State of Wisconsin

Labor and Industry Review Commission

Cristina S. Danforth, Complainant **Great Lakes Inter-Tribal Council, Inc.**, **(GLITC)**, Respondent ERD Case No. CR201801779 EEOC Case No. 26G201801109C	**Fair Employment Decision**[1] **Dated and Mailed:** June 22, 2020 danfocr_rsd.doc:109

The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural Posture

In a complaint filed with the Equal Rights Division (hereinafter "Division"), of the Department of Workforce Development, which named the Great Lakes Inter-Tribal Council, Inc. (hereinafter "GLITC") as the respondent, the complainant alleged that she had been discriminated against on the basis of her race and sex and in retaliation for opposing an unlawful practice under the Wisconsin Fair Employment Act (hereinafter "WFEA"). An equal rights officer issued a preliminary determination dismissing the complaint on the grounds that the Division did not have jurisdiction over tribal entities because of their sovereign status. An administrative law judge affirmed the preliminary determination on September 20, 2019, on the grounds that GLITC is immune from suit under the WFEA because it is an arm of its member tribes, that there was no evidence that GLITC expressly waived its sovereign immunity, and that the Division lacked subject matter jurisdiction because the allegedly discriminatory actions took place on tribal land. The complainant filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the information that was submitted to the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

This case is before the commission to consider whether the Division has jurisdiction over the complainant's claims under the WFEA. Wisconsin jurisdictional law provides that its application is not intended to diminish or expand the jurisdiction of tribal courts or the sovereignty of any tribe. Wis. Stat. § 801.54(6). Generally, Indian tribes are immune from suit under the WFEA due to their sovereign status. Jurisdiction can only be exercised if the tribe or state legislature expressly waives tribal sovereign immunity, as noted in *Ninham v. Oneida Tribe of Indians of Wis.*, ERD Case No. CR8922594 (LIRC June 25, 1991).

The complainant's arguments fall into four categories: 1) that the commission has subject matter jurisdiction over this case; 2) that because the respondent is comprised of many tribes rather than one, it is not entitled to sovereign immunity; 3) that because the respondent incorporated under state law, it is not entitled to sovereign immunity; and 4) that if the respondent's formation under state law does not, by itself, strip it of sovereign immunity, a balancing test ought to apply, and the respondent fails that balancing test.

Subject Matter Jurisdiction

Where a claim arises entirely on tribal land, state courts lack subject matter jurisdiction. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996); *Cichowski v. Ho- Chunk Hotel*, ERD Case No. CR200100719 (LIRC Aug. 17, 2001); *Kocian v. The*

Ho-Chunk Casino, ERD Case No. CR200304636 (LIRC Mar. 26, 2004). As stated by the commission in *Kocian:*

> As indicated in the cases of *Gavle v. Little Six, Inc.,* 555 N.W.2d 284, 289 (Minn. 1996) and *Williams v. Lee*, 358 U.S. 217, 223 (1959), cited by the ALJ, state courts (and consequently state administrative forums) have no jurisdiction over Indian entities as the U.S. Supreme Court has determined that state court jurisdiction over tribal activities that took place within Indian country would undermine the congressional aim of encouraging self-government and self-determination . . . and "infringe on the right of the Indians to govern themselves."

It is clear from the complaint in this case that the claim arose at least in part on tribal land. It alleges discriminatory acts taken by GLITC's board of directors and its human resources manager, who were housed at GLITC's central office on the Lac du Flambeau reservation. The complaint does not state that any discriminatory act took place off reservation land. The complainant, however, maintains that she performed her job in part beyond the boundaries of reservation land in Wisconsin, and argues for a remand for investigation into the degree to which her claim may have arisen off reservation land.

For purposes of determining subject matter jurisdiction, discrimination occurs where the complainant was employed. *See* *Peterson v. RGIS Inventory Specialists*, ERD Case No. 199703982 (LIRC Oct. 19, 2001), and cases cited therein. In *Peterson*, the commission took jurisdiction of a complaint in which the complainant performed much of her job out-of-state, but spent more than a *de minimis* amount of time in Wisconsin. Jurisdiction did not turn on whether the alleged acts of discrimination occurred in Wisconsin, only on whether enough of her employment occurred there. If subject matter were the only concern in this case, the commission, considering *Peterson*, would be inclined to remand for investigation of whether the complainant's claim might have arisen in part off reservation land in Wisconsin. A remand would serve no purpose here, however, because sovereign immunity attaches to GLITC.

Sovereign Immunity: Multi-Tribe Issue

The complainant argues that sovereign immunity of an Indian tribe can only be extended to entities that the tribe creates as an arm of the tribe and cannot be transferred to a multi-tribe group. The complainant raises some practical complications, such as asking what happens if one of the member tribes wants to sue the multi-tribal entity, or if the multi-tribal entity seeks to waive its sovereign immunity, but she provides no case law holding that multi-tribal agencies cannot maintain the sovereign immunity of their member-tribes. The one case the complainant cites for the proposition that multi-tribal agencies cannot be shielded by

sovereign immunity, *Runyan v. Assn. of Village Council Presidents*, 84 P.3d 437 (Alaska 2004), actually provides the opposite:

> Tribal status similarly may extend to an institution that is the arm of multiple tribes, such as a joint agency formed by several tribal governments.

