

**Case No. 09-3347**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**ROBERT NANOMANTUBE**

**Appellant**

**vs.**

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

**Appellee**

**APPELLANT'S REPLY 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**

**A. J. Kotich #08134  
Attorney at Law  
3601 SW Blue Inn Court  
Topeka, Kansas 66614  
(785) 478-4942  
Mrmhouse@hotmail.com**

**Glenn H. Griffeth #10298  
Attorney at Law  
2135 SW Arvonnia Place  
Topeka, Kansas 66614  
(785) 806- 6551  
grifflaw@cox.net**

**Oral Arguments Requested**

**TABLE OF CONTENTS**

**ARGUMENTS AND AUTHORITIES . . . . . 1**

**The Intent Behind The Exclusion of Indian Tribes from the Definition of Employers In Title VII Does Not Deprive the Federal Courts of Subject Matter Jurisdiction. . . . . 1**

*Arbaugh v. Y & H Corporation*, 546 U.S. 500, 125 S.Ct. 1235, (2006) . . . . . 1  
 42 U.S.C. § 2000e-5(f)(3) . . . . . 2  
 28 U.S.C. § 1332 . . . . . 3  
 28 U.S.C. § 1331 . . . . . 3  
*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). . . . . 3  
*Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, C.A. 8 (S.D. 2000) . . . . . 4  
 42 U.S.C. 2000e(b) . . . . . 4

**The Kickapoo Tribe Has Clearly Waived Any Sovereign Immunity it May Have to Title VII Claims Brought by Employees of the Golden Eagle Casino . . . . . 5, 6**

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 . . . . . 5  
*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) . . . . . 5, 7  
 42 U.S.C. § 2000e-5(f)(3) . . . . . 6  
*Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) . . . . . 6  
 25 U.S.C. §1301 . . . . . 6  
*Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F 2d 682,685, 10 C.A. 1980 . . . . . 6

**The “Montana Exception” Does Not Apply to Plaintiff, a Non-member**

**of the Tribe** . . . . . 7

*Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245,  
67 L.Ed.2d 493 (1981) . . . . . 8

*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct.  
1011, 55 L.Ed.2d 209 . . . . . 8

*Fletcher v. Pec*, 6 Cranch 87, 147, 3 L.Ed. 162 . . . . . 8

*Plains Commerce Bank v. Long Family Land and Cattle  
Company, Inc.* \_\_\_ U.S. \_\_\_, 128 S.Ct. 2709, 171  
L.Ed.2d 457 (2008) . . . . . 9

*San Manuel Indian Bingo and Casino v. NLRB*,  
475 F.3d 1306, 1315 D.C.Cir. (2007) . . . . . 9

**CONCLUSION** . . . . . 10

**CERTIFICATE OF COMPLIANCE** . . . . . 13

**CERTIFICATE OF SERVICE** . . . . . 14

**TABLE OF AUTHORITIES**

**Cases**

**United States Supreme Court**

*Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*  
\_\_\_ U.S. \_\_\_, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008) . . . . . 9

*Arbaugh v. Y & H Corporation* 546 U.S. 500, 125 S.Ct. 1235, (2006) . . . . 1, 2, 3,4

*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) . . . . . 5, 7

*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) . . . . . 6

*Zipes v. Trans World Airlines, Inc.*  
455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) . . . . . 3

*Montana v. United States*  
450 U.S. 544, 564, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981) ..... 8

*Santa Clara Pueblo v. Martinez*  
436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ..... 5, 6

**Tenth Circuit**

*Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682,685,  
10 C.A. 1980 ..... 6

**Eighth Circuit**

*Hagen v. Sisseton-Wahpeton Community College*  
205 F.3d 1040, 1044 C.A.8 (S.D.) 2000 ..... 4

**DC. Circuit**

*San Manuel Indian Bingo and Casino v. N.L.R.B.*  
475 F.3d 1306, C.A.D.C. (2007) ..... 9

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**Nanomantube,  
Appellant,**

**v.**

**Appeal No.: 09-3347**

**Kickapoo Tribe in Kansas,  
Kickapoo Tribe in Kansas  
Tribal Council and The  
Golden Eagle Casino Inc.,  
Appellees.**

**APPELLANT’S REPLY BRIEF**

COMES NOW the Plaintiff, by and through counsel, and files his reply to Appellee’s response brief filed herein. For the sake of brevity and judicial economy Plaintiff only addresses those areas where further argument may be helpful, and the fact that Counsel does not address the Tribe’s responsive argument in its entirety does not mean that Plaintiff concedes or abandons those arguments, but that they are adequately covered in Appellant’s Opening brief.

**ARGUMENTS AND AUTHORITIES**

**THE INTENT BEHIND THE EXCLUSION OF INDIAN TRIBES FROM THE  
DEFINITION OF EMPLOYER IN TITLE VII DOES NOT DEPRIVE THE FEDERAL  
COURTS OF SUBJECT MATTER JURISDICTION**

The Tribe misses the importance of the *Arbaugh* decision<sup>1</sup> in relation to Title

---

<sup>1</sup>*Arbaugh v. Y & H Corporation*, 546 U.S. 500, 125 S.Ct. 1235, (2006)

VII and those entities excluded from the definition of “employer”.

