

NH Supreme Court
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STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

2017-0658

Michelle Clark

v.

New Hampshire Department of Employment Security, et al.

APPELLANT'S REPLY BRIEF

Rule 7 Mandatory Appeal from
Merrimack Superior Court

Counsel for Appellant,
Michelle Clark

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Oral argument by:
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I. INTRODUCTION

Appellant is replying to those portions of Appellees' Brief to the extent necessary to clarify or expound on issues and legal arguments raised therein. Appellant will use the numbering system used by Appellees, but basically under the captions Appellant used in her Brief. Where a section is not referenced, Appellant relies on her original Brief without further comment.¹

ARGUMENT

II. (RESPONDING TO APPELLEES' II, STARTING AT A'EE. BR.:10, WHICH CORRESPONDS WITH APP. BR., VI.I., PP. 13, AND 16-24.)

A. Remedies Should Include Full Compensatory Damages

As argued in Appellant's brief, where the statute is remedial, as for workers' compensation, "all reasonable doubts will be liberally construed in a manner that favors the injured employee." *Petition of Markievitz*, 135 NH 455, 458; 606 A2d at 802 (quotation omitted)." *Petition of Blackford*, 635 A2d 501, 503, 138 NH 132 (NH, 1993). The term "civil action" could not be more broadly stated. App. Br.: 18-24. Appellees state it means anything not "criminal", which still implies the full range of damages. A'ee. Br.: 13, full argument found at 10-17.

Appellees argue that the term "civil suit" should not be rendered its usual and customary meaning. They claim that *Markievitz* supports that the term "civil suit" merely distinguishes a criminal action or administrative proceeding. However, neither "civil", "suit", nor "criminal" appear in *Markievitz*, nor is "administrative" used in that context. The Court stated that the "term

¹The Brief and its Addendum include the orders being appealed from, as well as the provisions of the relevant statutes, and is cited as "Br. #"; "App.: [page number]" refers to Appellant's separately bound Appendix (two volumes): Vol. I, App. 1-362; Vol II. p. 363 to end; and "A'ee. Br.: [page number]" refers to Appellee's Brief; "AA: [page number]" refers to Appellee's Appendix.

'claim' is not defined in the workers' compensation law. See RSA 281-A:2 (Supp.1991).

Consequently, we will construe the term according to its plain meaning in the context of the statutory scheme of which it is a part. *Appeal of Higgins-Brodersen*, 133 NH 576, 579, 578 A2d 868, 870 (1990)." *Petition of Markievitz*, 135 NH 455, 457-58 (1992).

While it is true that other states have expressly included compensatory, and sometimes punitive damages², as demonstrated below, New Hampshire has not always done so. Appellees cite a review of statutory provisions that use the term "civil suit", at A'ee. Br.: p. 13, fn 5. However, a thorough review of those statutes, found at AA 352-354, shows that, from Appellant's prospective, at worst, the meaning of "civil suit", and available damages, are ambiguous. Clearly, when the legislature wants to limit the remedy it knows how to do so, and this Court should follow the past practice of construing statutes to affect their broad remedial purpose. The citations listed by Appellants in their footnoted material support Appellant's position. For example, of the statutes listed as supporting their position that recovery in a "civil suit" (emphasis added in bolded type below) is limited, they include the following, followed by counsel's *comment*:

a. RSA 301:47: "Any person shall be liable to the association aggrieved in a **civil suit** in the penal sum of \$500 for each such offense." (*comment: sets a specific limiting dollar amount*);

b. RSA 301:48: "... shall be liable to the association aggrieved in a **civil suit** in the penal sum of \$500 for each such offense; and such association may apply to the superior court for an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceeding at law." (*comment: sets a specific limiting dollar amount*);

²E.g. Alaska: 39.90.120" "(a) A person who alleges a violation of AS 39.90.100 may bring a civil action and the court may grant appropriate relief, including punitive damages."; Massachusetts: MGL Chapter 149 Section 185 (d).

