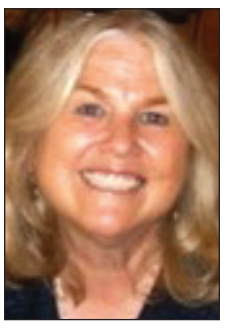
The N.H. Supreme Court on Employment Disability Accommodation. Pot, Yes; Sitting, No.

By Nancy Richards-Stower and Debra Weiss Ford


Richards-Stower


Ford

This is the 20th (!) N.H. Bar News debate over the last 16 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here they discuss two N.H. Supreme Court opinions issued in late fall 2021: *Paine v. Ride-Away, Inc*. and *Crowe v. Appalachian Stitching Company, LLC.*

Nancy: Deb, let's first discuss the marijuana opinion, ironically, the *Paine* case. I need its boost before we get to the *Crowe* summary judgment case.

Deb: Nance, I know you want me to say, "*go ahead, inhale,*" but I won't.

Nancy: Very funny. In *Paine v. Ride-Away, Inc.*, the employee suffered disabling PTSD, his doctor prescribed pot ("therapeutic cannabis"), his employer refused his request to waive its drug test, and the employee was fired after disclosing that he planned to treat his disability with cannabis, outside of work hours and off the employer's premises. The superior court tossed his discrimination suit (judgment on the pleadings), but the N.H. supreme court ruled that under the N.H. therapeutic cannabis statute, RSA chapter 126-X, the prescribed drug use *could* be a reasonable accommodation.

Deb: Ride-Away argued in part, that because marijuana is a federally controlled substance, it was not legally required to accommodate Paine's request to use marijuana to treat his PTSD. The Court ruled that the disability here was PTSD and not the illegal use of a drug and that a reasonable accommodation could be the use of marijuana to treat a disability. The case leaves many unanswered questions such as how an employer should deal with similar requests when there are federal mandated prohibitions on drug use for example, by US DOT.

Nancy: Well, at least "reefer madness"[1] has subsided and Mr. Paine will get his trial, unlike unfortunate Ms. Crow.

Deb: In *Crowe v. Appalachian Stitching Company,* the employee-assembler lost on summary judgment her quest to sit down periodically to accommodate her sciatica. You've ranted (and rapped) about summary judgment in employment discrimination cases for decades. What's special here?

Nancy: My historic rant is that the seeds of the needlessly complicated, generally anti-employee Title VII and ADA summary judgment laws were planted before jury trials were made available (by the Civil Rights Act of 1991, and corresponding state law amendments in 2000). N.H. state courts may, but need not, look to federal statute cases to interpret our similar state law. In *Crowe,* our supreme court reached way over to the 8th Circuit for "poetry" to kill the employee's case before trial. Crowe, diagnosed with sciatica, requested temporary, intermittent sitting on the job. Her boss allowed that accommodation and Crowe successfully performed her job. However, days later, when H.R. learned of her sciatica and accommodation, the H.R manager demanded a doctor's note. The resultant note said, "*no lifting or bending or stooping for 1 week*." Crowe said she didn't have to do those things; she just had to stand. But, H.R. sent her home, ordering her to not return until she had "no restrictions." Forced out, Crowe continued to improve, but her doctor could not provide a note "with no restrictions" and while she waited to improve to "no restrictions," she was fired for absenteeism. She could have continued performing her job with the accommodation of intermittent sitting.

