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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

RONALD J. WALKER, Plaintiff, v. JESSICA WINDY BOY, ROCKY BOY HEALTH CLINIC, and CHIPPEWA CREE TRIBE, Defendants.	Case No. 4:19-CV-00043-BMM-JTJ **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO EXHAUST TRIBAL REMEDIES, AND INAPPLICABILITY OF FEDERAL STATUTES**

Defendants, Jessica Windy Boy ("Windy Boy"), Rocky Boy Health Center ("Center"), and Chippewa-Cree Tribe ("Tribe"), through counsel, having moved to

dismiss this action, and Plaintiff having filed an untimely "Response"[1] to Defendant's Motion to Dismiss, hereby submit this Reply Brief in Support of their Motion to Dismiss in the unlikely event the Court considers Plaintiff's untimely Response. For the reasons set forth in Defendants' Opening Brief, Notice of Submittal, and herein, the Court must, as required by law, dismiss Plaintiff's claim.

INTRODUCTION

As an initial matter, and as pointed out previously in Defendants' Notice of Submittal, Plaintiff's untimely Response should be disregarded and Defendants' Motion should be deemed well taken and granted without further deliberation. *See* Doc. Nos. 17, 17-1. Defendants filed and served the Motion to Dismiss and Brief in Support on August 16, 2019. *Id.* Plaintiff failed to file a timely response or request an extension of time to do so, despite Defendants notifying him of the deadline provided by Local Rule 7.1 to respond and gratuitously providing extra time to do so. *Id.* Thus, Plaintiff's failure to file a timely response should be "deemed an admission that the motion is well taken." *See* L.R. 7.1(d)(1)(B)(ii).

[1] Plaintiff filed a document titled "Motion and Counter-claim Response to Defendants' Motion to Dismiss EEOC Civil for Lack of Subject Matter Jurisdiction, Failure to Exhaust Tribal Remedies, and Inapplicability of Federal Statutes & Question of Plaintiff's Medical Disability." While Defendants cannot be sure, they assume that this is intended to serve as an untimely Response to their Motion to Dismiss. Out of an abundance of caution, Defendants are submitting their Reply Brief in Support of the Motion to Dismiss based on this assumption.

However, even if the Court were to consider Plaintiff's untimely Response, which is nearly unintelligible, Plaintiff has utterly failed to provide any colorable argument or authority to avoid dismissal. Moreover, Plaintiff's newly contrived allegations, that he allegedly suffers from some disabling condition and that he allegedly informed the Center of such alleged disability, is patently false and does nothing to avoid dismissal, as Plaintiff admits again that any alleged disability had nothing to do with his resignation. Plaintiff's new allegations are at best a desperate attempt to avoid dismissal and are contrary to the allegations of his Complaint, his written letters re: his voluntary resignation, and his application for employment. *See* Doc.Nos. 1, 1-1, 6-3; Affidavit of Sharron Crossler, ¶¶ 5-11 (attached hereto as **Exhibit C**); Plaintiff's Application for Employment, p.2 (attached as **Exhibit C-1**); Affidavit of Geri Racine, ¶¶ 2-10 (attached as **Exhibit D**). Again, Defendants' Motion to Dismiss should be granted and this matter should be dismissed.

ARGUMENT

As set forth in Defendants' Opening Brief, Defendants have moved for dismissal on three separate alternative grounds: (1) the Court lacks subject matter jurisdiction over this tribal employment matter; (2) the matter should be dismissed as a matter of comity due to Plaintiff's failure to exhaust all tribal remedies; and

(3) the federal statutes cited in Plaintiff's Complaint are not applicable to the dispute and do not provide any basis for jurisdiction.

