UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAJU A.T. DAHLSTROM, Plaintiff, v. UNITED STATES OF AMERICA, et al. Defendants.	NO. 16-CV-01874-RSL INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT NOTED ON MOTION CALENDAR: JANUARY 4, 2019

I. RELIEF REQUESTED

Defendants Norma Ann Joseph, Ronda Kay Metcalf, Richard M. McDonnell, George Bailey, Christine Marie Jody Morlock, Susan Harriet Yurchak, and Robert Larry Morlock (hereinafter "Individual Defendants") hereby move the Court for summary judgment of the claims against them. The Individual Defendants first ask the Court to strike Plaintiff's operative complaint and enter judgment against him for his noncompliance with Fed. R. Civ. P. 8 and the Court's Order requiring a straightforward Complaint. (*See* Dkt. #62). Plaintiff's complaint continues to be a convoluted maze of allegations and purported claims that prevents the effective litigation of this case.

Even if the Court declines dispositive sanctions, the Individual Defendants cannot be liable as a matter of law. There can be no reasonable dispute that these defendants' acts and

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

omissions, if any, were taken under tribal law rather than the color of state or federal law, precluding any 42 U.S.C. § 1983 or *Bivens* claims. Additionally, Plaintiff's wrongful discharge in violation of public policy claim is both legally and factually invalid against the Individual Defendants, both because the cause of action does not apply to supervisors in their individual capacities, and because Plaintiff does not even allege that many of the Individual Defendants took a retaliatory act against his employment. Plaintiff's retaliation claim under the Affordable Care Act should also be dismissed because he failed to properly file a complaint within the applicable statute of limitations, and because there is no evidence supporting the claim in any event.

II. STATEMENT OF FACTS

Plaintiff Raju Dahlstrom, a serial litigator, brings this retaliation case arising out of his termination from the Sauk-Suiattle Indian Tribe ("Tribe"), where he served in a variety of roles. Plaintiff alleges that he was fired for whistleblowing about the medical practices at the tribal health clinic. The Individual Defendants vigorously deny Plaintiff's claims and aver that he was an at-will employee who was terminated because he was an ineffective and difficult coworker.

A. Background.

Plaintiff was initially hired as a social worker for the Tribe's Indian Child Welfare department in 2010. (Nedderman Decl., Ex. 1). He was promoted to run that department the following year. (*Id.*, Ex. 2). On April 30, 2015, Plaintiff was appointed the Tribe's Interim Health and Social Services ("HSS") Director. (*Id.*, Ex. 3) He became the (non-interim) Director in July 2015. (*Id.*, Ex. 4). Plaintiff was at all times an at-will employee, which he acknowledged means that the Tribe "may terminate [his] employment at any time, with or without cause or advanced notice." (*Id.*, Ex. 5).

Plaintiff's tenure as a director was rife with acrimony. For example, Plaintiff spread false information about Defendant Christine Morlock, a naturopath who worked at the tribal health clinic, including that her non-tribal patient suffered a maternal death. He was openly hostile to Dr. Morlock, creating a hostile working environment with her. And he, by his own

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SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

admission, quarreled with his supervisor, General Manager Ronda Metcalf. Defendants will put on evidence that Plaintiff was a difficult employee whose performance was inadequate.

Eventually, on October 22, 2015, Plaintiff was placed on administrative leave with pay. (*Id.*, Ex. 6). He was directed to remain out of the office and not perform official business with the tribe while on leave. (*Id.*). Plaintiff was terminated by the Tribe's Human Resources Director, Defendant George Bailey, on November 16, 2015. (*Id.*, Ex. 7). The Tribal Council approved this termination by a 5-0 vote with one abstention on December 4, 2015. (*Id*, Ex. 8). Metcalf sent Plaintiff a letter confirming his termination on December 8, 2015. (*Id*, Ex. 9).

B. Procedural history.

Plaintiff filed two cases arising from his termination, this retaliation case, and a False Claims Act *qui tam* case currently pending before the Honorable James L. Robart.[1] When Plaintiff filed this case on December 7, 2016 he alleged a potpourri of tort claims (including defamation, outrage, and negligence) in addition to a retaliation claim. (*See* Dkt. #1). Plaintiff amended his Complaint on August 14, 2017, still asserting many of the same claims. (Dkt. #33).

