UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SUNBEAM NECKLACE, as Special Administrator of the Estate of Walter T. Thornton, Jr.

Plaintiff,

vs.

UNITED STATES OF AMERICA, acting through the Bureau of Indian Affairs,

Defendant.

Civ. 06-4274

UNITED STATES' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

As evidenced by cross motions for summary judgment, the material facts involving the hiring of Primeaux to clear snow and ice from the pathway are basically undisputed. Although the Tribal Administrator hired Primeaux, it is the nature of his employment that is in dispute. On this first issue involving whether Primeaux was an employee of the Tribe or an independent contractor with the Tribe, the parties both agree that the United States' waiver of sovereign immunity does not extend to the acts of independent contractors, and that in order for the FTCA to apply in this case, Primeaux must have been an employee of the Tribe. (Aiken brief at p. 4). Consequently, the only issue that remains for the Court is the application of the undisputed facts to the law in order to decide under what status was Primeaux employed.

I. Primeaux was an Independent Contractor and not a Tribal Employee

Under the Federal Tort Claims Act, 28 U.S.C § 2871 defines a federal employee as follows:

> Employee of the government includes (1) officers or employees of any federal agency, member of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under [certain sections of title 32], and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a federal public organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

FTCA coverage was extended to include tribal employees operating under an Indian self-determination contract. No definition of a tribal employee is found under the FTCA, the ISDEAA, or the applicable regulations. In the absence of a clear definition, other courts faced with a similar question as to what constitutes an employee versus an independent contractor have presumed that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. *National Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992).

Plaintiff cites to two examples in her brief which she claims shows the Tribe controlled, or had the right to control, the detailed physical performance of Primeaux's work on the day in question. Neither example is supported by the citations to the record. First, the Plaintiff contends at page five of her brief that "Primeaux was required to adhere to Shield's specific instructions describing how to properly complete the task of clearing the Wagner pathway." The plaintiff cites to page 66 of Shield's deposition, but reading that testimony does not provide any "specific instructions." Rather, it just reveals that Primeaux was hired "to clear ice off the pathway," and that he was told he

could use tribal equipment. In contrast, Shields was asked directly whether he had given "specific directions" to Primeaux:

Q: Did you give Isaac any directions about how he was supposed to clear the ice off the path?

A: No.

Q: You just said, "I'm going to hire you to get that ice off the path."

A: Yes. There is no standard protocol for removing ice.

(Shields dep. 23:23-24, 24:1-4). There is no evidentiary support for the claim that Shields gave Primeaux specific directions describing how to complete the task of clearing the Wagner pathway.

Second, the Plaintiff argues that Heth, an employee of the YST Utilities, informed Primeaux "he would be required to transport the skid loader without straps." Plaintiff cites to Primeaux's deposition at page 52-53 in support of this statement on pages five and six of her brief. Although Primeaux does testify he asked Heth for chains (or straps) to secure the skid loader[1] and Heth did not have them, at no time does Primeaux testify that Heth informed him would be required to transport the skid loader without them. Heth's recollection was that he told Primeaux he was using the Utilities Department's chains on his semi trailer to haul the backhoe. SOF 48. No where in the record is there *any* support to claim that Primeaux "was instructed on how to use the equipment" as argued by the Plaintiff at page 6 of her brief. There is actual evidence to

[1]The skid loader is also referred to as a Bobcat by Primeaux during his deposition.

the contrary from Primeaux that he did not receive any instructions or training on how to hook up the trailer, load, or operate the skid loader. SOF 45.

There is additional evidence that Shields never intended to exert control over how Primeaux used the equipment to complete the job. Shields provided an example of one time when he fired someone he hired to work for the Tribe's EPA program after they did not procure a driver's license. He was asked whether he ever exercised any similar authority with Primeaux:

Q. Did you ever exercise any similar authority with Isaac Primeaux?

A: No.

Q: Did you have any intention of doing that?

A: No.

Shields dep. 73:1-14.

The Plaintiff relies upon *Schweiger v. Farm Bureau Ins. Co. of Nebraska*, 207 F.3d 480 (8th Cir. 2000) in support of her argument that the right to control the manner and means by which work is accomplished is dispositive on this issue of whether Primeaux is a tribal employee. *Schweiger* involved a female insurance agent who attempted to bring a sex discrimination lawsuit against Farm Bureau Insurance Corporation pursuant to Title VII. Her case was dismissed on grounds that Title VII applies only to employees and Schweiger was an independent contractor.

