THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

TEL: (802) 828-3171
FAX: (802) 828-3187
TTY: (802) 828-3665

http://www.ago.vermont.gov

January 16, 2018

VIA HAND DELIVERY & EMAIL

Vermont Human Rights Commission
c/o Jocelyn R. Bolduc, Case Manager
14-16 Baldwin Street
Montpelier, VT 05633-6301

Re: Ismina Francois v. Department of Mental Health,
VHRC No. E17-0002

Dear Members of the Commission, Executive Director Richards, Administrative Law Examiner Yang, and Case Manager Bolduc:

On behalf of the Vermont Department of Mental Health, thank you for providing this opportunity to respond to the Investigative Report in this matter. The Department takes its obligation to provide a discrimination-free workplace seriously, and, as the record shows, has taken action to address issues brought to its attention.

In her complaint, Ms. Francois alleged five instances of racial harassment by her coworkers at the Vermont Psychiatric Care Hospital over 20 months. The Investigative Report addresses several additional allegations over a ten-year period. The question is whether these instances of comments and conduct by VPCH staffers over this period could constitute racial harassment so "severe and pervasive" as to create a hostile work environment for Ismina Francois. The Department has been clear with staff that racial comments are unacceptable in the workplace, even when made out of ignorance. But that is not the question here, whether the conduct alleged was acceptable. The question is whether these comments were so "severe and pervasive" as to create a racially hostile work environment at VPCH. This is a high legal bar – a very different question than employee conduct generally – and the

Department respectfully submits that this high legal bar is not supported by the record in this matter.

The Administrative Law Examiner in this matter patiently interviewed over 20 employees and former employees of VPCH, and was provided with hours of recorded interviews from the Agency of Human Services Investigations Unit, and voluminous documents, including emails and other records. It would be impossible to include all this information in any Report. The State would like to take this opportunity to point out some salient points of fact and law that aren't covered in the Report, which are discussed below, and which warrant a different result than in the preliminary recommendation.

For these reasons we urge the Commission to issue a determination that there are no reasonable grounds to believe that Ms. Francois suffered severe and pervasive racial harassment by VPCH staff, or that a specific basis exists for holding the Department liable for staff actions and comments when the Department took prompt and appropriate action in response to each complaint.

However, in the event that the Commission were to find reasonable grounds in this case, the Department requests that the Commission redact or substitute pseudonyms for the names of the other individuals named in the Report, in the Commission's decision, and in any other documents in the file that may be released.

I. Vermont Psychiatric Care Hospital (VPCH)

VPCH is an unusual workplace. As noted in the Report, only 5% of nurses go into psychiatric nursing. A psychiatric hospital is an intense and challenging environment for employees, because staff are taking care of persons with mental illness. Vermont law defines "Mental illness, in relevant part, as "a substantial disorder of thought, mood, perception, orientation, or memory, any of which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."[1] And the patients at VPCH are some of the most severely impaired by mental illness.

VPCH treats persons who have been involuntarily committed to the State's care. Basically, to be admitted to VPCH, a person must be so impaired by mental illness that she or he lacks adequate capacity to exercise judgment, self-control, or discretion in daily life and social relations.[2] A person must meet this standard – and

[1] 18 V.S.A. § 7101(14) (defining "mental illness").
[2] 18 V.S.A. § 7101(17) (defining "a person in need of treatment"). In addition, patients who are already hospitalized may be kept involuntarily if they are persons in need of treatment or there is a substantial probability that they will become persons in need of treatment without continued treatment. 18 V.S.A. § 7611 (involuntary treatment); *see also,*

a court must make this finding by clear and convincing evidence[3] – before that person can be admitted to VPCH for treatment.

The Department opened VPCH in Berlin, Vermont in July 2014. Prior to that, patients involuntarily in the State's care were treated at the Department's temporary Morrisville site, the Green Mountain Psychiatric Care Center, which was set up after tropical storm Irene damaged the Vermont State Hospital (VSH) in Waterbury.

Staff at VPCH are responsible for taking care of patients who can be violent, manipulative, acutely psychotic, and unable to control themselves because they are so sick. That's the job; and it's not an easy one.

