Appeal No. 20-1797

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CRYSTAL HOLTZ,

Plaintiffs-Appellants,

v.

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

Defendants - Appellees.

Appeal from the United States District Court
For the Eastern District of Wisconsin
Case No. 1:2019-CV-01682-WCG
The Honorable William C. Griesbach Presiding

DEFENDANTS – APPELLEES' JOINT BRIEF

CONWAY, OLEJNICZAK & JERRY S.C.
Jodi Arndt Labs
Attorneys for the Defendants – Appellees
Oneida Airport Hotel Corporation and Robert Borton

POST OFFICE ADDRESS
231 South Adams Street
Green Bay, WI 54301
P.O. Box 23200
Green Bay, WI 54305-3200
(920) 437-0476
WI Bar No.: 1033359
E-mail: jodi@lcojlaw.com

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Mark A. Johnson
Attorneys for the Defendants – Appellees
Steve Ninham and Aimbridge Hospitality, LLC

POST OFFICE ADDRESS
Pabst Boiler House
1243 North 10th Street, Suite 200
Milwaukee, WI 53205
Tel: 414-239-6400
Fax: 414-755-8289
WI Bar No. 1018110
E-mail: Mark.Johnson@ogletree.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos: 20-1797

Short Caption: Holtz v. Oneida Airport Hotel Corporation, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Oneida Airport Hotel Corporation and Robert Barton

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Conway, Olejniczak & Jerry, S.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: *s/Jodi Arndt Labs* Date: August 17, 2020

Attorney's Printed Name: Jodi Arndt Labs

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d).

Yes X No

Address: 231 South Adams Street, Green Bay, WI 54301 Phone Number: (920) 437-0476

Fax Number: (920) 437-2868 E-Mail Address: jodi@lcojlaw.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1797

Short Caption: Crystal Holtz v. Aimbridge Hospitality, LLC et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Aimbridge Hospitality, LLC; Steve Ninham

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

Aimbridge Hospitality Holdings, LLC.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Mark A. Johnson Date: 5/26/2020

Attorney's Printed Name: Mark A. Johnson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☑ No ☐

Address: Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

1243 N. 10th Street; Suite 200; Milwaukee, WI 53205

Phone Number: (414) 239-6408 Fax Number: (414)755-8289

E-Mail Address: mark.johnson@ogletree.com

TABLE OF CONTENTS

Table of Authorities iii

Statement Regarding Oral Argument 1

Jurisdictional Statement 1

Statement of Issues Presented for Review 2

Statement of the Case 3

A. Procedural Background 3

B. Allegations in the Amended Complaint 5

Summary of the Argument 7

Argument 8

I. STANDARD OF REVIEW 8

A. Tribal Immunity 8

B. Motion to Dismiss Under Rule 12(b)(6) 8

II. THE DISTRICT COURT HAD SUFFICIENT GROUNDS TO DISMISS HOLTZ'S COMPLAINT DUE TO HER FAILURE TO RESPOND TO DEFENDANTS' MOTIONS TO DISMISS 9

III. HOLTZ FORFEITED HER "ARM-OF-THE-TRIBE" ARGUMENT BY FAILING TO PRESENT IT TO THE DISTRICT COURT. 11

IV. THE DISTRICT COURT DID NOT ERR WHEN IT DETERMINED THAT HOLTZ'S CLAIMS WERE BARRED UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY 14

A. The District Court relied on the well-established doctrine that Indian Tribes, including their business enterprises, officers and agents, are entitled to sovereign immunity 14

B. Oneida Airport Hotel Corporation is an arm of the Oneida Nation and thus is entitled to sovereign immunity. 17

V. EVEN DISREGARDING THE DEFENDANTS' SOVEREIGN IMMUNITY, THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED. 23

A. The Amended Complaint fails to state a claim under the United States Constitution and 42 U.S.C. section 1983 24

B. The Amended Complaint fails to state a claim under 42 U.S.C. section 1985 24

C. The Amended Complaint fails to state a claim under the Indian Civil Rights Act. 26

D. The Amended Complaint fails to state a claim under the Oneida Constitution or laws 26

E. Referring to statutes of limitations does not state a claim 27

F. The allegations under the Wisconsin Fair Employment Act fail to state a claim because claims under the Wisconsin Fair Employment Act must be litigated in the administrative forum 27

G. The allegations of wrongful termination fail to state a claim 28

Conclusion 29

Certificate of Compliance 31

Circuit Rule 25(a) Certification 32

Certificate/Proof of Service 33

TABLE OF AUTHORITIES

Cases **Page(s)**

Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997) 25

Alden v. Maine, 527 U.S. 706 (1999) 23

Alioto v. Town of Lisbon, 651 F.3d 715 (7th Cir. 2011) 11

Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006) 14, 23

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Circ. 1993) 14, 22

Anderson v. Hardman, 241 F.3d 544 (7th Cir. 2001) 9

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 8, 9

Bachand v. Connecticut General Life Ins., 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981) 27, 28

Barker v. Menominee Nation Casino, 897 F.Sup. 389 (E.D. Wis. 1995) 15, 16

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 8

Bonte v. U.S. Bank, N.A., 624 F.3d 461 (7th Cir. 2010) 9

Bourque v. Wausau Hosp. Ctr., 145 Wis. 2d 589, 427 N.W.2d 433 (Wis. Ct. App. 1988) 27

Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010) 18, 20, 22, 23

Brokaw v. Mercer Cty., 235 F.3d 1000 (7th Cir. 2000) 25

Brown v. Automotive Components Holdings, LLC, 622 F.3d 685 (7th Cir. 2010) 11

Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006) 24

Catskill Development, LLC. v. Park Place Entertainment Corp., 206 F.R.D. 78 (S.D.N.Y. 2002) 15

Cook v. AVI Casino Enters., Inc., 548 F.3d 718 (9th Cir. 2008) 15

Domka v. Portage County, 523 F.3d 776 (7th Cir. 2008) 12, 13

Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) 9

Everroad v. Scott Truck Systems, Inc., 604 F.3d 471 (7th Cir. 2001) 11

Fednav Int'l Ltd. v. Continental Ins. Co., 624 F.3d 834 (7th Cir. 2010) 11, 13

Forrer v. Sears Roebuck & Co., 36 Wis. 2d 388 28

Great Am. Fed. S. & L. Assn. v. Novotny,
442 U.S. 366, 60 L. Ed. 2d 957, 99 S. Ct. 2345 (1979) 25

Hartman v. Bd. of Trustees of Community College Dist. No. 508, 4 F.3d 465 (7th Cir. 1993).... 25

Heller v. Equitable Life Assur. Soc. of U.S., 833 F.2d 1253 (7th Cir. 1987)............................... 12

Hicks v. Avery Drei, LLC, 654 F.3d 739 (7th Cir. 2011).. 11

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751 (1998) 14, 22

L.P. v. Marian Catholic High Sch., 852 F.3d 690 (7th Cir. 2017) 24

Lewis v. Clark, 581 U.S. ___, 137 S. Ct. 1285 (2017).. 18, 19, 20

Lineen v. Gila River Indian Cmty., 276 F.3d 489 (9th Cir. 2002) 15

Local IV-302 Int'l Midworkers Union of Am. V. Menominee Tribal Enters.,
595 F.Supp. 859 (E.D. Wisc. 1984)... 15

Majeske v. Fraternal Order of Police, Local Lodge No. 7, 94 F.3d 307 (7th Cir. 1996)............ 25

Members v. Paige, 140 F.3d 699 (7th Cir. 1998) 9, 10

Meyers v. Oneida Tribe of Indians of Wisconsin, 836 F.3d 818 (7th Cir. 2016)........................... 8

