

**LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS  
TRIBAL COURT-CIVIL DIVISION**

FREDERICK ROY HARRINGTON, JR.,  
Plaintiff,

Case No. C-024-0101  
Hon. Pat Sekaquaptewa

v.

THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,  
Defendant.

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FREDERICK ROY HARRINGTON, JR.  
In Pro per  
1111 Howard  
Petoskey, MI 49770

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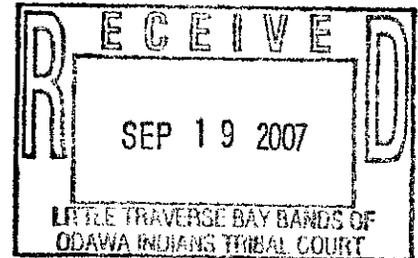
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**ORDER DENYING MOTION FOR SUMMARY JUDGMENT**

09-19-07A09:26 RCVD

Hon. Pat Sekaquaptewa, Judge Pro Tempore



**PROCEDURAL HISTORY**

On January 2nd, 2001, Plaintiff Fred R. Harrington, Jr. filed a Civil Complaint with the Tribal Court of the Little Traverse Bay Bands of the Odawa Indians. He sues the Tribe for back compensation (essentially for the years of 1999 and 2000) for overtime hours worked in violation of the U.S. federal Fair Labor Standards Act ("FLSA"). He also seeks interest on this amount. He argues that his job situation does not meet the criteria for employees exempted from overtime pay requirements under the Act.

On January 23rd, 2001, attorney Stanley A. Harwood entered an appearance on behalf of defendant Tribe and filed an Answer and Affirmative Defenses. Defendant Tribe asks the Court to deny Plaintiff's requested relief, dismiss his complaint, and to order Plaintiff to pay costs and attorneys fees for filing a frivolous action. Defendant raises the following affirmative defenses: (1) The FLSA does not apply to the Tribe; (2) The FLSA does not apply to executive, administrative, and professional employees and Plaintiff's job description meets these criteria so Plaintiff is exempt from required overtime pay; (3) Plaintiff has failed to exhaust the grievance process set out in the Employee Handbook; (4) Plaintiff did not bring this claim when he first requested overtime pay and has thus waived his right to make the claim; and (5) Plaintiff fails to state a claim upon which relief may be granted.

On February 6, 2001, Plaintiff Harrington filed a Rebuttal to Answer. In the Rebuttal he argues: (1) The Tribe waived its sovereign immunity to this suit by adopting Section 711 of the Employee Handbook providing that "An employee making a good faith allegation of violation of the employee's legal rights may bring an action for redress in Tribal Court;" (2) That the FLSA applies to employees of the Tribe (He argues that the Bureau of Indian Affairs ("BIA"), via its "638-contract" with the Tribe, requires compliance with the FLSA. He also claims that the BIA will take complaints concerning wage and hour discrepancies that will be forwarded to the Department of Labor and be decided by a federal administrative law judge. He further claims that if liquidated damages are awarded they will be taken directly from the Tribe's 638-contract.); (3) Plaintiff states that he has attempted an administrative resolution by writing to the Tribal

Council; and (4) Plaintiff claims that he is mitigating damages by bringing this action in Tribal Court. Plaintiff seeks \$21,230.72 in overtime pay for two years preceding the filing of his complaint, plus liquidated damages.

On May 11th, 2001, Defendant Tribe filed a Motion for Summary Judgment and Dismissal. Defendant argues that the Court lacks subject matter jurisdiction over this matter as the Tribe is immune to suite and has not waived this immunity. Defendant Tribe argues in the alternative that even if the FLSA applies, Plaintiff's job description would qualify as an exempt position, exempt from required minimum wage and overtime requirements.

