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INVESTIGATIVE REPORT

VHRC Case No.: PA19-0018

COMPLAINANT: Obadiah Jacobs
RESPONDENT: Town of Chester
CHARGES: Race and Color discrimination in a place of public accommodation by
Town of Chester Police

SUMMARY OF COMPLAINT

Obadiah Jacobs is African American and the color of his skin is brown. On Friday, May 10, 2019, Mr. Jacobs left work at approximately 2:30 p.m. and drove through the Town of Chester on the way to pick up his daughter from school. He stopped at two convenience stores and got back on the road. A police officer pulled onto the road behind him and began to follow him. He assumed that the officer intended to pull him over, so he pulled over into the driveway of a car wash.

The police officer then turned on his overhead lights and pulled his vehicle behind Mr. Jacobs. The officer quickly exited his vehicle and drew his firearm and pointed it directly at Mr. Jacobs. The officer ordered Mr. Jacobs to exit his vehicle with his hands up where he could see them.

Mr. Jacobs followed the officer's instructions and the officer proceeded to pat him down and search for a weapon. Mr. Jacobs asked why he was being pulled over and after the officer patted him down, the officer said that there was a report that he had pointed a gun out of his car window at an individual while driving his car across the bridge from New Hampshire to Bellows Falls. The officer searched Mr. Jacobs' car for 15-20 minutes and let him go without issuing any warnings or citations.

SUMMARY OF RESPONSE

On Friday, May 10, 2019, Sgt. William Frank of the Chester Police Department pulled over Obadiah Jacobs based on a *Be on the Look Out* ("BOLO") that he had received from dispatch at Bellows Falls Police Department a few days earlier. Sgt. Frank planned to pull behind Mr. Jacobs and follow him in order to allow himself time to call dispatch to find out more information, but the driver voluntarily pulled over. Sgt. Frank then activated his overhead lights and video camera and pulled behind the car. He ordered Mr. Jacobs out of the car and drew his firearm. He did a pat down search of Mr. Jacobs. Mr. Jacobs then asked to be allowed to return to his car to use his phone. Sgt. Frank asked him if he could do a search of his car first for

firearms. Mr. Jacobs consented, and Sgt. Frank searched the car. He found none and allowed Mr. Jacobs to return to his car while he returned to his cruiser and checked in with Bellows Falls dispatch. Dispatch could not locate the Bellows Falls officer that was assigned the case, and therefore directed Sgt. Frank to let Mr. Jacobs go and have him come by the Bellows Falls Police Department the following Monday.

PRELIMINARY RECOMMENDATION

This investigation makes a preliminary recommendation to the Human Rights Commission to find that there are **reasonable grounds** to believe that the Town of Chester via the Chester Police Department discriminated against Obadiah Jacobs based on his color and race in violation of the Vermont Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A. §4502 (a).

DOCUMENTS/RECORDINGS/VIDEO

- Complaint
- Response to Complaint
- Complaint in the United States District Court for the District Court of Vermont for *Vancore v. Newton & Frank*, Case No. 2:05-cv-00166
- Complaint in the United States District Court for the District of Vermont for *Towsley v. Frank*, Case No. 5:09-cv-00023
- Sgt. William Frank narrative of May 10, 2019 incident
- Initial call information - Bellows Falls, VT, May 7, 2019
- Job Performance Evaluation for Sgt. William Frank from February 26, 2019
- Job Performance Evaluation for Part-time officer William Frank from November 8, 2011
- Personnel file from Chester Police Department for Sgt. William Frank
- Prior police records for Obadiah Jacobs
- Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank
- Audio Recording of Bellows Falls Dispatch call to Sgt. William Frank on May 7, 2019

INTERVIEWS

- Obadiah Jacobs, Complainant, in-person, December 19, 2019
- Royan Wint, Friend of Complainant, via telephone, November 24, 2020
- Individual who called in about gun in Bellows Falls (asked that his name not be used, will be referred to hereinafter as Bellows Falls Witness), November 9, 2020
- Chief Richard Cloud, Chief of Police for Chester, Vermont, November 16, 2020
- Sgt. William Frank, Town of Chester Sgt who pulled over Obadiah Jacobs, November 16, 2020
- Chief David Bemis, Chief of Police Bellows Falls, via telephone November 9, 2020

FACTS

The Incident

The Towns of Bellows Falls and Chester are approximately 13 miles from each other in Southern Vermont. Sgt. William Frank is a White law enforcement officer for the Town of Chester's Police Department.¹ On Tuesday, May 7, 2019, Sgt. William Frank received a phone call from the Bellows Falls police dispatcher advising him of the following BOLO:

Possible mini cooper, red/maroon, one of those colors, possible stripe on it, black male with dreadlocks, waved gun at an elderly subject when came over North Bridge, went North on 5 and had out of state plates."²

Sgt. Frank reported that he had been told that the subject had allegedly been involved in some type of road rage incident in Bellows Falls and had waved a gun at another motorist.³ The vehicle was last reported leaving Bellows Falls and was believed to be traveling north on US Route 5, towards Chester.⁴

Three days later, on Friday May 10, 2019, Obadiah Jacobs, an African American male, left work at approximately 2:30 p.m. and drove through the Town of Chester on his way to pick up his daughter from school.⁵ Mr. Jacobs has bright red dreadlocks and on this day, they were pulled back.⁶ Mr. Jacobs stopped at the Jiffy Mart gas station/convenience store on South Main Street and noticed a Chester police vehicle enter the Jiffy Mart at approximately the same time.⁷ The officer remained in his vehicle as Mr. Jacobs entered the store.⁸ However, the officer did notice Mr. Jacobs and remembered the BOLO that he had received from Bellows Falls.⁹ Mr. Jacobs then left the store, got back in his car, and drove across the street to the Sunoco gas station/convenience store to buy lottery tickets.¹⁰ As he returned to his car, he noticed the police vehicle leaving the Jiffy Mart and driving south on Route 103. Sgt. Frank then took a stationary position in a parking lot to monitor traffic.¹¹ Mr. Jacobs began driving south on Route 103.¹² Sgt. Frank noticed the vehicle belonging to the Black male with dreadlocks and began following Mr. Jacobs' vehicle.¹³ Mr. Jacobs was driving a red Toyota with a white roof which had New Hampshire license plates. The following picture is of Mr. Jacob's vehicle taken from Sgt. Frank's cruiser dashboard, on the date of the stop.

¹ Interview of Sgt. William Frank

² Audio Recording of Bellows Falls Dispatch to Sgt. William Frank on May 7, 2019.

³ Ibid.

⁴ Ibid. and Initial Call Information-Bellows Falls, Vermont, May 7, 2019

⁵ Interview of Obadiah Jacobs

⁶ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

⁷ Interview of Obadiah Jacobs.

⁸ Ibid.

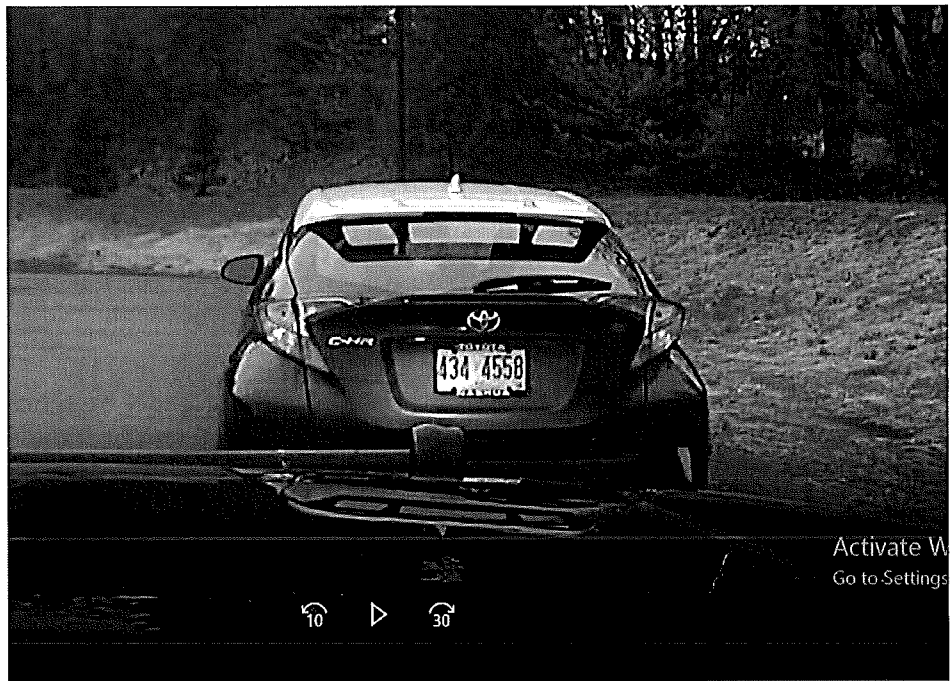
⁹ Chester Police Department Narrative of Sgt. William Frank.

