IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

KIM R. JIM,

Plaintiff,

v. **No. 1:17-cv-01114-RB-KBM**

SHIPROCK ASSOCIATED SCHOOLS, INC.,

Defendant.

REPLY BRIEF

I.

Plaintiff has not controverted any of the material facts set out at Part C of SASI's Memorandum in Support of Motion for Summary Judgment (Doc. 23). Plaintiff has not identified any disputed issues of material fact. Thus, in ruling on SASI's Motion for Summary Judgment, all the facts set out in Part C of SASI's Memorandum should be taken as true. *Bruce v. Martin-Marietta Corp.,* 544 F.2d 442 (10th Cir. 1976).

The only variance in the facts as presented by the parties in their respective statements of fact is the contrast between SASI's Fact # 2 (Doc. 23, p.2) and Plaintiff's Fact # 5 (Doc. 27, p. 2). There, SASI says it is incorporated under state law and began (but did not complete) incorporation under Navajo law. Plaintiff says SASI is incorporated both under state law and Navajo law (Doc. 27, p.2). That difference is not material. It does not matter for purposes of the Title VII issue here presented under which jurisdiction's law SASI is incorporated. *Giedosh v. Little Wound School Bd., Inc.,* 995 F.Supp. 1052 (D.S.D. 1997)*; EEOC v. Navajo Health Foundation-Sage Memorial*

Hospital, 2007 WL 2683825 (D.Az. 2007) (unpublished)*; Pink v. Modoc Indian Health Project, Inc.* 157 F.3d 1185 (9th Cir. 1998); *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999).

Thus, no matter which version of reality is taken as true as to the state of SASI's incorporation, the difference is not material since either version of that reality supports SASI's position. *Amparan v. Lake Powell Car Rental Companies*, 882 F.3d 943, 947 (10th Cir. 2018):

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Plaintiff's Fact # 12 (Doc. 27, p. 3) also does not undermine SASI's legal position. The issue discussed in SASI's minutes is its application to BIE for supplemental special education funds and whether SASI's TCSA grant applications had to be submitted by or through the Navajo Nation. Under the federal regulation referred to in the minutes, 25 C.F.R. § 39.105, such applications are made directly to the BIE. The discussion referenced at Plaintiff's Fact # 12 (Doc. 27, p. 3) pertained to a delay in processing such an application because it had been routed through the Navajo Nation. Under the plain language of 25 C.F.R. § 39.105, the Nation had no formal role in making or processing such applications. This process is similar to the process in the TCSA itself (25 U.S.C. §§ 2502(a) and (d), 2503(b)(1)(a)), and as evidenced by Exhibit A(2) (Doc. 5), under which a tribal organization authorized to seek funding under the TCSA by their tribe may apply directly to the BIE for TCSA grants and receive those grant funds directly, without

channeling them through their tribe. The SASI school board's discussion regarding the direct funding of SASI from the Bureau of Indian Education does not in any way alter SASI's status as a Navajo community school and Navajo tribal organizations requiring Navajo Nation authorization to operate per Title 10 of the Navajo Nation Code, and the TCSA as well, with the duty to comply with such Navajo laws and requirements (consistent with federal law) as the Nation otherwise opts to impose as a condition of obtaining or maintaining that status. *See,* Doc. 23, pp. 11-12.

None of the other facts set out in Plaintiff's Response (Doc. 27, pp. 2-4) undermine SASI's status as a Navajo community school operating under Title 10, N.N.C. and the TCSA, which requires authorization of the Nation to operate subject to Navajo law and the ultimate control of the Nation, all as shown in SASI's Memorandum (Doc. 23). *See,* Doc. 23, pp. 11-12.

Thus, there exist no disputed issue of material fact which forecloses entry of summary judgment for SASI and SASI has shown it is entitled to entry of summary judgment as a matter of law ruling that it is covered by the Indian Tribe exemption to Title VII based on those undisputed material facts. *See,* below and all the arguments set out at Doc. 23.

