

No. 19-15122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MILLER

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA and
DOES 1-25,

Defendant-Appellee.

PLAINTIFF-APPELLANT JOHN MILLER'S REPLY BRIEF

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)

SCOTT W. SOUERS, ESQ.
Nevada Bar No.13405
ALLING & JILLSON, LTD.
Post Office Box 3390
Lake Tahoe, NV 89449-3390
Ph. (775) 588-6676
Attorneys for Appellant John Miller

TABLE OF CONTENTS

ARGUMENT.....	1
I. THE UNITED STATES HAS FAILED TO SATISFY THE FIRST PRONG OF THE DISCRETIONARY FUNCTION TEST.....	1
A. Federal Regulations and Policies Specifically Prescribed a Course of Action the Tribe was Required to Follow in Terminating Miller.....	1
B. The United States fails to show that the termination rules and procedures in the BIA Handbook are not mandatory.....	5
C. In the District Court, Miller Raised the Argument that the BIA Handbook Rules and Procedures were Mandatory.....	6
II. THE UNITED STATES FAILED TO SATISFY THE SECOND PRONG OF THE DISCRETIONARY FUNCTION TEST.....	8
A. The United States Fails to Show that the Discretionary Function Exception Does Not Apply to Wrongful Termination or Tortious Discharge.....	8
B. Miller Did Not Waive the Argument that the Discretionary Function Exception Does Not Apply to Wrongful Termination or Tortious Discharge.....	9
III. THE UNITED STATES' ARGUMENTS ASKING THE COURT TO DISREGARD THE FACTS AND LAW FAIL.....	11
A. Miller's Statement of Facts Exists.....	11
B. Miller's Statement of Facts Complies with FRCP 28(a)(8)(A).....	14
C. ER019 is Properly Part of the Record.....	16

D.	Whether ER019 Clearly States that Miller was a Victim of Identity Theft is Not at Issue.....	18
IV.	MILLER'S RESPONDEAT SUPERIOR CLAIM SURVIVED THE DISMISSAL ORDER.....	20
A.	Miller Made a Claim that the United States is Liable for the Wrongs Alleged in the Complaint on the Basis of Respondeat Superior.....	20
B.	Miller Does Not Misconstrue <i>Hall's</i> Holding.....	22
	CONCLUSION.....	26

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Big Owl v. U.S.</i> , 961 F. Supp. 1304 (1997)	6
<i>Dahlstrom v. U.S.</i> , C16-1874RSL, 2018 WL 1046829, at *2 (W.D. Wash. Feb. 26, 2018).....	6
<i>Greenwood v. F.A.A.</i> , 28 F.3d 971 (9th Cir. 1994).....	13,15
<i>Hall v. United States of America</i> , Case No. CV-N-02-578 HDM-RAM, (D. Nev. June 3, 2004).....	22
<i>Hillis v. Heineman</i> , 626 F.3d 1014, 1019 (9th Cir. 2010).....	10
<i>Kaass L. v. Wells Fargo Bank, N.A.</i> , 799 F.3d 1290, 1293 (9th Cir. 2015).....	7,8,10
<i>Lacey v. Maricopa County</i> , 693 F.3d 896, 925 (9th Cir. 2012).....	12
<i>Ramirez v. County of San Bernardino</i> , 806 F.3d 1002 (9th Cir. 2015).....	13
<i>Richman v. Straley</i> , 48 F.3d 1139, 1146 (10th Cir. 1995).....	3,4
<i>Rosa v. Scottsdale Meml. Health Sys., Inc.</i> , 132 F.3d 38, at *2 (9th Cir. 1997).....	16
<i>Sydnes v. U.S.</i> , 523 F.3d 1179, 1183 (10th Cir. 2008).....	4,5
<i>United States v. Gaubert</i> , 499 U.S. 315, 322-323 (1991).....	1,2,3,5,23

STATUTES

25 C.F.R. § 12.....	5,6,18
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ARGUMENT

The United States' Answering Brief provides little substance on the central issues of Appellant John Miller's (hereinafter "Miller") appeal, which are: Whether the discretionary function exception to the Federal Tort Claims Act (hereinafter "FTCA") shields the United States from liability (1) where the Tribe violated mandatory termination procedures in discharging Miller, and (2) where Miller alleges wrongful termination and tortious discharge. Instead, the United States provides lengthy, misguided, argument as to why the Court should disregard the egregious facts in this case and the law pertaining to the issues at hand. *See* Ans. Br. Sections VI. B, C, D, and G. Accordingly, the United States fails to establish that the discretionary function applies in this case. Furthermore, Miller establishes below that the United States' position that the Court should disregard the facts and law of this case is without merit.

