The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAJU A.T. DAHLSTROM, Plaintiff, v. UNITED STATES, *et al.*, Defendants.	CASE NO. 2:16-cv-01874-RSL UNITED STATES' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6) Noted for Consideration on: May 4, 2018

I. INTRODUCTION

Plaintiff's Second Amended Complaint should be dismissed against the United States for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff has asserted four claims against the United States in his Second Amended Complaint. All are premised upon violations of the United States Constitution. This Court has already recognized that the United States has not waived sovereign immunity for constitutional tort claims. Dkt. No. 62, p. 6. In addition, the United

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SEATTLE, WASHINGTON 98101
(206) 553-7970

States has not waived sovereign immunity for *Bivens* claims based upon constitutional violations committed by federal employees. Therefore, Claim One, Claim IV and the second Claim VII, which assert claims for constitutional violations, should be dismissed against the United States for lack of subject matter jurisdiction.

Additionally, each of these four claims fail to state a cause of action against the United States. Plaintiff's constitutional claims fail because the termination of his employment did not involve a federal action. The constraints of the United States Constitution apply to limit federal and state authority, but do not apply to the actions of a separate sovereign such as the Sauk-Suiattle Indian Tribe. Plaintiff conflates the coverage conferred by the Indian Self Determination and Education Assistance Act of 1975 ("ISDEAA") for purposes of civil actions under the Federal Tort Claims Act ("FTCA") to mean that he and the individual tribal defendants are federal employees for all purposes and for any civil actions. This is incorrect. The ISDEAA only confers federal employee status upon individuals carrying out a 638 contract for purposes of cognizable tort claims under the FTCA. Constitutional violations are not cognizable under the FTCA. Thus, Plaintiff's constitutional claims fail to state a claim upon which relief may be granted.

Finally, for similar reasons, Plaintiff has not stated a claim for wrongful discharge in violation of public policy under Washington State law. Plaintiff's claim is a threadbare recital of the elements of this cause of action. Further, his claim is based upon federal statutes or policies that he has not identified, as well as the First, Fifth and Fourteenth Amendments, which all fail for a lack of federal or state action.

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For these reasons, Plaintiff's claims against the United States should be dismissed.

II. PROCEDURAL HISTORY

Plaintiff filed his initial Complaint in March 2017 asserting constitutional torts, *Bivens* claims, and common law tort claims for wrongful discharge of employment by the Sauk-Suiattle Indian Tribe. *See* Dkt. No. 1. In July 2017, the United States agreed to allow an amended complaint in order to correct flaws in the initial Complaint. Dkt. Nos. 32-33. Plaintiff's Amended Complaint again asserted constitutional torts, *Bivens* claims, and common law tort claims for wrongful discharge of employment by the Sauk-Suiattle Indian Tribe. The United States filed a motion to dismiss the Amended Complaint on September 1, 2017. Dkt. No. 38. On October 31, 2017, Plaintiff filed a motion for leave to file a second amended complaint. Dkt. No. 47.

By Order dated February 26 2018, the Court granted in part the United States' motion to dismiss and Plaintiff's motion to amend. Dkt. No. 62. The Court essentially dismissed all of Plaintiff's claims against the United States, including any constitutional tort claims, but held that Plaintiff could state a claim for wrongful discharge in violation of public policy with a properly amended complaint. *Id.* On March 28, 2017, Plaintiff filed a Second Amended Complaint. Dkt. No. 63.

III. STANDARD OF REVIEW

A. Motion to Dismiss under Rule 12(b)(1)

Dismissal is appropriate under Fed. R. Civ. P. 12(b)(1) when a court lacks subject matter jurisdiction over the claim. Subject matter jurisdiction is a threshold issue that goes to

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the court's power to hear the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). A motion to dismiss for lack of subject matter jurisdiction can attack the allegations either facially or factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A moving party factually attacks the allegations by "disput[ing] the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* A moving party facially attacks the allegations by asserting "that allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction." *Id.* In a factual attack, the court is not limited to the allegations in the complaint, but may consider affidavits or any other evidence outside of the pleadings, even if it requires the court to resolve factual disputes. *Id.*, *see also Ass'n of Am. Medical Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Here, Plaintiff's claims are facially insufficient to invoke federal jurisdiction because the United States has not waived sovereign immunity for constitutional tort or *Bivens* claims. Moreover, Plaintiff's claims are facially insufficient to establish jurisdiction over the United States for constitutional claims because there was no federal action or federal actors involved in the Sauk-Suiattle Tribe's decision to terminate Plaintiff's employment. Once challenged, the party opposing a motion to dismiss must furnish evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *Id.*

