UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEAN S. SENECA,

Plaintiff,

V.

Case No. 22-2271

GREAT LAKES INTER_TRIBAL
COUNCIL, INC.,

Defendant

APPEAL
DEFENDANT GREAT LAKES INTER-TRIBAL COUNCIL INC,
DOES NOT POSSESS SOVEREIGN IMMUNITY
THEY ARE NOT A "TRIBAL NATION"

Mr. Dean S. Seneca, MPH, MCURP, plaintiff, respectfully summits this brief in support of his complaint of several civil rights violations and to appeal the Western District of Wisconsin's decision and order that the Defendants Motion to Dismiss is granted on the grounds that the plaintiffs failed to state a claim upon which relief can be granted, and that Great Lakes Inter-Tribal Council (GLITC) actually possess sovereign immunity, which it does not!

PROCEDURAL HISTORY

Plaintiff Mr. Dean S. Seneca held the position of Epidemiology Director at GLITC from December 2017 to August 2018. Specifically, in September of 2018, Seneca filed a complaint with the Equal Rights Division of the Department of Workforce Development ("DWD"), alleging that GLITC: (1) did discharge him for discriminatory reasons. In his complaint, he alleged GLITC discriminated against him because of his inclusion in several protected classes

and retaliated against him for engaging in protected activity; (2) discriminated against him in the workplace based on his race, color, national origin/ancestry, age, and sex; (3) discharged him because of his race and sex; and (3) retaliated against him after his termination.

An Equal Rights Officer dismissed the complaint on the grounds that GLITC was entitled to tribal sovereign immunity. Seneca appealed, and on September 20, 2019, an administrative law judge, Beverly Crossen upheld the dismissal for that same reason. Seneca next filed a petition for review by the Labor and Industry Review Commission ("Commission), and on June 22, 2020, the Commission issued a decision similarly holding that GLITC is not subject to the Wisconsin Fair Employment Act as a sovereign entity. Finally, Seneca filed a Petition for Review of the Commission's decision with the Vilas County Circuit Court, Seneca v. Labor & Indus. Review Comm'n, Case No. 2020-cv-84, which is currently pending.

On May 4, 2020, while still awaiting the Commission's decision, Seneca also filed a separate lawsuit in Vilas County Circuit Court, naming as defendants GLITC, as well as former GLITC employees. Seneca v. Field, Case No. 2020-cv-38.

Mr. Seneca is trying to seek justice as GLITC is hiding behind the cloak of Tribal Sovereign immunity which they don't have.

ADDRESSING THE OPINION AND ORDER WESTERN DISTRICT COURT OF WISCONSIN

GLITC is funded by a combination of dues from member tribes, with federal, state and private grants. The dues provided my member tribes is inert and do not nearly cover the cost to operate the organization. You would find during discovery that this is not an issue. The vast majority of the organization is operated by federal grant money.

For every Tribal Leader (falsified) declaration that GLITC actually has sovereign immunity, provided by Catarina A. Colon and Shannon Holsey, I can easily obtain twice *as*

many or more elected Tribal Leaders that state GLITC does not have sovereign immunity. Those Leaders know they are falsifying information to cover their backs. If you were to ask the average Native professional in any of the 11 Wisconsin Tribes; "does GLITC have Tribal Sovereign immunity?" The answer would be overwhelming NO! The court should consider this social policy, dictated by the public, to be the law.

From the discovery of information in the case of Seneca v. Field, Case No. 2020-cv-38, it was uncovered that Mr. Seneca was exonerated from all complaints including sexual harassment by GLITC and the Human Resources Director, Ms. Donna Gavin. The coworker complaints were resolved while Mr. Seneca was still gainfully employed by GLITC. For the record, Mr. Seneca was not terminated directly after these complaints.

The Defendant in particular seeks dismissal on two bases: (1) plaintiff's claims cannot proceed against it due to tribal sovereign immunity; and (2) Title, VII, the ADA, GINA and ADEA specifically exclude claims against an Indian tribe. First GLITC does not have sovereign immunity. Sovereign immunity can only be granted to Tribal Nations and/or by Tribal Council Resolution provided by each of the 11 Tribes in Wisconsin. To date the board has not, nor would ever attempt to do this, knowing that a resolution of this nature would never get unanimous support by the 11 Wisconsin tribes. If one Tribe chooses to opt out, then there is no sovereign immunity for GLITC. And Second, GLITC is not an Indian Tribe. How many times do we have to explain to the court that GLITC is a non-profit organization, incorporated under the State of Wisconsin. It is not a federally recognized Tribe and is not on the list of federally recognized Tribes. So, any laws used in reference to Indian Tribes should be excluded by the defendant in their argument that GLITC is considered an Indian Tribe. Most if not all arguments in the defendant's opinion come from Wisconsin cases where the argument is in favor of Indian Tribes, well this is correct. We now need to heavily consider rulings from other states. GLITC is

not an Indian Tribe. Please show the land they own, Tribal Membership and language they speak. What the *defendant* tried to claim in the Tenth Circuit, *Dille v. Council of Energy Resource Tribes, 801 F.2d 373, 374 (10th Cir. 1986*), is whether a counsel of Indian tribes met the statutory definition of "Indian tribe" under Title VII, 42 U.S.C. § 2000e. Id. And it does not. The Dille court said that Title VII's exception extended to an entity for doing business with federally recognized tribes, but the governing of total sovereign immunity did not apply to that entity. Also, in Dille the court said, "a single tribe, backed into an impoverished corner, lacks the bargaining power essential to deal fairly with enormous multinational energy developers. By banding together to create their own sources of technical and legal expertise, Indian tribes can protect their resources." This was the intent of Council of Energy Resources Tribes (CERT) creation, not to provide them with sovereign immune status as an individual Tribal Nation. Lastly this case is very old and should be updated (1986) to reflect the current state of Tribal Nations. This is 11 years after self-determination legislation. Today, tribes have successful gaming operations and are very capable of defending their own resource needs.

The plaintiffs argue that CERT is a business entity, not an Indian tribe. That CERT does not meet the requirements of the § 703(i) exemption for businesses near Indian reservations. CERT, however, is more than a business or enterprise that Congress wanted to protect through § 703(i). CERT is itself a group of Indian tribes. As discussed, we do not believe that Congress intended to protect individual Indian tribes but not collective efforts by Indian tribes. Section 703(i) does not affect the status of CERT within the meaning of § 701(b). *Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 n. 4 (1st Cir.), cert. denied, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979).* The EEOC has interpreted the Indian tribe exemption to mean that a non-profit corporation seeking to promote the economic development of Indian people is not exempt from the requirements of Title VII. EEOC Decision No. 80-14 (1980), EEOC Decisions 1983

(CCH) ¶ 6823. Thus, the plaintiffs argue that CERT cannot claim the Indian tribe exemption because it consented to suit in its articles of incorporation. This argument was not raised before the district court. See Neu v. Grant, 548 F.2d 281, 287 (10th Cir. 1977).

In *McNally CPAs and Consulting v. DJ Host, Inc.*, 2004 WI App 221, ¶ 12, 277 Wis. 2d 801, 692 N.W.2d 347, the Wisconsin Court of Appeals considered the following *nine* factors to answer the narrow question of whether tribal sovereign immunity applies when an Indian tribe purchases all shares of an existing, for-profit corporation, then assumes its operations. Not one court, administrative, state or federal has weighed all 9 factors in its decision. I respectively ask the 7th circuit court to weigh each factor independently and you will find that GLITC does not pass the test. The Western District court followed suit and blew off the nine criteria to "express disapproval of the factors as an effective reflection of the Supreme Courts *Kiowa* decision." This is hog wash. We kindly asked the court to be the first to effectively weight the nine criteria against GLITC. We will discuss this further in this brief. GLITC was organized under the laws of the state of Wisconsin. GLITC was not organized under the laws and constitution of multiple, federally recognized Tribes. This is yet another fact the Western District got wrong.

