Docket No.: 15-13552-CC

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHRISTINE WILLIAMS,

Plaintiff-Appellant

v.

POARCH BAND OF CREEK INDIANS,

Defendant-Appellee

On Appeal from the United States District Court
For the Southern District of Alabama
District Court No.: 1:14-cv-00594-CG-M

BRIEF OF DEFENDANT-APPELLEE POARCH BAND OF CREEK INDIANS

James C. Pennington
M. Tae Phillips
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
420 20th Street North, Suite 1900
Birmingham, Alabama 35203
Telephone: (205) 328-1900
Facsimile: (205) 328-6000
james.pennington@ogletreedeakins.com
tae.phillips@ogletreedeakins.com

Counsel for Defendant-Appellee

Christine Williams v. Poarch Band of Creek Indians, Docket No. 15-13552-CC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Defendant-Appellee Poarch Band of Creek Indians ("PBCI"), certifies that the following persons, firms, and entities have or may have an interest in the outcome of this case:

(1) Granade, Callie V.S. – U.S. District Judge (S.D. Ala.);

(2) McGowan, Candis A. – Counsel for Plaintiff-Appellant;

(3) Milling, Jr., Bert W. – U.S. Magistrate Judge (S.D. Ala.);

(4) Ogletree, Deakins, Nash, Smoak & Stewart, P.C. – Counsel for PBCI;

(5) Pennington, James C. – Counsel for PBCI;

(6) Phillips, M. Tae – Counsel for PBCI;

(7) Poarch Band of Creek Indians – Defendant-Appellee;

(8) Smith, L. William – Counsel for Plaintiff-Appellant;

(9) Wiggins, Jr., Robert L. – Counsel for Plaintiff-Appellant;

(10) Wiggins, Childs, Pantazis, Fisher & Goldfarb – Counsel for Plaintiff-Appellant;

(11) Williams, Christine – Plaintiff-Appellant.

Christine Williams v. Poarch Band of Creek Indians, Docket No. 15-13552-CC

PBCI is a federally recognized Indian tribe. PBCI is not a nongovernmental corporate entity, and PBCI is not aware of any publicly traded company or corporation that has an interest in the outcome of this appeal.

Respectfully submitted,

/s/ M. Tae Phillips
James C. Pennington (ASB-1287-N62J)
M. Tae Phillips (ASB-6565-W74P)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
420 20th Street North, Suite 1900
Birmingham, Alabama 35203
Telephone: (205) 328-1900
Facsimile: (205) 328-6000
james.pennington@ogletreedeakins.com
tae.phillips@ogletreedeakins.com

Attorneys for Defendant-Appellee
Poarch Band of Creek Indians

STATEMENT REGARDING ORAL ARGUMENT

The Supreme Court has repeatedly recognized that federally recognized Indian tribes such as Defendant-Appellee Poarch Band of Creek Indians ("PBCI") are entitled to sovereign immunity from lawsuits such as the one at bar unless that immunity is explicitly abrogated by Congress or waived by the tribe. See, e.g., Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014). There is no waiver of immunity in this case, and Congress has not abrogated PBCI's sovereign immunity from private suits under the Age Discrimination of Employment Act of 1967. The outcome of this case is dictated by settled precedent, and oral argument is unnecessary.

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Alabama ("District Court") lacked jurisdiction over this case because PBCI is entitled to sovereign immunity from Plaintiff-Appellant Christine Williams' ("Williams") claims. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

This appeal is from the District Court's July 8, 2015 final Order dismissing Williams' Complaint and subsequent Judgment in favor of PBCI. (Docs. 28-29). Williams filed a timely Notice of Appeal to this Court on August 7, 2015 pursuant to Fed. R. App. P. 4. (Doc. 30).

STATEMENT OF THE ISSUES

Did Congress explicitly abrogate Defendant-Appellee Poarch Band of Creek Indians' ("PBCI") tribal sovereign immunity from private lawsuits to enforce the Age Discrimination in Employment Act of 1967 ("ADEA"), a statute that never refers to tribal sovereign immunity or to Indian tribes at all?

STATEMENT OF THE CASE

On December 22, 2014, Plaintiff-Appellant Christine Williams ("Williams") sued PBCI asserting a claim of disparate treatment discrimination under the ADEA. (Doc. 1). On February 20, 2015, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), PBCI filed a Motion to Dismiss Williams' Complaint with a supporting brief and declaration. (Docs. 10, 11, & 11-1).[1]

After briefing on the motion, Magistrate Judge Bert W. Milling, Jr. entered a Report and Recommendation recommending dismissal of Williams' Complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). (Doc. 25). Judge Milling did not reach the question of dismissal under Fed. R. Civ. P. 12(b)(6). (See id.) On July 8, 2015, the District Court adopted the Report and Recommendation

