Robert M. Cook (SBN 002628)
THE LAW OFFICES OF ROBERT M. COOK, PLLC
219 W. Second Street
Yuma, Arizona 85364
Office: (928) 782-7771
Facsimile: (928) 782-7778
E-mail: robertmcook@yahoo.com
Attorney for Plaintiffs,
Barbara Soto and Victoria Craun

THE LAW OFFICES OF ROBERT M. COOK, PLLC
219 W. SECOND STREET
YUMA ARIZONA 85364

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Barbara Soto, Victoria Craun, **Plaintiffs,** **v.** **Quechan Tribally Designated Housing Entity, John Does 1 through 10, Quechan Tribally Designated Housing Entity, Robert Letendre, Executive Director employed by the Quechan Tribally Designated Housing Entity, individually and in his official capacity as Executive Director, John Does 11-20, Quechan Tribally Designated Housing Entity Tad Zavodsky, a Supervisor Employed by the Quechan Tribally Designated Housing Entity, individually and in his official capacity as Supervisor , John Does 21-30, Housing and Urban Development, John Does 31 through 40, and John and Jane Does 1 through 100, each in their individual capacities,** **Defendants.**	Case No. 2:10-cv-00533-DGC **PLAINTIFFS' RESPONSE AND OBJECTION TO DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' MOTION TO GRANT AND DISPOSE SUMMARILY OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES TO REMEDY FEDERAL CIVIL RIGHTS VIOLATIONS, FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Plaintiffs Barbara Soto and Victoria Craun, by and through their undersigned counsel, hereby respond and object to Defendants' Motion to Dismiss and Defendants' Motion to Grant and Dispose Summarily of Their Motion to Dismiss Plaintiffs' Complaint for Damages to

Remedy Federal Civil Rights Violations, for Lack of Jurisdiction and Failure to State a Claim Upon Which Relief, and respectfully request that Defendants' Motions be denied in their entirety for the reasons more fully set forth with particularity in the Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 27th day of May, 2010.

THE LAW OFFICES OF ROBERT M. COOK

By /s/ Robert M. Cook
Robert M. Cook
Attorney for Plaintiffs
Barbara Soto and Victoria Craun

THE LAW OFFICES OF ROBERT M. COOK, PLLC
219 W. SECOND STREET
YUMA ARIZONA 85364

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

1. Plaintiffs Barbara Soto and Victoria Craun (hereinafter "Plaintiffs Soto and Craun") are Federal Indian females, who were employed by Defendant Quechan Housing and Defendant HUD, brought this action as a pure Section 1983 civil rights action against (i) Defendant Quechan Housing and (ii) Defendant HUD and (iii) individuals variously employed thereby acting under color of state law and being sued herein as individuals while acting in their official capacities. Plaintiffs Soto and Craun further brought this action as they alleged that they were discriminated against in their workplace on the basis of the alleged perceived sexual orientation of being lesbians. They were teased, called names and subjected to crude sexual gestures over their employment period, due to gender stereotyping as a homosexual by fellow employees based on those perceptions. Plaintiffs Soto and Craun were discriminated and retaliated against by the Defendants when Defendants allegedly failed to do the following: (1) respond to their reports of workplace harassment that created a hostile work environment, (2) treating Plaintiffs Soto and Craun differently when Defendants failed to promote Plaintiffs Soto and Craun, demoted Plaintiffs Soto and Craun, aided and abetted against Plaintiffs Soto and Craun, suspended and/or terminated Plaintiff Soto, and forced out Plaintiff Craun.

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2. The venue, jurisdiction, and allegations relative thereto, together with the facts, and all causes of action under Section 1983 have been set forth in Plaintiff Soto and Craun's Complaint as follows: Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 (Federal question). Venue is proper in the United States District Court for the District of Arizona because the acts complained of occurred exclusively in this judicial district in Arizona, and no real property is involved in this action. 28 U.S.C. §1402(b). Also, Plaintiff Soto and Craun's suit was timely filed pursuant to 28 U.S.C. §2675(a).

3. Defendants seek dismissal for lack of subject matter jurisdiction. Each of Defendants' contentions should fail because there exists both genuine issues of material fact and legal issues. It may be necessary to amend Plaintiff Soto/Craun's Complaint to further reflect the true outrageous conduct thereof.