I. THE UNITED STATES HAS FAILED TO SATISFY THE FIRST PRONG OF THE DISCRETIONARY FUNCTION TEST.

A. Federal Regulations and Policies Specifically Prescribed a Course of Action the Tribe was Required to Follow in Terminating Miller.

As discussed in the Opening Brief, the discretionary function exception "covers only acts that are discretionary in nature, acts that involve an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal quotes omitted).

"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.* (internal quotes omitted). "If the employee violates the 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.

Here, the Tribe's employees involved in Miller's termination were federal employees for FTCA purposes pursuant to the 638 Contract. ER149. The Tribe's employees failed to follow the mandatory termination appeals and investigations procedures prescribed by the BIA Handbook. ER153-155. No "element of judgment or choice" exists with respect to following mandatory termination appeals and investigation procedures. *Gaubert*, 499 U.S. 315, 322-23 (1991); *see also* 25 C.F.R. § 12, generally. As such, the Tribe had no *discretion* to terminate Miller or conduct his appeal in a manner that did not comply with the BIA Handbook. While employment decisions may be discretionary as a general matter, the United States government has expressly removed the Tribe's discretion with respect to the termination process by implementing mandatory regulations, procedures, and policies via the BIA Handbook. *See* 25 C.F.R. § 12, generally. Therefore, the discretionary function exception does not apply here.

The United States' Answering Brief fails to provide any legal reason why the Tribe was not obligated to follow the mandates in the BIA Handbook and the various provisions of Section 12 of Title 25 of the Code of Federal Regulations cited in Section I.A of the Argument in Miller's Opening Brief. *See* Ans. Br. p. 19-21. Instead, the Answering Brief rests on the United States' assertion that, notwithstanding the fact that federal regulations and policies "specifically prescribe[d] a course of action for [the Tribe] to follow" in this case with respect to termination procedures, *see Gaubert*, 499 U.S. at 322, the discretionary function exception should apply because "[d]ecisions regarding employment and termination are inherently discretionary." *See* Ans. Br. P. 18, citing *Richman v. Straley*, 48 F.3d 1139, 1146 (10th Cir. 1995). In essence, the United States argues that employment decisions, including termination, are always discretionary. However, such a general rule cannot co-exist with *Gaubert* unless an exception exists for circumstances such as the present, where a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322.

Further, the United States' reliance on *Richman* is misplaced. The torts alleged in the present case are easily distinguished from the torts alleged in *Richman*. In *Richman*, the plaintiff was terminated and then sued for tortious interference with prospective economic relations. 48 F.3d at 1146. The plaintiff's claim was tantamount

to suing on the basis that she would no longer be employed. *See id.* She did not allege that she was wrongfully terminated based on false criminal accusations, in violation of federal regulations and policies. The full quote in *Richman* highlights this fact: "Decisions regarding employment and termination are inherently discretionary, *especially where, as here, the relevant statutes provide no guidance or restrictions.*" *Id.* (emphasis added). Accordingly, the court acknowledged that employment decisions are not entirely discretionary where statutes, regulations, or policies provide a prescribed course of action.

Miller's case is dissimilar to *Richman* because regulations and policies prescribed a course of action for the Tribe to follow, and the Tribe failed to follow the prescribed course of action despite Miller requesting that the Tribe follow such course of action. ER154-155. Accordingly, *Richman* is not controlling here. Further, 10th Circuit authority is not binding on this Court, as discussed in the related analysis on the conflict among the Circuits in Opening Brief pages 22-26.

The United States also incorrectly cites to *Sydney v. United States*, 523 F.3d 1179, 1184 (10th Cir. 2008) to support its argument that termination decisions are discretionary notwithstanding any "federal statute, regulation, or policy [that] specifically prescribes a course of action for an employee to follow." Again, *Sydney* is a 10th Circuit case, and is therefore not controlling. Regardless, *Sydney* states, "To overcome the discretionary function exception and thus have a chance of establishing

a waiver of sovereign immunity, plaintiffs must show that the federal employee's discretion [to fire the plaintiff] was limited by a federal statute, regulation, or policy." *Id.* (internal quotes omitted). Accordingly, *Sydney* acknowledges the fact that termination decisions are not always discretionary. The *Sydney* plaintiffs failed to state a claim, in part, because they cited to state law statutes to support their claims. *Id.* By contrast, Miller points to federal regulations and policies (25 C.F.R. § 12 and the BIA Handbook) in keeping with *Gaubert*¹. As such, the United States' argument fails because it is entirely inconsistent with *Gaubert*. Thus, the discretionary function exception does not apply here.

