

Two Views: Constructive Wrongful Termination — *Lacasse v. Spaulding Youth Center*

By Nancy Richards-Stower and Debra Weiss Ford

Editor's Note: This is the second *NH Bar News* “debate” between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both New Hampshire fellows of the College of Labor and Employment Lawyers. The topic is the Oct. 13, 2006 NH Supreme Court decision, *Lacasse v. Spaulding Youth Center*, which reversed a trial court’s summary judgment ruling in favor of the employer, reinstating the employee’s constructive wrongful discharge claim.

The Debate

Debra: Again, I say, stop gloating, Nancy.

Nancy: Again, I say, why should I? Our state supreme court has affirmed that workers need not wait to suffer nervous breakdowns before fleeing retaliatory hostile workplaces. Yes, Deb, New Hampshire continues to lead America in the development of common law wrongful termination, which it catapulted to prominence back in 1974 with *Monge v. Beebe Rubber*.

Debra: The Court’s opinion will ensure that employment lawyers will continue to be busy and will get headaches determining whether the conduct complained of was sufficiently egregious to cause a reasonable person to feel that he or she had no option but to resign.

Nancy: *Lacasse* is another big reason for plaintiffs to dig in their heels to avoid federal court. Do you have any doubt at all that if *Lacasse* had been heard by the federal court, that it would have been crushed on summary judgment? The federal decision would have begun thusly: “As a matter of law, no reasonable person in plaintiff’s position would feel compelled to resign...” Federal courts are hostile towards employee rights and have been for over two decades. Remember all those years when the NH federal court denied emotional distress damages in wrongful termination cases as barred by the workers compensation statute? Geeze! If the guy is fired, he’s no longer an employee, so why in the world would the workers’ compensation statute be involved? It took *Karch* to drive that point home (*Karch v. BayBank FSB*, 147 N.H. 525 [2002]), and while *Karch* was pending, the plaintiffs’ bar spearheaded legislation to end the federal court debate once and for all (see R.S.A. 281-A: 8, III, which confirmed that the workers comp bar dissolved at the instant of termination unless the employee has accepted workers compensation damages for the termination-inspired harm).

Debra: I agree that it is more likely that the federal court would have upheld the lower court decision granting summary judgment, but I contend that the federal court would have been correct. This case again points out the murky, undefined area of constructive discharge and leaves an employer with little or no guidelines. What is most troublesome about the case is the court’s comment that the plaintiff might rightfully anticipate future mistreatment. This leaves the door wide open. Now, apparently, conduct does not need to be

egregious but only potentially egregious in the future.

Nancy: The state courts are much more willing to leave judgment calls to the jury while the federal court excels in granting summary judgment to the defendant employers. (See, for example, “*Anatomy of an Employment Discrimination Lawsuit*” by Lauren Irwin, Spring 2006 *NH Bar Journal*.) That’s why employees routinely give up lucrative federal claims and are forced to stipulate to less than \$75,000 in damages (the amount in controversy diversity removal requirement) to stay out of federal court. This situation greatly upsets me. When I started out as a civil rights attorney in the 1970s, I ran lickety-split to federal court for an expansive interpretation of employment civil rights’ claims. Now I try to squirm out from under federal jurisdiction. Employment claims require a determination of intent and some empathy for employees. Intent simply cannot be determined without getting the decision-maker on the stand and subjecting him to examination before a jury, yet plaintiffs are routinely denied jury access by summary judgment rulings in federal court. Affidavits give employers all they need, but if you could see the decision-maker crossing his fingers and rolling his eyes as he signs his affidavit, it would make a big difference.

Debra: Well, if it makes you feel any better, the recent New Hampshire federal court case of *Scannell v. Sears Roebuck & Co.*, Civil No. 06-CV-227-JD (D.N.H. Sept 6, 2006) may indicate a trend in both federal and state courts in New Hampshire towards lowering the standard for constructive discharge. In that case, the court ruled that a former employee who quit her job because she was allegedly underpaid and underappreciated can proceed with a lawsuit for wrongful discharge.

Nancy: Well, in that *Scannell v. Sears* case, the employee was forced to work overtime for years without overtime pay, a significant violation of the FLSA [Fair Labor Standards Act], so I wouldn’t exactly call it a beacon of hope for the liberalization of the federal court’s summary judgment standard.

In any event, *Lacasse* underscores the different attitudes of our federal and state courts on summary judgment. Our federal court seems bound and determined to kill employment claims. Recently, in a clearly erroneous decision (*Gatsas v. Manchester*, Nov. 7, 2006) it held that RSA 354-A, our state discrimination statute, didn’t include a private right of action and dismissed the count; yet, state law has had a jury trial option since June 2000 (see RSA 354-A:21-a). It’s not just that the court erred (we all make mistakes), but it went out of its way to kill the count *sue sponte* (on a basis not argued by the defendant). I assume the court will reverse itself on this error. RSA 354-A is to be interpreted liberally according to its own mandate (RSA 354-A:25). It has no damage caps. Title VII has damage caps. Those are only two reasons why it is important to keep state employment law claims alive in federal court. So, we’ll have to wait and see what impact *Lacasse* has on the federal court.

