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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

ANIBAL FERNANDEZ FONTANEZ, **Plaintiff ,** **vs.** **MHA NATION - THE THREE AFFILIATED TRIBES and UNITED STATES BUREAU OF INDIAN AFFAIRS,** **Defendants.**	**CV 11-148-M-DWM-JCL** **DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Pursuant to Rules 12(b)(1) and (b)(3) of the Federal Rules of Civil Procedure, the United States respectfully moves to dismiss this *pro se* employment discrimination suit against the Mandan, Hidatsa, and Arikara Tribes of North Dakota[1] and the United States. Plaintiff Fontanez was a non-member law enforcement officer for the Tribes until he was fired on or about March 29, 2010. Complaint at 5-6 (Dkt. 2). He now claims injury to his civil rights, which this Court has construed as an allegation of employment discrimination under either 42 U.S.C. § 2000e-2 (unlawful private employment practices) or § 2000e-16(a) (unlawful employment practices by federal agencies). Order of December 8, 2011 (Dkt. 3).

There are numerous problems with Fontanez's claims against the United States. To begin, the very statute that potentially provides a cause of action in this case, Title VII, contains a venue provision that requires Fontanez to file this case in North Dakota. *See* 42 U.S.C. § 2000e-5(f)(3). Beyond that, the United States has not waived its

[1] Also known as the Three Affiliated Tribes and referred to herein as the Tribes.

sovereign immunity for this action. Neither 42 U.S.C. § 2000e-2 nor § 2000e-16 waives federal sovereign immunity for employment actions taken by an Indian tribe. Further, the Tribes, while they are separately sovereign and not amenable to this suit, are indispensable parties to this action under Rule 19 of the Federal Rules of Civil Procedure because their employment actions and law enforcement budget are at issue. Because an indispensable party to the suit cannot be hailed into court, the case must be dismissed. Finally, to the extent Fontanez raises a claim of federal employment discrimination, he has failed to exhaust his administrative remedies with the Equal Employment Opportunity Commission (EEOC). On that basis alone the claims against the United States must be dismissed.

ARGUMENT

I. This suit is filed in the wrong venue.

The venue provision applicable to cases brought pursuant to Title VII provides that a civil action may be brought only in one of four judicial districts: 1) any judicial district in the State in which the unlawful employment practice is alleged to have been committed; 2) the judicial district in which the employment records relevant to such

practice are maintained and administered; 3) the judicial district in which the aggrieved person would have worked but for the unlawful employment practice; or 4) if the respondent is not found within any such district, within the judicial district in which the respondent has its principal office. See 42 U.S.C. § 2000e-5(f)(3).

The Ninth Circuit Court of Appeals has observed that the special venue provisions of § 2000e-5(f)(3) control employment discrimination cases over the more general provisions of 28 U.S.C. § 1391(b). *See Johnson v. Payless Drug Stores Northwest, Inc.*, 950 F.2d 586, 587-88 (9th Cir. 1991) ("venue for [Johnson's] right of action is circumscribed by the very statute that gives [him] the right to sue in the first place"); *Stebbins v. State Farm Mutual Auto Ins. Co.*, 413 F.2d 1100, 1102 (D.C. Cir. 1969).

In general, the effect of Title VII's venue provision is to allow suit in the judicial district in which the plaintiff worked or would have worked. Here, pursuant to the Declaration of Elmer Four Dance (filed contemporaneously with this brief), it is evident that only one district falls within the Title VII venue provision. The alleged unlawful activity occurred in North Dakota. *See* Complaint at 4. The records relevant to

Fontanez's employment are kept by the Tribes in North Dakota. Four Dance Declaration at 2-3. The judicial district where Fontanez would have worked in the absence of the alleged discrimination is North Dakota. Complaint at 4-5. Finally, the Tribes and the relevant office of the Bureau of Indian Affairs are both found in North Dakota. Four Dance Declaration at 2-3.

Fontanez may not maintain his suit in this district merely because he lives here, or because it may be a more convenient forum for litigating the lawsuit. Venue in the federal courts is governed entirely by statute. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979). In Title VII, Congress placed no weight on the plaintiff's choice of forum and convenience. His suit lies in North Dakota.

This Court may dismiss the case for lack of venue. It also has discretion under 28 U.S.C. § 1406(a) to transfer a case to the appropriate district. *See Pierce v. Shorty Small's of Branson*, Inc., 137 F.3d 1190, 1191 (10th Cir. 1998)("decision whether to dismiss or transfer lies within the sound discretion of the district court"). Given the serious jurisdictional issues set forth below, this Court should

exercise its discretion to dismiss the case subject to refiling in the proper jurisdiction.

