

**LITTLE TRAVERSE BAY BANDS OF
ODAWA INDIANS**

**Tribal Court
Civil Division**



Court Mailing Address: 7500 Odawa Circle, Harbor Springs, MI 49740

Phone: 231-242-1462

AARON ANAMEKWAN WEMIGWASE,

Case No.: C-216-1215

PLAINTIFF,

v.

OPINION AND ORDER

VINCE COOK, LTBB GAMING
REGULATORY DIRECTOR & ANDREA
COWLES, LTBB GAMING REGULATORY
LICENSING MANAGER

DEFENDANT.

This matter is before the Court on a motion to Dismiss and/or for Summary Disposition in response to a Complaint filed against Defendants on December 16, 2015. The Complaint claims violations of Tribal Law as more fully set forth with responses below.

After review of the rationale of the Defendants, and consideration of claims, responses, and briefs of the parties, this Court finds that the Defendants are entitled to sovereign immunity under the Tribal Constitution in their official and individual capacities as they acted within the scope of their duties and authority. Therefore summary disposition shall be granted and the Complaint against the Defendants dismissed.

Summary of Complaint and Answer

Jurisdiction and Venue

Parties agree on jurisdiction and venue except defendant would state jurisdiction is subject to plaintiff pleading and proving avoidance of defendant's immunity from suit. (Complaint para 1-16)

Count I

Violation of Plaintiff's rights as set forth in the Fair Employment Statute (FES) WOTCL 14.108(a).

Plaintiff sets forth the circumstances of events that led to the suspension i.e. a no contest plea to a civil disorderly conduct violation in Wisconsin.

Plaintiff states that his gaming license was suspended 8/7/15 for failing to meet licensing standards set forth in the LTBB gaming regulatory commission regulations. These regulations allow for suspension for any criminal offense whether committed in this state or any other jurisdiction that is or would be a crime under the Michigan Penal Code. A hearing was requested before the Gaming Regulatory Commission (GRC) on 8/13/15 and a hearing was held on 9/3/15. A copy of the transcript was provided to the Court. Plaintiff maintains the FES was violated by unlawfully altering the terms and conditions of employment by above action. Damages were in the form of lost wages, retirement, health, and dental benefits during suspension. Plaintiff requests compensatory and punitive damages in the amount of \$50,000 as specifically allowed, plus costs.

Defendants acknowledge the reasons for the suspension in part and in addition point out that the GRC has authority to review background information for a suitability determination. As to wages and benefits, it is within the Gaming Manager's discretion to pay wages and benefits in the event of suspension.

Count II

Violation of Whistle Blower Protection statute (WPS) WOTCL 14.404(A),(B).

Plaintiff states that on 11/12/13 he filed an incident report alleging that Defendant Cook violated the Minimum Internal Control Standards. Based on that complaint upon information and belief, disciplinary action was taken against Defendant Cook. Plaintiff maintains that Cook retaliated against Plaintiff by suspending his license in violation of WPS. He seeks wages, court costs and attorney fees.

Defendant Cook acknowledges he was subject to investigation and disciplinary action, but leaves plaintiff to his proofs on other statements and denies as untrue any retaliation or entitlement to any relief.

Count III

Defamatory statements in Violation of Tort statute. WOS 2014-012 sec.VI (B),(1),(2).

Plaintiff states that the defendants provided written and verbal statements to the GRC and Department staff that the Plaintiff had violated the licensing standards. They made these

statements with knowledge they were false and/or with reckless disregard of the truth or falsity, or with negligence in failing to ascertain the truth or falsity of the statement. Damages were lost wages and benefits.

Defendants maintain that prehearing information was provided to the GRC strictly within the regulations which included information of a violation. Otherwise defendants denied as untrue any disregard etc.

Count IV

Violation of GRC regulations by suspending license.

Suspension of the license was based on sections IVC3a and IVC4 of GRC Regulations. Therein it provides that an individual is ineligible for issuance of primary management license under 3a if convicted, entered plea of guilty or no contest to any criminal offense within the immediately preceding five years. C4 states an individual is ineligible for said license if it is determined by the GRC that the individual has participating in various activities---what is termed and the GRC calls "suitability". Plaintiff says defendants are not members of the GRC and that prior to suspension the GRC has not made any "suitability" determinations about Plaintiff. He maintains that defendants knew when they suspended plaintiff he was not in any criminal activity for the prior five years, and that the GRC had not made any suitability determinations under C4. Therefore the suspension of the license was not in accordance with GRC regulations or Licensing Policies and Procedures. As a result Plaintiff was unable to work for three weeks and suffered lost wages. Plaintiff further states that the Department has suspended licenses based on non-criminal city ordinance violations for the past 15 years. This pattern and practice is beyond the scope of their duties and authority as set forth in the Gaming Regulations and Policies.

