IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

WILLIAM PETERSON, III, Plaintiff, v. HARRAH'S NC CASINO COMPANY, LLC and CAESARS ENTERTAINMENT, INC., Defendants.	Civil Action No. 1:23-0036-MOC-WCM **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO JOIN A NECESSARY PARTY UNDER RULE 12(b)(7)**

I. INTRODUCTION

This action arises out of Plaintiff William Peterson, III's ("Peterson" or "Plaintiff") former employment as a table games dealer at the Harrah's Cherokee Casino Resort in Cherokee, North Carolina, and concerns alleged discrimination and retaliation. Plaintiff alleges Defendants Harrah's NC Casino Company, LLC ("Harrah's"), and Caesars Entertainment, Inc. ("Caesars") (collectively, "Defendants"), discriminated against Peterson due to his status as a veteran, in violation of the Uniformed Services Employment and Rehabilitation Act ("USERRA"), and violated Peterson's rights under the Family Medical Leave Act ("FMLA") by discriminating and retaliating against him and by interfering with his FMLA rights. However, at all relevant times, Peterson was employed by the Eastern Band of Cherokee Indians ("EBCI"), specifically working for a wholly owned and operated ECBI entity known as the Tribal Casino Gaming Enterprise ("TCGE"). In an attempt to avoid clear tribal sovereign immunity, Peterson failed to name his true employer as a defendant in this litigation. The Court should not countenance Peterson's effort in this regard.

Because TCGE was Peterson's true employer, it is a necessary and indispensable party under Rules 19 and 12(b)(7). Consequently, this Court should dismiss Plaintiff's Complaint pursuant to Rule 12(b)(7).

II. STATEMENT OF RELEVANT FACTS[1]

The ECBI is a federally recognized Indian tribe located in Cherokee, North Carolina. (*See* Exhibit A, Declaration of Leeann Bridges ("Bridges Dec."), ¶ 4); *see also* 25 U.S.C. § 479a-1 *transferred to* 25 U.S.C. § 5131; 81 Fed. Reg. 5019, 521 (Jan. 29, 2016). The ECBI contracts with Harrah's to oversee the management of its casino properties, including the casino and resort located in Cherokee, North Carolina, where Plaintiff worked as a table games dealer (the "Casino"). (*See* Bridges Dec., ¶¶ 6, 8.) Through the same management agreement, ECBI expressly delegates its obligations and rights to its wholly-owned and operated enterprise, TCGE. (*Id.*, ¶ 7.)

Disregarding the above, Peterson filed suit alleging discrimination under USERRA and discrimination, retaliation, and interference under FMLA against Defendants, alleging Defendants are his employer(s). (*See* Dkt. 1, ¶¶ 5-6, 65-90.) However, Peterson, like all employees of the Casino[2], was at all times relevant an employee of TCGE. (Bridges Dec., ¶ 6.) Further, Peterson's paystubs were issued by TCGE. (*See id.*, ¶ 10 and Exhibit 1 thereto.) Peterson's employment was conditioned on passing background checks conducted by the Cherokee Tribal Gaming Commission, and he was subject to the Cherokee Tribal Gaming Commission's rules and regulations for the entirety of his employment as a table games dealer. (*Id.*, ¶ 9.) Indeed, to the EEOC, Peterson, himself identifies his "employers" as Harrah's ***and*** TCGE. (*See* Exhibit B, October 23, 2021 letter from Peterson to the EEOC filing Charge of Discrimination 430-2022-00324 (the "EEOC Charge")).[3]

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[1] The allegations in the Complaint recited herein are accepted as true for purposes of this Motion only. Defendants will contest portions of the allegations in the Complaint for other purposes.

[2] The sole exception is that Harrah's employs a single management employee to supervise the operation of its North Carolina properties. (Bridges Dec., ¶ 6.)