In the United States Supreme Court's decision in *Yellen v. Confederated Tribes of Chehalis Reservation* 141 S. Ct. 2434 (2021), in which the Court held that Alaska Native regional and village corporations ("ANCs") were not themselves federally recognized, since they were not "Indian tribes" under the statutory definition, they were nevertheless eligible for relief under the CARES Act. Id. at 2452. Importantly, the *Yellen* Court did not grant tribal sovereign immunity because they are not federally recognized tribes, even know their corporate arms function to serve tribal members.

GLITC should consider liability factors before the organizations staff, under the direction of the board of directors (corrupt Tribal Leaders), engage in Civil Right Violations that impact people's careers and ability to move into other employment. An investigation during discovery will uncover this suit has no adverse financial impact. The 11 Wisconsin Tribes are shielded against GLITC with economic security, health and education. It would be good to see which tribes actually receive services from GLITC. It is apparent that not all of them do, thus GLITC cannot claim to be an "arm of the tribe" for all 11 Tribes. This would add to the *"Arm of the Tribe"* argument in *McNally* and further prove GLITC does not have Sovereign Immunity.

The plaintiff asserts that GLITC waived its sovereign immunity by (1) receipt of federal grant money, and (2) job announcements committing to follow the Civil Rights Act of 1964. That is the point, by accepting federal money you have waived your immunity due to the fact you signed an agreement saying you would abide by these laws. A claim of immunity is a sure indication you are not following the civil rights laws of the country. More to come in this brief.

BRIEF IN SUPPORT OF THE APPEAL

First, Mr. Seneca is a person of integrity, with high ethics and morals, who has been severally wronged by GLITC and is seeking justice. All he wants is a fair trial (that GLITC is running from) but is unable to obtain due to GLITC's false claims of immunity, lying and many legal experts' misinterpretations of the applicability of Tribal Nation law. He has had to file several complaints because GLITC continues to hide behind the smoke screen of Tribal Sovereignty that it doesn't hold, nor have the member tribes ever granted. Mr. Seneca just wants to clear his name of any wrongdoing. That's it! Mr. Seneca left an established career as a Senior Health Scientist at the Centers for Disease Control and Prevention, took a $40,000 dollar pay cut to develop a model Tribal Epidemiology Program, like he was promised. From the first day he

arrived he was thrown into an egregious hostile work environment. GLITC has proven it will go to extensive lengths to cover up this abusive treatment and will do anything to avoid a trial. All he is requesting is justice and fairness, under the rights of protection provided by the United States Constitution.

The injustices that GLITC inflicted on Mr. Seneca included a violation of a person's protected class, violation of all applicable federal civil rights laws, openly engaged in targeted discrete racial discrimination, no due process, fraud, retaliation, and employment termination. The issues of discrimination, retaliation and no due process have never been investigated. An explicit examination by the WI EEO would unveil a clear pattern of attrition and discrimination targeted at American Indian Heterosexual males by GLITC Tribal Leaders and Management. Since employment in 2018, eight Native males can be identified that have circled through GLITC and were forced to leave their employment due to invalid claims of sexual harassment, lies, humors, bullying by GLITC management and other miscellaneous reasons. GLITC staff to this day continue to spread lies about Mr. Seneca.

If the mother ship, the National Congress of American Indians (NCAI), the oldest, largest, and most representative of American Indian/Alaska Native Tribal Governments does not have sovereign immunity, then neither can their subordinate organization like GLITC. *Dante Desiderio v. National Congress of America Indians, Case No. 2022 CA 002830 B, Superior Court of the District of Columbia.* NCAI often represents many of the non-for profits throughout the country including GLITC. Shannon Holsey is an executive board member of NCAI as well as GLITC. So, she knows that these non-profit organizations don't have sovereign immunity. Did she lie under oath in support of GLITC?

Even the United Nations has the International Court of Justice. This main body of the UN settles legal disputes submitted to it in accordance with international law. Where is the court of justice for GLITC. There is none! That is why the Federal Government must intervene, so members and employees have a means of "due process" fifth and fourteenth amendments of the US Constitution.

Tribal Sovereignty should and can only be awarded to federally recognized Tribal Governments. GLITC is not on the list of federally recognized tribes. Sovereignty in any form cannot be awarded to tribal non-profit organizations, for-profit organization, ad hoc - organizations or even Alaska Native corporations *(Yellen v. Confederated Tribes of Chehalis Reservation).* In *Yellen,* Chief Justice Sonia Sotomayor made it clear that Alaska Native Tribes were eligible to receive CARES ACT money due the definition of Alaska Natives in the Indian Self-Determination and Assistance Act, but it was clearly explained that ANCs are not Tribal Nations and do not possess sovereign immunity. Sotomayor went on further to state, this "does not open the door to other Indian groups that have not been federally recognized becoming Indian tribes under ISDA." Moreover, even with respect to the ANCs, Sotomayor stressed that the result did not make the ANCs "Indian tribes" for the purposes of other statutes with different definitions. The NCAI brief indicated, "Private corporations are not "Tribal governments," and the district court's decision allowing them to access CARES Act funds reserved for sovereign, federally recognized Indian tribes wreaks havoc with the fundamental tenets of federal Indian law protecting the dignity of Indian tribes as governments."

In the United States District Court *N.D. Oklahoma, Eaglesun Systems Product, Inc (Plaintiff) V. Association of Village Council Presidents* (AVCP), (Defendants) where the motion

by AVCP to dismiss the case because it is non-profit corporation organized under state law and is entitled to sovereign immunity was denied.

AVCP claims that it should be treated as a federally recognized Indian tribe, because it was formed by Indian tribes for the purpose of carrying out governmental functions. "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Please note for the court, it does not say that Tribal Organizations incorporated under state law have sovereign immunity. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991).* Although Indian tribes no longer "possess the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations." *"Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).* One of the key attributes of sovereignty that the tribes retain is immunity from suit. *Northern Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1281 (10th Cir.2012).* Tribal immunity is similar to the immunity afforded to the states under the Eleventh Amendment, but tribal immunity is a matter of federal common law that is subject to congressional control and modification. *Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1154 (10th Cir.2011).* Although tribal immunity is not co-extensive with a state's sovereign immunity, the Supreme Court has clearly established that a federally recognized Indian tribe has immunity from suit unless that immunity has been abrogated by Congress or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 760 (1998).*

Even though Alaska Native corporations or regional associations are recognized as tribes for limited purposes, no court has ever found that these corporations or associations possess sovereign immunity from suit, because they do not possess key attributes of an independent and self-governing Indian tribe. *Aleman v. Chugach Support Services, Inc., 485 F.3d 206, 213 (4th*

Cir.2007) ("While the sovereign immunity of Indian tribes 'is a necessary corollary to Indian sovereignty and self-governance' ..., Alaska Native Corporations and their subsidiaries are not comparable sovereign entities."); see also *Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1350?51 (9th Cir.1990)* Alaska Native Village corporations are not governing bodies and they do "not meet one of the basic criteria of an Indian tribe" just like GLITC.

Tribal governments, as opposed to regional and village corporations, are the only Native entities that possess inherent powers of self-government and that can develop autonomous membership rules. Internal self-government within a village by a state-authorized municipal government is not an effective alternative when control of the government becomes diluted by the growth of a non-Native constituency. The Native regional and village corporations are chartered under state law to perform proprietary, not governmental, functions.