¹⁰ Interview of Obadiah Jacobs.

¹¹ Chester Police Department Narrative of Sgt. William Frank

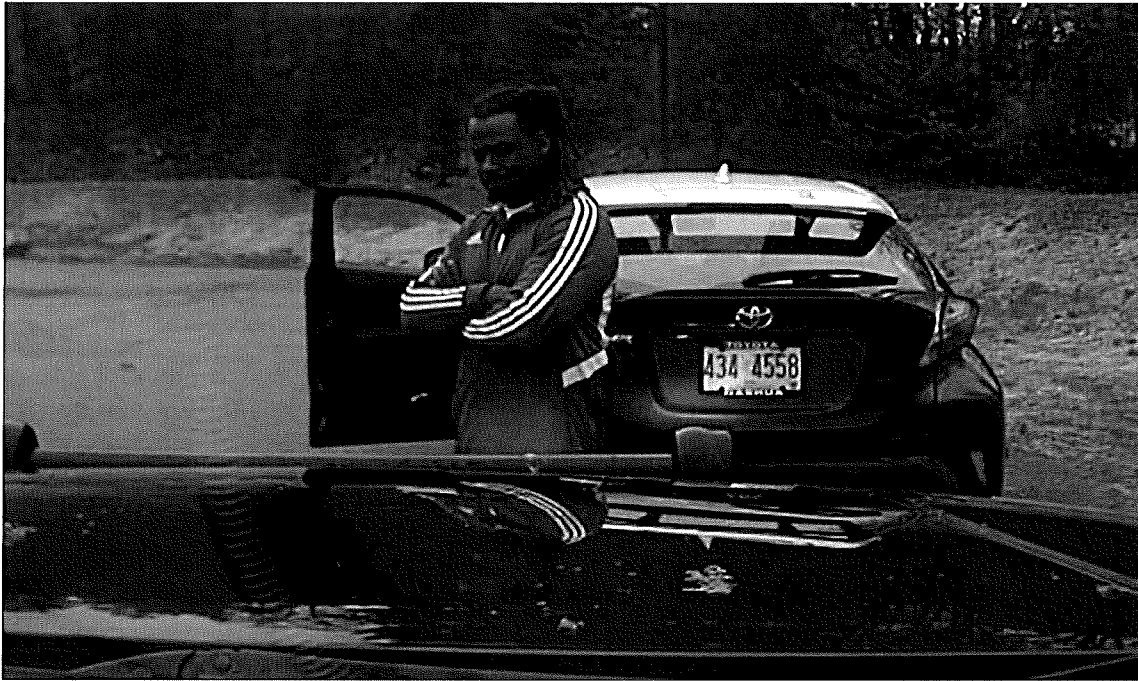
¹² Ibid.

¹³ Ibid.



Below are two pictures showing Mr. Jacobs' appearance from the dashboard camera on the same day:





Sgt. Frank stated that he intended to contact the Bellows Falls Police Department to see if they were still looking for the vehicle from the BOLO before deciding whether to pull over Mr. Jacobs.¹⁴ However, Mr. Jacobs decided to voluntarily pull over because he saw the police vehicle following him and assumed that he was going to be pulled over.¹⁵

Constitutional law requires police officers have “reasonable suspicion” before stopping citizens.¹⁶ Reasonable suspicion means that the officer “must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.”¹⁷ Although Sgt. Frank stated that the BOLO provided him reasonable suspicion to stop Mr. Jacobs, he also admitted that he had not planned to stop Mr. Jacobs until confirming with the Bellows Falls dispatcher.¹⁸ Furthermore, Sgt. Frank stated that he believed it was a “tactic” for drivers to voluntarily pull over when the police are behind them “in an attempt to prevent them from developing reasonable suspicion to pull them over because it forces the officer to stop them or let it go” at that moment.¹⁹ Once the vehicle was stopped, Sgt. Frank ordered Mr. Jacobs out of the vehicle and drew his firearm.²⁰ He pointed it at Mr. Jacobs and ordered Mr. Jacobs to show his hands and to exit the vehicle.²¹ He then ordered Mr. Jacobs to place his hands on the roof of the vehicle and to not remove them from the vehicle.²² Mr. Jacobs followed Sgt. Frank’s instructions.²³

¹⁴ Interview of Sgt. William Frank and Chester Police Department Narrative of Sgt. William Frank

¹⁵ Interview of Obadiah Jacobs

¹⁶ *United States v. Reyes*, 2017 WL 3206319 (D. Vt. Feb. 1, 2018)

¹⁷ *Id.*

¹⁸ Interview of Sgt. William Frank

¹⁹ Chester Police Department Narrative of Sgt. William Frank

²⁰ Chester Police Department Narrative of Sgt. William Frank

²¹ *Ibid.*

²² *Ibid.*

²³ Interview of Obadiah Jacobs

Sgt. Frank then patted Mr. Jacobs down with one hand while he held the gun in a low position with his other hand, which was pointed at Mr. Jacobs.²⁴ Sgt. Frank did not find any weapons and holstered his gun.²⁵ The gun was pointed at Mr. Jacobs for approximately one minute.²⁶ This was only a pat down for weapons and so Sgt. Frank did not search his clothing/body any further.²⁷

After Mr. Jacobs was pulled over, he asked Sgt. Frank what this was about, and Sgt. Frank said he would tell him in a minute.²⁸ Again, Mr. Jacobs asked Sgt. Frank what this was about and after Sgt. Frank finished the pat down, Sgt. Frank (S.F.) and Mr. Jacobs (O.J.) had the following conversation, which this investigation copied from the video/report verbatim:

S.F. Because yesterday or the day before, Bellows Falls coming across the bridge from New Hampshire, allegedly you waved a gun at somebody pointed a gun at somebody.

O.J. No way it could not be true.

S.F. It was a little tiny maroon car with a white stripe.

**This investigation notes that the BOLO did not identify the color of the stripe.*

O.J. Not possible

S.F., They thought it may or may not be a Mini Cooper. It was a black fellow with dreadlocks, so this could not match this description any better.

O.J. Nope that's terrible that could not be me, could never be me.

S.F. Why is that?

O.J. Because I am a single parent and I work all day long and that could not be me.

S.F. Well listen, we have road rage incidents all the time. We had a little old man that fired shots the other day in Dummerston.

O.J. That's not me.

S.F. So that is why I am stopping you because when the call came in, they said the vehicle was heading in this direction.

O.J. No that's terrible.

S.F. Stay right here. Do you have any weapons in the car?

O.J. No, I am just coming out of work.

S.F. Where do you work?

O.J. Ludlow

**Ludlow, VT is approximately 13 miles north of Chester.*

²⁴ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

²⁵ Ibid.

²⁶ Ibid.

²⁷ Chester Police Department Narrative of Sgt. William Frank

²⁸ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

S.F. In Ludlow?

O.J. Yes?

S.F. But, you were not coming from Ludlow?

O.J. Yes, I play scratch tickets.²⁹

**Omitted discussion about actual employer and work.*

S.F. What is your name?

O.J. Obadiah Jacobs

S.F. Oh, Obadiah Jacobs, I remember you now.

O.J. See, I am not that person, sir. You made a big mistake by making me do all of that. I don't have a gun. I don't want one because I am a black male and I feel offended as it is.

S.F. I am sorry you do. O.k.? But I did not make this up.

O.J. Well I am very offended that you can treat me like this.

S.F. O.k. Step back here by your car.

After this exchange, Sgt. Frank ordered Mr. Jacobs to stand at the back of his own vehicle while Sgt. Frank went back to his police cruiser.³⁰ When inside his cruiser, he called into dispatch to run Mr. Jacobs' plates and was told that the plates were "coming back on a 'red Toyota' from Toyota of Nashua" and that there was no individual shown as the lessee of the car.³¹ Mr. Jacobs later clarified that it was a rental car.³²

Sgt. Frank then called Bellows Falls dispatch before returning to speak to Mr. Jacobs.³³ He told the dispatcher, "Hey, I got that car about waving the gun the other day [sic]. I got it stopped right now."³⁴ Sgt. Frank asked the dispatcher whose case it was and then asked if the officer was on duty.³⁵ He found out that officer was not on duty and asked what the dispatcher wanted him to do and the Bellows Falls dispatcher informed him that they would call him back.³⁶

Sgt. Frank then contacted the Chester Police Department for backup and returned to talk to Mr. Jacobs.³⁷ Mr. Jacobs told Sgt. Frank that he was supposed to pick up his daughter and therefore needed to contact her mother to do so.³⁸ Mr. Jacobs attempted to enter his vehicle to retrieve his phone, but Sgt. Frank told him to stop.³⁹ Mr. Jacobs immediately stopped and backed

²⁹ Mr. Jacobs stated in his interview that he had methods to playing scratch tickets and he went to certain stores for certain tickets

³⁰ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Chester Police Department Narrative of Sgt. William Frank

³⁷ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

³⁸ Ibid.

