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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BETH A. BODI,

Plaintiff,

vs.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, SHINGLE SPRINGS TRIBAL HEALTH PROGRAM, SHINGLE SPRINGS TRIBAL HEALTH BOARD, BRENDA ADAMS (in her official capacity as current Chairperson of the Shingle Springs Tribal Health Board), and DOES 1-30,

Defendants.

Case No. 2:13-CV-01044-LKK-CKD

PLAINTIFF BETH BODI'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION ON THE BASIS OF SOVEREIGN IMMUNITY

Date: January 13, 2014
Time: 10:00 a.m.
Ctrm: 4

The Honorable Lawrence K. Karlton
Complaint filed: April 22, 2013

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Plaintiff BETH BODI hereby provides her Memorandum of Points and Authorities in opposition to the F.R.C.P. 12(b)(1) Motion to Dismiss filed by defendants SHINGLE SPRINGS BAND OF MIWOK INDIANS, SHINGLE SPRINGS TRIBAL HEALTH PROGRAM, SHINGLE SPRINGS TRIBAL HEALTH BOARD, and BRENDA ADAMS.

I. INTRODUCTION

Defendants own and operate a health and wellness clinic which was constructed with a $13.6 million dollar loan from the United States government. This lawsuit concerns plaintiff BETH BODI's wrongful termination by defendants from her position as the Executive Director of this clinic. Defendants seek dismissal of plaintiff's claims on the basis of sovereign immunity. Plaintiff respectfully requests that this Court deny defendants' motion to dismiss for it has the requisite subject matter jurisdiction by reason of an explicit waiver of sovereign immunity, and/or Congressional authorization as it concerns plaintiff's claims of wrongful termination in violation of the Family Medical and Leave Act.

II. BRIEF FACTUAL SUMMARY

Defendants' five story health and wellness clinic is open to all people needing medical treatment. The clinic provides almost 90% of its services to non-native residents living in El Dorado County. [Plaintiff's Second Amended Complaint ("SAC") at para. 14: "The Clinic has approximately 14,000 registered patients: about 12,500 are El Dorado County non-tribal residents, and approximately 1,500 Native patients."]. Similarly, the other employees at the subject clinic are mostly non-Native. [Id.].

The defendant's employee Ernest Vargas provided a sworn declaration to this Court, on behalf of defendants' Opposition. At paragraph 22 of his declaration, it is significant that Mr. Vargas does not refute these numbers for native patients to non-native patients. Mr. Vargas was also quoted in a September 2013 "Style" magazine article that, "About 80 percent of our patients are non-Indian and of that, probably 90 percent of that 80 percent are El Dorado County Medi-Cal patients…" [See, the Declaration of Wendy L. Hillger, provided herewith, at page 3 of Exhibit "A"]. This article also noted that the clinic does not follow the "usual pattern" for tribal health care programs which

"...provide health care only to the native community." [Exhibit "A" at page 3.]. Thus, plaintiff contends that because the clinic serves a majority of non-natives and employs a majority of non-natives, the clinic is not properly seen as an arm of tribal governance. The Tribe received a 40 year loan for over $13 million dollars from the U.S. Department of Agriculture on favorable terms to build the subject clinic building where plaintiff worked. [See, Defendants' Exhibit "D" (3.75% interest rate for 40 years), "H" and "I" filed with its Motion to Dismiss]. A limited waiver of the sovereign immunity was granted by the Tribe relative to the USDA loan transaction. The USDA loan helps finance essential community facilities for public use in rural areas. [SAC, para. 14(b) (emphasis added)]. The Tribe by and through its Chairman agreed to comply with Federal statutes and regulations to obtain the loan. [November 4, 2010 letter from Tribal Chairman Fonseca to Doug Colucci, Area Specialist for Rural Development at U.S. Department of Agriculture, defendants' Exhibit "F", at page 27 of 46[1]]. The FMLA is of course a Federal statute.

Further, on October 16, 2010, Chairman Fonseca also agreed to follow applicable state laws so long as the USDA 40 year loan remained unpaid. [Defendants' Exhibit "D", Section (5)(b), at page 21 of 46]. Plaintiff BODI's Second Amended Complaint asserts state claims for medical condition discrimination, failure to prevent discrimination, violations of CFRA (the state FMLA equivalent), wrongful termination and retaliation.

