



Employment Law in Indian Country: Finding the Private-Action Jurisdictional Hook Is Not Easy

When representing employment discrimination

claimants with grievances against American Indian tribes, first find an appropriate jurisdictional hook. The adage “easier said than done” comes to mind. The standard approaches to finding jurisdiction do not typically apply, whether in a district circuit court or a tribal court. The difficulty is rooted in Indian tribes’ immunity from suit. The purpose of this article is to give some guidance with respect to which federal statutes permit employment discrimination actions in Indian country, which ones do not, as well as offer some pointers on tribal law that may permit limited waivers of sovereign immunity for cases filed in tribal courts. Important to the analyses below are two central issues, whether a statute is one of general application applicable to Indian tribes, and whether a private cause of action may be brought against an Indian tribe. Before discussing the employment discrimination laws, the article provides an overview of the distinctions between federal Indian law and tribal law.

Tribal Law

Tribal law applies to individual tribes, based upon their respective oral customs, traditions, and rules of conduct. These laws were, and are today, sometimes conveyed through stories or symbols tied to Indian beliefs. Not all tribal laws were oral. Some were reduced to writing, such as the laws of the Iroquois Confederacy, which were recorded on wampum belts.¹ Tribal law today often includes written codes or ordinances applicable to a specific tribe.

Tribal courts exist as an exercise of inherent tribal sovereignty, allowing tribes to operate justice systems that take into account the customs and traditions of tribal societies, without any required consideration of Anglo-American concepts of justice.² Tribal law is distinguished from Anglo-American, or federal law, which developed in the United States based upon the common law of England.

Where tribal law does not exist in certain areas of the law, such as rules of evidence or civil procedure, most tribes will allow reference to the federal rules.

Historical Overview of Tribal Sovereign Immunity

A common thread throughout Indian law employment discrimination cases is the sovereign immunity of an Indian tribe. Sovereign immunity is not limited to Indian jurisprudence, as all sovereigns, including states and the U.S. federal government, assert sovereign immunity to one degree or another. One of the tasks of the legal practitioner representing a client in any jurisdiction is to present a case that is not frivolous and can potentially survive any jurisdictional challenges. If it appears the case may have a jurisdictional defense based upon immunity from suit, then it is the attorney’s responsibility to determine if there might be one or more exceptions to immunity from suit. As the cases mentioned below will bear out, in Indian country, that chore of finding an exception to immunity from suit can be rigorous. If federal Indian law does not clearly permit an employment discrimination action against an Indian tribe, and an exception cannot be argued, then special attention needs to be given to whether such an action is possible under tribal law. Tribal law requires an additional layer of analysis on top of the federal Indian law review and analysis.

Federally recognized tribes are sovereign entities that are immune from suit unless Congress has authorized such action or the tribe has given its consent to such action. Indian tribes possess common-law immunity from suit traditionally enjoyed by sovereign powers,³ and have been recognized as “domestic dependent nations”⁴ that “exercise inherent sovereign authority over their members and territories.”⁵ The continued recognition of tribal sovereignty promotes and protects the current federal policies of tribal self-determination, economic development, and cultural and political autonomy. This generally extends to immunity from suit when tribes engage in commercial activity both on and off reservation.⁶ The broad reach of tribal sovereign immunity was reaffirmed by the Supreme Court in a 2014 case holding that tribal sovereign immunity barred a state’s suit over a tribe’s operation of a casino located off of the tribe’s reservation.⁷

For an action in any court, subject matter jurisdiction must be

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cited in the pleading that commences the litigation, or the case will not survive a motion to dismiss. For example, under the Federal Rules of Civil Procedure, “[a] case is properly dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) when the court lacks the statutory or constitutional power to adjudicate it.”⁸ The plaintiff, as the party asserting subject-matter jurisdiction, has the burden of establishing that it exists,⁹ and the court should not draw argumentative inferences in plaintiff’s favor.¹⁰ Therefore, to avoid a client’s disappointment from false hopes; to avoid wasting the time of other parties, including the court; and to limit possible sanctions and possible loss of attorney reputation, it is critical to perform the jurisdictional analysis early in the life of the case.