Michigan v. Bay Mills Indian, Comty., 572 U.S. 782 (2014) 14

Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288 (10th Cir. 2008)................ 14

Packer v. Trustees of Indiana University, 800 F.3d 843 (7th Cir. 2015).................................... 12

Puffer v. Allstate Ins. Co., 675 F.3d 709 (7th Cir. 2012).. 11

Reger Dev. LLC v. National City Bank, 92 F.3d, 759 (7th Cir. 2010)... 8

Robyns v. Reliance Standard Life Ins. Co., 130 F.3d 1231 (7th Cir. 1997) 11

Romanella v. Hayward, 933 F. Supp. 163 (D.Conn. 1996) 15

Runs After v. United States, 766 F.2d 347 (8th Cir. 1985) 26

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 15, 22, 24, 26

Securities & Exchange Comm. v. Yang, 795 F.3d 674 (7th Cir. 2015) 12

Staats v. County of Sawyer, 220 F.3d 511 (7th Cir. 2000) 27

Stevens v. Tillman, 855 F. 2d. 394 (7th Cir. 1988) 25

Strozinsky v. School District of Brown Deer,
2000 WI 97, 237 Wis. 2d 19, 614 N.W.2d 443. (R. 6, 23) 4, 5, 28

Talton v. Mayes, 163 U.S. 376 (1896) 27

Thelen v. Marc's Big Boy Corp., 64 F.3d 264 (7th Cir. 1995) 28

Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,
370 F.2d 529 (8th Cir. 1967) 24

United States v. Berkowitz, 927 F.2d 1376 (7th Cir. 1991) 13

United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991) 13

Wandry v. Bulls Eye Credit Union, 129 Wis. 2d. 37, 384 N.W. 2d. 325 (1986) 28

West v. Atkins, 487 U.S. 42 (1988) 24

Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987) 25, 26

White v. Univ. of Cal., 765 F.3d 1010 (9th Cir. 2014) 18, 20

Williams v. Big Picture Loans, LLC, 929 F.3d 170 (4th Cir. 2019) 18, 20

Winkelman v. Beloit Memorial Hospital, 168 Wis. 2d 12, 483 N.W.2d 211 (1992) 28

Wisconsin v. Ho-Chunk Nation, 512 F.3d 921 (7th Cir. 2008) 8

Statutes

25 U.S.C. section 1302(a)(1) 26
25 U.S.C. § 1302 .... 1, 6, 26
28 U.S.C. 1291 2
28 U.S.C. section 1367(c) 5, 7, 29
28 U.S.C. §1331 1
28 U.S.C. §1446(b) 1, 3
28 U.S.C. §§1441 and 1446 1
42 U.S.C. section 1985 .... iv, 1, 6, 24
42 U.S.C. section 1983 .... passim
Section 102.03(2) Wis. Stat 28
Section 893.54 27
Section 893.57 27
Section 1302(a)(8) 26
Section 1985(2) 24
Section 1985(3) 24, 25, 26
Sections 893.53, 893.54 and 893.57 of the Wisconsin Statutes 27
§ 1985(1) 24

Other Authorities

Article VII of the Oneida Constitution 25, 26
Civil L.R. 7 .... 5, 13
Civil L.R. 41 .... 5, 13

Statement Regarding Oral Argument

The Defendants-Appellees do not request oral argument. The appeal involves the application of Fed. R. Civ. P. 12(b)(6) to the Amended Complaint. The appeal also involves the application of well-established sovereign immunity legal principles and jurisprudence. Because briefing adequately addresses these issues, oral argument is unnecessary.

Jurisdictional Statement

After the Plaintiff-Appellant filed this lawsuit in the Circuit Court for Brown County, Wisconsin, Defendants-Appellees timely removed the lawsuit to the United States District Court for the Eastern District of Wisconsin on November 14, 2019 under 28 U.S.C. §§1441 and 1446. (District Court ECF no. ("R.") 1). Holtz served the Defendants in the state court action on October 15, 2019. (R. 1, Exh. 2). Thus, the Notice of Removal was filed within 30 days after the Defendants' receipt of pleadings through service and therefore complied with 28 U.S.C. §1446(b).

The District Court possessed subject matter jurisdiction over the case under 28 U.S.C. §1331 because Plaintiff's Amended Complaint alleged numerous federal claims including Fifth Amendment and Fourteenth Amendment of the Constitution claims, along with alleged violation[s] of federal rights under 25 U.S.C. § 1302, 42 U.S.C. 1985 and 42 U.S.C. § 1983. (R. 1). Federal "district courts have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. §1331.

The District Court entered its order dismissing the Amended Complaint and entered judgment on April 30, 2020. (R. 25). The Plaintiff filed her Notice of Appeal of this final order on May 12, 2020. (R. 27). This appeal is therefore timely under Fed. R. App. P. 4(a)(4)(A)(v), which provides that the time to appeal an order or judgment subject to challenge under Rule 59

begins with the disposition of that motion and under Fed. R. App. P. 4(a)(1), which allows 30 days to file the Notice of Appeal.

This Court has jurisdiction under 28 U.S.C. 1291, which confers authority to review final orders and judgments from district courts. The District Court's Decision and Order was a final order and judgment because it disposed of all claims before the Court, dismissed the Amended Complaint and entered judgment against the Plaintiffs. (R. 26).

Statement of Issues Presented for Review

1. Did the District Court properly conclude Plaintiff-Appellant Holtz's failure to respond to the motions to dismiss was by itself sufficient to warrant dismissal under Civil Local Rule 7(d), which states that the "failure to file a memorandum in opposition to a motion is sufficient cause for the Court to grant the motion"?

2. Did Holtz waive the arguments she is now making on appeal by failing to raise them before the District Court?

3. Did the District Court correctly hold Holtz's federal and state claims are barred by the doctrine of sovereign immunity when the Amended Complaint alleges Defendant Oneida Airport Hotel Corporation is a tribally chartered corporation that is located on tribal land and the other Defendants were agents of the Oneida Airport Hotel Corporation acting within the scope of their employment and authority?

4. Sovereign immunity aside, did the Amended Complaint fail to state a claim upon which relief can be granted?

Statement of the Case

A. Procedural Background.

Plaintiff Crystal Holtz is a member of the Oneida Nation and a former employee of the Oneida Hotel Airport Corporation d/b/a Radisson Hotel & Conference Center Green Bay (the "Hotel" or "OAHC"). (R. 1-3 at 4). On October 15, 2019, Holtz filed an action in the Circuit Court for Brown County, Wisconsin, alleging various claims under federal, state, and tribal law, arising out of the termination of her employment. (Complaint, R. 1-2 at 4).

A week later, Holtz filed an Amended Complaint that added allegations as to the Defendants' motivation for terminating her employment. (Amended Complaint, R. 1-3 at 6). The Amended Complaint added no substantive claims. (R. 1-3 at 4, 6).

The Defendant Oneida Airport Hotel Corporation d/b/a Radisson Hotel & Conference Center Green Bay is "Oneida Nation-owned." (R. 1-3 at 4, 6). Defendant Robert Barton is a member of the Oneida Nation and President of the Hotel. (R. 1-3 at 11). Defendant Steven Ninham is also a member of the Oneida Nation who works as the General Manager of the Hotel for Defendant Aimbridge Hospitality, LLC. (R. 1-3 at 11).

The Defendants filed a timely notice to remove Holtz's action to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1446(b). (Notice of Removal, R. 1). The Defendants also filed motions to dismiss. (Motion to Dismiss of Oneida Airport Hotel Corp. and Robert Barton, R. 7; Motion to Dismiss of Steve Ninham and Aimbridge Hospitality, LLC, R. 11; collectively referred to as the "Motions to Dismiss").

