IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TINA MARIE SOMERLOTT, Plaintiff, vs. CHEROKEE NATION DISTRIBUTORS INC., AN OKLAHOMA CORPORATION, AND CND, L.L.C., AN OKLAHOMA LIMITED LIABILITY COMPANY, Defendants.	)	Case No. CIV-08-429-D

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(1)

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STATUTES AND RULES

As an economic arm of the Cherokee Nation, the Defendants CND, LLC ("CND") and its predecessor Cherokee Nation Distributors, Inc. ("CNDI")[1] are entitled to that tribal sovereign immunity which deprives this Court of subject matter jurisdiction, and accordingly, requires dismissal of this action. Alternatively, and independent of sovereign immunity, since, as Tenth Circuit decisional law establishes, these economic arms of the Cherokee Nation are not subject to Title VII and the ADEA on which Plaintiff's claims are based, this Court lacks subject matter jurisdiction over this action. In either event, this action should be dismissed.

STATEMENT OF PERTINENT FACTS

1. The Defendants as Tribal Commercial Enterprises.

The Cherokee Nation is a federally recognized Native American or Indian tribe. 68 Fed.Reg. 68180 (Dec. 5, 2005). CND is a limited liability company organized under the laws of the State of Oklahoma and wholly owned by Cherokee Nation Business ("CNB"), a limited liability company wholly owned by the Cherokee Nation.

At the time CND was originally formed, the Cherokee Nation did not have its own laws permitting the formation of a corporation or a limited liability company. (Dennis McLemore Affidavit, ¶ 9) (Exhibit "A" hereto). CND was originally formed as CNDI, a wholly-owned subsidiary of Cherokee Nation Industries ("CNI"). *Id.* On October 25, 2001, ownership of CNDI was transferred by CNI directly to the Cherokee Nation in anticipation of CNDI being certified under the Small Business Administration's 8(a)

[1] CNDI is the former name of CND, LLC, as the Certificate of Conversion attached to the Amended Complaint demonstrates.

Business Development Program.[2] *Id.* On April 29, 2004, CNDI was converted to an Oklahoma LLC and renamed CND, LLC with the Cherokee Nation as its sole member. *Id.* On February 1, 2008, pursuant to the Jobs Growth Act of 2005 (Exhibit "B" hereto), the Cherokee Nation assigned its interest in CND to CNB, a holding company wholly owned by the Cherokee Nation. The Jobs Growth Act of 2005 requires CND to provide notice to the Cherokee Nation Tribal Council of its business operations. *Id.*

Both CND and CNB were created by, are ultimately wholly owned by, are regulated by, and serve the governmental purposes of the Cherokee Nation, which includes tribal self-determination and a thriving economy. (Affidavit of McLemore, ¶ 5). In fact, CND and CNB were founded for the specific purpose of providing jobs for Cherokee tribal members, to meet the needs of business development, and to provide income for the Tribe. *Id.* This purpose was reaffirmed by the Jobs Growth Act of 2005, which reorganized the structure of the Cherokee Nation's business enterprises as a means of advancing the Cherokee Nation's long-term visions of responsible economic development, self-sufficiency for the government and its citizens, and a strong tribal government. Both CND and CNB are very much integral parts of the tribe. (Affidavit of McLemore, ¶ 5).

CND has a Board of Directors whose members are selected by the Principal Chief of the Cherokee Nation, and must be approved by the Cherokee Nation Tribal Council. (Affidavit of McLemore, ¶ 6). Under the terms of CND's Operating Agreement, the

[2] At the time, it was unclear whether a business seeking certification under the program could be owned by a holding company rather than the tribe itself.

