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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON - PORTLAND DIVISION

ERIC WEAVER,

Plaintiff,

v.

RON GREGORY. Individually and as Acting Chief of Police for Warm Springs Police Department; CARMEN SMITH, individually and as Public Safety Manager for Confederated Tribes of Warm Springs; ALYSSA MACY, individually and as Chief Operation Officer for Confederated Tribes of Warm Springs,

Defendants.

Case No. 3:20-CV-00783-HZ

DEFENDANTS RON GREGORY AND CARMEN SMITH'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6) AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Request for Oral Argument

LR 7-1(a) and LR 7-2 CERTIFICATIONS

Counsel for moving Defendants Ron Gregory and Carmen Smith[1] certifies that he completed a good faith conferral with counsel for Plaintiff concerning this issues raised herein, but the parties unable to reach an agreement resolving the dispute.

[1] Because Defendant Alyssa Macy does not appear to have been served, the present Motions have been brought by Defendants Ron Gregory and Carmen Smith only. Defendant Macy does not waive her right to assert all potentially available defenses (including without limitation, lack of personal jurisdiction, lack of subject matter jurisdiction, insufficiency of service/process).

Counsel further certifies that this Motion and its supporting Memorandum of Law complies with the applicable word-count limitations under LR 7-2(b), LR 26-3(b), LR 54-1(c), or LR 54-3(e) because it contains 6,295 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

MOTIONS

Motion One: Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), Defendants Ron Gregory and Carmen Smith request an order dismissing all four of Plaintiff Eric Weaver's Claims for Relief because they are barred by the doctrine of tribal sovereign immunity.

Motion Two: Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), Defendants Ron Gregory and Carmen Smith request an order partially dismissing all four of Plaintiff Eric Weaver's Claims for Relief because they are barred by the doctrine of tribal sovereign immunity to the extent alleged against Defendants in their "official" capacities.[2]

Motion Three: Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), Defendants Ron Gregory and Carmen Smith request an order dismissing Plaintiff Eric Weaver's First and Second Claims for Relief because 42 U.S.C. § 1983 claims cannot be brought for actions taken under color of tribal law.

Motion Four: Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. (6), Defendants Ron Gregory and Carmen Smith request an order dismissing Plaintiff Eric Weaver's Third and Fourth Claims for Relief because federal question (original) jurisdiction disappears if Plaintiff's 42 U.S.C. § 1983 claims are dismissed.

[2] To the extent that that dismissal is inappropriate for Motion Two because it is directed at only the "official capacity" aspects of Plaintiff's claims, moving Defendants alternatively characterize Motion Two as a Motion to Strike under Fed. R. Civ. P. 12(f).

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Motion Five: Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Ron Gregory and Carmen Smith request an order dismissing Plaintiff Eric Weaver's Third Claim for Relief because ORS 659A.199 does not apply to tribal employment matters.

MEMORANDUM OF LAW

A. Introduction

This case arises out of a dispute surrounding Plaintiff's employment as a tribal police officer, and the cessation of his employment. The named Defendants are: (1) Ron Gregory, Chief of Police for the Warm Springs Police Department; (2) Carmen Smith, Public Safety Manager for the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS); and (3) Alyssa Macy, the Chief Operations Officer for the CTWS.

Plaintiff Eric Weaver alleges that beginning in 2018, he witnessed and was subjected to sexual, racial and derogatory comments, and offensive touching, during his employment for the Warm Springs Police Department.[3] Plaintiff alleges that he attempted to report this conduct up the chain of command in the Warm Springs Police Department, and ultimately, up to the Chief Operating Officer for the CTWS, but that no remedial action was taken.[4]

Plaintiff alleges he reprimanded, subsequently reported to management for his use of excessive use of force during three service calls, and that an internal affairs investigation ensued (during which he was placed on unpaid administrative leave).[5] Plaintiff alleges that the reprimand, report of his use of excessive force, the internal affairs investigation, and the decision to place him on unpaid administrative leave were all decisions made in retaliation for Plaintiff having reporting the alleged harassment issues.[6]

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[3] *See* Docket No. 1, Complaint, ¶¶ 13-14.
[4] *Id.* at ¶¶ 16-18.
[5] *Id.* at ¶¶ 19-24.
[6] *Id.*