[1] Because PBCI challenged the District Court's subject-matter jurisdiction, the District Court could properly consider the Declaration of Edie Jackson without converting the Motion to Dismiss to a Motion for Summary Judgment. See Goodman ex rel. Goodman v. Sipos, 259 F.3d 1327, 1332 n.6 (11th Cir. 2001) ("A federal court must always dismiss a case upon determining that it lacks subject matter jurisdiction, regardless of the stage of the proceedings, and facts outside of the pleadings may be considered as part of that determination."). The District Court noted Williams did not dispute Ms. Jackson's Declaration or its contents. (Doc. 25). Alternatively, the District Court could take judicial notice of certain facts pertaining to PBCI, including its governmental structure, governing law, and departmental structure, all of which are set forth in detail in the PBCI Tribal Constitution and PBCI Tribal Code. See North County Cmty. Alliance, Inc. v. Salazar, 573 F.3d 738, 746 (9th Cir. 2009) (taking judicial notice of tribal ordinance); U.S. v. Youngbear, No. CR11-0151, 2011 WL 7070970, at *7 n.5 (N.D. Iowa Dec. 1, 2011) (taking judicial notice of portions of the Tribal Code).

and granted PBCI's Motion to Dismiss. (Docs. 28-29). Williams timely appealed. (Doc. 30).

After the parties completed briefing on Williams' appeal, the Court appointed counsel for Williams and ordered her to submit an Additional Appellant Brief. Williams did so on May 4, 2016.

STATEMENT OF THE FACTS

The Poarch Band of Creek Indians is a federally recognized Indian tribe. See 25 U.S.C. § 479a-1; 81 Fed. Reg. 26826, 26829 (May 4, 2016); 80 Fed. Reg. 1943, 1945 (Jan. 14, 2015).[2] PBCI maintains a governmental structure independent from the United States government, and operates under the PBCI Tribal Constitution and Tribal Code. (Doc. 11-1 at ¶¶ 3-4.) PBCI's Tribal Code explicitly preserves PBCI's right to tribal sovereign immunity. See PBCI Tribal Code § 1-1-1.

Included within the Tribal Code is the Tribal Employment Rights Code, which further preserves PBCI's tribal immunity without waiver. See id. at § 33-8-9. The Tribal Employment Rights Code also creates the Tribal Employment Rights Office ("TERO"), which is exclusively authorized to investigate employment-related complaints made by PBCI employees, and the Tribal Employment Rights Commission, which maintains jurisdiction to hear appeals of decisions made by the TERO. See id. at §§ 33-2-1, -4, -5; 33-8-2 to -6.

[2] The District Court took judicial notice of PBCI's designation as a federally recognized Indian tribe. (Doc. 25 at p. 12.) Like the District Court, this Court may properly take judicial notice of PBCI's recognition as an Indian tribe pursuant to Fed. R. Evid. 201(b). See, e.g., Solutia, Inc. v. McWane, Inc., No. 1:03-cv-1345-PWG, 2012 WL 2031350, at *9 n.9 (N.D. Ala. June 1, 2012) ("The court is authorized to take judicial notice of the contents of the Federal Register.") (citing 44 U.S.C. § 1507; Powers v. U.S., 996 F.2d 1121, 1125 n.3 (11th Cir. 1993)). This Court is also obligated to follow the Bureau of Indian Affairs' determination of an Indian tribe's federally recognized status. See Longo v. Seminole Indian Casino-Immokalee, 813 F.3d 1348, 1350 (11th Cir. 2016).

Williams is a former employee of PBCI. (Doc. 1). During her employment with PBCI, Williams was a Lab Manager/Chief Medical Technologist within the PBCI Health Department. (Id.; Doc. 11-1 at ¶ 5.) The PBCI Health Department is a Tribal Government Department located on PBCI Tribal Reservation Lands, and positions within the PBCI Health Department are Tribal government jobs. (Doc. 11-1 at ¶¶ 6, 8.) All employees of the PBCI Health Department, including Williams during her employment, are considered PBCI employees. (Id. at ¶ 7.)

PBCI terminated Williams' employment on June 17, 2014. (Id. at ¶ 10; Doc. 1.) Rather than submit a complaint to the TERO, as provided for in the Tribal Code, Williams submitted a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on September 10, 2014. (See Doc. 1). The EEOC dismissed Williams' EEOC charge and issued a notice of right to sue letter on September 22, 2014. (Id.) Williams filed suit on December 22, 2014, asserting a claim of disparate treatment discrimination against PBCI under the ADEA. (Id.)

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a dismissal pursuant to Fed. R. Civ. P. 12(b)(1) *de novo*. See, e.g., Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1328 (11th Cir. 2013). This Court reviews a district court's jurisdictional fact-findings for "clear error." Id. "The standard of review for a motion to dismiss is the same for the appellate court as it was for the trial court." Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1187 (11th Cir. 2004). A motion to dismiss is granted when the movant demonstrates "beyond a doubt that the plaintiff can prove no set of facts in support of [her] claim that would entitle [her] to relief." Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998).

