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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA/WEST DISTRICT

CRYSTAL A. MULLER,

Plaintiff,

vs.

MORONGO CASINO, RESORT, AND SPA; TRIBAL COUNCIL FOR THE MORONGO BAND OF MISSION INDIANS, KANDI KELLEY, BRITON COOK, and DOES 1 through 10, Inclusive,

Defendants.

Case No.: EDCV14-02308VAP(KKx)
[Before the Hon. Virginia A. Phillips]

PLAINTIFF CRYSTAL MULLER'S OPPOSITION TO THE MOTION TO DISMISS WITHOUT LEAVE TO AMEND THE FIRST AMENDED COMPLAINT

Complaint Filed: November 10, 2014

Hearing Date: June 01, 2015
Time: 2:00 p.m.
Fl/Ctrm: 2

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I. INTRODUCTION

The primary issues here are (1) whether or not the Morongo Casino, Resort, and Spa along with the Tribal Council for the Morongo Band of Mission Indians ("Morongo") waived this "sovereign immunity" with regard to the federal Family Medical Leave Act of 1993; (2) whether or not the individual Defendants (collectively "Defendants") acted beyond and outside their official duties; (3) whether or not Plaintiff Crystal A. Muller ("Muller" or "Plaintiff")) exhausted the

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available remedies in the Tribal Court; and (4) whether or not this Court lacks subject-matter jurisdiction. In the Amendment to the Tribal-State Compact Between the State of California and the Morongo Band of Mission Indians ("Amended Compact"), Morongo expressly waived its right to assert sovereign immunity with respect to arbitration which was requested by Muller in her First Amended Complaint ("FAC"). Based upon Muller's arguments below, she requests that the Defendants' Motion To Dismiss is denied in its entirety and that this Court invoke its jurisdiction and order arbitration or, in the alternative, stay the action until the Tribal Court has determined whether or not it has waived its sovereign immunity and/or whether or not it has jurisdiction to hear the action.

II. STATEMENT OF THE COMMON, RELEVANT FACTS TO OPPOSE THIS MOTION TO DISMISS

Muller was terminated from her position as a slot attendant on July 26, 2013, after working 11 years for Morongo. During her employment, she received good evaluations and always followed the policies and procedures of Morongo. At or about 2003, Muller became very ill with what was medically diagnosed as Fibromyalgia and chronic migraine headaches. Because this disability cause her to be in such severe, debilitating pain and unable to work, Muller's treating physician needed to place her off-work during the chronic, severe periods. As a result, Muller was qualified for, applied for, and received several times over the years the Intermittent Family Medical Leave of Absence under the FMLA ("IFMLA").

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Each time, Muller was informed of her rights under the FMLA. Specifically, Morongo informed Muller,

> "The Family and Medical Leave Act ("FMLA") requires *covered employers* to allow unpaid leave in certain situations to *eligible employees.* For employees who are eligible to take FMLA leave and satisfy the notification and certification requirements, we provide up to twelve (12) weeks of unpaid leave per year when leave is needed due to your own serious illness or injury, the birth, adoption, or placement of a child, or the serious health of a family member." [Emphasis added.] Declaration of Gloria Dredd Haney ("Haney Decl"), Exhibits A, p. 4, Exhibit B, p. 5

In fact, numerous times over a period of many years, Muller was expressly informed by Morongo to maintain the federal qualifications for her to remain a qualified employee under the IFMLA, like re-certification. Haney Decl, Exhibit C. Officially, when the IFMLA leaves were approved, and under the IFMLA, Muller was further informed she could not engage in any new or even "expand the scope of existing outside employment. . .". Haney Decl, Exhibits D and E. The re-certifications also continued, for example. Haney Decl, Exhibit F. The IFMLA approvals continued with the warnings Muller had to abide by the federal "Intermittent FMLA guidelines." Haney Decl, Exhibits G.

