STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

2017-0658

Michelle Clark
v.
New Hampshire Department of Employment Security, et al.

APPELLANT'S BRIEF

Rule 7 Mandatory Appeal from
Merrimack Superior Court

Counsel for Appellant,
Michelle Clark

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[1] The addendum to this brief includes the orders being appealed from, as well as the provisions of the relevant statutes, and is cited as "Br. #". "App. [page number]" refers to the separately bound Appendix (two volumes). Vol. I, App. 1-362; Vol II. P. 363 to end. Where pages of pleadings are cited which cite to their attachments, those citations will not be repeated herein, as they are in the original pleadings and the page numbers where they appear in the Appendix are referenced in the Table of Contents.

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[3]Copies of Pertinent Constitutional Provisions and Statutes are listed in the Table of Contents and attached as an addendum to the Brief at "Br." 71-73.

III. STATEMENT OF THE CASE WITH MATERIAL PERTINENT FACTS

A. PROCEDURAL BACKGROUND

Ms. Clark ("Plaintiff"/ "Appellant") alleges error at every step, and seeks review of several issues critical to protecting citizens, particularly state employees familiar with being bullied[4] and retaliated against, sometimes without any remedy, and to deter the State from retaliating against its employees who are whistleblowers and/or exercising their freedom of expression. The orders in this case should be reviewed and reversed as requested, and the case remanded for trial.

Ms. Clark is an employee of the Department of Employment Security ("NHES"/ "Defendant"), and was a supervisor when she stood up to illegal activities which caused resignations at the highest levels, the Commissioner and Deputy Commissioner of NHES, Defendants Reardon and Gates.[5] App. 1-38 (Comp. generally); App. 183-192 (articles). In essence, Clark was retaliated against for exercising her Freedom of Expression ("FOE") and Whistleblowing ("WPA").[6] App. 32-35. Clark should be considered a hero, not having given up when confronted with rampant violation of the nepotism and conflict of interest laws, under multiple threats of job loss by her direct supervisor (Timmons) if she did not leave the issues alone. The facts in this case are voluminous, as demonstrated in the Complaint and Clark's Affidavit, which are incorporated herein by reference. App. 1-38; 98-104. There are multiple violations of state laws, rules and regulations, multiple instances of whistleblowing, freedom of

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[4]There have been multiple attempts to institute an anti-bullying law for state employees. For example, see HB 591 – VERSION ADOPTED BY BOTH BODIES, 20Mar2013....

[5] Other individual defendants are Dianne Carpenter (Director of Unemployment Compensation Bureau); Gloria Timmons (Clark's direct supervisor); Collen O'Neill (supervisor of Timmons and Clark); and Sanda Jamak (co-worker and a supervisor). App. 2-3.

[6] Plaintiff brought claims for Whistleblowing, NH RSA 275-E, et seq. (All Defendants) (Count I); Wrongful Discharge/Demotion (State Defendant) (Count II); Freedom of Expression, NH RSA 98-E, et seq. (All) (Count III); Intentional Infliction of Emotional Distress (All) (Count IV); Interference With Contract (Individuals) (Count V); Violation of Constitutional Rights (All) (Count VI); and, 42 U.S.C. §1983 (All) (Count VII).

expression, criticism and disclosure, as well as more than dozens of facts of retaliation against Clark, spanning years.

A motion to dismiss, a six-day immunity hearing[7], and a motion for summary judgment, resulted in dismissal of all claims.[8] At issue is the Court's granting of the first motion to dismiss regarding wrongful discharge/demotion, because it found Ms. Clark was not terminated, although she was terminated from her position and demoted in lieu of termination, and also because this Court did not recognize the claim of wrongful demotion. Plaintiff argues that the termination of her supervisory position constitutes a wrongful termination, and that in addition this Court should recognize a claim for wrongful demotion.

After the immunity hearing, Defendants filed for summary judgment on the WPA and FOE claims, which the Court granted. On the WPA claim the Court found that only certain limited damages such as back pay and fringe benefits were allowed, and that Ms. Clark had received them as part of her PAB appeal. The Court declined to allow the case to proceed for injunctive or equitable relief because it found Clark had not adequately pled nor argued same, which was inaccurate. It also declined to recognize the statutory grant of a right to a "civil suit," which appears to be the plain language entitling an employee to general compensatory damages. RSA 275-E:2, II.; Br. 36-70.

The Court granted summary judgment on the FOE claim because it found Ms. Clark had not spoken publicly, which was in error as she had made several reports outside her agency.

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[7]The Court held a six-day immunity hearing on Counts IV-VII, ultimately dismissing them, pre-discovery, although the parties had a lot of documentation available. While Clark believes that the immunity order was in error, she is not appealing those issues because the facts related thereto are part of the claims under appeal, for which all remedies should be available. Therefore, Appellant is waiving her appeal on the immunity claims, as set forth in NOA issues 3-11; Orders on Immunity issues are included for completeness, however per the Court's order thereon, the factual findings and rulings on law have no binding effect on the on-going litigation as the immunity hearings were done without discovery, and the Court ordered they were "without prejudice to any other or further findings and orders that may be entered concerning those matters which remain for litigation". App. 440; App. 88; and App. 437-460.

[8]See Orders, Brief ("Br.") 36-70, and App. 437-460.

The Court also erred by misconstruing the statute, as the important element is that she spoke as an individual, whether or not publicly, and speaking as an individual in all forums is covered. App. 91-93. The Court also failed to give effect to the equally important provisions of the statute, which prohibits interference with a public employee for her full criticism and disclosure about her agency, regardless of where and how the complaints are made. RSA 98-E:2 Interference Prohibited.

B. STATEMENT OF FACTS RELEVANT TO APPEAL

The facts in this case are described in the Complaint and Clark Affidavit. While it was not found that there are disputed (and undisputed) issues of material fact to deny summary judgment, such as whether the interns, their parents and others violated laws, rules, and regulations, and that Ms. Clark brought these concerns to light, a brief background of the categories of illegalities reported through whistleblowing, and freedom of expression (speech, criticism, disclosure)[9], and resulting harassment and retaliation is necessary.

Ms. Clark served Defendant NHES since 1995, receiving many promotions and very good reviews until her whistleblowing after she became a supervisor in the Benefits Adjudication Unit ("BAU"), where she supervised 3-4 interns. Two of the interns Clark regularly supervised, N. Jamak and K. Gates, were the children of Supervisor Defendant S. Jamak and the other of Defendant, former Deputy Commissioner Gates. Clark also regularly supervised S. Cloutier, the niece of a longtime supervisor in another department. Also, an additional intern, A. Jamak, son of S. Jamak, would occasionally show up to work in Clark's unit because his mother had suggested it. This was highly irregular and a violation of the nepotism and conflict of interest policies, as were other actions by the individual defendants. See RSA 21-G:22, and RSA 21-

[9] Whistleblowing and Freedom of Expression will sometimes be referred to collectively herein as whistleblowing as their facts overlap.

G:26-a; App. 72. Clark did not learn until later, after she told Defendant Deputy Director Reardon about the intern problems, that Reardon also had a daughter, Ms. Flanders, who was an intern at NHES. App. 77.

As an example of a conflict of interest, Gates suggested the age for summer interns be lowered to 16, from 18 and college bound, so his daughter could apply. In fact, 15 of the 18 interns were related to upper management, the positions not having been posted agency-wide. They were also given tasks beyond their qualifications. App. 73-74. Ms. Clark tried to correct the intern problems but faced opposition by their parents and her supervisor. The problems included theft of wages (being paid to read their own books, for holidays they were not entitled to, for non-working lunch time, and falsified timesheets); bringing unauthorized friends into work (safety and confidentiality breaches); (one intern) yelling and throwing furniture; attempting to set their own work hours including times the agency was closed; unapproved work schedules contrary to regulations (failing to call in when late, failing to stay at work as scheduled, eating at their desks, making their own flex schedule); working outside their job description, hiding work, directing staff as a supervisor while having no authority; and being allowed to work full time hours when summer interns were to be part time and for only one summer. App. 5-6 (*see* Comp. ¶22 A-V); App. 5-9 (Clark Aff ¶ 2-11, verifying Complaint, App. 98-99). The above allegations contain many instances of theft, which is obviously a crime, *e.g.*, RSA 637, *et seq.*, as well as other acts contrary to law, regulations and public policies. However, there is no requirement under the FOE statute that Ms. Clark's criticisms and disclosures contain violations of law; criticisms and disclosures about the agency are protected. RSA 98-E:1 and 2.

The above also illustrates rampant nepotism and conflicts of interest, and the record shows interference by parents in the interns' hiring, supervision and termination. App. 5, 7, 11.

The claimed illegalities and unethical behavior included fraud, waste, and/or abuse in the expenditure of public funds by NHES. Clark made many complaints inside and outside NHES, beyond any job responsibilities. App. 47-48. Clark's reports included violations of the CBA, Personnel Rules, Ethics, Nepotism[10] and conflict of interest rules and laws. The only reason these rules were ignored was because of who the interns were related to, and who were committing the violations.

Ms. Clark made her reports to numerous agencies and individuals, including but not limited to various individuals within NHES; her supervisor, D. Timmons; parents of interns; HR; and, NHES legal counsel; she filed an ethics complaint 05.31.12 (Executive Branch Ethics Committee [21-G:21, Complaints (App. 167)]), reported violations to her Union, Governor's Office, DOL, and participated in the investigation with the Attorney General's Office (App. 78); reported Integrity and Ethic Concerns (App. 168-81); filed a Whistleblowers Complaint, 06.07.12 [later withdrawn to file in court] (App. 182); and, repeatedly voiced concerns about the summer interns to approximately seven superiors, raising various public policies and laws. App. 32, 34; App. 77-78; App. 9-10. The result of the AG investigation appears to be the resignations[11] of Gates and Reardon. *See e.g.,* App. 183-192, (newspaper articles); App. 78-79.

Interference included, but was not limited to, that Ms. Clark was given a poor six-month review within 15 work days of her three-month review, which had been excellent and had changed just after her repeated complaints about nepotism and conflict of interest. Timmons told

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[10]See NHES Directive 2050-11, and Nepotism law RSA 21-G:26-a, which provides: **Nepotism** - No executive branch official shall directly hire, evaluate, set the compensation or salary for, supervise, or terminate the employment of any full-time or part-time employee, temporary employee, or member of a state board or commission if such employee or member is related to such official in one of the following ways: (includes son, daughter, spouse, etc…). NH RSA 21-G:26-a; see App. 471(NHES Directive 2050-11). *See also* RSA 21-G:22: **"Conflict of Interest.** – Executive branch officials and classified employees shall avoid conflicts of interest. Executive branch officials and classified employees shall not participate in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties."

[11] Neither Gates nor Reardon admit to being terminated or asked to leave, but it is fair to infer given the timing.

Clark she would not be looked at for other management positions because of the complaints, and that she "was not going to win this battle because the parents [many of the individual Defendants] would insist." App. 12-13; App. 5.

As a result of Clark's whistleblowing and exercising her freedom of expression, in addition to her loss of salary[12], she was threatened, harassed, retaliated against, terminated, and then demoted. The evidence of threats includes that: (1) "Timmons threatened Clark that if she did not sign the review of NC (which was false and retaliation for NC's complaints about interns) **that Clark's unit [she supervised] would be let go.** Clark still refused, stating she needed to "do the right thing." **Timmons repeatedly told Clark that the intern issues (and NC) were not worth [her] job."** (emphasis added); (2) Timmons threatened Clark that EAP could make the same recommendation about [laying off] Clark's unit [not just Clark] if she was not careful, meaning to stop reporting issues with the interns; (3) K. Gates routinely threatened other employees about their jobs. (Comp. ¶38); (4) on or about 03/09/11 K. Gates threatened Clark's job; (5) on or about 06/14/11, 6/30/11, 7/15/11 and 7/28/11 Timmons threatened Clark's job (Comp. ¶39); and, (6) Timmons told Clark she was going to get rid of the employees who complained about the interns and/or about Timmons' management (by their letters to EAP) because it upset management, and she warned Clark it was "not worth [her] job". App. 75-76.

Interference and discouragement of Ms. Clark's reporting also included that Timmons ordered Clark not to speak to Senator Sharon Carlson, who was going to NC's review, as Timmons did not want Clark to tell NC that her review had been altered due to NC's Complaints about interns, from what Clark (NC's supervisor) had written. Clark refused to sign NC's falsified review and was not allowed to attend the review or talk to the Senator. App. 77-78. It

[12]Ms. Clark's continuing loss of salary is discussed below, refuting Defendants' claim that she has been paid all benefits to which she is entitled.

was not just that Clark could not talk to Senator Carlson at the review, but at any time. App. 14 (Comp. ¶41).

Ms. Clark's entire unit was suddenly RIF'd in August, as threatened by Timmons, although the unit had not been up for layoff before (in June), and a state contract to avoid layoffs had been reached. This happened even though Clark's position had been made "permanent" and her entire department had switched cost centers. The RIF was in retaliation for Clark's pattern of speaking out[13] against illegal and unethical activities of the interns, her superiors and a co-worker (individual Defendants), which reached the highest levels of NHES. As examples of violations, an executive branch official who serves as a department head or supervisor must recuse themselves from the hiring process when a dependent family member is a candidate for employment within that official's department. App. 76, App. 242-245 (NH Executive Branch Ethics Committee Opinion 2008-001). Gates had lowered the age for interns to include his daughter, and interns were allowed to stay on during the RIF, while full-time data control clerks were laid off (contrary to personnel rules), and at least two were illegally laid off instead of resigning or recognizing the natural ending of their internships in order to illegally collect unemployment benefits. App. 5-9, (Comp. ¶22 A-V); App. 183-192.

