APPLICATION OF THE ADEA TO INDIAN TRIBES: *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*, 986 F.2d 246 (8th Cir. 1993)

Indian tribes[1] in the United States, while not considered independent sovereign nations,[2] are entitled to certain rights of autonomy in their internal affairs.[3] The autonomy of Indian tribes is somewhat limited in that Congress retains plenary power[4] to modify or eliminate these rights of self-government.[5] Yet when a law infringes on a specific right which has been reserved to tribal self-government, that statute will not be enforced against a tribe absent a clear showing of congressional intent.[6] One law that implicates the tension between tribal rights and congressional power is the Age Discrimination in Employment Act of 1967 (ADEA),[7] which prohibits age discrimination in various aspects of employment.[8] The ADEA is silent regarding

---

1. This Comment uses the term "Indian" instead of "Native American" to be consistent with the Eighth Circuit's language in EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993).

2. See *infra* note 20 for a brief overview of U.S./Indian relations. For a discussion of the evolution of Indian tribes as sovereign nations in the United States, see generally Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359, 365-71 (1993).

3. *See, e.g.*, Montana v. United States, 450 U.S. 544, 566 (1981) (explaining that tribes have an inherent power of self-government with respect to their political integrity, economic security, health, and welfare); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (noting that Indian tribes have "the power of regulating their internal and social relations"); United States v. Wheeler, 435 U.S. 313, 322 (1978) (holding that Indian tribes have always had inherent but limited sovereign powers).

4. Plenary powers are defined as "[a]uthority and power as broad as is required in a given case." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990).

5. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 56 (acknowledging that Congress has plenary power to limit, modify, or eliminate the limited sovereignty of Indian tribes).

6. *See, e.g.*, United States v. Dion, 476 U.S. 734, 738 (1986) (holding that congressional intent to abrogate treaty rights must be explicit).

7. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992)).

8. Tribal employment is also governed by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1988 & Supp. II 1990). This Act contains a variety of constitutional rights that cannot be compromised by Indian tribes exercising their power of self-government, including "equal protection of its laws." *Id.* § 1302(8).

its applicability to Indian tribes, although it could potentially infringe on tribes' rights to regulate their internal affairs.[9] In *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*,[10] the Eighth Circuit held that the ADEA does not apply to Indian tribes because there is no clear congressional intent that the statute should apply to Indians.[11]

In *Fond du Lac*, a member of the Fond du Lac Band of Lake Superior Chippewa tribe, Marvin Pellerin,[12] sought employment with an equipment and construction company[13] wholly owned by the tribe. The employer allegedly refused to hire Pellerin because of his age.[14] Thereafter, Pellerin filed a complaint with the Equal Employment Opportunity Commission (EEOC), which brought suit on his behalf against both the construction company and the tribe itself,[15] alleging that they

---

9. The Age Discrimination in Employment Act provides in relevant part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. § 630(b) (1988 & Supp. IV 1992).

The Tenth Circuit addressed the applicability of the ADEA to Indian tribes in EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989). See *infra* notes 47-57 and accompanying text for a discussion of *Cherokee Nation*. Courts have also addressed the applicability of other employment-related statutes to Indian tribes. *See* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 494 (7th Cir. 1993) (holding Indian Commission exempt from FLSA regulation relying on comity because the statute and treaties were ambiguous). *See also* Smart v. State Farm Ins. Co., 868 F.2d 929, 935 (7th Cir. 1989) (holding that ERISA, as a statute of general application, does not significantly interfere with tribal self-governance); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985) (holding that OSHA does apply to Indian tribes because it does not affect self-governance); Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982) (finding that OSHA does not apply to Indian tribes).

10. 986 F.2d 246 (8th Cir. 1993).

11. *Id.*

12. The Equal Employment Opportunity Commission (EEOC) initiated the litigation on behalf of Pellerin. *Id.* at 248. The federal government officially recognizes Pellerin's tribe. *Id.*

13. Fond du Lac Heavy Equipment and Construction Company was located on the Indian reservation, but performed some jobs off the reservation. *Id.*

14. *Id.* The opinion does not specify Mr. Pellerin's exact age.

