IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Maria Del Refugio Balli,	)	
	)	
Plaintiff,	)	
	)	
-v.-	}	Case No. 1:23:CV-00067
	)	
AKIMA GLOBAL SERVICES, LLC,	)	
	)	
Defendant.	)	

PLAINTIFF'S OBJECTIONS TO THE U.S. MAGISTRATES JUDGE'S REPORT AND RECOMMENDATIONS ISSUED ON SEPTEMBER 12, 2023

Comes now, Plaintiff Maria Del Refugio Balli (hereinafter referred to as "Plaintiff" and/or "Balli") to file her objections to the United States (U.S.) Magistrates Judge's Report and Recommendations issued on September 12, 2023. The Plaintiff objects as follows: (a) The Magistrates' ruling that Defendant AKIMA Global Services, LLC, ("AGS") is completely exempted from being considered an employer; notwithstanding, that on April 1, 2019, AGS and the International Union, Security Police and Fire Professionals of America (SPFPA) and its Amalgamated Local 725 entered into a Collective Bargaining Agreement (herein after referred to as the "CBA" or the "SPFPA Agreement" which expressed SPFPA's and AGS' rights, obligations, and expectations of the parties to each other pursuant to the CBA. (Dkt. No. 8). The CBA and the parties' participation is similar to the agreements cited at *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma at* 532 U.S. 411 (2001), is a seminal case where a tribe's sovereign immunity is at issue before the Supreme Court, which held in part at p. 411:

> **By the clear import of the arbitration clause**, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of C & L. Like Kiowa, this case arises out of the breach of a commercial, off reservation contract by a federally recognized Indian Tribe. C & L does not contend that Congress has abrogated tribal immunity in this setting. The question presented is whether the Tribe has waived its immunity. 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. The construction contract's arbitration provision and related prescriptions lead to the conclusion that the Tribe in this case has waived its immunity with the requisite clarity…. (**Emphasis added**).

While at *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*, 523 U.S. 751 (1998), the Supreme Court also address the issue of a tribe waiving its sovereign immunity, in part holding. (p. 754 – 760):

> Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. **As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit, or the tribe has waived its immunity**. See, e. g., Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering, P. C., 476 U. S. 877, 890. Respondent's request to confine such immunity to transactions on reservations and to tribal governmental activities is rejected. This Court's precedents have not drawn those distinctions, see, e. g., Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U. S. 165, 168, 172, and its cases allowing States to apply their substantive laws to tribal activities occurring outside Indian country or involving nonmembers have recognized that tribes continue to enjoy immunity from suit, see, e. g., Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla., 498 U. S. 505, 510. ….[]Oklahoma Court of Civil Appeals' belief that federal law does not mandate such immunity is mistaken. It is a matter of federal law and is not subject to diminution by the States. E. g., Three Affiliated Tribes, supra, at 891. Nevertheless, the tribal immunity doctrine developed almost by accident: The Court's precedents reciting it, see, e. g., United States v. United States Fidelity & Guaranty Co., 309 U. S. 506, 512, rest on early cases that assumed immunity without extensive reasoning, see, e. g., Turner v. United States, 248 U. S. 354, 358. The wisdom of perpetuating the doctrine may be doubted, but the Court chooses to adhere to its earlier decisions in deference to Congress, see Potawatomi, supra, at 510, which may wish to exercise its authority to limit tribal immunity through explicit legislation, see, e. g., Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58. Congress has not done so thus far….(**Emphasis added**).

Sections 5.4—Arbitration Procedures of the Agreement specifically provides:

> **An arbitrator will be selected from the list supplied by the FMCA by parties alternatively striking from the list until one (1) name remains, and this individual shall be the arbitrator to hear the grievance.** (**Emphasis added**).
>
> ….
>
> **The arbitrator shall have no power to add to, or subtract from, or modify any of the terms of this Agreement, or to rule on any matter except while this Agreement is in full force and effect. The arbitrator's decision shall be based exclusively on evidence presented at the arbitration hearing. The arbitrator's decision shall demonstrate that he has thoroughly considered the arguments advanced by each party and cite the provisions of the Agreement serving as the basis for the decision.** (**Emphasis added**).

CBA at Dkt. No. 8-1, p. 14.

Effectively, the U.S. Supreme Court has ruled that a Native American entity can waive its non "employer" status; effective, contradicting the instant U.S. Magistrate Judge's holding that a Native American entity cannot voluntarily waive its non-employer status.

A. *Plaintiff's Operative Facts*

1. On or about **April 1, 2019**, AGS and the International Union, SPFPA and its Amalgamated Local 725 entered into the CBA expressed SPFPA's and AGS' rights, obligations, and expectations of the parties to each other pursuant to the CBA. Dkt. No. 8-1, p. 14.

2. At ***Section 5.4—Arbitration Procedures*** within the CBA, AGS specifically agrees to arbitrate. Dkt. No. 8-1, p. 14.

3. On or about February 28, 2022, the Plaintiff filed a discrimination complaint alleging that AGS' supervisors and managers were creating a hostile work environment against the Plaintiff due to her National Origin—Mexican American, female gender, hostile work environment and in retaliation for her having filed an Equal Employment Opportunity (EEO) complaint with the Texas Workforce Commission Civil Rights Division against AGS on or about December 6, 2021.

