THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0658

Michelle Clark

v.

New Hampshire Department of Employment Security, et al.

APPEAL PURSUANT TO RULE 7 FROM A DECISION OF THE MERRIMACK COUNTY SUPERIOR COURT

APPELLEE'S BRIEF

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QUESTIONS PRESENTED

1. Whether the remedies available under RSA 275-E:2 are limited to those expressly provided in the statute, and therefore, an employee who has been administratively made whole through back pay and restoration to a like position, lacks a cause of action under the statute.

2. Whether Clark is entitled to RSA 98-E public freedom of expression protection for non-publicly made opinions, speech or discourse.

3. Whether this Court should create a new cause of action for wrongful demotion or failure-to-promote absent legislative intent or clear public policy under the facts of the case.

STATEMENT OF THE CASE

On May 4, 2014, Appellant Michelle Clark, an employee with New Hampshire Employment Security (NHES), filed a complaint alleging 7 counts of wrongdoing including: (1) violation of the whistleblower's protection act, RSA 275-E; (2) wrongful discharge/demotion; (3) violation of statutory freedom of expression rights, RSA 98-E; (4) intentional infliction of emotional distress; (5) intentional interference with contractual relations; (6) violation of constitutional rights; and (7) interference with First Amendment rights under 42 U.S.C. § 1983. NHES answered on June 23, 2014 denying all counts. NHES also filed a motion to dismiss on December 12, 2014, arguing Clark failed to state claims upon which relief could be granted and claiming immunity protections. The superior court (*Smukler*, J.) granted the motion to dismiss the wrongful discharge/demotion count, but denied the others without prejudice, pending an evidentiary immunity hearing. ABr 37[1].

The subsequent immunity hearing spanned six days ending on October 6, 2015, at which all of the individual defendants, the plaintiff and other NHES staff testified. AA 439; ITr vol. 1-6. Following the hearing the court (*Mangones*, J.) issued an order dismissing counts four through seven based on NHES's sovereign immunity. AA 438–455. Clark submitted a motion for reconsideration, raising issues with the application of the motion to dismiss standard, with the superior court's applying the motion to dismiss after an evidentiary hearing, and noting that the evidence would be better suited for trial.[2] The court denied Clark's motion finding it had neither overlooked nor misapprehended the standard to be used where it had the discretion to rely on evidence presented at an evidentiary hearing for a motion to dismiss. AA 457.

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[1] "AA" refers to the Appellant's Appendix; "ABr" refers to the Appellant's Brief; "SA" refers to the State's Appendix; "ITr" refers to the transcript of the six day immunity hearing.

[2] None of the issues raised relative to the Immunity Order have been briefed by Clark; therefore, they are waived.

NHES filed for summary judgment on January 4, 2017 on the two remaining statutory claims relating to a violation of RSA 275-E, the Whistleblower Protection Act (WPA) (count 1) and RSA 98-E, public employee freedom of expression (count 3). AA 39. NHES argued that it was entitled to summary judgment on the WPA claim because Clark had been afforded all of the statutory remedies available to her under the WPA; and on the RSA 98-E claim because none of her discourse, opinions, or speech was made publicly as is required under the freedom of expression law. AA 41–42. Following discovery extensions, Clark filed her objection in late March. *Id.* at 66. On August, 2, 2017, the superior court (*McNamara*, J.) granted NHES's motion for summary judgment. ABr 55. The court found, as to count one that the rights and remedies under RSA 275-E do not include front pay for any speculative promotion not received or allow for recovery of a "gross-up" for tax purposes. *Id.* at 60–61. Further, the court found that compensation for "loss of status" was not contemplated by RSA 275-E. *Id.* at 61. Therefore, the court reasoned Clark had been fully made whole under the statutory remedies available in a civil suit under the WPA. *Id.* at 62. As to count three, the court found that Clark's alleged speech, opinion giving or discourse was not public discourse and therefore no recovery under the statute was appropriate. *Id.* at 63.

On the summary judgment motion for reconsideration, Clark countered that she had not received the entirety of what she was entitled under the WPA, such as the right to supervise, right to promotion and injunctive relief, and that the use of the phrase "civil suit" in RSA 275-E demonstrates the legislature's intent to provide the myriad of damages which are available to a plaintiff in any "civil action." AA 287–292. Clark also argued she would be left without an adequate remedy if 'compensatory damages' for her additional harm, such as retaliation were not allowed. AA 294. Finally, as to RSA 98-E, Clark reiterated why she believed she engaged in

public discourse and that such discourse or criticism need not be public at all. *Id.* at 297–299. In a seven page Order dated October 5, 2017, the superior court (*McNamara*, J.), denied the motion reasoning that 2010 amendments to the WPA did not expand the remedies available under the statute to permit an employee to obtain whatever damages would be available in a civil action, but rather eliminated the requirement to report internally and gave employees the freedom to choose the forum in which to challenge violations of the law. ABr 65–66. The court further addressed Clark's remaining arguments discounting them in turn. *Id.* at 67–70.

This appeal followed.

STATEMENT OF THE FACTS

Michelle Clark is a current employee of NHES and started with the agency in 1995, as a part-time Food Stamp Interviewer. ABr 38. Over the years she was promoted to various positions, eventually receiving a promotion to a temporary supervisor position, on October 1, 2010, at a labor grade 21, step 7, SA 59; AA 276, 284; ITr 122. Her position included the supervision of a number of employees in the Benefit Support Unit (BSU). Once Clark took on a supervisory role, she began to have issues and concerns with the behavior of individuals originally hired as interns in the BSU. ITr 199–206. After an unfavorable evaluation six months into the new position, Clark received a letter of warning, as part of the standard course of practice, for failing to meet expectations.[3] ITr 206.