³⁹ Ibid.

away from the vehicle. Sgt. Frank said, “I need to make sure you don’t have any guns in there, is that cool?”⁴⁰ Mr. Jacobs responded, “it is cool.”⁴¹ Sgt. Frank asked Mr. Jacobs to stand back by his police cruiser and Mr. Jacobs complied. Mr. Jacobs then said to Sgt. Frank, “This is a huge mistake, Sir.”⁴² And Sgt. Frank responded, “I absolutely hope it is a mistake, I really do.” And then he proceeded to search the car.⁴³

Mr. Jacobs started pacing a bit and Sgt. Frank told him “If you keep walking up on me like that, we are going to have problems.”⁴⁴ Mr. Jacobs immediately returned to the police cruiser.⁴⁵ He continued pacing a bit but stayed close to his car.⁴⁶ Sgt. Frank searched the car for approximately 1 minute and 45 seconds and did not find anything. He then allowed Mr. Jacobs to reenter his vehicle and make the phone call.⁴⁷

Sgt. Frank then asked Mr. Jacobs for his identification, took it, and returned to his police cruiser.⁴⁸ He radioed Chief Cloud, the Chief of Chester Police Department, and requested that the Chief come to his location.⁴⁹ In his cruiser, Sgt. Frank told Chief Cloud that he had Obadiah Jacobs pulled over and that “supposedly he waved a gun at another motorist the other day.”⁵⁰ Sgt. Frank closed that conversation by saying he would be there when Chief Cloud arrived.⁵¹ Sgt. Frank then called in Mr. Jacobs information to dispatch and was told that his license was valid with priors.⁵² The term “priors” mean past violations of motor vehicle laws.⁵³ Both Sgt. Frank and Mr. Jacobs stayed in their respective vehicles for multiple minutes.⁵⁴ Sgt. Frank then got out of his car and asked Mr. Jacobs if he was leasing the car and Mr. Jacobs said that it was a rental.⁵⁵ Sgt. Frank asked for Mr. Jacobs’ current address and Mr. Jacobs replied that it was the address on the identification.⁵⁶ A state trooper, who had heard what was going on through radio activity, arrived on the scene and stood at the back of the car but did not interact with Mr. Jacobs.⁵⁷

This investigator, listening to the video, was able to hear the voice of a man speaking on speaker phone from Mr. Jacobs’ cell phone but could not make out what he was saying.⁵⁸ Sgt. Frank did not say anything regarding what the man was saying nor did Mr. Jacobs.⁵⁹ Sgt. Frank then told Mr. Jacobs to go see Corporal Keefe or Officer Miller at the Bellows Falls Police

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Chester Police Department Narrative of Sgt. William Frank

⁵⁰ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

⁵¹ Ibid.

⁵² Ibid.

⁵³ <https://www.vermontjudiciary.org/self-help/traffic-violations>

⁵⁴ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Interview with Sgt. Frank.

⁵⁸ Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank

⁵⁹ Ibid.

Department the following Monday.⁶⁰ Mr. Jacobs agreed and then left the scene.⁶¹ The entire encounter between Sgt. Frank and Mr. Jacobs lasted approximately 18 minutes.⁶²

Following the encounter, Sgt. Frank told the State Trooper that “he (referring to Mr. Jacobs) is real perturbed that I pulled him out at gun point.” Sgt. Frank proceeded to tell the Trooper that the other day someone from Bellows Falls called and said, “this vehicle is coming your way, he just waved a gun at someone coming across the bridge from Walpole, and they said the caller described the car as looking kind of like a maroon mini cooper with a white stripe and a black guy with dread locks.” He then said he had seen a car stop at Jiffy Mart and when he came out of the store, the car drove away, and that the car just happened to back track and he saw him again. The trooper then asked if this was him and the Sgt. responded that it was. Sgt. Frank then told him that he, referring to Mr. Jacobs, used to be a “player” in Bellows Falls and that of course the only people that were on duty then are not on duty now.⁶³

Chief Cloud then pulled up on the scene.⁶⁴ Sgt. Frank said to Chief Cloud and the state trooper “by the way, he is going to file a complaint.” Chief Cloud responded “whatever.” Sgt. Frank then said that Mr. Jacobs was a “perfect match” of the BOLO description, stated that it was Obadiah Jacobs, and asked if Chief Cloud had ever dealt with him before. Chief Cloud responded that he had not. Sgt. Frank then said that Mr. Jacobs used to “sling dope” in Bellows Falls and that he always wears two or three sets of spandex jogging suits and keeps the dope between the layers. Chief Cloud asked if he had anything on him today and Sgt. Frank said he only patted him down for weapons, but that he searched the car and there were no weapons in there.⁶⁵

Chief Cloud and the state trooper began making jokes about Mr. Jacobs’s first name and whether he was Amish.⁶⁶ They asked Sgt. Frank if Mr. Jacobs had a beard and if Sgt. Frank was stopping a horse and buggy. Sgt. Frank responded that Mr. Jacobs is Jamaican and Chief Cloud says, “I guess that would work too.”⁶⁷ The state trooper then left.⁶⁸

Sgt. Frank then told Chief Cloud that, “I pulled him out at gunpoint. Of course, he is a Black man being treated this way. It is fucking bullshit. Whatever.” The Chief did not respond to those comments and instead asked if Mr. Jacobs got his car washed. Sgt. Frank chuckled and said “no.”⁶⁹ He told the Chief that Mr. Jacobs pulled in the carwash after he got behind him on the road. He told the Chief that he had never seen that model of Toyota before, and that it looked like a Mini Cooper.⁷⁰ They then began discussing another case.

This investigator questioned Sgt. Frank on why he immediately said that Mr. Jacobs was going to file a complaint and he said that he could hear a man on the speakerphone when he was

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

talking to Mr. Jacobs telling Mr. Jacobs to file a complaint.⁷¹ Sgt. Frank did not report this to Chief Cloud at the scene or in the narrative that Sgt. Frank wrote following the incident.⁷²

Mr. Jacobs did not go the Bellows Falls Police Department the following Monday nor did any officers ever contact Mr. Jacobs.⁷³ He never heard anything more from the Chester Police Department either.⁷⁴ Chief Bemis of Bellows Falls also stated that Bellows Falls did not follow up with Jacobs.⁷⁵ Further, the Citizen who called 911 to report the incident never received any follow up regarding his call or that police caught the person who had brandished a gun.⁷⁶

A closer look at BOLOs

There are no specific written policies or training from the Chester Police Department on how to handle BOLOs.⁷⁷ Therefore, this investigation could not confirm if Sgt. Frank's stop was contrary to any policy or practice. Sgt. Frank felt the details of the BOLO were a "100% perfect match" and therefore justified the stop of Mr. Jacobs.⁷⁸ However, this investigation notes that while Mr. Jacobs was Black, had dreadlocks and was driving a red/maroon vehicle, his vehicle was the wrong make/model and did not have stripes although its hood was a different color. What was noticeably missing from the BOLO and that this investigation finds would have been difficult for a witness to miss and odd to have been excluded from the BOLO: the fact that Mr. Jacobs' dreadlocks were bright red.

During this investigator's interview of Sgt. Frank, he explained his understanding and use of BOLOs in the field. He explained that BOLOs vary dramatically, they come in all forms in terms of how specific they are, how serious the alleged crime is and what the law enforcement agency sending out the BOLO would like the responding law enforcement agency to do if they find a match.⁷⁹ Sometimes the BOLOs only ask a responding officer to stop and identify the vehicle. Sometimes they will ask the responding officer to make an arrest or may only ask that the responding officer pass along the information to the requesting agency.⁸⁰ Typically, this information will be contained in the BOLO.⁸¹ Law enforcement agencies also find out about BOLOs in a variety of ways. Sometimes BOLOs will be broadcast widely to a variety of law enforcement agencies. Other times, an officer will just call another office to make them aware. Sometimes the call will go out from a dispatcher over the radio, via email or via direct cell phone call.⁸² In this case the dispatcher from Bellows Falls radioed only Sgt. Frank about the BOLO because he was the only officer in Chester on duty and the car was headed in that direction.⁸³

⁷¹ Ibid.

