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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

MARK S. ALLEN, Plaintiff(s), vs. MATTIE MAYHEW, RICKY MAYHEW, KIRBY BROWN, ELEANOR BOULTON, GUS MARTIN, BRIAN SANDUSKY, ERIN HARTER, ED WHITE, JIMMY EDWARDS, DEBBIE ARMUS, LEATHA CHASE, GOODIE MIX, TERRILYNN STEELE, MIKE HEDRICK, ART HATLEY, TASHA HERNANDEZ, DOES 1 THROUGH 50, Defendants.	No. CIV.S-04-322 LKK CMK (PS) DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

Defendants Mattie Mayhew, Ricky Mayhew, Eleanor Bolton, Gus Martin, Elin Harter, Ed White, Jim Edwards, Debra Armus, Leatha Chase, Goody Mix, Terrilynn Steele, Art Hatley, Mike Hedrick, Kirby Brown and Tasha Hernandez (collectively, "Defendants") hereby submit the following objections to Magistrate Judge's Findings and Recommendations ("F&R") with regard to Defendants' Motion to Dismiss ("Motion") Second Amended Complaint ("SAC").

I. INTRODUCTION.

A. Summary of Motion to Dismiss Argument.

This Court having dismissed Plaintiff's claims against the Berry Creek Rancheria of Tyme Maidu Indians ("Tribe") and its Gold Country Casino ("Casino") on the grounds of sovereign immunity, Plaintiff now attempts an end-run around the sovereign immunity bar by naming more than a dozen individual defendants who are officials or agents of the Tribe and its Casino. These defendants, Plaintiff alleges, "used their positions" (SAC, 4:2) at the Casino or "their status in the tribe" (SAC, 5:7-8) to promote a conspiracy to terminate Plaintiff because he is white. Plaintiff, however, may not circumvent immunity by the "simple expedient" of substituting tribal officials or agents in place of the Tribe and Casino. Just as Plaintiff's claims against the Tribe and Casino were barred by sovereign immunity, so too his claims against Tribal officials and Casino employees are equally barred.

Furthermore, the SAC fails to state a claim for civil rights violations under 42 U.S.C. section 1981 and 1985. To state a claim under section 1985, Plaintiff would have to allege and establish that he is a member of a racial minority or a suspect class. To the contrary, Plaintiff is white. SAC, 4:23 and 5:5. In addition, Plaintiff's attempt to state a claim under section 1981 or 1985 also fails because Title VII of the Civil Rights Act exempts Indian tribes from employment discrimination claims—and sections 1981 and 1985 may not be used to circumvent the exemption in Title VII.

B. Summary of Objections to Findings and Recommendations.

Defendants object to the Findings and Recommendations on two grounds. First, sovereign immunity should apply to all agents and employees of the Tribe, not just Tribal

Council members. This is true when, as here, Plaintiff has named individual defendants "as a 'simple expedient' calculated 'to avoid the doctrine of sovereign immunity.'" *Baugus v. Brunson*, 890 F. Supp. 908, 912 (E.D. Cal. 1995) quoting *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983). Sovereign immunity cannot be circumvented by simply naming the individual tribal officials or agents in place of the tribe itself. *See Dawavendewa v. Salt River Project, Agr. Improvement and Power District*, 276 F.3d 1150, 1161 (9th Cir. 2002) (rejecting plaintiff's "attempt to circumvent the [tribal] Nation's sovereign immunity by joining tribal officials in its stead"; affirming dismissal).

Second, Plaintiff's section 1981 claim also fails because Title VII of the Civil Rights Act exempts Indian tribes from employment discrimination claims. In the employment discrimination context, it would be "illogical to allow plaintiff to circumvent the Title VII bar . . . by allowing a plaintiff to style his claim as a § 1981 suit." *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1035 (11th Cir. 2001). *See also Stroud v. Seminole Tribe of Florida*, 606 F. Supp. 678, 679-80 (S.D. Fla. 1985) (dismissing plaintiff's section 1981 claim against tribe based on allegation she was terminated because she was white). Title VII's specific exemption of tribes from employment discrimination controls over section 1981, and thus, Plaintiff may not simply restyle his wrongful termination claim as a claim under section 1981. *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 672-73 (10th Cir. 1980) (affirming dismissal of section 1981 claim against Tribal employer and individuals).

