

UNITED STATES DISTRICT COURT
FOR DISTRICT OF KANSAS

ROBERT NANOMANTUBE)
)
 Plaintiff)
)
 vs.)
)
)
 THE KICKAPOO TRIBE IN)
 KANSAS, et al)
)
 Defendants.)

Case No. 09-CV-4107-RDR

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF
JURISIDICION

Comes now the above named Defendants the Kickapoo Tribe in Kansas the Tribal Council of the Kickapoo Tribe in Kansas and the Golden Eagle Casino by and through their attorneys of record Ilse L. Smith and Steven A. Campbell-Pro Hac Vice, and submits the following memorandum of law in support of Defendants Motion to Dismiss and Motion for Judgment on the pleadings.

I.

STATEMENT OF THE NATURE OF THE CASE BEFORE THE COURT

This case is before the Court on Plaintiffs claims that defendants, a Federally recognized Indian Tribe discriminated against him in employment hiring practices including the Defendants Indian hiring preference.

Plaintiff alleges he was denied employment because of his race, Native American in violation of 42 U.S.C. Section 2000e et seq. Plaintiff claims damages in excess of

\$100,000.00 and seeks reinstatement with back pay and benefits. In the alternative, Plaintiff seeks damages for: loss of income, benefits, humiliation, emotional distress, diminution in earning capacity and punitive damages.

Defendants deny Plaintiffs claims of discrimination and assert the doctrine of tribal sovereign immunity from suit, failure of the Plaintiff to exhaust tribal court remedies and lack of subject matter and personal jurisdiction of the Court over Defendants. Defendant further asserts that 42 U.S.C. Section 2000e specifically excludes Tribes as employers and does not provide a private right of action herein.

II.

STATEMENT OF FACTS

Plaintiff is a former employee of the Golden Eagle Casino owned and operated by the Kickapoo Tribe in Kansas located within the exterior boundaries of the Kickapoo Reservation. See: *Complaint paragraph 9 & 10*. Plaintiff was terminated from his employment with the Golden Eagle Casino on or about December 17, 2008. *id.*

Defendants are a federally recognized tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C.A. Sec. 461 et seq. The Kickapoo reservation is located in Brown County Kansas near Horton Kansas. The Tribal Council is the legislative and general governing body of the Tribe. See. *Complaint paragraph 3*.

Defendants apply Indian hiring preference to qualified Native American applicants that meet the minimum job description qualifications. See. *Attachment A. Of Plaintiff's Complaint; Indian preference policy-ref. KR25*. Former employees of the Golden Eagle Casino are not guaranteed future employment. Selection will be based on work history, applicable education or special training, aptitude and oral interviews with the Department Manager. Id. 3. Opportunity for re-employment. Employment at the Golden Eagle Casino is: "Employment at Will" id. 1. Employment at Will.

The Golden Eagle Casino Employee Handbook states: The Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991, and the Indian Preference Policy of the Kickapoo Tribe in Kansas. See: *page 4 Golden Eagle Casino Employee Handbook: Employee Selection Process. Plaintiff's attachment A.*

Indian preference applies when two or more applicants or employees applying for the same position have equal qualifications required by the job description. Id.

Plaintiff interviewed for the General Manager position with the Golden Eagle Casino. Plaintiff was not hired as the General Manager of the Golden Eagle Casino. A non-Indian was hired as the General Manager of the Golden Eagle Casino. See. Plaintiff's complaint paragraph 14.

The U.S. Equal Employment Opportunity Commission determined they lacked jurisdiction herein as the activity occurred on an Indian Reservation. Plaintiff's attachment B.

Plaintiff has filed a lawsuit in the Kickapoo Nation District Court concerning the same issues herein prior to filing his action in United States District Court. See: Tribal Court Complaint. Defendant's Attachment A. Plaintiff has not exhausted his Tribal Court remedies.

III.

QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity divests the Court of subject matter and personal jurisdiction herein?
2. Whether the Plaintiff is required to exhaust all Tribal Court remedies prior to proceeding in Federal District Court?
3. Whether 42 U.S.C.A. Section 2000e is applicable to Tribes?

IV.

ARGUMENT

- 1. The Defendants are immune from suit herein pursuant to the doctrine of tribal sovereign immunity and the Court lacks subject matter and personal jurisdiction.**

It has long been recognized that federally recognized Indian Tribes possess “the common-law immunity from suit traditionally enjoyed by sovereign powers.” Santa Clara Pueblo v. Martinez, 936 U.S. 49, 58 (785) (citing United States v. United States Fidelity & Guaranty, 309 U.S. 506, 512-513 (1940)). The basis of this immunity has been expressed as an inherent aspect of tribal sovereign powers predating the United States Constitution and as consistent with federal policy preserving the existence of tribal autonomy. White Mountain Apache v. Bracher, 448 U.S. 136, 142 (1980).

This Court has already addressed this issued and found that the Kickapoo Tribe was immune in claims of employment discrimination asserted under title VII by a former casino employee. Tammy Hartman et al.v. Golden Eagle Casino, 243 F.Supp.2nd 1200 (KS District Court, 2003)

Tribal sovereign immunity is a matter of subject matter jurisdiction which can be challenged in a motion to dismiss for lack of subject matter jurisdiction. Fed. Rules Civ. Proc. Rule 12(b) (1), Bales v. Chickasaw Nation Industries, 606 F. Supp. 2d 1299 D.N.M, 2009. Further, the Court in *Bales* held that a tribal corporation which was wholly owned by a federally-recognized Indian nation was entitled to tribal sovereign immunity on non-Native American employee’s race and age discrimination claims; Indian nation had not unequivocally waived sovereign immunity in its corporate charter, or otherwise, with respect to the claims brought in this lawsuit, and Congress had not abrogated that tribal sovereign immunity through its enactment of Title VII or the Age Discrimination in Employment Act (ADEA) Oklahoma Welfare Act, Sec. 3, 25 U.S.C.A. Sec. 503; Civil Rights Act of 1964, Sec. 701 et seq., Sec. 2000e et seq. In the case herein Defendants have not waived their sovereign immunity and Congress has not

abrogated Defendants tribal sovereign immunity rights by passage of Title VII of the Civil Rights Act of 1964, Sec. 701 et seq., Sec. 2000e et. Seq.

In, Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572 Cal. App.2Dist.2008

The Court held that tribal sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation; rather it presents a pure jurisdictional question. Waivers of tribal sovereign immunity are strictly construed, and there is a strong presumption against them. Id. at 572.

Tribal sovereign immunity extends to a Tribe's commercial as well as governmental activity and absent an express authorization by Congress or a clear waiver by the tribe Indian tribes are protected from suit. Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718 C.A. 9. Ariz., 2008. The Golden Eagle Casino is wholly owned and operated by the Kickapoo Tribe in Kansas and as such is entitled to protection from suit by the doctrine of tribal sovereign immunity. .

In 1991, the Supreme Court reaffirmed the rule of law that "Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 507 (1991).

Recently, the United States Court of Appeals, Tenth Circuit forcefully upheld the sovereign immunity of the Tribe in a claim for breach of contract. See Native American Distributing v. Seneca Cayuga Tobacco Co., 546 F. 3d 1288, 2008-2 Trade Case P 76,395 (2008). This immunity is so powerful that Courts have held there can be no “waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity, or the unique context of a case.” See Pan Am.Co v. Sycuan Band of Mission Indians, 884 F. 2d 416, 419 (9th Cir. 1989).

The Defendant, the Kickapoo Tribe in Kansas is a recognized Tribe under the laws of the United States, pursuant to the Indian Reorganization Act of June 18, 1934 and the Court may take judicial notice of that legal status for the purposes of this Motion to Dismiss. As a federally recognized Indian Tribe, the Kickapoo Tribe in Kansas is entitled to the sovereign immunity consistently recognized by federal courts.

