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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THERESA CARSTEN, Plaintiff, vs. INTER-TRIBAL COUNCIL OF NEVADA; RISA STERNS; and DARYL CRAWFORD, Defendants.	Case No. 3:11-cv-00749-HDM-VPC

OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT

Comes Now, Plaintiff above named, by and through undersigned counsel and opposes Defendants' motion to dismiss amended complaint. This Opposition is supported by the following Points and Authorities, the attached Declarations and Exhibits, and the file contained herein.

1. This Court has subject matter jurisdiction.

Defendants cite *to Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989) for the premise that Federal Courts are courts of limited jurisdiction and therefore jurisdiction must affirmatively appear. While jurisdiction was absent in the case cited by Defendants based on the Complaint not alleging a federal cause of action, it is present in this matter as it is for violations of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 et seq., and thus this Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1331. Additionally, in contrast to Title VII, when Congress drafted the FMLA it elected not to exempt the FMLA from Indian Tribes.

A general federal statute presumptively governs Indian tribes and will apply to them absent some superseding indication that Congress did not intend tribes to be subject to that legislation. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). It is "now well settled by many decision of the Court that a general statute in terms applying to all persons includes Indians and their property interests.´ *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct. 543, 553, 556, 4 L.Ed.2d 584 (1960). [G]eneral Acts of Congress apply to Indians … in the absence of a clear expression to the contrary. 362 U.S. at 120.

Unlike non-statutory causes of actions such as a breach of contract claim, when a general statute is present it is applicable to tribes unless an exemption is present. A tribal exemption will only occur in three situations cited as enunciated in *Coeur d'Alene*. 751 F.2d at 1116. However, none of the three situations are present in this matter. In *Coeur d'Alene*, the Court found that the operation of a tribal farm wholly owned and operated by the tribe was neither profoundly intramural nor essential to self-government. Id.

> "In short, we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here."
>
> Id.

> "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations . . .."
>
> Id.

Additionally, the three limited exclusions only apply to Tribes.

2. No exceptions under *Coeur d'Alene* are applicable.

While the Inter-Tribal Council of Nevada ("ITCN") cites to *Donovan v. Coeur d'Alene Tribal Farm*, it does not raise or argue any of the three exceptions. Therefore Plaintiff cannot present a counterargument to one not presented by Defendants. Instead, ITCN summarily states that ITCN is an arm of the 26 Tribes and therefore it is entitled to sovereign immunity. But such a statement completely bypasses the law that statutes of general application apply to tribes unless a *Coeur d'Alene*

exception is found.[1] Defendants' argument in essence is that ITCN is entitled to have the same immunity protections as a tribe, but ITCN bypasses the issue of whether there would be any immunity were it a tribe, in essence whether any immunity is transferred to ITCN. This can only be answered by performing a *Coeur d'Alene* analysis – which Defendants did not do. As such Defendants have conceded that there is no exception present to the general application of federal laws including the FMLA, and Plaintiff will now not have an opportunity to respond to arguments raised for the first time in Defendant's Reply and therefore it should not be considered if it is attempted.

It should also be mentioned that Tribes do not have absolute immunity.

> Any federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government. But Indian Tribes are not possessed of absolute sovereignty.... Statutes of general application are already applied to Indian Tribes which have the same arguable effect of interfering with the Tribe's ability of self-governance ... for example federal employment withholding taxes.... *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (9th Cir. 1996) (citing *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir.1989))

Tribes are not exempt from federal laws simply because their political integrity may be affected. 95 F.3d at 179. "The question is not whether the statute affects tribal self-governance in general, but rather whether it affects tribal self-governance in purely intramural matters." 95 F.3d at 181. Tribes are subordinate to the U.S. Government. Id. citing to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980).

The nature of the work being performed as well as where it is performed and who performs it is critical in any analysis.

> [E]mployment of non-Indians weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters. In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government. Furthermore, intramural matters generally consist of conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe. . . .Thus, the employment of non-Indians is another factor that tips the balance toward application (of the federal statute).
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> 95 F.3d at 181.

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[1] The *Coeur d'Alene* exceptions enunciated in the Ninth Circuit have been accepted and are being followed in other circuits. See *Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010).