B. Failure to State a Claim upon Which Relief may be Granted

A complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal may be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal

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theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To withstand a motion to dismiss under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint must also contain sufficient facts to give fair notice to enable the opposing party not only to defend itself effectively, but also to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1215-16 (9th Cir. 2011). Where the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss under Rule 12(b)(6), the court must accept as true all material allegations in the complaint, but it need not accept as true conclusory allegations, formulaic recitations of the elements, or legal conclusions. *Iqbal*, 556 U.S. at 678-79 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). In determining whether a claim is plausible, a court may discount conclusory statements, which are not entitled to a presumption of truth. *Id.* The court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into

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the complaint by reference, and matters of which a court may take judicial notice." *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

IV. ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction Over the United States for Plaintiff's Constitutional Tort Claims and *Bivens* Claims

Plaintiff has asserted four claims against the United States: (1) Claim One – Violation of Fifth Amendment (or First Amendment); (2) Claim IV – First Amendment Retaliation Free Speech Violations; (3) Claim VI – Retaliation and Wrongful Discharge in Violation of Public Policy; and (4) the second Claim VII – Fifth Amendment Rights Under State and Federal Constitution Law and Common Law Torts. The Court lacks subject matter jurisdiction over Plaintiff's constitutional or *Bivens* claims against the United States set forth in Claim One, Claim IV and the second Claim VII.

The United States, as sovereign, is immune from suit unless it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *see also Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). Any waiver of that immunity must be strictly construed in favor of the United States. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992); *Jerves v. United States*, 966 F.2d 517, 521 (9th Cir. 1992). The FTCA is a limited waiver of sovereign immunity that permits claims against the United States for money damages for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable in

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accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1).

The FTCA expressly reserves the sovereign immunity of the United States for constitutional tort claims. 28 U.S.C. § 2679(b)(2)(A)(The FTCA "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States."); *see also Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 478 (1994) ("[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims . . . [a] constitutional tort claim is not cognizable under § 1346(b) . . ."). For a claim to be actionable under the FTCA, it must allege that the United States "would be liable to the claimant" as "a private person" "in accordance with the law of the place where the act or omission occurred." *Id.* at 476. "Law of the place" means law of the State. *Id.* at 478; *see also United States v. Agronics Inc.*, 164 F.3d 1343, 1346 (10th Cir.1999) ("The underlying principle is that the FTCA's waiver of sovereign immunity is limited to conduct for which a private person could be held liable under state tort law."). Liability for constitutional tort claims arise under federal, not state law. *Meyer*, 510 U.S. at 476; *see also Jachetta v. United States*, 653 F.3d 898, 904 (9th Cir. 2011). Thus, constitutional claims are not cognizable under the FTCA, and the FTCA does not provide a waiver of sovereign immunity for those claims. *Jachetta*, 653 F.3d at 904.

Additionally, the United States has not waived its sovereign immunity for suits under 42 U.S.C. § 1983 and its federal analog, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See Meyer*, 510 U.S. at 484; *Arnsberg v. United*

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States, 757 F.2d 971, 980 (9th Cir. 1985)("*Bivens* does not provide a means of cutting through the sovereign immunity of the United States itself."); *Daly-Murphy v. Winston*, 837 F.2d 348 (9th Cir. 1987) ("[A]bsent a waiver of sovereign immunity, an individual may not maintain a *Bivens* action for monetary damages against the United States."). Finally, the United States has not waived sovereign immunity for civil actions under the ISDEAA unrelated to the FTCA. *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004).