The United States brought a Rule 12 Motion to Dismiss on September 1, 2017. (Dkt. #38). Plaintiff sought leave to file a Second Amended Complaint shortly thereafter. (Dkt. #47). The Court granted the United States' motion in part, but allowed Plaintiff to file an amended complaint, provided that it complied with Rules 8 and 10. (*See* Dkt. #62). The Court's ruling required that Plaintiff "avoid repetition," "exercise reasonable care," and "be specific." (Dkt. #62 at 9). In particular, the Court cautioned Plaintiff to avoid duplicative actions, specifically state which causes of action applied to which defendants ("rather than lumped into the phrase 'Individual Defendants'"), and to abide by Rule 8's requirement of "simplicity, directness, and clarity." (Dkt. #62 at 9-10). The Court also noted that if an acceptable amended complaint was

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

not filed within 30 days of its order, it "will consider sanctions, including dismissal." (Dkt. #62 at 11).

Plaintiff filed his Second Amended Complaint abiding by some—but not all—of the Court's instructions. (*See* Dkt. #63). Plaintiff's Second Amended Complaint sets forth eight largely repetitious claims against the remaining defendants:

1. Violation of Fifth Amendment (First Amendment Violation – Retaliation for Exercise of Free Speech);

2. Retaliation (First Amendment Violation – Retaliation for Exercise of Free Speech) and violations of the Affordable Care Act ("ACA") retaliation provisions;

3. Violation of Plaintiff's rights to equal protection by all defendants;

4. First Amendment Retaliation, Free Speech Violation, against Metcalf and McDonnell;

5. Retaliation under the First, Fifth, and Fourteenth Amendments, "for Engagement in Violating Plaintiff's Protected Activities and Free Speech Rights," against "Individual Defendants";

6. Retaliation and wrongful discharge under public policy, including the First, Fifth, and Fourteenth Amendments;

7. Retaliation and wrongful discharge under state and federal laws or under state common law torts, with another reference to the ACA; and

8. Denial of Fifth Amendment due process rights by losing his job.

(*See* Dkt. #63 at 27-32).

The Individual Defendants discern that Plaintiff's eight claims can apparently be consolidated into only a few discrete claims: (1) retaliation for exercise of free speech; (2) failure to provide due process; (3) retaliation in violation of the ACA; and (4) wrongful discharge against public policy. Many of his original, garden variety tort claims are no longer asserted against Defendants. Despite this, many of his factual allegations from prior complaints—irrelevant to the narrowed claims—remain.

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III. EVIDENCE RELIED UPON

The Individual Defendants rely upon the declaration of their attorney Thomas B. Nedderman in bringing this Motion.

IV. AUTHORITY AND ARGUMENT

A. Standard of Review.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In other words, "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

Mere allegation and speculation do not create a factual dispute for purposes of summary judgment. *See Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996). The nonmoving party may not merely state that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of evidence to support its claim. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Asso.*, 809 F.2d 626, 630 (9th Cir. 1987). The nonmoving party must instead produce at least some significant probative evidence tending to support the complaint. *See id.* If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323-24.

B. The Court should consider dismissing this action for Plaintiff's failure to adhere to its prior Order.

As a preliminary matter, the Court should consider assessing dispositive sanctions against Plaintiff for his continued failure to provide a complaint that abides by Rule 8's

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TEL 206 441-4455
FAX 206 441-8484

requirements of simplicity, directness, and clarity. (*See* Dkt. #62 at 10) (citing *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996)). Plaintiff's 34-page operative complaint, despite being perhaps the most accessible one he has filed to-date, is nevertheless extremely convoluted, forcing the defendants (and the Court) to create their own scorecard(s) to make sense of the unorganized allegations therein.

Plaintiff's Second Amended Complaint violates many of the requirements the Court ordered. For example, Plaintiff did not always specifically name the parties (rather than "All Defendants" or "Individual Defendants") allegedly liable under each cause of action, as the Court ordered. (*Compare* Dkt. #62 at 9:18-22 *with* Dkt. #63 at 29-32). Additionally, Plaintiff has duplicated claims in contravention of the Court's mandate; despite listing eight total claims, there seem to only be four discrete theories of liability. (*Compare* Dkt. #62 at 9:14-17 *with* 27-32). This repetition is not only wasteful and burdensome, it makes Plaintiff's actual claims unclear to defendants, limiting their ability to fully address and defend against them. This runs contrary to the text and spirit of Rule 8. *See United States ex rel. Dattola v. Nat'l Treasury Emps. Union*, 86 F.R.D. 496, 499 (W.D. Pa. 1980) (dismissing case with prejudice because plaintiff ignored prior opportunities to amend pleadings, and noting that "[t]he purpose of the Rule 8(a) requirement of a plain and simple statement of the claim is to give the defendant fair notice of the charges so that a meaningful response to the pleading may be filed.").

