New Mexico Law Review

43 N.M. L. Rev. 397 (Fall 2013)

Fall 2013

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THE NAVAJO PREFERENCE IN EMPLOYMENT ACT: A REVIEW AND UPDATE OF CASES AND RULES, 2010–2012

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I. INTRODUCTION

In the winter of 2010, the *New Mexico Law Review* published our article, "The Twenty-Fifth Anniversary of the Navajo Preference in Employment Act: A Quarter Century of Evolution, Interpretation, and Application of the Navajo Nation's Employment Preference Laws."[1] As the title suggested, the article marked the twenty-fifth anniversary of the Navajo Preference in Employment Act (NPEA) by providing an overview and analysis of the history, purposes, application, and interpretation of the NPEA. Our intent in writing the article was to

> improve employer compliance with the [NPEA], reduce employee overreaching under the [NPEA], and provide Navajo Nation leg-

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Portions of this article were presented at the 2013 Annual Conference of the Navajo Nation Bar Association, Inc. on June 6, 2013, in Flagstaff, Arizona. The authors wish to thank Jennifer Skeet (Navajo Nation Office of Legislative Counsel and counsel to the Navajo Nation Labor Commission) for providing copies of many of the Navajo Nation Labor Commission decisions and orders that are discussed in this article.

1. Howard L. Brown & Raymond D. Austin, *The Twenty-Fifth Anniversary of the Navajo Preference in Employment Act: A Quarter Century of Evolution, Interpretation, and Application of the Navajo Nation's Employment Preference Laws*, 40 N.M. L. REV. 17 (2010), *available at* http://lawlibrary.unm.edu/nmlr/40/1/04_brown_twenty.pdf.

> islators and judges with proposals for reforming the text and application of the [NPEA] in small, but important ways that continue to balance the rights of employees and the business interests of employers. The ultimate goal [was] to reduce litigation under the [NPEA], thereby encouraging potential employers to locate their operations on the Navajo Nation, and to thrive and create employment opportunities where they are so badly needed.[2]

This article updates NPEA cases and rule changes since publication of our 2010 article.[3] The Navajo Nation Supreme Court, the Navajo Nation Labor Commission (Commission or NNLC), and the U.S. federal courts have decided a number of NPEA cases that are worthy of consideration by employers, employees, legal practitioners, and Navajo Nation leaders. Although no generally applicable principle can be gleaned from these cases, several of the cases reveal a trend by the Navajo Nation Supreme Court and the Commission to hold employees accountable for their conduct, performance, and willingness to cooperate with employers' efforts to improve the workplace. If nothing else, the cases illustrate the continuing and difficult struggle to balance the rights of employees under the NPEA with the business interests of employers. The struggle to achieve this balance was noted in our previous article, wherein we discussed the Navajo Nation Supreme Court's recognition of

> the need for the government to strike a reasonable, pragmatic balance between (1) honoring and safeguarding employee rights under the Act and (2) establishing a system of laws that creates a positive business environment that is not overburdened with litigation and which provides employers with the certainty that they need to justify their business risks. When this balance is reached, employers will be more apt to locate their operations on the Navajo Nation, prosper, and thereby generate employment opportunities for Navajo workers.[4]

Part II of this article provides a brief background discussion of the economic and demographic context of the NPEA, the purpose for which it was enacted, and the rights and obligations it created. Part III analyzes NPEA-related cases since the publication of our 2010 article. Part III is divided into subsections addressing Navajo Nation court cases, Commission decisions and rules, and federal court cases. Part III also discusses

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2. *Id.* at 75.

3. As of the writing of this article, there have not been legislative changes to the NPEA since publication of our 2010 article.

4. Brown & Austin, *supra* note 1, at 19; *see also id.* at 34, 42, 46, 75.

Navajo customary law, or Navajo common law, as applied to employment and NPEA issues, where applicable and where it was relied upon by the court or administrative agency in deciding a case.

II. BACKGROUND

The Navajo Nation is one of the largest federally recognized Indian nations in the United States, with a population that now exceeds 280,000.[5] "The population of the Navajo Nation includes a workforce that produces goods and provides services in countless and diverse fields. Unfortunately, the full potential of the Navajo workforce has not yet been reached."[6] As stated on the Navajo Nation website, "the Navajo Nation is striving to sustain a viable economy for an ever increasing population."[7]

In 1985, the Navajo Nation enacted the NPEA[8] for the purpose of creating employment opportunities for Navajos, decreasing the Navajo Nation's dependence on off-reservation sources of employment, and bolstering the economic self-sufficiency of Navajo families.[9] Since 1985, the NPEA has evolved through legislative amendments, judicial interpretation, and administrative decisions.[10] Navajo courts and the Commission have incorporated Navajo common law into NPEA decisions, and they have, in many cases, strived to balance employee rights with employer interests. That evolution continues today and will continue into the future.

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5. U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATIONS: 2010, at 14–17 (January 2012).

6. Brown & Austin, *supra* note 1, at 17.

7. OFFICIAL SITE OF THE NAVAJO NATION, *History*, http://www.navajo-nsn.gov/history.htm (last visited May 4, 2013).

8. NAVAJO NATION CODE tit. 15, §§ 601–19 (2005). The Navajo Nation Code is hereinafter cited as "____ N.N.C. § ____", in accordance with citation instructions set forth in the Code itself. All references to the Code are to the 2005 edition. Navajo Nation court opinions are cited in accordance with the Navajo Nation Supreme Court's Order Establishing a Uniform Citation System for Opinions, as set forth in *In re a Universal Citation System for the Decisions of the Courts of the Navajo Nation*, No. SC–SP–01–00, slip op. at 1–2 (Nav. Sup. Ct. January 23, 2004).

9. *See* 15 N.N.C. § 602.

10. *See* Brown & Austin, *supra* note 1, at 17–25.

III. NPEA CASES AND LABOR COMMISSION RULE CHANGES

A. Navajo Nation Supreme Court Cases

The Navajo Nation Supreme Court issued seven NPEA-related decisions in 2011 and 2012 prior to the writing of this article.[11] Those decisions are discussed below.

In *Wauneka v. Navajo Department of Law Enforcement*,[12] the Navajo Nation Supreme Court addressed whether the Commission is authorized to award emotional distress damages for violations of the NPEA, how emotional damages are determined, and the conditions under which the Commission may impose civil fines.[13] Veronica Wauneka was a police captain who had served thirty years on the police force before she filed a charge with the Office of Navajo Labor Relations (ONLR) against her employer, the Navajo Department of Law Enforcement (Department).[14] After receiving an ONLR Notice of Right to Proceed, Wauneka filed a complaint with the Commission, alleging that the Department had created a hostile work environment and had harassed, humiliated, and intimidated her.[15] At her Commission hearing, Wauneka moved for and was granted a directed verdict.[16] At a separate damages hearing several months later, Wauneka and her husband testified that Wauneka suffered emotional harm that manifested in conditions such as sleeplessness, dreams of killing her supervisor, suicidal thoughts, and withdrawal from normal activities.[17] She sought emotional damages in the amount of $65,000, back pay for what she would have earned if she had received a better performance evaluation, and reinstatement of leave hours.[18] The Commission awarded Wauneka $9,911.20 in back pay, $8,337.60 in attor-

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11. After the body of this article was written, but before it was published, the Navajo Nation Supreme Court issued another NPEA case in 2012, *Meadows v. Navajo Nation Labor Commission*, No. SC-CV-64-11 (Nav. Sup. Ct. Nov. 2, 2012). This opinion may be accessed through the Navajo Nation Supreme Court Opinions webpage (http://www.navajocourts.org/suctopinions.htm). Once on the main webpage, scroll down and follow the "SC-CV-64-11" hyperlink. The Navajo Nation Supreme Court has made all of its opinions from 2006 to the present accessible in this manner; opinions dating from 1969 to 2005 may be found in the Navajo Nations Reporter, volumes 1 through 8.

12. Wauneka v. Navajo Dep't of Law Enforcement (*Wauneka I*), No. SC-CV-27-09, slip op. (Nav. Sup. Ct. May 25, 2011, eff. February 10, 2011).

13. *See id.* at 5–9.

14. *See id.* at 2.

15. *See id.* at 1–2.

16. *See id.* at 2.

17. *See id.*

18. *See id.* at 3.

ney's fees, $30,000 in emotional damages, eight hours of sick leave, and seventy-two hours of annual leave.[19] The Commission also imposed a $5,000 civil fine.[20] The Department appealed the award of emotional damages and the civil fine to the Navajo Nation Supreme Court.[21]

The court first determined that the issues on appeal involved the application of legal standards and therefore reviewed the issues de novo.[22] The court then addressed the question of whether the Commission is authorized to award damages for emotional distress.[23] The court looked to Section 612(A)(1) of the NPEA, which allows the Commission to award "remedial orders" that are intended to "cure the violation [of the NPEA]."[24] The court recognized that there was "no indication that the [Navajo Nation] Council intended emotional harm or distress to be a separate and actionable claim" under the NPEA.[25] The court distinguished between (a) remedies that are intended to cure the "anguish" that might arise from a NPEA violation, which are permitted under the NPEA, and (b) tort-like damages for emotional harm that arise from a tortfeasor's negligence, recklessness, or intentional conduct, which are not permitted under the NPEA.[26] Thus, the court analyzed the Commission's award of emotional damages by asking whether Wauneka's alleged distress was caused by the NPEA violation and whether the award was meant to cure the violation.[27] In reversing the Commission's award, the court wrote:

> The record shows that the Commission accepted the testimony of [Wauneka] and her husband that she experienced severe anguish, including sleeplessness and suicidal thoughts, during a specific period of time. However, the Commission made no finding that the NPEA violation had caused the asserted suffering; and furthermore, made no finding that the award was necessary to cure the violation. Additionally, the amount of the award ($30,000) was not reasonably tied to [Wauneka's] treatment of conditions that specifically arose from the NPEA violation. It is unclear from the record what caused [Wauneka's] emotional distress.
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19. *See id.*
20. *See id.*
21. *See id.* at 3–4.
22. *See id.* at 4–5.
23. *See id.* at 5–6.
24. *Id.* at 6.
25. *Id.* at 5–6 (discussing Yazzie v. Navajo Sanitation, No. SC-CV-16-06, slip op. at 3–4 (Nav. Sup. Ct. July 11, 2007)).
26. *Id.* at 6.
27. *See id.* at 6–9.

