UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Jennifer Sober,

Plaintiff,

v.

Soaring Eagle Casino and Resort,

Defendant.

Case No. 1:08-cv-11552-TLL-CEB
Honorable Thomas L. Ludington

Defendant Soaring Eagle Casino and Resort's
Second Notice of Motion and Motion to Dismiss

COMES NOW Defendant Soaring Eagle Casino and Resort ("SECR"), by and through its attorneys Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C. and Sean J. Reed, and again moves this Honorable Court to dismiss this matter.

In accordance with Local Rule 7.1(a) of the United States District Court for the Eastern District of Michigan, on August 17, before filing this Motion, counsel for SECR conferred with counsel for Plaintiff by telephone. **Counsel for Plaintiff *concurred* in the dismissal of all but Plaintiff's FMLA claim. Therefore, under Local Rule 7.1(a), the Tribe asks the Court to dismiss outright Plaintiff's ADA and Section 1981 claims.** The Tribe presents its arguments regarding these claims in this brief merely for the Court's information, but under the circumstances, it appears that no response is required in connection with either the ADA or Section 1981 claims and they may be dismissed now.

This Court also should not hear the remaining FMLA claim because Plaintiff has failed to exhaust Tribal Court remedies, despite this Court's order that it do so—Plaintiff has thereby

failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). In response to the Tribe's first motion to dismiss, this Court stayed this matter in order to permit Plaintiff to exhaust Tribal Court remedies. While Plaintiff did file suit in Tribal Court, the Tribe filed a motion to dismiss there on the same grounds as here, and the Tribal Court granted dismissal. Plaintiff then failed to appeal that Tribal Court order to the Tribal Appellate Court, but still seeks to have the case heard. As a matter of black-letter law, Plaintiff has failed to exhaust tribal court remedies and this Court therefore lacks jurisdiction to hear the case.

Additionally, the FMLA claim should be dismissed pursuant to Rule 12(b)(1) and (2) for lack of jurisdiction over the Tribe for purposes of these claims. SECR, which is solely owned by the Saginaw Chippewa Indian Tribe of Michigan (the "Tribe"), a federally recognized Indian Tribe, is immune from civil suit. Neither the Tribe, nor the Congress on behalf of the Tribe, has consented to this action.

Dated: August 17, 2009

SOARING EAGLE RESORT AND CASINO

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Defendant Soaring Eagle Casino and Resort's
Memorandum of Law in Support of Second Motion to Dismiss

Concise Statement of Issues Presented

1. In its September 12, 2008 Order, the Court stayed this matter and ordered Plaintiff to exhaust Tribal Court remedies before it would hear any aspect of this case, but Plaintiff failed to do so. Where a party fails to exhaust tribal court remedies, it should be barred from later seeking federal court review of any aspect of a tribal-court decision. Should this Court dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted?

2. A federally recognized Indian tribe has sovereign immunity from suit, including its business enterprises, and may only be sued if it or the U.S. Congress waives the tribe's immunity. Here, Plaintiff has sued the Soaring Eagle Casino and Resort, which is solely owned by the Saginaw Chippewa Indian Tribe of Michigan, alleging claims for which neither the Tribe nor the Congress has waived the Tribe's sovereign immunity. Should this Court dismiss under Rule 12(b)(1) and (2) for lack of jurisdiction over the Tribe?

Controlling or Most Appropriate Authority for the Relief Sought by the Defendant:

U.S. Code

Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.*

Civil Rights Act of 1964, 42 U.S.C. § 1981.

U.S. Supreme Court Cases

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998).

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

United States v. Wheeler, 435 U.S. 313 (1978).

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Federal Court Cases

Aleman v. Chugach Support Servs., Inc., 485 F.3d 206 (4th Cir. 2007)

Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006)

Chayoon v. Chao, 355 F.3d 141 (2nd Cir. 2004)

Sharber v. Spirit Mtn. Gaming, Inc., 343 F.3d 974 (9th Cir. 2003).

Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990 (8th Cir. 1999).

Aldrich v. Saginaw Chippewa Indian Tribe of Michigan, Order Granting Defendant's Motion to Dismiss (Unpubl.), Case No. 07-12801-BC (E.D. Mich. Oct. 4, 2007).

Piro-Harabedian v. Saginaw Chippewa Indian Tribe, 2005 WL 3163395 (E.D. Mich. Nov. 23, 2005).