15. The Fond du Lac Band of Lake Superior Chippewa tribe chartered and wholly owned the construction and equipment company. *Id.*

had discriminated against Pellerin on the basis of age[16] in violation of the ADEA.[17] The United States District Court for the District of Minnesota found that the ADEA did not apply to Indian tribes.[18] The Eighth Circuit Court of Appeals affirmed, holding that the ADEA did not apply to a member of a tribe, the tribe as an employer, or reservation employment.[19]

The U.S. government has historically recognized Indian tribes as politically distinct entities which possess inherent sovereign powers.[20] Specifically, the government has recognized that Indian tribes possess certain inherent rights of self-government in their internal affairs.[21] These Indian rights are created by treaties,[22] statutes, executive orders,[23] and federal common law.[24] Congress,

---

16. *Fond du Lac*, 986 F.2d at 248.

17. *Id.* at 247-48.

18. *Id.*

19. *Id.* at 251.

20. The United States originally recognized tribes as separate nations, as evidenced by its dealings with tribes and by the U.S. Constitution. The government, recognizing tribes as distinct nations, entered into various treaties with Indian governments, beginning with a 1778 treaty with the Delaware tribe and ending in 1871 with a statute prohibiting future treaties. *See* Act of Mar. 3, 1871, 16 Stat. 544, 566 (1871) (creating appropriations for Indian Department and fulfilling treaty stipulations); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549 (1832) (describing Indian tribes as distinct political societies and citing the 1778 treaty as authority). The U.S. Constitution equates Indian tribes with foreign nations and states in defining the scope of its power to regulate commerce. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the power . . . to regulate Commerce with foreign nations, and among the several states, and with Indian tribes."). Additionally, Indians are excluded from population counts for representation and taxation purposes. U.S. CONST. amend. XIV, § 2, cl. 2.

For an in-depth discussion of the evolution of Indian rights in the United States, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-228 (1982); VINE DELORIA, JR. & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984); Limas, *supra* note 2; Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

21. See *supra* notes 3 & 20 for a discussion of the limited sovereignty of Indian tribes.

22. The United States signed treaties with the Indian tribes until 1871. Act of Mar. 3, 1871, 16 Stat. 544, 566 (1871) (ending the power to make treaties with Indian tribes). Scholars have suggested that the one hundred-year history of such treaties is evidence that the United States saw Indian tribes as sovereign states because treaties are agreements between two sovereign states. *See* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 86 n.2 (1991); *see generally* 2 SENATE COMM. ON INDIAN AFFAIRS, INDIAN AFFAIRS: LAWS AND TREATIES, S. DOC. NO. 452, 57th Cong., 1st Sess. (Charles J. Kappler ed., 1903) (containing treaties between the United States and Indian tribes through 1868).

23. Indian reservations can be created by statute, agreement, or executive

however, has plenary authority to limit, modify, or eliminate these rights.[25] Courts have held that general acts of Congress apply to tribes unless Congress expressly indicated to the contrary.[26] However, if an act would abrogate a specific right reserved to Indian tribes, there must be an additional showing that Congress intended the statute to apply to Indian tribes.[27]

In *United States v. Dion*,[28] the Supreme Court held that when a specific Indian right exists, a statute can abrogate that right upon a clear showing of congressional intent.[29] The Court adopted an "actual consideration" test[30] to determine whether Congress actually considered the conflict between the Indian right and the law.[31] The *Dion* Court held that there must be a clearly articulated intent[32] to apply the statute to Indian tribes. However, the Court recognized that there is no absolute rule as to

---

order as well as by treaty. United States v. Dion, 476 U.S. 734, 745 n.8 (1986).

24. *Id.* at 745.

25. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (recognizing plenary power of Congress over Indian sovereignty). This plenary power derives from three sources. First, treaties signed between the United States and Indian tribes grant Congress this power. *See* Skibine, *supra* note 22, at 87 n.3. Second, the Commerce Clause of the federal constitution allows Congress to regulate commerce with Indian tribes. See *supra* note 20 for further discussion of this aspect of the Commerce Clause. Third, Congress claims it has a "trustee" relationship with the tribes in which Congress is the trustee and the tribes are the beneficiaries. *See* Skibine, *supra* note 22, at 87 n.3.

