No. 21-35324

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC WEAVER,
Plaintiff-Appellant,

v.

RON GREGORY, CARMEN SMITH, and ALYSSA MACY,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Oregon
Case No. 3:20-cv-00793-HZ
Honorable Marco A. Hernandez

DEFENDANTS-APPELLEES RON GREGORY AND CARMEN SMITH ANSWERING BRIEF

On appeal from the United States District Court
For the District of Oregon
Before the Honorable Marco A. Hernandez

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January 2022

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I. INTRODUCTION

This is a tribal employment case. Plaintiff is a former tribal police officer for the Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS" or "Tribe") who was terminated for cause. In response, Plaintiff brought claims against three tribal employee Defendants.[1] In addition to bringing two Oregon state law claims, Plaintiff brought two claims under 42 U.S.C. § 1983 based on the allegation that the tribal Defendants were acting under color of Oregon *state* law when they allegedly engaged in retaliatory employment actions, including the decision to terminate Plaintiff.

Stated simply, Defendants were not acting under color of state law in taking actions in this internal tribal employment matter involving a tribal employee. Rather, they were acting under color of tribal law, and it has been the law in this circuit -- for decades -- that constitutional deprivations allegedly resulting from actions taken under color of tribal law cannot support a claim for relief under 42 U.S.C. § 1983.

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[1] The named Defendants are: (1) Ron Gregory, Chief of Police for the CTWS Police Department; (2) Carmen Smith, Public Safety Manager for the CTWS; and (3) Alyssa Macy, the Chief Operations Officer for the CTWS. Defendant Macy was never served below and did not appear in this action; so while she is still on the case caption, she is not part of this appeal. Additionally, Defendant Smith passed away after Plaintiff filed his Notice of Appeal. Plaintiff has not filed a timely motion to substitute any Personal Representative as a party.

All of the alleged retaliatory actions that Plaintiff's claims rely upon (up to and including his termination) were purely internal tribal employment matters that have nothing whatsoever to do with Oregon state law, and they certainly do not involve "state action." Moreover, even if the CTWS later notified the State of Oregon of the fact that Plaintiff's employment had been terminated, equally well-established case law holds that simply providing information to the state does not transform the person conveying that information into a "state actor" for purposes of a 42 U.S.C. § 1983 claim.

Presumably recognizing that his 42 U.S.C. § 1983 claims cannot survive under existing Ninth Circuit law, Plaintiff pivots to the novel argument that he can nonetheless pursue those claims because the CTWS (and other tribes) chose to legislatively partner with the State of Oregon in enacting SB 412 in 2011.

SB 412 (2011) is legislation that provided tribal police officers with the authority, subject to certain conditions and requirements, to enforce Oregon state law in limited circumstances. However, Plaintiff wholly disregards the limited circumstances in which authorized tribal police officers exercise the power to enforce Oregon law, and instead urges the Court to accept an interpretation of SB 412 that effectively transforms every action taken by a

tribal police official into an action taken under color of *state* law for purposes of 42 U.S.C. § 1983.

Plaintiff's arguments are unsupportable. There is no statute, legislative history, case law or other source of legal authority that even remotely supports the argument that SB 412 operates to transform a Tribe's internal tribal employment actions/decisions involving its tribal employees into actions taken under color of the state law. In fact, the entirety of the available legal authority confirms that precisely the opposite is true: it was the clear intent of the State of Oregon, and the various tribes that worked together to enact SB 412, that the legislation provides authorized tribal police officers with a discretionary choice to exercise authority to enforce Oregon state law under certain limited circumstances. The legislation did not, and was never intended to transform those tribal police officials into Oregon state agents for all purposes. Plaintiff's arguments regarding his 42 U.S.C. § 1983 claims fail, and the district court clearly did not err when it granted Defendants' motion to dismiss.

