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September 29, 2014

Ninth Circuit Rejects EEOC's Challenge of Tribal Hiring Preferences

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Tribal hiring preferences based on political classifications are permissible under Title VII of the 1964 Civil Rights Act, the U.S. Court of Appeals for the Ninth Circuit recently held in *EEOC v. Peabody W. Coal Co.*[1] The first federal circuit court of appeals to address the question in such detail, the Ninth Circuit rejected the Equal Employment Opportunity Commission's claim that a mining company's implementation of a tribal hiring preference—based on leases drafted by the U.S. Department of the Interior—violated Title VII's prohibition of national origin discrimination. The case presented an unusual posture, with the EEOC being adverse to the Department of Interior, which itself was represented by the Department of Justice.

Factual Background

Peabody Western Coal Co. ("Peabody") mines coal at the Black Mesa Complex and Kayenta mines on the Navajo and Hopi reservations in northeastern Arizona under leases with the tribes. In 1964 and 1966, a predecessor of Peabody's entered into two leases with the Navajo Nation ("the Nation") that allow Peabody to mine coal on Navajo reservation land; the leases require Peabody to give preference in employment to "Navajo Indians." Both leases were approved by the U.S. Department of the Interior ("Interior") under the Indian Mineral Leasing Act of 1938[2] ("IMLA"). Since at least as early as the 1940s, Interior-approved mineral leases, including the two with Peabody, generally include provisions for tribal hiring preferences.[3]

In 1998, two Hopi Indians and one Otoe Indian filed EEOC charges alleging they applied for jobs with Peabody but were not hired because they were not members of the Nation. The EEOC later sued Peabody in 2001 and claimed Peabody's hiring preference constitutes national origin discrimination under Title VII. Following a tortured 13-year procedural history involving joinder and sovereign immunity issues, the Ninth Circuit finally addressed the EEOC's Title VII claim that Peabody's preference for Navajo Indians in particular constituted discrimination on the basis of national origin.

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1 --- F.3d ---, 2014 WL 4783087 (9th Cir. Sept. 26, 2014).

2 25 U.S.C. §§ 396a, 396e.

3 In his deposition during the District Court proceedings, former Secretary of the Interior Stewart Lee Udall stated that the hiring preferences were included in the leases based on trust obligations the U.S. government has to the Nation. *EEOC v. Peabody W. Coal Co.*, 2012 U.S. Dist. LEXIS 150091, *8-9 (D.Ariz. Oct. 18, 2012).

Tribal Preferences Under Title VII

Title VII includes a provision known as the "Indian Preference Exemption":

> Nothing contained in this title 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.[4]

In 1988, the EEOC issued a policy statement[5] in which it opined that the Indian Preference Exemption permits private employers to offer employment preferences solely based on Indian status generally, *not* on tribal affiliation.

In a 1998 Ninth Circuit opinion, the court gave deference to EEOC's Policy Statement and appeared to reject the position that the Indian Preference Exemption allows private employers to offer employment preferences on the basis of a specific tribal affiliation. *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (*Dawavendewa I*) ("An employment practice of giving preference to members of a particular tribe does not afford preference to an applicant 'because he is an Indian,' but rather because he is a member of 'a particular tribe.' Such a preference is not consistent with the objectives of the Indian Preferences exemption.").[6]

The Ninth Circuit in *Peabody*, however, determined to answer a different question: even if the Indian Preference Exemption does not *exempt* the practice of offering preferences to members of particular tribes, is giving the preference itself discrimination on the basis of national origin? In other words, if a preference does not violate Title VII, is there a need for an exception?

Tribal Preferences Do Not Constitute National Origin Discrimination When They Are Used to Further the Federal Government's Trust Obligations

While the court acknowledged that discrimination on the basis of specific tribal affiliation can sometimes constitute national origin discrimination, it held that in many other circumstances, "federal law yields out of respect for treaty rights or the federal policy of fostering self-governance." That is, whether a preference based on specific tribal affiliation is permissible or impermissible largely depends on the context, and whether the court will view that preference as furthering the political goals of the tribe.