II. STATEMENT OF FACTS

4. Plaintiffs Soto and Craun were Federal employees with Defendant Quechan Housing. Defendant Tad Zavodsky claimed, in front of other employees, that Plaintiffs Soto and Craun were guilty of masturbation and all homosexuals will go to hell, pursuant to his perceived sexual orientation.

5. Plaintiffs Soto and Craun protested and resisted the hostile sexual gestures, acts, contacts and comments of the individual Defendants. The acts were permitted to continue, and Plaintiffs Soto and Craun, after protesting, were not advanced, promoted, given additional responsibilities or maintained in their employment position. Instead, Plaintiff Soto was terminated from her employment on January 17, 2009. Plaintiff Soto did find another Federal job with the Indian Health Services which is funded by the Quechan and Cocopah Indian Tribes. Plaintiff Craun remained at her job, but the harassment became increasing more difficult as Defendants were attempting to force her to resign, in which she finally did in September 2009. Targeting someone because of their perceived sexual orientation based on gender stereotypes is a form of sex discrimination. *Schroeder v Maumee Bd of Educ.*, 296 F.Supp. 2d 869 (N.D. Ohio 2003).

Defendants' conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

6. Despite knowledge of these circumstances, Defendants aided, abetted, assisted and permitted a sexually permissive and unsafe workplace to exist at Defendant Quechan Housing where Plaintiffs Soto and Craun endured harassing conduct as 'sexual' in nature due to their perceived sexual status as homosexuals, and were harassed based on those perceptions.

7. The individual Defendants, each and all caused, contributed to and permitted a pervasive sexually exploitative environment to exist and surround the workplace where Plaintiffs Soto and Craun worked.

8. In *Ray v Antioch Unified School District*, 107 F.Supp. 2d 1165 (N.D. Cal. 2000), ... "it is reasonable to infer that harassment based on perceived beliefs about sexuality constitutes harassment based on sex."

9. It is believed that Defendants Quechan Housing and HUD have created and allowed Plaintiffs Soto and Craun to endure discriminatory insult, ridicule and intimidation practiced by Defendants. Such alleged harassment is based upon perceived sexual orientation, which harassment affected terms, conditions or privileges of their employment. There are federal laws which protect people (Federal employees) from workplace discrimination on the basis of sexual orientation. *Tanner v Oregon Health Sciences University*, 157 Ore. App. 502, 971 P.2d 435 (1998).

10. At all times while Plaintiffs Soto and Craun were employees of Defendant Quechan Housing and subject to the direct or indirect control of Defendant, owed Plaintiffs Soto and Craun a duty to:

a. Work in a workplace where co-employees would generally be expected and required by their employer, and employment circumstances, to comply with laws and regulations concerning discrimination based on alleged sexual orientation.

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b. Be able to work, and could work, free of sexual demands, pressures, and impositions affecting terms or conditions, prospects for promotion, and possibilities for continuing employment.

11. Defendant Quechan Housing negligently failed, by breaching and disregarding these duties in that they permitted acts and conduct like those described above to occur, recur, and continue and to be propagated against Plaintiffs Soto and Craun though they knew, or in the exercise of reasonable and ordinary care should have known, that such acts, events and circumstances were occurring.

12. It is believed that Defendants' complete and utter disregard for the duty of the corporate Defendants to provide, promote and maintain a safe, sound, secure, proper and responsible workplace for employees, and to act to thwart, prevent, and halt a pattern of discriminatory insult, ridicule and intimidation practiced against Plaintiffs Soto and Craun, including sexual and sex-based discrimination based on perceived sexual orientation harassment. Defendants had duties to provide such a workplace and to halt activity they knew or should have know was occurring at the work site, but they grossly, negligently failed to do so.

13. Plaintiffs Soto and Craun suffered great humiliation, embarrassment and mental suffering as a result of Defendants' unlawful conduct.

14. In doing the acts alleged herein, each of the above-named Defendants acted as the agent for and on behalf of the other Defendants, and was acting, at all times material, within the course and scope of their respective agencies, and in furtherance of the above-described conspiracy.

15. In doing the acts described above, Defendants, and each of them, attempted to impede, hinder, obstruct or defeat the due course of justice in the State of Arizona, with the intent to injure Plaintiffs Soto and Craun.

