible Church*, 2007 VT 72, ¶ 8.

B. Tortious Interference with Business/Contractual Relations

The tort of tortious interference with contract provides protection to contracts terminable "at-will." *Murray v. St. Michaels Coll.*, 667 A.2d 294, 164 Vt. 205 (1995). In other words, an employer may be liable for inducing someone to leave their employment for the new employer. To be liable for this tort, the defendant must have intentionally and improperly induced or caused a person not to perform under his contract with the plaintiff. *Trepanier v. Getting Organized, Inc.*, 583 A.2d 583, 155 Vt. 259 (1990). The intent element is satisfied even if the actor does not act with the intent to interfere "but knows that interference will be substantially certain to occur as a result of her actions." *Id.*, 155 Vt. at 268, *citing Williams v. Chittenden Trust Co.*, 484 A.2d 911, 914, 145 Vt. 76, 81 (1984), *but see Adams v. Green Mtn. R. Co.*, 2004 VT 75 (mere timing is not enough to demonstrate that termination occurred based on reporting of confrontation, which would have constituted tortious interference, as opposed to as result of the confrontation itself.)

VERMONT

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Although case law in Vermont recognizes restrictive covenants in employment agreements or contexts, trial courts vary in their willingness to uphold them. A restrictive covenant in an employment agreement will be enforced to the extent that enforcement is reasonably tailored to protect a legitimate interest of the employer. *See Sys. & Software, Inc. v. Barnes*, 886 A.2d 762, 178 Vt. 389 (2005).

When enforcing restrictive covenants against competitive employment, the Vermont Supreme Court proceeds with caution, since these “restraints run counter to [the] public policy favoring the right of individuals to [freely] engage in [desirable] commercial activity.” *Sys. & Software*, 178 Vt. at 391, *citing Roy’s Orthopedic, Inc. v. Lavigne*, 454 A.2d 1242, 1244, 142 Vt. 347, 350 (1982). Such restrictions are subject to scrutiny for reasonableness and justification. *Id.* “Courts seek to balance the employer’s interest in protecting its business and investments, the employee’s interest in pursuing a desired occupation, and the public’s interest in the free flow of commerce.” *Majestic Corp. of Am., Inc. v. Crepeau*, 2007 WL 922267 *5, 2007 U.S. Dist. LEXIS 21602 (D. Vt. Mar. 23, 2007), *citing Summits 7, Inc. v. Kelly*, 886 A.2d 365, 369, 178 Vt. 396, 399 (2005).

The Vermont Supreme Court has held that a restrictive covenant will be enforced unless: (1) the agreement is found to be contrary to public policy, (2) unnecessary for protection of the employer, or (3) unnecessarily restrictive of the rights of the employee, with due regard being given to the subject matter of the contract and the circumstances and conditions under which it is to be performed. *Vt. Elec. Supply Co. v. Andrus*, 315 A.2d 456, 458, 132 Vt. 195, 198 (1974).

In *Sys. & Software*, the plaintiff, a corporation engaged in the business of designing, developing, selling and servicing software, hired the defendant as an at-will employee to be the vice-president of sales. The defendant signed a non-competition agreement that prohibited him during his employment and six months thereafter from associating with any business that competed with the plaintiff. The defendant left his position with the plaintiff and started a consulting business working with a direct competitor. The plaintiff filed a complaint and a request for injunctive relief seeking to enforce the non-competition clause.

The defendant argued, among other things, that the agreement did not safeguard any legitimate interest of the employer because it did not protect any trade secrets. The Vermont Supreme Court rejected this argument citing § 80.16 of CORBIN ON CONTRACTS, which states, “employers may use non-competition agreements to protect the goodwill of business in addition to trade secrets and other confidential

VERMONT

information.” See 15 G. Giesel, CORBIN ON CONTRACTS § 80.16, at 141-42 (rev. ed. 2003).

The draft of the RESTATEMENT (THIRD) ON EMPLOYMENT LAW supports the language of Corbin and was discussed by the Vermont Supreme Court in *Sys. and Software*. The RESTATEMENT states that “[n]on-competition agreements may protect legitimate employer interests such as customer relationships and employee-specific goodwill that are “significantly broader” than proprietary information such as trade secrets and confidential customer information.” 178 Vt. at 392, citing RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 6.05.

“A noncompetition agreement presented to an employee [during the course of their] employment [has been determined by the court to be] ancillary to the employment relationship, and thus requir[ing] no additional consideration other than continued employment.” *Summit 7, Inc. v. Kelly*, 178 Vt. at 404 (2005). Thus, as long as the noncompetition agreement presented to the employee is reasonable the employee can be required to sign the agreement as a condition of continued employment.

