Employment Law Considerations on the Navajo Nation's Reservation

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Federal Employment Laws That Expressly Exempt Tribes

Title VII of the Civil Rights Act of 1964

- Title VII of the Civil Rights Act expressly exempts Indian tribes from the definition of "employer."
  - 42 U.S.C. § 2000e(b)
- Title VII permits Indian preference on or near Indian Reservations.
  - 42 U.S.C. § 2000e-2(i)

EEOC v. Peabody W. Coal Co., 773 F.3d 977 (9th Cir. 2014)

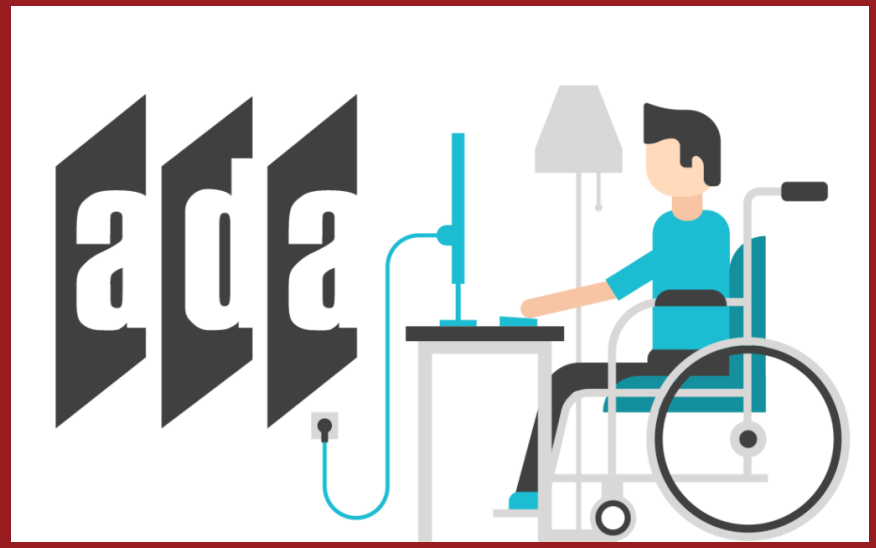
- Navajo Preference v. Title VII
- Tribal Hiring Preference was required in a mining company's lease
- Did not constitute national origin discrimination under Title VII of the Civil Rights Act
- Tribal Hiring Preference is a political classification

Americans with Disabilities Act

- Title I – employment – expressly excludes "Indian tribes" from the definition of "employer." 42 U.S.C. § 12111(5)(B)(i).

- Title II – state and local governments – applies to "public entities" defined as any State or local government - with no mention of Indian tribes. 42 U.S.C. § 12131(1).

- Title III – public accommodations – silent as to its application to Indian tribes.
  - > Even if it does apply, there must be at least a limited waiver of sovereign immunity to be able to bring a private cause of action under Title III of the ADA related to public accommodations.



Congressional Silence Re: Federal Employment Laws' Applicability to Tribes

Fed. Power Commission v. Tuscarora Indian Nation

- Whether the Federal Power Act permitted the U.S. government to seize land owned in fee simple by the Tuscarora Indian Nation

- Dicta - "[I]t is now well settled . . . **that a general statute in terms applying to all persons includes Indians and their property interests."** *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

- The Federal Power Act applied to the Tuscarora Indian Nation

- The "Tuscarora rule"

Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960)

Laws of General Applicability

(Meaning they are silent as to their applicability to tribal employers)

- Many federal employment and labor laws are silent as to whether they apply to Indian tribes.
  - FFCRA, ADEA, FMLA, FLSA, OSHA

- Laws that apply broadly ("all employers") and without exceptions are laws of general applicability.
  - *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049, 1053 (9th Cir. 2017)

