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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10 Keith Goss,
11 Plaintiff,
12 v.
13 United States of America, et al,
14 Defendants.

) Case No: 3-18-cv-08077-DCG

) **Response to Defendant United States**
) **of America’s Motion to Dismiss**

15 Plaintiff, by and through undersigned counsel, hereby responds to
16 Defendant United States of America’s (“USA”) Motion to Dismiss and asks that
17 it be denied.

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19 The parties stipulated to substitute in the USA for the counts under the
20 Federal Tort Claim Act. It is unclear exactly what the USA’s position is but they
21 agreed to substitute in thus they cannot now claim the counts don’t fall under the
22 Act. The USA is not named as to Counts 4, 5, 7, and 8 thus the Plaintiff is not
23 addressing those counts herein. As to Count 3, the allegation that Plaintiff did
24 not include the intentional infliction of emotional distress in the SF 95 FTCA
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1 claim is false. He is not required to outline every possible fact and legal claim
2 but regardless, in his request, he described what had been done to him and stated
3 he was seeking “\$150,000 for emotional distress.” Exhibit A.
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5 As for the claim that this Court has no jurisdiction over the remaining
6 claims as to the USA, the claim falls flat based on the acceptance of liability
7 under the FTCA and the statutory authority for tribal self-governance in health
8 care. Had the USA claimed it was not liable under the FTCA then it should not
9 have substituted in. The parties cannot have it both ways. Tuba City Regional
10 Health Care has tried to hide behind federal law when convenient and behind
11 tribal law yet registered in Arizona and obtain Arizona contracts under its self-
12 governing status. Once self-governing occurred, the employees of the tribal
13 corporation became federal actors and cannot hide behind tribal immunity.
14 Plaintiff should not be left without a remedy as this Court is the only court with
15 jurisdiction over a non-Indian Plaintiff against federal actors in the charged
16 counts. The certification of TCRCCH made the employees federal actors as
17 admitted by the USA thus there is no tribal issue.
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21 The essence of the USA’s claim is that these are “employment claims.”
22 That statement is also false. Simply because a tort occurs at an employer’s place
23 of work or is done by employees does not make it a contract employment claim.
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25 **Factual Background**
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1 This matter does in fact relate to a “broken working relationship”
2 however, as stated in the verified complaint, the claims do not fall under some
3 administrative process and addresses conduct outside of any possible resolution
4 through administrative processes. The following facts are as set forth in the
5 Verified Complaint.
6

7 Keith Goss is a podiatrist who worked for Tuba City Regional Health
8 Care Corporation (“TCRHCC”). Defendant Lynette Bonar was an employee at
9 TCRHCC. At the time of these allegations, with the exception of Jayson Watabe
10 relating to illegal recording, Defendant Bonar and others were acting in their
11 individual capacity under the color of law.
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13
14 Dr. Keith Goss was hired to work as a podiatrist at the TCRHCC.
15 TCRHCC was self-governed under P.L. 93–638, Approved January 4, 1975 (88
16 Stat. 2203), the Indian Self-Determination and Education Assistance Act. It
17 became a private corporation in September 2002 when it became a 638 contract
18 care facility giving complete administrative and fiscal control to local hospital
19 governing board which was supposed to provide the highest level of self-
20 determination where health care is concerned for its own native population.
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23 Plaintiff has alleged that what transpired was a culture of largely non-
24 Indian employees paying themselves large amounts of money, neglecting the
25 care of tribal members, contracting with outside providers and retaliating against
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1 Plaintiff for reporting what was happening. Dr. Goss believed that the care from
2 TCRHCC overall that was given to the tribal members was inadequate and he
3 made lawful attempts to bring these problems to the tribal leaders.
4

5 As a result of his efforts, he was met with retaliation and a constant
6 hostile working environment ending with an “investigation” that appeared to
7 have a predetermined outcome.
8

