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


CLERK, HOOPA VALLEY TRIBAL COURT

VEREL MOON, SR.,
Respondent/Cross-Appellant,

CASE NO. A-19-004
(underlying case no: CV-16-008)

vs.

OPINION

HOOPA VALLEY TRIBE,
Appellant/Cross-Respondent.

Before: Matthew L.M. Fletcher, Chief Justice; Brett Lee Shelton, Justice; Thomas Weathers, Justice.

Appearances: Alexandra N. Mojado, for Appellant Hoopa Valley Tribe; and J. Bryce Kenny, for Cross-Appellant Verel Moon, Sr.

OPINION

Fletcher, C.J.:

I. Introduction

Under the Hoopa Valley Tribe's personnel policies and procedures, covered employees may be "immediately terminated without notice when it is determined by the program manager's reasonable judgment that the employee's specific behavior is seriously prejudicial to the best interests of the Tribe." 30 Hoopa Valley Tribal Code § 8.1.

On June 2, 2016, the Tribe terminated Verel Moon's employment, stating in a letter to Moon that his "actions and behaviors over the last year," and his "attitude," are "deemed seriously prejudicial to the best interest of the Tribe. . . ." The letter was signed by Moon's direct supervisor and the Tribe's Chief Financial Officer, Brandy Morton, and the Tribe's Chairman, Ryan Jackson. Moon's behavior included text messages sent on October 7, 2015 and April 25, 2016 that Morton interpreted as threats to her.

We hold that the Tribe, acting through Morton and Jackson, exercised reasonable judgment in determining that Moon's behavior and actions were seriously prejudicial to the best interests of the Tribe, and that the Tribe's termination of Moon was lawful.

II. Factual and Procedural Background

The following facts are not in dispute:

Moon began working for the tribe as Property and Procurement Specialist in 2012. Initially, his supervisor was Steve Burbank, a man. Burbank wrote up Moon in 2014 for being excessively “rude” to Burbank. Burbank’s last performance review of Moon was in May 2015, and it indicated that Moon’s performance as an employee needed improvement.

In September 2015, Morton, a woman, took over as Moon’s supervisor. On October 7, 2015, Moon sent a text to Morton saying “like I said before what a person does to others will come back a whole lot worse.” In November 2015, Moon, who had supervisory duties over the Tribe’s account with Verizon, noticed unusual charges totaling around \$20,000 incurred around the time Morton took a vacation overseas. Morton explained that Verizon had made a mistake, and the charges were corrected, but Moon argued with her anyway. Eventually, Morton removed the responsibility for the Verizon account from Moon’s scope of duties.

Moon and Morton’s relationship deteriorated from there. Morton and Moon had disputes over Moon’s compliance with various personnel policies and procedures, including Moon’s work hours and obtaining approval from Morton to take leave. On April 25, 2016, Moon sent Morton a text saying “I guess you want to go down that road again. It’s going to catch up with you again. I really feel sorry for those people and have seen it happen. Some call it carma [sic] and others have a different name for it.” At trial, Morton would testify that she considered these interactions with Moon to be threatening. Morton testified that she stated to her own supervisor, Chairman Jackson, that she “didn’t feel comfortable with communicating with [Mr. Moon] – even to ask him on the progress on his work or the tasks that he had been assigned.” Moon’s Response Brief at 9.

On June 1, 2016, Morton received a memo from the director of the Tribe’s TANF Program, Leslie Colegrove, a woman, regarding Moon. The memo asserted that “Tribal TANF has experienced problems in working with Verel Moon . . . for years.” Colegrove alleged that Moon “reported his dislike for [Colegrove],” and that Moon “has issues with women who make decisions or are in a higher position than he.”

The next day, the Tribe terminated Moon’s employment, invoking the “seriously prejudicial” conduct justification under § 8.1.

Moon brought suit shortly thereafter under 30 HVTC § 15.1. The Hoopa trial court held a trial in December 2017. On February 23, 2018, the trial court ruled in favor of Moon, primarily on the ground that the Tribe was required to provide “progressive discipline” before terminating Moon’s employment. The Tribe appealed. This court vacated the trial court’s judgment that “progressive discipline” was required. *Moon v. Hoopa Valley Tribe*, 16 NICS App. 27 (2018) (“*Moon I*”). We remanded to the trial court to make a determination of whether “§ 8.1 allows for the Tribe to terminate an employee whose conduct becomes ‘seriously prejudicial to the best interests of the Tribe’ without engaging in the discipline, counseling, and other requirements contained in that section.” *Moon I*, 16 NICS App. at 29.

