

ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

Gladys Dallas,
Petitioner

v.

CASE NO: 22-EMP-001
DATE: March 28, 2022

Mark W. Powless, Area Manager/General Manager,
Respondent

FINAL ORDER

This case came before the Oneida Trial Court, Honorable Patricia Ninham Hoeft presiding.

Appearing in-person: Petitioner, Gladys Dallas; Petitioner's Advocate, Tsyoslake G. House; and Respondent's Attorney, Peggy Schneider.

BACKGROUND

On March 21, 2022, the Court heard oral arguments on the Petitioner's motion for summary judgment after denying the Respondent's motion to strike the brief in support of the motion because it was unsigned. For the following reasons, the Court granted the Petitioner's motion for summary judgment after determining the Area Manager failed to properly support the legal conclusions asserted in the Area Manager's decision to show a genuine dispute as to any material fact existed.

ISSUES

Did the moving party show there is no genuine dispute as to any material fact and if yes, is the moving party entitled to judgment as a matter of law?

PRINCIPLES OF LAW

803.4. General Provisions

803.4-3. *Other Rules of Procedure Used.* All matters and proceedings not specifically set forth herein shall be handled in accordance with reasonable justice, as determined by the Judiciary.

Where this Law is ambiguous or does not address a situation, the Federal Rules of Civil Procedure or Section 801 of the Wisconsin Statutes may be used as a guide. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in Tribal law unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

803.4-4. At every stage of the proceeding, the Court may disregard any technical error or defect in a failure to comply with this Law as long as the error or noncompliance does not affect the substantive rights of the parties; particularly those not represented by an attorney.

803.30. Summary Judgment

803.30-1. *Motion for Summary Judgment or Partial Summary Judgment.* A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The Court shall state on the record the reasons for granting or denying the motion.

803.30-3. *Procedures.*

(a) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed shall support the assertion by:

- (1) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (2) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

803.30-5. *Failing to Properly Support or Address a Fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 803.30-3, the Court may:

- (a) Give an opportunity to properly support or address the fact;
- (b) Consider the fact undisputed for purposes of the motion;
- (c) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
- (d) Issue any other appropriate order

Oneida Nation Personnel Policies and Procedures Manual

Section V.D.6.a.4. The Area Manager will file a decision with the employee and the HRD Manager (or designee) and will include a reason for the decision, an explanation of the decision and the action to be taken as a result of it.

Section V.D.6.d.1. Review of the Complaint

- 1) The Human Resources Department shall provide the information obtained to the Oneida Personnel Commission members selected to serve as the hearing body for the complaint, and the Oneida Personnel Commissioners shall review all the information submitted by the Petitioner and the Human Resources Department to determine if one or both conditions exist;
 - a) The decision of the Area Manager is clearly against the weight of the evidence; and/or
 - b) Procedural irregularities were exhibited during the appeal process that were harmful to one of the parties to the grievance.
- 3) If the Oneida Personnel Commission members find that neither condition exists, the Oneida Personnel Commission will deny the appeal for a hearing and affirm the decision of the Area Manager.

Section V.D.2. Disciplinary Actions

V.D.2.c.4. Personal Actions and Appearance

V.D.2.c.4. j. Failure to exercise proper judgment. (W/S/T)

O.C. Title 1. Government and Finances – Chapter 103, Code of Ethics.

103.4-4. Program personnel shall demonstrate the highest possible standards of personal integrity, truthfulness, honesty and fortitude in all public activities in order to inspire public confidence and trust in public institutions, including, but not limited to (a) dedication to the highest ideals of honor and integrity in all public and personal relationships (b) affirm the dignity and worth of the services rendered by the government and maintain constructive, creative, and practical attitude toward community affairs and a deep sense of social responsibility as a trusted public servant.

Oneida Nation Definitions (last revised 2-11-21)

Malicious: Showing spite or intentionally wanting to cause harm to someone or hurt their feelings.

