

**“KNOW YOUR RIGHTS”
Training on the Legal Rights and Responsibilities of
People with Alcohol and Drug Problems**

**Vermont Laws Regarding Discrimination
(April 2008)**

I. The Basics

- Q1.** Does Vermont have a State law, like the Federal laws in the “**Know Your Rights**” brochure, that protects people from discrimination because they have a history of alcohol or drug problems, or are in treatment or in recovery from the problems?
- A1.** Yes: The **Vermont Fair Employment Practices Act** (“VT Fair Emp. Act”), 21 V.S.A. § 495 *et seq.*, and the **Vermont Fair Housing and Public Accommodations Act** (“VT Fair Hous. and Pub. Accom. Act”), 9 V.S.A. § 4500 *et seq.*
- The **VT Fair Emp. Act** makes it unlawful for an employer to harass or discriminate against any individual on the basis of some physical or mental conditions. It is enforced by the attorney general or a state’s attorney. 21 V.S.A. § 495b.
 - The Vermont Human Rights Commission (“VHRC”) is the agency charged with enforcing the **VT Fair Housing and Pub. Accom. Act**. The VHRC receives and investigates discrimination complaints and provides technical assistance to employers, business establishments and housing providers regarding compliance with the anti-discrimination laws.
- Q2.** Are people with **alcohol or drug problems** considered individuals with a “disability” protected from discrimination under Vermont laws?
- A2.** Yes, with some limitations. Under the VT Fair Emp. Act, a person with a disability is one who has a “physical or mental impairment which substantially limits one or more major life activities.” 21 V.S.A. § 495d(5)(A). “Drug addiction and alcoholism” are both considered physical or mental impairments. 21 V.S.A. § 495d(7)(C). Likewise, drug addiction and alcoholism are considered to be a “physical or mental impairment” under the VT Fair House. and Pub. Accom.

Act. 9 V.S.A. § 4501(3)(C). However, as further discussed in Question 3, current drug or alcohol users are *not* protected if the current use constitutes a **direct threat** to property or the safety of others. VT Fair Emp. Act, 21 V.S.A. § 495d(6)(B); VT Fair Hous. and Pub. Accom. Act, 9 V.S.A. § 4501(3)(C).

Q3. Do Vermont’s laws define “**disability**” the same way as the Federal non-discrimination laws?

A3. In large part, yes, but with minor variations. While both laws are quite similar to the federal laws (and the legislative intent of the VT. Fair Hous. and Pub. Accom. Act was to mirror the ADA), there are the following differences:

- The VT Fair Hous. and Pub. Accom. Act’s definition of “disability” is slightly broader than the ADA in that it includes individuals whose impairment “limits” a major life activity, 9 V.S.A. § 4501(2), whereas the ADA only considers individuals to have a disability if the impairment “substantially limits” a major life activity.
- The Vermont laws do not go as far as the federal laws in excluding from coverage individuals who are currently engaging in the illegal use of drugs. The Vermont laws exclude from coverage those individuals whose current use of alcohol or drugs constitutes a “direct threat” to the property or safety of others. VT Fair Emp. Act, 21 V.S.A. § 495d(6) and VT Fair Hous. and Pub. Accom. Act, 9 V.S.A. § 4501(3)(C). Under the VT Fair Emp. Act, such an individual is considered to be an “individual with a disability,” but not “qualified.” Under the VT Fair Hous. and Pub. Accom. Act, such an individual is not even an “individual with a disability.” In contrast, the federal laws automatically exclude someone currently engaging in the illegal use of drugs. Accordingly, if someone is currently engaging in the illegal use of drugs in Vermont, s/he might still be considered an “individual with a disability,” provided such use did not constitute a “direct threat.”

II. Vermont’s Anti-Discrimination Laws

Q4. In what areas of life do Vermont’s anti-discrimination acts protect individuals from discrimination because of their disability?

A4. Vermont’s anti-discrimination acts extend to:

- Employment (VT Fair Emp. Act)
- Housing (VT Fair Hous. and Pub. Accom. Act)
- Public Accommodations (VT Fair Hous. and Pub. Accom. Act)
- Public Services (VT Fair Hous. and Pub. Accom. Act)

Employment
Vermont Fair Employment Practices Act (VT Fair Emp. Act)
21 V.S.A. § 495 et. seq.

