

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT

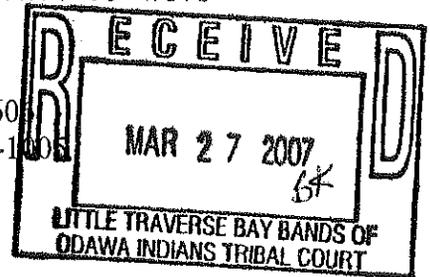
Albert Carey,
Plaintiff-Appellant,

03-27-07A11:55 RCVD

v.

Victories Casino,
John Espinosa, and Harlan Eckholm
Defendants-Appellees

Appellate Case #A-004-060
Tribal Court Case #C-062-1005
CJ Shepard, J Singel



**DECISION DISMISSING THE APPEAL AGAINST THE CASINO
AND REMANDING THE APPEAL AGAINST APPELLEES
ECKHOLM AND ESPINOSA**

I. Summary of the Appeal

Appellant Carey appeals the Tribal Court's dismissal of his claim against Victories Casino and the individuals Eckholm and Espinosa. For the reasons discussed below, the Appellate Court dismisses Carey's appeal against the Casino and it remands his appeal against the individuals Eckholm and Espinosa to allow Carey to recommence his suit by properly serving them with a summons and complaint in accordance with the service of process requirements described in this Decision.

A. Factual Summary

This case involves a wrongful termination claim brought by the Appellant Albert Carey in the Tribal Court. Appellant Carey was an employee with the Appellee Victories Casino, a subordinate entity of the Little Traverse Bay Bands of Odawa Indians. On September 21, 2005, he was informed by Harlan Eckholm that he was terminated from his employment for sexual harassment, insubordination, violation of employee

procedures, slander of upper management, and release of in-house confidential information.

Carey believes that he was terminated because he reported to a Tribal Council member that casino management was losing revenue by paying out too much money in its rewards program as a result of its failure to adequately test the program system.

According to the Victories Casino Employee Handbook, Carey had the right to request a hearing before an Employee Review Board (ERB) if he met the requirements of the Handbook's grievance policy.

Carey requested a hearing before the ERB, and when he appeared for it, he was asked to sign a confidentiality form and agree to certain limitations regarding the use of witnesses and legal representatives. Concerned that the confidentiality form and the restrictions on the use of witnesses and a legal representative would deprive him of his civil rights, Carey refused to participate in the ERB hearing. As a result, Carey alleges that he was never informed of the nature of any evidence that the Casino had in support of its reasons for terminating his employment. Shortly after Carey's refusal to participate in the ERB hearing, he commenced this suit in the Tribal Court by filing a Notice of Appeal of the Casino's decision to terminate his employment against the Casino.

B. Procedural History

Carey filed suit against the Casino in the Tribal Court on October 5, 2005. His original petition constituted an appeal from the administrative decision to terminate his employment from Victories Casino. Carey's suit included a claim that he was wrongfully terminated because he was not provided with any verbal or written warnings and he was never shown any written documentation to support the Casino's reasons for terminating

him. Carey's suit also included a claim that his civil rights were violated because the ERB required that he sign a confidentiality agreement and agree not to allow additional witnesses and representatives join him in the ERB hearing. Finally, in a reply brief that he filed at a later point in the proceedings, Carey added a claim that he was terminated for being a whistle blower. Carey requested that the Tribal Court award him with reinstatement of his employment and reimbursement for his lost wages and benefits.

In its answer, the Casino argued that the suit was barred by sovereign immunity. The Casino also argued that Carey had failed to exhaust the administrative remedies available to him because he failed to participate in the ERB hearing.