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ANALYSIS

This case arises out of Petitioner's termination from employment as an Oneida public transit driver because, while off work and using her personal equipment, she posted on Facebook a question about an alleged monetary "bonus" of additional compensation provided to Oneida Nation Health Center employees. Her employment was terminated but then subsequently restored after she grieved her termination from employment. During that process, the General Manager, acting as the Area Manager, found several procedural irregularities and modified the termination to a written warning. The Petitioner now appeals the written warning. After the close of discovery, the Petitioner moved for summary judgment which the Court grants for the following reasons: 1) There is no genuine dispute as to any material fact because there is no evidence in the record to support the Area Manager's legal characterizations of the Petitioner's Facebook post to be (a) malicious information, (b) an act of posting malicious information, and (c) the sharing of organizational information, with some parts false, that caused negative reactions and other employees to feel bashed; and therefore, 2) The Petitioner is entitled to judgment as a matter of law for showing the Area Manager's decision is clearly against the weight of the evidence because there is no evidence supporting any of the Area Manager's legal conclusions.

Summary Judgment Standard.

Under section 803.30-1 of the Oneida Rules of Civil Procedure, summary judgment is proper if the moving party shows there is no genuine dispute as to any material fact and the movant is

entitled to judgment as a matter of law. The party asking for summary judgment bears the initial burden of showing there is no genuine dispute as to any material fact, and thus, a trial is not needed to resolve the dispute. The party opposing summary judgment must show a genuine dispute as to any material fact exists and therefore must go to trial. To meet their burdens, each party presents their version of the facts “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” 8 O.C. 803.30-1(a)(2). The Court must determine whether a factual dispute exists, whether the dispute is material to the outcome of the case, and whether the dispute is genuine. A genuine dispute exists when the nonmoving party provides evidentiary support of the dispute. To be entitled to judgment as a matter of law, in an employee grievance matter where the moving party is the Petitioner, the moving party must show no genuine dispute exists and the Area Manager’s decision is clearly against the weight of the evidence.

Undisputed Facts

The Petitioner is employed as an Oneida public transit driver II at Oneida Public Transit, a program in the Governmental Services Division. At the pre-trial hearing on the motion for summary judgment, the Petitioner conceded to posting another person’s question on a private Facebook page called “GTC and Friends”, which is for users admitted as members by invitation. The Petitioner made the Facebook post in late November 2021 or early December 2021 but was unable, during the pre-trial hearing, to provide the actual date when the post was made. However, the actual date of the post is not a material fact necessary to determine the outcome of this matter. The Petitioner received a message from a person, who was not identified during the hearing, asking the Petitioner to post a question on the Facebook page, which the Petitioner did while off work using Petitioner’s personal equipment. During the disciplinary process, the Petitioner was provided a screenshot of the Petitioner’s two comments posted on the private Facebook page and listed below:

Gladys Dallas

13h

Well here is a question inquiring minds want to know. I was inboxed this question but have no clue what is going on so I’m going to post what was asked and let’s see if we can find out if it’s true or not. Again, don’t kill the messenger.

“Before I post BS...do you know if it’s true that every employee of the health center gets a 4000 bonus before Xmas because they need to use up funds? I heard from a pretty reliable source but don’t want to say anything if not true! You hear anything? 109 comments

Gladys Dallas Author

Danielle Doxtator that’s good. I don’t think anyone was bashing anyone with the question though. You can comment to those that are though and I will continue to bring up topics to this forum for others as I see fit. Thank you.

The Petitioner was initially terminated from employment on December 9, 2021 for making the post; but upon appeal to the Area Manager, the General Manager, acting as the Area Manager in this case, modified the termination decision to a written warning and restored the Petitioner’s employment. The General Manager replaces Tina Jorgenson, Division Director, Governmental Services Division, after she recused herself from hearing the Petitioner’s appeal because Ms. Jorgenson was responsible for providing the screenshot of Petitioner’s Facebook post to the Petitioner’s supervisor. The Petitioner was cited with the following violations:

- V.D.2.c.4.j. Failure to exercise proper judgment
- Oneida Nation Code of Ethics, Title 1, Chapter 103, section 103.4-4. Program personnel shall demonstrate the highest possible standards of personal integrity, truthfulness, honesty and fortitude in all public activities in order to inspire public confidence and trust in public institutions, including, but not limited to (a) dedication to the highest ideals of honor and integrity in all public and personal relationships (b) affirm the dignity and worth of the services rendered by the government and maintain constructive, creative, and practical attitude toward community affairs and a deep sense of social responsibility as a trusted public servant.

The Petitioner filed an appeal to overturn the written warning.

