State of New Hampshire
Supreme Court

NO. 2017-0540

2018 TERM

FEBRUARY SESSION

Carol St.Pierre

v.

School Administrative Units 28 & 95, Windham School District

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

REDACTED

BRIEF OF PLAINTIFF/APPELLANT, CAROL ST.PIERRE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

QUESTIONS PRESENTED. 1

STATEMENT OF FACTS. 2
- I. School District in Flux. 2
- II. St.Pierre Is Good at Her Job. 3
- III. St.Pierre Discloses Systemic Problems. 5
- IV. St.Pierre Discovers Vacation Pay Irregularities. 8
- V. St.Pierre [redacted] 8
- VI. St.Pierre Addresses Benefits Abuses to the School Board. 11
- VII. Retaliation for St.Pierre Doing Her Job. 13
- VIII. Investigation on Retaliation. 14
- IX. St.Pierre Is Forced to Leave Her Job. 16
- X. Co-Workers Attack the Messenger. 17

STATEMENT OF THE CASE. 20

SUMMARY OF ARGUMENT. 21

ARGUMENT. 22
- I. Court Erred by Granting Summary Judgment on Constructive Wrongful Discharge Claim. 22
- II. Court Erred by Granting Summary Judgment on Whistleblowers' Protection Act Claim. 26
- III. Court Erred by Dismissing SAU 28 as Defendant. 28

CONCLUSION. 30

REQUEST FOR ORAL ARGUMENT. 30

CERTIFICATIONS. 31

ADDENDUM. 31
- Omnibus Order on SAU's Motion for Summary Judgment (Aug. 11, 2017). 32

TABLE OF AUTHORITIES

Federal Cases

Digital Realty Trust, Inc. v. Somers,
No. 16-1276, 2018 WL 987345 (U.S. Feb. 21, 2018). 26

E.E.O.C. v. MacMillan Bloedel Containers, Inc.,
503 F.2d 1086 (6th Cir. 1974). 28

Guild v. Meredith Village Savings Bank,
639 F.2d 25 (1st Cir. 1980). 29

Marrero v. Goya of Puerto Rico, Inc.,
304 F.3d 7 (1st Cir. 2002). 28, 29

Musikiwamba v. ESSI, Inc.,
760 F.2d 740 (7th Cir. 1985). 28

National R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002). 28

United States Pipe & Foundry Co. v. N.L.R.B.,
398 F.2d 544 (5th Cir. 1968). 28

New Hampshire Cases

Appeal of Fred Fuller Oil Co., Inc.,
144 N.H. 607 (2000). 26

Appeal of Osram Sylvania, Inc.,
142 N.H. 612 (1998). 26

Appeal of Strafford Cty. Sheriff's Office,
167 N.H. 115 (2014). 23

Appeal of White Mountains Education Association,
125 N.H. 771 (1984). 23

Ashley v. Rye Sch. District,
111 N.H. 54 (1971). 26

Cloutier v. A&P,
121 N.H. 915 (1981). 23

Cluff-Landry v. Roman Catholic Bishop of Manchester,
169 N.H. 670 (2017). 26

Coleman v. School District of Rochester,
87 N.H. 465 (1936). 26

Concord Grp. Insurance Companies v. Sleeper,
135 N.H. 67 (1991). 22

Farnum's Petition,
51 N.H. 376 (1871).. 26

Iannelli v. Burger King Corp.,
145 N.H. 190 (2000). 22

Jeffery v. City of Nashua,
163 N.H. 683 (2012). 28

Karch v. BayBank FSB,
147 N.H. 525 (2002). 22

Lacasse v. Spaulding Youth Ctr.,
154 N.H. 246 (2006). 22

Madeja v. MPB Corp.,
149 N.H. 371 (2003). 23

Panciocco v. Lawyers Title Insurance Corp.,
147 N.H. 610 (2002). 22

Porter v. City of Manchester,
151 N.H. 30 (2004). 22, 24

Porter v. City of Manchester,
155 N.H. 149 (2007). 24

Other State's Case

Superior Care Facilities v. Workers' Comp. Appeals Board,
32 Cal. Rptr. 2d 918 (Cal.App. 1994). 28

New Hampshire Statutes

RSA 189:13-a. 27

RSA 189:15. 26

RSA 194:3-d. 27

RSA 194-C. 2

RSA 194-C:4. 2

RSA 275-E. 20

RSA 275-E:2, I(a). 26

RSA 275-E:8, IV. 26

RSA 491:8-a, III. 22

RSA 637:4. 27

RSA 638. 27

RSA 650:2. 27

Secondary Authority

Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empir. Legal Stud. 459 (2004). 22

April Guilmet, *Changes Coming as Windham, Pelham Divide into Independent School Districts*, SALEM OBSERVER, July 3, 2013. 2

Julie Hanson, *Pelham and Windham Begin Planning for Separate SAUs* UNION LEADER, Oct. 18, 2012. 2

John Toole, *Windham Studying Split from Pelham, SAU 28* EAGLE TRIBUNE, Sept. 1, 2011. 2

John Collins, *Mixed Views on Pelham-Windham School Split* LOWELL SUN, Oct. 22, 2011. 2

QUESTIONS PRESENTED

I. Did the court decide disputed issues of material fact, thereby erroneously granting summary judgment?

Preserved: OBJECTION TO SAU 28'S MOTION FOR SUMMARY JUDGMENT (June 27, 2017), *Appx*. at 482; OBJECTION TO SAU 95'S MOTION FOR SUMMARY JUDGMENT (June 27, 2017), *Appx*. at 486; MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO SAU'S MOTIONS FOR SUMMARY JUDGMENT (June 27, 2017).

II. Did the court artificially consider SAU 28 and SAU 95 separate employers for the purposes of constructive wrongful termination, retaliation, and the Whistleblowers' Protection Act and its limitations period, and otherwise fail to consider continuing employer actions as not within a course of conduct?

Preserved: OBJECTION TO SAU 28'S MOTION FOR SUMMARY JUDGMENT (June 27, 2017), *Appx*. at 482; OBJECTION TO SAU 95'S MOTION FOR SUMMARY JUDGMENT (June 27, 2017), *Appx*. at 486; MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO SAU'S MOTIONS FOR SUMMARY JUDGMENT (June 27, 2017).

STATEMENT OF FACTS

Carol St.Pierre worked as Human Resources Director for SAU 28 and then SAU 95 from 2011 to 2015. During that time, she exposed petty corruption and routine disregard for employment laws, which she brought to the attention of colleagues and superiors. Resented by co-workers for holding them accountable, her job life was made intolerable, forcing her to quit. Subsequent employment has not been as advantageous, resulting in damages she seeks to prove to a jury.

I. School District in Flux

Over the course of St.Pierre's employment, there were substantial changes in the school district where she worked. Until 2013, Windham, New Hampshire and Pelham, New Hampshire were administratively part of the same School Administrative Unit (SAU). *See* RSA 194-C. In 2009, Windham built a new high school, making SAU 28 possibly the only SAU in the state with two high schools. Subsequently, Windham wanted to divide the shared SAU, but Pelham resisted. The proposal was initially controversial, and complicated by numerous shared assets, such as computer systems and budgeting databases. In 2012 the towns amicably voted to split, beginning as of July 2013, with Pelham remaining as SAU 28, and Windham creating the new SAU 95. *See generally,* April Guilmet, *Changes Coming as Windham, Pelham Divide into Independent School Districts*, SALEM OBSERVER, July 3, 2013 <https://goo.gl/3spxAz>; Julie Hanson, *Pelham and Windham Begin Planning for Separate SAUs*, UNION LEADER, Oct. 18, 2012 <https://goo.gl/A69VBA>; John Toole, *Windham Studying Split from Pelham, SAU 28*, EAGLE TRIBUNE, Sept. 1, 2011 <https://goo.gl/iKu1Sq>; John Collins, *Mixed Views on Pelham-Windham School Split*, LOWELL SUN, Oct. 22, 2011 <https://goo.gl/QcCuXP>.

The transition period was pocked by staff turnover and lack of settled leadership. From 2009 to 2016, there were only temporary, interim, sub-contract, or short-term superintendents. *See* RSA 194-C:4. Henry LaBranche began as a one-year sub-contracted consultant superintendent of SAU

28 in 2011. Because he was already drawing state retirement benefits, he was not allowed to work more than 30 hours per week. He was persuaded to stay a second year, and left the job in Summer 2013 as the districts were dividing. *LaBranche Depo*[1] at 8-16; *Steel Depo* at 14.

LaBranche was succeeded in SAU 95 by Winfried Feneberg, who arrived in 2013, but left in 2015, "for a variety of personal and professional reasons," to another superintendent posting. *Feneberg Depo* at 12-13, 62-63, 102. At his departure, the school board sought an interim superintendent; it hired Tina McCoy, who stayed just one year. *McCoy Depo* at 31; *Eyring Depo* at 113-16.

II. St.Pierre Is Good at Her Job

After completing a medical assistant certificate in 1995, St.Pierre had worked as an administrative assistant in the medical industry, and then in several school districts. She was HR coordinator at SAU 27, where she gained some insight into SAU splits, and worked for several years at UNH Manchester. In 2006 St.Pierre took a job with SAU 15 as HR Manager, where she oversaw, for about five years, benefits and payroll for 600-plus employees, while also completing her associate's degree in 2007. In 2011, LaBranche hired St.Pierre at SAU 28 as Director of Human Resources, which St.Pierre regarded as an advancement in career and salary. *StPierre Depo* at 11-100, 109; EMPLOYMENT CONTRACT[2] (June 22, 2011), *Appx*. at 1.

While at SAUs 28 and 95, St.Pierre's job included managing recruitment of new teachers and staff; developing hiring policies; coordinating the interview process for new hires; assisting in teacher contract negotiations between the school board and labor unions; implementing details of the

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[1]Complete depositions of seven witnesses were appended to the plaintiff's memorandum supporting St.Pierre's objection to summary judgment (and selected excerpts of them were appended to the defendants' memorandum supporting summary judgment). Complete depositions are included in the appendix to this brief.

