Case No. 11-35970

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA L. GILBERTSON and LARRY GILBERTSON,

Plaintiffs-Appellants,

v.

QUINAULT INDIAN NATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington, Case No. 11-05380

BRIEF OF APPELLEE QUINAULT INDIAN NATION

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STATEMENT OF JURISDICTION

The Gilbertsons filed their complaint on May 17, 2011, and alleged jurisdiction under 28 U.S.C. § 1331. On October 24, 2011, the district court held that it lacked subject matter jurisdiction based on the sovereign immunity of the Quinault Indian Nation and dismissed the complaint under Fed. R. Civ. P. Rule 12(c).

The district court entered judgment on October 28, 2011, and denied the Gilbertsons' motion for reconsideration on November 7, 2011. Plaintiffs timely filed a notice of appeal on November 21, 2011. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issues on appeal are:

1. Whether the district court correctly held that a single statement in an employee guidebook is not an unequivocal expression of the Quinault Indian Nation's intent to waive its sovereign immunity to a Title VII suit in federal court?

2. Whether the district court correctly held that the Quinault Indian Nation's express waiver of sovereign immunity to the Quinault Tribal Court does not permit a Title VII suit brought in federal court?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Rebecca Gilbertson and Larry Gilbertson are a married couple residing in Grays Harbor County, Washington. They are non-Indian, nonresidents of the Quinault Indian Reservation. SER 2, ¶ 5.

The Quinault Indian Nation is a federally recognized, sovereign Indian tribe. SER 2, ¶ 6. The Quinault Beach Resort & Casino ("Resort") is a gaming facility owned by the Quinault Indian Nation and operated by the Quinault Nation Enterprise Board. SER 10 (Answer, *ll*.9-11); *see also* ER 1, 4; SER 2, ¶ 6.

Rebecca Gilbertson began employment with the Nation's Tribal Gaming Agency in 2000. In 2002, Gilbertson began working for the Resort. Rebecca Gilbertson has continued to be employed by the Resort through the pendency of these proceedings. SER 3, ¶ 9.

Rebecca Gilbertson signed and acknowledged the Resort's Team Member Guidebook ("Guidebook"). SER 3, ¶ 10. The Guidebook states:

> Your employment with the Quinault Beach Resort & Casino is strictly at-will. This means that neither you nor the Quinault Beach Resort & Casino have entered into a contract or agreement of any kind regarding the conditions of or duration of your employment.

ER 14. The same page of the Guidebook states that tribal and Indian preference will "apply to all employment considerations, including hiring, transfers, promotions and layoffs." ER 14.

The same page of the Guidebook states:

> Team members can raise concerns and make reports without fear of reprisal and are protected under Title VII which is a provision of the Civil Rights Act of 1964.

ER 14.

In 2008 Gilbertson filed suit in the Quinault Tribal Court alleging employment discrimination and harassment based on facts and circumstances that arose from her employment. SER 1, ¶ 1. The Tribal Court granted the Nation's motion to dismiss, and Gilbertsons' appeal to the Quinault Tribal Court of Appeals was dismissed. SER 2, ¶ 3. This lawsuit followed.

A. The Complaint

On May 17, 2011, Rebecca and Larry Gilbertson filed their Amended Complaint for Monetary Damages naming the Quinault Indian Nation as the sole defendant. SER 1-8. The complaint asserted three causes of action: the first for a violation of Title VII, SER 6-7, ¶¶ 17-21); the second for employment discrimination in violation of "Quinault Indian Nation laws," *id.* ¶ 22); and the third for false imprisonment under unstated law. *Id.* ¶ 23. The complaint requested relief in the form of compensatory and punitive damages and attorneys fees. *Id.* SER 7, ¶¶ 25-27.

On August 23, 2011, the Nation answered. SER 9-14. The Nation raised six affirmative defenses, including the Nation's sovereign immunity to plaintiffs' suit, plaintiffs' failure to exhaust administrative remedies with respect to their Title VII

cause of action, and the district court's lack of subject matter jurisdiction over the second and third causes of action. SER 13-14.