Introduction and Factual Background

I. Federal Court case.

On April 21, 2008, Plaintiff, a former floor person for the SECR, served the Tribe by certified mail with her complaint against the SECR. Therein, she alleged three separate counts. "Count 1 - Violation of American with Disabilities Act" includes her claim that, after suffering injury, she returned to work with a 10-pound weight restriction, which did not affect her job.[1] But she claims the SECR "refused to honor the restriction" and instead terminated her on September 28, 2006.[2] She asserts this violated Title I of the American With Disabilities Act ("ADA"), and that it caused her various damages.[3]

"Count 2 – Violation of FMLA" (the Family Medical Leave Act) includes Plaintiff's claim that she was entitled to 12 weeks of leave without losing her job after surgery if her injury prevented her from performing her job.[4] But she alleges SECR "failed to afford [her] the opportunity to take said leave and retain her position."[5] She claims this violated the FMLA, resulting in various damages.[6]

Finally, "Count 3 – Violation of 42 USC 1981" (for discrimination in employment under the Civil Rights Act) includes a claim that SECR "discriminated against [her] in a term or

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[1] Compl. at 1-2 ¶¶ 2-8. *See also* full text of ADA, 42 U.S.C. § 12101 *et seq.*
[2] Compl. at 2 ¶¶ 6-7.
[3] *Id.* at 2 ¶¶ 7-8. Plaintiff also claims that she first "exhausted her administrative remedies and received a right to sue letter from the EEOC" in connection with this claim. But she does not attach the letter to the Complaint. In fact, the common practice of the EEOC, when it receives any ADA claim against the Tribe, is to send the applicant a *dismissal* letter that state that "Employer is Exempt from Coverage." Unfortunately, the Tribe does not have a copy of the letter on file in connection with Plaintiff's ADA claim.
[4] *Id.* at 2 ¶¶ 10-16. *See also* full text of FMLA, 29 U.S.C. § 2601 *et seq.*
[5] Compl. at 2 ¶ 14.
[6] *Id.*

condition of employment based on her national origin and/or her race."[7] She does not, however, plead any facts to support the alleged discrimination. Furthermore, the Complaint makes no allegation with respect to the legal nature or status of the Tribe.

On May 12, 2008, the Tribe filed its first Motion to Dismiss under Rule 12(b)(1).[8] The Tribe argued that this Court lacked subject-matter jurisdiction because, as a sovereign, federally recognized Indian tribe, the Tribe possesses immunity from all unconsented proceedings, and neither the Tribe nor Congress has waived the Tribe's immunity from these proceedings.[9]

On June 6, Plaintiff responded and, amongst other things, asserted that the Tribe had "specifically waived tribal immunity overall all FMLA claims."[10] In support, Plaintiff cited a portion of the SECR Handbook that stated that "SECR will voluntarily comply with the provisions of the federal Family and Medical Leave Act of 1993 . . . ."[11]

On June 23, the Tribe replied that this language did not even arguably constitute a waiver of sovereign immunity.[12] This is because the standard for finding a Tribe has waived sovereign immunity requires words "that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court,"[13] not just handbook language describing "SECR's FMLA policy."[14]

On September 12, the Court issued an order (the "September 12 Order") in which it

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[7] *Id.* at 3 ¶¶ 17-20.
[8] Tribe's Mot. to Dismiss (5/12/08), Doc. 4.
[9] *Id.* at 4-7.
[10] *See* Plaintiff's Resp. (6/6/08) at 3-4, Doc. 7.
[11] *Id*. at 3.
[12] Tribe's Reply (6/23/09) at 4, Doc. 8.
[13] *Id.* at 4-5, *citing Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 297 (Minn. 1996).
[14] *Id.* at 4.

stayed the case and denied without prejudice the Tribe's first Motion to Dismiss.[15] Despite some discussion about the unavailability of certain claims under the law at the hearing, the Court did not dismiss any of the claims in the case. The Court held that Plaintiff had not yet sought any relief in Tribal Court or "exhausted available remedies,"[16] a question that neither party had briefed. The Court stated that "[t]he parties implicitly acknowledge, however, that the events underlying this litigation occurred within tribal jurisdiction and that Defendant is an entity of the Saginaw Chippewa."[17] The Court therefore cited the tribal-court exhaustion rule that requires that "tribal court[s] have the first opportunity to evaluate the factual and legal bases for the challenge to its jurisdiction."[18] Under the rule, "relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete."[19]

Therefore, the Court reasoned that "a party bringing a claim that is within the jurisdiction of a tribal court must demonstrate that the action is expressly exempt from the tribal court's jurisdiction" unless an established exception applies.[20] The Court cited the Ninth Circuit precedent of *Sharber v. Spirit Mountain Gaming, Inc.*,[21] a similar FMLA case against a tribe. There, the Ninth Circuit held that "[t]he absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement."[22]

In conclusion, the Court held that the Tribal Court should have the first opportunity to

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[15] Sept. 12 Order at 6, Doc. 9.
[16] *Id.* at 4.
[17] *Id.*
[18] *Id.* at 5, *citing Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (citation omitted).
[19] *Id., citing Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (internal citations omitted).
[20] *Id.* at 6.
[21] 343 F.3d 974, 976 (9th Cir. 2003)
[22] *Id.*

determine whether the Tribe or the Congress waived sovereign immunity for purpose of hearing Plaintiff's claims.[23] The Court did not reach substantive arguments concerning sovereign immunity.[24]

II. Tribal Court case.

On October 2, Plaintiff filed a complaint in Tribal Court *pro se*, alleging solely "VIOLATION FMLA (DISCHARGED FROM EMPLOYMENT)," seeking money damages.[25] Plaintiff never asserted either of her other claims in Tribal Court, nor did she flesh out her FMLA claim in any way.

