

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

Gladys D. Dallas,

Plaintiff,

v.

Case No. 18-CV-1657

Tehassi Hill, Brandon Stevens, Trish King,
Lisa Summers, Daniel Guzman King, David P.
Jordan, Kirby Metoxen, Ernie Stevens III, and
Jennifer Webster,

Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Dated January 22, 2019

ONEIDA LAW OFFICE

James R. Bittorf
Wis. State Bar No. 1011794
jbittorf@oneidanation.org
Kelly M. McAndrews
Wis. State Bar No. 1051633
kmcandre@oneidanation.org
P.O. Box 109
Oneida, WI 54155
Phone: (920) 869-4327
Fax: (920) 869-4065

Attorneys for Defendants

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Introduction

In her Amended Complaint, Plaintiff alleges Defendants, acting as members of the Oneida Business Committee, violated her right to freedom of speech under the First Amendment to the United States Constitution, the Indian Civil Rights Act (“ICRA”), 25 U.S.C. §§ 1301-1303, the Oneida Constitution and Iroquoian law. ECF 11, pp. 1, 4. She asserts this alleged violation is actionable under 42 U.S.C. §§ 1983 and 1985, and asks the Court to order the Oneida Business Committee to convene a meeting of the Oneida General Tribal Council so that she may address that body regarding her petition for a \$5,000 per capita payment. *Id.* at 9, 11. She also seeks punitive damages in the amount of \$10,000 from each Defendant. *Id.* at 11. If adopted, Plaintiff’s per capita proposal would effectively bankrupt the Oneida Nation and lead to the shuttering of tribal governmental programs and services. ECF 11-1, pp. 17-28.

In their Memorandum in Support of Motion to Dismiss, Defendants demonstrated, among other things, that (1) the First Amendment is not applicable to them as tribal officials, (2) ICRA does not provide a federal cause of action for Plaintiff, (3) section 1983 does not apply to them as tribal officials acting under color of tribal law, (4) section 1985 is not implicated by the facts alleged in Plaintiff’s Amended Complaint, (5) the Court lacks jurisdiction to hear claims arising under tribal law, and (6) Plaintiff’s suit is an official-capacity suit and her claim for damages is barred by the doctrine of tribal sovereign immunity. ECF. 16, pp. 12-21.

In her Brief in Opposition to Defendants’ Motion to Dismiss, Plaintiff does not contest that the First Amendment is not applicable to Defendants. ECF 20, p. 5 (inapplicability of First Amendment is a “red herring”). Instead, she claims the gravamen of her complaint is that Defendants violated her rights under the Oneida Constitution, *id.* at 2-4, 6, and asserts ICRA provides a cause of action and, under a supposed “net effect” rule, section 1983 serves as a

“catchall” which authorizes federal courts to hear claims arising under any law within the territorial jurisdiction of the United States. *Id.* at 2-4, 6-7, 9. She also asserts her suit is an individual-capacity suit and Defendants are not protected by sovereign immunity because they acted outside the scope of their authority. *Id.* at 2, 6, 8. While imaginative, Plaintiff’s arguments fundamentally misapprehend the controlling law governing federal jurisdiction and tribal sovereign immunity, and Plaintiff’s Amended Complaint must be dismissed.

Argument

I. Plaintiff Misapprehends Basic Tenets of Federal Jurisdiction.

“Federal courts are courts of limited jurisdiction. The circumscribed nature of the federal judiciary’s jurisdiction is a function of the restrictions placed upon it by both the United States Constitution and federal statutory law, both of which must authorize a federal court to hear a given type of case.” *Int’l Union of Operating Eng’rs, Local 150 v. Ward*, 563 F.3d 276, 280 (7th Cir. 2009) (citations omitted). The Constitution only permits federal courts “to hear certain claims, including those claims between parties of diverse citizenship and, most importantly for present purposes, ‘federal question’ claims, or those ‘arising under’ the laws of the United States.” *Id.* (citing U.S. Const. art. III, § 2, cl. 1). The Constitution also empowers Congress to further limit the jurisdiction of federal courts, and Congress has historically done so. *Id.* at 281. “Today, federal question jurisdiction is codified at 28 U.S.C. § 1331,” and “[a]lthough the language of § 1331 is similar to that of Article III, courts have interpreted § 1331 much more narrowly than its constitutional counterpart.” *Id.* (citations omitted). “Thus, when the basis of the action is a federal statute, a federal cause of action must exist as well for a federal court to hear a given claim; the general grant of federal question jurisdiction contained in § 1331 without a federal cause of action is not enough.” *Id.* (citations omitted). Plaintiff’s arguments

contravene these basic tenets, and Plaintiff otherwise ignores or misapprehends the controlling law.