II. The United States has not waived its sovereign immunity for employment discrimination claims brought against the Tribes.

Federal courts have jurisdiction over suits against the United States and its agencies only to the extent that sovereign immunity has been waived. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citations omitted). Further, the waiver "cannot be implied but must be unequivocally expressed." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

To find a waiver of sovereign immunity in this case, the Court should begin with the statute that gives the Tribes the authorization to run their own law enforcement program. As Fontanez correctly alleges on page 5 of his Complaint, the Tribes operate their own law enforcement program through a Self Determination Act contract under Public Law 93-638 (*see* 25 U.S.C. § 450e). *See* Exhibit A. Under an addendum to that law, the federal government waived its immunity for common law and intentional tort actions brought against tribes or tribal officers acting within the scope of their employment while carrying out the governmental functions enumerated in the contract. *See* Public Law 101-512, Title III, § 314 (codified as 42 U.S.C.§ 450f notes); *see Hinsley v. Standing Rock Child Protective Services*, 516 F.3d 668, 672 (8th Cir 2008). Such tort actions are "considered claims against the United States and are covered to the full extent of the [Federal Tort Claims Act]." *Id*. But there is no analogous waiver in the statute for employment discrimination actions, which are governed exclusively by Title VII, and thus, no "clear statement from the United States [in the Indian Self Determination Act] waiving sovereign immunity" for

employment discrimination actions. *White Mountain Apache Tribe*, 537 U.S. at 472. The Court must look further.

Looking next to the two provisions of Title VII that could possibly provide a waiver of sovereign immunity, the same problem arises – there is no waiver for actions against a tribal government employer. Title 42, section 2000e(b) defines "employer" for non-federal employment discrimination cases to exclude both the federal government and the tribes. In pertinent part, it excludes from the definition of the term "employer" "the United States, corporations wholly owned by the Government of the United States, [and] an Indian tribe . . . ." 42 U.S.C. § 2000e(b); *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 505 (2006).

Similarly, section 2000e-16(a), relating to federal employment discrimination claims, waives sovereign immunity for employment actions only "in military departments . . . executive agencies as defined in section105 of Title 5 . . , in the United States Postal Service, and the Postal Rate Commission" and some departments of the D.C. government, the Smithsonian, the Government Printing Office, the General Accounting Office, and the Library of Congress. *See also*, 29

C.F.R. § 1614.103(b) (identifying the agencies to which 42 U.S.C. § 2000e-16 applies). Section 105 of Title 5 defines "Executive agency" as "an Executive department, a Government corporation, and an independent establishment." An "independent establishment" is defined within the Code as "an establishment in the executive branch." 5 U.S.C. § 104.

Indian tribes are certainly not executive agencies, or corporations, of the federal government. Nor can they be considered an "establishment in the executive branch" because they were not created "explicitly for the furtherance of federal governmental goals." *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995); *Tewelde v. Albright*, 89 F.Supp.2d 12, 16 (D.D.C. 2000) (finding that the American Embassy Association was not an "instrument" of the State Department under 2000e-16 because it functioned independent of the government in all day-to-day matters including personnel issues). But there is no case law the government has found that addresses the exact issue in this case – whether an Indian tribe is the equivalent of a federal agency under section 2000e-16 for the purposes of Title VII liability. That should come as no surprise.

Indian tribes are the antithesis of an "establishment in the Executive Branch" of the federal government. They are "distinct, independent political communities, retaining their original natural rights" of self-government. *Worcester v. Georgia*, 6 Pet. 515, 559 (1832); F. Cohen, Handbook of Federal Indian Law 232-235 (1982). In fact, they pre-exist the federal government and cannot be seen as a product created by the United States to fulfill some federal purpose. They have sovereignty that, while not complete, allows them to retain "the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886). They can even make their own substantive law in internal matters and enforce it in their own courts. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citations omitted). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Id.* at 56.

In other words, while the Tribes may get money for their operations from the federal government, they serve their own sovereign purposes. They are neither established by, nor part of, the Executive

Branch, and thus, their actions cannot give rise to liability under section 2000e-16 or, for that matter, section 2000e-2.

III. The sovereign Tribes are indispensable to this case, but are not amenable to this action.

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940). Although tribal sovereignty is subject to the superior and plenary control of Congress, "without congressional authorization," the "Indian Nations are exempt from suit." *Fidelity & Guaranty Co.*, 309 U.S., at 512.