Pursuant to Fed. R. Civ. P. 12(b)(1), when a federal court concludes it lacks subject-matter jurisdiction over a matter, the court "must dismiss the complaint in its entirety." Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 1244 (2006). The burden is on the plaintiff to establish that subject-matter jurisdiction exists. See, e.g., Lawrence v. U.S., 597 F. App'x 599, 602 (11th Cir. 2015).[3]

[3] See Fed. R. App. P. 32.1 (permitting citation of unpublished federal judicial opinions); 11th Cir. R. 36-2 (noting unpublished opinions may be cited as persuasive authority).

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed Williams' ADEA claim based on lack of subject-matter jurisdiction. Under the well-settled doctrine of tribal sovereign immunity—which has been repeatedly upheld by the United States Supreme Court and the Eleventh Circuit—a private lawsuit against a federally recognized Indian tribe such as PBCI is barred unless: (1) Congress has expressly and unequivocally abrogated immunity, or (2) the tribe has clearly waived its immunity.

Williams has provided no evidence that Congress expressly and unequivocally abrogated PBCI's tribal sovereign immunity from private claims asserted under the ADEA. Nor has she provided any evidence that PBCI waived its tribal immunity with respect to her ADEA claim, a dispositive point Williams essentially concedes in her appellate brief.[4]

Because the District Court lacked subject-matter jurisdiction over Williams' ADEA claim due to PBCI's tribal sovereign immunity, it correctly dismissed her Complaint pursuant to Fed. R. Civ. P. 12(b)(1). Accordingly, the Court should affirm the District Court's decision.

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[4] To the extent Williams has argued that PBCI waived its tribal sovereign immunity—an argument that she abandoned completely in her current brief—any such argument is without merit. See PBCI's October 26, 2015 Appellee Br. at § A.1.b, p. 18-20. The PBCI Tribal Code and Tribal Employment Rights Code each reiterate and preserve PBCI's right to tribal sovereign immunity from suit. See PBCI Tribal Code §§ 1-1-1; 33-8-9.

ARGUMENT

The District Court properly dismissed Williams' Complaint because it lacked subject-matter jurisdiction over her ADEA claim.

The District Court correctly held that it lacked subject-matter jurisdiction over Williams' claim because the ADEA does not expressly abrogate tribal sovereign immunity from private enforcement suits. This holding comports with a number of directly on point decisions from other federal courts. See, e.g., Tremblay v. Mohegan Sun Casino, 599 F. App'x. 25, 26 (2d Cir. 2015) (summary order) ("Congress has not unequivocally expressed its purpose to abrogate tribal sovereign immunity pursuant to the ADEA . . . ."); Boricchio v. Chicken Ranch Casino, Case Nos. 1:14-cv-818-822, 2015 WL 3648698, at *4 (E.D. Cal. June 10, 2015) ("[T]he ADEA does not waive a tribe's tribal sovereign immunity."); Bales v. Chickasaw Nation Indus., 606 F. Supp. 2d 1299, 1308 (D.N.M. 2009) ("Congress did not abrogate tribal sovereign immunity when it enacted the ADEA."). Williams has not identified a single decision holding that the ADEA abrogates tribal sovereign immunity from private enforcement actions, and PBCI is aware of no such case law.

I. Tribal sovereign immunity bars Williams' ADEA claim.

Notwithstanding Williams' arguments, which are discussed and refuted in detail below, the Court's analysis in this case should begin and end with an

examination of tribal sovereign immunity. A clear understanding of the doctrine is integral to the proper resolution of this appeal.

For nearly two centuries, the Supreme Court "has held firm and fast to the view that Congress's power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty." Puerto Rico v. Sanchez Valle, 579 U.S. ----, ----, No. 15-108, 2016 WL 3189527 (June 9, 2016) (slip op. at 11, n.5). Consequently, Indian tribes, despite being deemed domestic dependent nations, "exercise inherent sovereign authority over their members and territories." Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991). Indian tribes therefore possess "common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978). Accordingly, a suit against an Indian tribe "is barred unless the tribe has clearly waived its immunity or Congress has expressly and unequivocally abrogated that immunity."[5] Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224, 1228 (11th Cir. 2012). See also Freemanville Water Sys., Inc. v. Poarch Band of Creek

[5] The terms "Congressional authorization," when referencing authorization of suit against Indian tribes, and "Congressional abrogation," when referencing abrogation of tribal sovereign immunity, are used interchangeably in this brief.