9 Dr. Goss originally had a contract and management refused to modify it to
10 be consistent with other employees. Dr. Goss worked countless overtime for the
11 tribal members to provide quality care. Instead of being rewarded, others were
12 paid overtime for doing minimal work and providing lower quality care.
13

14
15 Dr. Goss had knowledge of pay-offs between employees and third parties
16 to send contracts their way, to do things contrary to the best interests of the
17 patients simply to bring in more money, and the hospital’s funds declined as the
18 management and their chosen workers profited. After reports surfaced that the
19 problems of care and corruption within the hospital, Dr. Goss was placed on
20 leave despite no prior disciplinary actions. He was told he wasn’t under
21 investigation yet it was clear that was precisely what was transpiring based on
22 the witnesses sought, unlawful recordings made and allegations made to the
23 public.
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1 TCRHCC hired an outside attorney to “investigate” claims against the
2 “hospital” yet it was Plaintiff who was placed on leave. The attorney wanted to
3 interview Dr. Goss under the guise that the investigation was about the hospital
4 yet it was clear that was not the underlying purpose as the hospital stated in an
5 August 6, 2017 letter- that the attorney was conducting an independent review
6 related to complaints against the hospital and “statements made by Dr. Goss
7 RELATIVE TO HIS EMPLOYMENT and conditions at the hospital.”
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10 The attorney, Scott Bennett also advised that there were “threats” by Dr.
11 Goss which clearly showed that despite the claim they were doing an
12 independent review of the hospital, they were actually just focusing on his
13 employment matter. The hospital’s claim that the administrative leave was “non-
14 adverse and non-disciplinary” was not true given the other statements made.
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17 Dr. Goss asserts that he was driven out of his job due to the TCRHCC’s
18 negligent supervision over the employees as well as the negligence of the
19 individuals who used their positions to retaliate against him for reporting the
20 corruption and negligence within the hospital.
21

22 Dr. Goss was forced to resign due to this false administrative leave and
23 the claims that the investigation was into the hospital yet clearly it was an
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1 attempt to establish his whistleblowing efforts due to the nature of the questions.
2 He has lost numerous opportunities due to this constructive discharge.
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4 At the time of his employment, Dr. Goss was in a relationship with a
5 member of the Navajo Nation. They have since married. Dr. Goss regularly
6 stood up for the rights of the members of the Navajo Nation and his free speech
7 to address the concerns about their treatment was violated.
8

9 Plaintiff suffered damages through the emotional distress, loss of
10 reputation and loss of his earning capacity as well as the actions of the
11 Defendants contributed to the forced resignation given the hostile environment
12 and false accusations.
13

14 **Legal Analysis**

15 **Subject Matter Jurisdiction**

16 Under Rule 12, the USA is attempting to dismiss this matter claiming this
17 Court lacks jurisdiction. However, the general defense that the torts are
18 “employment related” does not translate into legal authority that deprives this
19 Court of jurisdiction. There could be no remedy in the tribal courts employment
20 administrative process for damages for torts and none is presented by the USA.
21 This argument also is unsustainable as the USA has admitted the certification of
22 TCRHCC falls under the FTCA.
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1 Counts 1, 2, 3, and 6 are torts. The fact that they were committed by the
2 employer or the employees does not make the claims subject to the employment
3 process. An employment process addresses the right to continued employment
4 and not torts done to people who worked at the employer. Numerous cases exist
5 where employees sue their employer or the staff for torts and the courts do not
6 dismiss for the obvious reason that there is no remedy for these torts.
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9 Also, the claim that the FTCA excludes coverage for employment related
10 matters among tribal employees and their employers is disingenuous as the USA
11 has already substituted in under the FTCA, admitting they are federal actors, not
12 tribal actors subject to some immunity. They cannot have it both ways. If the
13 USA had believed the claims were not subject to the FTCA then it should
14 withdraw the certification and the individual defendants should be reinstated. It
15 was the USA that invoked the claim that the FTCA required substitution.
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18 As to the FTCA, Congress abrogated its sovereign immunity in certain
19 circumstances so that the United States may be liable for damages for negligent
20 torts committed by its employees (or certain independent contractors) acting
21 within the scope of their employment "under circumstances where the United
22 States, if a private person, would be liable to the claimant in accordance with the
23 law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).
24 Congress extended the FTCA to negligent acts of Tribal contractors carrying out
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1 contracts, grants, or cooperative agreements pursuant to Public Law 93-638, the
2 Indian Self-Determination and Education Assistance Act. See 25 U.S.C. §
3 5321(d), 25 U.S.C. § 5396. There can be no doubt that this Court therefore has
4 jurisdiction.
5