Next, Plaintiff included a footnote in his response to Defendants' motion to dismiss suggesting that if the district court was inclined to grant Defendants' motion, Plaintiff "would be happy to amend" the Complaint. The district court rejected this procedurally defective suggestion, and instead invited Plaintiff to file an actual motion to amend that complied with the applicable rules. Plaintiff

chose to decline the district court's invitation. That is to say, Plaintiff never filed any actual motion to amend and he did not attach any proposed amended complaint that would have allowed the parties and the Court to determine whether the proposed amendments might save his claims from dismissal. Nor did Plaintiff provide any explanation as to how he could amend his Complaint to avoid dismissal of his claims. Again, the district court clearly did not err, and this Court should affirm the judgment below.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. §1291.

III. ISSUES PRESENTED FOR REVIEW

1. Were the tribal Defendants acting under color of state law for purposes of 42 U.S.C. § 1983 when they were involved in internal tribal employment actions involving a tribal employee?

2. Did the district court abuse its discretion when it rejected Plaintiff's procedurally defective suggestion that he would be willing to amend his Complaint, and instead invited Plaintiff to file an actual motion to amend that complied with the rules (which Plaintiff ultimately chose not to do)?

IV. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is an appeal from a judgment dismissing Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(6), so the operative facts come from the Complaint.

Plaintiff was a tribal police officer for the CTWS Police Department from April 2016 until his termination in September 2019. ER – 5-7, ¶¶ 12-23.

At all times relevant, Defendant Ron Gregory was the Acting Chief of Police for the CTWS Police Department, *id.* at ¶ 7; Defendant Carmen Smith was the Manager of Public Safety for the CTWS, *id.* at ¶ 8; and Defendant Alyssa Macy was the Chief Operations Officer for CTWS, *id.* at ¶ 9.

Plaintiff alleges that, beginning in 2018, he witnessed and was subjected to sexual, racial, and derogatory comments and offensive and unwanted touching during his employment for the CTWS Police Department. *Id.* at ¶¶ 13-15. Plaintiff reported this conduct to multiple supervisors in his chain of command, and his complaints were passed on to Defendant Gregory. *Id.* at ¶ 16. On January 1, 2019, Defendants Gregory and Smith called a department-wide meeting and, although addressing the department as a whole, singled out Plaintiff by staring at him repeatedly, minimized his complaints, and discouraged the bringing of grievances up the chain of command. *Id.* at 17. Plaintiff also reported the misconduct to Defendant Macy, but no remedial action was taken. *Id.* at 18.

Plaintiff alleges that Defendants retaliated against him for reporting the harassment and discrimination issues by formally reprimanding him, reporting him to management for using excessive force during three service calls, placing him on unpaid administrative leave during the investigation of those excessive force incidents, and finally, terminating him based on the findings of that

investigation. *Id.* at 19-24, 34. Plaintiff further alleges that he and his legal counsel experienced a general lack of cooperation from Defendants Smith and Macy during the investigation process. *Id.* at ¶¶ 26-27.

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

Defendants Gregory and Smith moved against the Complaint, asserting five motions or bases for dismissal: (1) dismissal of all claims on the grounds of tribal sovereign immunity; (2) dismissal of Plaintiff's "official capacity" claims against Defendants Gregory and Smith on the grounds of tribal sovereign immunity; (3) dismissal of the Plaintiff's First and Second Claims for Relief against Defendants Gregory and Smith because 42 U.S.C. § 1983 claims cannot be based on actions taken under color of tribal law; (4) dismissal of Plaintiff's Third and Fourth Claims for Relief against Defendants Gregory and Smith because federal question (original) jurisdiction disappears if Plaintiff's 42 U.S.C. § 1983 claims are dismissed; and (5) dismissal of Plaintiff's Third Claim for Relief against Defendants Gregory and Smith

because ORS 659A.199 does not apply to tribal employment matters. ER – 19-40.

