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DAWAVENDAWA V. SALT RIVER PROJECT AGRIC. IMPROVEMENT & POWER DIST., 276 F.3d 1150 (9th Cir. 2002)

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FACTS

The Salt River Project Agricultural Improvement and Power District (SRP) operated the Navajo Generating Station (NGS) on lands leased from the Navajo Nation (Nation).[1] Pursuant to the lease, SRP was required to extend an employment preference to qualified local Navajo.[2] SRP could only hire a non-Navajo if there was a lack of Navajos qualified for the position.[3] Harold Dawavendawa, a member of the Hopi tribe, applied for a job as an Operator Trainee at the station.[4] He took the required qualifications test and scored ninth out of twenty applicants.[5] Notwithstanding his score, he received neither an offer, nor an interview.[6]

Dawavendawa filed suit against SRP under Title VII,[7] alleging discrimination on the basis of his national origin.[8] SRP moved for summary judgment, arguing that its contract with the Nation required that it give preference to Navajo applicants, a preference allowed by the Indian preferences exemption of Title VII.[9] The district court agreed and dismissed the case.[10] On appeal, however, the Ninth Circuit reversed, holding that discrimination based on tribal affiliation creates a cause of action under Title VII. SRP appealed to the Supreme Court, which denied certiorari and remanded the case back to the district court.[11]

On remand, SRP once again moved for dismissal, arguing that Dawavendawa failed to join the Nation as an indispensable party.[12] The

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[1] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1153 (9th Cir. 2002).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 1154.
[6] *Id.*
[7] The statute states that it "shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2003).
[8] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1154 (9th Cir. 2002).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

district court granted defendant's motion and once again, Dawavendawa appealed.[13]

HOLDING

The Ninth Circuit affirmed the district court's dismissal.[14] The court held that the Navajo Nation is a necessary and indispensable party under Rule 19 of the Federal Rules of Civil Procedure.[15] As tribal sovereign immunity prevented the nation from being sued by a private individual, Dawavendawa's case had to be dismissed.[16]

ANALYSIS

Judge Trott, writing for the unanimous court, began his analysis with a review of the joinder requirements of Rule 19, to wit, that a party (here, the Nation) necessary for just adjudication must be joined if feasible.[17] If this party cannot be joined, the court must determine if the party is indispensable, i.e., the case cannot continue without them.[18] If so, the case must be dismissed.[19]

Indispensability is determined through a two-part analysis.[20] The first step of the analysis, as dictated in Rule 19(a), requires a determination as to whether the nation is a necessary party. The second step requires a determination of indispensability.[21] Necessity can be shown in one of two ways: either complete relief cannot occur without the party, or the party has a legally protected interest.[22] If an interest is found, the party's absence must either (1) put that interest at risk of impairment, or (2) run the risk that the plaintiff will be exposed to a risk of multiple or inconsistent obligations because of that interest.[23]

Turning to the instant matter, the court first held that complete relief cannot occur without the Nation.[24] It reasoned that even were Dawavendawa successful in his suit, the Nation would not be bound by the decision–it could

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[13] *Id.*
[14] *Id.* at 1163.
[15] *Id.* at 1159.
[16] *Id.* at 1161.
[17] *Id.* at 1154-55.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1155.
[22] *Id.*
[23] *Id.*
[24] *Id.*

use tribal courts to prevent SRP from hiring non-Navajos, including Dawavendawa.[25] On the other hand, if SRP refused to enforce the district court's order, not only would it face possible sanctions from the federal court system, Dawavendawa still would not have his job.[26] Stuck between the proverbial "rock and a hard place" in either situation, the court reasoned, complete relief could not be had, regardless of its decision.[27] This being so, the nation was a necessary party under Rule 19(a)(1).[28]

While satisfaction of only one prong of Rule 19(a) qualified the nation as a necessary party, the court further considered whether the nation satisfied the other criteria set forth therein.[29] It first examined Rule 19(a)(2)(i), and found that this test too was satisfied.[30] It was undisputed that the Nation and SRP had a contract between them.[31] A successful claim by Dawavendawa would invalidate a least part of this contract, and call into question the contractual relationship between SRP and the Nation.[32] Looking at its prior case law, specifically *Lomayaktewa v. Hathaway*,[33] the court reiterated the importance that all parties to a contract had to be present in an action to set aside that contract.[34] The court took notice that the Nation stressed the importance of the hiring preference in its contract with SRP, even alleging that without it, the Nation would have never agreed to the concessions SRP received vis-à-vis Navajo resources.[35] Furthermore, challenging the Nation's right to negotiate contracts as it deemed fit put a severe restriction upon its ability to govern itself effectively.[36] Taken *in toto*, these reasons and the general rule of prior precedent convinced the court that the Nation was a necessary party under Rule 19(a)(2)(i) as well.[37]

