

No. 19-15122

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JOHN MILLER

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA and  
DOES 1-25,

Defendant-Appellee.

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**PLAINTIFF-APPELLANT JOHN MILLER'S OPENING BRIEF**

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Appeal from Judgment of the United States District Court  
for the District of Nevada.  
District Case No. 3:17-cv-00121-MMD-WGC  
(Hon. Miranda M. Du)

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## **JURISDICTIONAL STATEMENT**

This case is an appeal from the November 27, 2018 judgment of the District Court of Nevada, in which the District Court granted Appellee's Motion to Dismiss, denied Appellant's Motion to Amend his Second Amended Complaint, and dismissed Appellant's case without prejudice. ER011.

This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291, as this is an appeal of a final decision of a District Court. Appellant timely filed a notice of appeal on January 23, 2019. F.R.A.P. 3 (a)(1).

## **ISSUES PRESENTED**

1. Whether the discretionary function exception to the Federal Tort Claims Act (hereinafter "FTCA") shields the United States from liability where the United States violated mandatory termination procedures in discharging Appellant for being the victim of a crime.
2. Whether the discretionary function exception to the FTCA shields the United States from liability for the intentional tort of wrongful termination, or tortious discharge.
3. Whether the Court erred by dismissing the case in its entirety where Appellee's Motion to Dismiss did not challenge Appellant's separate *respondeat superior* claim, and where the Court made no sua sponte rulings on that issue.



4. Whether the District Court has jurisdiction over Appellant's *respondeat superior* claim.

### STATEMENT OF THE CASE

Appellant, John Miller (hereinafter "Miller"), was terminated from his employment as a law enforcement officer with the Reno Sparks Indian Colony (hereinafter "Tribe") in retaliation for reporting workplace discrimination. The Tribe carried out Miller's termination by way of sham procedures that did not comply with procedures mandated by federal rules and regulations. Worse, the tribal officials carried out the termination on grounds that they knew to be false. Specifically, the Tribe claimed to terminate Miller for allegedly filing a fraudulent unemployment benefits claim while he was employed. However, prior to Miller's final appeal hearing with the Tribe, the Nevada Department of Employment, Training and Rehabilitation (hereinafter "DETR") had informed the Tribe that Miller was the victim of identity theft and a third party had filed the fraudulent unemployment claim using Miller's name.

The District Court dismissed Miller's Complaint on the incorrect premises that (1) the Tribe was not subject to mandatory termination procedures, and (2) the discretionary function exception to the FTCA shields the federal government from suits for the intentional tort of wrongful termination, or tortious discharge.

## STATEMENT OF FACTS

### *Public Law 93-638 Self Determination Contract*

On or about March 3, 2005, the Bureau of Indian Affairs (hereinafter “BIA”) entered into a Public Law 93-638 self-determination contract (the “Contract”) with the Tribe, in which the BIA agreed to fund the Tribe’s law enforcement and investigative services and to monitor the Tribe’s use of said funds in accordance with the Contract and applicable law. ER199, 218.

The Contract was ratified by the Tribe and the BIA on a multi-year basis, and remained in full force and effect at all times relevant to Miller’s claims. By the terms of the Contract, the United States is the Tribe’s employer of law enforcement personnel and administration and is charged with the duty of monitoring the Tribe’s actions to ensure compliance with all laws and the Contract. Section F.6(1) of the Contract states: “For the purpose of Federal Tort Claims Act Coverage, the Contractor (Tribe) and its employees . . . are deemed to be employees of the Federal government while performing work under this contract.” ER 233-234. Section C.2(2)(j)(v) of the Contract states: “The Contractor shall adhere to the general requirements of tribal personnel systems and policies prior to taking any adverse action against contract employees. If the tribal personnel system does not contain provisions for adverse actions, the following (1. through 6.) *shall* be followed.”



(Emphasis added). Subsection (3) requires that the Contractor set a hearing date not less than fifteen days after the employee has been given a written statement of allegations; subsection (4) requires that the Contractor provide the employee and the employee's counsel at the hearing with an opportunity to confront each adverse witness; subsection (5) requires that the Contractor provide the employee and the employee's counsel at the hearing with an opportunity to delineate issues, to present factual contentions in an orderly manner and to generally protect the employee's interest; subsection (6) requires that the Contractor reconsider the decision to take the adverse action based solely on evidence given at a hearing and provide the employee at the time the decision is announced with a written statement of the reasons for the decision and the evidence relied upon in reaching the decision. ER 206-207.

