IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USCA Case No. 13-13886-A
United States District Court, Middle District of Florida
2:12-cv-00411-SPC-UAM

STEPHANIE MASTRO,
an individual,

Plaintiff/Appellant,

v.

SEMINOLE TRIBE OF FLORIDA,
d/b/a Seminole Immokalee Casino,

Defendant/Appellee.

REPLY BRIEF OF APPELLANT STEPHANIE MASTRO

BENJAMIN H. YORMAK
Florida Bar Number 71272
YORMAK EMPLOYMENT & DISABILITY LAW
9990 Coconut Road
Bonita Springs, Florida 34135
Telephone: (239) 985-9691
Fax: (239) 288-2534
Email: byormak@yormaklaw.com

ATTORNEY FOR APPELLANT

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INTRODUCTION

The oft-confused doctrine of tribal sovereign immunity was misapplied by the District Court to the instant set of facts and the Casino invites this Court to continue this misapplication. While the law need not be changed, it does need to be properly interpreted and applied, as other courts have done. Title VII of the Civil Rights Act of 1964 is a law of general application and while it does exclude "Indian Tribes" from its definition of an "employer," such a definition was legislatively intended to plainly apply to intra-tribal affairs, not multi-billion dollar extra-tribal casinos that are engaged in large scale, interstate commerce.

As the instant set of facts are factually similar to ample precedent from other circuits, it is important to note again that the Appellee, Seminole Indian Casino ("Casino") employed the Appellant Stephanie Mastro ("Mastro") beginning about November 2008 as a card dealer. (Doc. #20, p. 2). The Casino may be wholly owned and operated by the Tribe but under Title VII, the Casino is not properly cloaked with immunity as sovereign immunity cannot be extended to purely economic arms of a tribe where, as here, the Tribe acts as a purely extra-tribal, commercial business enterprises, instituted solely for the purpose of generating profits from its engagement in interstate commerce. A critical distinction has already been properly drawn by the Courts between tribal affairs relating to purely intra-tribal governmental matters (where sovereign immunity would apply) and

extra-tribal affairs pertaining to strictly commercial activities, such as Casino Immokalee (where sovereign immunity is inapplicable).

ARGUMENT

I. THE MODERN CASINO IS A FAR CRY FROM THE DEFINITION OF A "TRIBE" UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, WHICH WAS *NOT* ENACTED TO SHIELD *BUSINESSES*.

Without question, Title VII protects employees from discrimination based on gender, race, color, religion, and national origin. *See* 42 U.S.C. §§ 2000e-2000e-17 (1994). While the language of Title VII suggests that Native American tribes are not considered "employers" under the Act, the properly emerging jurisprudence represents a significant shift towards adapting the stagnant notion of tribal sovereign immunity in the modern employment and interstate commerce arena.

In 1989, the United States District Court for the District of North Dakota has held that Title VII does *not* exempt tribal businesses from Title VII claims by non-Native Americans, such as the Appellant. In a case with an eerily similar set of facts to the case at bar, *Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753 (D.N.D. 1989), a corporation with a Native American tribe as the majority owner attempted to claim immunity from a race and age discrimination suit brought under Title VII and the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §§ 621-634 (1994); *see also Myrick*, 718 F. Supp. at 754.

There, the tribe claimed they were exempt under the Native American tribe exception to Title VII (*see Myrick*, 718 F. Supp. at 756) and that the ADEA does not apply to tribally owned businesses (*see id*. at 754). After close consideration, the court ruled that these defenses were "without merit," and allowed the suit against the tribally owned business to proceed. *Id*. The court took special care to distinguish contradictory cases such as *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), by finding that they "did not consider the present situation of non-tribal reservation employees." *Myrick*, 718 F. Supp. at 754 n.1. Consequently, the proposition that companies owned by Native American tribes cannot, and should not be allowed to, avoid claims brought under Title VII if those claims involve a non-Native American employee employed at a purely commercial enterprise, began to emerge, as is true in the instant case. *Id*. There has been ample precedent for this proper line of legal logic.

II. THE MODERN CASINO WAS NEVER INTENDED TO BE AN "EMPLOYER" UNDER TITLE VII.

Again, it is crucial to note that contrary to the holdings of the cases cited by the Casino, neither Title VII nor its legislative history explicitly state that tribal companies that hire non-Native American employees enjoy absolute exemption from the statute. To the contrary, the vague language excluding Native American tribes (see 42 U.S.C. § 2000e(b) (1994)) and the legislative purpose behind it indicate congressional intent to bar Title VII claims only in very limited situations.

Specifically, the legislative history demonstrates an intent to protect tribes from suits in only two situations: employment decisions specifically involving tribal government and the preferential hiring of a Native American over a non-Native American. See 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.).

