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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA
(Prescott Division)

ROCKY VULGAMORE,

Plaintiff,

vs.

TUBA CITY REGIONAL HEALTHCARE CORPORATION,

Defendant.

Case No. 3:11-cv-08087-DGC

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS (ECF No. 7) FILED JUNE 22, 2011

Plaintiff Rocky Vulgamore, by and through his counsel of record, submits this Response to Defendant's Motion to Dismiss.

I. SUMMARY OF PLAINTIFF'S ARGUMENT

Plaintiff brings this action because Defendant discriminated against him by offering him employment then withdrawing the offer based on Plaintiff's disability. Plaintiff is a recovered prescription drug user. Plaintiff's claims are based on violations of the Americans with Disabilities Act ("ADA"), the Americans with Disabilities Act Amendments Act ("ADAAA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Section 504 prohibits discrimination against the handicapped in any program or activity receiving federal assistance. Plaintiff does not claim Defendant discriminated against him because of his race, color or national origin. Plaintiff makes no claims under the Civil Rights Act of 1964, as amended.

As argued below, Plaintiff contends that Defendant's Motion to Dismiss and Memorandum of Points and Authorities (ECF No. 7) ("Motion to Dismiss"), misconstrues the nature of the non-discriminatory compliance requirements imposed by the U.S. Department of Health and Human Services ("HHS") by mistakenly applying standards applicable to discrimination claims brought under the Civil Rights Act of 1964. Plaintiff asserts that the correct standard applicable to Plaintiff's disability discrimination claims is found in § 504 of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, which incorporates the standards of Title I of the ADA for proving when discrimination in the workplace is actionable, and not in Title VI of the Civil Rights Act, 42 U.S.C. §2000d-3.

II. FED. R. CIV P. 12(b)(1) AND 12(b)(6) STANDARDS

A. Fed. R. Civ. P. 12(b)(6)

In considering a motion pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.

1998). The complaint must be read in the light most favorable to the nonmoving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The Court's review is "limited to the contents of the complaint." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). However, exhibits attached to the complaint, as well as matters of public record, may be considered in determining whether dismissal was proper without converting the motion to one for summary judgment. See *Parks School of Business, Inc. v. Symington*, *supra*; *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Further, a court may consider documents "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). *In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds *sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

Further, in deciding a motion to dismiss, the Court must construe the facts alleged in the complaint in the light most favorable to the drafter of the complaint and must accept all well-pled factual allegations as true. See *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). The Court may dismiss a complaint for failure to state a claim for two reasons: 1) lack of a cognizable legal theory and 2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pac. Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

"A court may, however, consider certain materials-documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice-without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Ninth Circuit summarizes the governing standard as follows: "In sum, for a complaint to survive a motion to dismiss, the non-conclusory, 'factual content' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)(quotations omitted).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Rule 12(b)(6). *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

B. Fed. R. Civ. P. 12(b)(1)

The standard for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction was recently summarized in *Griffin v. West Bay Props.*, 2011 U.S. Dist. LEXIS 64630, *4 (C.D. Cal. June 17, 2011):

> Under Federal Rule of Civil Procedure Rule 12(b)(1), the court's jurisdiction may be challenged either facially (based on the legal sufficiency of the claim) or factually (based on the sufficiency of jurisdictional fact). See *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citing 2 James W. Moore, Moore's Federal Practice § 12.30 [4] (3d ed. 1999)). Dismissal for a facial challenge to jurisdiction is proper only when the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or ... is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946). In making this determination, the court must accept as true the allegations contained in the complaint. *See White*, 227 F.3d at 1242.

