



**MERO**

**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Final Claim Determination**

**For Claims under 33 M.P.T.L.,  
the Mashantucket Pequot Tribal and Native American Preference Law**

<b>Case Name:</b> John Anthony Colebut v. Mashantucket Pequot Gaming Enterprise, d/b/a Foxwoods Resort Casino	<b>Case Number:</b> 2013-33018
<b>Date of Claim Filing:</b> February 6, 2013	<b>Date of Determination:</b> July 29, 2013

On July 2, 2013, the MERO issued a Proposed Claim Determination in the above case. Claimant’s oral request for an extension of time of one week, through the close of business on July 23, 2013, to file a Request for Reconsideration or Mediation, was granted. No timely Request for Reconsideration or Mediation was received from either party.<sup>1</sup> The MERO Director issues the following Final Claim Determination.

John Anthony Colebut (“Claimant”) alleges in his Claim that in about December, 2012, a position of Director of Food and Beverage was not publicized in accordance with the Tribal and Native American Preference Law, hereinafter referred to as the “Preference Law,” and he was not considered for, or promoted to the Director position, with the purpose and effect of depriving Claimant of the remedy previously ordered by the MERO in retaliation for his prior claim filing activity and success before the MERO.

The above-referenced claim has been investigated pursuant to 31 M.P.T.L., the Mashantucket Employment Rights Law and 33 M.P.T.L., the Tribal and Native American Preference Law (“Preference Law”).

**I. Positions of the Parties**

Claimant alleges that Respondent’s position of Director of Food and Beverage filled by Jason Morgan in about December, 2012, was not publicized, thereby denying him the opportunity to apply for and receive the position, depriving him of the remedy previously ordered by the MERO in retaliation for his pursuit of his rights under the Preference Law.

Respondent denies any violation of the Preference Law and asserts that no employment opportunity existed. Specifically, Respondent asserts that Mr. Morgan’s title was changed from Banquet Manager to Director of Food and Beverage to more accurately reflect the increased responsibilities assigned to Mr. Morgan over time.

<sup>1</sup> Notwithstanding the absence of a written request for reconsideration, in response to Claimant’s oral argument to the MERO Director, the Director revisited the evidence and analysis, resulting in certain modifications from the Proposed Claim Determination in this Final Claim Determination.

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## II. Procedural History

Claimant submitted a sworn affidavit dated February 6, 2013, with his Claim.<sup>2</sup> Claimant provided additional documents and information to the MERO throughout the investigation.

Respondent submitted a response dated March 18, which included a Position Statement, Answer to Claimant's Affidavit, Affidavits of Dale Merrill, Executive Director of Human Resources, and Jason Morgan, Director Food & Beverage, and several documents. By correspondence dated May 1, Respondent submitted additional documentation in response to the MERO's April 17 Request for Information. Thereafter, Respondent made available for interview by the MERO Director the following individuals: Jens Baake, Vice President, Food & Beverage; Dena Birdsell, Supervisor, Banquets; Robb Brunelle, Banquet Chef, MGM/Foxwoods; Kathryn Carvalho, Assistant Banquet Manager; Rob Mahoney, Supervisor, Banquets; Dale Merrill, Executive Director, Human Resources; and Jason Morgan, Food & Beverage Director.

## III. Findings of Fact

Respondent is the Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino. ("Respondent" or "Foxwoods") (March 18 Response to Claim)<sup>3</sup> Respondent admits that Claimant is a Tribal member in good standing within the meaning of Title 33 M.P.T.L.. (March 18 Response to Claim, Answer to Claimant Affidavit, ¶ 1)

### A. Background

Claimant has filed claims with the MERO previously. The MERO decision in *Colebut v. MPGE, d/b/a Foxwoods*, MERO Case No. 2009-33005 (October 2010)(hereinafter *Colebut I*), included a remedial order. The Order provides, in part, that "until such time as Claimant is awarded a director level position, if any food and beverage director or equivalent positions become available for which Claimant applies and meets the minimum necessary qualifications, he must be afforded preference over all other candidates, including other Tribal Members." (*Colebut I*, pg. 18; March 18 Response to Claim, Answer to Claimant Affidavit, ¶ 2) In *Colebut v. MPGE, d/b/a Foxwoods*, MERO Case No. 2010-33008 (March 2011)(hereinafter *Colebut II*) the Claimant alleged that he was minimally qualified for the position of Director of Food & Beverage, which the Tribal employer failed to post and subsequently awarded to a non-Native, Joseph Roberts. (*Colebut II*, pg. 1) The MERO determined that "[t]he position reclassification at issue...constituted a realignment that did not give rise to an employment opportunity for which preference was required to be afforded." (*Colebut II*, pg. 6, footnote omitted)

