

Oneida Tribal Judicial System

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ONEIDA TRIBAL JUDICIAL SYSTEM
TRIAL COURT

**Lillian M. Wheelock,
Petitioner**

v.

**Mari Kriescher,
Behavioral Health Manager,
Respondent**

Docket No: 11-TC-107

Date: July 12, 2012

Decision

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers; Mary Adams, Sandra L. Skenadore, and Leland Wigg-Ninham, presiding.

Background

This case involves allegations concerning the misapplication of the Oneida Preference and the Personnel Policies and Procedures within the hiring procedures involving the Psychotherapist position, in the Behavioral Health Department. We find that the applicable rules governing the selection process gave the Respondent enough latitude to justify her actions and the eventual result of Ms. Wheelock being denied the position.

Procedural background

On August 24, 2011 Petitioner filed a complaint against the following Respondents: Joanie Buckley, Internal Services Director; Gerald Danforth, HR Area Manager; Marianne Close, Director of Compensation & Employment; Barb Kolitsch, Training & Development-Director; Victrietta Hensley, Workforce Development-Coordinator; Katrina Snyder, HR Generalist; Peril

Huff, Oneida Personnel Commission; David Webster, Oneida Personnel Commission; Debbie Thundercloud, General Manager; Mari Kriescher, Manager-Behavioral Health and Diane McLester-Heim, Ombudsperson. All were sued for their alleged participation in the denial of hiring Ms. Wheelock for the Psychotherapist position. Petitioner's complaint included a Motion for Immediate Injunction.

On September 6, 2011 the Trial Court deliberated and issued its decision that denied Petitioner's request for a temporary restraining order against filling the Psychotherapist position. *Petitioner had not shown a likelihood of success on the merits; simply being rejected from a job for lack of experience, by itself, does not appear to be a violation of any rule or law.* A Pre-trial was scheduled for October 4, 2011.

On September 26, 2011 Attorney Gerald Hill representing the Oneida Personnel Commission (OPC) file a Response to Complaint and Motion to Dismiss Summons against Peril Huff and David Webster for the following reasons:

1. The Complaint alleges no improper acts of the named Commissioner Respondents but is simply unhappy with the result of the decision to deny her the position for which she applied.
2. The named Commissioner Respondents have no independent authority to compel the hiring of any candidate, nor can they be compelled, for the reasons stated above, to exercise their independent discretion by anyone.
3. The Compliant fails to cite any law, Tribal or otherwise, to support personal jurisdiction over the Summoned named Commissioner Respondents, and
4. The Complaint fails to set forth any facts, by Commission or omission, to substantiate Summoning the named Commissioner Respondents.

In conclusion, they Move this Court to Dismiss and Quash the Summons.

On October 3, 2011 the Respondents filed their Answer to Petitioner's Complaint Requesting Injunctive Relief based on the following reasons:

1. The United States Supreme Court has addressed Title VII of the Civil Rights Act of 1964 "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the [Civil Rights] Act does not command that a person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.
2. According to Lois Strong v. Oneida Human Resources Department and Oneida Business Committee, Docket 00-AC-0011, the proposition that lower body decisions will be

reviewed only for errors of law or procedure, and that outside of those parameters, all other decisions are within the discretion of the tribal agencies and their officials.

3. Respondents followed the Personnel Policies and Procedures (PP&P) when looking to fill the Psychotherapist position, and because Respondents followed the (PP&P) consistently, Petitioner was treated fairly as the (PP&P) have intended.
4. The named Respondents; Joanie Buckley, Marianne Close, Geraldine Danforth, Victrietta Hensley, Barb Kolitsch, Diane McLester-Heim, and Debbie Thundercloud took no part in determining whether the Petitioner was qualified for the position of Psychotherapist and should be summarily dismissed from this case.
5. Petitioner has failed to establish a right to relief.
6. Petitioner has failed to establish the Subject Matter Jurisdiction of this Court.
7. Petitioner has failed to prove a claim.
8. Petitioner's Complaint should be dismissed and the injunction should be denied.

On October 4, 2011 a Pre-trial was held to discuss Respondent's Motion to remove Joanie Buckley, David Webster, Peril Huff, Debbie Thundercloud, Geraldine Danforth, Barb Kolitsch, Marianne Close, Victrietta Hensley and Diane McLester-Heim from the list of Respondents.

