IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT NANOMANTUBE

Appellant

vs. **Case No. 09-3347**

THE KICKAPOO TRIBE IN KANSAS,
THE KICKAPOO TRIBE IN KANSAS TRIBAL COUNCIL, AND THE GOLDEN EAGLE CASINO

Appellee

APPELLANT'S OPENING BRIEF

Appeal from the U. S. District Court for the District of Kansas
Honorable Richard D. Rogers District Court Judge
Honorable K. Gary Sebelius, Magistrate Judge

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JURISDICTIONAL STATEMENT

Plaintiff, Robert Nanomantube, an American Indian filed his Notice of Appeal on December 3, 2009 (Doct. 21. Aplt. App. at 1), seeking review of the district court's Memorandum Opinion filed and entered on September 21, 2009 (Doc. 18 Aplt. App. at 6)[1], granting the Kickapoo Tribe's motion to file out of time. Nanomantube also appeals the district court's Order entered on November 5, 2009, granting the Kickapoo Tribe's motion to dismiss (Doc. 19. Aplt. App. at 10). The Order of September 21, 2009 was not a final order. The Order of November 5, 2009 was a final order disposing of all issues before the district court. Review is pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

A. The Exclusion of Indian Tribes from the Definition of Employers Under Title VII is Not Jurisdictional and Thus is Subject to Waiver by Voluntary Inclusion.

B. The Kickapoo Tribe's governing body, the Tribal Council, unequivocally waived any sovereign immunity to claims under Title VII of the Civil Rights Act of 1964 and 1991 as to employees of the Tribe's Golden Eagle Casino, by its affirmative decision and written announcement that "the Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991", with no conditions precedent or

[1] Nanomantube originally appealed the district court's order granting the Tribe's motion to file its Answer out of time, but will not pursue that issue as the basis for the court's decision was that the CMF system was not functioning the day in question.

subsequent to the waiver, and it was error for the district court to find that such language was not an "unequivocal waiver".

C. The defense of tribal sovereign immunity is not applicable to a non-tribal member's claim of violation of Title VII of the Civil Rights Act of 1964 and 1991, even though the acts took place in Indian Territory, because application of Title VII does not affect the Tribe's "inherent tribal sovereignty".

STATEMENT OF THE CASE

A.
NATURE OF CASE

Robert Nanomantube, a non-tribal member, American Indian of Kickapoo decent and Acting Manager of the Tribe's unincorporated casino filed a claim for violation of Title VII of the Civil Rights Act of 1964 and 1991, after the Kickapoo Tribe acting through its governing body took an adverse employment action against Nanomantube and similarly situated applicants solely because of their race and color by ignoring the Tribes hiring preference policy and hiring a non-Indian for the position. Jurisdiction was founded in the Tribes' waiver of sovereign immunity and voluntary subjection to Title VII, federal question, and general jurisdiction 28 U.S.C. § 1331.

In addition to monetary damages, Nanomantube also sought the equitable remedy of reinstatement.

B.
COURSE OF PROCEEDINGS

As an exhaustion prerequisite to filing his Title VII claim, Nanomantube filed his claim with the Equal Employment Opportunity Commission. The Commission summarily closed the case on jurisdictional grounds as the incident took place on an Indian reservation, and issued Nanomantube a "Dismissal and Notice of Rights" letter. (Doc. 1, Aplt. App. at 24).

Nanomantube filed his case in the United States District Court for the District of Kansas against the Kickapoo Tribe in Kansas, its governing body the Kickapoo Tribe in Kansas Tribal Council, and the Tribe's unincorporated casino, The Golden Eagle Casino, for violation of Title VII of the Civil Rights Act of 1964 and 1991, (Doc. 1, Aplt. App. at 19).

The petition and summons were served on August 3, 2009 and return made on August 6, 2009, with the response due on or before August 24, 2009. (Doc. 3, Aplt. App. at 2). The Kickapoo Tribe filed its answer on August 25, 2009. (Doc. 6, Aplt. App. at 28). On August 26, 2009, the Tribe filed a motion to dismiss for lack of jurisdiction. (Doc. 8, Aplt. App. at 30). Nanomantube filed his response in opposition to the motion to dismiss on September 8, 2009. (Doc.s 16 and 17, Aplt. App. at 75, 78). The Kickapoo Tribe did not file a reply to Nanomantube's response in opposition to the motion to dismiss.

The Court granted the Tribe's motion to dismiss on November 5, 2009. (Doc. 19, Aplt. App. at 10). Nanomantube filed his notice of appeal on December 2, 2009. (Aplt. App. at 3). Circuit mediation was uneventful.

STATEMENT OF FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW

Nanomantube is a non-member resident of the Kickapoo Tribe of Kansas Reservation, and a citizen of the United States of America. The Defendant The Kickapoo Tribe of Kansas is a Recognized Tribe under the laws of the United States, and pursuant to the Indian Reorganization Act of June 18, 1934, established its Constitution and Bylaws establishing the Tribal Council as the governing body of said Tribe. The Golden Eagle Casino is a business establishment, not registered with the Secretary of State for the State of Kansas as a corporation, foreign or domestic, open to the public for the purpose of gaming and is owned and operated by the Kickapoo Tribe in Kansas. The Tribe did not form a separate corporation to conduct business for the Tribe.

Nanomantube served as Senior Manager On Duty/Compliance Officer in the absence of the General Manager before being employed as Acting General Manager by the Tribal Council. The Golden Eagle Casino states that it will (and does) comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991. The

Kickapoo Tribe through their employment policies require a preference in hiring and all other aspects of employment to eligible individuals in the following order; Kansas Kickapoo Tribal Members, Enrolled Members of any other Kickapoo band, Resident Indians, Non-resident Indians, Kickapoo descendants, then to any qualified applicant. Nanomantube is a Resident Indian and a Kickapoo descendant as defined by the Indian Preference Policy.

On or about November 20, 2008, Nanomantube and other Indian applicants applied for the position of General Manager, for which Nanomantube was qualified, and which he had held for over four years, and for which he was entitled to the hiring preference due to being a Resident Indian and a Kickapoo descendant. On January 5, 2009, Nanomantube was informed that he was not selected for the position of General Manager of the Golden Eagle Casino and that the position had been given to a non-Indian, non-resident who did not meet any of the criteria of the hiring preference.

