UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DEAN S. SENECA,

Plaintiff,

v.

No. 21-CV-304-WMC

GREAT LAKES INTER-TRIBAL COUNCIL, INC.,

Defendant.

DEFENDANT GREAT LAKES INTER-TRIBAL COUNCIL, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

INTRODUCTION

Tribal sovereign immunity is a well-established principle of American law that should not be disturbed. Tribal sovereign immunity "predates the birth of the Republic." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir.1994). The immunity rests on the status of Indian tribes and tribal entities as autonomous political entities, retaining their original natural rights with regard to self-governance. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978). "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973).

Here, GLITC is a non-profit organization controlled completely by federally recognized Indian tribes and its sole purpose is to support those tribes. Ample case law supports that tribal entities like GLITC are entitled to sovereign immunity. For these reasons, and the reasons detailed below, GLITC should be dismissed based on sovereign immunity.

ARGUMENT

I. MR. SENECA'S REQUEST THAT THE COURT REVIEW THE LABOR AND INDUSTRY REVIEW COMMISSION'S DECISION IS IMPROPER.

Mr. Seneca requests that this Court "take control of, or review and reverse the decision of the Labor and Industry Review Commission." (*See* Dkt. 14 at 6). Labor and Industry Review Commission ("LIRC") decisions are subject to review under Wisconsin Statute § 227. Specifically, pursuant to Wisconsin Statute § 227.53(1)(a)1., "[p]roceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of circuit court for the county where the judicial review proceedings are to be held." Mr. Seneca has already filed a start court lawsuit, requesting the Vilas County Circuit Court to review the LIRC decision and that matter remains pending in Vilas County, as GLITC explained in its Brief in Support of its Motion to Dismiss ("Brief in Support"). (See Dkt. 10). Mr. Seneca is attempting to circumvent the proper procedure for review of the LIRC decision. There is no basis for Mr. Seneca's request that this Court review the LIRC decision. The review of that decision remains an issue for the Vilas County Circuit Court.

II. GLITC IS ENTITLED TO SOVEREIGN IMMUNITY

GLITC is indisputably a tribal enterprise—it is owned and controlled by federally recognized Indian tribes and its sole purpose is to support those tribes. These facts cannot be disputed. Mr. Seneca has not cited to any case law from Wisconsin or any other jurisdiction finding that a tribal enterprise analogous to GLITC is not entitled to sovereign immunity. In contrast, GLITC has cited several cases holding that tribal enterprises like GLITC are entitled to immunity. *See, e.g., Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 394 (10th Cir. 1986); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 394 (E.D. Wis. 1995); *Ransom v. St. Regis*

Mohawk Educ. & Commc'n, Inc., 658 N.E.2d 989, 993 (N.Y. Ct. App. 1995). Mr. Seneca fails to reconcile or distinguish these cases in any way. Further, as detailed in GLITC's Brief in Support, three Wisconsin forums—the Vilas County Circuit Court, the Wisconsin Equal Rights Division, and LIRC—have already determined that GLITC is entitled to sovereign immunity against Mr. Seneca's claims.[1]

A. Tribal entities are entitled to immunity.

Mr. Seneca contends that tribal sovereign immunity extends only to federally recognized tribes and not to non-profit tribal entities. That is not true based on a wide body of federal law that has extended immunity to tribal entities like GLITC. *See, e.g., Dille*, 801 F.2d at 394; *see also J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd.,* 842 F. Supp. 2d 1163, 1176-77 (D.S.D. 2012) (finding that a non-profit corporation created by 16 tribes to promote tribal health is entitled to immunity).

Mr. Seneca invokes *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434 (2021) in support of his argument that only federal recognized tribes are entitled to immunity. In *Yellen*, the United States Supreme Court addressed whether Alaska Native regional and village corporations ("ANCs") were eligible for emergency aid set aside for tribal governments under the Coronavirus Aid, Relief, and Economic Security Act. *Id.* at 2438. The Supreme Court determined that, while ANCs are not federally recognized tribes, they are "Indian tribes" under the statutory definition, and thus, were eligible to receive monetary relief under the CARES Act. *Yellen*, 141 S. Ct. at 2452. The Court did not hold or suggest that a non-profit corporation that constitutes an arm of its member tribes cannot be protected by tribal sovereign immunity. *Id.* at 2434-52. Nor

[1] GLITC attached the administrative law judge, LIRC, and Vilas County Circuit Court decisions addressing immunity, which are thoughtful and detailed, as Exhibit 1 to the Decl. of Catarina A. Colón filed on October 5, 2021. (Dkt. 13).

did the Court state that tribal sovereign immunity is limited to federally recognized tribes. *Id.*[2] If anything, by including ANC's within the definition of "Indian tribes," the court recognized that an entity composed of by tribes can be conferred the same benefits and protections as tribes.