Additionally, the facilities that treat Medi-Cal and Medi-Care patients require strict compliance with federal and state laws. The Tribe cannot both assert a right to self-governance through its sovereign immunity (as here, defending this lawsuit) and then on the other hand, take money from the U.S. and State governments which require compliance with its laws. At the time of her termination, plaintiff was the Executive Director for the SHINGLE SPRINGS TRIBAL HEALTH PROGRAM. In June 2011, plaintiff was diagnosed with cancer. Chemotherapy was recommended. Before starting chemotherapy, she met with Rhondella Dickerson, Chairperson for the SHINGLE SPRINGS TRIBAL HEALTH BOARD, and Brenda Adams, Human Resources Director for

[1] These page numbers refer to the case information header apparently added by the Court upon receipt of defendants' document filing.

Defendant SHINGLE SPRINGS BAND OF MIWOK INDIANS. At the time of this meeting with HR and her direct supervisor, leave from her employment was available to plaintiff by the Family and Medical Leave act. In other words, in 2011 defendants offered FMLA to its employees including plaintiff.

Regardless, both Rhondella Dickerson and Brenda Adams told plaintiff that she did not need to use FMLA leave because she was not in danger of losing her job. In reliance on their representations, plaintiff did not take the FMLA leave that was available to her. Instead, she tried to work while taking weekly chemotherapy treatments. Her chemotherapy was successful and as of the end of December 2011 she no longer chemotherapy. However, plaintiff was admittedly not herself during the invasive and aggressive chemotherapy treatment. The SHINGLE SPRINGS TRIBAL HEALTH BOARD decided to give plaintiff a performance evaluation, the first since the year 2000. The evaluation covered the time she was receiving chemotherapy. While admitting that approximately 90% of the items of concern listed in the evaluation had already been corrected, plaintiff was terminated on or about August 1, 2012. At the time of the termination, plaintiff actually was out on FMLA and temporary disability relative to her industrial ankle injury (in further violation of the law).

The HEALTH BOARD took the opportunity to give her a poor performance evaluation at a time when she was being treated for cancer, as a pretext for her termination. It appears the HEALTH BOARD wanted plaintiff terminated because she had complained about many of their actions, including that which she believed endangered patient safety. Plaintiff also believes that Rhondella Dickerson and Brenda Adams (and possibly others) had personal issues with plaintiff and wanted her fired.

III. LEGAL ARGUMENT

A. Standard of Review.

The district court shall presume that the factual allegations of the complaint are true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. This is similar to when a Rule 12(b)(6) motion is made. [Safe Air for Everyone v.

Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)]. This is compared to a factual attack, whereby, "the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." [id.] The court must also construe the alleged facts in the light most favorable to the plaintiff. [Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)]. All ambiguities or doubts must also be resolved in the plaintiff's favor. [Jenkins v. McKeithen, 395 U.S. 411, 421 (1969)].

Additionally, where the defect can be corrected by amendment, the court shall not dismiss the case. [Smith v. McCullough, 270 U.S. 456, 459 (1926); Tosco Corp. v. Communities for a Better Env't, 236 F3d 495, 499 (9th Cir. 2001)]. Also, discovery should ordinarily be granted when pertinent facts bearing on the question of jurisdiction are controverted, or when a more satisfactory showing of the facts is necessary. [Laub v. United States Dep't of Interior, 342 F3d 1080, 1092 (9th Cir. 2003)].

B. The Documents Provided in Defendants' Moving Papers Show a Waiver that Was in Existence at the Time of Plaintiff's Wrongful Termination.

Paragraph 14 of plaintiff's Second Amended Complaint makes allegations of an explicit waiver of sovereign immunity by defendants to allow a suit by an employee. While defendants' moving papers attempt to controvert these allegations, the information contained within the defendants' moving papers show otherwise. Additionally, the documents provided are incomplete.

In Tribal Resolution 2010-72[2] (dated October 16, 2010) and Tribal Resolution 2010-84[3] (dated December 9, 2010), defendants set forth an explicit waiver of its sovereign immunity as it relates to the USDA loan and specifically:

> authorized the Chairman or his designee to execute any and all documents and agreements necessary as may be required to give effect to the transactions.. and to take other such actions as may hereby be necessary and appropriate to carry out the obligations thereunder.

