LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIBAL COURT
7500 Odawa Circle ~ Harbor Springs, MI 49740 ~ (231) 242-1462

Albert Carey,
Plaintiff

v

Case No: C-062-1005
Hon. Jenny Lee Kronk

John Espinosa and Harlan Eckholm,
Defendants
_____/

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OPINION AND ORDER FOLLOWING MOTION TO DISMISS

PROCEDURAL HISTORY

On May 5, 2008, the Little Traverse Bay Bands (LTBB) of Odawa Indians Appellate Court remanded this case to the LTBB Tribal Court concluding that "it would be unfair to uphold the dismissal of Carey's suit against Espinosa and Eckholm for failure to file an original certificate of service with Tribal Court." See, May 5, 2008 LTBB Appellate Case #A-005-0507 (*Carey II*), p. 6.

Subsequently, on May 16, 2008, Plaintiff Albert Carey filed an Amended Complaint and Motion and Brief to Disqualify Hon. Jenny Lee Kronk with a certificate of service that these filings had been served on James A. Bransky. On June 5, 2008, Mr. Bransky

filed an answer, identifying himself as Defendants John Espinosa's and Harlan Eckholm's attorney.[1]

On June 12, 2008, Plaintiff filed a Notice of Hearing admitting that in his May 14, 2008 motion to "disqualify Hon [sic] Jenny Lee Kronk" he failed to "schedule a hearing date" prior to filing the motion as required by Court rule and that he had no objection for "the motion being decided without a hearing." On June 19, 2008, the Court issued an order denying Plaintiff's motion to disqualify Judge Kronk.

On July 28, 2008, Plaintiff filed First Interrogatories and Requests to Produce to Defendants and on July 29, 2008, Defendants filed a Motion Under LTBBRCP[2] XIV (e) to Cease Discovery Until Resolution of Affirmative Defenses. On August 5, 2008, Plaintiff filed Plaintiff's Memorandum Opposing Motion to Cease Discovery Pending Resolution of Affirmative Defenses. On August 7, 2008, the Court issued its order granting Defendants' motion to cease discovery. In its order, the Court found that Plaintiff's request was premature because the case could not proceed until the Court had jurisdiction after all pleadings had been filed as required by LTBBRCP V §§ 1 and 2(a) and VI.[3] Subsequently on August 21, 2008, Plaintiff's attorney filed a letter to the Court challenging its August 7, 2008 decision and chiding it for not scheduling a pre-trial hearing in June.

On September 3, 2008, Defendants filed a Motion to Dismiss Under LTBBRCP XVI (b) and on September 15, 2008, Plaintiff filed a Response to Defendants' Motion to Dismiss.[4]

On September 19, 2008, Defendants filed a Reply Brief and on September 23, 2008, filed Exhibit 1 that Defendants had neglected to file with the September 19 brief.

On September 23, 2008, Plaintiff filed a Motion to Expand 15-Page Limit on Response to Defendants' Motion to Dismiss, including an email attachment from

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[1] Mr. Bransky has not filed an appearance with the Tribal Court in this matter.

[2] Little Traverse Bay Bands of Odawa Indians Rules of Civil Procedure.

[3] LTBBRCP Rule V § 1 states that "The Court shall have jurisdiction from such time as the complaint or petition and summons are filed." See, LTBB Appellate Case # A-004-0606 (*Carey I*) at 10 where the Appellate Court stressed the importance of proper service of **summons** and complaint. **Emphasis added.** See also, *Carey II*, A-005-0507 at 5. The summons was finally filed in this matter on October 1, 2008.

[4] In the Response, Plaintiff's attorney argued that a letter sent to Mr. Lesky as an attachment to a motion for reconsideration after the Court had issued its April 16, 2007 order in this matter dismissing the case was his "summons". Court Clerk I, Esther Marcus, on September 15, 2008, sent a letter to Mr. Boal explaining that the Lesky letter contained no stamp that it had been filed with the Court on April 12, 2007, but, regardless, failed to meet the requirements for a summons set forth in Rule 4 of the Federal Rules of Civil Procedure (FRCP). Plaintiff was also directed to see the FRCP Appendix to forms and advised that the Tribal Court does not have jurisdiction until the complaint and summons are filed. On September 23, 2008, Plaintiff sent a letter to the Clerk, taking exception to her instructions, arguing that the FRCP did not apply, and seeking "procedural" advice. On September 24, 2008, Court Clerk II, Linda Harper, sent a letter to Plaintiff explaining why the FRCP did apply and that a summons must be filed within 120 days of the filing of the complaint. She further instructed him that even though he was past the 120 days, the Court would give him until October 1, 2008 to file with the court the summons in the proper form.