*BIA Office of Justice Services Law Enforcement Handbook*

BIA Office of Justice Services Law Enforcement Handbook, Rules and Procedures (hereinafter "BIA Handbook") § 4-48-01(D) provides that "[b]ecause of the potential liability associated with BIA, P.L. 93-638 contracted programs and Tribal programs receiving federal funding, the Office of Justice Services (OJS) has an obligation to provide for audits and inspections of the programs it operates and funds." Subsection (E) provides that "[s]pecial agents assigned to the PSD [professional standards division] will investigate without bias all allegations of

misconduct assigned to them. Agents will conduct fair, objective, and impartial investigations and audits . . .” Subsection H provides that “PSD will investigate all allegations of misconduct and perform audits of 638 contract programs in accordance with 25 CFR part 12.” 25 CFR part 12.53 states that “[t]he Deputy Bureau Director, OJS maintains an internal affairs component that investigates all allegations of misconduct by BIA officers, and any officer receiving funding and/or authority from the BIA. All allegations of misconduct *must* be thoroughly investigated and appropriate actions taken when warranted. Any person having knowledge of officer misconduct must report that information to the officer’s supervisor.” (Emphasis added). ER237.

BIA Handbook § 4-48-05, “Employee Rights During an Internal Investigation,” provides that District SAC’s [Special Agent in Charge], Chiefs of Police and supervisors are required to report all allegations of misconduct as defined above to PSD within 24 hours of occurrence. PSD will review all allegations to determine the appropriate classification and will investigate or refer allegations accordingly.” ER243.

BIA Handbook § 4-48-05 requires that “[p]rior to an interview or special examination, the PSD supervisor will provide the employee under investigation with confidential written notification of the allegation. This notification will include a

copy of the original complaint or a summary adequately listing the relevant facts, and the employee's rights and responsibilities during the investigation." ER243.

BIA Handbook § 4-48-06, "Investigation," states that "[t]he objective of the investigation is to determine the truth. PSD investigations will be objective, fair, and thorough." Subsection D provides that "[i]nvestigators will conduct an interview with the accused employee. An accused employee has the right . . . to be accompanied by an attorney, union representative, supervisor or other personal representative during any interview concerning allegations of misconduct." (Emphasis added). ER243.

BIA Handbook § 4-48-09, "Conclusion of Internal Affairs Investigations," mandates that "[a]fter a thorough, impartial investigation of a particular misconduct allegation has been completed, the responsible investigator will review all the evidence and circumstances and reach one of the five following conclusions: (1) Unfounded . . . (2) Exonerated . . . (3) Not sustained . . . (4) Sustained . . . (5) Policy or Training Failure . . ." ER247. On or around September 28, 2011, the Tribe's Council implemented the BIA Handbook as the policies and procedures for the Tribe's Police Department.

*Tribe's Employee Handbook*

During Miller's employment, Tribe Employee Handbook § 164.902 described

the appeals process that the Tribe's employees were required to follow if the Tribe subjected them to disciplinary action. ER114-118.

The Tribe Employee Handbook provided a two-step appeals process in which an employee could appeal a disciplinary action by filing an appeal with the employee's supervisor, and if the employee wished to pursue their appeal after meeting with the supervisor, the employee could present a written request to the Appeals Chairperson to empanel an Appeals Committee, who would decide whether to interview the employee before approving or disapproving the disciplinary action.

§ 164.209(C) of the Tribe Employee Handbook states that "the Appeals Committee's task is hear the appeals and insure that both parties have equal opportunity to present their case consistent with this policy." ER116.

§ 164.209(C)(5) of the Tribe Employee Handbook states that "the Appeals Committee will review documentation and if deemed necessary interview [the] employee, supervisor or other interested witnesses and/or subject matter experts." ER117.

*Workplace Discrimination and Harassment; Tribe's Retaliation*

Miller was a law enforcement officer employed by the Tribe on or about June 27, 2013 until he was terminated on or about August 22, 2014. For FTCA purposes, the Tribe's law enforcement personnel were employed by United States and at all

times mentioned herein were acting within the purpose, course and scope of that employment. The Tribe's letter offering employment to Miller states that he would undergo a new hire introductory period of 90 days, and upon successful completion of the probationary period he would be reclassified as a regular, full-time, non-exempt employee. Miller completed his 90-day introductory probationary period and was reclassified as a regular, full-time, non-exempt employee with contractual rights of continued employment with the Tribe.

From January, 2014 until he was terminated, Miller's colleagues and superiors subjected him to workplace discrimination and harassment regarding his race, perceived sexual orientation, and temporary physical disabilities due to an on the job knee injury. ER85-87. Around January, 2014, Miller's superior, Sergeant Avansino, told Miller that he was "the wrong color of skin" and Miller would not be issued equipment that had been issued to other officers because of his color of skin. ER085. On numerous occasions, Sergeant Avansino placed a background image on the monitor of Miller's work computer to display a pattern of "Chicago L.G.P.A. Gay Officer's Action League" logos. ER104.