B. The United States fails to show that the termination rules and procedures in the BIA Handbook are not mandatory.

Miller's Opening Brief cites to several federal regulations that establish that the rules and procedures in the BIA Handbook are mandatory. One such federal regulation is 25 C.F.R. § 12.14 ("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

¹

Miller further distinguishes *Sydney* on page 16, 20, and 23 of the Opening Brief.

Handbook (BIA Handbook)" (emphasis added). App. Br. p. 18-20.² The United States provides neither legal authority nor any substantive analysis in support of its conclusion that the BIA Handbook termination rules and procedures are not mandatory. *See* Ans. Br. p. 21-23.

The United States also fails to rebut Miller's argument and analysis that *Big Owl v. U.S.*, 961 F. Supp. 1304 (1997) and *Dahlstrom v. U.S.*, C16-187RSL, 2018 WL 1046829 (W.D. Wash. Feb. 26, 2018) support Miller's position and not the United States' position. *See* Ans. Br. p. 22-23. The United States merely restates Miller's Opening Brief argument and then concludes that Miller's argument is wrong without providing any support. *Id.* at 23. Therefore, the law-enforcement-officer termination rules and procedures in the BIA Handbook are mandatory.

C. In the District Court, Miller Raised the Argument that the BIA Handbook Rules and Procedures were Mandatory.

The United States' argument that this Court should not consider Miller's

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See also 25 C.F.R. §12.11 (“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. §12.12 (“Indian country law enforcement programs that receive Federal funding and/or commissioning will be subject to a periodic inspection or evaluation to provide technical assistance, to ensure compliance with minimum Federal standards, and to identify necessary changes or improvements to BIA policies.”), 25 C.F.R. §12.13 (“Your BIA law enforcement commission may be revoked, your law enforcement contract may be canceled, and you may no longer be eligible for tribal shares allocated from the law enforcement budget.”), and BIA Handbook provisions at ER238, ER240-243, and ER249.

arguments that are based on federal regulations because "in making his arguments before the district court, Miller did not cite to or rely on the federal regulations identified [in his Opening Brief]," is without merit. *See* Ans. Br. p. 21. "Ordinarily, an appellate court will not hear an issue raised for the first time on appeal." *Kaass L. v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015). However, one of four exceptions to that rule is where "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *Id.* Furthermore, context and reason suggest that the rule applies to new issues or arguments raised for the first time on appeal, not additional law in support of arguments made before the trial court.

Here, Miller is not arguing for the first time on appeal that the BIA Handbook's termination rules and procedures are mandatory. Miller made this argument before the district court and the district court acknowledged the argument. *See* ER017, ln. 6-8 ("Plaintiff argues the discretionary function doctrine does not apply because the Tribe's discretion in deciding to fire him was constrained by mandatory BIA and Tribe procedures regarding employee termination that the Tribe did not follow"). In making its argument, the United States fails to distinguish between raising a new argument or issue as opposed to citing additional legal support for an existing argument. Miller's citations to additional legal authority in support of his arguments

do not constitute new issues or arguments raised on appeal.

Even if Miller's citations to additional law in support of his argument fell under the rule prohibiting new arguments (they do not), the exception cited above pertaining to purely legal issues would apply. *See Kaass*, 799 F.3d at 1293. Specifically, the supposed new issue, whether the BIA Handbook's termination procedures were mandatory, is an issue purely of law because it pertains strictly to citations to federal regulations, *see* Ans. Br. p. 21 ("in making his arguments before the district court, Miller did not cite to or rely on the federal regulations identified above."), and it is not factual. The United States suffers no prejudice because it had the opportunity in its Answering Brief to address any new authority. Further, the United States does not suggest that it would be prejudiced by addressing the issue now, nor does the United States argue that this issue is a factual issue. Therefore, the United States presents no reason why the Court should not hear Miller's arguments that the BIA Handbook procedures are mandatory pursuant to federal regulations. For these reasons, the United States failed to satisfy the first prong of the discretionary function test.

