

THE JOURNAL RECORD

Gavel to Gavel: Tribal school avoids Title VII liability

By: Ashlyn M. Smith and Chris S. Thutchley Guest Columnists November 18, 2020 0



Ashlyn Smith



Chris Thutchley

On Nov. 10, the 10th Circuit Court of Appeals affirmed summary judgment for a tribal school in a Title VII discrimination case brought by a former employee.

That case, *Jim v. Shiprock Associated Schools Inc.*, turned on an exception in Title VII for Indian tribes. The trial court concluded the defendant, Shiprock Associated Schools – a private corporation – fell within that exception. The question on appeal was simply put: “what is an Indian tribe?”

In affirming the trial court’s ruling, the 10th Circuit observed that “courts elsewhere have considered an entity an Indian tribe under Title VII when a tribe created and controlled the enterprise.” Applying this create-and-control test, the court observed further that, in the instant case:

- Tribal statutes authorized establishment of the school board.
 - The school board empowered the defendant corporation to operate its educational programs.
 - The corporation operated such programs pursuant to the Tribally Controlled Schools Act.
 - The corporation acted through a board whose members were elected under tribal law.
 - Every board member was required to be enrolled in the tribal nation.
 - Tribal enrollees comprised over 98% of school students and about 80% of school employees.
- The court discounted other factors that the plaintiff argued showed the school was not an Indian tribe:
 - A pending proposal would allow the tribe to authorize operation of schools for 10 years at a time – up from just one year.
 - The corporation once refused to provide the tribe with requested information.
 - The corporation operated with federal and state funding.

At bottom, the court explained, the corporation served the tribal community, obtained its governing board from the tribe, followed tribal law, oversaw schools populated by tribal students and staffed by tribal members, and received federal funding because of the corporation’s service to the tribal community. “In these circumstances, the district court properly applied the exception for an Indian tribe.”

Though it remains to be seen whether the 10th Circuit will extend the create-and-control test to find that other corporations are Indian tribes for Title VII purposes, *Shiprock* appears to be a win for employers “created and controlled” by Indian tribes.

Ashlyn M. Smith and Chris S. Thutchley are attorneys with GableGotwals.

<https://journalrecord.com/2020/11/18/gavel-to-gavel-tribal-school-avoids-title-vii-liability/>