

**KYOKO APRIL,
Appellant,**

v.

**PALAU PUBLIC UTILITIES CORP.,
Appellee.**

CIVIL APPEAL NO. 10-014
Civil Action No. 06-048

Supreme Court, Appellate Division
Republic of Palau

Decided: August 16, 2010

[1] **Damages:** Punitive Damages

Governing decisional law in Palau states with relative uniformity that punitive damages should only be awarded for conduct impelled by a malicious motive or that can be considered outrageous because of the defendant's reckless indifference to the rights of others.

[2] **Constitutional Law:** Due Process

Our reading of the governing law on violations of procedural due process indicates that the trial court's determination of damages on remand requires it to assess whether the government actor was "justified" in taking the adverse action, i.e., to examine the substantive justifications behind the government's adverse action—not solely the internal procedures it used to do so.

[3] **Constitutional Law:** Due Process

It is axiomatic that procedural due process requires both (1) notice and (2) an opportunity

to be heard. However, it is less widely known that a prerequisite to a procedural due process analysis is to determine whether the government actor followed its internal policies in depriving the litigant of life, liberty or property.

[4] **Constitutional Law:** Due Process

U.S. case law interpreting statutes like the Civil Rights Act and the Equal Access to Justice Act, which are designed to protect against due process violations, almost uniformly directs trial courts to inquire whether the adverse government actions are either substantively or substantially justified—specifically by examining the *actual* reasons for the termination.

Counsel for Appellant: Pro se

Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Judge, presiding.

PER CURIAM:

Appellant, Kyoko April (“April”), appeals a judgment entered by the Trial Division awarding only nominal damages for Palau Public Utilities Corporation’s (“PPUC’s”) violation of April’s right to procedural due process. For the reasons that follow, we AFFIRM in part and REVERSE in part the Judgment of the Trial Division and

REMAND this action for a determination as to whether PPUC’s deprivation of April’s procedural due process was justified under the circumstances.

BACKGROUND

As indicated by the briefs, this case is now on appeal for a second time. Thus, because the procedural history and factual background are adequately set forth in this Court’s Opinion in *April v. Palau Pub. Utils. Corp.*, 17 ROP 18 (2009), and because the issue appealed is limited to the trial court’s order on damages, we will only provide an abbreviated version of the relevant facts.

In our November 3, 2009 opinion in this case, we concluded that PPUC had violated April’s right to procedural due process because it did not provide her with a hearing prior to terminating her employment. Thus, we remanded the case and instructed the trial court to calculate the amount of damages due to April as a result of PPUC’s violation. To guide the trial court’s determination, we stated:

[d]amages for a due process violation should be calculated only to compensate a plaintiff for the affront of suffering a deprivation of process. Only if proper process would have resulted in April’s reinstatement should she be allowed to recover anything resembling back pay or compensation for her termination. If notice and an opportunity to be heard would have left her in the same

position employment-wise, nominal damages are likely appropriate.

April, 17 ROP at 22-23 (citing *Zinerman v. Burch*, 110 S. Ct. 975, 983 n.11 (1990) (“[I]n cases where the deprivation would have occurred anyway, and the lack of due process did not itself cause any injury (such as emotional distress), the plaintiff may recover only nominal damages.”)).

On remand, the parties submitted briefs on damages. Unsurprisingly, PPUC argued that April should only be entitled to nominal damages, whereas April sought compensatory damages in the amount of \$119,106.70, punitive damages in the amount of \$25,000, and reinstatement to her previous position. The trial court found that the evidence at trial “established with reasonable certainty the amount of compensatory damages in the amount of lost wages” of \$119,106.70 as of December 3, 2009. Nonetheless, the trial court found that nominal damages in the amount of One Dollar (\$1.00) were still appropriate. In doing so, it expressed that

[t]he Court is sympathetic to Plaintiff’s plight in light of the fact that she had been a model employee for over 10 years; however, the undisputed fact is that PPUC’s termination was found to be justified based on their internal rules, and this finding was affirmed by the Appellate Division. Accordingly, the outcome would be the same if there was no procedural due process

violation because PPUC would have terminated Plaintiff anyway. Even taking into consideration the evidence of Plaintiff’s long employment history with PPUC and her testimony that she was shocked and humiliated by the shabby way she was treated at the end of her employment, the Court finds no evidence of wither [sic] wilful or malicious conduct by PPUC that would merit an award of punitive damages in this case.