II. THE UNITED STATES HAS FAILED TO SATISFY THE SECOND PRONG OF THE DISCRETIONARY FUNCTION TEST.

A. The United States Fails to Show that the Discretionary Function Exception Does Not Apply to Wrongful Termination or Tortious Discharge.

Miller establishes in his Opening Brief that the discretionary function

exception to the FTCA does not shield the United States from liability for wrongful termination or tortious discharge, citing federal statutes and case law.³ *See* App. Br. p. 22-26. The United States makes no direct attempt to rebut the legal authority that supports the argument that the discretionary function exception to the FTCA does not shield the United States from liability for wrongful termination or tortious discharge. *See* Ans. Br. p. 18-19, 23-25. Rather, the United States merely states that hiring and firing decisions are "usually," "generally," or always, discretionary. *See id.* The United States largely relies on its incorrect assertion that Miller waived the argument, which will be addressed in Section II.B, *supra*. As such, the discretionary function exception to the FTCA does not shield the United States from liability for wrongful termination or tortious discharge. Thus, the district court erred in holding that it did not have subject matter jurisdiction over Miller's FTCA claims.

B. Miller Did Not Waive the Argument that the Discretionary Function Exception Does Not Apply to Wrongful Termination or Tortious Discharge.

Miller's Second Amended Complaint (hereinafter "SAC") stated a claim for wrongful termination or tortious discharge, alleging retaliatory discharge and bad

³Miller also establishes that the so-called Intentional Torts exception in 28 U.S.C. section 2680(h) does not apply here because wrongful termination and tortious discharge are not included in subsection (h)'s list of excluded intentional torts. The United States makes no argument on this point. *See* Ans. Br. generally.

faith, despite the United States' assertion to the contrary on page 24 of the Answering Brief.⁴ *See* ER156-ER164. The United States argues incorrectly that the Court should disregard Miller's argument that the discretionary function exception does not apply to wrongful termination or tortious discharge, arguing that Miller did not raise the argument in the district court. *See* Ans. Br. p. 23. The United States misconstrues the law it cites in support of its position. *Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010), stands for the proposition that a party cannot make new claims or raise new issues on appeal. Notwithstanding, the rule has four exceptions, one of which, as mentioned above, is where "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *Kaass*, 799 F.3d at 1293.

Here, Miller has not raised a new issue or made a new claim. *See* ER156-ER164. Rather, he simply presents additional legal authority and analysis in support of his position. Miller's argument that the United States is liable under the FTCA for wrongful termination and tortious discharge is plain from the face of the SAC. *See id.*

Even if this Court determines that Miller makes a new argument on appeal

⁴In direct contrast to the United States' assertion, the SAC, at ¶ 117, ER162-163, states that "the Tribe terminated Miller for being the victim of identity theft."

pursuant to *Hillis* (Miller has not), the *Kaass* exception applies because whether the discretionary function exception shields the United States from liability for wrongful termination or tortious discharge is purely a legal issue, and the United States suffers no prejudice as a result of Miller's alleged failure to raise the issue in the district court. The United States does not offer any reason why it would be prejudiced by addressing the issue now, nor does the United States argue that this issue is a factual issue. Therefore, Miller respectfully requests that this Court determine that Miller did not waive his argument that the discretionary function exception to the FTCA does not shield the United States from liability for wrongful termination or tortious discharge.

III. THE UNITED STATES' ARGUMENTS ASKING THE COURT TO DISREGARD THE FACTS AND LAW FAIL.

A. Miller's Statement of Facts Exists.

The United States' argument that this Court should disregard Miller's entire Statement of Facts on the basis that "most" or "many" of the assertions in Miller's Statement of Facts cite to the original complaint is baseless. *See* Ans. Br. p. 11. The Excerpts of Record was prepared in accordance with Circuit Rule 30-1, which states,

The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision. The parties should ensure that in accordance with the limitations of Circuit Rule 30-1, those parts of the record necessary to permit an informed analysis of their positions are included in the excerpts.

The United States cites to no court rule that prohibits a party from citing to a subsequently-amended complaint. Ans. Br. p. 11-13. Furthermore, the United States dramatically misconstrues the law cited in support of its argument. Ans. Br. p.11. Specifically, the United States quotes only a portion of the "*Forsyth*" rule stated in *Lacey v. Maricopa County*, 693 F.3d 896, 925 (9th Cir. 2012) to argue that the original complaint is "non-existent" for purposes of record citations on appeal. The full quote is as follows:

The *Forsyth* rule is premised on the notion that the amended complaint supersedes the original, the latter being treated thereafter as non-existent. If a plaintiff fails to include dismissed claims in an amended complaint, the plaintiff is deemed to have waived any error in the ruling dismissing the prior complaint.