On October 6, 2011 the Court issued its decision and granted Respondents' motion to remove the above list of respondents for "Failure to state a cause of action." The Court stated, "*Simply because these individuals are within the chain of command for HRD does not establish a right to relief. Petitioner must show how these individuals' actions violated an Oneida rule, code of law or procedure that directly impacted her ability to be hired for the Psychotherapist position.*"

Petitioner was given twenty days to submit her brief backing up her complaint with supporting documents as a reason for this Court to move forward with her complaint against Mari Kriescher and Katrina Snyder.

On October 31, 2012 Petitioner submitted Petitioner's Back UP Brief claiming the following:

1. At her first interview for the Psychotherapist position, June 10, 2010, she was ranked the top candidate.
2. Mari Kriescher abused her discretion in determining that she didn't want to follow the recommendation of the Personnel Commission.
3. At her second interview for the Psychotherapist position, January 21, 2011, she was again ranked the top candidate by the Personnel Commission.
4. Finally, after her second interview and several memos requesting an answer to the disposition of the Psychotherapist position, she received a Disqualification Letter from HRD on February 16, 2011.

5. She contends Mari Kriescher and Katrina Snyder worked together to come up with a way to disqualify her from this position.
6. At the October 4, 2011 several Respondents failed to appear after being summoned. Therefore, the Respondents should be held in Contempt in accordance with Rules of Civil Procedure, Rule 32, for failure to obey a court order.
7. She is requesting a default judgment against Respondents for failure to appear before the Trial Court at any scheduled hearing, or proceeding.
8. She is requesting punitive damages due to the intentional violation of her Civil Rights in the amount of \$500,000.00 for the pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.
9. She is also requesting monetary damages not less than or equal to 15 years of full pay, vacation, sick time and full benefit package at the rate of \$27.36/hour, with the additional \$.75/hour raise that went into effect on 10/2/2011; which is the mid-range of the E5 salary Structure for the Oneida Tribe.
10. Plus all out of pocket expenses and legal expenses involved in preparation and presentation of this case.
11. She also requests that each respondent receive the most severe punishment possible and immediate sanctions for intentional disregard of the laws of the Oneida Tribe.
12. Each respondent has deliberately chosen to act with malice and egregious disregard for the Oneida Tribe's laws, policies and procedures. Anyone who intentionally chooses to behave in this fashion must be penalized to the fullest extent of the law.
13. To be paid within 30 calendar days after a decision is rendered.

On November 29, 2011, the Court found Petitioner's argument to retain Katrina Snyder on the list of respondents was not persuasive because she failed to provide any specific allegation Ms. Snyder did which, if true, would violate a law or rule of the tribe. The only evidence Petitioner provided was a memo she received from Ms. Snyder and it does not show Ms. Snyder acted outside of her scope of authority. Therefore, the Court excused Katrina Snyder for the list of respondents. The Court granted Petitioner's case to move forward against Mari Kriescher on the grounds of misapplication of the Oneida preference in hiring in order for this case to move forward. A pre-trial was scheduled for December 27, 2011 to narrow the issues and develop a scheduling order.

On December 14, 2011 Petitioner filed a motion for extension. The Court granted Petitioner's motion and rescheduled the hearing for January 10, 2012.

At the January 10th pre-trial the parties agreed to argue several issues and a Scheduling Order was issued, which included timelines and a trial date.

On February 22, 2012 the issued its Order setting dates for witness list, discovery, motions and issue(s) to be argued at trial:

1. Was Indian Preference Policy violated during the interview process for the Psychotherapist position?
2. Were the Oneida Policies and Procedures violated during the interview process for the Psychotherapist position?

The trial was scheduled for March 13, 2012 at 9:00 a.m.

On February 24, 2012 Petitioner filed three motions; Motion of Contempt, Request Default Judgment, and Dismissal of Action.

On March 6, 2012 Attorney Gerald Hill on behalf of the Oneida Personnel Commission filed a Response to Subpoena and Motion to Dismiss the named Personnel Commissioners from the list of witness testimony on the grounds of Tribal Sovereign Immunity and for failure to State a Cause of Action for appointed governments officials exercising their best discretion in the matters before them. In addition, OPC claims they were acting within their scope of authority.

