IN THE HOOPA VALLEY TRIBAL COURT OF APPEALS
HOOPA VALLEY TRIBE
HOOPA, CALIFORNIA

Jewell Frank and Pamela Risling, Plaintiffs/Appellants, v. **Ryan Jackson, in his Official Capacity; Hoopa Valley Tribe, and Does 1-10, Inclusive,** Defendants/Appellees.	**NO. A-17-002** **OPINION**

Before: Lisa L. Atkinson, Chief Judge; Matthew L.M. Fletcher, Judge, Jordan Elizabeth Wallace, Judge.

Appearances: J. Bryce Kenny, for Appellants; Amanda Wilbur, for Appellees.

Fletcher, J:

The legal consequences to tribal employment separation can be complex, and the Hoopa Valley Tribe is no exception. Today we are compelled to instruct the trial court to redo much of its work in this matter. Through the appellate filings and oral argument, it becomes apparent to this Panel that the underlying issues in this case are more complex than had first appeared, and as a result we remand this matter to the trial court for a more comprehensive analysis and decision. *See Ferris v. Hoopa Valley Tribe*, 8 NICS App. 1, 7 (2007).

This matter comes before the Hoopa Valley Court of Appeals following the trial court's granting of a motion to dismiss. We review appeals from motions to dismiss de novo. *See Hoopa Valley Tribal Council v. Marshall*, 10 NICS App. 1, 3 (2011). The appeal "comes before us based upon an order granting the tribe's Motion to Dismiss. We therefore must construe the facts in the record before us in the light most favorable to the non-moving party . . . ." *Hoopa Valley Tribal Plant Management Dept. v. Smith*, 5 NICS App. 132, 134 (1999).

I. Factual Background

The uncontested facts begin with plaintiffs, Jewel Frank and Pamela Risling, who were employees of a tribal government program titled "Project Connect." The Hoopa personnel policy governed their employment. *See* 30 HVTC §§ 1-15 (codification of the relevant personnel policy). Plaintiffs were not "program managers" as that term is used in the personnel policy. Letters from the Chairman of the Tribe dated January 11, 2016 informed Frank and Risling that

they were each laid off, pursuant to § 7.6 of the personnel policy. The letters were silent as to the right of the former employees to seek legal redress for the decision.

Frank responded to the letter, addressing it to the Chairman. The letter contained in the record contains a date stamp indicating it was received on February 1, 2016 by the K'ima:w Medical Center. The record also includes a copy of a similar letter from Risling in response to the Chairman. There is no date stamp or any other indication on the document or elsewhere in the record of when the letter was sent or received. There is no evidence in the record on whether and when any tribal defendants responded to either of these letters.

On April 25, 2016, plaintiffs filed a complaint in the Tribal Court alleging wrongful termination, defamation, negligent infliction of emotional distress, and discrimination relating to their termination from tribal employment resulting from the January 11, 2016 letters discharging them from employment.

The Tribe moved for a dismissal of the claims against all tribal defendants based on lack of subject matter jurisdiction. The tribal defendants argued that Tribe has not waived its sovereign immunity for claims arising from a lay off and, in the alternative, Plaintiffs failed to file within the 30-day period set out in the limited waivers the Tribe has codified. *See* 1 HVTC § 1.1.04(f); 2 HVTC § 2.3.13(b); and 30 HVTC § 15.1.

On July 5, 2017, the trial court dismissed the action on the ground that the "Plaintiffs filed their wrongful termination action 85 days past the 30-day deadline" for invoking the tribe's waiver of sovereign immunity. In so dismissing, the Trial Court made several conclusory findings of fact. However, no trial or fact-finding hearing was ever held and no deference was given to the non-moving party. *See Smith*, 5 NICS App. at 134.

We reverse and remand.

II. Discussion

A. Jurisdictional Facts Regarding the Process Invoked

Employees governed by Title 30 of the personnel policy enjoy specific rights to seek legal redress. Those appeal or grievance rights are tied to a limited waiver of tribal sovereign immunity.