Principal Chief of the Cherokee Nation appoints the members of CND's Board annually and appoints its Chairman. *Id.*

Under Article X, Section 4, of the Constitution of the Cherokee Nation (Exhibit "C" hereto), CND, as a business interest of the Cherokee Nation, must provide financial records to the Tribal Council. (Affidavit of McLemore, ¶ 8). In particular, pursuant to Section 4, the Tribal Council requires that records be maintained and provided to the Council of all funds, monies, accounts, indebtedness and all other accounts bearing upon the fiscal interests of the Cherokee Nation by use of an accounting system adhering to Generally Accepted Accounting Principles. *Id.* Accordingly, CND must provide such information to the Treasurer of the Cherokee Nation. In addition, under the Cherokee Nation Governmental Records Act, the Tribal Council has access to all records prepared in the discharge of governmental duties of the Cherokee Government, which includes CND. *Id.*

CND's headquarters are located within Indian Country in Stilwell, Oklahoma, that is built on trust land to which the United States holds title in trust for the Cherokee Nation. CND also uses a facility in Tahlequah, Oklahoma, owned by the Cherokee Nation. *Id.* (Affidavit of McLemore, ¶ 4).

Under Article X, Section 7 of the Constitution of the Cherokee Nation and the Cherokee Nation Corporation Act Reform Act of 2002 (Exhibit "D" hereto), CND cannot give, pledge, or loan its credit to any individual, firm, company, corporation, or association. In addition, under the Cherokee Nation Corporation Act Reform Act of 2002, CND cannot make certain real property purchases without prior approval of the

Tribal Council. (Affidavit of McLemore, ¶¶ 10 and 11). The Cherokee Nation Minimum Wage Act of 2006 (Exhibit "E" hereto) imposes minimum wage requirements upon CND. (Affidavit of McLemore, ¶ 12).

2. The Amended Complaint.

In her Amended Complaint, Plaintiff alleges that she was employed by CNDI and then CND as a chiropractic technician at the Reynolds Army Hospital in Lawton/Fort Sill, Oklahoma. (*See* Plaintiff's Amended Complaint, ¶¶ 10, 15, 16 and 22.) Plaintiff alleges that she was fired from her job due to her age and/or sex, and the desire to punish her for her objection to the hostile work environment created by her supervisor's sexual activities at the workplace. (*See* Plaintiff's Amended Complaint, ¶ 31.)

Plaintiff asserts four causes of action against CND and CNDI. Plaintiff's causes of action against CND are brought under Title VII of the Civil Rights Act of 1968, as amended, 42 U.S.C. § 2000 e(b) and the Age Discrimination in Employment Act (ADEA) of 1967, as amended, 29 U.S.C. § 621, et seq. (*See* Plaintiff's Amended Complaint, ¶¶ 41-58.) Specifically, Plaintiff asserts the following claims against CND: (1) vicarious liability under Title VII; (2) negligence under Title VII; (3) retaliation under Title VII; and (4) age discrimination under the ADEA.

Significantly, Plaintiff does not allege in her Complaint that there has been a waiver of sovereign immunity executed by the Cherokee Nation or Congressional abrogation which allows Plaintiff to pursue this action against CND and CNDI in federal court. (*See* Plaintiff's Amended Complaint, generally.) Indeed, Plaintiff cannot assert such allegations since there has been no Congressional abrogation or waiver by the

Cherokee Nation of the Cherokee Nation's sovereign immunity applicable to her claim. (Affidavit of McLemore, ¶ 14).

I. SOVEREIGN IMMUNITY APPLIES TO TRIBALLY OWNED COMMERCIAL ENTERPRISES WITHOUT CONSIDERATION OF ANY LIMITING FACTORS.

A. The Supreme Court has Consistently Recognized Sovereign Immunity for Tribally Owned Enterprises Without Consideration of Limiting Factors.