II.

Plaintiff for the first time now argues (Doc. 27, pp. 1, 2, 4, 6) that 25 C.F.R. § 38.10(c) (which adopts equal employment opportunity ("EEO") rules for implementing Title VII protections for federal employees of *federally operated* Indian schools) also applies to tribally controlled schools *not operated* by the Bureau of Indian Education

("BIE"). Plaintiff is mistaken. 25 C.F.R. § 38.10(c) (and all of 25 C.F.R. § 38) only applies to *BIE operated Indian schools* and "advisory" school boards which have a limited role in hiring decisions for teachers employed to work in such schools and not tribally controlled schools such as SASI. *See,* § 38.3—Definitions "Local School Board" limiting the role of such boards in re "Bureau operated schools" and § 38.7 "Appointment of Educators." Part 38 does not apply to tribally controlled schools operated by tribes or tribal organizations such as SASI under 25 U.S.C. § 2501 *et seq.*, the Tribally Controlled Schools Act ("TCSA").

The regulations applicable to tribally controlled schools receiving federal funds under the TCSA are set out at 25 C.F.R. Part 44 and incorporate many of the Indian Self-Determination Act ("ISDA") regulations at 25 C.F.R. Part 900. *See,* Part 44.110. None of the Part 38 regulations are made applicable to TCSA schools. *See,* 25 C.F.R. Part 44.101:

> § 44,101. What directives apply to a grantee under this part?
> In making a grant under this part the Secretary will use only:
> (a) The Tribally Controlled Schools Act;
> (b) The regulations in this part; and
> (c) Guidelines, manuals, and policy directives agreed to by the grantee.

Thus, Plaintiff's argument (Doc. 27, p. 2) that "an express aspect of federal control over Defendant includes a requirement that it obey federal law in preventing pregnancy discrimination" is flatly wrong as a matter of law.

III.

Plaintiff next argues that the fact that TCSA school employees are covered by the Federal Tort Claims Act, 28 U.S.C. § 2601 *et seq.* ("FTCA") (based on Pub. L. 101-512)

for torts based on their actions or inactions in carrying out their TCSA grant operations somehow makes them federal employees covered by the EEO rules that apply to BIE school employees.

Again, Plaintiff is just plain wrong. The fact that TCSA school employees are treated as if they were federal employees for FTCA purposes does not make them federal employees for any other purpose. *Henderson v. United States*, 2012 WL 4498871 (D.N.M.) (allegation that defendants were tribal members working under BIA Pub. L. 93-638 contract did not establish that they were federal officials, employees or agents to support Bivens claim); *see*, *Snyder v. Navajo Nation*, 371 F.3d 658, 662-663 (9th Cir. 2004) (even though Indian contractors and their employees are given FTCA coverage by § 314 of Pub. L. 101-512 "Congress … did not intent Section 314 to provide a remedy against the United States in civil actions unrelated to the FCTA."). *U.S. v. Cleveland*, 2018 WL 61121

74 (D.N.M. 11/21/2018) (tribal police officer operating under an ISDA contract (not holding a federal police commission) was not a federal police officer for purposes of 17 U.S.C. §§ 1111 and 1114 even though he was covered as if he was a federal employee by the FTCA per Pub. L. 101-512); *Shirk v. United States*, 773 F.3d 999 (9th Cir. 2014) (tribal employees carrying out work under tribal ISDA contract are deemed federal employees for purpose of the FTCA per Pub. L. 101-512); *see also*, *Romero v. Peterson*, 930 F.2d 1502 (10th Cir. 1991) (reversing district court's ruling that defendant police officers deputized as tribal police officers were subject to *Bivens* claims, and remanding

for further proceedings); *Romero v. Peterson*, 5 F.3d 547 (10th Cir. 1993) (affirming district court's ruling on remand that defendant police officers were not subject to *Bivens* claims since they "were police officers employed by Picuris Pueblo," even though they might have had the status of federal employees under the FTCA).