The section of Title VII excluding tribes from the definition of "employer" states that the Act does not apply to "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." 42 U.S.C. § 2000e-2(i) (1994) (emphasis added). Although this vague language does not specifically define "Indian tribe," Senator Karl Mundt of South Dakota, who proposed the amendment adding this provision, made its purpose clear when introducing the bill:

> "The reason why it is necessary to add these words is that Indian tribes, in many parts of the country, are virtually political subdivisions of the Government. To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces." 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.).

Senator Mundt went on to say that his amendment would allow tribes to "conduct their own affairs" in "their capacity as a political entity." *Id*. This speech by the amendment's sponsor demonstrates that the intent was to protect the employment intra-tribal decisions of tribes relating to tribal government, not to

deny non-Native American employees of Native American-owned interstate, commercial corporations their rights under Title VII. This language does not exempt tribes from discrimination suits based on gender, religion, age, or race; it only permits tribal and geographically situated employers to exercise a hiring preference for Native Americans.

Quite simply, Senator Mundt's two Title VII amendments were not meant to protect Indian-affiliated businesses engaged in billion-dollar interstate commerce that does not concern intra-tribal affairs, and who employ non-Native employees, from suits by non-Native American employees. Rather the purpose of these additions to the Act was to "assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs." 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.). The intent was not to allow tribes to profit from illegal acts against non-Native Americans, but to help Native Americans "decrease unemployment" and "integrate their people into the affairs of the national community." *Id*.

The cases previously cited by the Casino stand for the proposition that Title VII excludes tribal businesses from claims brought against them by non-Native American employees have failed to consider this legislative intent and thus, the reasoning of such cases cited by the Casino is flawed. Moreover, the Casino's own Tribal Sovereign Immunity Ordinance (attached to Casino's Motion to Dismiss as

Exhibit B) specifically indicates sovereign immunity applying only to "federal jurisdiction... over its (tribe's) employees... and tribal affairs which would impinge upon tribal self-government and economic development, including the protection of scarce tribal assets..." See Casino's Tribal Sovereign Immunity Ordinance. The Casino's Ordinance further makes clear that it extends to "the actions of tribal officials, employees and authorized agents..." Given this clear and express language, the Casino has made it known that it wishes to have tribal sovereign immunity as it pertains to the intra-tribal activities of the Seminole Tribe.

However, as has been clearly alleged, the Casino's employment of Ms. Mastro was not in its tribal capacity but rather as a multi-billion dollar interstate economic venture that employs mostly non-Natives. In sum, and as discussed below, Title VII was never intended to exclude multi-billion dollar casinos that engage in interstate commerce from the definition of an employer. As a result, the District Court erred in such an interpretation and in dismissing Ms. Mastro's Complaint.

III. TITLE VII IS A STATUTE OF GENERAL APPLICATION APPLICABLE TO THE CASINO.

The Tribe's primary argument as to why it is not covered by Title VII is that it is not an "employer" within the meaning of the Act. This argument presents a question of statutory interpretation, and when interpreting statutes in the context of Indian affairs, courts apply rules of construction designed for this purpose. One such rule is that a statute of general applicability that is silent on whether it applies

to Indian tribes is presumed to apply to them. See *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) (citing *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)). This presumption can be rebutted if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the statute not to apply to Indians on their reservations. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); see also *Smart*, 868 F.2d at 932–33. In any of these three situations, Congress must expressly apply a statute to Indians before a court will hold that it reaches them. Here, Title VII exempts Indian tribes from its definition of an "employer" but such is read in accordance with Congressional legislative intent to properly apply to intra-tribal affairs, which the Casino certainly is not.

The coverage language in Title VII is broadly worded and provides for few exceptions. *Cf. Smart*, 868 F.2d at 933 (concluding ERISA is generally applicable because "exemptions from coverage are explicitly and specifically defined, as well as few in number"). Moreover, the coverage language easily encompasses Indian tribes in their capacities as operators of commercial enterprises. See *EEOC v. Forest County Potawatomi Cmty.*, 2014 U.S. Dist. LEXIS 62353 (E.D. Wis. May 6, 2014). Similarly, Title VII applies to any "employer," which is defined in part as

"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." 42 U.S.C. § 701(b). "Person," in turn, is defined as "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 [originally, bankruptcy], or receivers." 42 U.S.C. § 701(a). An Indian tribe operating a casino is an "organized group of persons" and is "engaged in an industry affecting commerce." There is no question that the Tribe meets the fifteen-more-employees requirement. Thus, Title VII is a statute of general applicability and must be presumed to apply to Indian tribes in their capacities as operators of commercial enterprises. *Cf. Coeur d'Alene*, 751 F.2d at 1115 & n.1 (concluding that the Occupational Safety and Health Act is a statute of general applicability and that an Indian tribe in its capacity as operator of a tribal farm is an "organized group of persons . . . engaged in a business affecting commerce"). Thus, a generally applicable law such as Title VII that apply to all

