

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DEAN S. SENECA,

Plaintiff,

v.

No. 21-CV-304-WMC

GREAT LAKES INTER-TRIBAL
COUNCIL, INC.,

Defendant.

**DEFENDANT GREAT LAKES INTER-TRIBAL COUNCIL, INC.'S BRIEF IN
SUPPORT OF ITS MOTION TO DISMISS**

NOW COMES Defendant, Great Lakes Inter-Tribal Council, Inc. ("GLITC"), by its attorneys, Husch Blackwell LLP, and respectfully submits this Brief in Support of its Motion to Dismiss Plaintiff's Complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(1) and (6).

INTRODUCTION

GLITC is a non-profit Wisconsin corporation that is a tribal enterprise. It is owned and controlled completely by federally recognized Indian tribes and its sole purpose is to support those tribes by providing services and assistance to them. As such, GLITC is entitled to tribal sovereign immunity, which is a well-established principle of American law that precludes suits against tribal entities.

The Plaintiff, Dean Seneca, who is proceeding *pro se*, is GLITC's former Director of Epidemiology who held that position from December 2017 to August 2018. He was terminated by GLITC following a series of complaints from co-workers that he was acting unprofessionally and sexually harassing them.

Mr. Seneca is a serial litigant. The present case is now the third separate matter he has initiated against GLITC: (1) the first a Petition for review in Vilas County Circuit Court, Case No. 2020-CV-84 (2) the second in Vilas County Circuit Court, Case No. 2020-CV-38; and (3) the current lawsuit in federal court. The claims against GLITC in both of the prior matters were dismissed based on well-reasoned opinions finding that GLITC was entitled to tribal sovereign immunity.

Accordingly, for all these reasons and those detailed below, GLITC is entitled to tribal sovereign immunity and should be dismissed with prejudice.

I. MR. SENECA’S HISTORY OF FILING LAWSUITS AGAINST GLITC.

Mr. Seneca previously initiated litigation against GLITC in two different forums. First, in September 2018, Mr. Seneca filed a complaint with the Equal Rights Division of the Department of Workforce Development (“DWD”), alleging that GLITC discriminated against him in the conditions of his employment based on his race, color, national origin/ancestry, age, and sex; by discharging him based on his race and sex; and by retaliating against him after his termination. (Declaration of Catarina A. Colón (“Colón Decl.”) ¶ 2, Ex. 1 at p. 2.)¹ The Equal Rights Officer investigating that complaint dismissed it because GLITC was entitled to tribal sovereign immunity. (*Id.*) Mr. Seneca appealed that dismissal, and on September 20, 2019, an administrative law judge

¹ A court may consider the allegations in a complaint and the parties’ evidentiary submissions in deciding a motion to dismiss on jurisdictional grounds. *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008). Further, all materials referenced within the Declaration of Catarina A. Colón can be considered on the motion to dismiss because they are either referenced in the Complaint, central to plaintiff’s claims, or matters of public record. *See Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (“It is well settled that in deciding a Rule 12(b)(6) motion, a court may consider ‘documents attached to a motion to dismiss ... if they are referred to in the plaintiff’s complaint and are central to his claim.’”); *see also Ennenga v. Starns*, 677 F.3d 766, 774 (7th Cir. 2012) (the Court may “take judicial notice of matters of public record,” and it may do so without converting a motion to dismiss into one for summary judgment).

upheld that dismissal based on tribal sovereign immunity. (*Id.*) Mr. Seneca filed a petition for review by the Labor and Industry Review Commission (the “Commission”). (*Id.*) On June 22, 2020, the Commission, in a detailed, well-reasoned decision, upheld the determination that GLITC is not subject to the Wisconsin Fair Employment Act as sovereign tribal entity. (*Id.* at pp. 2-8.) Mr. Seneca then filed a Petition for Review of the Commission’s decision with the Wisconsin Circuit Court, captioned *Dean Seneca v. Labor & Industry Review Commission*, Case No. 2020-CV-84. (*Id.* ¶ 3, Ex. 2.) This matter is currently pending before Judge Neal A. Nielsen in Vilas County Circuit Court.

