

LICENSE TO DISCRIMINATE: THE APPLICATION  
OF SOVEREIGN IMMUNITY TO EMPLOYMENT  
DISCRIMINATION CLAIMS BROUGHT BY NON-  
NATIVE AMERICAN EMPLOYEES OF TRIBALLY  
OWNED BUSINESSES

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I. INTRODUCTION

When Kristine Roselius stepped on to the Seminole Indian Reservation in June of 1994, she thought she was beginning the job of a lifetime.<sup>1</sup> What she did not realize was that by taking a job with the Seminole Indian Tribe, she may have unwittingly waived the rights provided to her under federal employment discrimination statutes.<sup>2</sup> One year later when she sued the tribe and the tribal corporation,<sup>3</sup> claiming sexual harassment, the Seminole Tribe argued that sover-

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1. See Donna Leinwand, *Seminole Fight Sexual Harassment Suit*, MIAMI HERALD, Feb. 12, 1996, at A1 (Broward Co. edition).

2. For a discussion about these federal statutes and how they relate to tribal immunity, see *infra* Part V.A. Under the doctrine of tribal immunity, tribes also claim anyone on the reservation waives their rights under state legislation. See Leinwand, *supra* note 1. However, this Comment focuses mainly on federal discrimination statutes because it is more appropriate to obtain jurisdiction over Native Americans in federal court. See *id.*

3. See *Roselius v. McDaniel*, No. 95-6887, slip op. at 1 (S.D. Fla. Aug. 7, 1997) (dismissing the case for lack of subject matter jurisdiction).

eign immunity barred her suit.<sup>4</sup> According to Roselius, her employers repeatedly touched her, made sexual comments and degrading remarks, and even suggested that she could make a “quick \$10,000” from a wealthy client.<sup>5</sup>

Because Native American tribes and tribal corporations increasingly employ more non-Native Americans,<sup>6</sup> the *Roselius v. McDaniel*<sup>7</sup> case presented pressing issues as to what rights, if any, those employees have when they become the victims of employment discrimination. This Comment examines the compelling issue of employment discrimination claims against tribes and tribal entities. Specifically, Part II details the facts of the *Roselius*’ case and the legal issues it entailed. Part III looks at the changing role of the Native American tribe as an employer of non-Native Americans. Part IV defines the doctrine of Native American sovereign immunity as interpreted by the United States Supreme Court, and is followed by Part V’s conclusion that sovereign immunity should not bar employment discrimination suits. Part VI illustrates that sound policy justifications outweigh the application of sovereign immunity to employment discrimination suits by non-Native Americans. Part VII elaborates on possible remedies available to non-Native American employees experiencing discrimination,<sup>8</sup> notwithstanding the application of sovereign immunity. Ultimately, this Comment concludes that sovereign immunity should not act as a bar to all claims of employment discrimination against tribes.

## II. ROSELIOUS V. MCDANIELS

Kristine Roselius, with an education in journalism, public administration, and Native American studies,<sup>9</sup> left her native Iowa in 1994 to accept a job offer with the Seminole Tribe’s “Kissimmee

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4. See Leinwand, *supra* note 1; Plaintiff’s Response to Defendants’ Motion to Dismiss at 2-9, *Roselius* (No. 95-6887).

5. See Leinwand, *supra* note 1; see also Plaintiff’s Amended Complaint at 5-6, *Roselius* (No. 95-6887).

6. For a discussion of the increased role of tribes as employers of non-Native Americans, see *infra* Part III.

7. No. 95-6887, slip op. (S.D. Fla. Aug. 7, 1997) (dismissing the case for lack of subject matter jurisdiction).

8. “Discrimination” in this context means discrimination against non-Native American employees based on race other than in the context of preference of Native Americans over whites, as well as discrimination based on gender, national origin, age, and disabilities. Discrimination in the form of a preference for Native Americans over other races by tribal employers has consistently been found by courts and Congress to be justified as a means for fighting unemployment and poverty on reservations. See *infra* text accompanying notes 78-81, 96-99.

9. See Leinwand, *supra* note 1 (noting that *Roselius* was a master’s degree candidate at the time she accepted the job on the Seminole reservation).

Billie Swamp Safari" (Safari).<sup>10</sup> Roselius wanted to work with Native Americans and thought the position of public relations coordinator would be the ideal job for someone with her background.<sup>11</sup> Although she only worked on the reservation for six months, Roselius' Complaint painted a picture of a working environment that subjected her to "a continuous barrage of unwelcome sexual harassment."<sup>12</sup>

According to Roselius, the harassment began on her very first day of work.<sup>13</sup> Roselius claimed that her supervisor, James McDaniel, welcomed her to the job by suggesting that she sell her body to a wealthy Arab client who came to hunt at the Safari.<sup>14</sup> McDaniel, while in the presence of the Safari director, allegedly told her she could make a "quick \$10,000" and said she was foolish for turning down the offer.<sup>15</sup> At first, Roselius thought they were kidding, but soon she found out that it was a sign of things to come.<sup>16</sup> Roselius claimed that over the next several months, McDaniel asked her to go to a nudist colony, physically harassed her, told her to "look enticing," and asked if she would like him to buy her "Chinese massage balls because women liked to use them to have orgasms."<sup>17</sup> Finally, Roselius verbally complained of the harassment to another supervisor of the Safari.<sup>18</sup> Her employer responded by asking Roselius to sign a letter refuting her allegations of harassment.<sup>19</sup> When Roselius refused to sign the letter she was fired, despite the fact that she had received very high ratings in a recent job performance evaluation.<sup>20</sup>

Roselius filed suit under Title VII of the Civil Rights Act of 1964<sup>21</sup> against McDaniel, the Kissimmee Billie Swamp Safari, the Seminole Tribe of Florida Community Development Corporation, and the Seminole Tribe of Florida, Inc.,<sup>22</sup> She claimed that the tribal businesses were corporations separate from the tribe and that they waived any sovereign immunity by adopting a "sue or be sued" clause.<sup>23</sup> According to Roselius, the sue or be sued clause in the corporate charter of the Seminole Tribe of Florida, Inc. was included for

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10. See *id.*

11. See Leinwand, *supra* note 1; see also Plaintiff's Amended Complaint at 5, Roselius (No. 95-6887).

12. Plaintiff's Amended Complaint at 5, Roselius (No. 95-6887).

13. See Leinwand, *supra* note 1.

14. See *id.*; see also Plaintiff's Amended Complaint at 5, Roselius (No. 95-6887).

15. Leinwand, *supra* note 1; see also Plaintiff's Amended Complaint at 5, Roselius (No. 95-6887).

16. See Leinwand, *supra* note 1.

17. Plaintiff's Amended Complaint at 5-6, Roselius (No. 95-6887).

18. See *id.*

19. See *id.* at 6.

20. See *id.* (noting that Roselius saved the letter).

21. 42 U.S.C. §§ 2000e-2000e-17 (1994). For a discussion of Title VII's protection and how it relates to tribal immunity, see *infra* Part V.A.

22. See Plaintiff's Amended Complaint at 5-6, Roselius (No. 95-6887).

23. See *id.* at 3-4.

the express purpose of allowing tribal companies to become more economically viable.<sup>24</sup> Further, Roselius argued that the clause allowed the tribe's economic entities to be sued to make them more attractive to outside investors.<sup>25</sup> The tribe responded by claiming that Roselius' case could not be heard because of the doctrine of tribal sovereign immunity.<sup>26</sup>

Unfortunately for Roselius, on August 7, 1997, the United States District Court for the Southern District of Florida granted the tribe's Motion to Dismiss for lack of subject matter jurisdiction.<sup>27</sup> The court specifically held that because Roselius was employed by the tribal government and not the tribal corporate entity, the tribe's sovereign immunity barred her lawsuit.<sup>28</sup> Surprisingly, the court's order did not discuss the policy implications of the sovereign immunity application.<sup>29</sup>

### III. THE CHANGING ROLE OF TRIBES AS EMPLOYERS

The Southern District Court's decision is a compelling example of the harsh results that continue to arise as tribal businesses increasingly employ more non-Native Americans. In recent years, the once relatively isolated tribes have begun employing non-Native Americans at an increasingly rapid rate as they have expanded their economic enterprises.<sup>30</sup> This is due primarily to the advent of large-scale casino gambling on Native American reservations<sup>31</sup> but also

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24. See *id.* at 4.

