UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

CRYSTAL HOLTZ,

Plaintiff, Case No. 19-C-1682

v.

ONEIDA AIRPORT HOTEL CORPORATION,
ROBERT BARTON, STEVE NINHAM,
AIMBRIDGE HOSPITALITY, LLC,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS ONEIDA AIRPORT HOTEL CORPORATION AND ROBERT BARTON

Defendants, Oneida Airport Hotel Corporation d/b/a the Radisson Hotel & Conference Center Green Bay (the "Hotel") and Robert Barton ("Barton"), submit the following Memorandum in Support of their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In summary, Plaintiff, Crystal Holtz, is a member of the Oneida Nation f/k/a the Oneida Tribe of Indians ("Oneida Nation" or the "Nation") and has filed suit against the Hotel, a chartered tribal corporation, and Barton, who is an officer of the Hotel, asserting claims that apparently stem from her termination of employment with the Hotel. Plaintiff also has filed suit against Aimbridge Hospitality, LLC ("Aimbridge") and Steve Ninham ("Ninham"), parties that were acting as the Hotel's agents in all facets of Plaintiff's employment with the Hotel. The haphazard allegations in Plaintiff's Amended Complaint, however, fail to establish any right to recovery for a multitude of reasons including that the claims against the Hotel and Barton are barred by tribal sovereign immunity, the Court lacks

subject matter jurisdiction over the claims against the Hotel and Barton, and Holtz has failed to state a claim upon which relief can be granted.

FACTS

The Oneida Nation is a federally recognized Indian Tribe and is organized under federal law. Notice of Indian Entities Recognized and Eligible to Receive Services from the U.S. Dept. of Interior Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018); (Barton Decl. ¶ 3). The Nation is governed according to its Constitution and its Code of Laws. Pursuant to the Oneida Nation Constitution, the Nation is governed by the General Tribal Council "composed of all the qualified voters of the Oneida Nation." Constitution and By-Laws of the Oneida Nation, Art. III, Sec. 1 located at: https://oneida-nsn.gov/dl-file.php?file=2018/05/2015-06-16-Tribal-Constitution.pdf ("Oneida Nation Constitution"); Barton Decl. ¶ 3, Exh. 1).[1] The Tribal Council has, among other things, exclusive authority to manage all economic affairs and enterprises of the Nation. Oneida Nation Constitution, Art. IV, Sec. 1(e). Furthermore, the Nation has an elected nine-person Business Committee (composed of a Chairman, Vice Chairperson, Treasurer, Secretary, and five Councilpersons) to perform any duties authorized by the Tribal Council. *Id*. Sec. 3.

Among the many laws enacted by the Nation, the Sovereign Immunity law is one of the most fundamental. In particular, the Sovereign Immunity law provides that the sovereign immunity of the Tribe and "Tribal Entities, including sovereign immunity from suit in any state, federal or Tribal court, is hereby expressly reaffirmed" and, furthermore, "[n]o suit or other

[1] When assessing a Rule 12(b)1 motion challenging subject matter jurisdiction, "the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Menominee Indian Tribe of Wisconsin v. U.S. Envtl. Prot. Agency*, 360 F. Supp. 3d 847, 856 (E.D. Wis. 2018) (citing *Apex Digital, Inc. v. Sears, Roebuck & Co.,* 572 F.3d 440, 444 (7th Cir. 2009)).

proceeding, including any Tribal proceeding, may be instituted or maintained against a Tribe Entity . . . [or] officers, employees or agents of a Tribal Entity for actions within the scope of their authority, unless the Tribe or Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding." Oneida Code of Laws, Title 1, § 112.4-1 and 112.4-2 located at: https://oneida-nsn.gov/dl-file.php?file=2018/05/Chapter-112-Sovereign-Immunity-BC-02-12-14-D.pdf; (Barton Decl. ¶ 4, Exh. 2). A "Tribal Entity" is "a corporation or other organization which is wholly owned by the Oneida Tribe of Indians of Wisconsin, is operated for governmental or commercial purposes, and may through its charter or other document by which it is organized be delegated the authority to waive sovereign immunity." *Id*. at § 112.3-1(d).