On appeal, the Eighth Circuit noted there is "no shorthand formula or magic phrase that can be applied to find the answer, " and therefore, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 483 (citing *National Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992). In addition to

the right to control the manner and means by which a task is accomplished, there are twelve other factors courts may take into account when making a finding as to whether a hired party is an employee or an independent contractor:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24. This list is nonexhaustive. *Schweiger*, 207 F.3d at 484.

The Plaintiff cites to similar factors set forth under section 220 of the Restatement (Second) of Agency and the comments to that section which illustrate the difference between an employee and an independent contractor. These factors were referenced by the United States Supreme Court in both *Darden,* 503 U.S. at 324, and *Logue v. United States*, 412 U.S. 521, 527 & n. 5 (1973)(finding county sheriff's employees were not federal employees and FTCA did not apply).

Weighing all of the incidents of the hiring arrangement between Shields and Primeaux, it stretches the imagination beyond credibility to conclude that Primeaux rises to the level of a tribal employee. Although Primeaux was not skilled in the sense of someone who is a professional, he was skilled in that not everyone has the ability and knowledge concerning how to load machinery, haul heavy equipment or operate a skid loader. Contract labor may be performed by non-professionals, especially when hired to do labor intensive work. There was no ongoing employment relationship, as Primeaux had not worked for the tribe since 2005. SOF ¶¶ 27, 68, 72. Following the

accident, he was again unemployed. SOF ¶ 91. Shields considered Primeaux to be a contract employee. SOF 76. Primeaux was not hired in accordance with the Tribe's personnel procedures for hiring tribal employees, nor was he paid as a tribal employee. SOF ¶¶ 81-85. In fact, he was paid by the hour as a "contractual" worker, with no deductions for tax withholdings, social security, retirement or benefits. SOF ¶§ 83, 88. His payment was reported by the Tribe to the Internal Revenue Service as miscellaneous "non-employee compensation." SOF ¶ 90. He received no annual or sick leave benefits which accrue to tribal employees. Primeaux dep. 46:16-18. He had no set work schedule, and was completely unsupervised during the entire time he performed his task.

The primary factor that appears to be indicative of an employee-employer relationship is that Primeaux used equipment that generally belonged to the YST. However, none of the equipment belonged to the Roads Maintenance Department designated in the self-determination contract. Rather, they belonged to other Tribal departments which were not associated with the performance of self-determination or 638 contract functions. Consequently, it cannot even be said that the self-determination program provided or maintained the equipment utilized by Primeaux. This factor is far outweighed when all of the other incidents of Primeaux's employment are considered.

There were far more factors leaning towards an employee status in the *Schweiger* case than exist here. Schweiger had an ongoing and long-standing relationship with Farm Bureau, during which she was required to submit weekly and monthly production reports to a Farm Bureau manager who kept track of whether she

was meeting her goals and sales quotas and who could reassign her accounts to other agents. *Schweiger*, 207 F.3d at 484-86. She received performance evaluations and a pension plan offered to career agents, was expected to notify her manager of vacations, attended company training sessions, needed company authorization for advertisements and business cards, and used company software programs on a computer leased from the company. *Id.* Even with all these factors, the appellate court affirmed the district court's finding that Schweiger was an independent contractor, rather than an employee.

Plaintiff maintains that Shields regularly hired other individuals to perform duties in the same manner that he hired Primeaux. This does not create evidence of Primeaux's employee status in light of the testimony from the YST Personnel Director that even a temporary tribal employee would still be hired through the YST Personnel Office, while a contract employee is usually brought on by either the Business and Claims Committee or the Administrative Officer, who was Gordon Shields. SOF 84. The only thing this proves is that Shields hired other contract workers besides Primeaux to perform manual labor jobs.

Finally, the Plaintiff cites to Primeaux's Affidavit as further support for her argument that he was an employee of the Tribe. The affidavit is unreliable given that Primeaux admitted he was not sworn in under oath and that the affidavit was not signed in front of a notary. Primeaux dep. at 42:25-45:9 Id. It is also contradicted by Primeaux's sworn testimony at his deposition and the statements he made to the insurance investigator three days after the accident. SOF 89. When asked at his deposition whether he disagreed with the statement in his affidavit that he was

employed with the Tribe, he replied, "Yeah. Like I said, I was just hired for that day to do that job." Primeaux dep. 44:23-45:9. It is disingenuous to call Primeaux an "employee of the Tribe" simply because a Tribal official hired him under a contract to perform a specific job.

