

No. SC-CV-20-15

NNLC No. 2014-008

IN THE SUPREME COURT OF THE NAVAJO NATION

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FALANA HADLEY,  
Petitioner/Appellant,

v.

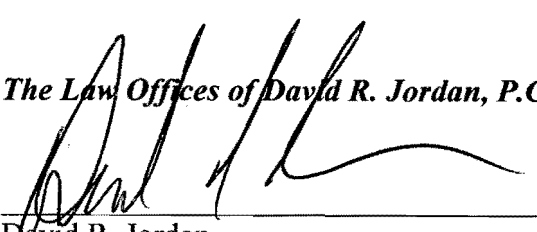
NAVAJO NATION DEPARTMENT OF PUBLIC SAFETY  
CHINLE POLICE DEPARTMENT  
Respondents/Appellees

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OPENING BRIEF OF THE APPELLANT

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*The Law Offices of David R. Jordan, P.C.*



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**Table Of Contents**

Table Of Contents ..... 2

Table Of Citations..... 3

Statement of the Case..... 4

Proceedings Below..... 4

Statement Of Jurisdiction..... 4

Standard Of Review ..... 4

Statement Of The Facts..... 5

Statement Of The Issue ..... 8

Argument ..... 8

The Court Should Not Defer To The Commission’s Conclusion That Hadley  
Was Not Harassed, Because It Was Contrary To The Weight Of The Evidence.  
..... 8

Conclusion ..... 12

## Table Of Citations

### Cases

1. *In the Matter of the Estate of Nat Benally*, No. SC-CV-49-08, slip op. (Nav. Sup. Ct. June 25, 2009) ..... 8
2. *Kesoli v. Anderson Security Agency*, 8 Nav. R. 724 (Nav. Sup. Ct. 2005)..... 11, 12
3. *Mitchell v. Davis*, 8 Nav. R. 542 (Nav. Sup. Ct. 2004) ..... 8
4. *Tsosie v. Central Consolidated School Dist.*, No. SC-CV-34-06, slip op. (Nav. Sup. Ct. August 12, 2009)..... 4, 9

### Statutes

1. 15 N.N.C. § 604 ..... 4, 12
2. 15 N.N.C. § 613 ..... 4
3. 7 N.N.C. § 302 ..... 4

## **Statement of the Case**

Petitioner/Appellant Falana Hadley (“Hadley”) appeals the dismissal of her case by the Navajo Nation Labor Commission. This Court should not defer to the finding of the Commission that Falana Hadley was not harassed in violation of 15 N.N.C. § 604(B)(9). As the Court shall see, the evidence at trial did not support this conclusion, and the dismissal order of the Commission must be reversed.

## **Proceedings Below**

Hadley filed her complaint on February 11, 2014. Record, 1. Appellee Navajo Nation Division of Public Safety/Chinle Police Department (“Public Safety”) filed an answer on March 24, 2014. Record, 6. After the parties engaged in discovery, the Commission held a final evidentiary hearing on September 12, 2014. Record, 14, p. 1. On March 31, 2015, the Commission entered a final order dismissing the case. Record, 14. This appeal was timely filed on April 15, 2015.<sup>1</sup> Record, 15.

## **Statement Of Jurisdiction**

The Commission has jurisdiction to review final orders of the Labor Commission pursuant to 15 N.N.C. § 613(A) and 7 N.N.C. § 302.

## **Standard Of Review**

The Supreme Court reviews Labor Commission decisions on an abuse of discretion basis. *Tsosie v. Central Consolidated School Dist.*, No. SC-CV-34-06, slip op. at 4 (Nav. Sup. Ct. August 12, 2009). It is an abuse of discretion when the factual findings are not supported by substantial evidence. *Id.*

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<sup>1</sup> The undersigned received the dismissal order on April 7, 2015, and the notice of appeal was filed eight days thereafter.

## **Statement Of The Facts**

The Supreme Court should not defer to the Labor Commission, because the facts elicited at trial reveal the following to be true.

### **Testimony of the Petitioner, Falana Hadley**

1. Hadley's supervisor was Dempsey Harvey.
2. Harvey would tell Hadley that he would not accept her as someone he wanted to be with in a romantic relationship. Transcript, p. 18.
3. Harvey told Hadley to clean up his office, which was not a part of her duties. Hadley was a commissioned officer at the time. Transcript, p.19.
4. Harvey told Hadley that her fiancé, Dean Hadley, was too old for her. He told her that Dean would deny her when she told him that she was pregnant. He also told her that Dean's family would not want her because she was too young. He also told her that Dean would go after her mom, and he would become her stepdad. Transcript, p. 20.
5. Hadley felt Harvey was watching her while she dusted, which required her to bend over. Harvey was in his chair behind her. Transcript, p. 21- 22.
6. Hadley transferred to Chinle. A couple months after she transferred, Harvey was reassigned to Chinle. Hadley said it was like Harvey was following her. Transcript, p. 23- 24.
7. Harvey continued to bring up Dean's past around Hadley. Transcript, p. 26.
8. Harvey blamed things on Hadley during the time that she was pregnant. Harvey blamed Hadley for passing out his office phone number. Transcript, p. 26.