[2]Various documentary exhibits were presented to the superior court. They are cited herein, and arranged chronologically in the appendix hereto, without regard to the exhibit designation they were given or the pleading to which they were attached below.

resulting teacher contracts; assisting in superintendent recruitment and hiring; administering employee benefits, including health insurance, savings plans, and retirement; compliance with labor laws, including anti-discrimination, time-sheets, and rest periods; compliance with Department of Education credentialing requirements; developing, in association with the school board, district-wide policies; ensuring compliance with existing school board policies; hearing direct employee complaints; triaging actionable grievances from routine employee grumbling; conducting and assisting in investigations of staff and internal procedures; disciplining and terminating staff when necessary; ensuring human resources priorities were met within fiscal constraints; and handling those priorities for more than 700 employees. *StPierre Depo* at 100-04, 109, 199-208; *Steel Depo* at 53, 158-59; *Eyring Depo* at 53; PERFORMANCE EVAL. (June 12, 2015), *Appx*. at 92; LETTER OF RECOMMENDATION (June 9, 2015), *Appx*. at 80.

St.Pierre began working for SAU 28 on July 1, 2011, for a salary of $62,000. She signed contracts each successive year through the 2015-2016 school year; the first two were with SAU 28, and after the district split, the next three were with SAU 95. She got a raise each time, and her last contract paid $74,200 plus a wealth of public-employee benefits. EMPLOYMENT CONTRACTS (June 22, 2011), (June 12, 2012), (June 4, 2013), (July 2, 2014), (July 2, 2015), *Appx*. at 1, 8, 17, 44, 104.

Her contracts required St.Pierre to "faithfully perform such duties as may be assigned by the … School Board and/or the Superintendent," and to "conform to and implement all New Hampshire statutes, all policies which have been adopted by the … School Board, all rules and regulations adopted by the New Hampshire Board of Education, and all applicable Federal statues and regulations." EMPLOYMENT CONTRACTS ¶ 3. St.Pierre could be terminated by mutual agreement, with cause, or without cause provided the SAU pay out the value of the contract. *Id.* ¶¶ 6, 7. Each contract was signed by St.Pierre, and by the chairperson of the respective school boards.

St.Pierre is very good at HR. It is clear from her performance evaluation after her first year

that St.Pierre was well-liked and effective. The evaluation complimented St.Pierre for "acclimation into the leadership team," keeping her colleagues "informed of all critical personnel matters," demonstrating a "breadth of human resources knowledge," having "integrity [that] has been uncompromising," and being "genuinely nice." "Without question you have demonstrated that you are a team player." PERFORMANCE EVAL. (May 14, 2012), *Appx*. at 5; *LaBranche Depo* at 78-82, 100-101. Her second annual review complimented St.Pierre for her "consistent effort … to make uniform … situations that presented as 'past practice,' 'exceptions,' or individual arrangements." It also praised her ability to be "a supportive listener who is able to demonstrate empathy while always maintaining a professional demeanor based on [her] role and responsibilities," and her "willingness to accept difficult assignments involving staff discipline and performance issues in an unbiased, highly professional manner." Commenting on her involvement in teacher contract negotiations, the evaluation noted that St.Pierre was a "reliable and independent voice," and "always ha[s] the best interest of employees as well as the district in mind when [she] execute[s] the functions of [her] office and [her] job responsibilities." PERFORMANCE EVAL. (June 24, 2014); *Feneberg Depo* at 48-49. Regarding HR responsibilities, her third review was similarly positive.

III. St.Pierre Discloses Systemic Problems

Within several months of commencing work, St.Pierre noticed some of her colleagues handling human resources issues in unwise or even unlawful ways. In one instance, a guidance counselor had reported sexual harassment after a school principal caused a sexually-embarrassing picture to be posted on school computer screens, but St.Pierre later learned the employee withdrew her complaint under pressure from the superintendent and assistant superintendent. *StPierre Depo* at 257-64. And while there were no corroborated instances of discriminatory hiring, St.Pierre repeatedly heard talk of avoiding prospective employees on the basis of race, gender, disability, religion, and pregnancy; St.Pierre later reported this to her superintendent. *Steel Depo* at 29-39,

49-51; *StPierre Depo* at 240-51, 272-73.

At both districts, St.Pierre worked alongside Adam Steel. He had a long career in several school districts, and was SAU 28's business administrator when St.Pierre began working there. He also went to SAU 95 at the split, and worked there until a few months after St.Pierre resigned. Steel's job responsibilities were overseeing the financial operations of the district, the facilities and grounds, food service and bus transportation – and until 2013, the technology department. He was involved in hiring people to run the facilities. Like St.Pierre, Steel reported to the superintendent. His name was in the running for interim superintendent in 2015, when the school board appointed Tina McCoy instead. *Steel Depo* at 9-12, 43-44; 85-94, 163-69, 189-93; *StPierre Depo* at 228; *Eyring Depo* at 117.

An especially rancourous instance was when Steel hired a custodian who had been informally recommended to him. Steel neglected routine HR involvement, and no background check was performed. The man worked for the district for several weeks before St.Pierre was made aware of his hire or able to access his records; she then noted the employee had disclosed a recent criminal drug charge – a potential job disqualification – which she raised with Steel. Steel then found a reason to fire the man, outside of regular procedures. St.Pierre reported the incident and the issue, in person and in writing, to their boss, LaBranche. LETTER FROM ST.PIERRE TO LABRANCHE (Sept. 13, 2012), *Appx*. at 11. Steel later took blame for the episode, calling it an oversight. *Steel Depo* at 39-46, 51-53, 60-61; *LaBranche Depo* at 39-41; *StPierre Depo* at 159-69, 191, 214; LETTER FROM ST.PIERRE TO LABRANCHE (Sept. 13, 2012). St.Pierre was troubled not only by the particular incident, but concerned more broadly about the lack of HR involvement in intake of employees and volunteers, resulting in non-compliance with the law and potential safety issues for school children. *StPierre Depo* at 159-69; EMAILS BETWEEN ST.PIERRE & STEEL (Oct. 12, 2012), *Appx*. at 12.

Another unsettling incident involved a maintenance employee named Warren Billings.

Without consulting St.Pierre, Steel attempted to fire Billings because, according to Steel, Billings had not come to work. *LaBranche Depo* at 25-27. St.Pierre objected, and refused to participate in a formal firing, because she thought the employee was within his rights regarding sick leave. *Id.*; *Steel Depo* at 26-27. In 2012 Billings sued. St.Pierre refused to testify in conformance with Steel's story, which she made known to the SAU's attorney, the law firm of Jackson/Lewis. The suit settled, which caused Steel to be angry with St.Pierre. *Ford Depo* at 8-10; *StPierre Depo* at 234.

From that time on, St.Pierre's relationship with Steel was "distant" at best. OMNIBUS ORDER at 3 (Aug. 11, 2017), *Addendum* at 34; *StPierre Depo* at 191, 235; *LaBranche Depo* at 95. At St.Pierre's request, LaBranche convened a meeting to mend their differences, but it did not go well. *LaBranche Depo* at 42-43, 95-97; *Steel Depo* at 47-48. St.Pierre indicated that in the custodian incident and others, Steel had undermined her authority by making promises that HR could not lawfully keep – thus repeatedly making her the "bad guy" – and that neither Steel nor LaBranche respected her HR duties. *LaBranche Depo* at 30-32; VARIOUS DOCUMENTS[3] at 3, *Appx*. at 55. LaBranche condemned St.Pierre for being a troublemaker. St.Pierre understood that LaBranche indicated that he knew most of the superintendents in the State, and if she did not back down, her job prospects in New Hampshire would be limited. While LaBranche and Steel denied any threat, *StPierre Depo* at 174; *LaBranche Depo* at 43; *Steel Depo* at 48-49, it is undisputed that "LaBranche told [St.Pierre] that she would be looking for a job in another state." OMNIBUS ORDER at 3. St.Pierre recalled that the reprimand was screamed at her, at a meeting in front of her colleagues. *StPierre Depo* at 192-93, 238-40. It is also undisputed that Steel yelled at her and threatened her; he "came probably within a foot of [St.Pierre's] face and screamed, 'Is that what this is, a game of "gotcha"? I'll get you.'" OMNIBUS ORDER at 2. LaBranche confirmed that Steel's behavior was "not appropriate" and that

[3]Attached to a May 29, 2015 email from St.Pierre to Attorney/Investigator Debra Ford, were various documents, made an exhibit to Ford's deposition. Collectively they have no convenient name, and are cited herein as VARIOUS DOCUMENTS.

LaBranche had to tell Steel to sit down. *StPierre Depo* at 169-72, 193; *LaBranche Depo* at 41-42; *Steel Depo* at 46. During another meeting on the same topic, LaBranche exhibited an "unpleasant tone" toward St.Pierre. OMNIBUS ORDER at 3. From these interactions, St.Pierre "felt in jeopardy of losing [her] job." *Id.*

IV. St.Pierre Discovers Vacation Pay Irregularities

Effective July 1, 2013, the school districts split, with SAU 28 responsible for the Pelham School District and SAU 95 for the Windham School District. After brief uncertainty about who would go with which, both St.Pierre and Steel signed contracts with SAU 95, though their offices remained in the same building in Windham. *LaBranche Depo* at 9; *StPierre Depo* at 197, 236; *Steel Depo* at 122; EMPLOYMENT CONTRACT (June 4, 2013), *Appx*. at 17. Steel was disappointed that both he and St.Pierre ended up working for the same SAU. *Steel Depo* at 179.

As part of the split, St.Pierre was responsible for determining, for each employee, how much and to which district to bring forward unused vacation pay. She sent an email to the entire staff, asking each for their vacation balances. Steel's calculation included vacation time he had carried over from another position, for which – in violation of district policy – he had no documentation. He claimed $24,000 in unused vacation pay. St.Pierre believed Steel was exaggerating, and made her position known, but LaBranche sided with Steel, and the money was paid out. *StPierre Depo* at 252-56; EMAILS (Mar. 2013), *Appx*. at 13; VARIOUS DOCUMENTS at 20-21.

V. St.Pierre [redacted]

Upon the departure of a technology administrator, St.Pierre came into possession of [redacted]

[redacted]

Two weeks later, on June 30, LaBranche's term expired, and Winfried Feneberg became the new superintendent on July 1, 2013. *StPierre Depo* at 236; *LaBranche Depo* at 65.

Given the timing, one of the first interactions St.Pierre had with her new boss was a conversation, and then a written report, about [redacted] Because it implicated a close co-worker, St.Pierre was reluctant to make the report, but did so because she felt that refraining would affect her own integrity and mental health. She also noted that she had not reported it to LaBranche only because he had been on the cusp of leaving the job. *Id.*

In response, Feneberg commissioned the [redacted]

[4]There are two investigation reports relevant to this case. [redacted] The second was conducted by Jackson/Lewis, dated June 12, 2015. It is cited herein as J/L INVESTIGATION.

