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SOUTHERN INDIAN HEALTH COUNCIL, INC.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

CAROLINA MANZANO, Plaintiff, v. SOUTHERN INDIAN HEALTH COUNCIL, INC.; and DOES 1-50, inclusive, Defendants.	Case No. 3:20-CV-02130-BAS-BGS **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1) & 12(B)(6)** Date: January 4, 2021 "No Oral Argument Unless Requested by the Court" Courtroom: 4B Judge: Hon. Cynthia Bashant

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I. INTRODUCTION

Plaintiff's Opposition to SIHC's Motion to Dismiss is devoid of any supporting law. Instead, Plaintiff merely regurgitates her defective Complaint allegations, and improperly attempts (unsuccessfully) to embellish them. In her Opposition, Plaintiff also ignores the indisputable fact that she, not SIHC, bears the burden to prove that the Court has subject matter jurisdiction. Plaintiff's purported evidence does not undermine the central indisputable fact: Since SIHC is a tribal consortium providing a government function to its Member Tribes, it is clearly entitled to sovereign immunity. Indeed, Plaintiff's Opposition fails to address the dispositive *Winter* factors. Furthermore, as a matter of law, Plaintiff has failed to state facts sufficient to support *any* claim for relief against SIHC. For the reasons described below and in SIHC's Motion to Dismiss, the Court should grant SIHC's motion and dismiss Plaintiff's Complaint in its entirety without leave to amend.

II. ARGUMENT

A. Plaintiff Failed to Satisfy Her Burden of Establishing this Court's Subject Matter Jurisdiction to Proceed Against SIHC.

1. SIHC is a Tribal Consortium Entitled to Sovereign Immunity.

Plaintiff argues that SIHC's dispositive sovereign immunity defense lacks evidentiary support, but Plaintiff fails to cite any case law or statutes in support of her argument. *See* ECF 7 at 6:16-9:4. Plaintiff, not SIHC, bears the burden of establishing the Court's subject matter jurisdiction. *See* ECF 5-1 5:8-6:11. Plaintiff simply attacks the evidence filed in support of the Motion without citing any authority or contradictory evidence. ECF 7 at IV. A, 2-3.[1] SIHC relies on Ninth Circuit precedent. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (quoting *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013)).

SIHC is a tribal consortium rather than a single tribe, but Ninth Circuit case law applies the sovereign immunity defense to many tribal entities, including commercial

[1] In Docket 7 at IV. A. 1, Plaintiff argues this Court has jurisdiction under 28 U.S.C. sections 1331 and 1367. SIHC will not be addressing this section as it is inapplicable to sovereign immunity.

enterprises such as casinos and governmental entities such as SIHC, including **health agencies** (*see Pink*, 157 F.3d 1185, 1188 [non-profit health corporation "served as an arm of the sovereign tribes, acting as more than a mere business."]; **tribal schools** (*see Hagen v. Sisselon-Wahpeton College*, 205 F.3d 1040 (8th Cir. 2000) [community college]; *E.F.W. v. St Stephen's Mission Indian High Sch.*, 51 F. Supp. 2d 1217, 1221–22 (D. Wyo. 1999), *affirmed*, 264 F. 3d 1297, 1304, n.2 (10th Cir. 2001) [tribal school]); and **utilities** (*see Dille*, 801 F.2d at 375 [noting Congressional intent to "promote the ability of sovereign Indian tribes to control their own economic enterprises"].

Regardless, Plaintiff fails to carry the burden to show this Court has subject matter jurisdiction over SIHC and that SIHC is not entitled to sovereign immunity. Although Plaintiff argues that the evidence is contradicted by the 1982 Articles of Incorporation (ECF 7 at 8:19-23), Plaintiff fails to point to any evidence that supports her conclusion that these were the formation documents of SIHC. *Id.* In fact, Plaintiff requested the Court take judicial notice of portions of SIHC's website[2] (Exhibits 4-5), which states "Southern Indian Health Council began as a satellite operation of the Indian Health Council in Pauma Valley. In the beginning, [SIHC] operated out of trailers on the Sycuan Reservation, offering outreach and referral services to southern San Diego tribes. In November 1982, [SIHC] incorporated as a nonprofit, public benefit corporation, and moved to the Barona reservation shortly thereafter." ECF 8, Exh. 4. The website goes on to explain how the current location of SIHC was created and turned into tribal lands before SIHC moved to it. *Id.* Not only does the website support that SIHC existed before 1982, but also that it has existed on tribal lands and provided a governmental function for its Member Tribes.

