

No. 23-2316

United States Court of Appeals
FOR THE FOURTH CIRCUIT

WILLIAM PETERSON, III,

Appellant

v.

**HARRAH'S NC CASINO COMPANY, LLC;
CAESARS ENTERTAINMENT, INC.,**

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

APPELLEES' RESPONSE BRIEF

Kevin Cleys, Bar No. 51589
kcleys@littler.com
LITTLER MENDELSON, P.C.
620 South Tryon Street, Suite 950
Charlotte, NC 28202
Telephone: 704.972.7000
Facsimile: 704.333.4005

Attorneys for Appellees

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Fourth Circuit Local Rule 26.1, Appellees Caesars Entertainment, Inc. and Harrah's NC Casino Company, LLC incorporate by reference the Disclosure Statements filed by each in this matter. (*See App. 4 and 5.*)

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JURISDICTIONAL STATEMENT

Appellees Harrah's NC Casino Company, LLC ("Harrah's") and Caesars Entertainment, Inc. ("Caesars") (collectively, "Appellees") do not dispute the Statement of Jurisdiction provided by Appellant William Peterson, III ("Appellant") in his Appellant's Brief (App. 14, at 8), except that Appellees dispute Appellant's allegation that Appellees were Appellant's employer(s).

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in holding that the Eastern Band of Cherokee Indians ("EBCI"), and, by extension, the Tribal Casino Gaming Enterprise ("TCGE") (collectively, the "Tribe") was Appellant's employer and, therefore, a necessary and indispensable party to the litigation that cannot be joined due to tribal sovereign immunity?

STATEMENT OF THE CASE

A. Factual Background

Appellant William Peterson was a table games dealer employed by the Tribe at the Harrah's casino property in Cherokee, North Carolina (the "Casino.") (JA 37-38.) Like Appellant, all employees at the Casino, with the exception of a single management employee who is employed by Harrah's, are Tribe employees, and their employment is conditioned on passing background checks conducted by the Tribe, and on continued compliance with the rules and regulations of the Tribe's Cherokee

Tribal Gaming Commission. (*Id.*) The Tribe’s employment of all individuals working at the Casino, or any casino property within the State of North Carolina, is required by a compact between the State of North Carolina and the Tribe—the Second Amended & Restated Tribal-State Gaming Company between the EBCI and the State of North Carolina (the “Gaming Compact”)—which requires the Tribe to, among other things: (a) conduct preemployment background checks for prospective casino employees; (b) issue gaming licenses to casino employees whose job duties including game operation; (c) provide and maintain a procedural manual, including disciplinary standards, for casino employees; and (d) set limitations on eligibility for hire, such as age requirements. (JA 88-91.) Appellant’s wages were paid, at all times, by the Tribe. (JA 37-40.)

Appellant alleges he is a United States Army veteran with a disability who began his employment at the Casino in or around June 2016. (JA 10.) Appellant further alleges he submitted an internal incident report after the Casino fire alarm was triggered, but Appellant was allegedly instructed to remain on the Casino floor. (JA 10-11.) Appellant further alleges that, thereafter, he requested intermittent FMLA leave due to his alleged disability, but Appellant was required to wait “one hour after [his] request” to take such leave. (JA 12-13.) Appellant alleges that he complained to management and human resources regarding the perceived delayed

response to his FMLA leave request, and was subsequently suspended and terminated in April 2021. (JA 13-14.)

B. Procedural Background

On October 23, 2021, Appellant initiated this action by submitting a letter to the Equal Employment Opportunity Commission (“EEOC”), which would become EEOC Charge No. 430-2022-00324 (the “Charge”). (JA 43-44.) In the Charge, Appellant made allegations nearly identical to the above, and referred to Harrah’s and the Tribe (which he refers to as the Tribal Casino Gaming Enterprise) as his “employers.” (JA 43.) On February 10, 2023, Appellant filed his unverified Complaint with the District Court, asserting causes of action under the FMLA and USERRA against Appellees, and not against the Tribe. (See generally JA 8-22.) In his Complaint, Appellant seeks to recover, among other things, monetary damages, including back pay and front pay, and reinstatement to his position at the Casino. (JA 20-21.)