On March 9, 2012 the Court deliberated and addressed Respondent's Objection to Petitioner's Witness List filed on February 10, 2012. Respondents claimed David Webster, Peril Huff and Marianne Close, played no part in the supervisor's choice of applicants and are not subject to subpoenas. Respondents assert that they were dismissed as parties on the basis of sovereign immunity and therefore not subject to subpoenas. The Court dismissed the Oneida Personnel Commissioners as parties, but do not view their immunity as extending to them in this specific role as potential fact witnesses. (See *Lillian Wheelock v Mari Kriescher* 11-TC-107, 3/9/12). Respondents argue Geraldine Danforth and Katrina Snyder can testify regarding whether Indian Preference was violated. The Court disagreed and the subpoenas for David Webster, Peril Huff and Marianne Close were upheld.

At the March 13th hearing the Court addressed Petitioner's February 24th three motions as follows:

1. Petitioner's Motion of Contempt: Petitioner claims because several Respondents did not appear for a scheduled hearing that the court should find Respondents in contempt. The

Court denied Petitioner's motion in accordance with Rules of Civil Procedure, Rule 16 A(2), a trial may proceed without the party's appearance so long as their representative appears. A Notice of Representation for the Respondents was mailed to Petitioner on September 19, 2011 and Attorney Garvey appeared in behalf of the Respondents at court. Contempt of court is behavior that opposes or defies the authority, justice, and dignity of the court. That did not occur.

2. Petitioner's Request Default Judgment: Petitioner claims because several Respondents did not appear for a scheduled hearing the Court should dismiss the case and rule in favor of Petitioner. The Court denied Petitioner's motion in accordance with Rules of Civil Procedure, Rule 16 A(2), a trial may proceed without the party's appearance so long as their representative appears. Attorney Garvey appeared at court representing Respondents.
3. Dismissal of Action: Petitioner contends because Mari Kriescher or Katrina Snyder did not appear for a scheduled hearing this case should be dismissed in her favor. Again, Mari Kriescher and Katrina Snyder were among the list of Respondents that Petitioner named in her complaint. Attorney Garvey filed her notice of representation of the named Respondents on September 19, 2011. The Court denied Petitioner's motion of Dismissal of Action in accordance with Rule 16(B), when a party whom a judgment for relief is sought fails to appear at the trial the court *may* grant a default judgment. In this case, Attorney Garvey appeared at court representing Respondents. As long as the Respondents were properly represented by their counsel the action shall not be dismissed.

On May 7, 2012 a trial was held and continued to May 14, 2012.

The transcripts were completed on June 1, 2012. A deliberation was held on June 26, 2012. The Court has 30-days to issues its final decision.

Jurisdiction

The body has original jurisdiction over Ms. Wheelock's claim under Sec. I.C of Resolution 8-19-91-A Addendum which states that a "subcommittee of the Oneida Appeals Commission shall have authority to hear . . . actions that are subject to ordinance or rules that have no specified hearing forum within the Oneida Tribe." Jurisdiction in hiring preference cases was affirmed in *Cornelius v. Oneida Nation Community Library*, 08-AC-026 (3/17/2009).

Issues

1. Was Indian Preference Policy violated during the interviewing process for the Psychotherapist position?

2. Were the Oneida Policies and Procedures violated during the interview process for the Psychotherapist position?

Findings of Fact

In May 2010 Ms. Wheelock submitted her application for the Psychotherapist position at the Oneida Behavioral Health Department. Petitioner is a member of the Oneida Tribe, holds a Master's Degree in Social Work, is a Licensed Clinical Social Worker, and has 20 years of experience in the field. The first interview was June 2010. Respondent Mari Kriescher, among others, attended and conducted the interview. There were two candidates interviewed, Ms. Wheelock and another tribal member. After the first interview, the other candidate was disqualified due to bonding issues. With only one remaining candidate, Ms. Wheelock, no candidate was selected.