[redacted]

One finding of the investigation was that St.Pierre [redacted]. It suggested creating and enforcing clear policies to ensure that everybody's usage can be logged and archived, but did not recommend any discipline. [redacted]

Feneberg accepted the investigation's conclusions, [redacted]

[redacted] he moved additional data-entry tasks to her department, moved money out

of HR's budget, and left her out of decisions that concerned HR, despite being aware that she had already become overworked. [redacted] claimed that any cutbacks and changes were a result of the district split. [redacted]

VI. St.Pierre Addresses Benefits Abuses to the School Board

During the 2014 school year, St.Pierre met Ken Eyring – a long-time parent-activist at the Windham School Board who was concerned with the cost of the high school and other expenses. Eyring was elected to membership on the school board in 2014, and served as its Chairperson in 2015 and 2016 when Feneberg's successor superintendent was being hired. *Eyring Depo* at 7-9, 38, 47-52, 128. Eyring and St.Pierre worked together when St.Pierre served on the district's policy committee, and during contract negotiations.

During the 2015 contract negotiations, Eyring sought information from the district regarding the value of salaries and benefits, so he could informedly negotiate. Eyring felt stonewalled by Feneberg and Steel, so turned to St.Pierre for the information. Because St.Pierre understood that answering to the school board was part of her job, because Feneberg assigned her to it, and because Eyring asked, St.Pierre transparently supplied him the information he needed. *Eyring Depo* at 52-55, 60-61, 66-67, 73-74.

In the context of retrieving the information and valuing benefits, St.Pierre discovered discrepancies in the amount of tuition reimbursement benefits granted to Steel and another SAU administrator, Curriculum Director Kori Becht. When she started asking questions, St.Pierre felt her colleagues were less than forthcoming, and when she explored the records, St.Pierre identified overpayments. MEMO FROM ST PIERRE TO FENEBERG (May 7, 2015), *Appx*. at 47; *Eyring Depo* at 79-81. She determined that both Steel and Becht got approval for reimbursements in excess of their

contract terms, and that Becht was reimbursed for classes she attended during the day when she was also getting a paycheck for being at work. *Steel Depo* at 143-47; *StPierre Depo* at 278-79; MEMO FROM ST.PIERRE TO FENEBERG (May 7, 2015). Feneberg approved the overages because it was an existing practice that he did not care to disrupt. *Feneberg Depo* at 76-77; *Eyring Depo* at 82.

The amount of money in Steel's case was in the range of about $1,500, but for Becht it was more substantial, amounting to about $42,000 over a two-year period, *Eyring Depo* at 160-62, and potentially involving fraud. Neither Steel nor Becht regarded the matter as worthy of attention; as a technical violation, however, St.Pierre took it more seriously, raising it with her colleagues and Feneberg. *Steel Depo* at 143-48, 151-53; *Feneberg Depo* at 75; MEMO FROM ST.PIERRE TO FENEBERG (May 7, 2015). As before, St.Pierre was uncomfortable pressing an issue she knew might create discord, but felt compelled to act by her HR duties and her "role to … protect the interest of the Windham School District's liability." MEMO FROM ST.PIERRE TO FENEBERG (May 7, 2015). She wrote a memo to Feneberg detailing her discoveries. She included Eyring on the communication because Feneberg had approved the payments, Feneberg's term was soon to expire, and because Feneberg had endorsed both Steel and Becht as possible superintendent replacements. *Id*; *Eyring Depo* at 78-79. Hackles raised, Eyring demanded answers from Feneberg, whom he felt was reluctant to produce information. *Eyring Depo* at 81. As a result of the episode, the incoming superintendent, Tina McCoy, reformed the "usual and customary practice" and approved tuition reimbursements strictly in accord with contracts. *McCoy Depo* at 26, 40-45.

As St.Pierre feared, her colleagues were displeased about the reimbursement issue itself, and more broadly that St.Pierre had involved the school board. *Steel Depo* at 148.

VII. Retaliation for St.Pierre Doing Her Job

At about the same time, St.Pierre was acting as liaison for the school board's superintendent job search. St.Pierre's had no role in decision-making, but was coordinating applications, administering the interview process, and generally assisting the school board. It was customary for an HR Director to be involved in this process, and St.Pierre felt the interaction with the school board was good for her career. *Eyring Depo* at 102-03, 145-46, 173, 176; *LaBranche Depo* at 46; *Steel Depo* at 158-59. Although Steel was not fully credentialed at the time, he was among the applicants, and favored by Feneberg, who lobbied the school board to appoint him. *Eyring Depo* at 186-87; *Steel Depo* at 154-55, 166-68; *Feneberg Depo* at 67. At Steel's request, Feneberg removed St.Pierre from the assignment. *Steel Depo* at 156-58; *Feneberg Depo* at 66-69; *Eyring Depo* at 173-76. Eyring, as school board chairperson, interviewed all the applicants, including Steel. During their conversation, Steel told Eyring that, if he became superintendent, he intended to eliminate the HR position. *Eyring Depo* at 86, 148; *Steel Depo* at 137-39. Eyring conveyed this to St.Pierre; she understood it as a threat to her job. *Eyring Depo* at 87-88.

Another action St.Pierre found troubling was a proposed physical rearrangement of the office. The plan was to lock the door, place St.Pierre's office at the entrance, and make St.Pierre responsible for buzzing people in. *Eyring Depo* at 85, 181; *StPierre Depo* at 214-15. St.Pierre objected because it would reduce productivity and compromise HR confidentiality, but also because, coinciding with a reduction in hours for her assistant, it meant she would be demoted to receptionist for a portion of her work-week. EMAIL FROM ST PIERRE TO FENEBERG (May 14, 2015), *Appx*. at xx; *StPierre Depo* at 214-17; *Feneberg Depo* at 54, 58; *Eyring Depo* at 85, 146-47. [redacted]

On May 18, 2015, St.Pierre met with Feneberg regarding her concerns about retaliation. On the same day, she sent an email memo to Feneberg and Eyring. St.Pierre's memo:

- referenced the retaliation;
- lamented that her "work environment situation … has escalated to the point of my being bullied and harassed by Adam Steel, making it very difficult for me to report to work each day";
- requested that her concerns be kept from Steel because he was the prime malefactor and had "displayed aggressive behavior toward me, as well as several other … employees";
- recollected that St.Pierre had repeatedly raised these issues with Feneberg during his two-year tenure to no avail; and
- noted that she circulated the memo to Eyring because Feneberg's departure was imminent, the problem had been first addressed to Feneberg's predecessor who also departed, and because the logical next step was the school board.

MEMO FROM ST PIERRE TO FENEBERG (May 18, 2015), *Appx*. at 52.

VIII. Investigation on Retaliation

The school board should have held a hearing on a senior personnel issue where the employee could not get relief from the superintendent and the superintendent was alleged to be complicit. *LaBranche Depo* at 36-37. But, "at the insistence of the superintendent," Feneberg blocked the school board from addressing St.Pierre's complaint. *Eyring Depo* at 109-10. Instead, two days after St.Pierre's memo, Feneberg commissioned an internal investigation.

The investigation, however, was conducted by the law firm of Jackson/Lewis, which is the same law firm that had defended SAU 28 in the Billings lawsuit in 2012, in which the district incurred liability because St.Pierre had refused to corroborate Steel's story. *Ford Depo* at 8; *StPierre Depo* at 227-33. While Feneberg was unaware of the previous representation, *Feneberg Depo* at 88, and lawyer/investigator Debra Ford did not personally work on the previous representation, Attorney Ford and Jackson/Lewis knew it had an inherent conflict of interest. The law firm's business model was and is representing employers to minimize their liabilities, *Ford Depo* at 6-7, and it has no employees as clients. *Id.* Jackson/Lewis also had continuing duties to its SAU client as

demonstrated by Attorney Ford declining to answer questions about the Billings lawsuit. *Ford Depo* at 10. Jackson/Lewis was not an impartial party, *LaBranche Depo* at 77, 104, which Attorney Ford effectively conceded. *Ford Depo* at 113-14.

Nonetheless, in June 2015 Jackson/Lewis issued its report. *Eyring Depo* at 112; J/L INVESTIGATION at 1. The report restated St.Pierre's specific allegations going back to shortly after she got hired, Steel's resulting repeated aggressive manner and retaliatory actions toward her, and her lack of success in gaining the help of her two short-term bosses in addressing the issue. The investigator interviewed St.Pierre, Steel, Feneberg, Assistant Superintendent Amanda Lecaroz, Becht, and Labranche, who each (apart from St.Pierre) said they had not witnessed hostile behavior. *Id.* St.Pierre suggested there were other witnesses, but they were not interviewed. *Eyring Depo* at 112. Based on this, the investigation concluded there was no retaliation, but found St.Pierre was difficult for her colleagues to work with. It recommended the SAU hire a facilitator to resolve St.Pierre's and Steel's differences, and a "coach for Ms. St.Pierre to help her [illegible] issues and learn how to more effectively work with the administrative team." J/L INVESTIGATION at 11. It also recommended that St.Pierre be informed of the investigation's findings.

Although Feneberg did not provide the investigation report to St.Pierre, *Ford Depo* at 36, Feneberg accepted its conclusions, apprised St.Pierre of its findings, and offered St.Pierre the recommended facilitator and job coach. LETTER FROM FENEBERG TO ST.PIERRE (June 18, 2015), *Appx*. at 96.

Feneberg's final annual employee evaluation of St.Pierre was issued the same day as the investigation report, and reflects it. Although it compliments St.Pierre on her fiscal responsibility, expertise on HR matters, transparency with colleagues, and self-improvement, the evaluation comments that St.Pierre did her job "in a context of feeling disregarded, unfairly treated, and being taken advantage of, when objective assessments did not warrant such presumptions." PERFORMANCE EVAL. (June 12, 2015).

IX. St.Pierre Is Forced to Leave Her Job

Throughout St.Pierre's history at SAUs 28 and 95, she felt that Steel was hostile and aggressive toward her, which both made it difficult for her to come to work and do her job, and also affected her health and well-being outside of work – feelings which she contemporaneously expressed to Eyring. Erying described St.Pierre as a respectful, quiet and not a particularly emotive person, but said he witnessed her near tears after being treated aggressively by her co-workers and supervisor. *Eyring Depo* at 95-96, 103-04, 144-45, 164-65, 184-85. He was aware she felt "distraught [over] many days in a row. In fact, it was over several weeks." *Eyring Depo* at 184. Even Feneberg knew St.Pierre was unhappy with the situation. *Feneberg Depo* at 108, 111.