Navajo Nation's Reservation

Focus on Ninth and Tenth Circuit Case law today

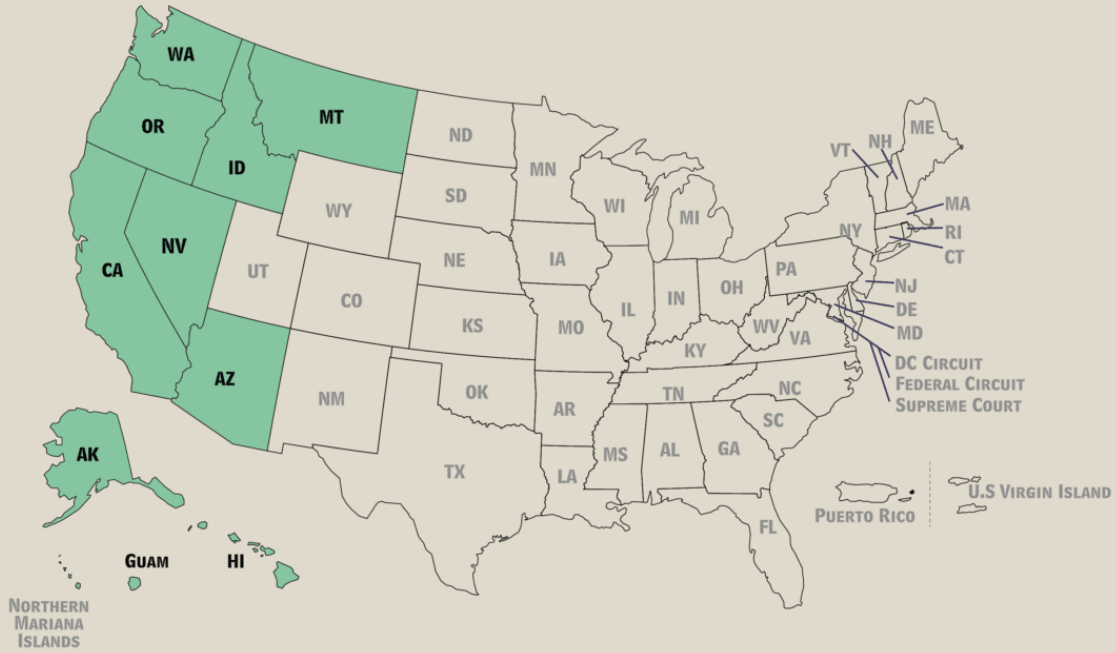
- Arizona - 9th Circuit Court of Appeals
- Utah and New Mexico -10th Circuit Court of Appeals

Circuit Split

Circuit Split Re: this Silence by Congress

- Ninth Circuit Approach - *Coeur d'Alene* three-part test
- Tenth Circuit Approach - *NLRB v. Pueblo of San Juan* (2002)
  - Whether Congress, in enacting the NLRA, had the intent to preempt Indian tribes from enacting their own right-to-work laws.
  - Followed by the 8th Circuit as well
- Although beyond the scope of this presentation, at least 2 other approaches in interpreting this congressional silence:
  - D.C. Circuit Court of Appeals Approach - *San Manuel Indian Bingo and Casino v. NLRB*
    - Focuses on traditional aspects of self-government v. commercial aspects of self-government.
  - Sixth Circuit/*Montana* Framework approach - *Soaring Eagle Casino v. NLRB*
    - Whether the tribe has enough sovereignty remaining to preempt the federal general law.

The 9th Circuit Approach



Donovan v. Coeur d'Alene Tribal Farm

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if the application would:

1. touch exclusive rights of self-governance in purely intramural matters;
2. abrogate rights guaranteed by Indian treaties; or
3. contradict Congress' intent expressed in legislative history or expressed in any other means.

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)

Donovan v. Coeur d'Alene Tribal Farm

- Whether the Occupational Safety and Health Act (OSHA) applied to a farm owned by the tribe.
- Court held that OSHA is a statute of general applicability, and that none of the three exceptions applied.
    - > Exception 1 – did not apply
        - Sold produce on the open market and in interstate commerce
        - Employed non-Indians
        - In virtually every respect, a normal commercial farming enterprise
    - > Exception 2 – no treaty
    - > Exception 3 – no indication from Congress or legislative history that OSHA was not meant to apply to Indian tribe
- OSHA applied to the farm

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)