The Bureau of Indian Affairs maintains a list of federally recognized tribes that "are acknowledged to have the immunities and privileges available to other federally acknowledged Indian Tribes by virtue of their government-to-government relationship with the United States...." Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 6081001 (Oct. 1, 2010). As to Alaska native entities, the individual tribes or villages are separately listed as Indian tribes, and AVCP is not identified as an Indian tribe. Id. Just like GLITC is not considered an Indian Tribe. As stated in Cohen's Handbook of Federal Indian Law, it is the native villages that retain the power of self-government.

I understand the courts are trying to do good by protecting Tribal Nation interest, but they are doing more harm than good when this is right is extended to other entities beyond our Tribal Nations. Especially when this right is extended to unethical, corrupt Tribal non-profit

organizations. The courts need to update its decisions in support of Tribes over Tribal Organizations. They are simply not the same.

In *Aleman v. Chugach Support Servs., Inc.* a three-judge panel said the same protections did not extend to a different federal law that bars discrimination on the basis of race or national origin. The court said Chugach Alaska, an Alaska Native regional corporation, doesn't fall in the same category as tribal governments. Judge J. Harvie Wilkinson wrote in the 19-page opinion. "While the sovereign immunity of Indian tribes is a necessary corollary to Indian sovereignty and self-governance, Alaska Native Corporations and their subsidiaries are not comparable sovereign entities." Just like GLITC. The court reinstate the claims of the first plaintiff because the exemption for Alaska Native Corporations from suit under Title VII does not immunize the defendants from suit under the separate and independent cause of action established by Section 1981. Section 1981 functions to "protect the equal right of 'all persons within the jurisdiction of the United States' to 'make and enforce contracts' without respect to race. *Domino's Pizza. Inc. V. McDonald. 546 U.S. 470, 474 (2006) (quoting 42 U.S.C.I 1981(a)).*

Please understand that there is no Wisconsin Court Decision dealing with the question of whether an entity owned and controlled by an Indian Tribe or group of Indian Tribes and created pursuant to Wisconsin Law, is entitled to sovereign immunity.[1] Also, I must remind the court that not a single published decision involving GLITC can be found. No court precedent exists to support the WI EEO position that "it has for a very long time NOT considered GLITC to be subject to the State and Federal Anti-Discrimination Statutes." Or the opinion that, "generally, Indian tribes are immune from suit under the Wisconsin Fair Employment Law (WFEP) due to

[1] From the Labor and Industrial Review Commission Decision, pg 6., Dean Seneca, Complainant vs Great Lakes Inter-Tribal Council, Inc, Respondent, June 22, 2020.

their sovereign status.[2] There is no place in the WFEP that states that Tribes have Sovereign Immunity.

Due to the facts that the US government considers Tribal Consultation to be based on a "Government -to- Government relationship, that being US Federal Government to Tribal Government, this is really a matter that needs to be handled appropriately in the Federal Courts. Given this reality, I hope the courts understands the severity of its decision when granting tribal sovereignty immunity to a non-profit corporation, that is not an arm of the Tribe(s) and created under laws of the State of Wisconsin. This is a very slippery slope and sets a bad precedent that must be reversed. Literally "anyone" that creates a non-profit that works for or with tribes will be granted sovereign immunity. This is getting out of hand.

Complainant-Appellant Dean Seneca respectfully requests that this Court take control of, or review and reverse the decision of the Western District Court of Wisconsin. This decision should be reversed for the following reasons:

GLITC does not pass the balancing test laid out for determining whether Sovereign Immunity applies to an 'arm of the tribe' as laid out in *McNally CPAs and Consulting v. DJ Host, Inc.*, 2004 WI App 221, 277 Wis. 2d 801, 692 N.W.2d 247.

If GLITC has Sovereign Immunity, it did by its own actions waive that Sovereign Immunity.

[2] From the Labor and Industrial Review Commission Decision, pg 2., Dean Seneca, Complainant vs Great Lakes Inter-Tribal Council, Inc, Respondent, June 22, 2020.

An allegedly multi-tribal actor such as GLITC deprives the plaintiff of a forum in which it can be sued for redress, violating the due process clauses of the Wisconsin and United States Constitutions.

ARGUMENT

1. Incorrectly Applied *McNally CPAs and Consulting v. DJ Host, Inc.*

This matter is either a case of first impression or one very close to it. The question of whether a corporation, formed under state laws and controlled by a compact of sovereign tribes, enjoys sovereign immunity is not one that has been addressed by this court. It is not a matter of dispute that 'arms' of a tribe share the same sovereign immunity afforded their parent tribe, but the question as to whether an entity is an 'arm' of a parent tribe is one open to dispute and litigation. Under the scenario of "One Tribe, one corporation;" yes, then tribal sovereign immunity would apply. But multiple tribes under the cloak of one corporation; there is no comprehendible means in which immunity can exist. Given the number of tribal stakeholders in GLITC, arguably any stakeholder could object and claim sovereign immunity if a discrimination claim were brought in any Court, including the tribal Court of a fellow stakeholder of GLITC. In this case, under GLITC's argument, Sovereign Immunity precludes any remedy for the violation of anti-discrimination proceedings despite GLITC explicitly stating that it would follow relevant anti-discrimination laws. Which it has not and continues not to do so.

Littered throughout the decisions and briefs on this matter you will see appeals to persuasive authority from other jurisdictions regarding the question as to whether an entity is an 'arm' of a tribe. Currently there are no clear definitions as to what constitutes an 'arm of a/the Tribe,' and GLITC is an organization that employs many non-tribal members that work on and off Tribal lands (reservations). Luckily, there is a case to provide more generalized guidance to this Court, namely *McNally CPAs and Consulting v. DJ Host, Inc.* 2004 WI App 221, 277 Wis.

2d 801, 692 N.W.2d 247. Given that the application of the generalized balancing test in *McNally* is a question of law, the Plaintiff does ask that this matter be reviewed *de novo*.

McNally deals with the Ho-Chunk Tribe purchasing a company and then attempting to use sovereign immunity to escape debts owed by that company. Again, a corrupt way of doing business. The *McNally* Court did then establish a 'nonexclusive' list of factors to be considered, namely:

> "(1) Whether the corporation is organized under the tribe's laws or constitution;
>
> (2) Whether the corporation's purposes are similar to or serve those of the tribal government;
>
> (3) Whether the corporation's governing body is comprised mainly or solely of tribal officials;
>
> (4) Whether the tribe's governing body has the power to dismiss corporate officers;
>
> (5) Whether the corporate entity generates its own revenue;
>
> (6) Whether a suit against the corporation will affect the tribe's fiscal resources;
>
> (7) Whether the corporation has the power to bind or obligate the funds of the tribe;
>
> (8) Whether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments; and
>
> (9) Whether the corporation is analogous to a tribal governmental agency or instead more like a commercial enterprise instituted for the purpose of generating profits for its private owners." *McNally* at para 12.

The administrative court did briefly address these factors, but it is the plaintiff's contention that this analysis was severely flawed and incomplete. The Western District Court of Wisconsin didn't address any factors and ignored the case totally. Other administrative courts (LIRC) relied heavily upon factor 8 while giving little weight to factors 1, 4, 5, 6, 7 and 9. Which if they did you would find that GLITC fails the test. Functionally these factors boil down into three categories: tribal purpose, control, and liability. The plaintiff is not contesting that the

health and welfare aspects of GLITC advance tribal purposes (although the portions of GLITC's work that impact and involve travel outside of tribal lands do mitigate these factors). The plaintiff does highly contest that GLITC is organized under a tribe's law, is tribally controlled, whether is earns its own revenue, whether a suit will damage the 11 Tribes fiscal resources, and whether the organization can bind the Tribes resources. Namely, the lack of a single tribe controlling GLITC complicates its governance and venue (a factor to be addressed below). Organizing under Wisconsin law should be considered a prima-facie waiver of Sovereign Immunity. It shows a clear and unambiguous submission of GLITC to the laws of the State of Wisconsin, including to all relevant anti-discrimination laws and civil rights laws.