An attorney representing a client against an Indian tribe has a difficult task, because sovereign immunity is often an insurmountable jurisdictional hurdle to many such actions. Most of the federal statutes, discussed below, either (1) have express prohibitions against application to Indian tribes, or (2) the exceptions to the general rules of analysis weigh against a finding of subject matter jurisdiction. This can be a time-consuming and costly legal analysis, so the client should be advised early in the case about the potential fees. Where federal Indian law does not permit suit against a tribe in a federal court, the practitioner should look for tribal court jurisdiction for the suit. Even in cases where suit in federal court is allowed, oftentimes an action must first be brought in a tribal court under the doctrine of exhaustion of tribal court remedies, which is a matter of comity and recognition of the inherent sovereignty of the Indian tribe.¹¹

Title VII of the Civil Rights Act of 1964

In employment matters, plaintiffs commonly rely on Title VII of the Civil Rights Act of 1964 (Title VII or Act). The Act prohibits covered employers from basing employment decisions on factors such as race, color, sex, religion, or national origin.¹² Title VII applies to private employers plus federal, state, and local governments.¹³ The Act excludes Indian tribes from its definition of covered employers.¹⁴ A case from the U.S. Court of Appeals for the Tenth Circuit held that “Indian tribes and businesses operating on or near Indian reservations are excluded from the employment discrimination prohibitions of Title VII.”¹⁵ As such, an attorney approached by a client to pursue a case against a tribe for allegedly basing an employment decision on one of the factors enumerated above should review the law to determine if there are new cases, statutes, or Acts that would permit a Title VII suit in the context of a grievance against an Indian tribe.¹⁶

The Americans with Disabilities Act

Plaintiffs also commonly seek a remedy in the Americans with Disabilities Act (ADA or Act). Legal practitioners with expertise in both federal Indian law and employment law generally agree that the applicability of

the ADA to Indian tribes depends upon the specific ADA title under which relief is sought.¹⁷ The first three titles of the Act are relevant, and analyzed below.

ADA Title I

Both federal district and tribal court cases are consistent in holding that Title I of the ADA, which seeks to prevent discrimination against disabled workers in employment, does not apply to tribal government employers. This is because Indian tribes are excluded from the definition of employer under the ADA.¹⁸ The U.S. Court of Appeals for the Eighth Circuit held that a former employee of a tribe-owned casino had no *private* remedy under the ADA for alleged disability discrimination because of the tribal exemption.¹⁹ Consistent with the express exclusion of Indian tribes from the ADA’s definition of employer, a tribal court in Oregon concluded “that the Spirit Mountain (Casino) is exempt from Title I of the ADA because it is not an ‘employer’ within the meaning of the [A]ct.”²⁰

Where, as here, an action cannot be brought under federal law, the attorney should turn to the possible existence of tribal law that may permit the same or similar action in a tribal court. An example is the Employment Action Review Ordinance of the Grand Ronde Community of Oregon, mentioned below. That ordinance provides administrative relief for ADA-like grievances, with tribal court review.

ADA Title II

ADA Title II regulates state and local governments. It neither mentions nor excludes Indian tribes from its definition of covered public entities.²¹ Employment and Indian law experts agree that it is doubtful Title II would apply to a tribal government, because Title II defines its applicability to programs, services, and activities run by state and local governments, with no mention of Indian tribes.²²

ADA Title III

The prospect of application of Title III to Indian tribes is more promising than Titles I and II. Title III requires places of public accommodation to be accessible to individuals with disabilities.²³ The analysis considers (1) whether Title III is a statute of general applicability, (2) whether a place of accommodation is public or private, and (3) whether a private cause of action may be brought under Title III.

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The Statute of General Applicability Analysis

The first part of the analysis is whether Title III is a statute of general applicability, and therefore applicable to Indian tribes. As with Title II, Title III gives no guidance on its applicability to Indian tribes. When legislation gives no guidance on its applicability to Indian tribes, courts resort to an analysis as to whether the legislation applies to all persons. In the case of *FPC v. Tuscarora Indian Nation*,²⁴ the court held “that a general statute in terms applying to all persons includes Indians and their property interests.” The *Tuscarora* line of cases “stand for the rule that under statutes of general application Indians are treated as any other person, unless Congress expressly excepts them therefrom.”²⁵ There are three circumstances that can defeat the “general statute” presumption. A general statute arguably applies to Indian tribes unless its application would (1) abrogate rights guaranteed under an Indian treaty, (2) interfere with purely intramural matters touching exclusive rights of self-government, or (3) contradict Congress’ intent.²⁶

