VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 280-3-20 Cncv

Frederick vs. Unilever United States, Inc et al

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Background

In 2017, Defendants Ben & Jerry's Homemade, Inc. and its indirect corporate parent, Unilever United States, Inc. (collectively, "Unilever"), began a major construction project to expand their plant in St. Albans (the "Project"). They engaged Defendant PC Construction ("PC") as the general contractor. PC employed Defendant John Lavoie as its Senior Superintendent on the Project. Separately, Unilever contracted with Defendant L&T Technology Services Limited ("L&T") for engineering and design services.

L&T, in turn, asked a staffing agency, Defendant Eros Technologies ("Eros"), to find qualified candidates for a "Safety Engineer" position for the Project. The job description indicated that the candidate would train and monitor construction personnel to achieve compliance with workplace health and safety policies on a construction project. On March 6, 2017, Plaintiff Katherine Frederick signed an agreement with Eros for at-will employment for a "ten-month-plus" period, "placed . . . with L&T/Unilever" as a Safety Engineer on the Project. Her primary supervisor was Umair Arshad, Unilever's lead safety manager for the Project. She was also supervised by an L&T on-site manager, Satyendrasinh Mahida.

Mr. Arshad was the lead author of the "Project Specific Safety Plan," a lengthy and detailed set of rules and policies intended to achieve Unilever's goal of zero injuries, incidents, or fatalities. The Plan applied to all personnel on the Project, and its mandates were generally more protective of worker health and safety than federal or state OSHA rules. This also meant that the Plan was more restrictive than the safety standards and policies familiar to PC and subcontractor personnel.

Mr. Lavoie was in charge of PC's work and that of its subcontractors; he was not Ms. Frederick's supervisor and exercised no control over her work. He interacted with Ms. Frederick frequently, however, as she bore responsibility for ensuring that construction personnel understood and

followed the Plan's requirements. Her role as auditor and enforcer of the Plan meant that her actions could disrupt, slow down, or otherwise make the construction work more difficult.

On March 27, 2017, Ms. Frederick engaged in a "lively discussion" with Mr. Lavoie in which she contended that certain PC workers should face discipline for their violation of workplace safety requirements. Shortly afterwards, Mr. Lavoie told Ms. Frederick that arguing with her "made my little man stand up," which Ms. Frederick understood as a description of his being sexually aroused. He then grabbed Ms. Frederick's hips, squeezed them for a few seconds, and began making kissing sounds. Ms. Frederick froze momentarily before breaking free and walking away without comment.

Sometime thereafter, Ms. Frederick informed Mr. Arshad, Mr. Mahida, and Dwayne Tisdale, a senior on-site manager for Unilever, of this incident. Mr. Tisdale responded that he would follow-up with Mr. Lavoie and PC. On April 4, 2017, however, Ms. Frederick went to the Unilever Human Resources ("HR") office to complain about Mr. Lavoie's behavior. She explained to the HR staff member on duty, Lisa Parmiter, what had happened, and that the incident made her uncomfortable. At Ms. Parmiter's request, Ms. Frederick returned the next morning to meet with Ms. Parmiter and the HR manager, who took a formal complaint. Ms. Frederick was then told that Unilever HR "didn't have any stake" in the matter, and did not have any "HR oversight," because Unilever was neither her nor Mr. Lavoie's employer. Ms. Frederick was told that if she wished to pursue the matter further, she would need to involve her presumed employer, L&T, and Mr. Lavoie's employer, PC Construction. When Ms. Frederick indicated that she still wanted to pursue it, Unilever HR staff asked her to obtain the contact information of the person who handled HR matters for L&T, and relay that information to Unileverr's HR staff, so that they could then connect the HR departments from PC Construction and L&T to investigate.

Later that morning, Ms. Frederick spoke with Mr. Lavoie about the March 27th incident. She then returned to Unilever's HR office and told Ms. Parmiter,

> that she [Ms. Frederick] would like to drop the case. She said she met up with John [Lavoie] and he asked her if something was wrong and she explained that she did not like the things he had said and done to her and that it made her feel uncomfortable. He supposedly apologized and said it would never happen again so she did not want to take it any further.

Ms. Frederick followed with an email to Ms. Parmiter later that day, confirming that she was "all set."

Apparently, Mr. Lavoie resumed his harassing behavior within a week of his promise of good behavior. Ms. Frederick, however, did not complain about any of that conduct to any of her supervisors or to the Unilever HR staff. In fact, on April 24, 2017, when Ms. Parmiter emailed Ms. Frederick "to

check in and see how things were going [and to see i]f you want to talk or need anything," Ms. Frederick replied:

> Thank you for checking in, Lisa [smiling face emoji]. Since our last chat, the situation is resolved and I feel really good about the outcome. I'll peek my head next time I'm in the office and thank you again!

Separately, throughout her employment, Ms. Frederick complained regularly to Mr. Arshad about the constant "disrespect" and "push-back" she faced from PC front-line workers (and some of their managers) in connection with her efforts to enforce the Safety Plan requirements. She described numerous instances in which she caught workers ignoring "cardinal" safety rules, and upon informing them of their violations, was met by loud and combative argument, or in some cases laughing or taunting. She blamed this sort of behavior on several factors, including: the workers' failure to understand and general dislike of the Plan's unique and more restrictive mandates; Mr. Arshad's lack of consistent and firm support for her authority and judgments; and Mr. Arshad's confusing and seemingly contradictory guidance as to how she should improve her communications regarding safety-related issues.

On July 24, 2017, Ms. Frederick explained in an email to Mr. Arshad that a recent safety-related meeting among key managers and stakeholders "went poorly," in the sense that the meeting participants—including herself—did not contribute "in a positive manner." She blamed her behavior on being "at a breaking point after the week from hell," in reference to her recent battles with disrespectful workers. According to Ms. Frederick, this meeting grew quite heated; she even admitted to leaving the meeting early, to avoid engaging in a "yelling match" with Lynn Hunter, PC's lead on-site safety manager.

On August 1, 2017, an off-site L&T "talent acquisition" staffer emailed Eros to explain that Unilever had raised concerns about Ms. Frederick's "[b]ehavioral issues with construction contractors on-site in terms of talking and pointing out issues[;] . . . many times she gets into debates/blames." The email also explained that Unilever had expressed concerns about her "[m]iscommunications among various stakeholders of [the] project team," which "created confusions/misunderstandings." The L&T staffer indicated that Ms. Frederick will be told that "she will be observed in a serious manner for [the] next couple of weeks and then have another feedback from Unilever." The message concluded by suggesting that "[Eros] start looking for [Ms. Frederick's] backup asap."

On September 19, 2017, Mr. Arshad emailed Ms. Frederick explaining that, despite having discussed multiple performance issues with her a "few weeks back . . . I have received multiple complains [sic] from [the] site regarding your attitude and you must change your attitude." He also

identified concerns with her recent communication practices, including her failure to apprise Mr. Arshad regularly or timely of repeat safety violations by the same workers.

On September 27, 2017, Ms. Frederick received a call from Eros notifying her that she had been terminated, with no information as to the reason. She was unaware that L&T had just received a one-page "Safety Violation" report from Unilever, which explained that she had entered a barricaded area of the site without proper permission, and that per the Safety Plan's disciplinary guidelines, that violation warranted her suspension or discharge. The report also indicated that Ms. Frederick "has received verbal and written warning to improve her ability to work harmoniously with other employees," and that such conduct also called for suspension or discharge under the Safety Plan's guidelines. Though L&T forwarded this Safety Violation report to Eros, neither Eros nor L&T ever shared it with Ms. Frederick, or otherwise explained the reasons for her discharge.

Discussion

On these facts, Ms. Frederick asserts a variety of claims. She asserts claims against L&T and Unilever under the Vermont Fair Employment Practices Act, 21 V.S.A. §§ 495–496a (FEPA). She also asserts claims against L&T, Unilever, and PC under the Vermont Occupational Safety and Health Act (VOSHA), 21 V.S.A. §§ 201–32. She sues Unilever and L&T for breach of contract, and PC for tortious interference with contractual relations. Finally, she sues L&T and Unilever for retaliation in violation of public policy.[1] The court addresses these claims in turn.

