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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

L.B., Plaintiff, vs. UNITED STATES OF AMERICA, BUREAU OF INDIAN AFFAIRS, and DANA BULLCOMING, an agent of the Bureau of Indian Affairs sued in his individual capacity, Defendants.	CV 18-74-BLG-SPW-TJC UNITED STATES' BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

There is one factual question on remand—Did Bullcoming act in the course and scope of his employment when he sexually assaulted L.B.? This factual question must be answered through a two-prong test:

> [I]f an on-duty police officer obtains consent by misusing official authority, the wrongful act may be within the scope of employment if **[1]** it arose out of the employment and **[2]** was at least partially motivated by an intent or purpose to serve the interests of his employer.

L.B. v. United States, 515 P.3d 818, 825 (Mont. 2022) (bracketed numbers added).

As to the first prong, Bullcoming's assault of L.B. did not arise out of his employment because the assault was not incidental to the performance of an act authorized by his employer, the Bureau of Indian Affairs Office of Justice Services (BIA-OJS). *See id.* at 822. In *L.B.*, the Montana Supreme Court adopted *Restatement (Second) of Agency* § 229 as the factors to consider when analyzing this prong. The declaration of BIA-OJS Special Agent in Charge Lenora Nioce addresses these factors and shows how Bullcoming's assault was not incidental to the performance of an authorized act. That conclusion is further supported by all the factual evidence in this case, including the deposition testimony of Bullcoming and L.B.

As to the second prong, the undisputed facts prove Bullcoming acted solely for his personal interests when he assaulted L.B. Bullcoming reiterated this point

repeatedly in his deposition—he acted solely for his personal interests and was not motivated to serve any law enforcement purpose or interest of BIA-OJS. L.B. has not offered any factual evidence to the contrary.

The Montana Supreme Court's directive in *L.B.* was clear—the parties must come forward with specific factual evidence that addresses the two prongs above. Even in her motion for summary judgment, L.B. offers no factual evidence that supports her claim. Instead she asks the Court to adopt a per se rule—that any law enforcement officer convicted under 18 U.S.C. § 242 ("Deprivation of Rights Under Color of Law," the underlying criminal statute to which Bullcoming pleaded guilty) must necessarily have acted in the course and scope of his employment. L.B. cites no legal authority to support her per se theory. She made this argument to the Montana Supreme Court, but the Court rejected it—holding that course and scope in this context is not a question of law but instead a question of fact answered through the two-prong test above.

Summary judgment for the United States is appropriate because the dispositive facts are known and, given Bullcoming's deposition testimony along with the other factual evidence, these facts cannot be disputed. Because L.B. has only a FTCA claim against the United States, her claims must be tried to the Court, not a jury. The Court now has all the factual evidence it needs to resolve this

matter, and the United States respectfully request that summary judgment be entered in its favor.

BACKGROUND

On October 31, 2015, Bullcoming was on duty, working for BIA-OJS on the Northern Cheyenne Indian Reservation, near Lame Deer. (SUF ¶ 1.) Early that morning, BIA-OJS received a call from L.B., stating her mother had just left her residence and was driving while intoxicated. (SUF ¶ 2.) Both L.B. and her mother had been out drinking the night of October 30, arriving at L.B.'s home around midnight that night. (*Id.*) L.B. fell asleep in a recliner in her living room after calling to report her mother. (SUF ¶ 3.)

Bullcoming responded to the call and located L.B.'s mother, who was then at an apartment and not driving. (SUF ¶ 4.) Bullcoming then drove to L.B.'s house. (*Id.*) L.B. was worried because there were beer cans laying around (the Northern Cheyenne Reservation is dry). (SUF ¶ 5.) Bullcoming asked L.B. if she was home alone, and she told him her kids were back in their rooms. (SUF ¶ 8.) Bullcoming allegedly told L.B. "something needed to be done."[1] (SUF ¶ 10.) L.B. alleges

[1] To the extent Bullcoming's statements regarding the events of October 31 differ from those made by L.B., the United States presents, for purposes of this motion, L.B.'s recollection of the events.

Bullcoming also suggested he might have to call social services because of the kids and that he would take her in for child endangerment because of her intoxication. (SUF ¶ 6.) L.B. told Bullcoming she did not want to go to jail or lose her job. (SUF ¶ 7.)