First, Plaintiff construes section 1983 as a grant of jurisdiction authorizing federal courts to hear claims arising under any law within the territorial jurisdiction of the United States. Plaintiff would thus have the Court hear claims arising under the Oneida Constitution because “Indian country” is located within the territory of the United States. ECF 11, pp. 1-2. There is no support in the law for this approach, and the Court’s jurisdiction is limited to “civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

Second, Plaintiff erroneously equates tribal law with territorial law, and claims Defendants are amenable to suit under section 1983 because they were acting under color of territorial law. ECF 11, pp. 5 and 7. The law is to the contrary. Tribal officials act under color of tribal law, and section 1983 does not extend to suits against tribal officials acting under color of tribal law. *See, e.g., Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006); *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).

Third, Plaintiff asserts ICRA provides a federal cause of action for her, although she is not seeking habeas corpus relief, and the Supreme Court has determined that ICRA does not create a federal cause of action other than habeas corpus. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (“Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress’ failure to provide remedies other than habeas corpus was a deliberate one.”) (citation omitted). In the absence of a federal cause of action, there is no federal jurisdiction over Plaintiff’s ICRA claim. *Id.*; *Int’l Union of Operating Eng’rs*, 563 F.3d at 281.

Fourth, Plaintiff erroneously asserts the Court possesses jurisdiction over her claims as a matter of equal protection and due process. ECF 11, pp. 1-2, 5, 7. Plaintiff seems to be suggesting the Court must exercise jurisdiction to afford her equal protection of the laws and due process. This assertion is baseless, as the Court may only exercise jurisdiction over claims arising under federal law for which a federal cause of action exists, and Plaintiff has stated no such claims. To the extent Plaintiff is attempting to assert equal protection and due process claims against Defendants, it should be noted that Plaintiff has not alleged that Defendants unlawfully discriminated against her, or that Defendants denied her liberty or property without due process of law, and any such claims fail for the same reasons Plaintiff's First Amendment claims fail, i.e., the Bill of Rights does not apply to Indian tribes and tribal officials, and ICRA does not create a federal cause of action for alleged violations of its provisions. *See* ECF 16, pp. 12-15.

Finally, Plaintiff references 42 U.S.C. § 1985 as a source of jurisdiction, but again fails to demonstrate how that statute is implicated by the facts alleged in her Amended Complaint.

II. Plaintiff Misapprehends Basic Tenets of Sovereign Immunity.

The Supreme Court has stated the distinction between official-capacity and individual-capacity suits is “paramount” in determining whether the sovereign is the real party in interest and a suit is therefore barred by sovereign immunity. *Lewis v. Clarke*, 137 S.Ct. 1285, 1291-92 (2017) (“In an official-capacity claim, the relief sought is only nominally against the official and is in fact against the official’s office and thus the sovereign itself.”) In this case, Plaintiff asks the Court to compel Defendants to act in their official capacities as members of the Oneida Business Committee to convene a General Tribal Council meeting and to expend tribal funds for

that purpose. The relief she seeks therefore is in fact against their offices and thus the Oneida Nation itself, and her suit is an official-capacity suit and her claim for damages is barred. *Id.*

Plaintiff asserts Defendants acted outside the scope of their authority under ICRA and the Oneida Constitution and as individuals are the “real target” of the lawsuit. ECF 20, pp. 2, 6, 8. Plaintiff thereby conflates two separate concepts: official-capacity suits for declaratory and injunctive relief to remedy ongoing violations of federal law under *Ex parte Young*, 209 U.S. 123 (1908), and individual-capacity suits for damages against governmental officials and employees for actions within the scope of their employment like the lawsuit at issue in *Lewis v. Clarke*. Neither concept furthers Plaintiff’s cause.

While sovereign immunity might not bar an official-capacity suit against a tribal official for declaratory and injunctive relief to remedy an ongoing violation of federal law, Plaintiff is not asserting an ongoing violation of federal law other than ICRA, and ICRA does not create a federal cause of action for Plaintiff. *See Santa Clara Pueblo*, 436 U.S. at 61, 69-70. Plaintiff also cannot base an official-capacity suit on an alleged violation of tribal law, because the Court lacks jurisdiction to adjudicate claims arising under tribal law. *See, e.g., Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (action requiring interpretation of tribal constitution and tribal law is not within the jurisdiction of the district court). On the other hand, while sovereign immunity might not bar an individual-capacity suit for damages against tribal officials or employees for actions within the scope of their employment, the relief Plaintiff seeks runs primarily against the Oneida Nation, as discussed above, and Plaintiff’s lawsuit is not an individual-capacity suit. Accordingly, her claims fail for lack of jurisdiction and are barred by sovereign immunity.

Conclusion

For all the foregoing reasons and the reasons set forth in Defendant's Memorandum in Support of Motion to Dismiss, this honorable Court should dismiss Plaintiff's Complaint.

Respectfully submitted this 22nd day of January, 2019.

ONEIDA LAW OFFICE

By: s/ James R. Bittorf

James R. Bittorf
Wis. State Bar No. 1011794
jbittorf@oneidanation.org
Kelly M. McAndrews
Wis. State Bar No. 1051633
kmcandre@oneidanation.org
P.O. Box 109
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