No. SC-CV-16-06

NAVAJO NATION SUPREME COURT

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Kevin Yazzie,
Petitioner-Appellant,

v.

Navajo Sanitation,
Respondent-Appellee.

**OPINION**

Before YAZZIE, Chief Justice, and FERGUSON and GRANT, Associate Justices.

An appeal from a decision of the Navajo Nation Labor Commission, Cause No. NNLC 2005-040, Casey Watchman, Chairperson, presiding.

David Jordan, Gallup, New Mexico, for Appellant; and Lawrence Ruzow, Window Rock, Navajo Nation, for Appellee.

YAZZIE and GRANT filed the opinion of the Court. FERGUSON dissented from part V of the opinion.

This case concerns whether the Navajo Nation Preference in Employment Act (NPEA) limits the types of remedies the Navajo Nation Labor Commission (Commission) can award an employee and whether the Commission has jurisdiction to hear a claim against an employer by an employee alleging sexual harassment by a fellow employee. The Court affirms the Commission's decision on the ground that it lacks jurisdiction over a sexual harassment claim.

I

The relevant facts are as follows. Appellant Kevin Yazzie (Yazzie) filed a complaint with the Commission against his employer, Appellee Navajo Sanitation (Sanitation), alleging that he was sexually harassed by his supervisor. He claimed several

violations of the NPEA, 15 N.N.C. §§ 601 *et seq.*, including "job harassment, sexual harassment, retaliation, and intimidation," and violations of "due process," "civil rights," and Sanitation's employment policies. Complaint, Index Listing 1, at 2. He sought damages for "emotional harm, anxiety and mental suffering," and requested that the Commission remove his supervisor from his position. *Id.* at 2-3.

At the request of Sanitation, the Commission dismissed Yazzie's complaint. The Commission concluded that it could not grant the remedies Yazzie sought, and that Yazzie should file his claims in a Navajo district court. The Commission interpreted Section 612(A)(1) of the NPEA, which states that upon finding a violation of the Act the Commission shall:

> issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of an intentional violation, imposition of civil fines; provided that liability for back-pay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which the basis for the complaint.

The Commission stated that this section restricted the type of remedies it could grant, and precluded it from awarding damages for emotional harm, anxiety and mental suffering and from removing his supervisor from his job. The Commission also ruled that it could not hear a claim of sexual harassment not tied to a disciplinary action against the employee. This appeal followed. The Court heard oral argument on November 3, 2006.

**II**

The issues in this case are 1) whether the NPEA restricts the types of remedies the Commission may award to an employee, and 2) whether the Commission has jurisdiction under the NPEA to hear a claim against an employer for sexual harassment.

## III

This Court reviews decisions of the Commission for an abuse of discretion. *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05, slip op. at 3 (Nav. Sup. Ct. February 16, 2007). One type of abuse is an error of law. *Id.* The Court reviews the Commission's interpretations of the NPEA *de novo*, with no deference given to the Commission's interpretation. *Id.*

## IV

The first issue turns on the interpretation of one section of the NPEA, Section 612(A)(1). Yazzie argues the Commission wrongly ruled that the section restricts its power to award remedies. Yazzie focuses on the phrase "without limitation," arguing that the Council created the list of specific remedies in the section to represent examples of remedies, but not to exclude other remedies not listed. Sanitation argues that the Commission's interpretation was correct, and further argues that Yazzie joined non-NPEA claims with NPEA claims in his complaint, requiring the Commission to dismiss his complaint under this Court's previous opinion in *Charles v. Furniture Warehouse*, 7 Nav. R. 92 (Nav. Sup. Ct. 1994).

The Commission misinterpreted Section 612(A)(1). The key phrase is "without limitation." Through this language, the Council intended to make the list of remedies in the section examples of possible remedies, not an exhaustive list of all remedies the Commission is empowered to award to an employee. *Cf. Navajo Nation Dept. of Child Support Enforcement v. Navajo Nation Labor Commission*, No. SC-CV-22-06, slip op. at 6 (Nav. Sup. Ct. August 24, 2006) (holding list of Privacy Act records with language stating that list did not exclude other records did not limit types of records deemed

"public"). Interpreting the phrase otherwise would render it meaningless. The Council did restrict a specific remedy in Section 612(A)(1), by limiting the duration of back-pay to two years prior to the filing of a charge. There is no other limitation in the section, and indeed the section states that the Commission may award remedies "without limitation."