26. *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960) (reiterating that general congressional acts apply to Indians when there is no clear expression otherwise). *See also* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 493 (7th Cir. 1993) (noting that there is a cannon of construction that treaties and statutes should be construed in favor of Indians) (citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985)).

27. *See, e.g., Dion*, 476 U.S. at 738 (requiring clear and plain congressional intent to abrogate Indian treaty rights).

28. 476 U.S. 734 (1986).

29. The *Dion* Court explicitly dealt with a treaty right. However, the Court noted that non-treaty rights carry the same implications as treaty rights. *Id.* at 745 n.8.

30. *Id.* at 739. This test requires that in order to enforce a statute against an Indian tribe, there must be clear evidence that Congress "actually considered" the conflict with the Indian right and then chose to abrogate the treaty right. Skibine, *supra* note 22, at 93-94. In *Dion*, the Court held that the Eagle Protection Act applied to the Yankton Sioux Tribe, despite the Tribe's right under a 1858 treaty to hunt the bald or golden eagle on the Indian reservation. *Dion*, 476 U.S. at 743. In so holding, the Court further concluded that, based on the legislative history of the Act, Congress believed it was abrogating the rights of Indians in enacting the statute. *Id.* at 744-45.

31. *Id.* at 739-40. See also Skibine, *supra* note 22, at 85, for a discussion of the *Dion* approach and its extension.

32. 476 U.S. at 738.

what constitutes evidence of this intent.[33] The Court concluded that it is sufficient that the evidence of congressional intent to abrogate any specific right be compelling.[34]

Congress enacted the Age Discrimination in Employment Act in 1967.[35] The Act prohibits an employer from discriminating in employment decisions based on age.[36] In defining "employer," the statute neither includes or excludes Indian tribes.[37] However, because application of the ADEA to Indian tribes would infringe upon a specific Indian right of self-government,[38] courts have used the *Dion* actual consideration test[39] to determine whether Congress intended to abrogate Indian rights.[40] Courts have looked to the language of Title VII,[41] the prototype for the ADEA, to ascertain congressional intent.[42]

Congress modeled the ADEA after Title VII in both language and asserted purpose.[43] However, while the definition of the

---

33. *Id.* at 739. The *Dion* Court noted that over the years they have applied many different standards, ranging from explicit statements of intent to a study of the legislative history. *Id.*

34. *Id.* at 739-40. The Court did not require explicit expressions of congressional intent, but instead allowed any mode of "clear evidence" that Congress considered the potential abrogation of Indian rights. *Id.*

35. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992)).

36. *Id.*

37. See *supra* note 9 for the ADEA definition of employer.

38. Specifically, application of the ADEA to Indian tribes would give the EEOC jurisdiction to investigate age discrimination complaints against Indian tribes, businesses, and individuals, thereby infringing upon the right of Indian tribes to regulate their own internal affairs. *Fond du Lac*, 986 F.2d at 249.

39. See *supra* notes 30-34 and accompanying text for further discussion of the actual consideration test.

40. *See* EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 250 (8th Cir. 1993); EEOC v. Cherokee Nation, 871 F.2d 937, 938 (10th Cir. 1989).

41. Title VII is part of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1988 & Supp. IV 1992).

42. Congress, in enacting Title VII, expressly excluded age as a protected category. *See* 110 CONG. REC. 2596-99 (1964) (debate over amendment to include age on the list of protected categories). Instead, after enactment of Title VII, the Secretary of Labor conducted an independent study on age discrimination. This study led to enactment of the ADEA, which relied heavily on Title VII for structural guidance. *See* EEOC v. Cherokee Nation, 871 F.2d 937, 941 n.2 (10th Cir. 1989) (Tacha, J., dissenting) (explaining the enactment of the ADEA as a result of the absence of protection against age discrimination in Title VII). The Americans with Disabilities Act, enacted in 1990, also expressly excludes Indian tribes from its definition of employer. ADA § 101(5)(B)(i), 42 U.S.C. § 12111(5).