The Court gave Plaintiff an order to abide by Rule 8, providing specific instructions for doing so. Plaintiff's Complaint, while an improvement on prior versions, still violates both Rule 8 and the Court's Order—sometimes explicitly. This substantially prejudices the defendants. The Individual Defendants therefore respectfully request the Court "consider sanctions, including dismissal," as it forewarned its prior Order. (Dkt. #62 at 11).

C. No Individual Defendant acted under color of state law, rendering Plaintiff's § 1983 claims against the Individual Defendants void.

Even if the Court declines dispositive sanctions, it should still dismiss Plaintiff's suit on legal grounds. 42 U.S.C. § 1983 affords a "civil remedy" for deprivations of federally protected

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TEL 206 441-4455
FAX 206 441-8484

rights caused by persons acting under color of state law without any express requirement of a particular state of mind. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L.Ed.2d 420 (1981) (emphasis added). "The elements of a § 1983 action are: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Johnson v. Hawe*, 388 F.3d 676, 681 (9th Cir. 2004) (citation and internal quotation marks omitted). § 1983 "does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by government officials." *Panagos v. Towery*, 2011 U.S. Dist. LEXIS 56405, at *9 (W.D. Wash. May 24, 2011).

The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L.Ed.2d 40 (1988). Courts "start with the presumption" that conduct is not state action, and plaintiffs bear the burden of establishing state action. *See Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011).

Whether a defendant acts under color of state or tribal law "*is* a necessary inquiry for the purposes of establishing the essential elements of [a] § 1983 claim." *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015). With respect to suits against the officers in their "individual capacities," it has been held that "Native American tribes and those acting under tribal law do not act under color of state law within the meaning of § 1983." *Chapoose v. Hodel*, 831 F.2d 931, 934-35 (10th Cir. 1987) (tribal action cannot be equated to state or territorial action in order to satisfy the state action requirement which is a pre-requisite to suit under § 1983) (emphasis added). The Ninth Circuit has repeatedly held that "actions under § 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law." *Pistor*, 791 F.3d at 1114; *Bressi v. Ford*, 575 F.3d 891, 895 (9th Cir. 2009)

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(plaintiff cannot succeed against tribal officers for "deprivation of constitutional rights to the extent that the Officers were acting under color of tribal law"); *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989); *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).

Here, despite an maze of conclusory, false, and extraneous allegations, Plaintiff only asserts a few discrete allegedly wrongful acts against him—(1) his termination; (2) the lack of "due process" after his termination; and (3) Richard McDonnell's "forced escort of him" following his termination. Although Plaintiff's operative complaint states that "defendants acted under color of state law," there is no evidence supporting this assertion. (Dkt. #63 at 7:26). In fact, Plaintiff's operative complaint makes no supporting factual allegations that would support this conclusion.

As to the first two discrete acts, the few Individual Defendants involved in Plaintiff's termination could not have been acting under color of state law when making this tribal personnel decision. The Ninth Circuit has previously held that tribes possess the ability to "make at least certain employment decisions without interference from other sovereigns." *Eeoc v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001). Without evidence, Plaintiff's general allegations as to Defendant acting under color of state law is insufficient. And, there can be no reasonable argument that the Tribal Council, when terminating Plaintiff, was acting on its own authority and not pursuant to some state law. *Cf. Dodge v. Nakai*, 298 F. Supp. 17, 21 (D. Ariz. 1968) (defendants acting under color of authority vested in them by Tribal Council order are not "under color of *state* law") (emphasis in original). Accordingly, without any state involvement, Plaintiff cannot plausibly support a § 1983 retaliation claim based on his termination or "due process" concerns thereafter.

The same can be said of Plaintiff's spurious allegation that Defendant McDonnell "silenced [him] by a barrel of the gun." (Dkt. #63 at 30). Outlandishness aside, Plaintiff does

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FAX 206 441-8484

not specifically tie this alleged act to the enforcement of any state law. Nor could he, as control over tribal lands—including expulsion therefrom—is within the province of the Tribe's sovereignty. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-47, 102 S. Ct. 894, 71 L.Ed.2d 21 (1982) (tribal non-member's "presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose," and permission to enter tribal land does not prohibit tribe from placing "other conditions on the non-Indian's conduct or continued presence on the reservation"). Even taking Plaintiff's allegations as true, there is no reasonable argument that McDonnell was simply removing Plaintiff from tribal grounds after his termination, not enforcing any state law. Accordingly, any § 1983 claim should be dismissed.

