UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

DIANE M. WILSON, Plaintiff, vs. THOMAS SHORTBULL and MICHELLE YANKTON, Defendants.	)	CIV. 12-5078-JLV **REPORT AND RECOMMENDATION AS TO DEFENDANTS' MOTION TO DISMISS** [DOCKET NO. 12]

INTRODUCTION

This case is pending on plaintiff Diane M. Wilson's *pro se* amended complaint alleging that she was wrongfully terminated from her job. See Docket No. 6. Defendants Thomas Shortbull and Michelle Yankton have filed a motion seeking dismissal in its entirety of Ms. Wilson's claims against them. See Docket No. 12. The Chief District Judge, the Honorable Jeffrey L. Viken, referred defendants' motion to this magistrate judge for a recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). See Docket No. 17. The following is this court's recommended disposition.

FACTS

The defendants' motion is based on the pleadings alone. Accordingly, the court recites the following facts from Ms. Wilson's original and amended complaints and the attachments thereto.

On November 24, 2008, Ms. Wilson was hired as a Teacher Assistant for the Wanblee Head Start program, which was operated by the Oglala Lakota College ("OLC"). Thereafter, Ms. Wilson appears to have been employed year to year on separate contracts. For example, she was employed by the OLC Headstart program as a Teacher Assistant for a nine and one-half month contract beginning August 10, 2009, and ending May 28, 2010. The total salary to be paid under the terms of the 2009-2010 contract was $23,577.

On April 2, 2009, OLC reprimanded Ms. Wilson based on an allegation that she had mistreated a child in the Head Start program. OLC purportedly told Ms. Wilson on this occasion that if another similar incident occurred, her employment might be terminated. OLC terminated Ms. Wilson's employment under the 2009-2010 contract on November 6, 2009, after allegedly receiving another complaint about Ms. Wilson mistreating a child in the Head Start program.

On November 13, 2009, Ms. Wilson filed a grievance against the OLC Head Start program, alleging that the November 2009 complaint against her was false. Ms. Wilson asked that she be reinstated or that OLC buy out her contract and clear her work record. An informal grievance meeting was held at which Ms. Wilson was allowed to appear and argue on her own behalf. The OLC stood by its original decision to terminate Ms. Wilson's employment, a decision of which Ms. Wilson was notified on November 30, 2009.

On December 10, 2009, Ms. Wilson wrote a letter to defendant Tom Shortbull, the President of OLC. In that letter, Ms. Wilson requested "a formal full board hearing" of the OLC Board of Trustees regarding the OLC's decision to terminate her. That request was denied.

OLC, which operates the Oglala Lakota Headstart program, is a tribally chartered organization. Ms. Wilson's employment contract is with OLC. Defendant Michelle Yankton is the Director of the Oglala Lakota Headstart program. Ms. Wilson is a member of the Oglala Sioux Tribe, a federally-recognized Indian tribe.

The grievance process at OLC is set forth in writing. An employee who is not satisfied with an employment decision may request an informal grievance procedure with her supervisor within 5 business days of the employment decision. If the employee is not satisfied with the outcome of the informal procedure, she may pursue a formal grievance with a Hearing Committee Review. That formal procedure must be initiated with the filing of a written grievance within 5 business days of the decision rendered at the informal stage. Although Ms. Wilson's first grievance at the informal level was filed within 5 days of the notice of her termination, her request for a formal grievance was untimely as it was filed more than 5 business days following OLC's November 30, 3009, notification that it had not ruled in her favor on her informal grievance.

Ms. Wilson filed her complaint in this court on October 23, 2012. She asserts the presence of jurisdiction based on a federal question, among other bases. See Docket No. 1. She alleges claims based on the 1868 Fort Laramie Treaty, the Administrative Procedures Act, and the Fourteenth Amendment to the United States Constitution. She requests compensatory and punitive damages.

