NON-REMOVABLE MILLE LACS BAND OF OJIBWE

COURT OF CENTRAL JURISDICTION

IN THE MILLE LACS BAND COURT OF APPEALS

Angela D. Roby,

Appellant,

vs.

Mille Lacs Band of Ojibwe, et al.,
Marge Anderson, Chief Executive,
Curt Kalk, Secretary/Treasurer,
Sandra Blake, District I Representative,
Marvin Bruneau, District II Representative,
Diant Gibbs, District III Representative,

Appellees.

Case No. 2011 APP 04

DECISION OF THE COURT OF APPEALS

INTRODUCTION

The present case in an appeal from a final order of the District Court of the Non-Removable Mille Lacs Band of Ojibwe ("District Court"). Appellant Roby previously served as the Mille Lacs Band's Commissioner of Finance, and she commenced her action against the Mille Lacs Band upon the expiration of her term of service. She seeks six months severance pay. In response the Mille Lacs Band moved to dismiss Appellant's complaint because the Mille Lacs Band had not enacted a waiver of sovereign immunity that would permit the court to entertain the merits of her claims. The District Court ultimately granted the Mille Lacs Band's motion to dismiss because Appellant Roby failed to prove the existence of a waiver of the Band's sovereign immunity. The District Court concluded that it did not have jurisdiction over the merits of Roby's claims.

STANDARD OF REVIEW

The Court of Appeals accords substantial deference to the District Court's factual findings because the lower court had an opportunity to observe the testimony and to weigh the credibility of the witnesses. This Court will not disturb the District Court's Findings of Fact unless such findings represent a clear abuse of discretion.

This Court's review of the District Court's conclusions of law does not accord any deference to the lower court's conclusions. Instead, this Court considers *de novo* the issues of law that are to be applied to the facts of a particular case.

Cases involving tribal sovereign immunity and waivers of such immunity are issues of law, which this Court reviews *de novo*. Because this case involves issues of tribal sovereign immunity and assertions of waivers of such immunity, this Court will review *de novo* the conclusion of law of the District Court.

FACTUAL BACKGROUND

Appellant Roby served the Mille Lacs Band in an appointed position as the Band's Commissioner of Finance from September 23, 2003 through April 29, 2011. By Band Statute the Commissioner of Finance position is a four year term of appointment by the Mille Lacs Band Assembly. Appellant Roby's four year term expired April 29, 2011, her last day of work. Appellant now seeks a six month severance payment in the amount of $69,650.00 from the Mille Lacs Band. Appellant has not cited any Band Statute or other policy that would entitle her to a severance payment. Instead, she relies upon the Band's severance payments to six prior appointed commissioners to justify her present claim.

Appellant alleges that the six prior recipients of severance packages were Native American, and the reason she did not receive a severance package is because she is non-Indian.

Appellant argues that this disparate treatment entitles her to the relief she requests pursuant to the equal protection provisions of the 14th Amendment to the United States Constitution, and the provisions of Title VII of the Civil Rights Act of 1964.

The Appellees deny that Appellant Roby is entitled to any type of severance package. The Appellees argue that they are protected from Appellant Roby's claims by tribal sovereign immunity and official immunity; and that there has been no waiver of these immunities that would permit the Court to address the merits of Appellant Roby's claims. Appellees further argue that there is no basis in law or fact to support Appellant's claim to severance payment.

The Appellees also point out that Appellant Roby obtained confidential employment information with respect to the six former appointed commissioners through her position as Commissioner of Finance for the Mille Lacs Band; and that she inappropriately broadcast the confidential business information into the public domain.

SOVEREIGN IMMUNITY DEFENSE

The District Court determined that the Mille Lacs Band, as well as the individually named Appellees were protected against Appellant Roby's claims by the sovereign immunity of the Mille Lacs Band. The District Court concluded that there was no waiver of the immunity of the Band that would permit the merits of Appellant's claims to be addressed.

The Court starts with the premise that Indian Tribes and tribal officials who are sued in their official capacities enjoy common-law immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1976). The Band may waive that immunity, either for itself or its officials, but that waiver must be clear and unequivocal and cannot be implied. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751 (1998) (tribal sovereign immunity is interpreted under federal law and is not subject to diminution by state or tribal law). Sovereign immunity is

a jurisdictional bar to suit and thus precludes a Court from hearing a case. Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000) (reversing the District Court's denial of a motion to vacate a default judgment entered against a tribal entity on the ground that the entity was immune from suit and its default did not give the Court jurisdiction).

