

COURT OF APPEALS

Oneida Personnel Commission,
Putative Contemnor.

Case No.: 17-AC-012
Date: April 23, 2018

INDIRECT CONTEMPT FINDINGS AND ORDER

The above entitled matter has come before Appellate Judge *Pro Tempore* Diane House, Appellate Judges Sharon House and Chad Hendricks, and Chief Appellate Judge Gerald L. Hill.

PROCEDURAL HISTORY

On November 21, 2017, the Oneida Personnel Commission (hereinafter "OPC") made an Initial Appearance, by its attorney of record, Erik Eisenmann, at a hearing ordered to Show Cause. The purpose of the hearing was to determine whether grounds existed for a finding of Indirect Contempt for acts committed by or on behalf of the OPC during this proceeding consolidated as 17-AC-012.

On December 28, 2017, this Court ordered the OPC to submit a written brief addressing the unanswered instructions set forth in our Remand Order dated May 8, 2017 and September 26, 2017, and the potential breaches outlined in the December 28th Order. After the Court's approval of an extension, the OPC submitted a timely brief in response to our Order to Show Cause on February 27, 2018.

BACKGROUND

On March 28, 2017, the OPC denied Appellant Elizabeth Somers (hereinafter "Somers") request for employee protection. Somers filed a notice of appeal on April 6, 2017 with the Court of Appeals. Somers' case was accepted for appellate review and on May 8, 2017 the Court vacated

the OPC's denial of Somers' request and remanded the matter back to the OPC with several instructions. This Court never received any response to the May 8, 2017 remand order.

Somers filed an appeal on August 24, 2017 for both her employee protection and employee grievance cases. We issued a second remand order on September 26, 2017 which mandated that the OPC convene hearings for Somers' cases. We also ordered the OPC to address our directives issued in the first remand order issued on May 8, 2017 within 30 days. The OPC failed to respond within the 30-day timeframe.

Throughout this proceeding, this Court has confined itself to the procedural issues only with the focus that Somers is entitled to minimal Due Process as guaranteed by the Oneida Constitution and the Oneida Nation Code of Laws. Along with its failure to communicate with the Court, we also informed the OPC that there were several legal errors in their decisions, which include, but are not limited to:

1. Recusing the entire OPC on May 5 and May 17, 2017;
2. The Ex parte communications with the Oneida Business Committee, a named party to the litigation on May 4, 2017;
3. Referring Somers to the Trial Court after this Court had taken jurisdiction of the case;
4. The OPC Administrator's interfering with and denying Somers access to the OPC offices on several occasions.

A Show Cause hearing was held by the Appellate Court on November 21, 2017 to determine if the cumulative effect of the OPC's errors and mis-communication issues were both negligent and disrespectful of the dignity of this Court, as set forth in 803.26-1(g). Attorney Eisenmann appeared on behalf of the OPC at the Show Cause Hearing. He acknowledged that he had not yet met with the OPC, his client, even though his contract was approved by the OBC on June 28, 2017. At the conclusion of the Show Cause Hearing, this Court took the matter under advisement. Since we determined that the OPC's constant failure to respond to our orders was unacceptable, we ordered the OPC to provide a brief addressing our concerns, pursuant to 803.26-3(b) and (c) on December 28, 2017.

ISSUES PRESENTED

1. Whether the OPC committed indirect contempt?
2. Whether the OPC is responsible for the actions of their Administrator?

ANALYSIS

The fact that the OPC is an original hearing body whose Commissioners are appointed by the OBC neither adds nor detracts from its responsibility of supervision of employees. We limit this analysis to addressing the matter of legal responsibility of the OPC.

Attorney Eisenmann's response on behalf of the OPC provides a partially factual basis as to why the delays occurred in the OPC process. While the OPC acknowledged some responsibility and indicated corrective steps had been taken in the communications chain, i.e. between the OPC and its Administrator, these steps were not sufficiently detailed. Thus, the response to the Indirect Contempt remains incomplete.

Breakdown in Communications

In his brief on behalf of the OPC, Attorney Eisenmann admitted that:

many of the actions referenced in the Court's various orders in the case were effectuated not by the OPC or its Officers: but instead were taken at the discretion and direction of the OPC's Administrator, Gina Buenrostro, (hereinafter "Buenrostro"), with limited or no involvement by other members of the Commission.¹

With communications between entities of government, in this case the Court of Appeals and the OPC, there should be collegiality of purpose. Specifically, when we are both dealing with the rights of employees of the Oneida Nation we should be of one mind and purpose in addressing threshold issues of Due Process. The delays resulting from the actions of the OPC's

¹See Putative Contemnor's Response to the Court's Order on Show Cause Hearing, pg. 1.