After Mr. Roberts received the Director of Food and Beverage position in about August, 2010, there were a total of three Food and Beverage Directors, Mr. Roberts, Tawny Gagney and Terri Milling. (*Colebut II*, pg. 3) At the time, Greg Poplewko held the position of Vice President of Food and Beverage. (*Colebut*

<sup>2</sup> All dates hereinafter are in Calendar Year 2013 unless otherwise indicated. Claimant's February 6 affidavit is hereinafter referred to as Claimant's "Affidavit."

<sup>3</sup> Submissions are generally identified by summary description and date of document.



II, pgs. 3-4) Before the end of 2010, Mr. Poplewko separated employment and the responsibilities of Interim Vice President of Food and Beverage were added to Beverage Director Joe Albanese's workload. (See Respondent's January 14, 2011 Response to MERO Request for Information for *In Camera* Review and Affidavit of Joe Albanese dated December 4, 2010, both submitted in *Colebut II*) In about April, 2011, the Food and Director position held by Mr. Roberts was eliminated. (March 18 Response to Claim, Merrill Affidavit, ¶ 13)

In June, Interim Vice President Albanese sought to fill the Beverage Director position. Claimant requested MERO review of Respondent's failure to offer him the Beverage Director position, alleging a violation of the October, 2010 MERO Order. (See MERO Compliance Inquiry dated June 14, 2011 in *Colebut I*) No violation of the MERO Order was found, because Claimant did not engage in the evaluative process for determining whether he was minimally qualified for the position. (See MERO Compliance Review decision dated August 18, 2011 in *Colebut I*) Shortly after issuance of the Compliance Review decision, the current Vice President of Food and Beverage, Jens Baake, was hired and Mr. Albanese returned his full attention to the Director of Beverage duties.

### ***B. Director of Food and Beverage 2012***

As of the beginning of December, 2012, the Food and Beverage Department had two Director of Food and Beverage positions, one filled by Tawny Gagney and the other filled by Terri Milling. (March 18 Response to Claim, Answer to Claimant Affidavit, ¶ 6; Merrill Affidavit, ¶ 13) Directly under the Vice President of Food and Beverage were the two Food and Beverage Director positions, as well as the Beverage Director, Joe Albanese, and the Banquet Manager, Jason Morgan. (March 18 Response to Claim, Exhibit ¶ 4)

Respondent concedes that it did not publicize an employment opportunity of Director of Food and Beverage in about December, 2012. (March 18 Response to Claim, Answer to Claimant Affidavit, ¶ 10) Rather, Respondent effected a restructuring to increase efficiencies that included the employment separation of Joe Albanese and the redistribution of the duties previously performed by Mr. Albanese to existing personnel, elimination of the Beverage Director and Banquet Manager positions and re-introduction of a Food and Beverage Director position. (March 18 Response to Claim, Position Statement, pg. 2 and Merrill Affidavit, ¶¶ 8 and 14) Respondent asserts that the action at issue was merely a reclassification and title change for employee Jason Morgan to more accurately reflect his expanded duties. (March 18 Response to Claim, Answer to Claimant Affidavit, ¶ 10) The restructuring resulted in a total cost savings of approximately \$67,000. (March 18 Response to Claim, Merrill Affidavit, Attachment)

### ***C. Claimant's Development Program***

Scott Butera, Respondent's CEO, committed to Claimant to promote him to a director level position upon completion of a development plan. (Claimant Affidavit, ¶ 5; Quarterly Leadership One-on-One dated November 1, 2011) Claimant agreed to a development program, entitled "Assistant Banquet Director Leadership Development Plan," April 4, 2012. (Assistant Banquet Director Leadership Development Plan signed by Claimant April 4, 2012) With respect to most of the responsibilities, the expectations for completion were clearly set forth in the plan. (Id.) The development program was administered by Jason

