

UNITED STATES U.S. DISTRICT COURT
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

**REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON
THE PLEADINGS**

Plaintiff's Response presents a strained theory that Keweenaw Bay Ojibwa Community College ("KBOCC")—a tribally-chartered educational institution created, funded, and operating under authority of the Keweenaw Bay Indian Community ("Tribe") and recognized by the Bureau of Indian Education ("BIE") and the American Indian Higher Education Consortium ("AIHEC") as a tribally-controlled college ("TCU"¹) under federal law—morphed itself into a "secular" institution for the greater L'Anse community when it allegedly steered "autonomous

¹ "TCU" generally refers to tribally-controlled colleges and universities.

from the tribe.” According to Plaintiff, KBOCC no longer serves the Tribe and, therefore, Defendants are not shielded by the Tribe’s sovereign immunity. However, Plaintiff’s Complaint allegations about “autonomy” or whether students and faculty are Indian or not fail to demonstrate that KBOCC, a TCU vetted and qualified under federal law, is not a tribal institution. He points to no case law to support his theory. And, the overwhelming evidence proves that KBOCC is, and always has been, an arm of the Tribe and a pillar of the Anishinaabe community in Michigan’s Upper Peninsula.

To this end, Plaintiff also argues that immunity offers no protection to the individual Defendants because he names them “individually” in his Complaint. However, he does nothing to demonstrate that his Complaint allegations—and particularly the damages he seeks which are employment-based and only recoverable from KBOCC—are truly claims against them. As previously shown in Defendants’ Memorandum of Law in Support of Motion for Judgment on the Pleadings (“Defs’ Memorandum”), **ECF No. 69-1**, pgs. 24 – 27, the expectation when pursuing an individual-capacity claim is that the claim actually be against the individual(s). *Lewis v. Clarke*, 581 U.S. 155, 161 – 162 (2017).

Plaintiff also insists that Defendants waived tribal sovereign immunity and tribal court exhaustion in pleadings and discovery documents. This allegation is not true. Defendants specifically plead “defendants have sovereign immunity,” and, under federal law, tribal court exhaustion applies to issues of tribal sovereign immunity. **ECF No. 17**, pg. 30. See also *Sober v. Soaring Eagle Casino & Resort*,

2009 U.S Dist. LEXIS 94462 (October 9, 2009) citing *Sharber v. Spirit Mt. Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) [“... the tribal exhaustion requirement also applies to issues of tribal sovereign immunity.”] In other words, they are intrinsically tied and Plaintiff’s waiver argument fails.

Plaintiff argues that the individual Defendants are liable for retaliation under the False Claims Act 31 U.S.C. §3730 where they need not be his actual employers. However, as shown below, he misconstrues case law requiring, at the very least, the existence of an “employment-like” relationship between the parties. This relationship is simply not present here. To the contrary, Plaintiff’s Complaint alleges they “worked with” one another. **ECF No. 1**, ¶¶ 25 - 26.

Last, Plaintiff argues that state laws requiring payment of fringe benefits apply to him because, despite working for a tribal institution mainly operating on the Tribe’s Reservation, he worked at a satellite campus and allegedly never stepped foot on the Reservation. However, as shown below, Plaintiff cannot simply circumvent tribal sovereignty and jurisdiction by arguing that he “was not on the Reservation.” **ECF No. 77**, pg. 32. Plaintiff, himself, invoked the Tribe’s jurisdiction via his relationship with KBOCC and particularly where his employment-based claims against KBOCC have a direct connection to the Tribe and its land. *Lexington Ins. Co. v. Smith*, 117 F.4th 1106 (9th Cir. 2024).

Besides, as shown below, Plaintiff should have pursued his claims, whether state law or otherwise, in the Tribal Court. *Lesperance, supra* at 724 citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) [“Tribal courts have repeatedly been

recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”]

I. Defendants are shielded by tribal sovereign immunity because KBOCC is a tribally-chartered educational institution, recognized as a TCU under federal law, and Plaintiff’s personal perception that KBOCC is “secular” fails to overcome immunity.

Plaintiff has personal opinions of what a tribal college should look like—it enrolls only Indian students, employs only Indian instructors, remains completely secluded on an Indian Reservation, and is excluded from pursuing higher education accreditation and outside funding sources. This opinion explains why Plaintiff wrongfully pegs KBOCC as a “secular” institution that allegedly went from a small tribal school tucked away on the Tribe’s L’Anse Reservation to an accredited educational institution serving the greater L’Anse community with no ties to the Tribe whatsoever. However, this characterization is not true.

