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 **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The Plaintiff, William Peterson, III, by and through his undersigned counsel submits this memorandum of law in opposition to Defendant's motion to dismiss his complaint. (Doc. # 15.)

INTRODUCTION

On a motion to dismiss the facts alleged in the Complaint are accepted as true for the purpose of judicial review. Plaintiff William Peterson, III ("Plaintiff" or "Peterson") is a former employee of Defendants ("Harrah's"). He worked as a table games dealer at Harrah's Cherokee Hotel & Casino Resort in Cherokee, North Carolina. (Doc. 001-1 at ¶¶ 1–8, 11–12.)[1] Peterson's Complaint alleges four legal claims:

COUNT I: Discrimination in Violation of the Family and Medical Leave Act

COUNT II: Retaliation in Violation of the Family and Medical Leave Act

COUNT III: Interference in Violation of the Family and Medical Leave Act

[1] Hereafter cited to as: Complaint ¶ ___."

COUNT IV: Violations of the Uniformed Services Employment and Rehabilitation Act.

(*See, generally*, Complaint.) Additionally, Peterson currently has a charge of disability discrimination pending with the federal Equal Employment Opportunity Commission ("EEOC"). (Complaint ¶ 57.) This matter remains pending with the EEOC and is not part of this litigation.

The facts supporting Plaintiff's claims are set forth in Plaintiff's Complaint and provide a concise statement of the facts, the legal claims, and the request for relief and satisfied federal notice pleading standards. That is not in dispute. Here, without the benefit of discovery, *or even an Answer to the Complaint*, Harrah's alleges that Plaintiff's lawsuit must be dismissed. Harrah's motion for dismissal is based on the premise that Harrah's, one of the world's largest gaming enterprises, can cloak itself in sovereign immunity from employment laws by virtue of having a casino on tribal land.

Harrah's argument lacks a sufficient legal basis to support a motion for dismissal. Harrah's argument is little more than conclusory statements to avoid litigation by alleging that Harrah's, one of the world's largest gaming companies, is immune from suit based on its ability to claim an affiliation with a tribal entity. Peterson's position is to the contrary. Peterson's legal claims are premised on the basic notion that the true employer at interest, Harrah's, can be sued for violations of federal employment law. Plaintiff is expressly *not* suing a tribal entity. This is not a legal maneuver: Peterson wants to hold his actual employer, Harrah's, to account for its violation of federal employment laws. Peterson's claims are based on the legal premise that a non-tribal entity—an enterprise

that is wholly responsible for its own employment practices—can be subject to liability for violations of federal law despite a claimed affiliation with an Indian tribe.

The legal arguments from both parties require discovery. The four corners of the Complaint do not warrant dismissal. Harrah's argument is not based on evidence that can be properly considered by the Court. Harrah's argument is little more than conclusory statements and arguments that one of the world's largest gaming enterprises is immune from employment laws by virtue of operating on Indian Tribal land. Plaintiff's position is that the Tribe is not a proper party because the Tribe never satisfied the requirements of being an "employer" under the statutes at issue and that full and complete relief can be afforded to Plaintiff without any need to include a Tribal entity.

This case is in its infancy, but there is zero evidence that the Tribe should be part of this litigation or has any interest legal in this litigation based on its own contractual agreements with Harrah's. For the reasons set forth more fully below, Plaintiff respectfully requests that Harrah's motion is denied.

PROCEDURAL POSTURE

Harrah's motion to dismiss is made in lieu of answering Plaintiff's Complaint. There has been no discovery in this case. Harrah's motion to dismiss is based on the argument of counsel in its memorandum of law. Harrah's supplemented the record with the Declaration of Leann Bridges and an email from Plaintiff to the Federal Equal Employment Opportunity Commission ("EEOC"). (Docs. 16–1 and 16–2.)

On a motion to dismiss a Court is not to consider alleged facts or documents outside the four corners of the complaint. *See Zak v. Chelsea Therapeutics Int'l, Ltd.,*

780 F.3d 597, 606 (4th Cir. 909) (analyzing Fed. R. Civ. P. 12(b)(6)). Plaintiff's position is that the exhibits to Defendants' motion should not be considered by the Court, and that Harrah's cannot unilaterally convert a motion to dismiss into a motion for summary judgment when Peterson is bereft of any discovery.

Rule 12(d) expressly states that on a motion for dismissal "all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." As described in this opposition, the absence of any discovery puts Peterson in the position of not having any opportunity—much less a reasonable opportunity—to set forth arguments about the applicability of Rule 19 factors on a dispositive legal issue as complicated as the issues presented here.

LEGAL ARGUMENT

Peterson does not challenge that the Tribe has sovereign immunity. Peterson's claims are premised on the basis that his employer in fact was Harrah's, a non-tribal entity that can be held liable for violations of federal employment law. Simply because a non-tribal entity claims an association with a federally recognized Tribe does not mean that it is immune from federal law.

Harrah's argument can be boiled down simply:

(1) Peterson was actually an employee of the Tribe and not Harrah's;

(in the alternative)

(1) Harrah's was Peterson's "joint employer" with the Tribe.