IV.

Plaintiff next argues that TCSA schools are subject to more federal control than tribal control. (Resp., pp. 8-9). Again, Plaintiff is mistaken. SASI acknowledges that it must comply with federal requirements applicable to TCSA schools, but that does not obviate the fact that SASI cannot be a TCSA school without the Navajo Nation's authorization and that SASI is subject to many requirements and controls imposed by the Nation as a condition of obtaining and maintaining its status as a tribally controlled TCSA school. Doc. 23, pp. 11-12. In contrast, as acknowledged in *Bitsilly v. Bureau of Indian Affairs*, 253 F.Supp.2d 1257, 1266 (D.N.M. 2003) the BIE has no authority to establish or enforce additional rules or requirements on TCSA schools except those set out in 25 U.S.C. § 2501 *et seq.* or 25 C.F.R. Part 44; and the TCSA does not give the BIE any direct operational control over TCSA schools, even when the BIE might be expected to ensure TCSA school compliance with other federal law. In *Bitsilly*, where the court acknowledged that the "BIA now maintains that it does not, and indeed *cannot*, monitor the tribally controlled schools for compliance with the IDEA because of the limitations placed on it by the TCSA. For instance, section 2503(b)(1)(B) clearly states that 'tribally controlled schools for which grants are provided shall not be subject to any requirements,

obligations, restrictions, or limitations imposed by the Bureau that would otherwise apply solely by reason of the receipt of funds' provided under federal law, including the IDEA.

"Defendants argue that, because the tribally controlled schools cannot be subjected to any further requirements or limitations, they (Defendants) are absolved of the (state educational agency) duties to monitor and assure that the tribally controlled schools comply with the IDEA. The Court finds that Defendants' interpretation of the TCSA is unreasonable." On this basis, the Court ruled that while "the TSCA does modify the relationship between the Bureau and tribally controlled schools and may protect the tribally controlled schools from intervention by Defendants," the BIA nonetheless had a separate and enforceable trust duty to take appropriate action to indirectly help the Indian student involved secure an appropriate individual education plan ("IEP") per the IDEA at another school in a suit in which the BIA was sued by the students' parents who sought to ensure that their child receive an appropriate education via a suitable IEP which the TCSA school she attended had not provided.

V.

Plaintiff next argues (Doc. 27, pp. 6-8) that SASI "is not an Indian Tribe" for purposes of the Title VII exemption. SASI does not argue that it is an Indian Tribe. Instead, SASI argues that it is entitled to be treated as an Indian Tribe for purposes of the Title VII exemption because of its status as a Navajo tribal organization carrying out essential governmental functions of the Navajo Nation pursuant to Navajo law and the TCSA, and subject to the ultimate control of the Nation. (Doc. 23, pp. 11-19).

Plaintiff's legal arguments to the contrary (summarized at Do. 27, pp. 6-7) simply do not withstand scrutiny. Specifically, and contrary to those legal arguments, (1) Defendant's school operations are, as a matter of tribal and federal law, subject to the ultimate control of the Navajo Nation (Doc. 23, pp. 11-12); (2) SASI's status as a Navajo tribal organization operating its schools under Title 10 of the N.T.C. and the TCSA entitles it to coverage the Title VII Indian tribe exemption. *Giedosh, Sage; Pink; Absentee Shawnee;* (3) the fact that SASI receives a small amount of federal school lunch funding through the state and some internet infrastructure funds through the FCC does not alter its status as a Navajo tribal organization, (Doc. 23, p. 11 and fn.1); (4) the fact that SASI also serves a very few (less than 2%) non-Indian students (children of school staff or Indian Health Service clinic staff) does not alter its status as a Navajo tribal organization (Doc. 23, p. 11, fn.1); (5) the fact that SASI operates under a state "non-profit" corporate charter does not alter its status as a Navajo tribal organization (Doc. 23, pp. 15-16). *Giedosh, Sage; Pink; Absentee Shawnee;* (6) the fact that 20% of SASI's work force (not 25% as is stated at Doc. 27, p.7—*see,* Plaintiff's statement of facts at Doc. 27, p. 3, fact 10) is non-Indian does not alter its status as a Navajo tribal organization, and in any event that variance is not material (Doc. 23, p. 11, fn. 1); (7) Plaintiff's assertion (Doc. 27, p.4) that "Defendant's Board of Directors is not required to be 100% Navajo" is not supported as a matter of fact in Plaintiff's statement of facts and SASI's undisputed fact No. 8 (Doc. 23, p.4) shows that only enrolled members of the Navajo Nation are legally eligible to serve on SASI's Board of Directors (Doc. 23, p. 12); and, (8) the fact that SASI "has repeatedly submitted itself to state and federal laws" does

