Case No. 09-3347

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT NANOMANTUBE,
Appellant,
vs.
THE KICKAPOO TRIBE IN KANSAS, THE KICKAPOO TRIBE IN KANSAS TRIBAL COUNCIL, AND THE GOLDEN EAGLE CASINO,
Appellees.

On Appeal from the U.S. District Court for the District of Kansas
Honorable Richard D. Rogers, District Court Judge
Honorable K. Gary Sebelius, Magistrate Judge

APPELLEES' RESPONSE BRIEF

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No Oral Argument Requested

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ISSUES PRESENTED

1. Does the sovereign immunity of The Kickapoo Tribe in Kansas preclude Plaintiff's Title VII suit in federal court because the court lacks subject matter jurisdiction?
2. Does the mere statement that the wholly owned casino of The Kickapoo Tribe in Kansas "will comply with the provisions of Title VII" amount to an unequivocal waiver of sovereign immunity?
3. Does the consensual relationship Plaintiff had with The Kickapoo Tribe in Kansas, as employee and employer, result in the tribal courts acquiring jurisdiction over Plaintiff and his claims arising from the employee-employer relationship?

SUPPLEMENTAL STATEMENT OF FACTS

As alleged by Plaintiff and admitted by Defendants, the Golden Eagle Casino is not an independent corporate entity, separate from The Kickapoo Tribe in Kansas. (Complaint, Doc. 1, p. 2 and Answer, Doc. 6, p. 1, Appellant's Appendix pp. 19, 28). The Golden Eagle Casino is located wholly on Kickapoo Tribe Reservation. (Complaint, Doc. 1, p. 2, Answer, Doc. 6, p. 1). Golden Eagle Casino is an arm of the Kickapoo Tribe and the defendant, the Kickapoo Tribe in Kansas Tribal Council, is its governing body. (Complaint, Doc. 1, p.1 and Answer, Doc. 6, p. 1). This Circuit has acknowledged that "[t]ribal immunity extends to subdivisions of a

tribe." *Native American Distributing v. Seneca-Cayuga Tobacco*, 546 F.3d 1288, 1292 (10th Cir. 2008). Because of this, and because Plaintiff has not asserted that these Defendants should be treated as separate entities, this brief refers to Defendants collectively as "The Kickapoo Tribe in Kansas," "The Kickapoo Tribe" or "the Tribe."

SUMMARY OF THE ARGUMENT

The Kickapoo Tribe in Kansas, as a sovereign political entity, is immune from suit unless Congress or the Tribe unequivocally waives that immunity. In Title VII, Congress expressly acknowledged the sovereign immunity of all Indian Tribes by exempting them from the definition of employer under Title VII. The Supreme Court's decision in *Arbaugh v. Y & H Corporation*, 546 U.S. 500, 125 S.Ct. 1235 (2006) is not applicable to this case. In *Arbaugh*, the Court held that the numerosity requirement of Title VII is not a question of subject matter jurisdiction, but the question of sovereign immunity clearly invokes subject matter jurisdiction.

The Tribe did not waive sovereign immunity by its statement that it "will comply with the provisions of Title VII." A waiver of immunity cannot be implied. It must be unequivocally expressed. Here, the statement that the Tribe will comply with the law is not an unequivocal statement that the Tribe consents to be sued in state or federal court for violation of Title VII. This language is similar to the statement that "the ICRA shall apply to all members of the Cherokee Nation,"

which this court found was not a waiver of the immunity against suit under the IRCA in *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989).

The controlling precedent of the United States Supreme Court found in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 759, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) clearly holds that a tribe enjoys tribal sovereign immunity from suit by a non-Native American entity whether the actions by the tribe "involve[d] governmental or commercial activities and whether they were made on or off a reservation." *Id*., 523 U.S. at 760, 118 S.Ct. 1700. Therefore, the Kickapoo Tribe is not subject to suit by Plaintiff in any state or federal court.

Under *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981), a tribe retains the power to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." The tribe and tribal courts have jurisdiction over non-Indians when there is such a relationship. Here, Plaintiff entered into a consensual employment relationship with the Tribe, and thus subjected himself to the tribal courts and to tribal regulation.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

This Court reviews de novo the district court's decision granting a motion to dismiss based on tribal sovereign immunity. *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). The question of whether Congress has abrogated tribal immunity is subject to de novo review. *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dept. of Labor*, 187 F.3d 1174, 1180 (10th Cir. 1999). Where subject-matter jurisdiction turns on a question of fact, the Court reviews the district court's factual findings for clear error and its legal conclusions de novo. *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008).

I. THE EXCLUSION OF INDIAN TRIBES IN TITLE VII BY CONGRESS IS A CLEAR STATEMENT THAT TRIBES HAVE SOVEREIGN IMMUNITY AND THE COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION OVER TITLE VII CASES AGAINST THEM

"Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002).

As a sovereign political entity, The Kickapoo Indian Tribe in Kansas enjoys sovereign immunity, and thus cannot be sued without its consent. *Kickapoo Tribe*

of Oklahoma v. Lujan, 728 F. Supp. 791 (D.D.C. 1990); *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 172-73, 97 S.Ct. 2616, 2621-22, 53 L.Ed.2d 667 (1977); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 715 (10th Cir.1989). In recognition of this principle of law, the Supreme Court has held that an Indian tribe is not subject to suit in a state or federal court, even for breach of contract involving off-reservation commercial conduct, and even where a non-Indian is involved, unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Absent a waiver of immunity, the district court has no subject matter jurisdiction. *Id*.

Subject-matter jurisdiction involves a court's power to hear a case, and thus can never be forfeited or waived. *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 126 S.Ct. 1235 (2006). In each case, the courts must determine whether subject-matter jurisdiction exists, even where no party has raised the issue. *Id*.

Plaintiff asserts as his first proposition that the Supreme Court's decision in *Arbaugh, supra*, applies here. It does not.

Arbaugh addressed the question of whether the failure of a Title VII Plaintiff to prove that the defendant had 15 or more employees so as to meet the definition of an "employer" under Title VII deprived the district court of subject matter jurisdiction. Under Title VII, "employer" is defined as one "who has fifteen or

more employees …, but such term does not include (1) … an Indian tribe….” 42 U.S.C. § 2000e(b).

To answer the question of whether the 15 employee requirement was a jurisdictional prerequisite to suit or simply an element of a plaintiff’s proof, the Court looked at whether “Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met.” *Arbaugh*, 546 U.S. at 514. If the provisions of Title VII showed that Congress intended the numerosity requirement to be a jurisdictional matter, then if the defendant did not have the requisite number of employees, there would be no subject matter jurisdiction.

The Court examined the provisions of Title VII, and found that “the 15-employee threshold appears in a separate provision that ‘does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.’” *Arbaugh*, 546 U.S. at 515. Thus the Court held that the number of employees was an element of a plaintiff’s proof and not a threshold question of subject matter jurisdiction.

The exception in 42 U.S.C. § 2000e(b), stating that Indian tribes are not employers under Title VII, is a much different matter. This is because there is no subject matter jurisdiction in any state or federal court without a waiver of sovereign immunity by Congress or the Tribe. In fact in any action against an Indian tribe, the jurisdictional statutes, such as 28 U.S.C. § 1331, providing for

federal question jurisdiction, "will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007).

In order for Congress to abrogate sovereign immunity and subject a tribe to suit, there must be an unequivocal expression in the statutory scheme indicating such an abrogation. *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dept. of Labor*, 187 F.3d 1174, 1180 (10th Cir. 1999). When a court determines whether a particular federal statute waives tribal sovereign immunity, it must "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Osage Tribal Council*, 187 F.3d at 1180-1181.

The courts that have considered whether Congress has abrogated tribal immunity have found the statutory language inadequately explicit when there was no language "specifically establishing the cause of action at issue." *Osage Tribal Council*, 187 F.3d at 1181. For example, in *Osage Tribal Council*, this Court addressed whether the Safe Drinking Water Act waived sovereign immunity. The statute defined "person" to include a municipality, and "municipality" to include Indian tribes. Based on this, it found that Congress abrogated immunity in enacting the Act. *Id*.

By contrast, here Congress expressly excluded Indian tribes from the definition of employer under 42 U.S.C. § 2000e(b). Such a specific exclusion shows that Congress did **not** intend to waive the sovereign immunity of Indian tribes with regard to Title VII. There is no language "specifically establishing the cause of action at issue." *Osage Tribal Council*, 187 F.3d at 1181. To the contrary, Congress expressed the intent that a plaintiff would have no cause of action against an Indian Tribe under Title VII. This fact was acknowledged by Judge Tacha in her dissent in *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), where she compared Title VII's exclusion of Indian tribes to ADEA's provisions that did not exclude tribes, impliedly acknowledging that this exclusion showed Congress's intent to uphold the sovereign immunity of Indian tribes in Title VII cases.