D. No Individual Defendant acted under color of federal law, invalidating Plaintiffs' referenced—but not specifically pleaded—*Bivens* claim(s).

Plaintiff's operative complaint also forwards a *Bivens* claim against the Individual Defendants arising from his alleged wrongful discharge. (*See* Dkt. #63 at 30).

Actions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*. *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991). In order to state a *Bivens* claim, "there must exist some interdependence" between the federal government and the tribal employees during the operation of the challenged action, here Plaintiff's termination. *Bressi*, 575 F.3d at 898 (holding that mere presence of federal authorities at tribal roadblock did not convert tribal official into federal official). The Ninth Circuit has previously held that where a federal government does not profit from any alleged constitution violation, there is no "symbiotic relationship" between the non-government entity and federal government that is required by *Bivens*. *See Morse v. N. Coast Opportunities*, 118 F.3d 1338, 1343 (9th Cir. 1997). Tribal defendants are not bound by the United States Constitution. *Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000) (citing *Talton v. Mayes*, 163 U.S. 376, 382-85, 41 L. Ed. 196, 16 S. Ct. 986 (1896) (holding that the U.S. Constitution only restricts the federal and state governments, but not tribal governments)).

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Plaintiff's *Bivens* claims must be dismissed for the same reasons as his § 1983 claims. Although Plaintiff blanketly asserts once in his operative complaint that "Defendants' retaliation … was wantonly or oppressively done, under state and federal law," he provides no specific evidence or even allegations to support this. *Cf. Dry*, 235 F.3d at 1255 (rejecting unsupported allegation of federal involvement without evidence). To the contrary, Plaintiff states that it was the "Individual defendants on the tribal council" who "failed to reverse" his termination, not state or federal entities. (*See* Dkt. #63 at 15). The Court should reject any *Bivens* claim just as it should reject any § 1983 claim against these tribal acts.

E. Even if Plaintiff could show concerted action with state or federal actors, he was not denied any "right, privilege, or immunity" afforded by the laws or Constitution of the United States.

In addition to the lack of specific evidence showing any adverse employment action was taken under color of state or federal law, Plaintiff's § 1983 and *Bivens* claims fail because he was never denied a federally afforded right.

In order to prevail under § 1983 or *Bivens*, Plaintiff must show "that the conduct deprived the claimant of some right, privilege, or immunity protected by the constitution or the laws of the United States." *Leer v. Murphy*, 844 F.2d 628, 632 (9th Cir. 1988). "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959). "Courts typically have held that this right is implicated only by government interference that is direct and unambiguous, as when a city official demands that a restaurant fire its bartender … or a state agency explicitly threatens to prosecute a private company's clients if they continue to contract with the company." *Mead v. Indep. Ass'n*, 684 F.3d 226, 232 (1st Cir. 2012) (citations omitted); *see also Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987) (determining that an individual may have a protected property interest in private employment when he is deprived of his employment through government conduct).

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Here, Plaintiff has no evidence that any act or omission taken under state or federal law caused him to lose his employment. Even if there were such an act or omission, Plaintiff would lack the critical "direct and unambiguous" nexus between any such action and his alleged adverse employment consequence. Indeed, Plaintiff has not even alleged that any (non-Tribal) government actor impacted his employment or was otherwise involved in the retaliation/termination, other than his blanket assertions that "defendants acted under color of state law." (Dkt. #63 at 7). *Cf. Watkins v. Consol. Eng'g Labs. Inc.*, 2015 U.S. Dist. LEXIS 97698, at *11 (D. Haw. July 27, 2015) (plaintiff's allegations regarding termination from private employment "wholly separate" from his allegations against municipal employee). Thus, without any evidence of federal or state action against Plaintiff's employment, his § 1983 and *Bivens* claims necessarily fail.

F. Plaintiff's wrongful discharge in contravention of public policy claim also fails as a matter of law.

Plaintiff also asserts a wrongful discharge claim under Washington law. Under the common law, an employer can fire an at-will employee (as Plaintiff was at the Tribe) for any reason without incurring liability. *Weiss v. Lonnquist*, 293 P.3d 1264, 1268 (Wash. Ct. App. 2013). An exception to this rule has developed, providing that employees may not be discharged for reasons that contravene public policy. *Id.* The exception is a narrow one, and courts must "proceed cautiously." *Id*. (citing *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, Wash. 1984)).