Debra: We’ll save *Gatsas* for our next debate, but that decision is not novel. See *Bergstrom v. University of New Hampshire*, 943 F.

Supp. 130 (D.N.H. 1996). Further, the federal court denied the defendant's motion for summary judgment on Count I which was a Title VII disparate treatment claim. So, I think that the federal court gets unfair criticism. But getting back to *Lacasse*, I think the standard should be higher than a mere threat of egregious conduct in the future.

Nancy: The supreme court's holding in *Lacasse* embraces the "hopelessness" standard, *i.e.* when a reasonable employee would give up hope that things will get any better, and will likely get worse, she can quit and preserve her rights to wrongful termination remedies. In state court, there's no need to wait around to be severely harmed. (By the way, *Lacasse*'s negligent supervision claim, dismissed by the supreme court, should never have been brought, because negligence claims against the employer have been barred by the workers' compensation statute for decades).

Debra: The "hopelessness" standard is a good way to frame the debate. From an employer's standpoint, however, it is amorphous and disconcerting because the Court has not set parameters and it now appears that the Court will entertain constructive discharge claims based on anticipating future mistreatment.

Nancy: New Hampshire's law of wrongful termination has taken a straight road to justice from *Monge* to *Howard* (*Howard v. Dorr Woolen Co.*, 120 N.H. 295 [1980]) to *Cloutier* (*Cloutier v. Great*

Atlantic & Pacific Tea Co., 121 N.H. 915 [1981]) to *Cilley* (*Cilley v. N.H. Ball Bearings, Inc.*, 128 N.H. 401 [1986]) to *Karch* (*Karch v. BayBank FSB & a*, 147 N.H. 525 (1999)) and to *Porter* (*Porter v. City of Manchester*, 151 N.H. 30 (2004)). An employee has tort remedies for wrongful termination when she is fired, with malice, for doing something that public policy applauds, or refusing to do that which public policy abhors. Constructive termination was first confirmed to satisfy the termination element of wrongful termination in *Karch* and again in *Porter*, and occurs when an employer maliciously renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign. *Lacasse* is the natural successor to those cases and stands for the proposition that as the hammer is falling, you can flee the job and you don't need to wait to get hit on the head.

Debra: *Lacasse* and *Scannell* suggest that the standard for what constitutes severe, pervasive and egregious conduct has shifted, and it is more likely that claims for wrongful termination based upon constructive discharge will go to a jury. The 4th Circuit in *Williams v. Giant Food, Inc.* got it right. "Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign."

Facts of the Case: *Lacasse v. Spaulding Youth Center*

The plaintiff in the case, Gloria Jean Lacasse, was an assistant food-service director at Spaulding Youth Center, a non-profit residential facility for emotionally impaired and autistic children. The plaintiff claimed that during her hiring interview, her future supervisor, Christine Couto, told her that "with everybody she hires, she lets them know right away that if she comes across anything she dislikes about the . . . person or persons, she makes it miserable enough for them to quit, that she does not fire anyone."

Lacasse accepted the job and at some point supervised two of Couto's daughters. She alleged the following:

On Aug. 24, Lacasse refused to submit timesheets for Couto's daughters because she questioned their reported hours, and she left the paperwork for their mother. Ten days later, Lacasse told Couto that the timesheet from the first daughter was inaccurate. She claimed that Couto yelled at her and gave her the cold shoulder for a day. Soon after, Lacasse reported to Couto that the second daughter had taken food home with her. Lacasse claimed that Couto began to treat her "gruffly," held back her work assignment information, criticized her as she served food, and yelled at her about a snack she had served. On Sept. 17, when Lacasse got her annual review, Couto had rated her lower than the prior year, and denied her request to leave early on Fridays. Following these incidents, Lacasse complained to Human Resources and was told that an investigation was underway. Soon after, Lacasse went to her doctor complaining of physical symptoms she assumed were from stress.

Although Spaulding's human resources director responded by putting Lacasse on paid leave while she conducted the investigation, Lacasse, who had earlier retained counsel, notified Spaulding that, based on her doctor's advice, she was quitting, effective immediately. Lacasse sued Spaulding, claiming, *inter alia*, constructive wrongful discharge and negligent supervision. The defendant's answer claimed in part that Couto had been counseled and that Lacasse had reported that the relationship had improved after her performance evaluation. The trial court dismissed the constructive discharge claim, holding that the incidents did "not rise to the level" necessary to justify the plaintiff's claim and dismissed the negligent supervision claim as barred by the Workers' Compensation Act.

The supreme court surprised few with its Oct. 13, 2006 ruling on *Lacasse v. Spaulding Youth Center* by upholding the tossing of the negligent supervision claim, since all negligence claims against an employer have been barred by the workers compensation law for decades; but it surprised many when it reinstated the constructive termination claim, holding that a jury could reasonably find that in light of the information learned from Couto at her hiring interview (which was ignored by the trial court), "that a reasonable person in the plaintiff's position would conclude that Couto was trying to drive her out, and that the relatively short period of mistreatment was only the beginning of a campaign of abuse that would continue until she quit. A jury could further find that a reasonable person would resign at that point rather than endure the continued mistreatment."