As unemployment claims started to decrease and NHES lost funding, NHES had to reduce the budget, doing so through layoffs in the summer of 2011. ITr 16–17, 57–60. Bureau Director Carpenter was instructed to meet a certain budget goal and create better efficiencies in her bureau. ITr 57. She did so by laying off "almost a third of [her] workforce." ITr 1047. The restructuring plan eliminated the BSU in Manchester where Clark was supervisor, and redistributed their work. ITr 58, 1048. NHES chose to eliminate full-time positions, rather than cut part-time staff, as they were less expensive. ITr 62, 1048. The state Director of Personnel approved the restructuring plan. ITr 59. Prior to approval, Human Resources at NHES and NHES legal counsel met with the State's Director of Personnel to ensure the accuracy and validity of the lay-off process. ITr 593, 1190–91. The Reduction-In-Force issue, however, became a topic of debate with the Union, who expressed concerns over why part-time employees were being kept as employees and other permanent employees laid-off. ITr 593.

[3] A supervisor removed this letter of warning on Dec. 5, 2011 following an informal administrative grievance process. ITr 1043–44.

Clark received her layoff letter on August 2, 2011 informing her that her position was part of the reduction in force. ITr 971; AA 461. By August 9, 2011, she learned of the opportunity to take a demotion in lieu of layoff. ITr 971; AA 461. Clark subsequently requested and received a meeting with the NHES Commissioner, Tara Reardon, to whom she expressed her concerns relating to layoffs and the interns and noted her desire to return to her former position as Certifying Officer III since most of those positions were not being cut from the budget. ITr 593–95. During the following days, Clark inquired as to available positions; she was informed the only available position was as a Program Assistant I which was a position many labor grades below the labor grade she held. ITr 974. Clark accepted that position by August 16, 2011. ITr 984–85; AA 463. The same day, she received a letter rescinding the layoff and placing her in the Program Assistant I position, at labor grade 12. AA 19–20. The change was complete on August 18, 2011, and she began in the position the next day. SA 41; AA 463. Clark's state service was, thus, uninterrupted.

Two weeks later, Clark appealed the demotion in lieu of layoff to the Personnel Appeals Board (PAB) pursuant to RSA 21-I:58. AA 465. In the PAB appeal, Clark claimed that NHES disciplined her disguising it as a demotion in lieu of layoff. *Id.* Further, she claimed the layoffs violated the personnel rules, since no temporary or probationary employees were cut, and that the demotion was the result of her raising concerns about work place behaviors of "interns." *Id.* The Attorney General's office was forwarded a copy of the appeal by the end of September.

In June 2012, Clark filed an ethics complaint with the Executive Branch Ethics Committee against Tara Reardon. ITr 1010–11. Former Commissioner Reardon never considered Clark to even be a "whistleblower." ITr 661. Clark also filed a whistleblower complaint with the labor department on June 7, 2012, but she later abandoned it. ITr 848–49. Likewise, Clark

provided an interview to the Attorney General's office relative to Tara Reardon's daughter receiving unemployment benefits. ITr 848. Following her demotion, Clark applied for several jobs and effective November 30, 2012, she achieved the position of Quality Control Investigator at labor grade 21, step 1. ITr 887–88.

The Governor and Executive Council appointed George Copadis Commissioner of NHES on July 16, 2012. SA 69; ITr 1091. In an effort to resolve Clark's complaints, Commissioner Copadis reinstated her to a position at NHES that had "like seniority, status and pay equal to that which [she] had when the Department went through the 2011 mandated reduction in force." SA 69. As a result, Clark was reinstated to a labor grade 21, step 7 retroactive to and effective as of August 19, 2011. SA 60. She was paid back-pay in March 2013, SA 44–51 receiving over $20,000.00, which Clark did not claim was inaccurate. SA 29. The Commissioner also directed the removal of the poor performance evaluation from Clark's personnel file, as if it had never been issued, directed the removal of another memorandum of counsel associated with the poor evaluation from Clark's personnel file, and agreed to send her to a certified public management class. SA 22.

Following the receipt of back-pay, and other Commissioner granted remedies, Clark's union counsel withdrew the Demotion in Lieu of Layoff Appeal that was pending with the PAB. AA 436. Clark initiated this action on May 7, 2014, 14 months after receiving the back-pay award. The action revolves around claims that she was harassed and retaliated against for speaking out against the "interns" under her supervision; however, her ethics complaint, investigative interviews at the Attorney General's office, her discussions with the state and agency personnel representatives and commissioner Reardon, all came *after* she received her lay-off letter. *See* AA 454.

SUMMARY OF THE ARGUMENT

The remedies available under RSA 275-E:2 are clearly identifiable and do not include compensatory damages, an apology, promotion, tax gross up, or attorney's fees where back pay and other equitable remedies had been provided to Clark prior to the initiation of this civil action. When a civil action is brought under RSA 275-E:2 the remedies are limited to those provided for in that statute. In contrast the remedies available under RSA 275-E:4 are available to a person who chooses the administrative forum at the Department of Labor, an avenue that Clark did not pursue. The superior court appropriately granted summary judgment to Defendants on Clark's RSA 275-E claims because prior to bringing this action Clark had already received her back-pay and was restored to a position of equal seniority in the classified system of employment as found in RSA 21-I:42, et. seq.

Additionally, a plain reading of RSA 98-E demonstrates that it protects freedom of expression and gives public employees the right to *publicly* discuss matters and give opinions. The statute cannot be parsed into an interpretation that separates the provisions of RSA 98-E:1 from RSA 98-E:2. Simply put, the word "publicly" within RSA 98-E:1 cannot be overlooked, as the chapter must be read as a whole. Likewise, any suggestion that Clark's attempt to discuss a fellow employee's personnel evaluation with Senator Carson was "public speech" would create an absurd result under the law. The statute protects an employee from the government interfering with the right of the employee to speak out fully, criticize and disclose opinions in a public context on matters that are no confidential.

Finally, the superior court properly granted summary judgment to Defendants on Clark's wrongful termination claim. Wrongful termination can only exist if there is actual separation from employment. Clark was never discharged from employment; rather, she chose a demotion

under the state's personnel rules in lieu of a layoff. Also, as a classified employee—one, not at-will—Clark does not have a common law wrongful discharge claim since she has protections under RSA 21-I:52 and the administrative process provided to employees by the legislature and the collective bargaining agreement. There is no support for this court to recognize a new cause of action for wrongful demotion or a wrongful failure-to-promote. Neither cause of action has been recognized in this jurisdiction, and the facts of this case do not support adoption of such new causes of action here. No policy consideration weighs in favor of adopting a new common-law action for a classified employee who already enjoys significant protections under the state's merit system of employment. The trial court did not abuse its discretion by finding that these causes of actions do not exist in New Hampshire.