Because the sovereign immunity defense pertains to the jurisdiction of a Court to hear a case, it is generally inappropriate to enter a default judgment against an entity cloaked in immunity. Hagen, at 11. In order for an immunity defense to justify dismissal before meaningful discovery has taken place, the party asserting immunity must demonstrate on the face of the pleadings that dismissal is appropriate. Hafley v. Lohman, 90 F.3d 264 (8th Cir. 1996). However, as the United States Supreme Court reaffirmed in Saucier v. Katz, 533 U.S. 134 (2001), the immunity defense is not only a defense to liability, but is an entitlement not to stand trial. Mitchell v. Forsyth, 472 U.S. 511 (1985). Although both Saucier and Mitchell dealt with the qualified immunity defense, there is no indication that the sovereign immunity defense should be treated any differently. As the Court in Saucier held, it is incumbent upon trial courts to resolve immunity issues as soon as possible to avoid an entity cloaked in immunity from having to defend a suit.

When an Indian Tribe, rather than a tribal official, is named as a Defendant in a lawsuit, courts have been particularly loath to recognize waivers of immunity. It is now a well-settled axiom of federal law that Indian Tribes, like state and federal governments, are sovereign entities that cannot be sued absent their consent or an unambiguous abrogation of their immunity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Tamiami Partners v. Miccosukee Tribe, 63 F.3d 1030 (11th Cir. 1995); Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991). Not only have the federal courts acknowledged this immunity, but

the state courts of Minnesota, See Gayle v. Little Six, Inc., 534 N.W.2d 280, 286 (Minn.Ct.App.1995); Cohen v. Little Six, Inc.,543 N.W. 2d376 (Minn.App.1996), as well as tribal courts of Indian nations throughout the country have accepted this doctrine. See Davis v. Mille Lacs Band, et al., 96CV701(Memorandum decision of September 30, 1996) (Tribe cannot be sued for money damages for actions taken by tribal employee); See also Clement v. LeCompte, 22 ILR 6111(Cheyenne River Supreme Court, 1994); GNS, Inc., et al v. Winnebago Tribe of Nebraska, 21 ILR 6104 (Winnebago Tribal Court, 1994); Raymond v. Navajo Agricultural Products Industry, 22 ILR 6100 (Nav. Supreme Court, 1995). An Indian Tribe is generally immune from any type of suit, including suits for money damages, as well as equitable and injunctive relief. Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation, 812 F.Supp. 1008, 1011 (D.N.D.1992), reversed on other grounds, 27 F.3d 1294 (8th Cir. 1994).

Even if it is demonstrated that tribal officials exceeded their authority, the Tribe itself cannot be sued for money damages. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269 (9th Cir. 1991); Oklahoma Tax Commission, supra. The United States Court of Appeals for the Eighth Circuit has recognized an exception to this principle when a tribe has exceeded its authority to promulgate legislation and is being sued for injunctive relief, but this exception is inapposite in this case as the case at bar involves claims for monetary relief. See Northern States Power Co., supra.

The courts have recognized numerous manners by which the sovereign immunity of a tribe can be waived or abrogated. The United States Supreme Court held that a tribe that enters into an arbitration clause as part of a contractual agreement has waived its immunity can be forced to comply with an arbitration award. C&L Enterprises v. Citizen Band of Potawatomi

Indian Tribe of Oklahoma, 532 U.S. 411 (2001). A tribe can waive its immunity, but that waiver must be clearly and unambiguously expressed and waiver will not be inferred. See Rosebud Sioux v. Val-U Construction Company, 50 F3d. 560 (8th Cir. 1995) (Tribe, by consenting to arbitration, waived its immunity from suit), contra, Calvello v. YST, 899 F.Supp. 431 (D.S.D.1995); Rupp v. Omaha Tribe, 45 F.3d 1241 (8th Cir.1995) (Tribe waived immunity as to any claim to land by filling quiet title action regarding same land); Dacotah Properties v. Prairie Island Indian Community, 520 N.W. 2d 167, 170 (Minn.Ct.App.1994) (Tribe, by engaging in commercial enterprises with non-Indian entities under a corporate charter permitting it to sue and be sued, waived its immunity from suit); Conklin v. Freemen, 20 ILR 6037 (N. Plns. Intertr. Ct. of Appls., 1993) (Tribe waived its immunity from suit for declaratory relief by adopting IRA constitution allowing itself to be sued).

