TURTLE MOUNTAIN TRIBAL COURT OF APPEALS
TURTLE MOUNTAIN INDIAN RESERVATION IN THE COURT OF APPEALS
BELCOURT, NORTH DAKOTA

TMAC-10-012
TMAC-10-016

Ellie Davis
Appellant,

vs. MEMORANDUM DECISION

Angel Poitra, et,
Appellees.

Erika Malataree,
Plaintiff,

vs.

Belcourt School District #7 and
PL 100-297 Grant School Board
Of Education,
Defendants

Both of these suits involve the same issue of whether the lower court can exercise jurisdiction over claims brought against a North Dakota School District and its employees operating within the Turtle Mountain Indian reservation. Both of these lawsuits were dismissed on the ground that the lower court lacked jurisdiction over Belcourt School District #7. The cases were consolidated for oral argument on the 23rd day of September 2011 at the University of North Dakota School of Law, at which time all Parties appeared through legal counsel.

For the reasons cited herein the Court holds that although the Tribal Court can exercise jurisdiction over the Belcourt School District #7 under Montana v. United States and its progeny the lower court should reexamine whether Erika Malataree has stated a

cause of action for violation of the Tribe's Tribal Employment Rights Ordinance because of that law's inapplicability to governmental entities.

Second, the Court also holds that the lower court had jurisdiction over the causes of action alleged by Ellie Davis against Belcourt Public School District officials, but that the lower court must examine whether there is a cause of action for defamation and intentional infliction of emotional distress for statements written in an employee assessment and whether any privilege applies to those statements.

Because both of these actions were dismissed below for want of subject matter jurisdiction over the suits against Belcourt School District #7 and its employees, the facts will be construed on appeal in a light favoring the Appellants. Appellant Malateree is an enrolled member of the Tribe who applied for a payroll officer with the Belcourt School District. She was not hired for the position and filed a suit asserting that a non-member was selected for the position over her in violation of tribal employment preference law and "federal grant conditions." At all times relevant to this appeal Belcourt School District #7 and PL 100-297 Grant School Board had an agreement for the education of high school students in the Belcourt School District. That agreement, entitled Turtle Mountain Community High School Plan of Operations, permitted the District to have "exclusive administrative authority" over the day-to-day operations of the School, including making employment decisions. The buildings where students attend school are owned by the Bureau of Indian Education, but are used by the District rent-free.

It is undisputed that in the agreement the Tribe and Belcourt School District #7 have entered into for the operation of the School the District agreed to "determine the salaries, employment, termination procedures, and conditions of employment provided

that such does not conflict with applicable Tribal, State or Federal Laws." One of the Tribal Laws governing employment on the Turtle Mountain Indian reservation is the Tribal Employment Rights Ordinance contained at Chapter 32 of the Turtle Mountain Tribal Code.

Appellant Ella Davis filed suit against tribal member Angel Poitra, an employee of the Belcourt School District #7 claiming that Poitra defamed her by putting a memorandum of warning in her employment file. Davis also sued non-District School employees including Dr. Albert Allick, who asserted below was a federal employee and therefore not subject to suit in the tribal court under the Federal Tort Claims Act and the Indian Self-Determination and Education Assistance Act. The lower court never addressed this issue because the Court dismissed Ms. Poitra from the suit finding that as a District employee she was not subject to suit in the tribal court.

The lower court found jurisdiction over these suits lacking under federal court precedent. The Belcourt School District #7's appellee brief properly states that the school district is a political subdivision of the State. As such, under North Dakota law, the school district is not an arm of the State. *See Baldwin v. Board of Edu. of City of Fargo*, 33 N.W.2d 473, 481 (N.D. 1948) (holding North Dakota's Constitution recognizes school districts as political subdivisions). Accordingly, the issue becomes whether a political subdivision of North Dakota, and its employees, can be subjected to suit in a tribal forum when it enters into a consensual agreement with a Tribe to operate a high school on trust lands owned by the United States Bureau of Education in accordance with tribal, state and federal law.

