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Council of Nevada

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THERESA CARSTEN,
Plaintiff,

Case No. 3:12-cv-00493

vs.

MOTION TO DISMISS AMENDED COMPLAINT

INTER-TRIBAL COUNCIL OF
NEVADA, RISA STEARNS, and
DARYL CRAWFORD,

Defendants.

Pursuant to Fed.R.Civ.P. 12(b), Defendants Inter-Tribal Council of Nevada ("ITCN"), Risa Stearns, and Daryl Crawford move to dismiss Plaintiff Theresa Carsten's Amended Complaint for lack of subject matter jurisdiction. Defendants base their Motion to Dismiss on the following Memorandum of Points and Authorities, the attached exhibit, and all papers and pleadings on file.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
DISMISS**

I. INTRODUCTION

Ms. Carsten sued Defendants for an alleged violation of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq. As the

1 following argument demonstrates, Defendants enjoy sovereign
2 immunity because ITCN is an arm of the 26 federally recognized
3 Indian tribes that created ITCN to provide Tribal services to the
4 Tribal members.

5 **II. STANDARD OF REVIEW**

6 "A federal court is presumed to lack jurisdiction in a
7 particular case unless the contrary affirmatively appears." *Stock*
8 *West, Inc. v. Confederated Tribes of the Colville Reservation*, 873
9 F.2^d 1221, 1225 (9th Cir. 1989). Fed.R.Civ.P. 12(h)(3) provides: "If
10 the court determines at any time that it lacks subject-matter
11 jurisdiction, the court must dismiss the action." Moreover, "[i]n
12 resolving a factual attack on jurisdiction, the district court may
13 review evidence beyond the complaint without converting the motion
14 to dismiss into a motion for summary judgment." *Safe Air v. Meyer*,
15 373 F.3^d 1035, 1039 (9th Cir. 2004). "The court need not presume the
16 truthfulness of the plaintiff's allegations." *Id.*

17 **III. STATEMENT OF UNDISPUTED FACTS**

18 ITCN was incorporated as a non-profit organization under
19 Nevada State Law on February 23, 1966. (Declaration of Daryl
20 Crawford, Executive Director, ITCN, at paragraphs 2 and 3, attached
21 as Exhibit 1.) ITCN is a Tribal organization made up of 26
22 federally recognized Nevada Tribes serving the member reservations
23 and colonies, including Duck Valley Sho-Pai-Tribes, Duckwater
24 Shoshone Tribe, Ely Shoshone Council, Fallon Paiute Shoshone
25 Tribes, Ft. McDermitt Pai-Sho Tribe, Confederated Tribes of Goshute,
26 Te-Moak Tribe, Yerington Paiute Tribe, Walker River Paiute Tribe,
27 Yomba Tribal Council, Winnemucca Colony Council, Lovelock Paiute
28 Tribe, Reno-Sparks Indian Colony, Summit Lake Paiute Tribe, Washoe

1 Tribe, and related colonies. The Governing Body of ITCN consists of
 2 an Executive Board, composed of Tribal Chairmen and Chairwomen from
 3 each of these Tribes. (*Id.* at paragraph 4.)

4 ITCN manages federal and state funded programs that improve
 5 the welfare and interests of Tribal members and their communities
 6 throughout Nevada, including WIC, HeadStart, domestic violence,
 7 elder nutrition programs, child care funding, workforce investment,
 8 and the Tribal appellate courts. (*Id.* at paragraph 5.)

9 Mr. Crawford is the Executive Director of ITCN; and Ms.
 10 Stearns is the Human Resources Manager. (*Id.* at paragraph 2, Amended
 11 Complaint at paragraphs 3 and 4.) Ms. Carsten was the WIC Director
 12 for ITCN immediately before her termination. (*Id.* at paragraph 6.)

13 **IV. ARGUMENT**

14 **A. ITCN Is An Arm Of Nevada's Indian Tribes, Is Exempt From** 15 **The FMLA, And Enjoys Sovereign Immunity.**

16 "As a matter of federal law, an Indian tribe is subject to
 17 suit only where Congress has authorized the suit or the tribe has
 18 waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*,
 19 523 U.S. 751, 754 (1998). Where a statute is silent with respect to
 20 Indian tribes, the statute does not apply to Indian tribes if: "(1)
 21 the law touches 'exclusive rights of self-governance in purely
 22 intramural matters;' (2) the application of the law to the tribe
 23 would 'abrogate rights guaranteed by Indian treaties;' or (3) there
 24 is proof 'by legislative history or some other means that Congress
 25 intended [the law] not to apply to Indians on their reservations...."
 26 *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3^d 1071, 1078-79
 27 (9th Cir. 2001) (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751
 28 F.2^d 1113, 1116 (9th Cir. 1985)). "In any of these three situations,

1 Congress must expressly apply a statute to Indians before we will
2 hold that it reaches them." *Id.*

3 The FMLA is a law of general application that is silent
4 concerning Indian tribes. 29 U.S.C. § 2601 *et seq.*; *Chayoon v.*
5 *Chao*, 355 F.3^d 141, 143 (2^d Cir. 2004) ("The FMLA makes no reference
6 to the amenity of Indian tribes to suit.") (*citing Garcia v.*
7 *Akwesasne Housing Authority*, 268 F.3^d 76, 86 (2^d Cir. 2001)). The
8 Second Circuit held that federally recognized Indian tribes are
9 immune from suit under the FMLA. *Chayoon*, 355 F.3^d at 143
10 ("[Plaintiff's] remedy, if there is to be one, lies with
11 Congress."); *see also Pearson v. Chugach Government Services Inc.*,
12 669 F.Supp.2^d 467, 477 (D. Del. 2009) ("The only courts to examine
13 whether tribal organizations are subject to the FMLA's employer
14 obligations held, based on the doctrine of tribal immunity, there
15 is no private cause of action under the FMLA against tribal
16 organizations.").