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Morgan, who held the position of Banquet Manager at that time. (March 18 Response to Claim, Answer to Claimant Affidavit, ¶ 4) The program was designed to last for six months, with the possibility of an extension of up to three months. (Id.) Mr. Morgan provided periodic oral and written feedback regarding progress toward goals. (March 18 Response to Claim, Morgan Affidavit, ¶¶ 13-14 and Tab 6) The program was extended for an additional 90 days due to Mr. Morgan's assessment that Claimant had failed to complete a majority of the goals. (March 18 Response to Claim, Morgan Affidavit, ¶ 15) After the first 30 days of the extension period, Mr. Morgan provided Claimant with an assessment of his progress and thereafter saw no further improvement. (March 18 Response to Claim, Morgan Affidavit, ¶ 15)

Claimant contends that he completed those portions of the training program for which he was provided necessary resources. (Claimant Affidavit, ¶ 9) Respondent contends that Claimant was not trained in certain aspects of the position because he had not mastered the aspects for which he had been trained. (March 18 Response to Claim, Answer to Claimant Affidavit, ¶ 9; Morgan Affidavit ¶13) Although Respondent no longer envisions having a Director of Banquets position due to financial constraints, it remains committed to the availability of an Assistant Director position. (March 18 Response to Claim, Merrill Affidavit, ¶ 15)

During the investigation, the MERO Director interviewed seven (7) employees of Respondent who were either directly or indirectly involved in Claimant's development plan, several of whom worked directly with Claimant and Mr. Morgan. The information received regarding Claimant's abilities and completion of various aspects of his development plan ranged widely. (See File Memos of witness interviews) The witness accounts were in accord, however, that the responsibility for documenting and demonstrating to Mr. Morgan completion of aspects of the development plan fell to Claimant. (Id.) Notably, Claimant's own counts of completed tasks disclose that even with respect to those aspects of the plan that he does not allege were under-resourced, he did not complete the required number in certain categories, including one-on-ones, quality coachings, special orders and meeting with the catering manager. (See Claimant's Response to Month 5 and Month 6 of Director of Banquets Evaluation; Attachment to Claimant's December 28, 2012, e-mail to MERO; Attachment to Claimant's April 10 e-mail to MERO; Various documents submitted by Claimant post-dating January 4)

One area in which Mr. Morgan was complimentary of Claimant was in his staff interactions. (See File Memo of Interview of Morgan) Maintaining consistent, positive employee interaction has proved to be an area of challenge for Mr. Morgan. (See May 1 Response to MERO Request for Information for *In Camera* Review; Daniel Calderon letter dated May 10 To Whom it May Concern) The relationship between Mr. Morgan and Claimant was marked with tension. (See File Memos of witness interviews)

#### **IV. Analysis and Conclusions of Law**

Jurisdiction over the parties and with respect to the Claim is undisputed and asserted.

The issue before the MERO is limited to determining whether Claimant was retaliated against due to his activities pursuing his rights under the Preference Law. The question is whether Respondent's failure to consider the Food and Beverage Director position an employment opportunity subject to posting and consideration of Claimant constituted retaliation against Claimant for his prior activities and success before the MERO. 33 M.P.T.L. ch. 1 § 13(a) provides:

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a. No Employer shall retaliate against any Person with respect to Employment Opportunities or terms or conditions of employment because such Person has filed a claim or instituted or caused to be instituted any proceeding under or related to this Law or has testified or is about to testify in any such proceeding or because of the exercise by such Person on behalf of himself or others of any right afforded by this Law.

The elements of a retaliation claim were set forth in *Colebut I*, pg. 14:

In order to prevail in a claim of retaliation, the evidence must show that (1) the claimant engaged in some known protected activity, (2) the claimant suffered an adverse employment action and (3) a causal connection exists between the protected activity and the adverse action. Respondent can nevertheless defeat the claim if it demonstrates that the adverse action would have been taken notwithstanding any retaliation.

In this case, there is no dispute that Claimant engaged in protected activity known to Respondent by filing and pursuing MERO claims previously, including a claim that resulted in an outstanding MERO Order that requires that Claimant be placed in an open Food and Beverage Director position for which he applies and is minimally qualified. Claimant alleges the failure to consider the Director of Food and Beverage position to be an open position subject to posting and the resulting failure to consider him for, and award him, the position as the adverse employment action. Through his case filings and otherwise, Claimant made his interest in obtaining a Food and Beverage Director position well known and the outstanding MERO Order is specific to Food and Beverage Director positions.