B. Any Litigation Against GLITC Would Have a Direct Adverse Impact on Its Member Tribes.

Mr. Seneca asserts tribal liability is the most important factor to be considered under the multi-factor analysis set forth in *McNally CPAs and Consulting v. DJ Host Inc*., 2004 WI App 221, ¶ 12, 277 Wis. 2d 801, 692 N.W.2d 247. There is no basis that this factor should be weighed more than the other factors, but even if it is given more weight, any adverse judgement against GLITC will negatively impact its member tribes, providing a basis for immunity. Specifically, a suit against GLITC would affect the member tribes' fiscal resources because tribal dues and grant money would have to be diverted from providing tribal services to pay for legal fees and potential damages. (Dkt. 11, Holsey Decl., ¶¶ 10-11). Further, GLITC was established to enhance the health, education, and welfare of tribal members, and it depends on dues paid by its tribal members for its fiscal survival. (*Id.* ¶¶ 9-10). Thus, any litigation against GLITC would unfairly impact the allocation of its member dues towards litigation and away from tribal support.

C. GLITC's Incorporation Under State Law Does Not Preclude It From Being Afforded Tribal Sovereign Immunity.

Mr. Seneca contends that GLITC's incorporation under state law forecloses immunity. (Dkt. 14 at 12-13). However, that is only one factor to be considered among many, and as detailed in GLITC's Brief in Support, all of the factors other than incorporation favor immunity. Several

[2] Mr. Seneca also invokes *Eaglesun Sys. Prod., Inc. v. Ass'n of Village Council Presidents*, No. 13-CV-0438, 2014 WL 1119726 (N.D. Okla. March 20, 2014), which is non-binding, unpublished opinion that has never been cited by any federal appellate court. *Eaglesun* is also factually distinguishable because it addressed whether an Alaskan native regional corporation organized under Alaska law was immune from claims arising out of the corporation's alleged breach of a licensing agreement. *Id.* at *1.

courts have held that tribal entities organized under state law can be afforded tribal sovereign immunity. *See, e.g., J.L. Ward Assocs.,* 842 F. Supp. 2d at 1171-77 (holding that an entity created by a group of tribes to work with the federal government in providing health care to tribal members could claim sovereign immunity despite being a South Dakota non-profit corporation); *McCoy v. Salish Kootenai Coll., Inc*., 785 F. App'x 414, 415 (9th Cir. 2019) (holding that a tribal college possessed tribal sovereign immunity even though it was incorporated under state law); *Ransom*, 658 N.E.2d at 991-95 (holding that a non-profit corporation formed by a tribe under the law of the District of Columbia had tribal sovereign immunity).

III. GLITC HAS NOT WAIVED TRIBAL SOVEREIGN IMMUNITY

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Tech., Inc*., 523 U.S. 751, 754 (1998). For Congress to abrogate tribal immunity, it "must unequivocally express that purpose." *Id*. Also, it is well settled that "a waiver of [tribal] sovereign immunity 'cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo,* 436 U.S. at 58. That expression must also manifest the tribe's intent to surrender immunity in clear and unmistakable terms. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

Here, Mr. Seneca does not contend that Congress abrogated immunity. Rather, he contends that GLITC waived tribal sovereign immunity by accepting federal grant monies that condition the receipt of those funds on agreeing to abide by federal antidiscrimination laws. However, several courts have held that the acceptance of federal funds, even when accompanied by an agreement

not to discriminate in violation of federal law, does not constitute a waiver of tribal sovereign immunity for suits brought under those laws. *Dillon v. Yankton Sioux Tribe Housing Authority,* 144 F.3d 581, 583 (8th Cir. 1998); *see also Sanderlin v. Seminole Tribe of Florida,* 243 F.3d 1282, 1286 (11th Cir. 2001) (holding even if a tribe implicitly promises not to discriminate in exchange for receiving federal funds, such conduct "in no way constitute[s] an express and unequivocal waiver of sovereign immunity and consent to be sued."); *Hagen v. Sisseton–Wahpeton Cmty. College*, 205 F.3d 1040, 1044 n. 2 (8th Cir. 2000) ("Nor did the College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964.").