Plaintiff's claims against the United States are premised upon the actions of the Sauk-Suiattle Indian Tribe. Plaintiff asserts that he was wrongfully discharged by members of the Sauk-Suiattle Indian Tribe, Tribal Council and Tribal Administration. Dkt. No. 63, ¶ 13. Plaintiff is attempting to hold the United States liable for the Tribe's action through the ISDEAA, 25 U.S.C. § 5321, *et seq.*[1] The purpose of the ISDEAA is to increase tribal participation in the management of programs and activities on the reservation. *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004). However, Congress wanted to limit the liability of tribes entering into these agreements. *Id.* Therefore, the ISDEAA provides that "any civil action or proceeding" against "any tribe, tribal organization, Indian contractor or tribal employee" involving claims resulting from the performance of a "contract, grant agreement, or any other agreement or compact" authorized by the ISDEAA "shall be deemed an action against the United States" and "be afforded the full protection and coverage of the Federal Tort Claims Act." Pub. L. No. 101-121 § 315, 103 Stat. 701, 744 (1989); Pub. L. No.

[1] Formerly 25 U.S.C. § 450(f).

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101-512, Title III, § 314, 104 Stat. 1915, 1959-60 (1990). This provision is known as Section 314.

Section 314 is an extension of the United States' waiver of sovereign immunity under the FTCA, but only for cognizable tort claims under the FTCA. *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004)("Congress did not intend section 314 to provide a remedy against the United States in civil actions unrelated to the FTCA."). Thus, Section 314 does not affect the United States' sovereignty for constitutional violations, *Bivens* claims, or civil actions unrelated to the FTCA. Because all of Plaintiff's claims against the United States fall into one of these prohibited categories, they must be dismissed.

1. Claim One Impermissibly Asserts a Constitutional Tort Claim against the United States

Claim One is labeled both "Violation of the Fifth Amendment" and "First Amendment Violation." Dkt. No. 63, p. 27. It does not specify against which defendants the claim is asserted, or what facts support a judgment against each defendant. Rather, Plaintiff merely "re-alleges and incorporates" all of the preceding factual allegations. *Id.* Paragraph 112 in Claim One is also confusing in that it provides that the unnamed defendants' actions "would violate Plaintiff's rights under state law, specifically the Fifth Amendment procedural due process requirements…." *Id.* Paragraph 113 cites a United States Supreme Court case, *Armstrong v. United States*, 364 U.S. 40, 49 (1960), which relates to claims under the Fifth Amendment to the United States Constitution. Dkt. No. 63, p. 27. Paragraph

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114 asserts that Plaintiff's actions are protected by the First Amendment of the United States Constitution and under Washington state law. *Id.* at pp. 27-28.[2]

Plaintiff's claims, regardless of whether derived from the First Amendment or Fifth Amendment, allege constitutional violations for which the United States has not waived sovereign immunity under the FTCA. *Meyer*, 510 U.S. at 477-78. Claim One must be dismissed for lack of subject matter jurisdiction over the United States.

2. Claim IV Impermissibly Asserts a *Bivens* Claim against the United States

Claim IV is labeled "First Amendment Retaliation Free Speech Violation(s)," and is asserted "[a]gainst all Defendants, under state and federal law." Dkt. No. 63, p. 29. Plaintiff claims that Defendants Metcalf and McDonnel restricted his First Amendment right of free speech, allegedly through use of a "strategically positioned" gun held by Mr. McDonnell while he was escorted off of the Sauk-Suiattle Reservation. *Id*, ¶ 121. Both defendants have been sued in the individual, rather than official capacities. Dkt. 63, p. 6, ¶¶ 16-17.

Bivens provides a cause of action for damages against federal agents who allegedly violate the Constitution. *Meyer*, 510 U.S. at 473. However, *Bivens* actions are not available against federal agencies or federal agents sued in their official capacities. *Ibrahim v. Dept' of Homeland Security*, 538 F.3d 1250, 1257 (9th Cir. 2008) (citing *Meyer*, 510 U.S. at 485-86; and *Nurse v. United States*, 226 F.3d 996, 1004 (9th Cir. 2000)); *see also Consejo de Desarrollo Economico de Mexicali, A.C. v. U.S.*, 482 F.3d 1157, 1173 (9th Cir. 2007). The

[2] Plaintiff also appears to request declaratory judgment in addition to money damages in Paragraph 114. Dkt. No. 63, p. 28. Declaratory relief is not available against the United States for claims under the FTCA. 28 U.S.C. § 1346(b).

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Supreme Court implied a cause of action against federal officials in *Bivens* in part because a direct action against the United States was not available. *Meyer*, 510 U.S. at 485.

