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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

GAYLEEN BONEY,

Plaintiff,

vs.

WALTER VALLINE,

Defendant.
_____/

CASE NO.: 3:05-CV-00683

PLAINTIFF'S OPPOSITION TO VALLINE MOTION TO DISMISS/ MOTION FOR MORE DEFINITE STATEMENT

ORAL ARGUMENT REQUESTED

Plaintiff responds to Defendant WALTER VALLINE's Motion to Dismiss Under Rule 12(b) FRCP, and/or For a More Definite Statement under Rule 12(e), FRCP, as follows.

1. PROCEDURAL POSTURE OF THE CASE

The procedural history of this case is that the Plaintiff filed a Complaint against Walter Valline on December 19, 2005. Defendant Valline, through the U.S. Attorney's office, filed a Motion for Extension of Time on April 3, 2006. On April 5, 2006,

the Magistrate Judge assigned to this case filed an Order granting this Motion for Extension of Time. On May 24, 2006, the U.S. Attorney's office filed a Second Motion for Extension of Time to File Response to Complaint. On May 31, 2006, the Magistrate Judge assigned to this case entered an Order granting an extension of time to June 26, 2006. On June 26, 2006, Defendant Valline filed his Motion to Dismiss Under Rule 12(b) FRCP, and/or for a More Definite Statement Under Rule 12(e), FRCP.

2. THE MOTION TO DISMISS

Valline make the following points in his Motion to Dismiss. No §1983 case exists (Section IV, found at Page 5 of the Motion), Plaintiff's three causes of action are defective as a matter of law (Section V, also found at Page 5 of the Motion) and Valline is entitled to qualified good-faith immunity from suit (Section VI, found at Page 13 of the Motion.

3. INTRODUCTION TO PLAINTIFF'S OPPOSITION TO VALLINE'S MOTION

On July 15, 2004, Defendant Walter Valline, a recent hire of the Walker River Indian Tribe's Police Department, responded to a dispatch call reporting that Norman Boney, Sr. was intoxicated and driving under the influence on tribal land. Valline encountered Norman, Sr. and, later, his son Norman Boney, Jr. (hereinafter referred to as "Manny") near the senior Boney's residence. Officer Valline tasered Norman, Sr. and shot Manny in the neck and chest. Seventeen year-old Manny was unarmed and gave no appearance of being dangerous.

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Manny's mother, Gail Boney, the Plaintiff herein, had made specific written complaints to the Walker River Tribal Council about Defendant Valline as recently as May 30, 2004, about six (6) weeks prior to the fatal shooting.

Defendant Valline acknowledges notice in Plaintiff's Complaint of the following (at Page 4, Paragraph 2 of his Motion), for the purposes of his Motion (paraphrased):

> The Plaintiff presents two Fourth Amendment Claims and one First Amendment Claim for relief, and that these claims involve (1) Plaintiff's suffering restraint by the use of excessive force, (2) that the Plaintiff's arrest was without probable cause, and (3) that the fatal shooting on Plaintiff's child, Manny, and her arrest were in retaliation for her exercise of protected First Amendment petition and speech rights.

These assessments of what this lawsuit is about are essentially correct.

Although under the pleading standards governing actions of this type, the Complaint is adequate as a notice pleading

Notice pleading simply requires a "short and plain statement" showing only that the pleader is entitled to relief. (FRCP 8(a)(2)).

For the U.S. Supreme Court's most recent reinforcement of the proposition that heightened pleading is not required (which Valline's Motion to Dismiss pays only lip service to) unless specified by the Rules, see Swierkiewicz v. Sorema, 534 U.S. 506, 514 (2002):

> "….Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. In *Leatherman* we stated: "[T]he

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Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius*." 507 U. S., at 168. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U. S. C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e) (1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley, supra*, at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

While Plaintiff does not yet have access to any investigative reports about the incident (despite Freedom of Information Act requests made by Plaintiff to the Bureau of Indian Affairs and the Federal Bureau of Investigation, after the Department Justice declined criminal prosecution of Valline in December, 2005), Plaintiff believes the following statement of law by the U.S. Supreme Court in two cases involving police use of deadly force are on point.