In *Knudsen v. United States*, a veteran suffering from PTSD received limited psychological counseling from a private psychologist who contracted with the Veterans Administration to provide psychotherapy services. *Knudsen v. United States*, 254 F.3d 747, 748 (8th Cir. 2001). Knudsen later sued the United States, and one of his theories for recovery was that the Veterans Administration was vicariously liable for the contract psychologist because the VA was required in the legislation which authorized the counseling program to provide extensive supervision of contract counselors to monitor the quality and effectiveness of the program. *Id.* 750-51. The Eighth Circuit was unconvinced that Congress intended to transform independent contractors into employees merely because it expected the VA to insure that quality work was done with government funds, quoting Orleans, "Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs . . . into federal government acts. *Orleans*, 425 U.S. at 816. Similarly, the fact that Shields retained a right to inspect Primeaux's work, or fire him if he did not complete the job satisfactorily, does not convert an hourly contract worker into a tribal employee.

Federal regulations interpreting the ISDEAA and its application to Indian self-determination contracts begin at 25 C.F.R. Part 900. The contractual agreement

prepared by Shields documenting his decision to hire Primeaux is further evidence of Primeaux's status as an independent contractor. 25 C.F.R. 900.45, which provides:

> Each subcontract entered into under this Act shall at a minimum:
> (a) be in writing;
> (b) Identify the interested parties, their authorities, and the purposes of the contract;
> (c) State the work to be performed under the contract;
> (d) State the process for making any claim, the payments to be made, and the terms of the contract, which shall be fixed; and
> (e) Be subject to sections 7(b) and (c) of the Act

The fact that a contract was written for a small job covering a brief amount of time at an hourly wage is contrary to Primeaux being an "employee" as that term is commonly used and understood.

The federal regulations provide additional guidance and support with regard to the government's claim that there is no FTCA coverage for the negligence of a person who subcontracts with a self-determination contractor. 25 C.F.R. Part 900.180 *et. seq* discusses the applicability of the Federal Tort Claims Act coverage for claims arising out of the performance of self determination contracts. With regard to subcontractors with a self-determination contractor, the regulations provide:

> (b) *What claims may not be pursued under the FTCA?* (1) Except as provided in § 900.181(a)(1) and § 900.189, claims against subcontractors arising out of the performance of subcontracts with a self determination contractor.

25 C.F.R. § 900.183(b). Applying this regulation to the instant case, a claim arising out of the performance of a contract between Primeaux and the Shields (arguably acting for the YST) may not be pursued under the FTCA.

Subpart 900.181(a)(1) refers specifically to the California Rural Indian Health Board or subcontractors of an Indian Tribe or tribal organization which are approved by

the Indian Health Service Director and have been identified through tribal resolution as the local provider of Indian health care services.

Subpart 900.189 further explains:

> **§ 900.189 Does this coverage extend to subcontractors of self-determination contracts?**
> No. Subcontractors or subgrantees providing services to a Public Law 93-638 contractor or grantee are generally not covered. The only exceptions are Indian contractors such as those under subcontract with the California Rural Indian Health Board to carry out the IHS programs in geographically defined service areas in California and personal service contracts under § 900.193[2] (for § 900.183(b)(1) or § 900.183(b)[3] (for § 900.190).

Non-medical related claims under the FTCA are further explained at 25 C.F.R. § 900.204 to 900.210. Relevant to this case is the regulation at § 900.206 which limits FTCA coverage for non-medical-related claims to persons employed by a self-determination contractor (i.e. tribal employees, as set forth in the legislation at 25 U.S.C. 450f).

The distinction between medical-related and non-medical related claims is supported by a Congressional amendment to the law which provided that FTCA coverage includes "an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service. . ." . 25 U.S.C. § 450f(d). Congress did not provide for a similar assumption of FTCA liability for non-medical subcontractors who provide other services to a tribal

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[2] 25 C.F.R. § 900.193 refers to self-determination contractors providing health related services in a facility owned by an Indian Tribe or tribal organization.

[3]Thus preserving the exception noted above in 25 C.F.R. allowing FTCA coverage for medically-related claims as opposed to non-medically related claims.

organization or Indian Tribal contractor. Without such authority, there is no waiver of the United States' sovereign immunity for those persons or entities who subcontract with a self-determination contractor. This would be in accordance with *FGS Constructors, Inc. v. Carlow,* 64 F.3d 1230 (8th Cir. 1995), *cert denied*, 517 U.S. 1134 (1996), which is the leading authority on this issue to date.

