THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2018-0675

APPEAL OF WAYNE PREVE

Appeal Pursuant to Rule 10 From a Final Decision of the New Hampshire Department of Labor

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BRIEF OF WAYNE PREVE, APPELLANT

Respectfully submitted,

WAYNE PREVE
By his Attorneys,

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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.

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.

New Hampshire Supreme Court Rule 37(7), Immunity:

Each person shall be immune from civil liability for all statements made in good faith to any committee of the attorney discipline system, the attorney discipline office, the attorney general's office, or to this court given in connection with any investigation or proceedings under this rule pertaining to alleged misconduct of an attorney. The protection of this immunity does not exist as to: (a) any statements not made in good faith; or (b) any statements made to others. See section (20)(k). The committees' members, staff, counsel and all others carrying out the tasks and duties of the attorney discipline system shall be immune from civil liability for any conduct arising out of the performance of their duties.

New Hampshire Supreme Court Rule 40(15):

All persons shall be immune from civil liability for all of their statements made in good faith to the committee or to the supreme court or given in any investigation or proceedings pertaining to a report of alleged misconduct or complaint against a judge. The protection of this immunity does not exist as to: (a) any statements not made in good faith; and (b) any statements made to others. The committee, its staff, counsel, and investigators shall be immune from civil liability for any conduct arising out of the performance of their duties.

QUESTION PRESENTED FOR REVIEW[1]

Whether DOL erred as a matter of law by failing to apply the "mixed motive" test, after Chief Preve a) established a *prima facie*[2] case that his employer, the Town, engaged in illegal retaliation and b) presented direct evidence[3] that the Town retaliated against him for reporting attorney misconduct to disciplinary authorities established by this Court. App. at 00002; 00019-00025; 00035; 00038-39.

[1] The certified record on file with the court and available to Chief Preve did not contain "Bates stamping." Chief Preve has therefore provided a copy of the certified record copied from the Court's file and stamped "00001" through "00398" as an appendix. References to the appendix shall be indicated through the abbreviation "App." followed by a page citation.

[2] App. at 00039 ("The claimant establishes a prima facie case of illegal retaliation. He filed a report with the JCC regarding TS. The claimant was given a one week [sic] suspension by the employer. There is a causal connection [sic], between his protected reporting, [sic] to the unpaid suspension/retaliation.").

[3] App. at 00017 ("The suspension letter, states: **"You signed the letter that was ultimately mailed, and you were involved in writing it…"**); App. at 00341 (suspension letter).

STATEMENT OF THE CASE

Chief of Police Wayne Preve of the Epsom Police Department ("Chief Preve") filed a complaint with DOL on January 10, 2018. App. at 00145-00174. In his complaint, Chief Preve alleged that the Town of Epsom (herein, the "Town") retaliated against him for attempting to file a disciplinary complaint against a New Hampshire attorney with this Court's disciplinary authorities. App. at 00150-00151; 00154-00156.

DOL held a hearing on the matter on September 10, 2018. App. at 00176. DOL rendered a decision October 2, 2018. App. at 00036-00040. The basis of the decision is set forth more fully, below. Chief Preve timely filed an application for rehearing on November 1, 2018. App. 00010-00033. DOL denied the application on November 9, 2018. App. 00002. This appeal followed.

STATEMENT OF THE FACTS

I. FACTS OF RECORD

Chief Preve has served as a police officer with the Epsom Police Department since 1997. App. at 00187. After working himself up through the ranks, he became the chief of the police department in 2004. App. at 00187, 00189. Over the past fifteen years, he has served in that position without ever having been disciplined in any manner. App. at 00190.

On October 16, 2017, Lt. Brian Michael of the Epsom Police Department returned from circuit court with deeply troubling news about

the conduct of a New Hampshire attorney, an attorney whose conduct had become increasingly extreme with regard to the police department over time. App. at 00202; 00206-07; 00254

Lt. Michael reported that the attorney while within a courtroom in the 6th Circuit District Division, Concord, New Hampshire, called Lt. Michael a "sex offender" in open court and in the presence of attorneys and parties to proceedings before the Court. App. 00202-203; App. at 00305. Other witnesses corroborated Lt. Michael's account. App. at 00306-00309.

As a consequence of the attorney's behavior, Chief Preve, the chief law enforcement officer for Epsom, concluded that he should make an attorney discipline complaint to this Court's Attorney Discipline Office. App. at 00202-00206. The attorney's behavior had become increasingly adversarial and erratic and Chief Preve felt that it was his duty to bring the matter to the attention of bodies established by this Court to monitor attorneys licensed to practice law in New Hampshire. App. 00206-00208.