B. Blue Penciling

Vermont has no blue penciling statute and there has not been significant case law in Vermont on the subject. However, in *Deringer v. Strough*, 103 F.3d 243 (2d Cir. 1996), the Second Circuit concluded that Vermont would permit enforcement of a defective restrictive covenant to the limit of its validity where the covenant contained a savings clause permitting its enforcement to the extent allowable by law. *Id.* at 248.

The Second Circuit noted that there are two approaches to modifying restrictive covenants. First is the “blue pencil” rule to “strike an unreasonable restriction ‘to the extent that a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken.’” *Id.* at 247, quoting *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 36 (Tenn. 1984). Second is the rule of reasonableness. This rule provides that “unless the circumstances indicate bad faith on the part of the employer, a court will enforce covenants not to compete to the extent they are reasonably necessary to protect the employer’s interest without imposing undue hardship on the employee when the public interest is not adversely affected.” *Id.* at 247. The Second Circuit predicted that Vermont would permit enforcement to the limit of its validity. *Id.* at 247-48.

C. Confidentiality Agreements

Disclosure of confidential company information in violation of a confidentiality agreement is grounds for discharge of an employee. *Robertson v. Mylan Labs.*, 848 A.2d 310, 176 Vt. 356 (2004). In *Robertson*, an employee’s description of confidential

VERMONT

projects listed on her resume from her employment with the defendants were found to be in violation of a confidentiality agreement and the employee was discharged.

D. Trade Secrets Statute

Vermont's Trade Secrets Act, 9 VT. STAT. ANN. §§ 4601-4609, was enacted to prevent the misuse of business information. Under the Act an injured party may recover injunctive relief and damages for the misappropriation of trade secrets. A "trade secret" is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other person who can obtain economic value from its disclosure or use; and
- (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

9 VT. STAT. ANN. §4601(3); *see also Dicks v. Jensen*, 172 Vt. 43, 768 A.2d 1279 (Vt. 2001).

The Trade Secrets Act defines misappropriation as:

- (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (B) disclosure of use of a trade secret of another without express or implied consent by a person who:
 - i. used improper means to acquire knowledge of the trade secret; or
 - ii. at the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
 - 1. derived from or through a person who had utilized improper means to acquire it;
 - 2. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - 3. derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - iii. before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

9 VT. STAT. ANN. § 4601(2).

A customer list can qualify as a trade secret, but the burden is on the employer to demonstrate that it pursued an active course of conduct to inform its employees that this information was to remain confidential. *Dicks v. Jensen*, 172 Vt. 43, 768 A.2d 1279 (Vt. 2001).

A corporate officer or director in Vermont may not profit at the expense or against the interest of the corporation. *J.A. Morrissey, Inc. v. Smejkal*, 2010 VT 66 ¶ 10. It is a breach of fiduciary duty for corporate officers, while still employed by the corporation, to solicit the business of any customers, to usurp business opportunities that belong to the corporation, or to use the corporation's facilities or equipment to assist them in developing their new business before leaving their employment at the corporation. *Id.* at ¶ 15.

XII. DRUG TESTING LAWS

A. Public Employer

See discussion below under "Private Employer."

B. Private Employers

Vermont law specifically proscribes when and how an employer is permitted to test employees for drugs.

Employers are prohibited from administering drug tests, or requiring applicants or employees to undergo drug tests, unless they comply with specific statutory requirements. 21 VT. STAT. ANN. §§ 512(a) and 513(a) (1996).

Employers may only require applicants for employment to submit to a drug test if the following conditions are met:

- (1) the applicant has been given an offer of employment conditioned on the applicant receiving a negative test result;
- (2) the applicant received written notice (which cannot be waived by the applicant) with the drug testing procedure, a listing of the drugs to be tested, and stating that therapeutic levels of prescription drugs will not be reported;
- (3) the test is administered in accordance with 21 VT. STAT. ANN. § 514.

VERMONT

21 VT. STAT. ANN. §512.

Employers may only require employees to submit to drug tests if the following conditions are met:

- (1) there is probable cause to believe the employee is using drugs or is under the influence of a drug on the job;
- (2) a bona fide drug and alcohol rehabilitation program is provided, either directly from the employer or through a health insurance plan; and
- (3) the employer may not terminate an employee who tests positive if the employee agrees to participate in, and successfully completes, the rehabilitation but the employee may be suspended for the time necessary to complete the rehabilitation, up to a maximum of three months.

