Harold DAWAVENDEWA, a single man, Plaintiff–Appellant,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant–Appellee,

The Navajo Nation, Appellee.

No. 00–16787.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 17, 2001.

Filed Jan. 2, 2002.

Unsuccessful applicant for position at power generating facility operated by regional power district located on Indian reservation lands brought Title VII action, challenging employment preference to qualified members of Indian tribe that district was required to grant under terms of its lease with tribe. After initial dismissal of suit was reversed, and matter remanded, 154 F.3d 1117, the United States District Court for the District of Arizona, Stephen M. McNamee, Chief Judge, dismissed suit based on failure to join tribe as party. Applicant appealed. The Court of Appeals, Trott, Circuit Judge, held that: (1) tribe was a necessary party to suit; (2) tribe could not joined as party, since it enjoyed tribal sovereign immunity; and (3) tribe was an indispensable party, whose absence required dismissal of suit.

Affirmed.

1. Federal Courts ⚿818

Court of Appeals reviews a district court's decision to dismiss for failure to join an indispensable party for abuse of discretion. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

2. Federal Courts ⚿776

To the extent that the district court's determination whether a party's interest is impaired, as will make it an indispensable party to suit, involves a question of law, Court of Appeals reviews that determination de novo. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

3. Federal Civil Procedure ⚿201

Inquiry used in determining whether a party is indispensable is a practical, fact-specific one, designed to avoid the harsh results of rigid application. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

4. Federal Courts ⚿763.1

In reviewing grant of motion to dismiss for failure to join an indispensable party, Court of Appeals must determine (1) whether an absent party is necessary to the action, and then, (2) if the party is necessary, but cannot be joined, whether the party is indispensable such that in equity and good conscience the suit should be dismissed. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

5. Federal Civil Procedure ⚿202

In determining whether a party not named in complaint is a necessary party, court considers whether, in the absence of that party, complete relief can be accorded to the plaintiff, or in the alternative, whether the absent party claims a legally protected interest in the subject of the suit such that a decision in its absence will (1) impair or impede its ability to protect that interest, or (2) expose named parties to the risk of multiple or inconsistent obligations by reason of that interest. Fed.Rules Civ. Proc.Rule 19, 28 U.S.C.A.

6. Federal Civil Procedure ⚿202

An absent party's claimed interest must be more than speculation about future events in order for that party to be

ception does not apply in this case. He certainly points to no authority, and we find none, construing the 1868 Navajo Treaty as it pertains to Title VII. Without the aide of supporting precedent, we reject Dawavendewa's invitation to ignore the Nation's plausible legal defenses.

Accordingly, we determine that SRP does face the substantial possibility of multiple or inconsistent obligations if the Nation is not a party to this suit. Thus, we conclude that in addition to being necessary as contemplated by Rule 19(a)(1) and 19(a)(2)(i), the Nation is a necessary party as defined by Rule 19(a)(2)(ii).

II Tribal Sovereign Immunity

[13, 14] Having determined that the Nation is thrice over a necessary party to the instant litigation, we next consider whether it can feasibly be joined as a party. We hold it cannot. Federally recognized Indian tribes enjoy sovereign immunity from suit, *Pit River Home,* 30 F.3d at 1100, and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58–59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

[15] In this case, the Nation has not waived its tribal sovereign immunity and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases.[9] Dawavendewa, undaunted, argues that tribal sovereign immunity does not exist because the suit could be sustained against tribal officials. We disagree.

[16] To support this proposition, Dawavendewa relies heavily on *Burlington N.R.R. v. Blackfeet Tribe,* 924 F.2d 899 (9th Cir.1991), and *Arizona Pub. Serv. Co. v. Aspaas,* 77 F.3d 1128 (9th Cir.1996). In *Blackfeet Tribe,* we extended the doctrine of *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908),[10] to tribal officials. In particular, we held that, in cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute. *See Blackfeet Tribe,* 924 F.2d at 901.

In *Aspaas,* the Navajo Supreme Court determined that the Arizona Public Service Company's ("APS") anti-nepotism policy violated Navajo employment discrimination law. APS then filed suit in federal district court seeking injunctive relief against the Navajo Nation, its executive

9. In fact, pursuant to 42 U.S.C. § 2000e(b), Indian tribes are specifically exempt from the requirements of Title VII. *See also, e.g., Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (finding that Congress abrogated the States' sovereign immunity by enacting Title VII under the Enforcement Clause, § 5, of the Fourteenth Amendment); *Board of Trustees v. Garrett,* 531 U.S. 356, 374, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (finding ineffective Congress's abrogation of state's sovereign immunity from suit by private individuals for money damages under the ADA).

10. *Ex Parte Young* held that a suit against a state official acting pursuant to an allegedly unconstitutional statute does not contravene that state's sovereign immunity under the Eleventh Amendment. 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Justice Peckham wrote: "The act to be enforced is alleged to be unconstitutional; and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." *Id.* at 159, 28 S.Ct. 441.

In announcing this rule, the Court created an oft-recognized legal fiction that injunctive relief against state officials acting in their official capacity does not run against the State. *See Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 269–70, 281 (1997); Charles Alan Wright, *The Federal Courts* 311 (1994).