Muller's performance remained good during the approved periods for IFMLA. For several years, without any problems, Morongo provided the necessary leaves of absence under the federal law of the FMLA. In 2011, Defendant Briton Cook ("Cook"), in her capacity as the Benefits Manager also provided Muller with the notice of her approved IFMLA leave. Included within the written notice was the

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reference to the federal guidelines and the requirements for Muller if she was to continue to receive benefits under the federal IFMLA. Haney Decl, Exhibit H, pp. 1-2. However, Cook and Defendant Kandie Kelley ("Kelly") began to complain to Muller about her continuous, although legal, use of the IFMLA. Morongo, nor its previous agents, had ever before criticized Muller because of her disability and use of IFMLA. The threats of the loss of Muller's job increased with each request Muller continued to make under the IFMLA.

In 2012, Defendant Cook, in her capacity as the Benefits Manager, again, provided Muller with the notice of her approved IFMLA leave which was to be effective to May 2013. Included within the written notice was the reference to the federal guidelines and the requirements for Muller if she was to continue to receive benefits under the federal IFMLA. Haney Decl, Exhibit I. The complaints from Cook and Kelley continued. In May 2013, Muller sought and had IFMLA leave approved to August 08, 2013, by Defendant Cook. Haney Decl, Exhibit J. Instead of the threats to Muller about the loss of her job if she continued to take this federal leave time, Kelley sent a letter to Muller, on or about August 02, 2013, stating, "[E]ffective July 31, 2013 the Morongo Casino Resort & Spa terminated your employment. . .". for what the California Employment Development Appeals Board and Muller described as specious reasons. Haney Decl, Exhibit K. Cook and Kelley violated federal law when they terminated Muller *while she was actually on IFMLA leave.* It came to Muller's attention from another employee that Kelley and

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Cook had been trying to get other non-Indian employees to join in and assist them in firing Muller by providing false statements against her. Haney Decl, Exhibit L. The Morongo employee handbook expressly informed employees like Muller of Morongo's waiver of the federal FMLA for use by its employees. Haney Decl, Exhibit M.

Muller began calling and writing in 2013, seeking to be heard before the Tribal Council and/or the Tribal Court and for arbitration regarding her termination while on approved IFMLA leave. Haney Decl, Exhibit N. In 2014, she continued with her verbal and written requests for a hearing before the Tribal Court because of her termination in violation of the FMLA. Haney Decl, Exhibit O.

On August 21, 2014, Muller wrote her last letter to Morongo, again, requesting to be heard by the Tribal Council or Court or to arbitrate her IFMLA claim. Haney Decl, Exhibit P. Finally, on August 29, 2014, after trying for over a year for any kind of response, Morongo responded that the Compact with California was only for "patron" claims and not for her. These individual Defendants claimed Morongo could do to her what it wanted to do when employees were injured on the job. Muller did not believe the excuse and knew her disability was ***not*** employment-related and had nothing to do with her employment relationship with Morongo and did not seek the FMLA except for those periods when she could not work because of the chronic and severe pain. The individual Defendants had removed any and all

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information from her personnel file which would have shown the irregularity of terminating Muller while she was on IFMLA leave. Haney Decl, Exhibit Q.

Morongo's Compact states: "[T]he Tribe waives its right to assert sovereign immunity with respect to the arbitration and court review of such claims but only up to the limits of the Policy." The Compact further provides, "To effectuate its consent to the foregoing arbitration procedure, the Tribe shall, in the exercise of its sovereignty, waive its right to assert its sovereign immunity in connection with the arbitrator's jurisdiction and in any action brought in federal court or, if the federal court declines to hear the action, in any action brought in courts of the State of California that are located in Riverside County, including courts of appeal, to (1) enforce the parties' obligation to arbitrate, (2) confirm, correct, modify, or vacate the arbitral award rendered in the arbitration, or (3) enforce or execute a judgment based upon award the award." This statement in the Compact reflects the Morongo's expressed waiver related to arbitration.