On or around April 21, 2014, and again on May 31, 2014, Miller complained of workplace discrimination and harassment to the Tribe's Chief of Police, Darrell Bill (hereinafter "Mr. Bill"). On or around June 26, 2014, Sergeant Avansino

informed Miller that he was reinstating and extending Miller's probation until December 27, 2014.

As a result, Miller scheduled an appointment to meet with Mr. Bill on July 14, 2014 to discuss his complaints of workplace discrimination and harassment and the wrongful probation reinstatement. ER086. Miller appeared at Mr. Bill's office for the scheduled appointment, but Mr. Bill did not come to the appointment. On or around July 17, 2014, Miller submitted a written claim to Tribal Administrator Gerald Smith describing the workplace discrimination and harassment to which he had been subjected. ER99. On or around July 17, 2014, Mr. Miller appealed Sergeant Avansino's decision to reinstate him on probation. Miller's request was denied. ER100.

#### *Miller's Termination*

On or around August 22, 2014, the Tribe terminated Miller. On August 25, 2014, the Tribe mailed a letter to Miller declaring that he was terminated for cause because he had allegedly lodged a fraudulent unemployment claim with the State of Nevada Unemployment Office on August 14, 2014. The Tribe's termination letter stated that Miller's alleged fraudulent unemployment claim was a "clear violation" of the Tribe's Human Resources Policy §164-202, Code of Ethics, and grounds for



immediate termination pursuant to the Tribe's Human Resources Policy §164.901, Disciplinary Actions. ER097.

Miller was the victim of identity theft. He informed the Tribe that he had not filed the unemployment claim and invoked his rights to defend himself. The Tribe failed to follow the disciplinary policies and procedures mandated by the Contract, the BIA Handbook, and the Tribal Handbook prior to terminating Miller. Specifically, the Tribe immediately terminated Miller without first placing him on administrative leave, without investigating or interviewing him, and without holding a hearing at which Miller could cross-examine witnesses and provide his own evidence with the assistance of counsel.

*Miller's Appeal of the Tribe's Termination*

On or about September 2, 2014, Miller appealed his termination with the Tribe, citing § 164.901 of the Tribe Employee Manual, and requested that he be reinstated. ER095.

On September 5, 2014, DETR informed the Tribe that Miller was a victim of identity theft and the fraudulent unemployment claim in his name – the Tribe's grounds for terminating him – was part of a large identity theft ring. ER019. From September 5, 2014, the Tribe had information and knowledge that Miller was the victim of identity theft and had not fraudulently filed an unemployment claim with the state of Nevada.

On September 5, 2014, Miller met with Mr. Bill, Sergeant Avansino, and Sergeant Zuniga regarding Miller's appeal of his termination. Sergeant Avansino drafted an "Appeals Meeting Summary," which concluded by stating that "Chief Bill explained to Miller he was free to contact H.R. to continue with his Appeal." ER093.

On or around September 11, 2014, Miller requested that the Tribe empanel an Appeals Committee pursuant to § 164.902 of the Tribe's Employee Handbook. Miller's request for an Appeals Committee cited to the BIA Handbook and argued that the Tribe had failed to meet various procedural requirements prior to terminating him, including: reporting the allegation of his unemployment claim to the Professional Standards Division within 24 hours of occurrence; providing him with a confidential statement of the allegation including a copy of the original complaint or summary listing the relevant facts and employee's rights and responsibilities during the investigation; and conducting an objective, fair, and thorough investigation. ER091. Even with knowledge that Miller was the victim of identity theft, after receiving Miller's Request for an Appeals Committee the Tribe still failed to satisfy the BIA Handbook's procedural requirements, which were designed to determine the truth of allegations made against an officer.

On October 2, 2014, the Tribe issued an Appeals Committee Letter to Miller

stating that the Tribe had reviewed various documents, including BIA Office of Justice Services Law Enforcement Handbook § 4-48.6, which required the Tribe to interview the accused employee prior to termination. ER089. The Appeals Committee's Letter explained that it was upholding Miller's termination, and that the decision was final and binding. Despite having DETR's information since September 5, 2014 that Miller was the victim of identity theft, the Tribe upheld Miller's termination and did not provide him with any further rights or opportunities to challenge his termination.