III. LEGAL ANALYSIS

A. Standard of Review

16. Motions to dismiss for failure to state a claim for relief are viewed with disfavor and

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rarely granted. Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 (9th Cir. 1986) (citing 5 C. Wright & A. Miller, *Federal Practice & Procedure,* Civil § 1357 at 598.) The general rule is that "a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 351 U.S. 41, 45-46, 78 S.Ct. 99, 101 (1956). See also, Clegg v. Cult Awareness Network, 18 F.3d 752, 753 (9th Cir. 1994) "All allegations of material fact in the Complaint are taken as true and construed in the light most favorable to the nonmoving party." Clegg at 754. A Complaint only has to set forth generalized facts that will enable a defendant to draft a responsive pleading. Securities Inv. Prot. Corp., v. Vigman, 764 F.2d 1309, 1328 (9th Cir. 1985) (citations omitted).

17. On its face, the complaint in this matter evidences the subject matter and personal jurisdiction of this Court. Defendants' motions are accompanied by matters outside the pleadings, thus Plaintiffs Soto and Craun urge this Court to treat Defendants' Motions as one for summary judgment, necessitating the application of summary judgment standards. Smith v. Payne, 156 Ariz. 506, 753 P.2d 1162 (1988).

18. The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issues of material fact, as well as entitlement to a judgment as a matter of law; that is, the moving party has the burden of establishing a prima facia case entitling her or him to summary judgment. See Gamez v. Brush Wellman, Inc., 201 Ariz. 266, 268, 34 P.3d 735 (Ariz. App. 2001). When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Id.; Orme School v. Reeves, 166 Ariz. 301, 309-10, 802 P.2d 1000 (Ariz. 1990). Thus, a genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In other words, summary judgment is proper only when the evidence presented by the opposing party has so little probative value that reasonable jurors could not agree with the opposing party's conclusions. Orme School,

166 Ariz. at 309-10. However, the evidence must be viewed in a light most favorable to the opposing party. Id. Finally, because the consequences of summary judgment are so severe, courts must be careful to avoid premature termination of legitimate lawsuits. Murrell v. Bennett, 615 F.2d 306, 309 (5th Cir. 1980). Although summary judgment is a useful device, it must be used cautiously or it may lead to drastic and lethal results. See Hanson v. Polk County Land, Inc., 608 F.2d 129, 130 (5th Cir. 1979).

19. Plaintiffs Soto and Craun accept Defendants' Statement regarding Standard of Review of a Federal Rules 12(b)(1) and (6) Motion, insofar as it goes. However, as the court in Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001) points out:

> [Under] the liberal system of 'notice pleading' set up by the federal rules [,] Rule 8(a)(2)...does not require a claimant to set out in detail the facts upon which he basis his claim. To the contrary all the rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Citing, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

20. Plaintiffs Soto and Craun need not prove their claims in their Complaint, not even a prima facie case. It appears that Defendants are attempting by their Motion to Dismiss to rewrite Plaintiff Soto and Craun's Complaint with a sterilized version of the facts, then using their rewritten factual allegations to claim that Plaintiffs Soto and Craun have not alleged any valid cause of action.

21. Plaintiffs Soto and Craun's notice- plead Complaint stands on its own and sufficiently states claims upon which relief can be granted.

> In this Circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conform to official policy, custom, or practice.'"

Lee 250 F.3d @682 quoting Karin-Panahi v. Los Angeles Police Dep't, 839 F.2nd 621, 624 (9th Cir. 1988).

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22. Plaintiffs Soto and Craun's Complaint alleges more than bare allegations. It alleges specific conduct that was deliberate, reckless, intentional, malicious, and with deliberate indifference in conscious disregard of their rights.

23. Furthermore, "the federal court may not apply a heightened pleading standard to a complaint alleging municipal liability under a Section 1983." Leatherman, 507 U.S. at 168. It follows the court may not apply a heightened stand to a complaint alleging county liability either.

24. Accordingly, Plaintiffs Soto and Craun's Complaint articulates sufficient allegation to satisfy Federal Rule 12(b)(b) read together with 8(a)(2)'s liberal "court notice pleading" standard.

