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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANCES A. BORICCHIO,

Plaintiff,

v.

CHICKEN RANCH CASINO, CHICKEN RANCH RANCHERIA OF ME-WUK INDIANS OF CALIFORNIA, and DOES 1 – 20,

Defendants.

Case No. 1:14-cv-00818-AWI-SMS

PLAINTIFFS' OPPOSITION TO DEFENDANTS MOTION TO DISMISS

Date: December 1, 2014
Time: 1:30 p.m.
Ctrm: 2, 8th Floor
Judge: Hon. Anthony w. Ishii

STATEMENT OF FACTS

The central issue in this case is the firing of older employees of the Chicken Ranch Casino, and replacement of the same qualified and long-tenured employees with much younger, and significantly less qualified employees. The discriminatory actions began when younger tribal members seized control of power within the Tribe by overthrowing the elder tribal members, including their grandfather. The younger tribal members, most notably Lloyd Mathiesen and James Smith, openly expressed their desire to rid the Casino of the older managers, and to replace them with younger employees.

The Plaintiffs in this case are five former employees of Chicken Ranch Casino, all over 50 years old. None are tribal members of the Chicken Ranch Rancheria of Me-Wuk Indians. Four of the five Plaintiffs were systematically fired from their employment as a result of their age, with the fifth Plaintiff quitting when it became clear she would be fired next.

The terminations followed a common theme, in that each Plaintiff would be instructed to train a younger, significantly less qualified new hire. Following the training of the new hire, each Plaintiff was fired with no explanation and no cause. A search of the personnel files of each Plaintiff would reveal that all had a clean employment history, with no write-ups or warnings for negative actions on the job.

The terminations of Casino employees began in January of 2013, when Tribal Office Chairman Lloyd Mathiesen was overheard telling General Manager James Smith, "Just like I told you James, out with the old and in with the young." Both high-level Casino employer defendants were overhead repeatedly referring to employees as "old fucks."

INTRODUCTION

Defendants posit that this action should be dismissed based on a claim of sovereign immunity from suit. They claim that a discrimination action cannot be entertained, no matter whether the

employment discrimination involved an internal tribal issue or a commercial enterprise, and whether or not the business was located on or off the reservation. In fact, the defendants claim that there can be no suit against the tribe for discrimination unless the tribe waives immunity or Congress expressly abrogates the tribe's immunity.

Defendants' argument that sovereign immunity completely shields it from suit, however, is misplaced. "Indian tribes are 'no longer possessed of the full attributes of sovereignty." *Babbitt Ford, Inc. v. Navaho Indian Tribe,* 710 F2d. 587 (9th Cir. 1983), citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56. In other words, their sovereignty is limited such that tribes cannot allow murder of non-Indians on their lands, among other limitations. Yet defendants argue that tribes are not bound by the United States Constitution, any civil rights acts, or any other discrimination statutes applicable to all other Americans. "This sovereignty is not absolute. Tribal sovereignty is subject to limitation by specific treaty provisions, by statute at the will of Congress, by portions of the Constitution found explicitly binding on the tribes, or by implication due to the tribes' dependent status." *Babbitt*, *supra*, at 591.

It is important to note the reality of Indian gaming. A majority of tribes are not gaming tribes. Some tribes with gaming are as small as a single family (Defendant Chicken Ranch tribe has only 11 members) and are of questionable provenance. Tribal casino operations are often managed by publicly-trading gaming companies such as Caesars Entertainment Corp., MGM Resorts and Stations Casinos. Defendants state that all commercial enterprises owned by a tribe are protected by sovereign immunity, and therefore those enterprises can freely and without consequence discriminate against anyone based on race, disability or age. Could it really be the state of the law that United States citizen have diminished or non-existent civil rights on certain parcels within the United States? *See, Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014)(Thomas, J., dissenting)

The position of the Chicken Ranch tribe is that they can invite members of the non-Indian public to gamble at their establishment pursuant to a Compact with the State, that they can rely on non-Indian employees to actually operate the establishment for them, that they can receive significant funding from the federal government, and nevertheless, they can freely discriminate against any suspect class they wish.

