IN THE HOOPA VALLEY TRIBAL COURT OF APPEALS
HOOPA VALLEY TRIBE
HOOPA, CALIFORNIA

Gary Risling, Plaintiff/Appellee, v. **Hoopa Valley Tribe, Byron Nelson, Jr., & Does A-E,** Defendants/Appellants.	**NO. A-14-001 {C-13-012}** **ORDER DISMISSING APPEAL**

Before: Lisa E. Brodoff, Chief Judge; Matthew L.M. Fletcher, Judge; Eric Nielsen, Judge.

Appearances: Thomas P. Schlosser and Rebecca JCH Jackson, Morisset, Schlosser, Jozwiak & Sommerville, for Appellants; J. Bryce Kenny, for Appellee.

Fletcher, J.:

This is an interlocutory appeal by the Appellants, the Hoopa Valley Tribe, Byron Nelson, Jr., and Does A-E (collectively Tribe), who are the defendants to a complaint alleging wrongful termination, hostile work environment, and harassment brought by Gary Risling (Risling) under Title 30 of the Hoopa Valley Tribal Code (HVTC). The Tribe sought to dismiss Risling's complaint on sovereign immunity grounds; namely, that Risling's complaint failed to comply with the Tribe's relevant limited waiver of sovereign immunity established in 1 HVTC § 1.1.04(f). The trial court denied the motion on January 25, 2014.

As this Court has previously held, interlocutory appeals are generally disfavored. *See Hoopa Valley Tribe v. LeMieux*, 6 NICS App. 43, 43-44 (Hoopa Valley Tribal Ct. App. 2001) ("[I]t does not serve the interests of judicial economy to allow piecemeal appeals."). However, we have reviewed an interlocutory appeal from a denial of a motion to dismiss based on tribal sovereign immunity. *See Hostler v. Hoopa Valley Tribe*, 10 NICS App. 14 (Hoopa Valley Tribal Ct. App. 2011) (pending publication, viewable at www.nics.ws) (reviewing an interlocutory appeal by the Tribe where the trial court denied a motion to dismiss on immunity grounds). *See also Miller v. Wright*, 705 F.3d 919 (9th Cir, 2013) (denial of a motion to dismiss on sovereign immunity grounds is an appealable order).

In *Pendergrass v. Sauk-Suiattle Tribe*, 11 NICS App. 52, 54 (Sauk-Suiattle Tribal Ct. App. 2013), viewable pending publication at http://www.nics.ws, the Sauk-Suiattle Tribal Court of Appeals reasoned

> One of the purposes of a motion to dismiss because a tribe has sovereign immunity is to conserve tribal resources (including the time and expense of litigating the merits of the claims in the Trial Court). If the suit is barred by sovereign immunity, tribal assets are conserved: the Tribe does not have to expend its money, staff time or energy that would be needed if it had to wait until the conclusion of a trial to appeal the denial of sovereign immunity. The assets and energy of the plaintiffs are likewise conserved by allowing an appeal of the denial of a motion to dismiss on sovereign immunity grounds.

That reasoning is sound. Moreover, HVTC 2.6.01 provides that "any party may appeal a final judgment of the trial court or trial court judgment on a dispositive motion." We hold that denial of a motion to dismiss, where the motion pleads sovereign immunity, is a final judgment as to that defense and will therefore ordinarily be appealable under HVTC 2.6.01, as occurred in *Hostler, supra*. However, this case provides an exception to this rule.

The Tribe argues this case is similar to *Hostler*, but that case is easily distinguishable. *Hostler* also involved a Title 30 wrongful termination claim, but the parties both agreed that the terminated employee had not filed a grievance in a timely manner as required by 30 HVTC § 9.2, which governs employee grievances. *Hostler, supra*, at 15. This case involves the termination of a manager, which is governed by § 9.1, a similar procedure in that both provisions require the employee provide their immediate supervisor with "a written summary of reasons" they object to the discipline. A program manager's immediate supervisor may be the Tribal Chairperson." 30 HVTC § 9.2. In *Hostler*, where both parties agreed the employee grievance was untimely, the trial court's denial of the Tribe's motion to dismiss was not dependent upon additional fact finding by the trial court.

Here, the Tribe alleges that Risling filed a § 9.1 grievance with the improper tribal official and argues that Risling should have filed the grievance with his supervisor, Darrin Jarnaghan, head of the Forestry Department. Risling, who served his grievance on the Vice-Chairman in lieu of the Chairman (the Vice Chair apparently serving as acting Chair at the time), contends that there is a factual dispute as to which tribal official was the proper recipient of the grievance. The trial court agreed with Risling:

> The court cannot determine from the paperwork alone to what degree the former Chairman and/or Mr. Jarnaghan acted as Mr. Risling's supervisor. This is a question of fact, which may require witness testimony and likely requires additional discovery between the parties. Because there is a question of fact as to whether Mr. Jarnaghan was in fact Mr. Risling's program manager, the Tribe[] has failed at this time to prove that Mr. Risling did not comply with section 9.1 of Title 30 or section 2.3.04(d) of Title 2.

Order Denying Tribe's Motion to Dismiss at 2-3, No. C-13-012 (Hoopa Valley Tribal Court, Jan. 15, 2014).

The Tribe asks us to accept its interlocutory appeal and reverse the trial court's conclusion that it must make a preliminary factual finding whether Mr. Risling's grievance was properly submitted to his immediate supervisor. This we will not do.

If Mr. Risling's § 9.1 grievance was submitted to the proper immediate supervisor, his complaint is not barred by the Tribe's sovereign immunity if filed within thirty calendar days from the date of termination. The date of termination is the date the immediate supervisor responds to the grievance or if there is no response, ten calendar days after the grievance is filed. *Macias v. Hoopa Valley Tribe*, 11 NICS App. 1, (Hoopa Valley Tribal Ct. App. 2013) (pending publication, viewable at www.nics.ws) (citations omitted). The threshold question in this case is the identity of Mr. Risling's immediate supervisor (Mr. Jarnaghan, the Tribal Chairperson, or Vice-Chairman in lieu of the Chairman) for purposes of submitting a § 9.1 grievance. Based on the record before it when the Tribe made its motion, the trial court properly concluded the Tribe failed "at this time" to "prove Mr. Risling did not comply" with § 9.1. We will not disturb the trial court's ruling that the Tribe has yet to establish the factual predicate necessary to support the legal conclusion that the suit is barred under the doctrine of sovereign immunity.

The Tribe is not foreclosed from filing a motion to dismiss on sovereign immunity grounds if it provides a sufficient factual basis to support the motion. To do that, it must prove that Mr. Risling's grievance was not properly submitted to his immediate supervisor.

We dismiss the appeal as premature, and remand to the trial court for proceedings consistent with this order.

It is so ordered, this 15th day of May, 2014, for the Court:

Lisa E. Brodoff, Chief Judge
Eric Nielsen, Judge
Matthew L.M. Fletcher, Judge

I CERTIFY THAT ON MAY 16 2014
I PROPERLY MAILED A COPY OF THIS DOCUMENT ADDRESSED TO EACH OF THE FOLLOWING NAMED PERSONS, AT THE ADDRESSES LISTED BELOW.

SUPAHA McCOVEY 05-16-14

CLERK OF COURT DATE

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