On June 27, 2023, Appellees filed their Motion to Dismiss for Failure to Join a Necessary Party under Rule 12(b)(7) (the “Motion to Dismiss”). The Motion to Dismiss asserted that the Tribe, and not Appellees, was Appellant’s employer, and that the Tribe was a necessary and indispensable party to the litigation under Rule 19 of the Federal Rules of Civil Procedure, and that the Tribe could not be joined

due to tribal sovereign immunity. (JA 24-44.) After a response brief from Appellant, a reply brief from Appellee, and a sur-reply by Appellant, the District Court conducted oral argument regarding the Motion to Dismiss. (*See generally* JA 46-216.)

On November 21, 2023, the District Court issued its order dismissing Appellant's Complaint, applying Rule 19 joinder analysis to determine that: (a) Appellant was an employee of the Tribe, and not an employee of either Appellee; (b) as Appellant's employer, the Tribe was a necessary party to the lawsuit because Appellant pursued employment-related claims; (c) due to tribal sovereign immunity, the Tribe could not be joined; and (d) the Tribe was indispensable to the lawsuit, requiring dismissal. (JA 218-224.)

SUMMARY OF THE ARGUMENT

The record on appeal (the "Record") establishes that Appellant was employed as a games dealer at a casino property on tribal land, where he and all of his coworkers, subordinates, and superiors were employed by the Tribe. The Fourth Circuit and other Circuits have *unanimously* concluded under substantially identical factual circumstances that such individuals are Tribe employees, and that when such an employee brings an employment claim, the Tribe is a necessary and indispensable party under Rule 19 that cannot be joined due to tribal sovereign immunity, and that

dismissal is required.

Indeed, this conclusion is in line with fundamental concepts of fairness and justice. Appellant's unprecedented assertion that he should be permitted to pursue his employment law claims against Appellees would mean that this action would have no preclusive effect on Appellant's ability to pursue claims arising out of the same operative allegations in tribal court, under tribal law, against the Tribe. Appellant's assertion would give Appellant two forums, and two opportunities, to seek recovery for the same alleged conduct. Furthermore, a reversal would require Appellees to defend against Appellant's employment claims despite never having been Appellant's employer.

Appellant urges this Court to break with the unanimous authority on this issue by citing inapposite case law analyzing different, and sometimes non-employment, causes of action outside of the Rule 12(b)(7) and Rule 19 context. Appellant also asks this Court to determine that its own decision, in *Yashenko v. Harrah's NC Casino Co.*, provides a conclusion that is nowhere in the opinion.

When viewed through the appropriate lens, and when considering the case authorities addressing the identical issue under functionally identical factual circumstances, there is no basis to find any error in the District Court's ruling, and this Court must affirm the same.

ARGUMENT

I. Standard of Review

The District Court dismissed Appellant's Complaint under Rule 19, for Appellant's failure to join a necessary and indispensable party. (JA 218-224.) Dismissal under Rule 19 is subject to an abuse of discretion review. *See National Union Fire Ins. Co. of Pittsburg, PA v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 250 (4th Cir. 2000) (citing *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir.1980)). Reversal requires a finding by this Court that the District Court's "findings of fact underlying its Rule 19 determination" were in "clear error." *Id.*

II. The Tribe has Tribal Sovereign Immunity with Respect to Appellant's Claims.

The United States Supreme Court has repeatedly concluded that "Indian tribes are 'domestic dependent nations that exercise inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014), quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991). Absent abrogation by Congress through legislation, or waiver by the tribe at issue, Indian tribes are not subject to suit in United States court. *Id.*; *see also Kiowa Tribe of Oklahoma v. Manuf. Techs., Inc.*, 523 U.S. 751, 754 (1998) ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived

its immunity”), *Tremblay v. Mohegan Sun Casino*, 599 Fed. Appx. 25, 26 (2d Cir. 2015) (unpublished), *State of FL. v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999) (“a suit against an Indian tribe is . . . barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit”). Waiver of sovereign immunity cannot be implied, but must be clearly and unambiguously expressed. *See Costello v. Seminole Tribe of Fla.*, 763 F. Supp.2d 1295, 1298 (M.D. Fla. 2010), citing *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001).