On January 2, 2009, the Tribe filed a motion to dismiss in Tribal Court, again relying on the fact that the Tribe had not waived its sovereign immunity such that it would be subject to suit for these claims, whether in Tribal Court or any other court.[26] The Tribe cited Section 3.201(c) of the Revised Tribal Code regarding Tribal Court jurisdiction: "The [Tribal] Court shall not have jurisdiction over any suit brought against the Tribe without consent of the Tribe. Nothing in this Code shall be construed as consent by the Tribe to be sued."[27] The Tribe also cited controlling Tribal Court precedent recognizing the Tribe's sovereign immunity from suit and Plaintiff's failure to properly state her claims.[28]

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[23] Sept. 12 Order at 6, Doc. 9.
[24] *Id.*
[25] *See* Tribal Ct. Compl. (10/3/08), attached as Ex.1.
[26] *See* Tribe's Tribal Ct. Mot. to Dismiss (1/2/09), attached as Ex.2.
[27] *See* Sag. Chip. Tribal Code §3.102, attached as Ex. 3.
[28] *See* Tribe's Tribal Ct. Mot. to Dismiss at 3-4, Ex. 2, *citing Steven Godbey v. Gail L. Jackson, et al*. (Sag. Chip. Tribal Ct. App. Case No. 95-C1-016, 1995) (under Tribal Code, Tribe and its officials have sovereign immunity from suits for money damages); *Jackson v. Kahgegab* (Sag. Chip. Tribal Ct. App. Case No. AC-1014, 2003) (general sovereign immunity rule); *Perini Bldg. Corp. v. SCIT* (Sag. Chip. Tribal Ct. Case. No. 01 CI-0044, 2002) (". . . implicit in the doctrine of sovereign immunity is the right of the sovereign to assert immunity from suit in its own courts

On February 2, Plaintiff's counsel finally entered an appearance in Tribal Court and filed a response to the Tribe's Motion to Dismiss.[29] Again, Plaintiff only argued the FMLA claim and relied on the language of the SECR Handbook.[30] Plaintiff falsely claimed that this language had "prompted Judge Ludington of the US District Court to conclude that the Saginaw Tribe has waived sovereign immunity over FMLA claims."[31] Plaintiff made a series of other arguments but did not make any further showing that the Tribe had waived its sovereign immunity.

The Tribal Court heard the Tribe's motion on February 2. On April 1, the Tribal Court entered and Opinion and Order dismissing Plaintiff's Tribal Court case, agreeing that the Tribe had not waived its sovereign immunity.[32] In discussing Plaintiff's arguments that the FMLA claim could be heard, the Tribal Court stated "[i]t is clear from his argument that Plaintiff does not understand sovereignty in Indian Country and in tribal courts."[33] The Tribal Court expressly "adopt[ed] the reasoning of the Defendant[] and states the Defendant cannot be the subject of a lawsuit in this case because of sovereign immunity. That is, the sovereign (the SCIT and by extension the SECR) is immune from lawsuit for the reasons stated in Defendant[']s] brief."[34]

In considering the language of the SECR Handbook, the Court stated that "[n]othing in the Tribal Constitution nor the FMLA as adopted by the Tribe waives that right to sovereign immunity." [35] The Tribal Court also noted that "the Tribe has its own enforcement and review

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. . .") (citations omitted); all Tribal Ct. cases are attached as Ex. 4.
[29] *See* Tribal Ct. Plaintiff's Resp. to Def.'s Mot. to Dismiss (2/2/09) at 2, attached as Ex. 5.
[30] *Id.*
[31] *Id.*
[32] Tribal Ct. Order (4/1/09) at 6, attached as Ex. 6.
[33] *Id.*
[34] *Id.*
[35] *Id.*

policy for employee disputes."[36]

It was not until May 7 that Plaintiff attempted to notice her appeal to the Tribal Appellate Court.[37] The Appellate Court rejected the appeal as untimely under Title I, Section 1.514.6 of the Tribal Code, which requires notice of appeal to be filed within 21 days.[38] Under the Tribal Code, this constituted "a waiver and a forfeiture of the right to appeal"--the Tribal Appellate Court lacked jurisdiction and returned Plaintiff's filing fee.[39]

On May 19, the Tribe updated this Court regarding the dismissal of the Tribal Court case.[40] The Tribe informed the Court that Plaintiff had not exhausted Tribal Court remedies.[41] On July 17, this Court held a status conference and directed Plaintiff to file a motion. On July 22, Plaintiff filed a Motion for Summary Judgment Pursuant to Rule 56(a),[42] which the Tribe will respond to separately. The Tribe hereby files its second, pre-answer motion for summary judgment under Rule 12(b)(1) and (2).