Indians, 563 F.3d 1205, 1208 (11th Cir. 2009) ("Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought.").[6]

Just two years ago, the Supreme Court reaffirmed the doctrine of tribal sovereign immunity, stating that it had "time and again treated the doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030-31 (2014) (internal quotations omitted). "[I]t is fundamentally Congress's job, not [a court's], to determine whether or how to limit tribal immunity." Id. at 2037.

In discussing Congressional abrogation of tribal sovereign immunity, the Supreme Court has provided definitive guidance: "[S]uch a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and [t]o abrogate [such] immunity Congress must unequivocally express that purpose." Id. at 2031 (internal quotations omitted). This Court has faithfully and correctly followed the Supreme Court's direction on this issue, holding that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject

[6] "Tribal sovereign immunity is a jurisdictional issue." Furry, 685 F.3d at 1228. A district court must examine whether tribal immunity applies as part of a threshold subject-matter jurisdiction analysis before proceeding to the merits of a case. See Sanderlin v. Seminole Tribe of Fla., 243 F.3d 1282, 1285 (11th Cir. 2001).

tribes to suit under the act." Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1131 (11th Cir. 1999) (internal quotations and citations omitted). See also State of Ala. v. PCI Gaming Auth., 801 F.3d 1278, 1287 (11th Cir. 2015) ("The doctrine of tribal immunity is settled law and controls unless and until Congress decides to limit tribal immunity.") (internal quotations and citations omitted).

The "definitive language" of the ADEA does not abrogate tribal sovereign immunity. Indeed, the text of the ADEA contains no mention of tribal immunity at all, much less an express and unequivocal abrogation of tribal immunity from private lawsuits. See 29 U.S.C. §§ 621-634. In the absence of statutory language to the contrary, the ADEA does not "clearly and unequivocally" abrogate tribal sovereign immunity, nor does it authorize private lawsuits against Indian tribes. See Bay Mills Indian Cmty., 134 S. Ct. at 2031; Fla. Paraplegic, 166 F.3d at 1131. The Court need go no further to resolve this appeal. See, e.g., Tremblay, 599 Fed. App'x at 26 (holding that there is no private right of action against an Indian tribe under the ADEA because "Congress has not unequivocally expressed its purpose to abrogate tribal sovereign immunity pursuant to the ADEA"); Bales, 606 F. Supp. 2d at 1308 (dismissing plaintiff's ADEA claim due to tribal sovereign

immunity and noting, "[p]laintiff has, therefore, failed to carry his burden of showing that this Court has subject matter jurisdiction over the ADEA claims.").

While Williams attempts to draw support from the ADEA's legislative history, this Court has held that legislative history is irrelevant when determining whether abrogation of tribal immunity exists. See Fla. Paraplegic, 166 F.3d at 1131 ("Given the complete absence in the ADA of any reference to the amenity of Indian tribes to suit, exhaustive analysis of the legislative history would be superfluous."). In any event, however, the legislative history of the ADEA, like the statutory text, contains no reference to authorization of suits against Indian tribes or the abrogation of tribal immunity. See EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 250 (8th Cir. 1993) ("[N]either the statute nor the statute's legislative history indicates a clear and plain congressional intent to apply the ADEA to Indian tribes."); 113 Cong. Rec. S. 35054 (daily ed. Dec. 5, 1967); 113 Cong. Rec. H. 34739 (daily ed. Dec. 4, 1967); H.R. Rep. No. 90-805 (1967). Express evidence of Congressional intent to waive tribal sovereign immunity from private ADEA claims simply does not exist, no matter where Williams looks.

Although the question of whether the ADEA authorizes private lawsuits against Indian tribes is an issue of first impression for this Court, numerous other federal courts have dismissed ADEA claims for lack of subject-matter jurisdiction

based on tribal sovereign immunity. See Tremblay, 599 F. App'x at 26 (affirming dismissal of plaintiff-appellant's ADEA claim based on tribal immunity); Garcia v. Akwasasne Hous. Auth., 268 F.3d 76, 88 (2d Cir. 2001) (affirming dismissal of plaintiff-appellant's ADEA claim against agency of Indian tribe); Boricchio, 2015 WL 3648698 at *4 ("[T]he ADEA does not waive a tribe's tribal sovereign immunity."); Colmar v. Jackson Band of Miwuk Indians, No. CIV S-09-0742, 2011 WL 2456628, at *4 n.3 (E.D. Cal. June 15, 2011) ("[I]t has been held that the ADEA . . . does not abrogate tribal sovereign immunity."); Bales, 606 F. Supp. 2d at 1308 ("Congress did not abrogate tribal sovereign immunity when it enacted the ADEA.").

