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TRIBAL COURT
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

LAURA C. LONCHAR,
Plaintiff,

v.

VICTORIES CASINO,
Defendant.
_____/

Case No. C-022-1200

*Ruling on Defendant's Motion For Summary Judgment and Dismissal*

# RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

The threshold issue presented to the Court in this matter is whether the Tribal Court has jurisdiction, i.e. authority and power, to hear Plaintiff's claim of wrongful termination. Answering this question is a necessary first step. This threshold issue must be addressed by the Court before it can proceed further.

This proceeding is based upon a claim by Plaintiff that she was wrongfully discharged from her employment at Victories Casino. Defendant argues that this Court does not have subject-matter jurisdiction because the Casino, which is an enterprise of the Little Traverse Bay Bands of Odawa Indians, is immune from suit because it is protected by tribal sovereign immunity. Defendant further argues that casino employment disputes are to resolved within the enterprise administration and that such resolution was made in this matter.

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## CASE ANALYSIS AND REASONING:

### I. Tribal Sovereign Immunity Under Federal Law

The inherent sovereign immunity of Indian tribes is well-established and has been long



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recognized in the law. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). The United States Supreme Court has consistently held that Indian tribal governments have sovereign immunity unless such immunity has been **expressly waived** by either Congress or the particular tribal government. See *Santa Clara*, supra, p.58. It is federal law which provides the parameters for tribal sovereign immunity. Also, see *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700 (1998).

## Subordinate Enterprises

Tribal sovereign immunity covers subordinate enterprises owned by tribes. The cases involving subordinate tribal enterprises have all restated the long-standing principle that without Congressional approval, tribes are immune from suit and it follows that subordinate enterprises are also immune. See *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (1968) and *White Mountain Apache v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971). In the instant matter, it is undisputed that Defendant, Victories Casino, is a subordinate tribal enterprise. As such, it is covered by the immunity protections of the Tribe.

## Effect of the Indian Civil Rights Act

Congress enacted the Indian Civil Rights Act (ICRA) in 1968. It has been argued by some that this federal law provision, which granted persons certain rights vis-a-vis an overly-intrusive tribal government, is in effect a Congressional waiver of tribal sovereign immunity. However, others argue that, while the ICRA created rights, its remedies are limited. The United States Supreme Court in *Santa Clara* decided that Congress only intended habeas corpus relief because that was the only relief **expressly** created. Tribal courts must provide a consistent interpretation

of that federal statute. *"It would be [a] contradiction of Santa Clara to hold on the one hand that the Indian Civil Rights Act is ineffective to waive tribal sovereign immunity by implication in the federal courts and on the other hand to hold that the same legislative enactment is effective to waive the sovereign immunity by implication in tribal courts."* *McCormick v. Election Committee of the Sac & Fox Tribe*, Okla. Trib. 8, 20; WL 128844 (Sac & Fox CIO 1980). This Court is persuaded by the tribal Court's reasoning in *McCormick* that the ICRA does not waive tribal sovereign immunity.

## Conclusion

For all of the foregoing, **this Court finds that federal law recognizes the inherent immunity of tribal governments and its subordinate enterprises and that there has not been any express abrogation of that immunity by Congress.**

## II. Tribal Sovereign Immunity Under Tribal Law

Having found that Congress has not waived tribal sovereign immunity, the threshold issue identified at the outset becomes narrower. It is whether the Tribe itself has waived its immunity to allow the present suit. That analysis is as follows.

## Tribal Constitution

In the instant matter, Defendant urges the Court to reconsider earlier decisions of this Court, which might otherwise serve as precedent in this matter. *Lonchar v. LTBB et al.*, Case No . C-008-0898 (1998) and *Deckrow v. LTBB*, Case No. C-006-0398 (1998) both relied, in part, upon ARTICLE VIII of the Tribe's *Interim Constitution* which provides that members have *"the right to petition for action or the redress of grievances"* to deny the Tribe's *Motion To Dismiss*

based upon an asserted defense of tribal sovereign immunity. Defendant argues in this matter that the quoted language is taken directly out of the *First Amendment* to the *United States Constitution* and the language has never been held to be a waiver of sovereign immunity by itself. It is further argued that one can only sue if government passes a specific law which explicitly allows such suit to occur. The Court finds that this argument is consistent with the federal law principle requirement that waivers of immunity must be explicit. The *Interim Tribal Constitution* does not contain an express and unequivocal waiver of tribal sovereign immunity.