Id. (Internal quotes omitted). The United States takes the *Forsyth* rule completely out of context. *Lacey's* holding overruled the *Forsyth* rule, in part, holding that "claims dismissed with prejudice and without leave to amend, [need not] be repleaded in a subsequent amended complaint to preserve them for appeal." *Id.* at 928. The rule in no way indicates that a party cannot cite to a later-amended complaint and its exhibits in a record on appeal. To the extent *Lacey* applies to the present context (it does not), it rebuts the United States' contention that a subsequently-amended complaint is "non-existent" on appeal because it directly permits a party to cite to a subsequently-amended complaint where "claims [are] dismissed with prejudice and

without leave to amend." *Id.* As such, a subsequently-amended complaint is not "non-existent" on appeal.

The United States' citations to *Ramirez v. County of San Bernardino*, 806 F.3d 1002 (9th Cir. 2015) and *Greenwood v. F.A.A.*, 28 F.3d 971 (9th Cir. 1994) are also out of context. *See* Ans. Br. p. 12. *Ramirez* simply stands for the proposition that a motion to dismiss a complaint is moot if it targets a complaint that is no longer in effect. 806 F.3d at 1008. In *Greenwood*, the "truffles" for which judges should not have to hunt refers to a party's unspecified arguments or issues raised on appeal. 28 F.3d at 977. The case has nothing to do with whether an appeal court may consider citations to a subsequently-amended complaint in a record on appeal. *See id.* Accordingly, the United States has not supported its argument with any relevant law.

The United States is attempting to use a rule of convenience as a battering ram in order to avoid analyzing the facts and merits of the case.

Most references to the original complaint in the Statement of Facts refer directly to the exhibits to the original complaint, specifically the 638 Contract and the BIA Handbook, Exhibits A and B, respectively, and not the text of the original Complaint. In fact, the Exhibits to the original Complaint also appear in the Excerpts of Record as exhibits to the SAC. For example, a portion of the 638 Contract appears at ER140 through ER146 as an Exhibit to the SAC, and the entire 638 Contract

appears at ER188 through ER235 as an exhibit to the original Complaint. The relevant portions of the BIA Handbook appear at ER121 through ER134 as an exhibit to the SAC and at ER237 through ER250 as an exhibit to the original Complaint. Accordingly, even if the United States' argument that the original complaint does not exist for purposes of citation in the Excerpts of Record had merit (it does not), the Excerpt of Records still contains the portions of the record upon Miller's arguments rely. Accordingly, the Excerpts of Record contains "those parts of the record necessary to permit an informed analysis of [Miller's] positions." *See* Circuit Rule 30-1. Thus, Miller's Statement of Facts exists.

B. Miller's Statement of Facts Complies with FRCP 28(a)(8)(A).

Again, the United States seeks to avoid the merits of this appeal by asking the Court to disregard portions of Miller's Statement of Facts, citing FRAP 28(a)(8)(A) and Circuit Rule 28-1. *See* Ans. Br. p. 12-13. FRAP 28(a)(8)(A) states that "[t]he appellant's brief must contain, under appropriate headings and in the order indicated . . . the argument, which must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies." Circuit Rule 28-1 gives this Court discretion to strike briefs that are not "prepared and filed in accordance with the Federal Rules of Appellate Procedure and these rules."

The Court should not consider the United States' argument on this issue by virtue of the United States' own argument that the Court "should not have to sift through the record to try to discern the factual basis for Miller's arguments." *See* Ans. Br. p.13, citing *Greenwood*, 28 F.3d at 977. Again, *Greenwood*, refers to issues and arguments, not facts. Moreover, the United States fails to point out any portions of the Statement of Facts that are unsupported by record citations, which it must do under *Greenwood*. *See* Ans. Br. p. 12-13. Accordingly, the United States has not shown that Miller's Opening Brief was not "prepared and filed in accordance with the Federal Rules of Appellate Procedure." *See* FRAP 28(a)(8)(A). Furthermore, the United States does not point to any particular fact that it contends is inconsistent with the SAC.⁵ *See* Ans. Br. p. 12-13. Additionally, the United States makes no argument as to why the Court, in its discretion, should strike Miller's entire Statement of Facts or any portion thereof pursuant to Circuit Rule 28-1. *See id.* Therefore, Miller respectfully requests that this Court not strike Miller's Statement of Facts or any portion thereof.⁶

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All factual assertions in the Opening Brief's Statement of Facts can be found in the SAC, ER147-167.