On May 4, 2020, Mr. Seneca filed yet another lawsuit in Wisconsin state court (also in Vilas County) against GLITC, and a number of current and former employees, captioned *Dean Seneca v. Emily Field, et al.*, 2020-CV-38. (*Id.* ¶¶ 4-5, Ex. 3.) On June 25, 2020, GLITC filed a Motion to Dismiss for lack of jurisdiction based on tribal sovereign immunity. (*Id.* ¶ 7.) On October 7, 2020, a hearing was held on the Motion to Dismiss before Judge Nielsen, and, in a well-reasoned oral decision, the court determined that GLITC was entitled to dismissal based on tribal sovereign immunity. (*Id.* ¶ 6, Ex. 4 at pp. 11-16.) On October 12, 2020, GLITC was dismissed from this lawsuit pursuant to the Court’s order. (*Id.* ¶ 7, Ex. 5.) Mr. Seneca has not appealed that determination. (*Id.* ¶ 7.)

Mr. Seneca has now filed the present lawsuit against GLITC. (Compl. Dkt. 1, 1-1.) The gravamen of Mr. Seneca’s allegations are that GLITC discriminated against him by terminating him based on his race, color, national origin, age, sex, gender identity, and sexual orientation, and retaliated against him for engaging in some unspecified protected activity. (*Id.*) From these allegations, Mr. Seneca brings discrimination and retaliation claims under: (1) Title VII of the Civil Rights Act of 1964 (“Title VII”); (2) the Americans with Disabilities Act of 1990 (“ADA”);

(3) the Age Discrimination in Employment Act of 1967 (“ADEA”); and (4) the Genetic Information Nondiscrimination Act of 2008 (“GINA”). (*Id.*)

II. GLITC’S TRIBAL STATUS.

GLITC is a Wisconsin non-profit corporation. (Declaration of Shannon Holsey (“Holsey Decl.”). ¶ 3.) It is a consortium of federally recognized Indian tribes in Wisconsin and the Upper Peninsula of Michigan, including the Bad River Band of Lake Superior Tribe of Chippewa Indians, Forest County Potawatomi Community, Ho-Chunk Nation, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Menomonee Indian Tribe of Wisconsin, Oneida Nation, Red Cliff Band of Lake Superior Chippewa Indians, Saint Croix Chippewa Indians, Sokaogon Chippewa Community, and Stockbridge-Munsee Community. (*Id.*)

GLITC’s sole purpose is to support its member tribes and it does so by providing services and assistance to them. (*Id.* ¶ 4.) GLITC’s mission is “to enhance the quality of life for all Native people.” (*Id.*)

GLITC is owned and controlled by its member tribes. (*Id.* ¶ 5.) Its governing body is a Board of Directors composed of a delegate from each of the member tribes, which is a respective tribe’s Tribal Chairperson or President. (*Id.*)

GLITC is headquartered at 2932 Highway 47 North, Lac du Flambeau, Wisconsin 54538. (*Id.* ¶ 6.) This location is on the lands of the Lac du Flambeau Band of Lake Superior Chippewa Indians, which was established by the Treaty of 1854. (*Id.*) The significant majority of GLITC’s operations and employees are located within tribal boundaries. (*Id.* ¶ 7.)

GLITC has approximately 65 employees, and only four of them work at a location that is not on tribal land. (*Id.* ¶ 8.) Those three employees work at the University of Minnesota, and the other works for the University of Wisconsin – Madison. (*Id.*)

GLITC’s operations primarily include providing government service systems and technical assistance to its members tribes to address the needs of tribal members living on or near reservations and tribal lands. (*Id.* ¶ 9.) At present, GLITC offers the following programs for the benefit of its member tribes: (1) Economic Development Programs, (2) Family and Child Services, (3) Aging and Disability Services, (4) Elder Services; (5) Health and Epidemiology; (6) Prevention Programs; and (7) Vocational Training and Rehabilitation Services. (*Id.*)

GLITC is principally funded through a combination of (1) dues paid by member tribes and (2) federal, state, and private grants. (*Id.* ¶ 10.) GLITC does not generate its own revenue and it is a non-profit organization with tax exempt status as a section 501(c)(3) corporation. (*Id.*) All money GLITC obtains through grants or other sources is funneled into programs for its member tribes. (*Id.*)

Any civil lawsuit against GLITC would directly impact the tribal sovereignty and the fiscal resources of the member tribes, as the legal fees and potential damages would be paid out of dues that have been paid by member tribes. (*Id.* ¶ 11.) This would result in an increase in dues paid by tribal members and/or a reallocation of dues to pay the costs of a lawsuit instead of providing services to tribal members through GLITC. (*Id.*)

ARGUMENT

I. GLITC IS ENTITLED TO TRIBAL SOVEREIGN IMMUNITY, WARRANTING DISMISSAL.

A. Legal Standard²

Federal courts are of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). If a claim lies outside this limited jurisdiction, “Federal Rule of Civil Procedure 12(b)(1) allows a party to move to dismiss a claim for lack of subject matter jurisdiction.” *Hallinan v. Fraternal Order of Police of Chicago*, 570 F.3d 811, 820 (7th Cir. 2009).