In pertinent part Federal Rule 8(a)(2) states that a:

> "Pleading which sets forth a claim for relief...shall contain...a short and plain statement of the claim showing that the pleader is entitled to relief."

Fed.R.Civ.P. 8(a). The Leatherman court explained that "the rule means what it says." 507 U.S. at 168.

25. Defendants' conduct also constitutes actionable, wrongful tortious behavior and includes, with respect to Plaintiff.

Defendants' Motions should be Denied as the Parties Have Not Undertaken any Substantive Discovery.

26. No substantive discovery has been undertaken by either party at this time, even though Defendants' filed their Motions.

27. Until discovery is completed in this complex case, Plaintiffs Soto and Craun do not believe it is appropriate for the Court to consider Defendants' Motions.

Plaintiffs Soto and Crauns'sAllegations are Presumed True and are Not Disputed.

28. Plaintiffs Soto and Craun's allegations are presumed true upon consideration of a motion to dismiss pursuant to Rule 12(b)(6) FRCP. See, Conley. The allegations are summarized in the Complaint. The allegations do satisfy the pleading requirements of Rule 8 FRCP.

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Accordingly, Defendants' Motions should be dismissed, as Plaintiffs Soto and Craun's allegations are presumed true.

Plaintiffs Soto and Craun's Claims State a Cause of Action For the Breach of the Duty of Fair Representation.

29. As previously set forth, Plaintiffs Soto and Craun's allegations are presumed true for the purposes of Defendants' Motion to Dismiss. Plaintiffs Soto and Craun's Complaint should not be dismissed unless it appears beyond a reasonable doubt that Plaintiffs' Soto/Craun cannot prove facts in support of their claim. Conley at 45-46, 99. Defendants, and each of them, carry a heavy burden to establish that Plaintiffs Soto and Craun cannot state a claim as they have not offered any declaration, affidavit of evidence in support of their position.

Plaintiffs Soto and Craun's Remaining Allegations State Claims for Relief.

Allegation:

30. Plaintiffs Soto and Craun allege sexual discrimination, perceived sexual orientation, and harassment in employment.

Claim for Relief:

31. Title VII of the Civil Rights Act of 1964 forbids sex discrimination in employment.

32. Title VII makes it unlawful for an employer to discriminate as to hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. It also forbids employers to limit, segregate, or classify employees in any way that tends to deprive any individual of employment opportunities or adversely affects his employment status because of his race, color, religion, sex, or national origin in advertisements relating to employment.

33. The United States Supreme Court has held that sexual harassment is a form of sex discrimination in employment and a violation of Title VII.

34. In Clark County v. Breeden, 532 U.S. 268 (2001), the United States Supreme Court defined sexual harassment as follows:

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219 W. SECOND STREET
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> "Title VII forbids actions taken on the basis of sex that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.' " Faragher v. Boca Raton, 524 U.S. 775, 786, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)(some internal quotation marks omitted)). See also Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)(Only harassing conduct that is "severe or pervasive" can produce a "constructive alteratio[n] in the terms or conditions of employment"); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)(Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"). Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " Faragher v. Boca Raton, supra, at 787-788, 118 S.Ct. 2275 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' " Faragher v. Boca Raton, supra, at 788, 118 S.Ct. 2275 (citation and quotation marks omitted)."

35. The Equal Employment Opportunity Commission is the federal agency responsible for administering and enforcing Title VII of the Civil Rights Act of 1964.

36. The EEOC Guidelines, 29 C.F.R. Section 1604.11, provide the following definition of sexual harassment:

> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

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> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

37. The EEOC Guidelines, under Regulation 29 CFR, Part 1614, Section 102(a)(3) further provides as follows:

> "requires agencies of help make the Federal Government a model employer by eliminating discrimination from personnel policies, practices and working conditions. A hostile work environment allows ridicule, abuse, insults or derogatory comments that are directly or indirectly based on race, color, national origin, sex, sexual harassment, religion, age, handicap, sexual orientation, reprisal, marital status, political affiliation or parental status. It is further defined as an offensive or intimidating environment that unreasonable interferes with work performance or that otherwise adversely affects employment opportunities. Personal conversations that can be overheard by other employees who consider the conversation offensive can also create a hostile environment."

38. Under the Act, EEOC has the authority to investigate and conciliate charges of discrimination because of race, color, religion, sex, or national original by employers, unions, employment agencies, and joint apprenticeship or training committees. Under the 1972 amendments, EECO no longer is limited to investigation and conciliation of charges. It can now bring an action through the U.S. Attorney General in a U.S. District Court against a non-responsive party.

39. Further, pursuant to the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission, Americans who knew only the potential of "equal protection of the laws" expected the President, the Congress, and the courts to fulfill the promise of the 14th Amendment. In response, all three branches of the federal government--as well as the public at large--debated a fundamental constitutional question: Does the Constitution's prohibition of denying equal protection always ban the use of racial, ethnic, or gender criteria in an attempt to bring social justice and social benefits? In 1964 Congress passed Public Law 82-352 (78 Stat. 241). The provisions of this civil

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rights act forbade discrimination on the basis of sex as well as race in hiring, promoting, and firing. The word "sex" was added at the last moment. According to the *West Encyclopedia of American Law*, Representative Howard W. Smith (D-VA) added the word. His critics argued that Smith, a conservative Southern opponent of federal civil rights, did so to kill the entire bill. Smith, however, argued that he had amended the bill in keeping with his support of Alice Paul and the National Women's Party with whom he had been working. Martha W. Griffiths (D-MI) led the effort to keep the word "sex" in the bill. In the final legislation, Section 703 (a) made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin." The final bill also allowed sex to be a consideration when sex is a bona fide occupational qualification for the job. Title VII of the act created the Equal Employment Opportunity Commission (EEOC) to implement the law. Subsequent legislation expanded the role of the EEOC. Today, according to the U. S. Government Manual of 1998-99, the EEOC enforces laws that prohibit discrimination based on race, color, religion, sex, national origin, disability, or age in hiring, promoting, firing, setting wages, testing, training, apprenticeship, and all other terms and conditions of employment. Race, color, sex, creed, and age are now protected classes. The proposal to add each group to protected-class status unleashed furious debate. But no words stimulate the passion of the debate more than "affirmative action."

40. Under Section 2000e-2 of the Civil Rights Act of 1964 - CRA - Title VII - Equal Employment Opportunities - 42 US Code Chapter 21 - Civil Rights, Unlawful Employment Practices, it states as follows:

> " (a) Employer practices - It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his

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> employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

41. The Supreme Court decisions in *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed. 2d 492 (1961), and *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), finally recognized the full scope of Congress's original intent in enacting Section 1983. The Supreme Court began accepting an expansive definition of rights, privileges, or immunities, and held that the Act does cover the actions of state and municipal officials, even if they had no authority under state statute to act as they did in violating someone's federal rights. The Supreme Court has held that Section 1983 creates "a species of tort liability". (*Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed. 2d 128 [1976]).

42. The Supreme Court has also held that, similar to tort law, punitive damages are available under Section 1983 (*Smith v Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed. 2d 632 [1983]). Defendants' conduct is reckless to the federally protected rights of others. The jury has the duty to assess the amount of punitive damages.

43. The Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C.A. §1988[b]) allows for the award of reasonable attorneys' fees to the prevailing party in cases brought under various federal civil rights laws, including Section 1983. This provision applies whether or not compensatory damages were awarded. This provision also applies whether the plaintiff or the defendant prevails.

44. The Supreme Court has held that in the interests of national uniformity and predictability, all Section 1983 claims shall be treated as tort claims for the recovery of personal injuries. (*Wilson v. Garcia,* 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 [1985])

45. Plaintiffs Soto and Craun suffered great humiliation, embarrassment, physical and mental suffering as a result of Defendants' unlawful conduct of discrimination based upon perceived sexual orientation.

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46. Executive Order 13087, issued on May 28, 1998, prohibits discrimination based upon perceived sexual orientation within Executive Branch civilian employment. The Executive Order states this policy uniformly by adding sexual orientation to the list of categories for which discrimination is prohibited. The other categories are race, color, religion, sex, national origin, handicap, and age. On May 2, 2000, Executive Order 13153 added "status as a parent" to the list of categories for which discrimination is prohibited. It is the policy of the Federal Government to provide an equal opportunity to all of its employees. Federal employees should be able to perform their jobs in workplaces free from discrimination- whether that discrimination is based on color, religion, sex, national origin, handicap, age or sexual orientation. The President's Executive Order states, as a matter of Federal policy, that a person's sexual orientation should not be the basis for the denial of a job or a promotion. As the Nation's largest employer, the Federal Government sets an example for other employers that employment discrimination based upon sexual orientation is not acceptable.

