

ROSEBUD SIOUX TRIBAL COURT)
ROSEBUD SIOUX RESERVATION) SS
ROSEBUD, SOUTH DAKOTA)
IN CRIMINAL COURT

SHARI BURNETTE, PLAINTIFF/Appellant,
DOCKET # CIV07-489 CA08-01

VS.
CHANCE WOODEN KNIFE, DEFENDANT/Appellee,
NOTICE OF ENTRY ORDER

TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 16th day of July, 2008, the Honorable Chief Justice Frank Pommersheim presiding, The Court entered an MEMORANDUM OPINION AND ORDER. A certified copy of said ORDER is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 17th day of July, 2008.

[Signature]
Clerk of Courts

CERTIFICATE OF SERVICE

I, Dentia Marshall, Chief Clerk of Courts of Rosebud Sioux Tribal Court, hereby certify that I served a true and correct copy of the Notice of Entry of Memorandum Decision Order and copy of said Memorandum Decision and Order upon the Defendant and Plaintiff as follows by placing the same in the U.S. Mail, postage prepaid, addressed as follows:

Matthew L. Rappold-PO Box 727, Mission, SD 57555
Eric Antoine-RST Attorney, PO Box 432, Rosebud, SD 57570

Dated this 17th day of July, 2008.

[Signature]
Clerk of Courts

SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

CA 07-489

MEMORANDUM OPINION
AND ORDER

SHARI BURNETTE,
Plaintiff/Appellant,

vs.

CHANCE WOODEN KNIFE,
Defendant/Appellee.

Per curiam (Chief Justice Frank Pommerstein and Associate Justices Leroy Greaves and Patrick Lee)

I. Introduction

Ms. Shari Burnette, plaintiff/appellant, was employed by the Rosebud Sioux Tribe's

Natural Resources Department during the period April 30, 2006 through January 12, 2007.

Plaintiff/Appellant was terminated on January 12, 2007 by Mr. Chance Wooden Knife,

Defendant/Appellee, who was her immediate supervisor, as well as the Director of the Rosebud Sioux Tribe's Natural Resources Department. The reason for Ms. Burnette's termination was

her alleged violation of the Tribe's substance abuse policy.

In accordance with the Tribe's employee grievance procedure, which is set out in

Ordinance 86-06, the plaintiff initiated the grievance process. The plaintiff was unrepresented

by counsel at this time and while the record is very sparse as to what transpired, it appears that

plaintiff's grievance was denied without any actual hearing or face to face meeting between

plaintiff and her supervisor or the Grievance Committee.¹

The plaintiff subsequently obtained legal counsel and filed a written request to the Tribal

Grievance Committee to reconsider the denial of the grievance (without any hearing). This

request for reconsideration was denied. The reasons for this denial, also, do not appear in the

¹ The reason(s) for the denial to provide any grievance hearing do not currently appear anywhere in the record.

record. Having apparently exhausted her administrative remedies, plaintiff filed a lawsuit in Tribal Court, which named the sole defendant as "Chance Wooden Knife in his official capacity." The gravamen of the complaint was that the plaintiff was wrongly terminated and that she was entitled to "reinstatement." The complaint did not seek any damages or financial compensation.

The defendant filed an answer that was captioned "Motion to dismiss or in the alternative Answer." The grounds asserted for dismissal included: Tribal sovereign immunity, lack of subject matter jurisdiction, failure to join an indispensable party, namely the Rosebud Sioux Tribe, and the failure to state a claim upon which relief may be granted. Defendant's answer/motion to dismiss was dated November 20, 2007.

The plaintiff subsequently filed a motion, pursuant to Rosebud Sioux Tribal Rule of Civil Procedure 19(a), to join the Rosebud Sioux Tribe as an indispensable party.² This motion was dated November 30, 2007. However, unbeknownst to the plaintiff, the Tribal Court entered a brief order dated November 27, 2007, which dismissed the action because the defendant "is protected by the doctrine of sovereign immunity from suit." No hearing was ever held on the motion to dismiss. No testimony or legal argument was presented.

The plaintiff subsequently filed a timely notice of appeal and oral argument was heard by this Court on May 21, 2008.

II. Issue

This appeal presents a single issue (albeit in two parts), namely whether the appellant was denied due process in the administrative handling of her grievance and whether a motion to dismiss filed as part of a defendant's answer may, consistent with due process and the Rosebud

² Indispensable parties are normally sought to be joined a *defendant*, while a plaintiff may simply seek to amend its complaint in order to add additional defendants.