B. Dismissal of the Complaint

The Nation subsequently moved to dismiss on the dispositive issue of the Nation's sovereign immunity to the suit. *See* ER 1. The Nation also argued that the complaint failed to allege that the Gilbertsons had exhausted administrative remedies before pursuing their Title VII cause of action and that the complaint failed to allege questions arising out of federal law with respect to their second and third causes of action.

The district court granted the Nation's motion and dismissed the complaint, holding that it lacked subject matter jurisdiction over the Gilbertsons' suit because of the Nation's sovereign immunity. ER 4-8. With respect to the Gilbertsons' Title VII claim, the court stated "The handbook language of which the Gilbertsons refer does not constitute an 'unequivocal expression' of waiver by the Quinault Indian Nation of its sovereign immunity." ER 7.

C. Denial of Reconsideration

The Gilbertsons moved for reconsideration, arguing for the first time that the Nation's limited waiver of its immunity to suits brought in the Quinault Tribal Court waived the Nation's sovereign immunity to their suit before the district court. *See* ER 10-11. The district court held that the Gilbertsons did not satisfy the

standard under Local Rule W.D. Wash. CR 7(h)(1) and that the express language of the waiver was limited to suits brought in the Quinault Tribal Court. ER 10-11. The district court denied the Gilbertsons' motion for reconsideration, stating that it had no merit. *Id*.

STANDARD OF REVIEW

Motions to dismiss under Federal Rule of Civil Procedure Rules 12(b) and 12(c) are "functionally identical," with the principal difference between the two being the time of filing. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). In this case, the Nation's motion was the functional equivalent of a motion to dismiss for lack of subject matter jurisdiction brought under Federal Rule of Civil Procedure Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). This Court reviews de novo a district court's dismissal under Rule 12(b). *Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir. 2006) (Canby, J.), *cert. denied,* 549 U.S. 1231 (2007). This Court also reviews de novo questions of sovereign immunity and subject matter jurisdiction. *Id.*

SUMMARY OF ARGUMENT

The district court correctly held that the Quinault Indian Nation's sovereign immunity deprived it of subject matter jurisdiction over all the Gilbertsons' causes of action. With respect to the Gilbertsons' Title VII claim, the district court correctly held that a single sentence from an employee guidebook was not an

unequivocal expression of the Nation's consent to waive immunity to the Gilbertsons' Title VII claim. The district court also correctly concluded that the complaint did not allege facts to establish satisfaction of the jurisdictional prerequisite to bring a Title VII cause of action or facts that establish federal question jurisdiction over the Gilbertsons' second and third causes of action.

On reconsideration, the district court correctly held that the Nation's unequivocal expression to waive its immunity under certain circumstances and conditions to the Quinault Tribal Court did not permit suit before the federal courts.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE GUIDEBOOK STATEMENT WAS NOT A WAIVER OF THE NATION'S SOVEREIGN IMMUNITY TO TITLE VII SUITS

There is no dispute that the Quinault Indian Nation is a federally recognized Indian tribe, Appellee's Supplemental Excerpts of Record ("SER") 2, ¶ 6, and that Congress specifically exempted Indian tribes from the reach of Title VII by exempting them from the definition of "employer." Appellants' Excerpts of Record ("ER") 4 (citing *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998), *cert. denied*, 528 U.S. 877 (1999); 42 U.S.C. § 2000e(b)); Appellants' Opening Brief ("Br.") at 4.

Sovereign Indian tribes, including the Quinault Indian Nation, may not be sued in federal court absent an unequivocal waiver of sovereign immunity or congressional abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). The issue here is whether that immunity was waived to the Gilbertsons' Title VII claim in the district court.[1] The district court correctly held it was not. ER 7. As the district court recognized, ER 5, this language does not establish the clear and unequivocal waiver of the Quinault Indian Nation's sovereign immunity necessary for this Court to hear the Gilbertsons' Title VII claim. *Allen*, 464 F.3d at 1047. Accordingly, the judgment should be affirmed.

A. Waivers of Tribal Sovereign Immunity Must be Unequivocal and Cannot be Implied

Whether made by Congress or a tribe, any waiver of a tribe's sovereign immunity "must be unequivocal and may not be implied." *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (same); *Santa Clara Pueblo v. Martinez*, 436 U.S. 48, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."). *Accord Native American Distrib. v. Seneca-*

[1] The district court also held that, because of the Nation's sovereign immunity, it lacked subject matter jurisdiction over the Gilbertsons' second and third causes of action. *See* ER 7. On appeal, the Gilbertsons have not argued that the district court erred in that respect.

