MASHANTUCKET PEQUOT TRIBAL COURT

Matthew LOUCHART v. MASHANTUCKET PEQUOT GAMING ENTERPRISE

No. MPTC-EA-99-105 (June 17, 1999)

Summary

The Employee Appeal Division of the Mashantucket Pequot Tribal Court finds that there was no reasonable basis for concluding that the plaintiff violated the applicable work rules, standards, or other conditions of employment established for the position held by the plaintiff.

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[2]The Gaming Enterprise did make various assertions of fact in its objection and attached copies of letters purportedly mailed to the plaintiff by the Employee Relations Department; however, such assertions and attachments do not constitute evidence. *Colvin v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 106, 107 (1997), citing *Cologne, et al. v. Westfarms Associates, et al.*, 496 A.2d 476, 484 (Conn. 1983).

[3]This Court is dismayed at the lack of professional courtesy displayed by counsel in the handling of this matter. Simple telephone calls from one counsel to the other could have spared Mr. Grossi months of unnecessary delay.

Full Text

Before SHIBLES, Chief Judge

This is an appeal pursuant to the provisions of the Mashantucket Pequot Employment Appeal Law, VIII M.P.T.L. ch. 1, § 8 (hereinafter, Law) by which the plaintiff, Matthew Louchart, challenges the decision of the President/CEO of the Mashantucket Pequot Gaming Enterprise (hereinafter Gaming Enterprise) to suspend him from his employment as a Blackjack Floor Supervisor in the defendant's Gaming Department.

I. Factual Background

The record supports the following facts. Sometime prior to March 1998, the Mashantucket Pequot Tribal Gaming Commission and the Connecticut State Police commenced an investigation of two Foxwoods Resort Casino employees, Tracey Macri and Miguel Rivera, for illegal drug activities. (R. at 25.) Macri was described to investigators as "having a severe addiction to cocaine" (R. at 25) and was thought to possibly be assisting Rivera in the distribution of drugs on Gaming Enterprise property. (R. at 76; Tr. at 12.) On March 1, 1998 at 9:47 p.m., Macri met with a "high roller" patron in the casino's 360° Lounge. (R. at 25.) The patron was suspected of being involved in drug activities. *Id.* After this meeting, Macri was observed at 10:49 p.m. exiting Cafeteria 2 with the plaintiff. *Id.* A composite videotape showed Macri and Louchart walking together around a corner and into view. (Gaming Enterprise Exhibit # 1.) After a few steps down the hallway toward the camera, Louchart reached into an inside breast pocket and withdrew a small package which he then placed into Macri's hand. *Id.* Macri did not look at the package but simply held it in her hand and continued to walk forward and out of view of the camera. *Id.* Louchart, shortly thereafter, turned in the opposite direction and walked away. *Id.* The contents of the package were not identified by the Gaming Enterprise. (R. at 95-96; Tr. at 31-32.)

Sometime between March 1, 1998 and August 25, 1998, Rivera was arrested by the Connecticut State Police and Macri was terminated from employment for "drug-related activities." *Id.*[1] The plaintiff was interviewed by Robert M. Hargraves, Sr., Special Investigator for the Compliance Department of Foxwoods Resort Casino, on August 25, 1998, "regarding his association and/or relationship with Tracey Macri." (R. at 26.) Upon questioning by Hargraves regarding the videotaped activity of March 1, Louchart stated that he could not remember what he had given to Macri, but insisted that it was not drugs or money. *Id.* The following day, Louchart returned to the Compliance Office and stated to Hargraves that, after thinking about the videotape, he concluded that he had given her either candy or a cigarette. *Id.*

Louchart was advised that he would be given a drug test on Wednesday morning, August 26, 1998. *Id.* The plaintiff, upon hearing this, notified Hargraves that he would fail the test as he had smoked marijuana on August 9, 1998 during his vacation in Aruba which took place from July 29 to August 10. *Id.* On August 26 at 9:00 a.m., Louchart appeared at the Compliance Office and met Allen Longendyke of the Gaming Enterprise's Employee Relations Office at the Nurse's Station to take his drug test. *Id.* The Employee Health Services "Drug Free Workplace Compliance and Duty Assessment Form" contains a section in which to indicate Drug Free Workplace compliance. The option "Does Not Comply" is marked on the form for Matthew Louchart's August 26, 1998 urine screen. (R. at 28.)

