

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

RAJU A.T. DAHLSTROM,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendants.

Case No. 16-cv-01874-RSL

**Plaintiff's Motion to Alter or
Amend Final Judgment
Fed. R. Civ. P. 54(b)**

NOTE ON MOTION CALENDAR:

Friday, December 27, 2019

Plaintiff, Raju A.T. Dahlstrom, by and through his undersigned counsel,
Richard L. Pope, Jr., of *Lake Hills Legal Services, PC.*, respectfully move this
Court to alter or amend the final judgments in this matter, to-wit "Order Granting
the United States' Motion for Summary Judgement." (Dkt. # 116, filed on

November 4, 2019) and entry of final judgment of dismissal (Dkt. # 117, filed on November 4, 2019), pursuant to Fed. R. Civ. P. 59(e).

The Court erred when it found that there was no evidence that the decision of the Tribal Council of the Sauk-Suiattle Indian Tribe (“Tribe”) to terminate Plaintiff’s employment as the Tribe’s Health & Social Services Director in December 2015 was NOT carrying out a federal contract or agreement under the Indian Self-Determination and Education Assistance Act of 1975 (“ISDEAA”).

Congress has expressly extended the FTCA’s waiver of sovereign immunity to claims “resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized” by the ISDEAA. 25 U.S.C. § 450f. Tribal employees will be deemed employees of the Bureau of Indian Affairs (“BIA”) for purposes of the FTCA only when they are acting within the scope of their employment in carrying out the contract or agreement. Shirk v. U.S. ex rel. Dep’t of Interior, 773 F.3d 999, 1003-04 (9th Cir. 2014). “Because ‘[t]he party asserting jurisdiction bears the burden of establishing subject matter jurisdiction’ . . . , a plaintiff in an FTCA suit must identify which contractual provisions the alleged tortfeasor was carrying out at the time of the tort.” *Id.* at 1006 (*quoting In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984 (9th Cir. 2008)).

The question of whether the Tribal Council was carrying out a federal contract in its employment decision to terminate Plaintiff as Health and Social Service Director can easily be answered YES by reference to the plain provisions of BIA Contract No. 248-96-0027 (“Contract”), Indian Self-Determination Agreement between IHS and the Sauk-Suiattle Tribal Council Contract effective January 1, 1996. Macy Decl., ¶ 5, ex. A, B, C. (dkt. # 101) (also attached hereto)

1 The provisions of BIA ISDEAA Contract No. 248-96-0027, as effective
 2 during the 2015 time frame at issue in this lawsuit are as set forth in the
 3 Declaration of Rena Macy (dkt. # 101), Chief Proposal Liaison Officer (CPLO)
 4 of the Portland, Oregon BIA office, and Exhibits A, B and C thereto.

5 Exhibit A to the Macy Declaration (dkt. # 101-1) is BIA ISDEAA Contract
 6 No. 248-96-0027 with the Tribe, originally effective January 1, 1996, and
 7 continued in effect in the same format through at least the end of 2015 by
 8 successive Annual Funding Agreements between BIA and the Tribe.

9 Under Paragraph (a)(2) of the Contract, the Tribe has agreed to perform the
 10 following services on behalf of the United States of America and the BIA:
 11 “Hospital & Clinics, Mental Health, Alcohol, Alcohol P.L. 99-570, Public Health
 12 Nursing (PHN), Community Health Representatives (CHR), Contract Health
 13 Services (CHS).” Even if this were the only relevant Contract provision, it is
 14 logical and necessary to have an administrator, such as the Health and Social
 15 Service Director position held by Plaintiff, in order to oversee and manage all of
 16 these programs. Even with only this, the Tribal Council would definitely be
 17 carrying out the contract when it hires, manages and/or terminates the Health and
 18 Social Service Director, thus waiving the sovereign immunity of the United
 19 States and making the federal government liable under the FTCA and 25 U.S.C.
 20 § 450f for any tortious actions committed in making such employment decisions.
 21

22 But there is more, and much more specific language which removes any
 23 doubt. Under Paragraph (f)(2) of the Contract, there is also an Annual Funding
 24 Agreement, which both renews the Contract each calendar year and specifies in
 25 more detail the provisions of the Contract and how the Tribe will carry these out,
 26 which is incorporated by reference as part of the Contract:
 27
 28

(2) ANNUAL FUNDING AGREEMENT.