The overwhelming evidence demonstrates that KBOCC, created under tribal law, is indeed an institution of the Tribe. Plaintiff offers nothing more than theories—no case law—to demonstrate otherwise. Moreover, according to the BIE and the AIHEC, KBOCC meets all of the qualifications to be designated a TCU under federal law. This designation cannot be understated, especially where Congress regards TCUs as “tribal entities and are viewed as such.” (Emphasis added.) H. Rep. 95-1558, at 7. See also **Exhibit Z**, G. Stull et al., Penn Ctr. For Minority Serving Institutions., *Redefining Success: How Tribal Colleges and Universities Build Nations, Strengthen Sovereignty, and Persevere Through Challenges* (2015)

[identifying KBOCC as a TCU, explaining the history and critical function of TCUs, and discussing the unique challenges faced by them where they are “subjected to narrowly defined, mainstream definitions of success that often overlook their true purpose and accomplishments.”]

Plaintiff draws significant attention to KBOCC’s “autonomous and independent” attributes, specifically the “trend away from KBIC [financial] support” where tribal “monies were provided to obtain accreditation so that the KBOCC [sic] could escape funding the KBOCC,” as if these somehow eliminate its critical function as a tribal institution.² **ECF No. 77**, pgs. 10 - 11, 17. Plaintiff fails to understand that without autonomy, KBOCC would not be eligible for accreditation and critical funding sources, including its designation as a TCU. On the other hand, if it were not for KBOCC’s existence under tribal law, its Charter issued by the Tribe and the Tribe’s ongoing endorsement, KBOCC also would not qualify as a TCU. So, while autonomy is relevant for KBOCC’s accreditation and funding, it does not strip the college of its sovereign immunity as an arm of the Tribe, nor does it transform it into something that is no longer an arm of the Tribe.

² Plaintiff points out that “as part of HLC’s accreditation the governing board of KBOCC must be ‘autonomous and independent.’” **ECF No. 77**, pg. 17. However, as shown in Defs’ Memorandum, KBOCC’s governing board must be comprised of the Tribe’s members committed to upholding the Charter’s purpose (which was created by and serves the objectives of the Tribe) and the governing board is also accountable to Tribal Council who must approve nominees to the board, among other responsibilities tied to the Tribe. **ECF No. 69-1**, pg. 9 Ultimately, KBOCC exists at the discretion of the Tribe which has exclusive authority to revoke its Charter – the power to close KBOCC’s doors.

This autonomy of which Plaintiff complains is a beneficial and often necessary component to keep various regulatory and operational functions of tribal enterprises separate from tribal governance in general. This separation helps to avoid undue influence and potential conflicts that may arise between governing council members and other leadership members responsible for regulating and operating a tribe's enterprises and institutions. In the case of KBOCC, autonomy opens the door to secure outside funding that might not otherwise be available to the Tribe. This opportunity is exactly what *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:

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.

There are numerous instances where tribes rely on autonomy to protect and promote their enterprises. Take tribal casinos as merely one example. Recently, the National Indian Gaming Commission, a federal regulatory commission overseeing tribal gaming operations nationwide, issued a Bulletin encouraging the independence of tribal gaming commissions regulating tribal casinos. *See* National Indian Gaming Commission, Bulletin 2022-5, Independence of Tribal Gaming Commissions and their Functions, July 12, 2022. The Bulletin offers

recommendations for independent tribal gaming commissions as they regulate tribal gaming enterprises:

“Effective regulatory oversight requires functional separation between regulating and operating the gaming operation. A well-run tribal gaming commission—free to regulate without undue interference from the Tribe’s leadership or from the gaming operation’s management—is the best vehicle for achieving this functional separation.”

Id. at 1.

The Bulletin recommends that “to create an independent gaming commission, the ordinance or law establishing and governing the commission should ... state that the gaming commission is an independent body” and “mandate the gaming commission’s autonomous authority” *Id.* at 2. However, despite independence and autonomy, tribal gaming commissions and the tribal casinos they regulate are still arms of a tribe.

To summarize, even though KBOCC exists under tribal law, is tribally-chartered and depends on the Tribe’s ongoing sanction of it, KBOCC also necessarily operates with “appropriate autonomy” in relation to the Tribe, as described in *McCoy*. Autonomy is important to achieve and maintain its TCU status and where outside funding opportunities are at stake. Without funding, the Tribe would forever be subsidizing KBOCC which depletes the Tribe’s financial resources needed for other critical programs and services for its members, such as housing for tribal elders, tribal health clinics, tribal courts and public safety.