I. THE COURT LACKS SUBJECT MATTER JURISDICITON.

As supported in Defendants' Opening Brief, the Court lacks subject matter jurisdiction over Plaintiff's tribal employment claims. *See* Doc.No. 10, pp. 10-14. Rather, the Chippewa Cree Tribal Court is the appropriate, and exclusive, jurisdiction to hear such claims. Plaintiff has not provided any authority or argument whatsoever to challenge this clearly established conclusion. Defendants have presented a factual challenge of the Court's subject matter jurisdiction which is unrefuted. Simply, the facts are the facts, and the law is the law and the facts in this matter applied to the law compel dismissal. As such, having provided no valid response to Defendants' Motion in this regard, the Court should end its inquiry and dismiss this matter consistent with the jurisdictional facts presented and supported, and authority relied upon, by Defendants.

II. PLAINTIFF ADMITS HE HAS NOT EXHAUSTED ALL AVILABLE TRIBAL REMEDIES.

Plaintiff admits in his Response that the only actions he undertook to resolve this matter within the Tribe's jurisdiction allegedly came through some unknown "internal mediation policy" and through the "Chippewa Cree Tribe's Compliance officer." *See* Doc. No. 24, pp. 7-9. These alleged actions are the only steps Plaintiff has purportedly taken to resolve this matter within the Tribe's jurisdiction.

By his own acknowledgment, Plaintiff has not filed a Tribal Court action, let alone appealed any adverse judgment in such an action. Moreover, Plaintiff has cited zero competing authority to suggest that his alleged administrative attempts to resolve his claim satisfied the well settled exhaustion requirement before proceeding in this Court. *See* Doc. No. 24.

While Plaintiff seemingly suggests he is only required to exhaust "administrative remedies" in order to proceed with a federal court action, this is clearly not the case under established federal common law. *See* Doc. No. 24, p. 8. Rather, Plaintiff is required to exhaust all tribal remedies, including court action and appeal. *See* Doc.No. 10, pp. 23-27 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17, 107 S.Ct. 971, 977, 94 L.Ed.2d 10 (1987)). Under the authority cited in Defendants' Opening Brief, Plaintiff has clearly failed to exhaust all tribal remedies before proceeding with his claim in this jurisdiction. *Id.* Again, this provides independent basis for dismissal.

III. PLAINTIFF HAS FAILED TO ESTABLISH THAT THE FEDERAL LAWS REFERENCED IN THE CASE APPLY TO INDIAN TRIBES OR ANY ALLEGED GENDER DISCRIMINATION.

Plaintiff does not provide any competing argument or authority that would suggest that the Americans with Disabilities Act ("ADA") or the Civil Rights Act are applicable to Defendants. As supported in Defendants' Opening Brief, neither Act is applicable to Indian tribes and thus no claim can be maintained against them

under the Acts. Thus, there is no question that Plaintiff has failed to state a claim upon which relief can be granted under either the Civil Rights Act or the ADA.

As set forth in Defendants' Opening Brief, Plaintiff is pursuing a gender discrimination claim following his voluntary resignation from the Rocky Boy Health Center ("Center") after his short two week employment as a Project Coordinator/Data Manager for the Center. *See also*, Doc.No.1. At the time of his resignation the only basis for his alleged resignation was differences in opinion with regard to the management style of his supervisors. *See* Doc.Nos 1-1, 6-3.

Now, Plaintiff alleges for the first time, after Defendants' Motion to Dismiss was filed and briefed, that he advised his supervisor about an alleged medical disability and an alleged speech impediment that resolved when he was twenty-seven years old. *See* Doc.No. 24, p. 6. He further alleges that he requested an accommodation to be moved to another office. *Id.* Finally, he alleges that it should have been obvious to people that he is disabled because of his posture and the way he walks. *Id.* What is missing from Plaintiff's Response, is any allegation that any purported disability or medical condition, or failure to accommodate the same, was the reason for his voluntary resignation. *See* Doc.No. 24. Even if he were so alleging, Plaintiff's newly contrived allegations are untrue and Plaintiff has not, and cannot, produce any documentation to establish that he informed the Center of any purported disability, let alone requested accommodations for the

same. *Id.* Again, Plaintiff's Response is the first time, from prior to his resignation through the course of this litigation, that he has alleged any medical condition or disability.