"persons" must be presumed to apply to Indian-affiliated billion-dollar casinos engaged in interstate commerce, even if it does not apply to States. The Ninth Circuit's decision in *Coeur d'Alene* illustrates this point. In that case, the court concluded that an Indian tribe operating a commercial enterprise was a "person" within the meaning of the Occupational Safety and Health Act even though that Act's coverage provisions separately mentioned States and excluded them from coverage. 751 F.2d at 1115 & n.1.

IV. THE CASINO'S ACTIVITIES ARE HARDLY "INTRA-TRIBAL."

However, *Coeur d'Alene* presents three possible situations that rebuts this presumption. The only situation that the Tribe claims is present is the law's touching exclusive rights of tribal self-governance in purely intramural matters. See Casino Response at P. 8. Purely intramural matters are matters "such as conditions of tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene*, 751 F.2d at 1116. Obviously, Title VII, when applied to the employment relationship between a billion-dollar tribe-operated casino and a non-Indian employee, does not touch on any such matters. See *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129 (11th Cir. 1999) (finding that a tribe-run restaurant and gaming facility does not fall under the intramural exception). The Tribe attempts to squeeze the employment relationship between a casino and a non-Indian employee into the exception for intramural

matters by previously noting that casino income is an important source of tribal revenue. However, as other courts have recognized, this type of argument is "overbroad" and "proves far too much." *Smart*, 868 F.2d at 935; *Coeur d'Alene*, 751 F.2d at 1116. The intramural exception does not apply whenever a law "affects self-governance as broadly conceived," since that would render almost every statute of general application, such as Title VII, subject to the exception. *Smart*, 868 F.2d at 935. Instead, as the Ninth Circuit determined in *Coeur d'Alene*, the operation of a commercial enterprise that employs non-Indians—which in that case was a "farm that sells produce on the open market and in interstate commerce"—is not an aspect of tribal self-governance. 751 F.2d at 1116.

Casino employees, even at Indian casinos, clearly do not exercise governmental functions. See *Cano v. Cocopah Casino*, 2007 U.S. Dist. LEXIS 54377 at *2 (D. Ariz. July 24, 2007) ("Although the profits resulting from casino operations . . . provide funding for purely intramural matters [of the Cocopah Tribe], the . . . Cocopah Casino appears to function 'simply [as] a business entity that happens to be run by a tribe or its members'"). Accord, *Mashantucket Sand & Gravel*, 95 F.3d at 181 ("a bingo hall and casino [even one on tribal grounds] designed to attract tourists from surrounding states undeniably affects interstate commerce."), citing *United States v. Funmaker*, 10 F.3d 1327, 1331 (7th Cir. Wis. 1993). Similarly, it

cannot even be argued that Mastro's employment was in any way part of the Tribe's governmental functions.

In *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1079-1081 (9th Cir. 2001), and *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993), the Eighth and Ninth Circuits made similar distinctions: in each case, the court ruled that sovereign immunity did not protect the tribe from EEOC investigations, but that the ADEA did not apply to the relationship between a tribal agency and one of the tribe's enrolled members, but this principle does not apply here; as the Casino admits, Mastro is clearly not an Indian. "In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government." *Solis v. Matheson*, 563 F.3d 425, 434 (9th Cir. Wash. 2009), quoting *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2nd Cir. 1996).

In *Karuk Tribe Housing Auth.*, 260 F.3d at 1080-1081, the Ninth Circuit drew the distinction even more sharply:

> The Housing Authority… functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance. **Courts conducting "self-governance" analysis have distinguished such essentially governmental functions from commercial activities undertaken by tribes and have classified actual tribal governmental entities as aspects of "self-government,"** see, e.g., *Fond du Lac*, 986 F.2d at 248; *Cherokee Nation*, 871 F.2d at 937, **while rejecting such a categorization for businesses that happen to be owned and operated by tribes**, see, e.g., *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th

> Cir. 1999) ("tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception" to *Coeur d'Alene*; the enterprise at issue "does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members"); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (**OSHA has jurisdiction over a tribe-owned business because the "nature of MSG's work, its employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce -- when viewed as a whole, result in a mosaic that is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters"**); *Occupational Safety & Health Review Comm'n*, 935 F.2d at 184 (tribal employer is subject to OSHA because it" employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans through channels of interstate commerce"); *Coeur d' Alene*, 751 F.2d at 1116 ("The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm … is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural …nor essential to self-government.'" (quoting *Farris*, 624 F.2d at 893)).