SUMMARY OF ARGUMENT

The district court erred when it found that the Tribe's commitment to comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991 in its operation of the Golden Eagle Casino was not an unequivocal waiver of the Tribe's sovereign immunity as to claims brought by former employees of the Golden Eagle Casino for violation of Title VII by the Tribal Council in the hiring of the General

Manager for the Casino. The clear and unequivocal language, without limitation, leaves no reasonable interpretation other than the Tribe has agreed to subject itself to the provisions of the Act, which would include enforcement for violations.

Although not addressed by the court below, but co-existent with the issue of waiver, is the issue of exclusion of Indian Tribes from Title VII jurisdiction. Those cases that have historically found that Indian tribes were not subject to Title VII jurisdiction were based upon the exclusion of Indian Tribes from the definition of employer found at 42 U.S.C. 2000e(b). In the case of *Arbaugh v. Y & H Corporation,* 546 U.S. 500, 125 S.Ct. 1235 (2006), a unanimous United States Supreme Court held that the definitions within subsection (b) of 42 U.S.C. 2000e are not jurisdictional, but rather elements to be proven, and thus may be waived. Consequently a tribe may bring itself within the coverage of Title VII as did the Kickapoo Tribe in this case. This issue appears to be a matter of first impression as applied to Indian Tribes.

Additionally, there is a question of whether the defense of immunity is available to the Tribe to bar Nanomantube's claims as his claims do not bear upon the Tribe's "inherent tribal sovereignty". The recent decision of the Supreme Court of Oklahoma in *Cossey v. Cherokee Nation Enterprises, LLC ,* 212 P.3d 447, (2009), while not precedent, is persuasive in light of United States Supreme Court decisions concerning an Indian Tribe's "inherent tribal sovereignty" i.e., its power to self-govern and

control its internal tribal relations (punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members). This inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations including a non-member's individual claims against a casino run by the tribal government in Indian Territory.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

The district court's determination is a question of law, which this Court reviews *de novo. Ute Distribution Corp. v. Ute Indian Tribe,* 149 F.3d 1260, C.A.10 (Wyo.) 2001(This court reviews *de novo* the legal question of whether a party can assert immunity); *E.F.W. v. St. Stephen's Indian High School,* 264 F.3d 1297, C.A.10 (Wyo.) 2001 (We review *de novo* a district court's dismissal under Rule 12(b)(1) and its ruling on sovereign immunity); *Fletcher v. United States,* 116 F.3d 1315, 1323-24 (C.A.10) 1997 (We review *de novo* the legal question of when a party can assert sovereign immunity); *Sierra Club v. Lujan,* 972 F.2d 312, 314 (C.A. 10) 1992 (Likewise, we review *de novo* a district court's determination of subject matter jurisdiction); *Matter of Tri-State Equip., Inc.,* 792 F.2d 967, 970 (C.A. 10) 1986 (We review *de novo* the district court's dismissal of a complaint for sovereign immunity).

I.

The Exclusion of Indian Tribes from the Definition of Employers Under Title VII is Not Jurisdictional and Thus is Subject to Waiver by Voluntary Inclusion and Triable in Courts of Competent Jurisdiction.

A.

The Exclusion of Indian Tribes from the Definition of Employers Under Title VII is Not Jurisdictional and Thus is Subject to Waiver by Voluntary Inclusion

Although not addressed by the District Court, the applicability of Title VII to Indian Tribes through waiver or consent is a key issue. Nanomantube does not dispute the well documented fact that 42 U.S.C.§ 2000e(b) specifically excludes Indian Tribes from the definition of employer. What Nanomantube does contest is the implication that such exclusion deprives state and federal courts of subject matter jurisdiction under any circumstances.

Justice Ginsburg writing for a unanimous court in *Arbaugh v. Y & H Corporation,* 546 U.S. 500, 125 S.Ct. 1235, (2006) clearly delineated what had been for some time the misconception that the exemption of certain entities, including Indian Tribes, from the definition of employer in Title VII equated to a lack of subject matter jurisdiction over Title VII and Indian Tribes;

> This case concerns the distinction between two sometimes confused or conflated concepts: federal-court "subject-matter" jurisdiction over a controversy; and the essential ingredients of a federal claim for relief. Title VII of the Civil Rights Act of 1964 makes it unlawful "for an

> employer ... to discriminate," *inter alia,* on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). The Act's jurisdictional provision empowers federal courts to adjudicate civil actions "brought under" Title VII § 2000e-5(f)(3). Covering a broader field, the Judicial Code gives federal courts subject-matter jurisdiction over all civil actions "arising under" the laws of the United States. 28 U.S.C. § 1331. Title VII actions fit that description. In a provision defining 13 terms used in Title VII, 42 U.S.C. § 2000e, Congress limited the definition of "employer" to include only those having "fifteen or more employees," § 2000e(b). The question here presented is whether the numerical qualification contained in Title VII's definition of "employer" affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief. *Id.* at 503.
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> On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. "Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief--a merits-related determination." 2 J. Moore *et al.*, Moore's Federal Practice § 12.30[1], p. 12-36.1 (3d ed.2005) (hereinafter Moore). Judicial opinions, the Second Circuit incisively observed, "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva,* 229 F.3d, at 361. We have described such unrefined dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on the question whether the federal court had authority to adjudicate the claim in suit. *Steel Co.,* 523 U.S., at 91, 118 S.Ct. 1003. *Id* at 511.

While the specific provision in *Arbaugh* was the number of employees to fall within the definition of employer under Title VII, its application in the present case is by reason that the exclusion of Indian Tribes is found in the same section, the definition section, and not the jurisdictional section:

> ... neither § 1331, nor Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3) (authorizing jurisdiction over actions "brought under" Title VII), specifies any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor. ***Instead, the 15-employee threshold appears in a separate provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."*** *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.(Emphasis added). *Id.* at 515 - 6.

Thus 42 U.S.C. 2000e(b) contains the exclusion of Indian Tribes from the definition of employer, but, as the *Arbaugh* Court noted, this does not deprive the courts of subject matter jurisdiction. Not being jurisdictional, it is permissible for the parties to agree, or as in this case for the Tribe to voluntarily bring themselves into the coverage of Title VII.[2] They chose to do so, they are bound by that decision

B.