The Second Circuit's recent decision in Tremblay, which Williams largely ignores in her appellate brief, is particularly instructive. In affirming the lower court's decision to dismiss plaintiff-appellant's claim of discrimination under the ADEA, the Second Circuit stated:

> The Supreme Court has explained that, "[t]o abrogate tribal immunity, Congress must unequivocally express that purpose," and "to relinquish its immunity, a tribe's waiver must be clear." ***Congress has not unequivocally expressed its purpose to abrogate tribal sovereign immunity pursuant to the ADEA***, nor has plaintiff identified any applicable waiver of immunity from such suits in federal court. Accordingly, tribal sovereign immunity barred Tremblay's ADEA claim.

Tremblay, 599 F. App'x at 26 (emphasis added).

This Court should follow the well-reasoned guidance set forth in Tremblay, Garcia, and other federal decisions and the Supreme Court's clear directive on tribal sovereign immunity. Where a statute contains "no specific references to Indians or Indian tribes," it necessarily provides "[n]o support . . . for a finding that Congress has waived tribal sovereign immunity . . . ." Fla. Paraplegic, 166 F.3d at 1131-32. The ADEA is such a statute. Accordingly, the Court should affirm the District Court's dismissal of Williams' ADEA claim.

II. Williams' arguments are unavailing.

Williams advances two principal arguments in support of her mistaken belief that Congress has abrogated tribal sovereign immunity from private lawsuits under the ADEA. First, she presents a statutory interpretation argument comparing the language of Title VII and the ADEA, incorrectly contending that Congress's decision not to explicitly exempt Indian tribes from the definition of "employer" in the latter statute constitutes an explicit abrogation of tribal sovereign immunity. Second, she argues that the ADEA applies to Indian tribes because of its broad, general applicability.

Neither of these arguments has merit. The sole task before this Court is to determine whether "the definitive language *of the statute itself*" expressly and unequivocally states a Congressional intent to abrogate tribal immunity with

respect to private ADEA claims—not by engaging in a complicated and unnecessary examination of Title VII. Id. at 1131 (emphasis added). As discussed *supra*, Williams has not identified any Congressional abrogation of tribal sovereign immunity from private ADEA claims; at most, her arguments go to whether the ADEA *applies* to Indian tribes. But whether the ADEA technically applies to Indian tribes has no bearing on tribal sovereign immunity from suit. See, e.g., id., 166 F.3d at 1130 ("[W]hether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions."); Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357 (2d Cir. 2000) ("[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it."); Boricchio, 2015 WL 3648698 at *4 (quoting Fla. Paraplegic and Bassett in holding that the ADEA does not abrogate tribal sovereign immunity). Because the District Court correctly determined that Congress did not authorize ADEA suits against Indian tribes or otherwise abrogate tribal sovereign immunity from ADEA claims,[7] this Court should affirm the District Court's dismissal of Williams' Complaint under Fed. R. Civ. P. 12(b)(1).

[7] As discussed *supra*, Williams does not allege that PBCI waived tribal immunity.

A. Williams' comparison of the definitions of "employer" in Title VII and the ADEA is irrelevant to whether Congress authorized suit against Indian tribes under the ADEA.

Notwithstanding the well-established standard for Congressional abrogation of tribal sovereign immunity—"express and unequivocal"—Williams asks this Court to *infer* an abrogation of tribal sovereign immunity based on the ADEA's statutory definition of employer. This argument is immaterial and misguided.

1. This Court and others have already determined that the difference in the definition of "employer" in Title VII and the ADEA does not expressly and unequivocally abrogate tribal sovereign immunity in ADEA cases.

Williams devotes the majority of her appellate brief to comparing the definitions of "employer" in Title VII and the ADEA. She erroneously contends that because Congress excluded Indian tribes from the definition of "employer[s]" subject to Title VII but did not do so in the ADEA, it necessarily and manifestly intended to abrogate tribal sovereign immunity from private suits under the latter statute.

This argument has no bearing on the standard for abrogating tribal sovereign immunity, which looks to the language of the statute itself rather than comparing and reading multiple statutes in concert. Moreover, the cases cited by Williams comparing Title VII and the ADEA are readily distinguishable. Lorillard v. Pons, 434 U.S. 575, 98 S. Ct. 866 (1978), examined the remedies and procedures of the

Fair Labor Standards Act and the ADEA in determining whether a plaintiff has a right to a jury trial for an ADEA claim. Smith v. City of Jackson, 544 U.S. 228, 125 S. Ct. 1536 (2005), analyzed the operative anti-discrimination language of Title VII and the ADEA in determining that a disparate impact claim exists under the ADEA. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 129 S. Ct. 2343 (2009), analyzed the enforcement provisions of Title VII and the ADEA to determine whether a mixed motive defense was available in ADEA cases. None of these decisions had any bearing on the Supreme Court's standard for assessing a putative abrogation of tribal sovereign immunity.