I. Vermont Fair Employment Practices Act

Ms. Frederick asserts three theories of liability under FEPA against both L&T and Unilever: (1) vicarious liability for Mr. Lavoie's sexual harassment; (2) negligence for failing to prevent or remedy a hostile and abusive work environment; and (3) unlawful retaliatory discharge. Only her hostile environment claim against Unilever survives summary judgment.

A. Joint Employer Doctrine

Unilever and L&T argue as a threshold matter that they cannot be liable under FEPA because they were not Ms. Frederick's "employer," and she was not their "employee." They point to Eros as the employer. While they are correct that Ms. Frederick's employment agreement was with Eros, this does not end the inquiry.

As a threshold matter, the court rejects Ms. Frederick's assertion that she can establish FEPA liability without proof of any employment relationship. FEPA makes it unlawful for any "employer . . . to discriminate against any individual because of [inter alia] . . . sex." 21 V.S.A. § 495(a)(1). It further

[1] She also asserted claims against Eros and Mr. Lavoie. She has settled the former, and Mr. Lavoie has not sought summary judgment on the latter. Thus, the court omits any discussion of those claims below.

provides that "[a]ll employers . . . have an obligation to ensure a workplace free of sexual harassment." *Id*. at § 495h(a)(1). She asserts without authority that any entity that falls within FEPA's seemingly open-ended definition of "employer" may be liable for unlawful employment practices taken against any person that meets the statute's broad definition of "employee," regardless of the lack of relationship between the two. In a word, she is mistaken; the existence of an employment relationship is essential. *See Felder v. U.S. Tennis Ass'n*, 27 F.4th 834, 842 (2d Cir. 2022); *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 212 (3d Cir. 2015). [2] Her reliance in this regard on 21 V.S.A. § 495h(a)(2), which extended the prohibition on sexual harassment to the independent contractor context, is also misplaced. That provision only became effective on July 1, 2018. *See* 2017, Adj. Sess. No. 183, §§ 1, 11. Thus it does not apply to this case. *See Windham County Sheriff's Dept. v. Dept. of Labor*, 2013 VT 88, ¶¶ 10–14, 195 Vt. 1 (under 1 V.S.A. § 214(b), no effect given to legislative amendments that would affect preexisting rights, obligations, or liabilities).

Under the "joint employer doctrine," however, there is sufficient evidence from which a rational jury could find that Ms. Frederick had relationships with both L&T and Unilever sufficient to make each company an "employer" of Ms. Frederick under FEPA. The "joint employer doctrine" arises in this context because Title VII does not contain meaningful definitions of the terms, "employer" or "employee." *See Felder* 27 F.4th at 842. The United States Supreme Court instructs that when statutes contain circular definitions of " 'terms that have accumulated settled meaning under . . . the common law,' " courts should infer that Congress intended that the statute incorporate the established, common law meaning of such terms. *Id*. at 842–43 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992), in turn quoting *Comm. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)). Indeed, in construing "employee" and "employer" in statutes that mirror Title VII's circular definitions of those terms, the Supreme Court has " 'relied on the general common law of agency' " to fill in the definitional void. *Id.* at 843 (quoting *Reid*, 490 U.S. at 740). Thus, although the Supreme Court not yet expressly adopted a "joint employer doctrine" in the Title VII context, a number of federal courts, including most recently the Second, Third, and Fourth Circuits, have looked to the common law of agency to fashion and apply such a doctrine for purposes of Title VII. *See id.* at 842–44; *Faush*, 808 F.3d at 213–15; *Butler v. Drive Automotive Indus. of Am., Inc.*, 793 F.3d 404, 408–410 (4th Cir. 2015). Importantly, each of those courts applied the doctrine to determine whether an employment staffing agency and its client were joint employers of a temporary employee assigned to work for the client. The "joint employer" inquiry broadly "examine[s] whether the alleged employer

[2] FEPA is "patterned on Title VII of the federal Civil Rights Act." *Payne v. U.S. Airways, Inc.*, 2009 VT 90, ¶ 10, 186 Vt. 458. Thus, our Court's construction of FEPA is "often guided by . . . federal courts' interpretations of Title VII." *Id.*

'paid [the employees'] salaries, hired and fired them, and had control over their daily employment activities,' and the crux of these factors is 'the element of control.'" *Felder*, 27 F.4th at 843 (quoting *Faush*, 808 F.3d at 214, and *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 371 (2d Cir. 2006)); *see Faush*, 808 F.3d at 219 n.9 (noting the similarity of the "hybrid" test used in *Butler*).

The Vermont Supreme Court has not addressed the applicability of this doctrine to a FEPA claim. Nevertheless, it is no stretch to predict that given the opportunity, it would apply the doctrine in this context. FEPA is patterned on Title VII, and "the standards and burdens of proof under FEPA are identical to those under Title VII." *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 161 (1992). With regard to the statutory definitions of "employer" and "employee," Title VII and FEPA contain only minor distinctions. FEPA defines "employer" as any individual or entity that has one or more "individuals performing services for it," 21 V.S.A. § 495d(1), and defines "employee" as "every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to perform services." *Id.* § 495d(2). Title VII defines "employer" as "a person engaged in industry affecting commerce who has fifteen or more employees," 42 U.S.C. § 2000e(b), and "employee" as "an individual employed by an employer." *Id.* § 2000e(f). Thus, while FEPA's definition of "employee" is not as circular as Title VII's, the FEPA definition fairly aligns with the common law of agency from which the federal "joint employment" doctrine is derived. For example, that the FEPA "employee" must be a person "permitted, required or directed" by the employer to perform services fairly echoes the common law of agency, which principally focuses on the degree of control or supervision. Likewise, that the FEPA "employee" must perform services "in consideration of direct or indirect gain or profit," merely removes unpaid persons or volunteers from statutory coverage. *See Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 9, 184 Vt. 1; *Gulino*, 460 F.3d at 377–78.

B. Employer Status of Unilever and L&T

A review of the pertinent factors shows that there is sufficient evidence from which a jury could find that Unilever and L&T were each Ms. Frederick's employer for purposes of FEPA.

1. Supervision and Control

Both Unilever and L&T exercised day-to-day supervision and control of Ms. Frederick's work, though Unilever (through Mr. Arshad) did so to a greater extent. Further, the Unilever Safety Plan contained a detailed description of Ms. Frederick's duties—including her day-to-day auditing, reporting, record-keeping, and communication/training obligations. She plainly lacked independence or discretion on a day-to-day or weekly basis as to her work assignments or how to perform the job of Safety Engineer. The record shows that Unilever monitored her punctuality and consistency at work,

and thus exercised oversight of Ms. Frederick's actual work schedule. L&T also provided oversight in this regard, through its review and approval of Ms. Frederick's hourly time-cards.

Of particular significance for this case, the Safety Plan also established and controlled the conditions of Ms. Frederick's workplace environment, by expressly addressing impermissible workplace conduct. The Plan stated that "[p]rofanity, harassing type remarks or gestures will not be tolerated," and "[a]ny complaints of this nature will result in the immediate removal of both parties involved and an investigation will follow to determine further actions." The Plan also prohibited "assault on [a] supervisor or other employee." Relatedly, each worker engaged on the Project received a six-page "Jobsite Safety Orientation & Rules" document from Unilever, which prohibited certain workplace conduct in more direct and forceful terms, as follows:

> All construction personnel, including visitors, delivery crews, etc., are expected to conduct themselves in a manner acceptable for a public use environment. **Any foul language, harassment or offensive behavior toward employees, staff, or visitors will result in immediate, permanent dismissal from the project.**
> All construction employees shall conduct themselves in the upmost professional manner.
>
> If the violation is of a serious enough nature the person or persons may be removed from the site immediately. UNILEVER reserves the right to bar a dismissed subcontractor employee from working on all UNILEVER Projects.

(Emphasis in original.) Moreover, Unilever also owned and controlled the entire work site, which reinforces its ability to enforce workplace conduct standards.