After a hearing on February 24, 2006, the Tribal Court ordered that the parties brief the Court on the applicability of the Whistle Blower Protection Statute. The Tribal Court also ordered that two individuals named Eckholm and Espinosa who had been employed by the Casino be joined as co-defendants. The Clerk of the Court mailed the amended notice of appeal and a copy of the entire record of the case to the individual defendants by first class mail. Neither Eckholm nor Espinosa filed an answer or appearance in the case, and the Clerk of the Court did not enter a default against them. Instead, the Tribal Court held a hearing on April 19, 2006. At that hearing, the Tribal Court questioned Carey and the Casino regarding the applicability of the Whistle Blower Protection Statute. Neither Espinosa nor Eckholm appeared at this hearing. The Court ultimately concluded that Carey had failed to establish the necessary elements of a claim under the whistle blower statute, and it dismissed the whistle blower claim against the individual co-defendants as a result. In addition, the Tribal Court concluded that the Casino had sovereign immunity and that its immunity had never been waived. Based on

its sovereign immunity finding and based on a separate finding that Carey had failed to exhaust all administrative remedies, the Tribal Court dismissed Carey's claim against the Casino. Carey filed this appeal shortly after the Tribal Court's dismissal of the suit.

Carey's initial petition to appeal simply stated that the grounds of his appeal were that "he lacked legal knowledge." Conceding that the appeal was insufficient, Carey obtained leave from the Appellate Court to file an amended petition to appeal. In his amended petition and in a later brief submitted as a response to the Casino's motion to dismiss, Carey explained that he sought review of the Tribal Court's determination that his right to due process was not violated when he was terminated from his employment. Carey also filed a second amended petition to appeal in which he added a request that the Appellate Court review the Tribal Court's determination that Carey had failed to establish the necessary elements of a whistle blower claim.

The Casino filed a variety of objections to Carey's first and second amended petitions to appeal. In a motion to dismiss, it requested dismissal for failure to allege an error in the Tribal Court's findings of fact or conclusions of law and for attempting to raise a novel issue on appeal. The Casino also filed a motion in opposition to Carey's second amended petition to appeal and a motion requesting the transcripts for a hearing and scheduling conference held by the Tribal Court. Finally, the Casino filed a motion to cross-appeal that requested appellate review of the Tribal Court's ability to raise a claim and join co-defendants *sua sponte*. For each of these filings produced by the Casino, Carey submitted responses and briefs in opposition that asserted arguments in defense of its claims.

The Appellate Court has reviewed each of the arguments put forward by the parties in this case. It concludes, however, that it cannot reach the merits of these arguments because of two barriers to its review. The first barrier is the sovereign immunity of the Casino, and the second is the failure of Eckholm and Espinosa to receive proper service of process in connection with the original notice of the commencement of this suit.

II. Appellate Court Jurisdiction and Review of Tribal Sovereign Immunity

The Tribal Court begins its review by considering whether it has jurisdiction to hear this appeal. Article IX, Section C of the Tribal Constitution provides that “the Tribal Appellate Court shall have jurisdiction over any case on appeal from the Tribal Court.” LTBB Constitution, Article IX, Section C, para. 5. Section C also provides that “[t]his jurisdiction shall not be construed to be a waiver of the sovereign immunity of the Little Traverse Bay Bands of Odawa Indians.” *Id.* at para. 4.

At the outset, the Appellate Court notes that since tribal sovereign immunity will effectively bar judicial review if it is not waived, all parties to appeals should establish whether sovereign immunity has been waived in their first briefs to the Appellate Court whenever an appeal involving the Tribe, one of its subordinate entities, or an officer or employee of the Tribe or one of its subordinate entities is brought before the Appellate Court. Thus, the Appellate Court treats sovereign immunity as a threshold issue that, like jurisdiction, must be determined before the Appellate Court can review the merits of the parties’ various arguments.

In this case, the Appellate Court concludes that it does have jurisdiction over the review as required by Article IX, Section C of the Tribal Constitution, since this is a “case on appeal from the Tribal Court” as required by subpart five of this portion of the Constitution. However, since the Appellate Court concludes that the Tribe’s sovereign immunity was not waived by the Tribe, it dismisses the appeal against Appellee Victories Casino.¹ As for the appeal against Appellees Espinosa and Eckholm, the Appellate Court concludes that they are not cloaked with sovereign immunity in this case, so it is not a bar to appellate review.