The district court granted Defendants' motion and dismissed the Complaint. ER - 76-87. It dismissed the "official capacity" claims on the grounds that they were barred by tribal sovereign immunity. ER – 80-83. It dismissed Plaintiff's first two "individual capacity" claims because they did not involve actions taken under color of state law necessary to support a claim under 42 U.S.C. § 1983. ER 83-84. Once the district court dismissed those federal claims, it declined to exercise supplemental jurisdiction over Plaintiff's two remaining state law claims. ER – 84-85. *See* 28 U.S.C. § 1367(c)(3).

Lastly, the district court's opinion and order addressed Plaintiff's footnote suggestion that if the district court was inclined to grant Defendants' motion, Plaintiff "would be happy to amend" the Complaint. ER – 85-86. The district court rejected Plaintiff's statement of willingness to amend, and instead invited Plaintiff to file an actual motion to amend that complied with both Fed. R. Civ. P. 15 and with the local rule for the Oregon District Court (D. Or. Civ. L.R. 15-1) that requires a plaintiff to attach the proposed amended complaint to a motion to amend. *Id.*

Plaintiff appeals, challenging only that part of the district court's opinion and order that concluded Defendants were not acting under color of state law

for purposes of the 42 U.S.C. § 1983 claims,[2] and also challenging the district court's rejection of Plaintiff's procedurally defective suggestion that he would be happy to amend his Complaint if the district court was inclined to rule against him. *See* Plaintiff's Opening Brief.

Plaintiff does not appeal the district court's dismissal of his "official capacity" claims, nor does he challenge the district court's discretionary decision to decline to exercise supplemental jurisdiction over Plaintiff's two remaining Oregon state law claims.

V. SUMMARY OF ARGUMENT

Defendants' internal tribal employment actions and decisions, including those relating to CTWS tribal police officers, are not actions taken under color of state law for purposes of 42 U.S.C. § 1983.

The parties do not dispute this general principle, but Plaintiff has argued that *all* actions and decisions taken by the tribal Defendants, including the internal tribal employment decisions and actions that are the subject of Plaintiff's claims, were actions taken under the color of state law merely because the CTWS chose to have some of its tribal police officers empowered to enforce Oregon law in limited circumstances under SB 412. *See* Opening

[2] Motion Three in Defendants' Motion to Dismiss.

Brief, page 11 ("[T]here is such an overlap between the operations of a tribal police department under SB 412, and a non-tribal police department that much if not all the internal operations of an SB 412 tribal police department are actions under color of state law.").

SB 412 is legislation that was passed in Oregon in 2011 that permits authorized tribal police officers, subject to certain conditions and requirements, to choose to enforce Oregon law under limited circumstances. What SB 412 does not do is transform every action taken by an authorized tribal police officer into an action taken under color of state law. Here, the internal tribal employment actions and decisions of the CTWS, including the decision to terminate its own employee (Plaintiff), had nothing to do with SB 412 or the enforcement of Oregon state law. The district court did not err when it concluded that the alleged actions taken by the Defendants were actions taken under color of tribal law, and therefore could not support Plaintiff's 42 U.S.C. § 1983 claims as a matter of law.

Next, the district court did not abuse its discretion when it rejected Plaintiff's procedurally defective footnote suggestion that he would be willing to amend his Complaint if the district court was inclined to grant Defendants' motion to dismiss. The district court invited Plaintiff to file an actual motion to amend that comported with the rules, including a specific reference to the

requirement that he submit his proposed amended complaint as an exhibit to the motion. Having declined the district court's invitation entirely, Plaintiff should hardly be heard to complain now about not being allowed to amend. This Court should affirm.

VI. ARGUMENT

Response to First Assignment of Error

The district court did not err when it concluded that Defendants were not acting under color of state law for purposes of 42 U.S.C. § 1983 because SB 412 does not transform internal tribal employment actions and decisions into "state action."

A. Standard of Review

Plaintiff's first assignment challenges the district court's grant of Defendants' Fed. R. Civ. P. 12(b)(6) motions as to both of Plaintiff's 42 U.S.C. § 1983 claims. This Court's review is *de novo*. *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010).

