UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 14 June 2013

ALJ NO.: 2013-CFP-00003

TAMMY A. STROUD,
Complainant

v.

MOHEGAN TRIBAL GAMING AUTHORITY,
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT

I. Statement of the Case

This proceeding arises from a complaint of discrimination brought by Tammy A. Stroud ("Stroud" or "Complainant") against Mohegan Tribal Gaming Authority ("MTGA" or "Respondent") under the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567, enacted July 21, 2010, and to the extent applicable, section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A and the procedural regulations found at 29 C.F.R. Part 1980 (2004).

II. Procedural History

Complainant initially filed claims of discrimination under Section 11(c)(1) of the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 660(c); Section 806 of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A; and Section 1057 of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. § 5567, with the U.S. Department of Labor, Occupational Health and Safety Administration ("OSHA"). On March 12, 2013, the Secretary of Labor acting through the Regional Administrator for OSHA, dismissed Complainant's SOX complaint for lack of jurisdiction and Complainant's CFPA complaint for failure to demonstrate a protected activity. Complainant's Section 11(c) OSH Act complaint remained with OSHA for further investigation.

On March 28, 2013, Complainant appealed OSHA's dismissal of her SOX and CFPA complaints to the Office of Administrative Law Judges. On April 5, 2013, a "Notice of Assignment and Hearing and Prehearing Order" issued. On April 23, 2013, the Court received "Complaintain's (sic) Request/Motion for Initial Disclosure" ("Initial Disclosure Request"). The Initial Disclosure Request demonstrated Complainant's misunderstanding of the purpose of an

initial disclosure, and was better suited as a discovery request. Also on April 23, 2013 the Court held an on the record prehearing telephone conference. The purpose of the telephone conference was to acquaint both parties with the form and schedule of the proceedings, to address any concerns and questions about the purpose and scope of the discovery process, and to ascertain whether Complainant had retained counsel.[1] Both parties were reminded of the scheduled deadlines. During the telephone conference, Complainant was asked to clarify the relief requested and was informed of her right to remove the proceedings to U.S. District Court.

On May 14, 2013, Respondent filed a "Motion for Summary Decision" ("Respondent's Motion"). Respondent argues Complainant's appeal should be denied because MTGA is not subject to SOX retaliation claims and because Complainant failed to demonstrate a protected activity during the proceedings below.[2] Respondent further argues that it is "covered by the federal doctrine of Indian tribal sovereignty and [is] immune from unconsented suit." Respondent's Motion at 2.

By prehearing order, Complainant had ten days to respond to Respondent's Motion. On May 22, 2013, Complainant filed "Complainant's Motion for Extension of Time to Respond to Summary Decision" ("Complainant's Motion for Time"), via facsimile. Complainant indicated she was *pro se* and might miss the postmark deadline because of her inexperience and difficulties in obtaining supporting evidence. Complainant requested an extension of the response deadline to Friday, June 12, 2013. Complainant's Motion for Time at 1.

On May 28, 2013, Respondent filed "Respondent's Objection to Motion for Extension of Time" ("Respondent's Objection"). Respondent alleged "Complainant's Motion, if granted, would significantly disrupt the schedule for any hearing that would be required in this matter." Respondent's Objection at 1. However, Respondent did "not object to a reasonable extension of time for the Complainant to file a responsive pleading to the [Motion for Summary Decision], but any extension should be short and reasonable in scope." Respondent's Objection at 2.

On May 28, 2013, the Court issued an "Order Granting Motion for Extension of Time to File Response," granting Complainant until June 5, 2013, to file her response to Respondent's Motion. Additionally, the Court *sua sponte* ordered the hearing date moved to June 25, 2013, and set the deadline for the Joint Pretrial Stipulation to June 21, 2013. All other dates in the prehearing order were preserved.

On May 29, 2013, Complainant filed "Complaintain's (sic) Motion to Compel/Motion for Sanctions" ("Complainant's Motion to Compel"). Complainant indicated a frustration with Respondent's attorney for a perceived unresponsiveness to discovery requests and failure to adequately communicate. Complainant's Motion to Compel at 1. Complainant indicated her calls to Respondent's counsel went unanswered, that Respondent failed to produce the requested discovery, and her "employee data files are riddled with false and unfactual events that can be proven by" reference to select video surveillance recordings. Complainant's Motion to Compel

[1] Claimant was *pro se* throughout the entirety of these proceedings.
[2] Respondent also objected to the Secretary's findings concerning Complainant's OSH Act, Section 11(c) claim, however that claim remained with OSHA and is not before this Court. As such, any arguments regarding Section 11(c) are not relevant.

at 2. Lastly, Complainant requested this Court: "Impose a sanction on the Respondent for reasonable fines, costs, and fees in the amount of [$]1,000.00 or highest allowable for obstructing justice and improper behavior of its counsel in this case." Complainant's Motion to Compel, at 3.

On May 30, 2013, Respondent filed "Respondent's Objection to Complainant's Motion to Compel and Motion for Sanctions" ("Objection to Motion to Compel"), via facsimile and mail. Respondent alleges "Complainant has made no formal discovery request," and all communications regarding discovery have primarily consisted of telephone conversations or voicemail messages. Objection to Motion to Compel, at 1. Respondent further alleges no such "surveillance" exists at this point in time as the data files are not typically preserved for such a long period of time. Objection to Motion to Compel, at 2.