The second question that must be addressed, should this Court find the lower court erred in finding no jurisdiction, is whether the District is shielded from suit by the State's sovereign immunity. Just as Indian tribes have sovereign immunity from suit in state and federal courts this Court is inclined to believe that states and their instrumentalities do not waive that immunity, if it exists, by operating on Indian reservations. This issue is a simple one as the United States Supreme Court held in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S 274, 280-81 (1977), that a political subdivision, which is not an arm of the State, is not entitled to assert any Eleventh Amendment immunity from suit in federal courts. In *Doyle*, the Court considered Ohio State law to determine whether a political subdivision of the State qualified as an arm of the State. *Id.* at 280. The Court held that a political subdivision of the State of Ohio is not an arm of the State. *Id.*

Similarly, the North Dakota Supreme Court held that a political subdivision is not an arm of the State entitled to sovereign immunity, but rather, is entitled to the doctrine of governmental immunity.[1] *Kitto v. Minot Park Dist.*, 224 N.W.2d 795 (N.D. 1974). The court noted that the sovereign immunity a state may enjoy is legally distinct from the doctrine of governmental immunity. Since North Dakota State law recognizes school districts as political subdivisions, which are not entitled to the State's sovereign immunity, the facts presented in this case do not fall comfortably within the Nevada v. Hicks analysis used by the lower court.

[1] The doctrine of governmental immunity was abolished in North Dakota as a result of *Kitto*. Following *Kitto*, the North Dakota Legislature enacted N.D.C.C. 32-12.1-03, which places limitations on the liability of political subdivisions within the State.

Because immunity does not appear to be a shield from suit the only question is whether the lower court erred in ruling that under the circumstances presented in these two cases whether the District and its employees are beyond the purview of this Court's jurisdiction. This Court does not think so.

The exercise of tribal court jurisdiction over non-Indians must conform to federal law because the United States Supreme Court has held that the tribal court exercise of jurisdiction over non-Indians is a federal question. See National Farmer's Union Insurance v. Crow Tribe, 471 US 845. There is a separate line of United States Supreme Court decisions that discuss the authority of tribal courts to adjudicate interests of non-Indians that needs to be examined. In *Montana v. United States*, 450 U.S. 544 (1981) the United States Supreme Court severely proscribed the authority of Indian tribes to regulate the conduct of non-members on fee lands within reservation boundaries. Although that case had nothing to do with tribal court adjudicatory authority, it was cited by the Supreme Court as the controlling case on this issue of tribal court authority to hear disputes involving non-Indians on non-tribal lands in *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). There are two situations when tribal courts can adjudicate the interests of non-Indians: 1) when the non-Indian has entered into a consensual relationship with a tribal member and the subject matter of the lawsuit pertains to that consensual relationship and; 2) when the non-member's conduct "threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the Tribe." *Montana*, at 566.

It should be noted that several recent federal courts have rejected the notion that the Montana analysis should apply to the exercise of tribal court civil jurisdiction over

non-Indians in disputes arising on tribal or trust lands, which this case seems to involve. For example, in Water Wheel Camp Recreation Area v. Larance, 641 F.3d 802 (9th Cir. 2011) the Court rejected the Montana analysis to a case involving tribal court authority to evict a non-Indian from tribal lands. In so doing the Court held that Montana does not apply to a Tribe's attempt to regulate or adjudicate the conduct of non-Indians on tribal lands.

> *Montana* does not affect this fundamental principle as it relates to regulatory jurisdiction over non-Indians on Indian land. *See Bourland*, 508 U.S. at 688-89 (describing *Montana* as establishing that when tribal land is converted to non-Indian land, a tribe loses its inherent power to exclude non-Indians from that land and thereby also loses "the incidental regulatory jurisdiction formerly enjoyed by the Tribe"); *see also Merrion*, 455 U.S. at 144-45 (upholding a tribal tax on non-Indians operating a business on tribal land as a condition of entry derived from the tribe's inherent power to exclude, without applying *Montana*); *Strate*, 520 U.S. at 456 (noting that the land in question was equivalent to non-Indian land and that "*Montana*, accordingly, governs this case"); *Mescalero Apache Tribe*, 462 U.S. at 330-31 (determining that *Montana* did not apply to the question of a tribe's regulatory authority over nonmembers on reservation trust land because "*Montana* concerned lands located within the reservation but not owned by the Tribe or its members"); *McDonald v. Means*, 309 F.3d 530, 540 n.9 (9th Cir. 2002) [**25] (as amended) (rejecting the argument that *Montana* applies to tribal land because *Montana* limited its holding to non-Indian lands and *Strate* confirmed that limitation); *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1062-63 (9th Cir. 1999) ("The threshold question in this appeal is whether *Montana's* main rule applies, that is, whether the property rights at issue are such that the land may be deemed 'alienated' to non-Indians.")"
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> Water Wheel at 812.

The United States District Court for the District of North Dakota similarly held that with regard to this Court's exercise of jurisdiction that the many of the same principles that guided the Ninth Circuit in Water Wheel with regard to tribal authority over non-Indians on tribal land should control an assessment whether a tribal court could exercise jurisdiction over a non-Indian company that used the reservation's tribal courts

to engage in business. See Ford Motor Corp v. Poitra, 776 F.Supp 2d 994 (D.N.D. 2011). There the Court noted this language in federal court precedents.