2. SIHC Has Not Waived Its Sovereign Immunity Defense.

In arguing that SIHC has somehow waived its sovereign immunity defense, Plaintiff fails to cite any legal authority and fails to address the binding legal authority

[2] Plaintiff requested the Court to take judicial notice of portions of SIHC's website. (Dkt. 7-4.) Although SIHC has no objection to the Court taking judicial notice, the Court should take judicial notice of the entire website, and not merely Plaintiff's selected excerpts, for contextual purposes.

cited in SIHC's Motion. ECF 7 at 9:6-10:4. Contrary to Plaintiff's claim, a tribal entity charged with providing health care is a governmental arm of the tribe entitled to sovereign immunity, and does not lose that immunity simply by its non-profit corporate status. *Pink v. Modoc Indian Health*, 157 F.3d at 1188. There is no evidence of any express written waiver of sovereign immunity by any one, some, or all of the Member Tribes that compromise SIHC, or by SIHC.

3. Contrary to Plaintiff's Argument, SIHC Never Waived Its Tribal Immunity Defense to Plaintiff's USERRA Claim.

Plaintiff improperly conflates the two-part test to determine the applicability of a general statute to a Native American tribe. ECF 7 at 10:8-17. "[W]hether an Indian tribe is *subject* to a statute and whether the tribe *may be sued* for violating the statute are two different questions." *Florida Paraplegic, Ass'n Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) (italics added). The first question is whether the language of the statute includes Indian tribes; the second, more critical question is whether a suit may be brought against the tribe for violating the statute. *See Kiowa Tribe v. Manufacturing Tech., Inc.*, 523 U.S. 751, 755 (1998) (explaining difference).

According to the Ninth Circuit, "a general statute applies to Indian tribes unless its application would (1) abrogate rights guaranteed under an Indian treaty, (2) interfere with purely intramural matters touching exclusive rights of self-government, or (3) contradict Congress's intent." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). Whether a tribe is subject to a statute of general applicability, however, does not address whether a suit may be brought against a tribe for the violation of that statute. The second question concerns the tribal sovereign immunity doctrine, addressed in SIHC's Motion at pages 5-13. ECF 5-1. Plaintiff argues that a 1993 Senate Report shows that Congress intended USERRA protections to include Indian tribes, and "thus, Sovereign Immunity is not an issue with regard to Plaintiff's USERRA claim." ECF 7 at 10:8-17. Plaintiff's facile analysis suffers from two fatal defects: (1) it only addresses the first prong of the above two-part applicability analysis, and (2) congressional intent

is irrelevant regarding the abrogation of sovereign immunity. Simply put, USERRA does not address Indian tribes. If it did, Plaintiff would have included such language in her Opposition. As the United States Supreme Court stated in *Michigan v. Bay Mills Indian Cmty.*, "[t]his Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader. And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because (as explained earlier) 'Congress must "unequivocally" express [its] purpose' to subject a tribe to litigation." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) (underlining added). Plaintiff has cited neither any statutory language in USERRA nor any case law demonstrating any intent to subject an Indian tribe to suit under USERRA. In short, tribal liability pursuant to USERRA turns on whether SIHC has clearly waived sovereign immunity, and not on any asserted congressional intent. For the reasons discussed in SIHC's opening memorandum (ECF No. 5-1 at pp. 5-13) and above, SIHC never waived its sovereign immunity defense. The issue is not whether USERRA applies to Indian tribes, but rather whether SIHC is a private employer such that USERRA can be judicially enforced against it.