Here, the United States has filed a notice of substitution and certification that defendant Richard McDonnell was acting within the scope of his employment as the Chief of Police for the Sauk-Suiattle Tribe Police Department at all times relevant to Plaintiff's allegations. Dkt. No. 37. Pursuant to the ISDEAA, the United States has substituted itself as the proper party for all common law tort claims asserted against Mr. McDonnell. *Id.* However, this substitution does not apply to constitutional tort claims or *Bivens* claims, as the United States has not waived sovereign immunity for such claims. *Id.* Absent a waiver of sovereign immunity, Plaintiff may not maintain a *Bivens* action against the United States. *Daly-Murphy v. Winston*, 837 F.2d 348 (9th Cir. 1987). Accordingly, Claim IV must be dismissed for lack of subject matter jurisdiction over the United States.

3. The Second Claim VII Impermissibly Asserts a Due Process Claim Against the United States

Plaintiff has numbered two consecutive claims as Claim VII. *See* Dkt. No. 63, pp. 31-32. The second Claim VII is labeled "Fifth Amendment Rigths [sic] Under State and Federal Constitutional and Common Law Torts (& Violation of Procedural Due Process, Under State Law)," and is asserted against "All Defendants." *Id.* at p. 32. Plaintiff asserts that he was denied due process under the Fifth Amendment, resulting in a loss of employment, benefits and other compensation. *Id.* He claims that are defendants are responsible for the deprivation of his Fifth Amendment rights. *Id.*

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For the reasons set forth above, Plaintiff cannot maintain a due process claim against the United States. Plaintiff's claim is identical to the claim asserted in *Meyer*, in which the Federal Savings and Loan Insurance Corporation terminated Meyer from his job as a senior officer. 510 U.S. 471. Meyer claimed that his summary discharge deprived him of a property right without due process of law in violation of the Fifth Amendment. *Id.* The United States Supreme Court held that Meyer's claim was not cognizable under the FTCA because Meyer could not maintain such an allegation under the law of the state where the termination occurred. *Id.* at 477-78. "By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." *Id.* at 478. For the same reasons, the second Claim VII must be dismissed for lack of subject matter jurisdiction over the United States.

B. All Claims Against the United States Should be Dismissed for Failure to State a Claim upon Which Relief May be Granted

Even if the Court finds subject matter jurisdiction over any of the claims against the United States, all four of Plaintiff's claims against the United States should be dismissed for failure to state a claim to relief that is plausible on its face. Because Claim VI – Retaliation and Wrongful Discharge in Violation of Public Policy – is premised in part upon violations of the First and Fifth Amendments, it will be addressed last, following a discussion of the required elements of those two claims.

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1. Claim One Fails to State a Cognizable Legal Theory

Claim One purportedly asserts violation of both the Fifth Amendment and the First Amendment. However, it fails to state the necessary elements of either claim. In order to state a claim against a government employer for violation of the First Amendment, an employee must show (1) that he or she engaged in protected speech; (2) that the employer took "adverse employment action"; and (3) that his or her speech was a "substantial or motivating" factor for the adverse employment action. *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (citing *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996); *Nunez v. City of Los Angeles*, 147 F.3d 867, 874-75 (9th Cir. 1998); *Hyland v. Wonder*, 972 F.2d 1129, 1135-36 (9th Cir. 1992); and *Allen v. Scribner*, 812 F.2d 426, 430–36 (9th Cir. 1987)).

First, the Sauk-Suiattle Indian Tribe is not a government employer for purposes of the First Amendment. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) ("[T]ribes have historically been unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896) (holding that the U.S. Constitution only restricts the federal and state governments, but not tribal governments). The United States is not Plaintiff's employer for purposes of the First Amendment. Rather, the United States has been substituted pursuant to the ISDEAA, but solely for cognizable tort claims under the FTCA. *Snyder*, 382 F.3d at 897. Second, Plaintiff cannot show that he engaged in protected speech, because protected speech relates to the performance of governmental agencies. *Coszalter*, 320 F.3d at 973 (quoting *McKinley v. City*

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of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)). The Sauk-Suiattle Indian Tribe is not a governmental agency for purposes of the First Amendment. Finally, for the same reason, Plaintiff cannot show that a government employer took adverse employment action against him. Thus, Plaintiff's claim that the United States violated his First Amendment right of free speech, or retaliated against him for that speech, fails to state a cognizable legal theory.

