UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-16985

THERESA CARSTEN,

Plaintiff - Appellant,

vs.

INTER-TRIBAL COUNCIL OF NEVADA, et al.

Defendant - Appellee.

Appeal from the United States District Court
District of Nevada
D.C. No. 3:12-cv-00493-MMD-WGC

OPENING BRIEF

Brian Morris, Esq.
59 Damonte Ranch Parkway, B-221
Reno, Nevada 89521
775-323-2800

Attorney for Plaintiff - Appellant

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Jurisdictional Statement

The District Court's jurisdiction was based upon alleged violations of 29 U.S.C. §§ 2601 et seq. (the Family and Medical Leave Act) and thus the District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

The basis for this appellate court's jurisdiction is 28 U.S.C. § 1991 in that this is an appeal of a civil case filed in the United States District Court, District of Nevada.

The filing date of the Order (granting a dismissal) was August 30, 2013. The Notice of Appeal was timely filed on October 1, 2013.

This appeal is from a final order that disposes of all parties' claims.

Statement of Issues Presented for Review

1. Did the District Court err when it determined that the Inter-Tribal Council of Nevada (a non-Tribe) was protected from a lawsuit?
2. Did the District Court err when it determined that Risa Sterns (an individual) was protected from a lawsuit?
3. Did the District Court err when it determined that Daryl Crawford (an individual) was protected from a lawsuit?

Statement of the Case

Ms. Theresa Carsten ("Carsten") filed an amended Complaint against the Inter-Tribal Council of Nevada ("ITCN") alleging violations of the Family and Medical Leave Act ("FMLA") under 29 U.S.C. §§ 2601 et seq. on October 19,

2012. ITCN responded by filing a Motion to Dismiss.[1] The District Court granted ITCN's motion on August 30, 2013.

Statement of Facts

1. ITCN is not a Tribe and is located at 680 Greenbrae Drive in Sparks, Nevada - which is not located on any tribal reservation. (AER 9, ¶ 3).
2. ITCN is Nevada Non-Profit Corporation. (AER 14, ¶ 3).
3. Several Native American Tribes are "members" of ITCN. (AER 14, ¶ 4).
4. Carsten was not an Indian. (AER 10, ¶ 6)
5. Defendant-Appellee Risa Sterns is not an Indian. Id.
6. Virtually half of ITCN's employees were not Indians. Id.
7. Carsten worked for ITCN and was its program director for the Women, Infants, and Children ("WIC") program. (AER 9. ¶ 2).
8. The WIC program is a program that offers nutrition education, food benefits and other benefits to low income women and their children. The WIC program is funded by the United States government to be run by states including Nevada as well as tribes. Pursuant to its U.S. governmental terms, the WIC program is not a program for Indians and is made available to all eligible low income women and children. Id.
9. There are approximately 1500 individuals that are clients of the WIC program administered by ITCN. Approximately 1200 to 1300 of those individuals (80 %) are serviced at 680 Greenbrae Dr., Sparks, Nevada -

[1] The original Complaint was filed on September 13, 2012 with the amended Complaint being filed on October 19, 2012. The defendant-appellees filed a motion to dismiss (the original Complaint) on November 5, 2012 and filed a motion to dismiss the amended Complaint on November 20, 2012.

which is not on a tribal reservation. Approximately half of the clientele of the 1200 to 1300 that are serviced at the location in Sparks, Nevada (the main location) are non-Indian and are mostly Hispanic. (AER 9, ¶ 4).

10. Different Nevada stores apply and become authorized to be vendors of ITCN's WIC program. These vendor stores vary from small stores to very large "chain" grocery stores. There are more than fifty (50) vendor stores that ITCN contracts with to offer discounted food products to WIC clientele. Out of these stores, only two (2) (less than 4%) are located on a reservation and are owned by a tribe. The other stores are privately owned stores or corporations such as large chain grocery stores that are not on any reservation. (AER 9, ¶ 5).
11. Carsten alleged she had a serious medical condition, needed time off work for her health condition, qualified for leave under the FMLA, gave ITCN FMLA papers approved and signed by a physician, and that she was terminated for requesting FMLA leave. (AER 16 - 18).

Summary of Argument

None of the defendants (appellees) were entitled to exemption from the FMLA as they were neither a Tribe nor performing a traditional tribal intramural function. The individual defendants (Risa Sterns and Daryl Crawford) are subject to individual liability pursuant to the language of the FMLA authorizing such suits.

Argument

Introduction

Carsten's claim under the FMLA is presented only for completeness and to show it is a federal law that allows the defendant-appellees to be sued. The only

issue that was decided by the trial court and that is before this appellate court is whether the defendant-appellees are exempt from being sued.