Administrator were, at minimum, grossly negligent, if not outright intentional. This resulted in several needless delays that impacted Somers' due process rights.

Over six (6) months elapsed between Somers' first filing with the OPC on March 24, 2017 to the date of her first hearing on October 23, 2017. This delay is not only unacceptable, it is unconscionable. By the OPC's admission, these delays were caused by the Administrator's interference. As the familiar legal maxim states "Justice delayed is justice denied."² While there is some acknowledgement of responsibility for the delays, the matter of accountability has not been addressed. Thus, there are still no assurances that actions of the Administrator will not happen again.

The OPC's By-Laws and the Administrator's job description show that the Chairperson of the OPC is the Administrator's supervisor. The Administrator handles correspondence of the entire OPC, as well as routine responsibilities such as office administration and budget preparation. As to sitting review panels, the Administrator is also responsible for sending and receiving communications from attorneys, advocates, parties, witnesses, and courts as may be necessary regarding pending or scheduling cases. This would include rulings and decisions of the reviewing panels and receiving pleadings filed by parties or their representatives.

The responsibilities of the Administrator regarding essential communications of the OPC are, thus, twofold. First, the Administrator facilitates communications for the entire OPC, and second, she is also responsible to send and receive documents for sitting review panels. These are two separate areas of responsibility of the Administrator. It is the Chairperson's responsibility to oversee the Administrator and to ensure she is acting in accordance with her duties.

The OPC, through its attorney's brief, has acknowledged that they were unaware of actions of the Administrator that interfered with Somers' right to file papers in her case, among other things. While the OPC has been candid in its acknowledgement of responsibility that is not the same as determining accountability for the specific harms that have occurred, or for ensuring that

² This quote has been attributed to English statesman William E. Gladstone (1809-1898).

such harms will not happen again in the future, nor does it excuse the OPC's failure to correspond with this Court's Orders on Remand.

Doctrine of *Respondeat Superior*

In general, one can only be legally responsible and liable for one's own actions, and not the actions of others. However, in certain circumstances, the law will place "vicarious liability" on a party who did not actually commit the act[s] in question. One well-settled doctrine for imposing vicarious liability is *respondeat superior*. The doctrine of *respondeat superior* addresses situations in which a principal is responsible for the acts of his agent. Since the Oneida Nation's laws are silent regarding the principles of vicarious liability and *respondeat superior*, we look to other jurisdictions for guidance on this issue.

Vicarious liability is "[l]iability that a supervisory party (such as an employer) bears for actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties." Black's Law Dictionary (8th ed. 2004). Courts impose vicarious liability only where the principal has control or the right to control the physical conduct of the agent such that a master/servant relationship exists. *Kerl v. Dennis Rasmussen, Inc.*, 273 Wis. 2d 106, 682 N.W.2d 328 (2004). When the master/servant relationship is between an employer and employee, the general rule of *respondeat superior* is that an employee's actions are imputed to his or her principal when the employee is acting within the scope of his or her employment. *Lewis v. Physicians Ins. Co.*, 243 Wis. 2d 648, 627 N.W.2d 484 (2001).

The doctrine of *respondeat superior* is one of public policy where liability is placed on the employer because, in the promotion of its work, it has control over the mode and manner of its employees' performance and therefore ought to be liable for injuries caused by its employees' conduct. *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 653, 121 N.W.2d 249 (1963).

In most *respondeat superior* cases, the point of contention is whether the employee was acting within the scope of his or her employment. When scope is at issue, the focus is on the employee's intent. *Olson v. Connerly*, 156 Wis. 2d 488, 498-99, 457 N.W.2d 479 (1990). If the

employee was not entirely motivated by his or her own purposes, but intended, at least in part, to serve his or her employer, the employee's conduct is imputed to the employer. *Id.* At 499-500.

In this instance, the actions of the Administrator are directly attributable to the OPC. The OPC was obligated to supervise its Administrator and is accountable for her actions. This includes the Administrator's interference with Somers access to the OPC as well as ignoring the orders of this Court. Attorney Eisenmann indicated that the OPC was unaware of the Administrator's actions taken on their behalf; but it appears that some of these actions were authorized by the signatures of the OPC's Commissioners. While the Administrator is employed by the OPC, she has no discretion to make decisions on her own without the knowledge of the OPC's Commissioners.

Scope is not at issue since the actions taken by the OPC Administrator were taken with the intent of serving the OPC. As a result, the actions of the OPC Administrator can also be imputed as actions taken by the OPC. It does not matter whether the OPC was aware of the Administrator's actions. Therefore, we can impute the actions of the OPC Administrator to the OPC as acts of indirect contempt.