Holtz filed an objection to the removal of her action, entitled "Motion for Order to Deny Removal." (R. 16). Her only argument was that the District Court did not have jurisdiction

because she was making a state law claim of constructive discharge under *Strozinsky v. School District of Brown Deer,* 2000 WI 97, 237 Wis. 2d 19, 614 N.W.2d 443. (R. 6, 23).

Holtz did not respond to the Motions to Dismiss. (Short Appendix at Decision and Order, R. 25 at 4).

On April 30, 2020, the District Court issued a Decision and Order, denying Plaintiff's motion to remand and granting the Defendants' Motions to Dismiss, dismissing all claims with prejudice. (*Id.* at 9). The District Court stated that Ms. Holtz's failure to respond to the Motions to Dismiss was by itself grounds to grant Defendants' motions. (R. 25 at 4). The District Court noted two local rules of the Eastern District of Wisconsin that supported this result. Civil L.R. 7(d) states that failure to file a memorandum in opposition to a motion is sufficient cause for the court to grant the motion. (*Id.*) Additionally, Civil L.R. 41(d)) states that when it appears that a plaintiff is not diligently prosecuting an action, it may dismiss the complaint. (Id.)

The District Court went on to conclude that even putting Holtz's failure to respond aside, there were "ample grounds" to dismiss the Amended Complaint. The District Court concluded none of the federal causes of action alleged in the Amended Complaint was plausibly stated. (R. 25 at 5).

The District Court concluded that all of Holtz's federal and state claims were barred by the doctrine of sovereign immunity. (Id. at 5). The Hotel is owned and operated by the Oneida Nation, a federally recognized Indian tribe. (Id. at 5). The claims against the Oneida Nation and its agents acting within the scope of their employment and authority were therefore barred by the doctrine of tribal immunity. (Id. at 6). Additionally, even if the Defendants were not immune from suit, the Amended Complaint did not state a federal claim. (Id.)

Furthermore, the District Court concluded that none of the factors in 28 U.S.C. section 1367(c) were present and therefore, remand of the state law claims, as opposed to dismissal, was inappropriate. (Id. at 9). Therefore, the Motions to Dismiss (R. 7 and 11) were granted and all claims were dismissed with prejudice. (R. 25 at 9).

On May 12, 2020, Plaintiff-Appellant filed a Notice of Appeal with the District Court, appealing the April 30, 2020 Decision and Order. (R. 27).

B. Allegations in the Amended Complaint

In the Amended Complaint, Holtz alleges she is a member of the Oneida Nation tribe who was employed as a sales manager by OAHC. . (R. 1-3 at 4, 6). She alleges that on September 20, 2019, the Defendants accused Holtz of drinking alcohol at lunch because she had droopy eyes and appeared flush, “leading management to reasonably suspect markedly impaired behavior.” (R. 1-3 at 5). She alleges she was escorted from the hotel to St. Mary’s Hospital to undergo what she calls a “2.8 screening.” (R. 1-3 at 5). This refers to a Hotel Drug and Alcohol Screening Policy that is found on page 2.8 of the employee handbook. (*Id.*). She alleges her employment was terminated for the stated reason that she refused to undergo the 2.8 drug and alcohol screening. (R. 1-3 at 16, ¶¶ 4-5).

Holtz alleges the “Oneida Defendant, Steve Ninham” - who was General Manager of the Hotel and employed by Aimbridge Hospitality - approved and authorized this 2.8 Drug and Alcohol policy. (R. 1-3 at 11). Holtz alleges that Ninham knows that she is Oneida and the Hotel is Oneida-owned and on tribal land and within the Oneida Reservation Boundaries and thus – according to the Amended Complaint - the Oneida Nation Constitution applies to Plaintiff. (*Id.* at 11, ¶¶ 2.A.iii).

Holtz alleges the Defendants failed to communicate the "2.8 screening protocol" to the hospital's staff. (*Id*., ¶ 2.A.i) She alleges her employment with the Hotel was terminated on September 20, 2019 because she had refused to submit to the 2.8 drug and alcohol testing. (*Id*. at 13). But Holtz claims this reason is false and she denies refusing the screening. (*Id*. at 6, 16).

The Amended Complaint alleges Defendants Barton and Ninham conspired to terminate her and hire a replacement employee who would not be a member of the Oneida Nation and that they did this so that tribal employment laws and the Oneida Constitution, which apply to Holtz, would not apply to her replacement. (R. 1-3 at 12 ¶¶ vi, vii, 14 ¶¶vi, vii). She also alleges Ninham was motivated to terminate her so that her replacement would be an employee of Aimbridge Hospitality so that Aimbridge could "make more money." (R. 1-3 at 6).

Holtz's Amended Complaint also alleges HR stated Holtz's daughter will never work for the Hotel, despite the fact that the HR manager's son is the Hotel's housekeeping supervisor. (R 1-3 at 7). The Amended Complaint also claims that her supervisor reprimanded her for wearing a nose ring in August 2019 and that her professional degree is a threat to her supervisor's position. (R. 1-3 at 7-8).

The Amended Complaint refers to a number of statutes, constitutional provisions and common law theories in an attempt to articulate a claim against the Defendants arising out of the termination of Holtz's employment. (R. 1-3). The Amended Complaint claims the Defendants violated Article VII of the Oneida Nation Constitution and tribal employment laws (R. 1-3 at 4, 12, 14); the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (R. 1-3 at 4, 14); 42 U.S.C. § 1985; 42 U.S.C. § 1983 (*Id*. at 4, 13, 14); the Fifth and Fourteenth Amendments to the United States Constitution (*Id*. at 11, 13); and various Wisconsin state law claims (*Id*. at 4). The Amended

Complaint also refers to the Americans with Disabilities Act (ADA), but expressly states it is not alleging a violation against Defendants under the ADA. (Id. at 10).

Summary of the Argument

First, the District Court properly concluded Holtz's failure to respond to the Motions to Dismiss was by itself sufficient to warrant dismissal of her claims under Civil Local Rule 7(d), which states that the "failure to file a memorandum in opposition to a motion is sufficient cause for the Court to grant the motion."

Second, Holtz waived the arguments she is now making on appeal by failing to raise them before the District Court. At no time during the underlying action did Holtz raise the "arm-of-the-tribe" legal argument and thus she is precluded from doing so at this time.

Next, the District Court correctly dismissed all counts contained in Holtz's Amended Complaint. Holtz contends that the District Court improperly granted sovereign immunity to OAHC and the other Defendants without first determining OAHC's "true identity" via application of the "arm-of-the-tribe" test. To the contrary, the District Court properly held that all of Holtz's claims against the Defendants, state as well as federal, were barred under the doctrine of sovereign immunity. The District Court relied on well-established law concerning sovereign immunity in reaching its decision; it did not need to apply the arm-of-the-tribe argument asserted by Holtz.

The District Court also correctly held that the Amended Complaint fails to state a federal claim upon which relief can be granted. Additionally, since none of the conditions set forth in 28 U.S.C. § 1367(c) are present, remand of the state law claims, as opposed to dismissal with prejudice, would have been inappropriate. Moreover, the state law allegations also fail to plausibly state a claim.

Argument

I. STANDARD OF REVIEW

A. Tribal Immunity.

This court reviews the question of whether the Plaintiff's claims are barred by sovereign immunity de novo. *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 824 (7th Cir. 2016): *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 929 (7th Cir. 2008).