Cayuga Tobacco Co., 546 F.3d 1288, 1293 (10th Cir. 2008) (stating that a tribe's waiver or Congress's abrogation of sovereign immunity "must be unequivocally expressed" and not implied; citing cases). Plaintiffs bear the burden of showing a waiver of tribal sovereign immunity. *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 956-57 (E.D. Cal. 2009). The district court correctly concluded that the Gilbertsons did not do so.

B. The District Court Correctly Held that the Guidebook Statement is Not an Unequivocal Waiver of the Nation's Sovereign Immunity

The Gilbertsons resurrect arguments rejected by this Circuit and the 10th Circuit and do not address the controlling precedent of *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006). In *Allen*, a former employee of a casino owned and operated by a federally recognized tribe claimed that he suffered a retaliatory discharge. *Allen*, 464 F.3d at 1045. After obtaining a right-to-sue letter from the EEOC, Allen brought various employment, civil rights, and conspiracy claims in the federal court. *Id.* Allen contended that the casino waived tribal sovereign immunity when it stated in its employee orientation booklet that it would

> practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin. . . and other categories **protected** by applicable federal laws.

Allen, 464 F.3d at 1047 (emphasis added). Allen argued that, under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001)**Error! Bookmark not defined.**, this language operated as a waiver of the

tribe's sovereign immunity to his Title VII claim. The district court, upon a magistrate's recommendations, dismissed Allen's claims against the tribe on grounds of sovereign immunity. *Allen*, 464 F.3d at 1045.

This Circuit affirmed the dismissal, *id.* at 1047, observing that in *C&L Enterprises* the U.S. Supreme Court held that the tribe waived its immunity to an action to enforce an arbitration award by expressly agreeing to arbitrate disputes, to permit Oklahoma law to be the governing law, and to the "enforcement of arbitral awards 'in any court having jurisdiction thereof.'" *Id.* (quoting *C&L Enterprises*, 532 U.S. at 414).

The Guidebook statement that is the linchpin of the Gilbertsons' argument—"Team members can raise concerns and make reports without fear of reprisal and are protected under Title VII which is a provision of the Civil Rights Act of 1964"—does not mention suing or being sued, judicial enforcement, governing law, a venue or jurisdiction in the event of a suit, or "any other phrase clearly contemplating suits" against the Resort or the Nation. *See Allen*, 464 F.3d at 1047; *cf.* Title 99 Statute of Limitations; Sovereign Immunity, QUINAULT CODE, ER 15-25 (enactment of Nation's governing body making limited waiver of sovereign immunity to Quinault Tribal Court). The district court correctly concluded that, while the Guidebook statement "may place substantive constraints on the [Nation], it does not waive the [Nation's] immunity from a suit alleging non-compliance

with those constraints." ER 7 (citing *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1153 (10th Cir. 2011)).

The Gilbertsons place great weight on the word "protected" in the Guidebook statement, arguing that the word "protected" includes "a definite procedure and process. . . ." Br. at 10-11. This argument ignores that the language which this Circuit previously rejected as a waiver also contained the word "protected." *Allen*, 464 F.3d at 1047 (employee orientation booklet stated that the casino would "practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin. . . and other categories **protected** by applicable federal laws"; emphasis added). Under this Court's precedent, the Guidebook statement is not a waiver of the Nation's sovereign immunity. Moreover, regardless of what "definite procedure and process" the word "protect" may incorporate, the Gilbertsons have not followed it. See discussion at Part III.B, infra.

This conclusion is consistent with the Tenth Circuit's recent decision in *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150 (10th Cir. 2011). In *Nanomantube*, the former employee-plaintiff argued that the tribe's sovereign immunity to his employment discrimination suit was waived by a single sentence in an employee handbook:

> The Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991, and the Tribal Employment Rights Ordinance of the Kickapoo Tribe in Kansas.