Defendants respond first that defendant Cowles did not suspend and acknowledge that defendant Cook did so upon reasonable cause to believe that the licensee may have violated any condition or requirement imposed on the licensee by the GRC or applicable laws. Section 3 and 4 were referenced and in accordance with the past practice of the GRC. Defendants further state that they are charged with the responsibility for oversight and compliance with Federal, State, and Tribal law as well as regulations. Defendants state that there are civil penalties that can impact suitability for a license. Defendants state that it is within the Gaming Operations general manager's discretion as to lost wages and benefits during a suspension. They deny that such practice is beyond the scope of their duties.

Summary of Motion to Dismiss and/or Summary Disposition

Defendants request a dismissal from the Court on two specific grounds: failure to exhaust administrative remedies and/or Constitutional sovereign immunity. Defendants state that the Plaintiff should have taken a review to Tribal Court if dissatisfied with the result of the licensing

hearing. Further, that the Tribal Constitution provides sovereign immunity from suit unless there is a clear and express waiver of that immunity and actions that could subject Tribal officials and employees to suit if they act beyond the scope of their duties and authority. Because Defendants have acted within the scope of their duties and authority, the complaint as a matter of law, should be dismissed.

Plaintiff, in response to the motion, states that a review/appeal in Tribal Court of the GRC's determination was limited to "procedural error that significantly prejudiced the licensee". Plaintiff feels that the GRC had given Plaintiff all the relief he could have received. As to the Constitutional immunity, Plaintiff claims that Defendants lacked authority to suspend on the specific acts i.e. "Criminal" v. "Civil" offense. Further, Plaintiff complains that the addition of the "suitability" factor in the suspension went beyond their authority, as it is the GRC that makes those determinations.

Discussion

In their briefs, as well as oral argument to the Court, both parties cited and referenced the following Odawa Appellate Court cases: *LTBB et al. v Harrington and McNamara* A-022-1212; *LTBB GRC v. Roberts* A-018-0811; *Carey v Espinosa and Eckholm* A-011-1008 (Carey III); and *Carey v. Victories Casino et al.* A-004-0606 (Carey I). These cases reflect the (developing) body of Tribal law as to Regulatory functions as well as Sovereign immunity of officials and employees from suit.

Exhaustion of remedies

Defendants claim that Plaintiff should have appealed the decision of the GRC to Tribal Court, and since that did not occur, they should not now complain. Plaintiff feels that the relief given by the GRC, that is, lifting the suspension subject to conditions was all he was going to receive.

This Court finds the Plaintiff's position to be persuasive, particularly in the terms of the process before the GRC. In fact, he did receive the relief he sought, and as such acknowledges that the Tribal Court has limited delineated power in that regard. However, as noted below, this may not be as availing as Plaintiff would believe.

Sovereign Immunity

An analysis of waiver of Sovereign Immunity begins with the Constitutional provisions Article XVIII A and Article XVIII B.

ARTICLE XVIII. SOVEREIGN IMMUNITY

A. Tribal Immunity From Suit

The Little Traverse Bay Bands of Odawa Indians, including all subordinate entities, shall be immune from suit except to the extent that the Tribal Council clearly and expressly waives its sovereign immunity, and officials and employees of the Tribe acting within the scope of their duties or authority shall be immune from suit.

B. Suit Against Officials and Employees

Officials and employees of the Little Traverse Bay Bands of Odawa Indians 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.

A comprehensive discussion and analysis is set forth in the *Roberts* decision. First, the Roberts Court finds the GRC, as a subordinate entity of the Tribe, to be immune from suit except to the extent expressly waived. Such a waiver can be found in the Appeal process in licensing for “procedural error”, but in that limited area only. In this case, Plaintiff chose not to proceed because he could get no further relief. (It is noted that the *Roberts* case did originally involve Gaming Commission members and Director, who were dismissed from the case by consent.)

Having determined that the GRC is immune from suit, this Court next looks to suits against officials and employees. Plaintiff here maintains several counts against the defendants in their individual and official capacities. All share a common legal thread. That is, that they acted beyond the scope of their duties and authority. Should the Court find that they did act within their scope of duties and authority, all claims must fail, as they have immunity. (But see *Carey I* footnote 2)

Plaintiff makes several salient points. The suspension was for, first, a civil offense and not a criminal offense, and not appropriate, and second, that including the “suitability” determination provision is not the duty of the Gaming Director but rather the Gaming Commission. The implication if not outright assertion is that there is no direct delegation of authority from the GRC to handle suspensions in that manner. From the record, as well as the transcript of the GRC hearing, it appears that the Gaming Commission was following a well-established process for dealing with such issues-- a “past practice” for fifteen years. The Court notes, that the hearing was conducted in an informal yet highly appropriate format, in which all parties, including Plaintiff, were allowed to testify. Such testimony elicited the fact the Gaming Director and the Licensing manager were following the practice with the concurrence of the GRC.

