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8 **UNITED STATES DISTRICT COURT**  
9  
10 **DISTRICT OF NEVADA**

11 \*\*\*

13 MICHAEL ERWINE,

14 Plaintiff,

15 v.  
16

17 UNITED STATES OF AMERICA, et al.,

18 Defendants.  
19

3:24-cv-00045-MMD-CSD

**RESPONSE IN OPPOSITION TO  
MOTION TO DISMISS [ECF # 66]**

20 COMES NOW, Plaintiff, MICHAEL ERWINE, by and through the undersigned counsel, and  
21 hereby files the following Response to the June 3, 2024 Motion to Dismiss filed by Defendant UNITED  
22 STATES OF AMERICA (hereinafter "United States")(ECF No. 66).  
23

24 This Response is made and based upon all of the pleadings and records on file for this  
25 proceedings together with every exhibit that is mentioned herein or attached hereto (each of which is  
26 incorporated by this reference as though it were set forth hereat in haec verba), if any there be, as well as  
27 the points and authorities set forth directly hereinafter.  
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## MEMORANDUM OF POINTS AND AUTHORITIES

In its Motion, the United States makes the following main arguments: (1) that the Court lacks subject matter jurisdiction under FRCP 12(b)(1) due Erwine not exhausting administrative remedies with Form 95; (2) failure to establish a plausible tortious discharge claim due to no well-pled facts of refusing to violate the law; and (3) failure to establish a bad faith discharge claim as the contract at issue is between the tribe and the Bureau of Indian Affairs (“BIA”) not Erwine. Erwine will address these arguments in turn below.

Under NRCP 12(b)(1), a defendant can seek dismissal of a claim due to a lack of subject matter jurisdiction. This type of dismissal is justified when the complaint, on its face, does not sufficiently allege facts that establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984-85 (9th Cir. 2008). The plaintiff must demonstrate the court's jurisdiction over the case. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001).

When considering a motion to dismiss under FRCP 12(b)(6), the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P’ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). “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.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* A facial plausibility standard is not a “probability requirement” but mandates “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). Dismissal is not

appropriate if the applicability of the equitable tolling doctrine depends upon factual questions not clearly resolved in the pleadings. See *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir. 1993); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988); *Donoghue v. Orange County*, 848 F.2d 926, 931 (9th Cir. 1987); *Supermail Cargo, Inc.*, 68 F.3d at 1206-1207.

## **I . Subject matter jurisdiction**

The United States argues that the court lacks subject matter jurisdiction over Erwine's claims because Erwine failed to exhaust administrative remedies under the Federal Tort Claims Act (FTCA). Specifically, Erwine did not present his tort claims for wrongful termination and bad faith discharge to the appropriate federal agency before filing the lawsuit, as required by the FTCA. The United States argues that “Erwine failed to present notice to the United States of an alleged wrongful termination claim based on the April 2021 and November 2021 incidents.”

Under the FTCA, district courts have jurisdiction over claims for money damages for injury or damage to property, personal injury, or death resulting from the negligent or wrongful actions or failures to act of a government employee while performing their official duties, under circumstances where the United States would be held liable as a private individual according to the law of the location where the incident occurred. 28 U.S.C. § 1346(b)(1). The United States waived sovereign immunity for some tort claims, allowing parties to sue the government. See *Esquivel v. United States*, 21 F.4th 565, 572–73 (9th Cir. 2021).

The cases cited by the United States are vastly different from Erwine’s case and do not support the argument that this Court lacks subject matter jurisdiction due to a failure to exhaust administrative remedies. In *Corey v. McNamara*, 409 F. Supp. 2d 1225, 1228 (D. Nev. 2006), the plaintiff failed to file a Form 95 entirely, which is not the situation here. Erwine did file a Form 95. In *Irish v. United States*, No. 2:13-cv-2201-APG-VCF, 2014 WL 2960300, at \*4 (D. Nev. June 30, 2014), the plaintiff filed their lawsuit before receiving a denial of their Form 95 claim, which again is not applicable to Erwine’s case.