Defendants' attorney that offered no objection to expanding the page limit. On September 24, 2008, the Court issued its decision granting Plaintiff's motion to allow the filing of its response even though it exceeded the page limit set out in the court rules.

A hearing on Defendants' motion to dismiss was held on October 1, 2008, the Honorable Jenny Lee Kronk, LTBB Associate Judge presiding. At the hearing, Plaintiff asked the Court to consider a September 16, 2008 letter (marked Exhibit #1) he sent to Defendants. Although Defendants' attorney offered no objection to the consideration of the letter, he informed the Court that he believed that this was yet another attempt to expand the length of Plaintiff's written arguments to the Court.

POSITIONS OF THE PARTIES

Defendants' Position

At the outset, Defendants argue that the Court does not have subject matter jurisdiction in this matter because of the sovereign immunity of Defendants who were acting within the scope of their authority as employees of the Tribe, citing Article XVIII, Section A of the LTBB Constitution. Although Plaintiff argues that Defendant Espinosa as the Casino General Manager and Defendant Eckholm as Casino Marketing Director[5] had no authority to fire Plaintiff, Defendants disagree and point out that all the allegations complained of involved actions within the scope of Defendants duties and authority to hire and fire employees.

Even if the Defendants were acting beyond the scope of their duties and authority, they argue, they are not responsible for monetary damages under Article XVIII, Section B of the LTBB Constitution that provides for suits only for purposes of enforcing rights and duties guaranteed by the Constitution. Even if Plaintiff has a right to his job, Defendants argue, they cannot reinstate Plaintiff. Plaintiff admits that "only the casino has the power to reinstate plaintiff." See, ¶ 38, Amended Complaint.

In the alternative, Defendants conclude that Plaintiff has failed to state a claim upon which relief can be granted. By his own admission, Plaintiff refused to participate in the administrative hearing and, thereby, failed to exhaust his administrative remedies before initiating suit. See, ¶ 36, Amended Complaint.

In addition, Defendants say, Plaintiff's allegations cannot be construed to establish a *prima facie* case under the Tribe's Whistle Blower Protection Act (WBPA), WPS 2000-15, WOTC 6.11-1-6.1103 because Plaintiff failed to identify any illegal activity of the Defendants which is an essential element of a WBPA cause of action. Plaintiff avers that "he told tribal council members that the casino had given away money in its rewards program." See, ¶ 1, Amended Complaint. Defendants say giveaway points are overhead costs of doing business, not net revenues. Player Tracking systems, like LTBB's Players Club, Defendants point out, are common practices of casinos and allowed by LTBB and

[5] See, Exhibit 1, Defendants' Motion to Dismiss Under LTBBRCP XVI (b).

federal regulations. Neither Tribal or federal regulations set limits on point reward levels and Plaintiff cites no law to support his position.

In addition to failing to state a claim, the WBPA enacted in 2000 cannot be interpreted to allow for personal liability of employees under Article XXI (1) of LTBB Constitution which preempts Tribal statutes enacted prior to the adoption of the 2005 Tribal Constitution to the extent that the statutes are inconsistent with the new Constitution.

Plaintiff's Position

"Plaintiff Albert Carey agrees with Defendants' factual and procedural history, with one major and one minor exception." See, Response to Defendants' Motion to Dismiss, p. 1. The major exception is where Defendants say that "Carey did not state that what happened was merely a bad management decision. He did not concede it was not illegal." Supra at 2. "Plaintiff denies that Carey acknowledges that the casino "corrected" glitches in the point system earlier in 2005." Supra at 4.

Plaintiff reports that Defendant Eckholm fired Plaintiff on September 21, 2005, for sexual harassment, insubordination, violations of employee procedures, slandering upper management, and disclosure of in-house confidential information. See, October 5, 2005 Petition to Appeal, p. 2. Plaintiff maintains that Defendants violated the WBPA "by discharging him from the casino because he told tribal council members that the casino had given away money in its rewards program" (See, Amended Complaint, ¶ 1) and "due to uncovering irregular accounting practices" (See, Amended Complaint, ¶ 33).

Plaintiff says his termination was not within Defendants' duties and authority. Plaintiff argues that neither General Manager Espinosa nor Marketing Director Eckholm had the authority to fire him. Plaintiff states that he reported to the Guest Services Manager who did not report to either of the Defendants. But even if the Defendants had the authority to fire him, Plaintiff avers, they not only fired him but threatened him with legal action for slander. Plaintiff concludes that these threats remove any immunity Defendants might have otherwise enjoyed.

Plaintiff argues that Defendants are not officials of the Tribe, but only "at-will staff employees, like Carey". See, Response to Defendants Motion to Dismiss, p. 13. He opines that their duties had nothing to do with the Tribe. Plaintiff says he was acting in the scope of his duties on casino time when he investigated the revenue giveaway. Finally, Plaintiff says that Defendants' argument that a statute enacted in 2000 cannot be interpreted to allow personal liability of employees under the LTBB Constitution adopted in 2005 is a bizarre proposition and considers that the Defendants abandoned it.

