

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA
ex rel. JESSE KOENIG, and JESSE
KOENIG individually,

Plaintiff-Relator,

v.

KEWEENAW BAY OJIBWA
COMMUNITY COLLEGE, LORI ANN
SHERMAN, BETH LOUISE
VERTANIN, and ROBIN CHOSA,
individually and as representatives of
Keweenaw Bay Ojibwa Community
College,

Defendants.

Case No. 2:23-CV-103

Hon. Paul L. Maloney
United States District Court Judge

Hon. Maarten Vermaat
United States Magistrate Judge

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Congress recognizes that the Indian Self-Determination and Education Assistance Act [25 U.S.C. 5301 et seq.], which was a product of the legitimate aspirations and a recognition of the inherent authority of Indian nations, was and is a crucial positive step toward tribal and community control and that the United States has an obligation to assure maximum Indian participation in the direction of educational services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities.

25 U.S.C. §2501.

On January 4, 1975, Congress passed the Indian Self-Determination and Education Assistance Act (“ISDEAA”) [P.L. 93-638]. This Act marks a shift in federal policy to encourage tribal sovereignty and self-determination over education for American Indian students. With the groundwork in place, on October 17, 1978, Congress passed the Tribally Controlled Colleges and Universities Assistance Act [P.L. 95-471] “to provide grants for the operation and improvement of tribally controlled community colleges to insure continued and expanded educational opportunities for Indian students.” 25 U.S.C. §1802.

Here lies the vision for Defendant Keweenaw Bay Ojibwa Community College (“KBOCC” or “College”) – a non-profit, public corporation chartered by the Keweenaw Bay Indian Community¹ (“Tribe”) and providing higher education opportunities for the Tribe’s Ojibwa community. With only thirty-five accredited tribal colleges and universities across the United States,² KBOCC is among those recognized by the United States Department of Interior, Bureau of Indian Education, as a “tribally controlled college,” making the College eligible for federal

¹ The Tribe is a federally-recognized sovereign nation. *See* 81 Fed. Reg. 5019, 5021.

² *See* American Indian Higher Education Consortium at aihec.org/tribal-colleges-universities/ [“Tribal Colleges and Universities (TCUs) are chartered by their respective tribal governments, including the ten tribes within the largest reservations in the United States. The 35 accredited TCUs operate more than 90 campuses and sites in 15 states—covering most of Indian Country—and serve students from well more than 250 federally recognized Indian tribes. TCUs vary in enrollment (size), focus (liberal arts, sciences, workforce development/training), location (woodlands, desert, frozen tundra, rural reservation, urban), and student population (predominantly American Indian). However, tribal identity is the core of every TCU, and they all share the mission of tribal self-determination and service to their respective communities.”]

grants explicitly designated for these federally-approved institutions. **Exhibit A**, December 22, 2010, Memorandum and Final Report.

Simply put, KBOCC advances the Tribe's sovereignty and self-determination where it is "based on the Tribe's status as a sovereign nation." *Id.* at (4). The College is chartered by the Tribe, sanctioned by Tribal Council, recognized by the United States as a "tribally controlled college," and certified by the American Indian Higher Education Consortium ("AIHEC"):

KBOCC was chartered by the Keweenaw Bay Indian Community on July 12, 1975, founded upon the idea that American Indian students, as members of sovereign nations, deserved an educational system responsive to their needs and concerns. In October 2009, KBOCC received initial candidacy for accreditation from the Higher Learning Commission. The Bureau of Indian Education, Bureau of Indian Affairs, conducted a site visit in April 2010 and recommended the college for approval as a Tribally Controlled Community College/University under the Act. In addition, the United States Department of Education approved the college's application for Title IV federal student aid programs. The College creates an academic environment rich in Ojibwa culture to foster understanding of Native American beliefs while promoting and preserving the customs of the Ojibwa people. Traditional leaders provide direction to faculty and staff for incorporating the Ojibwa language and culture into each of the college's programs. The student services program offers unique opportunities for students to actively engage in the traditional ceremonies and events throughout their educational journey.

See aihec.org/tcu-roster-and-profiles/.

The State of Michigan also acknowledges that tribal colleges in the state, including KBOCC, "help to ensure ongoing [tribal] sovereignty for education." *See*

<https://www.michigan.gov/mde/resources/indigenous-education/indigenous-communities-in-michigan/michigan-tribal-schools-colleges-and-universities>.

Federal courts have established in federal law that a tribe's sovereign immunity extends to its governmental and business activities. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998). Naturally, this includes tribal colleges, such as KBOCC. However, Plaintiff, Jesse Koenig, disagrees. He wrongfully alleges that KBOCC serves the greater "secular community" of L'Anse, Michigan, that it has no existing relationship with the Tribe and therefore, "is not an arm of the Tribe" and "not entitled to any type of sovereign immunity." ECF No. 1, ¶¶ 2 - 4. As shown below, this simply is not true and Plaintiff's claims against Defendants are properly dismissed where this Court lacks jurisdiction over them. Fed. R. Civ. Pro. 12(b)(1).

Alternatively, the tribal exhaustion rule compels this Court to dismiss this lawsuit under Fed. R. Civ. Pro. 12(b)(1) where "federal policy supporting tribal self-government requires federal courts, as a matter of comity, to stay their hands in order to give tribal courts a full opportunity to first determine their own jurisdiction." *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). In fact, by first pursuing remedies in this Court, Plaintiff wrongfully avoids the Tribal Court even though Tribal Council places the College under Tribal Court jurisdiction and Plaintiff's employee handbook directs that employment disputes shall be heard in

the Tribal Court.³

Alternatively, Plaintiff's Complaint fails to allege sufficient material facts required to state claims against Defendants under the False Claims Act and Michigan law. Accordingly, this lawsuit is properly dismissed under Fed. R. Civ. Proc. 12(c).

Last, and alternatively, Plaintiff's claims for violation of the False Claims Act against the Individual Defendant fails under the doctrine of qualified immunity. These claims are properly dismissed against them under Fed. R. Civ. Proc. 12(b)(1).

