

Filed  
out NOV 7 1997

WIK

IN THE COURT OF THE  
LOWER SIOUX COMMUNITY IN MINNESOTA

LOWER SIOUX INDIAN RESERVATION

STATE OF MINNESOTA

Margaret Lamote,

Plaintiff,

vs.

Dennis Lothert, Jackpot Junction,

Defendants.

Court File No. CIV-053

MEMORANDUM OPINION  
AND ORDER

I. Summary of Facts and Procedural History

Plaintiff, Margaret Lamote, alleges that she was sexually harassed while an employee at Jackpot Junction and that she was constructively discharged after complaining about the harassment. Ms. Lamote initially brought suit in Minnesota state court, which dismissed the matter in favor of this Court's jurisdiction.

Plaintiff's original complaint included three claims against Jackpot Junction: (1) violation of the Minnesota Human Rights Act; (2) violation of Title VII of the Civil Rights Act; and (3) intentional infliction of emotional distress. This Court dismissed all of Plaintiff's claims against Jackpot Junction with prejudice.<sup>1</sup> See Lamote v.

Lothert, No. CIV-053, slip op. at 4 (July 27, 1994). Plaintiff subsequently appealed

<sup>1</sup> This Court previously noted that Defendant Lothert has not responded to Plaintiff's complaint, nor has Plaintiff requested a default judgment against him. See Lamote v. Lothert, No. CIV-053, slip op. at 1 n.1 (July 27, 1994). The Court of Appeals concluded that "presumably the action against him is still pending before the tribal court." Lamote v. Lothert, No. 94-120, slip op. at 2 (L.S.C. Ct. App. Dec. 16, 1996). On the record submitted, the Court offers no opinion on the matter at this time.

this decision. The Court of Appeals upheld dismissal of the Minnesota Human Rights Act and the Title VII claims, but remanded the common law tort claim for reconsideration. See Lamote v. Lothert, No. 94-120, slip op. at 15-16 (L.S.C. Ct. App. Dec. 16, 1996). Specifically, the Court of Appeals instructed this Court to allow additional discovery on Jackpot Junction's status and to reconsider, in light of any new evidence presented, whether Jackpot Junction operates as a governmental or corporate entity and to determine whether a limited waiver of sovereign immunity enacted by the Lower Sioux Community Council in 1996 permits Plaintiff's tort claim to proceed. See id. at 16.

Additional discovery having been ordered and completed, this case now comes before the Court on a Motion for Summary Judgment brought by Defendant, Jackpot Junction, a wholly owned enterprise of the Lower Sioux Community ("Community" or "Tribe"). Defendant asserts that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Plaintiff counters that material facts remain in dispute, which preclude summary judgment.

## **II. Summary Judgment Standard**

For Defendant to prevail at summary judgment, it must appear to the Court "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." L.S.C. R. Civ. P. 30.<sup>2</sup> The United States

---

<sup>2</sup> Rule 30 of the Lower Sioux Community Rules of Civil Procedure closely resembles Rule 56 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 56(c) ("The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.") Consequently, this Court finds that interpretations and applications of



Supreme Court has emphasized that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Accordingly, the summary judgment standard should be applied "with due regard not only for the rights of persons asserting claims and defenses . . . , but also for the rights of persons opposing such claims and defenses to demonstrate . . . that the claims and defenses have no factual basis." Id.

The competing rights of the parties are not weighed on an even scale, however, because the federal standard instructs courts to construe all evidence and draw all reasonable inferences in favor of the nonmoving party. See Eastman Kodak Co. v. Image Technical Servs., Inc. 504 U.S. 451, 456 (1992); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Yet even with this inherent bias towards the nonmoving party, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-48. A "genuine issue" exists only where the evidence before the court could permit a reasonable jury to find in favor of the nonmoving party on that issue. See id. at 248. Furthermore, to preclude summary

---

Rule 56 by federal courts provide a useful backdrop to the summary judgment process. Cf. L.S.C. R. Civ. P. 1(d) ("Any procedures or matters not specifically set forth herein shall be addressed in a manner substantially similar to the Federal Rules of Civil Procedure insofar as such are not inconsistent with these rules, and with the general principles of fairness and justice as prescribed and interpreted by the Court.")

judgment a genuine issue must arise in relation to "material facts" that would "affect the outcome of the suit under the governing law." Id.