2. Claim IV Fails to State a Claim for a *Bivens* Action

Claim IV fails to state a claim for a *Bivens* action. Under *Bivens*, an individual has a cause of action *against a federal official* in his individual capacity for damages arising out of the official's violation of the United States Constitution *under color of federal law or authority*. *Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000) (citing *Applewhite v. United States Air Force*, 995 F.2d 997, 999 n. 8 (10th Cir 1993)) (emphasis in original). However, tribal law enforcement officers are not "federal law enforcement officers" for purposes of the FTCA unless the officer is commissioned by the Secretary of the Interior with a Special Law Enforcement Commission ("SLEC") under the Indian Law Enforcement Reform Act, 25 U.S.C. § 2804, and is enforcing federal law at the time of the activity at issue. *See Dry*, 235 F.3d at 1255 (tribal officers were acting under authority inherent to the Tribe's sovereignty and were not investigative or law enforcement officers for purposes of the FTCA). As a result, Courts have dismissed *Bivens* claims against tribal police officers. *See e.g. Dry*, 235 F.3d at 1255; *Boney v. Valline*, 597 F.Supp.2d 1167, 1177 (D. Nev. 2009); *Black v. United States*, 2013 WL 5214189 at *3 (W.D. Wash. Sept. 17, 2013).

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Plaintiff does not allege that Mr. McDonnell was commissioned as a federal law enforcement officer by the Secretary of the Interior, possessed an SLEC, or was acting under color of federal law when he allegedly detained and expelled Plaintiff from the reservation. Indeed, the United States has previously presented evidence demonstrating that an SLEC had not been issued to Mr. McDonnell. Dkt. No. 38-2, ¶ 11.

Plaintiff's claims relating to Ronda Metcalf, General Manager of the Sauk-Suiattle Tribe, fail for similar reasons. To the extent the ISDEAA applies to her actions at all, Ms. Metcalf is deemed a federal employee solely for purposes of civil actions under the FTCA. It does not extend to confer federal employment status upon her for any civil actions unrelated to the FTCA. *Snyder*, 382 F.3d at 897. Thus, Plaintiff's *Bivens* claim fails to plead sufficient facts to state a claim for relief that is plausible on its face because the constitutional violations he alleges have not been committed by federal officials. Claim IV should be dismissed.

3. Claims One and the second Claim VII Fail to State a Claim for a Fifth Amendment Due Process Violation

Finally, even if the Court had subject matter jurisdiction over Plaintiff's due process claims, Claim One and the second Claim VII fail to state a cognizable due process claim for the same reasons set forth above in relation to Plaintiff's First Amendment claim. Plaintiff's due process claim requires federal action. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) (dismissing Fifth Amendment due process and equal protection claims brought against the

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City of Los Angeles because defendants were not federal actors). The Sauk-Suiattle Tribe, Tribal Council, and Tribal Administration are not federal officials for purposes of the Fifth Amendment. The Fifth Amendment's due process protections do not apply to their actions. *Santa Clara Pueblo*, 436 U.S. at 55-56; *Talton v. Mayes*, 163 U.S. at 382–85. To the extent the ISDEAA confers federal employment status upon any of the tribal defendants at all, it is solely for purposes of cognizable tort claims under the FTCA. *Snyder*, 382 F.3d at 897.

Further, Plaintiff is not a federal employee for purposes of the Fifth Amendment's due process protections, but solely for purposes of claims resulting from the performance of a contract, grant agreement, or any other agreement or compact authorized by the ISDEAA. 25 U.S.C. § 5321(d). Although some public employees have a property right in their employment, plaintiff has not pled the source of any such right he claims to have. To the contrary, Plaintiff previously acknowledged, and the United States demonstrated, that he was an at-will employee of the Sauk-Suiattle Tribe, subject to termination by the Tribe with or without cause. Dkt. No. 33, p. 28, ¶ 93; *see also* Dkt. No. 38-1, pp. 8-9.