The record contains a form encaptioned "Mashantucket Pequot Tribe Drug Free Workplace Policy. Reasonable Cause for Alcohol and/or Drug Abuse Report." (R. at 29.) The form provides that, "This checklist is to be completed when an incident or accident has occurred or conduct has been observed or other evidence to ascertain that reasonable cause exists indicates that an employee/participant is using or is under the influence of a prohibited drug and/or alcohol." *Id.* Under the section "Nature of the Incident/Accident or Circumstances for Cause" is marked the selection "Observed/reported possession or use of a prohibited substance (includes a complaint)" next to which are written the words "Compliance has video." *Id.* It is also written on the form, "Test per Compliance Department Investigation." *Id.* There are no marks made in the sections for "Behavioral Indicators Noted" and "Physical Signs and Symptoms Noted." *Id.* The form is signed by Allen Longendyke on August 26, 1998 at 9:50 a.m.[2] *Id.* Finally, a notation is made on the bottom of the form that "Per EHS document—drug test positive." *Id.*

On September 9, 1998, the plaintiff was suspended pending further investigation for misconduct, namely "failure to comply with the Drug Free Workplace Policy." (R. at 24.) Louchart was separated from employment for "violation of the Drug Free Workplace Policy" and "under the guidelines of the Progressive Discipline Policy Procedure" effective September 16, 1998. (R. at 18.) Louchart requested a Board of Review hearing on September 24, 1998, which was convened on November 12, 1998, at which the plaintiff and his attorney, M. John Strafaci, appeared. (R. at 63-142; Tr. at 1-78.) Four members of the five-member Board of Review found that the plaintiff had consumed drugs "in Aruba where drugs are legal" and "[w]hen he returned to the U.S. of A. he still had the residue in his system." (R. at 5.) One panel member stated, "he used drugs." *Id.* The panel found that the plaintiff had drugs in his system and had tested positive and that this constituted conduct which violated a policy, procedure or standard of conduct of the Gaming Enterprise. *Id.* Four panel members did not believe termination to be appropriate and recommended that the termination be reduced to a suspension with no back pay; that the plaintiff should also pass a drug test before reinstatement; and, if he failed the test, that the termination should be upheld. (R. at 6.) One panel member recommended that the termination be upheld. *Id.*

The President/CEO issued written findings of fact and conclusions of law by memorandum dated January 6, 1999. (R. at 1.) He found that:

> I agree with the Board and believe that the employee did fail the drug test in violation of the Standards of Conduct for the following reasons:
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> 1. The Standards of Conduct state that the following may lead to termination: "Possession, sale, distribution or being under the influence or ... any controlled dangerous substance during working hours; ... If the employee tests positive for alcohol or drugs."
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> 2. It is clear that the employee is aware of the policy as this is the second time he has failed a drug test. He has previously been offered EAP and was compliant.
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> 3. The employee claims that he was in Aruba when he smoked marijuana and that said usage is legal in Aruba. I do not believe that his defense mitigates his actions because although the drug may be legal in Aruba, it is not legal in the United States. He tested positive for use of the drug while in the U.S. In addition, he did not report a "legal drug" in his system at the time of the drug test.

Id. The President/CEO agreed with the four members of the Board of Review panel that recommended that the termination

[1] There is an indication in the record that the charges against Rivera were subsequently dismissed. (R. at 87; Tr. at 23.)

[2] Longendyke admitted at the Board of Review hearing that he did not view the videotape prior to completing the form. (R. at 33; Tr. at 97.) He also suggested that the form more properly should have read "observed suspicious behavior" rather than "observed/reported possession." *Id.*

be reduced to a suspension with no back pay. He further stated that, "Compliance with EAP and continued drug testing should be a condition of continued employment." *Id.*

II. Conclusions of Law

This Court's role in reviewing an appeal by a Gaming Enterprise employee brought under the Law's provisions is to determine whether the President/CEO acted arbitrarily, capriciously or in abuse of his discretion. VIII M.P.T.L. ch. 1, § 8(d), *Chickering v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 41 (1998). The Law sets forth the standard of review, in relevant part, as follows:

> In determining whether the decision was arbitrary and capricious the Tribal Court shall sustain the decision of the Enterprise if it finds that:
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> (1) The President/CEO had a reasonable basis for concluding that the employee violated the applicable work rules, standards of conduct or other conditions of employment established by the Enterprise for the position held by the employee; in evaluating such basis the Court shall recognize the discretion of the supervisor to evaluate the weight of the evidence and credibility of information;
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> (2) The President/CEO substantially complied with the policies of the Enterprise regarding progressive discipline in the case of any minor infraction;
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> (3) The President/CEO provided the employee with a description of the alleged infraction which was the basis for the decision and a reasonable opportunity to present the supervisor with information indicating that the employee did not commit the infraction and any mitigating circumstances relating to the infraction; provided, however, that no formal rules of evidence or procedure shall be required in any personnel proceeding; VIII M.P.T.L. ch. 1, § 8(d)(1), (2), (3).

