IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMY COPPE,

Plaintiff,

v.

THE SAC & FOX CASINO HEALTHCARE PLAN,

Defendant.

Case No.: 2:14-cv-02598-RDR-GLR

Plaintiff's Response to Defendant Sac & Fox Casino Healthcare Plan's Motion to Dismiss

Plaintiff states as follows in response to Defendant's Motion to Dismiss:

Introduction

Plaintiff Amy Coppe was employed by Sac & Fox Casino from 1997 until February 2012. She filed this action pursuant to 29 U.S.C. § 1132(a)(1)(B) seeking recovery of health insurance benefits she was entitled to under a group health plan (the "Plan"). Defendant Sac & Fox Casino Healthcare Plan (hereinafter "Defendant") is the plan administrator.

Previously, Defendant filed a motion to dismiss or stay this action based on the grounds that plaintiff was required to exhaust tribal remedies before maintaining this action for ERISA benefits. The Court denied this Motion on March 13, 2015, after finding that Congress has preempted the tribe's authority over ERISA claims.

Despite the Court's prior finding of Congressional preemption, Defendant has filed a second motion to dismiss that again seeks to preclude any action against it for ERISA benefits. Defendant now maintains that it is entitled to tribal sovereign immunity from any claim for benefits by a Plan participant such as Plaintiff.

Defendant S&F Plan's argument fails on several grounds. First, Congress indicated that ERISA applies to tribal plans where the employees are engaged in commercial, rather than governmental functions. Therefore, to the extent Defendant may have been immune from suit, Congress has waived that immunity. Second, Defendant waived any tribal sovereign immunity it may have enjoyed when it agreed in the Plan document that it could be sued for benefits in federal court. Finally, Defendant, which is the Plan sponsor and administrator, is not an Indian tribe and, therefore, cannot avail itself of tribal sovereign immunity.

Statement of Facts

1. Plaintiff is not a member of the Sac & Fox Indian Tribe. Affidavit of Amy Coppe attached as Exhibit 1.

2. Plaintiff worked at the Sac & Fox Casino from 1997 to February 2012. Exhibit 1 at ¶ 7.

3. Plaintiff's positions at the Sac & Fox Casino included deli clerk in the food service department and security officer inside the casino. Exhibit 1 at ¶ 8.

4. The Plan document contains a section detailing a participant's ERISA rights. See Plan, attached as Exhibit 2 at p. 46.

5. The Plan states that "there are a number of steps the Plan member can take to enforce" ERISA rights. *Id.*

6. The Plan further provides that "[i]f the Plan member has a claim for benefits which [is] denied or ignored in whole or in part, the Plan member may file suit in a state or federal court." *Id.*

7. The Plan identifies "The Sac & Fox Casino Healthcare Plan" as both the Plan Sponsor and Plan Administrator. *Id.* at p. 54.

8. Defendant filed standard ERISA regulatory filings for the Plan with the Internal Revenue Service and Department of Labor. See Form 5500 for 2/1/2011 to 1/31/2012 attached as Exhibit 3.

Argument

A. Congress waived Indian Tribe's sovereign immunity by expressly making Indian Tribe benefit plans subject to ERISA .

With ERISA, Congress enacted an expansive statutory scheme to govern employment-related welfare benefit plans. The law encompasses all benefit plans and then carves out exceptions for certain plans. The issue, rather than one of merely "sovereign immunity" is whether, under ERISA, the plan at issue is exempt from Congress's statutory scheme. Most helpful in deciding this question is the fact that Congress amended ERISA in 2006 for the purpose, and with the effect of, allowing a simple resolution of this question.

Prior to 2006, ERISA was silent as to whether Indian tribal plans were covered or were exempt as "governmental plans." However, several courts called upon to decide this question looked to whether the employment related to the plan at issue was in commercial or governmental activities. *Stopp v. Mut. Of Omaha Life Ins. Co.*, 2010 WL 1994899 (E.D. Ok. May 18, 2010) ("Previous to the 2006 amendment, courts found that ERISA was applicable to tribal plans especially where participants performed commercial activities in their jobs such as in factories." Accordingly, in both *Lumber Industrial Pension Fund v. Warms Springs Forest Products Industry*, 939 F.2d 683 (9th Cir. 1991) and *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989), the courts employed this commercial or governmental function test. Both courts concluded that the employees participating in the plans were engaged in commercial activities and, therefore, found the plans were subject to ERISA. See also, *Stopp, supra* (where vast

majority of plan participants were employed in casino industry, court found that Indian tribe's disability plan would be subject to ERISA).

