

COURT OF APPEALS

Dr. Ravinder Vir,

Appellant,

Case No. 18-AC-002

v.

December 24, 2018

Dustin Fish

Respondent.

FINAL DECISION

This matter has come before Appellate Judges, Susan G. Daniels, Leland Wigg-Ninham, and Chief Appellate Judge, Gerald L. Hill.

INTRODUCTION

This matter was initiated by a disciplinary action taken against Dustin Fish (hereinafter, “Fish”) by Dr. Ravinder Vir (hereinafter, “Vir”), acting as the nominal supervisor due to various conflicts in the chain of managerial authority. The Oneida Personnel Commission (hereinafter, “OPC”) overturned the discipline. Vir appeals the OPC’s decision.

The decision of the OPC is *reversed and the discipline is upheld*.

JURISDICTION

The Court of Appeals has jurisdiction over this matter per §801.8-2(a)(2) of the Oneida Judiciary Law which gives this Court exclusive jurisdiction to review appeals of agency and administrative decisions.

BACKGROUND

Vir filed a Notice of Appeal with this Court on March 9, 2018. The above cited case was accepted for review on March 28, 2018. On April 17, 2018, the case record was received from the OPC which included eleven (11) hearing recording discs. Due to a technical issue with the recordings, the case record was not certified until August 2, 2018. On August 21, 2018, Vir filed his

Appellant's Brief. On September 10, 2018, Fish filed his Respondent's Brief, which also included a Motion to Dismiss. Fish's motion was denied on October 11, 2018. This case was also extended twice by this Court on September 10, 2018, and November 15, 2018.

ISSUE ON APPEAL

Was the OPC decision an abuse of discretion? Yes.

ANALYSIS

The OPC decision included issues outside the scope of this appeal which confused the threshold issues of Fish's discipline. Fish was disciplined for violation of the Oneida Personnel Policies and Procedures, sections V.D.2.1.(a), Insubordination (including disobedience) or failure/refusal to carry out assignments or instructions (W/S/T); V.D.2.IV.(b), Intimidating, interfering with or using abusive language towards customers, clients, coworkers or others (S/T); and finally, V.D.2.IV.(j), Failure to exercise proper judgment (W/S/T). The OPC decision erroneously focused on Fish's sexual harassment claim.

Abuse of Discretion

Abuse of discretion is based upon an analysis of the conclusion of the findings of fact of the lower hearing body. Where a finding is based upon reasonable facts, not contradicted by evidence, the court is usually deferential to such finding. The Oneida Judiciary Law, §801.8-3, states that "...the Court of Appeals shall not substitute its judgment or wisdom of the credibility of testimony or the weight of evidence for that of the original hearing body." Abuse is defined as "An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, or illegal." Black's Law Dictionary, 7th Edition. Applying these standards to the appeal at hand, the question is, are the OPC's findings supportive of its overturning of the discipline? In other words, do Fish's contentions credibly address the disciplinary action taken by Vir? The answer is no.

The OPC's analysis addressed Fish's justification of the altercation with his immediate supervisor, Keith Janssen, (hereinafter, "Janssen") on June 7, 2017, as a *last straw* of alleged continuing sexual harassment. The record shows that there were several inconsistent accounts of the altercation.

However, there was little to no factual analysis addressing Fish's insubordination, failing to follow Janssen's directives or that he refused to participate in the investigation of these infractions. In *Somers v. Powless*, 17-AC-002, following *Koon v. United States*, 518 U.S. 81, 100 (1996), this Court determined that a lower court or here, an original hearing body, OPC, "by definition abuses its discretion when it makes an error of law." We find such error by the OPC here. Its failure to address the disciplinary issues is an error of law and an abuse of discretion.

The OPC reached a determination that Fish had been harmed. The term harm implies that the person subjected to the harm was injured physically and/or mentally. The OPC decision provides no basis for addressing harm to anyone yet implies harm based upon the discipline. Thus, the *harm*, as designated in the OPC decision illogically converted the focus from the reasons for Fish's discipline to that of his being Janssen's victim, which conversion was an arbitrary and an egregious error not supported by the record.

Sexual Harassment

Though Fish has a right to contest the discipline, his claim of being the victim of sexual harassment clouded the real issue. Sexual harassment was not an issue in the discipline until it was alleged as a defense. The Disciplinary Action Form shows that Fish was being disciplined for failing to cooperate with Vir's investigation of the incident as well as the other infractions cited. Moreover, both Fish and Janssen were cited for Disorderly Conduct by the Oneida Police Department for their parts in the altercation that took place on June 7, 2017. The altercation was not part of the discipline, even though it initiated Vir's investigation.

As stated above, the OPC decision does not address these violations but instead focuses on Fish's defense of being the victim of alleged ongoing sexual harassment. Vir was addressing a workplace incident between Fish and Janssen. Fish did not cooperate with the investigation. We find the focus of the OPC decision on sexual harassment is unrelated to the discipline and therefore of no probative value or merit in overturning Fish's discipline and, thus, an abuse of the OPC's discretion.

Employee Protection Order

The OPC found that Employee Protection (hereinafter, "EP") did not apply because it was received by Vir *after* he had administered the discipline. The OPC decision correctly determined that Vir's discipline of Fish was not retaliatory. There is no basis upon which to apply or justify any inclusion of Fish's sexual harassment defense. It is unnecessary for this Court to address the EP Order for the reasons set forth.

CONCLUSION

Our review finds the decision of the OPC to be unreasonable, against the weight of the evidence and, more importantly, unrelated to the issues of the discipline. This Court must take into consideration the basis of the appeal filed here by the Vir. We find the Oneida Personnel Commission, based on the record presented in this case, was erroneous in its findings and therefore abused its discretion by overturning the discipline of Fish issued by Vir.

ORDER

For the reasons identified above, the decision of the OPC in the matter of Docket No. 17-SS-004 is hereby REVERSED and Vir's discipline of Fish is upheld.

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolutions 01-07-13-B and 3-19-17-A, the decision of the Oneida Personnel Commission is reversed, the two (2) week suspension of Dustin Fish is upheld. Dated this 24th day of December 2018, in the matter of Case No. 18-AC-002, *Ravinder Vir v. Dustin Fish*.

It is so ordered.