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Plaintiff further alleges he and his counsel experienced a general lack of cooperation during the investigation process.[7] Plaintiff alleges he was later taken off of the schedule, and that this decision was also made in retaliation for his reporting of the alleged harassment issues.[8] Finally, Plaintiff alleges he received a letter terminating his employment based on Plaintiff having used excessive force and having falsified a police report, but that in actuality that he was terminated in retaliation for his reporting of the alleged harassment issues.[9]

Plaintiff has brought four Claims for Relief against Defendants based on actions taken in their "individual" and "official" capacities: (1) Constitutional violation under 42 U.S.C. § 1983 (deprivation of "liberty interest"); (2) Constitutional violation under 42 U.S.C. § 1983 (retaliation for "free speech"); (3) Violation of ORS 659A.199; and (4) Intentional infliction of emotional distress.

B. Motion One: All of Plaintiff's Claims are Barred by the Doctrine of Tribal Sovereign Immunity

A claim of tribal sovereign immunity is jurisdictional in nature. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172, 97 S. Ct. 2616, 2621, 53 L. Ed. 2d 667, 674 (1977). An assertion of tribal sovereign immunity is properly raised as a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015 (9th Cir. 2007). Because it is presumed that a case lies outside the Court's jurisdiction, the burden is on the party asserting jurisdiction to show that subject matter jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994).

It is a well-established rule that Indian tribes are immune from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Tribal sovereign immunity

[7] *Id.* at ¶ 26-27.
[8] *Id.* at ¶ 28.
[9] *Id.* at ¶¶ 34 and 52.

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is rooted in the unique relationship between the United States government and the Indian tribes, whose sovereignty substantially predates the Constitution. *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).

Absent a clear waiver by a tribe or congressional abrogation of tribal sovereign immunity, suits against tribes are barred. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

Because the CTWS is a federally recognized Indian tribe,[10] it is entitled to tribal sovereign immunity unless there has been a Congressional abrogation of that immunity or an express waiver of that immunity. Here, the only basis for waiver that Plaintiff alleges[11] is CTWS Tribal Code Chapter 205.001, quoted by Plaintiff as follows: "the Tribe and its employees can be sued in the Warm Springs Tribal Court or other court of competent jurisdiction when authorized by federal or tribal law." In actuality, Chapter 205.001 provides: "The Tribes, its subordinate organization, enterprises, officer, agents, servants and employees may be sued in the Warm Springs Tribal Court or other court of competent jurisdiction only when explicitly authorized by either (1) applicable federal law, or (2) by ordinance or resolution of the Tribal Council."

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[10] *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 1200-01 (February 1, 2019) (listing the CTWS as one of 573 federally acknowledged tribes/entities in the 48 contiguous states acknowledged to have immunities and privileges available to federally recognized Indian Tribes).

[11] Docket No. 1, Complaint, ¶ 4.

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Here, Plaintiff has not alleged the existence of any federal statute that abrogates tribal sovereign immunity. Nor has Plaintiff alleged any ordinance or resolution of the Tribal Council that would constitute a waiver of tribal sovereign immunity. As such, tribal sovereign immunity remains applicable.

Although the CTWS is not one of the named defendants in this case, it is moving Defendants' position that because they are CTWS employees who are alleged to have been acting within the scope of their authority, they are also entitled to invoke the CTWS' tribal sovereign immunity from suit. It is anticipated that Plaintiff rely on *Lewis v. Clarke*, 137 S. Ct. 1285, 1288, 197 L. Ed. 2d 631 (2017) in arguing that Defendants are not entitled to tribal sovereign immunity because they have been sued in their "individual" capacities.

Moving Defendants concede that a broad reading of *Lewis v. Clarke* could support such an argument, but a closer examination shows that it is distinguishable. *Lewis v. Clarke* involved a common law negligence claim against a tribal limousine driver for causing an off-reservation car accident on a Connecticut Interstate. The Connecticut Supreme Court held that the tribal employee was protected by the sovereign immunity afforded to his tribal employer. *Id.* at 1290.

On appeal, the Supreme Court reversed, holding that the tribal employee was not entitled to sovereign immunity because he, not the tribal employer, was the real party in interest in the suit. *Id.* at 1292. However, in explaining why the tribal employer was not the real party in interest (which would implicate sovereign immunity considerations), the Court noted the plaintiff had alleged negligent conduct that had had occurred off reservation, and on state lands:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe.

Id. at 1291 (emphasis added).