The Hotel was issued a corporation charter by the Nation and is owned by the Nation. (Am. Compl., p. 1 (Hotel is "an Oneida Nation-owned company."); Corporate Charter of Oneida Airport Hotel Corporation, Art. I, located at: https://oneida-nsn.gov/dl-file.php?file=2016/02/2011-01-26-OAHC-Corporate-Charter.pdf ("Hotel Charter"); Barton Decl. ¶¶ 5, 7, Exh. 3). The Hotel is located "on tribal land." (Am. Compl., p. 8 ¶2, iii). Robert Barton is, among other things, a member of the Nation, a member of the Tribal Council, and the President of the Hotel. (Am. Compl., p. 8 ¶ 1; Barton Decl. ¶¶ 2, 6).

Holtz is a member of the Nation and lives in Green Bay, Wisconsin. (Am. Compl., p. 1). Holtz contends that she was an employee of the Hotel and was terminated pursuant to the Hotel's "Drug and Alcohol Screening Policy." (Am. Compl., p. 2). In particular, Holtz alleges that the Defendants suspected that she was under the influence of alcohol while at work and, as a result, escorted her to the hospital for a drug and alcohol screening. (*Id*.) Holtz contends that the drug and alcohol screening process utilized by the Hotel was "inept," "crude," "inferior," or otherwise lacking in some form or process. (Am. Compl., pp. 7-9). The Amended Complaint is silent as to

whether Holtz completed the drug and alcohol screening, but alleges that Holtz was discharged or terminated as a result of her failure to comply with the drug and alcohol screening policy, and that Holtz "refused to submit to the alcohol/drug testing." (*See generally* Am. Compl., p. 13). From these allegations, Holtz concludes that she was wrongfully discharged, as well as a slew of other legal conclusions relating to the end of her employment, by the Hotel and Barton.

LEGAL STANDARD

Federal courts, as courts of limited jurisdiction, have subject matter jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States," subject to those limitations imposed by Congress. 28 U.S.C. § 1331. For a court to exercise federal question jurisdiction, a well-pleaded complaint must establish "that federal law creates the cause of action or that plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983). The plaintiff bears the burden of establishing that the jurisdictional requirements have been met on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Schaefer v. Transp. Media, Inc.,* 859 F.2d 1251, 1253 (7th Cir. 1988). If material factual allegations are contested, the proponent of federal jurisdiction must "prove those jurisdictional facts by a preponderance of the evidence." *Meridian Sec. Ins. Co. v. Sedowski,* 441 F.3d 536, 543 (7th Cir. 2006). When the moving party "launches a factual attack against jurisdiction, the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Apex Digital, Inc. v. Sears, Roebuck & Co.,* 572 F.3d 440, 444 (7th Cir. 2009) (internal quotation marks and citations omitted).

A motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) challenges the sufficiency of the complaint. Fed. R. Civ. P. 12(b)(6). The complaint must contain sufficient factual matter "that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Supreme Court has held that a complaint must contain factual allegations that "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. While a plaintiff is generally not required to plead detailed factual allegations for most claims, she must plead "more than labels and conclusions." *Id.* A simple, "formulaic recitation of the elements of a cause of action will not do." *Id.* In addition, allegations of fraud must be stated "with particularity." Fed. R. Civ. P. 9(b). In evaluating a motion to dismiss, the court must view the plaintiff's factual allegations and any inferences reasonably drawn from them in a light most favorable to the plaintiff. *Yasak v. Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi.*, 357 F.3d 677, 678 (7th Cir. 2004).

ARGUMENT

Holtz asserts or references a variety of potential claims with little to no factual allegations to even suggest that such claims are plausible. In total, Holtz's Amended Complaint references six claims or categories of claims: (1) violation of the Oneida Constitution Article VII and tribal employment laws; (2) wrongful discharge or termination from employment (including references to "constructive discharge," "workplace tort," "hostile work environment," violations of Wis. Stats. §§ 111.31 or 111.322, and violations of the Americans with Disabilities Act); (3) references to certain Wisconsin statutes of limitations (Wis. Stats. §§ 893.53, 893.54, and 893.57); (4) violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (as well as the Fifth and Fourteenth Amendments of the United States Constitution); (5) violation of 42 U.S.C. § 1985; and (6) violation of 42 U.S.C. § 1983.

All of Holtz's claims, or references to possible claims, fail. First, the Hotel, as a tribal corporation, and Barton, as an officer of the tribal corporation, are protected from suit through tribal sovereign immunity. Second, there is no subject matter jurisdiction to any of the claims asserted, or referenced, against the Hotel or Barton in Holtz's Amended Complaint since the claims are not applicable to a tribal corporation or its officers. Lastly, even if there is personal and/or subject matter jurisdiction, the Amended Complaint fails to state a claim upon which relief may be granted.

