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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 REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)** **Request for Oral Argument**

Defendants Ron Gregory and Carmen Smith submit the following Reply in Support of their Motion to Dismiss:

I. Motion One

Defendants' Motion One sought dismissal of all of Plaintiff's Claims for Relief on the grounds that they are barred by the doctrine of tribal sovereign immunity. In his Response Brief, Plaintiff argues that his claims against Defendants are permitted under *Pistor v. Garcia*, 791 F.3d

1104, 1108 (9th Cir. 2015). Defendants acknowledge that *Pistor* does allow for "individual capacity" (as opposed to "official capacity") claims to be asserted against tribal officials based on alleged constitutional violations.[1]

However, and as discussed in Defendants' original Motion, the United States Supreme Court has applied a more recent analysis that appears to limit application of that rule (at least implicitly) to actions involving tortious conduct that has occurred off reservation lands. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1291, 197 L. Ed. 2d 631 (2017) ("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.") (emphasis added).

In this case, the actions that form the basis of Plaintiffs' claims are alleged to have occurred while on reservation land, not while on state land. Therefore, to the extent that the United States Supreme Court's more recent opinion in *Lewis v. Clarke* suggests that the rule followed in *Pistor* only applies to tortious conduct occurring on state lands, Defendants maintain that all of Plaintiff's remain subject to dismissal for lack of subject matter jurisdiction.

II. Motion Two

Defendants' Motion Two argued that even if Plaintiff's "individual capacity" claims survive, the Claims for Relief alleged against Defendants in their "official capacities" must be dismissed because they are barred by the doctrine of tribal sovereign immunity. *See Lewis v. Clarke, supra*, 137 S. Ct. at 1290–91 ("[L]awsuits brought against employees in their official

[1] Defendants note that the constitutional violation claims brought under 42 U.S.C. § 1983 in *Pistor* were based on actions allegedly taken under color of state law since the tribal officials had acted in concert with the Gila County Sheriff's Office and the Arizona Department of Gaming to steal the plaintiffs' property. *See id.* at 1109. This distinction is germane to the arguments made by Defendants in support of Motion Three.

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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.")

For his part, Plaintiff does not appear to dispute that Defendants have cited the correct rule disallowing "official capacity" suits. Indeed, the *Pistor* case relied upon by Plaintiff expressly states as much. *Pistor*, 791 F.3d at 1112 ("'[T]ribal sovereign immunity 'extends to tribal officials when acting in their *official* capacity and within the scope of their authority'") (italics in original).

Plaintiff's only argument in support of the viability of his official capacity claims is that tribal sovereign immunity has been waived by CTWS Tribal Code Chapter 390.130 – a Chapter that specifically involves the implementation of Senate Bill 412. That Chapter provides:

> 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. Instead, limitations of liability applicable to tort claims arising from the Tribe's state law enforcement authority under SB 412 shall be the limitations of liability applicable to a "local public body" (as that term is defined in ORS 30.260(6)) set forth in the Oregon Tort Claims Act, ORS 30.260 to ORS 30.300.

The problem with Plaintiff's argument is that it misconstrues the function of CTWS Tribal Code Chapter 390.130. The CTWS has already agreed to a waiver of its tribal sovereign immunity for torts, but it has done so only within its own tribal court as set forth in its tort claims code. This general waiver of tribal sovereign immunity for suits brought in CTWS Tribal Court is found in CTWS Tribal Code Chapter 205.001 (entitled "Authorization for Suit"), which provides as follows:

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> 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.

Thus, the general rule is that tort claims can be brought against the CTWS and its tribal officials, but only in CTWS Tribal Court unless there has been a Congressional law or a Tribal Council resolution that allows suit to be brought in an alternate forum. CTWS Tribal Code Chapter 390 does not expand that general waiver of sovereign immunity. Rather, it speaks only to the issue of the amount of damages that may be recovered in suits brought against tribal law enforcement officials depending on the nature of the claim asserted.

Under CTWS Tribal Code Chapter 390.130, if a claim is based on SB 412 activity (i.e. tribal law enforcement officials' enforcement of Oregon criminal or traffic laws), then the Tribes are not allowed to invoke their regular liability limits (i.e. the regular maximum recoverable damages). In such a case, CTWS Tribal Code Chapter 390.130 provides that the Oregon Tort Claims Act's liability limits apply, not the Tribe's regular liability limits. But if tribal law enforcement officials are being sued for some other conduct that does not involve the enforcement of Oregon criminal or traffic laws, then the Tribe's regular liability limits still apply. This distinction is further confirmed by CTWS Tribal Code Chapter 390.001 (entitled "Objective"), which provides as follows:

> In July 2011, the governor of the State of Oregon signed into law Senate Bill 412 ("SB 412"), which gives officers employed by a federally recognized Indian tribe located within the boundaries of the State of Oregon the power to enforce state law provided that certain requirements are met. Although the Tribe believes that it may already enforce state law under the Oregon Supreme Court's decision in State v. Kuriz, 350 Or. 65, 249 P.3d 1271 (2011), the Tribal Council has determined that it is in the best interests of the Tribe to implement SB 412 so that the ability of the Tribe to enforce state law on and off the Warm Springs Indian Reservation is clearly defined. The Tribal Council believes that implementation of SB 412 will improve public safety in the Warm Springs community, especially in

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> light of the significant number of non-Indians residing on and visiting the Reservation, over which the Tribe does not have criminal jurisdiction under the current United States Supreme Court case law. This chapter is intended to apply only to activities by the Warm Springs law enforcement personnel conducted under SB 412 – i.e., the enforcement of criminal and traffic laws of the State of Oregon. Thus, all provisions under this chapter shall be narrowly constructed to apply only to such state law enforcements activities, and to no other activities conducted by Warm Springs law enforcement personnel.

It bears repeating at this point that waivers of tribal sovereign immunity are strongly disfavored. *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) ("There is a strong presumption against waiver of tribal sovereign immunity."). Waivers of tribal sovereign immunity may not be implied, and must be expressed unequivocally. *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982) (tribe's sovereign power remains intact "unless surrendered in unmistakable terms").

Here, the only general waiver of tribal sovereign immunity that has been agreed to by Tribal Council resolution is found in CTWS Tribal Code Chapter 205.001. CTWS Tribal Code Chapter 390.130 only impacts the equation insofar as it allows recovery of larger damage amounts if the claimed tort involved the enforcement of Oregon criminal or traffic laws. What CTWS Tribal Code Chapter 390.130 did not do was expand the Tribe's general waiver of sovereign immunity (other than the damages recoverable) to allow it to be sued in the United States District Court or any other forum. Indeed, the relevant portion of CTWS Tribal Code Chapter 390.130 provides just the opposite: "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

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official arising from the Tribe's state law enforcement authority under SB 412 *must be asserted in accordance with Chapter 205*." (Italics added).

When CTWS Tribal Code Chapter 390.130 states that the Tribe has authorized actions "subject to the conditions and limitation set forth in Warm Springs Tribal Code Chapter 205," and that such claims "must be asserted in accordance with Chapter 205," it means just that. Perhaps the most important of these of CTWS Chapter 205 "conditions" and "limitations" is the command that suit must be brought in CTWS Tribal Court since there has not been any Congressional authorization for suit to be brought elsewhere.

Thus, this is not a case where application of the doctrine of tribal sovereign immunity leaves Plaintiff without either a remedy or forum in which to pursue his claims. There is an appropriate forum: the CTWS Tribal Court. Plaintiff's official capacity claims should be dismissed accordingly.

III. Motion Three

Defendants' Motion Three argued that 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.

Plaintiff's Response Brief does not dispute that Defendants have correctly stated the law on this issue. Rather, Plaintiff argues that Defendants have somehow been transformed into agents of the State of Oregon for all purposes merely by the passage of SB 412. Defendants urge the Court to reject this argument because it is based on a misunderstanding of what SB 412 does, and more importantly, what it does not do.

Simply stated, SB 412 does not transform all tribal law enforcement personnel into agents of the State of Oregon for any activity they might perform. It only provided tribal law

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enforcement officials with confirmation of their discretionary right to enforce Oregon state criminal and traffic laws while on and off tribal lands. That legislation was enacted in response to *State v. Kurtz*, 350 Or. 65, 249 P.3d 1271 (2011), a case that involved a person who committed a traffic offense while on the Warm Springs reservation, but who was not arrested by tribal law enforcement until after he crossed the boundary into Jefferson County. The defendant was charged with attempting to elude a "police officer" and resisting arrest by a "peace officer."

On appeal of the trial court's denial of a motion for acquittal, the Oregon Court of Appeals in *Kurtz* reversed, holding that the defendant could not be charged with either offense because the arresting tribal law enforcement official was neither a "police officer" nor a "peace officer" under the terms of the relevant statutes. *State v. Kurtz,* 233 Or. App. 573 (2010). The case was then appealed to the Oregon Supreme Court.

While the case was on appeal to the Oregon Supreme Court, and during the 2011 legislative session, the Tribes caused SB 412 to be introduced, which was designed to provide statutory confirmation that trained tribal police officers[2] have the same "peace officer" status as state law enforcement officials, thereby clarifying their jurisdiction to enforce state law within their discretion both within and outside of reservation boundaries. As it turned out, the Oregon Supreme Court ended up reversing the Oregon Court of Appeals, holding that for purposes of the crimes of fleeing or attempting to elude a police officer and resisting arrest, the legislature intended the statutory terms "police officer" and "peace officer" to include tribal police officers. 350 Or. at 67.