> Finally, the Commission's remedy must be specific to the cure, and targeted toward wholeness of the individual's emotional health and well-being . . . . Competent evidence is normally required in the damages phase of any proceeding, and the requirement is no different when an award is made as a remedial order. . . . .
> The record shows that the Commission made no specific finding that any emotional suffering arose from the NPEA violation. Additionally, the award was neither accounted for by competent evidence nor reasonably tied to making [Wauneka] whole in terms of emotional health and well-being. The Commission strayed into treating the remedy as if a tort claim had been filed. For these above reasons, the Commission's award of $30,000 in emotional damages is reversed.[28]

In sum, the court acknowledged that violations of the NPEA might cause emotional distress but ruled that the Commission cannot grant monetary awards for emotional distress except upon specific findings, supported by competent evidence, that (1) the violation of the NPEA actually caused the emotional distress; (2) a monetary award is necessary to cure the violation; and (3) the amount of the monetary award is reasonably tied to the complaining party's efforts to treat the emotional distress that arose from the violation.[29] That is, the award "must be remedial with a goal to cure" the NPEA violation.[30] The court also stated that the remedy must be tailored to cure the violation "within a reasonable time" and "that the timeframe for the remedy must not be open ended."[31] The court noted that the employee must be held accountable for timely treating his or her physical, mental, and spiritual conditions.[32]

In addition, the court said the Navajo principle of *bee k'éndzísdlį́į'* requires the Commission to hold both the offending party and the injured party accountable for their actions when it crafts remedies.[33] The principle of *bee k'éndzísdlį́į'* refers to methods that would be employed to resolve discord and restore a positive relationship among disputants. One such method, as the court suggested, is peacemaking: "[I]f parties are willing to meet in a peacemaking setting, the Commission may include such a remedy calculated to achieve balance and harmony for the parties,

28. *Id.* at 7–9 (citation omitted).
29. *See id.*
30. *Id.* at 6.
31. *Id.* (citing 15 N.N.C. § 612(A)(1)).
32. *See id.* at 7.
33. *See id.* at 8.

and require voluntary talking out and apologies . . . ."[34] Of course, the peacemaking session "must be specific to the cure," which means the session would also address the employee's "emotional health and well-being."[35]

The court then turned to the Commission's imposition of a civil fine.[36] The court affirmed the fine, recognizing that the NPEA permits the imposition of a civil fine as a "remedial order" for intentional violations and deferring to the Commission's finding that the Department acted intentionally.[37]

After the court issued its decision in *Wauneka I*, the Navajo Department of Law Enforcement sought reconsideration of the court's decision to affirm the Commission's award of a civil fine.[38] The court denied the motion for reconsideration, but took the opportunity to explain the perimeters of the Commission's authority for setting the amount of civil fines.[39] The court wrote that the NPEA permits civil fines as remedial measures but "does not contemplate punitive amounts" for such fines.[40] The fine, if awarded, "must not be excessive given a competently accounted for compensatory scheme."[41] In light of the Commission's award of $9,911.20 in back pay and $8,337.60 in attorney's fees, the court found the $5,000 civil fine to be "well within the compensatory scheme in this case."[42]

In *Hasgood v. Cedar Unified School District*,[43] the Navajo Nation Supreme Court responded to a United States District Court judgment depriving the Navajo Nation of jurisdiction over certain employment-related claims brought by Navajo employees against Arizona public school

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34. *Id.* For a more in-depth discussion of Navajo peacemaking, see, for example, Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297 (2000). Although portions of the article are outdated because of subsequent changes to peacemaking rules, the article provides a relevant overview and history of peacemaking.

35. *Wauneka I*, No. SC-CV-27-09, slip op. at 8.

36. *See id.* at 9.

37. *Id.* (citing 15 N.N.C. § 612(A)(1)).

38. Wauneka v. Navajo Dep't of Law Enforcement (*Wauneka II*), No. SC-CV-27-09, slip op. at 1 (Nav. Sup. Ct. May 25, 2011).

39. *See id.* at 1–2.

40. *Id.* at 1 (citing 15 N.N.C. § 612(A)(1)).

41. *Id.*

42. *Id.* at 1–2.

43. Hasgood v. Cedar Unified Sch. Dist., No. SC-CV-33-10, slip op. (Nav. Sup. Ct. May 9, 2011).

districts operating within the boundaries of the Navajo Nation.[44] The federal court had (1) granted summary judgment in favor of the Arizona school districts; (2) declared that the Navajo Nation had no regulatory or adjudicative jurisdiction over the personnel decisions of the school districts as they related to certain employment termination-related claims; (3) voided any orders and judgments previously issued by the Commission and the Navajo Nation Supreme Court as they pertained to those claims; (4) enjoined Hasgood and the other plaintiffs-appellees from further prosecution of their claims before the Commission and the Navajo Nation Supreme Court; and (5) enjoined the Commission from further adjudication of the claims.[45]

After the federal district court issued its judgment, the parties filed a stipulated dismissal of appeal in the Navajo Nation Supreme Court, agreeing that the then-pending appeal was rendered moot by the federal court decision.[46] The Navajo Nation Supreme Court, adopting a somewhat defiant tone, granted the dismissal "solely on the basis that the parties [did not pursue] an appeal of the federal district court's judgment" and declined to grant the dismissal on the stipulated basis of mootness.[47] The court characterized the federal court's decision as a determination that "state actors entering tribal lands to fulfill a governmental obligation are not subject to tribal legislative or adjudicative jurisdiction in decisions unrelated to tribal land."[48] The court then critiqued the federal court's reasoning as "overbroad and capable of being misapplied," "shortsighted," and "unsupported by authoritative precedent."[49] Emphasizing that the Navajo Nation government is "heavily reliant on a variety of public and private sources for the education of its children living within the Navajo Nation's boundaries," the court commented that the federal court's decision "operates to dismiss the superintending role of Navajo government in determining what Navajo children should learn on their own lands if such imperatives collide with state school policy and state law."[50] The court than called upon the "policy leaders of the Navajo Nation government" to discuss the jurisdictional issues arising from this mat-

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44. *See id.* at 1–2 (citing and quoting Red Mesa Unified Sch. Dist. v. Yellowhair, No. CV-09-8071-PCT-PGR, slip op. at 1–2 (D. Ariz. Sept. 28, 2010 (order)). The federal district court's decision is discussed in more detail in Part II, Section C, of this article, *infra* notes 334–348.

45. *See Hasgood*, No. SC-CV-33-10, slip op. at 1–2.

46. *See id.* at 1.

47. *Id.* at 2.

48. *Id.* at 2 (citing *Yellowhair*, No. CV-09-8071-PCT-PGR, slip op. at 9).

49. *Id.* at 2, 5.

50. *Id.* at 3–4.

ter "with the Federal and Arizona governments and resolve it before allowing any more time to pass."[51] The court concluded by writing that it would "forward a copy of this opinion to the federal district court, the Governor of the State of Arizona, the President of the Navajo Nation, the Superintendent of Public Instruction for the State of Arizona, and the Navajo Nation Superintendent of Schools."[52]

In *Rosenfelt & Buffington, P.A. v. Johnson*,[53] the Navajo Nation Supreme Court reviewed the NPEA's requirement that employers must have just cause to take adverse action against employees.[54] The specific issue in the case was "whether an employee's continued violations of an employer's written policies following numerous meetings and communications initiated by the employer provided just cause for termination . . . when each separate violation may not arise to substantial misconduct, each and in itself."[55]

Marlene Johnson was employed by the law firm of Rosenfelt & Buffington, P.A., in Shiprock, New Mexico, on the Navajo Nation.[56] The law firm's personnel policy contained the following provision:

> Employee conduct that violates accepted standards will not be tolerated. The Firm may give reasonable warnings to employees whose conduct falls below the norms, and employees are expected to demonstrate immediate and continued improvement with respect to the problems that generate such warnings. Repeated offenses, or a single instance of outrageous conduct, will lead to termination.[57]

Johnson engaged in "persistent violations, despite . . . months of meetings and emails initiated by the employer"[58] and "extensive in-house training."[59] Ultimately, the law firm terminated Johnson's employment for "sending emails containing sexually offensive matters, making demeaning comments about other staff and clients[,] undermining staff morale and

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51. *Id.* at 4-5.
52. *Id.* at 5.
53. Rosenfelt & Buffington, P.A. v. Johnson, No. SC-CV-34-08, slip op. (Nav. Sup. Ct. October 21, 2011).
54. *Id.* at 3. For a discussion of the NPEA's just cause requirement, see Brown & Austin, *supra* note 1, at 42–45. The authors thank Ian Burrell, James E. Rogers College of Law, University of Arizona, Class of 2013, for his editorial assistance with our discussion of the *Rosenfelt* case.
55. *Rosenfelt*, No. SC-CV-34-08, slip op. at 3.
56. *See id.* at 1.
57. *Id.* at 4.
58. *Id.*
59. *Id.* at 6.

office decorum, being rude and unhelpful to visitors and clients, and failing to perform assigned tasks properly."[60] Johnson ultimately filed a complaint with the Commission.[61] After a hearing, the Commission determined that the law firm terminated Johnson without just cause in violation of the NPEA.[62] Specifically, the Commission found that although "each ground cited by the firm for the termination violated multiple provisions" of the firm's written policies, none of Johnson's individual actions could be deemed "outrageous" and the law firm failed to apply progressive disciplinary measures prior to the termination.[63] The Commission invalidated the termination, finding that "no just cause for termination was established by the requisite preponderance of evidence."[64] The firm appealed the Commission's order to the Navajo Nation Supreme Court.[65]

In analyzing the case, the court reviewed a number of its prior opinions in which it held that (1) employees must comply with their employers' personnel manuals as long as the manuals comply with the NPEA;[66] (2) where personnel manuals allow for progressive discipline, employers are not required to take disciplinary action after every act of employee misconduct;[67] (3) just cause is determined on a case-by-case basis depending on the particular facts of each case;[68] and (4) misconduct must be "substantial" in order to constitute just cause.[69] Turning to the facts of the case before it, the court found that Johnson's continued acts of misconduct "showed a deliberate violation of the employer's standards after repeated warnings."[70] The court concluded that although each violation "may not have been so serious," the "cumulative effect—repeated violations of multiple provisions of the law firm's policies—[was] serious, constituting substantial misconduct that meets the standard for just cause [to

60. *Id.* at 2.
61. *See id.*
62. *See id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 4 (referencing Begaye v. Navajo Nation Envtl. Protection Agency, No. SC-CV-23-07, slip op. at 4 (Nav. Sup. Ct. November 30, 2009); Smith v. Navajo Nation Dept. of Head Start, 8 Nav. R. 709, 714 (Nav. Sup. Ct. 2005); Staff Relief v. Polacca, 8 Nav. R. 49, 57 (Nav. Sup. Ct. 2000); Dilcon Navajo Westerner/True Value Store v. Jensen, 8 Nav. R. 28, 40 (Nav. Sup. Ct. 2000)).
67. *Id.* at 5 (citing *Begaye*, No. SC-CV-23-07, slip op. at 9).
68. *Id.* at 4 (citing *Smith*, 8 Nav. R. at 714; *Dilcon*, 8 Nav. R. at 38; Smith v. Red Mesa Unified Sch. Dist. No. 27, 7 Nav. R. 135, 138 (Nav. Sup. Ct. 1995)).
69. *Id.* at 6 (citing Manygoats v. Atkinson Trading Co., 8 Nav. R. 321, 338 (Nav. Sup. Ct. 2001)).
70. *Id.*

support a termination action] under the NPEA."[71] The court thus held that the Commission erred and reversed the Commission's decision.[72]

In reaching this conclusion, the court commented that repeated violations do not constitute just cause simply because of their repetitive nature.[73] The court wrote: "The inquiry doesn't end simply because an employer's manual permits termination for 'repeated' violations after warnings have been given. The repeated violations must rise to substantial misconduct."[74] In other words, multiple acts of minor misconduct may still be minor, even when viewed cumulatively. It is the employer's burden to prove that the cumulative effect of the minor conduct rises to the level of substantial misconduct. The crucial factor in *Rosenfelt* was that the employee "had been conveyed the critical importance to the employer's business of her conforming her conduct to the policies."[75] In the court's view, Johnson's failure to conform her conduct to the policies after multiple warnings and training sessions was "deliberate," thus elevating it to the level of "substantial misconduct."[76]

The court's opinion is also notable for its comment that Johnson's individual acts may not "have been so serious."[77] This might come as a surprise to employers who would consider Johnson's individual acts to have been quite serious. Certainly, a reasonable employer could find that Johnson's demeanor or acts, individually or cumulatively, were "serious" or "substantial" enough to justify adverse employment action. To emphasize the point, employers striving to earn a profit (and therefore contributing to individual and societal economic development) depend on quality employees and a stable customer base. Employees engaged in conduct and behavior similar to Johnson's tend to jeopardize their employers' chances for success. In such circumstances, employers should not be hamstrung in their discretion to terminate the offending employee.