6 Counts 1-3 and 6 are not breach of contract claims. Simply because an
7 employee has a contract does not mean tort related claims become employment
8 matters.
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10 Count One claims that Defendants oversaw the employment of Plaintiff in
11 his role as a medical provider at TCRHCC and owed him a duty to make certain
12 other employees did not treat him wrongfully. Plaintiff has set forth sufficient
13 facts that show that Defendant Bonar and others acted to spread false
14 information about Plaintiff, required him to work lengthy hours, retaliated
15 against him when he complained about what he believed were violations of the
16 law, and placed him on leave resulting in a constructive discharge. He further
17 alleged that Defendants USA and/or TCRHCC were negligent in that they
18 breached the duty to Plaintiff to treat him fairly by failing to properly oversee
19 the conduct of Bonar and others, a breach which caused damage to Plaintiff.
20 There has been no evidence presented to support that the FTCA does not apply
21 here.
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1 The USA admits that it has liability for the torts committed by employees
2 of TCHHRC citing in part to *Wide Ruins Community School, Inc. v. Stago*, 281
3 F.Supp. 2d 1086, 1089 (D. AZ 2003) (only Federal obligation is for claims
4 within the scope of the Federal Tort Claims Act). However, the USA has no
5 support that torts that arise in the work place change the character and thus take
6 them out of the FTCA realm.
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9 Nor is there evidence sufficient for a dismissal for lack of jurisdiction
10 based on a claim that the FTCA's discretionary execution applies. The
11 determination of whether given conduct falls within the discretionary function
12 exception must focus on the "nature of the conduct, rather than the status of the
13 actor." *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 113
14 L.Ed.2d 335 (1991) (quoting *Varig*, 467 U.S. at 813, 104 S.Ct. 2755). Here, the
15 allegations are not simply general policy decisions. Plaintiff claims Bonar and
16 others acted to spread false information about Plaintiff, required him to work
17 lengthy hours, retaliated against him when he complained about what he
18 believed were violations of the law, and placed him on leave resulting in a
19 constructive discharge. He further alleged that Defendants USA and/or
20 TCRHCC were negligent in that they breached the duty to Plaintiff to treat him
21 fairly by failing to properly oversee the conduct of Bonar and others, a breach
22 which caused damage to Plaintiff.
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1 There are a plethora of cases that make it clear that torts in an
2 employment situation do not fall only as employment matters subject to some
3 administrative process. Under Defendants theory, there could be no workplace
4 torts. Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (waives immunity as to
5 certain torts committed by government employees acting in the scope of their
6 employment). *Spinelli v. Gaughan*, 12 F.3d 853, 857 (9th Cir. 1993)
7 (categorizing retaliatory discharge — "a tort so widely accepted in American
8 jurisdictions today ... that it has become part of our evolving common law" — as
9 legal in nature and analogizing an ERISA section 510 claim to that common law
10 tort); "Constructive discharge occurs when the employer's conduct effectively
11 forces an employee to resign." *Ross v. Arizona State Personnel Bd.*, 185 Ariz.
12 430, 432 n. 1, 916 P.2d 1146, 1148 n. 1 (App. 1995), *quoting Turner v.*
13 *Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1244, 32 Cal. Rptr.2d 223, 876 P.2d
14 1022, 1025 (1994). The Ninth Circuit has held that a constructive discharge
15 claim can be shown through a continuous pattern of discriminatory treatment
16 over months and years. *See Satterwhite v. Smith*, 744 F.2d 1380, 1382-83 (9th
17 Cir. 1984).