A. Appellee Victories Casino’s Sovereign Immunity

The appeal against the Casino should be dismissed because sovereign immunity acts as a bar to appellate review of the case. Article XVIII, Section A of the Tribal Constitution provides that the Tribe and its subordinate entities are immune from suit:

“the Little Traverse Bay Bands of Odawa Indians, including all subordinate entities, shall be immune from suit except to the extent that the Tribal Council clearly and expressly waives its sovereign immunity, and officials and employees of the Tribe acting within the scope of their duties or authority shall be immune from suit.”

LTBB Constitution, Article XVIII, Sec. A

On the surface, the Constitution’s sovereign immunity provision appears to prevent judicial review of allegations that the Tribe has violated the constitutional rights of individuals. But a closer review of the Constitution’s provisions indicates that

¹ The Appellate Court notes that the defense of sovereign immunity was not advanced as a basis for dismissing the appeal by the Appellee itself, and it notes that neither Appellant Carey nor Appellee Victories Casino argued the merits of the sovereign immunity defense in their Appellate briefs. Nevertheless, the Appellate Court considers sovereign immunity to be a mandatory threshold issue in any case that names the Tribe or one of its subordinate entities as a defendant, and it therefore stands firm in its decision to review *sua sponte* whether sovereign immunity acts as a bar to appellate review in this case.

individuals may seek recourse for perceived violations of their constitutional rights by invoking Section B of Article XVIII. That section provides:

“Officials and employees of the Little Traverse Bay Bands of Odawa Indians who act beyond the scope of their duties and authority shall be subject to suit in Tribal Court for purposes of enforcing rights and duties established by this Constitution or other applicable laws.”

LTBB Constitution, Article XVIII, Sec. B

Thus, where an official or employee of the Tribe violates the constitutional rights of an individual, that person may be sued to vindicate the individual’s rights. The logic behind this conclusion is that where the official or employee has in fact violated a person’s constitutional rights or other rights protected by law, they necessarily must have acted beyond the scope of their duties and authority, since no person can be authorized by the Tribe to violate any rights protected by law.²

In this case, Defendant Victories Casino is a subordinate entity of the Tribe. As a result, it is immune from suit under Section A of Article XVIII of the Constitution unless the Tribal Council has clearly and expressly waived its sovereign immunity. Here, the Tribal Court found that the Tribal Council did not waive Appellee Victories Casino’s sovereign immunity, and the Appellate Court finds no evidence in the record that indicates that the Tribal Court’s finding was clearly erroneous.³ The Appellate Court

therefore AFFIRMS the Tribal Court’s finding that Appellee Victories Casino is immune

² Of course, individuals would also be able to bring claims directly against the Tribe for perceived violations of their rights if the Tribal Council implemented a limited waiver of sovereign immunity to allow such claims.

³ The Appellate Court notes that in a ruling granting a motion for summary judgment, the Tribal Court must consider all of the filings and statements of the parties and conclude that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. In future rulings on motions for summary judgment, the Tribal Court should identify this as the appropriate standard for review and should include a description of all facts to which there is no genuine issue based on the parties’ admissions or lack of contention. In this case, the record indicates that there was no genuine issue as to the fact that the sovereign immunity of the Casino had not been waived.

from suit and DISMISSES the appeal against it. Because the appeal against the Casino is dismissed, the Appellate Court does not reach any of the parties' arguments regarding the merits of Appellant Carey's due process arguments against the Casino.

B. Appellee Eckholm and Espinosa's Sovereign Immunity

Unlike the Appellee Victories Casino, Appellees Eckholm and Espinosa are not protected by sovereign immunity in this appeal. In this case, they are employees of the Tribe who are not protected by Article XVIII, Section B because Appellant Carey has alleged that they violated the law and have therefore acted outside the scope of their authority.