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The Court's multiple references to the off-reservation location of the driver's negligence arguably suggest that the outcome would have be different had the employee's alleged negligence occurred while on the tribal employer's reservation. At the very least, the Court's references to the driver's negligence occurring on "state lands" begs the question: If the issue were as simple as asking only whether the plaintiff's claim had been brought against the defendant in his "individual" capacity, there would be no need to discuss the location of the accident, much less the need to specific that the alleged negligence took place "within the State of Connecticut" and while "on state lands."

There is nothing in the opinion to suggest that these references should be disregarded as mere surplusage, and the decisions of Justice Ginsburg and Justice Thomas not to join in the majority opinion appear to support this conclusion. Both of these Justices took the opportunity to author separate concurrences discussing their opinions on a tribal entity's ability to assert sovereign immunity depending on whether the wrongful conduct occurred inside or outside of reservation boundaries. *See id.* at 1294-1295 (Ginsburg, J., concurring; Thomas J., concurring).

Thus, the present case is distinguishable from *Lewis v. Clarke*. Whereas the tribal employee limousine driver in that case committed a state common law tort while driving on Connecticut "state lands," Plaintiff here alleges only that Defendants made a series of internal (allegedly retaliatory) employment decisions involving a tribal employee while on tribal land, not on the lands of the State of Oregon.

Moving Defendants respectfully request that this Court rule that the CTWS' tribal sovereign immunity extends to its employees and officials, including moving Defendants. Tribal employees and officials are ordinarily the means by which sovereign Indian tribes act, and in this case, Defendants are alleged to have been acting within the course and scope of their authority

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when they made a series of internal employment decisions for the CTWS while on Warm Springs Reservation land. Extending sovereign immunity under these circumstances would both effectuate the basic purpose of the doctrine and signal a recognition that sovereign immunity remains "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986).

C. Motion Two: All of Plaintiff's Claims are Barred by Tribal Sovereign Immunity to the Extent Alleged Against Defendants in Their "Official" Capacities

In the alternative to dismissing Plaintiff's claims in their entirety, Plaintiff's claims should be dismissed on tribal sovereign immunity grounds to the extent they have been brought against Defendants in their "official" capacities.[12] *Lewis v. Clarke*, *supra*, 137 S. Ct. at 1290–91 ("[L]awsuits brought against employees in their official capacity 'represent only another way of pleading an action against an entity of which an officer is an agent,' and they may also be barred by sovereign immunity."); *Miller v. Wright,* 705 F.3d 919, 927–28 (9th Cir. 2013) ("A suit against ... [a tribe's] officials in their official capacities is a suit against the tribe [that] is barred by tribal sovereign immunity.") (internal quotation marks omitted).

D. Motion Three: 42 U.S.C. § 1983 Does Not Apply to Actions Taken Under Color of Tribal Law

Plaintiff's First and Second Claims for Relief are subject to dismissal because 42 U.S.C. § 1983 claims cannot be maintained for actions taken under color of tribal law. The justification for this rule was explained by the Ninth Circuit in *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983):

> First, no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. Indian tribes are separate and distinct sovereignties, and are not constrained by the

[12] *See* Docket No. 1, Complaint, ¶¶ 7-9; 38; 61; 79; 85.

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> provisions of the fourteenth amendment. As the purpose of 42 U.S.C. § 1983 is to enforce the provisions of the fourteenth amendment, it follows that actions taken under color of tribal law are beyond the reach of § 1983…

Id. at 982. *See also*, *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989) ("[A]ctions under section 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law."); *Wallulatum v. Confederated Tribes of the Warm Springs Reservation of Oregon Pub. Safety Branch*, No. 6:08-CV-747-AA, 2012 WL 1952000, at *1 (D. Or. May 28, 2012) ("The law is clear that no action can be brought in federal court for alleged deprivations of constitutional rights under the color of tribal law.").

The test for determining whether a party charged with an alleged constitutional deprivation can be subjected to a 42 U.S.C. § 1983 claim is whether the party "may fairly be said to be a state actor," rather than a tribal actor. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L.Ed.2d 482 (1982).

Even a cursory review of Plaintiff's factual allegations reveals that they fall well short of the "state actor" standard. Plaintiff's Complaint alleges that Defendants took a series of employment actions against him based on his reporting of various instances of misconduct that had occurred in the Warm Springs Police Department. Plaintiff alleges that these actions deprived him of a "liberty interest" (precluding him in pursuing a career in law enforcement) and were otherwise made in "retaliation for exercise of free speech." Even accepting those allegations as true for purposes of this Motion, internal tribal employment decisions/actions of a tribal entity by tribal employees are, by definition, actions taken under color of *tribal* law, and uniquely within the Tribes' inherent right of self-governance.

