

Mohican Nation  
Stockbridge-Munsee Band  
Tribal Court of Appeals

OCT 29 2003

State of Wisconsin

County of Shawano

COURT CLERK

**Melinda Walsh**

Petitioner-Appellee,

vs.

**Stockbridge-Munsee Community**

Respondent-Appellant

) Case No.: 2000 AA 007

)  
) Appellate Court Opinion  
) and Order

**Opening Statement**

The Stockbridge-Munsee Community (Tribe) appeals the Stockbridge-Munsee Trial Court Decision of February 4, 2003. In that decision, the Trial Court held that the petitioner, Melinda Walsh, did establish, by a preponderance of the evidence, that she was terminated without cause. The Trial Court awarded the petitioner the following relief:

1. Reinstatement to previous position as secretary/receptionist or like position,
2. Back pay from September 15, 2000 to September 15, 2001,
3. Reinstatement of all previous benefits
4. A record of continuity in employment in Plaintiff's personnel file.

1 The Tribe appealed the Trial Court's decision, with oral  
2 arguments being heard on August 22, 2003 before Appellate  
3 Judges, David Raasch, Joseph Martin and Stanley Webster.

#### 4 **Jurisdiction**

5 This Appellate Court asserts jurisdiction under 1.6(1) of  
6 the Stockbridge-Munsee Ordinances (SMT0). That section states,  
7 "*The Stockbridge-Munsee Tribal Court of Appeals shall have*  
8 *jurisdiction over appeals from the Trial Tribal Court.*"

#### 9 **Scope of Review**

10 The Stockbridge-Munsee Tribal Court Rules of Procedure  
11 limit the Appellate Court to hear only appeals concerning  
12 matters of law.<sup>1</sup>

#### 13 **Issues**

14 By stipulation between the parties on February 23, 2001,  
15 the sole legal claim for the Trial Court to decide was "...whether  
16 *Ms. Walsh's employment was terminated with just cause in*  
17 *accordance with Section 53.3(M), SM Ord.*"

18 The sole issue for this Appellate Court to decide is; did  
19 the Trial Court err in applying the facts to Section 53.3(M) of  
20 the SMT0?<sup>2</sup>

21  
22  
23  
24 

---

<sup>1</sup> Stockbridge-Munsee Tribal Court - Rules of Procedure §23(I)

25 <sup>2</sup> §53.3(M) Employees may not be terminated from employment without just cause.

### Findings of Facts

The facts in this case are basically undisputed, although the question remains: *do the facts presented rise to the level of 'just cause' to terminate the employment of Ms. Walsh?* The Trial Court found that they did not.

On September 07, 2000, Ms. Walsh received a Stockbridge-Munsee Employee Action Notice of a five day disciplinary suspension, without pay, pending termination. On September 15, 2000, Ms. Walsh was notified that her employment was terminated effective on that date. The letter signed by Kenneth R. Ninham, gave the following grounds for termination:

1. "On 09-06-2000, a client called into the office to make an appointment to see a counselor. Melinda, you responded to this client by asking an inappropriate question which is clearly out of your role/duties as a receptionist. Melinda, you further responded to this client by stating to her, "oh co-dependency," and "co-dependency covers a lot of things." Your statement to the client is a clear violation of Section 7 page 39, (B-9). Melinda, you have been warned on several occasions not to be giving clients advise (sic) especially clinical advise (sic). Your action on 09-07-2000, same incident is another direct violation of Section 6, "Confidentiality," page 37 and a violation of Section 7 (C-1) page 40."

1       *"Melinda, on 05-06-2000, and 05-24, 2000, you were*  
2       *counseled and given direction in terms of making necessary*  
3       *changes, and that improvement in your job performance was*  
4       *required. On 06-23-2000, I once again, informed you of the*  
5       *necessary changes that needed to take place. I have*  
6       *provided you with counseling in order to make the necessary*  
7       *changes. You have continued to disregard my directives and*  
8       *recommendations for making the necessary changes. Your*  
9       *failure to improve you job performance given sufficient*  
10       *time/counseling/corrective measure/direction is*  
11       *unacceptable.*

12           On October 11, 2000, Ms. Walsh filed a petition for  
13       reinstatement in the tribal Trial Court, alleging that she  
14       was terminated without just cause. Ms. Walsh alleged that  
15       she was not afforded the counseling and corrective actions  
16       required pursuant to Section 07-Rules to Help, of the  
17       Information Handbook for Employees of the Mohican Nation,  
18       effective October 01, 1996.