4. Claim Six Fails to State a Claim for Wrongful Discharge in Violation of Public Policy

Claim Six fails to state the necessary elements of a Washington State tort claim for wrongful discharge in violation of public policy. Washington's common law tort of wrongful discharge in violation of public policy is a narrow exception to the terminable-at-will employment doctrine. *Danny v. Laidlaw Transit Svcs., Inc.*, 165 Wn.2d 200, 207 (2008). Whether Washington State has established a clear mandate of public policy is a question of

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law. *Id.* In determining whether a clear mandate of public policy is violated, courts must inquire whether the employer's conduct contravenes the letter or purpose of "a constitutional, statutory, or regulatory provision or scheme." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232 (1984) (quoting *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (1982)). "The wrongful discharge tort is narrow and should be 'applied cautiously.'" *Danny*, 165 Wn.2d at 208 (quoting *Sedlacek v. Hillis*, 145 Wn.2d 379, 389 (2001)). The employee has the burden of proving his dismissal violates a clear mandate of public policy. *Thompson*, 102 Wn.2d at 232. Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened. *Id.*

To sustain the tort of wrongful discharge in violation of public policy, an employee must establish: (1) the existence of a clear public policy (the *clarity* element); (2) that discouraging the conduct in which she or he engaged would jeopardize the public policy (the *jeopardy* element); (3) that the public-policy-linked conduct caused the dismissal (the *causation* element); and (4) the employer must not be able to offer an overriding justification for the dismissal (the *absence of justification* element). *Danny*, 165 Wn.2d at 207 (internal citations omitted).

Claim Six fails to provide the United States with adequate notice of the public policy at issue (the clarity element); how the United States' conduct jeopardized that policy (the jeopardy element); or facts supporting Plaintiff's allegations that such conduct caused his dismissal (the causation element). Claim Six provides as follows:

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> 125. Plaintiff re-alleges and incorporates the allegations of the preceding paragraphs to the extent relevant, as if fully set forth herein. These actions constituted retaliation and wrongful discharge under public policy (including federally [sic] statutory rights and polices set forth above) and in violation of Plaintiff's rights under the 1st, 5th and 14th amendments to the United States Constitution. This discharge constituted both a constitutional tort under Bivens and other authority and the wrongful discharged in violation of public policy under Washington law.
>
> 126. As a direct and proximate result of Defendants' actions, Plaintiff suffered injuries entitling him to recover compensatory and punitive damages and declaratory and injunctive relief against the individual defendants.

Dkt. No. 63, p. 31, ¶¶ 125-26. These allegations are merely threadbare recitals of the elements of the claim, without any supporting factual allegations. *Twombly*, 550 U.S. at 555. There is no indication of the federal statutory rights or policies Plaintiff is referencing in Claim Six, nor how the United States' conduct jeopardized those policies. As such, there is no way for the Court to assess, as a matter of law, whether such federal statues or policies establish a clear mandate of public policy in Washington State. *Danny*, 165 wn.2d at 207.

Further, for the reasons set forth above, Plaintiff has not adequately plead First Amendment or Fifth Amendment claims, so the conclusory assertion that "[t]hese actions" violated the First and Fifth Amendments fails to provide the United States with notice of the basis for his contention that his rights were violated. Additionally, Plaintiff maintains that the actions violated the Fourteenth Amendment, but it is not clear what type of claim Plaintiff is asserting under the Fourteenth Amendment. Plaintiff has not alleged the involvement of any state actors or that any defendants were acting under color of state law. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543, n. 21 (1987) (Fourteenth Amendment applies to actions by a State); *see also Morse v. North Coast Opportunities, Inc.*,

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118 F.3d 1338, 1343 (9th Cir. 1997) ("[B]y its very terms, § 1983 precludes liability in federal government actors."). Because the Fourteenth Amendment does not apply to the federal actors, it follows that the United States cannot be held liable for violating a public policy mandate set forth in the Fourteenth Amendment.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's claims against the United States should be dismissed.

DATED this 11th day of April, 2018.

Respectfully submitted,

ANNETTE L. HAYES
United States Attorney

s/ *Tricia Boerger*
TRICIA BOERGER, WSBA #38581
Assistant United States Attorney
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206-553-4067
Email: tricia.boerger@usdoj.gov

Attorney for the United States of America

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on April 11, 2018, I electronically filed said pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

Richard L. Pope, Jr.	rp98007@gmail.com
Jack W. Fiander	towtnuklaw@msn.com
Thomas Nedderman	tnedderman@floyd-ringer.com
William Dow	wdow@floyd-ringer.com

I further certify that on April 11, 2018, I mailed by United States Postal Service said pleading to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

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Dated this 11th day of April, 2018.

/Julene Delo
JULENE DELO, Legal Assistant
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206-553-4067
Email: julene.delo@usdoj.gov