ARGUMENT

I. STANDARD OF REVIEW

A statutory interpretation is a question of law, which this court evaluates *de novo*. *State v. Exxon Mobil Corp.*, 168 N.H. 211 (2015). Likewise, in reviewing a grant of summary judgment, an appellate court reviews the trial court's application of the law to the facts *de novo*, as well. *Tech-Built 153 v. Va. Surety Co.*, 153 N.H. 371, 373 (2006); *Ouellette v. Town of Kingston*, 157 N.H. 604, 612 (2008).

II. AS A STATUTORY CAUSE OF ACTION RSA 275-E ONLY PROVIDES THE REMEDIES THE LEGISLATURE EXPRESSLY SET FORTH IN THE STATUTE

There is no doubt that in New Hampshire a person is "entitled to a certain remedy, by having recourse to the laws" for injuries he may receive. N.H. CONST. pt. I, art. 14. But neither the "constitution [nor state statutes] guarantee that all injured persons will receive full compensation for their injuries." *Welzenbach v. Powers*, 139 N.H. 688, 691 (1995). Indeed, compensation may be limited and defined by the express law as fashioned by the legislature. *Trovato v. Deveau*, 143 N.H. 523, 525 (1999) (holding the right to recover for a violation of a statutorily created provision "exists only to the extent and in the manner provided by the legislature").

In enacting the WPA the New Hampshire Legislature created a private right of action with remedies it deemed adequate to ensure an employee is made whole, an "indispensable facet of which is back pay." *Appeal of Bio Energy Corp.*, 135 N.H. 517, 521 (1992); *see also, In re Hardy*, 154 N.H. 805, 816 (2007) ("The goal of the remedial provisions of [RSA 275-E] is to

ensure that employees are made whole and restored to the position they would have been in absent the employer's unlawful acts.").

Here, Clark asserted a claim under RSA 275-E:2 which provides as a remedy that "[t]he court may order reinstatement, and back-pay, as well as reasonable attorney fees and costs to the prevailing party." RSA 275-E:2, II. Clark received this precise relief, absent attorney's fees, prior to even filing her lawsuit. SA 29. Because Clark obtained the relief available under RSA 275-E:2, through an alternate enforcement mechanism, settlement of her personnel appeals board complaint, the court did not err in granting summary judgment. *Cf., Monahan v. N.Y. City Dep't of Corrs.*, 214 F.3d 275, 285 (2d Cir. 2000) (finding a settlement achieved by the union had preclusive effect where the claims were identical).

The express language of the WPA itself supports this interpretation. *Cf. Lachapelle v. Town of Goffstown*, 134 N.H. 478, 479 (1991) (court will not redraft statute to codify intention not expressed in the plain language of the statute); *see also, Appeal of HCA Parkland Med. Ctr*, 143 N.H. 92 (1998) (declining to give expansive interpretation to employee in remedial statute where such construction is unreasonable). The legislature in RSA 275-E:2, II granted an aggrieved employee the right to bring a "civil suit" in which the "court may order reinstatement and back-pay, as well as reasonable attorney fees and costs, to the prevailing party." RSA 275-E:2, II. Had the legislature intended to provide additional remedies it would have expressly stated them in the statute. The legislature also created slightly different rights and remedies under an administrative review process at the Department of Labor. *See* RSA 275-E:4 (authorizing the Labor Commissioner or his designee to render judgment and order remedies including reinstatement, back pay, fringe benefits, seniority rights, appropriate injunctive relief, or a combination thereof). *Id.* RSA 275-E:2 and RSA 275-E:4 provide employees a choice of forum

to pursue claims under the WPA, and the remedies provided in each forum are expressly enumerated by the respective statute.

Here, it is uncontested that Clark was reinstated to a position at labor grade 21, step 7 position as of February 8, 2013, and awarded back-pay suffered from the position difference from August 17, 2011 to February 7, 2013. SA 29; *see* RSA 275-E:2, II (authorizing court to order back-pay as the remedy for a WPA violation). In addition, NHES removed a negative personnel evaluation, recommended Clark for a Certified Public Manager Course, and allowed her to work from her previous work-site until the agency's new space was available in Concord. SA 69–70; *see* RSA 275-E:4 (authorizing labor commissioner to order additional equitable remedies through an administrative proceeding, such as fringe benefits, and other injunctive relief).

Accordingly, even though RSA 274-E:4 is not at direct issue in this appeal[4], NHES under either provision of RSA 275-E, met the remedial goals of the legislature when it crafted the settlement in the PAB proceedings. Allowing Clark to pursue a claim under RSA 275-E:2 when she already received the remedies available under the statute would conflict with New Hampshire's "strong public policy favoring the settlement of civil matters," *Hogan Family Enters., Ltd. v. Town of Rye*, 157 N.H. 453, 456 (2008); *see also Poland v. Twomey*, 156 N.H. 412, 414–15 (2007) ("[P]arties are free to settle a case on any terms they desire and that are allowed by law.").

[4] The provision of RSA 275-E:9 which states that a "public employee who files such a complaint shall be entitled to all rights and remedies provided by this chapter" was relied upon in briefing the summary judgment to discuss the remedy provided to Clark. It, however, does not change the analysis on the remedies available under the choice of forum.

A. Remedies for statutory causes of action are limited to those expressly provided by the legislature; RSA 275-E does not include compensatory damages.

The plain language of the WPA cannot be interpreted to allow an award of compensatory damages. Clark argues that the 2010 amendment to RSA 275-E:2, which created a private right of action to bring a "civil suit" in superior court, entitles her to compensatory damages. The trial court, however, correctly determined through a simple reading of the two versions of the statute that the legislature amended the WPA to "give employees the freedom to choose the forum for challenging violations of the law, not to expand the remedies available under the law." ABr 66. The 2010 amendment created a choice of forum, not remedies. As discussed above, had the legislature intended to provide for additional remedies, they would be expressly stated.