The foregoing background is provided here merely to explain the context of how and why SB 412 came into being. What SB 412 did not, and was never intended to do, was to transform

[2] CTWS police officers have actually been going to state police academy for training and certification since the 1970s.

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all tribal law enforcement officials into "state actors" any time they made an internal tribal employment decision (a matter that is uniquely within the Tribe's sovereign right of self-governance). The legislation was unquestionably designed to serve the important public safety purpose of confirming tribal law enforcement officials' authority to enforce Oregon criminal and traffic laws both on and off of the reservation.

With this background in mind, the critical question is whether Defendants were engaging in conduct involving an internal tribal employment matter, or whether they were engaging in "state action" (i.e. the enforcement of Oregon state criminal and traffic laws). And on this issue, the case law is clear: in those cases that have allowed 42 U.S.C. § 1983 claims to proceed, actual enforcement of state criminal or traffic laws was required. *See, e.g.*, *Evans v. McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989) (tribal employee police officers' arrest of the plaintiffs under a city ordinance met the "state actor" standard for purposes of a 42 U.S.C. § 1983 claim); *Bressi v. Ford*, 575 F.3d 891, 896-97 (9th Cir. 2009) (tribal officials were acting under color of state law for purposes of a 42 U.S.C. § 1983 claim in stopping a non-Indian at a public highway roadblock and citing him for a violation of state law).

This case obviously does not involve a criminal arrest or traffic stop of Plaintiff. That is precisely why Plaintiff does not appear to allege that there has been any enforcement of Oregon criminal or traffic law sufficient to meet the "state actor" requirement for his 42 U.S.C. § 1983 claims. Instead, Plaintiff has pivoted to an unpled, novel theory of liability that argues that merely by submitting unspecified information to the Department of Public Safety Standards & Training ("DPSST"), Defendants were thereby automatically transformed into "state actors" for purposes of 42 U.S.C. § 1983.

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The short response to Plaintiff's argument is that there is no allegation in the Complaint about the submission of any information to DPSST; no allegation of what was allegedly reported (or whether the information submitted was even untrue); what was done by DPSST in response to this unspecified information; or that this alleged reporting of information actually caused any of the damages claimed in this case.[3]

But the more comprehensive response to this new theory of liability is that even if Defendants did report information about the separation of Plaintiff's employment to DPSST, the mere fact that a tribal entity decides to submit information about a separation of employment from one of its employees does not turn a tribal entity or its officials into "agents" or "actors" of the State of Oregon for purposes of 42 U.S.C. § 1983 claims.

Plaintiff's Response Brief is remarkable in that it does not cite a single case in support of this unpled novel theory of liability. But the absence of any cited authority is to be expected, given that the Ninth Circuit, this Court, and other jurisdictions have held that a private party's mere reporting of information to a public body, even if inaccurate, does not transform that party into a "state actor" for purposes of 42 U.S.C. § 1983. *See, e.g., Lockhead v. Weinstein*, 24 F. App'x 805, 806 (9th Cir. 2001) ("[T]he mere furnishing of information to police officers does not constitute joint action under color of state law which renders a private citizen liable under § 1983.") (citing *Benavidez v. Gunnell,* 722 F.2d 615, 618 (10th Cir.1983)); *Sawyer v. Legacy Emanuel Hosp. & Health Ctr.*, 2019 WL 1982530, at *5 (D. Or. May 3, 2019) (a private doctor, acting pursuant to Oregon's mandatory reporter laws, was not a "state actor" for 42 U.S.C. §

[3] In fact, Plaintiff's Complaint does not allege that any DPSST reporting caused his damages. The Complaint alleges only that "Defendants' practice, policy and/or custom of harassment, bullying and retaliation was the direct and proximate cause of Plaintiff's damages herein." *See* Complaint, ¶¶ 57 and 75.

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1983 purposes even though the report imposed various investigative duties upon public officials).

These holdings make perfect sense, considering that any ruling to the contrary would affect a sweeping "state actor" transformation for any private entity or person who decides to communicate with the State of Oregon on any issue. This result is not only untenable in general application, it is exponentially so for cases involving sovereign tribal entities, who have been repeatedly and consistently recognized by this country's highest court as "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 1675, 56 L. Ed. 2d 106 (1978).