Deb: However, Crowe's own testimony as to her job's "essential functions" was not enough to establish a material factual dispute that her disability rendered her unable to do her job. The employer's summary judgment evidence included its written job description "*as well as the testimony of its general manager and floor supervisor to support its contention that the ability to 'bend, lift and turn, freely' was an essential job function. Crowe, however, presented no evidence other than her own testimony, that she did not need to bend, lift or stoop on the job," citing the* Eighth Circuit:

> "*the specific personal experience of the plaintiff alone is of no consequence in the essential functions inquiry.*" *Knutson v. Schwan's Home Service, Inc.,* 711 F.3d 911, 915 (8th Cir. 2013)... *Instead, the plaintiff must produce competent evidence, other than self-serving testimony, that raises a genuine issue of material fact about what constitutes an essential job function."*

Nancy: "Self-serving testimony?" That cracks me up. What litigant chooses testimony that isn't self-serving? N.H. courts would more correctly use federal cases to *provide the floor, not the ceiling* for interpreting protective legislation. Scouring the country for a restrictive standard to import into our state law ignores the commands of RSA 354-A:25 to construe the statute *liberally* to prevent and address discrimination. For "essential job functions," the First

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mon law wrongful discharge, alleging that the employer was motivated by bad faith, malice, or retaliation to the employee's performance of an act encouraged by New Hampshire public policy when the employer terminated him for discussing his pay at work. The source of the public policy supporting the plaintiff's conduct in discussing his pay was the pay disclosure and non-retaliation provisions discussed above.

In a motion for judgment on the pleadings, the employer argued that the Equal Pay Act had no application to the case because the plaintiff's claim – as a male employee sharing his pay in the absence of an issue related to a sex-based pay disparity – had no factual underpinning in the problem that the statute sought to solve.

The Court was unpersuaded, noting that the plain language of both the pay disclosure and non-retaliation provisions make no distinction between the sexes, and for purposes of both provisions, "employee" is defined as "any person employed for hire by an employer in any lawful employment." See Order at p. 10, *Murphy v. Marbucco Corp. d/b/a Granite State Glass,* Case No. 211-2019-CV-00342 (June 7, 2021). Thus, the Court concluded that "by the plain language of the definition, employee includes all sexes," and therefore, the pay disclosure and non-retaliation provisions, "by their plain language, evidence that public policy encourages employees of all sexes to discuss their wages." *Id.*

Where do we go from here?

Like the state legislature intended, employees need to have an open dialogue about their pay. Then, and only then, can we shed light upon sex-based pay disparity and take the steps necessary to correct it.

My hope is that my colleagues will give their clients this advice: live free, and talk about your pay.

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Circuit law is more liberal than the Eighth Circuit's. See: *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 25 (1st Cir. 2002):

> *[The EEOC regulations] recommend considering evidence of the amount of time spent performing the particular function, the consequences of not requiring the [employee] to perform the function, and the past and current work experience of incumbents in the job (or in similar positions elsewhere). Id. The purpose of these provisions is not to enable courts to second-guess legitimate business judgments, but, rather, to ensure that an employer's asserted requirements are solidly anchored in the realities of the workplace, not constructed out of whole cloth...*
>
> *...[t]he employer's good-faith view of what a job entails, though important, is not dispositive... it is "only one factor" in the mix...In the final analysis, the complex question of what constitutes an essential job function involves fact-sensitive considerations and must be determined on a case-by-case basis.*

Deb: And so?

Nancy: Let the jury decide.

Deb: The decision underscores the importance of current job descriptions which accurately reflect the essential functions of the position. Here, attendance was an essential function of the job and the employee's inability to attend work meant she was not a "qualified individual."

Endnotes

1. Originally a 1936 anti-drug propaganda film.

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

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provides evidence of the degree of control and the degree of independence between the parties. Facts that provide evidence of the degree of control and independence fall into three categories for purposes of the IRS test: behavioral control, financial control, and the nature of the relationship between the parties.

Implications for Business

Businesses must realize that in deciding whether an individual is an employee or an independent contractor, the individual's title is largely irrelevant. Further, the existence of an independent contractor agreement, by itself, does not determine a worker's status. There are multiple factors, as referenced above, which dictate whether a worker can qualify as an "independent contractor." Businesses should be encouraged to audit their existing employment classifications to guard against the possible risk of costly litigation and damages for a misclassification of the "independent contractor" relationship.

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