As a result of Congress's express exclusion of Indian tribes, it is clear there is no unequivocal intent to waive immunity. Thus, the district court was correct in finding that it had no subject matter jurisdiction over the Tribe in this case.

Plaintiff also asserts that federal laws of general application apply to tribes regardless of their assertion of immunity. In support, he cites several cases holding that various other federal statutes apply to Indian tribes. See Opening Brief, p. 13-14. In each of these cases, however, the courts applied the principle that a general statute that by its terms applies to "all persons" includes Indians." *U.S. Dept. of*

Labor v. Occupational Safety & Health Review Commission, 935 F.2d 182 (9th Cir. 1991). Each case cited by Plaintiff construes a statute that, unlike Title VII, does not specifically exclude Indian tribes: *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996), addressing OSHA and "the application of a federal regulatory scheme which is silent on its application to Indians," *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989), finding ERISA silent as to Indian tribes, and *Florida Paraplegic Association, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999), finding that the ADA, silent as to tribes, required the tribes to follow the law, but did not make tribes subject to suit for violation of its provisions. None of these cases applies here, where Congress has made explicit that Indian tribes are not subject to Title VII.

For the foregoing reasons, this Court must affirm the district court's dismissal of Plaintiff's complaint.

II. THE TRIBE'S STATEMENT THAT IT "WILL COMPLY WITH THE PROVISIONS OF TITLE VII" DOES NOT CREATE SUBJECT MATTER JURISDICTION IN THE FEDERAL COURTS

The Golden Eagle Casino, wholly owned by the Tribe, states in its employment manual, that it "will comply with the provisions of Title VII." (Exhibit A to Memorandum of Law re: Response in Opposition to Motion to Dismiss, Doc. 17-1, Appellant's Appendix p. 92). Plaintiff attempts to bootstrap

this statement into the unequivocal waiver required to subject the Tribe to jurisdiction in the federal courts. The attempt fails as a matter of law.

Plaintiff cites several cases he asserts show that this language rises to the level necessary for the court to find a waiver of sovereign immunity. Each is clearly distinguishable.

First, Plaintiff cites *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589, 149L.Ed.2d 623 (2001). There, the tribe had entered into a form construction contract containing an arbitration agreement. The other party to the contract sued the tribe in federal court, and asserted the tribe had waived sovereign immunity. The contract contained the following provision:

> All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] … shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association. ... The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Examining this language, the Court found that the arbitration clause itself contained an unequivocal waiver. The clause expressly provided that the judgment could be entered "in accordance with applicable law in any court," and provided that Oklahoma law would apply. Because Oklahoma law provided for the filing and enforcement of arbitration awards in Oklahoma state courts, the Supreme

Court held that the tribe had expressly agreed to judgment being filed and enforced against it in the Oklahoma state district court.

Here, on the other hand, there is nothing in the language of the manual indicating that the Tribe has consented to suit in a state or federal court. Nothing indicates a judgment may be entered against it or that claims under Title VII may be pursued in any court. Instead, all the Tribe has agreed to do is to comply with the provisions of Title VII.

In a similar case, this Court has held that a statement of compliance with state or federal law does not constitute a waiver of the right not to be sued. In *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989), the Plaintiff argued that language in the Cherokee Nation's Constitution stating that "the appropriate protection guaranteed by the ICRA [Indian Civil Rights Act] shall apply to all members of the Cherokee Nation" was a waiver of sovereign immunity and entitled him to sue in federal court for violations of the IRCA. This Court found that there was no unequivocal waiver in this language.

Further, the Supreme Court has instructed that even if substantive state laws apply to off-reservation conduct by agreement or otherwise, this does not mean that sovereign immunity is waived and a tribe may be sued. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755, 118 S.Ct. 1700 (1998). "There is a difference between the right to demand compliance with state

laws and the means available to enforce them." *Id*. The Supreme Court has held, for instance, that even though the State of Oklahoma could impose a tax on a tribal store's sales of cigarette to nonmembers, the State could not sue to enforce the tax. Sovereign immunity meant that the tribe was not subject to a suit to collect unpaid state taxes. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510, 111 S.Ct. 905, 909-910, 112 L.Ed.2d 1112 (1991). *See also, United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940) (recognizing immunity from suit over coal mining lease).

