UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Leigh Anna Harper,

Plaintiff,

vs.

Boys & Girls Club of the White Earth Reservation,
White Earth RTC Human Resources,
White Earth RTC Education Department,

Defendants.

Case No.: 0:16-CV-01797-JRT-LIB

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff Leigh Harper was employed as a Department Service Coordinator at the Boys & Girls Club of the White Earth Reservation from approximately March 23, 2011 until her employment separation on May 26, 2015. *Letter of Employment Termination* (attached as Exhibit 1). Following her termination, Plaintiff commenced an employment appeal pursuant to the White Earth Band's Employee Handbook alleging that she was wrongly dismissed from her position at the Boys & Girls Club of the White Earth Reservation. Thereafter, Plaintiff failed to follow through with the appeal process specified in the applicable policy.

On October 2, 2015, Plaintiff filed a notice of discrimination with the U.S Equal Employment Opportunity Commission (EEOC) alleging violations of Title VII of the Civil Rights Act (Title VII) and the Americans with Disabilities Act (ADA). On March 15, 2016, the EEOC concluded that Plaintiff's allegations did not establish violations of Title VII and the ADA. Plaintiff cannot proceed with this lawsuit because this Court does not have subject matter jurisdiction. First, the Defendants enjoy sovereign immunity from Plaintiff's claims in federal

court, and such immunity has not been waived or abrogated. Second, because Plaintiff's claims brought under Title VII, ADA, and Rehabilitation Act of 1973 do not apply to the Defendants there is no federal question presented to the court. For these reasons, Plaintiff's lawsuit against the Defendants must be dismissed.

STANDARD OF REVIEW

A federal court's jurisdiction is limited to what is recognized by the United States Constitution or federal statute: "Federal courts are not courts of general jurisdiction and have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Marine Equip. Mgmt. Co. v. United States*, 4 F.3d 643, 646 (8th Cir. 1993) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). "Subject-matter jurisdiction is a threshold requirement which must be assured in every federal case." *Kronhom v. Fed. Deposit Ins. Corp.*, 915 F.2d 1171 (8th Cir. 1990). "A motion to dismiss pursuant to Rule 12(b)(1) challenges the Court's subject matter jurisdiction and requires the court to examine whether it has authority to decide the claims. *Damon v.* Groteboer, 937 F.Supp.2d 1048, 1063 (D. Minn. 2013). A party may challenge the court's subject matter jurisdiction at any time because the defense may not be waived. *Bueford v. Resolution Trust Corp.*, 991 F.2d 481 (8th Cir. 1993). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

In deciding a motion under Rule 12(b)(1), the court must first "distinguish between a 'facial attack' and a 'factual attack.'" *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 2005). In

other words, in a facial challenge, the court "determine[s] whether the asserted jurisdictional basis is patently meritless by looking to the face of the complaint, and drawing all reasonable inferences in favor of the plaintiff." *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005) (citations omitted). In a factual attack, the court "inquires into and resolves factual disputes," *Falibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002), and is free to "consider [ ] matters outside the pleadings," *Osborn*, 918 F.2d at 729 n.6. The nonmoving party in a factual challenge "does not have the benefit of 12(b)(6) safeguards." *Id.*

Regardless of the nature of the challenge to jurisdiction, it is well-settled that the "plaintiff has the burden of establishing that subject matter jurisdiction exists." *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006). Here, Plaintiff is unable to meet this burden. It is clear that the Court does not have jurisdiction to hear Plaintiff's claims against the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, and the White Earth RTC Education Department because each of the entities is an agency of the White Earth tribal government, which is immune from suit. Therefore, Plaintiff's lawsuit against the Defendants must be dismissed.

ARGUMENT

I. The Defendants Enjoy Sovereign Immunity from Plaintiff's Claims in Federal Court.

This Court does not have jurisdiction to hear Plaintiff's claims against the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, and the White Earth RTC Education Department because these Defendants enjoy sovereign immunity from suit. "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Indian tribes "have the power to make their own substantive law in internal matters." *Id.*

"Indian tribes have long been recognized as possessing . . . immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58. "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998).