The complaint is labeled Exhibit 1 to the DOL hearing. App. at 00302-00327. The complaint includes a verification from Chief Preve addressing the complaint to the Attorney Discipline Office and a letter explaining the complaint and its contents. The letter, dated October 20, 2017, is mistakenly addressed to the Judicial Conduct Committee. App. at 00302-304. The letter concludes by explaining that "Attorney Soltani has had issues with my department for some time" and that Chief Preve "attached some of the calls for service, and a history of Attorney Soltani's police contact dating back to 1998" to corroborate that claim. App. 00304.

On October 24, 2017, the Judicial Conduct Committee sent the complaint back to Chief Preve and indicated that it received complaints

against judicial officers, only. App. at 00309. By that time, the attorney had received word that a complaint had been filed against him. On October 24, 2017, the attorney sent the Town an email threatening suit against individual Town employees. App. at 00301. The email makes further defamatory statements against Town employees. App. at 00301.

The Town took immediate retaliatory measures against Chief Preve. The Town instructed Chief Preve that he could not follow through with his referral to the correct disciplinary authorities, an instruction it never rescinded. App. at 00208-209. The Town then hired an outside consultant to commence an investigation and issue a report. App. at 00210, 00333. The outside consultant did not identify any law or rule that Chief Preve violated in the course of that investigation. App. at 00211-00213.

The consultant was not an attorney, had no experience with attorney disciplinary matters, did not investigate the process or procedure by which disciplinary infractions are brought to the attention of disciplinary authorities, and was not aware of any of the immunities this Court has conferred upon reporters. App. at 00269-00272. The consultant's analysis could not and did not provide conclusions of law because he was incapable of drawing any such conclusions. App. at 00272-00273.

On January 3, 2018, the Town nevertheless disciplined Chief Preve. App. at 00341. The Town imposed a one-week unpaid suspension without pay. App. at 00341.

The basis for the Town's decision is described in the letter addressed to Chief Preve, dated January 3, 2018, and conveying the suspension decision as follows:

This letter will serve as a notice of a ONE WEEK UNPAID SUSPENSION for your conduct on or about October 16, 2017-October 20, 2017. This matter was investigated by Alan Gould of Municipal Resources, Inc., and the following findings were made:

After an interaction with Attorney Tony Soltani in the Concord District Court during which he referred to Lieutenant Michael as a "sex offender," Lieutenant Michael returned to the office and typed a letter which was intended to be sent to the Attorney Discipline Office … regarding the incident. As part of the complaint, Lieutenant Michael included unrelated police records "to try to show the track record of what we had with Mr. Soltani." You participated in gathering and printing these police records which were sent along with the complaint. You did not redact them, despite the fact that they included not only personally identifying information about Attorney Soltani, such as his social security number, address, birth date, and birth place; but also included information about his children "because it was going to the Judicial Conduct Committee with attorneys and judges."

You signed the letter that was ultimately mailed, and you were involved in writing it, and gathering documents to be appended to it, all without any thought or concern about Attorney Soltani and his children's privacy rights. This is a violation of RSA 91-A:, IV, a violation of the Epsom Code of Ethics, and a potential violation of various criminal statutes.

Moreover, you have potentially exposed the

> town to substantial civil liability. As the Chief, you are required to know the law, to set a good example, and to not allow your officers to lead you down a path on which you are not exemplifying those qualities.

App. at 00341 (footnote omitted).

Notwithstanding these statements, at no point has any representative of the Town provided any analysis supporting any one of the conclusions of law set forth in the suspension letter. App. at 00213. Moreover, the concerns about Chief Preve's ability to manage staff appeared out of whole cloth. App. at 00214-00215. As of the date of the hearing, no law enforcement agency or official had declared that Chief Preve violated any law in making a protected report to a court-established disciplinary body. App. at 00273.

Chief Preve challenged the Town's decision to suspend him through the Town's internal dispute resolution processes. App. at 00343-00357. The Town responded by attempting to settle the matter, expressing "great respect for Chief Preve and the service he has provided to the Town." App. at 00358.

When Chief Preve made a counteroffer, App. at 00360, the Town retaliated once more by referring the matter, for the first time, to the New Hampshire Attorney General's Office, App. at 000362, 00364. By this point, the Town no longer asserted illegality but claimed to be seeking guidance. App. 00364. Chief Preve thereafter filed a complaint before DOL seeking relief for illegal retaliation. App. 00142-00174.