The relief provided in RSA 275-E is equitable in nature. *See In re Hardy*, 154 N.H. at 816 (interpreting RSA 275-E:4). When a statute's remedial provision is equitable in nature, the court has declined to interpret the statute to authorize compensatory damages and other forms of relief. *See id.* (citing *E.D. Swett, Inc. v. N.H. Comm'n for Human Rights*, 124 N.H. 404, 411–12 (1983)). The 2010 change did not create a right to obtain common-law damages.

The right to recover for a violation of a statutorily created provision "exists only to the extent and in the manner provided by the legislature." *See Trovato*, 143 N.H. at 525. The phrase "civil suit" should not be read to encompass general compensatory damages, rather it should be thought of using a common definition: a non-criminal matter. *See In Re Markievitz*, 135 N.H. 455, 457 (1992) (noting that the term "civil suit" distinguishes from a criminal action or an administrative proceeding).[5]

[5] A review of the statutory provisions that use the term "civil suit" reveals no correlation between that term and the ability to recover compensatory damages. *See* AA 352–54.

Further, one cannot imply the legislature offers additional remedies. *See, e.g.*, *Cross v. Brown*, 148 N.H. 485; 487 (2002) (stating remedies expressly authorized within a statute are not intended to create additional relief). Particularly, this is so when the statute expressly provides the available remedies. *See, e.g.*, *Wenner v. Great State Beverage Co.*, 140 N.H. 100, 103 (1995) (noting the legislature provides available remedies through the use of express terms).

In *Appeal of Hardy*, this court concluded that compensatory damages were not encompassed within the statutory framework for RSA 275-E. *Hardy*, 154 N.H. at 816. While this decision predates the 2010 statutory amendment, the language did not expand the express remedies incorporated into the statute. Seven other states and the District of Columbia[6] expressly provide for compensatory damages under whistleblower statutes; had the New Hampshire legislature intended their inclusion, they would be expressly stated. *See Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 255 (2011) ("courts interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include."); *see also State v. Yates*, 152 N.H. 245, 255 (2005).

Clark asks this court to read words into the WPA. This Court should be loath to do so. Simply because the statutory remedy is unsatisfactory to Clark, it does not logically follow that the legislature's use of the term, "an aggrieved employee may bring a civil suit..." references its intent to allow all forms of civil damages. The term allows an expanded right to use the superior court to recover those damages expressly permitted. *Compare* RSA 275-E:2 (1987) *with* RSA 275-E:2 (2010).

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[6] These include: Cal. Gov. Code § 19683 (West 2014); D.C. Code Ann. § 1-615.54 (West 2010); Fla. Stat. Ann. § 448.103 (West 1997); Ga. Code. Ann. § 45-1-4 (West 2012); La. Stat. Ann. § 23-967 (1997); Minn. Stat. Ann. § 181.935 (West 2007); Vt. Stat. Ann. Tit. 3, § 508 (West 2003); Wis. Stat. Ann. § 230.90 (West 2015).

B. Clark's choice of forum affected her appropriate remedies, limiting them to those the court may order under the statutory provisions.

The trial court looked not only to RSA 275-E:2 when identifying rights and remedies provided in RSA 275-E, but also noted other remedies available under RSA 275-E:4. "Thus, the rights and remedies provided in RSA 275-E include: reinstatement, back-pay, reasonable attorney fees and costs, restoration of fringe benefits and seniority rights, and appropriate injunctive relief." However, any additional remedies provided under RSA 275-E:4 are only available in a DOL administrative proceeding.

By seeking additional remedies from the court, Clark misapprehends the remedial nature of the statute when one brings *only* a civil suit. Rights and remedies are only available if you go through the proper channels. Clark did not continue the pursuit of her complaint with the DOL and therefore cannot seek those remedies exclusively under that administrative authority. *Compare* RSA 275-E:2 and E:4. Moreover, while RSA 275-E:9 provides public employees with all rights and remedies provided by RSA 275-E, it does not extend DOL's authority to fashion an equitable remedy in an RSA 275-E:4 proceeding to the court in an action brought under RSA 275-E:2.

C. Clark has already received all appropriate rights and remedies that would be available if her civil suit were permitted to proceed.

Clark argues that even if the remedies available in her civil action are limited to those expressly set forth in RSA 275-E:2, she has not recovered all damages to which she is entitled. Such an assertion is unsupported by the record. Prior to bringing this lawsuit, Clark was reinstated to a position of similar status, provided full back pay and applicable fringe benefits, and her negative review was removed from her personnel file. First, Clark was made whole with respect to lost wages. Back-pay is an "indispensable facet" of whistleblower injunctive relief.

Appeal of Bio Energy Corp., 135 N.H. 517, 521 (1992). Clark, just prior to accepting demotion in lieu of layoff, was a labor grade 21, step 7. AA 276, 284. On August 19, 2011, as a result of the NHES-wide layoffs, Clark agreed to remain with NHES but chose to accept the labor grade 12, step 8. SA 18. Later, as part of a resolution for Clark withdrawing her PAB appeal, Commissioner Copadis directed Clark's restoration and back-pay. SA 22. At his direction, NHES reinstated Clark to the same labor grade and step she previously held and provided all back-pay owed—the very remedies RSA 275-E allow.[7]

Second, Clark received applicable fringe benefits, along with the back-pay. The fringe benefits contemplated by the statute do not extend to compensatory damages for medical or emotional injury. Rather, fringe benefits are in-kind benefits such as health, disability, life insurance, and pension plans. *See, e.g.*, *Clapp v. Goffstown Sch. Dist.*, 159 N.H. 206, 211 (2009) (citations omitted). As part of the back-pay given to Clark, fringe benefits were included. These benefits include: Medicare, Retirement, and FICA payments. SA 29. NHES provided those fringe benefits to Clark.

Third, Commissioner Copadis extended further equitable relief by removing the poor evaluation from Clark's file. SA 22. Additionally, he agreed to remove the memorandum of counseling associated with evaluation. Finally, he agreed to send her to a certified public management class that she was entitled to prior to the demotion. SA 22. Clark has since completed the course. SA 2.