II. STATEMENT OF FACTS

A. **KBOCC is cloaked with the Tribe's sovereign immunity where it is chartered by the Tribe, subject only to Tribal Court jurisdiction, and serves as the Tribe's sole "tribally controlled college" for the Ojibwe community.**

The Keweenaw Bay Indian Community is a federally-recognized, constitutional tribal government under §16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §476. **Exhibit G**, Constitution, Article VI, Powers and Duties of Tribal Council, Section 1(a), (t) and (u); **Exhibit H**, Corporate Charter. *See*

³ As shown below, the College's Charter(s), Article X, Liability, Section 1, provides that "the Corporation may sue or be sued, provided that such suit is brought in the Keweenaw Bay Tribal Court." **Exhibit B**, 1975 Charter (KBOCC-000001 - KBOCC-000004), **Exhibit C**, 1998 Revised Charter (KBOCC-000005 - KBOCC-000011), **Exhibit D**, 2009 Charter (KBOCC-000012 - KBOCC-000019) and [previously omitted] pg. 8, **Exhibit E**, 2016 Charter (KBOCC-000020 - KBOCC 000028). This is consistent with KBOCC's employee handbooks. **Exhibit F**, Excerpts of KBOCC Staff Handbook 2011 – 2014, Employee Handbook 2015 - 2017 and KBOCC Employee Handbook 2018 - 2015, Section 3, Employee Selections, 3.1 Selection Policy, Sovereignty ["... legal matters concerning employment at the Keweenaw Bay Ojibwa Community College will be heard in KBIC Tribal Court."]

also Tribe's Code of Ordinances, Part 1, Constitution and Bylaws of the Keweenaw Bay Indian Community, Michigan.⁴ The Tribe is located approximately 30 miles south of Houghton, Michigan, in Baraga County, Michigan, with a land base including the L'Anse Reservation, the Ontonagon Reservation and trust property in Marquette, Michigan. *See* <https://www.kbic-nsn.gov/>. The Tribe's L'Anse Reservation, established under the Treaty of 1854, is the oldest and one of the largest in Michigan. *Id.* With members residing both on- and off-reservation, the Tribe extends programs and services for members in Baraga, Ontonagon, Gogebic, Marquette, Houghton and Keweenaw Counties. *Id.*

Following passage of the ISDEAA, Tribal Council, as the governing legislative body of the Tribe, chartered the Ojibwe Community College – now the Keweenaw Bay Ojibwe Community College – pursuant to Tribal Council Ordinance 75-1 on July 12, 1975. **Exhibit B.** To this day, Tribal Council continues to sanction KBOCC as the Tribe's only post-secondary educational institution.

For example, since 1975, the Tribe has amended KBOCC's charter on at least three occasions to modify the administration and operation of the College, as well as Tribal Council's recent re-codification of the Tribe's Code of Ordinances on June 28, 2023, specifically creating Title 114, Education (which re-codifies Ordinance 75-1, **Exhibit B**, KBOCC's original charter, as tribal law). **Exhibit C**, **Exhibit D**, **Exhibit E** and **Exhibit I**, Proposed Ordinance, Tribal Council Motion (Carried) and Tribal

⁴ The Tribe's Code of Ordinances, as well as KBOCC's original 1975 Charter, is publicly available at <https://www.kbic-nsn.gov/tribal-governance/tribal-code/>.

Code of the Keweenaw Bay Indian Community, Title 114, Education, Chapter 2, Ojibwa Community College Charter.

Amendments range from a simple name-change from Ojibwa Community College to Keweenaw Bay Ojibwa Community College to more robust provisions establishing duties of the College's President under Article IV, Purpose, Section 10. **Exhibit C, Exhibit D and Exhibit E.** *See also* Tribal Code, Title 114, Education, Chap. 2, Ojibwa Community College Charter. Tribal Council also amended, Article IV, Purpose, Section 1, from "educational programs ... on the L'Anse Reservation" to "educational programs ... on the L'Anse Reservation and at other locations," allowing for the College's expansion to off-reservation tribal lands. (Emphasis added). ***Id.*** *See also* Tribal Code, Title 114, Education, Chap. 2, Ojibwa Community College Charter, Sec. 114-23.

While Tribal Council has seen fit on occasion to evolve KBOCC's Charter(s), it has always expressed its intention that KBOCC share in the Tribe's sovereign immunity, subject only to the Tribal Court, under Article IX, Liability, Section 1 ["The Corporation may sue or be sued, provided that such suit is brought in the Keweenaw Bay Tribal Court."] ***Id.*** *See also* Tribal Code, Title 114, Education, Chap. 2, Ojibwa Community College Charter, Sec. 114-30(a). This mandate appears in KBOCC's own policies, specifically Plaintiff's employee handbooks, that "... legal matters concerning employment at the Keweenaw Bay Ojibwa Community College will be heard in KBIC Tribal Court." **Exhibit F.**

As further evidence of Tribal Council's intention to share immunity with

KBOCC, subject only to the Tribal Court, the Charter(s), Article V, Bonds, Section 1, directs:

The College may issue bonds from time to time in its discretion for any part of its corporate purposes. Bonds ... shall evidence claims against the obligations of the college which are justifiable in the Tribal Court.

(Emphasis added). **Exhibit C, Exhibit D, Exhibit E.** *See also* Tribal Code, Title 114, Education, Chap. 2, Ojibwa Community College Charter, Sec. 114-25(a)(1).

Similarly, Article X, Liability, Section 2, requires that KBOCC's contracts "shall designate the Tribal Court has the appropriate forum to decide liability of the Corporation." (Emphasis added.) *Id.* *See also* Tribal Code, Title 114, Education, Chap. 2, Ojibwa Community College Charter, Sec. 114-30(b).

Because the Tribe has a vested interest in fulfillment of KBOCC's purpose for the Ojibwa community, Tribal Council mandates, pursuant to the Charter(s), Article VIII, Meeting and Officers, that the "Board shall elect a chairman, vice-chairman, treasurer and secretary from within their membership who are members of the Keweenaw Bay Indian Community." (Emphasis added.) **Exhibit C, Exhibit D, Exhibit E.** *See also* Tribal Code, Title 114, Education, Chap. 2, Ojibwa Community College Charter, Sec. 114-28. The importance of having the Tribe's members oversee the administration and operation of KBOCC is further evidenced where the KBOCC Board of Regents By-Laws, III, Membership (2), require that all "board members must be members of the Keweenaw Bay Indian Community." **Exhibit J**, January 8, 2009, By-Laws, **Exhibit K**, March 9, 2011, By-Laws, **Exhibit L**, July 18, 2016, By-

Laws and **Exhibit M**, January 13, 2020, By-Laws.

While the Board of Regents, consisting only of tribal members, is the governing body of KBOCC, Tribal Council vets and ultimately controls the slate of nominees for selection to the Board. *Id.* III, Membership, (6) [“The Board of Regents shall submit a list of new Board nominees to the Tribal Council ... the Tribal Council will approve the slate of new nominees. The Board of Regents will provide a revised list of Board Members to the Tribal Council.”]