c. RSA 293-A:1.40 Act Definitions. – (18)(18) "Proceeding" includes **civil suit** and criminal, administrative, and investigatory action." (a proceeding may also include one under "293-A:14.07 Other Claims Against Dissolved Corporation. –

(a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice." (*comment: clearly all kinds of "claims" are included with the term "civil suit"*);

d. RSA 427:30 III. Refusal to Answer; False Statements: "III. If any person, firm, or corporation required by this subdivision to file any annual or special report shall fail so to do within the time fixed by the commissioner for filing the same, and such failure shall continue for 30 days after notice of such default, such person, firm, or corporation shall forfeit to this state the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable to the treasury of this state, and shall be recoverable in a **civil suit** in the name of the state brought in the superior court for the county" (*comment: sets a specific limiting dollar amount*);

e. RSA 301-A:35 Interference With Contracts. – "Any person or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association formed under this chapter or of a foreign cooperative association to breach his marketing contract with the association shall be guilty of a misdemeanor if a natural person or guilty of a felony if other than a natural person. Such person shall be liable to the association in a **civil suit** in the penal sum of \$500 for each offense." (*comment: sets a specific limiting dollar amount*);

f. RSA 260:46 - "When Toll Payment is in Default; Procedure. – If any distributor shall be in default for more than 10 days in the payment of any road tolls, interest or penalties, the department may proceed to collect the same by **civil suit**." (*comment: sets a specific limiting dollar amount, referencing the penalty amount*);

g. RSA 318-B:17-b IV (b) "Such proceeding shall be deemed a **civil suit in equity** ...". This refers to items that may be forfeited: 318-B:17-b I. "Interests in the following property, upon petition of the attorney general, shall be subject to forfeiture to the state and said property interest shall be vested in the state ...". (*comment: specifically refers to the items being forfeited*);

h. RSA 130-A:18 Civil Suits. – "Owners of pre-1978 rental housing and childcare facilities shall take reasonable care to prevent exposure to, and the creation of, lead hazards. ... To establish negligence on the part of an owner, the plaintiff in a **civil suit** shall demonstrate actual injury caused by the lead base substance. (*comment: obviously one recovering in a "civil suit" for lead poisoning is going to be seeking and recovering general compensatory damages- there was no need to spell out what damages are available in a "civil suit" under this statute*).

i. RSA 633:11 Civil Remedy. – I. A victim may bring a **civil action** against a person that commits an offense under this subdivision for damages, injunctive relief, or other appropriate relief.

V. Any individual who is a volunteer and appointed under this section as an auxiliary officer who is actually performing the duties of an auxiliary officer on a body of water in the state shall be considered a state employee for the purpose of defense and indemnification from civil suits under RSA 99-D; provided, however, that such person shall not be indemnified from any **civil suit** arising out of a criminal act. See also RSA 270:12-c Auxiliary Marine Patrol with a similar reference. (*comment: civil suits are not limited in damages*);

j. RSA 633:8, XII deals with civil forfeiture in human trafficking cases: “Such proceeding shall be deemed a **civil suit in equity** in which the state shall have the burden of proving all material facts by a preponderance of the evidence ...” (*comment: Clearly, the legislature knows how to limit remedies when it so desires.*)

k. 644:21 Searches of Portable Electronic Devices. – “Evidence obtained in violation of this section shall not be admissible in a criminal, civil, administrative, or other proceeding, except as proof of a violation of this section...