II. DOL'S DECISION

On this record, the DOL, through a Hearing Officer, found that Chief Preve "establishe[d] a prima facie case of illegal retaliation." App. at 00039. According to the Hearing Officer: "He filed a report with the JCC regarding TS. The claimant was given a one week [sic] unpaid suspension by the employer. There is a causal connection, [sic] between his protected reporting, [sic] to the unpaid suspension/retaliation." App. at 00039.

The Hearing Officer found, however, that "the Department is required to apply a 'pretext' analysis because of the circumstantial evidence of retaliation presented." App. at 00039 (citing *Appeal of Mary Ellen Montplaisir*, 147 N.H. 297 (2001)). The Hearing Officer found that the "pretext" analysis was to be applied because Chief Preve presented no "direct evidence" of retaliatory animus. App. at 00039.

According to the Hearing Officer: "evidence is only considered direct if it consists of statements by a decision maker that directly reflect the alleged animus and bear squarely on the contested employment decision." App. at 00039 (citation and internal quotations omitted). "Nothing in the evidence presented suggests animus on the part of the employer or retaliation based on the claimant's protected reporting. Therefore, the evidence presented is circumstantial." App. at 00039.

The Hearing Officer then proceeded to apply a "pretext" analysis, imposing upon Chief Preve the burden of persuasion. The Hearing Officer ruled against Chief Preve on the record applying that test. App. at 00040.

The Hearing Officer's subsequent application of this burden rested on a series of unsupported statements regarding what constitutes a protected

report to disciplinary authorities, including the following statement:

> Though the act of reporting an alleged violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States is protected under the statutes, it does not mean that every aspect of making that report is protected, including the employer's reasonable belief that there had been potential impropriety and/or criminality of the claimant's actions, including an unauthorized dissemination of protected information from within employer's records.

App. at 00040.

This unsupported statement regarding the law makes no logical sense, confuses parties and relevant mental states, and is representative of the deeply flawed and irrational decision-making standard adopted by DOL in this case. The statement indicates that DOL believes that Chief Preve, the petitioner in the case, is both the claimant and the employer at the same time, reporting against the employer while also acting on "the employer's reasonable belief" in making his report.

On rehearing, the Commissioner of DOL nevertheless affirmed with no additional analysis. App. at 00002.

SUMMARY OF THE ARGUMENT

Chief Preve made out a *prima facie* case that the Town, his employer, retaliated against him for reporting Attorney Anthony Soltani to the Judicial Conduct Committee, an acknowledged protective activity. Chief Preve then presented direct evidence that the Town retaliated against him because he made the report.

The direct evidence was contained in the Town's suspension letter

conveying the negative employment action Chief Preve challenged before the DOL. That same letter explained that Chief Preve received the suspension because he wrote, signed and sent a letter to the Judicial Conduct Committee. That straightforward explanation is a paradigmatic example of direct evidence of retaliation. It requires no other inference regarding the basis of the Town's decision. The Town's decision to suspend Chief Preve was based upon Chief Preve's submission of a protected report.

On that record, DOL was required to rule that Chief Preve triggered the mixed-motive test. The mixed-motive test would have placed the burden of persuasion upon the Town, a burden the Town would not have carried. The DOL's failure to apply the correct standard is the result of its basic failure to understand the legal concepts at issue in the case and to apply them properly.

Instead, DOL found for the Town by determining that information contained in Chief Preve's report was the reason the Town disciplined Chief Preve, a parsing of protected activity that is not supported by any authority. If affirmed, it would contravene this Court's policy of protecting those who seek to hold licensed attorneys accountable for misconduct through the Court's disciplinary bodies.

DOL's failure to understand the legal nature of the evidence presented to it and its consequent failure to apply the proper tests and standards in the case, all within the context of a decision infected with conclusions that do not withstand logical scrutiny, require this Court to intervene, impose reason and standards in this case, and reverse and remand the matter to DOL for proceedings consistent with this Court's decision.

STANDARD OF REVIEW

This Court will set aside decisions of DOL for two reasons. First, the Court will set aside a DOL decision if DOL has engaged in an "error of law." *See Appeal of Montplaisir*, 147 N.H. 297, 300 (citing RSA 541:13). Second, the Court will set aside a DOL decision if the Court is "satisfied, by a clear preponderance of the evidence, that such order is unjust or unreasonable." *Id.* (footnote, citations and internal quotations omitted).

