UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

SHANNON N. BUTRICK, Plaintiff, v. DINÉ DEVELOPMENT CORPORATION, and SARAH YOUNG, in her official capacity, Defendants.	Case No. 3:23-cv-884

DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1)

In her Response brief, Butrick concedes that DDC is an arm of the tribe that generally is entitled to sovereign immunity. This is a dispositive admission by Butrick, as an immune tribal entity can only be sued if Congress has clearly, expressly, and unequivocally abrogated tribal immunity. Butrick contends that the absence of any statement regarding immunity in the FMLA somehow constitutes an abrogation of immunity. In so arguing, Butrick confuses two separate principles of Indian law: the distinction between what is required for a statute to *apply* to a tribe and what is required for a plaintiff to *sue* a tribe. Butrick argues that the FMLA generally *applies* to DDC but offers absolutely no evidence or authority that Congress has abrogated tribal immunity such that Butrick can *sue* DDC. Only an express and unequivocal abrogation of immunity would allow Butrick to move forward with her claims, Congress made no such abrogation, and courts are unanimous that silence as to the application of a federal law to a tribe is not the express and unequivocal waiver of immunity necessary to overcome sovereign immunity. Thus, Butrick's

claims fail for lack of subject matter jurisdiction. Butrick's back up theory---that she can move forward under *Ex Parte Young* against her former manager Sarah Young---also fails as a matter of law because Butrick has conceded that she has only sued Young in her official capacity which means that Young has the same immunity as DDC. DDC's Motion to Dismiss should be granted.

ARGUMENT

I. *The FMLA's Silence on the Issue of Tribal Immunity Has No Bearing on Tribal Sovereign Immunity.*

Plaintiff argues that the FMLA should apply to Indian tribes and devotes the majority of this issue to a discussion about whether the FMLA's silence about Indian tribes means that Indian tribes are governed by the FMLA. But that is not the issue before the Court. Whether the FMLA *applies* to DDC has no bearing on whether DDC's sovereign immunity bars Butrick's claims. The general applicability of a federal law is only *one* part of the Court's analysis. For an individual to file suit against a tribe for violation of a federal law, the federal law must apply to the tribe and the tribe must *also* be subject to suit. As explained by the Eleventh Circuit Court of Appeals, "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999). And while a law of general applicability can be applicable to Indian tribes under certain circumstances, a private right of action can *only* be asserted against a tribe if Congress had expressly and unequivocally abrogated tribal immunity. *Id.*

While Plaintiff conflates applicability and enforcement in her Response brief, Plaintiff's entire argument is based on issues that are only relevant to the applicability of federal law. Plaintiff does not point to a single provision of the FMLA in which Congress expressly and unequivocally abrogated tribal immunity or otherwise granted a private right of action against Indian tribes. It

thus does not matter---and the Court does not even need to decide---if the FMLA applies to DDC. The Court only need consider whether DDC's immunity from suit has been waived. *See id.* at 1130 and 1133 (concluding that Title III of the ADA governed a tribal entity as a law of general applicability but that Congress did not abrogate tribal immunity from suit). Plaintiff has failed to identify any language in the FMLA by which Congress made "its intention unmistakably clear" as required to abrogate tribal immunity. *See Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985). Dismissal of Butrick's claims is thus appropriate as Butrick has not identified a *single* provision of the FMLA that even potentially waives tribal immunity.

Curiously, Butrick asserts in her Response that "federal courts around the country are divided on whether Indian tribes enjoy sovereign immunity from the FMLA." But, Butrick fails to cite a *single* federal case that demonstrates such a divide. The only case Butrick cites regarding FMLA immunity (the other cases all involve immunity from private rights of action for violation of other federal laws) is *Pearson v. Chugach Gov't Svcs Inc.*, 669 F. Supp. 2d 467 (D. Del. 2009). But that case did not involve tribal immunity---it involved immunity of Alaska Native Corporations. *Id.* at 477 (noting that no courts have analyzed whether ANCs are subject to FMLA" and recognizing that courts have repeatedly found that there is no "private cause of action under the FMLA against tribal organizations"). As the Fourth Circuit has recognized, Alaska Native Corporations are statutorily created corporate entities that are "not comparable sovereign entities" to Indian tribes or arms of the tribe like DDC. *Aleman v. Chugach Support Svcs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007); *Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S.Ct. 2434 (2021). Whether an Alaska Native Corporation is or is not immune under the FMLA has no bearing on the immunity of an arm of an Indian tribe like DDC.

