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GENERAL MEMORANDUM 19-017

Court Rules Tribal College Immune from Title VII Civil Rights Act Suit

The Ninth Circuit Court of Appeals ruled on November 20, 2019, in an unpublished opinion that the Salish Kootenai College ("the College"), a company incorporated under Montana and tribal law, enjoys tribal sovereign immunity because it qualifies as an arm of the Confederated Salish Kootenai Tribes of the Flathead Reservation ("CSKT"). The ruling is an important victory for tribal colleges in general, and the Salish Kootenai College in particular because allowing the suit to proceed forward would potentially expose the college to lawsuits challenging the college's tribal employment preference, its focus on tribal culture, or even jeopardize its funding under the requirements of the Tribally Controlled Colleges and Universities Assistance Act.

In *McCoy v Salish Kootenai College, Inc.*, No. 18-35729 (9th Cir. Nov. 20, 2019), the plaintiff, a school official, said that he was forced to resign as the result of a hostile work environment at the college. McCoy alleged that harassment and a hostile work environment constituted sex-based discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Montana Human Rights Act. The district court dismissed McCoy's claims, ruling it lacked subject matter jurisdiction over the claims because the school was not an "employer" under the definition of Title VII because the statute expressly excludes Indian tribes from its coverage and the college functioned as an arm of the Tribe.

In *McCoy*, the Ninth Circuit found that the tribal college shared in the tribe's immunity based on the five criteria used in the Ninth Circuit to determine whether an entity is an arm of a tribe. The five criteria are set forth in *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014):

- (1) the method of creation of the economic entities;
- (2) their purpose;
- (3) their structure, ownership, and management, including the amount of control the tribe has over the entities;
- (4) the tribe's intent with respect to the sharing of its sovereign immunity; and
- (5) the financial relationship between the tribe and the entities.

In finding that the Salish Kootenai College satisfied the *White* criteria, the Ninth Circuit wrote,

"Even though the college is incorporated under Montana law, the record demonstrates that CSKT has significant control over the college and that the college is structured and operates for the benefit of CSKT. ... Because a proper weighing of the *White* factors demonstrates, by a preponderance of the evidence, that the college is an arm of CSKT, the college is entitled to tribal sovereign immunity."

The Court's approach is significant because it decided that the fact that a tribal college was incorporated under state law was not dispositive by itself. Instead, the Court found that state law incorporation – which falls under the first of the *White* criteria – was outweighed by the four other *White* factors. The college was incorporated under both tribal and state law. While the plaintiff argued that the dual incorporation led to two separate entities, the tribe argued that they were in fact one and the same. At the district court level, the court found that, "[t]he dual incorporation of the college under tribal law and state law does not disqualify the college from functioning as a tribal entity." The Ninth Circuit, however, did not address the issue of how many college entities were created but instead approached the case as if the suit was only against a state-chartered entity.

With respect to the second *White* criteria, the entity's purpose, the Ninth Circuit agreed with the lower court that the purpose of the college is to benefit the Tribe. With respect to the third *White* criteria, the Ninth Circuit found that the Tribe has significant control over the college and its structure benefits Tribe. The Ninth Circuit did not discuss the fourth and fifth *White* criteria other than to say that the factors weighed in favor of the tribal sovereign immunity for the college. We note that at the district court level, the court determined that the Tribe had met the fourth *White* criteria of intention to share its sovereignty by incorporating the college as a Section 16 tribal corporation, by limiting its ability to be sued to tribal court, and by various tribal declarations. The district court also found that the college and the Tribe were financially interconnected, satisfying the final *White* criteria.

Please let us know if we may provide additional information regarding this case.

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