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20 Here, it is the manner of the actions taken in the employment process as
21 well as the wrongs done outside that process that brings Plaintiff before the
22 court.
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1 As properly stated by the Vermont Supreme Court "mere termination of
2 employment will not support a claim for intentional infliction of emotional
3 distress." *Crump v. P & C Food Mkts.*, 154 Vt. 284, 576 A.2d 441, 448 (1990).
4
5 "However, if the *manner* of termination evinces circumstances of oppressive
6 conduct and abuse of a position of authority vis-a-vis plaintiff, it may provide
7 grounds for the tort action." *Id.* (emphasis supplied).
8

9 As to the general jurisdiction argument, in litigation between Indians and
10 non-Indians arising out of conduct on an Indian reservation, resolution of
11 conflicts between the jurisdiction of state and tribal courts have depended,
12 absent a governing act of Congress, on "whether the state action infringed on the
13 right of reservation Indians to make their own laws and be ruled by them."
14 *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959);
15 *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382, 96 S.Ct.
16 943, 47 L.Ed.2d 106 (1976); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d
17 174, 181 (2d Cir.1996) (OSHA has jurisdiction over a tribe-owned business
18 because the "nature of MSG's work, its employment of non-Indians, and the
19 construction work on a hotel and casino that operates in interstate commerce —
20 when viewed as a whole, result in a mosaic that is distinctly inconsistent with
21 the portrait of an Indian tribe exercising exclusive rights of self-governance in
22 purely intramural matters").
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1 Regardless of any argument that the hospital may be intramural,
2 TCRHCC is a corporation created and operating as a business obtaining
3 contracts throughout the State of Arizona. The USA has admitted the actors
4 were federal actors, not tribal actors based on the certification to perform the
5 federal hospital work. The FTCA clearly applies directly to negligent acts of
6 Tribal contractors carrying out contracts, grants, or cooperative agreements
7 pursuant to Public Law 93-638, the Indian Self-Determination and Education
8 Assistance Act. See 25 U.S.C. § 5321(d), 25 U.S.C. § 5396. TCRHCC falls
9 squarely under that umbrella.
10

11
12 Here, Plaintiff is not a member of the tribe and he was working at the
13 hospital that employed many non-tribal members. Jurisdiction is not exclusive
14 with the tribal courts under 25 U.S.C. § 5321(d), 25 U.S.C. § 5396.
15

16 Count Three

17 This Court need to look no further than Exhibit A herein to show that the
18 issues if emotional distress were included in the claim. Exhibit A, SF95 and
19 Response. 28 U.S.C. §2675.
20

21 Immunity Claims

22 It is unclear if the USA is claiming any absolute immunity relating to the
23 actions of Bonar and TCRHCC. If it is, the immunity does not apply.
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1 The official asserting absolute immunity has the burden of showing that
2 immunity is justified for any particular function, and "[t]he presumption is that
3 qualified immunity is sufficient to protect government officials in the exercise of
4 their duties." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 n. 4, 113
5 S.Ct. 2167, 124 L.Ed.2d 391 (1993) (citing *Burns v. Reed*, 500 U.S. 478, 486-
6 87, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)).
7