L.B. and Bullcoming continued to talk and eventually both went outside to the patrol car (standing outside it, not getting in) where Bullcoming administered a breathalyzer test to L.B. (SUF ¶ 9.) The results were .132 or .136. (*Id.*) Both then walked toward the garage and Bullcoming allegedly stated, "Something needs to be done about this," repeating the phrase multiple times. (SUF ¶ 10.) L.B. eventually responded, "Like, what do you mean? Like sex?" Bullcoming responded, "Yes," and L.B. asked, "Well, uhm, let me—oh, let me guess, you've always had a crush on me since a long time ago." (*Id.*) Bullcoming agreed and confirmed her suspicion. (*Id.*) L.B. and Bullcoming both acknowledge they had known each other since they were kids, and she was best friends with Bullcoming's sister when they were teenagers. (SUF ¶ *Id.*)

L.B. and Bullcoming had unprotected sex. (SUF ¶ 11.) As Bullcoming was leaving, L.B. asked, "So, you know, are you working tomorrow night?" He responded, "Yeah." (*Id.*) She said, "Well, you should stop by again." (*Id.*)

L.B. became pregnant as a result of the encounter and had a child. (SUF ¶ 12.)

PROCEDURAL HISTORY

The Montana Supreme Court held that whether Bullcoming was acting in the course and scope of his employment is a fact question, not one that can be decided as a matter of law. *L.B.*, 515 P.3d 818. Given this holding, the Ninth Circuit reversed this Court's previous summary judgment order and remanded the matter for further fact finding.

Separately, after this Court ruled in favor of the United States and the United States was no longer a party to the case, the Court entered default judgment against Bullcoming in the amount of $1,611,854.00. (Doc. 89.)

Following remand, L.B. moved for summary judgment, and the United States responded. (Docs. 106, 111, 128.) Along with its response, the United States moved the Court to either deny L.B.'s motion or defer ruling on it under Rule 56(d) in light of Bullcoming's upcoming deposition. (Doc. 110.) Bullcoming was deposed on December 14, 2022. After the deposition, L.B. filed an emergency motion requesting a hearing, to which the United States responded. (Docs. 117, 123, 126, 130–132.)

STANDARD

Summary judgment is appropriate when the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

ANALYSIS

The Federal Tort Claims Act provides the sole waiver of the United States' sovereign immunity for a plaintiff seeking to sue the United States in tort. 28 U.S.C. § 1346(b). Under the FTCA, a plaintiff may bring suit against the United States for any tortious act caused by:

> . . . the negligent or wrongful act or omission of any employee of the Government *while acting within the scope of his office or employment*, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added).

The Ninth Circuit has made clear that L.B. bears the burden of persuading the Court that it has subject matter jurisdiction under the FTCA:

> Plaintiff bears the burden of persuading the court that it has subject matter jurisdiction under the FTCA's general waiver of immunity. This follows from the general principle that the party who sues the United States bears the burden of pointing to an unequivocal waiver of immunity.

Prescott v. United States, 973 F.2d 696, 701 (9th Cir. 1992) (cleaned up). Accordingly, it is L.B.'s burden to prove that the tortious act alleged was committed by a federal employee acting "within the scope of his office or employment" under the laws of the state of Montana. *See Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996).

The Montana Supreme Court's *L.B.* decision sets forth a two-prong test for analyzing whether employee conduct is within the course and scope of employment. It stated the test both generally and as applied to this case. The Supreme Court explained, "For over 80 years, the general test of an employer's liability has been whether the act complained of **[1]** arose out of and **[2]** was committed in prosecution of the task the servant was performing for his master." *L.B.*, 515 P.3d at 828 (cleaned up and bracketed numbers added). When unauthorized acts are at issue—as is undisputedly the case here—the test is whether "the act was **[1]** incidental to the performance of an authorized act and **[2]** at least partially motivated by the employee's intent or purpose to serve the employer's interest." *Id.* at 822 (bracketed numbers added).

The *L.B.* Court also articulated this two-pronged test as it applies when "an on-duty police officer obtains consent by misusing official authority"[2]:

> [I]f an on-duty police officer obtains consent by misusing official authority, the wrongful act may be within the scope of employment if **[1]** it arose out of the employment and **[2]** was at least partially motivated by an intent or purpose to serve the interests of his employer.