47. The new Executive Order further amends Section 1 of Executive Order 11478 (1969), which now reads, in part, as follows:

> "Under and by virtue of the authority vested in me as President of the United States by the Constitution and the laws and statutes of the United States, and in order to provide for a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation, it is Ordered as follows:
>
> > Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, or sexual orientation through a continuing affirmative program in each executive department and agency. This policy of equal employment opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government, to the extent permitted by law." *See* US. Office of Personnel Management, Ensuring the Federal Government has an Effective Civilian Workforce - Addressing Sexual Orientation Discrimination in Federal Civilian Employment. (http://www.opm.gov/er)

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Given the liberal standard afforded Plaintiffs Soto and Craun under both Federal Rules 8(a)(2) and 12(b)(6), Plaintiffs Soto and Craun have, indeed, made sufficient allegations, notwithstanding Defendants' conclusions of law, in their pleadings to withstand Defendants' Motions to Dismiss.

IV. LEGAL THEORIES

48. Defendants' conduct also constitutes actionable, wrongful tortious behavior and includes, with respect to Plaintiffs Soto and Craun. Outrageous conduct causing severe emotional distress contrary to *Restatement 2d of Torts* § 46, adopted in Arizona in *Cummins v. Mold-In Graphic Systems*, 26 P3d 518, 528 (Ariz App Div 1 2001) because Defendants' conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

49. Complete and utter disregard for the duty of the corporate Defendant to provide, promote and maintain a safe, sound, secure, proper and responsible workplace for employees, and to act to thwart, prevent, and halt a pattern of discriminatory insult, ridicule and intimidation practiced against Plaintiffs Soto and Craun including sexual and sex-based harassment. The corporate Defendant had duties to provide such a workplace and to halt activity they knew or should have know was occurring at the work site, but they grossly negligently failed to do so.

50. In addition, the treatment to which Plaintiffs Soto and Craun were subjected constituted a general pattern of discriminatory insult, ridicule and intimidation practiced against Plaintiffs Soto and Craun because Plaintiffs Soto and Craun did not exhibit receptivity to sexual harassment, but were subjected to harassment based upon sex, which harassment affected terms, conditions or privileges of their employment. These events and circumstances occurred when the employer, Defendant corporation, its controlling party, knew or should have known of the harassment but failed to take proper action to cause it to stop.

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51. Defendants and the corporation knew, or reasonably should have known, that the individual Defendants with managerial responsibilities and oversight over Plaintiffs Soto and Craun's conducted their harassive sexual behavior and subjected Plaintiffs Soto and Craun to indignities and improprieties all while the individual Defendants were acting within the scope of their employment with Defendant corporation. For example, Plaintiffs Soto and Craun were subjected to harassment and indignation while they were working. These events were observable even by casual observers and, accordingly, the Defendant corporation knew, or reasonably should have known, of their occurrence.

52. Since the tortious conduct practiced against the individual Defendants was done within the ordinary course of the conduct of the Defendants' business and within the scope of individual Defendants' authority over the individual Plaintiffs Soto and Craun, the Defendant corporation and its controlling party are vicariously liable to Plaintiffs Soto and Craun.

53. The individual Plaintiffs Soto and Craun' claims against the individual Defendants arose out of, and seek relief in respect of, the same and overlapping transactions, occurrences, events, circumstances and patterns thereof. Joinder of the claims is, therefore, appropriate under 16 *ARS R Civ P* 20(a).

54. At all times while Plaintiffs Soto and Craun were employees of the Defendant corporation, and subject to the direct or indirect control of Defendant corporation, as well as the corporation's agents, owed Plaintiffs Soto and Craun a duty to:

a. Work in a workplace where co-employees would generally be expected and required by their employer, and employment circumstances, to comply with laws and regulations.

b. Be able to work, and could work, free of sexual demands, pressures, and impositions affecting terms or conditions, prospects for promotion, and possibilities for continuing employment.