II. PLAINTIFF MAY NOT CIRCUMVENT TRIBAL IMMUNITY BY SUBSTITUTING INDIVIDUAL DEFENDANTS FOR THE TRIBE AND CASINO.

In his third complaint in this matter, Plaintiff has restyled his allegations and added individual tribal officials and agents in an attempt to circumvent tribal sovereign immunity. But sovereign immunity cannot be circumvented in this manner. S*ee Dawavendewa v. Salt River Project Agr. Improvement and Power District*, 276 F.3d at 1161; *cf. Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1943) ("The issue here is

whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable.")

It is settled that ". . . tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). *See also Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002) (same). Immunity extends to officers or agents of a tribal business entity, as well as the tribe itself, including "individuals working within the scope of their employment." *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 643 (1999) (internal quotations omitted). When plaintiff alleges no viable claim that officials or agents acted outside their authority, immunity applies. *Id.*, citing *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

A. Plaintiff Is Attempting To Circumvent Tribal Immunity.

Plaintiff originally filed this action as a "Complaint for Unlawful/Wrongful Termination," naming only the Tribe, its Casino, and Mattie Mayhew as defendants and alleging that he was fired because he voiced concerns about rats being found in the food preparation area of the Casino restaurant (Complaint, 5:1-3; First Amended Complaint, 5:20-22), and also because he had applied to the "white man's court" for guardianship of three half-Indian children (Complaint, 4:24-26; First Amended Complaint, 5:16-18). In response to a motion to dismiss, Plaintiff filed a First Amended Complaint adding claims for alleged violations of the Indian Civil Rights Act, the Tribal-State Gaming Compact, Public Law 280, and certain federal regulations. This Court dismissed Plaintiff's claims against the Tribe and the Casino on grounds of tribal sovereign immunity. *Allen v. Gold County Casino*, 464 F.3d 1044, 1048-49 (9th Cir. 2006).

In his Second Amended Complaint, Plaintiff no longer contends he was terminated in retaliation for voicing concerns about rats in the casino's food preparation area. Instead, Plaintiff now alleges "that all named defendant's [sic] (and possibly others) had fired him for being white." (Second Amended Complaint ("SAC"), 5:4-5). Because the Tribe and its

Casino are immune, Plaintiff has named 14 individual defendants who are officials or agents of the Tribe and its Casino. The fact remains, however, that Plaintiff was employed by the Tribe's Casino—not by the individual defendants—and he was terminated by the Casino, acting through Casino agents and employees. See *Dawavendewa v. Salt River Project Agr. Improvement and Power District*, 276 F.3d at 1161 (actions of a sovereign are undertaken by individuals, but that does not change the nature of the claim).

B. The Ninth Circuit Has Rejected Similar Attempts To Circumvent Tribal Immunity.

In *Dawavendewa*, the plaintiff initially filed causes of action against a non-tribal corporation operating on tribal lands for discriminatory hiring. *Dawavendewa*, 276 F.3d at 1154. Later, when faced with possible dismissal of his suit, plaintiff sought to join individual tribal officials as defendants. *Id.* at 1161. The Ninth Circuit rejected plaintiff's attempt to join the individual defendants, and affirmed dismissal. The court explained:

> Undoubtedly many actions of a sovereign are performed by individuals. Yet even if Dawavendewa alleged some wrongdoing on the part of Nation officials, his real claim is against the Nation itself . . . As such, we reject Dawavendewa's attempt to circumvent the Nation's sovereign immunity by joining tribal officials in its stead.

Id. Here, as in *Dawavendewa*, Plaintiff's "real" claim is for wrongful termination by the Tribe's Casino, not the individuals who carried out the termination on behalf of the Tribe and its Casino.