1. Washington law does not allow for the personal liability of supervisors in wrongful discharge claims.

The Individual Defendants could not find any Washington cases directly addressing whether a supervisor may be held personally liable under the public policy discharge exception, though the Washington Court of Appeals previously affirmed dismissal of a wrongful discharge claim brought against an entity other than the aggrieved worker's employer. *See Awana v. Port of Seattle*, 89 P.3d 291 (Wash. Ct. App. 2004). In *Awana*, the plaintiffs were asbestos

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FAX 206 441-8484

abatement contractors employed by a company that contracted with the Port of Seattle. *Id.* at 291-92. After being asked to perform work that could expose them to asbestos, the plaintiffs refused to work and ever eventually terminated. *Id.* They eventually filed a lawsuit against both their employer and the Port of Seattle alleging wrongful termination. *Id.* The Washington Court of Appeals affirmed the trial court's dismissal of the Port on summary judgment, noting that "[a] whistleblower action for wrongful discharge in violation of public policy therefore lies against" the plaintiffs' employer, rather than the Port. *Id.* at 294. It continued: "The wrongful discharge doctrine must be extended with caution. Perhaps a case can be made for its application outside the traditional employment context. But the doctrine is a narrow and specialized craft, and should not be sent adventuring when no rescue appears to be called for." *Id.* at 294-95.

Other Ninth Circuit states have also held that only an employer can be liable for wrongful discharge in violation of public policy. *See, e.g.*, *Draper v. Astoria Sch. Dist. No. 1C*, 995 F. Supp. 1122, 1126 (D. Or. 1998) ("[U]nder Oregon law, the employer is the only proper defendant in a claim for common law wrongful discharge."); *Reno v. Baird*, 18 Cal. 4th 640, 664, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 (1998) (plaintiff "may not sue her [supervisor] individually for wrongful discharge in violation of public policy").

There is no basis in Washington law for the extension of individual liability to any of Plaintiff's supervisors here. Doing so would not be a "cautious extension" as Washington courts have required, particularly under these facts. The Court should dismiss any such individual capacity claim.

2. Sovereign immunity should bar any such suit in any event.

Moreover, the Court should decline to apply Washington wrongful discharge law to an Indian employer. Indian tribes enjoy sovereign immunity over their business and government activities. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). "When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe." *Id.* Sovereign immunity promotes the "goal of Indian self-government, including

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its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987). In *Allen*, the plaintiff averred he was discharged in retaliation for reporting rats in a tribal casino restaurant. The Ninth Circuit affirmed a lower court's dismissal of the plaintiff's claims against the Tribe and Casino on sovereign immunity grounds. *Id.* at 1048.

Recent U.S. Supreme Court precedent does not allow *carte blanche* individual capacity suits against tribal officials as an end-around on sovereign immunity. Rather, courts must determine who is the real party in interest (i.e., the individual or the tribe) to determine whether sovereign immunity applies. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1292, 197 L.Ed.2d 631 (2017). A case in which the real party in interest is the sovereign is one where "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id.* at 1291. Courts look to whether the suit will require "action by the sovereign or disturb the sovereign's property," while being cognizant of the concern that plaintiffs not improperly circumvent sovereign immunity. *See id.* (citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949)).

Other courts have held that suits against defendant supervisors in their individual capacities are improper where there is no allegation that they took any actions outside their supervisory roles. *See, e.g., Buntin v. City of Bos.*, 857 F.3d 69, 76 (1st Cir. 2017) (citing *Lewis*); *Oden v. Oktibbeha Cty.*, 246 F.3d 458, 464 (5th Cir. 2001) ("[W]hen a plaintiff asserts a cause of action under § 1981 for discrimination in the terms and conditions of a municipal employment contract, the proper defendant is the government employer in his official capacity."); *see also Burks v. Salazar*, 2012 U.S. Dist. LEXIS 171329, at *3 (E.D. Cal. Dec. 3, 2012) (explaining that in discrimination in federal employment lawsuits, "while a Title VII plaintiff may bring claims against the head of an agency in his or her official capacity, federal officials cannot be sued in their individual capacities").

Here, there is no doubt that the real party of interest for the wrongful discharge claim is the Tribe, not the Individual Defendants. Whereas in *Lewis* the employee at issue was a casino

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employee driving off the reservation ferrying customers to their homes, the alleged acts herein implicate the very heart of tribal governance—it was the Tribal Council that terminated Plaintiff's employment. Allowing Plaintiff to assert individual capacity state law claims against tribal employees would be an impermissible circumvention of sovereign immunity specifically cautioned in *Lewis.* And, of course, there is no evidence that either Congress or the Tribe waived tribal sovereign immunity from suit. *See Sanderford v. Creek Casino Montgomery*, 2013 U.S. Dist. LEXIS 3750, at *7 (M.D. Ala. Jan. 10, 2013) ("As with workers' compensation claims, no authority supports the proposition that Congress has abrogated tribal sovereign immunity from suits alleging wrongful or retaliatory termination.").