25. See *id.*

26. See Plaintiff's Response to Defendants' Motion to Dismiss at 2-8, Roselius (No. 95-6887).

27. See Roselius, No. 95-6887, slip op. at 9-11 (S.D. Fla. Aug. 7, 1997) (final order granting the tribe's motion to dismiss on sovereign immunity grounds).

28. See *id.* at 9 (holding that Roselius could not produce sufficient evidence to raise a material issue of fact that she was employed by the tribal corporate entity).

29. See *id.* Not all was lost for Kristine Roselius. The Seminole Tribe of Florida settled the case with Roselius for approximately \$20,000.00, despite the case's dismissal. Telephone Interview with P. Tim Howard, Esq., Managing Partner of Howard & Associates, P.A. (Jan. 15, 1997).

30. See generally William Buffalo & Kevin J. Wadzinski, Application of Federal and State Labor and Employment Laws to Indian Tribal Employers, 25 U. MEM. L. REV. 1365, 1366 (1995) (stating that many tribes now are "significant employers," hiring hundreds of people); Keith David Bilezerian, Note, Ante Up or Fold: States Attempt to Play Their Hand While Indian Casinos Cash In, 29 NEW ENG. L. REV. 463, 463 (1995); William V. Vetter, Doing Business With Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction, 36 ARIZ. L. REV. 169, 169 (1994); Vicki J. Limas, Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency, 26 ARIZ. ST. L.J. 681, 681 (1994); Michael M. Pacheco, Toward a Truer Sense of Sovereignty: Fiduciary Duty in Indian Corporations, 39 S.D. L. REV. 49, 49 (1994).

31. The Fifth Circuit's decision in *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), paved the way for tribes to conduct bingo games for pay on reservations. See *id.* at 314-16. In the 10 years following the *Butterworth* decision, over 100 tribes across the nation opened high-stakes bingo parlors. See James J. Belliveau, Note, Casino Gam-

encompasses many other businesses owned and operated by increasingly corporate-savvy tribes.<sup>32</sup>

The employment discrimination issue is compounded by the fact that few tribes have policies in place to deal with allegations of sexual harassment or other forms of discrimination.<sup>33</sup> Cases like *Roselius*' present the issue of whether non-Native Americans waive their rights under federal employment law by accepting jobs on reservations. Also at issue is whether the justifications for tribal immunity outweigh the rights of employees who find themselves the victims of a tribe's employment discrimination. To answer these questions, the doctrine of sovereign tribal immunity in general must first be examined.<sup>34</sup>

#### IV. THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY

Currently, much debate exists over the exact nature of tribal sovereignty, including the very source of the doctrine. One theory suggests that Native American tribes are inherently sovereign because they were self-governing entities before Europeans colonized North America.<sup>35</sup> Under this theory, tribal immunity pre-dates the formation of the United States, and therefore, the U.S. government has no right to modify or limit this immunity.<sup>36</sup> The more widely accepted theory, however, is that by nature of their conquest by the Europe-

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bling Under the Indian Gaming Regulatory Act: *Narragansett Tribal Sovereignty Versus Rhode Island Gambling Laws*, 27 SUFFOLK U. L. REV. 389, 401 (1993). The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (1994), opened the door to casinos on reservations, and Native American gaming is now a multi-billion-dollar-a-year industry. See generally Mike Williams, *Indians Lose Court Fight on Casinos*, ATLANTA J. & CONST., Mar. 28, 1996, at A1; Bilezerian, *supra* note 30, at 463 (citing the example of the Mashantucket Pequot Tribe which numbers about 275 members but employs 6900 workers on a projected payroll of \$226 million a year).

32. Examples include tribally owned banks, manufacturers, and investment corporations with revenues in the millions. See Pacheco, *supra* note 30, at 49.

33. See generally Leinwand, *supra* note 1 (quoting professor Kirke Kickingbird, director of the Native American Legal Resource Center at Oklahoma City University, stating that "[t]he tribes really haven't contemplated the issue for the most part and don't have anything in place"). In *Roselius*' case, the Seminole tribe had no set personnel policies dealing with employment discrimination. See *id.*

34. For a comparison between tribal immunity and the sovereign immunity of states and foreign nations, see *infra* text accompanying notes 136-40.

35. See generally G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N.D. L. REV. 267, 275-77 (1996); Steve E. Dietrich, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 117 (1992); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (stating that tribes have the inherent power of a limited sovereign that has never been extinguished); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140-42 (1982) (stating that tribes have the inherent right to tax non-Native Americans within the tribal territory).

36. See Dietrich, *supra* note 35, at 117 (stating that "tribal powers flow from an original sovereignty, and are not derived from federal authority"); *Wheeler*, 435 U.S. at 322-23; Rice, *supra* note 35, at 275.

ans and later the United States, the Native Americans' sovereignty no longer inherently exists but is permitted by the government.<sup>37</sup> Under this theory, the federal government has the ability to abrogate tribal immunity as it wishes.<sup>38</sup>

In *Johnson v. M'Intosh*,<sup>39</sup> the Supreme Court first set forth the idea that the federal government allows tribal immunity as a matter of discretion. Chief Justice Marshall stated that the "discovery" of North America by Europeans "necessarily diminished" the Native Americans' sovereign immunity.<sup>40</sup> The Court further clarified the role of Native Americans in the American legal system in a pair of cases decided almost a decade later. In *Cherokee Nation v. Georgia*,<sup>41</sup> Marshall asserted that Native American tribes were not "foreign states," but were akin to the states or "domestic dependent nations" capable of managing their own affairs.<sup>42</sup> *Worcester v. Georgia*,<sup>43</sup> decided one year later, held that Georgia laws would not apply in Cherokee territory.<sup>44</sup> *Worcester* characterized the Native American tribes as "distinct, independent political communities, retaining their original natural rights," with the exception of the ability to deal with foreign powers.<sup>45</sup> *Cherokee Nation* and *Worcester* established a broad interpretation of tribal immunity that would not be significantly reduced for almost 150 years.

Despite the original breadth given to tribal immunity, the recent trend among courts has been to place increasing restrictions on the application of the doctrine.<sup>46</sup> This trend of limiting tribal immunity was ushered in by the 1978 Supreme Court case of *Oliphant v. Suquamish Indian Tribe*.<sup>47</sup> In *Oliphant*, the Court placed the first major restriction on tribal immunity since *M'Intosh*. The Court ruled that sovereign immunity did not allow tribes to exert criminal jurisdiction over non-Native Americans.<sup>48</sup> *Oliphant* asserted that Native American nations are dependent on the United States,<sup>49</sup> and retained only "quasi-sovereignty authority" restricted to powers consis-

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37. See, e.g., *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191, 207-08 (1978) (recognizing that Native American tribes are prohibited from exercising authority expressly terminated by Congress and inconsistent with their status as tribes).

38. See *id.*

39. 21 U.S. 543 (1823).

40. *Id.* at 574.

41. 30 U.S. 1 (1831).

42. *Id.* at 17.

43. 31 U.S. 515 (1832).

44. See *id.* at 561.

45. *Id.* at 559.