2. Hiring and Firing

Unilever was involved in Ms. Frederick's hiring, since Mr. Arshad interviewed Ms. Frederick for the position. L&T and Eros were also involved, though the record does not clearly show their degree of involvement. Perhaps more importantly, Unilever—not L&T, and certainly not Eros—was responsible for Ms. Frederick's termination of employment. On September 27, 2017, L&T's talent acquisition staff wrote to Eros: "As discussed over the phone today pl[ease] be informed that [Ms. Frederick's] contract has been terminated by Unilever effective 9/26." And when L&T's staff emailed Eros a copy of the Safety Violation report—the document that Defendants today use to explain the termination—L&T indicated that it was "received from Unilever for [Ms. Frederick]." Additionally, the Safety Violation report, the document giving reasons for Ms. Frederick's termination, cited Unilever's Safety Plan to support Ms. Frederick's discharge from the Project. Accordingly, there is

sufficient evidence in the record to support Ms. Frederick's belief that Mr. Arshad actually decided and caused her termination.

3. Compensation and Benefits

The Eros employment agreement established Ms. Frederick's hourly rate of pay, and required—as a condition of getting paid W-2 wages by Eros—that she submit her weekly time cards to L&T for review and approval, before the cards could be forwarded to Eros. This arrangement indicates that Eros's payments to Ms. Frederick "were functionally indistinguishable from direct employee compensation" from L&T itself. *Faush*, 808 F.3d at 215–16. It does not appear that either L&T or Unilever was involved in offering benefits, paying payroll taxes or maintaining workers' compensation insurance. Ms. Frederick cannot reasonably be considered a volunteer for Unilever, however, because under its agreement with L&T, Unilever remunerated L&T for supplied personnel.

4. Additional Factors

A party is more likely considered an employer if it furnishes the tools and instruments the worker uses to perform the job. *See Felder*, 27 F.4th at 846 (citing *Faush*. 808 F.3d at 216). Here, L&T furnished Ms. Frederick with a company laptop and office space in an on-site construction trailer. While Ms. Frederick used her own phone, she used an L&T email account that utilized the same domain as that used by ordinary L&T employees.

Another consideration is whether the work performed is part of the "regular business" of the would-be employer, or is akin to work performed by the hiring party's regular employees. *See id*. Unilever is not in the building construction trade. In this instance, however, Unilever did not simply "leave control over" its workplace health and safety obligations to any contractors. *Id*. Unilever was very much "in the business" of achieving the Plan's objective. And Ms. Frederick was hired to function as an extension of Mr. Arshad and other Unilever safety managers—as their eyes, ears, and mouthpiece with respect to construction personnel.[3] Accordingly, she performed work akin to regular Unilever employees, and carried out policies and directives crafted by Unilever for its own business objectives.

5. Conclusion

In conclusion, there is sufficient evidence in the record to support a determination that Unilever and L&T both were joint employers of Ms. Frederick for Title VII/FEPA purposes. Admittedly, Unilever's role in Ms. Frederick's compensation was negligible, and L&T exercised much less control

[3] Tellingly, Section 6.3 of the Safety Plan did not even distinguish or separately identify the various job duties and responsibilities to be performed by the "Safety Engineer/Contractor" (Ms. Frederick), on the one hand, and those duties of the "Safety Supervisor/Unilever," on the other.

over Ms. Frederick's job and her termination. Nevertheless, the "factors indicating a joint-employment relationship may vary depending on the case," so the court must be "mindful that 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.' " *Felder*, 27 F.4th at 844 (quoting *Darden*, 503 U.S. at 324, in turn quoting *Nat'l Labor Relations Bd. v. United Ins. Co. of Am.*, 390 U.S. 254, 257 (1968)); *see Faush*, 808 F.3d at 218 (summary judgment against plaintiff erroneous, even though his temporary employment agency paid him and possessed firing power, because plaintiff worked on client's "premises under immediate supervision and direction of" client's personnel).[4] In short, the court cannot say as a matter of law that either Unilever or L&T was not a joint employer. Neither is entitled to summary judgment on this ground.

C. Vicarious Liability Under FEPA

Of course, the conclusion that Unilever and L&T could each be found to be Ms. Frederick's employer for FEPA purposes does not end the inquiry. She must still establish that each violated FEPA in its actions towards her. In this regard, she asserts first that Mr. Lavoie's conduct is imputable to Unilever and L&T on a theory of vicarious liability. This assertion does not withstand scrutiny.

The general rule under Title VII is that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created *by a supervisor* with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (emphasis added); *see Sears-Barnett v. Syracuse Comm. Health Ctr., Inc.*, 531 F. Supp. 3d 522, 538 (N.D.N.Y. 2021) ("general rule for a harassing supervisor is that the employer is strictly vicariously liable," subject to an affirmative defense under *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)). "[A]n employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim[.]" *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). Here, there is no dispute that Mr. Lavoie was not Ms. Frederick's supervisor; nor was he even a supervisor for Unilever or L&T. Ms. Frederick did not report to Mr. Lavoie; he could not control her work or set her schedule, much less take any tangible adverse employment actions against her.

Even accepting Unilever's concession (for purposes of its motion only) that Mr. Lavoie could be viewed as its agent, that does not result in vicarious liability for his alleged misconduct. His alleged misconduct was not within the scope of his agency or employment, since (as Ms. Frederick agrees) he was motivated by his personal (prurient or sexual) interests, rather than to advance or serve the

[4] Contrary to L&T's primary argument, Ms. Frederick's admission that she was not an L&T employee is not controlling. The inquiry is not which corporate entity was her direct, formal employer, but whether employer status can be found as to one or more entities. *See Faush*, 808 F.3d at 215. ("Two entities may be 'co-employers' or 'joint employers' of one employee[.]").

interests of his (supposed) masters. *See Doe v. Newbury Bible Church*, 2007 VT 72, ¶ 6, 182 Vt. 174 (citing *Brueckner v. Norwich Univ.*, 169 Vt. 118, 122–23 (1999), and *Restatement (Second) of Agency* § 219(2)(d)); *Ellerth*, 524 U.S. at 756–57. Further, there is no evidence that Mr. Lavoie was aided in accomplishing the harassment by his supposed agency relationship with Unilever. *See Ellerth*, 524 U.S. at 760–61. And L&T was simply another prime contractor for Unilever; it had no sort of agency or other relation with Mr. Lavoie that could give rise to strict vicarious liability. Accordingly, Mr. Lavoie's conduct cannot be imputed to either Unilever or L&T.

D. Hostile Work Environment

Alternatively, Ms. Frederick alleges that Unilever and L&T are liable under FEPA for their *own* negligence, for having failed to remedy sexual harassment that caused a hostile and abusive work environment. There are two elements to such a claim: "[t]he first relates principally to the environment itself and its effect on the plaintiff; the second relates to the employer's response to a complaint about the environment." *Howley v. Town of Stratford*, 217 F.3d 141, 153 (2d Cir. 2000). First, the plaintiff must prove that the workplace was "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.'" *Id*. (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). Second, the plaintiff must prove that "'a specific basis exists for imputing the conduct that created the hostile environment to the employer.'" *Id*. at 154 (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)). When a hostile work environment is caused by co-worker misconduct, liability is imputed to the employer if the employer "failed to provide a reasonable avenue for complaint," *id*. (internal quotation marks omitted), or if it "knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action." *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009). The governing standard is "negligence." *Ellerth*, 524 U.S. at 759.

Here, neither Unilever nor L&T moves for summary judgment under the first element. Regarding the second element, L&T moves for judgment principally on the grounds that Mr. Lavoie was not sufficiently within its control to permit an adequate remedial response. Unilever, for its part, argues that its response was adequate.

1. Level of Control Over Non-Employee

With regard to employer liability for a hostile workplace environment caused by non-employees, the Equal Employment Opportunity Commission (EEOC) has promulgated a rule recognizing that "[a]n employer may . . . be responsible for acts of nonemployees, with respect to

sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e). The Second Circuit applies that rule "in imputing employer liability for harassment by non-employees according to the same standards for non-supervisory co-workers, with the qualification that [the court] 'will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.'" *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013); *accord Otis v. Wyse*, No. 93-2349-KHV, 1994 WL 566943, at **6–7 (D. Kan. Aug. 24, 1994).