Fed. R. Civ. P. 12(b)(6) permits a party to raise by motion the defense that the complaint "fail[s] to state a claim upon which relief can be granted," generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of Fed.

R. Civ. P. 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief."

Although Fed. R. Civ. P. 8 "does not require 'detailed factual allegations,' ... it [does] demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A complaint will not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id*. (quoting *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pled "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 556). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id*.

Facts "'merely consistent with' a defendant's liability" fall short of a plausible entitlement to relief. *Id*. (quoting *Twombly*, 550 U.S. at 557). This review requires context-specific analysis involving the Court's "judicial experience and common sense." *Id*. at 675 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id*.

B. Internal Tribal Employment Actions are not Actions Taken Under Color of State Law for Purposes of 42 U.S.C. § 1983, and SB 412 Does Not Change the Result

1. In order to state a claim under 42 U.S.C. § 1983, Plaintiff must establish that the Defendants were acting under the color of state law at the time of the alleged deprivation of rights.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States; and (2) the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer *is clothed with the authority of state law*.' " *West*, 487 U.S. at 49, 108 S.Ct. 2250 (emphasis added; citation omitted). A person "may fairly be said to be a state actor" only

if she has obtained "significant aid" from state officials or if her conduct is "otherwise chargeable" to the state. *Lugar v. Edmondson Oil*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L.Ed.2d 482 (1982).

2. A deprivation of rights resulting from actions taken under color of tribal law cannot support a claim under 42 U.S.C. § 1983.

42 U.S.C. § 1983 claims cannot be maintained for actions taken under color of tribal law. This Court explained the justification for this rule in *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983):

> First, no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. Indian tribes are separate and distinct sovereignties, and are not constrained by the provisions of the fourteenth amendment. As the purpose of 42 U.S.C. § 1983 is to enforce the provisions of the fourteenth amendment, it follows that actions taken under color of tribal law are beyond the reach of § 1983…

Id. at 982. *See also*, *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989) ("[A]ctions under section 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law.").

The test for determining whether a party charged with an alleged constitutional deprivation can be subjected to a 42 U.S.C. § 1983 claim is whether the party "may fairly be said to be a state actor," rather than a tribal

actor. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L.Ed.2d 482 (1982).

3. Defendants were not state actors, and their internal tribal employment decisions and actions were not actions taken under color of state law for purposes of 42 U.S.C. § 1983.

Internal tribal employment decisions and actions are not actions taken under color of state law for purposes of 42 U.S.C. § 1983. That is the conclusion this Court reached in *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006). Indeed, given that the test for whether the Defendants acted under color of state law is whether Defendants exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law[,]" *West*, 487 U.S. at 49, it is difficult to imagine how internal tribal employment decisions could ever amount to state action. But in any event, Oregon state law did not empower Defendants to take internal employment action against Plaintiff; CTWS tribal law did.

4. Plaintiff did not allege facts establishing that Defendants were state actors, and Plaintiff's invocation of SB 412 (and the statutes enacted pursuant to SB 412) does not change the result.

In his Complaint, Plaintiff alleges in conclusory fashion, that "All Defendants acted under the color of state and federal law on behalf of Warm

Springs at all times relevant to this Complaint." ER -5, ¶ 10. This is a bald legal conclusion that is properly ignored when deciding a motion under Rule 12(b)(6).

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Plaintiff repeats his conclusory "actions taken under color of state law" allegations in paragraphs 46, 51, and 70 of the Complaint. Those formulaic or conclusory allegations are properly ignored in the analysis as well.

Ignoring Plaintiff's conclusory allegations that all Defendants were state and federal actors for all purposes at all times, a plain review of the Complaint's actual factual allegations reveals that they fall well short of the "state actor" standard. The Complaint alleges that Defendants allegedly took retaliatory employment action against him based on his reporting of various instances of alleged misconduct that occurred within the CTWS Police Department. Plaintiff alleges that these actions deprived him of a "liberty interest" (precluding him from pursuing a career in law enforcement) and were otherwise made in "retaliation for exercise of free speech." Even accepting those allegations as true for purposes of appellate review of a judgment following a motion to dismiss, the internal tribal employment decisions and actions of the CTWS, as carried out by its own tribal officials, are inherently

actions taken under color of *tribal* law that fall uniquely within the Tribe's inherent right of self-governance.