Also, although racism alone is not a mental illness under the current the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), many VPCH and VSH patients at VPCH over the years have been racist; some aggressively so. The race-based conduct and comments of these racist patients can be highly egregious, as found in the Report. As a factual matter, such conduct can make the working environment at VPCH very hostile to persons of color. However, it is important to point out that this case is not about the patients, who by are definition so mentally ill that they cannot control themselves. The focus of this case is whether VPCH staff created a racially hostile work environment for Ms. Francois, and whether DMH failed to respond in a prompt and appropriate manner to reported incidents. This distinction between patients and staff may seem technical, but it is crucial to the analysis of this case.

II. Facts

It is undisputed that Ms. Francois began working for the Department of Mental Health over three years ago, in May 2014, after having worked for four years elsewhere as a state employee, and that she is a Mental Health Specialist responsible for assisting with patient care. Her Complaint alleges several race-related incidents at VPCH, which are outlined below, along with others noted in the Report.

January 2015 "Colored People" Morrisville Incident

The first incident alleged in the Complaint occurred in January 2015. The comment in question involved a nurse at GMPCC in Morrisville, who told a psychiatrist that she would not assign persons of color to a certain racist patient. But the allegation is that she said "colored," rather than "persons of color." This comment is unquestionably inappropriate in the workplace. Although the psychiatrist did not

[3] *See,* 18 V.S.A. § 7616 (burden on the State to prove involuntary treatment case by clear and convincing evidence).

remember this, and the alleged commenter, a nurse named Heidi Fox, was not interviewed, this allegation was substantiated by Ms. Francois' friend and coworker, Colleen Schmitt. However, the State did not have the opportunity to investigate and respond to this allegation because Ms. Fox left employment with the Department in January 2016, before the Complaint was filed.

August 2015 Shift Reassignment/Intoxication Complaint

The second incident alleged in the Complaint occurred in August 2015, when Associate Mental Health Specialist Dan Carver refused to reassign Ms. Francois from a racist patient on the night shift. She reported this and alleged that Mr. Carver had been intoxicated. It is undisputed that Mr. Carver did not reassign Ms. Francois and that Ms. Francois left her post to have the charge nurse reassign her. But even the Report notes that it is not clear whether this was due to racial animus or the difficult relationship between Ms. Francois and Mr. Carver.[4] The Department would add that while patient care shift-wide is the priority and staff know that the job is challenging, in such extenuating circumstances, VPCH makes every reasonable attempt to accommodate such transfer requests. In fact, charge nurse Mark Kavanagh did so immediately. As set forth above, it is not uncommon for staff to be assigned to violent patients, and even racist patients. While it might appear reasonable to protect staff of color from interaction with such patients, this is part of the job at VPCH and other psychiatric hospitals. Staff assignments are properly based on the totality of facts and circumstances, not just the staff member's race.[5] Ms. Francois' complaint against Mr. Carver was promptly investigated, but her racial harassment claim was unsubstantiated. Ms. Francois' claim that Mr. Carver had been intoxicated was also investigated and found unsubstantiated.

September 2015 Traveling Nurse Comment

The third incident alleged in the Complaint is that former VPCH traveling nurse, Annette Brennan, told an African-American nurse on the phone to get her "nappy @ss" into work, or something along those lines, and did so in the presence of two other VPCH staff, one of whom is African American and who told Ms. Francois about the incident. This traveling nurse was a contractual employee, and no longer works at VPCH. Neither Ms. Francois nor the other African-American coworker who told her about it reported this incident to VPCH, so the Department learned about it when the Complaint was served. Ms. Brennan had left months earlier.

---

[4] Mr. Carver reportedly told a VPCH trainee that Ms. Francois was a "dumb bitch" because of an error she had made in her work with a patient while still very new to the job.

[5] Race-based staff assignments, even in the context of a violent racist mental patient, may constitute racial discrimination. *See, e.g., Blackburn v. State of Washington,* 180 Wash.2d 250 (2016) (disparate treatment found where state hospital decided not to assign any African-American staff to violent, delusional, racist patient).

