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,	)	Date: June 30, 2023
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO AKIMA GLOBAL SERVICES, LLC'S MOTION TO DISMISS

A. *Introduction*

Comes now, Plaintiff Maria Del Refugio Balli (hereinafter referred to as "Plaintiff" and/or "Balli") to file her response to the Defendant Akima Global Services', LLC (hereinafter referred to as "Defendant" and/or "AGS") motion to dismiss the Plaintiff's Initial Complaint. AGS grounds its motion by claiming that AGS is not an employer pursuant to *Title 42 U.S.C. Sec. 2000e et seq., Title VII* of the *Civil Rights Act of 1964* ("*Title VII*"); therefore, *42 U.S.C. Sec. 2000e et seq.,* does not apply to AGS a Native American company headquartered at 13873 Park Center Road, Suite 400N, Herndon, VA 20171. At its motion to dismiss the Plaintiff's Complaint, AGS argues that it is exempt from being subjected to the jurisdiction of the U.S. Equal Employment Opportunity Commission (EEOC) or this Court's jurisdiction unless AGS waives its sovereign immunity.

B. *Plaintiff's Operative Facts*

1. On or about **April 1, 2019**, AGS and the International Union, Security Police and Fire

Professionals of America (SPFPA) and its Amalgamated Local 725 entered into an Agreement (herein after referred to as the "SPFPA Agreement" or "Agreement") which expressed SPFPA's and AGS' rights, obligations, and expectations of the parties to each other pursuant to the Agreement. (Ex. 1).

2. At ***Section 5.4—Arbitration Procedures*** in the Agreement, AGS specifically agrees to arbitrate. (Ex. 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 Agreement which explicitly provides AGS the right and obligation to arbitrate. (Ex. 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.

C. *Issue(s)*

a. *The principal issue before the Court is whether or not AGS is exempt from having to comply with the antidiscrimination laws of the U.S.*; and, if not;

b. *Is the Plaintiff barred from bringing her claims of discrimination against AGS before the Court.*

D. *Standards—Rule of Law*

a. *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**).

b. 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**).

c. **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**).

Agreement at Ex. 1, p. 14.

E. *Plaintiff's Argument—Application of the Standards to the Facts*

a. *Whether or not AGS is exempt from having to comply with the antidiscrimination laws of the U.S.*

As a Native American sovereign entity, AGS is exempted from *Title 42 U.S.C. Sec. 2000e et seq., Title VII* unless AGS waived its sovereign immunity. Plaintiff's proffered facts and exhibits support the fact that AGS publicly advertises *via* its webpage that it is an equal employment opportunity employer. (Ex. 2). Plaintiff's facts also support that AGS entered into the Agreement which expressed SPFPA's and AGS' rights, obligations, and expectations of the parties to each other pursuant to the Agreement. (Ex. 1).

Moreover, AGS's own webpage/site, represents itself as being an antidiscrimination entity, this together with the specifically expressed language at *Section 1.7 Anti-Discrimination* and *Section 5.4-Arbitration Procedures* the Agreement demonstrate that AGS has waived its sovereign immunity in-line with the requirements at *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma,* 532 U.S. 411 (2001) and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*, 523 U.S. 751 (1998).

Effectively, AGS is not exempt from the Plaintiff's allegations of discrimination as represented at Plaintiff's Complaint before the Bar.

b. *Whether or not the Plaintiff is barred from bringing her claims of discrimination against AGS before the Court.*

The Plaintiff's facts before the Court support that AGS waived its sovereign immunity on or about **April 1, 2019**, when AGS entered into the Agreement which contains ***Section 5.4*** whereby AGS specifically agrees to arbitrate. (Ex. 1, p. 14). The fact that AGS agrees to arbitrate definitely supports the Plaintiff's argument that AGS has voluntarily waived its sovereign immunity status as a Native American tribe.

At *Kiowa*, the High Court reaffirmed its earlier decisions in support of tribal sovereign immunity, holding tribes enjoy immunity from suits on contracts for both governmental and commercial activities on and off the tribal reservation. *Id.* at 760. Since sovereign immunity is

best understood as a government's power to define the forum, procedure, and limits placed on suits against itself, the power of sovereign immunity litigation and legislation mainly concerns the scope and waivers of that immunity. *Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.*, 50 F3d 560 (8th Cir. 1994).

As to the waiver of AGS' sovereign immunity, the waiver must be clear and unequivocal. 532 U.S. 417. Because *Section 5.4* of the Agreement provides for arbitration, the Agreement presents "clear and unequivocal" language that AGS waives its sovereign immunity at issues of discrimination as provided for at ***Section 1.7—Anti--Discrimination*** of the Agreement. (Ex. 1, pp. 7 and 14).

Effectively, AGS has voluntarily waived its sovereign immunity *via* the "clear and unequivocal" expressed language of **Sections 5.4—Arbitration Procedures** of the Agreement; accordingly, the Plaintiff's Complaint should not be dismissed *via* AGS' defense of sovereign immunity.

F. *Conclusion*

WEREFORE, premises considered, the Plaintiff respectfully requests that the Court dismiss the Defendant's motion to dismiss as supported by the decisions of the Supreme Court in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma,* 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

Lorenzo W. Tijerina, Attorney for the
Plaintiff Maria Del Refugio Balli
Local Office: 1911 Guadalupe
San Antonio, Texas 78207
Telephone No. (210) 231-0112
Email Address: tasesq@msn.com

G. *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 30th of June 2023.

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