At the end of the school year in 2015, St.Pierre thought she was about to get fired. *Eyring Depo* at 177. She was under pressure from Feneberg and Steel, *Eyring Depo* at 178, and did not feel she could depend on Tina McCoy, the new superintendent, because she knew McCoy and Steel had a long relationship, *McCoy Depo* at 49, she understood that superintendents rely on their business administrators for direction in staffing the SAU, *Steel Depo* at 181; *Feneberg Depo* at 45, she recognized Steel intended to eliminate her job entirely, and suspected he would be emboldened by the J/L investigation. Although the plans for reconfiguring the office evaporated after St.Pierre quit, she appreciated that contractors had drawn blueprints and calculated costs, and thus perceived an imminent partial demotion to receptionist. *Feneberg Depo* at 53-54, 60; *Eyring Depo* at 88-89, 147, 179-80. The indulgence of Steel in the retaliation investigation, although St.Pierre felt it was tainted by bias, *StPierre Depo* at 230-31, and St.Pierre's negative performance evaluation the same day largely based on the biased investigation, also convinced her an end was near. The job coach was humiliating payback for exposing petty corruption which she happened to notice within the purview of her job. Feneberg undermined and humiliated her to the extent she could no longer work in that environment. *StPierre Depo* at 225-26.

Although St.Pierre signed a contract for the following school year which would have raised her salary to $74,200, EMPLOYMENT CONTRACT (July 2, 2015), Feneberg was not surprised when St.Pierre nearly simultaneously tendered her resignation. *Feneberg Depo* at 115; *Email from St Pierre to Feneberg* (June 4, 2015), *Appx*. at 75. He wrote a positive letter of recommendation for her, extolling her diligence, tact, knowledge, and abilities. LETTER OF RECOMMENDATION (June 9, 2015), *Appx*. at 80; *Feneberg Depo* at 96-97; *StPierre Depo* at 139.

In June, St.Pierre accepted another job. Although it was in her field, it would be a step down from "Director of Human Resources" at the SAU, to "Senior Human Resources Generalist" with a county government. Pay and benefits at the new job would be in the range of $26,000 less per year. LETTER FROM ROCKINGHAM COUNTY (June 23, 2015), *Appx*. at 98, 100. St.Pierre resigned from the SAU a few days later, after accepting the other job. LETTER OF RESIGNATION (June 29, 2015), *Appx*. at 103. Steel was pleased. *Steel Depo* at 184-85. St.Pierre later took a different HR job, which was an improvement, but still not near the rate of pay, benefits, or prestige she enjoyed at the SAU. *StPierre Depo* at 122-31.

X. Co-Workers Attack the Messenger

It is apparent that because of the split, unsettled leadership, or some other reason, at the time St.Pierre was hired at SAU 28, and continuing when she followed the split to SAU 95, there were condoned or overlooked gaps between practice and policy. [redacted]Feneberg knew it, and McCoy knew it. [redacted]146-47 (tuition reimbursement); *McCoy Depo* at 25-26; *Feneberg Depo* at 76. This gap was evident from various incidents: a person with a criminal record was allowed to clean the schools for some weeks because Steel was not accustomed to ensuring HR paperwork was complete before an employee started working, *Steel Depo* at 41-42, and St.Pierre was blocked from tuition reimbursement information, requested by the school board, through normal channels. *Eyring Depo* at 72-73, 80-81. When she came on as superintendent at the end of St.Pierre's

tenure, McCoy, who had a long history of involvement with SAU 28, understood that the district had systemic problems and needed "a culture change." *McCoy Depo* at 8-11, 32. Aside from St.Pierre's reporting, in 2016 the school board commissioned a financial audit to address possible improprieties in how money was spent; it identified 130 deficiencies, with which Steel did not agree, and recommended (among other reforms) a whistle-blower policy with anonymous reporting. *Eyring Depo* at 114-20, 125-28; *Steel Depo* at 190.

It is also apparent that St.Pierre identified real problems and got tangible results. Reforms, so that hiring could not bypass HR as had occurred with the employee with a criminal history, were put in place after St.Pierre identified the issue. *Eyring Depo* at 150. Several policy changes were implemented as a result of the investigation [redacted] Changes were made to ensure that tuition reimbursements would be paid only in accord with employee contracts. *McCoy Depo* at 26, 40-45. [redacted]

McCoy agreed that St.Pierre helped expose and end problems in the district. *McCoy Depo* at 18-19. Eyring thought St.Pierre was treated poorly and edged out because she provided data to the school board that showed administrators were over-dealing their own benefits. *Eyring Depo* at

96-97, 102.

St.Pierre raised important issues, but she was subjected to backlash for doing her job. Steel alleged that St.Pierre simply did not like him because he gave her unwelcome advice and because she's paranoid and insecure. *Steel Depo* at 112, 115-16, 121-22. He claimed that she's no good at her job, that he's not the only one St.Pierre does not get along with, and that the issues she raised were negligible. *Steel Depo* at 153, 177. Feneberg said St.Pierre was insufficiently professional and tactful. PERFORMANCE EVAL. (June 12, 2015). Curriculum Director Kori Becht, who got caught over-reimbursing tuition, said St.Pierre was too easily offended, and raised too many problems. J/L INVESTIGATION at 8-9. LaBranche asserted St.Pierre lacked self-confidence. *LaBranche Depo* at 99.

St.Pierre's co-workers also picked on how St.Pierre addressed the abuses she perceived: they did not like that she had gone to the school board, or that if she went to the school board it should have been by formal grievance and not email, or that she should have gone to the State Board of Education or the Department of Labor rather than the school board, or that the things she complained about were too frequent or too petty to warrant any reporting, or that the timing of her complaints was off, or that she gave insufficient consideration to the feelings of those about whom she reported. *LaBranche Depo* at 34-36, 70-73, 80-85; *Steel Depo* at 52, 122-23, 141-42, 148, 152-53; PERFORMANCE EVAL. (June 12, 2015).

Eyring was sorry to see her go. He repeatedly praised St.Pierre for "put[ting] the … district's interests ahead of herself and everyone else even when it would put her in an uncomfortable position," *Eyring Depo* at 60, 66, 95, 102, and lamented that "I think she did a good job and I think the district lost a good employee when she left." *Eyring Depo* at 177.

STATEMENT OF THE CASE

Carol St.Pierre left employment from SAU 95 on June 29, 2015. LETTER OF RESIGNATION (June 29, 2015), *Appx*. at 103. On March 28, 2016, she sued SAU 28, SAU 95, and the Windham School District for two counts: wrongful termination based on constructive discharge for her employer having created a hostile work environment, and violation of the Whistleblowers' Protection Act, RSA 275-E.

In its pleadings, SAU 28 argued it should be dismissed from the suit for expiration of statute-of-limitations periods on both counts, and said anything that occurred did not constitute a hostile work environment or was not a legitimate subject of whistleblowing. SAU 95 argued that it took no adverse employment action against St.Pierre, that her reports were not whistleblowing, and that the facts did not constitute a hostile workplace.

On August 15, 2017, the Rockingham County Superior Court (*Marguerite L. Wageling*, J.), issued an omnibus order on the SAUs' motions for summary judgment. It dismissed SAU 28 from the suit on both counts, and held that the allegations against SAU 95 did not constitute a hostile work environment sufficient for constructive discharge. OMNIBUS ORDER at 3 (Aug. 11, 2017), *Addendum* at 34. This appeal followed.

SUMMARY OF ARGUMENT

Carol St.Pierre first notes that a jury trial in a civil case is a constitutional right, that the summary judgment statute is thus narrowly applied, and that all inferences must be drawn in favor of St.Pierre. She then enumerates the findings of fact and inferences of fact that the court nonetheless drew against her, leading to the erroneous grant of summary judgment. Regarding both her constructive wrongful termination claim and her Whistleblowers' Protection Act claim, she thus argues this court should reverse.

St.Pierre then points out that, unlike employment claims involving discrete acts, hostile workplace claims necessarily involve a series of events constituting a course of conduct occurring over time. She argues that the split of SAU 28 into two separate school district had little effect on her workplace, that the hostile environment spanned the split, and that the court defeated the purpose of hostile workplace claims by insisting on analyzing discrete acts. St.Pierre thus suggests this court should reinstate SAU 28 as a defendant.

ARGUMENT

I. Court Erred by Granting Summary Judgment on Constructive Wrongful Discharge Claim

In these days of fewer civil jury trials, *see generally,* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEGAL STUD. 459 (2004), it is easy to discount that a jury trial in a civil case is a constitutional right, U.S. CONST., amd. 7; N.H. CONST., pt. 1, art. 20, and remains the theoretical norm.

> While summary judgment can at times be a useful avenue to pursue in order to eliminate baseless claims from costly litigation, trial courts must be wary of its application. … [A]lthough the [summary judgment] statute is designed to reduce unnecessary trials, it is not intended that deserving litigants be cut off from their day in court.

Iannelli v. Burger King Corp., 145 N.H. 190, 192 (2000) (quotations and citations omitted).

A defendant deserves summary judgment only if "there is *no* genuine issue as to *any* material fact." RSA 491:8-a, III (emphasis added). "An issue of fact is material if it affects the outcome of the litigation." *Panciocco v. Lawyers Title Ins. Corp.*, 147 N.H. 610, 613 (2002). All inferences must be drawn in favor of the party opposing summary judgment – that is, "giving [St.Pierre] the benefit of *all* favorable inferences." *Concord Grp. Ins. Companies v. Sleeper*, 135 N.H. 67, 69 (1991) (emphasis added).

St.Pierre alleged constructive wrongful termination.

> To establish a wrongful discharge claim, a plaintiff must allege and prove that: (1) the termination of employment was motivated by bad faith, retaliation or malice; and (2) that she was terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn.

Karch v. BayBank FSB, 147 N.H. 525, 536 (2002). "The termination element of the claim may be satisfied by proof of a constructive discharge." *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248-49 (2006). "Constructive discharge occurs when an employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign." *Porter v. City of*

Manchester, 151 N.H. 30, 42 (2004). Co-worker retaliation may constitute an adverse employment action. *Madeja v. MPB Corp.*, 149 N.H. 371, 380 (2003). Whether there was retaliation is a question of intent or motive, *see Appeal of Strafford Cty. Sheriff's Office*, 167 N.H. 115, 124–25 (2014); *Appeal of White Mountains Educ. Ass'n*, 125 N.H. 771, 778 (1984), which is a fact to be determined by a jury. *Cloutier v. A&P*, 121 N.H. 915, 924 (1981). The question of what a reasonable person should withstand in the workplace is also for the jury. *Madeja v. MPB Corp.*, 149 N.H. at 371. These determinations turn on which witnesses are more credible, a jury job. *Id.* at 382-84 (cataloguing conflicting evidence reviewed by jury).