Furthermore, the Tribe is immune from suit under USERRA and the FMLA—the only claims asserted in Appellant’s Complaint. *Carsten v. Inter-Tribal Council of Nevada*, 599 Fed.Appx. 659 (9th Cir. 2015) (sovereign immunity for FMLA claims), *Manzano v. S. Indian Health Council, Inc.*, No. 20-cv-02130-BAS-BGS, 2021 U.S. Dist. LEXIS 126475 (S.D. Cal. July 7, 2021) (sovereign immunity for USERRA claims),; *see also Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002) (sovereign immunity for Title VII claims).

As a result, absent an act of Congress or an unambiguous waiver by the Tribe—neither of which exists here—the Tribe is immune from suit for Appellant’s claims, as a matter of law. Consistent with the same, the District Court correctly ruled that the Tribe could not be joined as a party to the litigation “because of its

status as a sovereign nation[.]” (See JA 223.)

III. Rule 12(b)(7) and Rule 19 Analysis

Against the backdrop of the Tribe’s sovereign immunity to Appellant’s claims, which Appellant does not and cannot dispute (see App. 14, 18), the District Court properly determined that dismissal was warranted in accordance with Rule 12(b)(7), for failure to join a party under Rule 19. (JA 220-224.)

A court may dismiss an action for failure to join a party in accordance with Rule 19(a)(1). Fed. R. Civ. P. 12(b)(7). Generally, a Rule 12(b)(7) motion should be granted when there is an absent party without whom complete relief will not be possible in the case, or whose interest in the controversy is such that to proceed without the party might prejudice it or the parties already present in the case. See Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1359 (2d ed. 1990). To analyze the merits of a Rule 12(b)(7) motion, the procedure set forth in Rule 19 must be applied.

Rule 12(b)(7) motions require a two-step inquiry by the Court. First, “the [C]ourt must determine whether a party is necessary under Rule 19(a) because of its relations to the matter under consideration.” *Humble v. Harrah’s NC Casino Co., LLC*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS 167966, at *14-15 (W.D.N.C. June 1, 2018), citing *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 440 (4th Cir. 1999).

Second, “[i]f the absent party is necessary, it must be ordered into the action so long as the joinder does not destroy the [C]ourt’s jurisdiction.” *Id.* at *15. To the extent the absent party “cannot be joined because it would destroy the [C]ourt’s jurisdiction, the [C]ourt must decide whether the action can continue without the party, or whether the party is indispensable under Rule 19(b) and the action must be dismissed. *Id.*

A. The Tribe, and Not Appellees, was Appellant’s Employer.

The District Court properly determined that Appellant was an employee of the Tribe, and was not an employee of either Appellee. Specifically, pursuant to the Gaming Compact, the U.S. Department of the Interior required all individuals employed at casinos on tribal grounds to be employees of the Native American tribe on whose ground the casino sits. (*See* JA 80-111.) Under the Gaming Compact, the Tribe, and not Appellees, was required to, among other things:

1. conduct preemployment background checks for prospective casino employees (JA 90);
2. issue gaming licenses to casino employees whose job duties included game operation (JA 89);
3. provide and maintain a procedural manual, including disciplinary standards, for casino employees (JA 89); and

4. set limitations on eligibility for hire, such as age requirements. (JA 88.)

Consistent with its obligations pursuant to the Gaming Company, the Tribe, and not Appellees, employed every individual working at the Casino, with the exception of a single management employee who was employed by Harrah's. (JA 37-38.) Further, pursuant to a management agreement between the Tribe and Harrah's, Harrah's was retained by the Tribe to provide management services at the Casino, but explicitly provided that the Casino workers were Tribe employees. (JA 37-38.) Appellant's employment with the Tribe was conditioned upon passing background checks conducted by the Tribe, and upon Appellant's compliance with applicable Tribe rules and regulations. (JA 38.) Appellant's wages were paid, at all times, by the Tribe. (JA 38, 40.)¹