III. PLAINTIFF'S OBJECTIONS TO PORTIONS OF DEFENDANT'S EVIDENCE IN SUPPORT OF MOTION TO DISMISS

Pursuant to LRCiv 7.2(m)(2), Plaintiff objects to the following portions of Defendant's Motion to Dismiss on the grounds that they are offered without foundation; they are merely counsel's unsupported assertions which provide no basis for admission into evidence:

1. Page 3, line 15 to page 4, line 9, to wit:

> TCRHCC is a 73 bed acute care facility located in North-East Arizona on the Navajo Indian Reservation. TCRHCC was organized as a non-profit health care corporation under Navajo Nation laws, specifically, the Navajo Nation Corporation Code, 5 N.N.C. §§3301-3332. TCRHCC provides services to Native Americans residing within a 4,400 square mile area and serves as a referral center for the western part of the Navajo and Hopi Reservations. Previously known as Tuba City Indian Medical Center, a federally owned and operated medical center under the federal Indian Health Services, TCRHCC incorporated under the Indian Self-Determination Act, PL 93-638, effective as of September 30, 2002. TCRHCC is controlled by a federally recognized Indian tribe, the Navajo Nation. Under Navajo Law (Navajo Nation Code), tribal chapters are considered to be political subdivisions of the Navajo Nation and therefore enjoy sovereign immunity. See 1 N.N.C. §552(E).
>
> TCRHCC was formed and is governed by representatives of eight such political subdivisions located within the Western Navajo Agency, including Bodaway-Gap, Cameron, Coalmine, Coppermine, Kaibeto, LeChee, Tonalea and Tuba City. These representatives make up a large part of the TCRHCC Board of Directors. In addition, the Board had one representative from the Hopi Village of Meoncopi and one representative from the San Juan Southern Paiutes. Every member of the Board is a member of a federally recognized Indian tribe. The Board of Directors has the fiduciary oversight responsibility for TCRHCC and its mission.

and,

2. Page 6, line 5 beginning with "TCRHCC does not" to the end of line 8, to wit:

> TCRHCC does not dispute receipt of these federal funds. However, all of the funds were specifically designated for medical equipment and medical facilities. None of these funds were designated or intended or used for the primary purpose of providing employment.

Plaintiff requests that the Court disregard these factual allegations when ruling on Defendant's motion.

IV. PLAINTIFF'S FACTUAL SUMMARY

Plaintiff is a registered nurse anesthetist who, in February 2008, successfully completed a drug rehabilitation program for chemical dependency. Plaintiff has been clean and sober for three (3) years and is enrolled in a monitoring program for chemically dependent nurses. (Plaintiff's Complaint, ¶¶ 12-16, ECF No. 1, hereafter "Comp.")

In October 2008, Plaintiff contacted Defendant Tuba City Regional Health Care Center ("TCRHCC") about employment. At that time Plaintiff disclosed his history of addiction. TCRHCC told him he should wait to apply. (Comp. ¶¶ 17-18.)

Approximately one year later, Plaintiff again contacted Defendant and was asked to interview with TCRHCC's staff, including its Chief Medical Officer, Dr. Alan Spacone ("Dr. Spacone"). TCRHCC offered Plaintiff a position as CRNA, Anesthesiology at an annual salary starting at $208,000 plus other benefits. (Comp. ¶¶ 19-21.)

In reliance on Defendant's job offer, Plaintiff completed the paperwork required by TCRHCC and received a Controlled Substance Registration Certificate from the United States Department of Justice Drug Enforcement Administration. On about September 1, 2010, the Defendant's credentialing committee told Plaintiff that they knew about Plaintiff's past addiction and that they "felt uncomfortable" with it. Later, on October 6, 2010, the committee told Plaintiff they did not want to credential him because they had not had an opportunity to meet with Plaintiff. (Comp. ¶¶ 22-25.)

Plaintiff flew to TCRHCC at the end of October 2010 to meet with the committee. At that meeting, the committee members tried to convince Plaintiff that he would not be comfortable working in Tuba City because of his prior addiction history. (Comp. ¶ 26.)

Dr. Spacone called Plaintiff on November 3, 2010, and withdrew TCRHCC's job offer. Dr. Spacone said the credentialing committee had decided that there was nothing in Tuba City to keep Plaintiff sober and would not grant Plaintiff privileges. Dr. Spacone also threatened to report Plaintiff to a national medical database. (Comp. ¶¶ 27-28.)