43. Title VII provides in pertinent part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for

word "employer" in Title VII explicitly excludes Indian tribes,[44] the ADEA definition lacks a similar exclusion.[45] Courts have struggled to determine whether this omission is evidence of congressional intent to include or exclude Indian tribes under ADEA coverage.[46]

In *EEOC v. Cherokee Nation*,[47] the Court of Appeals for the Tenth Circuit held that the ADEA did not apply to the Cherokee Nation[48] in an age discrimination claim.[49] The court, in applying the *Dion* actual consideration test,[50] found that explicit language applying the statute to Indian tribes, either in the statute itself or its legislative history, was necessary in order to find the clear intent required by *Dion*.[51] The court concluded that because there was no such explicit language, the ADEA did not abrogate the Cherokees' treaty right[52] of self-government.[53] The court declined to apply a Title VII analysis to determine the applicability of the ADEA to Indian tribes.[54] Although the court

---

> 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, [or] *an Indian tribe* . . .

42 U.S.C. § 2000e(b) (emphasis added). See *supra* note 9 for the similar provision of the ADEA.

44. Title VII explicitly excludes Indian tribes to allow them to prefer their members in tribal employment. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 548 (1974); *Cherokee Nation*, 871 F.2d at 941 (Tacha, J., dissenting).

45. See *supra* notes 9 & 43 and accompanying text for a comparison of the definitions of employer in Title VII and the ADEA.

46. *See, e.g.*, EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).

47. 871 F.2d 937 (10th Cir. 1989).

48. The Cherokee Nation is a federally recognized Indian tribe. The Cherokee Nation derives its right of self-government of internal affairs from the Treaty of New Echota, 7 Stat. 478 (1835), executed between the Cherokees and the United States. 871 F.2d at 938 n.2.

49. In *Cherokee Nation*, the EEOC sought to judicially enforce a subpoena duces tecum requiring the Cherokee Nation to produce employment documents as part of an age discrimination investigation. The complaint alleged that the Cherokee Nation's Director of Health and Human Services discriminated against former employees. 871 F.2d at 937.

50. See *supra* notes 30-34 and accompanying text for further discussion of the actual consideration test.

51. 871 F.2d at 938.

52. *Id.* at 939. See *supra* note 48 for a discussion of the Cherokee Nation's treaty right. *But see* Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753, 754 (D.N.D. 1989) (holding that the ADEA applied to a tribal business when a non-tribal employee was involved).

53. *Cherokee Nation*, 871 F.2d at 939.

54. *Id.*

conceded that under traditional statutory construction the ADEA's silence on exclusion of tribes would indicate congressional intent to include Indian tribes,[55] traditional rules of statutory construction do not apply to cases involving the abrogation of Indian treaty rights.[56] Additionally, the court held that in ambiguous situations, future courts should resolve uncertainties in favor of tribal sovereignty.[57]

The dissent in *Cherokee Nation* found that *Dion* did not require explicit language, but instead required only sufficiently compelling evidence of congressional intent to abrogate the Indian tribe's right.[58] Claiming that a comparison to Title VII is essential in determining congressional intent in drafting the ADEA,[59] the dissent concluded that because the drafters of the ADEA relied almost exactly on the wording of Title VII's employer definition, the absence of the Indian exclusion indicates a clear intent to include Indians in ADEA coverage.[60]

In *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*,[61] the Eighth Circuit adopted the reasoning of *Cherokee Nation*[62] in holding that the ADEA is not applicable to Indian tribes because it does not explicitly abrogate the tribe's right of self-government in internal affairs.[63] First, the court recognized that when a specific right is reserved to Indians, it exists absent a clear showing of congressional intent.[64] The court further recognized that while treaty rights are the most common Indian rights entitled to legislative deference, such rights also come from statutes, executive agreements, and federal common law.[65]

---

55. The *Cherokee Nation* court assumed that under normal rules of construction the conspicuous absence of an Indian exclusion clause in the ADEA indicates that Indians are included in the ADEA coverage. *Id.*

56. *Id. See also* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (holding that when there is an ambiguity in a statutory provision, courts should interpret this ambiguity in favor of Indian sovereignty); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (holding that there is a unique "canon[ ] of construction" mandating that ambiguous statutory provisions be construed in favor of Indian tribes).

57. 871 F.2d at 939. *See also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 180 (1989) (holding that ambiguities in federal law should be construed in favor of tribal sovereignty).

58. EEOC v. Cherokee Nation, 871 F.2d 937, 940 (10th Cir. 1989) (Tacha, J., dissenting) (quoting United States v. Dion, 476 U.S. 734, 739-40 (1986)).

59. *Id.* at 941 (Tacha, J., dissenting).

60. *Id.* See *supra* notes 41-45 and accompanying text for further discussion of the relationship between Title VII and the ADEA.

61. 986 F.2d 246 (8th Cir. 1993).

62. 871 F.2d 937 (10th Cir. 1989).

63. *Fond du Lac*, 986 F.2d at 250.

64. *Id.* at 248.

65. *Id.* See *supra* notes 20 & 25 and accompanying text for a discussion of the origin of Indian rights.

The *Fond du Lac* court found an implicit right of the tribe to make its own law on substantive matters.[66]

The court emphasized that the employment dispute at issue was strictly internal, involving not only an individual tribe member, but also a tribal employer engaged in a business located on the reservation.[67] Because of the internal nature of the dispute,[68] the court concluded that application of the ADEA would interfere directly with the tribe's right of self-government.[69] This direct interference with a specific Indian right led the court to require a clear and plain congressional intent to include Indians under the ADEA in order to apply the Act to them.[70]

Applying *Dion*,[71] the majority in *Fond du Lac* held that in order to prove congressional intent to subject Indians to the ADEA, either the language of the ADEA itself or its legislative history must refer explicitly to the effect of the statute on Indians.[72] Because the court found no express reference to Indians in either the statute or its legislative history, it concluded that the ADEA does not apply to Indian tribes.[73]

Lastly, the *Fond du Lac* court analyzed the impact of the employer definition in Title VII[74] as compared to the similar provision in the ADEA.[75] The court, although recognizing the similarity in the two provisions, found that *Dion* required an affirmative evidence of congressional intent to apply the statute to Indian tribes.[76] Here, the court held that the Title VII comparison did not provide the requisite clear and plain intention to apply the ADEA to Indian tribes.[77]

---

66. *Id.* at 249.

67. *Fond du Lac*, 986 F.2d at 250.

68. *Id.* The court noted that notions of a tribe's "culture and traditions" should be considered in determining the internal nature of the situation. *Id.* at 249. However, unlike Title VII, which by excluding Indian tribes permits them to prefer their own members for employment in their internal government, the *Fond du Lac* dissent found no reason to classify an employee's age as a matter of internal tribal concern. *Id.* at 251. (Wollman, J., dissenting). *See infra* notes 85-86 and accompanying text.

69. *Fon du Lac*, 986 F.2d at 249.

70. *Id.*

71. 476 U.S. 734 (1986). See *supra* notes 30-34 and accompanying text for discussion of *Dion* and its actual consideration test.

72. EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 250 (8th Cir. 1993).

73. *Id.* at 251.

74. See *supra* note 43 for the relevant language of Title VII.

75. *Fond du Lac*, 986 F.2d at 250.

76. Like the *Dion* Court, the Eighth Circuit referred to the fact that ambiguities should be resolved in favor of Indian tribes. *Id.*

77. *Id.* at 251.