IV. A person injured by a government entity as a result of a violation of this section may file **civil suit** against the government entity.” (*comment: There is no limitation on damages in this reference to civil suit*); and

l. RSA 206:27-i Indemnification. – “Any person recognized by the executive director, department of fish and game, as a fish and game volunteer...shall be considered a state employee for the purpose of defense and indemnification from civil suits under RSA 99-D; provided, however, such a volunteer shall not be indemnified from any **civil suit** arising out of a criminal act.” (*comment: There is no limitation on damages in this reference to civil suit*);

It is clear the legislature knows how to limit damages in civil suits, and likewise, where damages are not limited has sometimes just used the term “civil suit”, for example with reference to 130-A:18, as set forth above. The failure to be more explicit about available damages is not fatal to Appellant’s claim, as more fully supported and argued in her opening Brief. This Court has repeatedly viewed remedial statutes expansively, and Appellant requests that the Court do so by construing “civil suit” to encompass compensatory and other civil damages, in addition to the listed forms of equitable relief which appear in a different sentence.

B. The Court Erred In Not Allowing Ms. Clark To Proceed On Equitable Remedies And Injunctive Relief (Responding to A’ee. Br., pp. 11-13)

It defies common sense that the DOL could provide greater relief than the court in a

“civil suit”, which implies that all appropriate relief which a person could obtain in court, whether damages or equitable relief, is available. Appellees argue that the court erred in determining remedies under both 275-E:2 and 4 were available to Ms. Clark under 275-E:9. RSA 275-E:4 contains the additional words, “any appropriate injunctive relief”, “seniority rights” and “fringe benefits”. However, under RSA 275-E:2, II, reinstatement and back pay necessarily encompass fringe benefits and seniority rights, in order to be fully accomplished, but this is not where the controversy here lies. Appellant argues that “civil suit” has no limit on types of damages, and because of the remedial nature of the statute, should be read broadly if deemed to be ambiguous.

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

Ms. Clark has not received all of the additional rights and remedies available to her if her civil suit was allowed to proceed. Appellee NHES claims that it reinstated her to a like position, which Appellant argued was not in fact similar due to status and because she supervises no one, and it is not the labor grade she should have been at due to the level of work she was doing and the promises of her supervisor, Defendant Timmons. Therefore, full back pay has not been paid. Neither has she received any injunctive relief, including a finding that the WPA was violated. App. Br., p. 14-15. Also, NHES did not in fact provide reinstatement to her prior labor grade as part of the PAB appeal; instead it was a position which Ms. Clark found for herself in her efforts to return to her prior labor grade. In addition, much many of the retaliation Ms. Clark complained about occurred after resolution of the PAB appeal, so she has received nothing to compensate her for those actions, which included having things thrown at her and sabotage of

her work, as set forth in her Br.: pp. 9-11.³

III. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT ON CLARK'S RSA 98-E'S CLAIM AS THE STATUTE PROTECTS MORE THAN PUBLIC SPEECH.

Appellant relies on her Brief supporting this section, that RSA 98-E protects much more than public speech, and that she did in fact speak publicly on numerous occasions.

IV. MS. CLARK MET THE TERMS FOR WRONGFUL DISCHARGE AND THE ISSUE OF "AT-WILL" EMPLOYMENT IS NOT UNDER APPEAL (A'EE. BR.:24-29).

A. Ms. Clark Met The Terms for Wrongful Discharge Elements

The trial court, J. Smukler, found that "[t]he plaintiff's tenure with defendant NHES did not end; rather, the plaintiff accepted a different position when her 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." App. Br.: 43-44. That order was dated April 20, 2015, before the *Cluff-Landry* case cited by Appellant in her brief as additional support. App. Br.: 53.

In *Cluff-Landry*, this Court determined that the statute of limitations began running for a wrongful discharge case when the plaintiff was given notice of a termination that would occur months in the future, in other words, that as of the date of notice to her, the wrongful discharge had occurred even though Plaintiff remained employed in the same position, and Defendant could have changed its mind. "[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 v. Roman Catholic Bishop of Manchester*, 156 A3d 147, 153 (NH, 2017); App. Br.: 30-31. Therefore, Appellees'

³As to Appellees' Section II D (A'ee. Br.: 18-19), they did not argue sovereign immunity on the statutory claims, including for the WPA, nor could they.

claim that “wrongful termination can only exist if there is actual separation from employment”, is inaccurate under NH Law, and federal citations to the 5th Circuit are not controlling. App. Br.:24-25.