4. On December 22, 2022, the Plaintiff filed a second complaint of discrimination before the EEOC's San Antonio, Field Office.

5. On January 30, 2023, the EEOC issued its *Notice of Rights* letter and informed the Plaintiff that EEOC did not have jurisdiction over the Plaintiff's complaint of discrimination.

6. On May 1, 2023, the Plaintiff timely filed her complaint of discrimination before this Court.

7. On June 9, 2023, AGS filed its motion to dismiss the Plaintiff's Complaint due to AGS' sovereign immunity status as a Tribal Nation.

8. The Plaintiff argues that AGS waived its sovereign immunity status when it entered into the CBA which explicitly provides AGS the right and obligation to arbitrate. Dkt. No. 8-1, p. 14.

9. Before the Bar there are two sovereigns at issue: the U.S. and its laws against discrimination verses the NANA Native American tribe. NANA is one of thirteen Alaska Native Regional Corporations created under the Alaska Native Claims Settlement Act of 1971 (ANCSA) in settlement of Alaska Native land claims. Historically, AGS is under the tribal "umbrella" of the NANA.

10. Traditionally, American Indian Tribes are explicitly excluded from the definition as "employers" pursuant to *42 USC Sec. 12111(5)(B)(i)*.

B. *Issue(s)*

A. Whether or not AGS represented itself as an equal opportunity employer in line with *Title VII* the *Antidiscrimination Act of 1964*.

B. Did AGS' representations as an equal opportunity employer and its obligations pursuant to the CBA unilaterally waive AGS' exemption as an employer pursuant to *42 USC Sec. 12111(5)(B)(i)*.

C. ***Plaintiff's Objections***

Plaintiff hereby states her general objection to the Magistrate Judges's Report and Recommendation and the Plaintiff specifically objects to the entire Magistrate Judges's Report and Recommendation as follows:

The Court's principal reason for ruling against the Plaintiff is that AGS is a native American entity/company which is explicitly exempt as an employer at *42 USC Sec. 12111(5)(B)(i)*: "(B) Exceptions—The term "employer" does not include— (i) the **United States**, **a corporation wholly owned by the government of the United States**, or **an Indian tribe**…." Moreover, the Court appears to reason that a Native American entity as AGS may not voluntarily opt out of the *42 USC Sec. 12111(5)(B)(i)* definition of an employer since the U.S. Congress provided *42 USC Sec. 12111(5)(B)(i)* "employer protection" to AGS and other Native American entities. This rationale by the Court appears to be completely misplaced considering that Congress provided the same definition of employer to the U.S. and its entities; agencies including the U.S. Courts, the Federal Government, its Department and Agencies. However, todays' U.S. entities consider themselves "employers" and are expected to enforce antidiscrimination laws, regulations, and procedures. Effectively, the sovereign U.S. Government opted to consider itself not only the enforcer of *Title 42*; but also, an "employer" pursuant to *Title 42*. Moreover, the sovereign Federal Courts of the U.S. also opted to fall under the definition of an employer pursuant to *Title 42 USC Sec. 12111(5)(B)(i)*.

Effectively, a sovereign such as a Native American Tribe and/or the U.S. Government and all its entities may opt out of the definition of an employer as cited at *Title 42 USC Sec. 12111(5)(B)(i)*.

D. *Discussion*

A. Whether or not AGS represented itself as an equal opportunity employer in line with *Title VII* the *Antidiscrimination Act of 1964*.

The Court admits that the AGS did in-fact represent itself to the public as an equal employment opportunity employer and that it did enter into a binding arbitration agreement with the employees' International Union SPFPA and its Amalgamated Local 725 on April 1, 2019 which expressed SPFPA's and AGS' rights, obligations, and expectations of the parties to each other pursuant to the CBA. Dkt. No. 8-1. Effectively, AGS held itself out as an employer of SPFPA's union members, AGS' employees.

B. Did AGS' representations as an equal opportunity employer and its obligations pursuant to the CBA unilaterally waive AGS' exemption as an employer pursuant to *42 USC Sec. 12111(5)(B)(i)*.

The Plaintiff contends that by AGS' own actions at the CBA, AGS opted out of the "protection" of *42 USC Sec. 12111(5)(B)(i)* and its restricted definition of an employer. Moreover, the fact that AGS publicly admits to being an equal opportunity employer and enforcing equal employment opportunity, one can easily surmise that AGS is an employer and opting out of its *42 USC Sec. 12111(5)(B)(i)* employer definition as the U.S. and its Federal Courts have voluntarily done.

E. *Conclusion*

WHEREFORE, premises considered, the Plaintiff respectfully request that the Court not consider the U.S. Magistrate Judge's Report and Recommendations issued on September 12, 2023 as not supported by current Supreme Court rulings at *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma at* 532 U.S. 411 (2001) and *Kiowa Tribe of Oklahoma v.*

Manufacturing Technologies, Inc, 523 U.S. 751 (1998).

Respectfully submitted,

/s/Lorenzo W. Tijerina
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F. *Certificate of Service*

I hereby certify that a true copy of the foregoing has been served upon AGS's counsel *via* electronically on this the 26 of September 2023.

/s/ Adriana N. Ayala
Adriana N. Ayala, Paralegal for
Lorenzo W. Tijerina