As Clark already received the remedies available, the continuation of this case would result in Clark purely seeking a declaration that a violation occurred, or attempting to receive an

[7] To the extent Clark claims that the back-pay she had received fails to make her whole because she was expecting to receive a promotion before the layoffs occurred, that claim lacks merit. New Hampshire does not recognize "failure-to-promote" as a cause of action, and promotion as a remedy is unsound policy. *See Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 905 P.2d 559, 562 (Ariz. 1995) (refusing to create a wrongful failure-to-promote cause of action).

apology, or to clear her name. RSA 275-E:2 does not provide solely for declaratory relief. *See Cross*, 148 N.H. at 487 (holding the Right to Privacy Act does not confer upon those aggrieved any implied right to seek a general declaration). While *Cross* involved a different statute, the same application stands. Absent the legislature's express or implied intent to create additional remedies, the court will not conclude the statute provides them. Further, similar to *Cross*, the statute already provides for specific remedies; therefore, nothing in a plain reading of the statute supports an implied intent to allow for such declaratory relief. *See id; see also McKee v. Turner*, 491 F.2d 1106, 1107 (9th Cir. 1974) (discussing apology in the context of §1983 complaint); *Smith v. Mesa*, No. 2:13-CV-01255, 2013 U.S. Dist. LEXIS 175966, at *3 (D. Nev. Dec. 13, 2013 ("A plaintiff may not secure an order in a federal civil rights action directing an officer to make an apology...."); *Norris v. Poole*, No. CA 8:10-750JFABHH, 2010 U.S. Dist. LEXIS 46242 (D.S.C. Apr. 19, 2010) ("The injunctive relief of compelling a government official to issue a published apology is not available, because it is in the form of mandamus relief... Plaintiff fails... to show that he has a clear and indisputable right to the relief sought, because he has no legal right to a published apology.").

To the extent Clark suggests that she should be promoted as part of the remedial action necessary to make her whole; such an argument is based on speculation and bald assertions. The superior court correctly found that "the government decisions regarding the reduction in force, which caused the plaintiff to be demoted from her supervisory position at NHES, were 'planning decisions requiring a high degree of discretion,' and involved the consideration of competing social and economic factors." AA 451. As such, a trial in this case would amount to nothing more than a trial for trial's sake. Accordingly, summary judgment was proper.

D. Further injunctive relief is barred by NHES' sovereign immunity.

Finally, to the extent Clark is seeking injunctive relief beyond that expressly provided by RSA 275-E, sovereign immunity bars such relief since New Hampshire courts do not have subject matter jurisdiction over injunctive claims against the State unless such claims are expressly provided for by statute. *See Lorenz v. N.H. Admin. Office of the Courts*, 152 N.H. 632, 634 (2005). Sovereign immunity for the State has two independent grounds. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 591 (1999). The second, relevant here, is that the State is immune from claims they have not given consent to. *Sousa v. State*, 115 N.H. 340, 342 (1975). Further, as a state agency, NHES is cloaked with the State's sovereign immunity. *See, e.g., Chase Home for Children v. N.H. Div. for Children, Youth & Families*, 162 N.H. 720, 730 (2011); *see also XTL-NH, Inc. v. N.H. State Liquor Comm'n*, 2018 N.H. LEXIS 20, at *5 (N.H. Mar. 30, 2018).

RSA 275-E provides a limited waiver to sovereign immunity. RSA 275-E:2 and E:9. The clear intent of RSA 275-E is to provide an avenue for a wrongfully discharged employee to be reinstated and receive back-pay. *See Appeal of Bio Energy Corp.*, 135 N.H. 517, 520 (1992) (decided under prior law). The Supreme Court, in *XTL-NH, Inc.*, faced a similar narrow statutory limitation, in that case, for compensatory damages. 2018 N.H. LEXIS 20, at *3. The waiver of sovereign immunity in the statute at issue in *XTL* "extend[ed] only to suits seeking money damages," therefore injunctive relief was barred. *Id.*

Here, the statute specifically outlines the mechanics for suit. It requires civil suits to be brought within three years of the alleged violation. RSA 275-E:2, II. It sets out a clear jurisdictional framework between the DOL and court system. RSA 275-E:2–4. Also, it provides specific damages available in a civil suit: "reinstatement and back-pay, as well as reasonable

attorney fees[8] and costs." RSA 275-E:2, II. As such, RSA 275-E is an express and detailed waiver of sovereign immunity as to specific damages and thereby does not act as a blanket waiver. The State of New Hampshire has not waived immunity as to permit the injunctive relief Clark seeks.

III. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT ON CLARK'S RSA 98-E'S CLAIM BECAUSE THE STATUE ONLY PROTECTS PUBLIC SPEECH

A. The plain meaning of RSA 98-E characterizes protected speech as public speech.

The interpretation of RSA 98-E has been placed at issue in this case. The statute has only been evaluated by this court once before, in *Booker*. *See Appeal of Booker*, 139 N.H. 337, 341 (1995). *Booker* looked at a narrow issue to conclude whether, under a specific set of facts, the plaintiff gave an opinion as an individual. *Id.* In this case, Clark extends this narrow holding of what RSA 98-E stands for in *Booker* to blanket all individual opinions as protected—regardless of where or how the opinion was given. This is not the intended scope of RSA 98-E. To determine the proper interpretation of RSA 98-E, this Court determines legislative intent, first with the language of the statute itself. *Booker*, 139 N.H. at 341.

In 1979, the legislature passed a Freedom of Expression law that gave state employees the "full right to publicly discuss and give opinions as an individual on all matters concerning" any state entity or its policies. *See* Laws 1979, 433:1; RSA 98-E:1–9. In 2008 the legislature amended RSA 98-E, expanding the law to all public employees. *See* Laws 2008, 202 (H.B. 436). Besides expanding the law to all public employees in 2008, the general court also gave public employees a private right of action and the ability to obtain attorney's fees for enforcing their right to publicly voice their individual opinions. *See id.* The amendment did not however, change the law's intention of protecting "public speech." *See, e.g.*, *Expanding Employee Freedom of*

[8] Where Clark is not the prevailing party, attorneys' fees are not available.