At the request of the district court, Ms. Wilson filed an amended complaint on February 20, 2013. See Docket No. 6. This court infers that Ms. Wilson intended to supplement, rather than replace, her original complaint. The amended complaint does not specifically include a jurisdictional statement.[1] The factual basis of her claims arises from her allegation that OLC dismissed her based on false claims and failed to give her a full formal hearing before the OLC Board of Trustees. Defendants now move to dismiss Ms. Wilson's claims in their entirety.

[1] Under the form language "State the grounds for filing this case in Federal Court," Ms. Wilson wrote: "(1) Wrongful Termination. The employer OLC Heads Start (sic) comes under the scrutiny of the Federal Government because the OST (Oglala Sioux Tribe) is federally recognized. Through this wrongful termination from this Head Start Program of OLC. This is a violation of the 6th Amendment of the US Constitution." Due to Ms. Wilson's penmanship, this court cannot tell whether she wrote "6th" (right to a jury trial in criminal prosecutions) or "16th" Amendment (granting Congress power to lay and collect income taxes). Regardless, her original complaint lays out a clearer basis for jurisdiction.

DISCUSSION

Defendants assert a variety of arguments as to why Ms. Wilson's claims should be dismissed with prejudice on the merits.[2] Defendants also argue that this court should dismiss Ms. Wilson's claims because she has failed to

[2] For example, defendants argue that they are immune from suit because they are officers acting within their official capacity for a tribal entity, which entity is itself protected by sovereign immunity. However, the court notes that OLC is funded by the Tribally Controlled Colleges and University Assistance Act. The Head Start program is funded through grants under the auspices of the United States Department of Health and Human Services. Defendants do not provide a copy of OLC's grant contracts with either government agency, which may contain waivers of sovereign immunity. In addition the OLC Charter contains a provision allowing OLC to "sue and be sued in its corporate name in a competent court to the extent allowed by law, . . ." See Docket No. 14-1, Art. III (f). Defendants do not acknowledge the sue-and-be-sued clause, and therefore do not address whether the clause is sufficient to waive OLC's sovereign immunity for Ms. Wilson's suit. Decisions interpreting "sue and be sued" clauses are conflicting, some finding a waiver of sovereign immunity, and others not. See e.g. Fed. Housing Admin. v. Burr, 309 U.S. 242, 244 (1940) (United States government waived sovereign immunity with "sue and be sued" language); Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040, 1044 (8th Cir. 2000) (finding that "sue and be sued" clause in tribal college's charter did not waive sovereign immunity); Dillon v. Yankton Sioux Tribe Housing Authority, 144 F.3d 581, 583-84 (8th Cir. 1998) (finding that "sue and be sued" clause did not waive tribal agency's sovereign immunity); Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552-53 (8th Cir. 1989) (tribe waived sovereign immunity with "sue and be sued" clause); Weeks v. Oglala Sioux Housing Auth., 797 F.2d 668, 671 (8th Cir. 1986) (charter of tribal housing authority providing that authority could "sue or be sued" was an express waiver of sovereign immunity, although an independent basis for federal court jurisdiction must still exist). The assertion of tribal sovereign immunity raises a jurisdictional question. Rupp v. Omaha Indian Tribe, 45 F.3d 1241, 1244 (8th Cir. 1995). But the facts and the law on this issue are not fully developed by either party herein. The court declines to decide the sovereign immunity question on an incomplete record.

exhaust her remedies in tribal court for the Oglala Sioux Tribe before coming to federal district court. The latter basis, if adopted by the court, would result in a dismissal without prejudice. The doctrine of exhaustion of tribal remedies stems from a pair of United States Supreme Court cases. Those two cases are examined below in detail.