At least one federal circuit, in a case involving the Miccosukee tribe of Florida,²⁷ held that Title III can apply to public accommodations run by Indian tribes. In *Miccosukee*, the plaintiffs alleged that a public facility, a restaurant with gaming entertainment, owned and operated by the Miccosukee tribe did not satisfy Title III’s requirement that places of public accommodation be accessible to the disabled public.²⁸ The U.S. Court of Appeals for the Eleventh Circuit held that Title III is a statute of general application that applies to Indian tribes and that, because the tribe’s public facility was open to non-Indians and affected interstate commerce, it was not within the exclusive domain of the Miccosukee tribe. Accordingly, it did not come within the self-government exception to the applicability of the three-pronged balancing test. Finally, *Miccosukee* addresses (1) whether an Indian tribe is subject to a statute and (2) whether the tribe may be sued for violating the statute, suggesting that these are two entirely different inquiries.²⁹

Unless a tribe has a specific, limited waiver of sovereign immunity with respect to Title III violations, it is unlikely to permit a private party to bring such an action. If there is a pattern of discrimination or the discrimination rises to a level to attract unusual public attention, Title III allows the U.S. attorney general to bring a civil injunction to compel a tribe’s compliance with the Act.³⁰ As tribes continue with their efforts to compete in the business world with their casinos, restaurants, and other tribal-owned businesses, it is intuitive that they will want to voluntarily waive their immunity from private suit where it might encourage increased commercial dealings with their tribal-owned commercial enterprises. Some tribes have made efforts to modernize their codes and ordinances to harmonize those laws with the expectations of nontribal employees and the public.

Tribal Laws: ADA-like Remedies

Limited Waivers of Sovereign Immunity and Exclusive Remedies in Employment Cases

Often an Indian tribe will have a statute, code, or ordinance that provides a limited waiver of sovereign immunity for purposes of employment discrimination actions. “Some tribal governments have voluntarily complied with ADA or adopted their own codes to protect people with disabilities from employment discrimination.”³¹

An example is the Confederated Tribes of the Grand Ronde Community of Oregon’s (Grand Ronde Tribe) Employment Action Review Ordinance (EARO). This ordinance is the exclusive remedy

for employment-related claims of employees of the tribe’s agencies, including the Health and Wellness Center, Spirit Mountain Gaming Inc., the Grand Ronde Food and Fuel Company, and the Grand Ronde Tribal Housing Authority, all of which are within the exterior boundaries of the tribe’s reservation. EARO provides that “[t]ribal law and *applicable federal law* apply to the terms and conditions of employment with the Tribe and any Tribal Government Corporation, and likewise shall govern all complaints of ‘Wrongful Employment Actions.’”³² Given the controversies surrounding whether federal labor and employment laws apply to tribes ... there is much uncertainty about how the reference to ‘applicable federal law’ might operate under this ordinance.”³³ The Grand Ronde Tribe’s EARO requires an aggrieved employee to initiate a grievance procedure in writing within 30 days of the alleged wrongful act of the tribe giving rise to the grievance. Once a final determination has been made by way of this administrative procedure, an aggrieved employee who is not happy with the decision can file a complaint in the Grand Ronde Tribal Court. The tribal court is the final arbiter, and there is no appeal. For an employee to take advantage of this procedure, he or she needs to be aware of its existence. In some instances, employees find out about the procedure, if ever, only after the time to initiate the process has expired. There is a subject matter jurisdictional hook for a private action, but it is not well-known.

Because of the short notice requirements, aggrieved employees should ask pointed questions of their employers about any tribal procedures that must be filed if they are to protect their rights. The employees would also be wise to immediately confer with counsel admitted in the applicable tribal court. Counsel would want to review any employment offer letters, employment contracts, and any special provisions, such as arbitration provisions, that might contain a waiver of sovereign immunity. Inquiry should be made into whether there are any memoranda of understanding (MOU) or memoranda of agreement (MOA) with governmental agencies that require compliance with certain laws in exchange for funding, such as from the Bureau of Indian Affairs (BIA), Indian Health Services (IHS), Medicare, or Medicaid. The tribe’s constitution, bylaws, and all ordinances should be reviewed. Also, some consideration should be given to any possible due process violations under the Indian Civil Rights Act of 1968 (ICRA),³⁴ as amended, which is an act specifically applicable to Indian tribes. ICRA makes the majority of the guarantees of the Bill of Rights applicable to Indian tribes. Finally, for a thorough analysis and to avoid overlooking something that might be of importance in asserting the rights of a client against an Indian tribe, tribal custom and tradition should be considered. This includes an interview of any elders with experience in the issue. Even if this analysis does not aid the legal review, a genuine showing of sensitivity to tribal custom and tradition will be a credit to both the attorney and his or her client.