Expression to All Public Employees: Hearing on H.B. 436 Before the S. Comm. On Commerce, Labor and Consumer Protection, 2008 Leg. (N.H. Apr. 29, 2008) (statement of Rep. Jordan Ulery, sponsor of H.B. 436) ("It allows the individual to retain his freedom of expression in a public arena.").

Indeed, the plain reading of RSA 98-E demonstrates that it protects freedom of expression and gives employees the right to *publicly* discuss matters and give opinions concerning policies. RSA 98-E:1 (protecting the "right to *publicly* discuss and give opinions as an individual on all matters concerning any government entity and its policies") (emphasis added); *see generally Appeal of Booker*, 139 N.H. 337 (1995). RSA 98-E does not look particularly to the speech involved but does look at who is making the speech, where it is made, and whether the person was interfered with. *See Booker*, 139 N.H. at 340–41 (rejecting *Pickering* and *Connick* analysis in a RSA 98-E claim—that speech has to be of a public concern).

It is a well-accepted principle of statutory construction that every word in a statute must be given effect. *See, e.g., State v. Guay*, 164 N.H. 696, 699 (2013). As such, there is a presumption against surplus language. *Id.* The word "publicly" within RSA 98-E:1 cannot be overlooked.

Here, Clark argues that the superior court misinterpreted the statute because the law does not focus on the forum of speech, but rather whether the person was speaking as an individual. She suggests that the legislature created the law to "avoid the narrow construction of 1st Amendment claims under *Garcetti*. . . suggesting that the Superior Court's and the State's interpretation does not comport with the language of 98-E." ABr. 25. Such a statement is legally flawed and misses the mark. Similar to *Booker*, the U.S. Supreme Court in *Garcetti* was addressing whether the plaintiff was giving an opinion as an individual, it did not provide any

insight as to whether the opinion needed to be publicly discussed, as that was not the focus. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). In *Garcetti* the U.S. Supreme Court found that a district attorney who claimed that he had been passed over for promotion for criticizing the legitimacy of a warrant, did not have a First Amendment protection to his speech because his statements were made as a public employee rather than a private citizen. *Id.* Since the focus in *Garcetti* was the capacity of the individual making the statement, the decision affected nothing in the 1979 law requiring public discourse.

By reframing the issue and focusing on the capacity in which the individual employee speaks, Clark does nothing to aid the analysis on another necessary requisite of the law—the public nature of the discourse, opinion or speech. In *Booker*, the capacity issue was not raised because the individual's opinion was publicly published. *Booker*, 139 N.H. at 339. However, *Booker* does still provide guidance in evaluating a RSA 98-E claim. This court, in *Booker*, appears to have laid out a three-part analysis for such an evaluation: 1) who is making the speech and in what capacity; 2) where the speech is made; and 3) whether and how the employee's speech was interfered with. *Id.* at 340–341. This court has not yet had the opportunity to evaluate 98-E on the second prong of the test. Just because *Booker* stands as the analysis for the first prong that does not translate to it being the only part of the analysis. Under the plain language of the statute, the second prong requires that the speech be public.

B. Clark has too narrow an interpretation of the statute and fails to read it as a whole.

RSA 98-E:2 prohibits the interference with, "freedom of speech, full criticism, or disclosure by any public employee." While these three categories fall under the employee's freedom of expression, Clark's criticisms and disclosures do not fall under RSA 98-E's protection, as the concerns were not publicly made.

Further, RSA 98-E:2 appears to expand what is meant by an employee's right to "publicly discuss and give opinions..." where it discusses rights of "speech, full criticism and disclosure" and makes it unlawful for an employer to interfere with the right to express oneself about the government. To continue with traditional rules of statutory interpretation, the Court views the statute as a whole. *Atwood v. Owens*, 142 N.H. 396, 398 (1997); *Blue Mountain Forest Ass'n v. Town of Croydon*, 119 N.H. 202, 204 (1979). "Where reasonably possible, statutes should be construed so that they lead to reasonable results and do not contradict each other." *Sprague Energy Corp. v. Town of Newington*, 142 N.H. 804, 806 (1998). Further, "[t]he words of a statute should not be read in isolation; rather, all sections of a statute must be construed together." *Id.*

In reading the statute as a whole, the employee's freedom of expression with regard to "full criticism or disclosure" must be read in conjunction with RSA 98-E:1, entitled "Freedom of Expression." That statute makes clear that the employee's individual criticisms or disclosures must be *publicly* discussed to fall under protection. The intention of RSA 98-E:1 is to balance the right of expression of the employee with the employer's need to protect confidential information. *See* RSA 98-E:1. There is no need to go beyond the plain meaning as nothing in the statute is ambiguous. *See, Lamy v. N.H. PUC*, 152 N.H. 106 (2004).

Nonetheless, Clark turns to the legislative history in attempt to demonstrate her point. However the attempt to use the legislative history not only mischaracterizes it, but falls short in demonstrating how the Superior court misconstrued the law. Clark chooses to address testimony during the hearings on the proposed amendment to RSA 98-E in an effort to glean legislative intent; however, a review of the legislative history supports the lower court's interpretation. *See supra, Hearing on H.B. 436 Before the S. Comm. On Commerce, Labor and Consumer*

Protection, 2008 Leg. (N.H. Apr. 29, 2008) (statement of Rep. Jordan Ulery, sponsor of H.B. 436). Clark points to the testimony of a representative of the Attorney General in attempting to make her point. The testimony cited, however, was not meant to provide examples of what the statute would cover. ABr 27. Rather, this list presented during the legislative hearing was given as a warning of potentially frivolous suits resulting from the bill's passage due to the newly available private right of action. AA 342–44. It did not discuss whether the speech was public versus private in nature.

C. Clark cannot establish she has engaged in public discourse.

Clark did not attempt to engage in public discourse. Rather, by her admission, she spoke only to government officials or those associated with her agency, other state agencies, or the Governor's office. While Clark cites to multiple newspaper articles[9] citing her complaints—all publication occurred after she received her layoff letter. *See* AA 183–92. In fact, the earliest article went to print almost a full year later.