1 In *Blair v. IRS*, 304 F.3d 861, 864 (9th Cir. 2002) and *Ramone v. U.S. Postal Serv.*, No. 1:17-  
2 CV-0825-JLT, 2019 WL 3080820, at \*4 (E.D. Cal. July 15, 2019), the plaintiffs claimed damages  
3 above and beyond what was stated in their Form 95s. This is also not the case here. Erwine's Form  
4 95 adequately described his claims and did not seek damages beyond what was initially claimed.  
5 *Corey v. McNamara*, 409 F. Supp. 2d 1225, 1228 (D. Nev. 2006) held that a Form 95 needs to  
6 contain a written statement sufficiently describing the injury to enable the agency to begin its  
7 investigation, along with a sum certain for damages, citing, *Blair v. Internal Revenue Service*, 304  
8 F.3d 861, 864 (9th Cir. 2002) (quoting *Warren v. U.S. De't of Interior Bureau of Land Mgmt*, 724  
9 F.2d 776, 780 (9th Cir. 1984). For each of these cases, the analysis is too far afield to be applied to  
10 Erwine's case.  
11

12 Erwine's Form 95 at ECF No. 66-2 provides a written statement that sufficiently describes  
13 his injury, enabling the agency to begin its investigation in accordance with *Corey v. McNamara*,  
14 409 F. Supp. 2d 1225, 1228 (D. Nev. 2006). The form outlines that Erwine, a tenured/non-  
15 probationary police officer with the Washoe Tribe of Nevada and California, was terminated  
16 without receiving the procedural due process protections he was entitled to under the Tribe's  
17 disciplinary policies. The "facts" attached to the form detail the circumstances of his termination,  
18 the denial of his grievances, and the Tribe's failure to follow its own policies. See Paragraph 4 at  
19 ECF No. 66-2 Page 4. Furthermore, the Form specifies the nature and extent of his injuries,  
20 including loss of wages, benefits, and career opportunities, as well as intentional infliction of  
21 emotional distress. This description provided the agency with sufficient information to understand  
22 the basis of Erwine's claims, thereby enabling them to commence an investigation, which is all that  
23 is required.  
24

25 "Even a 'skeletal' administrative claim that informs the agency of the nature of the alleged  
26 injury and the amount of damages is sufficient under the FTCA." *Wanjala v. United States*, No. 10-  
27 486-AC, 2011 U.S. Dist. LEXIS 115953, at \*7 (D. Or. July 22, 2011) citing *Avery v. United States*,  
28 680 F.2d 608, 610 (9th Cir. 1982). In *Avery*, the 9th Circuit concluded that: "...the legislative history

1 indicates that a skeletal claim form, containing only the bare elements of notice of accident and  
2 injury and a sum certain representing damages, suffices to overcome an argument that jurisdiction is  
3 lacking.” *Id.* at 610.

4 The statement of fact attached to Erwine’s Form 95 details the specific incident giving rise to  
5 Erwine’s claim, describing that his termination was a result of retaliation for reporting misconduct  
6 and his claim that the termination process violated established procedures, showing his belief that  
7 his termination was wrongful. Further, contrary to United States’ argument, nowhere in Erwine’s  
8 Form 95 does he expressly claim a ***federal*** constitution-based due process claim. Erwine's  
9 references to due process concern the separate denial of the procedural requirements under his  
10 employment contract, not exclusively a constitutional claim. Erwine's Form 95 met the requirements  
11 to inform the agency of the nature of his claims, allowing them to begin their investigation.  
12