Since the Tribe is entitled to immunity as a matter of law, the Plaintiff cannot pursue his claims against the Defendant unless one of the conditions set forth in Oklahoma Tax Commission case (waiver or Congressional abrogation) exists. See also Kiowa Tribe of Oklahoma v. Apache Tribe of Mescalero Reservation, 673 F. 2d 751, 754 (1998) “All tribes have immunity from a lawsuit unless Congress authorizes the action or the Tribe waives their immunity.” The Plaintiff fails to allege that either condition exists. The Court may take judicial notice of the absence of a Congressional Act to abrogate the sovereign immunity of the Kickapoo Tribe in Kansas for purposes of the Plaintiff’s action.

As Congress has not authorized the current litigation, the only way the Plaintiff may proceed is if there has been a waiver of the sovereign immunity by the Tribe itself. There has been no such waiver of immunity. The Tenth Circuit has held that a waiver of tribal sovereign immunity cannot be implied, but must be unequivocally expressed. See, e.g., Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F. 2d 1166, 1171 (10th Cir. 1992) (citing Santa Clara Pueblo, 436 U.S. at 58). Additionally, the Supreme Court for the Kickapoo Nation in Kansas held in Potto v. Kickapoo Tribe in Kansas, SP005-02, (2007), that the Tribe, in its Employee Policy Manual, did not waive its sovereign immunity and upheld the District Court's dismissal which barred the employment action on the basis of sovereign immunity. The Tribe has not unequivocally expressed its intent to waive sovereign immunity for the purposes of this litigation and this action should be dismissed.

2. Plaintiff is required to exhaust all Tribal Court remedies before proceeding in Federal District Court.

This Court in Whitebird v. The Kickapoo Housing Authority, 751 F.Supp. 928 (1990) found that the federal action be dismissed so that the tribal court may have an opportunity to consider the matter. This Court cited the Supreme Court decision.

The Supreme Court in, National Farmers Union Insurance Cos v. Crow Tribe of Indians., 471 U.S. 845, 105 S.Ct 2447 (1985) examined the issue of exhaustion of Tribal Court remedies before a claim may be examined by the Federal District Court. Respondent a Crow Indian minor was struck by a motorcycle in the parking lot of a school located within the Crow Indian Reservation but on land owned by the State of Montana. The

Crow Tribal Court awarded damages to the minor and the minor obtained a default judgment against the School District, a political subdivision of the State. The School District and its insurer brought an action in Federal District Court for injunctive relief, invoking as a basis for federal jurisdiction 28 U.S.C. Sec. 1331,. The District Court held that the Tribal Court had no jurisdiction over a civil action against a non-Indian and entered an injunction against execution of the Tribal Court judgment. The Court of Appeals reversed, holding the District Court had no jurisdiction to enter such an injunction. The Court found that a “federal question” under Sec. 1331 was present concerning the issue of whether the Tribal Court exceeded the lawful limits of its jurisdiction.

However, the Court further held that exhaustion of Tribal Court remedies is required before petitioner’s claim may be entertained by the District Court. The existence and extent of the Tribal Court’s jurisdiction requires a careful examination of tribal sovereignty and the extent to which that sovereignty has been altered divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. Such an examination and study should be conducted in the first instance by the Tribal Court. 105 S. Ct. 2447 at 2452-2454. Until petitioners have exhausted the available remedies in the Tribal Court, it would be premature for the District Court to consider * 846 any relief. Whether the federal action should be dismissed or merely held in abeyance pending the development of the Tribal Court proceedings is a **2449 question that should be addressed in the first instance by the District Court.