Nanomantube is not required to bring his Title VII claims in Tribal Court.

Although Tribes can be subjected to Title VII, the Tribal Courts do not have jurisdiction over Title VII claims. Tribal Courts are not courts of general jurisdiction with respect to nonmembers. *Nevada v. Hicks* 533 U.S. 353, 368, 121 S.Ct. 2304

[2]Interestingly, this same section excludes the United States from the definition of employer, but see 42 U.S.C. 2000e16 - 16a “Government Employee Rights Act of 1991” applying the protections of Title VII to federal employees.

(2001):

> the Supreme Court recognized the authority of state courts as courts of "general jurisdiction" and further acknowledged our system of "dual sovereignty" in which state courts have concurrent jurisdiction with federal courts, absent specific Congressional enactment to the contrary. . . 'Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States,'.... That this would be the case was assumed by the Framers, *See* The Federalist No. 82, pp. 492-493 (C. Rossiter ed.1961). Indeed, that state courts could enforce federal law is presumed by Article III of the Constitution, which leaves to Congress the decision whether to create lower federal courts at all. This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts.
>
> Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.... *Id.* 2313-2314 (citation omitted).

Jurisdiction for Title VII is founded upon the Act itself as well as the

Court's federal question jurisdiction:

> Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Title VII surely is a "la[w] of the United States." *Ibid.* In 1964, however, when Title VII was enacted, § 1331's umbrella provision for federal-question jurisdiction contained an amount-in-controversy limitation: Claims could not be brought under § 1331 unless the amount in controversy exceeded $10,000. See § 1331(a) (1964 ed.). Title VII, framed in that light, assured that the amount-in-controversy limitation would not impede an employment-discrimination complainant's access to a federal forum. The Act thus contains its own jurisdiction-conferring provision, which reads:

> "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. § 2000e-5(f)(3). ...

> Congress amended 28 U.S.C. § 1331 in 1980 to eliminate the amount-in-controversy threshold. *See* Federal Question Jurisdictional Amendments Act of 1980, § 2, 94 Stat. 2369. Since that time, Title VII's own jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), has served simply to underscore Congress' intention to provide a federal forum for the adjudication of Title VII claims. *See* Brief for United States as *Amicus Curiae* 13; Tr. of Oral Arg. 4. *Arbaugh, supra* at 506 -7.

Title VII has its own "exhaustion" requirements. Nanomantube was required to, and did file his claim with the EEOC, and the EEOC has issued its right to sue letter. Nanomantube has exhausted all administrative requirements that he is required to under Title VII.

Although this Circuit does not appear to have addressed the issue directly (possibly because of the pre- *Arbaugh* thought that the omission of Indian Tribes from the definition of employer under Title VII was jurisdictional), other Circuits (without the benefit of *Arbaugh*) have held that when Title VII applies, federal courts have jurisdiction, specifically addressing *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed 818 (1985), and denying that Title VII cases are so related to tribal self governance and self determination, and acknowledging the exclusive jurisdiction of federal courts in Title VII cases;

The Court of Appeals for the Ninth Circuit held that Title VII claims are

> within the federal court's exclusive jurisdiction. *Valenzuela v. Kraft,* 739 F.2d 434 (9th Cir.1984). More recently, the Court of Appeals for the Seventh Circuit held that Title VII claims are within the concurrent jurisdiction of the state and federal courts. *Donnelly v. Yellow Freight System, Inc.,* 874 F.2d 402 (7th Cir.1989). The Court of Appeals for the Eighth Circuit has yet to render decision on this issue.
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> The federal claims which form the basis of this lawsuit are properly heard in the federal court. Neither existing case law nor sound reasoning necessitates dismissal.

Myrick v. Devils Lake Sioux Manufacturing Corp. 718 F.Supp. 753, 755, D.N.D. (1989).

These cases are consistent with the line of cases which apply federal laws of general application to Tribes irrespective of a Tribe's assertion of immunity, finding that application of the laws does not affect the Tribe's "inherent tribal sovereignty. *San Manuel Indian Bingo and Casino v. N.L.R.B.* 475 F.3d 1306, C.A.D.C., 2007:

> National Labor Relations Act (NLRA) applied to an *Indian-owned casino, which was operated on tribe's reservation, employed many non-Indians and catered primarily to non-Indians*; applying the NLRA to tribe's commercial activity would not impair tribal sovereignty, and tribe did not fall within NLRA's exception to definition of "employer" for "any State or political subdivision thereof." National Labor Relations Act, § 2(2), 29 U.S.C.A. § 152(2). [3] *(Emphasis added).*

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[3] *San Manuel* , although from the D.C. Circuit, is persuasive in that the facts are almost identical except for the fact that the Plaintiff there was asserting a personal injury claim and Nanomantube asserts a civil rights claim. The second issue in *San Manuel* differs somewhat in that here it is clear that Congress intentionally excluded Indian Tribes from the definition of employer, but under the facts of this case the tribe voluntarily subjected itself to the provisions of the Act.

See also Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir.1999) (holding ADA applied to restaurant and gaming facility operated by an Indian tribe); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174 (2d Cir.1996) (applying OSHA to a tribe-operated construction business); *Dep't of Labor v. Occupational Safety & Health Review Comm'n,* 935 F.2d 182, 184 (9th Cir.1991) (applying OSHA to a timber mill that a tribe operated on its reservation and noting "[t]he mill employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans through channels of interstate commerce"); *Smart v. State Farm Ins. Co.,* 868 F.2d 929 (7th Cir.1989) (concluding ERISA applied to a health center operated by an Indian tribe on its reservation).

Given the express language of 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1331, and this District's acceptance of *Arbaugh,* (*Hamilton v. Brad Systems, Inc.* 2006 WL 2092455 (D.Kan.) Unpublished 2006), this Court should likewise acknowledge the federal and state courts exclusive jurisdiction over Title VII cases including those applying to Indian Tribes.

II.

The Kickapoo Tribe's governing body, the Tribal Council, clearly waived any sovereign immunity to claims under Title VII of the Civil Rights Act of 1964 and 1991 as to employees of the Tribe's Golden Eagle Casino, by its affirmative decision and written announcement that "the Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991", with no conditions precedent or subsequent to the waiver, and it was error for the

district court to find that such language was not an unequivocal or clear waiver.

A.