Brousseau v. Haugen, 125 S. Ct. 596 (2005) stands as recent

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fundamental case authority in support of the proposition that Manny Boney should not have died on July 15, 2004 at the hands of Defendant Walter Valline. Citing Tennessee v. Garner, 471 U.S. 1 (1985), the U.S. Supreme Court held: "Specifically with regard to deadly force, we explained in Garner that it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead", and precedent from the United States Supreme Court and the Ninth Circuit as exemplified by the these cases:

1. Graham v. Connor, 490 U.S. 386, 397; 109 S. Ct. 1865; 104 L. Ed. 2d 443 (1989) (Fourth Amendment is violated by objectively unreasonable police conduct in the course of a seizure)
2. Alexander v. City and County of San Francisco, 29 F.3d 1355, 1366 (9th Cir. 1994), cert. den. sub nom. Lennon v. Alexander, 513 U.S. 1083, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995) and Duran v. City of Maywood, 221 F.3d 1127, 1130-31 (9th Cir. 2000) (Fourth Amendment is violated when police use excessive and unreasonable tactics that cause an escalation of events that lead to injury); and
3. Deorle v. Rutherford, 272 F.3d 1272, 1282 (9th Cir. 2001) (less intrusive alternatives to the force used may be considered as a part of the "totality of the circumstances" when deciding whether a police officer's use of force is excessive).

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It should be emphasized that Manny Boney was not even a criminal suspect in the encounter witnessed by his mother, sister and cousin.

4. VALLINE'S ARGUMENTS IN SUPPORT OF HIS MOTION

A. SOVEREIGN IMMUNITY

Valline first contends that he has immunity coextensive with a sovereign Indian tribe and, as such, is entitled himself, as an individual actor (but not as a member of the Tribe, since he is not a member), to sovereign immunity (Section IV).

His contention is erroneous, as is shown by an examination of his own legal authority and resort to other controlling and more pertinent case precedent.

B. LACK OF PLEADING DETAIL

Valline then contends that the three claims of Plaintiff fail, as a matter of law, because her Fourth Amendment claim for wrongful arrest does not detail the lack of probable cause, her Fourth Amendment claim for excessive force do not specify what force was used, that her First Amendment retaliation claim is speculative, and that her Complaint does not allege that Valline directly arrested or applied force to Plaintiff (Section V).

If the Court thinks additional detail is necessary, Plaintiff prays for leave of Court to amend her Complaint in conformance with the eyewitness Declarations submitted herewith, providing extensive detail as to how Plaintiff's arrest lacked probable cause, how excessive force was applied, and direct evidence of retaliatory motive flows from Valline's own statements. Obviously,

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another law enforcement officer agreed to Valline's directives to restrain Plaintiff, all of which amount to an actionable conspiracy, with the overt acts focusing on keeping Plaintiff from providing much-needed medical attention for her dying child and comforting her other children as Manny Boney died at the scene.

In addition, regarding Valline's claim that he should not be liable on the Fourth Amendment claims because he did not personally arrest the Plaintiff, but only directed the arrest, Harris v. Roderick, 126 F.3d 1189, 1196 (9th Cir. 1997) holds that, for the purposes of section 1983 liability "the requisite causal chain can occur through the setting in motion [of] a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury") (alteration in original; internal quotation marks omitted)

C. QUALIFIED IMMUNITY

Finally, Valline argues in Section VI of his Motion that he is entitled to qualified immunity from suit; that this is one of these cases where a law enforcement officer should not have to be bothered with filing an answer, participating in pretrial discovery or allowing a jury to evaluate his conduct and testimony. This argument presupposes that Valline was possessed of broad discretion as to how he could use deadly force; in fact, his use of deadly force in this incident was specifically circumscribed by the terms and conditions of his employment, as set forth in the contract under which the Walker River Tribal

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Police, and Defendant Valline, function. These contractual provisions were made pursuant to federal law. Only discretionary acts are within the purview of the "qualified immunity" defense, and it simply is inapplicable to this case, at either the pleading stage, dispositive motion stage or trial stage, as will be shown in the copy of the tribal law enforcement contract, restricting the use of deadly force, accompanying this Opposition.