#### *EEOC Claim*

On or around June 24, 2015, Miller filed a Charge of Discrimination with the Nevada Equal Rights Commission (hereinafter "EEOC Claim"). Miller's EEOC Claim reported that the Tribe had discriminated against him on the basis of his race, a temporary disability, and his sex. Miller's EEOC Claim further alleged that the Tribe had retaliated against him for engaging in protected activity. ER083-84. On September 18, 2015, the U.S. Equal Employment Opportunity Commission (hereinafter "EEOC") issued a Dismissal and Notice of Rights in response to Miller's EEOC Claim ("Dismissal of EEOC Claim"). ER080.

On or about December 17, 2015, DETR issued a letter stating that DETR had further investigated Miller's alleged unemployment claim and determined that a

person other than Miller appeared to have obtained Miller's identifying information and created the unemployment claim without his knowledge. ER078. The Tribe's terminating Miller was illegal, malicious, intentional, and in retaliation for the workplace harassment complaint he had filed with the Tribe.

### *Federal Tort Claim*

On or around May 2, 2016, Miller filed his Federal Tort Claim against the United States based on wrongful termination. ER074-76. On or about September 8, 2016, the United States Department of the Interior issued a letter to Miller denying his claim and informing him of his right to file suit in the United States District Court. ER072. Miller filed his Complaint in the District Court on February 24, 2017. ER178.

## **SUMMARY OF THE ARGUMENT**

The discretionary function exception to the FTCA does not apply here because the Tribe was not executing a statute or regulation or performing a discretionary duty on the part of a federal agency when it fired Miller for being the victim of identity theft. To the contrary, the Tribe failed to follow required procedures during the course of terminating Miller. The Tribe's termination of Miller was not discretionary since it failed to satisfy procedures mandated by the BIA Handbook although it was required to follow such procedures before firing Miller.

Moreover, the discretionary function exception does not apply since the Tribe terminated Miller for being the victim of identity theft, which does not involve an element of judgment or choice; the BIA Handbook's procedures prohibit the Tribe from terminating an employee under such wrongful circumstances. Interestingly, although the Tribe ignored express regulations before firing Miller, the Tribe still seeks protection under the discretionary function exception, which provides protection for federal agencies that *follow* statutes and regulations in exercising their discretion.

The discretionary function exception also does not apply because, assuming *arguendo* the Tribe had exercised a discretionary decision when it fired Miller for being the victim of a crime, the decision was made in bad faith and not the kind of decision that the exception was designed to shield.

Since the discretionary function exception does not apply here, the District Court has jurisdiction over Miller's FTCA claims and the Court should accordingly reverse the District Court's dismissal.

### **STANDARD OF REVIEW**

This Court reviews the District Court's determination of subject matter jurisdiction *de novo*. *Nurse v. U.S.*, 226 F.3d 996, 1000 (9th Cir. 2000). "The plaintiff bears the initial burden of proving subject matter jurisdiction under the FTCA."

*Blackburn v. U.S.*, 100 F.3d 1426, 1436 (9th Cir. 1996). The United States then “bears the burden of proving application of the discretionary function exception.” *Id.* “[A] District Court’s application of the discretionary function exception [is] reviewed *de novo*.” *O’Toole v. U.S.*, 295 F.3d 1029, 1032 (9th Cir. 2002) (internal quotes omitted). “In reviewing the District Court’s dismissal, [the Court] must accept as true the factual allegations in the complaint.” *Blackburn*, 100 F.3d at 1436.

This Court reviews the District Court’s decision to dismiss Appellant’s case in its entirety, despite Appellee not challenging Appellant’s separate *respondeat superior* claim *de novo*. ER054.

## ARGUMENT

### I. THE COURT HAS SUBJECT MATTER JURISDICTION UNDER THE FTCA SINCE THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT APPLY.

Miller’s claims against the United States for wrongful termination and tortious discharge arise under the FTCA, 28 U.S.C. § 2671 *et. seq.* wherein the United States provides a limited waiver its sovereign immunity “for torts committed by federal employees acting within the scope of their employment.” *Nurse v. U.S.*, 226 F.3d 996, 1000 (9th Cir. 2000); 28 U.S.C. § 1346(b)(1). In such cases, the United States is liable “in the same manner and to the same extent as a private individual under like



circumstances.” 28 U.S.C. § 2674. However, the waiver is subject to the exceptions listed in 28 U.S.C. § 2680.

One exception is the discretionary function exception, which states that the United States is not liable for

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The District Court does not have subject matter jurisdiction over any claims that fall within the discretionary function exception to the FTCA. *Nurse v. U.S.*, 226 F.3d at 1000.