Again, because the Western District Court indicated that plaintiff did not establish fact, we will state this again. This brings *into* question *whether* the corporate entities generate their own funding, whether a suit against the entity will impact tribal resources (which it will not), whether the governing body can dismiss corporate officers (it can't and has never), whether the entity has the power to bind funds of a Tribe (it has no ability to impasse funds of a Tribal Stakeholder) and whether the corporation is analogous to the Tribe(s). Finally, and the plaintiff believes dispositively, tribal liability weighs heavily against extending sovereign immunity to GLITC.

It is important to note, that there is precedent for considering tribal liability to be the most important factor of the *McNally* balancing test. The *McNally* Court itself was "particularly persuaded by the fact that, when a tribe purchases stock in an existing corporation, the tribe can choose to limit its risk to its investment in the stock." *Id.* At para 13. In short, the dispositive factor in that case was the use of *DJ Host's* corporate structure under state law to limit the liability to the controlling tribe.

Although the decision in *McNally* argues in favor of weighing the 'tribal liability' portion of the balancing test heavily, the plaintiff asks this Court to adopt the standard laid out in *Runyan v. Assn. of Village Council Presidents*, 84 P.3d 437 (Alaska 2004). *Runyan* identifies an entity to be protected by sovereign immunity as "a subdivision of tribal government or a corporation attached to a tribe may be so closely allied with and dependent upon the tribe that it is effectively an arm of the tribe. It is then actually a part of the tribe per se, and, thus, clothed with tribal immunity." In determining this relationship "The entity's financial relationship with the tribe is therefore of paramount importance if a judgment against it will not reach the tribes assets or if it lacks the power to bind or obligate the funds of the [tribe], it is unlikely that the tribe is the real party in interest. If, on the other hand, the tribe would be legally responsible for the entity's obligations, it may be an arm of the tribe. In such a case other factors relating to how much control the tribe exerts or whether the entity's work is commercial or governmental, may assist in the determination." In short, when choosing how to weigh the nine *McNally* factors, this Court should look first at the financial impact of a suit on the constituent tribes. Here, where the corporate structure would wholly shield the actual tribes themselves from liability, the constituent tribes of GLITC are not actual parties in interest. As such this Court need not look to the other *McNally* factors which should be treated as more informative than dispositive. Throughout this process, many suits, we have not had a court look at all the factors in detail, unambiguously in *McNally* and that is what we are kindly requesting this court to do.

In choosing to avail themselves of the protections inherent to incorporating under Wisconsin law, namely protecting the tribes themselves from suit in state or federal court, either via waiver or congressional authorization, the tribes have voluntarily distanced themselves from GLITC. This is not a choice that was forced upon them. They chose to avail themselves of the benefit of state law and in doing so, they should be bound by those laws.

The Seventh Circuit has not established a specific test or set of factors to consider when deciding whether an organization is entitled to tribal sovereign immunity. J.L. Ward. 842 F. Supp. 2d at 1173. In J.L. Ward, however, this Court—looking to decisions like *Wright v. Prairie Chicken*. 579 N.W.2d 7 (S.D. 1998), *Gavle Vs. Little Six. Inc.,* 555 N.W.2d 284 (Minn. 1996), and *Breakthrough Management Group. Inc. v. Chukchansi Gold Casino & Resort,* 629 F.3d 1173 (10th Cir. 2010)— used a multi-factor test to decide whether a nonprofit corporation created by sixteen tribes enjoyed sovereign immunity. *J.L. Ward,* 842 F. Supp. 2d at 1171-77. The non-exhaustive factors this Court considered were: (1) the entity's method of creation; (2) the entity's purpose; (3) the entity's structure, ownership, and management, including the level of tribal control; (4) the tribe's intent to extend its sovereign immunity to the entity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entity. Id. at 1176. Courts have referred to these factors as the "subordinate economic entity analysis" id at 1173 (cleaned up and citation omitted), or the "arm-of-the-tribe" test, *Williams v. Big Picture Loans, LLC*, .929 F.3d 170,177 (4th Cir. 2019). Formation under tribal law favors sovereign immunity, while incorporation under state law can preclude an entity from sharing in a tribe's immunity, *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1149-50 (10th Cir. 2012).

Sovereign immunity protects a tribe and any subordinate governmental and commercial entities that are considered to be a true "arm of the tribe." When you fairly weight the factors, when you look at all the evidence, the true results are overwhelmingly against GLITC. The United States Supreme Court has not set forth guidance under federal law as to the question of what constitutes an arm of the tribe. In fact, the great weight of authority supports a conclusion that only tribal corporations, not state corporations, can possess the sovereign immunity of a

tribe. One Tribe, one corporation, immunity is more likely than not to exist. Multiple tribes, it is not feasible possible for immunity to exist.

The courts of the State of Colorado were recently faced for the first time with the issue of sovereign immunity of tribally owned entities. In its undertaking of this task, the Supreme Court of Colorado performed a thorough review of federal and state court precedents. *"Cash Advance v. State of Colorado"* ex. rel. Suthers, 242 P.3d 1099 (Colo. 2010). Based on its detailed analysis of pertinent precedent across many jurisdictions, the Court determined that a tribal entity of a tribe has sovereign immunity of the tribe if (1) the tribe created the entity pursuant to tribal law; (2) the tribe owns and operates the entity, and (3) the entity's immunity protects the tribe's sovereignty. *Cash Advance,* 242 P.3d at 1111.

Applying the recent and well-reasoned approach articulated in *"Cash Advance"* to the facts and circumstances that exist here, GLITC absolutely fails the test. If GLITC were concerned about protecting itself with sovereignty, it could, and probably should, have been created under tribal law, but bottom line, it wasn't! It's not like they have not had the time to do this administrative change. GLITC is a creature of the laws of the State of Wisconsin. It is a state nonprofit corporation, availing itself to the laws of the State of Wisconsin, it is subject to the laws, rules, regulations, and jurisdiction of the State of Wisconsin, including the Wisconsin Fair Employment Law. A tribe's sovereign immunity cannot extend to an entity not created under tribal law. In choosing to become a state corporation, GLITC cannot assume the immunity of its Tribal Stakeholders that has never been granted.

Lastly, the Tribal Nations that are part of GLITC have not uniformly granted sovereign immunity to GLITC. If so, we would see tribal resolutions by each tribal nation extending their sovereign status to GLITC. Not one of the 11 Tribes in Wisconsin has ever done this. There are tribal protocols in place (Oneida Nation of Wisconsin) for Tribal Nations when extending their

sovereign status to other entities. The Tribes in Wisconsin have not agreed to avail sovereign immunity to GLITC by a Tribal Council Resolution. Where to these exist?

2) If GLITC Had Sovereign Immunity, That Immunity Has Been Waived when it accepted Federal Money.

The plaintiff further argues that GLITC waived its immunity regarding federal antidiscrimination laws by accepting money from the Federal Government. Every contract, cooperative agreement or grant with the U.S. Department of Health and Human Services ("HHS") requires the recipient, as a condition of receiving the money, to agree to abide by federal antidiscrimination laws such as Title VI of Civil Rights Law of 1964 42 U.S.C. §2000 et seq. ("Title VI"). Title VI is implemented through the regulations found at 45 Code of Federal Regulations ("C.F.R.") Part 80. 45 C.F.R. §80.1. Title VI and the regulations apply to any entity that accepts federal money through an HHS contract or grant. 45 C.F.R. §80.2. Discrimination based on race, color or national origin in employment practices is prohibited. 45 C.F.R. §80.3(c).

