IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN DOBBS and NAOMI DOBBS	)	
	)	
Plaintiffs-Appellants-Cross-Appellees,	)	
	)	
vs.	)	Case Nos. 07-1398 & 07-1402
	)	
ANTHEM BLUE CROSS AND BLUE SHIELD,	)	
	)	
	)	
Defendant-Appellee-Cross-Appellant.	)	

SOUTHERN UTE INDIAN TRIBE,

Amicus Curiae.

REPLY BRIEF OF THE CROSS-APPELLANT

Appeal from the United States District Court
for the District of Colorado
Civil Action No. 04-B-2283
Honorable Lewis T. Babcock. Judge

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I. The district court erred in determining that Plaintiffs' employee benefit plan meets the amended definition of "governmental plan" under 29 U.S.C. § 1002(32).

On cross-appeal, Anthem appeals the district court's determination that Plaintiffs' employee benefit plan meets the definition of "governmental plan" under 29 U.S.C. § 1002(32) as amended. If the judgment for Anthem is affirmed, there is no need to address the issue raised on cross-appeal.

If the judgment is reversed, however, then the district court's determination that Plaintiffs' employee benefit plan meets the amended definition of "governmental plan" under § 1002(32) must also be reversed for two reasons: First, the district court considered only the nature of Mr. Dobbs's employment rather than the nature of the employment of all of the participants of the Anthem plan and whether substantially all of their services as tribal employees "are in the performance of essential governmental functions" rather than "in the performance of commercial activities." Second, the only evidence on which the district court relied for its finding that "there is no indication that Mr. Dobbs was engaged in 'commercial activities'" in his employment was inadmissible under FED.R.EVID. 602.

The amended definition of "governmental plan" in § 1002(32) exempts employee plans established and maintained by an Indian tribal government from ERISA only if all of the participants of the plan are employees of the tribal entity, and only

if substantially all of those employees' services as employees "are in the performance of essential government functions but not in the performance of commercial activities (whether or not an essential government function)."[1] Therefore, ERISA may nonetheless still govern the Anthem plan depending on whether the services of the plan participants who are employees of the Southern Ute Indian Tribe (not limited to Mr. Dobbs) involve commercial activities, even if the commercial activities are an essential government function, rather than purely involving essential government functions.

As Anthem showed in its Opening Brief on Cross-Appeal, the district court decided only that Mr. Dobbs himself was engaged in an essential government function rather than commercial activities, based solely on assertions in Plaintiffs' motions and by reference to THE FEDERALIST NO. 30 for the premise that "Management of the treasury is a vital element of self-governance that enables a government

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[1]The pertinent part of § 1002(32) provides:

> The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

'to perform its most essential functions.'" *Dobbs v. Anthem Blue Cross & Blue Shield*, 2007 WL 2439310 at *2 (D.Colo.2007) (Doc.67 at 4; Supp.App.403). The district court acknowledged that, "For the purposes of Defendant's Motion to Dismiss, I must accept the factual assertion that Mr. Dobbs assists to manage the Tribal treasury as true." (*id.*). This alleged "factual assertion" was that Mr. Dobbs "assists to manage the Tribal treasury in order to provide financial security for tribal functions, a position he believes is 'a core function of sovereign government.'" (*Id.*; *see* Doc.32 at 2; Supp.App.297; Doc.17 at 9; Supp.App.184). However, the court did not consider whether *all* of the participants of the tribal plan who are employees of the Tribe perform substantially all of their services in essential governmental functions, only Mr. Dobbs.

It is understandable that the district court would accept the assertions in Plaintiffs' motions as true for purposes of Anthem's motion to dismiss, particularly where the court is inclined to grant the motion. *See Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 898-99 (10th Cir.2006) (in ruling on motion to dismiss under FED.R.CIV.P. 12(b)(6), court must accept all well-pleaded factual allegations in complaint as true and view them in light most favorable to nonmoving party).[2] Never

[2]As a general rule, admissions of the absence of a genuine factual dispute made for purposes of a dispositive motion terminate when that motion is denied. *Begnaud*

theless, this Court's prior opinion specifically held that "The determination of whether a tribal plan qualifies as a governmental plan under § 1002(32) requires a fact-specific analysis of the plan at issue and the nature of its participants' activities." *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176, 1178 (10th Cir.2007). To determine whether the Anthem plan is exempt from ERISA under § 1002(32) as amended, the district court therefore must consider not only Mr. Dobbs's services as an employee of the Tribe, but also whether substantially all of the services of the tribal employees who are participants in the Anthem plan are in the performance of essential governmental functions.

As this Court also recognized in its prior opinion, *id*., "Because the amended provision [of § 1002(32)] makes a distinction between 'essential governmental functions' and 'commercial activities,' not all plans established and maintained by tribes will fall under the governmental plan exemption." Although § 1002(32) does not expressly define "commercial activities," this Court has suggested that the "governmental plan" exemption does not apply where the terms and conditions of employment "more closely resemble those of private sector employees." *See McGraw v. Pruden-*

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v. White, 170 F.2d 323, 327 (6th Cir.1948). *See Nafco Oil & Gas, Inc. v. Appleman*, 380 F.2d 323, 325 (10th Cir.1967) ("[B]y the filing of a motion a party concedes that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted.").

tial Ins. Co., 137 F.3d 1253, 1258 (10th Cir.1998) (holding that employee benefit plan covering employees of ambulance service operated by state agency was not "governmental plan" exempt from ERISA under § 1002(32)).

The difference between "essential governmental functions" and "commercial activities" under § 1002(32) in the tribal context was touched on tangentially in *Lumber Industry Pension Fund v. Warm Springs Forest Prods.*, 939 F.2d 683 (9th Cir.1991), where the Ninth Circuit held that a sawmill owned and operated by a tribe was not an aspect of tribal self-government that would have exempted it from ERISA as a federal statute of general application. *See also Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir.1985) (farm wholly owned and operated by tribe was "commercial activity" subject to OSHA regulation and not exempt as aspect of tribal self-government; "We believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes."). There is little authority on the issue, however, and neither *Lumber Industry* nor *Coeur d'Alene* involved a complicated factual determination.

While it may be relatively simple to classify tribal businesses such as sawmills

and farms as "commercial activities," the line is not always so easy to draw, as Mr. Dobbs's employer, the Southern Ute Indian Tribe, explains in its Amicus Curiae Brief at 25-27. More specifically, distinguishing "essential government functions" from "commercial activities" which are also essential government functions can be difficult. As the Tribe points out in its Amicus Brief at 6, "[D]ue to the communal nature of tribal asset ownership, essential tribal governmental functions require commercial activity." *See id.* at 26 ("As reflected in previous descriptions of the Tribe's businesses and enterprises, many of its plan participants engage in commercial activities, even though the Tribe maintains that all of its employees are engaged in governmental functions."). This discussion should make clear that whether substantially all of the services of the employees who are participants in a tribal employee benefits plan "are in the performance of essential government functions" rather than "commercial activities" under § 1002(32) cannot be determined *a priori* but only as a question of fact.

Apparently recognizing that unsubstantiated assertions in motions are neither facts nor evidence, Plaintiffs nonetheless contend that three sentences of a purely conclusory nature in their Motion for Reconsideration (Doc.32; Supp.App.296), filed after the district court's original order of dismissal, constitute sufficient "evidence"

of the nature of Mr. Dobbs's employment with the Southern Ute Indian Tribe to sustain the district court's conclusion, because these sentences were verified by Plaintiff Naomi Dobbs (but not by Mr. Dobbs, whose employment they purport to characterize). Plaintiffs point to nothing else in the record, and, in particular, no admissible evidence of any kind, that would support the district court's conclusion that Mr. Dobbs's employment duties are executed in the performance of an essential government function and not commercial activities. As shown above, moreover, the district court confined its finding solely to Mr. Dobbs's employment services, and neither was presented with any evidence nor made any finding that substantially all of the services of the employees who are participants in the Anthem plan "are in the performance of essential government functions."

Mrs. Dobbs's specific verified "factual" assertions on which the district court relied, and which Plaintiffs urge on cross-appeal support the court's conclusion, concerned only Mr. Dobbs's employment, and not the employment of other participants in the Anthem plan. These assertions were:

> Mr. Dobbs employment involved a core sovereign function of managing the Tribe's treasury. Mr. Dobbs' activities were not "commercial" in the sense of being directed into the private wholesale or retail marketplace. Rather, he was managing tribal wealth in order to provide security for tribal functions, just as the United States Department of the Treasury, or an elected state treasurer would do with federal or state funds. (Doc.32 at 2; Supp.App.297).