[3] The Court may consider the uncontested contents of the EEOC Charge in deciding a defendant's motion to dismiss Title VII claims. *See CACI Int'l, Inc. v. St. Paul Fire & Marine*

As set forth below, the Complaint should be dismissed in its entirety due to Peterson's failure to join TCGE, his true employer, which is a necessary and indispensable party. Furthermore, due to tribal sovereign immunity, which has not been abrogated for USERRA or the FMLA, and which TCGE has not and does not waive, joinder of TCGE is not feasible, requiring dismissal under Rule 19(b).

III. ARGUMENT

A. Legal Standard

A court may dismiss an action for failure to join a party in accordance with Fed. R. Civ. P. 19(a)(1). Fed. R. Civ. P. 12(b)(7). Generally, a Rule 12(b)(7) motion should be granted when there is an absent party without whom complete relief will not be possible in the case or whose interest in the controversy is such that to proceed without the party might prejudice it or the parties already present in the case. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1359 (2d ed. 1990). To analyze the merits of a Rule 12(b)(7) motion, the procedure set forth in Fed. R. Civ. P. 19 ("Rule 19") must be applied.

Rule 12(b)(7) motions require a two-step inquiry by the Court. First, "the [C]ourt must determine whether a party is necessary under Rule 19(a) because of its relations to the matter under consideration." *Humble v. Harrah's NC Casino Co.*, LLC, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS 167966, at *14-15 (W.D.N.C. June 1, 2018) (citing *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 440 (4th Cir. 1999). Second, "[i]f the absent party is necessary, it must be ordered into the action so long as the joinder does not destroy the [C]ourt's jurisdiction." *Id.* at *15. To

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Ins. Co., 566 F.3d 150, 154 (4th Cir. 2009) ("[C]ourts may consider a document that the defendant attaches to its motion to dismiss if the document was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity."). Here, Peterson explicitly refers to the EEOC Charge in his Complaint, noting that he will seek leave to amend his Complaint upon exhaustion of his administrative remedies related to the claims alleged therein. (Dkt. 1, ¶ 57.)

the extent the absent party "cannot be joined because it would destroy the [C]ourt's jurisdiction, the [C]ourt must decide whether the action can continue without the party, or whether the party is indispensable under Rule 19(b) and the action must be dismissed. *Id.*

B. TCGE is a Necessary Party under Rule 19(a).

In pertinent part, Rule 19(a) provides as follows:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> >
> > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > >
> > > (ii) leave an existing party subject to a substantial risk of incurring double or multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a).

Regarding the first factor, TCGE has an interest in the subject matter of this action and is so situated that disposition without its presence will leave TCGE unable to protect itself. Specifically, TCGE was Plaintiff's true employer, and Plaintiff's claims are workplace claims, meaning that this Court could not grant complete relief in the absence of TCGE. *See Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *24-25; *see also Clark v. Harrah's NC Casino Co., LLC*, No. 1:17-cv-240, 2018 U.S. Dist. LEXIS 167963, at *11-12 (W.D.N.C. Apr. 27, 2018). Regarding the second factor, as Plaintiff's true employer, TCGE cannot protect its interests without participating in this litigation. *See Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *25. Not only does TCGE have an interest in defending against Plaintiff's employment claims, *see Clark*, No. 1:17-cv-240, 2018 U.S. Dist. LEXIS at *12, but it also has an interest, on behalf

of ECBI, in protecting its interests pursuant to the management agreement by which ECBI manages its casino properties, including the casino at which Plaintiff worked. Finally, allowing Plaintiff to proceed with his workplace claims without joining his true employer creates a substantial risk that TCGE would be subject to inconsistent obligations. *See Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *25.

In sum, TCGE is a necessary party under Rule 19(a).