Moreover, when First Amendment retaliation issues are present in a civil rights case, the actor's intent is relevant to determining whether a constitutional violation has occurred, and in ascertaining such intent to retaliate, a permissible inference of retaliation may be shown by the temporal proximity, in this case the six-weeks, between the First Amendment right exercised, and the injury sustained by the retaliation. Thomas v. City of Beaverton, 379 F.3d 802, 809 (9th Cir. 2004). The "causal link" in Thomas, was expressed in this fashion:

> "….The causal link between a protected activity and the alleged retaliatory action "can be inferred from timing alone" when there is a close proximity between the two. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002). Here, Thomas recommended hiring Perry for the position on February 22, 2001, and continued to oppose Miller's treatment of Perry thereafter. On April 11, approximately seven weeks after Thomas first supported Perry's promotion, Miller informed Thomas that she was being placed on extended probation. We have held that events occurring within similar intervals of time are sufficiently proximate to support an inference of causation. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (holding that sufficient evidence of causation existed where adverse employment action occurred less than three months after the protected activity); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731-32 (9th Cir. 1986) (concluding that there was adequate evidence of a causal link where the retaliatory action occurred less than two months after the protected activity)."

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5. WHAT THIS CASE IS NOT ABOUT

Plaintiff agrees with Valline on one point: that this is not a wrongful death case. However, the death of Manny Boney, and the restraints imposed upon the Plaintiff as she witnessed her child die, were the essence of the unconstitutional retaliation she claims was motivated by her complaints about Walter Valline to the tribal authorities.

There should be no argument, and none is made by Valline, that the Plaintiff had a right to complain about the tribal police, and him, specifically, to the authorities, as she has documented. There should also be no argument, but one is implied, that Valline cannot be held liable for the retaliation he is charged with, unless there is some direct evidence of his intent to retaliate. That is not the law.

In Robbins v. Wilkie, 433 F.3d 755 (10th Cir. 2006), the court commented:

> Although alleged rights violations must be analyzed at the proper level of generality, "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). No objectively reasonable government official would think he can retaliate against a citizen for that citizen's exercise of a clearly established constitutional right.
>
> In *DeLoach v. Bevers*, this court examined whether the right to be free from retaliation for the exercise of First Amendment rights was clearly established. 922 F.2d 618, 620 (10th Cir. 1990). We stated that "[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable . . . . The unlawful intent inherent in such a retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly

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established." *Id.* (citations and quotations omitted)

There are a number other First Amendment retaliation cases, indicating that subjective intent is germane to the claim for relief, and cannot usually support the grant of immunity merely by a review of the initial pleadings, or on summary judgment; examples include:

Mihos v. Swift, 358 F.3d 91, 103-07(1st Cir. 2004)

("Given the importance of Swift's motivation for firing Mihos for his vote, we must pause to address Swift's argument in her brief that 'the state of mind of the public official is not relevant to the question of qualified immunity,' citing to *Harlow v. Fitzgerald*. . . . This argument, along with citations to *Harlow*, is often made in First Amendment retaliation cases when defendants raise the qualified immunity defense. We are mindful that the Supreme Court in *Harlow* changed qualified immunity doctrine to emphasize the objective, not subjective, nature of that inquiry. However, *Harlow* does not stand for the proposition that inquiries into defendants' subjective motivation is inappropriate in the *first step* of the qualified immunity analysis in assessing whether an intent-based constitutional violation has been alleged. . . .

Harlow, then, did not affect the *first step* of the qualified immunity analysis: whether plaintiff's allegations, if true, establish a constitutional violation. Certain constitutional violations, including First Amendment retaliation claims, include defendant's motivations as a foundational element of the tort: Mihos's First Amendment retaliation claim 'has no meaning absent the allegation of impermissible motivation.' . . .

While the Supreme Court has removed from the qualified immunity analysis inquiries into whether a defendant knew that he was violating plaintiff's constitutional rights or acted maliciously to that end, this jurisprudence has not suggested that the 'objectification' of the qualified immunity inquiry somehow removes the intent element in the 'subset of constitutional torts [in which] motivation or intent is an element of the cause of action .' . . . In *Crawford-El v. Britton*. . . the Supreme Court confirmed that although *Harlow* eliminated inquiries into the defendant's subjective state of mind in the third step of the qualified immunity analysis, it did not eliminate inquiries into the defendant's subjective state of mind in the first step of the qualified immunity analysis when plaintiff alleges an intent-based constitutional tort. . . .