Nothing in these assertions, however, establishes that Mrs. Dobbs had sufficient personal knowledge of her own to be competent to testify to these matters. *See* FED.R.EVID. 602 ("A witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter."). Under the personal knowledge standard of Rule 602, an affidavit is inadmissible if "the witness could not have actually perceived or observed that which he testifies to." *Argo v. Blue Cross & Blue Shield of Kansas, Inc*., 452 F.3d 1193, 1200 (10th Cir. 2006). "Statements of mere belief" in an affidavit must be disregarded. *Id.*

Accordingly, these bare assertions of "mere belief," which are not factual but "merely conclusory," *see Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir.1988), must be disregarded because there is no foundation to show they are based on the affiant's personal knowledge, that is, on what Mrs. Dobbs herself could have actually perceived or observed. *See Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1117 (10th Cir.2007); *Lantec, Inc. v. Novell, Inc*., 306 F.3d 1003, 1019 (10th Cir.2002); *Argo*, 452 F.3d at 1200; *see also Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002) ("We do not consider 'conclusory and self-serving affidavits.'").

Moreover, even if this evidence were otherwise admissible, it pertained only to the services performed by Mr. Dobbs as an employee of the Tribe, not to the ser-

vices of *all* of the participants in the Anthem plan who are employees of the Tribe. This is what § 1002(32) directs the court to consider, rather than the services of an individual employee who is claiming benefits as a participant in the plan. As the Tribe points out in its Amicus Brief at 26, § 1002(32) "requires a consideration of more than the activities of Mr. Dobbs alone. Qualification for exemption of a tribal plan as a governmental plan requires that *none* of a plan's participants may engage substantially in commercial activities" (emphasis added). In determining whether a tribal plan is a "governmental plan" exempt from ERISA under § 1002(32), therefore, the services of one particular employee are not conclusive. Hence, "Under the current tribal government plan exemption contained in the [Pension Protection Act], the Tribe's plans are still subject to ERISA because many of its participants engage in commercial activities." Amicus Brief at 25-26.

In its Renewed Motion to Dismiss (Doc.49-1; Supp.App.310), Anthem specifically asked for permission to conduct discovery on this issue: "If the court, on the other hand, determines that the new definition does apply to a dispute involving actions alleged to have occurred in 2002-2003, then Anthem respectfully requests that the Court allow discovery to be conducted to address the question of whether the plan and its participant's activities involve 'essential governmental functions' or 'com-

mercial activities.'" (Doc.49-1 at 4; Supp.App.313). Anthem's request for discovery thus was not limited to Mr. Dobbs's employment, but sought to ascertain whether substantially all of the services of the employees who are participants in the Anthem plan are in the performance of essential governmental functions, as provided in § 1002(32).

At the status conference following remand, the district court recognized that "whether or not [§ 1002(32)] would apply given the nature of the employment of the employees of the tribe covered by the act" "may well be a question . . . potentially of fact" (3/28/2007 Transcript at 3:20-4:1; Supp.App.416). Although the court recognized that this issue "implicates potentially discovery" (*id.* at 4:4-5; Supp.App.417), it nonetheless granted the renewed motion to dismiss before any discovery on this issue could be conducted.[3]

Accordingly, if the judgment for Anthem is reversed, then the district court's

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[3]The court did explain, however, that:

> One way we can go about this is to tee up the question of law first and resolve that first. That has a certain economy to it, in that my answering that question one way or another, first, it preserves the resources of the parties in a more full-blown discovery mode which would then implicate, I suppose, a Rule 56 motion and all that goes along with that.
>
> So my suggestion is to tee up the first question first. (3/28/2007 Transcript at 3:15-23; Supp.App.417).

finding that Plaintiffs' employee benefit plan is a "governmental plan" under 29 U.S.C. § 1002(32) as amended should also be reversed and remanded with directions to permit discovery on whether the substantially all of the services of the Tribal employees who are participants in the Anthem plan "are in the performance of essential governmental functions" or whether they involve "commercial activities, whether or not an essential government function," and to conduct an evidentiary hearing and make a fact-specific analysis of the plan at issue and the nature of its participants' activities.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C)

As required by FED.R.APP.P. 32(a)(7)(C), I certify that this Brief is proportionally spaced and contains 2460 words. I relied on my word processor to obtain the count and it is Word Perfect X3.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s John R. Mann
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CERTIFICATION OF DIGITAL SUBMISSIONS

The undersigned hereby certifies, pursuant to General Order of August 10, 2007, that: (1) no required privacy redactions, have been made and every document submitted in Digital Form is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned for viruses with the program eTrust Antivirus, Version 8.1.637, on August 1, 2008 and, according to the program, are free of viruses.

/s John R. Mann
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CERTIFICATE OF SERVICE

The undersigned does hereby certify pursuant to FED.R.APP.P. 25 that on this 1st day of August, 2008, a true and correct copy of the foregoing **REPLY BRIEF OF THE CROSS-APPELLANT** was placed in the U.S. Mail, first-class postage prepaid, along with a CD-ROM containing the Brief in PDF format identical to that submitted to the Clerk of the Court in Digital Form, addressed to the following:

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