[2] Defendants' Exhibit "D", page 18 of 46.
[3] Defendants' Exhibit "I", page 36 of 46.

These Tribal Resolutions concern the USDA loan which built the clinic where plaintiff worked and served and employed both natives and non-natives. When read in concert with the November 4, 2010 letter from Tribal Chairman Fonseca to the U.S. Department of Agriculture [Defendants' Exhibit "F", at page 27 of 46] and his other assertions to follow state and federal laws [Defendants' Exhibit "D"], this is evidence of an intent to waive the immunity as it concerns plaintiff's FMLA and state law claims. These guarantees were all in place at the time of plaintiff's August 2012 wrongful termination.

Other similar guarantees are in the HHS program documents (Exhibit "S", at page 6 of 60) that show certifications by The Tribe to follow federal law "..The Applicant organization certifies that the statements in this application are true, complete and accurate… and the organization accepts the obligation to comply with U.S. Department of Health and Human Services' Terms and Conditions…" The list of certifications and assurances are not provided by the defendants' documents, but on information and belief plaintiff contends that compliance with federal laws is one of them.

Other documents provided by defendants with their Motion are unsigned (Exhibit "H") and incomplete. The entire USDA loan packet information is also not provided which could well have more information; for example Exhibit "D" at page 22 of 46 notes at Section 8 that the Tribe had to complete other forms for equal opportunity, non-discrimination and other assurances.

It is thus appropriate for the court to deny the instant motion to dismiss. Additionally, there has been no discovery conducted as of this date to allow plaintiff to further develop her defenses. [Hillger Dec., para. 2]. Lastly, plaintiff made multiple Freedom of Information Act requests to various providers in June 2013, and no response has received to date. [Hillger Dec., para. 3]. Plaintiff is informed and believes that documents to be provided by the government will show additional evidence of defendants' explicit waiver of sovereign immunity.

C. Defendants are not Entitled to Sovereign Immunity as The Clinic is not an Arm of the Tribe and/or it is a Tribal Commercial Venture

In approximately 1995, the SHINGLE SPRINGS BAND OF MIWOK INDIANS established

the SHINGLE SPRINGS TRIBAL HEALTH PROGRAM to operate a Clinic to provide health and medical services to both Native and non-Native patients. The SHINGLE SPRINGS TRIBAL HEALTH BOARD was created to oversee and operate the TRIBAL HEALTH PROGRAM in about 1998. The SHINGLE SPRINGS TRIBAL HEALTH BOARD was the entity responsible for the, "hiring and termination of the clinic Executive Director, who shall be responsible for hiring and termination of all other employees." [Shingle Springs Tribal Health Board By-Laws, Article II, Section 1 (as revised March 12, 2003); see, paras. 5, 6 of plaintiff's Second Amended Complaint].

At present, the Clinic has approximately 14,000 patients: about 12,500 are El Dorado County non-tribal residents, and approximately 1,500 Native patients. The clinic is 1 of 3 Medi-Cal providers in El Dorado County. In other words, the clinic serves a huge need in the community of El Dorado County for natives and non-natives alike. Further, a large majority of employees of the clinic are non-Native. In 2011, the year plaintiff was denied FMLA, there were 61 people working at the Clinic, 46 of which were non-native and 15 native Indians. It does not operate for the primary benefit of the tribal members and governance. [See, para. 11 of Second Amended Complaint].

In sum, the HEALTH PROGRAM is a commercial activity and not a governmental activity. Commercial activities operated by Native Americans do not necessarily enjoy the sovereign immunity of the tribe. If the entity acts as the arm of the Tribe, then it enjoys sovereign immunity. [Marceau v Blackfeet Hous. Auth., 455 F.3d 974, 978 (9th Cir. 2006)]. Here, however, plaintiff's position with defendants was not one that dealt with "purely internal matters" related to the tribal government. In fact, plaintiff did not report to the Tribal Council directly. As Executive Director, plaintiff reported to the HEALTH BOARD. The Health Board of Directors oversaw the PROGRAM's Clinic. As Executive Director, plaintiff was not involved in the tribal government; her tasks were to run the daily operations of the Clinic. The Clinic and the TRIBE were to be fiscally separate, too. [See, paras. 6, 7, 8, 9 of Second Amended Complaint].