¹ Appellees note that Appellant once again attempts to rely on inadmissible hearsay evidence regarding the purported 1996 version of the management agreement between Harrah's and the Tribe. (*See* JA 120-185; App. 14, 11-12, 32-33, 36.) To be admissible, and properly before this Court, the purported 1996 version of the agreement must be an authenticated business record, kept in the regular course of the Tribe's, or Harrah's, normal business, made at or near the time, and the authenticating individual must be a custodian or other qualified witness. *See* Fed. R. Ev. 803(6). However, Appellant seeks to rely on this document by a declaration of Appellant's counsel, who is not the proper party to authenticate such a record, and who does not provide any testimony regarding any of the required elements under Rule 803(6). (*See* JA 119.) As a result, the document is inadmissible hearsay not properly before this Court. Further, even if the document were admissible, it would ostensibly establish the terms of the management agreement in 1996, and nothing

Appellant spills much ink asking this Court to disregard applicable case authority by pointing to inapposite case law analyzing non-employment and/or distinct claims (such as Fair Labor Standards Act (“FLSA”) claims). (See App. 14, 20-21) (citing *Buser v. Southern Food Svc., Inc.*, 73 F.Supp.2d 556, 561 (M.D.N.C. 1999), *Kilvitis v. Cnty. of Luzerne*, 52 F.Supp.2d 403, 411 (M.D. Pa. 1999), *Iraheta v. Lam Yuen, LLC*, No. DKC 12-1426, 2012 WL 5995689 (D. Md. Nov. 12, 2012), *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132–35 (4th Cir. 2017), *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66–69 (2nd Cir. 2003), *Moreno v. EDCare Mgmt., Inc.*, 243 F.R.D. 258, 259 (W.D. Texas 2007), and *Roy v. FedEx Ground Package Sys., Inc.*, No. 3:17–30–30116-KAR, 2020 WL 3799203, at *1–3 (D. Mass. 2020). In none of these cases was the court asked to determine who the plaintiff’s employer was for purposes of Rule 19 analysis pursuant to a Rule 12(b)(7) motion to dismiss. Indeed, with the exception of *Buser*, none of the above cases even addressed FMLA or USERRA claims. Further, *Buser* is inapplicable, as it addressed, outside of the Rule 19 context, whether an individual can be a joint

more, and, therefore, has no bearing whatsoever on the version of the agreement applicable at the time of Appellant’s employment by the Tribe. See *Yashenko v. Harrah’s NC Casino Co., LLC*, 446 F.3d 541, 545 (4th Cir. 2006) (holding that, beginning in 2003, all casino employees were employees of the tribe, and not employees of Harrah’s.)

employer under the FMLA. *See Buser*, 73 F.Supp. 556, at 560-563. The present case presents no such question.

Appellant's attempt to avoid case law directly on point is as tortured as it is telling. This Court need not be distracted by other courts' interpretation of the FLSA's statutory definition of an "employer" outside of the context of Rule 19 analysis. Instead, this Court need look no further than the decisions wherein courts were asked, in nearly identical factual circumstances, to determine who employed tribal casino personnel. In every case in which a court has answered this question, the court has found that these individuals are employees of the Native American tribe. *See Humble v. Harrah's NC Casino Co., LLC*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS 167966, at *24-25 (W.D.N.C. June 1, 2018), *Clark v. Harrah's NC Casino Co., LLC*, No. 1:17-cv-240, 2018 U.S. Dist. LEXIS 167963, at *11-12 (W.D.N.C. Apr. 27, 2018), *Manzano v. S. Indian Health Council, Inc.*, No. 20-cv-02130-BAS-BGS, 2021 U.S. Dist. LEXIS 126475 (S.D. Cal. July 7, 2021). Indeed, in *Yashenko*, this Court recognized that "[b]y 2003, all employees that Harrah's hired were [Tribe], rather than Harrah's, employees." *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 545 (4th Cir. 2006).

The District Court correctly determined, consistent with the above applicable authority, that Appellant was an employee of the Tribe, and not an employee of

Appellees. (JA 222) (“[The] evidence, even when viewed in the light most favorable to [Appellant], established that [the Tribe] was [Appellant’s] employer.”)² This determination was premised on the District Court’s application of the facts on record regarding the Tribe’s control and authority over the terms and conditions of Appellant’s employment to the case law directly addressing this question. (See JA 221-224.)