Id. at 825 (cleaned up)).

Here, the first question under this test is: Did Bullcoming's assault of L.B. "arise out of" his employment with BIA-OJS, meaning was the assault "incidental to the performance of an authorized act"? *L.B.*, 515 P.3d at 822, 825, 828. As set forth more fully below, Bullcoming's assault of L.B. did not arise out of his employment because it was not incidental to the performance of an authorized act, as indicated by factors set forth in Section 229 of the *Restatement (Second) of*

[2] The FTCA waives sovereign immunity only "where the United States, if a private person, would be liable to the claimant," 28 U.S.C. § 1346(b)(1). Thus, the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities," even when assessing liability "in the performance of activities which private persons do not perform." *United States v. Olson*, 546 U.S. 43, 46 (2005). As the Montana Supreme Court made clear, the test here is the same as a that applied to private employers. To the extent that L.B. argues the test should be applied differently for law enforcement employers than other employers, such a rule is inapplicable under the FTCA. *See Xue Lu v. Powell*, 621 F.3d 944, 947 (9th Cir. 2010) (declining to rely on or consider liability based on "the unique authority vested in police officers," rather than "principles of respondeat superior liability that apply to private entities").

Agency. *See L.B.*, 515 P.3d at 824 (setting forth Section 229 as factors to consider for this prong).

The second question is whether Bullcoming assaulted L.B. solely for his personal interests or, instead, was he "at least partially motivated by an intent or purpose to serve the interests of his employer"? *Id.* at 825. As set forth more fully below, Bullcoming testified unequivocally at his deposition that his sexual encounter with L.B. served only his personal interests and served no law enforcement purpose or interest of BIA-OJS. This is corroborated by Bullcoming's longtime crush on L.B. and their pre-existing relationship.

L.B. must establish each of these two prongs in order to show Bullcoming was acting in the course and scope of his employment, but she cannot establish either. The United States is therefore entitled to summary judgment on L.B.'s claim that the United States is vicariously liable for Bullcoming's assault.

I. Bullcoming's assault of L.B. did not "arise out of" his employment with BIA-OJS.

The Montana Supreme Court explained in *L.B.* that an unauthorized act—like the act here—arises out of the employment if it was "incidental to the performance of an authorized act." *Id.* at 822. To be incidental to an authorized action, the act must be "subordinate to or pertinent to an act which the employee

was to perform." *Brenden v. City of Billings*, 470 P.3d 168, 174 (Mont. 2020) (quoting *Restatement (Second) of Agency* § 229 cmt. b) (alterations omitted).

Action that "represents *a departure from*, not an escalation of, conduct involved in performing assigned work or conduct that an employer permits or controls" constitutes "an independent course of conduct" and is not incident to authorized actions. *Restatement (Third) of Agency* § 7.07 cmt. b (emphasis added). For example, an assault to obtain property the employee was tasked with retrieving may be considered within the scope of employment, but one "committed with such violence that it bears no relation to the simple aggression which was reasonably foreseeable" is no longer incidental to an authorized act and not within the scope of employment. *Brenden*, 470 P.3d at 174. As the Restatement explains, it is not merely that actions like a serious crime are "unexpectable" but that they are "in nature different from what servants in a lawful occupation are expected to do," and the master is "not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized act." *Restatement (Second) of Agency* § 231 cmt. a ("[B]ribery of employees of the competitor, or the circulation of malicious stories, might be found to be within the scope of employment, while the murder of the competitor, although actuated solely by zeal for the master, would not be.").

The Montana Supreme Court adopted *Restatement (Second) of Agency* § 229, explaining it "provides the following factors to determine whether conduct, although not authorized, may be similar or incidental to the conduct authorized thus making it within the scope of employment":

> (a) whether or not the act is one commonly done by such servants;
>
> (b) the time, place and purpose of the act;
>
> (c) the previous relations between the master and the servant;
>
> (d) the extent to which the business of the master is apportioned between different servants;
>
> (e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
>
> (f) whether or not the master has reason to expect that such an act will be done;
>
> (g) the similarity in quality of the act done to the act authorized;
>
> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
>
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

The Section 229 factors show that Bullcoming's assault of L.B. was not "similar or incidental to the conduct authorized" by BIA-OJS.