19           On February 04, 2003, Trial Court judge Robert Miller  
20       ruled that the Tribe did not have cause to terminate Ms.  
21       Walsh's employment. This decision was received by the  
22       parties on or about February 11, 2003. The Tribe appealed  
23       the decision of the Trial Court, and this appellate panel  
24       now reviews the decision of the Trial Court.  
25

## Analysis

The thrust of this appeal is to determine if there was just cause to terminate Ms. Walsh's employment. First, we must look for the definition of just cause. In review of Chapter 53 of the SMTO governing employee rights, we find no definition of just cause. Therefore, we must look at prior tribal court cases where just cause was defined. Dauids v. Stockbridge-Munsee Community, 98-AA-013 (1999), sets forth the standard for just cause. In Dauids the Court said that just cause must be fair, impartial and consistent with the Tribe's policies and procedures.

In absence of a clear definition of just cause within the SMTO, we will proceed under the standards set forth in Dauids. In the present case, the Trial Court found that Ms. Walsh was terminated without just cause. Inserting the definition of just cause in Dauids, the Trial Court found that Ms. Walsh's termination was not fair, was not impartial, was not consistent with the Tribe's policies and procedures.

The purpose of the SM Employee Rights Ordinance states, in part; *The Stockbridge-Munsee Tribal Council further recognizes that employees of the Mohican Nation, comprised of all branches of government and business, need protection of their rights including a stable working environment and the right to file a grievance and seek*

1        *assistance in solving on-the-job problems via the proper,*  
2        *established policies and procedures.*<sup>3</sup>

3            In reviewing the transcript of the trial, the exhibits  
4        admitted into the record, and hearing oral arguments this  
5        appellate panel agrees with the Trial Court's  
6        determinations. If the purpose of §53.1 is to solve on-  
7        the-job problems via the proper, established policies and  
8        procedures, then the Tribe has failed in the case at hand.  
9        We agree with the Trial Court that Ms. Walsh was not given  
10       clear direction regarding job duties and responsibilities.  
11       Further, we agree with the Trial Court that Ms. Walsh  
12       "received mixed messages regarding counseling/corrective  
13       measures and direction".<sup>4</sup>

14           The Tribe argues that Ms. Walsh had been specifically  
15       told, in writing, on two different occasions that she was  
16       not to dispense advice to clients on the phone and not to  
17       argue with clients on the phone.<sup>5</sup> The Trial Court found the  
18       memo in Exhibit #3 which stated; "it is important to never  
19       argue on the telephone or in person with any client even if  
20       they are wrong or up-set, and never give any client's

---

22        <sup>3</sup> Chapter 53, Stockbridge-Munsee Tribal Law-Employee Rights Ordinance §53.1

23        <sup>4</sup> Page 4 of the Trial Court's decision.

24        <sup>5</sup> Page 6 of Respondent's Written Statement of Grounds for Appeal. Exhibits 2  
25       and 3.

1        *advice leave that up to the counselors,"* to be advisory in  
2        nature and content. Although the Tribe argues that the  
3        memo is specific, it does not provide an adequate threshold  
4        to meet the established policies and procedures intention  
5        of the purpose of Chapter 53. The Tribe would have been in  
6        a stronger position if it had specifically set forth  
7        definitions of what constitutes advice. Further, due to  
8        the nature of Ms. Walsh's position, specific instructions  
9        on how to deal with potential clients could have been part  
10       of the training. Based on the facts presented, Ms. Walsh  
11       was not given specific guidelines and the Trial Court did  
12       not err in making that determination. This Appellate Court  
13       also finds that to be true of Exhibit #2, which is merely a  
14       list of concerns with no specific direction. Again, the  
15       Trial Court did not err in its finding that this document  
16       lacked *evidence of counseling, corrective measures and*  
17       *suitable direction to meet the standards of progressive*  
18       *discipline as outlined in the Green Employee Handbook.*<sup>6</sup>  
19       If, in conjunction with these two documents, the Tribe had  
20       taken affirmative corrective measures and provided suitable  
21       direction to Ms. Walsh, it would have been in a better  
22       position to meet the just cause standard.