B. As Appellant’s Employer, the Tribe is a Necessary Party under Rule 19(a).

As noted above, Rule 19 analysis is a two-step process, first focusing on whether a party is required, or necessary, due to the party’s relation to the matter under consideration. See Fed. R. Civ. P. 19(a); see also *Yashenko v. Harrah’s NC Casino Co, LLC*, 446 F.3d 541, 552 (4th Cir. 2006), *Humble v. Harrah’s NC Casino Co., LLC*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS 167966, at *14-15 (W.D.N.C. June 1, 2018) (citing *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 440 (4th Cir. 1999)). Secondly, under Rule 19(a), “[i]f an absent party is necessary, it must be ordered into the action so long as joinder does not destroy the court’s jurisdiction.”

² While Appellant insists that the District Court’s Order misinterprets *Yashenko* (see App. 14, 21-23), this is not the case, as *Yashenko*, as well as *Clark* and *Humble*, all recognized that, at least from 2003, casino employees are employees of the Native American tribe.

Humble, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *15; *see also* Fed. R. Civ. P. 19(a)(2), *Yashenko*, 446 F.3d at 552.

Under Rule 19(a)(1), an absent party is necessary if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double or multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a).

Here, the District Court correctly determined that the Tribe is a necessary party. (JA 221-223.) Consistent with *Humble*, *Clark*, and *Manzano*, the District Court determined that the Tribe demonstrated that it had interests relating to the subject matter of the litigation—namely, its status as Appellant's employer, where Appellant brought employment claims, and its interests pursuant to its management agreement with Harrah's. (JA 222-223.)³ These interests satisfy the requirements

³ Contrary to Appellant's baseless assertion, the Tribe did claim an interest in this litigation—as Appellant's employer—and the Tribe has an interest in defending

under Rule 19(a). *See Clark*, No. 1:17-cv-240, 2018 U.S. Dist. LEXIS at *12. Further, the District Court determined that the Tribe could not protect these interests without participating in the litigation. (JA 222-223.)

Although not addressed in the District Court's Order, the District Court also could have determined that the Tribe is a necessary party because the District Court could not accord all of the relief requested by Appellant (namely, wage-related monetary damages and reinstatement) in the Tribe's absence. *See Fed. R. Civ. P. 19(a)(1)(A)*.⁴

As a result, the District Court's determination that the Tribe is a necessary party, under Rule 19(a), is correct, and in no way was an abuse of its discretion.

C. Joinder of the Tribe is Not Feasible, under Rule 19(b), Due to Tribal Sovereign Immunity.

The District Court also correctly determined that joining the Tribe to the litigation was not feasible, pursuant to Rule 19(b). *See Fed. R. Civ. P. 19(b)*; *see*

against Appellant's employment claims, and has an additional interest in protecting its rights pursuant to the management agreement with Harrah's. (JA 30-31.)

⁴ The District Court need not establish *both* that (a) in the Tribe's absence, the District Court cannot accord complete relief among existing parties, *and* that (b) the Tribe's ability to protect its interest would be impeded if it were not permitted to participate in the litigation, or that the Tribe's absence would leave an existing party subject to a substantial risk of inconsistent obligations. *See Fed. R. Civ. P. 19(a)(1)(A) and (B)* (separating subparts (A) and (B) by the disjunctive "or".)

also Humble, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *15. The Tribe cannot be joined to this litigation due to tribal sovereign immunity regarding Appellant's claims. (*Compare* JA 31-32, arguing that the Tribe is immune from USERRA and FMLA claims, *with* App. 14, 18-19, acknowledging that the Tribe is immune from same.) As a result, there was no abuse of discretion by the District Court when it determined that the Tribe could not be joined under Rule 19(b). (*See* JA 223, citing *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002)).