Further, Clark argues that she was not allowed to raise her individual concerns with Senator Carson during a review of another employee. Clark's role, at that time, was in her official capacity. Individual comments would have required a different meeting to raise issues of individual importance. Keeping Clark from raising her individual concerns while in her official capacity does not trigger RSA 98-E's protection.

[9] Full citations for articles: Matthew Spolar, *DES Deputy Retires Amid NepotismI Inquiry*, CONCORD MONITOR (Aug. 16, 2012), http://www.concordmonitor.com/Archive/2012/08/999651366-999651367-12-CM; Matthew Spolar, *Employment Chief Quits, Fires Back*, CONCORD MONITOR (July 12, 2012), http://www.concordmonitor.com/Archive/2012/07/999658557-999658558-1207-CM; Garry Rayno, *Charges of Nepotism Lead to DES Resignation*, UNION LEADER (July 12, 2012), http://www.unionleader.com/apps/pbcs.dll/article?AID=/20120711/NEWS06/120719932&template=mobileart.

Because there was no evidence that Defendants interfered with Clark's right to publicly discuss and given opinions as an individual, the superior court granted summary judgment in favor of Defendants on Clark's RSA 98-E claim.

IV. NO CLAIMS FOR WRONGFUL TERMINATION OR WRONGFUL DEMOTION EXIST IN NEW HAMPSHIRE UNDER THE FACTS OF THIS CASE

A. There is no cause of action for wrongful termination under the facts of this case as Clark was neither terminated nor is she an "at will" employee.

Wrongful termination can only exist if there is actual separation from employment. *See, e.g., Hitt v. Connell*, 301 F.3d 240 (5th Cir. 2002) (finding neither a threat to one's job nor proposed notice of firing constitutes an actionable injury). Clark was never discharged from employment. Clark indicates that she was given a notice that she was to be laid off from employment given a reduction in force, but rather than accept the layoff, she agreed to a demotion to a position at a lower pay grade. ITr 984–85. Although Clark asserts that she was discharged from her position and offered a lower position because she "took numerous actions that were supported by various public policies and refused to take actions that were against various public policies," the facts alleged show no break in state service. AA 33.

New Hampshire has recognized the common law intentional tort of wrongful discharge, which requires a plaintiff to demonstrate that she is an "at-will" employee and the employer was motivated by bad faith, malice or retaliation in discharging her because she performed an act that public policy would encourage or refused to do something public policy would condemn. *See Porter v. City of Manchester,* 151 N.H. 30, 38–39 (2004). While case law allows the termination aspect of this tort to be fulfilled by a "constructive discharge," that claim still requires that the employee have actually quit because of intolerable working conditions. *Lacasse v. Spaulding Youth Ctr.,* 154 N.H. 246, 249 (2006); *see also Harman v. Univ. of Tenn.,* 353 S.W.3d 734, 739

(Tenn. 2011) (actions by the employer, such as demotion, do not give rise to an action of retaliatory discharge); *Gibson v. ARO Corp.*, 32 Cal. App. 4th 1628, 1635 (Cal. App. 2d Dist. 1995) (demotion of job level, even when accompanied by reduction in pay, does not constitute constructive discharge); *Zherka v. Tower Grp. Cos., Inc.*, 2011 N.Y. Misc. LEXIS 7033, at *10 (N.Y. Sup. Ct. Apr. 29, 2011) (finding no constructive discharge claim where plaintiff did not resign and intended to return after her leave of absence). Here, plaintiff identifies no time period during which she has not been an employee of NHES since her start date in 1995.

In an attempt to establish a discharge, Clark argues the lay-off letter when issued provided her notice of termination which created an actionable event. Clark's reliance on *Cluff-Landry v. Roman Catholic Bishop of Manchester*, 169 N.H. 670, 677 (2017) to justify the accrual of her wrongful discharge claim on the date of notice is flawed. Clark construes *Cluff-Landry* as stating that wrongful discharge actions accrue at the time notice of termination is given. ABr 29. However, the analysis in *Cluff-Landry* focuses on when a claim accrues, thereby triggering the three-year statute of limitations clock, not on what constitutes a discharge. *Cluff-Landry*, 169 N.H. at 677. In this case, elements of a wrongful discharge claim were still outstanding at the time Clark filed suit, *i.e.* she was still employed since NHES rescinded the notice of layoff, when Clark accepted an open position at a lower labor grade due to reductions in force.

Additionally, it has long been recognized in New Hampshire that a cause of action for wrongful termination or wrongful discharge can only be brought by "at-will" employees against their employers. *Porter,* 151 N.H. at 38; *see also Cilley v. N.H. Ball Bearings*, 128 N.H. 401, 405 (1986); *Cloutier v. Great Atl. & Pac. Tea Co.,* 121 N.H. 915, 919–20 (1981) (at-will employment loses vitality where legislative carve-out, judicial exception or where CBA applies).

Here, Clark, as a classified state employee in a merit system under statute and rules subject to termination only for cause, is not an at-will employee. *See* RSA 21-I:42 – 58; N.H. Admin Rules, Per 1002; *see also Enquist v. Ore. Dep't of Agric.*, 533 U.S. 591, 606–07 (2008) (recognizing Congress and States, have replaced at-will employment with statutory schemes protecting public employees from discharge for impermissible reasons); *cf Gonzales v. City of Albuquerque*, 849 F. Supp. 2d 1123, 1131 (D.N.M. 2011) (unclassified employees not subjected to merit system treated as at-will employees); *see also McGrady v. Okla. Dep't of Pub. Safety*, 122 P.3d 473 (Okla. 2005) (granting summary judgment on wrongful termination claim where classified employee subject to merit system was not an at-will employee); *but see Smith v. Bates Tech. Coll.*, 991 P.2d 1135 (Wash. 2000) (extending tort of wrongful termination to all employees not just at-will). Indeed, plaintiff appealed her demotion to the New Hampshire PAB, under both New Hampshire law and regulation. *See* N.H. Admin. Rules, Per-A 101.03; *see also* AA 2, 4, 22. Given the protections of the classified merit system, the policy reasons behind creation of the tort of wrongful discharge for at-will employees do not apply. *See, e.g., Wright v. Kan. Water Office*, 881 P.2d 567, 571 (Kan. 1994) (Kansas Civil Service Act controls employment status).