The court continued its analysis in asking whether the nation was a necessary party under Rule 19(a)(2)(ii).[38] Of especial concern to the court was the potential for inconsistent obligations.[39] If the court ruled in favor of

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[25] *Id.*
[26] *Id.*
[27] *Id.* at 1156.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1156-57.
[33] Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975).
[34] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1156-57 (9th Cir. 2002).
[35] *Id.* at 1157.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 1158.
[39] *Id.*

Dawavendawa and SRP hired him, the court would have ordered a breach of contract actionable in tribal court, where the Nation would almost certainly prevail.[40] If, however, SRP refused to hire him, SRP would face the distinct possibility of sanctions for willfully violating an order of a United States court.[41] The uncomfortable position between the court systems of the two dueling sovereigns met the requirements of Rule 19(a)(2)(ii), again making the nation a necessary party.[42]

The court then rejected Dawavendawa's argument as to why this problem was illusionary.[43] Dawavendawa claimed that the court's decision in *Dawavendawa I*[44] stood for the proposition that SRP's conduct was a violation of Title VII.[45] Interpreting its prior decision, the court stated that the scope of that decision was not so broad.[46] That decision stood only for the fact that Dawavendawa had a cause of action and did not address the merits of the claim.[47] Nor could Dawavendawa show any precedent that would show that SRP's proffered defense was "baseless, specious, and violative of Rule 11," as he claimed.[48] Without any support for his broad allegations, the court refused to accept his invitation to ignore SRP's defense.[49]

Having decided that the nation was a necessary party under all three prongs of the tests enumerated in Rule 19(a), the court considered whether or not the Nation *could* be joined as a party.[50] As a general rule, federally recognized Indian tribes, similar to states, are immune from suit.[51] This immunity is set aside only if abrogated by Congress or waived by the sovereign.[52] Neither situation occurred.[53] Nonetheless, Dawavendawa argued that if the nation itself is immune, he could sue tribal officials.[54] The court disagreed.[55] In both *Burlington Northern Railroad v. Blackfeet Tribe*[56]

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117 (9th Cir. 1998).
[45] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1158 (9th Cir. 2002).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1159.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991).

and *Arizona Public Service Co. v. Aspaas*,[57] the court had held that tribal officials acting pursuant to an unconstitutional statute could be sued.[58] However, these cases were distinguishable from Dawavendawa.[59] In both cases, the tribal officials had taken positive action to enforce the statutes in question, while no such action occurred here.[60] Without this required positive action, Dawavendawa's attempt to substitute tribal officials for the Nation itself was merely a "ploy" to make an "end run" around sovereign immunity.[61] This the court would not allow.[62] So being, the court held that the Nation enjoyed sovereign immunity from suit.[63]

Having decided both that the nation was a "necessary" party and that it could not be sued, the court turned to the issue of whether or not it was an "indispensable" party.[64] If the Nation were found indispensable, the suit would have to be dismissed.[65] The court employed a four part balancing test based on "(1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum."[66] This last factor was considered especially important, and if no alternative forum existed, the court would be "extra cautious" to dismiss.[67] All of these factors tilted toward the Nation, and concurrently, toward dismissal.[68]

The determination of prejudice followed much along the same lines as the analysis of necessity under Rule 19(a)(2)(i).[69] Having reached a determination in favor of necessity earlier, the court confirmed it again.[70] Shaping relief or partial relief could not mitigate this prejudice.[71] Finally, the court noted that Dawavendawa was not without a potential alternative forum.[72] He could, for instance, bring a suit through the auspices of the EEOC, which as a manifestation of the United States, is not bound by the

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[57] Ariz. Pub. Serv. Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1996).
[58] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1159 (9th Cir. 2002).
[59] *Id.* at 1160.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 1161.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1162.
[67] *Id.*
[68] *Id.* at 1162-63.
[69] *Id.* at 1662.
[70] *Id.*
[71] *Id.*
[72] *Id.*

principle of sovereign immunity.[73] Alternatively, he could use the method endorsed by the court in *Aspaas*, i.e., bring suit in tribal court.[74] Assuming a negative result occurred, tribal officials would have then committed the positive action required to permit suit against them.[75]

For these reasons, the court determined that the Nation was indispensable.[76] The suit could not continue without the Nation and it could not be sued.[77] So being, the court dismissed Dawavendawa's suit and affirmed the district court's decision.[78] Dawavendawa appealed his negative result to the Supreme Court, which once again denied certiorari.[79]

CONCLUSION

Dawavendawa is first read as a procedural case that creates another hurdle for a potential plaintiff to satisfy what is, more or less, an exhaustion requirement based upon the court's decision in *Aspaas*. That is, the potential plaintiff, ill-treated by a sovereign tribe, must first bring his cause in the courts of that sovereign. Should he lose, he has thus created a situation whereby tribal officials have taken positive action against him, creating jurisdiction where none had existed beforehand.