Regarding KBOCC’s location, the Charter(s), Article III, Office, directs that KBOCC’s principal office be on L’Anse Reservation. **Exhibit C, Exhibit D, Exhibit E.** *See also* Tribal Code, Title 114, Education, Chap. 2, Ojibwa Community College Charter, Sec. 114-23. KBOCC has always maintained its main campus, including a principal office, on the L’Anse Reservation, where the College operated out of the Niiwin Akeaa Center which the Tribe owns. **Exhibit N**, Declaration of Megan Haataja, KBOCC Interim President. *Id.*

However, due to the expansion of other tribal programs and services at the Center and with increasingly limited space, KBOCC recently moved its principal office, with the blessing of Tribal Council, to one of its satellite campuses – named the Wabanung Campus – which originally was purchased from Baraga County in April 2013. *Id.* This property is contiguous to the L’Anse Reservation. *Id.* Notably, KBOCC’s principal office relocated after Plaintiff ceased employment with the College in August 2020. *Id.* Upon information and belief, Plaintiff worked on or reported to the L’Anse Reservation during the course of his employment. *Id.*

KBOCC is taking steps to further advance the Tribe's sovereignty and jurisdiction over its property where, with the support of Tribal Council, it submitted a fee-to-trust application with the Department of Interior, Bureau of Indian Affairs, to place a satellite campus in trust with the United States.⁵ **Exhibit O**, Keweenaw Indian Bay Community Resolution KB-036-2018. ["The Keweenaw Bay Indian Community Tribal Council hereby expresses its support for KBOCC's efforts to transfer title to the property ... to the United States to be held in trust for the benefit of the KBOCC. The Tribal Council urges the Secretary of the United States Department of Interior to accept the land into trust in further of the duty of the United States to support the farming rights reserved to the Keweenaw Bay Indian Community in Article 2 of the 1842 Treaty, as well as to promote higher educational opportunities for Keweenaw Bay Indian community membership in furtherance of the trust responsibilities owed to our membership by the government of the United States."]

There's more. The Tribe routinely engages in collaborative initiatives with KBOCC and vice versa because the Tribe values and "is cognizant of the need for providing post-secondary education and training" for tribal members. **Exhibit P**, March 14, 2008, Memorandum of Agreement ("MOA"), **Exhibit Q**, October 31, 2008,

⁵ The Bureau of Indian Affairs accepted KBOCC's application as the "Tribe" under 25 CFR Part 151.2(b) for purposes of seeking fee-to-trust status on the College's land. According to the Bureau of Indian Affairs, "placing land into trust is one of the most important functions of the BIA. Trust lands establish Tribal Jurisdiction and strengthen Tribal sovereignty." See <https://www.bia.gov/bia/ots/fee-to-trust>.

MOA, **Exhibit R**, October 1, 2009, MOA, **Exhibit S**, October 1, 2010, MOA, **Exhibit T**, October 1, 2013, MOA, **Exhibit U**, October 1, 2016, MOA, **Exhibit V**, October 1, 2019, MOA. Over the years, the Tribe has provided KBOCC with millions of dollars to support its mission, in addition to a variety of services and resources. *Id.* These include, for example, accounting, personnel and legal services, office and classroom space at the Niiwin Akeaa Center, and assistance with obtaining insurance and other benefits for KBOCC employees. *Id.*

In November 2012, the HLC evaluated KBOCC for purposes of initial accreditation as a higher-learning institution. In its Report, the HLC evaluation team recognized the College as a tribal institution for initial accreditation:

B. Overview of the Institution Keweenaw Bay Ojibwa Community College (KBOCC) is located in Baraga, Michigan on the L'Anse Indian reservation. It is a two-year college offering Associate of Arts or Sciences degrees in three areas and credit and non-credit courses in Ojibwa culture and language and workplace skills. Enrollment at KBOCC is approximately 90 students, the majority of whom are part-time, Native American, age 25 or older. The institution is served by three full-time faculty and fourteen permanent part-time or adjunct faculty (~4 FTE) and a staff of 13.

KBOCC receives an annual financial subsidy and access to some tribal services from the Keweenaw Bay Indian Community (KBIC) which is assured through a Memorandum of Agreement with the Tribal Council of KBIC. In 1999, KBOCC became a member of the American Indian Higher Education Consortium, an organization of 37 American Indian tribal colleges and universities, which provides student financial assistance as well as information and policies important to tribal institutions.

D. Governance Structure KBOCC's governing body is the Board of Regents which is authorized to set policies for the institution, approve budgets, review and approve program changes, and hire and evaluate the president. The President is empowered to hire and evaluate deans and to oversee the daily operations of the institution. Faculty advance curricular and programmatic recommendations through the Faculty Council to President and to the Board of Regents.

KBOCC receives financial support from the Keweenaw Bay Indian Community (KBIC) and has a three-year renewable Memorandum of Agreement with the Tribal Council that outlines the financial support. KBOCC's president meets periodically with the Tribal Council on the MOA and the KBIC's financial support of the College.

(Emphasis added.) **Exhibit W**, November 5 - 7, 2012, Excerpt of Report of Comprehensive Evaluation Visit for Initial Accreditation, Higher Learning Commission.

Year-after-year, as directed by Tribal Council, KBOCC submits regular reports and budgets to Tribal Council, keeps Tribal Council apprised on actions of the Board of Regents, seeks Tribal Council approval on new appointees for the Board of Regents and maintains lines of communication with Tribal Council regarding its future endeavors. **Exhibit P, Exhibit Q, Exhibit R, Exhibit S, Exhibit T, Exhibit U and Exhibit V.**

KBOCC also collaborates with the Tribe's Education Department "to uplift the [tribal] community through education." **Exhibit X**, August 20, 2024, Memorandum of Understanding. This collaboration includes meetings and shared

resources for “collaborative programming.” *Id.* The Tribe’s Education Department also offers scholarships for tribal members attending KBOCC. **Exhibit N.**

Another tribal educational initiative, KBOCC routinely seeks involvement of the Tribe’s elders and knowledge keepers as “cultural consultants” on strategic planning initiatives, with eye for preserving the cultural integrity and mission of the College. *See* <https://www.kbocc.edu/strategic-planning/>. Tribal elders also are engaged on a weekly basis to support KBOCC’s Migiizinsag “Little Eagles” pre-school program, recognizing that the Tribe’s elders are “an important link from past to future. *See* <https://collegefund.org/blog/kbocc-building-bridge/>.

Additionally, KBOCC’s employment policies promote the Tribe’s Indian Preference initiatives and its Tribal Employment Rights Ordinance (“TERO”), Code of Ordinances, Title 74, Tribal Employment, where qualified tribal members, their descendants and spouses are given preference for positions at KBOCC. **Exhibit F**, Section 3, Indian Preference Law.