April, Civ. Act. No. 06-048, Order on Damages at 3 (Tr. Div. Mar. 6, 2010). This appeal followed.

STANDARD OF REVIEW

Where factual issues are not in dispute, due process issues are reviewed *de novo*. *Lewill Clan v. Edaruchei Clan*, 13 ROP 66 (2006).

DISCUSSION

April’s appeal is essentially two-fold. She begins by claiming “PPUC should be punished for its wrongdoing,” arguing, in her way, for an award of punitive damages as a result of PPUC’s violation of her procedural due process. Second, she claims that, if the Board had given her an opportunity to explain herself at a hearing, then it would have understood where she was “coming from,” and presumably chosen not to fire her.

[1] As to the first issue, PPUC rightly notes that April has failed to point to any

evidence at the trial or appellate level of wilful or malicious conduct. Governing decisional law in Palau states with relative uniformity that punitive damages should only be awarded for conduct impelled by a malicious motive or that can be considered “outrageous [] because of the defendant’s . . . reckless indifference to the rights of others.” *Robert v. Ikesakes*, 6 ROP Intrm. 234 (1997) (quoting Restatement (Second) of Torts § 908(2) (1977)). April has presented no evidence that rises to this standard. We therefore AFFIRM the trial court’s decision as to the inappropriateness of punitive damages.

However, with respect to April’s second argument, we have concerns about whether the trial court correctly followed our directions concerning compensatory damages on remand. We question if the trial court made a determination as to whether a hearing would have left April in the same position or whether it assumed—wrongly—that we had already made that determination.

[2] The trial court’s order on remand reads:

[T]he undisputed fact is that PPUC’s termination was found to be justified based on their internal rules, and this finding was affirmed by the Appellate Division. Accordingly, the outcome would be the same if there was no procedural due process violation because PPUC would have terminated Plaintiff anyway.

April, Civ. Act No. 06-048, Order on Damages at 3. The trial court’s determination begs the question: Would a hearing have resulted in April’s reinstatement? If the answer is yes, then the trial court should consider an award of back pay or compensation for her termination. If the answer is no, then nominal damages are likely appropriate. We fear that the trial court confused our prior determination that PPUC followed its own internal procedure with our direction for it to decide whether April would still have been fired if she had been provided a hearing. Our reading of the governing law indicates that the trial court’s determination on remand requires it to assess whether PPUC was “justified” in firing April, i.e., to examine the substantive justifications behind PPUC’s decision to fire her—not solely the internal procedures it used to do so.

[3] In the trial court’s original June 12, 2008 decision in this case, it concluded that, “[i]n complying with its own Personnel Manual regarding hiring and firing of employees, PPUC’s Board exercised its legitimate authority and oversight in deciding to terminate Plaintiff.” *April*, Civ. Act No. 06-048, Decision at 9. April appealed this conclusion, arguing that the governing statute, as well as PPUC’s Personnel Manual, granted firing authority only to the General Manager of PPUC; thus, because she had been fired by the Board, her termination had been improper. We affirmed the trial court’s conclusion, finding that PPUC had in fact conformed with its enumerated procedure for terminating employees. Specifically, we concluded that April’s termination at the hands of the Board—as opposed to at the hands of the General Manager—did not violate PPUC’s internal procedures for employee termination,

because, according to 37 PNC § 407(b), the General Manager can act only in accordance with the oversight of the Board. This oversight satisfied the statutory mandate that employees only be fired by the General Manager, insofar as the Board possessed oversight authority over managerial decisions.¹ However, we did not, in any portion of that Opinion, conclude that PPUC

was actually justified in its reasons for firing her—only that it followed its own internal procedures in doing so.

In reviewing the record in this case, we have found numerous times in which April, PPUC, and even the trial court itself, appear to conflate her demotion with her termination. PPUC demoted April, presumably, because of some perceived irregularities with her previous promotion. It terminated her, according to its own statements, because it believed April had violated an internal policy against making public statements against the company. Yet, April argues, if the Board had given her an opportunity to explain how she received her original promotion, it would not have fired her. This is clearly a conflation of her demotion with her termination, in that PPUC did not fire her over the promotion issue, but rather over the means in which she complained about it.