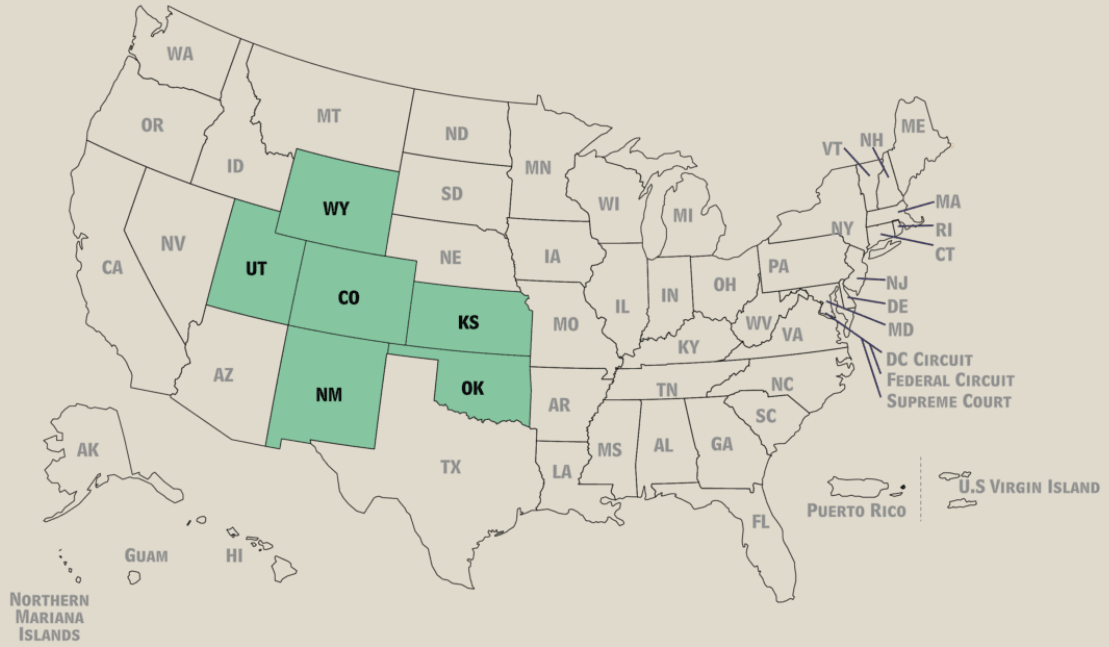
Snyder v. Navajo Nation, 382 F.3d 892 (9th Cir. 2004)

- Law enforcement officers of the Navajo Nation Division of Public Safety sued the Navajo Nation claiming violations of the Fair Labor Standards Act ("FLSA").
- The FLSA is a statute of general applicability.
- Exception #1 - statutes of general applicability do not apply when application would interfere with exclusive rights of self-governance in purely intramural matters.
- Navajo Nation DPS is a traditional governmental function, it enforces law and order, clearly a part of tribal government, and thus an appropriate activity to exempt as intramural.
- FLSA does not apply.

Criticism of *Coeur d'Alene Tribal Farm*

- Divests tribes of sovereignty without evidence of Congressional intent
- Based on a flawed foundation relating to whether a law of general applicability applies to *individuals* – not Indian tribes.
- Calls for different treatment based on being Indian vs. non-Indian.

The 10th Circuit Approach



Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982)

- Held that OSHA does not apply to the Navajo Forest Products Industries
- Treaty of 1868, Article II - power to exclude non-tribal members
  - > Was not abrogated
  - > Precludes application of OSHA to the timber enterprise
- Navajos did not voluntarily relinquish the power of the Treaty nor had that power been divested by Congress
- Absent a clear expression of Congressional intent, we shall not permit divestiture of this tribal power
- Indian law canon of construction - all doubtful expressions contained in Indian treaties should be resolved in the Indians' favor

EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989)

- District Court of Oklahoma found the ADEA applied to the Cherokee Nation under normal rules of statutory construction.

  > Congress modeled the ADEA after Title VII, but chose to exempt Indian tribes only under Title VII.

- Relies on *Donovan v. Navajo Forest Products Indus.* –the Cherokee Nation has an applicable treaty which recognizes tribal self-government.
- Normal rules of statutory construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue.
- Indian Law Canons of Construction apply.

EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989)

Montana v. Blackfeet, 471 U.S. 759, 766 – Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

County of Oneida v. Oneida Indian Nation, 470 U.S. 236, 247 – The canons of construction applicable in Indian law are rooted in the unique trust relationship between the U.S. and the Indians. Treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 – ambiguities in federal law have been construed generously in order to comport with traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

Relies on Indian Law canons of construction in reaching its decision.

EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989)

- Ambiguity exists – the ADEA's silence with respect to Indians.

- No clear congressional intent to abrogate Indian sovereignty rights, such as by legislative history or the existence of a comprehensive statutory plan.

- For matters involving Indian treaties, or even nontreaty matters involving Indians, apply the Indian law canons of construction to the benefit of Indian interests.

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002)

Facts

- Pueblo of San Juan's 1996 right-to-work ordinance:

  No person shall be required, as a condition of employment . . .on Pueblo lands, to: (i) resign or refrain from voluntary membership in . . . a labor organization; (ii) become or remain a member of a labor organization; (iii) pay dues, fees, assessments or other charges of any kind or amount to a labor organization; (iv) pay to any charity or other third party, in lieu of such payments any amount equivalent to or a pro-rata portion of dues . . . regularly required of members of a labor organization; or (v) be recommended, approved, referred or cleared through a labor organization. *Pueblo of San Juan*, 276 F. 3d at 1189.

- The NLRB and the Union brought an action for declaratory judgment and injunction, alleging the ordinance was preempted by the NLRA.

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002)

Holding

National Labor Relations Act (NLRA) did not preempt tribal government from enacting right-to-work ordinance.

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002)

Reasoning

- Tribes retain sovereign authority to regulate economic activity within their territory
- Silence is not sufficient to strip Indian tribes of their retained inherent authority of self-government.
- Whether Congress, in enacting the NLRA, had the intent to preempt Indian tribes from enacting their own right-to-work laws.
- In the absence of clear Congressional intent, federal laws will not be read as stripping tribes of their retained sovereign authority to pass right-to-work laws and be governed by them.
- This Congressional "silence" is a presumption of non-applicability

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002)

Reasoning

- The Tenth Circuit also relied on the Indian Law Canons of Construction
- A well-established canon of Indian law states that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (citing Montana v. Blackfeet Tribe, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L.Ed.2d 753 (1985)).
- The Supreme Court has also explained that this canon means that "doubtful expressions of legislative intent must be resolved in favor of the Indians." *Id.* (citing South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506, 106 S. Ct. 2039, 90 L.Ed.2d 490 (1986)).

ERISA does not apply to Indian governmental plans

Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275 (10th Cir. 2010)

- Steven Dobbs employed by the Southern Ute Indian Tribe filed state law claims pursuant to a health insurance policy
- U.S. District Court for the District of Colorado dismissed claims in part based on preemption under ERISA
- Pension Protection Act of 2006 - amends ERISA's exception for governmental plans to include a plan established by an Indian tribal government so long as employees performed essential governmental functions but not commercial activities.

ERISA does not apply to Indian governmental plans

Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275 (10th Cir. 2010)

- 10th Circuit finds that this amendment was a clarification and not a substantive amendment
- Amendment applied retroactively, and ERISA was *always* intended to exclude tribal plans.
- *NLRB v. Pueblo of San Juan* - tribes retain attributes of inherent sovereignty until Congress acts to withdraw those powers.
- Indian law canon of construction that statutes are to be construed liberally in favor of the Indians.

Tribal Sovereign Immunity

The Navajo Nation Has Sovereign Immunity

- A central axiom of Indian law centers on Indian tribes' status "as domestic dependent sovereigns." As such, tribes enjoy federal common-law sovereign immunity. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028 (2014) (reaffirming tribal sovereign immunity and holding that it bars suit against an Indian tribe for opening casino outside Indian lands).
- This immunity is very broad. Immunity shields tribal officials, employees acting in their official capacity and within the scope of their employment, and it shields Tribes from suits for damages and requests for injunctive relief (whether in tribal, state, or federal court).

But Immunity Can Be Waived

- Congress can authorize waivers of tribal sovereignty.
  - > *Id.*
- Tribes may waive their sovereign immunity by tribal law or contract, so long as the waiver is clear and unequivocal.
  - > *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).