21 VT. STAT. ANN. §513.

An employee testing positive for drugs may be terminated if the employee, after completing the rehabilitation program, again tests (in compliance with the statute) positive for drug use.

21 VT. STAT. ANN. §513(c)(3).

Pursuant to 21 VT. STAT. ANN. § 514, any drug test administered to applicants or employees must be conducted according to the following procedures:

- (1) The tests shall be administered only to detect the presence of alcohol or drugs listed in the statute;
- (2) Employers must provide all persons to be tested with a written policy identifying the circumstances under which persons may be tested, the procedures to be used, the drugs to be screened, a statement that over-the-counter medications may result in a positive result, and the consequences of a positive result;
- (3) Employers may not request or require that blood samples be drawn for the purpose of administering a drug test;
- (4) The employer may only use a laboratory designated by the Department of Health for analyzing test results;
- (5) The employer shall establish chain of custody procedures for collecting samples, for testing, and for verifying the identity of each sample and test result;

VERMONT

- (6) If urinalysis is used to screen for drugs, any positive results must be confirmed by gas chromatography with mass spectrometry or an equivalent scientifically accepted method, and the person tested may, at his/her own request and expense, have a blood sample drawn and preserved for later testing;
- (7) The testing laboratory may only report a positive result to the employer if both the initial test and the confirmation test are positive;
- (8) The detection of a drug at a therapeutic level as defined by the commissioner of health shall be reported as a negative test result;
- (9) The testing laboratory shall supply the medical review officer (who shall review and discuss with the individual tested) a written report of the test results, including the name of the person tested, the type of test conducted, the results of the test, the detection level used to distinguish positive and negative samples, the name and address of the laboratory, and any other relevant information provided by the laboratory to the employer concerning that person's test;
- (10) The employer shall ensure that a portion of any positive sample is preserved in a condition that will permit retesting for a period of at least 90 days after the person tested receives the test results;
- (11) The employer shall contract with or employ a certified medical review officer who is a licensed physician with knowledge of the medical use of prescription and non-prescription drugs; and
- (12) The employer shall designate a collector (who may be an employee for the purposes of collecting specimens from job applicants, but may not be an employee for purposes of collecting specimens from employees for drug testing bases on probable cause) to collect specimens from job applicants and employees.

The employer is required to have its medical review officer contact applicants or employees who have positive test results to explain the results and why the result may not be accurate and provide them with the opportunity to have the sample tested again by an independent lab at their own expense. 21 VT. STAT. ANN. §515.

Test results must be kept confidential and not released to anyone except the employer and the person tested. 21 VT. STAT. ANN. § 516. Any release of information under any other circumstances shall be solely pursuant to a written consent form, signed voluntarily by the person tested, unless such release is compelled by a court of competent jurisdiction. *Id.* The drug testing requirements do not restrict an employer's authority to prohibit nonprescription use of drugs or alcohol during work hours, or the employer's authority to discipline, suspend, or dismiss employees for being under the influence of drugs or alcohol during working hours. 21 VT. STAT. ANN. § 517.

VERMONT

An employee aggrieved by alleged violations of these requirements has a private right of action for injunctions, damages, court costs, and attorney fees. 21 VT. STAT. ANN. § 519(a). In any such action, the employer has the burden of proof to show compliance with the requirements of the drug testing provisions. 21 VT. STAT. ANN. § 519(b). The state may also seek civil fines of \$500 to \$2000 against persons who violate these requirements; and in the case of a person who knowingly violates the law, the state may seek criminal fines of \$500 to \$1,000 or six months imprisonment, or both. 21 VT. STAT. ANN. § 519(c).

Please note that Federal law also requires drug testing in certain circumstances, e.g. a blood test of CDL drivers under the Federal Motor Carrier Safety Administration.

XIII. STATE ANTI-DISCRIMINATION STATUTE

A. Employers/Employees Covered

The Vermont Fair Employment Practices Act applies to all public and private sector employers, labor unions representing at least five employees, employment agencies, and state contractors. 21 VT. STAT. ANN. § 495(a)(1).

B. Types of Conduct Prohibited

Vermont's Fair Employment Practices Act prohibits any employer, employment agency or labor organization from discriminating against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, or age or against a qualified handicapped individual (physical or mental condition), except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, sexual orientation, ancestry, place of birth, age, or physical or mental condition. 21 VT. STAT. ANN. § 495(a)(1). Gender identity is included as a protected category with respect to discrimination by an employer. 21 VT. STAT. ANN. § 495(a)(1). *Id.* The Act also prohibits discriminating against an employee who opposes illegal practices or participated in proceedings under the Act. *Id.* at § 495(a)(5).

"Employer" is defined as having one or more persons performing services within Vermont. 21 VT. STAT. ANN. § 495d. All employers have an obligation to ensure a workplace free of sexual harassment and are required to adopt a policy against sexual harassment. 21 VT. STAT. ANN. § 495h.

It had long been assumed that Vermont would follow the common standard that a "pretext" used to justify discrimination must be a lie by the employer to avoid its responsibilities under the Fair Employment Practices Act. In *Hammond v. Univ. of Vermont Med. Ctr.*, 2023 VT 31, ¶ 31 the Vermont Supreme Court confirmed the "pretext = a lie" principle.

VERMONT

In an employment-discrimination or retaliation case, under the *McDonnell Douglas* burden-shifting analysis, an employee might ultimately have to prove that the employer's stated reason for termination, etc., was a "mere pretext" for discrimination or retaliation. "Bluntly stated, to show pretext, a plaintiff must establish that the defendant's proffered legitimate, nondiscriminatory reason is a lie." *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 22, 200 Vt. 125, 138. *Gauthier* involved a retaliation claim under the Workers' Compensation Act.

In *Hammond*, the Court applied *Gauthier's* holding about pretext to a claim under FEPA. The Court rejected the employee's attempt to show pretext by challenging the employer's investigation and factfinding that led to termination.

¶ 33. Without more, these arguments [alleging deficiencies in the employer's investigation and factfinding] are insufficient to show pretext. "[A]n employer need only honestly believe in its proffered legitimate, nondiscriminatory reason for the challenged adverse employment action in order to prevail on a motion for summary judgment at the pretext stage." *Gauthier*, 2015 VT 108, ¶ 29, 200 Vt. 125, 129 A.3d 108. Thus, "arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are right but whether the employer's description of its reasons is honest." *Id.* ¶ 32 (quotation omitted).

The Court suggested that the employee might have met her burden to establish pretext by showing "'weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action' from which a jury could infer that the reasons were pretextual." 2023 VT 31, ¶ 34 (quoting *Zann Kwan v. Andalex Group LLC*, 737 F.3d 834, 846 (2d Cir. 2013)). But the employee had no such evidence.

C. Administrative Requirements

There are no requirements to exhaust administrative remedies under Vermont law. The Vermont Fair Employment Practices Act may be enforced either by the state or by aggrieved individuals. The Civil Rights Unit of the Vermont Attorney General's Office is the referral agency for the EEOC and it offers an online intake questionnaire for those with a complaint of discrimination in the work place. The state attorney or a state attorney general may bring an action in superior court to enforce the act. Individuals may bring an action in superior court. 21 VT. STAT. ANN. § 495b.

VERMONT

D. Remedies Available

In cases brought by the state, the court may obtain assurances of discontinuance, issue a restraining order, order reinstatement with back pay and benefits, impose civil penalties of up to \$10,000 for each violation, award investigation costs and attorney's fees, and order any other relief that may be appropriate. See 21 VT. STAT. ANN. § 495b; 495e. Individuals may seek compensatory and punitive damages or equitable relief, including restraining orders, reinstatement, restitution of wages and benefits, costs and reasonable attorney fees, and any other appropriate relief. Prevailing defendants are not entitled to recover attorney fees in an action under the Act. *See id.*

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged or penalized for serving as a juror. 21 VT. STAT. ANN. § 499(a). In addition, an employer is prohibited from discharging an employee who is a witness in a civil or criminal proceeding. 21 VT. STAT. ANN. § 499(a)(b).

B. Voting

Subject to the essential operation of a business or entity of state or local government, which shall prevail in any instance of conflict, an employee shall have the right to take unpaid leave from employment to attend the annual town meeting, provided the employee notifies the employer at least seven days in advance. 21 VT. STAT. ANN. § 472b.

C. Family/Medical Leave

The Family Medical Leave Act's state analog is referred to as the Parental and Family Leave Act in Vermont. See 21 VT. STAT. ANN. §§ 470-474. The federal law requires 50 or more employees for coverage whereas Vermont law requires 10 or more employees for parental leave coverage and 15 or more employees for family and short-term leave. 21 VT. STAT. ANN. § 471(1). Family Leave under Vermont law is leave for serious illness of the employee or a family member. *Id.* §471(3). A family member may include a spouse who is an employee's civil union partner. 15 VT. STAT. ANN. § 1204(a). Parental Leave under Vermont law is leave for pregnancy, birth or adoption of a child under the age of 16. *Id.* § 471(4) In order for an employee to be eligible, the employee must work 12 months for an average of 30 hours a week. 21 VT. STAT. ANN. § 471.