If this is indeed the Court's view of the state of the law, plaintiffs respectfully request that the Court make clear in its Order that federally recognized tribes are free to violate the civil rights of their customers and employees. On the other hand, if the Court finds that a claim of sovereign immunity should not insulate such obvious wrongdoing, the Court should deny defendants' motion, or, at the very least, clearly explain why age and race discrimination cannot be remedied by the federal courts even in connection with a business that is otherwise highly regulated by the State of California and operating pursuant to federal imprimatur.

Defendants' motion to dismiss argues that this Court should rule that it lacks subject matter jurisdiction for six specific points. The Chicken Ranch Rancheria of Me-Wuk Indians of California did in fact waive its immunity from suit and expressly subjected itself to federal employment discrimination laws. The Age Discrimination in Employment Act ("ADEA"), being a law of general application, does apply to the plaintiffs' employment with the Casino. The ADEA, as federal employment law, is not preempted by a shorter tribal limitations period, and plaintiffs are not required to exhaust tribal remedies. The Plaintiffs, therefore, oppose defendants' motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and respectfully request that this Court does indeed rule in favor of exercising jurisdiction over the subject matter at hand.

Precedent that is wrong should not constrain the Court from explaining what is right. See, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 282–283 (1988) (overruling precedent as "deficient in utility and sense," "unsound in theory, unworkable and arbitrary in

practice, and unnecessary to achieve any legitimate goals"). As blacks needed to wait 60 years for the reasoning of *Plessy v. Furguson*, 163 U.S. 537(1896) to be replaced by *Brown v. Bd. Of Education*, 347 U.S. 483 (1954), to end state-sponsored segregation of schools and the doctrine of "separate but equal," so it is now the time for tribal sovereign immunity to be discarded as a basis for denying constitutional and civil rights protections to all persons discriminated against by Indian tribes.

The sovereign nation "fiction," that somehow the Chicken Ranch tribe predates the Constitution and is entitled to be treated as a separate country, should be discarded in favor of equal rights for all. *See, Oklahoma Tax Comm'n v. Citizen Band of Potowatomi Tribe of Okla*., 498 U.S.505 (1991), J. Stevens, concurring, wherein Justice Stevens criticized tribal immunity as "founded upon an anachronistic fiction" and suggested that it might not extend to commercial activity. (concurring opinion, 498 U.S. at 514-15).

The eleven-member tribal defendant, situated on less than an acre of land, claims to be a sovereign nation entitled to sovereign immunity. Despite not being imbued with any of the traditional emoluments of a nation, such as a standing army, the ability to print its own currency, or to issue passports, the tribe claims that it has the right to ignore the laws of the country in which their less than one-acre "nation" is situated.

Clearly the tribe is not fully "sovereign" regarding which laws actually apply to it, as is pointed out by the defendants. In their argument, they make clear that sovereign immunity is abrogated either by an express waiver by the tribe, *or* by Congress declaring that a particular law is applicable to the tribe. Being subject to congressional whim is contradictory to any practical notion of sovereignty. Further, if Congress has the power to extend constitutional and civil rights protections to all persons going onto, or working at, this one-acre "nation", isn't a failure to do so a violation of the Constitution by Congress? The Equal Protection Clause can be seen to prohibit state

grants of gaming authority to Indians while the Indians discriminate and maintain immunity from suits for discrimination. This is analogous to *Bob Jones University v. United States*, 461 U.S. 574 (1983), wherein the Supreme Court upheld the IRS's revocation of a private school's tax-exempt status because it denied admission to students in interracial marriages. See, also, 26 U.S.C. §501(I) (2006).

Congress "has always been at liberty to dispose with such tribal immunity or to limit it." *Potowatomi, supra,* at 510. If this is truly so, then Indian sovereign immunity is indeed a "fiction." While tribes may assert that they are sovereign and control their own laws, in truth Congress's plenary power trumps that of the tribes. Congress's failure to protect the citizens of the United States from violation of their civil rights makes the federal government complicit in these tribal civil rights violations.