Courts that have actually assessed whether *Indian tribes* are immune from suit for alleged violation of the FMLA have consistently recognized that Congress' silence on tribal immunity in the FMLA means that Congress has not made the unequivocal expression required to waive immunity. *See e.g. Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004); *Peterson v. Harrah's NC Casino Co., LLC*, 2023 U.S. Dist. LEXIS 208747, *2 (W.D.N.C. Nov. 20, 2023) (holding that an FMLA claim could not proceed because the Tribal Casino Gaming Enterprise, an entity wholly owned and operated by the Eastern Band of Cherokee Indians, a federally recognized tribe, had to be joined as a necessary and indispensable party, but the tribe's "sovereign status prohibit[ed] its joinder."; *Carsten v. Inter-Tribal Council of Nev.*, 599 F. App'x. 659, 660 (9th Cir. 2015) (finding the FMLA does not abrogate otherwise applicable tribal sovereign immunity). The United States Supreme Court has mandated that Congressional intent to waive immunity be explicitly stated and Congress' silence on immunity in the FMLA simply does not meet this exacting standard.

Because she analyzed a different issue than is actually before the Court, Butrick's argument also ignores numerous other critical issues related to DDC's sovereign immunity. It has long been recognized that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). "[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit, or the tribe has waived immunity." *Applied Scis. & Info. Sys. v. Ddc Constr. Servs.*, 2020 U.S. Dist. LEXIS 94435, *5 (*citing Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1991)). The doctrine of tribal sovereign immunity operates as a presumption. *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (*citing Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509

(1991) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)) ("The Supreme Court has repeatedly declared a presumption favoring tribal sovereign immunity.")

The presumption of immunity even protects a tribal entity if it is shown to be an extension of tribe. In *Williams v. Big Picture Loans*, the Fourth Circuit considered this issue and found that a burden-shifting framework applies in deciding whether a tribal entity should be excluded from the reach of a statute. It found that:

> In determining the proper burden allocation in this context, this Court's arm-of-the-state doctrine guides our analysis. Given the unique attributes of sovereign immunity, we have held that the burden of proof falls to an entity seeking immunity as an arm of the state, even though a plaintiff generally bears the burden to prove subject matter jurisdiction. *Hutto v. S.C. Retirement Sys.*, 773 F.3d 536, 543 (4th Cir. 2014). The same burden allocation applies to an entity seeking immunity as an arm of the tribe.
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> …
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> Unlike the tribe itself, an entity should not be given a presumption of immunity until it has demonstrated that it is in fact an extension of the tribe. ***Once a defendant has done so, the burden to prove that immunity has been abrogated or waived would then fall to the plaintiff.***

Williams v. Big Picture Loans, LLC, 929 F.3d 170, 176-177 (4th Cir. 2019) (emphasis added). Here, Defendants have already proven that DDC is an extension of the tribe by applying the five-factor test used by the Fourth Circuit in its original Motion. *See generally*, ECF No. 7. Indeed, Plaintiff concedes that DDC is an arm of the Navajo Nation. Because the Navajo Nation is presumed to enjoy sovereign immunity and because DDC is an extension of tribe, the burden is shifted back to the Plaintiff to demonstrate that immunity has been abrogated or waived. Plaintiff has not done so. Instead, Plaintiff argues that because the FMLA did not carve out an exception for Indian tribes, it should apply equally to them (an argument that, as explained above, only deals with *applicability* of the FMLA, not immunity from suit). But the opposite framework is used by the Fourth Circuit—the Court starts with the presumption that the tribe is entitled to sovereign

immunity. Once an entity of the tribe has proven that it is entitled to sovereign immunity, the burden shifts back to the Plaintiff to demonstrate that the tribal entity (or the tribe itself) is not entitled to sovereign immunity because it has been abrogated or waived in some fashion. Plaintiff conflates the analysis by beginning with the statute in the first instance and ignoring that the tribe itself (and a tribal entity once proven to be an extension of the tribe) is presumed to be protected by immunity. Arguing that because the FMLA is silent on the issue of immunity, the tribe should be presumed to not be exempt from the statute is not the approach used by the United States Supreme Court, the Fourth Circuit Court of Appeals, or any circuit court or federal district court that is correctly applying federal law.