Perhaps the easiest way to demonstrate the absence of any allegations of "state action" in this case is to juxtapose Plaintiff's allegations with those that the Ninth Circuit has found

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sufficient to bring tribal employees within the purview of 42 U.S.C. § 1983. In *Evans v. McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989), the court held that tribal employee police officers' arrest of the plaintiffs under a city ordinance met the "state actor" standard, and even then, the court reached that conclusion only because there was evidence of a pre-existing agreement between the tribe and city that empowered tribal police officers to enforce both local and tribal law. Similarly, in *Bressi v. Ford*, 575 F.3d 891, 896-97 (9th Cir. 2009), the court held that tribal officials were acting under color of state law where the facts showed that the tribal officers had stopped a non-Indian at a public highway roadblock and cited him for a violation of state law.

Even more telling is the Oregon District Court decision in *Wallulatum v. Confederated Tribes of the Warm Springs Reservation of Oregon Pub. Safety Branch*, No. 6:08-CV-747-AA, 2012 WL 1952000. In *Wallulatum*, the court concluded that an allegation of a temporary police officer's use of excessive force against a plaintiff on the Warm Springs reservation did not allege action taken under state law for purposes of the plaintiff's 42 U.S.C. § 1983 claim:

> "It is undisputed that defendant Patterson was working as a tribal officer at the time of the incident giving rise to plaintiff's claims and that the incident occurred on the tribal sovereign land. Thus the actionable conduct, if any, *was under the color of tribal law* and 42 U.S.C. § 1983 does not provide a proper jurisdictional basis for this court to entertain plaintiff's claim."

Id. at *1 (italics added).

Simply stated, this case involves a dispute over the Tribe's application of its own employment practices to one of its tribal employees. Despite a diligent search, counsel for Defendants has yet to locate a single case, from any jurisdiction, which holds that a tribal employer's employment decisions/actions toward one of its own tribal employees can be characterized as "state action" for purposes of a 42 U.S.C. § 1983 claim. To the contrary, in

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every case located by counsel (including decisions from the Ninth Circuit Court and this Court), the courts reached the opposite conclusion, dismissing the employees' 42 U.S.C. § 1983 claims.

Allen v. Gold Country Casino, 464 F.3d 1044, 1048 (9th Cir. 2006) appears to be the sole Ninth Circuit authority on this issue. Allen involved a plaintiff who was a former employee of a tribal casino. He brought various claims (including a 42 U.S.C. § 1983 claim) against the tribe, the tribal casino, and an individual based on the allegation that he "was discharged in retaliation for reporting rats in the Casino's restaurant and for applying to 'the white man's court' for guardianship of three tribal children." *Id.* at 1045. In affirming the district court's dismissal of the 42 U.S.C. § 1983 claims, the *Allen* Court held that the retaliation allegations did not adequately allege the "state action" element required for such claims. *Id.* at 1048 ("The district court also properly dismissed Allen's claim under 42 U.S.C. § 1983 because there is no allegation that any defendant was acting under the color of state law.").

And somewhat conveniently, this Court had a chance to cite the holding in *Allen* in dismissing a similar case just last year. In *Toahty v. Kimsey*, No. 3:19-CV-01308-HZ, 2019 WL 5104742 (D. Or. Oct. 11, 2019), the plaintiff (who was apparently a former tribal employee) brought claims against the Grand Ronde Tribe, its Tribal Employment Rights Ordinance Division (TERO), and the Assistant Director of the TERO. The plaintiff alleged that he had been subjected to sexual misconduct and sexual harassment, and that "when he reported the harassment and misconduct to T.E.R.O. and the Human Resources department, he was subjected to retaliation, which included criticism, humiliation, and verbal assault." *Id.* at *1.

In addressing whether the Complaint adequately alleged a basis for federal question jurisdiction, this Court analyzed whether the plaintiff had alleged a viable First Amendment retaliation claim under 42 U.S.C. § 1983, ultimately holding that he had failed to do so:

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> To the extent that Plaintiff's complaint can be construed to assert a First Amendment retaliation claim under 42 U.S.C. § 1983, Plaintiff fails to allege that any Defendant was acting under color of state law. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006) ("The district court also properly dismissed [plaintiff's] claim under 42 U.S.C. § 1983 because there is no allegation that any defendant was acting under the color of state law."); *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983) ("no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law.").