Thus, because no Individual Defendant can be personally liable for wrongful discharge under Washington law, and because the wrongful discharge claim is truly against the Tribe and not any particular defendant in his or her individual capacity, the Court should dismiss Plaintiff's wrongful discharge claim.

G. There is no supporting evidence that most of the Individual Defendants could have retaliated against Plaintiff in any event.

§ 1983 claims against a government official for First Amendment retaliation require that an employee demonstrate: "(1) that he or she engaged in protected speech; (2) that the [official] took adverse employment action; and (3) that his or her speech was a substantial or motivating factor for the adverse employment action." *Grosz v. Lassen Cmty. Coll. Dist.*, 360 F. App'x 795, 797 (9th Cir. 2009) (citing *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003). Although the retaliation "need not be particularly great in order to find that rights have been violated … Mere threats and harsh words are insufficient." *Nunez v. City of L.A.*, 147 F.3d 867, 875 (9th Cir. 1998).

Each defendant may only be liable for misconduct directly attributed to him or her because there is no vicarious or respondeat superior liability under § 1983. *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Berch*, 973 F. Supp. 2d 1082, 1103 (D. Ariz. 2013). "Where a complaint alleges no specific act or conduct on the part of the defendant and

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the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed." *Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974) (dismissing § 1983 suit, notwithstanding it being *pro se*, because no wrongful acts were attributed to defendant).

1. Richard McDonnell, the Tribe's Chief of Police.

Plaintiff's § 1983 retaliation claim against most of the Individual Defendants can be easily disposed of because they had no part in any adverse employment action against him. For example, the only discrete factual allegation against Richard McDonnell is that he escorted Plaintiff from the reservation after his termination. (*See* Dkt. #63 at 21). McDonnell refutes Plaintiff's characterization of events. This notwithstanding, although Plaintiff claims this was retaliatory, there is no reasonable dispute that McDonnell, the Tribe's Chief of Police, lacked authority to terminate or otherwise take any "adverse employment action" against Plaintiff. Merely removing him from the premises after he was suspended from employment is insufficient. *Cf. Brown v. Georgetown Univ. Hosp. Medstar Health*, 828 F. Supp. 2d 1, 9 (D.D.C. 2011) ("[E]scorting [plaintiff] off hospital premises does not amount to an adverse employment action."); *see also Fricke v. E.I. Dupont Co.*, 2005 U.S. Dist. LEXIS 16794, at *9 (W.D. Ky. Aug. 11, 2005) (plaintiff's "removal from the building cannot be said to constitute an adverse employment action"). Any such claim against McDonnell should be dismissed.

2. Christine Morlock, Tribal health care provider.

Plaintiff's retaliation claim also fails as to Christine Morlock, NP. Plaintiff's operative complaint is replete with allegations against Dr. Morlock, but none of these allegations constitute an adverse employment allegation under the law. Nor could they—Plaintiff, by his own admission, actually directed Dr. Morlock as the health director.[2] (*See e.g.*, Dkt. #63 at 20). Dr. Morlock would have no authority to take any adverse employment action against Plaintiff. Accordingly, any such claim against Dr. Morlock is legally and factually invalid.

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

3. Susan Yurchak, Tribal health care provider.

Plaintiff's retaliation claim against Yurchak is also attenuated. Yurchak was a mental health worker in the Tribe's medical clinic. Plaintiff makes two specific allegations against Yurchak: (1) she failed to report Dr. Morlock's alleged malfeasance to the State of Washington, and (2) she "refused to provide written confirmation of the supervisory/training social work/mental hours that Plaintiff had worked from November 2010 to October 2015 resulting in Plaintiff's inability to secure a seat for the national licensure boards in Social Work and Mental Health." (Dkt. #63 at 7).

As to (1), Yurchak's alleged failure to report Dr. Morlock has no bearing on Plaintiff's employment, much less can it be considered an adverse employment action. As to (2), there is no evidence that this allegation, even taken as true, would constitute an adverse employment action. Moreover, Plaintiff lacks any evidence to establish a connection between the alleged adverse employment action and Plaintiff's protected speech activity. Indeed, besides Plaintiff's unspecific allegation of retaliation "because of his engagement in protected activity," at no point in the 34-page complaint is there *any* specific link between the alleged lack of confirmation and Plaintiff's alleged protected speech. Plaintiff has no evidence and has sought none. The Court should reject Plaintiff's mere allegations and dismiss any retaliation claim against Yurchak.