The moving party has the initial burden of making a prima facie case for summary judgment. A defendant moving for summary judgment meets this burden by submitting evidence that negates at least one essential element of the plaintiff's claim, see Celotex, 477 U.S. at 322-24, or by showing that there is no evidence in the record to support at least one essential element of the plaintiff's claim. See id. at 325. The plaintiff must counter with specific evidence from the record, beyond mere argument or a re-allegation of the pleadings, that preserves a genuine issue of material fact for trial. See id. at 324; Anderson, 477 U.S. at 248; JRT, Inc. v. TCBY Systems, Inc. 52 F.3d 734, 736 (8th Cir. 1995).

This burden on the nonmoving party also demands the production of more than a "scintilla" of evidence. See Anderson, 477 U.S. at 251 (quoting Improvement Co. v. Munson, 14 Wall 442, 448 (1872)); see also Foutch v. Joy Mfg. Co., 67 F.3d 299, 302 (6th Cir. 1995) (opining that the nonmoving party must do more than raise a "metaphysical doubt" as to the material facts); Vitkus v. Beatrice Co., 11 F.3d 1535, 1539 (10th Cir. 1993) (remarking that evidence offered to withstand a motion for summary judgment must be significantly probative). While the nonmoving party does not bear the ultimate burden of persuasion at this point, "the judge must view the evidence through the prism of the substantive evidentiary burden." Anderson, 477 U.S. at 254. In other words, a determination of whether a reasonable jury could return a verdict for the nonmoving party must be made with reference to the

evidentiary standard the nonmoving party ultimately would have to meet at trial.

See id. at 255.

### III. Discussion

#### A. Jackpot Junction's Immunity Status

Before applying the standard described above to the present case, this Court notes that if Defendant can demonstrate that no genuine issue of material fact exists as to Jackpot Junction's status as an immune organization, then summary judgment is a proper tool for disposing of the present controversy.

To this end, Defendant has offered affidavits from several Community Council members, from past and present general managers of Jackpot Junction, and from federal and state officials who unanimously assert and/or agree that Jackpot Junction is operated as an extension of the tribal government and, therefore, enjoys the protections of sovereign immunity. In addition, Defendant has offered Lower Sioux Community Resolution No. 16-92-93 ("Res. No. 16-92-93"), which memorializes the official position of the Community Council that Jackpot Junction was conceived and has been operated as an immune arm of the tribal government. The Court finds this evidence compelling. Plaintiff attempts to counter this strong showing by pointing to a single word in an insurance policy that describes Jackpot Junction as a corporation. In the view of the Court, no reasonable jury could conclude, based on this evidence, that Jackpot Junction does not enjoy the protections of sovereign immunity co-extensive with that of the Tribe.



The Defendant, however, has specifically countered Plaintiff's reliance on the insurance policy by offering the affidavit of the agent who arranged coverage for the Tribe. In his affidavit, the agent states that "[t]he designation of Jackpot Junction Casino as a 'corporation' was not done at the direction of the Lower Sioux Community or any official from Jackpot, and in making that designation, Neither [sic] myself nor New Hampshire Insurance Company had any intention of attempting to determine or to reflect the manner in which Jackpot Junction is operated by the Lower Sioux Indian Community." Lange Aff. ¶ 5. The agent further admits he lacks the authority to determine the manner in which the Tribe organizes and operates its businesses. See id. ¶ 6. These admissions fatally undermine the probative value of the only piece of evidence relied on by Plaintiff in opposing summary judgment. The mere designation of Jackpot Junction as a corporation by an unauthorized third-party does not indicate that the Tribe considered Jackpot Junction to be a non-immune entity when it purchased the general commercial liability policy. Consequently, Plaintiff has failed to demonstrate, after ample opportunity for discovery, that a genuine issue of material fact exists as to Jackpot Junction's status as an immune tribal government entity.