Id. at *2.

The District Court for the Eastern District of Wisconsin reached the same conclusion in *Louis v. Stockbridge-Munsee Cmty.*, No. 08-C-558, 2008 WL 4282589, (E.D. Wis. Sept. 16, 2008). In *Louis*, the plaintiff brought claims, including a 42 U.S.C. § 1983 claim, arising out of the termination of his employment at a tribally owned Health and Wellness Center. In addressing the viability of the plaintiff's 42 U.S.C. § 1983 claim, the *Louis* Court concluded: "A § 1983 action is unavailable 'for persons alleging deprivation of constitutional rights under color of tribal law.' Here, Louis' claims at most allege that the Tribe took unfavorable action against him under color of tribal law, which is insufficient to support a cognizable claim under § 1983." *Id.* at *3 (internal citations omitted).[13]

Tribal courts routinely reach the same conclusion. In *Bethel v. Mohegan Tribal Gaming Auth.*, the plaintiff brought a variety of claims, including a 42 U.S.C. § 1983 claim, against his tribal employer, a former supervisor and a co-employee, alleging physical harassment, demotion and termination from his employment. The Mohegan Gaming Disputes Trial Court dismissed the

[13] The District Court for the Eastern District of Wisconsin recently suggested that a defendant's mere status as a tribal employee will preclude a plaintiff from being able to state a claim for relief under 42 U.S.C. § 1983. *See Thurmond v. Forest Cty. Potawatomi Cmty.*, No. 18-CV-1047-PP, 2020 WL 488864, at *3 (E.D. Wis. Jan. 30, 2020) ("[I]f plaintiff was trying to allege that the Forest County Potawatomi Community and its employees were state actors who violated his federal constitutional rights (perhaps to equal protection), he could not state a claim…[A] person is liable under § 1983 only if that person was an employee, officer or agent of a state, a territory or the District of Columbia. These defendants were not employees of Wisconsin, or of a territory or of the district. They are a sovereign Indian tribe and employees of that tribe.").

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plaintiff's 42 U.S.C. § 1983 claim, reasoning that "under well established law, actions of a tribal government or its employees, do not constitute state action." *Bethel v. Mohegan Tribal Gaming Auth.*, 1 Am. Tribal Law 420, 1 G.D.R. 32, No. GDTC-T-98-105, 1998 WL 35281214 (Mohegan Gaming Trial Ct. Dec. 14, 1998).

On appeal, the Mohegan Gaming Disputes Court of Appeals began its examination of the issue by emphasizing that, "[c]ourts have held that an action by an Indian tribe is not the equivalent of the state action required to sustain an action under a 42 U.S.C. § 1983 action." *Bethel v. Mohegan Tribal Gaming Auth.*, 2 Am. Tribal Law 373, 1 G.D.A.P. 1, No. GDCA-T-98-500, 2000 WL 35733912 (Mohegan Gaming C.A. June 15, 2000) (citing *R.J. Williams Co., supra*). The *Bethel* Court went on to affirm the trial court's dismissal of the plaintiff's 42 U.S.C. § 1983 claim, explaining: "In the present appeal, the complaint is devoid of any allegations that the MTGE, the MTGA, or the individual defendant Keane were acting under any authority other than that of the Mohegan tribe. The trial court properly dismissed Count 9 of plaintiff's complaint for failure to allege an essential element of a claim under 42 U.S.C. § 1983." *Id.*

Similarly, in *DeLorge v. Mashantucket Pequot Gaming Enter.*, the plaintiff brought various claims, including a 42 U.S.C. § 1983 claim, based on the allegation that he was coerced into resigning from his position as a gaming inspector through the Gaming Commission's use of illegally recorded private telephone conversations. After citing the litany of cases holding that the actions of tribal governments/leaders are not "state actors" for purposes of 42 U.S.C. § 1983, the Mashantucket Pequot Tribal Court dismissed the plaintiff's 42 U.S.C. § 1983 claim:

> The plaintiff bases his claims on actions purportedly taken by employees and officials of the Gaming Commission. There is no allegation that state officials were involved or that the persons involved were acting under state law to deprive the plaintiff of rights protected by the United States Constitution or federal law.
> * * *

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> The purpose of 42 U.S.C. § 1983 is "to enforce the provisions of the fourteenth amendment" of the United States Constitution. In applying the precepts of Native American tribal sovereignty, federal courts have consistently held that no action may be maintained under 42 U.S.C. § 1983 where the defendant acted under color of tribal law.
> There being no cognizable action against a tribal government or a tribal agency, such as the Gaming Commission, under 42 U.S.C. § 1983, Count Six is dismissed for failure to state a claim for which relief may be granted, as well as for lack of subject matter jurisdiction.