Williams' entire argument depends upon drawing inferences from statutory language that does not express a clear and unequivocal abrogation of tribal sovereign immunity—the exact exercise this Court has warned against in the past. Fla. Paraplegic, 166 F.3d at 1131 (in determining whether Congress authorized suit against an Indian tribe, "inferences from general statutory language are insufficient."). See also Santa Clara Pueblo, 436 U.S. at 60, 98 S. Ct. at 1678 (in examining tribal immunity, courts should "tread lightly in the absence of clear indications of legislative intent").

Fla. Paraplegic is instructive. There, this Court examined whether Congress abrogated tribal sovereign immunity from private claims under Title III of the

Americans with Disabilities Act of 1990 ("ADA"). Arguing in favor of abrogation, plaintiffs-appellees noted that Title I of the ADA (which prohibits discrimination against disabled individuals in employment matters) specifically excluded Indian tribes from its definition of "employer," while Title III lacked a similar exclusion. See Fla. Paraplegic, 166 F.3d at 1133 n.17. The absence of a similar exclusion in Title III, plaintiffs-appellees argued, evinced Congressional intent to abrogate tribal immunity for Title III ADA claims. See id. This Court summarily dismissed the argument, stating: "This argument supports the conclusion . . . that Title III [of the ADA] *applies* to Indian tribes but sheds no light upon the critical question of whether tribes also may be sued by private citizens for violating the law." Id. (emphasis in original). The Court then held that Title III of the ADA, which, like the ADEA, made "no specific reference to Indians or Indian tribes," did "not meet the strict requirements" necessary to establish an abrogation of tribal sovereign immunity. Id. at 1131.

Other Circuits have considered the very argument that Williams makes here in the context of determining whether a federal statute abrogates a treaty right—an analysis that, unlike a determination of whether Congress has abrogated tribal sovereign immunity, actually considers legislative intent. Even in that context,

however, the Title VII/ADEA employer definition argument that Williams advances has been rejected. As the Eighth Circuit has explained:

> Although the two provisions are generally similar, differences do exist. Under ordinary canons of construction, the omission of the phrase "an Indian tribe" in the ADEA in comparison with its inclusion in Title VII could be construed as indicating that Indian tribes were intended to be covered by the ADEA. . . . United States v. Dion . . ., however, indicates that some affirmative evidence of congressional intent, either in the language of the statute or its legislative history, is required to find the requisite "clear and plain" intent to apply the statute to Indian tribes. Furthermore, ambiguities of congressional intent must be resolved in favor of the tribal sovereignty . . . . Because of the special rules of construction that apply in a case such as this, we do not find that a clear and plain intention of Congress should be extrapolated from the omission of the phrase "an Indian tribe" from the definition of "employer" in the ADEA.

Fond du Lac, 986 F.2d at 250-51 (internal citations omitted). See also EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) (reversing a district court decision applying the ADEA to an Indian tribe based on a comparison of the definitions of employer in Title VII and the ADEA).[8] Williams' argument by

[8] Williams misleadingly characterizes both Fond du Lac and Cherokee Nation as cases "consider[ing] the issue of tribal immunity under the ADEA." Appellant Br. at 18. Those cases dealt not with private litigants suing a tribe under the ADEA, but rather the federal government suing to enforce provisions of the ADEA. Under those circumstances, sovereign immunity is not an issue, as it is settled that tribal sovereign immunity does not apply to suits by the federal government. Instead, the issue in cases like Fond du Lac and Cherokee Nation is whether the ADEA abrogates treaty rights. Unlike the test for abrogation of sovereign immunity, which requires clear and unequivocal statutory language, the test for abrogation of a treaty right requires only a "clear and plain congressional intent," U.S. v. Dion,

analogy to Title VII is incompatible with this Court's precedent, and it has been repeatedly rejected by other federal appellate courts. It in no way undermines the District Court's decision or PBCI's tribal sovereign immunity.

Williams' efforts to undercut the authority supporting PBCI's position are unconvincing. She attempts to wave away Fond du Lac and Cherokee Nation by noting that they contained dissenting opinions. These dissents, from which Williams' appellate brief draws heavily, have no precedential and little persuasive value. They certainly cannot overcome relevant Supreme Court and Eleventh Circuit precedent requiring unequivocal rather than inferential evidence of Congressional intent to support an abrogation of tribal sovereign immunity.