Moreover, in his Response, Plaintiff again admits that the reason he resigned was not due to his disability, but rather, alleges his resignation was fear that he was going to be escorted out of the building by law enforcement. *See* Doc.No. 24, p. 5. Again, Plaintiff does not allege that his decision to resign was fueled by any alleged issues with an alleged disability or medical condition. *See* Doc.No. 24. He seemingly just wants it to be known that he has such an alleged disability. *Id.* Simply, by Plaintiff's own admissions in numerous written statements, including the Complaint, there is absolutely no correlation between any alleged disability and his decision to voluntarily resign from employment with the Center. *See* Doc.Nos. 1, 1-1, 6-3, 24.

In addition to the plain allegations of his Complaint, his prior written resignation, and letter to the Tribe that establish his voluntary resignation was not about any alleged disability, Plaintiff indicated to the Center in his Application for Employment that he did not suffer "*any physical conditions which might limit [his] ability to perform the job for which [he was] applying*." Ex. C, ¶ 5; Ex. C-1 (emphasis added); Ex. D, ¶ 6. Moreover, the Center's policies require that any employee requests for accommodations for disability or medical condition be in

writing and submitted to Human Resources ("HR"). Ex. C, ¶¶ 7-8; Ex. D, ¶ 7. All employees are trained on these procedures. Ex. C, p. 7. During his short employment, Plaintiff never submitted any request for accommodation, written or verbal, to his supervisor or HR or informed anyone of any alleged disability or medical condition that allegedly limited his ability to work. Ex. C, ¶ 9; Ex. D, ¶ 8. Moreover, Plaintiff's supervisor and HR Officer, who both interacted with Plaintiff during his employment, never observed any apparent signs of any medical or disabling condition which would limit his ability to perform his job. Ex. C, ¶ 9; Ex. D, ¶ 9.

"[A] judge ruling on a defendant's motion to dismiss a complaint 'must accept as true all of the factual allegations contained in the complaint.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572, 127 S. Ct. 1955, 1975, 167 L. Ed. 2d 929 (2007) (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)). Here, Plaintiff alleges in his Complaint that he was discriminated against due to his status as a "male" and due to differences in opinion with regard to the management style of the Center. Doc.Nos. 1, 1-1, 6-3. Plaintiff should not, at the prospect of dismissal, be allowed to change his alleged facts and legal theory upon which his claim rests after Defendants' dispositive motion is filed. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990). To allow Plaintiff to do so for the first time at the prospect of dismissal

would result in undue prejudice and delay to Defendants. *Id.* As such, the Court should ignore Plaintiff's newly contrived and unsupported statements regarding his alleged disability or medical condition. If Plaintiff's bald statements are considered, the Court should place little weight on the unsupported statements when contrasted with Defendants' position, which is supported by documentary evidence, sworn affidavits, and the law.

Plaintiff's new statements regarding alleged disability are fictitious and unsupported by any documentation. Moreover, they do not change the fact that this Court lacks subject matter jurisdiction and Plaintiff has failed to exhaust his tribal remedies. Dismissal remains appropriate and warranted.

CONCLUSION

For the reasons stated in Defendants' Opening Brief, Notice of Submittal, and herein, Defendants respectfully request the Court grant their Motion to Dismiss and dismiss this case with prejudice.

DATED this 22nd day of October, 2019.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By */s/ Evan M.T. Thompson*
Evan M.T. Thompson

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this ***Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to Exhaust Tribal Remedies, and Inapplicability of Federal Statutes***, is double spaced, is a proportionately spaced 14 point typeface, and contains 1,859 words.

/s/ Evan M.T. Thompson
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2019, a true copy of the foregoing was mailed by first-class mail, postage prepaid to the following parties:

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