Initially, Clark was laid off along with her Unit. App. 461-462. Ms. Clark then accepted a layoff and demotion in lieu of layoff, 9 labor grades, out of desperation to maintain her employment and insurance. App. 463-464. To protest the layoff and demotion, Clark filed an action with the Personnel Appeals Board. App. 465-470. That case was resolved without prejudice to further claims, or a release, with back pay and benefits paid. However, even after

[13]Many of Clark's subordinates also wrote letters protesting the interns behavior, so impacting them in the layoff, as well as the Lebanon Unit, also a vocal union-oriented group, fits Plaintiff's theory.

said resolution, Clark continued to be harassed and the terms and conditions of her employment affected in retaliation for her whistleblowing, and freedom of expression. App. 33, 103.

The ongoing retaliation and harassment was partially stated by Defendants. App. 44. Ms. Clark also experienced harassment both at home and at work during this time period: her car was egged (in the NHES parking lot); her home mailbox smashed; her telephone continuously rung; she received anonymous calls at home; and, an anonymous person called the fire department to report Clark's home was on fire, which was false. She received a book *Neggaholics* in the inter-office mail, which was from Timmons, at a time when Timmons was not her supervisor. She is entitled to an inference of causal relationship at the summary judgment stage. Clark became so distressed from the harassment and retaliation that she went out on FMLA from on or about 12/16/11 through 02/09/12. App. 78-79.

Harassment and retaliation also included being prevented from attending educational seminars and work meetings, being slandered in the newspapers (e.g. described as a disgruntled worker with bad review), being taunted, not allowed to use photocopiers, having information withheld from her to make it difficult or impossible to perform her job, having a co-worker bang his hands on her desk in an aggressive fashion, micromanagement, her attendance at work seminar in Puerto Rico was tampered with, being physically brushed or touched by other employees passing her, being called names ("ignorant" and "witch"), being yelled at, having a printer temporarily taken away (which had been given to her as an accommodation for a disability), which caused her increased pain while she was without it, and having things thrown at her, all done by staff sympathetic to Gates and/or Reardon, and other defendants. This retaliation occurred after Clark's demotion, and lasted up through at least the date of summary judgment, all contrary to 98-E and 275-E. App. 79-80. She has not recovered in any way for this

retaliation and harassment.

IV. SUMMARY OF THE ARGUMENT

Appellant, Ms. Clark, asserts the Court erred in dismissing Count I on summary judgment, under 275-E, the Whistleblower Protection Act ("WPA"), because even if the remedies are limited as determined for 275-E, Clark has not received all admittedly available relief under the statute (back pay and fringe benefits) and she has not received other equitable relief (similar status, fringe benefits, and most other equitable relief). Plaintiff demonstrated disputed issues of material fact on whether all available damages had been recovered.

The Court has also ignored Clark's right to injunctive relief, including whether Clark is entitled to a determination on the ultimate issue of whether the WPA was violated, and attorneys' fees and costs in pursuing justice. The Court incorrectly ruled that Clark had not requested such relief, and was not entitled to a determination of whether the statute had been violated, and orders for the behaviors to end. Clark had in fact requested injunctive and equitable relief in her complaint, and mentioned these arguments in her opposition to the summary judgment motion.

The Court ruled that general and full compensatory damages are unavailable in a WPA claim, but Clark argues that she is entitled to them as the standard relief in a "civil suit," and that failing to allow them means many of the illegal actions the statute seeks to prevent would provide no meaningful remedy. Clark argues that the Court should construe the plain language of 275-E:2, II, allowing employees to bring "civil suit" to encompass all reasonable relief including general compensatory damages, as to do otherwise does not comport with the broad remedial purpose of the statute, including serving as a deterrent to illegal conduct.

As to Freedom of Expression, 98-E ("FOE")(Count III), the Court dismissed the claim on summary judgment, and misconstrued the statute to require speaking publicly as an individual, which Clark in fact did. This imported 1st Amendment law, which the statute sought to avoid in

adopting 98-E. "Public" means not speaking confidentially. In addition, 98-E: 2 states "Interference Prohibited. – No person shall interfere in any way with the right of freedom of speech, **full criticism, or disclosure** by any public employee." (emphasis added). Full criticism and disclosure are also protected, regardless of where the statements are made, which the Court failed to address or recognize.

As to Count II, Wrongful Discharge/Demotion, the Court dismissed the claim on a motion to dismiss because it found Clark had not been discharged, but demoted. Ms. Clark asserts she met the elements for a wrongful discharge from her position. Ms. Clark then accepted a demotion. The Court then refused to recognize a cause of wrongful demotion as a new cause of action, which Clark requests from this Court. There is no valid reason for not recognizing wrongful demotion as a cause of action flowing from the wrongful discharge theory. Ms. Clark requests that this Honorable Court reverse the trial court on the above issues, as more fully set forth in her arguments below.

V. STANDARD OF REVIEW

A. Motion to Dismiss Standard: Ms. Clark has pled sufficient facts under the law to survive the motion to dismiss of her wrongful discharge/ demotion claim. In *In re Estate of Mills,* 167 N.H. 125, 127 (2014), the Court ruled:

> In reviewing the trial court's grant of a motion to dismiss, our standard of review is whether the allegations in the petitioner's pleadings are reasonably susceptible of a construction that would permit recovery. *Plaisted v. LaBrie,* 165 N.H. 194, 195 (2013). We assume that the facts set forth in the petitioner's pleadings are true and construe all reasonable inferences in the light most favorable to him. *Id.* We then engage in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss. *Id.*

B. Summary Judgment Standard (RSA 491:8-a): The Court granted summary judgment on the WPA and FOE claims by misconstruing the statute and treated the motion more

as a motion to dismiss on issues of law. At the appeal stage, the Supreme Court "review[s] de novo a trial court's grant of summary judgment. *Tech-Built 153 v. Va. Surety Co.*, 153 N.H. 371, 373 (2006). If our review of the evidence does not reveal any genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's decision. *Id." Thomas v. Telegraph Pub. Co.*, 155 N.H. 314 (N.H., 2007). The Court also stated that "[i]n reviewing a grant of summary judgment, 'we look at the affidavits and other evidence, and all inferences properly drawn therefrom, in the light most favorable to the non-moving party.'" *Sandford v. Town of Wolfeboro,* 143 N.H. 481, 484 (1999), (citing *Del Norte, Inc. v. Provencher,* 142 N.H. 535, 537 (1997)). A *de novo* review of the pleadings, and evidence, and the relevant law, will demonstrate that the granting of summary judgment was in error under either standard, and warrants reversal and remand for trial.

VI. ARGUMENT

VI.I. The Court Committed An Error Of Law, And/Or Abused Its Discretion, By Granting Summary Judgment To Defendants On Plaintiff's RSA 275-E Whistleblower Claim By Finding Only Limited Damages And Equitable Remedies, Including Injunctive Relief, Are Available Under RSA 275-E, And That They Had Been Recovered, When In Fact They Had Not, Such as Full Back Pay

The statute provides that "[a]n aggrieved employee may bring a civil suit within 3 years of the alleged violation of this section. 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. Even if the remedies are limited as determined by the Court, Ms. Clark has not received all relief to which she is entitled under the statute (similar status, fringe benefits, other equitable relief), and the Court has ignored Clark's right to a determination on the ultimate issue of a whistleblower violation, and the granting of other injunctive relief. App. 286-300.

The Court committed errors of fact and misconstrued the Whistleblower statute when it dismissed the WPA claim on the sole basis that Clark had allegedly recovered all damages she

could receive under the statute, and ruled she had allegedly not adequately requested equitable and injunctive relief. However, there is no requirement that monetary relief be awardable in order to sustain a whistleblower's claim, and Clark had requested injunctive and equitable relief.

A. Ms. Clark Met the Elements of a Whistleblower Claim

Ms. Clark clearly met the elements of a WPA claim:

> To survive the motion to dismiss, the plaintiff must have alleged facts in her complaint that show that: (1) she 'engaged in an act protected by' the Act; (2) she 'suffered an employment action proscribed by' the Act; and (3) 'there was a causal connection between the protected [conduct] and the proscribed employment action.' *Appeal of Seacoast Fire Equip. Co.*, 146 N.H. 605, 608, 777 A.2d 869 (2001).

Cluff-Landry v. Roman Catholic Bishop of Manchester, 156 A.3d 147, 151 (N.H., 2017).

The Court did not find a lack of disputed and undisputed issues of material fact which would support a dismissal on summary judgment, or on a motion to dismiss standard. It also erred by finding a case could not stand alone for a determination on the cause of action. It also ruled from a remedies approach, that there was nothing else for Plaintiff to recover, which is disputed below, and is also not supported in the statute. Br. 66-70. There is no requirement that monetary damages be due and owing for a plaintiff to bring a claim, and it certainly is not reason for dismissal as the Court did here.

B. The Court Erred In Not Allowing Ms. Clark To Proceed On Equitable Remedies And Injunctive Relief

Even if the Court were correct regarding a lack of available monetary recovery for additional wages, fringe benefits and the alleged unavailability of compensatory damages, discussed below, the Court erred in not allowing Ms. Clark to pursue equitable and injunctive remedies. The statute provides for the employee to be "reinstated to a like position, with like seniority, status and pay," which has not happened as she still supervises no one and pay increases are limited. Approximately 15 months ago, she was rejected for a supervisor position,

which would have restored her status. The Court stated Clark did not dispute she was reinstated to LG 21 S 7, however she did claim she was supposed to be a LG 24 as other similar supervisors were. This was not a promotion, but in accord with Personnel Rules that employees be paid based on the work they are doing, and therefore is not speculative, particularly as promised to her by her supervisor, Timmons. Pay comparable to other supervisors was promised. App. 13, 288. This is a disputed issue of fact. App. 286-290.

Ms. Clark was also entitled to a determination on the ultimate issue of whether or not the Defendants had violated the WPA and for fees in pursuing this equitable remedy. This is basic, the reason for having the WPA, to determine if violations occurred and to deter future occurrences. This was an important remedy for Clark, as her reputation had suffered, she had been demoted as if she had committed misconduct, called a "witch" at work, and had things thrown at her, among other injustices. App. 23 (Comp., e.g. ¶ J, N, O).

The Court found that Plaintiff had not sought to enjoin the complained of behavior, yet she did in fact do so. App. 29, ¶101, 103, and 104 request "an apology, restoration of her reputation, and the cessation of on-going retaliation"; all equitable relief to which she is entitled including injunctive relief. App. 36, ¶F, Reinstatement with NHES to her former position, or one that is comparable or better, within Clark's discretion. The statute already made the alleged behavior illegal, and she asked for it to be stopped. The Court also stated it was not going to allow her to amend her complaint at this late date, but it was not needed as she had already made requests for equitable and injunctive release. This error along justifies reversal.

On reconsideration, the Court also erred in ruling against Clark on the grounds she claimed she is "entitled to pursue her claim merely to obtain attorney's fees and a 'determination' whether the defendants violated the law...the Plaintiff failed to make these

arguments in opposition to the Defendant's Motion for Summary Judgment." Br. 69-70. However, the Court was wrong again, as Clark had argued in her Memorandum with her Objection to Summary Judgment that she "is entitled to a determination that Defendants violated the WPA, to clear her name and as a deterrent to future behavior, as noted above. Clark is entitled to attorneys' fees for obtaining the determination, remaining benefits, and damages still argued to be due, including compensatory damages for the harassment and retaliation up to the present time." App. 83. Ms. Clark should, at the least, be entitled to a determination and to clear her name by use of this remedial statute, particularly given the decision there are no compensatory damages.

C. Ms. Clark Has Not Recovered All Money Damages Admittedly Available And Other Similar Damages Under RSA 275-E

The Court and Defendants agree that back pay and fringe benefits are the only available money remedies. Ms. Clark asserted she has not received full back pay, front pay, lost benefits, lost of future earning capacity, depletion of annual and sick leave balances, increased mileage and wear and tear on her car, aggravation of her medical conditions, attorneys' fees, reinstatement to her former position, damage to reputation, and a host of other compensatory damage categories. App. 31, Comp., ¶103-104, which are incorporated herein by reference; App. 287.

Assuming *arguendo*, that only back pay and fringe benefits are available as damages for a violation of 275-E, as a result of resolving the PAB case[14] Clark received back pay and contributions to retirement based on the lower supervisory labor grade she was paid at the time of her demotion, but not the labor grade promised by her supervisor for doing work substantially

[14]In withdrawing Clark's PAB case Clark's counsel (M. Reynolds) stated "This withdrawal is made without prejudice to any rights, causes of action, or damages Clark may have." App. 436.

similar, if not greater, than that done by other equal supervisors, which increase was to go into effect prior to her demotion. App. 82-83. Clark asserts she should be able to recover under 275-E for the increase in labor grade as promised by her supervisor, Timmons, based on the work she was performing, in conformance with State Personnel Rules. This is a disputed issue of fact concerning entitlement to back pay, which would accrue up through the time of trial.

The Court found that Clark could not rely on her supervisor's promise. App. 69. However, in fact, Clark submitted evidence of labor grades, showing other supervisors' rate of pay, which included S. Jamak at the base pay rate of $57,554.50 per year, LG24. App. 82, 83, 273. Ms. Clark submitted evidence that her rate of pay was LG21/S8, and as of 08.19.11, her retroactive salary was $48,769.50. App. 104; 122. Whether or not Clark's pay should have been adjusted further is an issue of fact for the jury. Also, the increase in pay up to the time of trial would be "back pay", not front pay, which is clearly allowed by the statute. Clark also lost sick time from the books (@150 hrs), and additional back pay, front pay, incurred counseling fees, as well as for attorneys' fees and costs. App. 81, 286-290.

Ms. Clark was entitled to an increase award of back pay, and to recover for her other losses in order to be made whole, whether derived from damages awarded by the Court in equity or compensatory damages award from a jury. Ms. Clark is also entitled to a determination and other requested injunctive and equitable relief.

VI.II. The Court Erred by Misconstruing RSA 275-E as Not Including General Compensatory Damages, Despite it Being a Remedial Statute, Which Was Amended to Allow the Right to Bring a Civil Action, Without Which it Provides Plaintiff and Others No Remedy at all for Various Violations, Contrary to Part I, Art. 14 of the NH Const., Lacks as a Deterrent, and Thereby Partially Nullifies the Statute

A. The Court Should Deem RSA 275-E's Allowance of a "Civil Suit" to Encompass General Compensatory Damages

Plaintiff claims all compensatory damages that are available in civil suits/actions,

including those for emotional distress. Defendants seek to limit the remedies available under 275-E. Although the issue has not been determined by this Court, the trial Court found that compensatory damages are unavailable. Br. 59-60, 66-67 (Orders). Plaintiff requests that this Court, as final arbiter of the meaning of statutes, review 275-E and rule it allows general compensatory damages.

The statute states "[a]n aggrieved employee may bring a civil suit within 3 years of the alleged violation of this section. 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.[15] While not a model of clarity in drafting, fairly read, the second sentence supplements the first sentence and should mean that those equitable remedies, which are generally awarded by the judge as opposed to the jury, may be awarded by the judge, in addition to the general categories of damages awardable in a civil suit by a jury. There were no words limiting the available remedies in a civil suit. By allowing employees to bring a "civil suit" in court, the legislature apparently intended to broaden the scope of relief to include damages, and it is presumed a court has a full range of equitable powers to complement the equitable relief.

The Court need look no further than the plain language of the statute to interpret "civil suit":

> We are the final arbiter of legislative intent as expressed in the language of a statute . . . In construing a statute, we ascribe the plain and ordinary meaning to words used, considering the statute as a whole and interpreting it consistent with its purpose. *Id.* At issue here is the Workers' Compensation Law, which we construe liberally, 'resolving all reasonable doubts in statutory construction in favor of the injured employee in order to

[15] RSA 275-E:4, I (Rights and Remedies) applies only to DOL/WPA cases, which allows the DOL to "render a judgment on such matter, and shall order, as the commissioner or his designee considers appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies." This is arguably more equitable/injunctive power than given to the court in 275-E:2, II. Obviously, the legislature would not give greater power for monetary and other relief to the DOL. Notably, when a person chooses to complain to the DOL, it is not referred to in the statute, as a civil suit or action.

give the broadest reasonable effect to its remedial purpose' . . . .

Appeal of Peggy Denton, 786 A2d 845, 846-7 (2002) (internal and end citations omitted); *Appeal of Holloran*, 147 NH 177, 179 (2001) (internal and end citations omitted).

Making a determination regarding the WPA requires consideration of statutory construction issues, if not resolved by using the plain and ordinary meaning of the words, about which this Court has stated:

> Responding to the certified questions requires us to engage in statutory interpretation. We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Steir v. Girl Scouts of the U.S.A.*, 150 N.H. 212, 214 (2003). We begin by examining the language of the statute, and if possible, ascribe the plain and ordinary meanings to the words used. *Id.* When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we decline to consider what the legislature might have said or to add language that the legislature did not see fit to incorporate in the statute. *Id.* We do not consider words and phrases in isolation; rather, we consider them in the context of the statute as a whole. *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 585 (2003). This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id.*

U.S. Equal Employment Opportunity Commission et.al *v. Fred Fuller Oil Company, Inc.* et.al, 134 A.3d 17, 19 (N.H. 2016).

See also, *State Employees' Ass'n of New Hampshire v. State*, 161 N.H. 730, 738 (2011). When examining the language of a statute, the court ascribes the plain and ordinary meaning to the words used. *In re Guardianship of Eaton*, 163 N.H. 386, 389 (N.H. 2012). Legislative intent is interpreted from the statute as written, and the court will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* Further, statutes are interpreted in the context of the overall scheme and not in isolation. *Id.* Legislative history is not considered to construe a statute that is clear on its face. *Id.* Utilizing this Court's longstanding statutory construction analysis, using the plain meaning of "civil suit", should yield a decision in favor of Ms. Clark that compensatory damages are available for WPA claims.

B. Plaintiff Should Be Entitled to Pursue the Full Measure of Compensatory Damages Available in Civil Actions, Given the Remedial Nature of the Statute

The remedial nature of the statute also supports allowance of standard compensatory damages. Protective statutes such as 354-A (Law Against Discrimination), 275-E (WPA), 98-E (FOE), and 281-A (Workers' Compensation), are to be construed to give the fullest effect to their broad remedial purpose. For example, the Court has stated: "[w]e construe provisions of the Workers' Compensation Law liberally, 'resolving all reasonable doubts in statutory construction in favor of the injured employee in order to give the broadest reasonable effect to its remedial purpose.'" *Appeal of Currin*, 149 NH, 303, 306 (2002), (citing *Denton*, supra). *See also Whittemore v. Sullivan Cty. Homemaker's Aid Serv.*, 129 NH 432, 435, 529 A2d 919, 920-21 (1987). "'[G]iven the remedial nature of workers' compensation laws, all reasonable doubts will be liberally construed in a manner that favors the injured employee.' *Petition of Markievitz*, 135 N.H. 455, 458, 606 A.2d 800, 802 (N.H. 1992) (quotation omitted)." *Petition of Blackford*, 635 A.2d 501, 503, 138 N.H. 132 (N.H., 1993). Thus, when construing a remedial statute, all reasonable doubts should be resolved in favor of the protected class, the employee. However, the plain language here is not ambiguous.

There is clearly a division between what a jury and a court can do, as a jury cannot award equitable remedies. If all that is available are equitable remedies, then that leaves **no recovery** for an employee who is severely harassed, threatened or suffers other prohibited conduct under 275-E:2,I (but manages to stay at work with no lost wages or benefits). This method also fails to provide any deterrent effect for the employer and co-employees. Obviously, a "civil suit" must mean something more than equitable relief awarded by the court. The Court indicates that Clark would not be without relief as she could request reinstatement or an injunction to prohibit bad

behavior. However, Clark also asked for that relief, which the Court failed to recognize as discussed above.

Furthermore, the suggestion that an employee's sole remedy in perhaps the majority of situations is to have the court tell the person to just "stop it," is illusory relief. See App. 344-45 (Chuck Douglas discussing importance of deterrence in amendments to 98-E (FOE), which reasoning applies equally here. Without backing that up a finding with an award of damages, there is not an effective enforcement mechanism. The statute already makes retaliating against whistleblowers illegal. What happens when the Court order is violated? Their hand gets slapped again, or they are in contempt and thrown in jail? Even if this were to happen, it neither helps nor compensates the harassed employee, leaving little incentive for her to report malfeasance, and hardly any incentive for the employer to comply with the law. An employer is free to harass, threaten and abuse an employee as long as it does not cut her pay. That cannot be the intent.

The term "civil action" in this section obviously means general tort damages, particularly as it is within a remedial statute. Since it is a remedial statute, any reasonable doubt of the statute's meaning, should inure to the benefit of the protected employees. For example, with respect to workers' compensation under RSA 281-A, the Court has ruled "'[G]iven the remedial nature of workers' compensation laws, all reasonable doubts will be liberally construed in a manner that favors the injured employee.' *Petition of Markievitz*, 135 N.H. 455, 458; 606 A.2d at 802 (quotation omitted)." *Petition of Blackford*, 635 A.2d 501, 503, 138 N.H. 132 (N.H., 1993).

The Court has construed remedies expansively for remedial statutes. *Hardy, Swett,* and *Bio Energy* were not cases decided initially by courts, but by administrative agencies/commissions. However, this Court construed the statutory language expansively to include damages not mentioned in the statute. The Court in *Hardy,* justified attorneys' fees as

appropriate equitable relief, reasoning that the lack of such remedy "would weaken the deterrent effect of the Act vis-a-vis employers. Employers would have little incentive to comply with the Act if they faced only the prospect of future reinstatement of an employee. . . ." *In re Hardy*, 917 A.2d 1237, 1247 (N.H., 2007). The Court made this ruling even though attorneys' fees were not specifically mentioned as available relief which the DOL could award under 275-E. It found it to be appropriate injunctive relief for the DOL. The same rationale can be used for general compensatory damages.

Without a demotion or termination, lost wages and benefits may never be part of a whistleblower's case; in fact, under the court's reasoning, bringing such a claim without those specific damages, would foreclose it.[16] A Plaintiff could only recover for "discharge" in the above lengthy list of illegal activities. Defendants' argument that plaintiffs are limited to back pay and equitable relief would leave most whistleblowers, those who are not fired or suffer a reduction in pay, without any remedy. There would be no recovery for what a majority of the harassment statute seeks to prevent. Most often the intangibles, including garden variety emotional distress, aggravation, embarrassment, etc., are the only damages. It is hard to fathom how someone can be made whole under this statute without an award of compensatory tort damages.

In *Swett* the court ruled that the Commission for Human Rights ("CHR") had exceeded its statutory authority by awarding compensatory damages, which the legislature thereafter clarified by adding it to the status. See RSA 354-A:21,II(d). However, in ruling that the award could include attorneys' fees because they were equitable in nature and within the discretion of

[16]In fact, it is not even a question of being made whole, it is the ability to recover anything, which also serves the laudable goal of deterrence. In the case at bar, the Defendants have done terrible things to Ms. Clark in retaliation for expressing herself and blowing the whistle on them for fraud, mismanagement, nepotism, and conflict of interest. Ms. Clark's job was threatened repeatedly and then it was illegally followed through on.

the CHR, it declined to allow compensatory damages because they were not in the nature of equitable relief that the CHR could award. *E.D. Swett, Inc. v. New Hampshire Com'n for Human Rights*, 470 A.2d 921, 926, 124 N.H. 404 (N.H., 1983). However, in the case at bar, the term "civil suit" is used, which is broad and usually understood to encompass a wide range of compensatory damages. In *Bio Energy,* 135 N.H. at 518, 607 A.2d 606, the court determined that an award of back pay was within the DOL's broad injunctive powers.

In the case at bar, a "civil suit" is allowed, and there is no indication that the legislature intended to limit the available remedies to equitable ones, particularly where the described prohibitions on behavior, if violated would lead to compensatory damages that would not then be covered, which is illogical. The Court here says we have exhausted money damages as compensatory damages are not available, and although injunctive and equitable relief would be available we did not ask for it (although we did). Therefore, Ms. Clark requests that the Court order general compensatory tort damages are available under RSA 275-E so that she can be made whole and recover for her damages, as is her constitutional right, under Pt 1, Art 14 [Legal Remedies to be Free, Complete, and Prompt]. Ms. Clark has not been afforded a remedy that makes her whole.

VI.III. The Court Committed an Error of Law by Misinterpreting RSA 98-E to Require that Plaintiff Must Have Spoken Publicly, and Then Finding that Ms. Clark Had Not Spoken Publicly When in Fact She Had on Multiple Occasions

The Court did not properly analyze RSA 98-E as to whether Ms. Clark was speaking as an individual, as there is no requirement that she be speaking publicly, although she had. In addition, the Court neither analyzed nor recognized that full criticism and disclosure, in whatever forum, is protected conduct.

A. Plaintiff Can Establish She Has Engaged in Speech Protected by RSA 98-E, Even Under the Court's Restrictive Interpretation

RSA 98-E provides the following:

> **98-E:1 Freedom of Expression.** – Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to **publicly discuss and give opinions as an individual** on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.

RSA 98-E:1 (emphasis added, that to "give opinions as an individual" is in addition to "publicly discuss").

The statute also prohibits any person from interfering "in any way with the right of **freedom of speech, full criticism or disclosure** by any public employee." RSA 98-E:2 (emphasis added). Freedom of Expression includes all three.

Neither the Defendants nor the Court defined private v. public speech, but that is not important under the 98-E analysis. The right to speak "publicly" given by 98-E:1 is contrasted with speaking "confidentially". A State employee may fully discuss and give opinions concerning the State, because the "legislature specifically excepted only the disclosure of confidential communications and records from this 'full right' 98-E:3. Accordingly, we will not balance the petitioner's first amendment interests under *Bennett*." *Booker*, 139 N.H. 337, 341 (1995).

Speaking confidentially, for example, means an employee could not publicly discuss attorney/client communications if one was a state attorney, or go to the newspaper about a subordinate's review. Under the Court's interpretation, an employee would have to take out an ad in the newspaper, call a reporter, or stand on the street corner with a bullhorn to be protected, probably not publicity the State wants, more likely preferring internal criticism or disclosure. However, even under 98-E:2, such internal reports are protected. Defendants' suggestion that Clark must "engage in public discourse", as if she needs to take out an advertisement, is erroneous, and not supported by any relevant law.

The only authoritative NH case on 98-E is *Appeal of Booker*. Booker was a state worker casually speaking to a reporter in a hallway; not holding a press conference, but giving his opinion. Although the reporter published Booker's comments about the management of DCFS, Booker prevailed because he was speaking as an individual, not in his official capacity as someone **authorized by the employer** to speak about the issue. See *Appeal of Booker* at 340. In the case at bar, Timmons strongly suggested, if not ordered, Clark to stop talking about the intern and related issues. App. 76, 88. Clearly it was not part of Clark's job to make these reports, and they were not authorized by the employer. Ms. Clark was speaking publicly as an individual because it was not part of her job, and she was not authorized to speak for the agency.

In *Bellerose v. SAU #39*, the plaintiff expressed his concerns about health and safety issues (mold) at the elementary school, informally and offhand, to "his supervisors and to other governmental employees and to members of the public." *Bellerose v. SAU # 39*, No. 13-cv-404-PB (D.N.H. Dec. 29, 2014). All of his comments were protected expression.