This Court has looked to federal law in answering questions regarding the interpretation of the legal tests at issue in this case. *See id.* at 300 (citing *In re Seacoast Fire Equipment Co.*, 146 N.H. 605 (2001)).

In this case, Chief Preve challenges the decision of DOL to refuse to apply the "mixed motive" test in his case. The First Circuit Court of Appeals has ruled that this question is a question of law subject to *de novo* review. *See Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000) ("The question of whether particular evidence warrants a mixed-motive instruction is a question of law, subject to de novo review.").

The Court's review in this case is therefore *de novo*.

ARGUMENT

I. CHIEF PREVE RAISED A *PRIMA FACIE* CASE OF DISCRIMINATION AND PRESENTED DIRECT EVIDENCE OF DISCRIMINATION UNDER THIS COURT'S PRECEDENTS.

In this case, this Court's analysis begins with the unchallenged conclusion of the Hearing Officer that Chief Preve established a *prima facie* case of illegal retaliation after he reported an attorney to this Court's disciplinary authorities. As the Hearing Officer concluded, there was a

"causal connection" between the protected report and the disciplinary action, warranting a *prima facie* ruling. App. at 00039.

The Hearing Officer committed reversible error, however, in failing to acknowledge the presence of direct evidence of animus against Chief Preve in the case. This error arose from the Hearing Officer's apparent failure to understand the definition of "direct evidence." This error caused the Hearing Officer to err in her application of the correct burden of proof and in rendering a proper decision, generally.

"Establishing a *prima facie* case of retaliation creates a presumption that the employer unlawfully retaliated against the employee." *Appeal of Montplaisir*, 147 N.H. at 301 (citation omitted). Once a *prima facie* case is made, the question of how the case must be resolved depends upon the type of evidence of discrimination the claimant presents. "If the employee produces direct evidence that retaliation played a substantial role in a particular employment decision, then the mixed motive approach applies." *Id.* (internal quotations omitted). "If the trier of fact believes the employee's direct evidence, the burden of persuasion shifts to the employer to show that despite the retaliatory animus, it would have made the same adverse employment decision for legitimate, non-retaliatory reasons." *Id*.

Where the case does not present direct evidence, the burden of persuasion remains with the employee throughout the litigation. *See id*. at 301 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). *See also Appeal of Hardy*, 154 N.H. 805, 812 (block-quoting the *Appeal of Montplaisir* test). "Evidence is considered to be direct if it consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision." *Appeal*

of Montplaisir, 147 N.H. at 301 (internal quotations omitted) (quoting *Febres*, 214 F.3d at 60).

In *Febres*, the First Circuit concluded that an employer's admission, through testimony, that age was one of three criteria used in an employment decision, constituted sufficient direct evidence to require a "mixed-motive" instruction. *See Febres*, 214 F.3d at 61 ("Domenech listed 'age' among the pertinent criteria, signifying that this protected characteristic would be used as a criterion in some of those transfer decisions."). The First Circuit explained that: "Comments which, fairly read, demonstrate that a decisionmaker made, or intended to make, employment decisions based on forbidden criteria constitute direct evidence of discrimination." *Febres*, 214 F.3d at 61 (*citing Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) for the proposition that "the term direct evidence covers more than virtual admissions of illegality.").

In this case, the Hearing Officer ruled, by contrast: "Nothing in the evidence presented suggests animus on the part of the employer or retaliation based on the claimant's protected reporting. Therefore, the evidence presented is circumstantial." App. at 00039. This conclusion, which itself is entirely conclusory, ignores that Chief Preve's protected reporting of an attorney was identified, on the face of the letter announcing the negative employment decision, as the reason for the negative employment decision.

In other words, whereas in *Febres*, the protected activity was being employed regardless of age, 214 F.3d at 61, or in *Appeal of Montplaisir,* it was testimony before a grand jury, 147 N.H. at 299, or in *Appeal of Hardy*, it was calling foul on conflicts of interest for a regulated non-profit, 154

N.H. at 808, for Chief Preve, it was reporting Attorney Soltani to this Court's attorney and judicial disciplinary authorities.

II. DOL COMMITTED REVERSIBLE LEGAL ERROR BY FAILING TO ACKNOWLEDGE THE EXISTENCE OF SUBSTANTIAL DIRECT EVIDENCE OF ANIMUS PRESENTED BY CHIEF PREVE.

A proper legal analysis therefore would have required the Hearing Officer to isolate and describe the basis the Town gave for the negative employment decision Chief Preve received to determine whether it included the protected activity as a basis for the decision, and to what extent. The suspension letter provided to Chief Preve includes that very rationale. App. at 00041.