In 2006, Congress amended ERISA to effectively codify this commercial activity vs. governmental function distinction in determining whether Indian tribal plans are exempt from ERISA. As amended, 29 U.S.C. § 1002(32) defines "governmental plan" as including one that is "established and maintained by an Indian tribal government." However, such a plan is only a "governmental plan," and therefore exempt from ERISA, when "all of the participants" in the plan are employees "substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)."

The Tenth Circuit, in applying this new language, has held that a "plan qualifies as a governmental plan only if it is established and maintained by an Indian tribal government and all of the participants are employees primarily engaged in essential governmental functions rather than commercial activities." *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1285 (10th Cir. 2010) (remanding to district court for determination of whether "*all plan participants*" were engaged primarily in essential governmental functions) (emphasis original).

Here, the answer is clear that the Sac & Fox Casino Healthcare Plan is not a governmental plan, and therefore, not exempt from the purview of ERISA. The casino is a purely commercial enterprise. Furthermore, Plaintiff indicated that her job duties while employed at the casino were all related to commercial activities.

Defendant's Motion to Dismiss, just as in its first motion to dismiss for failure to exhaust administrative remedies, does not allege that the Plan in this case is a "governmental plan." Defendant does not make any argument that participants in the Plan are engaged primarily in

performing essential government functions and not commercial activities. Consequently, Defendant has failed to meet its burden to show the Court that the Plan is not subject to ERISA. *See also*, *Stopp*, *supra*, 2010 WL 1994899 at *3 (finding tribal plan was not exempt from ERISA where most employees were employed in commercial enterprises and the party arguing for exemption from ERISA "submitted absolutely no evidence to dispute this point.")

If the Plan is subject to ERISA, then it logically follows that Defendant cannot avail itself of a sovereign immunity defense. Since the Plan is not exempt from ERISA under the new "governmental plan" language, Congress has obviously abrogated any tribal sovereign immunity defense that could possibly apply to such the Plan.

At least one other court in this Circuit has used the same reasoning to come to the same conclusion. Plaintiff previously relied on *Vandever v. Osage Nation Enterprise, Inc.*, 2009 WL 702776 (N.D. Okla. March 16, 2009) in responding to the first motion to dismiss regarding the tribal remedy exhaustion argument. While *Vandever* did address the tribal exhausion doctrine, this was merely an alternative theory in the defendant's motion to dismiss. The primary basis for the defendant's motion to dismiss in *Vandever* was the same as that asserted here, tribal sovereign immunity. The *Vandever* court relied upon the 2006 amendment to ERISA and the Tenth Circuit's decision in *Dobbs* to conclude that "a Congressional waiver has abrogated tribal sovereign immunity with respect to ERISA cases." *Vandever* at *2. The *Vandever* court further explained that, while *Dobbs* did not explicitly discuss tribal sovereign immunity, it recognized that some tribal benefit plans are subject to ERISA and some are not and "implicit in this conclusion is an acknowledgment that tribal plans are subject to ERISA unless they meet the amended definition of a governmental plan." *Id.* at *4. For plans that do not meet the definition of a "governmental plan," tribal sovereign immunity is abrogated by ERISA. *Id.*

The determination of whether the Plan is exempt from ERISA is clearly controlled by Congress's statutory scheme and its intepretation by the Tenth Circuit in *Dobbs*.[1] Here, the Plan is not exempt because the employees' duties were related to business activities and not governmental functions. Since the Plan is not exempt from ERISA, tribal sovereign immunity has been abrogated and Defendant's Motion to Dismiss must be denied.

B. Defendant S&F Plan expressly waived any sovereign immunity defense as the Plan documents stated claims could be maintained against the plan administrator.

Even if the Court should find that Congress did not intend to abrogate sovereign immunity for an Indian Tribe's ERISA plan, the Court should still find that Defendant S&F Plan waived any sovereign immunity defense it may have had in the governing plan document. The Plan clearly indicated in the health benefit contract that a Plan participant could bring an action against the Plan. As noted above, the Plan specifically states that if a participant is denied ERISA benefits, she "may file suit in state or federal courts." Exhibit 2 at p. 47. In fact, the governing plan document lists several ways that a particpant may bring in action against the Plan and even discusses how a court may require the Plan to reimburse costs and fees. *Id.*

Federal courts have long held that ERISA plan documents are in the nature of a contract. In fact, a claim for benefits under 29 U.S.C. § 1132(a)(1)(B) is essentially a "breach of contract" action. *See Pratt v. Petroleum Prod. Mngmt. Employee Sav. Plan.*, 920 F.2d 651, 658 (10th Cir. 1990). Here, Defendant drafted the contract and Plaintiff had no input into the language. By including contractual language allowing for a legal action for benefits to be brought against the

[1] The authority on which Defendant relies does not require a different result. None of the cases Defendant cites involve ERISA plans or address the question of whether an employee welfare benefit plan is exempt from ERISA.