Likewise, PPUC argued that the trial division had upheld PPUC’s decision to terminate April when it held that

it cannot be overstated that the Board did not act arbitrarily in making the decision to terminate plaintiff. The Board’s decision was made after reviewing the recruitment process, including the GM’s decision to ask Plaintiff to apply for the position. The Board further sought the advice of their legal counsel before taking any action. The court therefore cannot say that Plaintiff’s termination was

¹ This determination was necessary because following internal procedures is a prerequisite to due process claims. *See April*, 17 ROP at 22 (“Under procedural due process a government actor must properly adhere to its own procedure in depriving a person of life, liberty, or property.”). It is axiomatic that procedural due process requires both (1) notice and (2) an opportunity to be heard. *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999); *see also Tolhurst v. Micronesian Occupational Center*, 6 TTR 296, 303 (1973). However, it is less widely known that a prerequisite to a procedural due process analysis is to determine whether the government actor followed its internal policies in depriving the litigant of life, liberty or property. In *Tolhurst*, for example, the court held that procedural due process required that the agency follow their internal regulations. Because the agency failed to follow its internal regulations, the court found a procedural due process violation. *Tolhurst*, 6 TTR at 300 (“The rule is generally recognized that when an administrative agency undertakes a personnel action in accordance with its regulations, even though it is not required by law to follow regulations, it must adhere to them.”). As we noted above, we agreed with the trial court and held that PPUC had in fact complied with the regulation requiring that only the General Manager could terminate April. However, this determination only satisfied the Court that PPUC’s conduct had conformed with their own internal procedures. We still found, upon further analysis, that PPUC’s failure to provide a hearing violated April’s right to procedural due process.

wrong or improper or without any justifiable basis.

(PPUC’s Supplemental Br. on Calculation of Damages at 1 (citing Decision)). This statement also belies a fundamental misunderstanding about the reasons for her termination. It seems to imply that April was fired because of irregularities in her promotion—not because of her violation of the internal rule against speaking publicly.

The trial court conflated her demotion and her termination in its Decision; PPUC relied on this conflation in its brief on damages; and the trial court appeared then to rely on PPUC’s brief to conclude that her termination was justified. This circularity may be at the root of the problem at hand.

Indeed, it is one thing for PPUC to have followed the right procedure, i.e., the correct person or entity did the actual firing, and it is another to conclude that PPUC was justified in concluding that April’s actions of contacting then-Delegate Mariur and then-President Remengesau to bemoan her demotion violated the internal personnel rule “prohibit[ing] employees from making public statements or displays unfavorable on the Company or its employees.” Whether April’s contact with these men was actually a “public statement” under PPUC’s internal personnel rules, or whether such can be said to reflect unfavorably on the Company—and, finally, whether PPUC was justified in terminating her—has yet to be reviewed by trial court.

The Supreme Court’s directive in *Carey v. Piphus*, 435 U.S. 247 (1978) suggests that just such a review is required in order for a trial court to award damages when

procedural due process rights have been violated. *Id.* at 258 (awarding damages for violation of procedural due process under 42 U.S.C. § 1983 (“Civil Rights Act”). In *Carey*, a student named Piphus was suspended from school without a hearing and sought actual and punitive damages in the amount of \$3,000. The Supreme Court stated that, on remand, if the trial court determined that the student’s suspension had been substantively justified, then only nominal damages for the due process violation would be appropriate. *Id.* at 266. The inverse, of course, would also be true, i.e., if the trial court determined that the suspension had *not* been justified, then it should consider Piphus’ claims for compensatory and punitive damages, including damages for the mental and emotional distress caused by the denial of due process itself. *Id.*

[4] The directive that trial courts inquire as to whether a government’s actions were substantively justified gives us some pause, in that it appears at first glance to substitute the court’s judgment for the judgment of an independent employer. However, U.S. case law interpreting statutes like the Civil Rights Act and the Equal Access to Justice Act, which are designed to protect against due process violations, almost uniformly directs trial courts to inquire whether the adverse government actions are either substantively or substantially justified—specifically by examining the *actual* reasons for the termination. *Cf. Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 505, 513 (2003) (interpreting the substantial justification requirement for adverse government actions under the Equal Access to Justice Act and concluding that “[t]he phrase ‘substantially justified’ means ‘justified in substance or in

the main’—that is, justified to a degree that could satisfy a reasonable person”) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); see also *TGS Int’l. Inc. v. United States*, 983 F.2d 229, 229-30 (Fed. Cir. 1993); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (to determine substantial justification the trial court must “look at the entirety of the government’s conduct and make a judgment call whether the government’s overall position had a reasonable basis in both law and fact”); *Dalton v. Washington Dep’t of Corrs.*, 344 Fed. Appx. 300 (9th Cir. June 18, 2009) (trier of fact should determine not only whether the termination of a government employee would have occurred despite the employee’s protected speech, but also whether Government’s “justifications are legitimate or merely pretextual”).