In EEOC v. Karuk Tribe Housing Authority ("Karuk Tribe"), 260 F.3d 1071 (2001), the Ninth Circuit declined to apply the Age Discrimination in Employment Act (ADEA) to a federally recognized tribe. The Karuk Tribe case is distinguishable from the instant matter as the employer

being sued was the tribal government, "acting in its role as provider of a governmental service: ensuring adequate housing for its members. The federal law that provides funds for the Housing Authority specifies that such funds 'should be provided in a manner that recognizes the right of Indian self-determination and tribal self governance.'" Here, the health clinic that employed plaintiff Beth Bodi was unrelated to essential government functions. There were no limitations of usage of the funds to benefit tribal self-governance. Also, the Karuk Tribe Housing Authority provided housing only to tribe members.

As set forth in Trudgeon v. Fantasy Springs Casino, 71 Cal. App. 4th 632, 637 (1991), there is a balancing test of factors to consider when to treat a tribal entity as, in legal effect, the tribe itself. Unlike in *Trudgeon* and *Karuk*, the business entity Tribal Health Program is not entitled to immunity. The provision of health services to natives and non-natives alike does not promote tribal self-determination. The finances of the Tribal Health Program and the Tribe are separate. The health clinic also employed many non-Natives.

Lastly, the Ninth Circuit has repeatedly reaffirmed the doctrine that tribal sovereignty applies only to tribal government and "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations." [Karuk Tribe, 260 F.3d at 1079 (9th Cir. 2001); Donovan v. Coeur d'Alene Tribal Farm ("Coeur d'Alene"), 751 F.2d 1113, 1116 (9th Cir. 1985).] Tribe-run businesses acting in interstate commerce do not fall under the "self-governance" exception if the business does not relate to the government function. [Coeur d' Alene, 751 F.2d at 1116]. Further, the employment of non-Native Americans weighs heavily against a claim made under the first *Coeur d'Alene* exception concerning intramural interference. [Coeur d'Alene, 751 F.2d at 1114 (the farm at issue employed some non-Indians); U.S. Department of Labor v. Occupational Safety & Health Review Commission, 935 F.2d 182, 183 (9th Cir. 1991) (about one-half of the mill's employees were non-Native)]. A refusal to apply sovereign immunity to the Clinic and those who operate the Clinic here would not interfere with tribal self-governance.

D. This Court also has Jurisdiction under FMLA, A Law of General Applicability, and the Motion to Dismiss should be Denied.

Plaintiff asserts in her Second Amended Complaint that defendants Shingle Springs Band of Miwok Indians and the Shingle Springs Tribal Health Program, acting through its Board of Directors, are bound by federal rules of general application such as The Family Medical Leave Act of 1993 ("FMLA"). In paragraphs 14(a), 24, 25, 41, 62, 63, 79 -90 (Third Cause of Action), 91- 96 (Fourth Cause of Action), 97 – 104 (Fifth Cause of Action) of plaintiff's Second Amended Complaint, plaintiff BODI sets forth claims under FMLA. FMLA applies to all levels of government, all public agencies, including local, State and Federal employers, and schools. In enacting the FMLA, Congress specifically found that, "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." [28 U.S.C. 2601(a)(4)]. That is precisely what occurred to plaintiff BODI when she was dissuaded from using the FMLA that defendants made available to its employees. Additionally, defendants terminated her while she was out on FMLA following her ankle injury in violation of 29 U.S.C. section 2614. Plaintiff submits that defendants should be held accountable in federal court for their violations that lead to her job loss and substantial damages.

Congress abrogated tribal sovereign immunity in the FMLA when it authorized private civil suits by employees against employers. The federal statute provides that it is unlawful for **"any employer[4]"** to interfere with, restrain, or deny the exercise of any right provided by FMLA. [29 U.S.C. section 2615(a)]. Indian tribal governments were not excluded and in fact, all governmental entities are covered by FMLA. A violating employer shall be liable for penalties including, "wages, salary, employment benefits… liquidated damages… and for such equitable relief as may be appropriate … including … reinstatement…" [29 U.S.C. section 2617(a)(1)]. Individuals may bring a private civil action against an employer for violations. A private cause of action against an employer "may be maintained… in any Federal or State court …" [29 U.S.C. section 2617(a)(2)]. Attorney's fees and costs are provided for in addition to any judgment on behalf of the employee. [29

[4] Private-sector employers must have 50 qualifying employees to be bound by FMLA.