The interpretation of Section 612(A)(1) however is not limited to the statutory language. This Court previously described the Commission's authority to grant remedies as discretionary, and equated it with the Navajo principle of *nályéél*. *See Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 9 (Nav. Sup. Ct. August 26, 2004). The Court emphasized that the NPEA empowered the Commission to mold remedies for NPEA violations to make an employee whole based on the unique circumstances of the case. *Id.* Consistent with these principles, the Court holds that the Commission is not restricted to the specific listed remedies in Section 612(A)(1), but is empowered to grant remedies reasonably tied to making an employee whole. What is reasonably tied depends on the circumstances of the case, but certain remedies are not reasonably tied to making a person whole in any circumstance, such as compelling an employer to fire a worker based on a complaint by another employee, as that remedy does not compensate the employee claimant, it simply punishes the other employee.

To address the two issues noted above, it is necessary to first emphasize that there is a difference between a "claim" and a "remedy" under the NPEA. Even if the Commission is barred from awarding a particular remedy, it cannot dismiss the case if the claims fall within the scope of the NPEA. A case can only be dismissed if one or more of the claims are outside the authority of the Commission, *see infra*, slip op. at 5-6; if the employee states claims that are all within the scope of the NPEA, the Commission has the

responsibility to hear the case and decide what remedies are appropriate. Under these principles, the Commission erred when it dismissed Yazzie's claims based on its conclusion that Section 612(A)(1) did not authorize the remedies Yazzie requested.

V

Though the Commission wrongly ruled the NPEA limited its remedies, the Court upholds the Commission's other decision that it cannot hear a claim for sexual harassment. The Commission has jurisdiction only to hear claims arising under the NPEA, and cannot hear other claims an employee might bring against an employer. *See Charles*, 7 Nav. R. at 95. Therefore, if any of the claims Yazzie brings against Sanitation are not within the scope of the NPEA, the Commission was required to dismiss all of them. *Id.* As noted above, Yazzie's complaint describes his claims as concerning "job harassment, sexual harassment, retaliation, and intimidation," and violations of "due process," "civil rights," and Sanitation's employment policies. However, a careful reading of his complaint shows that all of these various descriptions concern and arise out of the alleged incident of sexual harassment by his supervisor. The NPEA does require an employer to provide "employment conditions which are free of prejudice, intimidation and harassment." 15 N.N.C. § 604(B)(9) (2005). This Court has never decided whether an employer can be liable under the NPEA for an employee's sexual harassment of another employee under this subsection, though the Court has stated that "harassment," including sexual harassment can be "just cause" for termination of an employee. *See Toledo v. Bashas' Diné College*, No. SC-CV-41-05, slip op. at 4-5 (Nav. Sup. Ct. August 17, 2006) (upholding termination for sexual harassment of another employee; *Kesoli v. Anderson Security*, No. SC-CV-01-05, slip op. at 5-6 (Nav. Sup. Ct. October 12, 2005)

(upholding termination for verbal harassment of subordinates).

The Court holds that in this case the very broad, ambiguous language in Section 604(B)(9) does not authorize an employee to file a claim with the Commission against an employer for sexual harassment. Sexual harassment is an emerging issue in Navajo society, and other societies, and what it means and whether it should be an actionable claim are being developed. In the Navajo environment, this development is in its nascent stage. The Navajo Nation government has a sexual harassment policy in its Navajo Nation Personnel Policies Manual, § XVI(F), applicable only to tribal employees. Some private employers have such policies, while others do not. *See, e.g., Toledo*, No. SC-CV-01-05, slip op. at 4-5 (discussing Bashas' sexual harassment policy). Given the unsettled nature of what sexual harassment should mean and, absent explicit language in the NPEA that sexual harassment is actionable before the Commission, the Court will not expand the statute to allow for claims against an employer where the Council has not clearly provided for them. The language and structure of the NPEA demonstrate Council intent to provide remedies for direct disciplinary action by an employer, but nothing clearly allows claims against employers for allegedly allowing sexual harassment between employees. For this Court to conclude that the aspirational language of Section 604(B)(9) imposes a duty on an employer would be to venture into making laws, instead of interpreting laws. Whether or not an employer can be held liable for harassment between its employees is a matter of public policy to be set out in the first instance by the Council.[1] If the Council wishes the Commission to hear such claims, it may amend the