Here, there is no evidence that L&T had independent control over Mr. Lavoie sufficient to permit any appropriate investigatory or remedial action. The Safety Plan makes plain that Unilever was in charge of investigating and disciplining violators of the Plan's prohibitions on assault and harassment. Nor was L&T the owner or operator of the work site, with power to control the workplace environment or exclude certain personnel.

Even assuming that L&T could have taken some actions that might be thought of as remedial, like sharing Ms. Frederick's complaints with others, expressing disapproval to Mr. Lavoie, or supporting Ms. Frederick in some way, that is no basis for liability. Courts generally find remedial actions not directed at the harasser, and not tailored to the severity or gravity of the harassment, to be unreasonable and insufficient as a matter of law. *See*, *e.g.*, *Christian v. Umpqua Bank*, 984 F.3d 801, 813 (9th Cir. 2020) (bank unreasonable in asking its teller to try to avoid a harassing customer) (citing *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 876 (9th Cir. 2001), and *Intlekofer v. Turnage*, 973 F.2d 773, 780 n.9 (9th Cir. 1992)). Accordingly, because L&T lacked sufficient control over Mr. Lavoie to permit a proper remedial response, it cannot be held liable for the hostile work environment. *See Lima v. Addeco*, 634 F. Supp. 2d 394, 400-401 (S.D.N.Y. 2009) (although a joint employer for Title VII purposes, temporary staffing agency held not liable because no proof that the agency failed to take corrective actions within its control) (citing *Watson v. Addeco Empl. Servs., Inc.*, 252 F. Supp. 2d 1347, 1356–57 (M.D. Fla. 2003)); *Riesgo v. Heidelberg Harris, Inc.*, 36 F. Supp. 2d 53, 58–59 (D.N.H. 1997) (staffing agency not liable because it "was not the employer of any of [client's] employees responsible for harassment" and "did not have the right to take direct action against [client's] direct employees").

2. Employer's Duty Toward Reluctant Complaining Victim of Harassment

Unilever seeks summary judgment on grounds that it afforded Ms. Frederick a "reasonable avenue" of complaint and acted reasonably in response to her complaint and subsequent withdrawal.

Specifically, relying on *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), Unilever argues that its failure to investigate or discipline Mr. Lavoie was appropriate, given that shortly after Ms. Frederick lodged her complaint, she explained that she did not want to pursue the matter further and was "all set." That reliance, however, is misplaced.

In *Torres*, the court found that an employer reasonably construed an employee's repeated and "heartfelt" requests for strict confidentiality regarding her complaints of harassment as tantamount to requests not to take any investigatory or remedial action. *Id.* at 638–39. The court then fashioned its own standard of care: where an employee's complaint is coupled with such a request for confidentiality or inaction, the employer has no duty to act promptly unless (1) "serious physical or psychological harm" to the complaining victim would occur, or (2) the employer knows that "a supervisor or co-worker is harassing a number of employees, and one harassed employee asked the company not to take action." *Id*.

Torres is readily distinguishable. Unlike the *Torres* plaintiff, Ms. Frederick did not voice any pleas for strict confidentiality. Indeed, when she went to the Unilever HR office, she had already shared complaints about the March 27 incident with her supervisors, and she informed HR staff that she had done so. She even acknowledged and accepted without reservation Mr. Tisdale's statement that he would follow up with PC and Mr. Lavoie. Moreover, she explained that she "did not want to pursue the matter further" because she had just obtained Mr. Lavoie's apology and promise of better behavior; she did not say that her decision not to pursue the matter was based on a newly discovered desire for strict confidentiality. Accordingly, the *Torres* presumption—in favor of employer's inaction to maintain an employee's trust arising from the employee's specific request for strict confidentiality—does not exist in this case.

In any event, and perhaps more importantly, *Torres* is not the law, even in the Second Circuit. Since *Torres*, the Second Circuit has set forth the standard by which to measure an employer's remedial obligations in the face of a complaining victim's request for confidentiality or inaction. *Malik v. Carrier Corp*., 202 F.3d 97 (2000). In *Malik*, after a female employee complained about a male co-worker's sexually inappropriate comments, an immediate supervisor spoke with the co-worker about the comments, thus resolving the matter to the complaining female's "satisfaction," such that she expressed a "desire[] to have the matter closed." *Id*. at 100–01. Subsequently, however, another supervisor with higher authority re-opened the matter and ordered a full investigation of the co-worker's conduct. *See id*. at 101–02. The accused co-worker—having assumed the matter had been resolved initially to everyone's satisfaction—was emotionally "devastated" by this decision, so he sued

his employer for intentional infliction of emotional distress. *Id*. The employer defended itself on grounds that the full investigation could not have constituted negligence because it was required by Title VII. The Second Circuit agreed with the employer:

> an employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer. Moreover, the knowledge of corporate officers of such conduct can in many circumstances be imputed to a company under agency principles. As a result, an employer must consider not only the behavior of the alleged offender, but also the response, if any, of its managers. *Nor is the company's duty to investigate subordinated to the victim's desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at the victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.*

Id. at 105–06 (citations omitted; emphasis added).

> *Malik*'s holding is consistent with a June 1999 EEOC Enforcement Guidance:
>
> A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. *Inaction by the supervisor in such circumstances could lead to employer liability*. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer *must discharge its duty to prevent and correct harassment*.

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, June 18, 1999 [hereinafter "*EEOC Enforcement Guidance*"] (emphasis added).

And while *Malik* arose from an atypical legal claim, courts have relied upon its holding to conclude that an employer breached its duty of reasonable care to an accuser/victimized employee by failing to take action in the face of the accuser's request to stop or otherwise dictate the scope of the employer's remedial response. *See Simms v. Ctr. for Corr. Health & Pol'y Stud.*, 794 F. Supp. 2d 173, 191 (D.D.C. 2011); *Brunson v. Bayer Corp.*, 237 F. Supp. 2d 192, 204 (D. Conn. 2002).[5]

Accordingly, when confronted with allegations of harassment, an employer's proper response is not inaction, even if the complaining party immediately seeks to close the matter or lodges a request for strict confidentiality that is tantamount to a request for inaction. *Cf. EEOC Enforcement Guidance* at § V(C)(2) ("Due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome."). *A fortiori*, if the complaining party

[5] In *Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1186–87 (9th Cir. 2005), a 2-1 majority applied a rule of "employer inaction" very similar to the one in *Torres*, but the dissenting opinion is more persuasive. *See id.* at 1189–97 (Paez, *J*., dissenting in part). Indeed, the majority disregarded the EEOC's enforcement guidance simply because the appellant had not cited it. *See Hardage v. CBS Broadcasting, Inc.*, 433 F.3d 672 (9th Cir. 2006) (mem.).

makes no such request, the employer has a duty to take reasonable action. After all, Title VII's "primary objective" is "not to provide redress but prevent harm." *Faragher*, 524 U.S. at 806; *see* 29 C.F.R. § 1604.11(f) ("An employer should take all steps necessary to prevent sexual harassment from occurring[.]"). And "Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Thus, the employer's remedial obligations are not coextensive with, or controlled by, the wishes of the complaining victim, or intended merely to provide redress to the complaining victim alone. Though the employer certainly must take prompt and effective action in order furnish or restore to the victim a workplace free from unlawful harassment, the employer is not the complaining victim's agent or legal counsel, obligated to respect her wishes for silence or inaction. *See Malik*, 202 F.3d at 107. In short, for many good reasons, *Torres* has no bearing here.