B. Plaintiff Failed to Plead Sufficient Facts to Support Any of Her Conclusory Claims for Relief Against SIHC.

Although Plaintiff claims to have been the victim of "outrageous" conduct by one board member, and another board member allegedly once told her, "You can take it because Marines don't cry" (ECF 1 ¶13), Plaintiff's Complaint is factually devoid, in that it fails to describe any specific instance of the alleged fraud on the government and/or her alleged mistreatment, such as supporting facts, dates and causation. ECF 1 ¶¶7-10. To the extent that Plaintiff attempts to bolster her fatally defective Complaint allegations through new allegations in her Opposition and declaration, the Court should reject her effort. *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a

defendant's motion to dismiss." (citations omitted)); *see also Harrell v. United States*, 13 F.3d 232, 236 (7th Cir. 1993) (same); 2 Moore's Federal Practice, § 12.34[2] (Matthew Bender 3d ed.) (same).

C. Plaintiff's False Claim Act Claims Fails to Plead Any of the Essential Elements, Including Any Attempt by SIHC to Defraud the Government (First Claim for Relief).

Plaintiff attempts to salvage her FCA claim by pointing to allegations that she did not include in her challenged Complaint. ECF 7 at 12:14-13:4. But even were the Court to consider Plaintiff's un-pled allegations, Plaintiff failed to plead a viable claim under the FCA or its California counterpart. As SIHC noted in its motion, nowhere in the Complaint does Plaintiff allege presentation of a false or fraudulent claim to the government, or that SIHC retaliated against her for doing so or for refusing to do so. *See* ECF 1 ¶¶12, 14, 17 & 18. Undaunted, Plaintiff argues: (1) paragraph 17 alleges "that SIHC receives its funding from the Federal Government"; (2) "in paragraph 18, that she was terminated at least in part because of her complaints to SIHC of the misuse of that money"; and (3) "Plaintiff also complained of Board members using SIHC money for personal travel." ECF 7 at 12:14-13:4. Plainly, Plaintiff pled none of the required elements. More specifically, Plaintiff failed to plead: (1) SIHC presented a *false* claim *to the government* for payment; (2) the claim was *false or fraudulent*; (3) SIHC *knew* the claim was false or fraudulent; (4) she engaged in protected activity; (5) SIHC knew Plaintiff engaged in protected activity; and (6) SIHC terminated Plaintiff's employment *because of* her alleged protected activity. *Hutchins*, 253 F.3d at 184; *United States ex rel. Michael D. Watson v. Conn. Gen. Life Ins. Co.*, Civ. Action 98-6698, 2003 WL 303142 (E.D. Pa. 2003) at *4 (internal citations omitted) (citing *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001)).

D. Plaintiff Failed to Plead the Essential Elements of Her Cal. Lab. Code § 1102.5 Claim (Second).

Plaintiff argues that she "has pled that she reported to SIHC's attorney and Board Chair Garcia what she reasonably believed were violations of state and federal law

concerning the Board's misuse of meeting stipends and travel expenses," that "[g]iven their positions, these individuals obviously had the authority to investigate and correct the Board's unlawful acts," and "Plaintiff pleads that, 'A substantial reason for the termination was her refusal to violate . . . federal and California law and because she protested against the Board's unlawful misuse of funds." ECF 7 at 13:23-14:4 (citing ECF 1 ¶¶8-10 & 14). Plaintiff's Opposition mischaracterizes her own defective Complaint allegations, and even her un-pled "new" allegations fail to state a claim for violation of Section 1102.5.

Plaintiff failed to plead that she engaged in any protected activity, SIHC subjected her to an adverse employment action, and there is a causal link between the protected action and the adverse action. *See Patten v. Grant Joint Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384 (2005). In particular, Plaintiff failed to plead that SIHC "ma[d]e, adopt[ed], or enforce[d] any rule, regulation, or policy preventing" Plaintiff "from disclosing information" to anyone, let alone to law enforcement or senior management. Cal. Lab. Code § 1102.5(a). Nor did Plaintiff allege that SIHC "retaliate[d] against" her "for disclosing information" to law enforcement (§ 1102.5(b)) or "for refusing to participate in" any alleged unlawful conduct (§ 1102.5(c)). *See* ECF 1 ¶¶24 ("PLAINTIFF *raised complaints* of workplace financial illegality (violations of the Federal and State False Claims Acts), . . ."), 9 ("PLAINTIFF *reported the Board's breach of fiduciary duties and self-dealing transactions to the SIHC's attorney*, [ ] and chairman, . . ."). (Italics added.) *See also Patten*, 134 Cal. App. 4th at 1384-85 ("To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. [Citation.] [¶] We also agree with the trial court that Patten's disclosures to Grant about needing more staff for safety purposes do not amount to whistleblowing as a matter of law. Again, these disclosures were made in an exclusively internal administrative context. They do not show any belief on Patten's part that she was disclosing a violation of state or federal law

in any sort of whistleblowing context, as required for a section 1102.5(b) whistleblowing action.").