Special Agent in Charge (SAC) Lenora Nioce with the BIA-OJS District V (Billings) office addresses these factors. SAC Nioce is qualified to do so. She has more than 25 years of experience in law enforcement and oversees BIA-OJS operations in the same district Bullcoming served in. (Declaration of SAC Lenora Nioce, attached as Exhibit H to SUF, at ¶¶ 2–3.)

SAC Nioce explains that a central function of any law enforcement organization is to protect and ensure public safety, including the safety of those under investigation. (Nioce Decl. ¶ 7.) Indeed, Bullcoming was hired to protect and ensure public safety. (*Id.*) But his sexual assault of L.B. "ran contrary to every law enforcement purpose for which he was hired." (*Id.*) As SAC Nioce explains, instead of upholding the law, Bullcoming broke the law and infringed the public's safety. (*Id.*) She further declares that sexual assault is never "legitimately committed incidentally to or in furtherance of any law enforcement interest or purpose." (Nioce Decl. ¶ 8.) "Every reasonable law enforcement officer knows that no law enforcement purpose or interest is ever achieved by sexually assaulting another person, including those under investigation." (*Id.*)

SAC Nioce declares:

Factor (a): "When law enforcement officers investigate individuals for alcohol use, they do not commonly coerce them to have sex in exchange for

leniency, to let them go without an arrest or citation, or for any other reason. Law enforcement officers do not commonly sexually assault individuals as part of any investigative or law enforcement function." (Nioce Decl. ¶ 10.) SAC Nioce is not aware of any previous instances where a BIA-OJS officer sexually assaulted a person he or she was investigating. In fact, sexual assault is expressly prohibited by the BIA-OJS Law Enforcement Handbook. (*Id.*) Under those policies, "[A]ny personnel found guilty of sexual misconduct will be severely disciplined, to include termination of employment, and prosecuted to the full extent of the law." (*Id.*)

Factor (b): "Bullcoming's sexual assault did not serve any law enforcement purpose. There is no evidence or reason to believe the sexual assault deterred or prevented L.B. from engaging in any potentially criminal conduct. Nor is sexual assault ever a quid pro quo means of keeping individuals out of the criminal justice system or freeing up government resources. In fact, as evidenced in this case, Bullcoming's sexual assault resulted in an individual being thrust into the criminal justice system—namely, Bullcoming himself." (Nioce Decl. ¶ 11; SUF ¶¶ 22–23 (Bullcoming testified his conduct put a "black eye" on his "responsibilities as a law enforcement officer.").)

SAC Nioce also addressed whether Bullcoming's sexual assault can be likened to an officer's decision to exercise discretion and let a motorist with a broken windshield or taillight go free if they agree to fix the problem. *See L.B.*, 515 P.3d at 825–26. SAC Nioce explains that while law enforcement officers do, indeed, have discretion in some instances to warn a motorist about an infraction without issuing a citation, an officer never has discretion to sexually assault a person he or she has stopped or is investigating. (Nioce Decl. ¶ 12.) Every reasonable officer knows that issuing a warning for a broken taillight is vastly different than sexually assaulting someone.

Nor can an officer's threat or use of force to ensure public safety be compared to Bullcoming's sexual assault. *See L.B.*, 515 P.3d at 826. SAC Nioce explains that, in some circumstances, officers have discretion to use force or threats, as necessary, within the bounds of the Constitution, and applicable laws, regulations, policies, and practices in order to ensure or maintain public safety. (Nioce Decl. ¶ 13.) But, again, there are no circumstances where an officer would have discretion to sexually assault a person. (*Id.*) Bullcoming's sexual assault served no legitimate law enforcement purpose, such as ensuring public safety. (*Id.*)

Factor (c) and (f) [3]: SAC Nioce explains that BIA-OJS had no reason to believe Bullcoming would sexually assault L.B. The Office conducted a thorough background check of Bullcoming when he applied for employment, and nothing in his background suggested he would ever sexually assault someone he was investigating. (Nioce Decl. ¶ 14.) Nor was BIA-OJS aware of any conduct during his term of employment that would have led to that suspicion. (*Id.*; SUF ¶ 28 (Bullcoming testified he had not previously been disciplined or reprimanded by BIA-OJS for any misconduct and there was no reason why BIA-OJS should have believed Bullcoming would have sex with L.B. while on duty.) More generally, "Given the fact that sexual assault never serves a legitimate law enforcement purpose and BIA-OJS policies expressly forbid it, BIA-OJS has no reason to expect that an officer will sexually assault a person he or she is investigating." (Nioce Decl. ¶ 16.)