not alter its status as a Navajo tribal organization. (*See,* Doc. 23, pp. 14-17); *and see,* Part IV, *supra*.

VI.

As previously shown, the Navajo Supreme Court has unequivocally ruled that community schools operated by Navajo tribal organizations on the Navajo Reservation per the Navajo Nation's authorization and the TCSA are subject to Navajo law, including the Nation's election laws, which make SASI's school board members public officials of the Navajo Nation. (Doc. 23, p. 5, ¶ 10). The courts which has examined this issue in the Title VII context have uniformly ruled that being organized under state law does not alter a tribal organization's status as a tribal entity covered by the Title VII Indian tribe exemption. (Doc. 23, pp. 15-16). *Giedosh, Sage; Pink; Absentee Shawnee. See,* full cites at page 1, *supra.*

VII.

Plaintiff (Doc. 27, p. 9) again resurrects its argument that the Ninth Circuit's ruling in *Dawadendewa v. River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1123 (9th Cir. 1998) somehow supports its position. But, as shown at Doc. 15, p.15:

> …the *Dawadendewa* case involved the question of how to interpret the separate "Indian preference" exemption set out at 42 U.S.C. § 2000e-2(a) as applied to a private non-Indian employer operating on the reservation. The scope of separate "Indian tribe" exemption at § 2000e(b) was not at issue in that case.

VIII.

Plaintiff next argues (Doc. 27, pp. 9-10) that the "policy reasons for exempting tribes from Title VII do not apply to Defendant," relying on some discussion of

congressional comments in *Dille v. Council of Energy Resources Tribes,* 601 F.2d 373, 375 (10th Cir. 1086). But, none of those comments undermine SASI's position (and the rulings in *Giedosh, Sage; Pink; Absentee Shawnee*) that where a tribe opts to have some of its core governmental functions carried out through local tribal organizations rather than through its central government, that the same policy concerns that barred application of Title VII to Indian tribes also warrants applying that bar to their tribal organization carrying out those governmental functions as authorized by the tribe. *See,* Doc. 23, pp. 14-17, for a detailed analysis on this point.

IX.

Plaintiff's continued misplaced reliance upon *N.L.R.B. v. Chapa De Indian Health Program*, 316 F.3d 995 (9th Cir. 1998) as its core argument for why SASI is not covered by the Title VII Indian Tribe exemption (Doc. 27, pp. 10-11) is telling. As previously shown, *Chapa De* was not a Title VII or ADA case and is otherwise fundamentally distinguishable on multiple grounds. Doc. 23, p. 19; Doc. 15, pp. 4-20.

CONCLUSION

SASI has shown that no disputed issues of material facts exist and that SASI is entitled, as a matter of law, to entry of judgment that it is covered by the Indian tribe exemptions of Title VII and the ADA and dismiss all of Plaintiff's suit for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically pursuant to CM/ECF procedures, which caused the parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

s/ C. Bryant Rogers