In the present case, as in *Coeur d'Alene Tribal Farm*, "the enterprise at issue 'does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members'"; here, as in *Mashantucket Sand & Gravel*, Title VII applies "over a tribe-owned business because the 'nature of [the Casino]'s work, its employment of non-Indians, and the . . . work on a hotel and casino that operates in interstate commerce . . . is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters."

Because Title VII is a statute of general applicability, because Ms. Mastro is a non-Indian who did not work for an Indian agency exercising a governmental function, because the Casino does not operate exclusively within the domain of the Seminole community and its members, because the Casino employs non-Indians and serves a largely non-Indian clientele in interstate commerce, the Casino does not touch on the Tribe's right to self-governance in purely intramural matters and as the Casino is not an arm of the Tribe's government and does not serve in a governmental role (instead, it is a business run by the Tribe), the federal courts properly have jurisdiction over Ms. Mastro's Title VII action. E.g., *Solis*, 563 F.3d at 434 (intramural exception did not exempt from FLSA a retail store owned and operated by tribal members and located on tribe's reservation; the store was purely commercial enterprise in interstate commerce employing non-Indians and selling out-of-state goods to non-Indians). Accordingly, the Tribe's relationship with Mastro is properly covered by Title VII.

V. THE CASINO IS A BUSINESS THAT MEETS THE DEFINITION OF AN EMPLOYER UNDER TITLE VII.

The Casino essentially says that it is an aboriginal sovereign exercising inherent rights of self- government, and so is not a person or employer under Title VII. However, this is simply incorrect. The Casino is a business or, if you wish, an "association" or "organized group of persons" engaged in the casino business. Though owned by a tribe, it is a business enterprise "engaged in an industry

affecting commerce who has fifteen or more employees" 42 U.S.C. § 701(b), and not an Indian agency exercising law enforcement or other governmental functions. Therefore, it is covered by Title VII. See *Smart*, 868 F.2d at 933 ("ERISA is clearly a statute of general application, one that envisions inclusion within its ambit as the norm. The exemptions from coverage are explicitly and specifically defined, as well as few in number. Accordingly, there is no doubt that the Chippewa Health Center is an 'employer' within the broad meaning of ERISA."). Accord, *Mashantucket Sand & Gravel*, 95 F.3d at 181 (tribe-owned business which employed non-Indians and did construction work on a hotel and casino that operates in interstate commerce is an "employer" under OSHA); *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116; See also *Funmaker*, 10 F.3d at 1332.

VI. MASTRO'S COVERAGE UNDER TITLE VII IS CONSISTENT WITH PRECEDENT.

The Supreme Court's decision in *Kiowa* specifically involved (1) a tribe directly (as opposed to a purely commercial interstate entity) and (2) did not involve violation of federal employment statutes. The dissent in *Kiowa* renders a modern and more proper analysis that, with apparent foresight, better applies the judicial fiction of "tribal sovereign immunity." Quite simply, "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

As Judge Gorsuch correctly points out:

> "But no matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued. And it doesn't matter whether the sovereign owning the business is the federal government, a foreign sovereign, state — or tribe."

Somerlott v. Cherokee Nation Distribs., 686 F.3d 1144, 1154 (10th Cir. Okla. 2012). Similarly, the Casino cannot hide behind the judicial fiction of "tribal sovereign immunity" where it is engaged in extra-tribal, purely economic, billion – dollar interstate commerce employing mostly non-Native employees.

CONCLUSION

In sum, the Appellant respectfully requests this Court reverse the district court's order dismissing Mastro's action with prejudice and direct that the case be re-opened for adjudication on the merits.

Respectfully submitted,

s/ Benjamin H. Yormak
Benjamin H. Yormak (71272)
Appellate Counsel for Plaintiff
Yormak Employment & Disability Law
9990 Coconut Road
Bonita Springs, Florida 34135
Telephone: (239) 985-9691
Fax: (239) 288-2534
Email: byormak@yormaklaw.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 3,858 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

s/ Benjamin H. Yormak
Benjamin H. Yormak

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 2014, I electronically filed the foregoing Reply Brief with the Clerk of the Court by using the CM/ECF system. I also further certify that the foregoing document was sent by United States Mail to Mr. Donald A. Orlovsky, Esq., Kamen & Orlovsky, PA, P.O. Box 19658, West Palm Beach, Florida 33416.

s/ Benjamin H. Yormak
Benjamin H. Yormak