Factor (e): Bullcoming's sexual assault of L.B. was undisputedly "outside the enterprise of the master." "An officer's sexual assault of a person he is investigating never serves BIA-OJS's mission or function. In fact, BIA-OJS policies expressly forbid it." (Nioce Decl. ¶ 15.)

[3] Factor (d) appears to have no applicability here.

Factor (g): "Bullcoming's sexual assault bore no similarity or relationship to the investigation he was authorized to conduct. While Bullcoming was permitted to investigate L.B.'s and her mother's use of alcohol, that investigation did not require Bullcoming to sexually assault L.B. or otherwise coerce her into having sex with him. If Bullcoming had chosen to not take any law enforcement action against L.B., he should have done so without engaging in sexual activity with L.B. In fact, he was required to do so without engaging in sexual activity with L.B. because sexual assault cannot serve any law enforcement purpose." (Nioce Decl. ¶ 17.) As noted above, action that "represents *a departure from*, not an escalation of, conduct involved in performing assigned work or conduct that an employer permits or controls" is not incidental to authorized actions. *Restatement (Third) of Agency* § 7.07 cmt. b (emphasis added). This is a key distinction between cases involving excessive use of force in pursuit of a law enforcement purpose, and sexual actions that involve a gross departure from any authorized conduct.

Factor (h): BIA-OJS did not furnish Bullcoming with the instrumentality to sexually assault L.B.[4] "BIA-OJS did not facilitate Bullcoming's sexual assault; nor

[4] The Montana Supreme Court, for instance, observed, "Undisputedly, governments do not authorize their police officers to sexually assault people when performing these authorized acts." *L.B.*, 515 P.3d at 822.

did it provide him with any express or implied authority to sexually assault L.B. In fact, it strictly forbade such conduct under threat of prosecution and termination of employment." (Nioce Decl. ¶ 18.)

Factor (i): "Bullcoming's sexual assault of L.B. is a clear and gaping departure from the normal and accepted means of conducting an investigation. Sexual assault is never an acceptable component of an investigation or means of accomplishing an investigation." (Nioce Decl. ¶ 19.) The Montana Supreme Court made clear that, even if the employer authorized a particular result, an employee's actions in achieving that result may be "so outrageous or whimsical" to be beyond the scope of the employment. *Brenden*, 470 P.3d at 173 (quoting *Restatement (Second) of Agency* § 229(1) cmt. b)). While Bullcoming's sexual assault bore no relation to any legitimate law enforcement investigation, even if it had such a goal, Bullcoming's actions were too outrageous to be recognized as means of achieving such a goal.

Factor (j): "Bullcoming's sexual assault of L.B. was seriously criminal in nature, as evidenced by his indictment, guilty plea, and three-years' imprisonment for the assault." (Nioce Decl. ¶ 20.) Comment (f) to the restatement explains, "The fact that the act done is a serious crime is a factor indicating that it is not in the scope of employment" (emphasis added). Comment (a) to *Restatement (Second) of*

Agency § 231 further explains, "[S]erious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do."

For these reasons, Bullcoming's assault of L.B. did not arise out of his employment with BIA-OJS because it was not "incidental to the performance of an authorized act." The undisputed facts show that L.B. cannot establish the first prong of the two-prong test for course and scope of employment.

II. Bullcoming assaulted L.B. solely for his personal interests and not to serve any law enforcement purpose or interest of BIA-OJS.

The second prong of the course-and-scope analysis requires the Court to consider the employee's motivation for committing the act at issue. The Court must determine whether the employee's motivation was solely personal or, instead, whether it "was at least partially motivated by an intent or purpose to serve the interests of his employer." *L.B.*, 515 P.3d at 825 (cleaned up).