Acknowledgements of Responsibility by the OPC

To its credit, the OPC has admitted to violations caused by the OPC during this proceeding. In regard to whether an ex parte communication had taken place between the OBC and the OPC, Attorney Eisenmann stated that:

[t]his communication appears to have been made at the direction of the OPC Administrator, without consultation of the OPC Commissioners or Officers. The Commissioners were not aware of this correspondence, and it does not appear that copies of this correspondence were served on Somers.³

In answering why the OPC also failed to notify this Court that it referred Somers to the trial court after we had assumed jurisdiction of her case and remanded it back to the OPC, Attorney Eisenmann stated that:

³ See Putative Contemnor's Response to the Court's Order on Show Cause Hearing, pg. 11.

[t]he decision to refer Somers' case to the Trial Court following the remand by the Court of Appeals appears to have been made by the OPC Administrator, without consultation with the OPC Commissioners, and at least some of the OPC Officers. The Commissioners were not aware of this decision, or the failure to communicate with the Court of Appeals.⁴

Although these were errors on the part of the OPC, they do not rise to the level of contempt. The failure of the OPC to communicate with this Court; however, conflicts with professional communications implicit in the Oneida Code.

Acts of Indirect Contempt

Like other courts, we believe this Court should use the power of contempt sparingly, and it should not be used arbitrarily. *See In Re Adam's Rib, Inc.*, 39 Wis.2d 741, 746 (1968). However, this power is inherent as its main purpose is to uphold the dignity of the Court. Unlike direct contempt, acts of indirect contempt occur outside of the presence of the Court. The Oneida Rules of Civ. Proc. §803.26-1 states that a party can be held/is in contempt for:

- (c) Refusal to obey any order or judgment of the Court; and/or
- (g) Any other interference with the process, proceedings, or dignity of the Court or a Judge while in the performance of official duties.

The Oneida Rules of Civ. Proc. §803.26-3, *Relief*, states that Individuals or entities found guilty of contempt:

shall be subject to a fine in an amount not to exceed one thousand dollars (\$1,000) per act of contempt, and not to exceed five thousand dollars (\$5,000) per instance of continuing contempt payable to the Judiciary or to the complaining party. When that individual or other entity either pays the money or does whatever the Court orders that person to do, the contempt order shall be purged.

In our first Remand issued on May 8, 2017, we ordered the OPC to respond to eight (8) specific directives. The OPC failed to provide the Court with any response in regard to this first Remand Order. We issued a second Remand Order on September 26, 2017 which again directed the OPC to address the same eight questions from the May 8, 2017 Remand Order. The Second Remand

⁴ See Putative Contemnor's Response to the Court's Order on Show Cause Hearing, pg. 11.

Order directed the OPC to provide a response to this Court within 30 days. The OPC again did not respond to this Court within the given timeframe.⁵

When directed to respond as to whether any of the Remand directives were reviewed by the entire OPC, the Commissioners originally assigned to Somers' Employee Protection case, or the OPC Officers, Attorney Eisenmann responded that:

*[t]he Remand directives were received by the OPC Administrator, but were not shared with or reviewed by the entire OPC, the Commissioners originally assigned to Somers' EP case, and at least some of the OPC Officers.*⁶

A lower hearing body must comply with an appellate court's mandate. The term mandate is used to refer to an appellate court's instructions to a lower hearing body and to what the lower hearing body is permitted and required to do on remand. *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003). A lower hearing body "must comply strictly with the mandate rendered by the reviewing court" and "may not deviate" from the mandate. *Huffman v. Saul Holdings Ltd P 'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001).

The OPC, or at least the panel of Commissioners assigned to a case, must be keep abreast of pending matters before them on cases that they are assigned to. At a minimum, the Commissioners assigned to a case, not the Administrator, must review all appellate mandates so they can decide how to comply.

The OPC Administrator did not forward any of the Court's Remand Orders to the OPC's Commissioners, including the panel assigned to Somers' employee protection case. These lapses in communication constituted the acts that resulted in the OPC's failure to fully comply with the Court's mandate. The OPC simply failed to stay abreast of pending matters before it.

⁵See Putative Contemnor's Response to the Court's Order on Show Cause Hearing, at Exhibit B. The OPC submitted an October 24, 2017 update memo from the OPC Administrator, and a copy of an October 24 Oneida Inter-Office Certified Mail cover letter that did not have a verified signature on it as proof of it having been sent and received. The Court has not received it to date other than it being offered as Exhibit B in the OPC's February 27, 2018 Response and as Exhibit C in correspondence from the OPC's attorney dated November 13, 2017.

⁶*Id* at pg. 11.