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With its careful attention to the ways in which trial courts can control the examination of an official's state of mind pre-trial, the Supreme Court acknowledged in *Crawford-El* that the adoption of an objective standard for qualified immunity in *Harlow* did not foreclose all state of mind inquiries during the pre-trial consideration of qualified immunity when state of mind is an element of the constitutional tort. Swift misreads *Harlow* in asserting that its reformulation of the qualified immunity defense makes her motivation in firing Mihos irrelevant to the qualified immunity analysis. Therefore, if the qualified immunity defense proffered in her motion to dismiss does not identify proper grounds apart from motive for dismissing the case, and if the thrust of her motion to dismiss is simply to deny that she acted with the constitutionally proscribed motive, she is unlikely to succeed." [footnotes omitted]).

Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003)

("Where specific intent of a defendant is an element of plaintiff's claim under clearly established law, and plaintiff has adduced sufficient evidence of that intent to defeat summary judgment, summary judgment on qualified immunity grounds is inappropriate. . .

In the present case retaliatory intent is an element of plaintiff's claim, and we have already noted that plaintiff's evidence of retaliatory animus is sufficient to make defendants' motivation a triable issue of fact. Until that issue is resolved by a factfinder, therefore, the retaliation claim against defendant [police commissioner] cannot be dismissed on qualified immunity grounds.").

Larsen v. Senate of the Commonwealth of Pennsylvania, 154 F.3d 82, 94, 95 (3d Cir. 1998)

("The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was in fact unlawful. . . In the context of a First Amendment retaliation claim, that determination turns on an inquiry into whether officials reasonably could believe that their motivations were proper even when their motivations were in fact retaliatory. Even assuming that this could be demonstrated under a certain set of facts, it is an inquiry that cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations, and thus cannot properly be resolved on the face of the pleadings, but rather can be resolved only after the plaintiff has had an opportunity to adduce evidence in support of the allegations that the true motive for the conduct was

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retaliation rather than the legitimate reason proffered by the defendants. . . .

In reaching this result we are not suggesting that a bare allegation of retaliatory motive necessarily is sufficient to defeat an assertion of qualified immunity as to a retaliation claim. In some circumstances, the legitimate basis for the actions might be so apparent that the plaintiff's allegations of retaliatory motive could not alter the conclusion that under the circumstances alleged in the pleadings, the defendants would have been compelled to reach the same decision even without regard for the protected First Amendment activity.").

Kinney v. Weaver, 367 F.3d 337, 372, 373 (5th Cir. 2004) (en banc)

("We close our discussion of qualified immunity by noting that, contrary to the position asserted by the Police Officials, the district court's review of the reasons for the Police Officials' boycott does not mean that the lower court, or this court, has engaged in a 'subjective' analysis of the type condemned in *Harlow*. The Police Official's position, apparently, is that they are entitled to qualified immunity as long as there exists some conceivable set of reasons that would have made their actions appropriate. Such factual scenarios doubtless exist. It would have been permissible for the Police Officials to pull their students out of Kinney's and Hall's classes if (for instance) the Police Officials learned that the instructors were unskilled. Therefore, the Police Officials suggest, we necessarily engage in a forbidden 'subjective' inquiry if we take cognizance of a genuine dispute over the reasons for their actions against the instructors. What the defendants' approach would mean, of course, is that there can never be liability for any violation for which the elements include the official's intent or reasons for action. Most §1983 claims do not include such an element, but First Amendment retaliation claims do: The First Amendment protects employees only from 'termination because of their speech on matters of public concern,'. . . not from termination simpliciter. Similarly, the Constitution forbids officials from discriminating on the basis of race only when their discrimination is intentional. . .

In such cases, reading *Harlow* as forbidding all discussion of intent would allow the qualified immunity defense to preclude recovery even when the law was clearly established, for plaintiffs would be barred from proving an essential legal element of their case.").