Defendants attempt to limit the right to freedom of expression to speaking to the public at large, which does not comport with the language of 98-E, as it was created to avoid the narrow

construction by federal courts for 1st Amendment claims under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Citation to Federal 1st Amendment cases are irrelevant to the more protective provisions of 98-E. The focus under 98-E is whether the person was speaking as an individual, not what forum the individual is speaking in.

Ms. Clark was speaking as an individual. See Fact Section in III above, listing Clark's numerous discussions, reports, criticisms and disclosures to supervisors, the union, the governor, and ethics committee, to name a few. Ms. Clark's reporting, disclosures and criticisms of her agency and managers was extensive, as it occurred more than a dozen times on multiple illegalities, to numerous individuals, both verbally and in writing, both inside and outside of her agency. She participated in investigations, internal and external.

Whom Clark was speaking to, and where, is not important; speaking as an individual is. Ms. Clark was speaking as an individual, not as part of her job duties. Under the statute, the word "individual" means "a single or particular … human being as contrasted with a social group or institution." *Appeal of Booker,* 139 N.H. 337, 341 (1995). If one speaks as an individual, rather than a spokesperson, he/she falls within the meaning of the term. Also, if a person belongs to a group and speaks as a matter affecting the group, it does not necessarily mean he is not speaking as an individual. *Booker* at 341-42.

Ms. Clark expressed disagreement with violations of state rules, laws and regulations, including but not limited to theft of wages, nepotism, conflict of interest, fraud, waste, and mismanagement, and abuse in the expenditure of public funds. In fact, a number of Clark's complaints were reported in the newspapers several times. App. 183-189. It is reasonable to infer that reporting matters of alleged malfeasance, including charges of criminal and unethical behavior of high-level government executive officials, is not one of Clark's job duties, in the

literal sense of "job duties," nor is it within her job description. In fact, Timmons, Clark's immediate supervisor, repeatedly threatened Clark that she would lose her job for reporting, a clear indication doing so was not an official job duty. Ms. Clark satisfied the elements of 98-E as to speaking "publicly" to the extent it could be required.

VI.IV. The Court Committed An Error Of Law by Misinterpreting the Statute and Ignoring that RSA 98-E Also Protects for "Full Criticism or Disclosure," Which is Distinct From A Right to Free Speech

All of Ms. Clark's speech, criticisms and disclosures, even if to her own supervisors, qualify for protection under RSA 98-E, which was amended to avoid the restrictions on free speech set forth in *Garcetti v. Ceballos, supra.*, and do not require a particular forum. Under 98-E, an employee can criticize his supervisor, whether directly to that supervisor or someone else, and it is still protected conduct, as the terms "disclosure" and "full criticism" are expansive. RSA 98-E:2.

The legislative history supports this interpretation. For example, at the time amendment to the statute was considered, Attorney Head, representing the Attorney General's office, testified giving examples of what might be covered by the amendment: an employee objecting to a policy within their department, who later does not receive a promotion; an employee who issues a memo to his employer objecting to a policy, who is later caught in illegal behavior and then is fired might bring a claim; or any multitude of circumstances where an employee may have spoken adversely about the agency." App. 342-44. None of his examples involved publication of the criticism to the public at large, or anyone outside of the employee's agency.

By way of example only, the court noted that Ms. Clark was prevented from speaking with Senator Carson at the review was not a violation, but as indicated in her affidavit, she was also prevented from speaking to her outside of the meeting. "Ms. Clark refused to sign NC's

falsified review and was not allowed to attend the review, or talk to the Senator." App. 62, Order, p. 8; App. 13, Comp. ¶39; App. 101, ¶27. It was not just that Ms. Clark wanted to talk to the Senator about the false review of her subordinate, but about the intern issues (nepotism, conflict of interest, and fraud [wage theft]), which was the primary reason NC was also having trouble.[17] This criticism of her supervisor and others, even if not in furtherance of public policy, is protected conduct, and interference "in any way" is prohibited.

In conclusion, Ms. Clark spoke as an individual, and at times publicly, which is not required; and, also otherwise criticized and made disclosures about her agency and superiors to numerous individuals and divisions of state government, as noted in Section III above. These actions are protected by RSA 98-E, and her claim should not have been dismissed because of a misapplication of the law, requiring that she speak more publicly than she did. The Court also ignored the provisions protecting full criticism and disclosure, which covers expressions of criticism and disclosure, even to her own supervisor. The 98-E claim should be reinstated.

WRONGFUL DISCHARGE/ DEMOTION

VI.V. The Court Erred In Finding That Ms. Clark Was Not Wrongfully Discharged Where Her Supervisory Job Was Allegedly Dissolved, and She Was Terminated/Laid Off, and Later Accepted a Demotion of Nine Labor Grades to a Non-Supervisory Position

A. Ms. Clark Met the Elements for Wrongful Discharge

To succeed on a claim for wrongful termination, a plaintiff must prove, "(1) [that] the termination of employment was motivated by bad faith, retaliation or malice; and (2) that she [or he] was terminated for performing an act that public policy would encourage or for refusing to

[17] "27. Timmons ordered me not to speak to Senator Sharon Carlson, who was going to NC's review, as Timmons did not want me to tell NC that her review had been altered from what I, NC's supervisor had written. It was altered because of NC's complaints about interns, and Timmons' management. I refused to sign NC's falsified review and was not allowed to attend the review, or talk to the Senator." App. 101, Clark Affidavit, ¶27; App. 13, Comp., ¶39).

do something that public policy would condemn." *Karch v. Baybank FSB*, 147 N.H. 525, 536 (2002). Defendants alleged Ms. Clark's wrongful discharge and demotion claims should be dismissed because she was not discharged, and wrongful demotion is not a recognized claim.[18]

There is no serious dispute that Ms. Clark reported violations of law, and the motivation of the Defendants is a disputed issue of material fact. See section III above. The Court granted the motion solely on the basis it found Ms. Clark was not terminated as a matter of law because she continued to work for the Defendant in a different job, and therefore did not find her to be discharged, and that this Court has not recognized "wrongful demotion".

Ms. Clark was given a layoff letter on or about August 2, 2011, which notified her of the discharge from her position as a BAU supervisor, a termination of her employment as of the time it was given to her. App. 461-462. Although there were some recall rights mentioned, with a limit of three years and no guarantee of recall, Ms. Clark construed this as notice of her termination, which is actionable at the time it occurs. The statute of limitations on the wrongful discharge, however characterized, begins to run on the date of notice according to this Court's previous order in another case. The Court has recognized a wrongful discharge as being actionable on the date the notice of intent not to renew is given. In *Cluff-Landry,* despite this counsel's strenuous argument that employment could not be terminated until the last day of employment because things could change (changed mind, appeal), and therefore the discharge did not occur, nor accrue, until the last day of employment, the Court disagreed. The wrongful discharge was evaluated as being a claim as of the notice of the intention not to renew the contract. "[T]he plaintiff's wrongful discharge claim, to the extent she ever had one, accrued" [on the date of notice of intent not to renew]. *Cluff-Landry,* at 156 A.3d 147, 153 (N.H., 2017).

[18] Defendants also argued that Plaintiff was not an "at-will" employee, but that was not the rationale for dismissal. Summary judgment was not granted based on a lack of her meeting the elements of the claim.

This was even though her last date was not until June 30th of that year. The Court stated:

> The plaintiff's claim, as framed in her complaint, is based upon her contract being 'non-renewed' by the school. Her cause of action, therefore, accrued on April 15, 2012, when all of the elements necessary for the claim were present. See *Beane* , 160 N.H. at 712, 7 A.3d 1284. We are not persuaded by her characterization of her claim as one for wrongful termination. See *Jeffery v. City of Nashua* , 163 N.H. 683, 688, 48 A.3d 931 (2012) (noting in dicta that, in contrast to a constructive discharge claim as to which the cause of action accrues when the employee tenders his or her resignation, in a wrongful termination action, the claim accrues upon the employee's separation from employment).

Cluff-Landry, at 154.

Therefore, in the case at bar, whether the cause of action is for an intent to lay Clark off, or a termination, it should be recognized as being actionable. In both *Cluff-Landry* and here, the employees were given notice that her contractual relationship with their employment would be ending, with no guarantee of any renewal or rehiring. Ms. Clark sees her notice as one of termination; the fact that she mitigated her damages later, by accepting a different job, nine grades lower, does not erase the wrongful termination, or notice of layoff. It was not anticipated by Clark at the time of her discharge that she would become re-employed 9 labor grades lower. It was clear to Clark that once she was out the door, given the harassment and threats she had endured, it would be nearly impossible to return. She also desperately needed her health insurance and a paycheck so later accepted a demotion in lieu of layoff. App. 463-64 (August 16, 2011).

Defendants parse terms, indicating that Plaintiff was "never discharged from employment," without crediting the undisputed fact she was RIF'd, and only upon her complaints, finally offered a dramatically inferior job, which constituted a demotion of 9 labor grades, thousands of dollars per year in pay, with less prestige and supervisory responsibilities. Ms. Clark was discharged from her job, particularly as the RIF notice was terminating the employment relationship. This together with the reasoning in *Cluff-Landry,* that the termination

occurs on the date of notice, regardless of the last day of employment, or what happens later, supports that Ms. Clark has a wrongful discharge claim as of the notice of layoff.

Ms. Clark later accepting a demotion should have no effect. In *Trainor v. HEI Hospitality, LLC*, the First Circuit, in a retaliation claim, ruled that Plaintiff was not required to accept a demotion to a job paying much less and with less responsibility to demonstrate mitigation. The court found that it was not until the plaintiff engaged in protected activities that negotiations began to unravel. *Trainor v. HEI Hospitality, LLC*, 699 F.3d 19, 29 (1st Cir. 2012).

In the same vein, a Plaintiff who mitigates by accepting a substantial demotion which was offered with no expectation she would take it, has suffered a tangible employment action, which should be actionable as a discharge. Ms. Clark's acceptance of the demotion here amounts to a valiant and good faith attempt to mitigate the damages from her termination from her position, just as if she had applied to a job elsewhere. Whether considered a wrongful discharge, or an extension of that theory to a newly recognized claim for wrongful demotion (discussed below), Defendants' actions should be considered to be a wrongful discharge.

VI.VI. The Court Erred As A Matter Of Law, Or Abused Its Discretion, In Dismissing Plaintiff's Wrongful Demotion Claim On Grounds That New Hampshire Has Not Yet Recognized Said Cause Of Action; Plaintiff Argues And Requests That This Court Recognize "Wrongful Demotion" As A Cause Of Action

To the extent necessary, this Court should extend the law of wrongful discharge to include wrongful demotion. Ms. Clark argues in good faith for the extension of existing law, for "wrongful discharge" to extend to a cause of action for "wrongful demotion," which is recognized in other states. That New Hampshire has yet to recognize a claim for wrongful demotion should not bar the claim. Where the Supreme Court has not rejected a claim, one must

look to whether it is likely the Court would accept such a claim[19], by looking to outside authorities including decisions from other states, many of which have recognized this cause of action.

The theory behind wrongful discharge supports an extension to wrongful demotion cases. "[D]emotion, like discharge, violates public policy." *Trosper v. Bag 'N Save*, 734 N.W.2d 704, 711 (Neb. 2007) (extending wrongful discharge public policy exception to case where employee alleged retaliatory demotion due to filing for workers' compensation). In recognizing this claim, the Nebraska Court noted the explanation of the Kansas Court for recognizing retaliatory demotion as follows:

> The employers' violation of public policy and the resulting coercive effect on the employee is the same in both [termination and demotion]. The loss or damage to the demoted employee differs in degree only. We do not share the employers' concern that a torrent of litigation of insubstantial employment matters would follow in the wake of our recognition of a cause of action for retaliatory demotion and, even if we did, it does not constitute a valid reason for denying recognition of an otherwise justified cause of action.
>
> We conclude that the recognition of a cause of action for retaliatory demotion is a necessary and logical extension of the cause of action for retaliatory discharge. To conclude otherwise would be to repudiate this court's recognition of a cause of action for retaliatory discharge. The obvious message would be for employers to demote rather than discharge employees in retaliation for filing a workers compensation claim or whistleblowing. Thus, employers could negate this court's decisions recognizing wrongful or retaliatory discharge by taking actions falling short of actual discharge.

Id. at 710 (citing *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12 (1997)).

Although a discrimination case, the standards set forth in *Brooks v. Firestone Polymers*,

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[19] As an example of other courts allowing claims to proceed before the NH Supreme Court acknowledged their validity, in a charge of invasion of privacy-false light, the NH Court acknowledged that it has "not yet addressed whether the tort of invasion of privacy-false light is recognized in New Hampshire" and declined to address it at that time. *See Thomas v. Telegraph*, 151 N.H. 435 (2004). However, the First Circuit allowed a claim for false light invasion of privacy to proceed on the assumption that it is allowed in New Hampshire. *See Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002).

LLC, No. 1:12-CV-125, (E.D. Tex. Sept. 24, 2014) may be analogized to the tort of wrongful demotion, apart from discrimination. The District Court recognized a claim for "discriminatory demotion," ruling that for a "*prima facie* case of discriminatory demotion, a plaintiff must show (1) he is a member of a protected class; (2) he was qualified for the position he occupied; (3) he was demoted; and (4) he was replaced by someone outside the protected class…". *Id.* While the case at bar is not a discrimination case, the framework is helpful: Ms. Clark was in a protected class (she was a whistleblower), she was qualified for her position, she was demoted, and she was replaced by someone else to perform her job duties.[20] As Ms. Clark has made these allegations, she should survive a motion to dismiss on her wrongful demotion claim, which she respectfully requests be recognized by this Court.