The superior court, however, made numerous findings of fact on material issues, openly weighing the evidence, ascribing motives to the harassers, and evaluating the harassment's effect on St.Pierre. The court found:

- Conduct toward St.Pierre was not ongoing, repetitive, pervasive, or severe. ORDER at 16.
- Any hostility was a product of St.Pierre's "misperception and paranoia." ORDER at 17.
- The series of events, beginning at SAU 28, did not inform St.Pierre's constructive discharge from SAU 95. ORDER at 17.
- Eyring's testimony can be discounted because "it is vastly outweighed." ORDER at 17.
- Removal from the superintendent search had nothing to do with Steel and Feneberg wishing to reduce St.Pierre's contact with the school board. ORDER at 20.
- Salary raises and good performance reviews are anathema to constructive discharge. ORDER at 18-19.
- Constructive discharge was not considered as an adverse employment action. ORDER at 18, 19.
- The investigation report was impartial and not merely a useful cover to nudge St.Pierre out. ORDER at 17, 20.
- There was nothing humiliating or harassing about the office reorganization proposal. ORDER at 16.
- There was nothing humiliating or harassing about offering a job coach. ORDER at 19.
- There was nothing harassing about Steel's conduct toward St.Pierre. ORDER at 17, 19.

"Relatively minor abuse of an employee is not sufficient for a constructive discharge. Rather, the adverse working conditions must generally be ongoing, repetitive, pervasive, and severe." *Id.* (quotations and citations omitted). A list of employer actions that would otherwise appear trivial or insignificant, when occurring in a series over time, however, "can prove the elements of a constructive discharge claim." *Id.* at 33.

In *Porter*, on facts with similar elements, a jury twice found liability. *See Porter,* 151 N.H. at 30; *Porter v. City of Manchester*, 155 N.H. 149 (2007) (jury verdict after remand). In *Porter*, the employer actions, while maybe trivial alone, were together sufficient for constructive discharge:

- A threat to job security in the form of a statement by the boss that "[W]e'll see how long you last."
- The boss telling the employee the boss was "disappointed in him."
- The boss ignoring the employee's comments at staff meetings.
- The boss bumping into the employee in the hall.
- A threat of violence in the form of a statement by the boss that her son, if he could, would "take out" four or five people in the department.
- "Snickering comments."
- The boss "glaring" at the employee.
- The boss blocking an internal office door the employee was intending to walk out of.

Porter, 151 NH at 30, 33.

Essentially all of the conditions listed in *Porter*, or similar conditions, are present here. St.Pierre's job security was threatened when LaBranche told her that "she would be looking for a job in another state" and when Steel made clear his intent to eliminate the HR position. Feneberg conveyed his disappointment, or worse, in his last performance evaluation, where he wrote that St.Pierre's feelings of retaliation were unjustified. St.Pierre was left out of important meetings, vociferously vituperated in front of colleagues, treated coldly, threatened with exile to receptionist, and after an investigation unlikely at its origin to result in the employee's favor, blamed for the office

problems.

During the period of St.Pierre's employment, SAU 28 was going through profound institutional changes, a split, instability in the fledgling SAU 95 with a series of part-time and temporary superintendents, and a dearth of long-range leadership. Local "practices" differed from policy, accruing to the benefit of those administering them. Into this milieu was hired St.Pierre as HR Director, known for her exacting expertise on HR compliance, and for her integrity – which is not only unquestioned, but extolled by those who worked around her.

Nowhere in the record is there any hint that the individual and systemic problems St.Pierre pointed out were fanciful or inconsequential. At most, her critics criticized her means. It is understandable that her colleagues were upset by the accountability St.Pierre brought, especially when it affected them personally. Whether their lawful chagrin turned into tortious hostility, however, turns on the credibility of witnesses, which is for determination by a jury.

II. Court Erred by Granting Summary Judgment on Whistleblowers' Protection Act Claim

The New Hampshire Whistleblowers' Protection 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 … [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.

RSA 275-E:2, I(a). The Act applies to public employees. RSA 275-E:8, IV. A claimant must prove:

> (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.

Cluff-Landry v. Roman Catholic Bishop of Manchester, 169 N.H. 670, 674 (2017) (quotations omitted). There does not have to be an actual violation of law, so long as the employee reasonably believed there was. *Id.* Reasonableness is a fact to be determined by a jury. *Appeal of Osram Sylvania, Inc.*, 142 N.H. 612, 618 (1998). A "report" can be made internally. *Appeal of Fred Fuller Oil Co., Inc.*, 144 N.H. 607, 611 (2000); *cf., Digital Realty Trust, Inc. v. Somers*, No. 16-1276, 2018 WL 987345 (U.S. Feb. 21, 2018) (Wall Street whistleblower statute requires report to specified agency).

Although a "policy" of a private employer is not a "law or rule," *Cluff-Landry*, 169 N.H. at 674, school districts are "public corporate bodies." *Farnum's Petition*, 51 N.H. 376, 379 (1871). The "school board is the managing board of the school district," *Ashley v. Rye Sch. Dist.*, 111 N.H. 54, 55 (1971), and its policies are "regulations" which, when properly promulgated and limited to their statutory subject area, have the force of "law or rule" within the district. RSA 189:15; *Coleman v. School District of Rochester*, 87 N.H. 465 (1936). Also, St.Pierre's contract and job duties included ensuring compliance with school board policies.

St.Pierre reported a variety of violations of law and policy:

- An employee hired without a criminal history check, RSA 189:13-a;
- Steel's vacation pay irregularities, which possibly constituted theft by deception, RSA 637:4, and were also in violation of school board policy;
- [redacted]
- [redacted]
- [redacted]
- Becht and Steel's tuition reimbursement overcharges, which may have constituted theft by deception, RSA 637:4, were possibly fraud, RSA 638, and may have been in violation of school board policy.

Having caught her co-workers in petty corruption, they retaliated, by threatening to demote her, being aggressive, hiring a biased investigator and using its recommendations as cover for a poor performance evaluation, assigning a job coach, and causing constructive discharge.

Whether these actions were retaliatory within the meaning of the act depends upon the credibility of witnesses and the evaluation of evidence, the job of a jury. The court's summary judgment deprived St.Pierre of her right to have a jury determine these matters, which this court should restore.

III. Court Erred by Dismissing SAU 28 as Defendant

When discharge is constructive, the "cause of action accrues and the statute of limitations begins to run when the plaintiff tenders … her resignation or announces a plan to retire." *Jeffery v. City of Nashua*, 163 N.H. 683, 688 (2012). For allegations of employment violations that involve a course of conduct, where there is involvement of a successor entity during the time in which the course of conduct occurred, the successor entity may be liable for conduct occurring under the management of the predecessor entity. *See Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir. 1985) (enunciating 9-factor test); *E.E.O.C. v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974); *United States Pipe & Foundry Co. v. N.L.R.B.*, 398 F.2d 544, 545 (5th Cir. 1968); *Superior Care Facilities v. Workers' Comp. Appeals Bd.*, 32 Cal. Rptr. 2d 918, 925 (Cal.App. 1994).

In workplace claims involving a discrete act, the statute of limitations ticks from the date "it happened." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002) (quotation omitted).

> Hostile work environment claims are different. A hostile work environment … is created by repeated conduct – a series of separate acts that collectively constitute one unlawful employment practice. As such, hostile work environment claims do not turn on single acts but on an aggregation of hostile acts extending over a period of time. It follows that the unlawful employment practice that triggers the statute of limitations occurs, not on any particular day, but over a series of days or perhaps years. Thus… the statute of limitations is satisfied as long as the plaintiff files a charge within [the limitations period] of one of the many acts that, taken together, created the hostile work environment.

Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 18 (1st Cir. 2002).

St.Pierre filed her complaint on March 28, 2016. When she left work on Friday, June 28, 2013, St.Pierre worked for SAU 28. Although her desk did not move, when she arrived for work on Monday, July 1, she was a SAU 95 employee. The hostile work environment that existed on Friday still exited on Monday, and St.Pierre filed suit less than three years after the split. SAU 28 was therefore a proper defendant for both the constructive wrongful discharge and the Whistleblowers'

Act claims, and the court erred in dismissing it.[5]

Moreover, application of the statute of limitations does not bar discovery and use of evidence older than the limitations period to prove the full course of conduct; the limitations statute is not an evidentiary rule. *Guild v. Meredith Village Savings Bank*, 639 F.2d 25, 27 (1st Cir. 1980) ("[I]t has long been established that the statute [of limitations] is available only as a defense."). The superior court, however, drew a bright line between acts committed at SAU 28 and those committed at SAU 95. OMNIBUS ORDER at 14, 17-18. But for Steel and St.Pierre, before the split and after the split, they were doing the same jobs in the same location, and the hostile work environment smoothed from one district to the other. Artificially separating the pre- and post-split conduct has the effect of conflating claims involving a discrete act, and the claim here of a hostile workplace; ignoring that "[h]ostile work environment claims are different." *Marrero v. Goya*, 304 F.3d at 18.

Accordingly, the court erred in dismissing SAU 28 from the case, and also in separating the course of conduct into pre- and post-split categories.

[5]The court initially denied SAU 28's motion to dismiss, "without prejudice to raising a similar claim by way of a motion for summary judgment," ORDER ON SAU 28's MOTION TO DISMISS (Feb. 24, 2017), *Appx*. at 479; NOTICE OF DECISION (Feb. 27, 2017), *Appx*. at 481, which SAU 28 did. The court later granted SAU 28's motion for summary judgment, the order herein appealed.

CONCLUSION

Carol St.Pierre was the Human Resources Director for SAU 28 and then SAU 95 from 2011 to 2015. During that time, she exposed petty corruption and a routine disregard for employment laws and school board policies, which she brought to the attention of colleagues and superiors. Resented by co-workers for holding them accountable, they made her job life intolerable, forcing her to quit. Her subsequent employment has not been as advantageous, resulting in damages she seeks to prove to a jury. This Court should reverse.

REQUEST FOR ORAL ARGUMENT

Because this case presents novel issues, this court should hear oral argument.