3. Unilever's Remedial Conduct

There is sufficient evidence from which a jury could find Unilever's remedial response to Ms. Frederick's complaint unreasonable. First, that Mr. Lavoie's harassment of Ms. Frederick resumed after she made her complaint on April 5 is strong evidence that the response was not sufficiently calculated to stop or deter further harassment. *See Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 72 (2d Cir. 2000); *Christian v. Umpqua Bank*, 984 F.3d 801, 813 (9th Cir. 2020). Further, the failure to investigate the complaint is contrary to the Safety Plan's protocol for handling such matters, another factor "tending to show that the company's response was inadequate." *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 65 (2d Cir. 1998). The record also reasonably confirms that the Unilever HR staff believed Ms. Frederick's complaint was of sufficient seriousness and facial credibility to warrant a prompt investigation (if only by other companies). Lastly, Unilever cannot justify its inaction on grounds that Ms. Frederick's own "remedial" efforts towards Mr. Lavoie were—in her opinion—sufficient. *See Christian*, 984 F.3d at 812 ("[W]e refuse to accept the notion that a victim's own actions immunize her employer from liability for ongoing harassment."). Nor can the burdens of responding to and preventing further harassment reasonably be shifted to a complaining victim. *See Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864, 876 (9th Cir. 2001).[6]

Unilever points out that Ms. Frederick never informed its HR staff of any harassment after April 5. They contend that they cannot not be held liable for their failure to stop such further, unknown

[6] Ms. Parmiter's April 24 email to Ms. Frederick, for example, is insufficient because it placed too much of the remedial burden on the victim. *See Christian*, 984 F.3d at 812–13 (citing *Nichols*, 256 F.3d at 876). Nor is negligence liability avoided by Ms. Frederick's response to that email, since had Unilever acted in an "effective and prompt" manner in response to the initial her complaint, they could have prevented subsequent misconduct altogether. *Sears-Barnett v. Syracuse Comm. Health Ctr., Inc.*, 531 F. Supp. 3d 522, 536 (N.D.N.Y. 2021).

harassment, especially because Ms. Frederick failed to avail herself of the "reasonable avenue of complaint" provided to her. Relatedly, they emphasize Ms. Frederick's concession that she believed they had taken her complaint "seriously." These contentions are unavailing, for a number of reasons.

First, Ms. Frederick's hostile work environment claim does not seek to impose strict vicarious liability for a supervisor's harassment. Accordingly, she had no duty to mitigate further harm by reasonably and promptly availing herself of her employer's complaint mechanisms or processes. *See Reed v. MBNA Marketing Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003) (clarifying that mitigation defense reflected the *Farragher/Ellerth* Court's policy choice, to impose a duty on the complaining victim to mitigate further harm, as the price of suing on a theory of strict vicarious liability for supervisor harassment). Relatedly, an employer's lack of actual knowledge is no defense to liability—the standard is ordinary negligence. No plaintiff suing in negligence needs to complain twice of an injury or harm caused by a condition that the defendant is responsible to eliminate or control after the first notice. *Cf. Malik*, 202 F.3d at 107 (employer in receipt of complaint "could not assume without proper investigation and remedial action either that [the complaint] was false or, if true, reflected behavior that was unlikely to continue").

Second, and relatedly, Unilever's argument regarding their lack of knowledge essentially ignores what Ms. Frederick communicated to HR on April 5. Her statements of not wanting to "pursue the matter further" and feeling "all set" were not statements that the March 27 incident never happened. She explained that Mr. Lavoie admitted to and apologized for the conduct. Though she also dropped her complaint, she did not retract or disavow any of the underlying allegations. There was no requirement that she report subsequent harassment; Unilever had sufficient knowledge on which to take preventative action.

Third, that Ms. Frederick felt that Unilever HR took her complaint "seriously" was merely her belief that they had acted in good faith. Even if her belief were relevant, however, the absence of bad faith is just one element needed to prove an employer's reasonable remedial action. Nor is Ms. Frederick the arbiter of what constitutes an objectively reasonable remedial action. What was missing from Unilever's actions were reasonable efforts to show Mr. Lavoie that they took Mr. Frederick's complaint seriously and that his conduct would not be tolerated. *See Intlekofer v. Turnage*, 973 F.2d 773, 780 n.9 (9th Cir. 1992) ("[H]arassment is to be remedied through actions targeted at the *harasser*, not at the victim.").

Finally, even if Ms. Frederick, following her statements that she was "all set" and felt "really good about the outcome," could be thought to have had a duty to return to Unilever HR to complain of

Mr. Lavoie's subsequent harassment, there is still evidence in the record sufficient to prevent summary judgment. "The appropriateness of an employer's remedial action must be assessed from the totality of the circumstances," *Turley v. ISG Lackawanna*, 774 F.3d 140, 153 (2d Cir. 2014), and the statements made by Unilever HR to Ms. Frederick deserve close scrutiny. Ms. Frederick's decision to seek a "remedy" herself only occurred after she was told by Unilever HR staff that Unilever lacked an "HR stake" or "oversight" of the matter, and that Ms. Frederick was thus obligated to seek assistance through PC and L&T. As discussed above, that statement was incorrect; once Unilever was on notice of Mr. Lavoie's behavior it had an obligation to act reasonably to prevent a hostile work environment. It could not simply pass this duty off to others.

Moreover, the Plan gave no independent contractor the authority to investigate a complaint of workplace harassment or assault occurring on the Project, much less discipline any offender; such powers were reserved to Unilever. Thus, Unilever unequivocally "had a stake" in addressing workplace misconduct. Conversely, while PC obviously retained authority to discipline its employees, it had no FEPA obligation to non-employees, such as Ms. Frederick. Similarly, as discussed above, L&T was not Mr. Lavoie's employer, and the Plan gave it no authority to investigate or discipline personnel employed by another independent contractor. Thus, Unilever's suggestion that Ms. Frederick seek relief through either PC or L&T is compelling evidence of the insufficiency of Unilever's response. And it is more than a bit ironic that having told her to look elsewhere for help, Unilever now faults Ms. Frederick for not coming back when Mr. Lavoie's harassment resumed.

E. Retaliation Under FEPA

Ms. Frederick also alleges that her termination violated FEPA because her putative employers acted in retaliation for her April 2017 complaint. To establish a prima facie case of retaliatory discrimination under FEPA,

> the plaintiff must show that (1) she engaged in protected activity; (2) her employer was aware of that activity; (3) she suffered adverse employment decisions; and (4) there was a causal connection between the protected activity and the adverse employment action.

Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 42, 176 Vt. 356; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (listing these elements under Title VII). "If the plaintiff establishes a prima facie case, the burden shifts to the defendant-employer to articulate some legitimate nondiscriminatory reason for the alleged retaliation." *Robertson*, 2004 VT 15, ¶ 42. "If the defendant carries this burden of production, the plaintiff must then demonstrate that the defendant's reasons are pretext for discriminatory retaliation." *Id.* "Bluntly stated, to show pretext, a plaintiff must establish

that the defendant's proffered legitimate, nondiscriminatory reason is a lie." *Gauthier v. Keurig Green Mtn., Inc.*, 2015 VT 108, ¶ 22, 200 Vt. 125.

As a threshold matter, the record shows that L&T did not make the decision to terminate Ms. Frederick. They also did not stop it, but there is no showing how they could have done so. Under the "Unilever Purchasing Agreement" with L&T, Unilever retained the right to order a removal of any L&T-supplied personnel, from any Unilever project, that Unilever reasonably believed was lacking in skills or had engaged in misconduct. Accordingly, L&T is due summary judgment on the claim for retaliatory discharge.

Unilever is also entitled to summary judgment on this claim, for the simple reason that Ms. Frederick has failed to adduce sufficient evidence to meet the causation element of her prima facie case. Here, the nearly six-month gap between her complaint in early April of 2017 and her termination in late September of that year does not support any inference of a causal connection. In *Robertson*, for example, the Supreme Court found that a temporal gap of nearly seven months between the plaintiff's protected activity and her termination was not sufficient evidence, standing alone, to suggest retaliation and satisfy the causal element of the prima facie case. *See* 2004 VT 15, ¶ 47 (citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 566–67 (6th Cir. 2000) (six-month gap insufficient); *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (three-month gap insufficient)). Further, when assessing causation based on temporal proximity alone, courts within the Second Circuit " 'often find[] a limit at two or three months and almost universally disapprove longer time periods.' " *Raymond v. City of New York*, 317 F. Supp. 3d 746, 774 (S.D.N.Y. 2018) (quoting *Adams v. Ellis*, No. 09-cv-01329-PKC, 2012 WL 693568, at *16 (S.D.N.Y. Mar. 2, 2012)); *see also Thomas v. Bronco Oilfield Servs.*, 503 F. Supp. 3d 276, 312–13 (W.D. Pa. 2020) (gaps longer than two or three months found insufficient by Third Circuit).