D. The Tribe is an Indispensable Party.

The District Court also correctly determined that the Tribe was an indispensable party. (JA 223-224.) Rule 19 provides that, in determining whether a party is indispensable, courts should consider:

1. the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
2. the extent to which any prejudice could be lessened or avoided by:
 - A. protective provisions in the judgment;
 - B. shaping the relief; or
 - C. other measures;
3. whether a judgment rendered in the person's absence would be adequate; and

4. whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. Rule 19(b)(1)-(4). Where the absent party's joinder is not feasible due to immunity, there is "very little need for balancing Rule 19(b) factors because immunity itself may be viewed as *the compelling factor*." *Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *27, quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (internal quotations omitted) (emphasis added). Nonetheless, even though *Humble* provides that the District Court did not need to engage in extensive Rule 19(b) analysis, the District Court still determined that:

1. applying the analysis set out in Rule 19(b)(1):

A. any judgment rendered on Appellant's claims would prejudice the Tribe's interests as an employer and as a party to the management agreement with Harrah's (applying the analysis of Rule 19(b)(1));

B. any judgment rendered on Appellant's claims would prejudice Appellees, in that such judgment would interfere with Appellees' ability to resolve its contractual obligations to the Tribe (again applying the analysis of Rule 19(b)(1)); and

C. any judgment would only bind Appellant and Appellees, and would not bind the Tribe; and

2. applying the analysis set out in Rule 19(b)(2), there is no way to shape

the relief to surmount the prejudice to Appellees and to the Tribe.

(JA 223-224.)

The District Court's Rule 19(b) determination tracks with the decisions in *Humble, Clark, and Manzano*, which addressed the exact same question. *Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *27, citing *Enterprise Management Consultants v. United States ex rel. Hodel*, 883 F.2d 890, 893-94 (10th Cir. 1989); *Clark*, No. 1:17-cv-240, 2018 U.S. Dist. LEXIS at **9-12; and *Manzano*, No. 20-cv-02130-BAS-BGS, 2021 U.S. Dist. LEXIS at *15. In short, the District Court applied the Rule 19(b) analysis consistent with the unanimous authority on the issue. The District Court decision did not constitute an abuse of discretion, and should be affirmed.

IV. Dismissal is Consistent with Unanimous Authority and Notions of Fairness

A. The Case Law Addressing This Issue is Unanimous in its Support of the District Court's Order.

As noted above, every court that has faced this question has reached the same conclusion: personnel working at casinos located on tribal land are employees of the tribe. *See supra* § III(A). Appellant has had the opportunity to file a response brief and a sur-reply brief to the Motion to Dismiss, as well as an opening brief to this Court, and has not cited to a single case in which a court determined that such

individuals are *not* tribe employees. (*See generally* JA 46-57, 67-77; *see also generally* App. 14.) The absence of Appellant's citation to such a decision demonstrates that the case law on this question is unanimous and has never been successfully challenged anywhere in the country. Appellant now asks this Court to depart from that unanimous precedent and, in the same breath, argues that the District Court was somehow abusing its discretion in following the same.

Worse yet, Appellant asks this Court to depart from the unanimous position on this issue by raising irrelevant arguments regarding joint and several liability on non-FMLA and non-USERRA claims that are procedurally and factually distinguishable. *See supra* § III(A). Furthermore, Appellant's insistence that the Court consider inapplicable case law on joint and several liability ignores the undisputed fact that only the Tribe paid Appellant's wages and, therefore, only the Tribe, and not Appellees, could pay any wage-related damages awarded by the District Court. (*See* JA 38, 40.) Relatedly, because the Tribe was Appellant's employer, only the Tribe, and not Appellees, could be ordered to reinstate Appellant to his position at the Casino. (*See* JA 21.) As a result, Appellant's reliance on case law regarding joint and several liability between joint tortfeasors is no more than a strawman.

Finally, and contrary to Appellant's assertion, *Yashenko* does not provide that

the Tribe is not the employer of a casino employee. Appellant argues that this Court's silence on Rule 19 analysis in *Yashenko* stands for the position that it determined that Rule 19 was not a barrier to the plaintiff in that case proceeding with his FMLA claims. (App. 14, 22-23) ("To the contrary, *Yashenko* assumed the FMLA claim was proper and addressed the FMLA claims on their merits and at-length. . . . [Appellant] submits that *Yashenko*'s thorough and lengthy analysis of the plaintiff's FMLA claims was not dicta and surplusage, but reflects the Fourth Circuit's acknowledgment that Harrah's was subject to the FMLA and that TCGE was not a required (compulsory) party to the plaintiff's FMLA claims.") No such language appears anywhere in this Court's opinion in *Yashenko*, and, to the contrary, this Court acknowledged that the Tribe and Harrah's, in 2003, began transitioning to what is the current arrangement, that all casino employees are employees of the tribe. *See Yashenko*, 446 F.3d at 545. Indeed, *Clark* and *Humble* follow directly in line with this Court's analysis regarding that paradigm shift.