On May 11, 2001, Plaintiff filed a First Request for Documents, Admissions, and Interrogatories. On May 14, 2001, Plaintiff filed a Request for Default Judgment in Favor of the Plaintiff and Order to Comply. On June 6, 2001, Defendant filed a Response to Plaintiff's Request for Default Judgment in Favor of the Plaintiff and Order to Comply.

On May 22nd, 2001, Plaintiff Harrington filed a First Response to Defendant's Motion for Summary Disposition. He argues: (1) The Tribe in adopting an IRA Constitution waived sovereign immunity "with respect to federal regulations that apply to Indian Tribes;" (2) The Tribe's Constitution, through its inclusion of a bill of rights, waives tribal sovereign immunity for civil rights suits brought under tribal law or under "federal Indian policy and other laws of general applicability" by tribal members in tribal

court; (3) Specifically, Article VII, the clause beginning "the right to petition for action or the redress of grievance," was held in *Deckrow v. LTBB* to be a bar to raising sovereign immunity as a defense; (4) The Tribal Council expressly waived the Tribe's immunity by adopting a grievance procedure in the Employee Handbook, specifically where it states "An employee making a good faith allegation of violation of the employee's legal rights may bring action for redress in Tribal Court;" and (4) The Tribal Council expressly waived the Tribe's immunity for suits under the provisions of the FLSA by adopting Section 201 of the Employee Handbook which states "Each employee is designated as either NONEXEMPT or (sic) EXEMPT from federal and state wage and hour laws " Plaintiff also argues that the federal courts have held that "the FLSA and other federal statutes of general applicability, apply to Indian Tribal employees ."

Plaintiff further argues that the Tribal Court has broad jurisdiction to hear claims brought by tribal members under federal law. Plaintiff argues that Defendant's motion for summary judgment should be denied as there are indeed trial-worthy facts in dispute. Specifically he argues that under the FLSA, the Tribe has the burden to show that federal employees meet the criteria for exemptions from overtime provisions and that Defendant Tribe has failed to produce any evidence on the issue. Plaintiff also claims that there is documentation demonstrating that his supervisors acknowledged each week that he worked over forty hours in the form of signed time sheets.

Finally Plaintiff argues that he has attempted to reach an administrative remedy by corresponding with the Tribal Council with no response. He argues that he could not

use the grievance procedure outlined in the Employee Handbook as he has been terminated. He also claims that under the FLSA he has no duty to mitigate damages.

On June 6, 2001 a status conference was held. This was followed by an order entered on June 19, 2001, specifying that the Michigan Rules of Civil Procedure apply; denying Plaintiff's motion (presumably his "Request for Default Judgment in Favor of the Plaintiff and Order to Comply"), and setting a hearing on Defendant's Motion for Summary Disposition later in the day. Plaintiff, without counsel, and Attorney Harwood appeared and argued.

### **ISSUES RAISED**

- (1) Whether this Court has subject matter jurisdiction over this matter, i.e., whether the Tribe has waived its sovereign immunity for suits of this type?
  
- (2) Whether Congress has abrogated the Tribe's sovereign immunity for actions enforcing "statutes of generally applicability" - here the Fair Labor Standards Act?
  
- (3) Whether the Tribe has waived its sovereign immunity for suits similar to actions brought under the Fair Labor Standards Act by adopting the Employee Handbook?

### **DISCUSSION**

I. Has the Tribe waived its immunity for suits of this type?

Under Michigan Court Rules, Rule 2.116(B)-(C), a party may move for dismissal on a claim asserting that the court lacks subject matter jurisdiction. Here the attorney for the Tribe argues that the LTBB has not waived its immunity from suit by employees against the Tribe and that consequently this Court lacks subject matter jurisdiction over this matter. Further, he argues that neither Article VIII (the right to petition for redress of grievances) of the LTBB Constitution, nor its reference to the Indian Civil Rights Act constitutes an effective waiver of the Tribe's immunity. Finally he argues that the LTBB "has passed no express law allowing employees to sue the Tribe."