(2) Because the Tribe was a joint employer, it is an indispensable party.

(3) Because the Tribe has sovereign immunity Peterson cannot seek relief from his non-tribal employer.

These issues cannot be resolved without the benefit of discovery and Harrah's motion must be denied. Under Rule 12(d) a party must be afforded the "reasonable opportunity to present all the materials that [are] pertinent to [a motion to dismiss]." Similarly, it is not appropriate for a court to convert a motion to dismiss into a motion for summary judgment "when the parties have not had an opportunity to conduct reasonable discovery." *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 909)

Despite not being ripe for adjudication on a motion to dismiss, Plaintiff posits that Harrah's arguments fail as a matter of law, and that discovery will prove the same. Peterson must be allowed the opportunity to prove his claims and have the benefit of discovery to show that Rule 12(b)(7) and Rule 19 do not apply to the facts *in his case*.

To wit, Harrah's argues, without evidence, that a Tribal entity was Peterson's employer and simply expects that the Court is required to accept this conclusion. A party, and a court, is not deprived the opportunity of engaging in a meaningful analysis, without the benefit of discovery, simply because an entity claims an affiliation with a sovereign Indian tribe.

I. Peterson Was Employed by Harrah's

As set forth in the Complaint, Plaintiff was employed by Harrah's under the applicable federal laws. (Complaint ¶¶ 4–8, 11–12; *see also* Complaint ¶¶ 13–14.) Those facts must be accepted as true on a motion to dismiss.

To the extent the Court might consider facts outside of the four corners of the Complaint, Plaintiff submits that a "Management Agreement" between Harrah's and the Tribe reflects that Harrah's was Peterson's employer in fact. Peterson does not have the benefit of discovery or a copy of the Management Agreement that he can submit as true and correct. Regardless, the Management Agreement that has been submitted in connection with prior litigation against Harrah's Cherokee Casino states:

> All business and affairs in connection with the day-to-day operation, management, and maintenance of the Enterprise and the Facility . . . shall be the responsibility of [Harrah's] . . . . [Harrah's] shall have . . .the exclusive responsibility and authority to direct the selection, hiring, training, control, and discharge of all employees performing regular services for the Enterprise in connection with the maintenance, operation, and management of the Enterprise and the Facility and any activity upon the property.

See Humble et al. v. Harrah's NC Casino Co., LLC, no. 18-2208 (Opening Brief of Appellant) (4th Cir. Dec. 17, 2018).

In short, the record is incomplete, but the available evidence reflects that Peterson's employer, the entity responsible for the terms and conditions of his employment, was Harrah's and the named Defendants in this case. This is particularly true given the definition of "employer" under FMLA regulations. As relevant here, FMLA regulations state an employer ***includes* "[a]ny *person who acts, directly or indirectly in the interest of an employee to any of the employees of such employer."*** 29 C.F.R. § 825.102. FMLA regulations also identify joint employment coverage. 29 C.F.R. § 825.106. The FMLA covers joint employers, that is where "two or more businesses exercise some control over the work or working conditions of the employee." 29 C.F.R. § 825.106(a).

By any interpretation of the facts alleged in the Complaint and in the FMLA regulations Harrah's was Plaintiff's employer and can be liable for violations of federal employment laws. There is the absence of any evidence that the Tribe acted "directly or indirectly" to determine the terms and conditions of Peterson's employment. The Management Agreement certainly suggests that the Tribe had no control over the terms and conditions of Peterson's employment. Plaintiff again concedes that the Management Agreement is not part of the record in this case, but that is a limitation created by Defendants by bringing a Rule 12 motion. Under Rule 12(d) Peterson must be at least afforded the opportunity to have discovery to prove up that the Tribe is not a proper party to the case, or is not an "indispensable party." The Management Agreement between Harrah's and the Tribe certainly suggests that the Tribe is not an indispensable party that must be included in this litigation.

II. Federal Rules of Civil Procedure Govern Compulsory Joinder and Dismissal for Failure to Include a Necessary Party

There is no special exception to the rules of joinder simply by virtue of a defendant being able to claim an affiliation with a tribal entity. Federal Rule of Civil Procedure 12(b)(7) allows a party to assert the defense of failure to join a party. Rule 19 governs required (or compulsory) joinder of parties. Rule 19 is not as broad and expansive as argued by Harrah's.

Federal Rule of Civil Procedure 19 sets forth a two-step inquiry for a district court to determine whether a party should be joined in an action. First, the district court must determine whether the party is "necessary" to the action under Rule 19(a). If the Court

determines that the party is "necessary," it must then determine whether the party is "indispensable" to the action under Rule 19(b). *Teamsters Local Union 171 v. Keal Driveway Co.*, 173 F.3d 915, 917–18 (4th Cir. 1999).

Rule 19 sets forth criteria a court should consider in its analysis:

> (1) Whether the court can afford complete relief among the existing parties;
>
> (2) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (3) 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;
>
> (4) whether a judgment rendered in the person's absence would be adequate; and
>
> (5) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19.