4. Robert Morlock, Tribal human resources director.

Plaintiff's operative complaint asserts no discernible claims against Robert Morlock, the Tribe's human resources director. Other than being named as a party, there are no discrete facts alleged against him supporting any of Plaintiff's claims. Even if such facts or claims were asserted, Plaintiff lacks any evidence demonstrating that Morlock was involved in any adverse employment action. Indeed, Morlock was not even hired as interim human resources director

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[2] This is, in fact, one of Plaintiff's key complaints about Dr. Morlock: she allegedly failed to abide by a vaccine-related moratorium he issued while he was acting as Health Director. *See* Dkt. #63 at 23.

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

until the very day Plaintiff was terminated by the Tribal Council. (*Compare* Nedderman Decl., Ex. 11 *with* Ex. 8). Therefore, any retaliation claim against Morlock should be dismissed.

H. Plaintiff's ACA retaliation claim is also legally invalid.

Finally, Plaintiff also apparently makes a claim for retaliation under the ACA. (*See* Dkt. #63 at 28). Although the ACA was passingly mentioned in his prior complaints, Plaintiff did not assert a retaliation claim under the ACA (nor the "factual" circumstances underpinning it) until filing his second amended complaint. Nevertheless, Plaintiff now purports to bring these claims against Defendants Dr. Morlock, Metcalf, Bailey, and Joseph. (*See* Dkt. #63 at 28, 31-32).

1. Background on ACA retaliation regulations.

Federal regulations prohibit an employer from retaliating against an employee who reports or objects to practices he or she believes to be in violation of the Affordable Care Act. *See* 29 C.F.R. § 1984.102(b). A complainant may not simply file a lawsuit to seek the regulations' protections; rather, he or she must file a report to the Occupational Safety and Health Administration ("OSHA"), an agency within the U.S. Department of Labor. *See* 29 C.F.R. § 1984.103. The complaint must be filed with OSHA within 180 days of the alleged retaliation. 29 C.F.R. § 1984.103(d).

After receiving a complaint, OSHA investigates and provides both the complainant and respondent an opportunity to state their cases. *See* 29 C.F.R. § 1984.104. Within 60 days of the complaint, the OSHA Assistant Secretary will issue written findings regarding the merits of the retaliation claim. *See* 29 C.F.R. § 1984.105. If there is a finding of retaliation, the Assistant Secretary will provide with the findings a written order remediating the alleged retaliation, including possibly ordering reinstatement and damages. *See* 29 C.F.R. § 1984.105(a)(1). If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding. 29 C.F.R. § 1984.105(a)(2). "Any party who desires review, including judicial review, of the findings and/or preliminary order … must file [with OSHA] any objections and/or a request for a hearing on the record within 30 days of receipt of the

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

findings and preliminary order pursuant to § 1984.105(b)." 29 C.F.R. § 1984.106(a). If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order will become the final decision of the Secretary, not subject to judicial review. 29 C.F.R. § 1984.106(b).

A complainant may seek *de novo* review in the appropriate district court of the United States, within 90 days after receiving a written determination under § 1984.105(a) provided that there has been no final decision of the Secretary; or if there has been no final decision of the Secretary within 210 days of the filing of the complaint. 29 C.F.R. § 1984.106(a).

2. Plaintiff did not comply with procedural requirements to filing a retaliation complaint under the ACA, justifying dismissal of any such claim.

In this case, there is no evidence that Plaintiff properly filed an ACA retaliation case with OSHA as set forth in the federal regulations. Instead, the Individual Defendants—from information obtained via discovery—believe that Plaintiff only mailed a tort claim to the Department of Justice ("DOJ") and the Department of Health and Human Services ("DHHS"). (Dow Decl., Ex. 10). There is no evidence that the Department of Labor, much less OSHA, ever received Plaintiff's complaint, which is why there was is no known investigation into the ACA-related retaliation complaints.

More importantly, it is not clear that Plaintiff ever complained to any government agency that he was terminated for reasons related to the ACA, rather than about vaccinations or the other issues. Instead, his tort claim form submitted to the DOJ and DHHS merely reference alleged malpractice by Dr. Morlock "and other administrative concerns." This oversight was likely not an accident; Plaintiff's complaint to the DOJ and DHHS was, presumably, made to comply with the Federal Tort Claims Act rather than to assert specific ACA-related complaints.