KBOCC upholds the important purposes identified in the Tribe’s Code of Ordinances, Title 114, Education, Chap. 2, Ojibwa Community College Charter, Sec. 114-24, and its amended Charter(s), Article IV, Purpose, where it supports “all learners to achieve their goals through holistic education, while promoting Anishinaabe culture, language and lifeways.” **Exhibit C**, **Exhibit D** and **Exhibit E**. *See also* <https://www.kbocc.edu/about-us/>. A virtual tour of the Wabanung Campus proudly displays the Tribe’s Anishinaabe culture – the colors of the Four Directions, the Medicine Wheel, as well as murals, sculptures, paintings and artifacts

throughout the campus. **Exhibit N**. See also

<https://kuula.co/share/7S83J/collection/7YxCl?fs=1&vr=0&gyro=0&initload=0&thumbs=1&info=0&logo=1&logosize=200>. KBOCC employs a full-time Department Chair in Anishinaabe Studies, a full-time Anishinaabe Cultural Advisor and a full-time Cultural / Wellness Coordinator to incorporate the Tribe's traditions and culture into the workplace and curriculum. *Id.* Plaintiff, himself, completed KBOCC's Anishinaabe Values & Philosophy course in Spring 2018. *Id.*

B. Complaint Allegations

Plaintiff is a former, non-tribal employee of KBOCC, from August 2010 to August 2020. He filed this *qui tam* action alleging violations of the False Claims Act ("FCA") and Michigan law for payment of accrued sick leave.⁶ **ECF No. 1**. According to his Complaint, Defendants allegedly presented false information to the Higher Learning Commission ("HLC"), an independent institutional accreditor, in an attempt to secure federal funds for KBOCC and, thereafter, declined to renew Plaintiff's employment agreement allegedly in retaliation for his reporting their "suspect conduct" to the HLC. *Id.* at ¶¶ 18, 20. The Complaint also alleges violation of Michigan law where Defendants allegedly failed to pay him benefits when his employment with the College ceased in August 2020. *Id.* at ¶¶ 82 - 89.

In support of his FCA claims, Plaintiff alleges he observed that Defendant's administration had a history of "distain" for adhering to Higher Learning

⁶ The United States declines to intervene in this lawsuit.

Commission (“HLC”) standards:

“Various administrators of KBOCC that Plaintiff worked with had demonstrated their disdain and disregard for HLC standards, and their intentions to circumvent, ignore, and /or bypass certain accreditation requirements, that are part and parcel of HLC criteria needed to be met to achieve accreditation and qualify for FAA.”

ECF No. 1, ¶¶ 25 - 26.

Plaintiff also alleges that “Defendant KBOCC viewed the HLC review that occurred every four (4) years as an opportunity to cover-up elements of the Defendants’ conduct, including but not limited to backdating surveys, elimination of the Assessment Coordinator / Accreditation Liaison Officer position that did not comport with HLC guidelines, and / or representations made to HLC” *Id.* at ¶ 28.

According to his Complaint, Plaintiff alleges that “a new administration was hoped to be the solution” and he “tried to internally enlighten the new Administration as to how they were violating the accreditation requirements of the HLC,” but he was “met with stiff resistance and retaliation.” *Id.* at ¶¶ 32 - 33, 36. On May 10, 2020, Plaintiff submitted a 29-page complaint to HLC “detailing how the KBOCC, and the Individual Defendants, were undermining HLC Requirements and lying and providing false information to the HLC,” including advising the HLC that “KBOCC’s 2016 Assurance Argument was ‘a work of fiction.’” *Id.* at ¶ 48. Thereafter, Plaintiff notified “Defendants that he was passing his complaint and concerns to HLC.” *Id.* at ¶ 51.

Allegedly, “within hours ... of advising KBOCC, via Dr. Virtanen, and others,

that he had submitted a letter to HLC outlining the deficiencies of KBOCC, and the individuals administering KBOCC's practices," Plaintiff received a series of corrective actions plans." *Id.* at ¶ 52 – 53. Plaintiff responded by pursuing grievances against the "disciplinary write-ups" but alleges that the President of KBOCC "refused to abide by appropriate policy" when she "ruled against the Plaintiff." *Id.* at ¶¶ 54 - 56. Ultimately, Plaintiff alleges he wrongfully was "terminated" when his employment contract was not renewed for the 2021 - 2022 academic year. *Id.* at ¶ 71. Notably, upon receiving Plaintiff's complaint, the HLC opened an investigation but subsequently closed it with no findings against Defendants. **Exhibit Y**, December 17, 2020, Correspondence.

Regarding KBOCC as an educational institution, Plaintiff thinks the College has no relationship with the Tribe and stands as an independent company of sorts. His Complaint alleges that "KBOCC is an independent, non-profit educational corporation, operating off the reservation, and not part of the for-profit business run by the Tribe and is not entitled to any type of sovereign immunity." *Id.* at ¶ 4. He also alleges that KBOCC serves the "greater secular community of L'Anse," and only marginally American Indian students, that it "boasted and bragged about its independence from the Tribe" to achieve accreditation from the HLC and that "as far back as 2010," the College has operated under its own accounting systems and distanced itself financially from the Tribe. *Id.* at ¶¶ 2 - 7. For these purported reasons, Plaintiff asserts that KBOCC cannot be deemed an "not an arm of the Tribe" with any sovereign immunity. *Id.* at ¶ 3. Nowhere does Plaintiff allege that

the Tribe waived immunity as to this lawsuit. *Id.*

Plaintiff's Complaint also names as Individual Defendants Beth Virtanen ("Virtanen"), "the acting Dean of Instruction at KBOCC," Lori Ann Sherman ("Sherman"), "the acting President of KBOCC," and Robin Chosa ("Chosa"), "the acting Chairman of the KBOCC Board," seeking personal liability against them as the alleged "real party in interest" even though the Complaint demonstrates that they are being sued in their official capacities for alleged discretionary actions or decisions they made on the job with KBOCC. *Id.* at ¶¶ 8 - 10. Indeed, Plaintiff's allegations repeatedly are directed at KBOCC and its past and present administration – not the Individual Defendants.

For example, as to Count I and the False Claims Act, Plaintiff alleges that "Defendant's administration had a history of disdain and disregard of adhering to HLC standards," that "various administrators of KBOCC ... demonstrated their disdain and disregard for HLC standards" and that "KBOCC Administration knowingly did not follow HLC criteria" *Id.* at ¶¶ 25 - 26, 38. He alleges that "Defendant KBOCC viewed the HLC review ... as an opportunity to cover-up elements of the Defendants' conduct" and that "failure to meet the accreditation standards set forth by the HLC" would impact "Defendant KBOCC's students." *Id.* at ¶ 24.

According to the Complaint, the alleged wrongful conduct committed by KBOCC generally includes "backdating surveys" and "elimination of the Assessment Coordinator / Accreditation Liaison Officer position" which Plaintiff

alleges was to be a permanent, full-time position at KBOCC pursuant to HLC requirements. *Id.* at 28, 39 - 43, 47. To this end, Plaintiff alleges that “the interim reports drafted by KBOCC alleging that progress was being made in correcting the problem, was only achieved through the deception of the Administration of KBOCC, as a full-time AC was only obtained by adding non-AC duties to a part-time employee.” *Id.* at ¶32. Ultimately, the Complaint seeks a finding that “KBOCC’s conduct violated the *Qui Tam* provisions of the FCA” *Id.* at pg. 11.