Moreover, Plaintiff's argument regarding SIHC's sacred attorney-client privilege cannot withstand scrutiny in light of Plaintiff's own Complaint allegations. SIHC, not Manzano, was and is Mr. Griswold's client and the holder of the privilege. Cal. Evid. Code § 953. As the client, SIHC (whether or not a party) has a privilege to refuse disclosure and to prevent another from disclosing a confidential communication between client and lawyer. Evid. Code § 954. SIHC has not waived its privilege, and has never authorized Manzano to waive it. Manzano does not have a right to waive SIHC's attorney-client privilege or to disclose SIHC's privileged communications or information, including information obtained while serving as SIHC's CEO. *DP Pham, LLC v. Cheadle*, 246 Cal. App. 4th 653, 668 (2016). Plaintiff already admitted in her Complaint the foundation for and the existence of SIHC's attorney-privilege: "[A]fter observing the Board's repeated violations and breaches, PLAINTIFF reported the Board's breach of fiduciary duties and self-dealing transactions to the SIHC's attorney . . .." ECF 1 ¶9. *See D.I. Chadbourne, Inc. v. Sup.Ct. (Smith)*, 60 Cal. 2d 723, 736-38 (1964) (privilege applies to extent communications are within scope of employee's responsibility); *Triple A Machine Shop, Inc. v. State of Cal.*, 213 Cal. App. 3d 131, 141-42 (1989) (same). Reporting suspected wrongdoing by SIHC's directors to SIHC's corporate counsel was within the scope of Manzano's authority as the Company's CEO.[3]

E. Plaintiff Failed to Plead the Essential Elements of Her Cal. Lab. Code § 232.5 Claim (Third).

Plaintiff's conclusory Opposition ignores both her own defective Complaint allegations and the governing law. Plaintiff argues that she "was not an ordinary SIHC

[3] SIHC has objected to the above-cited, and any other, disclosures of information protected by its attorney-client privilege, and has demanded that Manzano immediately withdraw the pleadings improperly disclosing privileged information and promptly take all steps necessary to seal or strike such privileged information from the Court's record. SIHC reserves its rights to move to strike and/or seal the portions of Plaintiff's pleadings that improperly disclose privileged information, and reserves all other rights and remedies for this unauthorized disclosure of SIHC's privileged information.

employee," but "the CEO." ECF 7 at 15:11-12. Plaintiff then argues (but did not plead) that "two of the working conditions imposed on her by the Board was [sic] to be exposed to the Board's unlawful conduct and to go along with it." *Id*. at 15:13-17. There are many problems with Plaintiff's argument. Neither Section 232.5 nor *Tam v. Qualcomm* draw a distinction between the statutory language – "an employee" – and a CEO. Plaintiff's former CEO position does not excuse the requirement that she have complained about her working conditions. Her Complaint does not allege either her complaint about a working condition or retaliation based on her complaint. Plaintiff's attempted analogy to "workplace sexual harassment" is undeveloped and, frankly, unintelligible. Providing a safe workplace free of unlawful sexual harassment is a quintessential working condition. Plaintiff does not even allege that she complained to SIHC about any alleged race and/or national origin harassment. Nowhere does her Complaint allege that she complained to SIHC about a "working condition," which is fatal to her Section 232.5 claim.