The Court finds that the assertion of the defense of sovereign immunity by the Tribe in this case has not been an absolute bar to Plaintiff's petition for redress. Plaintiff did avail herself to her right to petition through the administrative process that was provided all employees at that time. Plaintiff conceded at the **Motion Hearing** that she did go through the administrative process but that her termination was upheld. Plaintiff simply did not get the result she desired.

## Tribal Enactments

In the above-cited matters, the Court also relied upon the *LTBB Court Statute*, enacted on December 17, 1995, which creates *"a court of general jurisdiction"*, which empowers the Court to hear *"all cases arising"* under Tribal law. The issue is whether this tribal legislative language is an express and unequivocal waiver of tribal sovereign immunity.

Defendant argues that it is up to the government to determine what the proper forum is for the "the right to petition for action or the redress of grievances". It is further argued that the appropriate forum depends upon the particular situation. The forum may be political, may involve an administrative process, or may allow for court review. **In the instant situation, the duly-elected governing body of the Tribe provided that employees grievances be addressed by an administrative process.** The procedures are provided in the *Victories Employment Policy*. This

argument makes it clear that the LTBB Tribal Council made a conscious choice about the appropriate forum for resolving employee complaints and that Plaintiff had this forum to hear her "petition", notwithstanding Defendant's assertion of a defense of sovereign immunity here. The primary concern must be that every person have a forum available to them before which they can present their claims. The Court is persuaded by Defendant's argument that the choice of which kind of forum be made available to hear complaints must be made upon due deliberation and the enactment of law and/or policies and procedures.

A matter is not a "case" for the court of general jurisdiction where the "case" is barred by the inherent sovereignty of the Tribe. It is an interesting observation that the very sovereignty, that gives rise to the right of the Tribe to operate the Casino and thus offer employment that would not otherwise have been available to Plaintiff in the first place, also gives rise to the very immunity of which Plaintiff now complains.

Defendant also argues that it is appropriate for government to decide where the ending points for disputes must be. The final decision of any dispute must lie somewhere. In the instant matter, the duly-elected body of the Tribe has provided that *"all decisions of the Grievance Panel shall be final"*. Defendant further argues that, "if the administrative process needs fixing" for whatever reason, it's up to the legislative/executive branch of government as a matter of political decision-making. The Court agrees with Defendant on this point because of the reasoning of *McCormick* which has been adopted above.

## Conclusion

**The Court** adopts the arguments made by Defendant on this issue and **finds that the legislative language before this Court does not constitute an express and unequivocal waiver of tribal sovereign immunity.**

FOR ALL OF THE FOREGOING, THIS COURT GRANTS DEFENDANT'S *MOTION FOR SUMMARY JUDGMENT AND DISMISSAL*.

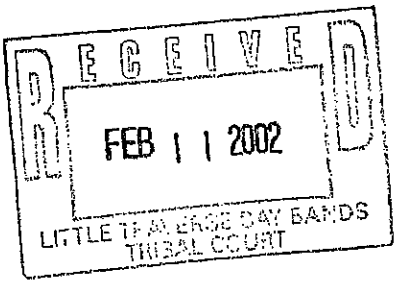
The *Amicus Brief* arguments submitted in this matter have been given due consideration by this Court. The primary difference in outcomes between this matter and the earlier cases is due to the involvement of counsel versed in federal Indian law and tribal sovereignty issues in this later matter. It is a matter of the cases being argued differently to this Court. The Court must rely upon the best arguments of the parties before it in a given matter.

To the extent that tribal members collectively desire access to the Court or other tribal dispute resolution forums, they must petition their elected representatives to enact express and unequivocal waivers of their collective immunity from suit. Due consideration of the *Deckrow* dicta may be timely now while the draft Tribal Constitution is under review by the Secretary of the Interior because the Secretary will most likely recommend other changes to the draft before an election is called.

02/11/02

DATED

MICHAEL PETOSKEY
TRIBAL JUDGE

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