Plaintiff also asserts that this Court's decision in *Native American Distributing v. Seneca-Cayuga Tobacco*, 546 F.3d 1288 (10th Cir. 2008)("*NAD*") supports its argument, stating that the case indicates that a sue and be sued clause can constitute a waiver of immunity. However, this Court did not address that question in *NAD*. In footnote 2, *Id.* at 1293, the Court noted that the question of "[w]hether a 'sue or be sued' clause in a tribal charter actually functions as a waiver of immunity is arguable," and noted that the defendants had apparently conceded the issue. The Court never addressed this issue. Further, there, the language of the 'sue and be sued' clause stated that the corporation had the power "[t]o sue and be sued; to complain and defend **in any court**." This language goes far beyond that found here. The employment manual in this case contains no

language giving the right to sue, nor to seek redress in state or federal courts. The decision in *NAD* provides no support for Plaintiffs' argument.

Plaintiff attempts to distinguish the cases relied on by the district court in dismissing Plaintiff's complaint, stating that they were "conditioned" upon the receipt of federal money. That factor makes no difference. In *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1289 (11th Cir. 2001), for instance, the Eleventh Circuit addressed language in a contract for federal financial assistance in which the tribe promised it would not discriminate in violation of federal civil rights laws. The court held that this language was merely a promise not to discriminate, and did not constitute an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court. The court went on to find that the taking of federal funds did not make it a waiver either, but the point of the case, that an agreement to abide by a particular law does not translate into a waiver of immunity from suit, still applies to uphold the district court's dismissal. Likewise, in *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir.1998), the Eighth Circuit held that accepting federal funding, even when accompanied by an agreement not to discriminate in violation of federal laws, does not effect a waiver of tribal sovereign immunity for suits brought under those laws.

Plaintiff next asserts that *Demontiney v. U.S. ex rel. Department of Interior, Bureau of Indian Affairs*, 255 F.3d 801 (9th Cir. 2001), a case cited by the district

court, actually supports his position. Plaintiff states that the Ninth Circuit found that the language in the parties' agreement was a waiver of immunity in the Tribal Court. Setting aside the fact that Plaintiff here isn't seeking to sue in Tribal Court, the case is distinguishable because of the language at issue. In *Demontiney*, the subcontract provided that it "shall be governed by and construed in accordance with the laws of the Chippewa Cree Tribe" and granted the "Chippewa Cree Tribal Court ... exclusive jurisdiction ... over disputes arising under the agreement." Nothing like that appears in the Casino's employment manual. Instead, it states only that the Casino will comply with Title VII, not that the Tribe waives its immunity from suit.

Plaintiff also raises the issue of whether the Kickapoo Tribe's treaty, which also asserts that "The Kickapoo's promise … to abide by the laws of the United States" might also waive sovereign immunity. Again, however, the language of Article 9 of the treaty does not waive sovereign immunity, and the Kickapoo Tribe does not agree to be sued in any court anywhere in the treaty.

Because the Tribe only agreed to comply with Title VII and did not agree to be sued in any court, under the precedents cited both by Plaintiff and herein, there has been no waiver of sovereign immunity. This Court must affirm the district court's decision dismissing Plaintiff's case.

III. SOVEREIGN IMMUNITY PROHIBITS PLAINTIFF'S SUIT, EVEN THOUGH HE IS NOT A MEMBER OF THE TRIBE

Plaintiff asserts that because he is not a member of the Kickapoo Tribe, the law giving the Tribe sovereign immunity does not apply. Plaintiff is wrong.

First and foremost, Plaintiff is the person who has filed this suit, not the Tribe. As the Supreme Court has affirmed, "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Thus, when a person seeks to sue a tribe, he cannot do so unless there is some abrogation of sovereign immunity by Congress or unequivocal waiver by the tribe. *Id*.; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007); *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dept. of Labor*, 187 F.3d 1174, 1180 (10th Cir. 1999).

Plaintiff argues that the proposition that a tribe does not have unlimited regulatory or adjudicative authority over a nonmember of the tribe means he can sue the tribe in district court. Citing *Cossey v. Cherokee Nation Enterprises*, LLC, 212 P.3d 447 (Okla. 2009), Plaintiff urges that the defense of tribal immunity does

not apply to non-tribal members. Plaintiff seriously misreads *Cossey* and the Supreme Court cases cited therein.[1]

In *Cossey* the tribe had entered into a Gaming Compact which provided that the tribe "consents to suit," in a "judicial proceeding for any cause arising from a tort claim," "in a court of competent jurisdiction." *Id*. at 464.The question the court faced was whether this meant that tribal courts or Oklahoma state courts had jurisdiction over a suit by a patron for injuries sustained in a casino. The tribe argued that the *tribal court* had jurisdiction to hear the matter as a court of competent jurisdiction, rather than the state court. The Oklahoma Supreme Court found that the tribal court was not a court of general jurisdiction, and thus had no general jurisdiction to hear a non-Indian's personal injury suit. Because of that, it was not the proper court for a personal injury suit, because the terms of the Compact only allowed suits in a "court of competent jurisdiction.