The Montana Supreme Court explained in *Brenden*, "The state of mind of the employee is determinative—the issue is whether the employee was at least partially motivated to serve the employer's interest 'to some extent.'" 470 P.3d at 175 (quoting *Restatement (Second) of Agency* § 235 cmt. a ("It is the state of the servant's mind which is material. Its external manifestations are important only as evidence."); *Restatement (Third) of Agency* § 7.07 cmt. b). The *Brenden* Court

further quoted from *Restatement (Third) of Agency* § 7.07 cmt. b, noting: The "employee's intention severs the basis for treating" an "act as that of the employer." *Brenden*, 470 P.3d at 175 (emphasis added). Even if a wrongful act arises out of the employment, the act is not in the course and scope of employment if the employee was motivated solely by personal interests.

Bullcoming was deposed on December 14, 2022. (SUF ¶ 15.) He unequivocally testified that his sexual encounter with L.B. was purely personal and not motivated by any law enforcement purpose or interest of BIA-OJS:

AUSA Tanner:	And your sexual encounter with [L.B.][5] did not serve any law enforcement purpose. Is that right?
Bullcoming:	No. No, it did not.
AUSA Tanner:	And were you employed with . . . Who were you employed with at the time of that encounter?
Bullcoming:	Bureau of Indian Affairs Law Enforcement Services.
AUSA Tanner:	And your sexual encounter with [L.B.] did not serve any interest or objection—or objective of the BIA. Is that right?
Bullcoming:	That's right.

[5] L.B.'s full name was used in the deposition.

AUSA Tanner:	When you had sex with [L.B.] in October 2015, that was solely based on your personal interest. Is that right?
Bullcoming:	Yes.
AUSA Tanner:	And you had known [L.B.] for several years and a had a bit of a crush on her. Is that right?
Bullcoming:	Yeah. That was prior—prior to my being in law enforcement, yes.

(SUF ¶ 16.)

Bullcoming's testimony—that his motivation for having sex with L.B. was purely personal—is consistent with the factual evidence, as well as his statements in his underlying criminal case. Bullcoming and L.B. have known each other for about 30 years. (SUF ¶ 17.) L.B. stated she and Bullcoming had been neighbors, and she had known him since they were kids. (SUF ¶ 18.) Bullcoming was a grade ahead of L.B. in school, and their mothers had been best friends. (SUF ¶ 19.) L.B. was also best friends with Bullcoming's sister when they were teenagers. (SUF ¶ 20.) Both Bullcoming and L.B. confirmed Bullcoming had a longstanding romantic interest in L.B. (SUF ¶ 21.) This pre-existing relationship between Bullcoming and L.B. is further evidence that Bullcoming was acting purely out of self-gratification and not in pursuit of BIA-OJS's mission.

Bullcoming has never once testified or otherwise stated—whether in this case or his criminal case—that he was motivated by anything other than his personal interests when he assaulted L.B. To the contrary, when Bullcoming allocuted at his sentencing hearing, he stated, "I put a black eye on it, and that was something I never even thought of. I was selfish, only thought about myself." (SUF ¶ 22.) When Bullcoming was asked at his deposition to explain what he meant by, "I put a black eye on it," he testified: "I put a black eye on my responsibilities as a law enforcement officer, you know, keeping the integrity, honesty, sound judgment, and what I had done pretty much kind of destroyed all that, and that's what I meant by that." (SUF ¶ 23.) Likewise, when asked to explain his statement, "I was selfish, only thought about myself," Bullcoming testified: "I was only thinking of myself in the sense of that personal—I guess, what I've come to understand about myself is self-gratification, in that sense." (SUF ¶ 24.) Bullcoming was then asked, "So was that statement, was that a reflection that you were acting solely out of your self-interest that night and not for any law enforcement purpose?" (SUF ¶ 25.) Bullcoming responded, "Yes." (*Id.*)

In addition to Bullcoming's testimony, no reasonable or objective construction of the facts could lead one to conclude that Bullcoming's assault of L.B. was motivated, even in part, by an intent to serve BIA-OJS's interests. As

SAC Nioce declares, sexual assault is never "legitimately committed incidentally to or in furtherance of any law enforcement interest or purpose." (Nioce Decl. ¶ 8.) "Every reasonable law enforcement officer knows that no law enforcement purpose or interest is ever achieved by sexually assaulting another person, including those under investigation." (*Id.*)