The Supreme Court has clearly recognized that "[a]s a matter of federal law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 754 (1998). Consistent with a judicial presumption in favor of tribal sovereign immunity, any waiver must be unequivocally expressed by the tribe. *See Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

Sovereign immunity extends to commercial enterprises of tribes, as the Supreme Court has consistently recognized. In *Kiowa*, the Court (in rebuffing attempts at judicial limitation of immunity for tribal economic activity) rejected an attempt to deny tribal commercial enterprises sovereign immunity. Initially, the Court noted that "[t]ribal enterprises now include ski resorts, gambling and sales of cigarettes to non-Indian." *Kiowa* at 758. After announcing that doctrine of tribal immunity is settled law, the Court reaffirmed that Congress, not the Court, controlled the extent of limitations on such immunity. In explaining the public policy behinds its pronouncement in words particularly compelling here, the Court stated that Congress has "failed to abrogate it in order to promote economic development and tribal self-sufficiency." *Id.* at 757.

Accordingly, the Court then rejected the exclusion of tribal commercial activity from such immunity.

> Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Id. at 758.

Kiowa was not the first time the Supreme Court had rejected a request to narrow the reach of tribal sovereign immunity. In *Potawatomi*, decided seven years before *Kiowa*, the Court was asked to narrow tribal sovereign immunity to allow Oklahoma to collect taxes on cigarettes sold at tribally owned convenience stores to non-tribal members. Oklahoma urged the Court to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity because tribal business activities such as cigarette sales are "so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context." *Id.* at 510. The Supreme Court refused to narrow, much less abrogate, tribal sovereign immunity explaining that "Congress has consistently reiterated its approval of the immunity doctrine," and that this approval reflects "Congress' desire to promote the goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

Significantly for purposes of this Motion, in upholding sovereign immunity for tribal activity, the Supreme Court in *Kiowa* and *Potowatomi* did not impose or set limiting factors to be judicially considered before tribal immunity is recognized.

B. Neither the Tenth Circuit nor the Western District Court of Oklahoma Since *Kiowa* Have Imposed Limiting Factors on the Sovereign Immunity of Tribal Commercial Activity.

Consistent with the fundamental principle that it is up to Congress, and not the courts, to alter the limits of tribal sovereign immunity, the Tenth Circuit and the Western District of Oklahoma have not recognized limiting factors that must be considered before tribal commercial activity enjoys sovereign immunity, as recent decisional law confirms.

In *Native American Dist. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), the appeal turned on whether the tribal enterprise in question had waived its sovereign immunity. *Id.* at 1293. Significantly for this Motion, the Court there began its waiver analysis with the recognition that the tribal enterprise, whether owned by the tribe or by a tribally owned corporation, initially enjoyed sovereign immunity, which could be waived.[3] By so doing, the Tenth Circuit made clear that, absent waiver, that tribal commercial activities enjoy sovereign immunity and, without reference to any limiting factor.

> "While the Supreme Court has expressed misgivings about recognizing tribal immunity in the commercial context, the Court has also held that the doctrine 'is settled law' and that it is not the judiciary's place to restrict its application. *Kiowa Tribe*, 523 U.S. at 756-69, 118 S.Ct. 1700. To the extent the plaintiffs have argued that we should abrogate the scope of the doctrine in the present case due to SCTC's commercial activities, we decline this request."

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[3] The tribal enterprise, SCTC, was either a division of the Seneca-Cayuga Tribe or of the tribal corporation. *Native American Dist.* at 1293. If a division of the Tribe, which the Court ultimately found SCTC to be, sovereign immunity applied because there was no tribal waiver. If a division of the tribal corporation, SCTC would not enjoy that otherwise available immunity, because the Tribal corporation had conceded that it had made "an unequivocal waiver of immunity." *Id.* at 1293, n.2.

540 F.3d at 1293.

The decision in *Johnson v. Choctaw Management/Services Enterprises*, 149 Fed.Appx. 800, 200 U.S. App. LEXIS 20195 (10th Cir. 2005) (unpublished) reaffirms the Tenth Circuit's commitment to *Kiowa*. After affirming dismissal for lack of subject matter jurisdiction by holding that 42 U.S.C. § 2000 e(b) "completely exempts the activities of Indian tribes from the requirements of Title VII,"[4] the court, as to another argument, noted without reference to limiting factors:

> As CM/SE correctly notes, however, it is not within the province of the courts to abrogate tribal immunity. Such decisions must be left to Congress. *See Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 758 (1998).