The Town stated that it made the decision to subject Chief Preve to a negative employment decision because he "signed the letter that was ultimately mailed," that he was "involved in writing it" and provided information appended to it to corroborate his position. App. at 00341. The Town then prevented Chief Preve from following up with a report of any kind, demonstrating the Town's desire to suppress Chief Preve's protected activity. App. at 00208-00209.

Again, the "letter" and all of the attachments submitted to the Judicial Conduct Committee was the "protective activity" in the case. The entire package comprised Chief Preve's report to disciplinary authorities. That report is the only basis the Town gave for the negative employment decision.

Arguments made by the Town, which were accepted by the Hearing Officer, parsing the protected activity into sending the letter on the one

hand, and including content supporting the letter, on the other, are not supported by the record and, if credited, would run contrary to public policy.

This Court's rules contemplate that reports to the Court-established disciplinary authorities will, in fact, include confidential information, and it provides mechanism by which that information may be protected by its disciplinary bodies. *See* N.H. Sup. Ct. R. 37(20)(g) ("Proceedings involving allegations of misconduct by . . . an attorney frequently requires the disclosure of otherwise confidential or privileged information").

Moreover, permitting the sort of parsing by the Town in its suspension letter (later endorsed by DOL) would create barriers to reporting, particularly to non-lawyer members of the public, creating new hurdles for reporters of misconduct under rules that otherwise grant reporters like Chief Preve from civil liability for making reports. *See* N.H. Sup. Ct. R. 37(7) and 40(15). Such an approach runs counter to the purpose of the rule and would not be workable, generally, inside disciplinary systems that include mandatory reporting components that may call for the disclosure of confidential information. *Cf.* RSA 169-C:29 (imposing mandatory obligation to report child abuse and neglect) and RSA 169-C:31 (conferring immunity from liability for making the report).

In any case, as a matter of uncontestable record, the letter states that Chief Preve was disciplined for signing, mailing and participating in writing the letter that was the complaint to the Judicial Conduct Committee, a statement that indicates that the decision was based, at least in part, on what the Hearing Officer deemed protected activity. App. 00341. In *Febres*, the First Circuit found that the mixed-motive test was to be

employed even if the plaintiff presented direct evidence that a negative employment decision was based, in part, on an impermissible basis, even if the same evidence indicated other permissible bases for the decision. 214 F.3d at 61. The Hearing Officer failed to acknowledge the presence of any direct evidence, let alone direct evidence that one reason for the negative employment action was an improper reason.

In the end, had DOL demonstrated a proper understanding of the legal concepts at issue in this matter and applied those concepts to this case, properly, a) the Town would have borne the ultimate burden of persuasion, and b) the Town could not have carried that burden by offering as a reason that it retaliated against Chief Preve because of the contents of his report—which were part of his protected activity. The DOL's decision to rule against Chief Preve in the case after having found that Chief Preve established a *prima facie* case is otherwise supported by a series of unsupported and illogical statements. App. at 00040. Under these circumstances, this Court should rule that the DOL acted unjustly and unreasonably in this case and reverse the DOL's decision, below. *See Appeal of Montplaisir*, 147 N.H. 297, 300-304 (2001) (vacating and remanding DOL determination for failure to properly apprehend, explain and apply standards at issue in this case); *see also Appeal of Walker*, 144 N.H. 181, 183 (1999) (reversing workers compensation benefits for failure to analyze position of claimant in intelligible manner for the purpose of facilitating intelligible judicial review) *and Appeal of Kelly*, 129 N.H. 462 (1987) (application of erroneous burden of proof constituted reversible error).

CONCLUSION

For the reasons set forth above, this Court must vacate the decision below and remand for proceedings consistent with its decision. Chief Preve requests oral argument in this matter.

Dated: March 22, 2019

Respectfully submitted,

CHIEF WAYNE PREVE

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CERTIFICATE OF SERVICE

The foregoing brief has been provided to counsel of record by electronic filing and through prepaid U.S. Mail.

Dated: March 22, 2019

/s/ Michael S. Lewis
Michael S. Lewis

CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)

I, Michael S. Lewis, hereby certify that the appealed decision is in writing and is appended to this brief.

Dated: March 22, 2019

/s/ Michael S. Lewis
Michael S. Lewis

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael S. Lewis, hereby certify that this brief contains a total of 4,744 words and meets the requirement of 9,500 words or less for Appellant's opening brief.

Dated: March 22, 2019

/s/ Michael S. Lewis
Michael S. Lewis