55. Defendant corporation, as the party in control of it, breached and disregarded these duties in that they permitted acts and conduct like those described above to occur, recur, and

continue and to be propagated against Plaintiffs Soto and Craun though they knew, or in the exercise of reasonable and ordinary care should have known, that such acts, events and circumstances were occurring.

56. As a proximate result of these breaches of duty, which were manifest in part by failure to provide a safe workplace and in part by failure to supervise management personnel, Plaintiffs Soto and Craun sustained damages as previously alleged.

V. MOTION TO DISMISS STANDARDS

57. On its face, Plaintiffs Soto and Craun's Complaint in this matter evidences the subject matter and personal jurisdiction of this Court. Defendants' Motions are accompanied by matters outside the pleadings, thus Plaintiffs Soto and Craun urge this Court to treat Defendants' Motions as one for summary judgment, necessitating the application of summary judgment standards. Smith v. Payne, 156 Ariz. 506, 753 P.2d 1162 (1988).

58. The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issues of material fact, as well as entitlement to a judgment as a matter of law; that is, the moving party has the burden of establishing a prima facia case entitling her or him to summary judgment. See Gamez v. Brush Wellman, Inc., 201 Ariz. 266, 268, 34 P.3d 735 (Ariz. App. 2001). When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Id.; Orme School v. Reeves, 166 Ariz. 301, 309-10, 802 P.2d 1000 (Ariz. 1990). Thus, a genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In other words, summary judgment is proper only when the evidence presented by the opposing party has so little probative value that reasonable jurors could not agree with the opposing party's conclusions. Orme School, 166 Ariz. at 309-10. However, the evidence must be viewed in a light most favorable to the opposing party. Id. Finally, because the consequences of summary judgment are so severe, courts must be careful to avoid premature termination of legitimate lawsuits. Murrell v. Bennett,

THE LAW OFFICES OF ROBERT M. COOK, PLLC
219 W. SECOND STREET
YUMA ARIZONA 85364

615 F.2d 306, 309 (5th Cir. 1980). Although summary judgment is a useful device, it must be used cautiously or it may lead to drastic and lethal results. See Hanson v. Polk County Land, Inc., 608 F.2d 129, 130 (5th Cir. 1979).

VI. DENIAL OF DEFENDANTS' MOTION

59. Defendants contend this matter should be dismissed for lack of subject matter jurisdiction. This is a tort action involving claims that do not arise from, or relate to, the operation of a motor vehicle. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 (Federal question). Venue is proper in the United States District Court for the District of Arizona because the acts complained of occurred exclusively in this judicial district in Arizona, and no real property is involved in this action. 28 U.S.C. §1402(b). Also, Plaintiffs Soto and Craun's suit was timely filed pursuant to 28 U.S.C. §2675(a).

VII. CONCLUSION

60. Plaintiffs Soto and Craun's allegations in their Complaintare sufficient for this Court to deny Defendants' Motions.

61. Despite Defendants' conclusions of law, Plaintiffs Soto and Craun's allegations are sufficient under the Federal Rules of Civil Procedure and the Federal Rules Notice Pleading to withstand Defendants' Motion to Dismiss.

RESPECTFULLY SUBMITTED this 27th day of May, 2010.

LAW OFFICES OF ROBERT M. COOK, PLLC

By /s/ Robert M. Cook
Robert M. Cook
Attorney for Plaintiffs
Barbara Soto and Victoria Craun

THE LAW OFFICES OF ROBERT M. COOK, PLLC
219 W. SECOND STREET
YUMA ARIZONA 85364

COPY OF THE FOREGOING e-mailed
this 28th day of May, 2010 to:

Timothy J. Humphrey, Sr.
STETSON LAW OFFICES
1305 Rio Grante Blvd., NW
Albuquerque, NM 87104
Attorneys for Defendants -
Quechan Tribally Designated Housing Entity,
Robert Letendre, Executive Director, and
Tad Zavodsky, Supervisor
tjh@stetsonlaw.com

By: Lynn A. Ballard
Certified Paralegal to Robert M. Cook

THE LAW OFFICES OF ROBERT M. COOK, PLLC
219 W. SECOND STREET
YUMA ARIZONA 85364