U.S.C. section 2617(a)(3)].

1. General Acts of Congress Apply to Indians, unless Clearly Expressed Otherwise

"[G]eneral acts of Congress apply to Indians as well as to others in the absence of a clear expression to the contrary." [Federal Power Commission v Tuscarora Indian Nation, 362 U.S. 99, 120 (1960); United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980) ("federal laws generally applicable throughout the United States apply with equal force to Indians on reservations."); United States v. Baker, 63 F.3d 1478, 1484 (9th Cir. 1995) ("Federal laws of general applicability are presumed to apply with equal force to Indians," subject to three exceptions).

These exceptions are:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters";
>
> (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or,
>
> (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations …"

If any of these three situations are found, Congress must expressly state that the statute applies to Indians in order for it will be found to apply to them. [Coeur d'Alene, *supra,* 751 F.2d at 1116 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980)].

A discussion of the "general applicability" rule and the "self-governance" exception will be discussed in turn.

2. FMLA is general federal law which is sufficient to proscribe employer-employee relations in tribal organizations

Congress could have, but chose not to, exempt tribes from the FMLA. Tribal governments were excluded from Title VII, for example. At 42 U.S.C. section 2000e, Title VII of The Civil Rights Act of 1964 specifically states the term "employer" … does not include … an Indian tribe"]. Indian tribes are also specifically excluded from the Americans with Disabilities Act of 1990, 42 U.S.C. 12111(5)(B)(i): "the term 'employer'… does not include … an Indian tribe."

Apparently Congress was concerned that Title VII's prohibition against national origin and race discrimination would require tribal employers to hire non-Indians, thereby exacerbating the high unemployment on reservations and undermining tribes' ability to maintain control over their internal affairs. See 110 Cong. Rec. 13702 (June 13, 1964) (remarks of Sen. Mundt, ""To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces."); see also Morton v. Mancari, 417 U.S. 535, 545-49 (1974).

In contrast, there is no comparable reason for Congress to carve out an exception for Indian tribes under the FMLA. Rather, Congress could reasonably have concluded that the importance of its national scheme for allowing family and medical leave in the workplace outweighed competing concerns of tribal sovereignty.

Defendants here may assert in its Reply that the failure to specifically exempt tribal governments from the FMLA reflects a drafting error by Congress, and thus for the court here to read in an exemption to match the one in Title VII or the ADA. This request (if made) should be rejected. Congress is presumed to act, "intentionally and purposely in the disparate inclusion or exclusion" of language in statutes. [Russello v. United States, 464 U.S. 16, 23 (1983) (held that Congress purposefully defined "interest" broadly in the RICO statute)]. Where there is a difference between the language adopted in different statutes (as here), courts should not, "presume to ascribe this difference to a simple mistake of draftsmanship." [Russello, *supra*, 464 U.S. at 23; Lorillard v. Pons, 434 U.S. 575 at 584-85 & n.14 (1978) (differences between Title VII and the Age Discrimination in Employment Act, "suggest that Congress had a very different intent in mind in drafting the later law")].

When Congress explicitly enumerates certain exceptions to a statutory scheme, additional exceptions should not be implied, absent evidence of a contrary legislative intent. [Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980)]. Here, the FMLA makes certain exceptions but of course decided not to include tribal governments. In fact, documents from the United States Department of Labor's website as it concerns the Family and Medical Leave Act of 1993 specifically calls out "Tribal" when discussing which "Governmental Levels Affected" as it concerns potential regulatory

changes to the FMLA. [Hillger dec., Exhibit "B", at para. 5]. As such, the U.S.'s Secretary of Labor- the entity in charge of administering FMLA- certainly has the belief that FMLA applies to tribal governments. Plaintiff respectfully submits that this court here has no reason to rule otherwise and bar plaintiff's complaint.

Of course, the issue of whether the FMLA applies to tribes is one of first impression for the Ninth Circuit courts. In a Ninth Circuit case, *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003), the court determined that the issue was not ripe because the plaintiff had not exhausted her tribal remedies before filing suit. It should be noted that the *Sharber* court did not dismiss the claim brought by an employee against a tribal casino under the FMLA, but rather stayed the action until such exhaustion was complete. [Sharber, *supra*, 343 F.3d at 976].