- Q5.** Which employers are covered by VT Fair Emp. Act?
- A5.** The VT Fair Emp. Act defines employer as “**any** individual, organization, or governmental body including any partnership, association, trustee, estate, corporation, joint stock company, insurance company, or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, and any common carrier by mail, motor, water, air or express company doing business in or operating within this state, and any agent of such employer, which has **one** or more individuals performing services for it within this state.” 21 V.S.A. § 495d(1) (emphasis added).
- Q6.** Are all employees covered by the VT Fair Emp. Act?
- A6.** Yes. **Any** person who is permitted, required, or directed by any employer to perform services is covered by the VT Fair Emp. Act. 21 V.S.A. § 495d(2).
- Q7.** Are the employment discrimination provisions like those of the Federal laws explained in *Know Your Rights*?
- A7.** Yes, but in some respects, the VT Fair Emp. Act has broader protections than the Rehabilitation Act and the ADA. The laws are *similar* in term of the –
- Definition of what constitutes unlawfully discriminatory employment policies and practices, in regard to hiring, firing, and the terms and conditions of employment. The VT Fair Emp. Act makes it illegal for any employer to deny employment to, or otherwise discriminate in employment against, an individual on the basis of a “disability”, except where a bona fide occupational qualification requires persons of a particular class, 21 V.S.A. § 495(a), or in terms of a bona fide seniority system or a bona fide employee benefit plan. 21 V.S.A. § 495f.
 - Reasonable accommodation requirements (see Question 9, below).

However, the VT Fair Emp. Act provides broader protection than the federal laws in the following area: whereas the federal laws have no protections for individuals who test positive for drugs, the VT Fair Emp. Act does. Employees who test positive for drugs may not be terminated if the employee agrees to participate in and successfully completes the employee assistance program; *and* the test is administered according to statutory requirements. 21 V.S.A. § 513.

- Q8.** What types of reasonable accommodations should an employer expect to make for a person in treatment or otherwise in recovery from an alcohol or drug problem?
- A8.** Like the Federal laws, the VT Fair Emp. Act requires employers to make reasonable accommodations for employees with a disability. “Reasonable accommodations” include job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices and other similar actions. 21 V.S.A. § 495(d)(12)(B) and (C).

Employment-related Medical Inquiries and Examinations

- Q9.** Are the VT Fair Emp. Act’s employment provisions regarding medical inquiries, examinations and drug and alcohol tests similar to those of the Federal laws explained in the *Know Your Rights* brochure?
- A9.** No. With respect to **medical inquiries and examinations**, the VT Fair Emp. Act is silent except for a provision rendering it unlawful for an employer to require any employee or applicant for employment to pay the cost of a medical examination as a condition of employment. 21 V.S.A. § 301.

With respect to **drug and alcohol testing**, the VT Fair Emp. Act has more protections than the federal laws:

- **Pre-Employment Drug and Alcohol Testing.** Generally, employers are prohibited from requesting, requiring, or attempting to administer to any applicant a drug or alcohol test. However, an employer may require an applicant to submit to a drug test if *all* of the following conditions are met: the applicant has been given a conditional offer of employment; the applicant has received written notice of the test; *and* the test is administered according to statutory requirements. 21 V.S.A. § 512.
- **Employment Drug and Alcohol Testing.** In general, employers are prohibited from requiring an individual employee to submit to a drug test. Additionally, employers are prohibited from conducting random or company-wide tests, unless such testing is required by federal law or regulation. However, an employer may require an individual to submit to a drug test if the employer has probable cause; the employer has available for the tested employee a bona fide rehabilitation program for alcohol or drug abuse; the employee may not be terminated if said employee agrees to participate in and successfully completes the employee assistance program; *and* the test is administered according to statutory requirements. 21 V.S.A. § 513.

- **Confidentiality.** All drug test information shall be kept confidential. Additionally, all health care information regarding the individual to be tested, including the identity of the individual, taken by the medical review officer shall be confidential and shall not be released to anyone except the individual tested. 21 V.S.A. § 516.
- **Positive Results.** Whereas the federal laws have no protections for individuals who test positive for drugs, the VT Fair Emp. Act does. Employees who test positive for drugs may not be terminated if the employee agrees to participate in and successfully completes the employee assistance program; *and* the test is administered according to statutory requirements. 21 V.S.A. §§ 513, 517. Additionally, any employee or applicant who has a positive test result shall be provided with an opportunity to retest a portion of the sample at an independent laboratory at the expense of that individual. 21 V.S.A. § 515

Housing
Vermont Fair Housing & Public Accommodations Act
 (VT Fair Hous. and Pub. Accom. Act),
9 V.S.A. § 4500 et. seq.

