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TRIBAL IMMUNITY STACKS DECK AGAINST WORKERS

Harassment Suit Fights 200 Years Of Precedent to Move Casino Under Authority of State Court

By Leslie Simmons
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LOS ANGELES - For Corinn Medina, walking into Thunder Valley Casino to work the late shift was like entering a virtual den of inequity.

Medina, then 21, was required to strut around in the Sierra foothills casino's costume du jour: a skimpy front-zipping top and pleather hot pants, fishnet stockings and 6-to-8-inch go-go boots - and claims she took daily doses of degrading sexual advances because of the outfit.

She was not alone, according to a proposed class action lawsuit alleging sexual harassment and discrimination filed by Medina and six other former female employees.

But with 200 years of courts upholding tribal sovereign immunity, the women realize they've entered unfriendly territory.

Tribes and their casinos are hard to pin down in the courts because of the supreme authority they have within their own Indian nations. The immunity they enjoy shields them from being sued outside their own tribal court system, if one even exists.

That's what happened last November, when a Placer County judge dismissed their lawsuit against the United Auburn tribe - a band of less than 250 members - and Thunder Valley Casino.

Now, Medina's attorneys at Equal Rights Advocates in San Francisco are using the case to try to change the law as they appeal the dismissal.

"[The tribe] did say at one point in the [employee] handbook that they're a sovereign immunity, but I don't think that meant leaving your civil rights at the door when you go to work," said ERA's lead counsel Debra Smith.

Since 1830, when U.S. Supreme Court Chief Justice John Marshall declared them "domestic dependent nations," Indian tribes have been sovereign - a right that only Congress can take away or a tribe can waive.

In the last decade, sovereign immunity has received attention because of the numerous Indian casinos popping up all over the country.

In California alone, tribal gaming is reportedly a \$5.1 billion per year industry, with the tribes doing business with non-tribal contractors, developers, employees and gamblers.

"It's one thing to talk about immunity on the reservation and making their own decisions about their own members," said tribal gaming expert Cathy Christian of Nielsen Merksamer in Sacramento. "Now, [the tribes] have a different set of questions. They employ lots of people and invite lots of people."

But when something goes wrong - for instance, an employment dispute, a disagreement over a contract or an injury on casino property - outsiders often find they have little recourse in court against tribes.

"I don't think people have figured out the magic bullet to reverse 200 years of legal precedent," Christian added.

Though casinos operate separately and are structured as economic subordinates, they are considered an arm of the tribe and immune from any court action, said Whittier Law School professor and gaming expert I. Nelson Rose.

"Sovereign immunity is with any government," he said. "If you're killed in battle, your family can't sue the government for wrongful death.

"You can't sue the post office if an employee goes 'postal' or runs his car into you," he added.

This is not to say everyone is happy with immunizing Indian tribes from lawsuits. The U.S. Supreme Court for one has suggested that Congress should rid the country of the privilege altogether.

"The U.S. Supreme Court basically hates tribal immunity," Rose said.

The definitive case, Rose said, is 1998's *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, in which the U.S. Supreme Court split 6-3, finding that "Indian tribes enjoy sovereign immunity from civil suits." *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 715 (1998).

"Immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims," Justice Anthony M. Kennedy wrote for the majority. "These considerations might suggest a need to abrogate tribal immunity, at least as an over-arching rule."

Rose said the *Kiowa* opinion is perplexing because the justices found sovereign immunity came from a misreading of the law. Still, the majority said it was up to Congress to change it. The minority indicated it should change now.

"It ignored what everybody had thought was the derivation of the rule," Rose said.

So far, the Thunder Valley plaintiffs have yet to pierce the United Auburn's sovereign immunity, but they intend to keep trying.

Some of the plaintiffs say they were harassed non-stop by big-spending customers known as high rollers, whose conduct was defended by management.

Other plaintiffs claim they were discriminated against because they were older than 40 and given "lower level, lower-paying, dead-end jobs with little chance of advancement."

The most serious allegations come from women who claim they were sexually assaulted at the casino by fellow employees or customers.

"The whole casino is very sexualized," said Smith, their attorney. "It was just pervasive. There was harassment by patrons, co-workers and by managers, which just went uncorrected despite complaint after complaint."

Medina claims she was attacked in the remote employee parking lot by an unknown assailant she believes was a customer.

"No action was taken to improve security or improve the employees well-being to get to the cars," she said. "It made me scared to death to go into work - always looking over my shoulder, never knowing who the person was, or if it was going to happen again."

The tribe's attorney, Howard Dickstein, refuted the claims, saying the alleged assaults went unreported to the district attorney's office and there was "no evidence to support those allegations."

Among the women's arguments for state court jurisdiction is the belief United Auburn waived its immunity in its tribal gaming compact with the state. All Indian casinos in California are governed by compacts, which create standards and regulations for the tribe to follow in order to build and run their gaming palaces.

California's original compacts with some 60 tribes, negotiated by Gov. Gray Davis, allow very little court jurisdiction.

