

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,

Defendant.

CASE NO. 2:16-cv-01874-RSL

UNITED STATES' REPLY IN
SUPPORT OF THE MOTION FOR
SUMMARY JUDGMENT

Noted for Consideration:
July 12, 2019

Defendant the United States, by and through its attorneys, Brian T. Moran, United States Attorney for the Western District of Washington, and Tricia Boerger and Michelle Lambert, Assistant United States Attorneys for the District, submits its Reply in Support of the United States' Motion for Summary Judgment ("Mot."), Dkt. 98.

ARGUMENT

Plaintiff has not met his burden by identifying a valid waiver of the United States' sovereign immunity. Mot., at 10 – 12. "Jurisdiction is a threshold separation of powers issue, and may not be deferred until trial." *PW Arms, Inc. v. United States*, 186 F. Supp. 3d 1137, 1142 (W.D. Wash. 2016) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 – 95 (1998)). As a starting point for this analysis, it is assumed that the

1 district court lacks subject matter jurisdiction, and the party asserting the claim bears the
2 burden of establishing that subject matter jurisdiction exists. *In re Dynamic Random*
3 *Access Memory Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008) (citing *Kokkonen v.*
4 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

6 Despite the various allegations made in Plaintiff's opposition to the United States
7 motion for summary judgment, the *only* claim remaining against the United States in this
8 litigation is the common law tort of wrongful discharge in violation of public policy.
9 Plaintiff alleges that the Sauk-Suiattle Indian Tribe (the "Tribe") terminated him because
10 of his whistle-blowing activities. Dkt. 103, Plaintiff's Opposition ("Opp."), at 9. To be
11 clear, the *Tribal Council* terminated Plaintiff's employment. Dkt. 99-4, Lambert Decl.,
12 Ex. D. However, the Tribal Council's employment decisions remain part of the Tribe's
13 self-governance and are not encompassed by a federal contract or agreement under the
14 Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"). Without
15 a relevant ISDEAA contract or agreement provision, the United States sovereign
16 immunity acts as a complete bar to Plaintiff's remaining claim against the United States.

21 In support of its motion for summary judgment, the United States has presented
22 both testimonial evidence and contractual evidence demonstrating that the ISDEAA
23 contracts do not contain any provision for the administration, oversight, or human
24 resource actions taken by the Tribal Council. Mot., at 4-5. In opposition, Plaintiff has
25 presented no relevant evidence creating a genuine issue of material fact. Accordingly,
26 Plaintiff cannot avoid summary judgment. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th
27 Cir. 1986) (the opposing party cannot rest solely on conclusory allegations).

1 Instead, Plaintiff conflates the analysis for when the ISDEAA § 314 extends the
2 United States' waiver of sovereign immunity under the Federal Tort Claims Act
3 ("FTCA"). Plaintiff fundamentally misunderstands which "tribal employee" is relevant
4 to the analysis. For ISDEAA § 314 protection to apply to a defendant's actions (as
5 Plaintiff seemingly asserts here by making claims against the United States), the liability-
6 causing event must occur while a tribal employee is "acting within the scope of their
7 employment in carrying out the contract or agreement." *Shirk v. U.S. ex rel. Dep't of*
8 *Interior*, 773 F.3d 999, 1003 (9th Cir. 2014). Plaintiff asserts that his employment with
9 the Tribe fell within the scope of the ISDEAA contract. Opp, at 13. However, the
10 relevant issue is not whether Plaintiff was acting within the scope of his employment
11 when whistleblowing; the relevant issue is whether the alleged tortfeasors were acting
12 within the scope of an ISDEAA contract or agreement when terminating Plaintiff. *See*
13 *Shirk*, 773F.3d at 1003 - 1006 (analyzing the officers' actions as the alleged tortfeasors).

14 The Tribal Council committed the conduct at issue in this litigation, as that entity
15 terminated Plaintiff. Mot., at 9. Plaintiff has produced no evidence that this conduct by
16 the Tribal Council fell under a provision of an ISDEAA contract or agreement. Mot., at
17 4-5. The Court has already exercised its discretion once pursuant to Federal Rule of Civil
18 Procedure 56(d) to deny the United States' motion to dismiss to allow Plaintiff to take
19 discovery on whether employment decisions are encompassed by an ISDEAA federal
20 contract or agreement. Order, Dkt. No. 46, at 2. Since that Order, Plaintiff has taken no
21 discovery in this litigation. Plaintiff has failed to, and indeed cannot, demonstrate that

1 the United States has waived sovereign immunity for the employment decisions of the
2 Tribe.

3
4 Furthermore, Plaintiff's opposition fails even to address the United States'
5 argument that the discretionary function exception to the FTCA bars Plaintiff's wrongful
6 discharge claim. Mot., at 13 – 18. The discretionary function exception to the FTCA
7 bars Plaintiff's only remaining claim because (1) the Tribal Council maintains complete
8 discretion to determine how to handle tribal personnel issues; and (2) decisions regarding
9 termination involve balancing of social, economic, and political policy choices. Mot., at
10 14-15.
11

12
13 Most of Plaintiff's opposition is devoted to the recitation of the law and
14 allegations that are more suited for his related *qui tam* action. Nevertheless, it is
15 abundantly clear from the opposition that Plaintiff has not raised any genuine issues of
16 material fact concerning the United States' sovereign immunity as to the sole remaining
17 claim. Accordingly, the Court should grant the United States' motion for summary
18 judgment.
19

20
21 //

22 //

23 //

24 //

25 //

26 //

27 //

CONCLUSION

For the foregoing reasons, Plaintiff's wrongful discharge claim against the United States should be dismissed and summary judgment granted.

DATED this 12th day of July, 2019.

Respectfully submitted,

BRIAN T. MORAN
United States Attorney

s/ Tricia Boerger
TRICIA BOERGER, WSBA #38581

s/ Michelle R. Lambert
MICHELLE R. LAMBERT
NY Reg. No. 4666657
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
Email: michelle.lambert@usdoj.gov

Attorneys for the United States

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 July 12, 2019, I electronically filed the foregoing 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

I further certify that on July 12, 2019, I mailed by United States Postal Service said pleading to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 12th day of Jul, 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