Temporal proximity is not necessarily the sole criterion by which to assess the sufficiency of evidence of a causal connection. Here, however, Ms. Frederick has offered no other circumstantial evidence, nor even a plausible explanation for why her termination was not taken immediately. She speculates that Mr. Lavoie, acting with retaliatory motive and intent, manipulated the actual decisionmaker, Mr. Arshad, to effectuate the termination. *See Lemay v. State*, 2012 VT 49, ¶ 10 n.2, 191 Vt. 635 (mem.) ("assum[ing] without deciding" that the so-called "cat's paw" theory could apply under FEPA) (citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011)). Yet, there is no evidence that Mr. Lavoie ever learned of Ms. Frederick's protected activity, and while Ms. Frederick testified that she was told by Mr. Arshad that Mr. Lavoie had complained to Mr. Arshad regarding Ms. Frederick's

job performance, such testimony appears to be hearsay. And even if admissible, a non-specific "complaint" or "criticism" is not enough to permit the conclusion that Mr. Arshad was convinced by the supposed criticisms to effectuate the termination. *See Gates v. Mack Molding, Inc.*, 2022 VT 24, ¶ 27 (" 'Evidence which merely makes it possible for the fact in issue to be as alleged, or which raises a mere conjecture, surmise or suspicion is an insufficient foundation for a verdict.' ") (quoting *Boyd v. State*, 2022 VT 12, ¶ 19).

Alternatively, Ms. Frederick maintains that her ongoing communications to Mr. Arshad about her difficulties with front-line construction workers were actually complaints of retaliatory conduct that was itself motivated by her April 2017 complaint regarding Mr. Lavoie. This is a stretch, in that she offers no proof that she ever made any such suggestion to Mr. Arshad. Moreover, she offers no proof that the workers ever knew about her complaint regarding Mr. Lavoie. In short, she offers no evidence that Mr. Arshad (or other Unilever supervisors) knew, or should have known, that her complaints to them were actually complaints of retaliatory harassment.

II. Retaliation Under VOSHA

Ms. Frederick also asserts retaliatory discharge under VOSHA. Here, she alleges that PC and Mr. Lavoie are liable along with L&T and Unilever. As a preliminary matter, the observation above that L&T did not make the decision to discharge Ms. Frederick forecloses any retaliatory discharge claim against it. Equally, PC has no employer-employee relationship with Ms. Frederick, and for that reason, no liability. The VOSHA whistleblower protection provision reads as follows:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself, herself, or others of any right afforded by this chapter.

21 V.S.A. § 231(a). The use of the term "employee" here indicates that the "person" who may not retaliate must be in an employment relationship with the protected "employee." *See also id.* § 203(6) ("'Employee' means any person engaged in service to an *employer* for wages, salary or other compensation, *excluding an independent contractor*.") (emphasis added); *id*. § 201(a) ("employers" obligated to their "employees"). The requirement of an employer-employee relationship also finds support in federal law. *See* 29 C.F.R. § 1977.5(a) ("this legislation demonstrates a clear congressional intent that the existence of an employment relationship . . . [under the whistleblower provision] is to be based upon economic realities rather than upon common law doctrines and concepts") (citing *United States v. Silk*, 331 U.S. 704 (1947), and

Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947)).[7] Thus, PC is entitled to summary judgment on Ms. Frederick's VOSHA retaliation claim.

Unilever is also entitled to judgment on this claim. "To succeed on her retaliation claims, plaintiff must show that (1) she was engaged in a protected activity, (2) the . . . defendants knew of that activity, (3) plaintiff suffered adverse employment action, and (4) a causal connection exists between plaintiff's protected activity and the adverse employment action." *Mellin v. Flood Brook Union Sch. Dist.*, 173 Vt. 202, 211 (2001). If she meets this initial burden, the court then analyzes her claim under the same burden-shifting framework—so-called "*McDonnell Douglas* analysis"—that applies to Title VII and FEPA retaliation claims. *See Boule v. Pike Indus., Inc.*, No. 5:12-cv-7, 2013 WL 711937, at *20 (D. Vt. Feb. 27, 2013).[8]

Analysis of this claim is complicated by the somewhat diffuse nature of Ms. Frederick's arguments. She suggests first that the protective activity in which she was engaged was her complaints to her supervisors at Unilever—principally Mr. Arshad—concerning workplace safety violations by front-line construction workers. She then suggests that her interactions with those front-line workers were protective activity. Only the first of these suggestions states a cognizable claim.

As to the first suggestion, it is well established that verbal or written complaints to one's supervisor—here, Mr. Arshad—is protected activity. *See Cole v. Foxmar, Inc.*, 387 F. Supp. 3d 370, 383 (D. Vt. 2019); *Boule*, 2013 WL 711937, at *20; *Donovan v. R.D. Anderson Constr. Co.*, 552 F. Supp. 249, 251–53 (D. Kan. 1982); *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1424 (E.D.N.Y. 1984). And while Unilever argues that Ms. Frederick's complaints only concerned worker "disrespect," and so were unrelated to VOSHA's goal of workplace safety, the federal whistleblower provision protects employee "complaints . . . under or related to" the OSHA law, and "[t]he range of complaints 'related to' [OSHA] is commensurate with the broad remedial purposes of [OSHA]." 29

[7] VOSHA was patterned after the federal OSHA law, and 21 V.S.A. § 231(a) is materially identical to the federal whistleblower protection provision, 29 U.S.C. § 660(c)(1). Indeed, VOSHA is a federally-approved "State Plan," and thus provides "at least as effective" standards and enforcement as under the federal OSHA. 29 U.S.C. § 667(c)(2); *see Green Mtn. Power Corp. v. Comm'r of Labor & Indus.*, 136 Vt. 15, 23–24 (1978); 21 V.S.A. § 201(c)(1).

[8] Ms. Frederick maintains that because she has presented sufficient evidence that VOSHA retaliation was a motivating factor in the decision to fire her, her claim for retaliation is not a "pretext"-style claim, but rather a "mixed motive" claim, and that therefore the court should eschew the *McDonnell Douglas* framework in favor of the framework required under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). Yet, she offers no concrete evidence that Mr. Arshad or Mr. Mahida acted with retaliatory motive or were influenced by workers with bad motives. *See Price Waterhouse*, 490 U.S. at 276–77 (O'Conner, *J.*, concurring) ("stray remarks in the workplace," "statements by nondecisionmakers," and "statements by decisionmakers unrelated to the decisional process itself," while perhaps "probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria"); *Lemay*, 2012 VT 49, ¶10 (same). Accordingly, *McDonnell Douglas* analysis applies here.

C.F.R. § 1977.9(a). Applying that standard, at least some of Ms. Frederick's complaints to Mr. Arshad could be found to be protected activity. For example, she identified instances in which workers were violating the Safety Plan, and expressed the good faith belief that if Mr. Arshad would come down harder and more consistently on those rule breakers—e.g., suspension, not merely "another talking to"—they would get in line with the Safety Plan. Those communications are clearly "related to" VOSHA's purpose. That conclusion does not change, even if (as Unilever points out) the gravamen of her communications with Mr. Arshad concerned the workers' disrespect or insubordination. These communications therefore meet the first prong of the *Mellin* test.