Argument

I. As a sovereign, federally recognized Indian tribe, the Tribe possesses immunity from all unconsented proceedings.

As a threshold matter, it is well-established that tribal sovereign immunity extends to a tribe's business activities, including a tribally-owned casino.[43] Therefore, the applicable

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[36] *Id.*
[37] *See* Tribal App. Ct. Minute Order (5/13/09), attached as Ex. 7.
[38] *Id.*; *see also* Tribal Code Title I, Section 1.514.6, attached as Ex. 8.
[39] *See* Tribal App. Ct. Minute Order, Ex. 7.
[40] *See* S. Reed to J. Ludington (5/19/09), attached as Ex. 9.
[41] *Id.*
[42] *See* Plaintiff's Mot. for S.J. Pursuant to R. 56(a) (7/22/09), Doc. 13.
[43] *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) (stating rule that tribes retain immunity from suits on contracts whether involving governmental or commercial activities); *see also Allen v. Gold Country Casino*, 464 F.3d 1044,

immunity analysis for SECR liability is the same as if Plaintiff had directly named the Tribe.

As this Court has repeatedly recognized, the Tribe is a sovereign entity with reserved rights that predate the existence of the American Constitution.[44] The Tribe is a federally recognized Indian tribe, the modern-day successor of Chippewa bands that signed three treaties with the United States in 1837, 1855 and 1864.[45] It retains full powers of self-government in all instances where such powers were not surrendered by treaty, modified by federal statute, or abrogated by implication as a necessary result of the Tribe's dependent status.[46]

The United States Supreme Court has consistently held that those retained tribal attributes and powers include sovereign immunity from unconsented suit.[47] This retained immunity extends to actions for money damages, including this case.[48] On more than one occasion, this Court has dismissed cases improperly brought by private parties attempting to enforce claims against the Tribe.[49] The Tribe asks the Court to do the same here.

1047 (9th Cir. 2006) (stating "there can be little doubt" that tribal casino functions as arm of tribe).

[44] *See* Sept. 12 Order at 3, Doc. 9; *see also Aldrich v. Saginaw Chippewa Indian Tribe of Michigan,* No. 07-12801-BC, slip. op. at 4 (E.D. Mich. October 4, 2007), attached as Ex. 10; *Piro-Harabedian v. Saginaw Chippewa Indian Tribe,* 2005 WL 3163395 (E.D. Mich. Nov. 23, 2005), attached as Ex. 11; *see also United States v. Wheeler,* 435 U.S. 313, 322-23 (1978); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832).

[45] *See* Treaty of January 14, 1837, 7 Stat. 528; Treaty of August 2, 1855, 11 Stat. 633; and Treaty of October 18, 1864 14 Stat. 657. *See also* Dept. of Int. "List of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 73 Fed. Reg. 18553-557 (April 4, 2008). Available on-line at http://edocket.access.gpo.gov/2008/pdf/E8-6968.pdf.

[46] *See, e.g., Wheeler,* 435 U.S. at 323; *see also* F. Cohen, *Handbook of Federal Indian Law* (2005 ed.) at 206.

[47] *See, e.g., Kiowa Tribe of Oklahoma,* 523 U.S. at 754-55; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940).

[48] *See Kiowa Tribe of Oklahoma,* 523 U.S. at 754-55.

[49] *See, e.g., Aldrich,* slip. op. at 4, Ex. 10 (dismissing FMLA claim without hearing and without

II. This proceeding should be dismissed under Rule 12(b)(6) because this Court ordered Plaintiff to exhaust tribal-court remedies as to the question of Tribal sovereign immunity and Plaintiff failed to do so.

The Court held that where there is a claim that a tribe or Congress on its behalf has waived sovereign immunity, under principles of comity, a tribal court should have the first opportunity to review the question. [50] Therefore, the Court ordered Plaintiff to exhaust her remedies in Tribal Court before this Court would hear any aspect of the case, preferring that the Tribal Court first determine whether it had jurisdiction over these parties and claims.[51] Plaintiff asserted only her FMLA claim in the Tribal Court, but could not meet her burden of showing the Tribe waived its sovereign immunity.[52] The Tribal Court granted the Tribe's motion to dismiss and held the Tribe had not waived sovereign immunity, and Plaintiff then failed to timely appeal to the Tribal Appellate Court.[53] Plaintiff failed to exhaust Tribal Court remedies in violation of the Court's order. Plaintiff cannot now get another bite at the apple in this Court. The Court should dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

As the Court pointed out in its September 12 Order, "tribal court[s] have the first opportunity to evaluate the factual and legal bases for the challenge to its jurisdiction."[54] The issue of a tribe's sovereign immunity "is the very kind of question that is to be decided in the

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requiring tribal court exhaustion); *Piro-Harabedian*, 2005 WL 3163395, Ex. 11. For more on the distinctions between the defenses of tribal sovereign immunity and tribal exhaustion, see Kirsten Carlson, "Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies," 101 Mich. L. Rev. 569, 584 (Nov. 2002) (stating that "Federal courts should treat sovereign immunity as jurisdictional because doing so promotes the efficient use of the court's time and resources.") (citations omitted).