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Notably, this Court could strike the Answering Brief pursuant to the United States' own argument because the Answering Brief fails to support its assertions with citations to the Excerpts of Record. Circuit Rule 28-2.8 states, "Every assertion in

C. ER019 is Properly Part of the Record.

The United States' argument that the Court should disregard ER019 is entirely without basis. *See* Ans. Br. 13-14. Again, the United States takes a case entirely out of context. *See* Ans. Br. p. 13-14. The sole case that the United States cites in support of its argument is *Rosa v. Scottsdale Meml. Health Sys., Inc.*, 132 F.3d 38, at *2 n.2 (9th Cir. 1997) (unpublished disposition) ("*Rosa*"). *Rosa* is not citable pursuant to Circuit Rule 36-3(c) because it is an unpublished opinion issued after January 1, 2007. Accordingly, the United States provides no legal basis upon which the Court should disregard ER019.

Nevertheless, *Rosa* is not applicable here. At Note 2, *Rosa* states that the appellant raised a new factual allegation for the first time on appeal "citing a single page from [her] deposition." The court "reviewed the entire district court record, and it [was] clear that this evidence was not submitted to the district for its review of the appellees' summary judgment motion." *Id.*

The present circumstances are starkly different. Miller submitted ER019 to the

briefs regarding matters in the record shall be supported by a reference to the location in the ***excerpts of record*** where the matter is to be found" (emphasis added). The United States cites to ECF Numbers throughout its Answer and does not cite to the Excerpts of Record except to refer to ER019. *See* Ans. Br. generally, and 13-14. Accordingly, this Court could, in its discretion, strike the Answering Brief, pursuant to Circuit Rule 28-1.

district court on September 18, 2018, when he filed his Motion for Leave to File [Proposed] Third Amended Complaint (ECF No. 57), attaching the proposed Third Amended Complaint, which included ER019 as an exhibit. ER019 and ER270. Miller's discovery of ER019 was largely the basis of the motion. The district court called out ER019 in the Order when it said, "Plaintiff responds that the Tribe wrongfully terminated him because he was the victim of identity theft-someone else applied for unemployment benefits in his name. (ECF No. 57-1 at 9-11)." *See* ER013, ln. 18-19. Accordingly, the district court, necessarily, and by the terms of the Order, considered the Third Amended Complaint, and ER019 attached thereto, where it denied Miller's Motion to Amend "because his proposed TAC (ECF No. 57-1) does not cure his case's jurisdictional defects." *See* ER012, ln. 18-19.

The United States fails to explain its argument that the Court should disregard ER019 because Miller "has not appealed the denial of the motion to amend the SAC, and the district court did not consider 'ER019' in dismissing the SAC." *See* Ans. Br. p. 13. The district court dismissed the SAC and denied the motion to amend in the same Order. *See* ER012, ln. 16-19. That Order is the subject of this Appeal. The United States provides no citation to the record wherein the district court indicates that it did not consider ER019 in dismissing the SAC. *See* Ans. Br. p. 13-14. Miller is not aware of any such statement by the district court. Therefore, the United States'

argument that the Court should disregard ER019 is without any basis in law, fact, or reason.

D. Whether ER019 Clearly States that Miller was a Victim of Identity Theft is Not at Issue.

The United States' misguided argument in Answering Brief section VI.E. reveals precisely why federal regulations and the BIA Handbook employee termination procedures are mandatory. *See* Ans. Br. p. 14. As recited in the Opening Brief, Title 25, Code of Federal Regulations, part 12.53, states that "[a]ll allegations of misconduct must be thoroughly investigated and appropriate actions taken when warranted." *See* ER121. Further, BIA Handbook section 4-48-06 states that "[t]he objective of the investigation is to determine the truth. PSD investigations will be objective, fair, and thorough." *See* ER127.