Age Discrimination in Employment Act

Employment discrimination suits typically include more than one jurisdictional foundation. Complaints commonly include alleged violations of two or more federal acts and/or tribal laws. For example, a pleading often includes alleged violation of the Age Discrimination in Employment Act (ADEA or Act), which prohibits discrimination

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in hiring, firing, compensation, assignment, and promotion against persons who are 40 years of age and over.³⁵

Unlike Title VII and ADA Title I, the ADEA makes no mention of applicability to Indian tribes, providing only that “the term ‘employer’ does not include ... the United States, or a corporation wholly owned by the government of the United States.”³⁶ Basing their decisions upon the *Tuscarora* rule and its three exceptions, the federal circuit courts that have addressed this issue have generally held that Indian tribes are not covered under the ADEA. Some of those cases are discussed briefly below, followed by two cases that appear to be a departure from any arguable bright-line rule.

Cases Holding that the Indian Tribe Exemption Applies to ADEA

ADEA cases are brought on behalf of the federal government by the Equal Employment Opportunity Commission (EEOC), an agency of the United States. In some ADEA cases brought by the EEOC, the federal circuit courts were not in favor of an Indian tribe exemption for application of the Act. In a case involving the Cherokee Nation, the Tenth Circuit stated that the “ADEA is not applicable because its enforcement would directly interfere with the Cherokee Nation’s treaty-protected right of self-government.”³⁷ In two other EEOC cases, the Eighth and Ninth circuits came to the same conclusion for similar reasons.³⁸

Cases Holding that the Indian Tribe Exception May Not Apply to ADEA

There is arguably a departure in the jurisprudence on the applicability of the ADEA to tribal commercial activities when it comes to Indian tribes involved in commercial activity not significantly tied to tribal self-government or purely intramural affairs. The casino case mentioned below opens the door for an argument that the ADEA can apply to private suits against Indian tribes when the plaintiff is not an Indian, and/or the tribe is engaged in activity not clearly protected by a treaty, or the tribe’s activity does not clearly impact exclusive rights of self-government, even where that activity provides funding for purely intramural matters.

In a private suit against the Cocopah Casino in Arizona,³⁹ the court held that the ADEA might apply with respect to a tribal-owned and -operated casino that was open to the public and employed both tribal and nontribal members. After reviewing the Ninth Circuit’s holding in the *Karuk Tribal Housing Authority* case,⁴⁰ the court distinguished the cases as follows:

In this case, the Tribe owns and operates Cocopah Casino, a commercial venture that provides services on the open market and employs both tribal members and *non-Indians*. Although the profits resulting from casino operations are presumably important to the Cocopah Tribe and provide funding for purely intramural matters, the actual operations and employment of workers at the Casino do not appear to touch on any “exclusive rights of self-governance in purely intramural matters.” The Cocopah Casino appears to function “simply [as] a business entity that happens to be run by a tribe or its members” ... *The ADEA, therefore, might apply in this case.*⁴¹

There is also arguably a departure in the jurisprudence on the applicability of the ADEA to tribal commercial activities when it comes to non-Indian plaintiffs. The Cocopah case and a fresh look at some older cases open the door for an argument that the ADEA can apply to Indian tribes when the plaintiff is not an Indian.

As the Cocopah case states, employees of Indian tribes can be both Indian and non-Indian. The Cocopah case did not turn on such analysis, but the court found it significant enough to mention. The non-Indian status of a plaintiff was the focus of one commenter. In a law-review article by Scott D. Danahy,⁴² the author reviewed two 1989 cases⁴³ from the Eighth Circuit and concluded that courts should not find Indian tribe exceptions to Title VII and ADEA when the plaintiff is a non-Indian. The author concludes that “companies owned by Native American tribes cannot avoid claims brought under Title VII (and elsewhere in the article ADEA) if those claims involve a non-Native American employee.”⁴⁴ While there has been nothing definitive holding that different results should obtain where a plaintiff is non-Indian, this area of the law is sufficiently nuanced for reasonable minds to differ on the issue. When representing a non-Indian in an employment discrimination dispute with an Indian tribe, special consideration should be given to whether claims for alleged violations of acts such as ADEA fall outside of any arguable Indian tribe exception.