[50] Sept. 12 Order at 5-6, Doc. 9.

[51] *Id.*

[52] *See* Tribal Ct. Compl., Ex. 1.

[53] *See* Tribal Ct. Order, Ex. 6; Tribal App. Ct. Minute Order, Ex. 7.

[54] Sept. 12 Order at 5, Doc. 9, *citing LaPlante*, 480 U.S. at 14 (citation omitted).

first instance by the tribal court itself."[55] The Court relied on *Sharber*, a 2003 Ninth Circuit case which dealt with a former tribal casino employee's assertion of a FMLA claim against a tribe.[56] In *Sharber*, the Ninth Circuit extended this rule and upheld the district court's conclusion that the relevant tribal court, not federal court, should have the first opportunity not just to decide the question of tribal sovereign immunity, but to hear a former employee's FMLA claim against a tribal casino.[57] The Ninth Circuit noted that "[t]he absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement."[58] Nevertheless, the Ninth Circuit held that a stay was appropriate rather than dismissal in order to avoid a permanent bar from the plaintiff's possible later assertion of claims in federal court due to the running of the applicable statute of limitations.[59] Therefore, the Ninth Circuit remanded with instructions to stay the case and sustained the requirement of tribal-court exhaustion.[60]

This Court in its September 12 Order also correctly pointed out that tribal-court exhaustion means that "relief may not be sought in federal court until *appellate review* of a pending matter in a tribal court is complete."[61] This rule is part of the seminal U.S. Supreme

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[55] *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999), *citing Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56l (1985); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994). *See also Mich. Prop. & Cas. Guar. Assoc. v. Foucault-Funke Amer. Legion Post*, 2007 WL 3121583 (Unpubl.) (W.D. Mich. Oct. 23, 2007), attached as Ex. 12 (requiring tribal-court exhaustion before federal-court challenge to tribal-court jurisdiction over bad-faith insurance claim).

[56] *Id.* at 5, *citing Sharber v. Spirit Mtn. Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003).

[57] *Sharber*, 343 F.3d at 975. *But see Nevada v. Hicks*, 533 U.S. 353, 366-69 (2001) (holding absent express federal authority to do so, tribal courts cannot entertain general federal civil claims).

[58] *Id.* at 976, *citing U.S. v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992); *see also Duncan Energy Co.*, 27 F.3d at 1302.

[59] *Id.*, *citing Deakins v. Monaghan*, 484 U.S. 193, 203 n. 7 (1988).

[60] *Id.*

[61] Sept. 12 Order at 5, *citing Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948

Court case that recognized the doctrine, *Iowa Mutual Insurance Co. v. LaPlante*: "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." [62]

Failure to do so is failure to exhaust, which operates as a bar to further proceedings in federal court. For example, in *Davis v. Mille Lacs Band of Ojibwe*,[63] the Eighth Circuit sustained the Minnesota District Court's dismissal of the claims of a former employee against the Mille Lacs Band and others because she failed to exhaust tribal court remedies. There, like here, the plaintiff first filed in district court, but the district court stayed the case pending tribal exhaustion (although, as here, no case had yet been filed in tribal court).[64] The *Davis* plaintiff then did file in tribal court and the tribal court dismissed all but one of the claims, a Band–law-based claim (for which there was a limited waiver of sovereign immunity in tribal law).[65] At the plaintiff's request, the tribal court certified this as a final decision, but the plaintiff then failed to timely appeal, and the tribal court found no excusable neglect that would permit an extension of time.[66] The Band's court of appeals affirmed.[67]

Thereafter, the Band moved the district court to dismiss the federal case based upon the plaintiff's failure to exhaust tribal court remedies. In the alternative, the Band moved for a ruling that the tribal court's exercise of jurisdiction was proper and therefore the district court could not

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(9th Cir. 2008) (internal citations omitted) (emphasis added).
[62] 480 U.S. 9, 17 (1987).
[63] 193 F.3d at 991.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* The Band appellate court also barred the plaintiff's attorney from further practice before it.

re-examine any of the tribal court holdings.[68]