In *Hagen*, the plaintiffs, former employees of a tribal college, brought a race discrimination action against the Sisseton-Wahpeton Sioux Tribe, which operated the tribal college. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000). The tribal college was chartered, funded, and controlled by the tribe to provide education to tribal members on Indian land. *Id.* at 1043. The Eighth Circuit determined that the tribal college was entitled to tribal sovereign immunity since it "serves as an arm of the tribe and not as a mere business." *Id.*

The White Earth Band is a component of the Minnesota Chippewa Tribe, which is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748-02 (January 29, 2014). As such, the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, and White Earth RTC Education Department as arms of the White Earth tribal government enjoy sovereign immunity from suit to the same degree as the White Earth Band. These Defendants all enjoy sovereign immunity from Plaintiff's claims because they are tribal entities or agencies of the White Earth Band. A tribe's sovereign immunity extends to its agencies. *See Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 (8th Cir. 2000) (holding that a community college chartered by the Sisseton-Wahpeton Sioux Tribe was an arm of the tribe and entitled to sovereign immunity); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998) (holding that "a housing authority, established by a

tribal council pursuant to its powers of self-government, is a tribal agency" and therefore, entitled to sovereign immunity); *Ferguson v. SMSC Gaming Enterprise*, 475 F.Supp.2d 929 (D. Minn. 2007) (holding that the Gaming Enterprise responsible for operating the Indian tribe's casino is a branch of the tribal government). Accordingly, since all three Defendants constitute arms of the White Earth Band, they have sovereign immunity from Plaintiff's claims.

The White Earth Band's Human Resources Policy 311 provides a limited waiver of tribal sovereign immunity to review an employment termination decision. However, if an employee fails to follow the specific process outlined in the policy, he or she is outside of the terms of the limited waiver of sovereign immunity. *Policy Number 311 of the White Earth Band's Appeal for Termination Policy* (attached as Exhibit 2). Here, Plaintiff failed to follow the procedures set forth in Policy 311 to have the merits of her employment termination reviewed by the White Earth Tribal Court. *White Earth Tribal Court Dismissal Order* (attached as Exhibit 3). Because Plaintiff failed to appear at the Appeal Board hearing scheduled for the purpose of addressing the merits of her termination; and because she failed to file a notice of appeal within five days of receipt of notice of her employment termination, Policy 311 cannot constitute a waiver of tribal sovereignty permitting Plaintiff to bring this lawsuit against the Defendants. Plaintiff failed to comply with the terms of the limited waiver of sovereign immunity.

Simply, this Court does not have jurisdiction to consider Plaintiff's claims against the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, or the White Earth RTC Education Department because each of the Defendants enjoy sovereign immunity from lawsuit. Because Plaintiff has failed to follow the process outlined in the limited waiver of sovereign immunity, her lawsuit against the Defendants must be dismissed.

II. Title VII, the ADA, and the Rehabilitation Act of 1973 Do Not Permit Plaintiff's Claims Against the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, and the White Earth RTC Education Department.

Further reasons that this Court does not have jurisdiction over the subject matter of this action are that Title VII of the Civil Rights Act, the American with Disabilities Act, and the Rehabilitation Act of 1973 include specific exemptions which do not permit Plaintiff to bring claims against the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, and the White Earth RTC Education Department as entities of the White Earth Band. Accordingly, there is no federal question presented to this Court and Plaintiff's lawsuit against the Defendants must be dismissed because this court lacks subject-matter jurisdiction.