In the absence of any case supporting the argument that a sovereign tribal entity becomes a state agent/actor merely for reporting an employment separation, the Court should follow the Ninth Circuit and Oregon District Court case law that actually is on point with the allegations that Plaintiff has pled in his Complaint. These cases hold that where a tribal employer engages in allegedly retaliatory employment actions, such actions are performed under color of tribal law, and therefore cannot support 42 U.S.C. § 1983 claims as a matter of law. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006) (plaintiff's employment retaliation allegations do not adequately allege the "state action" element required for 42 U.S.C. § 1983 claims); *Toahty v. Kimsey*, No. 3:19-CV-01308-HZ, 2019 WL 5104742 (D. Or. Oct. 11, 2019) (plaintiff's allegation of retaliation for reporting harassment and misconduct did not allege a viable claim under 42 U.S.C. § 1983).

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Because Plaintiff has not and cannot adequately allege the "state actor" element necessary to support his 42 U.S.C. § 1983 claims, they remain subject to dismissal under Fed. R. Civ. P. 12(b)(6).

IV. Motion Four

Defendants' Motion Four argued that if Plaintiff's 42 U.S.C. § 1983 claims are dismissed, then his remaining claims for violation of ORS 659A.199 and intentional infliction of emotional distress should also be dismissed because federal question jurisdiction would no longer exist.

In support of this argument, Defendants pointed out that although dismissal of the pending state law claims is not mandatory, both the United States Supreme Court and the Ninth Circuit have strongly suggested that if federal question claims are dismissed, any remaining state law claims should also be dismissed. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("if the federal claims are dismissed before trial...the state claims should be dismissed as well."); *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.").

Plaintiff has not even addressed, let alone challenged, any of these cases. Nor has Plaintiff addressed the "economy, convenience, fairness, and comity" factors that guide this Court's analysis of the issue. In the interest of brevity, Defendants rely on the arguments set forth in their original Motion showing that these factors weigh unanimously in favor of declination of jurisdiction.

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Rather than addressing Defendants' cited case law or the factors, Plaintiff has instead chosen to snipe at the legitimacy of the Warm Springs Tribal Court. Plaintiff's Response Brief concedes that the Warm Springs Tribal Court is "well established," but goes on to state that his ability to get a fair trial in that forum remains "shaky." Plaintiff does not come out and say why he believes that he cannot get a fair outcome in the Warm Springs Tribal Court, but he does point out that "Plaintiff is not a tribal member." The implication appears to be that Plaintiff believes he cannot get a fair trial because all of the potential tribal judges would rule against him based on some sort of prejudice or bias. That argument is not only unsupportable, it is offensive to the countless men and women (both tribal and non-tribal members alike) who have spent decades of time and effort in developing one of the oldest and most established tribal courts in the Pacific Northwest.

V. Motion Five

Defendants' Motion Five argued that Plaintiff's ORS 659A.199 claim should be dismissed because that statute does not apply to tribal employment matters. In support of this argument, Defendants cited a litany of cases from the United States Supreme Court, as well as the leading *Cohen* treatise on Indian law, in support of the proposition that Indian tribes are separate nations, and as such, individual states lack the power to regulate them or govern their internal tribal matters. If regulation of Indian Tribes or tribal matters is to occur, that is a decision for the United States Congress to make (as it has done in various areas); such decisions cannot be made by the Oregon Legislature.

Again, Plaintiff's Response Brief does not address any of the authority discussed in Defendants' Motion. Instead, Plaintiff again falls back again on the argument that in enacting

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CTWS Tribal Code Chapter 390.001, the CTWS has broadly "waive[d] tribal sovereign immunity for actions sounding in tort."

As discussed at length above, CTWS Tribal Code Chapter 390.001 does not contain some broad expansion of the Tribe's waiver of sovereign immunity such that it can be sued in any forum and for any action arising in tort. To the contrary, CTWS Tribal Code Chapter 205.001 mandates that suits be brought in CTWS Tribal Court unless there has been some Congressional act that allows suit to be brought elsewhere. There is no such Congressional act here, and all that CTWS Tribal Code Chapter 390 did was expand the amount of damages available in claims arising out of tribal law enforcement officials' enforcement of Oregon criminal or traffic laws.

In any event, it remains quite clear that ORS 659A.199 is a state law anti-retaliation whistleblower statute; it is not federal legislation enacted by Congress. As such, it is inapplicable to internal tribal employment matters. If Congress chooses to consider regulating the internal employment matters of tribal entities, it is certainly free to do so with due consideration given to the potential costs and benefits of such legislation. It is not, however, within the power of the Oregon Legislature to regulate the internal employment matters of sovereign tribal entities. *See generally*, *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 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."). Dismissal of Plaintiff's ORS 659A.199 claim remains appropriate.

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CONCLUSION

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

DATED this 6th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANTS RON GREGORY AND CARMEN SMITH'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)** 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 6th day of August, 2020.

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