IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

WILLIAM PETERSON, III, Plaintiff, v. HARRAH'S NC CASINO COMPANY, LLC and CAESARS ENTERTAINMENT, INC ., Defendants.	Civil Action No. 1:23-0036-MOC – WCM **PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The Plaintiff, William Peterson, III, by and through his undersigned counsel submits this surreply in opposition to Defendant's motion to dismiss his complaint (Doc. # 15). This Court granted Plaintiff's request to file this surreply by text entry of September 5, 2023.

INTRODUCTION

In support of its Reply briefing to their Motion to Dismiss, Defendants submitted the Second Amended & Restated Tribal – State Compact Between the Eastern Band of Cherokee Indians and the State of North Carolina.[1,2,3] (Doc. #19-1.) In their Reply brief, the Defendants argued that the Gaming Compact is dispositive as to whether Harrah's,[4]

[1] Hereafter the Eastern Band of Cherokee Indians is referred to as "the EBCI" or "the Tribe."
[2] Hereafter the State of North Carolina is referred to as "NC" or "North Carolina."
[3] Hereafter the Second & Amened & Restated Tribal – State Compact Between the Eastern Band of Cherokee Indians and the State of North Carolina (Doc. # 19-1) is referred to the "Gaming Compact."
[4] The Defendants are collectively referred to as "Harrah's."

the fourth largest gaming enterprise in the world, is afforded the immunity against federal laws that are granted to sovereign nations, like the Eastern Band of Cherokee Indians.

Harrah's position is that Plaintiff was required to sue the Tribe and because he is not suing the Tribe his claims must be dismissed. Harrah's position is that the Gaming Compact details the reasons why Harrah's should have the same sovereign immunity as the Tribe to support its motion to dismiss.

Plaintiff's position is that the Gaming Compact has nothing to do with Harrah's sovereign immunity—that it does not speak about it all. Plaintiff's position is that there is no requirement that he sue the Tribe and that, if anything, the Gaming Compact evidences that the Tribe should not be a required party to this litigation.

ARGUMENT

I. The Gaming Compact Confirms that the Tribe was not Plaintiff's Employer

The Gaming Compact is an agreement between the Eastern Band of Cherokee Indians and the State of North Carolina. (*See*, *generally*, Dkt. 19-1.) It is a 37-page contract governing the conditions for Class III Gaming on tribal land between the EBCI and NC. That's it. Harrah's argument that the Gaming Compact is somehow dispositive about whether or not Plaintiff can pursue a lawsuit against Harrah's is a red herring.

The EBCI was not Plaintiff's employer. Defendants' arguments require a showing that the EBCI is an indispensable party. If Harrah's cannot make that showing then Harrah's motion to dismiss must be denied.

Even if the Court should find that the EBCI was a joint employer it is not an indispensable party to the litigation. Tribal sovereignty issues only arise after a Court makes the requisite finding that a tribe is a necessary party under Rule 19. A Court must undergo a Rule 19 analysis in determining whether the joinder of the party is both necessary *and* indispensable. Harrah's arguments do not meet the necessary and indispensable legal requirements, as evidenced by Harrah's last hail-mary by attempting to supplement the record in its Reply memorandum filing.

A. The Gaming Compact Sets Forth Limited Employment Responsibilities to the EBCI

Harrah's argues that the EBCI is an indispensable party to the litigation because the Gaming Compact establishes the EBCI as Plaintiff's employer. That is a laughable misrepresentation of fact. The Gaming Compact has nothing to do with hiring and employment. The Gaming Compact sets forth 3 requirements about employees: (1) The EBCI is required to conduct background checks; (2) The EBCI is responsible for providing gaming licenses, procedural manuals, and disciplinary standards, and; (3) The EBCI Limits who can work, such as individuals under 21, and individuals under specific criminal convictions or charges.[5] The EBCI agreed to these requirements. It then turned over the entire management of the casino to Harrah's.

B. The Management Agreement Makes Harrah's Responsible for all Employment Issues

As discussed above, the Gaming Compact requires the EBCI to undertake three

[5] Hereafter referred to as the "EBCI Requirements."

employment responsibilities. Harrah's argues that this establishes that the EBCI is an indispensable party to this litigation. This does not conform to the facts.

