

**NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS
IN THE COURT OF CENTRAL JURISDICTION**

COURT OF APPEALS

Christine Costello,

Appellant,

vs.

Case No. 2011 APP 07

Mille Lacs Band of Ojibwe Indians,

Appellee.

DECISION OF THE COURT OF APPEALS

INTRODUCTION

The present case is an appeal from a final order of the District Court of the Non-Removable Mille Lacs Band of Ojibwe (“District Court”). Christine Costello was the Director of the Mille Lacs Band’s Workforce Center, and her employment was terminated through an Immediate Dismissal form. She filed a timely grievance of her termination to the Grievance Committee pursuant to the Mille Lacs Band of Ojibwe Personnel Policy and Procedure Manual (“Ordinance 14-10”). The Grievance Committee upheld Ms. Costello’s employment termination. In turn, Ms. Costello made a timely appeal to the District Court challenging the decision of the Grievance Committee. Before the District Court, the Mille Lacs Band did not provide any witnesses or exhibits, but simply rested its case. The Mille Lacs Band argued that because Ms. Costello was appealing the decision of the Grievance Committee, she thereby had

the burden of proof before the District Court. Ms. Costello argued instead that the Mille Lacs Band had the burden before the District Court to establish that her employment termination was justified. She argued further that because the Band failed to carry its burden of proof by not introducing any evidence before the District Court she should be restored to her employment and paid back pay for the time that she was out of work.

The District Court ultimately concluded that Ms. Costello was wrongfully terminated from her position as Workforce Center Director, because the Mille Lacs Band failed to go forward with evidence and meet its burden to prove that the termination was justified. The District Court also concluded that Ordinance 14-10 did not authorize the Court to award monetary damages or any other remedy to a person who was determined to have been wrongfully terminated. The District Court concluded that Ordinance 14-10 included a limited waiver of sovereign immunity which restricted its decision making in the employment context to issuing a declaratory judgment whether or not a person had been wrongfully terminated; and that the Band Assembly had not waived the Band's immunity from suit to permit the award of monetary compensation or any other remedies to a successful litigant.

Christine Costello and the Mille Lacs Band of Ojibwe each appealed the order of the District Court for different reasons. Ms. Costello appealed the order because the District Court concluded that it was without authority to award monetary damages or other remedies even though it concluded that she was wrongfully terminated from her employment. Ms. Costello asks this Court to award her, among other things, monetary compensation as a result of her wrongful termination, as well as reinstatement to her former position.

The Mille Lacs Band appealed the District Court's order because it disagrees with the Court's conclusion that Ms. Costello was wrongfully terminated. Additionally, the Mille Lacs

Band appeals the District Court's conclusion that the Mille Lacs Band had the burden to prove that Ms. Costello's employment termination was justified; and the District Court's conclusion that it was not restricted to the record before the Grievance Committee in its consideration as to whether Ms. Costello was wrongfully terminated. The Mille Lacs Band argues the District Court's determination that proceedings pursuant to the 14-10 Ordinance are *de novo* proceedings is erroneous and should be reversed. The Mille Lacs Band argues that the District Court should have been restricted to a review of the record that was generated by the Grievance Committee.

Ms. Costello argues that the 14-10 Ordinance is unconstitutional because it does not permit her any remedies in light of her wrongful termination. She makes a variety of arguments in support of her claim that the 14-10 Ordinance is unconstitutional. The Court will now turn to the standard of review that this Court will utilize in its review of the District Court's decision.

STANDARD OF REVIEW

The Court of Appeals accords substantial deference to the District Court's factual findings because the lower court had an opportunity to observe the testimony and to weigh the credibility of the witnesses. This Court will not disturb the District Court's findings of fact unless such findings represent a clear abuse of discretion.

This Court's review of the District Court's conclusions of law does not accord any deference to the lower court's conclusions. Instead, this Court considers *de novo* the issues of law that are to be applied to the facts of a particular case.

Cases involving tribal sovereign immunity and waivers of such immunity are issues of law, which this Court reviews *de novo*. Because this case involves issues of tribal sovereign immunity and assertions of waivers of such immunity, this Court will review *de novo* the conclusion of law of the District Court.

THE DISTRICT COURT'S ANALYSIS OF ORDINANCE 14-10

The Mille Lacs Band Personnel Policy and Procedure Manual was adopted by the Mille Lacs Band Legislative Branch on January 6, 2010. The Manual is known as "Ordinance 14-10". Ordinance 14-10 is an all encompassing set of personnel policies that is applicable to all employees of the Mille Lacs Band tribal government. The provision of Ordinance 14-10 that is at issue in the present case is as follows:

Level Three: If the employee believes that his/her grievance of a termination decision has not been adequately resolved by the Grievance Committee, he/she must file a written complaint with the Court of Central Jurisdiction within ten (10) business days of their receipt of the written decision. The decision of the Tribal Court shall be final and unappealable.