Respectfully submitted,

Carol St.Pierre
By her Attorney,
Law Office of Joshua L. Gordon

Dated: February 28, 2018

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on February 28, 2018, copies of the foregoing will be forwarded to Dona Feeney, Esq.

Dated: February 28, 2018

Joshua L. Gordon, Esq.

ADDENDUM

Omnibus Order on SAU's Motion for Summary Judgment (Aug. 11, 2017). 32

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

William B. Pribis, ESQ
Cleveland Waters and Bass PA
Two Capital Plaza 5th Floor
PO Box 1137
Concord NH 03302-1137

DOCKETED

Case Name: **Carol St. Pierre v School Administrative Unit 28 Windham School District, et al**
Case Number: **218-2016-CV-00374**

Enclosed please find a copy of the court's order of August 11, 2017 relative to:

Omnibus Order on Defendants Motions for Summary Judgment (Issued Under Seal)

August 15, 2017

Maureen F. O'Neil
Clerk of Court

(523)

C: Dona Feeney, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

CAROL ST. PIERRE

v.

SCHOOL ADMINISTRATIVE UNITS 28 & 95

Docket No. 218-2016-CV-00374

OMNIBUS ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (ISSUED UNDER SEAL)

Plaintiff, Carol St. Pierre, commenced the instant action against School Administrative Units 28 and 95 (collectively "Defendants")[1] alleging wrongful termination and violation of RSA 275-E (Whistleblowers' Protection Act). Defendants each move separately for summary judgment on all counts. Plaintiff objects. For the following reasons, Defendants' motions for summary judgment are **GRANTED**.

Facts

The following facts are undisputed by the parties, unless otherwise noted. In July 2011, Plaintiff was hired as the Director of Human Resources for SAU 28. St. Pierre Dep. 82:15, 88:10–:13,199:10; Compl. ¶ 7. In this capacity, she was responsible for coordinating staff hiring, as well as ensuring compliance with statutory labor laws, the New Hampshire Department of Education's credentialing rules, and internal policies, among other personnel matters. St. Pierre Dep. 100:19–:21, 101:1–:6. As Director of Human Resources, Plaintiff reported directly to then acting Superintendent Henry LaBranche. LaBranche Dep. 8:13–:14, 9:23–10:2. During Plaintiff's tenure, Adam Steel

[1] When needed, the Court will refer to Defendants individually as "SAU 28" and "SAU 95."

was employed by SAU 28 as a Business Administrator. Steel Dep. 11:3–:23, 12:1–5; Compl. ¶ 8. Similar to Plaintiff, Steel reported directly to LaBranche; but Steel had no supervisory authority over Plaintiff. St. Pierre Dep. 228:1–7.

Plaintiff's tenure began without issue, and there was little friction between her, Steel, and other school administrators. Id. 190:20–:23. In fact, Plaintiff received two favorable performance evaluations during her initial period of employment. Id. 188:12–:17; see e.g., SAU 28 Mot. Summ. J. Ex. D (Plaintiff's 2012 performance evaluation). Plaintiff also received a contract renewal that included a pay raise. Compare SAU 28 Mot. Summ. J. Ex. A (Plaintiff's 2011–2012 contract denoting an annual salary of $62,000), with id. Ex. J (Plaintiff's 2012–2013 contract denoting an annual salary of $64,000).

Beginning in 2012, however, the relationship between Plaintiff, Steel, and other SAU 28 school administrators began to "deteriorate." St. Pierre Dep. 191:1–:13. Plaintiff received "resistance" from Steel and LaBranche about her concerns regarding the criminal record check process for new employees. Id. 191:1–:6. Specifically, in October 2012, Plaintiff reported to LaBranche her concerns about the recent hiring by Steel of a custodian whose paperwork had not been properly processed. Id. 166:22–172. Plaintiff discovered in the process of printing out his paperwork that the custodian had disclosed "his criminal activity with marijuana" on his application. Id. 167:17–168:3; SAU 28 Mot. Summ. J. Ex. G (e-mail exchange between Plaintiff and Steel concerning new hire paperwork). During a meeting between Plaintiff, Steel, and LaBranche to discuss the custodian, Steel became angry at Plaintiff and "came probably within a foot of [Plaintiff's] face and said 'Is that what this is, a game of 'gotcha'? I'll get you.'" St.

Pierre Dep. 171:10–:13. LaBranche then yelled at Steel, agreed with Plaintiff's assessment of the situation, and directed Steel to figure out a solution. Id. 171:14–:22. A few days after this meeting, however, LaBranche told Plaintiff that she would be looking for a job in another state. Id. 174:3–:9. Plaintiff "felt in jeopardy of losing [her] job" after LaBranche made this statement to her. Id. 158:6–:10. Additionally, LaBranche had exhibited an "unpleasant tone" toward Plaintiff during a school meeting after Plaintiff "addressed the issue regarding the background check process for volunteers." SAU 28 Mot. Summ. J. Ex. F (letter from Plaintiff to LaBranche).

After the 2012 incident, the relationship between Plaintiff and Steel was "civil but distant," and the pair barely spoke to each other—only having professional interactions. St. Pierre Dep. 235:12–:19. In February 2013, while planning for the split of SAU 28 into two districts, discussions began about providing the Human Resources office of SAU 95 (the new district) with a full time administrative assistant. LaBranche Dep. 62:15–63:18. LaBranche, however, decided to keep the position part-time. Id. During this period, Plaintiff requested to relocate the Human Resources Department to an office that formerly housed the assistant superintendent. Id. 65:2–:5. LaBranche denied this request, explaining that after consulting with Superintendent-Elect Winfried Feneberg it was decided to move the business and financial staff to the that office. Id. 65:6–:18; SAU 28 Mot. Summ. J. Ex. H (letter from LaBranche to Plaintiff). LaBranche further explained that he "would recommend that [Plaintiff] relocate to the Student Services office where additional room is provided due to the lack of a closet." SAU 28 Mot. Summ. J. Ex. H.

In March 2013, Plaintiff questioned Steel's request for a buy-out for unused vacation time. Id. Ex. I (e-mail exchange between Plaintiff, LaBranche, and Steel). Specifically, Plaintiff believed that Steel had not reported his time correctly and had improperly cashed-out his vacation time for a value of up to $24,000. St. Pierre Dep. 252:6–253:9. On March 15, 2013, however, LaBranche informed Plaintiff that he had approved Steel's buyout after consulting with others in the school administration. SAU 28 Mot. Summ. J. Ex. I; St. Pierre Dep. 254:21–255:4. Plaintiff took issue with the buy-out given to Steel, and did not report her suspicions to any other authorities. St. Pierre Dep. 255:5–:13.

On July 1, 2013, SAU 28 split into two separate entities—SAU 28, which encompassed the Pelham public schools, and SAU 95, which encompassed the Windham public schools. LaBranche Dep. 9:1–:23. On June 30, 2013, Plaintiff's contract with SAU 28 lapsed. See SAU 28 Mot. Summ. J. Ex. E (Plaintiff's 2012–2013 contract with SAU 28, which lapsed on June 30, 2013). Prior to the split, Plaintiff signed a new contract with SAU 95 with a commencement date of July 1, 2013—receiving a 2% pay increase to work as SAU 95's Director of Human Resources. SAU 28 Mot. Summ. J. Ex. J (Plaintiff's 2013–2014 contract with SAU 95 denoting an annual salary of $65,000, which commenced on July 1, 2013). Feneberg and Steel likewise joined the administrative staff at SAU 95. Feneberg Dep. 10:14–13:20 (discussing the application process and transition period for SAU 95); Steel Dep. 11:8–12:5. Feneberg became SAU 95's superintendent, Feneberg Dep. 10:14–13:20, and Steel became SAU 95's

Director of Business, Finance, and Operations, Steel Dep. 11:8–12:5.[2] During this period, SAU 95 elected a separate School Board. See Eyring Dep. 38:1–40:23 (discussing his reasons for running for school board of SAU 95).

[redacted]

On June 3, 2014, Plaintiff requested additional assistance and administrative support from Feneberg because her workload was unmanageable. SAU 95 Mot.

[2] While Steel's title changed at SAU 95, his responsibilities remained the same as they were while employed at SAU 28. Steel Dep. 12:3–13:7.

Summ. J. Ex. G (letter from Plaintiff to Feneberg). Thereafter, in late June, Plaintiff signed a contract for employment for the 2014–2015 school year that included an annual salary of $66,810. Id. Ex. H (Plaintiff's 2014–2015 contract). Around the same time, Plaintiff received a positive performance evaluation from Feneberg. Id. Ex. I (Plaintiff's 2014 performance evaluation).

During the spring of 2015, multiple plans were explored concerning the most appropriate way to reorganize the administrative offices. Feneberg Dep. 51:16–53:1. On May 4, 2015, Plaintiff sent Feneberg an email indicating her disappointment that the reorganization plans were not going forward according to her desires. SAU 95 Mot. Summ. J. Ex. J (email from Plaintiff to Feneberg). On May 7, 2015, Plaintiff sent Feneberg and School Board Chair Ken Eyring a letter expressing her concerns about tuition reimbursements for Steel and the Director of Curriculum Kori Becht. Id. Ex. K (letter from Plaintiff to Feneberg). These expenditures, however, were authorized by Feneberg and approved by the school board. Id. Ex. L (voucher spreadsheet); Feneberg Dep. 76:6–77:12.

[redacted]

[redacted] Plaintiff requested and received a letter of recommendation from Feneberg for a position with Rockingham County. SAU Mot. Summ. J. Ex. N (email from Plaintiff to Feneberg requesting letter of recommendation); id. O (application); id. Ex. P (letter of recommendation from Feneberg). During the same period, Feneberg gave Plaintiff a favorable performance evaluation. Id. Ex. Q (Plaintiff's 2015 performance evaluation). [redacted]

On June 23, 2015, Plaintiff accepted a position with Rockingham County while still working at SAU 95. Id. Ex. S (letter of employment); St. Pierre Dep. 137:8–:10. On June 29, 2015, Plaintiff tendered her resignation from SAU 95. SAU 95 Mot. Summ. J. Ex. T (Plaintiff's letter of resignation). On July 1, 2015, Plaintiff signed a new contract for employment with SAU 95 at an annual salary of $74,200 per year, which would run until her final day of employment on July 10, 2015. Id. Ex. U (Plaintiff's final contract for employment with SAU 95).