In comparison, there are virtually no allegations of material fact demonstrating that the Individual Defendants submitted any false claims. At best, Plaintiff alleges that “Lori Ann Sherman, had expressed her opinion that the college should not have to adhere to HLC standards” and, in conclusory fashion, that she “intentionally, knowingly, fraudulently, and wrongfully submitted false claims, records and statements to officials of the HLC regarding KBOCC” *Id.* at 27, 29. Thereafter, Plaintiff alleges that when he attempted to grieve “corrective action plans” directed towards him, Sherman “ignored relevant [KBOCC] policy and “unilaterally dismissed Koenig’s appeal,” allegedly contrary to KBOCC policy, and that he “received a letter from President Sherman that ... he was being terminated and not having his contract renewed.” *Id.* at ¶¶ 67 – 71.

With regard to any alleged wrongful conduct by Virtanen, the Complaint merely alleges that she “systematically removed the Faculty Council from academic decision” even though “submissions were made to the HLC requiring documents with FC approval.” *Id.* at ¶ 45. And, regarding Chosa, his name only appears in an

introductory “[t]he Parties” paragraph in the Complaint and, presumably, he is referenced in one other paragraph where a “Chairman” allegedly he “replied that if the HLC did not care about what the previous president (Debbie) did in 2017, they would not care about our deficiencies now.” *Id.* at ¶¶ 10, 27.

As for the Complaint, Count III, alleging violation of Michigan labor laws, there are no allegations against the Individual Defendants, only that “Defendant, KBOCC, failed to pay the Plaintiff his accumulated sick leave.” *Id.* at ¶82.

III. STANDARD OF REVIEW

“Federal courts are court of limited jurisdiction” which “possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal subject-matter jurisdiction "can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). When faced with a challenge to subject matter jurisdiction, "a court must address that issue before all others." *Cain v. Redbox Automated Retail, LLC*, 981 F. Supp.2d 674, 681 (E.D. Mich. 2013)

Fed. R. Civ. Proc. 12(b)(1) provides that a complaint’s dismissal is appropriate when a court lacks subject matter jurisdiction over the dispute. *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 919 - 20 (6th Cir. 2009) [“[I]f [the tribe] enjoys tribal-sovereign immunity, we need not address the issues of diversity jurisdiction and federal-question jurisdiction.”]. In reviewing a motion under Rule 12(b)(1), the "court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties

are free to supplement the record by affidavits.” *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003). “When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion.” *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996).

The standard of review for a motion for judgment on the pleadings under Fed. R. Civ. Proc. 12(c) is the same as that for a motion to dismiss under Rule 12(b)(6). *See Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006). When deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or 12(c), the Court must “construe the complaint in the light most favorable to plaintiff and accept all allegations as true.” *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). “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) (internal quotation omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (concluding that a plausible claim need not contain “detailed factual allegations,” but it must contain more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action”). Facial plausibility is established “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant’s conduct.” *16630 Southfield Ltd., P’Ship*

v. Flagstar Bank, F.S.B., 727 F.3d 502, 503 (6th Cir. 2013).

A Rule 12(c) motion "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan v. City of Cleveland Civil Serv. Comm'n.*, 946 F.2d 1233, 1235 (6th Cir. 1991).

IV. LEGAL ARGUMENT

- A. **KBOCC is cloaked with the Tribe's sovereign immunity where it is a tribal-chartered educational institution, organized and operating under the laws of the Tribe and is recognized as a "tribally controlled college" under federal law.**

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority." *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) "Among the core aspects of sovereignty that tribes possess ... is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 59, 58 (1978)). Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

A Tribe's sovereign immunity extends to all of its governmental activities, as well as business "arms of the Tribe" acting on its behalf. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (recognizing that the Court has not "yet drawn a distinction between governmental and commercial activities of a tribe"); *Memphis Biofuels, LLC v. Chickaway Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009). As the Supreme Court held in *Bay Mills*, the baseline rule "is tribal

immunity.” *Bay Mills*, 572 U.S. at 790.

Here, while Plaintiff thinks KBOCC is not entitled to immunity because it exists as nothing more than “serving the greater secular community of L’Anse, Michigan” and that it has no meaningful ties with the Tribe, this is simply not true. The overwhelming evidence proves without question that KBOCC is an educational institution of the Tribe, chartered by the Tribe, and serving its given purpose by providing academic, training and career opportunities for the Tribe’s members while advancing Ojibwa traditions and culture. The Tribe’s significant investments – monetary, resources and services – in higher education for its members have helped to shape the success of KBOCC for generations to come while advancing the Tribe’s sovereignty and self-determination. This is exactly why Congress – when it passed the ISDEAA and the Tribally Controlled Colleges and Universities Assistance Act – put education of tribal communities back in the hands of tribes.

If that’s not enough, KBOCC maintains its status as a “tribally controlled college,” making it eligible for federal grants earmarked only for institutions of federally-recognized tribes, and the AIHEC also recognizes KBOCC as a “tribally controlled” institution of higher education – as one of only thirty-five across the nation. Surely, the Tribe would not devote millions of dollars to, resources to, services to and oversight of KBOCC to create nothing more than a “business” serving “the members of the greater secular community of L’Anse.” And neither would the Bureau of Indian Affairs, the Bureau of Indian Education, nor the AIHEC, entertain fee-to-trust, a “tribally controlled college” designation, or special

funding for KBOCC.

Plaintiff's suggestions are incredulous where the Tribe's members have devoted years of service to the College's Board of Regents in an effort to build a strong post-secondary educational support system for the Ojibwa community. This service is the essence of tribal sovereignty and self-determination.

Plaintiff's allegations that KBOCC is not an "arm of the Tribe" because of independence or autonomy demonstrates a misunderstanding of tribal governments vis-a-vis accreditation requirements for their educational institutions. However, *McCoy v. Salish Kootenai College*, 334 F.Supp.3d 1116 (2018), another lawsuit involving allegations against a tribal college for violation of the False Claims Act, explains why autonomy is necessary:

The Tribal Council's delegation of governance over the College is required for the College to be a "tribally controlled college" under the Tribally Controlled Colleges and Universities Assistance Act, which requires tribal colleges to be accredited in order to receive assistance. 25 U.S.C. § 1804. The NWCCU [Northwest Commission on Colleges and Universities] accredited the College. Accreditation standards mandated by the NWCCU require that the College possess its own governing board and operate with "appropriate autonomy." *See* NWCCU Accreditation Standards Std. 2A, 2A23, www.nwccu.org/accreditation/standards-policies/standards/. The Tribes and the College carefully preserve this "appropriate autonomy," because without it, the College would lose its accreditation and its primary funding source.