Plaintiff argues that the LTBB Constitution reserves rights to its members that go beyond the Indian Civil Rights Act and includes "rights or guarantees enjoyed by citizens under the Constitution of the United States." He argues that this includes all rights enjoyed by U.S. citizens and that the bill of rights provision of the LTBB Constitution constitutes an express waiver of the Tribe's sovereign immunity with respect to federal laws of generally applicability (here the Fair Labor Standards Act).

This Court is faced with almost identical arguments from the parties to those in an earlier related suit, *Harrington v. Perry et al.* (Case No. C-023-1200). In *Harrington v. Perry*, the Court reviewed prior LTBB case law and followed the precedent of *Lonchar v. Victories Casino* (Case No. C-022-1200), finding that where Plaintiff's original actions relied upon the LTBB's "redress of grievance" clause for waiver of sovereign immunity

and suit against the Tribe, they were barred by the Tribe's inherent immunity from suit in tribal court. However, the Court opined that "there is still a question as to whether other provisions in the LTBB Interim Constitution, under Article VIII, ... operate as a waiver of sovereign immunity." Similar to pleadings and arguments in *Harrington v. Perry*, this issue has not been adequately raised, briefed, or argued in Plaintiff's "First response to Defendant's motion for summary disposition."

Article VIII of the LTBB Constitution reads: "No member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law." While it may be legitimately argued that the members of the LTBB, when they voted for the inclusion of these provisions in the LTBB Constitution, would not have reserved such rights to themselves if they could not be enforced in a tribal forum, this Court notes that this list contains fundamental rights, not statutory rights (such as a right to a minimum wage or a right to overtime pay). Further, fundamental rights are typically asserted to, and are remedied by, striking a law as unconstitutional or by enjoining the enforcement of a provision, not by ordering money damages. Here, Plaintiff has not demonstrated which fundamental right is implicated, or that there is even a fundamental right at issue. Without more, he has not shown that the tribal membership, in voting for its bill of rights, intended to waive the Tribe's immunity to enforce the purported right to overtime.

II. Whether Congress has abrogated the Tribe's sovereign immunity for actions enforcing "statutes of generally applicability" - here the Fair Labor Standards Act?

Neither has Congress abrogated the sovereign immunity of the Tribe by enacting the Fair Labor Standards Act. No one claims that Congress explicitly intended that the Fair Labor Standards Act apply to Tribes: "The Fair Labor Standards Act does not mention Indians.... Nothing in the legislative history suggests that Congress thought about the possible impact of the Act on Indian rights, customs, or practices." *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490, 493 (7th Cir. 1993). As a general matter, federal courts are unwilling to read ambiguous statutory language as a congressional abrogation of tribal sovereign immunity: "Indian tribes are immune from lawsuits or court process in both state and federal court unless 'Congress has authorized the suit or the tribe has waived its immunity.'" *Cohen's Handbook of Federal Indian Law*, Section 7.05, (2005 Edition) citing *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890-891 (1986); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977)). While Congress has the constitutional power to abrogate tribal sovereign immunity by explicit legislation, the U.S. Supreme Court "concluded that the Indian Civil Rights Act of 1968 did not authorize a tribal member to sue her tribe in federal court over alleged tribal violation of her civil rights. The Court explained that any abrogation of tribal sovereign immunity 'cannot be implied but must be unequivocally expressed.' It has recently reaffirmed this holding, stating that to abrogate tribal immunity, Congress must 'unequivocally express that purpose.'" *Id.* (citing *Santa Clara Pueblo v. Martinez*,

436 U.S. 49 (1978); *C&L Enters. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000); *Fla. Paraplegic Ass'n v. Miccosukee Tribe*, 166 F.3d 1126, 1131 (11th Cir. 1999)). No federal court has found that Congress "unequivocally expressed," within the provisions of the Fair Labor Standards Act, the intent to abrogate tribal sovereign immunity.