Here, the Appeals Meeting Summary, ER093, and the Decision of Appeals, ER089, show that the Tribe's alleged appeals process did not comply with the BIA Handbook and that its investigation was wholly insufficient. The first meeting in the "appeals process" included no independent investigation of facts whatsoever. *See* ER093. Chief Bill, who had ignored Miller's previous complaint of being harassed by other officers, ER152-153, presided over the meeting, and conducted no independent investigation of the facts. ER093. Likewise, Sergeant Avansino, against whom Miller complained of harassment, participated in the meeting and signed the

Appeals Meeting Summary. *See* ER152-154 and ER093. At that initial meeting, Miller was simply questioned as to why he did not do one thing or another to clear his name. *See id.* The follow-up meeting by the purported Appeals Committee also failed to include an independent investigation of facts. *See* ER089. The Decision of Appeals states that the Appeals Committee had reviewed Miller's termination letter, the Letter of Notice of Appeal, the Appeals Meeting Summary, a letter from Miller, the BIA Handbook, and a "[l]etter from Director of Finance and Administration, subject: Fraud issue," and a fax relating to the notice of claim. ER089. None of these documents indicate that the Tribe performed any independent investigation whatsoever.

ER019 establishes that the Tribe's investigation was so deficient that it did not reveal that the Nevada Department of Employment, Training and Rehabilitation (hereinafter "DETR") communicated to the Tribe on September 5, 2014, that Miller was innocent, which was **prior** to the Appeals Committee decision on October 2, 2014. *See* ER019; *see also* ER078. Despite the United States' strained assertion to the contrary, the language in the note in ER019 is clear enough to indicate to a reasonable person that Miller did not file the false unemployment claim that led to the termination. Obviously, whoever "[a]dvised Reno Sparks Indian Colony that claim was hijack in ID Theft case" relayed more information to the Tribe than the

abbreviated phrasing typed into the notes. Notwithstanding, the phrase "ID theft" should have raised a red flag that Miller was innocent. This information should have been revealed during the Tribe's purported "appeals process." However, since the Tribe failed to follow the prescribed policies and procedures, Miller was wrongfully terminated for being the victim of a crime.

Further, the United States' argument that "Miller's failure to provide sufficient documentation to support his allegations before the Appeals Committee does not entitle him to relief in this action" shows that the United States misunderstands that the Tribe was obligated to investigate under the BIA Handbook. *See* Ans. Br. p. 16. Whether Miller investigated on his own and provided information in his defense is irrelevant to whether the Tribe fulfilled its mandatory obligations under the BIA Handbook. Also, the United States does not explain how the clarity of the notes in ER019 affects its argument for the discretionary function exception. Therefore, whether ER019 clearly states Miller was a victim of ID theft (it does) is not an issue in this case.

IV. MILLER'S RESPONDEAT SUPERIOR CLAIM SURVIVED THE DISMISSAL ORDER.

A. Miller Made a Claim that the United States is Liable for the Wrongs Alleged in the Complaint on the Basis of Respondeat Superior.

The United States conflates the terms "claim" and "cause of action" in its

Answering Brief, and thereby incorrectly asserts that Miller did not allege a claim for respondeat superior. *See* Ans. Br. p. 8-11, 25. Pursuant to Black's Law Dictionary, a "claim" is (1) "A statement that something yet to be proved is true. [(2)] The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional. [(3)] A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for." (11th ed. 2019). By contrast a "cause of action" is "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person." *Id.* Accordingly, courts do not dismiss causes of action because courts do not dismiss facts. Rather, courts dismiss claims for relief on the basis that the plaintiff is not entitled to relief for one reason or another, notwithstanding the alleged wrongs of the defendant.

That being said, pursuant to FRCP 8(a),

[A] claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

///

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Here, Miller's respondeat superior claim is a claim for relief because it asserts that Miller is entitled to relief based on the wrongs he suffered due to the actions of federal employees. It is not a cause of action, and the SAC does not label it as such. Neither party briefed for the district court whether the United States may be liable under a claim of respondeat superior because the United States did not attempt to have that claim dismissed in its Motion to Dismiss. *See* ER168-177. As such, in dismissing the SAC in its entirety without addressing Miller's respondeat superior claim, the district court failed to determine whether the wrongs committed against Miller gave rise to a claim for relief under a theory of respondeat superior. Therefore, the district court erred in dismissing Miller's respondeat superior claim.