Robbins, supra, also indicates:

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"Under the doctrine of qualified immunity, government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Douglas v. Dobbs*, 419 F.3d 1097, 1100 (10th Cir. 2005) (quotation omitted). When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to immunity. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). To overcome a qualified immunity defense, a plaintiff must first assert a violation of a constitutional or statutory right and then show that the right was clearly established. *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir. 1996). A right is clearly established if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). To show that a right is clearly established, a plaintiff does not have to produce a factually identical case. Rather, plaintiff may produce a Supreme Court or Tenth Circuit opinion on point, or demonstrate that the right is supported by the weight of authority from other courts. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004). Once the plaintiff satisfies this initial two-part burden, the burden shifts to the defendant to show that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. *Id.*

6. WHY SOVERIEGN IMMUNITY IS INAPPLICABLE TO THIS CASE

The holding of Oklahoma Tax Comm'n v. Potawatomi Tribe (89-1322), 498 U.S. 505 (1991), states that under the doctrine of tribal sovereign immunity, a State that has not asserted jurisdiction over Indian lands under Public Law 280 may not tax sales of goods to tribesmen occurring on land held in trust for a federally recognized Indian tribe, but is free to collect taxes on such sales to nonmembers of the tribe. Valline cites this case for the proposition that he, individually, is immune from suit here. Nothing in this purported legal authority supports that argument.

The holding of Santa Clara Pueblo v. Martinez, 436 U.S. 49,

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98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) likewise is completely inapposite. There, the Supreme Court held that: (1) suits against the tribe under Indian Civil Rights Act are barred by its sovereign immunity from suit, and (2) Indian Civil Rights Act does not impliedly authorize private actions for declaratory or injunctive relief against tribe's officers. Neither the Indian Civil Rights Act or the holding of Santa Clara Pueblo is implicated in Gail Boney's Bivens action.

Valline's reliance on Kennerly v. United States, 721 F.2d 1252 (9th Cir. 1983) is also misplaced. Kennerly specifically states:

"The situation with respect to the individual tribal defendants is different; the officials of the Tribe do not have the same immunity as the Tribe itself. See Santa Clara Pueblo, 436 U.S. at 59, 98 S. Ct. at 1677. The district court held that **these officials had immunity, however, on the ground that the dispute in this case is intra-tribal** and that such controversies are, under the Supreme Court's decision in Santa Clara Pueblo, beyond the jurisdiction of the federal courts. 534 F. Supp. at 277-78. The court stated that redress should be sought in tribal court under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. Id. at 278. (emphasis added)

That Gail Boney's claims for relief herein against Walter Valline, a non-member of the Walker River Tribe, are not "inter-tribal" should be self-evident.

Why Valline, in the context of this lawsuit, is not

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personally entitled to sovereign immunity is discussed below.

Tribal immunity is a matter of federal law. Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 759 [118 S.Ct. 1700, 1705, 140 L.Ed.2d 981]. The United States Supreme Court has stated as a general matter that immunity "does not immunize the individual members of the Tribe." Puyallup Tribe, Inc. v. Dept. of Game of State of Wash. (1977) 433 U.S. 165, 172 [97 S.Ct. 2616, 2621, 53 L. Ed. 2d 667,], fn. omitted; accord, Santa Clara Pueblo v. Martinez, supra, 436 U.S. 49, 59 [98 S.Ct. 1670, 1677, 56 L.Ed.2d 106].

However, lower federal court decisions have extended immunity to "tribal officials when acting in their official capacity and within their scope of authority." United States v. State of Or. (9th Cir. 1981) 657 F.2d 1009, 1012, fn. 8; accord, Hardin v. White Mountain Apache Tribe (9th Cir. 1985) 779 F.2d 476, 479.)

Plaintiff acknowledges the general principle affording immunity to tribal officials acting within their authority. She contends, however, that (1) Valline was not the kind of "tribal official" to whom immunity extends, and (2) in any event, Valline did not act within the scope of his authority in the incident involving plaintiff, her son and her ex-husband.

In Baugus v. Brunson (E.D.Cal. 1995) 890 F.Supp. 908 (hereafter, Baugus), the court held a tribal security officer, who was not a member of the tribe, was not a "tribal official" entitled to immunity in a civil rights action under 42 United

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States Code sections 1983 and 1985. The court stated the term "tribal official" was "virtually always used to denote those who perform some type of high-level or governing role within the tribe." It noted that cases in which the term had been used more expansively had invariably involved tribal members. (Baugus, supra, at pp. 911-912.)

