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Indian Preference and
Michigan's Elliott-Larsen Civil
Rights Act

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Summary

If an Indian tribe buys a Help Wanted ad in a Michigan newspaper that includes a statement of the tribe's Native American hiring preference, does the newspaper break the law if it runs the ad? The answer is no. Although Michigan law seems to prohibit the both tribe's policy and the ad, and would hold the newspaper responsible for the violation as an accomplice even if the tribe claimed sovereign immunity, federal Indian law clearly preempts the state law in this case because the federal law actually requires the tribe's Native-hire preference. Since the state law is preempted, it does not apply to the tribe, and the newspaper cannot be an accomplice.

I. State Law Apparently Prohibits a Tribe's Native Preference in Hiring

A. The Elliot-Larsen Civil Rights Act

The Elliott-Larsen Civil Rights Act (ELCRA)¹ prohibits employment discrimination based on "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status."² The words "tribe," "Indian," or "Native American" do not appear anywhere in the act, but ELCRA, on its face, seems to apply to tribes. The law applies to employers³, and an employer is a person with 1 or more employees.⁴ A person is defined as "any...legal or commercial entity."⁵ A tribe, as a legal entity, is almost certainly a "person," and thus an employer, which is prohibited from employment discrimination based upon race.

¹ MCL § 37.2102 et seq.

² § 37.2102(1).

³ § 37.2202(1).

⁴ § 37.2201(a).

⁵ § 37.2103(g).

The key language prohibiting racial discrimination states:

(1) An employer shall not do any of the following:

(a) Fail or refuse **to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment,** compensation, or a term, condition, or privilege of employment, because of religion, **race,** color, **national origin,** age, sex, height, weight, or marital status.

(b) Limit, segregate, or **classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant** because of religion, **race,** color, **national origin,** age, sex, height, weight, or marital status (emphasis supplied).⁶

A Native American hiring preference seems to "discriminate" against non-Natives in hiring and recruiting, and, if so, would "otherwise adversely affect the status of an...applicant" who was non-Native. Thus, if a Native American preference is based on "race" or even "national origin," then it is plainly prohibited by ELCRA.

If the discrimination is based upon "national origin," a tribe has a possible remedy under ELCRA. The "bona-fide occupational qualification" exemption states that "[a] person subject to this article may apply to the commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise."⁷ Thus, if a tribe can demonstrate to the state that having a Native American in a given position is "reasonably necessary to the normal operation" of the tribe, then the Native American preference would be exempt in so far as it is

⁶ § 37.2201(1)

⁷ § 37.2208.

based upon a "national origin" discrimination. However, the exemption does not apply to racial discrimination. As long as "Native American" is a racial category, a Native American preference cannot be exempted as an occupational qualification.

B. How ELCRA applies to a newspaper

If the Native preference is prohibited racial discrimination, then an employer may not publish a job announcement that mentions the preference,⁸ which is where the newspaper comes in. While ELCRA prohibits an employer from publishing or causing to be published a racially discriminatory job announcement, it does not prohibit a newspaper from publishing the ad (unless, of course, the newspaper is itself the employer). However, it is also unlawful to conspire, aid, or abet an ELCRA violation.⁹ This accomplice provision, on its face, makes a newspaper liable for running a racially discriminatory job announcement.

Therefore, if ELCRA applies to tribes in Michigan, and if a Native American preference is racially discriminatory, then a newspaper could very well face liability for publishing an tribe's "help wanted" ad that contains the tribe's Native American hiring preference policy. It is true that, even if the state law applies to the tribe, tribal governments are sovereign, and, in general, are immune from suit.¹⁰ But the tribe's immunity from state action would not extend to a private newspaper. Thus, for the newspaper to avoid accomplice liability, it must show that the state law does not apply at all to the tribe.

⁸ § 37.2206(1). Indeed, it is also an ELCRA violation for a job *seeker* to publish an ad mentioning the seeker's own religion, race, color, national origin, age, sex, height, weight, or marital status. § 37.2207.

⁹ § 37.2701(b).

¹⁰ See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

II. Federal Law Allows and Requires a Tribe's Native Preference in Hiring

A. Federal law allows the Native hire preference

Fortunately for a newspaper wishing to run a tribal employment ad with a Native hire preference, the federal law is that a tribe's preference for Native Americans is not racially discriminatory. In *Preston v. Heckler*, the 9th Circuit found that "Congress [clearly] considers Indian [hiring] preferences to be an important element of federal Indian Policy."¹¹ The policy is expressed in federal statutes that exempt tribes from civil rights obligations and by affirmative Native preference requirements.

The Civil Rights Act of 1964¹² prohibited race-based discrimination in employment, which might have created a conflict with the IRA's Native preference. However, Congress protected a tribe's right to prefer Natives in hiring by specifically exempting tribes from the Civil Rights Act's provisions.

The **term "employer"** means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term **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 supplied).¹³

¹¹ 734 F.2d 1359 (1984).

¹² 42 U.S.C. 21 § 2000 et seq.

¹³ § 2000(e)(b).