B. Motion to Dismiss Under Rule 12(b)(6).

This Court reviews the decision to grant a defendant's motion under Fed. R. Civ. P. 12(b)(6) without deference. *Reger Dev. LLC v. National City Bank*, 92 F.3d, 759, 763 (7th Cir. 2010).

To state a claim upon which relief can be granted, a complaint must assert facts demonstrating a claim for relief that "is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is "plausible on its face" when the complaint includes "factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A reasonable inference only exists when the complaint alleges facts showing "more than a sheer possibility that a defendant had acted unlawfully." *Id.* An inference is not reasonable when a complaint "pleads facts that are merely inconsistent with" an allegation that a party acted unlawfully. *Id.* A complaint's allegations must "raise a right to relief above the speculative level." *Twombly, 550 U.S. at, 570.*

When addressing a motion to dismiss for failure to state a claim, courts take a "two pronged approach": (1) eliminate any allegations in the complaint that are merely legal conclusions; and (2) when there are well-pleaded factual allegations, "assume their veracity and

then determine whether they plausibly give rise to an entitlement to relief.'" *Iqbal*, 556 U.S. at 679. Even though a pro se complaint is given a liberal construction, *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), a complaint must still be dismissed under Rule 12(b)(6) if the facts alleged do not "raise a right to relief above the speculative level." *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 465 (7th Cir. 2010).

II. THE DISTRICT COURT HAD SUFFICIENT GROUNDS TO DISMISS HOLTZ'S COMPLAINT DUE TO HER FAILURE TO RESPOND TO DEFENDANTS' MOTIONS TO DISMISS.

Defendants filed the Motions to Dismiss on November 21, 2019. (R. 7 and 11). Holtz did not file a response to either of the Defendants' motions. Although Holtz did not file a response to the Motions to Dismiss, Holtz filed a Motion for Order to Deny Removal from Brown County Circuit Court on November 25, 2019 (the "Removal Motion). (R. 16). On December 16, 2019, Defendants filed responses in opposition to Holtz's Removal Motion. (R. 20 and 21). Holtz filed a reply brief concerning her Removal Motion on December 20, 2019. (R. 23). Four (4) months later, the District Court entered a Decision and Order on Defendants' Motions to Dismiss wherein the court noted that Holtz failed to respond to either motion to dismiss. (R. 25).

Under the District Court's rules, "[f]ailure to file a memorandum in opposition to motion to a motion is sufficient cause for the court to grant the motion." Civil L.R. 7(d) (E.D. Wis.). In addition, under Civil L.R. 41(c), "[w]henever it appears to the Court that the plaintiff is not diligently prosecuting the action … the Court may enter an order of dismissal with or without prejudice." A pro se plaintiff is required to to comply with the rules governing the filing of a claim and to comply with court rules. *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001); *Members v. Paige*, 140 F.3d 699, 702 (7th Cir. 1998). Holtz failed to comply with the local rule

requiring her to file an opposition to the Motions to Dismiss. Therefore, this was sufficient grounds by itself to grant the Defendants' Motions to Dismiss.

Holtz claims that her motion to deny removal from state court was her opposition to the Motions to Dismiss. However, upon review of Holtz's Removal Motion filings, Holtz only references the Motions to Dismiss in one sentence wherein she alleges that evidence of the Defendants' "bad faith" to remove the case to federal court exists in the "Defendants' insubstantial Motions to Dismiss…." (R. 16 at 2). Holtz asserts that OAHC conflated its corporation with "tribal sovereignty" for the purpose of removing the case to federal court. (*Id.*). Other than suggesting that the Defendants were trying to rely on tribal sovereignty to remove the matter to federal court, Holtz makes no reference to the legal arguments raised by the Defendants in their Motions to Dismiss. Holtz's sole legal argument in Removal Motion was that the District Court lacked jurisdiction because she did not assert any federal claims; she argued her claim was supposedly only a claim of constructive discharge or wrongful termination under *Strozinsky v. School District of Brown Deer*, which per Holtz, did not depend on any question of federal law.

When opposing removal before the District Court, Holtz denied asserting any federal claims that would properly be in front of the federal court in order to argue there was not federal question jurisdiction. But Holtz did not respond to the Motions to Dismiss or provide any legal argument or authority for why – if removal was proper - the District Court should not grant Defendants' motion to dismiss her Amended Complaint.

In short, Holtz's motion in opposition to removal was not a response to the Motions to Dismiss and, therefore, the District Court had grounds to grant Defendants' Motions to Dismiss

without having to review the Defendants' legal arguments. The District Court's decision granting the Motions to Dismiss should be affirmed on this ground alone.

III. HOLTZ FORFEITED HER "ARM-OF-THE-TRIBE" ARGUMENT BY FAILING TO PRESENT IT TO THE DISTRICT COURT.

Holtz's key argument on appeal is that the District Court erred when determining that OAHC, and consequently the other Defendants, was entitled to sovereign immunity without applying the "arm-of-the-tribe" test to first determine OAHC's "true identity." The District Court's decision never addressed Holtz's argument that OAHC is not an arm-of-the-tribe and hence is not entitled to sovereign immunity. This is not because the District Court overlooked it; it is because Holtz never argued what she argues now. (R. 25 at 4). Holtz's first problem, then, is that she never raised the central argument she advances on appeal before the District Court.

By failing to present this argument, or any other argument, to the District Court, Holtz forfeits the argument on appeal. "The well-established rule in this circuit is that a plaintiff waives the right to argue an issue on appeal if she fails to raise the issue before a lower court." *Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1238 (7th Cir. 1997). This Court has applied that rule many times. *See, e.g., Everroad v. Scott Truck Systems, Inc.*, 604 F.3d 471, 480 (7th Cir. 2001); *Brown v. Automotive Components Holdings, LLC*, 622 F.3d 685, 691 (7th Cir. 2010); *Fednav Int'l Ltd. v. Continental Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012); *Hicks v. Avery Drei, LLC*, 654 F.3d 739, 746 (7th Cir. 2011); *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("Our system of justice is adversarial, and our judges are busy people. . . . [T]hey are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning" [citation and quotation omitted]).

Strong reasons support the rule. The district court's work is hardly meaningless, so permitting appellants to advance new arguments on appeal "undermines the essential function of the district court." *Domka v. Portage County*, 523 F.3d 776, 784 (7th Cir. 2008).

> On numerous occasions, we have held that if a party fails to press an argument before the District Court, he waives the right to present that argument on appeal. In our view, a trial judge may properly depend upon counsel to apprise him of the issues for decision. He is not obligated to conduct a search for other issues which may lurk in the pleadings.

Heller v. Equitable Life Assur. Soc. of U.S., 833 F.2d 1253, 1261 (7th Cir. 1987) [citations and quotations omitted].

Likewise, appellants who begin anew after losing at the district court distort this Court's role: "[B]ut our task, in reviewing the district court's decision . . . is to consider the reasons for that court's decision and in turn what was argued and presented to the district court by the parties." *Packer v. Trustees of Indiana University*, 800 F.3d 843, 849 (7th Cir. 2015). There is something inherently unfair about conjuring new arguments and fashioning fresh theories after the primary litigation has ended. Litigation should not degenerate into a boundless search for legal theories and arguments in the hope that, if one fails, the next may succeed. Consequently, appellate courts consider forfeited arguments only when the interests of justice require it, "but such cases are rare." *Securities & Exchange Comm. v. Yang*, 795 F.3d 674, 679 (7th Cir. 2015).