This Court "may not retry the case or 'second guess' the decision of management ... [however it is the law] that a court has the duty to decide whether, 'in its mind,' there is sufficient evidence in the record to support management's decision." *Flint v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 43, 44 (1998). The Mashantucket Pequot Court of Appeals held in *Healy v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 63, 66 [26 Indian L. Rep. 6189] (1999) that the Mashantucket Pequot judiciary possesses "authority to review under the [Indian Civil Rights Act, 25 U.S.C. § 1302] the Gaming Enterprise's actions in the application and implementation of the Tribal Council's enactments relating to employer-employee relationships." A challenge to an employment disciplinary action involving a claim of a violation of the rights secured by the Indian Civil Rights Act is subject to the general test of whether the error is "more probably than not harmless," unless "there has been a significant deviation from a constitutional rule or a specific statutory requirement, [where] plain error exists and reversal is automatic." *Grossi v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 55, 56 [26 Indian L. Rep. 6112] (1998).

The plaintiff raises three grounds for his appeal: first, that the Gaming Enterprise did not possess reasonable cause to believe that he was under the influence of drugs or in possession of the same, and that requiring him to undergo a drug test was a violation of its own policy; second, that the Gaming Enterprise's conduct in requiring him to undergo a drug test, without reasonable cause to believe that he was under the influence of, or in possession of, drugs violated his rights under Sections 1302(2) and (8) of the Indian Civil Rights Act; third, even if the drug test was appropriate, there was still no reasonable basis to conclude that he violated the "Substance and Alcohol Abuse and Drug Testing" policy or other Gaming Enterprise work rules, standards of conduct, or conditions of employment. The Court agrees with the plaintiff that the Gaming Enterprise did not have a reasonable suspicion that he was under the influence of drugs or alcohol which adversely affected or could have adversely affected his job performance and, thus, the requirement that he undergo a drug test was in violation of its own drug testing policy. Without the drug test, there is no reasonable basis for the President/CEO's decision to suspend the employee.

The Indian Civil Rights Act provides that: "No Indian tribe in exercising powers of self-government shall— ... (2) violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures ... (8) ... deprive any person of liberty or property without due process of law. 25 U.S.C. § 1302(2) and (8). The Mashantucket Pequot Tribal Council adopted the provisions of the Indian Civil Rights Act in 1993 as "tribal law" which "shall apply in the Tribal Court." *Healy* at 66, I M.P.T.L. ch. 3 § 10(a). "To help ensure a safe and healthful working environment ...," the Mashantucket Pequot Tribal Nation has adopted for Gaming Enterprise employees a "Substance and Alcohol Abuse and Drug Testing" Policy (hereinafter Drug Testing Policy). (Substance and Alcohol Abuse and Drug Testing, Section II—Policy 11, p. 2 of 2.) The Drug Testing Policy states that the Gaming Enterprise "prohibits any employee from having, selling, making or using any illegal drugs on Foxwoods Resort Casino premises or while conducting business off the premises." *Id.* There is no allegation that the plaintiff engaged in any of the enumerated prohibited acts. Further, the Drug Testing Policy provides, in pertinent part, that: "If Foxwoods Resort Casino has a *reasonable suspicion* that an employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance, Foxwoods Resort Casino may require such employee to submit to a drug test. Refusal to submit to a drug test may result in disciplinary action, up to and including termination of employment." *Id.* (Emphasis supplied.)