Fair Labor and Standards Act

Another federal law that should be considered for applicability to a claim against an Indian tribe involves wages and hours. The Fair Labor and Standards Act (FLSA, or Act) imposes upon employers statutory requirements with respect to minimum wage and overtime to be paid to workers, and it also regulates child labor.⁴⁵ Employers subject to the FLSA are prohibited from: (1) paying workers a lower rate than the statutorily prescribed minimum, (2) instituting a workweek in excess of 40 hours unless employees are compensated at one-and-a-half times their regular wage, and (3) exploiting child labor.⁴⁶

The FLSA makes no mention of its applicability to Indian tribes. A decision by the Ninth Circuit, however, provides some guidance. In *Solis v. Matheson*,⁴⁷ the court held that the FLSA’s overtime provisions applied to a tribal-owned retail store located within the boundaries of the tribe’s reservation. The court conducted an analysis pursuant to the *Tuscarora* case. The Ninth Circuit held that none of the three exceptions to the “general statute” presumption applied because (1) the tribe had not enacted its own wage and hour laws subject to a treaty and (2) the tribal business was not engaged in intramural affairs. The retail store was a “purely commercial enterprise engaged in interstate commerce selling out-of-state goods to non-Indians and employing non-Indians.”⁴⁸ Therefore, at least in the Ninth Circuit, a practitioner has precedent that the Act applied to Indian tribes.

Family Medical Leave Act

Another federal law that an attorney may need to review when representing a client against an Indian tribe is the Family Medical Leave Act (FMLA, or Act), which generally requires employers who employ 50 or more employees to provide up to 12 weeks’ unpaid family and medical leave per year to all eligible employees.⁴⁹ Both male and female employees are entitled to leave: (1) for the birth

or adoption of a child; (2) to care for a seriously ill child, spouse, or parent; (3) to care for a service member who is the spouse, child, parent, or next of kin of the employee; or (4) for the employee's own serious illness.⁴⁹ While on covered leave pursuant to the Act, eligible employees are assured adequate protection of their employment and health benefit.⁵⁰

Like most of the other federal acts discussed above, the FMLA itself gives no direction as to whether tribes are exempt from complying with its provisions. Whether an Indian tribe is subject to an act or can be sued for its violation are different issues, leaving the implication of the FMLA to Indian tribes and their commercial entities still unclear. At least one federal circuit court has decided the issue by holding that an Indian tribe cannot be sued for an FMLA violation,⁵¹ and another agreed that an FMLA action should be stayed while the tribal court had the first opportunity to decide the case under the exhaustion doctrine.⁵²

As mentioned above, tribal law sometimes offers remedies where federal law does not. At least one tribe voluntarily provides federal FMLA-like protection to its employees. The Grand Ronde's Spirit Mountain's family medical leave policy provides that "FMLA is available to employees who have completed at least one year of service and who have worked at least 1,250 hours in the previous year."⁵³ That tribal provision mirrors the federal FMLA definition of the term "eligible employee."⁵⁴ Such FMLA-like policies and decisions partially account for the scarcity of federal circuit court decisions applying FMLA to Indian tribes. Again, the importance of tribal law should not be overlooked when representing a client in an employment discrimination case against an Indian tribe.

Worker Adjustment and Retraining Notification Act

Another federal law a legal practitioner should review for current applicability to an employment action against a tribal government is the Worker Adjustment and Retraining Notification Act (WARN Act, or ACT). The WARN Act requires covered employers to provide certain workers 60 days' written notice of (1) the intention to lay off more than 50 employees during any 30-day period as part of a plant closing, or (2) any mass layoff that does not result from a plant closing but that will result in an employment loss of 500 or more employees or 33 percent of the workforce during any 30-day period.⁵⁵ The Act is silent as to its applicability to Indian tribes, but the U.S. Department of Labor's regulations interpreting the Act exclude "Indian tribal governments."⁵⁶