> We restricted the tribal self-government exception to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations." . . . The mill employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans . . .. Although revenue from the mill is critical to the tribal government, application of the Act does not touch on the Tribe's "exclusive rights of self-governance in purely intramural matters."
> *U.S. Dept. of Labor v. Occupational Safety & Health Review Com'n*, 935 F.2d 182, 184 (9th Cir. 1991)

In the case at bar, Plaintiff is a non-Indian as well as approximately twenty-three (23) other employees including defendant Risa Sterns (the personnel director) – which is roughly fifty percent (50%) of the individuals employed by ITCN at its main office. (Declaration of Plaintiff, Exhibit B, ¶ 6). Additionally, the work ITCN and Plaintiff performed was in the nature of implementing a welfare program on behalf of the United States Government. Id. at ¶ 2.

Plaintiff was the Program Director for the Woman, Infants and Children ("WIC") program – which is a program States (including Nevada) as well as Tribes can receive Federal money in exchange for implementing the federal program that helps provide nutritional education, food benefits and other benefits to women and children including to non-Indian members of the general public. Id. In its motion to dismiss, ITCN admits that it "manages federal and state funded programs". (doc # 7, 3:4-5). The WIC program is not limited to Indians and in fact it must include all individuals. Id. at ¶¶ 2, 4. This is also stated on ITCN's WIC website which states being an Indian is not a requirement to participate in ITCN's WIC program and anyone residing anywhere in Nevada is potentially eligible.

> To be eligible to participate in the WIC Program, one must:
>
> - Reside in Nevada or on Nevada Tribal Land
> - Be a pregnant or recently pregnant woman, infant or child up to age 5
> - Have a moderately low income (see chart below)
> - Be determined to have a nutritional risk (see sidebar)
>
> You are income eligible for WIC if you already receive TANF, SNAP, Medicaid or participate in the Food Distribution Program on Tribal Land.
>
> (ITCN WIC Eligibility webpage, Exhibit C)

> **1. Who is eligible?**
> Pregnant, postpartum and breastfeeding women, infants, and children up to age 5 are eligible. They must meet income guidelines, a State residency requirement, and be individually determined to be at "nutritional risk" by a health professional. (emphasis in original) (ITCN WIC FAQ webpage, Exhibit D, page 1)

Additionally, the vast majority (approximately 80%) of the WIC services are performed at its main location at 680 Greenbrae Drive, Sparks, Nevada which is not on any reservation. (Exhibit B, ¶ 4). ITCN also acknowledges this on its website where it states:

> **4. What are your locations?**
> Our main clinic is located at 680 Greenbrae Dr., Suite 222, Sparks, Nevada, 89431. ITCN travels to 18 satellite clinics located in varioius (sic) tribal health and community centers throughout Nevada and Utah. Visit our Contact page for more information. (emphasis in original)
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> (ITCN WIC FAQ webpage, Exhibit D, page 2)

Out of the 1200 to 1300 individuals that are serviced at 680 Greenbrae Drive, Sparks, Nevada location, approximately half are non-Indians and are Hispanic. (Exhibit B, ¶ 4).

The case at bar is strikingly similar to a Ninth Circuit case where a tribal organization that partially obtained funding from MediCal to perform out patient health services on non-Indian land (where many patients are non-Indians and where the organization employed many non-Indians) did not seem to touch on purely intramural matters that affect the right to self-governance. See *N.L.R.B. v. Chapa De Indian Health Program, Inc*., 316 F.3d 995 (9th Cir., 2003); see also *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (financially independent, nonprofit tribal organization that contracted to provide health services to tribal members and nonmembers and operated outside of the reservation was not exempt from FLSA's overtime provisions). The case at bar goes even further in that individual stores, including large chain grocery stores, apply for and become vendors for ITCN to provide discounted food products to ITCN's WIC clientele. (Exhibit B, ¶ 5). Out of the more than fifty (50) vendors ITCN contracts with, only two (2) are located on a reservation and are owned by a tribe. All of the others, including very large "chain" grocery stores are privately owned and are not on any reservation. Id. Thus ITCN is participating in and supplying nutritional services and food products for non-Indians on off-reservation locations including large chain stores.