May 2016 Coworker Singing Explicit Version of Rap Lyrics
The fourth incident alleged in the Complaint is that Ms. Francois heard Associate Mental Health Worker Holly Newman singing "My N-----, My N-----," while the sanitized version of the rap song by the same name was playing in the unit. Ms. Newman, who is married to an African-American man and has an African-American child, did not deny doing so. It is also undisputed that Ms. Francois and Ms. Newman have had other interpersonal difficulties. But no matter what her motivation, Ms. Newman's use of the n-word at work constitutes misconduct. The State learned about this allegation by email on September 1, 2016, and commenced an investigation promptly with interviews on September 7, 2016. That investigation was combined with another involving Ms. Newman, below. Disciplinary action pursuant to the Non-Management Unit Collective Bargaining Agreement remains pending against Ms. Newman. VPCH has also taken steps to ensure that Ms. Newman and Ms. Francois do not work on the same unit at the same time.

August 28, 2016 "Welfare Bus" Comment
The fifth and final incident alleged in the Complaint is that Mental Health Specialist Sara Wilson said, about Ms. Francois, "Oh, I thought she got dropped off by the welfare bus." This allegation was substantiated. Ms. Wilson made this comment, which has negative racial connotations, to a group of coworkers, including an African-American coworker who told Ms. Francois. As VPCH's former CEO Jeffrey Rothenberg testified during this investigation, Ms. Wilson's comment was "outrageously stupid and offensive." The incident occurred on August 28, 2016, was reported to then-CEO Rothenberg on August 29, 2016, and Ms. Wilson was disciplined with a written reprimand on September 15, 2016.

Winter 2007 Incident in Waterbury
Associate Mental Health Specialist Tim McCants testified during his interview in this matter that, in 2007, while he was working at the then-Vermont State Hospital in Waterbury, someone wrote the N-word in the snow on his car windshield. This one incident far surpasses the others in terms of its egregiousness. It appears to have been a shocking and threatening act of racism against Mr. McCants by someone who know which car was his. Although the employee Mr. McCants named in his interview as the likely culprit, Marcus Sweetser, was investigated for several other incidences of misconduct unrelated to the incident targeting Mr. McCants, and was terminated for that misconduct in 2009. The State was unable to find any record of report or investigation related to this incident at VSH. More important for purposes of this case, this incident occurred seven years before Ms. Francois joined the staff and was not alleged in the Complaint.

September 2016 – Fried Chicken Incident
The Report also includes another incident not alleged in the Complaint, that while Ms. Francois and Mr. McCants were discussing lunch and chicken Ms. Francois had made, a white male coworker who was not part of their conversation, Mental Health

Specialist Samuel Jensen, asked if it was fried chicken. The State learned of this incident and interviewed Mr. Jensen in September 7, 2017. Mr. Jensen readily admitted he had done this and said that he had fried chicken in mind having just eaten lunch at Kentucky Fried Chicken. He also acknowledged that his comment could be viewed as stereotypical and inappropriate. Mr. Jenkins received a verbal reprimand, consistent with the Contract's progressive discipline requirements.

September 2017 – "Little Black Man" Incident

Another incident addressed in the Report but not alleged in the Complaint, is that Holly Newman phoned another unit to speak with an African-American coworker and said to the man who answered, "Put the little black man on the phone." Ms. Francois was in her vicinity and overheard Ms. Newman. As the State's investigative report on Ms. Newman notes, this was combined with the investigation of the rap lyrics incident. Disciplinary action against Ms. Newman pursuant to the Non-Management Unit Collective Bargaining Agreement remains pending. Also, as noted above, VPCH stopped assigning Ms. Newman and Ms. Francois to work together.

Kitchen Duty

As noted in the Report, Ms. Francois told the Administrative Law Examiner that she felt singled out for kitchen duty and felt that this was an undesirable responsibility assigned to her due to her race. This claim was not in the Complaint. Moreover, the Report did not find that it was substantiated by other VPCH employees. As former nursing director Kathy Bushey testified, scheduling work assignments for VPCH staff is complex, and must consider the care needs of the patients on the unit and skill level and experience of each staffer working that shift. Kitchen duty gives staff the opportunity to interact with patients in a more positive environment in which the patients are getting meals or snacks. This can be particularly helpful for less experienced staff, according to Ms. Bushey.

VPCH Diversity Training

In addition to the prompt investigations of complaints of discrimination and resulting corrective actions described above, the State provided mandatory diversity training to all VPCH staff in 2016-2017. In 2015, VPCH originally sought to find diversity training that could address the unique working circumstances at VPCH, where it is not uncommon for staff to be subjected to racist comments and threats from the severely mentally ill patient population. However, the first vendor contacted left the state after providing an estimate, and by then the Vermont Department of Human Resources had developed its own training program. This is the program the VPCH staff attended. Although several VPCH staff involved in the above-listed incidents had not yet attended this training at the time of their interviews in this matter, to date, all have except for Dan Carver, who has been out on temporary relief from duty for the latter part of 2016 and most of 2017 for reasons unrelated to this case.

III. Legal Analysis

Vermont's Fair Employment Practices Act, like Title VII, affords employees the right to work in an environment free from discrimination based on race. 21 V.S.A. § 495(a). To state a claim of a racially hostile work environment, the complainant bears the burden of establishing:

1. That the discriminatory harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," and
2. That "a specific basis exists for imputing the objectionable conduct to the employer.

Tolbert v. Smith, 790 F.3d 427, 439 (2d Cir. 2015) (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir.1997) (internal quotation marks omitted)). Title VII legal standards apply in Vermont Fair Employment Practices Act cases. *Dreves v. Hudson Grp. Retail, LLC,* 2013 WL 2634429 (D.Vt. 2013) (unpublished) (citing *Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15, ¶ 41 n.8, 176 Vt. 356, 848 A.2d 310, 327, n. 8). Failure to meet any one of these elements is fatal to a hostile work environment claim under FEPA. The record here does not support a prima facie case because it fails to meet both elements.

A. Work Environment Not Objectively Hostile and Abusive

The first issue in this case is whether the incidents alleged in the Complaint constitute discriminatory harassment sufficiently severe and pervasive to alter Ms. Francois' working conditions and create an abusive work environment. As the U.S. Supreme Court has stated about Title VII, civil rights laws are not "a general civility code for the American workplace." *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)).

It is only "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' ... that is '*sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,*' that the law is violated." *Harris v. Forklift Systems, Inc.*, U.S. 17, 21 (1993) (citation omitted). This is a high bar for making an initial case of a hostile work environment.[6]

---

[6] To be clear, this is not the same as the bar that applies in disparate treatment cases applying the *McDonnell-Douglas* burden-shifting analysis. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.3d.2d 207 (1981) (employee need only prove prima facie case of disparate treatment by a preponderance of the evidence, then burden shifts to employer) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)); *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 16, 200 Vt. 125, 134, 129 A.3d 108 (stating

The law requires a showing that the workplace was objectively abusive and hostile. *Tolbert,* 790 F.3d at 439.

> As a general rule, incidents must be more than more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive. Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness.

Id. (quoting *Alfano v. Costello,* 294 F.3d 365, 374 (2d Cir. 2002) (internal citation and quotation omitted).

Determining whether the working environment is "hostile" or "abusive" requires consideration of "the totality of the circumstances, including the frequency and severity of the discriminatory conduct, whether such conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with the plaintiff's work performance." *Harris,* 510 U.S. at 23, 114 S.Ct. at 371; *see also, Williams v. Cty. of Westchester,* 171 F.3d 98, 100–01 (2d Cir. 1999). As set forth below, review of the totality of the circumstances in this case does not show a hostile work environment.

The facts as alleged by Ms. Francois, on their face, do not amount to an actionable hostile work environment claim. As in the Second Circuit's *Tolbert* case, the comments alleged in this case do not amount to "a steady barrage of opprobrious racial comments" that altered the conditions of her employment. *Tolbert v. Smith,* 790 F.3d at 439 (quoting *Schwapp v. Town of Avon,* 118 F.3d 106, 110 (2d Cir.1997) (internal quotation marks omitted)); *see also, Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007) (finding comments like "ghetto children" and comments related to plaintiff's shopping habits, car, and son's hobby inappropriate but not rising to an actionable claim); *compare, Walker v. Thompson,* 214 F.3d 615, 625 (5th Cir.2000) (holding that plaintiff survives summary judgment where evidence demonstrated years of inflammatory racial epithets, including "n-----" and "little black monkey"); *Daniels v. Essex Group, Inc.,* 937 F.2d 1264, 1266 (7th Cir.1991) (finding summary judgment for defendant inappropriate where plaintiff was subjected to "n----- jokes" for a ten-year period and whose workstation was adorned with "a human-sized dummy with a black head"). The isolated incidents alleged in the Complaint, taken together, are not sufficiently severe or pervasive to create an abusive work environment at VPCH. Further, the record does not show

---

that plaintiff must show retaliatory discrimination by a preponderance of the evidence, then burden shifts to employer) (citations omitted); *Gallipo v. City of Rutland,* 2005 VT 83, 178 Vt. 244, 882 A.2d 1177 (holding that plaintiff's initial burden in retaliation case is a preponderance of the evidence and "relatively light") (citations omitted).

that the inappropriate comments and conduct of a few of her coworkers interfered with her ability to do her job.