In response to these arguments from Defendants, Plaintiff argues that Defendants have been transformed into agents of the State of Oregon, apparently for all purposes and at all times, merely by the passage of the SB 412 legislation back in 2011. Opening Brief, page 11 ("[M]uch if not all the internal operations of an SB 412 tribal police department are actions under color of state law.").[3] Plaintiff is wrong.

SB 412 was enacted at the request of various Indian tribes in Oregon, including the CTWS, in response to *State v. Kurtz*, 350 Or. 65, 249 P.3d 1271 (2011). In *Kurtz*, the defendant committed a traffic offense while on the Warm Springs reservation, but fled when tribal police attempted to stop him. The defendant was not arrested by tribal law enforcement until after he had crossed over the reservation boundary into Jefferson County. The defendant was

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[3] While Plaintiff did not allege this in his original Complaint, the parties litigated the issue in the briefing on Defendants' motion to dismiss. As explained in more detail below, even though Plaintiff was permitted to argue unalleged theories of state action, the district court still properly rejected them in its opinion and order. Indeed, that is precisely why the district court stated in its opinion that it was skeptical that Plaintiff could amend his Complaint to avoid the fatal defect in his 42 U.S.C. § 1983 claims.

charged with the state law crimes of 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 criminal 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. The bill was designed to provide statutory confirmation that trained tribal police officers have the same "peace officer" status as state law enforcement officials, thereby clarifying their jurisdiction to enforce Oregon state law (within their discretion) both within and outside of reservation boundaries under certain circumstances, such as where only a state court would have jurisdiction over a non-Indian offender. As it turned out, the Oregon Supreme Court ended up reversing the Oregon Court of Appeals, holding that for purposes of the state law 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 legislative intent behind SB 412 was to empower tribal law enforcement to assert criminal jurisdiction over offenders who committed crimes on the reservation, but who would avoid criminal liability by leaving/fleeing the reservation. This legislative intent is unmistakable, since it is expressly stated in SB 412 itself. Indeed, Section 3 of SB 412 (2011) reads:

> **SECTION 3. (1) The Legislative Assembly finds and declares that the purpose of sections 1 to 4 of this 2011 Act is to provide authorized tribal police officers with a limited ability to exercise the powers of, and to receive the same authority and protections provided to, law enforcement officers under the laws of this state, without incurring any additional costs or loss of revenue to the State of Oregon or a political subdivision of the State of Oregon.**
>
> **(2) Notwithstanding section 2 of this 2011 Act, a tribal police officer may not act as an authorized tribal police officer outside of Indian country, unless the officer:**
>
> **(a) Is investigating an offense alleged to have been committed within Indian country;**
>
> **(b) Leaves Indian country in fresh pursuit as defined in ORS 133.420;**
>
> **(c) Is acting in response to an offense committed in the officer's presence; or**
>
> **(d) Has received the express approval of a law enforcement agency having jurisdiction over the geographic area in which the tribal police officer is acting.**

SB 412 (2011).

The CTWS adopted the SB 412 framework into its own Tribal Code,[4] and in so doing, it announced that its tribal legislative objective harmonized perfectly with the State of Oregon's stated legislative objective/intent (as quoted in in Section 3 of SB 412 above):

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[4] Warms Springs Tribal Code, Chapter 390.

WARM SPRINGS TRIBAL CODE

CHAPTER 390

SB 412 IMPLEMENTATION

I. GENERAL

390.001 Objective. 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 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.