No genuine dispute as to any material fact

The Area Manager asserts that this case cannot be decided without a trial because there is a genuine dispute as to material facts about whether the Petitioner’s post constitutes malicious information, is the act of posting malicious information, and the sharing of organizational information, which in part was false, causing negative reactions and other employees to feel

bashed. The Court disagrees. The Court's function is to determine whether there is a genuine issue for trial. A genuine issue for trial must be established by the non-moving party by providing evidentiary support of the dispute. Despite the requirement under Sec. 803.30, the Area Manager did not cite to particular parts of materials in the record or show the presence of a genuine dispute that would support the Area Manager's legal conclusions. Furthermore, the Court's review of the record supports the finding that the posts were neither malicious nor the sharing of false information related to the organization. This lack of showing is critical where the dispute in this case is over the Area Manager's legal characterizations of the Facebook post.

In this case, the Petitioner argues correctly that there is no evidence in the record to support any of the Area Manager's legal characterizations. The Area Manager makes four assertions here. First, that the post was malicious information or an act of posting malicious information, the Petitioner, in response, provided the Court with the Nation's list of definitions used in employment matters providing the meaning of the term "malicious." Under Oneida law, malicious means "showing spite or intentionally wanting to cause harm to someone or hurt their feelings." The Petitioner asserts she posted the question with the intent to discover information, not to bash or hurt others, or to put out hurtful information. The Petitioner argues there is no evidence the Area Manager's decision to characterize the post as malicious or showing she wanted to cause harm or hurt the feelings of other employees. The Court agrees with the Petitioner.

Second, that the Facebook post was the sharing of organizational information with some false parts, the Petitioner, in response, argues the post was not organizational information because it was a general question and not the release of specific information. The Petitioner again asserted there is no evidence in the record supporting the Area Manager's decision to characterize the post as the sharing of organizational information. The Court agrees with the Petitioner.

Third, that the Petitioner shared false information, the Petitioner, in response, asserts that posting a question in the manner that she did in this case should not be classified as sharing information. The Petitioner acknowledges that the post could be characterized as potentially false information if it were presented as a statement; however, not if it were presented as a question that did not represent her personal opinion. The Petitioner admits she posted the question to find out if it was true or not true. The Petitioner contends there is no evidence in the record, other

than the screenshot of the Petitioner's two Facebook comments, to support the Area Manager's characterization that parts of the post were false and that the Petitioner intended to share false information. The Court agrees with the Petitioner.

Fourth, that Petitioner's Facebook post caused negative reactions or other employees to feel bashed, the Petitioner, in response, contends her intent was to discover information, not to bash or hurt others, or to put out hurtful information. The Petitioner contends there is nothing in the record showing evidence of other employees claiming they were hurt by the Facebook post and – there are no assertions by the Area Manager of his observations of employees feeling bashed or affidavits from any employee claiming the post made them feel bashed.

The Area Manager's attorney disagrees and argues the screenshot itself is evidence to show employees felt bashed. The Petitioner disagrees and argues the screenshot is a copy of only the Petitioner's comments; the screenshot does not include comments by any other person. The Court agrees with the Petitioner's argument. The post itself does not contain information about how other employees felt. Because the screenshot itself is not proof of employees feeling bashed, there is no evidence of employees feeling bashed to support the Area Manager's assertions. Therefore, there is no evidence in the record to support the Area Manager's assertion that employees felt bashed by the Facebook post.

Having established there is no evidence in the record to support any of the Area Manager's legal characterizations of the Petitioner's Facebook post, the Petitioner argues there is no genuine dispute as to any material facts and this case can be decided without a trial. However, the Area Manager disagrees. The Area Manager asserts, in his written brief, there are genuine disputes as to the material facts and he intends to provide evidence at trial to support the statements made in the area manager's decision. At the pre-trial hearing on the motion for summary judgment, the Area Manager's attorney argues that material facts get presented during trial when witnesses are sworn in and statements are made under oath. This statement contradicts section 803.30-3 which requires each party to support its assertions by citing to materials in the record or if the party needs to go outside the record. While the motion hearing was not required to be a full evidentiary hearing, some information needed to be provided through affidavit, exhibit, or other offers of proof. That did not occur here.