Respondent contends that there was never an open position to be filled, that the Banquet Manager position occupied by Mr. Morgan was reclassified as a Director of Food and Beverage. Specifically, the law provides an exception to affording preference for an intradepartmental employment opportunity, or one that arises from a restructuring or reorganization, which is filled through the natural progression of an employee who is already performing substantial duties of the position.<sup>4</sup> 33 M.P.T.L. ch. 1 § 5(c). Respondent further argues that due to the elimination of the Banquet Manager position, Mr. Morgan, who was already performing substantial duties of the reclassified position, would have been displaced, a result not envisioned by the Preference Law. (*See Colebut II*, pg. 5) (addressing the law's exception to affording preference in promotion in the restructuring or reorganization context, thereby protecting certain existing employees from displacement)

Regardless of an applicable Preference Law exception, Respondent controlled the terms of the departmental changes and is not insulated from a finding of a violation if the changes it selected that excluded Claimant from consideration were motivated by retaliation against Claimant. Evidence that Respondent's actions were a pretext for retaliation may support or establish a causal connection between the protected activity and the adverse action. In support of his allegation of retaliation, Claimant contends that the structure and Mr. Morgan's administration of the development program were unfair, harassing,

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<sup>4</sup> Respondent's analogy to *Colebut II* is misplaced. *Colebut II* involved a realignment that was not an employment opportunity, whereas 33 M.P.T.L. ch. 1 § 5(c) addresses exceptions to affording preference when there *is* an employment opportunity.



designed to undermine his success and reflective of Respondent's retaliatory motive.<sup>5</sup> He further alleges that notwithstanding these roadblocks, he successfully completed the development program and should have been placed in the Food & Beverage Director position that Mr. Morgan received.

From the very first claim filed with the MERO, Claimant has asserted strong director level skills and experience. There is no doubt that CEO Scott Butera promised Claimant an assistant director position upon completion of a development program that began in April 2012. Under these circumstances, especially given Claimant's eagerness to hold a director level position, Claimant was anticipated to make short work of the development plan, to complete, document and convey to Mr. Morgan each of the requirements quickly and efficiently. During the course of the six month plan and the extension of 90 days, Claimant may have demonstrated proficiency in certain aspects of the work to select employees, but he did not meet his burden of submitting timely documentation to Mr. Morgan of completion of each aspect the plan that was successfully completed.<sup>6</sup> There can be no question that the Claimant was made aware of the expectations as they were well articulated in the plan he signed. Claimant was provided regular feedback regarding Mr. Morgan's understanding of what had and had not been completed successfully. Although Claimant alleges that he successfully completed all those aspects of the development program for which he received adequate resources notwithstanding Mr. Morgan's purported efforts to have him fail, Claimant's own records reveal otherwise.

The accounts of others in the department certainly suggest there may have been a less than amicable relationship between Claimant and Mr. Morgan. Nevertheless, neither Mr. Morgan's written evaluations nor the accounts of other employees support a finding that Mr. Morgan or Respondent undermined or retaliated against Claimant.<sup>7</sup> After nine months, Respondent's conclusion that Claimant did not successfully complete the development program was not unreasonable.

Voluminous documentation submitted in this case was reviewed and multiple witnesses were interviewed to determine if impermissible retaliation motivated Respondent's actions. The evidence simply does not lead to the conclusion that Respondent's actions were retaliatory. No causal connection was established between Claimant's protected activity and Respondent's failure to publicize the Food and Beverage Director position. Rather, Respondent was driven by an ongoing effort to find efficiencies in operations, which translates to more responsibility being shared among fewer employees.<sup>8</sup> Considered in its entirety,

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<sup>5</sup> Claimant also alleges that Respondent was so set on denying Claimant the director position that it preferred an employee who should have been considered ineligible due to prior employee complaints and a resulting active disciplinary record; however, *in camera* review of relevant personnel and other human resource records disclosed no disqualifiers.

<sup>6</sup> Claimant was not expected to demonstrate proficiency with respect to any aspects of the plan for which he did not have access to sufficient relevant resources.