(Emphasis added.) *Id.* at 1122.

The *McCoy* court dismissed the lawsuit against the Salish Kootenai College on the

basis of tribal sovereign immunity. See also *Stathis v. Marty Indian Sch. Bd.*, 560 F.Supp.3d (2021) [holding that a tribal school board was entitled to sovereign immunity].

KBOCC's connection to the Tribe is evident. Moreover, its designation as "tribally controlled college" under P.L. 95-471 cannot be understated where the federal government already recognizes that the College is a part of the Tribe making it eligible for funding explicitly reserved for tribal educational institutions. This alone makes KBOCC *de facto* a part of the Tribe entitled to sovereign immunity and, arguably, this alone serves as a basis for dismissal. Accordingly, this Court lacks jurisdiction over Defendants and Plaintiff's claims are properly dismissed under Fed. R. Civ. Proc. 12(b)(1).

B. The Tribe's immunity extends to the individual defendants where the real party in interest is KBOCC and where the individual defendants were acting solely in their official capacities on behalf of KBOCC.

In *Lewis v. Clark*, the United States Supreme Court held that a tribal employee may be sued in his individual capacity when, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. *Lewis v. Clarke*, 581 U.S. 155 (2017). *Lewis* presented an ordinary negligence action involving a car accident on a state highway brought against a tribal employee in state court under state law. In reaching its decision, the Court cautioned:

"Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars

the suit. See *Hafer v. Melo*, 205 U.S. 21, 25, 112 S. Ct. 358, 116 L.Ed 2d. 301 (1991). In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. See, e.g. *Ex parte New York*, 256 U.S. 490, 500 – 502, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). If, for example, an action is in essence against a State even if the State is not named a party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment protection.”

(Emphasis added). *Id.* at 161 - 162.

“In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself.” *Id.* at 162. An employee is sued in their official capacity when the recovery sought against the employee is the equivalent to recovery against the Tribe and would impact the Tribe’s sovereignty. *U.S. v. Menominee Tribal Enterprises*, 601 F.Supp.2d 1061, 1071 (2009). A plaintiff cannot circumvent tribal sovereign immunity by suing tribal officials in their individual capacities if relief would amount to specific performance against the tribe. *Tamiami Partners v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225 - 1226 (11th Cir. 1999). “The critical inquiry is who may legally be bound by the court’s adverse judgment, not who will ultimately pick up the tab.” *Lewis, supra*, at 1292 - 1293.

Here, the Individual Defendants are being sued in their official capacities as Dean of Instruction, President and Board Chairman for alleged wrongful conduct involving interactions with the HLC, decisions regarding the administration and operation of the College, interpretation of the College’s employment and grievance

policies and non-renewal of Plaintiff's employment. The damages that Plaintiff seeks – wage loss, benefits, fringe benefits, sick leave, pension benefits and other monetary compensation, as well as future damages to commute to his new employment and associated expenses, interest, costs, attorney fees, exemplary, and punitive damages – are all types of employment-based compensation normally paid by his employer, KBOCC, and ultimately, the Tribe.

The acts alleged against the Individual Defendants – as scant as they are – cannot be performed by them outside of their official capacities with KBOCC. And, the compensation that Plaintiff seeks is not the type that the Individual Defendants provide (since they are not his employer). Accordingly, even though Plaintiff attempts to hold Virtanen, Sherman and Chosa personally liable, his allegations amount to “official capacity” claims and they are all cloaked with the Tribe's sovereign immunity. As explained below, this conclusion is consistent with *Mestek v. Lac Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255 (7th Cir. 2023).

Similar to the present lawsuit, in *Mestek*, plaintiff sued a tribal health clinic and six individual clinic employees under the False Claims Act for alleged false reporting to the United States and retaliation. Assessing her claims against the individual defendants, the Court reasonably concluded:

“The district court concluded that despite the formal allegations in *Mestek's* complaint, her claims implicated only these defendants' official capacities because the relief she requested would effectively run against the Tribe – meaning sovereign immunity applied. We agree.

The Supreme Court has provided guidance on how to

approach this personal versus official-capacity distinction. '[C]ourts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign.' *Lewis v. Clark*, 581 U.S. 155, 162, 137 S. Ct. 1285, 197 L.Ed.2d 631 (2017).

These principles find straightforward application here and show why *Mestek's* claims are against the employee defendants on in their official capacities. In her complaint, *Mestek* requested front pay, back pay, damages, reinstatement, and injunctive relief prohibiting the defendants from blacklisting or retaliating against her. Critically, however, any monetary relief would come from the Health Center's coffers."

Id. at 261 - 262.

The same holds true here and Plaintiff's claims against the Individual Defendants are barred by the Tribe's sovereign immunity. Accordingly, this Court lacks jurisdiction and Plaintiff's claims are properly dismissed under Fed. R. Civ. Proc. 12(b)(1).

C. Plaintiff failed to exhaust his tribal remedies and this Court should stay its hand to allow the Tribal Court first to decide issues of tribal sovereign immunity and adjudicate Plaintiff's claims.

The United States Supreme Court first recognized the tribal exhaustion rule in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Tribal court exhaustion is a prerequisite to a federal court's exercise of its jurisdiction, requiring that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court. *Grand Canyon Skywalk Dev., LLC v. 'Sa' N'yu Wa Inc.*, 715 F.3d 1196,

1200-1201 (9th Cir. 2012).

“The exhaustion requirement also encompasses the initial question of whether the tribe may be sued, or whether it is immune from suit pursuant to the doctrine of tribal immunity.” *Sober v. Soaring Eagle Casino & Resort*, 2009 U.S. Dist. LEXIS 94462 (E.D. Mich., October 9, 2009) (unpublished opinion attached) *citing Sharber v. Spirit Mt. Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) [“Nor did the district court err in concluding that the tribal exhaustion requirement also applies to issues of tribal sovereign immunity.”] As *Sober* explains, “if a litigant receives an unfavorable ruling on the question of sovereign immunity in the tribal court, the litigant must pursue tribal appellate remedies before seeking review of the tribal court’s decision in a federal district court.” *See also Iowa*, 480 U.S. 9 (1987). The issue of a tribe’s immunity is the very kind of question that is to be decided in the first instance by the tribal court itself. *Stathis v. Marty Indian Sch. Bd.*, 560 F.Supp.3d 1283 (D.S.D. 2021).

The tribal exhaustion rule is based on comity considerations and federal court restraint from interfering with reservation affairs and tribal court authority. *Iowa*, 480 U.S. at 15. Notably, the basis for federal jurisdiction does not refute the rule because tribal courts are “competent to interpret federal law as it is state law.” *Id.* at 19. *See also Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (1993) *citing Iowa, supra*.