In *Peabody*, the court noted that the relevant leases had been approved under the Indian Mineral Leasing Act of 1938, which sought to create uniformity among mining practices on tribal lands. Earlier cases described the IMLA as "aimed to foster tribal self-determination by giving Indians a greater say in the use and disposition of the resources found on Indian lands."[7]

The Ninth Circuit had little difficulty concluding that tribal preferences related to fulfilling the goals of the IMLA are permissible, and involve a permissible political classification rather than one based on national origin. This was true even though the IMLA itself does not mention or require employment preferences; rather, it was the Department of the Interior that sought to negotiate the tribal affiliation preferences into relevant mining leases.

Significantly, numerous federal statutes relate to furthering tribal self-government. For instance, the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975 provides federal funding through the Bureau of Indian Affairs for many tribal government projects. That statute expressly allows for tribal law to govern contracts with third-party entities like private employers. If a tribe requires employers on tribal land to offer a preference to their members, that law would govern. Such a preference regime would likely pass muster under *Peabody's* rationale because the court held it did in the context of IMLA.

But the court in *Peabody* appeared to go further. It held that tribal affiliation preferences furthered the goals of the Indian Reorganization Act of 1942, a statute much broader than either IMLA or the ISDEAA. Because of the breadth of that statute, the court's position conceivably validates every affiliation preference throughout Indian Country.

4 42 U.S.C. § 2000e-2(i). Similarly, tribal governments are exempt from the definition of "employer" under Title VII. 42 U.S.C. § 2000e–2(a).

5 EEOC, *Policy Statement on Indian Preference Under Title VII* (May 16, 1988), *available at* http://www.eeoc.gov/policy/docs/indian_preference.html.

6 A subsequent Ninth Circuit opinion appeared to limit this holding. *See Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002) (*Dawanvendewa II*). During oral argument in *Peabody*, Judge Fletcher acknowledged that the two opinions in *Dawavendewa* appear to be inconsistent.

7 2014 WL 4783087 at *4 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 495 (2003)).

But, once more, the court appeared to go even further by indicating that whether a specific federal statute like the IMLA or IRA is at play is not dispositive as to whether a preference is based on national origin or political considerations. Instead, it seemed to hold that Title VII's prohibition on national origin discrimination does not apply to specific tribal affiliation preferences at all: "The Indian preference exemption contained in [42 U.S.C. 2000-e2(i)] is therefore necessary to clarify that Title VII's prohibition against racial or national origin discrimination does not extend to Indians." It noted that Title VII's silence regarding whether specific tribal affiliation preferences are permissible indicates they are permissible because "Congress could have created such an exemption or exception, but saw no need to do so." Although the court did not expressly overrule *Dawavendewa I* and *II*, it is difficult to see what remains of those cases after *Peabody*. It now appears that nearly any employment preference will pass muster if it is provided in the context of furthering the tribe's economic or self-governance interests.

Practical Considerations

Employers conducting business on tribal reservations face a host of challenging legal issues and a patchwork of federal, state, and tribal laws. In *Peabody*, for instance, two arms of the federal government were adverse to one another, each one purporting to tell a private employer that a preference was either mandatory or illegal. Nevertheless, *Peabody* offers at least some clarification going forward with respect to specific tribal affiliation preferences and indicates that most preferences will be upheld. And while the decision applies exclusively to the states within the Ninth Circuit for now, it is likely that other circuits will look to *Peabody* if they confront the same issue.

Given the *Peabody* decision, an employer who either engages in, or expects to engage in, business on tribal land and who may be required to provide an employment preference to certain members of the tribe connected to that land, should:

- Assess current or future contracts to determine whether they contain a requirement for employment preferences;
- Understand that tribal governments may seek to include a specific tribal affiliation preference in future contracts;
- Determine, where possible, whether the preference can fairly be read to stem from a federal interest in promoting tribal self-government;
- Continue monitoring legal developments in this area because EEOC may seek to have the panel's opinion reviewed *en banc* or may appeal to the U.S. Supreme Court; and
- Consult counsel regarding any EEOC, state, or local agency charges of national origin discrimination that employees may file.

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