Analysis

"The mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to determine if there is a genuine issue of material fact requiring a formal trial of the action." Weaver v. Stewart, 169 N.H. 420, 425 (2016) (quoting Community Oil Co. v. Welch, 105 N.H. 320, 321 (1964)). The moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits filed, 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. The party opposing the motion "must set forth specific facts showing a genuine issue for trial, and not simply assert general allegations or denials." Weaver, 169 N.H. at 425 (quotation omitted). In ruling upon the motion, the Court considers all of the evidence, and inferences properly drawn therefrom, in the light most favorable to the non-moving party. Id. If the Court's "review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law," summary judgment shall be granted. Id. (quotation omitted).

SAU 28 and SAU 95 have each independently moved for summary judgment. These motions address similar substantive law, but apply the law separately to the individual facts surrounding Plaintiff's allegations as they relate to each Defendant. Thus, in an effort to provide a linear analysis to appropriately address the arguments made in Defendants' motions, the Court will provide a brief overview of the applicable law and then address Defendants' motions individually.

A. *Wrongful Termination*

In order establish a wrongful termination claim, "a plaintiff must allege and prove that: (1) the termination of employment was motivated by bad faith, retaliation or malice; and (2) that she was terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn." See Karch v. BayBank FSB, 147 N.H. 525, 536 (2002). "The termination element of the claim may be satisfied by proof of a constructive discharge, . . . which occurs when an

employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign . . . ." Lacasse v. Spaulding Youth Ctr., 154 N.H. 246, 248–49 (2006) (citation and quotation omitted). "[T]he cause of action accrues and the statute of limitations begins to run when the plaintiff tenders his or her resignation or announces a plan to retire." Jeffery v. City of Nashua, 163 N.H. 683, 688 (2012) (quotation omitted). This is because "[t]he harm has been done when the employee feels compelled to resign." Id. (quotation omitted).

"[T]he constructive discharge standard, properly applied, does not guarantee a workplace free from the usual ebb and flow of power relations and inter-office politics." Suarez v. Pueblo Intern., Inc., 229 F.3d 49, 54 (1st Cir. 2000). "The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins—thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world." Id. Thus, "[c]onstructive discharge is not established by showing '[r]elatively minor abuse of an employee [;] . . . [r]ather, the adverse working conditions must generally be ongoing, repetitive, pervasive, and severe.'" Lacasse, 154 N.H.at 249 (alteration in original) (quoting Porter v. City of Manchester, 151 N.H. 30, 42 (2004)). Claims for constructive discharge "cannot be triggered solely by an employee's subjective beliefs, no matter how sincerely held," because "[t]he ultimate test is one of objective reasonableness." Suarez, 229 F.3d at 54; see Lacasse, 154 N.H. at 248–49 (applying a reasonable person standard); Porter, 151 N.H. at 42 ("Constructive discharge occurs when an employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign."); 45B Am. Jur. 2d Discrimination § 968 (2017) ("An objective standard is employed to determine

whether an employee is constructively discharged, as an employee may not be unreasonably sensitive to his or her working environment, and a constructive discharge arises only when a reasonable person would find the working conditions intolerable."). The party alleging constructive discharge must establish that the resignation occurred within a reasonable time of the complained of conduct because timeliness is "an important factor in the constructive discharge equation." Smith v. Bath Iron Works Corp., 943 F.2d 164, 167 (1st Cir. 1991); Serrano-Nova v. Banco Popular de Puerto Rico, Inc., 254 F. Supp. 2d 251, 263 (D.P.R. 2003). Moreover, "[a] plaintiff cannot make out a successful claim of constructive discharge if the employee leaves his or her employment for reasons other than the employer's" proscribed conduct. 45B Am. Jur. 2d, supra § 970.

B. *Whistleblower Protection Under RSA 275-E*

The purpose of New Hampshire's Whistleblower statute is to "encourage employees to come forward and report violations without fear of losing their jobs and to ensure that as many alleged violations as possible are resolved informally within the workplace." Appeal of Bio Energy Corp., 135 N.H. 517, 521 (1992). Pursuant to the statute:

> 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.

RSA 275-E:2, I(a)–(c). This protection extends to public employees. RSA 275-E:8, IV. To successfully invoke a claim under the statute, Plaintiff must establish 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." Cluff-Landry v. Roman Catholic Bishop of Manchester, __ N.H. __, 156 A.3d 147, 151 (2017) (quotation omitted); see Appeal of Seacoast Fire Equip. Co., 146 N.H. 605, 608 (2001). "RSA 275–E:2 'does not require an actual violation of a law or rule but only that an employee reasonably believe that such a violation has occurred.'" Cluff-Landry, __ N.H. __, 156 A.3d at 151 (quoting Appeal of Smithfield Dodge, Inc., 145 N.H 23, 26 (2000)). "Whether an employee had reasonable cause to believe is an objective question; namely, whether a reasonable person might have believed that the employer was acting unlawfully." Appeal of Osram Sylvania, Inc., 142 N.H. 612, 618 (1998).

While the statute does not specifically define "report," the New Hampshire Supreme Court has held that the best "approach is to presume that an employer is familiar with the laws and regulations governing its business and to consider a report to have been made if a reasonable employer would have understood from an employee's complaint that the employee was reciting a violation of law." Appeal Fred Fuller Oil Co., Inc., 144 N.H. 607, 611 (2000). Thus, "an employee need not make reference to any violation of any law or rule in order to be deemed to have reported under the Act." Appeal of Linn, 145 N.H. 350, 355 (2000). Moreover, "[a] private employer's internal policies or procedures do not constitute a law or rule adopted under the laws of a state

or the United States for purposes of a whistleblower claim," Cluff-Landy, __ N.H. at __, 156 A.3d at 151, because the "public does not have an interest in a business's internal management problems," Nichols v. Metro. Ctr. for Indep. Living, Inc., 50 F.3d 514, 517 (8th Cir. 1995) (quotation omitted).

C. *SAU 28*

SAU 28 argues that summary judgment is appropriate because: (1) Plaintiff did not resign from SAU 28; (2) Plaintiff suffered no adverse employment action at SAU 28; (3) Plaintiff's claims against SAU 28 under RSA 275-E are barred by the statute of limitations because any incidents giving rise to the claim occurred more than three-years prior to suit; and (4) Plaintiff's allegations against SAU 28 do not rise to a level that makes enhanced compensatory damages appropriate. Plaintiff does not specifically rebut SAU 28's arguments, instead relies on the arguments made in her objection to SAU 95's motion for summary judgment. The Court agrees with SAU 28 that summary judgment is appropriate.

Fatal to Plaintiff's claims against SAU 28 is the fact that she did not resign from SAU 28. Plaintiff left SAU 28 for reasons other than the work environment. See 45B Am. Jur. 2d, supra § 970. She stopped working for SAU 28 after the district was split into two entities, which occurred on July 1, 2013—two years before Plaintiff resigned from SAU 95. Indeed, Plaintiff's contract with SAU 28 lapsed on June 30, 2013, see SAU 28 Mot. Summ. J. Ex. E, and a new contract was entered into with Sau 95, see id. Ex. J. Likewise, after the split SAU 95 hired new administrative staff and elected new School Board members. See Feneberg Dep. 10:14–13:20 (discussing his application and transition to SAU 95); Eyring Dep. 38:1–40:23 (discussing his reasons for running

for school board of SAU 95). Plaintiff resigned while employed under her contract with SAU 95 not SAU 28, which is a separate entity. See SAU Mot. Summ. J. Ex. U. The harm to Plaintiff occurred—and the action began to accrue—upon the notice of resignation. Jeffery, 163 N.H. at 688. The split of SAU 28 and Plaintiff's transition to SAU 95 is undisputed by the parties. Given this fact, Plaintiff's claims against SAU 28 lack the element of termination, Karch, 147 N.H. at 536, which is satisfied by resignation, Lacasse, 154 N.H. at 248–49.

Plaintiff attempts to link SAU 28 to SAU 95 by arguing that the conduct continued after the split. In support of this argument, Plaintiff relies on Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 18 (1st Cir. 2002), for the proposition that "[a] hostile work environment . . . is created by repeated conduct—a series of separate acts that collectively constitute one unlawful employment practice." Id. at 18 (quotation omitted). This reliance is misplaced. To start, the "fact that the plaintiff endured a hostile work environment—without more—will not always support a finding of constructive discharge," id. at 28, because "[t]o prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment," Landsgraf v. USI Film Products, 968 F.2d 427, 430 (5th Cir. 1992). Nothing in the case law supports the proposition that conduct by separate employers may be joined in order to support a willful termination claim against each.

Moreover, under Plaintiff's rationale, a former employer could be held liable even where an employee does not resign from the former employer—but alleges that similar conduct occurred with the former employer—simply because, at one point in time, the

former employer was a unified entity with the current employer. Such a rationale would subvert the underlying purpose of constructive discharge, which is to provide an appropriate remedy when an "employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign . . . ." Id. (emphasis added) (quotation omitted). Further supporting the Court's conclusion is the fact that the alleged conduct on SAU 28's part occurred almost three years before Plaintiff's resignation. See Smith, 943 F.2d at 167 (holding that timeliness is "an important factor in the constructive discharge equation."); see also Serrano-Nova, 254 F. Supp. 2d at 263. Accordingly, SAU 28's motion for summary judgement is **GRANTED** as it relates to Plaintiff's wrongful termination claim.[3]

In the same vein, summary judgment is appropriate in Plaintiff's claims against SAU 28 under RSA 275-E because these claims are time barred. Pursuant to RSA 275-E:2, II, "[a]n aggrieved employee may bring a civil suit within 3 years of the alleged violation of this section." RSA 275-E:2, II (emphasis added). Plaintiff filed suit on March 28, 2016. See Compl. at 13. The relevant conduct at SAU 28, which would trigger the statute, occurred at the latest on March 15, 2013, when LaBranche approved Steel's vacation buy-out after Plaintiff objected on the grounds that she believed Steel had fraudulently miscalculated his vacation time. This conduct is beyond the three-year limitations period. Plaintiff does not specifically address this issue, instead pointing to conduct that occurred at SAU 95. Absent specific conduct that occurred at SAU 28, which would trigger the statutory protections outlined in RSA 275-E:2, Plaintiff's claims under the statute against SAU 28 are time barred. Accordingly, SAU 28's motion for

[3] The Court need not address whether Plaintiff suffered adverse employment action because it finds that the termination element, as it relates to Sau 28, was not met.

summary judgement is **GRANTED** as it relates to Plaintiff's claims under RAS 275-E. Additionally, because all of Plaintiff's claims against SAU 28 are disposed of herein, SAU 28's motion for summary judgment on Plaintiff's request for enhanced compensatory damages is likewise **GRANTED**.