A. National Farmers Union Ins. Cos. v. Crow Tribe of Indians

The first case to explain the doctrine of exhaustion of tribal court remedies was National Farmers Union Ins. Cos. v. Crow Creek Tribe, 471 U.S. 845, 847 (1985). In National Farmers Union, an accident had occurred in the parking lot of a school located on state land which was within the exterior boundaries of the Crow Indian Reservation. National Farmers Union Ins. Cos., 471 U.S. at 847. The injured student was a member of the Crow Creek Tribe. Id. Through his guardian, he brought a personal injury action against the school in Crow Tribal Court seeking damages. Id. The chairman of the school board received process for the tribal court action, but he never notified anyone else associated with the school or its insurer that a suit had been filed. Id. A default judgment against the school was eventually entered in the amount of $153,000. Id. at 847-48. Only after the judgment was served on the school board chairman did he then forward the judgment for payment to National Farmers Union Insurance Companies ("National"). Id. at 848.

National then brought suit in federal district court, seeking an injunction against the execution of the tribal court judgment against the school. Id. at 848. The district court granted the injunction on the grounds that the tribal court lacked subject-matter jurisdiction over the tort claim that was the basis of the tribal court judgment. Id. at 849.

The Supreme Court first noted that the federal courts had subject-matter jurisdiction over National's suit under 28 U.S.C. § 1331: the question whether an Indian tribe has the power to compel a non-Indian property owner to submit to tribal court civil jurisdiction presented a "federal question." Id. at 852-53. This is "because federal law defines the outer boundaries of an Indian tribe's power over non-Indians." Id. at 851.

The Court went on to hold that the question whether the tribal court had jurisdiction over the school district was not "automatically foreclosed" by existing precedent, but rather could be answered by carefully examining "tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." Id. at 855-56. Thus, the Court expressed no opinion as to whether the starting point for the analysis carried with it a presumption: the Court limited its observation to the fact that tribal jurisdiction was not "automatically foreclosed." Id. The analysis, the Court held, should be conducted in the first

instance by the tribal courts themselves so that a full record could be developed prior to the federal district court deciding the issue. The Court reasoned that such a rule of comity supported Congressional policy of supporting tribal self-government and self-determination. Id. at 856-57.

B. Iowa Mutual Ins. Co. v. La Plante

Two years after its decision in National Farmers Union, the Court decided Iowa Mutual Ins. Co. v. La Plante, which presented the question whether a federal court should exercise diversity jurisdiction under 28 U.S.C. § 1332 over a case presenting the issue whether a tribal court had jurisdiction over a non-Indian. Iowa Mut. Ins. Co. v. La Plante, 480 U.S. 9, 11 (1987). The facts of Iowa Mutual also involved a personal injury action arising from a motor vehicle accident on an Indian reservation. Id. La Plante, the injured party and a member of the Blackfeet Indian Tribe, filed suit in tribal court against his employer for whom he had been working at the time of the injury. Id. La Plante also sued his employer's liability insurance carrier, Iowa Mutual, for bad faith refusal to settle La Plante's insurance claim. Id.

Iowa Mutual appeared in tribal court and moved to dismiss La Plante's claim against it on the grounds that the tribal court lacked jurisdiction over the insurance company. Id. at 12. The tribal trial court denied the motion, holding that it had jurisdiction. Id. Iowa Mutual did not appeal to the tribal appellate court because it would have to go through a trial and await the entry

of final judgment to do so since tribal law did not allow for interlocutory appeals. Id. Instead, Iowa Mutual filed suit in federal district court on the basis of diversity jurisdiction, seeking a declaration that it had no duty to indemnify or defend La Plante's employer in the tribal court action. Id. at 12-13.

The Court started its analysis by articulating a presumption that Indian tribes retain their sovereignty over their territory and their members unless that sovereignty has affirmatively been taken away by an Act of Congress. Id. at 14, 18. Key to the Court's analysis of the issue presented by this case was whether the exercise of jurisdiction by the federal court would impair the authority of the tribal court. Id. at 15 (noting that state courts are generally divested of jurisdiction over Indians or activities on Indian land if the state jurisdiction would interfere with tribal sovereignty; then suggesting that the same is true in federal cases).