Id., 631 F.3d at 1152. Similar to this Court's analysis in *Allen*, the Tenth Circuit contrasted the handbook statement with the specific contractual provisions noted in *C&L Enterprises* and the "sue and be sued" language of the federal charter at issue in *Seneca-Cayuga Nation*, 546 F.3d at 1290 (cited in *Nanomantube*, 631 F.3d at 1152-53). The Tenth Circuit noted that the handbook statement "contained no reference to tribunals at which disputes could be resolved or legal remedies enforced." *Nanomantube*, 631 F.3d at 1153. It thus held that, while the handbook's statement may convey a promise not to discriminate, it "in no way constitute[s] an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court." *Id.* (citation and internal quotation marks omitted).

Just as the handbook language in *Nanomantube* contained no reference "to tribunals at which disputes could be resolved or legal remedies enforced," *id.* at 1153, the Guidebook statement contains no reference to venue or jurisdiction or process for the resolution of Title VII disputes or enforcement of legal remedies. district court thus properly held that the Guidebook statement did not waive the Nation's sovereign immunity to the Gilbertsons' Title VII cause of action.

II. UPON RECONSIDERATION, THE DISTRICT COURT CORRECTLY HELD THAT THE NATION'S LIMITED WAIVER OF SOVEREIGN IMMUNITY APPLIED ONLY TO CLAIMS BROUGHT IN TRIBAL COURT

On reconsideration, the Gilbertsons argued for the first time that Title 99 Statute of Limitations; Sovereign Immunity, QUINAULT CODE, ER 15-25, supplies the requisite waiver of sovereign immunity to their federal court suit. *See* ER 10. The district court found that argument meritless because the plain language of the Code specifically limits the waiver to suits brought in Quinault Tribal Court. ER 11. For the same reason, that argument fails here. *See* Br. at 13 (quoting § 99.02.020).

Section 99.02.020 illustrates the unequivocal language required for a valid waiver of tribal sovereign immunity. Enacted in 1998 by a formal resolution of the Business Committee of the Quinault Indian Nation, ER 24-25, Title 99 reaffirms the Nation's general immunity from suit, ER 18, § 99.02.010(a), and then states an unequivocal and express, albeit limited, waiver of the Nation's sovereign immunity under particular circumstances. ER 25, § 99.02.020(a) – (c) (quoted in Br. at 13-14). Title 99 expressly requires that any eligible suit be brought in the Quinault Tribal Court. ER 24-25. In addition to identifying the only forum in which eligible suits may be brought, Title 99 establishes a statute of limitations, ER 17, § 99.01.010, and a process for bringing eligible suits. ER 21-23, § 99.02.040.

Section 99.02.020(c), ER 19, permitted the Gilbertsons to bring their suit in Quinault Tribal Court, which they did. SER 1, ¶ 1. The plain language of this Quinault Code's specific and limited waiver of sovereign immunity is to only suits brought in the Quinault Tribal Court and by its own terms does not extend to the Gilbertsons' Title VII claim in federal court. Finding this argument meritless, *see* ER 11, the district court correctly denied reconsideration.

Citing *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), the Gilbertsons now argue that, through an odd extension of the tribal court exhaustion doctrine, the limited waiver to Quinault Tribal Court permits them to re-litigate their substantive claims before the district court. Br. at 14-15. However, as the Gilbertsons recognize, all that the exhaustion doctrine permits is federal court review of the tribal court's determination of its jurisdiction. *Id.* at 15. The Gilbertsons did not question the Quinault Tribal Court's jurisdiction over their claims before the district court and do not do so here. *See* SER 1-8. This new argument is equally meritless.

III. EVEN IN THE ABSENCE OF SOVEREIGN IMMUNITY, THE COMPLAINT'S FAILURE TO STATE A TITLE VII CLAIM COMPELLED DISMISSAL

Because sovereign immunity precludes exercise of federal subject matter jurisdiction over all plaintiffs' claims, the district court correctly did not address the Gilbertsons' argument that the Guidebook language created a contract to apply

Title VII to the Nation. *See EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001) ("As a threshold matter, we first address the Tribe's contention that it enjoys sovereign immunity from the EEOC's inquiry and thus from this lawsuit.").