VII. CONCLUSION

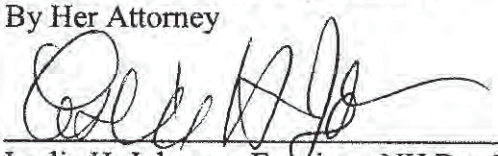
A *de novo* review of the pleadings, and evidence, and the relevant law, will demonstrate that the granting of summary judgment and the motion to dismiss was in error, and warrants reversal and remand. Also, Ms. Clark has made compelling arguments for the WPA to include compensatory damages, and for wrongful discharge law to be extended to wrongful demotion. For the foregoing reasons, Ms. Clark respectfully requests that this Honorable Court reverse the trial court's rulings as requested, under the applicable standards, and remand Counts I-III for a jury trial.

[20] See App. 92-94, that RIF was a sham.

REQUEST FOR ORAL ARGUMENT

These issues are of paramount importance to the citizens of New Hampshire and government employees, and therefore we request a hearing by the full panel. Ms. Clark requests 15 minutes of oral argument before a full panel of the Court. Ms. Clark's position will be argued by Leslie H. Johnson, Esquire.

Respectfully submitted,
MICHELLE CLARK, Plaintiff
By Her Attorney

Dated: May 15, 2018 By: 

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CERTIFICATION

The Appellant certifies that the Orders being appealed from are in writing and attached to this brief. The original Orders are dated April 21, 2015, August 3, 2017, and October 11, 2017.

Dated: 5/15/18

Leslie H. Johnson, Esquire

CERTIFICATION OF SERVICE

I hereby certify on May 16, 2018 (next business day after filing), two copies of Appellant's Brief and Appendix (Vol. I and Vol. II) are being mailed, first class mail to Lynmarie C. Cusack, Esquire and Anne M. Edwards, Esquire, counsel for Appellees in accordance with Supreme Court Rule 16(7).

Dated: 5/15/18

Leslie H. Johnson, Esquire

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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Concord NH 03302-2880

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NOTICE OF DECISION

Leslie Hughes Johnson, ESQ
Law Office of Leslie H Johnson PLLC
PO Box 265
Center Sandwich NH 03227

Case Name: **Michelle Clark v State of New Hampshire Department of Employment Security, et al**
Case Number: **217-2014-CV-00243**

Enclosed please find a copy of the court's order of April 20, 2015 relative to:

ORDER

April 21, 2015

Tracy A. Uhrin
Clerk of Court

(485)

C: Lynmarie C. Cusack, ESQ; Nancy J. Smith, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Michelle Clark

v.

New Hampshire Department of Employment Security, *et al.*

No. 14-CV-243

ORDER

The plaintiff, Michelle Clark, brought this action against the defendants—The New Hampshire Department of Employment Security ("NHES"), Tara G. Reardon, Darrell L. Gates, Dianne M. Carpenter, Gloria J. Timmons, Colleen S. O'Neill, and Sandra Jamak—asserting claims under the following theories: (1) the whistleblower's protection act (RSA 275-E) (Count I); (2) wrongful discharge/wrongful demotion (Count II); violation of statutory freedom of expression rights (RSA 98-E *et seq.*) (Count III); (4) intentional infliction of emotional distress (Count IV); (5) intentional interference with contractual relations (Count V); (6) violation of constitutional rights (Count VI); and (7) interference with First Amendment rights in violation of 42 U.S.C. § 1983 (Count VII). Before the court is the defendants' motion to dismiss. The plaintiff objects. Because the complaint is not susceptible of a construction that would permit recovery on Count II (wrongful discharge/wrongful demotion), the defendants' motion to dismiss Count II for failure to state a claim is GRANTED. Because the complaint is susceptible of a construction that would permit recovery on the remaining counts, the defendants' motion to dismiss the remaining counts is DENIED, without prejudice to the defendants' ability to prove their claims of immunity based on the record developed at an evidentiary hearing.

I

In ruling on a motion to dismiss, the court must determine whether the plaintiff's allegations are "reasonably susceptible of a construction that would permit recovery." *Bohan v. Ritzo*, 141 N.H. 210, 212 (1996). This determination requires the court to test the facts contained in the complaint against applicable law. *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44 (1987). In making such a determination, the court "assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences in the light most favorable to the plaintiff." *Bohan*, 141 N.H. at 213 (quotation omitted). "The plaintiff must, however, plead sufficient facts to form a basis for the cause of action asserted." *Mt. Springs Water Co. v. Mt. Lakes Vill. Dist.*, 126 N.H. 199, 201 (1985). A court "need not accept statements in the complaint which are merely conclusions of law." *Id.* Mindful of this standard, the court sets forth the plaintiff's well-pleaded facts, construing all inferences in her favor.

II

The plaintiff was employed with NHES from 1995 until the present time. At the start of her employment, she was a part-time Food Stamp Interviewer. Eventually, she became a supervisor at a Labor Grade 21, Step 8 level. Her first three-month review was "overwhelmingly positive." Compl. ¶ 17. On September 18, 2010, she was again promoted from Certifying Officer III to Temporary Supervisor, which included overseeing approximately 15 employees at the NHES office in Manchester. On or about July 1, 2011, her temporary position became permanent.

During the plaintiff's employment, she was responsible for supervising certain interns. The plaintiff alleges that "[t]he summer intern positions were supposed to be advertised on the State of New Hampshire website, to provide equal opportunity for members of the public to apply, with hiring from the pool of applicants. Instead, for years, only children of management were hired." Compl. ¶ 19. During employment, the plaintiff supervised the following interns: K.

Gates, the daughter of former NHES Deputy Commissioner Darrell J. Gates; N. Jamak and S. Jamak, daughter and son of former NHES Benefits Adjudication Supervisor Sandra Jamak; S. Cloutier, niece of "L.B," Programs Technician II; W. Flanders, daughter of former NHES Commissioner Tara G. Reardon; L. O'Neill, daughter of Colleen O'Neill, NHES Assistant Commissioner and supervisor of the plaintiff's current direct supervisor. Compl. ¶¶ 5–6, 9–10, 18.

Between September 2010 and July 2011, the plaintiff began to experience problems when dealing with these interns. *See id.* ¶¶ 22A–22V. The problems included, but were not limited to: (1) interns demanding that they be paid for lunch when lunch is unpaid; (2) interns receiving special treatment; (3) interns demanding that they be permitted flex schedules and being allowed to work irregular hours; (4) interns being paid for time they did not work; and (5) interns being held to a different standard than others with respect to their work. As evidenced by the allegations in the complaint, this behavior included fraud, waste, or abuse in the expenditure of public funds. Such behavior was unethical and criminal. *Id.* ¶ 23.

The plaintiff raised these issues with her superiors, but they disregarded her complaints. Subsequently, the defendants subjected the plaintiff to a hostile work environment by giving her a poor performance review based on the anger of the interns and their parents. Individual defendants threatened her job, were hostile to her, and created false allegations against her. Despite these threats, the plaintiff continued to report her complaints and, indeed, brought them to the attention of the Executive Council. On June 13, 2011, she was "forced to publicly share that she felt the summer interns should be let go because they are summer interns and casual help." Compl. ¶ 59. By "sharing" this statement with management, she suffered "further mistreatment." *Id.*

On August 8, 2011, the plaintiff's entire unit was the subject of a reduction in force ("RIF"). The plaintiff was targeted for a lay off due to her complaints that the process was "ir-

regular." *Id.* ¶ 66. As a result, the plaintiff accepted an offer to a lower position. *Id.* ¶ 72. While she was eventually reinstated, her new position is "very different, not as prestigious, her supervisory duties were removed, her pay and benefits were severely decreased ... and she has been the subject of further retaliation." *Id.* ¶ 117. As a result of her treatment, the plaintiff filed an appeal with the Personnel Appeals Board ("PAB") alleging in part that NHES violated personnel rules. The complaint alleges that the appeal was eventually resolved, but does not specify the resolution. Compl. ¶ 88.

The plaintiff continues to be harassed and subject to retaliation at work. Examples of such harassment and retaliation include: (1) not being invited to educational seminars and other work meetings; (2) being taunted, stared at, and subject to rude comments; (3) being micromanaged by her supervisor's supervisor; (4) being forced to leave a two-day training program after only one day; (5) being falsely accused of violating telephone password policy; (6) not being provided with answers to her question by coworkers; and (7) being referred to as a "witch" in reference to her activities.

The instant action followed. The plaintiff asserts claims against all defendants under: (1) RSA 275-E ("Whistleblowers' Protection Act"); (2) RSA 98-E ("Freedom of Expression"); (3) intentional infliction of emotional distress; and (4) violation of constitutional rights. Additionally, the plaintiff asserts a claim for "wrongful discharge/wrongful demotion" against defendant NHES. Finally, the plaintiff asserts claims against the individual defendants of intentional interference with contractual relations and interference with First Amendment rights contrary to 42 U.S.C. § 1983.

III

In their motion to dismiss, the defendants assert that the plaintiff has failed to state claims upon which relief can be granted. Additionally, to the extent that the plaintiff has stated claims

upon which relief may be granted, the defendants argue that various theories of immunity bar the plaintiff's action. In her objection, the plaintiff argues that her claims are reasonably susceptible of a construction that would permit recovery and not barred by immunity. The court will first address the parties' arguments with respect to the defendants' motion to dismiss for failure to state a claim and will subsequently address the defendants' immunity arguments.

The defendants argue that Count I of the plaintiff's complaint, which alleges a claim under the whistleblowers' act, must be dismissed because the plaintiff has not asserted facts to support the requisite elements of the claim. The defendants further argue that the plaintiff has already received all the remedies available to her under law.

The whistleblowers' act provides:

> No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because: (a) [t]he employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States; or (b) [t]he employee objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law.

RSA 275-E:2, I (a) and (b). When reporting an alleged violation, an employee is not required to expressly identify the law allegedly violated. *Appeal of Fred Fuller Oil Co., Inc.*, 144 N.H. 607, 610 (2000). Whether an employee "is entitled to bring a whistleblower claim presents an issue of statutory interpretation, which is a matter of law...." *Appeal of Ne. Rehab. Hosp.*, 149 N.H. 83, 85 (2003).

To establish her whistleblower claim, the plaintiff must show that "1) [s]he engaged in an act protect by the whistleblowers' protection statute; 2) [s]he suffered an employment action proscribed by the whistleblowers' protection statute; and 3) there was a causal connection between the protected act and the proscribed employment action." *Appeal of Seacoast Fire Equipment*

Co., 146 N.H. 605, 608 (2001). If the plaintiff makes out the necessary elements of her whistle-blower claim, she is only entitled to the remedies specified in the statutory scheme. *See* RSA 275-E *et seq*. The rights and remedies provided in the statute include: reinstatement, back-pay, reasonable attorney fees and costs, restoration of fringe benefits and seniority rights, and appropriate injunctive relief. *See* RSA 275-E:2, II; RSA 275-E:4, I.

"'[T]he goal of the remedial provisions of [RSA chapter 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.'" *In re Hardy*, 154 N.H. 805, 816 (2007), quoting *Appeal of Osram Sylvania*, 142 N.H. 612, 619 (1998). The relief provided in RSA 275-E is equitable in nature. *See E.D. Swett, Inc. v. N.H. Comm'n for Human Rights*, 124 N.H. 404, 411–12 (1983). 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 In re Hardy*, 154 N.H. at 816, citing *E.D. Swett, Inc.*, 124 N.H. at 411–12.

Here, the plaintiff has set forth sufficient facts to sustain a claim under RSA 275-E. She asserts that the defendants violated RSA 275-E by "harassing, abusing, intimidating, discharging, threatening and otherwise discriminating against [her]" because she reported in good faith actions that she believed were violations of law, rules and regulations. These well-pled facts are susceptible of a construction that would support a finding that the plaintiff engaged in activity protected by the statute by attempting to report behavior that she believed was illegal. Additionally, the plaintiff has adequately alleged that she has suffered adverse employment action in the form of discrimination and harassment during her employment. Finally, the plaintiff has sufficiently alleged a causal connection between the protected acts and the proscribed employment

action. As a result, the plaintiff has set forth a cognizable claim under the whistleblowers' statute.

The defendants argue that even if the plaintiff has stated a claim under the whistleblowers' act, it should be dismissed because the plaintiff has already received all the remedies available under the statute. The plaintiff disagrees. She argues that she has not received all back pay she is owed in addition to other remedies under the statute. While the court agrees with the defendants' position as it applies to compensatory damages that fall outside the purview of the statute, it cannot determine on this record that the plaintiff's claim is limited to such compensatory damages. Indeed, the parties dispute the remedies the plaintiff has already received. Because the court must construe all inferences in favor of the plaintiff, the court concludes that the defendants' motion to dismiss Count I for failure to state a claim must be denied.

The defendants next argue that the plaintiff's claim for "wrongful termination/demotion" (Count II) must be dismissed. The defendants provide the following reasons for dismissal: (1) the plaintiff was never discharged; (2) New Hampshire does not recognize the tort of wrongful demotion; and (3) the complaint does not establish an at-will employment relationship, which is necessary for sustaining an action of wrongful discharge. In a wrongful termination case, the plaintiff must prove two elements. "First, the plaintiff must show that the defendant was motivated by bad faith, malice, or retaliation in terminating the plaintiff's employment." *Cloutier v. Great Atl. & Pac. Tea Co., Inc.*, 121 N.H. 915, 921 (1981). "Second, the plaintiff must demonstrate that [she] was discharged because [s]he performed an act that public policy would encourage, or refused to do something that public policy would condemn." *Id.* at 922.