9. Harvey called Hadley into his office and told her that “Officers like you wouldn’t even be working here anymore.” Transcript, p. 27.

10. Hadley felt that Harvey was always calling her in and telling her what she did wrong. Harvey would bang his fist on the table and yell at Hadley loud enough that the dispatcher, Joan Woods, who was next door could hear him. Transcript, p. 28.

11. Harvey yelled at Hadley for transferring his calls to him and not answering him on the radio every time he called. Hadley said that she was busy and others didn’t acknowledge Harvey when he called. Transcript, p. 29.

12. Harvey only called Hadley into his office. Transcript, p. 30.

13. Hadley felt that Harvey was picking on her and targeting her. Transcript, p. 33.

14. Harvey sent text to the cell phone of Dean Hadley, Appellant’s husband, that said, “Send me a beautiful pic of your body, tits, so I can sleep with it tonight.” Transcript, p. 34.

15. Harvey yelled at Hadley more after the text. Transcript, p. 36.

16. Harvey asked for Hadley’s cell phone number a few months after the text. Transcript, p. 37-38.

17. Harvey suspended Hadley for 15 days for failing to appear at his office. Hadley had not known she needed to be at his office. Transcript, p. 45.

18. Harvey made Hadley cry almost all the time when he called her in. Transcript, p. 72.

19. Harvey did not care about Hadley being on the dive team with her husband as the supervisor until he received Hadley's complaint about his harassment. Transcript, p. 76.

#### **Testimony of Dean Hadley**

20. Harvey called in Hadley and asked her who had made her pregnant. Harvey told Hadley that her fiancé was a bad person and would leave her once she had the baby. Transcript, p. 97.

#### **Testimony of Bernita Benally**

21. Harvey made environment hostile for Bernita. Transcript, p. 133.

22. Harvey made environment hostile for other coworkers. Transcript, p. 133.

23. Harvey retaliated against people for standing up to him. She testified, "If you stand up to Harvey, he will crack down on you." Transcript, p. 133.

24. Other employees have filed complaints against Harvey about the hostile environment. Transcript, p. 133.

25. Harvey doesn't like being spoken up to especially if person speaking up is a female. Transcript, p. 138.

26. Harvey knew that Hadley was out of town and was not given the memo stating that Hadley needed to appear in Harvey's office on the 25<sup>th</sup>. Transcript, p. 142.

27. Harvey has raised his voice with Bernita. Harvey intimidates Bernita when he does this. Transcript, p. 143-144.

#### **Testimony by Dempsey Harvey**

28. Harvey has had multiple people including Darren Yazzie, Loretta Benally, Hadley, and Alicia Barber file harassment complaints against him. Transcript, p. 180.

29. There were five women working when Harvey started at Chinle and five or six more hired. There are only four left. Transcript, p. 183. This represents a loss of approximately 60% of the females in the workforce during Harvey's tenure at Chinle.

30. Harvey spoke with Hadley about her relationship with Dean Hadley. Transcript, p. 183.

31. Harvey said that it was 'his duty' as a supervisor to talk to Hadley about her relationship with Dean. Transcript, p. 184.

32. Harvey acknowledges that Hadley had a right to lunch at time that she was gone. Transcript, p. 190.

33. Harvey disciplined Hadley for not showing up at his office even though she did not know that she was supposed to be there. Transcript, p. 194.

### **Statement Of The Issue**

Should the Court refuse to defer to the Commission's conclusion that Hadley was not harassed where the conclusion was not supported by substantial evidence?

### **Argument**

#### **The Court Should Not Defer To The Commission's Conclusion That Hadley Was Not Harassed, Because It Was Contrary To The Weight Of The Evidence.**

The Court does not accept findings of fact from the lower tribunal that are clearly erroneous. *In the Matter of the Estate of Nat Benally*, No. SC-CV-49-08, slip op. at 4 (Nav. Sup. Ct. June 25, 2009). A court abuses its discretion if it relies on erroneous factual findings or legal conclusions, because it is not empowered to make a decision based on erroneous reasons. *Mitchell v. Davis*, 8 Nav. R. 542, 546 (Nav. Sup. Ct. 2004).

It is an abuse of discretion when the Commission makes factual findings that are not supported by substantial evidence. A decision is "supported by substantial evidence"



where, after examining the relevant evidence, a reasonable mind could accept the evidence as adequate to support the conclusion, even if it is possible to draw two inconsistent conclusions from the evidence. *Tsosie v. Central Consolidated School Dist.*, No. SC-CV-34-06, slip op. at 4 (Nav. Sup. Ct. August 12, 2009).

The decision by the Commission that harassment did not occur was not supported by substantial evidence.

Critical to this analysis was the testimony of Bernita Benally, the only truly independent and disinterested witness to testify at the hearing. She testified in direct examination:

Q. Has [Dempsey Harvey] ever made the environment hostile for you?

A. Yes.

Q. In your observation, has he made the environment hostile for other workers in Chinle?

A. Yes.

Q. As you testify here today, are you afraid of retaliation for your testimony here today?

A. Yes.

Q. Have you ever observed Mr. Harvey retaliate against people for standing up to him?

A. Yes.

Q. You mean the environment is such that Chinle is such that people understand if you stand up to Dempsey Harvey, he's going to crack down on you?