Ordinance 14-10, Personnel Policy and Procedure Manual for the Mille Lacs Band of Ojibwe, Grievance Procedure.

The District Court analyzed the above-referenced provision and concluded that it constituted a limited waiver of the Band's sovereign immunity, which permitted employees like Ms. Costello a forum to challenge an adverse decision of the Grievance Committee. The Level Three provision referenced above, however, is silent as to the specific processes to be applied by the District Court. The parties to the present dispute raised a number of issues for the District Court, including whether the Band sufficiently waived its immunity from suit to permit Ms. Costello to raise her claims; whether Ordinance 14-10 permitted employees to claim money damages, or whether they were restricted to declaratory relief; whether the employee or the Band had the burden of proof before the District Court; whether the District Court should give any deference to the decision of the Grievance Committee; and whether Ms. Costello's constitutional

right to petition for the redress of grievances was violated because she was denied the ability to receive monetary compensation and other relief. ¹

The District Court decided to utilize its discretionary authority to provide the parties in this case with procedures for employment appeals because Ordinance 14-10 is silent on the standard of review the court should apply and which party has the burden of proof. The District Court decided to give no deference to the decision of the Grievance Committee, and to instead review the present matter *de novo*. Additionally, the District Court decided to place the burden of proof on the Mille Lacs Band; instead of placing the burden of proof on Ms. Costello, who was the party appealing the adverse decision of the Grievance Committee.

The District Court concluded that it was entirely appropriate for the Band Assembly to waive its sovereign immunity from suit to permit employees a forum to challenge adverse decisions of the Grievance Committee; while at the same time not extending that waiver to permit any type of remedy to an employee who proves that the Grievance Committee's decision was wrong. The District Court concluded that Ms. Costello was wrongfully terminated from her position as Executive Director of the Mille Lacs Band Workforce Center; and that she was not entitled to reinstatement, back pay or any other remedy as a result of the wrongful termination.

¹ Ordinance 14-10 was amended effective February 22, 2012, for the purpose of enacting APPENDIX A, "Rules and Procedures Governing Appeals to the Court of Central Jurisdiction from Grievance Committee Decisions in Cases Involving Grievances of Termination Decisions". Appendix A included a detailed description of the steps an employee must take when appealing a decision of the Grievance Committee to the Court of Central Jurisdiction. Additionally, Appendix A makes clear that the District Court must give "considerable due deference to the decision of the Grievance Committee", and that the District Court's review is limited to the record that was generated by the Grievance Committee. Also, Appendix A limits the relief to which an employee is entitled if he/she successfully challenges the Grievance Committee's decision to reinstatement to the last position held, and back pay from the date of the employee's termination through the date of reinstatement; but in no event shall back pay exceed twelve (12) weeks of the employee's salary.

While Appendix A settles many of the issues involved in the present appeal, the provisions cannot be applied to the circumstances of Ms. Costello's employment grievance because Appendix A was enacted *after* her employment termination. The Court is restricted to analyzing Ms. Costello's employment grievance according to Ordinance 14-10 as it existed on July 27, 2010, the date of her employment termination.

Ms. Costello argues that the Mille Lacs Band Assembly could not have intended such an incomplete result as that reflected in the District Court's decision. She argues that she is entitled to complete relief in the form of reinstatement to her former position, back pay and other remedies; and that her arguments are supported by the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe and Mille Lacs Band Statutes. Ms. Costello also argues that the traditional cultural principle of Sha wa ni ma supports her award of the remedies she desires. The Court will now turn to Ms. Costello's constitutional arguments.

MS. COSTELLO'S RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

Ms. Costello argues that her right to petition for redress of grievances is guaranteed by the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, and that such right also guarantees her the remedies she seeks as a result of her wrongful termination. The constitutional provision upon which she relies in its entirety is as follows:

All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.

Article XIII, Revised Constitution and Bylaws of the Minnesota Chippewa Tribe.

Ms. Costello argues that her right to petition for redress of grievances is a fundamental right; and that the constitutional guarantee in this case requires that she be reinstated to her former position as Executive Director of the Mille Lacs Band's Workforce Development Center, that she be awarded back pay and all other remedies to make her whole. Ms. Costello further argues that because Ordinance 14-10 does not permit the remedies that she desires, the entire ordinance should be declared void, unconstitutional and unenforceable.

The Mille Lacs Band argues, on the other hand, that Article XIII of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe does not guarantee Ms. Costello and other similarly situated individuals that their fundamental rights will be free from infringement by the Mille Lacs Band; but that instead, Article XIII guarantees tribal members that their fundamental rights will not be infringed by the *Minnesota Chippewa Tribe*. The Mille Lacs Band further argues that if the protections of Article XIII were supreme over the guarantees included in the Mille Lacs Band's Civil Rights Code, the traditions, customs and sovereignty of the Mille Lacs Band would be eroded. As an example, the Mille Lacs Band would be prohibited from establishing a religion pursuant to Article XIII; and 1 MLBSA Section 13, which established Me da win as the Band's official religion, would be rendered unconstitutional. Also, Mille Lacs Band Statutes which provide for preferences in housing, employment and other governmental services for Mille Lacs Band members would be required to yield to any member of the Minnesota Chippewa Tribe if Article XIII rights were superior to the rights guaranteed by the Mille Lacs Band Civil Rights Code for Mille Lacs Band members.

This Court agrees with the Mille Lacs Band that Article XIII of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe guarantees that the *Minnesota Chippewa Tribe* will not infringe the fundamental rights of its members; and that Article XIII does not supercede the Mille Lacs Band Civil Right Code as it applies to actions of the Mille Lacs Band Tribal government. Our conclusion is consistent with the Indian Civil Rights Act, which prohibits tribes from making or enforcing any law abridging the right to petition for a redress of grievances. 25 U.S.C. Section 1302.

The Mille Lacs Band statutes provide protections for persons who are subject to actions by the Mille Lacs Band tribal government. We will now turn to these protections and their applicability to Ms. Costello's circumstances.

**THE RIGHT TO PETITION FOR A REDRESS OF GRIEVANCES THROUGH THE
MILLE LACS BAND CIVIL RIGHTS CODE**

The Mille Lacs Band Civil Rights Code mandates that the Band Assembly "shall make no law which prohibits the free exercise of religion or abridges the freedom of speech or of the press and *to petition for a redress of grievances*". 1 MLBSA Section 1 (a). (Emphasis added).

Ms. Costello argues that the right to petition for redress of grievances encompassed within the Mille Lacs Band Civil Rights Code necessarily requires that a remedy be available to make the redress of grievances complete; and that if a remedy is not available in a particular situation, that the Court of Central Jurisdiction has the inherent authority to fashion a remedy pursuant to 2 MLBSA Section 102. Furthermore, Ms. Costello argues that there are no limitations on the Court's exercise of its inherent authority to fashion a remedy for a tribal member pursuant to the following Mille Lacs Band Statute:

"... The Court of Central Jurisdiction shall have all powers necessary for carrying into execution its judgments and determinations in order to promote the general welfare, preserve and maintain justice, and to protect the rights of all persons under the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians."

2 MLBSA Section 101.

The Mille Lacs Band disagrees with Ms. Costello's sweeping arguments, and argues instead that the right to petition for redress of grievances does not guarantee a person the remedy that she desires; but instead protects a person's right to bring a complaint or claim to her government. The Band argues that the right to petition for redress of grievances means that the

government may not prevent a person from complaining, either by prohibiting it or by retaliating afterward; but it does not run afoul of the right to petition for refusing to act upon a petition, favorably or at all.

If this Court were to adopt the reasoning promoted by Ms. Costello we would necessarily have to disregard a myriad of other fundamental Mille Lacs Band Statutes. For example, sovereign immunity from suit is a fundamental attribute of the Mille Lacs Band's sovereignty which is specifically retained in Band Statutes:

“... Nothing herein shall be construed as a waiver of the sovereign immunity of the Band unless specifically authorized in accordance with Band law or by specific Band Statute.”

5 MLBSA Section 111 (d) (1).

This Court scrupulously guards the Mille Lacs Band's sovereign immunity from suit, and recognizes waivers of sovereign immunity only where such waivers are clearly and unequivocally expressed. Ms. Costello has not pointed us to any clear and unequivocal waiver of the Band's immunity from suit that would permit us to return her to her former position and award her the monetary compensation that she requests, nor is this Court aware of any specific waivers of sovereign immunity that would permit Ms. Costello's present claims. In support of her claims, Ms. Costello instead points us to general statements of the powers of the Court of Central Jurisdiction. Such general statements do not overcome the fundamental principle that waivers of sovereign immunity must be clearly and unequivocally expressed.

Ms. Costello also relies upon Rule 71 of the Mille Lacs Band Rules of Court to support her claim that the Court of Appeals is authorized to order the relief that she requests. The Rule provides as follows:

The Court of Appeals shall promulgate additional rules and procedures to provide any remedy guaranteed by the Constitution of the Minnesota

Chippewa Tribe in the event the Band Assembly has failed to prescribe procedures for such remedy and such rules and procedures shall remain in effect until the Band Assembly prescribes such procedures.

