

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TAMMY DINGER, surviving spouse and
heir-at-law for Darren Scott Dinger, and
TAMMY DINGER, as Administratrix of
the estate of Darren Scott Dinger,

Plaintiffs,

vs.

Case No. 12-4002-EFM-DJW

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM IN SUPPORT OF REPLY TO PLAINTIFFS' RESPONSE
TO MOTION TO DISMISS COMPLAINT OR IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT

The United States, on behalf of its Agency, the Department of Health and Human Services, through Barry R. Grissom, United States Attorney for the District of Kansas, and T.G. Luedke, Assistant United States Attorney, hereby submits its reply to Plaintiffs' response to the motion of the United States to dismiss the Complaint filed herein, or, in the alternative, grant summary judgment to the United States.

ARGUMENT AND AUTHORITIES

The United States raises both a facial and a factual challenge to the sufficiency of Plaintiffs' Complaint. The facial challenge relates to the sufficiency of the Complaint's allegations concerning the connection between the self-determination contract alleged in this case and the duties being performed by Candace Wishkeno. In the Complaint, Plaintiffs fail to identify the portion of the self-determination contract that relates to Ms. Wishkeno's duties. This is necessary in order to identify a valid waiver of sovereign immunity. Tribal employees are only designated federal employees for

FTCA purposes if they act within the scope of their employment as defined by the self-determination contract. [*Snyder v. Navajo Nation*, 382 F.3d 892, 896-97 \(9th Cir. 2004\)](#). “Tort claims against tribes, tribal organizations, or their employees, that arise out of the tribe or tribal organization carrying out a self-determination contract, are considered claims against the United States and are covered to the full extent of the FTCA.” [*Hinsley v. Standing Rock Child Protective Serv.*, 516 F.3d 668, 672 \(8th Cir. 2008\)](#). “It is clear from the plain language of the ISDEAA that Congress waived sovereign immunity by allowing FTCA liability to attach to injuries arising only out of self-determination contracts.” [*Goodthunder v. Na’Nizhoozhi Ctr., Inc.*, 1995 WL 865870 \(D. N.M.\)](#). The converse, therefore, is also true. If the tribal employee is not carrying out a self-determination contract they are not covered by the FTCA. Plaintiffs’ Complaint fails to identify any portion of a self-determination contract that makes Ms. Wishkeno an employee of the United States for FTCA purposes. Not all Indian tribe employees are considered government employees under the FCTA. [*Serrano v. United States*, 2008 WL 343490 \(S.D.Fla.\)](#). In paragraph 17 of the Complaint, Plaintiffs allege:

17. Upon information and belief, on July 23, 2009, Wishkeno was deemed an employee of the United States for purposes of this FTCA claim based upon her performance of duties as a program coordinator for the KTIK in support of programs under the Indian Self-Determination and Education and Assistance Act (hereinafter “IDEA”).

Without reference to a specific provision of a self-determination contract, or even a specific self-determination contract, it is impossible to determine whether Candace Wishkeno’s activity was covered by the FTCA. The conclusory statement that she was serving under a self-determination contract is insufficient. [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 \(2007\)](#). Plaintiffs’ failure allege this necessary link is a facial challenge to the Complaint.

Additionally, Plaintiffs have alleged no self-determination contract with HHS. As stated previously, a waiver of sovereign immunity requires activity associated with a self-determination contract. The only self-determination contract referenced in Plaintiffs' Complaint are those related to the Department of the Interior. Plaintiffs' Complaint, therefore, is facially defective in the absence of this allegation.

The factual challenge is the very existence, or lack thereof, of a self-determination contract covering Ms. Wishkeno's employment. The factual predicate for the waiver of sovereign immunity is missing. Plaintiffs contend at the time of accident Ms. Wishkeno was transporting Kickapoo youth to the Flint Hills Job Corps Center. Doc. 1, ¶ 13. As such, Plaintiffs claim Ms. Wishkeno was acting pursuant to her duties as program coordinator for the Kickapoo working in support of programs under the self-determination contract. Doc. 1, ¶ 17. The only reference to a self-determination contract is with the Department of Interior wherein Plaintiffs state: "Upon information and belief, at the time of the occurrence, KTIK had entered into self-determination contracts with the Secretary of Interior to plan, conduct and administer programs for the benefit of Indians pursuant to [25 U.S.C. § 450\(f\)](#)." Doc. 1, ¶ 15. While it is true that the Secretary of the Interior had self-determination contracts with the KTIK, there is no evidence that any of these contracts had anything to do with transporting Kickapoo youth to the Flint Hills Job Corp Center. In fact, to the contrary, the declaration of Candace Fox (Exhibit 1) indicates that there were no self-determination contracts between the Department of the Interior and the KTIK that would subsume Ms. Wishkeno's activity on the day of this accident. Therefore, Plaintiffs' alleged waiver of sovereign immunity pursuant to a self-determination contract is ineffectual.

As indicated by the declaration of Ronda Longbrake, (Exhibit 2), HHS also had no self-determination contracts that would cover Ms. Wishkeno's activity. The only two self-determination contracts with HHS, as evidenced by the attachments to Ms. Longbrake's declaration, relate to alcohol and substance abuse services and medical clinics. Therefore, neither of the HHS self-determination contracts provide the required waiver of sovereign immunity.

A waiver of sovereign immunity must be unequivocal. [*United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 37](#) (1992). It will not be implied. [*Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95](#) (1990). Plaintiffs, both facially and factually, have been unable to establish a sufficient likelihood of a waiver of sovereign immunity to allow this case to go forward.

CONCLUSION

Based on the foregoing the United States would respectfully request that Plaintiffs' cause of action be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 27, 2012, the foregoing document was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Rodney C. Olsen, olsen@mfoilaw.com, Attorney for Plaintiffs

s/ T.G. Luedke
T.G. LUEDKE
Assistant United States Attorney