The nature of tribal sovereign immunity and its waiver

> Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' *United States v. Lara,* 541 U.S. 193, 212, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (KENNEDY, J., concurring in judgment).

As Judge TACHA, noted in her dissent in *Cherokee Nation*[4]**:**

> Indian tribes possess inherent powers of sovereignty that predate the coming of the Europeans to this continent Their incorporation within the territory of the United States, and their acceptance of its protection, however, "necessarily divested them of some aspects of [that] sovereignty." In addition to the implicit divestment of sovereign powers by virtue of tribal dependence upon the United States, other sovereign powers were explicitly yielded by treaties or removed by Congress. "The Indian tribes [however] retain all aspects of tribal sovereignty not specifically withdrawn." *Id.* 939-40.

But this immunity is not an absolute immunity:

> In *Prairie Island,*[5] this court likened sovereign immunity to an affirmative defense, but did so only in the context of explaining in dicta that while "sovereign immunity is jurisdictional in nature," unlike subject matter jurisdiction, immunity may be waived. *Hagen v. Sisseton-Wahpeton Community College,* 205 F.3d 1040, 1044 C.A.8 (S.D.) 2000.

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[4] *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937 C.A. 10 (Okl) (1989).

[5] *In re Prairie Island Dakota Sioux,* 21 F.3d 302 (8th Cir.1994).

> The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices. But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint . . . . The Supreme Court's concern for tribal sovereignty distinguishes among the different activities tribal governments pursue, focusing on acts of governance as the measure of tribal sovereignty. *San Manuel Indian Bingo and Casino v. N.L.R.B.,* 475 F.3d 1306, 1314 C.A.D.C. 2007.

> In sum, whenever Indian interests are tendered in a controversy, a state court must make a preliminary inquiry into the nature of the rights sought to be settled. Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance.... Thus, it is the regulation of the activities of non-members on the land, rather than the resale of the land, which the *Plains*[6] Court found to be the key point with regard to the tribe's sovereign interests. 128 S.Ct. at 2724. *Cossey v. Cherokee Nation Enterprises, LLC,* 212 P.3d 447, 453 Okla. 2009.

One might also inquire as a preliminary matter, what immunities the Kickapoo Tribe in Kansas has retained as a review of applicable treaties indicate an agreement to abide by the laws of the United States with no mention of a retention of its sovereignty, or preservation of customs:

> ARTICLE 9. The Kickapoos promise to use their best efforts to prevent the introduction and use of ardent spirits in their country, to encourage industry, thrift and morality, and by every possible means to promote their advancement in civilization. They desire to be at peace with all men, and therfore bind themselves to commit no depredation or wrong

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[6] *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.* ___ U.S. ____, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008).

> upon Indians or citizens, and when ever difficulties arise to abide by the laws of the United States in such cases made and provided, as they expect to be protected and to have their own rights vindicated by them. *Treaty with the Kickapoo, 1854* (Aplt. App. at 103-105).(Emphasis added).

The above language would in fact indicate a submission to the laws of the United States and invoking them for protection.

Against this legal backdrop the facts of this case establish that in fact the Kickapoo Tribe in Kansas has waived any immunity it may have, as least as to claims under Title VII of the Civil Rights Act.

B.

The Kickapoo Tribe Has Affirmatively Waived Their Defense of Sovereign Immunity

The Kickapoo Tribe, by not replying to Nanomantube's response did not address the issue of the Tribe's waiver, and do not deny the compliance language.

The sole question addressed by the district court was whether the Kickapoo Tribal Council, by subjecting the Golden Eagle Casino to the provisions of Title VII of the Civil Rights Act of 1964 and 1991, has waived its defenses at least to claims brought under Title VII. It is well established that a Tribe's immunity can be either abrogated by Congress or waived by the tribe itself. What is not quite as clear, upon closer reading is the test to be applied and whether the evidentiary bar is higher when

an abrogation by Congress is claimed ("unequivocal"), or lower when there is a claim that the Tribe itself waived its immunity ("clear"). *See: C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (To abrogate tribal immunity, Congress must "unequivocally" express that purpose); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (Similarly, to relinquish its immunity, a tribe's waiver must be "clear."); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (finding a contract's arbitration provision and related prescriptions lead to the conclusion that the Tribe in this case had waived its immunity with the requisite clarity); *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.,* 523U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) (reaffirming doctrine of tribal immunity and stating Congress can alter the limits of tribal immunity through "explicit legislation"); *U.S. v. Dion* 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767, (1986) (different standards over the years); *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260 C.A.10 (Utah) 1998 ("[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."),(internal quotations omitted); *see also Fletcher v. U.S.,* 116 F.3d 1315, C.A.10 (Okl.) 1997 (Although an express restriction of an aspect of tribal sovereignty is preferred, Congress' clear intent to restrict an aspect of

sovereignty is also sufficient even if it is not express); *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937 C.A.10 (Okl.) 1989 (no *clear* indication of congressional intent to abrogate Indian sovereignty rights).

Judge Tacha's dissent in *EEOC v. Cherokee Nation*, 871 F.2d 937, referenced the Supreme Court's decision in *United States v. Dion*, 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986).

> We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. In other cases, we have looked to the statute's " 'legislative history' " and " 'surrounding circumstances' " as well as to " 'the face of the Act.' ". An Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights. We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute."

Although expressed in the dissent, the Supreme Court's words are what they are - "preferable - not a per se rule". Judge Tacha's dissent found application recently in *Native American Distributing v. Seneca-Cayuga Tobacco*, 546 F.3d 1288, 10 CA (Nov. 2008). This time, however, in the majority opinion.

In *Native American,* the Seneca-Cayuga Tribe had formed a separate corporation for conducting business. The corporation had a "sue and be sued" clause.

Native American brought suit in federal court against the Tribe for violation of the agreement. The Tribe asserted sovereign immunity as a defense. *Native American* argued that inclusion of the "sue or be sue"clause in the corporate charter was a waiver of the Tribe's sovereign immunity. The District Court dismissed on the basis of immunity, and the Tenth Circuit affirmed, finding, however, that the sue and be sued clause could be an "unequivocal waiver" of immunity,

> It is also undisputed that the Seneca-Cayuga Tribe has unequivocally waived its own immunity via the "sue or be sued" clause in the Corporate Charter- but only with respect to the actions of the Tribal Corporation, and not the actions of the Tribe. *Id* at 1293.