The district court dismissed based upon the failure to exhaust, and the Eighth Circuit affirmed.[69] The Eighth Circuit did not even reach the merits of the district court's alternative holding that the tribal court had, indeed, properly exercised jurisdiction.[70] The court stated plainly: "We do not think that the exhaustion requirement has been satisfied when the absence of tribal appellate review stems from the plaintiff's own failure to adhere to simple deadlines."[71]

Under *LaPlante* and *Davis*, the Court should dismiss this case without further review. Plaintiff disregarded this Court's order to exhaust tribal-court remedies, in the process disobeying Tribal Court rules and procedures. As the Tribal Court noted, it was even "difficult to tell exactly the grounds of the Complaint . . . ."[72] Plaintiff's counsel did not enter his appearance (or seek admission to practice) in Tribal Court until four months after Plaintiff filed *pro se*, only then to respond to the Tribe's motion to dismiss, and then sought an extension of time.[73] Plaintiff never offered any clarification to the complaint even after counsel appeared. Plaintiff made a material, false allegation to the Tribal Court regarding this Court's September 18 order, stating that the language in the SECR Handbook had "prompted Judge Ludington of the US District Court to conclude that the Saginaw Tribe has waived sovereign immunity over FMLA claims."[74] This Court expressly *refrained* from making any such order.

Plaintiff's arguments prompted the Tribal Court to conclude that "Plaintiff does not

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[68] *Id.*
[69] *Id.* at 992.
[70] *Id.*
[71] *Id.*
[72] Tribal Ct. Order at 2, Ex. 6.
[73] *Id.* at 3.
[74] *Id.*

understand sovereignty in Indian Country and in tribal courts,"[75] even after Plaintiff's counsel had briefed the issues both before this Court and the Tribal Court. And Plaintiff did not attempt to appeal until two weeks after the Tribal appellate timeline had run, more than 35 days after the Tribal Court decision. Tribal Code Title I, Section 1.514.6 provides a strict deadline of 21 days for appeals.[76] Plaintiff never sought an extension of time. This is just as indefensible as filing an unexcused late notice of appeal from a decision of this Court, where Federal Rule of Appellate Procedure 4(a)(1)(A) provides a 30-day time limit. The Court should dismiss for failure to exhaust tribal-court remedies.

III. Even if this Court holds that it does have jurisdiction to review any aspect of the Tribal Court Order, the Court should defer to the Tribal Court's determination that the Tribe did not waive its sovereign immunity.

The failure to exhaust tribal-court remedies is conclusive and no further review is warranted. But should the Court disregard Plaintiff's failure to exhaust tribal-court remedies in violation of the September 12 Order and decide to review any substantive aspect of the Tribal Court's order, the Court should still concur with the Tribal Court's determination that the Tribe did not waive its sovereign immunity.

Lower courts generally agree that a federal court should review whether a tribe has properly exercised jurisdiction *de novo* because the limits of tribal jurisdiction present questions of federal law. Federal courts will review the tribal court's "jurisdictional factual findings," however, only for clear error.[77] And interpretations of tribal law should be accorded even greater

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[75] *Id.*
[76] See Ex. 8.
[77] *See, e.g., Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d at 1300 (8th Cir. 1994); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

deference.[78]

Here, the Tribal Court's inquiry, and this Court's review of that, is very limited—it begins and ends with the determination that neither the Tribal Court nor any other court has jurisdiction over this matter because the Tribe has not waived its sovereign immunity. The Tribal Court based its determination upon its reading of Tribal law and its jurisdictional factual findings, in addition to its interpretation of federal waiver law. In reviewing the SECR Handbook, the Tribal Court concluded that Tribe uses the FMLA as "merely a guideline for the Tribe's supervisors to follow,"[79] and the Tribe "can (and does) substitute its own, non-FMLA-based enforcement of the rules of the [FMLA]."[80] The Tribal Court determined that the FMLA itself is not part of the Tribal Code, which is the Tribe's body of laws,[81] and also noted that the Tribe has its own employee dispute resolution policy through the "Fair Treatment Team," which is the Tribe's prerogative as a sovereign.[82] The Tribal Court concluded that "[n]othing in the Tribal Constitution nor the FMLA as adopted by the Tribe waives [its] right to sovereign immunity"[83] and expressly adopted "the reasoning of the Defendant [Tribe] . . . the Defendant cannot be the subject of a lawsuit in this case because of sovereign immunity."[84]

This Court should not disturb the Tribal Court's conclusions. The Tribal Court made no clear errors of fact and its interpretation of Tribal law regarding the lack of waiver here should be respected as conclusive. The Court should dismiss this case.

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[78] *Duncan*, 27 F.3d at 1300, *citing FMC*, 905 F.2d at 1313.
[79] Tribal Ct. Order at 5, Ex. 6.
[80] *Id.* at 6
[81] *Id.* at 5.
[82] *Id.* at 6.
[83] *Id.*
[84] *Id.*

IV. This proceeding must also be dismissed under Federal Rule of Civil Procedure 12(b)(1) and (2), as this Court does not have jurisdiction over the Tribe.