<sup>7</sup> To the extent that Claimant felt harassed by Mr. Morgan, the evidence contains no link between any purported harassment and the protected activity. Moreover, the fact that other employees took issue with Mr. Morgan's management style or demeanor supports the conclusion that any "harassment" was not retaliatory.

<sup>8</sup> Even assuming, without finding, that Claimant had established a retaliatory motive, an employer may nevertheless avoid liability by demonstrating "that the adverse action would have been taken notwithstanding any retaliation." (*Colebut I*, pg. 14) Given the departmental changes at issue, Respondent would have invoked the 33 M.P.T.L. ch. 1 § 5(c) exception regardless of any retaliatory motive.



the evidence does not support a conclusion that Respondent did not publicize the Food and Beverage Director position or afford Claimant the opportunity to be promoted to the position in retaliation for Claimant's protected activity or success before the MERO.<sup>9</sup>

## V. Disposition

Respondent did not retaliate against Claimant in violation of the Preference Law when it declined to treat the Food and Beverage Director position as an open employment opportunity subject to publication, or when it did not consider Claimant for, or promote Claimant to, the Director position. The Claim is hereby dismissed in its entirety.

Nothing herein modifies the MERO's outstanding Order that provides "until such time as Claimant is awarded a director level position, if any food and beverage director or equivalent positions become available for which Claimant applies and meets the minimum necessary qualifications, he must be afforded preference over all other candidates, including other Tribal Members." (*Colebut I*, pg. 18)

## VI. Notice of Publication

This Final Claim Determination is available to the public through the MERO and subject to formal revision and publication by the MERO. Readers are encouraged to advise the MERO of any typographical or other formal errors so that corrections can be included in the published opinion.

## VII. Appeal Rights

The parties are directed to the enclosed Notice of Appeal Rights. If no timely appeal is filed with the Tribal Court, this Final Claim Determination is final and binding upon the parties.

Dated this 29th day of July, 2013



Ursula L. Haerter  
MERO Director

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<sup>9</sup> Given the MERO's decision, no determination is made as to whether Claimant would have been considered minimally qualified for the Food and Beverage Director position.



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**MASHANTUCKET EMPLOYMENT RIGHTS OFFICE**

**Notice of Parties' Appeal Rights**

**For Claims under 33 M.P.T.L.,  
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**Case Name:**

John A. Colebut v. Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino

**Case Number:**

2013-33018

**Date of Mailing of Final Claim Determination:**

July 29, 2013

Pursuant to 33 M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law, as amended, and the Compliance and Claims Procedures Manual for the Mashantucket Pequot Tribal and Native American Preference Law, the MERO has investigated the above-referenced claim and issued a Final Claim Determination. A party adversely affected by a Final Claim Determination of the MERO may appeal the determination to the Mashantucket Pequot Tribal Court as follows:

**Form of Appeal:** An appeal must be in writing on a form available from the Tribal Court clerk. A copy of the MERO Final Claim Determination from which an appeal is being taken must be submitted to the Tribal Court with the completed appeal form.

**Deadline for Filing Appeal:** To be timely filed, an appeal must be filed with the Tribal Court within thirty (30) days of the above Date of Mailing of Final Claim Determination.

**Notice to the MERO:** A copy of any appeal filed in Tribal Court must be forwarded to the MERO Director.

**Appeal Hearings:** Appeal hearings in Tribal Court are conducted in accordance with the rules of the court. The parties may not introduce evidence in court that was not submitted to the MERO during the investigation of the claim unless the evidence is newly discovered or was not available to the party during the investigation notwithstanding the party's best efforts to secure the evidence.

**Representation in Court:** If a party wishes to be represented in Tribal Court by an attorney, it is that party's responsibility to find and retain an attorney at that party's cost. The MERO represents the MERO's decision in court and does not represent any employer or claimant.

**Contacting the Tribal Court:** Mashantucket Pequot Tribal Court, Office of the Tribal Court Clerk, P.O. Box 3126 Mashantucket, CT 06338-3126. Telephone Number: (860) 396-6115.

**Please contact the Mashantucket Pequot Tribal Court clerk for Appeal Forms.  
Any questions about Tribal Court appeal or other processes should be directed to the court.**

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