Plaintiff also claims in her Opposition (but not in her Complaint) that, "[a]dditionally, one of Plaintiff's other working conditions was a duty to monitor and correct, if necessary, activities by the Board which overstepped its authority, failed to follow the Board bylaws, and/or violated state or federal laws." ECF 7 at 16:1-4. Plaintiff did not plead anything remotely close to the statute's requirements. California Labor Code section 232.5, subdivision (a), prohibits employers from "[r]equir[ing], as a condition of employment, that an employee refrain from disclosing information about the employer's working conditions," and subdivision (c) prohibits employers from "[d]ischarg[ing], formally discipline[ing], or otherwise discriminat[ing] against an employee who discloses information about the employer's working conditions." Cal. Lab. Code § 232.5 (added by Stats. 2002, Ch. 934, Sec. 2, effective January 1, 2003); *see also Tam v. Qualcomm, Inc*., 300 F. Supp. 3d 1130, 1150 (S.D. Cal. 2018) ("Plaintiff's section 232.5 cause of action fails because Plaintiff does not allege any facts supporting the statute's requirement that an employee disclose information about the employer's working conditions. . . . [¶] *Plaintiff alleges no facts showing how a discussion about work quality was a condition of employment at Qualcomm*.") (Italics added.)

F. Plaintiff Failed to Plead the Essential Elements of Her USERRA Discrimination Claim (Fourth).

Plaintiff literally attempts to make a federal case out of a rather innocuous single alleged comment, "You can take it because Marines don't cry." ECF 1 ¶13. The Complaint fails to allege and cannot plausibly allege that this single alleged comment affected a term or condition of her employment or motivated SIHC's decision to terminate her employment. Even assuming the truth of Plaintiff's allegation that Ms. Chamberline on one occasion stated, "You can take it because Marines don't cry," the Complaint fails to allege sufficient facts to establish either a hostile work environment due to her veteran status or that her veteran status motivated SIHC's decision to terminate her employment for consistently poor performance. In 2011, the Congress amended USERRA to include protection against hostile work environments on the basis of military status. The phrase Congress added – "terms, conditions, or privileges of employment" – directly mirrors the language under Title VII of the Civil Rights Act of 1964. *See Montoya v. Orange County Sheriff's Dep't*, 987 F. Supp. 2d 981, 1012-13 (C.D. Cal. 2013) ("by adding this particular phrase Congress intended to ensure that plaintiffs are able to bring hostile work environment claims under USERRA"); *see* 42 U.S.C. § 2000e-2 (1991). The Complaint fails to allege the requisite "severe" or "pervasive" workplace harassment based on Plaintiff's veteran status. *See Harris v. Forklift Sys.*, 510 U.S. 17, 25, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993); *Vasquez v. City of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003); CACI No. 2524 – "Severe or Pervasive" Explained (and see case authorities cited).

G. Plaintiff Failed to Plead Any of the Required Elements of her *Tameny* Claim for Tortious Wrongful Discharge (Fifth).

Plaintiff's Opposition to SIHC's motion to dismiss her *Tameny* claim more closely resembles a brick thrown from a tenth story window than a reasoned legal argument. Plaintiff's Opposition, for example, fails to cite a single supporting case citation, and consists entirely of her own improper legal conclusions, built entirely on her four other legally defective claims for relief. ECF 7 at 18:7-26.

As noted in SIHC's moving memorandum, the law required Plaintiff to plead facts sufficient to establish that SIHC discharged her for her refusal to violate a statute of public significance, performing a statutory obligation of public significance, exercising a statutory or constitutional right or privilege or public significance, or reporting an alleged violation of a statute of public significance. *Pettus v. Cole*, 49 Cal. App. 4th 402, 454 (1996); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176 (1980). Plaintiff also fails to allege that she reported, complained about or refused to participate in any alleged unlawful activity. *See* ECF 1 ¶9. "Questioning" or "reporting" Plaintiff's beliefs, opinions or concerns regarding Board members' use (or even the alleged misuse) of stipends, and believing that SIHC should be doing something else, does not equate to reporting, complaining about or refusing to participate in unlawful conduct. *Lavin v. United Technologies Corp*., 2015 WL 847392 at *21 (C.D. Cal. 2015) ("no evidence that Lavin ever reported suspicions that defendants' rejection of the machining idea amounted to 'illegal activity'"). Accordingly, the Court should grant SIHC's Rule 12(b)(6) motion in its entirety.

III. CONCLUSION

As Plaintiff cannot plead any facts to remedy her defective pleading, the Court should grant SIHC's Motion to Dismiss without leave to amend.

Dated: December 28, 2020

Respectfully submitted,

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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☑ *(Federal)* I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 28, 2020, at **San Diego**, California.

Yveline Coulond