Under Federal Rule of Civil Procedure 12(b)(2), a party is also entitled to file a motion for dismissal for lack of personal jurisdiction before filing an answer. Here, even beyond Plaintiff's failure to exhaust tribal-court remedies, because neither the Tribe nor the Congress on its behalf has waived the Tribe's sovereign immunity from suit, this case must be dismissed because the Court lacks jurisdiction over the Tribe.

A. Neither the Tribe nor Congress has waived the Tribe's immunity from proceedings under the ADA, FMLA, or § 1981, nor has Congress created a cause of action against the Tribe under these acts.

An Indian Tribe, like other sovereigns, may waive its immunity, but as the Supreme Court said in *Santa Clara Pueblo*, "[i]t is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"[85] Here, the Tribe has not itself waived its immunity, and there is no waiver by the Congress on behalf of the Tribe in any of the federal statutes upon which Plaintiff bases her claims. Moreover, Plaintiff has agreed to dismissal of her ADA and § 1981 claims.[86] Nevertheless, for the Court's benefit, the Tribe responds to them.

First, like the United States, an Indian tribe is *expressly* excluded from the definition of a covered "employer" under the ADA. Under 42 U.S.C. §12111 (5)(B),"[t]he term 'employer' does not include—(i) the United States, a corporation wholly owned by the government of the United States, *or an Indian tribe*; . . ." (emphasis added). By the plain language of the statute, no ADA claim can lie against a tribe—the Congress has neither created a cause of action against

[85] 436 U.S. at 59, quoting *United States v. Testan*, 424 U.S. 392, 399 (1976).

[86] Note also that Plaintiff's allegation in her own Motion for Summary Judgment that this Court has already dismissed all but the FMLA claim is incorrect. *See* Plaintiff's Mot. for S.J. Pursuant to R. 56(a) (7/22/09) at 2, Doc. 13. The Court stayed all aspects of this case in its September 12 Order and has not dismissed any of Plaintiff's claims.

Indian tribes, nor waived tribes' sovereign immunity to actually make them subject to claims under the ADA. Plaintiff has actually conceded this, making her refusal to concur in this motion all the more perplexing.[87]

Second, as this Court recently recognized, there is no waiver of tribal sovereign immunity in the FMLA.[88] In dismissing an identical FMLA claim against the Tribe in 2007 without even holding oral argument or requiring exhaustion, this Court stated the following:

> Because Defendant is a federally recognized tribe, it retains tribal sovereign immunity from suit absent a waiver or Congressional authorization. Neither have occurred here. Indeed, Plaintiff has not countered Defendant's assertion that it is a federally recognized tribe. Nor has she offered any basis on which to conclude that Defendant waived its immunity or that Congress has authorized the instant suit. Consequently, Plaintiff cannot proceed in her claim against the sole defendant. Accordingly the Court will grant Defendant's motion to dismiss, because the Court lacks subject matter jurisdiction where Defendant is immune from suit.[89]

In *Aldrich*, the Court relied on the 2004 Second Circuit case of *Chayoon v. Chao*.[90] The facts were identical—a former tribal-casino employee sued his former employer under the FMLA, and the district court dismissed due to lack of subject-matter jurisdiction on grounds of sovereign immunity.[91] The Second Circuit held that neither abrogation nor waiver was present in the case and that the FMLA "makes no references to the 'amenity of Indian tribes to suit."[92] Therefore, the Second Circuit affirmed dismissal (without requiring tribal-court exhaustion). This Court should dismiss this FMLA claim for the same reasons.

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[87] Plaintiff's Brief in Opp. to Def.'s Rule 12(b) Mot. at 1, Doc. 7-2.
[88] *Aldrich*, No. 07-12801-BC, slip. op. at 5, Ex. 10; *see also Chayoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004) (affirming dismissal of FMLA claim against tribe due to lack of waiver in statute).
[89] *Aldrich*, No. 07-12801-BC, slip. op. at 5, Ex. 10.
[90] 355 F.3d 141.
[91] *Chayoon*, 355 F.3d at 142.
[92] *Id., citing Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86 (2d Cir. 2001) (internal citations omitted).

The same reasoning also applies to Plaintiff's § 1981 claim. Like with the FMLA, Indian tribes are not even mentioned in § 1981. And it appears that all the federal appellate courts that have analyzed whether a tribe retains sovereign immunity from § 1981 claims have come to the same conclusion: there is no waiver.[93] As this Court has recognized, the defense of sovereign immunity is jurisdictional and admits of no consideration of the merits of a barred claim. [94] Accordingly, this action must be dismissed.