DeLorge v. Mashantucket Pequot Gaming Enter., 2 Mash.Rep. 198, No. CV-GC-1997-0109, 1997 WL 34641750, at *8 (Mash. Pequot Tribal Ct. July 23, 1997), on reconsideration, No. CV-GC-1997-0109, 1997 WL 34641775 (Dec. 4, 1997) (internal citations omitted).

As the foregoing cases demonstrate, an allegation that a tribe or a tribal employee has taken adverse employment action (even up to and including termination) cannot support a 42 U.S.C. § 1983 claim as a matter of law. The reasoning of these decisions makes perfect sense. Tribal employment decisions are, by their very nature, actions taken under color of tribal law, and as a corollary, they lack the element of "state action" upon which Plaintiff's 42 U.S.C. § 1983 claims are predicated.

And yet, that is precisely what Plaintiff alleges as the basis for his 42 U.S.C. § 1983 claims here: a series of adverse employment actions taken by a tribal employer that resulted in his termination as a tribal employee. As a matter of law, those are allegations of actions taken under color of tribal law, not state law, and therefore they cannot support a claim under 42 U.S.C. § 1983. Indeed, and as the United States District Court for the Eastern District of Wisconsin explained, such "claims at most allege that the Tribe took unfavorable action against him under color of tribal law, which is insufficient to support a cognizable claim under § 1983." *Louis v. Stockbridge-Munsee Cmty.*, *supra*, 2008 WL 4282589 at *3. Plaintiff's First and Second Claims for Relief should be dismissed accordingly.

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E. Motion Four: If the 42 U.S.C. § 1983 Claims are Dismissed, Federal Question Jurisdiction Disappears and Plaintiff's Remaining State Law Claims Should Also be Dismissed

If the Court grants Motion Three (dismissing Plaintiff's 42 U.S.C. § 1983 claims), Plaintiff's remaining claims for violation of ORS 659A.199 (Third Claim for Relief) and intentional infliction of emotional distress (Fourth Claim for Relief) should also be dismissed because federal question jurisdiction would no longer exist.

A federal district court's decision to retain or decline jurisdiction over state law claims following dismissal of the claim(s) over which it had original jurisdiction is governed by 28 U.S.C. § 1367(c)(3). That statute provides that, "district courts may decline to exercise supplemental jurisdiction over a claim ... if—the district court has dismissed all claims over which it has original jurisdiction."

Although the exercise of pendent jurisdiction to consider remaining state claims lies within the discretion of the district court, the United States Supreme Court has indicated that "if the federal claims are dismissed before trial ... the state claims should be dismissed as well." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). The decisions of the Ninth Circuit are in accord. *See, e.g.*, *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 509 (9th Cir. 1989) ("When, as here, the court dismisses the federal claim leaving only state claims for resolution, the court should decline jurisdiction over the state claims and dismiss them without prejudice.").

The factors for federal district courts to consider in deciding whether to retain jurisdiction over pendent state claims are "economy, convenience, fairness, and comity." *Express Car Wash Corp. v. Irinaga Bros.*, 967 F. Supp. 1188, 1195 (D. Or. 1997). Here, those factors all weigh against retention of jurisdiction over Plaintiff's remaining state law claims.

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This case is still in its infancy. It was filed only last month by Plaintiff, and moving Defendants are only now filing their first appearance through the present Motions. As such, there has been only limited expenditure of time/cost by the parties, and therefore the factors of economy, convenience, and fairness all weigh "powerfully" against federal court retention of jurisdiction. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351, 108 S. Ct. 614, 619, 98 L. Ed. 2d 720 (1988) ("When the single federal-law claim in the action was eliminated at an early stage of the litigation, the District Court had a powerful reason to choose not to continue to exercise jurisdiction.").