Runyan found a lack of sovereign immunity because the entity was formed under Alaskan rather than tribal law, not because it was a multi-tribal agency.

The complainant acknowledges that there is case law allowing multi-tribal agencies to have sovereign immunity. *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998); *J.L. Ward Associates v. Great Plains Tribal Chairmen's Health Board*, 842 F. Supp. 2d 1163 (S.D.S.D. 2012); *Taylor v. Alabama Intertribal Council Title IV*, et al., 261 F. 3d 1032 (11th Cir. 2001). In addition, GLITC's purpose is, without question, to advance the interests of the participating tribes and the members of those participating tribes. These are "tribe-centric purposes" as described in *Pink*. The commission believes that an organization made up of several tribes is capable of imparting tribal immunity to entities that it creates.

Sovereign Immunity: State Incorporation

The complainant's primary argument is that when a tribe, or group of tribes, starts a corporation under a state's corporation laws it thereby relinquishes any claim the corporation has to sovereign immunity. This argument is based on a number of court decisions in other states, and these are summarized in *American Property Management Corp. v. Superior Court,* 206 Cal. App. 4th 491, 502-03, 141 Cal. Rptr. 3d 802 (2012).

American Property did not explicitly hold that state incorporation by itself canceled out the sovereign immunity of a tribal entity, but instead made it one of a number of factors to consider, citing the factors listed in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort,* 629 V. 3d 1173 (10th Cir. 2010):

> At this time there is no need to define the precise boundaries of the appropriate test to determine if a tribe's economic entity qualifies as a subordinate economic entity entitled to share in a tribe's immunity. In this case, we conclude that the following factors are helpful in informing our inquiry: (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities...

> Furthermore, our analysis also is guided by a sixth factor: the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.

Nevertheless, the court in *American Property* made it clear that the method of the entity's creation was critical:

> We agree that the list of factors set forth by the Tenth Circuit is helpful and, although the factors overlap somewhat when applied, they accurately reflect the general focus of the applicable federal and state case law. Here, when we apply those factors we conclude that U.S. Grant, LLC is not an arm of the Sycuan tribe entitled to sovereign immunity. As we will explain, the dispositive fact throughout our analysis is that U.S. Grant, LLC is a California limited liability company.

American Property, at 501.

The respondent in this case argues that *American Property* was "overturned" by the Supreme Court of California in *People v. Miami Nation Enterprises,* 386 P. 3d 357 (Cal. 2016). That is an overstatement. The court in *Miami Nation* did, however, indicate that no single factor is "universally dispositive":

> *Method of creation*. In considering "the method of creation of the economic entit[y]" (*Breakthrough*, *supra*, 629 F.3d at p. 1187), courts have focused on the law under which the entity was formed. Formation under tribal law weighs in favor of immunity (*id.* at p. 1191), whereas formation under state law has been held to weigh against immunity (*American Property Management*, *supra,* 206 Cal. App.4th at p. 503, 141 Cal.Rptr.3d 802) or to constitute a waiver of immunity (*Wright*, *supra*, 147 P.3d at p. 1280; *Runyon*, *supra*, 84 P.3d at p. 441). The circumstances under which the entity's formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise, are also relevant.
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> . . .
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> In setting forth the five factors of the arm-of-the-tribe test, we emphasize that no single factor is universally dispositive. (*See*, e.g., *Breakthrough*, *supra*, 629 F.3d at p. 1187 [financial relationship "is not a dispositive inquiry"]; *American Property Management*, *supra*, 206 Cal.App.4th at p. 509, 141 Cal.Rptr.3d 802 (conc. opn. of Aaron, J.) [method of creation is not dispositive].) Each case will call for fact-

> specific inquiry into all the factors followed by an overall assessment of whether the entity has carried its burden by a preponderance of the evidence.

Considering the importance of a tribe's sovereign immunity to its identity, the commission considers the court's approach in *Miami Nation*, by which state incorporation is not universally dispositive of the question of immunity but is only one of several factors to consider, to be the more thoughtful approach. As discussed in the following section, the commission also finds a multi-factor approach to comport more closely with Wisconsin case law.

