

AUG 27 2018


CLERK, HOOPA VALLEY TRIBAL COURT

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

VEREL MOON, SR.,

Appellant,

v.

HOOPA VALLEY TRIBE,

Respondent.

NO. A-18-002

(underlying case no: CV-16-008)

OPINION

June 13, 2018 – Argued

August 27, 2018 – Decided

Before: Lisa L. Atkinson – Chief Judge;
Daniel A. Brown – Judge;
Matthew L.M. Fletcher – Judge.

Appearances: J. Bryce Kenny (Attorney at law) for Appellant Verel Moon; and
Alexandra N. Mojado (Tribal Attorney’s Office) for Respondent Hoopa
Valley Tribe.

This matter comes before the Hoopa Valley Tribal Court of Appeals pursuant to a Notice of Appeal filed on March 5, 2018 by Appellant Verel Moon (“Appellant” or “Moon”). Moon appealed the entry of a February 23, 2018 Order on Trial in favor of the Respondent Hoopa Valley Tribe (“Respondent” or the “Tribe”).¹ Because this Court determines that the Appellant’s claims presented through evidence at the underlying trial in this matter still require further adjudication by the Tribal Court, the decision of the Tribal Court is **AFFIRMED** in part and **REVERSED** in part and **REMANDED** for further action by the Tribal Court in accordance with this decision.

¹ This Court acknowledges that the Order on Trial was meant to be and is treated as a final judgment for purposes of appeal.

I. Facts and Procedural History

Previously, Moon was an employee of the Tribe's Fiscal Department from August 2008 through June 3, 2016, when that employment was terminated by the Tribe. Moon subsequently grieved his termination and filed a *pro se* complaint on July 5, 2016 in the Tribal Court pursuant to the Tribe's code, HVTC § 1.1.04(f). On August 19, 2016, Moon sought leave to amend his complaint which was granted by the Tribal Court on October 22, 2016, resulting in Moon's first amended complaint being filed on November 17, 2016 (the "amended complaint"). The amended complaint alleged that the Tribe violated 30 HVTC § 8.1, which provides that tribal employment may be terminated either (1) when an employee's performance remains unsatisfactory after disciplinary action and counseling, or (2) when an employee's performance is "seriously prejudicial to the best interests of the Tribe." Additionally, the amended complaint alleged that the Tribe violated 30 HVTC § 5.5, which prohibits harassment of tribal employees by tribal managers, but Moon voluntarily dismissed that claim prior to trial.

The Tribe's limited waiver of sovereign immunity allowing the tribal court to assert jurisdiction over wrongful termination actions is codified at 1 HVTC § 1.1.04(f). The code further provides in relevant part that suits brought in accordance with this limited waiver of immunity must "state with particularity in the complaint the following . . . any relevant Tribal codes alleged to have been violated and the specific action that violated the relevant tribal codes. . . ." 2 HVTC § 2.3.09(h). The Tribe answered the complaint on December 9, 2016.

Present counsel for Moon entered the case on June 23, 2017. On October 2, 2017, Moon dismissed his Second Cause of Action for Harassment leaving the remaining pled claim for wrongful termination to proceed to a bench trial before the Tribal Court (the Honorable Leona Colegrove, Judge *Pro Tem*) on December 11 and 21, 2017. The Tribe submitted its trial brief on November 27, 2017 and Moon submitted his trial brief on November 29, 2017.

II. The Tribal Court Order²

On February 23, 2018, the Tribal Court issued its Order on Trial finding for the Tribe. First, despite the fact that Moon had dismissed his harassment claims, the trial court nevertheless held that the Plaintiff failed to prove those claims. Second, the Tribal Court concluded that Moon "proffered new claims" alleging a violation of the "progressive discipline" that the Tribe's personnel policies "clearly intended" to be utilized. This second finding appears to be the mixture of a conclusion of law and a finding of jurisdictional fact. The court's order stated (1) the Tribe was obligated to provide "progressive discipline" before terminating Plaintiff's