C. TCGE Cannot Be Joined because of Tribal Sovereign Immunity.

As noted by the Supreme Court, "Indian tribes are 'domestic dependent nations that exercise inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991). Absent abrogation by Congress through legislation or waiver by the tribe at issue, Indian tribes are not subject to suit. *See id.*; *see also Tremblay v. Mohegan Sun Casino*, 599 Fed. Appx. 25, 26 (2d Cir. 2015) (unpublished), *State of FL. v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999) ("a suit against an Indian tribe is . . . barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit"), *Kiowa Tribe of Oklahoma v. Manuf. Techs., Inc.*, 523 U.S. 751, 754 (1998) ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"). The law is clear that waiver of sovereign immunity cannot be implied, but must be clearly and unambiguously expressed. *See Costello v. Seminole Tribe of Fla.*, 763 F. Supp.2d 1295, 1298 (M.D. Fla. 2010) (citing *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001)).

Further, tribes are immune from suit under USERRA and the FMLA. *See generally Manzano v. S. Indian Health Council, Inc.*, No. 20-cv-02130-BAS-BGS, 2021 U.S. Dist. LEXIS 126475 (S.D. Cal. July 7, 2021) (sovereign immunity for USERRA claims), *Yashenko v.*

Harrah's NC Casino Co., LLC, 446 F.3d 541 (4th Cir. 2006) (sovereign immunity for FMLA claims). That sovereign immunity extends to TCGE, as an instrumentality of the ECBI. *See Yashenko*, 446 F.3d at 544. Joinder is not possible as a result of ECBI's and TCGE's sovereign immunity. *See Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *25; *Clark*, No. 1:17-cv-240, 2018 U.S. Dist. LEXIS at *12; *see also Manzano*, No. 20-cv-02130-BAS-BGS, 2021 U.S. Dist. LEXIS at *34 (finding that the court lacked subject matter jurisdiction over plaintiff's USERRA claims due to tribal sovereign immunity).

D. This Action Should Not Proceed without TCGE.

Given TCGE's status as a necessary party under Rule 19(a) and this Court's inability to join TCGE due to tribal sovereign immunity, the final inquiry is whether TCGE is an indispensable party, meaning whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The factors to be considered include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.; *see also Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *27. Where a necessary party "is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as ***the compelling factor***.'" *See id.* (quoting *Kescoli v. Babbitt*,

101 F.3d 1304, 1311 (9th Cir. 1996) (emphasis added). Here, TCGE, as Plaintiff's true (or, by Plaintiff's own admission, joint) employer, has an interest in this litigation and would, therefore, be prejudiced if this Court were to render a judgment in its absence, which favors dismissal. *Id.* Furthermore, as noted herein, TCGE is immune from suit and, as a result, this Court need not analyze the remaining factors.[4]

Clearly, this Court cannot, in equity and good conscience, permit this action to proceed with the existing parties, in the absence of TCGE (and, by extension, ECBI) because doing so would effectively abrogate ECBI's tribal sovereign immunity without its consent. *See Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *27 (citing *Enterprise Management Consultants v. United States ex rel. Hodel*, 883 F.2d 890, 893-94 (10th Cir. 1989).

IV. CONCLUSION

In sum, TCGE, and by extension ECBI, are necessary parties to Plaintiff's employment claims, as Plaintiff's sole (or, at bottom, joint) employer. Thus, Plaintiff's Complaint should be dismissed with prejudice under Rules 12(b)(7) and 19.

Dated: June 27, 2023

Respectfully submitted,

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[4] Even if this Court were to analyze the remaining factors, the second factor also weighs in favor of dismissal. Practically speaking, there is no manner in which this Court could shape relief or include provisions in a judgment against Defendants, who are not Plaintiff's employer, that would lessen the prejudicial impact such a judgment would have against Plaintiff's actual employer. Further, although Plaintiff has an interest in being permitted to litigate his claims, such an interest is outweighed by the need to protect TCGE's sovereign immunity. *See Humble*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS at *27-28.

CERTIFICATE OF SERVICE

This is to certify that on June 27, 2023, the undersigned filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following CM/ECF participants in this case.

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