**B. The Scope of the Sovereign Immunity Waiver**

Having concluded that Jackpot Junction operates as an immune entity of the tribal government, this Court next focuses its attention on the effect of Lower Sioux Community Resolution No. 55-96 ("Res. No. 55-96"). Construction of the language of this ordinance presents a pure question of law, which is appropriately addressed

by the Court at summary judgment. The Lower Sioux Community Council passed this resolution on October 30, 1996. The plain language of the ordinance gives no indication that it would apply retroactively. Established canons of statutory construction and caselaw regarding waivers of immunity and the retroactive application of legislation, however, strongly counsel that the ordinance should not be given retroactive effect. The weight of these authorities, as described below, convince this Court that Res. No. 55-96 did not result in a retroactive waiver of sovereign immunity that would permit the claim raised by Plaintiff in the present case to proceed.

There is a general presumption in federal jurisprudence against retroactive legislation. See Landgraf v. USI Film Products, 511 U.S. 244, 265 (recognizing a presumption against retroactive legislation that is "deeply rooted in our jurisprudence; and embodies a legal doctrine centuries older than our Republic") (footnote omitted); Bowen v. Georgetown Hosp., 408 U.S. 204, 208 (1988) (limiting retroactive application of congressional enactments and administrative regulations to those situations where "their language requires this result"); see generally Kaiser Aluminum v. Bonjorno, 494 U.S. 827, 840-858 (1990) (Scalia, J., concurring) (tracing a nearly "unbroken line of precedent" applying a presumption against retroactivity). A law has impermissible retroactive effects if it "changes the legal consequences of acts completed before its effective date." Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting Weaver v. Graham, 450 U.S. 24, 31 (1981)).

The Supreme Court put this "change in legal consequences" standard to use in a particularly apposite recent opinion. In Hughes Aircraft Co. v. United States ex rel. Schumer, 138 L. Ed. 2d 135, 145-46 (1997), the Supreme Court unanimously declined to retroactively apply a 1986 amendment that permitted a False Claims Act suit to be brought by private parties on behalf of the United States. Prior to the amendment, only the United States could pursue a claim against a false claimant. See id. at 145. The Court recognized the significance of extending a cause of action to private parties that was previously foreclosed. "[P]ermitting actions by an expanded universe of plaintiffs . . . essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." Id. In contrast, the Court distinguished those few cases that had applied legislation retroactively without a clear directive from Congress as affecting merely the procedural or secondary conduct of litigation. See id. at 146. The Court noted that:

[s]uch statutes affect only where a suit may be brought, not whether it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among fora. Rather, it creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Id. (emphasis in original).

Res. No. 55-96 is precisely such a piece of legislation. It permits private causes of action against the Tribe where none had been permitted before. In other words, it created tribal court jurisdiction over the tribal government itself. As noted above, sovereign immunity serves as a jurisdictional bar against unconsented suits.



It does not simply provide an affirmative defense, it prevents a sovereign from unwillingly being called before a judicial tribunal in the first place. Consequently, a waiver of sovereign immunity affects more than the procedural conduct of litigation, it "creates jurisdiction where none previously existed." Id. Consistent with the Supreme Court reasoning outlined above, this Court will not apply such legislation retroactively absent the clearly expressed intent of the Tribe's legislative body.