The *Rosenfelt* case illustrates the difficulty inherent in the subjective "substantial misconduct" standard for determining whether just cause exists to terminate an employee. In *Smith v. Navajo Nation Department of Head Start*, the court attempted to give meaning to "substantial misconduct" by distinguishing it from what it is not: "a minor neglect of duty, an excusable absence, a minor misrepresentation, rudeness, and even filing a

71. *Id.*
72. *See id.* at 7, 9.
73. *See id.* at 6.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

defamation action against the employer."[78] After *Rosenfelt*, however, employers are left to struggle with the question of whether an employee's individual acts such as "making demeaning comments about other staff and clients," "undermining staff morale and office decorum," "being rude and unhelpful to visitors and clients," "failing to perform assigned tasks properly," and even "sending emails containing sexually offensive matters," each of which would certainly seem "substantial" and "serious" to many employers, are sufficiently serious enough to satisfy the Commission's and court's standard of "substantial misconduct." To the extent that the court has successfully balanced the interests of employers and employees under the NPEA in past cases, this aspect of the *Rosenfelt* case could tip the scale in favor of employees to the detriment of reasonable employers. As such, this portion of the case is worthy of reexamination by the court or the Navajo Nation Council.

The final section of the court's opinion in *Rosenfelt* discusses *k'é* measures as they apply to employer-employee relationships. *K'é* measures are values that facilitate a positive employer-employee relationship and include personal accountability, talking things out, self-knowledge, self-correction, withholding punishment or threat of sanctions, and respect for others.[79] A basic Navajo principle in this area states that "an individual voluntarily corrects errant conduct out of respect for others."[80] A problem is pointed out to an individual through oblique methods with the expectation that the individual will voluntarily address or correct the problem.

> Traditionally, values in Diné society are transmitted through oblique methods of speaking that emphasizes voluntariness . . . . [T]he person requiring action would say that something needs to be done and leave it up to the person to whom they are speaking to take action. For example, one would simply be told that an animal is not getting enough feed in the place it is in, or there is not enough firewood, or some behavior is causing disharmony. The person being spoken to would be expected to understand that he or she is responsible to take action and make the decision to correct the situation themselves.[81]

Johnson's employer relied on *k'é* values and methods through personal meetings, emails, and counseling over the course of eight months in

78. Smith v. Navajo Nation Dep't of Head Start, 8 Nav. R. 709, 714 (Nav. Sup. Ct. 2005) (footnote and citations omitted).

79. *Rosenfelt*, No. SC-CV-34-08, slip op. at 7, 8.

80. *Id.* at 7.

81. *Id.* at 8.

attempts to get Johnson to self-correct her errant behavior. However, she did little to self-correct, perhaps because, as the court said, the employer did not impose "punishments or threats of punishments" on her.[82] The court explained, Johnson's "actions show a belief, apparently relying on an interpretation of how employment laws have evolved in our sister jurisdictions, that workplace violations require no corrective actions by an employee unless the employer has made a threat of future sanctions."[83] While sanctions may play a role in workplace relationships in "*bilagaana* jurisdictions, it is not the Diné way, nor will [Navajo] laws support such a purely adversarial interpretation of employer-employee responsibilities . . . when disputes occur."[84]

While use of oblique methods failed to register with Johnson, the court praised her employer's "efforts at counseling over eight months without also imposing reprimands or other punishments" because such efforts conform "to the Diné objective of restoring relationships."[85] Expanding on its statement, the court wrote:

> [W]here an employer's personnel policies manual permits a *k'é* alternative to progressive sanctions . . . , such measures undertaken by an employer (in which the employee is informed of his or her violative acts, and is asked to be self-accountable by self-correcting the violations without also being imposed threats of sanctions) may be used in place of reprimands, oral or written, in the Navajo Nation employment context . . . . [*K*]*'é* measures are desirable and even preferred in Navajo Nation employment relations policies, and may even be utilized in lieu of progressive discipline in appropriate circumstances.[86]

The court suggests that employers who use *k'é* alternatives need not impose progressive disciplinary actions when an employee violates employment rules and policies. Nonetheless, it is certainly established and acceptable practice, though not required by the NPEA or its case law, to impose progressive measures and provide written notices so that employees are made aware of the consequences of their misconduct and poor performance. Furthermore, written warnings are consistent with the court's instruction that *k'é* and disciplinary measures "must be fundamentally fair to employees by ensuring that they are fully aware of the stan-

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82. *Id.* at 7.
83. *Id.*
84. *Id.* at 7-8. The term "*bilagaana*" refers to people of European descent.
85. *Id.* at 8.
86. *Id.* at 8-9.

dards of conduct expected of them and are treated fairly and consistently should a violation occur."[87]

Clark v. Diné College[88] addressed a variety of issues, not all of which were related to the NPEA and some of which were as political in nature as they were legal.[89] As a matter of background, Diné College (College) is a two-year college located in Tsaile on the Navajo Nation.[90] The College is a creature of Navajo statutory law, is governed by a Board of Regents (Board), and was, at the time of the case, subject to the oversight of the Navajo Nation Council's Government Services Committee (GSC).[91]

Ferlin Clark was the president of the College.[92] On January 25, 2010, the Board placed Clark on paid administrative leave pending an investigation into allegations that he engaged in unprofessional and unacceptable conduct.[93] The College's policies allowed for non-disciplinary paid administrative leave for thirty calendar days, unless extended upon the approval of the employee's supervisor and the Director of Human Resources.[94] On March 5, 2010, Clark petitioned the Commission for a preliminary injunction.[95] The petition asked the Commission to enjoin the College from extending Clark's administrative leave.[96] Notably, an underlying ONLR charge had never been filed; the action began with the filing of Clark's petition for injunctive relief.[97]

On March 24, 2010, the Commission held a hearing on Clark's petition and, on April 6, 2010, the Commission granted the injunction.[98] On the same day, the College filed a request to stay the injunction, but the Commission never ruled on the College's request.[99] On April 26, 2010, the GSC "voted without explanation to immediately remove three regents from the Board, leaving the Board with three active serving regents, which is below the number needed for a quorum."[100] On the following

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87. *Id.* at 9.
88. Clark v. Diné Coll. (*Clark I*), No. SC-CV-25-10, slip op. (Nav. Sup. Ct. Oct. 27, 2010).
89. *Id.*
90. *See* DINÉ COLLEGE, *History*, http://www.dinecollege.edu/about/history.php (last visited May 4, 2013).
91. *See id.*
92. *See Clark I*, No. SC-CV-25-10, slip op. at 1.
93. *See id.* at 2.
94. *See id.* at 2 n.2.
95. *See id.* at 2.
96. *See id.*
97. *See id.* at 2, 15.
98. *See id.* at 2.
99. *See id.* at 3.
100. *Id.*

day, while the Board still had only three active regents, the College's legal counsel filed a Notice of Appeal from the Commission's grant of injunctive relief.[101]

On May 31, 2010, Clark's employment contract expired by its own terms.[102] However, Clark continued to "occupy and function in the college president's position."[103] As of August 30, 2010, the Commission had not yet ruled on the College's April 6, 2010, request to stay the injunction, and on that date the College filed with the Navajo Nation Supreme Court a second, emergency petition to stay the injunction.[104] In its petition, the College explained that Clark "was now terminating employees who had testified against him in front of the Commission, demonstrated against him, or otherwise questioned his authority . . . ."[105] On September 8, 2010, the College filed a request for immediate issuance of the stay.[106] The court granted the College's request for immediate issuance of the stay and ordered Clark to cease all duties as College president.[107] Jack Jackson, Sr.—an educator and former Arizona state legislator—was appointed to serve as the temporary president of the College.[108] On September 16, 2010, Jackson sought leave to file an amicus brief or for leave to intervene as a party.[109] Then, on September 20, 2010, Clark filed a response to the College's August 30, 2010, emergency petition to stay the injunction.[110] On September 21, 2010, the court held a hearing on the College's request for a stay.[111] A number of issues were presented to the court and, at the close of the hearing, the court granted the College's petition for a stay and ordered additional briefing.[112]

The court issued its opinion on October 27, 2010, addressing a variety of issues including jurisdiction, standing, the legality of the GSC's removal of three regents, the status of Clark's employment contract, and the authority of the Commission to issue preliminary injunctions when an underlying ONLR charge had not been filed.[113] The court noted, "Events have overtaken this appeal since it commenced, and issues regarding

101. *See id.*
102. *See id.*
103. *Id.*
104. *See id.* at 4.
105. *Id.*
106. *See id.*
107. *See id.*
108. *See id.*
109. *See id.*
110. *See id.*
111. *Id.* The hearing was held at the College.
112. *See id.* at 4–5.
113. *See id.* at 5–16.

standing and the expiration of an employment contract have shaped the arguments of the parties and now dictate the direction of this Court's opinion."[114]

With respect to jurisdiction, the court addressed the fact that the College filed its petition for a stay with the Supreme Court even though the Commission had not yet ruled on the College's request for a stay.[115] Finding that this fact did not deprive the court of jurisdiction over the College's petition, the court explained:

> Appeals from Commission decisions are prescribed by statute. Decisions of the Navajo Nation Labor Commission are generally appealable to the Supreme Court of the Navajo Nation pursuant to 15 N.N.C. § 613(A). However, petitions for stays of Commission orders must first be filed with the Commission with an opportunity for response by the adverse party unless the Commission has otherwise approved a stipulation by the parties. A petition for a stay may be filed with the Supreme Court if the petition to the Commission is denied, which may grant the stay upon satisfaction of an appeal bond, or otherwise. In this case, the College petitioned this Court for a stay almost four months after they had filed for a stay to the Commission with no response from the Commission. We deem the inaction by the Commission over such a lengthy period a denial for purposes of [Navajo Rules of Civil Appellate Procedure] Rule 25(d), and find the College's petition for a stay of execution is properly before this Court.[116]

The court next addressed the status of Clark's employment contract.[117] Clark argued that, although his contract expired on May 31, 2010, the Board had entered into a new contract with him.[118] Alternatively, Clark argued that he could not be terminated "without a proper ceremony because of the medicine bundle entrusted to him when he became college president."[119] Clark's first argument was based on the Board's December 18, 2009 vote to send Clark a written letter of intent to renew his employment contract.[120] Following the vote, the Board president signed a resolution stating that the Board had approved an employment contract for Clark.[121] The Board president later asserted that he signed the resolu-

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114. *Id.* at 5.
115. *See id.*
116. *Id.* (citing 15 N.N.C § 613(B) and N.R.C.A.P. 25(d)).
117. *See id.* at 11.
118. *See id.*
119. *Id.*
120. *See id.*
121. *See id.*

tion by mistake.[122] In any event, no contract was approved and, on January 25, 2010, Clark was placed on paid administrative leave.[123] However, a written contract, signed only by Clark and bearing hand-written changes initialed by Clark, did exist.[124]

Clark maintained that the Board president's signature on the resolution created a contract.[125] The court disagreed.[126] The court pointed out that neither the College's bylaws nor applicable statutes made the Board president an agent of the Board or gave him apparent authority to bind the College to contracts without the Board's actual consent.[127] In fact, the Navajo Nation Code expressly provides that "No individual power or authority to act for or on behalf of Diné College shall attach to any Regent by virtue of that office, except as may be expressly given by this Chapter, the Bylaws, or resolution of the Board."[128] The court added, "The limitations of the powers of the Board president [are] plain, and Clark would be familiar with this provision."[129]

The court then discussed and ultimately disagreed with Clark's argument that he could not be terminated without a proper ceremony.[130] Clark argued that "as college president, [he] had been entrusted with ceremonial items" so that he could not "be terminated without a formal ceremony of passing the ceremonial items to a successor."[131] The court explained that, under the terms of Clark's contract, no such ceremony was required for termination.[132] Without being altogether dismissive of the importance of such ceremonies for certain purposes of transferring leadership, the court noted that the lack of a ceremony "has no impact on the interpretation of contract terms and duties of officers."[133]

Regarding the ceremonial items in Clark's custody, the court wrote: "The sacred items belong to the College, and not to the individual. These ceremonial items are to be used in a positive way—to ensure that the

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122. *See id.*
123. *See id.* at 12.
124. *See id.*
125. *See id.*
126. *See id.* at 12–13.
127. *See id.*
128. *Id.* at 13 (citing 10 N.N.C. § 2011).
129. *Id*. at 13.
130. *See id.*
131. *Id.* Like the court, some Navajo traditionalists would likely view Clark's use of the "sacred items" to save his job as disrespectful of Navajo traditional religious-ways. Furthermore, this may be the first time since the College's founding in 1968 that its president has attempted to use the College's sacred items to avoid termination.
132. *See id.*
133. *Id.*

College maintain[s] its philosophy of *Sa'ah Naaghéí Bik'eh Hózhóón*."[134] Diné College uses this philosophy, which stresses acquisition of knowledge through a traditional Navajo framework, to educate its students.[135] Another positive way would be the use of a proper ceremony to transfer the items from the custody of a current president to that of a successor.[136] Implicit in the court's positive-way statement was its displeasure with Clark's attempted use of Navajo sacred items to block his termination.