The case does not apply to the situation at hand. There, Plaintiff had a cause of action he could assert under because of the waiver found in the Compact, and the only question was which court was the "court of competent jurisdiction." Here,

[1] The cases cited in *Cossey* and by Plaintiff in his Opening Brief – *Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245, 1258-1259, 67 L.Ed.2d 493 (1981), *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997) and *Plains Commerce Bank v. Long Family Land and Cattle Co.*, __ U.S. __, 128 S.Ct. 2709 (2008) – all address land issues, holding that tribal courts have presumptive jurisdiction over the activities of non-Indians on reservation lands, but that once tribal land is converted into fee simple from tribal trust land, the tribe loses plenary jurisdiction over it. Since there is no such question involved in this case the decisions don't apply to the issues here. Thus, the reasoning in *Cossey*, however correct or incorrect under existing law, do not apply here either.

although Plaintiff complains that he cannot bring his Title VII case in tribal courts, that is not the issue. The issue is whether Plaintiff has a cause of action under Title VII against the Tribe in any court. There is nothing in Title VII or in the Casino's employee manual that "consents to suit," in a "judicial proceeding," "in a court of competent jurisdiction."

Further, even if *Cossey* applied here, the rule announced of that case does not apply. The Oklahoma Supreme Court, following *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981), held that the general rule is that tribes have no authority over the activities or conduct of nonmembers of the tribe. However, it also held, as in *Montana*, that the rule is subject to two exceptions, one of which applies here: A tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Cossey*, 212 P.3d at 456-457.

The Plaintiff in *Cossey*, as a visitor to the casino, had no such relationship with the tribe. He was a mere invitee. *Id*. at 460. Here, however, Plaintiff entered into a consensual relationship with the Kickapoo Tribe as an at-will employee of the Tribe's Casino. As a result, the holding in *Cossey*, which dealt with a nonconsensual relationship, simply does not apply.

Here, the district court correctly found that neither the Congress nor the Tribe had waived the Tribe's sovereign immunity to suit under Title VII, and that Plaintiff's case should be dismissed. This Court should affirm.

CONCLUSION

Congress specifically excluded Indian tribes from the coverage of Title VII. Thus, there has been no abrogation of the sovereign immunity of the Tribe. *Arbaugh* did not change that, because the numerosity requirement of Title VII is different than the sovereign immunity of an Indian tribe. Further, Title VII is not a statute of general application to all persons, because it does exclude Indian tribes. Thus Plaintiff has no cause of action under Title VII and no right to sue the Tribe.

The Tribe did not waive sovereign immunity either, when it agreed that it "will comply with the provisions of Title VII." Merely agreeing to abide by a law does not equate to a consent to suit or waiver of sovereign immunity without a further, unequivocal intent to do so.

By entering into a consensual relationship with the Tribe, Plaintiff here entered into a consensual relationship, which gives the Tribe authority over his activities and conduct despite his status as a nonmember of the Tribe. As a result, Plaintiff does not have the right to sue in federal court under the general rule that tribes have no authority over the activities or conduct of nonmembers of the tribe.

The district court correctly decided to dismiss Plaintiff's Complaint. This Court must affirm that decision.

Respectfully Submitted,

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RULE 28(f) ADDENDUM

42 U.S.C. § 2000e

STATEMENT OF RELATED CASES

There are no related cases.

ORAL ARGUMENT STATEMENT

The issues presented by Appellant are settled by numerous cases. This is not a case of first impression. Indian Tribes are excluded from pursuant to 42 U.S.C. § 2000e . Appellant's are creative, but not compelling.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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/s/ Charley L. Laman
Attorney for Appellees
Dated: February 25, 2010.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on February 25, 2010, I electronically filed the above and foregoing Appellees' Response Brief with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system, and mailed seven hard copies to the Clerk of the Tenth Circuit Court of Appeals; I also mailed 2 hard copies of the Appellees' Response Brief and sent CM/ECF notification of the filing of the Brief to:

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/s/ Charley L. Laman

ADDENDUM

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter VI. Equal Employment Opportunities (Refs & Annos)
§ 2000e. Definitions

For the purposes of this subchapter--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(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.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer

Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(*l*) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

CREDIT(S)

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