B. The language of the SECR Handbook does not present a dispute of material fact sufficient to sustain the claim that the Tribe has waived its sovereign immunity for purposes of Plaintiff's FMLA claim.

As support for her FMLA claim, Plaintiff has asserted that the Tribe waived its sovereign immunity through language in the SECR Associate Handbook.[95] But the language does not, either as a legal or factual matter, constitute a waiver. The Handbook states only that SECR "will voluntarily comply with the provisions of the federal Family and Medical Leave Act of 1993."[96] This means exactly what it says: that the SECR will voluntarily comply with the FMLA provisions, within the tribal employment context. Indeed, the SECR Handbook goes on

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[93] *See, e.g.*, *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 212 (4th Cir. 2007) (stating rule that Indian tribal immunity bars § 1981 liability), *citing Yashenko v. Harrah's N.C. Casino Co.*, 446 F.3d 541, 551-53 (4th Cir. 2006); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034-36 (11th Cir. 2001) (dismissing § 1981 claim due to tribal sovereign immunity); *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1285 (10th Cir. 2000) ("The exclusion of Indian tribes from the employment discrimination statutes illustrates congressional intent not to interfere in employee-management disputes on reservations."); *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 673 (10th Cir.1980) (holding that specific exclusion for tribes under Title VII extends to bar § 1981 claims).

[94] *See, e.g.*, *Aldrich*, No. 07-12801-BC, slip. op. at 4, Ex. 10; *Piro-Harabedian*, 2005 WL 3163395, Ex. 11; *see also Chayoon*, 355 F.3d at 143 (same); *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1974); *Ramey Const., v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982).

[95] Plaintiff's Resp. at 2 and Ex. 1.

[96] *Id*.

to lay out "*SECR's* FMLA policy."[97] This does not constitute a waiver of sovereign immunity as to an employee's FMLA-based claims, and under well-established Tribal and federal law, the Handbook's FMLA policy language fails to provide a consent to this suit.

The Tribe does not lightly choose to waive its sovereign immunity. There must be an express statement by the Tribal Council in order to waive sovereign immunity for *any* purpose. As the Tribal Court noted, there is no such waiver in the Tribal Code[98] nor anywhere else.

This is directly in line with federal precedent. To find that a tribe has waived sovereign immunity, courts require words "that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court," including as a tribal council resolution that expressly waives sovereign immunity.[99] Courts have found waivers where a tribe agrees "to sue and be sued" for a specific purpose;[100] where it expressly submits to arbitration and judgment "in accordance with applicable law in any court having jurisdiction thereof;"[101] where it agrees it will "not assert the defense of sovereign immunity;"[102] or where it uses other express language.

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[97] *Id.*
[98] Tribal Ct. Order at 5, Ex. 6.
[99] *See citing Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 297 (Minn. 1996).
[100] *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 671-72 (8th Cir. 1986) (waiver found where tribal council had given "irrevocable consent" that tribal housing authority "sue and be sued" on any of its contracts, and further authorized the housing authority to "agree by contract to waive any immunity from suit which it might otherwise have," and where contract contained such a waiver). *See also Amer. Ind. Ag. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985) (holding waiver in "sue and be sued" clause); *Maryland Cas. Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir. 1966) (same); *Namekagon Dev. Co., Inc. v. Bois Forte Res. Housing Auth.*, 395 F. Supp. 23 (D. Minn. 1974) (same).
[101] *C & L Ents., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 523 U.S. 411, 418-19 (2001) (recognizing comprehensive arbitration scheme in contract between tribe and company as waiver). *See also Sokoagon Gaming Ent. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656 (7th Cir. 1996) (same).
[102] *Weeks*, 797 F.2d at 671.

Plaintiff has not raised a factual question sufficient to sustain her claim that the Tribe has waived immunity by making a voluntary policy statement in the SECR Handbook. It is Plaintiff's burden to show jurisdiction--she bears the burden of proving by a preponderance of evidence that jurisdiction exists where the defense of sovereign immunity is raised.[103] Because she cannot meet that burden, this Court should dismiss her claims.

Conclusion

Dismissal is warranted under Rule 12(b)(6), because this Court ordered Plaintiff to exhaust remedies in Tribal Court and she failed to do so. Even if the Court does review any of the substantive aspects of the Tribal Court's determination that the Tribe has not waived sovereign immunity here, it should concur and dismiss under Rule 12(b)(1) and (2). Neither the Tribe, nor Congress on the Tribe's behalf, has consented to this suit, so this Court does not have jurisdiction over the Tribe. Respectfully, this suit must be dismissed.

Dated: August 17, 2009

SOARING EAGLE RESORT AND CASINO

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[103] *Chayoon*, 355 F.3d at 143, *citing Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001).

Certificate of Service

I hereby certify that on August 17, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Richard A. Meier
30300 Northwestern Highway, Suite 320
Farmington Hills, MI 48334

and I hereby certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

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