The simple fact is that ITCN is not performing tribal government functions limited to Indians that can be classified as tribal intramural government functions, nor did ITCN even present an argument that it did. Additionally almost half of ITCN's employees (including Plaintiff and Defendant Sterns) are non-Indians. Therefore, no limited exception to applying a federal statute is present and no

immunity to Plaintiff's FMLA claim is present. At a minimum, there are material facts in dispute that prevent this matter from being dismissed.

It should also be pointed out that the case cited by Defendants for the proposition that the FMLA does not apply to tribal organizations actually states the opposite.[2]

> [T]he FMLA defines "employer" in broader terms and provides no exemption for ANCs (Alaska Native Corporations), or even Native American tribes.
> *Pearson v. Chugach Government Services Inc*., 669 F.Supp.2d 467 (D. Del., 2009)

> [B]ecause of the narrow purpose for the ANC exemption—to protect tribal self-governance and to permit an Alaskan Native employment preference—and the FMLA expansive scope, and their divergent purposes, the Court concludes that Alaskan Native Corporations are subject to employer obligations under the Family Medical Leave Act.
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> Id.

> For the reasons set forth above, Defendants' motion to dismiss . . . FMLA claims is denied. Id.

3. Defendants Crawford and Sterns are not a Tribe.

Defendants also argue that Defendants Crawford and Stern have the same immunity, if any, that ITCN does since they were performing work as ITCN employees. While this may be true with other statutes and types of lawsuits, Crawford and Sterns stand in a different position under the FMLA - which considers them not as being in the same place as ITCN, but instead as an employer themselves. The FMLA is very specific that acts done by individuals in violation of the FMLA exposes them to individual liability.

> An ''employer'' includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. . . . As under the FLSA, individuals such as corporate officers ''acting in the interest of an employer'' are individually liable for any violations of the requirements of FMLA.
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> 29 C.F.R. § 825.104(d)

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[2] ITCN also cited *to Pink v. Modoc Indian Health Project, Inc*., 157 F.3d 1185 (9th Cir. 1998) for the proposition that a tribal organization cannot be sued when congressionally created employment law exemptions. However Congress chose not to carve out an FMLA exemption for Tribes (unlike the issue in *Modoc* where Title VII specifically exempts tribes). Since Congress did not create an employment law exemption under the FMLA, *Modoc* is not applicable in this matter.

The test to determine whether immunity, if any, extends to individuals named in a lawsuit is to analyze the source of the funds sought.

> The relevant inquiry for sovereign immunity purposes is not whether an individual or the tribe itself is named in the suit, but whether payment is in effect sought from the Tribe's treasury. *Larimer v. Konocti Vista Casino Resort*, 814 F.Supp.2d 952, 956 (N.D. Cal., 2011) (citing to *Cook v. AVI Casino Enter. Inc*., 548 F.3d 718, 727 (9th Cir. 2008))

In this matter, Plaintiff alleged that both Crawford and Sterns participated in her dismissal in violation of the FMLA – which makes them individually liable under the FMLA pursuant to 29 C.F.R. § 825.104(d). (doc. # 3, 2:6-8). Therefore the source of the funds sought are from Crawford and Sterns as individuals and are not from ITCN. As such, they are not entitled to any immunity even if ITCN itself is found to have immunity. Of course if ITCN is not found to have immunity then this becomes a moot issue.

Conclusion

Based on the above, Defendants are far removed from any limited intramural exemption of federal laws. The first removal is that no defendant is in fact a tribe. Defendants become even further removed as Defendants activities and the subject of this lawsuit have nothing to do with any intramural activities such as tribal membership, inheritance rules, and domestic relations. Instead, ITCN's activities involve significant non-Indian clientele, employees and contracts with outside non-Indian vendors while implementing a U.S. Government welfare type program. As such, Defendants do not fall within the narrow exemption tribes are allowed for purely intramural activities. Additionally, Defendants Sterns and Crawford have individual liability apart from ITCN and are not afforded any exemption even if one was to be granted to ITCN. At a minimum there are material facts in dispute that prevent dismissal. Therefore Defendants' motion to dismiss should be denied.

Dated this 14th day of December, 2012

Brian Morris, Esq.

CERTIFICATE OF SERVICE

I certify that on the 14th day of December, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the email address of the following on record with the United States District Court:

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