Here, it is proper for this Court to stay its hand and dismiss Plaintiff’s lawsuit to allow the Tribal Court first to decide issues of tribal sovereign immunity

and jurisdiction. This is especially so where Plaintiff seeks to avoid the Tribal Court even though he consented to its jurisdiction. Plaintiff concedes he was an employee of KBOCC for approximately 10 years and his employer's Charter(s) Article X, Liability, Section 1, expressly states that "the Corporation may sue or be sued, provided that such suit is brought in the Keweenaw Bay Tribal Court." This tribal-court requirement is consistent with Plaintiff's employee handbook(s), Section 3, Employee Selections, 3.1 Selection Policy, Sovereignty ["... legal matters concerning employment at the Keweenaw Bay Ojibwa Community College will be heard in KBIC Tribal Court."]

Tribal court jurisdiction in this case is also consistent with the long-standing United State Supreme Court case law that states that a tribal court may exercise jurisdiction over a non-member where the non-member engages in a consensual business relationship with a tribe. *Montana v. United States*, 440 U.S. 147 (1979).

The tribal exhaustion rule, coupled with Plaintiff's consent to the Tribal Court's jurisdiction, provides an alternative basis for the dismissal of this lawsuit under Fed. R. Civ. Proc. 12(b)(1).

D. Plaintiff's Complaint fails to state claims against Defendants under the False Claims Act §3729 where KBOCC is not a "person" under the Act and the Complaint fails to allege with sufficient "particularity" materials facts to demonstrate a specific false claim submitted by them.

Plaintiff's Complaint advances two claims under the False Claims Act. Count I is a *qui tam* action based on §3729 [false claims] where Defendants allegedly presented false information to the HLC allegedly to maintain KBOCC's

accreditation. However, as shown above, KBOCC is a part of the Tribe. Therefore, it is not a “person” under the FCA against whom liability may be asserted. Moreover, the Complaint fails to adequately allege material facts “with particularity” against Defendants in order to make out claims for violation of the FCA.

First, the United States Supreme Court holds that states are not ‘persons’ for purposes of liability under §3729 of the False Claims Act:

The relevant portion of the FCA, 31 U.S.C. §3729(a), subjects to liability “[a]ny person” who, inter alia, “knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.” We must apply this text to our longstanding interpretative presumption that “person” does not include the sovereign.

(Emphasis added.) *Vt. Agency of Natural Res. V. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). In other words, because a sovereign is not a “person,” the FCA “does not subject a State [or state agency] to liability.” *Id.* at 787 - 788.

The same holds true for tribal sovereigns and their entities, such as KBOCC. *United States ex. rel. Cain v Salish Kooteni College*, 862 F.3d 939, 944 (9th Cir. 2017) [holding that a tribal entity that functions as an arm of the Tribe is not a “person” under the FCA]. As shown above, KBOCC is an educational institution – a “tribally controlled college” – of the Keweenaw Bay Indian Community and, for this reason, it is not a “person” for purposes of liability under the FCA.

Second, “the Sixth Circuit imposes a clear and unequivocal requirement that a relator allege specific false claims when pleading a violation of the False Claims Act” where Fed. R. Civ. Proc. 9(b) requires a plaintiff to state with particularity the

circumstances constituting fraud. *United States v. Fazzi Assoc.*, 16 F.4th 192 (6th Cir. 2021). The default rule is that a False Claims Act claimant must identify a “representative claim that was actually submitted to the government for payment.” *Fazzi, supra* at 196 citing *Ibanez V. Bristol-Myers Squibb Co.*, 874 F.3d 905 (6th Cir. 2017); see also *United States ex rel. Hirt v. Walgreen Co.*, 846 F.3d 879, 881 (6th Cir. 2017) [holding that under Rule 9(b), “[t]he identification of at least one false claim with specificity is an indispensable element of a complaint that alleges a False Claims Act violation.”] The “touchstone is whether the complaint provides the defendant with notice of a specific representative claim that the plaintiff thinks was fraudulent.” *Fazzi, supra*.

For example, the Court in *Fazzi* dismissed the plaintiff’s FCA claims where the complaint merely described a fraudulent scheme in detail but then failed to “identify any specific claims” that were submitted pursuant to that scheme. *Id.* at 196. See also *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir 2006) [holding that “the False Claims Act does not create liability merely for a health care provider’s disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe.”]

Here, the Complaint alleges that Defendants held “distain” or disregard for HLC accreditation requirements and that they backdated surveys, eliminated the Assessment Coordinator / Accreditation Liaison Officer position and drafted interim reports alleging that progress was being made in correcting problems even though,

in Plaintiff's mind, that was not true. However, the Complaint is completely silent as to who, when and how an actual false claim was submitted. In the instance of Chosa, his name is not identified anywhere in the body of the Complaint, save one introductory paragraph.

Plaintiff's Complaint fails to state with particularity allegations of material facts against Defendants to make out a claim for violation of §3729, and these claims are properly dismissed under Fed. R. Civ. Proc. 12(c).

E. Plaintiff's Complaint fails to state claims against the Individual Defendants under the False Claims Act §3730 where they are not an "employer" under the Act.

Count II of the Complaint is based on §3730 [unlawful retaliation], where Plaintiff alleges Defendants issued corrective action plans to him, did not follow KBOCC policies and procedures pertaining to his grievances, denied his appeal and then terminated him by declining to renew his employment for the 2021 – 2022 academic year.

"To establish a prima facie case [of False Claims Act retaliation], the plaintiff must show the following elements: (1) her was engaged in a protected activity; (2) her employer knew that she engaged in the protected activity; and (3) her employer discharged or otherwise discriminated against the employee as a result of the protected activity." (Emphasis added.) *Jones-McNamara v. Holzer Health Sys.*, 630 F. App'x 394, 398 (6th Cir. 2015).

Here, the Individual Defendants are Plaintiff's colleagues – not his employer. The Complaint makes no allegations that the Individual Defendants were Plaintiff's

employer. *El-Khalil v. Tedeschi*, 2019 U.S. Dist. LEXIS 91260 (E.D. Mich. 2019) (unpublished opinion attached) [holding that dismissal of the plaintiff's §3730 claims against his colleagues was warranted where no employment-like relationship was alleged.] Accordingly, there can be no liability against the Individual Defendants under §3730 and these claims against them are properly dismissed under Fed. R. Civ. Pro. 12(c).

F. Plaintiff's Complaint fails to state claims against the Individual Defendants under MCLA 408.473 & MCLA 408.475 where they are not an "employer" under these statutes and Michigan law does not apply to KBOCC as a tribal entity operating under tribal law.