“It is standard learning that federal question jurisdiction arises only when the complaint standing alone establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294, 298 (7th Cir. 2003). But relevant to the Mr. Seneca’s claims, “[a] claim invoking federal question jurisdiction . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006); *In re African American Slave Descendants Litigation*, 471 F.3d 754, 757 (7th Cir. 2006) (“A frivolous federal law claim cannot successfully invoke federal jurisdiction.”).

The overwhelming majority of United States courts of appeals have held that the issue of whether an entity enjoys tribal sovereign immunity is a jurisdictional question. *See Lovely v. United States*, 570 F.3d 778, 782 n.2 (6th Cir. 2009) (“[S]overeign immunity is a jurisdiction doctrine . . .”); *see also Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (if defendants are

² “[W]hen faced with motions to dismiss under both 12(b)(1) and 12(b)(6), a district court should ordinarily decide the 12(b)(1) motion first. *See Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1046 n. 3 (E.D. Wis. 1999).

entitled to tribal immunity from suit, the district court would lack jurisdiction over the claims against them and would be required to dismiss them from the litigation); *see also Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 670 (8th Cir. 2015) (“Tribal sovereign immunity is a jurisdictional threshold matter.”); *see also Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1285 (11th Cir. 2001) (“Tribal sovereign immunity is a jurisdictional issue.”); *see also Dotson v. Tunica-Biloxi Gaming Commission*, 835 Fed. Appx. 710, 713 (5th Cir. 2020) (“Absent congressional authorization or a waiver, a court must dismiss a suit against a tribe for lack of subject-matter jurisdiction.”) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)).

In contrast to this authority, the Seventh Circuit has stated that the issue of sovereign immunity is technically not a “jurisdictional one.” *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016). Instead, federal courts within the Seventh Circuit can decide the question of tribal sovereign immunity at the pleading stage under Fed. R. Civ. P. 12(b)(6). *Id.* at 823 (explaining that courts may choose among different “non-merits threshold” grounds for dismissing an action, including tribal sovereign immunity; “a federal court has leeway to choose among threshold grounds for denying an audience on the merits, and our conclusion that the defendants have sovereign immunity resolves a non-merits threshold matter without further burden on the courts and parties”).³ When deciding on a Rule 12(b)(6) motion, the court may consider plaintiff’s complaint, documents referenced in the complaint, documents critical to the complaint, and information subject to judicial notice. *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012).

³ While the majority of courts have determined that tribal sovereign immunity is a jurisdictional issue, GLITC is cognizant of the Seventh Circuit’s holding and is therefore moving to dismiss under Rule 12(b)(1) and 12(b)(6).

B. GLITC is Immune From Suit as a Tribal Enterprise.

“Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). Thus, Indian tribes are immune from suit in both state and federal courts unless Congress abrogates the tribe’s sovereign immunity or the tribe waives sovereign immunity. *Wells Fargo Bank, Nat’l Ass’n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 689 (7th Cir. 2011) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)). The bar for congressional abrogation or tribal waiver of immunity is high. The Supreme Court has “often held” that for Congress to abrogate tribal immunity, it “must unequivocally express that purpose.” *Id.* at 2032. “Similarly, to relinquish its immunity, a tribe’s waiver must be clear.” *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Business entities owned and operated by Indian Tribes enjoy the same immunity as an Indian Tribe. *See Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010); *see also Barker v. Menominee Nation Casino*, 897 F. Supp. 389 (E.D. Wis. 1995); *see also Int’l Woodworkers Union Local IV-302 v. Menominee Tribal Enters.*, 595 F. Supp. 859 (E.D. Wis. 1984).