I. THE HOTEL AND BARTON ARE IMMUNE FROM SUIT.

"Indian tribes are considered 'domestic dependent nations' which 'exercise inherent sovereign authority over their members and territories.'" *Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803, 812 (7th Cir.1993), cert. denied, 510 U.S. 1019 (1993), quoting *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991). Indeed, it has been well established that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). Tribal sovereign immunity protects Indian tribes from suit in their governmental activities, as well as their "commercial activities," absent express authorization by Congress or clear waiver by the tribe. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754–55, 118 S. Ct. 1700, 1703, 140 L. Ed. 2d 981 (1998) (The Supreme Court has not "drawn a distinction between governmental and commercial activities of a tribe.); s*ee* U.S. Const. Art. I, § 8 (tribal sovereign immunity reflects the federal Constitution's treatment of Indian tribes as sovereign entities). As the Supreme Court has indicated, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Likewise, tribal enterprises are treated the same as the tribe itself and, therefore, are cloaked with sovereign immunity. *Local IV–302 Int'l Midworkers Union of Am. v. Menominee Tribal Enters.,* 595 F.Supp. 859, 862 (E.D. Wis. 1984) (applying tribal sovereign immunity to entity created by the tribal constitution); *Barker v. Menominee Nation Casino,* 897 F.Supp. 389, 393-94 (E.D. Wis. July 26, 1995) (applying tribal sovereign immunity to a corporation whose charter was issued through tribal ordinance). Further, tribal sovereign immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726–27 (9th Cir. 2008); *Bynon v. Mansfield*, No. CIV.A. 15-00206, 2015 WL 2447159, at *1-2 (E.D. Pa. May 21, 2015) (manager "in charge of day-to-day operations" of tribal corporation was immune from suit where "factual allegations regarding Mansfield pertain to his role as manager").

All of Holtz's claims in the Amended Complaint arise from her employment with the Hotel, a chartered tribal corporation owned by the Nation, and take issue with actions of the Hotel, related to her termination of her employment, and, as such, the claims fall within tribal sovereign immunity. Holtz's claims in the Amended Complaint make clear that all of the underlying allegations arose from within the Nation's boundaries and, at least as it relates to Barton, due to the actions of officers and managers of the Hotel. There is no allegation of waiver in the Amended Complaint and, moreover, neither the Nation nor the Hotel or Barton have waived immunity. (Barton Decl., ¶ 8). As a result, Holtz cannot sue the Hotel or Barton in federal court. *Barker*, 897 F.Supp. at 394 ("Because Barker cannot sue the . . . the Casino in federal court based simply on a prior employment relationship, his wrongful termination, breach

of promise and discrimination claims must be dismissed, and instead may only be heard in Tribal Court.")

II. THE CLAIMS AGAINST THE HOTEL AND BARTON SHOULD BE DISMISSED DUE TO LACK OF SUBJECT MATTER JURISDICTION.

Holtz's Amended Complaint states that this Court has jurisdiction "[p]ursuant to Wis. Stats. 893.57, Intentional torts." (Am. Compl., p. 13). However, that Wisconsin statute of limitation does not afford this Court jurisdiction. Furthermore, neither the United States Constitution nor any federal statute provides a basis for federal jurisdiction of any of the claims asserted by Holtz against the Hotel or Barton.

A. Claims Asserted Under the Oneida Constitution or Laws

This Court lacks jurisdiction over Holtz's claim that the Hotel and Barton violated Article VII of the Oneida Nation Constitution and tribal employment laws since federal courts lack jurisdiction to hear claims based on tribal law. *Dallas v. Hill*, No. 18-C-1657, 2019 WL 403713, at *2 (E.D. Wis. Jan. 31, 2019). Application and enforcement of tribal law is "solely a matter within the jurisdiction of the courts" of that Nation. *Talton v. Mayes*, 163 U.S. 376, 385, 16 S. Ct. 986, 989–90, 41 L. Ed. 196 (1896) ("the decision of such a question in itself necessarily involves no infraction of the constitution of the United States). As a result, Holtz's contention that the Hotel and Barton violated the Oneida Nation Constitution and/or tribal employment laws is not subject to the limited jurisdiction of this Court and should be dismissed.