Because of their immunity, the Tribes cannot be sued in this action. Nevertheless, the Tribes have a heightened interest in this case because it concerns the functions of tribal government and the expenditure of tribal funds. Under those circumstances, if the Tribes cannot be joined, the case cannot proceed. *See Clinton v. Babbitt*,180 F.3d 1081, 1088 (9th Cir. 1999); *Wichita and Affiliated Tribes of*

Oklahoma v. Hodel, 788 F.2d 765, 775 (D.C. Cir. 1986); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir.1975).

Under Rule 19(a) of the Federal Rules of Civil Procedure, a party must be joined if "in that person's absence the court cannot accord complete relief among existing parties" or if "disposing of the action in that party's absence may as a practical matter impair or impede the person's ability to protect" that party's claimed interest in the proceeding. Fed. R. Civ. P. 19 (a)(1)(A) & (B). Since Fontanez intends to impugn the Tribes' decision to fire him, the Tribes are undeniably interested in the proceeding and without means to protect that interest. Further, Fontanez seeks damages from the Tribes in the form of back pay and lost wages. The loss of those funds will certainly impact other Tribal operations.

The Tribes are indispensable to this action and, since there is nothing that can be done to protect that interest under Rule 19(b), the case must be dismissed. *See Babbit*, 180 F.3d at 1090. In deciding whether, in equity and good conscience, this case should go forward despite the absence of the Tribes, the Court should consider that there is an alternate remedy available. Fontanez can sue in tribal court and

this Court should step aside until he exhausts those judicial remedies. *See National Farmers Union Insurance Co.*, 471 U.S. 845, 856 (1985) (explaining that, while the federal courts may have jurisdiction of a civil case involving a non-Indian plaintiff in Indian country, the federal courts defer to the tribes for a "full record to be developed in the Tribal Court . . .").

Nothing in the Complaint indicates that Fontanez has availed himself of his judicial remedies in tribal court. Therefore, under Rule 19(b), this Court should dismiss to allow the tribal courts to develop a full record of the events that led to Fontanez's dismissal.

IV. Plaintiff failed to exhaust administrative remedies.

To raise a claim of Title VII employment discrimination, Fontanez must be able to demonstrate that he exhausted his administrative remedies before seeking judicial relief for the alleged discriminatory agency action. *United Air Lines v. Evans*, 431 U.S. 553, 555 n.4 (1977); *McDonnell Douglas Corp. V. Green*, 411 U.S. 792, 798 (1973). The principal exhaustion requirement is that the complainant must initially seek relief in the agency that has allegedly discriminated against him. *Brown v. General Services Administration*, 425 U.S. 820, 831 (1976).

For a claim of federal employment discrimination, Fontanez must also be able to demonstrate compliance with the procedures set forth in 29 C.F.R. 1614.104-106. He must contact an equal employment opportunity (EEO) counselor from the EEOC within 45 days of the alleged discrimination. *Id*. at § 1614.105(a)(1). During this "informal" counseling stage, the EEO counselor will attempt to resolve the matter and advise the individual of his rights. 29 C.F.R. § 1614.105(b)(1). At the conclusion of the informal counseling, an individual has 15 days to file a complaint with the agency that allegedly discriminated against him. 29 C.F.R. § 1614.106(a),(b). Once a formal complaint is filed and accepted by the agency, the agency has 180 days to conduct an investigation of the claims, 29 C.F.R. §§ 1614.106(e)(2) & 1614.108. The administrative exhaustion process also allows individuals to request a written final agency decision or a hearing before the Equal Employment Opportunity Commission – *all before* an action may be filed in district court. *Id*. at 1614.106-110; 42 U.S.C. s 2000e-16(c) ("Within thirty days of receipt of notice for final action taken by a department ... or after one hundred and eighty days from the filing of the initial charge with the

department ... an employee ... if aggrieved by the final disposition of his complaint ... may file a civil action ...").

Fontanez has done none of that. He filed a grievance with the Tribes. That is all. He made no inquiry of the EEO counselor for the Bureau of Indian Affairs, he filed no complaint with agency, and he received no final agency determination. *See* Declaration of Four Dance at 3. He has no federal claim, and even if he did, he failed to exhaust administrative remedies.

CONCLUSION

For all the foregoing reasons, the Complaint should be dismissed, or, in the alternative, transferred to the appropriate venue in North Dakota.

DATED this 31st day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2012, a copy of the foregoing document was served on the following persons by the following means:

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 2625 words, excluding the caption and certificates of service and compliance.

DATED this 31st day of January, 2012.

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