1. CHICKEN RANCH HAS WAIVED SOVEREIGN IMMUNITY AND EXPRESSLY SUBJECTED ITSELF TO FEDERAL EMPLOYMENT DISCRIMINATION LAWS.

Chicken Ranch has indeed waived sovereign immunity in employment discrimination matters. Notably, the tribal casino's employment application contains the following language: "**We are pleased that you are seeking employment with Chicken Ranch Casino. Applicants are considered without regard to race, color, religion, age, national origin or any factors prohibited by federal law. We are proud to be an Equal Opportunity Employer. Please fill in all information or write N/A if not applicable**." By acceding to "federal law", it is clearly arguable that Chicken Ranch, in order to attract employees, has declared itself subject to federal discrimination laws and suits thereunder. Also, contrary to defendants' protestations, there is nothing in the tribe's Employee Handbook, or the Acknowledgment of Receipt and Understanding,

that states that the ADEA is not applicable to the tribe, or that plaintiffs would be in any way be foreclosed from seeking relief in federal court.

2. THE ADEA IS APPLICABLE TO THE DEFENDANTS.

In any event, the ADEA is a law of general application and, at least in the Ninth Circuit, will be applied to Defendants. In *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), the Ninth Circuit found that the Occupational Safety and Health Act, a statute of general applicability silent as to its application to tribes, applied to the Coeur d'Alene tribal farm, a commercial enterprise wholly owned by the Coeur d'Alene Tribe, which sold produce on the open market outside of tribal lands and employed non-Native Americans. To address that issue, the Ninth Circuit applied the principal in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) which states that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary…." *Id*. at 120. The Ninth Circuit in *Coeur d'Alene* went on to hold that when a statute of general applicability is silent with respect to tribes, that statute will not apply to tribes 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….' In any of these three situations, Congress must expressly apply a statute to Indians before [a court] will hold that it reaches them." *Coeur d'Alene*, 751 F.2d at 1118 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980).

The Eastern District of Wisconsin recently crafted an excellent analysis of an ADEA claim made against an Indian casino. In *EEOC v Forest County Potawatomi Community*, 2014 WL 1795137, slip opinion (E.D.Wis. 2014) the Court held: "the ADEA is generally applicable and therefore presumed to apply to Indian tribes." The Court found that only one of the three situations

described in *Coeur d'Alene* that was even arguably present was the law's touching exclusive rights of self-governance. The Court held that purely intramural matters are matters "such as conditions of tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene*, 751 F.2d at 1116. The Court noted that "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." *Id.* at, citing *Coeur d'Alene*, 751 F.2d at 1116.

This issue was also directly addressed in *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007), wherein it was held:

> The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, *see generally* ***Reich v. Mashantucket Sand & Gravel***, 95 F.3d 174, 180-81 (2d Cir.1996) ("[E]mployment of non-Indians weighs heavily against [a] claim that ... activities affect rights of self-governance in purely intramural matters."), then application of the law might not impinge on tribal sovereignty.

Id. at 1313.

Defendants also assert that the tribe is not a "person" and therefore cannot be an "employer" subject to the ADEA. "Person" is defined as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives or any organized group of persons." 29 U.S.C. §630(a). An Indian tribe operating a casino is "an organized group of persons" and is "engaged in an industry affecting commerce." *See, Coeur d'Alene*, 751 F.2d at 1115 & n.1 (concluding that OSHA is a statute of general applicability and that an Indian tribe in its capacity as the operator of a tribal farm is an "organized group of persons … engaged in a business affecting commerce.")

3. THIS MATTER DOES NOT AFFECT INTERNAL TRIBAL GOVERNMENT FUNCTIONS AND IS THEREFORE NOT BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

Contrary to the defendant's assertions, the instant case is easily distinguishable from *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. Cal. 2011) ("*Karuk*"). *Karuk* is not applicable to the instant case because that case had to do with internal tribal government, unlike the instant case. In that case, the employer was a tribal government acting in its governmental role of providing housing for its tribal members. In the instant case, we have discrimination against *non-tribal* members perpetrated by their employer, the casino. While in both instances the business may be located on tribal land, this fact is not dispositive.