A review of SB 412 and the CTWS Tribal Code provision implementing SB 412 confirms that the legislative bodies of both the State of Oregon and the CTWS never intended that tribal police officers would be considered state actors at all times and for all purposes. Indeed, Warm Springs Tribal Code Chapter 390 states that its provisions should be narrowly construed to "apply only to activities by Warm Springs law enforcement personnel conducted under SB 412 – *i.e.* the enforcement of criminal and traffic laws of the State of Oregon," and "to no other activities conducted by Warm Springs law enforcement personnel."

Clearly, SB 412 does not, and was never intended to, transform all tribal police officials into "state actors" any time they made an internal tribal employment or personnel decision. As noted above, those are matters that fall uniquely within the Tribe's inherent, sovereign right of self-governance. Rather, the legislation was unquestionably designed to serve the important public safety purpose of confirming tribal police officers' authority to choose to enforce Oregon's criminal and traffic laws on and off of the reservation.

With this background in mind, the critical question is whether Defendants were involved in an internal tribal employment matter, or whether they were engaging in actual "state action" (i.e. the enforcement of Oregon state criminal and traffic laws). In answering this question, this Court's 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 laws sufficient to meet the "state actor" requirement for his 42 U.S.C. § 1983 claims. Instead, Plaintiff pivots to argue 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. Plaintiff is wrong again.

Even if Defendants did report information about the separation of Plaintiff's employment to the DPSST, the mere fact that a tribal entity chooses to submit information to the State of Oregon about the separation of employment of a tribal employee does not thereby transform the tribal employee who relayed that information into an "agent" or "actor" of the State of Oregon for purposes of a 42 U.S.C. § 1983 claim.

Tellingly, Plaintiff has yet to cite to a single case (either in the district court below or in his Opening Brief) in support of this novel theory of so-called "state action." But this is to be expected, given that this circuit and others have held that a private party's mere reporting of information to a public body does not transform that party into a "state actor" for purposes of supporting a 42 U.S.C. § 1983 claim. *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)). *See also Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 941, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (holding that "private misuse of a state [process] does not describe conduct that can be attributed to the state[.]").

These holdings in these cases 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 when considered in its application to members of the general public, it is exponentially so for cases involving employees of 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 employees of sovereign tribal entities can be unknowingly and involuntarily transformed in state agents/actors merely by reporting the fact of an employment separation, the Court should follow its prior precedent holding that where a tribal employer

engages in allegedly retaliatory employment actions, such actions are taken under color of tribal law, not state law, and therefore cannot support a 42 U.S.C. § 1983 claim. *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).

Plaintiff has also suggested that Defendants are state actors for all purposes because CTWS tribal police officers receive training and certification to enforce state law under SB 412. Again, the mere fact that tribal police officials have the authority to choose to enforce Oregon law in some limited circumstances does not make them actors or agents of the State of Oregon when making internal tribal employment decisions. *See, e.g., E.F.W. v. St. Stephen's Indian High Sch*., 264 F.3d 1297 (10th Cir. 2001) (holding that the fact that Indian tribes had agreement with state under which state furnished funds to tribal social service agencies to provide social services to reservation children and agreed to use state rules and regulations as their own, did not render actions of employees of the tribal agency actions "under color of state law" for purposes of 42 U.S.C. § 1983).

It is certainly the case that states provide all manner of training for private individuals, on topics ranging from hunter safety to food handling and

alcohol service. But the mere receipt of training from the state or a state agency does not render those individuals state actors. This is because those individuals' conduct is not chargeable to the state. Without such limits upon who can be considered a state actor, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S. at 937.

Again, these holdings make sense; under the state action test, "the [constitutional] deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Defendants' authority to terminate Plaintiff derived from CTWS tribal law, not from Oregon state law. The fact that the CTWS chose to enter into the SB 412 arrangement whereby its tribal police officers are empowered to pursue fleeing criminals off reservation simply has nothing whatsoever to do with tribal officials making internal employment decisions about a tribal employee.

