



Dealing with Tribal Traditional Law: The Navajo Supreme Court Develops a Practical Jurisprudence.

The Issue: Businesses often have concerns about the effect of unwritten tribal law on doing business in Indian country.ⁱ Among these concerns are how to identify such unwritten laws and assess their impact in dispute resolution in tribal forums, and how to bridge the cultural differences and historical legacies between Native Americans and corporations. Almost all tribes implement laws requiring preference in employment in contracting for Native Americans or Native American contractors. The Navajo Nation has an employment law, the Navajo Preference in Employment Act (“NPEA”), which requires just cause for any adverse employment action.ⁱⁱ

The Case: A recent Navajo Supreme Court case provides a good example, and therefore a roadmap, for how such concerns may be addressed in a manner beneficial to both tribal nations and their business partners. Adding to a substantial body of case law developing the NPEA, the Navajo Supreme Court recently determined that an employer, a law firm, had just cause to terminate its receptionist, Ms. Marlene Johnson.ⁱⁱⁱ Ms. Johnson is a Navajo tribal member, and worked for a firm that was wholly owned by non-members of the Nation, but which had offices on the Navajo Reservation.

In essence, Ms. Johnson was fired for being rude to persons visiting the firm, undermining office morale, making or sending demeaning or sexually offensive comments, and failing to perform her duties. She was counseled, but not disciplined, over a period of eight months and then fired. The Navajo trial court found that the law firm lacked just cause, but the Navajo Supreme Court reversed.

What is of greatest interest in this case, at least culturally, is the Navajo Supreme Court’s explanation of Diné Fundamental Law, which may be generally understood as the traditional practices of the Diné, or Navajo people. The court stated that personal accountability and responsibility are emphasized in Diné Fundamental Law, reflected “through oblique methods of speaking that emphasizes voluntariness^{iv}.” For instance, should someone say that there is not enough firewood, the listener should understand she or he is being asked to take action to address the situation. The listener is expected to understand what is needed and take appropriate steps.

In turn, according to the court, threats, reprimands, and punishments are not traditional means of direction or instruction, in part because such methods are not consistent with an important principle of Diné Fundamental Law, k’é, which may be understood as maintaining proper relationships and harmony. The implications of these principles for employment are clear, and may have made the difference for the employer law firm.

The law firm had counseled Ms. Johnson over eight months, explaining the deficiencies in her performance and the standards of conduct she was expected to meet. That course of conduct



was consistent with Diné Fundamental Law, and was accepted, though not without reservations, by the court (it appears the employer could have, instead, applied progressive discipline or warnings, which would have comported better with Navajo custom). Ms. Johnson's failure to correct her misconduct, and instead "demand[ing] endless opportunities to correct [the firm's alleged] deficiencies," was a "deliberate violation of the employer's standards."^v Thus, the firm had just cause to terminate her employment.

The Take-Away: From the economic development perspective, the *Johnson* case strengthens a series of cases in which the Navajo Supreme Court has developed a body of law based on common sense, Diné common sense, which allows employers to take appropriate measures. In the context of the NPEA, we believe the Navajo Nation's developed body of law and procedure is at least as simple and fair as most non-Navajo employment law. The Navajo Supreme Court has demonstrated the willingness to outline and explain cultural differences.^{vi} While there remain significant unpredictable elements of Dine' Fundamental Law,^{vii} the court has made significant progress in developing comprehensible standards to complement the text of the NPEA.

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ⁱ For instance, issues of sovereign immunity require careful analysis, as demonstrated by *New Gaming Systems v. National Indian Gaming Comm'n*, No. CIV-0800698-HE (W.D. Ok., Sept. 13, 2012) (finding that the Sac and Fox Business Enterprises did not waive sovereign immunity), and a non-Indian developer has recently been subject to a tribal eminent domain acquisition of its business interest, as reflected in *In the Matter of Grand Canyon Skywalk Development, LLC*, Amer. Arb. Ass'n No. 76 517 Y 0091 11 S1M, Final Award at 3, available at: http://turtletalk.files.wordpress.com/2012/08/419831135_v-1_finalaward-120816.pdf.

ⁱⁱ 15 N.N.C. § 604(B)(8).

ⁱⁱⁱ *Rosenfelt & Buffington, P.A. v. Johnson*, No. SC-CV-34-08 (Nav. Sup. Ct., Oct. 21, 2011). The opinion may be found on the Navajo Supreme Court's website, <http://www.navajocourts.org/indexsuct.htm>.

^{iv} Slip. Op. at 8.

^v Slip Op. at 5, 6 (citing previous authority).

^{vi} As always, a few cautionary notes are warranted. The law firm's employment policies, which the Navajo judiciary will enforce as a contract, did not promise progressive discipline. The policies also expressly allowed discipline, including termination, for repeated misconduct. The employer was required to provide Ms. Johnson notice of both her misconduct and the proper standards. Navajo employment law has some complexities, and one should not rely on the *Johnson* case alone.

^{vii} In a potentially problematic decision, the Navajo Supreme Court held Dine' Fundamental Law prevented enforcement of a contractual provision exempting the employer from compliance with Navajo Nation employment law. *Thinn v. Navajo Generating Station*, Nos. SC-CV-25-06 & SC-CV-26-06 (Nav. Sup. Ct., Oct. 19, 2007).