As a classified employee, not at-will, Clark has protections under RSA 21-I:52 and the administrative process. Therefore, the common law tort of wrongful termination does not apply to the facts of this case. As such, the superior court correctly found no termination that could be subject to the common-law claim.

B. The superior court correctly predicted that a new cause of action for wrongful demotion is inappropriate under the facts here.

Wrongful demotion has not been recognized as a common-law cause of action in New Hampshire. Prior to the creation of a new cause of action, this court looks to the policy behind a

plaintiff's request. *See Rockhouse Mountain Prop. Owners Ass'n v. Conway*, 127 N.H. 593, 597 (1986). In *Rockhouse*, this court required a two-part analysis for new causes of action. First, the court makes a determination of whether the interest that the plaintiff asserts should receive legal recognition. *Id.* Second, whether the relief requested is the appropriate recognition of the interest. *Id.* at 598. The trial court's role is to predict what this court would do if an issue was presented to it. *Clare v. Bank of New England*, 2013 N.H. Super. LEXIS 22, at *5 (N.H. Super. Ct. Nov. 26, 2013).

When looking to create a new cause of action, public policy concerns must be well-established to warrant inclusion. Public policy relates to what is right and just and what affects the citizens of a state collectively. *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981). Therefore, one should look to state constitutions, statutes, and regulations to provide an outline of the applicable public policy. Should these provide no guidance, one can look to decisional law and administrative documents. *See Faulkner v. United Tech. Corp.*, 693 A.2d 293, 297 (Conn. 1997).

Here, the trial court correctly rejected a new cause of action for wrongful demotion. First, policy does not support the legal recognition of Clark's proposed cause of action since, a wrongful demotion cause of action would open the doors to a myriad of alleged retaliatory tort claims for actions that fall short of termination. Public policy backs maintaining a clear line for definitions of what employers cannot do. While demotion may seem to elicit a clear definition, many issues arise; and include: "Is a demotion in title or status, but not a salary, actionable? Could a transfer from one department to another be considered a demotion? Would it be fair to characterize as a demotion a significant increase in an employee's duties without an increase in salary?" *Zimmerman v. Buchheit of Sparta, Inc.*, 645 N.E.2d 872, 882 (Ill. 1994). Such

considerations provide no bright line guidance for an employer, who could be subject to such claims when resources demand lay-offs.

The adoption of such a cause of action could subject employers and the courts to a flood of "unwarranted and vexatious suits filled by disgruntled employees at every juncture in the employment process." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 905 P.2d 559, 562 (Ariz. 1995) (quoting *Ludwig v. C & A Wallcoverings*, 960 F.2d 40, 43 (7th Cir. 1992)). If demotions raise the same public policy concerns as a termination, so too would some of the other potential issues raised in *Zimmerman*. *See id.* ("If . . . a demotion raises the same policy concerns as a termination, so too would transfers, alterations in job duties, and perhaps even disciplinary proceedings.").

Second, there should be a judicial reluctance to recognize a new common-law claim when statutes offer certain protections for the same interest. *See* Restatement (Third) of Emp't Law § 5.01 cmt. e (Am. Law Inst. 2015); *see also Bereston v. UHS of Del., Inc.,* 180 A.3d 95, 110 (D.C. App. 2018) (supporting the Restatement's assertion that courts are reluctant to consider whether to extend causes of action absent statutory authorization). Here, the legislature has provided a classified state employee a remedy for challenging improper demotions through the Personnel Appeal Board process. *See* RSA 21-I:58; N.H. Admin. Rules, Per-A 207.02 (giving a full evidentiary hearing for demotion appeal). Such a process can adequately address an aggrieved employee's concerns and apply an appropriate remedy including making "such other order as it may deem just." RSA 21-I:58, I.

Third, when analyzing a new common law cause of action, this court looks to, when necessary, other jurisdictions due to the relatively small number of cases decided in New Hampshire. *See Clare*, 2013 N.H. Super. LEXIS 22, at *5. Other jurisdictions have similarly

declined to extend common-law wrongful discharge to include wrongful demotion. *See, e.g.*, *Tang v. City of Seattle*, 2016 Wash. App. LEXIS 1599, at *46 ("A common law cause of action for wrongful demotion in violation of public policy does not exist in Washington."); *Jones v. H.N.S. Mgmt. Co.*, 2003 Conn. Super. LEXIS 2704, at *5 ("Connecticut law does not recognize a common-law cause of action for wrongful demotion."); *but see Garcia v. Rockwell Int'l Corp.*, 187 Cal. App. 3d 1556, 1562 (1986) (holding that "an employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the employee in retaliation for the employee's 'whistle-blowing' activities, even though the ultimate sanction of discharge has not been imposed.").

Wrongful demotion is not a recognized cause of action in the state of New Hampshire for good reason, especially when it comes to a state classified employee who enjoys the protections of the state classified system. Additionally, here, even if this court were to rely *Brooks v. Firestone Polymers LLC*, 70 F. Supp. 3d 816 (E.D. Tex. 2014), relative to the elements of the tort; Clark cannot prevail. The final element requires that the plaintiff "be replaced by someone outside the protected class." *Id.* Here there is no record evidence that the supervisor job originally held by Clark has ever been filled.

For these reasons this court should decline to expand the cause of action for wrongful discharge to include other employment actions that fall short of termination, such as wrongful demotion.

CONCLUSION

For the foregoing reasons DHHS respectfully requests that this honorable Court affirm the decision of the trial court. To the extent oral argument is required, Lynmarie C Cusack, Senior Assistant Attorney General, will argue.

Respectfully submitted,

NH DEPARTMENT OF HEALTH & HUMAN SERVICES

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent 2nd day of July 2018, postage prepaid, to:

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