Finally, Plaintiff cites both *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989) and *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009) to support his argument that Defendants were state actors for purposes of his 42 U.S.C. § 1983 claims. Those cases are easily distinguishable, and in fact, they have been cited by

Defendants herein and to the district court below as illustrative of the difference between a case where the facts actually support a viable 42 U.S.C. § 1983 claim, versus a case where the facts are clearly insufficient to support a 42 U.S.C. § 1983 claim.

In both *Evans* and *Bressi*, this Court held that a tribal officer who is enforcing state law, and who deprives another of a constitutional right in the process of doing so (i.e. via a police stop or police arrest), can be considered to be have been acting under color of state law for purposes of a 42 U.S.C. § 1983 claim. That makes sense, but it is wildly different from what has been alleged in this case: that Defendants made internal tribal employment actions and decisions about a tribal employee that do not even remotely involve the enforcement of Oregon's criminal and traffic laws.

Simply stated, Plaintiff has not and cannot alleged any facts establishing that Defendants were acting under color of state law when they made the internal tribal employment decisions that form the basis of Plaintiff's 42 U.S.C. § 1983 claims. Consequently, the district court clearly did not err in granting Defendants' motion to dismiss, and this Court should affirm.

Response to Second Assignment of Error

The district court did not abuse its discretion when it denied Plaintiff's procedurally defective suggestion about being willing to amend his Complaint,

which was not part of any recognized or actual motion. The Court specifically invited Plaintiff to file an actual motion to amend that complied with the Federal Rules of Civil Procure and the district court's local rules, but Plaintiff declined. Plaintiff has still not provided any proposed amendment that would have made a difference.

A. Standard of Review

Motions to amend are governed by Rule 15, and by D. Or. Civ. L.R. 15-1. This Court reviews a district court's decision on a motion to amend for abuse of discretion. *Navajo Nation v. U.S. Dep't of the Interior*, 996 F.3d 623, 634 (9th Cir. 2021). A district court does not abuse its discretion when it denies a motion to amend that fails to comply with the local rules. *Hamilton v. Tiffany & Bosco PA*, 713 Fed. Appx. 674 (9th Cir. 2018); *Jeremiah v. Lincoln*, 663 Fed. Appx. 546 (9th Cir. 2016); *Waters v. Weyerhaeuser Mortg. Co*., 582 F.2d 503, 507 (9th Cir. 1978) (concluding that it was "clearly discretionary" for court to deny motion to amend for failure to attach proposed pleading as required by local rule). Neither does the district court abuse its discretion where the proposed amendments would be futile. *See Cervantes v. Countrywide Home Loans, Inc*., 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile).

B. The District Court did not Abuse its Discretion when it Rejected Plaintiff's Procedurally Defective Suggestion that He Would Amend His Complaint

In response to Defendant's motion to dismiss, Plaintiff included a footnote stating: "Should the Court not deem the allegations sufficiently clear to assert violations made under color of state law, Plaintiff is happy to amend his complaint where appropriate." Plaintiff's Response to the Motion to Dismiss (ECF 14), page 4 n. 1.

Including in a footnote a conditional suggestion about being willing to amend a complaint is not the same thing as filing an actual, recognized motion to amend that requires the Court to act. Plaintiff never filed an actual motion to amend under Fed. R. Civ. P. 15, and he did not comply with D. Or. Civ. L.R. 15-1. He never submitted a written motion. He did not attach a proposed amended complaint to his request, as is required by the local rule. He never explained the basis of his as-yet unspecified amendments. He did not cite the Court to any case law. And, he did not discuss the elements and considerations that district courts use when deciding whether to allow a motion to amend.

Unsurprisingly, the district court rejected Plaintiff's footnote suggestion about being willing to amend, and instead invited him to file an actual motion to amend that complied with the rules governing such motions:

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> Although Plaintiff states that he "is happy to amend his complaint where appropriate" if the Court finds he failed to adequately plead "violations made under the color of state law," he neglects to explain how he intends to cure the deficiencies in the Complaint. Pl. Resp. 4 n.1. Nor does Plaintiff address the leave-to-amend factors discussed above. Moreover, given the limited nature of Plaintiff's allegations, the Court has serious doubts that amendment can cure the deficiencies in his legal theories. Therefore, Plaintiff's request for leave to amend is denied. Nonetheless, Plaintiff may renew his request by filing a motion for leave to amend under Rule 15(a) along with the proposed amended complaint. A renewed motion for leave to amend, if any, is due within 14 days of this Opinion & Order.