Count III of the Complaint arises independent of the FCA claims. Instead, this claim deals with allegations of unpaid sick leave. According to Plaintiff, Michigan law mandates that Defendants pay him accrued sick leave up to the date that his employment was not renewed. **ECF No. 82 – 89.** However, these statutes are directed at "an employer." *See* MCLA 408.475(1) ["An employer shall pay to an employee voluntarily leaving employment all wages earned and due"]; MCLA 408.473(3) ["An employer shall pay fringe benefits to or on behalf of an employee in accordance with the terms set forth in the written contract or written policy."]

Here, Plaintiff's claims for violation of Michigan law fail against the Individual Defendants for the same reasons that his FCA §3730 claims fail against them. Simply put, the Individual Defendants are not his employer. Accordingly, these claims are properly dismissed against them under Fed. R. Civ. Pro. 12(c).

These state law claims also fail against KBOCC where it is an educational

institution of a Tribe on tribal land such that state law does not apply to it.

California v. Cabazon, 480 U.S. 202, 207 (1987) [holding that state laws may only be applied to tribal lands “if Congress has expressly so provided.”] The Michigan Supreme Court also recognizes that Michigan law cannot be exerted over tribes on tribal land. *See Taxpayers of Mich. Against Casinos v. State*, 471 Mich. 306 (2004) [observing that the Michigan Legislature, while required to approve tribal gaming compacts, “could not have unilaterally exerted its will over the tribes involved because the tribes’ consent is required by federal law”]

Here, as shown above, KBOCC is chartered by the Tribe and operates pursuant to tribal law. At all times relevant, it maintained its principal office and main campus at the Niiwin Akeaa Center which is owned by the Tribe and located on its L’Anse Reservation. Moreover, Plaintiff consented to jurisdiction of the Tribal Court as to any employment disputes with KBOCC. Accordingly, his state law claims against KBOCC fail because they do not apply to it.

Even if this Court were to find that Michigan law applies to KBOCC under the circumstances presented in this case, which the College denies, his claims would fail because tribal sovereign immunity is a matter of federal law and it is not subject to diminution by the states. *Kiowa Tribe*, 523 U.S. at 756. “There is a difference between the right to demand compliance with state laws and the means to enforce them.” *Id.* at 755.

Accordingly, Plaintiff’s claims for violation of Michigan law fail against KBOCC, and they are properly dismissed under Fed. R. Civ. Proc. 12(b)(1) and

12(c).

G. Alternatively, and challenging the Court's jurisdiction, Plaintiffs claims for violation of the FCA against the Individual Defendants is barred by qualified immunity.

Although there is no apparent authority in the Sixth Circuit on the issue of qualified immunity for tribal employees, *Acres Bonusing Inc. v. Ramsey*, 2022 U.S. Dist. LEXIS 21688 (N.D. California, 2022) (unpublished opinion attached) demonstrates that the Individual Defendants, acting in their official capacities as Board of Regents Chairman, President, and Dean of Instruction for KBOCC, an educational institution of the Tribe, are entitled to immunity under the qualified immunity doctrine.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft*, 563 U.S. at 743. Liability generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken. *Messerschmidt v. Millender*, 565 U.S. 535, 546, (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

Federal courts see no relevant difference between tribal employees and officials for purposes of qualified immunity. *Chayoon v. Chao*, 355 F.3d 141, 143 (2d

Cir. 2004) [observing that qualified immunity may apply to tribal officials or tribal employees of a tribe's casino because the casino is an arm of the tribe]. "Plaintiff cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." See *Cook v. AVI Casino Enters*, 548 F.3d 718, 727 (9th Cir. 2008) citing *Chayoon*, *supra* at 143.

Here, qualified immunity applies to the Individual Defendants and bars Plaintiff's claims because they were acting in their official capacities on behalf of KBOCC. The Complaint makes clear that, at all times relevant, the Individual Defendants were performing their duties in the administration and operation of KBOCC and making discretionary decisions about accreditation requirements, employee performance obligations, and grievance and appeal procedures. There is no allegation in the Complaint that the Individual Defendants acted outside of the scope of their employment and each are identified in their official capacities. Accordingly, the FCA claims against the Individual Defendants are properly dismissed under Fed. R. Civ. Proc. 12(b)(1).

In pursuing this alternative immunity defense, the Individual Defendants seek leave to amend their affirmative defenses to assert qualified immunity. Fed. R. Civ. Proc. 15(a) directs that leave shall be freely given "when justice so requires." *Id.* Qualified immunity is "threshold issue." *Everson v. Leis*, 556 F.3d 484, 492 (6th Cir. 2009) ["questions of ... immunity should be resolved at the 'earliest possible stage of

litigation,’ or else the ‘driving force behind the immunity – avoiding unwarranted discovery and other litigation costs – will be defeated.”] Now is the appropriate time to address qualified immunity of the Individual Defendants because “the “driving force” behind the creation of the qualified immunity doctrine was a desire to ensure that ‘insubstantial claims ‘ against government officials [will] be resolved prior to discovery” and at the earliest possible time. *Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009).

H. This Court should deny Plaintiff leave to amend his Complaint as futile.

While Fed. R. Civ. Pro. 15(a)(2) provides that leave to amend shall be given freely, a court may deny leave to amend where the amendment would be futile. *Williams v. City of Cleveland*, 711 F.3d 945, 949 (6th Cir. 2014) [noting that an amendment is futile if it could not survive a motion to dismiss].

Turning to the present matter, it is obvious that any amendment would be futile. Not only does the KBOCC’s sovereign immunity completely bar Plaintiff’s claims against Defendants, but the tribal exhaustion rule weighs heavily against jurisdiction of this Court where Plaintiff has failed to exhaust tribal remedies in the Tribal Court and he consented to Tribal Court jurisdiction over any disputes with the College.

VIII. CONCLUSION


This is a textbook case where tribal sovereign immunity of a “tribally controlled college” and the tribal exhaustion rule require dismissal. Alternatively, it

is clear that Plaintiff's Complaint fails to make claims against Defendants for violation of the False Claims Act or under state law. Alternatively, the Individual Defendants seek leave to amend their Affirmative Defenses to assert qualified immunity as this provides another basis for dismissal of Plaintiff's claims against them. This Court should grant the motion for judgment on the pleadings for lack of subject-matter jurisdiction and for failure to state a claim, without leave to amend.

Defendants also request that the Court take judicial notice of the Tribal Code of Ordinances, the Exhibits presented and the information provided from official websites of the Tribe, KBOCC and other government agencies and organizations. The Court is permitted to take judicial notice of public records and government documents, including information posted on official websites of government agencies. *Nikolao v. Lyon*, 238 F.Supp.3d 964, 977 (E.D. Mich. 2017), *aff'd in part*, vacated on other grounds, 875 F.3d 310 (6th Cir. 2017).

Dated: December 30, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon counsel for Plaintiff at his respective address as disclosed on the pleadings on December 30, 2024, via ECF Filing.



Lori Ann Zullo

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