## 13 **II. Tortious discharge**

14 United States argues that Erwine's tortious discharge claim should be dismissed because his  
15 allegations fail to establish a plausible claim. Specifically, Erwine did not sufficiently allege that he  
16 was ordered to violate the law, refused such an order, and was terminated for his refusal - pointing  
17 out that Erwine's disciplinary records contradict his claims, showing no orders to engage in illegal  
18 actions. Additionally, the United States contends that Erwine’s claims are unsupported by the  
19 factual context provided, and they do not meet the high threshold for tortious discharge under  
20 Nevada law, which requires a violation of strong and compelling public policy As United States  
21 points out *Ceballos v. NP Palace, LLC*, 138 Nev. Adv. Op. 58, \*7, 514 P.3d 1074, 1078 (2022)  
22 provides that a tortious discharge claim lies for refusing to violate the law, which is precisely what  
23 is described in the Amended Complaint. ECF No. 59 at 18 and 21.  
24

25 The United States argues that Erwine's claims are contradicted by the disciplinary and  
26 termination documents cited in the Amended Complaint and that a court is not required to accept as  
27 true any allegations that contradict documents referenced in the complaint, citing *Johnson v. Fed.*  
28 *Home Loan Mortg. Corp.*, 793 F.3d 1005, 1008 (9th Cir. 2015), which involved considering a Deed

1 of Trust in a dispute over a mortgage at the motion to dismiss stage of a case. Here, Erwine has pled  
2 sufficient facts showing that his refusal to violate the law was a significant reason for his  
3 termination, and the documents provided by the United States in its Motion support his claims. In  
4 his termination paperwork, the Tribe explicitly stated that the incident in which Erwine did not  
5 arrest a subject for DUI was one of the reasons for his termination. See the termination paperwork at  
6 ECF No. 66-3 on Page 6 and the Amended Complaint at ECF No. at 59 at 42. Erwine claims that  
7 the arrest he was ordered to conduct would have been unlawful. The evidence and allegations of  
8 fact before the Court indicate that Erwine's refusal to engage in unlawful behavior, i.e. by arresting a  
9 person where the evidence did not support doing so, were factors in the decision to terminate him.  
10

11 The United States claims that Erwine's termination resulted from performance issues, and  
12 Erwine claims that these performance issues were pretextual. As described in Mr. Erwine's  
13 Declaration, attached hereto as Exhibit 1, Erwine disputes the claims made in the termination  
14 paperwork, and the allegations of wrongdoing alleged, even if true, did not rise to the level of a  
15 firing offense. Further, every time the United States points to the fact that the Tribe fired Erwine for  
16 "failure to follow directives given by supervisory staff of this Department" in cases where he  
17 refused to arrest a person without sufficient grounds, they only make Erwine's case for him. Further  
18 the claim that Erwine's termination was a result of ongoing performance issues is belied by Erwine's  
19 assertions that his annual performance review rating actually increased throughout the time he was  
20 employed with the Washoe Tribe. See ECF 59 at Paragraphs 10, 125, and 149.  
21

22 The United States argues that Erwine did not show that he was ordered to violate the law or  
23 terminated for refusing to do so, the facts as presented by Erwine tell a different story. The board's  
24 conclusion that discipline should focus on Erwine not calling his supervisor rather than not making  
25 the arrest, and the recommendation for additional DUI training, do not negate the fact that the  
26 termination paperwork explicitly cites his refusal to make unlawful arrests as a reason for  
27 termination. Further Erwine's termination paperwork contains allegations of additional misconduct  
28 on behalf of Erwine during the DUI incident that was not mentioned in Erwine's original disciplinary

1 action. See ECF No. 66-3 Page 4 where Erwine's termination memorandum states that he failed to  
2 arrest an DUI suspect and allowed the suspect to have the scene with a firearm too intoxicated to do  
3 so. However in Erwine's original disciplinary action for the incident at ECF No. 66-3 Page 6, it  
4 mentions nothing of a firearm.  
5