A. The District Court Properly Did Not Reach the Question of Whether the Guidebook Created a Contract to Apply Title VII to an Otherwise Exempt Sovereign Tribe

The question of whether there is congressional or tribal consent to sue a sovereign Indian tribe to enforce a law is different from whether Congress has made the law applicable to the tribe.[2] Congress specifically exempts tribes and tribal entities from the definition of "employer" as used in Title VII. 42 U.S.C. § 2000e(b); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d at1188 (nonprofit corporation created and controlled by tribes exempt "Indian tribe" for purposes of Title VII and thus exempt).[3]

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[2] *E.g., Florida Paraplegic Ass'n. v. Miccosukee Tribe*, 166 F.3d 1126, 1127 (11th Cir. 1999) (holding that, while Title III of the ADA was applicable to tribes, Congress did not abrogate tribal sovereign immunity to enforcement of that title); *Dillon v. Yankton Sioux Housing Auth.*, 144 F.3d 581, 584 (8th Cir. 1998) (holding tribal agency's agreement with HUD to abide by civil rights statutes did not waive tribe's immunity to discrimination suit).

[3] *See also Curtis v. Sandia Casino,* 2003 WL 21386332, 1 (10th Cir. 2003) (casino owned and operated by tribe exempt under Title VII); *Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.,* 199 F.3d 1123, 1125 (10th Cir. 1999) (tribal housing authority exempt as "Indian tribe" under Title VII); *Dille v. Council of Energy Resource Tribes,* 801 F.2d 373, 376 (10th Cir. 1986) (consortium of tribes exempt as "Indian tribe" under Title VII); *Barker v. Menominee Nation Casino,*

The Gilbertsons argue that, in addition to waiving the Nation's sovereign immunity to their Title VII claim, the single Guidebook sentence creates an enforceable contract to apply Title VII to the Nation. *See* Br. at 1, 5. This argument ignores that the same page of the Guidebook expressly affirms adherence to Native hiring preferences and disclaims formation of a contract, ER 14, and that the record is bare of any indication that the governing body of the Nation adopted the Guidebook or any other provision of Title VII. *Cf.* Br. at 11.

As this Circuit and other Circuits recognize, rather than creating an enforceable contract to apply Title VII to an otherwise exempt sovereign tribe or tribal entity, such language at most "might imply a willingness to submit to federal lawsuits," *Allen*, 464 F.3d at 1047, or may "convey a promise not to discriminate." *Nanomantube*, 631 F.3d at 1153. *See also Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 n.2 (10th Cir. 2000) (holding that tribe did not waive sovereign immunity to Title VII claim when it executed a certificate of assurance with DSHS); *Dillon v. Yankton Sioux Housing Auth.*, 144 F.3d 581, 584 (8th Cir. 1998) (holding tribal agency's agreement with HUD to abide by civil rights statutes did not waive tribe's immunity to discrimination suit).

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897 F. Supp. 389, 393 (E.D. Wisc. 1995) (tribe's gaming operation, organized as a tribal subordinate economic enterprise, exempt as "Indian tribe" under Title VII).

The district court properly declined to hold that the Guidebook statement makes Title VII applicable to the Nation and held only that the Guidebook statement did not meet the unequivocal standard required for waivers of tribal sovereign immunity. ER 5; 6; *see Nanomantube*, 631 F.3d at 1152 n.1 ("Because we affirm the dismissal of the case on sovereign immunity grounds, we need not and do not address the question of how [42 U.S.C. § 2000e(b)'s exemption of tribes from Title VII's definition of employer] might affect the merits of Mr. Nanomantube's Title VII claim.").

B. Even if Title VII Were Held to Apply to the Nation, the Record Is Devoid of Any Allegation That the Gilbertsons Exhausted Their Title VII Administrative Remedies

Assuming arguendo that if tribal sovereign immunity did not bar the Gilbertsons' suit and if the Gilbertsons could establish that Title VII applies to the Nation, a district court would have subject matter jurisdiction only over the "allegations of discrimination that either 'fell within the scope of the EEOC's actual investigation or an EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1096 (9th Cir. 2002) (citing 42 U.S.C. § 2000e-5(b)). The complaint does not allege nor is there any other indication in the record that the Gilbertsons ever filed a charge of discrimination or otherwise invoked and exhausted their remedies before the EEOC. *See* SER 1-8.

