
Appellate Court

Peter Reed
Appellant

Docket No. 03-AC-013

v.

Oneida Bingo and Casino,
Respondent

Date: October 5, 2003

Final Decision

This case has come before the Oneida Appeals Commission. Judicial Officers Winnifred L. Thomas, Linda Cornelius, Kirby Metoxen, Marjorie Stevens, Stanley R. Webster, presiding.

I Background

The appellant was terminated from his employment after he kicked and damaged a door while at work in the Casino. The incident occurred on January 23, 2003 and the termination was issued on February 6, 2003. An appeal to the Area Manager was filed on February 13, 2003. The decision of the Area Manager was issued on February 17 and received by the appellant on February 20. The Personnel Commission received the grievance on February 27, 2003 and the final decision was issued on April 22, 2003.

The appellant argues that there were procedural irregularities within the hearing process that affected the final decision of the Personnel Commission. The appellant further argues that termination is not justified and that the appellant did not willfully destroy Tribal property as found by the Personnel Commission.

II Issues

Were there procedural irregularities in the hearing process that affected the final decision of the Personnel Commission?

Did the Personnel Commission erroneously find that the appellant willfully destroyed Tribal property, thereby justifying termination under the Personnel Policies and Procedures?

III Analysis

The facts of this case are well established through testimony and review of video surveillance. On January 23, 2003, the appellant kicked a secure door to the point of damaging it. At the original hearing level, the appellant argued that the respondent failed to make referrals to employee assistance programs available to the employees, and that extreme stress resulted in his lashing out at an inanimate object. As a result of this action, the appellant was terminated under Section V.D.2.III.b. of the Personnel Policies and Procedures Handbook.¹

¹ Unauthorized possession, removal, or willful destruction of Tribal or another employee's property.... (T)

Procedurally, the appellant argued that the Personnel Commission improperly admitted hearsay evidence and considered this evidence in its final decision. The nature of the argued hearsay is statements submitted by individuals to investigators about the event, none of whom are said to have actually witnessed the appellant's actions.

The appellant has misapplied the concept of hearsay in this case and the argument is without persuasive merit. Hearsay is testimony from a person, but not about what that person has seen. Rather, it is testimony from a person about what a third party has said about what the third party has seen. It is usually offered to prove what the third party has seen and is generally inadmissible because it contains a statement not made under oath and cannot be effectively cross examined. However, in this case, the witness statements were not about what other witnesses said with respect to the appellant's actions. The statements were about what the witnesses did or did not actually observe, such as hearing a loud noise in the proximity of the appellant and then finding the damaged door. That is not hearsay. It is circumstantial evidence of the appellant's actions.

Furthermore, the appellant's attempt to exclude the investigator's report fails to persuade this court. Nearly all investigative reports detail not what the investigator has found, but what witnesses have related to the investigator. If only what the investigator saw were admissible, it would be a witness statement. Investigators rarely, if ever, witness the events that they are investigating.

The Personnel Commission did not violate any hearsay rules in admitting witness statements into the record. The statements were not hearsay and were therefore admissible. The statements related what the individuals giving the statements knew, personally witnessed, or heard. In addition, even if it were a procedural error, it would likely be found to be harmless error. There is a video tape from surveillance that depicts the appellant's actions. This is direct, not circumstantial, evidence of the appellant's conduct, and the appellant has never denied that he damaged the door while angry. Even if the witness statements were hearsay and therefore inadmissible, there is sufficient direct evidence to find that the appellant damaged a Tribal door. If the admission were a procedural irregularity, it would be harmless because it would not affect the final decision of the Personnel Commission.

The appellant argues that he should not be terminated because he did not intentionally damage the door or act with premeditation and willfulness in kicking the door. This is not the standard of a willful action. The appellant kicked the door. He did so on purpose. He may not have intended to damage the door, but he acted in a manner that a reasonable person could expect might result in damage to property. No outside force lifted the appellant's leg and struck the door with it. Under the Personnel Policies and Procedures, there is only one suggested disciplinary action. That is termination. This court therefore cannot reasonably conclude that the Personnel Commission erred when it found that the appellant was appropriately terminated from his employment. It can certainly be hoped that the appellant's counseling will continue and that he may again be gainfully employed, but that does not mean that the respondent acted in violation of existing employment laws when it was determined that the appellant's actions warranted termination.

The appellant argues that one act committed under extreme stress should not justify immediate termination. In the alternative, the appellant presents speculative assertions that ask why the disciplinary process was followed if his action was so bad as to warrant termination asking questions such as “Why wasn’t he immediately terminated if it was such a bad act?”, and “Why hasn’t the door been replaced if it’s such an important door?” Such questions are rhetorical and do not address the legal issues presented in this case. The appropriate questions to ask are: “What did the employee do?”; “Does this violate the Personnel Policies and Procedures?”; and “Did the employer follow the Personnel Policies and Procedures in issuing discipline?”.

The appellant kicked a Tribal door. This damaged Tribal property. The Personnel Policies and Procedures state clearly that an employee may be terminated immediately for damage to property. The respondent issued a disciplinary action in the form of termination, and there is no evidence that the respondent failed to follow proper disciplinary procedure.

IV Decision

The Personnel Commission decision is affirmed and the appellant’s termination is upheld.