Because Primeaux is not a tribal employee, but rather is a person who entered into a subcontract with a Tribe, there is no liability under the FTCA for negligence arising out of his conduct. Consequently, the United States respectfully asks that the court dismiss the Plaintiff's lawsuit with prejudice.

II. An Indian Self-Determination Contract May Not Be Implicitly Modified

The Plaintiff concedes that the self-determination contract at issue did not include the pedestrian pathway in it's scope of work authorized under the contract. Both parties are in agreement that the pathway was not built at the time the scope of work for the contract was agreed upon. Further, there is no dispute about the fact that there was no written modifications or amendments to the self-determination contract to include the pathway, and that the scope of work did not authorize any maintenance of the pathway.

The Plaintiff contends, however, that the self-determination contract was modified by the subsequent conduct of the BIA highway engineers, who were involved in the construction and inspection of the pathway. The Court should reject this argument on grounds that the engineers who built and inspected the pathway had no actual authority to modify the self-determination contract. There is a designated BIA

contracting officer who signs each self-determination contract. Only that person has the authority to officially modify a self-determination contract. In this case, no written modification to add maintenance of the pathway was ever requested or approved. Accordingly, Primeaux cannot be said to have been acting in furtherance of the self-determination contract when he was hired to remove snow and ice from the pathway.

The court must look to federal law in this case because the government is a party and the outcome of the case will directly affect substantial financial obligations of the United States. The South Dakota cases cited by the Plaintiff which allow for private parties to modify a contract by their implied behaviors do not apply to the federal government. "[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. . . this is so even when the agent himself may have been unaware of the limitations upon his authority." *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380, 384 (1947).

Merrill involved a farmer who was informed by the local county agent for FCIC that his reseeded wheat crop would be insured, when in fact, the federal regulations precluded crop insurance on spring wheat which was reseeded on winter wheat acreage. *Id.* at 383-384. After the farmer's crop was destroyed by drought, the FCIC refused to pay the loss and the farmer sued to recover insurance proceeds. *Id.*

Although the Supreme Court acknowledged the hardship caused by the refusal to pay, and assumed that recovery could be had against a private insurance company, it reinforced the reality that "[i]t is too late in the day to urge that the Government is just

another private litigant." *Id.* Thus, the scope of the Government's authority to enter into a contract, or to modify such contracts, may be explicitly limited by legislation, properly exercised through the rule-making power (i.e., federal regulations). The insurance contract was unenforceable even though the agent in *Meyer* may have been unaware of the regulation that limited his ability to insure reseeded crops. *Id.* The same is true in the instant case, where the Plaintiff claims that the BIA highway engineers mistakenly thought that maintenance of the pathway was part of the self-determination Road Maintenance contract.

"It is beyond dispute that parties seeking to enforce contracts against the United States - as opposed to individuals- face an additional requirement: they have the added burden of establishing that the government representative whose conduct they relied upon had the actual authority to bind the government." *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1989). A government employee possesses expressed authority to bind the government when the Constitution, a statute or a regulation unambiguously grants him such authority. *Starflight Boats v. United States*, 48 Fed.Cl. 592, 598 (2001).

The Plaintiff claims the contract should be considered modified because the BIA highway engineers included the pathway on its official road inventory and inspected the pathway during occasional visits to the YST Reservation. (Plf. brief at 12-13). However, the BIA highway engineer provides technical assistance to either the agencies or the tribes on the maintenance of the BIA reservation road systems. SOF 12. He does not sign the self-determination contract, or have any authority to modify the contract. SOF

14. Plaintiff makes no claim that any employee with actual contracting authority, such as the Awarding Official, acted in any way to modify the self-determination contract.

A copy of the modification to the YST Consolidated Tribal Grant Program distributing the funding for the fiscal year 2006-2007 was signed on October 31, 2005 by Contracting Officer Lorraine Brockie. Brockie has also provided a sworn affidavit that she is a certified Awarding Official with the appropriate training requirements to award and negotiate self-determination or "638" contracts. Along with her affidavit, Brockie provided a copy of her certificate and included relevant portions of the BIA Indian Affairs Manual concerning the delegation of authority from the Secretary of the Interior to various employees at the BIA Regional Area Offices and the system used to certify an awarding official.

With regard to procurement authority, purchases in excess of $2,500 may be delegated only to employee who meet the requirements of the Contracting Officers' Warrant System. The roads maintenance program for the fiscal year in question involved funding of $16,380.00, while the entire funding modification under the consolidated award to the YST added a total of $551,151.00 to the contract. There can be no question that a Contracting Officer was required to modify this contract.

