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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

TAMMY WILHITE,
Plaintiff,

v.

PAUL LITTLELIGHT, LANA THREE
IRONS, HENRY PRETTY ON TOP,
SHANNON BRADLEY, and CARLA
CATOLSTER,
Defendants.

Case No. CV-19-20-BLG-SPW-TJC

**DEFENDANTS' BRIEF IN SUPPORT
OF MOTION TO DISMISS RE:
FEDERAL TORT CLAIMS
ACT EXCLUSIVITY**

Defendants, Paul Littlelight, Lana Three Irons, Henry Pretty On Top, Shannon Bradley, and Carla Catolster (collectively hereinafter "Defendants"), hereby submit this Brief in Support of their Motion to Dismiss Regarding Federal Tort Claims Act Exclusivity.¹ The primary basis for this Motion is that Plaintiff's

¹¹ Defendants reserve the right to file additional motions to dismiss under 12(b)(1) and 12(b)(6) on the basis that the Defendants enjoy sovereign immunity and

claims are subject to the exclusive remedy provisions of the Federal Tort Claims Act (“FTCA”), as Defendants operate pursuant to a 638 Contract with the United States Government.

INTRODUCTION

In this action, Plaintiff seeks monetary damages from Defendants on a civil RICO theory following her termination from employment from the Awe Kualawaache Care Center (“Care Center”) where she worked as a registered nurse. *See* Dkt 1, ¶¶ 1, 9, 20-28. Plaintiff alleges that her termination was in retaliation for reporting alleged abuse of a Care Center patient. *See* Dkt 1, ¶¶ 24-25. Four of the individually named Defendants in this action were members of the Board of Directors for the Care Center and the fifth is the administrator and managing employee for the Care Center. *See* Dkt 1, ¶¶ 3-8. Plaintiff alleges that at a meeting of the Care Center Board of Directors, she was terminated from employment at the discretion of all named Defendants. *See* Dkt 1, ¶¶ 20-21, 25.

The Care Center operates pursuant to what is commonly referred to as a 638 Contract with the United States Government. *See Wilhite v. Awe Kualawaache Care Ctr.* (“*Wilhite I*”), 2018 IER Cases 388820, 2018 WL 5255181, at *1 (D. Mont. Oct. 22, 2018) (this court found that “[t]he Care Center operates under what

further that res judicata and collateral estoppel bar Plaintiff’s claims in this action. Defendants anticipate filing these additional motions as soon as possible, but need additional time to confirm the facts supporting those motions.

is known as a 638 contract, which is a contract between a tribe and the federal government that provides for tribal administration of federal programs.”). The alleged actions or omissions of Defendants related to the employment discipline of Plaintiff, as a Care Center employee, are necessarily a result of their duties as officials of the Care Center under the relevant 638 Contract. *See* Complaint; *See* “*Wilhite I*”, at *1-2 (this Court previously found that the same alleged actions of Defendants were undertaken in their official capacity and within the scope of their authority). The alleged acts by Defendants were undertaken within the course and scope of their employment and within the process of disciplining Plaintiff as a Care Center employee. *Id.* Plaintiff’s claims against Defendants are limited to alleged actions or omissions that are ultimately attributable to the Care Center. *Id.*

The Crow Tribe entered into a 638 Contract with the United States for provision of health services within the Crow Indian Reservation. *See* 638 Contract No. HHSI244200700002C, Preamble; Art. I, § 2; Art III (2006) (attached hereto as **Exhibit 1-A**);² *See also Wilhite I*, at *1. Annual Funding Agreements are expressly incorporated as part of the 638 Contract. *See* Ex. 1-A, Art. VII, § 2. The Care Center was expressly incorporated into the 638 Contract in 2014. *See* Annual Funding Agreement Modification (2014) (attached hereto as **Exhibit 1-B**). The

² *See* Affidavit of Dennis Bear Don’t Walk, Chief Executive Legal Counsel for the Crow Tribe (Sep. 25, 2018) (attached hereto as **Exhibit 1**) which authenticates the various 638 Contract Documents referenced herein.

most current Annual Funding Agreement (“AFA”) was executed in 2017 and also expressly includes the Care Center in its scope of work. *See* Annual Funding Agreement Modification, Attachment A (2017) (attached hereto as **Exhibit 1-C**).