The facts of the case before the Court are even more compelling than those found in National Farmers Union as there is no question of Tribal Court jurisdiction, Petitioner himself filed an action in Kickapoo Nation District Court on March 20, 2009 seeking damages and reinstatement of employment. Petitioner has served extensive discovery in the Tribal Court action and the matter is still pending. All of the facts herein occurred on Tribal lands and Petitioner is Native American. The gaming activity of the Golden Eagle Casino is the economic flagship of the Kickapoo Tribe and entails key elements of tribal self governance. There is no better example of the Kickapoo Tribes right of sovereignty than the right to manage its tribally owned casino free from the review of the federal courts. The Kickapoo Nation District Court is the proper venue for this case.

Finally, the Supreme Court stated in dicta: Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

In, Iowa Mutual Insurance Company v. LaPlante,. 480 U.S. 9 , 107 S. Ct. 971 (1987) The Supreme Court again addressed the issues if tribal court jurisdiction and exhaustion of tribal court remedies. In LaPlante the employee of a ranch, (respondent,) located on the Blackfeet Indian Reservation and owned by Indians, brought an action in Tribal Court seeking compensation from the ranch for personal injuries he suffered when the cattle truck he was driving “jackknifed.” And seeking compensatory and punitive damages from petitioner, the ranch’s insurer, for alleged bad-faith refusal to settle the personal injury claim. Petitioners moved to dismiss the tribal court action, the Tribal

Court ruled that it had subject-matter jurisdiction, petitioner then brought an action in federal district court without seeking review by the Tribal Appellate Court.

Petitioner based his federal claim on diversity of citizenship, and seeking a declaration that petitioner had no duty to defend the ranch because respondent's injuries fell outside the applicable insurance policies. The District Court dismissed the action for lack of subject matter jurisdiction, the Federal Court of Appeals affirmed, concluding that the Tribal Court system should be permitted to initially determine its own jurisdiction, which determination** 973 could be reviewed later in federal court. The Supreme Court held: 1. a federal district court may not exercise diversity jurisdiction over a dispute before an appropriate Indian tribal court system has first had an opportunity to determine its own jurisdiction Pp 975-978. (a) The rule announced in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 105 S. Ct. 2447, 85 L.Ed 2d 818 requiring exhaustion of tribal remedies, applies here even though *National Farmers Union* was a federal-question case rather than diversity case.. Regardless of the basis of jurisdiction, federal policy supporting tribal self-government requires federal courts, as a matter of comity, to stay their hands in order to give tribal courts a full opportunity to first determine their own jurisdiction. Pp. 976-977

As *National Farmers Union* indicates, proper respect for tribal legal Institutions require that they be given a "full opportunity" to consider the issues before them and "to rectify any errors". 471 U.S. at 857, 105 S.Ct., at 2454, The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. Thus federal courts should not intervene until the tribal court appellate process is completed. If the federal court later agrees that

the tribe had jurisdiction, it cannot relitigate the merits of the dispute. *LaPlante*, 480 U.S. at 19.

This Court has addressed the issue of tribal court exhaustion of remedies In, *Tidwell v. Harrah's Kansas Casino Corp*, 322 F.Supp. 2d 1200 (2004). In *Tidwell*, a non-tribal employee of a casino operated by a non-Indian corporation pursuant to a casino management contract with the Potawatomi Indian Nation files a complaint against her employer alleging violations of Title VII and the Kansas Act Against Discrimination. The respondent moved to dismiss for lack of subject matter jurisdiction. Judge Robinson of the District Court held: 1. tribal exhaustion was required as a matter of comity, not jurisdictional prerequisite. 2. No tribal sovereignty concerns were implicated, even though case arose on reservation; 3. Assertion of tribal court jurisdiction was not motivated by bad faith, nor would tribal court action violate express or implied jurisdictional prohibitions; and 4. Even if tribal exhaustion applied, comity did not require dismissal of suit.