⁷² Video recording of May 10, 2019 incident involving Obadiah Jacobs and Sgt. William Frank and Chester Police Department Narrative of Sgt. William Frank

⁷³ Interview of Obadiah Jacobs

⁷⁴ Ibid.

⁷⁵ Interview of Chief David Bemis

⁷⁶ Interview of Bellows Falls Witness

⁷⁷ Interview of Chief Richard Cloud

⁷⁸ Interview of Sgt. William Frank

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Bellows Falls Dispatch call to Sgt. William Frank on May 7, 2019

There are reasons that law enforcement agencies may want to broadcast BOLOs more or less publicly depending on the circumstances and if there are reasons to keep it more private.⁸⁴

The detail level of a BOLO varies greatly as well. Officers frequently receive BOLOs that originate on the interstate. But often these are very sparse in detail; for example, “there is a green car being driven erratically.”⁸⁵ Sgt. Frank says there is not much you can do with that. Unless you see a green car with the driver doing something illegal in that moment, he would not pull someone over just because they are driving a green car.⁸⁶ BOLOs can be for very minor offenses as well as serious crimes. BOLOs also do not have expiration dates. If a person has not been located sometimes law enforcement agencies will put out a nationwide bulletin after a period of time or, if there is new information, they will reissue a BOLO.⁸⁷ Sometimes a BOLO could go out from Florida and so it could take a few days, but then the vehicle could be spotted in Vermont. Therefore, it would make sense that the BOLO would still be active. If it is a report of an erratic driver on the highway, this may not be the case.⁸⁸

Sgt. Frank stated that he does not often deal with multiple BOLOs at the same time and that the Chester Police Department does not have any protocols or policies for responding to BOLOs. It is up to him (or other officers) to decide if a BOLO is a close enough match to a vehicle to pull the driver over. If he does find it to be a close enough match, he would pull the vehicle over or he would feel like he was not doing his job.⁸⁹

The Scope of the Search

This investigator asked Sgt. Frank about the grounds for his search of Mr. Jacobs’ person and vehicle. Sgt. Frank said that because it was a felony stop, he was allowed to do a hard object pat down. This meant that he could only search for weapons, so the scope of the search was limited to a search for weapons and nothing else.⁹⁰ As for the car search, when this investigator asked what would have happened if Mr. Jacobs did not consent to the car search, Sgt. Frank responded that he would not have let him go back into the car because of the suspected weapon. He would have had to call for state troopers and then perform the search, but it would have been too dangerous to allow him to access his car without a search for weapons.⁹¹

Use of a Dangerous Weapon

This investigator asked if it was standard procedure to use a firearm in this type of stop based on a BOLO, and Sgt. Frank stated that this was a felony stop because the call was about someone allegedly using a gun and so it was normal protocol to display a weapon when pulling him over.⁹² This is what he would do in every stop of this nature.⁹³ Further, Sgt. Frank stated that he would not have searched Mr. Jacobs’ car or other vehicles in this same situation unless the individual wanted to re-enter the vehicle. Mr. Jacobs needed to make a phone call and his phone was in his car. Sgt. Frank felt that the only safe way he could allow Mr. Jacobs to reenter the car

⁸⁴ Interview of Sgt. William Frank

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

was to check it for guns. Otherwise, he would have had Mr. Jacobs stand outside with him until he received a return call from Bellows Falls.⁹⁴

Sgt. Frank also stated that a felony stop where he draws his weapon is not a typical everyday stop but one that he probably makes maybe once or twice a year.⁹⁵ Often, when he does pull his weapon, it is because people have reached for objects when they are not supposed to, so he pulls for his weapon and tells them to stop. He did have one incident in the last few years where he stopped a vehicle and they sped off before he had completed the stop. He was in a high-speed pursuit of the vehicle. He shot out the tires and the driver escaped on foot. He pulled out his gun and was able to apprehend the passenger. He did not discharge his weapon aside from shooting out the tires. In this case the driver was Hispanic, and the passenger was Black.⁹⁶ He stated that he did not receive any discipline related to this incident. Sgt. Frank has never discharged his weapon on a human but has been required to discharge it on an animal (e.g., deer that have been hit by cars).⁹⁷

Chester Police Department requires documentation or a use of force report when an officer draws a weapon. The form of this report has changed multiple times over the years. The typical process is that the officer would fill out the form and the Chief would review it.⁹⁸ There was no report filled out in this incident.⁹⁹ Sgt. Frank stated that this was because Chief Cloud was there at the time. When this investigator followed up with the fact that the Chief was not at the scene when the weapon was drawn, Sgt. Frank said he was not sure exactly when the Chief arrived, but that he told him what happened.¹⁰⁰

The Extent of Sgt. Frank's Knowledge of Mr. Jacobs Prior to the Stop

This investigator received a copy of Mr. Jacobs' prior incidents involving the Bellows Falls Police Department. Neither incident involved drugs. One involved Sgt. Franks when he was an Officer with Bellows Falls stopping to talk to Mr. Jacobs and his friend who were sitting in a parked car and telling them it was not a good place to hang out. The other involved an incident where Mr. Jacobs was with a woman who was prohibited from contacting him and was in violation of her condition of release. Mr. Jacobs was not found to be doing anything wrong.¹⁰¹

Sgt. Frank also reported that he did not know who Mr. Jacobs was until he identified himself during the stop.¹⁰² This investigator asked Sgt. Frank during his interview where his knowledge came from that Mr. Jacobs was a drug dealer in Bellows Falls. Sgt. Frank responded that he did not know exactly where the knowledge came from, it was just "known" in Bellows Falls that he was.¹⁰³ He said that his "girlfriend/baby momma" was a "junkie" and that it was known that Mr. Jacobs was her supplier.¹⁰⁴ It should be noted that Chief Cloud was not familiar with Mr. Jacobs although he's been the Chief of Police for 19 years.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Prior Police Records of Obadiah Jacobs

¹⁰² Interview of Sgt. William Frank

¹⁰³ Ibid.

¹⁰⁴ Ibid.

Chief Cloud

This investigator interviewed Chief Cloud, who did not observe this incident outside of watching the video after the fact.¹⁰⁵ When asked if he felt Sgt. Frank followed procedure, he stated that he believed Sgt. Frank had. When this investigator asked if he believed there was any issue with how it was handled considering that the BOLO was then three days old, he did not feel that that mattered. He felt that if it had been a week old, then maybe Sgt. Frank would have needed to take more time to call and check in with Bellows Falls. But even then, the fact that Mr. Jacobs pulled into the car wash may have changed the scenario enough that Sgt. Frank's actions may still have been justified.¹⁰⁶ He felt that this was suspicious behavior that would have warranted further investigation based on the BOLO that Sgt. Frank had received.¹⁰⁷ He also felt that the BOLO description was close enough to justify a felony stop.¹⁰⁸

Chief Cloud further stated that it is within an officer's discretion to show a weapon, and it depended on why they were stopping the vehicle and whether that warranted showing a weapon. The Chester PD does not offer training on use of force; that was something that officers learned at the police academy.¹⁰⁹

This investigator asked Chief Cloud whether he or anyone else did an independent investigation of this incident outside of this complaint and he said they did not.¹¹⁰ This investigator asked him his reaction to Sgt. Frank telling him that Mr. Jacobs would probably file a complaint and he said that he was not under the impression that the complaint had anything to do with race. He thought the complaint would be because he could not have been the suspect in the BOLO because he "was a working parent."¹¹¹ Chief Cloud never received a complaint from Mr. Jacobs outside of this complaint.¹¹²

Chief Cloud did not investigate this matter internally or have any further discussions with Sgt. Frank about this matter until this charge was filed with the Vermont Human Rights Commission.¹¹³

Harm to Mr. Jacobs

Mr. Jacobs was very distressed by this incident.¹¹⁴ He could not sleep properly after the event.¹¹⁵ He continues to worry about his safety if he sees an officer while he is driving.¹¹⁶ He feels like he always needs to be looking over his shoulder.¹¹⁷ He began to go to counseling because he was having such troubles with anxiety and fears being out in public.¹¹⁸ Mr. Jacobs believes that the true reason he was pulled over was because Sgt. Frank saw him drive this

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Interview of Obadiah Jacobs

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

stretch of road often and that, because he was a black man, Sgt. Frank used the BOLO as an excuse to pull him over to see what he was up to.¹¹⁹