Holtz has not acknowledged that her central appellate argument went unasserted and unexplained below and this case does not present the rare occasion requiring this Court to dispense with its long-established practice of swiftly rejecting such arguments. Without a surreply brief, the Defendants/Appellees lack the right to respond in briefing if Holtz presents belated excuses for ignoring the rule, a fact that only worsens the transgression.

Admittedly, Holtz referenced "tribal sovereignty" when she opposed removal but her statements were merely conclusory and unsupported by law. In fact, Holtz only referenced "tribal sovereignty" on two occasions and at no time mentions or refers to the "arm-of-the-tribe" test that she now relies on in her appeal. The first instance was in her original Removal Motion pleading wherein she stated "[t]he Defendant Corporation [OAHC] conflates their Corporation with tribal sovereignty." (R. 16 at 2). The second instance was in her reply brief wherein she stated "Defendants provide a silly smoke-n-mirrors example by suggesting a corporation is protected by sovereignty; arguably a federal question but is inherently idiotic." (R. 23 at 3). The foregoing references did not sufficiently raise the "arm-of-the-tribe" legal argument she makes now to the District Court and, as a result, neither the Defendants nor the District Court had an opportunity to address such argument in the underlying proceedings.

Holtz may not overcome the foregoing well-established waiver rule by these general, conclusory or unsupported statements when opposing removal. The courts have recognized that raising an issue in general terms is not sufficient to preserve specific arguments that were not previously presented. *See Fednav Int'l Ltd.*, 624 F.3d at 841. "[A] party has waived the ability to make a specific argument for the first time on appeal when the party failed to present the specific argument to the district court, even though the issue may have been before the district court in more general terms." *Domka*, 523 F.3d at 783. Moreover, even arguments that have been raised may still be waived on appeal if they are underdeveloped, conclusory, or unsupported by law. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived…"); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve the claim.").

For the foregoing reasons, this Court should summarily reject Holtz's "arm-of-the-tribe" argument because she never made it to the District Court.

IV. THE DISTRICT COURT DID NOT ERR WHEN IT DETERMINED THAT HOLTZ'S CLAIMS WERE BARRED UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY.

A. The District Court relied on the well-established doctrine that Indian Tribes, including their business enterprises, officers and agents, are entitled to sovereign immunity.

The District Court determined that Holtz's federal and state law claims fail because they are barred under the doctrine of sovereign immunity. Although the District Court did not address the six factor "arm-of-the-tribe" test advocated now by Holtz for the first time in her appeal, the District Court did rely on the well-established doctrine that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority" over their members and territories. *Michigan v. Bay Mills Indian Comty.*, 572 U.S. 782, 788 (2014); *see, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Circ. 1993), cert. denied, 510 U.S. 1019 (1993). Among the core aspects of sovereignty that tribes possess is the common-law immunity from suit traditionally enjoyed by sovereign powers. *Bay Mills Indian Comty.*, 572 U.S. at 788. 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, 760 (1998) (The Supreme Court has not "drawn a distinction between governmental and commercial activities of a tribe."). Tribal enterprises are treated the same as the tribe itself and, therefore, are cloaked with sovereign immunity. *See, e.g., Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (casino organized pursuant to tribal ordinance and interstate gaming compact entitled to tribal sovereign immunity as arm of the tribe); *Native Am. Distrib. v. Seneca-Cayuga Tobacco*

Co., 546 F.3d 1288, 1292-96 (10th Cir. 2008) (tobacco manufacturer had sovereign immunity as enterprise of tribe); *Barker v. Menominee Nation Casino*, 897 F.Sup. 389, 393-94 (E.D. Wis. 1995) (tribal gaming commission and casino found to be immune from suit); *Local IV-302 Int'l Midworkers Union of Am. V. Menominee Tribal Enters.*, 595 F.Supp. 859, 862 (E.D. Wisc. 1984) (applying tribal sovereignty to entity created by the tribal constitution).

Further, tribal sovereign immunity "extends to tribal officials when acting in their original capacity and within the scope of their authority" and to employees and agents of the tribe and the tribal entity when acting within the scope of their employment or authority. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978); *Lineen 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) (sovereign immunity applied to two employees of casino who allegedly "acted in the course and scope of their authority as casino employees"); *Catskill Development, LLC. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 91 (S.D.N.Y. 2002) (sovereign immunity applied to attorney acting as agent of tribe within scope of authority); *Romanella v. Hayward*, 933 F. Supp. 163, 168 (D.Conn. 1996) (sovereign immunity barred claims against two employees who allegedly were negligent in maintaining parking lot of casino).

The record includes the following facts that the District Court was able to consider and apply when determining the Defendants' Motions to Dismiss:

- The Oneida Nation is a federally recognized Indian Tribe. (R. 9 at 1; Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018)).
- The Oneida Nation is governed according to its Constitution and Code of Laws. (R. 9 at 1).

- Pursuant to the Oneida Nation Constitution, the Nation is governed by the General Tribal Council. (R. 9-1).
- The Tribal Council has exclusive authority to manage all economic affairs and enterprises of the Nation. (*Id.*).
- The Oneida Nation has an elected nine-person Business Committee to perform any duties authorized by the Tribal Council. (*Id.*).
- The Oneida Nation enacted a "Sovereign Immunity" law that 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 provides that waiver can only occur by a resolution or motion passed in accordance with the Sovereign Immunity law. (R. 9-2).
- The Oneida Nation's Sovereign Immunity law defines a "Tribal Entity" as "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 documents by which it is organized by delegated the authority to waive sovereign immunity." (*Id.*).
- The Oneida Airport Hotel Corporation was issued a corporation charter by the Oneida Nation and is wholly owned by the Oneida Nation. (Amended Complaint R 1-3 at 1; R. 9 at 2).
- The Hotel is located on tribal land. (Amended Complaint R. 1-3 at 8).
- Robert Barton is a member of the Oneida Nation, a member of the Tribal Council, and the President of the Hotel. (Amended Complaint R. 1-3 at 8; R. 9 at 1-2).
- Steve Ninham is a member of the Oneida Nation who works as the general

manager of the Hotel for Aimbridge Hospitality. (Amended Complaint R 1-3 at 8).

- Aimbridge Hospitality manages the Hotel on behalf of OAHC and the Oneida Nation. (Amended Complaint R. 1-3 at 8).

Based on the foregoing undisputed facts, it was proper for the District Court to determine that Holtz's claims fell within tribal sovereign immunity. Relying on the allegations in Holtz's own Amended Complaint, the allegations arose from acts within the Oneida Nation's boundaries and related to her employment with OAHC and the actions of the officers and managers of the Hotel. Holtz did not raise any allegation of waiver by OAHC or Oneida Nation and neither the Oneida Nation nor the Hotel or the other Defendants have waived immunity. It is for these reasons, among others, that Holtz's claims cannot be pursued in federal or state court and the District Court properly dismissed them under the doctrine of sovereign immunity.

B. Oneida Airport Hotel Corporation is an arm of the Oneida Nation and thus is entitled to sovereign immunity.

Holtz asserts that had the District Court applied the arm-of-the-tribe test to OAHC it would not have dismissed Holtz's claims as the court allegedly would not have been able to conclude that OAHC was entitled to sovereign immunity. Defendants disagree with this assertion.

First, as stated above, Holtz failed to raise the arm-of-the-tribe test in response to Defendants' Motions to Dismiss. Thus the Defendants did not have an opportunity to develop a record that specifically addressed the factors that make up the arm-of-the-tribe test. Second, the 7th Circuit has not yet adopted the arm-of-the tribe test referenced by Holtz. Regardless, there are sufficient facts in the record that would support a finding that OAHC is in fact an arm of the

Oneida Nation and, as a result, is entitled to sovereign immunity, along with its officers, employees and agents.