In response to the exhaustion of administrative remedies argument, Plaintiff says that the WBPA does not require him to exhaust administrative remedies. Plaintiff avers that at the hearing that the hearing spokeswoman "excluded his observers[6], and insisted that

[6] Plaintiff's initial petition identified these three observers as "Tribal Council members—Fred Harrington Jr. and Rita Shanaquet (*sic*) and spiritual leader Tony Miron." See, Petition to Appeal, p. 3.

plaintiff sign a confidentiality form." (See, Amended Complaint, ¶36). Plaintiff further says that the grievance hearing violated his civil rights because of the requirement that Carey sign a confidentiality form. Plaintiff concludes that he would have been bound by the confidentiality statement and it would have been untruthful because he had already discussed details of his termination prior to the hearing. Further, the confidentiality requirement would have precluded him from discussing and evaluating the hearing afterwards, but the casino's human resources department was allowed to discuss it with others on a need to know basis. Plaintiff says confidentiality is not fair and the Appellate Court has said that fairness is the watchword in this case.

Finally, Plaintiff says that the possible unlawful activity he reasonably reported was the use of net revenue for illegal purposes.[7] Plaintiff says that the point's giveaway program used net revenues which can only be used to fund tribal government operations and programs; to provide for the general welfare of the Tribe; to promote tribal economic development; for donations to charity; and/or to help fund operations of local government.

In the alternative, Plaintiff says, Defendants immunity would bar litigation of retaliatory action prohibited by statute. Plaintiff concludes that the Defendants are not protected by sovereign immunity because they violated the law. Plaintiff contends that Defendants' immunity argument would bar practically all whistleblower suits. Plaintiff further concludes that Tribal Council is sensitive to immunity suits and could not have intended to bar practically all WBPA cases when it enacted the law in 2000. Finally, Plaintiff says tribal members are entitled to their day in court.

Plaintiff opines that the Defendants are wrong in saying that Plaintiff failed to state a claim under the WBPS because Plaintiff failed to identify any illegal activity he reported. Plaintiff says he did not answer the question directly in the motion to dismiss hearing on April 19, 2006 when the Court asked him what illegal act he reported. Plaintiff argues that he was not a sworn witness and thereby not bound to identify possible illegal activity during the motion to dismiss hearing. Plaintiff maintains that this silence cannot be used against him and that the Court misstated the law. In support of this position, Plaintiff cites *Cheyenne River Housing Authority* v. *Howard*, 23 ILR 6165, that instructs the Court on how to handle the examination of sworn witnesses. [8]

Further, Plaintiff says that even though the Defendant says that the player rewards programs are a common business practice for casinos everywhere and not illegal activity, Plaintiff disagrees and says that this constitutes an impermissible use of net revenues and

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[7] At the first dismissal hearing on April 19, 2006, Plaintiff was asked to identify for the Court what illegal activity he reported, but Plaintiff was non-responsive. The Court takes judicial notice that on May 22, 2006 (a month after the Court had issued its April 20, 2006 decision dismissing the case), Fred Harrington Jr. filed an affidavit with the Court with the net revenue argument as the illegal activity Defendants engaged in, in the Carey case. This argument was subsequently used in Plaintiff's argument on appeal and throughout the pendency of the case since that time.

[8] The Court notes that this case involved sworn witnesses not an unsworn advocate making legal arguments at a motion to dismiss hearing.

is not permitted. Finally, Plaintiff contends, that he only need have a reasonable belief of possible violation of illegal activity to prevail.

DISCUSSION

Sovereign Immunity

This Court agrees with Defendants that as General Manager and Marking Director of the Tribal casino, they were employees of the Tribe. Therefore, they are protected by sovereign immunity under Article XVIII, Section A of the LTBB Constitution that provides that "employees of the Tribe acting within the scope of their duties or authority shall be immune from suit." The Court further finds that Defendants, as upper management employees of the casino with the authority to hire and fire, were acting within the scope of their employment when they fired Plaintiff.

Even if Defendants were not acting within the scope of their authority with the Tribe, Article XVIII B provides that "employees who act beyond the scope of their duties and authority shall be subject to suit in Tribal Court for purposes of enforcing rights and duties established by this Constitution or other applicable laws." Even if Plaintiff could show that Defendants acted outside their duties and authority, he has failed to articulate any right that could be enforced by this lawsuit. Indeed, Plaintiff has conceded that he was an at-will employee of the casino with no right to his job.