46. See, e.g., *Dietrich*, *supra* note 35, at 110-15; *Rice*, *supra* note 35, at 278.

47. 435 U.S. 191 (1978).

48. See *id.*

49. See *id.* at 207.

tent with their "domestic dependent" status.<sup>50</sup> Further, the Court implied that the immunity of the tribes would be limited "so as not to conflict with the interests" of the United States.<sup>51</sup> The *Oliphant* decision paved the way for other cases that have further limited sovereign immunity.<sup>52</sup> Exactly how far the limitations on immunity will extend is unclear. However, several cases since *Oliphant* have reaffirmed the sovereign power of tribes in certain areas.<sup>53</sup>

Notwithstanding conflicting lower court decisions, the Supreme Court has settled several important issues with respect to the breadth of sovereign immunity. From the tribes' perspective, the most important of these is that tribes have virtually unlimited power over "internal affairs."<sup>54</sup> The second well-established doctrine of sovereign immunity is that states do not have the authority to infringe on tribal self-governance.<sup>55</sup> Finally, it has long been recognized that Congress has plenary power to limit tribal immunity.<sup>56</sup> Despite these few relatively uncontested tenants of tribal immunity, how far the

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50. *Id.* at 208.

51. *Id.* at 209.

52. See, e.g., *Montana v. United States*, 450 U.S. 544, 549 (1981) (holding that the tribe lacked the power to regulate hunting and fishing by non-Native Americans on non-Native-American-owned land within a reservation); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) (holding that sovereign immunity does not include the power to regulate liquor sales on reservations).

53. See *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (holding that tribes have the power to punish their own members); *Washington v. Confederated Tribes*, 447 U.S. 134, 135 (1980) (affirming the power of tribes to tax the activities of non-Native Americans on reservations); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 130-32 (1982) (similar holding).

54. See *Merrion*, 455 U.S. at 132 (stating that tribes have the inherent right to tax members and non-members on their land); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 846 (1984) (finding that although power over internal affairs is not unlimited, courts must inquire whether any express limitations prevent the tribe from acting, not whether tribes have the authority to act); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978); *Limas*, *supra* note 30, at 685.

55. See *Worcester v. Georgia*, 31 U.S. 515, 560 (1832); *Williams v. Lee*, 358 U.S. 217, 223 (1959); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). However, this doctrine has been somewhat undermined by what is commonly called the "federal preemption theory." Under the federal preemption theory, the reason states do not have jurisdiction over tribes is not due to sovereign tribal immunity, but due to the preemption of federal courts over state courts with respect to Native American affairs. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 136 (1980); *Central Mach. Co. v. Arizona St. Tax Comm.*, 448 U.S. 160, 160 (1980). Under this theory, it has sometimes been found that where federal law does not allow a case against a tribe, the states may in fact have jurisdiction. See also *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 170 (1973); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

56. See *Talton v. Mayes*, 163 U.S. 376, 379 (1896); *United States v. Kagama*, 118 U.S. 375, 379 (1886); *Martinez*, 436 U.S. at 56; Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1139-40 (1990); Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195 (1984) (asserting that only one federal statute has been struck down on grounds that Congress exceeded its authority over tribes).

doctrine extends and what it protects continues to be ambiguous and confusing.<sup>57</sup>

## V. EMPLOYMENT DISCRIMINATION CLAIMS AGAINST TRIBAL BUSINESSES ARE NOT SUBJECT TO THE DEFENSE OF SOVEREIGN IMMUNITY

### A. Congress's Use of Its Plenary Power to Limit Tribal Immunity

Title VII protects employees from discrimination based on race, color, religion, sex, and national origin.<sup>58</sup> Without the protection of Title VII, plaintiffs such as Kristine Roselius would be excluded from bringing sexual harassment claims because other federal discrimination statutes do not protect women from sexual harassment.<sup>59</sup>

Title VII states that Native American tribes are not considered "employers" under the Act, and thus cannot be held responsible for acts of discrimination.<sup>60</sup> However, the United States District Court for the District of North Dakota has held that this language does not exempt tribal businesses from Title VII claims by non-Native Americans. In *Myrick v. Devils Lake Sioux Manufacturing Corp.*,<sup>61</sup> a corporation with a Native American tribe as the majority owner attempted to claim immunity from a race and age discrimination suit brought under Title VII and the Age Discrimination in Employment Act (ADEA).<sup>62</sup> The tribe claimed they were exempt under the Native American tribe exception to Title VII,<sup>63</sup> and that the ADEA does not apply to tribally owned businesses.<sup>64</sup> The court ruled that these defenses were "without merit," and allowed the suit against the tribally owned business to proceed.<sup>65</sup> The court distinguished contradictory cases such as *EEOC v. Cherokee Nation*<sup>66</sup> by finding that they "did not consider the present situation of non-tribal reservation employ-

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57. See generally David H. Getches & Charles F. Wilkinson, *Cases and Materials on Federal Indian Law* 315 (2d ed. 1986) (stating that "the nuances of tribal sovereign immunity . . . are recommended only for the brave"); Rice, *supra* note 35, at 278 (calling the "case-by-case" decisions of the Supreme Court a "fog").

58. See 42 U.S.C. §§ 2000e-2000e-17 (1994).

59. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994), does not protect individuals from sexual discrimination, nor does 42 U.S.C. § 1981 (1994).

60. See 42 U.S.C. § 2000e(b) (1994) ("The term employer . . . does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia . . .") (emphasis added); see also *Buffalo & Wadzinski*, *supra* note 30, at 1367.

61. 718 F. Supp. 753 (D.N.D. 1989).

62. 29 U.S.C. §§ 621-634 (1994); see also *Myrick*, 718 F. Supp. at 754.

63. See *Myrick*, 718 F. Supp. at 756.

64. See *id.* at 754.

65. *Id.*

66. 871 F.2d 937 (10th Cir. 1989) (holding that the ADEA does not apply to Native American Tribes).

ees.”<sup>67</sup> According to this reasoning, companies owned by Native American tribes cannot avoid claims brought under Title VII if those claims involve a non-Native American employee.<sup>68</sup> Although several cases conflict with *Myrick* and have held that tribal businesses are exempt from Title VII, the reasoning of these cases is flawed. In *Dille v. Council of Energy Resource Tribes*,<sup>69</sup> the Tenth Circuit held that former female employees could not bring a sex discrimination suit under Title VII against an organization comprised solely of Native American tribes.<sup>70</sup> *Dille* suggests that the language of Title VII clearly offers broad protection to Native American tribes and all Native American entities.<sup>71</sup> However, without ever considering the difference between tribal governmental entities and tribal businesses, the court reasoned that because the statute applies broadly to all Native Americans, it must likewise apply to a company run by a conglomeration of tribes.<sup>72</sup>

Courts have cited another Tenth Circuit case, *Wardle v. Ute Indian Tribe*,<sup>73</sup> as support for the application of tribal immunity to discrimination claims by non-Native Americans against tribal businesses.<sup>74</sup> This is, however, a misinterpretation of the *Wardle* holding. *Wardle*, a non-Native American policeman, was discharged by the tribe, which sought to fill the position with a member of the tribe.<sup>75</sup> *Wardle* brought an employment discrimination claim against the tribe under section 1981 of the Civil Rights Act of 1866, in addition to other similar claims.<sup>76</sup> The court dismissed the suit on the grounds that Title VII's express exemption for Native American tribes controls over other, more general federal civil rights statutes and, thus, no claim could be brought against the tribe by a plaintiff in *Wardle's* situation.<sup>77</sup> However, the Tenth Circuit explicitly limited its holding to the “narrow context” of hiring decisions based on preferences for Native Americans.<sup>78</sup> This holding is consistent with Title VII's ex-

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67. *Myrick*, 718 F. Supp. at 754 n.1.