> The power to exercise tribal civil authority over non-Indians derives not only from the tribe's inherent powers necessary to self-government and territorial management, but also from the power to exclude nonmembers from tribal land." Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141-44, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982)). If the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with the Indians. It is true that "a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe," Merrion, 455 U.S. at 142, but we think that no lesser principle should govern those who voluntarily enter a tribal courtroom seeking compensation from tribal members. Indeed, there may be circumstances in which a nonmember plaintiff may have no forum other than the tribal courts in which to bring his claims. We hold that a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a "consensual relationship" with the tribe within the meaning of Montana.
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> Ford Motor, at 959 citing Smith v. Salish Kootenai College, 434 F.3d 1127, 1139-40 (9th Cir. 2006).

It is not therefore clear to this Court that the Parties are correct in their assertion that the Montana test should even apply to this case because this case involves non-Indian management of a school on tribal lands. Indeed, the District seemed to concede at oral argument that it must abide by tribal regulatory law on the reservation and even that the Tribe could remove it from the School it currently operates. It would be quite ironic if this Court were to hold that the lower court could not assert jurisdiction over a party that the Tribe can regulate the conduct of and even remove from the reservation.

An added concern of this Court is that tribal members not be left without recourse against non-Indian entities that operate on the Turtle Mountain reservation when they have legitimate grievances. In Malateree's case for example, assume arguendo that she does have an actionable claim for violation of the Tribe's TERO ordinance, but the lower

court lacks jurisdiction to hear her claim. The rejoinder of the District that she can pursue her action in state court rings a bit hollow when one recognizes that North Dakota state courts are not bound to enforce or even apply tribal law in disputes arising on the reservation. It is even questionable whether a state court could apply a law favoring Indians in employment without running afoul of the North Dakota State Constitution and its requirement of equal protection of the law.

This Court therefore finds that the application of the two-prong Montana test to the instant case is dubious at best. However, because the federal law on this subject is so tenuous this Court will analyze this case under that standard.

In the Supreme Court's most recent pronouncement on the subject, Plains Commerce Bank v. Long Family Cattle Company, 554 U.S. 316 (2008), the United States Supreme Court carved out a narrow exception to the first prong of the Montana test so as to limit tribal court jurisdiction over any dispute that involves the ownership or potential title to fee lands. It is telling that the fee lands in Plains Commerce were located on the Cheyenne River Indian reservation in that case. Despite this the Court held that a tribal court cannot entertain any legal dispute pertaining to such lands that may affect the title to such lands. The tribal court in the Plains Commerce Bank case had upheld tribal court jurisdiction over an action brought by Indian plaintiffs against a non-Indian Bank asserting that the Bank had discriminated against them by foreclosing on fee lands within a reservation and selling them to non-Indians on more favorable terms than those offered them. Even though the tribal court noted that the transaction between the Bank and the Long Family Cattle Company was certainly a consensual one and it arose on the reservation, the Supreme Court nonetheless held that because the result of the litigation

could potentially impact the title to such lands, tribal court jurisdiction was foreclosed under Montana.

Plains Commerce does not seem to have any relevance in the cases at bar because the disputes arose on federal lands leased to a public school district and the suit in no way would divest any party of title to fee lands.

The other narrow exception to Montana seems to be *Nevada v. Hicks*, 533 U.S. 353 (2001), although the opinion in that case is not clear on whether it created an exception to Montana or whether the Court merely engaged in statutory interpretation to hold that a tribal court could not exercise jurisdiction over a cause of action premised on 42 U.S.C. §1983 brought by a tribal member against a "state" employee- a game warden. The vast majority of cases, with one *major* exception, simply restate the Court's holding in *Hicks* as an example of when a tribal court lacks civil jurisdiction and therefore may not exercise jurisdiction over the claim.[2] However, as noted, there is one case which appears to interpret the *Hicks* decision as establishing that the *Montana* exceptions do not apply to state or government entities. *See MacArthur v. San Juan County*, 497 F.3d 1057, 1073 (10th Cir. 2007) (citing *Montana*, 450 U.S. 544). Specifically, the Tenth Circuit cites Justice O'Connor's concurrence in *Hicks* as establishing "a per se rule that consensual relationships entered into between state governments and tribes, 'such as contracts for services or shared authority over public resources,' could no longer give rise to tribal civil jurisdiction." *Id.* (citing Hicks, 533 U.S. at 393-94). In addition, the circuit court noted Justice Scalia's response that "[t]he [*Montana*] Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was