In the present case the district court rejected this reasoning, finding:

> Plaintiff's reliance upon NAD is misplaced. In NAD, the Tenth Circuit considered whether the tobacco manufacturer was a division of the tribe and, thus, would necessarily enjoy sovereign immunity or whether it was a division of the tribal corporation and, thus, subject to suit because the "sue and be sued" clause in the corporate charter waived tribal sovereign immunity.

Nanomantube agrees that this was the end result, but the Court over looked the import of the language that a "sue and be sued clause" *can be* sufficient language to waive sovereign immunity.

The district court relied upon similar issues decided in cases such as *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 584 (8th Cir); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 n. 2 (8th Cir. 2000);

Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282, 1289 (11th Cir. 2001); *Demontiney v. U.S. ex rel. Dept. of interior, Bureau of Indian Affairs*, 255 F.3d 801, 814 (9th Cir. 2001). The distinction however is that in *Dillion, Hagen and Sanderlin* the waiver language relied upon was "conditioned" upon the receipt of federal money, grants or programs. There are no such allegations in this case or evidence thereof.[7] There was no condition precedent or subsequent to the Kickapoo Tribe's agreement to comply with the provisions of Title VII and inherent waiver of tribal immunity.

Demontiney, on the other hand, supports Nanomantube's position. There it was held that a tribe, which was sued by a tribal member for breach of contract in federal court, did not waive sovereign immunity *to trial in federal court* when it incorporated the Indian Civil Rights Act into its constitution and bylaws). However, it is key to the decision that the Ninth Circuit found the language in the contract to establish a waiver of immunity in Tribal Court:

> We agree with the district court's conclusion that "[a]t best, [these] provisions ... establish only the Tribe's willingness to face suit in tribal court" and not an explicit waiver of tribal immunity. The only express discussion of sovereign immunity, paragraph 2(a) of the General Provisions contract, indicates that the Tribe did not intend to waive its sovereign immunity. Paragraphs 9.6 and 9.12 of the July subcontract

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[7] Although the gaming compact between the State of Kansas and the Kickapoo Tribe requires compliance with several laws or the establishment of tribal laws providing the same protections and benefits, the compact does not require an agreement to comply with Title VII of the Civil Rights Act.

> invoke tribal law and judicial remedies, and paragraph 9(a) of the General Provisions contract invokes tribal administrative remedies. *These provisions support a waiver of sovereign immunity only for claims asserted in Tribal Court*. Contrary to Demontiney's reading of paragraph 9.2 of the July subcontract concerning delay or omission of rights and remedies, this provision does not show any intention to appeal to nontribal jurisdiction. *Supra at* 813. (Emphasis added).

The *Demontiney* Court also found its decision consistent with *C & L Enterprises*:

> The Supreme Court's decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), finding a clear waiver of tribal sovereign immunity in contract arbitration provisions, is wholly consistent with our holding. There, the Court relied on two provisions of a contract between a tribe and a construction company to find sufficient evidence of a clear waiver of tribal sovereign immunity: (1) a clause stating that all contractual disputes should be resolved according to American Arbitration Association Rules and providing for enforcement of the arbitrator's award "in accordance with applicable law in any court having jurisdiction thereof"; and (2) a choice-of-law clause consenting to the law of the project location, Oklahoma. *Id.* at 1592-94. The referenced arbitration rules provided that "[p]arties to these rules shall be deemed to have consented" to enforcement of the award in federal and state court. *Id.* at 1593. Oklahoma law provides that an agreement calling for arbitration in the state confers jurisdiction on its courts for enforcement. *Demontiney at 813.*

Application of *C & L* to this case is also consistent with that decision.

The Kickapoo Tribe has not exercised its right under Section 3 of the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 503, "to organize and act through two entities: a government entity organized under a constitution and a corporation entity organized under a corporate charter." *Id* at 1290. Instead, the Tribal Council is the

governing body of the Tribe. (Doct. 8-2 at p.2; Aplt App. at 34) As admitted by the Tribe, "the Golden Eagle Casino is wholly owned and operated by the Kickapoo Tribe in Kansas"(Doct. 8-2, page 6; Aplt App. at 38); and the Tribe is the governing and legislative body of the Tribe (Doct. 8, page 2; Aplt App. at 34). The handbook which contains the waiver was adopted by the Tribal Council. The waiver is the waiver of the Tribe.

The Court in *C & L* applied the "clear" standard to establish waiver;

> To abrogate tribal immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (citing *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)). Similarly, to relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). We are satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award.

The Court then looked to the arbitration clause itself, going beyond the "four corners" of the agreement:

> the arbitration clause specifies American Arbitration Association Rules for the construction industry, *ibid.,* and under those Rules, "the arbitration award may be entered in any federal or state court having jurisdiction thereof," American Arbitration Association, Construction Industry Dispute Resolution Procedures, R-48(c) (Sept. 1, 2000) [8]

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[8]In footnote 1 of the original decision, the court noted that "The United States, as *amicus* supporting the Tribe, urges us to remain within the "four corners of the contract" and refrain from reliance on "secondary sources." The American

In the present case, the Tribal Council expressly agreed that "[t]he Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991 ... ". Like the arbitration language in *C & L* "Will comply with the provisions of" is much more than a statement that the Tribe will follow or apply the principles of Title VII or the "intent" of Title VII. It is an unequivocal and clear statement that the Tribe, as it relates to employees of the Golden Eagle Casino, will comply with the "provisions" of Title VII.[9]

As with the rules of the American Arbitration Association, the "provisions" of Title VII include a definite procedure and process[10], including the the right to bring enforcement proceedings for violations, and that these proceedings may be brought in Federal or State courts;

> **(3)** Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may

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Arbitration Association Rules and the Uniform Arbitration Act, however, are not secondary interpretive aides that supplement our reading of the contract; they are prescriptions incorporated by the express terms of the agreement. itself.

[9] *Black's Law Dictionary* defines "comply" as; "To yield; to accommodate, or to adapt oneself; to act in accordance with; to accept." *Black's Law Dictionary,* (5th ed.).

[10] *See* EEOC Procedural Regulations, 29 CFR § 1601.1, 42 U.S.C.A. foll. § 2000e-4; 42 U.S.C. § 2000e-4.