The Tribe would ask this Court to ignore the straight forward question in *Arbaugh* because the Tribes have benefited from a misconception for years, i.e. that the Courts are deprived of subject matter jurisdiction when it comes to Title VII and Indian Tribes.

In *Arbaugh* Justice Ginsburg stated the question:

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.

The Court’s response was:

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. *Id.* at 515 - 6.

The “readily administrable bright line” referred to by the Court, simply put, is if Congress meant for the exclusions from the definition of employer in Title VII to be jurisdictional, they would have said so, and they did not.

Of course, Congress could make the employee-numerosity requirement “jurisdictional,” just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. But 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). Given the “unfair [ness]” and “waste of judicial resources,” App. to Pet. for Cert. 47, entailed in tying the employee-numerosity requirement to subject-matter jurisdiction, we think it the sounder course to refrain from constricting § 1331 or Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), and to leave the ball in Congress' court. If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. See *Da Silva*, 229 F.3d, at 361 (“Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question.”). But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

The Tribe seeks to avoid the results of the *Arbaugh* decision by arguing that the Tribes exclusion from the definition of employer is somehow different and deprives the court of subject matter jurisdiction. Such argument should fall within the category of "drive-by jurisdictional rulings" referenced by Justice Ginsburg.

The legal effect of the exclusion of Indian Tribes from the definition of employer is no different than the effect of the exclusion of employers with less than 15 employees from the definition of employer. Exclusion from the definition of employer does not deprive the Courts of subject matter jurisdiction. It does raise an issue as to whether or not employer-employee relationship exist for Title VII purposes. Unlike subject matter jurisdiction, however, exclusion from the definition can be waived as it was in this case. The Tribe's argument of Congressional intent

analysis as being the key factor in *Arbaugh* is misplaced. The congressional intent to be ascertained was not ultimately the intent behind the 15 employee requirement, but rather behind listing the exclusions from the definition of employer in a definition section separate and apart from the jurisdictional section.

As clearly indicated by the *Arbaugh* decision and its “readily administrable bright line”, Lack of subject matter jurisdiction based upon specific jurisdictional requisites such as amount in controversy, diversity, federal question, are different from exclusion from the definition of Title VII or a claim of lack of subject matter jurisdiction based upon sovereignty. Sovereignty can be waived, as it was here.

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.

Because the jurisdiction of the federal courts over Title VII is clear, and because the exclusions found in 42 U.S.C. §2000e(b) are not jurisdictional, the Court below would not be precluded from asserting subject matter jurisdiction over Mr. Nanomantube’s Title VII claims in light of a valid waiver of immunity and voluntary commitment to Title VII.

**THE KICKAPOO TRIBE HAS “CLEARLY” WAIVED ANY SOVEREIGN IMMUNITY IT MAY HAVE TO TITLE VII CLAIMS BROUGHT BY EMPLOYEES OF THE GOLDEN EAGLE CASINO**

“To relinquish its immunity, a tribe's waiver must be “clear.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106. The unequivocal language “the Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991”, is such a clear waiver.

The Tribe seeks to differentiate the clear waiver found 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), from the current waiver. In *C & L* the court went 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)

Likewise the Tribe by agreeing to comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991 agreed that:

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 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 .

. . 42 U.S.C. §2000e5(f)(3).

As with the American Arbitration Association rules, Title VII specifically provides for a forum to bring its claims. There is no distinction.

The arguments advanced by the Tribe however are distinguishable. For example *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*<sup>2</sup> is cited for the proposition that the tribes can not be subject to suit to collect unpaid state taxes. There is a difference with a distinction between enforcement of an involuntary tax and enforcement of a law that the Tribe has voluntarily subjected itself to.

The Indian Civil Rights Act<sup>3</sup> (ICRA) cases are not on point as the Courts have clearly held that by its language, the ICRA only makes habeas corpus relief available in federal courts, but that the ICRA is a congressional waiver of immunity in Tribal Courts. *Santa Clara Pueblo v. Martinez* 936 U.S. 49, 69, *Fn*28. Even this axiom is subject to the *Dry Creek Lodge Exception*<sup>4</sup> allowing federal court jurisdiction when there is no other forum available to the claimant.

The Tribe insists on the express language that the Tribe waives its sovereign

---

<sup>2</sup>498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)

<sup>3</sup>Indian Civil Rights Act of 1968 25 USC § 1301 *et seq*

<sup>4</sup>*Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F 2d 682,685, 10 C.A. 1980.

immunity. While that may be preferred, it is not required. What is required is that the waiver be clear. 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.