The trial court issued an Order on Remand on January 17, 2019 confirming its judgment in favor of Moon. The critical language of the Order stated:

While unsatisfactory and even unprofessional at times, none of plaintiff's conduct or behavior during the course of his employment rose to the level of seriously prejudicial to the Tribe's best interest under HVTC Section 8.1[()]. [The Tribe] asserted the seriously prejudicial provision of the code in plaintiff's termination letter referencing "actions and behaviors over the last year" and at trial presented text messages that were interpreted by the Tribe as threats by plaintiff toward his supervisor, failure of plaintiff to complete property inventory, plaintiff taking leave without permission, plaintiff failing to cooperate with other departments, all as grounds for immediate termination under the seriously prejudicial provision of the Code. The Court finds that all of this conduct or behavior was of a nature that could have been reasonably addressed by a warning and a lesser sanction without causing harm to the Tribe, yet the Tribe never took action to do so. Logically, if his conduct presented over at least his last year of employment was indeed seriously prejudicial to the Tribe, the Tribe arguably would have terminated Mr. Moon's employment well before a year or at a minimum reprimanded him. It is not reasonable to believe that an employee engaged in conduct or behavior seriously prejudicial to the Tribe for at least a year and the Tribe stood by and took no disciplinary action of any kind. As such, this Court finds that none of the conduct or behavior qualifies as seriously prejudicial to the Tribe.

Order on Remand at 2-3.

The Tribe appeals this judgment.¹ We reverse.

III. Employee Termination for Conduct "Seriously Prejudicial to the Best Interests of the Tribe"

The meaning of the provision in Section 8.1 of the Hoopa Valley Tribe's personnel policies and procedures is a question of first impression in this court.

Section 8.1 provides in full:

Disciplinary action including termination or demotion, may be taken against any employee. Program managers must demonstrate that counseling on specific areas of poor performance has occurred and that insufficient improvement has taken place as a result of counseling or other corrective efforts. Unsatisfactory performance must be documented and must relate to the employee's job description and employee's evaluation. *However, employee's [sic] may be immediately terminated without notice when it is determined by the program manager's reasonable judgment that the employee's specific behavior is seriously prejudicial to the best interests of the Tribe.* (emphasis added)

¹ There are other matters on appeal as well, but our decision to vacate and reverse the trial court's January 2019 order and to order the trial court to enter judgment for the Tribe renders those matters moot.

According to the Tribe, § 8.1 provides two avenues by which an employee could be terminated. The first avenue, which the Tribe did not follow in this case, requires supervisors and managers to document poor performance by employees and engage in active and sustained efforts to counsel and rehabilitate employees before they may be terminated. The second avenue, invoked in this case by the Tribe, allows a program manager to terminate an employee without notice if the employee's behavior becomes "seriously prejudicial" to the best interests of the Tribe. No prior discipline or documentation, or even notice, is required.

The trial court initially misread § 8.1 to require "progressive discipline" even if the Tribe terminated an employee without notice under the "seriously prejudicial" provision. We reversed that decision in *Moon I*. On remand, the trial court concluded that the Tribe's decision to terminate Moon was unreasonable. We reverse that decision today.

A. Standard of Review

This court must defer to the findings of fact made by the finder of fact at the trial court level and must affirm those findings unless the trial court made a clear error. *Hostler v. Hoopa Valley Tribe*, 10 NICS App. 14, 15 (2011). This court engages in *de novo* review of the trial court's conclusions of law. *Id.*

B. What Is Conduct "Seriously Prejudicial to the Best Interests of the Tribe"?

The Hoopa Valley Tribal Code does not define the phrase "seriously prejudicial to the best interests of the Tribe." The phrase constitutes a legal term of art under Hoopa tribal law. The phrase provides a standard by which the trial court must analyze claims by discharged employees like Moon who argue the Tribe acted unreasonably in terminating them without notice. The trial court must make findings of fact related to the employee's conduct, but the determination of whether that conduct rises to conduct that is "seriously prejudicial" is a question of law.