As a condition of receiving the money, the receiving entity agrees to allow a complaint to be filed against it for, *inter alia*, engaging in prohibited employment practices; to allow an investigation of the complaint; to have a hearing to resolve the complaint; and to allow judicial review of decisions. 45 C.F.R. §§80.7-11. Retaliation is prohibited 45 C.F.R. 80.7(e). One way to resolve a complaint is through any applicable proceeding under State or local law. 45 C.F.R. §80.8(a)(2).

Most importantly, the entity receiving the money knowingly and expressly agrees to abide by the federal antidiscrimination laws. The recipient of federal money must provide assurances, at the time of contracting and on an annual basis for the duration of the contract, that

the entity is in full compliance with federal antidiscrimination laws. 45 C.F.R. §80.4. "Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement." *Id.* Every HHS contract contains a form clause and checklist (collectively, "HHS Form") for the recipient to provide the written assurances of compliance to HHS. In agreeing to comply literally allows GLITC to be sued in federal court.

In the present matter, GLITC waived its sovereign immunity with regard to federal civil rights laws prohibiting discrimination in the workplace by accepting these grants and cooperative agreements. GLITC was under no obligation to accept this money, instead proactively seeking out these grants and affirmatively agreeing to be bound by the terms of said grants.

GLITC receives millions in Federal and State money that are now subject to retraction and recuperation by the Internal Revenue Service because they claim sovereign immunity where they refuse to abide by Federal and State Civil Rights laws and thus should be required to return this funding. By accepting federal and state funding they must abide by federal and state civil rights laws and EEO regulations or return the funding.

As a condition for entering into a contract with HHS and accepting the money, GLITC repeatedly gave its written assurance to HHS that it would comply with Civil Right Law of 1964 and the regulations enforcing them. By doing so, GLITC made a knowing and express waiver of its sovereign immunity regarding antidiscrimination laws in employment practices. On an annual basis, GLITC certifies that it is following the antidiscrimination laws. There is no question that GLITC expressly and repeatedly waived its sovereign immunity regarding these antidiscrimination laws. You cannot have both, the funding and no compliance (your cake and eat it too).

Either you have sovereign immunity thus return the taxpayer dollars to the federal government for non-compliance of federal EEO laws or you do not have sovereign immunity

thus accepting federal funding, fulfilling those contracts, can be sued in court and abiding by federal EEO laws. GLITC has accepted the funding thus its corporation is not immune to suit. My question to the Western District Court is, why is the court not taking the Civil Right Act of 1964 seriously? Civil rights laws should supersede all other laws and the fact that the courts brushes this off is an insult to the equal rights of the country. It is almost as if the Civil Rights laws afforded to the country do not matter.

When you are purposely not abiding by the EEO provisions in the contract, (and many of the components of the Civil Right Laws) you are intentionally stealing/cheating the (US taxpayer) government and misleading the public. Because of non-compliance of EEO Laws, GLITC is blatantly disregarding the stated requirements stipulated by the US government to attain and administer all grants and cooperative agreements. Not only are they not complying with the EEO requirements, but they are also giving their prospective employees a false sense of security that GLITC complies with all US EEO requirements. These are both serious acts of negligence and in this case GLITC is purposely/intentionally committing multiple criminal felonies. We are asking the court to take this seriously.

To the same issue as referenced above, in all its job announcements to date, GLITC has a declaration at the bottom of each announcement stating that they are:

> "An equal opportunity employer that applies Native American Preference as defined in Section 703(i) of the Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e- 2(i). Consistent with the referenced Native American Preference, it is the policy of GLITC to provide employment, compensation, and other benefits related to employment based on qualifications of the job applied for, without regard to race, color, religion, national origin, age, sex, veteran status or disability, or any other basis prohibited by federal or state law. As an equal opportunity employer, GLITC intends to comply fully with all federal and state laws and the Information requested on this application will not be used for any purpose prohibited by law."

This statement appears to be yet another clear and unambiguous waiver of sovereign immunity, done at GLITC's own will. On the question of employment discrimination and Title

VII they are falsely presenting to comply with the provisions of Civil Rights employment. I did rely on this statement to my own detriment when I took the position of Epidemiology Director at GLITC. Believe me, I would have never come to work for an employer (GLITC) without some federal oversight and EEO protection which the above quote I believed did assure me. In the decision from the Wisconsin Western District court, the judge indicated that GLITC did not mention that it waives its sovereign immunity in these job announcements thus the plaintiff argument fails. Well, of course GLITC is not going to put that they wave sovereign immunity in their Job |Announcements. The point that is being made by the plaintiff is that GLITC is downright lying when they announce a job. They are providing a false sense of security they never intend to abide by or implement.

3. In This Matter Due Process Demands A Forum

While in general, multiple tribes may band together to form an 'arm' of the tribe, it is important to note that by doing so the tribes may run afoul of the Fifth and Fourteenth Amendments to the United States Constitution. Namely, applying sovereign immunity under these circumstances amounts to a violation of the due process clause.

There is little question that the plaintiff has been deprived of property (namely his employment, contrary to the guarantees of nondiscrimination made by GLITC above). The problem arises as to whether there is a process available for the plaintiff to redress these concerns.

It is all well and good for the respondent to claim sovereign immunity, but that begs the question. Who is the sovereign? GLITC is a council made up of twelve different sovereign tribes. Should the plaintiff have brought his claims in one of the seven Chippewa tribal courts?

Would the Menominee, Potawatomie, Ho-Chunk, Oneida, or Stockbridge-Munsee tribes and communities have then claimed sovereign immunity against one of the Chippewa courts?

The Western District of Wisconsin decision brushed off this question as 'practical concerns,' but that is unfair to the gravity of the question. Due process requires there to be *some* process. If sovereign immunity can be used by the eleven other tribes and communities against any action brought in the court by one tribe, there is fundamentally no procedure to seek redress against GLITC for any of its actions.

Further, by claiming sovereign immunity, the respondent is positioning itself as a quasi-state actor. The plaintiff would argue that the 14th Amendment applies not only the State of Wisconsin in ensuring the plaintiff's right to due process, but also to GLITC.

Luckily, congress has provided a solution to this problem. Public Law 280 (18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326) is a federal statute enacted in 1953. It enabled states to assume criminal, as well as civil, jurisdiction in matters involving Indians as litigants on reservation land. Public Law 280 grants civil jurisdiction in matters such as this to the State of Wisconsin. The Western District never addressed this question!

The Attorney General of the State of Wisconsin has recognized that, under Public Law 280, the jurisdiction of the State of Wisconsin extends to its civil laws of general application. 70 Op. Att'y Gen 237 (1981). There can be no doubt that the civil rights laws of Wisconsin are enforceable here under authority granted to state by Public Law 280. The civil right laws represent major public policy of Wisconsin.

It should be noted that Public Law 280 does not grant states any authority to regulate civil activities in Indian country through P.L. 280. *Bryan v. Itasca County*, 426 U.S. 373 (1976) (no authority under P.L. 280 to tax personal property of tribal member). In repudiating these

attempts to regulate Indian Country, the *Bryan* Court stated that it "was not the Congress's intention to extend to the States the 'full panoply of civil regulatory powers,' but essentially to afford Indians a judicial forum to resolve disputes among themselves and with non-Indians." *Id.*

If the State refuses to exert jurisdiction, what laws exist that will protect GLITC employees, patrons or supporters? Which of the 11 Wisconsin-based tribal laws are to be applied? Which of those tribe's laws provide protection? There is no tribal law that would protect a GLITC employee from offensive discriminatory employment practices. A tribal agency does not exist with expertise to adequately investigate, administer, and enforce applicable civil rights violations, including those violations arising under federal and state EEO law. GLITC has, in fact, demonstrated that it refuses to investigate and enforce the policies articulated by the very same civil rights laws.