As the Eighth Circuit explained in *Dillon*:

> In its agreement with HUD, the contract signed by the Authority specifically provides that '[a]n Indian Housing Authority established pursuant to tribal law shall comply with applicable civil rights requirements, as set forth in Title 24 of the Code of Federal Regulations.' ***There is no provision in these regulations, however, mandating a waiver of sovereign immunity when a tribal housing authority enters into an agreement with HUD. Because the Authority did not explicitly waive its sovereign immunity, we lack jurisdiction to hear this dispute.***

Dillon, 144 F.3d at 584 (emphasis added). In this case, the same analysis applies. While GLITC receives federal funding, and it may acknowledge that it will comply with federal antidiscrimination laws as part of receiving that funding, it has not agreed to waive its tribal sovereign immunity in clear and unmistakable terms. (Decl. of Therese Safford ¶¶ 4-5).

Specifically, in response to Mr. Seneca's argument, GLITC has filed the Declaration of Therese Safford, the Deputy Administrator/Compliance Officer at GLITC. In that role, Ms. Safford is responsible for and oversees GLITC's federal grant applications, and adherence to all private, federal, and state grant guidelines. (*Id.* ¶ 3). As set forth in her declaration, "in receiving these federal funds, the federal government has never requested that GLITC waive its tribal

sovereign immunity, and GLITC has never agreed to waive its tribal sovereign immunity." (*Id.* ¶ 4). Ms. Safford further explained that in response to Mr. Seneca's contention, she conducted a thorough review of GLITC's federal grant related documents and "none of those documents reflect that GLITC has agreed to waive its tribal sovereign immunity." (*Id.* ¶ 5.)

Further, GLITC did not waive it immunity through its job announcements. Even if Mr. Seneca's recitation of those announcements is accurate, they set forth an intention to comply with federal and state law—not a clear and unequivocal waiver of immunity. The Tenth Circuit rejected a similar argument in *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150 (10th Cir. 2011) where the plaintiff argued that a tribe waived its sovereign immunity in the casino employee handbook by stating the tribe would comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991. *Id.* at 1153. The court found that the tribe's agreement to comply with Title VII did not constitute an unequivocal waiver of tribal sovereign immunity.

Accordingly, for all these reasons, GLITC has not agreed to waive its sovereign immunity and the reasoning of *Dillon* applies.

IV. THE FOURTEENTH AMENDEMENT DOES NOT APPLY TO TRIBAL ENTITIES

Mr. Seneca contends that applying sovereign immunity under the present circumstances would amount to violations of the due process clause. This argument has been plainly rejected by the Supreme Court of the United States. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarding as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo,* 436 U.S. at 56. In fact, by their express terms, the Fifth and Fourteenth Amendments place limitations only on state and federal authority, and not on other sovereign governments. *Suarez v. Confederated Tribes & Bands of Yakima Indian Nation*, No. 91-36025, 1993 WL 210727 at *1 (9th Cir. 1993).

Specifically, the Fourteenth Amendment bans discriminatory actions only by state entities/officials and the Fifth Amendment against actions by federal entities and officials. Thus, Mr. Seneca's allegation of an equal protection violation by GLITC, a tribal entity, is unsupportable.[3]

V. PUBLIC LAW 280 DOES NOT IMPACT TRIBAL SOVEREIGN IMMUNITY.

Mr. Seneca contends that Public Law 280 effectively preempts tribal sovereign immunity under these circumstances. However, the Supreme Court of the United States has held that Public Law 280 and its amendments, entitled the Indian Civil Rights Act of 1968, do not, ***and have never***, constituted a waiver of tribal immunity. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 892 (1986); *see also Bryan v. Itasca Cty*., 426 U.S. 373, 387-388 (1976). Public Law 280 was intended to create civil and criminal jurisdiction for the resolution of private disputes between individual Indians or between Indians and non-Indians, not to create jurisdiction over tribal entities. *Bryan*, 426 U.S. at 383–384. Consequently, suits brought against Indian tribes pursuant to the terms of Public Law 280 are barred by tribal immunity absent a legislative pronouncement to the contrary. *Santa Clara Pueblo*, 436 U.S. at 59.

CONCLUSION

For all the above reasons, GLITC requests that it be dismissed with prejudice.

Dated this 8th day of November, 2021.

[3] Mr. Seneca makes much ado about whether tribal law provides a remedy to him; however, whether trial law provides a remedy is a matter for tribal law, and it does not impact tribal sovereign immunity. *See Miller v. Coyhis*, 877 F. Supp. 1262, 1266-67 (E.D. Wis. 1995) (holding that the defendant is entitled to tribal sovereign immunity despite there being no available forum for resolution of plaintiff's dispute).

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