68. See *id.*

69. 801 F.2d 373 (10th Cir. 1986).

70. See *id.* at 376.

71. See *id.*

72. See *id.*

73. 623 F.2d 670 (10th Cir. 1980).

74. See *Buffalo & Wadzinski*, *supra* note 30, at 1367-68.

75. See *Wardle*, 623 F.2d at 671.

76. See 42 U.S.C. § 1981 (1994); *Wardle*, 623 F.2d at 671-72. The other claims consisted of an unlawful discharge claim under the Indian Civil Rights Act, 25 U.S.C. § 1302 (1994), a claim under the Fifth Amendment to the United States Constitution, and claims under an array of other civil rights provisions, specifically 42 U.S.C §§ 1983, 1988, and 2000d (1994). See *id.*

77. See *Wardle*, 623 F.2d at 673.

78. *Id.* at 672.

plicit language<sup>79</sup> and legislative intent.<sup>80</sup> While both *Wardle* and the statute itself allow preferential treatment of Native Americans on and around reservations, neither should be interpreted to allow tribal businesses to claim immunity against discrimination suits by non-Native Americans based on other grounds.<sup>81</sup>

Although some federal employment discrimination statutes expressly exempt Native American tribes from liability,<sup>82</sup> several opinions have noted that unless a federal statute specifically includes Native American tribes within its reach, it should be interpreted as if tribes are exempt from its remedial provisions.<sup>83</sup> In one of these opinions, *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*,<sup>84</sup> the Eighth Circuit found that for such a statute to apply to tribes, it must be demonstrated that the legislation specifically intended Native American tribes to be included.<sup>85</sup> In *Fond du Lac*, the Equal Employment Opportunity Commission (EEOC) brought a claim against a tribally owned business under the ADEA.<sup>86</sup> The court reasoned that because there was no affirmative proof that Congress intended the ADEA to apply to Native American tribes or tribal entities, there could be no claim asserted under the statute.<sup>87</sup> Other cases support the notion that absent a federal statute to the contrary or express waiver by the tribe, sovereign immunity is absolute.<sup>88</sup> These cases imply that tribal corporations are exempt from employment discrimination claims because there is no statute explicitly holding them susceptible to suit.

The reasoning in *Dille* and *Fond du Lac* is flawed because these cases either fail to consider or incorrectly interpret the express legislative intent behind Title VII. Contrary to the holdings of these cases, neither Title VII nor its legislative history explicitly state that tribal companies that hire non-Native American employees enjoy absolute exemption from the statute. To the contrary, the vague lan-

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79. See 42 U.S.C. § 2000e-2(I) (1994) (permitting preferential hiring of Native Americans).

80. See *infra* text accompanying notes 93-99.

81. See *infra* text accompanying notes 95-99.

82. The Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994), explicitly states that the statute does not apply to tribes. See *id.* § 12111(5)(B)(i) (stating that "employer" does not include "an Indian Tribe"). However, neither the ADEA (29 U.S.C. §§ 621-634 (1994)), nor section 1981 (42 U.S.C. § 1981 (1994)), specifically exclude Native Americans from their definitions of who may be held liable.

83. See, e.g., *EEOC v. Cherokee Nation*, 871 F.2d 937, 938-39 (10th Cir. 1989) (holding that the ADEA does not apply to tribes absent express congressional language abrogating Native American treaty rights or their sovereign immunity).

84. 986 F.2d 246 (8th Cir. 1993).

85. See *id.* at 249-51.

86. See *id.* at 247.

87. See *id.* at 249-51.

88. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993).

guage excluding Native American tribes<sup>89</sup> and the legislative purpose behind it indicate congressional intent to bar Title VII claims only in very limited situations.<sup>90</sup> Specifically, the legislative history demonstrates an intent to protect tribes from suits in only two situations: employment decisions specifically involving tribal government,<sup>91</sup> and the preferential hiring of a Native American over a non-Native American.<sup>92</sup>

The section of Title VII excluding tribes from the definition of “employer” states that the Act does not apply to “the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia.”<sup>93</sup> Although this vague language does not specifically define “Indian tribe,” the legislator who proposed the amendment adding this provision made its purpose clear. In the speech in which he introduced the amendment, Senator Karl Mundt of South Dakota stated:

The reason why it is necessary to add these words is that Indian tribes, in many parts of the country, are virtually political subdivisions of the Government. To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces.<sup>94</sup>

Senator Mundt went on to say that his amendment would allow tribes to “conduct their own affairs” in “their capacity as a political entity.”<sup>95</sup> This speech by the amendment’s sponsor demonstrates that the intent was to protect the employment decisions of tribes relating to tribal government, not to deny non-Native American employees of Native American-owned corporations their rights under Title VII.

Senator Mundt also proposed the amendment to Title VII protecting tribal entities from claims related to the hiring preferences of Native Americans in and around reservations. The language of this portion of the Act is unambiguous. It states:

Nothing contained in this chapter 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 indi-

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89. See *supra* note 60.

90. See *supra* Part V.A.

91. See 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.); see also *infra* text accompanying note 98.

92. See 42 U.S.C. § 2000e-2(i) (1994); see also *infra* text accompanying note 98.

93. *Id.* § 2000e(b) (emphasis added).

94. 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.).

95. *Id.*

vidual because he is living on or near a reservation.<sup>96</sup>

This language does not exempt tribes from discrimination suits based on gender, religion, age, or race; it only permits tribal and geographically situated employers to exercise a hiring preference for Native Americans.<sup>97</sup> Senator Mundt's two Title VII amendments were not meant to protect tribal businesses from suits by non-Native American employees. Rather, the purpose of these additions to the Act was to "assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs."<sup>98</sup> The intent was not to allow tribes to profit from illegal acts against non-Native Americans, but to help Native Americans "decrease unemployment" and "integrate their people into the affairs of the national community."<sup>99</sup> Courts ruling that Title VII excludes tribal businesses from claims brought against them by non-Native American employees have failed to consider this legislative intent. Thus, the reasoning of such cases is flawed.

#### B. Tribal Businesses, Tribal Government, and Non-Economic Entities

Tribally owned businesses facing an employment discrimination suit may allege they are entitled to the same sovereign immunity defense as are tribal governments. While there is some case law to support such a claim, most have held that tribal companies do not enjoy sovereign immunity from their dealings with non-Native Americans.<sup>100</sup> Most courts distinguish tribal affairs relating to government matters from tribal affairs pertaining to commercial activities, and hold that immunity does not protect the latter.<sup>101</sup> On the other hand, some jurisdictions hold that tribal companies are protected by the tribes' sovereign immunity. Thus, they must expressly waive that immunity to be subject to suit.<sup>102</sup> The Supreme Court has also implied that tribal corporations do not relinquish their immunity simply by hiring non-Native Americans. In *Merrion v. Jicarilla Apache Tribe*<sup>103</sup> the Supreme Court stated that it is the non-tribal

96. 42 U.S.C. § 2000e-2(i) (1994).

97. For example, a Title VII claim brought by an African-American tribal employee alleging that she was passed over for a job given to a white employee based on discriminatory motives would not be exempt. See *id.*

98. 110 CONG. REC. 13702 (1964) (statement of Sen. Karl Mundt, Repub., S.D.).

99. *Id.*

100. See *infra* text accompanying notes 106-14.

101. See *supra* text accompanying notes 54-55.

102. See, e.g., *Fontenelle v. Omaha Tribe of Nebr.*, 430 F.2d 143, 147 (8th Cir. 1970) (holding that the tribe waived sovereign immunity by adopting a "sue or be sued" clause in its corporate charter).

103. 455 U.S. 130 (1982).

members who subject themselves to the law of the tribe by choosing to come to the reservation.<sup>104</sup>

One argument is that tribes should be exempt from employment discrimination suits because employment matters are "internal affairs" of the tribe, as they almost always occur on tribal lands and involve tribal actions. Because it is well-established that tribes have sovereignty over internal affairs,<sup>105</sup> it could be argued that all employee matters fall within the protective cloak of tribal immunity.

In contrast, several courts have repeatedly found that corporations and other commercial activities operated by Native Americans do not enjoy the sovereign immunity of the tribe. In *Donovan v. Coeur d'Alene Tribal Farm*,<sup>106</sup> the Ninth Circuit ruled that sovereign immunity could not protect a Native-American-owned-and-operated farm from a claim<sup>107</sup> under the Occupational Safety and Health Act (OSHA).<sup>108</sup> *Coeur d'Alene* reaffirmed the doctrine that tribal sovereignty applies only to tribal government and "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations."<sup>109</sup> Because the farm employed non-Native Americans, was a "normal commercial farming enterprise," and did not involve intramural matters of self-government, the court found it fell within OSHA's definition of "employer."<sup>110</sup>

In another relevant case, *Roberson v. Confederated Tribes*,<sup>111</sup> the Federal District Court of Oregon allowed a commercial entity of a tribe to be sued under the National Labor Relations Act.<sup>112</sup> The court found a distinction between tribal employers acting in their governmental capacities and tribal employers acting as corporations.<sup>113</sup> According to the district court, tribally owned businesses that involve the hiring of non-Native Americans and commercial activities with non-Native American customers are not internal affairs involving tribal government.<sup>114</sup> As such, these activities should not receive the benefit of tribal sovereign immunity.

Just as the economic activities of tribes should not be exempt from Title VII, neither should they be exempt from other federal employment discrimination statutes such as the Americans With Dis-

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104. See *id.* at 147.

105. See *supra* text accompanying note 54-55.

106. 751 F.2d 1113 (9th Cir. 1985).

107. See *id.* at 1115.

108. 42 U.S.C. §§ 651-678 (1994).

109. *Coeur d'Alene*, 751 F.2d at 1116.

110. *Id.*

111. 103 L.R.R.M (BNA) 2749 (D. Or. 1980).

112. See *id.* at 2750.

113. See *id.* (citing the Indian Reorganization Act, 25 U.S.C. §§ 476-477 (1994)).

114. See *id.* at 2751.

abilities Act (ADA),<sup>115</sup> the ADEA, or section 1981. Although it can be argued that the ADA explicitly exempts tribal businesses, no court has ever ruled on the issue.<sup>116</sup> However, the ADA contains language concerning Native Americans that is modeled almost precisely after the language in Title VII.<sup>117</sup> Accordingly, the same argument can be made that it does not exempt the commercial activities of tribes from the Act.<sup>118</sup> The ADEA and section 1981 do not mention Native Americans at all in their text or legislative history. These statutes allow non-Native American tribal employees of tribal businesses to bring suit under a doctrine originated by the Supreme Court and developed by the Ninth Circuit known as the "Tuscarora Rule."

### C. The Tuscarora Rule

The Tuscarora Rule stems from *Coeur d'Alene's* interpretation of the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*.<sup>119</sup> In *Tuscarora*, the Supreme Court ruled that the Power Authority of the State of New York could take land from the Tuscarora Indian Nation under the Federal Power Act.<sup>120</sup> The Tuscaroras argued that the Federal Power Act was a statute of general applicability, and that Native Americans are exempt absent an express intent by Congress stating otherwise.<sup>121</sup> The Court found this argument unpersuasive, stating "It is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Native Americans and their property interests."<sup>122</sup> Accordingly, it can be implied from the *Tuscarora* decision that Native Americans may be held liable under federal labor and employment statutes of general applicability.<sup>123</sup>

In *Coeur d'Alene* the Ninth Circuit specifically enumerated three exceptions to the *Tuscarora* Rule.<sup>124</sup> Native American tribes will be exempt from any law of general applicability that is silent on the is-

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115. 42 U.S.C. §§ 12101-12213 (1994).

116. See *Buffalo & Wadzinski*, *supra* note 30, at 1376.

117. See *id.* at 1376 n.62; see also 42 U.S.C. § 12111(5)(B)(i) (1994) (stating that "employer" does not include "an Indian tribe").

118. See *supra* text accompanying notes 89-99.

119. 362 U.S. 99 (1960).

120. See *id.* at 115-24. The Federal Power Act is codified at 16 U.S.C. §§ 791-825 (1994).

121. See *Tuscarora*, 362 U.S. at 115.

122. *Id.* at 116 (citing *Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935)).

123. See *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). See also *supra* text accompanying notes 106-10 for a more in-depth discussion of the *Coeur d'Alene* case. But cf. *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 713 (10th Cir. 1982) (stating that the Supreme Court has overruled by implication, or at least limited, the *Tuscarora* decision).

124. See *Coeur d'Alene*, 751 F.2d at 1116 (citing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980)).

sue of applicability to Native American tribes if that law would affect “exclusive rights of self-governance in purely intramural matters,”<sup>125</sup> “abrogate rights guaranteed by Indian treaties,”<sup>126</sup> or if there is proof by legislative intent that the statute was not meant to apply to tribes.<sup>127</sup> The court further stated that a tribe’s employment of non-Native Americans was one indication that the business enterprise was not an area of self-government.<sup>128</sup>

In 1991, the Ninth Circuit reaffirmed the Tuscarora Rule in *Department of Labor v. Occupational Safety & Health Review Commission*.<sup>129</sup> The Department of Labor court ruled that the Tuscarora Rule mandated that OSHA be applied to a tribally run mill, even though the tribe had a treaty impliedly giving them the right to exclude OSHA inspectors from coming on to the property.<sup>130</sup> Notwithstanding the fact that giving effect to the statute would effectively nullify the second exception to the Tuscarora Rule, the court held that OSHA applied despite the agreement.<sup>131</sup>

The Seventh Circuit also adopted the Tuscarora Rule in *Smart v. State Farm Insurance Co.*<sup>132</sup> In *Smart* the court ruled that the Employee Retirement Income Security Act (ERISA)<sup>133</sup> applied to a group insurance policy issued to tribal employees of the Chippewa Indian Tribe.<sup>134</sup> The *Smart* decision relied on the Tuscarora Rule by finding that the federal statute would apply unless the tribe could demonstrate that doing so would intrude on its self-governance or internal affairs.<sup>135</sup>

Federal statutes and case law indicate that tribal businesses should not be able to assert sovereign immunity as a defense to employment discrimination suits based on federal legislation brought by non-Native American employees. Moreover, the language of Title VII, as well as the Act’s legislative intent, demonstrate that tribally owned companies should not be exempt from the statute.

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125. *Id.*

126. *Id.*

127. *See id.*

128. *See id.*

129. 935 F.2d 182 (9th Cir. 1991).

130. *See id.* at 184.

131. *See id.* at 187.

132. 868 F.2d 929 (7th Cir. 1989). Other jurisdictions have also held that federal employment discrimination statutes apply to tribes, without necessarily basing those decisions on the Tuscarora Rule. Interestingly, the very court that dismissed Roselius’ lawsuit previously ruled that a claim under 42 U.S.C. § 1981 (1994) could be brought against the Seminole Indians. *See Stroud v. Seminole Tribe of Fla.*, 574 F. Supp. 1043, 1046 (S.D. Fla. 1983) (“Although the Supreme Court has specifically reserved ruling on whether a claim of national origin discrimination is cognizable under § 1981, . . . the trend among lower courts seems to favor such a cause of action.” (citation omitted)).

133. 29 U.S.C. §§ 1001-1461 (1994).

134. *See Smart*, 868 F.2d at 938.