The cases cited by defendants regarding the FMLA are not a binding precedent for they are either from different circuits or are trial-level courts. The Chayoon v. Chao, 355 F.3d 141 (2nd Cir. 2004) court did not discuss the rule that general acts of Congress apply to Indians as well as to others in the absence of a clear expression to the contrary [Federal Power Commission v Tuscarora Indian Nation, 362 U.S. 99, 120 (1960); United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980)], and instead selected the narrow reading of Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) to require that the FMLA specifically state it is applicable to Indians. Plaintiff submits that a more true reading of the law is to follow *Federal Power Commission* and *Farris* to apply FMLA to defendants here as there is no contrary expression otherwise. Also, both *Sharber* and *Chayoon* noted that the potential applicability of the immunity has to be made on a case by case basis because, unlike some other federal statutes, the FMLA does not specifically reference tribes. As defendants here offered FMLA to its employees, it is nonsensical to hold that defendants are not subject to suit for failing to comply with the federal statute. Further and pursuant to its own Articles of Association, the powers of the Tribal Council are subject to any limitations imposed upon such powers by the statutes of the United States or the State of California. [Shingle Springs Rancheria, September 9, 2000 Articles of Association, Article VI, Section 1, as alleged in plaintiff's Second Amended Complaint at para. 3].

3. The Tribal self-governance exception Does Not Apply Here

The Shingle Springs Tribe does not have a treaty with the United States. [Plaintiff's Second Amended Complaint at para. 2]. Without a treaty, and since Congress has not specifically expressed its intent that FMLA did not apply to Indian tribes, the Ninth Circuit has recognized that the generally-applicable statute will not apply to the tribe or its members if the law touches 'exclusive rights of self-governance in purely internal matters'. [Karuk Tribe, *supra*, 260 F.3d at 1078, following Coeur d'Alene, *supra*, 751 F.2d at 1116].

Reservation Indians may well have exclusive rights of self-governance in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians. [Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978), citing Roff v. Burney, 168 U.S. 218 (1897) (tribal membership); Jones v. Meehan, 175 U.S. 1 (1899) (inheritance rules); and United States v. Quiver, 241 U.S. 602 (1916) (domestic relations)].

The federal statute at issue, however, is not an intramural matter but rather a general labor and employment regulation. Other federal statutes of general applicability that regulate labor and employment have been found applicable to tribal governments. [NLRB v. Chapa De Indian Health Program, Inc. ("Chapa De"), 316 F.3d 995, 998 (9th Cir. 2003)]. The *Chapa De* case involved a health care clinic which was chartered by a resolution made by a federally recognized tribe. The organization was formed to contract with Indian Health Services (IHS) on behalf of the Tribe to provide free health services to qualifying Native Americans.

Interestingly, the "Style" magazine article notes that defendant Shingle Springs Tribe was previously with "Chapa-De" before striking out on its own to provide health care to natives and non-natives. [Hillger Dec., Exhibit "A", page 3].

The court ruled that employment laws which sought to regulate a tribal health care clinic did not touch exclusive rights of self-governance in purely internal matters. In discussing the tribal self-government exception, the court first noted that tribal self-government **does not** embrace all tribal business and commercial activity. [Chapa De, *supra*, 316 F.3d 995 at 999].

The *Chapa De* court also examined the tribe's claim that the provision of health care services

to tribal members is intramural and thus not subject to federal laws of general applicability because of the "tribal self-government" exception. Chapa De also asserted that the provision of health care services, "is at least as intramural as the employment practices that we held were purely intramural in *Karuk Tribe."* [*Id.*]. The court denied the claim of the health clinic on this basis. The court noted that the provision of health care services was made to non-Indians as well as Indians and thus is not an intramural matter. In sum, the court affirmed the rule that, "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." (Id., at 999-1000, citing *Coeur d'Alene*, 751 F.2d at 1116). The court held that NLRB rules, along with OSHA and ERISA are "generally applicable" to tribes.