While such a requirement may discourage some plaintiffs, unable or unwilling to bring multiple claims to vindicate their claims, it is hardly earth shattering, and does not spell the end of their claims. A larger, more fundamental, problem is called back into question and remains unanswered by the court: do Sovereign tribes have *carte blanche* to blatantly discriminate against non-tribal members without fear of remedial action? The Indian Preferences exemption, codified in Title VII allows hiring preferences to be given to "Indian[s] living on or near a reservation."[80] If, however, discrimination against non-Indians was acceptable on public policy grounds, left unanswered was whether one tribe had the right to discriminate against another.

The EEOC answered in the negative: in a 1988 policy statement, the Commission concluded that the "extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of

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[73] *Id.* at 1163.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 537 U.S. 820 (2002).
[80] 42 U.S.C. § 2000e-2(i) (2003).

Title VII."[81] This conclusion was based on three factors: (1) legislative intent to disallow tribal distinctions and encourage "pan-Indianism"[82]; (2) other federal regulations prohibiting distinctions on a tribal basis; (3) inequities of preferential treatment in areas where more then one tribe resides.[83] No federal court, however, addressed the issue until *Dawavendawa I.*

The court rejected the idea of deference to the EEOC statement but nonetheless agreed with it in principle, holding that tribal discrimination did not fall under the aegis of the Indian Preferences exemption.[84] This reading held sway amongst commentators and was advanced by Dawavendawa in the instant manner; it was, however, rejected by the court.

The court explained its prior holding in *Dawavendawa I* by stating that said holding spoke only to the issue of whether or not Dawavendawa had a cause of action, and did not address the merits of his potential claim.[85] As it fails to reach the merits in the case at bar as well, the question remains as to whether the Navajo (and Indian tribes in general) can justify discrimination against Indians of other tribes. The seeming clarity of *Dawavendawa I* is thrown by the wayside. It remains to a future plaintiff to test this unexplainable gap in the law.

It is perhaps not surprising that this case arose in the context of Navajo-Hopi relations. The Hopi reservation lies within the larger Navajo territory, and animosity between the tribes is high, manifesting itself over a long history of lawsuits and counter-suits.[86] So too may the Navajo themselves be susceptible to nationalistic hiring practices. Complex historical and sociological reasons led the Navajo culture to be more resistant to Spanish and later American pressures of assimilation and forced removal. Historians and anthropologists have noted that this, in turn, has led to a stronger identity amongst the Navajo as "Navajo," as opposed to a larger "Indian" identity constructed against the "Whiteness" of the state. Non-Navajo observers attribute the popular conception of Navajo "arrogance" and feeling of cultural superiority to this identity.

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[81] *Policy Statement on Indian Preference Under Title VII*, 405 Fair Empl. Prac. (BNA) 6647, 6653 (May 16, 1988).

[82] Similar to pan-Africanism or pan-Arabism, pan-Indianism is a movement designed to downplay traditional cultural differences, instead emphasizing similarity amongst all "Indians," especially counter-posed against non-Indians.

[83] 405 Fair Empl. Prac. (BNA) at 6654.

[84] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1124 (9th Cir. 1998).

[85] Dawavendawa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1158 (9th Cir. 2002).

[86] *See Dawavendawa I*, 154 F.3d at 1118.

Accepting such a theory may tease out the cultural rationale behind Navajo hiring preferences, but it does not answer the policy question of desirability of such practice. I would suggest that such practice should not be encouraged. Indian preferences serve as some remedy, much like affirmative action programs, for long-standing hegemonic practices of discrimination and denial of basic human rights. While not without their problems or critics, such practices serve a valuable and arguably necessary purpose.

Such purpose is diluted when preferences act not against the benefactors of historical hegemonic practice (here, non-Indians), but against other groups similarly situated. Allowing the Indian preferences exemption to be read as allowing inter-tribal discrimination shifts the exemption from being remedy for wrongs committed against the group as a whole to fostering tribal nationalism that has the potential to create future wrongs of its own. If Congress intends this, so be it, but it was not the intent of the Indian Preferences Act, and should not be read into it.

Summary and Analysis Prepared By:
Erik Swanson