The defendant argues that the "plaintiff's claims about the propriety of the drug screen should not be considered by the court here. At no time during these proceedings did plaintiff raise any question or concern about the drug screen or procedure. Given that the plaintiff failed his drug test that should be the end of the court's inquiry." (Defendant's Brief dated May 24, 1999, p. 10.) The record is replete with questions and comments by plaintiff's counsel regarding the basis upon which the drug test was ordered. For example, in his closing argument before the Board of Review, Attorney Strafaci said: "I think Allen indicated that had he not been told by Bob Hargraves that there was this video that showed a drug transaction going on, Allen never would have had Matt take a drug test.... When we finally look at that tape, you can't see what, I think everybody admits, nobody knows what he gave her. One person might think it's suspicious, another person might not think it's suspicious.... I think just simply based on that tape, that tape is evidence of almost nothing." (R. at 132-133; Tr. at 68-69.) It is well-settled law that, "Mashantucket Pequot tribal law has created and defined an individual entitlement to continued employment that is significant enough to be considered a property right to which due process attaches." *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 115, 119 (1996), *aff'd Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15 [25 Indian L. Rep. 6011] (1996). Judicial scrutiny of claims alleging violations of the Indian Civil Rights Act in the context of an appeal, pursuant to the Law, has been consistently exercised by this Court and by the Court of Appeals. *Id.*, *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104 (1995); *Grossi v. Mashantucket Pequot Gaming Enterprse*, 1 MPR 55 (1998).

The Court finds that the plaintiff did challenge the propriety of the drug test in the proceedings below. His claim that the Gaming Enterprise's action in requiring the test, without reasonable cause to believe him to be in possession of, or under the influence of, drugs violated his right to be free from unreasonable search and his right to due process is properly before this Court. The Gaming Enterprise's argument that the focus of the inquiry should start at the drug test result would require the Court to turn a blind eye to the plaintiff's complaint that there was no legal basis for the test in the first instance. While the Court decides this case on narrower grounds, namely that the defendant violated its own policy, it is necessary to consider the issue against the backdrop of the Indian Civil Rights Act's protections against unreasonable searches and the deprivation of property without due process.

The Drug Testing Policy does not define the term "reasonable cause." Section XI provides that employee appeals must be decided in accordance with tribal law; however, where no tribal law exists with respect to a particular issue, the Court "may be guided but shall not be bound by the principles of law applicable to similar claims arising under the laws of the State of Connecticut or of the United States." VIII M.P.T.L. ch. 1. This Court is mindful that: "The guarantees afforded to individuals under the ICRA, such as the right to due process, are similar but not identical to those provided for under the United States Constitution. Both federal and tribal courts have acknowledged that Congress did not intend the due process principles of the Constitution to disrupt settled tribal customs and traditions." *Johnson*, 1 Mash. at 118. In this appeal, no Mashantucket Pequot custom or tradition has been argued to be implicated. Thus, the Court will look to general U.S. constitutional principles, as articulated by federal and Connecticut courts, for guidance in this matter.

The issue of reasonable suspicion for drug testing has been the subject of recent Connecticut case law. Connecticut General Statutes § 31-51x(a) provides that: "No employer may require an employee to submit to a urinalysis drug test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance." In view of the close similarity between the language of the defendant's Drug Testing Policy and the language of Section 31-51x(a), the Connecticut courts' analysis of Section 31-51x(a) is helpful. In *Doyon v. Home Depot U.S.A. Inc.*, 850 F. Supp. 125, 129 (D. Conn. 1994), the federal district court stated that "Section 31-51x, properly understood as protecting the privacy right of employees from employer-mandated urinalysis drug testing, is thus analogous to the Fourth Amendment, which protects the privacy rights of employees against Government-mandated urinalysis testing." *See Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 617 (1989). In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989), the United States Supreme Court found that the Fourth Amendment protects individuals from unreasonable searches conducted by federal and state governments, even when acting as employers. Thus, under the Fourth Amendment, "the Government may not require an employee to submit to urinalysis testing absent a showing of individualized reasonable suspicion."[3] *Doyen* at 129.[3] Reasoning that "urinalysis drug testing is no less intrusive when required by private employers than when required by the Government," the *Doyen* court found that section 31-51x "requires a showing of individualized suspicion before an employer may require an employee to submit to a urinalysis drug test. *Doyen* at 129.