The same cannot be said, however, about Ms. Frederick's communications with front-line construction workers about their unsafe conduct. While those communications were undoubtedly related to VOSHA's purpose, they were not protected activity. A statement by a supervisor (Ms. Frederick) to a subordinate (construction workers), or a statement by one co-worker to another that a safety rule has been violated, is not protected activity because the recipient of that communication lacks authority to discharge or otherwise take adverse employment-related actions. 21 V.S.A. § 231(a). The person communicating safety violation reports to a subordinate or co-worker is not risking the terms or conditions of her employment, and for that reason is given no "whistleblower" employment protection.[9]

There is no dispute here that Ms. Frederick's supervisors—at least at Unilever—knew of her statements to Mr. Arshad. Equally, there is no dispute that she suffered an adverse employment action. On the element of causation, the temporal proximity between Ms. Frederick's comments to Mr. Arshad and her termination is sufficient to support an inference of improper motive. Such evidence, however, satisfies only Ms. Frederick's initial burden under the *McDonnell Douglas* test. That showing then shifts the burden to the defendant, to produce evidence of a "legitimate, non-discriminatory reason" for the termination. *Robertson*, 2004 VT 15, ¶ 25 (applying *McDonnell Douglas* framework in context of employment discrimination). If the defendant meets that burden, the burden then returns to the plaintiff to produce evidence that shows that the "justification is a mere pretext for discrimination. *Id.*, ¶ 27. Critically, at this step of the analysis, the timing of the adverse employment decision alone is

[9] Ms. Frederick contends that she was not given sufficient authority to discipline workers for safety or misconduct violations. And while she was able to report such violations up the chain, and thus influence the ultimate decision-makers, she was unable to convince them to take the actions necessary to curb the workers' behavior. She thus argues, in a few sentences of her opposition brief, that the workers' ongoing disrespect toward her constituted a distinct adverse employment action, as unchecked and legally actionable retaliatory harassment. Her briefing in this regard, however, does not identify any applicable standard, and her counsel did not address this theory during the two-hour motion hearing. Thus, the court deems her to have waived the argument. Moreover, the court's independent research has uncovered no authority from any source that suggests that the Vermont Supreme Court would embrace such a theory.

insufficient evidence of motive. "There must be some evidence other than chronology that gives the factfinder reason to believe that the timing is an indication of improper motive." *Adams v. Green Mtn. R.R. Co.*, 2004 VT 75, ¶ 9, 177 Vt. 521 (mem.). Of particular relevance here, " '[i]n challenging an employer's action, an employee must demonstrate that the employer's [proffered, nondiscriminatory] reasons (*each of them*, if the reasons independently caused [the] employer to take the action it did) are not true.' " *Gauthier*, 2015 VT 108, ¶ 22 (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998)) (emphasis in original).

Here, as discussed more fully below, Unilever and L&T have adduced abundant evidence that Ms. Frederick's termination was motivated not by any protected activity, but by her failure to work harmoniously with other employees and by a violation of a workplace rule against entering a barricaded area without permission. Thus, to survive summary judgment, Ms. Frederick must also adduce evidence from which a jury could infer that these proffered motives were "mere pretext[s]." She has failed to meet this burden.

At the outset in this regard, it bears observing that there is sufficient evidence to support a finding that the barricade violation was a "mere pretext" for Ms. Frederick's termination. For example, other employees were not disciplined for the same violation; the Safety Plan recommended an investigation of such infractions (which did not occur); and the Plan recommended suspension or discharge for an employee's second violation of the rule, not the first. That circumstantial evidence, together with Ms. Frederick's testimony that the violation never happened, is sufficient proof of pretext.

That evidence, however, meets only part of her burden. As noted above, to meet her burden, Ms. Frederick must show that both proffered motives are not true. She has produced insufficient evidence, however, to show that her supposed failure to work harmoniously with other employees was a lie, given in bad faith and serving as mere cover for retaliation.

Unlike the barricade violation, Ms. Frederick's tendencies to blame and debate front-line workers were ongoing, well-documented, and clearly explained to her on multiple occasions. Unilever identified these concerns as early as August 1, 2017, following an instance where Ms. Frederick confessed that she had failed to contribute positively during a meeting among key Project stakeholders. She even admitted that during that meeting she was on the verge of engaging in a "yelling match" with a PC safety manager. And Mr. Arshad's response to learning of such behavior does not suggest a supervisor bent on retaliation. He did not then dismiss Ms. Frederick, but instead voiced his concerns regarding her performance verbally and in writing, and even held a meeting among himself, Ms.

Frederick, Mr. Tisdale, and Mr. Mahida, to go over these particular issues. Mr. Arshad told Ms. Frederick, at least twice, that certain job performance improvements were needed and expected. By late September, however, after Ms. Frederick had been warned and given opportunities to change, Mr. Arshad decided that she had failed to improve to his satisfaction. That record does not reasonably suggest that Mr. Arshad or other decision-makers contrived the grounds for her discipline or termination, or that he crafted an extensive "paper trail" post-hoc, to disguise an intent to retaliate against her.[10] There are no "weaknesses, implausibilities, inconsistencies, or contradictions" here that would permit a reasonable conclusion that her termination was more probably than not caused by retaliatory animus. *Gauthier*, 2015 VT 108, ¶ 22 (internal quotation marks omitted).

Ms. Frederick strongly disputes the wisdom or accuracy of Mr. Arshad's performance assessments of her. A rational fact finder could certainly agree with Ms. Frederick that she had a very difficult job. In that circumstance, her behaviors and performance failings may have been understandable. Relatedly, Mr. Arshad's failure to appreciate her performance in light of those challenges was perhaps unreasonable or short-sighted. Yet, any such misjudgments or oversights merely make Mr. Arshad a poor, if not unsympathetic, safety supervisor. They might also make his disciplinary actions and decision to terminate her misguided. Ultimately, however, "[w]hether an employer's reason for the adverse employment action is . . . . shown to be well advised or not is beside the point." *Gauthier*, 2015 VT 108, ¶ 32. As our Supreme Court has held, "[the court] may not second-guess an employer's non-discriminatory business decisions, regardless of their wisdom." *Robertson*, 2004 VT 15, ¶ 35. Thus, Ms. Frederick's criticisms fail to show that her termination was motivated by retaliatory animus.

Moreover, " 'an employer may terminate an employee who behaves inappropriately, even if that behavior relates to a legitimate safety concern,' as long as the termination is not *because* of the safety complaint." *Ridgley v. U.S. Dep't of Labor*, 298 Fed. Appx. 447, 454 (6th Cir. 2008) (quoting *Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998)); *see Ma v. Am. Elec. Power, Inc.*, 647 Fed. Appx. 641, 644 (6th Cir. 2016) ("it was not [plaintiff's] safety reports . . . that irked colleagues, but rather the aggressive tone with which she delivered them"). Here, the only competent evidence is that Ms. Frederick was fired for her inability to work harmoniously with front-line construction workers. While she also communicated safety-related concerns directly to Mr. Arshad and other supervisors—her "protected activity"—she has not shown that such activity was a substantial

[10] The termination decision finds additional legitimacy in Ms. Frederick's job description, which states that the candidate's primary skills should include "good abilities in leadership, communication (verbal and written), [and] interpersonal skills."

reason for her termination. For all these reasons, Unilever is due summary judgment on Ms. Frederick's VOSHA retaliation claim.

III. Breach of Contract

Ms. Frederick argues that the Safety Plan somehow modified her at-will employment contract with Eros into a binding, enforceable agreement with Unilever and L&T. Simply to state this argument is to debunk it. Ms. Frederick offers no authority to support the suggestion that such a plan can somehow transmogrify an agreement with one employer into an agreement with another.

Even if Ms. Frederick's agreement with Eros could somehow be found also to be an agreement with Unilever, so as to be modified by the Safety Plan, the Plan could not be found to effect such a modification. An employer may modify an at-will agreement into an enforceable one through written policies, but "[o]nly if those policies . . . are definitive in form, [are] communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself[.]" *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 19 (1995). Importantly, "in the employment context, . . . the interpretation of *unambiguous* writings is a matter of law for the court, as is the determination *of whether* a writing is ambiguous." *Dillon v. Champion Jogbra, Inc.*, 175 Vt. 1, 6 (2002) (citations omitted). Here, the Safety Plan unambiguously does not demonstrate Unilever's intent to modify Ms. Frederick's at-will status.