The plaintiff's complaint concedes that she is still employed by defendant NHES. The plaintiff's tenure with defendant NHES did not end; rather, the plaintiff accepted a different posi-

tion when her entire unit was subject to a RIF. Thereafter, the plaintiff has been reinstated to a position in NHES with seniority. Because a wrongful termination case necessarily requires a plaintiff to be terminated from employment, the court concludes that the plaintiff has failed to state a claim upon which relief may be granted. As a result, the defendants' motion to dismiss Count II must be granted.[1]

Nevertheless, the plaintiff argues that her current position is different, less prestigious, and her pay and benefits have been severely decreased. *See* Compl. ¶ 117. Thus, plaintiff argues that she has been wrongfully demoted and is entitled to compensation. The court disagrees. New Hampshire does not recognize a cause of action for "wrongful demotion" and the court declines the plaintiff's invitation to adopt such a cause of action at this time.

The defendants next argue that the plaintiff has failed to state a claim under RSA 98-E, titled "Public Employee Freedom of Expression" (Count III). RSA 98-E:1 provides, in pertinent part, "a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies." The statute further states that "[n]o person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee." RSA 98-E:2,

The plaintiff's allegations support a claim under RSA 98-E. The complaint asserts that the plaintiff expressed concerns about illegal and unethical activities to numerous individuals and agencies, both within NHES and outside the agency, and the defendants interfered with her ability to express those views through their conduct, as described in the plaintiff's complaint. Consequently, the defendants' motion to dismiss Count III for failure to state a claim must be denied.

[1] Based on the court's ruling, the court declines to address the defendant NHES' remaining arguments with respect to this claim.

The defendants next argue that the plaintiff has failed to state a claim of intentional infliction of emotional distress (Count IV). "In order to make out a claim for intentional infliction of emotional distress, a plaintiff must allege that a defendant 'by extreme and outrageous conduct, intentionally or recklessly cause[d] severe emotional distress to another." *Tessier v. Rockefeller*, 162 N.H. 324, (2011), citing *Morancy v. Morancy*, 134 N.H. 493, 496 (1991). "In determining whether conduct is extreme and outrageous, it is not enough that a person has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice." *Id.* "Liability has been found only where conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

A defendant's position of authority over a plaintiff is relevant to whether his actions could reasonably be construed as extreme and outrageous. "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." RESTATEMENT (SECOND) OF TORTS § 46, cmt. e at 74.

Here, the complaint is susceptible of a construction that would allow recovery on a claim of intentional infliction of emotional distress. The plaintiff alleges that the defendants harassed, retaliated against, intimidated, abused and humiliated her, causing severe emotional distress. The plaintiff alleges that the defendants' conduct was "payback" because she spoke out about perceived misbehavior taking place in the workplace that was illegal and unethical. Moreover, the defendants in this case are individuals in a position of authority or power over the plaintiff. Thus, the defendants' motion to dismiss Count IV for failure to state a claim must be denied.

The defendants next argue that the plaintiff has failed to state a claim of intentional interference with contractual relations (Count V). New Hampshire recognizes the tort of intentional interference with contractual relations. *See, e.g., Montrone v. Maxfield*, 122 N.H. 724, 726 (1982). "[T]he elements necessary to plead a cause of action for tortious interference with contractual relations are 'that (1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally and improperly interfered with this relationship; and (4) the plaintiff was damaged by such interference.'" *Jay Edwards, Inc.*, 130 N.H. at 46, quoting *Emery v. Merrimack Valley Wood Prods.*, 701 F.2d 985, 988 (1st Cir. 1983). "Only improper interference is deemed tortious in New Hampshire." *Roberts v. General Motors Corp.*, 138 N.H. 532, 540 (1994).

Here, the plaintiff has alleged that she has an economic relationship with NHES; the individual defendants knew of this relationship; the individual defendants intentionally and improperly interfered with this relationship; and the plaintiff was damaged by the interference. Thus, at this early stage in the litigation, the plaintiff has established a claim for tortious interference with contractual relations.

The defendants nevertheless contend that the plaintiff has failed to state a claim for intentional interference with contractual relations because, assuming the plaintiff did have an economic relationship with defendant NHES, defendant NHES was not a third party with respect to the relationship between the plaintiff and the individual defendants. They argue that the individual defendants were acting within the scope of their employment as NHES supervisors. The court is not persuaded. An individual does not act within the scope of his employment if his decision "was motivated by actual malice, where actual malice is defined as bad faith, personal ill-will, spite, hostility, or a deliberate intent to harm the plaintiff." *Soltani v. Smith*, 812 F. Supp. 1280,

1298 (1993), citing *Piekarski v. Home Owners Sav. Bank*, 956 F.2d 1484, 1495 (8th Cir. 1992). In this case, the plaintiff has set forth sufficient facts to show that the individual defendants interfered with the plaintiff's contractual relations and were motivated by a deliberate intention to harm her. As a result, defendant NHES was a third party with respect to the relationships between the plaintiff and the individual defendants. Thus, defendants' motion to dismiss Count V for failure to state a claim must be denied.

The defendants next argue that the plaintiff has failed to state a claim that her constitutional rights were violated (Count VI) and a claim under 42 U.S.C. §1983 (Count VII).[2] "To determine whether an adverse employment action against a public employee violates her first amendment free speech rights, this Court has articulated a three-part inquiry." *Decotiis v. Whittemore*, 635 F.3d 22, 29 (1st Cir. 2011). "First, a court must determine whether the employee spoke as a citizen on a matter of public concern." *Id.* (citations and quotation omitted). "Second the court must balance ... the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees." *Id.* "Third, the employee must show that the protected expression was a substantial or motivating factor in the adverse employment decision." *Id.* In making this determination, a court must assess whether the speech underlying the claim was made pursuant to the employee's official duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). If the employee's speech is made within the capacity of her duties, she has no first amendment claim because "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties." *Id.* at 421–22.

[2] The plaintiff has voluntarily nonsuited defendant NHES and the individual defendants in their official capacities with respect to Counts VI and VII.

Here, the plaintiff has pled facts sufficient to sustain Counts VI and VII. The defendants argue that all of the plaintiff's statements regarding allegedly illegal activities at her place of employment were made in the course of the plaintiff's supervisory duties. The court disagrees. At this stage in the litigation, the specific scope of the plaintiff's supervisory duties is unclear, as are the nature and timing of the comments made by the plaintiff. The court must therefore resolve the ambiguity by construing the complaint in the light most favorable to the plaintiff. Under this assumption, the complaint is susceptible of a construction that would permit recovery on Counts VI and VII. Accordingly, the defendants' motion to dismiss Counts VI and VII for failure to state a claim must be denied.

IV

Having addressed the parties' arguments with respect to the defendants' motion to dismiss for failure to state a claim, the court turns to the defendants' immunity arguments. The defendants have asserted the following types of immunity: sovereign immunity, official immunity, discretionary immunity, and qualified immunity. "Various concepts of immunity exist under both common law and statutory law to protect governmental entities and public officials from liability for injury allegedly caused by official conduct." *Everitt v. Gen. Elec. Co.*, 156 N.H. 202, 209 (2007). Immunity is based upon the recognition that "certain essential, fundamental activities of government must remain immunity from tort liability so that our government can govern." *Id.* at 210.

"Sovereign immunity protects the State itself from suit in its own courts without its consent, and shields it from liability for torts committed by its officers and employees." *Conrad v. N.H. Dept. of Safety*, __ N.H. __ (slip op. at 8) (decided Nov. 6, 2014). "With respect to personal liability for public offices and employees, the doctrines of qualified immunity and official immunity provide immunity for wrong acts committed within the scope of their governmental em-

ployment." *Id.* "Qualified immunity shields against lawsuits alleging constitutional violations, such as claims brought under 42 U.S.C § 1983." *Id.* Official immunity shields against lawsuits alleging common law torts, such as negligence." *Id.* (quotations omitted). "The goal of official immunity is to protect public officials from the fear of personal liability, which might deter independent action and impair effective performance of their duties." *Id.* "A genuine need exists to preserve independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits." *Id.*

> It would be manifestly unfair to place any public official in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight.

Id. Questions with respect to immunity should be decided before trial, if at all possible. *Id.* With these principles in mind, the court addresses the parties' specific arguments below.

The defendants begin by arguing that the plaintiff's claims of wrongful discharge (Count II), intentional infliction of emotional distress (Count IV), and intentional interference with contract (Count V) are barred by sovereign immunity. *See* RSA 541-B:19, I (d). Because Count II has already been dismissed, the court confines its analysis to Counts IV and V.

> RSA 541-B:19, I(d) provides sovereign immunity for
>
> [a]ny claim arising out of an intentional tort, ... provided that the employee whose conduct gives rise to the claim reasonably believes, at the time of the acts or omissions complained of, that his conduct was lawful, and provided further that the acts complained of were within the scope of official duties of the employee for the state.

Culotta v. N.H. Dept. of Labor, 142 N.H. 304, 306 (1997) (bracket and ellipsis in original). Wrongful discharge, intentional infliction of emotional distress, and intentional interference with contractual relations are all intentional torts. *See Porter v. City of Manchester*, 151 N.H. 30 (2004). Thus, as the defendants argue, "[t]he State is immune from an intentional tort claim as

long as the employee giving rise to the conduct complained of reasonably believes that the conduct was lawful and within the scope of duties." Defs.' Mem. Supp. Mot. to Dismiss at 20.

The intentional torts in this case stem from the plaintiff's allegations that she was illegally chosen for layoff and demotion, as well as from certain actions taken by the individual defendants during the course of her employment at NHES. If the court construes all inferences in favor of the plaintiff, as it must, it cannot make a conclusive determination as to whether the defendants reasonably believed that their conduct was lawful, nor can it determine whether the acts were committed within the scope of the defendants' official duties. As a result, the defendants' assertion of sovereign immunity is not amenable to resolution on the pleadings alone.

Similarly, the defendants argue that the plaintiff's tort claims are barred by official immunity. RSA 541-B:19, I(b) provides:

> Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter shall not apply to ... [a]ny claim based upon and act or omission of s a state officer, employee, or official when such officer, employee or official is exercising due care in the execution of any statute or any rule of a state agency.

Under the same standard—accepting the facts asserted in the complaint—the court cannot resolve the defendants' official immunity claim on the pleadings alone. The plaintiff alleges that the defendants acted individually and in concert to retaliate against her through hostile acts in the workplace. Construing all inferences in her favor, the complaint is reasonably susceptible to a construction that would support a finding that the defendants did not exercise due care. As a result, the court cannot conclude that official immunity bars the plaintiff's cause of action based on the pleadings.

Further, the defendants argue that the plaintiff's tort claims are barred by discretionary immunity. RSA 541-B:19, I(c) provides:

> Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter shall not apply to ... [a]ny claim based upon the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or a state officer, employee or official acting within the scope of his office or employment.

"In resolving discretionary immunity questions, [the court] distinguish[es] between planning or discretionary functions and functions that are purely ministerial." *Appeal of N.H. Dep't of Transp.*, 159 N.H. at 74 (quotation omitted). "When the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability." *Ford v. N.H. Dep't of Trans.*, 163 N.H. 284, 295 (2012) (citation omitted).

Here again, the plaintiff's allegations in the complaint are susceptible of a construction that would allow recovery. At this stage, it is unclear whether the defendants' actions fall within the purview of discretionary immunity—the defendants' particular conduct in this case may or may not be characterized as involving a "high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." The court must therefore resolve this ambiguity in favor of the plaintiff.

The defendants next assert that they are entitled to qualified immunity on the plaintiff's freedom of expression constitutional claims. *See Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (establishing qualified immunity from suit); *Everitt*, 156 N.H. at 209 (qualified immunity protects public officials and employees from personal liability under § 1983 for wrongful acts committed within the scope of their government employment). Under the doctrine of qualified immunity, "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their con-

duct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Snelling v. City of Claremont*, 155 N.H. 674, 684 (2007). For the same reasons articulated above, it is premature to rule on this issue, given the current state of the record. The defendants' qualified immunity argument cannot be decided on the pleadings alone.

Finally, the defendants assert that the state law claims against individual defendants are barred by RSA 541-B:9-a because the plaintiff's allegations fail to demonstrate that the individual defendants acted in a wanton and reckless manner. RSA 541-B:9-a provides:

> When a claim filed pursuant to this chapter is against both the state and an agent, official or employee of the state, the court shall determine whether the state is responsible for the actions of the agent, employee or official. If the court determines that the state is responsible for the actions of the agent, employee or official; the agent, employee or official shall be dismissed as a defendant and the plaintiff shall proceed solely against the state.

Under RSA 99-D:1, the state is not responsible for the wanton or reckless actions of its agents.

The plaintiff's allegations are susceptible of a construction that allows recovery on the state law claims against the individual defendants. The plaintiff alleges that the individual defendants acted individually and in concert to retaliate against her through hostile acts in the workplace. Construing all inferences in the plaintiff's favor and given the current state of the record, the court cannot dismiss the state law claims against the individual defendants based on the pleadings alone.

Given the aforementioned considerations and in light of the need to resolve issues of immunity as early as possible, the court will schedule an evidentiary hearing. Following the evidentiary hearing, the court shall determine whether immunity bars the plaintiff's claims.

V

Based on the foregoing, the court concludes that complaint is not susceptible of a construction that would permit recovery on Count II (wrongful discharge/wrongful demotion). Ac-

cordingly, the defendants' motion to dismiss Count II for failure to state a claim is GRANTED. The complaint is susceptible of a construction that would permit recovery on the remaining counts. Accordingly, the defendants' motion to dismiss the remaining counts is DENIED. This is without prejudice to the defendants' ability to assert their arguments that various doctrines of immunity bar the present action, which shall be resolved based on the record developed at an evidentiary hearing to be scheduled by the court. The parties shall contact the clerk within 20 days of this order to schedule the evidentiary hearing. Unless the parties specify otherwise, one day will be allocated.

So ORDERED.

Date: April 20, 2015

LARRY M. SMUKLER
PRESIDING JUSTICE

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **Michelle Clark v State of New Hampshire Department of Employment Security, et al**
Case Number: **217-2014-CV-00243**

Enclosed please find a copy of the court's order of August 02, 2017 relative to:

ORDER

August 03, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Leslie Hughes Johnson, ESQ; Lynmarie C. Cusack, ESQ; Anne M. Edwards, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Michelle Clark

v.