Opinion and Order, ER – 88.

Plaintiff's response to this invitation was not to file any motion to amend, so technically there was no motion to deny by the district court. And yet, even if Plaintiff's footnote suggestion about being willing to amend is somehow deemed an actual motion to amend (which it was not), it was defective on numerous levels, so the district court certainly did not err in rejecting it.

The local rules required Plaintiff to move for leave to amend, and to attach the proposed amended complaint to the motion. *See* D. Or. Civ. L.R. 15-1(d)(1) ("A copy of the proposed amended pleading must be attached as an exhibit to any motion for leave to file the amended pleading."). Here, Plaintiff never attached any proposed amended complaint, and he did not provide or

discuss the legal or factual grounds for the proposed amendments. This Court has repeatedly said that a district court does not abuse its discretion in denying leave to amend under these circumstances. *See, e.g., Waters v. Weyerhaeuser Mortg. Co*., 582 F.2d 503, 507 (9th Cir. 1978) ("It was clearly discretionary to deny the first motion to amend for failure to comply with the local rule."); *Cervantes v. Countrywide Home Loans, Inc*., 656 F.3d 1034, 1043 (9th Cir. 2011).

What is more, neither Defendants nor the district court (or this Court for that matter) have any way of knowing how Plaintiff would have amended his Complaint in the first place because Plaintiff has not let anyone know the details of proposed amendments.[5] It is Plaintiff's burden to present a proposed amendment that would have made a difference. This Court has repeatedly held that where an amendment would be futile, the district court does not abuse its discretion when it denies the motion for leave to amend. *See, e.g., Cato v. United States*, 70 F.3d 1103, 1106–07 (9th Cir.1995) (dismissal without leave to amend is not an abuse of discretion where amendment would be futile).

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[5] This highlights the importance of the requirement in the local rule to provide a copy of the proposed amendments, since a review and analysis of those proposed amendments is what enables the parties and the Court to determine whether they can save the Complaint from dismissal.

This Court has also repeatedly ruled that where the plaintiff is not able to explain to the district court the basis for the amendments and how they would resolve the issues raised in the motion to dismiss, the district court does not abuse its discretion in denying the motion to amend. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008) ("Appellants fail to state what additional facts they would plead if given leave to amend...Accordingly, amendment would be futile."); *Hip Hop Beverage Corp. v. Michaux*, 729 Fed. Appx. 599, 600 (9th Cir. 2018) (same). Here, Plaintiff did not offer any explanation to the district court about how his proposed amendment would have changed the outcome.

Given the absence of any actual motion to amend, and the fatal deficiencies in his footnote suggestion about being willing to amend (if that footnote were somehow sufficient to constitute an actual motion to amend), the district court did not err, and this Court should reject the second assignment of error.

CONCLUSION

This is a tribal employment case, not a case involving a constitutional deprivation that occurred during a tribal police officer's enforcement of Oregon's criminal or traffic laws. This Court should affirm the district court because Defendants, in making internal tribal employment decisions regarding

a tribal employee, were not acting under color of state law for purposes of 42 U.S.C. § 1983. This Court should also affirm because the district court did not abuse its discretion when it denied Plaintiff's procedurally defective suggestion about being willing to amend, and instead invited him to file an actual motion to amend that complied with the applicable rules, which Plaintiff chose not to do.

DATED this 10th day of January, 2022.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature */s/ Jonathan* Henderson **Date:** January 10, 2022

CERTIFICATE OF SERVICE

I hereby certify that I filed **DEFENDANTS-APPELLEES RON GREGORY AND CARMEN SMITH ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 10, 2022.

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Dated: January 10, 2022.

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