A two-prong test exists to determine whether the discretionary function exception applies to a cause of action. *United States v. Gaubert*, 499 U.S. 315, 322-323 (1991). The United States is immune from suit only if it satisfies both prongs of the test. *Sydney v. U.S.*, 523 F.3d 1179, 1183 (10th Cir. 2008). As such, a plaintiff may proceed with its claim if the United States fails to establish just one of the two prongs. *Id.*

The first prong of the discretionary function test asks whether the action in question was discretionary. *Gaubert*, 499 U.S. at 322. A discretionary action

involves “an element of judgment or choice.” *Id.* “The requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive.” *Id.* “If [an] employee violates [a] mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.” *Id.* at 324.

If the United States can show that the action in question was discretionary, it must then establish the second prong – that the discretionary decision was of the kind “that the exception was designed to shield.” *Id.* at 322 (internal quotes omitted). “[T]he purpose of the exception is to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *Id.* As such, “when properly construed, the exception protects only governmental actions and decisions based on considerations of public policy.” *Id.* (internal quotes omitted). “For a complaint to survive a motion to dismiss [upon reaching the second prong], it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.” *U.S. v. Gaubert*, 499 U.S. 315, 324–25 (1991). “The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the

actions taken and on whether they are susceptible to policy analysis.” *Id.*

- A. The discretionary function exception to the FTCA does not shield the United States from liability since the Tribe violated mandatory termination procedures, the most egregious of which was terminating Miller despite knowledge that the accusation against him was false.

The United States failed to meet the first prong because the Tribe failed to follow mandatory regulations that (1) prohibited it from firing Miller on false accusations, and (2) required the Tribe to follow termination procedures designed to provide Miller with a fair termination process to determine the truth. The Tribe’s law enforcement personnel and administration are considered federal employees for purposes of the FTCA. ER 233-234. All officers and administrators working in the Tribe’s law enforcement program are required to follow the procedures found in 25 C.F.R § 12: “You *must* follow the minimum standards outlined in the regulations in this part if you are part of a BIA or tribal law enforcement program receiving Federal funding or operating under a BIA law enforcement commission.” 25 C.F.R. § 12.11 (Emphasis added).

The Director of the Office of Law Enforcement Services for the BIA is responsible for developing and publishing policies and standards in manuals and handbooks such as the BIA Handbook. See 25 C.F.R. § 12.2 (providing that “*Every* Indian country law enforcement program covered by the regulations in this part *must* maintain an effective and efficient law enforcement program meeting minimal

qualitative standards and procedures specified in chapter 68 Bureau of Indian Affairs Manual (BIAM) and the Law Enforcement Handbook (BIA Handbook).” 25 C.F.R. § 12.14 (Emphasis added). Periodic inspections are to take place to ensure that tribal law enforcement programs comply with “minimum Federal standards.” 25 C.F.R. § 12.12. If a tribal law enforcement program fails to comply with 25 C.F.R. § 12, its “commission may be revoked, [its] law enforcement contract may be canceled, and [the program] may no longer be eligible for tribal shares allocated from the law enforcement budget.” 25 C.F.R. § 12.13. Accordingly, the procedures and rules in the BIA Handbook are mandatory and not discretionary.

The BIA Handbook prohibits discipline for allegations that are found to be untrue. Specifically, “*Employees may not be disciplined for allegations deemed unfounded, exonerated, or not sustained.*” (Emphasis added). ER249. “The objective of [a misconduct] investigation is to determine the truth. “[Professional Standards Department (“PSD”)] investigations will be objective, fair, and thorough. . . . A proper investigation demands that the investigator . . . *gather all of the facts.*” (Emphasis added). ER243.

The BIA Handbook further requires that: a special agent be assigned to investigate the allegation of misconduct; the requirement that the Chief of Police report the allegation of misconduct to PSD within 24 hours; the right to provide the

employee under investigation with confidential, written notification of the allegation including a copy of the original complaint or a summary listing all relevant facts and the employee's rights and responsibilities prior to interviewing the employee. ER238, 240-243.

Here, the Tribe failed to follow the mandatory rules and procedures for investigating alleged employee misconduct and termination based on such allegations. Most egregiously, the Tribe fired Miller for allegedly filing a fraudulent unemployment benefits claim even though it knew that Miller was, in fact, the victim of a scheme whereby a third party filed the fraudulent claim in his name. Specifically, on September 5, 2014, DETR advised the Tribe that the unemployment claim was "hijack in ID theft case." ER019. In firing Miller on false accusations, the Tribe violated multiple mandatory provisions of the BIA Handbook, particularly § 4-48-11(E) (prohibiting disciplinary actions against employees for unfounded allegations) and § 4-48-06 (requiring the investigator to gather all of the facts).