B. Tortious Discharge or Wrongful Termination Claims

Holtz's allegations relating to her termination also do not provide a basis for federal jurisdiction. *Landreman v. Martin,* 191 Wis. 2d 787, 803-804, 530 N.W.2d 62 (Ct. App. 1995). Although it is not clear what the basis is for Holtz's tortious discharge or wrongful termination claim, other than the fact that her employment with the Hotel ended, the Amended Complaint

falls short of establishing federal jurisdiction on those grounds. First, as it pertains to Barton, there is no allegation that he was Holtz's employer and, therefore, there is no basis to assert a claim against him individually relating to Holtz's end of employment with the Hotel.

Second, the Amended Complaint references the Wisconsin Fair Employment Act ("WFEA"), Wis. Stats. §§ 111.31 – 111.395, but such a claim does not present a federal question arising under the U.S. Constitution or federal statutes and, as further discussed herein, there is no original jurisdiction to support supplemental jurisdiction. 28 U.S.C. § 1367(c)(3). Moreover, the Wisconsin Legislature, in passing the WFEA, provided that "[t]his subchapter shall be administered by the department." Wis. Stats 111.375(1). "When the legislature creates a right, the statutory remedies for violation of that right are exclusive." *Bachand v. Conn. Gen. Life Ins. Co.,* 101 Wis. 2d 617, 623-24, 305 N.W.2d 149 (Ct. App. 1981). As a result, all remedies under the WFEA are to be pursued through the Equal Rights Division of the Wisconsin Department of Workforce Development ("DWD") and "that avenue is the exclusive means by which the remedy may be pursued." *Id*. at 624 (the DWD replaced the Department of Industry, Labor, and Human Relations in 1996).[2]

Likewise, any tortious discharge claim or hostile work environment claim under state law fails for similar reasons. By way of background, under Wisconsin law, there is no right or guarantee of employment or continued employment. Rather, Wisconsin adheres to the at-will employment doctrine, which provides that employers may terminate an employee's employment at any time and for any, or no, reason. Indeed, "the termination of an employee who has agreed

[2] It should also be noted that the Wisconsin circuit courts would lack jurisdiction over such claim. The WFEA "does not grant jurisdiction over Indian Tribes or business entities owned and operated by Indian Tribes because of their sovereign status." *Kocian v. The Ho-Chunk Casino,* ERD Case No. CR200304636 (LIRC March 26, 2004) located at http://lirc.wisconsin.gov/erdecsns/635.htm. Likewise, Indian Tribes and the business entities owned and operated by Indian Tribes are immune from suit. *Cichowski v. HO-Chuck Hotel and Convention Center,* ERD Case No. 200100719 (LIRC Aug. 17, 2001) located at http://lirc.wisconsin.gov/erdecsns/404.htm.

to enter into an at-will employment relationship 'does not constitute a breach of contract justifying the recovery of damages.'" *Bukstein v. Dean Health Sys., Inc.*, 2017 WI App 54, ¶ 15, 377 Wis. 2d 688, 696, 903 N.W.2d 130, 134, *review denied,* 2018 WI 5, ¶ 15, 379 Wis. 2d 53, 906 N.W.2d 452 (citation omitted). There is no allegation in the Complaint indicating any limitations on or exceptions to the at-will employment doctrine and, therefore, there is no viable claim stemming from the end of Plaintiff's employment.[3] But, more to the point, there is no basis to suggest federal jurisdiction based on a common law or state law wrongful or tortious discharge claim.

Third, the Amended Complaint also suggests violations of the Americans with Disabilities Act ("ADA") despite indicating that Holtz "is not currently suing the Defendants under violations of the Act" and despite the lack of any allegation (under the ADA or the WFEA) that she has a qualified disability, that the Hotel knew of the disability, or that the Hotel took any adverse action against her as a result. (Am. Compl. at 7). Nonetheless, the ADA does not support federal jurisdiction since Title I of the ADA does not apply to "an Indian tribe." 42 U.S.C. §12111(5)(b)(i). *See* 42 U.S.C. §2000e(b). Since the Hotel is a tribal enterprise, it qualifies as an "Indian tribe" under the statute. *Reuer v. Grand Casino Hinckley*, No. CIV. 09-1798 MJD/RLE, 2010 WL 3384993, at *12 (D. Minn. July 12, 2010), *report and recommendation adopted,* No. CIV. 09-1798 MJD/RLE, 2010 WL 3385058 (D. Minn. Aug. 24, 2010) (Since the "Corporate Commission is an arm of the Mille Lacs Band, such that the Corporate Commission clearly falls within the definition of an Indian Tribe," the court held that

[3] Likewise, there is no public policy exception to the at-will employment doctrine, particularly when the complaint references both the WFEA and ADA—both of which provide their own remedies. *McCluney v. Jos. Schlitz Brewing Co.,* 489 F.Supp. 24, 26 (E.D. Wis. 1980*)* (the public policy exception to the at-will employment rule only applies when there was no other adequate remedy to vindicate such policy).