The jurisdictional scope of a plaintiff's Title VII court action depends on the scope of both EEOC charge and investigation. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994); *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990). The specific claims made in district court ordinarily must be presented to the EEOC. *Albano v. Schering-Plough Corp.*, 912 F.2d 384, 385 (9th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991). Where a claim brought before a district court exceeds the scope of the charge filed with the EEOC, the court lacks jurisdiction to hear it. *E.g., Steffen v. Meridian Life inc. Co.*, 859 F.2d 534, 544 (7th Cir. 1988) (dismissing retaliatory discharge claim because it did not fall within the scope of the charge submitted to the EEOC), *cert. denied*, 491 U.S. 907 (1989).

While the time period for filing a charge of discrimination may be subject to equitable considerations, *Zipes v. TWA*, 455 U.S. 385, 398 (1982), substantial compliance with the exhaustion requirement is not. *See Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001). Title VII's exhaustion requirement limits the jurisdiction of federal courts to those claims that the EEOC has had an opportunity to examine, meaning those claims the EEOC actually adjudicates and any claims the plaintiff files with the EEOC but the EEOC fails to adjudicate or investigate. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 644 (9th Cir. 2003).

The complaint does not allege that Rebecca Gilbertson received a right-to-sue letter. *See* SER 1-8. The EEOC issues a right-to-sue letter to notify claimants

of their right to file a private action under Title VII within 90 days. 29 C.F.R. § 1601.28. It is the plaintiff's burden to show that she has complied with the 90-day filing requirement following the receipt of a right-to-sue letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1); *see Greenlaw v. Garrett*, 59 F.3d 994, 997 (9th Cir. 1995), *cert. denied*, 519 U.S. 836 (1996).

The Gilbertsons argue that they are not required to have a right-to-sue letter, and, by implication, not to file a charge of discrimination. Br. at 11-13. The authorities cited by the Gilbertsons, *id.*, do not assist them because those authorities involve plaintiffs who demonstrably filed charges of discrimination with either the EEOC or the appropriate state agency.[4] Nor does the complaint

[4] *E.g., Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003) (dismissing disability claim where plaintiff's charge filed with EEOC did not contain claim reasonably related to disability claim); *B.K.B. v. Maui Police Dept.*, 173 F.3d 1100 (9th Cir. 2002) (plaintiff filed charges with state human rights commission which issued right-to-sue letter without investigating complaint); *Rodriguez v. Airborne Express*, 265 F.3d 890 (9th Cir. 2001) (in context of FEHA holding that, where dispute existed as to whether plaintiff had succeeded in making a charge of discrimination on disability grounds, reversing summary judgment and remanding for further proceedings to determine whether equitable considerations excused plaintiff's failure to exhaust his administrative remedies); *Albano v.Schering-Plough Corp.*, 912 F.2d at 386 (in context of ADEA, holding that where plaintiff's detailed affidavit established that he had filed charge with EEOC but EEOC refused to allow him to amend charge and EEOC otherwise mishandled his charge, he was not precluded from pursing claim for which he sought to amend charge)*; Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976) (plaintiff filed charges with EEOC and was issued right-to-sue letter), *cert. denied*, 433 U.S. 915 (1977).

allege the existence of any equitable consideration that purportedly excuses the failure to file a discrimination charge or possess a right-to-sue letter. *See* SER 1-8. .

Accordingly, because the complaint fails to allege that the Gilbertsons invoked—let alone exhausted—proceedings before the EEOC or appropriate state agency, the district court correctly concluded that it did not allege sufficient facts to establish the jurisdictional prerequisite to bring a Title VII claim. ER 8.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted this 30th day of March, 2012.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: this brief is proportionally spaced, has a type face of 14 point Times New Roman font, and contains 3,970 words.

/s/ Kyme Allison Marie McGaw
Kyme Allison Marie McGaw

STATEMENT OF RELATED CASES

I am unaware of any related cases pending in this Court.

/s/ Kyme Allison Marie McGaw
Kyme Allison Marie McGaw

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ECF system and that all participants in this case were served through that system.

/s/ Kyme Allison Marie McGaw
Kyme Allison Marie McGaw