Over the next several months, Ms. Kriescher had the job qualifications revised for the position. The job qualifications in June 2010 required successful applicants to have three years of experience. Ms. Wheelock met this requirement; however her application indicated that she had not been active in the field for about eight years.¹ Shortly after the first interview, Ms. Kriescher doubted whether the qualifications listed for the position were sufficient. In particular, she re-considered the experience qualification. She spoke with the Medical Director at the Oneida Health Center, Dr. Ravi Vir. Ms. Kriescher also checked several other health care facilities to see what their standards were for hiring a Psychotherapist. Each told her that "current" experience means within the last three years. Ms. Kriescher met with the interviewing committee, discussed the criteria and they decided, by majority vote, that to be qualified for the Psychotherapist position an applicant must have current clinical experience, meaning within the past three years.

The reason for re-consideration of the job qualification is somewhat in doubt. Ms. Kriescher claims that it was in the interest of ensuring excellent client care. That's understandable, but why wouldn't the job description reflect that important concern when it was used the first time?

Ms. Wheelock, predictably, sees it differently. Ms. Wheelock draws an inference from the time of the change of the job qualifications. They were changed *after* her first interview. She infers the job qualifications were changed not in the interest of client care but to find a way to exclude her from being qualified for the position. It is difficult for the Court to know what the true motivation was for the change or whether there was more than one motive.

Shortly after the change in the job qualifications, HRD sent Ms. Wheelock a letter asking that she re-interview for the same position. This was done despite the fact that Petitioner's past experience was over eight years earlier with no direct client contact and therefore she was likely unqualified for the position. Based on her research and the input from Dr. Vir, language was added that the experience required for the position was to be "current clinical experience."

After several months, Ms. Wheelock had not heard anything so she contacted Katrina Snyder, HR Generalist, for a status on the position and was informed that the supervisor had not decided.

In January 2011 Ms. Wheelock was contacted for a second interview for the same position, at this time the position was not reposted. That interview was held on January 21, 2011.

In February 2011 Ms. Wheelock received a memo indicating that she was disqualified from the Psychotherapist position based on not having current clinical experience.

Apparently there were several candidates interviewed in the second round in June 2011. The position remained unfilled.

There is no dispute that Ms. Wheelock otherwise met all other qualifications for the position. She also scored well in the interviews and is an Oneida tribal member. However, according to the ranking scores in the first interview Ms. Wheelock's scored ranked second. The other

¹ Ms. Wheelock testified that in fact she had been practicing during those eight years on her own. This testimony is undisputed. For purposes of the Court's decision we include this in the findings of fact, though it does not bear on the outcome because Ms. Kriescher was not aware of this at the time the decisions at issue were made.

candidate who was also an Oneida tribal member was disqualified based on her background check.

We incorporate by reference and make a part of our findings of fact, all exhibits accepted into evidence at the hearing.

Conclusions of Law

First we quickly review the relevant sections of the Blue Book. Sec. III A. of the Blue Book states:

[T]he Tribe applies the following priorities of Indian Preference in staffing decisions:

1. Enrolled Oneida Tribal member;
2. Oneida Indians eligible for enrollment in the Oneida tribe;
3. Documented first generation Oneida descendant;
4. Other Native American Indian;
5. Other (non-Indian).

This policy will apply in decisions where the basic requirements for employment are met.

The other relevant portion of the Blue Book is Section III.B.h. which states:

- 1) The supervisor shall select one of the top two (2) candidates as ranked through the rating scale.
 - a) The supervisor may conduct an additional personal interview with the top two (2) candidates.
 - b) The selection decision shall be governed by the Oneida Preference and Indian Preference Policy.
 - c) The HRD office will notify the selected candidate and offer the candidate the job within five (5) working days of the selection by the supervisor.
 - i. Should the supervisor's choice refuse the offer, the HRD Office will offer the job to second candidate.
- 2) Should both of the top two ranked candidates refuse the job offer, the supervisor may:
 - a) Repeat the process outlined in B.2.h.1. above; or
 - b) Re-post the position.
- 3) The HRD Office will notify those candidates interviewed but not selected of the decision to hire the best-qualified candidate.
- 4) All newly hired employees will be listed in the HR newsletter.