Plaintiff's several complaints further support this conclusion—it was not until Plaintiff's third draft that he even mentioned the facts underlying his ACA retaliation complaint. This occurred in 2018, well beyond the 180-day statute of limitations stated in 29 C.F.R. § 1984.103(d). Accordingly, Plaintiff's ACA retaliation claim fails because (1) he did

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

not properly file any such complaint with OSHA as required by federal law and (2) the complaint he did file did not mention retaliation based on any ACA-related circumstances. Plaintiff's noncompliance with this procedural hurdle should preclude relief.

3. Plaintiff only complained to the DOJ and DHHS (not OSHA) about Defendant Metcalf, meaning that her ACA retaliation claim(s) are procedurally improper against the other Individual Defendants.

Even if the Court allows the ACA retaliation claim to move forward against Defendant Metcalf, it should not allow any such claim against Dr. Morlock, Bailey, Joseph, or any other Defendant. Plaintiff's January 4, 2016 tort claim form does not list Bailey or Joseph, nor does it state any retaliatory acts by Dr. Morlock. Instead, it targets Metcalf—and only Metcalf—for the alleged wrongdoing. Plaintiff should not be permitted to bootstrap additional claims against previously unnamed individuals to an already defective notice.

4. Plaintiff lacks any evidence in support of his ACA claims in any event.

Moreover, Plaintiff's claim against these defendants is factually deficient even if legally valid. Plaintiff has not alleged that Dr. Morlock undertook any act in violation of the ACA, nor can he establish that she somehow took retaliatory action against him, her supervisor. Plaintiff has also not—and cannot—present any facts establishing that his termination (or any other adverse action against his employment) was motivated by any alleged ACA-related issues, which were first raised years after Plaintiff's termination. These *post-hoc* allegations are unavailing and should be dismissed as factually and legally deficient.

V. CONCLUSION

Plaintiff's rambling and conclusory operative complaint is legally and factually defective and should be dismissed. No Individual Defendant can be held liable for retaliation—to the extent they were even involved in any adverse employment action—because any such actions were made not under state or federal law, but tribal law. Plaintiff lacks and has not sought any evidence to the contrary. Plaintiff's wrongful discharge against public policy claim should likewise be dismissed because supervisors should not be personally liable, and because any such claim is merely an attempt to evade sovereign immunity principles. Finally, any claim

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

under the ACA should be dismissed because Plaintiff did not properly file his case with OSHA, a prerequisite to judicial review, and because there is simply no evidence of ACA-related retaliation.

DATED this 13th day of December, 2018.

FLOYD PFLUEGER & RINGER, P.S.

By: /s/Thomas B. Nedderman
Thomas B. Nedderman, WSBA No. 28944
tnedderman@floyd-ringer.com
William J. Dow, WSBA No. 51155
wdow@floyd-ringer.com
FLOYD, PFLUEGER & RINGER P.S.
200 W. Thomas Street, Suite 500
Seattle, WA 98119
Tel (206) 441-4455
Fax (206) 441-8484
Counsel for the Individual Defendants

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

DECLARATION OF SERVICE

Pursuant to 28 U.S.C. § 1746 and the laws of the United States of America, I declare under penalty of perjury that on the below date, I delivered a true and correct copy of INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT via the method indicated below to the following parties:

Tricia Boerger United States Attorney's Office 700 Stewart Street Ste. 5220 Seattle, WA 98101 Tricia.Boerger@usdoj.gov	*Counsel for Plaintiff United States of America*	[ ] Via Messenger [ ] Via Email [ ] Via Facsimile [ ] Via U.S. Mail [X] Via CM/ECF
Richard Lamar Pope, Jr. Lake Hills Legal Services PC 15600 NE 8th Street, Ste. B1-358 Bellevue, WA 98008 rp98007@gmail.com	*Counsel for Plaintiff Raju A.T. Dahlstrom*	[ ] Via Messenger [ ] Via Email [ ] Via Facsimile [ ] Via U.S. Mail [X] Via CM/ECF
Jack Warren Fiander Towtnuk Law Offices, Ltd. Sacred Ground Legal Services, Inc. 5808A Summitview Avenue, Ste. 97 Yakima, WA 98908 Towtnuklaw@msn.com	*Counsel for Defendants*	[ ] Via Messenger [ ] Via Email [ ] Via Facsimile [ ] Via U.S. Mail [X] Via CM/ECF

DATED this 13th day of December, 2018.

/s/Monica R. Howard
Monica R. Howard, Legal Assistant

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484