Ultimately, the court held that Clark's employment contract expired on its own terms on May 31, 2010, his contract was not extended, and he was not given a new contract.[137] Having decided that Clark's contract expired on May 31, 2010, the court next denied a further stay of the Commission's injunction, stating that the issue was moot.[138] In other words, because Clark did not have a contract and was no longer employed by the College, there was no need for an injunction against the College keeping Clark on paid administrative leave.

Finally, the court noted that the case had proceeded not from an initial ONLR charge, but from Clark's petition for a preliminary injunction filed with the Commission.[139] The court noted that Rule 4 of the Commission's Amended Rules of Procedures allows for preliminary injunctions.[140] The Rule merely states that the ONLR or the petitioner can seek preliminary relief "[p]rior to the initiation of Commission proceedings on a Charge[.]"[141] The court stated, "The rule suggests that a[n ONLR] charge is to be filed at some point, but is unclear as to whether and when a charge must be filed when Rule 4 relief is sought."[142] With the issue mooted by the expiration of Clark's employment contract, the court declined to offer any clarity on the issue.[143]

On November 16, 2010, Clark filed a petition for reconsideration of the court's opinion in *Clark I*, raising a number of issues including those related to the ceremonial transfer of the medicine bundle, as well as the

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134. *Id.* at 13.

135. DINÉ COLLEGE, *Educational Philosophy*, http://www.dinecollege.edu/about/philosophy.php (last visited May 4, 2013).

136. *Clark I*, No. SC-CV-25-10, slip op. at 13.

137. *See id.* at 14.

138. *See id.* at 14–15.

139. *See id.* at 15.

140. *Id.* (citing AMENDED RULES OF PROCEDURES FOR THE NAVAJO NATION LABOR COMMISSION, 4 (as amended by Res. NNLC JUN-02-2012 (June 28, 2012, eff. July 25, 2012)) (on file with Howard L. Brown) [hereinafter NNLC Rules]).

141. *Id.* at 15 (quoting and citing NNLC Rules, 4).

142. *Id.* at 15.

143. *See id.* at 15–16.

status of his employment contract.[144] With respect to the ceremonial transfer of the medicine bundle, the court affirmed its earlier holding that such a ceremony was not necessary to terminate Clark's employment.[145] Clark claimed that "as a matter of Navajo fundamental law," his employment as College president could "not be terminated unless a formal ceremony is conducted passing the ceremonial items to a successor."[146] Clark claimed that the court erred when it (1) stated "that the sacred items belong to the College as if they were items of property" and (2) found that "a ceremony passing the sacred items is not necessary for his employment to be terminated."[147] Addressing those claims, the court first clarified what it meant when it used the word "belong" in its previous opinion. "We clarify that this Court's sense of 'belong' or own is in the sense of being rightly placed in a specific position, not in relation to property. . . . [Thus] the right place for the sacred items is the College[.]"[148] In other words, the court saw the College as "the keeper" of the sacred items. As illustrated by the court's discussion, attempts to translate Navajo traditional concepts into English can be difficult.

The court then turned to the question of whether a ceremony passing the sacred items to a successor must be done before Clark could be terminated. At the outset, the court voiced its displeasure with the use of sacred items and ceremony to advance arguments in the case.

> When in this appeal, Appellee [Clark] asserted to this Court that a ceremony to surrender the sacred items is required before the College may terminate him, we were frankly uneasy. This matter has been raised in the atmosphere of chaos which has engulfed both parties, who cannot speak directly to each other and who even mutually deny events which occurred in their presence. Matters of sacred ceremonies ought to be discussed with a heightened measure of *k'é*—a sense of balance, restoration among the parties, and coming from the heart. *K'é* is naturally diminished in an adversarial forum where one party is accusing the other and there is no consensus that an ongoing relationship is even desired.[149]

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144. Clark v. Diné Coll. (*Clark II*), No. SC-CV-25-10, slip op. at 1 (Nav. Sup. Ct. December 3, 2010). Issues discussed in the case that are not relevant to the NPEA or Navajo employment law are not addressed herein.

145. *Id.* at 2–4.

146. *Id.* at 2. Navajo Fundamental Law is codified at 1 N.N.C. §§ 201–206.

147. *Clark II*, No. SC-CV-25-10, slip op. at 2.

148. *Id.*

149. *Id.* at 2–3. In its previous opinion, the court denied Amicus Jackson's request to dismiss the appeal because it was filed after the GSC removed three regents, thus leaving the Board without a quorum and without the ability to authorize the filing of the appeal. *Clark I*, No. SC-CV-25-10, slip op. at 7. The court examined the legality of

Practitioners would be well advised to thoroughly understand the nature of sacred objects, their purpose, and how they are handled and spoken of before determining whether they should be used to fashion legal arguments in an adversarial proceeding.

Sacred items, the court said, "confer duties of the heart and spirit."[150] Clark had referred to the sacred items interchangeably as "*jish*" and "medicine bundle," but the court found those terms were not appropriate because the record did not reflect what specific items were placed in his custody.[151] The court explained that "traditionally, a *jish* is entrusted to a medicine man who may then perform ceremonies, songs and prayers."[152] Regarding the items in Clark's custody, the court wrote:

> The association of other sacred ceremonial items (which also may constitute part of a *jish*) with an institution such as Diné College is a modern-day development where the holder, here the President of the College, appears to be relieved of the actual ceremonial duties and instead, is given intangible duties of the heart and spirit to uphold Diné philosophy in the education of our children. The establishment of hierarchical institutions is also a modern-day development, and perhaps it is inevitable that there will be confusion regarding the symbolism of sacred objects when associated with institutions. We note that such sacred items are not mere symbols, but are medicine as traditionally used by the Diné.[153]

If, as the court said, sacred items "confer duties of the heart and spirit" and are "medicine," then it may not be appropriate to use them as pawns in an adversarial proceeding.

A ceremony passing the sacred items to Clark's successor was not needed as part of his employment termination because sacred items do not confer "hierarchical authority and power over institutions or people, only duties and responsibilities of the heart and spirit to protect and heal . . . . The sacred items are not like a *bilagaana* scepter or crown or a

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the GSC's action "insofar as it bears on the College's standing in this appeal." *Id.* at 9. The court ultimately found that "the GSC's reduction of the Board to below quorum . . . was prohibited by law as it violated" a statutory prohibition against interference with the day-to-day activities of the Board. *Id.* at 10. The court thus held that the three regents had not been "legally removed and, therefore, continued to serve in their positions . . . without interruption." *Id.* at 10–11. The court further held that the College's "appeal" was properly before the court. *Id.* at 11.

150. *Clark II*, No. SC-CV-25-10, slip op. at 3.

151. *Id.* at 1 n.2.

152. *Id.* at 3.

153. *Id.*

great seal of office." In addition, the court found it too must respect the nature of the sacred items:

> We note in closing that it is beyond the jurisdiction of any adversarial proceeding to dictate the proper handling of sacred ceremonial items, to make findings on the story of their creation, or to settle guidelines for their use. This Court will not engage in adversarial sparring concerning these matters, and such matters are not to be discussed in the environment of gamesmanship and obfuscation that often takes place in adversarial forums.[154]

The court is obviously protective of what is called "guarded knowledge."[155] The court also made it plain that Navajo sacred items should not be used in adversarial proceedings in an attempt to gain an advantage (or, perhaps, to contravene the terms of a written contract). Finally, Clark was instructed to make "proper passage of the College's sacred items for the sake of the mental, psychological and emotional well-being of the students of Diné College."[156]

With respect to the status of his employment contract, Clark argued that his case was on point with the court's opinion in *Goldtooth v. Naa Tsis [Aan] Community School*.[157] In *Goldtooth*, the court ruled that "an employee may rely on the apparent authority of the Executive Director . . . when offered renewal of an employment contract by mistake, when the Executive Director had done so believing that the board had voted to renew [the employee's] contract when it did not."[158] The *Clark II* court determined that *Goldtooth* was distinguishable.[159] In *Goldtooth,* the employee was a staff member who did not attend board meetings, whereas in *Clark II*, Clark was a high-ranking official and was actually present during key Board actions and discussions regarding his employment and contract.[160] Additionally, Clark had "made substantial changes to the proposed contract in his own handwriting."[161] In short, Clark knew or should have known of the circumstances surrounding his employment contract (i.e., that there was no contract) and therefore could not rely on

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154. *Id.* at 4.

155. For a brief discussion of "guarded knowledge," see Brown & Austin, *supra* note 1, at 61.

156. *Clark II*, No. SC-CV-25-10, slip op. at 4.

157. *Id.* at 9 (citing Goldtooth v. Naa Tsis [Aan] Comty. Sch., 8 Nav. R. 682 (Nav. Sup. Ct. 2005)). For a more in-depth discussion of *Goldtooth*, see Brown & Austin, *supra* note 1, at 64–65.

158. *Clark II*, No. SC-CV-25-10, slip op. at 9.

159. *Id.*

160. *Id.*

161. *Id.* at 10.

an "apparent authority" argument as had been used in *Goldtooth*. As such, the court affirmed its prior decision that Clark's contract had expired without being renewed and therefore Clark was not under contract with the College.

Turning to the next case, *Yazzie v. Tooh Dineh Industries, Inc.*[162] returned to the Navajo Nation Supreme Court. In a 2006 decision, which we briefly discussed in our 2010 article,[163] the Navajo Nation Supreme Court remanded the case to the Navajo Nation Labor Commission for a hearing on the merits.[164] After remand, the Commission dismissed Yazzie's complaint and Yazzie appealed again to the Navajo Nation Supreme Court.[165] The court affirmed the dismissal on February 2, 2010.[166] Yazzie then filed a petition for reconsideration.[167] In his petition, Yazzie argued that the Commission and the court "were not informed and they did not note" that he could not have violated the personnel policy that was at issue in his complaint.[168] Tooh Dineh Industries countered that Yazzie was asserting a new issue not previously raised.[169] The court agreed with Tooh Dineh and cited a number of opinions for the well-established principle that "no new issues should be considered if [they were] not brought up in the lower tribunal."[170] Thus, the court denied Yazzie's petition for reconsideration, stating that Yazzie had the opportunity to present all of his legal theories and factual arguments and that he "knew or should have known of the facts at the trial level."[171]

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162. Yazzie v. Tooh Dineh Indus., No. SC-CV-44-07, slip op. (Nav. Sup. Ct. April 6, 2010).

163. Brown & Austin, *supra* note 1 nn.240 & 257.

164. Yazzie v. Tooh Dineh Indus., No. SC-CV-67-05, slip op. at 8 (Nav. Sup. Ct. September 2, 2006).

165. *Tooh Dineh*, No. SC-CV-44-07, slip op. at 1.