In *Barker*, the Eastern District of Wisconsin court held that a tribal gaming commission and tribal casino employer were immune from suit “because an action against a tribal enterprise is, in essence, an action against the tribe itself.” *Barker*, 897 F. Supp. at 394. The same analysis applies here: GLITC is a tribal enterprise and this action is “in essence, an action against the tribe[s].” As detailed above, GLITC is comprised strictly of federally recognized Indian tribes in Wisconsin and Upper Michigan; its Board of Directors is comprised of a delegate from each of the member tribes; its sole purpose is to support the member tribes; it is funded by the member tribes

(and government grants); and any civil lawsuit against GLITC would directly impact tribal sovereignty and the fiscal resources of member tribes. (Holsey Decl. ¶¶ 3-5, 10-11.)

Critically, the *Barker* court cited with approval to the Tenth Circuit’s opinion in *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 394 (10th Cir. 1986). In *Dille*, the Tenth Circuit found that the Council of Energy Resource Tribes (“CERT”) was afforded the protections of tribal immunity because even though it was not technically a tribe, it was nonetheless comprised of tribes, just like GLITC. *Id.* at 376. At issue was whether CERT qualified as an “Indian tribe” under Title VII, 42 U.S.C. § 2000e, and thus, was exempt from suit under that specific statute. *Id.* at 374.⁴

CERT was a council with a structure and mission similar to GLITC.⁵ CERT was comprised of Indian tribes that together collectively managed energy resources owned by member tribal entities. *Id.* at 374. The CERT board of directors was composed of designated representatives of each tribe facilitating the member tribes’ exclusive control over the operations of CERT. In finding that CERT qualified as an “Indian tribe” under 42 U.S.C. § 2000e(b) to exempt CERT from suit under that statute, the *Dille* court considered whether Congress intended the exemption to apply to an organization comprised of many Indian tribes. *Id.* at 374. The Tenth Circuit found that “the purpose of [the] exemption was to promote the ability of sovereign Indian tribes to control their own economic enterprises” and that the “purposes of CERT mirror the purposes of the exemption.” *Id.* at 375. Accordingly, the *Dille* court found that the “creation of CERT to advance the economic conditions of its thirty-nine member tribes is precisely the type of activity that Congress sought to

⁴ For that statute, Congress codified immunity through the exemption. Again, only Congress has the power to waive immunity. *Okla. Tax Comm’n v. Potawatomi Tribe*, 498 U.S. 505, 508 (1991).

⁵ GLITC’s mission is: “To enhance the quality of life for all Native people.” (Holsey Decl. ¶ 4.) Similarly, a purpose of CERT was: “To improve the general welfare of Indian people through educational, charitable and energy-related activities.” *Dille*, 801 F.2d at 375.

encourage by exempting Indian tribes from the requirements of Title VII” and held that CERT fell within the scope of the Indian tribe exemption. *Id.* at 375-76.

Directly analogous to the Tenth Circuit’s holding, here, the conclusion is that “Congress certainly could not have intended to withdraw the [right to immunity] anytime a group of Indian tribes coalesce for a common purpose related to economic development” and it is not logical to believe that “Congress intended to protect individual Indian tribes but not collective efforts by Indian tribes.” *Dille*, 801 F.2d at 376.

Further, some courts, including the Wisconsin Court of Appeals, have set forth a list of factors to address whether an entity should be conferred tribal sovereign immunity. Those factors include:

- (1) Whether the corporation is organized under the tribe’s laws or constitution;
- (2) Whether the corporation’s purposes are similar to or serve those of the tribal government;
- (3) Whether the corporation’s governing body is comprised mainly or solely of tribal officials;
- (4) Whether the tribe’s governing body has the power to dismiss corporate officers;
- (5) Whether the corporate entity generates its own revenue;
- (6) Whether a suit against the corporation will affect the tribe’s fiscal resources;
- (7) Whether the corporation has the power to bind or obligate the funds of the tribe;
- (8) Whether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments;
- (9) Whether the corporation is analogous to a tribal governmental agency or instead more like a commercial enterprise instituted for the purpose of generating profits for its private owners.

McNally CPAs and Consulting v. DJ Host, Inc. 2004 WI App 221, ¶ 12, 277 Wis. 2d 801, 692 N.W.2d 247.