The Tribe asserts, in response “[b]ecause the Tribe only agreed to comply with Title VII and did not agree to be sued in any court . . . there has been no waiver of sovereign immunity”, yet overlooks the express provisions of 42 U.S.C. §2000e5(f)(3) and the Tribes express agreement to comply with that provision of Title VII. There is no language picking and choosing which provisions of the act the Tribe would comply with and which ones it would not. The Tribes governing body’s agreement to comply with the *provisions of* Title VII of the Civil Rights Act of 1964 and 1991 “would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed”<sup>5</sup> for the Tribe’s violations of the Act. 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.

**THE “MONTANA EXCEPTION” DOES NOT  
APPLY TO PLAINTIFF, A NON-MEMBER OF THE TRIBE**

In response to Plaintiff’s claim that the defense of tribal sovereign immunity is

---

<sup>5</sup> *C & L Enterprises, Inc., Supra at 422.*

not applicable to a non-tribal member's Title VII claim because application of Title VII does not affect the Tribe's inherent tribal sovereignty, the Tribe attempts to invoke one of the *Montana* exceptions:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

The Tribe seeks to invoke this exception by asserting a consensual relationship between the Plaintiff and the Tribe through Plaintiff's employment. A reading of the opinion in which the aforementioned quote is found does not support an application to Plaintiff's circumstances:

But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation . . . The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Pec*, 6 Cranch 87, 147, 3 L.Ed. 162 the first Indian case to reach this Court—that the Indian tribes have lost any “right of governing every person within their limits except themselves.” 435 U.S., at 209, 98 S.Ct., at 1021. Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-

Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

In *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.* \_\_\_ U.S. \_\_\_, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008), the Supreme court addressed the limitations of this very language:

*Montana* 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). *Id.* 2721.

*See also, San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C.Cir.2007), operation of a casino is not a traditional attribute of self-government, but is virtually identical to purely commercial casinos across the United States. Most of the casino's employees and customers were not tribal members and lived off the reservation. For those reasons, Tribe's sovereignty was not called into question because the tribe was not simply engaged in internal governance of its territory and members.

The Tribe's ability to unlawfully discriminate against its employees in violation of Title VII is not the type of regulated activity referenced in *Montana*.

This Court should follow the lead of more recent decisions and look to whether the Tribe's conduct for which it asserts its immunity affects the Tribe's inherent tribal

sovereignty.

## 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, unequivocally, and without any conditions, agreed to “comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991”, Nanomantube exhausted his administrative remedies and sought the relief in federal courts that he is entitled to.

The district court dismissed Nanomantube’s claim on the basis that the Tribe’s agreement to comply with the provisions of Title VII was not a waiver of the Tribe’s immunity.

While the express words “and the Tribe waives its sovereign immunity” do not appear in that statement, the per se words are not required. The waiver is expressed in the clear language to unequivocally comply with the provisions of this specific law. No conditions precedent or subsequent. It is no 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 Tribe agreed that a claim may be pursued in the state or federal district courts.

This Court determines the issue *de novo*. 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.

The exclusion of 42 U.S.C. § 2000e(b) from the definition of employer, in Title VII does not divest this Court of subject matter jurisdiction. A unanimous Supreme Court in *Arbaugh v. Y & H Corporation* held, that the definitions in 42 U.S.C. § 2000e(b) were not jurisdictional but rather elements to be proven and thus may be waived. The exclusion of Indian Tribes is found in 42 U.S.C. § 2000e(b), consequently a tribe may bring itself within the coverage of Title VII as did the Kickapoo Tribe in this case. That compliance carried with it a waiver of any immunity the Tribe may have had.

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.

The Tribe argues that one of the exceptions to *Montana*, i.e. the ability to regulate activities of non-members in consensual relationships, allows it to discriminate with impunity. That is neither the intent or effect of the *Montana* decision.

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;

A. J. Kotich, Attorney at Law  
Glenn Griffeth Attorney at Law

/s/ Glenn H. Griffeth  
Glenn Griffeth #10298  
Attorney at Law  
2135 SW Arvonian Place  
Topeka, Kansas 66614  
(785) 806-6551  
grifflaw@cox.net

### **CERTIFICATE OF COMPLIANCE**

Please complete one of the sections:

#### **Section 1. Word Count**

As required by Fed.R.App.P.32(a)(7)(C), I certify that this brief is proportionally spaced and contained 3102 words.

Complete one of the following:

- I relied on my word processor to obtain the count and it is WordPerfect Software.
- I counted five characters per word, counting all characters including citations and numerals.

/s/ Glenn Griffeth  
Glenn Griffeth #10298  
Attorney at Law

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that on March 3rd, 2010 I electronically filed the above and foregoing *Appellant's Reply Brief* with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system which sent notification of such filing to:

Charley Laman  
Attorney at Law  
5622 West Glendale Ave.  
Glendale AZ 85301  
Attorney for Defendants

/s/ Glenn Griffeth  
Glenn Griffeth #10298  
Attorney at Law