1. ITCN is not a Tribe.

ITCN is not a tribe, nor is ITCN a tribal business such as an Indian casino or Smoke Shop and does not operate on a reservation. Instead, ITCN is a Nevada Non-Profit corporation that has several tribes as "members". With ITCN not being a tribe, the only analysis in this matter is whether ITCN has an exemption from being sued under the FMLA.

2. Federal Statutes apply to Tribes unless specifically exempted.

While Carsten did not file her lawsuit against a Tribe and instead only against two individuals and a Nevada Non-Profit Corporation (ITCN), an analysis of tribal exemptions is needed. Without ITCN or the other defendant-appellees being exempt from a lawsuit then they are liable and it was error for this matter to have been dismissed.

The starting point in an exemption analysis is to look at the statutory language of the law alleged to have been violated - which is the FMLA in this matter. Some Federal statutes have an exemption for Tribes written into the code, such as Title VII. See 42 U.S.C. 2000e(b)(1) (The term “employer” . . . does not include (1) . . . an Indian tribe). Absent such an explicit exemption, federal statutes apply to Tribes.

In contrast to Title VII, when the FMLA was drafted the language chose not to exempt Indian Tribes from its application. The defining case in this circuit on tribal exemptions found that a general federal statute presumptively governs Indian tribes and will apply to them absent some superseding indication that Congress did not intend tribes to be subject to that legislation. *Donovan v. Coeur d'Alene Tribal*

Farm, 751 F.2d 1113, 1115 (9th Cir. 1985). It is "now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct. 543, 553, 556, 4 L.Ed.2d 584 (1960). [G]eneral Acts of Congress apply to Indians … in the absence of a clear expression to the contrary. 362 U.S. at 120. "[F]ederal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), cert. denied, 449 U.S. 1111, 101 S.Ct. 919, 66 L.Ed.2d 839 (1981).

When a general federal statute is silent as to a tribal exemption, an exemption to its application only occurs in three situations. *Coeur d'Alene*. 751 F.2d at 1116.

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them 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 law] not to apply to Indians on their reservations" Id. at 1116 (citing Farris, 624 F.2d at 893-94)
>
> "In short, we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here."
>
> Id.
>
> "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations . . .."
>
> Id.

In *Coeur d'Alene*, the Court found that the operation of a tribal farm that was wholly owned and operated by the tribe that employed non-Indians and sold

produce to consumers in general on the open market was neither profoundly intramural nor essential to self-governance and thus it was not entitled to an exemption Id.

Other courts have followed and applied the *Coeur d'Alene* analysis. An exemption was also not found in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996) where it was found that activities were of a service nature and not a governmental character exercising sovereign power considering the employment of non-Indians, the work performed and the location of the work. 95 F.3d at 180.

> The "employment of non-Indians weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters. In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government. Furthermore, intramural matters generally consist of conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe.
>
> Id. at 181.

> Since non-Indians are not subject to tribal jurisdiction, the enterprise (that employs non-Indians) cannot be thought to be part of the tribe's governance structure.
>
> *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 673 (7th Cir. 2010).

An exemption was also not found in *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) where the non-profit corporation was not a tribe, the health care facilities ran by the corporation were not located on Indian land, funding for the facility came from MediCal and third-party insurance, and nearly half the patients and half the employees were non-Indians - all of which went against the finding that organization touched rights of self-governance on a purely intramural matter. 316 F.3d at 1000; see also *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (financially independent, nonprofit tribal organization that contracted to provide health services to both tribal members and nonmembers and

operated outside of the reservation was not exempt from FLSA's overtime provisions).

In an OSHA case a tribe was found to not be exempt from federal law.

> We restricted the tribal self-government exception to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations." . . . The mill employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans . . .. Although revenue from the mill is critical to the tribal government, application of the Act does not touch on the Tribe's "exclusive rights of self-governance in purely intramural matters."
> *U.S. Dept. of Labor v. Occupational Safety & Health Review Com'n*, 935 F.2d 182, 184 (9th Cir. 1991).

The fact that the application of a federal law may affect a tribe is not relevant.

> Any federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government. But Indian Tribes are not possessed of absolute sovereignty.... Statutes of general application are already applied to Indian Tribes which have the same arguable effect of interfering with the Tribe's ability of self-governance ... for example federal employment withholding taxes....
> *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2nd Cir. 1996) (citing *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir.1989))

Tribes are not exempt from federal laws simply because their political integrity may be affected. 95 F.3d at 179. "The question is not whether the statute affects tribal self-governance in general, but rather whether it affects tribal self-governance in purely intramural matters." 95 F.3d at 181. Tribes are subordinate to the U.S. Government. Id. citing to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980).

It is not enough that a business is run by a tribe for its members, but the role of the business must also be quintessentially related to tribal self-governance or a

governmental function. *Equal Employment Opportunity Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001).