Occupational and Health Safety Act

The Occupational Safety and Health Act of 1970 (OSHA) is a federal law that was enacted to ensure safe and healthful working conditions for employees. In *Donovan v. Coeur d'Alene Tribal Farm*,⁵⁷ the Ninth Circuit court interpreted OSHA's applicability to an Indian tribe and its tribal-owned farm (the Farm). The Farm challenged OSHA's authority to conduct health and safety inspections and argued that Congress did not intend OSHA to apply to the Farm. The court (1) reversed a decision of the Occupational Safety and Health Review Commission (Commission) that had vacated citations and penalties applied against the Farm, and (2) held that OSHA applied to commercial activities carried on by the Farm, despite being wholly owned and operated by an Indian tribe. In *Donovan*,⁵⁸ the court applied the *Tuscarora* rule. This included the analysis whether any of the three exceptions to the "general statute" presumption should

apply to defeat application of OSHA to the Farm.

The Coeur d'Alene Indian Tribe has no formal treaty with the United States. Finding no treaty to analyze, Secretary Raymond Donovan rejected the OSHA-authority challenge raised by the tribe. OSHA is an act of general applicability designed to "assure so far as possible [for] every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ..."⁵⁹ The United States argued that the Act's coverage was comprehensive and that its definition of employer clearly included the Farm. The Farm, however, argued that its inherent sovereign powers barred application of the Act to its activities absent an express congressional decision to that effect.

The court had no doubt that Congress had the power to modify or extinguish the tribe's right. The court found that, "[u]nlike the states, Indian tribes possess only a limited sovereignty that is subject to complete defeasance."⁶⁰ The issue raised on appeal was "whether congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject."⁶¹

As the Coeur d'Alene Indian Tribe does not have a treaty with the United States, only two of the three circumstances that could defeat a "general statute" presumption received significant attention. With respect to the "aspects of Tribal self-government" exception, the court found:

The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is "neither profoundly intramural ... nor essential to self-government."⁶²

With respect to the "other indications" or intent of Congress, exception, the Farm did not argue, and the court did not believe, that the legislative history of the Act or the surrounding circumstances of its passage indicated any congressional desire to exclude tribal enterprises from the scope of its coverage.

False Claim Act (Whistle-blower Claim or Qui Tam Action)

Finally, consideration should be given to whether a client might be entitled to bring a claim against an Indian tribe under the False Claim Act,⁶³ or what is known as a whistle-blower claim or a qui tam action. A person need not be a victim of a false claim to bring such an action, but in those situations where an employee is terminated in retaliation for blowing the whistle on an activity constituting a false claim and witnessed during the course of employment, the employee is arguably a victim. If the employee is unable to bring a claim under one or more of the other federal acts discussed in this article, some financial reward to the wrongfully terminated employee might be possible under the False Claim Act. Qui tam actions are brought by an individual as a "relator" in the name of the government, and successful relators are entitled to a percentage of the recovery obtained from the wrongdoer that had filed a false claim against the government.

For some guidance, see the *American Indian Law Deskbook*, Fourth Edition,⁶⁴ which discusses whistle-blower actions applicable to Indian tribes under both state⁶⁵ and federal law,⁶⁶ including

a reference to a qui tam action.⁶⁷ As with all of these federal and tribal laws, research should be conducted with each new client representation to ensure there have been no new statutes, acts, or case law that would affect applicability to an Indian tribe.

Conclusion

In summary, if asked to represent a client with an employment discrimination case in Indian country, know that there are limited causes of action that can be pursued under federal law, and those may require exhaustion of tribal remedies in a tribal court before advancing to a federal circuit court. Other actions can only be filed under tribal law with exclusive jurisdiction in a tribal court. By acting quickly, a lawyer might achieve some success with codes or ordinances that provide limited waivers of sovereign immunity as exclusive remedies. If you are not experienced or comfortable with handling employment cases in tribal courts, associate with, or refer the matter to, an attorney who specializes in representing clients in those courts.

Endnotes

¹See, e.g., Carrie E. Garrow and Sarah Deer, *Tribal Criminal Law and Procedure*, 10 (2004), Tribal Law and Policy Institute, AltaMira Press.

²See, generally, Hon. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 Washburn L.J., 733, 734 (2008), available at www.ok.gov/odmhsas/documents/Specialty%20Court%20Conference-%20Handout-Korey%20Wahwassuck.pdf.