In its findings of fact, the trial court identified several different types of behaviors that Moon engaged in while an employee that could constitute "seriously prejudicial" conduct: (1) "threats by plaintiff toward his supervisor," (2) "failure of plaintiff to complete property inventory," (3) "plaintiff taking leave without permission," and (4) "plaintiff failing to cooperate with other departments." Order on Remand at 2. There is sufficient evidence in the record to support the trial court's statement that all of these behaviors occurred.

The trial court, however, did not take the next step and determine whether as a matter of law these types of employee conduct could rise to the level of "seriously prejudicial" conduct. Instead, the trial court erroneously jumped to the next step (which we discuss in subpart C, below) and decided that the Tribe's termination of Moon for this conduct was unreasonable.

We hold that the trial court is obligated to decide in the first instance whether the alleged employee conduct is of the type of conduct that could be "seriously prejudicial" to the Tribe. We realize the code does not define that phrase, but the personnel policies and procedures do offer helpful context. Section 8.1.3 lists a series of classes of employee conduct that can result in termination of employment in the first instance:

- * “Neglect of Duty/Sleeping on the Job.”
- * “Insubordination; failure to carry out legitimate instructions or duties.”
- * Releasing confidential information without proper authorization.”
- * “Misconduct.”
- * “Intentional falsification of information on employment application or falsification of personnel records, time sheet, or other records.”
- * “Theft on [sic] unauthorized possession of tribal property.”
- * “Acceptance or solicitation of gifts; unless it’s a promotion or company logo.”
- * “Acceptance of bribes in official capacity.”
- * “AWOL 1-3 days.”

This list is not intended to be exhaustive, nor does inclusion of a type of behavior require automatic dismissal. The list is representative of examples of employee conduct that could rise to the level of justifying immediate dismissal from employment with the Tribe.

As noted above, the trial court identified several classes of conduct engaged in by Moon: (1) “threats by plaintiff toward his supervisor,” (2) “failure of plaintiff to complete property inventory,” (3) “plaintiff taking leave without permission,” and (4) “plaintiff failing to cooperate with other departments.” Order on Remand at 2. Any of the classes of Moon’s conduct identified by the trial court fits within these examples, most notably insubordination and misconduct. Threats against a supervisor likely is an example of misconduct. Failure to complete work and failure to cooperate with other employees likely is insubordination and failure to carry out duties. Taking leave without permission likely is akin to going “AWOL.”

The critical analysis is whether Moon’s conduct rose to the level of becoming “seriously prejudicial to the best interests of the Tribe.” The code provides a starting point for the judiciary to analyze this question – and that begins with assessing the “reasonable judgment” of the employee’s supervisor. We address that question in the next subpart.

C. What Is the “Program Manager’s Reasonable Judgment”?

The trial court’s job when the Tribe has terminated an employee under § 8.1 without notice is to determine whether the judgment of the employee’s manager was reasonable. We hold that the trial court erred in substituting its judgment for the judgment of Moon’s supervisor in terminating Moon’s employment. We further hold that Moon’s supervisors did exercise “reasonable judgment” when deciding to discharge Moon.

Once the trial court determines that an employee’s conduct is the class of conduct that justifies termination without notice under § 8.1, the court must then analyze whether the supervisor exercised “reasonable judgment” in making that decision. The court’s determination on that point involves legal analysis; therefore, its determination is a conclusion of law. We may engage in de novo review of that determination by the trial court.

We focus our attention first on Moon’s behavior and actions that Morton considered to be threatening. The evidence – uncontroverted by Moon – is that on two separate occasions Moon sent text messages to Morton. Morton interpreted those texts as threatening to her. Morton thereafter reported to her supervisor, the Chairman, that she was uncomfortable dealing with

Moon as a result of her interactions with him. There is evidence in the record that women from other tribal departments that dealt with Moon had issues with his attitude toward women in supervisory positions over him or positions of greater authority than he possessed, specifically Leslie Colegrove's memo one day before Moon's termination in which she stated Moon had issues with women in power.