3. No exceptions under *Coeur d'Alene* are applicable to ITCN.

Assuming this Court determines that ITCN's corporation is entitled to the same protections of a tribe, ITCN is unable to show it is entitled to any of the *Coeur d'Alene* exemptions so that it is exempt from having to abide by the FMLA.

The latter two *Coeur d'Alene* exemptions are obvious as to not applying in this matter and were not argued to the trial court. This leaves only the first *Coeur d'Alene* exception to consider. As previously presented, the nature of the work being performed as well as where it is performed and who performs it is critical in any analysis. In this matter it is not disputed that ITCN is not a tribe, that it is not located on a reservation and that virtually half of its employees (including Carsten and Sterns) are not Indians. It is also not disputed that it is in the business of providing services to the general public and in the case of the Federal WIC program, ITCN has simply taken on the role of being a provider for the United State's WIC program with U.S. Government funding with virtually all of its services being provided off any reservation and mostly to Hispanic individuals with a variety of Nevada stores (virtually all off a reservation) being vendors for the program. In short the services being performed are services not for a tribe or its sel-governance, but instead are services for the U.S. Government to provide a sort of welfare program for the benefit of U.S. residents in general.

Many of the details of the WIC program and how an individual can receive the WIC benefits are on ITCN's website - which states being an Indian is not a requirement and anyone residing anywhere in Nevada is potentially eligible.

To be eligible to participate in the WIC Program, one must:

- Reside in Nevada or on Nevada Tribal Land

> - Be a pregnant or recently pregnant woman, infant or child up to age 5
> - Have a moderately low income (see chart below)
> - Be determined to have a nutritional risk (see sidebar)
>
> You are income eligible for WIC if you already receive TANF, SNAP, Medicaid or participate in the Food Distribution Program on Tribal Land.
>
> (AER 11)

ITCN's website further explains who is eligible and where services are provided.

> **1. Who is eligible?**
> Pregnant, postpartum and breastfeeding women, infants, and children up to age 5 are eligible. They must meet income guidelines, a State residency requirement, and be individually determined to be at "nutritional risk" by a health professional. (emphasis in original) (AER 12).
>
> **4. What are your locations?**
> Our main clinic is located at 680 Greenbrae Dr., Suite 222, Sparks, Nevada, 89431. ITCN travels to 18 satellite clinics located in varioius (sic) tribal health and community centers throughout Nevada and Utah. Visit our Contact page for more information. (emphasis in original) (AER 13).

The case at bar is strikingly similar to *Chapa De* case where a tribal organization that partially obtained funding from MediCal to perform out patient health services on non-Indian land (where many patients are non-Indians and where the organization employed many non-Indians) did not seem to touch on purely intramural matters that affect the right to self-governance. See *N.L.R.B. v. Chapa De Indian Health Program, Inc*., 316 F.3d 995 (9th Cir., 2003); see also *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (financially independent nonprofit tribal organization that contracted to provide health services to tribal members and nonmembers and operated outside of the reservation was not exempt from FLSA's overtime provisions). The case at bar goes even further in that individual stores, including large chain grocery stores, apply for and become vendors for ITCN to provide discounted food products to ITCN's WIC clientele. (AER 9, ¶ 5). Out of

the more than fifty (50) vendors ITCN contracts with, only two (2) (less than 4 %) are located on a reservation and are owned by a tribe. All of the others, including very large “chain” grocery stores are privately owned and are not on any reservation. Id. Thus ITCN is participating in and supplying nutritional services and food products for non-Indians on off-reservation locations including large chain stores.

The simple fact is that ITCN is not performing tribal government functions limited to Indians that can be classified as relating to self-governance. Instead ITCN is a local provider of a Federal Government service to mostly non-Indians. When this general service to non-Indians is combined with ITCN employing a substantial percentage of non-Indians and is conducting business and providing services off a reservation, the totality shows that the *Coeur d'Alene* exemption from the FMLA based on the law touching "exclusive rights of self-governance in purely intramural matters" is not applicable, especially considering that ITCN is implementing a Federal program and not an intramural activity. At a minimum, there were material facts in dispute that prevented the dismissal of this case.

4. Crawford and Sterns have individual liability.

The trial court also dismissed Carsten's lawsuit against Crawford and Sterns as individuals based on the finding that the Carsten's lawsuit against ITCN was not viable. The trial court found that employees of a tribe receive the same protections of a tribe when they are "acting in their official capacity and within the scope of their authority. (AER 7:17-18). The trial court did not consider the FMLA's provision that specifically allows lawsuits against individuals "acting in the interest of an employer" and instead applied the general principle that tribal protections

may not be bypassed by simply suing individuals.[2] (AER 7:16-18). When it comes to tort liability, other decisions have followed the trial court's reasoning due to the lack of a statute granting such a suit or liability. See *M.J. v. United States*, 721 F.3d 1079 (9th Cir. 2013). However the FMLA is a federal statute with language that specifically contemplates and authorizes employees to be sued in their individual capacity.[3]