³See, e.g., *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356 (2d Cir. 2000).

⁴*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

⁵See *Citizen Band of Potawatomi Indian Tribe*, *supra*, note 3, at 509.

⁶*Kiowa Tribe v. Manufacturing Technologies Inc.*, 523 U.S. 751, 756-60 (1998).

⁷*Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014) (No. 12-515), 2013 WL 4829343, at *11-13, *15-16.

⁸*Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000).

⁹*Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir.1996).

¹⁰*Atl. Mut. Ins. Co. v. Balfour MacLaine Int'l*, 968 F.2d 196, 198 (2d Cir.1992).

¹¹See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) (“[A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court.”); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (holding that the inquiry over “whether a tribal court has the power to exercise civil subject matter jurisdiction ... should be conducted in the first instance in the Tribal Court itself”).

¹²42 U.S.C. § 2000e, Section 703 (a)(1), *et seq.*

¹³*Id.* at § 2000e *et seq.*

¹⁴*Id.* at Section 701, subchapter (b) (“The term ‘employer’...” and subchapter (b)(1) (“...does not include...an Indian tribe.”). See also *Morton v. Mancari*, 417 U.S. 535, 547-48 (1974) (Indians

are considered members of quasi-sovereign tribal entities, or a political category of people, as contrasted with a discrete racial group.)

¹⁵*Wardle v. Ute Indian Tribe*, 623 F.2d 670, 672 (10th Cir. 1980). See also *Tenney v. Iowa Tribe of Kan.*, 243 F. Supp. 2d 1196 (D. Kan. 2003) (involving the Nebraska Gaming Commission that operated a casino with the Iowa tribe of Kansas and was comprised of tribal members was exempt under the Act). *But see Hines v. Grand Casinos of La., LLC*, 140 F. Supp. 2d 701 (W.D. La. 2001) (holding that an Indian gaming casino that was both exclusively operated and managed by an independent contractor was not exempt under the Act), *aff'd with op.*, 31 F. App'x 832 (5th Cir. 2002).

¹⁶See *Morton v. Mancari*, *supra*, note 14, at 544 (“The preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion”).

¹⁷See 42 U.S.C. § 12101 *et seq.*

¹⁸42 U.S.C. §§ 12111(5)(B)(i).

¹⁹See, e.g., *Charland v. Little Six Inc.*, 198 F.3d 249 (8th Cir. 1999).

²⁰See *In the Matter of William Tornquist v. Spirit Mountain Gaming Inc.*, C-01-08-002 (2002). (The Tribal Court for the Confederated Tribes of the Grand Ronde Community of Oregon) (Order Affirming Final Employment Decision.).

²¹42 U.S.C. § 12131(1).

²²*Id.*

²³42 U.S.C. §§ 12181-12189.

²⁴362 U.S. 99, 116, 80 S.Ct. 543, 553, 4 L.Ed.2d 584 (1960).

²⁵*Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 711 (1982). The *Tuscarora* line of cases is sometimes referred to as the *Tuscarora* Doctrine.

²⁶See *Fla. Paralegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th Cir. 1999).

²⁷*Id.* at 1128.

²⁸*Id.* at 1127.

²⁹*Id.* at 1130 (private suit not authorized).

³⁰42 U.S.C. § 12188(b)(1)(B).

³¹*Understanding Disabilities in American Indian and Alaskan Native Communities: Toolkit Guide*, National Council on Disability, 6 (Aug. 1, 2003), available at www.ncd.gov/publications/2003/Aug12003

³²The Confederated Tribes of the Grand Ronde Community of Oregon, Employment Action Review Ordinance, Chapt. 307(e), eff. July 2, 2104 (emphasis added), available at www.gran-dronde.org/archives/.

³³Kaighn Smith, Jr., *Labor and Employment Law In Indian Country*, 213 (2011) (referring to previous § 255.5, with almost identical language).

³⁴25 U.S.C. §§ 1301-1304.

³⁵29 U.S.C. § 621, *et seq.*

³⁶29 U.S.C. § 360(b)(2).

³⁷*EEOC v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989).