In this District, Judge Friot recently recognized that sovereign immunity barred a suit against a tribal commercial enterprise. *Nahno-Lopez v. Houser*, 2009 U.S. Dist. LEXIS 44878 (W. D. Okl. May 20, 2009). There the Court dismissed the Fort Sill Apache Casino as "immune from suit based on tribal immunity." The Court relied heavily on *Seneca-Cayuga Tobacco Co.*, including that decision's invocation of *Kiowa* supporting the extension of immunity to tribal commercial activities. *Id.* at 27-28. No

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[4] The Tenth Circuit has expressly rejected the argument that tribal ownership of an activity through a state authorized entity, including a state chartered corporation, is an impediment to tribal organization status. *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority,* 199 F.3d 1123, 1125 (10th Cir. 1999) (holding that the tribal housing authority created pursuant to state statute was a tribe exempt from Title VII); *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 375-76 (10th Cir. 1986), *cert. denied*, 529 U.S. 1134 (2000) (holding that an organization representing the interests of 30-9 Indian tribes was a "tribe" for purposes of the Title VII exemption); *U. S. v. Crossland*, 642 F.2d 1113, 1114-15 (10th Cir. 1981) (housing authority's creation under state statute did not preclude characterization as a tribal organization); *U. S. v. Logan*, 641 F.2d 860, 862 (10th Cir. 1981) (rejecting contention that incorporation under state law precluded characterization of corporation as a tribal organization).

list of limiting factors were considered. Rather, the District Court's finding as a matter of law that the casino was an arm of the tribe, that it was owned and operated by the tribe, and that the casino's economic advantages inured to the tribe, all merely confirmed the one essential fact under the operation of *Kiowa* for sovereign immunity -- that the enterprise is a tribal commercial activity.

II. AS A TRIBAL COMMERCIAL ACTIVITY, CND AND CNDI ARE ENTITLED TO SOVEREIGN IMMUNITY AND ACCORDINGLY, DISMISSAL OF THIS ACTION FOR WANT OF SUBJECT MATTER JURISDICTION.

Under *Kiowa* and instructive Tenth Circuit and Western District of Oklahoma decisions, the test for sovereign immunity here is clear. A commercial enterprise of the Cherokee Nation is entitled to sovereign immunity, without resort to any judicially imposed list of limiting factors. CND and CNDI , as wholly owned arms of the Cherokee Nation, are such commercial enterprises, and accordingly are entitled to such immunity. That presence of tribal sovereign immunity deprives the Court of subject matter jurisdiction and requires dismissal. *See E. F. W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001).

III. SOVEREIGN IMMUNITY NOTWITHSTANDING, SINCE THE STATUTES ON WHICH PLAINTIFF PREMISES HER CLAIMS DO NOT APPLY TO INDIAN TRIBES, THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION.

A. CND and CNDI are Exempt from the Scope of Title VII.

Plaintiff alleges three claims against the Defendants under Title VII: vicarious liability, negligence and retaliation for engaging in an activity protected by Title VII.

Title VII applies to "employers" -- a term that is expressly defined in the statute. In defining "employer," Title VII *expressly exempts Indian tribes* from its scope:

> (b) The term "employer" . . . 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 . . .

42 U.S.C. § 2000 e(b) (emphasis added).

The Tenth Circuit and other federal courts have construed the term "Indian tribe" as used in Title VII to include various enterprises, including commercial ones, owned by Indian tribes. *See Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1125 (10th Cir. 1999) (housing authority designed to further tribe's economic interest was deemed tribe under Title VII); *Johnson v. Choctaw Management/Services Enterprise*, 149 Fed.Appx. 800, 802, 2005 U.S. App. LEXIS 20195 (10th Cir. 2005) (unpublished); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1188 (9th Cir. 1998), *cert. denied*, 528 U.S. 877 (1999) (exempting a health service organization owned by an Indian tribe from liability under Title VII); *Thomas v. Choctaw Management/Services Enterprise*, 313 F.3d 910 (5th Cir. 2002) (unincorporated business venture owned 100% by tribe is an "Indian Tribe" expressly exempted from being "employer" under Title VII).