[2] A tribal court may not exercise civil jurisdiction over state agents for on-reservation investigations stemming from off-reservation conduct

referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *San Juan County*, 497 F.3d at 1073 (quoting *Hicks*, 533 U.S. at 372). When considering the language in *Hicks* that, at the very least, the first *Montana* exception cannot apply to States or state officers, Justice Scalia was surely implying that the exception could not pierce the sovereign immunity protection enjoyed by States and state officers. Thus, according to the Tenth Circuit's interpretation of *Hicks*, if the Belcourt School District #7 is an arm of the state, the Turtle Mountain Tribal Court may not exercise civil jurisdiction under, at least, the first *Montana* exception.

As this Court has already examined, however, the School District is not considered a state entity under North Dakota Supreme Court precedent. It is thus difficult for this Court to understand how the Hicks decision would exempt the District and its employees from tribal court civil jurisdiction when they do not seem to fall under the umbrella of "state entity or employee." Even if they did nowhere in Hicks does the Court intimate that tribal courts would never have civil jurisdiction over an agency of state government or its employees when the state agency has voluntarily acceded to tribal law by signing an agreement in which it agrees to abide by tribal law governing employment. State entities and their agents may have to appear in tribal courts in various contexts (child support enforcement or dependency proceedings for example) and if those entities and their employees are beyond reproach when it comes to tribal court jurisdiction they are apparently permitted to operate with impunity in tribal communities.

This Court therefore disagrees with the lower courts' decisions to dismiss the suits against the District for lack of jurisdiction. That does not necessarily mean that the Appellants have stated causes of action against these Appellees however.

On remand the lower court must consider several issues. First with regard to the Malateree suit, there is a serious question whether Tribal law controls the employment of personnel at the School in light of the Tribe's TERO ordinance. The TERO ordinance defines covered "Employers" at §32.0201(9) to exclude employees of a state, tribal, county or federal government, although it does not exclude non-profit entities created under tribal or state law who contract with Tribes under PL 100-297. Is a state school district covered under the TERO law? This will have to be decided by the lower court.

Second this Court never addressed the defenses to the suit offered by the other Defendant in both suits. It appears to this Court that the Grant School is not a proper party Defendant in the Malaterre suit because that School has nothing to do with employment decisions made at the High School. In addition it appears that Defendant Dr. Albert Allick is covered by the Federal Tort Claims Act in the Davis lawsuit and such would bar tribal court jurisdiction over him in his personal capacity.

This Court also has some serious concerns about the viability of a defamation lawsuit in the Davis case. Although this Court is not aware of any tribal court decisions on this issue, the majority of state courts that have addressed this issue have held that employers and their agents engage in privileged communication when they take adverse disciplinary action against employees. "(A)n employer has a conditional or qualified privilege that attaches to communications made in the course of an investigation

following a report of employee wrongdoing. . . . *The privilege remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate*. . . . [However,] proof that a statement was motivated by actual malice existing at the time of publication defeats the privilege. . . . In the defamation context, a statement is made with actual malice when the statement is made with knowledge of its falsity or with reckless disregard as to its truth. . . .." Wal-Mart Stores v. Lane, 31 S.W.3d 282 (Tx. App. 2000). Some courts have held that employees may not sue employers for defamation actions for personnel actions taken against them and the sole remedy is one sounding in breach of contract. See Foley v. Interactive Data Corp., 47 Cal. 3d 654; 765 P.2d 373; 254 Cal. Rptr. 211 (Cal. 1988).

This bar to defamation suits also extends to co-workers in certain states. See Shepherd v. Freeman, 67 Cal. App. 4th 339 (Cal. App. 4th Dist. 1998).

It shall be the duty of the Judge on remand to determine the viability of the lawsuits filed by both Malateree and Davis in the lower court. However, this Court finds that the lower court may make this analysis because it does have jurisdiction over Belcourt School District #7 under both tribal and federal law principles.

Wherefore, after due consideration it is hereby

ORDERED, ADJUDGED, AND DECREED that the orders in these cases dismissing these lawsuits for lack of jurisdiction over the Belcourt School District #7 are hereby REVERSED and these cases remanded for a determination whether the Appellants have stated causes of action under tribal law.

So ordered this 6th day of February 2012.

BY THE COURT

B.J. Jones, Chief Justice

Keith Richotte, Jr., Associate Justice

Michael T. Swallow, Associate Justice

ATTEST: _____