Although Plaintiff was qualified for the TCRHCC position, Defendant refused to hire Plaintiff because Defendant regarded Plaintiff as disabled and/or considered Plaintiff's dependency as an impairment. (Comp. ¶¶29-31.)

V. ARGUMENT

A. Plaintiff's Claims are based on violations of the ADA, § 504 of the Rehabilitation Act and the ADAAA.

Plaintiff brought his lawsuit for violations of Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. ¶ 12101 *et seq*, Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. § 794 and the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (2008). Plaintiff, as a recovered prescription drug addict, is recognized as disabled under the ADA. 42 U.S.C. §§ 12112(a), 12114(b)[1], see, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124

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[1] 42 USCS § 12114 (b) provides:

> Rules of construction. Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who--
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use…

S. Ct. 513, 157 L. Ed. 2d 357 (2003), and *Lopez v. Pac. Maritime Ass'n*, 636 F.3d 1197, 1199 (9th Cir. Cal. 2011).

1. Section 504 of the Rehabilitation Act.

The Rehabilitation Act creates a private right of action for individuals subjected to disability discrimination by any program or activity receiving federal financial assistance, including employment discrimination in such programs. It provides that no otherwise qualified individual with a disability shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance. 29 U.S.C. § 794(a), see also, *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 940 (9th Cir. 2009), *cert. den'd*, 130 S. Ct. 3468 (U.S. 2010).

2. Civil Rights Restoration Act.

Following the passage of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, the Rehabilitation Act now broadly defines "program or activity" as all of the operations of state instrumentalities, colleges and universities, local education agencies, and an entire corporation, partnership, or other private organization, or an entire sole proprietorship if the entity as a whole receives federal assistance or if the entity is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation, and various other services. 29 U.S.C. § 794(b)(3)(A), *Fleming*, *supra.* at 940.

3. Rehabilitation Act Incorporates the Standards of the ADA.

The relationship between the Rehabilitation Act and Title I of the ADA was described by the Ninth Circuit in *Fleming* as follows at 940-41:

> The Rehabilitation Act, as amended, incorporates various standards and remedies from other civil rights laws. Most important for our case, §504(d) provides that "[t]he standards used to determine whether this section has been violated in a complaint

> alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act . . . as such sections relate to employment." 29 U.S.C. § 794(d). See 42 U.S.C. §§ 12111-17, 12201-04, 12210. Title I of the ADA defines key terms in the act, § 12111, defines discrimination in the workplace, § 12112, provides for defenses and limitations for employees using illegal drugs or alcohol, §§ 12113-14, 12210, and commits enforcement to the Equal Opportunity Employment Commission and the Attorney General, § 12117.

In *Fleming*, plaintiff, a physician who suffered from sickle cell anemia, applied for a position at a regional medical center. When the medical center physicians learned of plaintiff's disability, they told him they would not be able to accommodate his operating room and call schedules. By refusing to accept the contract with these conditions, the contract was cancelled. The lower court granted defendant's motion for summary judgment and found that plaintiff was an independent contractor and was not protected by the Rehabilitation Act.

On appeal, the 9th Circuit addressed whether § 504(d) of the Rehabilitation Act, "which refers to 'the standards applied under Title I of the Americans with Disabilities Act [ADA]. . . as such sections relate to employment,' incorporates Title I literally or selectively." *Id.* at 939. The 9th Circuit needed to resolve this question in order to determine the primary issue of whether § 504 extends to a "claim of discrimination brought by an independent contractor." *Id.* at 939. The court noted that "if Title I is incorporated literally, then the Rehabilitation Act is limited by the ADA and only covers employer-employee relationships in the workplace." *Id.* However, as the court pointed out, if Title I is incorporated selectively, "the Rehabilitation Act covers all individuals 'subject to discrimination under any program or activity receiving Federal financial assistance,' who may bring an employment discrimination claim based on the standards found in the ADA." *Id.*