The trial court concluded on the same facts before it that Morton's judgment was not reasonable. The trial court concluded, without a basis in the evidence, that Moon's behavior would better be addressed "by a warning and a lesser sanction without causing harm to the Tribe. . . ." The trial court further concluded that if Moon's behavior had been so poor for such a long period of time, the Tribe would have done something about it before resorting to a summary termination under § 8.1. But in fact, as the Tribe exhaustively detailed in its opening brief in pages 15 through 18, Morton and, before her, Burbank, repeatedly admonished and counseled Moon on his behavior and how to improve. The trial court's statement that "the Tribe never took action" to counsel Moon is clear error. The trial court's analysis, which depended on large part with its conclusion that the Tribe "never" admonished or counseled Moon, is inherently flawed by this omission. We do not agree with the trial court's conclusion that Morton's judgment was unreasonable.

Instead, we find that Morton's judgment that Moon had engaged in conduct seriously prejudicial to the best interests of the Tribe to be reasonable. "Reasonable" has been defined as "fair, proper, just, moderate, suitable under the circumstances." See Black's Law Dictionary 1265 (6th ed. 1990). We begin with the question of whether Morton was threatened by Moon's conduct. Morton testified that she did in fact feel threatened, and reported to her supervisor, the Chairman, that she felt uncomfortable dealing with Moon. Moon's response at trial was, and on appeal is, to assert that Morton's sense of discomfort and fear simply was unreasonable. The trial court made no finding of fact on whether it believed Morton actually felt threatened. We are left with the record on its face.

We conclude that given the larger context of the factual record, it would have been reasonable for the trial court to conclude that Morton felt physically threatened. The text messages from Moon to Morton evidence hostility, to be sure. Morton's report to the Chairman that she was uncomfortable with Moon evidences hostility by Moon. The memo from Leslie Colegrove claiming Moon had a history of hostility toward women in authority supports that proposition. Morton's testimony at trial was unequivocal that she felt threatened. Recent social science research strongly suggests that many men who report to supervisors who are women act aggressively against their bosses after receiving negative feedback. Martin Abel, *Do Workers Discriminate against Female Bosses?*, IZA Institute of Labor Economics Discussion Paper Series No. 12611 (Sept. 2019). Another study shows that men in subordinate positions feel threatened by supervisors who are women and act more assertively as a result. Ekaterina Netchaeva et al., *A Man's (Precarious) Place: Men's Experienced Threat and Self-Assertive Reactions to Female Superiors*, 41:9 Psych. Bull. 1247 (2015). Yet another study shows that men's reaction to women in power may include sexual harassment, which threatened men appear to utilize against women in power as an "equalizer." Heather McLaughlin, *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77:4 Am. Soc. Rev. 625 (2012). It would have been reasonable for the trial court to conclude that Morton felt physically threatened by Moon.

The evidence so overwhelmingly supports the conclusion that Morton felt threatened that the trial court would have had to make special and specific findings of fact discrediting virtually everything to which Morton testified. As the Tribe noted, the trial court never made a determination that Morton's testimony was not credible. There simply is no evidence to contradict Morton's discomfort and fear of Moon. Moon's own effort to discredit Morton is an argument that her definition of a threat is too broad. Quoting from her testimony, in which Morton stated, "[W]hen anything is going to get you [including Santa Claus], that's a threat." A threat is a threat. Whether a person accused of threatening another meant their act to be a threat or not is relevant, but far less compelling than whether the intended target of the act considered it a threat. The trial court never made a finding of fact contradicting Morton's testimony that she felt threatened.

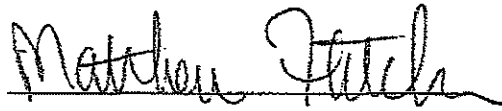
An employee who engages in acts that are threatening to his supervisor is an employee whose conduct is "seriously prejudicial to the best interests of the Tribe." We hold that Morton's judgment was reasonable in terminating Moon without notice.

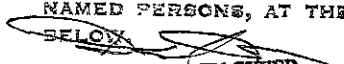
Order

This case is remanded to the trial court with instructions to enter judgment in favor of the tribal defendant.

Dated this 6th day of January, 2020.

Brett Lee Shelton, Justice
Thomas Weathers, Justice


Matthew L.M. Fletcher, Chief Justice

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