On June 5, 2013, Complainant filed "Complaintain's (sic) Reply to Respondent Motion for Summary Decision" ("Summary Decision Response"). Complainant's Summary Decision Response correctly indicated Complainant's OSH Act, Section 11(c) claim is not before this Court and is not relevant to these proceedings. Complainant also argues, albeit with a lay sophistication, Respondent clearly abrogated its sovereign immunity to unconsented suit under SOX through the harassment and discrimination policies set out in its employee procedure manuals. Summary Decision Response, at 2-3.

Complainant offers no legal rebuttal to Respondent's argument for dismissing Complainant's CFPA claim, and instead argues Respondent made an error of fact in describing the title and duties of her position at the casino and as such, misrepresented her protected status. Summary Decision Response, at 3.

III. Analysis

Respondent alleges Complainant's SOX claim should be dismissed because Respondent does not have a class of securities registered under section 12 of the Securities Exchange Act of 1934, is a voluntary filer under section 15(d) of the Securities Exchange Act of 1934, and is therefore outside the scope of the statute's whistleblower provisions. Further, Respondent argues it enjoys sovereign immunity and is therefore immune from unconsented suit under SOX. Respondent's Motion at 2 and 6. Complainant essentially argues Respondent abrogated its sovereign immunity to suit under SOX when it instituted "Policy # 67," stating: "In accordance with Mohegan Sun Policy #24, Harassment/Discrimination, retaliation against employees who raise concerns related to Sarbanes Oxley will not be tolerated, whether such retaliation is by an officer, employee, agent or a contractor of the Mohegan Tribe or of the Mohegan Tribal Gaming Authority (MTGA)." Summary Decision Response, Exhibit A.

Assuming Complainant has successfully shown MGTA waived its sovereign immunity under the SOX retaliation provision, Complainant has still failed to show Respondent is the kind of entity SOX's whistleblower protections apply to. The language of the statute is clear; SOX's whistleblower protections only apply to a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) . . . ." 18

U.S.C. 151A(a). No party has contested Respondent's assertion that it does not have a class of securities registered under section 12 of the Securities Exchange Act of 1934, nor mandated to file under section 15 of the Securities Exchange Act of 1934. Respondent avers it files under section 15 voluntarily for the purposes of maintaining compliance with lending agreements, not out of any statutory mandate. Respondent's Motion, at 6.

Therefore, assuming Complainant can show Respondent willingly abdicated its sovereign immunity, Complainant is unable to demonstrate Respondent is in the class of employers normally regulated by SOX whistleblower protections. Therefore, Complainant's SOX section 806 claim must be DISMISSED for lack of subject matter jurisdiction.[3]

Respondent also argued Complainant's CFPA claim should be dismissed because Complainant failed to establish a prima facie case in the proceedings below; the Secretary found Complainant was unable to demonstrate she engaged in any protected activity. Respondent's argument is rejected as a gross misunderstanding of the purpose of a *de novo* hearing. The evidentiary record below is not binding on the decision of this Court, and the Complainant has the opportunity to present evidence not adduced during the prior proceeding. Therefore, Respondent's argument resting on the record below is disregarded as immaterial to the case at hand.

However, Respondent further alleged sovereign immunity against Complainant's CFPA claim. Tribal sovereign immunity is a matter of federal law that more closely mirrors the sovereign immunity of foreign governments rather than the sovereign immunity of the various states. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-59 (1998). Tribal sovereign immunity successfully insulates qualifying Native American tribes from unconsented suit barring explicit congressional repudiation or a clear abrogation of sovereign immunity by the tribe. Id. at 759. There is no indication or claim that the Mohegan tribe is not a sovereign nation.

The text of the CFPA contains no explicit repudiation of tribal sovereign immunity, nor has any evidence been presented indicating the MTGA abrogated its sovereign immunity for the whistleblower provisions of the CFPA. Therefore, I must grant Respondent's Motion for Summary Decision and Complainant's section 1057, CFPA complaint must be DISMISSED.

[3] I note the analysis in this proceeding is similar to Administrative Law Judge Purcell's decision in the matter of *Basil Hylton v. The Seminole Tribe of Florida*, 2010-SOX-00014 (March 1, 2010), affirmed by the Administrative Review Board in ARB Case No. 10-078 (October 31, 2011). In *Hylton*, Judge Purcell found section 806 of SOX "does not contain any express abrogation of Respondent's sovereign immunity with respect to the whistleblower provisions in SOX." *Hylton*, 2010-SOX-00014 at 3. However, Judge Purcell concluded his analysis with the determination that "Respondent does not possess a class of securities registered under section 12 of the Securities Exchange Act of 1934 nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934." *Id*. at 4. Thus, as in the instant case, the whistleblower provisions of SOX do not apply to an entity that is not publicly traded or required to file reports under section 15(d). This must be the first inquiry and it is separate and distinct from the defense of tribal sovereign immunity.

IV. Order

Based on the foregoing, Respondent's Motion for Summary Decision is **GRANTED**, and Complainant's SOX and CFPA claims against Mohegan Tribal Gaming Authority are **DISMISSED**. Complainant's Motion to Compel/Motion for Sanctions is **DENIED**. The hearing scheduled for June 18, 2013 is hereby **CANCELLED**.

SO ORDERED.

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

NOTICE OF REVIEW – CONSUMER FINANCIAL PROTECTION ACT: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶ 5.c.(48) of Secretary's Order 01-2010, Delegation of Authority and Responsibility to the Administrative Review Board, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. §5567. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.

NOTICE OF REVIEW – SARBANES-OXLEY ACT: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).