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NAVAJO NATION SUPREME COURT REVERSES LABOR COMMISSION DECISION

The Navajo Nation Supreme Court has issued an opinion in *Rosenfelt & Buffington v. Johnson*, No. SC-CV-34-08, an appeal of a Navajo Nation Labor Commission decision in which the Commission determined that a law firm terminated an employee without just cause for repeated violations and during which time the law firm met with the employee over more than eight months without also imposing progressive discipline measures.

The Commission had found that each of the repeated violations was not substantial, and the employer had failed to impose progressive discipline prior to termination.

The Court reversed the Commission's decision, stating that the Commission did not consider if the cumulative misconduct met the "substantial" standard. "While each of Appellee's violations may not have been so serious, we find that the cumulative effect – repeated violations of multiple provisions of the law firm's policies – were serious, constituting substantial misconduct that meets the standard for just cause under the NPEA [Navajo Preference in Employment Act]," the Court stated.

The Court further stated that there was a detailed section in the employer's personnel policy manual requiring reasonable warnings to employees whose conduct fell below established standards and opportunity provided to the employee to improve behavior. The Court read this section as imposing minimum obligations on the employer amounting to *k'é* measures.

The Court held that a personnel policy manual is a contract between an employee and employer and that in this particular case, *k'é* was used when the employer took measures to meet with and communicate with the employee over the violations over more than eight months. The Diné method of dispute resolution emphasizes accountability and personal responsibility and when the law firm attempted to counsel the employee, it was utilizing an acceptable alternative to progressive disciplinary action, the Court found. Employers who use *k'é* measures should not be penalized for not also imposing or threatening disciplinary action, the Court ruled.

Finally, the Court stated that *k'é* measures to resolve disputes in the workplace are desirable and even preferred on the Navajo Nation. However, the Court cautioned that any measures – *k'é* or progressive discipline – must be fundamentally fair to employees by ensuring that they are fully aware of the standards of conduct expected of them and are treated fairly and consistently should a violation occur.

The Court also vacated the Labor Commission's award of damages and ordered that all parties be responsible for their own costs and attorney fees.

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