6 The United States also argues that Erwine's termination was based upon a totality of  
7 circumstances including Erwine falsely asserting that another officer had given *Miranda* warnings  
8 to a suspect on February 19, 2022 and that the other officer's body camera had established that no  
9 *Miranda* warning had been given (See ECF No. 66 at 10-10). This argument however is not  
10 supported by Erwine's termination paperwork supplied at ECF No. 66-3. Nowhere in Erwine's  
11 termination documents does it state that the other officer's body camera contradicted Erwine's  
12 assertions. Rather Erwine contends that the other officer was not actually wearing a body camera.  
13 See Erwine's Declaration attached as Exhibit 1.  
14

15 When the facts are viewed in the light most favorable to Erwine, it is evident that he has  
16 established a plausible claim that his termination was significantly motivated by his refusal to arrest  
17 individuals unlawfully and the Tribe becoming aware of his dispute with Churchill County and  
18 Sheriff Trotter, thereby meeting the requirements for a tortious discharge claim under Nevada law.  
19

### 20 **III. Bad Faith Discharge**

21 A claim of bad faith discharge lies where: (1) there is an enforceable contract; (2) a special  
22 relationship characterized by trust and reliance, such as that between an insured and an insurer, must  
23 exist; and (3) the employer's conduct must go well beyond the bounds of ordinary liability for  
24 breach of contract, indicating actions that are malicious or oppressive. Tort damages are appropriate  
25 in cases of bad faith discharge as contract damages are generally insufficient. See *Martin v. Sears,*  
26 *Roebuck & Co.*, 111 Nev. 923, 929, 899 P.2d 551, 555 (1995).  
27

28 The United States argues that Erwine's bad faith discharge claim should be dismissed  
because he did not establish the existence of an employment contract with the Tribe, a prerequisite  
for such a claim under Nevada law. The United States contends that Erwine's allegations are

1 insufficient to demonstrate that his employment was governed by a specific contract, as the  
2 referenced contract was between the Tribe and the Bureau of Indian Affairs, not Erwine.

3 Furthermore, Erwine's allegations of wrongful conduct by the Tribe do not rise to the level of  
4 egregiousness required for a bad faith discharge claim, which necessitates conduct that goes well  
5 beyond ordinary breach of contract disputes.  
6

7 As referenced in Erwine's Amended Complaint at ECF No. 59 page 43, the contract is rooted  
8 in the P.L. 93-638 self-determination agreement between the Washoe Tribe and the United States of  
9 America. This contract, ratified by both the Tribe and the BIA, mandates that the United States  
10 provide funding for law enforcement and investigative services, as well as oversee the Tribe's use of  
11 these funds in accordance with the contract and applicable laws. Contrary to the United States'  
12 assertions, Erwine has clearly established the existence of an employment contract.  
13

14 Further, the Contract between the Tribe and the United States included as Exhibit C to the  
15 Motion at ECF No. 66-4 at page 7, expressly provides that: "Washoe shall be fully covered by the  
16 Federal Tort Claims Act and any liability insurance or equivalent coverage that the Secretary  
17 provides to Title I contractors or obtains pursuant to Section 102 of P.L. 93-638, as amended."  
18 However, as described by Erwine in his Declaration attached hereto as Exhibit 1, describes that the  
19 "contract" referred to in the Amended Complaint at 59 is not the same as the contract included as  
20 Exhibit C to the Motion at ECF No. 66-4. As Erwine states, he does not have a copy of the contract,  
21 but did see it when he worked at the Tribe. While the United States claims that the "referenced  
22 contract is between Tribe and the BIA. See First Am. Compl. ¶ 332. That contract is not signed by  
23 Erwine, and it does not purport to govern the terms of his employment. See Ex. C," the United  
24 States is pointing the Court to the wrong contract.  
25

26 Erwine signed an employment contract with the United States, represented by the Washoe  
27 Tribe. The terms of this contract, supported by the Tribe's employee handbook and policies,  
28 transitioned Erwine from an at-will employee to a tenured one after completing a one-year  
probationary period. This transformation meant that Erwine's employment was secured for the