Because the District Court's Order is consistent with the unanimous authority on this issue, it could not be an abuse of discretion, and this Court should affirm the same.

V. . The District Court's Decision Is Grounded in Fundamental Notions of Fairness, Consistent with the Tribe's Sovereign Immunity

The Tribe is a sovereign nation. *Bay Mills Indian Cmty.*, 572 U.S. at 782-783;

see also *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118(1998), *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). It has enacted its own laws, and maintains a separate judicial process. *See generally* *U.S. v. Lara*, 541 U.S. 193 (2004) (recognizing that tribes, in the exercise of their inherent sovereign tribal authority, can prosecute crimes); *see also* Official Government Website of the Eastern Band of Cherokee Indians: Judicial, <https://ebci.com/government/judicial/> (last visited May 14, 2024). The District Court's decision properly recognizes and respects the purpose of the Tribe's sovereign immunity. (*See* JA 223-224.) Appellant seeks to ignore the Tribe's sovereign immunity. And, if Appellant were to have his way, issue and claim preclusion would not apply, and Appellant would not only be permitted to proceed in the District Court against Appellees, but to proceed in tribal court against the Tribe, as well, *for the same alleged conduct*. *See Lara*, 541 U.S. at 198-200 (finding that the principle of double jeopardy does not apply to a criminal defendant prosecuted for the same conduct in tribal court and in United States federal court.) Appellant's unprecedented assertion would give Appellant two opportunities, in two separate forums, against two sets of defendants, to recover for the same alleged wrong. There is nothing in the precedent that supports the path Appellant seeks to take.

Finally, a reversal would require Appellees, which never employed Appellant, to defend a lawsuit in which Appellant brings employment claims. It is axiomatic that an employee can only bring employment claims against his employer, and that the law should not permit such employee from bringing employment claims against any entity he sees fit. Relatedly, a reversal would put the District Court in the impossible position of potentially having to award monetary damages, including wage-related damages, to be paid by Appellees, even though the Tribe paid Appellant's wages. (JA 38, 40.) Relatedly, the District Court could similarly be put in the impossible position of awarding Appellant reinstatement to his position with the Tribe, which Appellees do not have the authority to do.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Order in its entirety.

Dated: May 22, 2024

/s/ Kevin Cleys

Kevin Cleys, Bar No. 51589
kcleys@littler.com

LITTLER MENDELSON, P.C.
620 South Tryon Street
Suite 950
Charlotte, NC 28202
Telephone: 704.972.7000
Facsimile: 704.333.4005

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, the undersigned certifies the following:

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Dated: May 22, 2024

/s/ Kevin Cleys

Kevin Cleys, Bar No. 51589
kcleys@littler.com

LITTLER MENDELSON, P.C.
620 South Tryon Street
Suite 950
Charlotte, NC 28202
Telephone: 704.972.7000
Facsimile: 704.333.4005

Attorneys for Appellees

CERTIFICATE OF SERVICE

I certify that on this 22nd day of May, 2024, I electronically filed the foregoing Appellees' Response Brief with the Clerk of Court using the CM/ECF System, which will serve the document to the following counsel of record:

Jake Snider
Asheville Legal
349 Haywood Road
Asheville, NC 28806

Daniel Gray Leland
Leland Connors PLC
60 South Sixth Street, Suite 2800
Minneapolis, MN 55402

Attorneys for Plaintiff

/s/ Kevin Cleys

Kevin Cleys, Bar No. 51589
kcleys@littler.com

LITTLER MENDELSON, P.C.
620 South Tryon Street
Suite 950
Charlotte, NC 28202
Telephone: 704.972.7000
Facsimile: 704.333.4005

Attorneys for Appellees