State of New Hampshire Department of Employment Security, *et al.*

No. 217-2014-CV-243

ORDER

The Plaintiff, Michelle Clark, brought this action against the Defendants— State of New Hampshire Department of Employment Security ("NHES"); Tara G. Reardon; Darrell L. Gates; Dianne M. Carpenter; Gloria J. Timmons; Colleen S. O'Neill; and Sandra Jamak—asserting claims under various theories: RSA 275-E, the whistleblower's protection act (Count I); wrongful discharge/wrongful demotion (Count II); RSA 98-E *et seq.*, violation of statutory freedom of expression rights (Count III); intentional infliction of emotional distress (Count IV); intentional interference with contractual relations (Count V); violation of constitutional rights (Count VI); and interference with First Amendment rights in violation of 42 U.S.C. § 1983 (Count VII). Following the Defendants' filing of a Motion to Dismiss and a six-day evidentiary hearing on immunity, the Court dismissed Counts II and IV–VII. As a result, only Counts I and III remain. Before the Court is the Defendants' Motion for Summary Judgment on the two remaining counts. The Court held a hearing on the motion on June 26, 2017. For the reasons stated in this Order, the Motion for Summary Judgment is GRANTED.

I

To prevail on a motion for summary judgment, the moving party must "show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, 'sufficient . . . to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial.'" Phillips v. Verax Corp., 138 N.H. 240, 243 (1994) (quotation omitted). A fact is material if it affects the outcome of the case under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the Court considers the evidence, and all inferences properly drawn from it, in the light most favorable to the nonmoving party. Sintros v. Hamon, 148 N.H. 478, 480 (2002).

II

The individual defendants in this action are current or former NHES employees. The Plaintiff began working for NHES in the mid-1990s, and held various positions within the department, eventually becoming a Supervisor II in the fall of 2010. Although the plaintiff's supervisor position was initially temporary, it became permanent in July 2011. (Clark Aff. ¶ 15, Mar. 27, 2017.) As part of her role, the Plaintiff supervised approximately 15 people, including several "interns": N. Jamak, K. Gates, and S. Cloutier. (Clark Aff. ¶ 12.) N. Jamak is the daughter of Defendant Sandra Jamak, the Plaintiff's supervisor from 2009 to 2010. Clark v. State of N.H. Dep't. of Emp't Sec., Merrimack County Superior Ct., No. 217-2014-CV-243, at 5 (Dec. 11, 2015) (Order, Mangones, J.) ("Immunity Order"). K. Gates is the daughter of Defendant Darrell Gates, the former deputy commissioner of NHES. Id. S. Cloutier did not have a parent working for NHES. Id.

Once the Plaintiff became the supervisor, she began to have problems with the

interns. These problems, which the Court laid out in its Immunity Order, included interns seeking to be paid for lunch breaks when such breaks were not subject to compensation, interns working irregular hours, interns failing to accurately record their time, interns working outside their assigned clerical duties, interns failing to call out if they were going to be absent, an intern bringing her boyfriend into work, and parents of interns occasionally talking to the Plaintiff about their children. Id. The Plaintiff raised her concerns about the interns with her superiors, including Defendant Gloria Timmons, the Plaintiff's supervisor beginning in 2010. Id. at 6.

The Plaintiff's first three-month evaluation in her new role as supervisor was positive. However, the Plaintiff received a negative review in her six-month evaluation. (Clark Aff. ¶ 28.)

In the summer of 2011, NHES conducted layoffs as part of a reduction in force. The Plaintiff received a layoff letter on August 2, 2011. (Def.'s Mem. Supp. Summ. J. Ex. A at 971.) However, in August 2011, the Plaintiff accepted a demotion in lieu of layoff to a position as a Program Assistant I. (Def.'s Mem. Supp. Summ. J. Ex. C at ¶ 4.) The Program Assistant I position was a labor grade 12, step 8 position. (Id.) As a Supervisor II, the Plaintiff had been at a labor grade 21, step 7 position. (Id. at ¶ 3.)

On September 1, 2011, the Plaintiff appealed her demotion in lieu of layoff to the Personnel Appeals Board ("PAB"). (Def.'s Mem. Supp. Summ. J. Ex. 2 to Ex. B.) In her appeal, the Plaintiff claimed she was demoted because she expressed concerns about the work behaviors of other NHES employees and that she was pressured to treat the children of management differently than other employees that she supervised. (Id.) The Plaintiff further claimed she was demoted because she raised concerns about "fraud, waste, or abuse," and that she was pressured to illegally pay K. Gates. (Id.)

In June 2012, the Plaintiff filed an ethics complaint with the Executive Branch Ethics Committee against Defendant Reardon. (Def.'s Mem. Supp. Summ. J. Ex. A at 1010.) On June 7, 2012, the Plaintiff filed a whistleblower complaint, which she later abandoned. (Id. at 1012.)

On July 16, 2012, George Copadis was appointed to be the new commissioner of NHES after Defendant Reardon resigned. (Def.'s Mem. Supp. Summ. J. Ex. 11 to Ex. B.) Following his appointment, Commissioner Copadis met with the Plaintiff to discuss her complaints and ultimately reinstated her to a position with "like seniority, status and pay equal to that which [she] had when [NHES] went through the 2011 mandated reduction in force." (Id.) The Plaintiff does not dispute that she was reinstated to a labor grade 21, step 7 retroactive to and effective as of August 19, 2011, the date of her demotion. (Pl.'s Mem. of Obj. to Mot. for Summ. J. 1, 11–12.) In March 2013, the Plaintiff was paid back-pay. (Def.'s Mem. Supp. Summ. J. Ex. C at ¶ 8.) The Governor and Executive Council approved retroactive back-pay for fiscal years prior to 2013, and the Plaintiff received $11,497.13 for that time. (Id. at ¶¶ 7–8.) The Plaintiff also received $8,937.00 in back-pay for fiscal year 2013. (Id. at ¶ 8.) Additionally, the Plaintiff's negative review for her six-month evaluation was removed from her personnel file. (Id. at ¶ 10.)

On October 3, 2013, the Plaintiff withdrew her PAB appeal. (Def.'s Mem. Supp. Summ. J. Ex. 5 to Ex. B.) The Plaintiff filed the instant action in May 2014. As a result of the Court's December 15, 2015 immunity order, only the Plaintiff's RSA chapter 275-E and RSA chapter 98-E claims remain. The Defendants now seek summary judgment on the remaining claims, to which the Plaintiff objects. The Court addresses the parties' arguments in turn.

III

The Defendants first argue they are entitled to summary judgment on Count I because the Plaintiff has already been provided the statutory remedy under RSA chapter 275-E, the whistleblower's protection act. The whistleblower's protection act provides, in pertinent part, as follows:

> I. No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because:
>
> (a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States; or
>
> (b) The employee objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law. . . .

RSA 275-E:2.

Under RSA 275-E:2, II, the Court "may order reinstatement and back-pay, as well as reasonable attorney fees and costs, to the prevailing party" in a whistleblower protection action. Likewise, RSA 275-E:4, which provides an employee alleging an RSA chapter 275-E violation the ability to obtain a hearing with the Department of Labor, states that following such a hearing, "the labor commissioner or the designee appointed by such commissioner . . . shall order, as the commissioner or his designee considers appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies." Thus, the rights and remedies provided in RSA chapter 275-E include: reinstatement, back-pay, reasonable attorney fees and costs, restoration of fringe benefits and seniority rights, and appropriate injunctive relief.

"[T]he goal of the remedial provisions of [RSA chapter 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." In re Hardy, 154 N.H. 805, 816 (2007) (quotation omitted). The relief provided in RSA chapter 275-E is equitable in nature. See E.D. Swett, Inc. v. N.H. Comm'n for Human Rights, 124 N.H. 404, 411–12 (1983); see also Clark v. State of N.H. Dep't. of Emp't Sec., Merrimack County Superior Ct., No. 217-2014-CV-243, at 6 (Apr. 20, 2015) (Order, Smukler, J.). When a statute's remedial provision is equitable, the New Hampshire Supreme Court has declined to interpret such a statute to authorize compensatory damages and other forms of relief. See In re Hardy, 154 N.H. at 816.

Here, following her demotion in lieu of layoff, the Plaintiff was reinstated to a position with "like seniority, status and pay equal to that which [she] had when [NHES] went through the 2011 mandated reduction in force." (Def.'s Mem. Supp. Summ. J. Ex. 11 to Ex. B.) As a result, she was reinstated to a labor grade 21, step 7 retroactive to and effective as of August 19, 2011. In March 2013, the Plaintiff was also paid back-pay. In particular, the Governor and Executive Council approved retroactive back-pay for fiscal years prior to 2013 in the amount of $11,497.13. The Plaintiff also received $8,937.00 in back-pay for fiscal year 2013. Additionally, the Plaintiff's negative her six-month performance evaluation was removed from her personnel file.

The Plaintiff claims that had she not been demoted, she would have been promoted to a labor grade 24, thus receiving an increase in pay. The Court finds this claim to be speculative and without support. The Plaintiff additionally argues that she will lose front pay in the future because she is currently "maxed out" on her wages in her current position. RSA chapter 275-E, however, does not contemplate front pay as a

remedy. The Plaintiff further alleges that she had to use sick time for FMLA leave, for which she could be compensated. However, the Plaintiff was able to keep her employee benefits, such as sick leave, despite her demotion, because she was still employed by the State.

The Plaintiff further argues that she was not fully compensated with back-pay due to the tax consequences she received upon being paid the back-pay. The language of the remedial provisions within RSA chapter 275-E do not provide for an increased award in order to compensate for tax consequences. Nor is the Court aware of any case in this jurisdiction permitting the Court to "gross-up" damages in order to compensate a prevailing plaintiff for the tax consequences of an award. See Carney v. State of N.H. Dep't. of Health & Human Servs., Belknap County Superior Ct., No. 16-CV-047, at 4–7 (Nov. 1, 2016) (Order, O'Neill, J.) (denying claim for "gross-up" due to tax consequences).

The Plaintiff also argues that she is entitled to compensatory damages for harassment and retaliation. However, as discussed above, compensatory damages are not available here. The Plaintiff additionally makes a vague claim that her "status" has not been restored as she no longer supervises others. (Pl.'s Mem. of Obj. to Mot. for Summ. J. 1, 13.) The Plaintiff does not dispute that she was reinstated to a labor grade 21, step 7. The loss of any status associated with supervising others is not the type of fringe benefit contemplated by RSA chapter 275-E. Although the statute does not define the meaning of "fringe benefits," such benefits are typically understood to include pension plans, health insurance, life insurance, and disability insurance. See Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 211 (2009).

The Plaintiff has already been provided the statutory remedies available to her

under RSA chapter 275-E. The Defendants, therefore, are entitled to summary judgment on Count I of the Plaintiff's complaint. Thus, the Court need not address the Defendants' argument that the Plaintiff cannot show the necessary causal connection to establish a whistleblower protection claim.[1]

IV

RSA 98-E:1, the Public Employee Freedom of Expression Act, provides, in pertinent part, "a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies." See also Appeal of Booker, 139 N.H. 337, 341 (1995) ("RSA 98–E:1 grants State employees a 'full right' to discuss *publicly* all matters, and to give opinions as an *individual* on all matters concerning the state and its policies.") (quotation omitted) (emphasis added). The statute further states that "[n]o person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee." RSA 98-E:2. The Defendants also argue they are entitled to summary judgment on Count III because the Plaintiff has not engaged in public discourse as is necessary for an RSA chapter 98-E claim.

Here, the Plaintiff has provided evidence that she expressed her concerns about the interns to individuals within NHES, her union, the Governor's office, and the Department of Labor, that she filed an ethics complaint with the Executive Branch Ethics Committee, and participated in an investigation with the Attorney General's office. (Pl.'s Mem. of Obj. to Mot. for Summ. J. Exs. 16–18.) The Plaintiff has not provided any evidence that she discussed matters with anyone outside the State

[1] The Plaintiff additionally seeks attorney's fees and costs under RSA chapter 275-E. Although a plaintiff prevailing on a whistleblower's protection act claim may be awarded reasonable attorney's fees and costs, the Plaintiff here has not prevailed on her claim.

government, of which she is an employee. Nor has she provided evidence that she raised her concerns with anyone other than the people to whom she would be expected to raise her concerns as a State employee.

The Plaintiff additionally argues that Defendant Timmons ordered her not to speak to Senator Sharon Carlson, who was going to be at the performance review of N.C., a woman the Plaintiff supervised. (Clark Aff. ¶ 27.) Personnel evaluations are confidential and, therefore, not public. Moreover, the Plaintiff's participation in the review with Senator Carlson would have been in the role of a supervisor, not as an "individual."

As a result, the Defendants are entitled to summary judgment on Count III because the Plaintiff has not provided sufficient evidence to establish that she engaged in public discourse as is necessary for an RSA chapter 98-E claim. The Court, therefore, need not address the Defendants' argument that the Plaintiff has not established damages under RSA chapter 98-E. Nor must the Court address the Defendants' argument that the individual defendants are not responsible for damages.

In sum, for the reasons stated in this Order, the Defendants' Motion for Summary Judgment is GRANTED.

SO ORDERED

8/2/17
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Michelle Clark v State of New Hampshire Department of Employment Security, et al**
Case Number: **217-2014-CV-00243**

Enclosed please find a copy of the court's order of October 05, 2017 relative to:

ORDER

October 11, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Leslie Hughes Johnson, ESQ; Lynmarie C. Cusack, ESQ; Anne M. Edwards, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Michelle Clark

v.