[1] The Dissent would have the Court engage in such law-making by defining "harassment" as used in Section 604(B)(9) to include "any form of harassment that might result in intimidation, threats and discomfort, and which may result in the departure of an employee who otherwise might continue employment but for the 'harassment.'" Dissenting Opinion, *infra*, slip op. at 8. The Dissent's conclusion

statute to clearly provide such jurisdiction. *Cf. In re Grievance of Wagner*, No. SC-CV-01-07, slip op. at 6 (Nav. Sup. Ct. May 14, 2007) (Council must clearly provide Office of Hearings and Appeals with power to invalidate election for irregularities).

The Court's holding does not mean that Yazzie lacks any remedy; it simply means that he may not seek that remedy from the Commission. Assuming compliance with applicable statutes of limitation,[2] Yazzie is free to file a claim with a Navajo district court alleging the same facts to seek damages. The Court makes no comment on the outcome of such suit, but only states that he has that option despite the Court's upholding of the dismissal by the Commission.

**VI**

Based on the above, the Commission's decision is AFFIRMED on the ground that the Commission lacks jurisdiction over a claim of sexual harassment.

Dated this 11th day of July, 2007.

Herb Yazzie
Chief Justice

Louise Grant
Associate Justice Grant

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that the lack of a definition of harassment in the NPEA is to be regarded as the intent of the Navajo Nation Council to allow claims whenever an employee feels intimidated, threatened or uncomfortable is simply without any legal basis. Furthermore, the three subsections of Section 602 specifying the purposes of the NPEA do not aid the Dissent's desire to expand the scope of the NPEA. The specified purposes of providing employment opportunities, promoting economic development, and fostering economic sufficiency, simply are not relevant to the issues in this case.

[2] In *Charles*, this Court opined that any statute of limitations applicable to a non-NPEA claim is tolled while the Commission "determines whether it can hear the applicant's claims." 7 Nav. R. at 95.

**Dissenting opinion of Associate Justice Ferguson**

My dissent is limited to the decision by the Majority that sexual harassment claims cannot be brought under the Navajo Preference in Employment Act (NPEA) and before the Navajo Nation Labor Commission (NNLC).[3] The Majority concludes that the claims are limited to disciplinary actions and since there was no disciplinary action, the NNLC lacks jurisdiction to review the matter. The Majority states that the legislature did not specify that sexual harassment claims can be brought before the NNLC and therefore the NNLC was not authorized jurisdiction to hear the sexual harassment claims.

The Majority approaches this case from a stand point that the legislature, by not specifying the words "sexual harassment," did not intend the NNLC to address such claims. This dissent, on the other hand, approaches the case from a broad perspective. The statute prohibits "harassment" in work places, 15 N.N.C. § 604(B)(9), a term not limited to any particular form of harassment, indicating that the legislators intended that the term be inclusive of any form of harassment that might result in intimidation, threats and discomfort, and which may result in the departure of an employee who otherwise might continue employment but for the "harassment."

The NPEA sets out the intent of the legislators. There are three sections under the purposes section which require review in determining whether the NPEA authorizes the NNLC review of sexual harassment claims. Section 602(B) of the NPEA requires that the NPEA be construed and applied to accomplish the purposes of the act. The purposes are set out in 15 N.N.C. § 602(A) and this section makes it clear the Council intended to

[3] This dissenting opinion focuses on the question of whether the NNLC has authority to review sexual harassment matters in a work place. The question of whether the NNLC has authority to grant pain, suffering, or other such remedies is not addressed here. That is within the discretion of the NNLC to determine.

provide employment opportunities for the Navajo work force and to provide the Navajo workers continued employment by requiring training and expanded opportunities for the Navajo workers. In other words, priority is given to providing jobs to Navajo workers and ensuring continued employment. Within the purposes listed, the legislators intended to promote economic development of the Navajo Nation, to lessen the Navajo Nation's dependence upon off-reservation sources of employment, income, goods and services, and to foster the economic self sufficiency of Navajo families. *See* 15 N.N.C. § 602(A)(3),(4),(5).

Under Section 604, the legislators made certain that in order to accomplish the purposes set out, employers must meet certain requirements. These requirements are listed under 15 N.N.C. § 604, which aid the accomplishment of the purposes. The employer is made aware of the preference in hiring Navajo workers, which includes providing information to not only encourage Navajos to compete for and obtain employment but also to require the employer to maintain employees. *See* 15 N.N.C. § 604(A)(1). To aid maintenance, the employer is required to provide training, become sensitive to cultural needs, provide a process using non-discriminatory job qualifications and selection processes and non-discriminatory benefits. *See* 15 N.N.C. § 604(B)(1)-(7) and (10)-(12).. Also to aid the goals of providing continued employment, the employer is required to maintain a safe and clean working environment and to provide working conditions that are free of prejudice, intimidation, and harassment. *See* 15 NNC § 604(B)(9).

All of the listed requirements support the intent that Navajo workers be given preference in hiring, and, once hired, the employer is required to provide opportunities to

assure continued employment. Also within the list, set out under 15 N.N.C. § 604(B)(8), an employer is prohibited from penalizing, disciplining, discharging or taking any adverse actions against an employee without "just cause." This subsection safeguards and guarantees due process when adverse action is taken against a Navajo worker, especially upon termination.

The NNLC concluded that it had no authority to review Yazzie's complaint because his complaint did not allege he suffered a "tangible employment action" as a result of the alleged sexual harassment. The NNLC then concluded that it was only authorized to review cases involving tangible employment actions such as discharge, demotions, or other adverse actions. In its decision, NNLC has limited itself to cases where an employee has been disciplined, where a petitioner who was entitled to employment was unlawfully denied employment, or where an employer did not comply with the firing procedures. Section 604(B)(8) within the last decade has been the basis for the bulk of cases brought before the NNLC and on appeal before this Court. Almost all cases brought before the NNLC are cases in which someone was terminated. This fact is the basis for NNLC's conclusion that the NNLC is only authorized to review cases that stem from disciplinary actions.

Such history should not limit the scope of NPEA to a few cases that involve disciplinary actions. I disagree with the Majority's reasoning that since the sexual harassment claim here is not a disciplinary action, it is outside the scope of NPEA. The scope of the NPEA is broader than interpreted by the Majority. Since most violations brought before the NNLC and therefore to this Court are brought upon some sort of

disciplinary action under 15 N.N.C. § 604(B)(8), the Majority, like the NNLC, erroneously perceives NPEA's scope to be limited to disciplinary actions.

The purposes and requirements set out by the act are much broader than the boundaries set out by the NNLC and the Majority. The concept of tangible employment actions does not apply to those claims outside NPEA disciplinary actions and it should not preclude or limit NNLC jurisdiction or authority, because review of disciplinary claims are one of the many authorities granted to the NNLC by the NPEA.[4]

The maintenance of employees requires a safe and healthy work environment, free of harassment of varying kinds, including sexual harassment. Particularly where employers do not have affirmative action plans which might include sexual harassment policies, the need for review by the NNLC is important. As noted by the Majority, sexual harassment is an emerging issue, and when it does occur, it is sensitive and embarrassing for most to raise and that is probably one of the reasons the Navajo sexual harassment claim is in its "nascent" stage. Employees who experience sexual harassment need to be protected, and this protection is woven into the broad purpose of a work environment that is free of harassment, whether it is harassment by their supervisor or other employee. In any case, an employer is required to keep the workplace free of harassment.

It is my position that harassment of any kind, including sexual harassment, comes within the scope of NNLC review and protection of an employee from harassment is a purpose protected by the NPEA. The NNLC has a duty to determine whether claims brought before it fall within the purview of the purposes and requirements of the NPEA.

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[4] For example, the employer may be violating the NPEA if it does not have an affirmative action plan as required by this section. This violation would not require a disciplinary action when such violation affects the continued employment of an employee protected by the NPEA, as the scope of the purposes and requirements under the act authorize the NNLC to review the violations, even those outside disciplinary actions.

NNLC is required to look at the NPEA and determine whether its answer is based on a permissible construction of the statute.

Here, both the Majority and the NNLC ignore the clear intent of the Navajo Nation Council as set out in 15 N.N.C. § 602(B). For the reasons as stated I offer my dissent in part.

Associate Justice Ferguson