Further, the Civil Rights Act even allows a Native-hire preference for *any* employer, tribal or otherwise, if the employer's activities take place on or near an Indian reservation.¹⁴

B. Federal law requires the Native hire preference

Later, Congress included affirmative Native-hire preferences in the Indian Self-Determination and Education Assistance Act (ISDEA).¹⁵ The ISDEA requires a broad Native preference for not only tribes, but any federal contractor running programs that benefit Indians. The relevant language of the ISDEA states:

Any contract, subcontract, grant, or subgrant pursuant to this [Act] ... or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible —

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given Indians....¹⁶

A Native hiring preference for tribes and the federal Bureau of Indian Affairs does not violate the federal Constitution. The Supreme Court in *Morton v. Mancari* held that the Native preference, authorized in the IRA, did not violate the Equal Protection or Due Process clauses.¹⁷ The *Mancari* court found that tribes are political entities, and Congress has a political relationship with them as well as a trust obligation towards tribes and Indians; thus Indians, as members of tribes, have a political relationship with Congress.¹⁸ In addition, the *Mancari* court

¹⁴ § 2000(e)(2)(i).

¹⁵ 25 U.S.C. § 450 et seq.

¹⁶ 25 U.S.C. § 450e(b).

¹⁷ 417 U.S. 535 (1974).

¹⁸ *Id.*

found that Native preferences based on political classifications have not been repealed by a subsequent federal laws, including the Equal Employment Opportunity Act.¹⁹

C. State versus Tribal and Federal Native hire preferences

Not all Native preferences have been upheld, as those under *state* law have been struck down by federal courts. In *Rice v Cayateno*, a state law preferring Native Hawaiians violated the 15th Amendment prohibition on race-based voting qualification.²⁰ And in *Malabed v. North Slope Borough*, a local government's Native preference violated the state constitution's equal protection clause.²¹ In both cases, the court found that the federal law allowing for a Native preference did not apply. At least one state law Native preference has been upheld, however. A city's Native preference for selling crafts in certain areas of town was justified by the state's interest in preserving Indian fine arts, and was also justified under the Civil Rights Act § 703(i) exception as being "near a reservation."²²

Importantly, a court has never held that a *tribe's* Native preference, as opposed to a state's or city's Native preference, to be contrary to any federal or state law, constitutional or statutory. However, there is authority suggesting that this political treatment requires a given Native American to be a member of a tribe.²³ If a Native American is not a tribal member, then any separate treatment is based only upon a racial characteristic, which is then subject to strict scrutiny under the Equal Protection Clause.

¹⁹ *Id.*

²⁰ 528 U.S. 495 (2000).

²¹ 335 F.3d 864 (9th Cir. 2003).

²² *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979).

²³ See *In re A.W.*, 741 N.W.2d 793 (Iowa 2007) (expansion of the term "Indian child" in the Iowa ICWA to include ethnic Indians who were not eligible for membership in a federally recognized tribe constituted a racial classification that was not narrowly tailored to further a compelling government interest since it extended beyond the federal political boundary of tribal membership).

Given the nature and history of Congressional relations with tribes, and the ample statutory expressions allowing native hiring preference as a means to promote the policy of tribal self-determination, and the Constitutional validity of that policy and those statutes, it is clear that federal law not only permits but requires tribes to have a Native-hire preference. Thus, the only question is whether this federal law pre-empts a state law that seems to reach the exact opposite result.

III. Federal Law pre-empts State Law Regarding a Tribe's Native Preference in Hiring

As shown above, state civil rights law that seemingly prohibits a Native-hire preference by tribes conflicts with federal Indian law that usually requires that same preference. The question, then, is whether or not the state law is preempted by the conflicting federal law. The Supreme Court in *New Mexico v. Mescalero Apache Tribe* stated the preemption doctrine this way: “State jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”²⁴

In other words, courts will balance the conflicting laws. In this balancing, tribal self-determination tips the scale away from states because it is a «weighty federal interest.”²⁵ Federal law has not preempted state law when state law does not burden tribal self-government or conflict with federal law, and that usually means state taxes.²⁶

Naturally, as with any analysis of federal Indian law, there are no guarantees. For example, in *Oklahoma Tax Commission v. Chickasaw Nation*, the Supreme Court did not use

²⁴ 462 US 324, 334 (1983).

²⁵ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 90 (4th ed. 2004).

²⁶ See *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514, (1991).

preemption analysis, but instead used generic interstate tax rules.²⁷ However, «[m]ost cases involving the application of state law in Indian country are decided on preemption grounds.»²⁸

In this case, the federal law regarding Native hire is directly connected to the “weighty” interest of tribal self-determination. As the Supreme Court said in *Washington v. Confederated Tribes of Colville Indian Reservation*, the Native hire preferences in the IRA and ISDEA «evidence to varying degrees a congressional concern with fostering tribal self-government and economic development.»²⁹ On the other side of the scale, the application of state law directly conflicts with federal law. And unlike a generally applicable tax, a prohibition on a tribe's Native hire preference would not increase state revenues and would «burden tribal self-government» by directly interfering with the Native-hire preferences required under federal law. Finally, it has long been recognized that state law does not have any effect on Indians in their tribal relations.³⁰

IV. Conclusion

As the state law conflicts with federal law and burdens tribal self-government, and as tribal self-government is a weighty federal interest, a court should find that the state law prohibiting a Native hire preference is preempted by the federal law requiring it.

Since the state law is preempted, the federal law "bars application" of the ELCRA to the tribe.³¹ And since ELCRA does not apply to the tribe, a newspaper that runs an ad stating the tribe's Native-hire preference is not exposed to ELCRA's accomplice liability.

²⁷ 515 U.S. 450 (1995).

²⁸ CANBY, *supra* note 25, at 90.

²⁹ 447 U.S. 134, 156 (1980).

³⁰ *Kobogum v. Jackson Iron Co.*, 76 Mich. 498 (1889).

³¹ *See, e.g., Porth v. Roman Catholic Diocese of Kalamazoo*, 209 Mich.App. 630 (1995).