Holtz relies on a six-factor test that was applied by the Arizona Supreme Court; Holtz refers to the test as the *Fox* test. *See Hwal'Bay Ba: J Enters., Inc. v. Jantzen*, No. 19-0123 (Ariz. Feb. 25, 2020). (Opening Brief of Plaintiff-Appellant ("Appellant Brief") at 9). Holtz argues that the District Court was required to apply the six-factor *Fox* test to determine whether a tribe's economic entity is to share in the tribe's immunity.

Although Holtz refers to and relies on the 6-factor *Fox* test, there are a few federal circuits that have applied an "arm-of-the-tribe" test that relies on either five or six factors, including the Fourth Circuit (*Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019)), Ninth Circuit (*White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014)) and Tenth Circuit (*Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010). In addition, the U.S. Supreme Court has recognized that tribal immunity may remain intact when a tribe elects to engage in commerce through tribally created entities, i.e., arms of the tribe, but has not articulated a framework for that analysis. *Lewis v. Clark*, 581 U.S. ___, 137 S. Ct. 1285 (2017).

The six factors relied on by Holtz in taking the position that OAHC is not an arm of the Oneida Nation and thus not entitled to sovereign immunity are:

1. The entity's creation and business form;
2. The entity's purpose;
3. The business relationship between the tribe and the entity;
4. The tribe's intent to share immunity with the entity;
5. The financial relationship between the entity and the tribe; and

6. Whether immunizing the entity furthers federal policies underlying sovereign immunity.

(Appellant Brief at 10-11).

Although the authority cited by Holtz in support of its position is an Arizona Supreme Court decision and not a federal court decision, let alone a Seventh Circuit decision, the foregoing factors are similar and in line with the factors adopted by the Fourth, Ninth and Tenth Circuits and therefore, for the sole purpose of this response, Defendants will address the application of the *Fox* test. It is important to note that the foregoing factors are non-exhaustive and merely provide a framework for courts to use when determining whether the facts weigh in favor of or against sovereign immunity.

Holtz asserts that OAHC fails all six factors. That is simply not true and can be easily refuted by the record in this matter. In applying the six factors relied on by Holtz, it is easy to see that OAHC is in fact an arm of the Oneida Nation and is entitled to sovereign immunity.

The first factor, the entity's creation and business form, weighs strongly in favor of immunity for the Defendants. Contrary to Holtz's assertion, OAHC is not a "public corporation." It is not chartered by the State of Wisconsin. Instead, the Corporate Charter of OAHC clearly states OAHC is a tribally chartered corporation upon which the Oneida Nation conferred all of the "rights, privileges and immunities existing under federal and Oneida tribal laws." (Appellant Appendix, Corporate Charter at 1; R. 9-3). The Oneida Nation's Business Committee granted the charter pursuant to the Nation's Constitution and By-Laws. (*Id.*). Per the Nation's laws and the Corporate Charter, OAHC's business offices are required to be on the Oneida Indian Reservation. (*Id.*). In addition, the Corporate Charter includes the following "Jurisdiction" provision pertaining to the creation and business form of OAHC:

> The Corporation is created under and is subjected to the jurisdiction, laws and ordinances of the Oneida Tribe of Indians of Wisconsin. The actions taken hereby by the Oneida Business Committee and the Oneida General Tribal Council expressly reserve to the Oneida Tribe of Indians of Wisconsin all its inherent sovereign rights as an Indian Tribe with regard to the activities of the Corporation.

(*Id.*). It is clear to see from the foregoing facts that OAHC was formed under the Oneida Nation's laws. Courts that have applied the arm-of-the-tribe test have held that formation under tribal law weighs in favor of immunity. *Breakthrough*, 629 F.3d at 1191-92; *Big Picture Loans*, 929 F.3d at 177; *White v. Univ. of Cal.*, 765 F.3d at 1026.

The second factor, the entity's purpose, also weighs in favor of immunity for the Defendants in that OAHC's primary purpose is to support the Oneida Nation by providing a source of income and revenue for the Nation. The stated purpose need not be purely governmental to weigh in favor of immunity as long as it relates to broader goals of tribal self-governance. *Big Picture Loans*, 929 F.3d at 178. In *Breakthrough,* the Tenth Circuit found that the "purpose" factor weighed in favor of immunity where the stated purpose of a casino was to financially benefit the tribe and enable it to engage in various governmental functions-even though the entities themselves engaged in commercial activities. 629 F.3d at 1192. Per OAHC's Corporate Charter, a key purpose of the entity is to "promote the establishment and development of a hotel on Tribal land in conformity to and in coordination with the economic development policies and plans of the Oneida Tribe of Indians of Wisconsin as adopted by the Oneida Business Committee." (Appellant Appendix, Corporate Charter at 1; R. 9-3). In addition, Article X of the Corporate Charter specifically provides that OAHC is to make "prorated payments to the government of the Oneida Tribe of Indians of Wisconsin," thereby creating a direct financial benefit to the Oneida Nation. (Corporate Charter at 5).

The third factor, the business relationship between the Tribe and the entity, further weighs in favor of immunity. OAHC is a tribal entity that is ultimately governed and regulated by the Nation's Business Committee. Per Article VII of OAHC's Corporate Charter, the business affairs and property of OAHC "shall be managed by a Board of Directors consisting of five (5) members, whom shall be selected and appointed by the Oneida Business Committee." (*Id. at 4*). The fact that the Oneida Business Committee selects the corporation's Board of Directors demonstrates that OAHC, as a Tribal corporation is managed and controlled by the Oneida Nation to ensure that the Nation's goals and objectives are met. OAHC does not function as an independent corporation as suggested by Holtz.

The fourth factor, the Tribe's intent to share immunity with the entity, is clearly satisfied in favor of the Defendants and supports a finding of immunity. There is no question that the Oneida Nation intended to share its immunity with OAHC. As noted above, the Corporate Charter granted by the Oneida Business Committee expressly states that the Oneida Nation has conferred on the corporation all immunities and "inherent sovereign rights" that exist under the federal and Oneida tribal laws. (*Id.* at 1). Furthermore, OAHC is subject to all of the Oneida Nation's laws, including its Sovereign Immunity law. Sections 112.5 and112.6 of the Sovereign Immunity law prescribes who has authority to waive immunity and the process for waiver. Specifically, § 112.5-1 of the Sovereign Immunity law provides that OAHC retains sovereign immunity unless specifically waived:

> The sovereign immunity of Tribal Entities, including sovereign immunity from suit in any state, federal or Tribal court, is hereby expressly reaffirmed. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against a Tribal Entity unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against officers, employees or agents of a Tribal Entity for actions

> within the scope of their authority, unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding.

(R. 9-2 at 2; https://oneida-nsn.gov/dl-file.php?file=2018/05/Chapter-112-Sovereign-Immunity-BC-02-12-14-D.pdf). Section 112.6 provides that waiver by the Tribe or Tribal Entity must be by resolution of the General Tribal Council, Oneida Business Committee, or a Tribal Entity exercising authority expressly delegated to it by its charter or by resolution of the General Tribal Council or the Oneida Business Committee. (*Id.*).

Admittedly, Article VI, Section M of the Corporate Charter allows OAHC to waive its immunity from suit. However, such waiver needs to be unequivocally expressed before it is a valid waiver of immunity; a waiver of immunity cannot be implied. *Santa Clara Pueblo,* 436 U.S. at 58; *Altheimer & Gray,* 983 F.2d at 812; *Kiowa Tribe of Okla.,* 523 U.S. at 753. Holtz has not provided the court with any documentation or evidence that OAHC waived its immunity with respect to her claims.