Harrah's and the EBCI have a Management Agreement setting forth responsibilities of each entity. (Exhibit 1 to the Declaration of Daniel Gray Leland Regarding Plaintiff's Surreply in Opposition to Dismiss.) As cited in Plaintiff's initial response brief, the Management Agreement expressly states that Harrah's authority and responsibility is as to:

> [a]ll business and affairs in connection with the day-to-day operation, management, and maintenance of the Enterprise and the Facility . . . shall be the responsibility of [Harrah's]."

(Leland Decl. Ex. 1 at § 4.1.) The language is not subtle, Harrah's responsible for the entirety of the operations.

The Management Agreement is also explicit that Harrah's has complete control over employees:

> [Harrah's] shall have . . . the exclusive responsibility and authority to direct the selection, hiring, training, control and discharge of all employees performing regular services for the Enterprise in connection with the maintenance, operation, and management of the Enterprise and the Facility and any activity upon the Property.

(Leland Decl. Ex. 1 at § 4.6.1.)

The employment responsibilities the EBCI assumed in the Gaming Compact were expressly delegated to Harrah's in the Management Agreement. ***The Tribe has no meaningful control over employees working at Harrah's North Carolina Casino***.

The Tribe should not even be considered a proper party to this litigation, much less one that is an *indispensable* party requiring dismissal. The EBCI does not meet any of the requirements of being an employer under any factors or requirements set forth by the Fourth Circuit Court of Appeals. *See Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, (4th Cir. 2017).

C. The Gaming Compact and Management Agreement Show that the EBCI is not an Employer

Harrah's argues that the EBCI was Plaintiff's "true employer." Plaintiff submits that the EBCI was not Plaintiff's employer, much less an indispensable party requiring dismissal of his case.

Harrah's assertions that EBCI was Plaintiff's employer runs afoul of all common-law and statutory definitions of "employer" and "employee." This is evidenced by the fact that Harrah's argument, based on the Gaming Compact, sets forth three incredibly narrow "employer" requirements, which the EBCI delegated to Harrah's, as well as every single other employment, management, and operations decision.

There is voluminous case law examining the factors determining whether or not a specific individual and company are "employee" and "employer." The United States Court of Appeals for the Fourth Circuit has established six factors that a court should consider in determining whether there is a joint-employment relationship. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141–142 (4th Cir. 2017). Those factors are:

(1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;

(2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to — directly or indirectly — hire or fire the worker or modify the terms or conditions of the worker's employment;

(3) The degree of permanency and duration of the relationship between the putative joint employers;

(4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

(5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

(6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

The Management Agreement speaks to each of these factors. The *only* factor in this 6-factor analysis that favors EBCI is factor 5. Every other factor illustrates that the EBCI was not Plaintiff's employer, as detailed by the United States Court of Appeals for the Fourth Circuit in *Salinas*.

The *Salinas* factors show the exact opposite to Harrah's argument: that the Tribe was not Plaintiff's employer. The Gaming Compact coupled with the Management Agreement makes it very clear that all of the *Salinas* factors show that the EBCI was not Plaintiff's joint-employer, and thus *not* an indispensable party to this litigation.

II. *Yashenko* Is Irrelevant to this Court's Analysis

Harrah's argues that the *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541 (4th Cir. 2006) is controlling precedent requiring dismissal of Plaintiff's complaint. *Yashenko*

is irrelevant.[6] An even cursory analysis of *Yashenko* shows that it has nothing to do with the facts relating to this case.

The issues decided before the Fourth Circuit in *Yashenko* were:

1. Whether the federal Family and Medical Leave Act ("FMLA") provides an employee with an absolute right to be restored to his previous job after taking approved leave; and (**ISSUE 1)**

2. Whether Harrah's could be sued for having a hiring policy that provided a hiring preference favoring EBCI tribal members, as required by the Management Agreement. **(ISSUE 2)**

Yashenko, 446 F.3d at 544.