---

25       <sup>6</sup> Page 4 of Trial Court decision

1           Other documents support Ms. Walsh's position of lack  
2 of *suitable direction*. The Performance Appraisal of Ms.  
3 Walsh dated 9/29/99 states in the section **Specific steps**  
4 **employee must take to improve performance within specified**  
5 **time period:** She has all the skills necessary to do more  
6 than is required to do the job. Would encourage to  
7 participate in any training which becomes available which  
8 would enhance existing skills or help her develop new ones.

9       On June 23, 2000, right after the documents that the Tribe  
10 uses to establish performance issues, Ms. Walsh received  
11 another Performance Appraisal. We will note that the  
12 appraisal rating fell into the Very Good category of  
13 performance. We further note that in the section **Specific**  
14 **areas of needed improvement**, it states: Confidentiality-  
15 telephone skills-dealing with clients experiencing  
16 conflict-stress. In the section **Recommendations for**  
17 **professional development (seminars, training, schooling,**  
18 **etc.)**, it states: Confidentiality laws that apply to  
19 AODA/Mental Health. Although these concerns are mentioned,  
20 there is nothing in the record to indicate that any of  
21 these recommended areas were provided to Ms. Walsh. This  
22 would have been the perfect time for the Tribe to establish  
23 specific guidelines, establish specific procedures and  
24 policies, and to specify training needed to meet the  
25 recommendations of the Performance Appraisal.



1           The Trial Court found that the described events of  
2           September 6, 2000 and September 7, 2000 did occur. These  
3           events are undisputed. However, the Trial Court found that  
4           the termination was not fair, impartial or consistent with  
5           procedural rules, based on lack of evidence of counseling,  
6           corrective measures and suitable direction to meet the  
7           standards of progressive discipline as outlined in the  
8           Green Employee Handbook. For this Appellate Court to  
9           overturn the Trial Court's decision, we must find that  
10          there was a material error in the application of the law to  
11          the facts of this case. We cannot find any material error  
12          concerning the matter of the law.

13          The Tribe argues that the Trial Court's decision is  
14          flawed for several reasons. One is that progressive  
15          discipline is not required by the Tribe's personnel  
16          procedures. We agree. Any requirement of progressive  
17          discipline policies would prevent the Tribe from  
18          terminating an employee who has committed serious  
19          violations that may involve criminal conduct such as theft,  
20          fraud, acts of violence or any other actions that would  
21          require immediate removal from employment. We also agree  
22          with the Tribe's position that it is not an issue as to  
23          whether, or not, the Court agrees with the Tribe's  
24          management practices. We fully agree with the Tribe's  
25          position that *the purpose of the just cause standard is not*

1       for a wholesale substitution of the court's judgment for  
2       the employer's on management and personnel issues but  
3       rather a limited review by the court to ensure that the  
4       employer has followed its own procedures.<sup>7</sup> This is exactly  
5       what the Trial Court did. It conducted a limited review of  
6       the employer's procedures and determined that Ms. Walsh was  
7       not afforded the counseling, corrective measures and  
8       suitable direction to meet the employer's standards. This  
9       Appellate Court can find no compelling errors to overturn  
10      that decision.

#### 11                               **Conclusion**

12               We find the Trial Court did not err in its decision,  
13               and that decision is affirmed as to its determination that  
14               Ms. Walsh's termination was without just cause.

---

25       <sup>7</sup> Page 12 of the Respondent's Written Statement of Grounds for Appeal

Order

This case is remanded back to the Trial Court for a hearing to determine damages and reinstatement consistent with the findings of the Stockbridge-Munsee Court of Appeals in Stockbridge-Munsee v Joseph Miller 97-AA-004 and \$53,5(F) of the SMT0.

By the Court

This 24<sup>th</sup> Day of OCTOBER 2003

David Raasch

Honorable David Raasch

Joseph H. Martin

Honorable Joseph Martin

Stanley R. Webster

Honorable Stanley Webster