"the Plaintiffs' ADA claim must be dismissed for lack of subject matter jurisdiction."); *Barker*, 897 F.Supp. at 393 (stating that "an action against a tribal enterprise is, in essence, an action against the tribe itself").

Fourth, the Amended Complaint contains allegations that appear to assert a claim for a "hostile work environment" allegedly experienced by Plaintiff while she worked at the Hotel. However, as is the case with a claim under the ADA, Plaintiff may not assert any claims against the Nation for hostile work environment or sexual harassment under Title VII of the Civil Rights Act ("Title VII") because Indian tribes are not "employers' subject to liability under that statute. 42 U.S.C. § 2000e(b) ("The term "employer" … does not include … an Indian tribe"). *See also Barker*, 897 F. Supp. at 394; *Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 237 F. Supp. 3d 867, 875 (W.D. Wis. 2017) (holding that "plaintiffs cannot state a Title VII claim against the Tribe" on the ground that an Indian tribe is not an "employer" subject to Title VII). Furthermore, Plaintiff may not assert a Title VII claim against Barton because Title VII prohibits discrimination by "employers" – it does not apply to employees, or even supervising employees. 42 U.S.C. § 2000e-2. As a matter of law, a Title VII claim can be asserted only against the employer – here, the Hotel – not an individual supervisor. The Seventh Circuit has repeatedly held "Title VII authorizes suits against employers, not employees." *Sullivan v. Village of McFarland*, 457 F. Supp. 2d 909, 914 (W.D. Wis. 2006) (emphasis added), *aff'd*, 232 Fed. Appx. 585 (7th Cir. 2007); *see also United States Equal Employment Opportunity Commission v. AIC Sec. Investigations, Ltd*., 55 F.3d 1276, 1281 (7th Cir. 1995) (no individual liability under Title VII, ADA, or ADEA). "It is by now well established in this court that 'a supervisor does not, in his individual capacity, fall within Title VII's definition of employer.' " *Sattar v. Motorola, Inc*., 138 F.3d 1164, 1168 (7th Cir. 1998); *see also Williams v. Banning*, 72

F.3d 552, 555 (7th Cir. 1995) ("a supervisor does not, in his individual capacity, fall within Title VII's definition of employer").

In addition, the Amended Complaint fails to establish sufficient facts alleging that she has complied with conditions precedent to filing suit under either the ADA or Title VII—namely that she has received the requisite Notice of Right to Sue letter issued by the United States Equal Employment Opportunity Commission. 49 U.S.C. § 2000e-5(f)(1). Receipt of the Notice of Right to Sue letter is a condition precedent to filing a federal discrimination lawsuit. *Alexander v. Gardener-Denver Co.*, 415 U.S. 36, 47 (1974); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1109 (7th Cir. 1992); *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1240 (7th Cir. 1980). As such, a plaintiff must allege fulfillment of such conditions precedent in the complaint. Fed. R. Civ. P. 9(c). As of the date of this Motion, it does not appear that any administrative proceeding was commenced (neither within the EEOC nor the Wisconsin DWD) and the EEOC has not issued a Notice of Right to Sue letter.

Lastly, the Amended Complaint makes reference to three separate Wisconsin statutes of limitations: §893.53 (action for injury to character or other rights); § 893.54 (injury to the person); and § 893.57 (intentional torts). The foregoing statutes do not provide the basis for any specific substantive claim but rather are simply statutes of limitations that apply to the potential types of claims cited therein. Moreover, there is no allegation in the Amended Complaint to support or explain any of these references and, therefore, they should be disregarded. In any event, for the reasons stated above, there is no original jurisdiction to support supplemental jurisdiction of the type of claims that such statute of limitations would ordinarily apply to. 28 U.S.C. § 1367(c)(3).