Two questions…

1. Does a federal employment law apply to the tribal employer operating on the Navajo Reservation?
2. May a private cause of action be brought by an individual against the tribal employer in light of sovereign immunity?

> But remember tribal sovereign immunity does not bar suits by federal agencies.

Abrogation by Congress or Waiver of Sovereign Immunity

Nanomantube v. Kickapoo Tribe in Kansas, 631 F.3d 1150 (10th Cir. 2011)

- Former tribal employee brought suit against the Kickapoo Tribe in Kansas, Tribal Council, and Golden Eagle Casino for violations of Title VII.
- Employee handbook stated that the tribe promised to comply with the employment discrimination provisions of Title VII.
- Congress did not abrogate tribal immunity – Title VII expressly exempts Indian tribes.
- And the tribe did not waive it sovereign immunity by agreeing to comply with Title VII in its employee handbook.
- Different from other examples of waivers in other cases found in choice of law and arbitration provisions of a contract or waivers of immunity in a "sue or be sued" clause in the corporate charter.

Exhaustion of Tribal Remedies

Exhaustion of Tribal Remedies

***Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017), as amended (Aug. 3, 2017)**

- Window Rock and Pinon Unified School Districts operate schools on land leased from the Navajo Nation.
- Current and former employees filed complaints with the Navajo Nation Labor Commission alleging violations of state law and laws under the Navajo Preference in Employment Act.
- School Districts sought declaration in the federal district court of Arizona that the Commission and Navajo tribal courts lacked jurisdiction.
- Commission and employees moved to dismiss for failure to exhaust tribal remedies.

Exhaustion of Tribal Remedies

***Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017), as amended (Aug. 3, 2017)**

- Ninth Circuit held that tribal jurisdiction is colorable or plausible under the court's interpretation of *Nevada v. Hicks* because the claims arise from conduct on tribal land and implicate no state criminal law enforcement interests.
- Thus, the tribal forum must have the first opportunity to evaluate its own jurisdiction over the case.
- Lifts injunction against tribal forum proceedings.

Navajo Employment Laws

Navajo Employment Laws

Title 15

- Office of Navajo Labor Relations
- Navajo Nation Labor Commission
- Navajo Preference in Employment Act
- Navajo Nation Healthy Start Act

  > Must Provide Opportunities for Working Mothers to Breastfeed

- Child Labor
- Workers' Compensation
- Navajo Technical College
- Navajo OSHA

Civil Rights of Individuals with Disabilities Act

- Added Disability Protections to the NPEA

Navajo Nation Mining Safety Code

- 18 N.N.C. Section 401 *et seq*.

The Navajo Preference in Employment Act

More than Just Preference

604. Navajo employment preference.
605. Reports.
606. Union and employment agency activities; rights of Navajo workers.
607. Navajo prevailing wage.
608. Health and safety of Navajo workers.
609. Contract compliance.
610. Monitoring and enforcement.
611. Hearings.
612. Remedies and sanctions.
613. Appeal and stay of execution.
614. Grievance Procedure for Navajo Nation Government Employees
615. Non–Navajo spouses.
616. Polygraph test.
617. Rules and regulations.

604(B)(8) – Adverse Action and Just Cause

“All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases."

- “Adverse Action” is undefined
- “Whether an ‘action’ is ‘adverse’ depends on the specific employment relationship.” *Sells v. Rough Rock Cmty. Sch.*, 8 Nav. R. 643, 648 (Nav. Sup. Ct. 2005). An employer’s action is adverse if it “results in some tangible, negative effect on the Plaintiff's employment." *Id*.
- ”Just Cause” is undefined
- “The term ‘just cause’ is broad, and it encompasses a wide range of employer justifications for adverse action. The presence or absence of "just cause" in a particular situation is a factual matter, which is particularly suited to specialized inquiry before the Commission.” *Smith v. Red Mesa Unified Sch. Dist. No. 27*, 7 Nav. R. 135, 138 (Nav. Sup. Ct. 1995)

“At Will” Legislation

CO-60-17

- Amended Section 604(B)(8) Regarding “Program Managers”
- Added them to the list of people who are exempted from ”just cause”