The concept of sovereign immunity, like the presumption against retroactivity, is also deeply rooted in history, in common law, and in the Constitution of the United States. See Seminole Tribe, 134 L. Ed. 2d at 275 (tracing the status of sovereign immunity in caselaw and in statements of the constitutional framers). Accordingly, the United States Supreme Court has repeatedly guarded the sovereign immunity of the United States, the several States, and the Indian tribes. See, e.g., Lane v. Pena, 135 L. Ed. 2d 486, 492-93 (1996) (noting a prudential doctrine of construction in favor of sovereign immunity); Seminole Tribe, 134 L. Ed. 2d at 276-77 (reaffirming the principles of state sovereign immunity); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (observing that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.") The United States Supreme Court will find waivers of sovereign immunity only where evidenced by clear language--waivers by implication are extremely disfavored. See, e.g., United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990). In addition, waivers of sovereign immunity "are not generally 'liberally construed.'"

Nordic Village, Inc., 503 U.S. at 34. Rather, they should be "construed strictly in favor of the sovereign and not enlarged beyond what the language requires." Id. (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) (internal citation and quotations omitted)); accord Lane, 135 L. Ed. 2d at 492-93 (recognizing that "a waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign"); Ardestani v. INS, 502 U.S. 129, 137 (1991).

This Court shares the United States Supreme Court's regard for sovereign rights and, similarly, will not expand the diminution of sovereign immunity beyond that required by the plain language of the tribal resolution. Such a rule of construction also comports with positive tribal law governing waivers of sovereign immunity. Specifically, the Lower Sioux Community Judicial Code provides that "[w]aivers of sovereign immunity shall not be general but shall be specific and limited as to . . . duration . . . ." L.S.C. Judicial Code, Ch. II, § 3(c) (emphasis added).

Plaintiff suggests, nevertheless, that the "spirit" of the ordinance should prevail over its plain language and that the limited waiver of sovereign immunity effected by Res. No. 55-96 should be extended in a manner not clearly contemplated by the drafters. Any diminution of sovereign immunity presents an important matter of public policy. It exposes tribal assets to significant legal liability, which in turn may inhibit the political and economic well-being of the tribe. The decision to waive sovereign immunity is most appropriately made by the representative leadership of the tribe, cognizant of the countervailing costs and benefits. This

Court will not presume to substitute its judgment for the clearly expressed intent of the tribal government.

Taking note of the presumption against retroactivity and the protected status of sovereign immunity in the jurisprudence of the United States Supreme Court, this Court concludes that Plaintiff's argument for a retroactive extension of tribal sovereign immunity by implication fails as a matter of law.

#### IV. Order

For the foregoing reasons, summary judgment is granted for Defendant Jackpot Junction.

Dated: November 7, 1997

  
Kurt V. BlueDog, Chief Judge



## Lower Sioux Community in Minnesota Tribal Court

Kurt V. BlueDog, Chief Judge  
Andrew M. Small, Associate Judge  
Steven F. Olson, Associate Judge  
Vanya Hogen-Kind, Clerk of Court

5001 W. 80th Street, Suite 500  
Bloomington, Minnesota 55437  
Telephone (612) 893-1813  
Telefax (612) 893-0650

### CLERK'S NOTICE

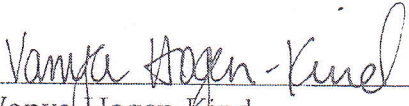
**Date:** November 7, 1997

**To:** Patrick J. Tierney  
Collins, Buckley, Sauntry & Haugh  
W-1100 First National Bank Building  
332 Minnesota Street  
St. Paul, Minnesota 55101

Joseph Halloran  
John Jacobson  
Jacobson, Buffalo, Schoessler & Magnuson  
810 Lumber Exchange Building  
Ten South Fifth Street  
Minneapolis, MN 55402

**Re:** *Margaret Lamote v. Dennis Lothert and Jackpot Junction*, Case No.  
CIV-053

An Order (copy enclosed) was issued in this matter today.

  
\_\_\_\_\_  
Vanya Hogen-Kind  
Clerk of Court