Q10. Are the housing and public accommodation anti-discrimination provisions like those of the Federal laws explained in *Know Your Rights*?

A10. Yes, they are very similar. The VT Fair Hous. and Pub. Accom. Act –

- makes it unlawful for *any* person to refuse to sell or rent, or otherwise make unavailable, a dwelling or other real estate to any person because of handicap, or to generally discriminate against any person because of his or her handicap. 9 V.S.A. § 4503(a).
- prohibits disability-based discrimination by owners or employees of places of public accommodation (i.e., schools, restaurants, stores, or other facilities at which services or accommodations are offered to the general public). 9 V.S.A. § 4501.
- does *not* require a public accommodation to permit anyone to participate in or benefit from that public accommodation if that person poses a direct threat to the health or safety of others. Additionally, a person who engages in any disruptive behavior as the result of alcohol or illegal drug use shall be excluded from participating in or benefiting from that public accommodation. 9 V.S.A. § 4502.

III. Analyzing Discrimination Claims under Vermont Law

There has been only one reported court decision directly applying these laws to individuals with alcohol or drug problems. In *Kennedy v. Department of Public Safety*, 719 A.2d 405 (VT, 1998), the court held that while alcoholism is a disability protected by VT FAIR EMP. ACT, the termination of a state employee for alcohol-related misconduct is not protected by VT FAIR EMP. ACT or the Rehabilitation Act.

IV. Remedies and Resources for Addressing Illegal Discrimination

Q11. What can I do if I think I have been discriminated against because of an alcohol or drug problem?

A11. In addition to the remedies under the federal anti-discrimination laws listed at the end of the *Know Your Rights* brochure, state remedies include:

- Any person who has suffered discrimination in violation of the VT Fair Emp. Act may file a discrimination claim with the Civil Rights Unit of the Vermont Attorney General’s Office *or* bring a claim in superior court seeking compensatory or punitive damages or other equitable relief. 21 V.S.A. § 495b. The Attorney General’s Office has a policy of not accepting claims that exceed a year since the most recent alleged discriminatory act, unless the claim is very compelling.¹ The statute of limitations to bring a claim in court is generally three years. 21 V.S.A. § 512. 21 V.S.A. § 512.
 - If the employer complained of in violation of the VT Fair Emp. Act is a **state agency**, then the Vermont Human Rights Commission shall have jurisdiction, i.e., the power of enforcement. 9 V.S.A. § 4552(b).
- Any person who has suffered discrimination under the VT Fair Housing and Pub. Accom. Act may file a charge under oath with the Vermont Human Rights Commission (“VHRC”). The charge must be filed within one year of the most recent alleged discriminatory act. If the facts alleged are proven and meet the legal elements constituting unlawful discrimination, the VHRC may accept the charge. Once VHRC has accepted the charge and begun its investigation, if it finds reasonable grounds to believe that discrimination has occurred, the Executive Director will attempt to settle the case for a time period not to exceed six months. If the Executive Director is unable to settle the dispute, the VHRC is authorized to initiate a lawsuit. (VHRC 2007 Annual Report).

¹ Per conversation with Ira Hammerslough from the Vermont Attorney General’s Office, April 3, 2008.

Remember: Employment discrimination claims under Federal law:

- If you intend to file an employment discrimination lawsuit under the ADA or Rehabilitation Act, you must first file a complaint with the U.S. Equal Employment Opportunity Commission (“EEOC”) within 180 days of the alleged discrimination.

- There are EEOC offices in Boston, Buffalo, New York City, and Newark. The New York District Office is located at 33 Whitehall Street, New York, New York 10004, phone (800)669-4000, and is open Monday – Friday from 8:30 a.m. through 5:00 p.m., and intake hours are Monday – Friday from 8:30 am through 3:00 pm. You can only file a lawsuit after receiving a “right to sue” letter from the EEOC. You may wish to check the EEOC website, www.eeoc.gov, for more information.