Dawavendewa is not the only Ninth Circuit case where the court rejected an attempt to get around tribal immunity by naming individual defendants. In *Snow v. Quinault Indian Nation*, plaintiffs brought claims against a tribe and a tribal official challenging a proposed tribal tax. The district court dismissed on the grounds of tribal immunity, and plaintiffs appealed. *Snow*, 709 F.2d at 1321-22. The Ninth Circuit affirmed, holding "Snow cannot now avoid the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Id.* at 1322. *See also Hardin*

v. White Mountain Apache Tribe, 779 F.2d at 479-80 (affirming dismissal of action against tribe and tribal police officers).

Here, as evidenced by his initial complaint, Plaintiff's suit is, in effect, one against the Tribe and its Casino for wrongful termination. Tellingly, Plaintiff seeks wrongful termination damages—compensation "for lost wages, health, dental and other insurance covers that would apply, as well as pay increases that would have come, bonuses, and other incentive pay awards, like those plaintiff received in the past," SAC, 6:5-7—based on his employment at the Tribe's Casino. Though re-styled as a civil rights complaint, Plaintiff still claims he was wrongfully terminated (SAC 5:1-5), which is a claim against his employer. Indeed, Plaintiff admits he is attempting to circumvent tribal immunity because "the tribe can and did claim that they have sovereign immunity from suit." SAC, 4:1.

Following the Ninth Circuit precedents of *Dawavendewa*, *Snow* and *Hardin*, Plaintiff should not be allowed to circumvent tribal immunity when his real claim is against the Tribe and its Casino.

C. The *Chayoon* Cases Are Directly On Point.

The series of cases, *Chayoon v. Mashantucket Pequot Tribal Nation*, Docket No. 3:02CV0163 (D. Conn. May 31, 2002), *Chayoon v. Chao*, 355 F.3d 141 (2d Cir. 2004), *cert. denied sub nom. Chayoon v. Reels*, 543 U.S. 966 (2004), and *Chayoon v. Sherlock*, 89 Conn. App. 821 (Conn. App. 2005) are directly on point. The plaintiff in those cases, Joseph Chayoon, was an employee of Foxwoods Casino, a casino owned and operated by the Mashantucket Pequot Gaming Enterprise, an arm of the Mashantucket Pequot Tribe. Chayoon was granted a leave of absence under the Family Medical Leave Act, but he was terminated when he returned to work. Plaintiff sued for wrongful termination in a series of three lawsuits, the first two in federal court, the last in state court. *Chayoon v. Sherlock*, 89 Conn. App. at 823.

In his first federal lawsuit, plaintiff sued the Mashantucket Pequot Tribe and Foxwoods Casino. The case was dismissed for lack of subject matter jurisdiction, based on the sovereign immunity of the tribe and its casino. *Id.* Plaintiff then filed a second federal

lawsuit, naming 18 individual defendants, including seven members of the Mashantucket Pequot Tribal Council, as well as several employees, representatives and officers of the casino. *Id.* The district court dismissed that case too, and the Second Circuit affirmed. In affirming dismissal, the Second Circuit explained:

> Chayoon cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority.

Chayoon v. Chao, 355 F.3d at 143. In so doing, the Second Circuit echoed the Ninth Circuit's prohibition on "circumventing" tribal immunity by substituting individual defendants. *See Dawavendewa*, 276 F.3d at 1161 (rejecting attempt to "circumvent" tribe's sovereign immunity by joining tribal officials instead); *Snow*, 709 F.2d at 1322 (plaintiff cannot avoid immunity by the "simple expedient" of naming an officer of the tribe).

Nevertheless, Chayoon filed a third wrongful termination lawsuit—this time in state court—naming eight individual employees of the casino. *Chayoon v. Sherlock*, 89 Conn. App. at 824. Plaintiff argued sovereign immunity should not apply because defendants were not Indians and were being sued individually, and because in terminating his employment defendants acted in violation of federal law and therefore beyond the scope of their authority. *Id.* at 825. Defendants argued that at the they were all casino employees when plaintiff was fired, and plaintiff's claims related to conduct that was within their employment responsibilities. *Id.* The court agreed, affirming dismissal on the basis of sovereign immunity. *Id.* The court began by observing that "[t]ribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority." *Id.* at 826.