166. *Id.*

167. *Id.*

168. *Id.* at 1–2.

169. *Id.* at 2.

170. *Id.*

171. *Id.* at 2–3. In *Clark I*, the court was faced with legal questions that it characterized as having "evolved due to changed circumstances" and that therefore had not been raised at the Commission level. *Clark I*, No. SC-CV-25-10, slip op. at 6. The court noted that "issues not raised below are not appealable" but stated that "we have long reserved the right to raise legal issues not raised by the parties." *Id.* (citations omitted). Reading *Clark I* together with *Tooh Dineh*, No. SC-CV-44-07, slip op., it appears that the court might, under certain circumstances, consider legal arguments not previously raised, but will decline to address factual issues that could or should have been raised below.

B. Navajo Nation Labor Commission Cases and Rules[172]

In *Mae Arviso v. Sacred Wind Communications*,[173] the Commission dealt with (1) the NPEA's requirement that employers give written notice of adverse action to the affected employee and (2) the question of how to craft remedies for violations of the NPEA based on the unique facts of each case.[174] Sacred Wind Communications, Inc. (SWC) is a telecommunications company with headquarters in Albuquerque, New Mexico, and offices in Bloomfield, Grants, and Yatahey, New Mexico.[175] None of its offices are located on the Navajo Nation.[176] However, at the relevant time, approximately 94 percent of its customers and twenty-one out of thirty-five of its employees were Navajo.[177] SWC was not aware that the NPEA applied to its employment actions because all of its offices were located outside the Navajo Nation.[178] Without addressing the point directly, the Commission concluded that the NPEA did, in fact, apply to SWC's employment actions.[179]

Arviso was an employee at SWC's office in Yatahey.[180] On January 13 and 14, 2010, several SWC employees found a "corn pollen/meal substance on their desks, on their office doors, throughout the premises, and surrounding the outside [perimeter] of the building which caused wide spread panic and fear among the staff."[181] One employee testified that he was "disturbed when he found the substance because he believed it could affect him physically and mentally in a bad way" and he "did not touch the substance because he thought it might be for evil purposes."[182] The employee explained to SWC's chief operating officer (COO) that "this

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172. This discussion is not intended to be a comprehensive survey of all NNLC decisions over the past several years. Additionally, readers are cautioned that the Commission decisions discussed herein may have since been appealed to the Navajo Nation Supreme Court. For more information about the authority and responsibilities of the Commission, see Brown & Austin, *supra* note 1, at 55–60.

173. Arviso v. Sacred Wind Commc'ns, Inc., NNLC 2010-085, slip op. (May 9, 2012).

174. *Id.* at 2–3. For more information on the NPEA's requirement for written notice, see Brown & Austin, *supra* note 1, at 47–49.

175. *Arviso*, NNLC 2010-085, slip op. at 3.

176. *Id.* at 4.

177. *Id.* at 3.

178. *Id.* at 3–4.

179. *Id.* at 4. Presumably, the Commission determined that the NPEA applied to SWC because, although its offices were located outside the Navajo Nation, it conducted business within the boundaries of the Navajo Nation or within Navajo Indian Country. *See* 7 N.N.C. § 254.

180. *Arviso*, NNLC 2010-085, slip op. at 3.

181. *Id.* at 4.

182. *Id.*

was a very serious situation for Navajos and that something bad was probably going to happen."[183] The COO watched video surveillance of the premises, which showed Arviso "walking the perimeter of the premises strewing a substance from a bag she held in her hand after hours on January 13[, 2010]."[184] The matter was investigated further and, on January 25, 2010, SWC's chief executive officer (CEO) and COO met with Arviso.[185] The CEO did not intend to terminate Arviso; instead he "went to the meeting with an open mind hoping that [Arviso] would explain her actions and maybe apologize to her co-workers so that she could save her job."[186] Arviso did not do so and, as a result, the CEO terminated her for creating a hostile work environment.[187] SWC did not provide Arviso with a written notice of the termination and the reasons for the termination, as required by the NPEA.[188]

Arviso ultimately filed a Commission complaint against SWC.[189] At the hearing, the Commission granted a directed verdict in favor of Arviso based on SWC's failure to provide Arviso with a written notice of adverse action.[190] However, the Commission granted the directed verdict only after receiving testimony from SWC's witnesses regarding the circumstances surrounding Arviso's termination.[191] Arviso argued that it was improper for the Commission to consider the reasons advanced by SWC for terminating her because such reasons were not set forth in a written notice.[192] The Commission disagreed, stating that it was proper to receive evidence of the reasons for the termination "for the sole purpose of calculating remedial relief" and apportioning fault "consistent with the Navajo concept of *nályéél*."[193] As the Commission stated, "A ruling in favor of [Arviso] based on a technicality, like this case, cannot be viewed in a vacuum when it comes to the 'flexible concept of *nályéél*, which seeks to make a wronged person whole based on each unique situation.'"[194] Ultimately, the Commission pointed to its interpretation of Navajo Nation

183. *Id.* at 6.
184. *Id.*
185. *Id.* at 8.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 1.
190. *Id.* at 2.
191. *Id.* at 8.
192. *Id.*
193. *Id.* at 9 (citing Casaus v. Diné Coll., No. SC-CV-48-05, slip op. at 7 (Nav. Sup. Ct. March 8, 2007)).
194. *Id.* at 9 (quoting and citing Tso v. NHA, 8 Nav. R. 548, 559 (Nav. Sup. Ct. 2004)).

Supreme Court cases directing the Commission to "ensure that both parties are accountable for their actions when it crafts remedies."[195]

With that sense of balance as a backdrop, the Commission determined that, although Arviso did not receive written notice, her "due process right to notice was not violated."[196] Arviso admitted that she knew why she was terminated, and the Commission found that she was also aware of the facts giving rise to the allegations against her.[197] In fact, SWC's representatives attempted to engage in the *k'é* mechanism by meeting with Arviso and giving her an opportunity to explain her actions.[198] Noting that Navajo Fundamental Law "emphasizes personal accountability through talking things out, self-knowledge, and self-correction[,]" the Commission emphasized that Arviso refused to participate with the employer and "showed little respect for the *k'é* measures taken by the employer."[199]

Accounting for Arviso's conduct and relying on its own discretion to "shape an award based on the unique facts of each case," the Commission granted relief in favor of Arviso in the amount of $10,000, plus attorney's fees in the amount of $3,500, and directed SWC to expunge Arviso's personnel file; however, SWC was not required to reinstate Arviso or pay for her medicine man expenses.[200]

Arviso is an important case because of the Commission's insistence on holding the employee accountable for her misconduct and unwillingness to cooperate with her employer (even though the employee ultimately prevailed on her claim that the employer violated the NPEA), at least for purposes of determining a remedy. The case is also significant for the Commission's characterization of the NPEA's written notice requirement as a technicality, at least in cases where the employee had actual knowledge of the reasons she was terminated and the factual basis for those reasons.

Verna Begay v. Winslow Indian Health Care Center, Inc.[201] involved the NPEA's prohibition against taking adverse action without just cause and written notice.[202] As a matter of background, Verna Begay was employed by Winslow Indian Health Care Center (WIHCC) as the Director

195. *Id.* at 10.
196. *Id.* at 11.
197. *Id.* at 4, 11.
198. *Id.* at 11.
199. *Id.* at 12.
200. *Id.* at 12–13.
201. Begay v. Winslow Indian Health Care Ctr., Inc., NNLC 2010-030, slip op. (January 5, 2012).
202. *Id.* at 1.

of Community Health Services beginning on September 17, 2007.[203] While serving in that capacity, she was the subject of complaints that she was disrespectful and discourteous, she belittled and yelled at staff, and she intimidated and used disrespectful language toward her subordinates.[204] Begay was warned about her misconduct, she was placed on disciplinary probation as a result of such misconduct, and she received a variety of employment-related counseling to try to improve her conduct.[205] Her behavior continued and in April 2009 she was suspended for three days without pay.[206] Begay received a written notice of suspension advising her that "further misconduct may result in more severe disciplinary action including termination of employment."[207]

In April 2009, WIHCC learned that the State of Arizona had filed fifteen felony charges against Begay, arising from her seeking and receiving unemployment insurance benefits prior to being employed by WIHCC.[208] Although the charges were filed in July 2008, and Begay had attended a number of court appearances in 2008 and 2009, she never reported the charges to WIHCC.[209] To attend three of her court appearances, Begay requested and was granted sick leave from WIHCC.[210]

On May 11, 2009, WIHCC's human resources director and its chief executive officer learned that Begay, without authorization, had delivered to a number of WIHCC's board members documents including confidential paperwork about other WIHCC employees.[211] On May 12, 2009, WIHCC issued Begay a termination notice, effective the same day.[212] The basis for the termination was Begay's misuse of sick leave, communications with a board member outside established lines of authority, and disclosure of confidential information.[213] The termination notice also referenced Begay's disciplinary history.[214] WIHCC upheld Begay's termination after an internal grievance process.[215]

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203. *Id.*
204. *Id.* at 4.
205. *Id.* at 5, 6.
206. *Id.* at 2. The suspension was upheld after review by WIHCC's grievance committee. *Id.* at 11.
207. *Id*. at 7.
208. *Id*. at 12.
209. *Id.*
210. *Id.* at 13.
211. *Id.* at 14.
212. *Id.* at 13.
213. *Id.*
214. *Id.*
215. *Id.* at 14–15.

Begay filed an ONLR charge and then a Commission complaint against WIHCC. After review, the Commission found that WIHCC showed by a preponderance of the evidence that it had just cause to terminate Begay based on "the extensive documented incidences of [Begay's] failure to treat her subordinates and other WIHCC staff members with courtesy and respect"[216] and because, under the NPEA, employers are required "to prevent hostile activity by a supervisor to maintain a harmonious work place."[217] With respect to Begay's dishonesty about the criminal charges against her and misuse of sick leave, the Commission referred to the Navajo concept of a leader (*nat'áanii*) and stated that Begay, as a *nat'áanii*, had "the duty to be responsible to [her] employer to be honest and open about any conduct that may reflect badly on the organization."[218] Finally, the Commission noted that Begay's violation of WIHCC policy by providing the board with copies of confidential documents "may not have justified termination, but the cumulative effect of all of [Begay's] misconduct qualifies as substantial misconduct" warranting termination.[219] Finally, the Commission analyzed whether Begay received proper notice of her termination.[220] The Commission wrote:

> The Commission concludes that [Begay] received proper notice of the adverse action taken against her given the extensive prior oral and written warnings [Begay] received and the numerous meetings WIHCC had with [Begay] to correct her conduct. In reaching the foregoing conclusions, the Commission has taken into account [Begay's] lack of respect toward her employer contrary to *k'é*.
>
> WIHCC employed the *k'é* mechanism numerous times to deal with [Begay's] misconduct by meeting with her to let her know that her conduct was unacceptable and that she needed to correct herself. WIHCC was patient with [Begay] and demonstrated a willingness to work with her. However, as the CEO concluded in her final memorandum accepting the grievance committee's recommendation to terminate [Begay]—[Begay] was unwilling or unable to change her conduct. [Begay] lacked self-accountability.[221]

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216. *Id.* at 16–17.

217. *Id.* at 17–18 (citing Kesoli v. Anderson Sec. Agency, 8 Nav. R. 724, 729–730 (Nav. Sup. Ct. 2005)).

218. *Id.* at 18.

219. *Id.* at 19.

220. *Id.*

221. *Id.* (citing Rosenfelt & Buffington, P.A. v. Johnson, No. SC-CV-34-08, slip op. at 7 (Nav. Sup. Ct. October 21, 2011); Begay v. Navajo Nation Envtl. Prot. Agency, No. SC-CV-23-07, slip op. at 10 (Nav. Sup. Ct. November 20, 2009)).