Sovereign Immunity: Balancing Test

There is no Wisconsin appellate court decision dealing directly with the question of whether an entity owned and controlled by an Indian tribe or a group of Indian tribes, and created pursuant to Wisconsin corporation law, is entitled to sovereign immunity. The closest case is *McNally CPAs and Consulting v. DJ Host, Inc.,* 2004 WI App 221, 277 Wis. 2d 801*,* 692 N.W.2d 247. In *McNally,* a for-profit corporation organized under Wisconsin law, which was clearly subject to Wisconsin law from the time of its inception, was bought entirely by the Ho-Chunk Nation. The court found that the tribe, simply by purchasing all shares of a Wisconsin corporation, was not able to cloak that corporation in sovereign immunity. The court emphasized that it was making a very narrow holding that a tribe cannot convert a corporation with no sovereign immunity into one with sovereign immunity by purchasing it. The court did not address the question of whether a tribe could use Wisconsin corporation law to create an entity that would enjoy the benefit of the tribe's sovereign immunity. Nevertheless, the court in *McNally* found it helpful to draw on cases from other jurisdictions that listed a number of factors that should be balanced in determining whether a tribal entity has sovereign immunity. *McNally* did not draw on cases which held that incorporation under state law by itself stripped that entity of sovereign immunity. That fact, plus the principle that the sovereign immunity of a tribe or group of tribes cannot be lost except by express waiver, leads the commission to conclude that a balancing test is the correct way to determine whether sovereign immunity has been relinquished.

Since *McNally* itself listed nine relevant factors, the commission applies them to this case to determine whether sovereign immunity extends to GLITC. The nine factors in *McNally* are as follows:

> (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 CPAs and Consulting v. DJ Host, Inc., 277 Wis. 2d at 810.

On balance, the commission finds that the factors favor a finding that GLITC is entitled to sovereign immunity. Factor (1), of course, weighs against a finding of sovereign immunity because GLITC was not formed under the tribes' laws. Factor (2) favors a finding of sovereign immunity because GLITC's vision statement and main functions appear to be to advocate "for the improvement and unity of tribal governments, communities and individuals." Factor (3) also favors a finding of sovereign immunity because GLITC's board of directors consists of one delegate from each member tribe. Factor (4) favors a finding of sovereign immunity as GLITC's CEO reports to the board of directors. Factor (5) leans towards finding sovereign immunity because GLITC does not generate revenue in the sense that a business does. It receives dues from each member tribe and seeks federal, state and private grants. Factor (6) leans against a finding of sovereign immunity since its corporate form probably would insulate the tribes from any lawsuit against GLITC. Factor (7) is neutral because, while GLITC is entitled to receive dues from each tribe and can obligate those funds to carry out its purposes, it likely does not have authority to obligate any tribal funds beyond what it receives in dues. Factor (8) strongly favors a finding of sovereign immunity because GLITC's funding is used to fund numerous social services programs providing economic, educational, health and vocational training and rehabilitation services to its member tribes and the Native American community. Factor (9) favors sovereign immunity since GLITC is definitely not a

commercial or profit-making enterprise, and is analogous to a tribal government agency.

Factors (2) and (8) are particularly persuasive in this case – it is clear that GLITC was formed for the purpose of advancing the aims of the member tribal governments, particularly their social services, educational and health programs. It stands to reason that the closer an entity is aligned with the purposes of the tribal governments, the stronger its claim is to the attributes of the tribe, particularly sovereign immunity. As the court in *McNally* observed, court determinations of immunity appear to turn on "whether a tribe-owned corporation was so integrated with the tribe that the policies behind tribal immunity were advanced by treating the corporation as part of the tribe for immunity purposes." *McNally,* 277 Wis.2d at 809.

Additionally, the principle that all American Indian tribes have sovereign immunity is sufficiently strong that, when a tribal entity's status is at issue, the key question is whether the tribal organization has waived that immunity. In other words, since GLITC started with a presumption of sovereignty, it did not have to reserve it. Waiver of tribal sovereign immunity must be express; it cannot be merely inferred. *Ninham v. Oneida Tribe of Indians of Wis.*, ERD Case No. CR8922594 (LIRC June 25, 1991).

The complainant claimed that GLITC waived sovereign immunity in several ways, however none of those claimed included what was necessary under *Ninham*, namely, an express waiver of immunity. Thus, for example, the act of incorporation under state law is not an express waiver of immunity nor is state incorporation, *ipso facto,* an express waiver of tribal sovereign immunity. Similarly, GLITC's assertion that it would maintain an affirmative action plan that was in compliance with federal and state laws was not an express waiver of immunity. In fact, GLITC also asserted that it intended to create its own affirmative action plan, indicating that it desired to be covered by its own plan rather than those of federal and state governments. The complainant also argued that GLITC waived its immunity by not expressly reserving sovereign immunity. However, since GLITC started with a presumption of immunity, reservation of immunity was not required. Finally, the complainant claimed that, if GLITC wished to be shielded by sovereign immunity, it would have reorganized as a tribally created entity. The commission finds that reorganization was unnecessary since GLITC did not expressly waive sovereign immunity.

For all the reasons set forth above, the commission agrees with the administrative law judge that the Division is without jurisdiction to hear this matter. The dismissal of the complaint is, therefore, affirmed.

cc: Robert Driscoll, Attorney for Respondent

This case has been appealed to the circuit court.