IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JULIE A. NAKAI,

ORDER AND OPINION

Plaintiff,

03-C-0331-C

v.

HO-CHUNK NATION,

Defendant.

- -

This is a civil suit brought under 25 U.S.C. § 1302 of the Indian Civil Rights Act in which plaintiff Julie A. Nakai contends that defendant Ho-Chunk Nation violated the provisions of the Act when it discharged her from employment after she had been away from work for the birth of her child. The case is before the court on defendant's motion to dismiss on the ground of sovereign immunity. Defendant alleges that, as a federally recognized Indian tribe, it enjoys sovereign immunity from suit and neither it nor Congress has waived that immunity. I conclude that plaintiff has not shown that her suit against defendant comes within any exception to defendant's sovereign immunity so as to allow it to go forward in this court. Therefore, defendant's motion will be granted and the case will be dismissed.

For the purpose of deciding this motion, I find that plaintiff has fairly alleged the following facts in her complaint.

ALLEGATIONS OF COMPLAINT

Plaintiff Julie A. Nakai is a citizen of the state of Wisconsin and an enrolled tribal member of defendant Ho-Chunk Nation. Defendant is a federally recognized tribe with its principal offices in Black River Falls, Wisconsin.

Plaintiff was hired by plaintiff on December 19, 2000 [sic, should be 1999], to work as a floor sales supervisor at the De Jope Bingo Facility, which is located on defendant's tribal trust lands in Madison, Wisconsin. At the time, she was six months pregnant and had an estimated delivery time of March 15, 2000. On February 24, 2000, plaintiff was admitted to the hospital for complications of her pregnancy. She gave birth to her child on February 25, 2000. On February 28, 2000, she was discharged from her position at De Jope.

After her discharge, plaintiff filed suit against defendant in the Ho-Chunk Nation Trial Court. Her suit was dismissed on July 3, 2002, on the ground of sovereign immunity.

OPINION

Section 1302 of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, imposes certain obligations on Indian tribes. For instance, it prohibits tribes from infringing the free exercise

of religion and speech, denying accused persons the right to a speedy trial or denying the equal protection of the law "to any person within its jurisdiction." 25 U.S.C. § 1302(8). Although the Act appears to give persons such as plaintiff the right to sue a tribe that violates her right to equal protection, the United States Supreme Court has not read it as a waiver of the sovereign immunity that federally recognized Indian tribes possess. Individuals can claim the protections of § 1302 only in a petition for a writ of habeas corpus. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51-52 (1978) (Indian Civil Rights Act contains no general waiver of tribal sovereignty that would allow suits against tribes under Act; allowing habeas corpus remedy does not imply waiver because respondent is not tribe, but individual custodian of petitioner). The Court confirmed this tribal immunity from suit in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 760 (1998), holding that "tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."

Plaintiff argues that because she was denied an opportunity to sue in the tribal court, the rule announced in Santa Clara Pueblo does not apply to her. She likens her case to Dry Creek Lodge, Inc. v. Arapahoe &Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981), in which the court of appeals held that a non-Indian corporation that was denied a tribal forum could bring an Indian Civil Rights Act claim in

federal court. Plaintiff argues that like the Dry Creek Lodge corporation, she was deprived of any opportunity to obtain relief from the tribal courts or any other branches of the tribal government. Thus, she argues, she should be able to bring her case in federal court. She acknowledges that Dry Creek Lodge is not a decision of the Supreme Court, but notes that the Supreme Court's denial of certiorari supports the argument that certain circumstances exist in which a cause of action under the Act should be authorized.

Unfortunately for plaintiff, Dry Creek Lodge does not provide the legal support she needs. Indeed, the case appears to be an anomaly, dictated by judicial concern that the particular circumstances of the dispute between the lodge owners and the Indian tribe would lead to serious trouble unless a federal forum was made available to the parties. The tribe had blocked the road leading to the lodge because it crossed Indian land, leaving persons in the lodge confined there until the federal district court issued a temporary restraining order. The non-Indian plaintiffs sought a remedy in the tribal court, but were denied access to the court. The Tribal Business Council had directed that the matter be resolved through self-help. Given these unusual circumstances, it is not surprising that the court of appeals reached the decision it did and that the Supreme Court denied certiorari. In any event, plaintiff can draw no inference from the Court's denial of certiorari. Teague v. Lane, 489 U.S. 288, 296 (1989) ("'denial of a writ of certiorari imports no expression of opinion upon the merits of the case'") (quoting United States v. Carver, 260 U.S. 482, 490 (1923)).

In more recent decisions the Court of Appeals for the Tenth Circuit has sharply circumscribed the holding in Dry Creek Lodge, as defendant has explained in its brief. In distinguishing the facts in Dry Creek Lodge from thos in Santa Clara Pueblo, the court of appeals relied heavily on specific factual difference. In Dry Creek Lodge, the debate was not over a purely internal tribal matter and the tribal court was not available. The court of appeals has never found federal jurisdiction on the basis of the narrow exception carved out in Dry Creek Lodge. Ordinance 59 Assoc. v. United States Dept. of Interior Secretary, 163 F.3d 1150, 1158-59 (10th Cir. 1989). It appears that the Dry Creek Lodge exception is available only when the plaintiff is a non-Indian, the problem is not an internal tribal affair and no tribal remedy is available. Id.

Even if Dry Creek Lodge remained good law, it would not help plaintiff because she does not meet all of the tests that would bring her within the exception to the holding in Santa Clara Pueblo. Assuming she does not have a tribal remedy available to her, she is a member of the tribe and the issue concerns the tribe's management of facilities on its own land. (In fact, defendant suggests that she would have had a remedy in the tribal court had she not brought her case under 42 U.S.C. § 2000e(k) but instead filed a direct, original action under the Bill of Rights in defendant's constitution, which contains the same equal protection language as § 1302(8) of the Indian Civil Rights Act. It is not necessary to decide whether defendant's representation is correct.)

Plaintiff argues that in addition to the Indian Civil Rights Act, "four other laws are relevant to her cause of action." Plt.'s Br., dkt. #9, at 2. If she is suggesting that she has a cause of action under Title VII, 42 U.S.C. § 2000e(k), the Equal Employment Opportunity section of the Ho-Chunk Nation Personnel Policies and Procedure Manual, the Maternity Leave section of the Ho-Chunk Nation Personnel Policies and Procedure Manual or the Bill of Rights of the Constitution of the Ho-Chunk Nation, she did not plead it. It would have made no difference if she had. She has cited nothing in any of these other "laws" that would act as a waiver of the tribe's sovereign immunity from suit in this court. Whether she would be able to proceed on them in the tribal court is another question, but not one that must be decided in order to decide defendant's motion to dismiss.

ORDER

IT IS ORDERED that defendant Ho-Chunk Nation's motion to dismiss plaintiff Julie A. Nakai's complaint against it is GRANTED. The clerk of court is directed to enter judgment

for defendant and close this case.

Entered this 7th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge