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

SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1)

Defendants Diné Development Corporation ("DDC") and Sarah Young ("Young"), by counsel and under Rule 12(b)(1) of the Federal Rules of Civil Procedure, file this Supplemental Memorandum in Further Support of their Motion to Dismiss the Complaint filed by Plaintiff Shannon N. Butrick ("Butrick"). The Court should grant the Motion and dismiss the Complaint, for the reasons stated below.

INTRODUCTION

Pursuant to the Court's order at ECF No. 16, the parties were directed to submit supplemental briefing on the issues introduced in Defendants' original Motion to Dismiss Plaintiff's complaint for relief under the Family Medical Leave Act, 29 U.S.C. § 2601, et seq. (the "FMLA"). Defendants reiterate and reincorporate the arguments in their original memorandum in support, and explain further in the present briefing why this Court should follow its sister circuits in ruling that the FMLA's silence on the issue of its applicability to Indian tribes implies that tribal

sovereign immunity is not abrogated, barring FMLA claims against Indian tribes and by extension, any relevant tribal entities considered to be arms of the tribes.

ARGUMENT

Plaintiff alleged two Counts in her Complaint: interference with exercise of leave rights under the FMLA, in violation of 29 U.S.C. 2615(a)(1), and retaliation for complaining of discrimination under the FMLA, in violation of 29 U.S.C. 2615(a)(2). The relevant statute reads:

> *(a) Interference with rights*
>
> > *(1) Exercise of rights*
> > *It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.*
> >
> > *(2) Discrimination*
> > *It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.*

29 U.S.C. § 2615(a)(1)-(2).

The term "employer" within the FMLA does not include any reference to Indian tribes. Thus Congress did not expressly make the statute applicable to tribes and tribal entities, or exempt them. In some similar employment laws, the term "employer" specifically exempts Indian tribes. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(1)(b); Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(b); Workers Adjustment and Retraining and Notification Act, 20 CFR 639.3(a)(1)(ii) ("The term 'employer' includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered.")

Plaintiff asks this Court to interpret the FMLA's failure to expressly exempt tribes as employers in clear language as a decision not to exempt them from coverage. However, "[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 its immunity." *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702, 140 L. Ed. 2d 981, 985 (1998) (citations omitted). See also *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790, 134 S. Ct. 2024, 2031, 188 L. Ed. 2d 1071, 1084 (2014) (citing *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001)) (emphasis added) ("Our decisions establish as well that such a congressional decision must be clear. **The baseline position, we have often held, is tribal immunity**; and '[t]o abrogate [such] immunity, Congress must unequivocally express that purpose.'")

Although the Fourth Circuit has not addressed the precise question of whether Indian tribes are exempt from employee suits under the FMLA, other appeals courts that have addressed the question have found that the FMLA's silence on the issue of whether tribes can be considered "employers" indicates that the FMLA does not abrogate tribal sovereign immunity. *See Carsten v. Inter-Tribal Council of Nev.*, 599 F. App'x 659, 660 (9th Cir. 2015) ("The district court correctly held that the FMLA does not abrogate tribal sovereign immunity" and citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1970, 56 L.Ed 2d 106 (1978) "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers…. It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (internal citation omitted)); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (citing *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 175 (2d Cir. 1996)) ("The Mashantucket Pequot Tribe is a federally recognized Indian tribe, and neither abrogation nor waiver has occurred in this case."); *Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 169 (N.D.N.Y. 2006) ("Thus, Congress has not expressly abrogated the sovereignty of Indian Nations

in the FMLA, and Congress must expressly do so for there to be an effective abrogation.") *Muller v. Morongo Casino, Resort & Spa*, Case No. EDCV 14-02308-VAP, 2015 U.S. Dist. LEXIS 79457, *11-13 (C.D. Cal. June 17, 2015) (recognizing that the FMLA does not abrogate tribal immunity).As the Second Circuit noted in its *Chayoon* decision, Indian tribes are not subject to suit where Congress does not expressly assert jurisdiction or the tribes do not clearly waive immunity: "The FMLA makes no reference to the "amenity of Indian tribes to suit[.]" *Chayoon*, 355 F.3d 141, citing *Garcia v. Akwesasne Hous. Auth.* 268 F.3d 76, 84 (2d Cir. 2001) (holding that since ADEA did not make any express reference to the amenity of Indian tribes to suit, they cannot be sued under the statute.) *Accord Pearson v. Chugach Gov. Services Inc.,* 669 F.Supp.2d 467, 477 (D.Del.2009) ("The only courts to examine whether tribal organizations are subject to the FMLA's employer obligations held, based on the doctrine of tribal immunity, th[at] there is not [a] private cause of action under the FMLA against tribal organizations.").

Butrick argues that DDC is not immune from Butrick's FMLA suit because the FMLA does not expressly exempt Indian tribes from liability under the statute. But this misses the relevant question. Even if the FMLA *applies* to DDC because there no express exemption for Indian tribes, nothing in the FMLA contains the express language necessary to waive immunity such that a claim can be asserted for an alleged violation of the statute. *See e.g. Florida Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 and 1132 (11th Cir. 1999) (concluding that although the ADA was a law of general applicability that applied to tribes, the absence of any waiver of immunity precluded a private right of action). As noted 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." *Id.* at 1130. Federal circuits to consider the relevant question in this case—whether a tribe (or an arm

of the tribe like DDC) may be sued for violation of the FMLA—question have found that tribal immunity prohibits suit under the FMLA. This Court should follow the same approach as its sister districts.