III. Appellate Review of the Case Against Appellees Eckholm and Espinosa

The parties raise a number of issues related to the Appellate Court's review of the case against Appellees Eckholm and Espinosa. Appellant Carey argues that the case should be remanded for entry of a default for failure to answer the initial complaint and that he be allowed to reinstate his whistle blower claim against them in the Tribal Court. Carey also argues that the Appellant Victories Casino should not be allowed to answer the claims against Eckholm and Espinosa for them, and he argues that the Casino's counsel should not be permitted to represent them because they may have a conflict of interest with the Casino in this litigation. Appellee Victories Casino also raises several issues relating to Appellees Eckholm and Espinosa. It defends its ability to allow its counsel to represent them and it defends its ability to defend the whistle blower claims against them on their behalf even before they were represented by the Casino's counsel. Appellee Victories Casino also argues that the Tribal Court improperly raised the whistle

blower claim and improperly joined Eckholm and Espinosa as co-defendants because both actions were taken *sua sponte*, on the Tribal Court's own motion.

The Appellate Court does not reach the merits of the various arguments described above because it finds that the appeal against Appellees Eckholm and Espinosa should not be allowed because they never received proper service of process of the underlying suit in Tribal Court. Unlike the Casino, which filed an answer in the Tribal Court, there is no evidence in the entire Tribal Court record that Eckholm and Espinosa received actual notice of the suit. When Eckholm and Espinosa were joined as co-defendants, the Tribal Court clerk delivered by first class mail a copy of the notice of Appeal with copies of the entire case file. This delivery failed to conform to the requirements of the Michigan Court Rules, which applied to the case in all instances where the Tribal Court's rules were silent (see Clarification of Procedural Rules dated March 31, 2006). The Michigan Court Rules impose strict requirements on how a plaintiff must serve a complaint on a defendant. It is not enough for the Tribal Court Clerk to deliver the complaint by first class mail. Rather, the Michigan Court Rules require that the plaintiff serve the defendant with a summons and complaint, and if mailed, they require that the summons and complaint be delivered by registered or certified mail, return receipt requested. MCR 2.105(A)(2). Subrule (A)(2) also states that service is made when the defendant acknowledges receipt of the mail. In this case, Eckholm and Espinosa never acknowledged receipt of the notice of appeal. Where a defendant is not served with process in accordance with the court's rules and the defendant has not otherwise submitted to the court's jurisdiction, the Michigan Court Rules provide that the action is deemed dismissed without prejudice as to that defendant. MCR 2.102(E)(1).

In this case, the Appellate Court is persuaded that the stringent Michigan Court rules for service of process should be applied to this case and all other civil court cases until the Tribal Court adopts its own civil court rules. Strict standards for service of process for a summons and complaint serve an important purpose because they ensure that a defendant is informed that a lawsuit has been filed in Tribal Court and that they must submit a response. Delivery of the summons and complaint by registered or certified mail, return receipt requested, ensures that the plaintiff and the Tribal Court receive physical evidence that the defendant actually received notice of the suit. When the summons and complaint are delivered merely by first class mail, there is no way of knowing with certainty whether the defendants received the mailing. In this case, the address used for the defendants could have been old or incorrect, and it would be unfair to allow a lawsuit to proceed against them without their knowledge of its existence.

The Appellate Court also notes that the strict requirements of the Michigan Court Rules regarding service of process should apply even though the Tribal Court entered an order clarifying that the Michigan Court Rules applied to the case on March 31, 2006, one month after the Clerk of the Court sent copies of the notice of appeal to Eckholm and Espinosa by first class mail. The fact that Carey and the Court Clerk are held to the standard for service of process found in the Michigan Court Rules even before the Tribal Court clarified the applicability of the Michigan Court Rules is not unfair or prejudicial because where the Tribal Court rules are silent, the Tribal Court has generally followed the Michigan Court Rules in all Tribal Court proceedings pending the formal adoption of the Tribal Court's own civil rules.