Relatedly, but perhaps even more importantly, comity for the CTWS and the Warm Springs Tribal Court system strongly supports declining to retain jurisdiction over Plaintiff's two remaining state law claims. "Under federal Indian law, the Warm Springs tribes, like other federally recognized tribes, are a distinct community. Although their reservation is within the exterior boundaries of Oregon, it is not fully part of the state. The Tribes occupy their own territory, within particular boundaries, in which the laws of Oregon have no force, and into which the citizens of Oregon have no right to enter, except with the assent of the Indians themselves, or in conformity with treaties and acts of Congress."[14]

The Warm Springs Tribal Court is the judicial branch of the CTWS tribal government. It was established in the 1950s to adjudicate criminal and civil matters within the jurisdiction of the Warm Springs Tribe as provided in the Warm Springs Tribal Code. The Warm Springs Tribal Court is the successor to the U.S. Department of Interior Court of Indian Offenses that operated pursuant to federal law on the Warm Springs Reservation from the late Nineteenth Century until replaced by the Warm Springs Tribal Court, which operates pursuant to Warm Springs tribal law

[14] *North Pacific Insurance Co. v. Switzler*, 143 Or. App. 223, 234, 924 P.2d 839, 846 (1996).

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and exercises the inherent sovereign authority of the CTWS affirmed by nearly two centuries of American jurisprudence.[15]

In cases like this one, where Warm Springs Tribal Court has subject matter jurisdiction, plaintiffs (including Plaintiff here) are required to exhaust their tribal court remedies before seeking recourse in federal or state forums.[16] The requirement that a plaintiff exhaust their tribal court remedies is not merely procedural in nature, but also requires deference be shown to the tribal court's findings and judgment. Indeed, "[a]s a general rule, federal courts must recognize and enforce tribal court judgements under principles of comity."[17]

Beyond the issue of mere jurisdiction to hear Plaintiff's claims, it should also be noted that the Warm Springs Tribal Court is among the oldest and most established tribal courts in the Pacific Northwest. It consists of three full time judges: the Chief Judge and two Associate Judges. In addition to the three full time judges, the Warm Springs Tribal Court also employs Judges *Pro Tempore* to hear cases in which the Chief Judge and the Associate Judges are unavailable or disqualified from presiding. It has been the practice of the Warm Springs Tribal Court to appoint one of the *pro tem* judges to hear all cases arising under the CTWS Tort Claims Ordinance, in order to avoid any appearance of bias by the Tribal Court judges in favor of the CTWS or its government employees. Moreover, appeals from the final orders and judgments of the Warm Springs Tribal Court are heard by the Warm Springs Court of Appeals, pursuant to

[15] *See generally Worcester v. Georgia*, 31 U.S. 515 (1832); *U.S. v. Wheeler*, 435 U.S. 313, 328-329 (1978).
[16] *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 920-921 (9th Cir. 2008) ("Principles of comity require federal courts to dismiss or abstain from deciding claims over which tribal court jurisdiction is 'colorable'").
[17] *FMC Corporation v. Shoshone-Bannock Tribes*, 942 F.3d 916, 930-31 (9th Cir. 2019) ("As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity").

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Warm Springs Tribal Code Chapter 203. The Warm Springs Court of Appeals currently consists of four judges, all with extensive legal and judicial experience and backgrounds.

While there are of course some differences between the Warm Springs Tribal Court system and the federal court system, both federal and Oregon state courts have consistently recognized that the procedures of the Warm Springs Tribal Court afford litigants due process.[18]

Since the Warm Springs Tribal Court has subject matter jurisdiction, provides a fair and impartial forum in which Plaintiff's claims may be adjudicated, and can provide adequate remedies for Plaintiff on his claims if proven at trial, the "comity" factor also strongly favors declining retention of jurisdiction over Plaintiff's two remaining state law claims.

Thus, even if one were to disregard the United States Supreme Court's guidance stating that "if the federal claims are dismissed before trial ... the state claims should be dismissed as well," all of the factors that operate to guide the Court's inquiry militate against retaining supplemental jurisdiction over any of Plaintiff's remaining state law claims.

F. Motion Five: ORS 659A.199 is Inapplicable to Tribal Employment Matters

"A state ordinarily may not regulate the property or the conduct of tribes or tribal member Indians in Indian Country." *Felix S. Cohen's Handbook of Indian Federal Law,* §6.03[1][a], p. 511 (2012) (cataloguing federal and state cases all supporting that proposition); *see also*, *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in & for Rosebud Cty.*, 424 U.S. 382, 386, 96 S. Ct. 943, 946, 47 L. Ed. 2d 106 (1976) ("The right of [an Indian tribe] to govern itself independently of state law has been consistently protected by federal statute."); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 93 S. Ct. 1257, 1260, 36 L. Ed. 2d 129 (1973) ("[T]he policy of leaving Indians free from state jurisdiction and control is deeply

[18] *See, e.g., Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 954 (9th Cir. 1998); *In re Marriage of Red Fox*, 23 Or. App. 393, 542 P.2d 918 (1975).