State of New Hampshire
Department of Employment Security, *et al.*

No. 217-2014-CV-00243

ORDER

The Plaintiff, Michelle Clark, sued the Defendants, the State of New Hampshire Department of Employment Security, Tara G. Reardon, Darrell L. Gates, Dianne M. Carpenter, Gloria J. Timmons, Colleen S. O'Neill, and Sandra Jamak, alleging seven Counts. After the Defendants filed a motion to dismiss on immunity grounds, the Court dismissed Counts II and IV–VII. The Plaintiff now seeks reconsideration of the Court's Order dated 08/02/17, granting the Defendants summary judgment on the remaining Counts I and III, which alleged violations of RSA 275-E and RSA 98-E respectively. The Defendants object. Based on the following, the Plaintiff's Motion to Reconsider is DENIED.

I

In Count I, the Plaintiff alleged the Defendants demoted her for expressing concerns about the behavior of co-workers and supervisors. Prior to initiating this action, however, the Plaintiff was reinstated to a position with the same labor grade and salary as she had prior to her demotion, and she also received back-pay in the amount she would have earned had she not been demoted. Although the Plaintiff sought

compensatory damages in excess of this amount, the Court granted the Defendants summary judgment on Count I because, inter alia, the remedies available to the Plaintiff pursuant to RSA 275-E do not include an award of compensatory damages. The Plaintiff now argues that the Court misconstrued the law in this regard.

First, the Plaintiff contends that RSA 275-E:2, II's use of the phrase "civil suit" suggests the legislature sought to provide an avenue for aggrieved employees to obtain whatever damages would be available to a plaintiff in an average civil action. The Court disagrees. To benefit from the protections of the statute prior to its amendment in 2010, RSA 275-E:2, II required an employee to ordinarily bring an alleged violation of the law to the attention of a supervisor and allow his or her employer a reasonable opportunity to take corrective action. After the statute's amendment, however, RSA 275-E:2, II no longer requires employees to report violations to their employers, but, instead, states "[a]n aggrieved employee may bring a civil suit within 3 years of the alleged violation of this section." In this context, it is apparent that the amendment to RSA 275:2, II was intended to give employees the freedom to choose the forum for challenging violations of the law, not to expand the remedies available under the law.

Additionally, on several occasions prior to the 2010 amendment, the New Hampshire Supreme Court declined to interpret statutes akin to RSA 275-E — which grant discretion to award injunctive relief but do not expressly authorize an award of compensatory damages — as allowing for compensatory damages without "express indication from the legislature." E.D. Swett, Inc. v. New Hampshire Comm'n for Human Rights, 124 N.H. 404, 412 (1983); see also In re Hardy, 154 N.H. 805, 819–21 (2007) (Duggan, J and Dalianis, J concurring in part and dissenting in part). In light of this precedent, it is likely that had the legislature intended the amendment of RSA 275-E:2,

II to authorize courts to award compensatory damages for violations of the statute that the legislature would have done so in a more explicit manner.

The Plaintiff also argues that the Court's interpretation is incorrect because it allows statutory violations to go unpunished under certain circumstances. Relevant to this case, in her position prior to her demotion, the Plaintiff supervised several individuals, yet in her current position she has no such responsibility. The Plaintiff maintains that the responsibility to supervise co-workers constituted a "condition" or "privilege" of her employment and, therefore, by depriving her of these duties the Defendants violated RSA 275-E:2, I. Even assuming, without deciding, that the Plaintiff is correct in this regard, simply because the statute does not enable the Plaintiff to obtain compensatory damages for whatever value is attributable to her loss of supervisory responsibility does not mean the statute is entirely devoid of a remedy. For example, under the law the Plaintiff could have sought injunctive relief preventing her demotion in the first place. Moreover, the Plaintiff has failed to cite any authority for the proposition that an individual is not sufficiently "reinstated" just because her former position involved the supervision of co-workers and her new position does not.

The Plaintiff next argues that the Court has overlooked certain remedies available to her other than compensatory damages. First she contends she is entitled to reimbursement for sick time and counseling costs incurred due to the Defendant's alleged harassment, as well as mileage reimbursement for traveling expenses associated with her demotion. The Plaintiff has not, however, satisfactorily demonstrated she was deprived of any benefit owed to her pursuant to the terms of her employment. Instead, she seems to argue that had the Defendants not violated RSA 275-E she would not have required sick time, had to drive increased distances, or needed to seek counseling.

Accordingly, the Plaintiff in actuality simply seeks compensatory damages that, as the Court has explained above, are not available to her under the statute.

The Plaintiff also maintains that she is entitled to injunctive relief due to alleged ongoing intimidation and harassment in the workplace. Although her affidavit, (see Mem. of Law in Supp. of Pl.'s Obj. to Defs.' Mot. for Summ. J, Ex. 1 ¶ 35), suggests there may be a genuine issue of whether the Defendants have violated RSA 275-E since the Plaintiff was reinstated to her present position, the Plaintiff is, nonetheless, not entitled to proceed on this issue. In her Complaint, the Plaintiff alleged several examples of ongoing harassment, but the relief she explicitly sought, (see Compl. at pages 37–38), did not include a request for any relief that was both available under the statute and designed to curb the behavior of her co-workers. The Plaintiff could have expressly sought to enjoin the alleged violating behavior for example, yet the Plaintiff merely requested damages, reinstatement, an apology, and the "[p]rosecution or discipline of the individuals responsible for the violations of various laws." (Id. at page 38.) At this late stage of this litigation, the Court will not allow the Plaintiff to amend her Complaint with regards to this issue.

Nor is the Court persuaded that it erred in determining that RSA 275-E does not entitle an employee to an award of front pay. Notwithstanding the Plaintiff's reliance on McPadden v. Wal-Mart Stores E., L.P., ___ D.N.H. ___ (decided January 5, 2017) (slip op. at 4), the Court is unaware of, and the Plaintiff has not cited, any binding authority to support her position on this issue. Furthermore, based on the cases referenced earlier, in which the New Hampshire Supreme Court has declined to expansively interpret the statutory authority to grant "any injunctive relief," see E.D. Swett, Inc., 124 N.H. at 412;

In re Hardy, 154 N.H. at 819–21, it stands to reason that had the legislature intended to include front pay among RSA 275-E's remedies it would have done so expressly.

The Court is equally unpersuaded that it overlooked the Plaintiff's claim that, absent the Defendants' alleged retaliation, she would have reached a higher labor grade than she presently holds. The only evidence the Plaintiff cites in support of this theory are claims in her affidavit that — on some unspecified date — her supervisor "promised" she would be upgraded to "LG 24" and that the Plaintiff "believed" her work "was out-performing" similarly situated employees she suspected had higher labor grades than her own. (Mem. of Law in Supp. of Pl.'s Obj. to Defs.' Mot. for Summ. J, Ex. 1 ¶ 36.) The Plaintiff does not, however, cite any other evidence demonstrating her suspicions about her co-workers' labor grades and performances are anything more than speculative. The Plaintiff also has not identified the process with which her supervisor would need to comply to increase the Plaintiff's labor grade, nor has she alleged that her supervisor had unilateral authority to change the Plaintiff's labor grade. Without such evidence, no reasonable fact-finder could return a verdict in the Plaintiff's favor. See Stoyanov v. Winter, 643 F. Supp. 2d 4, 14 (D.D.C. 2009) ("[P]laintiff cannot establish pretext simply based on his own subjective assessment of his own performance . . . ."); Goldberg v. B. Green & Co., 836 F.2d 845, 848 (4th Cir. 1988) ("[N]aked opinion, without more, is not enough to establish a prima facie case of . . . discrimination . . . .").

Finally, regarding the Plaintiff's remaining arguments, including that she is entitled to pursue her claim merely to obtain attorney's fees and a "determination" whether the Defendants' violated the law, (see Mot. for Recons. at page 4), the Plaintiff failed to make these arguments in opposition to the Defendants' Motion for Summary Judgment. See Appeal of Morton, 158 N.H. 76, 79 (2008) (citing Mt. Valley Mall Assocs.

v. Municipality of Conway, 144 N.H. 642, 654–55 (2000) for the proposition that a "party cannot raise an issue for the first time in a motion for reconsideration when the issue was readily apparent at the time the party initially filed for relief"); Mt. Valley Mall Assocs., 144 N.H. at 655 ("It is in the interest of judicial economy to require a party to raise all possible objections at the earliest possible time . . . ." (emphasis in original)); Caisee Nationale De Credit Agricole v. CBI Indus., 90 F.3d 1264, 1270 (7th Cir. 1996) ("Reconsideration is not an appropriate forum for rehashing previously rejected arguments or for arguing matters that could have been heard during the pendency of the previous motion.").

II

In Count III the Plaintiff alleged violations of RSA 98-E:1. The Court granted summary judgment for the Defendants on this claim because the Plaintiff failed to satisfactorily demonstrate that she engaged in public discourse as is necessary for an RSA 98-E:1 claim. In her Motion for Reconsideration, repeating the same arguments she made in opposition to the Defendants' Motion for Summary Judgment, the Plaintiff maintains that she did in fact engage in public discourse or, alternatively, that the statute does not require public discourse as an element of a claim. As the basis of a Motion to Reconsider is limited to "points of law or fact that the court has overlooked or misapprehended," Super. Ct. Civ. R. 12(e), the Plaintiff is not entitled to simply reargue prior theories. Accordingly, the Plaintiff's Motion to Reconsider is DENIED.

SO ORDERED

10/5/17
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

COPIES OF PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES FOR APPEAL

NH CONSTITUTION

Pt 1, Art 14 [Legal Remedies to be Free, Complete, and Prompt.]

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.

STATUTES

NH RSA 21-G:22 Conflict of Interest. – Executive branch officials and classified employees shall avoid conflicts of interest. Executive branch officials and classified employees shall not participate in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties.

Source. 2004, 214:1. 2006, 21:2, eff. June 2, 2006. 2016, 57:2, eff. July 4, 2016.

NH RSA 21-G:26-a Nepotism. –

No executive branch official or classified employee shall directly hire, evaluate, set the compensation or salary for, supervise, or terminate the employment of any full-time or part-time employee, temporary employee, or member of a state board or commission if such employee or member is related to such official in one of the following ways:

I. Spouse;
II. Parent by birth or adoption;
III. Son or daughter by birth or adoption;
IV. Stepson or stepdaughter;
V. Brother or sister by whole or half blood or by adoption; or
VI. Mother-in-law, father-in-law, sister-in-law, brother-in-law, daughter-in-law, or son-in-law.

Source. 2009, 239:1, eff. July 16, 2009. 2016, 57:7, eff. July 4, 2016.

NH RSA 98-E:1 Freedom of Expression. – Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.

Source. 1979, 433:1. 2008, 202:2, eff. June 16, 2008.

NH RSA 98-E:2 Interference Prohibited. – No person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee.

Source. 1979, 433:1. 2008, 202:4, eff. June 16, 2008.

NH RSA 98-E:4 Employees' Remedies. –

I. A public employee may seek injunctive relief or maintain a civil action, or both, to recover damages for violation of this chapter in any court of competent jurisdiction by bench or jury trial.

II. If the public employee prevails, in addition to damages the court may allow the costs of the action and such attorney's fees as it finds to be reasonable to be paid by the defendant employer.

III. This chapter shall not alter or impair the rights of any person under a collective bargaining agreement or affect any other right or remedy provided in law.

Source. 1979, 433:1. 2008, 202:5, eff. June 16, 2008.

NH RSA 275-E:2 Protection of Employees Reporting Violations. –

I. No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because:

(a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States; or

(b) The employee objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law; or

(c) The employee, in good faith, participates, verbally or in writing, in an investigation, hearing, or inquiry conducted by any governmental entity, including a court action, which concerns allegations that the employer has violated any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

II. An aggrieved employee may bring a civil suit within 3 years of the alleged violation of this section. The court may order reinstatement and back-pay, as well as reasonable attorney fees and costs, to the prevailing party.

Source. 1987, 386:1, eff. Jan. 1, 1988. 2010, 340:2, eff. July 20, 2010.

NH RSA 275-E:3 Protection of Employees Who Refuse to Execute Illegal Directives.

No employer shall discharge, threaten or otherwise discriminate against any employee regarding such employee's compensation, terms, conditions, location, or privileges of employment because the employee has refused to execute a directive which in fact violates any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

Source. 1987, 386:1, eff. Jan. 1, 1988.

NH RSA 275-E:4 Rights and Remedies. –
I. Any employee who alleges a violation of rights under RSA 275-E:2 or 3, and who has first made a reasonable effort to maintain or restore such employee's rights through any grievance procedure or similar process available at such employee's place of employment, may obtain a hearing with the commissioner of labor or a designee appointed by the commissioner. Following such hearing, the labor commissioner or the designee appointed by such commissioner shall render a judgment on such matter, and shall order, as the commissioner or his designee considers appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies.
II. Decisions rendered by the commissioner of labor under paragraph I may be appealed pursuant to RSA 541.

Source. 1987, 386:1. 1992, 72:1, eff. May 20, 1992.

NH RSA 275-E:9 Protection of Public Employees. – No governmental entity shall threaten, discipline, demote, fire, transfer, reassign, or discriminate against a public employee who files a complaint with the department of labor under RSA 275-E:8 or otherwise discloses or threatens to disclose activities or information that the employee reasonably believes violates RSA 275-E:2, represents a gross mismanagement or waste of public funds, property, or manpower, or evidences an abuse of authority or a danger to the public health and safety. Notwithstanding this provision of law, public employers may discipline, demote, fire, transfer, or reassign an employee so long as the action is not arbitrary or capricious and is not in retaliation for the filing of a complaint under this chapter. Any public employee who files such a complaint or makes such a disclosure shall be entitled to all rights and remedies provided by this chapter.

Source. 2010, 340:1, eff. July 20, 2010.