Finally, the Court in *Carey* emphasized that “[p]rocedural due process rules are meant to protect persons not from the deprivation but from the mistaken or *unjustified* deprivation of life, liberty, or property.” *Carey* 435 U.S. at 258 (emphasis added). We have already determined that PPUC denied April the proper forum for a substantive evaluation of whether her deprivation of property was justified. It stands to reason then that the trial court must now step in to analyze whether PPUC was justified in firing her. Thus, in addition to the persuasive U.S. law, common sense and fairness dictate that a substantive determination must be made somewhere along the way; otherwise, the government simply gets a free pass. Thus, reading these cases in context leads us to conclude that, in this case, a substantive evaluation of the reasons

proffered by PPUC for April’s termination is still needed before a damages award can issue.

It is worth noting that the similar but distinct standards, i.e., substantively versus substantially justified, which are alternately used by the courts in *Carey* and *Lion Raisins*, are derived not only from the statutory language at issue in each case—the Civil Rights Act in *Carey* and the Equal Access to Justice Act in *Lion Raisins*—but also from the many years of decisional law interpreting that language. In this case, we interpret no statute nor any decisional law directly on point, inasmuch as we previously determined that April’s “right” to continued employment derives from PPUC’s own admission in its Answer. Accordingly, we have the freedom to adopt the standard that best accords with our own sense of fairness and procedural due process here.

In addition to the common sense approach adopted by *Carey*, we find persuasive our own decision in *Ministry of Justice v. Rechetuker*, 12 ROP 43 (2005), in which we interpreted the statutory language contained in 33 PNC §426 (b)(1)(2), which reads:

Any regular employee who is suspended for more than three working days, or dismissed or demoted, may bring an action for reinstatement and loss of pay in the Trial Division of the Supreme within 60 calendar days after written notice of the decision of the grievance panel on the government’s favor.

If the court finds that the reasons for the action are not *substantiated* in any material respect, or that the procedures required by law or regulation were not followed, the court shall order that the employee be reinstated in his position, without loss of pay and benefits. If the court finds that the reasons are *substantiated* or only partially substantiated, and that the proper procedures were followed, the court shall sustain the action of the management official, provided that the court may modify the action of the management official if it finds the circumstances of the case so require, and may thereupon order such disposition of the cases as it may deem just and proper.

33 PNC §426 (b)(1)(2) (emphasis added). In *Rechetuker*, we interpreted the term “substantiated” to indicate that a substantial evidence standard should be used in evaluating the grievance panel’s decision. As such, we noted, “[s]ubstantial evidence means more than a mere scintilla but less than a preponderance: it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 50 n.2 (Ngiraklsong, C.J., concurring) (citing *De La Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003)).

With all of this in mind, we direct the trial court to examine the substantive justifications for April’s termination under the

substantial evidence standard, i.e., to examine PPUC’s justifications for firing April and to determine whether a reasonable person would accept such justifications as adequate to support April’s termination. Although doing so will likely be a task of some delicacy, it must be undertaken. If the trial court determines that PPUC was justified in relying on its personnel rule when it fired April, then only nominal damages will be appropriate.² If, however, the trial court determines that PPUC was unjustified in its reasons for firing April, she should be allowed to recover compensatory damages for her termination. Again, we acknowledge the difficulty in knowing how a hearing by PPUC over April’s termination would have played out in the past. That is why we expect the trial court to hold a surrogate hearing, per the directive in *Carey*, and on remand make a meaningful determination as to PPUC’s justifications for firing her.

CONCLUSION

For the reasons set forth above, we AFFIRM the trial court’s order as to the inappropriateness of punitive damages and REVERSE the trial court’s order awarding only nominal damages, because such was based upon a fundamental misunderstanding of the governing law. Accordingly, we REMAND this action for a determination as to whether PPUC’s deprivation of April’s procedural due process was justified under the circumstances. Only after such a

² Of course, if April provides satisfactory evidence of mental or emotional distress caused by the denial of procedural due process itself, then the trial court would be entitled to grant such relief as well.

determination has been made can the trial court issue a new order on the appropriate damages for the denial of April's procedural due process.