What Happens When the NHCHR Fails to Meet Its Statute's 24-Month Case Processing Time?

By Nancy Richards-Stower and Debra Weiss Ford


Richards-Stower


Ford

This is the 23rd (!) *Bar News* "debate" over the last 18 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here, they discuss a case awaiting a certiorari decision by the New Hampshire Supreme Court, the Petition of Annalee Dolls, LLC (New Hampshire Commission for Human Rights) No. 2023-0319.

Nancy: Deb, do you remember the Johnny Carson character, Carnac the Magnificent, the great seer, soothsayer, and sage?

Deb: For the youngsters (which is everyone but us), Johnny Carson was a legendary comedian, and host of *The Tonight Show* before Jay Leno, Conan O'Brien, and Jimmy Fallon. And, for oldsters (like us), after Jack Paar. So, Nance, what about Carnac?

Nancy: Carnac foretold the future, and now we are asked to. We were supposed to write about what the Supreme Court did with Annalee Dolls' petition for certiorari arising from litigation at the New Hampshire Commission for Human Rights. Our print deadline is here but the cert decision isn't. Even if certiorari is granted, a decision on the merits is many months away.

Deb: Annalee Dolls, LLC, asks the New Hampshire Supreme Court to exercise its discretion and grant certiorari to hear its appeal from a Human Rights Commission order denying Annalee's Motion to Close a discrimination/retaliation case brought against it by employee Jackie Verrill. Annalee filed this Motion to Close only after the Commission issued a probable cause (PC) determination in favor of the employee. The issue: the PC was issued more than two years after the case was filed, despite RSA 354-A:21, IV:

> In administering this section, the commission shall be exempt from the provisions of RSA 541-A:29, II, *but shall close each case or commence adjudicative proceedings on such case under RSA 354-A:21 within 24 months after the filing date of the complaint.* (Emphasis added)

Annalee argues that the 24 months is a jurisdictional issue (which gets messy, because the PC covered different filing dates arising from amendments).

Nancy: My first reaction: Some nerve! Annalee Dolls sat on its "24-month jurisdictional shut down argument" for two years! The case was filed in 2019. The motion could have been filed in 2021 but Annalee waited for the PC determination before griping about jurisdiction in March 2023. Thoughts of waiver dance around questions of laches and all things equitable. Regarding precedent, other agencies' missed-closure deadline cases turned on whether an agency's statute specified consequences for missing a time limit, and/or whether anyone was prejudiced by the delay.

Deb: I don't think it is an untimely argument. There was no requirement to file it in 2021. And, just prior to its petition for certiorari, Annalee filed motions for reconsideration and rehearing at the Human Rights Commission (both now stayed) and appealed the PC ruling to Belknap Superior court (now stayed). Annalee argues that its post-PC administrative, superior court, and supreme court filings all were required because the appellate routes are unclear, and it needed to protect its position.

Nancy: Hm. I listened to the Supreme Court oral arguments. That a jury trial option exists for complainants who remove the case from the Commission to court within three years of the discriminatory act was repeatedly referenced by a justice at oral argument. This an apparent "yang" to the "yin" of the obvious injustice the court would create by slamming a case closed during its investigation, immediately upon the clock striking 24 months.

Yet another "yang" was the court's assumption in the form of questions (oddly, without any pushback by any of the counsel) that a case closure on state claims, coming even after the three-year statute of limitations had passed for the employee to exercise her jury trial option, didn't totally shaft the victims of discrimination, because "they would still have their federal claims." That is not true for most of New Hampshire's small business employees. Why? State law kicks in at six employees, but federal law requires at least 15 (for Title VII and the ADA), and for ADEA cases, 20. So, "that dog don't hunt."

News Flash: Federal court is no option for a pro se complainant, nor for a represented plaintiff without an attorney willing to risk $150,000 plus in attorney fees, along with thousands of dollars of ESI consultant costs. Court dockets are public and live forever on the internet. Plaintiffs who litigate brand themselves forever to future employers.

Real Life-Check: The only folks shafted by a 24-month jurisdictional case closure ruling are employees seeking their statutory rights to cost-free, confidential investigations by the Commission, which investigations expose discriminatory practices, protect current employees from retaliation, and simultaneously guide employers to confront – and change – discriminatory practices. Also, the Commission's very successful free mediation program resolves disputes.

Deb: I of course don't agree with that but, I do agree that both employees and employers suffer when Commission investigations languish. Prompt, thorough investigations would benefit everyone. It becomes a formidable issue when investigations are delayed. Employee witnesses may move on to other employment and memories may become hazy.

Nancy: I hope the Supreme Court denies certiorari to let the Superior Court get first crack at gathering the record and tweaking the scholarship. But whatever court hears the 24-month closure issue, it should be guided and inspired by the Commission's construction clause:

The provisions of this chapter shall

DEBATE *continued on page 29*

■ DEBATE *from page 22*

be construed liberally for the accomplishment of the purposes thereof. (Emphasis added)

Deb: The purposes, found in RSA 354-A: 1 are for the Commission "to eliminate and prevent discrimination," because it is "a matter of state concern" because:

"Discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." (Emphasis added)

The certiorari petition exposes the battle of the "shall" clauses: "*Shall close within 24 months* after filing date" versus the more inspirational "*shall be interpreted liberally* for the accomplishment of its purposes." We shall see.

(To be continued.) ♦

Nancy Richards-Stower advocates for New Hampshire and Massachusetts employees and invented/owns/operates trytosettle.com, a confidential bid, online settlement service. Her website is ***jobsandjustice.com****.*

Debra Weiss Ford is the managing principal at the Portsmouth, New Hampshire offices of Jackson Lewis, PC. Their website is ***jacksonlewis.com****.*

■ AGREEMENTS *from page 24*

of being fined. We do not recommend the approach of ignoring the NLRB because if a judge ends up in a position to reform a severance agreement, he or she is not likely to look fondly on an employer who willfully violated the law.

- Most employers have also been broadly ascribing "supervisor" status to employees to exempt them (in most circumstances) from the National Labor Relations Act (NLRA). Whether an employee actually is a supervisor or not extends beyond just their title so employee-side attorneys should gather more information to see if there is room for pushback.
- On the employee side, the argument is that the intent of the NLRB was clear. Employees should be able to complain about their former employers. Likewise, the NLRB memo watered down the decision some by allowing the amount of severance to remain confidential. Employees argue that if they are allowed to compare wages, they should be allowed to compare severances to know that they are receiving a fair amount.

When educating clients on settlements and severance agreements, it is also wise to make sure that their handbooks and general work rules do not unreasonably restrict concerted activity. Most employers know that they can not overtly restrict such behavior, but employers do not always recognize when a rule, such as limiting what employees can say about the business on social media, can inadvertently violate the NLRA.

Shortly after the *McLaren Macomb* decision, on August 2, 2023, the NLRB adopted a new legal standard for evaluating employer work rules. Stericycle, Inc., 372 NLRB No. 113 (August 2, 2023). The new standard is an effort to weigh the competing interests of the employer in promulgating work rules that advance legitimate and substantial business interest but that does not chill employees from exercising their rights under the Act.

Under the new legal standard, NLRB's general counsel must prove that a challenged workplace rule has a "reasonable tendency" to chill employees from exercising their rights under the Act.

"The Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." *Id*.

If the general counsel carries her burden, then the work rule is presumptively unlawful, but the employer then has the opportunity to rebut the presumption by proving that the work rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. *Id*. "If the employer provides its defense, then the work rule will be found lawful to maintain." *Id*.

While this new legal standard appears to effectuate a more balanced approach, employers who promulgate work policies that are narrowly tailored to its legitimate and substantial business interest are more likely to have a greater chance of prevailing.

While it is a year after *McLaren Macomb*, we are still left with many of the same questions we had when the decision and memo first came out. If you are still wondering what you and your clients are and are not allowed to do under the NLRA, you are in good company.

For more information on best practices, we recommend the New Hampshire Bar Association's "Employment Law 101" CLE from March 6, 2024, specifically attorney Jo Anne Howlett's presentation entitled "NLRA and NLRB Overview" and attorneys Katherine E. Hedges and Julie A. Moore's presentation entitled "Settlement and Severance Agreements." ♦

Beth A. Deragon and Kathleen A. Davidson are counsel at the law firm of Pastori | Krans, PLLC. For more than 18 years, Beth has been practicing employment law, civil litigation, and representation of professionals before licensing boards. For more than 14 years, Kathleen has practiced employment law, civil litigation, and family law.