

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

APPELLATE COURT

CARTER MCFALL,
Appellant,

File No. A-003-1203
Trial Court File No.: C-025-0101

v.

VICTORIES CASINO,
LITTLE TRAVERSE BAY BANDS
OF ODAWA INDIANS
Appellee.

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Appellee Victories Casino moved for an order dismissing Appellant Carter McFall's appeal to this Court. We grant Appellee's motion and uphold the Tribal Court's decision dismissing McFall's claim of wrongful termination for the reasons provided below.

Statement of Facts

Appellant Carter McFall was employed with Victories Casino as a facilities manager from June 1999 until September 8, 2000. Following his dismissal, McFall filed a complaint in Tribal Court against Victories, claiming that he had been wrongfully terminated and that he had been unlawfully deprived of due process. On October 22,

2002, the Tribal Court dismissed McFall's claims for lack of jurisdiction on the basis that the defendant's sovereign immunity had not been waived.

McFall appealed the Tribal Court's dismissal, and on June 9, 2003, the Little Traverse Bay Bands Appellate Court reversed the dismissal and remanded the case to the Tribal Court. The Appellate Court reversed the dismissal because it concluded that McFall had a constitutional right to a fair review of the decision to terminate his employment with Victories under the due process clause of the Tribal Constitution. The Appellate Court's decision ordered the Tribal Court on remand to make findings of fact for each issue presented by McFall, to conclude whether McFall received due process in the review of his termination, and to issue an appropriate order based on those findings.

On remand, the Tribal Court reviewed the record of the case and concluded that McFall was not wrongfully terminated or denied due process. The Tribal Court's decision of November 24, 2003 held that McFall was an employee who could only be terminated for just cause. The Tribal Court also held that although the procedures for the processing of grievances set forth in the Victories Employee Handbook were not strictly followed in connection with McFall, Victories lawfully terminated his employment because of the seriousness of the circumstances surrounding his termination and because the decision to terminate him was made by three separate bodies, including Victories' Grievance Panel, the general manager of Victories Casino, and the director of the Tribe's Human Resources Department.

Immediately following the Tribal Court's issuance of its opinion after remand, McFall filed this appeal to the Appellate Court. In his appeal, McFall asked this Court to overturn the Tribal Court's decision and award damages. After some delay while the

parties sought to obtain a copy of the transcript of the original hearing held in November of 2001, McFall filed an amended brief and Victories submitted a motion for summary disposition and a response brief.

1. Victories' Motion to Dismiss

It is not necessary for the Appellate Court to reach a decision on the merits of the arguments made in Appellee's motion to dismiss because it finds that the appeal must be dismissed and the Tribal Court's decision upheld following an application of the appropriate standard of review for this matter.¹

Under the rules of practice and procedure of the Appellate Court,

An appeal is properly brought before the Tribal Appellate Court if:

- (A) The judgment, order or decision of the Tribal Court is final;
- (B) The appeal involves an order denying an appellant's motion for disqualification of a justice; or
- (C) The appeal involves an order affecting a substantial right or claim which disposes of the matter as to that participant.²

Under this rule, McFall's appeal is properly brought before the Appellate Court because subsection (A) is satisfied.

The Appellate court consists of a panel of Justices that review decisions made by the Tribal Court. The Tribal Court receives testimony and exhibits, assesses the evidence, and weighs credibility, persuasiveness and relevancy as a matter of first

¹ Appellee's motion to dismiss argued that the Tribal Court's opinion would be final based on the holding of the Appellate Court's first decision in this case. This argument is based on reasoning in the Appellate Court's first opinion that applied a delegation of authority theory to the events that gave rise to this case. This delegation of authority theory is not a binding precedent in future cases because the Tribe is governed by a new Constitution that creates the Judiciary as a separate branch of government and that defines the scope of the Judiciary's power. In the future, all questions regarding the power of the Appellate Court to hear cases and all questions regarding the finality or availability of appeal for future cases will be decided in light of the relevant provisions of the new Constitution.

² App. Rules 7.304.

instance. The Appellate Court reviews only that which has already occurred in the Tribal Court. Because the Appellate Court serves as a reviewer and is not in as good of a position to make decisions about the credibility, persuasiveness and relevancy of the evidence as the fact-finder that was present during the hearing, the Appellate Court has adopted standards for reviewing Tribal Court decisions. These standards of review are the “measuring sticks” by which the Appellate Court evaluates decisions of the lower court.