The key factor in element one of the *Coeur d'Alene* exceptions is whether the issue is a matter that is purely intramural, and in the instant case, it clearly is not. Additionally, Defendants' argue that, "the intramural nature of the dispute is evidenced by the fact that the Tribe has established three internal procedures for adjudicating such matters, which are contained in: the Employment Rights Ordinance, the Claims Ordinance, and the Tribal Court Ordinance. For these reasons, the Tribe's operation of its Casino is within the kind of internal and intramural activity contemplated by the first *Coeur d'Alene* exception." This argument by Defendants is less than persuasive, as it posits that just because the Tribe has established "internal independent procedures" regarding a matter, that the matter is then necessarily encompassed within the Tribe's self-government. This is clearly not so. The Tribe can establish "internal independent procedures" on any host of matters, but that does not lead to the conclusion that the matters are now "purely intramural".

A statute of general applicability that is silent as to 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). Defendants argue that "because the ADEA is silent as to its application to Indian tribes and there exists a comprehensive statutory plan, the IGRA, the Court is obligated to construe the ADEA

liberally and in favor of the Tribe." Not so. Given that the ADEA is a statute of general application, it is applicable to Indian tribes unless Congress specifically says otherwise. The second *Coeur d'Alene* situation plainly states that tribes will be exempt if the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties.' Defendants admit the absence of applicable treaty provisions. Because Defendants point to no treaties on the subject, their argument fails under the second *Coeur d'Alene* factor. The Court in *Potawatomi* agreed, "In the present case, the Tribe does not contend that treaty rights are at stake or point to any such rights that would be affected by applying the ADEA to the casino's employment relationship with a casino employee. Thus, the reasoning of *Cherokee Nation* does not apply here." *Id.*

Coeur d'Alene remains binding authority in the Ninth Circuit and is controlling authority in this matter. As none of the three situations set forth in Coeur d'Alene are present here, Plaintiffs' actions are not barred by sovereign immunity.

4. FAILURE TO FILE A CLAIM IN TRIBAL COURT DOES NOT BAR THIS FEDERAL COURT ACTION.

Defendants' second basis for their motion to dismiss is a claim that this action is barred because the plaintiffs failed to exhaust their remedies in tribal court before commencing this federal action. Defendants claim that this action is barred because the plaintiffs did not file a claim with the tribe within the 90 to 180 day time limits of Section 1.070 of Ordinance No. 98-0630-2, the Tribal Torts Claims Ordinance, or Section 17.04.090 of Ordinance No. 01-0222-2, the Tribal Gaming Facility Employment Rights Ordinance.

There is nothing in either ordinance which makes the tribal gaming commission or the tribal court the exclusive fora to bring employment actions. As discussed earlier, the ADEA applies to the tribal defendants and it is appropriate to bring this federal age discrimination action in federal court pursuant to Section 14(b) of the ADEA, codified at 29 U.S.C.A. §626(c). *See also, San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007) ("IGRA certainly permits

tribes and states to regulate gaming activities, but it is a considerable leap from that bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming.)

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Supreme Court explained that while Section 14(b) does require that plaintiffs first pursue a state remedy before filing in federal court, "Section 14(b) does not stipulate an exhaustion requirement. The section is intended only to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief." *Id.* at 762. The Court expressly held that "The structure of the ADEA reinforces the conclusion that state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy." The Court found that the failure to earlier file a claim with the Iowa State Civil Rights Commission did NOT result in plaintiff's suit being barred in federal court. Instead, the Court found that the plaintiff "may yet comply with the requirements of §14(b) by simply filing a signed complaint with the Iowa State Civil Rights Commission. That Commission must be given an opportunity to entertain respondent's grievance before his federal litigation can continue. Meanwhile the federal suit should be held in abeyance." *Id.* at 764-65.

Thus the remedy for failure to bring a claim in tribal court is NOT to dismiss this action, but to instead hold this federal action in abeyance for 60 days from the date that Plaintiffs file their claims with the tribe. Proof of such filings will be provided before the hearing on this motion to dismiss.

CONCLUSION

Plaintiffs have shown that sovereign immunity does not bar this action because the ADEA is a statue of general application that does not affect internal tribal governance. Plaintiffs have also

shown that a failure to commence an action in tribal court does not bar a federal court action, but at most, will result in the federal court action being in abeyance for 60 days following the filing. Plaintiffs therefore respectfully request that the Court deny Defendants' motions in their entirety.

Dated: November 17, 2014

_____/s/_____
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