³⁸See *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249-51 (8th Cir. 1993) (holding that that the Act did not apply to an action against a tribal employer brought by a

member of the tribe); *See also EEOC v. Karuk Tribal Housing Auth.*, 260 F.3d 1071, 108-81 (9th Cir. 2001) (holding that the tribal Housing Authority “is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self governance. ... Further, the dispute here is entirely ‘intramural,’ between the tribal government and a member of the Tribe.”).

³⁹*Cano v. Cocopah Casino*, 2:06-cv-02120-JAT (DC AZ 2007) available at www.gpo.gov/fdsys/pkg/USCOURTS-azd-2_06-cv-02120/content-detail.html (last viewed Jan. 15, 2015).

⁴⁰*See Karuk Tribal Housing Auth.*, *supra*, note 51, at 108.

⁴¹*Cocopah Casino*, *supra*, note 52, at p. 6:5-12 [italics added.]

⁴²Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native Employees of Tribally Owned Businesses*, 25 Fla. St. U. L. Rev. 679, 686-87 (1998).

⁴³*See Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753, 755 (D.N.D. 1989) (noting that “[f]irst, DLSMC argues that plaintiff’s Title VII claim should be dismissed because it falls within the Indian Tribe exception as provided in 42 U.S.C. § 2000e(b) and that the ADEA claim should be dismissed because the ADEA does not apply to businesses on the Reservation. These arguments are without merit.”) *Id.* at 754. The court further states, “*EEOC v. The Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) decided that the ADEA does not apply to Indian tribes. This decision did not consider the present situation of non-tribal reservation employees.” *Id.* at 755.

⁴⁴Danahy, *supra* note 55 at 687.

⁴⁵29 U.S.C. § 202.

⁴⁶29 U.S.C. § 206(a).

⁴⁷563 F.3d 425 (9th Cir. 2009).

⁴⁸*Id.* at 434.

⁴⁹29 U.S.C. § 2601 *et seq.*

⁵⁰29 U.S.C. § 2612(a).

⁵¹*Id.*

⁵²*See Chayoon v. Chao*, 355 F.3d 141 (2d Cir. 2004) (holding that a casino employee could not bring a FMLA suit against a tribal employer or against employees or officers of tribe acting in their representative or official capacities).

⁵³*Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 975 (9th Cir. 2003).

⁵⁴*See In The Matter of Tornquist*, *supra*, note 20.

⁵⁵29 U.S.C. § 2611(2)(A)(ii).

⁵⁶29 U.S.C. § 2101 *et seq.*

⁵⁷20 C.F.R. § 639.3(a)(1)(ii).

⁵⁸751 F.2d 1113, 1115-16 (9th Cir. 1985).

⁵⁹*Id.* at 1115-16.

⁶⁰29 U.S.C. § 651(b) (1982).

⁶¹*Donovan*, *supra*, note 73 at 1115 (citations omitted).

⁶²*Id.*

⁶³*Id.* at 1116-17 (citation omitted).

⁶⁴31 U.S.C. §§ 3729-3733.

⁶⁵Conference of Western Attorneys General, *American Indian Law Desk Book*, University Press of Colorado (2008).

⁶⁶*Id.*, at 218, a footnote citing two cases with the same result, “*Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 52-53 (1st Cir. 2007) (finding that state human rights and whistle-blowers’ protection acts applicable to tribe by virtue of Maine Indian Claims Settlement Act’s subjecting it to state law to the same extent as other persons); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73 (1st Cir. 2007) (same).”

⁶⁷*Id.* at 449, “On a (Safe Drinking Water Act) SDWA-related matter, the Tenth Circuit Court of Appeals held that the Act’s whistle-blower provision, 42 U.S.C. § 300j-9(i)(1), abrogates tribal sovereign immunity for suits within its scope. *Osage Tribal Council v. USDOL*, 187 F.3d 1174 (10th Cir. 1999).”

⁶⁸*Id.* at 545, “*United States ex rel. Saint Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt. Co.*, 451 F.3d 44, 49-53 (2d Cir. 2006) (tribe’s action to have construction contract declared invalid as a collateral agreement not approved by the Commission was barred by failure to exhaust administrative remedies available before the agency, while the qui tam remedy under a now-repealed provision in 25 U.S.C. § 81 was superseded by IGRA with respect to the regulation of management and collateral agreements”). Additional guidance can be found in “Qui Tam: An Abbreviated Look at the False Claims Act and Related Federal Statutes,” Congressional Research Service, 2009, available at www.ncd.gov/publications/2003/Aug12003.

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