The statement quoted above illustrates the Commission's commitment to holding employees accountable for their misconduct and unwillingness to cooperate with their employers' attempts to improve workplace conduct and performance.

In *LaFrenda Frank v. Diné College Board of Regents*,[222] the Commission addressed the NPEA's requirement that employers must hire Navajo applicants who meet the minimum qualifications for employment positions over non-Navajo applicants.[223] LaFrenda Frank, an enrolled member of the Navajo Nation, applied for an employment position with Diné College and was determined by the College to be qualified for the position.[224] Nonetheless, she was not hired.[225] Frank ultimately brought the matter to the Commission and filed a petition for a preliminary injunction against the College.[226] The Commission analyzed the factors relevant to issuing a preliminary injunction and, with respect to Frank's likelihood of success on the merits, referred to the NPEA's requirement that a Navajo applicant who demonstrates the necessary qualifications for an employment position must be hired.[227] The Commission found that Frank "not only met the minimum qualifications . . . , she was more qualified than the two persons who were hired . . . ."[228] The Commission went on to find that the College "intentionally violated the NPEA" by failing to hire Frank.[229] As such, the Commission granted Frank's petition for a preliminary injunction, ordered the College to hire Frank for the position

222. Frank v. Diné Coll. Board of Regents, NNLC 2011-060, slip op. (September 23, 2011).

223. *Id.* at 1, 3. For more information about NPEA requirements dealing with minimum qualifications, see Brown & Austin, *supra* note 1, at 31–38.

224. *Frank*, NNLC 2011-060, slip op. at 1, 3.

225. *Id.* at 5.

226. *Id.* at 1. Pursuant to the NPEA and the Amended Rules of Procedures for the Navajo Nation Labor Commission, a preliminary injunction may be granted if the moving party can show a protectable interest by a preponderance of the evidence, a high likelihood of success on the merits, that irreparable injury is likely to occur if the injunction is not issued, that the threatened injury is substantial, and that the movant does not have an adequate remedy at law. 15 N.N.C. § 610(K); AMENDED RULES OF PROCEDURES FOR THE NAVAJO NATION LABOR COMMISSION, Rule 4. The Commission analyzed these factors and found that Frank satisfied each of them.

227. *Frank*, NNLC 2011-060, slip op. at 5–6 (quoting 15 N.N.C. § 604(C)(1)). For more information about the NPEA's requirements dealing with the selection of qualified Navajo applicants, see Brown & Austin, *supra* note 1, at 31–38.

228. *Frank*, NNLC 2011-060, slip op. at 6.

229. *Id.* Although an intentional violation of the NPEA can trigger civil fines, 15 N.N.C. § 612(A)(1), the NNLC refrained from imposing a civil fine in this case because Frank did not request that it be imposed. *Frank*, NNLC 2011-060, slip op. at 6.

for which she applied (and which position was "occupied by the non-Navajo who had been illegally hired"), and pay Frank's attorney's fees.[230]

In *Eugene Bedonie v. Peabody Western Coal Company*,[231] the Commission dealt with the timelines for filing ONLR charges and Commission complaints.[232] Eugene Bedonie had been employed by Peabody Western Coal Company (PWCC) since 1978 and served as a supervisor since 2005.[233] In July 2006, PWCC posted a job opening for which Bedonie and ten other applicants applied.[234] Bedonie was not selected.[235] PWCC selected another employee with thirty years of experience but who was not Indian.[236] PWCC informed Bedonie about its selection of the other applicant in a letter dated August 9, 2006.[237] Over three-and-one half years later, on March 22, 2010, Bedonie filed an ONLR charge asserting that PWCC should have hired him in August 2006 because he was more qualified than the successful candidate (Failure to Hire Charge).[238] Bedonie also filed an ONLR Charge on March 5, 2010, alleging that, in a separate matter, he had been disciplined without just cause (No Just Cause Charge).[239] The following year, on March 10, 2011, Bedonie filed a Commission complaint.[240]

PWCC argued that Bedonie's Failure to Hire Charge was untimely, as the NPEA requires that ONLR charges must be filed within one year after accrual of the employee's claim.[241] Bedonie maintained that this time limitation was subject to equitable tolling because PWCC "actively concealed" information that the successful candidate was less qualified than Bedonie.[242] In rejecting this argument and finding that Bedonie's claim accrued on or about August 9, 2006 (the date PWCC informed Bedonie that another person was hired for the position), the Commission wrote:

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230. *Frank*, NNLC 2011-060, slip op. at 6–7. The Commission allowed Frank to submit proof of her costs and expenses, including the costs she incurred for traditional healing ceremonies related to the matter. *Id.* at 7.

231. Bedonie v. Peabody W. Coal Co., NNLC 2011-014, slip op. (August 8, 2011).

232. *Id.* at 1.

233. *Id.*

234. *Id.* at 2.

235. *Id.*

236. *Id.* at 2–3.

237. *Id.* at 2.

238. *Id.* at 3.

239. *Id.* at 5.

240. *Id.*

241. *Id.* (quoting 15 N.N.C. § 610(B)(6)).

242. *Id.* at 3–4. For a discussion regarding equitable tolling of the deadline for filing ONLR Charges, see Brown & Austin, *supra* note 1, at n.243, 257.

> Between September 2006 and March 22, 2010, [Bedonie] did not raise any questions about the hiring process. That is, during this time, [Bedonie] did not personally make any inquiries directly to the Human Resources Department regarding [the successful candidate's] credentials and qualifications . . . . A finding of "active concealment" may have been more likely had [Bedonie] asked PWCC to produce information . . . , but [PWCC] refused to offer any information, or where[ ] PWCC provided [Bedonie] false information indicating that [the successful candidate] was more qualified. In other words, the NPEA does not require employers to "share" information regarding the qualifications of an applicant who has been selected with other applicants who were not selected for a certain position, absent a request made by a non-selected applicant or upon the filing of [a] Charge challenging the qualifications of the person hired.[243]

In sum, the Commission wrote, "Equitable tolling is not available when the Petitioner[ ] himself[ ] fails to exercise due diligence."[244] As such, the Commission dismissed Bedonie's complaint because the underlying Failure to Hire Charge was untimely.[245]

Turning to the No Just Cause Charge, the NPEA requires that Commission complaints be filed within 360 days following the date on which the underlying charge was filed with the ONLR.[246] Bedonie filed his complaint 370 days after his No Just Cause Charge was filed with the ONLR.[247] Bedonie argued that the Failure to Hire Charge (which was filed on March 22, 2010—within the 360-day filing period) was really just an amended charge and that it included the No Just Cause Charge (which was filed on March 5, 2010—not within the 360-day filing period).[248] In a sense, Bedonie tried to resuscitate the untimely No Just Cause Charge by tying it to the timely Failure to Hire Charge. In analyzing this claim, the Commission considered Section 610(B)(5) of the NPEA, which provides that charges may be amended, but that any portion of the amendment that does not arise out of the same subject matter as the original charge shall constitute a new charge.[249] The Commission found that Bedonie's March 22, 2010, Failure to Hire Charge did not arise from the same subject matter and therefore was not an amendment of his March 5, 2010, No

243. *Bedonie*, NNLC 2011-014, slip op. at 4.
244. *Id.* at 4–5.
245. *Id.* at 6.
246. *Id.* at 5.
247. *Id.*
248. *Id.*
249. *Id.* at 5 (quoting 15 N.N.C. § 610(B)(5)).

Just Cause Charge.[250] As such, the Failure to Hire Charge constituted a new charge and the complaint based on the No Just Cause Charge was untimely.[251]

Duane Yazzie v. Navajo Agricultural Products Industry[252] discussed the just cause requirement for taking adverse actions against employees, as well as hostile work environment standards under the NPEA. [253] Duane Yazzie was employed by Navajo Agricultural Products Industry (NAPI) beginning in February 1995.[254] On May 28, 2009, Yazzie was disciplined for using profane and vulgar language toward another employee.[255] He was counseled regarding his misconduct and warned that another incident would lead to further disciplinary action, up to and including termination of employment.[256] On February 25, 2010, Yazzie had a confrontation with his direct supervisor in which Yazzie was insubordinate and disrespectful.[257] His employment was terminated later that day.[258]

Yazzie challenged the termination and ultimately filed a Commission complaint. Upon review, the Commission determined that NAPI had just cause to terminate Yazzie for insubordination.[259] The Commission noted that Yazzie had engaged in similar misconduct in the past and that he had been counseled and warned that future misconduct could result in termination.[260]

Traditional Navajo methods of conflict resolution are always available to employees and their supervisors. In this case, the Commission found that "a frank 'talking things out' session" between Yazzie and his supervisor would have been productive.[261] The civil process of talking things out encourages airing and discussion of complaints in a respectful manner with the goal of reaching agreement on how the conflicts should be resolved. As the Commission noted, Navajo custom discourages persons in dispute from "summoning the coercive powers of a powerful person or entity, but should seek to correct the wrongful action by 'talking

250. *Id.* at 6.
251. *Id.*
252. Yazzie v. Navajo Agric. Prods. Indus., NNLC 2010-072, slip op. (July 27, 2011).
253. *Id.*
254. *Id.* at 1.
255. *Id.* at 2.
256. *Id.*
257. *Id.* at 3–5, 6.
258. *Id.* at 5.
259. *Id.* at 4.
260. *Id.* at 7.
261. *Id.* at 9.

things out.'"[262] If the talking things out method does not work, then the employee always has the option of filing a formal grievance under the employer's grievance process.[263]

The Commission also addressed Yazzie's claim that he had been subjected to a hostile work environment.[264] Yazzie asserted that his supervisor yelled at him to get out of her office.[265] The Commission stated:

> Even if, for argument's sake, the Commission was convinced that [the supervisor] indeed yelled at [Yazzie] to get out of her office, this one incident does not rise to the level of a pervasive hostile work environment. Especially, in this case, where [Yazzie's] inconsiderate and disrespectful conduct toward his supervisor, more than likely, created the heated exchange between [Yazzie] and his supervisor . . . .
>
> In conclusion, the Commission is not convinced that this one incident gives rise to an actionable claim of "hostile work environment" pursuant to 15 N.N.C. § 604(B)(9).

Therefore, the Commission dismissed Yazzie's complaint against NAPI.

In *Elsie Rose Albert v. Ch'ooshgai Community School Board of Education, Inc.*,[266] the Commission considered an employer's hiring process, whether that process was fair, and whether a Navajo applicant should have been hired for a specific employment position.[267] Elsie Rose Albert was a teacher at Ch'ooshgai Community School.[268] She was hired on an annual term contract that expressly stated that she had no vested right in her employment beyond the specified term.[269] As a result of requirements under the federal No Child Left Behind Act, the school was forced to restructure its program by reclassifying and upgrading its employment positions.[270] The school notified its employees that it would be restructuring, employees would be required to reapply for their positions, and interviews would be a part of the process for filling the reclassified positions.[271] The school "designed the interview process to be as fair and

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262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. Albert v. Ch'ooshgai Cmty. Sch. Bd. of Educ., NNLC 2010-026, slip op. (October 27, 2010).
267. *Id.*
268. *Id.* at 1–2.
269. *Id.* at 2.
270. *Id.* at 2–3.
271. *Id.* at 3–4.

objective as possible," including developing interview questions and a scoring rubric in consultation with a professor of education from the University of New Mexico and using experienced individuals who were not affiliated with the school to interview applicants.[272] Albert applied for a position, was interviewed, and received the lowest score of all applicants who were interviewed.[273] Based on her interview score, she did not meet the pre-established minimum qualifications for the position and therefore was not hired.[274] The school hired an applicant who attained a higher interview score than Albert, had extensive teaching experience, and met the minimum qualifications for the position.[275]

After the selection process was completed, the school determined that it would need to hire more teachers.[276] The school advertised the open positions.[277] The school did not solicit Albert or any of the applicants from the first selection process to apply in the second round, and none of those individuals, including Albert, applied in the second round.[278] After the second round was completed, the school selected a non-Navajo applicant for a position.[279]

Upon reviewing the foregoing facts, the Commission concluded that the school did not violate the NPEA.[280] Specifically, the school showed by a preponderance of the evidence that it was necessary to restructure its program, the selection process that it used to fill the reclassified positions was fair, Albert did not meet the necessary qualifications for the position, and the school's hiring decisions were in compliance with the NPEA.[281] The Commission seemed influenced by the school's proactive decision to notify employees well in advance that they would need to re-apply for their positions and be interviewed,[282] as well as the school's process for developing a fair and reasonable interviewing procedure with the assistance of an expert.[283] The school's diligence in planning for the restructuring paid off when it came time to explain and defend its employment actions.