The Appellate Court also notes that in this case, the insufficient service of process is not solely the fault of Appellant Carey. In fact, service of Carey's lawsuit on Eckholm and Espinosa was attempted by the Clerk of the Court. (See Notice of Appeal and Certificate of Service, dated March 1, 2006). Although it is generally the plaintiff's responsibility to ensure that all formal requirements relating to the summons and complaint are fulfilled, here the Appellate Court also notes that the Clerk of the Court bears at least partial responsibility for failing to properly serve Eckholm and Espinosa. As a result, the Appellate Court is persuaded that Appellant Carey should not be unduly penalized for the Clerk of the Court's actions by a dismissal as provided in MCR 2.102(E)(1). The Appellate Court therefore determines that the appeal should be remanded to the Tribal Court rather than dismissed, with instructions that Appellant Carey shall have a second chance to properly initiate his suit by effecting appropriate service of process on Eckholm and Espinosa. On remand, Appellant Carey shall have fourteen days from entry of this Decision to file a complaint. Furthermore, the Tribal Court's Ruling on Defendant's Motion for Summary Judgment and Dismissal shall not have a preclusive effect on the claim or claims that Appellant Carey may bring in accordance with this Decision.

For the reasons stated above, the Appellate Court hereby REMANDS the appeal against Eckholm and Espinosa to the Tribal Court for further proceedings in accordance with this Decision.

IV. Review of Issues under the Tribe's New Constitution

Although the Appellate Court is remanding Appellant Carey's lawsuit against Eckholm and Espinosa for further proceedings without reaching the merits of whether

Carey was deprived of due process, it wishes to provide some direction for the parties and the Tribal Court on this subject. First, the Appellate Court notes that none of the Appellate cases decided prior to the adoption of the Tribal Constitution on March 18, 2005 have precedential value on questions of constitutional interpretation. Cases decided prior to this date in 2005 were not subject the Tribe's new Constitution, and they therefore provide little to no insight into interpretation of this document. Second, the Appellate Court notes that the Constitution's protection of an individual's right to due process requires that certain elements be established by a plaintiff. For a constitutional individual rights claim to proceed, a person must assert that their case meets the specific parameters of the constitutional right in question. In the case of an allegation of a denial of due process of law, where the Tribal Constitution provides that the Tribe shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law," a plaintiff must establish that they are within the tribe's jurisdiction, that they are a person, that they have been deprived of either a liberty or property interest, and that they have been denied due process of law in connection with that deprivation.

The Appellate Court also recognizes that without the benefit of earlier precedents interpreting the meaning of the Tribal Constitution's due process guarantee, the Tribal Court has very little guidance. Although the opinions of other jurisdictions are not binding on questions involving the interpretation of the Tribe's Constitution, such opinions are often helpful guideposts that may provide examples of effective methods for resolving legal questions that arise under the Tribe's Constitution. For example, the federal courts have interpreted the pre-termination due process rights of a public

employee with a property interest in their employment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1988) (“The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.”). In the *Loudermill* case, the Supreme Court found that a tenured public employee’s due process rights were protected if they received a pre-termination hearing and had the opportunity to pursue a more extensive hearing after termination. The Supreme Court’s opinion in *Loudermill* is not binding on the Tribal Court, but opinions like it may occasionally serve as useful examples of how other jurisdictions have resolved issues that our legal system must address. The Appellate Court cannot predict the scope of a tribal employee’s due process rights without the benefit of actually reviewing the merits of a case presenting this issue, and it cannot predict whether a standard like that articulated in the *Loudermill* case would be appropriate to adopt, but the Tribal Court may consider the Tribal Constitution’s due process guarantee within the context of the broad considerations articulated here.

March 27, 2007

Decided and Approved by a Unanimous Court

Chief Appellate Justice

Rita Shepard

Certificate of Service

I certify that a copy of the Decision Dismissing the Appeal against the casino and remanding the appeal against appellees Eckholm and Espinosa was served upon the following individuals by first class certified mail return receipt requested:

John Espinosa
170 Lorne Avenue
New Market Ontario
Canada L3Y4J9

Ellis Boal
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Charlevoix, MI 49720

Harlan Eckholm
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Devil's Lake, ND 58301

Harlan Eckholm
102 Southwaite
Redwood Falls, MN 56283

Albert Carey
187 Mishe Mokwa Drive
Harbor Springs, MI 49740

And by LTBB Internal Mail to:

Matthew Lesky, Tribal Attorney

On this day March 27, 2007.

Bernadece Kiogima
Court Administrator