In making this finding, the *Chapa De* court discussed U.S. Department of Labor v. Occupational Safety & Health Review Commission, 935 F.2d 182 (9th Cir. 1991). In this case, the issue was application of the federal OSHA statute to a tribal run timber mill on its reservation. The court found that where about half of the mill's employees were non-Indian, and where most of the mill's revenue came from sales to non-Native Americans, application of OSHA regulations to the mill was held not to interfere with tribal rights of self-government. The Ninth Circuit has also upheld application of ERISA as it concerned a tribal sawmill. The court held ERISA was applicable to a tribal sawmill even in the face of a tribal ordinance regarding a transfer of the mill's tribal-member employees' contributions to a tribal pension plan. [Lumber Indus. Pension Fund v. Warm Springs Forest Prod, 939 F.2d 683, 685 (9th Cir. 1991)].

Based on these clear decisions from the Ninth Circuit, plaintiff asserts the health clinic defendants are not asserting tribal rights of self-government and thus they are subject to suit.

E. Plaintiff also Seeks Injunctive relief against Brenda Adams.

If this court should determine that jurisdiction is not to be found against defendants, the Second Amended Complaint should not be dismissed in its entirety. The Second Amended Complaint sets forth a request for injunctive relief against the current health board chairperson,

Brenda Adams, sued in her official capacity. The request for injunctive relief is to have plaintiff reinstated in her job as Executive Director of SHINGLE SPRINGS TRIBAL HEALTH PROGRAM. [Garcia v Akwesasne Housing Authority, 268 F.3d 76, 87-88 (2nd Cir., 2001), citing Santa Clara Pueblo v Martinez, 436 U.S. 49, 59 (1978) as it concerns the doctrine of Ex parte Young, 209 U.S. 123 (1908) and other cases whereby sovereign immunity did not bar private plaintiffs from suing a state (or here, an Indian tribe) for injunctive relief).]

There are two caveats, which are met here. The law under which she seeks injunctive relief must apply to the defendant, and the law must provide for a private cause of action. [Garcia, supra, at 88. (granting plaintiff leave to amend her complaint against the agency defendant in conformance with these rules)]. As discussed above, FMLA applies to tribe and allows plaintiff to bring a private cause of action. The law also provides for equitable relief, including reinstatement, which is the reason for the claims made against BRENDA ADAMS in her official capacity as current Chairperson of the Shingle Springs Tribal Health Board. While the Tribe tries to avoid this by asserting that plaintiff's position is no longer available, this is a matter of factual dispute and should not be disposed of here without discovery.

IV. CONCLUSION

The FMLA applies to defendants as a Congressional statute of general applicability. It applies in the present case because plaintiff's job as the Executive Director of the SHINGLE SPRINGS TRIBAL HEALTH PROGRAM is unrelated to self-governance and "internal matters" of the Tribe, but instead relates solely to a commercial enterprise. The USDA gave a loan to accommodate a public need in a rural area. Nearly 90% of the clinic's patients are non-native, so it can hardly be said to be an internal matter or otherwise infringe on the tribe's right to self-govern.

Further, it is nonsensical than an employer can offer a federally-mandated program and yet claim that it is not required to follow the rules of the program. In Tribal Resolutions 2010-72 and 2010-84 (Defendants' Exhibit "D", page 18 of 46; Exhibit "I", page 36 of 46), defendants set forth an explicit waiver of its sovereign immunity as it relates to the USDA loan. When read in concert with

the November 4, 2010 letter from Tribal Chairman Fonseca to the U.S. Department of Agriculture (and elsewhere), which he gave assurances and certified that the Tribe would comply with federal and state laws as a condition of the loan, there is sufficient evidence of waiver.

For these reasons, plaintiff respectfully requests that this Court deny defendants' motion to dismiss. Alternatively, if this court is inclined to grant the motion, plaintiff seeks leave to conduct discovery on the jurisdictional issues. Discovery should ordinarily be granted when pertinent facts bearing on the question of jurisdiction are controverted, or when a more satisfactory showing of the facts is necessary. [Laub v. United States Dep't of Interior, 342 F3d 1080, 1092 (9th Cir. 2003)]. Here, plaintiff is still waiting for the U.S. Department of Agriculture's Rural Development division and the other governmental entities to respond to her June 2013 Freedom of Information act requests. [Hillger Dec., para. 3].

Respectfully submitted,

Dated: November 4, 2013

PACIFIC AMERICAN LAW GROUP, PC

By: /s/ Wendy L. Hillger
Wendy L. Hillger
Attorneys for Plaintiff BETH A. BODI