Noting that no federal treaty or statute specifically took away the jurisdiction of Indian tribes over civil matters involving non-members which arose on tribal lands, the Court extended the holding from National Farmer's Union to the facts of Iowa Mutual. Id. at 16-17. Even in diversity cases, parties must exhaust their tribal remedies by allowing the tribal court to decide in the first instance whether it had jurisdiction over the case. Id. at 18-19. The Court further clarified that exhaustion of tribal remedies requires

appealing the tribal jurisdictional issue to the tribal appellate court of last resort. Id. at 17. After exhausting tribal remedies, the federal district court would be free to review the jurisdictional issue. Id. at 19.

C. Application of the Tribal Exhaustion Doctrine to This Case

There are exceptions to the comity-based requirement of exhaustion of tribal remedies. No exhaustion is required where the assertion of tribal jurisdiction is made in bad faith or to harass; where the action is "patently violative of express jurisdictional prohibitions"; or "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." Nevada v. Hicks, 533 U.S. 353, 364 (2001) (citing National Farmers Union, 471 at 856 n.21). A fourth exception exists where the tribe is attempting to assert civil jurisdiction over a non-member of the tribe.[3] Ms. Wilson suggests that the tribal courts will be biased because of their connections to OLC, but this allegation does not lay a factual foundation for any of the above exceptions.

The facts in this case support requiring exhaustion of tribal remedies even more compellingly than did the facts in National Farmers Union and

[3] Exhaustion is not required where the tribe asserts jurisdiction over a nonmember " '[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule,' so the exhaustion requirement 'would serve no purpose other than delay.' " Hicks, 533 U.S. at 369 (citing Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997)).

LaPlante. In those cases, the issue was whether the tribe had jurisdiction over a *non*-member. Here, the issue is whether the tribe has jurisdiction over a dispute between a *member* and a tribally chartered organization.

Indian tribes retain, as an aspect of their inherent sovereignty, the authority to exercise civil jurisdiction over their own members unless such authority is taken away by Congress. Iowa Mutual Ins. Co., 480 U.S. at 14, 18; Montana v. United States, 450 U.S. 544, 564 (1981). The exhaustion requirement from LaPlante and National Farmers Union applies equally to tribal-related activities occurring on reservation land, even if an independent basis of federal jurisdiction such as Title VII exists for the action. See Krempel v. Prairie Island Indian Community, 125 F.3d 621, 622 (8th Cir. 1997).[4] The doctrine of tribal exhaustion is premised "on 'a policy of supporting tribal self-government and self-determination,' and it is prudential, rather than jurisdictional." Gaming World Internat'l., Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 849 (8th Cir. 2003) (quoting Nat'l. Farmers Union, 471 U.S. at 856; and citing Iowa Mutual, 480 U.S. at 20 n.14). However, when the facts of a case fit within the exhaustion policy, exhaustion is mandatory. Gaming World Internat'l., 317 F.3d at 849. Exhaustion is especially appropriate where the dispute arises out of tribal governmental

[4]The Kremple court did not, however, require tribal exhaustion in that case for the reason that tribal courts did not exist at the time the plaintiff initiated his action. Kremple, 125 F.3d at 622-23.

activity. Id. at 850. Such is the case here, where Ms. Wilson's claim is premised on the employment action of a tribally chartered organization.

It may be that this court does not have jurisdiction at all over Ms. Wilson's suit once the record is fully developed as to the assertion of tribal sovereignty, but certainly the facts known at this juncture require that this court stay its hand in addressing the merits until Ms. Wilson first presents her claims in tribal courts for the Oglala Sioux Tribe.

CONCLUSION

The court recommends granting the motion to dismiss by defendants [Docket No. 12]. Such dismissal should be without prejudice to Ms. Wilson's ability to re-file her lawsuit in federal court once she has exhausted her tribal remedies.

NOTICE OF RIGHT TO APPEAL

The parties have fourteen (14) days after service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Civ. P. 72; 28 U.S.C. § 636(b)(1)(B). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Id. Objections must be timely and specific in order to require *de novo* review by the District Court.

Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

Dated July 10, 2013.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE