

Employment Discrimination

Morton v. Mancari, 417 U.S. 535 (1974). The Indian preference in hiring for the federal agency, Bureau of Indian Affairs, was upheld. The court held that “Indian” was a political classification, not a racial one.

Dawavendewa v. Salt River Project Agricultural Improvement and Power District, No. 97-15803 (9th Circuit 1998).

Harold Dawavendewa, a Native American, alleges that because he is a Hopi and not a Navajo, he was not considered for a position with a private employer operating a facility on the Navajo reservation. He contends that the employer’s conduct constitutes unlawful employment discrimination under Title VII of the Civil Rights Act of 1964. To determine whether Dawavendewa’s Title VII complaint may proceed, we address, first, whether discrimination based on tribal affiliation constitutes “national origin” discrimination, and, second, whether such discrimination is permitted under a Title VII provision that allows preferential treatment of Indians in certain specified circumstances.

Salt River does not contend that the different Indian tribes are not “nations” for Title VII purposes. Rather, it relies on *Morton v. Mancari*, 417 U.S. 535, 552-554 (1974) for the proposition that employment preferences based on tribal affiliation are based on political affiliation rather than national origin and are thus outside the realm of Title VII. *Morton* involved a Due Process challenge to the Bureau of Indian Affairs’ policy hiring Indian applicants over non-Indian applicants. The Court found that the policy did not constitute an impermissible racial classification because it was “reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.” *Id.* at 554.

However, *Morton* did not involve a claim of discrimination on the basis of membership in a particular tribe. In fact, in *Morton* no claim was made of any violation of Title VII. *Morton* simply held that the employment preference at issue, though based on a racial classification, did not violate the Due Process clause because there was a legitimate non-racial purpose underlying the preference: the unique interest the Bureau of Indian Affairs had in employing Native Americans, or more generally, Native Americans’ interests in self-governance — interests not present in this case.

For these reasons, *Morton* does not affect our conclusion that discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination. We therefore conclude that differential employment treatment based on tribal affiliation is actionable as “national origin” discrimination under Title VII.