Appellant Roby concedes that the Mille Lacs Band has not waived its sovereign immunity from suit. She argues that even in the absence of a waiver of sovereign immunity she is entitled to have the District Court address the merits of her claims pursuant to the Fourteenth Amendment to the United States Constitution and Title VII to the Civil Rights Acts of 1964. Without citation to any authority, Appellant Roby argues that the federal authorities she relies upon somehow supercede the Band's immunity from suit. The consistent body of case law referenced above demonstrates that Indian tribes and tribal officials enjoy immunity from suit, unless clearly and unequivocally waived. Appellant Roby's reliance upon Title VII of the Civil Rights Act of 1964 is particularly misplaced. Congress expressly omitted federally recognized Indian tribes from the definition of "employer" in Title VII. The cases that have addressed claims against Indian tribes based on alleged violations of Title VII of the Civil Right Act of 1964 have consistently held that the activities of Indian tribes are completely exempt from the

provisions of the Act. See Dille v. Council of Energy Res. Tribes, 801 F.2d 373 (10th Cir. 1986); Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117 (9th Cir. 1998), cert.denied, 528 U.S. 1098 (2000); Nanomantube v. Kickapoo Tribe of Kansas, 631 F.3d 1150 (10th Cir. 2011).

Because Appellant has the burden to cite the Court to clear and unequivocal waivers of sovereign immunity; and because she has failed to cite any authority to support her claim that Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution permit the merits of her claims to be addressed by the District Court, Appellant's argument must be rejected.

WAIVERS OF IMMUNITY IN MILLE LACS BAND STATUTES

Appellant Roby points the Court to the jurisdictional provisions of Mille Lacs Band Statutes found in 5 MLBSA Sections 111(b) and 111 (d)(2), and argues that the statutes provide the requisite waivers of sovereign immunity since the District Court is conferred with exclusive jurisdiction over civil cases involving the Mille Lacs Band and its officials. Appellant also references the purpose section of the General Provision of the Mille Lacs Statutes pertaining to Judicial Proceedings found in 24 MLBSA Section 1(b), to support her claim that the statute provides the requisite waiver of sovereign immunity in order for the District Court to consider the merits of her claim.

While the Court of Central Jurisdiction is the proper jurisdiction for claims to be litigated involving the Mille Lacs Band and its officials, the question is whether the Court is able to exercise the jurisdiction. Mille Lacs Band Statutes specify that the Band Assembly must specifically consent to any suit brought against the Band, and that the sovereign immunity of the

Band shall apply unless expressly waived by Band Statute. See, 2 MLBSA Section 5(A); 5 MLBSA Section 111 (d) (l); and 24 MLBSA Section 2(b).

The Band Statutes that Appellant Roby relies upon do provide the District Court with subject matter jurisdiction over her claims. However, the next step in the inquiry is whether the Court is able to *exercise* this jurisdiction. In order for the Court to exercise jurisdiction over her claims, Appellant Roby must point the court to a clear and unequivocal waiver of the Band's immunity from suit. The Band Statutes relied upon by Appellant do not include the required waivers of sovereign immunity. The Appellees correctly cite the Powelson case, which provides: "sovereign immunity is grounds for dismissal independent of subject matter jurisdiction. A statute may create subject matter jurisdiction yet not waive sovereign immunity." Powelson v. United States, 150 F.3d 1103, 1105 (9th Cir. 1998). In the present case, the Band statutes cited by Appellant Roby create subject matter jurisdiction before the District Court, but the statutes do not waive the Band's sovereign immunity from suit. Accordingly, the Court is not able to exercise jurisdiction over her claims.

APPELLANT ROBY COMPLETED HER TERM AS COMMISSIONER OF FINANCE

Appellant Roby now seeks a severance payment in the amount of $69,650.00, which represents six months of her salary as the Band's Commissioner of Finance. She acknowledges that there is no Band Statute or policy authorizing a severance payment to an appointed Commissioner who has completed her term of service. Appellant Roby further acknowledges that her four year term expired April 29, 2011, her last day of work. The only support for her claim is her assertion that six individuals who served the Band in the past as appointed Commissioners were given severance payments. Presumably, Appellant Roby obtained this information through her position as the Band's Commissioner as Finance.

Because Appellant completed her term of service to the Band as Commissioner of Finance; and because there is no Band statute or policy providing for severance payments to Commissioners who complete their terms, Appellant has not carried her burden of establishing her entitlement to a severance package. Accordingly, her claim must be rejected.