A. Yes.

Q. Are you aware of other employees besides Ms. Hadley who have filed complaints against Mr. Harvey?

A. Yes.

Transcript, pp. 132-133.

Under cross-examination, her testimony only became stronger:

There are other times when other female officers have been in charge. And at the time, I couldn't even do my job. I speak up for everybody that I had to -- that I had to speak up for, which is about four to five officers, and then some dispatchers. Two or more dispatchers, depending on whose on the shift. So for that, I'm speaking up for every single one of these people.

And for doing that, you know, I have to try to present everything. And then I can't be honest, I can't be direct, and I can't tell him exactly what I'm thinking, and then he has a problem with it. There is an issue where we can't speak the truth or else we get into trouble for it.

I basically did the same thing. I don't -- I have no reason to bring up my personal issues of bringing -- you know, why I had to deal with him directly, but, you know, if you want to know, I can tell you that, too. But right now, we're talking about Falana.

So yes, that is a hostile environment.

Everybody feels that it's there and nobody wants to speak up. Nobody wants to say anything because it's going to come back on us no matter -- somehow, some way, in some form it's going to come back on us no matter what we say. We try to speak up, we try to, you know, reason, we try to explain the situation, but still, we get in trouble, get written up, suspended and whatnot.

\* \* \*

I'm saying he can't handle the truth. I'm very direct. I will tell you what it is. This is the problem, this is what I think. But he doesn't want to accept it. I don't know if it's because of me being a female, trying to speak up to him, which, to me, I realize that that's not what he likes, to be spoke up to, especially if you're a female... There's not a whole lot of us females left in the district.

Transcript, pp. 136-138.

Ms. Benally later testified that Dempsey Harvey disciplined her for not serving a memorandum upon Falana Hadley, even though he knew that Ms. Benally attempted service, but Falana Hadley was not home. Transcript, p. 143. Harvey then disciplined Hadley for not showing up to the meeting described in the memorandum, even though he knew that Falana Hadley never received the memorandum!!

Q. So did you know on January 25th that you were supposed to report to his office that day?

A. No.

Q. Did you communicate to him that you didn't receive it before January 25th?

A. Yes.

Q. And how long did he suspend you for failure to appear at his office on January 25th?

A. For 15 days.

Transcript, p. 45.

Falana Hadley and Bernita Benally also testified that Dempsey Harvey yells at them, which this Court found to be harassment as a matter of law in *Kesoli v. Anderson Security Agency*, 8 Nav. R. 724, 731-732 (Nav. Sup. Ct. 2005). Transcript, pp. 58 and 143-144. Ms. Benally specifically testified that he uses yelling to intimidate employees. Transcript, p. 144.

Finally, Ms. Benally testified that the only reason that she has not complained against Mr. Harvey is her fear of retaliation. Transcript, p. 145.

“Harassment” is a broad term encompassing all forms of conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. *Kesoli*, 8 Nav. R. at 731-732. Falana Handley testified that Dempsey Harvey created a hostile and offensive work environment. Dempsey Harvey denied having done so. But the Court should give strong credence to the courageous testimony of Bernita Benally, who testified under direct fear of retaliation. She said that Harvey creates a hostile work environment for all employees – especially female employees. In fact, at least 60% of the female workforce has quit during Harvey’s tenure! Statement of Facts, ¶ 29.

In *Kesoli*, the Commission again refused to make a finding of harassment when a supervisor was yelling at subordinates. In that case, this Court ruled: “Though deference

on factual findings is the general rule, this Court cannot defer to the Commission in this case.” *Kesoli*, 8 Nav. R. at 730. The Court further held: “In the specific context of his position as a supervisor, it was wholly inappropriate to shout at a subordinate, regardless of any purported rumors. To maintain a harmonious work place, employers must prevent hostile activity, especially from a supervisor.” *Kesoli*, 8 Nav. R. at 731-732.

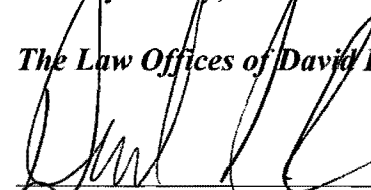
Under these circumstances, the Commission’s refusal to rule in favor of Falana Hadley on her harassment claim was a dereliction of duty. Dempsey Harvey may not believe that he is creating a hostile work environment, but the evidence at the hearing established that he is doing so – especially to females employed at the Chinle District. Falana Hadley asks this Court to step up and do what the Commission failed to do – protect the employees in Chinle from Dempsey Harvey.

### **Conclusion**

The Commission should have ruled that Public Safety violated 15 N.N.C. § 604(B)(9). The Court should reverse the Commission.

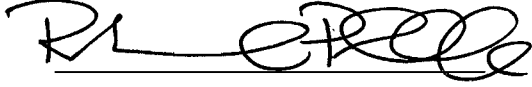
RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of July, 2015

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