135. *See id.* at 933-34.

## VI. POLICY JUSTIFICATIONS FOR ENFORCING THE RIGHTS OF EMPLOYEES AGAINST TRIBAL BUSINESSES

### A. Tribes and Tribal Companies Are No Longer “Financially Fragile”

In the last four decades, the doctrine of sovereign immunity has been drastically limited as it applies to the immunity of states and other government entities, as well as in its application to foreign sovereigns.<sup>136</sup> The majority of states have had their immunity abolished or greatly diminished by the courts.<sup>137</sup> In addition, courts are increasingly amenable to arguments that states have impliedly waived their immunity<sup>138</sup> and have been more likely to prohibit or limit immunity where the state undertakes commercial endeavors.<sup>139</sup> Federal courts have also placed more restrictions on the doctrine of sovereign immunity as it applies to foreign countries, thus allowing citizens with legitimate claims against foreign nations to have their day in court.<sup>140</sup>

In contrast, although some limitations have been placed on tribal immunity, Native American tribes continue to enjoy a more powerful and comprehensive version of sovereign immunity.<sup>141</sup> The policy argument used to justify this anomaly is the necessity of protecting Native American tribes that are generally more impoverished and have weaker economies than states or foreign countries.<sup>142</sup>

Specifically, it is argued that sovereign immunity should be applied to tribal businesses because if immunity is not applied, the resulting financial loss would threaten the economic existence of the “financially fragile” tribes.<sup>143</sup> The United States Supreme Court indirectly recognized that Native American economies should be protected in *United States v. United States Fidelity & Guaranty Co.*<sup>144</sup> While there are some statistics to support this argument, the recent impressive economic successes of Native American tribes demon-

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136. See Thomas P. McLish, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 COLUM. L. REV. 173, 174-77 (1988).

137. See *id.* at 174.

138. See *id.* at 175.

139. See *id.* at 176.

140. See *id.* at 177.

141. See *id.* at 173, 179-80.

142. See Getches & Wilkinson, *supra* note 57, at 8-9, 13-20; Rice, *supra* note 35, at 267-69, 294; Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1349 (1993).

143. See generally *Recent Cases*, 102 HARV. L. REV. 556, 558 (1988) (claiming that a broad application of sovereign immunity is necessary to protect “financially fragile Indian tribes”).

144. 309 U.S. 506, 511-13 (1940) (holding that a previous property judgment against the tribe could not be the basis of a *res judicata* defense in a subsequent suit by the tribe because judgment was void *ab initio* as a result of sovereign immunity).

strate that this policy is no longer valid concerning most tribes.<sup>145</sup> The cited statistics, which allegedly demonstrate that tribes are financially unstable, were compiled prior to the huge successes of Native American casinos and businesses.<sup>146</sup> For example, in *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationships*,<sup>147</sup> the author cited six-year-old statistics to support his claim that Native American tribes were impoverished.<sup>148</sup> The author pointed out that at the time of the census Native Americans had the lowest per capita income of any ethnic group in the United States.<sup>149</sup> The author cited to these figures as the reason for other dire statistics from the same year.<sup>150</sup> Similarly, other authors have relied on pre-1990 surveys to indicate rampant current unemployment on Native American reservations.<sup>151</sup>

These authors assert that the survival of Native American tribes depends upon their ability to make a living.<sup>152</sup> In order to make a living, they argue, tribal members must have the freedom to invest money in economic ventures and conduct business in a manner "consistent with the culture, values and traditions of the various tribes."<sup>153</sup> Some authorities claim that tribally operated businesses may be the only source of income for a tribe, other than federal subsidies.<sup>154</sup> Thus, they argue that the operation of tribal corporations, including all employee-related decisions, should be considered a matter of "internal affairs" and well within the scope of sovereign immunity.<sup>155</sup>

Despite the dire statistics from several years ago, many tribes have recently enjoyed explosive economic growth.<sup>156</sup> In light of this

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145. See *infra* text accompanying notes 158-71.

146. See Rice, *supra* note 35, at 267 n.1.

147. 72 N.D. L. REV. 267 (1996).

148. See *id.* at 267-68 (citing 1990 census figures).

149. See Rice, *supra* note 35, at 267 n.1 (noting that according to the census statistics, the average per capita income of Native Americans in 1990 was \$8328, while the average income for whites was \$15,687).

150. See *id.* (noting that the mortality rate for Native Americans was considerably higher in 1990 for certain causes of death, i.e., tuberculosis, 440% greater than the general population; alcoholism, 430% higher; accidents, 165% higher; and homicide, 50% percent greater).

151. See, e.g., Getches & Wilkinson, *supra* note 57, at 8.

152. See, e.g., Rice, *supra* note 35, at 268.

153. *Id.*

154. See *id.* at 294; Limas, *supra* note 30, at 690.

155. See Rice, *supra* note 35, at 295.

156. See generally Buffalo & Wadzinski, *supra* note 30, at 1366 (characterizing the recent prosperity among Native American tribes as "unprecedented economic growth and development"); Bilezerian, *supra* note 30, at 463-65; Williams, *supra* note 31 (asserting that casino gambling on Native American reservation is a \$6 billion a year industry); Pacheco, *supra* note 30, at 49; Rice, *supra* note 35, at 294 (boasting of the continued success of the tribes' "various economic endeavors" that contradicts his earlier portrayal of the dire economic conditions of the tribes).

phenomenal upswing in Native American economies, the policy of protecting "financially fragile" tribes is outdated. In particular, this policy should no longer apply to tribally owned industries that gross billions of dollars every year.<sup>157</sup>

Many of the tribes' successes have resulted from the opening of high stakes casinos on Native American reservations pursuant to the Indian Gaming Regulatory Act of 1988.<sup>158</sup> A prime example is the Mashantucket Pequot tribe of Connecticut, which began the reservation casino craze in 1990<sup>159</sup> and now owns the largest casino in the entire Western Hemisphere.<sup>160</sup> The Foxwoods Casino, located on the Pequots' reservation, is a 139,000 square foot facility that includes shops, hotels, restaurants, theaters, and a planned theme park.<sup>161</sup> The tiny tribe, which has only about 275 members, employed 6900 workers with an estimated annual payroll of \$226 million as of 1994.<sup>162</sup> The Foxwoods Casino has been so lucrative that the tribe recently made a donation of \$10 million to the Smithsonian Institution.<sup>163</sup>

The Mashantucket Pequots may be the most extreme example, but they are not alone in reaping the benefits of high stakes gambling on reservations. Hundreds of tribes in twenty-three different states own gaming operations estimated to generate as much as \$6 billion a year in revenue.<sup>164</sup> These astronomical profits are made all the more lucrative because Native Americans are exempt from state taxes on income that is earned on reservations.<sup>165</sup>

The new-found prosperity of many Native American tribes is not limited solely to profits generated from casino gambling. An investigation in 1987 revealed that Native Americans owned 21,380 companies in the United States.<sup>166</sup> These firms generated an estimated \$911 million in revenue in 1987.<sup>167</sup> Included among these enterprises was a "tribally owned federally chartered" bank in Montana and three companies owned by the Lummi tribe of Washington, which

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157. See Williams, *supra* note 31.

158. 25 U.S.C. §§ 2701-21 (1994); see also *supra* note 31.

159. See generally *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990) (holding that the Indian Gaming Regulatory Act forced the state of Connecticut to negotiate in good faith with the tribe over opening a casino on the reservation).

160. See Bilezerian, *supra* note 30, at 463.

161. See *id.*

162. See *id.*

163. See *id.*

164. See Williams, *supra* note 31; Bilezerian, *supra* note 30, at 465; Kim Bell, *Casino Plans Alarm Town; Tribe Eyes Seneca, Mo., For Gambling Operation*, ST. LOUIS POST-DISPATCH, Oct. 8, 1995, at A1. The Seminole Indians, against whom Roselius filed suit, gross an estimated \$10 million annually from high stakes bingo and other forms of gaming. See Anetta Miller, *Indian Tribes Incorporated*, NEWSWEEK, Dec. 5, 1988, at 40.