For this reason, Plaintiff, and some federal judges, rely on the argument that statutes of general applicability apply to Indians: "...the U.S. Supreme Court stated that a 'general statute in terms of applying to all persons includes Indians and their property interests.' Likewise, this court has stated 'general statutes, ... whose concerns are widely inclusive and do not affect traditional Indian or Tribal rights, are typically applied to Indians.' A statute of general applicability does not apply to the Indians if: '(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservation...." *Reich v. Great Lakes Indian Fish and Wildlife Commission*, at 499 (dissenting opinion citing *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 553 (1960); *Smart v. State Farm Insurance Co.*, 868 F.2d 929, 932 (7th Cir. 1989); and *Donovan v. Coeur d' Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)).

Plaintiff however, is filing his federal law claim in the wrong court. Further, he would need to convince a federal court that the Fair Labor Standards Act, as a statute of

general applicability, applied to tribes as well as Indians and that no exception is warranted. It is the federal forum that handles such claims and even federal law is unsettled on this question.

Plaintiff here appears to be arguing here that the Tribal Court, as a court of general jurisdiction, under its equity powers - that is its power to hear and decide cases where no applicable tribal council statute has been passed, may hear a claim under the Fair Labor Standards Act. This raises the question as to whether the Court should (or whether it has a practice of) hearing claims to generally remedy wrongs in employment matters. In the western system courts will issue non-monetary remedies such as an injunction or specific performance, especially when monetary damages cannot adequately redress the injury. Plaintiff is asking for overtime pay, which would satisfy his alleged wrong. Plaintiff's claim and requested relief are not of a nature typically handled in western courts of equity (courts of general jurisdiction). Plaintiff's claim and requested remedies derive from a statutory scheme - from law, and in this case, the law of a different sovereign. Until the LTBB Tribal Council adopts a similar law, Plaintiff lacks a cognizable quasi-FLSA claim in either law or equity in the LTBB Tribal Court.

III. Whether the Tribe has waived its sovereign immunity for suits similar to actions brought under the Fair Labor Standards Act by adopting the Employee Handbook?

This Court will construe Plaintiff's arguments as follows: that the LTBB Tribal Council's adoption of the Employee Handbook containing FLSA-like language, both

waives tribal sovereign immunity for employees in Tribal Court and creates subject matter jurisdiction in the Tribal Court with respect to the enforcement of its provisions.

As the Court held in the related case of Harrington v. Perry et al. (Case No. C-023-1200), the Tribal Council intended to establish a meaningful tribal employee grievance procedure. Section 711 of the Employee Handbook created a limited waiver of tribal sovereign immunity for tribal employees to grieve through the specified administrative process. The Court may review the legality and fairness of a denial of Plaintiff's request for overtime via an appeal of any administrative decision affecting his legal employment rights to the LTBB Tribal Court. Section 711 does not appear to limit the time for the filing of Appeals. This Court will construe Plaintiff's Civil Complaint as an appeal of the Tribe's Department of Education denial of a right to overtime pay pursuant to the Employee Handbook. The extent to which the Tribal Council intended to create FLSA-like rights and remedies is a question of first impression.

IV. Whether Plaintiff should be penalized for filing a frivolous action?

Defendant, in his Answer and Affirmative Defenses, asks the Court to order Plaintiff to pay costs and attorneys fees for filing a frivolous action. The Court recognizes Plaintiff's right to appeal pursuant to Section 711 of the Employee Handbook. The Court construes his original complaint as taking such an appeal. The action is not frivolous.

**IT IS HEREBY ORDERED:**

- (1) Defendant's Motion for Summary Judgment is denied.
- (2) Defendant's Motion for costs and attorneys fees is denied.
- (3) Plaintiff has 30 days from the filing of this order to notify the Court that he wishes to proceed with this appeal or the matter will be dismissed for lack of prosecution.

**IT IS SO ORDERED.**

Entered:

Honorable Pat Sekaquaptewa  
Judge Pro Tempore