In this situation where we have a potential dispute between many different tribes, it only seems appropriate to turn to the State of Wisconsin or the Federal government as an independent forum to decide what has the potential to be a dispute between twelve different sovereign entities. At a minimum, Public Law 280 should answer any questions about disputes arising on tribal land (notwithstanding the properties GLITC rents away from historical tribal land).

Further, the word 'tribe' in all caselaw is singular. GLITC's argument is that it exists as an arm of a conglomeration of tribes which raises an interesting question as to whether multiple tribes claim immunity jointly. Given the incorporation of Title VI provisions into each tribes' ordinances, it is clear that GLITC is allowed to be sued for discrimination, the question is just in which Court such suit should occur. Unfortunately, under GLITC's reasoning any suit brought under any shareholder tribe's ordinances in tribal court would be subject to dismissal from the other shareholder tribes under sovereign immunity grounds as each tribe's court has no authority

to force another tribe to submit to their jurisdiction. Ultimately, by creating a conglomeration of tribes under Wisconsin law and by agreeing to comply with Title VI, GLITC has created a situation where it either cannot abide by Title VI (to which it has contractually agreed) or in which a cause of action must be allowed in a venue where one of its shareholders can claim sovereign immunity.

GLITC's organization documents contain no reference to sovereign immunity or the process and procedure for approving a limited waiver of sovereign immunity. Some of the consent forms where you agree to be silent on a particular issue, problem or disciplinary measure have an agreement clause in them "to sue or be sued." This section in itself is a waiver of sovereign immunity. No evidence of tribal action, tribal resolutions or tribal ordinances has been offered to suggest even a faint hint that the member tribes of GLITC intended to extend sovereign immunity to GLITC. Alarmingly, GLITC apparently only raises a defense of sovereign immunity when former employees claim violations of civil rights laws. GLITC will urge that it is under the ultimate control of tribes and as a result can violate civil rights laws with reckless abandonment because it has the sovereign immunity of those tribes.

The United States Supreme Court has explained how paramount tribal sovereignty is in relation to state sovereignty, when a tribe conducts activities within state boundaries; it is subject to state law. You simply cannot grant sovereign immunity to a Tribal entity where all the violators are non-Indian. Tribes cannot prosecute non-members. This, by far is not the intention of Tribal Sovereignty.

Suffice it to say that GLITC's activities on behalf of a tribe(s) are far from being purely "intramural" or solely involving "internal tribal disputes" so as to treat it or its activities as being governed only by tribal law is literally absurd. The employees, patrons, and supporters of

GLITC have an expectation that the federal government will protect them, especially with respect to the civil rights laws of the State. Since non-Indians cannot be protected or prosecuted under tribal laws, then where are they accountable, if not by the states or federal government in which they work? Now it is the undeniable responsibility of the federal government or the federal courts to assume jurisdiction for civil and criminal matters when it pertains to Tribal non-profit organization like GLITC.

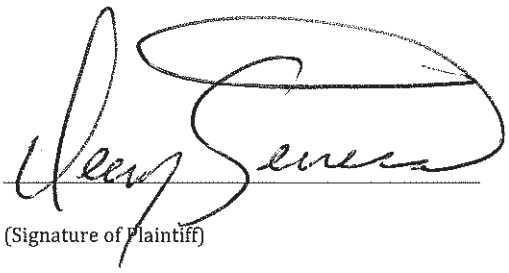
State ex. rel. Dept. of Human Services v. Jojola, 660 P.2d 590,593 (New Mex. 1983), cert. denied, 464 U.S. 803 (1983). No law or policy concern exists that is more compelling than the protection of the civil rights of American citizens. The Federal Government is required to show deference to activities having a nexus to tribal lands when the activities constitute an egregious violation of a person's civil rights. The plaintiff has made many arguments to state a claim under which relief can be granted.

CONCLUSION

In reviewing this matter, the plaintiff asks that this Court find that *McNally* and *Cash Advance* weighs heavily against a finding of sovereign immunity for GLITC. Further, the list in *McNally* is meant to be nonexclusive. Given the due process concerns detailed in this request, it seems appropriate to consider the multi-tribal nature of GLITC and weigh that against it. Also, accepting money but intentionally not abiding by the contractual agreements (civil rights laws), is a waiver of sovereign immunity. Finally, the plaintiff is requesting that it find that such immunity was waived due to GLITC's actions or otherwise voided by the Fifth and Fourteenth Amendment. The plaintiff seeks compensatory relief from GLITC for a plethora of civil rights violations.

This court has jurisdiction over this matter pursuant to 28 U.S.C. 1331

Dated this 1st day of November, 2022



(Signature of Plaintiff)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEAN S. SENECA,

Plaintiff,

v.

GREAT LAKES INTER-TRIBAL COUNCIL, INC.,

Defendant.

OPINION AND ORDER

21-cv-304-wmc

In this civil action, *pro se* plaintiff Dean S. Seneca claims that defendant, Great Lakes Inter-Tribal Council, Inc. ("GLITC"), terminated him from his position as Director of Epidemiology on the basis of his race, color, national origin/ancestry, age and sex, then retaliated against him for engaging in protected activity, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act of 1990 ("ADA"), the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Genetic Information Nondiscrimination Act of 2008 ("GINA"). This lawsuit is Seneca's third action challenging his termination, having filed two, previous Wisconsin state court actions. Defendant GLITC seeks dismissal (dkt. #9), invoking tribal sovereign immunity, just as it did in state court, further arguing that GLITC is not subject to suit under any of the federal statutes Seneca appears to be invoking. Since GLITC is entitled to tribal sovereign immunity in this court as well, defendant's motion to dismiss will be granted.

ALLEGATIONS OF FACT[1]

A. GLITC's status and function

GLITC is a Wisconsin non-profit, tax-exempt corporation owned and controlled by a consortium of federally recognized Indian tribes located in Wisconsin and the Upper Peninsula of Michigan, including: the Bad River Band of Lake Superior Tribe of Chippewa Indians, Forest County Potawatomi Community, Ho-Chunk Nation, Lac Courte Oreilles Bank of Lake Superior Chippewa Indians, Lac Vieux Bank of Lake Superior Chippewa Indians, Menomonee Indian Tribe of Wisconsin, Oneida Nation, Red Cliff Bank of Lake Superior Chippewa Indians, Saint Croix Chippewa Indians, Sokaogon Chippewa Community, and Stockbridge-Munsee Community. Governed by a Board of Directors composed of a delegate from each of the member tribes (usually a tribe's Chairperson or President), GLITC is funded by a combination of dues from member tribes and federal, state and private grants. Beyond member dues, it generates no revenue of its own, and all money GLITC receives through grants or other sources is directed into programs for its member tribes. Indeed, GLITC's stated purpose is to support its member tribes by providing service and assistance to them.

[1] For purposes of defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court "accept[s] as true all of the well-pleaded facts in the complaint and draw[s] all reasonable inferences in favor of" plaintiff. *Jakupovic v. Curran*, 850 F.3d 898, 902 (7th Cir. 2017) (internal citation omitted). In addition, the court may consider documents referenced in the complaint, documents critical to the complaint, and information subject to judicial notice. *Geinosky v. city of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012) (citing Fed. R. Civ. P. 10(c); *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir. 2002) (documents referred to in the complaint and central to claim); *Wright v. Assoc. Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994)). This includes some information from the declarations of Catarina A. Colón and Shannon Holsey since the information they provide is either central to plaintiff's claim that tribal sovereign immunity does not apply or matters of public record.