Williams also attempts to discount much of the precedent cited by PBCI by noting that those cases did not consider the Supreme Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S. Ct. 2666 (1976). It is true that the courts in Tremblay, Garcia, Fond du Lac, and Cherokee Nation, as well as other decisions cited by PBCI, did not consider Fitzpatrick. That is because Fitzpatrick has nothing to do with tribal sovereign immunity or the ADEA. In Fitzpatrick, the Supreme Court answered the narrow question of whether Congress, acting under the Fourteenth Amendment, had the power to authorize federal courts to award

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476 U.S. 734, 739 (1986), and therefore entails an inquiry beyond the statutory language itself.

damages against state entities in Title VII matters notwithstanding Eleventh Amendment state sovereign immunity. See Fitzpatrick, 427 U.S. at 447-48, 96 S. Ct. at 2667-68. Relying solely on the language of the Fourteenth Amendment, the Court held that Congress did have such authority. U.S. Const. amend. XIV, § 5; Fitzpatrick, 427 U.S. at 456, 96 S. Ct. at 2671. The Court's holding did not focus on the requirements for abrogation of state sovereign immunity, nor did it even mention the ADEA or the doctrine of tribal sovereign immunity. See generally Fitzpatrick, 427 U.S. at 447-56, 96 S. Ct. at 2667-2672.

Fitzpatrick's examination of Congress's ability under the Fourteenth Amendment to authorize Title VII claims against state entities is completely irrelevant to this Court's analysis of the ADEA, tribal immunity, or Congressional authorization of ADEA claims against Indian tribes. Simply put, Fitzpatrick has nothing to do with this case.

2. The amendments to Title VII allowing for suit against state entities are immaterial to a determination of Congressional authorization of suits against Indian tribes under the ADEA.

As discussed *supra*, the text of Title VII is wholly irrelevant to the question of whether Congress, in the text of the ADEA, unequivocally expressed an intent to abrogate tribal sovereign immunity from ADEA claims. Undeterred by this fact, Williams attempts to extend her argument by analogy to Title VII a step further,

contending that Congressional amendments to Title VII in 1972 support the abrogation of tribal sovereign immunity from her ADEA claim in this case.

Williams again relies heavily on Fitzpatrick v. Bitzer in presenting her argument, and her reliance is again misplaced. While Fitzpatrick held that the 1972 amendments to Title VII allowed plaintiffs to assert Title VII claims against state entities, analogizing the Fitzpatrick decision to the instant matter is inappropriate. As noted in Fitzpatrick, the original text of Title VII excluded "a State or political subdivision thereof" from the definition of "employer," which was defined in relevant part as "a *person* engaged in an industry affecting commerce who has fifteen or more employees." 78 Stat. 253, Pub. L. 88-352 (emphasis added). In 1972, Congress amended Title VII to remove the phrase "a State or political subdivision thereof" from the list of entities excluded from the definition of "employer." 86 Stat. 103, Pub. L. 92-261. Congress further amended the definition of "person" to specifically include "governments, governmental agencies, [and] political subdivisions," 86 Stat. 103, 42 U.S.C. § 2000e(a), thereby affirmatively bringing them within the definition of "employer" for purposes of Title VII. In addition, the definition of "employee" was amended to include those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." 86 Stat. 103, 42 U.S.C. § 2000e(f). Thus, after the 1972

amendments, the statutory language made it abundantly clear that Congress intended to include state governments within the scope of Title VII.

In contrast, neither the original text of the ADEA, nor the 1974 amendments to the ADEA, contained "Indian tribes" within the exclusions to the definition of "employer." 81 Stat. 605, Pub. L. 90-202; 88 Stat. 74, Pub. L. 93-259. Contrary to Williams' repeated contention, Congress never affirmatively deleted "Indian tribes" from the text of the ADEA—as it had "a State or political subdivision thereof" from Title VII. Therefore, Williams' reliance on Congressional amendment of Title VII is particularly immaterial to determining whether Congress abrogated tribal sovereign immunity from private ADEA claims.

Despite Williams' rampant speculation as to the reasoning behind the omission of the term "Indian tribes" in the statutory exclusions to the ADEA's definition of "employer," this anomaly[9] is irrelevant to the Court's determination of whether the text of the ADEA expressly and unequivocally abrogates tribal sovereign immunity. At most, the differences in Title VII and the ADEA show that plaintiffs may not assert private causes of action against Indian tribes under Title VII for two reasons (tribal sovereign immunity and the "Indian tribes" exclusion

[9] "[T]his Court does not revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address." Bay Mills Indian Cmty., 134 S. Ct. at 2033.

that renders Title VII inapplicable to tribes),[10] whereas only tribal sovereign immunity protects tribes from private ADEA claims. See Fla. Paraplegic, 166 F.3d at 1133 n.17 (the fact that a particular statute "*applies* to Indian tribes [] sheds no light upon the critical question of whether tribes also may be sued by private citizens for violating the law"). Either way, Congressional authorization for Williams' ADEA claim against PBCI is lacking.

3. Even if the omission of the term "Indian tribes" in the ADEA created ambiguity, such ambiguity would not reflect an express and unequivocal abrogation of tribal sovereign immunity.