Tidwell is factually a much different case than the case at bar. Herein, Defendants are without question a federally recognized Indian Tribe and the sole owners and operators of the Golden Eagle Casino. Petitioner states he is Native American and on March 20, 2009 filed a lawsuit mirroring the present case in Tribal Court. Herein, it is clear that tribal sovereignty issues are implicated. The Golden Eagle Casino is the main economic resource of the Kickapoo Tribe and provides funding for essential Tribal governmental services and programs. *Tidwell* was a sexual harassment case not a claim of Indian hiring preference violation. In *Tidwell*, the Tribe was not a party to the lawsuit

clearly in this case the Tribe is the main Defendant and self governance is a key component of the litigation.

The Court did find that the Tribe was specifically exempt from Title VII, and that said exemption could not be construed as a bad faith claim because the Tribe is not a party to the lawsuit. Moreover the Tribal Court used a code of civil procedure that is substantially similar to the Federal Rules of Civil Procedure. The Court denied the Plaintiffs bad faith argument. The Supreme Court decision of Strate v. A-1 Contractors, 520 U.S. at 459 n. 14, 117 S.Ct. 1404, 137 L.Ed. 2d 661 (1997) is not applicable herein as *Strate* involved activity on non-Tribal land, land that had been alienated to non-tribal members. *Strate* held that a court should not apply the tribal exhaustion doctrine when the facts concern non-tribal member's activity on land that has been alienated to nonmembers. *Strate* at 459 n. 14 S.Ct. 1404, 137 L.Ed.2d 661. Plaintiff and Defendant agree all essential facts herein occurred within the exterior boundaries of the Kickapoo Reservation and the Golden Eagle Casino is physically located on trust land not fee land owned by non-Indians or nonmembers.

Finally, *Tidwell*, citing Kerr-McGee Corp, 115 F. 3d at 1507 stated: When the activity at issue arises on the reservation or involves a "reservation affair," comity concerns "almost always dictate that the parties exhaust their tribal remedies before resorting to the federal forum," The case at bar is most certainly a "reservation affair". Plaintiff describes himself as a "resident Indian" and Defendant as a federally recognized tribe. The tribal exhaustion doctrine should be applied herein as required by applicable federal law.

III.

42 U.S.C.A. Section 2000e of the Civil Rights Act of 1964 and 1991 is not applicable to federally recognized tribes.

Plaintiff claims that due to the Golden Eagle Casino Employee Handbook –(attachment A to Plaintiff’s complaint) the Defendants have consented to be sued under Title VII

Section 2000e. This Court has previously found that Tribes are specifically exempt from Title VII, see: *Tidwell v. Harrah’s Kansas Casino Corp.* 322 F.Supp 1200, (2004.) 42

U.S.C.A. Section 2000e contains a specific exclusion for tribes under the definition of employer.

(b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in [section 2102 of Title 5](#)), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under [section 501\(c\) of Title 26](#), except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Defendants strongly argue that they have not consented to be sued or waived any aspect of their sovereign immunity. The statement that the Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991 in no way gives Plaintiff standing to bring a private action under Section 2000e in federal district court.

In fact compliance with section 2000e would apply the exclusion of tribes as an employer. The Golden Eagle Casino is simply stating they will not discriminate in

employment practices. Wavier of tribal sovereign immunity must be clear and unequivocal, there is no such waiver in this case.

Defendants cannot abrogate the clear intention of Congress to exclude Tribes as an employer under Title VII Section 2000e. The Golden Eagle Casino handbook is not binding upon Congress and is not a waiver of the Tribes sovereign immunity it is also not a contract with the Plaintiff.

In conclusion, the Plaintiffs case should be dismissed with prejudice as the Court lacks subject matter and personal jurisdiction over the Defendants under the doctrine of tribal sovereign immunity and the exclusion of Tribes as an employer under Title VII and the exhaustion of tribal court remedies as outlined above.

Respectfully submitted this 26th day of August 2009.

/s/ Ilse L. Smith

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CERTIFICATE OF SERVICE

We the attorneys for the Defendants certify that on this 26th day of August, 2009, the foregoing was filed with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following:

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