The court then noted that the 6th and 8th Circuits determined that Title I of the ADA is incorporated literally, while the 10th Circuit found Title I to be

incorporated selectively. *Id.* The 9th Circuit agreed with the 10th Circuit in finding that while § 504 of the Rehabilitation Act "incorporates the 'standards' of Title I of the ADA for proving when discrimination in the workplace is actionable," it does not incorporate Title I in totality. *Id.* The court disagreed with the 8th Circuit's position that the "similarity" between Title I and the Rehabilitation Act leads to the conclusion that both statutes apply to "employer-employee" relationships, and therefore do not extend coverage to independent contractors. *Id.* at 946. The 9th Circuit disagreed with the 6th Circuit's conclusion that the ADA and Rehabilitation Act "borrowed" the definition of "employer" from Title VII of the ADA. *Id.* The Court concluded that § 504 "incorporates the 'standards' of Title I of the ADA for proving when discrimination in the workplace is actionable, but not Title I *in toto,* and therefore the Rehabilitation Act covers discrimination claims by an independent contractor." *Id.* at 939.

While Plaintiff does not claim status as an independent contractor, *Fleming* is controlling in that it dispenses with Defendant's argument that Defendant is not an "employer" under the ADA and/or the Rehabilitation Act. The Ninth Circuit was clear in that the ADA standards apply to any program or activity.

4. ADAAA Broadened ADA and Restoration Act Coverage.

The ADA Amendments Act of 2008 became effective January 1, 2009, 29 U.S.C. § 705. The ADAAA amends the ADA in important respects, particularly with regard to the definition and construction of "disability" under the statute. The ADAAA broadens the definition of disability and rejects the strict standards that the Supreme Court adopted in *Toyota Motor Mfgl, Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002). Also, although the general definition of "disability" retains largely the same language, the ADAAA adds a provision that addresses the intended scope of the "regarded as" prong. 42 U.S.C. § 12102(3)(A) (specifying that "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an

action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity"). "The 'regarded as' prong shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." *Id.*

5. ADA Burden of Proof.

In order to prove discrimination under the ADA a plaintiff must prove (1) he is disabled within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation and (3) he suffered an adverse employment action because of his disability. *Hohider v. UPS*, 574 F.3d 169, 186-187 (3d Cir. Pa. 2009).

6. Plaintiff States a *Prima Facie* Claim of Disability Discrimination.

Plaintiff's allegations state facts which support a *prima facie* claim of disability discrimination. The Court must accept these facts as true for purposes of this motion. The facts, as alleged, state a *prima facie* claim for disability discrimination. Plaintiff alleges that he is disabled because of his past chemical dependency and that he is rehabilitated. He claims the disability has lasted longer than six months. Plaintiff also alleges he was and is qualified to perform the job duties Defendant assigned to him since Defendant had actually offered the CNRA position to Plaintiff after he had submitted all of the required documentation of his qualifications. The offer of employment was rescinded after TCRHCC's credentialing committee expressed discomfort with Plaintiff's disability and refused to credential him. Plaintiff alleges that TCRHCC refused to hire Plaintiff because its management regarded him as disabled and/or considered his history of dependency as a substantially limiting impairment.

B. Defendant Relies on Legally Unsupportable Basis for Motion to Dismiss

Defendant's Motion to Dismiss argues that Plaintiff's complaint is legally insufficient under either Fed. R. Civ. P. 12(b)(1) or 12(b)(6). Defendant does not challenge the sufficiency of the facts pled in support of Plaintiff's legal theories.

Defendant first asserts that it is exempt from the requirement of the ADA because it is a corporation owned by an Indian tribe. Motion to Dismiss, p.3. Plaintiff acknowledges that Defendant is a tribal entity. Next, Defendant argues that it is a "health service controlled by tribes" "is a tribal enterprise" and "is exempt from federal discrimination laws and regulations." Motion to Dismiss, p. 4.

1. Defendant Incorrectly Cites Case Law Based on the Civil Rights Act of 1969.

In support of that argument, Defendant cites to a series of cases that do not apply to Plaintiff's legal claims. Defendant's argument is that it primarily cites to case law dealing with Title VI of the civil Rights Act of 1964, 42 U.S.C. § 2000d, which provides that "[n]o person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added). Title VI pertains only to "race, color or national origin" discrimination and not to disability discrimination. Congress addressed that form of discrimination in the ADA.[2]

Plaintiff does not claim Defendant discriminated against him on the basis of "race, color or national origin."

[2] The Department of Health and Human Services' regulations distinguish between discrimination in Federally funded programs or activities arising under Title VI of the civil Rights Act of 1964 (45 C.F.R. Part 80) and discrimination in Federally funded programs or activities arising under section 504 of the Rehabilitation Act (45 C.R.F. Part 85).

2. Summary of Defendant's Case Authorities.

A review of the authorities cited by Defendant demonstrates that they too principally deal with race, color or national origin. Defendant relies on the following authorities at pages 4-6 of the Motion to Dismiss:

Pink v. Modoc Indian Health Project, 157 F.3d 1185, 1187 (9th Cir. Cal. 1998) (Plaintiff Rosemarie Pink brought suit against the Modoc Indian Health Project, Inc., her former employer, her former supervisor, and a federal agency, seeking damages for sexual harassment, gender, race, and national origin discrimination, and wrongful termination under the Title VII of the Civil Rights Act of 1964.)

EEOC v. Navajo Health Found., 2007 U.S. Dist. LEXIS 66839, 1-2 (D. Ariz. Sept. 6, 2007) (Plaintiff, EEOC filed a complaint against Defendant Navajo Health Foundation-Sage Memorial Hospital, Inc. pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. alleging that defendant discriminated against several employees based on their race and national origin.)

Ferguson v. SMSC Gaming Enter., 475 F. Supp. 2d 929, 930 (D. Minn. 2007) (Plaintiff brought the action *pro se* alleging defendants discriminated against him based on his race, in violation of Title VII of the Civil Rights Act of 1964.)

Giedosh v. Little Wound Sch. Bd. Inc., 995 F. Supp. 1052 (D. S.D. 1997) (Plaintiffs alleged that defendant violated Title VII of the Civil Rights Act of 1964 because it had a pattern and a practice of discriminating against employees based upon race.)

Curtis v. Sandia Casino, 67 Fed. Appx. 576 (10th Cir. N.M. 2003) (*Pro se* Plaintiff's claims for Title VII and ADA failed because of statutes do not apply to Indian tribes. The application of the Rehabilitation Act was not discussed.)[3]

[3] The Court made the following notation, "This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral

Gao v. State Dep't of the AG, 2010 U.S. Dist. LEXIS 2073, 2-3 (D. Haw. Jan. 12, 2010) (Genbao Gao filed the instant employment discrimination lawsuit complaining that Defendant discriminated against him in violation of: (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; (2) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and (3) Title I the Americans with Disabilities Act, 42 U.S.C. § 12112. The ADA claim was barred by the Eleventh Amendment.)

Johnson v. County of Nassau, 411 F. Supp. 2d 171 (E.D.N.Y. 2006) (Plaintiff employee brought suit against defendant employers, alleging discrimination on the basis of race and in retaliation for complaining of race discrimination, in violation of 42 U.S.C.S. §§ 1981 and 1983, Title VI, 42 U.S.C.S. § 2000d, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e *et seq*.)

Commodari v. Long Island Univ., 89 F. Supp. 2d 353, 362 (E.D.N.Y. 2000) (Plaintiff job applicant filed suit against defendants alleging employment discrimination, in violation of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, and the Civil Rights Act of 1871, 42 U.S.C.S. §§ 1981 and 1983.)

Rosario-Olmedo v. Community School Bd. for Dist. 17, 756 F. Supp. 95 (E.D.N.Y. 1991) (Plaintiffs contended that the Defendants violated Titles VI and VII of the Civil Rights Act of 1964 (the "Act"), 42 U.S.C. §§ 2000d to 2000d-4, and 2000e to 2000e-17 (1976), and the antidiscrimination provision of the State and Local Fiscal Assistance Act ("Revenue Sharing Act"), 31 U.S.C. § 1242(a) (1976).)