Even if the Court were to accept Williams' arguments related to the definitions of employer in Title VII and the ADEA and her reliance on Fitzpatrick v. Bitzer as relevant to this case, she at most would have succeeded in establishing that the ADEA may be ambiguous with respect to Indian tribes—the complete opposite of the "express and unequivocal" standard for abrogation of tribal sovereign immunity. As this Court previously stated when discussing abrogation of tribal immunity, "[t]o be effective the expression of congressional intent must be a clarion call of clarity. Ambiguity is the enemy of abrogation." Freemanville Water

[10] Indian tribes would still be protected from private suit under Title VII based on tribal immunity, even if "Indian tribes" were not excluded from the Title VII definition of employer. See Longo, 813 F.3d at 1350 (affirming lower court's dismissal of Title VII matter based on tribal sovereign immunity).

Sys., 563 F.3d at 1206 ("After a hard look . . . the only thing that is unmistakably clear to us is that the statutory language does not make it unmistakably clear that Congress intended to abrogate tribal sovereign immunity."). By definition, a statute that is ambiguous in its treatment of tribal sovereign immunity does not clearly and unequivocally abrogate such immunity.

Moreover, it is important to bear in mind the general canon of construction requiring that statutory ambiguities be resolved in favor of Indian tribes. As this Court has held, "to the extent that the relevant language of the . . . Act is ambiguous as to its coverage and effect on tribal sovereignty, any ambiguity must be resolved in favor of the Tribe." Sanderlin, 243 F.3d at 1291.

B. The ADEA's broad general applicability has no effect on tribal sovereign immunity.

Williams states in her appellate brief that the ADEA is a statute of broad, general applicability that may apply to Indian tribes. Williams errs, however, in attempting to equate Congress's making a statute applicable to Indian tribes with a Congressional abrogation of tribal sovereign immunity from private suits to enforce that statute. As this Court has held, these two concepts present "entirely different questions." Fla. Paraplegic, 166 F.3d at 1130. See also Bassett, 204 F.3d at 357 ("The fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it."); Boricchio, 2015 WL 3648698 at *4

(quoting Fla. Paraplegic and Bassett). In other words, the ADEA may apply to an Indian tribe, but that does not abrogate tribal immunity from a private cause of action under the ADEA.

In Fla. Paraplegic, the Court explicitly considered and rejected the argument that tribes lack immunity from private suits under generally applicable federal statutes. While the Court agreed that the ADA is a statute of general applicability, it went on to explain that "[t]he analysis does not stop there, however, for whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." Fla. Paraplegic, 166 F.3d at 1130 (emphasis in original). The Court reached a similar conclusion two years later in Sanderlin, reiterating that "[t]he bare proposition that broad general statutes have application to Native American tribes does not squarely resolve whether there was abrogation of tribal immunity in this particular instance." Sanderlin, 243 F.3d at 1292.

The ADEA is a statute of broad general applicability. But the ADEA does not authorize private suits against Indian tribes, irrespective of whether it applies to them. For these reasons, Williams' argument that the ADEA is a generally applicable statute that applies to PBCI is irrelevant to PBCI's tribal sovereign immunity from ADEA claims.

CONCLUSION

The District Court correctly held, like every other federal court to consider the question, that the ADEA does not abrogate tribal sovereign immunity from private lawsuits to enforce the Act. It is well settled that any such abrogation cannot be implied, but must be expressed unequivocally. Williams concedes, as she must, that the ADEA makes no mention of tribal sovereign immunity, yet she asks this Court to interpret that silence as an unequivocal expression of Congressional intent. The Court explicitly rejected an identical invitation with respect to the ADA in Fla. Paraplegic, and it should do the same here with respect to the ADEA. The District Court's decision should be affirmed.

Respectfully submitted,

/s/ M. Tae Phillips
James C. Pennington (ASB-1287-N62J)
M. Tae Phillips (ASB-6565-W74P)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
420 20th Street North, Suite 1900
Birmingham, Alabama 35203
Telephone: (205) 328-1900
Facsimile: (205) 328-6000
james.pennington@ogletreedeakins.com
tae.phillips@ogletreedeakins.com

Attorneys for Defendant-Appellee
Poarch Band of Creek Indians

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 5,869 words according to the word-count function of the word-processing system used to prepare the brief.

/s/ M. Tae Phillips
Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2016, I electronically filed the foregoing with the Clerk of Court using the Eleventh Circuit's electronic filing system which will send notification of such filing to all counsel of record. A copy has also been served via First Class U.S. Mail, postage prepaid and properly addressed, to the following:

Robert L. Wiggins, Jr.
Candis A. McGowan
L. William Smith
WIGGINS, CHILDS, PANTAZIS, FISHER & GOLDFARB
The Kress Building
301 19th Street North
Birmingham, Alabama 35203

Further, seven (7) paper copies have been sent via Federal Express to the Appellate Court Clerk's office.

/s/ M. Tae Phillips
OF COUNSEL