The term "reasonable suspicion" is defined by *Black's Law Dictionary* (6th ed. 1990) as a suspicion of illegal activity which "must be based on specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant intrusion." This definition mirrors that developed in *Terry v. Ohio*, 392 U.S. 1, 21 (1968), where the United States Supreme Court first defined the term for purposes of the Fourth Amendment, explaining that a suspicion could not be reasonable unless it is supported by "specific and articulable facts which, taken together with rational inferences from those facts, warrant [the search or seizure]." The *Doyen* court and others have similarly defined the standard in the context of drug testing under the Fourth Amendment. See also *Poulos v. Pfizer*, 711 A.2d 688 (Conn. 1998); *Fowler v. New York City Dep't of Sanitation*, 704 F. Supp. 1264, 1272 (S.D.N.Y. 1989); *Bailey v. City of Baytown, Texas*, 781 F. Supp. 1210, 1215 (S.D. Tex. 1991). Tribal courts have also relied upon Fourth Amendment standards in determining the propriety of searches under tribal law and the Indian Civil Rights Act. *Duckwater Shoshone Tribe v. Thompson*, 25 Indian L. Rep. 6131, 6132 (Duckwater Shoshone Tr. Ct., 1998) ("Federal Indian Law experts agree that 25 U.S.C. § 1302(2), which nearly mirrors the Fourth Amendment, is derived from the U.S. Constitution ..."); *Southern Ute Tribe v. Scott*, 18 Indian L. Rep. 6105 (S. Ute Tr. Ct. 1991) (utilizes U.S. Supreme Court rulings to determine voluntariness of consent to search).

In this appeal, the only basis for subjecting the plaintiff to the drug test was his association with a suspected drug user, Macri, and the passing of an unidentified item to her in a hallway. (R. at 99; Tr. at 35.) There is no evidence that the item was drugs. There is no allegation that the plaintiff exhibited any physical or behavioral symptoms indicative of drug or alcohol consumption. There is no evidence that his job performance or judgment was affected in any way. The record does not support a finding of "reasonable suspicion" that the plaintiff was under the influence of drugs or alcohol. Moreover, assuming *arguendo* the alleged "suspicious behavior" occurring on March 1, 1998 constituted reasonable suspicion that the plaintiff was under the influence of drugs, the drug test was not ordered until five and a half months later. The event allegedly giving rise to the suspicion of drug use was too far removed in time to provide a basis for a test over five months later. Fourth Amendment case law in the criminal context has established:

> Generally, the greater the interval between an observation of criminality and an application for a warrant, the more likely it is that circumstances will have changed so that probable cause no longer exists.... When the affidavit recites an isolated violation, probable cause dwindles in direct proportion to the passage of time.

American Bar Association Criminal Justice Section, *Guidelines for the Issuance of Search Warrants*, (1990) p. 26. *See also Anderson v. State*, 331 A.2d 78 (Md. Ct. Spec. App. 1975), *aff'd* 427 U.S. 463 (1976). Likewise, in the drug testing situation there must be some freshness to the information giving rise to the suspicion that the employee is under the influence of drugs or alcohol. In this case, the delay of over five months renders the information regarding the plaintiff's suspicious behavior too stale to constitute reasonable suspicion to require a drug test.

The plaintiff's confession of arguably legal marijuana use in Aruba came only *after* the Gaming Enterprise ordered the plaintiff to undergo the drug test.[4] The results of the drug test were obtained in violation of the Gaming Enterprise's Drug

[3]The Supreme Court has recognized limited exceptions to this general rule "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion," as is the case in certain industries or occupations with compelling safety concerns. *Skinner* at 624. The defendant concedes that the test was not a random one, but was one based on the reasonable suspicion or cause provision of the Drug Testing Policy. (R. at 99; Tr. at 35.)

[4]The drug levels found by the test were not a part of the record. Therefore, there is no means by which to determine whether the level

Testing Policy as there was no reasonable suspicion to support the testing in the first instance. The Court finds that, without the illegal drug test, the President/CEO had no reasonable basis for concluding that the plaintiff violated the applicable work rules standards or other conditions of employment established by the Enterprise for the position held by the plaintiff. VIII M.P.T.L. ch. 1, § 8(d)(1). Having found that a review of the record establishes that it is devoid of rational evidence to support the ordering of the drug test, this Court "has a responsibility in the interest of justice to set aside management's action [in suspending the plaintiff] as arbitrary and capricious." *Flint* at 44.

Accordingly, the plaintiff's appeal is sustained and the decision of the President/CEO is reversed. The Court will schedule a hearing regarding the imposition of remedies consistent with the Law.

Counsel for plaintiff: M. John Strafaci
Counsel for defendant: Jeffrey R. Godley