

POKAGON BAND OF POTAWATOMI INDIANS
TRIBAL COURT
58620 Sink Road, P.O. Box 355, Dowagiac, MI 49047

GYPSY CRAKES,
Plaintiff

-vs-

Case No. 10-971-CV

FOUR WINDS CASINO RESORT,
Defendant

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ORDER

Introduction

This case is before the Court on a Motion for Summary Disposition filed by the Defendant, Four Winds Casino Resort, Plaintiff's employer, which is operated by the Pokagon Gaming Authority which is an unincorporated governmental instrumentality of the Pokagon Band of Potawatomi Indians, a sovereign, federally recognized Indian Tribe (the "Band"). The Defendant brings its Motion pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10).

Background

The Plaintiff was employed by the Defendant and requested medical leave under the Family Medical Leave Act ("FMLA") beginning April 8, 2009, which was granted and the Defendant was to return to work on July 1, 2009. The Plaintiff was unable to return to work because of a medical condition until July 7, 2009, whereupon the Four Winds Casino Resort terminated Plaintiff's employment.

The Plaintiff filed her Complaint requesting injunctive relief, declaratory relief and attorney fees and costs alleging the Casino's unlawful discrimination against her for violation of the Band's Civil Rights Ordinance. Plaintiff alleges the Defendant failed to accommodate the Plaintiff after learning of her disability and thus discriminated against her in violation of the Band's Civil Rights Ordinance.

Defendant's position is that the Plaintiff's claim has been rendered moot for the reason that the Court only has jurisdiction to award declaratory and injunctive relief and reasonable attorney fees because the Band's sovereign immunity and the Civil Rights Ordinance prevent the Court from granting monetary damages. The Defendant claims that any violation of the Civil Rights Ordinance is moot because on October 26, 2010, the Casino made an offer of re-employment to the Plaintiff which was accepted on November 3, 2010.

The Plaintiff claims that the Court should not determine the claim is moot for the reasons stated as the four major exceptions to the Mootness Doctrine in *EEOC v Federal Express Corp*, 558 Fed 3rd 842 (9th Circuit 2009). Plaintiff further claims she is entitled to attorney fees pursuant to Section 3 of the Tribal ordinance.

Sovereign Immunity

It is well settled law that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.*, 523 US 751 (1998). This immunity applies to a tribe's commercial contracts, whether made on or off an Indian reservation. To relinquish its immunity, a tribe's waiver must be clear. *C & L Enterprises, Inc. v Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 532 US 411 (2001).

Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. Further, a waiver cannot be implied and must be unequivocally expressed. *Santa Clara Pueblo v Martinez*, 436 US 49 (1978).

Article XVIII of the Constitution of the Pokagon Band of Potawatomi Indians provides as follows:

Section 1 Tribal Immunity. The Pokagon Band, as a sovereign Indian nation, is immune from suit in all forms except to the extent that immunity is expressly waived as provided in this Article.

Section 2 Waivers of Immunity. The Tribal Council may waive the Band's immunity from suit in furtherance of a governmental or a tribal business purpose. Such a waiver must be in writing and must be approved by the affirmative vote of at least 8 Tribal Council members. The Tribal Council may delegate its authority under this section to the governing bodies of subordinate tribal entities provided that recourse is limited to assets of the entity.

Civil Rights Ordinance

The Pokagon Band of Potawatomi Indians Civil Rights Ordinance provides in pertinent part as follows:

Section 2. Declaration of Civil Rights

The Pokagon Band of Potawatomi Indians (the "Band"), in the exercise of self-governance shall not:

- K. discriminate against any person on the basis of sex, age (because they are elderly), physical disability, or sexual orientation.

Section 3. Enforcement and Remedies

The Pokagon Band of Potawatomi Indians Tribal Court (the "Tribal Court") shall have jurisdiction over claims for violations of the provisions of Section 2 brought against the Band, its Tribal Council, its governmental agencies, or its governmental officials for declaratory or injunctive relief.

The Tribal Court shall have jurisdiction to award only declaratory and injunctive relief for claims brought under this Ordinance, *provided however*, that the Tribal Court may award a reasonable attorney fee and costs to a claimant.

As can be seen by the above, the only relief this Court may grant under the ordinance is declaratory and injunctive relief (which is stated twice) and reasonable attorney fees and costs.

The Court is unable to render a judgment in favor of Plaintiff which would require monetary damages due to the doctrine of sovereign immunity and Section 3 of the Civil Rights Ordinance, both as noted above.

Attorney Fees

The Plaintiff's action is brought for a violation of the Americans with Disabilities Act ("ADA") and Section 3 of the Civil Rights Ordinance which provides: "The Tribal Court may award a reasonable attorney fee and costs to a claimant." The statutory authority to award attorney fees is contained in the ordinance. Defendant argues under the ADA the Plaintiff is only permitted attorney fees and costs to be levied against a "prevailing party" and cites *Buckhannon Board and Care Home, Inc. v West Virginian Dept. of Health and Human Resources, 532 US 598 (2001)*. Defendant claims that the Plaintiff is not "a prevailing party" because she has "failed to secure a judgment on the merits... but has nonetheless achieved the desired result because the lawsuit has brought about a voluntary change in the Defendant's conduct".

Analysis

It is clear from the above case law that the Band enjoys sovereign immunity unless clearly and expressly waived by eight members of the Tribal Council or delegating such authority to a subordinate Tribal entity. The Four Winds Casino Resort and the operational instrumentality, the Pokagon Gaming Authority, is a subordinate Tribal entity.

There is no claim of a waiver of sovereign immunity by the Plaintiff.

The Court is without authority to grant damages as a result of alleged discrimination by the Plaintiff due to the doctrine of sovereign immunity and the Civil Rights Ordinance and, accordingly, renders that issue moot.

The Court finds the Defendant's position regarding attorney fees based on the *Buckhannon* case unpersuasive when considered in light of the clear language in the Band's Civil Rights Ordinance.

Decision

Pursuant to MCR 2.116(C)(8) the Plaintiff has failed to state a claim upon which the Court may grant relief based on the Civil Rights Ordinance (Section 3) and for the reason that Defendant enjoys sovereign immunity which renders the Plaintiff's claim for monetary damages moot.

The Court further finds that the Plaintiff is entitled to attorney fees for the reason that Plaintiff has achieved a desired result upon the institution of this lawsuit which resulted in her re-employment with the Defendant. The amount of attorney fees and costs provided for in the Civil Rights Ordinance shall be determined at a later hearing in this case unless agreed upon by the parties.

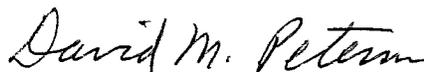
The Court denies the Defendant's Motion for Stay of Proceedings for the reason that no activities in this case have occurred between the time of the Motion and this Court's decision.

The Plaintiff's request to reject any ex parte communication by the Defendant is denied for the reason that any ex parte communication was not considered by this Court.

Order

IT IS SO ORDERED.

Dated: March 22 2011



David M. Peterson
Judge, Pokagon Band Tribal Court