III. THE TRIBAL COURT SHOULD HAVE FIRST OPPORTUNITY TO DETERMINE WHETHER IT HAS JURISDICTION TO HEAR ACTIONS BASED ON THE FAMILY MEDICAL LEAVER ACT OF 1993, § 2 et seq., 29 USCA § 2601 et seq.

Tribal courts should have first opportunity to determine whether they have jurisdiction to hear actions based on the Family and Medical Leave Act of 1993. *Sharber v. Spirit Mountain Gaming* (9th Cir 2003). The district court did not err in concluding that tribal courts should have first opportunity to determine whether they

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have jurisdiction to hear action based on the Family and Medical Leave Act. *See Iowa Mut. Ins. Co. v. La Plnte,* 480 U.S. 9, 15 ("[A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is address by the District Court."); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 541 U.S. 845, 855-56 (holding that the inquiry over "whether a tribal court has the power to exercise civil subject-matter jurisdiction . . . should be conducted in the first instance in the Tribal Court itself"). Muller made multiple requests, both verbally and in writing, to have her termination based upon the violation of the FMLA heard by the Tribal Court. However, these individuals when outside the boundaries of their job duties and conspired to deprive Muller of her rights under the FMLA which Morongo had approved over the years. There is no way of actually knowing whether or not the Tribal Council or the Tribal Court is even aware of Muller's requests. The individual Defendants, however, sought fit to respond to Muller requests as if they were the Tribal Court which, unequivocally, would not be the case, especially for non-Indians.

Nor did the district court err in concluding that the tribal exhaustion requirement also applies to issues of tribal sovereign immunity. Determining whether the tribe has waived immunity, or whether Congress has abrogated its immunity, requires "a careful study of the application of tribal laws, and tribal court decisions." *Stock West Corp. v. Taylor,* 964 F.2d 912, 920 (9th Cir. 1992); *see also*

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Nat'l Farmers, 471 U.S. at 855-8556. Accordingly, the district court properly "stayed its hand until after the . . . Tribal Courts have the opportunity to resolve the question. *Stock West Corp.*, 964 F.2d at 920.

It is Muller's argument that Morongo did, in fact, expressly waive sovereign immunity by publishing, officially, its waiver by the tribe which could not be taken away by these non-Indian Defendants. A tribe's waiver of sovereign immunity must be clearly expressed as to its scope and applicability to disputes, and must be made by a person or entity authorized to do so. *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (9th Cir 2011) 201 Cal.App.4th 190. Morongo made clear within the official documents the scope and applicability to disputes and Muller's continuing right to get approved absences under the IFMLA.

In determining whether a waiver of tribal sovereign immunity is valid, the issue is whether the waiver was authorized by tribal law. *Yavapai-Apache Nation, supra.* Defendants do not dispute that it is "tribal law" which determines whether or not a waiver has been authorized—not the non-Indian official agents of the tribe. More importantly, no magic words are required to waive tribal sovereign immunity, and an adequate waiver need not be phrased with only the particular terms "waiver" or "sovereign immunity." *Yavapai-Apache Nation, supra.* It is clear, Morongo intended to be bound by its own expressed FMLA guidelines which follows exactly that of the federal FMLA § 2 et seq., 29 USCA § 2601 et seq. and waived any immunity it may have had with regard to the FMLA.

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The Ninth Circuit has recognized that some of the exhaustion exceptions announced in *National Farmers* and have not required exhaustion where "the litigant was able to show either that [(1)] exhaustion would have been futile or that [(2)] the tribal court of appeals offered no adequate remedy." *Alvarez v. Tracy* (9th Cir 2014) 2014 DJDAR 16135. And so, it appears to be the case here. Until petitioners have exhausted the available remedies in the Tribal Court, it would be premature for the District Court to consider any relief. Whether the federal action should be dismissed or merely held in abeyance pending the development of the Tribal Court proceedings is a question that should be addressed in the first instance by the District Court. *National Farmers Union Insurance Companies v. Crow Tribe of Indians* 471 U.S. 845 (1985).

