FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT
MAR 21 2005
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

KENNETH LEE TWIN,
Appellant,

vs

DECISION

TONI MCDONALD, Ho-Chunk Nation,
Ho-Chunk Nation Department of Personnel,
Appellees.

SU04-10

This matter came before the full Court on January 29, 2005 for oral argument. Heard before Associate Justice Mark Butterfield, Associate Justice Jo Deen Lowe and Chief Justice Mary Jo B. Hunter, presiding.

CASE SUMMARY

Appellant Kenneth Lee Twin appeals from the trial court's November 12, 2004 Order (Granting Defendants' Motion for Summary Judgment). This appeal was based on the Appellant's objection to the Ho-Chunk Nation's Personnel Department's determination that the Appellant had not returned to work from a family medical leave as required and that the Appellant had voluntarily resigned.

STATEMENT OF THE CASE

The Appellant, Kenneth Lee Twin, was employed by the Ho-Chunk Nation as the Executive Director of the MIS Department. On December 10, 2003, Appellant Twin filed an application for Family Medical Leave. On December 16, 2003, the application was approved.

On February 12, 2004, Appellant Twin moved his residence. Appellant advised the Nation of his new address circa February 12, 2004.

Appellant Twin received a payroll check from the Ho-Chunk Nation on March 2, 2004 at his new address.

On February 27, 2004, the Appellant applied for a short-term disability benefits leave through the Four Winds Insurance Agency.

On March 2, 2004, the Ho-Chunk Nation Department of Personnel mailed a letter to the Appellant that advised him the if he (Twin) did not report to work on March 4, 2004, the Ho-Chunk Nation would consider the failure to report to work as a voluntary resignation.

The record does not indicate whether the letter was sent by certified mail, return receipt requested or by regular U.S. mail. The record indicates that the letter was sent to the Appellant's former address. Appellant Twin argues that he did not receive the letter until March 6, 2004 which was two days after the deadline to return to work.

On March 8, 2004, another letter was sent to the Appellant. That letter was also addressed to Appellant Twin's previous address. The March 8 letter was from the Executive Director of Personnel and it advised him that the Nation had determined that he had voluntarily resigned based on his failure to return to work.

On that same day, Mr. Twin sent a letter to Mr. Douglas Greengrass, Executive Director of Administration for the Ho-Chunk Nation, and requested approval for the short term disability application. The record does not indicate whether Mr. Greengrass was the supervisor of Appellant Twin or why Mr. Greengrass was contacted.

Mr. Twin engaged an attorney who contacted the Ho-Chunk Nation's attorney in the Department of Justice on two occasions. Appellant did not receive a response. On April 6, 2004, Mr. Twin filed a complaint in the Ho-Chunk Nation Trial Court. On

November 12, 2004, the Trial Court granted the Nation's Motion for Summary Judgment. The Trial Court held that the Appellant had failed to exhaust his administrative remedies based upon the lower court's interpretation of *Loa L. Porter v. Chloris Lowe, Jr.,* SU96-05 (HCN S. Ct., Jan. 10, 1997). Appellant appealed that Order.

DECISION

The issue before this Court is whether the trial court properly applied the standards for granting or denying a summary judgment under Rule 55 of the Ho-chunk Nation Rules of Civil Procedure. That rule states:

> "Any time after the date an *Answer* is due or filed, a party may file a *Motion for Summary Judgement* (sic) on any or all of the issues presented in the action. The Court will render summary judgement (sic) in favor of the moving party if there is no genuine issue as to material fact and the moving party is entitled to judgement (sic) as a matter of law."

The Appellee Ho-Chunk Nation filed a *Motion for Summary Judgment* below. The Trial Court granted the motion in the *Order (Granting Defendants' Motion for Summary Judgment)* on November 12, 2004. This Court has the authority to review the matter based on the question of law that is before this Court on whether the lower court correctly analyzed the case when it granted the motion.

In reviewing the Trial Court's order, no analysis is made as to whether there was a genuine issue as to material fact. Nor, did the Court provide a thorough explanation as to why the motion was granted as a summary judgment matter.

Rather, the Trial Court opined that the Supreme Court had previously decided that a complaint cannot be addressed on employment appeals if the matter has not proceeded

through the administrative process.[1] That analysis would be correct IF the Appellee had filed a *Motion to Dismiss* below. However, the motion was not about dismissal, rather, it sought a summary judgment.

In reviewing the order, the summary judgment was granted in error. The summary judgment motion should have been denied. The case should have proceeded on the merits or until a motion for dismissal of the action on the basis that Appellant lacked standing to proceed for failure to fulfill the administrative process was filed. Neither of these occurred. That failure on the part of the trial court is an error. The Order is reversed and the matter is remanded for further proceeding. The Trial Court may wish to allow the parties to proceed with the pre-trial motion phase to allow for a full fact finding hearing on the case prior to proceeding to trial.

EGI HESKEKJET. Dated this 21st day of March 2005.

Hon. Mark D. Butterfield, Associate Justice

Hon. Jo Dean B.Lowe, Associate Justice

Mary Jo B. Hunter

Hon. Mary Jo B. Hunter, Chief Justice
HCN Supreme Court

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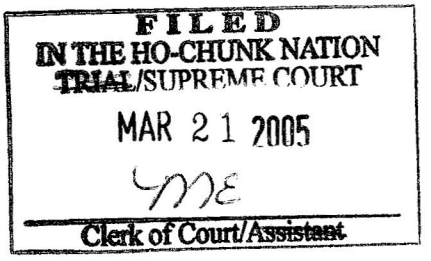
[1] The Court reviewed the case of *Loa L. Porter v. Chloris Lowe,* SU96-05 (HCN Sup. Ct. Jan. 10, 1997) and questions whether that case is applicable to the facts in this matter. However, since the record did not address such facts as who was the supervisor of Mr. Twin and whether the letters of Mr. Twin constituted an effort to follow the administrative process, this Court is not inclined to distinguish the *Loa Porter* case at this juncture. Further factual findings from the Trial Court are needed.

CERTIFICATE OF SERVICE

I, Mary K. Endthoff, Clerk of the Ho-Chunk Nation Supreme Court, do hereby certify that on the date set forth below, I served a true and correct copy of the Decision in Case No. SU04-10, upon all persons listed below:

By United States Postal Service:



Attorney Mark Goodman
Osborne & Goodman, S.C.
132 North Water Street
P.O. Box 420
Sparta, WI 54656

Attorney Michael Murphy
P.O. Box 667
Black River Falls, WI 54615

Kenneth Lee Twin
N7015 Iron Road
Black River Falls, WI. 54615

Hon. Mary Jo B. Hunter
HCN Supreme Court Chief Justice
4 Linder Court
St. Paul, MN 55106

Hon. Jo Deen B. Lowe
HCN Supreme Court Associate Justice
N5710 Hwy 12-16
New Lisbon, WI 53950

Hon. Mark Butterfield
HCN Supreme Court Associate Justice
1021 Ellen Drive
Tomah, WI 54660

Dated: March 21, 2005

Mary K. Endthoff

Mary K. Endthoff, Clerk of Court
Ho-Chunk Nation Supreme Court