(A) In General. The annual funding agreement under this Contract shall only contain

(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

(B) Incorporation by Reference. The annual funding agreement is hereby incorporated in its entirety in this contract and attached to this Contract as attachment 2.

Exhibit B to the Macy Declaration is the Annual Funding Agreement between the Tribe and BIA for the 2015 calendar year. (dkt. # 101-2) Section 6 of the Annual Funding Agreement further describes the Tribe's responsibilities:

Section 6 - Tribal Programs, Functions, Services and Activities (PFSA) and Standards

The Tribe agrees to perform the following PFSAs as listed below and described in greater detail in Attachment C:

1. Alcohol
2. Alcohol & Substance Abuse (P.L. 99-570)
3. Community Health Representative
4. Contract Health Services
5. Dental
6. Health Education
7. Mental Health
8. Public Health Nursing

1 In carrying out the PFSAs above, the Tribe is committed to
 2 and shall provide quality health services that will at all times meet
 3 applicable standards during the period specified in Section 2 of this
 4 AFA.

5 Exhibit C to the Macy Declaration (dkt. # 101-3) is the “Sauk-Suiattle
 6 Indian Tribe Health & Social Services Program Description”, which was
 7 approved by the Tribal Council on October 31, 2013 (*see* dkt. # 101-2 at p. 13)
 8 and is incorporated by reference as part of each Annual Funding Agreement. The
 9 Program Description makes several references to the Health & Social Services
 10 Director, and Paragraph 9, Program Management and Administration, makes it
 11 clear that the employment of this Director is necessary to carry out the Contract:
 12

13 **9. Program Management and Administration**

14
 15 The SSIT Health & Social Services Director (Director) is
 16 responsible for culturally appropriate program development, annual
 17 plans and budgets; directs, implements, policy development,
 18 provides reports, and evaluates the health and social service
 19 programs and personnel.

20 Prior to the adoption of the ISDEAA in 1975, the United States provided
 21 health, social services, and other support of Native American tribes directly by
 22 federal employees working for BIA, IHS and other federal agencies. When these
 23 people were directly employed by the United States, there was no question that
 24 they had FTCA remedies against the United States for wrongful termination.
 25 *See e.g. Loumiet v. U.S.*, 828 F.3d 935, 942-46 (D.C. Cir. 2016). As direct
 26 federal employees, they would also be covered by various anti-discrimination and
 27 other applicable civil rights laws.
 28

Given the extension of the FTCA to ISDEAA contracts under 25 U.S.C. § 450f, this analysis should not change when employees performing the same vital functions of the United States are instead hired, fired and otherwise managed by Native American tribes, instead of superior United States administrators. They are still carrying out United States functions in their own work, and the tribal chiefs or councils are in turn carrying out United States functions under the same ISDEAA contracts by making employment decisions to hire, fire, and otherwise manage the employees necessary to perform the ISDEAA contracts. Public policy and the letter of the FTCA and ISDEAA is best served by giving aggrieved employees the right to sue the United States for being terminated wrongfully or other tortious actions by tribal councils and administrators that would give regular United States employees the right to sue the federal government. Not only that, this result is dictated by the letter of the statutory language in the ISEAA and FTCA cited above.

Plaintiff therefore respectfully requests the Court to alter or amend its final judgment Orders (Dkt. 116 & 117), rule that the Tribal Council was carrying out responsibilities the ISDEAA Contract (albeit tortuously) by terminating Plaintiff in December 2015, that the United States is liable for these action under the FTCA and 25 U.S.C. § 450f, and set this matter for trial on the merits.

DATED this 2nd day of December 2019.

LAKE HILLS LEGAL SERVICES, PC.,

/s/ Richard L. Pope, Jr.

RICHARD L. POPE, JR.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 2nd day of December 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):

Tricia Boerger, E-mail: tricia.boerger@usdoj.gov

Michelle R. Lambert, E-mail: michelle.lambert@usdoj.gov.

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DATED this day 2nd of December 2019.

LAKE HILLS LEGAL SERVICES, PC.,

/s/ *Richard L. Pope, Jr.*

RICHARD L. POPE, JR.