The *Johnson* Court also pointed out that the doctrine of tribal sovereign immunity is not to be conflated with Title VII's express exemption of Indian tribes from its coverage. 149 Fed. Appx. at 802. Whether the Court finds that CND and CNDI qualify as an "Indian tribe" under Title VII is a separate consideration that is in no way dependent upon whether CND is entitled to tribal immunity. As the Court of Appeals has

explained, "[b]ecause the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration, we must interpret the Title VII exemption in light of its purpose promoting the ability of sovereign Indian tribes to control their own economic enterprises." *Absentee Shawnee Tribe*, 199 F.3d at 1125 (internal citations and quotations omitted).

Here, there can be no doubt either that CND and CNDI are tribally owned enterprises intended to further the economic interests of the tribe or that an exemption from Title VII will further the purpose of promoting the Cherokee Nation to control its own economic enterprises. As such, CND and CNDI are expressly exempt from Title VII and, as in *Absentee Shawnee Tribe*, dismissal for lack of subject matter jurisdiction is appropriate.

B. CND and CNDI are Exempt from the ADEA.

The tribal commercial activity represented by CND and CNDI exempts them from the ADEA. In *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), the Court of Appeals reversed the District Court and expressly held that the Cherokee Nation was not within the scope of the ADEA. The Court of Appeals holding was premised on two points, one applicable to the Cherokee Nation and one applicable to Indian tribes generally. As to the Cherokee Nation specifically, invoking Article V of the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (Exhibit "F" hereto), the Court held that "the ADEA is not applicable because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government." *Id.* at 938.

As to Indian tribes generally, the Court of Appeals addressed the ADEA in light of the Indian canons of construction and stated:

> We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests. *Cf. Merrion*, 455 U.S. at 148-49 n. 11, 102 S.Ct. at 906-08 n. 11 ("Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence [in the Tribe's Constitution] is that the sovereign power to tax remains intact."). We conclude that, in this case, the bases for inferring congressional intent were not so clear as to overcome the burden with the EEOC was required to carry.

Cherokee Nation at 939. *See also, EEOC v. Fon du Lac Heavy Equipment and Construction*, 986 F.2d 246, 250 (8th Cir. 1993) (holding that the ADEA did not apply to a tribally owned equipment and construction company that did work off reservation land).[5]

Likewise, the general statutory evaluation of the ADEA by use of the Indian Canons of Construction in *EEOC* should also exclude the Nation's economic arms CND and CNDI from the ADEA here.[6] Any contrary determination would eradicate the effect of the Indian Canons of Construction to the determination of the tribal interests which these canons exist to advance.

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[5] Subsequent to the decisions of these circuits, Congress has not amended the ADEA to expressly include Indian tribes within that statute's scope.

[6] That policy rationale articulated in *Absentee Shawnee Tribe*, 199 F.3d at 1125 that exempts tribal commercial enterprises from Title VII, promotion of the ability of sovereign Indian tribes to control their own economic enterprises, should apply equally to the tribe's economic enterprise embodied by CND and CNDI.

CONCLUSION

Since the Defendants, as wholly owned commercial activity of the Cherokee Nation, enjoy tribal sovereign immunity, this Court lacks subject matter jurisdiction over this action against them. Additionally, and independently of sovereign immunity, since these Defendants, as an Indian Tribe, are exempt from the two statutes on which Plaintiff premises her claims, this Court lacks subject matter jurisdiction over this action. Dismissal is appropriate.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of Notice of Electronic Filing to the Following ECF registrants:

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