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272. *Id.* at 4–5.
273. *Id.* at 5–6.
274. *Id.* at 6.
275. *Id.* at 7–8.
276. *Id.* at 8.
277. *Id.*
278. *Id.* at 8–9.
279. *Id.* at 9.
280. *Id.* at 10–12.
281. *Id.*
282. *Id.* at 10.
283. *Id.* at 4–5, 11.

In *Casey Clifford, Jr. v. BHP Billiton/Navajo Mine*,[284] the Commission considered the question of whether an employer had just cause to terminate a long-term, experienced employee.[285] Casey Clifford was employed by BHP Navajo Coal Company (BNCC) as an electrician for almost twenty years.[286] His employment was terminated based on an incident in which Clifford participated in the removal of two safety devices from an electrical substation at the Navajo Mine.[287] The termination notice stated that Clifford knowingly and willfully disabled the safety devices and energized an electrical circuit, a potentially fatal safety hazard; caused property damage; violated federal regulations addressing mine safety; and violated BNCC General Rules of Conduct.[288] After he was terminated, Clifford filed an ONLR charge and then a Commission complaint. Upon review, the Commission ruled in favor of BNCC, concluding that the company had shown by a preponderance of the evidence that it had just cause to terminate Clifford.[289] In reaching its conclusion, the Commission considered relevant that (1) Clifford "as an experienced electrician with many years of experience should know that the removal of the safety devices would create a life threatening safety hazard"[290] and (2) Clifford admitted that he was aware of BNCC's General Rules of Conduct, Job Safety Analysis (regarding the hazards of performing certain tasks and how to eliminate those hazards), and federal regulations.[291] As stated by the Commission:

> [Clifford's] misconduct created a safety hazard, endangered persons and property which violated MSHA regulations, the BNCC General Rules of Conduct and the BNCC's Job Safety Analysis or JSAs.
>
> [Clifford] was a . . . certified and trained experienced electrician with over sixteen years of experience. [Clifford] admitted under oath that he was aware that his work had to be in accord with [federal regulations]. [Clifford] also admitted under oath that he was familiar with the BNCC's General Rules of Conduct and JSAs. Petitioner, therefore[,] knew or should have known that he

284. Clifford v. BHP Billiton/Navajo Mine, NNLC 2010-015, slip op. (October 19, 2010).
285. *Id.*
286. *Id.* at 1.
287. *Id.* at 2.
288. *Id.* at 7.
289. *Id.* at 10.
290. *Id.* at 7.
291. *Id.* at 9.

> could not lawfully remove safety devices and create potentially fatal circumstances.[292]

Clifford is significant because the Commission held the employee accountable based on his lengthy tenure and actual knowledge of job requirements and workplace rules.

In *Glen Young v. Peabody Western Coal Company*,[293] Glen Young filed a Commission complaint alleging that Peabody Western Coal Company (PWCC) violated its own collective bargaining agreement when it issued to Young a written notice of suspension with intent to terminate.[294] PWCC moved to dismiss the complaint, arguing that the Commission was preempted by federal law from interpreting the collective bargaining agreement.[295] Applying the U.S. Constitution's Supremacy Clause and federal cases dealing with the National Labor Relations Act, the Commission agreed with PWCC and therefore dismissed the complaint.[296] In so doing, the Commission acknowledged the limits of its own jurisdiction in light of the preemptive force of applicable federal laws.

C. Amended Rules of Procedures for The Navajo Nation Labor Commission

The Commission has amended its procedural rules, known as the Amended Rules of Procedures for The Navajo Nation Labor Commission (NNLC Rules), a number of times over the years.[297] As of the writing of this article, the most recent changes to the NNLC Rules became effective in July 2012.[298] The changes pertain to complaints brought under 15 N.N.C. § 604(B)(9) of the NPEA alleging "hostile work environment, harassment, humiliation, or intimidation."[299] Under revised NNLC Rule 5(g), all such allegations "shall be specifically plead[ed] and shall include specific name(s), date(s), place[s], and a brief description of the event(s) giving rise to the allegations."[300] Additionally, although employers in

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292. *Id.* at 10–11.

293. Young v. Peabody W. Coal Co., NNLC 2010-025, slip op. (August 5, 2010).

294. *Id.* at 1–2.

295. *Id.* at 2.

296. *Id.* at 2–3.

297. NNLC Rules. In fact, the NNLC has amended its rules a number of times since they were first adopted in May 1981, including once in 2009, once in 2011, and once in 2012. For more information on the Commission's procedural rules, see Brown & Austin, *supra* note 1, at 55 n.255.

298. NNLC Rules, *supra* note 297.

299. NNLC Rules, *supra* note 297, R. 5(g). For a discussion regarding the bringing of complaints for such matters under the NPEA, see Brown & Austin, *supra* note 1, at 49–51.

300. NNLC Rules, *supra* note 297, R. 5(g).

NPEA matters have the burden of proof and going forward, the initial burden is reversed in cases involving claims of hostile work environment, harassment, humiliation, or intimidation.[301] In such cases, the employee has the initial burden of going forward with evidence that the employer created such conditions.[302] The burden then shifts to the employer to show no violation and, ultimately, the employee may attempt to rebut the employer's evidence.[303]

D. U.S. Federal Court Cases

Federal courts have decided a number of cases dealing with the NPEA and related issues. For over ten years, the U.S. Equal Employment Opportunity Commission (EEOC) has pursued litigation based on its position that the tribal employment preference requirements contained in the NPEA violate Title VII of the Civil Rights Act of 1964.[304] After much substantive and procedural wrangling, the U.S. District Court for the District of Arizona addressed the merits of the issue in *EEOC v. Peabody Western Coal Co.* on the parties' cross-motions for summary judgment.[305]

As a matter of background, PWCC mines coal on trust lands within the Navajo Nation pursuant to lease agreements. The leases contain provisions requiring PWCC to give employment preference to Navajos.[306] In describing the leases, the court emphasized that the U.S. Department of

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301. 15 N.N.C. § 611(B); NNLC Rules, *supra* note 297, R. 15(I).

302. NNLC Rules, *supra* note 297, R. 15(I). The NNLC Rules do not specify the employee's standard of proof, but one can presume that it is by a preponderance of the evidence (the same standard by which the employer must prove an absence of a violation of the NPEA).

303. *See id.*

304. For a more in-depth discussion of the history of portions of this litigation, see Brown & Austin, *supra* note 1, at 68-72, 74.

305. Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co., No. 2:01-CV-01050 JWS (D. Ariz. Oct. 18, 2012). The court captured the tone of the extensive procedural maneuvering in this case by writing:

> Furthermore, this litigation has been pending since 2001, and any further review related to the correct parties to be included in this case and how the parties are to be included would needlessly prolong a decision on the primary issue—whether the tribe-specific preference in Peabody's mining leases falls within the scope of Title VII. The court has now heard from all involved parties regarding this issue. It is time to resolve it.

Id. at 4. After the body of this article was written, but before it was published, the EEOC appealed this case to the Ninth Circuit Court of Appeals.

306. *See id.* at 2. Referring to the NPEA, the court stated, "[s]ince 1985 a Navajo Nation tribal ordinance has required employers doing business on the Navajo Nation reservation to give employment preference to Navajo members. As a result, employment preference provisions are standard terms in leases within the Navajo Nation's

the Interior (DOI) "not only approved the leases but actually drafted them," the Navajo Nation "negotiated for the inclusion of the tribe-specific hiring preference," the DOI "required the inclusion of the Navajo employment preference provisions" pursuant to the DOI's "trust obligations toward the [Navajo] Nation," and DOI has approved mining leases with tribe-specific employment preferences "since before the passage of Title VII."[307] The EEOC, while acknowledging that certain employers are permitted to give employment preference to Indians in general, challenged the application of the Navajo-specific lease provisions as constituting national-origin discrimination in violation of Title VII.[308]

After analyzing various perspectives on the legal challenge, the court ultimately granted judgment in favor of the DOI and the Navajo Nation and against the EEOC, thus upholding the Navajo-specific employment preference provisions in PWCC's DOI-approved leases.[309] The Court reasoned as follows:

> [E]ach tribe is its own quasi-sovereign entity. The federal government has a distinct relationship with each tribe and distinct trust obligations owed to each tribe. Tribe-specific employment preferences in DOI-approved leases help discharge those trust obligations. Their inclusion in the leases is for political reasons: to benefit the members of the tribe—a political entity—and to foster tribal self-government and self-sufficiency. It is tribal membership, not status as an Indian, that is the touchstone. Like the general Indian preference in [*Morton v. Mancari*], the tribe-specific preference included in the DOI-approved leases is a political classification.
>
> Because the preference in Peabody's . . . leases is a political classification and not a national origin classification, it should be found lawful as long as the inclusion of the preference is rationally tied to legitimate, nonracially based goals. First, the preference fur-

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jurisdiction." *Id.* (citing The Navajo Preference in Employment Act, 15 N.N.C. §§ 601-619). The court continued,

> According to the Nation, as of 2005, there were 326 current or recently expired business leases on tribal lands that contain similar employment preference provisions for Navajo job applicants, and all of these leases have been approved by the [U.S. Department of the Interior's Bureau of Indian Affairs]. The Nation has entered into at least two lease agreements that require the lessee to maintain a tribal employment preference, but only to the extent the preference is not in derogation of federal law.

Id. (citations omitted).

307. *Id.* at 2-3, 8.

308. *See id.* at 5.

309. *See id.* at 8.

> thers the goal of tribal self-sufficiency. Providing on-reservation jobs for the Nation's members is rationally connected to the goal of economic self-sufficiency. Second, and similarly, the preference furthers the goal of economic development on tribal lands . . . . Finally, the preference helps further the goal of self-governance.[310]
> . . . .
> [T]he court concludes that such a preference is not unlawful national origin discrimination but a political classification and thus not within the scope of Title VII.[311]

Navajo Nation officials hailed the court's decision as a "victory for tribal sovereignty" and a pathway to protecting "existing jobs held by Navajos."[312] By contrast, the EEOC announced that it was "disappointed" by the decision and, as of the writing of this article, was considering whether to appeal the decision.[313]

In *Salt River Project Agricultural Improvement and Power District v. Lee*,[314] the Ninth Circuit Court of Appeals determined that the Navajo Nation was not a necessary party in a case involving the application of the NPEA to employers at a power plant located on land leased to the power company.[315] Two Navajo employees—Leonard Thinn and Sarah Gonnie—were employed at the Navajo Generating Station power plant on the Navajo Nation.[316] The power plant is co-owned by Plaintiff-Appellant Salt River Project Agricultural Improvement and Power District (SRP).[317] The other Plaintiff-Appellant in the case, Headwaters Resources, Inc.

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310. *Id.* at 7.

311. *Id.* at 8.

312. Bill Donovan, *Court Upholds Navajo Preference*, NAVAJO TIMES (Nov. 1, 2012), www.navajotimes.com/news/2012/1112/110112pre.php (last visited May 14, 2013).