In *Ferguson*, the plaintiff, a former casino employee, brought an employment discrimination claim under Title VII of the Civil Rights Act against his former employer, SMSC Gaming Enterprise, which operates Mystic Lake Casino. *Ferguson v. SMSC Gaming Enterprise*, 475 F.Supp.2d 929 (D. Minn. 2007). The court determined that as an agency of the Shakopee Mdewakanton Sioux Community of Minnesota, SMSC Gaming Enterprise was entitled to sovereign immunity. *Id.* at 930–31. The court also found that "even if the tribe had waived its sovereign immunity," the plaintiff could not establish that the court had jurisdiction over his claims because Title VII does not apply to SMSC Gaming Enterprise. *Id.* at 931–32. Therefore, the court dismissed the plaintiff's lawsuit for lack of subject-matter jurisdiction. *Id.*

In *Charland*, the plaintiff, a former employee at Mystic Lake Casino, brought a lawsuit against the Shakopee Mdewakanton Sioux Community, and Little Six Inc., a corporation wholly-owned by the Shakopee Mdewakanton Sioux Community. *Charland v. Little Six, Inc.*, 112 F.Supp.2d 858, (D. Minn. 2000). The plaintiff alleged various claims, including discrimination in violation of the ADA and Title VII. *Id.* at 861. The Eighth Circuit affirmed the district

court's order adopting the magistrate judge's report and recommendation finding that "both Title VII and the ADA explicitly exempted Indian tribes from the definition of employer" and thus dismissing the plaintiff's claims against both the Shakopee Mdewakanton Sioux Community and Little Six, Inc. under Title VII and the ADA for lack of jurisdiction. *Charland v. Little Six*, 13 Fed.Appx. 451, 249 n.1 (8th Cir. 2001).

The ADA prohibits "employers" from engaging in discrimination based on disability. 42 U.S.C. § 12112(a)–(2). The ADA expressly excludes Indian Tribes from the definition of "employer." The language of the ADA states that "[t]he term 'employer' does include -- (i) . . . a corporation wholly owned by the government of the United States, or an Indian tribe." 42 U.S.C. 12111(5)(B).

Title VII of the Civil Rights Act also specifically excludes Indian tribes from the definition of employer: "The term 'employer' does not include (1) . . . an Indian tribe." 42 U.S.C. § 2000e(b). The Supreme Court has explained that this "exception reveals a clear congressional recognition in Title VII, of the unique legal status of tribal and reservation-based activities." *Morton v. Mancari*, 417 U.S. 535, 545–46 (1974). The court in *Ferguson* ruled that this exclusion has consistently been held to mean that "Title VII claims cannot be brought against Indian tribes or their agencies or businesses." *Ferguson v. SMSC Gaming Enter.*, 475 F.Supp.2d 929, (D. Minn. 2007).

The Rehabilitation Act of 1973 allows lawsuits against a local agency of an Indian tribe, but only when the agency "has an agreement with the designated State agency to conduct a vocational rehabilitation program . . . ." 29 U.S.C. § 705(24). This provision in the Rehabilitation Act is concerned with a particular kind of program, and does not contain a clear and unequivocal intent by Congress that is necessary to abrogate tribal sovereignty with respect

to all claims against an Indian tribe. *See Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2031 (2014) ("[t]he baseline position, we have often held, is tribal immunity; and [t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose. That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.") (internal citations omitted). Here, Plaintiff also does not allege that the White Earth Band maintains a covered vocational rehabilitation program. Plaintiff has not pointed to an express provision of the Rehabilitation Act of 1973 that unequivocally demonstrates that Congress intended to abrogate tribal sovereign immunity in the type of circumstances at issue. Furthermore, Plaintiff has not presented any evidence that the White Earth Band has waived its sovereign immunity to be sued for claims under the Rehabilitation Act.

Because the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, and the White Earth RTC Education Department are tribal entities of the White Earth Band, which are excluded from the provisions of Title VII, the ADA, and the Rehabilitation Act of 1973, there is no federal question presented to this Court. Therefore, Plaintiff's lawsuit against the Defendants must be dismissed because this Court lacks subject matter jurisdiction in this matter.

CONCLUSION

For the reasons set forth above, the Defendants, the Boys & Girls Club of the White Earth Reservation, White Earth RTC Human Resources, and the White Earth RTC Education Department of the White Earth Band respectfully request that this Court issue an order dismissing Plaintiff's lawsuit against the Defendants in its entirety.

Respectfully submitted,

Dated: June 17, 2016

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