CA No. 19-15122

District Court No. 3:17-cv-00121-MMD-WGC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MILLER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GOVERNMENT'S ANSWERING BRIEF

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I. INTRODUCTION

Plaintiff-Appellant John Miller filed suit against the United States in the U.S. District Court for the District of Nevada, challenging his discharge under the Federal Tort Claims Act ("FTCA"). The district court properly dismissed the case based on the FTCA's discretionary function exception because the decision to discharge Miller involved an element of judgment and choice and implicated policy concerns. Accordingly, the Court should affirm the district court's dismissal order.

II. STATEMENT OF JURISDICTION

On November 26, 2018, the district court dismissed Miller's case. The Clerk entered judgment the following day—on November 27, 2018. Miller filed a timely notice of appeal on January 23, 2019. This Court has jurisdiction over the district court's decision pursuant to 28 U.S.C. § 1291.

III. ISSUES PRESENTED FOR REVIEW

Whether the district court properly dismissed Miller's claims challenging his discharge where the FTCA's discretionary function exception barred those claims because the discharge decision involved an element of judgment and choice and implicated policy concerns.

Whether Miller asserted a respondeat superior "claim" before the district court.

IV. STATEMENT OF THE CASE

Miller served as a law enforcement officer with the Reno-Sparks Indian Colony ("Tribe") from June 27, 2013 until his termination on or about August 22, 2014. (ECF No. 32 p. 2 ¶¶ 5-6). The Tribe informed Miller that the reason for the termination was Miller's filing of a fraudulent unemployment claim with the State of Nevada while employed with the Tribe. (ECF No. 32 p. 7 ¶ 41).

At the time of Miller's termination, the Tribe and the United States had entered into a Public Law 93-638 ("638") contract. (ECF No. 32 pp. 2-3 ¶¶ 10-14). A "638" contract is a contract between an Indian tribe and the United States whereby the United States provides funding to allow a tribe to provide certain services for the benefit of tribal members. *Boney v. Valline*, 597 F. Supp. 2d 1167, 1173 (D. Nev. 2009). The purpose of a "638" contract is to encourage Indian self-determination and tribal control over federal programs for the benefit of the tribe. *Id.* For purposes of tort claims, the tribe and its employees are considered to be part of the United States Bureau of Indian Affairs ("BIA") while acting within the scope of their employment in "carrying out" the "638" contract. *Shirk v. United States*, 773 F.3d 999, 1003 (9th Cir. 2014).

V. PROCEDURAL HISTORY

A. February 24, 2017 – Miller files a complaint asserting two claims against the United States based on vicarious liability.

On February 24, 2017, Miller filed suit against the United States, asserting two claims under the FTCA related to his termination: Miller was wrongfully terminated in retaliation for having previously filed a "workplace harassment complaint" (ECF No. 1 ¶ 26), and the BIA was negligent in failing to "intervene against" Miller's termination by the Tribe. (ECF No. 1 ¶¶ 29, 31). The asserted basis for the claims was a "638" contract by which the Tribe and its employees were "deemed to be employees of the Federal government." (ECF No. 1 ¶¶ 6-9). The United States moved to dismiss Miller's complaint, Miller opposed the motion, and the United States filed a reply. (ECF Nos. 9-11).

B. January 5, 2018 – Miller seeks to file a first amended complaint asserting five claims based on vicarious liability.

Before the district court ruled on the United States' motion to dismiss, Miller moved to amend his complaint. (ECF No. 24). His proposed first amended complaint ("FAC") asserted five FTCA claims against the United States: wrongful termination by breach of employment contract; wrongful termination by retaliatory discharge; wrongful termination in bad faith; wrongful termination/tortious discharge; and breach of contract. (ECF No.

24-1 ¶¶ 62-131). The asserted basis for the proposed claims was again the "638" contract by which the Tribe and its employees were deemed to be federal employees. (ECF No. 24-1 ¶¶ 9-12, 137).

The FAC set forth Miller's five claims under separate headings that identified each as a "Cause of Action." (ECF No. 24-1 pp. 12, 15, 17-18, 20). Immediately after the section describing the "Cause[s] of Action" was a section entitled "Miller has exhausted his administrative remedies." (ECF No. 24-1 p. 21). Following that section was a section entitled "Defendant United States is vicariously liable under respondeat superior." (*Id.)*. A paragraph under that heading asserted: "As the employer of the Tribe and all of the Tribe's law enforcement personnel and administration, Defendant is vicariously liable for the Tribe's tortious conduct and breach of contract under respondeat superior." (*Id.* ¶ 137). That statement thus confirmed the FAC's previous assertion that the underlying basis of liability for Miller's five claims derived from vicarious liability under the "638" contract. (ECF No. 24-1 ¶¶ 9-12, 137).