The *McNally* court considered the above factors and determined that a for-profit Wisconsin corporation was not an arm of a tribe simply because an Indian tribe owned the corporation’s

shares. *Id.* ¶ 7.⁶ However, the court contrasted its situation with a non-profit social services corporation created for the benefit of tribal members. *Id.* ¶ 14. The *McNally* court noted that this non-profit situation was present in a New York case, *Ransom v. St. Regis Mohawk Educ. & Comm’n, Inc.*, 658 N.E.2d 989 (N.Y. Ct. App. 1995): “[t]he non-profit corporation in *Ransom*, created by the tribe to provide direct services to tribe members, holds a place on the other end of the spectrum from the situation before us.” *McNally*, 2004 WI App 221 at ¶ 15. The non-profit entity was “allied with and dependent upon the tribe,” and thus, entitled to the protection of tribal sovereign immunity. *Id.* ¶ 14 (citing *Ransom*, 658 N.E.2d at 993).

In this case, GLITC satisfies all the *McNally* factors with the only exception being the first factor. As a non-profit corporation created by its member tribes for the sole purpose of providing social services to tribal members, GLITC’s purpose is to serve its member tribes (satisfying factor 2). (Holsey Decl. ¶ 4.) GLITC’s governing body is its Board of Directors, which is comprised solely of a delegate from each of the member tribes, which is a respective tribe’s Tribal Chairperson or President, and the Board has the power to dismiss corporate officers (satisfying factors 3 and 4). (*Id.* ¶ 5.) GLITC does not generate its own revenue—in fact, it depends in part on dues paid by its tribal members for its fiscal survival (satisfying factor 5). (*Id.* ¶ 10.) Further, a suit against GLITC would affect the tribe’s fiscal resources because tribal dues and grant money would have to be diverted from providing services to paying for legal fees and potential damages (satisfying factor 6). (*Id.* ¶ 11.) GLITC can decide how to use the funds it receives from the member tribes (satisfying factor 7). (*Id.* ¶ 5.) GLITC was established to enhance the health,

⁶ The *McNally* court was very careful to not disrupt tribal sovereign immunity and emphasized that its holding “reflects the facts before us” and is “narrow.” *Id.* ¶ 18. “We conclude that when the sole facts are that an Indian tribe purchases all of the shares of an existing for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation.” *Id.*

education, and welfare of tribal members, which is traditionally a function of tribal government (satisfying factor 8). (*Id.* ¶ 9.) Finally, GLITC is analogous to a tribal governmental agency because of the services it provides that make it akin to a tribal governmental agency and nothing like a commercial enterprise instituted for the purpose of generating profits (satisfying factor 9). (*Id.* ¶ 10.) In short, GLITC is an arm of its member tribes and is entitled to tribal sovereign immunity.

C. Mr. Seneca’s Claims Are Meritless Because Title VII, the ADA, GINA, and the ADEA Claims Cannot Be Brought Against “Indian Tribes.”

Mr. Seneca appears to bring claims under Title VII, the ADA, GINA and the ADEA. Consistent with the doctrine of tribal sovereign immunity, each statute has explicitly excluded “Indian tribes” from the definitions of employers subject to the statutes or courts have interpreted “Indian tribes” to be excluded from the definition of employer under those Acts. For example, under Title VII, “employer” is defined as

a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person, but such term does not include . . . an *Indian tribe*.

42 U.S.C. § 2000e(b)(1) (emphasis added).

This language is also mirrored, or has been interpreted as such, in the ADA, the ADEA, and GINA. *See* 42 U.S.C.A. § 12111(5)(B)(i) (explicitly providing under the ADA that the term “employer” does not include . . . an Indian tribe); *see also Reich v. Great Lakes Indian Fish and Wildlife Com’n*, 496 (7th Cir. 1993) (reading the Indian tribal exemption into the ADEA as “rectifying an oversight”); *see also* 42 U.S.C. 2000ff(2)(B)(i); 42 U.S.C. 2000e(b) (explicitly providing under GINA that the term “employer” . . . does not include . . . an Indian tribe”).

As detailed above, GLITC is entirely comprised of member tribes and is effectively an “Indian tribe.” Consequently, GLITC is immune from suit under the federal statutes referenced within Mr. Seneca’s Complaint.

CONCLUSION

For all the above reasons, GLITC requests that it be dismissed with prejudice.

Dated this 5th day of October, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 5, 2021, the foregoing was filed with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to all counsel of record. I also certify that the foregoing document will be sent to Plaintiff Dean Seneca via U.S. Mail at the following address:

9795 Hill Road

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s/ Dieter J. Juedes

Dieter J. Juedes