The 638 Contract expressly provides that the Crow Tribe shall provide personnel management in accordance with its Personnel Policies for entities, such as the Care Center, operating under the 638 Contract. Ex. 1-A, Art. V, § 5(C). The Care Center is expressly authorized as an entity operating under the 638 Contract. *See* Ex. 1-C, Attachment A (Scopes of Work).

The 638 Contract further provides that “[t]he scope of work will encompass all of the daily operations required to provide quality services to residents of the [Care Center].” *See* Ex. 1-C, Attachment A, p. 1. The 638 Contract further recognizes that Care Center administrator “oversees the daily operations of the facility” and that “administration of ... staff” is an important feature of the Care Center. *Id.* The Care Center is charged with ensuring that the administrator and director of nursing services are performing their tasks. *See* Ex. Ex. 1-C, Attachment A, § 7(b). The administrator is responsible for the day-to-day operations of the Care Center and is responsible for “overall administrative management and operation of the Care Center.” *See* Ex. 1-C, Attachment A, § 7(b)(1) and (2).

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Here, it is clear that Plaintiff's claims, arising from alleged inappropriate employee discipline in the form of termination from employment and retaliation, are being pursued against Defendants as a result of the alleged actions of Defendants during the course and scope of employment under the relevant 638 Contract. Administration of staff and day-to-day operation of the Care Center, which necessarily includes personnel management and discipline, are expressly identified within the scope of work for the 638 Contract. *See* Ex. 1-C, Attachment A. As the following discussion establishes, Plaintiff's claims are barred due to the exclusive remedy provisions of the FTCA. Accordingly, dismissal of this matter with prejudice is the appropriate and warranted result.

STANDARD OF REVIEW

Dismissals under Rule 12(b)(6) are reviewed *de novo*. *United States v. Corinthian Colleges*, 655 F.3d 984, 991 (9th Cir. 2011). "The focus of any rule 12(b)(6) dismissal—both in the trial court and on appeal—is the complaint." *Corinthian Colleges*, 655 F.3d at 991 (citing *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197 n. 1 (9th Cir.1998)). A 12(b)(6) dismissal may be affirmed "on any ground supported by the record, even if the district court did not rely on the ground." *Corinthian Colleges*, 655 F.3d at 992 (citing *Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir.2005)).

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ARGUMENT

Plaintiff's claims in this matter are precluded as a matter of law due to the exclusive remedy provisions of the Federal Tort Claims Act. 28 U.S.C. § 2679. The United States has subjected itself to suit under the FTCA "for *torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA.*" *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004) (citing Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959 (codified at 25 U.S.C. § 450f note) (hereinafter § 314)) (emphasis added). While it is true that not every tort claim related to a 638 contract is covered by the FTCA, Plaintiff's claims against Defendants do not fall within the exceptions to FTCA exclusivity. *See* 28 U.S.C. 2680; 25 C.F.R § 900.183. In other words, the FTCA provides the sole and exclusive remedy for Plaintiff.

The Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"), Public Law 93-638, authorizes federal agencies to contract with Indian tribes to provide services within the reservation. *See* 25 U.S.C. 450-450n. The ISDEAA serves to "increase tribal participation in the management of programs and activities on the reservation. *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004). Congress intended to "limit the liability of tribes" that agreed to participate in these self-determination contracts, commonly referred to as "638 Contracts." *Id.* (emphasis added). "Congress therefore provided that the United

States would subject itself to suit under the Federal Tort Claims Act (“FTCA”) for torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA.” *Id.* (emphasis added).

The FTCA imposes liability upon the United States for the tortious conduct of its employees when acting within the course and scope of their employment, in the same manner and to the same extent as a private individual under like circumstances. *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996); 28 U.S.C. §§ 2674, 1346. “The Federal Employees Liability Reform and Tort Compensation Act of 1988 (“FELRTCA” or “Westfall Act”), which amended the FTCA, provides that ‘[t]he remedy against the United States’ under the FTCA ‘is *exclusive* of any other civil action or proceeding for monetary damages.’” *Wilson*, 87 F.3d at 1076 (citing 28 U.S.C. § 2679(b)(1)) (emphasis added). *Id.*

Furthermore, 28 U.S.C. § 2679 expressly precludes a cause of action against Defendants:

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the **remedies provided by this title in such cases shall be exclusive.**

(b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission

gave rise to the claim or against the estate of such employee. **Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded** without regard to when the act or omission occurred.