The fifth factor, the financial relationship between the Tribe and entity, also weighs in favor of immunity for the Defendants. As noted in the Corporate Charter, OAHC was chartered to support and promote economic development within the Oneida Nation. In arguing that OAHC fails the fifth factor, Holtz focuses on the fact that the Corporate Charter shields the Oneida Nation from any liabilities for the debts and obligations of the Hotel. However, what Holtz ignores is that a judgment against the OAHC could significantly impact the Oneida Nation's treasury as such a judgment would decrease the amount of profits that are available for the Oneida Nation's use, thereby depriving the Oneida Nation of monies that it could otherwise use to support the Oneida Nation's governmental functions and/or its tribal members.[1] The

---

[1] Per the Corporate Charter, OAHC was required to pay to the Oneida Nation annually 80 percent of its gross operating profit derived from the hotel each year. (Appellant Appendix, Corporate Charter at 5).

Breakthrough court encountered similar facts and reasoned that since a judgment against the tribal entities would significantly impact the Tribal treasury, the fifth factor weighed in favor of immunity even if the Tribe's liability for an entity's actions was formally limited. *Breakthrough*, 629 F.3d at 1195.

As for the sixth and final factor, whether immunizing the entity furthers federal policies underlying sovereign immunity, such factor also weighs in favor of immunity for the Defendants. Arguably, the policies underlying sovereign immunity are embedded in the other five factors and thus this should not even be a separate factor. However, to the extent it is, there is no question that granting immunity to the Defendants in this matter would further the federal policies that underlie sovereign immunity. As the Ninth Circuit has noted, immunity for subordinate economic entities "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Allen,* 464 F.3d at 1047 (9th Cir. 2006) (citing *Alden v. Maine*, 527 U.S. 706, 750 (1999)).

In short, had Holtz raised the "arm-of-the-tribe" doctrine in response to the Defendants' motions to dismiss, the District Court would more than likely have issued the same decision and dismissed all of her claims on the ground of sovereign immunity. It is clear from the record before the Court that OAHC is an arm of the Oneida Nation and thus it and its officers, managers and agents are immune from claims brought in state or federal court.

V. EVEN DISREGARDING THE DEFENDANTS' SOVEREIGN IMMUNITY, THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Even putting sovereign immunity aside, the District Court correctly concluded the claims alleged in the Amended Complaint fail to state a federal claim.

A. The Amended Complaint fails to state a claim under the United States Constitution and 42 U.S.C. section 1983.

The Amended Complaint alleges a claim under 42 U.S.C. § 1983 and alleges deprivations of Holtz's rights under the Fifth and Fourteenth Amendment of the United States Constitution. (R. 1-3 at 4, 11, 13).

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988); *L.P. v. Marian Catholic High Sch.*, 852 F.3d 690, 696 (7th Cir. 2017). However, "[a] section 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). This is because tribal officers and agents do not act under color of state law. *See Santa Clara Pueblo,* 436 U.S. at 56; *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967), superseded by statute on other grounds as recognized by 361 F. Supp. 3d 14 at 53.

The Amended Complaint alleges that the Defendant Hotel, which is a Tribal entity and the other Defendants acted as the Hotel's agents when taking actions that Plaintiff alleges violated her constitutional rights under the Fifth and Fourteenth Amendments.

Because the Amended Complaint lacks an allegation of state action the Section 1983 claim and the claims of alleged violations of the Fifth and Fourteenth Amendments fail to state a claim.

B. The Amended Complaint fails to state a claim under 42 U.S.C. section 1985.

The Amended Complaint alleges a violation of 42 U.S.C. § 1985. (R.1-3 at 4, 13, 14). But because Ms. Holtz is not a government official § 1985(1) does not apply. And because she is not a party, witness, or juror section 1985(2) does not apply.

In order to state a claim under section 1985(3), Holtz would have had to allege: "(1) the existence of a conspiracy, (2) a purpose of depriving a person or class of persons of equal protection of the laws, (3) an act in furtherance of the alleged conspiracy, and (4) an injury to person or property or a deprivation of a right or privilege granted to U.S. citizens." *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1024 (7th Cir. 2000) (*quoting Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 311 (7th Cir. 1996)).

To assert a claim under section 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).

Section 1985(3) does not by itself create a substantive cause of action. *Great Am. Fed. S. & L. Assn. v. Novotny*, 442 U.S. 366, 372, 60 L. Ed. 2d 957, 99 S. Ct. 2345 (1979); *Akins v. Penobscot Nation*, 130 F.3d 482, 490 (1st Cir. 1997). To state a claim, Holtz would need to first identify a right independently secured by state or federal law to serve as a predicate for a section 1985(3) claim. *Stevens v. Tillman,* 855 F. 2d. 394, 404 (7th Cir. 1988). *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987). Holtz failed to do this.

Holtz did not allege an independent substantive right enforceable in the federal courts to serve as the necessary predicate violation for a claim under section 1985(3). Instead, she alleged that she was discharged in order to avoid *tribal laws*. (R. 1 at 12, 14). And she alleges this was a violation of her rights under Article VII of the Oneida Constitution and the Indian Civil Rights Act. (R. 1-3 at 14, ¶ vii). But even if such allegations were true, it would not be a conspiracy to

deprive her of the equal protection of federal or state law. Therefore, the Amended Complaint fails to state a claim under section 1985(3).[2]

C. The Amended Complaint fails to state a claim under the Indian Civil Rights Act.

The Amended Complaint also alleges a violation of the Indian Civil Rights Act, 25 U.S.C. section 1302. The Indian Civil Rights Act limits the authority of Indian tribes over individual tribal members. For example, 25 U.S.C. section 1302(a)(1) prohibits Indian tribes from making or enforcing any law abridging freedom of speech, and section 1302(a)(8) prohibits tribes from depriving any person of property without due process of law. Holtz contends that the alleged conduct by Defendants violated provisions of the Indian Civil Rights Act.

But the Indian Civil Rights Act does not create a federal cause of action for such a claim. The Indian Civil Rights Act authorizes "federal judicial review of tribal actions only through the habeas corpus provisions of § 1303." *Santa Clara Pueblo,* 436 U.S. at 70-72 ("§1302 does not impliedly authorize actions" in a civil context in federal court). The Amended Complaint's alleged claim under the Indian Civil Rights Act therefore fails to state a claim.

D. The Amended Complaint fails to state a claim under the Oneida Constitution or laws.

The Amended Complaint alleges violations of Article VII of the Oneida Constitution and Oneida tribal employment laws. (R. 1-3, p. 11-14).

The District Court correctly concluded it had no authority to enforce the Oneida Nation's laws. *See Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (concluding resolution of disputes involving questions of interpretation of a tribal constitution and tribal law are not within the district court's jurisdiction). Those disputes are solely within the jurisdiction of the

[2] Additionally, 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*.

tribal courts. *See Talton v. Mayes*, 163 U.S. 376, 385 (1896) (application and enforcement of tribal law is "solely a matter within the jurisdiction" of the tribal courts).

Therefore, any claim that the Defendants violated the Oneida Nation Constitution or tribal employment laws was not subject to the jurisdiction of the District Court and failed to state a claim.

E. Referring to statutes of limitations does not state a claim.

The Amended Complaint refers to sections 893.53, 893.54 and 893.57 of the Wisconsin Statutes. (R.3 at 4, 13, 16). But these are statutes of limitations that can apply to a number of potential types of claims; they do not provide a basis for a specific substantive claim. Section 893.53 is a six year statute of limitations that applies to certain common law claims, not based on contract, related to the character of a person. Section 893.54 is a six year statute of limitations that applies to personal injury claims. Section 893.57 is the statute of limitations for intentional torts. The Amended Complaint's mere reference to these statutes of limitations does not state a claim.