The Area Manager's attorney asserts that the Area Manager "deserves the opportunity" to testify at trial where he intends to testify as to the falseness of the information presented by the

Petitioner in her post and explain his decision. This argument misses the point: the truthfulness of the statement is not at issue. At issue is whether the Area Manager is able to establish there is evidentiary support to back up his legal conclusion as to the falseness of the information. The Petitioner is characterizing the statement as a question and not an assertion of fact; the plain language of the post supports this. The Area Manager seems to misunderstand the summary judgment phase: at that point in the proceeding, the Area Manager could have submitted an affidavit or other documentary evidence to support his assertions and then the Court would be able to evaluate whether the asserted material facts are in genuine dispute. The Area Manager did not do this.

In his written brief, the Area Manager argues that summary judgment should be denied and the parties allowed to present evidence at trial. However, the purpose of summary judgment is to avoid the expense and time of a trial where, as here, the facts are established and there is no meaningful dispute. “The purpose of the proof filed in support of, and in opposition to, summary judgment is solely to allow the trial court to determine whether there exists a genuine issue of material fact which precludes summary judgment. When the court identifies such an issue, summary judgment proof gives way to trial proof.” *Berna-Mork v. Jones*, [173 Wis. 2d 733, 496 N.W.2d 637](#) (Ct. App. 1992). In the Area Manager’s case, the Area Manager, as the non-moving party, is required under 8 O.C. 803.30-5 to disclose any facts to back up his characterizations of the Petitioner’s Facebook post, but failed to do so. Even by viewing the facts in the light most favorable to the party opposing the motion for summary judgment, the Court is unable to make any factual inferences in favor of the non-moving party because in certain areas the Area Manager did not file any proof in support of his allegations. Without a sufficient evidentiary showing, the disciplinary decision is unsupported and the Area Manager has failed to show the existence of a genuine dispute of material fact.

Finally, to be entitled to judgment as a matter of law and relief, the Petitioner must also meet the burden required of employees appealing an Area Manager’s decision – to show the Area Manager’s decision is clearly against the weight of the evidence and/or procedural irregularities exist that were harmful.¹ Here, the Petitioner showed there was no evidence in the

¹ The Court notes that the Area Manager found procedural irregularities with respect to the original disciplinary action of termination. Some of those irregularities, such as charging the employee with a violation of the Code of Conduct Standard Operating Procedures before the providing a copy of the operating standard to the employee and then doing so on the day of the investigation, could not be cured by reducing the discipline to a written

record to support the written warning issued by the Area Manager. At discovery, the Area Manager provided no evidence or disclosures to support his decision and did not seek discovery from the Petitioner. At the pre-trial hearing on the motion for summary judgment, the Area Manager failed to meet his burden to overcome the motion for summary judgment. Thus, the Court concludes the Area Manager's decision is clearly against the weight of the evidence because there is no sufficient evidence in the record to support the Area Manager's decision. Therefore, the Petitioner met her burden and is entitled to judgment as a matter of law.

In conclusion, the Area Manager failed to meet his burden as the non-moving party to show a genuine dispute exists as to any material fact. The legal conclusions of the Facebook posts being malicious information, an act of posting malicious information and the sharing of organizational information causing negative reactions and employees to feel bashed are unsupported by the Area Manager. Therefore, the Court grants summary judgment in favor of the Petitioner as provided in 8 O.C. 803.30.5(c) and orders the written warning overturned and expunged from the Petitioner's employment record. In addition, the Petitioner requested reimbursement of the \$25.00 filing fee. Under 8 O.C. 803.28-4.(2), filing fees are non-refundable but the Court may, in its discretion, require the non-prevailing party to pay some or all of the reasonable costs of the prevailing party if it has been clearly and convincingly shown that the case is frivolous. In this case, the Court concludes that the Area Manager presented his claims and arguments for a proper purpose as warranted by the Oneida Personnel Policies and Procedures (OPPP) grievance procedure and Oneida law. Because there is no evidence to clearly and convincingly show the case is frivolous or presented for reasons not supported by existing law, the Petitioner's request for filing fees to be reimbursed by the non-prevailing party is denied.

FINDINGS

1. The Court has subject matter, personal and territorial jurisdiction over this matter.
2. Notice was given to all those entitled to notice.
3. The Petitioner was initially terminated from employment for a social media post made while not at work and using Petitioner's personal equipment.

warning. As such, these procedural irregularities found by the Area Manager, to the extent they have not been cured, provide additional ground for overturning the written warning.