Make no mistake, the Fourth Circuit expressly stated that it was directly addressing those issues and only those issues. *Id.*

A. ISSUE 1: *Yashenko* Acknowledges that Federal Courts Have Jurisdiction Over Harrah's

As to Issue 1, the *Yashenko* Court held that, consistent with the other Courts of Appeal, there is no absolute right to reinstatement after an employee takes FMLA leave. The Fourth Circuit's decision had nothing to do with tribal sovereign immunity or the confines and/or requirements of the joint employer doctrine. In *Yashenko* the Fourth Circuit simply addressed whether Harrah's—one of the same Defendants in this case—was required to provide the plaintiff in that case with an absolute right to restoration under the FMLA. Plaintiff does not contest this holding, nor is it relevant to Plaintiff's claims.

[6] All references to *Yashenko* refer to the decision of the United States Court of Appeals for the Fourth Circuit in 446 F.3d 541 (4th Cir. 2006).

Plaintiff's FMLA claims have nothing to do with his restoration rights under the FMLA: his FMLA claims are about being discriminated against for requesting FMLA leave, interfering with his ability to take FMLA leave, and retaliating against him because he reported his FMLA leave was being interfered with. (*See* Doc. 1–1.) He makes no claim that he had a right to "restoration," a separate FMLA right that Plaintiff has not claimed or argued.

What is most applicable is that *Yashenko* Court's analysis as to Issue 1 is that it engaged in a thoughtful and deliberate analysis of the question. If tribal sovereignty was the ultimate trump card that controlled everything, certainly the Fourth Circuit Court of Appeals would not waste its time. If the Fourth Circuit Court of Appeals did not have jurisdiction over the case (what Harrah's argues in this case) it would have no reason to address Issue 1 at all.

For that matter, in *Yashenko* the Fourth Circuit expressly stated that it was deciding a case of "first impression," that would establish the analysis to be applied by the district courts in the Fourth Circuit as to whether or not the FMLA provided an absolute right to restoration under the FMLA. *Yashenko*, 446 F.3d at 544. The Fourth Circuit would certainly not establish binding precedent on an issue of first impression unless it was unequivocally sure that the federal district courts had jurisdiction over employment matters against Harrah's. Plaintiff does not need to remind this Court that courts only address cases over which they have subject-matter and party jurisdiction; and a Court of Appeals certainly does not establish new precedent on issues of first impression over which it has no jurisdiction.

With respect to Issue 1, in *Yashenko* the Fourth Circuit made it very clear that FMLA and standard employment claims can be brought against the EBCI, even if those claims were not viable in that lawsuit.

B. ISSUE 2: *Yashenko* Does Not Provide Harrah's with Sovereign Immunity

In ISSUE 2 of the *Yashenko* decision the Fourth Circuit determined that the EBCI was an indispensable party to the litigation about Harrah's hiring policies that provided a preference credit for tribal members. The Management Agreement explicitly requires that tribal members are provided preference in hiring. Plaintiff does not challenge that at all. But the "preference" hiring issue in *Yashenko* has nothing to do with his case.

Once again, Harrah's reliance on *Yashenko* reflects how that case has nothing to do about the facts in this case. Plaintiff does not dispute that Harrah's can have a hiring preference policy, the matter at issue in *Yashenko*. It also has nothing to do with this litigation. *The only reason* that the Fourth Circuit addressed sovereign immunity at all in *Yashenko* was because it implicated a racially based hiring preference policy in favor of members of the Tribe. *Yashenko*, 446 F.3d at 551–553. The Court rightfully determined that any policy favoring the hiring of tribal members sufficiently implicated tribal interest as to make the Tribe a non-dispensable party.

And this stands in direct contrast to the *Yashenko* court's decision, just a few pages prior, that the FMLA could be applied to the Harrah's as an employer of the plaintiff in that case.

CONCLUSION

As set forth in Plaintiff's previously filed Opposition to Motion to Dismiss and this Surreply, Plaintiff respectfully requests that Defendant's motion to dismiss is denied.

Respectfully submitted,

Dated: September 19, 2023.

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CERTIFICATE OF SERVICE

This is to certify that on September 19, 2023, the undersigned filed the foregoing with the Clerk of the Court, which will notify the following counsel of record:

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Dated: September 19, 2023

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