Plaintiff also argues that immunity offers no protection to the individual Defendants. However, he does nothing to demonstrate that his Complaint allegations—and particularly the damages he seeks which are employment-based and only recoverable from KBOCC—are truly claims against the individual Defendants, arguing instead that “Defendant Vertanin is not Indian” or “all of them were working ... off the Reservation.” **ECF No. 77**, pg. 28.

As previously shown in Defs’ Memorandum, **ECF No. 69-1**, pgs. 24 – 27, Plaintiff cannot simply allege “individual capacity,” particularly where his Complaint allegations are repeatedly directed at KBOCC and its past and present administration. **ECF No. 1**, ¶¶ 11, 24 - 26, 32, 38 – 43, 47. Instead, he needs to demonstrate that the claims against Sherman, Virtanen, and Chosa are actually against them, individually, and that he seeks damages recoverable against them. See *Lewis v. Clarke*, 581 U.S. 155, 161 – 162 (2017). Here, Plaintiff fails to do so.

II. Contrary to Plaintiff’s “waiver” argument, Defendants asserted tribal sovereign immunity as an affirmative defense and immunity and tribal court exhaustion are intrinsically tied as threshold issues involving subject matter jurisdiction that “cannot be waived for forfeited.”

Tribal immunity and tribal exhaustion remain viable defenses that have not been waived where (1) Defendants asserted “sovereign immunity” as an affirmative defense; and (2) Defendants notified Plaintiff several months ago that they intended to move for dismissal based on tribal sovereign immunity and tribal court exhaustion. See Affirmative Defenses, **ECF No. 17**, pg. 30; Defendants’ Opposition to Plaintiff’s Motion to Compel Production of Documents, **ECF No. 40**, pg. 2. To be

clear, tribal sovereign immunity and tribal exhaustion are intrinsically tied as threshold issues to a federal court's exercise of jurisdiction:

“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 (October 9, 2009) *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.”]

Furthermore, federal subject-matter jurisdiction “can never be waived or forfeited.”

Gonzalez v. Thaler, 565 U.S. 134, 141 (2012).

While Plaintiff argues that Defendants waived jurisdictional defenses when they allegedly made admissions of random facts involving KBOCC's autonomy or compliance with accreditation or federal funding requirements,³ see **ECF No. 77**,

³ Several federal circuits hold that a tribe's intention or agreement to comply with federal law, without more, does not waive tribal sovereign immunity. *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150 (10th Cir. 2011) [holding that a tribe's agreement to comply with Title VII, without more, does not constitute an unequivocal waiver of tribal sovereign immunity; *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1289 (11th Cir. 2001) [holding that a tribe's promise to comply with a federal statute “in no way constitute[s] an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court”]; *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) [“Moreover, Demontiney provides no support for the proposition that the Tribe's incorporation of [the Indian Civil Rights Act] into its constitution and bylaws shows an intent to waive sovereign immunity in federal court.”]; *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1044 n.2 (8th Cir. 2000) [“Nor did the [tribal] College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964.”]; *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460-61 (10th Cir. 1989) [holding that the promise to ensure rights, although it may “place substantive constraints on the Tribe,” does not constitute an unequivocal expression of waiver].

pgs. 1 - 5, none of these constitute waivers because a waiver of tribal sovereign immunity [and its partner, tribal court exhaustion] must be express, “clear” and unequivocal, none of which are present here. *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F.Supp.3d 713, 717 – 718 (2017) citing *C&L Enters., v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). “There is a strong presumption against waiver of tribal sovereign immunity.” *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir, 2001). Again, Defendants specifically asserted “tribal sovereign immunity” as an affirmative defense. **ECF No. 17**, pg. 30. And, Plaintiff’s Complaint fails to allege any specific waiver by Defendants.

If there were any waiver, which Defendants deny, this possibly comes in the form of KBOCC’s Charter, issued by the Tribe, and Plaintiff’s employee handbook, where they direct that lawsuits and employment matters involving KBOCC must be submitted to the Tribal Court. Plaintiff had an opportunity to present his claims to the Tribal Court but—to this day—refuses to do so. His attempts to argue “waiver” to circumvent the Tribal Court are disingenuous.

III. The individual Defendants are not liable for retaliation under §3730 where they are not Plaintiff’s employers and have no “employer-like” relationship with him.