Unacceptable workplace behavior such as that alleged in the Complaint may be inexcusable, but is not always actionable. The Department asks the Commission to review the record with a focus on whether the coworker misconduct is sufficiently hostile, abusive, or pervasive to be actionable. Again, the appropriate focus of the law is on workplace conduct by coworkers, not the severely mentally ill patients involuntarily in their charge.

B. No Specific Basis to Impute Liability to the Department

The complainant also bears the burden of demonstrating that the employer either provided no reasonable avenue for complaint, or that the employer knew of the harassment and did nothing about it. *Perry v. Ethan Allen, Inc.*, 115 F.3d 143 (2d Cir. 1997) (quoting *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), cert. denied, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994)). The record here does not support such a finding, as set forth below.

It is axiomatic that a hostile work environment claimant must also demonstrate "a specific basis" for holding the employer liable for employees' "objectionable conduct." *Tolbert v. Smith,* 790 F.3d 427, 439 (2d Cir. 2015) (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir.1997)). An employer will be held liable when "it knew or should have known of the harassment and failed to take measures to stop it." *Howard v. Winter*, 446 F.3d 559, 564–65 (4th Cir. 2006). "When presented with the existence of illegal conduct, employers can be required to respond promptly and effectively, but when an employer's remedial response results in the cessation of the complained of conduct, liability must cease as well." *Id.* at 567. Stated another way, an employer "is only liable for [employee's discriminatory] conduct if it was negligent in failing, after actual or constructive knowledge, to take prompt and adequate action to stop it." *Id.*; s*ee e.g., Hirras v. National R.R. Passenger Corp.,* 95 F.3d 396, 400 (5th Cir.1996) (affirming summary judgment in employer's favor on Title VII claim where employer took [the employee's] complaints seriously and conducted a prompt and thorough investigation); *Ward v. Bechtel Corp.,* 102 F.3d 199, 203 (5th Cir. 1997). An employer's prompt and appropriate response, including investigation, discipline and/or strong pronouncement to offenders and all employees that discrimination won't be tolerated, training, and other necessary actions can mitigate or cut off the employer's liability altogether.

Even if there were a reasonable basis to believe that Ms. Francois' coworkers engaged in severe or pervasive racial harassment that interfered with her ability to do her job, liability could only attach if the Department had been negligent and failed to take remedial action when it knew or should have known about such harassment. That is not the case here. The Department has made significant efforts

to respond and address each allegation brought forward. Specifically, the Department promptly investigated each allegation brought to management's attention, and followed up as appropriate with disciplinary action. It is important to keep in mind that the Collective Bargaining Agreement for Non-Management Employees (the Contract) has specific provisions on employee discipline that can affect disciplinary options and process. The Department requests that the Commission take administrative notice of the Contract, and find that the Department acted promptly and exercised reasonable care.

In addition, the Department has partnered with the Department of Human Resources to provide Ms. Francois support at work, including granting her request to transfer to a different unit. The Department has never condoned the discriminatory conduct and has enforced DHR Policy 3.3, prohibiting any form of discrimination. Finally, as outlined above, in 2016 – 2017 the Department held a mandatory diversity training for all staff to help create awareness and appreciation for cultural and racial differences. Although some of the VPCH staff named in the Complaint had not attended at the time of their interviews in this matter, all except one employee who is on leave have since attended the diversity training. Therefore, there is no specific basis to impute liability to the Department.

The investigative record does not support a positive finding that a specific basis exists to impute liability to the Department. Accordingly, Ms. Francois' claim must fail.

IV. Conclusion

The Department appreciates this opportunity to respond to the Investigative Report, and respectfully requests that the Commission find no reasonable grounds to believe that the Department of Mental Health discriminated against Ismina Francois.

Sincerely yours,

Melanie Kehne
Assistant Attorney General