The Indian Self-Determination Awarding Official Certification System is explained under Part 13, Chapter 13 of the Indian Affairs Manual. This manual sets standards which must be met by employees to become an Awarding Official. This evidence is offered to rebut Plaintiff's claim that because one highway maintenance engineer believed the contract included the pathway, the contract should be modified on the

basis of his mistaken belief. Only an Awarding Official, certified by the BIA, may award or modify a self-determination contract.

The Plaintiff also claims that the pathway should be deemed part of the contract because it has always been maintained by funds paid out of the road maintenance self-determination contract. Once again, a factual assertion made by the Plaintiff is not supported by the evidence. Plaintiff's claim that the pathway has always been maintained by funds paid out of the road maintenance self-determination contract is contradicted by the paperwork documenting Primeaux's contractual employment with the Tribe and Primeaux's testimony. In April of 2005, Primeaux was paid $600 to clean up and mow the pedestrian pathway by the YST Economic Development Administration (EDA), which is not operated pursuant to a self-determination contract. SOF 71. There may indeed be other persons, or other payments from the Tribe related to maintaining the pathway by EDA. However, just looking at the work done by Primeaux alone, it cannot be claimed that all of the maintenance costs associated with the pathway were always paid from self-determination funds.

Additionally, without this pathway being included in the self-determination contract's scope of work, any expenditure of self-determination funding to maintain the pathway (or repair the little league dugouts and crows nest, as we have also discovered during the course of this litigation), potentially violates 25 U.S.C. 450d which makes it a criminal offense for any tribal employee who is the recipient of a self-determination contract to willfully misapply the funds. The source of funding to maintain the pathway is not a persuasive argument when the funds were also used for other projects that wre clearly not authorized under the road maintenance scope of work.

Refusing to allow an implied modification of the self-determination contract is consistent with other cases involving contracts with the United States. *See, Humlen v. United States*, 49 Fed.Cl. 497(2001)(special agent of U.S. Customs Service and FBI agents lacked the authority to modify drug informant's written contract with the government); *Schism v. United States*, 316 F.3d 1259, 1278 (C.A.Fed 2002) (military recruiters had no authority to contract with recruits to promise them free lifetime medical care and no contract would be implied); *Strickland v. United States*, 382 F.Supp.2d 1334, 1344 (2005) (a person with no actual authority to modify a contract may not gain actual authority through the court-made rule of implied actual authority).

In *Strickland*, the court elaborated on the limited circumstances where contracts with the government have been modified through implied conduct and noted these cases all involve employees with actual contracting authority and where contracting was an integral part of their assigned duties. *Id.* The right to inspect work or make recommendations for additional work was insufficient to contractually obligate the government. *Id.* 1345. Likewise, the BIA's inspection of the pathway or its inclusion in their road inventory is not sufficient to contractually obligate the government under the self-determination contract.

Under 25 C.F.R. § 900.16, the Secretary of the Interior reviews self-determination contract proposals and either accepts or declines them. It would be contrary to 25 U.S.C. §450f(2) to allow the revision of a government contract by random acts or statements of either a BIA or Tribal employee. In addition, 25 U.S.C. §450m-1(b) also provides that a self-determination contract may not be modified without the

tribal organization's consent. To allow an implied modification of the self-determination contract in this case would lead to uncertainty and confusion as to what programs or actions are actually covered under a self-determination agreement. It would render the scope of work set forth in these contracts virtually meaningless. These are valid reasons to require that modifications or amendments to a self-determination contract must be in writing and approved by both the tribal contract organization and an awarding official certified by the Secretary of the Interior.

Conclusion

The facts surrounding the employment of Primeaux weigh in favor of finding that he was an independent contractor, and as such, there is no waiver of the United States' sovereign immunity under the FTCA pursuant to 28 U.S.C. §§ 1346(b) and 2671. In addition, the contract is clear on the face, and does not include maintenance or snow removal from the pedestrian pathway which Primeaux was hired to clear. An Indian self-determination contract cannot be modified as a matter of law by employees of the BIA who had no actual contracting authority. For this additional reason, the United States respectfully requests that the Court dismiss the Plaintiff's complaint with prejudice on grounds that Primeaux was not acting within the scope of work authorized by the contract.

Dated this 4th day of October, 2007.

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Certificate of Service

I, Diana Ryan, do hereby certify that on October 4, 2007, I caused the United States' Response to Plaintiff's Brief in Support of Motion For Summary Judgment to be served by first class mail, postage prepaid upon:

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