Plaintiff cites *Tibor v. Mich. Orthopaedic Inst.*, 72 F.Supp.3d 750 (E.D. Mich. 2014) and *Boegh v. Energy Solutions, Inc.*, 772 F.3d 1056, 1062-63 (6th Cir. 2014) for

the rule that a §3730 retaliation claim does not require a defendant actually be an employer. While true, his reliance on these cases is misplaced.

These cases merely expand on “employer” and “employee” as critical elements of this claim to other “employment-like” relationships, such as that of an independent contractor or an agent. Here, as previously shown in Defs’ Memorandum, Plaintiff’s Complaint alleges no employment-like relationship with any of the individual Defendants. The only employer alleged in his Complaint is KBOCC and Plaintiff’s Complaint states he “worked with” the individual Defendants, which is their reference to “colleagues.” (Emphasis added.) **ECF No. 1**, ¶¶ 25 - 26. Accordingly, this claim is properly dismissed.

IV. The individual Defendants have properly raised qualified immunity and properly presented this defense in their Motion for Judgment on the Pleadings.

Plaintiff argues that the individual Defendants waived qualified immunity where they neglected to present it as an affirmative defense. However, Defendants preserved their right to amend their affirmative defenses, see **ECF No. 17**, pg. 30, and the individual Defendants have properly asserted and presented this defense in their Motion for Judgment on the Pleadings. See **ECF No. 69-1**, pgs. 35 - 37.

Plaintiff, himself, resolves the issue where he cites *Summe v. Kenton County Clerk’s Office*, 604 F.3d 257 (6th Cir. 2010) citing *Narducci v. Moore*, 572 F.3d 313 (7th Cir. 2009), which holds that the failure to raise qualified immunity for the first time in a reply brief constitutes a waiver of the defense, which is not the case here.

V. Plaintiff's state law claims fail where Defendants are shielded by tribal sovereign immunity, which also extends to conduct occurring off-reservation, and KBOCC is not bound by state law where it is a tribally-chartered institution operating on tribal land, under tribal law.

Plaintiff argues that his claims for fringe benefits under MCLA 408.473 & MCLA 408.475 must survive on the premise that he earned these benefits while working adjacent to—but allegedly never actually stepping foot on—the Tribe's Reservation at KBOCC's satellite campus, even though KBOCC's main campus and administrative operations were all conducted on the Tribe's Reservation. This argument fails.

As previously argued in Defs' Memorandum, it is clear that Plaintiff chose to work for KBOCC knowing it operates on the Tribe's Reservation. Just because his work took him off-reservation to a satellite campus immediately adjacent to the Tribe's Reservation does not mean he avoids tribal jurisdiction in favor of state jurisdiction.

In fact, this issue was recently examined in *Lexington Ins. Co. v. Smith*, 117 F.4th 1106 (9th Cir. 2024), where a non-tribal insurance company insuring tribal businesses on a reservation argued that it could not be subjected to tribal jurisdiction because it never actually stepped foot on the reservation. However, the Court disagreed holding that when determining whether nonmember conduct occurs on tribal land, courts should look at whether the cause of action brought by the nonmember bears some direct connection to tribal lands. *Id.*

Here, there is no question that Plaintiff's cause of action involves his employment with a tribal institution operating on the Tribe's Reservation and state law is not appropriately applied. Even if this Court were to find that Michigan law applies to Plaintiff's claims against KBOCC under the circumstances presented in this case, which KBOCC denies, his claims would fail as a result of tribal sovereign immunity [and tribal exhaustion] because "there is a difference between the right to demand compliance with state laws and the means to enforce them." *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 755 (1998).

Furthermore, Plaintiff could have pursued his claims for fringe benefits at the Tribal Court, but he refused to do so. *Lesperance, supra* at 724 citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) ["Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."]


CONCLUSION

Everyone in the room, including the Tribe, KBOCC, the Bureau of Indian Education, the State of Michigan, and the American Indian Higher Education Consortium, recognizes that KBOCC is a "tribally-controlled college," an educational institution of the Keweenaw Bay Indian Community and a pillar of the Anishinaabe community. That is, everyone except for Plaintiff who says KBOCC is "secular" when it comes to him and his lawsuit. Not only are Plaintiff's claims properly dismissed, but this lawsuit presents an opportunity for the Western District to affirm that Michigan's TCUs, when qualified under federal law, are *de*

facto tribal institutions or “arms of the Tribe.”

Dated: March 21, 2025

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 March 21, 2025, via ECF Filing.


Elizabeth Avila