Sgt. Frank's History

Sgt. Frank has been a police officer for approximately 19 years.¹²⁰ He has worked for the Springfield Police Department, Chester Police Department, Bellows Falls Police Department and then returned to the Chester Police Department approximately three years ago. He stated that he voluntarily left all those positions.¹²¹ He left Springfield PD because there were many internal problems at the Department and because his wife was dying of cancer. He took a year off after she passed away. He then went to Chester PD and was a part time officer. When a full-time position opened up in Bellows Falls, he took that position until a sergeant position opened in Chester and he returned to take that position.¹²²

Sgt. Frank received a performance evaluation from the Town of Chester on February 26, 2019 and received an overall rating of "exceeds expectations" (the second highest rating).¹²³ He also received a performance evaluation from the Town of Chester on November 8, 2011 from his first employment as an officer with the Town of Chester and received an overall rating of "exceeds expectations" (the second highest rating).¹²⁴

Sgt. Frank received a citizen complaint in 2012 as an officer with the Chester Police Department based on his alleged rude treatment of a driver that he pulled over for passing another vehicle, which was not related to any protected status of the driver. The letter was in Sgt. Frank's file, but there did not appear to be any follow up from the Town of Chester.¹²⁵ Chief Cloud also received a positive letter from a citizen based on Sgt. Frank's work in 2019.¹²⁶ Sgt. Frank further stated that he had not received any discipline in his career for unfair treatment of a citizen based on race or a protected status or because of excessive use of force.¹²⁷

During Sgt. Frank's time in law enforcement, he reported being named a defendant in three lawsuits. He denied any wrongdoing in those suits.¹²⁸ In the first lawsuit, which was filed in 2002, the Plaintiff was a White female who was at a veterinary office and was refusing to pay the bill for an operation on her animal and was arrested. Another officer who was also named in the lawsuit initiated the arrest. Both the arresting officer and Sgt. Frank were accused of causing harm to the Plaintiff and using excessive force. This lawsuit was settled.¹²⁹

The second lawsuit was based on an incident that took place in 2007, when a convicted felon violated his parole and Sgt. Frank was one of four officers tasked with arresting the individual. During the arrest, Sgt. Frank tased the individual two times. The Plaintiff sued him for excessive use of force. The court granted summary judgment for Sgt. Frank as to the first

¹¹⁹ Ibid.

¹²⁰ Interview of Sgt. Frank

¹²¹ Ibid.

¹²² Ibid.

¹²³ Sgt. Frank performance evaluation 2/26/2019

¹²⁴ Sgt. Frank performance evaluation 11/8/2011

¹²⁵ Sgt. Frank's personnel file

¹²⁶ Ibid.

¹²⁷ Interview of Sgt. Frank

¹²⁸ Ibid.

¹²⁹ Interview of Sgt. Frank and online research by investigator and Complainant's attorney

tasing and for neither of the parties on the second tasing. The parties ended up settling as to the second tasing and resolved the case.¹³⁰ The Plaintiff in this lawsuit was a White male.

This investigator was not able find a record of the third lawsuit online, but Sgt. Frank reported that he was searching a car during a traffic stop which the Plaintiff had given him permission to do. He found a rifle with a serial number that had been removed. He asked the Plaintiff for permission to take it to the station to give it a closer look. He said she agreed. She denied that she gave permission and brought a claim related to unreasonable search and seizure. Sgt. Frank reported that the case was settled.¹³¹

LEGAL ANALYSIS

A police stop, such as the one in this case, raises overlapping civil, criminal and constitutional issues. As previously mentioned, the Constitution requires that a law enforcement officer have reasonable suspicion to stop a motor vehicle. If Sgt. Frank did not have reasonable suspicion to stop Mr. Jacobs, it certainly suggests there was no legitimate basis for the stop and creates an inference that some other reason prompted the stop and search. On the other hand, finding that Sgt. Frank did have reasonable suspicion to stop and search Mr. Jacobs does not necessarily relieve Respondent from liability under Vermont's anti-discrimination laws. Law enforcement officers enjoy a wide latitude in how they exercise discretion. If that discretion results in disparate treatment on the basis of race or color, even if reasonable suspicion exists, the officer still violates Vermont's anti-discrimination laws. For example, if an officer observes the theft of a bicycle and permits the White suspect to escape criminal liability with a warning but makes an arrest of the Black suspect doing the same, that officer could presumably be in violation of the Vermont Fair Housing and Public Accommodations Act (VFHPAA) even if there exists probable cause for the arrest of the Black suspect.

Reasonable Suspicion

First, this investigation must determine if Sgt. Frank had reasonable suspicion to make an investigatory stop of Mr. Jacobs. Police officers may make an investigatory stop based on "a reasonable and articulable suspicion of criminal activity or a traffic violation."¹³² The officer must have more than an unparticularized suspicion or hunch of criminal activity.¹³³ It is of no consequence that Mr. Jacobs voluntarily pulled over his vehicle when he noticed Sgt. Frank following him. Once Sgt. Frank parked his vehicle behind Mr. Jacobs, it became an investigatory stop. Sgt. Frank claims that he had reasonable suspicion based on the BOLO that he had received from the Bellows Falls Police Department. To review, the BOLO that Sgt. Frank received stated: "Possible mini cooper, red/maroon, one of those colors, possible stripe on it, black male with dreadlocks, waved gun at an elderly subject when came over North Bridge, went North on 5 and had out of state plates."¹³⁴

¹³⁰ Interview of Sgt. Frank and online research by investigator and Complainant's attorney

¹³¹ Interview of Sgt. Frank

¹³² *Sate v. Davis*, 933 A.2d 224 (Vt. 2007) as cited in *State v. Clinton-Aimable*, 232 A.3d 1092, 1097 (2020)

¹³³ *State v. Welch*, 650 A. 2d 516, 517(Vt. 1994)

¹³⁴ Audio Recording of Bellows Falls Dispatch to Sgt. William Frank on May 7, 2019.

The Vermont Supreme Court, in *State v. Boya*, held that in cases involving an anonymous tip (similar to a BOLO in that it is evidence from an eyewitness), the court should consider three factors in assessing the reliability of the information:

- 1) The nature and specificity of the information conveyed;
- 2) the extent of corroboration by the officer;
- 3) the urgency of effectuating a stop in the circumstances.¹³⁵

In the unreported Vermont Supreme Court Opinion, *State of Vermont v. Wood*, the Court ruled that an officer did not have reasonable suspicion when a tip had come in about a driver and the caller only indicated that the vehicle was small, grey, and occupied by males. The Court found the generic description to be insufficient to constitute reasonable suspicion for pulling over the vehicle.¹³⁶ In *State of Vermont v. Wood*, the officer encountered the vehicle three streets away within minutes unlike the vehicle stop in this case which was three days later.¹³⁷

In another Vermont Supreme Court case, *State of Vermont v. Alexander*, the anonymous tip described the individual as “a large African-American man who traveled by taxi or bus to Bennington.” The Court found the description to be too broad and general to meet the requirements for reasonable suspicion. The court found that such a description could encompass a large number of presumably innocent individuals.¹³⁸ Other courts have made similar findings.¹³⁹

Further, in the context of a search for a perpetrator of a recently committed crime, “the more the description [of the person sought] can be said to be particularized, in the sense that it could apply to only a few persons in the relevant universe, the better the chance of having at least sufficient grounds to make a stop.”¹⁴⁰

An analysis of Vermont case law reveals that the first element of the *Boya* test has not been met in the present case. The information relayed in the BOLO was not specific enough to connect Mr. Jacobs to the incident. It did not mention the age of the driver, the build of the driver and it did not mention that the driver had bright red dreadlocks. The BOLO mentioned a possible stripe on the vehicle, whereas Mr. Jacobs vehicle had a roof that was entirely white, not just a stripe. There were many details left out that would have made the BOLO “the more the description [of the person sought] can be said to be particularized, in the sense that it could apply to only a few persons in the relevant universe, the better the chance of having at least sufficient

¹³⁵ *State v. Boyea*, 765 A.2d 862,864 (Vt. 2000)

¹³⁶ *State of Vermont v. Wood*, 2011 WL 4976125 (April 21, 2011)

¹³⁷ *Id.*

¹³⁸ *State of Vermont v. Alexander*, 139 A.3d 574,582-83 (Vt. 2016)

¹³⁹ See *In re Tony C.*, 582 P.2d 967, 962, 969 (1978) (vague description of suspects in burglaries committed the day before as three black males could not reasonably support suspicion that two black minors in question were the missing culprits); *Gaines v. State*, 155 So.3d 1264, 1270 (Fla.Dis. Ct. App. 2015) (The description of a teenage black male with short hair wearing a long dark-sleeved shirt was too vague to justify an investigatory stop.); *State v. Johnson*, 293 Kan. 1, 259, P.3d 719, 723 (2011) (A physical description of a black man with facial hair was too broad to be of any assistance in formulating reasonable suspicion); *Commonwealth v. Scott*, 801 N.E.2d 233, 238 (2204) (fact that defendant fir the general description of a “tall, muscular, black” alleged to have perpetrated attacks at the same location about two months earlier at the same time night was insufficient to create reasonable suspicion to seize defendant) as cited in *State of Vermont v. Alexander*, 139 A.3d 574, 583 (Vt. 2016)

¹⁴⁰ 4 W. LaFave, *Search & Seizure* §9.5 (h) (5th ed. 2015) as cited in *State of Vermont v. Alexander*, 139 A.3d 574, 583 (Vt. 2016)

grounds to make a stop.”¹⁴¹ To hold otherwise would permit law enforcement officers to stop any driver who is Black and operating a red/maroon vehicle. A similar BOLO describing the driver as white male with short hair certainly would not have permitted Sgt. Frank to stop any and all white male drivers with short hair, operating a red/maroon vehicle. The fact that Vermont is predominantly white does not change how law enforcement or courts apply constitutional requirements to drivers of different race and color in this state.