In *Chayoon*, the Second Circuit affirmed a district court's dismissal of an FMLA lawsuit against the Mashantucket Pequot Tribal Council. In affirming the lower court, the appeals court stated:

> Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 754. "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose," and "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C&L Enters., Inc.*, 532 U.S. at 418 (citations omitted). The Mashantucket Pequot Tribe is a federally recognized Indian tribe, *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 175 (2d Cir. 1996), and neither abrogation nor waiver has occurred in this case. The FMLA makes no reference to the "'amenity of Indian tribes to suit.'" *Garcia v. Akwesasne Hous. Auth.,* 268 F.3d 76, 86 (2d Cir. 2001) (quoting *Florida Paraplegic Ass'n v. Miccosukee Tribe*, 166 F.3d 1126, 1133 (11th Cir. 1999)).

355 F.3d at 143. A similar result was reached in a district court out of the Ninth Circuit considering the applicability of the FMLA to tribal entities. The Court explained:

> Multiple courts have analyzed the FMLA and determined that it does not abrogate tribal sovereign immunity. Carsten, 599 F. App'x. at 660 ("The district court correctly held that the FMLA does not abrogate tribal sovereign immunity."); *Chayoon*, 355 F.3d at 143 ("The FMLA makes no reference to the amenity of Indian tribes to suit."); Morrison v. Viejas Enters., Case No. 11-cv-97-WQH (BGS), 2011 U.S. Dist. LEXIS 81922, at *3 (Jul. 26, 2011) ("The Family Medical Leave Act is a law of general application that is silent with respect to Indian tribes."); *Pearson v. Chugach Gov. Services Inc.*, 669 F. Supp. 2d 467, 477 (D. Del. 2009) ("The only courts to examine whether tribal organizations are subject to the FMLA's employer obligations held, based on the doctrine of tribal immunity, th[at] there is not [a] private cause of action under the FMLA against tribal organizations."); *Myers*, 488 F. Supp. 2d at 169 ("Thus, Congress has not expressly abrogated the sovereignty of Indian Nations in the FMLA, and Congress must expressly do so for there to be an effective abrogation.").

Muller, 2015 U.S. Dist. LEXIS 79457 at *11-13.

The common logic used among the Courts is that it is ultimately up to Congress to decide whether to abrogate tribal sovereign immunity in the context of FMLA claims. Absent an "unequivocal expression of its intention to do so," it is inappropriate for a court to abrogate immunity by allowing an FMLA claim against a tribe (or an extension of a tribe) to proceed. *Chayoon*, 355 F.3d at 143. As a result, this Court should maintain the baseline position of granting tribal immunity, which extends to DDC as an arm of the tribe, per the *Breakthrough* factors analysis used by the Fourth Circuit thoroughly explored in Defendant's original memorandum in support. *Id.* at 4-11. Without statutory language within the FMLA making Indian tribes expressly amenable to suit, their default sovereign position should be recognized and not found to be abrogated. *See Chayoon,* 355 F.3d at 143, *Carsten,* 599 F. App'x at 660, *Myers*, 488 F. Supp. 2d at 169, *Muller*, 2015 U.S. Dist. LEXIS 79457 at *11-13 (all holding that FMLA's failure to expressly mention Indian tribes is insufficient to exercise jurisdiction over otherwise sovereign Indian tribes). This Court should likewise find that FMLA's silence does not equate to an express intention to exercise jurisdiction.

The recognition that a federal law must both apply to a tribe *and* expressly waive sovereign immunity before a private litigant can assert a claim is not limited to the FMLA. Federal courts have applied these principles to numerous federal laws and have consistently found (as required by United States Supreme Court precedent) that the absence of an express waiver of immunity is fatal to a private litigant's claim even if the law generally applies to tribes. For example, the Seventh Circuit Court of Appeals, in considering an argument that the Fair Credit Reporting Act was "a statute of generally applicability and thus is assumed to apply to Indian Tribes," declined to even consider the issue because, as the district court had concluded, "the question here is not whether the Tribe is subject to FCRA; it is whether [p]laintiff can sue the Tribe for violating

FCRA." *Meyers v. Oneida Tribe of Indians of* Wisconsin, 836 F.3d 818 (7th Cir. 2016). The Eleventh Circuit Court of Appeals applied this same reasoning to claims under the Fair Labor Standards Act, holding that although the FLSA is a law of general applicability, dismissal of an FLSA claim against a tribe was appropriate because "there is no such indication that Congress intended to abrogate the tribe's immunity to suit." *Lobo v. Miccosukee Tribe of Indians of Florida*, 279 Fed.Appx. 926, 927 (11th Cir. 2008). Similarly, a United States District Court of the District of New Mexico, in *Navajo Nation v. Urban Outfitters, Inc.*, 2014 WL 11511718, *6 (D.N.M. Sept. 9, 2014), found that although the Lanham Act applied to tribes, "nothing on the face of this Act purports to subject tribes to the jurisdiction of federal courts in civil actions brought by private parties, and a congressional abrogation of tribal immunity cannot be implied."

The Court thus does not need to decide in this case whether the FMLA applies to DDC. That is because even if the statute generally applies, there is absolutely nothing in the FMLA that constitutes the express waiver of immunity required for Plaintiff to be able to assert a claim against DDC. Since Congress chose not to waive tribal immunity when it enacted the FMLA. Plaintiff's FMLA claims should be dismissed due to this Court's lack of jurisdiction over such claims.

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: July 1, 2024

Respectfully submitted,

DINE DEVELOPMENT CORPORATION AND SARAH YOUNG

By Counsel

/s/ Joan C. McKenna

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to counsel of record.

/s/ Joan C. McKenna
Counsel for Defendants Diné Development Corporation and Sarah Young