> be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought. 42 U.S.C. §2000e5(f)(3).

These courts however do not include Tribal Court. *Nevada v. Hicks* 533 U.S. 353, 368, 121 S.Ct. 2304, 13-4.

In C & L, the Court further stated:

> The arbitration clause ... would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed; *Val/Del,* 145 Ariz., at 565, 703 P.2d, at 509 (because the Tribe has "agree[d] that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity"); cf. *Rosebud Sioux Tribe v. Val-U Constr. Co.,* 50 F.3d 560, 562 (C.A.8 1995) (agreement to arbitrate contractual disputes did not contain provision for court enforcement; court nonetheless observed that "disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense"). *Id.* 422

The same applies to the Tribe's adoption of Title VII of the Civil Rights Act of 1964 and 1991. Title VII is not some obscure law. It's title is well know, as well as its purpose. Reference to the specific law itself and the clear language **"**the Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991" is clear and without limitation. To grant immunity as asserted by the Tribe

" would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed ". The compliance language is a clear and unequivocal waiver of immunity_as to Title VII claims by the employees of the Casino. The sovereign immunity defense has been waived.

III.

The defense of tribal sovereign immunity is not applicable to a non- tribal member's claim of violation of Title VII of the Civil Rights Act of 1964 and 1991, even though the acts took place in Indian Territory, because application of Title VII does not affect the Tribe's "inherent tribal sovereignty".

Given the Supreme Court's recent decision in *Plains*, it is important to keep in mind that although Nanomantube is an American Indian, he is not a member of the Kickapoo Tribe in Kansas.[11]

In determining the claims of non-members and the applicability of Tribal Immunity, the Courts must look to the individual making the claim and whether the claim is such that sovereign immunity applies in the first instance:

> *Montana*[12] does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the *activities* of nonmembers' (internal quotations omitted; emphasis added)). *Plains* at

[11] Following the lead of the Supreme Court in *Plains*, the Oklahoma Supreme Court in *Cossey* stated: "The terms "non-Indian" and "nonmember" designate a person who is not a member of the Cherokee Nation for purposes of this opinion. *Supra, at 450, footnote 1.*

[12] *Montana v. U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981.*

2721.

> After *Strate,*[13] it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. *Cossey* at 459.

Although *Cossey* is an Oklahoma Supreme Court case, and not binding precedent upon this Court, its discussion of a Tribe's claim of immunity in a tort action involving a non-Indian and a Tribal Casino in Indian Territory is instructive and persuasive.

Cossey, a non-Indian, sued Cherokee Nation Enterprises, L.L.C., in state court for personal injuries he suffered while he was a customer at the Cherokee Casino in Roland, Oklahoma. The Tribe filed a 12(b)(1)(2)[14] motion to dismiss for lack of subject matter and personal jurisdiction. The trial court denied the motion to dismiss. Cossey, argued that the doctrine of sovereign immunity was never meant to protect entities conducting "non-tribal business which was unrelated to the activity of furthering tribal self-government. The Oklahoma Supreme Court in reviewing *Hicks, Montana, Strate and Plains* held, that the Tribe, in conducting "non-tribal business was not entitled to sovereign immunity from suit in state court. The same reasoning

[13] *Strate v. A-1 Contractors,* 520 US 438, 117 S.Ct. 1404 (1987)

[14] 12 O.S. Supp. 2004 § 2012(b)(1), (2)

would apply to similar claims in federal court:

> [I]n a case brought by a non-Indian, we must consider the nature of the activities of this particular non-Indian plaintiff under these facts and the manner in which these activities affect the tribe's "inherent tribal sovereignty," i.e., its power to self-govern and control its internal tribal relations. Indian tribes retain their inherent power to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members. *Montana v. United States,* 450 U.S. 544, 564, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981). Such powers refer to a Tribe's "inherent sovereign powers," the powers a tribe enjoys apart from express provision by treaty or statute. *Strate v. A-1 Contractors,* 520 U.S. 438, 445-446, 117 S.Ct. 1404, 1416, 137 L.Ed.2d 661 (1997). But this inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations. See *Strate v. A-1 Contractors,* 520 U.S. at 459, 117 S.Ct. at 1416; *Montana,* 450 U.S. at 564, 101 S.Ct. at 1257-58, A tribe's exercise of such power is inconsistent with its dependent status and cannot survive without an express congressional delegation of power to the tribes. *Montana,* 450 U.S. at 564, 101 S.Ct. 1245, citing *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *United States v. Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); and *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). *Cossey,* 456.

The Court in Cossey applied the *Montana Rule* that tribes have no authority over the activities or conduct of nonmembers of the tribe and found that the tribe's sovreign immunity did not preclude Cossey's claims;

> Under *Montana,* the tribes' retained inherent powers of self-government involve only the **relations among members of a tribe.** It is consistent with the "dependent status" of tribes; it is necessarily inconsistent with

their freedom to determine their "external relations." *Id.* [15]

In this case Nanamantoube's Title VII claims have nothing what-so-ever to do with the Kickapoo Tribe's "power to self-govern and control its internal tribal relations . . . inherent power to punish tribal offenders, determine tribal membership, regulate domestic relations among members, or prescribe rules of inheritance for members, (*Montana)* or what is necessary to protect tribal self-government or to control internal relations, (*Strate*). To use the words of the Ninth Circuit, the Tribe in its operation of the Golden Eagle Casino tribe "was not simply engaged in internal governance of its territory and members", and Nanomantube's claims of violation of Title VII should not be barred by a claim of sovereign immunity.