Next, the court looks to the extent that the officer’s own observations could corroborate the BOLO. This BOLO was three days old at the time that Sgt. Frank spotted Mr. Jacobs’ vehicle. Sgt. Frank had no opportunity to observe the original road rage incident. There was no ongoing crime on the day of the incident. Mr. Jacobs had not committed any traffic violations, engaged in any criminal activity or done anything suspicious such as waving a gun, driving erratically, or undertaking any other actions that would have matched the alleged actions of the original incident. In fact, Sgt. Frank relied entirely on Mr. Jacobs’ physical characteristics and his vehicle. Sgt. Frank admitted that he was not comfortable pulling Mr. Jacobs over without first contacting the Bellows Falls Police Department and seeking verification. As mentioned earlier, that call did not result in any further information as the originating officer was not available. Consistent with the decisions of Vermont’s courts, this Investigation finds that the second element here has also not been met.

Finally, Respondent cannot show that there was any urgency in making the stop. The BOLO was three days old. There was no evidence that Mr. Jacobs was engaging in a crime or putting the public in any danger. This Investigation finds that Sgt. Frank did not have reasonable suspicion to pull over Mr. Jacobs.

Because there was no reasonable suspicion for the stop or the search that followed, this Investigation now turns to the Vermont Fair Housing and Public Accommodations Act to determine if Mr. Jacobs was treated differently based on his race and color.

The Vermont Public Accommodations Act

The Commission is charged with enforcing the Vermont Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A. § 4502 which reads:

- (a) An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the race...color...of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.

The burden on the Complainant at the prima facie stage is “not an onerous one.”¹⁴² To prove a prima facie case of discrimination under the Act, complainant must show that 1) He is a member of a protected class; 2) Respondent is a place of public accommodations; 3) He was denied accommodations, advantages, facilities, and privileges of the place of public accommodation; 4) The denial of accommodations, advantages, facilities, and privileges of the place of public accommodation was because of Complainant’s membership in a protected class.

The last prong of the prima facie case of discrimination can be proven with direct evidence. Direct evidence relates to the strength of the proof of discriminatory animus and not

¹⁴¹ *Id.*

¹⁴² *Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 367 (2004).

whether it is “circumstantial” evidence. It is evidence “showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated’ the action.”¹⁴³ A plaintiff that proves his/her case through direct evidence is not subjected to the burden shifting analysis often used for discrimination cases.¹⁴⁴

Absent direct evidence, the court utilizes the *McDonnell-Douglas* balancing test.¹⁴⁵ Under this test, the Complainant can prove the last prong by showing he was treated differently than a similarly situated comparator and/or received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.¹⁴⁶ Then, Respondents may rebut the prima facie case of discrimination by producing a legitimate non-discriminatory reason and Complainant may persuade the trier of fact that those reasons are pretextual.

The Prima Facie Case of Discrimination

1. Complainant is a member of a protected class.

Complainant identifies as Black/African American, and his skin color is dark. The parties do not dispute that Complainant is a member of a protected class.

2. Respondent is a place of public accommodations.

Under the VFHPAA, places of public accommodations are defined as an “...establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public.”¹⁴⁷ A “public accommodation” is defined as, “an individual, organization, **governmental**, or other entity that owns, leases, leases to, or operates a place of public accommodations.”¹⁴⁸ (emphasis added). Section 4502 of Vermont’s Public Accommodations Act prohibits an owner or operator of a place of public accommodation from refusing, withholding from or denying to a person any of the “accommodations, advantages, facilities, and privileges of the place of public accommodation” because of that person’s race, color or national origin, etc.

In *Department of Corrections v. Human Rights Commission*, The Vermont Supreme Court held that “the most reasonable interpretation of the statute, particularly considering that it must be liberally construed to effectuate its remedial purpose, is that the Legislature intended to make *all* governmental entities, in addition to all private entities offering services or benefits to the general public, subject to the Act’s anti-discrimination provisions.” (emphasis added)¹⁴⁹. The Court then concluded by saying, “the definition of a place of public accommodation is more useful for determining jurisdiction over private entities than it is for determining which governmental entities are public. *Government is public.*”¹⁵⁰ (emphasis added). Therefore, all

¹⁴³ *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

¹⁴⁴ *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

¹⁴⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁴⁶ *Makhzoomi v. Sw. Airlines Co.*, 419 F. Supp. 3d 1136, 1150 (N.D. Cal. 2019) as cited in *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001)

¹⁴⁷ 9 V.S.A. §4501(1).

¹⁴⁸ 9 V.S.A. §4501(8).

¹⁴⁹ 917 A.2d 451 (Vt. 2006)

¹⁵⁰ *Id.*

governmental entities are places of public accommodation and therefore fall within the HRC's jurisdiction to review.

There is no dispute that Respondent is a governmental entity, owned and operated by the county and through public funds. It provides services, benefits, and privileges to the general public by responding to all types of calls for service, along with investigating traffic crashes, making arrests, preparing court documents, resolving domestic related disputes, juvenile problems, and helping the public during any type of emergency situation that arises and more.

3. Respondents withheld from, or denied to Complainant the accommodations, advantages, facilities, and privileges of the place of public accommodation when it stopped Mr. Jacobs, pulled a gun on him and ordered him out of the vehicle and when it searched him unlawfully.

Stopping the Vehicle

Article 11 of the Vermont Constitution requires police have, "at minimum, a reasonable and articulable suspicion of wrongdoing before making even a brief investigatory stop."¹⁵¹ Because Sgt. Frank did not have reasonable suspicion to pull over the vehicle and Mr. Jacobs was not committing a traffic violation or any crime, he was deprived of the privilege of driving on a public road without being detained. Even though Mr. Jacobs began to pull over voluntarily, once Sgt. Frank turned on his cruiser lights while wearing his uniform it became a stop and search under the law.

The Exit Order and Use of a Dangerous Weapon

Sgt. Frank not only pulled Mr. Jacobs over, but he ordered Mr. Jacobs out of the car at gunpoint. Only if "objective facts and circumstances would support a reasonable suspicion that the safety of the officer or of others was at risk or that a crime has been committed" would allow the police to require the operator of a vehicle to exit.¹⁵² The Fourth Amendment of the U.S. Constitution and Article 11 of the Vermont Constitution protect citizens against unreasonable searches and seizures.¹⁵³ An "officer can extend a detention if, during the course of an investigative stop, the officer gathers additional information providing reasonable suspicion that some other criminal activity is afoot."¹⁵⁴ Sgt. Frank presented no evidence to show that his safety was at risk or that he observed any criminal activity or even dangerous activity. For that reason, Sgt. Frank had no basis to order Mr. Jacobs out of the car, much less at gunpoint. This, too, denied Mr. Jacobs the privilege of driving on a public road without being detained and removed from his vehicle.

Search of Person and Vehicle

As stated above, Article 11 of the Vermont Constitution protects citizens against unreasonable searches and seizures.¹⁵⁵ Because, Sgt. Frank did not have reasonable suspicion for the stop of the vehicle and no additional illegal activity occurred during the stop, there was no justification for the search of Mr. Jacobs or the search of his vehicle. Mr. Jacobs consented to the search of

¹⁵¹ *State v. Lussier*, 757 A.2d 1017, 1027, n.2 (citing *State v. Siergiey*, 582 A.2d. 119, 121 (Vt. 1990)

¹⁵² *State v. Sprague*, 824 A.2d 539 (Vt. 2003) as cited in *Zullo v. State*, 205 A.3d 466, 497 (Vt. 2019)

¹⁵³ *Zullo v. State*, 205 A.3d 466, 492 (Vt. 2019)

¹⁵⁴ *Id.* at 1097.