Employees first must invoke the administrative grievance process of Section 9.2. *See Hostler v. Hoopa Valley Tribe*, 10 NICS App. 14, 19 (2011). That section provides:

> Within 5 (five) calendar days following any disciplinary action or termination of employment, the employee may submit in writing to his or her immediate supervisor a summary of the reasons and any documentary evidence supporting

> why the said action should not have been taken against the employee. If the process does not resolve the grievance to the employee's satisfaction, the employee may submit a written grievance to the Program manager of the immediate department for which the employee works. If the Program manager of the immediate department for which the employee works does not respond within ten (10) calendar days, the prior decision shall be deemed to be upheld. Failure of the disciplined or terminated employee to follow the specified time lines shall constitute an automatic withdrawal of the grievance. With the exception of persons who have been terminated as described in § 9.3 of this Ordinance, the program manager's decision shall be final. The employee's submission and any supervisor responses will be kept in the employee's file. Whenever a response is required in a certain number of days, the time computation does not include the day the action was taken, but begins as of the next following day and runs until the last day specified, unless the last day falls on a weekend or a Tribal Holiday, in which even the due date is the next Tribal work day.

The administrative grievance process requires terminated employees to follow a very specific process:

1) The employee must submit in writing to the employee's immediate supervisor within five calendar days a grievance document that explains why the employee should not have been terminated, with supporting evidence. *See Macias v. Hoopa Valley Tribal TANF*, 11 NICS App. 1 (2013).

2) The employee must wait for the immediate supervisor to initiate "a process" that resolves the grievance one way or the other. In Section 9.2, there is no express deadline for this stage of the administrative grievance process. *Ferris v. Hoopa Valley Tribe*, 8 NICS App. 1, 4 (2007) ("The code, however, does not impose any time limits on either the employee or supervisor to perform any act in this stage of the grievance process.").

3) If the immediate supervisor confirms the termination, the employee then has 10 calendar days to submit another written grievance, this time to the "program manager" of the department for which the employee worked.

4) The employee must wait 10 more days for the program manager to respond.

5) The employee then has 30 calendar days to file an appeal to the tribal court. *See* 30 HVTC § 9.3. *See also Ferris*, 8 NICS App. at 5-6 ("After appealing a termination decision to the supervisor and program manager under 30 HVTC § 9.2, an employee who is not satisfied with the outcome may then file an appeal from the termination decision to the tribal court, provided the appeal is filed within 30 days of the 'date of the termination.'") (citing 30 HVTC § 9.3 and 2

HVTC § 2.3.13(b)). In *Ferris*, we concluded that the 30-day period to file an appeal in tribal court does not begin to run until the program manager responds to the employee's grievance or fails to take action within 10 days of receipt of the employee's grievance, whichever comes first. *Id.* at 7.

Questions of fact – sometimes called jurisdictional facts – abound in this analysis. Whether employees have invoked the administrative grievance procedure is a question of fact for the trial court to make in the first instance. Whether employees have complied with the requirements of either the administrative grievance process or the direct tribal court review process is also a question of fact for the trial court to make in the first instance. Tribal codes and cases are silent as to questions of jurisdictional facts. We hold, analogizing to Federal Rule of Civil Procedure 12, that

> [w]hen a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant. [citation] A plaintiff must make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss. [citation] [U]ncontroverted allegations in plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in plaintiff's favor.

Donius v. Mazzetti, 2010 WL 3768363, at 3 (S.D. Cal., Sept. 21, 2010) (internal citations omitted).

In this matter, the record shows that the Chairman of the Tribe delivered a letter informing Frank and Risling that they had been laid off. The record further shows that Frank and Risling wrote responses to the chairman. At oral argument, the tribe's counsel was unsure whether the Chairman was the immediate supervisor at the time of the separation. Plaintiffs also allege the Chairman's letter did not contain sufficient notice of appeal rights under our decision in *Hoopa Valley Housing Authority v. Gerstner*, 3 NICS App. 250, 259 (1993). There may need to be a determination on additional jurisdictional facts assess whether the plaintiffs complied with the appeal process. Those factual findings must be made in the first instance by the trial court.

B. Sufficiency of the Allegations of Pretextual Termination

We next address an even more difficult question: whether the plaintiffs may invoke section 9.2 at all. We hold that the plaintiffs may do so because they appear to have alleged that the stated reason for their termination was a pretext for an improper reason.