IV. IN THE ALTERNATIVE MULLER SEEKS ARBITRATION

Federal court is required to stay its hand in exercising jurisdiction over matters relating to Indian reservation affairs until party has exhausted all available tribal remedies. *Alvarez v. Tracy* 2014 WL 6871570 (C.A.9 (Ariz.)). Tribal exhaustion requirement applies to issues of tribal sovereign immunity also. *Sharber v. Sprit Mountain Gaming Inc., supra.* If the Tribal Court refused to permit Muller to exhaust the internal remedies, then she is requesting that her petition to compel arbitration be granted. A petition to compel arbitration is, in essence, "a suit in equity seeking specific performance of [a] contract." *United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1026. Muller

requested arbitration but was denied on August 29, 2014. Haney Decl, Exhibit Q. The Amended Compact is, indeed, instructive in this area because it refers to arbitration in its "VII. PUBLIC AND WORKPLACE HEALTH, SAFETY, AND LIABILITY." Section 10.2(d) specifically refers to Morongo's waiver of sovereign immunity with regard to arbitration. Haney Decl, Exhibit R. Muller seeks to have this Court compel arbitration if she is prevented from exhausting her remedies by way of the Tribal Court.

V. THE INDIVIDUAL DEFENDANTS ARE LIABLE UNDER THE FMLA AS A RESULT OF ACTING BEYOND AND OUTSIDE THE SCOPE OF THEIR DUTIES IN THEIR OFFICIAL CAPACITIES.

Although tribal sovereign immunity extends to tribes' employees sued in their official capacities, it does not prevent suits against those same employees when sued in their individual capacities. *See Maxwell v. County of San Diego*, 708 f.3d 708 at 1088. An employee may be sued in his or her individual capacity when the suit arises out of actions taken in the employee's official capacity if the remedy sought is against the individual. *See id.* at 1088-89. When Muller first filed her complaint, she only had Morongo as the Defendant. Docket Entry, #1. After further investigation, it became clear that the individual Defendants used their official capacity to intentionally strip Muller of her right to the IFMLA, which Morongo had provided for years, and her job. So, Muller filed her FAC, now including the individual Defendants and specifically referring to the individuals in the claim under the FMLA. Docket Entry, # 7. Individual managers of employers are potentially

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subject to liability under the Family and Medical leave Act of 1993, § 2 et seq., 29 U.S.C.A. § 2601 et seq. *Mercer v. Borden*, 11 F.Supp.2d 1190 (Cal. C.D. 1998):

> The Ninth Circuit has recognized that, in determining whether liability extends to managing individuals in wrongful employment practice cases, comparative "employer" definitions in the respective statutes are significant. *Miller v. Maxwell's International, inc.*, 991 F.2d 583 (9th Cir. 1993)(comparing similar "employer" definitions under Title VII and the Age Discrimination in Employment Act of 1967, but contrasting different definition in the Fair Labor Standards Act).
>
> Since the definition of "employer" in the FMLA is identical to the definition of "employer" in the FLSA, the Court holds individuals are potentially subject to liability under the FMLA. The plain language of the FMLA appears to compel this result. *Mercer v. Borden, supra*.

Morongo has already identified itself as a *covered employer*. Haney Decl, Exhibit B, p. 5. Because these individual Defendants are managers who violated the FMLA, Muller has stated a claim against them.

CONCLUSION

Plaintiff, Crystal Muller, respectfully requests the Court deny the Defendants' motion in its entirety based on the reasons stated above and/or seek the Tribal Court's determinations or, in the alternative, compel arbitration. If the Court deems necessary, Plaintiff requests the Court dismiss with leave to amend.

DATED: May 11, 2015 By: */"s"/ Gloria Dredd Haney*
Gloria Dredd Haney
Attorney for Plaintiff

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