¹⁵⁵ *Zullo v. State*, 205 A.3d 488 as cited in *State v. Nagel*, 232 A. 3d 1081, 1086 (Vt. 2020)

his vehicle because he needed to be able to call his child's mother in order to arrange for her to pick the child up. So, it is difficult to say that his consent was voluntary but, regardless, in most circumstances "consent obtained during an illegal detention is invalid."¹⁵⁶ The illegal detention of an individual "irremediably tainted" the consensual search of Mr. Jacobs that followed.¹⁵⁷ This, too, denied Mr. Jacobs the privilege of driving on a public road without his body and vehicle being searched.

4. Respondent withheld from, or denied to Complainant the accommodations, advantages, facilities, and privileges of the place of public accommodation because of his race and/or color.

Direct Evidence

As previously stated, direct evidence links the alleged discriminatory animus with the challenged decision.¹⁵⁸ If the evidence is sufficient to support a finding by a reasonable fact finder that an illegitimate basis motivated the action, it is direct evidence. Courts often borrow more established analysis from the employment context. The Equal Employment Opportunity Commission (EEOC) states that direct evidence of motive may include statements that indicate bias towards a particular group or may come in the form of a document or failure to act.¹⁵⁹ For example, using disparaging terms to refer to members of a protected class.¹⁶⁰ It may also include stereotyped views of a protected group of people such as women or African Americans. If an employer often mentioned that women could not lift heavy boxes and then also failed to permit women to demonstrate their ability to perform the task, this would amount to discrimination even if the employer did not harbor any ill will towards women.¹⁶¹ Lastly, direct evidence can be proven when someone makes a statement that they find certain characteristics undesirable if it's associated with members of a protected class. For example, if a person finds that aggression is acceptable when displayed by men but not women or displayed by whites but not African Americans.¹⁶²

¹⁵⁶ *State v. Betts*, 978 A.3d 629 as cited in *State v. Alexander*, 139 A.3d 574, 575 (Vt. 2016)

¹⁵⁷ *State v. Sprague*, 824 A.2d 539 as cited in *State v. Alexander*, 139 A.3d 574, 583 (Vt. 2016)

¹⁵⁸ *Fall v. LA Fitness*, 161 Supp. 3d 601, 605 (S.D. Ohio 2016) (In a public accommodations lawsuit, a plaintiff may establish his case either by presenting direct evidence or alternatively by establishing a prima facie case with circumstantial evidence.)

¹⁵⁹ Equal Employment Opportunity Commission Guidance, *Theories of Discrimination*, EEOC-CVG-1988-13; Section 604(3)(c); Issue Date 08-01-1988

¹⁶⁰ *Id.* See also, Commission Decision No. 71-357, CCH EEOC Decisions (1973) ¶ 6168.

¹⁶¹ *Id.* See also Commission Decision No. 76-76, CCH Employment Practices Guide ¶ 6655; Commission Decision No. 76-94, CCH Employment Practices Guide ¶ 6671; See also, Commission Decision No. 70-727, CCH EEOC Decisions (1973) ¶ 6152; Commission Decision No. 70-47, CCH EEOC Decisions (1973) ¶ 6044.

¹⁶² Direct evidence "reflects directly the alleged discriminatory attitude" and "bear[s] directly on the contested employment decision." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006) (quoting *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc) (citation and internal quotation marks omitted)). Direct evidence "typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005). A plaintiff may meet the burden to show pretext using either direct or circumstantial evidence. Direct evidence is evidence "which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994)) (alteration in original). Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer. See, e.g., *Godwin*, 150 F.3d at 1221 (supervisor stated he "did not want to deal with [a] female"); *Cordova v. State Farm Ins.*, 124 F.3d 1145, 1149 (9th Cir. 1997).

In this case, the actions of Sgt. Frank and the Chester Police Department demonstrated that their denial of privileges and benefits was directly linked to Mr. Jacobs' race and color. First, the BOLO was not a perfect match and insufficient to constitute reasonable suspicion. Sgt. Frank relied almost entirely on Mr. Jacobs' race, color and dreadlocks as the basis for the stop without any new corroborating observations or additional information. As previously stated, a similar BOLO description of a white male driver with short hair in a red/maroon maybe Mini Cooper would not justify a stop. Second, Sgt. Franks made assumptions about Mr. Jacobs being a "player" in Bellows Falls even though Mr. Jacobs had no criminal history and his limited interaction with Sgt. Franks in the past was entirely innocent in nature. Sgt. Franks even went so far as to assume that it was Mr. Jacobs that provided the mother of his child, a white woman, with drugs even though he had no basis for this knowledge. This was suggestive of stereotypes of African American males being associated with drug dealing. Third, Chief Cloud and the State Trooper made jokes about Mr. Jacob's name and whether he was Amish. They asked Sgt. Frank if Mr. Jacobs had a beard and if Sgt. Frank was stopping a horse and buggy. When Sgt. Frank responded that Mr. Jacobs is Jamaican, Chief Cloud said, "I guess that would work too." Then the conversation turned to the possibility of Mr. Jacobs filing a complaint. Specifically, Sgt. Frank said, "I pulled him out at gunpoint. Of course, he is a Black man being treated this way. It is fucking bullshit. Whatever." The Chief does not respond to those comments but instead he asks if Mr. Jacobs got his car washed (they were at the car wash at the time). Then, Sgt. Franks suggests that it would be "bullshit" if Mr. Jacobs filed a complaint. These conversations were occurring in the context of an unlawful stop and search and on official business. They either indicate a belief that Black men file frivolous claims of discrimination or that Sgt. Frank knew he had acted wrongfully in this instance.

Viewed in totality, this Investigation finds that there is sufficient direct evidence to show Sgt. Frank was motivated by racial animus when he stopped and searched Mr. Jacobs at gunpoint on the road. When a prima facie case is proven by direct evidence, the analysis need not turn to alternative theories of discrimination or the burden shifting test articulated by the *McDonnell Douglas* case. But for the sake of argument, this Investigation briefly reviews the analysis under the markedly hostile test and finds that it is also proven by the evidence.

Markedly Hostile

Absent direct evidence, a plaintiff can prove the last prong of the prima facie case by showing someone outside of his protected class was similarly situated and was not treated in the same adverse manner. These individuals are known as comparators and in the employment context, they are more available. There, coworkers of different sex, gender identities, sexual orientations, race and color work alongside one another and may share the same titles and job duties and responsibilities. In the public accommodations context, it is difficult if not impossible to find a comparator. Mr. Jacobs would have to show Sgt. Franks failed to stop, search or use a gun to pull over a white driver under a similarly generic BOLO. Because comparators rarely exist in the public accommodations context, courts have permitted a different test to show discriminatory intent – markedly hostile.

In the commercial context, unlike an employment situation, persons may be "highly mobile" and sometimes "transient" and documentation may be lacking in "any meaningful

sense.”¹⁶³ As a result, the courts have permitted Plaintiffs to show they were treated in “markedly hostile manner” that a reasonable person would find objectively discriminatory.¹⁶⁴ Granted, law enforcement entities are neither employers in this instance nor a commercial entity, but they do often serve a community that is transient and, in the case of stops and searches, documentation is often lacking. Therefore, it is fair to utilize the markedly hostile test to determine if Mr. Jacobs was denied the services, privileges, or benefits of operating on a public road by the Chester Police because of his race and color.

Mr. Jacobs received markedly hostile services from the Chester Police and specifically Sgt. Frank. First, he was pulled over without reasonable suspicion. Sgt. Frank relied significantly on Mr. Jacobs’ race, color and the fact that he had dreadlocks to justify the stop, even though he had not observed any new suspicious activity. Next, Mr. Jacobs was subjected to an unlawful stop and then unlawful search because Sgt. Franks was convinced Mr. Jacobs was the alleged perpetrator despite a lack of corroborating evidence. Mr. Jacobs was unable to pick up his child and was delayed in his activities. Lastly, and perhaps most importantly, he was held at gunpoint when he had not been observed to be doing anything dangerous.

Based on this evidence, this Investigation finds that Mr. Jacobs received services in a markedly hostile manner that a reasonable person would find objectively discriminatory. Thus, even if the aforementioned statements and assumptions made by Sgt. Frank did not amount to direct evidence, the last prong of the prima facie case has nevertheless been met. Under the markedly hostile analysis, the burden then shifts to the Respondent to provide a legitimate, non-discriminatory reason for its actions.