As this case reaches us on a motion to dismiss, we must assume facts alleged by the plaintiffs to be true. *Smith*, 5 NICS App. at 134. As plaintiffs allege employment discrimination, our decisions require the trial court to grant some deference to the plaintiffs: "If it is possible that

some form of prohibited discrimination occurred, we have no choice but to allow the employee to present her evidence. Any ambiguities are to be resolved in favor of a right of an employee to file a grievance and obtain judicial review." *Id.* at 136 (citing *Gerstner*, 3 NICS App. at 256; other citation omitted).

The tribal defendants argue that Plaintiffs Frank and Risling were not employees entitled to seek legal redress because the tribe invoked § 7.6 of the personnel policy, titled "LAYOFF," when ending their employment. According to the tribal defendants, the legal import of invoking § 7.6 is to bar anyone laid off due to program reorganization or lack of funds to continue a program from seeking redress under §§ 9.2 and 9.3. The tribal defendants read § 7.6 in conjunction with § 7.7, which is titled "DISMISSAL." Section 9.3 allows any "terminated" employees to file an appeal. Section 7.7 refers to "dismissed" employees and "terminated" employees. Section 7.6 only refers to employees who are "laid off." We are somewhat doubtful of the this narrow reading of these statutes given the lack of specificity within them, but we need not conclusively decide that question today.

We do, however, reject the tribal defendants' conclusion as to the import of § 7.6, in at least this situation. The plaintiffs' complaint is replete with allegations that their "lay off" was mere pretext for a discriminatory firing. The defendants' reading of § 7.6 would allow "bad actor" managers (assuming there are any) to give the label of "lay off" to an improper "termination" to avoid judicial review of any kind. At oral argument, the Tribe's counsel could not identify a statutory mechanism to protect laid off employees alleging wrongful termination.

Other tribal appellate courts have remanded or considered remanding employment matters to require the trial court to make factual determinations concerning whether a manager's stated reason for terminating an employee was merely a pretext for an improper reason. *E.g.*, *Warner v. Ho-Chunk Nation*, 7 Am. Tribal Law 56, 60 (Ho-Chunk Nation Supreme Court 2007) ("An allegation of a demotion based upon pretext would appear to raise several factual disputes. Thus, this matter is remanded to the Trial Court for further review of the issue of pretext."); *J.M. v. Tulalip Tribes*, 12 NICS App. 52, 55 (Tulalip Tribal Court of Appeals 2014) ("[W]e do not resolve the question . . . of whether a properly supported claim of unlawful discrimination is sufficient to overcome the prohibition against appealing dismissals for violation of attendance policies."). Both *Warner*, which involved a demotion not usually appealable under that tribe's law, and *J.M.*, which involved a termination for poor attendance, allowed for the possibility that even where an employee's right to appeal might be barred, a plaintiff could still allege facts that make a showing the employment decision was a pretext for an improper act by a manager.

We do not make a decision on whether the complaint actually does allege facts sufficient to raise a pretext claim. That is for the trial court to make. This court held in *Smith* that we must construe the complaint in favor of providing judicial review. The tribal defendants might ultimately show that Plaintiffs' employment discharge was no more than a lay off, but Plaintiffs

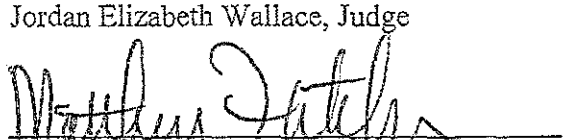
have at least alleged facts that suggest otherwise. At this stage of litigation, where all facts are to be assumed true, and employment discrimination complaints are to be construed in favor of judicial review, the granting of the motion to dismiss was in error.

* * *

The trial court did not make sufficient findings of fact about various documents, events, and claims. Given the complexity of employment separation law, the trial court's error is "understandabl[e]," *Ferris*, 8 NICS App. at 7, however, we must remand to allow the parties to more fully develop the record and to allow the court to make the relevant findings required by this opinion.

It is so ordered, this 4th day of October 2017, for the Court:

Lisa L. Atkinson, Chief Judge
Jordan Elizabeth Wallace, Judge



Matthew L.M. Fletcher, Judge

I CERTIFY THAT ON OCT 0 4 2017
I PROPERLY MAILED A COPY OF THIS DOCUMENT ADDRESSED TO EACH OF THE FOLLOWING NAMED PERSONS, AT THE ADDRESSES LISTED BELOW.

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