313. *Id.* After the body of this article was written, but before it was published, the U.S. District Court for the District of Arizona revisited this case upon remand by the Ninth Circuit and filing of new motions by the parties. Salt River Project Agric. Improvement & Power Dist. v. Lee, No. CV-08-08028-PCT-JAT, slip op. (D. Ariz. January 28, 2013) (order). The District Court granted summary judgment in favor of the plaintiffs and granted the plaintiffs' request for a permanent injunction on the basis that, although the Navajo Nation has the "sovereign power to regulate the employment activities of nonmembers engaged in consensual relationships with the tribe," the Navajo Nation defendants had "expressly waived that power in this case." Id. at 38–40.

314. Salt River Project Agric. Improvement & Power Dist. v. Lee, 672 F.3d 1176 (9th Cir. 2012) (as amended on denial of rehearing and rehearing en banc).

315. *See id.* For a discussion of the history of this case, including tribal court proceedings, see Brown & Austin, *supra* note 1, at 21 n.22, 26 n.49, & 63 nn.318-323.

316. *See Lee*, 672 F.3d at 1177.

317. *See id.*

(Headwaters), is a contractor providing services for SRP at the power plant.[318] The two employees were fired and ultimately filed Commission complaints alleging that they were terminated without just cause in violation of the NPEA.[319] SRP and Headwaters defended against the complaints by arguing that (1) the terms of the lease between SRP and the Navajo Nation for the land on which the power plant is located waived the Navajo Nation's right to regulate employment at the power plant and (2) a federal statutory right of way extinguished all Indian uses of the land.[320] On appeal to the Navajo Nation Supreme Court, the court rejected SRP's and Headwaters' arguments, held that the NPEA applied to both entities at the power plant, and remanded the case to the Commission for a decision on the merits.[321]

SRP and Headwaters then filed an action in federal district court for declaratory and injunctive relief against the Navajo Nation officials responsible for enforcing the NPEA.[322] The Navajo officials moved to dismiss the action for failure to join the Navajo Nation, which it argued was a necessary party under Rule 19 of the Federal Rules of Civil Procedure.[323] The federal district court agreed, concluding that the Navajo Nation was a necessary and indispensable party that could not be joined in the litigation because of the Navajo Nation's sovereign immunity.[324] SRP and Headwaters appealed the dismissal to the Ninth Circuit Court of Appeals.

The Ninth Circuit analyzed Rule 19 and determined that the district court's conclusions were wrong.[325] First, the Ninth Circuit addressed the district court's conclusion that the Navajo Nation was a necessary party because an injunction against current Navajo Nation officials would not prevent future or other officials from taking the same actions. The Ninth Circuit wrote, "An injunction against a public officer in his official capacity—which is what the plaintiffs seek here—remains in force against the

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318. *See id.*

319. *See id.* at 1177-78.

320. *See id.* at 1178. The relevant section of the lease states, "The Tribe covenants that . . . it will not directly or indirectly regulate or attempt to regulate the Lessees in the construction, maintenance or operation of the Navajo Generating Station." *Id.* at 1178 n.1. The relevant section of the right-of-way grant states, "All present existing Indian uses of any land described herein are hereby extinguished and prohibited for the term of the [grant], and any renewals thereof." *Id.* at 1178 n.2.

321. *See id.* at 1178.

322. *See id.*

323. *See id.*

324. *See id.*

325. *See id.* at 1179-81.

officer's successors."[326] From a practical standpoint, the court also pointed out, "if in the future the plaintiffs believe that other officials are acting in violation of federal law, they may bring another action against those officials."[327] Next, the Ninth Circuit dealt with the district court's determination that the Navajo Nation was a necessary party because of its distinct interests in the SRP lease, Navajo job security, and Navajo Nation governance.[328] The Ninth Circuit did not dispute the existence or legitimacy of these interests; rather, the Ninth Circuit determined that the Navajo Nation's interests would be adequately represented by the Navajo Nation official defendants.[329] As such, the Navajo Nation was not a necessary party.[330] Finally, the Ninth Circuit tackled the argument that the Navajo Nation was a necessary party because its absence could subject the plaintiffs to inconsistent obligations, namely that an injunction in favor of the plaintiffs would not bind the Navajo Nation (because it was a non-party) and would not prohibit the Navajo Nation from enforcing the NPEA at the power plant.[331] The Ninth Circuit disagreed, questioning how the Navajo Nation could enforce the NPEA "without the aid of its *officers* responsible for enforcing the [NPEA], who *would* be bound by the plaintiffs' requested injunction."[332] The court thus reversed the district court's order of dismissal and remanded.[333]

In *Red Mesa Unified School District v. Yellowhair*,[334] the U.S. District Court for the District of Arizona determined that the Navajo Nation lacked jurisdiction over certain employment-related claims brought by Navajo employees against Arizona public school districts operating within the Navajo Nation.[335] The plaintiffs, Red Mesa Unified School District and Cedar Unified School District, are political subdivisions of the State of Arizona operating within the exterior boundaries of the Navajo

326. *Id.* at 1180 (citations omitted).
327. *Id.*
328. *See id.*
329. *See id.*
330. *See id.* at 1181.
331. *See id.*
332. *Id.* (emphasis in original).
333. *See id.* at 1182. The Navajo Nation sought review by the Ninth Circuit en banc, and the Ninth Circuit denied the request. Email from David Jordan, attorney for Defendants-Appellees Thinn and Gonnie, to Howard L. Brown (Nov. 14, 2012, 2:13 p.m. MST) (on file with Howard L. Brown).
334. Red Mesa Unified Sch. Dist. v. Yellowhair, No. CV-09-8071-PCT-PGR, slip op. (D. Ariz. Sept. 28, 2010) (order).
335. *See id.* at 1. As an aside, the geographic boundaries of one of the school districts involved in the case, Cedar Unified School District, extends into the Hopi Reservation.

Nation on tribal trust land.[336] The school districts employed and later terminated the defendant employees.[337] The employees filed charges with the ONLR and then filed complaints with the Commission.[338] The school districts filed motions to dismiss for lack of jurisdiction, but the Commission denied those motions.[339] The school districts then filed writs of prohibition with the Navajo Nation Supreme Court, which ruled that the Commission had jurisdiction to apply the NPEA to the school districts.[340] The school districts then filed complaints in federal district court against the employees and members of the Commission, seeking declaratory and injunctive relief to stop the proceedings in Navajo Nation tribunals and render null and void any decisions issued by those tribunals.[341] The school districts filed motions for summary judgment and the Commission defendants filed a cross-motion for summary judgment.[342] The general thrust of the school districts' arguments was that the Navajo Nation lacked authority to apply Navajo law to the personnel decisions of Arizona political subdivisions.[343]

The district court analyzed whether the Navajo Nation's inherent sovereignty vested it with authority over the school districts' employment decisions.[344] The court referred to the U.S. Supreme Court case of *Montana v. United States*, which the court characterized as denying Indian tribes' inherent sovereign powers over non-members within the tribes' borders except where (1) the non-member enters into consensual relationships with the tribe or its members or (2) the activity in question directly affects the tribe's political integrity, economic security, health, or welfare.[345] Addressing only the first *Montana* exception (because apparently the defendants did not raise the second exception), the court stated that the school districts' relationships with the Navajo Nation were "not by themselves sufficient to establish tribal jurisdiction."[346] The court explained:

> [T]he Court believes that the dispositive factor here is that Red Mesa and Cedar are not private actors for purposes of *Montana*—

336. *See id.* at 2.
337. *See id.*
338. *See id.* at 3.
339. *See id.*
340. *See id.*
341. *See id.* at 4.
342. *See id.* at 1, 4.
343. *See id.* at 5.
344. *See id.*
345. *See id.* at 5-6, 8 (citing Montana v. United States, 450 U.S. 544, 565-66 (1981)).
346. *Id.* at 9.

> they are instead political subdivisions of the state of Arizona. Red Mesa and Cedar argue, and the Court concurs, that there is a fundamental difference for tribal jurisdictional purposes between governmental actors constitutionally mandated to enter tribal lands to fulfill a governmental obligation [to educate the children of the state, including those living on the Navajo Nation] and private actors operating commercial enterprises on tribal lands and that the former is not the kind of consensual relationship that subjects a nonmember to tribal jurisdiction over decisions unrelated to the tribal land. Even if the consensual relationship exception were to extend under some circumstances to state actors based on the existence of a state-tribe contract . . . the defendants have not persuaded the Court that the first *Montana* exception can properly be extended to reach the actions here of Red Mesa and Cedar . . . since both made the employment decisions at issue while operating in their governmental capacities pursuant to their state constitutionally-imposed mandate to operate a public school system within the reservation boundaries.[347]

The court concluded "as a matter of law" that the Navajo Nation lacked regulatory and adjudicative jurisdiction over the two school districts' employment-related decisions and therefore granted the districts' motion for summary judgment and denied the Commission defendants' cross-motion.[348]

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347. *Id.* at 9-10.

348. *Id.* at 12-13. The court directed the school districts to submit a proposed form of judgment and allowed the defendants to file objections thereto. *Id.* at 13. The court issued a Judgment on November 9, 2010, and upon the school districts' motion to alter or amend the judgment, issued an Amended Judgment on January 6, 2011. The Amended Judgment provided that the Navajo Nation had no regulatory or adjudicative jurisdiction over the plaintiff school districts' personnel decisions as they relate to the employment termination-related claims of the defendant employees; any orders or judgments previously issued by the NNLC and the Navajo Nation Supreme Court related to those claims were void and of no force or effect; the defendant employees were enjoined from any further prosecution of their claims before the NNLC, the Navajo Nation Supreme Court, and any other Navajo Nation court or tribunal; and the NNLC defendants were enjoined from any further adjudication of the claims. Red Mesa Unified Sch. D. v. Yellowhair, No. CY-09-8071-PCT-PGR (D. Ariz. Jan. 6, 2011) (amended judgment). For a discussion of the Navajo Nation Supreme Court's response to the federal district court's order and amended judgment, see *supra* notes 43-52.

IV. CONCLUSION

The Navajo Nation Supreme Court and Navajo Nation Labor Commission, as well as federal trial and appellate courts, continue to shape the way that Navajo Nation employment laws are applied to employees and employers. As the cases discussed in this article illustrate, the NPEA can be a powerful influence on employees' well-being and employers' business decisions. On the one hand, the NPEA tries to safeguard employee rights and encourage individual economic self-sufficiency. [349] On the other hand, the NPEA and the threat of litigation under the NPEA can create an adverse economic environment for the very employers that create employment opportunities for Navajo workers. To make a meaningful difference in the economic lives of Navajo employees and their families, the Navajo Nation Supreme Court, the Navajo Nation Labor Commission, and Navajo lawmakers should continue to strive to find a reasonable, workable balance between these interests. As we wrote in our previous article, our goal in writing about the Navajo Preference in Employment Act is to reduce employment-related litigation, thereby encouraging potential employers to locate their operations on the Navajo Nation and to create employment opportunities where they are so badly needed.

The NPEA can serve as a model for Indian Nation self-governance and the ways that Indian nations apply their unique laws, customs, and traditions in business and employment settings. In the preface to a recent book on Indian labor and employment law, John Echohawk wrote that "Indian tribes as governments were not exercising—or did not know they could fully exercise—their sovereign authority to enact tribal laws regulating labor and employment relations."[350] The Navajo Nation has indeed exercised its sovereign authority over employment issues through the adoption and implementation of the NPEA. Employees, employers, legal practitioners, and government leaders will watch with interest whether that authority is exercised in a balanced way that better meets the needs of all who are impacted by employment issues on the Navajo Nation.

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349. 15 N.N.C. § 602(B).

350. KAIGHN SMITH, JR., LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY xiv (2011).