Parties are required to comply with all orders issued by the Court of Appeals or face potential consequences per Oneida Rules of Civ. Proc. §803.26-1(c) and the Oneida Rules of App. Proc. §805.15-3. The Court of Appeals was compelled to issue three separate Remand Orders with the same directives to the OPC because the OPC failed to fully comply with the Court's mandate. This Court should not have had to repeatedly issue the same directives to the OPC. Based upon the foregoing, we find the OPC is guilty of Indirect Contempt of Court in violation of Oneida Rules of Civ. Proc. §803.26-1(c), for refusing to obey the orders of the Court.

Interference of Process

Attorney Eisenmann acknowledged in his reply brief that:

*the limitations imposed by the Administrator are inconsistent with the Commission's rules, regulations, and operating procedures that have been developed to ensure free and fair access to the OPC, and in violation of the Tribe's personnel policies and procedures. The Commission has taken certain steps to address these issues and will be taking additional steps in the near future.*⁷

Although these actions were taken by the Administrator, as stated above per the doctrine of *respondeat superior*, the OPC is guilty of interfering with the proceedings of the Court. These acts violated Somers' right to due process and are egregious enough to substantiate this Court's finding of Indirect Contempt in violation of §803.26-1(g).

FINDINGS OF FACT

Accordingly, the OPC brief having been considered, this Court makes the following findings supportive of the conclusion that Indirect Contempt by the OPC has in fact occurred:

1. The Court of Appeals has jurisdiction over this matter per §801.8-2(a)(2) of the Oneida Judiciary Law.
2. The OPC is an "original hearing body" for employee disciplinary actions per the Oneida Personnel Policies and Procedures and §801.8-3(a) and §805.3-1(s) of the Oneida Code of Laws.

⁷See Putative Contemnor's Response to the Court's Order on Show Cause Hearing, at pg. 12.

3. The OPC was ordered to appear before this Court to determine whether facts and circumstances were present to which a hearing was required to determine whether acts of Indirect Contempt have occurred during this proceeding.
4. The OPC was given notice and an opportunity to be heard when this Court ordered the OPC to submit a brief addressing the unanswered instructions set forth in this Court's Remand Orders dated May 8, 2017 and September 26, 2017, and the potential breaches outlined in the December 28, 2017 Order on the Show Cause Hearing.
5. The OPC submitted a brief as the Putative Contemnor's Response to the Court's Order on Show Cause Hearing on February 27, 2018.
6. The OPC made admissions that "the Court's various orders in the case were effectuated not by the OPC or its Officers: but instead were taken at the discretion and direction of the OPC's Administrator, . . . with limited or no involvement by other members of the Commission."⁸
7. The OPC, or its designee, supervises an Administrator who is responsible to carry out the directives of the OPC and communications of active reviewing panels, including its decisions and rulings to parties and where otherwise required as when addressing remand orders.
8. The OPC is responsible for the actions of the OPC Administrator when the Administrator is acting within the scope of her employment and with the intent of serving her employer, the OPC.
9. Somers' ability to file documents with the OPC was limited and interfered with by the OPC Administrator.

⁸See Putative Contemnor's Response to the Court's Order on Show Cause Hearing, at pg. 11.

10. By its own admission, these actions and “limitations imposed by the Administrator are inconsistent with the Commission’s rules, regulations, and operating procedures that have been developed to ensure free and fair access to the OPC, and in violation of the Tribe’s personnel policies and procedures.”⁹

CONCLUSIONS OF LAW

Based upon the above findings, we conclude that the OPC is guilty of Indirect Contempt of Court by 1) its noncompliance with the Remand Orders issued by this Court; and 2) for interference with the process and the proceedings of the Court.

ORDER

Pursuant to Oneida Rules of Civ. Proc. §803.26-1, this Court now resolves this matter and hereby finds the OPC committed acts of Indirect Contempt for:

1. Refusing to obey the Court’s Remand Orders; and
2. Interfering with the process and proceedings of the Court.

Pursuant to Oneida Rules of Civ. Proc. §803.26-3, *Relief*, the OPC shall:

1. Pay a forfeiture in the amount of \$1,000.00 for refusal to obey the Court’s Remand Orders;
2. Pay a forfeiture in the amount of \$1,000.00 for interference with the process and proceedings of the Court;
3. These fines shall be submitted to the Judiciary on or before May 23, 2018; and
4. This Order is issued Without Prejudice.

⁹See Putative Contemnor’s Response to the Court’s Order on Show Cause Hearing, pg. 12.

By the authority vested in the Oneida Judiciary, Court of Appeals, by Oneida General Tribal Council Resolutions 01-07-13-B and 03-19-17-A, dated this 23rd day of April 2018, in the matter of Case No. 17-AC-012, *Elizabeth Somers v. Oneida Personnel Commission and Oneida Business Committee*.

It is so ordered.