Legitimate Non-Discriminatory Reasons

Respondent argues that Sgt. Frank had a legitimate non-discriminatory reason for pulling over Mr. Jacobs because he believed that Mr. Jacobs fit the description in the BOLO and was therefore justified in believing that Mr. Jacobs had engaged in criminal activity. In this case the activity included the possibility of a firearm within the suspected vehicle that had reportedly

¹⁶³ *Id.*

¹⁶⁴ *Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694 (D. Md. 2000). *Callwood* derived from Section 1981 complaint. Section 1981 provides in relevant part that “[a]ll persons [. . .] shall have the same right [. . .] to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” Title II of the Civil Rights Act, 42 U.S.C. § 2000a(a), and Vermont’s public accommodations act, 9 V.S.A. §4502(a), address the obligation of places of public accommodation to deliver “services, facilities, goods, privileges, advantages, benefits or accommodations [. . .][that are] offered to the general public” in a manner that is free from discrimination. Therefore, Section 1981, Title II, and Vermont’s Public Accommodation Act represent public accommodations statutes which are meant to facilitate and enforce fair contractual relationships with the public, regardless of race. These statutes ensure that all members of the public have the same ability to access goods and services of equal quality and convenience as that of other citizens. See also *Robin v. Durkin*, 2004 WL 6240719 (2004) (Vt.Super.) (Trial Order), Windham County. See e.g., *Makhzoomi v. Southwest Airlines Co.*, 419 F.Supp.3d 1136 (N.D. Ca. 2019) (§1981 case discussing application of the Christian prima facie case outside the employment context in a case involving the alleged wrongful removal of a Middle Eastern man from a flight); (*Fall v. LA Fitness*, 161 F.Supp.3d 601, 607 (S.D. Ohio 2016)(applying §1981 elements of the prima facie case in *Christian* to an analysis of plaintiff’s Title II claim).

¹⁶⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) The “markedly hostile” standard has also been used in employment cases, see, e.g., *Hayes v. Cablevision Systems New York City Corp.*, 2012 WL 1106850, at *10 (E.D.N.Y. 2012) (considering the markedly hostile standard due to supervisor’s use of the word “thug” to describe the complainant’s work-dress style).

been used in a road rage incident.¹⁶⁵ Respondent argues that skin color was not used to profile but instead to establish identity which, taken into account with the other identifiers, established reasonable suspicion to conduct the investigatory stop.¹⁶⁶

Respondent also argues that initiating a high-risk stop was reasonable under the circumstances because Sgt. Frank was alone at the time of the stop. “The risk of harm to both the police and the occupants of a stopped vehicle is minimized, “if the officers routinely exercise unquestioned command of the situation.”¹⁶⁷ Respondent argues that the firearm was only out of its holster for 48 seconds, the pat down for weapons only took 7 seconds and the vehicle search, which was consented to, took 1.27 minutes. Further, the actions were limited to “the investigatory purpose of the temporary detention and were all calculated at assuring the safety of those involved in an encounter that took a total of 19 minutes to complete without incident.”¹⁶⁸

Finally, the Respondent argues that “[I]t is hornbook law that the mere fact that something bad happens to a member of a particular racial group does not, without more, establish that it happened because the person is a member of that racial group.”¹⁶⁹ Therefore, Respondent argues that this incident had nothing to do with race and was based on the content of the BOLO and the safety of Sgt. Frank.

Because a legitimate non-discriminatory reason need only be produced to the trier of fact and not be sufficiently persuasive, this Investigation accepts Respondent’s reasons for the purposes of moving to the next step in the analysis.

Pretext

The burden now shifts back to the Complainant to show that the reasons offered by the Respondent lacked credibility or that a discriminatory motive was a more likely reason for the action.¹⁷⁰ As previously stated, the BOLO was too generic and captured too many innocent persons in its description. Mr. Jacobs was not a perfect match. Sgt. Franks did not make any new observations prior to his stop. Therefore, he did not have reasonable suspicion to make the stop and all of the actions that followed were invalid. The comments and treatment of Mr. Jacobs is sufficient evidence to show the stop, search, and use of a gun on Mr. Jacobs was based on his race and color. Respondent’s argument that race and color was used only for identification purposes entirely ignores the record in which Sgt. Franks made assumptions about Mr. Jacobs being a drug-dealer and a well-known “player” in Bellows Falls without any evidence. Those stereotypes of African American men being associated with drugs and criminal activity is exactly the type of stereotypes that motivate one to find “reasonable suspicion” when it does not exist. Even Chief Cloud attested that in his 19 years as Chief of Police in Chester, he was not familiar with Mr. Jacobs. Therefore, Mr. Jacobs has sufficiently persuaded this Investigation that the reasons Respondent provided are pretextual and not credible.

¹⁶⁵ Respondent’s Response to Complaint

¹⁶⁶ Ibid.

¹⁶⁷ *Arizona v. Johnson*, 555 U.S. 323, 330 (2009)(internal citations omitted) as cited in Respondent’s Response to Complaint.

¹⁶⁸ Respondent’s Response to Complaint

¹⁶⁹ *Burwell v. Peyton*, 2013 U.S. Dist. LEXIS 48701, *19 (internal citation omitted) as cited in Respondent’s Response to Complaint

¹⁷⁰ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

CONCLUSION & RECOMMENDATION

Therefore, this investigation makes a preliminary recommendation to the Human Rights Commission to find that there are **reasonable grounds** to believe that the Town of Chester via the Chester Police Department discriminated against Obadiah Jacobs based on his color and race in violation of the Vermont Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A. §4502 (a).

Melissa Horwitz

Melissa Horwitz
Attorney Investigator

5/4/2021

Date

Bor Yang

APPROVED:

Bor Yang
Executive Director & Legal Counsel

5/4/2021

Date



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SENT VIA EMAIL TO <jcarroll@64court.com>

May 4, 2021

RE: Jacobs v. Town of Chester
VHRC Case No: PA19-0018

Dear Mr. Carroll,

Enclosed is the Investigative Report in the above referenced case involving a Charge of Discrimination in Public Accommodations based on race and color. This Report makes a preliminary recommendation to the Vermont Human Rights Commission to find that there are reasonable grounds to believe that the Respondent unlawfully discriminated against the Complainant with respect to his race and color, in violation of Vermont's Fair Housing and Public Accommodations Act.

This Investigative Report is not the final determination of the Commission. That determination will be made by the Human Rights Commissioners at their next monthly meeting which will be held on **Thursday, May 27, 2021, by virtual meeting. This case is scheduled to be heard at 11:00 a.m.** Hearings generally are between ten (10) to twenty (20) minutes long. Instructions for accessing the virtual meeting by computer and phone will sent via email ahead of time.

Please contact us by Tuesday, May 11, 2021, to confirm the following:

- Whether you plan to participate in the Commission meeting
 - Whether you would like to request any disability-related reasonable accommodations.
 - Whether you are unable to attend the meeting and would like to reschedule the hearing.
- The Commission will not grant a continuance unless all parties agree or in the event of an emergency. Continuances are at the discretion of the Executive Director.

RESPONSES

You now have the opportunity to submit a written response explaining why you agree or disagree with the facts set forth in the enclosed Investigative Report, its legal analysis, and/or its preliminary recommendation.

Please note that the investigation phase is now closed, and the Commission will not accept additional evidence as part of your written response, nor will it accept attachments to your

written response. Additionally, your response may not refer to statements made in the course of settlement negotiations including mediation sessions.

In order for your response to be attached to the Investigative Report sent to the Human Rights Commissioners for their consideration, your response must be received by the Human Rights Commission by the close of business on May 18, 2021. The Commissioners will not consider responses submitted after that deadline. When your written response is received by this office, the Commission will also provide a copy to the Complainant.

COMMISSION MEETING

At the upcoming Commission meeting, each party will have a brief opportunity to state why they agree or disagree with the Investigative Report. You may use your speaking opportunity to supplement your written remarks as to why you agree or disagree with the Report. The Commissioners may also have questions for you regarding the contents of the Investigative Report.

Since the Investigative Report's recommendation is only preliminary, the Commission strongly urges parties to attend the Commission meeting either in person or by telephone. The Commissioners find it extremely helpful to meet with all parties and discuss their cases with them.

Since these proceedings take place in executive session and are confidential, the only individuals who may attend the Commission meetings for case discussions are the parties and their attorneys. Please call me if you have any questions. Thank you for your cooperation in this process.

Sincerely,



John McKelvie
Executive Staff Assistant/Case Manager

Enclosures (2)