CONCLUSION

Nanomantube, was discriminated against by his employer the Kickapoo Tribe in Kansas through the Golden Eagle Casino because of his national origin and color. Because the Tribe had explicitly agreed to "comply with the provisions of Title VII

[15] The Court also enters a footnote that "In *San Manuel Indian Bingo and Casino v. NLRB,* 475 F.3d 1306, 1315 (D.C.Cir.2007), the D.C. Circuit Court of Appeals held the operation of a casino is not a traditional attribute of self-government, but was virtually identical to purely commercial casinos across the United States. It also held that most of the casino's employees and customers were not tribal members and lived off the reservation. For those reasons, it held its sovereignty was not called into question because the tribe was not simply engaged in internal governance of its territory and members. *Cossey,* 457, Fnte 21.

of the Civil Rights Act of 1964 and 1991", Nanomantube sought to exhaust his administrative remedies through the Equal Employment Opportunity Commission, only to have his claim summarily denied for lack of jurisdiction because it involved an "Indian Tribe". The EEOC failed to consider the fact that the Tribe had voluntarily committed itself to the provisions of Title VII or that such a waiver would be effective. The EEOC appears to remain under the misconception that the exclusion of 42 U.S.C. § 2000e(b) from the definition of employer, divest*s* this Court of subject matter jurisdiction. This is not surprising as many courts have traditionally followed the same reasoning. A unanimous Supreme Court in *Arbaugh v. Y & H Corporation* held, however, that the definitions in 42 U.S.C. § 2000e(b) were not jurisdictional but rather elements to be proven, and thus may be waived. Consequently a tribe may bring itself within the coverage of Title VII as did the Kickapoo Tribe in this case.

The Kickapoo Tribe in Kansas has done just that. The Tribe did not form a separate corporation to conduct the Tribe's business and operates the Golden Eagle Casino through the Tribe's governing body, the Tribal Council. The Tribal Council unequivocally agreed to "comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991".

While the words "and the Tribe waives its sovereign immunity" are not expressed in that statement, the waiver is expressed in the clear language to

unequivocally comply with the provisions of this specific law. This written commitment was not a condition to the state gaming compact, nor is there any evidence in the record that it was a condition for any federal grants or funds. No conditions precedent or subsequent. It is little different than an arbitration clause which has been held to be a waiver, particularly when the Court looks at the "provisions" of Title VII of the Civil Rights Act of 1964 and 1991. The Act has a very definite procedure and process through the EEOC. The aggrieved individual ultimately may pursue his or her claim in the state or federal district courts. Tribal courts do not have jurisdiction over Title VII claims because they are not courts of general jurisdiction and have jurisdiction only over those issues decreed by Congress. Title VII is not one of those.

Although the district court found that the language was not sufficient to create an unequivocal waiver of immunity, this Court determines the issue *de novo.* The cases relied upon by the district court simply are too distinct in their factual circumstances to find them controlling. They deal with language that was included in order to receive a federal benefit or grant or discuss whether a "sue or be sued" clause in a contract with an Indian corporation is sufficient to waive immunity for the Tribe. Those circumstances are not present in Nanomantube's case. Here we are reviewing a voluntary commitment by the Tribe to comply with the provisions of Title VII in

dealing with its employees of the Golden Eagle Casino. Nanomantube was one of those employees, the Tribal Council acting on behalf of the Tribe violated Title VII, and Nanomantube is entitled to pursue his remedies under Title VII in the federal district court having complied with the Act's requirement to first pursue his remedy through the EEOC, and having received his Notice of Right to Sue Letter.

Just as compelling is the fact that the Tribe's sovereign immunity if not found to have been waived, still does not prevent the federal courts from hearing Nanomantube's Title VII claims. It is possible for a tribe's sovereign immunity to co-exist with federal court jurisdiction. More recent decisions including the United States Supreme Court in *Plains* look to the purpose of sovereign immunity as applied to non-members. The Court's have considered the purpose behind such immunity as the manner in which the activities affect the tribe's "inherent tribal sovereignty," i.e., its power to self-govern and control its internal tribal relations. Indian tribes retain their inherent power to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members. *Montana,*1258-59. Such powers refer to a Tribe's "inherent sovereign powers," the powers a tribe enjoys apart from express provision by treaty or statute. *Strate,* 445-446. But this inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations.

As has been determined by two Courts, the operation of a gaming casino by an Indian Tribe, even on reservation property, is not one of those powers of self-governance and internal tribal relations so as to entitle the Tribe to the defense of sovereign immunity. These decisions, while not binding precedent, are well founded in the precedent of cases such as *Hicks, Montana, Strate and Plains,* and should be given persuasive consideration by this Court. This case should be remanded to the district court with directions to proceed on Nanomantube's Title VII discrimination claim.

Respectfully Submitted;

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LOCAL RULE 28.2(A)(1) ADDENDUM

Memorandum and Order of November 5, 2009.

STATEMENT OF RELATED CASES

There are no related or prior Appeals.

ORAL ARGUMENT STATEMENT

Elements of this appeal are issues of first impression and of potential magnitude. Appellant is of the opinion that a legal basis exist for this Court to find that Title VII of the Civil Rights Act of 1964 and 1991 apply to Indian Tribes in the operation of Tribal casinos or other activities that do not affect the tribe's "inherent tribal sovereignty," i.e., its power to self-govern and control its internal tribal relations**.** Such a ruling would not only impact this Appellant, but Indian Tribes through out the nation as well as the processes of the EEOC which currently deny jurisdiction over Indian Territory.

CERTIFICATE OF COMPLIANCE

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/s/ Glenn Griffeth
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on January 22, 2010 I electronically filed the above and foregoing *Appellant's Opening Brief* with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system which sent notification of such filing to:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

ROBERT NANOMANTUBE,

Plaintiff,

vs. **Case No. 09-4107-RDR**

THE KICKAPOO TRIBE IN
KANSAS, et al.,

Defendants.

MEMORANDUM AND ORDER

This is an employment discrimination action brought by the plaintiff against the Kickapoo Tribe in Kansas, the Kansas Kickapoo Tribe in Kansas Tribal Council, and the Golden Eagle Casino pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. This matter is presently before the court upon defendants' motion to dismiss. Having carefully reviewed the arguments of the parties, the court is now prepared to rule.

In his complaint, plaintiff, a Native American, alleges that the defendants discriminated against him because of his race in failing to hire him as General Manager for the Golden Eagle Casino. Plaintiff had been the Acting General Manager of the casino prior to the decision to hire someone else. He alleges further that he was terminated following the decision by the defendants to hire a non-Native American to the position of General Manager.

In the instant motion, the defendants contend that dismissal is appropriate for two reasons. First, they contend that the court

lacks subject matter jurisdiction because they are entitled to sovereign immunity. Second, they assert that plaintiff has failed to exhaust tribal court remedies.