GLITC is headquartered in Lac du Flambeau, Wisconsin, on lands of the Lac du Flambeau Bank of Lake Superior Chippewa Indians established by the Treaty of 1854. A significant majority of GLITC's operations and employees are also located within tribal boundaries, with only four of its approximate 65 employees living on non-tribal land. Its operations include providing government service systems and technical assistance to its member tribes to address the needs of tribal members living on or near reservations and tribal lands. GLITC presently offers programs for its member tribes related to: economic development, family and child services; aging, disability and elder services; health and epidemiology; prevention programs; and vocational training and rehabilitative services.

B. Seneca's termination and discrimination complaints

Plaintiff Dean Seneca held the position of director of Epidemiology at GLITC from December 2017 to August 2018. After several co-workers complained that he was acting unprofessionally and sexually harassing them, Seneca was terminated and promptly pursued an employment discrimination complaint. Specifically, in September of 2018, Seneca filed a complaint with the Equal Rights Division of the Department of Workforce Development ("DWD"), alleging that GLITC: (1) discriminated against him in the workplace based on his race, color, national origin/ancestry, age and sex; (2) discharged him because of his race and sex; and (3) retaliated against him after his termination.

An Equal Rights Officer dismissed the complaint on the grounds that GLITC was entitled to tribal sovereign immunity. Seneca appealed, and on September 20, 2019, an administrative law judge upheld the dismissal for that same reason. Seneca next filed a

petition for review by the Labor and Industry Review Commission ("Commission), and on June 22, 2020, the Commission issued a decision similarly holding that GLITC is not subject to the Wisconsin Fair Employment Act as a sovereign entity. Finally, Seneca filed a Petition for Review of the Commission's decision with the Vilas County Circuit Court, *Seneca v. Labor & Indus. Review Comm'n*, Case No. 2020-cv-84, which is currently pending.[2]

On May 4, 2020, while still awaiting the Commission's decision, Seneca also filed a separate lawsuit in Vilas County Circuit Court, naming as defendants GLITC, as well as current and former GLITC employees. *Seneca v. Field*, Case No. 2020-cv-38. On June 25, 2020, GLITC filed a motion to dismiss for lack of jurisdiction on the ground of tribal sovereign immunity. On October 7, 2020, the trial judge held a hearing on the motion and in an oral decision granted GLITC's motion. Accordingly, GLITC was dismissed as a party in that lawsuit.

OPINION

While defendant seeks dismissal of this action under both Federal Rule of Civil Procedure 12(b)(1) and (6), its motion is properly brought in this circuit under Rule 12(b)(6). *See Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016) ("[T]his circuit has clearly held that the question of sovereign immunity is not a jurisdictional one.") (citations omitted). Defendant in particular seeks dismissal on two bases: (1) plaintiff's claims cannot proceed against it due to tribal sovereign immunity; and (2) Title, VII, the ADA, GINA and ADEA specifically exclude claims against an Indian

[2] The court has taken judicial notice of details of the state court proceedings, which are publicly available at Wisconsin Circuit Court access, https://wcca.wicourts.gov (last visited May 23, 2022).

tribe. Since defendant is entitled to tribal sovereign immunity in this court, the court limits its discussion to that issue.

Federally recognized Indian tribes are immune from suit in both state and federal courts unless Congress abrogates a tribe's sovereign immunity, or the tribe waives its right to invoke sovereign immunity. *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 689 (7th Cir. 2011) (citing *Kiowa Tribe of Okla v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)). Moreover, and critical here, business entities owned and operated as arms of a federally recognized Indian tribe may assert the same immunity as the tribe itself. *See Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010) ("In the absence of a clear waiver, suits against tribes (and tribal corporations) are barred by sovereign immunity.") (citing *Kiowa*, 523 U.S. at 753; *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993)); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 394 (E.D. Wis. 1995) ("because 'an action against a tribal enterprise is, in essence, an action against the tribe itself,'" a tribal gaming commission and tribal casino employer were entitled to tribal sovereign immunity) (quoting *Local IV-302 Int'l Woodworkers Union of Am. v. Menomonee Tribal Enter.*, 595 F. Supp. 859, 862 (E.D. Wis. 1984)).

Given that GLITC is composed of and operated *solely* by federally recognized tribes and its members, with its sole purpose being to support its member tribes through service and assistance, there appears little question that this entity is entitled to assert sovereign immunity as an arm of those tribes. By way of comparison defendant directs the court to a decision from the Court of Appeals for the Tenth Circuit, *Dille v. Council of Energy Resource*

Tribes, 801 F.2d 373, 374 (10th Cir. 1986), in which the court considered whether a counsel of Indian tribes met the statutory definition of "Indian tribe" under Title VII, 42 U.S.C. § 2000e. *Id.* The *Dille* court addressed whether Title VII's exception extended to an entity composed of federally recognized tribes, but the same principles governing sovereign immunity generally were applied.

The entity at issue in *Dille*, the Council of Energy Resources Tribes ("CERT"), was structured similarly to GLITC and had a stated purpose "To improve the general welfare of Indian people through educational charitable and energy-related activities." *Dille*, 801 F.2d at 375. Like GLITC, CERT's board of directors also consisted of designated representatives of each tribe, insuring the member tribes' exclusive control over the operations of CERT. The Tenth Circuit agreed that CERT qualified as an Indian tribe as defined by Title VII because the "creation of CERT to advance the economic conditions of its thirty-nine member tribes is precisely the type of activity that Congress sought to encourage by exempting Indian tribes from the requirements of Title VII." *Id.* at 375-76. The court further found it illogical to believe that "Congress intended to protect individual Indian tribes but not collective efforts by Indian tribes." *Id.* at 376. Given all the similarities between GLITC and CERT, this decision offers a solid basis to find that GLITC is entitled to assert sovereign immunity here.[3]

Defendant further cites a multi-factor test to determine whether a tribe should

[3] While the court does not reach the merits of defendant's alternative argument that plaintiff's Title VII, ADA, GINA and ADEA claims, the reasoning in *Dille* would appear squarely on point to the extent plaintiff's claims in this lawsuit are limited to these federal statutes. Thus, even absent GLITC's assertion of sovereign immunity, plaintiff's statutory claims in this lawsuit would likely be subject to dismissal for failure to state a claim.

receive the benefit of sovereign immunity. In *McNally CPAs and Consulting v. DJ Host, Inc.*, 2004 WI App 221, ¶ 12, 277 Wis. 2d 801, 692 N.W.2d 347, the Wisconsin Court of Appeals considered the following *nine* factors to answer the narrow question of whether tribal sovereign immunity applies when an Indian tribe purchases all shares of an existing, for-profit corporation, then assumes its operations:

> (1) whether the corporation was organized under the tribe's laws or constitution;
> (2) whether the corporation's purposes are similar to those of the tribal government;
> (3) whether the corporation's governing body is comprised mainly or solely of tribal officials;
> (4) whether the tribe's governing body has the power to dismiss corporate officers;
> (5) whether the corporate entity generates its own revenue;
> (6) whether a suit against the corporation would affect the tribe's fiscal resources;
> (7) whether the corporation has the power to bind or obligate the funds of the tribe;
> (8) whether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments; and
> (9) whether the corporation is analogous to a tribal governmental agency or is more like a commercial enterprise created to generate profits for its owners.