- a. On appeal to the Area Manager, the termination was modified, restoring the Petitioner's employment; however, the Area Manager determined the Petitioner's social media post still violated workplace rules and issued a written warning for the following violations:
 - i. Oneida Nation Code of Ethics, Title 1, Chapter 103, section 103.4-4 (a) and (b); and
 - ii. Oneida Nation Personnel Policies and Procedures (OPPP) manual, section V.D.2.c.4.j. Failure to exercise proper judgment.
 - b. The Petitioner's supervisor and area manager provided the Petitioner with a screenshot of Petitioner's social media post.
 - i. The screenshot was provided by Tina Jorgensen, Division Director, Governmental Services Director.
4. The screenshot shows the following content:
- Gladys Dallas
13h
- Well here is a question inquiring minds want to know. I was inboxed this question but have no clue what is going on so I'm going to post what was asked and let's see if we can find out if it's true or not. Again, don't kill the messenger.
- "Before I post BS...do you know if it's true that every employee of the health center gets a 4000 bonus before Xmas because they need to use up funds? I heard from a pretty reliable source but don't want to say anything if not true! You hear anything? 109 comments
- Gladys Dallas Author
- Danielle Doxtator that's good. I don't think anyone was bashing anyone with the question though. You can comment to those that are though and I will continue to bring up topics to this forum for others as I see fit. Thank you.
5. On January 27, 2022, the Petitioner timely filed an employee grievance with the Trial Court to appeal the Area Manager's decision to overturn the written warning.

- a. The appeal was accepted after the Court determined the Petitioner sufficiently alleged the Area Manager's decision was clearly against the weight of the evidence.
6. Both parties, the Petitioner and the Area Manager, did not submit a list of witnesses, additional information, disclosures, or other evidence on or before the close of discovery as ordered by the Court.
7. On March 7, 2022, at a pre-trial hearing:
 - a. the Petitioner made an oral motion for summary judgment;
 - b. the Area Manager's request for one week to obtain legal counsel was granted; and
 - c. the Respondent's request to extend time for discovery was denied because a copy of the Code of Ethics was the only additional information Respondent intended to submit.
8. On March 8, 2022, the Court issued a scheduling order identifying due dates for written briefs on the motion for summary judgment and for a pre-trial hearing to allow the parties to present oral arguments on the motion for summary judgment.
 - a. On March 14, 2022, Attorney Peggy Schneider timely filed a Notice of Representation to appear on behalf of the Respondent.
9. At the pre-trial hearing on March 21, 2022, the Court denied the Area Manager's motion for the Court to strike Petitioner's written brief in support of the motion for summary judgment because it was unsigned.
 - a. Petitioner inadvertently filed the unsigned brief after believing Petitioner's electronic signature was applied to the written document.
10. Petitioner admitted to the following facts:
 - a. Petitioner posted another person's question on a private Facebook page called "GTC and Friends."
 - i. The "GTC and Friends" Facebook page is a private page for users admitted as members by invitation.
 - b. Petitioner received a message from a person, who was not identified during the hearing, asking the Petitioner to post a question.
 - i. Petitioner did not have personal knowledge about the content of the question.

- ii. Petitioner was not sharing organizational information or sharing Petitioner's opinion by posting another person's question.
 - iii. Petitioner posted the question with the intent to find information, not to bash others.
 - c. Petitioner made the posting while off work using Petitioner's personal equipment.
 - d. The January 12, 2022 Area Manager's decision issued to the Petitioner provided no information showing her post was organizational information, no identification of the part that was false, no reports from employees who were "feeling bashed," no explanation to show how the content of the post was malicious information.
11. At the pre-trial hearing for oral arguments on the motion for summary judgment, the Area Manager's attorney appeared on behalf of the Area Manager, who did not appear.
12. The Area Manager's attorney presented no information to contradict the Petitioner's presentation of material facts and argued that material facts get presented at trial when witnesses are sworn in and statements made under oath.

ORDER

1. The Court grants the Petitioner's motion for summary judgment.
2. The written warning issued to the Petitioner is overturned and expunged from the Petitioner's employment record.

IT IS SO ORDERED.

By the authority vested in the Oneida Trial Court pursuant to Resolution 01-07-13-B of the General Tribal Council an order was signed on March 28, 2022.

Patricia Ninham Hoeft, Trial Court Judge