8 42 U.S.C. § 233(a) only applies to actions resulting from the performance
9 of medical, surgical, dental, or related function. Bonar was acting as an
10 administrator or individual NOT performing medical functions as to these
11 claims. It is no different than a judge acting as an administrator. "But the
12 FSHCAA waives that sovereign immunity only 'for damage for personal injury,
13 including death, resulting from the performance of medical, surgical, dental, or
14 related functions, including the conduct of clinical studies or investigation, by
15 any commissioned officer or employee of the Public Health Service while acting
16 within the scope of his employment.'" In *Mendez v. Belton*, 739 F.2d 15, 19 (1st
17 Cir. 1984), a physician sued her colleague, a Public Health Service official, for
18 civil rights violations under 42 USC §§ 1983 & 1985, on account of the
19 revocation of her hospital staff privileges. The defendant official claimed the
20 immunity from suit that section 233(a) provides for individuals (at the same time
21 as it opens the United States to liability), and the district court granted summary
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1 judgment in favor of the defendant official. *Id.* The First Circuit disagreed,
2 holding:

3 “The statute protects Public Health Service officers or employees from
4 suits that sound in medical malpractice. Dr. Mendez's action against Dr.
5 Belton for alleged acts of intentional discrimination on the basis of race
6 and sex occurring in the course of the professional peer review process is
7 not the sort of malpractice claim that 42 U.S.C. § 233(a) . . . meant to
8 protect against.”

9 *Id.*

10 As cited by the USA through Bonar’s Motion, *Hui v. Castaneda*, 559 U.S.
11 799 (2010), is misrepresented as the U.S. Supreme Court considered whether a
12 *Bivens* claim could be brought against PHS employees in light of 42U.S.C. §
13 233(a). The *Hui* case involved whether “immunity provided by § 233(a)
14 precludes *Bivens* actions against individual PHS officers or employees for harms
15 arising out of conduct described in that section.” It did not specifically address
16 what was included. In fact it cited to *Cuoco* as conflicting with the 9th circuit
17 which “construed § 233(a) to foreclose *Bivens* actions against PHS personnel.”
18

19 The *Hui* case is SOLELY about whether section 233 precludes *Bivens*
20 actions for medical malpractice:
21

22 “As the Ninth Circuit recognized, its holding conflicts with the Second
23 Circuit's decision in *Cuoco v. Moritsugu*, 222 F.3d 99 (2000), which construed §
24 233(a) to foreclose *Bivens* actions against PHS personnel. We granted certiorari
25

1 to resolve this conflict. 557 U.S. ___, 130 S.Ct. 49, 174 L.Ed.2d 632 (2009).”

2 In *Cuoco v. Moritsugu*, 222 F.3d 99, 107 (2nd Cir.2000), the Court of
3 Appeals for the Second Circuit concluded that under 42 U.S.C. § 233(a),
4 members of the Public Health Services were absolutely immune from suit in a
5 *Bivens* action if the injury for which compensation is sought resulted from the
6 performance of a medical or related function while acting within the scope of
7 their office or employment.
8
9

10 Here, the injuries are unrelated to the performance of medical functions as
11 to Dr. Goss. They thus do not fall under the absolute immunity.

12 "To determine when a non-judge is cloaked with judicial immunity, we
13 examine the nature of the function entrusted to that person and the relationship
14 of that function to the judicial process." *Burk v. State*, 156 P.3d 423, 426, 215
15 Ariz. 6,9 (Ct. App. 2007). A generalized connection to the judicial process does
16 not confer immunity for all activities.
17
18

19 **Conclusion**

20 The USA accepted liability under the FTCA because the federal law and
21 cases are clear that the acceptance of TCRHCC's self-governance made the
22 entity and the employees federal actors. The fact that the torts occurred in the
23 work place is no basis to divest this Court of jurisdiction between a non-tribal
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1 member and a corporation and employee that are considered federal actors. The
2 Motion to Dismiss must therefore be denied.
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4
5 RESPECTFULLY SUBMITTED this 4th day of July, 2018.

6
7 By: /s/ Robert F. Gehrke
8 ROBERT F. GEHRKE
9 Attorney for Plaintiff

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on July 4, 2018, I electronically transmitted the attached
12 document to the Clerk's Office using the CM/ECF System for filing. I further
13 certify served the attached document by mail on the following parties:
14

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