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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Portland Division

ERIC WEAVER, an individual,

Plaintiff,

vs.

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

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANTS RON GREGORY AND
CARMEN SMITH'S MOTIONS TO DISMISS
PURSUANT TO FED. R. CIV. P. 12 (b)(1) &
12(b)(6)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Eric Weaver ("Plaintiff"), hereby submits his opposition to Defendants Ron Gregory and Carmen Smith's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12 (b)(1) & 12(b)(6). Plaintiff's Complaint meets and exceeds the standards governing the form of a complaint contemplated by

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Federal Rule of Civil Procedure 8(a) and this Court has subject matter jurisdiction, accordingly, Defendants' motions should be denied in their entirety.

I. Plaintiff's claims are sufficiently stated, and the Court has subject matter jurisdiction.

The named defendants to this suit are being sued in both their individual capacity, (in which the tribal sovereign immunity they seek in this motion does not apply) as well as their official capacity (in which tribal sovereign immunity has been waived by tribal code). All defendants were acting pursuant to state law through an amendment to the tribal code, and all defendants waived sovereign immunity for torts committed by tribal police, as discussed further below.

A. Plaintiff's suit is not barred by the doctrine of tribal sovereign immunity.

In their first and second motions, which are addressed together in this response, Defendants Ron Gregory and Carmen Smith move to dismiss all four of Plaintiff's Claims for Relief. The motions ask for this relief as a full dismissal, or alternatively a partial dismissal, stating the claims are barred by the doctrine of tribal sovereign immunity.

In support of their Motion, Defendants argue correctly the general rule stating tribes are immune from suit. This is not, however, a suit directly against the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS). Defendants neglect to acknowledge, two key points: 1) a waiver by the CTWS to allow suit and expressly waive sovereign immunity based upon the signing into law of Senate Bill 412, and 2) the inability to raise tribal sovereign immunity as a defense to claims against Defendants in their personal capacity.

The implementation of SB 412 is codified in the Warm Springs Tribal Code (WSTC) under Chapter 390. The chapter notes the Oregon governor signed SB 412 into law in July 2011, allowing officers employed by a federally recognized tribe in Oregon to enforce state law. The CTWS believed

it already held this power but agreed to implement SB 412 to make this power more clearly defined. (WSTC 390.001) To accept this power, the tribe had to agree to specifically authorize tort claims against state certified tribal officers, which they did, stating:

The Tribe has authorized tort claims against the Tribe, its subordinate organizations, enterprises, officers, agents, servants and employees subject to the conditions and limitation set forth in Warm Springs Tribal Code Chapter 205. Any tort claim brought against the Tribe, the WSPD, a State Certified Tribal Officer, or other Tribal official arising from the Tribe's state law enforcement authority under SB 412 must be asserted in accordance with Chapter 205, except that the limitations on damages set forth in WSTC 205.004(1) shall be inapplicable to tort claims arising from the Tribe's state law enforcement authority under SB 412.

WSTC 390.130. To date, there have been no cases filed to date under this authority, but nonetheless, it exists and is properly used in the matter at hand. Here, the claims are brought against officers and agents of the tribe, and met the conditions of WSTC Chapter 205, as pled in the Complaint.

Should the court find an inability to bring suit against defendants in their official capacities despite the tribe's express waiver, claims against the defendants in their individual capacities would still stand. Defendants sued in their individual capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties. *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015).

In *Pistor*, Plaintiffs were "advantage gamblers," or those who use techniques to gain a statistical advantage in a casino game. They brought suit, specifically 42 U.S.C. §1983 claims, against the tribal police chief, tribal gaming office inspector, and the general manager of the casino, for detaining Plaintiffs and seizing their property. The casino was owned and operated by the tribe on tribal land. The Court held an officer sued in his individual capacity cannot claim sovereign immunity

from suit “so long as the relief is sought not from the [government] treasury but from the officer personally.” *Id. at 1112 citing Alden v. Maine*, 527 U.S. 706, 757 (1999).

The 10th Circuit has explained the difference, stating:

The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits arising out of actions they took in their official capacities . . . Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1296 (10th Cir. 2008). Taken one step further, here there has been a waiver to allow an official-capacity claim, and there can be no tribal sovereign immunity for individual-capacity suits, thus both claims in the instant matter should be allowed to proceed.