VERMONT

Under the Parental and Family Leave Act, an employee is permitted to take up to 12 weeks unpaid parental and family leave during any 12 month period. *Id.* § 472. Vermont law also permits an employee to take short-term family leave up to four hours in any 30-day period and up to 24 hours in any 12-month period for purposes such as attending or accompanying a family member to routine medical or dental appointments expand. *Id.*

In *Woolaver v. State*, a former state employee brought an action against the state alleging that he was fired while on parental leave in violation of 21 VT. STAT. ANN. § 472. *Woolaver*, 833 A.2d 849, 175 Vt. 397 (2003). In *Woolaver*, the Vermont Supreme Court held that in a discharge case under the Parental and Family Leave Act, a plaintiff must demonstrate that: (1) the plaintiff was an employee within the meaning of the Act; (2) the employer is an employer under the Parental and Family Leave Act; (3) the employer refused to reinstate the plaintiff-employee after Act leave; (4) prior to requesting leave the employee had not been given notice that the employment would terminate; and (5) the employee was terminated for reasons related to the leave or the condition for which the leave was granted. *Woolaver*, 833 A.2d 849, 175 Vt. 397, citing, 21 VT. STAT. ANN. § 472.

There are some significant differences between Vermont's Parental and Family Leave Act and the Federal Family and Medical Leave Act, however. Some (but not all) of those employment differences include: spouses/partners working for the same employer are each entitled to the full twelve (12) weeks, even if taken separately; only the employer can elect to use accumulated paid time off to run concurrent with PFLA leave, but up to a maximum of six (6) weeks; all benefits continue during the leave; and - - while there is a difference in opinion in private law - - the state interprets its law as saying that the employer can request a medical certification for the serious illness of the employee, but not for the serious illness of a family member for whom the employee is taking leave.

Under § 472(c) of the Vermont Parental and Family Leave, an employee does not continue to accrue paid leave during unpaid parental leave. *Vt. Human Rights Commission v. State*, 2012 VT 45, 191 Vt. 485, 49 A.3d 149 (Vt. 2012).

The Vermont Legislature has repeatedly voted to extend paid family leave. The governor vetoed such bills in 2018 and 2020.

D. Pregnancy/Maternity/Paternity Leave

See discussion above of the Vermont Parental and Family Leave Act, and Pregnancy Accommodation (XIV. C.)

VERMONT

E. Day of Rest Statutes

There is no Vermont statute addressing this issue, but the U.S. District Court for Vermont held in *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974), that a member or minister of an organized religion does not have an absolute privilege, under the Civil Rights Act of 1964, to disregard his employment obligations for the sake of his religion; but the Act does require the employer to make reasonable accommodations where no undue hardship would result to the employer's business.

F. Military Leave

Vermont law provides protection for reserve training and military duty. See 21 VT. STAT. ANN. §§ 491 – 493. Employees must notify employers of the need for leave 30 days prior to the date of departure or as soon as practical after being called into service. The employee has a right to return to their job after the leave period, unless no longer qualified for the job. The employee may not lose any sick leave, vacation time, bonuses, promotion and other benefits because of such leave. The employee is authorized to sue to enforce his or her rights under this section.

G. Sick Leave

Vermont's Earned (paid) Sick Time law 21 VT. STAT. ANN. § 4781 et seq. was phased in from Jan. 1, 2017 to Jan. 1, 2019 for hours paid and size of employer. Eligible employees must work one year for an average of 18 hours/week, unless the employee is a rehire after termination, in which case there is no wait time if previously employed a year. The law does not apply to employees under the age of 18 or to seasonal employees who work fewer than 20 weeks/year. As of January 1, 2019, all employers but single owner businesses are covered. Earned/paid time is similar to the Paid Family and Medical Leave Act plus, generally, victims of abuse. Terms include carry over, notice for use, substitution circumstances in lieu of using earned sick leave, and accounting for time as earned. Employers with policies that meet or exceed the requirements of the law are deemed in compliance.