D. *SAU 95*

SAU 95 argues that summary judgment is appropriate because: (1) the undisputed facts do no rise to the level required for constructive discharge; and (2) no adverse action was taken against Plaintiff in violation of RSA 275-E. The Court agrees that summary judgment is appropriate in this instance.

Plaintiff again argues that constructive discharge has been met because she was subjected to a hostile work environment. This, however, is not the standard applied when determining whether a constructive discharge occurred. As discussed above, "a hostile work environment—without more—will not always support a finding of constructive discharge." Marrero, 304 F.3d at 28. Indeed, a constructive discharge requires "a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." Landsgraf, 968 F.2d at 431. Thus, an employee's working environment must be objectively intolerable to a reasonable person, such that resignation was required. Porter, 151 N.H. at 42.

Here, the undisputed facts establish that the conduct was merely "the usual ebb and flow of power relations and inter-office politics." Suarez, 229 F.3d at 54. Plaintiff attempts to analogize the facts of this case with that of Porter. To start, as SAU 95 correctly points out, Plaintiff attempts to blend the interactions that occurred at SAU 28 with those that occurred at SAU 95. For example, the statement by LaBranche that

Plaintiff would be "looking for a job in another state," occurred while she was employed by SAU 28. Similarly, the interaction Plaintiff had with Steel—where Steel came within a foot of Plaintiff's face and yelled at her—occurred while employed with SAU 28. The only facts related to SAU 95 are: (1) school administrators considered placing Plaintiff's office with the receptionist and Human Resources Administrative Assistant; and (2) Steel's "markedly cold" conduct toward Plaintiff, which precipitated Attorney Ford's investigation. Neither of these actions, either taken separately or together, rise to the level required to establish constructive discharge.

Indeed, the undisputed facts are markedly different from those in Porter. The pertinent facts of Porter are as follows:

> When Porter returned to work after sharing his concerns with human resources, Lafond said to him, "[W]e'll see how long you last," and told Porter that she was disappointed in him. Lafond ignored suggestions that Porter made at staff meetings. In the summer of 2000, Lafond physically bumped into Porter as they passed each other in the hallway. Lafond also told an employee that if her son could, he would "take out" four or five people in the department. Lafond made "snickering comments" and glared at Porter. Finally, in May 2001, following a disagreement about the way Porter handled a case, Lafond told Porter that he was not leaving, blocked the doorway and suspended him.

Porter, 151 N.H. at 42. According to the New Hampshire Supreme Court, these facts proved the plaintiff's constructive discharge claims. Id. Here, however, the alleged conduct was not "ongoing, repetitive, pervasive, and severe," see Lacasse, 154 N.H.at 249 (quotation omitted), but simply "the ordinary slings and arrows that workers routinely encounter in a hard, cold world." Suarez, 229 F.3d at 54. First, as SAU 95 correctly points out, the proposed office reorganization plan to which Plaintiff takes issue with was just that—proposed—and did not occur until after Plaintiff left her employment with SAU 95. Moreover, while the relationship between Steel and Plaintiff

was less than warm, the facts establish that each engaged in conduct toward the other that can be classified as "the usual ebb and flow of power relations and inter-office politics." Suarez, 229 F.3d at 54. For example, while at SAU 95 Plaintiff described her interactions with Steel as "civil but distant," and the pair only had professional interactions. However, Plaintiff received positive job performances in 2014 and 2015 from Feneberg and in 2015, a positive letter of recommendation from Feneberg.

Plaintiff's attempts to defeat SAU 95's motion by suggesting that a clear dispute of fact exists as to whether the "hostile work environment was merely a product of [her] 'misperception and paranoia' or whether it was" actionable conduct is misplaced. The standard is not a subjective one. See Suarez, 229 F.3d at 54; see also Lacasse, 154 N.H. at 248–49. By the same token, Eyring's statement that he subjectively believed that the workplace was hostile is just that—subjective belief. While Eyring's opinion is a factor to be considered in the overall calculus, it is vastly outweighed by the undisputed facts. Accordingly, SAU 95's motion for summary judgment is **GRANTED** as it relates to Plaintiff's wrongful termination claim.[4]

Similarly, the Court finds that SAU 95 did not violate RSA 275-E:2 or RSA 275-E:9. SAU 95 identifies four separate instances that, in its view, could potentially be perceived as unlawful behavior such that reporting would have been appropriate. These events include: (1) "Plaintiff's report to Mr. Feneberg in July of 2013 about [redacted].

[4] Plaintiff's argument that Attorney Ford's investigation was in some way swayed by her relationship with SAU 95 is unsupported by any facts on the record. Moreover, Plaintiff's claim that "Attorney Ford herself testified that it would not be appropriate for someone who was an attorney for the defendant to conduct the investigation into [Plaintiff's] claim" takes Attorney Ford's testimony out of context. Pl.'s Obj. SAU 95 Mot. Summ. J. 11–12. A complete reading of Attorney Ford's deposition testimony makes it clear that she answered "no" to counsel's question about whether it would be appropriate to conduct the investigation: "If the school had contacted you and said, 'We want to hire you as our lawyer. We want you to look out for our best interests. And as our lawyer, looking out for our best interests, we want you to conduct this investigation.'" Ford Dep. 13:23–14:7.

[redacted] (2) Plaintiff's report to District counsel that she would testify truthfully in litigation in which the District was involved (in contrast to how she believed Mr. Steel would testify in the same matter)"; (3) Plaintiff's report in May of 2015 to the School Board about Ms. Becht's and Mr. Steel's alleged improper use of the District's tuition reimbursement program"; and (4) [redacted]" SAU 95 Mot. Summ. J. 15–16. Plaintiff does not specifically address each instance in her objection; instead highlighting her report to SAU 95 officials that she believe Becht and Steel improperly received tuition benefits. Pl.'s Obj. SAU 95 Mot. Summ. J. 19–20. Nevertheless, the Court need not decide whether Plaintiff "engaged in an act protected by the Act" because assuming, arguendo, that she did, she did not suffer "an employment action proscribed by the Act." Cluff-Landry, __ N.H. __, 156 A.3d at 151 (quotation omitted).

It is evident from the undisputed facts that throughout Plaintiff's tenure she received positive reviews and pay increases. Indeed, Plaintiff received salary increases during the two-years she was employed with SAU 95. See SAU 28 Mot. Summ. J. Ex. J (Plaintiff's 2013–2014 contract denoting an annual salary of $65,000); id. Ex. H (denoting a raise to an annual salary of $66,810). Additionally, Plaintiff received positive performance evaluations during her two-year tenure. For example, in her 2013–2014 performance review, Plaintiff received "proficient" and "distinguished" marks. SAU 95 Mot. Summ. J. Ex. I. It was remarked that Plaintiff's "willingness to accept difficult assignments involving staff discipline and performance issues in an unbiased, highly professional manner." Id. Plaintiff's 2014–2015 performance was likewise

positive. Id. Ex. Q. While it is true that Feneberg noted some areas of improvement, much of his comments centered on his appreciation of Plaintiff's work for the school. Id.; see

Plaintiff argues that there are six instances that establish adverse employment action. These instances include: (1) Feneberg expressing significant anger toward Plaintiff for involving the School Board in the tuition reimbursement investigation; (2) Feneberg improperly hiring the "District's paid advocate" to investigate Plaintiff's retaliation claims; (3) Feneberg "improperly den[ying] [Plaintiff] a hearing before the School Board (to which she was entitled to)" after Plaintiff's claims of retaliation; (4) Feneberg telling Plaintiff that her workspace was being reconfigured "so that she would have to take on receptionists duties"; (5) Feneberg removing Plaintiff from the superintendent search; and (6) Feneberg telling Plaintiff the school was hiring a "coach" to help her with coworker relations. Pl.'s Obj. SAU 95 Mot. Summ. J. 20–21. This conduct, however, does not rise to a level necessary to invoke the statutory protections, which requires an employer to "harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment." RSA 275-E:2, I (emphasis added).

Indeed, as SAU 95 correctly points out, no adverse employment action was taken against Plaintiff. She did not lose pay, did not receive a demotion, was not moved out of her office, and was not limited in her employment privileges. The fact that SAU 95 felt it necessary to hire a "coach" to assist Plaintiff to better develop her inter-office communication does not, in and of itself, constitute adverse employment action. Cf. Sweeney v. West, 149 F.3d 550, 556–57 (7th Cir. 1998) (noting that "negative

performance evaluations, standing alone, cannot constitute an adverse employment action . . . ."). If the Court were to recognize these "simple personnel actions as materially adverse, [it] would be sending a message to employers that even the slightest nudge or admonition (however well-intentioned) given to an employee can be the subject of a . . . lawsuit." Id. at 557. In effect, the Court would "be deterring employers from documenting performance difficulties, for fear that they could be sued for doing so." Id. This is not the purpose of the statute.

While Plaintiff was removed from the superintendent search, this was because Steel was an applicant and Feneberg feared that Plaintiff would be bias in her evaluation of Steel. Feneberg Dep. 66:5–67:6. Moreover, Plaintiff's argument that she was entitled to a hearing before the School Board—and that it was improper for SAU 95 to hire outside counsel to conduct the investigation—is without merit. Plaintiff cites no law, rule, or school policy to establish that the proper procedures were not followed by SAU 95. In sum, the Court finds that Plaintiff suffered no adverse employment action by SAU 95, and is therefore not protected by RSA 275-E. Accordingly, SAU 95's motion for summary judgment is **GRANTED** as it relates to Plaintiff's claims under RSA 275-E. Additionally, SAU 95's motion for summary judgment is **GRANTED** as it relates to enhanced compensatory damages.[5]

[5] The Court need not address Plaintiff's claims that the office reorganization was adverse because such conduct did not occur until after Plaintiff left SAU 95. Moreover, there are no facts on the record to suggest that Feneberg told Plaintiff that she would be given receptionists duties. In fact, this characterization was made by Plaintiff to Feneberg in her objection to the planned reorganization. See SAU 95 Mot. Summ. J. Ex. J (email from Plaintiff asking: "When the receptionist and HR Administrative Assistant are gone for the day would the HR Director be responsible for answering the phone and the door buzzer?").

Conclusion

For the reasons set forth above, Defendants' motions for summary judgment are **GRANTED**.

So Ordered.

August 11, 2017
Date

Marguerite L. Wageling
Presiding Justice