III. The Tribe is Not a Necessary Party to this Litigation

As described above, Plaintiff believes that the evidence that will be learned in discovery will reflect what is evidenced in the Management Agreement between Harrah's and the Tribe that has been previously cited in other litigation. Plaintiff's Complaint certainly does not allege that he was subject to the control or management of the Tribe in the course of the performance of his duties.

This is not an effort at legal maneuvering as suggested by Harrah's. For all practical and legal purposes Peterson's employer was Harrah's *and not* the Tribe.

Plaintiff submits that after discovery the evidence will show that the Tribe did not have any meaningful control over Peterson's employment. At the time of this filing, there is no evidence that the Tribe exercised *any* control over the work or working conditions of Peterson. The Management Agreement (that is admittedly not part of the record) suggests that the tribe effectively had *no control* over the employment relationship between Harrah's and employees like Peterson.

That a tribal entity might have been the signatory on paychecks speaks nothing about the actual *control* over the working conditions of an employee. Based on the limited record available—a Complaint without an Answer and no evidentiary record—there is no suggestion that the Tribe should even be considered a "joint employer" even under the broad definitions of the FMLA.

IV. "Equity and Good Conscience" Do Not Require Joinder

As described above, and it is Plaintiff's express position, that any Tribal entity is not only ***not*** a *required* party to the litigation but would *not even a be proper party* to this litigation. The Tribe has no legal interest in this case. It appears that any judgment would have no effect on the Tribe and that the Tribe has no responsibility to defend against this action. The Management Agreement effectively states that all of the casino's employment policies are solely the decisions of, and the responsibility of, Harrah's. The Tribe has delegated all of the employment law issues to Harrah's and Harrah's is responsible to defend/indemnify/pay all employment law issues.

To provide a blunt assessment, it appears that the Tribe has a simple agreement that all of the employment issues are the responsibility of Harrah's and the Tribe doesn't

want any involvement in it. With the benefit of discovery, Plaintiff believes the evidence will show that the Tribe had no actual role as Peterson's purported "employer." In short, the evidence seems to suggest that the Tribe has no skin in the game. The Tribe doesn't care how Peterson's employment lawsuit plays out; because that is Harrah's responsibility. It therefore stands to reason that the Tribe cannot be an "indispensable party" that must be part of the litigation when it practically has no legal interest in the case.

Under Rule 12(b)(7) and 19, the principal concern is whether or not an absent party can be effectively represented even in their absence. *See Salt River Project Agrm. Imp. And Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012). The evidence (granted without the benefit of discovery) suggests there is no harm or prejudice to the Tribe or Harrah's if the Tribe is not a party to the litigation. There is no evidence that if Peterson succeeds in his claims and has a judgment against Harrah's the Tribe would be subject to any prejudice or harm. On the flip side of that coin, there is no evidence that Harrah's is prejudiced or harmed if the Tribe is not a party to the litigation.

The only entity that might be subject to any "harm," or from whom relief or remedy can be sought, is Harrah's, the named Defendants in this litigation. There is no indication that this litigation can harm or prejudice the Tribe in any way. The Tribe cannot be subject to any prejudice or harm if it has no possibility of exposure to any liability, and not even the responsibility to defend against this action. By the same token, Harrah's is not subject to any prejudice or harm by the Tribe not being included in the action if it has already waived any rights to contribution or indemnification by the Tribe.

CONCLUSION

Harrah's is one of the largest gaming companies in the world. It was solely responsible for operating Harrah's Cherokee Casino and responsible for all employment practices, procedures, and decisions about Peterson's employment. Harrah's claims that dismissal is necessary under Rule 12(b)(7) for failure to include an indispensable party that cannot be joined because of sovereign immunity lacks merit. There is no evidence of any harm or prejudice to either Defendants or the Eastern Band of Cherokee Indians, and certainly not the prejudice or harm that require this court in its considerations of "equity and good conscience" to dismiss Plaintiff's claims.

Dated: July 28, 2023.

LELAND CONNERS PLC

/s/ Daniel Gray Leland
Daniel Gray Leland (MN Bar No. 389027)
Admitted pro hac vice
60 South Sixth Street, Suite 2800
Minneapolis, MN 55402
Telephone: (612) 255-2255
Fax: (612) 677-3323
Email: dan@lelandconners.com

WIMER SNIDER, P.C.

/s/ Jake Snider
Jake Snider (NC Bar No. 46416)
349 Haywood Road
Asheville, NC 28806
Telephone: (828) 350-9799
Email: jsnider@ashevillelegal.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that on July 28, 2023, the undersigned filed the foregoing with the Clerk of the Court, which will notify the following counsel of record:

Kevin Cleys
LITTLE MENDELSON,P.C.
620 South Tryon Street
Suite 960
Charlotte, NC 28202
Telephone: (704) 972-7000
Fax: (704) 333-4005
Email: Kcleys@littler.com

Dated: July 28, 2023

/s/ Daniel Gray Leland
Attorney for Plaintiff