H. Domestic Violence Leave

See discussion of 21 VT. STAT. ANN. § 4781 et seq. above (XIV. G.) Vermont's paid sick leave law extends to situations in which an employee needs to arrange for social or legal services or obtain medical care or counseling for the employee or the employee's parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, who is a victim of domestic violence, sexual assault, or stalking or who is relocating as the result of domestic violence, sexual assault, or stalking. *Id.*

VERMONT

I. Other Leave Laws

An employee has the right to take unpaid leave to attend an annual town meeting provided the employee notifies the employer at least seven days prior to the date of the town meeting. An employer shall not discharge or retaliate against an employee for exercising this right. 21 VT. STAT. ANN. § 472b.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

Vermont's minimum wage law is currently set at \$13.67 per hour and will increase on each subsequent January 1 by 5% or the percentage increase of the Consumer Price Index (CPI), whichever is smaller, per Act 86 of the 2019 Vermont General Assembly. now become minimal.

The basic wage rate for “service and tipped” employees is set at half the standard minimum wage and is currently \$6.84 per hour.

B. Deductions from Pay

An employer may deduct from the minimum wage rates the amounts for board, lodging, apparel, rent, or utilities paid or furnished or other items or services or such other conditions or circumstances as may be usual in a particular employer-employee relationship, including gratuities as determined by the wage order made by the Vermont Department of Labor. 21 VT. STAT. ANN. § 384(c).

Vermont allows wage deductions for goods and services provided by the employer to the employee if the following conditions are met:

- a. The deduction does not reduce an employee’s wages below the hourly minimum wage;
- b. The employee provides written authorization or the employer sufficiently documents the employee’s intention to repay;
- c. The deduction is not prohibited by state or federal law or these rules.
- d. The deduction shall not exceed the amount the employee agreed to.

See Vermont Department of Labor Minimum Wage Rules.

In Vermont, an employer may also, with written authorization from the employee, make deductions for contributions for health insurance or retirement plans. *Id.* However, an employer may not deduct from an employee’s wages any amount to offset a state mandated Health Care Contribution by the employer as defined under 21 VT. STAT. ANN. §2003. *Id.*

VERMONT

An employer is also entitled to deduct an allowance for meals and lodging actually furnished and accepted, in the amounts indicated in the Vermont Minimum Wage Rules. *Id.*; *See also Lanphear v. Tognelli*, 157 Vt. 560, 601 A.2d 1384 (Vt. 1991).

An employer may *not* deduct from an employee's wages any amount due to claimed damages, cash register shortages or to pay for a medical exam as a condition of employment. *See* Vermont Department of Labor Minimum Wage Rules. Also, an employer may not deduct from an employee's wage any amount for providing or maintaining required apparel, including a uniform, nor shall any other compensation pass to any employer from an employee for required apparel, including a uniform or the maintenance thereof, unless the employee voluntarily consents to such deduction or compensation in writing and such deduction does not:

- a. Reduce the total remuneration received by an employee below the hourly minimum wage;
- b. Include any administrative fees or charges;
- c. Amend, nullify or violate the terms and conditions of any collective bargaining agreement.

Id. An employer may neither deduct from an employee's wages, nor require an employee to pay, any amount for personal protective equipment required by occupational safety and health regulations, except as allowed by sections 1910.132(h) and 1926.95(d) of Title 29 of the Code of Federal Regulations. *Id.*

C. Overtime Rules

The Vermont State Labor Law requires employers to pay their employees an overtime rate for any hours worked over forty hours a week. Overtime is calculated as one and a half times the employee's regular wage rate. 21 VT. STAT. ANN. § 384(b). Vermont generally follows Federal/DOL Regulations. Vermont exempts from this overtime requirement employees of retail or service establishments; hotels, motels or restaurants; the state and political subdivisions of the state; certain amusement or recreational establishments; and certain employees engaged in transportation if also exempt from the F.L.S.A.

D. Time for Payment upon Termination

Where an employee leaves voluntarily, the employee need only be paid during the next regular pay period. 21 VT. STAT. ANN. § 342(c)(1). If an employer terminates the employment, the employer must pay all amounts owed the employee within 72 hours of their discharge. 21 VT. STAT. ANN. § 342(c)(2). An employer is also required to provide payment that includes all accrued benefits. 21 VT. STAT. ANN. § 345(a). Although the statute does not specifically state vacation, the State interprets it to include vacation, sick, personal time, etc. unless there is a specific policy that

VERMONT

indicates any such accumulated time is not paid upon the end of employment or paid only on a pro-rata basis.

E. Breaks and Meal Periods

An employer is required to provide an employee with reasonable opportunities to eat and use toilet facilities during work hours. 21 VT. STAT. ANN. § 304.

Vermont recently enacted a law requiring employers to provide employees who are breastfeeding uncompensated time throughout the day to express breast milk and make reasonable accommodation to provide appropriate private space, that is not a bathroom stall or small storage area, for an employee who is nursing for up to three years after the birth of a child. 21 VT. STAT. ANN. §305.