These standards also serve as limits for the Appellate Court in ascertaining whether or not an error has occurred and if it has, whether it warrants reversal or modification. When deciding a case, the first task of an Appellate Court is to identify the applicable standard of review. These standards are set forth in Section 7.501 of the Judiciary’s Appellate Procedures:

7.501 Standard of Review. The following standards apply to the Tribal Appellate Court when deciding an appeal, unless a clear miscarriage of justice would result:

- (A) Judge Finding of Fact. A finding of fact by a judge shall be sustained unless clearly erroneous.
- (B) Jury Finding of Fact. A finding of fact by a jury shall be sustained if there is any credible evidence to support it.
- (C) Factual Inference. A factual inference drawn by a judge or jury shall be reviewed as a finding of fact if more than one reasonable inference can be drawn from the fact(s).
- (D) Witness Credibility. Any finding, whether explicit or implicit, of witness credibility shall be reviewed as a finding of fact.
- (E) Conclusion of Law. A conclusion of law shall be reviewed by the Tribal Appellate Court *de novo*, i.e., reviewed as though it is the first time for the matter to be decided.
- (F) Contracts. An unambiguous contract term is reviewed as a conclusion of law.
- (G) Mixture of Law and Fact. A matter which is a mixture of law and fact is reviewed by the standard applicable to each element.

- (H) Discretion of the Court. A matter which is determined to be within the Tribal Court's discretion shall be sustained if it is apparent from the record that the Tribal Court exercised its discretionary authority and applied the appropriate legal standard to the facts.
- (I) Sentence or Penalty. A sentence and the imposition of fine, forfeiture, and/or penalty, excluding the assessment of damages, shall be reviewed as a discretionary determination of the Tribal Court.

Thus, under Rule 7.501(A), the Appellate Court sustains findings of fact made by the Tribal Court unless they are clearly erroneous.³ McFall's argues on appeal that the Tribal Court made incorrect factual findings, and that these errors require that we overturn the Tribal Court's decision. The Appellate Court reviews McFall's factual claims under the clearly erroneous standard. In other words, the Appellate Court will only reverse the Tribal Court's findings if its factual conclusions were clearly erroneous. If the Tribal Court's findings were reasonable given the evidence and testimony received by the Court, the Appellate Court defers to the Tribal Court's conclusions.

McFall argues that the Tribal Court incorrectly concluded that the Grievance Panel was the body responsible for sorting grievances. McFall claims that the Grievance Panel did not sort grievances because grievances were initially received and responded to by the human resources manager and department manager, and the Grievance Panel only addressed grievances after a grievant was dissatisfied with the resolution proposed by management. McFall is correct that the Grievance Panel did not receive and respond to grievances when they were initially filed. However, the Tribal Court was correct that questions regarding the validity of grievances were ultimately determined by the Grievance Panel, and not by individual employees. Furthermore, to the extent the Tribal

³ App. Rules 7.501(A).

Court omitted the fact that the Grievance Panel was not immediately responsible for grievances under the grievance procedure in effect until August 20, 2000, this omission was not material to the Tribal Court's conclusion that McFall's termination was not unlawful. Since the Tribal Court's characterization of the authority of the Grievance Panel in contrast to the authority of individual employees is correct, the Appellate Court sustains the Tribal Court's finding on this point.

McFall argues that the Tribal Court failed to note that he had filed grievances against the Human Resources Department. In explaining the basis for its decision, the Tribal Court is not required to make an exhaustive statement of every fact relating to the matter. The Tribal Court is merely required to provide findings of fact that address matters that were specifically at issue in the case, and provide a basis and rationale for its conclusions drawing on the facts of the case. In describing the relevant facts, the Tribal Court has the discretion to select those facts which it deems most relevant to its opinion. If the Tribal Court made glaring omissions of facts which are clearly material to the matter at hand or which have the power to determine the case's outcome, then the Appellate Court would consider reversing the lower court's findings. Here, the Appellate Court sees no reason to reverse the failure to mention McFall's grievances against the Human Resources Department because the grievances filed against him provided an independent justification for his termination.

McFall argues that the Tribal Court incorrectly concluded that several witnesses stated that his management style could be described as "my way or the highway." The Appellate Court concludes that McFall misinterprets the Tribal Court's findings. The Tribal Court did not state that it found that several witnesses to McFall's case had used

the words “my way or the highway.” Instead, the Tribal Court stated that “[n]umerous defense witnesses testified that Plaintiff’s management style and attitude were one of ‘my way or the highway.’” Thus, the Tribal Court concluded that the testimony of several witnesses generally supported the claim that McFall’s had an uncompromising management style. The Appellate Court finds that the Tribal Court did not make any errors in its statement.

McFall argues that the Tribal Court was wrong to conclude that his opinions about the Indian Preference in Tribal Employment statute were irrelevant. This argument is not a challenge of a specific factual finding of the Tribal Court, but is a challenge of the Court’s determination of whether a fact is relevant or not. The Tribal Court has wide discretion to determine which facts are relevant to its analysis and findings, and accordingly the Appellate Court declines to overturn the Tribal Court’s finding of relevance in this case.