Although the defendants have not specifically relied upon Fed.R.Civ.P. 12(b)(1), it is reasonable to conclude that they raise sovereign immunity as a defense to subject matter jurisdiction under Rule 12(b)(1). Normandy Apts., Ltd. v. U.S. Dept. of Housing and Urban Dev., 554 F.3d 1290, 1295 (10th Cir. 2009) ("The defense of sovereign immunity is jurisdictional in nature, depriving courts of subject matter jurisdiction where applicable."). Federal courts are courts of limited jurisdiction and, as the party seeking to invoke federal jurisdiction, plaintiff bears the burden of proving that jurisdiction is proper. See Southway v. Cent. Bank of Nigeria, 328 F.3d 1267, 1274 (10th Cir. 2003). A court lacking jurisdiction "cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974). Motions to dismiss under Fed.R. Civ.P. 12(b)(1) "generally take one of two forms. The moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." Merrill Lynch Bus. Fin. Servs, Inc. v. Nudell, 363 F.3d

1072, 1074 (10th Cir. 2004) (internal citation and quotations omitted). Here, defendants have facially attacked the sufficiency of the complaint's allegations concerning the existence of subject matter jurisdiction. In analyzing such motions to dismiss, the court must presume all of the allegations contained in the complaint to be true. Ruiz v. McDonnell, 299 F.3d 1173, 1180 (10th Cir. 2002); Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995).

Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose," and "to relinquish its immunity, a tribe's waiver must be 'clear.'" C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001) (citations omitted).

This court has previously determined that the doctrine of sovereign immunity precluded an employment discrimination claim under Title VII against the Kickapoo Tribe by a former casino employee. Hartman v. Golden Eagle Casino, 243 F.Supp.2d 1200 (D.Kan. 2003). Plaintiff, however, asserts an issue that was not raised in Hartman. Plaintiff, relying upon the employee handbook produced by the Kickapoo Tribe for casino employees, asserts that

the Tribe has waived its sovereign immunity on Title VII claims. Specifically, plaintiff points to the following language that is contained in the employee handbook:

> The Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964, and the Tribal Employment Rights Ordinance of the Kickapoo Tribe in Kansas.

Based upon this language, plaintiff contends that the Tribe has unequivocally waived sovereign immunity. Plaintiff relies upon the Tenth Circuit's decision in Native American Distributing [NAD] v. Seneca-Cayuga Tobacco, 546 F.3d 1288 (10th Cir. 2008) for support of his position.

In NAD, the Tenth Circuit considered an action brought by a tobacco distributor against a tobacco manufacturer, which was a business initiated by an Indian tribe. The tribe sought to dismiss the action based upon sovereign immunity. Plaintiff argued that the tobacco manufacturer was not an enterprise of the tribe and, even if it were, the "sue and be sued" clause of the tribe's corporate charter for the tobacco manufacturer had waived sovereign immunity. The district court dismissed plaintiff's complaint, finding that the tobacco manufacturer was entitled to sovereign immunity. On appeal, the Tenth Circuit affirmed.

Plaintiff's reliance upon NAD is misplaced. In NAD, the Tenth Circuit considered whether the tobacco manufacturer was a division of the tribe and, thus, would necessarily enjoy sovereign immunity or whether it was a division of the tribal corporation and, thus,

subject to suit because the "sue and be sued" clause in the corporate charter waived tribal sovereign immunity. Here, there is no question that the Golden Eagle Casino is a division of the Kickapoo Tribe and is entitled to sovereign immunity absent waiver of that immunity. Plaintiff somehow suggests that the language contained in the employee handbook is the equivalent of the "sue and be sued" clause contained in the corporate charter in NAD. We cannot agree. We are not persuaded that anything in NAD commands a specific result here. The particular facts of NAD differ substantially from the facts here.

The issue is simply whether the language in the employee handbook constitutes an "unequivocal waiver" of sovereign immunity by the Kickapoo Tribe. Plaintiff argues that the use of the word "comply" means "to yield," "to accept," or "to act in accordance with." Plaintiff further contends that the use of the words "provisions of Title VII" means that the tribe has agreed to follow all of the aspects of Title VII, including those portions that indicate that actions for violations may be prosecuted in all federal district courts in the United States. See 42 U.S.C. § 2000e-5(f)(3).

The court will readily admit that plaintiff's counsel has raised an interesting issue and has done an excellent job with some difficult legal barriers. Nevertheless, the court is not persuaded that plaintiff has demonstrated that the tribe has "unequivocally

waived" sovereign immunity. The language contained in the employee handbook is simply an indication that the tribe will not discriminate in employment matters. It does not constitute an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court on the claim alleged by plaintiff. The court finds no showing by plaintiff that the Kickapoo Tribe has waived its sovereign immunity.

The court's determination is supported by the decisions of other courts who have considered similar issues. See Dillon v. Yankton Sioux Tribe Housing Authority, 144 F.3d 581, 584 (8th Cir. 1998) (tribal housing authority, which was sued by former employee for civil rights violations after he was terminated from employment, did not waive sovereign immunity even though tribe had entered into an agreement with federal government to abide by civil right statutes); Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040, 1044 n. 2 (8th Cir. 2000) (college operated by Indian tribe, which was sued by former employees alleging race discrimination, did not waive sovereign immunity when it executed certificate of assurance with federal government in which it agreed to abide by Title VI of the Civil Rights Act of 1964); Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282, 1289 (11th Cir. 2001) (tribe, which was sued by former employee for disability discrimination under the Rehabilitation Act, did not waive sovereign immunity when it accepted federal funds contingent on

compliance with the Rehabilitation Act); Demontiney v. U.S. ex rel. Dept. of interior, Bureau of Indian Affairs, 255 F.3d 801, 814 (9th Cir. 2001) (tribe, which was sued by tribal member for breach of contract, did not waive sovereign immunity when it incorporated Indian Civil Rights Act into its constitution and bylaws).

In sum, the court finds that the defendants' motion to dismiss for lack of jurisdiction must be granted. The Kickapoo Tribe and its subdivisions enjoy sovereign immunity from the claims asserted by the plaintiff. Accordingly, the court lacks subject matter jurisdiction here. With this decision, the court need not consider the defendants' other argument concerning exhaustion of tribal remedies.

IT IS THEREFORE ORDERED that defendants' motion to dismiss for lack of jurisdiction (Doc. # 8) be hereby granted. This action shall be dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated this 5th day of November, 2009 at Topeka, Kansas.

s/Richard D. Rogers
United States District Judge