Instead of following federally mandated regulations and procedures, the Tribe attempted to follow its own "Tribe Employee Handbook," which merely allowed for a two-step appeals process in which the employee could appeal the disciplinary action by filing an appeal with the employee's supervisor, and, if the employee wished to pursue his appeal after meeting with the supervisor, the employee could present a

written request to the Appeals Chairperson to empanel an Appeals Committee, who would decide whether to interview the employee before approving or disapproving the disciplinary action. ER153-155, ER237-250.

The District Court incorrectly cited *Big Owl v. U.S.*, 961 F. Supp. 1304 (1997) and *Dahlstrom v. U.S.*, C16-1874RSL, 2018 WL 1046829, at \*2 (W.D. Wash. Feb. 26, 2018) in concluding that Miller did not point to federal law indicating that the Tribe did not have full discretion to fire Miller, in keeping with *Sydney v. U.S.*, 523 F.3d 1179, 1184 (10th Cir. 2008). ER17.

*Big Owl* and *Dahlstrom* support Miller's position. In both cases, the plaintiffs sought to establish that provisions in a tribal employee handbook limited the defendants' discretion to terminate the plaintiff's employment (in *Dahlstrom*), and to decide not to renew plaintiff's employment contract (in *Big Owl*). In both cases, the challenged employee handbook was not a federally mandated handbook containing federally mandated procedures. Rather, the handbooks in both cases were drafted and adopted by the Tribe.

Here, the BIA Handbook is not a tribal employee handbook, drafted and adopted by the Tribe as in *Big Owl* and *Dahlstrom*. The BIA Handbook is commissioned by federal regulation, 25 C.F.R. § 12, and contains mandatory procedures and rules that tribal law enforcement programs must follow. As discussed



above, the BIA Handbook prohibited the Tribe from firing Miller on false accusations and without following mandated termination procedures.

The Tribe failed to follow BIA Handbook rules and procedures, particularly firing Miller on knowingly false grounds. Accordingly, the Tribe did not have discretion to fire Miller for false accusations, and it did not have discretion to ignore the BIA Handbook's required termination rules and procedures. Thus, the United States failed to satisfy the first prong of the discretionary function exception test.

B. The discretionary function exception to the FTCA does not shield the United States from liability for wrongful termination or tortious discharge.

Even if the Tribe had discretion to fire Miller, which it did not, the United States failed to establish that it satisfied the second prong of the discretionary function test. In Nevada, tortious discharge is “the so-called public policy tort.” *D’Angelo v. Gardner*, 107 Nev. 704, 712 (1991). “An employer commits a tortious discharge by terminating an employee for reasons which violate public policy.” *Id.*

Nevada has adopted the federal discretionary-function immunity test and has determined that Nevada is not immune from suit from intentional torts or bad-faith conduct committed by its employees. *Fran. Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 724 (Nev. 2017), *cert. granted sub nom. Fran. Tax Bd. of California v. Hyatt*, 138 S. Ct. 2710 (2018).

The Ninth Circuit does not appear to have considered the issue of whether 28

U.S.C. § 2680(a) provides an exception for intentional torts not specifically enumerated under 28 U.S.C. § 2680 (h). However, in *Sabow v. U.S.*, 93 F.3d 1445, 1456 n. 13 (9th Cir. 1996), as amended (Sept. 26, 1996), the Court stated, as a foregone conclusion, and without any analysis, that the discretionary function exception did not apply to the plaintiffs' intentional infliction claim.<sup>1</sup>

NRS 41.032 includes similar language to 28 U.S.C. § 2680(a), and specifically provides immunity for government employees' discretionary decisions "whether or not the discretion involved is abused," as does 28 U.S.C. § 2680(a). Nevada's exception for intentional torts or bad-faith misconduct is not binding on this Court, but *Hyatt* is a recent case that provides an accurate overview of the conflict between circuits with respect to this issue. *Hyatt* summarized that

[o]ther courts addressing similar questions have reached differing results, depending on whether the court views the restriction against considering subjective intent to apply broadly or is limited to determining if the decision is a policy-making decision. Some courts conclude that allegations of intentional or bad-faith misconduct are not relevant to determining if the immunity applies because courts should not consider the employee's subjective intent at all. *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135 (10th Cir. 1999); see also *Sydney v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008). But other courts focus on whether the employee's conduct can be viewed as a

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The court's analysis in *Sabow* is limited to whether the plaintiffs' claim for intentional infliction of emotional distress was barred by the intentional torts exception in 28 U.S.C. § 2680(h) since that tort is not enumerated in that statute. The court concluded that the intentional torts exception does not apply to intentional infliction of emotional distress. *Id.* at 1457.

policy-based decision and hold that intentional torts or bad-faith misconduct are not policy-based acts. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006); *Palay v. United States*, 349 F.3d 418, 431–32 (7th Cir. 2003); *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000). These courts bar the application of discretionary-function immunity in intentional tort and bad-faith misconduct cases when the government action involved is “unrelated to any plausible policy objective[ ].” *Coulthurst*, 214 F.3d at 111.