165. See *McClanahan v. Arizona St. Tax Comm'n*, 411 U.S. 164, 179-81 (1973).

166. See Pacheco, *supra* note 30, at 49 n.2.

167. See *id.*

have boasted annual sales estimated at \$34 million.<sup>168</sup> Other examples of multi-million dollar Native American corporations include an electronics assembly plant operated by the Cherokee nation, which had a annual payroll of \$9 million in 1987,<sup>169</sup> and various enterprises by the Choctaws of Mississippi that qualify them as one of the top twenty employers in the state.<sup>170</sup>

It would be presumptuous to claim that this increased prosperity will solve all the hardships facing every single Native American tribe, but it has made a difference. The Cabazon Band of Mission Indians, for example, reduced their unemployment rate from fifty percent to zero and enjoyed a 400% increase in their standard of living after opening tribally owned gaming enterprises.<sup>171</sup> If tribes with such resources still can not meet their economic needs, the cause would presumably be mismanagement or some other difficulty, rather than financial fragility.

The tribes profiting from the \$6 billion generated annually by gaming, as well as enjoying other major sources of revenue, could hardly be characterized as "financially fragile."<sup>172</sup> These tribes should be held accountable for wrongs committed against the non-Native American employees who contribute the labor that allows tribes the luxury of such financial fortune.

#### B. Non-Native Americans Should Not Be Forced to Waive Their Rights Provided by Federal Law

In light of the recent economic boom of tribal economies, the justification for the policy of ensuring that non-Native Americans do not involuntarily waive the protections afforded them under federal employment discrimination statutes is even stronger. Recently, Congress expressed a clear intent to ensure that employees do not forfeit their rights under the ADEA absent an explicit and consensual waiver. In 1990, Congress amended the ADEA to state that "[a]n individual may not waive any right or claim under this chapter unless

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168. See *id.*

169. See David Owen, *Indians Dealing on New Terms*, *FIN. TIMES*, Apr. 14, 1987, at 6, 10.

170. See *id.* Another immensely profitable industry for the tribes has been tourism. For example, the Chemehuevi tribe of California draws 150,000 visitors annually to a tribally owned water park and operates a restaurant that grosses \$4 million annually. See Alan Abrahamson, *Tribes' Immunity Sparks Criticism*, *L.A. TIMES*, July 29, 1991, at A3.

171. See Haya El Nasser, *Critics Want Reservation Gaming Curbs*, *USA TODAY*, May 20, 1993, at A1.

172. This is especially relevant when considering that the casino run by the Mashantucket Pequot tribe is a larger enterprise than any single casino run by Donald Trump or Steve Wynn, both multi-millionaire players in America's casino industry, and who, unlike the Native Americans, must pay taxes on their revenues. Neither Trump nor Wynn are able to avoid suits brought by employees under Title VII.

the waiver is knowing and voluntary.”<sup>173</sup> The amendment requires that such a waiver must be part of a written agreement that is understandable, must refer to the rights covered by the ADEA, and must advise the employee to consult an attorney.<sup>174</sup> In addition, Congress has incorporated other safeguards for employees waiving their rights, including a requirement that such employees receive consideration in exchange for the waiver and have a waiting period during which they can “consider the agreement.”<sup>175</sup>

Additionally, the Supreme Court has ruled that an employer/employee collective bargaining agreement may not be used to waive any statutory cause of action of the employee. In *Alexander v. Gardner-Denver Co.*,<sup>176</sup> an African-American drill operator named Harrell Alexander, Sr. accused his employers of firing him based on racial discrimination.<sup>177</sup> Because Alexander signed a collective bargaining agreement that contained an arbitration clause, the dispute was arbitrated.<sup>178</sup> Subsequent to the arbitrator’s decision, Alexander filed a claim under Title VII in federal court.<sup>179</sup> The District Court of Colorado granted summary judgment in favor of the defendants because Alexander agreed to settle any disputes through arbitration and the collective bargaining agreement barred him from bringing suit.<sup>180</sup> After the Tenth Circuit affirmed the decision, Alexander appealed to the Supreme Court.<sup>181</sup>

The Court ruled for Alexander, stating: “We are unable to accept the proposition that petitioner waived his cause of action under Title VII . . . . [W]e think it is clear that there can be no prospective waiver of an employee’s rights under Title VII.”<sup>182</sup> The Court reasoned that the policy of Title VII is “absolute” and represents Congress’s “command that each employee be free from discriminatory practices.”<sup>183</sup> One exception to this may be in the event of a voluntary waiver by the employee.<sup>184</sup> The Court found that such a waiver would only be valid if it is a settlement to which the employee consented voluntarily and knowingly.<sup>185</sup> Because Alexander signed a collective bargaining agreement and not an individual voluntary waiver, he did

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173. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978, 983 (codified at 29 U.S.C. § 626(f)(1) (1994)).

174. See *id.*

175. *Id.*

176. 415 U.S. 36 (1974).

177. See *id.* at 38-42.

178. See *id.* at 40-43.

179. See *id.* at 43.

180. See *id.*

181. See *id.*

182. *Id.* at 51.

183. *Id.*

184. See *id.* at 52.

185. See *id.* at 52 n.15.

not forfeit his right to sue. Therefore, the Court held that the Title VII claim could not be dismissed.<sup>186</sup>

The Court recently found, in *Gilmer v. Interstate/ Johnson Lane Corp.*,<sup>187</sup> that while employees may voluntarily waive their procedural rights to a trial under federal employment statutes, they may not involuntarily surrender their substantive rights.<sup>188</sup> The Court ruled that an employee had waived his right to a jury trial under the ADEA by signing an agreement to arbitrate any grievances he had against his employer.<sup>189</sup> The rationale of the *Gilmer* decision was that the right to a trial by jury under statutory claims can be waived through arbitration agreements.<sup>190</sup> This is permissible only because a plaintiff waiving the right to trial in favor of arbitration does not “forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”<sup>191</sup> The court distinguished *Alexander* as a case in which an arbitration clause threatened substantive rights, rather than the limitation of certain procedural rights as was the case in *Gilmer*.<sup>192</sup> In holding that agreements to arbitrate employment discrimination claims are valid only if they allow a plaintiff to assert her substantive rights under the statute,<sup>193</sup> the *Gilmer* Court reaffirmed that employers may not force their employees to involuntarily waive these rights.

The Supreme Court has also specifically ruled that citizens should be protected by the laws of the United States, even when they venture on to tribal lands. In *Oliphant v. Suquamish Indian Tribe*,<sup>194</sup> the Court limited sovereign immunity to matters that would not interfere with the interests of the United States.<sup>195</sup> The Court held that tribal sovereignty should not interfere with the protection of U.S. citizens from “unwarranted intrusions on their personal liberty.”<sup>196</sup> Forcing non-Native Americans to involuntarily waive their rights under federal statutes such as Title VII would certainly be an intrusion on those employees’ personal liberties, and therefore tribal sovereign immunity should be denied.

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186. See *id.* at 51-52.

187. 500 U.S. 20 (1991).

188. See *id.* at 28.

189. See *id.* at 35.

190. See *id.* at 26.

191. *Id.* (emphasis added) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

192. See *id.* at 33-35 (stating that the distinction between *Alexander* and *Gilmer* is that the arbitration clause in *Alexander* was part of a collective bargaining agreement and, therefore, not voluntary).

193. See *id.* at 28.

194. 435 U.S. 191 (1978).