Plan administrator, Defendant S&F Plan waived any sovereign immunity protection it may have had.

The Supreme Court, in an analogous case, found that Indian tribes can waive their right to assert a sovereign immunity defense by contractually agreeing to a resolution procedure. In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), a tribe entered into a contract containing an arbitration and choice of law provision. The plaintiff argued that the tribe had breached its contract and sought to enforce the arbitration clause. *Id.* at 416. Like Defendant S&F Plan here, the tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. *Id.* After an award in the plaintiff's favor, the plaintiff filed an action in state court to enforce the award. *Id.* The tribe appealed to the U.S. Supreme Court asserting it was immune from the suit. However, in a unanimous decision, the Supreme Court found that, by entering a contract with an arbitration and choice of law provision allowing enforcement in a state court, the tribe waived its sovereign immunity and agreed to allow an award to be pursued in an Oklahoma court. *Id.* at 420. The Court concluded:

> the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures…[the Arbitration] Act concerns arbitration in Oklahoma and correspondingly designates as enforcement forums courts of competent jurisdiction of [Oklahoma]…C&L selected for its enforcement suit just such a forum.

Id.

Likewise here, Defendant S&F Plan tendered the contract (the Plan document) that specifically allowing for Plaintiff to bring an action in state or federal court to enforce a claim for benefits under ERISA. Plaintiff had no power to reject terms of the Plan document or seek alternatives. Therefore, even if Defendant S&F Plan may have had a sovereign immunity

defense available to it, Defendant clearly waived that defense and agreed that Plaintiff could bring an action against it.

C. Defendant, as the Plan administrator and sponsor, is a distinct legal entity that is not entitled to assert a claim of sovereign immunity and is a proper party to a plan member's ERISA action for benefits.

Defendant's argument concerning sovereign immunity glosses over an important distinction. The Defendant in this case is the Sac & Fox Healthcare Plan, not the Sac & Fox Indian Tribe. Defendant is being sued because it is the actual ERISA Plan as well as the Plan administrator and sponsor for this healthcare benefit plan. Regardless of how the Plan is funded, it is the Plan that is the party here, not the tribe.

The Plan document itself never mentions the Tribe. The Plan administrator and sponsor is identified as "The Sac & Fox Healthcare Plan." See Exhibit 2 at p. 54. The Form 5500 Annual Return/Report of Employee Benefit Plan that Defendant filed with the Department of Labor identifies "Sac & Fox Casino Benefit Plan" as both the name of the plan and the plan Sponsor. See Exhibit 3. The Sac & Fox Casino, and by extension the Tribe, is merely the employer that funds the Plan and is not a party here.

ERISA specifically provides that "an employee benefit ***plan*** may sue or be sued under this subchapter as an entity." 29 U.S.C. § 1132(d)(1) (emphasis added). Indeed, some courts have held that the employer is not even a proper party to an ERISA action for benefits. See *Madden v. ITT Long Term Disability Plan,* 914 F.2d 1279, 1287 (9th Cir. 1990), *cert. denied,* 498 U.S. 1087, 111 S.Ct. 964, 112 L.Ed.2d 1051 (1991) ("ERISA permits suits to recover benefits only against the Plan as an entity"); *Miller v. Pension Plan for Employees of Coastal Corp.,* 780 F.Supp. 768, 773 (D. Kan. 1991), *aff'd on other grounds,* 978 F.2d 622 (10th Cir.1992), *cert. denied,* 507 U.S. 987, 113 S.Ct. 1586, 123 L.Ed.2d 152 (1993) (granting summary judgment for

a defendant employer in an action to recover benefits "for the additional reason that it is not a proper party").

Plaintiff did not bring an action against Sac & Fox Indian Tribe. Rather, Plaintiff sued the Plan which is self-identified as the plan sponsor and administrator. While Defendant is possibly funded by an Indian tribe, it is not an Indian tribe. As an ERISA Plan sponsor and administrator, Defendant is subject to claims for benefits and it cannot avail itself of a sovereign immunity defense.

Conclusion

Tribal sovereign immunity as a defense to this ERISA benefits claim was waived by both Congress and Defendant. Congress expressly provided that benefit plans covering employees in commercial activities of Indian Tribes are not exempt from ERISA's statutory scheme. This expansive legislative scheme includes the ability and right of a plan participant to bring an action to assert a claim for benefits arising out of her employment. Because of Congress's actions, tribal sovereign immunity cannot be used as a defense. However, even if Congress had not waived Defendant's right to assert a sovereign immunity defense to an ERISA benefit claim, Defendant expressly waived that right by contractually agreeing in the Plan document to allow itself to be sued in federal court.

For all of these reasons, Defendant's Motion to Dismiss this action should be denied.

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