*Hyatt*, 407 P.3d at 731. Ultimately, *Hyatt* determined that case law prior to adopting the federal two-prong standard was “consistent with the reasoning in *Coulthurst* that intentional torts and bad-faith conduct are acts unrelated to any plausible policy objective and that such acts do not involve the kind of judgment that is intended to be shielded from judicial second-guessing.” *Id.* at 732 (internal quotes omitted). This reasoning is consistent with *Gaubert*, which provided the following example while discussing the second prong of the test:

[t]here are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official’s decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

*Gaubert*, 499 U.S. at 325 n. 7. Perhaps most importantly, the express language of the discretionary function exception, 28 U.S.C. § 2680(a), does not extend to bad faith actions. The statute provides merely an abuse of discretion standard. *See* 28

U.S.C. § 2680(a) (providing exception “whether or not the discretion involved be abused.”). As *Hyatt* points out, “bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith involves an implemented attitude that completely transcends the circumference of authority granted to the actor.” *Hyatt*, 407 P.3d at 730. Accordingly, a court’s turning a blind eye to all intentional or bad-faith misconduct is inconsistent with the language of 28 U.S.C. § 2680(a).

Furthermore, the drafters of 28 U.S.C. § 2680 enumerated a laundry list of intentional torts in subsection (h). This indicates that the drafters did not intend to include intentional torts in the discretionary function exception because if subsection (a) were designed to include all intentional torts, then subsection (h) would be duplicative. Also noteworthy is the fact that certain intentional torts are conspicuously absent from subsection (h), such as intentional infliction of emotional distress, as is apparent in *Sabow*, and tortious discharge.

In this case, the Tribe terminated Miller for being the victim of a crime and in retaliation for his reporting workplace harassment and discrimination perpetrated by his superiors. Since those reasons clearly violate public policy, Miller successfully stated a claim for tortious discharge. The Tribe’s action was not within the discretionary function exception because firing an employee for being the victim of

a crime and in retaliation, “cannot be said to be based on the purposes that the regulatory regime seeks to accomplish,” *Gaubert*, 499 U.S. at 325 n. 7, or “any plausible policy objective,” *Hyatt*, 407 P.3d at 732.

The Tribe’s actions extend well beyond the abuse of discretion standard established in the discretionary function exception and easily reaches into the realm of bad faith. Accordingly, the United States cannot satisfy the second prong of the discretionary function test. Therefore, the District Court erred in determining that it did not have subject matter jurisdiction over Miller’s wrongful termination/tortious discharge claims.

II. THE DISTRICT COURT ERRED BY DISMISSING THE CASE IN ITS ENTIRETY WHERE THE UNITED STATE’S MOTION TO DISMISS DID NOT CHALLENGE MILLER’S SEPARATE *RESPONDEAT SUPERIOR* CLAIM, AND WHERE THE COURT MADE NO SUA SPONTE RULINGS ON THAT ISSUE.

The District Court erred by inadvertently dismissing Miller’s claim for damages under the separate theory of *respondeat superior*. ER164. The United State’s Motion to Dismiss the SAC did not attempt to dispose of Miller’s *respondeat superior* claim. ER054-68. Miller accordingly did not defend his *respondeat superior* claim in his Opposition to defendant’s Motion to Dismiss the SAC. The District Court likewise did not address whether Miller’s separate *respondeat superior* claim survived Defendant’s Motion to Dismiss under Rule 12(b)(1).

Accordingly, the District Court improperly dismissed the case “in its entirety” since Miller’s *respondeat superior* claim was outside the scope of the Motion to Dismiss and the District Court did not sua sponte consider the legal theory of Miller’s *respondeat superior* claim, or make any ruling with respect to that cause of action. As such, the District Court improperly dismissed Miller’s entire complaint without addressing his *respondeat superior* claim, which survives Defendant’s Motion to Dismiss since it was not challenged therein.