The United States opposed Miller's motion to amend. (ECF No. 26). In so doing, the United States argued that the FAC asserted five claims and they all lacked legal viability. (ECF No. 26 p. 2). In his reply, Miller did not argue that the United States failed to address an alleged sixth respondeat superior

"claim." (ECF No. 28). Instead, Miller acknowledged vicarious liability as the basis for the FAC's *five* proposed claims. (ECF No. 28 pp. 1-2, 5). For example, the reply's introduction states:

> Mr. Miller timely filed suit, alleging wrongful termination by the Tribe under the F.T.C.A. based on [the] Tribe's failure to follow required policies and procedures prior to terminating him. Mr. Miller also alleged wrongful termination based on retaliatory discharge. *Defendant is vicariously liable for the Tribe's actions under [the "638"] Contract.*

(ECF No. 28 p. 2) (emphasis added). Miller reiterated vicarious liability as the basis for the causes of action throughout his reply. *See*, *e.g.*, ECF No. 28 p. 5 (as to the first cause of action, claiming "*Defendant is therefore vicariously liable* since the Tribe wrongfully terminated Mr. Miller, causing him damages." (emphasis added); *id.* (as to the third cause of action, claiming "Defendant is involved due to its vicarious liability under the ['638'] Contract…"); *id*. p.9 (conclusion stating that "Defendant is liable to Plaintiff for the Tribe's wrongful termination—*under all of Plaintiff's theories—based on vicarious liability*." (emphasis added).

The district court denied Miller's motion to amend, but granted him leave to file a second amended complaint ("SAC") with respect to his second claim (wrongful termination by retaliatory discharge), third claim (wrongful termination in bad faith) and fourth claim (wrongful termination/tortious discharge). (ECF No. 29 p. 6).

C. April 4, 2018 – Miller files a SAC asserting three claims based on vicarious liability.

On April 4, 2018, Miller filed his SAC, which asserted three FTCA claims against the United States: wrongful termination by retaliatory discharge; wrongful termination in bad faith; and wrongful termination/tortious discharge. (ECF No. 32 ¶¶ 63-127).[1] As with the FAC, the asserted basis for the claims was the "638" contract, by which the Tribe and its employees are deemed to be federal employees. (ECF No. 32 ¶¶ 10-13). The SAC, like the FAC, also clearly identified each of the three claims as a separate "Cause of Action," (ECF No. 32 pp. 10-18), followed by a section entitled "Miller has exhausted his administrative remedies," and then a section again entitled "Defendant United States is vicariously liable under respondeat

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[1] The retaliatory and tortious discharge claims alleged that the Tribe extended Miller's probation and terminated him in retaliation for Miller's reports of "workplace discrimination and harassment" to tribal authorities. (ECF NO. 32 ¶¶ 63-86, 94-119). The tortious discharge claim also alleged that the probation extension and discharge violated three public policies: "protecting employees who object to and expose illegal conduct or practices of employers or superiors" (ECF No. 32 ¶ 97); requiring employers to "abide by their employee handbooks' due process provisions prior to terminating employees" (ECF No. 32 ¶ 99); and protecting employees from the effects of crime. (ECF No. 32 ¶ 110). Miller's claim for bad faith discharge alleged that the Tribe acted in bad faith when it breached its employment agreement with Miller by terminating him for reporting workplace misconduct. (ECF No. 32 ¶¶ 87-93).

superior." (ECF No. 32 p. 18). As with the FAC, a paragraph under that heading stated: "As the employer of the Tribe and all of the Tribe's law enforcement personnel and administration, Defendant is vicariously liable for the Tribe's tortious conduct and breach of contract under respondeat superior." (*Id.*). The statement thus again confirmed the SAC's earlier assertion that the basis of liability for Miller's three claims derived from vicarious liability under the "638" contract. (ECF No. 32 ¶¶ 10-13, 133).

D. May 2 and 31, 2018 – The United States moves to dismiss the SAC. Miller opposes the motion, but does not dispute the United States' recitation of his claims or argue that a respondeat superior "claim" survives the motion.

On May 2, 2018, the United States moved to dismiss the SAC, arguing that the filing asserted three FTCA claims that lacked legal viability: wrongful termination by retaliatory discharge; wrongful termination in bad faith; and wrongful termination/tortious discharge. (ECF No. 39 p. 2). In opposing the United States' motion (on May 31, 2018), Miller did not dispute the United States' recitation of his claims or argue that a respondeat superior "claim" survived the motion to dismiss. (ECF No. 44). Instead, Miller again acknowledged, in his opposition's introduction, that "vicarious liability" was the underlying basis of his three claims based on the "638" contract:

> Plaintiff timely filed suit, alleging wrongful termination against the United States under the [FTCA] based on the Tribe's wrongful

> discharge, which included the Tribe's failure to follow required regulations and procedures prior to terminating him. Plaintiff also alleged wrongful termination based on retaliatory discharge and tortious discharge based on the Tribe's terminating him as a result of his reporting his superiors['] unlawful conduct to the Tribe. *Defendant is vicariously liable for the Tribe's actions under the ["638"] Contract.*

(ECF No. 44 p. 2) (emphasis added).