Plaintiff asserts Baugus is persuasive authority for rejecting immunity here.

The U.S. Supreme Court has already refined the absolute immunity afforded public officials in Westfall v. Erwin (1988) 484 U.S. 292 [108 S.Ct. 580, 98 L.Ed. 619] (hereafter, Westfall). The court reversed a summary judgment for the defendants, federal employees who worked as supervisors at an Army depot, in a state court negligence action arising from a workplace injury to a civilian employee. The court held that "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties *and the conduct is discretionary in nature.*" (*Id.*, at pp. 297-298, italics added.)

The Westfall court observed that "official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official." (Westfall, supra, 484 U.S. at p. 295.) The court further observed that "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from

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state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature." (*Id.*, at p. 296.) To escape liability, therefore, the official must exercise more than "'minimal discretion'"; otherwise virtually all official acts would be immunized. (*Id.*, at p. 298.)

In the case before it, the Westfall court held, summary judgment was improper because the plaintiff had asserted the defendants' duties only required them "'to follow established procedures and guidelines'" and that they were "'not involved in any policy-making work . . . .'" The defendants, who had the burden of proving they were immune, had not presented "any evidence relating to their official duties or to the level of discretion they exercise." (Westfall, supra, 484 U.S. at p. 299.)

The application of the Westfall rule to federal officials was superseded in 1988 by the enactment of the Federal Employees Liability Reform and Tort Compensation Act. That act eliminated the discretionary conduct requirement and conferred absolute immunity on federal employees for common law tort claims, relegating claimants to an action against the government under the Federal Tort Claims Act. (28 U.S.C. § 2679(b), (d); see Pani v. Empire Blue Cross Blue Shield (2d Cir.1998) 152 F.3d 67, 72.) However, "the Westfall test remains the framework for determining when nongovernmental persons or entities are entitled to the same immunity." (Pani, supra, at p. 72.)

Valline, while he is a law enforcement officer of a

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federally recognized tribe, acting under color of federal law, is not a federal official. Therefore, his right to immunity remains a matter of common law. As the Ninth Circuit Court of Appeals has stated, "Tribal immunity has been described as 'the common-law immunity from suit traditionally enjoyed by sovereign powers.' [Citation.] A necessary first step in the analysis is determining the scope of sovereign immunity at the common law." (In re Greene (9th Cir.1992) 980 F.2d 590, 593.) The Westfall rule represents the Supreme Court's most recent formulation of the scope of common law immunity for government officials. In the absence of further guidance from that court as to the appropriate standard for determining immunity of tribal officials, the Westfall standard should govern.

The remaining question is the extent to which immunity under that standard extends to tribal law enforcement officers. Under Westfall, immunity depends on whether an official's wrongful conduct is discretionary in nature. Police officers as a group have never been afforded absolute common law immunity (Pierson v. Ray (1967) 386 U.S. 547, 555 [87 S.Ct. 1213, 1218, 18 L.Ed.2d 288]; Falls v. Superior Court (1996) 42 Cal.App.4th 1031, 1038), perhaps in recognition of the fact that not all of their duties are inherently discretionary. On the other hand, it is recognized that police officers, like other public officials, "exercise some discretionary functions while carrying out their executive "discretionary" duties . . . ." (Walden v. Carmack (8th Cir. 1998) 156 F.3d 861, 869.). Thus, in actions

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alleging violations of constitutional rights under 42 U.S.C. 1983), police officers enjoy the same qualified immunity afforded most public officials as a matter of common law, i.e., they are immune unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. (*Ibid.*) The rationale for affording a measure of immunity to police and other officials is that, while they may err in the performance of their duties, "it is better to risk some error and possible injury from such error than not to decide or act at all." (Scheuer v. Rhodes (1974) 416 U.S. 232, 242 [94 S.Ct. 1683, 1689, 40 L.Ed.2d 90].)