C. Claims Pursuant to the Indian Civil Rights Act and U.S. Constitution

Although Plaintiff references it in the Amended Complaint, the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1304, does not afford jurisdiction in this case. The ICRA authorizes "federal judicial review of tribal actions only through the habeas corpus provisions of § 1303." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 70, 98 S. Ct. 1670, 1683, 56 L. Ed. 2d 106 (1978) ("§1302 does not impliedly authorize actions" in a civil context in federal court). Likewise, the Fourteenth and Fifth Amendments to the U.S. Constitution do not apply to the Hotel or Barton. *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S. D.*, 259 F.2d 553, 556 (8th Cir. 1958) ("The Fourteenth Amendment places limitations on legislative actions by the states.") Since Indian tribes are not states, such "Constitutional limitations have no application to the actions, legislative in character, by Indian tribes." *Id.*; *see also Dallas v. Hill*, No. 18-C-1657, 2019 WL 403713, at *2 (E.D. Wis. Jan. 31, 2019) (noting that Indian tribes are not States and that Constitutional limitations, such as the First Amendment do not apply to Oneida Nation or the individuals named as Defendants). As a result, neither the ICRA nor the Fifth or Fourteenth Amendments provide a basis for jurisdiction against the Hotel or Barton.

D. Claims Pursuant to 42 U.S.C. § 1985 and § 1983.

Holtz's Amended Complaint references violations of 42 U.S.C. § 1983. As noted above, Holtz's assertions related to the U.S. Constitution do not apply. Furthermore, "[a] § 1983 action is unavailable 'for persons alleging deprivation of constitutional rights under color of tribal law.'" *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (quoting *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983)). Accordingly, there is no subject matter jurisdiction against the Hotel or Barton for a § 1983 claim.

Holtz also references a violation of 42 U.S.C. § 1985. Section 1985, however, addresses conspiracies to prevent an officer of the United States from discharging duties; conspiracies to obstruct or intimidate a party, witness, or juror in a court of the United States; and conspiracies to deprive a person or class of people equal protection of the laws, equal privileges and immunities, and voting rights. 42 U.S.C. §§ 1985(1)–(3). Holtz is not a government official and is not a party, witness, or juror; therefore, § 1985(1) and § 1985(2) do not apply to her case. To assert a claim under § 1985(3), a plaintiff must allege, "first, that the defendants conspired; second, that they did so for the purpose of depriving any person or class of persons the equal protection of the laws; and third, that the plaintiff was injured by an act done in furtherance of the conspiracy." *Hartman v. Bd. of Trustees of Community College Dist. No. 508*, 4 F.3d 465, 469 (7th Cir. 1993) (citation omitted). Holtz must establish "independent substantive rights enforceable in the federal courts to serve as a predicate violation" under the statute. *Gallegos v. Jicarilla Apache Nation*, 97 F. App'x 806, 812 (10th Cir. 2003). An allegation of "due process and equal protection violations cannot serve as predicate violations for a § 1985(3) claim because those provisions of the United States Constitution do not constrain tribes and their officials." *Id*. Holtz's Amended Complaint fails to assert any independent substantive right enforceable in the federal courts.

III. HOLTZ HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to set forth "a short and plain statement of the claim showing that [he or she] is entitled to relief." Although pro se parties are afforded great latitude in pleadings, *McCormick v. City of Chicago,* 230 F.3d 319, 325 (7th Cir.2000), they nevertheless must comply with the procedural rules, because strictly enforcing procedural requirements is "the best guarantee of evenhanded administration of the law."

Members v. Paige, 140 F.3d 699, 702 (7th Cir.1998) (internal quotations omitted). *See also McNeil v. United States,* 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed.2d 21 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.") (footnote omitted); *McMasters v. United States,* 260 F.3d 814, 818 (7th Cir.2001) (plaintiff's pro se status does not excuse requirement that he comply with procedural rules).

In order for Holtz's Amended Complaint to survive a Rule 12(b)(6) motion to dismiss, she "must plead some facts that suggest a right to relief that is beyond the 'speculative level.'" *Atkins v. City of Chicago,* 631 F.3d 823, 832 (7th Cir.2011). In addition to the fact that the claims are barred by tribal sovereign immunity and this Court lacks subject matter jurisdiction, the allegations of the Amended Complaint fail to suggest any right to relief for the reasons already stated herein. The Amended Complaint is, by and large, a hodge-podge of allegations and legal conclusions—none of which amount to a claim upon which relief may be granted. As such, Holtz has failed to allege sufficient facts to suggest that the Hotel or Barton has violated the law or any other right that would entitle Holtz to damages and, therefore, all claims asserted against the Hotel and Barton should be dismissed.

CONCLUSION

For the foregoing reasons, the Hotel and Barton respectfully request that the Court dismiss Plaintiff's claims against them.

Dated this 21st day of November, 2019.

s/ Jodi Arndt Labs
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