1 future, contingent upon adherence to the detailed disciplinary processes outlined in the contract.  
2 However, the Washoe Tribe breached this agreement by terminating Erwine without due process,  
3 failing to notify him of his employment deficiencies, and not adhering to the promised progressive  
4 disciplinary procedure. This breach, executed with malice and intent to destroy Erwine's law  
5 enforcement career, constituted bad faith discharge. Erwine's bad faith termination by the Washoe  
6 Tribe, acting through the United States, substantiates Erwine's claim and underscores the existence  
7 and breach of a binding employment contract.  
8

9 Multiple contracts existed that governed Erwine's employment and disciplinary procedures,  
10 including the contract between the Tribe and the BIA that governs their relationship and outlines  
11 how employee discipline matters should be handled, similar to the contract in *Miller v. United*  
12 *States*, 992 F.3d 878 (9th Cir. 2021). In *Miller*, a case directly analogous to Erwine's, the Court  
13 found that the tribe in that case hired Miller under the "auspices" of the contract. *Id.* at 882. As  
14 alleged in Erwine's Amended Complaint, this agreement provides the framework within which the  
15 Tribe operates, including disciplinary procedures that are required be followed. See ECF No. 59 at  
16 41 and 43.  
17

18 Additionally, as alleged in the Amended Complaint, there was an employment contract  
19 between Erwine and the Tribe that included a progressive disciplinary policy. ECF No. 59 at 16 and  
20 43. Erwine was a party to this contract, which detailed specific terms and conditions related to his  
21 employment, including how disciplinary actions should be managed. The Tribe's failure to adhere  
22 to the terms of this employment contract forms the basis for Erwine's claims of bad faith discharge.  
23 By not following the agreed-upon disciplinary procedures, the Tribe breached its contractual  
24 obligations, thereby supporting Erwine's claim of bad faith discharge. Erwine's allegations  
25 regarding breach of the employment contract directly contradict the United States' argument that no  
26 enforceable contract existed between Erwine and the Tribe and underscores the validity of his  
27 claims.  
28

“To assert standing as a third-party beneficiary to a contract, a plaintiff must show (1) a clear intent to benefit the third party, and (2) the third party's foreseeable reliance on the agreement. *Boesiger v. Desert Appraisals, Ltd. Liab. Co.*, 135 Nev. 192, 197, 444 P.3d 436, 441 (2019) citing *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 13.2d 819, 824-25 (1977). Erwine has standing as a third-party beneficiary of the contract between the Tribe and the United States because the agreement is clearly intended to benefit individuals like Erwine by providing funding and oversight for law enforcement employment, which includes employment protections and procedural guarantees. Erwine's reliance on this agreement was foreseeable, given that it outlined specific employment terms and disciplinary processes that governed his employment, thereby establishing the necessary trust and reliance for a bad faith discharge claim.

WHEREFORE, Plaintiff requests that this Court deny the Motion or grant leave to amend the Plaintiff's Amended Complaint to clarify that Erwine is a third party beneficiary of the contract between the Tribe and the United States, and other matters as applicable.

Dated: June 17, 2024

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## Exhibit List

1. June 17, 2024 Declaration of Michael Erwine

1  
2 **CERTIFICATE OF SERVICE**

3 I certify that on the date shown below, I caused service to be completed of a true and correct  
4 copy of the foregoing by:  
5

6 \_\_\_\_\_ personally delivering;

7 \_\_\_\_\_ delivery via Reno/Carson Messenger Service;

8 \_\_\_\_\_ sending via Federal Express (or other overnight delivery service);  
9

10 \_\_\_\_\_ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,

11   x   delivery via electronic means (fax, eflex, NEF, etc.) to:  
12

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June 17, 2024

By: /s/ Luke Busby, Esq. \_\_\_\_\_