At various times in this case, L.B. has argued the Court can infer Bullcoming acted with a "mixed motive"—that he was partly motivated to serve BIA-OJS's interests because, by not arresting L.B., he freed up government resources and/or reduced his caseload. (*See, e.g.*, Doc. 128 at 6–10.) That argument is entirely at odds with Bullcoming's testimony and the factual evidence. Bullcoming never testified he assaulted L.B. in order to free up government resources or because he did not want to add to his caseload. Nor has L.B. put forward any evidence support a claim that Bullcoming was, in fact, so motivated. L.B.'s argument also ignores a simple fact—if Bullcoming intended L.B. to walk free without an arrest or citation, he simply could have issued her a warning or otherwise let her go without sexually assaulting her in violation of the federal law and the express requirements of his employer. Bullcoming testified he has previously exercised his discretion to issue warnings for alcohol-related violations without assaulting suspected violators. (SUF ¶ 27.) Bullcoming has repeatedly

testified he assaulted L.B. solely for his personal interests and not any law enforcement purpose. (*See, e.g.*, SUF ¶¶ 16–25.) Bullcoming's testimony in this regard is "determinative." *Brenden*, 470 P.3d at 175.

L.B. also argues Bullcoming could have acted with a mixed motive because, "Sexual assault serves the policing purpose of intimidation, thus Bullcoming's assault of L.B. served the purposes of BIA law enforcement." (Doc. 128 at 11.) While, in some circumstances, an officer may use "intimidation"—*e.g.*, the threatened use of force—to maintain law and order, *see L.B.*, 515 P.3d at 826, there is no evidence of the record that Bullcoming was, in fact, motivated by such a purpose. L.B.'s own testimony demonstrates the contrary, when L.B. asked Bullcoming if his motivation for "sex" was his "crush" on her, he agreed. (SUF ¶ 10.) That exchange precludes any inference that his intention was to intimidate. Moreover, intimidation is not a purpose or goal of law enforcement in and of itself. Nor, as SAC Nioce declares, is any law enforcement purpose ever achieved by sexually assaulting a person. (SUF ¶ 29.)

L.B.'s argument also fails because she provides absolutely no factual evidence to support her argument on an issue upon which she bears the burden of proof. She relies solely on a law review article and FBI bulletin for the generalized conclusion that sexual assault may be used to exert power over a victim. (Doc. 128

at 11.) The Montana Supreme Court, though, rejected this sort of generalization. *See L.B.*, 515 P.3d at 826. The Court concluded that, "on the certified facts," it could not determine whether Bullcoming was acting either with a mixed motive or solely for his personal interests. The purpose of the remand is to find the facts that show whether Bullcoming acted with a mixed motive or solely for his personal interest. L.B., though, has not identified any facts specific to this case that could lead the Court to conclude that Bullcoming assaulted L.B. to intimidate her in furtherance of some law enforcement purpose. Instead, all the facts and testimony are to the contrary—as discussed at length above, Bullcoming acted solely for his personal interests.

Finally, as noted above, in *Brenden*, the Court explained that even if an employee proffers the notion that he was serving his employer's interest, conduct might be "so outrageous or whimsical" to be beyond the course and scope of employment, regardless of the employee's motivation. *Brenden*, 470 P.3d at 173 (quoting *Restatement* § 229 cmt. b). Here, as explained in regards to the first prong of the test, Bullcoming's sexual assault of L.B. was a crime, not acceptable under any circumstances, that violated BIA-OJS policy, and "ran contrary to every law enforcement purpose for which he was hired." (Nioce Decl. ¶ 7.) Instead of upholding the law, Bullcoming broke the law and infringed the public's safety.

(*Id.*) His actions were plainly "outrageous" such that even if Bullcoming acted with a mixed motive, he did not act in the course and scope of his employment.

L.B. cannot establish the second prong of the two-prong test because the undisputed facts show that Bullcoming assaulted L.B. solely for his personal interests and not to serve any employer interest or law enforcement purpose. Accordingly, L.B. cannot meet her burden of establishing that the United States waived sovereign immunity under the FTCA. The Court should grant summary judgment in favor of the United States.

III. Bullcoming's criminal guilty plea does not establish that he acted in the course and scope of his employment when he assaulted L.B.

The central argument L.B. has advanced throughout this case is that Bullcoming's criminal guilty plea and the United States' prosecution of Bullcoming establish that he was acting in the course and scope of his employment. The United States prosecuted Bullcoming because he unlawfully abused his position when he sexually assaulted L.B. Bullcoming's abuse of his authority remains as true today as it did when the United States prosecuted him. But the fact that Bullcoming abused his position to coerce sex with L.B. does not imply or establish that he was acting in the course and scope of his employment. Stated differently, committing a crime while in uniform does not mean the crime

was incidental to the performance of an authorized act or that the crime served the employer's interest.

Bullcoming was prosecuted under 18 U.S.C. § 242—"Deprivation of Rights Under Color of Law"—and ultimately pleaded guilty to that offense. (SUF ¶ 13.) The United States explained the first element of this offense is that "the defendant was acting under color of law when he committed the act charged in the indictment." (SUF ¶ 14.) L.B.'s argument focuses on this element, but does not inform the course-and-scope analysis.

The United States Supreme Court explained that a government employee unlawfully acts under the color of law when he abuses the position given to him by the government. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 50 (1988) (citation omitted)[6]. But courts have also explained that unlawfully acting under the color of law does not establish the employee was within the course and scope of his employment. *See, e.g.*, *Daniels v. United States*, 470 F. Supp. 64, 66–68 (E.D.N.C. 1979) (rejecting argument that an officer acting "under color of law" is necessarily acting in the course and scope of employment).

[6] In *West*, the Supreme Court addressed the meaning of "under color of state law" in the context of 42 U.S.C. § 1983, but courts have held the meaning of the phrase under § 1983 and 18 U.S.C. § 242 are the same. *See Collins v. Womancare*, 878 F.2d 1145, (9th Cir. 1989).

"Acting under color of law" and "course and scope of employment" are distinct legal concepts. The difference between the two is evidenced by their tests. While the "color of law" analysis focuses on an employee's abuse of authority, the course-and-scope test focuses on the two prongs discussed above: (1) whether the conduct at issue arose out of the employment and (2) whether the employee was at least partially motivated by an intent or purpose to the serve the interests of his employer. The fact that an employee abused his authority—i.e., engaged in an unauthorized act while on duty—is only one of several factors to consider when determining whether the employee acted in the course and scope of his employment. *See, e.g.*, *L.B.*, 515 P.3d at 822, 824. The Montana Supreme Court made clear in *L.B.* that there are several other factors to consider for course-and-scope—for example, the *Restatement* § 229 factors and, critically, whether the employee acted solely for his personal interests or, instead, to serve the interests of his employers.

L.B. made this same argument to the Montana Supreme Court—that Bullcoming's guilty plea to 18 U.S.C. § 242 establishes course-and-scope. The Court plainly did not agree with L.B., though. If the Court had agreed with L.B., it simply could have held that Bullcoming's guilty plea establishes he was in the course and scope of his employment. But it did not. Instead, the Court held that the

course-and-scope analysis is a fact-based inquiry answered through the two-prong test above.

Despite the Montana Supreme Court's directive that the course-and-scope test is fact-based, L.B. urges the Court to adopt a per se rule—that anytime a law enforcement officer is convicted under 18 U.S.C. § 242, the government is automatically vicariously liable for the underlying conduct. L.B. has never cited a single case to support that argument. Nor does the argument make sense—it would hold the employer liable regardless of how heinous the employee's conduct, whether the act was purely personal in nature, or whether the act had any relationship at all to the employee's job function or the employer's mission.

This is not the law in Montana, either before or after the Montana Supreme Court's *L.B.* decision. In fact, factor (j) of *Restatement* § 229—which the *L.B.* Court adopted—indicates that the criminality of an employee's conduct (*e.g.*, violating 18 U.S.C. § 242) weighs against a course-and-scope finding. Comment (f) to the Restatement states: "The fact that the act done is a serious crime is a factor indicating that it is not in the scope of employment."

Instead of supporting L.B.'s claim, Bullcoming's criminal conduct and guilty plea is one of many reasons her claim should be denied.

CONCLUSION

For the reasons above, the United States respectfully request the Court enter summary judgment in its favor.

DATED this 13th day of January 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 6,323 words, excluding the caption and certificates of service and compliance.

DATED this 13th day of January 2023.

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