195. See *id.* at 208-09.

196. *Id.* at 210.

Most non-Native American employees would not realize they were waiving certain rights by accepting a tribal job. Without being aware that they are forfeiting their rights, this waiver can hardly be considered "knowing and voluntary."<sup>197</sup> Because such an involuntary waiver of substantive rights is prohibited by the Supreme Court, employment discrimination statutes should apply to tribally owned companies and tribes. Tribes should not be allowed to profit from non-Native American labor and then subsequently deny all liability stemming from their interaction with that workforce.

### C. Allowing Employment Discrimination Claims Against Native-American-Owned Businesses Would Benefit the Tribes Themselves

As tribal corporations continue to make millions of dollars and have increasing interaction with non-Native American consumers, businesses, and employees, the likelihood of non-Native Americans filing legal grievances against the tribes increases. If wealthy tribes continue to avoid legitimate legal claims simply by claiming sovereign immunity,<sup>198</sup> the public will eventually demand that Native Americans be held accountable.<sup>199</sup> This in turn, could lead to Congress using its plenary power over tribal immunity to eliminate the doctrine partially or entirely.

The tribes can avoid this by voluntarily waiving a portion of their immunity on their own terms. Tribal ordinances and corporate charters could limit the waiver to tribal businesses while maintaining sovereign immunity for the tribe's government and other resources.<sup>200</sup> To avoid depleting any limited resources, limitations on damages could be incorporated.<sup>201</sup> A voluntary partial waiver of immunity would also benefit tribes by encouraging further economic investment by non-Native Americans who are hesitant about entering into business with an entity that may be immune from suit.<sup>202</sup> For example, the Mashantucket Pequot Tribe, one of the biggest Na-

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197. See *supra* text accompanying note 173.

198. See Alan Abrahamson, *Tribes' Immunity Sparks Criticism*, L.A. TIMES, July 29, 1991, at A3. The article discusses a woman who will never be able to have children because of an injury suffered at a Native American water park, a man who drowned at a tribal marina, and a woman who broke her hip at a Native American gaming parlor. All three claims were denied based on sovereign immunity. See *id.*

199. See *id.*; see also Fogleman, *supra* note 142, at 1356-59.

200. See Fogleman, *supra* note 142, at 1356-59, 1366-67, 1373, 1375.

201. See *id.* at 1377-78.

202. See generally Rice, *supra* note 35, at 293, 295 (asserting that uncertainty about the scope of sovereign immunity infringes on the economic investment of tribes by outsiders because of their fear of being sued in the place of the immune tribe); Fogleman, *supra* note 142, at 1361.

tive American success stories, have waived immunity for their casino gambling operations, limiting their liability to \$1 million.<sup>203</sup>

#### VII. POSSIBLE REMEDIES AVAILABLE TO NON-NATIVE AMERICAN TRIBAL EMPLOYEES

Under current law, there are many different legal options for a non-Native American employee claiming employment discrimination against a tribe. In the most extreme case, where a court holds sovereign immunity bars such a claim, an employee can sue the individual responsible for the discrimination. Courts have held that sovereign immunity does not apply to the actions of individual officers of the tribe.<sup>204</sup> Although Title VII does not allow for individual liability,<sup>205</sup> nothing prevents a non-Native American from bringing intentional tort claims against the individual defendant. This may be an unsatisfactory remedy, however, because the assets of an individual tribal officer are likely to be less than those of the tribe.

Moreover, the Indian Civil Rights Act (ICRA)<sup>206</sup> could also be used to fashion a private cause of action. The Act prohibits tribal governments from infringing on the civil rights of persons over which they have jurisdiction.<sup>207</sup> Among the rights protected by the statute is the right to be secure from the denial of "liberty or property without due process of law."<sup>208</sup> Under this language, terminating an employee's job based upon a discriminatory motive and then claiming that sovereign immunity bars the suit could be considered a denial of liberty without due process.<sup>209</sup>

Although ICRA is generally thought of as a statute providing certain rights for Native Americans, it also is applicable to non-Native Americans on tribal land. As Justice Rehnquist stated in *Oliphant*, the legislative history behind ICRA demonstrates that the proposed statute was worded to protect "American Indians," but was passed

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203. See Fogleman, *supra* note 142, at 1362-63, 1377.

204. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050-51 (11th Cir. 1995). But see *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (extending immunity to tribal officials acting in a representative capacity).

205. See *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991) (holding that there is no individual liability under Title VII); *Cross v. Alabama*, 49 F.3d 1490 (11th Cir. 1995) (reaffirming the *Busby* holding as to individual liability).

206. 25 U.S.C. § 1301-1326 (1994).

207. See *id.* § 1302.

208. *Id.* § 1302(8).

209. The Indian Civil Rights Act, section 1302(8), also mandates that tribal governments provide "equal protection of its laws" to all persons within its jurisdiction. Under this language, a terminated employee could also conceivably have an ICRA suit if the particular tribe had laws granting employees certain rights.

only after being modified to include "any person."<sup>210</sup> The Court interpreted this language of ICRA as meaning that the statute applies to all persons under the jurisdiction of tribal governments, regardless of whether they are Native American or not.<sup>211</sup> The Supreme Court, as well as some tribal courts, have held that in enacting the ICRA, Congress used its plenary power to expressly waive Native American sovereign immunity.<sup>212</sup> As a result, a non-Native American employee may be able to use this rationale to bring a claim against her employers through ICRA.

The most successful strategy for a non-Native American employee, of course, may be to bring a claim utilizing the federal case law holding that employment discrimination statutes should apply to tribally owned businesses.<sup>213</sup> The best possible remedy for a non-Native American tribal employee who has been wronged, however, is not currently in existence. This remedy would be an explicit act of Congress, using its plenary power over tribal immunity, to make it clear that tribes cannot escape responsibility for employment discrimination.<sup>214</sup>

#### VIII. CONCLUSION

It is contrary to all notions of fairness that plaintiffs such as Kristine Roselius are denied legitimate legal claims merely because their employers are Native American tribes. As the tribes and their entities continue to prosper economically and hire increasing numbers of non-Native Americans, courts will find it more difficult to justify an application of sovereign immunity that will deny employees their rights under federal law. The current state of the law regarding tribal immunity and its specific application to employment discrimination is vague, unpredictable, and contradictory. This area should be clarified, either by the judiciary or by Congress.

Because of public, economic, and political pressures, tribes frequently choose to voluntarily waive their immunity for economic enterprises.<sup>215</sup> However, Title VII claims should not be dependent on

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210. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6; see also 25 U.S.C. § 1302 (1994).

211. See *Oliphant*, 435 U.S. at 195, 212.

212. See *Davis v. Keplin*, 18 Indian L. Rep. 6148, 6149 (Turt. Mt. Tr. Ct. 1991); *Dupree v. Cheyenne River Housing Authority*, 16 Indian L. Rep. 6106, 6108 (Chy. R. Sx. Ct. App. 1988); *Stone v. Swan*, 19 Indian L. Rep. 6093, 6094 (Col. Tr. Ct. 1992).

213. See *supra* Part V.B.-C.

214. Title VII, for example, could be amended to explicitly state what its language and legislative history already implies: that tribes are exempt from the statute only in matters involving preferential Native American hiring practices and tribal government. This would make it clear that Native Americans will be held responsible under Title VII for all other dealings involving non-Native Americans.

215. See *supra* Part VI.C.

the fact that the non-Native American plaintiff was employed by the tribal entity instead of the sovereign tribe. In the face of such waivers, Congress should still find it necessary to enact legislation protecting the rights of non-Native American tribal employees. Until Congress, the courts, or the tribes themselves clarify this issue, plaintiffs such as Kristine Roselius will continue to struggle to adjudicate lawful claims of sexual discrimination.