With that established, the primary issue for the *Chayoon v. Sherlock* court was "whether the plaintiff had made a sufficient claim that the defendants acted beyond the scope of their authority so as to denude them of the protection of sovereign immunity." *Id.* at 828. The court explained:

> In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads-and it is shown-that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe. . . . Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity. . . . [A] tribal official—even if sued in his individual capacity—is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority . . . .

Id. [internal quotations and citations omitted], citing *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp.2d 271, 280 (D. Conn. 2002). To overcome sovereign immunity, plaintiff "must do more than allege that the defendants' conduct was in excess of their . . . authority; [he] also must allege or otherwise establish facts that reasonably support those allegations." *Id.* The court held that nothing alleged by plaintiff suggested that defendants acted "manifestly or palpably beyond their authority in their conduct regarding the termination of his employment." *Id.* at 829. In language that applies equally well to Plaintiff's claims here, the *Chayoon v. Sherlock* court stated:

> [T]he complaint against the defendants in the present matter patently demonstrates that in terminating the plaintiff's employment, the defendants were acting as employees of Foxwoods within the scope of their authority. It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. *See Bassett v. Mashantucket Pequot Museum & Research Center, Inc., supra,* 221 F. Supp.2d at 280-81. Such an interpretation would eliminate tribal immunity from damages actions because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted "without any colorable claim of authority . . . ." (Internal quotation marks omitted.) *Id.*, at 281. The plaintiff has made no proffer of such conduct here. The plaintiff merely has alleged that he sued the defendants in their personal capacities and that they acted outside of their authority.

Id. at 829-30.

Here, as in *Chayoon*, Plaintiff has failed to plead facts showing that tribal officials or casino employees acted "without any colorable claim of authority." *Id. See also Native Am. Distributing v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056, 1071 (N.D. Okla. 2007) ("tribal official, even if sued in an individual capacity, is only stripped of tribal

immunity when he acts 'without any colorable claim of authority'"); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th at 644 ("Where the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies") (citing *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

D. *Baugus* Supports Dismissal Because Plaintiff Is Trying To Circumvent Tribal Immunity.

In the Findings and Recommendations, the Magistrate Judge concludes: "Although the cases from Connecticut may be persuasive, this court is more persuaded by its own opinion in *Baugus*." F&R, 7:1-2. Baugus, however, is distinguishable because it did not involve a claim for wrongful termination, like here or in *Chayoon*. Nor did plaintiff, in *Baugus*, attempt to circumvent tribal immunity by naming the individual. Indeed, *Baugus* supports dismissal when, as here, plaintiff names individuals as a "simple expedient" to "avoid the doctrine of sovereign immunity." 890 F. Supp. at 912.

Baugus brought civil rights claims against a casino security guard arising out of the guard's "citizen arrest" of him for driving while intoxicated. The security guard moved to dismiss on the grounds of sovereign immunity as a tribal official. In denying the guard's motion to dismiss, the court observed that no ruling of the Ninth Circuit has extended immunity to the individual employees of a tribal enterprise. 890 F. Supp. at 912. Baugus, unlike the Plaintiff here, was not an employee of the tribe or its casino; and Baugus's claims, unlike the Plaintiff's here, did not arise out of any relationship with the tribe or casino.

Not only is *Baugus* distinguishable, the case actually supports dismissal where, as here, Plaintiff is attempting to circumvent tribal immunity. *Baugus* had distinguished *Snow v. Quinault Indian Nation* because "the *Snow* court viewed the naming of the [individual] defendant as a 'simple expedient' calculated to 'avoid the doctrine of sovereign immunity.'" *Id.*, quoting *Snow*, 709 F.2d at 1322. But our case **is** like *Snow* and *Dawavendewa* (which was decided in 2002, seven years after *Baugus*), rather than *Baugus*.

Whereas in *Baugus*, plaintiff's "real" claim was against the individual rather than the tribe or casino, not so in *Snow*, *Dawavendewa* and here.

III. PLAINTIFF'S SECTIONS 1981 AND 1985 CLAIMS FAIL AS A MATTER OF LAW.

Plaintiff styles his Second Amended Complaint as a "Complaint For: Violation of Civil Rights Under; U.S. Code Title 42; Section 1981—Equal Tights under the Law and Section 1985—Conspiracy to Interfere with Civil Rights." However, Plaintiff cannot state claims under 42 U.S.C. sections 1981 or 1985. Accordingly, this action should be dismissed as to all defendants.