Although Plaintiff says that the Tribe's WBPA, a tribal statute enacted in 2000 that predates the Tribe's 2005 Constitution, gives him a cause of action because he reasonably reported Defendants possible illegal activity, the Court disagrees. Plaintiff argues that the illegal activity was paying out too much in the casino's Players Club rewards system as a result of a computer program that was not properly tested which was an illegal payment of the Tribe's net revenues. Plaintiff cites no tribal or federal regulation that prohibits casino rewards programs or sets limits on point reward levels.

This Court agrees with the Defendants that the points awarded to clients who belong to the Tribe's Players Club is a marketing tool, *i.*e., a player tracking system that is a cost of doing business. It is an overhead cost and, therefore, not a net revenue of the Tribe. Therefore, Plaintiff has failed to identify possible illegal activity of the Defendants. Even if Plaintiff had been successful in identifying Defendants' violation of the law, the WBPA's remedy of reinstatement of the employee's position and back pay, if appropriate, is preempted by Article XVIII B of the Tribal Constitution that only allows the remedy of enforcement of rights and duties. Plaintiff has conceded that as an at-will employee of the casino, he had no right to his job and that Defendants have no authority to reinstate him. Further, the WBPA does not permit damages including interest and punitive damages that he has requested as relief and, under the Constitution, costs and attorney fees are likewise not allowed. See, Article XXI, Section 1 of the Constitution that provides that "All actions of the Little Traverse Bay Bands of Odawa Indians taken before the effective date of this Constitution shall remain in full force and effect to the

extent that they are consistent with this Constitution." The Court declines to address Plaintiff's argument of what the Tribal Council intended in passing the WBPS in 2000 or what the Tribal citizens intended more recently when they approved the Constitution in 2005.

Exhaustion of Administrative Remedies

The Tribe has provided that employee grievances shall be addressed by an administrative process. See, Tribal Council Resolution # 010806-04. Therefore, this Court must conclude that the LTBB executive and legislative branches, in establishing an administrative process to resolve employee complaints, made a conscious choice about the appropriate forum for resolving employment disputes. The primary concern must be that employees have a forum available to them before which they can present their claims. Plaintiff was afforded an opportunity to participate in an administrative process to contest his termination as provided in the Gaming Regulatory Employee Handbook. However, the Plaintiff refused to sign the confidentiality agreement required of all participants and, therefore, chose not to participate in the forum made available to him by the Tribe.

There is no evidence in the record to indicate that Defendants Espinosa and Eckholm designed the grievance hearing process or were involved at all in Plaintiff's administrative hearing. Indeed, the Defendants were merely tribal employees implementing a grievance procedure approved by the Gaming Board of Directors. If the administrative hearing process was flawed and somehow violated Plaintiff's civil rights, the proper Defendants would be those who designed the procedure and not tribal employees who were following a grievance procedure established by their superintending authority, the Gaming Board of Directors.

Even if Espinosa and Eckholm are the proper defendants, Plaintiff has failed to identify a protected property right necessary to proceed on a constitutional due process claim. Indeed, Plaintiff concedes that he was an at-will employee, therefore having no right to continue in his job at the casino. See, *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1988), where the civil service employee was able to show a property right in continued employment only because the Ohio statute had established that state employees had a protected property interest to retain their positions. See also, *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) explaining that property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Even if Plaintiff could show that his job at the casino was a protected property right, there are no allegations to support a finding that he was not given adequate notice of the grievance hearing (indeed, he showed up for the hearing), or that he was denied an opportunity to be heard. By his own admission, Plaintiff elected not to participate in the hearing because he determined that signing a confidentiality statement was "unfair."

Failure to State a Claim upon Which Relief May Be Granted

Finally, this Court agrees with Defendants argument that Plaintiff's allegations cannot be construed to establish a *prima facie* case under the WBPA, because he failed to identify activity that he reasonably believed was possible illegal activity, an essential element of a WBPA cause of action. Casino giveaway points, even if excessive, are overhead costs of doing business, not net revenues. Even if Plaintiff were able to establish a *prima facie* case under the WBPA, the Constitution has preempted much of the protection it provided. The only remedy left to Plaintiff would be the reinstatement of his job, but only then if it were a right to which he is entitled. However, Plaintiff has conceded that as an at-will employee he has no right to his casino job and that Defendants have no authority to reinstate him. Therefore, Plaintiff has failed to state a claim upon which relief may be granted.

CONCLUSION

For all of the reasons articulated above, Plaintiff's cause of action is barred by the sovereign immunity of the Defendants and for failure to state a claim upon which relief can be granted.

Therefore, it is ORDERED that Defendants' motion to dismiss is GRANTED and the case is DISMISSED with prejudice.

October 9, 2008

October 9, 2008

Hon. Jenny Lee Kronk, LTBB Associate Judge