E. September 18, 2018 – Miller moves to file a third amended complaint and acknowledges his SAC asserts claims other than respondeat superior.

Before the district court ruled on the United States' motion to dismiss, Miller sought leave, on September 18, 2018, to file a third amended complaint ("TAC"). (ECF No. 57). Miller based his motion on purported "newly discovered evidence" showing that the Tribe discharged Miller knowing he was the victim of identity theft. (*Id*. at 2). In his motion, Miller conceded that the SAC asserted three claims: "On April 4, 2018 Miller filed a Second Amended Complaint *alleging three causes of action* arising from the [FTCA] based on the wrongful termination of Miller by Defendant[.]" (ECF No. 57 p. 1) (emphasis added). Miller's motion also sought leave to assert two new FTCA claims—negligence and gross negligence—based on newly discovered evidence. (*Id.* p. 4). His motion to amend thus proposed a total of five claims.

(ECF No. 57-1 pp. 12-22, ¶¶ 66-141).[2] The motion made no mention of a "claim" for respondeat superior.

The TAC itself clearly identified each of Miller's five claims, as referenced in his motion to amend, as a "Cause of Action." (ECF No. 57-1 pp. 12-22). As was the case with the FAC and SAC, the asserted basis for the TAC's proposed claims was the "638" contract by which the Tribe and its employees were deemed federal employees. (ECF No. 57-1 ¶¶ 10-13). The section following the five "Cause[s] of Action" was again entitled "Miller has exhausted his administrative remedies" followed by a section again entitled "Defendant United States is vicariously liable under respondeat superior." (ECF No. 57-1 p. 24). As with the FAC and SAC, a paragraph under that heading reiterated: "As the employer of the Tribe and all of the Tribe's law enforcement personnel and administration, the United States is vicariously liable for the Tribe's tortious conduct and breach of contract under respondeat

[2] The first three proposed claims were nearly identical to the claims asserted in the SAC except that each of the proposed claims included an allegation that the Tribe knew on September 5, 2014 that Miller was the victim of identity theft. (*Compare* ECF Nos. 32, 57-1). The two new proposed claims—negligence and gross negligence—were again based on the Tribe's discharge despite allegedly knowing Miller was the victim of identity theft. (ECF No. 57-1 pp. 21-22, ¶¶ 130-41).

superior." (*Id.*). Like the FAC and SAC, that statement thus again confirmed the TAC's earlier assertion that the basis of liability for Miller's five proposed claims derived from vicarious liability based on the "638" contract.

F. October 22 and November 13, 2018 – The United States opposes Miller's motion to amend, but Miller's reply does not refute the United States' recitation of Miller's claims.

On October 22, 2018, the United States opposed Miller's motion to amend. (ECF No. 60). In so doing, the United States recited the TAC's five proposed claims, and argued against the viability of each of those claims. (ECF No. 60 pp. 4, 5-12). In his reply (on November 13, 2018), Miller did not dispute the United States' recitation of the claims or argue that his "claim" for respondeat superior was a viable cause of action that the United States failed to address.

G. November 26, 2018 – The district court dismisses the SAC and denies the motion to amend, identifying the claims as those described under each "Cause of Action" heading in the SAC and TAC.

On November 26, 2018, the district court granted the United States' motion to dismiss the SAC and denied Miller's motion for leave to file a TAC. (ECF No. 64 p. 7). In issuing its ruling, the district court determined that Miller's SAC asserted three claims and his TAC asserted five claims, as follows:

> In the SAC, Plaintiff alleges the following causes of action: (1) wrongful termination by retaliatory discharge under the FTCA; (2) wrongful termination in bad faith under the FTCA; and (3) wrongful termination/tortious conduct under the FTCA. (ECF No. 32 at 10-18). In the proposed TAC, Plaintiff alleges the same three causes of action as in the SAC, plus causes of action for negligence and gross negligence under the FTCA. (ECF No. 57-1 at 12-22).

(ECF No. 64 p. 2).

VI. ARGUMENT

A. Standard of Review

This Court reviews dismissals under Federal Rule of Civil Procedure 12(b)(1) *de novo*. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 963 (9th Cir. 2018).