A. Plaintiff's Section 1985 Claim Fails Because He Is Not a Member of a Racial Minority or Suspect Class.

Plaintiff has no standing to state a claim under section 1985 because he is not a member of a class that the government has determined to warrant "special federal assistance in protecting their civil rights." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). "Plaintiffs have standing under Section 1985 only if they can show they are members of a class that the government has determined require[s] and warrant[s] special federal assistance in protecting their civil rights." *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994) (internal quotations omitted); *Voigt v. Savell*, 70 F.3d 1552, 1540 (9th Cir. 1995). *See also Collins v. County of Kern*, 390 F. Supp. 2d 964, 977 (E.D. Cal. 2005) ("plaintiffs bringing a cause of action under section 1985(3) must show that they are in a class that the courts have designated as a suspect or quasi-suspect class requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection"). Because Plaintiff is white (SAC, 3:26 and 4:23), he cannot satisfy the elements of a section 1981 claim.

B. Plaintiff's Section 1981 Claim Fails Because Title VII of the Civil Rights Act Exempts Indian Tribes from Employment Discrimination Claims.

The Findings and Recommendations recommend Plaintiff may proceed with his section 1981 claim, because section 1981 prohibits private racial discrimination against white persons as well as against nonwhites. F&R, 9: 4-5. The Findings & Recommendations, however, do not address Defendants' argument that substantive statutory law—that is, Title VII of the Civil Rights Act—prohibits claims against an Indian tribe (including its officials and employees) for allegedly wrongful, racially-motivated discharge. Title VII specifically exempts Indian tribes from the definition of "employers" within purview of the statute. *Wardle v. Ute Indian Tribe,* 623 F.2d at 672-73 (holding specific provision of Title VII exempting tribes from definition of "employer" subject to Act, 45 U.S.C. § 2000e(b)(1), controls over the general civil rights statutes such as 42 U.S.C. section 1981; affirming dismissal of section 1981 claim against tribe and tribal officials). Accordingly, courts have held that—in the employment discrimination context—it would be "illogical to allow plaintiff to circumvent the Title VII bar . . . by allowing a plaintiff to style his claim as a § 1981 suit." *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d at 1035.[1]

[1] *See also Stroud v. Seminole Tribe of Florida*, 606 F. Supp. at 679-80 (dismissing plaintiff's section 1981 claim against tribe based on allegation she was terminated because she was white). *But see Aleman v. Chugach Support Services, Inc.*, 485 F.3d 206, 213 (4th Cir. 2007) (holding exemption for Alaska Native Corporations did not immunize employer from discrimination suit under section 1981; noting that Alaska Native Corporations do not enjoy sovereign immunity like federally recognized Indian tribes).

The exemption of Indian tribes from section 1981 claims is also supported by the fact that Indian tribes are political, not racial, classifications. To succeed on a section 1981 cause of action, "plaintiffs must be able to allege racial discrimination as an element of their claim." *Parravano v. Babbitt*, 861 F. Supp. 914, 926 (N.D. Cal. 1994). In *Morton v. Mancari*, 417 U.S. 535, 554 (1974), the Supreme Court held that a preference for tribal hiring was not "racial," but political.[2] As a result, Plaintiff cannot succeed on a claim for racial discrimination arising our of his employment at the Tribe's Casino. *Parravano v. Babbitt*, 861 F. Supp. at 928 (dismissing section 1981 claim because plaintiffs cannot show racial discrimination in Indian preference). *See also Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 722 (9th Cir. 1986) ("preferential treatment for tribal members is not a racial classification, but a political one"). For this reason, too, the section 1981 claim should be dismissed.

IV. CONCLUSION.

For all the foregoing reasons, the Second Amended Complaint should be dismissed without leave to amend.

Dated: February 22, 2008.

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[2] The Tribe and its Casino expressly give preference in hiring to "all qualified Native American[s]." See Plaintiff's original Complaint, Ex. B (Tribe's hiring preference) and Ex. C (Casino's hiring preference).