Id. Yet in a subsequent case, *Koscielak v. Stockbridge-Munsee Community*, 340 Wis. 2d 409, 811 N.W.2d 409 (Wis. Ct. App. 2012), the Wisconsin Court of Appeals endorsed a narrow application of the test, and further expressed disapproval of the factors as an effective reflection of the Supreme Court's *Kiowa* decision, finding no distinction between governmental and commercial activities of a tribe. *Id.* at 417-418, 811 N.W.2d at 456. Since the court has been unable to find any Seventh Circuit authority suggesting that this

multi-factor test should apply, the court is not bound to apply those factors here.[4] Regardless, all factors adopted in *McNally* point to immunity, and plaintiff has not persuasively established that these factors, or any other authority, suggest that tribal immunity does not extend to GLITC.[5]

Plaintiff's primary argument in opposition is that tribal sovereign immunity extends only to federally recognized tribes themselves, not to non-profit tribal entities such as GLITC. Plaintiff offers no supporting authority, directing the court instead to the United States Supreme Court's decent decision in *Yellen v. Confederated Tribes of Chehalis Reservation*,

[4] Recently this court applied a five-factor test from the Court of Appeals for the Ninth Circuit to determine whether an entity is an "arm of a federally-recognized Native American tribe" in the context of a claim under the False Claims Act's *qui tam* provision. *Mestek v. Taylor*, No. 21-cv-541-wmc, dkt. #27, at 9 (W.D. Wis. May 18, 2022). Notably, that test also considers the purpose and structure of the entity, as well as the financial relationship between the tribe and the entity in question.

[5] Even the organizational factor essentially applies, except that instead of GLITC being organized under the laws and constitution of a single tribe, it was organized under the laws and constitution of multiple, federally recognized tribes, something Congress has strongly endorsed their interests align and is hardly a distinction that supports an abandonment of each tribe's sovereign immunity. If anything, it is arguably bolstered. In fairness, as plaintiff points out, the Tenth Circuit held in *one* decision that one of the requirements for an entity to be entitled to sovereign immunity was that it be organized under tribal law as opposed to state law and in this case, GLITC was incorporated under Wisconsin law. *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1149-50 (10th Cir. 2012). However, in *Somerlott* the entity at issue was a for-profit business, and other jurisdictions subsequently have found that tribal sovereign immunity applies to an entity incorporated under state law, particularly when the entity is a non-profit, like GLITC. *See McCoy v. Salish Kootenai Coll., Inc.*, 785 F. App'x 414, 415 (9th Cir. 2019) (tribal college incorporated under state law was entitled to tribal sovereign immunity); *Stathis v. Marty Indian Sch. Bd. Inc.*, -- F. Supp. 3d -- , 2021 WL 4255644, (D. S.D. Sept. 17, 2021) (school board that administered a school that was a tribal entity, was entitled to sovereign immunity despite incorporation under state law); *Cain v. Salish Kootenai Coll., Inc.*, CV-12-181-M-BMM, 2018 WL 2272792, at *1-4 (D. Mont. May 17, 2018) (college incorporated under tribal and state law entitled to sovereign immunity); *Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288, 289, 291-21 (D. Me. 2014) (Maine limited liability company entitled to sovereign immunity because entity was owned by an Indian Reorganization Act § 17 corporation and it was formed to advance governmental objectives). The court is neither bound by the *Somerlott* decision, and it is inapposite in any event given GLITC's structure.

141 S. Ct. 2434 (2021), in which the Court held that Alaska Native regional and village corporations ("ANCs") were eligible for relief under the Coronavirus Aid, Relief and Economic Security Act. However, this decision does not advance plaintiff's position. In particular, the *Yellen* Court held that although the ANCs were not themselves federally recognized, since they were not "Indian tribes" under the statutory definition, they were nevertheless eligible for relief under the CARES Act. *Id.* at 2452. Importantly, the *Yellen* Court did not address tribal sovereign immunity or comment further about the distinction between federally recognized tribes and their non-profit, corporate arms that function to serve tribal members. As defendant properly points out, if anything, this decision would serve to broaden the scope of the definition of "Indian tribes," working to GLITC's advantage with respect to its sovereign immunity argument.

Plaintiff further argues that the court must heavily weigh the tribal liability factor from *McNally*, but again cites no legal authority for this position beyond the *McNally* decision itself. Even assuming these factors apply here, *and* this court is required to weigh the impact of tribal liability to a greater degree than the other factors, as previously alluded to, GLITC has detailed the adverse impact of a judgment against it: a decrease in funding available for tribal services due to the costs of litigation and a potential judgment against it. Plaintiff makes no effort to dispute this adverse impact.

Plaintiff's remaining arguments in opposition are unavailing. As a threshold matter, plaintiff's suggestion that the court should take up review of the Commission's decision is simply off the mark. This court does not have jurisdiction to review that decision. Rather, an appeal from a decision of the Commission must be taken in accordance with Wis. Stat.

§ 227.53(a)(1), which sets forth the procedures by which a petitioner would submit a decision for review in the appropriate county circuit court. Moreover, as previously noted, plaintiff already followed those procedures with respect to the Commission's decision by filing a petition for review in Vilas County Circuit Court in Case No. 2020-cv-84. Should plaintiff wish to appeal *that* decision, once it is issued, the next step would be for him to appeal the outcome to the Wisconsin Court of Appeals.

In addition, plaintiff asserts that GLITC waived its sovereign immunity by (1) receipt of federal grant money, and (2) making job announcements committing to follow federal and state law. However, a waiver of sovereign immunity must be explicit, and the bar for waiver is high: "to relinquish its immunity, a tribe's waiver must be clear." *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001). Plaintiff has not met this burden. First, by accepting federal grant money, GLITC did not waive its tribal sovereign immunity. Plaintiff does not attempt to distinguish the cases finding that the acceptance of federal funding, even with an agreement not to discriminate in violation of federal law, does not constitute a waiver of tribal sovereign immunity. *See Dillon*, 144 F.3d at 583; *see also Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1286 (11th Cir. 2001) (even if tribe accepts federal funds in exchange for an implicit promise not to discriminate, the exchange "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."). Second, GLITC's

job announcements include no hint of a waiver. Plaintiff claims that GLITC's job announcement includes the following statement: "As an equal opportunity employer, GLITC intends to comply fully with all federal and state laws and the Information requested on this application will not be used for any purpose prohibited by law." (Dkt. #14 at 16.) Again, however, GLITC did not mention, much less explicitly waive, its tribal sovereign immunity in those announcements, so this waiver argument fails as well.

Plaintiff next argues that an application of tribal sovereign immunity here would implicate his Fourteenth Amendment due process rights. However, the Supreme Court has already considered and rejected this argument: "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. 49, 56 (1978). Moreover, the fact that plaintiff is left without recourse is not a reason to find no tribal sovereign immunity. *Miller v. Coyhis*, 877 F. Supp. 1262, 1266-67 (E.D. Wis. 1995) (defendant entitled to tribal sovereign immunity despite no available means for plaintiff to challenge defendant's conduct).

Finally, plaintiff argues that Public Law 280 and its amendments, the Indian Civil Rights Act of 1968, preempts tribal sovereign immunity. Again, however, the Supreme Court has already addressed this question and found that these laws do not amount to a waiver of that immunity. *See Three Affiliated Tribes of the Fort Berthold Reservation v. World Engineering*, 476 U.S. 877, 892 (1986) ("We have never read Pub.L.280 to constitute a waiver of tribal sovereign immunity, nor found Pub.L.280 to represent an abandonment of the federal interest in guarding Indian self-governance."). Accordingly, defendant is

immune from suit by plaintiff, and the court need not take up its alternative argument that any federal *statutory* claims lack merit because GLITC is expressly exempted from suit as an "Indian tribe."

ORDER

IT IS ORDERED that:

1) Defendant's motion to dismiss (dkt. #9) is GRANTED on the ground that plaintiff's complaint fails to state a claim upon which relief can be granted. The claims in this lawsuit are DISMISSED with prejudice.

2) The clerk's office is directed to enter judgment in defendant's favor and close this case.

Entered this 23rd day of May, 2022.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEAN S. SENECA,

Plaintiff,

Case No. 21-cv-304-wmc

v.

GREAT LAKES INTER-TRIBAL COUNCIL, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant dismissing this case with prejudice.

/s/
Joel Turner, Clerk of Court

May 23, 2022
Date