B. Plaintiff’s 42 U.S.C. § 1983 claims are brought under the color of state law

In their third motion, Defendants Ron Gregory and Carmen Smith request an order dismissing Plaintiff’s First and Second Claims for Relief, stating 42 U.S.C. § 1983 claims cannot be brought for actions taken under color of tribal law. Plaintiff disagrees with the assertion the instant claims for relief alleged were the result of actions taken solely under the color of tribal law. Instead the allegations in the case at hand is that Defendants’ conduct was committed under the color of *state* law.¹

Defendants correctly note the test for subjecting a party to a 42 U.S.C. § 1983 claim is whether the party is a “state actor” rather than a “tribal actor.” *Lugar v. Edmondson Oil Co., Inc.*, 457 US 922, 937, 102 S. Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). A person may be a state actor because “he is a

¹ Should the Court not deem the allegations sufficiently clear to assert violations made under the color of state law, Plaintiff is happy to amend his complaint where appropriate.

state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.” *Id.*

The CTWS cannot have it both ways – they cannot get state training and certification to enforce state law under SB 412, making them state officials, and then hide under tribal protections when they act under those same laws and trainings. That is what is being done here. The CTWS police department wanted certification through the state, so Defendant Gregory and others on the department became state certified. These actions taken by a state certified officer to investigate, discipline, and terminate an officer and then report those findings to the state certification board is done under the color of state law, and not tribal law.

This litigation is in the early stages, and discovery has not yet been done, but it appears clear at the very least documentation of Plaintiff’s termination was provided to the state’s Department of Public Safety Standards & Training (DPSST). A quick search of the DPSST’s website lists Plaintiff’s “separation from employment” as an Open/Pending Professional Standards Case as of 7/17/20. *Decl. of Daniel E. Thenell*, Ex. 1. This open investigation has ramifications for Plaintiff’s state certification. In order for that to have happened, Defendants must have provided that notice to DPSST. That likely required a state DPSST Personnel Action New Hires and State Changes Form, commonly known as an F4, to be completed and submitted. Completion and submission of this state form, especially doing so as a form of retaliation against an officer, is an action taken under the color of state law. Therefore, while adverse employment actions may have initially been taken under the color of tribal law, doing so as a state actor and then further reporting the result of those retaliatory actions to the state, giving rise to potential ramifications to Plaintiff’s state certification, are done under the color of state law. While discovery is being conducted, these claims as pled should stand.

C. Even if the 42 U.S.C. §1983 claims are dismissed, this Court should retain jurisdiction

Should the Court dismiss Plaintiff's 42 U.S.C. §1983 claims as being actions solely under the color of tribal law, the remaining claims should be retained by this Court, and not dismissed as requested by Defendants' 4th motion. A federal district court has discretion to retain or decline supplemental jurisdiction under 28 U.S.C. §1367(c)(3), specifically highlighted by the use of "may" within the statute, rather than "shall".

Here, Plaintiff claims members of the CTWS police department took actions against him that eventually resulted in his unlawful termination from the department. Plaintiff is not a tribal member. While the Warm Springs Tribal Court is well established, the allegations raised in the matter at hand will be complicated if heard within the tribal court venue. Given the nature of his claims, Plaintiff's ability to get a fair trial in the Warm Springs Tribal Court for his remaining state law claims is shaky, at best. For the allegations raise herein, the present venue is best for all claims for economy, convenience, fairness, and comity.

D. ORS 659A.199 extends to tribal employment matters

In their fifth motion, Defendants Ron Gregory and Carmen Smith request an order Dismissing Plaintiff's Third Claim for Relief because ORS 659A.199 does not apply to tribal employment matters. However, the CTWS, by adopting WSTC 390.001 has waived tribal sovereign immunity for actions sounding in tort. There is no exclusion in the tribal code for tort claims brought in violation of state laws protecting whistleblowers. The Oregon statute exists, in part to help root out corruptions, waste, fraud, and abuse in public institutions such as law enforcement organizations. The CTWS again can not have it both ways, they cannot participate in training and certification of their officers, enjoy the power to enforce State Laws, and then ignore those very same state laws within the police department.

The Defendants now are attempting to deprive Plaintiff, a non-tribal member, of the legal protections which apply to him by virtue of state law, while availing themselves of the benefits of those same state laws. If the Court is unconvinced of the applicability of ORS 659A.199 to tribal entities and persons Plaintiff is willing to amend the Complaint to more fully allege his theory of liability under state, federal, and/or tribal law.

II. Conclusion

Accordingly, for the reasons set forth herein, the Plaintiff respectfully requests the Court deny Defendants Ron Gregory and Carmen Smith's Motions to Dismiss, as the tribe has waived sovereign immunity, and the actions were taken under the color of state law. Should the court choose to dismiss all of the Federal claims, it should retain jurisdiction over the remaining claims as the most unbiased venue available to Plaintiff.

DATED this 24th day of July 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 24, 2020 I served the foregoing PLAINTIFF'S
OPPOSITION TO DEFENDANTS RON GREGORY AND CARMEN SMITH'S MOTION TO
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SENT VIA:

- U.S. Postal Service, ordinary first-class mail
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THENELL LAW GROUP, P.C.

By:  _____
Anne M. Puppo, Legal Assistant