B. Miller Does Not Misconstrue *Hall's* Holding.

Hall indicates that the district court erred by dismissing Miller's respondeat superior claim on jurisdictional grounds pursuant to the discretionary function exception. Miller stipulates that *Hall v. United States*, is not binding on this Court. 2003 WL 24262157 (D. Nev. Oct. 28, 2003). Miller cited to *Hall* in the SAC⁷, and he provides *Hall* as an example of a case with similar facts wherein the district court

⁷The United States incorrectly states that Miller has not cited to *Hall* in two years of litigation. *See* Ans. Br. p. 26.

determined that it had jurisdiction to hear a claim for respondeat superior where the plaintiff exhausted his tribal administrative remedies. *See id.* Miller may cite *Hall* in the district court if this issue returns to the district court. Accordingly, Miller is not citing *Hall* as authority, pursuant to Circuit Rule 63-3, but to establish that, if the Court reverses the dismissal on the grounds that the district court did not consider Miller's respondeat superior claim, Miller would again cite to *Hall* in the district court.

Despite the United States' contention to the contrary, Miller's interpretation of *Hall's* holding is correct. In *Hall*, the court made three findings with respect to the plaintiff's respondeat superior claim. (1) The United States "concede[d] . . . that a discharge in retaliation for justifiably filing reports concerning allegedly false criminal conduct constitutes a public policy violation." ER008. Accordingly, the court determined that, because the plaintiff precisely alleged his discharge was a public policy violation, an issue of material fact existed as to whether the plaintiff's termination was tortious. *See* ER008.⁸ (2) The court determined that the undisputed facts of the case established that the individual that fired the plaintiff was acting

8

The discretionary function exception "protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (internal quotes omitted).

within the scope of his employment when he terminated the plaintiff. *See* ER009. As such, the court rejected the United States' argument that even if the plaintiff's termination was tortious, the United States would not be liable. (3) The court determined that the United States "failed to demonstrate . . . that th[e] court is barred from hearing a federal question claim brought against the United States when the plaintiff has exhausted his tribal remedies." ER010. The federal question to which the court refers is the plaintiff's theory that the United States is "liable under respondeat superior for [the] tortious conduct." *See* ER005. Accordingly, the court denied the United States' motion for summary judgment on the plaintiff's claim that the United States is liable in respondeat superior for the tortious conduct.

Here, as in *Hall*, Miller exhausted his tribal remedies and seeks relief in the federal court. As in *Hall*, Miller alleged that his termination violated public policy. *See* ER160. As in *Hall*, the facts here indicate that the individuals responsible for Miller's termination were employed pursuant to the 638 Contract and were acting within the scope of their employment in terminating Miller. *See* ER147-165, generally. In addition, as in *Hall*, the United States failed to demonstrate that the court is barred from hearing Miller's respondeat superior claim because the United States did not address that as an issue in its Motion to Dismiss. *See* ER054-069, generally.

The United States incorrectly indicates that Miller misreads *Hall* on its own assumption that the court "did not consider the discretionary function exception as it applied to respondeat superior because defendant did not raise the defense." *See* Ans. Br. p. 29. However, the United States does not establish how it knows that the defendant did not raise the discretionary function exception as a defense to respondeat superior. *See id.* The United States provides no citation to the case in that regard. *See id.* To the contrary, it is clear that the defendant raised the discretionary function exception, which did not dispose of the case. *See* ER006.

It is unclear whether the defendant raised the discretionary function exception *as a defense to liability under respondeat superior* because the court does not address discretionary function in relation to respondeat superior. ER004-010. However, it seems unlikely that the court would have considered the discretionary function exception in a vacuum as to the defendant's position on the plaintiff's negligent failure to intervene claim and not considered it as a defense to the respondeat superior claim. Regardless, the holding from *Hall* indicates that the plaintiff's respondeat superior claim survived summary judgment notwithstanding the fact that the court considered the discretionary function exception on a different issue in the same case.

Accordingly, to the extent this Court may consider *Hall*, it shows that a respondeat superior claim may survive dismissal despite a discretionary function

exception defense. As such, the district court erred by dismissing Miller's respondeat superior claim on jurisdictional grounds pursuant to the discretionary function exception where neither the United States, nor the district court, raised the issue. Therefore, Miller respectfully requests that this court reverse the district court's Order inasmuch as it dismisses Miller's respondeat superior claim, and direct the district court to entertain briefing on this issue.

CONCLUSION

Therefore, Miller respectfully requests that this Court reverse the district court's Order in its entirety, and remand to the district court for further proceedings.

Respectfully submitted,

ALLING & JILLSON, LTD.

DATED: September 23, 2019

s/ Scott W. Souers, Esq.
Attorneys for Appellant John Miller

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Attorneys for Appellant John Miller