Common Law Wrongful Termination - New Hampshire Once Led the Way

By Nancy Richards-Stower and Debra Weiss Ford

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This is the 21st (!) *Bar News* "debate" over the last 17 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here, they discuss New Hampshire's history of common law wrongful termination, and the NH Supreme Court opinion issued this fall: *Donovan v. Southern New Hampshire University*.

Nancy: I used to brag that NH provided the earliest common law wrongful termination case, *Monge v. Beebe Rubber* (1977). Olga Monge refused to date her married boss, was fired, and sued for breach of contract. Our Supreme Court created an exception to the "employment at will" doctrine, holding that a termination based on retaliation, bad faith, or malice broke the "oral employment contract," because all contracts carry a covenant of good faith.

Deb: Back then, cheating with someone's spouse was a crime (adultery) and the employer couldn't force an employee to commit a crime to keep her job. Ms. Monge didn't bring a sex discrimination claim, probably because it wasn't until 1986, in *Meritor Savings Bank v. Vinson,* that the US Supreme Court recognized sexual harassment as sex discrimination.

Nancy: Next came *Howard v. Dorr Woolen Co.* (1980). The NH Supreme Court ruled that illness, age, bad faith, and malice alleged as wrongful termination by Howard's widow failed, because status wasn't enough. The employee had to do some act reflecting public policy. Public policy had to encourage the act performed or condemn the act the worker refused.

Deb: Next came *Tice v. Thompson* (1980). The Supreme Court held that wrongful termination didn't exist for a member of the governor's staff, the Coordinator for Drug Abuse. There were pleading deficiencies and the matter became moot after the next governor (Gov. Gallen) abolished the position.

Nancy: Then came *Cloutier v. Great Atlantic & Pac. Tea Co*. (1981), where the court first characterized wrongful termination as a "tort," and ruled that the public policy underlying the tort need not be clear, nor strong, nor reflected in a statute.

Deb: Cloutier was fired after 36 years at his job because his store safe, full of cash, was burglarized on his day off. A&P had ended $3 police escorts, and Cloutier wouldn't order his subordinates, fearful of robbery, to transport money to the bank. The bad faith? A&P had authorized using the safe, Cloutier was fired in a five-minute meeting, and held responsible for the robbery occurring on his first day off after working seven days. The public policy? Public policy supported the safety of his employees (even without relying on OSHA), and it was unfair to hold him responsible for something that happened on his regularly scheduled day off (even without relying on the state's day of rest statute).

Nancy: Most importantly, *Cloutier* ruled that the jury would decide what was public policy, because its determination "*... calls for the type of multifaceted balancing process that is properly left to the jury in most instances...*"

Deb: But not all the time. *Cloutier* authorized courts to take the issue from the jury when the public policy "*...was so clear as to be established or not established as a matter of law...*"

Nancy: Then came *Cilley v. N.H. Ball Bearings* (1986). The trial court granted summary judgment to the employer because it found no public policy.

Deb: But the Supreme Court did, even though the employee's misconduct more than justified his termination (including using subordinate employees' labor at his home, charging the employer with overtime pay). Cilley claimed the real reason for his firing was his supervisor's revenge, because Cilley had outproduced him and refused to lie to the company president for the supervisor.

Nancy: The public policy implicated? The policy in support of truthfulness.

Deb: Of interest is Justice Souter's decision in *Richardson v. Chevrefils* (1988).

Nancy: Because the employee landed (temporarily) on the State's child abuse offender list, he lost his job with a private employer. Richardson argued (in part) that his rights should be assessed in the context of public policy, as in wrongful termination. The court slammed that door: "*[Plaintiff] argues that he had a property interest in his job subject to due process protection because firing him without hearing would violate due process. This is circularity, pure and simple, and it will never get the plaintiff to a source of entitlement in State law... The only reason alleged or suggested for the State's action against the plaintiff was his admitted act of French-kissing the juvenile for whom he had responsibility as a social worker. However, that act may be described, no one could reasonably treat it as an act that public policy approves.*"

Deb: Next came *Short v. SAU 16* (1992), a half-million-dollar verdict reversed by the Court. Here, a public teacher's contract was not renewed, and he raised as public policy his refusal to criticize his superintendent. The Court said, "*Short cannot assert a public policy in favor of refusing to criticize his supervisor...when such criticism [would support] the ... management objectives of his employer. Further, an employee's expression of disagreement with a management decision is not an act protected by public policy... Secondly, we find the SAU's decision not to renew Short's employment to be just the sort of political decision it was elected to perform, and thus in no way against public policy...Presumably the voters elected them because they agreed with the candidates' philosophies*..."

Nancy: Thankfully, since then, public employees' freedom of expression under amended RSA 98-E protects such plaintiffs. Otherwise, this decision could supercharge the extremists landing on school and library boards, threatening the jobs of teachers and librarians for speaking in support of teaching actual history.

Deb: Next came *Karch v. Baybank FSB* (2002), overloaded with issues, but for our purposes, its important holding is that wrongful termination can occur by constructive discharge.

Nancy: Next? *Porter v. City of Manchester* (*Porter I*) (2002), holding that the workers compensation act does not bar wrongful termination claims. Now the comp statute carries a clear option for the employee (RSA 281-A:8, III).

Deb: It is possible for employees to have both claims: a comp claim for emotional illness for occurrences up until the moment of termination, and after that moment, a wrongful termination claim for all harm flowing from the termination. *Porter I* confirmed that wrongful termination is a tort.