B. The Court should disregard Miller's Statement of Facts because Miller bases most of that Statement on a superseded, non-existent complaint.

Miller's opening brief includes a lengthy 10-page Statement of Facts. (*See* App. Br. 8-18).[3] Many of the assertions in that Statement come from his original complaint. (*Id.).* Miller amended that complaint, however, thereby superseding the filing and rendering it "non-existent." *See Lacey v. Maricopa County*, 693 F.3d 896, 927 (9th Cir. 2012) ("an amended complaint supersedes the original complaint and renders it without legal effect");

[3] "App. Br." refers to "Plaintiff-Appellant John Miller's Opening Brief."

Valadez-Lopez v. Chertoff, 656 F.3d 851, 857 (9th Cir. 2011) ("it is well-established that an amended complaint supersedes the original, the latter being treated thereafter as non-existent") (internal quotation marks omitted); *Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) (once a complaint is amended, "the original pleading no longer performs any function" and "cease[s] to exist"). Thus, the Court should not consider assertions in the Statement of Facts that are based on Miller's superseded, non-existent original complaint. Moreover, neither the Court nor the United States should be required to sift through the record to decipher the factual basis for Miller's arguments. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("Judges are not like pigs, hunting for truffles buried in briefs."). Miller's deficient briefing, particularly when considered with the other deficiencies described below, warrants an affirmance of the district court's order dismissing the SAC.

C. The Court should not consider assertions in Miller's Statement of Facts that are not supported with record citations.

Miller fails to support many assertions in his Statement of Facts with record citations. (*See* App. Br. 8-18). That deficiency violates the rules of appellate procedure. *See* FRAP 28(a)(8)(A) (requiring appellant's brief to include "citations to the * * * parts of the record on which the appellant

relies"). The Court should disregard all unsupported factual assertions. Again, it should not be the Court's or the United States' job to sift through the record to try to discern the factual basis for Miller's arguments. *Greenwood*, 28 F.3d at 977. Accordingly, the Court should affirm the district court's dismissal order. *See* Ninth Cir. R. 28-1(a) ("Briefs not complying with FRAP and these rules may be stricken by the Court.").

D. The Court should disregard ER 19, attached to the TAC, because the district court denied the motion to amend the SAC and Miller did not appeal that ruling.

Miller asserts that "[o]n September 5, 2014, [the Nevada Department of Employment, Training and Rehabilitation ("DETR")] informed the Tribe that Miller was the victim of identity theft and the fraudulent unemployment claim in his name—the Tribe's grounds for terminating him—was part of a large identity theft ring." (App. Br. 15). He cites "ER019" as the purported record citation to support that assertion. (*Id.).* "ER019" is an attachment to Miller's proposed TAC. (ECF No. 57-1 p. 87). Miller never filed the TAC, however, because the district court denied Miller's motion to amend the SAC. (ER 18). Moreover, Miller has not appealed the denial of the motion to amend the SAC, and the district court did not consider "ER019" in dismissing the SAC. (App. Br. 6-7; ER 18). Thus, "ER019" should not be part of the excerpts of record, and the Court should not consider the document. *See Rosa v. Scottsdale*

Mem'l Health Sys., Inc., 132 F.3d 38, at *2 n. 2 (9th Cir. 1997) ("Because this evidence was not considered by the district court, we will not consider it on appeal.").

E. "ER019" does not state that the DETR informed the Tribe that Miller was the victim of identity theft.

In any event, "ER019" does not state that the DETR informed the Tribe that Miller was the victim of identity theft, as Miller claims. (App. Br. 15; ECF No. 57-1 p. 87). On the contrary, the DETR entry on which Miller relies simply states: "Advised Reno Sparks Indian Colony that claim was hijack [sic] in ID Theft case." (ECF No. 57-1 p. 87) (brackets in original). The precise meaning of that entry is unclear. While the statement identifies some kind of "ID theft case," details about that "case" are lacking, such as precisely what the nature of the "case" is and who the alleged perpetrator(s) and victim(s) are. Miller's claim that the notation establishes that the DETR informed the Tribe that Miller was the victim of identity theft is thus unfounded. Regardless, the notation is dated September 5, 2014—a date *after* Miller's termination (on August 24, 2014 (ECF No. 57-1 pp. 82, 87)). Thus, at the time of Miller's discharge, the Tribe had no reason to believe he was the victim of identity theft.

Even if the DETR had informed the Tribe that Miller was the victim of identity theft, the mere relaying of that information would not give rise to a

cause of action. Miller cites no authority that the Tribe's receipt of such information required a certain response. The DETR record cited by Miller shows that, as of December 4 and 9, 2015, an investigation was underway. (ECF No. 57-1 p. 87).[4] Miller cites no authority to demonstrate that the Tribe was required to take some particular action in response to that DETR investigation, the nature of which was unclear and, in any event, that was still ongoing.