Under the facts of the case at bar, Appellant was given notice of her termination on August 2, 2011, and did not accept a subsequently offered new position until August 16, 2011. App. 461 and 463. Therefore, the “reinstatement” (a term that itself indicates an absence of a position for a period of time), to the much lower grade position was after a two-week period during which the discharge was in effect, as mandated by the reasoning in *Cluff-Landry, supra*. Appellees wrongly assert that a case can accrue before all of the elements of the claim are present. Ms. Clark was terminated from her position, as indicated by the Court in its order. If that is enough in *Cluff-Landry* for the statute of limitations to commence running under RSA 508:4, I, then it should likewise be deemed a termination in this case. In addition, the Appellant was undisputedly terminated from her supervisor position.

B. The Court Did Not Dismiss Wrongful Discharge Because of the At-Will Employment Argument

While Appellant NHES made the argument about at-will employment below, the court did not accept that argument, nor rule on it, and this issue has not been cross-appealed. The Court specifically declined to address the at-will argument. App. Br.:44, fn 1. Appellant’s arguments on this issue are found in her Memorandum of Law in Support of Plaintiff’s Objection to Defendants’ Motion to Dismiss. App.:410, and 413-17, incorporated herein by reference. Succinctly, it is settled that wrongful discharge is a cause of action in tort, and refers to an “at-will employment contract.” *Porter v. Manchester*, 151 NH 30, 38-39 (2004). In the seminal wrongful discharge case, the employee was a union employee. *Monge v. Beebe Rubber Co.*, 114 NH 130, 131 (1974). In addition, Ms. Clark’s hiring was not for a definite period of time and is

therefore “at-will”. *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 NH 915, 919 (1981). However, it is clear that all employees are protected from wrongful discharge for public policy reasons, whether they are at-will with or without a contract.

C. (Responding to Appellees’ IV B) The Superior Court Incorrectly Predicted That A New Cause Of Action For Wrongful Demotion Would Not Be Created

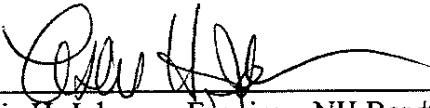
Appellant relies on her briefing of this issue, and further states that this Court has recognized causes of action when warranted and argues this is such an opportunity. In one case, the Court adopted the tort of malicious defense, which is substantially similar to malicious prosecution. *Aranson v. Schroeder*, 671 A2d 1023, 140 NH 359 (NH, 1995) (“The difference between the adoption of the tort of malicious defense and the existing power of courts to levy sanctions is the nature and extent of the damages recoverable by the aggrieved party. Is a plaintiff less aggrieved when the groundless claim put forth in the courts is done defensively rather than affirmatively in asserting a worthless lawsuit for improper purposes? We think not.”) Ms. Clark’s demotion is still affecting her, even though she is partially back to the labor grade she should have been at. The demotion was to a grade 12, many labor grades below her supervisory job, which caused a substantial loss of income, as well as emotional distress. The only lesser amount of damages for the demotion, as opposed to the discharge, is that she did not completely lose her wages.

CONCLUSION

For the reasons set forth above, and within Appellant’s opening Brief, Appellant respectfully requests that this Court reverse the trial court’s rulings and remand the case for further proceedings including trial.

Respectfully submitted,
MICHELLE CLARK, Appellant
By Her Attorney

Dated: July 23, 2018

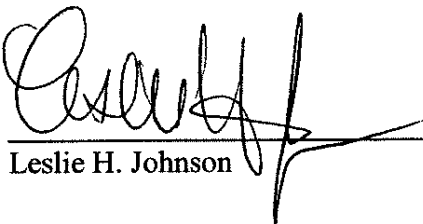
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CERTIFICATION OF SERVICE

I hereby certify on July 24, 2018 (next business day after filing), two copies of Appellant's Reply Brief are being mailed, USPS 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: July 23, 2018



Leslie H. Johnson