APPELLANT'S RELEASE OF CONFIDENTIAL INFORMATION

Appellant's filings before the District Court and the Court of Appeals include references to the amounts of severance payments made to six individuals who previously served the Band as appointed Commissioners. In her capacity as Commissioner of Finance for the Mille Lacs Band, Appellant had access to the details of severance payments made to prior Commissioners. The Court agrees with the Appellees that this information is confidential business information; and that Appellant Roby wrongfully placed this information into the public domain. The Court hereby orders all records before the District Court and the Court of Appeals in this matter be redacted so that the amounts of severance payments to prior Commissioners, as well as the names of prior Commissioners, be redacted.

SHA WA NI MA

Appellant Roby seeks to invoke the traditional theory of law of the Mille Lacs Band, codified at 24 MLBSA Section 2003, in an effort to overcome the Band's sovereign immunity from suit. This Court has implemented the traditional concept of Sha Wa Ni Ma in its analysis of Appellant Roby's claims. The Court has concluded that on the facts presented herein that the concept of Sha Wa Ni Ma does not require the waiver of the Mille Lacs Band's immunity from suit.

EX PARTE YOUNG DOCTRINE

Appellant Roby asserts without argument that a tribal official who ignores federal law can inadvertently waive sovereign immunity through his actions. Appellant cites the decision of the United States Supreme Court in Ex Parte Young, 209 U.S. 123 (1908), in support of her assertion. Appellant does not explain how her circumstances fit the Ex Parte Young exception; or how the doctrine relates to the Indian Civil Rights Act; or how the doctrine impacts her argument that a waiver of sovereign immunity exists which permits the Court to exercise jurisdiction over her claim for severance pay.

The Indian Civil Rights Act was enacted by Congress in 1968 to extend to those persons who interact with tribal governments many of the same rights that citizens were guaranteed in interacting with the state and federal governments. Prior to 1978, the federal courts took a very expansive view of the Indian Civil Rights Act and utilized it to uphold a variety of claims for both declaratory and monetary relief against Indian tribes and tribal officials in federal courts. That line of cases came to an abrupt halt when the United States Supreme Court decided Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) where the Court dismissed a suit for declaratory and injunctive relief against an Indian tribe in federal court that was based upon an alleged violation of the Indian Civil Rights Act. In dismissing the case, the Court strongly intimated that tribal courts are the appropriate forums to resolve disputes alleging violations of the Indian Civil Rights Act, provided the suit requests declaratory or injunctive relief and is filed against a tribal official who exceeds his authority under tribal law. The Court relied upon the Ex Parte Young doctrine to find that such remedies would lie in tribal court.

Appellant Roby has alleged no facts that would justify her claim to severance pay pursuant to the Ex Parte Young exception. The doctrine requires heightened interests, such as a taking of an individual's property without just compensation and due process of law.

The Court does not agree that every claim for money damages arising from employment with a tribal entity rises to the level of a "taking" under the Indian Civil Rights Act. An obligation to pay money under a contract or pursuant to terms of employment is not the type of property right that the Fifth Amendment to the United States Constitution, and the Indian Civil Rights Act, refers. See United States v. Sperry Corp., 493 U.S. 52 (1989) (failure to pay a money obligation does not rise to the level of a taking under the fifth amendment). In this case, Appellant cannot even justify a contract claim for the severance pay she seeks. A breach of contract by a government could give rise to a takings argument, but only if the property interest is separate and distinct from any claim arising under the contract. See Prudential Insurance v. United States, 801 F.2d 1295, 1300 n.13 (Fed. Cir. 1986). Only when a litigant can point to some statutory entitlement to maintain employment is there a "property" right reserved that employee. See Arnett v. Kennedy, 416 U.S. 134 (1974). Similarly, in Means v. Wilson, 522 F2d 833 (8th Cir. 1975), the Court upheld the right of an individual to bring an ICRA claim against a tribal official for denial of the right to vote, a property right preserved under the Tribe's constitution.

In this case, Appellant Roby cannot point to any law entitling her to severance pay. The anecdotal evidence she does offer falls far short of the heightened burden she must carry in order to implicate the Ex Parte Young doctrine. Accordingly, Appellant Roby's argument fails.

DECISION

Appellant Roby has failed to carry her burden of proving that the Mille Lacs Band has waived its immunity from suit, which would permit the District Court to consider the merits of her claims. The decision of the District Court is affirmed.

BY THE COURT OF APPEALS:

Dated: 3-29-12

Chief Justice Rayna Churchill

Dated: 3-26-12

Justice Brenda Moose

Dated: 3-27-12

Justice Clarence Boyd