F. Employee Scheduling Laws

An employee may request a flexible working arrangement that meets the needs of the employer and employee. *See* 21 VT. STAT. ANN. § 309 (effective January 1, 2014). “Flexible working arrangement” means intermediate or long-term changes in the employee’s regular working arrangements, including changes in the number of days or hours worked, changes in the time the employee arrives at or departs from work, work from home, or job-sharing. *Id.* “Flexible working arrangement” does not include vacation, routine scheduling of shifts, or another form of employee leave. *Id.* The employer shall discuss the request for a flexible working arrangement in good faith. *Id.* Employer must consider the request and if it could be granted in a manner that is not inconsistent with business operations (defined by statute). *Id.* Employer will notify the employee of the determination. *Id.* If the request was submitted in writing, response must be in writing. *Id.* This law shall not diminish any rights under a collective bargaining agreement — it is a floor, not a ceiling. *Id.* The Vermont Attorney General has the power to enforce this section; there is no private right of action. *Id.* Retaliation against an employee for exercising these rights is prohibited. *Id.*

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

The use of lighted tobacco products is prohibited in any workplace in Vermont. 18 VT. STAT. ANN. § 1421. For the purposes of this statute, except for schools, workplace does not include areas commonly open to the public or any portion of a structure that also serves as the employee's or employer's personal residence. 18 VT. STAT. ANN. § 1421(b)(2).

VERMONT

B. Health Benefit Mandates for Employers

Vermont requires all individual and small group health insurance plans to be sold through the Vermont Health Benefit Exchange (Exchange) and defines a qualified employer for purposes of the Exchange as an employer of any size from 2017 on. See 33 VT. STAT. ANN. §§ 1802(5), 1804 (2012).

C. Immigration Laws

Vermont allows undocumented migrant workers to obtain drivers' licenses. 23 VT. STAT. ANN. § 603.

For the purposes of the Vermont Health Benefit Exchange, a "qualified individual is defined as an individual who at the time of enrollment "is, or is reasonably expected to be during the time of enrollment, a citizen or national of the United States or an immigrant lawfully present in the United States as defined by federal law." 33 VT. STAT. ANN. §§ 1802(8)(B).

D. Right to Work Laws

Vermont has a "fair share" law, which is the opposite of a "right to work" law. This statute imposes collective bargaining service fees on non-union education, state and municipal employees in Vermont because those non-union employers are included in the contracts which unions negotiate with education, state, and municipal employers, and can file grievances. See 3 VT. STAT. ANN. § 903(c). Nothing in this section shall require an employer to discharge an employee who does not pay the collective bargaining service fee. *Id.*

E. Lawful Off-Duty Conduct (including lawful marijuana use)

Vermont's recreational marijuana law, Act 86, effective July 1, 2018, states that adults aged 21 and over may possess up to 1 ounce of cannabis and up to 5 grams of hashish. 18 V.S.A. § 4230. Since then, Vermont has formulated regulations regarding the production and sale of cannabis, and it is now widely available in recreational dispensaries statewide. Smoking marijuana remains illegal in public places or in any place where it is illegal to smoke tobacco, and possession of marijuana in amounts greater than the statutory amount results in civil penalties. Vermont also permits the use of marijuana for medicinal purposes. None of this limits an employer's ability to mandate a sober workplace. However, as has been noted above, Vermont has strict limits on workplace drug testing, including of applicants, and allows an employee to elect rehab in the event of a positive test.

Vermont limits the right to deny employment or take adverse employment action because of bad credit. An employer may not discriminate or take adverse employment action against an applicant/employee because of an

VERMONT

applicant/employee's credit report or history [including money and account balances]. Exceptions apply including for financial institutions. Certain notice and confidentiality provisions apply to all employers regardless of exceptions to the law. Retaliation is prohibited and the state is empowered to investigate violations. 21 VT. STAT. ANN. § 495(i).

F. Gender/Transgender Expression

Vermont prohibits any workplace discrimination based on gender identity. Adverse employment action related to gender identity and/or transgender expression would also be a violation of Vermont public policy.

G. Other Key State Statutes

1. Flexible Work Arrangement. Vermont requires employers to consider "flexible work arrangements" requested by an employee, including temporary or permanent changes in work schedule, job sharing, work from home or number of days or hours worked. If the request is made in writing the response to the employee must be in writing. A request may be denied because it is "inconsistent with business relations, with the statute providing a number of examples for this term including cost, detrimental effect and detrimental impact. The statute contains an anti-retaliation provision and the right of the state to investigate and enforce. 21 VT. STAT. ANN. §§ 308.