28 U.S.C. § 2679(a), (b)(1) (emphasis added). FTCA exclusivity is further confirmed in the Code of Federal Regulation. The relevant sections provide in pertinent part:

§900.190 Is FTCA the exclusive remedy for a tort claim for personal injury or death resulting from the performance of a self-determination contract?

Yes, except as explained in §900.183(b). No claim may be filed against a self-determination contractor or employee for personal injury or death arising from the performance of medical, surgical, dental, or related functions by the contractor in carrying out self-determination contracts under the Act. Related functions include services such as those provided by nurses, laboratory and x-ray technicians, emergency medical technicians and other health care providers including psychologists and social workers. **All such claims shall be filed against the United States and are subject to the limitations and restrictions of the FTCA.**

25 C.F.R. § 900.190 (emphasis added). The Code further states:

§900.191 Are employees of self-determination contractors providing health services under the self-determination contract protected by FTCA?

Yes. For the purpose of Federal Tort Claims Act coverage, an Indian tribe or tribal organization and its employees performing medical-related functions under a self-determination contract are deemed a part of the Public Health Service if the employees are acting within the scope of their employment in carrying out the contract.

25 C.F.R. § 900.191 (emphasis added). The Code of Federal Regulations provides further that FTCA exclusivity extends to non-medical-related claims:

To what non-medical-related claims against self-determination contractors does FTCA apply?

It applies to:

- (a) **All tort claims arising from the performance of self-determination contracts** under the authority of the Act on or after October 1, 1989; and
- (b) **Any tort claims** first filed on or after October 24, 1989, regardless of when the incident which is the basis of the claim occurred.

25 C.F.R. § 900.205 (emphasis added). In this case, the United States has expressly agreed pursuant to the terms of the 638 contract at issue that:

INSURANCE AND FEDERAL TORT CLAIMS COVERAGE:

- (i) **The Tribe is deemed by statute to be a part of the [United States] Public Health Service, and the employees of the Tribe are deemed by statute to be part of or employed by the Public Health Service, for purposes of coverage under the Federal Tort Claims Act,** while performing programs, activities, functions, or services under this Contract and the Annual Funding Agreement...

Ex. 1-A, Art. V, § 5(J) (emphasis added); *see also* 25 U.S.C.A. § 450f(d) (employees of tribal organizations and tribal contractors operating under § 638 contracts deemed employees of federal government).

Here, Plaintiff's claims, arising from alleged inappropriate employee discipline in the form of termination from employment and retaliation, are being pursued against Defendants as a result of their alleged actions or omissions undertaken within course and scope of employment under the 638 Contract. Administration of staff and day-to-day operation of the Care Center, which

necessarily includes personnel management and discipline, are expressly identified within the scope of work for the 638 Contract. *See* Ex. 1-C, Attachment A.

From the foregoing, it is clear Plaintiff's claims against Defendants are precluded as a matter of law and they should be dismissed without delay. Plaintiff's claims in this matter may only be brought against the United States under the FTCA, which provides the exclusive remedy available to Plaintiff. Plaintiff's exclusive remedy is to pursue a claim against the United States for the alleged actions or omissions of Defendants, who are deemed to be employees of the United States. On this basis, the only appropriate result is that Plaintiff's claims against Defendants be dismissed with prejudice. Any holding to the contrary would fly in the face of established law providing for FTCA exclusivity.

CONCLUSION

For the reasons set forth herein, the Defendants respectfully requests that the Motion to Dismiss be granted and Plaintiff's claims be dismissed with prejudice.

DATED this 15th day of April, 2019.

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

By /s/ Evan M.T. Thompson

Evan M.T. Thompson

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2019, a true copy of the foregoing was mailed by first-class mail, postage prepaid, addressed as follows:

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