Association against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 259 (2d Cir. Conn. 1981) (Plaintiff claimed that he was discriminated against based on his race and in retaliation for his alleged

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estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3."

complaints of race discrimination in violation of Titles VI and VII of the Civil Rights Act of 1964.)

Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980), *cert. den'd* 449 U.S. 892 (1980) (The court affirmed the judgment of the district court, which denied the applicant relief under the Rehabilitation Act for alleged discrimination on the basis of handicap by the potential employer.)

Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (CA4 1978), *cert. den'd*, 442 U.S. 947 (1979) (The Fourth Circuit affirmed dismissal of Plaintiff's complaint in which she alleged that her employment termination was in violation of Section 504 of the Rehabilitation Act.)

3. Restoration Act Applies "Institution Wide".

Both *Carmi* and *Trageser* were later questioned and disapproved of by the U.S. Supreme Court in *Conrail v. Darrone*, 465 U.S. 624, 628-29 (1984). In *Darrone*, the Supreme Court held that the anti-discrimination language of the Rehabilitation Act was, as Defendant argues, "program-specific." Following *Darrone* and earlier Supreme Court decisions, Congress responded by passing the Civil Rights Restoration Act of 1987, Pub. L. No.100-259 (1988) ("Restoration Act"). In passing the Restoration Act, Congress found that

> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and *title VI of the Civil Rights Act of 1964*; (emphasis added) and
>
> (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

As a result of the passage of the Restoration Act, the definition of "program or activity" in the statute was broadened so that the anti-discrimination provision of Section 504 as well as Title VI would apply "institution wide." "In other words,

the prohibition on discrimination applied to the entire institution and all of its operations, programs, and activities whenever it received any federal funds at all." *Russo v. Diocese of Greensburg*, 2010 U.S. Dist. LEXIS 96338, 11 (W.D. Pa. Sept. 15, 2010), *See also, Rothschild v. Grottenthaler*, 716 F. Supp. 796, 798 (S.D.N.Y. 1989) and *Bonner v. Arizona Dep't of Corrections*, 714 F. Supp. 420, 422-423 (D. Ariz. 1989).

4. Defendant Agreed to Comply With Federal Discrimination Laws by Accepting Federal Funds.

Defendant's reliance on Title VI and cases interpreting or relying on that statute have little, if any, authoritative significance for this case. Plaintiff's claims are not based on any claim arising under the Civil Rights Act of 1964 and, therefore, any restrictions on claims against a tribal entity found in Title VI are not applicable. Defendant's arguments that federal funds must be earmarked for "providing employment" must fail for the same reason – Title VI's applicability is separate and distinct from the rights afforded under the Rehabilitation Act.

Defendant, by its own admission, is an entity that has received substantial financial funds from the federal government. By accepting these funds TCRHCC agreed to comply with the non-discrimination requirements imposed by Congress when it enacted the American Recovery and Reinvestment Act of 2009. TCRHCC agreed to be contractually bound by the obligations imposed by the U.S. Department of Health and Human Services when it awarded TCRHCC close to $1,500,000 in funding.[4]

At this early stage of litigation, the details surrounding Defendant's application for and the conditions of the award of federal funds are unknown. But, it is reasonable to infer that TCRHCC knowingly entered into and agreed to be bound by HSS's contractual provisions requiring Defendant to comply with federal non-discrimination laws, including the Rehabilitation Act and the ADA.

[4] Since no discovery has yet been undertaken, it is unknown whether or not TCRHCC accepts other forms of federal funds such as Medicare or Medicaid.

Whether explicitly or implicitly, TCRHCC, by contracting with HSS, waived any claims of sovereign immunity. Defendant is properly before this Court to defend against Plaintiff's claims that TCRHCC discriminated against Plaintiff because of his disability.

Plaintiff requests that the Court deny Defendant's Motion to Dismiss.

DATED this 8th day of July, 2011.

THOMAS, WILLIAMS & PARK, LLP

William H. Thomas
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2011, I electronically transmitted the attached document to the Clerk's Office using the CV-DCF System for filing and transmittal of a Notice of Electronic Filing to the following CV-ECF registrants:

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