2. False Claims Act. A contractor or agent of the state or employer shall not retaliate or discriminate against any private person ["relator"], employee, contractor or agent for presenting a claim or assertion under Vermont's False Claims Act, e.g. fraudulent billing for services or goods. 32 VT. STAT. ANN. § 638.

3. Notice of Potential Layoffs Act. Vermont's Notice of Potential Layoffs Act is similar to the federal WARN Act and applies to reductions in force and business closings. The law applies to employers with 50 or more full-time and part-time [1040 hours per employee year] employees. Mass lay off or business closure means permanent or at least 90 days. Notice to a particular state agency is required. There are exceptions. 21 VT. STAT. ANN. §§ 411 et seq

4. Unlawful Off-Duty Conduct. An employee's discharge for off-duty criminal conduct does not constitute gross misconduct disqualifying him from unemployment compensation benefits under 21 VT. STAT. ANN. § 1344(a)(2)(B). *Mohamed v. Fletcher Allen Health Care*, 2012 VT 64, 192 Vt. 204; 58 A.3d 222 (Vt. 2012). The full disqualification provision of Vermont's unemployment compensation law requires the misconduct to be connected with the employee's work. *Id.* Vermont has a procedure by which the pension benefits of a public employee convicted of certain crimes may be forfeited. 32 VT. STAT. ANN. §§ 621 – 626.

VERMONT

5. Delinquent Tax Collection Act Since 2015, the Commissioner of Taxes may obtain information from delinquent taxpayers' employers about taxpayers' earnings, etc., to determine the taxpayer/employee's disposable income; the employer is and has been immune from liability to the employee for providing required information. However, the 2015 Act 134 added extra immunity for employers for complying with garnishment provisions.

6. Child Support. Vermont enacted Act 18 in 2017.. For cases covered by the UIFSA, instead of sending the payment through the Vermont Child Support Registry, payment would now be sent directly. This means payments may now be sent directly out of state.

7. Dram Shop Act. Vermont has a Dram Shop Act, which imposes strict liability for injuries to third parties on dram shop employers when their employees serve persons apparently under the influence of intoxicating liquor where it would be reasonable to expect that the person served would be under the influence of intoxicating liquor as a result of the amount of liquor served, or where the person served is a minor or the person is served after legal serving hours. 7 VT. STAT. ANN. § 501. or

H. New Developments (including COVID)

1. COVID. The Vermont Department of Labor instituted two presumptions for Workers' Compensation cases from the period of March 1, 2020 to July 15, 2021. The first created a presumption of compensability for front-line workers. A front-line worker Claimant from this period who receives a positive COVID test, OR a COVID-19 diagnosis from a licensed health care provider is presumed to have been infected at work unless the employer is able to demonstrate by a preponderance of the evidence that the infection is due to non-work exposure or risk factors. This has proven to be a difficult burden for employers to meet and may require contact tracing, employee interviews and other investigation to show non-work exposure. However, this does open up avenues of discovery previously unexplored by carriers in Vermont (getting medical records of family members and co-workers, for example, or interviewing every fellow employee).

The second presumption of compensability is available to non-front-line workers. In order to avail themselves of this presumption, a non-front-line worker from this period must show a positive test or diagnosis from a licensed health care provider and either:

- a) a documented exposure to COVID while working (burden of proof is on the injured employee, like usual, but just as to exposure, not causation);
or
- b) that the worker performed services at a residence or facility with one or more residents or employees who:

- a. were present at the time the services were performed; and either
 - i. had COVID-19 at that time; or
 - ii. tested positive for COVID-19 within 14 days after the services were performed.

An employer may defeat this second presumption by

- a. demonstrating that the infection is due to non-work exposure or risk factors (as above for the first presumption, this can be difficult) OR
- b. demonstrating that at the time the employee was potentially exposed to COVID-19, the employee's place of employment was in compliance with the relevant COVID-19 guidance, usually the Restart Vermont Worksafe Guidance issued by the Agency of Commerce and Community Development, and any similar guidance. More recently, the Vermont Supreme Court determined that a business may be entitled to coverage under insurance policies for property damage where COVID-19 can be demonstrated to have caused "direct physical damage" to the insured's property. *Huntington Ingalls Industries, Inc. v. Ace American Insurance Co.*, 2022 VT 45 ¶ 38 (finding that the common phrase in in property insurance policies "direct physical loss or damage to property" included two distinct components – direct physical loss to property and direct physical damage to property – either of which would trigger coverage unless exclusion applied).