Sioux Tribe Rules of Civil Procedure, be granted without notice or any hearing to present legal

argument and/or offer evidence.

III. Discussion

It is significant to note at the outset that Ms. Burnette, plaintiff/appellant, has not yet had the opportunity, in any forum, to present her substantive argument(s) as to why she believes that she was wrongfully terminated. This fact appears to confound a core ingredient of due process, which is the opportunity to be heard. The basic issue of due process³ presents itself in two settings, namely the grievance proceeding and the handling by the trial court of the answer/motion to dismiss. Each will be discussed in turn.

A. Administrative Due Process

While the Tribe is under no federal or tribal mandate to provide for an employee grievance procedure, it is to be applauded for doing so. Yet having adopted such a process, it must hue to its guarantees, especially that of due process. The Tribe does not contend otherwise. Since the record is absolutely devoid of any explanation as to why no grievance hearing was ever held, the case must be reviewed and remanded to the trial court to determine – after the presentation of evidence and legal argument – whether the plaintiff/appellant was properly denied a hearing.

Potential grounds for such a ruling, include, for example, the failure of plaintiff/appellant to comply with procedural requirements for the timely filing of a request for a grievance hearing. If such grounds exist as a matter of fact and law, the administrative component of the case may

³ Due process is a basic guarantee within both the Rosebud Sioux Tribe Constitution and the Indian Civil Rights Act. Art. X, Sec. 3 of the Tribal Constitution provides: "No person shall be ... deprived of life, liberty, or property without due process of law," while 25 U.S.C. § 1302(8) provides: "No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

be dismissed for failure to comply with the Tribe's grievance process as set out in Ordinance 86-06. If such grounds do not exist, the case should be remanded to the Tribal Grievance

Committee for the appropriate administrative hearing. Should the administrative hearing

component be dismissed, the trial court shall proceed to the issue dismissed in Part III(B) of this

opinion.

B. Answer/Motion to Dismiss and Due Process

In the context of the complaint filed in this matter and the corresponding answer/motion

to dismiss, the issue of due process will again come to the fore. The following analysis is

provided to the trial court as *procedural* guidance for how to deal with such a situation.

Primary guidance is found in the text of Rule 12 of the Rosebud Sioux Rules of Civil

Procedure. While Rule 12(b) does permit that the "following defenses may at the option of the

pleader be made prior to the filing of a responsive pleading by motion, namely lack of

jurisdiction over the subject matter... failure to state a claim upon which ruling may be granted,

failure to join a party under Rule 19," there can be no ruling on the answer/motion, according to

Rule 12(b) and (c), unless there is a "hearing" and a "reasonable opportunity to present all

material pertinent to such motion." This Rule accords with basic notions of fairness. If the

defendant moves to dismiss a complaint on jurisdictional grounds or the failure to state a claim

upon which ruling may be granted, surely the plaintiff must have the opportunity to respond

before the Court rules on the motion.

The Court further notes that, based on the briefs submitted to this Court, the question of

Tribal sovereign immunity in this matter is clearly in dispute. While there is basic (correct)

agreement between the parties that the Tribe possesses sovereign immunity, the central issue is

whether it has been waived. The briefs suggest at least two possible lines of argument, namely

the Tribal Constitution and Ordinance 86-06 (and its amendments). There may be additional contentions to be made on both sides of this issue. The Court, of course, takes no position, at this time, on merits of the arguments put forward in the respective briefs. It mentions them only to provide necessary guidance to the trial court should it be faced with this issue on remand.⁴

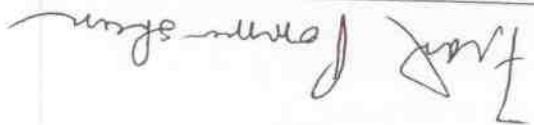
IV. Conclusion

For all the above-stated reasons, the judgment of the trial court is reversed and remanded to the trial court with directions to proceed in accordance with the discussion set forth above.

IT IS SO ORDERED.

Dated this 15th day of July, 2008.

FOR THE COURT:



Frank Pommersheim
Chief Justice

⁴ To be clear, other grounds for dismissal were raised in the Defendant's answer/motion to dismiss, but they were not addressed in the briefs or in oral arguments before this Court. Therefore this Court cannot provide any guidance or commentary, but this does *not* mean in any way that this Court considers such arguments to be waived.