Valline has cited no decision, and Plaintiff is aware of none, holding that any individual employed by or affiliated with a tribe is absolutely immune from tort liability for acts in the course of his or her duties, without regard to the nature of those duties. And although no case has expressly adopted the *Westfall* standard as a test for immunity of tribal officials, the basis for immunity set forth in the Ninth Circuit's seminal decision in (Davis v. Littell (9th Cir. 1968) 398 F.2d 83 (hereafter, Davis) -- "the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired" Davis, supra, 398 F.2d at p. 85) -- wholly supports application of the Westfall standard. Official duties which are sufficiently sensitive that they cannot be effectively performed unless the actors are protected from later inquiry into their motivations, such as the

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communications between the general counsel and the tribal council in Davis, are virtually certain to qualify as "discretionary" conduct under Westfall.

The Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"), Public Law 93-638, authorizes federal agencies to contract with Indian tribes to provide services on the reservation. 25 U.S.C. §§ 450-450n. The purpose of the ISDEAA is to increase tribal participation in the management of programs and activities on the reservation. Congress wanted to limit the liability of tribes that agreed to these arrangements. Congress therefore provided that the United States would subject itself to suit under the Federal Tort Claims Act ("FTCA") for torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA. Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959 (codified at 25 U.S.C. § 450f note) (hereinafter § 314).

In this case, the Walker River Tribe contracted with the BIA to provide law enforcement on the Walker River Reservation under a self-determination contract, or so-called "638 Contract." Thus, the United States arguably agreed to assume liability under the FTCA for tribal officers' torts.

Congress, however, did not intend section 314 to provide a remedy against the United States in civil actions unrelated to the FTCA. *See generally* Demontiney v. United States, 255 F.3d 801, 807 (9th Cir. 2001); FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234 (8th Cir. 1994); Comes Flying v. United States,

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830 F.Supp. 529, 530-31 (D.S.D. 1993); General Accounting Office Report No. 00-169, Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts 6, 16 (July 2000) (GA Report). It is this distinction which explains why Valline is being sued individually, and not under the FTCA, but instead under Bivens, for his personally motivated retaliation while acting under color of federal law.

This Court is respectfully reminded that Bivens is simply a judicial doctrine putting constitutional claims against individuals acting under color of federal law on an equal footing with claims arising against persons acting under color of state and municipal law pursuant to 42 U.S.C. 1983, which provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

When a person acting under color of federal authority deprives a person of her constitutional rights, the person may seek redress directly under the Constitution. Carlson v. Green, 446 U.S. 14, 18-19 (1980); Bivens v. Six Unknown Named Agents of

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Fed. Bureau of Narcotics, 403 U.S. 388, 396-97 (1971); see, e.g., Harris v. Roderick, 126 F.3d 1189, 1198 (9th Cir. 1997), (officials who arrested Ruby Ridge resident were entitled to qualified immunity in Bivens action alleging excess force in violation of Fourth Amendment rights, but Deputy U.S. Marshals who allegedly created and disseminated falsehoods were not), cert. denied sub nom., Smith v. Harris, 118 S. Ct. 1051 (1998).

The Bivens civil rights claim before this Court is not a FTCA action. Manny Boney's wrongful death is being pursued separate and apart from this action, under the FTCA. The interests sought to be vindicated here of Gail Boney are that she should not be punished (by the death of her son, or unlawful arrest or the use of excessive force upon her) for the exercise of her First Amendment rights to speak and petition for redress of grievances (in this case, the conduct of the Walker River Tribal Police, and Defendant Valline, in particular), and that Walter Valline killed her child and directed her arrest and resulting force used in effecting that arrest, in retaliation for her letters of May 30, 2004. The foregoing is, simply put, Plaintiff's theory of the case.

7. THE DOCTRINE OF QUALIFIED IMMUNITY DOES NOT APPLY HERE

A copy of the "638 contract" in force as of July 15, 2004, is submitted herewith as a separate Exhibit "A", due to its volume, and this Court's attention is invited to the following provisions, found at Attachment 2 thereof, Page 19:

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"A firearm may be discharged only when in the considered judgement of the officer, there is imminent danger of loss of life or serious bodily injury to the officer or to another person. The weapon may be fired only for the purpose of rendering the person at whom it is fired, incapable of continuing the activity prompting the officer to shoot. The firing of warning shots is prohibited...."