In her pleadings, Ms. Wheelock claims that she was discriminated against due to her age and that the Ms. Kriescher failed to follow the Tribe's hiring policy after the first interview in June 2010 when Ms. Wheelock was the only qualified candidate. After the first interview, Ms. Wheelock contends Ms. Kriescher and Katrina Snyder intentionally worked together to exclude her from the position, specifically by changing the job qualifications to include a qualification that Ms. Wheelock could not meet.

The first interview

In June 2010 two candidates were interviewed for the Psychotherapist position: Ms. Wheelock and another candidate. After the interviews, the other candidate was disqualified due to an issue with the candidate's ability to be bonded. That left only Ms. Wheelock.² According to the tally sheets dated June 10, 2010 both Petitioner and the second applicant were tribal members; therefore Indian Preference was not at issue. When there is more than one non-tribal member applicant then each tribal member applicant receives two extra points, but when both applicants are tribal members then neither receive the extra two points which was the case here. Therefore, there was no violation of Indian Preference.

Beyond the issue of preference, Ms. Wheelock contends she should have been hired as she was the only remaining qualified candidate. Ms. Kriescher argues that she was not obligated to offer the job to Ms. Wheelock because Sec. III.B.h.1.c.i. only requires HRD to offer the position to the second candidate when the first candidate has refused an offer of employment. In June 2010, the offer was not refused but rather the other candidate was disqualified.

We accept this argument and acknowledge that it is technically correct: Ms. Kriescher and Oneida HRD were not obligated to hire Ms. Wheelock. While Ms. Wheelock was a qualified candidate and an Oneida member, the Blue Book only specifically requires HRD to offer the position to the second candidate when the first candidate has refused the offer. That did not happen here. Nowhere in the Personnel Policies & Procedures does it state the supervisor must

² Ms. Wheelock was the second candidate as the other candidate scored higher on the Tribe's point system used to rate candidates after the interview.

hire if there is only one applicant. It seems at least plausible that the Policies and Procedures were written so that a supervisor will have two choices when making a hire.

We acknowledge Ms. Wheelock's perception of unjustified exclusion. She was qualified and had gone through the interview process; the Tribe could have hired her. However, even if Ms. Kriescher avoided hiring Ms. Wheelock because she didn't like her or didn't think she would be a good fit for the position, this is legal under the Blue Book. The hiring rules are very specific and must be followed, but there also is a measure of discretion for supervisors. Absent a violation of the rules or impermissible discrimination, candidates can be denied jobs for a wide variety of reasons which the candidate may not perceive as fair or just. The supervisor will make legitimate judgments and decisions about a candidate beyond their qualifications: whether the candidate will fit in with other employees, whether the supervisor believes the candidate will take direction well, or whether the candidate has the ability to learn quickly. We are not saying those specific issues were present in this case, but list them as examples.

Change of job description and second interview

Here again, we understand Ms. Wheelock's frustration and perception that she may have been excluded. However, there is no evidence that a tribal rule or law was broken. The Tribe is within its rights to change a job description. Whether this change was because of Ms. Wheelock or some other concern is not exactly clear. After seeing the applicants, including Ms. Wheelock, Ms. Kriescher decided to learn whether the job description should be changed in the area of experience. Even though she had a lot of experience, Ms. Wheelock had not been employed for eight years. In an area such as psychotherapy, it's not unreasonable for a supervisor to want someone with more recent experience. Whether that job qualification was added to get a different type of candidate or whether it was to exclude Ms. Wheelock, we don't know. But whatever the motivation, it is not illegal to beef up a qualification so that the eventual hire will be able to give good service to the Tribe's clients.

Ms. Wheelock alleges that changing the job description is a violation of her due process rights. We disagree. Due process implies that Ms. Wheelock has a right to something that is being

taken away from her without notice to her and without an opportunity for her input. Ms. Wheelock does not have a right to a certain job description. The Tribe is not obligated to even offer a certain job for hire.

Ms. Wheelock alleges age discrimination in her original complaint. However, there is no evidence the record to support a finding of age discrimination. The ages of the eventual candidates hired were not included. Furthermore, it is not clear to us what tribal law or rule, if any prohibits discrimination on the basis of age.

Decision

Ms. Wheelock has failed to prove her claims; therefore they are denied. Petitioner has the right to appeal this decision with the Appellate Court.

IT IS SO ORDERED.