F. The allegations under the Wisconsin Fair Employment Act fail to state a claim because claims under the Wisconsin Fair Employment Act must be litigated in the administrative forum.

The Amended Complaint appears to allege a claim under the Wisconsin Fair Employment Act. (R.3 at 4) But it is well-established that claims under the Wisconsin Fair Employment Act must be litigated before in the administrative forum - the Wisconsin Department of Workforce Development, Equal Rights Division. *Bachand v. Connecticut General Life Ins.*, 101 Wis. 2d 617, 624, 305 N.W.2d 149 (Ct. App. 1981): *Staats v. County of Sawyer*, 220 F.3d 511, 516 (7th Cir. 2000); *Bourque v. Wausau Hosp. Ctr.*, 145 Wis. 2d 589, 427 N.W.2d 433, 437 (Wis. Ct. App. 1988).

Therefore, Plaintiff's claims, if any, under the Wisconsin Fair Employment Act cannot be litigated in a judicial forum and must be dismissed as a matter of law. *See Bachand,* 101 Wis. 2d at 624. The allegations concerning the Wisconsin Fair Employment Act fail to state a claim.

G. The allegations of wrongful termination fail to state a claim.

The Amended Complaint alleges Barton and Ninham "wrongfully terminated" Plaintiff. (R.1-3 at 12, 15) The general rule in Wisconsin is that employment is terminable at will by either the employer or employee without cause. *Forrer v. Sears Roebuck & Co*., 36 Wis. 2d 388, 393 153 N.W.2d (1967). Wisconsin has "a strong presumption in favor of employment at-will." *Thelen v. Marc's Big Boy Corp*., 64 F.3d 264, 269 (7th Cir. 1995).

The Amended Complaint refers to "workplace tort"; but work-related torts are generally precluded by the exclusive remedy of the Workers Compensation Act. Section 102.03(2) Wis. Stat.

The Amended Complaint cites *Strozinsky v. School District of Brown Deer*. (R.3 at 7). That case discussed Wisconsin's limited wrongful discharge against public policy theory. But Plaintiff has not stated a claim under that theory.

To establish such a claim, a Plaintiff must first "identify a fundamental and well defined public policy in their complaint sufficient to trigger the exception to the employment-at-will doctrine." *Strozinsky v. School Dist. of Brown Deer*, 237 Wis. 2d 19, 40, 614 N.W.2d 443, 453 (2000). A "fundamental and well-defined public policy" can be articulated by constitutional, statutory, or administrative provisions. *Id*. at 46. Second, the Plaintiff must "demonstrate that the termination violated that fundamental and well defined public policy." *Id*. at 40. The Complaint must also allege that she was terminated for refusing to violate this public policy. *Winkelman v. Beloit Memorial Hospital*, 168 Wis. 2d 12, 483 N.W.2d 211, 215 (1992); *Wandry*

v. Bulls Eye Credit Union, 129 Wis. 2d. 37, 42-43, 384 N.W. 2d. 325 (1986). The Amended Complaint fails to state a claim because it does not plausibly allege or suggest even one of these three requirements.

Moreover, the Amended Complaint alleges that Holtz was discharged so that the Defendants could avoid tribal employment laws. (R. 3 at 12-14). This allegation pleads Holtz out of court because it is an admission that there is no causation, an essential element of a wrongful discharge against public policy claim.

To summarize, the District Court correctly held that all of Holtz's claims, state as well as federal, were barred under the doctrine of sovereign immunity. Additionally, since none of the conditions set forth in 28 U.S.C. section 1367(c) are present, remand of the state law claims, as opposed to dismissal with prejudice, would have been inappropriate. The District Court also correctly held that the Amended Complaint also fails to state a federal claim upon which relief can be granted. Moreover, the state law allegations also fail to plausibly state a claim. Therefore, the District Court's Decision and Order dismissing the claims in the Amended Complaint with prejudice should be affirmed in its entirety.

Conclusion

For the foregoing reasons, the Defendants-Appellees respectfully request that this Court affirm the District Court's order dismissing the Amended Complaint.

Respectfully submitted this 14th day of August, 2020.

By: *s/Jodi Arndt Labs* ______
Jodi Arndt Labs (WI Bar No. 1033359)
Conway, Olejniczak & Jerry, S.C.
231 S. Adams Street
P.O. Box 23200
Green Bay, WI 54305-3200
Tel: 920-437-0476
Fax: 920-437-2868
jodi@lcojlaw.com
Attorney for Defendants-Appellees,
Oneida Airport Hotel Corporation and Robert Barton

By: */s/ Mark A. Johnson*
Mark A. Johnson (WI Bar No. 1018110)
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Pabst Boiler House
1243 North 10th Street, Suite 200
Milwaukee, WI 53205
Tel: 414-239-6400
Fax: 414-755-8289
Mark.Johnson@ogletree.com
Attorneys for Defendants-Appellees,
Aimbridge Hospitality, LLC and Steve Ninham

Certificate of Compliance With
Type-Volume Limitation, Typeface Requirements,
And Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,892 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Windows 10 in 12-point Times New Roman font.

Dated this 14th day of August, 2020.

By: *s/Jodi Arndt Labs*
Jodi Arndt Labs
Conway, Olejniczak & Jerry, S.C.
Attorney for Defendants-Appellees,
Oneida Airport Hotel Corporation and Robert Barton

By: */s/ Mark A. Johnson*
Mark A. Johnson (WI Bar No. 1018110)
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Pabst Boiler House
1243 North 10th Street, Suite 200
Milwaukee, WI 53205
Tel: 414-239-6400
Fax: 414-755-8289
Mark.Johnson@ogletree.com
Attorneys for Defendants-Appellees,
Aimbridge Hospitality, LLC and Steve Ninham

Circuit Rule 25(a) Certification

The undersigned hereby certifies that I have electronically filed, pursuant to Circuit Rule 25(a), the Brief and all of the appendix items.

Dated this 14th day of August, 2020.

By: *s/Jodi Arndt Labs*
Jodi Arndt Labs
Conway, Olejniczak & Jerry, S.C.
Attorney for Defendants-Appellees,
Oneida Airport Hotel Corporation and Robert Barton

By: */s/ Mark A. Johnson*
Mark A. Johnson (WI Bar No. 1018110)
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Pabst Boiler House
1243 North 10th Street, Suite 200
Milwaukee, WI 53205
Tel: 414-239-6400
Fax: 414-755-8289
Mark.Johnson@ogletree.com
Attorneys for Defendants-Appellees,
Aimbridge Hospitality, LLC and Steve Ninham

Certificate / Proof of Service

I, Jodi Arndt Labs, certify that the Joint Brief of the Defendants-Appellees, Oneida Airport Hotel Corporation, Robert Barton, Steve Ninham and Aimbridge Hospitality, LLC, was filed with the Clerk of Courts for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that service on Pro Se Plaintiff-Appellant was served via U.S. Mail on the date indicated below, to the following:

Clerk of Courts (via Federal Express)
U.S. Court of Appeals
Room 2722
219 S. Dearborn Street
Chicago, IL 60604

Crystal Holtz
1140 Moraine Way, Apt 21
Green Bay, WI 54303

Dated this 14th day of August, 2020.

CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for the Defendants-Appellees,
Oneida Airport Hotel Corporation and Robert Barton

By: *s/Jodi Arndt Labs*
Jodi Arndt Labs