According to the witness statements submitted herewith, Valline went far beyond the restrictions placed upon him by the 638 contract, in using deadly force upon Manny Boney. If Valline contends otherwise, he should be put to answering Plaintiff's Complaint, participating in pretrial discovery and permitting a jury to evaluate his credibility, just as the credibility of the other eyewitnesses would be evaluated.

The central point regarding the deadly force policy enunciated in the operative Section 638 contract is this: That Defendant Walter Valline had no discretion to violate that policy in effecting an arrest, or seizure, of Manny Boney, and he certainly did not have the discretion to kill Manny Boney to settle a score with Gail Boney.

Valline's argument that he is entitled to qualified immunity for his actions requires a more detailed analysis. The purpose of qualified immunity is to effect a balance between the rights of persons residing in this country to be free from blatant constitutional violations and the need to ensure that the larger needs of society are met and that law enforcement personnel are not unnecessarily diverted from their duties. Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982). Under the doctrine, law enforcement officers who are wrongdoers may

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sometimes escape the economic consequences of their actions. Officials who perform discretionary functions are afforded "qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987). As The Ninth Circuit has held repeatedly, "[a] law enforcement officer is entitled to qualified immunity in a [Bivens] action . . . [if], in light of clearly established principles governing the conduct in question at the time of the challenged conduct, the officer could reasonably have believed that the conduct was lawful." Mendoza v. Block, 27 F.3d 1357, 1360 (9th Cir. 1994); see also Alexander v. County of Los Angeles, 64 F.3d 1315, 1319 (9th Cir. 1995); Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991).

In order to determine whether Valline is entitled to qualified immunity, a court will engage in a two-pronged inquiry:

"1) Was the law governing the official's conduct clearly established?

2) Under that law, could a reasonable officer have believed the conduct was lawful?"

Act Up!/ Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993); see also Mendoza, 27 F.3d at 1360.

. . .

. . .

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The specific questions this Court must decide are as follows: was it clearly established that the deadly force or the arrest used by Valline violated constitutional requirements, and should reasonable officers have known that such was the case?

In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that "[t]he `reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. at 396.

Ordinarily, the "inquiry is . . . whether the totality of the circumstances, (taking into consideration the facts and circumstances of the particular case including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether he is actively resisting arrest or attempting to evade by flight) justified the particular type of seizure. " Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991). In Tennessee v. Garner, 471 U.S. 1, 11 (1985), the Court held that the use of deadly force "to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." Furthermore, the Court observed that "[i]t is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Id.

Certain principles are clearly established under the cases

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described above and others that implement the fundamental rules regarding the use of deadly force. Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons. See Curnow, 952 F.2d at 325 (holding that "police officers could not reasonably have believed that the use of deadly force was lawful because Curnow did not point the gun at the officers and apparently was not facing them when they shot him the first time"); Ting v. United States, 927 F.2d 1504, 1511 (9th Cir. 1991) ("It was generally established at the time of the shooting that an officer could use deadly force to effectuate an arrest if, under the circumstances, he reasonably believed that such force was necessary to protect himself or others from serious bodily harm."). Moreover, whenever practicable, a warning must be given before deadly force is employed. Garner, 471 U.S. at 11-12. [footnote 15]

8. CONCLUSION

This is not a case amenable to judgment on the pleadings. Should the Court require an amended pleading, consonant with the facts asserted in the Declarations filed along with Plaintiff's response to Defendant's Motion to Dismiss and/or For a More Definite Statement, it should be apparent that triable claims will survive the amended pleading.

In any event, any perceived pleading deficiencies are not Fatal to this civil action.

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The defense claim of sovereign immunity is not supported by fact or applicable law. It is apparent Defendant Valline is on notice of the essential facts supporting Plaintiff's claims against him. The fact that Defendant Valline was not the sole actor in effecting Plaintiff's arrest and the force used upon her does not absolve him of liability in this case. No reasonable officer could think that Valline's actions on the night of July 15, were constitutional or otherwise lawful.

Accordingly, the defense Motion to Dismiss on these grounds should be denied.

Dated this 14th day of July, 2006.

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