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rooted in the Nation's history… It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. ").

The basis for the absence of state power over tribal affairs "stems from the United States Constitution, which vests exclusive legislative authority over Indian affairs in the federal government. This constitutional vesting of federal authority vis-à-vis the states allows tribal sovereignty to prevail in Indian country, unless Congress act to the contrary." Cohen, *Handbook of Indian Federal Law*, §6.03[1][a], p. 512 (2012) (as amended by 2015 supplement). Based on this federal dominance, Cohen explains, "Indian activities and property in Indian country are ordinarily immune from state taxes and regulations." *Id.* at p. 513.

Notably, Oregon's appellate courts have routinely recognized that the State of Oregon lacks power to regulate on-reservation conduct and activities. The Court of Appeals has expressly stated that, "the state has no regulatory control over the reservation,"[19] and the Oregon Supreme Court has even gone so far as to reject the ability of the state to pursue state law criminal charges for on-reservation criminal conduct.

In *State v. Smith*, 277 Or. 251, 560 P.2d 1066 (1977), the defendant was taken from Jefferson County jail to the reservation for a dental appointment, whereupon he fled custody. In holding that the State of Oregon lacked jurisdiction to prosecute the defendant on a state criminal escape charge, the *Smith* Court explained: "[T]he relations between white and Indians in 'Indian

[19] *Warm Springs Forest Prod. Indus., a div. of Confederated Tribes of Warm Springs Reservation of Oregon v. Employee Benefits Ins. Co.*, 74 Or. App. 422, 428, 703 P.2d 1008, 1012 (1985), affirmed sub nom 300 Or. 617, 716 P.2d 740 (1986).

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country' and the conduct of Indians themselves in Indian country are not subject to the laws or the courts of the several states.'" *Id.* at 255-58.[20]

And if there were any remaining question as to whether there might be some federal law that would allow Oregon to assume jurisdiction over Warm Springs tribal matters, that uncertainty is foreclosed by 28 USC § 1360(a), which provides that, "Oregon shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in all Indian country within Oregon, *except the Warm Springs Reservation*." (italics added); *see also*, *N. Pac. Ins. Co. v. Switzler*, 143 Or App 223, 229, (1996) (state subject matter jurisdiction is not pre-empted by 28 U.S.C. § 1360 for matters involving Warm Springs members arising off of Warm Springs reservation boundaries).

Lastly, it should be noted that even the federal government, which does possess the power to regulate Indian affairs, has still chosen not to do so in some of its most prominent employment/labor legislation. *See, e.g.*, 42 U.S.C. § 2000e(b) (specifically excluding Indian tribes from the definition of an "employer" under Title VII of the Civil Rights Act of 1964); 42 U.S.C. § 12111(5)(B)(i) (specifically excluding Indian tribes from the definition of an "employer" under Title I of the Americans with Disabilities Act).

Since Oregon's statutory scheme for regulation of employment practices (including ORS 659A.199) is inapplicable to tribal employment matters arising on the Warm Springs Reservation, Plaintiff's Third Claim for Relief fails to state a claim upon which relief can be granted, and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

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[20] *See also*, *State v. McGill,* 115 Or. App. 122, 124, 836 P.2d 1371(1992) (Oregon has no jurisdiction over crimes committed by Native Americans on the Warm Springs Reservation); 18 U.S.C. § 1162(a) (Oregon does not have jurisdiction over offenses committed by or against Indians on the Warm Springs Reservation).

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CONCLUSION

For all of the reasons set forth above, moving Defendants Ron Gregory and Carmen Smith respectfully request that the Court enter an Order granting the Motions to Dismiss set forth herein.

DATED this 26th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANTS RON GREGORY AND CARMEN SMITH'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6) AND MEMORANDUM OF LAW IN SUPPORT THEREOF** on the following attorneys of record:

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by filing it with the court's electronic-filing and service system and by e-mailing a courtesy copy to the attorneys stated above, on this day.

DATED this 26th day of June, 2020.

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