The authorities cited by Plaintiff in support are either not analogous to the circumstances at hand or reiterate the general principle that sovereign immunity applies in the absence of congressional abrogation or waiver. In *Federal Power Comm'n v. Tuscarora Indian Nation*, for instance, the statute at issue, the Federal Power Act, "neither overlook[ed] nor exclude[ed] Indians or lands owned or occupied by them." 362 U.S. 99, 118 (1960). Instead, the Act gave "every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians," essentially abrogating tribal immunity to which Indian tribes would otherwise be entitled. *Id.* In other cases cited by Plaintiff, at issue were federal laws criminalizing certain conduct. In *United States v. Farris*, the Ninth Circuit considered a federal law criminalizing illegal gambling businesses and in doing so held that federal jurisdiction extends "to crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer." 624 F.2d 890, 893 (9th Cir. 1980) (citations omitted). Similarly, in *United States v. Baker*, at issue was the applicability of the Contraband Cigarette Trafficking Act to Indian traders, the relevant part of which made it "unlawful for any

person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 63 F.3d 1478, 1484 (9th Cir. 1995) (citing 18 U.S.C. § 2342). Unlike the criminal statutes at issue in *Farris* and *Baker*, the FMLA is not a law of general applicability. It applies specifically to "employers", the definition of which, as Plaintiffs conceded, has excluded Indian tribes or tribal entities in similar statutes. *See* ECF No. 12 at 4 (citing 42 U.S.C. § 2000e(b) and 42 U.S.C. 12111(5)(B)(i) (both excluding Indian tribes from the definition of "employer")). Further, both the Farris and Baker courts recognized that even a federal statute of general applicability will not apply to Indian tribes if the law implicates "exclusive rights of self-governance in purely intramural matters." *Farris*, 624 F.2d at 893 (citations omitted); *Baker*, 63 F.3d at 1485 (internal citations and quotation marks omitted). In the present case, at issue is a law that is not one of general applicability and applies specifically to employers. *See* 29 U.S.C. 2615(a)(1)-(2). Further, the FMLA implicates matters of self-governance in the Navajo Nation's ability to choose its own members and self-govern an entity that provides economic benefits to the tribe. The FMLA is thus not a law of general applicability and, even if it is, it contains no waiver of sovereign immunity that would allow a private right of action such as the one Butrick has attempted to assert.

II. *Because Plaintiff concedes that the suit against Sarah Young is brought in her official and not personal capacity, it is similarly barred by principles of tribal sovereign immunity.*

Plaintiff has readily conceded that Butrick sued Sarah Young in Young's official capacity in order to obtain the prospective relief of reinstatement. ECF No. 12 at 6. Regardless of the merits of seeking reinstatement as a remedy (Plaintiff makes no allegations that Young has the authority to reinstate), Plaintiff is barred from seeking relief against Young in her official capacity because a suit against an official is equivalent to a suit against the tribal entity, and thereby barred by principles of tribal sovereign immunity. This concept is supported by the very authorities that

Plaintiff cites. In *Carsten*, for instance, the Court found that although tribal sovereign immunity "does not prevent suits against those same employees when sued in their individual capacities," sovereign immunity ***does*** extend to tribal employees sued in their official capacities. *Carsten v. Inter-Tribal Council of Nev.*, 599 F. App'x. 659, 660 (9th Cir. 2015) (*citing Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013)). In *Carsten*, the Ninth Circuit also recognized that "the FMLA does not abrogate tribal sovereign immunity" and reiterated that the claimant's suit against the Inter-Tribal Council of Nevada would be barred if "ITCN is an arm of tribe acting on behalf of the tribe and therefore [has] tribal sovereign immunity." *Id.* at 660. Here, DDC is an arm of the Navajo Nation, and Plaintiff has conceded such. Any claim against Young in her official capacity is a claim against the tribe itself. *See Thomas v. Dugan*, Case No. 97-2717, 1998 U.S. App. LEXIS 32675, *2-3 (4th Cir. Dec. 31, 1998) (citations omitted) ("Tribal entities and individual tribal officers acting within their representative capacity within the scope of their authority are also shielded by sovereign immunity."); *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 774 (M.D.N.C. 2000) (citations omitted) ("A suit against a public employee in his or her official capacity is a suit against the government entity.") As a result, Plaintiff's claims against Young should be barred by tribal sovereign immunity.

CONCLUSION

WHEREFORE, for the reasons stated above, Defendants respectfully request that the Court dismiss this action with prejudice and grant all further relief deemed necessary.

Date: April 29, 20224

Respectfully submitted,

DINE DEVELOPMENT CORPORATION AND SARAH YOUNG
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I electronically filed the foregoing using the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to counsel of record.

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