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Ninth Circuit Upholds Tribal Preference in Employment

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In an important decision that will strengthen tribal sovereignty, the Ninth Circuit held in *EEOC v. Peabody Western Coal Co.*, 2014 WL 4783087 (9th Cir. 2014), that tribal preference does not violate federal anti-discrimination laws. The case, which originated more than ten years ago and two previous interim rulings by the Ninth Circuit, addresses the alleged distinction between preferences in favor of members of Indian tribes generally (Indian preference) and preferences, normally under tribal law, in favor of members of a particular tribe (tribal preference).

Peabody Western Coal Co. (Peabody) had entered into two leases with the Navajo Nation, which had been approved by the Department of the Interior (DOI) under the Indian Mineral Leasing Act of 1938, to mine coal on the Navajo reservation. The leases, like many other DOI-approved mining leases since the 1940s, required the lessee (Peabody) to give preference in employment to "Navajo Indians". The Equal Employment Opportunity Commission (EEOC) sued Peabody, contending that the tribal preference provision constituted national origin discrimination in violation of Title VII of the Civil Rights Act of 1964. Title VII excludes tribes from the definition of "employer", which insulates tribes themselves from enforcement actions. Title VII also includes an express Indian preference for employers on or near reservations:

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the U.S. Supreme Court had upheld Section 12 of the Indian Reorganization Act, 25 U.S.C. § 472, which directed the DOI to give preference in employment to qualified Indians. The U.S. Supreme Court concluded the Indian Preference was neither race nor national origin discrimination but, rather, a distinction based on the unique political relationship between the United States and tribes.

The EEOC had ignored the obvious political nature of the relationship between tribes and their citizens and the compelling policy arguments supporting tribes' preference for their own members. Seizing on the supposed ambiguity in Title VII's reference to "Indian(s)," EEOC insisted that Peabody could not comply with the tribal preference obligation in its lease with the Navajo Nation without committing "national origin discrimination" against members of other tribes and non-Indians.

The consequences of the EEOC's interpretation of Title VII, had it prevailed, were potentially disastrous. Tribes engage in economic development for two equally important reasons: to provide employment for tribal members and to generate revenue to fund tribal government. Similarly, tribes give their own members preference in bidding on tribal contracts in order to encourage entrepreneurship and the development of a private sector reservation economy. (Congress does the same thing with "Buy American" requirements for federal contracting.) Requiring contractors and lessees working on the reservation to adopt tribal employment and contracting preferences advances the same legitimate goals. Moreover, these goals are in complete accord with the policy of the federal government to encourage tribes' economic development as a means of reducing dependence on the federal government and promoting tribal self-determination. The Ninth Circuit had no difficulty identifying the flaws in the EEOC's reading of Title VII:

> We recognize that Mancari addressed a political classification providing a general Indian hiring preference rather than a tribe- specific preference. But Mancari's logic applies with equal force where a classification addresses differential treatment between or among particular tribes or groups of Indians.

Congress did not carve out from Title VII's prohibitions any similar exemption for preferences based on tribal affiliation. That Congress could have created such an exemption or exception, but saw no need to do so, suggests that it did not understand Title VII to reach tribal affiliation because such affiliation is a political classification.

Tribal hiring preferences were, and are, intended to further the policy goals embodied in the IRA and the IMLA. Nothing indicates that Congress viewed Title VII as a recalibration of its policy toward tribal communities that had been articulated in its prior legislation. Nor is there any suggestion that Congress viewed Title VII as a specific disapproval of DOI's longstanding and settled practice of approving tribal hiring preferences in mineral leases.

The Court's reasoning applies not only to the employment discrimination provisions of Title VII of the Civil Rights Act, but also to Title VI, 42 U.S.C. 2000d, which prohibits discrimination based on "race, color or national origin" in connection with "any program or activity receiving Federal financial assistance". Title VI is a high-impact statute because of its potential applicability to construction and other federally funded activities on and near reservations. Numerous federal agencies have their own extension regulations implementing the provisions of Title VI. Many federal agencies have interpreted Title VI and the equal opportunity clause mandated by Executive Order 11246 in a manner that bars Indian preference, except with respect to contracts within the scope of Indian Self-Determination Act exception at 25 U.S.C. § 450e(c).

Because of the large number of tribes within its jurisdiction, the Ninth Circuit's Indian law decisions are often given extra weight by other state and federal courts. The Court's decision in the Peabody Coal case will likely go a long way toward dispelling the misguided notion that tribes somehow violate federal civil rights laws when they provide their members with employment and contracting opportunities and require others operating within their jurisdictions to do the same.

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