Moreover, on December 17, 2015, the DETR sent Miller a letter stating that while it "appears" he was the victim of identity theft, "there is no firm proof of identity theft." (ECF No. 57-1 p. 104). The DETR further asserts that it is "assisting Federal Agencies in investigating the claim for benefits filed under your name and Social Security Number[.]" (*Id.*). Again, Miller cites no authority that would have required the Tribe to take a particular course of action under those circumstances.

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[4] The December 4, 2015 entry states that Miller was informed that "we are still waiting for a response about the letter he requested." (ECF No. 57-1 p. 87). The December 9, 2015 notation states that "we have no update regarding the letter he requested…" (*Id.*). The referenced "letter" was a letter from DETR stating that Miller was the victim of identity theft. As of December 2015, no such letter was forthcoming.

Lastly and perhaps most significantly, the Appeals Committee before whom Miller challenged his termination declined to overturn his discharge, in part, because "no further documentation [was] received from you regarding this claim." (ECF No. 57-1 p. 93, ECF No. 32-12 p. 2). Miller's failure to provide sufficient documentation to support his allegations before the Appeals Committee does not entitle him to relief in this action. Accordingly, the Court should affirm the district court's dismissal of the case.

F. The discretionary function exception bars Miller's FTCA claims.

The United States is immune from suit unless it has expressly waived such immunity and consented to be sued. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). The FTCA does not waive sovereign immunity for claims against the United States "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Congress designed this limitation, known as the discretionary function exception, to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Gaubert*, 111 S. Ct. 1267, 1273 (1991). The discretionary function exception "marks the boundary between Congress' willingness to

impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 808 (1984). The discretionary function exception must be strictly construed in favor of the United States. *Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

A two-pronged test determines whether the discretionary function exception applies. First, the court must determine whether the alleged negligent or wrongful act of a federal employee involved "an element of judgment or choice." *Gaubert*, 111 S. Ct. at 1273. A challenged action satisfies this prong if there is no federal statute, regulation or policy that "specifically prescribes a course of action for an employee to follow[.]" *Id.*

If the first prong of the test is satisfied, the second prong requires that the challenged decision be of "the kind that the discretionary function exception was designed to shield." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Under that prong, the court determines if the discretionary conduct at issue is "susceptible to policy analysis." *Gaubert*, 111 S. Ct. at 1275. When government policy allows a government agency to exercise its discretion, it must be presumed "that the agent's acts are grounded in policy when exercising that discretion." *Id.* at 1274; *Miller v. United States*, 163 F.3d 591, 593-94 (9th Cir. 1998). "Even if the decision is an abuse of the discretion

granted, the exception will apply." *Terbush v. United States*, 516 F.3d 1125, 1129 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2680(a).

Applying the two-pronged test here demonstrates that the discretionary function exception bars Miller's FTCA claims, as the district court correctly found. Personnel actions, such as the decision to terminate an employee, clearly involve an element of judgment and choice. *See Richman v. Straley*, 48 F.3d 1139, 1146-47 (10th Cir. 1995) ("Decisions regarding employment and termination are inherently discretionary…[because s]uch sensitive decisions are precisely the types of administrative action the discretionary function exception seeks to shield from judicial second-guessing."); *Sydnes v. United States*, 523 F.3d 1179, 1184 (10th Cir. 2008) ("employment decisions generally involve a significant degree of discretion by personnel supervisors").

As for the test's second prong, personnel decisions require the type of policy analysis that the discretionary function exception was enacted to protect. *See Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) ("This court and others have held that decisions relating to the hiring, training and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield."); *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995) ("Issues of employment supervision and retention generally involve the permissible exercise of policy

judgment and fall within the discretionary function exception."); *Sydnes*, 523 F.3d at 1186 ("employment and termination decisions are, as a class, the kind of matters requiring consideration of a wide range of policy factors").

In short, the Tribe's decision to terminate Miller involved elements of judgment and choice and implicated policy concerns. The FTCA's discretionary function exception thus deprived the district court of subject matter jurisdiction to consider Miller's claims. Accordingly, the Court should affirm the district court's dismissal order. *See Crete v. City of Lowell*, 418 F.3d 54, 64 (1st Cir. 2005) ("[U]niformly[,] the federal circuit courts under the FTCA have found that employer decisions such as hiring, discipline, and termination of employees are within the discretionary function exception."); *Sydnes*, 523 F.3d at 1187 ("A federal agency's decision to terminate or request the termination of an employee involves an element of choice and is the kind of decision that implicates policy concerns relating to accomplishing the agency's mission.").

G. Miller's arguments about the discretionary function exception lack legal and evidentiary support.

Miller argues that the discretionary function exception does not apply for two reasons. First, the Tribe violated "mandatory regulations" that prohibited discharging him based on "false accusations." (App. Br. 23). Second, the Tribe failed to follow mandatory termination procedures. (*Id.*). As

support for those arguments, Miller cites several regulations and provisions from the BIA handbook. *See* App. Br. at 23-24 (citing, *inter alia*, 25 C.F.R. §§ 12.11, 12.12, 12.13, 12.14, 12.15, 12.2). Miller contends those regulations demonstrate that "the procedures and rules in the BIA Handbook are mandatory and not discretionary" (App. Br. 24), and that the Tribe failed to follow the "federally mandated regulations and procedures" referenced above. (App. Br. 25). He asserts the most "egregious[]" violation was the Tribe's decision to discharge him "even though it knew Miller was, in fact, the victim of a scheme whereby a third party filed the fraudulent claim in his name." (App. Br. 25).

Miller fails to include record citations for many of his BIA Handbook assertions, and makes BIA Handbook assertions based on attachments to his original complaint. (App. Br. pp. 9-11; ER 237, 243, 247). The Court should disregard all unsupported assertions. *See* FRAP 28(a)(8)(A) (requiring appellant's brief to include "citations to the * * * parts of the record on which the appellant relies"). The Court also should disregard assertions based on Miller's original complaint because Miller amended that complaint, thereby rendering the filing "non-existent." *See Valadez-Lopez*, 656 F.3d at 857 ("it is well-established that an amended complaint supersedes the original, the latter being treated thereafter as non-existent") (internal quotation marks omitted).

Further, in making his arguments before the district court, Miller did not cite to or rely on the federal regulations identified above. Therefore, the Court should not consider arguments based on those regulations now. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) ("Th[is] argument [is] raised for the first time on appeal, and because [it was] never argued before the district court, we deem [it] waived."). In any event, the federal provisions that Miller cites do not state that the BIA Handbook provisions are mandatory. Nor do the BIA Handbook's pre-termination procedures dictate what adverse employment action, if any, the Tribe was required to impose on Miller.

Moreover, the Court should disregard Miller's assertion that the Tribe purportedly knew he was the victim of identity theft. Again, that assertion comes from an attachment to the TAC—not the SAC; the district court did not approve the TAC for filing, and Miller did not appeal that ruling. Thus, Miller was precluded from including the TAC and its attachment in the excerpts of record. Regardless, the TAC attachment on which Miller relies does not state that the Tribe knew Miller was the victim of identity theft, as explained above. Accordingly, the Tribe did not violate the BLM Handbook provision that prohibits disciplining employees based on unfounded allegations.

1. The *Big Owl* and *Dahlstrom* cases do not support Miller's position.

In dismissing the case, the district court cited several cases that support her conclusion that the discretionary function exception bars Miller's claims. (ER 16-17). Miller contends that two of those cases—*Big Big Owl v. United States*, 961 F. Supp. 1304, 1308-09 (D.S.D. 1997) and *Dahlstrom v. United States*, 2018 WL 1046829, at *1-2 (W.D. Wash. Feb. 26, 2018)—support his position. (App. Br. 21). In *Big Owl* and *Dahlstrom*, the district court invoked the discretionary function exception to bar the plaintiff's claims, concluding that the tribal handbooks that limited the employer's discretion to terminate did not qualify as federal law. *See Dahlstrom*, 2018 WL 1046829, at *1-2 (barring FTCA claim based on discretionary function because tribe's internal codes and policies "do not represent federal law" and none of the cited federal statutes "prescribes the circumstances in which plaintiff could be fired."); *Big Big Owl*, 961 F. Supp. at 1304 (barring FTCA claim based on discretionary function because staff handbook did not rise to the level of a federal statute, regulation, or policy that prohibited school board's nonrenewal of contract beyond period set forth in tribal staff handbook.). In contrast, according to Miller, the BIA handbook in his case "is commissioned by federal regulation, 25 C.F.R. § 12, and contains mandatory procedures and rules that tribal law enforcement programs must follow." (App. Br. 26).

Miller's argument is without merit. Again, the federal regulations he cites do not state that the BIA Handbook's provisions are mandatory. Even if they did, the provisions do not dictate what adverse employment action, if any, the Tribe was required to impose on Miller. Under the circumstances, the Tribe was permitted to exercise its discretion in deciding whether to terminate him.

2. Miller waived his argument that the discretionary function exception does not apply to intentional and bad faith torts.

Miller argues that the second prong of the discretionary function exception test does not apply to intentional torts or torts committed in bad faith. (App. Br. pp. 27-31).[5] In Miller's view, such acts are unrelated to any plausible policy objective and do not involve the kind of judgment that is intended to be shielded from judicial second-guessing. (App. Br. 29). Miller contends the United States acted in bad faith in discharging him where he was the victim of identity theft, and thus the discretionary function exception

[5] The discretionary function exception's second prong requires that the challenged decision be of "the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. Under that prong, the court determines if the discretionary conduct at issue is "susceptible to policy analysis." *Gaubert*, 111 S. Ct. at 1275. When government policy allows a government agency to exercise its discretion, it must be presumed "that the agent's acts are grounded in policy when exercising that discretion." *Id.*

should not apply. (App. Br. pp. 27-31). Miller, however, did not make that argument before the district court, and he may not advance that argument for the first time now. *See Hillis*, 626 F.3d at 1019 ("Th[is] argument [is] raised for the first time on appeal, and because [it was] never argued before the district court, we deem [it] waived.").

In any event, Miller's argument lacks merit. Miller claims the Tribe acted in bad faith because "firing an employee for being the victim of a crime, and in retaliation, 'cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.'" (App. Br. 30-31). According to the SAC, however, the Tribe terminated Miller "because he had allegedly reported a fraudulent unemployment claim to the State of Nevada Unemployment Office on August 14, 2014." (ECF No. 32 ¶ 41). Also according to the SAC, the Tribe did not learn Miller was an alleged victim of identity theft until *after* his termination. (ECF No. 32 ¶¶ 6, 41, 58).[6] Further, the Appeals Committee before whom Miller challenged his termination declined to overturn the discharge, in part, because "no further documentation [was] received from you regarding this claim." (ECF No. 32-12 p. 2). The SAC thus fails to

[6] The SAC states that Miller was discharged on or about August 22, 2014, but an investigation did not disclose that he was the victim of identity theft until December 15, 2015. (ECF Nos. 32 ¶¶ 6, 41, 58).

demonstrate bad faith by the Tribe. Accordingly, the Court should affirm the district court's dismissal order.

H. The district court did not inadvertently fail to consider a respondeat superior "claim" because Miller did not allege such a "claim."

Miller contends the district court inadvertently failed to address a respondeat superior "claim" that he allegedly asserted in the SAC. (App. Br. 31). This contention fails. He did *not* assert a "claim" for respondeat superior in the SAC—or at any other time in the proceedings. On the contrary, he simply identified respondeat superior under the "638" contract as the basis for liability for each of the claims alleged. That undisputed fact is evident from his filings throughout the case. For example, the SAC plainly asserted three claims, as evidenced by separate headings identifying each as a "Cause of Action": wrongful termination by retaliatory discharge; wrongful termination in bad faith; and wrongful termination/tortious discharge. (ECF No. 32 ¶¶ 63-127). No respondeat superior "claim" was asserted as a "Cause of Action." Miller's motion for leave to file his TAC confirmed that the SAC asserted only three claims: "On April 4, 2018 Miller filed a Second Amended Complaint *alleging three causes of action* arising from the [FTCA] based on the wrongful termination of Miller by Defendant[.]" (ECF No. 57 p. 1) (emphasis added).

Moreover, Miller did not oppose the United States' motion to dismiss the SAC by disputing the United States' recitation of his claims or arguing that the SAC survived based on a respondeat superior "claim." Nor did Miller refute the United States' recitation of Miller's proposed claims when Miller replied to the United States' opposition to Miller's motion to amend to file the TAC. In fact, Miller's two years of filings in the case make it clear that he *never* asserted a "claim" for respondeat superior. Again, he simply identified respondeat superior as the basis for liability for each of his asserted claims pursuant to the "638" contract by which tribal employees were deemed federal employees. In rejecting all of Miller's claims, however, the district court implicitly rejected the underlying respondeat superior theory of liability that served as the basis for each dismissed claim. Accordingly, the Court should affirm the district court's dismissal order.

I. Miller failed to cite or discuss the *Hall* case despite two years of litigation and, in any event, he misconstrues the *Hall* holding.

Miller claims he is entitled to relief based on *Hall v. United States*, 2003 WL 24262157 (D. Nev. Oct. 28, 2003), a case decided by United States District Court Judge Howard D. McKibben more than 15 years ago. (App. Br. 33-34). Miller claims the case demonstrates that the discretionary function exception does not apply to deprive the Court of subject matter jurisdiction

over Miller's respondeat superior "claim." (*Id.*). According to Miller, the district court's dismissal of the SAC based on the discretionary function exception was thus erroneous. (*Id.*). For three reasons, Miller's argument fails.

First, in opposing the United States' motion to dismiss the SAC, Miller did not cite or discuss *Hall*. He thus waived his right to make arguments based on the case. *See Hillis*, 626 F.3d at 1019 ("Th[is] argument [is] raised for the first time on appeal, and because [it was] never argued before the district court, we deem [it] waived."). Second, even if Miller had cited the case, the district court was not bound by a decision from another judge in the same district. *See Peugeot v. U.S. Tr.* (*In re Crayton*), 192 B.R. 970, 979-80 (1996) ("One district court judge, however, is not bound to follow the decision of another."); *Starbuck v. City & Cty. of S.F.*, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (district courts are not bound by decisions from other district courts). Third, Miller misconstrues the *Hall* holding, as explained below.

In *Hall*, the plaintiff sued the United States, claiming a tribal chairman discharged him from his employment as a law enforcement officer with the Walker River Paiute Tribe in retaliation for reports by the plaintiff that prompted criminal charges against the chairman. (ECF No. 66-2 p. 2). The plaintiff cited two theories as support for his allegation: 1) The BIA was negligent in failing to intervene to protect the plaintiff from the chairman's

retaliation; and 2) The United States was considered to be the chairman's employer under a "638" contract and thus liable for his tortious conduct under the doctrine of respondeat superior. (*Id*. pp. 2-3).

The defendant moved to dismiss the complaint and, alternatively, moved for summary judgment, under multiple theories. (*Id*. at 3). The defendant argued that the BIA's refusal to intervene fell within the FTCA's discretionary function exception, thereby depriving the Court of subject matter jurisdiction over the claim. (*Id*. at 6). The Court agreed and dismissed the claim. (*Id*.).

As for the respondeat superior theory of liability, the defendant made three arguments. (*Id*.). First, the defendant argued that the plaintiff's discharge for poor performance was not tortious. (*Id*.). The Court concluded that an issue of material fact existed on that question based on the plaintiff's allegation that his discharge in retaliation for filing reports about alleged criminal behavior constituted a public policy violation. (*Id*.). Second, the defendant argued that the chairman was not "carrying out" the "638" contract in participating in the events that led to the plaintiff's termination and thus the chairman could not be considered a federal employee. (*Id*. at 7). The Court rejected that argument and concluded that the chairman acted within the scope of his employment in carrying out the "638" contract. (*Id*.). Third, the defendant argued that the tribal council's finding that the plaintiff was justifiably terminated was final

and that considering that issue in federal court would violate the tribal autonomy that the "638" contract was designed to protect. (*Id.*). The Court rejected that argument, noting that the defendant provided only general statements of policy regarding tribal autonomy. (*Id.* at 7-8). The Court also found that the defendant did not demonstrate that the Court was barred from hearing a federal question claim brought against the United States when the plaintiff had exhausted his tribal remedies. (*Id.* at p. 8). In the Court's view, a federal court may hear a federal claim against a tribal member if that member has exhausted administrative remedies. (*Id.*).

Miller contends that *Hall* precludes the dismissal of his respondeat superior "claim" pursuant to the discretionary function exception. *(*App. Br. 33-35). Miller misreads *Hall*. In *Hall,* the Court rejected the plaintiff's failure-to-intervene theory of liability based on the discretionary function exception, but did not consider the discretionary function exception as it applied to respondeat superior, because the defendant did not raise the defense. The discretionary function exception arguments and cases asserted by the United States in this case were thus not presented at all in *Hall*. Here, the United States argued that Miller's claims were barred by the discretionary function exception because the Tribe's decision to terminate Miller involved elements of judgment and choice and implicated policy concerns. (ECF No. 39 pp. 9-

11; ECF No. 51 pp. 5-6). The United States cited numerous supporting cases, including binding Ninth Circuit precedent. (*Id.*). The cited cases demonstrate that courts throughout the country are unanimous in barring FTCA challenges of employment decisions based on the discretionary function exception. (*Id.*).

In short, the *Hall* Court did not consider or address the discretionary function exception arguments and cases that the United States presented for this Court's consideration. Miller's suggestion to the contrary is unfounded and disingenuous. Accordingly, this Court should affirm the judgment of the district court.

VII. CONCLUSION

For the reasons argued above, the Court should affirm the district court's dismissal order.

Dated this 2nd day of August 2019.

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VIII. STATEMENT OF RELATED CASES

The government is unaware of any related cases currently pending in this Court.

Dated: August 2, 2019

s/ *Holly A. Vance*
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Assistant United States Attorney

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1

I hereby certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached Answering Brief is proportionately spaced, has a typeface of 14 points, and contains 6,759 words.

Dated: August 2, 2019

s/ *Holly A. Vance*
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