McFall states that the Tribal Court incorrectly concludes that he was a temporary or upper management employee. In fact, the Tribal Court did not make this finding. Instead, the Tribal Court merely stated that the employment at will relationship is probably most appropriate for temporary and upper management employees.

McFall states that the Tribal Court incorrectly concluded that he committed mistakes in his employment that resulted in significant expenses for the Tribe. McFall argues that this conclusion is not supported by documents and is therefore unwarranted. On review, the Appellate Court notes that the Tribal Court stated twice that it heard testimony from witnesses at a hearing on the merits in support of both of these facts. When the Tribal Court makes factual findings based on the oral testimony of witnesses

that appear before it, the Appellate Court defers to the Tribal Court's conclusions regarding the reliability of testimony. This is especially appropriate since the Tribal Court judge had the opportunity to view the credibility of the witnesses during the hearing and the Appellate Court does not.

McFall states that the Tribal Court incorrectly relied on the Grievance Panel's determinations to support its findings because the Grievance Panel was admittedly "running amuck." Again, the Appellate Court defers to the Tribal Court's conclusions that the Grievance Panel's determinations were valid evidence of the basis for terminating McFall. The Appellate Court defers to the Tribal Court's conclusions regarding the reliability of the Grievance Panel's determinations, in part because the Tribal Court had the opportunity to observe the credibility of witnesses from the Grievance Panel during the hearing. In addition, the Appellate Court sees no evidence that the Tribal Court's findings were clearly erroneous. The fact that the grievance process operated with some flaws does not completely discredit all of the grievances filed with it and the conclusions reached by the Grievance Panel.

McFall challenges the Tribal Court's finding that he had a warning notice in his personnel file for intimidating behavior. The Appellate Court finds that the Tribal Court's conclusion is correct, since the Warning Notice of December 29, 1999 stated that McFall had engaged in "conduct creating and promoting an intimidating, hostile and threatening work environment."

McFall also disputes the Tribal Court's description of the Grievance Panel's recommendations in response to its review of three grievances filed by other employees against him. McFall is correct that the Tribal Court makes a mistake in describing the

Grievance Panel's response to each grievance. The Tribal Court states that the Grievance Panel recommended management training in response to the first grievance, and the Court states that the panel concluded that McFall acted in an intimidating manner in response to the second grievance. In reality, the finding of intimidating behavior was found in response to the first grievance (August 24, 2000 at 9:30 am), and the recommendation of management training was made in response to the second (August 24, 2000 at 11:00 am). The Appellate court finds that this inversion of the sequence of the grievances is immaterial and does not merit reversal.

McFall also argues that the Tribal Court erroneously relied on the recommendations of the general manager of Victories, the Tribal Human Resources Director and the Grievance Panel to support its conclusion that his termination was justified. McFall claims that this reliance is unwarranted and that these sources are not dependable, reliable or competent because the Tribal Court acknowledged that the Grievance Panel did not function properly. Again, the Appellate Court defers to the Tribal Court's conclusions regarding the reliability of the testimony of witnesses and the reliability of evidence. Since the Tribal Court had the opportunity to observe the witnesses' credibility first-hand and the Appellate Court does not, as a general rule this Court defers to the Tribal Court's determinations regarding reliability.

In some areas of his brief, McFall challenges the statements made by witnesses during the hearing held November 7, 2001 before the Tribal Court. This Court will not venture to weigh the statements made at that hearing that were not addressed in the Tribal Court's opinion. Instead, the review of the Appellate Court is limited to McFall's challenges to the Tribal Court's opinion after remand.

In addition to the specific factual challenges addressed above, McFall also argues more generally that the Tribal Court's opinion after remand was biased against him. The Appellate Court declines to entertain McFall's challenge to the Court's ability to serve as a fair and impartial forum. The Appellate Court sees no grounds that support this allegation of bias. Moreover, as this Court's opinion illustrates, the Appellate Court is committed to reviewing every finding of fact and conclusion of law that McFall appeals to this court, and this Court applies its utmost diligence to correct any challenged factual finding in the opinion that is clearly erroneous. It is through this process of review that the Court is able to protect against the injustices of any potential bias in the lower court's opinion.

Based on the foregoing, the Appellee's motion to dismiss is GRANTED, the Tribal Court's opinion after remand is UPHeld and the Appellant's requested relief is DENIED.

This is a unanimous decision of the Appellate Court.

Rita Gasco-Shepard, Chief Appellate Justice

12/13/05
Date