² In this appeal, the Tribe raised an additional argument in that Moon's Notice of Appeal is deficient under 2 HVTC § 2.6.03(e) and does not advise the Tribe as to the issues present in this appeal thus requiring dismissal of this appeal by this Court. We hold Moon's notice satisfies the requirement to "summarize briefly the alleged mistake of the trial court . . ." 2 HVTC § 2.6.03. Though Moon's Notice of Appeal was not the picture of clarity, the court and Appellee Tribe easily concluded what issues were at stake in this appeal, namely the issue of whether the trial court properly disregarded Appellant's "progressive discipline" claims.

employment (a legal conclusion), and (2) Plaintiff's claims relating to "progressive discipline" were "new claims" that had not been alleged as required by 2 HVTC § 2.3.09(h) (a finding of jurisdictional fact).

III. Discussion

We hold the trial court's determination that Moon did not comply with the pleading rules of 2 HVTC § 2.3.09(h) in alleging a violation of a supposed "progressive discipline" requirement contained in 30 HVTC § 8.1 is clear error. We further hold that, as the phrase "progressive discipline" does not appear in § 8.1 or anywhere else in this court's precedents, that the trial court's naked conclusion without legal analysis that "progressive discipline . . . was clearly intended under the Tribe's Personnel Policies" is improper, at least at this stage.

First, the amended complaint adequately alleged a violation of 30 HVTC § 8.1. Paragraph 7 of the amended complaint alleges that the Tribe did not subject Moon to disciplinary action prior to his termination, and specifically alleged that the Tribe's alleged inaction violated § 8.1. Paragraph 8 of the amended complaint acknowledges that the Tribe can terminate the employment of a tribal worker whose conduct becomes "serious prejudicial to the best interests of the Tribe," and effectively argued that Moon's conduct had not reached that stage. There are more allegations, but these two paragraphs are sufficient to allege a § 8.1 violation. Moreover, the Appellant's trial brief details for many pages how Moon would argue at trial that the Tribe violated § 8.1. The trial court's determination that the § 8.1 violations were "new" is wrong.

Second, whether "progressive discipline" – whatever that term means – is required under 30 HVTC § 8.1 is an issue of first impression in this court. The court can find no instance in the decisions of the Hoopa judiciary or in § 8.1 itself utilizing or defining this term. And "progressive discipline" absolutely is a term of art under federal and state law, as Moon points out. Whether § 8.1's discipline, counseling, and other requirements are the equivalent to "progressive discipline" as defined in the cases cited by Moon is an open question that should not be merely assumed by the trial court. In short, the state and federal court cases cited by Appellant might or might not be relevant as persuasive authority. The trial court is obligated to make an initial determination on what "progressive discipline" is and whether it is relevant to the requirements of tribal law under § 8.1.

Relatedly, the trial court's apparent assumption that the tribal code "clearly intends" for the Tribe to utilize "progressive discipline" as a mandatory precursor to the termination of an employee requires further fact finding and a clearer record for consideration. It could be argued that such a position is belied by the code itself as § 8.1 allows for the Tribe to terminate an employee whose conduct becomes "serious prejudicial to the best interests of the Tribe" without engaging in the discipline, counseling, and other requirements contained in that section. As this is seemingly an issue of first impression at least before this appellate court, these are matters that the finder of fact must address in the first instance more thoroughly if they are to factor into the ultimate decision on remand.

IV. Conclusion

This Court reverses in part and remands solely for revised written findings of fact and conclusions of law based on the evidence already taken in by the Tribal Court as to Moon's first cause of action in his amended complaint and upon the legal conclusions of this opinion.

NOW THEREFORE, IT IS ORDERED:

The Tribal Court's decision is **REVERSED** in part and **AFFIRMED** in part and **REMANDED** for further action in accordance with this opinion.

DATED this 27th day of August, 2018.

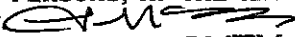
For the Panel:

Lisa L. Atkinson
Chief Judge

Matthew L.M. Fletcher
Judge



Daniel A. Brown
Judge

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