"It was thrown together," Christian said. "There wasn't a way to set up standards and enforce it. If you can't sue them in state court, what else can you do?"

Nothing, experts say, unless a tribe renegotiates its compact.

"Some of those tribes want new compacts for more slot machines, but they balk at the labor and environmental standards," Christian said of the original 60 compacts.

The United Auburn Indian Community's compact - negotiated by Gov. Arnold Schwarzenegger - called for the tribe to establish within 30 days fair employment protections comparable to federal and state law and a forum to file claims. If that didn't happen, then the tribe by default had to adopt state law and waive immunity.

The plaintiffs say the tribe never adopted any protections or a claims process. "We're very confident there was no law or forum," Smith said.

Dickstein said there were established protections and a way for the women to make complaints, and there still is today.

"They just have not chosen to exercise it - at least to date," said Dickstein of Dickstein & Zerbi in Sacramento.

In April, 21 months after the lawsuit was filed, the United Auburn's tribal council adopted an employment discrimination ordinance that includes binding arbitration and establishes a claims review board. The board can decide a complaint or send it to mediation or arbitration at JAMS, the alternative dispute resolution firm. The agreement provides for damages up to \$10 million.

Most importantly, Dickstein said, the tribe adopted a special resolution allowing the Thunder Valley plaintiffs to use the claims process.

"The tribe is not just blowing them off or standing on its immunity," Dickstein said. "It wanted to get to the bottom of it.

"This is the only tribe in the state that has done that," he said. "It's particularly frustrating ... to have the plaintiffs ... continue to seek state court jurisdiction, which is a hopeless quest, when they have an independent binding remedy."

The women's appeal is pending in the 3rd District Court of Appeal. *Medina v. Thunder Valley Casino*, C052017.

In addition to their argument that the tribe failed to set up a complaint process, the lawyers say Thunder Valley also represented itself as an equal opportunity employer under the state's Fair Employment and Housing Act.

Violating FEHA is a violation of public policy, and under the 1953 federal Public Law 280, states do have some civil and criminal jurisdiction over tribes on limited issues, including violating public policies, Smith said.

But Thomas Gede, executive director of the Conference of Western Attorneys General, said that interpretation is broad. Public Law 280 mostly allows tribe members to sue one another in state court, rather than deal with the matter through a tribal court, if there even is one, he said.

"But that does not mean the tribe waives sovereign immunity in suits brought against it," said Gede, whose organization advises state attorneys general on Indian gaming issues.

In California, Public Law 280 has applied in cases involving juvenile dependency, criminal search warrants and most recently, two lawsuits over campaign donations by tribes, which is under review by the state Supreme Court.

In both cases, two separate appellate panels found the Fair Political Practices Commission could sue a tribe for allegedly violating campaign finance disclosure rules.

Without Public Law 280, access to tribes via the state courts has been few and far between, though there are some unique cases where immunity does not apply.

Recently, the 4th District Court of Appeal ordered arbitration in a personal injury case against a tribe pursuant to its compact.

In another lawsuit, the 4th District ordered discovery to determine whether a tribal gaming co-op, comprised of various tribes nationwide, surrendered its immunity with a California commercial real estate developer.

But a survey of published cases in California indicate most lawsuits against tribes still get tossed based on sovereign immunity.

Last year, the court of appeal refused to allow a non-tribal contractor to sue the Cabazon Band of Mission Indians for \$500,000 worth of remodeling work done at the Fantasy Springs Casino near Palm Springs.

Though siding with the tribe, the justices warned in the unpublished opinion it was a "cautionary tale" to those who do business with tribes.

In another 2005 case, a Rohnert Park citizen activist group was barred from placing a referendum on the ballot to decide whether the a local tribe could build a casino just outside the city.

And former employees of a casino run by the Big Valley Band of Pomo Indians lost their case alleging the tribe waived its sovereign immunity from suit because it had an arbitration clause in the contract. The court of appeal ruled the clause was not a general waiver of the tribe's immunity "because consent to arbitrate cannot be interpreted as a consent to be sued for all causes of action arising from the contract."

Despite this history, the former Thunder Valley employees continue their fight.

But there's a glitch: the new claims review board created by the United Auburn in April, well after the lawsuit was filed.

"I think the timing speaks for itself," ERA's Noreen Farrell said of the tribe's new rules. "As to what it means and what it says and how to interpret it, we're still reviewing."

Gede said the appellate court could reject the women's appeal because of the new ordinance and resolution.

"I imagine the court of appeal ... might ask the question, 'Why are you here?'" Gede said.

Christian said that the tribe's neutral forum is a "huge step in the right direction" but not the "ultimate answer."

"All of us are struggling with how to deal with the role tribal governments play," she said. "One thing for sure, when a tribe makes an effort to find a solution and remedy, we should encourage it."

Smith, the women's attorney, said litigation isn't the only option for forcing Indian casinos to change their ways.

"Ultimately, if we lose on all these legal issues, we're creating a record that we can take to the governor and to the Legislature," Smith said. "We're in it for the long haul."