> An ‘‘employer’’ includes any person who acts directly or indirectly in the interest of an employer to any of the employer’s employees. . . . As under the FLSA, individuals such as corporate officers ‘‘acting in the interest of an employer’’ are individually liable for any violations of the requirements of FMLA.
>
> 29 C.F.R. § 825.104(d)

Applying the plain meaning of the "FMLA regulations leave little doubt that individual liability is available under the FMLA." *Haybarger v. Lawrence County Adult Prob. & Parole*, 667 F.3d 408, 414 (3rd Cir. 2012). This Circuit has followed such an interpretation under the FLSA where it has "held that the definition of "employer" under the FLSA is not limited by the common law concept of "employer," but "`is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.'" *Boucher v. Shaw*, 572 F.3d 1087, 1090 (9th Cir. 2009)(citing *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999) (en banc) (quoting *Bonnette v. California Health & Welfare Agency*, 704

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[2] The trial court cited to *Cook v. AVI Casino Enter. Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) - which was a lawsuit filed under a general tort negligence theory for a personal injury claim.

[3] The Fair Labor Standards Act (FLSA) and the FMLA use very similar language for the definition of an employer including individual liability. See 29 U.S.C. § 203(d).

F.2d 1465, 1469 (9th Cir.1983))). This Court has also looked to the FLSA to interpret the FMLA, especially in determining that the FMLA allows individual liability. See *Hibbs v. Department of Human Resources,* 273 F.3d 844. 872 (9th Cir.2001), *aff'd, Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003).

In this matter, Carsten was not suing the individuals as a means to bypass some sort of tribal protection, but was instead suing these individuals as they have their own separate individual liability under the FMLA. Carsten alleged that both Crawford (ITCN's Executive Director) and Sterns (ITCN's personnel director) participated in her dismissal in violation of the FMLA making them individually liable under the FMLA pursuant to 29 C.F.R. § 825.104(d). (AER 16:24-25; 17:6-8). The trial court itself found that Crawford and Sterns were acting within the scope of their authority for ITCN and thus the law of the case established the very element necessary for the individual liability section of the FMLA to be applied to Crawford and Sterns - that they were acting in the interest of ITCN. See 29 C.F.R. § 825.104(d). As such, their liability is completely separate from ITCN's and dismissing the lawsuit against them based on the decision that the lawsuit against ITCN should be dismissed was error. So even if this Court determines that the lawsuit was properly dismissed against ITCN, the lawsuit against Crawford and Sterns should continue. Of course if ITCN is found to have been improperly dismissed, then this becomes a moot issue. Based on the FMLA's language creating individual liability separate from the traditional employer liability, it was error for the claims against Crawford and Sterns to be dismissed. In short, Crawford and Sterns are subject to individual liability for acting in the scope of their duties, or they do not have any immunity if they were acting outside the scope of their duties.

Conclusion

Based on the above, defendant-appellees are far removed from any limited intramural exemption of federal laws. First, none are actually a tribe. Next their activities and the subject of this lawsuit have nothing to do with any intramural activities such as tribal membership, inheritance rules, and domestic relations. Instead, ITCN's activities involve significant non-Indian clientele, non-Indian employees, and non-Indian vendors off reservations while implementing U.S. Government welfare type services to all individuals. As such defendant-appellees do not fall within the narrow exemption tribes are allowed for purely intramural activities touching on tribal self-governance. Additionally, Defendants Sterns and Crawford have individual liability apart from ITCN and are not afforded any exemption even if one was to be granted to ITCN. At a minimum there are material facts in dispute that prevented dismissal. Therefore this matter should be reversed and remanded.

Dated this 10th day of February, 2014.

/s Brian Morris
Brian Morris, Esq.

STATEMENT OF RELATED CASES

There are no related cases that are related to this appeal.

Dated this 10th day of February, 2014.

/s Brian Morris
Brian Morris, Esq.

CERTIFICATE OF COMPLIANCE FOR CASE NUMBER 13-16985

I certify that this brief is in conformance with the type specifications set forth at Fed.R.App.P. 32(a)(5) and is conformance with the length specifications set forth at Fed.R.App.P. 32(a)(7)(B)(ii) as it has a typeface of 14 points and contains 3640 words and 367 lines of text.

Dated this 10th day of February, 2014.

/s Brian Morris
Brian Morris, Esq.

CERTIFICATE OF SERVICE

I certify that on the 10th day of February, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the email address of the following on record with the Ninth Circuit Court of Appeals:

Robert W. Story, Esq.
2450 Vassar Street, Ste. 3B
Reno, Nevada 89502
rstory@storylaw.net

/s Brian Morris
Brian Morris, Esq.