Nancy: In 2009, *Mackenzie v. Linehanm* upheld a JNOV that dissolved another half-million-dollar verdict in favor of an off-duty police officer fired following an altercation with an unbalanced citizen outside a bar. The employee argued that because he refused to concede that his off-duty conduct violated his work rules, his termination implicated the public policy favoring truthfulness. The trial court ruled that *"no rational trier of fact could have ruled in the plaintiff's favor, considering the evidence and all reasonable inferences..."*

Deb: Well, when telling the truth is a confession of a rule violation, it is more likely than not, you get fired for the rule violation and not your acknowledgement of it. Next came *Leeds v. BAE Sys.* (2013). The employee, previously disciplined for yelling and swearing at a subordinate, was fired following a road rage incident in the BAE parking lot. Summary judgment was upheld despite Leed's protests that (1) his actions were in self-defense and (2) that a jury should decide if swatting away from his face a cell phone held by the other driver was in furtherance of the public policy of self-defense (especially because he thought it might be a weapon). The other driver had followed Leeds into the BAE parking lot after a near collision. The court explained that even if Leeds' acts were legal under the criminal law, and the other driver was the primary aggressor, Leeds' other conduct (30 seconds in a shouting match filled with obscenities) tanked his claim.

Nancy: Then, in *Clark v. N.H. Dep't of Emp't Sec* (2019), the Supreme Court "went rigid," refusing to expand the philosophy of wrongful termination to include a new tort,

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"wrongful demotion."

Deb: Which brings us to *Donovan v. Southern New Hampshire University.*

Nancy: Another case where the court snatched public policy from the jury.

Deb: *Donovan* holds that after a private college sets its guidelines for student grades, it can require its professors to implement them.

Nancy: Well, it frosts me that an Associate Dean lost her constructive termination claim, because she declined to alter grades.

Deb: The Associate Dean and Senior Associate Dean together had reviewed the course design for a math course and discovered that different instructors used different grading criteria, without communicating that difference to the students. The senior Dean concluded that two students who had failed, should be passed; but the plaintiff wouldn't change the grades.

Nancy: Donovan argued that the grade change requests were unethical and violated the school's grading policy, and she invoked the university's Whistleblower Policy (adopted to encourage faculty to raise concerns about "ethical conduct or violations of the University's policies"), to no avail. The employer changed the grades. The plaintiff claimed she was retaliated against by a resulting hostile work environment and her placement on a performance improvement plan (PIP) (albeit void of reference to the grade changes). Then she quit.

Deb: The trial court granted summary judgment, because the plaintiff, "*failed to establish the existence of a public policy that would support her refusal to alter grades in this case,"* [because] "*the determination of what grading policy to implement in a class, and whether exceptions to that policy should be made on a case-by-case basis, are matters of academic judgment that the Court will not second guess. Further, although the plaintiff believed SNHU's decision to be unethical, the court concluded that "it remained an internal policy determination of a private university.*"

Nancy: It seems to me that the Court created an exception to wrongful termination based on its own politics.

Deb: The Court explained, *"the plaintiff appears to maintain that public policy protects her refusal to comply with her supervisor's directive because she acted in accordance with the university's internal grading and whistleblower policies;"* and that *"because she complied with one internal policy - SNHU's Whistleblowers Policy - her refusal to comply with another internal policy - SNHU's alleged departure from its grading policy - constitutes an act protected by public policy."* The court found this argument to be *"circular and insufficient as a matter of law to sustain a wrongful termination claim. Put simply, whether the plaintiff complied with the university's Whistleblower Policy has no bearing on whether public policy supports her conduct."*

Nancy: What? The court just broadcast to all private school teachers: "*Do what you are told and change Johnny's grade, regardless of if it is deserved*!" Why? Because under *Donovan*, any ethical opposition *"would subject the internal grading decisions of a private university to the ethical considerations of a jury and contravene the well-established principle disfavoring judicial intervention in disputes involving academic standards."*

Deb: *Short v SAU 16* set public policy at whatever an elected school board said it was; and *Donovan v. SNHU* removes from public policy whatever a private institution decides.

Nancy: I don't brag about New Hampshire common law anymore. ■

Nancy Richards-Stower advocates for NH and MA employees, "has gone totally remote" at ***jobsandjustice.com****, and invented/owns/operates* ***Trytosettle.com®*** *online settlement service. Debra Weiss Ford is the Managing Principal at the Portsmouth, NH offices of Jackson Lewis, PC,* ***jacksonlewis.com****.*

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hered to, along with requirements for other benefits such as bonuses, commissions, stock options, and restrictive covenants.

When negotiating the severance amount with the employer, employees should consider the value of the claims they will be waiving. For example, if an employee has a disability and has been harassed by the employer and/or believes that the employer is terminating their employment for a reason related to their disability, the employee could present those arguments to the employer to support their demand for increased severance. When determining the value of the claim waived, employees should look beyond just regular compensation and consider the high value of certain benefits, such as health insurance.

While non-competition agreements are disfavored in New Hampshire, employees may have signed restrictive covenants at some point in their employment. The terms of the restrictive covenant could also be negotiated during the review of the severance agreement. This is another reason to make sure that the employee understands the scope of the employment related documents that are at issue.

Severance is a valuable tool in an employer's tool belt and can be helpful to employees in their transition to new employment, but like with most legal issues, employers and employees should consult competent employment counsel prior to offering an employee severance and before signing a severance agreement. ■

Kathleen Davidson and Beth Deragon are counsel at the law firm of Pastori | Krans, PLLC. Kathleen advises both businesses and individuals, conducts employment investigations, and also practices family law and business litigation. Beth focuses her practice on counseling and training businesses on sound employment practices and defending businesses in employment litigation. They can be reached at ***kdavidson@pastorikrans.com*** *and* ***bderagon@pastorikrans.com****.*

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