III. THE DISTRICT COURT HAS JURISDICTION OVER MILLER’S RESPONDEAT SUPERIOR CLAIM.

The District Court has subject matter jurisdiction to consider Miller’s *respondeat superior* claim. In Nevada, *respondeat superior* is a claim based on a status relationship between the accused and a primary tortfeasor, such as an employer-employee situation. The plaintiff must show: (1) a tortfeasor is employed by the defendant; (2) the tortfeasor was under the defendant’s control and acting in the scope of the tortfeasor’s employment at the time the tort was committed; (3) relationship of the parties is of superior and subordinate, where the tortfeasor is subject to the control of the defendant; and (4) proximate cause and damages. NRS 41.130; NRS 41.745; *Wood v. Safeway, Inc.*, 121 Nev. 724 (2005); *Kornton v. Conrad, Inc.*, 119 Nev. 123, 67 P.3d 316 (2003); *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, (1996); *Batt v. State*, 111 Nev. 1127, 901 P.2d 664 n.6 (1995);



*Evans v. Southwest Gas*, 108 Nev. 1002, 842 P.2d 719 (1992); *Nat'l Convenience Stores v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978); *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, (1970).

In *Hall v. U.S.*, Case No. CV-N-02-578 HDM-RAM,(D. Nev. June 3, 2004)<sup>2</sup>, the Court considered a motion for dismissal, or in the alternative for summary judgment, brought by defendant United States of America, arguing that the FTCA's discretionary function exception required dismissal of the plaintiff's complaint for lack of subject matter jurisdiction under FRCP 12(b)(1). ER008. In ruling on the motion for dismissal, the Court identified that the plaintiff's complaint relied on two theories: (1) the BIA was negligent in failing to intervene to protect the plaintiff from the tribal chair terminating him in retaliation; and (2) the United States is the tribal chair's employer, and is therefore liable under *respondeat superior* for the tribal chair's tortious conduct. *Hall v. U.S.* (Order denying Defendant's Motion for Dismissal) (D. Nev. June 3, 2004). ER008-9.

The Court *denied* the United State's motion for dismissal on the plaintiff's claim that the United States was liable in *respondeat superior* for the tribal chair's conduct since the tribal chair acted in the scope of his employment in carrying out the

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Plaintiff Gary Hall was a police officer for the Walker River Tribal Police who was terminated in retaliation for initiating criminal proceedings against the tribal chairman. Similar to the present case, the Walker River Tribe did not provide Mr. Hall with his administrative due process rights, promised by a 638 Contract between the United States and the Walker River Tribe, prior to terminating him.

638 contract for tribal law enforcement when he terminated the plaintiff. ER007-10. The *Hall* court declared that “[t]he Ninth Circuit has repeatedly allowed federal district courts to hear federal question claims against tribal members when the tribal member has exhausted his administrative remedies.” ER010. See also, *Arizona Public Service Co. v. Aspaas*, 77 F. 3d 1128 (9th Cir. 1995); *Stock West, Inc. v. Confederated Tribes of the Coleville Reservation*, 873 F.2d 1221 (9th Cir. 1989).

Similar to *Hall*, in the present case Miller’s SAC claimed that the Tribe’s law enforcement personnel and administration were employed by Defendant and were at all times mentioned in the complaint acting within the scope of their employment. ER148. Miller’s SAC alleged specific wrongdoings of various Tribe employees leading to his termination, including Chief of Police Darrell Bill, Sergeant Avansino, Sergeant Zuniga, and Tribal Administrator Gerald Smith, who were all acting within the scope of their employment. ER152-54. Miller’s SAC alleged that pursuant to the 638 Contract between the Tribe and the United States, the United States is the employer of the Tribe and all of the Tribe’s law enforcement personnel and administration, and as employer of the Tribe and all of the Tribe’s law enforcement personnel and administration, the United States is vicariously liable for the Tribe’s employees’ tortious conduct under *respondeat superior*. ER164.

Accordingly, the District Court had subject matter jurisdiction over Miller’s

*respondeat superior* claim, which, under *Hall*, is not subject to dismissal pursuant to the FTCA's discretionary function exception. Therefore, dismissal of Miller's *respondeat superior* claim was improper.

### CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed, and the case remanded for trial for consideration of the merits of Miller's claims.

Respectfully submitted,

ALLING & JILLSON, LTD.

DATED: May 3, 2019



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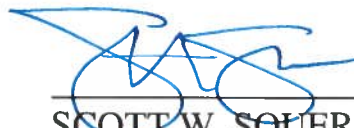
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### STATEMENT OF RELATED CASES

Pursuant to Fed. R. App. P. 28-2.6, counsel for Appellant certifies that:

Counsel is not currently aware of any other cases previously heard in this Court which concern the matters being briefed, that involve the same or closely related issues, or involve the same transaction or event.

DATED: May 3, 2019



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Attorneys for Appellant John Miller

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: May 3, 2019



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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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