Appellate Court Rule 71, Mille Lacs Band Court of Central Jurisdiction Rules of Court.

We do not interpret this rule as authority to fashion substantive remedies as Ms. Costello suggests. Instead, we view Rule 71 as authority to promulgate procedural rules where a substantive right clearly exists. Because the Tribal Court provisions of Ordinance 14-10 do not clearly and unequivocally provide waivers of the Band's sovereign immunity from suit, and because Ordinance 14-10 does not specifically authorize the Court of Central Jurisdiction to award money damages and to reinstate terminated employees to their former employment, we decline to order such substantive remedies.

SHA WA NI MA

Ms. Costello requests that this Court invoke the traditional theory of law of the Mille Lacs Band, codified at 24 MLBSA Section 2003, to order her reinstatement to her former position and award her monetary compensation for her wrongful termination. The traditional theory of Sha wa ni ma provides that "... the laws of the Band shall be construed to balance the rights of the individual with the need to continue to co-exist in peace and harmony with one another". The concept of Sha wa ni ma emphasizes as the higher goal the balance of the larger tribal community; and the provision of individual remedies is secondary. The concept of Sha wa ni ma is not intended to authorize substantive relief for and an individual where such relief does not otherwise exist, particularly where the relief is demanded from a tribal government and the tribal government has not clearly and unequivocally permitted such relief. Sha wa ni ma cannot be a substitute for a substantive provision of law that does not exist; but is instead intended to supplement procedures where such procedures serve to balance the larger community.

Accordingly, this Court will not implement the principles of Sha wa ni ma to create the substantive law that Ms. Costello requests.

CONCLUSION

The rights of tribal members encompassed in Article XIII of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe protect tribal members from infringement of their fundamental rights by the Minnesota Chippewa Tribe. The Mille Lacs Band Civil Rights Code protects individuals from infringement of their fundamental rights by the Mille Lacs Band. The right to petition for redress of grievances is a fundamental right. Ms. Costello's fundamental right to petition for redress of grievances was not infringed by the Mille Lacs Band because she was accorded the right to challenge the adverse employment-related decisions that were brought against her.

The right to redress grievances does not guarantee Ms. Costello the remedy that she seeks. The remedies that Ms. Costello seeks - - reinstatement to her former position and monetary compensation -- are against the Mille Lacs Band of Ojibwe, a federally recognized Indian tribe that enjoys sovereign immunity from suit. The sovereign immunity from suit of the Mille Lacs Band remains intact unless clearly and unequivocally waived. Through Ordinance 14-10 the Mille Lacs Band has clearly and equivocally waived its immunity to permit the Court of Central Jurisdiction to review decisions of the Grievance Committee; but the Band has not clearly and unequivocally waived its immunity from suit to permit the award of monetary damages or to order reinstatement of employment. The absence of a Mille Lacs Band Statute that would permit the award of monetary damages, or the ability to order a terminated employee to her former position after she was determined to have been wrongfully terminated, does not render Ordinance 14-10 unconstitutional.

Finally, the traditional theory of Mille Lacs Band law, Sha wa ni ma; as well as Mille Lacs Band Statutes that authorize the Court of Central Jurisdiction to utilize inherent judicial powers to fill gaps in Band law, do not permit the Court to create substantive laws. Instead, these principles only permit the Court to promulgate procedural rules to implement substantive laws that clearly exist in Band law. Where the traditional theory of Sha wa ni ma, and the inherent powers of the Court of Central Jurisdiction come into conflict with the sovereign immunity from suit of the Mille Lacs Band, the Band's sovereign immunity from suit prevails. In this case, the Band has not specifically permitted suits against it by former employees seeking monetary compensation and the ability to return to work. The Court cannot overcome the Mille Lacs Band's lack of a waiver of sovereign immunity by fashioning a remedy for Ms. Costello through resort to principles of Sha wa ni ma, or the Court's own inherent powers.

The Band Assembly has amended Ordinance 14-10 to fill the gaps that were exposed during the litigation of the present case. Accordingly, the shortcomings of the Ordinance are not likely to be repeated.

Ms. Costello's request for reinstatement to the same or similar position; back pay; reinstatement of employment benefits; reimbursement for any out of pocket insurance expenses that otherwise would have been paid through her employment; and expungement from her personnel record of any negative records regarding this matter, are accordingly denied.

BY THE COURT OF APPEALS

Dated: 5-31-12

Clarence Boyd
Justice Clarence Boyd

Dated: _____

Brenda Moose
Justice Brenda Moose

Dated: 5/27/12

Joseph Plumer
Special Magistrate Joseph Plumer