First, the Safety Plan from Unilever cannot be reasonably understood to have modified Ms. Frederick's at-will status because Unilever was never a party to the original contract—between Eros and Ms. Frederick—which expressly recognized her at-will status. This case is thus unlike a typical "handbook" modification case, in which a lone employer attempts to disclaim "just cause" employment (or attempts to assert "at will" terms of employment), but also furnishes writings to all employees that reasonably reflect its intent to be bound by progressive disciplinary policy. The supposed "modification" in this case simply does not fit the paradigm. This conclusion is confirmed by the term of the Eros contract stating that Ms. Frederick would be "placed with . . . L&T/Unilever" for work on their project, not employed by those other entities. That she was supervised by L&T and Unilever and functioned as their agent does not change this conclusion. *See Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 940–41 (D.S.C. 1997) ("employee" status "under common law principles" and Title VII does not modify at-will status of employee). And L&T was not even the author of the Plan, so how the Plan could somehow have created a contract between L&T and Ms. Frederick is a complete mystery.

In any event, the Safety Plan's guidelines did not objectively manifest an intent by Unilever or L&T to commit to a definite system or process of progressive discipline; rather, the guidelines set forth

"a guide" for determining the appropriate discipline for enumerated infractions. The Plan provided that "[e]ach violation should be investigated to the extent necessary to determine the level of accountability to which the worker should be held." That refutes any supposed promise of specific and definite disciplinary actions for specified violations or conduct. *Cf. Ross*, 164 Vt. at 20. Further, Ms. Frederick testified that the Safety Plan's disciplinary guidelines were actually never applied consistently or uniformly against any of the workers, which undercuts the argument that there ever was a binding commitment to a definite policy of progressive discipline. Lastly, the broad applicability of the Plan, covering all Project personnel (whether at-will or not), does not affect Ms. Frederick's employment status. Employers are free to distribute "[g]eneral statements of policy" that do not include "a promise for specific treatment in specific situations," without also creating a binding, enforceable contract for just cause employment. *Ross*, 164 Vt. at 20 (emphasis added).

Further, even if the Safety Plan created an enforceable employment agreement, Ms. Frederick's theory of breach of contract is not cognizable. She identifies no promise or obligation extended to her by Unilever or L&T to take certain disciplinary actions against personnel who commit workplace misconduct affecting her employment. As shown under the joint employer doctrine, such an employer obligation may arise under a statute (e.g., FEPA), as a result of certain provisions of the Safety Plan, and from other employer writings or practices (e.g., daily supervision and control), but those obligations are statutory, not contractual promises on which she can recover damages for breach.[11] Thus, Unilever and L&T are entitled to summary judgment on this claim.

IV. Tortious Interference with Contractual Relations

Ms. Frederick asserts that PC is liable for tortious interference with contractual relations, on grounds that it was aware of Mr. Lavoie's sexual misconduct and failed to stop it, thus interfering with Ms. Frederick's ability to perform her employment contract. Such a claim may arise where a defendant "intentionally and improperly interferes with the performance of contract . . . [that is] between another [party] and a third person[,] by inducing or otherwise causing the third person not to perform the contract." *Restatement (Second) of Torts* § 766; *see Gifford v. Sun Data, Inc.*, 165 Vt. 611, 612 (1996) (mem.). Though PC argues without serious dispute that it never learned of Mr. Lavoie's misconduct, Ms. Frederick counters that requisite knowledge may be imputed to PC Construction as a result of Mr. Lavoie's knowledge of his own misconduct.

[11] By her failure to brief the issue, Ms. Frederick has waived her claim against Unilever for breach of the implied covenant of good faith and fair dealing. In any event, the claim lacks merit. Ms. Frederick's at-will status does not allow her such a claim, *see Boynton v. ClearChoice MD, MSO, LLC*, 2019 VT 49, ¶ 6, 210 Vt. 454, and she has failed to base her claim on conduct that is distinct from the conduct on which she relies to assert breach of contract, *see Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, ¶ 33, 209 Vt. 244.

In *Mann v. Adventure Quest, Inc.*, however, the Court made clear that such a theory is unavailing. 2009 VT 38, 186 Vt. 14. There, the Court recognized that "[u]nder agency law, the starting point is the general rule that any notice or knowledge received by an officer or agent authorized to receive the same is imputed to the corporation itself." *Id.* ¶11. The court went on to identify an "exception to the rule—notice or knowledge received by the agent outside the scope of the agent's authority is not imputed to the principal." *Id.* Finally, the court observed, "When an agent's interests in the subject matter are so adverse as to practically destroy the agency relationship, there is no imputation of knowledge to the principal." *Id.* ¶ 12. Applying those principles, the Court held that the executive director of a school acted inconsistently with his duty of loyalty when he subjected students to sexual abuse. *Id.* ¶ 13. It thus concluded that adverse-interest exception precluded the imputation of the executive director's personal knowledge of the abusive conduct to the company. *Id.*[12]

These teachings dispose of any suggestion that Mr. Frederick's knowledge of his sexual harassment of Ms. Frederick can be imputed to PC. There can be no serious suggestion that in engaging in this behavior, he was actuated by a desire to serve the interest of PC. *See Doe v. Newbury Bible Church*, 2007 VT 72, ¶ 6 (" 'Conduct of a servant is not within the scope of employment if it is different in kind from that authorized . . . or too little actuated by a purpose to serve the master.'") (quoting *Restatement (Second) of Agency* § 228(2)). Rather, Mr. Lavoie clearly acted for his own personal (prurient or sexual) interests. Thus, he clearly acted outside the scope of his employment, and inconsistently with his duty of loyalty to the company.

Ms. Frederick further argues that Mr. Lavoie acted to diminish or eliminate (through termination) her ability to effectively enforce safety mandates, as a campaign to avoid having Ms. Frederick cause workplace disruptions or other increased costs resulting from her persistent enforcement efforts. Yet, she cites nothing showing that PC had a corporate policy in place that conflicted with VOSHA or the Safety Plan. While "[s]afety costs money," *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 722 (6th Cir. 1979) (internal quotations omitted), the general motive to reduce costs does not equate to a policy to ignore or violate federal or state worker-protection statutes. It is a fair assumption, for example, that profit-driven companies also wish to avoid federal and state tax liabilities whenever possible, and that they might even hire attorneys and other professionals to help achieve that specific purpose. That does not demonstrate a corporate policy to cheat on taxes, however.

[12] The Court went on to discuss the "sole representative exception" to the adverse interest exception. That discussion—and the exception to the exception—is not relevant here because there is no suggestion that Mr. Lavoie was PC's sole representative. What is relevant is the Court's recognition that the adverse interest exception is well established in Vermont law.

V. Public Policy

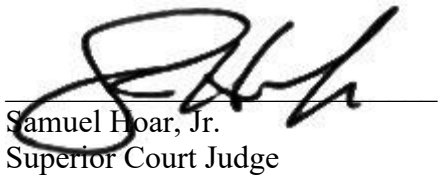
Finally, in Count VI, Ms. Frederick asserts a claim for retaliation in violation of public policy. In response to Unilever's attack on that claim, she offered neither factual nor legal support for the claim. In response to L&T's attack, she indicated that she pleaded the claim only as a fallback to her assertion that Unilever and L&T could be found "employers" under FEPA or VOSHA, and so to owe duties under those statutes. As the court has concluded that Unilever and L&T did owe such duties, it concludes further that this claim is moot. In any event, the claim fails because her public policy claims are duplicative of, and preempted by, her statute-based claims for retaliation. *See Cole v. Foxmar, Inc.*, 387 F. Supp. 3d 370, 384 (D. Vt. 2019).

ORDER

The court grants Unilever's motion in part and denies it in part. All claims against Unilever except the FEPA hostile work environment claim are dismissed. The court grants L&T's and PC's motions. All claims against these Defendants are dismissed.

Stated otherwise, Count I of the third Amended Complaint is dismissed, except to the extent that it pleads a FEPA hostile work environment claim. Counts II, III, and VI are dismissed in their entirety. Count V is dismissed, except to the extent that is pleads a claim against Mr. Lavoie. Thus, Ms. Frederick's FEPA hostile work environment claim against Unilever (part of Count I) and her VOSHA assault and battery retaliation and claims against Mr. Lavoie (Counts IV and part of V) remain for trial.

Electronically signed pursuant to V.R.E.F. 9(d): 9/7/2022 6:21 PM



Samuel Hoar, Jr.
Superior Court Judge