Change of Venue for Tribal Government Employees

CO-48-14

- Changed the Process for Navajo Government Employees
- Executive, Legislative, & non-LGA certified chapter employees must follow the Navajo Nation Personnel Policies Manual
- Judicial Branch must follow the Judicial Branch Employee Policies and Procedures
- Certified Chapters are with all other employers in the Labor Commission

Tribal Internal Grievance Processes

THE NAVAJO NATION

Personnel Policies Manual

JUDICIAL BRANCH
OF THE NAVAJO NATION

EMPLOYEE POLICIES AND PROCEDURES
BEEHAZ'AANII BIK'EHGO DA'INIISH

EFFECTIVE: November 08, 2010
***Amendments through:* July 18, 2013**
Annotated

Change in the Burden of Proof & Sexual Harassment

CMA-13-16

- This was likely a response to *Hadley v. Navajo Nation Dep't of Pub. Safety,* No. SC-CV-20-15 (Nav. Sup. Ct. Feb. 10, 2016)
- Added sexual harassment to Section 604(B)(9)
- Changed the burden of proof under Section 611 from the employer to the employee by the preponderance of the evidence

Harassment

Section 604(B)(9)

- Sexual Harassment was added
- "All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and including sexual harassment. The employee alleging a violation of this subsection shall have the burden of proof to show that violation by a preponderance of the evidence."
- "Like 'just cause' and 'adverse, action,' both key terms in the NPEA, 'harassment' is not defined." *Kesoli v. Anderson Sec. Agency*, 8 Nav. R. 724, 731 (Nav. Sup. Ct. 2005).
- The Navajo Nation Supreme Court has stated harassment is "a broad term encompassing all forms of conduct that unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment." *Id.*

Some Navajo Cases Regarding Outside Employment Laws

- *Bradley v. Lake Powell Med. Ctr.*, 9 Nav R. 89 (Nav. Sup. Ct. 2007)
  - Employee who was fired claimed unemployment benefits with ADES
  - Plaintiff also filed a complaint with ADES and the Navajo Nation Labor Commission
  - Issue was whether to grant comity and *res judicata to* ADES decision
  - Held that the Commission should have granted comity, but not *res judicata*
- *Cedar Unified School District v. Navajo Nation Labor Commission*, 9 Nav. R. 152 (Nav. Sup. Ct. 2007)
  - Arizona School District employees filed claims alleging violations of the NPEA
  - Navajo Supreme Court held that the School District had to follow Navajo law even though the employment contracts purported to follow Arizona law
  - The Court also said that Title VII of the Civil Rights Act does not preempt Navajo law

Continued

- *McDonald v. Ellison*, 7 Nav. R. 429 (Nav. Sup. Ct. 1999)
  - Lawsuit regarding life insurance proceeds
  - "[A] general statute that does not expressly apply to Indians will not apply if: (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians-on their reservations." (citing *Lumber Indus. Pension Fund v. Warm Springs Forest Prod*., 939 F. 2nd 683 (9th Cir. 1991).
  - Holding that ERISA does not apply to this case even though it was an ERISA plan governed by its provisions.
  - Navajo Court could decide who is entitled to the life insurance proceeds under Navajo law
- *Ariz. Pub. Serv. Co. v. Office of Navajo Labor Rels*., 6 Nav. R. 246 (Nav. Sup. Ct. 1990)
  - Suggested that the ADEA would not apply given *EEOC v. Cherokee Nation* 871 F.2d 937 (10th Cir. 1989)

Navajo Nation Occupational Safety and Health Act

- 15 N.N.C. Section 1401 *et seq*.
  - Creates the NNOSHA Office
  - "Employers shall furnish to each employee a place of employment free from recognized hazards that are causing or are likely to cause death or serious harm."
  - Inspections
  - Citations
  - Enforcement
  - Penalties

Navajo Disability Protections

- Civil Rights of Individuals with Disabilities - CJY-63-18
  - Applies to housing, employment, education, voting, incarceration, government services, & public accommodations
  - Amended the NPEA Section 604(B)(7) to state that no person can be denied selection or retention for employment because of their disability so long as reasonable accommodations can be made that allow the person to perform their duties.

Any Questions?

Thank You

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