17 ITCN is a Nevada non-profit corporation created and controlled
18 by the 26 federally recognized Indian tribes of Nevada to deliver
19 services to Native Americans within the State of Nevada. In 1998,
20 the Ninth Circuit Court of Appeals faced a substantially similar
21 issue in *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3^d 1185
22 (9th Cir. 1998). The Ninth Circuit held that a non-profit
23 organization incorporated by Indian tribes for on- or off-
24 reservation services is an Indian tribe for purposes of the
25 congressionally created employment law exemptions. The non-profit
26 organization is an arm of the sovereign Indian tribes and cannot be
27 sued under federal employment laws. "[T]he settled law of our
28 circuit is that tribal corporations acting as an arm of the tribe

1 enjoy the same sovereign immunity granted to a tribe itself." *Cook*
 2 *v. AVI Casino Enterprises, Inc.*, 548 F.3^d 718, 725 (9th Cir. 2008).

3 ITCN is an arm of the 26 Nevada Indian Tribes that created
 4 ITCN and is therefore exempt from the FMLA because it enjoys Tribal
 5 sovereign immunity.

6 **B. Ms. Carsten Cannot Circumvent ITCN's Sovereign Immunity**
 7 **By Naming Individual Defendants.**

8 As the Second Circuit recognized, a plaintiff "cannot
 9 circumvent tribal immunity by merely naming officers or employees
 10 of the Tribe when the complaint concerns actions taken in
 11 defendants' official or representative capacities and the complaint
 12 does not allege they acted outside the scope of their authority."
 13 *Chayoon*, 355 F.3^d at 143 (citing, *Oneida Indian Nation of New York*
 14 *v. City of Sherrill*, 337 F.3d 139, 169 (2d Cir.2003)). Mr. Crawford
 15 is the Executive Director of ITCN; and Ms. Stearns is the Human
 16 Resources Manager. Both acted in their official capacities in
 17 dealing with Ms. Carsten. Accordingly, Ms. Carsten cannot
 18 circumvent tribal immunity by naming Mr. Crawford and Ms. Stearns.

19 **V. CONCLUSION**

20 For the foregoing reasons, Defendants request that this Court
 21 dismiss Ms. Carsten's FMLA suit against them because ITCN enjoys
 22 Tribal sovereign immunity; and Mr. Crawford and Ms. Stearns acted
 23 in their official capacity and cannot be sued individually.
 24 Therefore, this court lacks jurisdiction to entertain Ms. Carsten's

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1 FMLA suit.

2 November 20, 2012

3 STORY LAW GROUP

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5 By: /s/ Robert W. Story .

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7 Attorneys for Defendant Inter-
8 Tribal Council of Nevada
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CERTIFICATE OF SERVICE

In accordance with Fed.R.Civ.P. 5(b)(3) and Local Rule 5-4, I hereby certify that on November 20, 2012, I electronically filed the foregoing **Motion to Dismiss Amended Complaint** with the Clerk of the Court for the United States District Court for the District of Nevada by using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

Brian R. Morris
59 Damonte Ranch Parkway
B-221
Reno, NV 89521

I certify that the foregoing is true and correct.

Dated on November 20, 2012, at Reno, Nevada

/s/ Barbara A. Ancina
BARBARA A. ANCINA

EXHIBIT INDEX

Exhibit 1

Declaration of Daryl Crawford

2 pages

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EXHIBIT 1

EXHIBIT 1

DECLARATION OF DARYL CRAWFORD

I, Daryl Crawford, declare as follows:

1) I have personal knowledge of the matters stated in this Declaration, and if called as a witness, I could competently testify to them.

2) I am the Executive Director of Inter-Tribal Council of Nevada ("ITCN").

3) ITCN was incorporated as a non-profit organization under Nevada State Law on February 23, 1966.

4) ITCN is a Tribal organization made up of 26 federally recognized Nevada Tribes serving the member reservations and colonies, including Duck Valley Sho-Pai-Tribes, Duckwater Shoshone Tribe, Ely Shoshone Council, Fallon Paiute Shoshone Tribes, Ft. McDermitt Pai-Sho Tribe, Confederated Tribes of Goshute, Te-Moak Tribe, Yerington Paiute Tribe, Walker River Paiute Tribe, Yomba Tribal Council, Winnemucca Colony Council, Lovelock Paiute Tribe, Reno-Sparks Indian Colony, Summit Lake Paiute Tribe, Washoe Tribe, and related colonies. The Governing Body of ITCN consists of an Executive Board, composed of Tribal Chairmen and Chairwomen from each of these Tribes.


5) ITCN manages federal and state funded programs that improve the welfare and interests of Tribal members and their communities throughout Nevada, including WIC, HeadStart, domestic violence, elder nutrition programs, child care funding, workforce investment, and the Tribal appellate courts.

6) Theresa Carsten was the WIC Director for ITCN immediately

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1 before her termination.

2 Executed on November 5, 2012, in Washoe County, Nevada.

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6 DARYL CRAWFORD
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