The dissent in *Fond du Lac* concluded that the ADEA should apply to Indian tribes based on the dissent in *Cherokee Nation*.[78] First, the *Fond du Lac* dissent opined that the omission of the Indian exclusion clause in the ADEA's definition of employer demonstrated congressional intent to include Indian tribes in the statute's coverage.[79] Second, the dissent reasoned that, while application of Title VII to Indian tribes potentially would threaten the tribe's internal sovereignty, no similar concern justified excluding Indian tribes from coverage under the ADEA.[80] While the Indian tribe exception was necessary in Title VII to allow Indian tribes to preferentially hire tribe members, no such basis for tribal sovereignty exists in the context of age discrimination.[81] Therefore, the dissent concluded that the ADEA would not infringe upon tribal rights of self-government and should apply to Indian tribes.[82]

The *Fond du Lac* majority's reasoning is faulty. While the ADEA does not explicitly refer to Indian tribes, there is clear evidence that Congress intended the statute to be one of general applicability. First, the court erred in its comparison of Title VII and the ADEA. The court failed to give sufficient weight to the omission of the Indian exception in the ADEA employer definition as an affirmative expression of congressional intent.[83] Given that the definition of employer in both statutes is identical except for the Indian exception, Congress clearly considered whether or not Indians should be included under the ADEA. Additionally, while ambiguities should generally be construed in

---

78. *Id.* See *supra* notes 58-60 and accompanying text for discussion of the *Cherokee Nation* dissent.

79. 986 F.2d at 251 (Wollman, J., dissenting). In his dissent, Judge Wollman relied heavily on the reasoning of the *Cherokee Nation* dissent. According to both dissents, the language of Title VII compared with that of the ADEA clearly shows that Congress intended the ADEA to apply to Indian tribes. Judge Wollman characterized this as "the clear congressional reliance on Title VII's provisions . . . [that] evidences congressional intent on the face of the statute to include Indian tribes in the definition of employer for the purposes of the ADEA." *Id.* (quoting EEOC v. Cherokee Nation, 871 F.2d 937, 942 (10th Cir. 1989) (Tacha, J. dissenting)). See *supra* notes 41-45 and accompanying text for a discussion of the similarities between the ADEA and Title VII.

80. 986 F.2d at 251 (Wollman, J., dissenting). For similar reasoning applied to the FLSA, see Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d. 490, 499 (7th Cir. 1993) (Coffey, J., dissenting) (concluding that absent an abrogation of a specific right, the FLSA applies to the Indian Commission because the FLSA is a statute of general applicability).

81. 986 F.2d at 251.

82. *Id.*

83. *Id.* at 250.

favor of Indian tribes,[84] the ADEA is not ambiguous. Instead, the ADEA clearly identifies who qualifies and who does not qualify as an employer. Finally, EEOC regulation of age discrimination does not necessarily infringe upon any specific tribal rights of self-government.[85] Therefore, as Judge Wollman stated in the *Fond du Lac* dissent, application of the ADEA to Indian tribes would not threaten tribal sovereignty to a degree greater than would any federal law of general applicability.[86]

The Eighth Circuit, in holding that the ADEA does not apply to Indian tribes, misconstrued the statute to the detriment of victims of age discrimination. The ADEA does not pose a threat to Indian sovereignty and should be applied to Indian tribes acting as employees in accordance with the apparent intent of Congress.

*Lindsay A. Newbold**

84. For a discussion of rationales asserted in support of sovereign immunity, see Limas, *supra* note 2, at 371-75.

85. The Fond du Lac Board apparently failed to identify any cultural practices that require the tribe to favor younger members of the tribe for employment. *Fond du Lac*, 986 F.2d at 251 (Wollman, J., dissenting). If there are in fact no cultural reasons to favor young employees, this is support for a distinction between Title VII and the ADEA. Within the context of Title VII, it is reasonable that Indian tribes should be allowed to favor Indians for employment, and are therefore not covered as employers under Title VII. *Id.* (citing EEOC v. Cherokee Nation, 871 F.2d 937, 942 (10th Cir. 1989) (Tacha, J., dissenting)). *See also supra* notes 68-70. *See generally* Limas, *supra* note 2, at 389-92 (arguing that is actually in the best interest of Indian tribes as sovereigns to protect the employment rights of their tribal employees).

86. 986 F.2d at 251.

* J.D. 1995, Washington University.